

**Reconstructing Bankruptcy Law in Canada: 1867 to 1919**

**From an Evil to a Commercial Necessity**

by

**Thomas G. W. Telfer**

**A thesis submitted in conformity with the requirements  
for the degree of Doctor of Juridical Science  
Faculty of Law  
University of Toronto**

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# **Reconstructing Bankruptcy Law in Canada: 1867 to 1919**

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Thomas G.W. Telfer

Doctor of Juridical Science, 1999

Faculty of Law, University of Toronto

In the nineteenth century, Canadian bankruptcy legislation was not widely accepted as a means to distribute assets to creditors or as a way to provide a debtor with a fresh start. In 1880, Parliament repealed the *Insolvent Act of 1875* and abandoned its constitutional jurisdiction over bankruptcy and insolvency until 1919.

Much of the debate in the nineteenth century focused on the morality of the discharge and whether it interfered with a debtor's higher obligation to repay debts. Notions of forgiveness competed unsuccessfully with the idea that all debts had to be honoured. The collective nature of bankruptcy proceedings and the distribution of the debtor's assets on an equal basis were also central to the debate. Bankruptcy law's interference with the traditional common law scramble for the debtor's assets affected the specific interests of local and distant creditors. Bankruptcy law represented, therefore, both a conflict of values over the morality of the discharge and a distinct divergence of interests between local and distant creditors over the advantages and disadvantages of a pro rata distribution. This clash of ideas and interests took place within a changing economy that was moving away from its local and rural base. Repeal in 1880 was symbolic of the weakness of the national economy. By 1919, uniform bankruptcy

legislation could no longer be delayed in an expanding national market. Credit relationships became less dependent upon matters of character and the bankruptcy discharge became more acceptable as a central feature of the legislation.

Institutional factors such as federalism and the emerging regulatory state also had an independent effect on the legislative history. In the 1870s, the absence of a strong government department and bureaucracy inhibited the implementation of stable and lasting legislation. In 1919, bankruptcy reform coincided with an unprecedented growth of federal regulation during the War. Federalism also affected the timing of the legislation. The ability of the provinces to regulate voluntary assignments and the administration of debtors' estates alleviated the immediate need for federal legislation until after the turn of the century.

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My brother, who completed his Ph.D. in 1997 talked me through the dissertation process on a number of occasions. His "Top Ten Pieces of Advice on Finishing Your Ph.D." was up on my bulletin board and was a source of inspiration. My father-in-law and mother-in-law welcomed Patricia, Alexander and I into their home on our various trips back to London, Ontario. My father-in-law proof read early versions of my chapters and provided many helpful suggestions. My mother and father have always encouraged me and did so throughout this period. They helped locate sources at the University of Western Ontario on numerous occasions.

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[A]ll insolvency laws are wrong ... on account of being in direct conflict with the constitution of things, the established order under which we live, furnishing occasion and opportunity for men to overlook their responsibilities and neglect their obligations to God and to their fellow men.<sup>1</sup>

Under the British North America Act, bankruptcy and insolvency are within the purview of the Federal authority, the object of the Imperial Parliament, no doubt being that this important branch of legislation ...should have universal application throughout the Dominion. Trade should not be limited by local or provincial considerations.... In this way, trade is stimulated throughout the whole country....

Discharge may be said to be the very soul of a Bankruptcy Act, and in cases where a debtor has been obliged to go through the insolvency Courts through misfortune, the law ought to give him the opportunity of obtaining a clean bill of health, without interference by creditors...<sup>2</sup>

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<sup>1</sup> Thomas Ritchie, "Fallacy of Insolvency Laws and Their Baneful Effects" (1885).

<sup>2</sup> S.W. Jacobs, "A Canadian Bankruptcy Law—Is It a Necessity?" (1917) 37 Can. L. T. 604, 608.



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# CHAPTER 1

## Introduction

In the nineteenth century, Canadian bankruptcy legislation was not widely accepted as a means to distribute assets to creditors or as a way to provide debtors with a fresh start. Both of these central goals of bankruptcy law proved to be controversial. After Confederation, Parliament passed bankruptcy legislation in 1869<sup>1</sup> and again in 1875.<sup>2</sup> However, opponents of bankruptcy law began to call for repeal shortly after the Act of 1869 came into effect and between 1869 and 1880 Parliament debated 10 separate repeal bills.<sup>3</sup> In 1880, Parliament repealed the *Insolvent Act of 1875* and abandoned its constitutional jurisdiction over bankruptcy and insolvency until 1919.<sup>4</sup> After 1880, the provinces sought to ameliorate the effects of the federal repeal by enacting legislation that provided some means of distributing an insolvent debtor's assets. The fact that provincial law could never provide a uniform solution led Parliament to re-visit the bankruptcy reform issue on numerous occasions after 1880. All federal bankruptcy bills between 1880 and 1903 failed. By the end of the century provincial regulation became entrenched and it was not until after World War I that bankruptcy again became a national issue.

Why Canada rejected bankruptcy law in 1880 and did not pass a national uniform statute until 1919 is the central question of this study. A more specific question arises when one notes that much of the opposition to bankruptcy legislation in the nineteenth

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<sup>1</sup> *Insolvent Act of 1869*, S.C., 32-33 Vic. 1869, c. 16. Section 155 provided that it was to only remain in force for four years. The law was extended in 1873 and again in 1874. S.C. 1873, 36 Vic. c. 2; S.C. 1874, 37 Vic. c. 46.

<sup>2</sup> *Insolvent Act of 1875*, S.C. 39 Vic. 1875 c. 16.

<sup>3</sup> See infra chapter 5.

<sup>4</sup> *An Act to Repeal the Acts Respecting Insolvency Now in Force in Canada*, S. C. 1880, 43 Vic., c. 1. The British North America Act granted to the federal Parliament jurisdiction over bankruptcy and insolvency. 30-31 Vic., c. 3, s. 91(21). In 1919, Parliament passed the *Bankruptcy Act of 1919*, S.C. 1919, c. 36. See T.G.W. Telfer, "The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest?" (1994-95) 24 C.B.L.J. 357 and infra chapter 7.

century centred on the discharge of debtors. However, by 1919 it was argued that bankruptcy legislation was a necessity. What had been deemed an evil in 1880 became an essential form of business regulation after the War. The study accounts for the nineteenth century opposition to bankruptcy law, the lack of federal legislation for 40 years, and the success of the legislation in 1919. Canadian developments are placed in a comparative English and American context.

The economic development of any country must inevitably include stories of financial success as well as financial failure. English historians of the industrial revolution have been accused of focussing on the successful factory owners and the "spectacularly rich and successful" while ignoring failure.<sup>5</sup> Canadian historians, on the other hand, have pointed out numerous examples of business failure that date back to the discovery and exploration of the continent. For example, failure can be traced back to the demise of Martin Frobisher's Cathay Company in the sixteenth century. Frobisher, it has been said, "fathered" one of the first failures on the "northern rocks".<sup>6</sup> The Canadian fur trade left many in financial ruin in New France with many of the large chartered French companies failing.<sup>7</sup> The North West Company merged with its rival the Hudson Bay Company in 1821 after several years of severe financial difficulty.<sup>8</sup>

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<sup>5</sup> J. Hoppitt, *Risk and Failure in English Business, 1700-1800* (New York: Cambridge University Press, 1987) at 1, 4 [hereinafter Hoppitt, *Risk and Failure*]; I. Duffy, *Bankruptcy and Insolvency in London during the Industrial Revolution* (New York: Garland, 1985) at 2 [hereinafter Duffy, *Bankruptcy and Insolvency in London*]; B. Weiss, *The Hell of the English: Bankruptcy and the Victorian Novel* (Cranbury, NJ: Bucknell University Press, 1986) at 23 [hereinafter Weiss, *Bankruptcy and the Victorian Novel*].

<sup>6</sup> Forged with the hopes of finding a Northwest Passage to China, and also mining gold and silver in Canada, the Cathay Company failed and the principal merchant backer of Frobisher was sent to debtor's prison. M. Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland & Stewart, 1987) at 25 [hereinafter Bliss, *Northern Enterprise*].

<sup>7</sup> Bliss notes that at the time of the British take over of New France, many of the French merchants were bankrupt or had left the colony. The Compagnie du Nord, an early French competitor of the Hudson's Bay Company failed in 1700. Bliss, *Northern Enterprise*, *supra* note 6 at 83, 115; G.D. Taylor & P.A. Baskerville, *A Concise History of Business in Canada* (Toronto: Oxford University Press, 1994) at 49 [hereinafter Taylor and Baskerville, *Business in Canada*].

<sup>8</sup> Bliss, *Northern Enterprise*, *supra* note 6 at 104-105; Taylor and Baskerville, *Business in Canada*, *supra* note 6 at 89-93.

However, Canadian historians have tended to focus on the financial difficulties of larger enterprises that played a significant role in the business history of the country. Further, a discussion of business failure in Canada necessarily involves government intervention to subsidize and salvage failing enterprises.<sup>9</sup> The history of financial failure in Canadian history includes significant involvement of the state in areas of public infrastructure dating back to the pre-Confederation era. The Welland Canal received financial support from the Upper Canadian government and eventually the province assumed control over the project.<sup>10</sup> Government support for infrastructure projects also extended to railways. In 1849 and 1851 the Province of Canada intervened by passing legislation providing forms of state guarantees for railways. Municipalities were also granted the power to assist flagging railways by the Consolidated Municipal Loan Fund Act of 1852 which allowed local governments to grant debenture aid to railway developers.<sup>11</sup>

The Grand Trunk Railway, described by one historian as the colonies' first "mega project", faced collapse and turned to the Province of Canada for support between 1856 and 1862.<sup>12</sup> State commitment to publicly supported railways continued with the proposed Canadian Pacific line. Grants of money and land as well as subsequent government loans aided the new national line.<sup>13</sup> The rail subsidies and loan guarantees

<sup>9</sup> On the attention given to investment in public infrastructure in Canada, see S. McBride, "The Political Economy Tradition and Canadian Policy Studies" in L. Dobuzinskis, M. Howlett & D. Lacock, *Policy Studies in Canada the State of the Art* (Toronto: University of Toronto Press, 1996) at 51 [hereinafter Dobuzinskis, et al., *Policy Studies in Canada*].

<sup>10</sup> Bliss, *Northern Enterprise*, *supra* note 6 at 172.

<sup>11</sup> *Ibid* at 180-182; Taylor and Baskerville, *Business in Canada*, *supra* note 8 at 168-169. For Brantford's involvement with this fund and its impact, see D. Burley, *A Particular Condition in Life: Self-Employment and Social Mobility in Mid Victorian Brantford* (Montreal: McGill-Queen's University Press, 1994) at 203-205 [hereinafter Burley, *A Particular Condition*].

<sup>12</sup> Bliss, *Northern Enterprise*, *supra* note 6 at 188.

<sup>13</sup> Taylor and Baskerville, *Business in Canada*, *supra* note 8 at 235-236. Bliss, *Northern Enterprise*, *supra* note 6 at 218-219.

continued with the building of two new transcontinentals under the Liberals. The Canadian Northern and the National Transcontinental-Grand Trunk Pacific were completed in 1915. By 1916 the Canadian Northern had accumulated \$104 million in federal loan guarantees as well as substantial loan guarantees from some of the provinces. These two systems were nationalized with the formation of Canadian National Railways between 1917 and 1922.<sup>14</sup> However, as noted by one historian, small and medium sized business were allowed to collapse "with impunity." Those companies which were the largest and those with the biggest debts "seem, throughout Canadian history, to have been rescued in one form or another".<sup>15</sup> The success or failure of these enterprises had a significant impact on the survival of many other small firms, sole proprietorships, partnerships. Yet little is known about the legislative framework that regulated individual debtors.

There are some examples of studies that do examine financial failure in small firms. For example, Douglas McCalla's study of the Buchanan family's wholesale business in Upper Canada from 1834-1871 traces the success and failures of the business and includes accounts of negotiations with foreign and domestic creditors.<sup>16</sup> However, the legislative framework within which creditors were acting and the changes to the legislation are not discussed. David Burley's study of the mid-Victorian Brantford business community includes a discussion of the changing nature of credit relations and

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<sup>14</sup> Taylor and Baskerville, *Business in Canada*, *supra* note 8 at 274-284; Bliss, *Northern Enterprise*, *supra* note 6 at 328-329; 391-392. The Royal Commission to Inquire into Railways and Transportation in Canada concluded that the Canadian Northern Railway was bankrupt as of 30 June 1916. Lewis and MacKinnon argue that the government guarantees had a negative impact on the project. F. Lewis & M. MacKinnon, "Government Loan Guarantees and the Failure of the Canadian Northern Railway" (1987) 47 *J. of Econ. Hist.* 175 at 177, 194.

<sup>15</sup> K. Norrie & D. Owrarn, *A History of the Canadian Economy* (Toronto: Harcourt, 1991) at 438.

<sup>16</sup> D. McCalla, *The Upper Canada Trade 1834-1872: A Study of the Buchanans' Business* (Toronto: University of Toronto Press, 1979) at 135-148.

an analysis of the changing rates of insolvencies from 1851-1881. His analysis, however, is made without reference to the relevant legislation.<sup>17</sup>

Other pieces of commercial legislation or topics of regulation have been well documented in Canadian history. The National Policy or protective tariff has been described as "the most important issue in Canadian business and political life in the late nineteenth and early twentieth century".<sup>18</sup> Similarly, Canadian competition law, which emerged in 1889, has been the subject of a number of historical studies.<sup>19</sup> However, the history of Canadian bankruptcy legislation has received scant attention from business and economic historians.<sup>20</sup>

In part the lack of Canadian historical work may be explained by the long absence of federal legislation after 1880. Modern Canadian bankruptcy legislation can be traced back to the *Bankruptcy Act of 1919* which provided a legislative framework for most of the twentieth century.<sup>21</sup> The Act of 1919 was such a significant change that the earlier

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<sup>17</sup> Burley, *A Particular Condition*, *supra* note 11 at 103-126; 187-190. David Burley's study includes statistics on the rates of "insolvencies" 1851-1881. He concludes, "the majority of bankrupts in the 1850s and 1870s did quit business" (at 188). His study does not define the legal meaning of bankruptcy or insolvency. The evolving regulatory framework and the eligibility of debtors to qualify as bankrupts is not discussed.

<sup>18</sup> M. Bliss, *A Living Profit: Studies in Social History of Canadian Business 1883-1911* (Toronto: McClelland and Stewart, 1974) at 95 [hereinafter *A Living Profit*].

<sup>19</sup> J. Benidickson, "The Combines Problem in Canadian Legal Thought: 1867-1920" (1993) 43 U.T.L.J. 799; M. Bliss, "Another Anti-Trust Tradition: Canadian Anti-Competition Policy 1889-1910" (1973) 47 *Bus. Hist. Rev.* 177; P. Gorecki & W.T. Stanbury, *The Objectives of Canadian Competition Policy 1888-1983* (Montreal: Institute for Research on Public Policy, 1984).

<sup>20</sup> Michael Bliss, for example sums up the struggle to achieve national legislation in two lines: "Twenty-five years of mercantile agitation for a federal insolvency law led nowhere mainly because of business inability to agree on a law that would satisfy all the competing interests." Bliss, *A Living Profit*, *supra* note 18 at 130.

<sup>21</sup> Jacob Ziegel notes that although the 1919 Act has been amended many times, "the 1919 Canadian Bankruptcy Act still provides the conceptual framework for the current Bankruptcy and Insolvency Act": J. Ziegel, "Canada's Phased in Bankruptcy Law Reform" (1996) *Am. Bankr. L.J.* 383. See also J.M. Ferron, "The Bankruptcy Court and Administration in Ontario" (1990) 24 *L. Soc. Gaz.* 130 at 131 [hereinafter Ferron, "Bankruptcy Court"]; Report of the Study Committee on Bankruptcy and Insolvency Legislation (Canada, 1970) at xiii. [Hereinafter Tassé Report].



short-lived bankruptcy statutes of 1869 and 1875 have become either historical footnotes or ignored altogether.<sup>22</sup> In some instances, some sources incorrectly identify the Act of 1919 as Canada's first bankruptcy statute.<sup>23</sup>

The most significant legal-historical work has been on bankruptcy statutes in pre-Confederation Canada. There are regional studies of pre-Confederation Quebec,<sup>24</sup> Ontario,<sup>25</sup> and Nova Scotia<sup>26</sup> that include discussion of the evolution of bankruptcy statutes (or in the case of Nova Scotia the absence thereof) in those regions. These studies provide an important context for post-Confederation developments. There have been fewer historical studies of the post-Confederation bankruptcy statutes. One can trace briefly the legislative history of bankruptcy statutes in introductory chapters of

<sup>22</sup> The recent journalistic account of bankruptcy law, Walter Stewart, *Belly Up: The Spoils of Bankruptcy* (Toronto: McClelland and Stewart, 1995), also contains a brief chapter on the history of bankruptcy law generally. His reference to the history of Canadian legislation is quite brief and contains a major error. He briefly describes the 1875 legislation and then indicates that "there was no substantive change in Canada until the passage of the Bankruptcy Act of 1919 ...". He ignores of course the fact that Parliament repealed the legislation in 1880.

<sup>23</sup> One source incorrectly claimed that "the first Canadian act was adopted in 1919". United States Senate, *Strengthening of Procedure in the Judicial System: Report to the President on the Bankruptcy Act and Its Administration in the Courts of the United States* (72d Cong., 1 Sess., Senate Document) at 65. Other studies also have forgotten about the nineteenth century *Insolvent Acts*. See e.g., M. Priest & A. Wohl, "The Growth of Federal and Provincial Regulation of Economic Activity, 1867-1978" in W.T. Stanbury, ed., *Government Regulation Scope, Growth, Process* (Montreal: The Institute for Research on Public Policy, 1980) 69 at 119.

<sup>24</sup> E. Kolish, "L'Introduction de la Faillite au Bas Canada: Conflit Social ou National?" (1986) 40 R.H.A.F. 215 at 217; E. Kolish, "Imprisonment for Debt in Lower Canada, 1791-1840" (1986/87) 32 McGill L.J. 603; E. Kolish, *Changement dans le Droit Privé au Québec et au Bas-Canada, entre 1760 et 1840: Attitudes et Réactions des Contemporains* (Ph.D. diss., Université de Montréal, 1980) now published as E. Kolish, *Nationalismes et Conflits de Droits: Le Débat du Droit Privé au Québec* (Québec: Cahiers du Québec, 1994).

<sup>25</sup> R.C.B. Risk, "The Golden Age: The Law About the Market in Nineteenth Century Ontario" (1976) 26 U.T.L.J. 307.

<sup>26</sup> P. Girard, "Married Women's Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia 1820-1867" in P. Girard & J. Phillips, eds., *Essays in the History of Canadian Law*, vol. 3, *Nova Scotia* (Toronto: University of Toronto Press, 1990).

bankruptcy law texts and in a government report.<sup>27</sup> The history of the Canadian legislation has also featured in the works of John Honsberger. This bankruptcy scholar has raised historical issues as part of his larger bankruptcy studies and his most recent paper examines the evolution of bankruptcy administration in Canada from 1867 to the present.<sup>28</sup>

The few studies that have considered the post-Confederation legislation provide various explanations for the law's unpopularity in the nineteenth century. Some studies lay the blame on the legislation's faulty administrative provisions. High fees and administrative expenses were at fault.<sup>29</sup> Others argue that the depression of the 1870s contributed to the unpopularity of bankruptcy law. The economic crisis of 1873 occurred at the very time that Parliament was considering the merits of the legislation.<sup>30</sup> The increased number of commercial failures was a particular concern among farmers in rural

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<sup>27</sup> L. Duncan, *The Law and Practice of Bankruptcy Administration in Canada* (Toronto: Carswell, 1922) [hereinafter Duncan, *Bankruptcy in Canada*]; L.J. de la Durantaye, *Traité de la Faillite en la Province de Québec* (Montréal: Chez L'Auteur, 1934). The Tassé Report, *supra* note 21 briefly traces the nineteenth century legislation.

<sup>28</sup> See for example, J. Honsberger, "Bankruptcy Administration in the United States and Canada" (1975) 63 Cal. L. Rev. 1427 [hereinafter Honsberger, "Bankruptcy in the United States and Canada"]; J. Honsberger "Bankruptcy: A Comparison of the Systems of the United States and Canada" (1971) 45 Am. Bank. J. 129. [hereinafter Honsberger, "A Comparison of the Systems"]; J. Honsberger, "The Historical Evolution of the Bankruptcy and Insolvency Process in Canada" (unpublished, on file with the author). [hereinafter Honsberger, "Historical Evolution of Bankruptcy"]. I am indebted to John Honsberger for a number of lengthy discussions on the subject.

<sup>29</sup> Duncan, *Bankruptcy in Canada*, *supra* note 27 at 18-19; A. Bohémier, *Faillite et Insolvabilité*, tome 1, (Montréal: Editions Thémis, 1992) at 11 [hereinafter Bohémier *Faillite*]; A. Bohémier, *La Faillite en Droit Constitutionnel Canadien* (Montréal: Les Presses de L'Université de Montréal, 1972) at 101 [hereinafter Bohémier, *Droit Constitutionnel*]; E.H. Levi & J.W. Moore, "Bankruptcy and Reorganization: A Survey of Changes" (1937) 5 U. Chi. L. Rev. 1 at 19 [hereinafter Levi & Moore, "Bankruptcy and Reorganization"]; Lloyd W. Houlden, *Bankruptcy* (Toronto: Special Lectures of the Law Society of Upper Canada, 1956) at 3; J. Bicknell, "Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 42-44.

<sup>30</sup> Honsberger, "Bankruptcy in the United States and Canada", *supra* note 28 at 1529; Jacobs, "A Canadian Bankruptcy Act: Is it A Necessity?" (1917) 37 Can. L.T. 604 at 605; Tassé Report, *supra* note 21 at 14.

areas.<sup>31</sup> Public opinion was opposed to a system which permitted debtors to obtain a release of their debts.<sup>32</sup> Finally, one author argues that the diversity of pre-Confederation provincial legislation, particularly the differences between the English law of Ontario and the Quebec Civil Code, contributed to the “non-success of the act”.<sup>33</sup>

These explanations highlight important issues to be considered but they do not provide a complete answer. Administrative expenses have long been a criticism of bankruptcy law. Was this the sole reason for repeal, or were there other fundamental reasons why bankruptcy law was not accepted in Canadian society? The depression of the 1870s is an important context to consider but one must also examine the nature of the Canadian economy and whether it was moving away from its traditional rural base. Furthermore, one needs to examine the parliamentary debates to consider why public opinion was so vehemently opposed to the discharge. Additionally, what particular aspects of bankruptcy law offended the farming community?

Studies that have commented on the emergence of the new legislation in 1919 have focused largely on the fact that the new federal legislation provided a uniform solution to the problem of diverse provincial legislation that emerged after 1880.<sup>34</sup> However, the provincial era did not emerge overnight and provincial reform proceeded at a slow pace after 1880. It was not until 1903 that all of the provinces had in place a pro rata regime which abolished preferences. Between 1880 and 1903 it was not certain

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<sup>31</sup> Naylor portrays the division over bankruptcy law as a struggle between “farmers and local merchants against the urban financial oligarchy”. T. Naylor, *The History of Canadian Business 1867-1914*, Vol. 1: *The Banks and Finance Capital* (Toronto: James Lorimer, 1975) at 80. On rural opposition generally, see Honsberger, “Bankruptcy in the United States and Canada”, *supra* note 28 at 1529; Tassé Report, *supra* note 21 at 14; Honsberger, “Historical Evolution of Bankruptcy”, *supra* note 28 at 41;

<sup>32</sup> Bohémier, *Faillite*, *supra* note 29 at 11; Bohémier, *Droit Constitutionnel*, *supra* note 29 at 101.

<sup>33</sup> R. Brown, “Comparative Legislation in Bankruptcy” (1900) 5 J. Comp. Leg. & Int’l. L. 251 at 259.

<sup>34</sup> Duncan’s 1922 bankruptcy text claims, for example, that “in time a fairly complete code was built up”: Duncan, *Bankruptcy in Canada*, *supra* note 27 at 20. See also Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters* (Toronto: Ministry of the Attorney General, 1983) which refers to “shortly after the Legislative Assembly of Ontario enacted *The Creditors’ Relief Act*, 1880, most of the other province introduced similar legislation”.

whether provincial or federal regulation of debtor creditor matters would prevail. Prior studies have ignored the various efforts to re-establish a federal law between 1880 and 1903.<sup>35</sup>

Earlier in this century, one author complained that many scholars had ignored the historical evolution of bankruptcy law in England and the United States. Writing in 1917, he claimed that bankruptcy law scholars considered a historical treatment of the subject as “unnecessary, uninteresting, or impossible”.<sup>36</sup> That claim can no longer be made with respect to England and the United States. There are now numerous studies that detail the evolution of bankruptcy legislation in those two countries.

In contrast to Canadian works, historical studies of English and American bankruptcy law have flourished. The origins of English bankruptcy law have been well documented by older commentaries and more modern works.<sup>37</sup> Broader works on both the eighteenth century and nineteenth century place individual financial failure both in the context of the industrial revolution and the regulatory framework.<sup>38</sup> English authors

<sup>35</sup> See e.g., Ferron, “Bankruptcy Court”, *supra* note 21 at 131; Honsberger, “Bankruptcy in the United States”, *supra* note 28 at 1529; Tassé Report, *supra* note 21 at 15-16; Honsberger, “Historical Evolution of Bankruptcy in Canada”, *supra* note 28 at 43; Levi & Moore, “Bankruptcy and Reorganization” *supra* note 29 at 19.

<sup>36</sup> L. Levinthal, “The Early History of Bankruptcy” (1917-1918) 66 U. Pa. L. Rev. 223 [hereinafter Levinthal, “The Early History”].

<sup>37</sup> W. Holdsworth, *A History of English Law* (Boston: Little Brown, 1938); *Potters Historical Introduction to English Law and Its Institutions*, 4th ed. (London: Sweet & Maxwell, 1958); H.J. Stephen, *New Commentaries on the Laws of England* (New York: Garland Publishing, 1979, reprint of 1841-45 ed.); W.J. Jones, *The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period* (Philadelphia: American Philosophical Society, 1979) [hereinafter Jones, *Foundations of Bankruptcy*]; Levinthal, “The Early History”, *supra* note 36; Louis Levinthal, “The Early History of English Bankruptcy Law” (1919) 67 U. Pa. L. Rev. 1; E. Welbourne, “Bankruptcy before the Era of Victorian Reform” (1932) 4 Camb. Hist. J. 51.

<sup>38</sup> Hoppitt, *Risk and Failure*, *supra* note 5; Julian Hoppitt, “Financial Crises in Eighteenth Century England” (1986) 39 Econ. Hist. Rev. 39 [hereinafter Hoppitt, “Financial Crises”]; Ian Duffy, “English Bankrupts” (1980) 24 Am. J. Legal Hist. 283; Ian Duffy, *Bankruptcy and Insolvency in London*, *supra* note 5.

have also examined specific issues such as imprisonment for debt,<sup>39</sup> attitudes towards debt,<sup>40</sup> and bankruptcy law and literature.<sup>41</sup> The most recent book examines the parliamentary history of nineteenth century legislation and discusses the role of various interest groups on the legislative process.<sup>42</sup> Further understanding of the history of English bankruptcy can be gleaned from a number of American works which review the English origins of bankruptcy law to the founding of the republic.<sup>43</sup>

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<sup>39</sup> Abraham Freedman, "Imprisonment for Debt" (1928) 2 Temp. L. Q. 330; J. Cohen, "The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy" (1983) 3 J. of Legal Hist. 153; G.R. Rubin, "Law Poverty and Imprisonment for Debt, 1869-1914" in G.R. Rubin & D. Sugarman, eds., *Law Economy and Society, 1750-1914* (Abingdon: Professional Books Ltd, 1984); Bruce Kercher, "The Transformation of Imprisonment for Debt in England, 1828-1838" (1984) 2 Aust. J. L. & Soc. 60. See other more specialized studies, such as I Treiman, "Escaping the Creditor in the Middle Ages" (1927) 43 L.Q.R. 230; I. Treiman, "Acts of Bankruptcy; A Medieval Concept in Modern Bankruptcy Law" (1938) 38 Harv. L. Rev. 189; Clinton Francis, "Practice Strategy and Institution: Debt Collection In the English Common Law Courts, 1740-1840" (1986) 80 Nw. U. L. Rev. 807; L. Friedman & T.E. Niemira, "The Concept of the 'Trader' in Early Bankruptcy Law" (1958) 5 St. Louis U.L.J. 2.

<sup>40</sup> C. Muldrew, "Interpreting the Market: The Ethics of Credit and Community Relations in Early Modern England" (1993) 18 Soc. Hist. 163-183 [hereinafter Muldrew, "Interpreting the Market"]; C. Muldrew, "Credit and the Courts: Debt Litigation in a Seventeenth-Century Urban Community" (1993) 46 Econ. Hist. Rev. 23 [hereinafter Muldrew, "Credit and the Courts"]; J. Hoppitt, "Attitudes To Credit in Britain 1680-1790" (1990) 33 Hist. J. 305.

<sup>41</sup> Weiss, *Bankruptcy and the Victorian Novel*, *supra* note 5; M. Quilter, "The Merchant of Venice in the Context of Contemporary Debt and Bankruptcy Law of England" (1998) 6 Insol. L.J. 43; C.R.B. Dunlop, "Debtors and Creditors in Dickens' Fiction" (1990) 19 Dickens Stud. Ann. 25 at 26.

<sup>42</sup> V.M. Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt and Company Winding-Up in Nineteenth Century England* (Oxford: Clarendon Press, 1995) [hereinafter Lester, *Victorian Insolvency*]. See also Victor Batzel, "Parliament, Businessmen and Bankruptcy, 1825-1883: A Study in Middle Class Alienation" (1983) 18 Can. J. of Hist. 171.

<sup>43</sup> See e.g., C.J. Tabb, "The Historical Evolution of the Bankruptcy Discharge" (1991) 65 Am. Bankr. J. 325; [hereinafter Tabb, "Historical Evolution of the Discharge"]; R. Weisberg, "Commercial Morality, the Merchant Character, and the History of the Voidable Preference" (1986) 39 Stan. L. Rev. 1 [hereinafter Weisberg, "History of the Voidable Preference"]; J. McCoid, "The Origins of Voluntary Bankruptcy" (1988) 5 Bankr. Dev. J. 361 [hereinafter McCoid, "Voluntary Bankruptcy"]; J. McCoid, "The Discharge: the Most Important Development in Bankruptcy History" (1996) 70 Am. Bankr. L.J. 163 [hereinafter McCoid, "The Discharge in History"].

The history of American bankruptcy law is equally well represented in the literature. Following the formation of the republic, the United States enacted three short-lived national bankruptcy statutes before finally settling on what was to become a more permanent solution in 1898. Charles Warren's depression era book traces the political history of the national legislation while Peter Coleman's study places the national legislation in the context of the various state level reforms.<sup>44</sup> These two major books have been followed by a plethora of articles and dissertations. Each of the Bankruptcy Acts of 1800,<sup>45</sup> 1841,<sup>46</sup> 1867,<sup>47</sup> and 1898<sup>48</sup> have now been the subject of a separate detailed study

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<sup>44</sup> Charles Warren, *Bankruptcy in United States History* (Cambridge: Harvard University Press, 1935); [hereinafter Warren, *Bankruptcy in United States*]; P. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy* (Madison: State Historical Society of Wisconsin, 1974) [hereinafter, Coleman, *Debtors and Creditors in America*].

<sup>45</sup> B. Mathews, "*Forgive Us Our Debts*": *Bankruptcy and Insolvency in America 1763-1841* (Ph.D. diss., Brown University, 1994) [hereinafter Mathews, *Bankruptcy and Insolvency in America*]; M. Bradshaw, "The Role of Politics and Economics in Early American Bankruptcy Law" (1997) 18 Whittier L. Rev. 739; K.H. Nadelman, "On the Origin of the Bankruptcy Clause" (1957) 1 Am. J. Legal Hist. 215; R. Frimet, "The Birth of Bankruptcy in the United States" (1991) 96 Com. L.J. 160 at 164-165; A. Duncan, "From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law" (1995) 100 Com. L.J. 191 at 217.

<sup>46</sup> Edward J. Balleisen, *Navigating Failure: Bankruptcy in Antebellum America* (Ph.D. diss., Yale University 1995) [hereinafter Balleisen, *Navigating Failure*]; E.J. Balleisen, "Vulture Capitalism in Antebellum America: The 1841 Federal Bankruptcy Act and the Exploitation of Financial Distress" (1996) 70 Bus. Hist. 473 [hereinafter Balleisen, "The 1841 Bankruptcy Act"]; M. Weisman, "Story and Webster and the Bankruptcy Act of 1841" (1941) 36 Comm. L.J. 4; D. Beesley, *The Politics of Bankruptcy in the United States, 1837-1845* (Ph.D. diss., University of Utah, 1968).

<sup>47</sup> While there is no one major study devoted to this Act, it is an essential part of the larger story covered by Warren and Coleman. The political debates are analysed in detail in D. Bauman, "*As this is the Year of the Jubilee*": *The Bankrupt Act of 1867* (M.A. Thesis, California-State Fullerton, 1995); See also B. Watkins, "To Surrender All His Estate: The 1867 Bankruptcy Act" (1989) 21 Prologue Q. of the National Archives 207.

<sup>48</sup> See B. Hansen, *The Origins of Bankruptcy Law in the United States 1789-1898* (Ph.D. diss., Washington University, 1995) [hereinafter Hansen, *Origins of Bankruptcy Law*]; B. Hansen, "Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law" (1998) 72 Bus. Hist. Rev. 86 [hereinafter Hansen, "Demand for Bankruptcy Law"]; R.C. Sauer, "Bankruptcy Law and the Maturing of American Capitalism" (1994) 55 Ohio St. L.J. 291 [hereinafter Sauer, "Maturing of American Capitalism"].

with some studies placing bankruptcy law in a more specific regional context or relating financial failure to broader cultural trends.<sup>49</sup> Further, the history of the discharge, voidable preferences, voluntary and involuntary bankruptcy are all given separate treatment.<sup>50</sup> This rich body of literature has allowed American historians to place bankruptcy law developments into the wider history of the regulation of the American economy and provided the prospect for further regional studies and an examination of how bankruptcy affected particular groups in society.<sup>51</sup>

English and American works adopt a number of different approaches to explain the evolution of bankruptcy law. In England, studies have emphasized the evolution of bankruptcy law from a criminal statute in the sixteenth century to a necessary form of economic regulation. The original bankruptcy statute of 1543 and the several statutes that followed were concerned largely with the control of the debtor.<sup>52</sup> The discharge did not become part of English bankruptcy law until early in the eighteenth century. In pre-industrial England, bankruptcy legislation was harsh and it was not until the nineteenth century that England began to liberalize many features of the bankruptcy regime. English studies have raised the issue of the personal nature of credit relationships in pre-industrial England. Credit was extended on the basis of trust and personal connection rather than economic considerations. Bankrupts were regarded as moral failures.<sup>53</sup> In the mid-

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<sup>49</sup> J. Ciment, *In Light of Failure: Bankruptcy, Insolvency and Financial Failure in New York City, 1790-1860* (Ph.D. diss., City University of New York, 1992); S. Sandage, *Deadbeats, Drunkards, and Dreamers: A Cultural History of Failure in America 1819-1893* (Ph.D. diss., Rutgers University, 1995).

<sup>50</sup> Tabb, "Historical Evolution of the Discharge", *supra* note 43; McCoid, "The Discharge in History", *supra* note 43; Weisberg, "History of the Voidable Preference", *supra* note 43; McCoid, "Voluntary Bankruptcy", *supra* note 43; J. McCoid, "The Occasion for Involuntary Bankruptcy" (1987) 61 *Am. Bankr. L.J.* 195.

<sup>51</sup> K. Gross, M. Stefanini Newman & D. Campbell, "Ladies in Red: Learning From America's First Female Bankrupt's" (1996) 40 *Am. J. Legal Hist.* 1.

<sup>52</sup> On the origins and development of the early law, see Jones, *Foundations of Bankruptcy*, *supra* note 37.

<sup>53</sup> Muldrew, "Interpreting the Market", *supra* note 40; Julian Hoppitt, "Attitudes to Credit in Britain 1680-1790" (1990) 33 *Hist. J.* 305; Muldrew, "Credit and the Courts", *supra* note 40; Hoppitt, "Financial

nineteenth century, the English Parliament greatly expanded the scope of bankruptcy legislation by opening proceedings to all types of debtors, allowing voluntary bankruptcy and in 1883 it removed creditor control over the discharge. While negative attitudes towards bankruptcy continued throughout the Victorian era, there was also a growing acceptance of the necessity of a bankruptcy statute. The growth of corporations and the decline of more personal credit relationships in a rapidly expanding economy made bankruptcy law more acceptable.<sup>54</sup> The landmark bankruptcy reforms of 1883 have been attributed to the presence of an active government department. The English Board of Trade was committed to reform as a public policy measure.<sup>55</sup>

In the United States a permanent bankruptcy solution was not achieved until 1898. The three prior national bankruptcy statutes of 1800, 1841, and 1867 were all repealed shortly after their enactment. Several studies explain the rise and fall of bankruptcy legislation in terms of politics and ideology. Bankruptcy law divided American political parties and its success and failure can be linked to the popularity of particular parties representing opposing ideologies. Rural values, which emphasized the importance of personal and local debt obligations, competed with a more dynamic view of capitalism that sought to expand markets in an unrestrained fashion across the nation.<sup>56</sup> Other studies have tried to specifically identify why these ideals appealed to different interests. The role of distance and credit networks is a significant theme in the American literature. Bankruptcy law created divisions between local and distant creditors. Without a national law, local creditors operating under the common law won the race to the debtor's assets

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Crises", *supra* note 38; Paul Haagen, "Eighteenth Century English Society and the Debt Law" in S. Cohen & A. Scull eds., *Social Control and the State* (Oxford: Blackwell, 1983) 222.

<sup>54</sup> Weiss, *Bankruptcy and the Victorian Novel*, *supra* note 5 at 46-47; Muldrew, "Interpreting the Market", *supra* note 40 at 181-183; V. Batzel, "Parliament, Businessmen and Bankruptcy, 1825-1883: a Study in Middle Class Alienation" (1983) 18 *Can. J. Hist.* 171 at 181.

<sup>55</sup> Lester, *Victorian Insolvency*, *supra* note 42.

<sup>56</sup> Several studies emphasize the division over bankruptcy as an ideological and political. Charles Warren's work illustrates the political divisions. Warren, *Bankruptcy in United States*, *supra* note 44. See also Sauer, "Maturing of American Capitalism", *supra* note 48.



or received preferential payments from friendly creditors.<sup>57</sup> Creditors who traded at a distance demanded a national law to ensure that the debtor's assets were distributed on a pro rata basis.<sup>58</sup> Tony Freyer's recent work illustrates this divide in the ante-bellum period where what he calls the local "associational economy" was "at odds with the demands of big corporate and mercantile enterprises tied more directly into the national market."<sup>59</sup> This clash of interests and values took place within the framework of a changing economy. The evolution of American bankruptcy law to 1898 has been analysed as "part of the larger transformation of American society"<sup>60</sup> while another author refers to the process as the "maturing of American capitalism".<sup>61</sup> The depersonalization of business and credit, the growth of national markets, and the rise of corporations were significant factors explaining the success of the Act of 1898. When the United States finally settled on a permanent Bankruptcy Act in 1898, the American economy generated most of its wealth from commerce and manufacturing, and had shifted away from its traditional agricultural base. The expansion of transportation and communication networks removed geographic barriers to a national market. These economic changes removed or weakened moral opposition to the discharge, as debts

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<sup>57</sup> Several historical studies touch on the division between local and distant creditors. However, modern bankruptcy scholarship has also emphasized the advantages of a bankruptcy regime over the common law. See Thomas Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge: Harvard University Press, 1986). A more recent modern study specifically raises the advantages national creditors derive from a uniform bankruptcy law. See D. Carlson, "Debt Collecting as Rent Seeking" (1995) 79 *Minn. L. Rev.* 817.

<sup>58</sup> On the tension between local and distant creditors and the tendency to make preferential payments to friendly creditors, see Sauer, "Maturing of American Capitalism", *supra* note 48; Weisberg, "History of the Voidable Preference", *supra* note 43; Balleisen, *Navigating Failure*, *supra* note 46; Balleisen, "The 1841 Bankruptcy Act", *supra* note 43.

<sup>59</sup> T. Freyer, *Producers versus Capitalists Constitutional Conflict in Antebellum America* (Charlottesville: University of Virginia. Press, 1994) at 9, 11, 21, 38, 85-87.

<sup>60</sup> Coleman, *Debtors and Creditors in America*, *supra* note 44 at 248.

<sup>61</sup> Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 48.

became simple accounts to be collected rather than debts of honour.<sup>62</sup> Further, the growth of interstate trade led to the rise of new national organizations that were able to lobby effectively for a national law at the end of the century.<sup>63</sup>

Federalism also affected the evolution of American bankruptcy law. In the absence of federal bankruptcy legislation, several states passed laws to deal with insolvent debtors. Several of the statutes were subject to constitutional challenge. The constitutional uncertainty surrounding the bankruptcy law issue and the subsequent rulings of the American Supreme Court which upheld in part the validity of state legislation, inhibited the need for a federal law.<sup>64</sup>

An examination of these various American and English works provokes several areas of inquiry for a Canadian study. Broad economic change, the evolving nature of credit relationships, and institutional factors such as the strength of the public state and federalism also play an important role in Canada. Any explanation of the Canadian story, however, must begin with a consideration of the nature of bankruptcy law. Bankruptcy law is a statutory exception to the common law and interferes with the ordinary relations between debtors and creditors.<sup>65</sup> While several scholars have attempted to formulate the essential nature of bankruptcy law,<sup>66</sup> two fundamental goals lie at the heart of all

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<sup>62</sup> Both Coleman and Sauer place an emphasis on broad economic change.

<sup>63</sup> Hansen, "The Demand for Bankruptcy Law", *supra* note 48; Hansen, *Origins of Bankruptcy Law*, *supra* note 48.

<sup>64</sup> On the importance of federalism, see e.g., Mathews, *Bankruptcy and Insolvency in America*; F.R. Noel, *A History of the Bankruptcy Clause of the Constitution of the United States of America* (Washington: Chas. H. Potter, 1919); D. Boshkoff, "Limited, Conditional and Suspended Discharges in Anglo-American Bankruptcy Proceedings" (1982) 131 U. Pa. L. Rev. 69 at 111; T. Plank, "Constitutional Limits of Bankruptcy" (1996) 63 Tenn. L. Rev. 487; Balleisen, "The 1841 Bankruptcy Act", *supra* note 46.

<sup>65</sup> See e.g. *Shields v. Peak* (1883) 8 S.C.R. 579; Lester, *Victorian Insolvency*, *supra* note 42 at 8.

<sup>66</sup> On the various efforts to define bankruptcy, see J. Honsberger, "The Nature of Bankruptcy and Insolvency in a Constitutional Perspective" (1972) 10 Osgoode Hall L.J. 199 at 206; M. Radin, "The Nature of Bankruptcy" (1940) 89 U. Pa. L. Rev. 1.

bankruptcy statutes.<sup>67</sup> First, bankruptcy legislation ensures that the debtor's assets are distributed equally among all unsecured creditors. The equal treatment of creditors is supported by the statutory prohibition which prevents debtors from making preferential payments to favoured creditors. Second, bankruptcy law also entitles a debtor to obtain a release of his or her debts through the order of discharge.

These two policies dramatically alter the relationship between debtors and creditors. Under the common law, creditors who obtain the first execution against the debtor are not required to share the benefits of execution with subsequent creditors.<sup>68</sup> Bankruptcy law therefore ends the common law scramble for the debtor's assets. The collective nature of the bankruptcy regime prohibits creditors from continuing to pursue the debtor once bankruptcy has begun. The bankruptcy discharge also intervenes by releasing debtors from their prior obligations. Any account of the demise of Canadian bankruptcy law in 1880 and its later re-enactment in 1919 must examine the debate from the perspective of both the discharge and the distribution of the debtor's assets. Why Parliament rejected the discharge and favoured a return to the common law race to the assets can be analysed by examining not only the opposing values or ideals concerning the discharge but also by studying the interests favoured or disadvantaged by repeal. The debate over bankruptcy law between 1867-1919 represented both a clash of values or ideals<sup>69</sup> over the discharge and a division between local and creditor interests. The

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<sup>67</sup> Lester, *Victorian Insolvency*, *supra* note 42 at 37-38. The pro rata principle was established as early as 1543 but it was not until 1705 that the discharge became part of English bankruptcy law.

<sup>68</sup> See e.g., *Beekman v. Jarvis* (1847) 3 U.C.Q.B. 280; *Topping v. Joseph* (1859) 1 E. & A. 292; *Rowe v. Jarvis* (1863) 13 U.C.C.P. 495; *Bank of Montreal v. Munro* (1864) 23 U.C.Q.B. 414. For an overview of the common law principles, see C.R.B. Dunlop, *Creditor-Debtor Law in Canada* 2nd ed., (Toronto: Carswell, 1995) at 545.

<sup>69</sup> Values or ideology can operate as an independent variable in explaining policy change, see C. Tuohy, "National Policy Studies in Comparative Perspective: An Organizing Framework Applied to the Canadian Case" in Dobuzinskis, et al., *Policy Studies in Canada*, *supra* note 9 at 319. Mark Roe acknowledges that ideology is not normally essential to public choice stories and that the opinions of average people are often irrelevant. However, he argues that ideology matters when a broad mass of people have what he calls a weak preference and the preference is the same for most people, see M. Roe, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance* (Princeton: Princeton University Press, 1995) at 27.

changing nature of the economy had a direct impact on both attitudes towards the discharge and the success or failure of local and distant creditors.

The absence of a national market in the 1870s made a federal bankruptcy law premature. While the Canadian economy entailed some inter-provincial trade in the 1870s, the economy was still largely rural and locally based. The bankruptcy discharge challenged the very nature of local credit relationships that depended upon trust and emphasized the moral obligation to repay debts. The obligation to repay debts mattered more in a rural and local economy where the personal character of the debtor was the foundation of credit relationship. The bankruptcy discharge ran counter to the notion that all debts were to be re-paid and repeal was in many ways an explicit rejection of the discharge. However, the lengthy public debate over the evils of the discharge throughout the 1870s concealed or distracted from an equally important consideration which explained the law's demise.

Creditors who traded across regional or provincial boundaries, unable to overcome the powerful moral arguments on the discharge, focused on the other major goal of bankruptcy law in an effort to prevent repeal. Bankruptcy law offered a major advantage over the common law as it provided a distribution of the debtor's assets to all creditors on a pro rata basis. Creditors who traded at a distance favoured a national bankruptcy law and its equitable distribution policy which prevented local creditors from seizing all of the debtor's assets. The Montreal and Toronto Boards of Trade as well as a new national organization, the Dominion Board of Trade, lobbied for the retention of a federal bankruptcy law. However, uniform legislation was not a widely accepted goal and the Dominion Board of Trade was itself divided over the issue. The defeat of national bankruptcy legislation in 1880 was symptomatic of the weakness of the national economy and suggests that some creditors may have preferred local markets and a return to a system of grab law.

The passage of the *Bankruptcy Act of 1919* can be linked to major changes to the Canadian economy. By 1919, uniform bankruptcy legislation could no longer be delayed in an expanding national market. Credit relationships became less dependent upon

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matters of character and the bankruptcy discharge became more acceptable as a central feature of the legislation. An honest but unfortunate debtor became the focal point of the discharge. A new national interest group, the Canadian Credit Men's Trust Association, emerged just prior to the War and played a significant role in leading the call for national reform. The advantages of a national bankruptcy law, first debated in the nineteenth century, could no longer be denied.

By linking legislative change exclusively to economic development, there is a danger in viewing the evolution of the law as somewhat inevitable or some form of natural progression with reform coinciding with the evolution of society and commerce.<sup>70</sup> While it is clear that the nature of the economy had an impact on the shifting fortunes of local and distant creditors and the evolving attitudes towards debt, other factors constrained reform even after the economy began to move in a national direction. Institutional factors had an independent effect on policy direction. Recent scholarship has emphasized the importance of institutions as an independent variable affecting policy choice.<sup>71</sup> Relevant to this study is the effect of federalism<sup>72</sup> and the relative strength or

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<sup>70</sup> See e.g., "As civilization has advanced, the statutes have been modified, repealed and re-enacted. The purpose has changed with the development of the law, with the growth of commercialism and with the progress of the world.": H.H. Shelton, "Bankruptcy Law, Its History and Purpose" (1910) 44 *Amer. L. Rev.* 394. See also N. Aminoff, "The Development of American and English Bankruptcy Legislation--From a Common Source to a Shared Goal" (1989) 10 *Statute L. Rev.* 124; R. Clark, "The Interdisciplinary Study of Legal Evolution" (1981) 90 *Yale L.J.* 1238; Sauer, "Maturing of American Capitalism", *supra* note 48. On various theories of legal change, see D. Horowitz, "The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change" (1994) 42 *Am. J. Comp. L.* 244.

<sup>71</sup> R. Kent Weaver & Bert Rockman eds., *Do Institutions Matter? Government Capabilities in the United States and Abroad* (Washington: Brookings Institution, 1993). For an overview of the recent historical literature in this area, see D. Ernst, "Law and American Political Development 1877-1938" (1998) 26 *Rev. in Amer. Hist.* 205. One recent study of the history of American bankruptcy law adopts an institutional approach, see Hansen, *Origins of Bankruptcy Law*, *supra* note 48.

<sup>72</sup> Leslie Pal, "Missed Opportunities or Comparative Advantage? Canadian Contributions to the Study of Public Policy" in Dobuzinskis, et al., *Policy Studies in Canada*, *supra* note 9 at 367. Pal argues that federalism is the one institutional variable that has attracted the most sustained attention by Canadian scholars.

weakness of the state bureaucracy in proposing and implementing policy change.<sup>73</sup> In the bankruptcy law context, institutions offer an additional independent explanation for repeal and for the lengthy delay in enacting national legislation.

In the 1870s, the absence of a strong government department and bureaucracy inhibited the implementation of stable and lasting legislation. In 1919, bankruptcy reform coincided with an unprecedented growth of federal regulation during the War. Federalism also affected the timing of the legislation. In 1880, provincial jurisdiction over "property and civil rights" provided Parliament with an opportunity to repeal an unpopular law. Given the great unpopularity of the discharge, those who advocated some form of distribution scheme began to think in terms of a legislative solution that did not contain a discharge. The possibility of provincial legislation, which might provide for the equitable distribution of debtors' assets in the form of a *Creditors' Relief Act*, gave the federal Parliament the opportunity to jettison a controversial subject matter. Ontario passed the *Creditors' Relief Act* in 1880 immediately after the repeal of the federal bankruptcy law. The provincial law provided only for an equitable distribution of the debtor's assets but did not provide for a discharge.<sup>74</sup>

The ability of the provinces to regulate voluntary assignments and the administration of debtors' estates constrained reform at the national level after 1880. With the growth of provincial regulation, bankruptcy law became a constitutional issue as litigants challenged the validity of provincial regulation. The decision of the Privy

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<sup>73</sup> The professional expertise of the legislators and public bureaucracy affects the capacity of the political system to implement stable and lasting policies. On the capacity of the political system, see David Brian Robertson, "History, Behaviouralism, and the Return to Institutionalism in American Political Science" in E.H. Monkkonen, ed., *Engaging the Past: The Uses of History Across the Social Sciences* (Durham: Duke University Press, 1994) at 9. On the importance of state expertise, see R. Kent Weaver & Bert A. Rockman, "Assessing the Effects of Institutions" in Weaver and Rockman, *Do Institutions Matter*, *supra* note 71 at 32.

<sup>74</sup> The ability of the provinces to provide for a discharge was never in issue. Provincial legislation carefully avoided any direct conflict with the federal bankruptcy and insolvency power by excluding the discharge. Edward Blake later argued in the Privy Council that the provincial legislation was not bankruptcy and insolvency legislation within the meaning of s. 92(21) of the *British North America Act* as it did "not enable a debtor to obtain a discharge from the obligation of any contract or any liability". *A.G. of Ontario v. A.G. for Canada* [1894] A.C. 189 at 191 (P.C.).

Council in *A.G. of Ontario v. A.G. for Canada*<sup>75</sup> held that s. 9 of the Ontario *Assignments and Preferences Act*, which prevented the first execution creditors from securing a preference over other creditors, was within the competence of the provincial legislature. The ruling contributed to the growth of provincial regulation and removed the immediate need for federal legislation until after the turn of the century. Provincial law became entrenched as the primary means of regulating debtor creditor matters. It was not until after World War I that bankruptcy law again became a national issue.

In order to analyse the evolving attitudes towards the discharge, the clash of local and distant creditors and the relevance of institutions, a number of sources need to be considered. First, as bankruptcy law is a creature of statute, any study of the history of the legislation must examine the parliamentary debates and the legislation itself.<sup>76</sup> The fact that both the Acts of 1869 and 1875 remained on the statute books for a short time reduces the possible value of case law as an historical source for this thesis.<sup>77</sup> In assessing why Canada opted for repeal and delayed in enacting federal legislation, more is to be gleaned from parliamentary sources as the significant policy changes occurred at the legislative level.<sup>78</sup>

An evaluation of certain key provisions of the legislation provides a measure of how bankruptcy law evolved. Access to bankruptcy proceedings is an important indication of the general tenor of the legislation. One may compare the scope of the

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<sup>75</sup> [1894] A.C. 189 (P.C.).

<sup>76</sup> This term is borrowed from Lester, *Victorian Insolvency*, *supra* note 42 at 8. Lester's work is the study of imprisonment for debt, bankruptcy, and company winding up. "Case law plays almost no part. All three systems were an exception to the common law and are, therefore, the creatures of statute."

<sup>77</sup> The development of bankruptcy principles at common law such as the doctrine of voidable preferences has been the subject of other studies: Weisberg, "History of the Voidable Preference", *supra* note 43 at 46-51; G. Glenn, "The Diversities of the Preferential Transfer: A Study in Bankruptcy History" (1930) 15 Cornell L.Q. 521.

<sup>78</sup> Risk in his study of the law and the economy of Ontario from 1841 to 1867 stated that "the legislature, not the courts, made the major changes in legal policy", see R.C.B. Risk, "A Prospectus for Canadian Legal History" (1973) 1 Dal. L.J. 227. G. Parker, "Masochism of Legal Historians" (1974) 24 U.T.L.J. 279 at 288 argues that legal scholars have too often focused on case law and ignored the fact that most law is the product of legislative bodies.

legislation by examining what debtors were eligible for bankruptcy over time and determining whether bankruptcy law operated as a voluntary or involuntary regime. The availability of the discharge and the ease by which it could be obtained also provides an important indicator of the character of the legislation. However, as the thesis is also concerned with the failure of federal bankruptcy reform efforts for a period of nearly forty years, the unsuccessful federal bankruptcy bills will also be examined. These bills illustrate the specific concerns of those directly affected by repeal in 1880.

