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Corporations Not Subject to Canadian Bankruptcy Law*

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* A general revision of the *Bankruptcy Act* being expected in the near future, it is desirable to remind the reader that this article discusses the Act as it stands in May, 1970, being R.S.C. 1952, c. 14, as amended by 14-15 Eliz. II, S.C. 1966-67, cc. 25 and 32.

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I. The Problem

Wholesale exclusion of "non-profit" corporations from Canadian bankruptcy jurisdiction is now indicated by decisions involving (apart from municipal and church corporations)[1] a credit union (*"caisse populaire"*)[2] and a building co-operative[3] — both incorporated under the Quebec *Cooperative Syndicates Act*[4] — as well as a building society,[5] a youth welfare organization,[6] and, most recently, a cultural centre,[7] all three incorporated without share capital under Part III of the Quebec *Companies Act*.[8]

This development, one may confidently hazard, is scarcely to be expected by anyone who reads the language of the present Canadian *Bankruptcy Act*[9] free from preconceptions as to its proper inter-

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[1] For church corporations, see *infra*, n. 15; for municipal and school corporations, n. 16.

[2] *Feeney* v. *Lacroix*, (1938), 65 B.R. 386, 20 C.B.R. 149 (*Coram* Tellier, C.J., Rivard, Galipeault, St-Jacques and Barclay, JJ.); decided under the 1919 Act as revised, then being the *Bankruptcy Act*, R.S.C. 1927, c. 11.

[3] *In re Construction Coopérative de Montréal* v. *Z. Berthiaume & Fils Ltée*, (1939), 66 B.R. 409, 20 C.B.R. 351 (*Coram* Létourneau, Galipeault, Walsh, St-Jacques, and Langlais *ad hoc*, JJ.); reversing (1938), 20 C.B.R. 285 (C.S.), (Boyer, J.). The case was decided under the 1919 *Bankruptcy Act* as it stood in R.S.C. 1927, c. 11.

[4] R.S.Q. 1925, c. 254; now the *Cooperative Syndicates Act*, R.S.Q. 1964, c. 294.

[5] *Philippe de Gaspé Beaubien* v. *L'Union Economique d'Habitation*, [1947] C.S. 33, 28 C.B.R. (C.S), (Boyer, J.); decided under the 1919 Act as revised, R.S.C. 1927, c. 11.

[6] *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse Inc.*, [1960] B.R. 413 (*Coram* Pratte and Owen, JJ.; Rinfret, J., dissenting), affirming a judgment of the Superior Court sitting in Bankruptcy rendered by Hon. Mr. Justice André Montpetit on March 12, 1957, No. 240/1956, hitherto unreported, dismissing without costs a petition in bankruptcy. The case was decided under the present (1949) Act as it stood revised as R.S.C. 1952, c. 14. The judgment of the Hon. Mr. Justice Montpetit is reported *infra*, as Appendix One, pp. 602 *et seq.*

[7] *In re Centre Culturel du Vieux Montréal*, Superior Court of the Province of Quebec: In Bankruptcy; Montreal, No. 7714; Hon. Mr. Justice André Montpetit, February 6, 1968. The case, being hitherto unreported, is reported here, *infra*, as Appendix Two, pp. 606 *et seq.*

[8] The *Quebec Companies Act*, R.S.Q. 1941, c. 276, in the first two cases; in the third, the same Act as presently revised, being the *Companies Act*, R.S.Q. 1964 c. 271.

[9] The *Bankruptcy Act, 1949*, 13 Geo. VI, S.C. 1949, 2nd Sess., c. 7, as revised and re-enacted in the *Bankruptcy Act*, R.S.C. 1952, c. 14, and amended by the *Government Organization Act, 1966*, 14-15 Eliz. II, S.C. 1966-67, c. 25, and further amended by *An Act to amend the Bankruptcy Act*, 14-15 Eliz. II, S.C. 1966-67, c. 32; which last statute received royal assent on July 11, 1966 and was in force from that date, but by section 23 provided that certain of its provisions should apply only in the case of assignments, proposals by insolvents,

pretation. It is the more surprising in the light of the broad historical evolution of bankruptcy law, from a jurisdiction for traders only, into a general jurisdiction;[10] and it is especially striking in the face of what seems the distinct policy of Canadian bankruptcy legislation (which differs in that respect from the British) to embrace persons natural and artificial of every description,[11] save only those which, for special reasons, are to be dealt with in special ways;[12] and those which, like public authorities, are — at any rate by implication [13] — to be presumed [if not constitutionally deemed],[14] by reason of their nature or status, to be outside the scope of bankruptcy legislation.

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or receiving orders, made thereafter. The text of the Act as it now stands is most conveniently accessible in the form of an Office Consolidation published by the Queen's Printer in 1968.

[10] For an historical account of bankruptcy and insolvency law, and references, see Duncan and Honsberger, *Bankruptcy in Canada*, 3rd ed., (Toronto, 1961), chapters 1-4. As to England, see p. 3 and esp. n. 14; as to territories now forming part of Canada, pp. 5 *et seq.*; as to Canada and its provinces since Confederation, pp. 15 *et seq.*

[11] See Appendix Three, *infra*, pp. 607 *et seq.*

[12] See Appendix Four, *infra*, pp. 609 *et seq.*

[13] *Commission Municipale de Québec* v. *Ville d'Aylmer*, (1933), 71 C.S. 117, 14 C.B.R. 437; and (in an English translation) [1933] 2 D.L.R. 638 (Superior Court: Trahan, J.). The case involved a municipal corporation and the decision dealt with municipal and school corporations; see *infra*, n. 16.

[14] In *Ladore* v. *Bennett*, [1939] A.C. 468, [1939] 3 D.L.R. 1, 21 C.B.R. 1, [1939] 2 W.W.R. 566, [1939] 3 All E.R. 98, the Privy Council, affirming the Court of Appeal for Ontario (Latchford, Masten and Henderson. JJ.A.), [1938] O.R. 324, [1938] 3 D.L.R. 212, which had affirmed a judgment of Hogg, J., upheld the constitutional validity of various Ontario statutes providing for the amalgamation of municipalities in default to meet their obligations, the supervision and control of their affairs by a public board and later by a government department, and the refunding of debts on a compulsory basis by a public board having power to change the terms and conditions of the obligations, more particularly in respect of times of payment and interest rates. Lord Atkin said for the Board, [1939] A.C. 468, at p. 480: "Insolvency is the inability to pay debts in the ordinary course as they become due; and there appears to be no doubt that this was the condition of these corporations. But it does not follow that because a municipality is insolvent the Provincial Legislature may not legislate to provide remedies for that condition of affairs. The Province has exclusive legislative power in relation to municipal institutions in the Province. ...If local government in any particular area becomes ineffective or non-existent because of the financial difficulties of one or more municipal institutions, or for any other reason, it is not only the right, but it would appear to be the duty, of the Provincial Legislature to provide the necessary remedy, so that the health of the inhabitants and the necessities of organized life in communities should be preserved. If corporation A or B or C is unable to function satisfactorily it would appear to be elementary that the Legislature must have power to provide that the functions of one or all should be transferred to some other body or corporation. For this purpose, as the corporation could be created by the Prov-

More intriguing still, the statutory construction upon which rests this exclusion of "non-profit" corporations seems, in its origin, to have been little more than a rationale designed to justify, upon the very terms of the Act then in force rather than merely upon common-

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ince, so it could be dissolved, and a new corporation created as a municipal institution to perform the duties performed by the old. The result of dissolution is that the debts of the dissolved corporation disappear. ... And in creating the new corporation with the powers of assuming new obligations it is implicit in the powers of the Legislature (sovereign in this respect) that it should place restrictions and qualifications on the obligations to be assumed...". (At p. 481): "That for the purpose of keeping control over municipal institutions the Legislature provided that a department of the Provincial government should have the means of ascertaining whether a particular municipal body was solvent or insolvent does not make its legislative provision in that regard an encroachment on the general powers of the Dominion over bankruptcy and insolvency...". (At p. 482): "The statutes are not directed to insolvency legislation; they pick out insolvency as one reason for dealing in a particular way with unsuccessful institutions...".

The existence of the provincial power does not, it is submitted, of itself prove the non-existence of federal power. A power to deal with municipalities without regard to their solvency or otherwise does not negative a power to deal with insolvents without regard to whether they are municipalities. See Henderson, J.A., for the Court of Appeal in *Ladore* v. *Bennett*, [1938] O.R. 324, at p. 352; "It is argued that the field of bankruptcy and insolvency is fully occupied by legislation of the Dominion of Canada. It is, however, conceded that the existing Dominion legislation does not apply to municipal institutions. It is a serious question, in my opinion, whether bankruptcy and insolvency legislation could have any application to municipalities, but that need not be discussed. See *Sarrazin* v. *Les Curé et Marguilliers de l'Oeuvre et Fabrique de la Paroisse de St-Gabriel de Brandon*, (1935), 16 C.B.R. 350. It is sufficient to say that it has not done so." Clearly, *federal* power was not in issue.

Per St-Germain, J., in *St-Gabriel de Brandon* v. *Sarrazin*, (1935), 58 B.R. 123, at p. 137, 16 C.B.R. 326: "Or, il est assez difficile de concevoir que la loi de faillite puisse s'appliquer à ces corporations de droit public, tant ecclésiastique que laïque. Il ne semble faire de doute pour personne qu'une corporation municipale n'est pas soumise à la loi de faillite et je doute fort d'ailleurs que le Parlement fédéral pourrait s'autoriser du pouvoir qui lui est attribué de légiférer sur la banqueroute et la faillite, une matière, encore une fois, qui fait plutôt partie du droit privé, pour imposer une loi de faillite à cette corporation municipale, être moral, qui persounifie la collectivité des habitants d'une portion déterminée de territoire d'une province et qui est revêtue par le gouvernement de de cette province des pouvoirs nécessaires pour veiller aux intérêts et droits que ces habitants peuvent avoir en commun."

"Les corporations municipales sont des éléments constitutifs de l'organisation sociale, dont la création appartient aux provinces, et l'on concevrait difficilement que sous prétexte de légiférer en matière de faillite, le pouvoir fédéral pût s'ingérer dans le fonctionnement de ces corps publics. Or, s'il en est ainsi pour les corporations municipales, pourquoi n'en serait-il pas de même pour les fabriques qui sont aussi des corporations publiques et qui remplissent vis-à-vis des habitants d'une paroisse, pour les fins du culte, les fonctions que les conseils muni-

law rules of interpretation, the extension to church corporations [15] of the immunity from bankruptcy jurisdiction already attributed by judicial decision to municipal and school corporations.[16]

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cipaux remplissent vis-à-vis des mêmes habitants pour tous les autres objets et besoins locaux?"

In sustaining the constitutional validity of provincial legislation subjecting defaulting municipalities to the control of a provincial government board, Trahan, J., in *Commission Municipale de Québec* v. *Ville d'Aylmer*, (1933), 71 C.S. 117, (1933), 14 C.B.R. 437, held that it did not infringe upon exclusive federal legislative authority, but, in upholding the provincial power, left open the question of federal power; at 71 C.S. 117, at p. 122, his Lordship, speaking of the provincial statute, said: "[E]lle demeure de cette compétence tant et aussi longtemps que le Parlement n'aura pas, dans l'exercice de son pouvoir concernant la faillite et l'insolvabilité, adopté une législation incidente pour la rendre inopérante[.]" The case is reported in an English translation in [1933] 2 D.L.R. 638. On constitutional matters, see *infra*, Appendices Three and Four.

[15] *Bricault* v. *Curé et Marguilliers de l'Oeuvre et Fabrique de la Paroisse de St.-Etienne*, (1935), 58 B.R. 100, 16 C.B.R. 196 (*Coram* Tellier, C.J., Dorion, Bernier, St.-Jacques and Barclay, JJ.); reversing (1933), 71 C.S. 471, 39 R.J. 452, also reported, together with the decision on appeal, 16 C.B.R. 196, at p. 197 (Superior Court: Boyer, J.); and also *Curé et Marguilliers de l'Oeuvre et Fabrique de la Paroisse de St.-Gabriel de Brandon* v. *Sarrazin*, (1935), 58 B.R. 123, 16 C.B.R. 326 (*Coram* Dorion, Rivard, Létourneau, Hall, and St.-Germain, JJ.); reversing the decision of Boyer, J., in the Superior Court, reported, together with that on appeal, at (1933), 16 C.B.R. 326; refusal, with reasons, of leave to appeal to the Supreme Court of Canada, being reported at [1935] S.C.R. 419, [1935] 3 D.L.R. 554, 16 C.B.R. 350 (Davis, J., in Chambers). The judgments of the Queen's Bench in both cases were delivered on January 31, 1935.

[16] In *Commission Municipale de Québec* v. *Ville d'Aylmer*, (1933), 71 C.S. 117, 14 C.B.R. 437, Trahan, J., in the Superior Court of Quebec, in upholding the constitutional validity and operation of provincial legislation subjecting defaulting municipalities to the control of the Quebec Municipal Commission, held *inter alia* that there was no conflict with the *Bankruptcy Act*, R.S.C. 1927, c. 11, for the reason (*semble*, amongst others) that that Act was not applicable to municipal and school corporations; speaking at (1933), 71 C.S. 117, at p. 122, his Lordship said: "...[L]a loi de faillite du Canada n'est pas applicable aux corporations municipales et scolaires; elle ne contient, en effet, aucune disposition pouvant permettre au syndic qui serait nommé de prélever sur les biens imposables de la municipalité les sommes requises pour le paiement des montants dus aux créanciers de la corporation; comme susdit, ces biens répondent du paiement des dettes de la corporation, et constituent la seule garantie pratique des créanciers; elle serait donc absolument inefficace au cas d'une cession volontaire ou de la mise en faillite d'une municipalité...". This passage may be found in English translation in [1933] 2 D.L.R. 638, at p. 642. The case was referred to by Hogg, J., in *Ladore* v. *Bennett*, [1938] O.R. 324, at p. 346, and the point made above by the learned judge Trahan J. was conceded by counsel before the Court of Appeal for Ontario in *Ladore* v. *Bennet*; see the remarks of Henderson, J.A., for the Court, [1938] O.R. 324, at p. 352, quoted *supra*, n. 14.

The results of the course of interpretation seem highly anomalous. A wide range of corporate bodies appears wholly excluded by judicial decision from the operation of *all* Canadian insolvency legislation; and in this these bodies are unique, not only amongst corporations, but also amongst individuals, even individuals not engaged in gainful activities — and this, though the *specific ground of exclusion* of the corporations in question is precisely that *they* are *not* incorporated with object of gain.

Excluded from the *Bankruptcy Act,* they are equally excluded from the federal *Winding-up Act,*[17] except such as are federally incorporated; for the federal *Winding-up Act* applies to companies otherwise than federally incorporated *only* if [18] they are 'incorporated

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[17] R.S.C. 1952, c. 296, as amended in immaterial respects by the *Government Organization Act,* 1966, 14-15 Eliz. II, S.C. 1966-67, c. 25, s. 38. Insolvency is defined by sections 3 and 4. By section 2(a), *capital stock* includes a capital stock *de jure* or *de facto.* The position of various types of corporations is discussed below in detail in Appendix Four. The principal relevant sections are as follows:

APPLICATION

6. This Act applies to all corporations incorporated by or under the authority of an Act of the Parliament of Canada, or by or under the authority of any Act of the late Province of Canada, or of the Province of Nova Scotia, New Brunswick, British Columbia, Prince Edward Island or Newfoundland, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada; and also to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock, and incorporated trading companies doing business in Canada wheresoever incorporated and,

(*a*) which are insolvent; or

(*b*) which are in liquidation or in process of being wound up, and, on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under the provisions of this Act.

7. This Act does not apply to building societies that have not a capital stock or to railway or telegraph companies.

[18] But not necessarily *if* they are. As regards bodies neither federally incorporated nor continued in respect of their incorporation under federal legislative authority, the application of the federal *Winding-up Act* is predicated upon actual or apprehended insolvency (*B.N.A. Act,* s. 91 (21)). In addition to the authorities referred to in Appendices Three and following, reference may be had to the usual works on Canadian company law.

trading companies doing business in Canada' [19] or 'incorporated banks, savings banks, incorporated insurance companies, [or] loan companies having borrowing powers, [or] building societies having a capital stock...'.[20] Parliament, having *in terms* indicated the exclusion from the *Bankruptcy Act* of 'building societies having a capital stock, ...incorporated banks, savings banks, insurance companies, trust companies, loan companies [and] ... railway companies',[21] has made special provision for them,[22] in most cases giving them a home under the *Winding-up Act*,[23] as we have just seen. But no such special provision has been possible as a correlative to exclusions from the *Bankruptcy Act* by *judicial gloss*.[24]

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[19] The term "trading company" is defined in section 2 (*i*) as follows:

INTERPRETATION

2. In this Act,...

(*i*) "trading company" means any company, except a railway or telegraph company, carrying on business similar to that carried on by apothecaries, auctioneers, bankers. brokers, brickmakers, builders, carpenters, carriers, cattle or sheep salesmen, coach proprietors, dyers, fullers, keepers of inns, taverns, hotels, saloons or coffee houses, lime burners, livery stable keepers, market gardeners, millers, miners, packers, printers, quarrymen, sharebrokers, ship-owners, shipwrights, stockbrokers, stock-jobbers, victuallers, warehousemen, wharfingers, persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment or otherwise, in gross or by retail, or by persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling or buying and letting for hire goods or commodities, or by the manufacture, workmanship or the conversion of goods or commodities or trees[.]

[20] Section 6. See *infra*, Appendix Four, at pp. 609 *et seq.* for details about each.

[21] These are excluded from the definition of "corporation" in the *Bankruptcy Act*, s. 2(*f*); see *infra*, Appendix Four, at pp. 609 *et seq.* for details about each.

[22] With the sole exceptions of trust companies not federally *incorporated*; loan companies without borrowing powers and not federally *incorporated*; and railway companies whose *operations* are not governed by federal laws. *Infra*, Appendix Four, at pp. 609 *et seq.* The above exceptions appear deliberate.

[23] R.S.C. 1952, c. 296 as amended; *infra*, Appendix Four, at pp. 609 *et seq.*

[24] Indeed, in *Beaubien* v. *L'Union Economique d'Habitation*, [1947] C.S. 33, Boyer, J., in the Quebec Superior Court held that a company incorporated without object of pecuniary gain under Part III of the Quebec *Companies Act*, R.S.Q. 1941, c. 276, to obtain housing at moderate cost for its members, was subject neither to the then *Bankruptcy Act*, R.S.C. 1927, c. 11, nor to the Dominion *Winding-up Act*, R.S.C. 1927, c. 213. It being a non-profit body corporate, the *Bankruptcy Act* was held not to apply. And the Dominion *Winding-up Act* was held not to apply (see [1947] C.S. 33, at p. 34) because the company was neither a trading company nor (as it lacked a capital) within the category of 'building societies having a capital stock' such as were expressly subject to the *Winding-up Act*, R.S.C. 1927, c. 213, s. 6 — correlatively, it seems clear, to their exclusion from the *Bankruptcy Act*. Surely this case

Deprived of the operation of the *Bankruptcy Act*, creditors of "non-profit" corporations have (save in those cases where the *Winding-up Act* can be applied),[25] for example, no other means of setting aside contracts and payments as preferential, than any which may be validly prescribed by provincial statute or by any surviving common-law or unrepealed statutory rules.[26] They have, likewise, no other special rights or means of recovering property so transferred from the third, fourth and fifth parties into whose hands it has come.[27] Such creditors have, moreover, no other statutory preferences

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provides a powerful illustration of the manner in which the current judicial interpretation frustrates the clear intention of Parliament. There is surely no way to justify refusal to treat the two Acts as together embracing all insolvent building societies. The *Bankruptcy Act* expressly *excluded* those with a capital stock; the *Winding-up Act* expressly *included* them and also expressly excluded those which had none. See *infra*, Appendix Four, at pp. 609 *et seq.*

[25] See sections 96 and following. Especially since the most recent amendments to the *Bankruptcy Act* (*supra*, n. 9), it is the latter statute which gives the creditors immensely the more powerful weapons.

[26] Relevant provisions do appear on the statute books of the provinces under various designations (assignments, fraudulent preferences, fraudulent conveyances, and so on), but, as will be seen below, serious doubts exist as to the extent of their constitutional validity and, at all events, as to their operation in the face of federal legislation. See *e.g. Re Bozanich*, [1942] S.C.R. 130, 23 C.B.R. 234, [1942] 2 D.L.R. 145. See Appendix Five, *infra*, pp. 612 *et seq.*

[27] The tracing provisions found in the various provincial statutes mentioned *infra*, Appendix Five, at pp. 612 *et seq.* are often wide enough to allow tracing property concerned in transactions avoided under *other* laws. Even so, they can serve no greater purpose than the substantive provisions whose machinery they are; if the latter cannot operate, neither can the former.

The terms of the tracing provisions themselves vary in their stringency from province to province. Where such provisions are inserted they permit at least the following of the property into its *proceeds*, so long at least as the proceeds are in the hands of the beneficiary of the void transaction. How far (i) the property itself, and (ii) its proceeds, may be followed into the hands of third parties, is more clear in some provinces than in others. Even where such rights are not specifically enacted, they may be presupposed by clauses inserted to protect "innocent purchasers"; and it is of course arguable that common law or equitable rights of tracing may exist in consequence of the operation of the statutes in question. In R.S.A. 1955, c. 120, s. 12(1); R.S.M. 1954, c. 11, s. 49(1); and R.S.S. 1965, c. 397, s. 13(1): "the money or other proceeds, or the amount thereof, *whether further disposed of or not*"; (emphasis added). In R.S.B.C. 1960, c. 156, s. 5: "the money or other proceeds or the amount or value thereof". In R.S.N.B. 1952, c. 13, s. 21: "the money or other proceeds realized therefor". In R.S.N.S. 1967, c. 16, s. 20(1) and R.S.O. 1960, c. 25, s. 12(1): "the money or other proceeds". See also R.S.N. 1952, c. 114, s. 254. The terms of the relevant provisions differ in other material respects. Compare s. 66 of the *Bankruptcy Act*, itself far from unambiguous. On R.S.M. 1954, c. 11, s. 49, see Smith, J., in *Re Mid-West Catering Co. Ltd.*, (1965), 9 C.B.R. n.s. 72, at p. 77. See also for example *Re Shelly Films Ltd.*, and *Re Hecimovic*, *infra*, Appendix Five, at pp. 616-617.

amongst themselves than such as may already validly result from provincial laws such as those in Quebec establishing privileges and hypothecs, those in the common law provinces establishing rights of mortgage and lien, and other federal and provincial laws creating analogous rights of property or security and a few preferences.[27a]

Nor, indeed, are such creditors necessarily assured even of a rateable share of the property taken in execution. Even though there seem to be statutes in most Canadian provinces denying preference amongst judgment creditors in an execution,[28] and even allowing non-judgment creditors a right to share,[29] anomalous results are still possible. Thus the Quebec *Code of Civil Procedure* [30] denies, where insolvency is alleged, preference amongst ordinary judgment creditors;[31] it furthermore allows non-judgment creditors to file their claims.[32] But the claims of privileged creditors — that is to say those having privileges and hypothecs — must of course be preferred to ordinary creditors;[33] and a *judgment* creditor for a sum

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[27a] Preferences, for example, for wage claims, can, of course, be found on the statute books of various provinces; see R.S.A. 1955, c. 103, s. 16; R.S.B.C. 1960, c. 135, s. 6; R.S.M. 1954, c. 76, s. 9; R.S.N.B. 1952, c. 244; R.S.N. 1952, c. 114, s. 241, s. 251; R.S.N.S. 1967, c. 70, s. 21; *Civil Code*, arts. 1994(9), 1994*d*, 2009(7) and (9), 2013*d*, *etc.*; R.S.S. 1965, c. 98, s. 15.

[28] *The Execution Creditors Act*, R.S.A. 1955, c. 103, s. 3; *Creditors' Relief Act*, R.S.B.C. 1960, c. 85, s. 3; *The Executions Act*, R.S.M. 1954, c. 76, s. 24; R.S.N.B. 1952, c. 50, s. 3; *Creditors' Relief Act*, R.S.N.S. 1967, c. 70, ss. 2 and 41 (denying priority amongst creditors in distribution of *personal* property, and excluding the Act from operating as to land): the author being unaware as to whether any similar provision is to be found as to lands; *The Creditors' Relief Act*, R.S.O. 1960, c. 78, s. 3; *The Creditors' Relief Act*, R.S.S. 1965, c. 98, s. 3. For Quebec, see *infra*, nn. 30-31. By *The Judgment and Execution Act*, R.S.P.E.I. 1951, c. 78, s. 1, a judgment against a debtor operates as a lien on his lands, and s. 12 denies preference to execution creditors *against previously registered judgments*. There does not seem to be in P.E.I. or Newfoundland creditors' relief legislation analogous to that in the other provinces. No doubt the view is that a bankruptcy will accomplish much the same result. The Newfoundland *Judicature Act*, as *infra* indicated (Appendix Five) contains a set of general insolvency provisions such as are presumably now superseded by the *Bankruptcy Act*. On the provincial legislative power to deal in this fashion with executions, the leading decision is of course the *Voluntary Assignments Case*, *A.-G. Ont.* v. *A.-G. Can.*, [1894] A.C. 189.

[29] See the statutes listed *supra*, n. 28. Provision is made in these Acts for the filing of claims by other creditors, their contestation, and so forth.

[30] 13-14 Eliz. II, S.Q. 1965, c. 80.

[31] Art. 578 C.C.P.

[32] *Ibid.*, para 2.

[33] Arts. 613 and 615 C.C.P. (seizure in execution of moveable property); 711 and 713, 715 *et seq.* C.C.P. (seizure in execution of immoveables); arts. 1981, 1982, 2016 C.C.

certain may by certain formalities of registration acquire a judicial hypothec on any of the debtor's immoveable property.[34] The result seems clear that a creditor of an insolvent "non-profit" corporation may by winning the race to judgment, and complying with the formalities necessary to obtain judicial hypothec, obtain in Quebec a preference prescribed by law; and a preference which, should the current interpretation of the *Bankruptcy Act* stand, cannot be disturbed by those provisions of that Act which would ordinarily operate to avoid the judicial hypothec.[35]

"Non-profit" corporations have been excluded from the scope of the present Act, to put the matter most succinctly, by excluding them [by construction] from the statutory definition of "corporation"; thence from the statutory definition of "person"; thence from the statutory definitions of "debtor" and "insolvent person"; and, in consequence, from the *Bankruptcy Act.*

The reasoning by which this has been accomplished will be examined below. But of all the decisions mentioned above as supporting the exclusion of "non-profit" corporations, two only[36] are based upon the present statute, the *Bankruptcy Act, 1949*,[37] which continues in force as revised[38] and amended.[39] The earlier decisions

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[34] Arts. 2034 to 2036 C.C.; and see art. 2026 C.C.

[35] Sections 41(1) and 41(2) of the *Bankruptcy Act*, R.S.C. 1952, c. 14. The Privy Council case sustaining the constitutional validity of such an enactment by the Parliament of Canada is of course one of the leading constitutional decisions on the subject of the federal power over bankruptcy and insolvency: *Royal Bank of Canada* v. *Larue*, [1928] A.C. 187. It dealt precisely with the question whether a Quebec judicial hypothec could be avoided by the predecessor of s. 41(1).

[36] *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse, Inc.*, [1960] B.R. 413, affirming a judgment of Montpetit, J., reported herein, *infra*, Appendix One (see *supra*, n. 6); and *In re Centre Culturel du Vieux Montréal*, Quebec Superior Court, District of Montreal, Montpetit, J., February 6, 1968, reported by the author herein, *infra*, Appendix Two (see *supra*, n. 7).

[37] 13 Geo. VI, S.C. 1949, 2nd Sess., c. 7.

[38] *Bankruptcy Act*, R.S.C. 1952, c. 14.

[39] In particulars not material, by the *Government Organization Act, 1966*, 14-15 Eliz. II, S.C. 1966-67, c. 25, and as to the substance of bankruptcy law by *An Act to amend the Bankruptcy Act*, 14-15 Eliz. II, S.C. 1966-67, c. 32. See *supra*, n. 9.

depend upon the *Bankruptcy Act, 1919,* as amended[40] and revised;[41] their continuing authority cannot therefore be taken for granted, but must depend upon a rather careful comparison of the relevant statutory provisions.[42]

Under the present Act it is necessary, in order to be liable to a *receiving order,* to be (amongst other things) a "debtor".[43] This is an important term, and we shall shortly examine its statutory definition.[44] But a *receiving order* is of course by no means the only basis of bankruptcy jurisdiction: under the present Act, as under the old, a bankruptcy may equally be founded upon an *assignment* of property for the general benefit of creditors;[45] and, in addition, a *proposal* made by an insolvent under the *Bankruptcy Act,* hitherto doubtless at least a form of proceeding within the scope of the Act,[46]

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[40] *The Bankruptcy Act,* 1919, 9-10 Geo. V, S.C. 1919, c. 36 was amended by a considerable number of statutes, references to which may be found in Duncan & Honsberger, *Bankruptcy in Canada,* 3rd ed., (Toronto, 1961), p. 30. Of the sections which we are discussing, the only closely significant amendment appears to have been made by *The Bankruptcy Act Amendment Act, 1921,* 11-12 Geo. V, S.C. 1921, c. 17 which, by s. 5, replaced the former section 2(*aa*) defining "person" with a new definition. Other amendments to the sections under discussion concerned the application of the *Winding-up Act* where it overlapped with *The Bankruptcy Act*; reference to these are given in the third paragraph of Appendix Three, *infra,* at p. 608.

[41] R.S.C. 1927, c. 11. All the major cases on the old Act, with one exception, were decided under the *Bankruptcy Act* as it appeared in that revision.

[42] For a review of the various statutory provisions and their evolution, see Appendix Six, *infra,* at pp. 619 *et seq.*

[43] By section 21(1), "one or more creditors may file in court a petition for a receiving order against a debtor" under the circumstances set forth.

[44] Section 2(*i*), which is set out in the next following paragraph of the text.

[45] Section 26.

[46] For a history of the rules concerning proposals, see Duncan & Honsberger, *op. cit.,* pp. 260 *et seq.* An insolvent could, from 1919 to 1923, make a proposal, even though he had not been adjudicated bankrupt; and, under the 1949 Act (s. 27), the same has been possible. Refusal by the court to approve a proposal might, it would seem, *be followed by* an adjudication of bankruptcy (see Duncan & Honsberger, *op. cit.,* p. 272), and annulment by the court of a proposal most certainly could *be followed by* an adjudication of bankruptcy: *The Bankruptcy Act,* 1919, 9-10 Geo. V, S.C. 1919, s. 13(14); *Bankruptcy Act, 1949,* 13 Geo. VI, S.C. 1949, 2nd Sess., c. 7, s. 36, and see Duncan & Honsberger, *op. cit.,* pp. 278 *et seq.* Refusal or annulment would however merely provide the *occasions* for an adjudication in bankruptcy, which would not relate back to the making of the proposal: *The Bankruptcy Act,* 1919, s. 26(14), Duncan & Honsberger, *op. cit.,* p. 280. Now, however, where the creditors or the court refuse their approval, the debtor is deemed to have made an assignment *on the day the proposal was filed*; the proposal becoming in effect the commencement of the bankruptcy. Where a proposal is *annulled,* the debtor is deemed *thereupon* to have made an assignment. See *infra,* nn. 47, 48, 49 and 50. An assignment now follows automatically both from refusal of approval and from annulment.

(even furnishing the occasion for an adjudication of bankruptcy) can since 1966[47] commence an actual bankruptcy: whether in consequence of the refusal of the creditors to accept the proposal;[48] the refusal of the court to approve it;[49] or its annulment by the court pursuant to default, to the occasioning of injustice or undue delay, or to fraud in obtaining the approval of the court.[50] In connection with assignments and proposals, as distinguished from receiving orders, the present Act speaks of the "insolvent person" rather than of the "debtor". It is to the "insolvent person" that the Act gives the right to make an assignment [51] or a proposal;[52] and the "insolvent person", too, is, like the "debtor", the subject of statutory definition — though it should be observed that one who is an "insolvent person"

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[47] By *An Act to amend the Bankruptcy Act*, 14-15 Eliz. II, S.C. 1966-67, c. 32, s. 7 (adding *inter alia* a new s. 32B., concerning the consequences of non-approval by creditors), s. 8 (amending s. 34, so as to provide *inter alia* for the consequences of non-approval by the court), and s. 9 (substituting a new s. 36 which provides *inter alia* for the consequences of annulment).

Heretofore, refusal of the court's approval *might* provide the *occasion* for an adjudication of bankruptcy, which would only operate *from the time when it was made.* Now, refusal of the creditors' approval *or* of the court's approval *automatically* operates as an assignment in bankruptcy, and the *commencement* of the bankruptcy is *the time of filing the proposal.*

Heretofore, annulment by the court of the proposal *might* provide the *occasion* for an adjudication of bankruptcy; now it *automatically* has that result, though, as before, only from the time of the court order.

See *supra*, n. 46; *infra*, nn. 48, 49, and 50.

[48] Section 32B. (1) provides that "Where the creditors refuse to accept a proposal by an insolvent person... the debtor shall *be deemed* to have made an assignment *on the day the proposal was filed...*" (Emphasis added.) The bankruptcy resnlts automatically, and its commencement is the filing of the proposal.

[49] Section 34. (10) provides that "Where the court refuses to approve a proposal by an insolvent person a copy of which has been filed under section 35, the debtor shall *be deemed* to have made an assignment *on the day that the proposal was so filed...*" (Emphasis added.) The bankruptcy results automatically, and its commencement is the filing of the proposal.

[50] Section 36(1). A proposal may also be annulled at the request of the trustee or any creditor if the debtor be aftorwards convicted of any offence under the Act: section 36(3). By section 36(4), "Upon the proposal being annulled, the debtor shall *be deemed* to have *thereupon* made an assignment and the order annulling the proposal shall so state." (Emphasis added.) The bankruptcy is automatic, but only begins from the time of the order. Compare, nn. 48 and 49 *supra.*

[51] Section 26(1).

[52] Section 27(1)(*a*).

is also by definition a "debtor",[53] and is often referred to as such by the Act.[54]

The scope of bankruptcy jurisdiction thus expands or contracts with the statutory definition of the terms "debtor" and "insolvent person", which may conveniently be quoted here.

