REFERENCE RE VALIDITY OF THE ORDERLY PAYMENT OF DEBTS ACT, 1959 (Alta.), C. 61

Orderly Payment of Debts Act (Alta.) — Right of Debtor to seek consolidation order to force creditors to accept periodic payments — Invalid invasion of Federal power in relation to bankruptcy and insolvency.

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I. Introduction

The role of provincial debt adjustment and the scope of its power in the light of Federal jurisdiction over bankruptcy and insolvency under s. 91 (21) of the B.N.A. Act has come under close scrutiny in a recent decision of the Supreme Court[1]. This case is significant in that it brings to light many important issues, one of which is revived by the comments of the court on the *Voluntary Assignments Case*[2], a decision of the Privy Council which has prevailed for more than sixty years. It is also sententious because its reasoning shows that, in the future, in determining how far provincial legislation dealing with subjects analogous to bankruptcy and insolvency legislation can be used, a careful re-appraisal of the earlier decision and its effects will be necessary.

This comment will deal specifically with the effects and consequences of this decision on the *Voluntary Assignments Case*[3] and on the Lacombe Law, Quebec's long unquestioned debt adjustment legislation. Embodied in articles 697 (a) to 697 (i) of the Code of Civil Procedure, the Lacombe Law, as a result of this case, should be subjected to renewed scrutiny.

II. The Facts

The question referred to the court was whether a certain Debt Adjustment Act of Alberta[4] was valid as coming within the enumerated heads of section 92 of the B.N.A. Act of 1867, or whether it was *ultra vires* as coming within the Federal power over bankruptcy and insolvency under 91 (21).

The Alberta Act attempted to regulate the payment of debts by a debtor to his creditors. The Act provided that in the case of judgments or claims not exceeding $1,000, or in excess of $1,000, with the consent of the creditor, a debtor could apply for a consolidation order to the clerk of the District Court of the judicial district in which he resided. The debtor was required to file an affidavit giving information as to all his creditors with the amounts owed to

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[1][1960] 23 D.L.R. 2d. 449.

[2][1894] A.C. 189.

[3]*Ibid.*, p. 189.

[4]The Orderly Payment of Debts Act, Alberta, 1959, C. 61.

each; his total income and, if married, his wife's income; the persons dependent upon him; and the amount payable for board, lodging or rent; whether any of his creditors were secured, and if so, the nature and particulars of the security held by each. The clerk was able to settle the amount to be paid by the debtor into the court periodically, and provisions were made for hearing objections. On the basis of the clerk's findings and the hearing, if any, a consolidation order was made. The Act gave authority to impose terms on the debtor with respect to his property and to require the debtor to make an assignment of money owing to him to the clerk of the court. Provisions were made for the adding of additional creditors to the affidavit. The clerk was required to distribute the monies paid into the court rateably among the creditors at least once every three months. Upon the making of the consolidation order, no further proceedings could be taken against the debtor in respect of the judgments or claims to which it applied. The Attorney General for the Province argued that the Act was within Provincial legislative powers under sections 92 (13), (14), and (16) of the B.N.A. Act of 1867.

The Federal Government based its argument against the validity of the Act on Sections 91 (15), (18), (19), and (21). It was also contended that the Act gave to the Clerk of a District Court the powers of a section 96 judge. On the other hand, the Province relied upon three earlier decisions: the *Voluntary Assignments Case*[5], *Leclerc v. Bennet*[6] and *Abitibi Power and Paper Co. Ltd. v. Montreal Trust Co.*[7].

III. The Findings

The Alberta Supreme Court decided unanimously that the Act was *ultra vires* because it infringed upon section 91 (21) of the B.N.A. Act. The Supreme Court of Canada upheld unanimously the decision of the lower court.

a) Reasoning of Kerwin C. J. C.

Kerwin C. J. C. reasoned that the Act was, in pith and substance, bankruptcy and insolvency legislation and was therefore wholly within federal jurisdiction. His Lordship contended that the Act was not legislation for the recovery of debts, but rather for the adjustment of the debts of a person who is unable to pay them. He quoted Lord Thankerton's definition of insolvency as "the inability to meet one's debts or obligations . . .", in the case of *Attorney-General for British Columbia v. Attorney-General for Canada et al*[8]. Having thus defined insolvency and having placed it under Federal jurisdiction, Chief Justice Kerwin concluded:

> While the Act applies only to claims or judgments which do not exceed one thousand dollars, unless in the case of a judgment for the payment of money in excess of one thousand dollars, the creditor consents to come under the Act, *I can read these provisions in no other way*

[5]*Supra*, note 2, at p. 189.