In order to evaluate the role of interest groups on the Canadian legislative process, a number of sources become relevant. Parliamentary debates and committee reports often identify why a particular provision was added or deleted or provide an indication of what sector of the community supported the legislation. Petitions to Parliament also identify specific groups or indicate the size of community supporting or asking for repeal of bankruptcy legislation. Beyond official government sources, private correspondence of Prime Ministers, papers of the Department of Justice and interest groups are reviewed. Records of proceedings of private interest groups, political parties, newspaper and business periodicals are also examined.<sup>79</sup> These sources also provide an indication of the prevalent attitudes towards bankruptcy law and debt. How values evolved as the economy shifted from a local to national economy is an important part of the explanation and trade journals, law reviews, business newspapers and bankruptcy texts are examined.<sup>80</sup>

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<sup>79</sup> John McLaren has recently called for the legal historical project to investigate "the status role and motives of those who create, apply and enforce the law ...". He argues that such work should consider "the history of legislation and its promoters and sponsors". J. McLaren, "The Legal Historian Masochist or Missionary? A Canadian's Reflections" (1994) *Legal Educ. Rev.* 67 at 78 [hereinafter McLaren, "Legal Historian"].

<sup>80</sup> See J.D. Edgar, *The Insolvent Act of 1869* (Toronto: Copp Clark, 1869); J. Popham, *The Insolvent Act of 1869* (Montreal: Dawson Brothers, 1870); J.D. Edgar and F.H. Chrysler, *The Insolvent Act of 1875* (Toronto: Copp Clark, 1875); H. MacMahon, *The Insolvent Act of 1875* (Toronto: Willing & Williamson, 1875); I. Wotherspoon, *The Insolvent Act of 1875* (Montreal: Dawson Brothers, 1875); S.R. Clarke, *The Insolvent Act of 1875 and Amending Acts* (Toronto: Carswell, 1877); W. Wilson, *Analyse et Indexe de l'Acte de Faillite* (Ottawa: Maclean Roger, 1875).



Two areas of institutional concern are explored. First, the extent to which the state or private interest groups generated policy and bills is considered by a review of the papers of the Department of Justice and the records of various Boards of Trade and commercial organizations. Second, the effect of federalism on legislative reform is examined by studying the constitutional litigation on the validity of both federal and provincial legislation. While the various rulings of the Ontario Court of Appeal and the landmark 1894 ruling of the Privy Council<sup>81</sup> may have been relevant to the ongoing evolution of constitutional doctrine, the political impact of the decisions are more germane to the thesis.

Beyond Canadian primary materials the thesis also makes use of the vast literature on the history of English and American bankruptcy law. An examination of the factors which contributed to legal change in the United States and England may offer answers as to why Canada delayed in adopting a more permanent solution until 1919. One legal historian suggests that one should not always focus on the issue of "change and innovation". Rather the important question to ask is "why a legal change did not occur when society changed, or when perceptions about the quality of the law change. Why, one must always ask, did the legal change not occur before?"<sup>82</sup> In this light it becomes important not only to understand the introduction of a new Canadian regime in 1919 as a significant innovation, but also to examine why such reforms were delayed for a lengthy period. The absence of Canadian bankruptcy legislation between 1880 and 1919 is even more dramatic when one takes note of the comprehensive legislation enacted in England in 1883 and the United States in 1898. Comparisons with how other countries responded to the problem of the insolvent debtor may offer insights into why Canada delayed national legislation until after the War.<sup>83</sup>

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<sup>81</sup> *Clarkson v. Ontario Bank* (1888) 15 O.A.R. 166 (C.A.); *Union Bank v. Neville* (1891) 21 O.R. 152 (C.A.); *In Re Assignments and Preferences Act* (1893) 20 O.A.R. 489 (C.A.); *A.G. of Ont. v. A.G. for Canada* [1894] A.C. 189 (P.C.).

<sup>82</sup> A. Watson, "Legal Change: Sources of Law and Legal Culture" (1983) 131 U. Penn. L. Rev. 1121 at 1123 [hereinafter Watson, "Legal Change"].

<sup>83</sup> On the importance of comparative studies, see Colin Bennett, "Comparative Policy Studies in Canada: What State? What Art?" in Dobuzinski, et al., *Policy Studies in Canada*, *supra* note 9 at 299.

In addition to identifying several themes which may be relevant to Canada, American and English studies provide a comparative context for the Canadian story. Canada was not the only country to consider repeal. Bankruptcy legislation was equally controversial in England and the United States during the 1870s. Canadian legal historians have long recognized the need to adopt a comparative approach.<sup>84</sup> A comparative approach allows one to examine the extent to which Canadian bankruptcy legislation was influenced by foreign bankruptcy models or repeal movements.<sup>85</sup> An explicit comparison allows one to challenge the assumption that Canada blindly followed and matched the substance and timing of English bankruptcy legislation.<sup>86</sup>

Chapters 2 and 3 are therefore comparative. Chapter 2 highlights the evolution of English bankruptcy law from its inception through to the establishment of the landmark reforms in 1883. The chapter examines the origins of the legislation in the sixteenth century, the emergence of the discharge in the early eighteenth century and the establishment of voluntary proceedings and a court supervised discharge system in the nineteenth century. Chapter 3 examines the history of the short-lived American Acts of 1800, 1841 and 1867 and the reasons for the success of the Bankruptcy Act of 1898. Chapter 3 also considers the relevance of federalism to the American story. Chapter 4 examines the evolution of bankruptcy law in pre-Confederation Canada and provides the necessary background to the post-Confederation developments. The extent of bankruptcy

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<sup>84</sup> Risk identified the influence of the England, the United States and to a lesser extent France on Canadian legal developments as a major theme in his prospectus for legal a history R.C.B. Risk, "Prospectus for Canadian Legal History" (1973) 1 Dal. L.J. 227 at 231; R.C.B. Risk, "The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective" (1977) 27 U.T.L.J. 403 at 431.

<sup>85</sup> See e.g. Watson, "Legal Change", *supra* note 82.

<sup>86</sup> Former colonies received European laws "refracted through lenses coloured by local as well as external political, social and economic conditions". McLaren, "Legal Historian", *supra* note 79 at 74. McLaren warned against simply assuming legal developments in former colonies reflected the "glorious and undefiled spread of the colonial power's legal system and tradition of justice". He suggested that there is more involved than an "undiscriminating and blanket process of the translation of concepts, doctrine, institutions and ideology from the colonial parent to the colonial child" (at 78).

legislation is considered in each of the colonies and the chapter in particular pays close attention to the state of the law in 1867.

The central part of the thesis is concerned with the period 1867 to 1919. This time frame can be divided into 3 separate eras. Chapter 5 examines the *Insolvent Acts of 1869 and 1875* and the reasons for repeal in 1880. Chapter 6 considers the period 1880 to 1903 and discusses the rise of provincial legislation and the failure of federal reform efforts. Chapter 6 also focuses on federalism and the impact of the constitutional litigation upon the reform efforts. Chapter 7 examines why bankruptcy law, an unwanted nineteenth century experiment, became an essential form of commercial regulation after the War. Chapters 5, 6, and 7 examine the bankruptcy law issue from the perspective of evolving attitudes towards debt, the division between local and distant creditors and the role of institutions.

Before proceeding to an examination of the origins of English bankruptcy law a few preliminary points need to be made with respect to the use of the terms "bankruptcy" and "insolvency" and the scope of the thesis. In the modern context bankruptcy refers to the formal legal proceeding whereby an individual debtor's assets are realized and distributed in a pro rata fashion. The distribution is normally followed by a discharge. Generally insolvency refers to the debtor's financial status rather than a formal legal proceeding. Historically, however, the distinction between "bankruptcy" and "insolvency" was of even greater importance. In England until 1861, only traders were able to take advantage of the bankruptcy statute and the discharge. Non-commercial debtors were not eligible for bankruptcy and became dependent upon Parliament to enact legislation to provide some form of relief. Legislation to ameliorate the plight of non-traders became known as "insolvent" legislation. In 1861, the English Parliament abolished the trader distinction and opened up bankruptcy legislation to both traders and non-traders.

Canada's first bankruptcy statute of was known as the *Insolvent Act of 1869*. This Act, despite the formal name, was a bankruptcy law that provided for a distribution of the debtor's assets and a discharge. The Acts of 1869 and 1875 only applied to traders. The Canadian *Bankruptcy Act of 1919* abandoned the trader rule and widened the scope of the legislation to cover all types of debtors. The thesis is a study of the evolution of

federal bankruptcy law and uses that term to describe the formal legal process to distribute assets to unsecured creditors and provide a discharge of the individual debtor.

The field of bankruptcy and insolvency law is wide and encompasses much more than the regulation of insolvent individuals and unsecured creditors. The scope of the dissertation, however, is limited to how Parliament chose to regulate insolvent individuals and unsecured creditors. Companies only played a minor role in the debate over bankruptcy legislation. Corporate reorganization did not feature as a major issue between 1867 and 1919.<sup>87</sup> Further, while secured creditors and more specifically banks also played a role in the financing of debtors, the legislation at issue, the *Insolvent Act of 1869*, the *Insolvent Act of 1875* and the *Bankruptcy Act of 1919* did not directly apply to secured creditors. Secured creditors were entitled to realise on their security outside of the provisions of the legislation.<sup>88</sup> In the nineteenth century, there were several important changes to the rights of secured creditors.

In 1890 amendments to the *Bank Act* entitled banks to take *Bank Act* security over goods and wares manufactured by a wholesale manufacturer. The legislation also allowed wholesale purchasers or shippers to give security to banks over products of agriculture, the forest, and mine, or the sea, lakes and rivers, and live or dead stock. Prior to 1890 banks had the ability to take security over goods by means of a warehouse receipt.<sup>89</sup> Banks were not directly affected by the bankruptcy legislation and the

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<sup>87</sup> The *Insolvent Act of 1875* applied to individuals as well as companies. The company provisions were rarely used and were adopted without debate. In 1882 Parliament adopted *An Act Respecting Insolvent Banks, Insurance Companies Loan Companies, Building Societies and Trading Corporations*. The Act later became known as the *Winding-Up Act*. The *Bankruptcy Act of 1919* also applied to companies but the focus of the debate was on the regulation of individuals.

<sup>88</sup> *Insolvent Act of Act of 1869* ss. 10, 50, 60; *Insolvent Act of 1875* s. 16, 84. see: *Archibald v. Haldan* (1870) 30 U.C.Q.B. 30; *Crombie v. Jackson* (1874) 34 U.C.Q.B. 575; *Henderson v. Kerr* (1875) 22 Gr. 91. See also *Bankruptcy Act of 1919*, s. 6.

<sup>89</sup> *Bank Act*, S.C. 1890 c. 31, s. 74. Banks did not originally have the ability to take security over goods. It was not until 1859 that banks were able to obtain security through the use of warehouse receipts. An owner or person entitled to receive the goods described in the warehouse receipt could endorse the document to the bank as collateral. The endorsement operated as a conveyance of the goods to the bank. The amendment of 1890 abolished the right of the bank to take security by means of a warehouse receipt and included the predecessor of the modern form of *Bank Act* security. See B. Crawford, *Crawford and*

Canadian Bankers' Association, which emerged in 1891 was largely concerned with ensuring that any proposed bankruptcy legislation did not affect *Bank Act* security.<sup>90</sup>

The nineteenth century also saw the evolution of another important branch of insolvency law. Secured creditors began to rely on the remedy of appointing a private receiver to collect income and profits of the debtor. In the late nineteenth century, private receivers were utilised to enforce upon floating charges, blanket liens covering all assets of the enterprise.<sup>91</sup> The evolution of the rights of secured creditors, however, is beyond the scope of the thesis as one of the central struggles, whether to adopt a pro rata distribution to unsecured creditors did not directly affect secured creditors. The conflict between local and distant creditors over whether to adopt a national bankruptcy law was a conflict between non-bank unsecured creditors.<sup>92</sup>

Finally, credit relationships were also governed by provincial legislation. As discussed above, in the absence of federal bankruptcy and insolvency legislation, several provinces adopted laws to attempt to fill the gap left by the repeal of the *Insolvent Act of 1875*. Two basic model laws were adopted in the common law provinces. Ontario adopted what was later to become known as the *Creditors Relief Act* which provided for a pro rata distribution of the debtor's assets. This was followed in 1880 by *An Act*

*Falconbridge Banking and Bills of Exchange*, 8<sup>th</sup> ed., Vol. 1 (Toronto: Canada Law Book, 1986) at 403-404; M.H. Oglivie, *Canadian Banking Law* (Toronto: Carswell, 1991) at 341; R.M. Breckenridge, *The History of Banking in Canada* (Washington: Government Printing Office, 1910) at 141-143. On the early forms of security in Ontario see: R.C.B. Risk, "The Golden Age: The Law About Market in Nineteenth Century Ontario" (1976) 26 U.T.L.J. 307 at 331-337.

<sup>90</sup> On the efforts of the Canadian Bankers' Association in 1894 see chapter 6.

<sup>91</sup> On the origins of private receiverships, see Jacob S. Ziegel, "The Privately Appointed Receiver and the Enforcement of Security Interests: Anomaly or Superior Solution" in J.S. Ziegel, ed., *Current Developments in International and Comparative Corporate Insolvency Law* (Oxford: Clarendon Press, 1994). See also F.H. Buckley, "The American Stay" (1993) 3 So. Cal. Interdisc. L. Rev. 733.

<sup>92</sup> The remedy of private receiver was not recognized in American law. This marks a major difference between American and Commonwealth bankruptcy and insolvency law. Despite this difference, American historiography is still relevant to the Canadian story. The struggle in the United States over whether to adopt a national bankruptcy law was also a conflict between unsecured creditors. See B. Hansen, *The Origins of Bankruptcy Law in the United States 1789-1898* (Ph.D. diss., Washington University, 1995).

*Respecting Assignments for the Benefit of Creditors.* This latter legislation permitted debtors to make a voluntary assignment of their assets to an authorized trustee appointed by the provincial government. The trustee liquidated the property of the debtor under the supervision of creditors. The legislation also prohibited debtors from making preferential payments.<sup>93</sup> While the prohibition of preferences and provisions for the distribution of debtors' assets overlapped with the functions of bankruptcy and insolvency law, two important differences were evident. Creditors could not compel debtors to make an assignment and the legislation did not permit debtors to obtain a discharge. Provincial legislation therefore is relevant to the thesis to the extent that developments at the provincial level had an impact on the legislative history of federal bankruptcy law.

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<sup>93</sup> See (1880) 43 Vic. c. 10 (Ont.); (1885) 48 Vic. 26. Other provinces later adopted these two models of legislation. See chapter 6. L. Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at 20; J. Honsberger, "Bankruptcy Administration in Canada and the United States" (1975) 63 Cal. L. Rev. 1515 at 1529.

## CHAPTER 2

### **The Evolution of English Bankruptcy Law: 1543 to 1883**

#### **Introduction**

The evolution of English bankruptcy law was, in the words of one author, a “slow and tortuous” journey.<sup>1</sup> While one can trace the origins of the first English bankruptcy statute to 1543, the discharge was not established until early in the eighteenth century and bankruptcy law remained an involuntary procedure until the mid-nineteenth century. Although many of the key features of the bankruptcy regime had been established by the mid-nineteenth century, bankruptcy reform continued to be a controversial issue until England settled on a more permanent solution in 1883. Bankruptcy law in the nineteenth century was a “welter of legislation and confusion of principle”.<sup>2</sup> Between 1817 and 1883, three royal commissions, ten parliamentary select committees and one special Lord Chancellor’s committee all studied the issue and made recommendations for reform.<sup>3</sup> It is not proposed to examine every aspect of the history of English bankruptcy law. Instead the chapter focuses on the origins of several key features of the bankruptcy regime and examines English bankruptcy law issues that later became matters of controversy in Canada.

A review of the origins and evolution of the essential elements of English bankruptcy law will achieve several purposes. First, it provides an historical and comparative context for the Canadian developments between 1867 and 1919. Further, an

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<sup>1</sup> B. Weiss, *The Hell of the English: Bankruptcy and the Victorian Novel* (Cranbury N.J.: Bucknell Univ. Press, 1986) at 40 [hereinafter: Weiss, *Bankruptcy and the Victorian Novel*].

<sup>2</sup> V. Batzel, “Parliament, Businessmen and Bankruptcy, 1825-1883: A Study in Middle Class Alienation” (1983) 18 Can. J. of Hist. 171 at 175 [hereinafter Batzel, “Parliament, Businessmen and Bankruptcy”].

<sup>3</sup> Between 1831 and 1914 the English Parliament debated nearly 100 bankruptcy bills. V.M. Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt and Company Winding-Up in Nineteenth Century England* (Oxford: Clarendon Press, 1995) at 2 [hereinafter Lester, *Victorian Insolvency*].

overview of some key nineteenth century developments supplies a comparative framework by which one can ascertain the influence of English law on the Canadian debate and assists in the inquiry as to why Canada rejected bankruptcy law in 1880 and delayed permanent reform until 1919. Finally, this study of English bankruptcy law, which is based on secondary sources, reveals a number of themes which are useful in highlighting areas of inquiry for this thesis. Economic change, the nature of credit relationships and the relevance of institutional factors are considered.

This chapter is divided into two main parts. Part I deals with the origins of English bankruptcy law, the concepts of "acts of bankruptcy", the discharge and the trader rule. Nineteenth century developments are also examined and in particular the chapter discusses the creation of voluntary proceedings, the abolition of the trader rule and the evolution of the discharge through to 1883. Part II examines a number of the relevant themes found in the literature.

## I The Legislative History

### A *Weakness of the English Common Law*

In order to understand the evolution of English bankruptcy law, a brief description of the weaknesses of creditors' common law remedies is necessary.<sup>4</sup> Creditors originally relied on two writs of execution, the writ of *fiery facias*, and the writ of *levari facias*. The writs allowed the sheriff to seize goods and profits from land. However, creditors had to individually enforce the judgment against the debtor at their own expense. The common law rewarded the most diligent creditor. The first to enforce was paid in full leaving other creditors with little or nothing.<sup>5</sup> One merchant, writing in 1542, characterized the

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<sup>4</sup> This chapter does not discuss the evolution of bankruptcy concepts that pre-date English developments. On the early history of European and Roman law, see L. Levinthal, "The Early History of Bankruptcy" (1917-1918) 66 U. Pa. L. Rev. 223 at 228-250 [hereinafter Levinthal, "The Early History of Bankruptcy"]; J.M. Garrido, "The Distributional Question in Insolvency: Comparative Aspects" (1995) 4 Int'l. Insol. Rev. 25 at 28-32; J.H. Dalhusien, "Development of Bankruptcy Remedies in Western Europe and the United States in the Nineteenth and Twentieth Centuries" in D. Botwinik & K. Weinrib, eds., 2d ed. (Washington: ABA, 1986) at 131-168; F.R. Noel, *A History of the Bankruptcy Clause of the Constitution of the United States* (Washington: Chas. H. Potter, 1919) at 13-22.

<sup>5</sup> W.S. Holdsworth, *A History of English Law*, vol. 8 (London: Methuen, 1909) at 230 [hereinafter Holdsworth, *A History of English Law*]. C. Tabb, "The Historical Evolution of the Bankruptcy Discharge" (1991) 65 Am. Bankr. L.J. 325 at 328 [hereinafter Tabb, "The Historical Evolution"]; L. Levinthal, "The



regime as "first come first served".<sup>6</sup> The system encouraged fraud and collusion amongst debtors and creditors as the parties sought to anticipate and outwit each other in the race of diligence.<sup>7</sup>

Creditor difficulties were also compounded by the fact that early English remedies for imprisonment for debt were not effective. Originally, English law did not permit imprisonment for debt.<sup>8</sup> Thirteenth century statutes created the right of imprisonment and the remedy was gradually expanded.<sup>9</sup> However, debtors devised numerous ways to avoid imprisonment which undermined the effectiveness of the statutes.<sup>10</sup> Debtors fled the realm,<sup>11</sup> took refuge in sanctuaries<sup>12</sup> or kept house. This latter method frustrated the

Early History of English Bankruptcy" (1919) 67 U. Pa. L. Rev. 1 at 13 [hereinafter Levinthal, "The Early History of English Bankruptcy"].

<sup>6</sup> H. Brinklow cited in Holdsworth, *ibid.* at 232. See discussion of Brinklow's complaint in Hugh-Barty King, *The Worst Poverty: A History of Debt and Debtors* (Bath: Alan Sutton Press, 1991) at 14.

<sup>7</sup> Levinthal, "The Early History of Bankruptcy Law", *supra* note 4 at 235.

<sup>8</sup> C.R.B. Dunlop, *Debtor Creditor Law in Canada* (Toronto: Carswell, 1981) at 93. See also Holdsworth, *A History of English Law*, *supra* note 5 at 230. Compare ancient Roman law which allowed for the seizure of the person: W.W. Buckland, *A Manual of Roman Private Law* (Cambridge: Cambridge University Press, 1928) at 385.

<sup>9</sup> The first statute allowing for the imprisonment of a defendant in a civil suit was the Statute of Marlbridge, 52 Henry III, c. 23 (1267). It was limited, however, to a Lord's arrest of his bailiff who failed to make an accounting. In 1283 the Statute of Acton Brunel 11 Edw. 1 (1283) allowed for the imprisonment of a merchant's debtor. In 1285, the Statute of Merchants, 13 Edw. 1 (1285) allowed for imprisonment regardless of whether or not a debtor had sufficient assets. A similar power was also given to a feudal Lord to detain his debtor in the Statute of Westminster II, 13 Edw. I, c. II. For a more detailed treatment and subsequent reforms, see J. Cohen, "The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy" (1983) 3 J. Legal Hist. 153 [hereinafter Cohen, "The History of Imprisonment for Debt"]; A. Freedman, "Imprisonment for Debt" (1928) 2 Temp. L.Q. 330; Levinthal, "The Early History of Bankruptcy", *supra* note 4; Holdsworth, *ibid.* at 230-233; J. Ford, "Imprisonment for Debt" (1926) 25 Mich. L. Rev. 24 at 27; J.C. Fox, "Process of Imprisonment at Common Law" (1923) 39 L.Q.R. 46;

<sup>10</sup> On the general problems with these early statutes, see D. Sutherland, "Mesne Process upon Personal Actions in the Early Common Law" (1966) 82 L.Q.R. 483 at 496.

<sup>11</sup> This allowed a debtor to escape payment of his creditors. An absconding debtor, however, could be deemed an outlaw, with his assets escheating to the crown: Cohen, "The History of Imprisonment for

efforts of creditors as the common law prevented entry into a debtor's home in order to enforce a judgment.<sup>13</sup> Hiding assets and making fraudulent conveyances were also common debtor practices.<sup>14</sup>

*B 1543: "An Act Against Such Persons As Do Make Bankrupts"*

These limitations on creditors' collection efforts lay at the heart of the first bankruptcy statute enacted in 1543.<sup>15</sup> The absence of a collective proceeding at common law and the inability of creditors to control the conduct of debtors prompted the legislative intervention.<sup>16</sup> The preamble illustrates that the legislation had little to do with the concerns of debtors. It spoke of people who:

craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors, their duties, but at their own wills and pleasures consume debts and the substance obtained by credit of other men,

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Debt", *supra* note 9 at 155 and I. Treiman, "Escaping the Creditor in the Middle Ages" (1927) 43 L.Q.R. 230 at 231 [hereinafter Treiman, "Escaping the Creditor"].

<sup>12</sup> The ability to take refuge in a sanctuary was abolished by statute in 1697. See J. Hertzler, "The Abuse and Outlawing of Sanctuary for Debt in Seventeenth Century England" (1971) 14 Hist. J. 467.

<sup>13</sup> Cohen, "The History of Imprisonment for Debt", *supra* note 9 at 155 and Treiman, "Escaping the Creditor", *supra* note 11 at 234. See letter from French merchants addressed to Charles IX of France complaining of the English practice of keeping house in Treiman, "Escaping the Creditor", *supra* note 11 at 234; W. Jones, *The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period* (Philadelphia: Amer. Philosophical Society, 1979) at 12-15 [hereinafter Jones, *The Foundations of English Bankruptcy*].

<sup>14</sup> Tabb, "The Historical Evolution", *supra* note 5 at 328.

<sup>15</sup> 34 & 35 Hen. VIII, c. 4. Tabb reviews the debate as to whether or not the 1543 statute was the "first" bankruptcy statute and concludes that scholars largely agree that it was the first English bankruptcy law. Tabb, *ibid.* The debate is also reviewed in A. Duncan, "From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law" (1995) 100 Com. L.J. 191 at 192-194 [hereinafter Duncan, "From Dismemberment to Discharge"].

<sup>16</sup> See eg., M. Quilter, "The Merchant of Venice in the Context of Contemporary Debt and Bankruptcy Law of England" (1998) 6 Insol. L.J. 43 at 47.

for their own pleasure and delicate living against all reason, equity, and good conscience.<sup>17</sup>

The legislation was directed against fraudulent bankrupts and was characterized as a criminal statute with the aim of obtaining property for the benefit of the creditors.<sup>18</sup> The Act allowed a creditor to petition the Chancellor and other bankruptcy commissioners to summon and examine the bankrupt, and in some cases imprison him until his possessions had been forfeited.<sup>19</sup> Proceedings could be instituted against debtors who fled the kingdom, kept house or otherwise made attempts to avoid payment.<sup>20</sup> The statute referred to the bankrupt as an offender.<sup>21</sup>

In addition to addressing the issue of debtor fraud, the statute enshrined in law the fundamental principle of a pro rata division of the debtor's assets. The first section of the Act provided that the debtor's assets were to be distributed: "to every one of the said creditors, a portion rate and rate alike according to the quantity of their debts".<sup>22</sup> The policy of the statute was described by Coke in *The Case of the Bankrupts*:

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<sup>17</sup> 34 & 35 Hen. VIII, c. 4, cited in J. Hoppitt, *Risk and Failure in English Business, 1700-1800* (New York: Cambridge University Press, 1987) at 19 [hereinafter Hoppitt, *Risk and Failure in English Business*]. The marginal notes adjacent to the preamble in the original statute state, "Evil of Debtors absconding or keeping House, their Debts unpaid". 34 & 35 Hen. VIII, c. 4.

<sup>18</sup> Duncan, "From Dismemberment to Discharge", *supra* note 15 at 194; Holdsworth, *A History of English Law*, *supra* note 5 at 236.

<sup>19</sup> Cohen, "The History of Imprisonment for Debt", *supra* note 9 at 157. Further provisions allowed the bankruptcy commissioners to break down the debtor's door and criminally sanction those who concealed assets: R. Weisberg, "Commercial Morality, the Merchant Character, and the History of the Voidable Preference" (1986) 39 *Stan. L. Rev.* 1 at 21 [hereinafter Weisberg, "Commercial Morality"]. On the evolution of the powers of the bankruptcy commissioners, see S. Hicks & C. Ramsay, "Law, Order and the Bankruptcy Commissions of Early Nineteenth Century England" (1987) 55 *Tjdschrift voor Rechtsgeschiedenis* 123 [hereinafter Hicks & Ramsay "Law, Order and the Bankruptcy Commissions"].

<sup>20</sup> Holdsworth, *A History of English Law*, *supra* note 5 at 237.

<sup>21</sup> I.A. Hansen, *Bankruptcy in the Beginning: A Historical Survey of the Laws of Bankruptcy* (Wellington: NZ Institute of Credit and Financial Management, 1974) at 4.

<sup>22</sup> 34 & 35 Hen. VIII, c. 4, s. 1.

The intent ... was to relieve creditors of the bankrupt equally, and that there should be an equal and rateable proportion observed in the distribution of the bankrupt's goods amongst the creditors, having regard to the quantity of their several debts.<sup>23</sup>

The collective nature of bankruptcy was further enhanced by the fact that the ability of creditors to enforce upon their individual debts was suspended in an effort "to prevent creditors from cutting each other's throats".<sup>24</sup>

The statute did not provide a release or discharge of any outstanding debts.<sup>25</sup> Once the creditors received their pro rata distribution they were free to pursue the debtor's body, lands and goods for collection of any unpaid debts.<sup>26</sup> The relief of the unfortunate debtor was not within the objectives of this statute.

### C 1571 Acts of Bankruptcy and the Trader Rule

Debtor misconduct continued to be a problem, leading to a second Bankruptcy Act in 1571.<sup>27</sup> The preamble to the 1571 Act referred to the 1543 statute and stated:

those kinds of persons have and do still increase into great excessive numbers and are like more to do if some better provision be not made for the repression of them and for a plain declaration to be made and set forth who is ought to be taken and deemed a bankrupt.<sup>28</sup>

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<sup>23</sup> (1584) 2 Co. Rep. at 25; 76 E.R. 441.

<sup>24</sup> Jones, *The Foundations of English Bankruptcy*, *supra* note 13 at 16.

<sup>25</sup> Cohen, "The History of Imprisonment for Debt, *supra* note 9 at 156. See also *ibid.* at 15.

<sup>26</sup> Jones, *ibid.* at 16. See also Lester, *Victorian Insolvency*, *supra* note 3 at 14.

<sup>27</sup> 13 Eliz. I, c. 7 (1571). Two earlier Bills were presented to Parliament in 1563 and 1571. They were not enacted. Lester notes that the Act "stemmed more from a need to alter existing procedures than from economic conditions". Lester, *Victorian Insolvency*, *supra* note 3 at 15.

<sup>28</sup> Preamble to 13 Eliz. I, c. 7 (1571) cited in H.H. Shelton, "Bankruptcy Law, Its History and Purpose" (1910) 44 Am. L. Rev. 394 at 397. The marginal notes adjacent to the preamble in the original statute acknowledge the "Insufficiency of 34, 35 H. VIII. c. 4 as to Bankrupts".

Again, there was no provision that released bankrupts from their debts. All after acquired property was available for the satisfaction of creditors' claims.<sup>29</sup> The statute was, however, notable for two new features. First, the statute was limited to a defined class of individuals known as traders. Second, traders were subject to bankruptcy proceedings only if they committed an "Act of Bankruptcy".<sup>30</sup> The trader rule and Acts of Bankruptcy influenced the shape of English bankruptcy law for over three hundred years and the origins of these concepts are worth noting. The 1571 statute was limited to any:

Merchant or other Person using or exercising the Trade or Merchandize by way of Bargaining, Exchange, Rechange, Bartry, Chevisance, or otherwise, in Gross or by Retail, or seeking his or her Trade of Living by Buying or Selling.<sup>31</sup>

The definition was a vague general category and focused on the concept of buying and selling. In limiting the definition to traders, Parliament accepted the allegations of mercantile misconduct. Fraudulent traders disrupted the flow of commerce. The limitation also served to protect the landowning community who were outside the scope of the definition and thus free from the law's harsh provisions.<sup>32</sup> The trader rule also "reflected the vague moral suspicion in pre-capitalist England about the elusive, manipulative role of those who deal in money, credit and other people's goods".<sup>33</sup>

The listed Acts of Bankruptcy were in effect a list of criminal acts. All Acts required proof of an intention to defraud creditors.<sup>34</sup> Acts of Bankruptcy included

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<sup>29</sup> 13 Eliz., c. 7, s. 11 (1571); Duncan, "From Dismemberment to Discharge", *supra* note 15 at 197.

<sup>30</sup> Lester, *Victorian Insolvency*, *supra* note 3 at 15.

<sup>31</sup> 13 Eliz., c.7 (1571), cited in L.M. Friedman & T.F. Niemira, "The Concept of the 'Trader' in Early Bankruptcy Law" (1958) 5 St. Louis U.L.J. 223 [hereinafter Friedman & Niemira, "The Concept of the 'Trader' in Early Bankruptcy Law"].

<sup>32</sup> I. Duffy, "English Bankrupts, 1571-1861" (1980) 24 Am. J. Legal Hist. 283 at 284 [hereinafter Duffy, "English Bankrupts"]; Hoppitt, *Risk and Failure in English Business*, *supra* note 17 at 24. Weisberg, "Commercial Morality", *supra* note 19 at 25.

<sup>33</sup> Weisberg, *ibid.* at 22.

<sup>34</sup> *Ibid.* at 35

leaving the country, fleeing to a sanctuary, an alienation to defraud creditors, and an attempt to be arrested to avoid having to pay one's creditors.<sup>35</sup> The original Acts of Bankruptcy focused on some positive and intentional conduct of the debtor rather than on the debtor's solvency.<sup>36</sup> Subsequent amendments in 1604 and 1623 expanded the list of fraudulent behaviour.<sup>37</sup> The list, however, began to include non-intentional and non-fraudulent acts. For example, under the 1604 statute a debtor who remained in prison for a debt for a period of six months was deemed to have committed an Act of Bankruptcy. By 1623, the Acts of Bankruptcy included the failure to pay a debt within six months. The inclusion of a simple insolvency condition in the list of Acts of Bankruptcy linked the non-payment of debt to some form of wrongdoing.<sup>38</sup> An Act of Bankruptcy, in the words of Lord Mansfield, "in the eye of the law is considered as a crime".<sup>39</sup> The requirement of proof of an Act of Bankruptcy would remain a fundamental concept in English law into the twentieth century.<sup>40</sup>

#### *D The Discharge*

While the Acts of 1543 and 1571 established many of the principal elements of bankruptcy legislation, no discharge was available by statute until 1705. The bankruptcy discharge is often viewed as one of the essential elements of modern bankruptcy law as it

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<sup>35</sup> I. Treiman, "Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law" (1938) 52 Harv. L. Rev. 189 at 194; Jones, *The Foundations of English Bankruptcy*, *supra* note 13 at 24.

<sup>36</sup> Treiman, *ibid.* at 195. "The nature and size of the debt, unless it was small, was irrelevant. Bankruptcy followed from a particular kind of action committed by a definable man in a stipulated situation". Jones, *The Foundations of English Bankruptcy*, *supra* note 13 at 24.

<sup>37</sup> 1 Jac. I, c. 15 (1604); 21 Jac., c. 19 (1623). See Weisberg, "Commercial Morality", *supra* note 19 at 37 and Jones, *ibid.* at 24; Treiman, *ibid.* at 196.

<sup>38</sup> See Treiman, *ibid.* at 196-197.

<sup>39</sup> *Hooper v. Smith* (1763) 96 ER 252, 253.

<sup>40</sup> See Weisberg, "Commercial Morality", *supra* note 19 at 39.

allows debtors to obtain a release of their debts.<sup>41</sup> The enactment of the discharge in 1705, was in the words of one author, “the first provision enabling an honest and cooperative bankrupt to obtain a discharge from pre bankruptcy debts”.<sup>42</sup> Another author suggests that the discharge emerged as the result of “the gradual realisation of the fact that in many cases the bankrupt might be properly an object of pity”.<sup>43</sup> However, when one examines the historical context of 1705 it is clear that debtor rehabilitation was not the prime motivating factor behind the legislation.

Daniel Defoe, one of the most prolific commentators on bankruptcy during this period, recognized that the criminal character of the law and the absence of a discharge posed problems for both debtors and creditors. The absence of a discharge and cruelty on the part of creditors encouraged debtor misbehaviour. If the original goal of the Act of 1543 had been to prevent debtor fraud, debtors continued to devise ways to avoid their creditors and bankruptcy proceedings. Defoe spoke of absconding merchants who, in an effort to avoid the reach of the law, placed their goods “beyond the seas”. The promise of a discharge was the only effective way in which to deter fraudulent debtor activity. The discharge, by promising the release of debts, would encourage co-operation on the part of the debtor.<sup>44</sup>

Although the law did not include Defoe’s recommendation of a voluntary regime, nevertheless England enacted a discharge provision in 1705.<sup>45</sup> Bankruptcy remained an

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<sup>41</sup> Cohen, “The History of Imprisonment for Debt”, *supra* note 9 at 156.

<sup>42</sup> Tabb, “The Historical Evolution”, *supra* note 5 at 332.

<sup>43</sup> Levinthal, “The Early History of English Bankruptcy”, *supra* note 5 at 18. Levinthal also acknowledges that “the unlimited incarceration of the debtor did not tend to reimburse the creditors at all”. (p. 18).

<sup>44</sup> The account of Defoe’s work is drawn from Weisberg, “Commercial Morality”, *supra* note 19 at 5-9; J. McCoid, “Discharge: The Most Important Developments in Bankruptcy History” (1996) 70 Am. Bankr. L.J. 163 at 169-172 [hereinafter McCoid, “Discharge: The Most Important Developments”]. Defoe’s principal commentary on bankruptcy is *Essay on Projects* (1697).

<sup>45</sup> Several authors have examined the short term or immediate causes of the legislation rather than seeing the emergence of the discharge as part of a natural evolution of the law. “But there were also short-term causes behind the new law: the warfare and consequent instability of overseas trade ushered in by the

involuntary procedure. The original discharge provision required a majority of the bankruptcy commissioners to certify that the bankrupt had conformed to the Act. Conformity required submitting to an examination by the commissioners, disclosure and surrender of all assets.<sup>46</sup> Additional provisions focused on fraudulent bankrupts, providing the severe penalty of death for those who failed to surrender assets, refused to be examined, fraudulently disposed of goods, concealed or embezzled property worth more than £20.<sup>47</sup> If the discharge was the “carrot offered to induce debtors to co-operate in disclosing and turning over their estates; the death penalty was the stick”.<sup>48</sup>

The discharge therefore “facilitated the recovery of the most assets for the benefit of the creditors”.<sup>49</sup> As the discharge provided a form of limited liability, the debtor had a strong incentive to submit to the bankruptcy proceedings.<sup>50</sup> Parliament was not motivated by generosity to debtors.<sup>51</sup> Creditor interests lay at the heart of the reform and the change had only a limited beneficial effect on most debtors.<sup>52</sup>

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Glorious Revolution; the catastrophic winter of 1703 when the Thames froze over, shipping stopped and livestock were destroyed; the financial panic of 1701 associated with the Spanish succession and the battle between the old and the new East India Companies; and, finally, the massive fraudulent bankruptcy of Thomas Pitkin, a London linen draper”. Hoppitt, *Risk and Failure in English Business*, *supra* note 17 at 35; Duffy, “English Bankrupts”, *supra* note 32 at 286; Cohen, “The History of Imprisonment for Debt”, *supra* note 9 at 157.

<sup>46</sup> Tabb, “The Historical Evolution”, *supra* note 5 at 334.

<sup>47</sup> Duffy, “English Bankrupts”, *supra* note 32 at 287; Tabb, *ibid.* at 337. However, Tabb notes that only “a handful of people were actually executed under the statute in the more than a century of its existence”. (p. 337).

<sup>48</sup> Tabb, *ibid.* at 337.

<sup>49</sup> *Ibid.* at 334.

<sup>50</sup> “Because the discharge provided limited liability for the bankrupt, it gave him a strong incentive to submit voluntarily to bankruptcy proceedings.” Cohen, “The History of Imprisonment for Debt”, *supra* note 9 at 156.

<sup>51</sup> Lester, *Victorian Insolvency*, *supra* note 3 at 17; Weisberg, “Commercial Morality”, *supra* note 19 at 30. See also Duffy, “English Bankrupts”, *supra* note 32 at 287.

<sup>52</sup> Tabb, “The Historical Evolution”, *supra* note 5 at 332. W.R. Cornish & G. de N. Clark, *Law and*



The original discharge provision was enacted as a trial remedy as the Act was to expire after a period of three years. Parliament extended the operation of the law after 1705 and the legislation was consolidated in 1732. The consolidation provided the basis for the regulation of bankruptcy for the balance of the eighteenth century.<sup>53</sup> The discharge provisions as amended in 1707, however, were based upon the notion of creditor consent. Parliament introduced a requirement that four-fifths of the creditors, in number and in value, consent to the granting of the discharge. The requirement of creditor consent was a lasting feature of the English bankruptcy discharge until the nineteenth century.<sup>54</sup> Creditor control over the discharge led to two consequences. First, fraudulent bankrupts obtained their discharges by bribing creditors. Second, debtors who were unable to bribe, coerce or convince their creditors into consenting to the discharge remained bankrupt indefinitely.<sup>55</sup>

Bankruptcy law, however, continued to apply only to traders. Bankrupts were eligible for the discharge and could not be imprisoned for their debts. Thus a dual system of law emerged to deal with insolvent debtors. The traditional debt collection mechanisms, including the ability of the creditor to imprison the debtor who fell outside the definition of trader, "continued alongside the bankruptcy system". Creditors had the

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*Society in England 1750-1950* (London: Sweet & Maxwell, 1989) at 231 arguing that bankruptcy was a deterrent aimed at those who failed to submit to ordinary processes [hereinafter Cornish & Clark, *Law and Society*].

<sup>53</sup> 5 Geo. 2, ch. 30 (1732). See Lester, *Victorian Insolvency*, *supra* note 3 at 18. This statute was subsequently continued on a number of occasions until the provision was made perpetual in 1796. See Tabb, *ibid.* at 333-340. McCoid, "Discharge: The Most Important Developments", *supra* note 44 at 181.

<sup>54</sup> McCoid, *ibid.* at 181. England removed creditor consent in 1842, restored it briefly in 1869, before finally removing it 1883. See 12 & 13 Vict., c. 106 (1849); 32 & 33 Vict., c. 71 (1869); 46 & 47 Vict., c. 52 (1883). V. Countryman, "History of American Bankruptcy Law" (1976) 81 Com L.J. 226 at 229 [hereinafter Countryman, "History of American Bankruptcy Law"].

<sup>55</sup> I. Duffy, *Bankruptcy and Insolvency in London During the Industrial Revolution* (New York: Garland, 1985) at 32 [hereinafter Duffy, *Bankruptcy and Insolvency in London*]. Duffy states that as many as 40% of all bankrupts were not able to obtain their discharge. In 1718, a requirement was introduced which required a debtor to take an oath stating that the certificate of the creditors' consent was fairly obtained. See Tabb, "The Historical Evolution", *supra* note 5 at 340.

option of having the non-trading debtor imprisoned until the full debt was paid.<sup>56</sup> Debtors not covered by the bankruptcy statutes could be released from individual debts only with the consent of the specific creditor. Legislation that sought to ameliorate the plight of the non-trader became known as insolvency laws. Throughout the eighteenth century, Parliament periodically passed specific statutes that provided for the release of imprisoned debtors.<sup>57</sup> Two systems of debtor legislation, bankruptcy law (available to traders) and insolvency law (which sought to provide some form of relief for non-traders), operated side by side until the English Parliament ended the divergence with the elimination of the trader distinction in 1861.<sup>58</sup>

### *E Nineteenth Century Reforms*

Before the emergence of the discharge, there was no advantage to a debtor to be made subject to bankruptcy proceedings. Bankruptcy law was something to be avoided. Prior to 1700 plaintiffs sought damages in defamation suits for being called a bankrupt.<sup>59</sup> However, once the right of discharge became available, the trader rule “faced a new counter pressure to expand to include ‘deserving debtors’”.<sup>60</sup>

The older categories of trader broke down with the emergence of new forms of business, and the expansion of credit.<sup>61</sup> The courts expanded the definition of trader to

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<sup>56</sup> Lester, *Victorian Insolvency*, *supra* note 3 at 88, 89.

<sup>57</sup> Duffy, *Bankruptcy and Insolvency in London*, *supra* note 55 at 56. Lester, *ibid.* at 105-106.

<sup>58</sup> Lester, *ibid.* at 89.

<sup>59</sup> Friedman & Niemira, “The Concept of the ‘Trader’ in Early Bankruptcy Law”, *supra* note 31 at 226.

<sup>60</sup> Weisberg, “Commercial Morality”, *supra* note 19 at 31.

<sup>61</sup> Duffy, *Bankruptcy and Insolvency in London*, *supra* note 55 at 18-19. See also Friedman & Niemira, “The Concept of the ‘Trader’ in Early Bankruptcy Law”, *supra* note 31 at 225; Duffy, “English Bankrupts”, *supra* note 32 at 292, 293. Friedman & Niemira at 243-244 note that financiers of industrial enterprise may have had an interest in bringing manufacturers within the protective umbrella of the bankruptcy laws. Further with the growth of the notion that the market set values according to supply and demand, one was led to the conclusion that no particular activity or commerce was bad or evil if the market demanded it.

encompass some occupations not specifically mentioned in the statute.<sup>62</sup> By the nineteenth century the definition included a wide range of trading activities.<sup>63</sup> The trader rule expanded to meet “the needs of the business community”.

And as surplus capital came to be deposited with bankers, or invested in shipping, or in buying a line of insurance through Lloyd's, insolvency tended to become a business risk of all those who had wealth to invest. The effect of these changes was to put two kinds of pressure on the bankruptcy laws: first to soften their nature, and second to extend their scope.<sup>64</sup>

The abolition of the trader rule in 1861<sup>65</sup> expanded the availability of the bankruptcy discharge by making all types of debtors eligible for the discharge. Critics of the trader distinction pointed to the failure of the insolvency laws to encourage non-traders to give up their property at the first sign of financial difficulty.

On the one hand, because creditors possessed no summary instrument, debtors were able to dispose of their property before going to court. On the other hand, imprisonment in execution, obviously encouraged others to flee to continental towns, such as Boulogne where there were sizeable colonies of Englishmen waiting for their creditors to propose favourable

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<sup>62</sup> Cohen, “The History of Imprisonment for Debt”, *supra* note 9. For an authoritative summary of the evolution of the concept of trader at common law, see Friedman & Niemira, *ibid.* at 226-248. See also Duffy, *Bankruptcy and Insolvency in London*, *ibid.* at 18-23; Duffy, “English Bankrupts”, *ibid.* at 305; Weisberg, “Commercial Morality”, *supra* note 19 at 24; Jones, *The Foundations of English Bankruptcy*, *supra* note 13 at 21-24; Lester, *Victorian Insolvency*, *supra* note 3 at 16.

<sup>63</sup> In 1825, the definition was expanded by adding the following categories: Bleachers, builders, calenderers, carpenters, cattle and sheep salesmen, coffee-house keepers, fullers, hoteliers, innkeepers, insurers of ships, packers, printers, scribes, shipwrights, victuallers warehousemen and wharfingers. The 1825 statute contained several exclusions, exempting farmers, graziers, labourers, hired workmen, tax receivers and subscribers to companies established by an Act of Parliament. Duffy, *ibid.* at 23. In 1842, the list was further expanded to include alum-makers, apothecaries, auctioneers, brickmakers, carriers, coach proprietors, cow-keepers, limeburners, livery stable-keepers, market gardeners, millers and shipowners. Duffy “English Bankrupts”, *ibid.* at 293-294; Lester, *ibid.* at 62.

<sup>64</sup> Friedman & Niemira, “The Concept of the ‘Trader’ in Early Bankruptcy Law”, *supra* note 31 at 233, 242.

<sup>65</sup> E. Jenks, *A Short History of English Law: From the Earliest Times to the End of the Year 1911* (London: Meuthen, 1912) at 386 [hereinafter Jenks, *A Short History of English Law*]. See 24 & 25 Vict. c. 134. Recommendations to abolish the distinction can be traced to 1840, see Cornish & Clark, *Law and Society*, *supra* note 52 at 234.

compositions .... Further, perpetual liability was counter-productive since it paralysed the exertions of debtors who were released and encouraged others to avoid payment by remaining in prison of their own volition.<sup>66</sup>

However, the removal of the trader rule was controversial. When the proposal was suggested, "a great hue and cry ensued, in which 'private gentlemen' expressed a great distaste for being brought within laws designed for the trading classes".<sup>67</sup> For the first time professional men such as Members of Parliament, doctors, clergy and judges faced the possibility of bankruptcy. A strong feeling remained among the landed classes that bankruptcy was "a harsh set of laws designed purely for those who had soiled their hands with trade and ought therefore to be held responsible for a strict accounting of their financial dealings".<sup>68</sup>

The abolition of the trader rule took on even greater significance as earlier in the century Parliament had introduced voluntary proceedings.<sup>69</sup> The ability of traders to initiate their own bankruptcy proceedings had been introduced in 1844<sup>70</sup> and the demise of the trader rule meant that by 1861 all categories of debtors were free to put themselves into bankruptcy and apply for a discharge. The introduction of voluntary proceedings was a significant step towards the modernization of English bankruptcy law.

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<sup>66</sup> Duffy, "English Bankrupts", *supra* note 32 at 291. Duffy's review of the parliamentary debates indicates that abolitionists "succeeded because they exposed the theoretical defects and detrimental practical consequences of the law".

<sup>67</sup> Weiss, *Bankruptcy and the Victorian Novel*, *supra* note 1 at 36.

<sup>68</sup> *Ibid.*

<sup>69</sup> Despite the prior inability of debtors to initiate their own bankruptcy petition, the involuntary provisions had been abused by debtors and creditors. See T. Plank, "The Constitutional Limits of Bankruptcy" (1996) 63 *Tenn. L. Rev.* 487 at 511-513.

<sup>70</sup> 7 & 8 *Vict.*, c. 96 (1844). See Tabb, "The Historical Evolution", *supra* note 5 at 353. Tabb notes that England had earlier taken a step in this direction in 1825 when Parliament recognized a debtor's statement of insolvency as an Act of Bankruptcy that would support a creditor's petition. See 6 *Geo. 4*, c. 16, s. 6 (1825). While England took some three centuries to adopt a voluntary regime, the idea had been briefly raised by Daniel Defoe in the late seventeenth century. See J. McCoid, "The Origins of Voluntary Bankruptcy" (1988) 5 *Bankr. Dev. J.* 361 at 363.

Further, the removal of the trader distinction in 1861 alleviated the need for a separate parallel insolvency regime. Parliament had earlier in 1813 established a Court for the Relief of Insolvent Debtors which heard petitions from imprisoned debtors seeking release. The Court was no longer needed and was removed from the statute with the merger of the bankruptcy and insolvency regimes. These reforms coincided with the movement to abolish imprisonment for debt. Parliament had abolished imprisonment on mesne process in 1838 (a procedure available to a creditor to imprison a debtor before judgment) and removed the ability to imprison on final process in 1869.<sup>71</sup>

In addition to abolishing the trader rule in 1861, Parliament also ended the statutory requirement to classify the discharge. Introduced in 1849, the legislation categorized the certificate of discharge into "moral categories".<sup>72</sup> The classification distinguished between virtuous, unfortunate and dishonest debtors.<sup>73</sup>

A first class certificate would be awarded in cases where bankruptcy was caused wholly by unavoidable misfortune, a second-class in cases where the cause was partially due to misfortune (that is, the bankrupt may have been careless or reckless, but not dishonest), and a third class in cases not due in any way to misfortune but rather to the dishonesty of the trader.<sup>74</sup>

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<sup>71</sup> For a discussion of earlier reforms, tracing specific legislation directed at insolvent debtors, see Duffy, *Bankruptcy and Insolvency in London*, *supra* note 55 at 56-87; Lester, *Victorian Insolvency*, *supra* note 3 at 100-106, 116-117; B. Kercher, "The Transformation of Imprisonment for Debt in England, 1828-1838" (1984) 2 Aust. J.L. & Soc. 60; P. Rock, *Making People Pay* (Routledge: London, 1973) at 307-15. See 32 & 33 Vict., c. 62 (1869). The 1869 Act did not entirely abolish imprisonment for debt and created a major exception for small debts. Rubin argues that the title of the Act, "An Act for the Abolition of Imprisonment for Debt" was "cruel and ironic deception". See G. Rubin, "Poverty and Imprisonment for Debt, 1869-1914" in D. Sugarman and G. Rubin, *Law Economy and Society 1750-1914: Essays in the History of English Law* (Abingdon: Professional Books, 1984) at 241.

<sup>72</sup> Weiss, *Bankruptcy and the Victorian Novel*, *supra* note 1 at 43. In 1849, Parliament introduced a consolidating bill, which codified previous amendments as well as containing a number of reforms. See 12 & 13 Vict., c. 106 (1849). Earlier reforms enacted in 1842 had abolished creditor consent for a discharge as well as allowing debtors to cause their own bankruptcy, see 5 & 6 Vict., c. 45 (1842). Lester, *ibid.* at 62.

<sup>73</sup> Lester, *ibid.* at 67.

<sup>74</sup> Weiss, *Bankruptcy and the Victorian Novel*, *supra* note 1 at 45.

The Consolidation Act of 1849 set up the machinery whereby the courts were "to distinguish between moral and immoral businessmen by classifying discharge certificates according to moral culpability".<sup>75</sup> However, it became apparent that such categories of discharge did not affect the moral character of trade. The categories were not applied uniformly and many cases were too complex to categorize. Further, debtors who received the lowest third class certificate were still able to obtain credit and many debtors did not seem to care which class of discharge they received. In 1861, Parliament repealed the classification of discharges, and "never again attempted such a specific means of legislating morality in bankruptcy".<sup>76</sup>

However, free and easy access to the discharge did not follow. Legislation enacted in 1869 significantly increased the powers of creditors both with respect to the discharge and the administration of the debtor's estate. In 1869, Parliament "entrust[ed] everything to the creditors; in the belief that motives of self interest would produce efficiency".<sup>77</sup> Under the new legislation, the office of official assignee was abolished and replaced by creditors' trustees.<sup>78</sup> The office of the official assignee had been established in 1831 and assignees had been responsible for the administration of the bankrupt's estate. In 1869, Parliament moved away from official control to a system of direct creditor control of the debtor's estate. Creditors in a position to influence policy believed that private control was a more efficient solution to the problem of administering the

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<sup>75</sup> Lester, *Victorian Insolvency*, *supra* note 3 at 68. However, at least one author views the classification system as an important shift in the assumptions that were behind the bankruptcy statute. Previously, the assumption had been that all traders were "generally deceitful and unscrupulous: That they were all intent on cheating creditors by deliberate fraud or by delaying tactics". Marriner, sees the classification system as a statutory admission that some debtors failed because of simple misfortune. See S. Marriner, "English Bankruptcy Records and Statistics Before 1850" (1980) 33 *Econ. Hist. Rev.* 351 at 358.

<sup>76</sup> The above paragraph is based on Weiss, *Bankruptcy and the Victorian Novel*, *supra* note 1 at 44-45. See 24 & 25 *Vict.*, c. 134 (1861).

<sup>77</sup> Jenks, *A Short History of English Law*, *supra* note 65 at 386, see 32 & 33 *Vict.*, c. 71.

<sup>78</sup> Lester, *Victorian Insolvency*, *supra* note 3 at 163.

bankrupt's estate.<sup>79</sup> Creditors obtained greater control over the granting of the discharge. Where the estate did not pay out a minimum prescribed dividend, debtors required the majority creditors representing three-quarters of the value of all claims to consent a discharge.<sup>80</sup>

The Act of 1869 was yet another response to the central question of the day: "Who would best administer the bankrupt's estates: the creditors or government officials?"<sup>81</sup> One author characterized the continuous reforms as a "legislative pendulum" which "oscillated from one theory to another, as the imperfections of each were experienced in succession".<sup>82</sup> After 1869, it became apparent that creditor control was not an effective form of administration. Merchants would rather write off a loss than spend countless hours attending creditors' meetings and examining debtors' accounts.<sup>83</sup>

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<sup>79</sup> On the establishment of the office of the Official Assignee, see *ibid.* at 82. On the abolition of the office, see *ibid.* at 162-163.

<sup>80</sup> The estate was required to pay out a dividend of 10 shillings per pound. *ibid.* at 155. Countryman, "History of American Bankruptcy Law", *supra* note 54 at 229; Tabb, "The Historical Evolution", *supra* note 5 at 354. Creditor consent had long been a feature of the bankruptcy discharge since its inception. It had been briefly removed in 1842 before being reinstated in 1869. See 5 & 6 Vict., c. 122, s. 39 (1842); 32 & 33 Vict., s. 48 (1869).

<sup>81</sup> Lester, *ibid.* at 38. "Bankruptcy law in the early nineteenth century England called less loudly for reform than did the machinery of its courts." E. Welbourne, "Bankruptcy before the Era of Victorian Reform" (1932) 4 Cambridge Hist. J. 51.

<sup>82</sup> Baron Bowen, "Progress in the Administration of Justice during the Victorian Period" in *Select Essays in Anglo-American Legal History* (New York: Lawbook Exchange, 1992) 516 at 548. For a diagram of the shifting pendulum between official and creditor control and the character of the legislation as being either pro-creditor or pro-debtor, see Charley del Marmol, *Les Origines et Les Principes de la Réglementation de la Faillite dans les Pays de Common Law* (Ph.D. diss., Université de Liège, 1936) at 85.