2. In this Act, ...

i) "debtor" includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt;

j) "insolvent person" means a person who is not bankrupt and who resides or carries on business in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

i) who is for any reason unable to meet his obligations as they generally become due, or

ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due[.]

2. Dans la présento loi, l'expression ...

i) «débiteur» comprend une personne insolvable et toute personne qui, à l'époque où elle a commis un acte de faillite, résidait au Canada ou y poursuivait des affaires, et, lorsque le contexte l'exige, comprend un failli;

j) «personne insolvable» signifie une personne qui n'est pas en faillite et qui réside au Canada ou y poursuit des affaires, dont les obligations, envers les créanciers, prouvables comme réclamations aux termes de la présente loi, s'élèvent à mille dollars, et

i) qui, pour une raison quelconque, est incapable de faire honneur à ses obligations au fur et à mesure de leur échéance, ou

ii) qui a cessé d'acquitter ses obligations courantes dans le cours ordinaire des affaires au fur et à mesure de leur échéance, ou

iii) dont la totalité des biens n'est pas suffisante, d'après une juste estimation, ou ne suffirait pas, s'il en était disposé lors d'une vente bien conduite par autorité de justice, pour permettre l'acquittement de toutes ses obligations échues ou à échoir[.]

It can be seen from these definitions how their terms in effect delimit Canadian bankruptcy jurisdiction in, for example, the terri-

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[53] Section 2(*i*), defining "debtor", provides that it "includes an insolvent person ...".

[54] Section 26(1), for example, gives an "insolvent person" the right to make an assignment; 26(2) then speaks of the "property of the debtor", and 26(3) of the "locality of the debtor". Section 27(2) uses a similar variation of language in dealing with proposals. References in the Act to debtors are of course intended to cover insolvent persons wherever applicable.

torial sense — produce, in effect, a rule of jurisdiction *ratione personae vel loci* — but this is not our present concern. Our interest lies not in deciding in what cases foreign persons are amenable to Canadian bankruptcy jurisdiction, but rather in determining what *types* of person — and, more particularly, what types of *corporate* person — are susceptible to it.

For this purpose, it is sufficient to notice that both "debtor" and "insolvent person" are defined in terms of the single word "person":[55] it is sufficiently clear that one who is *not* a "person" can be neither a "debtor" nor an "insolvent person".

Thus, in order to be a "debtor" or an "insolvent person" and therefore subject to bankruptcy law, it is first necessary to be a "person"; and, in order to be a "person", it is necessary, one must suppose, to be a "person" within the definition of that term provided by the statute.[56] Section 2 gives that definition as well; it provides that, in the Act,

> *m*) "person" includes a partnership, an unincorporated association, a corporation, a co-operative society or organization, the successors

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[55] The same was true of the definitions of the old Act: see *infra*, Appendix Six, at pp. 619 *et seq.*; but, *there*, as the author will point out below, restrictions on the scope of the term "debtor" were effected, *not* by restricting the definition of "*person*" [which indeed seems to have been *widened* to its utmost extent to allow its natural use elsewhere in the Act] but rather by incorporating all the restrictions into the term "*debtor*" itself, either immediately (through qualifying language) or mediately (through restricting the definition of "corporation").

[56] Per Pratte, J., in *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse Inc.*, [1960] B.R. 413: "Pour être susceptible d'être déclaré en faillite, sous l'empire de la Loi sur la faillite, il faut être débiteur. Et qu'est-ce qu'un débiteur, aux termes de la Loi sur la faillite? C'est une personne insolvable... (art. 26), le mot "personne" devant être pris dans le sens que lui donne l'art. 2(*m*) de la loi, ci-après reproduit: [here quoting the definition]..." See also *Argus Adjusters and Appraisers Ltd.* v. *Assistance Loan and Finance Corporation*, [1964] B.R. 375; (1963), 44 D.L.R. (2d) 692, where however the translation is not entirely reliable.

Per Owen, J., at p. 416: "Section 21 of the Bankruptcy Act sets out the conditions under which a petition for a receiving order may be filed against a 'debtor'.

"Section 2(*i*) of the said Act provides as follows: [here the learned judge quotes the definition of '*debtor*' in terms of 'an insolvent *person* and any *person* who [ete.]'.

"The next inquiry is as to the meaning to be given to the word 'person' in the said Act. Section 2(*m*) of the Bankruptcy Act provides as follows: [here the learned judge quotes the definition of 'person' provided by section 2(*m*)]."

The same is presupposed by Rinfret, J., as well, in his judgment, at pp. 417 *et seq.* It is after this point that the reasoning of Rinfret, J., diverges from that of the majority.

> of such partnership, association, corporation, society or organization, and the heirs, executors, administrators or other legal representative of a person, according to the law of that part of Canada to which the context extends;

and, in the French version,

> *m*) «personne» comprend une société en nom collectif, une association non constituée en corporation, une corporation, une société ou organisation coopérative, les successeurs de pareille société en nom collectif, association, corporation, société ou organisation, ainsi que les héritiers, exécuteurs testamentaires, administrateurs ou tout autre représentant légal d'une personne, conformément à la loi de la partie du Canada à laquelle s'étend le contexte[.]

This may usefully be compared with the definition of "person" set forth in the *Interpretation Act* as it was found in the Revised Statutes of Canada, 1952, re-enacted contemporaneously with the *Bankruptcy Act*:[57]

> 35. In every Act, unless the context otherwise requires,...
>
> (22) "person" or any word descriptive of a person, includes any body corporate and politic, and the heirs, executors, administrators or other legal representatives of such person, according to the law of that part of Canada to which the context extends;
>
> 35. Dans une loi, à moins que le contexte ne s'y oppose, l'expression,...
>
> (22) «personne», ou tout mot ou expression ayant le sens du mot «personne», comprend tout corps politique constitué en corporation, et les héritiers, exécuteurs testamentaires, administrateurs ou autres représentants légaux de cette personne, suivant la loi de la partie du Canada à laquelle s'étend le contexte[.]

This latter definition has been replaced by another in the new *Interpretation Act*[58] recently enacted by the Parliament of Canada:

> 28. In every enactment,...
>
> (27) "person" or any word or expression descriptive of a person, includes a corporation;
>
> 28. Dans chaque texte législatif,...
>
> (27) «personne» ou tout mot ou expression ayant le sens du mot «personne» désigne également une corporation[.]

How far the new *Interpretation Act* can be taken to alter the meanings of antecedently enacted statutes is perhaps rather too fine a point to merit investigation here, even assuming that the *Interpretation Act*'s definition of "person" is not wholly superseded for bankruptcy purposes by that contained in the *Bankruptcy Act*.[58a]

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[57] The *Interpretation Act*, R.S.C. 1952, c. 158.

[58] 16-17 Eliz. II, S.C. 1967-68, c. 7. The Act was itself amended (not in any respect material to us) by c. 25, s. 58 of the same session.

[58a] In Part II(1) of this article it will be suggested that "person" must, even in the *Bankruptcy Act*, be nnderstood in its wider, natural, sense — *despite* the restrictive definition imposed by section 2 of the Act. If this be so, it is to the

Of the various rubrics under which one may enter the class of "persons" as defined by the *Bankruptcy Act*, that of most importance to us is the "corporation"; it, too, is defined in section 2:

> *f*) "corporation" includes any company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or of any of the provinces of Canada, and any incorporated company, wheresoever incorporated, that has an office in or carries on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies;
>
> *f*) «corporation» comprend toute compagnie constituée en corporation ou autorisée à poursuivre des affaires en vertu ou sous l'autorité d'une loi du Parlement du Canada, ou de l'une des provinces du Canada, ainsi que toute compagnie constituée en corporation, en quelque lieu qu'elle ait été constituée en corporation, qui a un bureau au Canada ou qui poursuit des opérations au Canada, mais ne comprend pas les sociétés de construction avec un capital-actions, ni les banques, caisses d'épargne, compagnies d'assurance, compagnies de fiducie, compagnies de prêt ou compagnies de chemin de fer constituées en corporations[.]

Now the reasoning upon which "non-profit" corporations have been excluded from the scope of bankruptcy law is, essentially, the following.

(1) Any body corporate which is not a "corporation" *within the definition of that term in section* 2(*f*), is also, in consequence, not a "corporation" *in the list of those who may be "persons" as defined by section* 2(*m*). Furthermore [so the argument runs], it cannot come, *otherwise than as a "corporation"*, within the definition of "person" — *either* under any *other* of the headings of section 2(*m*), *or* (even if that list of headings be not limitative) under any *residual* category which may then exist. Such a body corporate is thus excluded from entering the class of "persons" *under any heading whatever.*

Interpretation Act that one ought first to have recourse. But which? Is it the old, or the new, *Interpretation Act* which is to be preferred? *Maxwell on The Interpretation of Statutes*, 11th ed., (London, 1962) says (p. 58) that the "words of a statute will, generally, be understood in the sense which they bore when it was passed." This would favour the *Interpretation Act*, R.S.C. 1952, c. 158, which was contemporaneous with the *Bankruptcy Act*, R.S.C. 1952, c. 14. But both would, in the present context, seem equally suitable. Both make "person" include "corporation" [and by "corporation" is *not* meant the restrictive definition in section 2(*f*) of the *Bankruptcy Act*, which is exactly what makes the 2(*m*) "person" too narrow to serve generally in the *Bankruptcy Act*; the *very thing* which forces us to look *outside* the *Bankruptcy Act* for a *wider* definition]. For the authorities which entitle us to disregard the *Bankruptcy Act* definition of "person", see *infra* pp. 539-549 and esp. n. 94.

(2) But, if it is to be a "corporation" within section 2 (*f*), and thus be a "person" within 2 (*m*), a body corporate must, it is clear, be a *"company"*. Furthermore, it must [it is supposed] *either* be *incorporated to carry on business* or *else* be *authorized to carry on business.*

But the term *"company"* does not [it is said] properly embrace "non-profit" bodies corporate. Alternatively the activities which "non-profit" bodies corporate are incorporated or authorized to carry on are [it is thought] not *business.* In either event, "non-profit" bodies corporate cannot [so it is concluded] be "corporations" as defined by section 2(*f*).

(3) Not being a "person", a "non-profit" body corporate can be neither a "debtor" nor an "insolvent person", and is, in consequence, excluded from bankruptcy law.

The chain of reasoning outlined above is of course vulnerable at a number of points, at several of which, if broken, it will be irreparable. As the courts have appreciated, it is a consideration of these points of controversy which is decisive one way or the other. But such a consideration, regrettably, necessarily involves somewhat abstruse and indeed rather tedious exercises in statutory interpretation. Parliament, however, has chosen to insinuate the rules governing the scope of Canadian bankruptcy jurisdiction into the definitions

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[59] For strictures on this practice, see the authorities cited in *Craies on Statute Law*, 6th ed., (London, 1963), p. 212; *Odgers' Construction of Deeds and Statutes*, 5th ed., (London, 1967), p. 315.

See, for example, the remarks of Rivard, J., in *Paroisse de St-Gabriel de Brandon* v. *Sarrazin*, (1935), 58 B.R. 123, at p. 125:

"Et que faut-il entendre, ici, par débiteur?

"Le mot est clair, et ne prête à aucun équivoque. Il ne faut pas moins prendre garde aux explications que la loi même a cru donner là-dessus, dans des clauses dites interprétatives. Un procédé couramment employé dans la confection des lois consiste, en effet, à définir d'abord les termes dont le législateur entend se servir pour dire sa volonté. Ce procédé, qu'on a critiqué, en effet, n'est pas toujours heureux: souvent on le croirait plutôt assorti au dessein de mettre une expression peu sûre au service d'une pensée indécise. Cependant, il ne laisse pas que d'être utile parfois: on y a justement recours quand le sens des mots manque de précision, quand on veut leur attribuer une acception particulière pour laquelle il n'y a pas de terme propre, ou marquer des nuances que le contexte est impnissant à indiquer; mais il arrive aussi que, sous le couvert d'une apparente définition, on édicte plutôt une véritable disposition législative, par quoi, au lieu de définir un mot, on pose une règle qui fait partie de la loi proprement dite."

And, having quoted the definition of debtor in the then Act (R.S.C. 1927, c. 11; see *infra*, Appendix Six) his Lordship continued:

"Ce n'est pas là une définition: le sens ordinaire du mot *débiteur* subsiste. C'est plutôt une disposition législative où il est réglé que, pour être traitée

of a number of terms; the interpretation of those rules is, in consequence, necessarily a word game.[59] The analysis undertaken below follows the order of the heads of judicial reasoning as outlined and arranged above.

II. An Analysis of the Authorities: Some Tedious Exercises in Statutory Construction

(1) *Can a body corporate other than a section 2(f) "corporation" be a "person" within 2(m)?*

All effort expended on a restrictive construction of the term "corporation" must, of course, prove fruitless unless it can be assured that, when once a body corporate is held not to be a *"corporation"* as defined by section 2(*f*), it cannot, *otherwise* than as a *"corporation"*, be a *"person"* as defined in section 2(*m*) [and capable, as such "person", of becoming a "debtor" or an "insolvent person" and accordingly subject to bankruptcy law]. There is obviously no point in excluding "non-profit" bodies corporate from bankruptcy jurisdiction under one title if they can enter in another guise.

There are, indeed, very powerful reasons for conceding at once that "corporations" as restrictively defined by section 2(*f*) are exhaustive of the bodies corporate who may be "persons" subject to bankruptcy law. A variety of bodies corporate have, as we have seen, been *expressly* excluded from the statutory *definition of "corporation"* with the plain object of excluding them in this way from the *scope of the bankruptcy law.* To the successful accomplishment of that object it is necessary to say not only that such bodies corporate are not *"corporations"*, but furthermore that they are not alternatively "persons" under *any other head.* This in turn requires that the definition of "corporation" be exhaustive of the bodies corporate which can be persons. A negative answer to the question posed in the title above is therefore necessary to the solution of the problem of keeping out of bankruptcy law a variety of bodies corporate incontestably intended to be kept out.

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comme débitrice sous l'empire de la loi de faillite, une personne doit posséder l'une ou l'autre des qualités énumérées. Par là, le sens propre du mot débiteur ne se trouve ni élargi, ni restreint, ni détourné, mais l'application de la loi de faillite est limitée aux débiteurs qui ont quelqu'une de ces qualités."

See also the remarks of Hall, J., at pp. 132-3, *inter alia*: "It is unfortunate that the authors of the Bankruptcy Act were not more careful in their choice of terms, the ambiguity of which renders very difficult the interpretation of certain so-called definitions."

Nothing, for example, is clearer[60] than that the Act, in excluding by its express language *inter alia* banks, insurance companies, railway companies and trust companies *from the definition of "corporation"*, means thereby to exclude them *from being subject to bankruptcy law altogether*: it is, indeed, difficult to conceive *what other imaginable purpose* the express statutory exclusions from the definition of "corporation" *could* serve. Yet if these very bodies corporate — banks, insurance companies, trust companies and railway companies — *could*, though excluded from the definition of "corporation", yet be "persons" otherwise than as "corporations", they would again become immediately subject to bankruptcy law by another name: a point which appears to have been taken, and (with respect) taken with good reason, by Pratte, J., in *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse Inc.*[61] For the courts, having then given up reliance on the words plainly intended to keep the banks, *etc.*, out of bankruptcy law, would have nothing else whatever in the Act to point to as justifying any such exclusion. Moreover, deprived of its obvious *raison d'être*, the list of expressly excluded undertakings would be rendered useless language, language to which no plausible function whatever could be attributed. The express limitation of the definition of "corporation" would then seem pointless.

One need not balk, therefore, at admitting, in sum, that, in the list of those who may be "persons" as defined by section 2(*m*), the rubric "corporation" in principle completely exhausts bodies corporate; and, further, that the rubric "corporation" under section 2(*m*) means exactly what it is defined to mean by section 2(*f*), and embraces neither more nor less.

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[60] Pratte, J., for example, in *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse, Inc.*, [1960] B.R. 413, remarks, at p. 414: "Aussi le législateur a-t-il jugé à propos de dire, à l'art. 2*(f)* de la loi, quelles sont les corporations qui sont susceptibles d'être déclarées en faillite." The definition of *corporation* is thus assumed to be tantamount to a regulation of the scope of bankruptcy jurisdiction. *Per* Owen, J., at p. 417: "Obviously all corporations are not governed by the provisions of the Bankruptcy Act. Some corporations are specifically excluded." See also *Argus Adjusters and Appraisers Ltd.* v. *Assistance Loan and Finance Corporation* and *Taxi Owners' Reciprocal Insurance Association*, [1964] B.R. 375; (1963) 44 D.L.R. (2d) 692, where however the translation is not entirely reliable.

[61] [1960] B.R. 413, at p. 416: "Au surplus, il ne paraîtrait pas raisonnable que le législateur, après avoir précisé quelles sont les corporations qui peuvent être déclarées en faillite, eût voulu que d'autres puissent l'être sous une autre appellation."

His Lordship, of course, is, in the passage quoted, applying this reasoning not to bodies corporate *expressly* excluded from the definition of "corporation", but to bodies which, contrary to the view of the present author, he finds *impliedly* excluded from the definition of "corporation".

Yet it is also right to point out immediately that such an answer, if it will solve some problems, will merely create others. For if the courts, recognising the manifest purpose of the Act to exclude [for example] railway companies from bankruptcy law, prefer, as a means of so doing, reliance on express statutory language obviously enacted to that end, to dependence instead on an arbitrary judicial *fiat* to the same effect, it is yet as well to observe that, owing to the faulty structure of the definitions, the courts will simply be driven instead to arbitrary expedients to allow the *same* railway companies *back into* the Act — to claim, for example, as *creditors. For it is not the debtor alone who must be a "person"*; the *creditor,* too, *must equally be one*: thus, section 2 provides that, in the Act

> (h) "creditor" means a person having a claim, preferred, secured or unsecured, provable as a claim under this Act[.]

One way, or another, the Act becomes unworkable without a strained construction of its terms. The question becomes not whether, but rather where, it shall be so strained. Indeed, those who have been excluded by definition from the class of "persons", in order that they may not become bankrupts, *could not,* on a *consistent* application of the statute, *inter alia,* be persons related to anyone or parties to a reviewable transaction (sections 2 A. and 2 B.); be trustees in bankruptcy (s.3); record a complaint with the Superintendent for investigation (s.3(3)(*f*)); be engaged by the Superintendent to take necessary action (s.3(5)); be subjected to an order for disclosure of records to enable tracing the property of an estate (s.3(7)); give rise to investigations by the Superintendent in connection with an offence, be examined in connection therewith, or be guilty of impeding the same (s.3A.); be disentitled to withhold the books, papers, or property of the bankrupt (s.9(3) and 8(5)); be subjected to criminal proceedings by the trustee though authorized thereto (s.8(13)); *semble,* buy property from the estate (s.10(1)); apply to the court for a revision of the trustee's acts (s.15); exclude *their own* property, held in trust for them by the bankrupt, from division amongst the bankrupt's creditors (s.39(*a*)); be garnished as employers to deposit wages (s.39A.); (possibly) be protected as buyers in good faith at a sale in execution being an act of bankruptcy (s.42(1)); be denied as security holders the right to realize a bankrupt's property pending a trustee's decision whether or not to redeem it (s.48); be denied a recourse against the trustee personally for innocently seizing their property as being that of the bankrupt (s.49); be denied the right to claim their property in the bankrupt's possession though completely disregarding section 50; be pursued for money or property which has come into their hands under a fraudulent preference or other void or voidable transaction (s.66(1));

be examined by the trustee in connection with the bankruptcy or be required to disclose relevant books and papers (s.121(1)ff.); be subjected to search for, or seizure of, the bankrupt's property (s.146(1)); be entitled to disclosure by undischarged bankrupts, on pain of fine and imprisonment, that they are such, when the latter obtain credit or engage in business transactions (s.157); be guilty of a variety of bankruptcy offences; render liable participating officers, directors and agents (s.162); or, most importantly, be creditors in bankruptcy entitled to petition for a receiving order, prove a claim, obtain payment thereof, vote, or exercise any of the other multifarious rights and powers of creditors.

This has not, indeed, gone unnoticed, and parties before the courts have not been slow to claim that the sauce for the goose be applied to the gander. In *Re Selkirk Spruce Mills Limited,*[62] Collins, J., in the Supreme Court of British Columbia observed:[63]

> Counsel for the debtor took a preliminary objection that the petitioner, being an incorporated bank, has no status to present a petition for a receiving order under s. 21 of *The Bankruptcy Act,* R.S.C. 1952, ch. 14, on the ground that an incorporated bank is not a "creditor" within the meaning of that term as used in said s. 21. He presented a carefully worked-out and interesting argument in support of his objection...

Having quoted the relevant definitions, his Lordship continued:[64]

> Counsel for the debtor argued that the definition of "corporation" found in (*f*) as quoted above requires the exclusion of an incorporated bank from the definition of "person" when considering the problem of whether an incorporated bank is a "creditor" who may file a petition under s. 21.

In this case, however, the learned judge was able to rely on section 169 of the *Bankruptcy Act,* which provides that

> 169. Nothing in the provisions of this Act shall interfere with or restrict the rights and privileges conferred on banks and banking corporations by the *Bank Act.*

Accordingly, Collins, J., ruled:[65]

> After a study of the able arguments of both counsel, a consideration of *The Bankruptcy Act,* other relevant statutes and certain judicial decisions, I have come to the conclusion that the preliminary objection of counsel for the debtor cannot be sustained...
>
> My view is that those provisions of *The Bankruptcy Act* which may appear on first reading to affect the rights and privileges of an incorporated bank must be considered in conjunction with s. 169 Therefore, in matters concerning the rights and privileges of an incorporated bank, when considering the meaning of the word "person" in a section of that Act, it becomes necessary to consider whether "person" should be interpreted in its un-

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[62] (1958), 37 C.B.R. 11, 25 W.W.R. 598.
[63] (1958), 37 C.B.R. 11, at p. 12.
[64] *Ibid.,* p. 13.
[65] *Ibid.,* p. 12 and p. 13.

> restricted sense, as defined in *The Interpretation Act* above referred to, or alternatively whether it should be interpreted in a narrower sense embodying the restricted meaning of the term "corporation" as defined in s. 2(*m*).

Referring to the statutory power of a bank to carry on the business of banking, his Lordship said:[66]

> This implies the right to collect money loaned, and to use such lawful means to protect its position as a creditor as are available to other creditors save in so far as its rights may be restricted by law. *The Bank Act* also gives a bank certain further powers unnecessary to consider here. If the word "creditor" in s. 21(1) of *The Bankruptcy Act* were to be interpreted in a sense restricted by excluding an incorporated bank from its meaning such an interpretation would interfere with the right and privilege of such bank to protect itself as a creditor by taking such steps as may be lawful for creditors generally to take. Such an interference would be an interference with the rights and privileges conferred on it by *The Bank Act*.

Sensible though this result is, and with all the strength of section 169 to support it in the case of banks, it still has not escaped doubts as to whether it could be justified on the terms of the statute; thus a learned commentator suggesting at the same time a legislative solution, said:[67]

> The result arrived at in this case certainly seems to be correct but it is open to question whether on the wording of *The Bankruptcy Act* it can be justified.
>
> The purpose of the limitation in the definition of "corporation" in s. 2(*f*) is to prevent the presentation of a petition against a bank, or the making of an assignment. It would seem preferable to extend s. 25 of *The Bankruptcy Act* so as to make this clear and to take out the limitations contained in s. 2(*f*) which lead to the difficulty which has occurred in the present case.
>
> A similar problem occurs in the appointment of trustees. Section 5 provides that a "person" can apply to be licensed as a trustee and s. 2(*m*) defines "persons" to include a partnership and an incorporated association. The licensing of a partnership as a trustee can certainly lead to real difficulty, and again it would seem better if the Act were to make it clear that only individuals or corporations can receive a licence, and to limit the wording of s. 5.

Even in the case of banks, however, the balance of the Act is not wholly redressed by section 169: a bank might understandably be well content, for example to be excluded from the provisions respecting reviewable transactions; to be freed from garnishment of employees' wages; to be allowed to recover its property from a trustee without complying with section 50 of the Act; or to be freed from pursuit

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[66] *Ibid.*, p. 14.

[67] Lloyd D. Houlden, of the Ontario Bar, Consulting Editor of the *Canadian Bankruptcy Reports*, in a comment on the case which appears in 37 C.B.R., at p. 17, immediately following the report.

in connection with fraudulent preferences: and the literal application of the Act which would bring it these privileges could scarcely be said to "interfere with or restrict the rights and privileges" of the bank, contrary to s. 169. But if s. 169 does not suffice to restore a balanced operation of the Act as regards banks, still less is the balance restored as regards insurance companies, trust companies, and so on, which, like banks, are expressly excluded from being "corporations" by section 2(*f*), but in favour of whom there is no section analoguous to section 169 in favour of banks. In their case it becomes perfectly clear that the choice is either to *exclude them purely arbitrarily* from being capable of *bankruptcy*, or to *include them purely arbitrarily* as capable of the *rights of other persons*. And, as indicated above, it is probably the *latter* course that is preferable, as it does not leave a statutory list of types of corporation dangling in a definition without any purpose or effect, and this in a situation moreover where it is obvious that the intended purpose is to immunize them from becoming bankrupts. This appears to have been the general attitude of the courts in analogous problems arising under the old Act so far as any conclusion at all is possible from the cases. The examination which follows of the relevant decisions may be passed over without loss by any reader not requiring a nice examination of the precise state of the authorities, as may the ensuing discussion applying the sections of the present Act. The general reader may resume the thread of the discussion after bypassing the portion included below between asterisks, which is placed here, not because it is in controversy, but because the completeness of the argument requires that it be dealt with, and because in logical order it belongs next. It is unfortunately rather laboured.[67a]

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The Ditchburn Boats Case. In *Re Ditchburn Boats & Aircraft (1936) Limited*[68] Urquhart, J., in the Ontario Supreme Court in 1938, was apparently willing to carry the exclusion of trust companies from the definition of "corporation" far enough to make use of it to stop a trust company from voting proxies — a practice to which

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[67a] The thread of discussion may be resumed *infra*, at p. 553.

[68] (1938), 19 C.B.R. 216, [1938] 2 D.L.R. 518. Related proceedings are reported (1938), 19 C.B.R. 240, [1938] O.W.N. 241 (quashing of appeal as incompetent); and (1938), 19 C.B.R. 248.

his Lordship was openly and distinctly hostile [69] — though seemingly not so far as to prevent it from voting as a creditor. His Lordship, referring to section 99 of the old Act, which provided that a corporation might vote at creditors' meetings by authorized agent,[70] observed somewhat inconclusively: [71]

> I realize that if carried to its logical conclusion this interpretation of sec. 99 would not permit certain building societies, incorporated and savings banks, insurance companies, trust companies, loan companies or railway companies from voting as creditors either, but we must take an Act of Parliament as we find it.

The Inverness Case. Of rather more authority but of problematical effect, is *Re Inverness Railway and Collieries Ltd.: Royal Bank of Canada* v. *Eastern Trust Co.*,[72] which came in 1923 to the Supreme Court of Canada from the Supreme Court of Nova Scotia.

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[69] Per Urquhart, J., at (1938), 19 C.B.R. 216, at p. 219: "Another argument advanced by the appellant was that the maxim *"delegatus non potest delegare"* applied. I am inclined to think that it does and that a trust company by its very nature is prevented from acting as proxy for creditors generally... It will be noted that an authority to delegate may be implied from "the very nature of the employment"; but this is quite different from saying than an authority to delegate may be implied from the very nature of the agent... I am of opinion that if the trust company is to delegate, the instrument creating it as agent must expressly give it power to delegate its duties further. I am advised in this case that the proxy forms were in the usual form and merely appointed the trust company to be proxy and there was nothing else to the effect that certain officers could act as agents for the trust company in voting same."

Compare also the order for costs at (1938), 19 C.B.R. 216, at pp. 220-221 with that made at (1938), 19 C.B.R. 248, at p. 250. Per Urquhart, J., (1938), 19 C.B.R. 216, at p. 221: "Trust companies are now invading many fields, and if they go into a field where there is no authority for them doing so, they must be prepared to pay the costs if they are wrong."

Compare the refusal of Urquhart, J., to allow the Premier Trust Co. to act as trustee and the determination in favour of Mr. Higgins, (1938), 19 C.B.R. 216, with Urquhart, J's, change of view when the administration proved unprofitable to Mr. Higgins: (1938), 19 C.B.R. 248.

[70] Section 42(18) of the Act of 1919, which at the date of the case in question appeared as the first paragraph of section 99 of *The Bankruptcy Act*, R.S.C. 1927 c. 11, provided that "A corporation may vote at meetings of creditors as if a natural person, by an authorized agent."

[71] (1938), 19 C.B.R. 216, at p. 220.

[72] In the Supreme Court of Canada, [1923] S.C.R. 177, 3 C.B.R. 724, [1923] 1 D.L.R. 498, [1923] I W.W.R. 937 (*Coram*: Davies, C.J.. and Idington, Duff, Anglin, and Brodeur, JJ.); on appeal from the Supreme Court of Nova Scotia, 55 N.S.R. 306, 3 C.B.R. 271, 65 D.L.R. 139 (*Coram*: Russell, J., Ritchie, E.J., Chisholm and Mellish, JJ.).

It involved two basic questions: (i) whether an assignment of book debts to the above-mentioned bank was valid against the trustee; and (ii) whether the first-mentioned company was a railway company within the meaning of the words of section 2(*k*) of the 1919 Act, excluding "railway companies" from the definition of "corporation" [and therefore from the definition of "debtor", and therefore from the power to make an assignment in bankruptcy altogether].

On the former question, it was urged for the bank that section 30(1), avoiding (in favour of the trustee) certain assignments of books debts, spoke [73] (at the time of the impugned assignment of debts) of assignments by one *"person"* to another *"person"*; and that, banks being expressly excluded from the definition of "corporation" [74], the Royal Bank could not, in consequence, be a "person" as defined by the Act of 1919,[75] and could not therefore be prejudiced by section 30(1).

A majority both in the Supreme Court of Canada [76] and in the Supreme Court of Nova Scotia[77] held the assignment of debts to the bank to be indeed void by s. 30(1) against the trustee. The majority of the Supreme Court of Canada which considered and upheld the contention that the assignment of debts to the bank was invalid must be taken, in holding the assignment invalid under the then section 30(1), to have decided that — whether or not the bank was a "person" generally within the definition in s. 2(*aa*) of the

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[73] *The Bankruptcy Act*, 9-10 Geo. V, S.C. 1919, c. 36, s. 30(1). By the date of hearing, this section had been replaced by *The Bankruptcy Act Amendment Act, 1921*, 11-12 Geo. V, S.C. 1921, c. 17, s. 25, but the earlier enactment appears to have been treated as applicable, though the later one was referred to: see Russell, J., in 65 D.L.R., at pp. 141-2, and Mellish, J., at p. 150; compare however the opinion of Chisholm, J., at p. 147, where it seems to be the amended legislation that is being applied. It is not clear from the report at what date (i) the assignment of book debts to the bank, and (ii) the assignment in bankruptcy of the debtor, took place. At least the first appears to have been effected before the amending act came into operation, and it is the date of the assignment of the book debts which would seem to be material to the application of s. 30. In the Supreme Court, Anglin, J., speaking in [1923] S.C.R., at p. 181, for himself and Davies, C.J., applies the earlier Act; and Duff, J., approves the opinion of Mellish, J., who does likewise.

[74] Section 2(*k*) of the Act of 1919; quoted in Appendix Six, *infra*, at p. 619.

[75] Section 2(*aa*), quoted in the next following paragraph of the text, and in Appendix Six, *infra*, at p. 619. The amending Act of 1921, quoted in Appendix Six, *infra*, pp. 620-621, replaced this definition with one which left no doubts as to its wide scope. At the date material for the assignment of debts, the earlier version would seem to have been applicable; see *supra*, n. 73.

[76] Davies, C.J.; Duff, and Anglin, JJ.

[77] Chisholm, J.; Ritchie, E.J., and Mellish, J.

1919 Act[78] ['"person" includes corporation and partnership'] — the bank was at least a person within s. 30(1). Indeed, in the Nova Scotia Supreme Court, Chisholm, J., with whom Ritchie, E.J., concurred, spoke to the latter effect:[79]

> With respect to the contention that the bank is not a person within the meaning of the Act, the general rule is that when a word is used more than once in a section, the same meaning must be given to it whenever it occurs. That would work a result with respect to sec. 30(1) which I cannot believe to have been intended by Parliament. I should rather read the section as being intended to enact that where any person who is liable to be adjudicated bankrupt or is capable of making an assignment, under the provisions of the Act, makes an assignment to any person capable of taking an assignment of book debts, etc., the assignment shall be void, etc.

Russell, J., spoke more generally, indicating that a given body corporate, though it be outside the definition of "corporation", could yet be a "person", not merely *within a particular section*, but even *within the general definition of "persons"*:[80]

> At the date of the assignment to the bank the statute, sec. 30(1) referred only to an assignment to "any other person" and it is contended that the word "person" is by the Bankruptcy Act made inapplicable to an incorporated bank. This argument is founded on the definition in sec. 2(aa.) which enacts that "person includes corporation and partnership[.]" If we were confined to the Bankruptcy Act in our search for the meaning of the term we should have to say that the bank is not a person, because it is not a partnership and it is not a corporation as defined in the Act, the latter term expressly excluding incorporated banks. But the Bankruptcy Act, while it enacts that the term person "includes" a partnership and a corporation, meaning corporation as defined in the Act does not say it may not include other things as well. It certainly must include an individual *homo sapiens*, and I know of nothing in the Bankruptcy Act which excludes the definition of person given in the Revised Statutes of Canada as including any body corporate and politic.

Mellish, J.'s words were similar in their general effect to those of Russell, J.:[81]

> It is contended on behalf of the bank that it is not a 'person' within the meaning of this section; and that although the word 'person' includes by

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[78] 9-10 Geo. V, S.C. 1919, c. 36, s. 2(*aa*), quoted in Appendix Six, *infra*, p. 620 with the definition put in its place by the amending Act of 1921. The reasons do not make clear what date was considered material as regards the law to be applied te the debtor's assignment in bankruptcy. The assignment took place, as appears from the judgment of Chisholm, J., 65 D.L.R., at p. 145, on February 26, 1921, — that is to say, several months before the commencement of the amending Act of 1921, 4th June, 1921, the day of its assent. The hearing in the Nova Scotia Supreme Court appears to have taken place afterwards. See *supra*, nn. 73 and 75.