[6][1939] A.C. 468.

[7][1943] A.C. 536.

[8][1937] A.C. 39 at p. 407.

> *than showing that they refer to a debtor who is unable to pay his debts as they mature.* Why else is authority given the Court to impose terms with respect to the custody of his property or any disposition thereof or of the proceeds thereof as it deems proper to protect the registered creditors (s. 12)? And why else may no powers be issued in any court against the debtor at the instance of a registered creditor or a creditor to whom the Act applies, except as stated (s. 13)? Section 14 authorizing the Clerk to require an assignment to him by the debtor of any monies due, owing or payable or to become due, owing or payable to the debtor, or earned or to be earned by the debtor is surely consonant only with the position of an insolvent debtor. In fact a debtor under the Act is ceasing to meet his liabilities generally as they become due and therefore falls within S. 20 (1) (j) of the Bankruptcy Act, R.S.C. 1952, c. 14.[9]

This definition of insolvency, which is very broad, suggests that few Provincial Debt Adjustment Acts would be declared *intra vires* by the use of such a definition.

Commenting on the merits of the *Voluntary Assignments Case*[10], Kerwin C. J. C. declared that it is distinguishable from the case under comment and that it is doubtful whether in view of later pronouncements by the Judicial Committee, the former case would at present be decided in the same sense, even in the absence of Dominion legislation upon the subject of bankruptcy and insolvency.[11] An analysis of this early case will be dealt with later on by the author.

b) Reasoning of Locke J.

Mr. Justice Locke concluded that while the Act does not actually require that the debtor who applies must be insolvent in the sense that he is unable to pay his debts as they become due, it must be so construed, since it is impossible to believe that it was intended that the provisions of the Act might be resorted to by persons who were able to pay their way but did not feel inclined to do so.[12] Hence the true nature of the legislation was to deal with insolvency. In his opinion there was a clear invasion of the legislative field of insolvency, which was an exclusive federal power. To him the procedure of the Alberta Act is comparable to that provided for dealing with proposals which may be made to a trustee in bankruptcy by an insolvent person under the provisions of Part III of the Bankruptcy Act[13]. In deciding what subject matters were generally regarded as included in the terms under dispute, Locke J. looked to the bankruptcy laws of England and the terms of the statutes in force in England prior to 1867.

There have been bankruptcy laws in England since 1542 dealing with the estates of insolvent persons, and for more than 100 years compositions and schemes of arrangement have been treated as subject-matter falling within the

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[9] *Supra*, note 1, p. 452. *Italics* are mine.

[10] *Supra*, note 2, at p. 189.

[11] *Ibid.*, p. 453. Among the later pronouncements which Kerwin C. J. C. might have in mind are: (1) *Reference Re Alberta Debt Adjustment Act* 1937, 24 C.B.R. 129; (2) *Atty.-Gen. for Sask. v. Atty.-Gen. for Can.* [1949] A.C. 110; (3) *Atty.-Gen. for Alta. v. Atty.-Gen. for Can.* [1943] A.C. 356; (4) *Reference re Legal Proceedings Suspension Act* [1942] 3 D.L.R. 318; (5) *Canadian Bankers' Association v. Atty.-Gen. for Saskatchewan* [1956] S.C.R. 31.

[12] *Supra*, note 1, at p. 458.