<sup>83</sup> Jenks, *A Short History of English Law*, *supra* note 65 at 387. See also Weiss, *Bankruptcy and the Victorian Novel*, *supra* note 1 at 46. "Leaving the administration of bankruptcy to creditors had failed because they were not an organized body. Often they had conflicting interests, and few had either the time or the inclination to attend the frequent meetings or to pursue complicated investigations. More often than not, the creditors would simply write off their bad debts, a situation that understandably led to a great rise in corruption, and a corresponding decrease in the amount of assets divided". See also Lester, *Victorian Insolvency*, *supra* note 3 at 174.

The lack of court supervision allowed a number of debtors to escape without a proper investigation into their prior conduct.<sup>84</sup>

Problems with the creditor regime made bankruptcy law controversial during the 1870s and early 1880s as England struggled to find a legislative solution. Although England never repealed its bankruptcy legislation, frustration with the existing system led some members of Parliament to call for repeal in 1878. Further, the repeal of the United States Bankruptcy legislation in 1878 caused the Bristol Chamber of Commerce to print and distribute the news to other chambers. Lord Sherbrooke, in an 1881 article, argued that the common law was a more appropriate creditors' remedy. Another author in 1883 questioned whether state intervention in the form of bankruptcy law was required at all. While these were minority viewpoints, there was a growing feeling that the failure of the series of reforms "left little choice but to abandon the system altogether and leave creditors with their common law rights".<sup>85</sup>

In 1883, Parliament enacted new legislation that firmly returned to the model of state control.<sup>86</sup> Joseph Chamberlain, in introducing the legislation, claimed that there were two "distinct objects" of any bankruptcy law. He argued that the first object was the honest administration of the estate "with a view to the fair and speedy distribution of the assets among the creditors". Secondly, he stated that bankruptcy law should lessen the number of failures and promote honest trading. However, "with regard to those two most

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<sup>84</sup> As a result, many proposed that the discharge be granted only to those debtors who were able to make a minimum level of payment to their creditors. However, little consensus existed within the business community as to what level the debtor should pay. Lester points to specific proposals dating as early as 1878 from various groups on what amount debtors should pay to their creditors before being released. Lester, *ibid.* at 182-183.

<sup>85</sup> *Ibid.* at 184. See, Lord Sherbrooke, "What Shall We Do With Our Bankrupts?" (1881, Aug) *Nineteenth Century* 315; T.F. Cashin, *The Inutility of Bankruptcy Laws: Lord Sherbrooke's Remedy* (London: 1883). See also, Batzel, "Parliament, Businessmen and Bankruptcy", *supra* note 2 at 180 who notes that while "there is no evidence that there was any serious attempt to abolish bankruptcy legislation altogether ... it is of passing interest to note that the idea did surface occasionally". As early as 1865, the *County Court Chronicle and Bankruptcy Gazette* argued that the entire bankruptcy system be abolished. Lester, *ibid.* at 182. See "A Suggestion for Bankruptcy Reformers" (1 March 1865) *County Court Chronicle and Bankruptcy Gazette* 55.

<sup>86</sup> Jenks, *A Short History of English Law*, *supra* note 65 at 387. See 46 & 47 Vict., c. 52 (1883).



important objects, there was only one way by which they could be secured and that was by securing an independent and impartial examination into the circumstances of each case .... No investigation could be worth anything unless it was conducted by an independent and impartial officer".<sup>87</sup>

Provisions of the bill reflected a reaction against the creditor system. After the filing of a bankruptcy petition, a receiving order authorized an official receiver to assume control of the debtor's estate. The official receiver acted as a public investigator of the debtor's affairs and was appointed by the government department of the Board of Trade. Under the 1883 Act, the official receiver was replaced ultimately by a trustee selected by the creditors. Trustees, however, were carefully monitored by the Board of Trade.<sup>88</sup>

Apart from re-establishing official control over the administration of the bankrupt's estate, the reforms of 1883 are also well known for the creation of the court supervised discretionary system of discharge. Parliament abolished the requirement of creditor consent in 1883 and substituted judicial control. Creditor consent had led to arbitrary results with creditors withholding consent even when no further payments could be made for their benefit. Further, some creditors had been able to manipulate the consent rules to ensure preferential treatment while debtors abused the rules by filing fictitious claims that diluted the voting power of legitimate creditors.<sup>89</sup> These difficulties were removed as the courts were given a broad discretion to grant or deny a discharge. In addition, the court had the discretion to make an order of discharge conditional on the

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<sup>87</sup> Hansard's Parliamentary Debates (England) 3rd Series, vol CCLXXVII, p. 817 (19 March 1883) in *Report of the Study Committee on Bankruptcy* (Ottawa, 1970) at 11 [hereinafter Tassé Report]. See also Lester, *Victorian Insolvency*, *supra* note 3 at 194.

<sup>88</sup> Cornish & Clark, *Law and Society*, *supra* note 52 at 236.

<sup>89</sup> D. Boshkoff, "Limited, Conditional and Suspended Discharges in Anglo-American Bankruptcy Proceedings" (1982) 131 U. Pa. L. Rev. 69 at 104.

making of certain payments or to suspend an order of discharge for an indefinite period of time.<sup>90</sup>

The Bankruptcy Act of 1883 was the most significant reform of the nineteenth century and its longevity is evidence of its importance. Parliament passed amendments in 1890 and 1913, followed by a consolidation in 1914. However, "the original 1883 Act remained the bankruptcy law for England and Wales until the Insolvency Acts of 1985 and 1986".<sup>91</sup> A 1908 committee concluded that there was no major dissatisfaction with the main provisions of the legislation and recommended only technical changes.<sup>92</sup>

The evolution of the discharge, the demise of the trader rule and the introduction of voluntary proceedings marked the emergence of a modern bankruptcy regime. Parliament through trial and error had finally achieved a lasting legislative regime. However, it is important to recognize that the judiciary also played a role in the development of bankruptcy law. Creditor equality had been the cornerstone of all English bankruptcy legislation. Preferential payments threatened to undermine creditor equality and the common law gradually evolved to hold that payments to a preferred creditor were void. In *Worsely v. Demattos*<sup>93</sup> and *Alderson v. Temple*<sup>94</sup> Lord Mansfield developed the principle that the very object of the bankruptcy statute, which was designed to ensure the equal treatment of creditors, would be defeated if debtors were able to make preferential payments.<sup>95</sup> In 1869, the English Parliament finally created a

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<sup>90</sup> See Tabb, "The Historical Evolution", *supra* note 5 at 363; Countryman, "History of American Bankruptcy Law", *supra* note 54 at 230. On the origins of this bill, see Lester, *Victorian Insolvency*, *supra* note 3 at 194-197.

<sup>91</sup> Lester, *ibid.* at 289.

<sup>92</sup> *Ibid.* at 291; Cornish & Clark, *Law and Society*, *supra* note 52 at 236.

<sup>93</sup> (1758) 1 Burr 467; 96 E.R. 1160.

<sup>94</sup> (1768) 4 Burr 2235; 98 E.R. 165.

<sup>95</sup> Earlier authority had established the doctrine of relation back which vested title to the debtor's assets in the commissioners upon an Act of Bankruptcy, see *Case of Bankrupts* (1592) 76 E.R. 441. On the origins of preferences, see Weisberg, "Commercial Morality", *supra* note 19; C. Tabb, "Rethinking Preferences" (1992) 43 S.C. L. Rev. 981 at 995-1000; G. Glenn, "The Diversities of the Preferential

statutory provision that prohibited preferential payments by debtors on the eve of their bankruptcy.<sup>96</sup>

## II Explaining the Evolution of English Bankruptcy Law

Why Canada chose not to follow the landmark English reforms of 1883 until 1919 remains the central question of the thesis. Conversely, one may ask why England developed a settled regime earlier than Canada? This section discusses two major themes that are raised in the literature on the history of English bankruptcy law and that provide areas of inquiry for the comparative Canadian study.

First, economic change and the shift in the nature of credit relationships affected the pattern of legislation. Early English legislation was particularly harsh and was concerned with the control of the debtor. In pre-industrial English economy credit relationships were often personal and as a consequence the inability to repay was linked to a moral failure. Negative attitudes to debt contributed to the stigma that attached to bankruptcy law. In the nineteenth century, England introduced a number of reforms that liberalized the law as Victorians sought to deal with the problem of debt in a more realistic way. The modernization of legislation was a pragmatic response to the needs of the new industrial economy and new forms of credit relationships.

Second, it is evident that institutions also had an affect on the timing of legislative change. The legislation of 1883 became entrenched as it fell within the responsibility of the government department of the Board of Trade. The English government led the move for reform and ensured its success. While these two themes assist in accounting for the state of English law, they also signal areas of inquiry to explain why Canada came to a permanent regime so late.

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Transfer: A Study in Bankruptcy History" (1930) 15 Cornell. L. Rev. 521 at 527-533; G. Glenn, "A Study in the Development of Creditors' Rights" (1914) 14 Colum. L. Rev. 491 at 502; A. Harding, *A Social History of English Law* (London: Penguin, 1966) at 317. Harding suggests that the law of preferences evolved due to the rise in the number of bankruptcies between 1740 to 1790.

<sup>96</sup> See 32 & 33 Vict., c. 71, s. 92 (1869).

*A Attitudes to Bankruptcy in the Seventeenth and Eighteenth Century*

As discussed in Part I, bankruptcy law originated as a criminal statute designed to control fraudulent debtors. For example, the preamble to the 1604 amendment characterized bankrupts as:

Frauds and deceits, as new diseases, daily increase amongst such as live by buying and selling to the hindrance of traffic and mutual commerce, and to the general hurt of the realm, by such as wickedly and wilfully become bankrupts.<sup>97</sup>

The 1604 statute included the sanction of the pillory and the removal of an ear for debtors who committed perjury.<sup>98</sup> The early discharge provisions enacted in the seventeenth century extended capital punishment to bankrupts who “failed to surrender, refused to be examined, fraudulently disposed of goods, concealed or embezzled property worth more than £20, or withheld books”.<sup>99</sup>

Early case law commenting on the purposes of bankruptcy law reinforced the view that bankruptcy was a crime. In *Tribe v. Webber* Abney J stated that:

Bankruptcy is in my opinion ever was and yet is considered a crime, whatever tradesman may now think of it. It was anciently punished with corporal punishment; the body lands and goods are at this day subject to the commissioners.<sup>100</sup>

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<sup>97</sup> 1 Jac. I, c.15 (1604) cited in Duffy, *Bankruptcy and Insolvency in London*, *supra* note 55 at 9.

<sup>98</sup> See G. Dal Pont & L. Griggs, “The Journey from Ear-Cropping and Capital Punishment to the Bankruptcy Legislation Amendment Bill 1995” (1995) 8 Corp. & Bus. L.J. 155 at 164. The authors note that in 1624 the punishment was extended to those who failed to show some good reason why they went bankrupt.

<sup>99</sup> Duffy, “English Bankrupts”, *supra* note 32 at 287. Duffy notes that capital punishment was applied to only five fraudulent bankrupts before its abolition in 1820. Blackstone thought bankruptcy was on par with forgery or falsifying the coin of the realm, “clearly a public and criminal offence”. W. Blackstone, *Commentaries on the Laws of England* (1783) cited in Hicks & Ramsay “Law, Order and the Bankruptcy Commissions”, *supra* note 19 at 128.

<sup>100</sup> (1744) 125 E.R. 1270 at 1271. See also: *Crispe v. Perrit* (1744) 125 E.R. 1272: A bankrupt is “not considered as an unfortunate person, but as one who has been guilty of a crime”.

*Ex Parte Cabot* (1739 Ch) 26 E.R. 141: “The old laws considered bankrupts as fraudulent insolvents ... but the more modern laws have considered them as unfortunate debtors.”

The criminal origins of the law had a significant impact on how the law was perceived.<sup>101</sup>

While bankruptcy laws may have been enacted and amended to deal with the problem of fraudulent debtors, it is important to note that the word "fraud" at least in the eighteenth century had a much wider meaning than its modern definition. Fraud was used to describe other actions including:

the acceptance of loans without a 'reasonable' expectation of being able to repay them, living 'extravagantly' after borrowing someone else's money, failure to anticipate 'avoidable' difficulties, and the failure to struggle 'enough' before giving up and defaulting.<sup>102</sup>

Negative attitudes to debt also contributed to the stigma of bankruptcy.<sup>103</sup> The growth of credit in England between the late seventeenth and the late eighteenth centuries

*Fowler v. Padget* (1798) 101 E.R. 1103, 1106: "Bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender: but it is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea*. The intent and the Act must both concur to constitute the crime."

*Clough v. Samuel* [1905] A.C. 442, 444: "In earlier times bankruptcy was a crime, and in dealing with our law to commit the crime it was necessary to commit an act of bankruptcy."

*Re Chinery* (1884) 12 Q.B.D. 342, 346: "The words 'final judgment' having, then, a proper professional meaning, when they are found in a section of an Act of Parliament which is defining acts of bankruptcy, they should be construed as strictly as if they occurred in a section which was defining a misdemeanour, because the commission of an act of bankruptcy entails disabilities on the person who commits it."

<sup>101</sup> Hoppitt, who examined the period 1700-1800, noted that businessmen viewed bankruptcy law with horror. "One aspect of this derived from the tradition, inherited from the early statutes, that viewed bankruptcy law as a crime." Hoppitt, *Risk and Failure in English Business*, *supra* note 17 at 25. One author surveying Victorian insolvency argued that "the criminal origins of bankruptcy law were very likely one reason for the social disgrace that attached to it". Weiss, *Bankruptcy and the Victorian Novel*, *supra* note 1 at 35.

<sup>102</sup> P. Haagen, "Eighteenth Century English Society and the Debt Law" in S. Cohen & A. Scull, *Social Control and the State* (Oxford: Blackwell, 1983) 222 at 230 [hereinafter Haagen in Cohen & Scull, *Social Control and the State*].

<sup>103</sup> Hoppitt, *Risk and Failure in English Business*, *supra* note 17 at 27.

led many to question its virtue.<sup>104</sup> Credit was assessed from the point of view of moral and ethical standards rather than economic considerations.<sup>105</sup> The culture of the markets in early modern England was “explicitly moral”.<sup>106</sup> The extension of credit was associated with extravagance and recklessness. Those who achieved luxury through credit were attacked as having created an “illusion of substance” and for allowing “the erosion of traditional patterns of social hierarchy”. While society might initially prosper, credit “embodied destructive forces in the form of new aspirations and values” and in the long run would only “produce decay”. Cash transactions were celebrated and “the virtues of prudent housekeeping and parsimony extolled”. Retail creditors, pawnbrokers and money lenders all became the targets of criticism.<sup>107</sup>

Critical attitudes to debt may be linked to the local nature of credit relations that depended on trust and mutual exchange.<sup>108</sup> Such an economy was characterized by

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<sup>104</sup> J. Hoppitt, “Attitudes To Credit in Britain 1680-1790” (1990) 33 *Hist. J.* 305 at 307 [hereinafter Hoppitt, “Attitudes To Credit”]. On the relationship between the growth in credit and the rise of capitalism, see C. Francis, “Practice Strategy and Institution: Debt Collection in the English Common Law Courts, 1740-1840” (1986) 80 *Nw. U. L. Rev.* 807 at 901 [hereinafter Francis, “Debt Collection”].

<sup>105</sup> Hoppitt, *ibid.* at 306, 320.

<sup>106</sup> Muldrew argues that in the late sixteenth century and seventeenth centuries, people “were not simply or even primarily concerned with self interest in the Smithian sense, and did not interpret their behaviour in such terms”. C. Muldrew, “Interpreting the Market: the Ethics of Credit and Community Relations in Early Modern England” (1993) 18 *Soc. Hist.* 163 at 169 [hereinafter Muldrew, “Interpreting the Market”]. Muldrew takes issue with modern studies who have read back into history the model of self interest. While it is important to recognize the influence of the moral and ethical standards, one cannot entirely dismiss the rational actor, thereby creating a tension between the two norms. For a different view, see Francis, “Debt Collection”, *supra* note 104 at 901-902.

<sup>107</sup> Hoppitt, “Attitudes To Credit”, *supra* note 104 at 312-315. The above paragraph is based on Hoppitt’s article.

<sup>108</sup> This section is based on Muldrew, “Interpreting the Market”, *supra* note 106; Hoppitt, “Attitudes To Credit”, *supra* note 104; C. Muldrew, “Credit and the Courts: Debt Litigation in a Seventeenth Century Urban Community” (1993) 46 *Econ. Hist. Rev.* 23 [hereinafter Muldrew, “Credit and the Courts”]; J. Hoppitt, “Financial Crises in Eighteenth Century England” (1986) 39 *Econ. Hist. Rev.* 39 [hereinafter Hoppitt, “Financial Crises in Eighteenth Century England”].

individual contractual relationships with buying conducted on terms of trust "in which an individual's creditworthiness in their community was vital".<sup>109</sup>

[T]his network of credit was so extensive and intertwined that it introduced moral factors which provided strong reasons for stressing co-operation within the marketing structures of the period. Individual profit and security were important, but neither could be achieved without the direct co-operation of one's neighbours which trust entailed. As a result, buying and selling at this time, far from breaking up communities, actually created numerous bonds that held them together.<sup>110</sup>

Although English merchants were involved in national and international trade, most transactions were local and small. This created a norm of "social dependency based only on each other's word, or word of others which linked them together".<sup>111</sup> Only a small percentage of credit in the eighteenth century was provided by institutional lenders as most lending was carried out as part of other business "or as part of personal relations".<sup>112</sup> Credit was extended between individual agents when trust was established to ensure repayment. To have credit "meant that character was respected because you could be trusted to pay back your debts".<sup>113</sup> When a shopkeeper granted credit, "he conferred an honour". However, a refusal of credit conferred "an insult".<sup>114</sup>

If credit was tied to the mutual bonds of community, one must consider the important implications of default. One default could lead to a domino effect of numerous

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<sup>109</sup> Muldrew, "Interpreting the Market", *ibid.* at 169. See also Haagen in Cohen & Scull, *Social Control and the State*, *supra* note 102 at 230. Haagen notes that there is evidence that about half of retail transactions were based on trust. See also P. Haagen, *Imprisonment for Debt in England and Wales* (Ph.D. diss., Yale, 1986) at 103-104 [hereinafter Haagen, *Imprisonment for Debt*].

<sup>110</sup> Muldrew, "Interpreting the Market", *supra* note 106 at 171.

<sup>111</sup> *Ibid.* at 174; Muldrew, "Credit and the Courts", *supra* note 108 at 36.

<sup>112</sup> Haagen in Cohen & Scull, *Social Control and the State*, *supra* note 102 at 230.

<sup>113</sup> Muldrew, "Interpreting the Market", *supra* note 106 at 178. See also B. Mathews, *Forgive Us Our Debts: Bankruptcy in America: 1763-1841* (Ph.D. diss., Brown University, 1994) at 8, 25 [hereinafter Mathews, *Forgive Us Our Debts*].

<sup>114</sup> Haagen, *Imprisonment for Debt*, *supra* note 109 at 105.

other defaults. It was in society's interest to prevent extravagance. Therefore, a community standard of thrift and caution was imposed. Those who failed became "pariahs of the community".<sup>115</sup> Creditors themselves did not escape criticism. One author writing in 1750 suggested that there was an onus on creditors to lend wisely and those who did not should have their remedies limited.<sup>116</sup>

Traders<sup>117</sup> who became bankrupts operated under a stigma. Failing to repay one's debts betrayed the community standard of ethical credit and was associated with personal failure:

When a debtor fails to repay his creditors he inevitably breaks his word and wrecks their expectations of him on the rocks. In an instant, he becomes untrustworthy; he should not have been trusted in the past and must never be trusted in the future. The creditors have been fooled by the debtor, be it innocently or culpably. In short, from this angle, bankruptcy was always akin to dishonesty ....<sup>118</sup>

Given the negative attitudes to debt, it is difficult to reconcile bankruptcy law with the principle that all debts should be honoured. Despite the inherent mistrust of debt, there were signs in the eighteenth century of some positive support for credit. Some recognized that credit was the "cornerstone of their growing prosperity" and regarded credit as essential.<sup>119</sup> Further, mercantile theory connected the prosperity of the country

<sup>115</sup> Muldrew, "Interpreting the Market", *supra* note 106 at 178-179. On the precarious credit network and the wider implications of default, see Haagen in Cohen & Scull, *Social Control and the State*, *supra* note 102 at 230.

<sup>116</sup> Haagen, "Imprisonment for Debt in England and Wales", *supra* note 109 at 110-114. Haagen's study notes that the 1750 pamphlet suggested that the onus should lie with the creditor to lend wisely. Those creditors who extended credit unwisely to the unwary or inexperienced should have their remedies limited.

<sup>117</sup> Hoppitt, "Financial Crises in Eighteenth Century England", *supra* note 108 at 44. Hoppitt argues that while the definition of trader excluded farmers and landowners unless they traded, "nevertheless the scope of bankruptcy was wide, catching the merchant princes alongside small shopkeepers, the large west country clothier and his poorer cousin in the West Riding, the once great goldsmith and the unassuming jeweller. Only those at the base of the pyramid of enterprise were excluded".

<sup>118</sup> Hoppitt, *Risk and Failure in English Business*, *supra* note 17 at 26-27.

<sup>119</sup> Haagen, *Imprisonment for Debt*, *supra* note 109 at 110-114.



to the well being of its merchants. Bankruptcy law acknowledged that risk taking was not only beneficial to individual merchants but to the country as well. The legislation implicitly recognized the importance of credit in the economy. The bankruptcy statutes were designed "to prevent or limit the adverse effects of large scale failure", ensuring that creditors would receive at least something from the estate.<sup>120</sup>

A competing view of credit emerged which characterized merchants as the victim of the shifting fortunes of trade and commerce.<sup>121</sup> Bankruptcy law was restricted to traders, according to Blackstone, "since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own". By contrast, non-traders who incurred debt, "must take the consequences of their own indiscretion". Blackstone likened mercantile trade to a brotherhood:

Trade cannot be carried on without mutual credit on both sides: the contracting of debts is therefore here not only justifiable but necessary. And if by accidental calamities, as by loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or a trader becomes incapable of discharging his own debts, it is his misfortune and not his fault.<sup>122</sup>

*B Economic Change and Bankruptcy in the Nineteenth Century*

One might have expected that as the economy expanded and credit relationships became less personal, attitudes to bankruptcy law and debt would have softened. Indeed, in the nineteenth century there were some suggestions in the contemporary literature and government reports that debt was an acceptable and necessary element of a market economy. However, despite these positive statements, Victorians also expressed "fear

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<sup>120</sup> The link between mercantile theory and support for a bankruptcy law in the face of negative attitudes towards debt is drawn from Mathews, *Forgive Us Our Debts*, *supra* note 113 at 17-26.

<sup>121</sup> On the transition from the evil merchant to merchant as hero, see Weisberg, "Commercial Morality", *supra* note 19 at 13-21.

<sup>122</sup> Cohen, "The History of Imprisonment for Debt", *supra* note 9 at 159-160, citing W. Blackstone, *Commentaries on the Laws of England* vol 2 at 473-474.

and hostility towards debt". For many Victorians the starting point was that "debts should be re-paid". The inconsistent and contradictory response illustrates a tension between the Victorians' moral concern with bankruptcy law and the pragmatic realities of a modernising nation.<sup>123</sup>

Although studies of pre-industrial and early industrial England show that moral attitudes to debt developed prior to the nineteenth century,<sup>124</sup> many continued to criticize bankruptcy legislation in this light. Studies have suggested several reasons for the negative social stigma that attached to debt and bankruptcy law. The criminal origins of the bankruptcy law and the class associated trader distinction contributed towards the "moral repugnance with which the Victorians regarded it".<sup>125</sup> In addition, the fear of debt can be linked to the influence of evangelicalism. Churches treated bankruptcy as a moral problem. Character, self-help and individual effort were important virtues. For Victorians, financial failure meant dishonesty and weakness of character.<sup>126</sup> Bankruptcy challenged Victorians' sense of hard work, thrift and accumulation of wealth. If success was a virtue, failure "must in turn be due to moral inadequacies and does much to explain the great moral stigma which was associated with bankruptcy". In Parliament and newspapers, the emphasis was on "the strictest standards of commercial morality".

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<sup>123</sup> C.R.B. Dunlop, "Debtors and Creditors in Dickens' Fiction" (1990) 19 *Dickens Studies Ann.* 25 at 26 [hereinafter Dunlop, "Debtors and Creditors in Dickens' Fiction"].

<sup>124</sup> Muldrew, "Interpreting the Market", *supra* note 106; Hoppitt, "Attitudes to Credit", *supra* note 104; J. Hoppitt, "The Use and Abuse of Credit in Eighteenth Century England" in N. McKendrick & R. Outhwaite, eds., *Business Life and Public Policy: Essays in Honour of D.C. Coleman* (Cambridge: Cambridge University Press, 1986) at 64. These earlier studies linked this attitude to the local nature of the economy. In some respects, there is evidence of a continued local interdependence in the nineteenth century. One author found that in the early nineteenth century the "interdependency inherent in credit transactions increased the vulnerability of small businessmen". Kent argues that in rural and provincial England, trade credit was "wholly a matter of personal confidence". See D. Kent, "Small Businessmen and their Credit Transactions in Early Nineteenth Century Britain" (1994) 36 *Bus. Hist.* 46 at 54.

<sup>125</sup> Weiss, *Bankruptcy and the Victorian Novel*, *supra* note 1 at 37.

<sup>126</sup> Lester, *Victorian Insolvency*, *supra* note 3 at 68. For a discussion of the role of evangelicalism and its impact on bankruptcy through to 1865, see B. Hilton, *The Age of Atonement: The Influence of Evangelicalism on Social and Economic Thought 1785-1865* (Oxford: Clarendon Press, 1988) at 136-147 [hereinafter Hilton, *The Age of Atonement*].

Bankruptcy and its challenge to honour in commercial dealings threatened the very foundation of England's greatness as a trading nation.<sup>127</sup> Finally, one author suggests that Victorians feared political revolution and that widespread default challenged not only the market but also was a threat to the state power enshrined in judgments of the courts.<sup>128</sup> The question of how society should respond to the alarming bankruptcy statistics "provoked the most bitter debate concerning the proper moral attitude toward bankruptcy".<sup>129</sup>

The tension between moral outrage and a pragmatic solution to the bankruptcy problem became evident:

The process of bankruptcy reform was slow and tortuous, often beset by conflicting interests, and by the contradictions between traditional morality and economic necessity. In theory nothing should have been simpler than to construct a set of just and rational bankruptcy laws .... The tortured history of bankruptcy legislation, however, demonstrates the problems of translating moral and legal theories into practice. Often conflicting interests were involved: justice for the creditor vs mercy for the debtor; moral outrage over bankruptcy vs recognition of economic realities; idealism vs pragmatism.<sup>130</sup>

Despite the calls for harsh legislation and in some cases repeal, the pragmatic realities of the industrial economy and the increasing number of financial failures created pressures for a more modern bankruptcy law. The overall trend in the nineteenth century English bankruptcy legislation "was towards ameliorating the plight of the victims of capitalism". The abolition of imprisonment for debt<sup>131</sup> and the increasing official control in bankruptcy proceedings illustrate this trend:

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<sup>127</sup> Weiss, *Bankruptcy and the Victorian Novel*, *supra* note 1 at 31-34.

<sup>128</sup> Dunlop, "Debtors and Creditors in Dickens' Fiction", *supra* note 123 at 40.

<sup>129</sup> Weiss, *Bankruptcy and the Victorian Novel*, *supra* note 1 at 23.

<sup>130</sup> *Ibid.* at 40. Dunlop also traces this contradictory response of Victorian society. See Dunlop, "Debtors and Creditors in Dickens' Fiction", *supra* note 123 at 26.

<sup>131</sup> See note 71 and accompanying text.

Bankruptcy by the 1880s was no longer treated as a criminal offence, nor was the bankrupt thrown upon the mercy of his creditors. Instead by yielding up his property for distribution, every man could earn the right to re-establish himself in the economic community. Thus in spite of the fact that public rhetoric continued to denounce bankruptcy as a moral outrage against morality, and in spite of the fact that the public demand for harsh treatment of bankrupts was apparently louder than the voices calling for reform, the condition of the bankrupt was materially improved by the end of the nineteenth century.<sup>132</sup>

Although at mid-century bankruptcy had been perceived in terms of fraud, dishonesty and morality, "bankruptcy became increasingly to be viewed as a systemic problem, implicit in a credit based economy, requiring a technical answer with legal sanctions".<sup>133</sup> Despite the public expressions of deep moral convictions about the "shame of bankruptcy" economic necessity forced the adoption of "a more humane and pragmatic attitude towards the failures of a capitalist economy".<sup>134</sup> The economic realities of an industrial economy undermined the public rhetoric. The reality of bankruptcy law "did not match the public perceptions about it, and these underlying contradictions were constantly surfacing to force Victorians to reappraise their traditional attitudes".<sup>135</sup>

Further, new forms of credit and business relationships served to challenge the ideal of personal responsibility. Personal credit arrangements gave way to more distant impersonal transactions:

Eventually, contracts made on a national scale became more important for large scale merchants. Given the much more fragile state of trust which existed in obligations contracted over long distances, it is probable that the more distant obligations of some larger middlemen might have become as

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<sup>132</sup> Weiss, *Bankruptcy and the Victorian Novel*, *supra* note 1 at 46-47.

<sup>133</sup> Batzel, "Parliament, Businessmen and Bankruptcy", *supra* note 2 at 181.

<sup>134</sup> Weiss, *Bankruptcy and the Victorian Novel*, *supra* note 1 at 47. Hicks and Ramsay also argue that as credit and the negotiability of bills increased "personal responsibility was gradually redefined in terms of the need to maintain a network of interdependent deals according to one's role in the system. The interest of society in this grew to be more economic than punitive." Hicks & Ramsay "Law, Order and the Bankruptcy Commissions", *supra* note 19 at 147.

<sup>135</sup> Weiss, *Bankruptcy and the Victorian Novel*, *supra* note 1 at 38.

important, or more important, for the maintenance of their credit and wealth, as obligations to others within their own communities, especially those towards poorer members. If this was so, then it is possible that a division in the nature of the social structure of obligations might have eventually helped the erosion of older customary charitable obligations ....

In addition, the decline of the older order can be traced to the rise of large joint stock companies that traded in national or large regional markets. Credit therefore became less dependent on individual morality and increasingly more "objective and rational factors began to predominate". The emergence of managerially structured companies in the late nineteenth century "further augmented the impersonalisation of credit".<sup>136</sup>

### C *The Role of Institutions*

If economic considerations contributed to the gradual evolution of the law to encompass a voluntary regime applicable to all types of debtors, it is also important to consider the impact of institutional factors on the pattern of legislation.<sup>137</sup> The relationship between business and government is a further significant theme. The establishment of a permanent regime in 1883 in many ways reflected the growth and influence of the English government.<sup>138</sup>

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<sup>136</sup> Muldrew, "Interpreting the Market", *supra* note 106 at 181-183. The emergence of limited liability companies may have contributed to this factor as well. Limited liability was established in England in 1856. Joint Stock Companies Act, 1856, 19 & 20 Vict., c. 47 (1856). See M. Lobban, "Corporate Identity and Liability in France and England 1825-67" (1996) 25 *Anglo-Am. L. Rev.* 397. However, the change to limited liability was not without controversy. See Hilton, *The Age of Atonement*, *supra* note 126 at 252-267.

<sup>137</sup> The professional expertise of the legislators and public bureaucracy affects the capacity of the political system to implement stable and lasting policies. On the capacity of the political system, see D.B. Robertson, "History, Behaviouralism, and the Return to Institutionalism in American Political Science" in E.H. Monkkenon, ed., *Engaging the Past: The Uses of History Across the Social Sciences* (Durham: Duke University Press, 1994) at 9. On the importance of state expertise, see R. Kent Weaver & B.A. Rockman, "Assessing the Effects of Institutions" in Weaver & Rockman, *Do Institutions Matter? Government Capabilities in the United States and Abroad* (Washington: Brookings Institute, 1993) at 32 [hereinafter Weaver & Rockman, "Assessing the Effects of Institutions"].

<sup>138</sup> Lester, *Victorian Insolvency*, *supra* note 3 at 7.

Business groups were most influential in 1869 and as a result of their lobbying Parliament enacted legislation that firmly placed creditors in control of the bankrupt's affairs:

In large measure this change resulted from pressure on Parliament exerted by a vocal section of the business community, as expressed through local chambers of commerce and through new organizations such as the National Association for the Promotion of Social Science and the Associated Chambers of Commerce of the United Kingdom. With the Bankruptcy Act of 1869, organized business achieved, on the whole, all the major reforms it had been urging.<sup>139</sup>

If business groups triumphed in 1869, what led to the demise of their regime in 1883? First, the failure of the 1869 creditor system lessened the credibility of those opposed to official control. Parliament passed legislation in 1869 at the height of the Victorian boom. By way of contrast, the 1883 legislation was enacted "towards the end of the period of unusually severe decline in trade and prices". In 1883, Parliament no longer had confidence in the business sector.

However, the success of the 1883 legislation can be explained by the efforts of the government department, the Board of Trade. The void in leadership on the bankruptcy reform issue was "filled by Joseph Chamberlain and the senior staff of the Board of Trade". Two senior civil servants "formulated much of the policy expressed in the statute". They "accepted the growing view of the expanded supervisory role that government was to play in society and drafted a statute embodying that new role". Bankruptcy was not "merely a problem for creditors, but affected society as a whole".<sup>140</sup> Chamberlain's comments in Parliament emphasized the public nature of the legislation:

In the case of accidents by sea and by land-railway accidents, for instance it was incumbent upon a Government Department to institute an inquiry. There were inquiries in the case of accidents in mines, and of boiler

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<sup>139</sup> *Ibid* at 5, 123. Victor Batzel, however, presents a different view of the relationship between business and government. Batzel concludes that businesses mistrusted Parliament and were in fact alienated from this autonomous institution. "The result of the legislative process, seemed never to meet the expectations of the business community or its perceived needs. Batzel, "Parliament, Businessmen and Bankruptcy", *supra* note 2 at 172.

<sup>140</sup> Lester, *ibid.* at 207-213, 221, 304.

explosions, and sad as those disasters were, they did not, in the majority of the cases, cause so much misery as a bad bankruptcy, which brought ruin to many families by carrying off the fruits of their labour and industry.<sup>141</sup>

Once the legislation was in place, the Board of Trade created a separate Bankruptcy Department which became one of the largest departments in the civil service during the last quarter of the nineteenth century. Any business group that wanted repeal after 1883 had to contend with the competing interest of the bankruptcy bureaucracy.

The ability of the state to enact reforms was also enhanced by the absence of jurisdictional issues. Federalism, as will be seen in the following chapters on the United States and Canada, had a significant impact on the progress of bankruptcy reforms in those two countries. As nineteenth century England was a unitary state, reform of debtor creditor law had to be addressed by Parliament.<sup>142</sup>

### Conclusion

English studies have highlighted the importance of economic change and the nature of credit relationships as important factors that explain patterns of reform. Early English bankruptcy law was harsh and was concerned with controlling the fraudulent conduct of debtors. Debtors who failed to repay their creditors breached the community standard of trust. In pre-industrial England credit was extended on the basis of trust and character rather than economic considerations. Bankrupts were regarded as moral failures.

In the nineteenth century, Victorians sought a more pragmatic solution to the problem of debt. While the public continued to express its disapproval of bankruptcies, the English Parliament greatly expanded the ambit of bankruptcy law by abolishing the trader rule, introducing voluntary proceedings and removing creditor control over the discharge. The growth of corporations and the depersonalization of credit in a rapidly expanding economy contributed to these reforms. Bankruptcy law, and more specifically

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<sup>141</sup> Hansard's Parliamentary Debates (England) 3rd Series, vol CCLXXVII, p. 817, (19 March 1883) in Tassé Report, *supra* note 87 at 11.

<sup>142</sup> On the importance of federalism as a policy constraint, see Weaver & Rockman, "Assessing the Effects of Institutions", *supra* note 137 at 32.

the discharge, became acceptable in the more modern economy. Further, it is evident from the English experience that institutional factors affected the timing of the legislation. The presence of an active government department, the Board of Trade, which was committed to bankruptcy reform, facilitated change in 1883 and ensured that the legislative settlement was a lasting one.

England was not the only country that may have affected the evolution of Canadian bankruptcy law. The United States debated the merits of bankruptcy law throughout the nineteenth century and repealed national laws on three separate occasions, the last being in 1878, just prior to the repeal of Canadian legislation in 1880. Its similar experience with legislation and repeal, a comparable federal structure and geographic proximity provide ample reason to examine the comparative history of American bankruptcy law.



## CHAPTER 3

### **The Evolution of American Bankruptcy Law: 1800 to 1898**

#### **Introduction**

The history of American and Canadian bankruptcy law is similar in one important respect. The American Congress and the Canadian Parliament briefly experimented with short-lived national acts before opting for repeal. During long periods of federal inactivity,<sup>1</sup> state and provincial governments attempted to fill the void leading to jurisdictional disputes that reached the United States Supreme Court and the Privy Council. The repeal of national legislation followed by the introduction of state or provincial laws distinguishes the history of bankruptcy law in Canada and the United States from the English experience. England never opted for outright repeal. New legislation replaced older statutes in a process of continual revision.

An examination of the history of American bankruptcy law in this thesis is useful for a number of reasons. First, it will illustrate possible American influences on the development of Canadian law. More importantly, however, if Canada and the United States shared an ambiguous commitment to a national bankruptcy law, theories that explain the erratic legislative pattern in the United States may well be relevant to a study of Canadian law. Explanations of legal change focus, for example, on the role of ideology and values. The conflict over bankruptcy law represented a larger ideological division within American society over the nature of debt obligations. Other studies explicitly link the evolution of a national bankruptcy law to economic growth. The emergence of a federal bankruptcy law in 1898 represented the “maturing of American capitalism”.<sup>2</sup>

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<sup>1</sup> Prior to 1898, the three national Acts of 1800, 1841 and 1867 were only in force for a combined period of 15 years. S. Seidman, “Development of Bankruptcy Legislation” (1936) 10 Conn. Bar J. 24 at 29 [hereinafter Seidman, “Development of Bankruptcy Legislation”]. Canada experienced a gap of nearly 40 years between repeal of federal legislation in 1880 and a new Act in 1919. See chapter 5.

<sup>2</sup> See eg., R.C. Sauer, “Bankruptcy Law and the Maturing of American Capitalism” (1994) 55 Ohio St. L.J. 291 [hereinafter Sauer, “Bankruptcy Law and the Maturing of American Capitalism”].

However, it is also important to acknowledge the importance of institutions in determining policy outcomes.<sup>3</sup> The institutional structure of the American constitution also affected the direction of bankruptcy law. Because England is a unitary state, the history of English bankruptcy law is the history of parliamentary revision. By way of contrast, federalism ensured that bankruptcy law would not only be debated on its merits in Congress but that it would be the subject of constitutional dispute. Federalism and constitutional litigation impeded federal reform efforts. This chapter, which is based on a review of the secondary sources, is divided into two Parts. Part I traces the legislative and constitutional history of American bankruptcy law and examines the Bankruptcy Acts of 1800, 1841, 1867 and 1898. Part II examines important historiographical themes and evaluates their relevance to the history of Canadian bankruptcy law.

## **I The Legislative History of American Bankruptcy Law**

### *A The Bankruptcy Act of 1800*

The United States Bankruptcy Act of 1800 was based largely on English legislation and focused on the rights of creditors. Almost one hundred years later Congress passed the Bankruptcy Act of 1898 which placed more of an emphasis on debtors. Comparing the Bankruptcy Act of 1800 with the Act of 1898 may lead one to conclude that reform followed the general progress of an industrialising society, and was

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<sup>3</sup> On the influence of institutions and their effect on policy development generally, see D. Ernst, "Law and American Political Development 1877-1938" (1998) 26 *Rev. Am. Hist.* 205 [hereinafter Ernst, "Law and American Political Development"]; D.B. Robertson, "History, Behaviouralism, and the Return to Institutionalism in American Political Science" in E.H. Monkkenon, ed., *Engaging the Past: The Uses of History Across the Social Sciences* (Durham: Duke University Press, 1994) at 113 [hereinafter Robertson, "History, Behaviouralism, and the Return to Institutionalism"]; K. Thelen & S. Steinmo, "Historical Institutionalism in Comparative Politics" in S. Steinmo, K. Thelen and F. Longstreth, eds., *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge: Cambridge University Press, 1992) 1 [hereinafter Thelen & Steinmo, "Historical Institutionalism"]. R. Weaver & B. Rockman, eds., *Do Institutions Matter? Government Capabilities in the United States and Abroad* (Washington: Brookings Institution, 1993) [hereinafter Weaver & Rockman, *Do Institutions Matter?*]. One recent study of American bankruptcy law explicitly adopts an institutional approach. See B. Hansen, *The Origins of Bankruptcy Law in the United States, 1789-1898* (Ph.D. diss., Washington University, 1995) [hereinafter Hansen, *The Origins of Bankruptcy Law*].

based on a process of "progressive liberalization" or natural evolution.<sup>4</sup> However, a review of the literature on the history of American bankruptcy law suggests that legislative reform was not a natural or progressive evolution. Bankruptcy law reform oscillated between periods of creditor and debtor interest throughout the nineteenth century.<sup>5</sup> Congress enacted three short-lived national bankruptcy statutes in 1800, 1841 and 1867 before passing a more permanent statute in 1898.<sup>6</sup>

Although the Act of 1800 was the first Congressional foray into the field, the history of bankruptcy law in the United States can be traced to the colonial period.<sup>7</sup>

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<sup>4</sup> M. Radin, "The Evolution of Modern Bankruptcy Law: A Comparison of the Recent Bankruptcy Acts of Italy and the United States" (1947) 31 Minn. L. Rev. 401, citing *Adair v. Bank of America Nat. Trust and Savings* 303 U.S. 350 (1937) at 355. See also Shelton who argues that: "As civilization has advanced, the statutes have been modified, repealed and re-enacted. The purpose has changed with the development of the law, with the growth of commercialism and with the progress of the world." H.H. Shelton, "Bankruptcy Law, Its History and Purpose" (1910) 44 Amer. L. Rev. 394 [hereinafter Shelton, "Bankruptcy Law, Its History and Purpose"].

<sup>5</sup> For a graphical analysis of the oscillation between debtor and creditor interest, see Charley Del Marmol, *Les Origines et les Principes de la Réglementation de la Faillite dans les Pays de Common Law: Étude de Législation et de Jurisprudence Faite dans le Cadre de la Loi Anglaise de 1914* (Ph.D. diss., Université de Liège, 1936) at 86. 1800: creditor interest; 1841: debtor interest; 1867: mixed; 1898: debtor interest.

<sup>6</sup> P. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy* (Madison: State Hist. Soc. of Wisc., 1974) at 18 [hereinafter Coleman, *Debtors and Creditors in America*]. Warren concludes that the history of American bankruptcy law can be grouped into three major periods. Initially, creditors demanded legislation geared to their interests. The era of the creditor from 1789 to 1827 was followed by the period of the debtor, lasting from 1827 to 1861. Finally, Warren concludes that legislation which followed can be regarded in the national interest. C. Warren, *Bankruptcy in United States History* (Cambridge: Harvard University Press, 1935) at 2 [hereinafter Warren, *Bankruptcy in United States History*].

<sup>7</sup> Weisberg describes the efforts of the various colonial legislatures as an endless oscillation of laws, trying out "carrots and sticks, discharge laws and cruel imprisonment laws, reenacting all the permutations of bankruptcy and insolvency laws in England". R. Weisberg, "Commercial Morality, the Merchant Character, and the History of the Voidable Preference" (1986) 39 Stan. L. Rev. 1 at 62 [hereinafter Weisberg, "Commercial Morality"]. "At the time of the Revolution, only three of the thirteen colonies--Rhode Island and the two Carolinas--had laws discharging insolvents of their debts. No two of these relief systems were alike in anything but spirit. In four of the ten colonies, insolvency legislation was either never enacted or, if enacted, never went into full effect, and in the remaining six colonies, full relief was available only for scattered, brief periods, usually on an ad hoc basis to named insolvents." Coleman, *Debtors and Creditors in America*, *supra* note 6 at 14. Only a few state constitutions expressly dealt with

Colonies did not widely embrace liberal bankruptcy regimes. Many of them enacted various forms of legislation that allowed creditors to pursue delinquent debtors. This included the remedy of imprisonment for debt.<sup>8</sup> A few colonies enacted legislation that offered a discharge of debts.<sup>9</sup> The early colonial bankruptcy statutes were in many cases short lived, and did not represent a general colonial acceptance of the forgiveness of debt. According to one author, "bankruptcy law ... proved even more controversial and unacceptable in the colonies than in England".<sup>10</sup>

The potential for the development of a national bankruptcy act came with the adoption of the new Constitution in 1789. The Constitution granted power to Congress to "establish ... uniform Laws on the subject of Bankruptcies throughout the United

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bankruptcies and insolvency: North Carolina, Pennsylvania and Georgia. See F.R. Noel, *A History of the Bankruptcy Clause of the Constitution of the United States of America* (Washington: Chas. H. Potter, 1919) at 69 [hereinafter Noel, *A History of the Bankruptcy Clause*].

<sup>8</sup> B. Mathews, "*Forgive Us Our Debts*": *Bankruptcy and Insolvency in America: 1763-1841* (Ph.D. diss., Brown University, 1994) at 38 [hereinafter Mathews, *Forgive Us Our Debts*]. Colonial debtor creditor law is discussed in Coleman, *ibid.* Colonial enforcement statutes all faced the problem of "dissipative effects of individual enforcement" which raised the question of whether a more centralized system should be adopted. See S.A. Riesenfeld, "Enforcement of Money Judgments in Early American History" (1973) 71 Mich. L. Rev. 691 at 727. For a description of debtors' prison, see B. Mann, "Tales from the Crypt: Prison, Legal Authority and the Debtors' Constitution in the Early Republic" (1994) Wm. & Mary Q. 183.

<sup>9</sup> J. McCoid, "The Origins of Voluntary Bankruptcy" (1988) 5 Bankr. Dev. J. 361 at 367-371 [hereinafter McCoid, "The Origins of Voluntary Bankruptcy"]; T. Plank, "The Constitutional Limits of Bankruptcy" (1996) 63 Tenn. L. Rev. 487 at 519 summarizing the various colonial efforts [hereinafter Plank, "The Constitutional Limits of Bankruptcy"]. See also M. Bradshaw, "The Role of Politics and Economics in Early American Bankruptcy Law" (1997) 18 Whittier L. Rev. 739 at 740 [hereinafter Bradshaw, "The Role of Politics and Economics"] and Coleman, *ibid.* at 8-15 and Mathews, *ibid.* at 28-41, 43.

<sup>10</sup> Mathews, *ibid.* at 42. During the revolutionary period North Carolina, Pennsylvania and Maryland all briefly experimented with bankruptcy legislation. See Mathews, *ibid.* at 55, 65-66; S.L. Shaiman, "The History of Imprisonment for Debt and Insolvency Laws in Pennsylvania as They Evolved from the Common Law" (1960) 4 Am. J. Legal Hist. 205 at 216 [hereinafter Shaiman, "The History of Imprisonment"]. However, states also provided relief through court closings, and stay laws.

States".<sup>11</sup> Further, the Constitution prohibited states from passing any "Law impairing the Obligations of Contract".<sup>12</sup> The debates of the founders included very little discussion of the bankruptcy clause.<sup>13</sup> James Madison in the *Federalist* stated:

The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states that the expediency of it seems not likely to be drawn into question.<sup>14</sup>

When Congress passed legislation in 1800,<sup>15</sup> it did not venture beyond the safe confines of the creditor-based model offered by English bankruptcy legislation.<sup>16</sup> In

<sup>11</sup> U.S. Const. art. I, s. 8, cl. 4. For a discussion of the founders' intent, see Plank, "The Constitutional Limits of Bankruptcy", *supra* note 9 at 527-532.

<sup>12</sup> U.S. Const. art. I, s.10, cl. 1.

<sup>13</sup> For a detailed description of this issue, see K.H. Nadelman, "On the Origin of the Bankruptcy Clause" (1957) 1 Am. J. Legal Hist. 215. See also, Bradshaw, "The Role of Politics and Economics", *supra* note 9; C.N. Fritsch, "The First National Bankruptcy Act: A Study of Legal Development and Application" (paper presented to 11th Annual Meeting of the Society for Historians of the Early American Republic, Charlottesville, Va, July 20-22, 1989) [hereinafter Fritsch, "The First National Bankruptcy Act"]; R. Frimet, "The Birth of Bankruptcy in the United States" (1991) 96 Com. L.J. 160 at 164-165 [hereinafter Frimet, "The Birth of Bankruptcy in the United States"]; A. Duncan, "From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law" (1995) 100 Com. L.J. 191 at 217 [hereinafter Duncan, "From Dismemberment to Discharge"].

<sup>14</sup> James Madison, *The Federalist* No. 42, cited in Warren, *Bankruptcy in United States History*, *supra* note 6 at 7. See also Bradshaw, *ibid.* at 746 discussing the relationship between commerce and bankruptcy.

<sup>15</sup> For a discussion of the debates leading up to the adoption of the Act, see Bradshaw, "The Role of Politics and Economics", *supra* note 9 at 746-752.

<sup>16</sup> Duncan suggests that from 1789 to 1800, "the advocates of national bankruptcy legislation struggled each year to enact an 'English style' law". Duncan, "From Dismemberment to Discharge", *supra* note 13 at 218. Glenn argues that bankruptcy law is a common possession of England and the United States and in particular refers to an American book published in 1801 that compares the Act of 1800 to English legislation: Cooper, *Bankrupt Law of America Compared with Bankrupt Law of England* (Philadelphia, 1801). According to Glenn, Cooper's book states that the Bankruptcy Act of 1800 was "formed in great measure upon that of England". G. Glenn, "Essentials of Bankruptcy: Prevention of Fraud and Control of Debtor" (1937) 23 Va. L. Rev. 373 at 376. Mathews concludes that the Act "essentially copied contemporary English bankruptcy law. Its radicalism lay in the fact than an American Congress had passed it at all". Mathews, *Forgive Us Our Debts*, *supra* note 8 at 118. The copying extended to the practice of

particular it followed the basic structure of English bankruptcy law, in that it only applied to merchants<sup>17</sup> and only involuntary proceedings were allowed on proof of an act of bankruptcy.<sup>18</sup> The discharge procedures “practically mirrored contemporary English bankruptcy law”.<sup>19</sup> A discharge was available to those debtors who obtained the consent of two thirds of their creditors in number and value.<sup>20</sup> Further, the debtor had to swear that the consent of the creditors had been obtained fairly and without fraud.<sup>21</sup> The legislation contained a provision limiting its life to five years.<sup>22</sup>

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adopting the English gender neutral drafting style. See K. Gross, M. Stefanini Newman & D. Campbell, “Ladies in Red: Learning From America’s First Female Bankrupt’s” (1996) 40 Am. J. Legal Hist. 1 at 3 [hereinafter Gross, Stefanini & Cambell, “Ladies in Red”].

<sup>17</sup> In the United States the restriction became known as the merchant rule rather than the trader rule which was used in England. C.J. Tabb, “The Historical Evolution of the Bankruptcy Discharge” (1991) 65 Am. Bankr. L.J. 325 at 346 [hereinafter Tabb, “The Historical Evolution of the Bankruptcy Discharge”]. See also Fritsch, “The First National Bankruptcy Act”, *supra* note 13 at 9-10.

<sup>18</sup> The acts of bankruptcy were similar to those found in the English statute. V. Countryman, “A History of American Bankruptcy Law” (1976) 81 Com. L.J. 226 at 228 [hereinafter Countryman, “A History of American Bankruptcy Law”]. See also, R.G. Hunt, “National Bankruptcy Legislation: Past Present and Future” (1933) 38 Com. L.J. 630 at 631 [hereinafter Hunt, “National Bankruptcy Legislation”].

<sup>19</sup> Mathews, *Forgive Us Our Debts*, *supra* note 8 at 116.

<sup>20</sup> Tabb, “The Historical Evolution of the Bankruptcy Discharge”, *supra* note 17 at 348. The general thrust of the legislation was to assist creditors and the “discharge was only an incident to be granted only in the rarest of cases”. *Strengthening of Procedure in the Judicial System*, Report of the Attorney-General on Bankruptcy Law and Practice, 72d Congress, 1st Sess., Senate, Document No. 65 (February 24, 1932) at 51.

<sup>21</sup> The Act also contained criminal provisions for fraudulent bankruptcies. Tabb, *ibid.* at 346-347; Mathews, *Forgive Us Our Debts*, *supra* note 8 at 116. While the Act did not mention preferences, the courts did infer an “aggressive preference doctrine, firmly condemning eve of bankruptcy transfers that constituted bona fide payments of bona fide debts”. Weisberg, “Commercial Morality”, *supra* note 7 at 76. For a discussion of early case law on this issue, see G. Glenn, “The Diversities of the Preferential Transfer: A Study in Bankruptcy History” (1930) 15 Cornell L. Rev. 521 at 534 [hereinafter Glenn, “The Diversities of the Preferential Transfer”].

<sup>22</sup> Coleman, *Debtors and Creditors in America*, *supra* note 6 at 19; Frimet, “The Birth of Bankruptcy in the United States”, *supra* note 13 at 166.

The five-year limit proved to be meaningless as Congress repealed the Act in 1803.<sup>23</sup> Several reasons are offered for its demise. First, there were difficulties of travelling to the new distant federal courts. Second, the bankrupts' estates paid out only small dividends to creditors. Further, creditors complained that fraudulent speculators utilized the Act to obtain a discharge.<sup>24</sup> However, one historian suggests that claims of high administrative costs were not the main source of opposition.<sup>25</sup> Rural opposition to bankruptcy law was a significant factor. Bankruptcy law divided American society. Those in favour of commercial and industrial development and the expansion of credit tended to favour national legislation. In contrast, the rural and agricultural sector opposed a national law. The agricultural sector argued that the Act only advantaged city merchants as it did not apply to farmers. The rural sector pointed to the injustice of a merchant "availing himself of the benefits of bankruptcy law" resulting in the cancelling of the debts owed to a farmer. That same farmer, unable to take advantage of the Act as a debtor, continued to be subject to the collection efforts of his creditors.<sup>26</sup> The division over bankruptcy law between the rural and commercial sector is a significant theme and will be examined more closely in Part II of this chapter.

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<sup>23</sup> Mathews, *Forgive Us Our Debts*, *supra* note 8 at 118. In November 1803, the House voted 93-13 in favour of repeal and the Senate voted 17-12 in favour of repeal.

<sup>24</sup> Frimet, "The Birth of Bankruptcy in the United States", *supra* note 13 at 170-171 argues that repeal occurred because of the perception that it was being used by wealthy debtors and speculators. Coleman also points to the low dividends and abuse by speculators Coleman, *Debtors and Creditors in America*, *supra* note 6 at 19.

<sup>25</sup> Friedman argues that the administrative and distance arguments were not the true cause of its downfall. The arguments were "merely used as fuel for the fires of repeal. The main opposition came from those congressmen who spoke for agriculture and the debtor class". L. Friedman, *The History of American Law*, 2nd ed. (New York: Simon and Schuster, 1985) at 270 [hereinafter Friedman, *The History of American Law*].

<sup>26</sup> Warren, *Bankruptcy in United States History*, *supra* note 6 at 21; However, see Gross, Stefanini & Cambell who challenge Warren's findings on the number of the debtors who were affected by the Act, the character of the debtor and the size of distributions to creditors. Gross, Stefanini & Cambell, "Ladies in Red", *supra* note 16 at 25-27.