[79] (1922), 65 D.L.R. 139, at pp. 147-8.

[80] *Ibid.*, at p. 141.

[81] 65 D.L.R., at p. 150.

> sub-sec. 2(*aa*) above quoted a 'corporation' the latter word must there be held to be used in the restricted sense as defined in sec. 2(*k*).
>
> Undoubtedly sec. 2 is a part of the Act, but a perusal of the section itself I think indicates that the word 'corporation' as therein used is not always intended to be read in such a restricted sense. Where such restricted sense is clearly intended in this section the words 'corporation as defined by this section' (see sub-sec. 2(*o*)) are used. I am therefore of opinion that the word 'corporation' is used in sub-sec. 2(*aa*) in its ordinary and unrestricted sense, which indeed is the usual and proper way of using definitive language, and that consequently the word 'person' in sec. 30, line 2, includes an incorporated bank.

In the Supreme Court of Canada, of the five justices who took part in the appeal, [82] only the three forming the majority found it necessary to deal at all with the question of the bank's assignment; of these Duff, J., found that the judgment of Mellish, J., 'presents the considerations governing the disposition of this appeal exactly as I conceive them',[83] and Anglin, J., with whom Davies, C.J., concurred, said on the point in question only that:

> I also agree with the unanimous view of the learned judges of the Supreme Court of Nova Scotia that the appellant bank is an "other person" within the meaning of that term as used in section 30(1) of the statute.

Anglin, J., and Davies, C.J., thus say nothing at all as to whether the bank would be a "person" for any other purposes than those of section 30(1) — more especially, *whether it could be a "person" generally* within the definition of section 2(*aa*).

It is most important to say at once that they *could* have done so *without in any way prejudicing the exempt status of banks* from being debtors under the *Bankruptcy Act*. For, under the Act of 1919, the question, whether a body corporate excluded from "corporation" could yet be a "person", had not the same implications as under the present Act. True, susceptibility to bankruptcy law then depended, as it does now, on being a "debtor": but under the 1919 Act "debtor" was defined,[84] not (as now) purely in terms of "persons", but rather in terms which, on a fair reading, appeared to make it necessary *also* to be *either an individual or a "corporation"*.[85] Susceptibility to bankruptcy law did not, therefore, under the 1919 Act, arise once one was found to be a "person". *Person or not,* if a body corporate was outside the definition of "corporation",[86] then, not being an individual either, it was outside a fair reading of the 1919 Act's definition of "debtor", and thus not subject to bankruptcy jurisdiction. That it

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[82] Davies, C.J., and Idington, Duff, Anglin, and Brodeur, JJ.

[83] [1923] S.C.R., at p. 181.

[84] Quoted in Appendix Six, *infra,* at p. 619. Section 2(*o*) in the Act of 1919.

[85] See *infra,* pp. 589-590.

[86] Quoted in Appendix Six, *infra,* at p. 619. Section 2(*k*) of the 1919 Act.

might be a "person" was therefore not determinative. Thus the Royal Bank, for example, though a body corporate, was expressly excluded from being a *"corporation"*. Not being an individual either, it was thus fairly outside the definition of "debtor" — and therefore outside bankruptcy jurisdiction — *whether it was a person or not. The courts might thus with perfect equanimity have held it to be a "person" generally under the Act without thereby raising any inconsistency with its express statutory immunity from bankruptcy law.* Indeed, when the 1919 Act was generally amended in 1921,[87] the definition of *"person"* was so far widened in its express terms as to include *all* bodies corporate — without however thereby rendering subject to bankruptcy law such bodies corporate as, not being *"corporations"* (and thus not *"debtors"*) had not theretofore been subject to bankruptcy law: for, *though now "persons" beyond question,*[88] they would *still* not be "corporations", therefore *still* not "debtors", therefore *still* not subject to bankruptcy law. So likewise even *before* the 1921 amendments, a body corporate, though it were not also a "corporation" as defined, might nevertheless have been held to be a "person", without for that reason alone becoming subject to bankruptcy jurisdiction.

The courts then *might,* without prejudicing the bank's immune status under the 1919 Act, have held that banks, though neither "corporations" nor "debtors", were nevertheless within the *general* definition of "person". They *did* hold that a bank was *at least* a "person" *within s. 30(1),* and so subject to the same rules in that respect as everyone else.

The decisions in *Re Inverness Railway and Collieries Ltd.: Royal Bank of Canada* v. *Eastern Trust Co.*[89] thus afford only a very limited assistance. Chisholm and Ritchie, JJ., in saying that the bank is at all events a person within s. 30(1), support the proposition that a body corporate can, even should it, by reason of restrictions, not be a "person" generally within a statutory definition, yet be a "person" within the meaning of a section when this result is required for the proper operation of the Act.

Russell and apparently also Mellish, JJ., (with the latter of whom Duff, J., in the Supreme Court agreed) by their holding that the

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[87] *The Bankruptcy Act Amendment Act, 1921,* 11-12 Geo. V, S.C. 1921, c. 17.

[88] The author considers this clear beyond discussion. The word *person* was to be used in its natural sense throughout the Act; it was the words *debtor* and *corporation* which were to be restricted. Compare however *Construction Coopérative de Montréal* v. *Z. Berthiaume et Fils, Ltée,* (1939), 66 B.R. 409; 20 C.B.R. 351, discussed *infra,* pp. 573-576.

[89] Citations *supra,* n. 72.

bank was indeed a "person" within the general definition of section 2(*aa*) of the 1919 Act, support the proposition that in construing such a phrase, '"person" includes partnership *and corporation*', one cannot necessarily say that "corporation[s]", as defined in turn by *another* special definition, exhaust the bodies corporate which may be *persons* within the *first*-mentioned definition. This may be because *"includes"* is not necessarily equivalent to *"includes only"* — is not, in sum, necessarily a synonym for "means".[90] Or it may be because because "corporation" as a rubric in the definition of "person" is not confined to "corporation[s]" as elsewhere defined.[91]

In the Supreme Court of Canada, while Duff, J., by concurring with Mellish, J., supports the latter proposition, Anglin, J., and Davies, C.J., by their general concurrence with the result below, concur with one or other or both of the propositions; but which, it is impossible to say.

It would seem, however, that one can collect a majority of the Supreme Court of Nova Scotia in favour of the position that, in the context under discussion, such terms as "person" and "corporation" may in the *Bankruptcy Act* have different meanings from those assigned to them in the definition sections. Chisholm and Ritchie, JJ., in the passage above quoted from the opinion of the former, clearly state that the term "person", supposing it to be defined restrictively, may be used in the Act in a wider sense. Mellish, J., in the passage quoted above, is willing to vary the meaning of the term "corporation".

Under the present Act. The cases on the old Act thus afford some slight authority for the proposition that what may not[92] be a "corporation" or "person" in general, may have to be taken specially as a "corporation" or "person" within some one or more provisions, in order to allow a reasonable operation to the Act. The definition sections of the *present* Act seem to see the "person", and not only the "corporation",[93] primarily as debtors; and, with their

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[90] See *infra*, at p. 550 and n. 96.

[91] See text *infra*, at p. 549 and esp. n. 94.

[92] By reason of a restrictive statutory definition, especially one evidently designed for certain limited purposes.

[93] On a fair construction of the 1919 Act, an entity would not, even though a "person", be a debtor liable to bankruptcy law uuless it were also either an individual or a "corporation" as defined. Hence liability to bankruptcy law did not, under the old Act, arise by reason only of being a "person" within the meaning of the successive definitions of that term. See *supra*, pp. 546-547 and *infra* pp. 562 *in fine* to 565.

position as such in mind, the terms of the Act restrictively define the scope of these categories. But, in other contexts, the "person" and "corporation" so restrictively defined become unworkable. The cases on the old Act (so far as they go) indicate accordingly that, where desirable for the proper operation of the Act, a considerable license will be allowed to the courts to widen by construction such phrases beyond the narrow limits fixed by statutory definition or by the judicial gloss thereon. In some measure, we shall be allowed to have our cake and eat it, too. This we may do in better conscience for being assured of the support of the authorities on statutory interpretation.[94]

The necessity of a measure of interpretive flexibility in this direction has already been pointed out. Bodies corporate kept from becoming subject to bankruptcy law under the present Act, by being excluded from status as "corporations" and as "persons", must be re-admitted to status as such for a variety of purposes, not least the right to claim as "creditors". Apart from the general authorities on statutes, the cases on the old Act already lend some countenance to this sort of flexibility. Where the terms of the statutory definitions have been *explicitly* restrictive, the Act has been made workable by not carrying the effect of the restrictive definitions inexorably to their logical and systematic consequences. The *further* restrictions brought to the same statutory definitions by *judicial gloss* can admittedly *likewise* be lived with for the same reason — that the restrictive definitions will not be applied in too thoroughgoing a manner. So much can be willingly enough conceded. Even therefore if non-profit bodies corporate succeed in the end in eluding "debtor" status on the ground that they are (contrary to the author's view) neither "corporations" nor "persons", it will not necessarily follow that they will not be allowed to be "persons" for *any* purpose *at all*. Whatever other arguments are therefore available against the line of decisions coming from the Quebec Queen's Bench, this particular argument *ab inconvenienti* is probably not one of them. So much the cases on the old Act seem to suggest. Those inclined to pursue a course of restrictive definition can thus do so without too much concern at being held later to a reckoning for wholly disastrous consequences.

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[94] *Maxwell on The Interpretation of Statutes*, 11th ed., Roy Wilson, Q.C., ed., (London, 1962), p. 311 ff.; *Craies on Statutes Law*, 6th ed., S.G.G. Edgar, ed., (London, 1963), p. 168 ff.; p. 212 ff.; *Odgers' Construction of Deeds and Statutes*, 5th ed., G. Dworkin, ed., (London, 1967), p. 254 ff.; 315 ff. See also *supra*, nn. 58a and 59.

Is there then any substantial reason why it should not be accepted that section 2(*f*) "corporations" are exhaustive of the bodies corporate which may be "persons" within section 2(*m*)? We have admitted that the resulting restrictive definition of "person", whether it stem from restrictive statutory language or restrictive judicial gloss, can be faced with some equanimity, because it need not be applied in so thoroughgoing a manner as to entail entirely catastrophic consequences. So far as the *mechanical* steps in reaching the above result are concerned, we have already at least agreed[95] to accept that, *in the list of categories* of those who may be "persons" under section 2(*m*), the rubric "corporation" in principle exhausts bodies corporate; and moreover that "corporation" in section 2(*m*) means just what it is defined to mean in section 2(*f*). Does any link remain to be forged?

Yes, for section 2(*m*) merely provides that "person" *includes* a partnership, an unincorporated association, a corporation, and so forth. "*Includes*" need not necessarily mean "includes *only*". "Person" may thus be wider than the list which follows it in section 2(*m*). Clearly, in order that the restrictive effect of the definition of "*corporation*" in section 2(*f*) be carried over the definition of "*person*" in section 2(*m*), it is necessary also to prevent bodies corporate *excluded* from 2(*f*) from insinuating themselves into the definition of "person" in 2(*m*) on the basis that "person" as defined by section 2(*m*) merely "includes" *amongst others* the categories there listed.

Now, "includes", as used in section 2(*m*), clearly cannot mean "includes only"; for, if it did, *individuals* could not be persons within that section: *they* not being listed. "Person" in section 2(*m*) must therefore in some measure be open-ended. This was true for the same reason under the old Act both as it originally stood and as it was subsequently amended; it was also recognized in the case law.[96]

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[95] *Supra*, pp. 537-538.

[96] See the passage quoted *supra*, at p. 545 from the judgment of Russell. J., in *Re Inverness Railway and Collieries Ltd.*, (1922), 65 D.L.R. 139.

In *Bricault* v. *Paroisse de St.-Etienne*, (1935), 58 B.R. 100, Barclay, J., in his concurring opinion whose reasons were adopted also by St.-Jacques, J., said at p. 131 (on the *old Act*):

> "The wording of section 2 presents difficulty. It is entitled an "Interpretation" section and in the margin is the word "Definition", and it says that "in this Act, unless the context otherwise requires or implies, the expression" — and then follows a long list of expressions, some of which are followed by the word "includes" and some by the word "means". The word "includes" has at least two shades of meaning. It may apply where that which is affected is the only thing included, and it is also used to

Yet even allowing an open-ended character to the definition of "person" in section 2(*m*), it will still be possible to carry over into section 2(*m*) the restrictive effect of 2(*f*) provided that we are

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express the idea that the thing in question constitutes a part only of the contents of some other thing. Generally speaking, it is employed as a term of enlargement and not as a term of limitation. It is obvious, for example, that it is not to be taken as limitative in section 2(*z*), which says that "oath" includes affirmation and statutory declaration.

Section 2(*k*), which states that "corporation" includes..., etc., taken by itself would not appear to be limitative, but in section 2(*cc*), which includes a corporation as a person, the words are "a corporation as restrictively defined by this section", so that in sub-section (*k*) the word "includes" is evidently used in the same sense as the word "means".

When we come to section 2(*p*), the word "includes" also seems to be used as equivalent to "means" because it appears to be all-embracing."

Again, in *Paroisse de St. Gabriel de Brandon* v. *Sarrazin*, (1935), 58 B.R. 123, Rivard, J., whose reasons were adopted by Létourneau and St. Germain, JJ., said of section 2(*p*) of the old Act defining "debtor", at p. 126:

"Aussi importe-il fort peu que le par. *p* ait employé l'expression *includes*, au lieu de *means*. Seules, les personnes tombant dans l'un ou l'autre des quatre cas énumérés sont assujetties aux dispositions de la loi de faillite qui frappent les *débiteurs*. Ainsi, l'individu qui serait vraiment un débiteur et qui commettrait un acte de faillite, mais qui ne se trouverait pas personnellement au Canada, qui n'y résiderait pas ordinairement, qui n'y aurait pas de lieu de résidence, qui n'y ferait commerce ni personnellement ni par mandataire, ne serait pas sujet aux dispositions de la loi de faillite applicables aux débiteurs. Et de même, s'il s'agit d'une personne morale, elle ne sera sujette à la loi que si elle est une corporation."

And, speaking in the same case of the old definition of "corporation" in section 2(*k*) of the former Act, Hall, J., said, at p. 133:

"It is argued by the appellant that the word *includes* is used in the sense of *means*, and that, therefore, the act does not apply to any corporation except those specified, which are trading or commercial corporations.

It is difficult to accept this interpretation of the word "includes" unless it is used in two entirely different senses in the same interpretation clause of the act. For instance, paragraph *jj* says:

Sheriff includes bailiff and any officer charged with the execution of a writ or other process.

It was certainly not the intention to restrict the meaning of sheriff to bailiffs and other officers, and, therefore, in that paragraph, the word *includes* is not used in the sense of *means*.

It is difficult to believe that the word *includes* is used in the same sense in the two paragraphs. It is quite reasonable to say that the word *sheriff* includes other officers, because without that proviso it would be impossible to argue that a bailiff is a sheriff, but if it was intended to subject every corporation to the jurisdiction of the act, there could have been no reason for seeking to clarify the term by declaring that a corporation includes a company. Every company is, of course, a corporation, although every corporation is not a company."

willing to concede that, in the ultimate determination of the scope of *"person"* in section 2(*m*),[97] *whatever else* may be included beyond the categories listed, the *rubric "corporation" in principle*[98] *exhaustively covers the ground* of *bodies corporate*, and means what it is defined to mean in section 2(*f*) — both reasonable concessions.

In *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse Inc.*,[99] decided under the present Act, the Quebec Bench, by a majority (Pratte and Owen, JJ.; Rinfret, J., dissenting) held that a youth welfare organization, incorporated without share capital for purposes other than gain under Part III of the Quebec *Companies Act*,[100] was outside bankruptcy jurisdiction as not being a "corporation" within the present statutory definition [section 2(*f*)] and [so] also outside the definition of "person"; the Court accordingly affirmed a judgment of Montpetit J. dismissing a petition in bankruptcy.[101] Whether this organization was correctly held to be outside the definition of "corporation" is a question which will be considered below. The majority justices, however, being of that view, but rightly appreciating that the matter did not end there, went on to hold that the body in question, if it was not a "corporation", was not a "person" either: for, as listed in the enumeration of those who were "persons" under 2(*m*), "corporation" was exhaustive of bodies corporate; and "corporation" in the enumeration of 2(*m*) meant what it did in 2(*f*). So Owen, J., though without elaboration as to his reasons, said:[102]

> Returning to section 2(*m*) of the Bankruptcy Act, I am of the opinion that respondent would come within the definition of "person" therein only as a "corporation".
>
> ...Having concluded that respondent is a corporation my next step is to determine whether it is a corporation subject to the provisions of the Bankruptcy Act. Section 2(*f*) of that Act provides... [the definition of "corporation"]...

And, *inter alia*, Pratte, J., made the general remark that:[103]

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[97] And not merely, as earlier conceded, that *in the list of categories* in section 2(*m*), the rubric "corporation" in principle exhausts bodies corporate. See *supra*, p. 550. The compulsion for the wider proposition: *supra*, pp. 537-538.

[98] *"In principle"* is a *caveat* introduced because it will be *generally*, though not *universally*, true, that "corporation" will cover the whole ground of bodies corporate. It is still possible, for example, that a body corporate may enter the class of "persons" under the rubric of "heirs, executors, administraters or other legal representative of a person"; or, as a partner in "a partnership".

[99] [1960] B.R. 413.

[100] R.S.Q. 1964, c. 271.

[101] Reported *infra*, Appendix Two.

[102] [1960] B.R. 413, at p. 417.

[103] [1960] B.R. 413, at p. 416.

> Au surplus, il ne paraîtrait pas raisonable que le législateur, après avoir précisé [*sc.* dans la définition de "corporation"] quelles sont les corporations qui peuvent être déclarées en faillite, eut voulu que d'autres puissent l'être sous une autre appellation [*sc.* entre celles déclarées "personnes" par la section 2(*m*)] ...

— a clear acceptance of the almost self-evident conclusion that the restrictive definition of "corporation" cannot, in the mechanics of the *Bankruptcy Act* definitions, achieve its object without being carried over to restrict the definition of "person".[104]

* * *

Conclusion. So far as the present statute is concerned, it would seem on balance necessary to concede — along the lines indeed already traced by the courts — that "corporation" as specially defined is

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[104] Before his Lordship's general observation, however, as just quoted, Pratte, J., had dealt particularly with one other category of "person" within which it was sought to put the respondent organization if it should not be a "person" as a *"corporation"*. This was the category of *"unincorporated association"*.

It had been argued that if the *Association du Bien-Etre de la Jeunesse, Inc.* was not a "corporation", then it must be deemed "unincorporated"; and, if "unincorporated", then an "unincorporated association" and as such a "person".

This argument, indeed, found favour with Rinfret, J., dissenting, who took the view that the respondent — if indeed not a "corporation" [as to which his Lordship expressed no opinion: [1960] B.R. 413, at pp. 419 and 420] — would then instead be a "person" as an "unincorporated association". Consistency of interpretation between 2(*f*) and 2(*m*) required, in Rinfret, J.'s view, that whatever was not a "corpora*tion*" must be held correlatively to be "*un*incorpora*ted*." Certainly the majority were in no position to quarrel with Rinfret, J.'s insistence that "corporation" meant exactly the same in 2(*f*) as in 2(*m*) — after all, their whole position rested on just that proposition.

What the majority *might* have answered was that there was no strictly formal reason why *corporation* should be coextensive with *incorporated*; non-corporation with *unincorporated*. [For corpora*tion* and *un*incorpora*ted* are not formally — not literally — correlatives. Consequently, even though not a "corporation", as formally defined, a body could nevertheless be considered *in*corpora*ted* — not therefore *unincorporated* — still less an "unincorporated association".] The courts, in sum, though faced with an *artificially narrow* definition of *"corporation"*, would not be forced to reciprocate with an *artificially wide* definition of *"unincorporated association"*. They would be free to define "unincorporated association" in a sense not so artificially wide as to include every body corporate that might on a true construction of "corporation" be held excluded from being a "corporation". And, in avoiding having to make such bodies corporate "persons" under the head of "unincorporated associations", the would avoid also utterly defeating the very object of the exclusion of these bodies from the definition of "corporation". The majority *might*, in short, have said that even if, under compulsion of statute, a given body corporate must be deemed not to be a "corporation", it still need not for that reason alone be considered to be an "unincorporated association" — a term which

exhaustive of corporate *"persons"* within the definition of the latter term and, therefore, exhaustive too of corporate *"debtors"*. The restrictions on "corporation" must be carried over onto "persons", and thence onto "debtors".

It has, of course, been shown that the Act does not operate properly when bodies corporate outside the definition of "corporation" are *systematically* denied status as "persons" for all purposes. The terms of the statute are therefore to be stretched to include them as "persons" *notwithstanding* the defining clause, whenever necessary. All that can be said in defence of this mode of construction is that, within the accepted canons of construction,[105] it is rather easier to *include* them arbitrarily as "persons" by way of exception from the definition, specially within those sections of the Act that seem to require it, — than it is to *exclude* them arbitrarily from being "debtors", as Parliament clearly appears to have intended, and as must be accomplished one way or another.[106]

It is submitted, therefore, on balance, that the question posed as the title to this Part must in principle be answered in the negative. A body corporate other than a section 2(*f*) "corporation" cannot be a "person" as defined by section 2(*m*). But, this much being conceded, it is necessary to add the important qualification that the term "person", as used in many — if not most — sections of the *Bankruptcy Act*, has a different meaning from the definition of "person", found in section 2(*m*), when so interpreted. Even in the *Bankruptcy Act*, it is the ordinary meaning of "person" — that prescribed by the *Interpretation Act* [107] — which will commonly apply.

(2) *Can a non-profit body corporate be a "company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or of any of the provinces of Canada"* or *"an incorporated company, wheresoever incorporated, that has an office in or carries on business within Canada"* ?

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the courts would still be free to define in the ordinary way, without regard to the artificial restrictions on the definition of "corporation".

Pratte, J.'s answer to Rinfret, J.'s argument *was*, however, in substance, that, [at least] when one used the French texts, the term *"association non constituée en corporation"* in 2(*m*) was not correlative to *"corporation"* in 2(*f*), *because*, Pratte, J., considered, the application of the latter definition merely produced an infinite regress — and, in any event, the rule that a term must mean the same thing throughout a statute was not absolute: [1960] B.R. 413, at p. 415.

[105] See *supra*, n. 94.

[106] *Supra*, pp. 537-38, esp., at p. 538.

[107] *Supra*, p. 534 and nn. 57 and 58.

If, then we accept the plausibility of the judicial view that whatever restrictions are imposed upon the definition of *"corporation"* must be carried over into the definition of *"person"*, it becomes critical to decide just *how severe those restrictions are.*

Indeed, it is just at the point that the definition of "corporation" has been subjected *by judicial gloss* to limitations more severe than those *explicitly imposed by statute,* that the decisions of the courts are most vulnerable to adverse criticism.

The definition of "corporation" found in the present Act may here conveniently be repeated for ease of reference:

> 2. In this Act,...
>
> (*f*) "corporation" includes any company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or of any of the provinces of Canada, and any incorporated company, wheresoever incorporated, that has an office in or carries on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies....

It will be noticed at the outset that "corporation" so defined is said to *include* the listed classes of bodies, not to *mean* (*i.e.* include all and *only*) the listed classes. So far as the Act goes, therefore, "corporation" might thus *be wider* than the *listed classes.* There is, indeed, enough here alone to serve as a basis for an argument that, however far the judicial gloss may succeed in restricting the phrases "company incorporated or authorized to carry on business" and "incorporated company ...that has an office... or carries on business", *"corporation"* might nevertheless *still* "include" even a body *outside* the scope of these last phrases. After all, the *explicit* restrictions imposed by the Act would not be undermined thereby, for the definition, in terms, says that "corporation" *does NOT include* banks, railways, and the other expressly excluded undertakings. Whatever is *"included", they* will stay excluded. But it is by no means necessary to rely at all on this distinction between "includes" and "means".[108] One can *still* easily succeed in restoring "non-profit" bodies corporate to the definition of "corporation" *without* relying on *any extension whatever* of "corporation" *beyond the listed* classes of bodies *expressly declared* by s. 2 (*f*) to be included in that term. For the natural and ordinary meaning of the words employed in defining *these* categories which go to make up "corporation", *are quite wide enough in themselves to embrace non-profit bodies corporate.*

We can therefore accept that, for the purpose of the Act, "corporation" *"includes"* the bodies listed, not in the sense only that

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[108] *Supra,* p. 550 and n. 96.

it *comprehends* them, but in the sense that it comprehends *only* the categories listed; that is to say, "corporation" *means* the categories listed. "Corporation", in sum, is defined by section 2(*f*) *exhaustively* in terms of the listed categories, and embraces *no more*. Indeed, were it not so, the definition of "corporation" could arguably fail in its limitative purpose. The solution that the categories listed are exhaustive was also adopted by the cases on the old Act, for the same reason.[109]

But if "non-profit" bodies corporate are *not* to be brought into the scope of the Act on the basis that "corporation" is *wider* than the categories expressly declared to be "corporations", it remains to see *whether non-profit bodies corporate do not indeed already fall* squarely *within* one or other of the *listed* categories.

The opposite suggestion, which is that favoured (contrary to the author's view) by the weight of judicial opinion, requires that we accept either that "non-profit" bodies corporate are, by reason of being such, not *"companies"*; or else (as a *prima facie* alternative) that they are, even if *companies*, not companies *"incorporated or authorized to carry on business"*.

It will be argued below that each of these arguments is false; and indeed that the second, even if it were correct in all other respects, would still not lead to the result desired by its proponents. But each has a greater or lesser measure of support from the case law interpreting the definition of "corporation" found under the old Act.[110] So far as those cases may be held to have been correctly decided on the terms of the *old* Act, they are, it must be conceded, relevant, though perhaps not decisive, on the *new* Act. The authority of the interpretation of the one on the interpretation of the other derives from two factors. *First*, the definitions of "corporation" are virtually identical under both Acts.[111] *Second*, and equally important, the definitions of "corporation" have performed, under, both closely similar, if not quite identical, functions. Thus under the old Act, an entity other than an individual had, in order to come within the scope of bankruptcy law, to be *a corporation as specially defined,*[112] *EVEN IF IT WAS a "person"*.[113] Under the present Act, an entity which is a body corporate must, in order to be subject to bankruptcy

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[109] *Supra*, n. 96.

[110] See *supra*, nn. 40, 41 and *infra*, Appendix Six, at pp. 619 *et seq.*, for references to and relevant excerpts from, the old legislation.

[111] For the definitions quoted in full, see *supra*, pp. 532-535 (the new Act); and Appendix Six, *infra*, pp. 619 *et seq.* (the old Act).

[112] *Ibid.*; s. 2(*k*) of the old Act.

[113] See *infra*, pp. 562 *in fine* to 565 and nn. 144 to 148.

law, be *a "corporation as specially defined SO THAT IT CAN BE a "person".*

(a) *Does the term "company" properly embrace non-profit bodies corporate?* Much the most effective argument for excluding non-profit bodies corporate from the definition of "corporation" — and so from the scope of the *Bankruptcy Act* — is that such bodies are not *companies*, whilst the *Bankruptcy Act* by the definition in section 2(*f*) requires that a "corporation" be a "*company* incorporated or authorized... [etc.]." It is indeed on this question that, it is submitted, the susceptibility of non-profit bodies corporate to Canadian bankruptcy jurisdiction must in the end turn.

Bankruptcy decisions suggesting that non-profit bodies corporate are not "companies". Judicial authority, in construction of the old and present Bankruptcy Acts, favouring the proposition that *all* — or *certain particular types* of — "non-profit" bodies corporate are not "companies", can be traced to the decisions in 1935 respecting the status in Canadian bankruptcy law of *fabriques*, or Roman Catholic parish church or vestry corporations in Quebec.[114]

In two separate decisions,[115] two panels of five justices of the Quebec Queen's Bench sharing only one individual judge, agreed that *fabriques* were not subject to the 1919 *Bankruptcy Act*, as it then stood revised and amended;[116] reversing in each case a judgment of Boyer, J., in the Superior Court.[117]

In one of these cases, *Bricault* v. *Les Curés et Marguilliers de l'Oeuvre et Fabrique de la Paroisse de St-Etienne,*[118] the *fabrique*

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[114] Citations are given *supra*, n. 15.

[115] *Bricault* v. *Curé et Marguilliers de l'Oeuvre et Fabrique de la Paroisse de St-Etienne*, (1935), 58 B.R. 100, 16 C.B.R. 196 (*Coram* Tellier, C.J., Dorion, Bernier, St-Jacques and Barclay, JJ.); reversing (1933), 71 C.S. 471, 39 R.J. 452, reported also together with the appeal in 16 C.B.R. 196, at p. 197 (Superior Court: Boyer, J.); and also *Curé et Marguilliers de l'Oeuvre et Fabrique de la Paroisse de St-Gabriel de Brandon* v. *Sarrazin*, (1935), 58 B.R. 123, 16 C.B.R. 326 (*Coram* Dorion, Rivard, Létourneau, Hall, and St-Germain, JJ.); reversing the decision of Boyer, J., in the Superior Court, reported, together with that on appeal, in (1933), 16 C.B.R. 326; refusal, with reasons, of leave to appeal to the Supreme Court of Canada, is reported in [1935] S.C.R. 419, [1935] 3 D.L.R. 554, 16 C.B.R. 350 (*Coram* Davis, J., in Chambers). The judgments of the Queen's Bench in both cases were delivered on January 31, 1935.

[116] R.S.C. 1927, c. 11.

[117] See *supra*, n. 115.

[118] (1935), 58 B.R. 100; other citations *supra*, n. 115.

supported and desired the exercise of bankruptcy jurisdiction;[119] in the other, *Les Curés et Marguilliers de l'Oeuvre et Fabrique de la Paroisse de St-Gabriel de Brandon* v. *Sarrazin*,[120] the *fabrique* resisted it.[121] It cannot therefore be concluded that the issues came before the Quebec Queen's Bench in a posture which suggested that bankruptcy jurisdiction was inherently hostile to the activities of the church. But while it would be unjustified to explain the result in that way, it is clear that the inherent appropriateness or otherwise, as it would have appeared to the judges, of the exercise of bankruptcy jurisdiction upon a *fabrique*, had great influence — and justifiably so. To take account of such considerations is simply to weigh whether a given object is inherently suitable as the subject-matter of a statute which it is sought to apply to it.[122] Such considerations had indeed been prominent amongst the reasons given in 1933 by Trahan, J., in the Superior Court in *Commission Municipale de Québec* v. *Ville d'Aylmer*[123] for holding that the *Bankruptcy Act*[124] did not apply to municipal and school corporations, even though neither type of body was *expressly* excluded by the terms of the statute. The view that *fabriques* were so far bodies *iuris publici* that the *Bankruptcy Act* must likewise be presumed to exclude *them* from its scope emerges plainly in the *per curiam considérants* given by the Court in *Bricault* v. *Paroisse de St-Etienne*:[125]

> Considérant que la fabrique de la paroisse de St-Etienne, comme, du reste, généralement toute autre fabrique de paroisse, en cette province, est un corps public, constitué, non pour des fins de commerce, d'industrie, ou de gain, ni pour aucune autre *fin d'intérêt privé ou d'ordre privé*, ni même pour des fins de propagande religieuse ou autre, mais uniquement pour participer dans la mesure et en la manière déterminées par la loi, la coutume et l'usage, à l'administration des biens de l'Eglise, dans la paroisse, et de l'école ou des écoles de fabrique, qu'elle peut avoir à son nom; *qu'elle est régie, à cet égard, par le droit public ou administratif tant ecclésiastique que civil; qu'un tel corps public*, si endetté soit-il, ou puisse-t-il être, n'est pas, au regard de la loi de faillite, une des corporations ou personnes, ni, conséquemment, un des débiteurs contre qui une ordonnance de séquestre

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[119] The *fabrique* was resisting the annulment of the receiving order, and alternatively contending *inter alia* that it had in substance made, and had a right to make, an assignment in bankruptcy: see 58 B.R. 100, at pp. 102-3 and 108-9.

[120] (1935), 58 B.R. 123; other citations *supra*, n. 115.

[121] The respondent *fabrique* contested the petition for a receiving order and, on appeal, was successful: (1935), 58 B.R. 123, at p. 125.

[122] See, for example, *Maxwell on The Interpretation of Statutes*, 11th ed., (London, 1962), pp. 83-95.

[123] (1933), 71 C.S. 113, 14 C.B.R. 437; English translation, [1933] 2 D.L.R. 638.

[124] R.S.C. 1927, c. 11.

[125] (1935), 58 B.R. 100, at p. 103; emphasis added.

> peut valablement être émise, ou qui, de son chef, pourrait faire valablement une cession de biens autorisée....

And Sir Mathias Tellier, C.J., with whose individual opinion Bernier and St-Jacques, JJ., concurred, twice drew an analogy with municipal and school corporations. Speaking of the conjoint effect of the definitions of "debtor" and "corporation", Tellier, C.J., said: [126]

> Or, à mon avis, ces deux définitions, qu'il faut prendre ensemble et en série, lorsqu'il s'agit d'une corporation, ne comprennent pas les fabriques, non plus que les corporations municipales et scolaires.

Later, resuming the same theme: [127]

> Tout comme les corporations municipales et les corporations scolaires, les fabriques sont des corporations publiques ou corps publics, dont les pouvoirs et les devoirs sont déterminés par le droit public. Elles sont constituées et elles existent, non pour des fins de commerce, ou d'industrie, ni pour l'exercice d'un métier ou d'un emploi, dans un but de gain ou de lucre, mais uniquement pour l'administration, sous l'autorité supérieure de l'évêque et la direction du curé, du temporel des paroisses, ce qui, parfois, quoique très rarement, comprend une école ou des écoles.
>
> On conçoit difficilement qu'un gardien ou un syndic nommé en vertu de *La Loi de Faillite*, pourrait remplacer le curé et les marguilliers de l'œuvre et fabrique, pour l'administration du temporel d'une paroisse ou pour la direction d'une école de fabrique; et à cause de cela, il est difficile de croire que le Parlement a voulu qu'il en soit ainsi. Raison de plus pour interpréter les textes de ladite Loi comme je l'ai fait ci-dessus.
>
> Donc, je suis d'opinion que la Fabrique n'est pas une des corporations auxquelles *La Loi de Faillite* s'applique ou peut s'appliquer.