[13] *Ibid.*, p. 458.

scope of the statutes relating to bankruptcy and insolvency[14]. Locke J. concluded, therefore, that the Act under consideration was indeed an attempt to substitute for the provisions of the Bankruptcy Act and the Farmers' Creditors Arrangement Act, "relating to proposals for an extension of time or a scheme of arrangement which are submitted to the interested creditors for their approval and, if approved, thereafter to the judge in bankruptcy, a scheme whereby the propriety of accepting such a proposal is to be determined by a clerk of the district court. The provisions of the Provincial Act thus conflict with those in the legislation passed by Parliament dealing with the same matters."[15]

The precedent relied on by the Province[16] was dismissed by Locke J. as being in relation to matters different from the problem considered in this case. He dismissed the *Voluntary Assignments Case*,[17] which based itself on the unoccupied field doctrine, by saying that ". . . the language of s. 91 is that the exclusive legislative power of the Parliament of Canada extends to all matters in relation to, *inter alia*, bankruptcy and insolvency, and the provinces are excluded from that field . . ."[18]. In considering the *Leclerc Case*,[19] it was noted, the courts held that while the legislation affected the rights of persons who had claims against insolvent municipalities, it was in pith and substance related to municipal institutions in the province and as such, was *intra vires* of s. 92(8) of the B.N.A. Act of 1867. In the *Abitibi Case*[20] the purpose of the impugned legislation was to stay proceedings in an action under a mortgage until the interested parties had an opportunity of considering a plan for reorganization of the company—the true nature of the legislation was held to be concerned with property and civil rights within the province. The pith and substance of both these cases was thus found to be of a provincial nature.

IV. The Effect of the Orderly Payment of Debts Case on the Voluntary Assignments Case

The words of Kerwin C.J.C. and Locke J. with regard to the *Voluntary Assignments Case*[21] appear to bring an end to the precedent which the Privy

[14]*Ibid.*, p. 459. In support of his argument he quotes Sir Lyman Duff in the *Reference re Companies Creditors Arrangement Act* [1934] S.C.R. 660. He says Duff J. seems to show clearly that legislation in respect of compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law.

[15]*Ibid.*, p. 459.

[16]*Supra*, p. 221.

[17]*Supra*, note 2, at p. 189.

[18]*Supra*, note 1, at p. 460. To further support his point, he quotes Lord Watson in *Union Colliery Co. v. Bryden* [1899] A.C. 580 at p. 588: "The abstinence of Dominion Parliament from legislating to the full limit of its power could not have the effect of transferring to any provincial legislature, legislative power which had been assigned to the Dominion by s. 91 of the B.N.A. Act of 1867."

[19]*Supra*, note 6, at p. 468.

[20]*Supra*, note 7, at p. 536.

[21]*Supra*, note 2, at p. 189.

Council decision created in 1894. In this early decision, the Privy Council held a law passed by a provincial legislature which affected the assignments and property of insolvent persons to be valid as falling under s. 92(13) of the B.N.A. Act, although it was of such a nature as to be a suitable auxiliary provision to bankruptcy law. The basis of the decision was that the law in question did not fall within the scope of "Bankruptcy and Insolvency" in the sense in which these words are used in s. 91 (21). The court employed the double aspect doctrine and said that although the Federal Parliament must be able to deal with priority among the executive creditors of an insolvent debtor from the point of view of effective bankruptcy legislation, the provincial legislatures, nevertheless, have to deal with priorities among such executive creditors from the point of view of provincial responsibility for civil procedure. In other words, the principle stated was that "Subjects which in one aspect and for one purpose fall within section 92 may have another aspect and for another purpose fall within section 91."[22] In recognizing such a situation the court concluded that a concurrent power existed: both authorities had power to make laws in the same field. The Privy Council also maintained, using what is known as the doctrine of the unoccupied field, that the provincial legislation could operate in this field as long as no federal statute existed—that is, as long as the field remained unoccupied by federal legislation.

The *Voluntary Assignments Case* hinged, therefore, on two points: (1) that the Provincial Act was auxiliary to the provincial powers of property and civil rights, and civil procedure; and (2) that since there was an unoccupied field because no Bankruptcy legislation of the Federal Parliament existed, the provincial law would prevail. The decision is summarized at pp. 200-201 of the case:

> It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to arrangements purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various auxiliary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation *inasmuch as interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects as might properly be treated as auxiliary to such a law and therefore within the power of the Dominion Parliament, are excluded from the legislative authority of the Provincial Legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.*[23]

The Privy Council, in this instance, went very far by implying that even if there were Federal Bankruptcy legislation, the provincial law could exist side by side with it if there was no conflict between the two. A distinction was also drawn between voluntary and compulsory assignments; the Privy Council stated that if the assignment were compulsory, it would infringe upon the

[22] *Hodge v. The Queen* (1883) 9 A.C. 117 at p. 130.