*B Constitutional Litigation and the Bankruptcy Act of 1841*

The United States did not enact another bankruptcy law until 1841. The period between 1803 and 1841 was marked by a series of failed attempts to re-enact national legislation<sup>27</sup> and constitutional challenges to state legislation. Despite the repeal of the federal bankruptcy legislation in 1803, states did not rush to fill the void. In fact only New York and Pennsylvania passed legislation which provided for the discharge of debts.<sup>28</sup> Many considered state bankruptcy laws to be unconstitutional, and early lower level decisions did not clearly resolve the jurisdictional issue.<sup>29</sup>

In 1819, many hoped that the Supreme Court would finally resolve the matter in *Sturges v. Crowninshield*.<sup>30</sup> There was no federal law in force at the time and the court had to consider first whether the Constitution's grant of the bankruptcy power to Congress precluded state action. Secondly, if the states could legislate, the court also had

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<sup>27</sup> For a discussion of the unsuccessful federal bankruptcy Bills during the period 1803 to 1841, see Mathews, *Forgive Us Our Debts*, *supra* note 8 at 141-150; 171-180; 211-224. At p. 142, Mathews argues that in the period 1803-1818 that failure was caused by "the legacy of the first bankruptcy act and the traditional misgivings about laws discharging debts". For a review of the debates, see D. Beesley, *The Politics of Bankruptcy in the United States: 1837-1845* (Ph.D. diss., University of Utah, 1968) at 17-40 [hereinafter Beesley, *The Politics of Bankruptcy*].

<sup>28</sup> After the repeal of the federal law in 1803, most states did not enact legislation which provided for the discharge of debts. New York, however, updated an earlier 1788 law in 1811 which discharged debts and did not contain a merchant or trader limitation. Pennsylvania passed legislation in 1812. See Mathews, *ibid.* at 156.

<sup>29</sup> In *Golden v. Prince* 10 F.C. 542-547, number 5509 (1814) a United States Circuit Court struck down the Pennsylvania legislation as an impairment of the contract clause and a violation of the federal bankruptcy clause. By way of contrast, the New York legislation was upheld by a federal court in *Adams v. Storey* 10 F.C. 141-152, number 66 (1817) holding that it was not a bankruptcy law as it was not restricted to merchants and was voluntary. See Mathews, *ibid.* at 159; Coleman, *Debtors and Creditors in America*, *supra* note 6 at 32. Frimet argues that the effect of these rulings created uncertainty among merchants who "were unsure if their own state statutes would afford protection until Congress moved forward". Frimet, "The Birth of Bankruptcy in the United States", *supra* note 13 at 171.

<sup>30</sup> 4 Wheaton 122 (1819). The case was decided in the same year as *McCullough v. Maryland* 4 Wheaton 316 (1819) and *Dartmouth College v. Woodward* 4 Wheaton 518 (1819) two landmark decisions of the Marshall court. Today *Sturges* has largely been forgotten. However, Mathews' review of periodical literature indicates that in 1819 interest in *Sturges* "overshadowed concern with the other two. Newspapers across the nation reported the impatient anticipation with which Americans awaited a ruling on state laws discharging debts." Mathews, *ibid.* at 162-163.



to consider whether or not there was a violation of the contract clause.<sup>31</sup> The debtor in the case had utilized a New York State law to obtain a discharge and release from prison. The debt at issue had been incurred prior to the passage of the law. Marshall C.J. concluded that until Congress acted, state bankruptcy legislation was permissible. However, the Court held that the retroactive effect of the state law violated the prohibition on the impairment of contracts.<sup>32</sup> The reasoning caused confusion.<sup>33</sup> Many read the decision as preventing states from enacting any laws discharging past or present contracts. Some states reacted by withdrawing their relief legislation, while others continued to utilize state discharge laws.<sup>34</sup> Following *Sturges* Congress renewed its

<sup>31</sup> Smith, *John Marshall*, *supra* note 22 at 439.

<sup>32</sup> The case raised three separate issues. First, did the state have the right to enact any bankruptcy law in light of the bankruptcy clause granting the power to Congress to enact uniform bankruptcy laws? Secondly, whether the New York law was a bankruptcy law and thirdly whether the New York state law impaired the obligation of contracts. The Court held that state bankruptcy legislation was allowed if the federal congress had withdrawn as long as the Act did not violate other constitutional provisions. The Court held that the New York law did impair contracts. See, A.H. Kelly, W.A. Harbison & H. Belz, eds., *The American Constitution: Its Origins and Development* 7th ed., vol. 1 (New York: Norton, 1991) at 192 [hereinafter Kelly, Harbison & Belz, *The American Constitution*]. Smith, *ibid.*

<sup>33</sup> "Marshall's decision in *Sturges v Crowninshield* did not address the question of bankruptcy law's legal meaning and the case exposed the degree of disagreement on the bankruptcy question even among America's finest legal minds ..." Mathews, *Forgive Us Our Debts*, *supra* note 8 at 170-171. "It now appeared that there was no avenue for the insolvent debtor to either be discharged from his debts (since there was no bankruptcy law) or be released from jail with discharge of debt (since there were state insolvency laws being declared unconstitutional.)" Frimet, "The Birth of Bankruptcy in the United States", *supra* note 13 at 172.

<sup>34</sup> See, Kelly, Harbison & Belz, *The American Constitution*, *supra* note 32 at 192 who note that many states sought to use a "loop-hole" in the decision by passing legislation which only applied to debts incurred after the enactment of the law. Confusion was also caused by the subsequent decision of *McMillan v. McNeil* 4 Wheaton 209 (1819) decided on the next day. The court struck down a Louisiana relief law. The debt had been contracted after the law came into effect but had been entered into in another state. Coleman notes that between 1789 and 1838 no eastern state entered the bankruptcy field and Rhode Island, Vermont and Connecticut withdrew its relief system after the *Sturges* decision. New York did not take the view that the decision prevented all state discharge laws. Maryland and South Carolina also continued to enforce their state laws which granted debtors discharges. Coleman, *Debtors and Creditors in America*, *supra* note 6 at 32-33, 94, 102, 122-127, 153, 274. See also Mathews, *ibid.* at 170 for a description of the New York reaction.

attempts to pass national legislation. However, Congress could not reach a consensus as to the form of the law.

A subsequent decision by the Supreme Court in 1827 relieved the immediate need for a federal act. The Supreme Court resolved the confusion with the landmark 1827 decision of *Ogden v Saunders*.<sup>35</sup> The case involved an in-state debt contracted after the passage of a New York relief law. The Supreme Court held that state laws were valid as long as they did not interfere with pre-existing debts. The court also ruled that state laws were valid if they did not interfere with out of state debts or federal legislation. Legislation which invalidated a contract owed to a citizen of another state was unconstitutional.<sup>36</sup> The Court delivered its decision on February 18, 1827, twelve days after the defeat of the Bankruptcy Bill of 1827.<sup>37</sup> The decision removed the immediate need for a national act and over the long encouraged diverse state legislation.<sup>38</sup>

It was not until 1841 that Congress passed another federal bankruptcy law. The Bankruptcy Act of 1841<sup>39</sup> shifted the focus to the protection of the debtor and signalled

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<sup>35</sup> 12 Wheaton 213 (1827).

<sup>36</sup> For discussion of the case, see Kelly, Harbison & Belz, *The American Constitution*, *supra* note 32 at 193; Marshall dissented in the case. Smith, *John Marshall*, *supra* note 22 at 498-499.

<sup>37</sup> See Warren, *Bankruptcy in United States History*, *supra* note 6 at 51 and Coleman, *Debtors and Creditors in America*, *supra* note 6 at 35. For a discussion of *Ogden v. Saunders*, see Mathews, *Forgive Us Our Debts*, *supra* note 8 at 177-180. See also M. Horwitz, *The Transformation of American Law 1879-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992) at 150-151 [hereafter Horwitz, *The Transformation of American Law*].

<sup>38</sup> This point is considered in more detail in Part II.

<sup>39</sup> 5 Stat 440 (1841). Sources that focus on the 1841 Act are: E.J. Balleisen, *Navigating Failure: Bankruptcy in Antebellum America* (Ph.D. diss., Yale University, 1995). On the details of the 1841 Act, see at pp 199-205 [hereinafter Balleisen, *Navigating Failure*]; E.J. Balleisen, "Vulture Capitalism in Antebellum America: The 1841 Federal Bankruptcy Act and the Exploitation of Financial Distress" (1996) 70 *Bus. Hist.* 473 [hereinafter Balleisen, "Vulture Capitalism"]; M. Weisman, "Story and Webster and the Bankruptcy Act of 1841" (1941) 36 *Com. L.J.* 4; Beesley, *The Politics of Bankruptcy*, *supra* note 27.

an early divergence from the English bankruptcy model.<sup>40</sup> Voluntary bankruptcy was permitted “for the first time in Anglo American jurisprudence”.<sup>41</sup> In another departure from the English model, the Act of 1841 allowed all types of debtors to utilize voluntary proceedings. However, involuntary bankruptcies continued to apply to only merchants.<sup>42</sup>

The Act of 1841 is also significant as it marked the first bankruptcy statute in English or American history to specifically forbid preferential payments to creditors.<sup>43</sup> While the English common law had earlier developed the doctrine of preferences, England did not enact legislation that allowed for the recovery of these payments until 1868.<sup>44</sup> The introduction of a statutory preference rule highlights an important theme that runs throughout the history of American bankruptcy law. Debtors often repaid local or familial creditors to the detriment of distant creditors. A uniform national act containing a statutory prohibition on preferential transfers appealed to creditors trading over greater distances. The inclusion of a preference rule in 1841 indicates that the problem of

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<sup>40</sup> There is a general consensus that the law was much more pro-debtor. See Balleisen, *Navigating Failure*, *ibid.* at 195; Warren, *Bankruptcy in United States History*, *supra* note 6 at ii, iii; R.E. Flint, “Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor” (1991) 48 Wash. & Lee L. Rev. 515 at 524-5 [hereinafter Flint, “Bankruptcy Policy”]. For a detailed discussion of the debates over the Bill, see Mathews, *Forgive Us Our Debts*, *supra* note 8 at 211-220.

<sup>41</sup> Tabb, “The Historical Evolution of the Bankruptcy Discharge”, *supra* note 17 at 349. For a detailed legislative history of this provision, see McCoid, “The Origins of Voluntary Bankruptcy”, *supra* note 9. Perlman argues that the law of 1841 marked a “watershed” as it introduced voluntary proceedings. B. Perlman, “A View From the Bench” (1992) 61 U. Cinn. L. Rev. 511 at 515. Countryman notes that England did not extend voluntary proceedings to merchants until 1844 and to non-merchants in 1861. See V. Countryman, “Bankruptcy and the Individual Debtor and a Modest Return to the Seventeenth Century” (1983) 32 Cath. U. L. Rev. 809 at 814 [hereinafter Countryman, “Bankruptcy and the Individual Debtor”].

<sup>42</sup> England retained its trader rule for involuntary and voluntary bankruptcies until 1861. Tabb, *ibid.* at 350; Frimet, “The Birth of Bankruptcy in the United States”, *supra* note 13 at 179. Countryman, “A History of American Bankruptcy Law”, *supra* note 18 at 228, 229. Lawrence King, in his poem, “An Ode to the Bankruptcy Law” states, “This new Act had no creditor control, But had a discharge and could be voluntary, though.” L. King, “An Ode to the Bankruptcy Law” [1976] Com. L.J. 234.

<sup>43</sup> For an overview of the 1841 preference provisions, see C.J. Tabb, “Rethinking Preferences” (1992) 43 S.C. L. Rev. 981 at 1002-1004. See also, Weisberg, “Commercial Morality”, *supra* note 7 at 78.

<sup>44</sup> England formally adopted the preference rule in 1868, see 32 & 33 Vict. c 71, s. 92. See Weisberg, *ibid.* at 44-55. The evolution of the English preference law is discussed in chapter 2.

disadvantaged distant creditors was already prevalent. The problem would continue to grow and was one of the forces leading to a permanent act in 1898.<sup>45</sup> The Act of 1841 made it illegal for a debtor to give a preference or priority to a creditor, "in contemplation of bankruptcy".<sup>46</sup>

The last important provision concerned the discharge. The Act of 1841 "softened" the creditor consent requirement. Creditors had to take the initiative to file a written objection to the discharge. Previously, the debtor had the burden of obtaining the affirmative agreement of the creditors. The Act reduced the level of creditor consent, from the two-thirds requirement under the 1800 statute, to a majority in number and value. However, the Act expanded the grounds upon which the court could deny a discharge.<sup>47</sup>

The Act of 1841 signalled an early departure from the English model and reflected the changing nature of the economy and attitudes towards debt. One author has suggested that by passing a voluntary and universal bankruptcy law, "American lawmakers turned their back upon economic and social assumptions that had regulated English and American bankruptcy laws since the sixteenth century".<sup>48</sup> However, the

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<sup>45</sup> Tabb, "The Historical Evolution of the Bankruptcy Discharge", *supra* note 17 at 351. The practice of preferential payments "was perceived as unfair, particularly as to more distant creditors who had less ability to invoke individual state collection procedures in an expeditious manner". For a further discussion of this theme, see Part II.

<sup>46</sup> See Weisberg, "Commercial Morality", *supra* note 7 at 78. See discussion of the American jurisprudence of the preference found in Glenn, "The Diversities of the Preferential Transfer", *supra* note 21 at 536.

<sup>47</sup> See Tabb, "The Historical Evolution of the Bankruptcy Discharge", *supra* note 17 at 352. Countryman notes that Congress was aware of a British Parliamentary Commission report that had recommended removing the creditor consent to the discharge provisions at the time it enacted the Act of 1841. Countryman suggests that the result in the legislation was a compromise. See Countryman, "Bankruptcy and the Individual Debtor", *supra* note 41 at 814.

<sup>48</sup> The author concludes that "In doing so, they looked ahead to a world in which the traditional emphasis on the moral and economic responsibilities of the individual would be increasingly subsumed by larger considerations of the needs of a global and expanding economy." Mathews, *Forgive Us Our Debts*, *supra* note 8 at 224.

United States was not quite fully prepared to rush headlong into a new order and repealed the Act in 1843.<sup>49</sup>

Authors point to a number of different reasons for its repeal. High administrative expenses reduced the amount of creditors' claims, resulting in a pay-out of small dividends.<sup>50</sup> Creditors reacted to the large numbers of debtors lining up for a discharge. Even debtors were disappointed that the Act did not preserve the various state exemption laws.<sup>51</sup> Politically, bankruptcy law was no longer attracting votes for the Whig party.<sup>52</sup>

#### C *The Bankruptcy Act of 1867*

The repeal of the Bankruptcy Act of 1841 again left the United States without national legislation. An improving economy and the rising number of state relief laws ameliorated the need for a national act.<sup>53</sup> States enacted stay laws preventing foreclosure and broadened their exemption laws. A few states passed legislation that discharged

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<sup>49</sup> 5 Stat 614 (1843).

<sup>50</sup> Tabb, "The Historical Evolution of the Bankruptcy Discharge", *supra* note 17 at 353; Warren, *Bankruptcy in United States History*, *supra* note 6 at 81. However, see Gross, Stefanini & Cambell who challenge the validity of this statistic and challenge the claim by Warren that very small dividends were paid out to creditors. Gross, Stefanini & Cambell, "Ladies in Red", *supra* note 16 at 28-29.

<sup>51</sup> Warren, *ibid.* at 82-83. Balleisen argues that meagre payments to creditors, the ease with which debtors obtained discharges, limited federal exemptions and the lack of material political gains for the Whig party were all significant factors in explaining repeal. Balleisen, *Navigating Failure*, *supra* note 39 at 232.

<sup>52</sup> See Warren, *ibid.* at 83. The Whigs, who represented the commercial sectors of the country, passed the legislation. Democrats, the inheritors of the Republican tradition, attacked the legislation and its repeal was "perceived as a general repudiation of Whig policies". Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 2 at 297. Beesley's study claims that its repeal was brought about by a shift in political power away from the Whigs in favour of the Democrats which was caused by a reaction to the way in which the Act wiped out debts and from a re-assertion of states' rights sentiments in the south. Beesley, *The Politics of Bankruptcy*, *supra* note 27 at 145.

<sup>53</sup> E.g. by 1853, 11 states had in place statutes which prohibited the making of preferential payments. Balleisen, *Navigating Failure*, *supra* note 39 at 167. Frimet, "The Birth of Bankruptcy in the United States", *supra* note 13 at 180; Warren, *ibid.* at 87.

debts.<sup>54</sup> However, the Supreme Court decisions precluded the states from discharging prior debts and debts of out of state creditors.<sup>55</sup> Thus, state legislation would always remain an unsatisfactory solution. With the economic panic of 1857, and the rising number of financial failures during the Civil War, the cry again rose for a new national bankruptcy law.<sup>56</sup> Debate continued throughout the war, with Congress finally settling on the Bankruptcy Act of 1867.<sup>57</sup>

The Act of 1867 was a compromise between debtor and creditor interests as there were major points of disagreement on a number of key issues.<sup>58</sup> Congress debated the extent of state exemption laws; the level of creditor consent for a discharge; the minimum level of dividends; and whether farmers should be subjected to involuntary proceedings.

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<sup>54</sup> Warren notes that not all of these laws survived constitutional challenges. However adverse court rulings often did not come for a period after the law had been in effect. The delays allowed many debtors to take advantage of the relief provisions. Warren, *ibid.* at 90-91, 148-153.

<sup>55</sup> See discussion *infra*. *Sturges v. Crowninshield* 4 Wheat. 122 (1819); *Ogden v. Saunders* 12 Wheat. 213. *Sturges* held that state laws which allowed for the discharge of prior debts was unconstitutional as it impaired the obligation of contracts. *Ogden* held that a state law could not discharge a debt due to a resident of another state. See Tabb, "The Historical Evolution of the Bankruptcy Discharge", *supra* note 17 at 348-349.

<sup>56</sup> See Frimet, "The Birth of Bankruptcy in the United States", *supra* note 13 at 181. Noel, *A History of the Bankruptcy Clause*, *supra* note 7 at 145-147 indicates that the 37th Congress received 40,000 petitions in favour of a national act. He notes that throughout the war, there was a permanent committee of the House of Representatives on the issue of establishing a national bankruptcy act.

<sup>57</sup> Noel, *A History of the Bankruptcy Clause*, *supra* note 7 at 153. An overview of the provisions of the Act of 1867 can be found in W. Dunscomb, "Bankruptcy: A Study in Comparative Legislation" in *Studies in History Economics and Public Law* Vol 11 Number 2 (Columbia: New York, 1893) at 142-145. The Act of 1867 was based on the Insolvency Law of Massachusetts. O. Vrooman, "Origin and History of the Bankruptcy Law" (1932) 37 Com. L.J. 127 at 128 [hereinafter Vrooman, "Origin and History of the Bankruptcy Law"]. The political debates are analysed in detail in D. Bauman, "*As this is the Year of the Jubilee*": *The Bankrupt Act of 1867* (M.A., Cal-State Fullerton, 1995) [hereinafter Bauman, "*As this is the Year of the Jubilee*"].

<sup>58</sup> See Warren, *Bankruptcy in United States History*, *supra* note 6 at 106; B. Watkins, "To Surrender All His Estate: The 1867 Bankruptcy Act" (1989) 21 Prologue Q. of the National Archives 207; W. Dunscomb, "Bankruptcy: A Study in Comparative Legislation" in *Studies in History Economics and Public Law* Vol 11 Number 2 (New York: Columbia, 1893) at 142; K. Hall, *The Magic Mirror: Law American History* (New York: Oxford University Press, 1989) at 207 [hereinafter Hall, *The Magic Mirror*].

All proved to be controversial. Between 1867 and 1874 Congress passed a number of amendments and, ultimately, it repealed the law in 1878.<sup>59</sup>

The Act of 1867 applied both to merchants and non-merchants and allowed for both voluntary and involuntary proceedings.<sup>60</sup> Vestiges of English law remained in some respects. The legislation retained acts of bankruptcy for involuntary petitions.<sup>61</sup> Further, the Act of 1867 is significant as for the first time in the United States corporations were subject to a bankruptcy law.<sup>62</sup> A number of elements were clearly favourable to debtors.<sup>63</sup> First, the Act allowed generous exemptions, creating a federal list of exempted property as well as allowing state law exemptions. However, debtors could only rely on state exemption laws that were in effect as of 1864, thus penalising secessionist states. Eventually, Congress relented, and in 1872 it passed legislation to incorporate state exemption laws in effect as of 1871.<sup>64</sup>

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<sup>59</sup> Tabb, "The Historical Evolution of the Bankruptcy Discharge", *supra* note 17 at 355.

<sup>60</sup> Noel, *A History of the Bankruptcy Clause*, *supra* note 7 at 153 and Countryman, "A History of American Bankruptcy Law", *supra* note 18 at 228-229. The older issues of the constitutionality of voluntary bankruptcy as well as whether to extend it to non-merchants "aroused practically no debate". Warren, *Bankruptcy in United States History*, *supra* note 6 at 109. Warren's theory is that the "country had expanded and the Constitution had kept pace".

<sup>61</sup> Noel, *ibid.* W. Dunscomb, "Bankruptcy: A Study in Comparative Legislation" in *Studies in History Economics and Public Law Vol 11 Number 2* (New York: Columbia, 1893) at 143.

<sup>62</sup> The issue of including corporations had been debated in 1841 and rejected. Warren, *Bankruptcy in United States History*, *supra* note 6 at 99-101; 107. See also Countryman, "A History of American Bankruptcy Law", *supra* note 18 at 228-229. For the debate over the inclusion of corporations in 1841, see Warren, *Bankruptcy in United States History*, *supra* note 6 at 64-68; Mathews, *Forgive Us Our Debts*, *supra* note 8 at 216-217; Frimet, "The Birth of Bankruptcy in the United States", *supra* note 13 at 178.

<sup>63</sup> Warren, *ibid.* at 105.

<sup>64</sup> See P. Goodman, "The Emergence of the Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880" (1993) 80 *J. Am. Hist.* 470 at 492 [hereinafter Goodman, "The Emergence of the Homestead Exemption"]. It should be noted that a number of state courts held that their state exemption laws were unconstitutional as they affected prior debts. Congress therefore in 1873 enacted a law declaring the true intent of the amendment of 1872 and stating that state exemption laws affecting prior debts were valid. For a discussion of the constitutionality of this provision, see Warren, *ibid.* at 112 who indicates that some courts held this provision to be

The creditor consent issue, long a stringent condition to obtain a discharge, continued to be controversial. In order to obtain a discharge, a debtor had to pay a 50% dividend to creditors or obtain a majority of the creditors' consent in number and value. However, the initial Act delayed creditor consent requirements for one year.<sup>65</sup> Subsequent amendments further postponed the creditor consent provisions until 1869.<sup>66</sup> The delays allowed thousands of debtors to obtain a discharge without creditor consent. Further, Congress radically altered the creditor consent provisions in 1874. It eliminated entirely the provision for involuntary proceedings and reduced the ratio in voluntary cases.<sup>67</sup> The 1874 amendments were "the last flickering vestige of consent requirements in Anglo-American bankruptcy jurisprudence". Other provisions provided a check on the availability of the discharge. The court could deny a discharge based on a number of grounds. The list included almost every ground for denying a discharge that had existed in "any of the previous English and American bankruptcy laws" and added new ones.

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unconstitutional. A. Kull, "The Enforceability After Emancipation of Debts Contracted For the Purchase of Slaves" (1994) 70 Chi.-Kent L. Rev. 493 at 496.

<sup>65</sup> Tabb, "The Historical Evolution of the Bankruptcy Discharge", *supra* note 17 at 357.

<sup>66</sup> Tabb, *ibid.* at 357. 15 Stat 227-228.c. 258, s. 1. Archival research by Watkins (in the files contained in the National Archives--Southeast Region for Elizabeth City and Wilmington, North Carolina) suggests that the 50% of the cases for those two cities were filed in 1867 and 1868, suggesting a link between the postponement of the creditor consent provisions and the number and timing of the filings. B. Watkins, "To Surrender All His Estate: The 1867 Bankruptcy Act" (1989) 21 Prologue Q. of the National Archives 207, at 211-212. I am indebted to Beverley Watkins for providing me with a copy of this article.

<sup>67</sup> Tabb, *ibid.* at 357. In 1874 Congress reduced the level for voluntary cases to either a 30% dividend or the consent of 1/4 in number and 1/3 in value of the bankrupt's creditors. 18 Stat 180 (1874) c. 390, s. 8. See also Countryman, "Bankruptcy and the Individual Debtor", *supra* note 41 at 815; Dunscomb argues that the intent of Congress was to reward debtors who had forced their creditors to file an involuntary petition while punishing those debtors who filed a voluntary petition. W. Dunscomb, "Bankruptcy: A Study in Comparative Legislation" in *Studies in History Economics and Public Law* Vol 11 Number 2 (New York: Columbia, 1893) at 149; Hunt, "National Bankruptcy Legislation", *supra* note 18 at 633.



The harsh section may have been in reaction to the perception that the law of 1841 had been too lenient on debtors.<sup>68</sup>

Despite the attempt to forge a compromise between debtor and creditor interests, Congress repealed the law in 1878. Signs of its unpopularity were evident in the 1870s as Congress considered a number of repeal and amending Bills.<sup>69</sup> The House of Representatives passed a repeal Bill, without debate, by a two-thirds majority in January of 1873. A subsequent repeal Bill was passed by the House in December of 1873, by a vote of 219 to 44. However, on reaching the Senate, the repeal became the amending Act of 1874, passing on 22 June 1874. The amendments included the adjustments to the creditor consent provisions, previously discussed, and in addition added a composition proceeding, borrowed from the English Bankruptcy Act of 1869.<sup>70</sup> Compositions offered debtors the opportunity to reach an agreement with their creditors without the stigma of bankruptcy.<sup>71</sup> However, the amendments failed to stop the repeal movement. The "demand for repeal ... became overwhelming from all over the country" with a number of state legislatures endorsing removal of the national act. In April 1878, the Senate passed

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<sup>68</sup> Tabb, *ibid.* at 358. One particularly broad ground for denial was gambling. See D.S. Kennedy and J. Bailey, "Gambling and the Bankruptcy Discharge: An Historical Exegesis and Case Survey" (1994-95) 11 *Bankr. Dev. J.* 49 at 54.

<sup>69</sup> Noel indicates that thirteen amending Bills and 8 repeal Bills were introduced during the 43d Congress. Noel, *A History of the Bankruptcy Clause*, *supra* note 7 at 156. See also *Strengthening of Procedure in the Judicial System*, Report of the Attorney-General on Bankruptcy Law and Practice, 72d Congress, 1st Sess., Senate, Document No. 65 (24 February 1932) at 53.

<sup>70</sup> The discussion of the timing of the repeal Bills and the 1874 amendment is based on Warren, *Bankruptcy in United States History*, *supra* note 6 at 118. See also Frimet, "The Birth of Bankruptcy in the United States", *supra* note 13 at 185.

<sup>71</sup> In order to approve the composition, a vote of a majority in number and 3/4 value was required. I. Treiman, "Majority Control in Compositions: Its Historical Origins and Development" (1937-38) 24 *Va. L. Rev.* 507 at 526; See Tabb, "The Historical Evolution of the Bankruptcy Discharge", *supra* note 17 at 360-361. This provision also was challenged under the constitution, with the Supreme Court approving the law in 1881. *Wilson v. Mudge* 103 U.S. 217 (1881). See Warren, *ibid.* at 120.

a repeal Bill after only two days debate and the House also voted for repeal by a vote of 205 to 40.<sup>72</sup>

A number of reasons are given for the ultimate demise of the legislation. The repeal debates took place during a depression following the economic panic of 1873. Critics called for an end to bankruptcies, arguing that the Act was a cause of financial ruin.<sup>73</sup> Creditors called for its repeal, citing small dividends, expensive fees, delays in collecting debts and the new privileges granted to debtors.<sup>74</sup> The Act was administered by federal courts which were "not well known to lawyer and client" who preferred local courts.<sup>75</sup> Northern creditors, who had originally demanded the legislation to protect their interests in distant states, lost confidence in the federal courts. They complained of fraud and corruption in the federal courts by "carpet-bag" judges in Louisiana and other southern states. Rural opposition was also a relevant factor.<sup>76</sup> Further, southern and western states viewed bankruptcy legislation as another post-bellum federal attempt to interfere with state courts.<sup>77</sup>

#### D *The Bankruptcy Act of 1898*

Despite the repeal, the nation "continued reaping its annual harvest of business failures, and it was within a year of repeal that advocates of a national act again called for

<sup>72</sup> Warren, *ibid.* at 121-122. Ch. 160, 20 Stat. 99 (1878). For a discussion of the various amending and repeal Bills and voting patterns, see Bauman, "As this is the Year of the Jubilee", *supra* note 57.

<sup>73</sup> For a discussion of the effects of the depression, see Warren, *ibid.* at 117, 123, 127. Noel, *A History of the Bankruptcy Clause*, *supra* note 7 at 155.

<sup>74</sup> See Warren, *ibid.* at 127, Tabb, "The Historical Evolution of the Bankruptcy Discharge", *supra* note 17 at 362; Noel, *ibid.* Countryman, "A History of American Bankruptcy Law", *supra* note 18 at 228, 230.

<sup>75</sup> Noel, *ibid.* at 153.

<sup>76</sup> See Warren, *Bankruptcy in United States History*, *supra* note 6 at 122, citing speech of John A. McMahon of Ohio who argued that bankruptcy law was not relevant for a country with a great number of farmers.

<sup>77</sup> Warren, *ibid.* at 112-114. Sauer also links the repeal to a resurgence in the Democratic party who had been historically opposed to bankruptcy along with their ideological ancestors. Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 2. On statistics of the usage of the Bankruptcy Act of 1867, see Countryman, "A History of American Bankruptcy Law", *supra* note 18 at 228.

new legislation".<sup>78</sup> Between 1878 and 1898, the United States Congress debated a series of major reform proposals before finally passing the Bankruptcy Act of 1898.<sup>79</sup> The debates took place during the "nation's worst economic depression to that point in history".<sup>80</sup> While there were some subsequent repeal efforts,<sup>81</sup> 1898 marked the end of a century long battle to establish a national act and initiated a dramatic departure from the English model of bankruptcy law.<sup>82</sup> The Act of 1898 survived several repeal attempts after its enactment and provided the framework for most of the twentieth century.<sup>83</sup>

The Act allowed both voluntary and involuntary proceedings against all persons. However, it specifically exempted farmers and wage earners from involuntary proceedings.<sup>84</sup> Although the earlier legislation of 1867 did not contain this exception,

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<sup>78</sup> Coleman, *Debtors and Creditors in America*, *supra* note 6 at 26; Noel, *A History of the Bankruptcy Clause*, *supra* note 7 at 159; G. Staring, "Bankruptcy: An Historical View" (1985) 59 *Tulane L. Rev.* 1157 at 1161-1162.

<sup>79</sup> Warren, *Bankruptcy in United States History*, *supra* note 6 at 127 to 141.

<sup>80</sup> D. R. Papke, "Rhetoric and Retrenchment: Agrarian Ideology and American Bankruptcy Law" (1989) 54 *Mo. L. Rev.* 871 [hereinafter Papke, "Rhetoric and Retrenchment"]. Previously, there had been a number of business failures owing to a period of speculation in the West between 1883 and 1889. See Noel, *A History of the Bankruptcy Clause*, *supra* note 7 at 157. However, Hansen suggests that the 1898 Act was not in response to an economic crisis and ties it into the institutional structure of new national interest groups. See Hansen, *The Origins of Bankruptcy Law*, *supra* note 3.

<sup>81</sup> Noel, *ibid.* at 162.

<sup>82</sup> In some respects, forms of the English law remained. Acts of bankruptcy were still required to be proven on involuntary petitions. See *ibid.* at 159; J. Olmstead, "The Development of Bankruptcy Law" (1924-25) 1 *Am. Bankr. Rev.* 151 at 152 [hereinafter Olmstead, "The Development of Bankruptcy Law"].

<sup>83</sup> See *Strengthening of Procedure in the Judicial System*, Report of the Attorney-General on Bankruptcy Law and Practice, 72d Congress, 1st Sess., Senate, Document No. 65 (February 24, 1932) at 64 where the report discusses various submissions for repeal including a submission by the Anti-Bankruptcy Law Association in 1916 to the House Committee on the Judiciary.

<sup>84</sup> Papke indicates that the statutory provision protected any person "engaged in farming or tillage of the soil from creditor initiated bankruptcy". He notes that this group was to have its "integrity, dignity and independence preserved". Papke, "Rhetoric and Retrenchment", *supra* note 80. Olmstead argues that the amendment had its origins in opponents of bankruptcy who "frequently came from the plantation or planter class". Olmstead, "The Development of Bankruptcy Law", *supra* note 82 at 153.

rural and agricultural opposition to bankruptcy is a strong theme in the history of American law, and the legislative provisions in the 1898 Act reflected the historical importance of the American farmer.<sup>85</sup>

The Bankruptcy Act of 1898 also "signalled a clear ... parting of the ways between England and the United States regarding the discharge".<sup>86</sup> While the English legislation of 1883 had removed creditor control over the discharge, England adopted a system of judicial discretion, allowing courts to grant conditional, absolute or suspended discharges.<sup>87</sup> The Bankruptcy Act of 1898 did not give the courts discretion to impose conditions on a discharge. The rules governing the discharge were fixed firmly by Congress, only allowing court intervention in the interpretation of grounds for denial and the exceptions to the discharge. The statutory grounds for denial, compared with the list adopted in 1867, were quite limited.<sup>88</sup> The Bankruptcy Act of 1898 also abandoned the concept of creditor consent.<sup>89</sup>

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<sup>85</sup> It is important to note that the Bankruptcy Act of 1898 was passed in the midst of a Populist era, which as a political movement which "created a new awareness of farmers and their condition". Papke, "Rhetoric and Retrenchment", *ibid.* The Bankruptcy Act of 1898 also continued the policy of allowing generous exemptions. The debtor was allowed the exemptions specified in the federal Act as well as the laws of the state of the debtor's domicile. The United States Supreme Court rejected arguments in 1902 that the exemption policy was unconstitutional as did not allow a uniform bankruptcy law. See Countryman, "Bankruptcy and the Individual Debtor", *supra* note 41 at 817. *Hanover Nat'l Bank v Moyes* 186 U.S. 181 (1902).

<sup>86</sup> Tabb, "The Historical Evolution of the Bankruptcy Discharge", *supra* note 17 at 363. Boshkoff calls it a "radical change in the bankruptcy discharge process that departed from the practice in England". D. Boshkoff, "Limited, Conditional and Suspended Discharges in Anglo-American Bankruptcy Proceedings" (1982) 131 U. Pa. L. Rev. 69 at 104 [hereinafter Boshkoff, "Limited, Conditional and Suspended Discharges"].

<sup>87</sup> For a discussion of the English reforms of 1883, see chapter 2.

<sup>88</sup> Tabb, "The Historical Evolution of the Bankruptcy Discharge", *supra* note 17 at 366 to 368. Tabb notes that there were only two major grounds for denial in 1898: bankruptcy crime (defined as concealing property or making a false oath) and failing to keep proper books or records. He notes that the narrow scope of the limitations were expanded in 1903 by adding 4 additional grounds.

<sup>89</sup> Boshkoff argues that creditor consent provisions in both countries had historically been subject to abuse. Boshkoff, "Limited, Conditional and Suspended Discharges", *supra* note 86 at 104.

The Act of 1898 formally recognized “for the first time the overriding *public* interest in granting a discharge to ‘honest but unfortunate’ debtors”. There was a recognition that with the lifting of the burden of debts, society benefited as the debtor was able to return to productive life in society. The discharge was no longer primarily viewed as a collection mechanism designed to provide incentives for debtor cooperation.<sup>90</sup> The new form of discharge marked the “beginning of the modern era in American bankruptcy law”. No longer was the ability to repay creditors a relevant factor in obtaining a discharge.<sup>91</sup>

While much of the scholarship places an emphasis upon the discharge provisions of the 1898 Act, it is important to note that uniform federal legislation was sought by commercial organizations. The other goal of bankruptcy law, an equitable distribution of the debtor’s assets without preferences, was an important one for creditors trading in the national market. The new Act created a national system and provided certainty to creditors trading over distances.<sup>92</sup> The importance of an equitable distribution and the tension between local and distant creditors is one of the many themes explored in Part II.

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<sup>90</sup> Tabb, “The Historical Evolution of the Bankruptcy Discharge”, *supra* note 17 at 364. Flint argues that by abandoning the creditor consent requirements Congress acknowledged separate and distinct policy underlining the discharge. Flint, “Bankruptcy Policy”, *supra* note 40 at 544, 548.

<sup>91</sup> Boshkoff, “Limited, Conditional and Suspended Discharges”, *supra* note 86 at 105. The other major difference between American and English bankruptcy law aside from the discharge and exemption policy is that of after acquired property. Under the English system, the trustee is entitled to reach the debtor’s post-petition earnings, while in the United States, a debtor’s post-petition earnings could not be taken. See Boshkoff, “Limited, Conditional and Suspended Discharges”, *supra* note 86 at 82-83; G.S. Joslin “Bankruptcy: Anglo-American Contrasts” (1966) 29 Mod. L. Rev. 149 at 154 [hereinafter Joslin “Bankruptcy: Anglo-American Contrasts”]; and J. Honsberger, “Bankruptcy: A Comparison of the Systems of the United States and Canada” (1971) 45 Am. Bankr. L.J. 129 at 140 [hereinafter Honsberger, “Bankruptcy: A Comparison of the Systems”]. Boshkoff argues that the discharge provisions enacted in 1898 and as they exist today are “more generous to debtors than those of any other major industrialized nation”. D. Boshkoff, “Fresh Start, False Start or Head Start” (1995) 70 Ind. L.J. 549 at 550.

<sup>92</sup> The legislative history and voting patterns have been the subject of a new study and challenges some of the more traditional accounts that have focussed on the discharge. See Hansen, *The Origins of Bankruptcy Law*, *supra* note 3; B. Hansen, “Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law” (1998) 72 Bus. Hist. Rev. 86.

## II The Historiography of American Bankruptcy Law

A number of historians have sought to explain why the United States did not achieve permanent reform until the end of the nineteenth century and why it ultimately diverged from the English model. The division over bankruptcy law is presented by some as an ideological split over the future of the American economy with historians tying the rise and fall of bankruptcy legislation to the success of various political parties. However, ideology and American political parties do not provide a complete explanation and others have tried to identify why certain groups opposed or supported national bankruptcy legislation. The role of distance and credit networks is also a significant theme. Without national legislation, local creditors operated at an advantage. Local creditors often won the common law race to the debtor's assets or received preferential payments from friendly debtors. Creditors who traded on a more national basis demanded a federal bankruptcy act to ensure that the debtor's assets were distributed on a pro rata basis. Local creditors generally opposed federal legislation that interfered with local advantage.

The changes to credit networks are part of a larger economic explanation as many historians have placed an emphasis on important structural changes to the American economy. One author suggests that the evolution of bankruptcy law was "part of the larger transformation of American society" while another refers to the process as the "maturing of American capitalism".<sup>93</sup> The depersonalization of business and credit, the growth of national credit markets, and the rise of corporations were significant factors explaining the success of the Bankruptcy Act of 1898. The growth of interstate trade led to the rise of new national organizations that were able to effectively lobby for a national act at the end of the century. However, many of the structural changes described in the maturation of capitalism thesis had begun well before the end of the nineteenth century and other factors must be sought to explain why the United States did not obtain a permanent national regime until 1898.

A more complete explanation may be sought by examining the role of institutions. Although ideas and economic growth are important factors in explaining the

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<sup>93</sup> Coleman, *Debtors and Creditors in America*, *supra* note 6 at 248; Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 2 at 313.

development of policy, an institutional approach places an importance on state institutions as a factor in affecting the direction of policy.<sup>94</sup> The federal constitution and the bicameral structure of the U.S. Congress affected the course of the development of bankruptcy legislation. Constitutional litigation over the scope of the Congressional bankruptcy power and the ability of states to enact local bankruptcy laws delayed federal reform efforts. Bicameralism prevented consensus as political opponents occupied the separate houses of Congress during the latter part of the nineteenth century.<sup>95</sup> The initial institutional framework therefore constrained the methods by which reform was achieved and ultimately affected the direction of policy.<sup>96</sup>

English bankruptcy law must also be included within the initial institutional framework. English law defined the debate and had the effect of limiting policy choices for American legislators who sought to design a bankruptcy law more suited to local conditions. This part examines these themes and concludes with an evaluation of their possible applicability to the Canadian study.

*A Bankruptcy and Division in American Society*

A number of authors have presented the debate on bankruptcy law as representing ideological division within American society and have linked opposition and support of bankruptcy law to specific political parties.<sup>97</sup> While the debate often turned to technical procedural matters and issues of jurisdiction, the “real struggle” was between “impersonal and barely perceived forces of system, order, and rationality and the older

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<sup>94</sup> On the influence of institutions and their effect on policy development, see Ernst, “Law and American Political Development”, *supra* note 3; Robertson, “History, Behaviouralism, and the Return to Institutionalism”, *supra* note 3 at 113; Thelen & Steinmo, “Historical Institutionalism”, *supra* note 3.

<sup>95</sup> Hansen, *The Origins of Bankruptcy Law*, *supra* note 3 at 150.

<sup>96</sup> *Ibid.*

<sup>97</sup> E.g., Richard Sauer’s paper in part uses the bankruptcy debate to “analyze the ideological differences associated with the divergent and divisive economic experiences of nineteenth century America”. Sauer, “Bankruptcy Law and the Maturing of American Capitalism”, *supra* note 2 at 298. Bankruptcy law in the United States has traditionally been portrayed as one of political division with Charles Warren’s work being the classic treatment of the political history of the legislation. See Warren, *Bankruptcy in United States History*, *supra* note 6.

forces of personal responsibility and respectability". The most important issues "were really the old versus the new, the eighteenth century versus the nineteenth".<sup>98</sup>

Supporters of a national bankruptcy act were promoters of rapid progression of commercial and industrial activity. This ideology was expressed by the political ideals of Hamiltonian federalism, the Whig Party and later the McKinley Republican party in the late nineteenth century. The alternative tradition of thought argued for a nation of small independent yeomen farmers as the focus of national development. This 'republican' tradition of thought found a home in the parties of Jefferson, Jackson and William Jennings Bryan. The bankruptcy law debates served "as a political hobby horse on which two opposed ideologies galloped in place for a century". The bankruptcy debates "revealed with unique clarity the inner workings of two opposed social paradigms that deeply informed nineteenth century American life".<sup>99</sup> Underlying the debate about bankruptcy law was "a deep cultural division over the moral worth of a credit economy".<sup>100</sup>

Specific evidence of the split over bankruptcy law can be seen in the legislative history. The Act of 1800 was a measure enacted by Federalists<sup>101</sup> for the "needs of the

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<sup>98</sup> Coleman, *Debtors and Creditors in America*, *supra* note 6 at 286.

<sup>99</sup> Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 2 at 298, 339. David Papke has examined in detail the history of "agrarian ideology" in the context of bankruptcy reform. Papke notes that most important factor explaining why bankruptcy law has often had a specific approach to farmers is "the highly valorized image of the farmer in the dominant American ideology". He indicates that the idealization of the American farmer can be traced to the eighteenth century. He also argues that it is important to study the inter-relationship between law and ideology. He argues that agrarianism "infuses bankruptcy law". See Papke, "Rhetoric and Retrenchment", *supra* note 80.

<sup>100</sup> Weisberg, "Commercial Morality", *supra* note 7 at 60-61, 84. Bankruptcy law became a "partisan conflict fuelled by ideological disagreements over the country's political character and economic destiny". Mathews, *Forgive Us Our Debts*, *supra* note 8 at 97.

<sup>101</sup> For a discussion of the political divisions in 1800, see Bradshaw, "The Role of Politics and Economics", *supra* note 9 at 751; Mathews, *ibid.*; Duncan, "From Dismemberment to Discharge", *supra* note 13; Frimet, "The Birth of Bankruptcy in the United States", *supra* note 13.



commercial classes" and opposed by republicans.<sup>102</sup> In 1803, Jefferson and the republicans repealed the measure. In 1841, the Whig Party of Henry Clay enacted the second national act, which was seen as "representative of that party's program of centralized economic planning and rapid commercial development".<sup>103</sup> Its repeal in the following year was "perceived as a general repudiation of Whig policies". In 1867, the third statute was enacted in the interests of northern creditors seeking to collect from southern debtors. It was repealed in 1878 during a Democratic revival. Finally, twenty years later, the United States enacted the Bankruptcy Act of 1898:

[T]hose who saw aggregated capital as the engine of national progress, and an increasingly regulatory state as its ally, obtained the permanent bankruptcy system they had sought for a century. The Democrats and Populists who opposed the Act of 1898 regarded its passage as confirming the ascension of an alien presence in our national life and signalling the destruction of their 'real and genuine America' of small towns and family farms.<sup>104</sup>

The underlying differences between these two paradigms become clear when one analyses their respective positions on the institution of credit and the larger issue of bankruptcy. The underlying ideals of the commercial sector fit more closely with the goals of bankruptcy law. Those in the merchant and commercial community tended to favour a utilitarian theory of contract:

Bankruptcy exemplifies the move to regulate 'in such a manner as to render the use of property subservient to the public welfare.' Based on concerns of economic efficiency, national bankruptcy administration promised to

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<sup>102</sup> In 1803, "ideological intransigence played a far greater role in the bankruptcy act's repeal than concerns about its utility or efficiency". Mathews, *ibid.* at 138. Reasons for this division in society are discussed in Part II.

<sup>103</sup> Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 2 at 296-297. See Warren, *Bankruptcy in United States History*, *supra* note 6 at 61 for a summary of arguments of those opposing the Bill. In 1840 a bankruptcy Bill was passed in the Senate. It did not pass the House before Congress was adjourned. The split over the vote in the Senate was largely geographic. The vote passed 21 to 19, however it split, "North and East against the South and part of the West". See Warren, *Bankruptcy in United States History*, *supra* note 6 at 69. For a political division between the Whigs and Democrats over the Bankruptcy Act of 1841, see Beesley, *The Politics of Bankruptcy*, *supra* note 27.

<sup>104</sup> Sauer, *ibid.* at 297-298.

smooth the course of development, and thereby increase social wealth, by removing the impediments of an overly personalized and subjective system of debt collection.<sup>105</sup>

Further, commercial men believed in unrestrained economic activity, seeking to expand their networks nationally. National legislation was necessary to “knock down provincial barriers to commerce”.<sup>106</sup> The advocates of modernization “thought continentally and presented themselves as taking up the torch of commercial unity lighted at our nation’s birth”. Bankruptcy, therefore, was “fundamental to the growth of the national community”.<sup>107</sup> During the debate over the 1841 Bill, one Congressman concluded that previously the country was more agricultural than commercial. This prior agricultural era, in his view, gave rise to state laws that better corresponded with local concerns:

But the relations of business in this country are greatly changed and enlarged. The modern facilities of intercourse have brought all the States together in a common market. The North and South are in the constant interchange of their products and merchandise. This is calculated to give national uniformity to the rules of trade and induces the necessity in the treatment of the relation of debtor and creditor.<sup>108</sup>

In contrast, bankruptcy law challenged many of the essential tenets of republican ideology. As many farmers’ contracts were “face-to-face” bargains, they tended to have a libertarian or natural law view of contract. Debts were an “absolute moral obligation of the individual”. Contract rights came from tangible property and were entitled to legal

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<sup>105</sup> *Ibid.* at 308. This view fits in with a vision of a “well regulated society” that challenged a more traditional and absolute view of contractual obligation. See W.J. Novak, *The People’s Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill: UNC Press, 1996) at 47-49.

<sup>106</sup> Sauer, *ibid.* at 322. Frimet also argues that advocates of a national Act, at least in 1800 “were steeped in the need to shed old debt in order for impoverished traders to resume business discharged from the onus of paying off old debts.” Frimet, “The Birth of Bankruptcy in the United States”, *supra* note 13 at 167.

<sup>107</sup> Sauer, *ibid.* at 323.

<sup>108</sup> Cited in Warren, *Bankruptcy in United States History*, *supra* note 6 at 176. No date is given for Congressional speech.

protection.<sup>109</sup> Agrarians did not accept any ideal that allowed the state to release debtors from their rightful obligations.<sup>110</sup> Agrarians also supported other forms of legislation that, in their view, preserved contractual integrity. Stay laws protected the vulnerable farmers from economic dislocation by preventing creditors from enforcing debts for a period of time. Stay laws preserved the status quo, it was argued, and allowed for a return to the contractual repayments once it was possible. These debt moratorium laws preserved the old order, while bankruptcy law swept away the past. Secondly, exemption laws, which precluded creditors from seizing specifically listed items of property, also found favour in the agricultural setting. Many exemptions related to farming activities and a number of states exempted the family homestead.<sup>111</sup>

Republican ideology favoured a locally based economy, comprised of a community of independent farmers. Bankruptcy law and its federal administrative and judicial structure threatened to take away local control, destroying traditional values and community structures. Local state courts, it was argued, consisted of jurors who knew the local parties. Federal courts covered large districts and were staffed by alien officials and judges.<sup>112</sup>

Although values or ideals played a significant role in the debate over bankruptcy law, the legislative history of American bankruptcy cannot be explained by reference

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<sup>109</sup> Those of the more traditional 'republican' ideology saw credit as an evil as it was transitory and imaginary. Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 2 at 296.

<sup>110</sup> See Warren, *Bankruptcy in United States History*, *supra* note 6 at 62, 73-74 summarising the opponent's arguments on the Act of 1841. See also Noel, *A History of the Bankruptcy Clause*, *supra* note 7 at 139 who cites petitions opposing the law based on the principle that it was immoral. For a summary of some of the agrarian arguments made in opposition to the Act in 1800, see Frimet, "The Birth of Bankruptcy in the United States", *supra* note 13 at 167.

<sup>111</sup> See Goodman, "The Emergence of the Homestead Exemption", *supra* note 64 at 498. Goodman concludes that the exemption laws offered the prospects, "however illusory" that the state "stood ready to protect families against the perils of the market, a promise that served to smooth the painful transition from an agrarian to an industrial republic".

<sup>112</sup> The preceding three paragraphs based upon Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 2 at 303, 312; Papke, "Rhetoric and Retrenchment", *supra* note 80; Warren, *Bankruptcy in United States History*, *supra* note 6 at 15-16, 21.

only to the rise and fall of ideas. This was not an abstract philosophical debate over bankruptcy law. Rather, in many instances, the competing values represented underlying interests. For example, while supporters of bankruptcy law appealed to the value of growth and economic progress, bankruptcy legislation served to promote the interests of those engaged in commerce. First, involuntary bankruptcy offered a collection tool for creditors.<sup>113</sup> Second, the discharge of the debtor promoted industry by returning businessmen to the economy.<sup>114</sup> The discharge offered an incentive to debtors to give up their property by allowing a return to the productive economic stream. The discharge, it was argued, reduced the possibility of a debtor hiding or squandering valuable assets and thereby served to enhance the return to creditors.<sup>115</sup> Those advocating a national act argued in terms of a rationalized, uniform, predictable system that would serve the market, facilitate credit and limit liability. As capitalism expanded, merchants required protection from the inherent risks and misfortunes of trade.<sup>116</sup>

Similarly, while rural opposition to bankruptcy law was expressed in terms of contractual integrity, farmers also opposed bankruptcy law as it affected them in their occasional status as creditors. Farmers were at risk when selling their crops or livestock to a middleman. If the middleman failed, farmers were left with an unsecured claim in the bankruptcy necessitating a journey to a distant federal court.<sup>117</sup>

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<sup>113</sup> Sauer, *ibid.* at 299.

<sup>114</sup> See e.g. Daniel Webster's speech cited in Warren, *Bankruptcy in United States History*, *supra* note 6 at 67 from 26th Cong., 1st Sess.

<sup>115</sup> Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 2 at 315.

<sup>116</sup> Weisberg, "Commercial Morality", *supra* note 7 at 60. To any that suggested that the English model was uncertain or open to abuse and fraud, advocates of a national Act suggested that the new American bankruptcy Act would be "a modern, commercially scientific advance on the English law".

<sup>117</sup> Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 2 at 303, 312. See Papke, "Rhetoric and Retrenchment", *supra* note 80. See also Warren who in the review of the debates in 1800 notes the agricultural opposition. Warren, *Bankruptcy in United States History*, *supra* note 6 at 15-16, 21.

Thus while an analysis of competing values allows one to isolate the divisions within society, it is important to see whether or not the appeals to higher public ideals concealed interests that were being advanced. Further, the focus upon ideological differences over the discharge does not provide a complete picture. The other goal of bankruptcy law, the equitable division of the debtor's assets, represented not so much an ideological division but rather a sharp divide between local and distant creditor interests.

*B Distance and Credit Networks*

A national bankruptcy law worked to the advantage of creditors trading over distances.<sup>118</sup> In the absence of a national act, state collection rules provided a first come first served priority regime leading to a "race of diligence".<sup>119</sup> Bankruptcy law, which provided a pro rata distribution of the debtor's assets and a prohibition against preferences, put all creditors, near and far, on an equal footing. This rationale for a national bankruptcy law was not much different from the premise behind the original English Act of 1542 that had established the first pro rata regime.<sup>120</sup> Without a bankruptcy law debtors devised a number of ways to disadvantage distant creditors.

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<sup>118</sup> No one historical work emphasizes this theme as its central argument. There are several references to the theme scattered throughout various sources. One author who has explicitly given credence to this theory in the modern context is David Carlson. Carlson argues that bankruptcy law strengthens "the hand of the national creditor, thereby preventing the local creditor from overcharging debtors for their loans". He argues that "local creditors and dishonest debtors conspire to take rents from the national credit market. The key structural feature of this conspiracy is the local creditor's power to pull out principal from the failing debtor before the national creditors can get it. Therefore, when voidable preference law, in conjunction with bankruptcy redistribution rules, breaks up that power, the Bankruptcy Code effectively empowers national creditors against local creditors." Carlson concludes that "the theory that bankruptcy law favors national over local markets enjoys the advantage of having a close connection with American history". D. Carlson, "Debt Collecting as Rent Seeking" (1995) 79 Minn. L. Rev. 817 at 828, 832, 835.

<sup>119</sup> Hansen, *The Origins of Bankruptcy Law*, *supra* note 3 at 17. Balleisen, *Navigating Failure*, *supra* note 39 at 142 discusses the scramble for the debtors' assets. One author, writing early in the twentieth century made reference to the practices that occurred just prior to the enactment of the Act of 1898. "They can recall how clients have rushed into their offices demanding immediate action; how they have ... worked all night preparing general creditors' bills and attachments and assignments, and how when morning came they have found that the other fellow was ahead of them only by a few moments .... 'First come first served' was the idea and to the victor belonged the spoils was the result." Shelton, "Bankruptcy Law, Its History and Purpose", *supra* note 4. For a similar account of pre-1898 practices, see Vrooman, "Origin and History of the Bankruptcy Law", *supra* note 57 at 129.

<sup>120</sup> See chapter 2.