Dorion, J., in a concurring opinion, makes the same reasoning an explicitly distinct ground of decision;[128] *by their very nature*, his Lordship thinks, *fabriques* are inappropriate to the operation of bankruptcy legislation, so that the Act cannot be construed to embrace them: [129]

> Cependant, l'énumération des personnes qui peuvent être déclarées en faillite est limitative, et quoiqu'on mentionne quelques exceptions (*Loi de Faillite*, sec. 2(*k*) (*p*)), il peut se trouver des personnes, ou corporations, qui, par leur nature même ne sont pas susceptibles d'être mises en faillite. Tel est le cas des corps publics qui sont chargés d'exercer l'autorité de l'Etat dans certaines branches de l'administration.
>
> La Fabrique transige des affaires, mais uniquement dans l'administration des biens nécessaires aux fonctions du service religieux et moral des fabriciens et les biens qu'elle administre sont, en général, inaliénables.

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[126] *Ibid.*, p. 114.

[127] *Ibid.*, p. 116.

[128] *Ibid.*, p. 118: "Je concours, en outre, dans le motif donné par mes savants collègues, savoir que la loi de faillite est applicable aux corporations qui sont des *compagnies*, mais non aux autres." The question whether they are *companies* or *corporations* as defined is regarded as a separate question.

[129] *Ibid.*, pp. 117-8.

> Sans doute, l'inaliénabilité de la plus grande partie de ses biens ne résout pas la question. Elle peut servir cependant pour aider à fixer le caractère principal et dominant de cette corporation.
>
> La Fabrique est un corps public qui fonctionne avec la sanction de l'Etat, sous la surveillance d'un officier public chargé d'homologuer l'ordonnance même qui érige civilement la paroisse et la Fabrique.
>
> Les constructions mêmes des Eglises et presbytères sont faites sous la surveillance et la sanction des commissaires nommés par le Lieutenant-Gouverneur de la Province.
>
> L'Etat intervient autant dans la création et dans les affaires des Fabriques, que dans les affaires des corporations municipales.

Similar considerations can be detected in the opinions delivered by those of the Quebec Queen's Bench who sat in the other panel to hear *Paroisse de St-Gabriel de Brandon* v. *Sarrazin*.[130] Of the latter five, Dorion, J., whose views we have already seen in the *St. Etienne* case, was one. Of the remaining judges, however, only St. Germain, J.,[131] appears to make a separate and distinct ground of decision out of his finding that *fabriques* are as a matter of implication excluded from the *Bankruptcy Act* as inherently inappropriate to it by their nature:[132]

> Que si les termes de cette loi pouvaient laisser quelque doute dans l'interprétation que nous lui donnons, quant à son application aux Fabriques, ce que cependant je n'admets pas, il suffirait, il me semble, de considérer le caractère public de ces personnes morales que l'on appelle des Fabriques pour conclure que ladite *Loi de Faillite*, dont la matière est du domaine du droit privé et sur laquelle le fédéral s'est particulièrement réservé le pouvoir de légiférer, ne saurait affecter ces sortes de corporations en main morte régies à la fois par les lois ecclésiastiques reconnues civilement et par les lois administratives de notre province.

And, having cited substantial excerpts of statute law and commentary on parishes and fabriques, St. Germain, J., carried the matter beyond one of mere statutory interpretation, and into the arena of constitutional power:[133]

> Il ressort des citations ci-dessus que les biens de fabrique d'une paroisse sont la propriété des paroissiens catholiques de cette paroisse, qui forment une communauté ou corporation en main morte et que les membres qui composent le conseil d'administration des biens de la Fabrique ne sont que les mandataires de ladite corporation et que ces mandataires administrent des biens publics.
>
> Or, il est assez difficile de concevoir que *La Loi de Faillite* puisse s'appliquer à ces corporations régies par le droit public, tant eccléciastique

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130 (1935), 58 B.R. 123; other citations are giveu *supra*, n. 115; see pp. 124, 127, 130 ff.

131 (1935), 58 B.R. 123, at p. 135. His Lordship concurs in Rivard, J.'s, analysis of the terms and goes on to make the remarks next quoted.

132 (1935), 58 B.R. 123, at p. 135.

133 *Ibid.*, at p. 137-8.

que laïque. Il ne semble faire de doute pour personne qu'une corporation municipale n'est pas soumise à *La Loi de Faillite* et je doute fort d'ailleurs que le Parlement fédéral pourrait s'autoriser du pouvoir qui lui est attribué de légiférer sur la banqueroute et la faillite, une matière, encore une fois, qui fait plutôt partie du droit privé, pour imposer une loi de faillite à cette corporation municipale, être moral qui personnifie la collectivité des habitants d'une portion déterminée de territoire d'une province et qui est revêtu par le gouvernement de cette province des pouvoirs nécessaires pour veiller aux intérêts et droits que ces habitants peuvent avoir en commun.

Les corporations municipales sont des éléments constitutifs de l'organisation sociale, dont la création appartient aux provinces, et l'on concevrait difficilement que sous prétexte de légiférer en matière de faillite, le pouvoir fédéral pût s'ingérer dans le fonctionnement de ces corps publics. Or, s'il en est ainsi pour les corporations municipales, pourquoi n'en serait-il pas de même pour les Fabriques qui sont aussi des corporations publiques et qui remplissent vis-à-vis des habitants d'une paroisse, pour les fins du culte, les fonctions que les conseils municipaux remplissent vis-à-vis des mêmes habitants pour tous les autres objets et besoins locaux?

Nous avons vu, par les citations ci-dessus, le concours que l'Etat apporte à l'Eglise pour l'exécution des décrets canoniques dans toutes les matières relatives à l'érection des paroisses, à leur division, à la construction et à la réparation des églises, des presbytères et des cimetières, de même que pour le prélèvement des fonds nécessaires à ces fins au moyen de cotisations autorisées par les commissaires. Or, les fabriques sont des corporations créées en même temps que la paroisse et chargées d'un service public qui naît aussi avec la paroisse, savoir, l'administration des biens meubles et immeubles nécessaires au culte et à la desserte.

His Lordship accordingly concludes, emphasizing the analogy with municipalities:[134]

Je suis donc d'avis, pour les raisons additionnelles ci-dessus exposées, que la loi de faillite ne s'applique pas aux Fabriques, pas plus qu'elle ne saurait s'appliquer aux corporations municipales. Je n'ai aucune hésitation à maintenir cet appel.

The result is that a majority of the court in the *St-Etienne* case,[135] and two judges in the *St-Gabriel de Brandon* case,[136] were prepared to consider the inherent nature of fabriques to be sufficient to operate their implied exclusion from the *Bankruptcy Act*[137] — quite apart from recourse to any particular interpretation of those statutory definitions by which bankruptcy jurisdiction was regulated under the Act as it then stood.[138]

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[134] *Ibid.*, at p. 138.

[135] Tellier, C.J., Dorion, Bernier, and St-Jacques, JJ.

[136] Dorion and St-Germain, JJ.

[137] R.S.C. 1927, c. 11.

[138] Quoted in Appendix Six, *infra*, pp. 619 *et seq.*, esp. 620 for the revision of 1927. The present definitions are quoted in the text above, at pp. 532-535.

Had this been the *only* reasoning given to support the resulting decision that *fabriques* were outside the *Bankruptcy Act*, the two cases would still have been of interest, no doubt, but very much more limited in the significance of their implications. The reasonableness of the judicial assessment both of the character of *fabriques* and of the policy of excluding them would have been a matter of individual opinion. Nor would it have mattered a great deal whichever way the cases went.

But the judges preferred to base their decision upon grounds more closely rooted in the words of the *Bankruptcy Act*. To these latter grounds may be attributed the institution of a class of impliedly-excluded bodies corporate which has become ever wider, extending much beyond bodies of a governmental [139] or quasi-governmental or public character, to include (as defined at least since 1947) all bodies of a "non-profit" character — a private golf club, for example.

Susceptibility to jurisdiction under the 1919 *Bankruptcy Act* — whether as it originally stood [140] or as subsequently revised and amended [141] depended [142] on being a "debtor" as specially defined. This term appeared in the *Revised Statutes of Canada* of 1927 — without having undergone any alteration material for our purposes [143] — defined as follows:

> 2*(p)* "debtor" includes any person, whether a British subject or not, who, at the time when any act of bankruptcy was done or suffered by him, or any authorized assignment was made by him,
>
> (i) was personally present in Canada, or
>
> (ii) ordinarily resided or had a place of residence in Canada, or
>
> (iii) was carrying on business in Canada personally or by means of an agent or manager, or

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[139] See cases cited *supra*, n. 5 and reported in Appendices One and Two, *infra*, at pp. 602 and 606 respectively.

[140] 9-10 Geo. V, S.C. 1919, c. 36; see quotations in Appendix Six, *infra*, pp. 619-620.

[141] The material amendments, which are quoted in Appendix Six, *infra*, pp. 620-621, were made by 11-12 Geo. V, S.C. 1921, c. 17, and the cases were for the most part decided under the *Bankruptcy Act*, R.S.C. 1927, c. 11. A more detailed legislative history may be had through the references, *supra*, n. 10 and *infra*, Appendix Three, at pp. 607 *et seq.*

[142] Section 4 (receiving orders); section 9 (assignments). As to proposals, see, under the 1919 Act, 9-10 Geo. V, c. 36, s. 13, and, under the 1927 revision, R.S.C. 1927, c. 11, s. 11; and, generally, *supra*, n. 46.

[143] The numeration of paragraphs was altered, and, as may be seen from the references *infra*, Appendix Three, at pp. 607 *et seq.*, the provisions as to the *Winding-up Act* were amended and ultimately placed elsewhere.

(iv) was a corporation or a member of a firm or partnership which carried on business in Canada[.]

A fair reading of this definition is that paragraphs (i), (ii) and (iii) deal only with individuals, and (iv) only with corporations, (and members of firms and partnerships), with the consequence that, *even if one were a "person"*, one could not be a "debtor" (and as such subject to bankruptcy jurisdiction) unless one were *also either* an individual *or* a "corporation", itself specially defined. This appears to have been accepted, demonstrably by a majority both in *Bricault* v. *Paroisse de St.-Etienne* [144] and *Paroisse de St.-Gabriel de Brandon* v. *Sarrazin*,[145] certainly without dissent by any

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[144] Per Tellier, C.J., (1935), 58 B.R. 100, at p. 114: "Il n'est pas tout à fait exact de dire que la loi de faillite s'applique d'une manière générale à toutes personnes au Canada, sauf exception. *Ce qui est vrai, c'est qu'elle s'applique à à tout débiteur* compris dans dans le définition que l'article 2, paragraphe (*p*) de ladite loi, donne du mot 'débiteur', *et, lorsqu'il s'agit d'une corporation, compris en outre, dans la définition que le même article donne du mot 'corporation'.* [Emphasis added.] The reasons of Tellier, C.J., were expressly concurred in by Bernier, J., (p. 118) and by St-Jacques, J., (p. 119).

Barclay, J., in whose reasons St-Jacques, J., expressly concurred (p. 119), remarked (at p. 120) that: "A petition may be presented whenever *a debtor* [emphasis added] commits an act of bankruptcy." (At p. 212, referring to the definition of "debtor" in s. 2(*p*)), his Lordship continued: "As regards the first sub-section — 'who was personally present in Canada', *the context clearly shows that the reference is to an individual and not to a legal entity other than individual.* The *same may be said of sub-section 2*, which speaks of a person who resided or had a place of residence in Canada, *and of sub-section 3* — a person carrying on business personally or by means of an agent or manager... *The only section*, therefore, *that refers to persons other than individuals is the fourth sub-section*, which refers to a corporation. As the word "corporation" has been restrictively defined, such entity must be an entity coming within the definition of the word 'corporation'..."

[145] The opinion written by Rivard, J., (1935), 58 B.R. 123, at p. 125, was expressly concurred in by Létourneau, J., (at p. 132) and St-Germain, J., (at p. 135).

That the restriction on bankruptcy jurisdiction was accomplished under the old Act by restricting "corporation", and hence "debtor" — and not by restricting "person" — appears in the opinion of Rivard, J., (at p. 125): "La loi de faillite s'applique-t-elle aux fabriques? Pour être, sous l'empire de cette loi, susceptible d'être déclaré en faillite, il faut d'abord qu'on soit débiteur... Et que faut-il entendre, ici par débiteur?..." (At p. 126) "[I]l arrive aussi que, sous le couvert d'une apparente définition, on édicte plutôt une véritable disposition législative, par quoi, au lieu de définir un mot, on pose une règle qui fait partie de la loi proprement dite... Ainsi, la loi de faillite contient, en son article 2, une suite de paragraphe où se trouve déterminé le sens d'un grand nombre de termes. Le par. *p* se rapporte au mot débiteur. [Here his Lordship quotes the defini-

judge, and probably with the concurrence of all. That such was indeed the way the judges read the definition emerges rather clearly from the *per curiam* reasons in the latter case.[146] And in the

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tion.] ... Ce n'est pas là une définition: le sens ordinaire du mot *débiteur* subsiste. C'est plutôt une disposition législative où il est réglé que, pour être traitée comme *débitrice* sous l'empire de la loi de faillite, une personne doit posséder l'une ou l'autre des qualités énumérées... Aussi importe-t-il fort peu que le par. *p* ait employé l'expression *includes*, au lieu de *means*. *Seules, les personnes tombant dans l'un ou l'autre des quatre cas* énumérés sont assujetties aux dispositions de la loi de faillite qui frappent les *débiteurs*. Ainsi, *l'individu qui serait vraiment* un débiteur et qui commettrait un acte de faillite, mais qui ne se trouverait pas personnellement au Canada, qui n'y résiderait pas ordinairement, qui n'y aurait pas lieu de résidence, qui n'y ferait commerce ni personnellement ni par mandataire, ne serait pas sujet aux dispositions de la loi de faillite applicables aux débiteurs. *Et de même, s'il s'agit d'une personne morale*, elle ne sera sujette à la loi que si elle est une corporation." [Italics on phrases longer than a single word are the author's.]

The point is further illustrated by the way in which Rivard, J., met one of counsel's arguments. It had been pressed on the court that the *fabrique* was at all events a "body politic and corporate", a head added in 1921 to the definition of "person": 11-12 Geo. V, S.C. 1921, c. 17, s. 5, redefining "person". The *fabrique*, so the argument ran, was therefore a "person". The conclusion sought to be drawn was that, as a "person", it was subject to bankruptcy jurisdiction. The learned judge answered this contention *inter alia* by pointing out that, even if it was a "person", that alone did *not* make it a "*debtor*", and only "*debtors*" were subject to bankruptcy jurisdiction. At p. 128 his Lordship asks: "[U]ne fabrique pourrait-elle être déclarée en faillite, par le motif que le par. *cc* dit que le mot *personne* comprend un *corps constitué et politique*?... Rappelons d'abord que la première solution développée ci-dessus répond à cette question, en l'écartant: le par. *p* [*débiteur*] ne mentionne pas les corps constitués et politiques parmi les personnes assujetties aux dispositions de la loi concernant les débiteurs.

[146] "Considérant que nul ne peut être déclaré en faillite ou faire une cession de ses biens, sous l'empire de la loi de faillite, s'il n'est débiteur; qu'aux termes mêmes de cette loi, les seules personnes fictives ou morales qui peuvent être, en vue de leur mise en faillite, traitées comme débitrices sont les corporations poursuivant des affaires au Canada; que le mot *corporation*, tel que *limitativement défini* dans ladite loi, désigne 'toute compagnie constituée en corporation ou autorisée à exercer un commerce sous l'empire d'une loi du Parlement du Canada, ou de l'une des provinces du Canada, et toute compagnie constituée en corporation, en quelque lieu que ce soit, qui a un bureau au Canada ou qui y poursuit ses opérations';

"Considérant qu'aux termes de ladite loi, le mot *personne* peut s'entondre d'une association, d'une société, d'une corporation telle que *limitativement définie* si-dessus, et d'un corps constitué et politique; mais qu'en vue de la mise en faillite, l'application de la loi est restreinte comme il est dit plus, aux personnes physiques dans certaines conditions et aux personnes fictives qui sont des corporations; ...

"Par ces motifs, la Cour... rejette la pétition en faillite...": (1935), 58 B.R. 123, at p. 124.

subsequent decision of *Feeney* v. *Lacroix*,[147] Barclay, J., so read the two earlier decisions, with approval.[148]

There is no reason to doubt the correctness of the judicial reading to the above effect. If it is correct, it was then quite unnecessary, merely in order to exclude a *fabrique* or any other given type of body corporate from being a "*debtor*" (and subject as such to the Act) to go to the lengths of showing that it was not a "person" — whether "*person*" as originally defined in 1919: [149]

> 2. In this Act, unless the context otherwise requires or implies, the expression
>
> (aa) "person" includes corporation and partnership;

or "*person*" as more widely redefined [possibly *ex maiore cautela*] [150] in 1921: [151]

> (aa) "person" includes a firm or partnership, an unincorporated association of persons, a corporation as restrictively defined by this section, a body corporate and politic, the successors of such association, partnership, corporation, or body corporate and politic, and the heirs, executors, administrators or other legal representatives of a person, according to the law of that part of Canada to which the context extends,

or indeed "*person*" as defined in the *Interpretation Act*: [152]

> 37. In every Act, unless the context otherwise requires,
>
> (20) "person" or any word or expression descriptive of a person, includes any body corporate and politic, and the heirs, executers, administrators or other legal representatives of such person, according to the law of that part of Canada to which the context extends[.]

A fabrique or other body corporate would be quite effectively excluded from the Act by showing that it was not 'a corporation or a member of a firm or partnership which carried on business in

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147 (1938), 65 B.R. 386.

148 *Ibid.*, at p. 389: "The definition of the word 'debtor' therein contained deals with persons who are individuals or a corporation or a member of a firm. It has been held by this Court in two cases (*Bricault* v. *Les Curé et Marguilliers de L'Oeuvre et Fabrique de la Paroisse de Saint-Etienne*, and *Les Curé et Marguilliers de L'Oeuvre et Fabrique de la Paroisse* v. *Sarrazin*), that, from the point of view of the Bankruptcy Act, the application of the law is restricted to individuals or physical persons under certain conditions and to fictitious or moral persons who are corporations ...".

149 *The Bankruptcy Act, 1919*, 9-10 Geo. V, S.C. 1919, c. 36, s. 2*(aa)*.

150 It might have been widened, for example, by the conclusion of "unincorporated association of persons". But it would, at any rate, settle such questions as whether a bank was a "person" subject like all others to the rules against taking fraudulent preferences: see the *Inverness* case, *supra*, pp. 543 *et seq.*

151 *The Bankruptcy Act Amendment Act, 1921*, 11-12 Geo. V, S.C. 1921, c. 17, s. 5.

152 R.S.C. 1927, c. 1.

Canada', and so not a *"debtor"*, without also attempting a baseless and destructive [153] demonstration professing to show [154] that such a body was not even a *"person"*.

Though some judges did attempt to show, at least as a further or additional reason, that *fabriques* were not even *"persons"*,[155] effort was concentrated on the demonstration that a fabrique was not 'a corporation or a member of a firm or partnership which carried on business in Canada', and so not a "debtor" within paragraph (iv) of the definition. This could obviously be done *either* by establishing that it was not a "corporation or a member of a firm or partnership" *or* that it did not "carry on business in Canada".[156] The *second* alternative — that it did not carry on business — is no doubt justified if one assumes that by *business* is meant *economic gain*; though (whatever may be true of fabriques or municipalities) it is by no means obvious that the activities of non-profit institutions can never be described accurately as their "business".[157] The exact meaning of the phrase "carrying on business" is, however, obviously less important under the present Act where it is enough if a *"debtor"* or an *"insolvent person"* [unlike the *"debtor"* and *"insolvent debtor"* under the old Act] resides *OR* carries on business, and where [as was always the case] it is enough to be a *"corporation"* if a company, wheresoever incorporated, has an office in *OR* carries on business within Canada *OR* [in the author's view] if it is incorporated by or under a federal or provincial statute. Such being the diminished importance of the *second* of the two alternative lines of argument,

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153 Baseless and destructive because it creates gratuitously all the absurdities described *supra*, pp 539-540, without in any way assisting the working of any other part of the *Act*.

154 It is impossible to accept the view that they were not even *"persons"*. If they were not such under the rubric "corporation as restrictively defined", they would at least enter under "body corporate and politic" whose very purpose was to enlarge the definition of *"person"*. See *infra*, pp. 573-576.

155 See, in the *St-Gabriel de Brandon* appeal, the remarks of Rivard, J., in (1935), 58 B.R. 123, at pp. 129-30, offering this, apparently, as an alternative reason: "on pourrait aussi répondre autrement...". Létourneau and St-Germain, JJ., concurred in the reasons of Rivard, J.

156 The words "which carried on business in Canada" would appear to qualify *both* "corporation" *and* "member of a firm or partnership". It will be shown below that the terms of the present Act have been changed so as to exclude that qualification: *infra*, pp. 586-590.

157 Most commonly, the phrase "carrying on business" does of course have the flavour of activities carried on for pecuniary gain and, indeed, in a commercial manner. See, for example, Fry, L.J., in *Graham* v. *Lewis*, (1888), L.R. 22 Q.B.D. 1, at p. 5, and compare *Ex parte Breull; In re Bowie*, (1880), L.R. 16 Ch. D. 484. See also *infra*, p. 586.

it is the *first* which is of major significance: the one which sought to show that a fabrique was not a "corporation or a member of a firm or partnership" within the meaning of the then Act. This first alternative, which is the basis of the continuing authority of these decisions to-day, was a line of argument depending on the construction of the definition of *"corporation"*: [158]

> 2. In this Act, unless the context otherwise requires or implies, the expression...
>
> (k) "corporation" includes any company incorporated or authorized to carry on business by or under an Act of Parliament of Canada or of any of the provinces of Canada, and any incorporated company, wheresoever incorporated, which has an office in or carries on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies[.]

Though in terms "corporation" is merely said to *include* the listed classes, it was accepted that in the context this meant "corporation" *means* the listed classes,[159] particularly in view of the reference, contained in the 1921 redefinition of "person", to "corporation as restrictively defined by this section".

If "corporation" was then no wider than the listed classes, it would suffice, in order to exclude a *fabrique* or some other body corporate from the definition of "corporation" — thence from the definition of "debtor", and thence from the Act — to show that it did not constitute a *company*. Accordingly, considerable judicial attention was devoted to this point.

So in *Bricault* v. *Paroisse de St.-Etienne* [160] the Chief Justice, Sir Mathias Tellier, with whom Bernier and St-Jacques, JJ., concurred, said that: [161]

> Comme on le voit, une corporation, au sens de la loi de faillite, c'est une compagnie qui poursuit des affaires, *which carry on business*. Il n'est question, dans tout le paragraphe *(k)*, même dans l'exception, que de compagnies faisant ou ayant fait des affaires.
>
> Pourquoi n'a-t-on pas mentionné, dans l'exception, les corporations municipales et les corporations scolaires? [162] C'est évidemment, parce que ce

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[158] *The Bankruptcy Act, 1919*, 9-10 Geo. V, S.C. 1919, c. 36; the *Bankruptcy Act*, R.S.C. 1927, c. 11. The continuing authority of the exposition of the old section is discussed *supra*, pp. 528-529, 556; *infra*, pp. 589-590.

[159] See, *supra*, n. 96.

[160] (1935), 58 B.R. 100.

[161] *Ibid.*, p. 115.

[162] His Lordship's question is answered in his own judgment in either of two ways. Even if admitted to be *"corporations"* within the definition of *that* term, they could be held not to carry on business and so fall outside head (iv) of the definition of *"debtor"*; alternatively they could be held impliedly excluded from the scope of bankruptcy legislation as inappropriate to it, the Act containing no express language to include them.

> ne sont pas des compagnies, et qu'elles ne font pas ou ne poursuivent pas ce qu'on est convenu d'appeler "des affaires", business. Or, les fabriques sont dans le même cas; elles ne sont pas des compagnies; elles ne font pas ou ne poursuivent pas des affaires.

The phrase "business", one should perhaps add, is apparently conceived by his Lordship both as it is used in the statute, and as employed by himself, in the sense of economic gain : [163]

> L'expression "poursuivre des affaires", *to carry on business*, dans les dispositions ci-dessus, implique, il me semble, des actes ou des opérations faits en vue d'un profit ou d'un gain, dans l'exercice d'un commerce, d'une industrie, d'un métier ou d'un emploi.
>
> Seules des compagnies ou corporations privées sont supposées faire de tels actes ou opérations.

Dorion, J., delivering his concurring judgment in the same case, added to his own reasons the following: [164]

> Je concours, en outre, dans le motif donné par mes savants collègues, savoir que la loi de faillite est applicable aux corporations qui sont des *compagnies*, mais non aux autres.

Barclay, J., concurring, added the following: [165]

> Is a fabrique a *corporation* within the meaning of that section? [*i.e.*, section 2(*k*)]
>
> In the first place, the definition of "corporation" is restricted to companies incorporated to carry on business in Canada. A fabrique is not a company incorporated or authorized to carry on business by or under an act of the Parliament of Canada or any of the Provinces. Not only is it not an incorporated company but it does not "carry on business" in the ordinary sense of that expression. Nor is it an incorporated company which has an office in or carries on business within Canada. A fabrique, therefore, escapes wholly from the definition of the term "corporation"...

It is clear that it is because, in his Lordship's view, a fabrique is not a "*company*", that *fabriques* are held to escape even the phrase "incorporated company, wheresoever incorporated, which has an office in ...Canada."

In *Paroisse de St-Gabriel de Brandon* v. *Sarrazin*,[166] the decision that the fabrique was not a *company* appears in the reasons delivered *per curiam*: [167]

> Considérant que les fabriques ne sont pas des personnes naturelles ou physiques; qu'elles ne peuvent être des personnes morales qu'à titre de corporations; mais qu'en tout cas elles ne sont pas des compagnies, dont elles diffèrent par leur constitution, leur nature et leur fin....

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[163] *Ibid.*, pp. 115-16.

[164] *Ibid.*, p. 118.

[165] *Ibid.*, p. 122.

[166] (1935), 58 B.R. 123; other citations *supra*, n. 115.

[167] (1935), 58 B.R. 123, at p. 124.

Rivard, J., with whose opinion Létourneau and St-Germain, JJ., concurred, [168] elaborated: [169]

> Or les fabriques sont des personnes fictives ayant le caractère de corporations, mais elles ne sont pas des compagnies. Cette double proposition n'a pas besoin d'être autrement démontrée. Les fabriques diffèrent des personnes artificielles, nommées compagnies, autant par leur constitution que par leur nature et leur fin; ni dans leur composition, ni dans leurs opérations, elles n'ont rien de ce qui caractérise les compagnies. Du reste, elles n'exercent aucun commerce; elles ont ceci de particulier, qu'elles n'existent et n'ont de pouvoir que pour administrer les biens d'autres corporations, qui sont les paroisses religieuses. En tout cas, elles ne constituent pas des compagnies.
>
> Les propres définitions de la loi de faillite font donc échapper les fabriques à son application.
>
> Le raisonnement pourrait être résumé dans les propositions suivantes: Ne peuvent être mis en faillite que les débiteurs.
>
> Les seules personnes morales qui peuvent être, en vue de la faillite, traitées comme débitrices sont les corporations.
>
> Les corporations, sous l'empire de la loi de faillite, ne comprennent que les compagnies.
>
> Or, les fabriques, si elles sont des corporations, ne sont pas des compagnies.
>
> Donc les fabriques ne peuvent pas être déclarées en faillite.
>
> Ces considérations suffisent, et la conclusion s'impose.

Hall, J., in a concurring judgment, added: [170]

> I conc[o]ur with Mr. Justice Rivard in the opinion that the clause in question defining *corporation*, restricts the application of the act to commercial corporations, that is, companies authorized to carry on business

And, in another concurring opinion, St-Germain, J., said: [171]

> La principale question qui nous est soumise sur le présent appel est de savoir si une fabrique peut être mise en faillite sous l'empire de la loi de faillite.
>
> Un examen raisonné du texte des définitions des mots *personne, corporation* et *débiteur* dans ladite loi suffit pour nous permettre de répondre à cette question. Mon honorable collègue, M. le juge Rivard, a fait cet examen; il en est ainsi arrivé à la conclusion que la loi de faillite ne s'applique pas aux fabriques, et je concours entièrement dans les motifs qu'il donne au soutien de cette conclusion.

Leave to appeal to the Supreme Court of Canada was sought in the latter case and refused by Davis, J., on motion in chambers.[172]

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[168] *Ibid.*, pp. 132 and 135 respectively.

[169] *Ibid.*, pp. 127-8.

[170] *Ibid.*, at p. 135.

[171] *Ibid.*

[172] [1935] S.C.R. 419, [1935] 3 D.L.R. 554, 16 C.B.R. 350.

His lordship, however, gave written reasons which, though they supported the *result* reached below, seem (even supposing them to have the authority of a decision of the Court) to leave open the *general*[173] question whether non-profit corporate bodies were, under the 1919 Act[174] as it then stood, excluded as such from bankruptcy jurisdiction. These reasons we shall examine below.[175]

The judicial *dicta* in the Queen's Bench both in the *St-Etienne* and the *St-Gabriel de Brandon* cases rely heavily, as we have seen, on a *fabrique* not being a *company*. This view is, in itself, far from indefensible; it would be plausible, for example, to adopt the view that the term *"company"* is equally inappropriate to municipalities or school corporations. But the judicial remarks are also heavily interlaced with observations to the effect that *fabriques* do not carry on business. Some of these last-mentioned observations may be attributable to the definition of *"debtor"* in section 2(*p*) of the old Act, which required that in order to be a *"debtor"*, a body which *was* a *corporation* be *furthermore* a corporation which *"carried on business in Canada"*.[176] Not all the observations seem so directed, however. It is difficult to escape the inference that it is meant *also* to insist that incorporation with the object of carrying on business is an essential condition even of being a *"company"* at all. So read, the judicial *dicta* do not *merely* say that *fabriques* are bodies *iuris publici* like municipalities, not properly described as *"companies"*.

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173 His Lordship thought the *Bankruptcy Act* "essentially designed" for "persons or corporations carrying on business"; but that does not mean *exclusively confined* to such persons, since *individuals* were and are embraced whether or not they carried on business; and at all events his Lordship was directing himself to "ecclesiastical bodies". See *infra*, p. 585.

174 R.S.C. 1927, c. 11.

175 *Infra*, p. 585.

176 Speaking of the definition of *"corporation"*, Tellier, C.J., in *Bricault* v. *Paroisse de St-Etienne*, (1935) 58 B.R. 100, at p. 115: "Comme on le voit, une corporation, au sens de la loi de faillite, c'est une compagnie qui poursuit des affaires, *which carry on business*. Il n'est question, dans tout le paragraphe *(k)*, même dans l'exception, que de compagnies faisant ou ayant fait des affaires." Later, referring to head (iv) of the definition of *"debtor"*, which *did* use language about carrying on business his Lordship said: "Egalement, dans le paragraphe *(p)*, sous-paragraphe (IV), il n'est question que des corporations qui "poursuivent des affaires", *which carry on business.*"

In *St-Gabriel de Brandon* v. *Sarrazin*, (1935), 58 B.R. 123, at p. 124, the court recited: "Considérant... qu'aux termes mêmes de cette loi, les seules personnes fictives ou morales qui peuvent être, en vue de leur mise en faillite, traitées comme débitrices sont les corporations poursuivant des affaires au Canada...". Rivard, J., said, at p. 127: "Ajoutons que les corporations qui peuvent être traitées comme débitrices sont celles qui exercent un commerce. Le paragraphe *p* le dit expressément: ...*which carried on business in Canada.*"

Rather, the *dicta* seem to say *also* that *NO* body which does not carry on business in the sense of gain, can be a *company*. This is a view of much wider repercussions; and leads in the end to the conclusion that a golf club incorporated under a *Companies Act* is not a company. Such indeed has been the direction taken by subsequent decisions, relying, especially at first, on the two cases involving *fabriques*, which could certainly be supported on the much narrower grounds suggested above.

In *Feeney* v. *Lacroix*[176a] the Quebec Queen's Bench held the same *Bankruptcy Act* not to apply to a *caisse populaire* (credit union) incorporated under the Quebec *Cooperative Syndicates Act*[177] substantially, it would seem, on the basis that a co-operative syndicate so incorporated could not be described as a *company*, and so fell outside the statutory definition of "corporation".[178] Apart from the individual opinions of the judges, *considérants* were delivered *per curiam* which appear to support the conclusion just mentioned upon the basis that bodies created under the Quebec *Cooperative Syndicates Act*, while not denied to be bodies corporate,[179] were not *companies* but bodies *only partly assimilated to companies*: "the responsibility of its members or shareholders being assimilated to a company for the purpose of limiting the liability of its members."[180]

[176a] (1938), 65 B.R. 386.

[177] R.S.Q. 1925, c. 254; now R.S.Q. 1964, c. 294.

[178] The court below had held the *caisse populaire* outside the Act "because, on account of its operations, it was in reality a savings bank and loan company" (65 B.R., at p. 387) and so expressly excepted from the definition of "corporation". The Queen's Bench explicitly confined itself to affirming in its *considérants* the *disposition* of the case below, while giving other reasons. And the appellate court further stated *per curiam* "that the first question to be decided is whether such a corporation as the one in question comes under the Bankruptcy Act at all, and not whether it comes within one of the exceptions contained in section 2(*k*) of the Act..." (*ibid.*); a question on which its guiding principle was "that the Bankruptcy Act is not of universal application, but only applies to such persons as are therein defined..." It may accordingly be concluded that the Queen's Bench expressed no opinion on the question whether the *caisse populaire*, whether by reason of the objects of its incorporation or by reason of the activities which it in fact carried on [whichever be material: *infra*, pp. 590-599], was within the exceptions *expressly* made for various kinds of banks and loan companies. See at p. 388 the doubts entertained by Barclay, J., (in whose opinion Rivard and Galipeault, JJ., and apparently also Tellier, C.J., concurred); quoted *infra*, pp. 594-595.

[179] The court, referring to the *caisse populaire*, by implication accepted that it was a body corporate, at p. 387: "Considering that the Act does not apply to all corporations, but only to corporations which come within the said restrictive definition."