[23] *Italics* are mine.

exclusive legislative power conferred upon the Dominion Parliament under s. 91(2) of the B.N.A. Act. As it will later be shown, this distinction makes no difference as to whether or not the assignment comes under Federal or Provincial jurisdiction.

What are the criticisms of the *Voluntary Assignments Case* in the light of the case under comment? It is submitted that the importance of the *Orderly Payment of Debts Case* stems from the broad interpretation given to the word "insolvency" and the fact that it is an enumerated power of the Federal Parliament under s. 91(21). If we consider that the Federal power, and bankruptcy and insolvency is a power exclusive to the Federal Parliament, (and it *was* classified as such by the Privy Council in the *Voluntary Assignments Case*), then we must conclude that in no instance can a provincial parliament legislate in this field either as auxiliary to one of its powers such as property and civil rights, or by using the double aspect doctrine, if it can be shown that in pith and substance the legislation concerns bankruptcy and insolvency.

By invoking the doctrine of the concurrent field, one can argue that jurisdiction over subjects can be given to *both* Federal and Provincial legislatures, as in Section 95 of the B.N.A. Act. In the *Voluntary Assignments Case* the concurrent field was implied in the argument on the unoccupied field. However, it is submitted that bankruptcy and insolvency is an exclusive field of the Federal Parliament; thus the provincial legislature cannot legislate in that field by relying on any doctrine of interpretation, if it can be shown that the challenged legislation falls within the terms of the definition given by law either to the word "bankruptcy" or "insolvency". If we admit an exclusive field, then concurrency cannot exist. As Laskin says:

> It is a well established doctrine of the courts that Dominion legislative powers are exclusive in the sense that the abstinence of the Dominion Parliament from legislating to the full limit of its powers could not have the effect of transferring to any provincial legislature the legislative power which has been assigned to the Dominion by s. 91.[24]

As to the "pith and substance" of challenged legislation regarding matters of insolvency, whether or not it is a voluntary or compulsory assignment or anything else which is or is not yet included in the Bankruptcy Act, if the Act under dispute has anything to do with a debtor who is "unable to pay his debts as they become due" (the definition of insolvency used by the judges in the recent case), it is a matter of insolvency and hence exclusively within the federal field of legislative jurisdiction. Indeed, the definition used is quite broad and will most likely encompass much of the provincial legislation today dealing with subjects analogous to bankruptcy legislation. The double aspect doctrine will not apply if the nature of this legislation can be encompassed in the definition set out in the *Orderly Payment of Debts Case*. As Viscount Haldane said in the *Snider Case*:

> When there is a question as to which legislative authority has the power to pass an act, the first question must therefore be whether the subject falls within s. 92. Even if it does, the

[24]Laskin, *Canadian Constitutional Law*, 2d ed. 1960, p. 89. *Cf.*, also *Union Colliery Co. v. Bryden* [1889] A.C. 580 at p. 588.

> further question must be answered, whether it falls also under an enumerated head in s. 91. If so, the Dominion has the paramount power of legislating in relation to it.[25]

It can also be argued that the general language in the heads of s. 92 yields to particular expressions in s. 91 where the latter are unambiguous[26].