Firstly, local debtors were well placed to conceal assets. One northern congressman argued in 1841 that southern debtors placed assets “into a napkin” and buried them up in the earth. Hidden assets were “lost to business, lost to commerce, lost to trade, lost to manufactures, and to all useful purpose”. He argued that a national act would “disinter those assets from their burial place”.<sup>121</sup>

Debtors also used the priority regime of the state rules to selectively favour certain creditors. The delays and costs involved in bringing a lawsuit to recover a debt turned upon whether the debtor disputed the claim. Debtors on the eve of financial collapse “confessed judgments to selected creditors” allowing those claimants a priority claim over their assets. Debtors were not always able to fend off the claims of all creditors. However, as one recent study points out, debtors most easily “circumvented the demands of creditors” who resided at a “comfortable distance”. “Far flung customers” it was said in 1839, “had a disturbing habit of responding to dunning letters with silence”.<sup>122</sup> Distance and poor communication therefore had the effect of strengthening the influence of local markets. Many who derived benefit from the conditions of local markets resisted any change that might weaken local control.<sup>123</sup>

The more important problem facing distant creditors was that a debtor might prefer to pay “a neighbour, fellow church member, or perhaps a local bank or supplier whom the debtor hoped to do business with in the future”.<sup>124</sup> One recent study claims:

Financial obligations to relatives or close business associates generally carried more weight than debts which resulted from more impersonal

<sup>121</sup> Cong Globe app., 27 Cong., 2d sess. 179 and 480 (1841) (remarks of Sen Choate) in Sauer, “Bankruptcy Law and the Maturing of American Capitalism”, *supra* note 2 at 316.

<sup>122</sup> Balleisen, *Navigating Failure*, *supra* note 39 at 162.

<sup>123</sup> T. Freyer, *Producers versus Capitalists Constitutional Conflict in Antebellum America* (Charlottesville: University of Virginia. Press, 1994) at 62-63 [hereinafter Freyer, *Constitutional Conflict in Antebellum America*].

<sup>124</sup> Sauer, “Bankruptcy Law and the Maturing of American Capitalism”, *supra* note 2 at 326; Weisberg, “Commercial Morality”, *supra* note 7 at 74.

business transactions. Antebellum debtors cared more about the fortunes of people close to them.

Few hesitated to protect the finances of a father-in-law or brother or close friend by paying them ahead of other creditors.<sup>125</sup>

The local or customary credit relationships assumed that the debtor had an irregular source of cash flow due to the fluctuations in seasonal markets. Local creditors, therefore, relied on "a mutual sense of honor to efficiently reconstruct their debts". The personal aspect of preferences appealed to the republican sentiments. "Debts of honour" to local lenders may have been repaid first. In fact, the initial extension of credit by the local creditor may have been granted on the basis of loyalty and the expectation that the debtor would make preferential payments. Opponents of the national act feared that they would lose their "customary local settlements and did not want to yield greater creditor rights to distant creditors". Those opposing a national Act saw preferences as "a healthful expression of local trust, family ties, and personal moral commitment".<sup>126</sup>

To more nationally oriented commercial interests, preferences "subverted the predicability of commercial relations and cheated the system out of a portion of its rightful returns".<sup>127</sup> Preferences were "bad because they were at best inefficient, provincial, and perhaps sentimental anachronisms that blocked the development of an efficient national machine of credit and commerce".<sup>128</sup> While national commercial interests accepted self-interest as the basis for conduct in the market, this self-interest had to be "mediated by regulatory mechanisms to direct that impulse toward the

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<sup>125</sup> Balleisen, *Navigating Failure*, *supra* note 39 at 168. See also J. Ciment, *In Light of Failure: Bankruptcy, Insolvency and Financial Failure in New York City, 1790-1860* (Ph.D. diss., City University of New York, 1992) at 245-263 [hereinafter Ciment, *Failure in New York City*].

<sup>126</sup> Weisberg, "Commercial Morality", *supra* note 7 at 63, 65, 74.

<sup>127</sup> Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 2 at 328.

<sup>128</sup> Weisberg, "Commercial Morality", *supra* note 7 at 66. For an overview of the various demands for national legislation on the basis of discriminatory local laws, see T. Freyer, *Producers versus Capitalists: Constitutional Conflict in Antebellum America* (Charlottesville: Univ. of Va Press, 1994) at 79-80.

maximization of social wealth".<sup>129</sup> Bankruptcy law with its collective proceedings and the ability to recover preferential payments was such a regulatory mechanism. Without a law that prohibited preferences debtors chose in an inconsistent way which creditors to repay. Choice was based on subjective matters such as honour or local custom. In a predictable and orderly fashion, a national act would place all creditors on an equal footing by setting aside preferential payments. The market could not trust private assignments to ensure pro rata distribution.<sup>130</sup>

One author writing early in the nineteenth century clearly identified the advantages of a national act. A uniform law would "pierce the veil of local custom". "No one can transact business with a stranger residing at a distance, with safety and confidence, unless he has some knowledge of the peculiar laws and usages by which his rights may be affected."<sup>131</sup> Following the financial panics of 1819, 1839, and 1857, urban merchants repeatedly urged Congress to enact a national bankruptcy law that prohibited preferences. The chief petitioners were mercantile creditors in large urban commercial centres such as Boston, New York City, Philadelphia, Nashville and Charleston. National legislation was necessary, they argued, because state laws favoured local debtors and encouraged preferential payments.<sup>132</sup>

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<sup>129</sup> Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 2 at 328.

<sup>130</sup> Weisberg, "Commercial Morality", *supra* note 7 at 70. Fessenden, a congressman from Maine, during the debate over bankruptcy law in 1841 referred to the important theme of local and distant creditors. Warren summarized his arguments in favour of a national law as follows: "Under the present insolvency laws, distant and foreign creditors unable to be on the watch get nothing; and local creditors in the North benefit by preference and attachment law." See Warren, *Bankruptcy in United States History*, *supra* note 6 at 75.

<sup>131</sup> Sewell, "On at Bankruptcy Law" (1829) 1 Am Jurist 35, cited in Weisberg, *ibid.* at 66. It was not always northern commercial creditors who were critical of local laws. Robert Hayne of South Carolina introduced a Bill in 1826. "In support of the bill, it was argued that the State insolvent laws were inadequate, full of injustices, allowing preferences, which were invariably made by the insolvent merchant in favor of his bank or commercial creditor, and allowing in New England local creditors to obtain unfair advantages by its system of mesne attachment, so that as Hayne said, 'a distant farmer or planter stands no chance.'" Warren, *ibid.* at 42.

<sup>132</sup> Freyer, *Constitutional Conflict in Antebellum America*, *supra* note 123 at 87-88.



The Act of 1841 was the first bankruptcy statute to specifically prohibit preferential payments to creditors. After its repeal, some states attempted to regulate the problem by passing statutes that prohibited the making of a preferential assignment.<sup>133</sup> Prohibitions against preferential payments were also significant aspects of the federal bankruptcy Acts of 1867 and 1898. One author writing shortly after the 1898 Act came into effect, reflected back upon an earlier era:

To anyone whose mind travels back to the state of chaos which existed in all the states of the Union with their different laws affecting insolvency and bankruptcy, some states preferring local creditors to foreign ones, it is a immense relief .... to know that there is one universal law applying to the whole subject.<sup>134</sup>

However, it is important to note one caveat on the issue of distant creditors. With the growth of credit information networks late in the century, national firms extending credit were at times able to out manoeuvre local creditors and obtain first payment. Therefore, some national firms through investments in information were able to outwit their competing national creditors as well as local creditors. Their own networks alleviated the need for a national act. The generalization that commercial centres or creditors trading over great distances supported a national act must be re-evaluated in the context of improvements to information networks by the end of the century.

Traditional opponents of bankruptcy were no longer able to argue that the legislation "was a scheme to allow the Eastern monied interests to defeat the time honoured ability of local creditors to satisfy their claims first under state grab laws".<sup>135</sup> In fact an argument could be made that Eastern creditors no longer derived this advantage from bankruptcy law as they could rely on their own networks of information to ensure quick action.

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<sup>133</sup> Balleisen, *Navigating Failure*, *supra* note 39 at 167. Balleisen notes that by 1853 11 states had statutes in place.

<sup>134</sup> A. Elkus, "Alleged Evils of the Bankruptcy Law" (1913) 20 *Case and Comment* 788 at 789. The same author made reference to some members of Congress who wished to repeal the Bankruptcy Act of 1898 on the basis that local creditors should have a preference over foreign creditors.

<sup>135</sup> Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 2 at 335.

[T]he farther away the creditor may be the sharper will be his watchfulness. He will have his collection agents or attorneys near the debtor with a watchful eye upon his interests and will exercise greater vigilance than the nearer creditor will. In addition to this, the difference between location of creditors is destroyed by the wonderful facilities that now exist for sending telegrams and for speedy modes of travel between all parts of the country. The Eastern creditor can send a telegram to his attorneys which will put him on the ground as quickly as the nearer debtor.<sup>136</sup>

John Ingalls of Kansas, who introduced a reform proposal for a national act in 1882, claimed that some large wholesale merchants in the main distributing centres opposed the act:

For they have their agents and attorneys in the vicinity of every debtor, obtaining early information of approaching disaster and ready to avail themselves of the local machinery of State Courts by attachments or preferences, through which they can secure full payment of their claims to the exclusion of less powerful or less vigilant but equally meritorious creditors. Naturally, they want no bankrupt law at all.<sup>137</sup>

Creditors who tended to support national legislation did not have adequate information about the debtor. Once information was obtained and creditors were able to act upon it through enforcement, then creditors had no need for bankruptcy legislation and were in fact disadvantaged by it. The costs of obtaining the information and taking legal action

<sup>136</sup> 31 Cong Rec 1789 (1898) remarks of Rep Henderson, cited in Sauer, *ibid.* at 335. David Henderson of Iowa responded to the argument often posed that it was only the eastern interests that favoured a national Act. He tried to persuade Western opponents that it was in their interests to have a national Act because it was no longer a valid argument to say that local creditors derived an advantage by being closer to the debtor. "This overlooks the fact of Eastern creditors having collection agents or attorneys on the spot and the facilities of the telegraph". Warren, *Bankruptcy in United States History*, *supra* note 6 at 143, citing David Henderson, in 55th Congress, 1st Session March and April of 1897 in the Senate and 55th Congress 2d Sess. in the House February and June 1898 and March 1 1898.

<sup>137</sup> Warren, *ibid.* at 129 citing John Ingalls in 47th Congress, 2nd Sess., in the Senate, December 1882. See also Coleman, who in summarizing this aspect of the debate states: "[S]ome of the larger wholesale houses thought their debts better protected under state than national laws. They were usually represented by alert agents who, at the first sign of difficulty, brought suit, often obtaining full satisfaction before other creditors, even local ones, knew of an impending failure. Many more eastern groups supported than opposed enactment of a national relief law, but the 'moneyed conspiracy' allegations were rhetoric rather than fact". Coleman, *Debtors and Creditors in America*, *supra* note 6 at 28.

to preserve their position through enforcement would be lost once a preferential payment was set aside in a bankruptcy proceeding.<sup>138</sup> Local creditors and those creditors with access to information networks opposed bankruptcy legislation as it destroyed their advantage. The shifting fortunes of local and distant creditors, however, must be explained in the context of changing credit relationships in the modernization of the economy.

*C Economic Structural Change*

Early accounts of the history of bankruptcy law viewed its evolution as a natural progression, coinciding with the evolution of society and commerce generally.<sup>139</sup> The general theme of commercial growth is an important one. However, it is important to identify what aspects of commercial or structural economic changes necessitated a permanent bankruptcy law. Coleman's study suggests that several structural or economic changes made a national bankruptcy law more acceptable. He concludes that, while it is important to trace the political, constitutional, sectional, humanitarian and practical considerations behind the formation of bankruptcy law, he sees the process as "part of the larger transformation of American society". His thesis focuses on changes in debtor-creditor relations over time. "[A]s American life in general and debtor-creditor relations in particular became inexorably commercialized, depersonalized, and channelled through the corporate, legalistic, and institutionalized structure of commercial finance, the need for bankruptcy systems became imperative."<sup>140</sup>

<sup>138</sup> Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 2 at 337. See also, Warren, *ibid.* Therefore can one conclude that national firms who sought legislation still did not have confidence in their credit networks.

<sup>139</sup> "As civilization has advanced, the statutes have been modified, repealed and re-enacted. The purpose has changed with the development of the law, with the growth of commercialism and with the progress of the world." Shelton, "Bankruptcy Law, Its History and Purpose", *supra* note 4. Aminoff, in comparing the reform patterns of England and the United States, concludes that American bankruptcy law reform was one of rapid adaptation, smoothing out the "rough edges of an imperfect commerce and trade". N. Aminoff, "The Development of American and English Bankruptcy Legislation--From a Common Source to a Shared Goal" (1989) 10 Statute L. Rev. 124 [hereinafter Aminoff, "The Development of American and English Bankruptcy Legislation"].

<sup>140</sup> Coleman, *Debtors and Creditors in America*, *supra* note 6 at 248.

Coleman concludes that there were four major trends in the evolution of attitudes towards debts and bankruptcy law. First, the depersonalization of business as reflected in the growth of the corporation and the institutionalization of money markets, was a significant trend in American history:

Loans were not so much asked for or granted on the basis of a personal assessment of the applicant's 'respectability' in the old sense ... but rather on the basis of an impersonal evaluation of the borrower's record--balance sheets, evidence of assets, liabilities, inventories or sales, and the availability of commercial paper and other collateral that could be used to justify an extension of credit. This obliged the borrower to manage his affairs in such a way as to be able to supply independently verifiable proof of his credit worthiness, and it obliged the lender, now increasingly accountable to his employers or shareholders, to rely on such evidence so that if challenged he could justify his decisions.<sup>141</sup>

Second, the expansion of markets, from local and regional to a more national scale, contributed to the depersonalization process. Size and distance intervened and "customers became names on pieces of paper rather than faces and personalities".<sup>142</sup> Distance created a need for a new form of business, credit bureaus. Lenders increasingly made decisions on impersonal credit reports<sup>143</sup> rather than personal knowledge. Coleman

<sup>141</sup> *Ibid.* See also Mathews who argues that the decline in imprisonment for debt and individual remedies reflected this change. In seventeenth and eighteenth century society, "the personal nature of the economic transactions made default an Act of personal betrayal. Because everyone was tied in a complex web of obligations that pervaded the entire society, default and failure took on highly personal and pejorative connotations .... Imprisonment for debt was not abolished because it no longer accomplished its original purpose. It was eliminated because it failed to meet the needs of an increasingly complex society." Mathews, *Forgive Us Our Debts*, *supra* note 8 at 211.

<sup>142</sup> Coleman, *ibid.* at 284. See also Horwitz, *The Transformation of American Law*, *supra* note 37 at 228-229. One may point to literature from general business history to support the changes in the economy throughout the nineteenth century. One author points to literature suggesting that prior to the 1870s the United States was a society of island communities where business was conducted on an informal and local basis and that these island communities prevailed because of the weak communication systems which isolated communities from national influence. Railroads and the rise of national corporations weakened these communities. See D.A. Bellam, "The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present" (1993) 31 *Amer. Bus. L.J.* 554 at 601.

<sup>143</sup> On the rise of credit reporting agencies and the decline of personal connections, see Balleisen, *Navigating Failure*, *supra* note 39 at 305-310; Balleisen, "Vulture Capitalism", *supra* note 39; J. Madison,

concludes that this trend led to an acceptance of the discharge as something “normal and routine”. Debtors were no longer “people with reputations” but rather “names which passed across ledgers”.<sup>144</sup>

The third element in Coleman’s thesis was the formalization of legal relationships. Grace periods and absolute forgiveness became rare as more and more lenders resorted to litigation to collect debts. As actions became more common, lawsuits for debt lost their moral quality. The rationalization of the debt collection system and the growth of the professional bar also contributed to the increased formalization of legal relationships. Bankruptcy, therefore, came to be viewed as a necessary part of this process. “It represented the full flowering of the bookkeeper mentality.”<sup>145</sup>

Finally, Coleman argues that as the nineteenth century progressed increasingly, “the public became fascinated by and privately envious of the man who found ways to enrich himself and his associates with what was formally thought to be indecent speed”. This trend led to a shift in opinion from hostility to mixed indifference and outright approval of bankruptcy law.<sup>146</sup>

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“The Evolution of Commercial Credit Reporting Agencies in Nineteenth Century America” (1974) 48 *Bus. Hist. Rev.* 164. Madison contrasts the early nineteenth century practices of merchants to rely on “personal ties” to the established credit reporting practices of the 1880s.

<sup>144</sup> Coleman, *Debtors and Creditors in America*, *supra* note 6 at 284. Local creditors may have had an advantage over distant creditors unless had they had good agents. Mathews also develops this theme but suggests that the decline of personal relationships began early in the nineteenth century. Mathews, *Forgive Us Our Debts*, *supra* note 8 at 222.

<sup>145</sup> Coleman, *ibid.* at 285.

<sup>146</sup> *Ibid.* at 283-284. Hallinan also suggests that the severing “in public consciousness of the ... close relation between fault and default easily found its way into legal rhetoric and theory and provided a legitimising framework for legislation shielding insolvent debtors from coercive collections activity”. C. Hallinan, “‘The Fresh Start’ Policy in Consumer Bankruptcy: An Historical Inventory and an Interpretative Theory” (1986) 21 *U. Rich. L. Rev.* 49 at 56 [hereinafter Hallinan, “‘The Fresh Start’ Policy”]. Friedman also suggests that there was a shift in attitudes towards debt. However, it is not linked to any particular structural change. “Bankruptcy had originally a punitive ring. It was at one time a crime, later a disgrace. But in the mercantile era, the triumph of the merchant meant the triumph of a cool neutrality toward debt.” Friedman, *The History of American Law*, *supra* note 25 at 271.

Sauer also argues that the United States finally settled on a permanent bankruptcy act in 1898 because of changes in "social and economic structure that rendered bankruptcy administration of broader practical utility while undermining the traditional normative arguments against it". By the 1890s the relative importance of agriculture declined with more wealth being generated by commerce and manufacturing than by farming. Businesses began to take a longer and more informed view of debtor creditor relations. No longer were depressions seen as aberrations of speculation but rather as more natural phenomena. Permanent bankruptcy laws were required to deal with this ongoing problem. Temporary discharge laws were no longer practical.

Further, the passage of the 1898 Act reflected the expansion of communication and transportation networks on a national scale. Geographic barriers fell and national legislation became essential. The growth of credit information gathering organizations assisted in the spread of credit on a more national basis. By the end of the century an information industry was established:

Federal bankruptcy administration was a logical outgrowth of these developments in transportation, finance and commercial organization. Many corporations had grown so geographically extensive and financially complex that to administer their bankruptcies through a jumble of overlapping and conflicting state court actions was obviously impractical. Further, the administrative resources necessary to adequately address their insolvencies were beyond what many states could muster.

The evolution of bankruptcy law was symbolic of the maturation of American capitalism:

That this tradition of conflict would at last be resolved in favor of a permanent system of bankruptcy administration ... was the result of changes in social and economic structure that rendered bankruptcy administration of broader practical utility while undermining the traditional normative arguments against it. By the 1890s, most Americans no longer made their living from agriculture, and most of our national wealth came not from farming but from commerce and manufacturing.<sup>147</sup>

One recent study argues that the growth of inter-state trade and a change in how goods were distributed led to a change in the "expected net benefits of bankruptcy

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<sup>147</sup> The above paragraphs referring to Sauer's work are based upon Sauer, "Bankruptcy Law and the Maturing of American Capitalism", *supra* note 2 at 330-335.

legislation".<sup>148</sup> With the growth of national trade greater numbers of creditors<sup>149</sup> experienced the difficulty of operating under the diverse state collection laws. Ascertaining the numerous state laws proved costly. Distant creditors were not well placed to seize assets in a race of diligence and faced the additional problem of payments by the debtor to preferred local creditors.

If interstate trade led to an increased expected benefit of bankruptcy laws, additional changes at the end of the century also led to a relative decline in the cost of seeking legislation. For the first time demands for federal legislation were organized on a national basis. During the last three decades of the nineteenth century, the growth of trade and commercial associations made possible the formation of national organizations "to draft and lobby for bankruptcy legislation". These trade associations, formed for a variety of other reasons such as distributing information about their particular industry or promoting business, provided a means by which like minded groups could come together and demand federal legislation. The names given to these new organizations reflected their national character: The National Convention of Boards of Trade, The National Bankrupt Law Convention of Commercial Bodies, and the National Convention of the Representatives of Commercial Bodies. The Act of 1898 was largely based on a Bill drafted by the this latter group in 1889:

Never before had creditors played such a large role in the demand for bankruptcy legislation, nor had there existed any sort of national, or even regional, organization to lobby for bankruptcy legislation ... And unlike

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<sup>148</sup> The following is based upon Hansen, *The Origins of Bankruptcy Law*, *supra* note 3 at 70-97.

<sup>149</sup> A change in the way in which goods were distributed increased the number of creditors likely to benefit from a national law. In the years immediately following the Civil War retailers relied on general wholesalers as the main or in many cases the sole source of supply and credit. General wholesalers did not advocate a national bankruptcy law as they were not disadvantaged by the first-come-first serve state law. The decline of general wholesalers and the growing trend for retailers to purchase goods from a wide variety of manufacturers and specialist wholesalers, meant that retailers received credit from a number of sources. Manufacturers and specialist wholesalers were troubled by the race of diligence rules as they competed with multiple creditors and therefore demanded a national bankruptcy law which provided for a pro rata distribution of the debtor's assets. *Ibid.*

previous laws, the bill was initially drafted by business interests rather than by legislators.<sup>150</sup>

The economic and structural changes noted by Coleman and Sauer did not, however, suddenly emerge at the end of the nineteenth century. More recent historical studies of bankruptcy law have more explicitly integrated their findings within the historiography of economic development.<sup>151</sup>

The “market revolution” which has been described by one historian as the growth of a national economy defined by “an expansion in long-distance money transactions among strangers”<sup>152</sup> began well before the end of the nineteenth century. Many of the economic developments traced by Coleman had their origins in the antebellum period. Improved transportation links with the consequent creation of more integrated credit markets; the emergence of manufacturing for mass markets; and specialization within marketing and distribution, can all be traced to developments that began during the first six decades of the nineteenth century.<sup>153</sup> A recent study of financial failure in New York City illustrates that the shift away from traditional forms of personal credit relationships to more modern credit bargains began during the period of 1815-1845. Credit reporting

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<sup>150</sup> Hansen, *The Origins of Bankruptcy Law*, *supra* note 3 at 10. See also pp 18-20, 77, 98-100, 150-151. The role of interest groups is also raised by Sauer, “Bankruptcy Law and the Maturing of American Capitalism”, *supra* note 2 at 332; Friedman, *The History of American Law*, *supra* note 25 at 550. *Strengthening of Procedure in the Judicial System, Report of the Attorney-General on Bankruptcy Law and Practice*, 72d Congress, 1st Sess., Senate, Document No. 65 (February 24, 1932) at 58. Other organizations also contributed to the cause in a more general way. The American Bar Association was founded in 1878 and its founding charter of 1878 included a clause which referred to advancing uniformity in legislation. Hall, *The Magic Mirror*, *supra* note 58 at 208; Friedman, *The History of American Law*, *supra* note 25 at 550.

<sup>151</sup> See eg, Balleisen, “Vulture Capitalism”, *supra* note 39; Balleisen, *Navigating Failure*, *supra* note 39 at 23-26, 34; S. Sandage, *Deadbeats, Drunkards, and Dreamers: A Cultural History of Failure in America 1819-1893* (Ph.D. diss., Rutgers University, 1995) at 28 [hereinafter Sandage, *Cultural History of Failure in America*]; Ciment, *Failure in New York City*, *supra* note 125.

<sup>152</sup> Sandage, *ibid.* at 27-28.

<sup>153</sup> Balleisen, “Vulture Capitalism”, *supra* note 39 at 475; Balleisen, *Navigating Failure*, *supra* note 39 at 26.



agencies, which Coleman signals as an important factor in the depersonalization of credit, emerged during the 1840s. By the 1850s business became increasingly tied to the corporate form.<sup>154</sup>

Despite these major economic changes during the first half of the nineteenth century, a permanent solution was not established until the end of the century. The erratic pattern of national bankruptcy legislation did not match early indications of a shift to a more modern economy and contrasts with the more evolutionary response to structural changes in other areas of commercial law.<sup>155</sup> Either there was insufficient economic growth and the lack of a true national economy to support a federal law until 1898 or there were other impediments to reform.

It might be argued that there was not sufficient economic change across the country to support a national law until later in the century. Some areas of the country, for example, would have been beyond the reach of the market changes and likely continued to trade on the more traditional ethic of personal exchange.<sup>156</sup> One historian points out

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<sup>154</sup> Ciment, *Failure in New York City*, *supra* note 125 at 21-116. Ciment concludes that during the antebellum years, the financial community had expanded to the point that it was "impossible for the kind of personal, face to face encounters typical of the 18th century" at 185. Further, see Bruce Mann's detailed study of pre-revolutionary Connecticut which illustrates the growing formalization of credit relationships signified by the decline of the more personal book debt relationship and the growth of formal written debt instruments. Mann acknowledges that this did not mean the end of impersonal transactions but suggests that a dual approach be adopted. "It is important to emphasize the juxtaposition of multilayered and instrumental relations rather than a dichotomous succession from one to the other." Book debts shared the stage with more formal debt relationships. B. Mann, *Neighbours and Strangers Law and Community in Early Connecticut* (Chapel Hill: UNC Press, 1987) at 10-46. See in particular his discussion of dual developments at p.41. See also See B. Mann, "Law, Legalism and Community Before the American Revolution" (1986) 84 Mich. L. Rev. 1415.

<sup>155</sup> Ciment argues that the erratic trajectory of commercial law contrasted with legislative and judicial developments in tort, negligence and contract "which were moving consistently in the direction of promoting rapid economic development". Ciment, *ibid.* at 186, 266.

<sup>156</sup> Balleisen, *Navigating Failure*, *supra* note 39 at 181. Coleman does acknowledge that traditional attitudes or respectability remained in smaller petty transactions. In particular he suggests these attitudes survived in localized transactions involving petty retailing, customized crafts, and farming. These groups tended to cling to older attitudes. Coleman, *Debtors and Creditors in America*, *supra* note 6 at 284. Among the working class, families still extended loans to kin. See E. Rotella & G. Alter, "Working Class Debt in the Late Nineteenth Century United States" (1993) 18 J. Fam. Hist. 111 at 112.

that even as late as the 1860s “a dual economy existed in which local and national market relations coincided”. Economic development spread unevenly across different regions and industries.<sup>157</sup>

Additionally it might be argued that the older notions of personal responsibility continued to influence urban areas that had embraced the new credit markets. Historians of the “‘market revolution’ have found that the diffusion and maturation of a market economy was a complex, uneven process that generated ambivalence and resistance”.<sup>158</sup> Older norms of pre-market culture and the moral obligation to repay debts did not disappear overnight as many resisted the advance of market values. For example, rather than viewing the emergence of credit reporting agencies as evidence of a new impersonal economy, Sandage argues that credit reports were more than just balance sheets and contained vast amounts of information relating to the character of the debtor. The moral judgments found in credit reports were attempts by the agencies to preserve “the conventions of doing face-to-face business in an increasingly long distance economy”. The agencies sought to “create an imagined community of national commerce that would re-inforce connections between character and financial success”. This continued influence of older norms suggests that moral obligation may have been an obstacle to bankruptcy law reform in the antebellum period and beyond.<sup>159</sup>

While economic explanations can account for the emergence of a national law at the end of the century, the factors which signify the emergence of a more modern national economy began to emerge well before 1898. This suggests that there may have

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<sup>157</sup> Freyer, *Constitutional Conflict in Antebellum America*, *supra* note 123 at 9. The persistence of local markets perpetuated in some areas of the country, what Tony Freyer has called, “associational” market relations. See pp 11, 39.

<sup>158</sup> Goodman, “The Emergence of the Homestead Exemption”, *supra* note 64 at 473.

<sup>159</sup> However, one should not ignore the role of these reports in the wider, more national market economy. While the goal of credit reports was to give confidence to the creditor “equivalent to a personal acquaintance” Sandage acknowledges that the promise was not to re-capture a “lost world of trust and community”. Rather, it was an attempt to “project those values onto the larger, more profitable venue of a national market”. Credit agencies were part of the new market and sought to “commodify” character through reports which could be bought and sold on the open market to facilitate future extensions of credit. Sandage, *Cultural History of Failure in America*, *supra* note 151 at 85-87; 272-289.

been other impediments to the implementation of a lasting national bankruptcy law. Economic change therefore is not a complete explanation and must be considered in light of other institutional factors which impeded reform.

#### *D Institutional Factors*

Institutions are a significant factor in determining bankruptcy policy. Initial institutional structures "constrained people's choices" and affected the methods by which national bankruptcy reform was achieved at the end of the century. For example, federalism and constitutional litigation impeded reform. In addition, the legislative system was also relevant as demands for bankruptcy legislation had to be channelled through a bicameral legislature which was often politically divided.<sup>160</sup> However, before examining these specific institutional factors it is first important to consider another element that constrained or limited policy choices.<sup>161</sup> In many ways, English bankruptcy law defined the debate over bankruptcy law before the middle of the century.

#### 1 The Lasting Impact of English Bankruptcy Law

Some modern studies argue that the United States has always shown a greater concern for the debtor while English bankruptcy law has historically been based on the concerns of creditors.<sup>162</sup> It is all too easy to point to current legislative differences between American and English bankruptcy law<sup>163</sup> and suggest that the variances can be

<sup>160</sup> See Hansen, *The Origins of Bankruptcy Law*, *supra* note 3 at 150. Hansen explicitly adopts an institutional approach in his analysis of U.S. Bankruptcy law. However, his thesis does not discuss in detail the constitutional litigation, nor does he address the issue of impact of English law as a constraint on reform. Other sources, while acknowledging the impact of federalism do so outside any form of institutional analysis. I rely on other secondary literature to illustrate the impact of federalism and English law.

<sup>161</sup> On the influence of past policy choices and policy inheritances, see R.K. Weaver & B.A. Rockman, "Assessing the Effects of Institutions" in Weaver & Rockman, *Do Institutions Matter?*, *supra* note 3 at 36.

<sup>162</sup> Joslin "Bankruptcy: Anglo-American Contrasts", *supra* note 91; Aminoff, "The Development of American and English Bankruptcy Legislation", *supra* note 139; Honsberger, "Bankruptcy: A Comparison of the Systems", *supra* note 91 at 133; Flint, "Bankruptcy Policy", *supra* note 40 at 524-5.

<sup>163</sup> Wood's survey of modern legislation concludes that the United States legislation is more pro-debtor than English law. P. Wood, *Principles of International Insolvency Law* (London: Sweet & Maxwell, 1995) at 8.

supported throughout history.<sup>164</sup> However, one must examine the historical record to determine whether concerns for the debtor predominated throughout American history. As illustrated by the legislative history, English bankruptcy law influenced early American legislation and must be seen as an important element in influencing legal change.

The United States looked to England as a model for its first bankruptcy law and the colonial experience does not suggest a wide acceptance of liberal bankruptcy laws. In fact, Americans debating bankruptcy law at the end of the eighteenth century borrowed extensively from the English bankruptcy law:

Federalists and Jeffersonians did not create the positions they took on the bankruptcy question. Both sides drew extensively upon pre-existing beliefs and arguments to support their respective stances. The Jeffersonians appealed to English and American insolvency law precedents while ignoring or criticising England's bankruptcy system. The Federalists, meanwhile, relied heavily on contemporary English bankruptcy law in formulating their own arguments and legislation. This second factor ultimately proved even more influential than party hostility in shaping the course and content of early bankruptcy debates.<sup>165</sup>

Federalists invoked the English example, pointing out that bankruptcy laws were "indispensable to aspiring and established commercial countries". Further, several hundred years of English bankruptcy law provided a powerful precedent. Federalists

<sup>164</sup> E.g., one author suggests that the central justification for the discharge is "founded on a natural law theory of morality". The moral approach, which emphasizes human dignity, "is closely associated with the actual historical development of debtor's protection in this country and with the fundamental precepts underlying the formation of our nation". Flint, "Bankruptcy Policy", *supra* note 40 at 524-5. Compare Olmstead who argues that the discharge was only an incidental policy of bankruptcy and that its main features were distribution and administration. See Olmstead, "The Development of Bankruptcy Law", *supra* note 82.

<sup>165</sup> Mathews, *Forgive Us Our Debts*, *supra* note 8 at 105. Mathews concludes after reviewing the debate over the legislation in the 1790s that "neither Federalists nor Jeffersonians created the positions they took on the bankruptcy question. Rather they co-opted older assumptions and traditions that proved remarkably compatible with their own distinctive belief systems". Bradshaw concludes that Congress did not draft bankruptcy legislation "upon a clean slate". Legislation would be judged against "pre-conceived notions" of the form it should take based upon earlier English and colonial efforts. Bradshaw, "The Role of Politics and Economics", *supra* note 9 at 740.

appealed to the fact that bankruptcy law, while setting aside creditors' rights, actually enhanced creditors' interests "as a whole", forcing a distribution to all creditors "without favouritism". Federalists appealed to the English experience because of the "lack of indigenous precedents". Few colonies had enacted bankruptcy laws, thus forcing Federalists to "imitate contemporary English law". Jeffersonians also made reference to the English model. However, they argued that it was not acceptable to the circumstances of the United States. The United States, they argued, was an agrarian nation. A statute which created an artificial distinction between merchants or traders and others was not suitable to a country where occupations were not sharply defined. Further, Jeffersonians referred to the English model and argued that bankruptcy laws breached "sacred contract obligations".<sup>166</sup> In many ways therefore, English bankruptcy law defined the terms of the debate.<sup>167</sup>

Despite some of the early colonial laws on the subject which allowed voluntary procedures and applied to a broad class of debtors, advocates of a national bankruptcy act sought an English law. Colonists were heavily dependent on English trade and therefore "wanted the compatible, creditor orientated 'English style' system, whereby miscreant merchants and traders could be punished if they broke the rules". The Act of 1800

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<sup>166</sup> Mathews, *ibid.* at 108-111. See also Olmstead who notes that the origins of the actual bankruptcy clause in the constitution were possibly influenced by England. He notes that the Pickneys and Rutledge of South Carolina were the fathers of the bankruptcy clause. Both were trained in England at the Temple. See Olmstead, "The Development of Bankruptcy Law", *supra* note 82.

<sup>167</sup> Mathews, *ibid.* at 135-137. However, Mathews argues that eventually, the English model as a precedent became more of a liability than a strong foundation. While the English legislation shaped the scope of the debate, transplanting a well established model to an emerging nation created difficulties. According to Mathews, English bankruptcy law rested on a firm ideological consensus based on mercantilism. Bankruptcy law existed in England to benefit the merchant class and was limited to traders. Once transplanted to the United States, the ideological consensus was removed. Americans remained deeply divided over whether to have a bankruptcy law. Further the artificial trader distinction was inappropriate in the emerging nation's structure of "fluid and inexact occupational structure".

“mirrored” the English bankruptcy legislation which “exerted a strong influence on early American legislators”.<sup>168</sup>

The English trader rule, which was incorporated into American legislation, specifically affected the tenor of the debates in the United States. Historically, the trader rule in England provided that only traders were eligible for bankruptcy proceedings. In 1800, the inclusion of the English rule meant that “of the numerous trades and activities that contributed to the national economy ... only a select handful could receive a discharge”. The distinction “created resentment” and in part explains why it was repealed in 1803.<sup>169</sup> Federal bankruptcy Bills presented to Congress up until 1820 all incorporated some form of trader rule. During the 1820s, Congress began to debate whether to remove the trader restriction. Advocates of national legislation therefore split into two factions. Some favoured a bankruptcy law open to all debtors while others sought to retain the traditional English restriction. The split over the merchant clause was one of the factors that led to the defeat of three federal Bills between 1821 and 1827. Thus, “arguments for and against a bankruptcy law were ... conducted in a limited framework”.<sup>170</sup> English law also had a further impact as many believed Congress, as a matter of constitutional law,<sup>171</sup> had to follow English precedent.<sup>172</sup>

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<sup>168</sup> Duncan, “From Dismemberment to Discharge”, *supra* note 13 at 216-218; Shelton, “Bankruptcy Law, Its History and Purpose”, *supra* note 4 at 399.

<sup>169</sup> Bradshaw, “The Role of Politics and Economics”, *supra* note 9 at 753.

<sup>170</sup> Mathews, *Forgive Us Our Debts*, *supra* note 8 at 147, 171-175. See also Beesley, *The Politics of Bankruptcy*, *supra* note 27 at 20-25.

<sup>171</sup> This was based upon the premise that the founders drafted the bankruptcy clause with the view to the existing state of English bankruptcy law which only applied to traders and allowed only involuntary proceedings. For a discussion of this argument, see S. Williston, “The Effect of a National Bankruptcy Law Upon State Laws” (1909) 22 Harv. L. Rev. 547 and Plank, “The Constitutional Limits of Bankruptcy”, *supra* note 9 at 537-539.

<sup>172</sup> Aside from constitutional law, English law had a more general impact on American bankruptcy jurisprudence. On the role of English authority on the definition of insolvency and preferences in the decision of *Toof v. Martin* 80 U.S. 40 (1871), see J. McCoid, “The Occasion for Involuntary Bankruptcy” (1987) 61 Am. Bankr. L.J. 195. The decision split the commercial and agricultural communities. The unpopular decision was used as a way of attacking the Act generally, including a call for repeal of the 1873

## 2 The Constitution

The institutional structure of the federal constitution played an important part in the history of American bankruptcy law.<sup>173</sup> It is important to acknowledge the importance of the constitutional struggle and examine how the interpretation of bankruptcy clause changed over time. However, perhaps what is more significant is to identify how the constitution affected both the substance of the law and the timing of various legislative initiatives. Bankruptcy law was not just debated on its merits, but the subject became entwined in constitutional conflict both in terms of the relevance of English law and in relation to the ambit of state powers.

The very structure of federalism ensured that federal attempts to enact legislation would be challenged on the basis of interference with local control. Tony Freyer's recent work argues that "constitutional principles shaped the rules governing credit" and sustained what he calls "associational market relations". Interpersonal bonds that governed credit relationships were stronger in local markets. The "locally orientated associational economy was at odds with the demands of big corporate and mercantile enterprises tied more directly into the national market". Local producers turned for protection to "local governmental institutions and the constitutional values they represented".

In contrast to the highly centralized regimes of England and Europe, Americans "tenaciously adhered to a belief in local control". In England, national business interests governed English policy ensuring that bankruptcy law favoured national creditors. In the United States the federal system facilitated local control and "made it impossible for the

Act by the President in 1873. However, *Toof* rejected the English rule of intention base preferences. See discussion in Weisberg, "Commercial Morality", *supra* note 7 at 81-82 and Glenn, "The Diversities of the Preferential Transfer", *supra* note 21 at 537. English authorities are critically examined in *Re George W. Hall* 4 Amer. Bankr. Rep. 671 (W.D. N.Y. 1900).

<sup>173</sup> One author has likened the bankruptcy clause of the United States constitution to a cloak which was designed to "protect the bitter winds of misfortune and the cruel assaults of his creditor". While the cloak was to be of uniform application, "neither pattern or material was specified" leading to constitutional uncertainty and conflict. Noel, *A History of the Bankruptcy Clause*, *supra* note 7 at 8. Charles Warren also notes the importance of the constitution in the history of bankruptcy law. In Warren's view the bankruptcy clause evolved as the needs and interests of the Nation changed. Warren, *Bankruptcy in United States History*, *supra* note 6 at 8-9.

United States to follow the English example". It was in response to the problem of local control that national merchants pushed for a federal law. The fact that their efforts failed during the antebellum period, was "a measure of the strength of the locally orientated associational economy". Localism "helped defeat federal legislation". Opponents of a federal law opposed "subjecting the administration of debtor-creditor relations to centralized authority". Resort to the federal judiciary, "like the unitary administrative process that existed in England" discouraged local voluntary settlements between debtors and creditors. A centralized federal bankruptcy system "threatened the constitutional ideal of limited public and private power".<sup>174</sup>

If federalism from a more general perspective weakened the efforts of supporters of a national law, constitutional litigation also impeded reform and affected how Americans defined bankruptcy law. The constitutional arguments over the validity of state bankruptcy legislation eventually led to a reformulation of how one defined bankruptcy law, opening the door to a bankruptcy law that encompassed all types of debtors. Article I, section 8 gives Congress the authority to "establish uniform laws on the subject of Bankruptcies throughout the United States". The first U.S. Bankruptcy Act of 1800 mirrored English legislation "due to the largely erroneous belief that the Congress was restricted to conformity with the only well-defined system with which it was familiar".<sup>175</sup> Many argued that the Congressional power was limited to passing a law modelled on "the English bankruptcy system as the Constitution's framers and ratifiers knew it". Therefore the jurisdiction of Congress, according to this theory, only extended to legislation that was involuntary and restricted to traders. Voluntary

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<sup>174</sup> Freyer, *Constitutional Conflict in Antebellum America*, *supra* note 123 at 9, 11, 21, 38, 85-87.

<sup>175</sup> Noel, *A History of the Bankruptcy Clause*, *supra* note 7 at 124. See also Tabb, "The Historical Evolution of the Bankruptcy Discharge", *supra* note 17 at 345, "Indeed it was a commonly held view at the time that the English law extant at the time of the adoption of the Constitution defined the outer limits of permissible bankruptcy legislation." See also Frimet, "The Birth of Bankruptcy in the United States", *supra* note 13 at 165; "The strict constructionists in the United States maintained that the word 'bankruptcy' as used in the constitutional grant to Congress should be limited in meaning to the narrow English sense." W. Dunscomb, "Bankruptcy: A Study in Comparative Legislation" in *Studies in History Economics and Public Law* Vol 11 Number 2 (Columbia, New York 1893) at 140.



proceedings and legislation that provided a discharge for all types of debtors, it was argued, was beyond the competence of the federal government.<sup>176</sup> This view “broke down only gradually in the nineteenth century”.<sup>177</sup>

Two state bankruptcy laws enacted in the early nineteenth century in New York and Pennsylvania did not adopt the English model of an involuntary regime that was restricted to traders. As these state laws came under attack for violating the constitutionality of the bankruptcy clause and impairing contracts, attention focused on whether or not these were true bankruptcy laws as they were not limited to traders. In *Sturges v Crowninshield*<sup>178</sup> lawyers arguing in favour of the law’s validity stated that the New York legislation was not a bankruptcy law as it did not limit its application to traders. Lawyers in opposition argued that the legislation was a bankruptcy law as it discharged debts. While this specific point was not decided in *Sturges*, the decision in *Ogden v Saunders*<sup>179</sup> upheld the validity of a New York law which discharged debts. Thus the Supreme Court had transformed the definition of a bankruptcy law. The decision:

effectively severed prospective legislation from the economic and legal precedents of the past. The old assumption that bankruptcy law only applied to those in the business of buying and selling was cast aside. So was the belief that true bankruptcy laws operated only involuntarily upon the bankrupt. A new definition of bankruptcy law was born: Any law that discharged debts and forced creditors to accept a proportionate dividend of the debtor’s remaining property was a bankruptcy law.<sup>180</sup>

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<sup>176</sup> Balleisen, *Navigating Failure*, *supra* note 39 at 188.

<sup>177</sup> Tabb, “The Historical Evolution of the Bankruptcy Discharge”, *supra* note 17 at 345.

<sup>178</sup> 4 Wheat. 122 (1819) discussed *infra*.

<sup>179</sup> 12 Wheat. 213 (1827) discussed *infra*.

<sup>180</sup> Mathews, *Forgive Us Our Debts*, *supra* note 8 at 159, 163-164, 227. The United States in 1841 was free to adopt a new model of bankruptcy law which was voluntary and was not limited to traders. On the evolution of voluntary proceedings in the United States, see McCoid, “The Origins of Voluntary Bankruptcy”, *supra* note 9. McCoid suggests that Marshall’s dicta in *Sturges*, which seemed to indicate that Congress could authorize voluntary proceedings, planted the seed (at 379-381). Frimet argues that “the real work of the Bankruptcy Act of 1841 was done, however, before its repeal”. Frimet points out that as voluntary bankruptcy had never been tested by the Supreme Court on constitutional grounds, it could

While *Ogden* may have helped in throwing off the restrictions of the English model,<sup>181</sup> it also had the effect of delaying the need for a federal act. The Supreme Court in *Ogden* further “facilitated seven decades” of experimentation in state legislation by ruling “that state insolvency laws remained in effect during periods when there was no federal bankruptcy legislation”.<sup>182</sup> The sanctioning of state action in the bankruptcy field “severely hindered efforts to create a federal law”. The immediate impact “was to diminish the chances of producing a viable national act by opening up new possibilities on the state level”.<sup>183</sup> The decision confirmed the belief of the opponents of national bankruptcy legislation that state laws were “sufficient to deal with the relations of debtor and creditor, and that there was no need of an exertion of a National power”.<sup>184</sup> Constitutional disputes therefore impeded federal reform.<sup>185</sup>

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survive and influence the direction in 1867. Frimet, “The Birth of Bankruptcy in the United States”, *supra* note 13 at 180.

<sup>181</sup> However, some continued to believe that Congress was restricted to enacting involuntary legislation. In 1842, one Missouri judge declared the Act of 1841 unconstitutional. The decision was overturned on appeal. See *Re Klein* 14 F.C. 716 (C.D.D. Mo 1843) which upheld the validity of the 1841 Act. However, the appeal was not decided until after the Act of 1841 was repealed thus denying residents of Missouri access to the Act of 1841. See Balleisen, *Navigating Failure*, *supra* note 39 at 206-7; Plank, “The Constitutional Limits of Bankruptcy”, *supra* note 9 at 538 and Beesely, *Politics of Bankruptcy 1837-45* at 128-131.

<sup>182</sup> Boshkoff, “Limited, Conditional and Suspended Discharges”, *supra* note 86 at 111. Warren similarly concludes that the impact of *Ogden* strengthened opponents of a national Act. See Warren, *Bankruptcy in United States History*, *supra* note 6 at 51. “Naturally, this decision struck a major blow to those who sought to have a national bankruptcy law as it bolstered the argument that the states should govern this area themselves.” Frimet, “The Birth of Bankruptcy in the United States”, *supra* note 13 at 174. See also Duncan, “From Dismemberment to Discharge”, *supra* note 13 at 219-220.

<sup>183</sup> Mathews, *Forgive Us Our Debts*, *supra* note 8 at 179-180.

<sup>184</sup> Warren, *Bankruptcy in United States History*, *supra* note 6 at 51.

<sup>185</sup> See also Balleisen, *Navigating Failure*, *supra* note 39 at 188; Balleisen, “Vulture Capitalism”, *supra* note 39 at 478.

The upholding of the validity of state legislation earlier in the century affected the ultimate form of the legislation in late nineteenth century and explains why the 1898 legislation broke from English tradition by abandoning the conditional discharge. While the weakness of diverse state laws ultimately provided an impetus for a national act,<sup>186</sup> one author speculates that if state laws had been invalidated by the Supreme Court the history of American bankruptcy law would have been very different. A national bankruptcy act, passed early in the nineteenth century on the heels of a decision invalidating state laws, would have been passed before “the development of a powerful alliance between debtors and sectional interests”. Because American history unfolded as it did, Congress was in 1898:

free to consider another objective for bankruptcy proceedings--the return of the honest debtor to productive society, free of the continuing control of both the bankruptcy court and creditors. Earlier in the nineteenth century, this country might well not have been ready to ignore the possibility of using bankruptcy as a collection device.<sup>187</sup>

The American discharge, therefore, abandoned the connection between payment to creditors and the release of debts.<sup>188</sup> Further, by the turn of the century there was no

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<sup>186</sup> *Ogden* did not open the door very widely for state intervention. The actual decision prohibited states from enacting legislation which discharged pre-existing debts. Further, state laws could not discharge out of state debts. These limitations, Matthews argues, in the long run revived the need for a national Act. It is likely that the flaws in the limitations in state powers were not immediately recognisable and only after the lapse of time or further financial panics did the need for national legislation become apparent. See Matthews, *Forgive Us Our Debts*, *supra* note 8 at 187-188 Seidman, “Development of Bankruptcy Legislation”, *supra* note 1 at 29; Hallinan, “‘The Fresh Start’ Policy”, *supra* note 146 at 59; Shaiman, “The History of Imprisonment”, *supra* note 10 at 225. Coleman notes that there was not an immediate rush by the states to legislate. Within states, the same sectional battles at play on the national front played themselves out within state borders, pitting rural against urban. See Coleman, *Debtors and Creditors in America*, *supra* note 6 at 34-36.

<sup>187</sup> Boshkoff, “Limited, Conditional and Suspended Discharges”, *supra* note 86 at 111.

<sup>188</sup> Boshkoff argues that at the end of the nineteenth century, the expanding western frontier led to a “sectionalism that favoured Debtor interests”. This sectionalism forced a Congressional compromise between creditor and debtor interests. Those seeking a permanent national Act did not have the votes and “were willing to yield to debtors the right to institute voluntary proceedings and to abandon the conditional discharge rules”. The break from English tradition was made in 1898 “without the slightest expression of regret”. Boshkoff, “Limited, Conditional and Suspended Discharges”, *supra* note 86 at 110. See also 112.

longer any constitutional uncertainty as to the scope of the federal power.<sup>189</sup> Federalism therefore affected the timing and substance of American bankruptcy law.

### 3 Bicameralism

Political structure was also an institutional factor which inhibited reform. The extent to which the authority of the government is unified or fragmented is a crucial factor. Not only is it significant to consider how power is divided between the central and state governments but it is also relevant to consider whether powers are unified within a level of government.<sup>190</sup>

The bicameral legislature had a significant impact on the timing of bankruptcy legislation in the last part of the nineteenth century. Demand for a national bankruptcy law arose immediately after Congress repealed the federal law in 1878. During the 1880s and 1890s, Congress debated numerous reform Bills but no law was enacted until 1898. The near twenty year delay can be attributed to the fact that political control of the two chambers of Congress was split between the Republicans and Democrats for most of the 1880s and 1890s. Each of the parties supported bankruptcy law during the 1880s and 1890s but each sought a different form of legislation. The Democrats were unwilling to accept a Bill with involuntary bankruptcy while the Republicans found a purely voluntary Bill unacceptable. An analysis of the voting records in a recent study shows that throughout the 1880s and 1890s votes split along party lines. The near twenty year delay in adopting a national act at the end of the century "arose out of the inability to find a

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<sup>189</sup> Hallinan argues that the lack of Congressional activity on bankruptcy law prior to 1898 "deferred any authoritative judicial pronouncement on the constitutional scope of 'bankruptcy' until the beginning of the twentieth century. By that time, the expansion of the term to include debtor relief measures had been so often stated, and concepts of federalism had so radically changed, that the correctness of the expansive view could be affirmed by the Supreme Court as 'really not open for discussion.'" Hallinan, "'The Fresh Start' Policy", *supra* note 146 at 60. The United States Supreme Court upheld the validity of the Act of 1898 in *Hanover Nat'l Bank v Moyses* 186 U.S. 181 (1902). In 1874 it previously had upheld the validity of the 1874 composition amendments. See *In re Reiman* 20 F.C. 490 (S.D.N.Y. 1874). Plank, "The Constitutional Limits of Bankruptcy", *supra* note 9 at 539.

<sup>190</sup> On the importance of political structure, see Robertson, "History, Behaviouralism, and the Return to Institutionalism", *supra* note 3 at 137.

bipartisan compromise and the split in partisan control of the two chambers of Congress.<sup>191</sup>

### Conclusion

The achievement of a lasting national bankruptcy law in 1898 ended a near century of failed reform efforts. The earlier Acts of 1800, 1841 and 1867 had all been repealed shortly after their enactment. State laws continued to govern debtor creditor relationships during the long absences of a national bankruptcy law. The establishment of a national law in 1898 was not a gradual evolution as reform throughout the century oscillated between creditor and debtor orientated acts. The cycle of national legislation followed by repeal provides a contrast with the English experience where bankruptcy laws were continuously in place. Several studies have attempted to account for the failure of American bankruptcy legislation throughout the nineteenth century and have offered a number of different explanations.

Historians have emphasized the deep division in values that the bankruptcy law debate represented. Rural values, which emphasized the importance of personal responsibility and trust, competed against notions of material progress and rapid economic expansion. These ideals found representation in various political parties throughout the nineteenth century. Bankruptcy law, however, was not a disinterested debate about values. Expressions of support or opposition to bankruptcy law, while couched in terms of larger values, concealed underlying interests advocating reform or repeal.

Therefore a more complete explanation of the evolution of American bankruptcy law examines the particular interests affected by repeal. Bankruptcy law divided local and distant creditors. Creditors who extended credit over distances sought a national law that distributed the debtor's assets on a pro rata basis and prohibited preferences. National bankruptcy legislation destroyed local creditor advantage. This tension between local and distant creditors took place within the context of a modernizing economy and several authors have emphasized the importance of economic change as an explanation for the emergence of a national act at the end of the century. The depersonalization of

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<sup>191</sup> Hansen, *The Origins of Bankruptcy Law*, *supra* note 3 at 6, 19-21, 135-142.

credit relationships, the growth of corporations and interstate trade, and the rise of national organizations committed to reform all contributed to the emergence of the legislation in the late nineteenth century.

The rise and fall of local and distant or national creditors can be linked, therefore, to the changing nature of the economy. The maturation of American capitalism theory, however, does not explain why legislation did not emerge earlier when many of the economic factors, which are alleged to have contributed to success in 1898, were already present before the end of the century in many areas of the country. A more complete explanation therefore must take into account possible impediments or constraints on reform. Institutional factors such as federalism played a significant role in the history of bankruptcy legislation. The Supreme Court decision of *Ogden v. Saunders* in 1827 relieved the immediate need for a national Act as it reinforced the belief that state legislation was adequate to deal with debtors.

The study of the American historical literature reveals a number of themes that will be important for the study of Canadian bankruptcy law and assists in answering the question of why Canada abandoned the field of bankruptcy law for nearly forty years. The role of ideas, the clash between local and distant creditors, the changing nature of the economy and federalism all provide areas of inquiry for the Canadian study. For example, if one accepts that the United States achieved national legislation in 1898 due to the advanced state of its national economy, an inquiry must be made about the nature of the Canadian economy at the end of the nineteenth century.

Further, in the United States the growth of a national economy led to the formation of new commercial organizations which lobbied for legislative change at the end of the nineteenth century. It will be significant to identify when similar interest groups emerged in Canada and whether Canada's delay in enacting legislation until 1919 can be linked to the later emergence of similar national interest groups.

Political and constitutional institutions are also relevant. The stronger institutional point of comparison is the shared federal constitutional system. The division of powers and the similar legislative pattern of national legislation followed by repeal and the enactment of local laws suggests that Canadian federalism is an important element in the history of Canadian bankruptcy legislation. The themes raised in the American literature

are therefore useful in alerting the legal historian to similar issues in Canada. However, the history of Canadian bankruptcy law followed its own path, and some unique Canadian features need to be developed.

## CHAPTER 4

### **The Evolution of Bankruptcy Law in Pre-Confederation Canada**

On 7 November 1867, the Canadian federal government announced its intention to pass bankruptcy legislation for the new Dominion. Three days later, over cries of the opposition, the government appointed a committee to "inquire into and report upon the nature and operation of laws of bankruptcy now in force in the several Provinces of the Dominion".<sup>1</sup> Before examining post-Confederation bankruptcy legislation, it is important to study the findings of the committee and review the state of bankruptcy law enacted before 1867. This survey of pre-Confederation law, based on the committee's report<sup>2</sup> and a review of secondary literature and select primary sources,<sup>3</sup> will demonstrate that bankruptcy law was just as controversial before 1867 as it was afterwards. Part I of this chapter, which surveys the legislative history, illustrates that from the Maritimes to Vancouver Island there was little consensus on the subject.

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<sup>1</sup> *House of Commons Debates* (7 November 1867) at 2; *House of Commons Debates* (10 November 1867) at 87-88.