[180] (1938), 65 B.R. 386, at pp. 387-88.

The view that the co-operative syndicate was not a "corporation" because not a "*company*" emerges clearly from the opinion of Barclay, J., with whom Rivard and Galipeault, JJ., and apparently also Tellier, C.J., expressed their concurrence. His Lordship said: [181]

> In section 2*(k)* a corporation is defined as "any company incorporated or authorized to carry on business". Only companies incorporated or companies authorized to carry on business by or under an act of the Parliament of Canada or any of the Provinces of Canada and incorporated companies, whensoever incorporated, which have an office in or carry on business within Canada, are included in the definition. A corporation which is not a *company* does not come within the definition.

And speaking more specifically of *La Caisse Populaire de St-Eusèbe de Stanfold* in the case at bar, his Lordship said: [182]

> La Caisse Populaire, as a co-operative syndicate, is authorized under the terms of chapter 254 of the Revised Statutes of Quebec (1925). Section 2 of that Act allows the formation of co-operative syndicates for certain purposes. Section 3 declares that "such syndicate or association shall be of the nature of a joint stock company, the responsibility of its members or shareholders being limited to the amount of their respective shares". It is obvious from this section that the association is not a company, but is assimilated to a company for the purpose of limiting the liability of its members. The Bankruptcy Act *does not deal with corporations assimilated to companies or of the nature of companies, but only with corporations which are incorporated companies, or companies authorized to carry on business.* It has been argued that this is manifestly not the intontion of the legislation. The Bankruptcy Act has been enacted and re-enacted, amended and partially repealed many times, and the intention of the legislature must be gathered from what the enactment says rather than what it may be thought was intended to be said.

St. Jacques, J., who wrote a concurring opinion, seems to have shared the view of his brethren that the *caisse populaire* was not a "corporation" as defined because it was not a *company*.[183] Neither the *considérants* given *per curiam* nor the individual opinions make it clear *in what respects* the *caisse populaire* was thought to lack the qualities of a *company*. The first of the passages quoted above from the opinion of Barclay, J., may be taken to imply that, in the view of a majority, the *caisse populaire* was not incorporated to "carry on business" and that this was what negatived its character as a company. It is by no means obvious, however, that the activities of a credit union do not constitute the carrying on of business, even

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[181] *Ibid.*, at p. 388.

[182] *Ibid.*, at p. 390. Emphasis added.

[183] *Ibid.*, at p. 394: "Ce n'est pas une compaguie au sens de la loi de faillite et elle n'a pas été créée ou autorisée 'to carry on business' pour d'autres fin que la loi des syndicats coopératifs a en vue, c'est-à-dire la coopération au bénéfice de ses membres."

if with limited objects and on a mutual or co-operative basis only. Indeed St. Jacques, J., appears to concede that the *caisse populaire was* incorporated to carry on a business, albeit one of limited objects: "elle n'a pas été créée ou autorisée 'to carry on business' pour d'autres fins que celles que la loi des syndicats coopératifs a en vue, c'est-à-dire la coopération au bénéfice de ses membres."[184]

Feeney v. *Lacroix* [185] was followed *In re Construction Coopérative de Montréal* v. *Z. Berthiaume & Fils Limitée,*[186] where the appelant, also incorporated under the Quebec *Cooperative Syndicates Act,* contesting a petition for a receiving order, had in the Superior Court relied mainly upon the contention that it was within the express words excepting from the definition of "corporation" *'building societies having a capital stock'.*[187] Boyer, J., there rejected this argument, holding (without explanation) the stated exception to be applicable rather to such building societies as were incorporated under the *Building Societies Act.*[188] On appeal the Queen's Bench agreed on this point [189] without elaboration, but reversed the Superior Court on the different ground taken by appellant [190] that, even if not

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[184] *Ibid.,* at pp. 394-5.

[185] *Ibid.*

[186] (1938), 20 C.B.R. 285 (Superior Court in Bankruptcy: Boyer, J.); reversed by 20 C.B.R. 351 (Queen's Bench: Létourneau, Galipeault, Walsh, St. Jacques and Langlais *ad hoc,* JJ.).

[187] 20 C.B.R. 285, at p. 287 and 20 C.B.R. 351, at p. 353.

[188] R.S.Q. 1925, c. 251. *Per* Boyer, 20 C.B.R. 285, at p. 287: "Quant à un autre moyen qu'il s'agit d'une compagnie de construction à laquelle *La Loi de Faillite* ne s'appliquerait pas, la débitrice n'est pas dans ce cas car elle a été incorporée en vertu du Quebec *Co-operative Syndicates' Act,* R.S.Q. 1925, c. 254, et non du *Building Societies' Act,* R.S.Q. 1925, c. 251, qui concerne les sociétés de construction visées par l'article 2(*k*)."

[189] Per St. Jacques, J., with whom Langlais and Létourneau, JJ., (the only other members of the bench who wrote opinions) expressed concurrence; 20 C.B.R. 351, at p. 353: "En Cour supérieure, l'appelante paraît surtout avoir soutenu qu'elle est une société de construction et que, comme telle, elle doit être classée dans les exceptions de l'article 2(*k*) de *La Loi de Faillite*... La Cour supérieure n'a pas accueilli cette prétention, et je crois qu'elle a eu raison. Ce sont les sociétés de construction constituées sous l'autorité du chapitre 251 des Statuts refondus de 1925 qui peuvent bénéficier de cette expression."

[190] Per St. Jacques, J., for the court, 20 C.B.R. 351, at p. 353: "Devant cette Cour, l'appelante a posé la question différemment. Elle soumet que, même si elle n'est pas une société de construction, au sens du chapitre 251 des Statuts refondus, elle n'est pas, non plus, l'une des *personnes* visées par *La Loi de Faillite.* C'est bien ainsi qu'il faut envisager la question."

within the *expressly* excepted classes, it was nevertheless not such a body corporate as was subject to the *Bankruptcy Act.*

In so doing, the Court based itself [101] on *Feeney* v. *Lacroix,*[102] which decision had not been reported at the time of the judgment *a quo,* and the reasoning in which had not been used as argument by counsel in the present case.[103]

St. Jacques, J., in speaking on appeal for the Queen's Bench,[104] expressly noted concession by counsel for the respondents that the appellant *was not within the statutory definition of "corporation"* [105] — a concession approved by St. Jacques, J., apparently, on the usual ground that the body in question was not a *"company".*[106] [It may be added that counsel, having made this most surprising concession sought to overturn *Feeney* v. *Lacroix* [107] on the [unpromising] [108] ground that the earlier court had there failed to appreciate that a co-operative syndicate, if not a *"corporation",* was at least a *"person",* and, being a "person" [it was argued] subject to administration under bankruptcy law. In pursuing this argument counsel appears

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[101] (1939), 20 C.B.R. 351, at p. 353; per St.-Jacques, J., for the Court: "Cette Cour a formellement décidé *In re: Feeney* v. *Lacroix,* qu'un tel syndicat n'est pas l'une des personnes morales ou juridiques qui puissent prendre avantage *La Loi de Faillite* ou être contraint par cette loi."

[102] (1938), 65 B.R. 386.

[103] (1939), 20 C.B.R. 351, at pp. 353-4; per St.-Jacques, J., for the Court: "Ce jugement de la Cour d'appel n'avait pas encore été rapporté lorsque la présente cause a été décidée en Cour supérieure, et il ne paraît pas que ni un ni l'autre des procureurs des parties ait fait devant la Cour supérieure l'argument qui avait été soutenu avec beaucoup de vigueur et d'habileté dans la cause de *Feeney et Lacroix."*

[104] Létourneau, Galipeault, Walsh, St.-Jacques, and Langlais *ad hoc,* JJ.; apart from general *considérants* delivered *per curiam* no opinions were written other than that of St.-Jacques, J., and very short opinions of Langlais and Letourneau, JJ., expressing concurrence.

[105] (1939), 20 C.B.R. 351, at p. 354: "Les intimées ont reconnu devant la Cour, et ils admettent également à leur mémoire écrit, que l'appelante n'est pas une corporation, telle que définie par *La Loi de Faillite."*

[106] (1939), 20 C.B.R. 351, at p. 354, immediately following the words quoted in n. 187, *supra*: "En effet, le mot 'corporation' dans cette loi comprend toute *compagnie* constituée en corporation ou autorisée à exercer un commerce sous l'empire d'une loi du Parlement du Canada, ou de l'une des provinces du Canada, etc."

[107] (1938), 65 B.R. 386.

[108] See *supra,* pp. 562-566, and nn. 143 to 154.

to have neglected the fact that subjection to bankruptcy jurisdiction depended on being *not a "person" but a "debtor"*, and that the term "debtor", as read judicially, *was confined* — and probably correctly confined — to *persons* who were *also* either individuals or *"corporations"*.[199] Success in his contention that appellant was a *"person"* would still have left respondent's counsel far from establishing that appellant was a *"debtor"* — impossibly far, given his concession that appellant was not a *"corporation"*. Unfortunately, however, St. Jacques, J., for the Court, does not seem to have appreciated the irrelevancy of the respondent's argument that appellant was a "person", and appears to have thought it necessary to refute it. This was indeed impossible, short of perverse [200] interpretation of *"person"*, since long before 1939 — even before the *fabrique*[201] cases in 1935 — the definition of "person" had read:

> *(cc)* "person" includes a firm or partnership, an unincorporated corporated association of persons, a corporation as restrictively defined by this section, a body corporate and politic, the successors of such association, partnership, corporation, or body corporate and politic, and the heirs, executors, administrators or other legal representative of a person, according to the law of that part of Canada to which the context extends...

and the construction co-operative, even if rightly held not to be a "corporation" as defined, was clearly (if incorporated) *at least* a body politic and corporate. But respondent's counsel[202] seems to have suggested only "unincorporated association of persons" as the rubric under which the co-operative should be a "person", and it

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[199] See *infra*, pp. 586 *et seq.*, esp. 589-590; *supra*, pp. 562-565.

[200] See *supra*, pp. 565-566.

[201] See the references *supra*, n. 15.

[202] (1939), 20 C.B.R. 351, at p. 354: "Les intimées n'en persistent pas moins à soutenir que l'appelante est une personne visée par *La Loi de Faillite*. Ce n'est assurément pas une personne physique; ce ne peut être qu'une personne morale ou une entité juridique.

"C'est bien ainsi, du reste, qu'elles l'ont décrite dans la requête pour mise en faillite, et c'est cette personne moral dont la Cour supérieure a déclaré la mise en faillite.

"Les intimées soutiennent que l'appelante doit être classée dans la seconde catégorie des personnes visées par l'article 2(*cc*) [9 C.B.R. 23]: 'an unincorporated association of persons' (version française: '*une association de personnes non constituées en corporation*' [2 (z)])."

was easy enough for St. Jacques, J., to show[203] that the appellant was not an unincorporated association of persons.][204]

Whatever generality one may care to find in the foregoing cases wherein the term "company" was held to be too narrow to embrace the kinds of bodies *then* in question, it is, at latest, in 1947 that

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[203] (1939), 20 C.B.R. 351, at p. 355 *in fine*: "Ce syndicat ou société, dit l'article 3, est de la nature d'une société par actions, la responsabilité de ses membres ou actionnaires étant limitée au montant de leurs mises respectives.

"Ce n'est donc pas véritablement une société par actions, sauf en ce qui concerne les responsabilités de ses membres, telle que limitée. Ce n'est pas et ça ne peut être, 'une association de personnes non constituées en corporation', ainsi que le soumettent les intimées devant cette Cour, afin de contourner, si possible, la portée et le sens véritable de la décision *In re: Feeney* v. *Lacroix*."

A difference of view might have been possible as to whether, under the Quebec *Co-operative Syndicate' Act*, R.S.Q. 1925, c. 254, co-operative syndicates were or were not incorporated. The Act does not appear to have explicit words of incorporation, though the Act. as published in the Revised Statutes, appears with the [probably unofficial] heading *"Incorporation"* over page 3193. The section of the Act [s. 3] declaring the syndicates to be "of the nature of a joint stock company" is not in itself conclusive of incorporation, because the term "joint steck company" does not necessarily mean a corporate company: Wegenast, *The Law of Canadian Companies*, (Toronto, 1931), pp. 4-5. On the other hand, the then Quebec *Companies' Act*, R.S.Q. 1925, c. 223, dealt with unmistakably corporate bodies, under Part I of the Act, *"Incorporation of Joint Companies by Letters Patent"*.

But whether a co-operative syndicate under the legislation then in force was or was not incorporated would be immaterial to its being "person" within the *Bankruptcy Act* definition of *that* term; if not a "body corporate and politic" it would be an "unincorporated association of persons."

It should be noted that the *Co-operative Syndicates Act*, R.S.Q. 1964, c. 294, s. 3, now reads "Such syndicate or association shall be a civil corporation. An associate shall be responsible only for the unpaid amount of his subscription."

[204] St.-Jacques, J., also indicated, in reasoning not wholly clear, that in his view the definition of "person" contemplated, in any event, not the unincorporated association collectively, but its individual members, as "persons".

Thus his Lordship said, (1939), 20 C.B.R. 351, at p. 354: "Les intimées soutiennent que l'appelante doit être classée dans la seconde catégorie des personnes visées par l'article 2 (*cc*) [9 C.B.R. 23]: 'an unincorporated association of persons' (version française: 'une association de personnes non constituées en corporation' [2 (*z*)]).

"Comme on le voit clairement par la version française de cette loi, les mots 'non constituées en corporation' ne s'appliquent pas à l'association, mais aux personnes qui sont ainsi jointes ou associées ensemble pour faire des affaires et contracter des dettes.

"Il en est de même du mot 'unincorporated' dans la version anglaise qui ne qualifie pas le mot 'association', mais bien, plutêt, le groupe de personnes.

"On comprend facilement que le législateur ait ajouté cette catégorie de débiteurs à l'article 2(*cc*) [*sic*], tel qu'amendé en 1921; on sait que, particu-

the decisions were said to have established the *general* proposition that non-profit bodies corporate *as a class* were outside the then *Bankruptcy Act;*[205] in *Beaubien* v. *L'Union Economique d'Habitation,*[206] Boyer, J., in the Quebec Superior Court cited *Paroisse de St-Gabriel de Brandon* v. *Sarrazin,*[207] *Feeney* v. *Lacroix,*[208] and *Construction coopérative de Montréal* v. *Berthiaume*[208a] as establishing that "La Loi de faillite est limitative dans son application et ne s'applique pas aux sociétés organisées sans but de profit." That case involved a company incorporated without share capital under Part III of the *Quebec Companies Act,*[209] which provides for the incorporation of companies for objects "without pecuniary gain". The company in question had, it appears, been incorporated to obtain for its members dwellings at moderate cost. His Lordship evidently thought the matter too well established by authority to require him to review again the relevant statutory provisions, and contented himself with supporting the above-quoted principle on the cases cited

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lièrement dans les provinces de l'ouest, des cultivateurs, ou même des commerçants, se groupent ensemble pour acheter et exploiter des machines agricoles, des grains de semences, ou autres effets nécessaires à leur industrie. Ces associations ou groupements de personnes, qui ne sont incorporées sous l'empire d'aucune loi, peuvent tout de même contracter des dettes dont elles sont responsables, en parts égales, à l'égard des créanciers."

If *this* explanation were correct, it would seem that the head "unincorporated association of persons" *would add absolutely nothing* to the definition of "person"; individuals *already* being unquestionably "persons". Furthermore, whether (in the English or French versions or both) it is the *"persons"* who have not been incorporated, or the *association* which has not, seems utterly irrelevant. In *either* case, the *association* is included *ex facie* as a *collectivity* in the definition of *"person"*.

More to the point, and probably correct, is his Lordship's view (20 C.B.R. 351, at p. 355) that unincorporated groups cannot be "debtors" [as distinct from "persons"] collectively — but only as individuals: "S'il s'agissait, dans la présente cause, d'un groupe de personnes ainsi associées sans s'être constituées en corporation, il aurait fallu que la requête pour déclaration de faillite fût dirigée contre chacune des personnes qui composent ce groupe et qui sont débitrices." But if this be true it is because the definition of *"debtor"* appears to require *debtors* to be either individuals or corporations — not because the definition of *"person"* lacks a definition wide enough to embrace unincorporated associations as collectivities.

[205] R.S.C. 1927, c. 11 (the Act of 1919 as revised).

[206] [1947] C.S. 33. See *infra*, pp. 589-590 and 594.

[207] (1935), 58 B.R. 123, 16 C.B.R. 326; leave to appeal to the Supreme Court refused, [1935] S.C.R. 419, 16 C.B.R. 350.

[208] (1938), 65 B.R. 386, 20 C.B.R. 149.

[208a] (1939), 66 B.R. 409, 20 C.B.R. 351.

[209] R.S.Q. 1941, c. 276; now the *Companies Act*, R.S.Q. 1964, c. 271.

above, though it must be observed that he stated in general terms what may plausibly be said to have been theretofore only (at most) a principle implicit in a series of particular cases.

Chaussé v. *L'Association du Bien-Etre de la Jeunesse Inc.*[210] appears to have been the first reported case on the question to be decided under the present Act, that of 1949, as revised.[211] The Quebec Queen's Bench in 1959 by a majority (Pratte and Owen, JJ.; Rinfret, J., dissenting) held that a youth welfare organization incorporated without object of gain under Part III of the *Quebec Companies Act*[212] was outside the scope of bankruptcy jurisdiction. One of the majority, Pratte, J.,[213] relied on the view that the respondent Association was not a "company" in order to show that it was not a *"corporation"*, hence not a *"person"*: [214]

> Je dirais donc que les seules corporations qui sont visées par la Loi sur la faillite sont les compagnies *incorporated or authorized to do business* ...
>
> Or, l'intimée n'est pas une compagnie: elle n'a pas de capital-actions, et le législateur a pris soin de substituer le mot "corporation" au mot "compagnie", dans toutes les dispositions de la loi la concernant; elle n'a pas été constituée pour poursuivre des affaires *(incorporated to do business)* et n'est pas non plus autorisée à le faire.

(It is not clear whether the fact that respondent was neither incorporated nor authorized *to do business* was offered by the learned judge as going to negative altogether its character as a *company*, or whether the remark was directed only to the *qualifying* words, "company *incorporated or authorized to carry on business*" — which *latter* was the basis of Owen, J.'s opinion,[215] but which, standing by itself, will be shown below to be an insufficient basis for keeping *"non-profit"* bodies out of the definition of "corporation".[216])

It is sufficiently clear from the judgment below that at least Montpetit, J., in the Superior Court, appreciated that *only* by negativing *altogether* respondent's character as a *company* could respondent be excluded from *all* the alternative heads of the definition of *"corporation"*: [217]

> Or, selon l'article *2(f)*, une "corporation" doit être soit "une compagnie constituée en corporation", soit une compagnie *"autorisée* à poursuivre des affaires... en vertu ou sous l'autorité d'une loi... de l'une des provinces du Canada."

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210 [1960] B.R. 413.
211 R.S.C. 1952, c. 14.
212 R.S.Q. 1941, c. 276; now the *Companies Act*, R.S.Q. 1964, c. 271.
213 For Owen, J's reasoning, see *infra*, pp. 586-587.
214 [1960] B.R. 413, at pp. 414-15.
215 [1960] B.R. 413, at p. 417; quoted *infra*, pp. 586-587.
216 *Infra*, pp. 587-589.
217 Appendix One, *infra*, at p. 605.

> D'autre part en me référant à la troisième partie de la *Loi des compagnies* de Québec, je constate qu'une corporation ainsi constituée n'est pas une compagnie, c'est-à-dire qu'elle n'est pas une entité corporative ou un "body politic and corporate" dont le but principal est de réaliser des profits ou des bénéfices grâce à un capital quelconque qui y est préalablement investi.

The judgment of Montpetit, J., in this case, reported herein by the present author,[218] may be taken as the most cogent of the authorities supporting the view that "non-profit" corporations are not subject to the present *Bankruptcy Act*. While one may disagree with his Lordship's conclusion — as does the present author — the judgment in the Superior Court is free from ambiguities and arguments demonstrably unsound on the face of the Act.

His Lordship's more recent judgment in 1968 *In re Centre Culturel du Vieux Montréal,*[219] reported by the author herein,[220] holding that another Quebec Part III company, organized for cultural activities, was not amenable to bankruptcy jurisdiction, is supported simply[221] on the authority of *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse,*[222] and therefore does not profess to carry the matter further.

A critique of the view that "non-profit" bodies corporate cannot be "companies". The author has attempted in the foregoing pages to catalogue all the judicial authority available in the context of the present problem, directed at establishing that "non-profit" bodies corporate cannot be *"companies"* as that term is used in the old[223] and new[224] Bankruptcy Acts. For if the argument can be made good that they are *not* "companies," that will clearly be decisive in excluding them under the present Act from the definition of "corporation", hence from the definition of "person", hence of "debtor", and therefore from the Act.[225] The argument that "non-profit" bodies

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218 Appendix One, *infra*, at pp. 602 *et seq.*

219 Superior Court of the Province of Quebec: In Bankruptcy; District of Montreal, No. 7714. Judgment rendered by Hon. Mr. Justice Montpetit, February 6, 1968.

220 Appendix Two, *infra*, pp. 606-607.

221 The petition for annulment of the proceedings on the proposal in *Re Centre Culturel du Vieux Montréal* refers solely to the said case, and the judge's order declares this petition "well founded in fact and law": *infra*, p. 606.

222 [1960] B.R. 413; affirming a decision of the Superior Court reported as Appendix One, *infra*, pp. 606-607.

223 *The Bankruptcy Act*, 1919, 9-10 Geo. V, S.C. 1919, c. 36; see *supra*, n. 40 as to amendments; revised as R.S.C. 1927, c. 11.

224 R.S.C. 1952, c. 14, consolidating 13 Geo. VI, S.C. 1949, 2nd Sess., c. 7; for amendments, see *supra*, n. 39.

225 See *supra*, pp. 532-536.

corporate are not *"companies"* plainly can, if substantiated, lead to the result desired by its proponents. It is also a defensible argument — though, in the author's view, a wrong one. This argument is therefore much the most important one — indeed, it is submitted, the only important one — supporting the exclusion of "non-profit" bodies corporate from bankruptcy jurisdiction at the present time. Its only serious rival,[226] probably valid under the old Act,[227] is easily demolished on the face of the present Act.[228]

The controversy is resolved into a rather simple issue as to the meaning of the term "company" as used in the original Act of 1919,[229] in the Act as it appeared in the revision of 1927,[230] and, perhaps more important, in the Act of 1949 [231] and in the revision of 1952.[232] *Could* the term "company", at any rate at the most recent dates,[233] embrace "non-profit" bodies corporate? *Does* it, as used in the present Bankruptcy legislation, embrace such bodies?

The author's view is unhesitatingly affirmative. In support of this view it would have been most desirable to trace the statutory, judicial, learned, and common usage of the term "company" in English and Canadian law from earliest days. The very considerable resources of time required for such a study are far beyond those of the present author, who must therefore be content with indicating certain primary and secondary sources which seem to him decisive in favour of his view.

In 1931, near the beginning of his classic treatise, Wegenast wrote: [234]

> In Canada the word "company", at first employed by way of contraction for "joint-stock company", is tending to become synonymous with the word "corporation". It still seems to import, however, some of the older significance of an organization of "adventurers" for making gain, while the word "corporation", except where it is used with a suggestion of opprobrium in

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226 That the body be not only a *company*, but a company which has carried on (or at least is incorporated to carry on) *business*.

227 Head (iv) of the definition of "debtor" under the old Act required that, to be a *debtor*, a corporation be one *"which carried on business in Canada"*: *infra*, pp. 589-591.

228 *Infra*, pp. 586-589.

229 *The Bankruptcy Act*, 1919, 9-10 Geo. V, S.C. 1919, c. 36; as amended (*supra*, n. 40) and revised, R.S.C. 1927, c. 11.

230 R.S.C. 1927, c. 11.

231 13 Geo. VI, S.C. 1949, 2nd Sess., c. 7.

232 R.S.C. 1952, c. 14.

233 Whether the meaning of the present Act is to be taken at 1949 or at 1952 is a question which may savour of quibble.

234 F. W. Wegenast, *The Law of Canadian Companies*, (Toronto, 1931), p. 4.

> referring to large aggregations of capital, still retains its broader significance of an artificial legal person. Corporations for objects other than gain are usually called by other names, such as "association", "society", etc.

This suggests that while *"company"* is used *primarily* in the sense of bodies corporate created with object of gain, it can include others, and *was* at the date of writing tending to become synonymous with "corporation". It would seem to be less important that the term was *primarily* used for bodies with object of gain, than that it was *not exclusively* so used.

Pratte, J., was doubtless right in his observation in *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse Inc.*[235] that our legislation seems to prefer the term *"corporation"* to the term *"company"* when speaking of "non-profit" bodies corporate:

> [L]e législateur a pris soin de substituer le mots "corporation" au mot "compagnie", dans toutes les dispositions de la loi la concernant....

The learned judge was there referring to the Quebec *Companies Act;*[236] perhaps his remark would have had even more force had he pointed to a similar preference in the then *Companies Act* of Canada,[237] since the relevant issue is the meaning of "company" when used in a Dominion, not a provincial, statute — the *Bankruptcy Act.*

But the Dominion and provincial statute alike bear title as Companies Acts; and, while the Quebec statute then in force had the long title "An Act respecting certain Companies *and Corporations*",[238] the Canadian act bore a long title speaking simply of "An Act respecting Dominion *Companies*".[239] The term is clearly comprehensive.

The editor of the more recent collection of *Studies in Canadian Company Law*,[240] Professor Jacob S. Ziegel, notes in his own chapter on "Constitutional Aspect of Canadian Companies":[241]

> "Company" is not a term of art and in the last century the word was generally understood to mean an association of persons pursuing a common object. *It was not restricted to business enterprises,* nor even to private as distinct from public bodies. But it did invariably imply a grouping of persons on whom personality was conferred by incorporation.

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235 [1960] B.R. 413, at pp. 414-15.

236 R.S.Q. 1941, c. 276; now, R.S.Q. 1964, c. 271.

237 R.S.C. 1952, c. 53; Part II is entitled "CORPORATIONS WITHOUT SHARE CAPITAL", and bodies incorporated thereunder are referred to in that Part as "corporations".

238 R.S.Q. 1941, c. 276.

239 R.S.C. 1952, c. 53.

240 (Toronto, 1967).

241 Ch. 5, pp. 149 ff., at pp. 154-55.

The learned author is able to support the proposition to which emphasis has been added in the above quotation, with examples drawn from the legislative usage of the Legislature of the Province of Canada,[242] of the Parliament of Canada,[243] and of the United Kingdom Parliament in the British *Companies Acts* of *1862* and *1867*.[244] It is certainly the present author's understanding that the Goldsmiths' *Company* and the Worshipful *Company* of Fishmongers, bodies corporate of early date, are not themselves incorporated with object of gain.[245]

Nor does the Manitoba Court of Appeal appear to have experienced any difficulty in treating a co-operative association as a *company* susceptible to jurisdiction under the old *Bankruptcy Act* when in *Re Winnipeg Co-operative Bakery Company*[246] the court (Perdue, C.J.M., and Fullerton, Denniston, Prendergast and Trueman, JJ. A.) affirmed without written reasons a judgment of Mathers, C.J.K.B., adjudging the debtor a bankrupt. The debtor there contested only petitioner's status as a creditor, and no question was in fact raised as to the debtor's susceptibility to bankruptcy jurisdiction. The case therefore decides the point only *sub silentio*, and its authority might

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242 27 & 28 Vict., S.C. 1864, c. 23, s. 1(7).

243 32 & 33 Vict., S.C. 1869, c. 13, s. 3.

244 *The Companies Act, 1862*, 25 & 26 Vict., c. 89, of which s. 6 provided: "Any Seven or more Persons associated for any lawful Purpose may... form an incorporated Company, with or without limited Liability." *The Companies Act, 1867*, 30 & 31 Vict., c. 131, provided by s. 23 that "Where any Association is about to be formed under the principal Act as a Limited Company, if it proves to the Board of Trade that it is formed for the Purpose of promoting Commerce, Art, Science, Religion, Charity, or any other useful Object, and that it is the Intention of such Association to apply the Profits, if any, or other Income of the Association, in promoting its Objects, and to prohibit the payment of any Dividend to the Members of the Association...", the Board of Trade might allow registration with limited liability without the addition of the word "Limited" to its name.

245 *The Oxford English Dictionary*, Volume II, "C", (Oxford, 1933), gives, as one of the meanings of "company": "6: A body of persons combined or incorporated for some common object, or for the joint execution or performance of anything; *esp.* a mediaeval trade guild, and hence, a corporation historically representing such, as in the London 'City Companies'". Amongst the examples given is a usage in 1600 of the phrase "religious companies". The dictionary continues with: "7. *Commerce.* An association formed to carry on some commercial or industrial undertaking."

246 (1924), 34 Man. R. 615; 5 C.B.R. 457; [1925] 1 W.W.R. 79. *In re Montreal Co-Operative Bakery*, 1920, 1 C.B.R. 377 (Superior Court of the Province of Quebec: In Bankruptcy; Bruneau, J.), indicates that a debtor of that name was administered in bankruptcy, but it is not clear whether it was incorporated nor whether it was a non-profit body.

plausibly be contested on this ground. But St. Jacques, J., for the Court of Appeal of Quebec in *Re Construction Coopérative de Montréal* v. *Z. Berthiaume & Fils Limitée*[247] chose also to distinguish it.[248]

> Les intimées croient trouver un appui dans un arrêt de la Cour d'appel du Manitoba, *In re Winnipeg Co-operative Bakery Co.* ... Il n'est pas prudent de s'en rapporter uniquement au sommaire qui est fait de cet arrêt. Il faut lire en entier le jugement de la première Cour, confirmé par la Cour d'appel, bien que les notes des juges de cette Cour ne soient pas rapportées.
>
> Il s'agissait bien, en effet, dans cette cause, d'une association coopérative, mais régie par une loi absolument différente du chapitre 254 des Statuts refondus de notre province. Cette loi du Manitoba *(The Co-operative Associations Act)*, adoptée en 1913, et modifiée en 1921, ch. 10, sec. 8, comporte l'article suivant:
>
> "36B. All associations subject to this Act shall be subject to the provisions of 'The Companies Act' and its amendments, save where such provisions are inconsistent with this Act."
>
> Il n'est pas étennant qu'en face d'une disposition comme celle-là, les tribunaux aient décidé que cette association coopérative, qui, en réalité, est une *compagnie*, soit assujettie à *La Loi de Faillite* fédérale.

Very possibly the Manitoba *Co-operative Associations Act*[249] as amended[250] up to the time of the *Winnipeg Co-operative Bakery* case, might indeed properly be distinguished, as to the nature of its creatures, from the Quebec *Cooperative Syndicates' Act*[251] as it stood at the time of *Re Construction Coopérative de Montréal.*[252] Little useful purpose would be served by bothering to refute such a conclusion by analytical comparisons of the two statutes. For even if they be distinguishable, as the Court of Appeal of Quebec would have it, where does that leave the Quebec judges when they come to deal with a *Part III* (*i.e.*, "non-profit") *Quebec company*?[253] Must they not say that a Part III Quebec Company is, *a fortiori* to a Manitoba Co-Operative Association, a "company"? For a Part III Quebec company *is included in the very* Companies Act *itself*, let alone the application *mutatis mutandis* of the rules of Part I.[254] St. Jacques J., thus distinguishes *In re Winnipeg Co-operative*

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247 (1939), 66 B.R. 409; 20 C.B.R. 351; reversing (1938), 20 C.B.R. 285 (C.S.).

248 20 C.B.R., at p. 356.

249 R.S.M. 1913, c. 41.

250 11 Geo. V, S.M. 1921, c. 10.

251 R.S.Q. 1925, c. 254; now the *Cooperative Syndicates Act*, R.S.Q. 1964, c. 294.

252 21 Geo. V, S.Q. 1930-31, c. 96.

253 Which have been exactly the ones lately involved in the cases at bar: *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse, Inc.*, reported, *infra*, Appendix One, at pp. 602 *et seq.*; and *Re Centre Culturel du Vieux Montréal*, reported, *infra*, Appendix Two, at pp. 606-607.

254 R.S.Q. 1964, c. 271, s. 220.

Bakery Company [255] on grounds which must force him to admit that Part III Quebec companies *must* be subject to the *Bankruptcy Act*, every bit as much as was the Winnipeg Co-operative Bakery. Nor should it be overlooked that the bodies corporate successfully resisting bankruptcy jurisdiction in *Philippe de Gaspé Beaubien* v. *L'Union Economique d'Habitation*,[256] in *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse Inc.*,[257] and *In re Centre Culturel de Vieux Montréal*,[258] were, *in all cases, Part III Quebec companies*. How are *they* to be reconciled with St. Jacques, J.'s rationale for the *Winnipeg Co-operative Bakery* case?

The proper conclusion is not very hard at all to draw. Legislative and learned usage alike prove conclusively that *"company"* is a term which is, and has long been, perfectly capable of embracing "non-profit" bodies corporate. It may, of course, not properly embrace *all*. To refer to a municipality or a public school corporation as a "company", might well strike the listener as odd. The inaptitude of the word "company" to describe a *fabrique*, if inaptitude it be, would constitute a ground quite sufficient to exclude *it* from the definition of "corporation" under the present act, as under the old, with the ultimate consequence of excluding *fabriques* from bankruptcy jurisdiction. Furthermore, under the old Act there was the further ground — now non-existent [259] — that to come with the definition of "debtor" — though not merely to be a "corporation" — the statute required a corporation to "carry on business" in Canada. It is possible to say also that *fabriques* have been impliedly excluded from both Acts as inherently unsuitable subject-matter.[260] But to suppose that, merely because a *fabrique* or a municipality or, indeed, the Crown,[261] cannot properly be described as a "company", therefore *no* "non-profit" body corporate can be a "company", is without foundation.

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[255] *Supra*, n. 246.

[256] [1947] C.S. 33, 28 C.B.R. 108.

[257] [1960] B.R. 413, affirming a decision of Montpetit J. in the Superior Court, reported herein as Appendix One, *infra*.

[258] (1968), in the Superior Court of the Province of Quebec sitting in Bankruptcy; reported *infra*, Appendix Two.

[259] *Infra*, pp. 589-590.