W. R. Lederman, Dean of the Law School at Queens University, does not agree with the stringent view taken above. He feels that the classification of powers in s. 91 and s. 92, inevitably, by its nature leads to overlapping and in this manner tends to place a 'straight-jacket' on provincial powers.[27] As Dean Lederman views it, if the challenged law has features that might reasonably cause it to fall within one or more of the provincial classes of law in section 92 as well as features of meaning that might reasonably cause it to fall within one or more of the federal classes of laws in section 91, a further question must be asked. What is the relative importance of the federal features and the provincial features of the challenged law? The answer to this question will determine whether the power to pass such a law is exclusively federal or exclusively provincial or is something over which both legislative authorities have jurisdiction. According to Lederman, the criteria of relative importance here arise from the social, economic, political and cultural conditions of the country. Following his reasoning through, if the federal features of the challenged law are deemed clearly to be more important than its provincial features, then the power to pass the law is exclusively federal and the doctrine of abstinence applies. If, however, both the federal and provincial aspects of the challenged law seem to be of equivalent importance, then the double aspect doctrine and concurrent powers apply and the two laws can exist together as long as there is no inconsistency. The doctrine of Dominion Paramountcy will of course prevail. Lederman's analysis of a complex problem is indeed a laudable one. However, it is submitted that this argument is merely a compromise. A close study of the intentions of the Fathers of Confederation at the London and Quebec Conferences reveals that this interpretation would not suit their intentions for a strong federation. It is contended that the problem should be solved by looking at the *pith and substance* of the challenged law and asking the question: Has this law the qualitative and quantitative features that would bring it under the definition, for example, of insolvency? If it does, then it is an exclusive Federal law and, if the province attempts to justify it under a provincial head, using the double aspect doctrine, it becomes colourable legislation.[28]

The *Orderly Payment of Debts Act Case* applied the pith and substance criterion. The Judges examined the definition of insolvency and the Alberta Act and

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[25] *Toronto Electric Commissioners v. Snider* [1925] A.C. 396 at p. 406.

[26] Jackett, W. R., "Section 91 and 92 of the B.N.A. Act and the Privy Council", *Legal Essays in Honour of Arthur Moxon*, 1953, p. 161.

[27] Lederman, "Clarification of Laws and the B.N.A. Act", *ibid.*, p. 183.

[28] See the following cases: (1) *Atty.-Gen. for Can. v. Atty.-Gen. for Ont.* [1898] A.C. 700; (2) *Atty.-Gen. for Ont. v. Reciprocal Insurers* [1924] 1 D.L.R. 789; (3) *In re Insurance Act of Canada* [1932] A.C. 41; (4) *Turner's Dairy Ltd. v. Lower Mainland Dairy Products Board* [1941] S.C.R. 573.

concluded that the features of the Act implied the same results as the definition. Cartwright J., in concurring with his brothers, contended that the only reason that other provincial legislation was upheld in previous cases was because (1) the challenged law did not conflict with section 91 (2) and (2), the impugned legislation was not in truth and substance bankruptcy and insolvency legislation. In other words, the challenged law did not comply with the definition given to the words in sections 91 (21).[29] As Laskin writes: "Surely the real question in connection with the exclusive powers conferred by sections 91 and 92 is (to paraphrase the Privy Council) whether a matter expressed in legislation is fairly included within the class of subject to which it is sought to attribute it; and if so, then the authority is exclusive."[30]

V. Implications of the Case: The Lacombe Law

It is submitted, that the Quebec Lacombe Law appears to be *ultra vires* of the provincial legislature because in its *pith and substance* it comes under insolvency legislation as defined in the case under comment. The Lacombe Law is covered by articles 697 (a) to 697 (i) of the Code of Civil Procedure. The essence of this law is that the salary or wages of a debtor cannot be seized by his creditor if he deposits a sizeable portion of the sum at the Lacombe Court, within four days of the payment of his salary. He is to give the Clerk of the Magistrates Court a list of all his creditors and the amounts owing to each, the address of his employer or employers, his status and family responsibilities, etc. Any creditor can file his claim with the Clerk of the Magistrates Court and also has a right to contest a claim filed on record; the debtor is given a chance to do likewise. The Clerk's duty is to distribute among the creditors every three months the amounts owing to each such creditor after it has been determined summarily and rateably and without cost.

In order to determine whether this law can be considered part of bankruptcy and insolvency legislation (an exclusive Federal Field), we must, following the *Orderly Payment of Debts Case*, determine what is the pith and substance of the legislation. As Labrie states: ". . . in order to ascertain the class of subjects in relation to 91 and 92 to which any particular enactment belongs, it is first necessary to ascertain what is variously described as '*the primary matter dealt with*' by it, its '*true nature and character*', its '*subject matter*', and '*legislative character*', its '*leading feature*' or its whole *pith and substance*."[31] Following the method of the judges in the case under comment a conclusion can be reached as to the nature of the Lacombe Law. They approached the problem by looking at the pith and substance of the legislation. They first defined, as was previously

[29]*Cf.* The Debt Adjustment Act, 1937 (Alta.) Ch. 9, (R.S.A. 1942, Ch. 119) was held to be wholly *ultra vires* because in its pith and substance it was an act dealing with insolvency. See also: (1) *North American Life Ass. v. McLean*, 22 C.B.R. 288; (2) *Atty.-Gen. for Alta. v. Atty.-Gen. for Can.*, 24 C.B.R. 129.