<sup>2</sup> Canada, House of Commons, Select Committee, "Third Report of the Select Committee on Bankruptcy and Insolvency" in *House of Commons Journals* (17 April 1868). Also reported in (1868) L.C.L.J. 46 & 62. [hereinafter "Bankruptcy Select Committee 1868"].

<sup>3</sup> There is no one study devoted to the history of bankruptcy law in pre-Confederation Canada. However, overviews of the legislative history can be found in the following secondary sources: Lewis Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) [hereinafter Duncan, *Bankruptcy in Canada*]; A. Bohémier, *La Faillite en Droit Constitutionnel Canadien* (Montréal: Les Presses de L'Université de Montréal, 1972) [hereinafter Bohémier *Droit Constitutionnel*]; A. Bohémier, *Faillite et Insolvabilité*, tome 1, (Montréal: Editions Thémis, 1992) [hereinafter Bohémier, *Faillite*]. There are however regional studies on Quebec, Ontario, Nova Scotia and British Columbia which are discussed below. This overview has been limited to a review of these and other secondary sources as well as a select group of primary sources. These include references located in treatises on the *Insolvent Act of 1864* as well as articles in nineteenth century law journals. See J. D. Edgar, *The Insolvent Act of 1864 with Tariff, Notes, Forms* (Toronto: Rollo & Adam Law Publishers, 1864) [hereinafter Edgar, *The Insolvent Act of 1864*]; J.J.C. Abbot, *The Insolvent Act of 1864 with Notes together with the Rules of Practice* (Quebec: Desbarats & Cameron, 1864) [hereinafter Abbott, *The Insolvent Act of 1864*].



The Maritime legislatures never passed any bankruptcy laws and the only major bankruptcy statutes enacted prior to 1867 were the Lower Canadian Bankruptcy Act of 1839 and the Province of Canada Acts of 1843 and 1864.<sup>4</sup> This latter Act was influential in shaping the direction of post-Confederation bankruptcy statutes. The 1864 Act did not mark the widespread acceptance of bankruptcy law throughout the United Province of Canada as there were calls for its repeal shortly after it came into force. Further it did not apply equally as between Canada West and Canada East. While voluntary proceedings were available to all types of debtors in Canada West, in Canada East only traders could take advantage of its provisions.

The absence of widespread bankruptcy laws parallels the earlier experience of the American colonies. Bankruptcy statutes in American colonies were short-lived and not all colonies adopted such a measure. Further, the pre-Confederation period coincides with the failure of the American federal bankruptcy statutes of 1800 and 1843. While English statutes provided the basis for the pre-Confederation bankruptcy laws, there was no determination to ensure that the Canadian provinces matched the English progression of continuous bankruptcy reforms of the nineteenth century. Constitutional change in pre-Confederation Canada was a more significant influence in prompting changes to provincial bankruptcy legislation than English statutory reform. Part I examines the legislative and constitutional history of the period.

Part II analyses in more detail the nature of the debate and attempts to account for the lack of support for general bankruptcy statutes. The debate focussed on the two central goals of bankruptcy law: the discharge and the equitable distribution of the debtors' assets. Opponents of the discharge relied on moral arguments. The equating of debt with moral blameworthiness had great appeal in a rural society where debt relations were of a personal nature. If the discharge challenged the fundamental obligation to repay debts, the equitable distribution of the debtor's assets and the prohibition against

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<sup>4</sup> Canada, House of Commons, Select Committee, "Third Report of the Select Committee on Bankruptcy and Insolvency" in *House of Commons Journals* (17 April 1868) at 8. Also reported in (1868) L.C.L.J. 46 & 62. [hereinafter "Bankruptcy Select Committee 1868"].

preferential payments interfered with the traditional ability of debtors to favour local and friendly creditors.

### I Legislative History to 1867

Before considering the legislative history of pre-Confederation bankruptcy legislation, it is important to differentiate between “bankruptcy” and “insolvency” legislation. In addition to considering bankruptcy bills, various legislatures often debated, and sometimes passed legislation known as “insolvency law” to provide relief for the imprisoned debtor. The distinction was based upon English legislation that had, prior to 1861, maintained two separate regimes to deal with debtors.<sup>5</sup> Bankruptcy legislation only applied to traders and offered a debtor the important right of discharge.

Non-traders became dependent on the legislature to enact “insolvency laws” which allowed imprisoned debtors to petition the court for their personal freedom. Insolvency statutes, while providing the debtor with his freedom, did not extinguish the underlying debt.<sup>6</sup> Before Confederation, some provinces enacted both bankruptcy and insolvency statutes.<sup>7</sup> Imprisonment for debt remained an important weapon in the arsenal of creditors’ remedies until the end of the nineteenth century.<sup>8</sup> The provincial legislatures enacted numerous insolvency statutes prior to Confederation and again after 1867, in what one author has called a “melange of overlapping and confusing statute law which proved to be difficult to understand and organize in any comprehensible pattern”.<sup>9</sup>

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<sup>5</sup> See chapter 2.

<sup>6</sup> See e.g., discussion of Upper Canadian insolvency statutes in P. Oliver, *‘Terror to Evil Doers’ Prisons and Punishments in Nineteenth Century Ontario* (Toronto: University of Toronto Press, 1998) at 49, 50, 55-58 [hereinafter Oliver, *Prisons and Punishment*].

<sup>7</sup> Abbott, *The Insolvent Act of 1864*, *supra* note 3 at 15.

<sup>8</sup> C.R.B. Dunlop, *Creditor Debtor Law in Canada*, 2d ed. (Toronto: Carswell, 1995) at 97 [hereinafter Dunlop, *Creditor Debtor Law*]. See also, Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters*, Part 5 (Toronto: Ministry of the Attorney General, 1983) at 84-85.

<sup>9</sup> Dunlop, *ibid.* at 98. After Confederation, between 1875 and 1910, the provinces enacted comprehensive reforms on the issue of imprisonment for debt. Dunlop cites the *Imprisonment for Debt Act*, S.N.S. 1890, c. 17; *Arrest, Imprisonment and Examination of Debtors Act*, S.N.B. 1896, c. 28; *Fraudulent Debtors Arrest Act*, S.O. 1909, c. 50. This survey focuses primarily on bankruptcy statutes.

The issue of reception further complicates the history of pre-Confederation bankruptcy law. The reception of English law depended upon whether or not a territory was "settled" or "conquered". Where a territory was settled, colonists were subject to English common law and Acts of Parliament "relevant to their local circumstances". Where land was acquired through conquest, local laws continued to exist subject to the extent necessary to establish colonial rule.<sup>10</sup> English statute law was received either by judicial recognition or through the specific recognition by local colonial legislatures.<sup>11</sup> The doctrine of reception, as it applied to English bankruptcy statutes, had little effect in pre-Confederation Canada.

It has long been held that Nova Scotia, New Brunswick and Prince Edward Island were settled colonies.<sup>12</sup> A recent study of Nova Scotia illustrates that as the colonial legislature never enacted an omnibus bill declaring English law to apply to the colony, "judicial decision was the primary medium of reception". Reception was a continuing process and the courts determined whether or not an English statute was in force.<sup>13</sup> However, no court was asked to recognize that English bankruptcy laws were introduced upon settlement of the Maritimes or whether "as the population wealth and commerce of the colonies increased such laws were attracted to them".<sup>14</sup>

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<sup>10</sup> This is the reception doctrine in "skeletal form" based upon M. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's L.J. 350 at 359-361. Walters' article, however, provides further details on the rights of British settlers and indigenous peoples. See pp 367-385.

<sup>11</sup> E.G. Brown, "British Statutes in the Emergent Nations of North America" (1963) 7 Am. J. Leg. Hist. 95 at 102. Cote notes that very few colonies, even settled ones, received English law solely under the common law rule of reception. Most received English law through some form of local legislation that specified that the Law of England would apply from a certain date. J.E. Coté, "The Reception of English Law" (1977) 15 Alta. L. Rev. 29.

<sup>12</sup> Duncan, *Bankruptcy in Canada*, *supra* note 3 at 4; Coté, *ibid.*; D.G. Bell, "Maritime Legal Institutions Under the Ancien Régime" (1996) 23 Man. L.J. 103 at 104.

<sup>13</sup> B. Cahill, "'How Far English Laws are in Force Here' Nova Scotia's First Century of Reception Jurisprudence" (1993) 42 U.N.B.L.J. 113 at 150.

<sup>14</sup> Duncan, *Bankruptcy in Canada*, *supra* note 3 at 5. On the general issue of reception and

Further evidence that the Imperial bankruptcy laws did not apply in the Maritimes can be gleaned from the efforts of the Nova Scotia legislature to enact a local bankruptcy statute.<sup>15</sup> Bankruptcy and debtor-creditor bills “appeared constantly between 1825 and 1867”.<sup>16</sup> While all attempts to pass a bankruptcy law failed, Nova Scotia did provide some relief for imprisoned debtors.<sup>17</sup> The first Bankruptcy bill in Nova Scotia was introduced in 1827. The *Frivolous Arrests Bill* applied to traders as well as non-traders and allowed voluntary proceedings. The Bill failed and was followed by another in 1828. The 1828 bill favoured creditors, as a discharge required the approval of four-fifths of the creditors in value. The legislature debated further bills in 1834, 1838 and 1842. All failed to garner sufficient votes. Opponents of bankruptcy legislation drew on the example of the short-lived American Bankruptcy Act of 1841 (which was repealed in 1843) as a reason why the colony should not adopt its own legislation.<sup>18</sup>

In 1854, five commissioners were appointed to draft a bankruptcy law.<sup>19</sup> Their report included a draft bill that provided for the discharge of a debtor and allowed

bankruptcy, see L.J. de la Durantaye, *Traité de la Faillite en la Province de Québec* (Montréal: Chez L’Auteur, 1934) [hereinafter *Traité de Faillite*]. The Select Committee did not comment on the issue of reception. See “Bankruptcy Select Committee 1868”, *supra* note 4 at 9.

<sup>15</sup> This section is largely based upon P. Girard, “Married Women’s Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia 1820-1867” in P. Girard & J. Phillips, eds., *Essays in the History of Canadian Law*, vol. 3, *Nova Scotia* (Toronto: University of Toronto Press, 1990).

<sup>16</sup> *Ibid.* at 93.

<sup>17</sup> *Act for the Relief of Insolvent Debtors* R.S.N.S. 1864, c. 137. The statute permitted an imprisoned debtor to apply for release on the fulfilment of certain conditions. These conditions included the provision of a sworn statement containing a list of assets and debts. The debtor was further required to execute a Deed of Assignment in trust for the benefit of the creditor who initiated the arrest. *Ibid.* at 94-95. See also, P. Girard, “The Maritime Provinces, 1850-1939: Lawyers and Legal Institutions” (1996) 23 *Man. L.J.* 379 at 380. The committee was quite critical of the Act and pointed out its two main shortcomings. The statute did not provide for a general release of debts, or provide any means of distributing the debtor’s assets. “Bankruptcy Select Committee 1868” *supra* note 4 at 9

<sup>18</sup> Girard, “Insolvency Law Reform in Nova Scotia” *supra* note 15 at 97.

<sup>19</sup> Nova Scotia, *The Report of the Undersigned Commissioners Appointed by your Excellency to Prepare an Act on the Subject of Bankruptcy* (Halifax, 1854) at 1. The Bill distinguished between first and second class discharges.

voluntary petitions. The Bill failed in 1855. Subsequent efforts to adopt a bankruptcy law did not succeed. The Nova Scotia legislature debated Bills in 1858, 1861, 1862 and in 1863. With the demise of the 1863 bill, "the advocates of a bankruptcy law finally gave up. The issue never again came before the legislature."<sup>20</sup>

New Brunswick never enacted a bankruptcy law<sup>21</sup> but did pass a statute dealing with confined debtors.<sup>22</sup> Prince Edward Island also enacted a series of insolvency statutes that provided relief for the imprisoned debtor.<sup>23</sup> It appears that Newfoundland, unlike the Maritime provinces, did enact various bankruptcy laws that date back to 1791.<sup>24</sup>

<sup>20</sup> The summary is based upon Girard, "Insolvency Law Reform in Nova Scotia" *supra* note 15 at 97-105.

<sup>21</sup> "Bankruptcy Select Committee 1868", *supra* note 4 at 9.

<sup>22</sup> *Act with Respect to Insolvent Confined Debtors*, R.S.N.B. 1854, c. 124; as am. by S.N.B. 1860, 23 Vic. c. 28 and by S.N.B. 1863, 26 Vic. c. 10. In 1864 a Winding Up Act was also passed. See S.N.B. 1864, 24 Vic. c. 44. See Duncan, *Bankruptcy in Canada*, *supra* note 3 at 5. For an account of imprisoned debtors in New Brunswick, see A.Q. Lodhi, "Debt and Debt Sentences in 19th Century New Brunswick" (Paper presented to Law in History Conference, Carleton University, Ottawa, 8-10 June 1987).

<sup>23</sup> Duncan, *Bankruptcy in Canada*, *supra* note 3 at 5; Durantaye, *Traité de la Faillite*, *supra* note 14 at 21; Prince Edward Island, after Confederation, but before the colony officially joined Canada, passed *An Act for the Relief of Unfortunate Debtors*, S.P.E.I. 1868, 31 Vic. c. 15. One author has characterized this Act as a bankruptcy act. See L. Duncan, "The Operation and Effect of the Bankruptcy Act" (1922) 29 J. Can. Bankers' Ass'n. 502.

<sup>24</sup> See Judicature Act of 1791 and the important amendments on the issue of insolvency in the Judicature Act of 1792. See C. English, "Newfoundland's Early Laws and Legal Institutions: From Fishing Admirals to the Supreme Court of Judicature in 1791-92" (1996) 23 Man. L.J. 55 at 69-70; C. English, "From Fishing Schooner to Colony: The Legal Development of Newfoundland, 1791-1832" in L.A. Knafla & S.W.S. Binnie, eds., *Law Society and the State: Essays in Modern Legal History* (Toronto: University of Toronto Press) 73 at 84. It is beyond the scope of this dissertation to trace the subsequent history of the Judicature Act. For a detailed discussion of the state of insolvency law in 1934, just prior to Newfoundland joining Canada, see C.E. Hunt, "Insolvency Laws of Newfoundland" (1934) 8 J. Nat'l Assoc. Ref. Bankr. 156.

British Columbia originally existed as two separate colonies until they were united in 1866.<sup>25</sup> Vancouver Island and mainland British Columbia were established by settlement<sup>26</sup> and the governor of mainland British Columbia issued a proclamation that marked 1858 as the date of reception of English law into the colony. Evidence that British Columbia received English bankruptcy law in 1858 can be found in an 1865 ordinance to amend the law of bankruptcy and insolvency. The ordinance stated that the laws of bankruptcy and insolvency, then existing, were to continue in force, subject to the new provisions of 1865.<sup>27</sup> Vancouver Island took steps to clarify the reception issue in 1862. The Assembly passed a statute that declared that the bankruptcy and insolvency laws of England should, subject to any local changes, be deemed to be the laws within the colony.<sup>28</sup> After unification, British Columbia took steps to further clarify the reception issue.<sup>29</sup>

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<sup>25</sup> The most relevant regional study which briefly touches on bankruptcy issues is T. Loo, *Making Law, Order, and Authority in British Columbia 1821-1871* (Toronto: University of Toronto Press, 1994) [hereinafter Loo, *Law in British Columbia*]. Vancouver Island was constituted in 1849 and its assembly first met in 1849. British Columbia, the mainland, was constituted in 1858 but no assembly was granted and only the governor was allowed to make law. Duncan, *Bankruptcy in Canada*, *supra* note 3 at 14.

<sup>26</sup> *Ibid.* at 14.

<sup>27</sup> *Ibid.* at 14. The ordinance was entitled, *An Ordinance to Amend the Law Relative to Bankruptcy and Insolvency in British Columbia*. Duncan also notes that in 1871 a statute was passed to exempt cattle from the effects of the bankruptcy and insolvency legislation. Loo indicates that the effect of the 1865 ordinance gave magistrates powers in bankruptcy and insolvency equivalent to those held by the Supreme Court. Further, the ordinance allowed magistrates to grant debtors immediate protection from imprisonment. In 1865, British Columbia also abolished imprisonment for debt. Loo, *Law in British Columbia*, *supra* note 25 at 69, 88; British Columbia Law Reform Commission, *Working Paper No. 21: The Enforcement of Judgments: The Creditors' Relief Act* (Vancouver: Law Reform Commission, undated) at 5; British Columbia Law Reform Commission, *Report on Creditors' Relief Legislation: A New Approach* (Vancouver: Law Reform Commission, 1979) at 6.

<sup>28</sup> Duncan, *Bankruptcy in Canada*, *supra* note 3 at 14. The 1862 Act was entitled, *An Act to Declare the Law Relative to Bankruptcy and Insolvency in Vancouver Island and its Dependencies*. See *Insolvent Act of 1875* s. 149. It appears that this issue required legislative clarification after the ruling by Judge Cameron that pre-1849 English bankruptcy law applied to Vancouver Island. Foster's only citation to this case is a January 1861 Californian newspaper account. See, H. Foster, "British Columbia: Legal Institutions in the Far West, from Contact to 1871" (1996) 23 *Man. L.J.* 293 at 298.

<sup>29</sup> A statute united the two colonies in 1866. It proclaimed that the local laws in force in the separate

Matters of credit and bankruptcy were of extreme importance in pre-Confederation British Columbia. A recent study of court files reveals that the British Columbia Supreme Court devoted 28.9% of its time to bankruptcy matters between 1858 and 1871. This was the single largest portion of the court's time.<sup>30</sup> Further, an analysis of the lower court proceedings in British Columbia indicates that the majority of cases up to 1871 were suits for debts.<sup>31</sup> The nascent mining colony thrived on the extension of credit from merchants. Commentators often blamed the liberal extensions of credit and speculation for downturns in the economy.<sup>32</sup> There is little evidence that bankruptcy was much of an issue in the other western provinces. However, there was some debate as to the date of reception of English law.<sup>33</sup>

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colonies were to continue. However, the new Legislative Council of the united colony passed an ordinance that established 1858 as the date of reception for the entire colony. British Columbia became a province of Canada in 1871. Duncan, *Bankruptcy in Canada*, *supra* note 3 at 14-15; Loo, *Law in British Columbia*, *supra* note 25 at 61. As to the relationship between the reception of English law and the authority of the Hudson Bay Company in the colony, see J. McLaren & H. Foster, "Hard Choices and Sharp Edges: Legal History of British Columbia and the Yukon" in H. Foster & J. McLaren, *Essays in the History of Canadian Law: vol. 3, British Columbia and the Yukon* (Toronto: Osgoode Society for Canadian Legal History, 1995) at 7.

<sup>30</sup> Loo, *ibid.* at 75.

<sup>31</sup> Loo indicates that only 2.5% of the cases in the lower courts were for matters other than the collection of debts. 60.3% of cases related to merchants extending credit for goods or individuals extending credit in the forms of promissory notes. *Ibid.* at 79.

<sup>32</sup> *Ibid.* at 76.

<sup>33</sup> Manitoba, Saskatchewan and Alberta also became provinces of Canada after 1867. In 1874, three years after admission into Canada, the Manitoba legislature passed legislation that specified the reception date as 15 July 1870. In 1888, Parliament specified that the reception date as to matters of federal jurisdiction was also 15 July 1870. The same reception date of 15 July 1870 was also preserved for what later became Alberta and Saskatchewan. See Duncan, *Bankruptcy in Canada*, *supra* note 3 at 12-13. Duncan notes that there was some issue prior to the creation of Manitoba as to when English law was received into the area known as Rupert's Land and Northwestern Territory. Further, while the provincial reception statute did not have the effect of introducing English bankruptcy law, Duncan notes that at least one case did hold that the English Debtor's Act of 1869 did apply. See Duncan, *Bankruptcy in Canada*, *supra* note 3 at 12.

Debate over bankruptcy law also took place in the geographic areas now known as Quebec<sup>34</sup> and Ontario. A study of these regions reveals the importance of constitutional change as a factor affecting legislative reform. The British victory in New France established a military regime from 1759 to 1774. France formally ceded New France to Britain by the Treaty of Paris in 1763. As stated above, the normal rule for conquered territories allowed the law of the acquired territory to continue. However, the Royal Proclamation of 1763 and an ordinance by the first British Governor purported to establish English law in the colony.<sup>35</sup> Nevertheless, it was not exactly clear how much English law applied to the colony. Legal commentators on both sides of the Atlantic were at odds on the issue.<sup>36</sup> The issue of whether an English or French bankruptcy regime should be adopted was a common theme in Quebec. As early as 1767, for example, merchants in Quebec who opposed the introduction of an English-style system pointed to the fact that the American colonies and Scotland had not adopted English bankruptcy laws.<sup>37</sup>

The Quebec Act of 1774 purported to resolve the issue of the applicability of English law, for it restored the French civil system.<sup>38</sup> French civil law differed

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<sup>34</sup> On the evolution of bankruptcy law in nineteenth century Quebec: L.J. de la Durantaye, *Traité de la Faillite*, *supra* note 14; E. Kolish, "L'Introduction de la Faillite au Bas Canada: Conflit Social ou National?" (1986) 40 R.H.A.F. 215 at 217 [hereinafter Kolish, "L'Introduction de la Faillite"]; E. Kolish, "Imprisonment for Debt in Lower Canada, 1791-1840" (1986/87) 32 McGill L.J. 603 [hereinafter Kolish, "Imprisonment for Debt"]; Kolish, *Changement dans le Droit Privé au Québec et au Bas-Canada, entre 1760 et 1840: Attitudes et Reactions des Contemporains* (Ph.D. diss., Université de Montréal, 1980) [hereinafter Kolish, *Changement*] now published as E. Kolish, *Nationalismes et Conflits de Droits: Le Débat du Droit Privé au Québec* (Québec: Cahiers du Québec, 1994).

<sup>35</sup> P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 27 [hereinafter Hogg, *Constitutional Law*].

<sup>36</sup> M. Greenwood, "Lower Canada (Quebec): Transformation of Civil Law, from Higher Morality to Autonomous Will. 1774-1866" (1996) 23 Man. L.J. 132 at 133 [hereinafter Greenwood, "Transformation of Civil Law"].

<sup>37</sup> Kolish, *Changement*, *supra* note 34 at 50; Kolish, "Imprisonment for Debt", *supra* note 34 at 606; Kolish, "L'Introduction de la Faillite", *supra* note 34 at 219-220.

<sup>38</sup> Greenwood, "Transformation of Civil Law", *supra* note 37 at 133; Duncan, *Bankruptcy in Canada*, *supra* note 3 at 7; Bohémier, *Faillite*, *supra* note 3 at 9; Bohémier, *Droit Constitutionnel*, *supra*



significantly from English bankruptcy law. French civil law of *cession des biens* was a process of voluntary assignment for bankrupt merchants. The procedure did not automatically discharge the debtor; however, it prevented the imprisonment of the debtor.<sup>39</sup> Prior to the conquest, merchants used this regime in New France.<sup>40</sup>

The traditional assertion that the civil laws of Canada remained in place until the Bankruptcy Act of 1839 needs to be re-examined in light of more recent scholarship.<sup>41</sup> Powerful elements in the colony's English and Scottish elite refused to accept the settlement of 1774. Being members of the judiciary and bureaucracy, "they were well placed to obstruct and undermine".<sup>42</sup> The courts did not consistently apply French civil law and they regularly contradicted themselves on many issues including insolvency. In any given case, judges might apply French civil law, Roman law, English law, or notions of equity.<sup>43</sup> More importantly, during the 1770s and 1780s, the Quebec courts eliminated the concept of the civil law *cession des biens*, leaving a vacuum in the field of bankruptcy

note 3 at 13. Smandych notes that the Quebec Act allowed for the introduction of the laws of England to serve in part as the rule for decisions in all cases in actions grounded on debts, promises, contracts and agreements. He argues that, "Theoretically and legally, the act allowed for the introduction of English poor law and bankruptcy law into Quebec". However, perhaps owing to opposition to bankruptcy law, it was not raised. See R. Smandych, "William Osgoode, John Graves Simcoe, and the Exclusion of the English Poor Law from Upper Canada" in L.A. Knafla & S.W.S. Binnie, eds., *Law, Society and the State: Essays in Modern Legal History* (Toronto: University of Toronto Press, 1995) 99 at 112 [hereinafter Smandych, "The Exclusion of the English Poor Law"].

<sup>39</sup> For a detailed discussion of the *cession des biens*, see Kolish, *Changement*, *supra* note 34 at 46; Kolish, "Imprisonment for Debt", *supra* note 34 at 605; Kolish, "L'Introduction de la Faillite", *supra* note 34 at 221, 227.

<sup>40</sup> For a discussion of bankruptcy law in New France, see J.D. Dickinson, "New France: Law, Courts, and the *Coutume de Paris*, 1608-1760" (1996) 23 Man. L.J. 32 at 39, 43, 45. See also, D.E. Thomson, "Bankruptcy Legislation in Canada" (1902) 1 Can. L. Rev. 173 at 174.

<sup>41</sup> Duncan makes this claim in his 1922 text. See Duncan, *Bankruptcy in Canada*, *supra* note 3 at 7. Durantaye also makes this claim. See Durantaye, *Traité de la Faillite*, *supra* note 14 at 22.

<sup>42</sup> B. Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Montreal: McGill-Queen's University Press, 1994) at 21 [hereinafter Young, *Politics of Codification*].

<sup>43</sup> Greenwood, "Transformation of Civil Law", *supra* note 36 at 141; Young, *ibid.* at 21-22.

law.<sup>44</sup> Even without the operation of a civil bankruptcy system, there was little demand for new legislation until the 1820s. A 1787 merchants' report proclaimed that credit had not been sufficiently established in Quebec to warrant the adoption of English bankruptcy laws.<sup>45</sup>

The constitutional structure changed again in 1791 with the splitting of Quebec into Upper and Lower Canada.<sup>46</sup> The absence of bankruptcy law in Lower Canada continued until 1839. While Lower Canada did not formally adopt bankruptcy law until 1839, the debate over the issue re-surfaced in the 1820s. During the 1820s and 1830s, legislators debated numerous proposals, ranging from bills attempting to re-introduce the French *cession des biens* to proposals that sought to impose an English bankruptcy regime. In the 1820s, the Legislative Council and the merchants of Montreal and Quebec stubbornly resisted any introduction of bankruptcy laws.<sup>47</sup>

Attitudes began to change in the 1830s when economic conditions worsened. British merchants demanded the adoption of a bankruptcy law.<sup>48</sup> In 1835, a member of the Legislative Assembly introduced the first English style bankruptcy bill. He claimed that London merchants were becoming more cautious in extending credit to merchants in

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<sup>44</sup> Kolish, *Changement*, *supra* note 34 at 519; Kolish, "Imprisonment for Debt", *supra* note 34 at 605; Kolish, "L'Introduction de la Faillite", *supra* note 34 at 222.

<sup>45</sup> Kolish, "L'Introduction de la Faillite", *supra* note 34 at 224.

<sup>46</sup> Hogg, *Constitutional Law*, *supra* note 35 at 28.

<sup>47</sup> For a review of the various bills from both English and French camps, see Kolish, *Changement*, *supra* note 34 at 520-533; 624-638; Kolish, "Imprisonment for Debt", *supra* note 34 at 611; Kolish, "L'Introduction de la Faillite", *supra* note 34 at 226-233. Kolish notes that Denis-Benjamin Viger's *cession des biens* proposal was introduced 10 times between 1823 and 1836 and adopted 6 times by the assembly. However, it did not receive final approval. Kolish, "L'Introduction de la Faillite", *supra* note 34 at 226. For a general discussion of Viger's contribution, see Young, *Politics of Codification*, *supra* note 42 at 32-34. See also, Greenwood, "Transformation of Civil Law", *supra* note 36 at 146.

<sup>48</sup> Kolish, *Changement*, *supra* note 34 at 624; Kolish, "L'Introduction de la Faillite", *supra* note 34 at 230-231. Kolish, "Imprisonment for Debt", *supra* note 34 at 612. A review of court files between 1785 and 1825 reveals that debt litigation was frequent. See E. Kolish, "Some Aspects of Civil Litigation in Lower Canada, 1785-1825: Towards Use of Court Records for Canadian Social History" (1989) 70 *Can. Hist. Rev.* 336 at 365.

Lower Canada. The author of the bill argued that "it was necessary to adopt some legislative measures, by which confidence would be re-established between the British and Canadian merchants".<sup>49</sup> The importance of bankruptcy law for foreign or distant creditors is an important theme that will be discussed in Part II.

Ethnic division between English and French speaking merchants complicated the debate. It became a question of whether to adopt the English or French model. The committee charged with the responsibility to study the issue chose the civil law *cession des biens* in 1836. While the lower assembly supported the measure, the upper Council refused to adopt the proposal.<sup>50</sup> The identification of the bills with differing legal traditions prevented the adoption of a bankruptcy law. The debate in Lower Canada, according to one author, "cannot be properly understood without taking ethnic conflict into account".<sup>51</sup>

The passage of the Lower Canadian Bankruptcy Act of 1839 can be attributed to a further constitutional change. Following the Lower Canada rebellion, the Special Council, an appointed body made up of English officials and merchants, replaced the Lower Canadian legislature.<sup>52</sup> In 1839, after much pressure from merchants,<sup>53</sup> the Special Council proclaimed "An Ordinance concerning bankrupts and the administration and distribution of their estates and effects."<sup>54</sup> The Act of 1839 deserves special mention

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<sup>49</sup> Statement of George Vanfelson as quoted from Kolish, "L'Introduction de la Faillite", *supra* note 34 at 232; Kolish, *Changement*, *supra* note 34 at 633.

<sup>50</sup> Kolish, *Changement*, *supra* note 34 at 638-639.

<sup>51</sup> Kolish, "L'Introduction de la Faillite", *supra* note 34 at 216. Kolish, in commenting on the numerous proposals stated, "Most of these bills were lost on their way through the legislative mill, with especially the more general bills falling victim to partisan conflict over the choice of best 'national' legal model". Kolish, "Imprisonment for Debt", *supra* note 34 at 613.

<sup>52</sup> Greenwood, "Transformation of Civil Law", *supra* note 36 at 158.

<sup>53</sup> Bohémier, *Faillite*, *supra* note 3 at 9.

<sup>54</sup> Duncan, *Bankruptcy in Canada*, *supra* note 3 at 7; S.L.C. 1839, 2 Vic. c. 36.

as, in the words of one author, "C'est le premier monument de la législation sur le sujet dans l'histoire canadienne."<sup>55</sup>

The Special Council adopted in substance the English legislation of 1571, 1706 and 1825.<sup>56</sup> One author has characterized the proclamation as a "tough Bankruptcy Act satisfactory to most English merchants".<sup>57</sup> The legislation only applied to traders and in the absence of fraud allowed a debtor to obtain a discharge.<sup>58</sup> This legislation, while important for marking the beginning of bankruptcy legislation in Canadian history, did not have much of an impact. In 1840, a further constitutional change re-united the two colonies of Upper and Lower Canada. In 1843, the united assembly of the province of Canada repealed the bankruptcy ordinance of 1839 and enacted a new bankruptcy law for both sections of the colony.<sup>59</sup> Before dealing with the 1843 law, it is necessary to comment briefly on the developments in Upper Canada<sup>60</sup> commencing with 1792.

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<sup>55</sup> Durantaye, *Traité de la Faillite*, *supra* note 14 at 23. In an address to the Canadian Manufacturer's Association in 1902, D.E. Thomson, in referring to the 1839 ordinance stated: "But Quebec (then Lower Canada) takes first place on this subject among the provinces, not only by reason of the greater liberality of its common law, but because it was the first to cover the whole ground by statutory provision." D.E. Thomson, "Bankruptcy Legislation in Canada" (1901-02) 1 Can. L. Rev. 173 at 174.; E. Martel, "The Debtor's Discharge From Bankruptcy" (1971) 17 McGill L.J. 718 at 720; L. Duncan, "The Operation and Effect of the Bankruptcy Act" (1922) 29 J. of Can. Bankers' Ass'n 502 at 502.

<sup>56</sup> Durantaye, *Traité de la Faillite*, *supra* note 14 at 23.

<sup>57</sup> Greenwood, "Transformation of Civil Law", *supra* note 36 at 158.

<sup>58</sup> D.E. Thomson, "Bankruptcy Legislation in Canada" (1901-02) 1 Can. L. Rev. 173 at 174; Duncan, *Bankruptcy in Canada*, *supra* note 3 at 7; Bohémier, *Droit Constitutionnel*, *supra* note 3 at 13.

<sup>59</sup> Duncan, *Bankruptcy in Canada*, *supra* note 3 at 8. S. Prov. C. 1843, 7 Vic. c. 10. See also, Durantaye, *Traité de la Faillite*, *supra* note 14 at 23; Bohémier, *Faillite*, *supra* note 3 at 10; Bohémier, *Droit Constitutionnel*, *supra* note 3 at 13.

<sup>60</sup> The most relevant regional study on the pre-Confederation statutes in the area now known as Ontario can be found in R.C.B. Risk, "The Golden Age: The Law About the Market in Nineteenth Century Ontario" (1976) 26 U.T.L.J. 307 [hereinafter, Risk, "The Law About the Market"]. A general overview is also contained in the introductions of two books devoted to the *Insolvent Act of 1864*. Edgar, *The Insolvent Act of 1864*, *supra* note 3; Abbott, *The Insolvent Act of 1864*, *supra* note 3.

After the division of Quebec into Upper and Lower Canada,<sup>61</sup> the Legislative Assembly of Upper Canada in its first session in 1792 adopted a statute which introduced English law into the province. Bankruptcy law, however, was specifically excluded:

III That from and after the passing of this act, in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England, as the rule for the decision of the same ....

VI Provided always ... That nothing in this act contained shall ... introduce any of the laws of England respecting the maintenance of the poor, or respecting bankrupts.<sup>62</sup>

Upper Canada operated therefore without the benefit of bankruptcy law.<sup>63</sup> The rationale for the exclusion of English bankruptcy and poor law from Upper Canada has been the subject of some debate by historians and will be discussed in Part II of this chapter. No domestic bankruptcy law came into force until after unification.<sup>64</sup> Despite the absence of

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<sup>61</sup> On the constitutional division, see P. Romney, "Upper Canada (Ontario): The Administration of Justice, 1784-1850" (1996) 23 Man. L. J. 183.

<sup>62</sup> S.U.C. 1792, 32 Geo. III, c. 1 cited in E.G. Brown, "British Statutes in the Emergent Nations of North America: 1606-1949" (1963) 7 Am. J. Legal Hist. 95 at 113-114. This exclusion is also discussed in J. Bicknell, "The Advisability of Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35 at 39. This important exclusion is not often mentioned in works that survey the constitutional change in Upper Canada. Important works which do not discuss the exclusion include Hogg, *Constitutional Law*, *supra* note 35 at 28; P. Romney, "Upper Canada (Ontario): The Administration of Justice, 1784-1850" (1996) 23 Man. L.J. 183 at 184; B. Laskin, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969) at 5.

<sup>63</sup> "The only authority of any English statutory provisions as to bankruptcy, or decisions founded upon that statute law, consists therefore, in their analogy to our own law on the subject, and the assistance they thus afford in its interpretation." J.D. Edgar & F.H. Chrysler, *The Insolvent Act of 1875, with an Introductory Chapter; Notes Forms and Tariffs for Ontario, Quebec and New Brunswick* (Toronto: Copp Clark, 1875) at xxxiii.

<sup>64</sup> The Union Act, 1840 merged Upper and Lower Canada into the united province of Canada. See (1840) 3-4 Vic. c. 35 (UK). The new assembly was made up of equal members from Canada West (previously Upper Canada) and Canada East (previously Lower Canada). See Hogg, *Constitutional Law*, *supra* note 35 at 28-29; Duncan, *Bankruptcy in Canada*, *supra* note 3 at 8. See S.U.C. 1843, 7 Vic. c. 10.

bankruptcy legislation in Upper Canada, the assembly did pass legislation that attempted to ameliorate the plight of the insolvent debtor between 1805 and 1840.<sup>65</sup>

The unification of Upper and Lower Canada in 1840 created the opportunity for further bankruptcy reform. As indicated above, the Bankruptcy Act of 1843 applied to both sections of Canada.<sup>66</sup> The legislation of 1843 was primarily based on the English legislation of 1825. The procedure applied only to traders<sup>67</sup> who could be petitioned into bankruptcy upon proof of certain acts of bankruptcy. The Act discharged a debtor's liabilities upon disclosure and delivery of all assets.<sup>68</sup> Matters not provided for by the statute or the general laws of Upper and Lower Canada were to be resolved by reference to English law. This proviso applied only to the former Upper Canada.<sup>69</sup>

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<sup>65</sup> Risk, "The Law About the Market", *supra* note 60 at 343; Duncan, *Bankruptcy in Canada*, *supra* note 3 at 7-8; Bohémier, *Faillite*, *supra* note 3 at 9; R. Smandych, "Colonial Welfare Laws and Practices: Coping without an English Poor Law in Upper Canada, 1792-1837" (1996) 23 Man. L.J. 214 at 223. The best description of each piece of legislation can be found in Durantaye, *Traité de la Faillite*, *supra* note 14 at 22.

<sup>66</sup> *An Act to repeal an ordinance of Lower Canada, intituled, 'An ordinance concerning bankrupts, and the administration and distribution of their effects' and to make provision for the same object throughout the Province of Canada*, S. Prov. C. 1843, 7 Vic., c. 10. See generally, Edgar, *The Insolvent Act of 1864*, *supra* note 3 at 17; R.C.B. Risk, "The Law About the Market", *supra* note 60 at 343-345; Duncan, *Bankruptcy in Canada*, *supra* note 3 at 8; Durantaye, *Traité de la Faillite*, *supra* note 14 at 23; J. Bicknell, "The Advisability of Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35 at 39.

<sup>67</sup> According to a nineteenth century commentator, the term "trader" was "very strictly defined". Edgar, *The Insolvent Act of 1864*, *supra* note 3 at 17; J. Bicknell, "The Advisability of Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35 at 39 who agrees with the strict definition of trader. Note that Risk in commenting on the 1843 Act, states that "the creditors of a trader, a term that was defined expansively, were given the power to initiate the bankruptcy process..". Risk, "The Law About the Market", *supra* note 60 at 343.

<sup>68</sup> Risk indicates that "its general structure was the same as the English act, although it differed in a few particular respects and was generally much less detailed". Risk, *ibid.* at 343-344. Risk notes that a discharge was available even though creditors objected. It appears that this proved unpopular and led to an amendment in 1846 that increased the ability of creditors to oppose a discharge. See, *Commentaries on the Present Bankrupt Act in a Series of Letters Addressed to the Editor of the Morning Courier* (Montreal: Lovell and Gibson, 1848) at 45. See also Edgar, *The Insolvent Act of 1864*, *supra* note 3 at 18.

<sup>69</sup> Duncan, *Bankruptcy in Canada*, *supra* note 3 at 8.

By borrowing the English model, Canadian legislators were destined to revisit the English debate over the merits of the trader rule. As discussed in chapter 3, the United States had similarly debated whether or not to extend federal bankruptcy law to all debtors or restrict its application to traders or merchants. Division over whether to restrict bankruptcy law to merchants had led to the defeat of three American bankruptcy bills in the 1820s. One Canadian commentator called into question the validity of the trader rule in the 1843 Act. The distinction "has become so shadowy, that the filmy line of principle which used to separate them is now utterly capricious in its operation".<sup>70</sup> The divide over the trader rule continued throughout the nineteenth century and in a way these arguments foreshadowed the larger debate to come after Confederation.

One should not view the legislation of 1843 as marking a new acceptance of bankruptcy law. Within five years a pamphlet appeared containing a series of letters to the *Montreal Gazette* which were critical of the operation of the Act with some calling for repeal.<sup>71</sup> In Upper Canada, the Act suffered a credibility problem as the newly established and unpopular Court of Chancery was responsible for reviewing bankruptcy matters. The Court of Chancery had been criticized for its incessant delays, inefficiency, and a higher scale of costs, and the court's unpopularity did little to enhance the acceptability of bankruptcy law.<sup>72</sup> By 1849 the law was allowed to expire.<sup>73</sup> One

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<sup>70</sup> "Bankruptcy and Insolvency" (1861) 7 U.C.L.J. 10 at 11.

<sup>71</sup> For a review of the criticisms of the Act, see *Commentaries on the Present Bankrupt Act in a Series of Letters Addressed to the Editor of the Morning Courier* (Montreal: Lovell and Gibson, 1848). In particular, the letters criticize the administrative problems (at 4-6); the voidable preference rules (at 11-14); preferential creditors including workers and landlords (at 30-36); discharge (at 44-46). On the issue of repeal, see discussion at 38-39.

<sup>72</sup> In 1844 a creditor applied to the Court of Queen's Bench to issue bankruptcy proceedings against a debtor. The debtor applied to Chancery to obtain a stay. Chancery Court issued the stay but the Queen's Bench division ignored the stay, claiming Chancery had exceeded its jurisdiction. See E. Brown, "Equitable Jurisdiction and the Court of Chancery in Upper Canada" (1983) 21 *Osgoode Hall L.J.* 274 at 288, 291-292. On the evolution of the Court of Chancery, see generally, J.C. Weaver, "While Equity Slumbered: Creditor Advantage, a Capitalist Land Market, and Upper Canada's Missing Court" (1990) 28 *Osgoode Hall L.J.* 871 at 875, and P. Romney, "Upper Canada (Ontario): The Administration of Justice, 1784-1850" (1996) 23 *Man. L. J.* 183.

editorial attributed its failure to the fact that it was too closely modelled upon English law:

First and foremost, with all the eager haste of a hot-headed thoughtless youth, she snatched intact the whole body of English Bankruptcy Law, deeply coated as it was with endless layers of expense. This was found to be too rich a dish — too complex a portion for her simple wants, and was accordingly dropped with feelings of remorse if not disgust.<sup>74</sup>

The demise of the Act of 1843 paralleled the repeal of the United States Bankruptcy Act of 1841.

Once a bankruptcy law regime disappeared in 1849, the province turned its attention to amending the insolvency laws.<sup>75</sup> Amendments proved unsatisfactory as debtors continued to flee the province to avoid imprisonment for debt leading some to demand a reinstatement of a bankruptcy statute.<sup>76</sup> The assembly debated bankruptcy

<sup>73</sup> "Broadly speaking, it may be stated that the bankruptcy law was in force in the two provinces from 1843 to 1849." D.E. Thomson, "Bankruptcy Legislation in Canada" (1902) 1 Can. L. Rev. 173 at 174; "The Act by its terms is to continue in force for two years, but by subsequent enactments passed annually it was continued in force until 1849." J. Bicknell, "The Advisability of Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35 at 39; Greenwood, "Transformation of Civil Law", *supra* note 36 at 159; Risk, "The Law About the Market", *supra* note 60 at 343. S. Prov. C. 1843, 7 Vict., c. 10; S. Prov. C. 1846, 9 Vict., c. 30. In reference to the attempt to continue the legislation in 1849, Risk states: "The attempt to continue it was made by the government in a collection of miscellaneous extensions, but an amendment terminated it. The result was 12 Vict. (1849), c. 18 which continued it for proceedings that had been begun but not concluded. In 13 & 14 Vict. (1850), c. 20, power was given to the courts to give discharges regardless of the consent of creditors to debtors who had been declared bankrupt under the act but not discharged". See also S. Prov. C. 1864, 27-28 Vict., c. 24 and S. Prov. C. 1866, 29-30 Vict., c. 14; Durantaye, *Traité de la Faillite*, *supra* note 14 at 23.

<sup>74</sup> "Shall We Have A Bankruptcy Law?" (1858) 4 U.C.L.J. 2.

<sup>75</sup> An 1851 Insolvency Act amendment allowed traders to take advantage of its provisions preventing imprisonment. Edgar, *The Insolvent Act of 1864*, *supra* note 3 at 18; See also Risk, "The Law About the Market" *supra* note 60 at 344. See S. Prov. C. 1851, 14 & 15 Vic. c. 116; S. Prov. C. 1856, 19-20 Vic c. 93; S. Prov. C. 1857 20 Vic. c. 1.

<sup>76</sup> "A Bankruptcy Law Required" (1863) 9 U.C.L.J. 141 at 141-142. On the criticisms of imprisonment for debt and the demand for a bankruptcy law in 1858, see Oliver, *Prisons and Punishment*, *supra* note 6 at 57-58. On the reaction of the Toronto Board of Trade to the series of insolvency laws and amendments after 1856, see D. McCalla, "The Commercial Politics of the Toronto Board of Trade, 1850-1860" (1969) 50 Can. Hist. Rev. 51 at 61; G.H. Stanford, *To Serve the Community the Story of Toronto's*



bills occasionally but the government showed little interest in pursuing bankruptcy reform, claiming in 1859 that it wanted to await changes to English legislation. Major reforms were pending and in 1861 England abolished the historic distinction between bankruptcy and insolvency legislation by abandoning the trader rule.<sup>77</sup>

Despite calls for the introduction of a bankruptcy law, the government found it difficult to achieve a consensus on reform. In 1861, John A. Macdonald introduced a bill that only applied to Canada West. Its demise was due in part to the "principled opposition to bankruptcy legislation".<sup>78</sup> Despite petitions from Montreal merchants demanding a bankruptcy law 1863, the legislature did not take any action until the following year.<sup>79</sup>

The *Insolvent Act of 1864*<sup>80</sup> was the most significant piece of bankruptcy legislation in the pre-Confederation period. The federal Select Committee of 1868 found

*Board of Trade* (Toronto: University of Toronto Press, 1974) at 20. On general calls for a bankruptcy law, see "Colonial Bankruptcy Law" (1861) 7 U.C.L.J. 165; "Bankruptcy and Insolvency" (1861) 7 U.C.L.J. 10. One commentator referred to the ad hoc series of amendments as "scrap legislation". See "The Act Respecting Insolvency" (1864) 10 U.C.L.J. 225.

<sup>77</sup> Risk, "The Law About the Market", *supra* note 60 at 345. Risk adds that the government also did not want to provoke a conflict between the two sections of the province. For a discussion of the English reforms, see chapter 2.

<sup>78</sup> *Ibid.* at 345. Concern over administrative matters is expressed in a letter from Macdonald to the County Treasurer of Kingston. Letter from Macdonald to William Ferguson dated 21 April 1861. See also Letter, Macdonald to Judge George Stephen Jarvis, 29 April 1861. J.K. Johnson & Carole B. Stelmack eds., *The Letters of Sir John A. Macdonald, 1858 to 1861* (1969). On the principled opposition, see Macdonald's speech, "To the Electors of the City of Kingston," 10 June 1861. Johnson, *Letters of Macdonald* at 346. "Nothing could be more factions [sic] or unprincipled than the course of the opposition on this question, and although they professed to be in favour of the principle of the measure, they voted against the second reading of the Bill, and therefore voted against its principle."

<sup>79</sup> "... [A] large number of leading merchants of Montreal petitioned the Legislature [in 1863], asking for certain reforms in, and additions to, the dispositions of the Common Law of Lower Canada, and not a Bankruptcy Law at once applicable to both sections of the Province." D. Girouard, *Review of the Insolvent Act of 1864 and the Proposed Amendment Bill*; See also C. Beausoleil, *La Loi de la Faillite* (Montreal, 1877).

<sup>80</sup> *Insolvent Act of 1864*, S. Prov. C. 1864, 27 & 28 Vic. c. 17. The three contemporary annotated commentaries on the Act of 1864 are: Abbott, *The Insolvent Act of 1864*, *supra* note 3; Edgar, *The Insolvent Act of 1864*, *supra* note 3; D. Girouard, *Review of the Insolvent Act of 1864 and the Proposed*

that the Act had been frequently used and was the only pre-Confederation bankruptcy statute to merit further study.<sup>81</sup> J.J.C. Abbott, Solicitor General of the Province, and Dean of Law of McGill, drafted the bill.<sup>82</sup> In the introduction to his text on the Act, Abbott outlined the need for reform:

There has been for some years past an urgent demand in Canada, for a law creating a summary mode of realizing and distributing the estates of Insolvents, and of affording relief from liability, to debtors making full disclosure and delivery of their estates to their Creditors. The absence of such a law left the failing debtor no chance of success in any future enterprise, unless he could succeed in the almost hopeless task of procuring a discharge from everyone of his creditors. Thus many such were tempted to secure their remaining assets by dishonest devices, rather than leave themselves destitute by resigning themselves to their Creditors.<sup>83</sup>

As will be seen, the *Insolvent Act of 1864* did not escape criticism. For many, the legislation interfered with the natural order of debtor-creditor relationships.<sup>84</sup>

Further, while the Act was passed by the united assembly, the legislation applied differently in the two sections of the province. The reforms in England in 1861 were not followed in both parts of the province. Traditional English bankruptcy law had been restricted in application to traders. In 1861, the abolition of the trader rule allowed all

*Amendment Bill* (CIHM, No. 23285). For general comments on the *Insolvent Act of 1864*, see D.E. Thomson, "Bankruptcy Legislation in Canada" (1901-02) 1 Can. L. Rev. 173 at 174; S.W. Jacobs, "A Canadian Bankruptcy Act--Is it a Necessity?" (1917) 37 Can. L.T. 604; J. Honsberger, "Bankruptcy Administration in the United States and Canada" (1975) 63 Cal. L. Rev. 1515 at 1527.

<sup>81</sup> "Bankruptcy Select Committee 1868" at 10.

<sup>82</sup> On Abbott, see C. Miller, "Sir John Joseph Caldwell Abbott," in *Dictionary of Canadian Biography, 1891-1900* vol. 12 (Toronto: University of Toronto Press, 1990) 4 at 5, 7; P. Hutchinson, "Sir John J.C. Abbott: Barrister and Solicitor" (1948) 26 Can. Bar Rev. 934 at 944; G.B. Baker, "Law Practice and Statecraft in Mid Nineteenth Century Montreal: The Torrance-Morris Firm, 1848-1868" in C. Wilton, ed., *Essays in the History of Canadian Law: Beyond the Law: Lawyers and Business in Canada, 1830 to 1930* (Toronto: Osgoode Society, 1990) 45 at 56 [hereinafter Baker, "Law Practice and Statecraft"].

<sup>83</sup> Abbott, *The Insolvent Act of 1864*, preface.

<sup>84</sup> On the legal profession's perspective of legislation in general, see Baker, "Law Practice and Statecraft", *supra* note 82 at 74.

classes of English debtors to take advantage of voluntary proceedings and obtain a discharge. The United States had earlier allowed all types of debtors to make an assignment in bankruptcy under the short-lived American Act of 1841. John Abbott was only partially able to achieve a similar result in the Province of Canada. The Act of 1864 permitted both voluntary and involuntary proceedings. In Canada East, only traders, however, were able to take advantage of the legislation.<sup>85</sup> In Canada West, "any person unable to meet his engagements" was able to make an assignment in bankruptcy.<sup>86</sup> The result was two very different schemes. Access to the discharge was therefore much more limited in Canada East and reflected a general distrust of bankruptcy legislation.

The title of the legislation, the *Insolvent Act of 1864*, was in some ways a misnomer. As discussed above, insolvent acts had been passed for the benefit of non-traders who sought release from imprisonment for debt. The *Insolvent Act of 1864*, unlike other previous "insolvent acts", was a bankruptcy law as it distributed the debtor's assets and provided for the discharge of debts. In explaining his choice of title, Abbott stated that "the word 'insolvent'... is not used in this Act in the sense that it had acquired in England, but corresponds with the English word Bankrupt in its more modern meaning".<sup>87</sup> One author has speculated that the title reflected an attempt to distance the new legislation from traditional debtor fears of 'bankruptcy law'.<sup>88</sup>

All of the debtor's assets, save for a few exempted items, were distributed to the creditors.<sup>89</sup> Abbott also paid close attention to the issue of fraud. As discussed in Part II,

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<sup>85</sup> *Insolvent Act of 1864*, s. 1. D. Thomson, "Bankruptcy Law in Canada" (1894) 1 Barrister 39. D.E. Thomson, "Bankruptcy Legislation in Canada" (1901-02) 1 Can. L. Rev. 173 at 174.

<sup>86</sup> *Insolvent Act of 1864* s. 2. In Canada West, the trader rule applied to involuntary proceedings only. Thus only traders could be forced into bankruptcy. See s. 3(2).

<sup>87</sup> Abbott, *The Insolvent Act of 1864*, *supra* note 3 at 15.

<sup>88</sup> "Le mot 'insolvency' annouçait davantage des lois d'aide aux débiteurs que des lois de répression." Bohémier, *Faillite*, *supra* note 3 at 10. See also Bohémier, *Droit Constitutionnel*, *supra* note 3 at 13-14.

<sup>89</sup> Sections 2(7) and 3(22) of the *Insolvent Act of 1864* vested the debtor's property in the official assignee and excepted those items which were exempt from seizure and sale under other legislation. The exemptions are listed in S. Prov. C. 23 Vic. c. 25.

many viewed debtors with a great deal of suspicion. The preamble of the *Insolvent Act of 1864* stated that it was expedient to make provision for "the punishment of fraud".<sup>90</sup> The discharge provisions also addressed the issue of fraud.<sup>91</sup> A debtor had two possible routes to obtain a discharge. The first method involved obtaining the required level of creditor consent.<sup>92</sup> If the creditors agreed in the requisite numbers an application could be made to the court for confirmation of the discharge.<sup>93</sup> At confirmation, any creditor could object to the discharge on the grounds of, among others, "fraud or evil practice in procuring the consent of the creditors to the discharge".<sup>94</sup> The court could either confirm the discharge absolutely or conditionally, or make an order for suspension. Orders of suspension, according to Abbott, were "considered as punishment for any delinquency or impropriety of conduct by the insolvent which is considered reprehensible". In Abbott's view, the powers of the court could "be most beneficially exercised as a check upon the conduct of debtors, by punishing their minor delinquencies, and by compelling their attention to the reasonable requirements of their creditors".<sup>95</sup> Debtors who were unable to obtain the consent of creditors could apply to the court for a discharge after one year.<sup>96</sup>

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<sup>90</sup> *Insolvent Act of 1864*, preamble.

<sup>91</sup> Abbott, *The Insolvent Act of 1864*, *supra* note 3 at 54.

<sup>92</sup> The first involved the issue of creditor consent. Under the Act it was possible to obtain creditor consent while proceedings were still pending. This procedure was known as a composition. See *Insolvent Act of 1864*, s. 9(1).

<sup>93</sup> The debtor required the consent of a majority in number of creditors (each required to hold a claim of at least \$100 or more) representing three-quarters in value of the liabilities *Insolvent Act of 1864*, s. 9(8). Abbott noted that there were some exceptions to the discharge but "they do not interfere with the principle of the general rule, that by a discharge under this Act, the insolvent is freed from all debts and claims whatsoever". Abbott, *The Insolvent Act of 1864*, *supra* note 3 at 63.

<sup>94</sup> *Insolvent Act of 1864*, s. 9(6).

<sup>95</sup> Abbott, *The Insolvent Act of 1864*, *supra* note 3 at 69.

<sup>96</sup> *Insolvent Act of 1864*, s. 9(11).

Under the *Insolvent Act of 1864*, the orders of discharge, whether conditional or absolute, were all of equal weight once the conditions or suspension had been lifted.<sup>97</sup> The decision not to classify discharges followed England's lead of 1861. Between 1849 and 1861, discharges granted under the English statute had been classified as either first, second, or third class. Classification allowed the court to make an official statement about the moral trustworthiness of the debtor. Abbott's decision to drop the moral classification of the discharge was premature. Concerns over the morality of the bankruptcy discharge did not disappear. The federal legislation of 1869 and 1875 classified discharges.<sup>98</sup>

Apart from regulating general fraudulent activity, the *Insolvent Act* specifically prohibited fraudulent conveyances and preferences.<sup>99</sup> Payments by debtors in favour of friends or family at the expense of the general body of creditors had long been a problem. Prohibiting these types of payment in theory ended the ability of creditors to extract payment from nearby debtors. This perhaps was the source of some of the opposition to bankruptcy law. The tension between local and distant creditors is examined in Part II.