[260] *Supra*, pp. 557 *et seq.* and n. 122.

[261] The *Bankruptcy Act*, R.S.C. 1952, c. 14, provides: "172. The provisions of this Act bind the Crown in right of Canada or of a province." It is doubtless intended thereby to eliminate all special rights of the Crown not consistent with the terms of the Act. See s. 95(1)(*h*) and (*j*), and compare *In re Silver Brothers, Limited; A.-G. Que.* v. *A.-G. Can.*, [1932] A.C. 514. Is s. 172 in terms broad enough to allow the Government of Canada or of a Province to be put into bankruptcy? See *The Canadian Broadcasting Corporation* v. *The Attorney-General for Ontario*, [1959] S.C.R. 188.

The term *"company"* may therefore be inapt to embrace a considerable variety of bodies corporate, especially bodies *juris publici*. But there can be no general principle that it can embrace none save those incorporated with object of gain.

That the *Bankruptcy Act* is, historically, "essentially commercial", proves little one way or the other about the susceptibility thereto of corporations, commercial or not, in a state of affairs when *any* individual is subject thereto, *quite independently of any commercial character whatsoever*. But the inherent unlikelihood that Parliament has intended to include such bodies as municipalities or *fabriques* within the *Bankruptcy Act* (apart from the inaptitude of the term "company" to describe them) is, by itself, quite sufficient a ground for assuming that, at least in the absence of clear language to the contrary, it has excluded them from the present as from the old Act. This ground taken by a majority of the Quebec Queen's Bench in *Paroisse de St-Etienne*,[262] and by two judges at least in *Paroisse de St-Gabriel de Brandon*,[263] appears clearly in, and sufficiently supports, the judgment of Davis, J., in Chambers refusing leave to appeal to the Supreme Court of Canada in the last-mentioned case:[264]

> I have no doubt that the *Bankruptcy Act* was never intended to apply to a parish or church or other religious body. Clear and explicit language would be necessary to bring ecclesiastical bodies or institutions within the ambit of a bankruptcy statute essentially designed for the administration of the property of persons or corporations carrying on business.

If the term *"company"* is then one which *can* bear a variety of meanings, the only question remaining is which it *should* be given in the context of the present *Bankruptcy Act* — the question being academic as regards the old.[265] We have already sufficiently pointed out the anomalies which flow from the exclusion of bodies corporate from the *Bankruptcy Act* on the sole ground that they are incorporated without object of gain or not incorporated "to carry on business".[266] Apart from anything else, such an exclusion imposes a test in respect of bodies corporate which the Act considers irrelevant in the case of individuals. And it is obvious that the properties of,

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[262] (1935), 58 B.R. 100; other citations *supra*, n. 15. The relevant passages from the judgments are quoted and discussed *supra*, pp. 558-561.

[263] (1935), 58 B.R. 123; other citations *supra*, n. 15. The relevant passages from the judgments are quoted and discussed *supra*, pp. 558-561.

[264] [1935] S.C.R. 419; other citations *supra*, n. 15. The passage quoted is found in [1935] S.C.R., at p. 421.

[265] References to the old Act are found *supra*, nn. 40 and 41. The courts would presumably interpret words used in the present *Act* as at its enactment, 13 Geo. VI, S.C. 1949, 2nd Sess., c. 7, or at its revision as R.S.C. 1952, c. 14.

[266] *Supra*, pp. 525-529.

for example, a golf club, are no less apt for liquidation by a trustee in bankruptcy than are the properties of any commercial corporation, and a great deal more apt than many.

It is the author's view, therefore, that not only is the term *"company"* demonstrably *capable* of including bodies corporate not incorporated with object of gain or "to carry on business", but that, as it appears in the present Act, the word *does* in law include a wide range of such bodies.

(b) *Can a "non-profit" body corporate, assuming it is a "company", meet the other requisites for qualification as a section 2(f) "corporation"?*

Under the present Act. In order to be a "debtor", and subject as such to the *Bankruptcy Act*,[267] it is necessary, as we have seen, to be a *"person"*.[268] In the case of a body corporate, it is necessary, in order to be a *"person"*, to be a *"corporation"*. But to be a *"corporation"*, as defined by section 2(*f*), a body corporate must be within the following class: [269]

> any COMPANY *incorporated or authorized to carry on business* by or under an Act of the Parliament of Canada or of any of the provinces of Canada, AND ANY INCORPORATED COMPANY WHERESOEVER INCORPORATED *that has an office in OR carries on business within Canada* ...

It is easy enough to see that a body corporate can be pushed outside the above-defined class if it can be shown not to be a *"company"*. As we have seen, a substantial body of judicial opinion *does* hold that (at least in the present context) no "non-profit" body can be a *"company"*.[270] This issue we have already debated above, and given reasons for suggesting that while perhaps *some* such bodies cannot properly be described as "companies", there is no general principle that *none* can be; and that the term "company", as used in the *Bankruptcy Act*, is entirely apt to include such bodies.

But it is obvious that, to come within the above-defined class, a body corporate must be more than a *"company"*. It must be a "company" meeting the additional qualifications set out above. In particular, *it has been said* that it must be a company incorporated *to carry on business*. Consider, for example, the reasons of Owen, J., in *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse Inc.*[271] for holding that the respondent body was not a *"corporation"* as defined.

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[267] *Supra*, nn. 37-39.
[268] As defined by s. 2(*m*). *Supra*, pp. 532-533.
[269] All emphasis is added.
[270] *Supra*, pp. 557-579.
[271] [1960] B.R. 413.

After quoting the definition of *"corporation" in extenso,* Owen, J., said:[272]

> Obviously all corporations are not governed by the provisions of the Bankruptcy Act. Some corporations are specifically excluded.
>
> Respondent is subject to the Bankruptcy Act if it is a company incorporated or authorized to carry on business by or under an Act of the Province of Quebec. In my opinion respondent was not so incorporated or authorized to carry on business and therefore is not a corporation governed by the provisions of the Bankruptcy Act.

Now these remarks are open to a number of objections. In the first place they treat half of the definition as if it did not exist. *"Corporation",* if one will trouble to look at the definition of the term, is *not* defined to include only "any company incorporated or authorized to carry on business by or under" a federal or provincial statute. *The definition carries on much further. "Corporation"* includes *also* "any company *wheresoever* incorporated *that has an office in OR carries* on business within Canada".[273] No attention whatever is given by Owen, J., to the effect of the latter part of the definition. It is dealt with by the rather simple, but scarcely satisfactory, expedient of ignoring it altogether. The *literal terms* of the second part of the definition *make it fully sufficient* that a company *wheresoever* incorporated should *have an office in Canada.* Nor need anyone suppose that this objection is satisfactorily answered by restricting the phrase *"any incorporated company WHERESOEVER incorporated"* to embrace only companies incorporated outside Canada. Such an answer would *at best* produce only this plainly absurd result, that a *foreign*-incorporated "non-profit" company *would* be subject to Canadian bankruptcy law *provided only that it had an office in Canada,* but that a *Canadian*-incorporated body *of exactly the same description* would *not.*[274]

So much, then, for the fanciful notion that a *"company",* in order to be a *"corporation",* must *also* be *"incorporated or authorized to carry on business by or under"* a federal or provincial Act. The words which follow in section 2(*f*) — which give the definition of "corporation" a second branch — which make it enough for a *"company"* to *have an office* in Canada or *in fact to carry on business* therein — speak for themselves.

But *even taking the first half of the definition alone* — by what right can it be assumed that a *company* must (to be a "corporation") be *either* one *INCORPORATED TO CARRY ON BUSINESS or else*

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272 [1960] B.R. 413, at p. 417.

273 Emphasis added.

274 The jurisdiction should, if anything, be *less* in the case of the former.

one *AUTHORIZED TO CARRY ON BUSINESS?* This presupposes that the phrase *"to carry on business"* qualifies *both* the word "incorporated" *and* the word *"authorized"*. But this *cannot* be taken for granted. In the *French* version it seems *not even a possible* construction: [275]

> "Corporation" comprend toute compagnie constituée en corporation ou autorisée à poursuivre des affaires en vertu ou sous l'autorité d'une loi du Parlement du Canada, ou de l'une des provinces du Canada...

The two heads in the first branch are clearly *compagnie "constituée en corporation"* and *compagnie "autorisée à poursuivre des affaires"*. In French, "constituée en corporation... à poursuivre des affaires" does not seem a natural reading at all; if the phrase "à poursuivre des affaires" had been intended to qualify "constituée en corporation", it would have read instead "constituée en corporation *afin de* poursuivre des affaires". That the two heads are distinctly *compagnie "constituée en corporation"* and *compagnie "autorisée à poursuivre des affaires"* emerges perfectly clearly from the judgment of Montpetit, J., in *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse Inc.*:[276]

> Or, selon l'article 2*(f)*, une "corporation" doit être soit "une compagnie constituée en corporation", soit une compagnie *"autorisée* à poursuivre des affaires... en vertu ou sous l'autorité d'une... de l'une des provinces du Canada."

Why should it then not be sufficient, as the French text indicates that it is, that the company be *either INCORPORATED* by or under a federal or provincial statute, *or else AUTHORIZED TO CARRY ON BUSINESS* by or under a federal or provincial statute?

A moment's reflection suggests that the probable *raison d'être* of the words "authorized to carry on business" is to be found in the history of the federal and provincial legislation requiring licensing of extra-provincial and extra-Canadian companies as a condition of their carrying on [all or certain kinds of] business in Canada, or the province, as the case might be.[277] *Incorporation* in Canada might thus have been considered only one possible *nexus* of (at least) [278] two; the other would be *authorization* in Canada to carry on business.

So to read the Act that Canadian incorporation is understood as a *nexus* alternative, to and independent of, any object of carrying

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[275] This is a case where the English version of s. 2(*f*) is open to two interpretations, but the French, to one only; and the latter must prevail.

[276] Reported *infra*, Appendix One, pp. 602 ff., at p. 605.

[277] See Wegenast, *The Law of Canadian Companies*, (Toronto, 1931), pp. 33 ff. and Ch. XXXIII, pp. 830 ff.

[278] There remain furthermore the words: "and any incorporated company, wheresoever incorporated, that has an office in or carries on business within Canada".

on business — a *nexus* sufficient of itself to support Canadian jurisdiction — is, admittedly, to give the first branch of the definition of "corporation" one of two possible interpretations of the *English* text. But even if the French text be not (as it probably *is*) decisive, we must again point to the considerations which must be determinative of the policy of the present Act: the implausibility of making critical for bodies corporate tests which the Act treats as irrelevant for individuals; the absurdly inconvenient results which flow from an obviously unintended exclusion of a wide class of bodies corporate from *all* Canadian insolvency legislation.

On this view of the matter, which is that of the author, the qualifying language which follows the words "any company" in section 2(*f*), is sufficiently satisfied by an *incorporation* by or under a federal or provincial statute. An *authorization to carry on business* under a federal or provincial statute is merely an *alternative* way of satisfying the requirements of the definition. And any such companies incorporated under Canadian law as may *still* not satisfy *either* of the foregoing requirements can probably qualify for bankruptcy jurisdiction by *having an office* in Canada.[279]

Under the Old Act. It is doubtless desirable to point out specially that, *under the old Act*, as distinguished from the present one, the definition of *"debtor"*, while admitting a *"corporation"* as a "debtor" under the fourth head:[280]

> "debtor" includes any person, whether a British subject or not, who, at the time when any act of bankruptcy was done or suffered by him...,
>
> (iv) was a corporation or a member of a firm or partnership *which carried on business in Canada*...,

also *superadded a requirement of carrying on business.* THERE IS NO CORRESPONDING PROVISION IN THE PRESENT ACT. TO BE A "DEBTOR" IT IS ENOUGH TO HAVE RESIDED *OR* CARRIED ON BUSINESS IN CANADA. The judicial remarks on the old Act (about a requirement of carrying on business) were therefore *in this context alone* literally justified by the terms of

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[279] *"Wheresoever* incorporated" appears wide enough to include bodies incorporated *in Canada* as well as *outside Canada.* It does not appear confined to the latter, even though companies incorporated in Canada might be supposed to have been dealt with exhaustively in the preceding words of the definition. But the preceding words do not appear to cover companies such as pure Royal Charter corporations. They are probably not to be considered to have been incorporated "by or under an Act". Yet the Crown in creating them can arguably be said to have acted "in right of" Canada or a province. Consider, for example, the case of McGill University.

[280] Emphasis added.

the Act.[281] But, as we have seen, it is not in this context alone — the meaning of *"debtor"* — that they were uttered: a business object was also, as we have seen, said to be a requisite of existence as a *"company"*,[282] and the definition of *"corporation"* was also read (or misread) under the old Act in much the same way as it has sometimes been judicially under the new: [283] namely, *ignoring the second branch* which makes it *enough* to have an office in Canada, or to carry on business therein; and failing also to appreciate that bare *incorporation* in Canada is probably, on a true reading, alternative to any object of carrying on business or actual carrying on of business.

(c) *Is the character of a body corporate to be tested by its objects, by its powers, or by its actual activities? What if these are multiple?*

If the view prevails that "non-profit" bodies corporate are not "companies", or else that they do not satisfy the additional qualifying language in the definition of *"corporation"* in section 2(*f*), it becomes essential to determine, precisely, just what bodies are thereby excluded.

The term *"non-profit" bodies corporate,* used by the author throughout this discussion, is a loose one, adopted by the author for brevity and convenience's sake. Much of its convenience has consisted in the very looseness of the term, which has enabled us to postpone to this point a consideration of the extent of the implied judicial exclusions.

But judicial gloss aside, it remains nevertheless indisputable that on *any* view of section 2(*f*) *some* bodies corporate are excluded from the definition of *"corporation"* — if for no other reason than that the Act says so in express words. The bodies so excluded are building societies having a capital stock, incorporated banks, savings banks, insurance companies, trust companies, loan companies and railway companies.

In respect at least of *these* bodies, the question is unavoidable: is their character, in each case, to be tested by their respective corporate objects? by their powers? by their actual activities? Does it matter whether their actual activities are beyond the scope of those which they may lawfully carry on? If so, is the case of a body corporate which is assimilated to a natural person,[284] to be dis-

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281 See quotations from various judgments, *supra,* pp. 570 *et seq.* and n. 176.

282 *Supra,* pp. 567-579.

283 *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse, Inc.,* [1960] B.R. 413; see discussion *supra,* pp. 586-587.

284 *Bonanza Creek Gold Mining Company, Limited* v. *The King,* [1916] 1 A.C. 566.

tinguished from that of a body corporate which is so literally incapable of carrying on the activities in question that they cannot be imputed to the body corporate itself at all, being thus subject to the *ultra vires* rule in the most rigorous form?[285] Can a material distinction be drawn between "objects" and "powers"? Suppose that the body is incorporated with two or more objects, or powers, or carries on two or more activities; one or more of which is *within*, and one or more *outside*, the excluded classes — is the body then within the definition or not?

These questions, clearly, are inescapable on *any* view of the Act. But they are more numerous and complex if, to the express exclusions, we add, in deference to the judges, the implied exclusion of "non-profit" bodies corporate.

The above-mentioned problems of characterisation appear to have arisen first in *Re Inverness Railway and Collieries Ltd.; Royal Bank of Canada* v. *The Eastern Trust Company*,[286] discussed above.[287] The appellant bank, it will be recalled, was seeking to sustain the validity of its assignment of book debts against the operation of section 30(1) of the former Act, invalidating in favour of the trustee certain unregistered assignments. Its legal contentions were alternative; namely, *first*, that the insolvent, the Inverness Railway and Collieries Ltd., was a *"railway company"* and so outside the Act altogether, and therefore not to be affected by any provision of the Act including section 30(1); and, *second*, that alternatively the bank *itself* was not a "person" within the meaning of section 30(1) and so could not suffer any invalidation by that section of the book debts which it had taken.

The appellant bank must have succeeded in the result had it succeeded on either of these grounds. By a majority, the Supreme Court of Canada (Davies, C.J., Duff and Anglin, JJ.; Idington and Brodeur, JJ., dissenting) held that the Inverness Railway and Collieries Ltd., was *not* a *"railway company"*, and so not excepted

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285 See recently the doubts cast upon the scope of the nullity in *Bell Houses Ltd.* v. *City Wall Properties Ltd.*, [1966] 2 Q.B. 656, at p. 694. The problem of activities carried on contrary to the charter of a letters-patent body corporate arose in the context we are discussing in *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse, Inc.*, [1960] B.R. 413, and Appendix One.

286 In the Supreme Court of Canada, [1923] S.C.R. 177, 3 C.B.R. 724, [1923] 1 D.L.R. 498, [1923] 1 W.W.R. 937 (*Coram:* Davies, C.J., Idington, Duff, Anglin, and Brodeur, JJ.); on appeal from the Supreme Court of Nova Scotia, 55 N.S.R. 306, 3 C.B.R. 271, 65 D.L.R. 139 (*Coram:* Russell, J., Ritchie, E.J., Chisholm, and Mellish, JJ.).

287 *Supra*, pp. 543-548.

as such from the definitions of "corporation" and "debtor".[288] It therefore remained within the scope of the Act; and only the judges in the majority went on to consider, and reject [for reasons, as we have seen, which are uncertain] [289] the bank's alternative contention that *it* was not a "person" within section 30(1) of the then Act.

Now, section 2(*k*) of the 1919 Act in terms excluded from the definition of "corporation", and so from the definition of "debtor", *inter alia* a *"railway company"*. And, equally undoubtedly, Inverness Railway and Collieries Ltd. had been incorporated under the Nova Scotia Joint Stock Companies Act for the purpose of carrying on a mining and railway undertaking; and, apparently, it had in fact carried on both, the railway having been operated for some six and one half months, until the entire railway and mining undertaking which the company operated was repossessed by the vendor in consequence of a default.

The majority of the Supreme Court which held the insolvent was nevertheless not a *"railway company"* within section 2(*k*) simply adopted the reasons of Mellish, J., below,[290] in the Supreme Court of Nova Scotia. These were as follows: [291]

> Was the Inverness Railway and Collieries, Ltd., entitled to make an assignment under the Bankruptcy Act? This road was constructed and operated under special legislation of the Province. It was subject to the provisions of the local Railway Act, ch. 99, R.S.N.S. 1900. And that Act, including secs. 269, 270 and 271, I think contemplates that it should not be otherwise held or operated except by license as therein provided unless under special legislation. A company incorporated by letters patent might perhaps not be subject to the provisions of the Railway Act. But it is, I think, the intention of that Act that a railway like the one in question when subject to the provisions of the Act should so remain.
>
> The proper conclusion, as it seems to me, is that the Inverness Railways and Colieries. Ltd., was not in business as a 'railway company' within the meaning of the Bankruptcy Act. It did not have, and could not have, the usual powers of a railway company as to acquiring lands, etc., without special legislation. It was doing what any person could do as agent for Henderson in the operation of the railway with a view apparently of going into business after the Legislature met, as a railway company having the powers and responsibilities of such a company in respect to the particular road in question; and it was not even doing that when it made the assignment in bankruptcy. Indeed there may be some question as to whether the term 'debtor' as defined in sec. 2*(o)* of the Bankruptey Act does not include

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[288] Quoted in Appendix One, *infra*, p. 602.

[289] *Supra*, pp. 547-548.

[290] In the Supreme Court, Anglin, J., speaking in [1923] S.C.R., at p. 181 for himself and Davies, C.J., appears to adopt Mellish, J.'s analysis. Duff, J., *ibid.*, does so expressly.

[291] 65 D.L.R. 139, at p. 152.

> every sort of 'corporation' in view of the restrictions applied to that word when used in that sub-section in connection with winding-up proceedings. On this, however, I offer no opinion.

Why, then, was a corporation whose *objects* included the carrying on of a railway undertaking, and which *had in fact carried one on*, not a *"railway company"?* It was not suggested that the railway was merely ancillary to a colliery undertaking: indeed, it clearly appears that the undertaking included railway *passenger and freight* services.[292] The reasons quoted above seem to lay emphasis on Inverness Railway and Collieries Ltd. having, in Mellish, J.'s view, *acted as a mere agent* for one Henderson — who had himself acquired from the predecessor Inverness Railway and Coal Co. (and from the trustee-mortgagees for the latter's bondholders). Mellish, J., in fact describes the relationship as one of agency in more than one part of his judgment.[293] (Yet Chisholm, J., who thought that the insolvent *was* a railway company, points out that though Henderson remained owner of the undertaking, he did so only *by agreement* and only *as trustee for Inverness Railway and Collieries Ltd.*, describing himself *as vendor to the latter*, and professing to transfer *to it* all his rights).[294] Mellish, J.'s reference to *powers* characteristic of railway companies is also significant.

It is difficult to draw any very precise conclusions from the *Inverness* case. Perhaps all that can be said is that *the mere fact of carrying* on an undertaking of a certain kind does not put a body corporate within one of the types of corporations expressly excluded from the definition of "corporation" in the *Bankruptcy Act*.[295] Even the fact that a body corporate *was incorporated with the object* of carrying on an undertaking of that kind, and that *it has carried one on*, may not suffice if it does not *itself* enjoy the *powers* regularly associated with an enterprise of kind in question, and accordingly acts merely as agent for another.

It is to be noted that *it is nowhere suggested* that since Inverness was *also* a colliery company *that alone* sufficed to except it from the (excluded) class of "railway companies", even should it have been true that it must in all *other* respects have *been* considered a *"railway company"*. The point would have seemed too obvious to overlook. That it was *not* taken may suggest that a body corporate

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[292] 65 D.L.R., at p. 148.

[293] 65 D.L.R., at p. 149, and at p. 152.

[294] 65 D.L.R., at p. 145.

[295] A distinction is perhaps to be drawn between *a railway company* and *a company* which happens to be carrying on a railway.

is excluded from the *Bankruptcy Act* if, having *multiple* objects, powers or undertakings [whichever is relevant], *any* of them would bring it within an excluded class of bodies corporate.

Activities carried on in fact. In *Beaubien* v. *L'Union Economique d'Habitation*,[296] having held that, by reason of its incorporation under Part III of the Quebec *Companies Act*[297] without object of gain, the respondent housing union (whose object was providing its members with moderate-cost housing) was not subject to the then *Bankruptcy Act*,[298] Boyer, J., rejected, as unproved, allegations that the respondent *had in fact engaged* in trade. His Lordship did not however consider whether these allegations, *if proved, would have been relevant* in law to change the character of the respondent for bankruptcy purposes.

The *Inverness* case[299] seems to suggest that the activities in fact carried on do *not* suffice to alter, for the purposes of the *Bankruptcy Act*, the character of a body corporate as determined by an examination of its object and its powers. Such an inference from *Inverness* is, however, debatable and the case is not in any event conclusive.

A clearer statement is however to be found in the opinion of Barclay, J., (with which at least a majority of the Quebec Court of Appeal concurred) in *Feeney* v. *Lacroix*.[300] The trial judge had found (in the words of the Appeal Court) that a *Caisse populaire* (credit union) was, because of the 'nature of the operations' it carried on, excluded expressly from the definition of "corporation"[301] as being "in reality a savings bank and at the same time a loan company" — both expressly excluded classes, then as now. Though Barclay, J., did reach the same *result* — that the *caisse populaire* fell outside the definition of "corporation" and hence outside the *Bankruptcy Act* — his Lordship's reason was that the *caisse populaire* was *not* a *company* at *all*, and not that it was a company *of a class expressly excluded*. In the course of rejecting the reasons of the trial judge, Barclay, J., disapproved the use of the *activities in fact carried on* as the test:[302]

> If one could take for granted, as the parties seem to have done, that La Caisse Populaire is a corporation which comes within the terms of section 2*(k)* either as being included or excluded, I would be of the opinion that

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296 [1947] C.S. 33, 28 C.B.R. 108.
297 R.S.Q. 1941, c. 276; now R.S.Q. 1964, c. 271.
298 R.S.C. 1927, c. 11.
299 Citations *supra*, n. 286.
300 (1938), 65 B.R. 386, 20 C.B.R. 149.
301 Quoted in Appendix Six, *infra*, pp. 619-621, esp. 620.
302 (1938), 65 B.R. 386, at p. 388.

> the judgment was erroneous, because *to me it is not the nature of the operations of the company which must be looked at to ascertain whether a corporation comes within the exception, but the nature of the company at the time of its creation.* But, in my opinion, the first question to be asked is whether such a corporation as the one in question comes under the Bankruptcy Act at all....

More recently, in *Chaussé* v. *L'Association du Bien-Etre de la Jeunesse Inc.*,[303] a case on the present Act, the Quebec Queen's Bench indicated reasonably clearly that, in deciding whether the respondent was a body corporate susceptible to the *Bankruptcy Act*, regard was to be had to its incorporating laws and instruments, and not to the activities which in fact it carried on. The Queen's Bench, holding that respondent was a body corporate incorporated without object of gain, and as such outside the definition of "corporation" in section 2(*f*) of the *Bankruptcy Act*,[304] affirmed a judgment of Montpetit, J., in the Superior Court dismissing a petition in bankruptcy.[305] Montpetit, J., had held it to have been proved that respondent, contrary to its objects of incorporation, had carried on trade purely and simply for gain.[306] The learned judge considered this irrelevant: [307]

> De là, je tire une première conclusion: la corporation intimée, même s'il est absolument exact qu'elle a été constituée en vertu de la troisième partie de la loi des compagnies de Québec, a posé des actes de nature commerciale qui excédaient ses droits et pouvoirs en tant qu'entité sans but lucratif.
>
> Ceci étant, y a-t-il lieu de la déclarer sujette à la loi de faillite? En d'autres termes, et tel que signalé plus haut est-elle, ou devient-elle en regard des transactions commerciales qu'elles a faites, soit une "personne" ou une "corporation" au sens de cette loi? [His Lordship here discussed the various definitions, and continued:]
>
> Or, selon l'article 2(*f*), une "corporation" doit être soit "une compagnie constituée en corporation", soit une compagnie "*autorisée* à poursuivre des affaires... en vertu ou sous l'autorité d'une loi... de l'une des provinces du Canada."
>
> D'autre part, en me référant à la troisième partie de la *Loi des compagnies* de Québec, je constate qu'une corporation ainsi constituée n'est pas une compagnie, c'est-à-dire qu'elle n'est pas une entité ou un "body politic and corporate" dont le but principal est de réaliser des profits ou des bénéfices grâce à un capital quelconque qui y est préalablement investi.
>
> De plus, et toujours en me basant sur l'article 2(*f*), l'intimée, je l'ai déjà dit, n'est pas et n'a jamais été *autorisée* à poursuivre des affaires "en vertu ou sous l'autorité" de cette troisième partie de la *Loi des companies* de Québec.

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303 [1960] B.R. 413, affirming the decision reported in Appendix One *infra*.
304 See *supra*, pp. 578 and 586-587.
305 See the report below, Appendix One.
306 *Infra*, p. 604.
307 *Infra*, pp. 604-605.

> A mon avis, le fait qu'elle a outrepassé ses droits et pouvoirs et qu'elle a poursuivi des affaires ne peut rien changer à *l'absence d'autorisation* de ce faire.
>
> Je ne crois pas que ces abus commis par l'intimée ont fait, ou pu faire, d'elle une *"compagnie autorisée"*.

Rinfret, J., in dissent, in the Queen's Bench, pointed out [308] the finding of fact by Montpetit, J.:

> La Cour supérieure a tenu pour avéré l'exercice par l'intimée d'une commerce pur et simple aux fins de gains personnels et contrairement à son but primordial et à celui pour lequel elle avait obtenu sa charte.

Rinfret, J., further pointed out that Montpetit, J., had held that, despite this finding as to the activities in fact carried on by the respondent, respondent was still not a body corporate within the statutory definition: [309]

> Le premier juge a statué que l'intimée n'étant pas, d'une part, une compagnie, c'est-à-dire une entité corporative ou un *body politic and corporate* dont le but principal est de réaliser des profits et ayant, d'autre part, outrepassée les pouvoirs concédés par sa charte, n'étant pas, par conséquent, autorisée à poursuivre des affaires en vertu ou sous l'autorité de la troisième partie de la Lei des compagnies du Québec, n'est pas incluse dans la définition du "corporation" à l'art. 2*(f)* de la Loi sur la faillite.

The materiality of activities *in fact carried on* was thus indisputably before both the Queen's Bench and the Superior Court. Montpetit, J., in the Superior Court treated it as irrelevant, and neither the majority of the Queen's Bench, Pratte and Owen, JJ., nor Rinfret, J., in dissent, suggested otherwise. All, whatever their conclusions, characterised the respondent by an examination of its laws and instruments of incorporation. And Owen, J., explicitly considered the effect of carrying on activities beyond the objects of the charter, — though only for the limited purpose of deciding whether, *quoad* such activities, respondent must be considered a *"person" under the one rubric* of "unincorporated association": [310]

> Respondent was incorporated by letters patent under section 214 of the Quebec Companies Act. The fact that it may have exceeded its corporate powers would not in my opinion be a justification for considering it to be "an unincorporated association" insofar as its activities in excess of the purposes or objects set forth in its charter are concerned. In other words, it should not be considered a corporation when acting within its powers and an unincorporated association when acting beyond its powers.

Owen, J., went on, however, to consider the legal character of respondent without having regard for *any purpose* to its actual activities.

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308 [1960] B.R. 413, at p. 417.
309 *Ibid.*, at p. 418.
310 *Ibid.*, at p. 417.

It is submitted, with respect, that the view taken by the courts is correct; namely, that the character of a body corporate, for the purposes of deciding whether it is a "*company*", and whether it falls within one of the enumerated excluded classes, is to be determined by reference to its incorporating laws and instruments. *It should not be supposed, however, that activities in fact carried on may not be highly relevant* for *other* purposes of the definition of "corporation" in section 2 (*f*). Thus, when once a body *is* found to be a "company" [whatever that properly includes [311]], and *not* to fall in one of the expressly excluded classes, it is then the *fact* of *having an office* in Canada, or the *fact* of *carrying on business* in Canada, which will bring it within section 2(*f*).[312]

Capacity, Objects, and Powers. So far as the character of a body corporate is, for the purposes of bankruptcy jurisdiction, to be determined with reference to its incorporating laws and instruments, it remains to be decided whether it is the *capacity* conferred, the *objects*, or the *powers* which are material; or whether more than one must be considered.

These are terms with many possible meanings, and disputes about their meanings are disputes about the rules which depend upon them.

It is obviously beyond the scope of this paper to subsume, under an account of Canadian bankruptcy jurisdiction, another analysis of the basic concepts of company law, and a critique of the judicial decisions by with its rules have been elaborated. Much might be said about the *ultra vires* doctrine. A cheque, for example, is not the more a statutory instrument for being defined, and having its incidents regulated, by the *Bills of Exchange Act*; and if the law of contract were codified in England, contracts would not for that reason alone become statutory instruments. While, therefore, the objects or powers set out in the incorporating Act of *those companies created directly by Act of Parliament* can, as a matter of public law, be held limitative *of the bare capacity* of these companies — with *ultra vires* acts "of" the latter being in consequence wholly void and indeed unimputable to the statutory body — why must the same necessarily be true of companies incorporated, not *by* statute, but rather by instruments made *under the authority* of a statute? [313]

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311 *Supra*, pp. 557-586, esp. pp. 579-586.

312 *Supra*, pp. 586-587.

313 Whatever may be said in favour of *Ashbury Railway* v. *Riché*, (1875), L. R. 7 H. L. 653, that decision does not necessarily follow, as Lord Selborne appears to have though (pp. 693-4), from the rule regarding corporations created directly by statute or by an instrument properly described as a statutory instrument.

Assuming that the ultra vires doctrine of *Ashbury Railway* v. *Riché*[314] cannot be disturbed, its effect, *where relevant in Canada*, will apparently be to render the *ultra vires* acts not even imputable to the company in question, as beyond its bare capacity.[315] So a body which is a company but which, though neither incorporated to carry on business nor authorized to carry on business, *does in fact* carry on business, will not, for that reason alone, come within the second branch of the definition of "corporation" in section 2(*f*), since, as a creature limited by law in its bare capacity, it was literally incapable of carrying on the business, which can be imputed only to others.

Where the doctrine of *Ashbury Railway* v. *Riché*[316] does *not* apply, *because excluded* by statute, or by common law (as in the case of "letters-patent" companies such as are assimilated to natural persons),[317] it is necessary to decide *how far the susceptibility of a company to bankruptcy jurisdiction is affected by the fact that it may have acted beyond its objects*, though within its bare capacity, or *have exceeded its powers*, or *have violated prohibitions or commands* to be found in its incorporating instruments or legislation, or, indeed, in other laws.

When once it is established that the material facts (unlawful or not) *can*, in law, be *imputed* to the company, the above question is answered by what has been said earlier about the relevancy of activities *in fact carried on*. The second branch of section 2(*f*) makes it enough for a body corporate which *is* a *company* to have *in fact* an office or to carry on business *in fact*; it will then be a 2(*f*) corporation, unless of course it is one of the expressly excluded classes. On the other hand, it would seem irrelevant to the *express statutory exclusions made by section* 2(*f*) that a company, incorporated without either the objects or powers of an insurance, trust, loan, or railway company [etc.], may have *in fact* carried on such activities. It is *still not* an insurance, trust, loan, or railway company [or as the case may be], and still not excluded as such from the Act.

It will be observed that we have still the unanswered question as to how far the character of a body corporate is to be determined with reference to its *objects* and how far with reference to its *powers*.

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314 (1875), L. R. 7 H. L. 653.

315 See *supra*, n. 285 as regards an attempt to limit the nullity to a nullity *quoad* certain parties. It is submitted that if the same principle is to be applied to the bodies incorporated under Companies acts as to bodies created by Act of Parliament, *ultra vires* activities are in principle absolutely void *erga omnes*.

316 (1875), L. R. 7 H. L. 653.

317 *Bonanza Creek Gold Mining Company, Limited* v. *The King*, [1916] 1 A.C. 566.

Laying down as a general principle under the 1919 Act[318] that "non-profit" bodies corporate were not subject to bankruptcy jurisdiction, Boyer J. in 1947 in *Beaubien* v. *L'Union Economique d'Habitation*,[319] considering a housing union incorporated without object of gain under Part III of the *Quebec Companies Act*[320] with the object of providing its members with moderate-cost housing, held that a non-profit corporate body was outside bankruptcy jurisdiction, *nothwithstanding that it might enjoy powers which would be granted to a trading company.* The housing union in the case at bar enjoyed these powers, his Lordship held, for the *objects* for which it had been organized.[321]

On the present author's view of the law, the question need never have arisen in that case. The Union Economique d'Habitation was not the less a company for being organized without object of gain. If it *was* a company, it was enough, under the *second* branch of the definition of section 2(*f*), that it *did* have an office in, or *did* carry on business in, Canada — even leaving aside the author's further opinion that incorporation in Canada was a sufficient alternative, under the *first* branch of section 2(*f*), to authorization in Canada to carry on business.