[30]*Supra*, note 20, at p. 89. See also *Reference re Alberta Bill of Rights Act* [1947] A.C. 503, at p. 517.

[31]Labrie F. E., *Canadian Constitutional Interpretation and Legislative Review* at p. 300. See also O'Connor Report to the Senate of Canada on the B.N.A. Act, 1939, Annex 1, p. 40. *Italics* are mine.

discussed, what came under insolvency, then looking at the challenged Act they asked if it had features which met the given definition.

The features need not be explicit in the challenged Act, as Locke J. concluded in speaking of the Alberta Act:

> While the Act does not require that the debtor who applies must be insolvent in the sense that he is unable to pay his debts as they become due, *it must, in my opinion, be so construed since it is quite impossible to believe that it was intended that the provisions of the Act might be resorted to by persons who were able to pay their way but do not feel inclined to do so. In my opinion, this is a clear invasion of the legislative field of insolvency* and is, *accordingly, beyond the power of the legislature.*[32]

Applying this directly to the merits of the Lacombe Law, one can ask, is not this a type of system of debt adjustment for a debtor who is unable to pay his debts? No person who is able to pay his debts will make a proposal to the Lacombe Court because he feels inclined to do so. Why else is authority given to the Lacombe Court to impose tetms with respect to the salary handed to it as a means of distributing it rateably amongst the creditors? And why else may no creditor seize the salary or wages of the debtor who at any time before the said salary or wages were seized, produced a declaration in conformity with article 697 (b) and conforms to all other requirements as mentioned in 697 (a) of the Code of Civil Procedure?[33] The Act does not require that the debtor who applies to the court must be insolvent in the sense that he is unable to pay his debts as they become due, but as Locke J. submitted, in the case under comment, it can be interpreted in no other way. Hence, this is a clear invasion of the legislative field of insolvency and is accordingly beyond the power of the legislature. The double aspect doctrine cannot play any part because the primary matter of Lacombe Law, its true nature and character and its leading feature, come under the definition of insolvency. The Lacombe Law is in pith and substance insolvency legislation under the definition of insolvency. Provisions dealing with assignments and proposals by an insolvent debtor to his creditor are an essential part of bankruptcy and insolvency legislation under section 26 and 27 of the Bankruptcy Act. As Holden and Morawetz note:

> Section 20(2) of the Baukruptcy Act provides that every assigument other than an assignment pursuaut to the Bankruptcy Act by au insolvent debtor for the general benefit of creditors is null and void. Various provincial statutes make provisions for assignments, *e.g.*, the Assignments and Preferences Act, R.S.Q. 1950, ch. 26. These statutes were passed to provide for the situation which existed when there was no federal Baukruptcy Act. Assignments made pursuant to these statutes are now null and void by virtue of Section 20(2).[34]

It can be argued in the light of the criticism of the *Voluntary Assignments Case* that even prior to s. 20 (2) of the Bankruptcy Act these provincial enactments were *ultra vires*. There can be no doctrine of the unoccupied field when dealing with an Act which is exclusive to the federal field. Thus, whether the Lacombe Law is or is not covered by the Federal Bankruptcy Act is of no significance because any legislation coming within the pith and substance of s. 91

[32] *Supra*, note 1, at p. 458. *Italics* are mine.

[33] *Supra*, p. 221-2 and the quote by Kerwin J.

[34] Holden & Morawetz, *Bankruptcy Law of Canada* at p. 82. See also *Hamilton v. Vipond*, 1 C.B.R. 483.

is outside the competence of the Provincial legislature and it is immaterial whether the Dominion has dealt with the subject by legislation or whether that legislative field is or is not occupied by the Dominion Parliament.[35]

The arguments that the Lacombe Law is justified under sections 92(13) and 92(14) of the B.N.A. Act and that it is a purely local matter cannot hold because of the pith and substance rule[36]. It has been shown that the subject-matter of the Lacombe Law falls within the definition of insolvency. Even using the method formulated by Lederman, the same conclusion can be reached. Even if the Lacombe Law had in it features which fell under both 91 and 92, the use of the term "relative importance" would indicate that the need for national standards under federal law outweighs the need for provincial law.