In contrast to earlier pre-Confederation bankruptcy statutes, the *Insolvent Act of 1864* allowed voluntary proceedings and applied to all classes of debtors in Canada West. However, the 1864 Act did not fit well with the values of mid nineteenth century Canada, particularly the notion of individual responsibility for debts.<sup>100</sup> Within three years there

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<sup>97</sup> "There were no classifications, or meritorious or degrading distinctions whatever." Edgar, *The Insolvent Act of 1864*, *supra* note 3 at 78.

<sup>98</sup> *Insolvent Act of 1869*, S. C. 1869, 32 & 33 Vict., c. 16, s. 95; *Insolvent Act of 1875*, S.C. 1875, 38 Vict., c. 16, s. 57.

<sup>99</sup> On the issue of preferences, see Abbott, *The Insolvent Act of 1864*, *supra* note 3 at 54.

<sup>100</sup> One might wonder how, in light of the subsequent criticisms, the Act was passed. The Act was little understood in 1864 and it passed with little debate. Risk, "The Law About the Market", *supra* note 60 at 345. Perhaps the members of the assembly did not fully comprehend the scope of the Act. A reviewer of Edgar's book on the *Insolvent Act of 1864*, stated in 1865, "This little volume must command an extensive circulation. The Act which it contains ... is as yet little understood, and many are interested in the speedy and correct understanding of it." "Review of the Insolvent Act of 1864, with Tariff, Notes, forms and a Full Index, by James D. Edgar" (1865) 1 Local Courts and Municipal Gaz. 15. It took experience and the tangible evidence of discharged debtors before specific criticisms came to light.

was a call for its repeal.<sup>101</sup> Part II examines a number of factors that explain the general unacceptability of bankruptcy law prior to 1867.

## II An Assessment of the Bankruptcy Law Debate

### A Two Competing Views of the Discharge

Supporters of bankruptcy law often appealed to the benefits of the discharge. Beamish Murdoch, a leading proponent of reform in Nova Scotia, raised this issue in 1831. His pamphlet focused on the reform of imprisonment for debt. However, in a key passage, the author recognized the importance of the discharge of debts:

In cases of insolvency it also appears conformable to the immutable principles of justice that the effects of the debtor should be divided among all his creditors in proportions according to the amount of their claims.-- Nothing can be more simple than an arrangement of this kind, and it at once would restore the honest man to the power of pursuing his occupations without the perpetual annoyance of duns, the embarrassment and wretchedness of an undecided situation, and the tortures of dependence which to the honourable mind are worse than death.<sup>102</sup>

A similar view of debt was adopted in Upper Canada Law Journal editorials. In the absence of a discharge, a debtor would continue to have "the millstone of debt about his neck".<sup>103</sup> Debtors burdened with debt were of little use to society. "The man may be useful, if free--he is worse than useless if he is not".<sup>104</sup> In the absence of a discharge, debtors took extreme measures. Individuals, "driven in self defence" to remove

<sup>101</sup> See note 115 and accompanying text.

<sup>102</sup> B. Murdoch, *An Essay on the Mischievous Tendency of Imprisoning for Debt and in Other Civil Cases*, 2d ed. (Halifax: Cunnabell, 1831) at 18. Murdoch completes his argument for an unstated form of bankruptcy law by stating, "This would be opening a gate by which virtue could escape from the arrows of misfortune, while Justice would ward off the worthless and dishonest, and prevent their taking advantage of its occasional opening." For a study of Murdoch, see P. Girard, "The Making of a Colonial Lawyer: Beamish Murdoch of Halifax, 1822-1842" in C. Wilton ed., *Essays in the History of Canadian Law*, vol. 7, *Inside the Law: Canadian Law Firms in Historical Perspective* (Toronto: University of Toronto Press, 1996) 57. On Murdoch's personal experience with debtor-creditor matters in his practice, see at 64-67.

<sup>103</sup> "A Bankruptcy Law Required" (1863) 9 U.C.L.J. 141.

<sup>104</sup> "Bankruptcy and Insolvency" (1861) 7 U.C.L.J. 10 at 11.

themselves from the reach of creditors, left for the United States as they found Canadian laws "void of mercy". The "expatriation" of traders was a loss to Canada.<sup>105</sup>

Not all agreed that bankruptcy law was beneficial. A traditional complaint about bankruptcy law related to the expense of the system and the frequent delays in obtaining a dividend.<sup>106</sup> However, a more forceful argument against bankruptcy law focused on the fundamental obligation to repay debts. Phillip Girard's study of the debate in Nova Scotia illustrates that opponents of bankruptcy complained of dishonest debtors and the immorality of failing to repay obligations. Refusal to repay debts was likened to a sin. Girard claims that the objections to bankruptcy law:

were rooted in an ideology that accepted the efficacy of imprisonment as a deterrent to reckless borrowing and viewed the payment of debts as a moral duty .... What was moral about allowing a dishonest debtor, even a petty debtor, to evade his obligations or to have his debts discharged by bankruptcy?<sup>107</sup>

The exclusion of English bankruptcy law from Upper Canada in 1792 is perhaps the best indication of the unacceptability of bankruptcy law. The legislative records of

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<sup>105</sup> "Shall We Have a Bankrupt Law?" (1858) 4 U.C.L.J. 2 at 3-4; See also Girard, "Insolvency Law Reform in Nova Scotia", *supra* note 15 at 103.

<sup>106</sup> On complaints of bankruptcy procedure expense and delay in Quebec in 1767, see Kolish, *Changement*, *supra* note 34 at 50; Kolish, "Imprisonment for Debt", *supra* note 34 at 606; Kolish, "L'Introduction de la Faillite", *supra* note 34 at 219-220. For procedural criticisms in Ontario before Confederation, see St. Lawrence, "Comment Re: Insolvent Act of 1864," (1868) 4 Can. L.J. (N.S.) 1; Union, "The Insolvent Act of 1864-- Assignees" (1868) 4 Can. L.J. (N.S.) 131; Scarboro, "Assignees in Bankruptcy Matters -- The Operation of the Act" (1868) 4 Can. L.J. (N.S.) 83; Quinte, "Insolvent Acts, Assignees" (1868) 4 Can. L.J. (N.S.) 101; "A Bankruptcy Law Required" (1863) 9 U.C.L.J. 141 at 142.

<sup>107</sup> Girard, "Insolvency Law Reform in Nova Scotia", *supra* note 15 at 101. In British Columbia there was also a division over the responsibility to repay debts. One author draws upon the 1862 case of *Cranford v Wright* to demonstrate the conflicting views. The case involved a claim for breach of contract to deliver goods. Chief Justice Begbie who heard the case had a traditional view of contractual obligations. The duty to pay was not derived from the written instrument but rather was a moral obligation based upon one's social status. The responsibilities of a businessman included an obligation to pay bills. Not all settlers shared Begbie's view and the outcry over the decision reflected a tension between those with a belief that bills should be paid and a belief that debt was simply a consequence of doing business. Loo, *Law in British Columbia* at 92-103. *Cranford v Wright* British Columbian (13 December 1862) cited in Loo's text.

the House of Assembly and the Legislative Council do not provide any express reasons for the exclusion of bankruptcy law.<sup>108</sup> A number of historians have examined this puzzling question. Risk argues that the reason for the omission may have been “the complexity and abuses of the English legislation and a vague feeling that any bankruptcy legislation would be inappropriate for the simple economy”.<sup>109</sup> Weaver asserts that the exclusion “suggests a desire to be rid of old country obligations”.<sup>110</sup> Smandych speculates that any attempt to include English bankruptcy and poor law would have been opposed by the elected members of the assembly. Upper Canada may simply have been following the precedent set in Lower Canada. As noted above, English bankruptcy laws were not introduced into Lower Canada until 1839.<sup>111</sup>

Levy argues that the decision to exclude bankruptcy law was a principled one rather than a pragmatic one. Upper Canadians had a vision of a “vigorously self-reliant society founded upon individual initiative...”. Only the fittest would survive, and those in temporary distress would be helped by family or local charity. In this vision, government played a minimal role:

Rigorous theories of self reliance and individual responsibility dictated that man must pay the full price of his financial misfortune. Any concession to human frailty would weaken the entire social fabric and encourage people to take risks secure in the knowledge that they would never have to pay the full social price .... Those who favoured the perpetuation of a superficially stable, stratified agrarian society would naturally oppose any measure that seemed to weaken individual responsibility.<sup>112</sup>

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<sup>108</sup> Smandych, “Exclusion of the English Poor Law”, *supra* note 38 at 117.

<sup>109</sup> Risk, “The Law About the Market” *supra* note 60 at 343. Risk claims that the reasons for the exclusion “are not clear”. Smandych provides a historiographical overview which focuses primarily on the exclusion of the poor laws. Smandych, “Exclusion of the English Poor Law”, *supra* note 38 at 100-104.

<sup>110</sup> J.C. Weaver, “While Equity Slumbered: Creditor Advantage, a Capitalist Land Market, and Upper Canada’s Missing Court” (1990) 28 *Osgoode Hall L.J.* 870 at 875.

<sup>111</sup> Smandych, “Exclusion of the English Poor Law”, *supra* note 38 at 118. On the comparative point, see pp 112-115.

<sup>112</sup> J.C. Levy, “The Poor Laws in Early Upper Canada” in D.J. Bercuson & L.A. Knafle eds., *Law and Society in Canada in Historical Perspective* (Calgary: University of Calgary Studies in History, 1979) 23 at 27-28.



Levy links the dislike of English bankruptcy law to the discharge. These provisions interfered with the creditor's right to insist on the imprisonment of the debtor.<sup>113</sup>

The forgiveness of debts ran counter to the concept of responsibility for one's debts. Risk, in his study of nineteenth century Canada West, concludes that the major themes in this period were:

individual autonomy, and the benevolence and attainability of material progress .... Two values about individual autonomy were the most apparent: respect and encouragement for individual initiative, and the need for each individual to take responsibility for his own fate.<sup>114</sup>

Evidence of opposition to the very principle of bankruptcy laws in this period can be illustrated by the specific expressions of dissatisfaction with the *Insolvent Act of 1864*. In 1867, a Resolution of the County of Huron asked for the repeal of the *Insolvent Act of 1864*. The council viewed "with great apprehension, the action taken by so many parties, in taking advantage of the Provisions of the *Insolvent Act of 1864*".

It is notorious that numbers, daily increasing, resort to the Act to shirk their just debts, which they might exert themselves to pay, had they not so a facile a method to relieve themselves from their debts.

In addition, according to the council, the Act affected the morality of individuals:

We view the act as legalised inducement held out to parties to cheat, and a great means of demoralising numerous people who, otherwise, might be tolerably honest; and we hold that the Act is conducive of much more evil than good, therefore it should be taken off the Statute Books of the Country.<sup>115</sup>

<sup>113</sup> Levy is wrong to claim that bankruptcy laws were modern innovations in 1792. Bankruptcy laws, as shown in my previous chapters can be traced back to the sixteenth century. Discharge provisions were not enacted until early in the eighteenth century. *Ibid.* at 27.

<sup>114</sup> Risk, "The Law About the Market", *supra* note 60 at 337-338. During the debates in 1846 and in 1849 over whether to extend the Act of 1843, the defenders of the legislation argued it was a commercial necessity. It was "attacked as a denial of a simple belief that debts should be paid" (at 343).

<sup>115</sup> Resolution of Corporation of the County of Huron, at June Session 1867.

Others also suggested a policy of honesty and high moral principles for debtors. One author of an 1869 pamphlet suggested that his readers would achieve “high honour and satisfaction of doing right, even although for a time you should suffer”. However, if one were to achieve prosperity through dishonesty, “the remembrance of the wrong deed will embitter every cup of peace”.<sup>116</sup>

The ease with which an individual could make an assignment in bankruptcy also drew criticism from the author. The Act of 1864 held out a “positive premium to rascality” when a debtor was able “at any moment to make a valid assignment of his property, without giving any notice, and to get through his bankruptcy on such easy terms as any calculating rogue can generally succeed in wresting from his reluctant creditors”. The concept of a fresh start was not readily accepted:

It is a common objection to the Bankruptcy Law of this country that it can be... readily used by dishonest men for the purpose of making capital and getting a fresh start in business.

A debtor used the law as a “refuge in his last extremity from angry and vindictive creditors”. A better alternative, according to the author, was for debtors to approach creditors to arrange for repayment terms or forbearance from suit. “Creditors are proverbially indulgent and forbearing ... and you will have very little difficulty in getting all the time you ask for if you show a determined spirit to meet your difficulties like a man.”<sup>117</sup>

The moral obligation to repay debts also arose in the context of the evolution of the limited liability company. The shift to limited liability advantaged shareholders because unlike partnerships, where principals were jointly and severally liable for the firm’s debts, the shareholders’ potential exposure was limited only to the sums invested. The risk of loss therefore fell on creditors who could only seek recovery from the assets

<sup>116</sup> E.T. Bromfeld, *Practical Hints to the Retail Merchant, or How to Make a Business Successful. With an Appendix Containing Advice to Embarrassed Debtors and Remarks of the Present Law of Bankruptcy in Canada.* (Jan. 1869).

<sup>117</sup> *Ibid.*

of the corporation rather than from the shareholders.<sup>118</sup> Limited liability facilitated investment in large undertakings but it also challenged some deep-rooted ideas. In England, limited liability was resisted in the first half of the nineteenth century. It was argued that full personal responsibility was a “precondition of the proper functioning of a free economy”. It was the duty of the legal system to enforce that responsibility. Limited liability challenged this duty as it provided the very machinery to escape responsibilities.<sup>119</sup> England eventually moved to a general statute providing for limited liability in 1855.<sup>120</sup> Limited liability statutes began to be adopted by leading states of the United States by the 1830s.<sup>121</sup>

In pre-Confederation Canada the debate about limited liability extended from the 1820s to the 1850s and “reflected the debate in England and the United States”. Limited liability was defended in the Canadian setting on the basis that “accumulations of capital were necessary”. Without limited liability, businessmen would not invest in company ventures given that personal fortunes would be at risk. Further, as limited liability had been established in many areas of the United States, the principle had to be adopted in Canada to make investment attractive. However, limited liability was “opposed by a simple belief that debts should be paid”. It was further argued that limited liability companies had an unfair advantage over businessmen carrying on trade as sole enterprises. Opposition to the principle may have prevented the passage of some bills providing for individual corporations.

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<sup>118</sup> J.B. Baskin & P.J. Miranti, *A History of Corporate Finance* (New York: Cambridge University Press, 1997) at 139.

<sup>119</sup> W. R. Cornish & G. de N. Clark, *Law and Society in England 1750-1950* (London: Sweet & Maxwell, 1989) at 247.

<sup>120</sup> *Ibid.* at 256-257.

<sup>121</sup> J.B. Baskin & P.J. Miranti, *A History of Corporate Finance* (New York: Cambridge Univ. Press, 1997) at 141; K.L. Hall, *The Magic Mirror Law in American History* (New York: Oxford Univ. Press, 1989) at 98

Although limited liability prevailed,<sup>122</sup> its establishment did not end the debate over the moral obligation to repay debts in the wider bankruptcy law context. As will be seen, in the 1870s and 1880s many continued to advance the argument that debts had to be repaid. However, debts that led to bankruptcy were not always investments in business ventures. Debts to relatives or friends, long-term farming debts, and debts incurred for purely personal purposes such as gambling or the purchase of goods often led to financial ruin and were of a different category than investments in failed businesses. In the bankruptcy law context, many continued to differentiate between commercial and non-commercial debts and argued that the trader rule, which separated the two, should be continued. The unpopularity of the *Insolvent Act of 1864* and its predecessors did not hold out much promise for long-lasting post-Confederation bankruptcy reform. Those opposed to bankruptcy law made equally strong moral arguments after Confederation.

*B The Personal Nature of Credit*

The appeal of moral arguments can be linked to the personal nature of debt in the rural society of pre-Confederation Canada. Arguments about individual responsibility to repay debts carried more weight when credit conditions turned on the creditor's personal knowledge of the debtor. Monod argues that "individuality rather than cash served as the nexus of mid-nineteenth century trading". He argues that bartering was common and a "deal was as good as the people striking it". Prices varied depending on the relationship between the buyer and seller. Buyers more heavily in debt could be expected to pay marginally more for goods:

In fact, nothing was more individual than credit. In many stores accounts were paid or not paid, at the customers' convenience, and it was not until

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<sup>122</sup> R.C.B. Risk, "The Nineteenth Century Foundations of the Business Corporation in Ontario" (1973) 23 U.T.L.J. 270 at 295-298. One cannot point to a conclusive date by which limited liability was established for all companies. Risk's study shows that before 1849 most of the individual statutes did not include any terms about limited liability. In 1849 the Interpretation Act established limited liability for all corporations for which express provisions were not made. Some of the general incorporation statutes expressly limited liability while others, e.g. public utility statutes did not. The first general incorporation statute which related to mining, manufacturing, mechanical and chemical concerns adopted limited liability in 1850. See also F.E. Labrie & E.E. Palmer, "The Pre-Confederation History of Corporations in Canada" in J.S. Ziegel, ed., *Studies in Company Law* (Toronto: Butterworths, 1967) 33 at 57.

the 1870s that enough cash entered the economy to allow most buyers to pay their bills monthly ... Shopkeepers kept track of these credit accounts in journals organized by the name of the purchaser, which meant that most retailers must have known pretty well everyone who came into their shops to buy.<sup>123</sup>

This personal nature of debt also extended to the relationship between merchants and suppliers. Many retailers made an "annual buying pilgrimage" to wholesale centres where personal contacts were renewed. These contacts were very significant as "so much of the commercial life of the colonies depended on trust: wholesalers would often be paid annually, but sometimes they would continue supplying a retail debtor for years on end."<sup>124</sup>

The lack of transportation and ready cash constrained merchants in the eighteenth and early nineteenth century. They therefore had to extend long term credit, relying on "informal reputations and familial connections when assessing the worthiness of clients". "Injunctions to honesty were especially important in an age characterized by long credit lines and minimal opportunities for the personal assessment of one's business contacts."<sup>125</sup>

Douglas McCalla's study of the Buchanans' family business in Upper Canada from 1834 to 1872 also illustrates the importance of personal credit ties. McCalla argues that "personal knowledge by the lender or the endorser of the borrower was essential to the system's operation. Credit tied metropolis and hinterland together."<sup>126</sup> McCalla's description of the Buchanans' credit checking system is worth quoting at length:

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<sup>123</sup> D. Monod, *Store Wars: Shopkeepers and the Culture of Mass Marketing: 1890-1939* (Toronto: University of Toronto Press, 1996) at 21.

<sup>124</sup> *Ibid.* at 22.

<sup>125</sup> *Ibid.* at 60.

<sup>126</sup> D. McCalla, *The Upper Canada Trade, 1834-1872: A Study of Buchanans' Business* (Toronto: University of Toronto Press, 1979) at 6 [hereinafter McCalla, *Buchanans' Business*]. McCalla's other study of rural credit in Upper Canada indicates that within a local community, "many upper Canadians were at once debtors and creditors, as they extended credit to their neighbours and received credit from them". D. McCalla, "Rural Credit and Rural Development in Upper Canada 1790-1850" in R. Omner ed., *Merchant Credit and Labour Strategies in Historical Perspective* (Fredericton: Acadiensis Press, 1990) at

In selecting customers and managing their accounts, the partners relied on knowledge and judgment .... Every winter, once the roads had frozen and while the wholesale trade was least active, partners and, later, senior employees toured the hinterland .... On such trips, the partners met customers and inspected their businesses .... The partners did not hesitate to demand to see the customer's books, aiming to judge his assets and liabilities, his sales and managerial abilities. They inspected his stocks and assessed the strengths and weaknesses of his employees .... Yet even so there was much room for error and oversight. Accordingly the partners sought above all to judge the man's character and integrity, and they looked especially for signs of weakness such as alcoholism and serious neglect of business details.<sup>127</sup>

Under the system of personalized credit relations, those debtors who had no means of obtaining further credit to repay old debts in many cases had no choice but to leave the community.<sup>128</sup> Further, prior to Confederation, due to the shortage of liquidity, many Upper Canadians found themselves entwined in a system of mutual debts and credits. Periodically, merchants set-off mutual small debts and credits.<sup>129</sup>

A recent study of mid-Victorian Brantford Ontario also indicates that from the late 1840s to the 1860s businessmen received recommendations for credit "by virtue of their character despite their limited wealth or trade prospects."<sup>130</sup> Those who extended credit relied on the honourable borrower to repay. While a man's wealth might determine the amount of credit, it was character that determined whether or not the loan would be

262 [hereinafter McCalla, "Rural Credit"].

<sup>127</sup> McCalla, *Buchanans' Business*, *ibid.* at 37-38; See also P. Baskerville & G. Taylor, *A Concise History of Business in Canada* (Toronto: Oxford University Press, 1994) at 142-143.

<sup>128</sup> McCalla, "Rural Credit", *supra* note 126 at 270; D. McCalla, *Planting the Province: The Economic History of Upper Canada 1784-1870* (Toronto: University of Toronto Press, 1993) at 147 [hereinafter McCalla, *Planting the Province*].

<sup>129</sup> McCalla, *Planting the Province*, *ibid.* at 146.

<sup>130</sup> D. Burley, *A Particular Condition in Life: Self Employment and Social Mobility in Mid Victorian Brantford* (Montreal: McGill-Queen's University Press, 1994) at 103 [hereinafter Burley, *A Particular Condition*]. For an overview of this study, see D. Burley, "'Good for All He Would Ask': Credit and Debt in the Transition to Industrial Capitalism--The Case of Mid-Nineteenth Century Brantford, Ontario" (1987) 20 *Soc. Hist.* 79-99.

extended. Those who gambled, speculated, broke contracts or imbibed in alcohol received a qualified credit rating. Positive matters included the stability of home life; those who were single or abdicated familial responsibilities received less positive reports.<sup>131</sup> Credit therefore was the "prerogative of the respectable and responsible man." The purpose of the loan did not concern the lender "since an honourable borrower fulfilled his obligations."<sup>132</sup>

One study has argued that one of the most important aspects for a nineteenth century business to consider was the issue of risk and how best to minimize it:

Risks were high primarily because people lacked concrete information upon which to base sound business decisions .... Economic vulnerability to the vagaries of world markets was exacerbated by the chain of long term credit .... Risks were kept to a tolerable level by judicious selection of partners, agents, and employees, often drawn from the merchant's extended family.<sup>133</sup>

The creation of legal mechanisms to allow for the enforcement of debts was one step in risk reduction. Legal institutions that allowed for the collection of debts provided a substitute for familial or personal transactions. However, simple debt collection mechanisms, as will be seen, could be thwarted by insolvent debtors making preferential

<sup>131</sup> Burley, *A Particular Condition*, *ibid.* at 103-111. A study of early nineteenth century Quebec also recognizes the significance of the personal nature of debt. The renewed demands for a bankruptcy law in the 1820s are attributed in part to an economic crisis in 1820-21 which led to a rising number of debtors. Importantly, however, an increase in the number of English immigrants beginning in 1815, led to a vast increase in the population. Creditors were more at risk lending to a larger population in contrast to a less populous colony. Kolish, "L'Introduction de la Faillite", *supra* note 34 at 223. For a detailed study on the nature of credit and debt during the 1820s in Lower Canada, see G. Bervin, "Aperçu Sur Le Commerce et le Crédit à Québec 1820-1830" (1983) 36 R.H.A.F. 527. Kolish's study of court records from 1785 to 1825 indicates that debt recovery and disputes over contracts dominated civil litigation. See E. Kolish, "Some Aspects of Civil Litigation in Lower Canada, 1785-1825: Towards the Use of Court Records for Canadian Social History" (1989) 70 Can. Hist. Rev. 337 at 365

<sup>132</sup> D. Burley, "'Good for All He Would Ask': Credit and Debt in the Transition to Industrial Capitalism--The Case of Mid-Nineteenth Century Brantford, Ontario" (1987) 20 Soc. Hist. 79 at 83.

<sup>133</sup> P. George and P. Sworden, "The Courts and the Development of Trade in Upper Canada: 1830-1860" (1986) 60 Bus. Hist. Rev. 258 at 262.

payments to local creditors. Bankruptcy laws in combination with debt collection statutes, were essential to promote a wider and more distant trade.<sup>134</sup>

The personal nature of debt in a localized rural economy in pre-Confederation Canada may therefore account for the persuasiveness of the moral opposition to the discharge of debts. Rural opposition to bankruptcy law, as will be seen, was partially responsible for the repeal of the federal bankruptcy legislation in 1880. There is evidence of a similar rural opposition in pre-Confederation Nova Scotia. After citing evidence of moral arguments against bankruptcy, Girard argues that rural opponents were more attracted to these types of arguments as rural lending practices tended to be "highly personal and informal", in contrast to more impersonal practices in Halifax.<sup>135</sup>

Members of the Nova Scotia legislature did not embrace bankruptcy reform as "ideologies stressing proper commercial behaviour ... continued to attract many adherents." Girard claims that debtor-creditor reform in England and the United States "was ultimately associated with both urbanization and increased commercial activity. Pre-Confederation Nova Scotia was still intensely rural."<sup>136</sup>

#### C *The Role of Distance and Preferential Payments*

The discharge was not the only matter upon which there was a difference of opinion. Bankruptcy law had different effects upon distant and local creditors and the tension between these two types of creditors is an important theme. A centralized bankruptcy system reduced risks for distant or foreign creditors, and destroyed local creditor advantage. The role of distance and credit networks was an important theme in

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<sup>134</sup> "The necessity of relying on family or personal relationships can be reduced by the availability of social institutions to enforce private contracts, including ready access to legal remedies. Such institutions provide substitutes for the authority, assurances, and sanctions identified with family centred transactions, and increase the likelihood of exchange over a wider range of trading parties." *Ibid.* at 262-263.

<sup>135</sup> Girard, "Insolvency Law Reform in Nova Scotia", *supra* note 15 at 101, 105. Rural opposition to bankruptcy law surfaced as early as 1842 when rural members complained that bankruptcy proceedings were to be centred in Halifax. Further, rural members of the legislature tended to oppose bankruptcy reform in favour of the status quo as debt collection was an important part of their practices. Girard indicates that further research of voting patterns needs to be completed in order to confirm the urban rural variable as a significant factor in predicting lawyers' attitudes to bankruptcy law.

<sup>136</sup> *Ibid.* at 115.



the evolution of United States bankruptcy law and a similar trend can be found in pre-Confederation Canada.

Evidence of the tension between local and distant creditors appeared very early on in pre-Confederation Canada. After the British victory in New France, a debate emerged as to the applicability of English law. In 1767 a debtor, who had been financially ruined by the war, was unable to reach an agreement with his creditors. He consulted the Attorney-General, who purported to issue a commission in bankruptcy on the assumption that the English bankruptcy laws were in force.<sup>137</sup> Local Quebec merchants, however, opposed the introduction of bankruptcy law.

Merchants in Quebec argued that London merchants would advance less credit to local merchants if Quebec adopted a bankruptcy regime.<sup>138</sup> The claim did not go unchallenged. The Attorney-General, understanding the economic motives of both local and distant creditors, responded by arguing that overseas traders in fact favoured a bankruptcy scheme for the colony. Such a procedure, according to the Attorney-General, would encourage further credit from England. Without a bankruptcy law, overseas merchants were disadvantaged as local creditors were in a better position to monitor the business of the debtor and thus were favourably placed to collect from the debtor.<sup>139</sup> In the end, merchants in Quebec succeeded in preventing the Attorney-General from issuing a bankruptcy commission. The merchants preferred to avoid judicial or administrative supervision of private arrangements with their debtors.<sup>140</sup>

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<sup>137</sup> Kolish, "L'Introduction de la Faillite", *supra* note 34 at 217; Kolish, "Imprisonment for Debt", *supra* note 34 at 605; Kolish, *Changement*, *supra* note 34 at 49.

<sup>138</sup> Kolish, *Changement*, *supra* note 34 at 50; Kolish, "Imprisonment for Debt", *supra* note 34 at 606; Kolish, "L'Introduction de la Faillite", *supra* note 34 at 219-220.

<sup>139</sup> Kolish, *Changement*, *supra* note 34 at 51; Kolish, "L'Introduction de la Faillite", *supra* note 34 at 220.

<sup>140</sup> Kolish, "L'Introduction de la Faillite", *supra* note 34 at 221. Bryan Young has pointed out that in many other areas of law, English merchants pressed for "the imposition of English law in matters affecting commerce and succession practices". Young, *The Politics of Codification*, *supra* note 42 at 8-9. Smadych also has found further evidence of the opposition to bankruptcy law in Quebec. He refers to a petition sent by British merchants in Canada stating their objections to the imposition of English bankruptcy law in the colony. The petition was enclosed in a letter from Guy Carleton, the governor, to the Earl of Hillsborough,

The problem for distant creditors was a common one in pre-Confederation Canada. Their collection efforts were hampered by the common law priority rules of "first come first served" that advantaged local creditors. The race of diligence, also a problem under American state collection law,<sup>141</sup> favoured creditors who were able to first enforce upon the debtor's assets. Creditors who obtained the first execution against the debtor were not required to share the benefits of execution with subsequent creditors.<sup>142</sup> The bankruptcy law principle of equal treatment of creditors, upheld by the pro rata distribution of the debtor's assets put all creditors, near and far, on an equal footing. According to an 1863 Upper Canada Law Journal editorial, in the distribution of the debtor's assets among his creditors "there shall be no preference or priority... all shall share alike."<sup>143</sup>

The problems inherent in the common law's rewarding of the first creditor were recognized in the Ontario case of *Gottwalls v. Mullholland*.<sup>144</sup> Justice John Wilson noted that the "grasping oppression ... might be avoided if a seizure under execution were made to operate as an attachment for the benefit of all creditors who chose to claim within a given time." The law was unsatisfactory as it "permits the creditor who can get a judgment and execution to have a preference, by allowing him to have his debt paid in full, with no regard either to the interest of the debtor or the other creditors". It was

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the first secretary of the new Department of State for the colonies dated 21 November 1767. Hillsborough's response 6 March 1768 indicated that "it is impossible to conceive, that could ever be His majesty's intention signified, either by the proclamation, or by the ordinance for the establishment of courts of Judicature, to extend laws of that particular and municipal nature to the colony". See Smandych, "Exclusion of the English Poor Law", *supra* note 38 at 114

<sup>141</sup> See discussion in chapter 2 at pp 34-38.

<sup>142</sup> See eg., *Beekman v. Jarvis* (1847) 3 U.C.Q.B. 280; *Topping v. Joseph* (1859) 1 E. & A. 292; *Rowe v. Jarvis* (1863) 13 U.C.C.P. 495; *Bank of Montreal v. Munro* (1864) 23 U.C.Q.B. 414. For an overview of the common law principles, see Dunlop, *Creditor Debtor Law*, *supra* note 8 at 545.

<sup>143</sup> "A Bankruptcy Law Required" (1863) 9 U.C.L.J. 141

<sup>144</sup> (1864) 15 U.C.C.P. 62 aff'd (1866) 3 E. & A. 194.

possible for a debtor to choose to prefer a creditor by permitting one creditor to obtain default judgment while defending others.<sup>145</sup>

Once the Bankruptcy Act of 1843 expired, commentators recognized the ability of certain creditors to extract extra payments from the debtor to the disadvantage of less well-informed creditors. The primary goal of bankruptcy was “the rapid, thorough, and economical application of the whole available funds of the debtor to pay his creditors”.<sup>146</sup> Secondly, the lack of any mandatory distribution scheme encouraged debtors to make preferential payments to favourite creditors.<sup>147</sup> Here lay the true motive behind calls for reform:

as the law now stands in Upper Canada ... a debtor, though largely embarrassed, may select any one or more of his creditors to the exclusion of all others, and to the ‘select few’ pay their demands in full to the impoverishment of all others not so lucky. These few are ‘friends.’ .... In private they are cheek and jowl with [the debtor] as the merry laugh peal after peal arises over the good old wine. Oh, that the bulk of the creditors could get one peep behind the curtains in cases such as this!<sup>148</sup>

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<sup>145</sup> (1864) 15 U.C.C.P. 62 at 73-74. A Province of Canada statute enacted in 1858 did prohibit the making of a payment with the “intent of giving one or more of the creditors of such person a preference over his other creditors”. See 22 Vict., c. 9 and consolidated as *Relief of Insolvent Debtors Act* C.S.U.C. c. 26, s. 18. However, as pointed out by Wilson J. debtors could circumvent the provisions by choosing to defend certain lawsuits while allowing default judgments in others. Wilson J. stated at 73 that the law “permits a preference while it forbids it”. The subsequent article in the U.C.L.J. attacking the practice of preferences more generally suggests that the legislation was not effective. The existence of this statute later became relevant in 1894 when the constitutionality of provincial assignment and preference legislation was tested before the Privy Council. See chapter 6.

<sup>146</sup> “Bankruptcy and Insolvency” (1861) 7 U.C.L.J. 10 at 11.

<sup>147</sup> Loans to personal connections such as friends and neighbours posed the most significant problem. One study shows that farmers not only borrowed from private lenders but also borrowed from others in a similar social and economic standing i.e. “friends and neighbours”. See D. Bilak, “The Law of the Land: Rural Debt and Private Land Transfer in Upper Canada, 1841-1867” (1987) 20 *Social History* 177 at 181 discussing a study of the Toronto Gore Township.

<sup>148</sup> “Shall We Have a Bankruptcy Law?” (1858) 4 U.C.L.J. 2 at 3-4. See also “A Bankruptcy Law Required” (1863) 9 U.C.L.J. 141; “The Act Respecting Insolvency” (1864) 10 U.C.L.J. 225 at 226.

Distant creditors never came close enough to the curtain to discover how the debtor distributed his assets. Arguments such as these were raised after Confederation and became increasingly important for those who had a more national vision of the Canadian economy.

### **Conclusion**

This overview of pre-Confederation legislation illustrates that bankruptcy legislation was not widely accepted prior to 1867. Upper Canada had expressly excluded the operation of English bankruptcy law in 1792. In the Maritimes, no bankruptcy laws were ever passed. Nova Scotia considered the subject on a number of occasions but all bills were defeated. Only three major bankruptcy statutes were enacted in the pre-Confederation period. The Lower Canada Bankruptcy Ordinance of 1839 had little impact as it was replaced by the Province of Canada Bankruptcy Act of 1843. This Act was also short-lived and expired in 1849 leaving the province of Canada without a law until 1864. The *Insolvent Act of 1864* did not adopt a uniform regime over the two sections of the province. While all debtors in Canada West were able to make a voluntary assignment and apply for a discharge, in Canada East only traders were eligible for the discharge. In 1867, therefore, Parliament was not able to draw on a strong tradition of provincial bankruptcy legislation. Bankruptcy legislation, open to all types of debtors, was only known in Ontario since 1864.

The pattern of short-lived bankruptcy statutes and the outright rejection of bankruptcy bills in the Maritimes is consistent with the American experience. During the pre-Confederation period, Congress repealed the Bankruptcy Acts of 1800 and 1841. While English bankruptcy law provided the basis for the pre-Confederation statutes, the provinces exhibited no desire to match the continuous reforms of the mother country in the nineteenth century.

Both objectives of bankruptcy law, the discharge and the equitable distribution of the debtor's assets, were in issue. Most of the attention focused on the debtor's responsibility to repay debts. Claims of the immorality of the discharge appealed in a local and rural economy that relied on the personal nature of debt. However, the economic effects of bankruptcy law suggest that there must have been more to opposition than just morality and an appeal to values. Bankruptcy law's principle of a pro rata

distribution of the debtor's assets reduced the risk for distant creditors and destroyed local creditor advantage. The moral obligation to repay debts and the tension between local and distant creditors merit further study in the post-Confederation era.

## CHAPTER 5

### **The Demise of Canadian Bankruptcy Law: 1867 to 1880**

#### **Introduction**

After 1867, the bankruptcy discharge and the equitable distribution of the debtor's assets continued to be controversial. Following Confederation, Parliament passed the *Insolvent Act of 1869*.<sup>1</sup> The abolition of voluntary proceedings in 1875<sup>2</sup> and subsequent amendments that further restricted access to the discharge did little to placate the demands for repeal. In 1880, Parliament repealed the *Insolvent Act of 1875* and abandoned its constitutional jurisdiction over bankruptcy and insolvency matters for a period of nearly forty years.<sup>3</sup> Uniform national bankruptcy law did not emerge until 1919.<sup>4</sup>

Repeal in 1880 was not a surprise development. Opponents of bankruptcy law began to call for repeal shortly after the Act of 1869 came into effect. Between 1869 and 1880, the House of Commons debated 10 separate repeal bills.<sup>5</sup> This chapter examines

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<sup>1</sup> *Insolvent Act of 1869*, S.C., 32-33 Vic. 1869, c. 16. Section 155 provided that it was to only remain in force for four years. The law was extended in 1873 and again in 1874. S.C. 1873, 36 Vic. c. 2; S.C. 1874, 37 Vic. c. 46.

<sup>2</sup> *Insolvent Act of 1875*, S.C. 39 Vic. 1875 c. 16.

<sup>3</sup> *An Act to Repeal the Acts Respecting Insolvency Now in Force in Canada*, S. C. 1880, 43 Vic., c. 1. The British North America Act granted to the federal Parliament jurisdiction over bankruptcy and insolvency. 30-31 Vic., c. 3, s. 91(21).

<sup>4</sup> *Bankruptcy Act of 1919*, S.C. 1919, c. 36. See T.G.W. Telfer, "The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest?" (1994-95) 24 C.B.L.J. 357.

<sup>5</sup> 1869 : Bill to Repeal Act Respecting Insolvency, 1869;  
1871: *Bill to Repeal Insolvency Laws Now Existing in the Dominion*, 1871;  
1872: Bill C-3, *Bill to Repeal the Insolvency Laws*, 4th Sess., 1st Parl., 1872;  
1877: Bill C-39, *Bill to Repeal the Insolvent Act of 1875, and All Acts Passed in Amendment thereof*, 4th Sess., 3rd Parl., 1877; Bill C-2, *Bill to Repeal the Insolvency Laws, Now in Force in the Dominion of Canada*, 4th Sess., 3rd Parl., 1877;  
1878: Bill C-2, *Bill to Repeal the Insolvency Laws, Now in Force in the Dominion of Canada*, 5th Sess., 3rd Parl., 1878;  
1879: Bill C-15, *Bill to Repeal the Acts Respecting Insolvency Now in Force in the Dominion*, 1st Sess.,

the controversy over bankruptcy law from 1867 to 1880, and offers a number of explanations as to why Parliament ultimately chose to repeal the legislation. Part I traces the legislative history of Canadian bankruptcy law to 1880. Part II considers both economic and institutional factors as explanations for repeal.

The absence of a national market in the 1870s made a federal bankruptcy law premature. As we shall see, the continuation of a local and rural economy was a significant factor in explaining the law's demise. The rural nature of the economy shaped debate on the two central features of bankruptcy law. First, the discharge challenged the fundamental obligation to repay debts. Critical attitudes towards debt can be linked to the continued importance of local credit relationships that depended upon trust and mutual exchange.<sup>6</sup> Opponents of bankruptcy law appealed to the important value of repaying all debts. Bankruptcy law, however, did more than challenge traditional attitudes to debt.

Opposition to a national bankruptcy law was not based entirely upon a disinterested debate of the ideal credit relationship. The debate over bankruptcy law also revealed a tension between local and distant creditors. The repeated appeals to moral obligations obscured an equally important debate on the impact of bankruptcy law's equitable distribution of the debtor's assets. The pro rata division of the debtor's assets had different consequences for local and distant creditors. Creditors trading beyond local markets sought to retain a national bankruptcy law that preserved a pro rata distribution. Bankruptcy law destroyed local advantage as it abolished the common law race to the debtor's assets and prohibited the payment of preferential claims to local or friendly

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4th Parl., 1879; Bill C-22, *Bill to Repeal the Insolvent Act of 1875, and to Make Provision in Lieu Thereof*, 1st Sess., 4th Parl., 1879; Bill C-85, *Bill to Repeal the Insolvent Act of 1875 and the Acts Amending It and to Make Provision for the Liquidations of the Estates of Insolvent Debtors*, 1st Sess., 4th Parl., 1879; 1880: Bill C-2, *Bill to Repeal the Acts Respecting Insolvency Now in Force in Canada*, 2nd Sess., 4th Parl., 1880. This last Bill received Royal Assent and became *An Act to Repeal the Acts Respecting Insolvency Now in Force in Canada*, S. C. 1880, 43 Vic., c. 1.

<sup>6</sup> There is evidence of a similar moral economy in England although at an earlier time. See e.g., C. Muldrew, "Interpreting the Market: the Ethics of Credit and Community Relations in Early Modern England" (1993) 18 Soc. Hist. 163. In the United States, see Tony Freyer's work on the "associational economy". T. Freyer, *Producers versus Capitalists Constitutional Conflict in Antebellum America* (Charlottesville: University of Virginia Press, 1994) [hereinafter Freyer, *Constitutional Conflict*].

creditors.<sup>7</sup> The rural nature of the economy also had an impact on this aspect of the debate. Repeal in 1880 suggests that the national market was not yet fully established. Some creditors preferred local markets and a return to the common law race to the debtor's assets.

However, the success of the repeal movement in 1880 cannot be entirely explained by the nature of the Canadian economy. It is also important to acknowledge the significance of institutions<sup>8</sup> as having an autonomous influence on policy choice.<sup>9</sup> The absence of a strong government department committed to reform was an important institutional factor. The weakness of the state inhibited the implementation of stable and lasting legislation.<sup>10</sup> The Canadian regulatory state was still yet to be formed. Federalism

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<sup>7</sup> Modern bankruptcy theorists have long recognized the advantages of bankruptcy law over the common law. Thomas Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge: Harvard University Press, 1986) [hereinafter Jackson, *Logic and Limits of Bankruptcy Law*]. One modern bankruptcy theorist has acknowledged the advantages that bankruptcy law offers to distant creditors. (The Bankruptcy Code effectively empowers national creditors against local creditors.) D. Carlson, "Debt Collecting as Rent Seeking" (1995) 79 Minn. L. Rev. 817 at 828, 832, 835.

<sup>8</sup> R. Kent Weaver & Bert Rockman eds., *Do Institutions Matter? Government Capabilities in the United States and Abroad* (Washington: Brookings Institution, 1993) [hereinafter Weaver & Rockman, *Do Institutions Matter?*]. For an overview of the recent historical literature in this area, see D. Ernst, "Law and American Political Development 1877-1938" (1998) 26 Rev. Am. Hist. 205. One recent study of the history of American bankruptcy law adopts a new institutional approach. See B. Hansen, *The Origins of Bankruptcy Law in the United States, 1789-1898* (Ph.D. diss., Washington Univ. 1995).

<sup>9</sup> Broad economic change may influence policy direction over time. However, institutional factors may have an autonomous influence on policy choice. On the interplay between macroeconomic change and state structures see L. Dodd, & C. Jillson, "Conversations on the Study of American Politics: An Introduction" in L. Dodd & C. Jillson eds. *The Dynamics of American Politics* (Boulder: Westview, 1994) 1 at 10.

<sup>10</sup> The professional expertise of the legislators and public bureaucracy affects the capacity of the political system to implement stable and lasting policies. On the capacity of the political system, see D.B. Robertson, "History, Behaviouralism, and the Return to Institutionalism in American Political Science" in E.H. Monkonen, ed., *Engaging the Past: The Uses of History Across the Social Sciences* (Durham: Duke University Press, 1994) at 9 [hereinafter Robertson, "Return to Institutionalism"]. On the importance of state expertise, see R. Kent Weaver & Bert A. Rockman, "Assessing the Effects of Institutions" in Weaver and Rockman, *Do Institutions Matter?*, *supra* note 8 at 32.



also affected policy direction.<sup>11</sup> Provincial jurisdiction over “property and civil rights” created the possibility of a provincial solution to a contentious subject. Ontario’s proposal of a provincial law that distributed the debtor’s assets on a pro rata basis without the controversial discharge provided Parliament with an opportunity to repeal the federal bankruptcy law.

## I Legislative History and Constitutional Framework

### A *The British North America Act*

One of the objectives of Confederation<sup>12</sup> was to create a strong central government while at the same time permitting the provinces to regulate their local affairs.<sup>13</sup> Section 91 of the British North America Act granted to Parliament a general power for “the Peace, Order and Good Government” of Canada “in relation to all Matters not coming within the Classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces”. “[F]or greater certainty” s. 91 also listed several specific subjects over which the federal government had jurisdiction. Included in the long list of economic powers, which were designed to establish a national economy,<sup>14</sup> was jurisdiction over “bankruptcy and insolvency”.<sup>15</sup>

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<sup>11</sup> Federalism is acknowledged as an important institutional factor in Weaver and Rockman, *ibid.* at 31 and Robertson, *ibid.* at 137. Historical studies have acknowledged the importance of federalism in the United States. See e.g., Harry N. Scheiber, “Federalism and the American Economic Order” (1975) 10 *Law & Soc. Rev.* 57; Freyer, *Constitutional Conflict*, *supra* note 6.

<sup>12</sup> There are two works devoted exclusively to bankruptcy and the constitution. A. Bohémier, *La Faillite en Droit Constitutionnel Canadien* (Montréal: Les Presses de L’Université de Montréal, 1972) [hereinafter Bohémier, *Droit Constitutionnel*]; P. Carignan, “La Compétence Législative en Matière de Faillite et d’ Insolvabilité” (1979) 57 *Can. Bar Rev.* 47.

<sup>13</sup> R. Risk, & R.C. Vipond, “Rights Talk in Canada in the Late Nineteenth Century: ‘The Good Sense and Right Feeling of the People’” (1996) 14 *L. & Hist. Rev.* 1 at 4.

<sup>14</sup> *Ibid.*

<sup>15</sup> B.N.A. Act, s. 91(21). See provincial powers under s. 92 including jurisdiction over “property and civil rights” (s. 92(13)) and “generally all matters of a merely local or private nature in the province (s. 92(16)). For an description of the structure of s. 91 and s. 92, see R. Risk, “The Scholars and the Constitution: P.O.G.G and the Privy Council” (1996) 23 *Man. L.J.* 496. On a general summary of the

The drafters of the B.N.A. Act included both "bankruptcy and insolvency" in s. 91(21) to avoid possible ambiguity over the ambit of the power.<sup>16</sup> Historically the distinction between the two terms had been of great significance. Traditionally bankruptcy laws only applied to traders. Insolvency laws, however, were available to non-traders and offered a debtor a release from imprisonment. England abolished this distinction in 1861, and in 1864 the Province of Canada followed this reform in part by abolishing the trader rule for voluntary proceedings in Canada West. If England and pre-Confederation legislation had only recently moved away from the distinction, it made sense to list both terms in s. 91.<sup>17</sup>

In the United States the federal power did not expressly include the term "insolvency". It was limited to "uniform Laws on the subject of Bankruptcies". As discussed in chapter 3, the meaning of the term "bankruptcy" was the subject of constitutional litigation in the United States.<sup>18</sup> The inclusion of both terms in the B.N.A. Act was an attempt to avoid a similar dispute that might arise between Parliament and the provinces.<sup>19</sup>

While there appears to have been no express reason given by the framers of the

reasons for Confederation, see R. Risk & R.C. Vipond, "Rights Talk in Canada in the Late Nineteenth Century: 'The Good Sense and Right Feeling of the People'" (1996) 14 L. & Hist. Rev. 1 at 4; R. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: SUNY Press, 1991) at 6-10, 15-45; B. Baker, "The Province of Post Confederation Rights" (1995) 45 U.T.L.J. 77.

<sup>16</sup> J. Honsberger, "The Nature of Bankruptcy and Insolvency in a Constitutional Perspective" (1972) 10 Osgoode Hall L.J. 199 at 199-200; Bohémier, *Droit Constitutionnel*, *supra* note 12 at 19.

<sup>17</sup> Despite their titles, the *Insolvent Acts of 1864, 1869 and 1875* were all bankruptcy laws.

<sup>18</sup> See discussion of *Sturges v. Crowninshield* 4 Wheat. 122 (1819); *Ogden v. Saunders* 12 Wheat. 213 (1827) contained in chapter 3.

<sup>19</sup> *The Queen v. Chandler* (1869) 12 N.B.R. 556 at 561 (C.A.). See also J. Honsberger, "The Nature of Bankruptcy and Insolvency in a Constitutional Perspective" (1972) 10 Osgoode Hall L.J. 199 at 199-200. See also Bohémier, *Droit Constitutionnel*, *supra* note 12 at 19; P. Carignan, "La Compétence Législative en Matière de Faillite et d' Insolvabilité" (1979) 57 Can. Bar Rev. 47 at 51; L.J. de la Durantaye, *Traité de la Faillite en la Province de Québec* (Montréal: Chez L'Auteur, 1934) at 24 [hereinafter de la Durantaye, *Traité de la Faillite*]; E.H. Levi & J.W. Moore, "Bankruptcy and Reorganization: A Survey of Changes" (1937) 5 U. Chic. L. Rev. 1 at 19.

B.N.A. Act for the inclusion of bankruptcy and insolvency in s. 91,<sup>20</sup> bankruptcy law fitted naturally with the other listed national powers. The framers deemed trade to be of national significance, and powers granted under s. 91 included “trade and commerce”, “navigation and shipping”, “currency and coinage”, “banking, incorporation of banks and the issue of paper money”, “bills of exchange and promissory notes”.<sup>21</sup> One might also link the penal aspects of bankruptcy to federal control over criminal law. Just as criminal law regulated moral behaviour, bankruptcy law also played a role in this regard by sanctioning the conduct of fraudulent debtors.<sup>22</sup> A national bankruptcy law instilled confidence in foreign and distant creditors. A national act was more accessible and easier to learn than numerous provincial variations. Foreign capital was important to the young country, and this may have been put at risk if provinces were allowed to legislate in distinctive ways. A federal law applied equally to all creditors, and allowed the collection of the debtor’s assets wherever they were located.<sup>23</sup>

Local matters, including regulation over “property and civil rights” were granted to the provinces. While the grant of jurisdiction over bankruptcy and insolvency was

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<sup>20</sup> Bohémier’s review of the primary sources led him to conclude: “Nulle part, les pères de la confédération n’ont exprimé les motifs de leur décision”. Bohémier, *Droit Constitutionnel*, *supra* note 12 at 19.

<sup>21</sup> D.E. Thomson, “Bankruptcy Law in Canada” (1894) 1 *Barrister* 39 at 39-40; D.E. Thomson, “Bankruptcy Legislation in Canada” (1902) 1 *Can. L. Rev.* 173 at 174.

<sup>22</sup> Bohémier, *Droit Constitutionnel*, *supra* note 12 at 26.

<sup>23</sup> This paragraph is based upon Bohémier’s work. Bohémier argues that the new national Parliament may have been perceived as a more stable and mature institution by foreign creditors. He claims that some fathers of Confederation mistrusted local legislatures as they had a tendency to favour local and narrow interests. “Il est concevable que certaines provinces auraient pu chercher à accorder un traitement privilégié aux créanciers locaux au détriment des créanciers étrangers.” Bohémier, *Droit Constitutionnel*, *supra* note 12 at 19-25; A. Bohémier, *Faillite et Insolvabilité*, tome 1, (Montréal: Editions Thémis, 1992) 21. The importance of uniformity was also cited by the Quebec Superior Court in 1888 decision: *Dupont v. La Cie de Moulin a Bardeau Chanfren* (1888) 2 *L.N.* 255 at 227. See also, J. Honsberger, “The Historical Evolution of Bankruptcy and Insolvency Process in Canada” (unpublished) at 27 [hereinafter Honsberger, “Historical Evolution of Bankruptcy”]; *Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Ottawa, 1970) [hereinafter, Tassé Report] at 37.

exclusive, the provinces retained the right to regulate debtor-creditor matters generally.<sup>24</sup> The B.N.A. Act created the possibility of some overlap in relation to the regulation of debtors. Bankruptcy law therefore could not be separated from constitutional law. The federal government's abandonment of bankruptcy legislation and the provincial legislation that followed suggests that consensus as to the need for a national bankruptcy law did not survive long after Confederation. Despite the clear wording of the B.N.A. Act, the federal government did not view bankruptcy law as a fundamentally important economic power.

*B Insolvent Act of 1869*

Following the government's announcement of its intention to introduce uniform bankruptcy legislation,<sup>25</sup> a Parliamentary Select Committee was appointed to report on the operation of provincial bankruptcy laws enacted prior to Confederation.<sup>26</sup> The Committee issued its report on 17 April 1868<sup>27</sup> and John A. Macdonald subsequently introduced the first federal bankruptcy Bill. Due to the lateness of the session, Parliament postponed the matter pending further distribution of the Bill. The failure of the 1868 Bill disappointed Macdonald, who indicated that the opposition took "every objection" to the Bill, and prevented its passage during that session.<sup>28</sup> The Bill appears to have been the

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<sup>24</sup> B.N.A. Act, s. 92(13); 92(16). On the issue of potential overlap, see D. Gibson, "Development of Federal Legal and Judicial Institutions in Canada" (1996) 23 Man. L.J. 450 at 471; J.A.C. Cameron, "Annotation of Bankruptcy Act of Canada, 1920" (1920) 53 D.L.R. 135 at 137; J.H. Greenberg, "The Bankruptcy Law in Canada" (1931) 5 J. Nat'l. Ass'n. Ref. Bankr. 118.

<sup>25</sup> *Debates of the Senate* (7 November 1867) at 2.

<sup>26</sup> Discussed in chapter 4. See House of Commons, Select Committee, "Third Report of the Select Committee on Bankruptcy and Insolvency" in *House of Commons Journals* (17 April 1868). Also reported in (1868) L.C..L.J.46 & 62. See also *House of Commons Debates* (18 November 1867) at 87-88.

<sup>27</sup> Submissions were specifically sought on a number of issues. Voluntary bankruptcy, Acts of bankruptcy, preferences, mode of discharge and whether conditions should attach, and "whether the whole of the operation of the law had been beneficial, or the reverse". Minutes of Meeting of Council of Montreal Board of Trade, 10 December 1867, *Montreal Board of Trade Papers*, Public Archives of Canada [hereinafter PAC] MG28, III, 44, Reel M2785, p. 407, 408.

<sup>28</sup> Letter of John A. Macdonald to John Abbott, 22 May 1868, *Macdonald Papers*, PAC MG26-A,

work of John Abbott, the author of the *Insolvent Act of 1864*.<sup>29</sup> In 1869, Macdonald re-introduced the Bill, and it received Royal Assent on 22 June 1869. The Act became known as the *Insolvent Act of 1869*.<sup>30</sup>

The Act of 1869 repealed the *Insolvent Act of 1864* and provided that "all other Acts and parts of Acts now in force in any of the said provinces which are inconsistent with the provisions hereof are also repealed".<sup>31</sup> The national law consolidated pre-Confederation statutes, and created a uniform system of bankruptcy law:

WHEREAS it is expedient that the Acts respecting Bankruptcy and Insolvency in the several Provinces ... be amended and consolidated, and the law on those subjects be assimilated in the several Provinces of the Dominion.<sup>32</sup>

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Vol. 1 File 718, Reel, c-26. Macdonald also blamed the lateness of the Select Committee's report. Letter of John A. Macdonald to Charles Stathers, 28 May 1868, Vol. 1, File 727, Reel, c-26.