But, if the authorities are right in holding that a "non-profit" body corporate is not a company at all, it is necessary to decide whether, in that state of the law, what we have briefly called a "non-profit" body corporate shall be taken as one incorporated *without object of gain* or one incorporated *without powers of gain.* The authorities, more especially the *Chaussé* case,[322] and in particular the opinion of Montpetit J., appear to indicate that it is the ultimate objects rather than the powers which are material.

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318 R.S.C. 1927, c. 11.

319 [1947] C.S. 33, 28 C.B.R. 108.

320 R.S.Q. 1941, c. 276; now R.S.Q. 1964, c. 271.

321 *Per* Boyer, J., [1947] C.S. 33, at p. 35: "Les requérants, toutefois, prétendent que les pouvoirs accordés sont ceux d'une société commerciale et que l'intimé a de fait fait commerce.

Il est vrai que l'intimé a des pouvoirs qui seraient accordés à une compagnie commerciale, mais elle les a, non pas pour faire un profit, mais dans le but pour lequel elle a été organisée."

322 [1960] B.R. 413, affirming the decision of the Superior Court reported *infra*, Appendix One. See the quotations, *supra*, pp. 595-596.

III. Conclusions

Obvious considerations of policy can support the *express* exclusion from the *Bankruptcy Act* of certain classes of corporation, particularly since Parliament has, in general, made other provision for their liquidation. It might be thought implausible for the trustee to advertise in the press for the sale of fifty diesel locomotives, a number of railway stations, or the track from Montreal to Toronto.

The policy which leads to the *implied* exclusion, inferred by the courts, of municipal and other governmental bodies, is no easier to quarrel with. It is difficult to envision a City Council chamber where the trustee sits in the mayor's seat, surrounded by the inspectors, passing by-laws to provide for snow removal and to levy enough taxes to leave a surplus distributable amongst creditors who have proved their claims.

What *is* difficult to understand is why a trustee in bankruptcy is any the less suited to the liquidation of the assets of a private golf club than to the assets of a commercial corporation. It is hard, in short, to discern — much less justify — the policy which has led the courts to find *implied* by the *Bankruptcy Act* an exclusion of non-profit bodies corporate *as such* from bankruptcy jurisdiction.

Under the *old Bankruptcy Act*, the courts could rely on the phrase which made it necessary, in order to be a *"debtor"*, and so subject to the Act, to be, under the single head applicable to a "corporation", a corporation *"which carried on business in Canada"*.

Under the *present* Act, in order to be a *"debtor"*, and so subject to bankruptcy jurisdiction, the relevant requirements — stated in language equally applicable to individuals and corporate persons — are that one reside *or* carry on business in Canada. A corporation, like an individual, can have a residence.

To be a *"debtor"* as defined in the Act, it is necessary to be a *"person"* as therein defined. Amongst the classes of *"person"* is *"corporation"*, itself the subject of a restrictive definition. The draftsman apparently intended the restrictions on *"corporation"* to be carried over onto *"person"* [forgetting however that *"person"* would become too narrow to be applied to most sections of the Act without producing absurd and impossible results]. The draftsman similarly intended the restrictions thus put upon *"person"* to be carried over onto *"debtor"* and *"insolvent person"*, thus indirectly regulating the scope of bankruptcy jurisdiction by regulating the definition of *"corporation"*.

Effect must be given to the Act by carrying the *express* restrictions on *"corporation"* over onto *"person"* and thence to *"debtor"* — though

in most sections of the Act *"person"* has then to be understood in an unrestricted sense.

It is one thing to give effect to *express* restrictions, and another to *imply* them. The courts have proceeded to engraft onto the definition of *"corporation"* the implied restriction that no non-profit body corporate can be a *"corporation"*. They have done this in face of legislation which makes no such distinction in the case of individuals. Of the reasons which they have offered in support of their doing so, one, and one only, enjoys any degree of plausibility, and that is that non-profit bodies corporate cannot be *"companies"*. If this were so, such bodies would indeed fall outside the statutory definition of *"corporation"*; but it is submitted, with respect, for the reasons given above, that there is no general rule that non-profit bodies corporate cannot be "companies". Some, particularly of a governmental character, probably cannot. Doubtless they would in any even be held impliedly excluded from the Act as inherently unsuitable to its subject-matter. But most non-profit bodies corporate can, and should, be considered *"companies"* as that word is used in the *Bankruptcy Act* definition of *"corporation"*, and therefore susceptible to bankruptcy jurisdiction.

The other argument for excluding non-profit bodies corporate from the definition of *"corporation"* is wholly lacking in substance. It is based on the reference, in that definition, to "business". But the latter half of the definition of *"corporation"* — iguored by the courts — makes it enough for an incorporated company to have "an office in" *OR* to carry on business within Canada.

For reasons fully set out above — partly because the French text cannot be read otherwise — it is submitted that the definition of *"corporation"* in the *Bankruptcy Act*, must, subject always to the express exclusions, be read as embracing four alternative possible classes:

(1) any company incorporated by or under an Act of the Parliament of Canada or of any of the provinces of Canada;

(2) any company authorized to carry on business by or under an Act of the Parliament of Canada or of any of the Provinces of Canada;

(3) any incorporated company, wheresoever incorporated, that has an office in Canada;

(4) any incorporated company, wheresoever incorporated, that carries on business within Canada.

To be a *"debtor"* or an *"insolvent person"*, and so subject to the Act, some other requirements must of course be met; *inter alia* residing *or* carrying on business in Canada.

How corporations are to be characterized for purposes of the above rules is elaborated above in the body of the article.

To the draftsman of the next revision, the author would commend the policy of avoiding special definitions as far as possible. If it is desired to exclude certain classes of corporations from being subject to bankruptcy jurisdiction, the proper means of doing so is to insert a provision saying so. Such definitions as "debtor" or insolvent person" may perhaps be workable as they are; but it is easy to see what grotesque results flow from trying to apply to all, or even to most, sections of the Act, the restrictive definitions of "corporation" and "person". Even if the draftsman remembers always that he has specially defined a term, and even if he uses it consistently on every occasion, his successor a decade later, drafting an amending Act, is likely to forget.

APPENDIX ONE

CHAUSSE *v.* L'ASSOCIATION DU BIEN-ETRE DE LA JEUNESSE INC., Superior Court of the Province of Quebec: In Bankruptcy; District of Montreal, No. 240/1956. Judgment rendered by the the Honourable Mr. Justice André Montpetit, March 12, 1957. Affirmed, [1960] B.R. 413.

Mr. Justice Montpetit

La cour, saisie de la requête en faillite, après avoir entendu la preuve et les procureurs des parties en cause, examiné les procédures, les exhibits et les mémoires produits, et, sur le tout, délibéré:

I

Attendu que le requérant, créancier de la corporation intimée, allègue que celle-ci a cessé, au cours des derniers six mois, de faire honneur à ses obligations au fur et à mesure qu'elles étaient échues, a disposé de ses biens et a cherché à cacher et à soustraire à ses créanciers en général le produit de la vente de ses biens;

Attendu que la corporation intimée conteste les susdites allégations du requérant et plaide spécifiquement que la loi de faillite ne lui est pas opposable;

Attendu que la contestation a été dûment liée;

II

Sans discuter pour l'instant de la preuve concernant les actes de faillite que la corporation intimée aurait commis, ou pu commettre, je veux m'arrêter d'abord à la question de savoir si elle a raison, ou non, de prétendre que la loi de faillite ne peut lui être opposée.

Cette prétention est essentiellement basée sur le fait que l'intimée est une corporation constituée selon les dispositions de la troisième partie de la *Loi des compagnies* de Québec (S.R.Q. 1941, c. 276) et qu'elle n'est ni «une personne», ni «une corporation» au sens de la loi de faillite.

D'après l'article 214 de la *Loi des compagnies* de Québec, trois personnes ou plus peuvent se procurer une charte les constituant en corporation «sans intention de faire un gain pécuniaire, dans un but national, patriotique, religieux, philanthropique, charitable, scientifique, artistique, social, professionnel, athlétique ou sportif ou autre du même genre.»

C'est en invoquant ces dispositions que la corporation intimée obtint une charte, le 8 janvier 1927.

Cette charte énumère les objets ou buts de la corporation comme suit:

a) Succéder, à toutes fins que de droit, à l'Association pour le Bien-Etre de la Jeunesse, en assumer les fonctions et en accepter toutes les charges et obligations;

b) S'occuper du développement de la jeunesse en général, mais en particulier du progrès physique, intellectuel et moral de la jeunesse canadienne-française et catholique;

c) Organiser dans ce but tous genres de réunions récréatives ou intellectuelles, telles que conférences, concerts, voyages, jeux athlétiques, concours littéraires ou autres;

d) Etendre son champ d'action dans toutes les parties de la Province de Québec;

e) Acheter, louer, ou autrement acquérir et posséder tous terrains, bâtisses, ou biens immobiliers quelconques, pourvu que la valeur totale de tous les biens immobiliers acquis et possédés à titre de propriétaires ne dépasse, en aucun temps, la somme de $100,000.00;

f) Faire la location de tous ou partie de tels immeubles, les vendre, échanger ou autrement aliéner, en acquérir d'autres à leur place;

g) Se procurer les fonds nécessaires à son but, et ce par contribution imposée à ses membres, souscription, quête publique, kermesse, pourvu qu'elle se conforme, dans chaque cas, aux lois ou règlements en vigueur dans la ou les localités où s'organiseront telles fêtes, quêtes publiques ou kermesses;

h) Fonder et maintenir, à Montréal ou ailleurs, des maisons ou établissements secourables, de façon à pouvoir venir en aide aux orphelins ou autres enfants que l'Association jugera à propos d'aider;

i) Aider l'instruction et l'établissement des jeunes gens que l'Association jugera devoir secourir; stimuler l'amour de l'étude par l'octroi de récompense ou autrement, et généralement promouvoir le bien-être physique, moral et intellectuel de la jeunesse par tous les moyens qu'elle jugera convenables;

j) Venir en aide. seconder, secourir pécuniairement ou autrement, toutes autres associations de bienfaisance qu'elle jugera à propos;

k) Emprunter toutes sommes de deniers jugées nécessaires à ses fins, par billets, obligations ou autrement, et garantir le remboursement de tels emprunts par nantissement ou hypothèques consentis sur les immeubles de l'Association;

l) Engager toutes les personnes dont les services peuvent être jugés nécessaires ou utiles pour l'administration des affaires de l'Association et l'accomplissement de ses oeuvres et de ses fonctions;

m) Passer généralement tous contrats et contracter tous engagements ou obligations nécessaires ou utiles à l'administration des affaires de l'Association et l'accomplissement de ses oeuvres et de ses fonctions;

n) Adopter tous les règlements qu'elle jugera à propos relativement à l'admission des membres, le montant de leur contribution, l'élection et la qualification des directeurs, l'administration générale de l'Association et son bon fonctionnement.

Il est évident qu'aux fins d'atteindre son objectif principal, à savoir:... (b) «s'occuper du développement de la jeunesse en général, mais en particulier du progrès physique, intellectuel et moral de la jeunesse canadienne-française et catholique,» la corporation intimée avait le droit de poser certains actes d'un caractère plus ou moins commercial, dont, entre autres, ceux indiqués dans les paragraphes *e*, *f*, *g*, *k* et *m* ci-dessus cités.

Nul doute cependant que la corporation intimée, en se prévalant ainsi de ce droit, se devait de rechercher non pas un but lucratif personnel ou un gain pécuniaire en soi, mais simplement une source de revenus destinés à lui permettre d'atteindre son objectif principal.

Or, le requérant, dans sa réponse à la contestation, n'a pas manqué de souligner (1) que la corporation intimée avait outrepassé ses pouvoirs (paragraphe 3); (2) que les immeubles érigés sur son terrain, au Bout de l'Ile, et la plage qui s'y trouve ...«ont servi beaucoup plus et presque exclusivement, en ces dernières années, à des fins commerciales qu'aux loisirs des jeunes en général, à titre charitable» (paragraphe 4); (3) que... «de toute façon, l'intimée n'a pratiqué aucune fin charitable depuis de nombreuses années» (paragraphe 5); (4) et que... «les revenus de l'intimée provenaient en majorité de la maison de touristes, de sa plage et des autres commerces qu'elle opérait» (paragraphe 6).

De l'ensemble de la preuve, et compte tenu de certaines admissions et explications fournies par le témoin Chalifoux et du témoignage réticent et plus ou moins sincère de Mademoiselle Albertine Tremblay, la secrétaire de la corporation intimée, qui, manifestement, n'a pas voulu dire *toute* la vérité et a cherché à jouer sur les mots, je suis convaincu que ladite corporation, au cours des dernières années pour le moins, a excédé les pouvoirs que lui conférait sa charte, a fait commerce purement et simplement, a cherché à faire des gains personnels et a perdu de vue, en tout ou en partie, son but primordial et celui pour lequel elle avait obtenu une charte, à savoir, de s'occuper de la jeunesse en général et, en particulier, du progrès physique, intellectuel et moral de la jeunesse canadienne-française et catholique.

De là, je tire une première conclusion: la corporation intimée, même s'il est absolument exact qu'elle a été constituée en vertu de la troisième partie de la *Loi des compagnies* de Québec, a posé des actes de nature commerciale qui excédaient ses droits et pouvoirs en tant qu'entité sans but lucratif.

Ceci étant, y a-t-il lieu de la déclarer sujette à la loi de faillite? En d'autres termes, et tel que signalé plus haut, est-elle, ou devient-elle en regard des transactions commerciales qu'ell a faites, soit une «personne» ou une «corporation» au sens de cette loi?

L'article 2 (*m*) dit d'une «personne» qu'elle «comprend une société en nom collectif, une association non constituée en corporation, une corporation, une société ou organisation coopérative, les successeurs de pareille société en nom collectif, association, corporation, société ou organisation, ainsi que les héritiers, exécuteurs testamentaires, administrateurs ou tout autre représentant légal d'une personne, conformément à la loi de la partie du Canada à laquelle s'étend le contexte».

L'article 2 (*f*) mentionne, par contre, qu'une «corporation» comprend «toute compagnie constituée en corporation ou autorisée à poursuivre des affaires en vertu ou sous l'autorité d'une loi du Parlement du Canada, ou de l'une des provinces du Canada, ainsi que toute compagnie constituée en corporation, en quelque lieu qu'elle ait été constituée en corporation, qui a un bureau au Canada ou qui poursuit des opérations au Canada, mais ne comprend pas les sociétés de construction avec un capital-actions, ni les banques, caisses d'épargne, compagnies d'assurance, compagnies de fiducie, compagnies de prêt ou compagnies de chemin de fer constituées en corporations».

Même s'il est vrai que l'article 2 (*m*) en énonçant que le mot «personne» comprend une «corporation», et ce, sans ajouter comme cela était le cas dans l'ancienne loi (article 2cc) ... «a corporation as restrictively defined by this section», il n'en demeure pas moins que la définition (si l'on peut dire que cela en est une) du mot «corporation» est demeurée restrictive ou limitative dans ses termes, de telle sorte que la jurisprudence qui m'a été citée sur ce point s'applique toujours (voir *In re: l'Union Economique d'Habitation*, 28 C.B.R. 108 et les jugements mentionnés au haut de la page 109).

Puisqu'il en est ainsi, je ne vois pas comment je pourrais donner à ce mot un sens ou une portée qui sortirait des cadres fixés par le législateur lui-même.

Or, selon l'article 2 (*f*), une «corporation» doit être soit «une compagnie constituée en corporation», soit une compagnie «*autorisée* à poursuivre des affaires... en vertu ou sous l'autorité d'une loi... de l'une des provinces du Canada.»

D'autre part, en me référant à la troisième partie de la *Loi des compagnies* de Québec, je constate qu'une corporation ainsi constituée n'est pas une compagnie, c'est-à-dire qu'elle n'est pas une entité corporative ou un «body politic and corporate» dont le but principal est de réaliser des profits ou des bénéfices grâce à un capital quelconque qui y est préalablement investi.

De plus, et toujours en me basant sur l'article 2 (*f*), l'intimée, je l'ai déjà dit, n'est pas et n'a jamais été *autorisée* à poursuivre des affaires «en vertu ou sous l'autorité» de cette troisième partie de la *Loi des compagnies* de Québec.

A mon avis, le fait qu'elle a outrepassé ses droits et pouvoirs et qu'elle a poursuivi des affaires ne peut rien changer à *l'absence d'autorisation* de ce faire.

Je ne crois pas que ces abus commis par l'intimée ont fait, ou pu faire, d'elle une «*compagnie autorisée*».

Dans les circonstances, et sans qu'il y ait lieu ici de discuter des autres moyens soulevés de part et d'autre, je suis d'opinion de rejeter la requête.

III

Vu ce que ci-dessus;

Considérant que la requête est mal fondée en droit, et ce, pour les motifs mentionnés plus haut;

Considérant, dans l'opinion du juge soussigné, qu'il s'agit ici d'un cas où le requérant ne devrait pas être condamné à payer à l'intimé quelques frais et dépens que ce soient;

Pour ces raisons:

La Cour rejette la requête, sans frais.

APPENDIX TWO

IN RE CENTRE CULTUREL DU VIEUX MONTREAL, Superior Court of the Province of Quebec: In Bankruptcy; District of Montreal, No. 7714. Judgment rendered by the Honourable Mr. Justice André Montpetit, February 6, 1968.

By proposal filed December 8, 1967, the insolvent Centre Culturel du Vieux Montréal submitted for the consideration of its creditors certain terms respecting the payment of its debts and the supervision and control of its affairs.

A meeting of creditors to consider the proposal was held on January 24, 1968 and adjourned to January 31, 1968, at which time the proposal was refused for lack of approval by the three-fourths in value of the creditors required by section 32 B of the *Bankruptcy Act.*

By petition datod February 1, 1968, and filed on February 6, 1968, R. V. Barnett, C.A., in his quality as Trustee under the proposal, after reciting facts to the above effect, alleged as follows:

"4. That since said Proposal was lodged with your Petitioner, your Petitioner has become aware of the following facts:

"(a) That the Debtor under the corporate name «Théâtre de l'Ancienne Bourse» was incorporated by Letters Patent dated January 20, 1966 under the provisions of Part III of the *Companies Act,* R.S.Q. [19]64, Chap. 271 for purposes other than pecuniary gain, the whole as appears from Xerox copy of Letters Patent filed and produced herewith as Petitioner's Exhibit P-1;

"(b) That by Supplementary Letters Patent bearing date of November 10, 1966, the name of said corporation was changed from «Théâtre de l'Ancienne Bourse» to «Centre Culturel du Vieux Montréal» the whole as appears from Xerox copy of said Supplementary Letters Patent filed and produced herewith as Petitioner's Exhibit P-2;

"(c) That so incorporated and for such purposes, the Debtor is not a "corporation" as same is defined under the provisions of Section 2 (*f*) of the *Bankruptcy Act* and said Act does not extend to and the Debtor is not entitled or qualified to proceed thereunder (*Chaussé* v. *L'Association du Bien-Etre de la Jeunesse Inc.*, [1960] B.R. 413).

"5. That in consequence your Petitioner was in error in allowing such Proposal to be lodged with him under the provisions of the *Bankruptcy Act* and having same received by this Honourable Court;

"6. That seeing the nullity of such proceedings, it is in the interest of the Debtor and its creditors that such nullity be so declared and that all proceedings with respect thereto under the provisions of the *Bankruptcy Act* be forthwith voided and terminated for all purposes.

"Wherefore your Petitioner prays that by judgment to intervene herein, it be declared:

"(a) That all proceedings by way of a Proposal under the provisions of the *Bankruptcy Act* initiated by the Debtor herein are null and void *ab initio,* same having been illegally lodged with Petitioner and received by this Honourable Court;

"(b) that Petitioner be discharged as Trustee for all purposes the whole without prejudice to the validity of any act duly done by him under or in pursuance of the Proposal.

"The whole without costs on the proceedings both on the proceedings under the said Proposal and on this Petition."

The following is an extract from Letters Patent under the Great Seal of the Province of Quebec bearing date June 20, 1966, incorporating the debtor «pour les objets suivants: Exploiter et administrer les salles de théâtre, donner pour le public des représentations musicales et dramatiques de toutes sortes de même que des exhibitions et divertissements de toutes sortes.»

There was filed in the record an acknowledgment by the debtor of receipt of a copy of the petition in lieu of service, a waiver of delays, and consent to judgment being granted according to the conclusions.

Broderick, McQuillan and Kennedy, Advocates, appeared for Petitioner.

The debtor did not appear.

The judgment of the Court was rendered on February 6, 1968, by the Honourable Mr. Justice André Montpetit, as follows.

Mr. Justice Montpetit

"The Court, seized of the Petition for order declaring Proposal null and void and discharging trustee:

"Seeing the contents of the Petition and the affidavit in support thereof;

"Seeing the exhibits;

"Seeing default of the Insolvent to appear;

"Considering that the Petition is well founded in fact and law;

"For these reasons:

"Doth grant the said Petition without costs;

"Doth declare null and void *ab initio*, all proceedings by way of a Proposal under the provisions of the *Bankruptcy Act* initiated by the Debtor, same having been illegally lodged with Petitioner and received by this Honourable Court;

"Doth discharge the Petitioner as trustee for all purposes the whole without prejudice to the validity of any act duly done by him under or in pursuance of the Proposal."

APPENDIX THREE

BANKRUPTCY AND WINDING-UP ACTS

The *Bankruptcy Act*, 4 & 5 Geo. 5, 1914, c. 59 (U.K.) provides by s. 1(2) that: 'In this Act, the expression "a debtor," unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him —

(a) was personally present in England; or

(b) ordinarily resided or had a place of residence in England; or

(c) was carrying on business in England, personally, or by means of an agent or manager; or

(d) was a member of a firm or partnership which carried on business in England.'

Insolvent *companies* are in England dealt with under the law relating to winding-up, contained in the Companies legislation itself. See L. C. B. Gower, *Modern Company Law*, 2nd ed., (London, 1957), p. 578: 'The process ... resembles bankruptcy and follows its rules closely if the company is insolvent. A company cannot be made bankrupt; instead it must be wound up under a separate but not dissimilar procedure. But here the differences are more marked. If a company is put into liquidation it cannot, like a bankrupt individual, obtain its discharge and continue freed from the burden of its debts. The liquidation winds up its affairs and then kills it — although, under a reconstruction it may rise like a phoenix from the ashes of its funeral pyre.'

In Canada, the Insolvent Act of 1875, *An Act respecting Insolvency*, 38 Vict., S.C. 1875, c. 16, was by s. 1 declared to apply not only to traders and trading co-partnerships, but also to "trading companies whether incorporated or not, except Incorporated Banks, Insurance, Railway, and Telegraph Companies."

When, forty years after the repeal of this statute (during which time the only general insolvency legislation in Canada was that respecting the winding-up of insolvent companies) the *Bankruptcy Act, 1919*, was enacted (9-10 Geo. V, S.C. 1919, c. 36), the definition of "debtor" which it contained [see Appendix Six, *infra*, at pp. 619 *et seq.*] was in all material respects identical with the definition quoted above from the British Act; except that (*d*) read "was *a corporation or* a member of a firm or partnership which carried on business in Canada". The federal *Winding-up Act* and the *Bankruptcy Act* thus overlapped; provision was made for this which, in substance, made the latter Act prevail: s. 2(*o*); the Court being later given power to order otherwise: *The Bankruptcy Act Amendment Act, 1920*, 10-11 Geo. V, S.C. 1920, c. 34, s. 2; *The Bankruptcy Act Amendment Act, 1922*, 12-13 Geo. V, S.C. 1922, c. 8, s. 2; *The Bankruptcy Act Amendment Act, 1923*, 13-14 Geo. V, S.C. 1923, c. 31, s. 2(6); the *Bankruptcy Act*, R.S.C. 1927, c. 11, s. 153. See *Argus Adjusters and Appraisers Ltd.* v. *Assistance Loan and Finance Corp.*, [1964] B.R. 375; *sub nom., Re Taxi Owners' Reciprocal Insurance Association*, (1963), 44 D.L.R. (2d) 692.

The federal *Winding-up Act*, now R.S.C. 1952, c. 296 can, it would seem, put an end to the corporate state and powers, though (s. 19) this will not happen until the winding-up is completed; see *Jolicoeur* v. *Boivin et Cie Ltée*, [1951] R.P. 369; *McCarter* v. *York County Loan Co.*, (1907), 14 O.L.R. 420; *Re Clarke and The Union Fire Insurance Company*, (1887), 14 O.R. 618, at p. 620, per Boyd, C.; aff'd. (1889), 16 O.A.R. 161; aff'd. *sub nom. Schoolbred* v. *Clarke*, (1890), 17 S.C.R. 265. However, the *Bankruptcy Act, per contra*, has no such effect: *Banque Provinciale du Canada* v. *Ross*, [1955] C.S. 292, 35 C.B.R. 198; *National Trust Co.* v. *Ebro Irrigation and Power Co.*, [1954] O.R. 463, at p. 481, [1954] 3 D.L.R. 326; *Re Canadian Cereal and Flour Mills Co. Limited*, (1921), 51 O.L.R. 316, 67 D.L.R. 234, 2 C.B.R. 158 (Orde, J.). On the other hand, until July 11, 1966, a corporation might apply for a discharge under the *Bankruptcy Act*, but not under the *Winding-up Act*; see now the new s. 127 (3a) added to the *Bankruptcy Act*, R.S.C. 1952, c. 14, by 14-15 Eliz. II, S.C. 1966–67, c. 32, s. 17: "A corporation may not apply for a discharge unless it has satisfied the claims of its creditors in full."

Since July 11, 1966, the *Bankruptcy Act* has had unequivocal precedence over the *Winding-up Act* in all cases where both can apply; and a receiving order or assignment under the former Act operates the abatement of proceedings under the latter: *Bankruptcy Act*, R.S.C. 1952, c. 14, s. 163A, added by 14-15 Eliz. II, S.C. 1966-67, c. 32, s. 20.

It should be borne in mind that the application of the federal winding-up legislation to *provincially*-incorporated companies [foreign companies present rather more difficult issues] is based primarily on the federal legislative power in relation to "Bankruptcy and Insolvency" (*B.N.A. Act, 1867*, s. 91 (21)). Liquidation for causes other than insolvency would ordinarily be taken under *provincial* winding-up acts. See Duncan and Honsberger, *op. cit.*, pp. 25-6; *Can. Abr.* (2d), tit. "Corporations", vol. 8, pp. 690 *et seq.* The jurisdiction claimed by the federal Act is *ex facie* somewhat wider than the above would suggest: R.S.C. 1952, c. 296, s. 6 (*b*), quoted *supra*, n. 17, and authorities hereinbefore cited, esp. Duncan and Honsberger, *op. cit.*, p. 26, n. 19. See *A.-G. Ontario* v. *Policyholders of Wentworth Insurance Company*, [1969] S.C.R. 779, 12 C.B.R. 265, 6 D.L.R. (3d) 545.

The present *Bankruptcy Act*, R.S.C. 1952, c. 14, as amended, no longer makes, as did the 1919 Act, the carrying on of business a condition of being a *"debtor"* in the case of corporations: s. 2(*i*). As to the definition of *"corporation"* itself (s. 2(*f*)), we shall see that, on its face, it is enough that a body corporate be a *company*, and that it have an office in Canada *or* carry on business in Canada *or* be empowered in Canada to carry on business *or even* (*semble*) simply be incorporated in Canada without more: see *supra*, pp. 554-586. As to the scope of the term *"company"* itself, see *supra*, pp. 557-586.

APPENDIX FOUR

INSOLVENT BUILDING SOCIETIES, BANKS, AND INSURANCE, TRUST, LOAN, AND RAILWAY COMPANIES.

The definition of *"corporation"* in the *Bankruptcy Act*, R.S.C. 1952, c. 14, s. 2(*f*), expressly provides that it "does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies" — «mais ne comprend pas les sociétés de construction avec un capital-actions, ni les banques, caisses d'épargne, compagnies d'assurance, compagnies de fiducie, compagnies de prêt ou compagnies de chemin de fer constituées en corporations[.]» The English and French texts cannot mean the same thing unless the torms "incorporated" and «constituées en corporations» qualify *all* the listed classes of bodies from banks to railway companies inclusive — rather than merely *banks* in the English text and *compagnies de chemin de fer* in the French. See *Argus Adjusters and Appraisers Ltd.* v. *Assistance Loan and Financc Corp.*, [1964], B.R. 375; *sub nom., Re Taxi Owners' Reciprocal Insurance Association*, (1963), 44 D.L.R. (2d) 692, *per* Owen, J., at [1964] B.R. 377, 44 D.L.R. (2d) 698, approving *inter alia* the fourth ground of appellant's argument. Owen, J., spoke for himself and Bissonette, Montgomery and Rivard, JJ. The D.L.R. report shows the emphasis added. See also the reasons of Bissonnette, J., [1964] B.R., at p. 379, speaking of exclusion from the *Bankruptcy Act* "lorsque toutes ces sociétés sont constituées en corporation (art. 2, para. f.)."

The foregoing restrictive definition of *"corporation"*, when applied in conjunction with section 2 (*m*) which defines *"person"*, section 2 (*j*) which

defines "*insolvent person*", and section 2 (*i*) which defines "*debtor*", operates the exclusion from bankruptcy jurisdiction of the above-enumerated classes of corporation.

"[B]uilding societies having a capital stock", excluded in those terms from the English version of the *Bankruptcy Act* (as above indicated), are included *eodem nomine* in the *Winding-up Act*, R.S.C. 1952, c. 296, s. 6 [considered in *Re People's Loan and Deposit Co.*, (1906), 7 O.W.R. 253, at p. 265]. It should be observed that while the French text of the *Bankruptcy Act* (*Loi sur la faillite*) excludes «les sociétés de construction avec un capital-actions», the French text of the *Winding-up Act* (*Loi sur les liquidations*) «s'applique... aux sociétés de construction qui ont un capital social». The French texts would suggest that while the *Bankruptcy Act* excludes only such societies as have a *share* capital, the *Winding-up Act* includes such as have a capital of *any* kind. This would produce a certain overlap. By s. 2(*a*), the *Winding-up Act* provides that 'In this Act... "capital stock" includes a capital stock *de jure* or *de facto*'; 'Dans la présente loi, l'expression ...*a*) «capital social comprend un capital social de droit ou un capital social de fait[.]' The same Act goes on to provide that '7. This Act does not apply to building societies that have not a capital stock...'; '7. La présente loi ne s'applique pas aux sociétés de construction qui n'ont pas de capital social...'. See *Beaubien* v. *L'Union Economique d'Habitation*, [1947] C.S. 33 *supra*, p. 526, and esp. n. 24. It is perhaps desirable to repeat that it is also, speaking roughly, necessary to the application of the *Winding-up Act* of Canada that the bodies in question be either federally-incorporated or else insolvent: s. 6, but compare s. 6(b), and see the authorities referred to in Appendix Three, *supra*, pp. 607-609.

"[B]anks" and "savings banks", excluded in terms from the *Bankruptcy Act*, as above indicated, are in terms included under the *Winding-up Act* of Canada, R.S.C. 1952, c. 296, s. 6. By the new *Interpretation Act*, 16 Eliz. II, S.C. 1967-68, c. 7, s. 28(2), '"bank" or "chartered bank" means a bank to which the *Bank Act* applies[.]' See also the *Bank Act*, 14-15-16 Eliz. II, S.C. 1966-67, c. 87. ss. 120 to 133. For savings banks, see the *Quebec Savings Banks Act*, 14-15-16 Eliz. II, S.C. 1966-67, c. 93, and especially ss. 102 to 113. As indicated in the first paragraph of this note, the word "*incorporated*" must qualify "*bank*" and apparently also "*savings bank*" in the enumeration of institutions *excluded* from the *Bankruptcy Act*. As might be expected, the institutions *included* in the *Winding-up Act* (s. 6) are 'incorporated banks, savings banks', translated as 'banques constituées en corporations, ...caisses d'épargne[.]' Such restrictions as may be imposed upon the term "bank", by the qualifying adjective "incorporated" and by the effect of the *Interpretation Act* (if any; the two acts in question antedate it), will serve to limit the exclusions from the *Bankruptcy Act* and the inclusions in the *Winding-up Act*.

"[I]nsurance companies"; "companies d'assurance" are, as indicated, expressly excluded from the *Bankruptcy Act*; as suggested above, in the first paragraph of this note, these terms are qualified by the adjectives "incorporated" and "constituées en corporations" respectively. This would be consistent with, and exactly correlative to, the explicit inclusion under the *Winding-up Act* (s. 6) of "incorporated insurance companies"; "companies d'assurance constituées en corporation". See *Argus Adjusters*, *supra*, for, *inter alia* the drastic consequence on policyholders of an unincorporated insurance association of being under the *Bankruptcy Act* rather than the *Winding-up Act*. Note that the report at 44 D.L.R. (2d), at p. 696, apparently mistranslates "(except... unincorporated insurance companies)" in the third to last paragraph, for "(sauf... les com-

pagnies d'assurance... incorporées)"; [1964] B.R., at p. 382 which is in accord with the sense of the judgment. The federal statutes respecting Canadian, British, and Foreign insurance companies should be referred to for provisions directly and indirectly concerning Insolvency and Winding-up. *Absent* federal incorporation, insolvency is (roughly) a condition of jurisdiction: see *supra*, Appendix Three. On the constitutional problem, see now, *A.-G. Ont.* v. *Policyholders of Wentworth Insurance Co.*, [1969] S.C.R. 779, 12 C.B.R. 265, 6 D.L.R. (3d) 545.