In other words, the federal features of the Lacombe Law are clearly deemed more important than its provincial features; thus, the power to pass the law is exclusively federal. The federal characteristics are more important because, in the writer's opinion, the regulation of bankruptcy and insolvency is an integral and important aspect of running the economy of Canada. The Fathers of Confederation envisioned a strong, united country, both powerful and stable enough to be forever free from such situations that had forced the provinces as separate entities to the very brink of disaster. Stability can only be realized under basic controlling laws under federal powers, one of these being bankruptcy and insolvency.

If one wishes to contend that a conflict and not merely a similarity must exist before one can declare this law *ultra vires*, this contention is defeated by the case of *Re Regina v. Duhie, Re Regina v. Pomerleau*[37]. There the judge held that the Crown's argument—that Dominion and provincial legislation of the same general terms or effect does not imply conflict—did not in his opinion "hold water" because to him the similarity constituted the very reason for the clash or the conflict.

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[35]*Atty.-Gen. for Alta. v. Atty.-Gen. for Can.* [1943] A.C. 356, Viscount Maughn. The majority of the previous cases, before this recent 1960 Supreme Court decision, seem to hinge on the unoccupied field doctrine, that is, that where the Bankruptcy Act did not provide for a situation, the provincial legislature would. (1) *In re Davison* 5 C.B.R. 860; (2) *In re United Exhibitors* 5 C.B.R. 200; (3) *In re Cohen and Mahlin Ltd.* 7 C.B.R. 655; (4) *Card v. Yates* (1936) 17 C.B.R. 168.

[36]The case of *Parent v. Trudel* (1887) 13 Q.L.R. 136 in discussing articles 853 to 893 of the Code of Civil Procedure, had taken a similar line. The Court stated that abandonment of property is a purely local matter of property within the Province, or it may be regarded as a mode of execution, in civil matters and hence within paragraphs (13), (16), of s. 92 of the B.N.A. Act. The court further stated that it was to be distinguished from bankruptcy and insolvency on the ground that the latter is compulsoty, whereas abandonment is a right of the creditor and voluntary. However, looking at Philippe Ferland's Code of Civil Procedure under Chapter 26 entitled "Abandonment of Property", it is stated that articles 853 to 893 are in conflict with the B.N.A. Act 1867, s. 91(21), thus indicating the exclusiveness of the Federal power of bankruptcy and insolvency.

[37][1955] 2 D.L.R. p. 757. See also *Johnson v. Atty.-Gen. for Alta.* [1954] S.C.R. 127. Rand J. noted that if the acts are the same it is merely leading to repetition and confusion and hence would hinder exclusive Dominion power. Quoted in Laskin, *op. cit.*, at p. 838.

It is submitted that the test used by Cartwright J. in the *Orderly Payment of Debts Case* is sound, but if the two criteria used by him are interpreted to be used cumulatively instead of alternatively, the reasoning is fallacious. In other words, if you can show that the impugned legislation is in pith and substance Federal, there is no need to look for a conflict.

Returning to the merits of the Lacombe Law, since the B.N.A. Act gives exclusive power over bankruptcy and insolvency to Parliament and because it has been proved that according to the definition given to insolvency, the main features of the Lacombe Law are included under it, it must be concluded that the subject matter of the Act should be given to Parliament and not to the provincial legislature. This reasoning is also justified by the fact that debt adjustment is practically indispensable to the type of national economy under which we have been living, hence such an important matter that it should be handled by the federal authority. The rule then, should be the one stated in the case of *Canadian Bankers' Association et al v. Attorney-General for Saskatchewan*[38]: "If the Province steps in and actively assumes general protection of such a debtor, *by whatever means*, it is acting in relation to insolvency, and assuming the function of Parliament; it is so far administering, coercively as to creditors, the affairs of insolvent debtors. In this it is frustrating the laws of the Dominion in relation to the same subject."

In concluding on the merits of the Lacombe Law *vis-à-vis* the federal jurisdiction, the words of Torrance J. are very significant, when he concluded in *Belisle v. L'Union St. Jacques*:[39]

> The Dominion Legislature has exclusive legislative authority in matters of insolvency and there is this most significant clause in section 91 defining the power of the Parliament of Canada. The Parliament has exclusive legislative authority over "Bankruptcy and Insolvency" and further on it said, "and any of the classes of subjects enumerated in this section, (*e.g.* Bankruptcy and Insolvency) shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of classes of subjects by this Act assigned exclusively to the legislatures of the Provinces."
>
> In other words, the Imperial Act declares first what the Parliament of Canada alone can do and then to make its meaning plainer, declares what the Local Legislatures shall not do.
>
> *The Court is of the opinion that the B.N.A. Act, 1867, being the Imperial Act just now under consideration, has, in as plain language as words can make it, prohibited the Provincial Legislatures from making laws in matters of insolvency, directly or indirectly.*

VI. Conclusions

It is hoped that the importance of the *Orderly Payment of Debts Case* has been shown with all its implications. The writer has attempted to discuss its

[38]35 C.B.R. 135. *Italics* are mine. It is also interesting to note how the case defines and clarifies the word "insolvency" under 91(21). As stated in the headnote: "Insolvency, . . . seems to be a broader term that contemplates measures of dealing with the property of debtors unable to pay their debts in other modes or arrangements, as well, there is the composition and voluntary assignment, clauses which, in appropriate circumstances, may avoid technical bankruptcy without too great prejudice to creditors and hardship to debtors. *These means of salvage from the ravages of misfortune are of the essence of insolvency legislation and they are incorporated in the Bankruptcy Act. The usual mark of insolvency is the inability to meet obligations as they mature.*" *Italics* are mine.

[39](1870) 15 L.C.J. 212 at p. 214. Note this case went to appeal and was reversed. But it is submitted the words of Torrance J. are significant and correct. *Italics* are mine.

significance as regards the *Voluntary Assignments Case* and to prove that the precedent created by the latter case, which invoked the doctrine of an unoccupied field, is now dead. The idea of the exclusiveness of the federal power is of the utmost importance and it would henceforth seem that any provincial legislature dealing with subjects analogous to bankruptcy and insolvency legislation would be on very unsure ground. The important factor to consider is the rule of pith and substance, using as a guide the broad definition given by the court. Only then can we ascertain in which field the challenged law falls.

As a last comment upon the legality of the Lacombe Law, it can be said that one need only look at the similarity of the individual sections in both the Alberta Act and the Lacombe Law to conclude that due to the Alberta Act being *ultra vires*, *a fortiori*, the Lacombe Law is *ultra vires*.[40]

Whether or not this decision of the nation's highest tribunal will place upon the provincial legislatures too restrictive an interpretation of their legislative powers remains to be seen. It is submitted that the interpretation in this case is the correct one and complies with the true intention of the Fathers of Confederation. It was their wish and purpose to create a strong central government and a vigorous national economy by a broad interpretation of Dominion powers and a restrictive interpretation of provincial powers.

[40]It has been argued that the Lacombe Law could not be affected by the decision under review because of one basic distinction between the two acts. The argument is that, while the Alberta Act (under section 13) attempted to prohibit federal bankruptcy legislation from coming into the picture, even in case of conflict, nowhere does the Lacombe Law attempt to do this. This contention is reinforced by the case of *Ouellette v. Saxe et Allard* [1955] S.C. 190 which held that where a debtor goes under the Lacombe Law and subsequently becomes bankrupt the Bankruptcy Act prevails and the trustee is entitled to the undistributed funds remaining in the court, based on article 41(1) of the Bankruptcy Act. However, it is submitted that the above in no way disproves the foregoing article. For by admitting that the decision in the *Ouellette Case* is correct, one must admit the doctrine of concurrency. But concurrency does not apply here because the articles under the Lacombe Law conform to the definition of insolvency, which the author has repeatedly attempted to characterize as an exclusive federal power which cannot be legislated on by the province. The question of whether or not the Lacombe Law prevents the application of the federal law is in reality superfluous once it is proven that it is in pith and substance insolvency legislation.