"[T]rust companies", or "compagnies de fiducie" — or such at least as are incorporated [see paragraph one of this note] — are excluded in terms from the *Bankruptcy Act*, as indicated above. Such as have been incorporated by, or have continued since Confederation under the legislative authority (in respect of their incorporation) of, the Parliament of Canada, are, as such, included in the *Winding-up Act*: s. 6. Parliament appears to have made no special provision to put *provincially* incorporated trust companies under the *Winding-up Act*, correlatively to their exclusion from the *Bankruptcy Act*. How far provincial Winding-up legislation would be constitutionally inapplicable by reason only that the company sought to be wound up was in fact insolvent (at whatever stage this might be discovered), or by reason only that petitioner desired the winding-up because of insolvency, is not clear, especially in circumstances where Parliament has not occupied the field. *Quaere* whether the provincial legislature might not provide for the extinction of its own creatures, without regard to the motive therefor, at least *absent* valid federal legislation. See authorities indicated above, Appendix Three. Whatever be the answer, the Quebec *Winding-up Act*, R.S.Q. 1964, c. 281, is by its terms restricted to voluntary winding up at the instance of the directors (s. 1), and judicial winding-up at the suit of a *shareholder* "whenever [the Superior Court]... is of the opinion that, for a reason other than bankruptcy or insolvency, it is just and equitable that the company be wound up." For federally-incorporated trust companies, see the *Trust Companies Act*, R.S.C. 1952, c. 272 as amended, esp. s. 74(5) (constructive insolvency).

"[L]oan companies" or "compagnies de prêt" — with the qualification, discussed in the first paragraph above, that they be "incorporated" or "constituées en corporations" — are in terms excluded from the *Bankruptcy Act*, as indicated above. The *Winding-up Act*, in terms, includes (s. 6) only "loan companies having borrowing powers"; "compagnies de prêt qui ont des pouvoirs d'emprunt". Does this impliedly exclude even such loan companies without borrowing powers as are incorporated by, or (in respect of their incorporation) continued since Confederation under the legislative authority of the Parliament of Canada? "Federal" corporations are in terms all subject to the *Winding-up Act* in *all* cases; other corporations in the classes listed are made subject to the Act in case of insolvency, etc. *Semble* loan companies without borrowing powers are, if federally-incorporated, still subject to the Act, whether the winding-up happens to be based on insolvency or not. No provision is made for provincially-incorporated loan companies *not* having borrowing powers; but this is plainly no oversight by Parliament. Those provincially-incorporated loan companies that *do* have borrowing powers are subject to the federal *Winding-up Act* only, of course, on the usual additional condition that the petition is founded on insolvency, etc.

"[R]ailway companies" — with the qualification, discussed above, that they be "incorporated" or "constituées en corporations" — are excluded from the *Bankruptcy Act*, as above indicated. Section 7 of the *Winding-up Act* provides likewise that *it* "does not apply to... railway or telegraph companies". The Parliament of Canada has however provided for railways in case of insolvency by the *Railway Act*, R.S.C. 1952, c. 234, as amended, s. 157 *et seq.* (schemes of arrangement),

and by the *Exchequer Court Act*, R.S.C. 1952, c. 98, as amended by 14-15-16 Eliz. II, S.C. 1966-67, c. 69, s. 94 and Schedule, substituting the Canadian Transport Commission for the Board of Transport Commissioners for Canada, (sale of railway, section of railway, rolling stock, equipment, and other accessories). It will be noted, however, that these provisions, though applicable to railways regardless of incorporating authority, are confined by the terms of the statutes in question to railways whose *operation* is subject to federal legislative authority. In *La Compagnie de Chemin de Fer de la Baie des Chaleurs* et al. v. *Nantel*, (1896), 5 B.R. 64, the Quebec Queen's Bench by a 3-2 decision (Baby, Bossé and Blanchet, JJ.; Hall and Wurtele, JJ., dissenting) affirmed a decision of Pagnuelo, J., in the Superior Court, (1896), 9 C.S. 47, upholding the constitutional validity and application of a provincial statute, authorizing the sequestration and sale of insolvent railways, to a railway under exclusive federal legislative jurisdiction as a work declared to be for the general advantage of Canada. The dissenting judges appear to have accepted its validity *quoad* provincial railways. Compare, on the former point, *Bourgoin* v. *La Compagnie du Chemin de Fer Montréal, Ottawa et Occidental*, (1880), 5 App. Cas. 381 (P.C.). See *Railway Act*, R.S.Q. 1964, c. 290, ss. 198 *et seq.* under the title: "Division XXIII" "Sequestration"; the jurisdiction is expressly predicated upon, as one of several alternatives, insolvency. Consider the application, if any, to the above questions, of the remarks of Lord Atkin for the Privy Council in *Ladore* v. *Bennett*, [1939] A.C. 468, [1939] 3 D.L.R. 1, 21 C.B.R. 1, [1939] 2 W.W.R. 566, [1939] 3 All E.R. 98, quoted *supra*, n. 14. *Quaere*, the effect of the recent Supreme Court decision in *A.-G. Ont.* v. *Policyholders of Wentworth Insurance Co.*, [1969] S.C.R. 779, 12 C.B.R. 265, 6 D.L.R. (3d) 545.

APPENDIX FIVE

PROVINCIAL LAWS COGNATE TO BANKRUPTCY AND INSOLVENCY.

The following references are offered for convenience's sake. As the matter is only incidental to the discussion in this article, the author has not attempted an exhaustive search of the provincial statute books, and still less a reconstruction of the statutory history of each provision; nor are the following suggestions to be taken as a definitive opinion on their meaning, validity, or operation; nor has any attempt been made to refer to all the relevant judicial decisions. For a recent consideration of the scope of federal legislative authority on insolvency and of the extent to which it precludes provincial legislation, see *A.-G. Ont.* v. *Policyholders of Wentworth Insurance Company*, [1969] S.C.R. 779, 12 C.B.R. 265, 6 D.L.R. (3d) 545.

The author would however stress that, in considering the constitutional *validity* of the *rules contained* in such statutes, *it is absolutely essential* to bear in mind that, insofar as they merely reproduce pre-Confederation law, they *will validly continue to operate as such: B.N.A. Act, 1867*, s. 129, subject only to competent repeal, express or implied. Such is the case of the relevant *Civil Code* provisions in Quebec (*infra*). In the common-law provinces, the Act 13 Eliz. 1, c. 5, against fraudulent conveyances, would seem in like case. Though, at all events, it would presumably form parcel of the English law

introduced with the settlement of a colony, it appears in a rather literal reproduction in the British Columbia statutes (*infra*), and its substance is found in the statute books of other provinces, sometimes separately enacted and sometimes not (*infra*). Like the fraudulent conveyance rules, those dealing with fraudulent preferences may in some cases at least have a valid basis in pre-Confederation law. See, for example, Edward Blake, Q.C., *arguendo*, in the *Voluntary Assignments Case*, on the historical antecedents of the Ontario *Assignments and Preferences Act*, *A.-G. Ont.* v. *A.-G. Can.*, [1894] A.C. 189, at pp. 190-91. A provision avoiding various fraudulent preferences and transfers in Upper Canada, 22 Vict., c. 96, s. 19 of the statutes of the Province of Canada, was continued as s. 18 of chapter 26 of the *Consolidated Statutes for Upper Canada* (1859), and survived repeal by the Parliament of Canada in the *Revised Statutes of Canada*, 1886; see *An Act respecting the Revised Statutes of Canada*, 49 Vict., S.C. 1886, c. 4, especially s. 5, which should be read with Schedule B to the *Revised Statutes of Canada*, 1886, "Acts and Parts of Acts of a public general nature, which affect Canada, aud have relation to matters not within the legislative authority of Parliament, or in respect to which the power of legislation is doubtful or has been doubted, and which have in consequence not been consolidated; and also, Acts of a public general nature, which, for other reasons, have not been considered proper Acts to be consolidated." Under this head is included *inter alia* the whole of chapter 26 of the *Consolidated Statutes for Upper Canada*, except sections 14, 19 and 20. A subsequent federal repeal, if any, would be an implied, and not an express, repeal, such as could arguably be found in the *Bankruptcy Act*; but *quaere* whether the latter could be held to cover the whole ground of the former.

As regards pre-Confederation legislation, as to which the problem of legislative jurisdiction does not arise at all, and post-Confederation legislation in the several provinces which may be found to be validly enacted, and as to which the only remaining question in both cases is its continued operation in the face of inconsistent legislation, or at least occupation of the field, by the Parliament of Canada, the Quebec cases should not be lost sight of in the common law provinces. The provisions of the *Civil Code* are undoubtedly valid as pre-Confederation legislation, but their continued operation might have been denied on the ground that they had been displaced by subsequent legislation of the Parliament of Canada. That this has not been done (see *infra*) argues strongly for the continued operation of any *valid* post-Confederation provincial legislation giving wider rights of avoidance.

Quaere whether, where the only objection to provincial legislation is that its continued operation is made impossible by the occupation of the field by Parliament, an argument could be made that, *quoad* debtors who are for any reason not subject to the federal insolvency legislation, the field has *pro tanto* been left unoccupied by that Parliament.

For *Alberta*, see *The Fraudulent Preferences Act*, R.S.A. 1955, c. 120, of which s. 13 provides that the "Act shall be read and construed subject to the provisions of the *Bankruptcy Act* (Canada)." In *Re McIntosh-Marshall Equipment Ltd.*; *Nash* v. *Guelph Engineering Co.*, (1964), 7 C.B.R. n.s. 92, 48 D.L.R. (2d) 619, 50 W.W.R. 115, aff'g 7 C.B.R. n.s. 84, 48 W.W.R. 420, the Appellate Division of the Supreme Court of Alberta (Macdonald, Porter, Johnson, Kane and McDermid, JJ. A.) held *ultra vires* section 4 of the Act, which, roughly stated, purported to avoid payments and transfers made by insolvents or persons knowing themselves to be on the eve of insolvency, *having the effect* of preferences, and which should be attacked *within one*

year. It conflicted, held the Court, with section 64 of the *Bankruptcy Act*, which limited the avoidance of preferential payments to a period within *three months* of a bankruptcy, with the result (thought the Court) that, even *assuming* that the provincial legislation would have been valid had it been enacted *before* the *Bankruptcy Act* provision in question (on which hypothesis the provincial legislation would merely have been *superseded* by the federal), the fact that the provincial legislation *was* enacted *afterwards* rendered it *ultra vires* (*semble*, not merely *inoperative*): 7 C.B.R. n.s. 92, at p. 96 *in fine*, at pp. 98-9, and at p. 101 *in fine*; but compare the remark that "It may be that certain sections of the Fraudulent Preferences Act are continued effective by the amendment to section 41 of the Bankruptcy Act [*i.e.*, the addition of s. 41(6) preserving provincial laws relating to property and civil rights not in conflict with the *Bankruptcy Act*], but because of the conflict between the section we are considering and s. 64, s. 4 is not one of them": *ibid.* How could s. 41(6) "continue them effective" if they were wholly void from enactment? Does the Court mean to treat the Revised Statutes of Alberta of 1955 as a re-enactment after a partial federal withdrawal from the field? Why does the *Bankruptcy Act* wholly occupy the field, so as entirely to supersede, or render entirely *ultra vires*, provincial legislation giving rights of avoidance not dependent on whether a bankruptcy occurs? It should be observed that the Alberta statute is more severe than the federal not merely in making transactions unsafe for a longer period (under the Alberta statute, one year from the time of the transaction to the time of the attack; under the *Bankruptcy Act*, three months before bankruptcy), but also in making the preferential *effect* conclnsive of the *intent* to prefer provided that the attack be made within the year; whilst under the federal Act (s. 64(2)) preferential effect merely creates a presumption *prima facie* of intont. Where transfers or payments can be shown to have been made with *actual intent* to prefer, indeed, the Alberta statute appears to go much further: it allows them to be attacked *beyond* the year, and indeed without any evident limit of time save such as may result from the laws relating to the limitation of actions. It may be noted that s. 5 of the Alberta statute expressly makes pressure by a creditor, or his ignorance of the debtor's circumstances, irrelevent to the success of an attack under s. 4 aforementioned. But no provision similar to s. 5 is enacted in relation to s. 2 (transfers by insolvents with intent to defeat, hinder, delay or prejudice creditors), nor (what is more important) is one enacted in relation to s. 3 (transfers or payments made with actual *intent* to prefer). It may, therefore, be that s. 3, if it can validly operate at all, remains restricted in its operation by the doctrine that payments made under pressure of creditors are not made with the requisite intent to prefer: *Molsons Bank* v. *Halter*, (1890), 18 S.C.R. 88; *Stephens* v. *McArthur*, (1891), 19 S.C.R. 446; *Gibbons* v. *McDonald*, (1891), 20 S.C.R. 587; *Adams & Burns* v. *Bank of Montreal*, (1903), 32 S.C.R. 721; *Banque d'Hochelaga* v. *Jcannotte*, (1923), 16 Sask. L. R. 523, [1923] 1 W.W.R. 28; *Copp* v. *Williams*, (1922), 65 D.L.R. 377; *Goldman* v. *Harrison*, (1929), 10 C.B.R. 395 (cases applying the doctrine in question to statutes of various provinces against fraudulent preferences and conveyances). Under the *Bankruptcy Act*, pressure is made irrelevant by s. 64 (2). Similarly, the usefulness of sections 2 and 3 of the Alberta statute is probably limited by a requirement that the requisite fraudulent intent be *concurrent* in the debtor and creditor or payee: *Gibbons* v. *McDonald*, (1891), 20 S.C.R. 587 and other cases cited *supra*; while under the federal Act the requirement of concurrent intent is at least an open question, with the better view probably being that the terms of the Act do not justify any requirement of fraudulent intent on

the part of the creditor or payee: see Duncan & Honsberger, *Bankruptcy in Canada*, (Toronto, 1961), pp. 485 *et seq.*; Houlden and Morawetz, *Bankruptcy Law of Canada*, (Toronto, 1960), pp. 149 *et seq.*, and *Cumulative Supplement, 1966*, (Toronto, 1966), p. 53.

For *British Columbia*, see the *Fraudulent Conveyances Act*, R.S.B.C. 1960, c. 155, and the *Fraudulent Preferences Act*, R.S.B.C. 1960, c. 156. Where the transfer or payment is not made with preferential *intent*, but merely has preferential *effect*, attack must be made within sixty days of the impugned transaction, or of the registration by law of the instrument evidencing it, unless the debtor makes an assignment within the sixty days of the transaction. What is said above in relation to Alberta concerning pressure and concurrent intent appears to apply to British Columbia *mutatis mutandis*. In *Totem Radio Supply Company Ltd.* v. *Stone*, (1959), 38 C.B.R. 112, Whittaker, J., in the Supreme Court of British Columbia held s. 64 of the *Bankruptcy Act* to apply "only to preferences given within three months prior to the date of bankruptcy. Where there is no conflict the provincial Act is not superseded." His Lordship considered s. 41(6) of the *Bankruptcy Act* (*q.v.*) decisive. Compare *Canadian Credit Men's Trust Association Ltd.* v. *Hoffar Ltd.*, [1929] S.C.R. 180, 10 C.B.R. 374, [1929] 2 D.L.R. 106, refusing leave to appeal from (1929), 40 B.C.R. 454, 10 C.B.R. 369, [1929] 2 D.L.R. 73, [1929] 1 W.W.R. 557. Here a conflict was found between the Dominion provision which merely attaches a *presumption prima facie of intent to prefer* to transactions with preferential *effect* made within three months of bankruptcy, and the provincial legislation which *avoids them altogether* within the sixty days above mentioned. It will be noted that the constitutional validity of the provincial legislation is presupposed. See also *Gard* v. *Yates*, [1936] 2 D.L.R. 50, 17 C.B.R. 168, [1936] 1 W.W.R. 212, 50 B.C.R. 353, upholding both validity and operation, in the absence of conflict.

For *Manitoba*, see *The Assignments Act*, R.S.M. 1954, c. 11, and *The Fraudulent Conveyances Act*, R.S.M. 1954, c. 91. In *Re Mid-West Catering Co. Ltd.*, (1965), 9 C.B.R. n.s. 72, 53 D.L.R. (2d) 560, Smith, J., in the Manitoba Queen's Bench held *ultra vires* s. 38 of the first-mentioned statute, which made conveyances, transfers, and payments, by insolvents and persons knowing themselves on the eve of insolvency, with intent to defeat, hinder, delay or prejudice one or more creditors, void against the latter. The holding was not however necessary to the result. The preference provisions make preferential *effect* sufficient where there is a challenge, or an assignment for the benefit of creditors, with sixty days of the impugned transaction; in such cases, pressure by, or want of notice to, the creditor, is made irrelevant.

For *New Brunswick*, see the *Assignments and Preferences Act*, R.S.N.B. 1952, c. 13. Preferential *effect* suffices to create a (rebuttable?) presumption of preferential intent where there is an attack or an assignment for the benefit of creditors within sixty days of the impugned transaction. In such cases pressure is made irrelevant. See *Re N. B. Tractor and Machinery Co.*; *Canadian Credit Men's Trust Association* v. *Dominion Bank*, (1932), 14 C.B.R. 195, where it was held that the statute of 13 Elizabeth I, c. 5 (U.K.), was in force in the province, and that it, and the provincial statute above mentioned, might operate even if s. 64 of the *Bankruptcy Act* did not.

Owing te *Newfoundland's* recent entry into Confederation, the scheme of its statutory provisions is dissimilar to those already outlined for the other provinces. *The Judicature Act*, R.S.N. 1952, c. 114 contains a Part VII entitled "Insolvency", being s. 215 *et seq.*; see also Schedule A. Of these provisions,

s. 254 avoids conveyances, transfers, payments, and so forth, made by an insolvent with a view of preferring a creditor, within a two month period before a petition. Even if this could still operate, it would appear to be embraced in the wider federal statute.

By the Nova Scotia *Assignments and Preferences Act*, R.S.N.S. 1967, c. 16, transfers, etc., having preferential *effect* are (rebuttably?) presumed to be intented to prefer and as such avoided if attacked within sixty days or if an assignment for the benefit of crediters is made within the same period; pressure being irrelevant in such cases. Otherwise an intent to defeat, hinder, delay, or prejudice creditors, or to prefer a creditor, is needed.

Ontario retains on its statute books both *The Assignments and Preferences Act*, R.S.O. 1960, c. 25, and *The Fraudulent Conveyances Act*, R.S.O. 1960, c. 154. It is of course the predecessor of the first-mentioned Act, "An Act respecting Assignments and Preferences by Insolvent persons", as it stood in R.S.O. 1887, c. 124, that gave rise to the famous *Voluntary Assignments Case* (see the third paragraph of this note). However, only the postponement of incomplete executions to an assignee for the benefit of creditors was there in issue, as the reference sought a ruling on the one section of the Act relating thereto, and the decision of the Privy Council cannot safely be relied on as supporting anything else. Since that time (1894), as before, the provisions of the Ontario Act have been treated as valid in many judicial decisions: see *Can. Abr.* (2d) v. 3, pp. 557 *et seq.*, though after the *Bankruptcy Act* of 1919 there was doubt as to how far the provincial legislation was superseded. See *Re Trenwith*, [1934] O.R. 326, [1934] 3 D.L.R. 195, 15 C.B.R. 372, overruling *Re Pommier*, (1930), 65 O.L.R. 415, 11 C.B.R. 449, [1930] 4 D.L.R. 113; per Masten, J.A., for a majority of the Court of Appeal for Ontario in *Re Trenwith*, [1934] O.R., at p. 332: "[I]t seems clear to me that the common field of legislation respecting the distribution of the estates of insolvents having now become occupied by the Dominion Bankruptcy Act, the provisions of *The Assignments and Preferences Act* respecting the preference of one creditor over another have been thereby superseded and have ceased to have any operation." In *Re Bozanich*, [1942] S.C.R. 130, the Supreme Court of Canada refused to hold the sections of the *Bankruptcy Act* avoiding settlements to be sufficiently broad to embrace all conveyances or transfers of property, and, particularly, chattel mortgages given to secure indebtedness in the course of business. As regards a possible application of the Ontario legislation, Duff, C.J.C., for himself, Davis, and Kerwin, JJ., and apparently without dissent by Rinfret, J., who spoke for himself and Crocket, J., said (at p. 136): "I may add that, in my opinion, the provisions of R.S.O. 1927, Chap. 162, in relation to preferences are superseded by section 64 of the *Bankruptcy Act*, and that the authority of the Ontario Legislature to enact such legislation is, in consequence of the enactment of section 64, suspended in view of the concluding paragraph of section 91." *Quaere* whether this is affected by the reservation contained in s. 41 (6) of the present *Bankruptcy Act* (*q.v.*). See *Re Shelly Films Ltd.*, [1963] 1 O.R. 431, 37 D.L.R. (2d) 419, 4 C.B.R. n.s. 186; *Vasey* v. *Kreutzweiser*, (1965), 8 C.B.R. n.s. 225.

Section 4 avoids conveyances, transfers, payments, etc., made with intent to defeat, delay, or prejudice creditors, by an insolvent or one who knows himself to be on the eve of insolvency. Such transactions, made with intent to prefer a creditor, are avoided by section 5; and where the attack is brought, or an assignment for the benefit of creditors is made, within sixty days of the impugned transaction, preferential *effect* is sufficient to create a presumption

of intent to prefer, whether the preference be made voluntarily or under pressure. It is noteworthy, however, that, as in the federal Act, the presumption of intent to prefer which attaches to preferential effects is a presumption *prima facie* only — a matter which, as we have seen, is unclear in Nova Scotia and New Brunswick, and definitely otherwise in Alberta, B.C., and Manitoba.

For a recent application of *The Fraudulent Conveyances Act*, R.S.O. 1960, c. 154, see *Re Dougmor Holdings Ltd.*; *Fisher* v. *Wilgorn Investments Ltd.*, (1966), 10 C.B.R. n.s. 141. See also *Re Hecimovic*, (1966), 10 C.B.R. n.s. 229.

The Frauds on Creditors Act, R.S.P.E.I. 1951, c. 65, appears to be closely similar in substance to the Ontario legislation, on the subject of preferences, particularly with reference to the sixty-day period in which a *prima facie* presumption of intent to prefer is attached to transactions with preferential effect. An attack must be made within the period, however, as the Act does not provide for the case of an assignment being made within the same time limit. It is specially declared by section 2(5) that the preferential intent, or the intent to defeat, hinder, delay, or prejudice creditors, is the intent of the assignor or transferor, and that no concurrence therein, or knowledge thereof, or of insolvency, need be shown.

In *Quebec*, reference may be had to art. 1031 of the *Civil Code* (the so-called "oblique" action) and 1032 C.C. (the "paulian" action), and, generally, arts. 1032 to 1040 of the *Civil Code*. These are, of course, *pre-Confederation* statute law, and the power to repeal the law *embodied in them* is precisely coextensive with the respective legislative jurisdictions of Parliament and the provinces since Confederation: *B.N.A. Act*, s. 129. (As to attempts to interfere with the *text* of a pre-Confederation enactment — *i.e.*, to repeal otherwise than by inconsistent legislation which leaves it to the courts to decide to what extent the old rules lie within what has become one or other jurisdiction — see the remarks in *A.-G. Ont.* v. *A.-G. Can.*, [1896] A.C. 348, at p. 366.) The pre-Confederation character of the original provisions of the *Civil Code* is often overlooked, with serious consequences upon that is said about them; such oversights, on the part of a judge of the Supreme Court of Canada, cannot be described as being otherwise than of the utmost gravity: see the remarks of Locke, J., in *Traders Finance Corporation* v. *Levesque*, [1961] S.C.R. 83, at p. 90 in the final paragraph; particularly unfortunate in so able a judgment. Article 1037 C.C., and a saving clause at the end of art. 1039 C.C., both referring to the *Insolvent Act* of 1864 (Province of Canada), were repealed by the Parliament of Canada in the revision of 1886; 49 Vict., c. 4, s. 5 and Schedule A to the *Revised Statutes of Canada*, 1886.

For authorities on the application of these articles, see *Can. Abr.* (2d), v. 3, pp. 564 *et seq.* *Cie de Construction Charlesbourg; Lefaivre* v. *Demers*, [1948] B.R. 745, 29 C.B.R. 176, clearly supports the view that the relevant articles of the *Civil Code* have not been superseded by the *Bankruptcy Act*, and that the trustee may avail himself of them. A *payment* by an insolvent debtor to a creditor knowing his insolvency is deemed to be made with intent to defraud and may be recovered by the creditors for their benefit according to their respective rights: art. 1036. A *contract* cannot be avoided unless it is made by the debtor with intent to defraud and will have the effect of injuring the creditor; but a *gratuitous* contract is deemed to be made with intent to defraud if the debtor is then insolvent, and an *onerous* contract made by an insolvent with a person who knows him to be such is deemed to be made with intent to defraud: arts. 1033 to 1035. Art. 1038 provides that "An onerous contract

made with intent to defraud on the part of the debtor, but in good faith on the part of the person with whom he contracts is not voidable; saving the special provisions applicable in the case of insolvency of traders." Art. 1040 provides that "No contract or payment can be avoided by reason of anything contained in this section [*i.e.* Section VI, "Of Avoidance of Contracts and Payments made in Fraud of Creditors", arts. 1032 to 1040], at the suit of any individual creditors, unless such suit is brought within one year from the time of his obtaining a knowledge thereof. If the suit be by assignees or other representatives of the creditors collectively, it must be brought within a year from the time of their appointment." By art. 1039, a contract or payment can be avoided under the articles in question only by a creditor anterior to the impugned transaction, or one subrogated in his rights. In *Cie de Construction Charlesbourg, supra*, the Quebec Queen's Bench held that one year limitations provided by art. 1040 *supra* applied even to proceedings taken under s. 64 of the *Bankruptcy Act*; this was rejected by Locke, J., in *Re Garage Causapscal; Traders Finance Corporation* v. *Levesque*, [1961] S.C.R. 52, 26 D.L.R. (2d) 384; and the opinion of Fauteux, J., for himself and Kerwin, C.J., and Taschereau and Abbott, JJ., in the same case, avoided deciding the matter since, in their view, the proceedings, being taken under s. 16 of the *Bankruptcy Act*, were taken by plaintiff in his own right and not as successor to the trustee, so that the one year limitation of 1040 C.C., if applicable at all (which was not decided), ran from one year of plaintiff's knowledge, which had not expired. The majority judgment does contain the implication that the recourses of arts. 1032 *et seq.* C.C. and those of the *Bankruptcy Act* do not cover the same ground; thus Fauteux, J., [1961] S.C.R. 52, at p. 87, speaks of "les déchéances spécifiquement établies en l'art. 1040 du *Code Civil* pour *des recours qui, s'apparentant à celui qu'autorise* l'art. 16, *en diffèrent*" (emphasis added). The erroneous assumption of Locke, J., that the *Civil Code* was a post-Confederation Quebec statute is discussed above.

Saskatchewan has on its statute books *The Fraudulent Preferences Act*, R.S.S. 1965, c. 397. Preferential *effect* suffices to avoid payments, transfers, etc. by insolvents and persons knowing themselves on the eve of insolvency, provided that the attack is made within 60 days; in such cases pressure by a creditor, or his want of notice, is made irrelevant. Otherwise a preferential intent is necessary, or an intent to defeat, hinder, delay or prejudice creditors. For cases on Saskatchewan legislation, and the doctrine of concurrent intent, etc., see *Can. Abr.* (2d), v. 3, pp. 565 *et seq.*

APPENDIX SIX

THE DEFINITIONS UNDER THE 1919 ACT

Under *The Bankruptcy Act, 1919*, 9-10 Geo. V, S.C. 1919, c. 36, the relevant definitions, so far as material, were as follows:

2. In this Act, unless the context otherwise requires or implies, the expression, —

(k) "corporation" includes any company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or of any of the provinces of Canada, and any incorporated company, wheresoever incorporated, which has an office in or carries on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies;

(o) "debtor" includes any person, whether a British subject or not, who, at the time when any act of bankruptcy was done or suffered by him, or any authorized assignment was made by him, *(a)* was personally present in Canada, or *(b)* ordinarily resided or had a place of residence in Canada, or *(c)* was carrying on business in Canada personally or by means of an agent or manager, or *(d)* was a corporation or a member of a firm or partnership which carried on business in Canada; ...

(t) "insolvent person" and "insolvent" include a person, whether or not he has done or suffered an act of bankruptcy, *(i)* who is for any reason unable to meet his obligations as they respectively become due, or *(ii)* who has ceased paying his current obligations in the ordinary course of business, or *(iii)* the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process would not be sufficient, to enable payment of all his obligations, due and accruing due, thereout;

(aa) "person" includes corporation and partnership [.]

2. En la présente loi, à moins que le contexte n'exige ou n'implique une interprétation différente, l'expression:

(k) «corporation» comprend toute compagnie constituée en corporation ou autorisée à exercer un commerce par ou sous l'empire d'une loi du Parlement du Canada, ou de l'une quelconque des provinces du Canada, et toute compagnie constituée en corporation, en quelque lieu que ce soit, qui a un bureau au Canada ou qui y poursuit ses opérations, mais ne comprend pas les sociétés de construction qui ont un capital-actions, ni les banques, caisses d'épargne, compagnies d'assurance, compagnies de fiducie, compagnies de prêt ou compagnies de chemin de fer constituées en corporation;

(o) «débiteur» s'applique à quiconque, sujet britaunique ou non, à l'époque où un acte de faillite a été commis ou subi par lui, ou à l'époque où une cession autorisée a été faite par lui *(a)* était personnellement présent au Canada, ou *(b)* résidait à l'ordinaire ou avait un domicile au Canada, ou *(c)* poursuivait des affaires au Canada, soit persounellement ou au moyen d'un agent ou gérant, ou *(d)* était une corporation ou faisait partie d'une firme ou société qui poursuivait des affaires au Canada, ...

(t) «personne insolvable» et «failli» comprennent les personnes, qu'elles aient ou non fait ou subi un acte de faillite, *(i)* qui sont, pour une raison

quelconque, incapables de faire honneur à leurs obligations au fur et à mesure de leur échéance respective ou *(ii)* qui ont cessé de payer leurs obligations courantes dans le cours ordinaire des affaires, ou *(iii)* dont la totalité des biens n'est pas, d'après une estimation raisonnable, suffisante, ou ne serait pas suffisante, au moyen d'une vente bien conduite par autorité de justice, pour permettre le paiement de toutes leurs obligations, échues ou à échoir;

(aa) «personne» comprend corporation et société [.]

By *The Bankruptcy Act Amendment Act, 1921*, 11-12 Geo. V, S.C. 1921, c. 17, it was provided:

5. Paragraph *(aa)* of section two is repealed and the following substituted therefor:—

"*(aa)* "person" includes a firm or partnership, an unincorporated association of persons, a corporation as restrictively defined by this section, a body corporate and politic, the successors of such association, partnership, corporation, or body corporate and politic, and the heirs, executors, administrators or other legal representatives of a person, according to the law of that part of Canada to which the context extends."

5. Est abrogé l'alinéa *(aa)* de l'article deux, et remplacé par le suivant:

«*(aa)* «personne» comprend une firme ou société, une association de personnes non constituée en corporation, une corporation telle que limitativement définie par le présent article, un corps constitué et politique, les successeurs de cette association, société, corporation, ou de ce corps constitué et politique, et les héritiers, exécuteurs testamentaires, administrateurs ou autres représentants légaux d'une personne, conformément à la loi de la partie du Canada à laquelle le contexte s'étend.»

In the *Bankruptcy Act*, R.S.C. 1927, c. 11, the definitions, so far as material, were as follows:

2. In this Act, unless the context otherwise requires or implies, the expression

(k) "corporation" includes any company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or of any of the provinces of Canada, and any incorporated company, wheresoever incorporated, which has an office in or carries on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies;

(p) "debtor" includes any person, whether a British subject or not, who, at the time when any act of bankruptcy was done or suffered by him, or any authorized assignment was made by him,

(i) was personally present in Canada, or

(ii) ordinarily resided or had a place of residence in Canada, or

(iii) was carrying on business in Canada personally or by means of an agent or manager, or

(iv) was a corporation or a member of a firm or partnership which carried on business in Canada;

(u) "insolvent person" and "insolvent" includes a person, whether or not he has done or suffered an act of bankruptcy,

(i) who is for any reason unable to meet his obligations as they generally become due, or

(ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due, thereout;

(cc) "person" includes a firm or partnership, an unincorporated association of persons, a corporation as restrictively defined by this section, a body corporate and politic, the successors of such association, partnership, corporation, or body corporate and politic, and the heirs, executors, administrators or other legal representative of a person according to the law of that part of Canada to which the context extends [.]

2. En la présente loi, à moins que le contexte n'exige ou n'implique une interprétation différente, l'expression

k) «corporation» comprend toute compagnie constituée en corporation ou autorisée à exercer un commerce sous l'empire d'une loi du Parlement du Canada, ou de l'une des provinces du Canada, et toute compagnie constituée en corporation, en quelque lieu que ce soit, qui a un bureau au Canada ou qui y poursuit ses opérations, mais ne comprend pas les sociétés de construction qui ont un capital-actions, ni les banques, caisses d'épargne, compagnies d'assurance, compagnies de fiducie, compagnies de prêt ou compagnies de chemin de fer constituées en corporation;

p) «débiteur» comprend quiconque, sujet britannique ou non, lorsqu'un acte de faillite a été commis ou permis par lui, ou qu'une cession autorisée a été faite par lui

(i) était personnellement présent au Canada, ou

(ii) résidait à l'ordinaire ou avait un domicile au Canada, ou

(iii) poursuivait des affaires au Canada, soit personnellement soit au moyen d'un mandataire ou gérant,

z) «personne» comprend une firme ou société, une association de personnes non constituées en corporation, une corporation telle que limitativement définie par le présent article, un corps constitué et politique, les successeurs de cette association, société, corporation, ou de ce corps constitué et politique, et les héritiers, exécuteurs testamentaires, administrateurs ou autres représentants légaux d'une personne, conformément à la loi de la partie du Canada à laquelle le contexte s'étend;

aa) «personne insolvable» et «failli» comprend les personnes, qu'elles aient ou non fait ou subi un acte de faillite,

(i) qui sont, pour une raison quelconque, incapables de faire honneur à leurs obligations au fur et à mesure de leur échéance respective, ou

(ii) qui ont cessé de payer leurs obligations courantes dans le cours ordinaire des affaires et au fur et à mesure de leur échéance respective, ou

(iii) dont la totalité des biens n'est pas, d'après une estimation raisonnable, suffisante, ou ne serait pas suffisante, au moyen d'une vente bien conduite par autorité de justice, pour permettre le paiement de toutes leurs obligations, échues et à échoir [.]