<sup>29</sup> Macdonald left Abbott in charge of the Bill pending its re-introduction the following year. Abbott, according to Macdonald, "thoroughly understands the subject". Letter of John A. Macdonald to Alex Longue, 30 May 1868, *Macdonald Papers*, PAC MG26-A, File 777, Reel c-26.

<sup>30</sup> *Report of the Committee on Bankruptcy and Insolvency*, 17 April 1868, (1868) 3 L.C.L.J. 47; *House of Commons Debates* (13 May 1868) at 690; *House of Commons Debates* (21 April 1869) at 36; *Debates of the Senate* (22 June 1869) at 390. Two annotated versions of the *Insolvent Act of 1869* were published. See J.D. Edgar, *The Insolvent Act of 1869* (Toronto: Copp Clark, 1869) [hereinafter Edgar, *The Insolvent Act of 1869*]; J. Popham, *The Insolvent Act of 1869* (Montreal: Dawson Brothers, 1870) [hereinafter Popham, *The Insolvent Act of 1869*].

<sup>31</sup> *Insolvent Act of 1869*, s. 154. Honsberger suggests that "there is almost no federal policy reflected in the Act other than that there should be a uniform system across the country". Honsberger, "Historical Evolution of Bankruptcy", *supra* note 23 at 33. The promise of uniformity, however, was not quickly realized as problems arose with the inconsistency of application of the rules and general principles across different regions. Letter to John Abbott, 5 March 1869, *Department of Justice Files*, RG 13 A3, Vol. 557, File No. 703.

<sup>32</sup> *Insolvent Act of 1869*, Preamble. Even though the government may have aspired for uniformity, one reviewer criticized the lack of uniform practice rules in the various provinces. See "Review of Edgar, *The Insolvent Act of 1869*" (1870) 6 *Local Courts and Municipal Gaz.* 31.

The passage of the *Insolvent Act of 1869* did not reflect a wide acceptance of bankruptcy law. First, Parliament designed the law as a temporary four-year measure.<sup>33</sup> Second, Parliament debated the Bill only three days after a Member proposed the repeal of the *Insolvent Act of 1864* which remained operative in Ontario and Quebec. While the repeal Bill did not proceed, it foreshadowed events to come. Once the *Insolvent Act of 1869* came into effect, Parliament debated two further repeal Bills.<sup>34</sup> These repeal efforts are significant given that the law would have expired on its own terms.<sup>35</sup>

The first issue that Parliament had to address was the scope of the Act and whether it should be restricted to traders. The trader rule had long been established in Quebec and the *Insolvent Act of 1864* had not altered this position. Debate over whether to broaden its scope to encompass non-traders as well as traders threatened the very success of the Bill. Sir John A. Macdonald ended the debate by deferring further discussion of the trader rule to another day.<sup>36</sup> Parliament could only agree on a law that retained the trader rule. The Act did not define trader, leaving the courts to work their way through the confused state of English jurisprudence.<sup>37</sup> A trader had been traditionally defined as a person "seeking to gain his living by buying or selling".<sup>38</sup> By

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<sup>33</sup> The Senate debates reveal that the 4-year limit was included to ensure that the measure would pass. *Debates of the Senate* (19 June 1868) at 368 (Campbell).

<sup>34</sup> *Bill to Repeal Act Respecting Insolvency, 1869; Bill to Repeal Insolvency Laws now existing in the Dominion, 1871; Bill C-3, Bill to Repeal the Insolvency Laws, 4th Sess., 1st Parl., 1872.*

<sup>35</sup> *Insolvent Act of 1869*, s. 155.

<sup>36</sup> *House of Commons Debates* (9 June 1869) at 685.

<sup>37</sup> *Insolvent Act of 1869*, s.1. Former English statutes and older English cases had developed a detailed and somewhat confusing jurisprudence on the definition of trader: Edgar, *The Insolvent Act of 1869*, *supra* note 30 at 33-36. On the definition of trader, see J.J.C. Abbott, *The Insolvent Act of 1864* (Quebec: George Desbarats, 1864) at 1-10 [hereinafter Abbott, *The Insolvent Act of 1864*]; Girouard, "Can a Person Who Ceased to Be a Trader Before the Passing of the *Insolvent Act of 1869*, Take Benefit of the Act" (1872) 2 R.C.L.J. 65; Girouard, "Can a Trader without Assets Make an Assignment" (1872) R.C.L.J. 63.

<sup>38</sup> Edgar, *The Insolvent Act of 1869*, *supra* note 30 at 33-34. For a discussion of the concept of trader under the *Insolvent Act of 1864* in Lower Canada, see Popham, *The Insolvent Act of 1869*, *supra* note 30 at 19; Abbott, *ibid.* at 1-10.

restricting the application of the Act to traders, Parliament limited the availability of the discharge to a narrow class of debtors.<sup>39</sup>

The Act also applied to unincorporated trading companies and co-partnerships<sup>40</sup> but did not mention incorporated trading companies. While corporations existed, many businesses preferred to carry on as partnerships or sole proprietorships. Specific statutes had created many of the pre-Confederation corporations, and if a company became insolvent, specific amendments often restructured the particular company.<sup>41</sup> The modern dichotomy of consumer and corporate bankruptcy, therefore, did not exist under nineteenth century Canadian bankruptcy statutes. The bankruptcy law debate focused almost entirely on individual debtors engaged in some form of trade. This allowed opponents of bankruptcy law to focus on the evils of personal debt.

Creditors could force a debtor into bankruptcy on proof of an "Act of Bankruptcy".<sup>42</sup> Debtors who committed one of the thirteen separate acts were deemed to be insolvent and subject to the compulsory liquidation provisions of the legislation.

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<sup>39</sup> While the annotated texts are filled with references to English case law, there appears to have been only 2 reported cases under the *Insolvent Act of 1869* on the issue of trader. In *Duncan v. Smart* (1874) 35 U.C.Q.B. 532 (Ont. C.A.) a banker and exchange money broker who bought and sold American currency was held to be a trader. In *Harman v. Clarkson* (1872) 22 U.C.C.P. 291 (Ont.) an innkeeper was held not to be a trader. This decision apparently led to the inclusion of "keepers of inns" in the *Insolvent Act of 1875*. H. MacMahon, *The Insolvent Act of 1875* (Toronto: Willing & Williamson, 1875) at 34 [hereinafter MacMahon, *The Insolvent Act of 1875*].

<sup>40</sup> *Insolvent Act of 1869*, s. 143. The B.N.A. Act was also silent on the specific issue of corporate liquidations. Also, no province had enacted a general statute dealing with the liquidation of companies prior to confederation. Bohémier, *Droit Constitutionnel*, *supra* note 12 at 43.

<sup>41</sup> See e.g. *Re Cobourg & Peterborough Railway* (1869) 16 Gr. 571 (Ont. Ch.). On the history of corporations in Canada see F.E. Labrie & E.E. Palmer, "The Pre-Confederation History of Corporations in Canada" in J.S. Ziegel, ed., *Studies in Canadian Company Law* (Toronto: Butterworths, 1967). On the issue of corporate reorganization prior to Confederation in Ontario, see R.C.B. Risk, "The Nineteenth Century Foundations of the Business Corporation in Ontario" (1973) 23 U.T.L.J. 270 at 295.

<sup>42</sup> *Insolvent Act of 1869*, s.3

Parliament chose to copy the "Acts of Bankruptcy" from English legislation,<sup>43</sup> which focused on the wrongful conduct of the debtor.<sup>44</sup>

The legislation also permitted debtors to file for bankruptcy. One author claimed that voluntary bankruptcy law was in accordance with the "spirit of modern legislation".<sup>45</sup> However, this was an overly optimistic view. By adopting a voluntary procedure in 1869, Parliament may have moved beyond what was acceptable to society. Voluntary proceedings proved contentious after 1869. Parliament abolished this right in 1875.<sup>46</sup>

The *Insolvent Act of 1869* also contained provisions prohibiting fraudulent conveyances<sup>47</sup> and preferences.<sup>48</sup> As the general policy of bankruptcy law was to treat all creditors on an equal basis, prohibiting preferential payments or transfers ensured that creditors did not receive more than their fair share of the pro rata distribution.<sup>49</sup> The

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<sup>43</sup> Popham, *The Insolvent Act of 1869*, *supra* note 30 at 36, 41.

<sup>44</sup> To avoid compulsory proceedings, a debtor had to show that the stoppage of payment was a temporary condition, and not linked to fraud or fraudulent intent: *Insolvent Act of 1869*, s. 15. See Popham, *ibid.* at 46. If a creditor was found to have made a false claim, treble damages were awarded to the debtor. For a discussion of the origins of the Acts of Bankruptcy see chapter 2.

<sup>45</sup> Edgar, *The Insolvent Act of 1869*, *supra* note 30 at 38.

<sup>46</sup> See note 82 and accompanying text.

<sup>47</sup> Fraudulent conveyances generally involve a transfer to a third party who is a stranger to the debtor-creditor relationship. It is an attempt by the debtor to isolate property from the reach of creditors. All conveyances made with the intent to defraud and with the knowledge of the other party were void under s. 88. The statute also raised a presumption of fraud in the case of gifts (s. 86) or where a debtor who was unable to pay debts, made a contract with a party within thirty days of the assignment in bankruptcy (s. 87). Similarly, if the transferee knew of the debtor's inability to pay, the Official Assignee could look back beyond thirty days to set aside the fraudulent conveyance (s. 88). As to the general definition of fraudulent conveyances, see M.A. Springman et. al., *Fraudulent Conveyances and Preferences* (Toronto: Carswell, 1994) at 1-4-1-5 [hereinafter Springman, *Fraudulent Conveyances and Preferences*].

<sup>48</sup> The relevant provisions can be found in ss. 86-93 of the *Insolvent Act of 1869*. The *Insolvent Act of 1875* followed the precedent of the 1869 provisions. See sections 130 to 137 of the *Insolvent Act of 1875*.

<sup>49</sup> *Davidson v. Ross* (1876) 24 Gr. 22, 58. (Ont. Ch). On the 1869 provisions, see Popham, *The Insolvent Act of 1869*, *supra* note 30 at 116; Edgar, *The Insolvent Act of 1869*, *supra* note 30 at 105. See also Springman, Stewart & MacNaughton, *Fraudulent Conveyances and Preferences*, *supra* note 47 at 1-4-



prohibition against preferences<sup>50</sup> ensured that creditors trading over distances were not disadvantaged by debtors who chose to favour local creditors. The tension between local and distant creditors is evident in the parliamentary debates and will be discussed in more detail in the second section of this chapter.<sup>51</sup>

The discharge provisions of the *Insolvent Act of 1869* illustrated society's deep mistrust of debtors. In order to obtain a discharge, and be released "from all liabilities whatsoever,"<sup>52</sup> the debtor had to obtain consent from creditors representing a majority in number and three-fourths of the value of the debtor's liabilities.<sup>53</sup> However, before

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<sup>50</sup> The Act prohibited two types of preferences. The first involved a transfer of real or personal property by a debtor in contemplation of insolvency to a creditor. If a transfer occurred with 30 days prior to assignment, the transaction was presumed to have been made in contemplation of insolvency. The second involved a payment of money. The Act specified that the payment, by a debtor unable to meet his engagements, had to fall within a 30-day period prior to the assignment. Further, the receiving creditor had to have knowledge of the debtor's inability to pay. Payments beyond the 30 days or payments to a bona fide creditor within the 30-day period were outside the scope of the Act. *Insolvent Act of 1869*, s. 89.

<sup>51</sup> A decision of the Ontario Court of Appeal in some ways strengthened the preference provisions by abolishing the common law rule of pressure. Traditionally the common law allowed a creditor to retain payment obtained under pressure on the rationale that the payment was not voluntary. *Davidson v. Ross* (1876) 24 Gr. 22 overturned this doctrine. However, the Supreme Court of Canada disapproved of the ruling in *Davidson*. See *McCrae v. White* (1883) 9 S.C.R. 22. Once federal legislation was repealed, the doctrine of pressure re-emerged under provincial legislation. C.B. Lobbatt, "The Doctrine of Pressure" (1899) 35 Can. L.J. 322.

<sup>52</sup> *Insolvent Act of 1869*, s. 98. See *Austin v. Gordon* (1872) 32 U.C.Q.B. 621. The discharge provision contained some exceptions. However, they did not "interfere with the principle of the general rule". Abbott, *The Insolvent Act of 1864*, *supra* note 37 at 63. Abbott was commenting on the *Insolvent Act of 1864*. However the general principle was followed in the 1869 legislation. The exceptions listed in s. 100 included debts for which imprisonment of the debtor was possible under the Act, damages for assault, seduction, libel, slander, or malicious arrest. Also excluded were maintenance obligations for parent, wife or child and penalties for offences committed.

<sup>52</sup> *Insolvent Act of 1869*, ss. 94, 98.

<sup>53</sup> *Insolvent Act of 1869*, s. 94. The Act also provided a separate regime that allowed debtors to enter into a deed of composition. The level of creditor support was identical. A deed of composition in effect allowed debtors to reach a settlement with their creditors. If there was a deed, the estate was reconveyed to the debtor and debts were paid in accordance with the deed. By way of contrast a discharge released the debtor from all debts and creditors received a pro rata dividend. For a detailed description of the operation

taking effect, the discharge had to be approved at a court hearing where dissenting creditors could appear and object to the confirmation of the discharge. Grounds of opposition included:

Fraud and fraudulent preference ... fraud or evil practice in procuring the consent of the creditors to the discharge ... fraudulent concealment by the Insolvent of some portion of his estate ....<sup>54</sup>

Even if creditors could not establish a proper ground, the court still retained a discretion under s. 103 to suspend the discharge for up to five years or issue a second class discharge. Both a first and second class discharge released a bankrupt from his debts. However, the classification of discharges represented an official statement as to the moral trustworthiness of a debtor.

First class discharges were awarded in most cases where the bankruptcy had arisen from unavoidable loss or misfortune.<sup>55</sup> The court granted second class discharges when:

The Insolvent has been guilty of misconduct in the management of his business, by extravagance in his expenses, recklessness in endorsing or becoming surety for others, continuing his trade unduly after he believed himself to be insolvent, incurring debts without reasonable expectation of paying them .... or negligence in keeping his books and accounts.<sup>56</sup>

This classification system had its origins in English law.

England introduced the classification of discharges in 1849 and abandoned the regime in 1861.<sup>57</sup> John Abbott followed this lead when he drafted the *Insolvent Act of*

of the discharge provisions, see W.H. Kerr, "Deeds of Compositions and Discharge Between Co-Partners and their Creditors under the *Insolvent Act of 1869*" (1871) 1 R.C.L.J. 171. The Act penalized creditors who received money or property in exchange for their consent. Creditors were required to forfeit the sum and pay to the estate treble damages. *Insolvent Act of 1869*, s. 149. This was re-enacted in the *Insolvent Act of 1875*, s. 142.

<sup>54</sup> *Insolvent Act of 1869*, s. 101.

<sup>55</sup> See Popham, *The Insolvent Act of 1869*, *supra* note 30 at 138.

<sup>56</sup> *Insolvent Act of 1869*, s. 103.

<sup>57</sup> The English system awarded a first class certificate when it was shown that bankruptcy had arisen

1864 and excluded a class system.<sup>58</sup> However, the *Insolvent Act of 1869* re-introduced official moral judgment into bankruptcy proceedings. James Edgar, author of an annotated text on the 1869 Act, noted that under the English statute a "certain stigma was deservedly attached" to a third class certificate. In contrast, a first class certificate "was justly prized by its possessor as a passport by which he might again enter into business with an untarnished reputation for honesty at least".<sup>59</sup> John Popham, author of the competing text on the 1869 Act, offered a rationale for the class system:

It would seem but just there should be a distinction between the discharge given to an insolvent whose losses were unavoidable, and whose dealings were honourable; and that to another whose conduct bordered on recklessness or fraud, though insufficiently so to warrant a refusal of his discharge.<sup>60</sup>

Creditor consent was not always possible, and the Act provided a separate route to the discharge. After one year, debtors could apply for a judicial discharge. In comparison to the English three-year period, the Canadian statute appeared to be liberal.<sup>61</sup> However, creditors could effectively block this alternative route. A majority of the creditors representing three-fourths of the claims could apply to the court requesting suspension, or classification, or both. The court did not have any independent discretion on this issue and had to follow the direction of the creditors.<sup>62</sup>

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from unavoidable losses and misfortunes. A second class was granted where bankruptcy had not wholly arisen from unavoidable loss and misfortune. A third class discharge meant that bankruptcy had not arisen from unavoidable losses or misfortunes. Popham, *The Insolvent Act of 1869*, *supra* note 30 at 138.

<sup>58</sup> Edgar notes that the reason Abbott abandoned the class system was "the uncertainty and capriciousness with which the several judges gave the different classes of certificates; but the wisdom of the step has been very much questioned in England and has now been retraced in Canada". Edgar, *The Insolvent Act of 1869*, *supra* note 30 at 120.

<sup>59</sup> Edgar, *The Insolvent Act of 1869*, *supra* note 30 at 120.

<sup>60</sup> Popham, *The Insolvent Act of 1869*, *supra* note 30 at 138.

<sup>61</sup> Abbott, *The Insolvent Act of 1864*, *supra* note 37 at 70 and *Insolvent Act of 1864*, s. 9(10). *Insolvent Act of 1869*, s. 105.

<sup>62</sup> *Insolvent Act of 1869*, at s. 107. The suggestion for this change came from "an eminent judge in

The Act of 1869 was a strange amalgam of English bankruptcy law concepts. While it adopted the modern notion of voluntary proceedings, the Act retained the trader rule and the classification of discharges. The one modern feature, however, would be abandoned in 1875.

After the enactment of the *Insolvent Act of 1869*, debate continued over the merits of the law. The House of Commons debated a repeal bill in 1871 and in 1872. The sponsor of the repeal Bill outlined several reasons for repeal. First, Parliament only needed to consider a temporary bankruptcy law after some great financial crisis. In addition, the laws of bankruptcy were "not in accordance with the principles of morality". They encouraged recklessness in trade. Finally, the expense of bankruptcy proceedings disadvantaged creditors. While the Bill of 1871 failed,<sup>63</sup> the Repeal Bill of 1872 almost succeeded. The repeal Bill passed the House of Commons on 18 May 1872 by a slight majority.<sup>64</sup> The Senate, however, in a vote of 35-24, decided to defer reading of the Bill,

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Ontario". See *Debates of the Senate* (18 June 1869) at 355. As imprisonment for debt was still a possibility for civil suits, the Act specifically addressed this issue. The Act allowed imprisoned debtors who made an assignment under the *Insolvent Act* to make an application for release. The court could order the release of the imprisoned debtor on being satisfied that a bona fide assignment had been made and that the debtor had not concealed or disposed of assets in a fraudulent way. *Insolvent Act of 1869*, s. 145. Commentators pointed out that these provisions went much further than the English counterpart. The English provisions did not allow imprisoned debtors to be released if the debt was related to fraud or breach of trust. The Canadian provisions applied to any civil suit. Despite the criticisms, the provisions were followed in 1875. See *Insolvent Act of 1875*, s.127. See Edgar, *The Insolvent Act of 1869*, *supra* note 30 at 146; I. Wotherspoon, *The Insolvent Act of 1875* (Montreal: Dawson Brothers, 1875) at 170 [hereinafter Wotherspoon, *The Insolvent Act of 1875*].

<sup>63</sup> The government proposed to defer the second reading of the repeal Bill but a division was lost on this issue. 79 Members voted not to delay the repeal Bill. 60 Members voted to delay the repeal Bill. The 1871 Bill passed second reading stage. See *House of Commons Debates* (3 April 1871) at 830.

<sup>64</sup> The recorded vote on the second reading indicated a slight majority in favour of repeal. 77 Members voted in favour of repeal, while 62 voted against repeal. See vote on second reading *House of Commons Debates* (26 April 1872) at 163-164. There was no recorded vote on the third reading which was passed "amid loud cheers". However, the Senate Debates refer to a bare majority of three on the third reading division. See *House of Commons Debates* (18 May 1872) at 667-668; *Debates of the Senate* (22 May 1872) at 74 (Carrall). It was claimed in the Senate that the House of Commons repeal Bill had been supported by a majority of 36 from Ontario and Quebec and that "for the most part" Maritime representatives opposed repeal. *Debates of the Senate* (22 May 1872) at 746 (Sanborn).

thus preventing its passage.<sup>65</sup> The temporary law of 1869 was extended in 1873, and in 1874.<sup>66</sup> The *Insolvent Act of 1875* replaced the *Insolvent Act of 1869*.

### C *Insolvent Act of 1875*

The *Insolvent Act of 1875* received Royal Assent on 8 April 1875,<sup>67</sup> and came into force by virtue of s. 148 on 1 September 1875.<sup>68</sup> There was a consensus that the Act of 1869 had not gone far enough to protect creditors who required further means of discovering and punishing fraud.<sup>69</sup> The “‘poor creditor’ proposes now to take his innings, the ‘poor debtor’ having had ... a good time of it for many years past”.<sup>70</sup> Although the 1869 legislation had contained many provisions favourable to creditors, the “object of the [1875] bill was to give the creditors greater control of the estate”.<sup>71</sup>

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<sup>65</sup> *Debates of the Senate* (23 May 1872) at 789-790. For a discussion of the repeal issue, see “Proposed Repeal of the Insolvency Laws” *Monetary Times* (19 April 1872) 826; “Opposition to the Insolvent Act” *Monetary Times* (3 May 1872) 867-868. On the extent of the division in public opinion, see R.M.F., “Legislation Upon Insolvency” (1873) 2 *Can. Monthly* 419.

<sup>66</sup> S.C. 1873, 36 *Vic. c. 2*; S.C. 1874, 37 *Vic. c. 46*.

<sup>67</sup> There was more interest in the *Insolvent Act of 1875* with five separate publishers releasing annotated versions of the statute. J.D. Edgar & F.H. Chrysler, *The Insolvent Act of 1875* (Toronto: Copp Clark, 1875) [hereinafter Edgar, *The Insolvent Act of 1875*]; H. MacMahon, *The Insolvent Act of 1875*, *supra* note 39; Wotherspoon, *The Insolvent Act of 1875*, *supra* note 62. S.R. Clarke, *The Insolvent Act of 1875 and Amending Acts* (Toronto: Carswell, 1877) [hereinafter Clarke, *The Insolvent Act of 1875*]; W. Wilson, *Analyse et Indexe de l'Acte de Faillite* (Ottawa: Maclean Roger, 1875). A pamphlet was also published, providing an overview of the 1875 Act. See G. Beausoleil, *La Loi De Faillite* (Montreal: Plinguet, 1877). For a review of MacMahon, see “The New Insolvent Act” *Monetary Times* (24 September 1875) 352. For a scathing review of Wotherspoon, MacMahon, and Edgar texts, see “Editions of the Insolvent Act” *Monetary Times* (17 December 1875) 691.

<sup>68</sup> *Insolvent Act of 1875*, s. 148. See Clarke, *ibid.* at 2. The *Insolvent Act of 1875* repealed the *Insolvent Act of 1869* and amending Acts. Parliament enacted minor amendments in 1876 and in 1877 added further amendments which made the discharge more difficult to obtain. *An Act to Amend “The Insolvent Act of 1875”* S.C. 1876, 39 *Vic.*, c. 30; *An Act to Amend “The Insolvent Act of 1875, and the Act Amending the Same”* S.C. 1877, 40 *Vic.*, c. 41.

<sup>69</sup> C. Beausoleil, *La Loi de Faillite* (Montreal: Plinguet, 1877) 2.

<sup>70</sup> “Review of MacMahon, *Insolvent Act of 1875*” (1875) 9 *Can. L.J. (N.S.)* 259.

<sup>71</sup> *House of Commons Debates* (19 February 1875) 239; *House of Commons Debates* (10 March

The *Insolvent Act of 1875* also applied only to traders.<sup>72</sup> Unlike the general definition found in the Act of 1869, the new legislation attempted to define trader in a detailed way.<sup>73</sup> Categories included bankers, brokers, builders, millers, printers, and sharebrokers as well as a general category of “persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment ... in gross or by retail”.<sup>74</sup> The definition specifically excluded farmers, graziers, common labourers, and workmen for hire.<sup>75</sup> The exclusion provided the focal point for rural opposition and is discussed in more detail in Part II.

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1875); *House of Commons Debates* (25 March 1875). See also Wotherspoon, *The Insolvent Act of 1875*, *supra* note 62 at 38; Honsberger, “Historical Evolution of Bankruptcy”, *supra* note 23 at 28.

<sup>72</sup> “The list of ‘trades, callings or employments’ which is given is copied from the English Act ....” “The Act Respecting Insolvency” *Monetary Times* (26 March 1875) 1006.

<sup>73</sup> One commentator preferred to allow the judiciary to interpret a general term and questioned the utility of a detailed definition. Wotherspoon, *The Insolvent Act of 1875*, *supra* note 62 at 2-3. For an example of the trader issue, see *Joseph v. Haffner* (1881) 29 Gr. 421 (Ont. H.C.) where it was held that a barrister who dealt extensively in land transactions was not a trader.

<sup>74</sup> *The Insolvent Act of 1875*, s. 1. “The following persons and partnerships or companies exercising like trades, callings or employment, shall be held to be traders with the meaning of this Act: Apothecaries, auctioneers, bankers, brokers, brickmakers, builders, carpenters, carriers, cattle or sheep salesmen, coach proprietors, dyers, fullers, keepers of inns, taverns, saloons or coffee houses, lime burners, livery stable keepers, market gardeners, millers, miners, packers, printers, quarrymen, sharebrokers, stock-jobbers, victuallers, warehousemen, wharfingers, persons insuring ships or their freight or other matters against perils of the sea, persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment or otherwise, in gross or by retail, and persons who either for themselves, or as agents or factors or others, seek their living by buying and selling, or buying and letting for hire goods or commodities, or trees; but a farmer, grazier, common labourer, or workman for hire shall not, nor shall a member of any partnership, association or company which cannot be adjudged insolvent under this Act, be deemed as such, a trader for the purposes of the Act.”

<sup>75</sup> Honsberger questions the validity of the exemption for farmers. Honsberger, “Historical Evolution of Bankruptcy”, *supra* note 23 at 35. For discussion of the definition of “trader”, see Wotherspoon, *The Insolvent Act of 1875*, *supra* note 62 at 2-1; Clarke, *The Insolvent Act of 1875*, *supra* note 67 at 1-21; MacMahon, *The Insolvent Act of 1875*, *supra* note 39 at 34-37; Edgar, *The Insolvent Act of 1875*, *supra* note 67 at 33-40.

The Act allowed incorporated companies to take advantage of a general bankruptcy statute for the first time.<sup>76</sup> Parliament added the corporate provisions out of a belief that they “would protect companies from being forced into insolvency through the anxiety of creditors for a settlement”.<sup>77</sup> It is possible to view the inclusion of companies as a recognition of the “large and daily increasing share of the trade and manufactures of the country...” being carried out by corporations.<sup>78</sup> However, in the 1870s companies were still not the dominant mode of carrying on business. The provisions did not offer much scope for a corporate rescue and they were rarely used.<sup>79</sup> The Act complicated matters, as it did not provide “the machinery for dissolving a company when its affairs have been wound up, and thus putting an end to its corporate existence”.<sup>80</sup> There was some confusion as to whether or not a corporation could receive a discharge. If this was the case, one author claimed that it “would only have the effect of misleading the

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<sup>76</sup> *Insolvent Act of 1875*, s. 1. The Act applied to “traders and to trading co-partnerships, and to trading companies whether incorporated or not”. The Act excluded banks, insurance companies, railways and telegraph companies.

<sup>77</sup> *House of Commons Debates* (19 February 1875) at 240.

<sup>78</sup> Wotherspoon, *The Insolvent Act of 1875*, *supra* note 62 at vi.

<sup>79</sup> A search of the reported cases on s. 147 indicates only one reported decision. See *Ross v. Fiset* (1882) 8 Q.L.R. 251 (Que. C.S.). As the *Insolvent Act of 1875* prohibited any kind of voluntary proceedings, it is difficult to envision how the company provisions operated as anything other than a liquidation scheme. Nevertheless, there did appear to be scope for the court to order the continuation of the company if it chose to follow the recommendations of the creditors. Prior to issuing the writ of attachment, an order placing the company under the control of the Official Assignee, the judge could order an inquiry, or call a meeting of creditors who had the ability to pass resolutions “either for the winding up of the affairs of the company or for allowing the business thereof to be carried on as they may deem most advantageous to the creditors”. However, these resolutions were not binding, and the court could confirm, reject, or modify the directions given by the creditors. The court had the discretion to delay the issuing of the writ for a period of six months, during which time either an Official Assignee or Receiver managed the affairs of the company.

<sup>80</sup> Edgar, *The Insolvent Act of 1875*, *supra* note 67 at xxxi.

world".<sup>81</sup> Companies only played a minor role in nineteenth century bankruptcy legislation.

Parliament's decision to abolish voluntary assignments was the most significant policy change.<sup>82</sup> The *Insolvent Act of 1875* only allowed creditors to initiate proceedings.<sup>83</sup> Voluntary proceedings under the Act of 1869 had been a central point of opposition.<sup>84</sup> How Parliament chose to regulate access to the bankruptcy regime is perhaps one of the best ways to measure the tenor of bankruptcy policy at the time.<sup>85</sup> In England, bankruptcy began as a creditor's mechanism and early legislation did not allow debtors to file voluntarily for bankruptcy. By 1844, voluntary proceedings were available in England.<sup>86</sup> In 1875, the creation of a single compulsory system represented a sharp

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<sup>81</sup> The author questioned "whether the same practice and proceedings applicable to individual insolvents will prove suitable for companies". Edgar, *The Insolvent Act of 1875*, *supra* note 67 at xxxi.

<sup>82</sup> "[T]he abrogation of the power of voluntary assignments ... is the greatest change effected by the present Act." Wotherspoon, *The Insolvent Act of 1875*, *supra* note 62 at vi.

<sup>83</sup> The Act permitted creditors to force a debtor into bankruptcy if the creditor could prove that an insolvent trader was indebted to them for not less than \$200. A trader's insolvency could be established by proof of one of the many listed "Acts of Bankruptcy". The 1875 list was similar to that found in the Act of 1869 and also focused on debtor misconduct: *Insolvent Act of 1875*, ss. 3, 9. For a general review of Acts of Bankruptcy in the *Insolvent Act of 1875*, see "Some Provisions of the New Insolvent Act" *Monetary Times* (3 September 1875) 265-266. A debtor could still make an assignment but the voluntariness of the procedure was removed. A creditor had to make first a formal demand to a debtor to make an assignment. If the debtor failed to make an assignment, his estate became subject to the liquidation provisions of the Act. Parliament anticipated attempts by debtors to persuade friendly creditors to issue formal demands. Creditors, in addition to issuing the demand, were required to file an affidavit indicating that they were not "acting in collusion with the debtor". *Insolvent Act of 1875*, s. 4.

<sup>84</sup> "The great opposition to the law was that it allowed voluntary assignments to be made." *House of Commons Debates* (26 February 1877).

<sup>85</sup> Wotherspoon likened the tension between creditor and debtor interests as a balance that needed to be struck. The balance was particularly affected by the extent of the right of the debtor to obtain access to the bankruptcy regime. Wotherspoon, *The Insolvent Act of 1875*, *supra* note 62 at 38.

<sup>86</sup> See chapter 2.



return to the creditor-oriented regimes of the past.<sup>87</sup>

Public opinion had turned against voluntary assignments.<sup>88</sup> The abolition of voluntary assignments appeased those who sought repeal of all bankruptcy laws. It also removed the debtor's ability to use the threat of assignment "as a lever to secure extension of time". Creditors who sought to collect on debts "were continually met by a threat to assign if they ventured to press their legal remedies".<sup>89</sup> Small traders often made a voluntary assignment in bankruptcy without consulting their creditors.<sup>90</sup>

Abolition of voluntary assignments reflected a fundamental shift in policy.<sup>91</sup> The discharge provisions further restricted the eligibility of debtors to obtain a release of their debts.<sup>92</sup> The Act of 1875 also required creditors to consent to a discharge. Debtors had to obtain the agreement of a majority of creditors representing three-quarters of the value of liabilities. Debtors could also apply for a judicial discharge after a one-year wait. However, additional provisions made the discharge more difficult to obtain.<sup>93</sup>

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<sup>87</sup> "Ainsi, la loi était a la fois rétrograde et réactionnaire." De la Durantaye, *Traité de la Faillite*, *supra* note 19 at 25.

<sup>88</sup> L.J. de la Durantaye, *idid.* at 25; Bohémier, *Faillite et Insolvabilité*, *supra* note 12 at 11. Abolishing voluntary assignments was one of the many "palliatives" which Parliament adopted in an attempt to satisfy public opinion (at 101).

<sup>89</sup> Edgar, *The Insolvent Act of 1875*, *supra* note 67 at xxix. Honsberger argues that the principal object of the 1875 Act was to "give creditors greater control over the administration of bankrupt's estates". J. Honsberger, "Bankruptcy Administration in the United States and Canada" (1975) 63 Cal. L. Rev. 1515 at 1528.

<sup>90</sup> *House of Commons Debates* (19 February 1875) at 239.

<sup>91</sup> Honsberger, "Historical Evolution of Bankruptcy", *supra* note 23 at 28. Not all agreed with the merits of abolition. Wotherspoon, *The Insolvent Act of 1875*, *supra* note 62 at 32.

<sup>92</sup> Wotherspoon, *The Insolvent Act of 1875*, *supra* note 62 at vii. "One improvement upon previous legislation will be observed in the increasing stringency of the provisions respecting composition and discharge."

<sup>93</sup> The discharge provisions in the *Insolvent Act of 1875* are found in ss. 49-66. There was a distinction between a consent to discharge and a deed of composition. The first procedure operated to release the debtor of his debts. Creditors under this procedure accepted whatever dividend that resulted from the bankruptcy proceedings as payment of their claims. In the case of a deed of composition, the

If the bankrupt obtained the required level of creditor consent, the Act obliged the Assignee to call a further meeting of creditors to consider the proposed discharge.<sup>94</sup> If the meeting endorsed the discharge, the debtor still had to apply for judicial confirmation.<sup>95</sup> Creditors could still object at the confirmation stage, and the Act of 1875 provided a list of reasons for the court to refuse to confirm a discharge.<sup>96</sup> Additionally, the court had the discretion to suspend or grant a second class discharge if the debtor engaged in some form of misconduct. The court had a duty to ensure that “the insolvency law is not used as a mere white-washing machine”.<sup>97</sup>

The *Insolvent Act of 1875* also introduced another new hurdle for debtors. Under s.58, a judge had the discretion to suspend or refuse the discharge altogether if it appeared that the dividend from the estate would not pay thirty-three cents on the dollar. Drawing on the concept that individuals should be responsible for the payment of their debts:

Anyone whose estate could not pay 33 cents in the dollar, who had not been overtaken by some unexpected calamity, had no right to be whitewashed or to receive credit again.<sup>98</sup>

estate of the bankrupt was restored to the debtor. The composition, or arrangement was administered by the court for the benefit of the creditors. See Clarke, *The Insolvent Act of 1875*, *supra* note 67 at 161-162.

<sup>94</sup> *Insolvent Act of 1875*, s. 49. See Wotherspoon, *The Insolvent Act of 1875*, *supra* note 62 at 96. Under the 1869 Act the debtor was able to approach creditors separately and did not require a meeting of creditors. The requirement of an additional meeting seemed unnecessary, particularly if the debtor initially obtained the requisite 3/4 vote. Clarke, *The Insolvent Act of 1875*, *supra* note 67 at 160.

<sup>95</sup> *Insolvent Act of 1875*, s. 54. See Form K.

<sup>96</sup> *Insolvent Act of 1875*, s. 57. This was a re-enactment of s. 103 of the *Insolvent Act of 1869*. See e.g. *Re Hutchinson* (1877) 12 N.S.R. 40 where the appellate court overturned the original order of the trial judge which had suspended the discharge for a period of one year. The creditor appealed and convinced the Nova Scotia Supreme Court to refuse the discharge absolutely on the grounds that the debtor had not kept proper books of account and gave judgments to certain creditors. However, in *Re Russell* (1882) 7 O.A.R. 777 the Ontario Court of Appeal refused to interfere with the original order which suspended the order of discharge. The Ontario Court of Appeal held that there were no grounds upon which to deny the debtor his discharge.

<sup>97</sup> Wotherspoon, *The Insolvent Act of 1875*, *supra* note 62 at 175.

<sup>98</sup> *House of Commons Debates* (25 March 1875) at 912, 914. For an excellent overview of how the 1875 discharge provisions worked, see *House of Commons Debates* (3 April 1877) at 1091 (Colby). See also, *Monetary Times* (3 September 1875) 266.

The new provision, in the opinion of one commentator, "discouraged debtors from this immoral waste of other people's property". Previously there was no obstacle that prevented a debtor from obtaining a discharge when his assets were "utterly out of proportion to his liabilities". The Act of 1869 did not provide a debtor with any incentive to stop trading "in the earlier stages of his difficulties, so that his creditors might receive a productive estate to wind up".<sup>99</sup>

The 33 cents on the dollar test was ineffective as courts refused to exercise their discretion and deny a discharge even when dividends did not meet the minimum level. Critics pointed to the discretionary power of the judge being exercised in a "compassionate spirit".<sup>100</sup> Without a voluntary procedure, debtors continued to trade long after becoming insolvent. When a creditor finally forced a debtor into bankruptcy, the dividend rarely reached the 33c level.<sup>101</sup> In 1877, Parliament amended the Act and imposed a requirement of a dividend level of 50c on the dollar before a debtor could obtain a discharge.<sup>102</sup>

<sup>99</sup> Edgar, *The Insolvent Act of 1875*, *supra* note 67 at xxix-xxx.

<sup>100</sup> *House of Commons Debates* (26 February 1877) at 292. Sympathetic judges had long been a bone of contention. "It would appear that the judges are directly blamable for the lax, not to say reckless way in which insolvency cases are disposed of." "Proposed Repeal of the Insolvency Laws" *Monetary Times* (19 April 1872) 826.

<sup>101</sup> *House of Commons Debates* (26 February 1877) at 293 (Blake). The *Monetary Times* suggested the 50% dividend as early as 1875. See "Some Provisions of the New Insolvent Act" *Monetary Times* (3 September 1875) 265. For a general commentary on the amendments, see "The Insolvent Act Amendment Bill" *Monetary Times* (9 March 1877) 1027. The *Monetary Times* suggested that the amendment would prevent the running down of estates by traders who delay. "Amendments to the Insolvent Act" *Monetary Times* (23 March 1877) 1083.

<sup>102</sup> 40 Vict., c. 41., (1877) s. 14, 15. In order to avoid the fifty per cent threshold a debtor had to allege that such a dividend might have been paid but for the negligence or fraud of the assignee. Further, the section provided a procedure whereby a debtor could notify his creditors of his insolvency, and stating "that such a dividend would have been paid but for circumstances for which the insolvent cannot be justly held responsible". Creditors who received the notice and did not initiate compulsory proceedings did so at their peril. A debtor could later argue that the reason for the shortfall in the dividend was due to the creditors' delay in initiating compulsory proceedings.

The amendments did little to stop the flow of criticism.<sup>103</sup> Some even objected to the provision, as it did not require debtors to pay all of their debts.<sup>104</sup> Others objected to the provision as it interfered with the creditors' ability to set their own level of acceptable dividend:

Law has no right to dictate on this point that an insolvent should pay 10c, 25c, 33c, 50c, or 75c, on the dollar in order to obtain a discharge .... Law cannot and ought not to go into details on a point like this. It can only deal with broad principles. Every man must judge for himself in details and take the consequences of his folly or wisdom.<sup>105</sup>

Despite these further amendments, opposition to bankruptcy laws continued to increase. Parliament debated further repeal Bills in 1877, 1878, and 1879.<sup>106</sup> Prime Minister Macdonald, newly returned to power in 1878, was under pressure to allow repeal. One individual wrote to Macdonald, hoping "you will wipe out that accursed insolvent act ... the country will sustain you and call you blessed".<sup>107</sup> In 1878<sup>108</sup> and 1879

<sup>103</sup> "Minor Defects in the Solvent Act" *Monetary Times* (11 April 1879) 1274; "The Bankrupt Law, and the Collection of Debts" *Monetary Times* (11 January 1878) 812.

<sup>104</sup> See speeches of Mitchell and Paterson, *House of Commons Debates* (3 April 1877) 1094 to 1096. A further condition that could be satisfied to allow for a discharge again reinforced the notion of responsibility for one's own action. A debtor could give notice to his creditors before any proceedings had been commenced, acknowledging his insolvency and that a dividend would have been paid "but for which the insolvent cannot justly be held responsible ..." 41 Vict., c. 40, s. 15(3).

<sup>105</sup> See Letter of "Experience" to Editor of Journal of Commerce (5 March 1877) in "Insolvency" *J. of Commerce* (8 March 1877) 116, cited in *House of Commons Debates* (3 April 1877) at 1096.

<sup>106</sup> Palmer's Repeal Bill, introduced on 26 February 1877, was withdrawn on 7 March 1877. *House of Commons Debates* (26 February 1877) at 269; (7 March 1877). Barthe's Repeal Bill was introduced on 12 February 1877, and the second reading was postponed for 6 months (in effect killing the Bill) on 28 February 1877. (12 February 1877) at 24; (28 February 1877) at 366. Minor amendments dealing with technical matters were dealt with in 1876. See 39 Vict., c. 30, (1876). A law was also passed to make provision for the winding up of Insolvent Incorporated Banks. See 39 Vict., c. 31, (1876).

<sup>107</sup> Letter of E. Sills to John A. Macdonald, 12 March 1879, *Macdonald Papers*, PAC MG26-A, Vol. 356, File 156502-505, Reel c-1715.

<sup>108</sup> In 1878, another repeal Bill was introduced but did not pass. *House of Commons Debates* (18 February 1878) at 349. Agreed on 27 March 1878 to delay Bill 6 months, 99-55. See House of Commons

the government faced several private member Bills calling for the repeal of all Insolvency legislation.<sup>109</sup> No longer committed to retaining the federal law, and uncertain how to proceed, the government established a Committee to study the matter.<sup>110</sup>

*D The Select Committee of 1879 and Repeal*

The 1879 Select Committee was to consider all options including the “expediency of continuing, amending or repealing such Laws”.<sup>111</sup> At the first meeting, the committee found itself “very much divided in sentiment, as were this House and the country,” with regard to the wisdom of continuing the *Insolvent Act* or repealing it “pure and simple”.<sup>112</sup> The Committee’s Bill was a compromise that purported to appeal to the “repealers...and [to] the champions of insolvency law and insolvency principles”.<sup>113</sup>

They had stripped the old Act of its evil as thoroughly as if they had repealed it, and had furnished the commercial community with what they did desire—a law by which the creditors might possess themselves of an insolvent’s estate and fairly divide among themselves its proceeds.<sup>114</sup>

Bill No. 85, if enacted, would have become the *Insolvent Act of 1879*.<sup>115</sup>

Debates (27 March 1878) at 1453. For a discussion of this vote, see “The Bankrupt Law” *Monetary Times* (5 April 1878) 1176. For criticism of the ease in which discharges were granted, see “Proposed Repeal of the Insolvency Laws” *Monetary Times* (19 April 1872) 826.

<sup>109</sup> See Bills presented on February 19, 20, March 3, and 4, 1879. *House of Commons Debates* 19, 20 February, 3, 4 March 1879) at 41, 48, 107, 126.

<sup>110</sup> *House of Commons Debates* (7 March 1879) at 189. Bicknell, “Establishing a Bankruptcy Court in Canada” (1913) 33 Can. L.T. 43. Prime Minister Macdonald was “not ashamed to confess, as the leader of the Government, that he desired ... the assistance of commercial and professional men, before the matter was dealt with”. *House of Commons Debates* (7 March 1879) at 191.

<sup>111</sup> *House of Commons Debates* (7 March 1879) at 189.

<sup>112</sup> An initial vote by the committee indicated nine Members in favour of amendment, and eight Members for repeal *House of Commons Debates* (29 April 1879) at 1594 (Colby).

<sup>113</sup> *House of Commons Debates* (29 April 1879) at 1605 (Girouard).

<sup>114</sup> *Ibid.*, 1599.

<sup>115</sup> Bill 85, *An Act to Repeal the Insolvent Act of 1875, and the Acts amending it, and to Make*

The committee listed several evils associated with the bankruptcy regime. It had given rise to recklessness and extravagance in trade. Rather than inducing men to extricate themselves from financial difficulties through hard work, the *Insolvent Act of 1875* was available as a “easy process of starting anew in life, free from the load of debt”. The Committee specifically intended to “diminish the facilities now possessed by a debtor for obtaining a discharge”. In addition, it sought to increase the grounds of opposition to the discharge and to extend and increase the “precautions for ascertaining the conduct of the insolvent”.<sup>116</sup> It “struck the axe at the root of that evil” by requiring a debtor to obtain the consent of creditors representing 4/5 in number and 4/5 in value.<sup>117</sup> “They had made it impossible for [a debtor] to obtain his discharge as a matter of right, under any circumstances whatever, from the obligations he had voluntarily assumed.”<sup>118</sup>

Bill 85 also represented an attempt to satisfy rural opposition to bankruptcy law. The committee adopted a proposal that the House of Commons had earlier rejected on two separate occasions. It recommended that even if a debtor received a discharge, the claims of non-trader creditors survived. Therefore, debts due by the insolvent to “farmers, labourers, common sailors, workmen for hire, and generally, any person not

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*Provision for the Liquidation of the Estates of Insolvent Debtors*, 1st Sess., 4th Parl., 1879, s. 135.

<sup>116</sup> The *Journal of Commerce* reproduced a memorandum attached to the report of the Parliamentary Committee. “The Insolvent Law” *J. of Commerce* (8 April 1879) 274. The *Monetary Times* criticized the Committee for not tabling its full report. “Insolvent Act Amendment” *Monetary Times* (18 April 1879) 1304.

<sup>117</sup> *House of Commons Debates* (29 April 1879) at 1597 (Colby). One Member argued that this would result in only one debtor out of a hundred receiving his discharge. *House of Commons Debates* (29 April 1879) at 1611 (Lane). Bill 85, *An Act to Repeal the Insolvent Act of 1875, and the Acts Amending it, and to Make Provision for the Liquidation of the Estates of Insolvent Debtors*, 1st Sess., 4th Parl., 1879, s. 44. The House also considered Bill 22, *An Act to Repeal the Insolvent Act of 1875, and to Make Provision in Lieu thereof*, 1st Sess., 4th Parl., 1879. Bill 22 required the unanimous consent of all the creditors to approve a discharge. See Bill 22, s. 15. Another variation on the level of consent was 7/8 in number and value. See “The Insolvent Law of Canada” *J. of Commerce* (21 February 1879) 19.

<sup>118</sup> *House of Commons Debates* (29 April 1879) at 1596.

being a trader” survived the discharge. In other words, “the discharge, difficult as it was to obtain, was not one that cut off the claim of the non-trader”.<sup>119</sup>

The House of Commons debated Bill 85 at length. However, in the end it unexpectedly abandoned the comprehensive reform Bill to consider Bill 15, which simply proposed to repeal the *Insolvent Act of 1875*.<sup>120</sup> An attempt to delay the third reading was lost by a vote of 107 to 55, and the House of Commons voted to repeal the *Insolvent Act of 1875* on 5 May 1879.<sup>121</sup> The 2-1 margin in favour of repeal contrasts with the earlier 1872 House of Commons vote which only passed by a slight majority.<sup>122</sup> After approval in the House of Commons, the Repeal Bill moved to the Senate.<sup>123</sup> The Senate immediately took up the Bill, and after a lengthy debate, voted 31 to 27 on 9 May 1879 to delay the Bill for six months. The Senate action prevented repeal.<sup>124</sup> A further repeal Bill was introduced in 1880, and quickly passed second reading stage in the House of Commons with little debate.<sup>125</sup> The government announced in the Senate that it had

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<sup>119</sup> *House of Commons Debates* (29 April 1879) at 1598 (Colby). Bill 85, *An Act to Repeal the Insolvent Act of 1875, and the Acts Amending it, and to Make Provision for the Liquidation of the Estates of Insolvent Debtors*, 1st Sess., 4th Parl., 1879, s. 53.

<sup>120</sup> The House divided 99-77 in favour of delaying consideration of the reform Bill. See *House of Commons Debates* (29 April 1879) at 1621. The House immediately thereafter resumed debate on Bill 15. Bill 15, *An Act to Repeal the Acts Respecting Insolvency Now in Force in the Dominion*, 1st Sess., 4th Parl., 1879. J. Bicknell, “Establishing a Bankruptcy Court in Canada” (1913) 33 Can. L.T. 36 at 44.

<sup>121</sup> *House of Commons Debates* (5 May 1879) at 1783-1784. See “Editorial” (1879) 15 Can. L.J. (N.S.) 119; “Editorial” (1879) 15 Can. L.J. (N.S.) 146.

<sup>122</sup> *House of Commons Debates* (30 April 1879) at 1627. 117 votes in favour of second reading of repeal Bill. 60 votes against second reading. See “Insolvent Act Repeal” *Monetary Times* (2 May 1879) 1359.

<sup>123</sup> *House of Commons Debates* (5 May 1879) at 1783. It was this Bill that was rejected by the Senate and not the amendment to the report as indicated by Bicknell. J. Bicknell, “Establishing a Bankruptcy Court in Canada” (1913) 33 Can. L.T. 36 at 43.

<sup>124</sup> *Debates of the Senate* (9 May 1879) at 537.

<sup>125</sup> Bill C-2, *An Act to Repeal the Acts Respecting Insolvency Now in Force in Canada*, 2nd Sess., 4th Parl., 1880. Only a few Members spoke to the Bill and in contrast to the very lengthy debates of 1872 and 1879, the debate on second reading was brief. See *House of Commons Debates* (19 February 1880) at 103-

decided to allow the *Insolvent Act of 1875* to be repealed. The Senate approved the repeal by an almost 3-1 margin on 12 March 1880 and the Bill received Royal Assent on 1 April 1880.<sup>126</sup>

## II The Nature of the Debate and Explanations for Repeal

An analysis of the parliamentary debates and commentary in business publications reveals a deep division over bankruptcy law. In opening the debate on the new Insolvent Bill of 1869, Macdonald highlighted the extent of division over whether to adopt such a law. He noted that a “strong opinion had arisen that all laws relating to insolvency were inexpedient”. By way of contrast, many argued that a bankruptcy law “was essentially requisite in a commercial community”.<sup>127</sup> Macdonald framed the question for the House in this way: “The question was whether they should have an Insolvent Act or not.”<sup>128</sup>

Why bankruptcy law proved to be controversial in the 1870s and why Parliament chose to repeal the legislation in 1880 is the central question of Part II. This section considers both economic and institutional factors as explanations for repeal. However, before considering the nature of the Canadian economy and the role of institutions, it is important to consider the political context and the influence of parallel repeal movements in the United States and England.

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111. One Member considered it a foregone conclusion that repeal would succeed. See at 105 (Bechard).

<sup>126</sup> *Debates of the Senate* (12 March 1880) at 152; (1 April 1880) at 219. The Senate voted 47-17 in favour of repeal. See *An Act to Repeal the Acts Respecting Insolvency Now in Force in Canada* S.C. 43 Vict., c. 1, 1880.

<sup>127</sup> *House of Commons Debates* (21 April 1869) at 36.

<sup>128</sup> *House of Commons Debates* (4 May 1869) at 173-174. As late as 1879, opinions were divided into “two classes: those favourable to the maintenance of the law, and those favourable to its repeal or to amendments so radical that they would be equal to its repeal”. *House of Commons Debates* (7 March 1879) at 205 (Houde). In a letter to the editor of the *Journal of Commerce*, one author noted the diametrically opposed views on whether “we want an Insolvent Law or not?” Letter of Experience to Editor of the *J. of Commerce* (5 March 1877) in “Insolvency” *J. of Commerce* (8 March 1877) 116.



### A *The Political Context*

One possible explanation for the legislative pattern of bankruptcy law may lie in the realm of politics. Political parties, dominant politicians, and the timing of elections may offer a rationale for the change in legislation in 1875 and its repeal. In the United States, division over bankruptcy law is presented as a larger ideological divide between American political parties and the success or failure of the legislation has been linked to the fortunes of different parties.<sup>129</sup> In Canada, however, bankruptcy law was not a party issue and was not a matter of government policy. The various governments of the day showed little interest in the legislation, and mismanaged reform efforts. Bankruptcy law divided political parties and cabinet.<sup>130</sup>

As early as 1872, the Conservatives, who held power during the passage of the *Insolvent Act of 1869*, acknowledged that bankruptcy was not a government matter. The government showed little interest in the debate<sup>131</sup> and lost a crucial vote in the Commons. Only the action of the Senate staved off repeal in 1872.<sup>132</sup> When George Cartier spoke for the government, he indicated that they "did not make it a Government question".<sup>133</sup> Cartier feebly defended bankruptcy legislation, and claimed that it was only a temporary

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<sup>129</sup> See chapter 3.

<sup>130</sup> In 1878, the *Journal of Commerce* noted that the subject was not one of "party character; indeed the insolvent law is objected to by members of both parties". "The Insolvent Law" *J. of Commerce* (3 May 1878) 312. The Conservatives held office from 1867 to 1873 winning the elections of 1867 and 1872. They were forced to resign in November 1873. The Liberals won the election of 1874 and held office until 1878 when the Conservatives were returned to power. See J.M. Beck, *Pendulums of Power: Canada's Federal Elections* (Toronto: Prentice Hall, 1968) at 1-37.

<sup>131</sup> "The Government ought to declare their views on a matter of such importance." *House of Commons Debates* (24 April 1872) at 134; "The Government ought to have indicated their policy" (at 137); "He thought the Government should have stated their views, and the side they intended to take in the matter." (25 April 1872) at 157.

<sup>132</sup> "The Insolvency Acts" (1872) 8 *Local Courts & Municipal Gaz.* 65.

<sup>133</sup> *House of Commons Debates* (25 April 1872) at 162.

measure that was only beginning to be understood. “[T]he obvious course was to let the matter rest, and the Act could then expire in its natural course.”<sup>134</sup>

At first glance, one might assume that the change in government from Conservatives to Liberals in 1874 directly led to the enactment of the new *Insolvent Act of 1875*.<sup>135</sup> However, the *Insolvent Act of 1875* was not considered a government measure, and it was supported by a majority of Members from both sides of the House.<sup>136</sup> Edward Blake, a prominent member of the new Liberal Administration, summed up the traditional government position:

The position of all Governments on this question, as far as I know, from the time when it first came before the Legislature of old Canadas, and certainly since the Union, has been rather questionable .... It was never promoted by the government at all; the fact is that leading Members on both sides of the House have entertained conflicting views on the question for this law, and that, whether for good or ill, it has been one on which political lines have never been drawn, and on which divisions of a party have never taken place.  
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The election of 1878 returned the Conservatives to power. While in opposition, the Conservatives had been critical of the Liberal administration’s handling of bankruptcy matters. These criticisms had found favour with the electorate during the election. Once returned to power, the Conservatives found it difficult to support bankruptcy reform in the face of a strengthening repeal movement. In appointing the 1879 Select Committee, the Conservatives made the announcement without committing the government in

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<sup>134</sup> *Ibid.*

<sup>135</sup> There is some evidence that even though John A. Macdonald introduced the Bill, it was not considered a government Bill. During the parliamentary debates in 1875, a Member appears to refer to the 1869 Act when he stated: “While he was a member of the government he was bound to accept the majority of the Cabinet, but it happened that the Bill of that year was not a government measure.” *House of Commons Debates* (20 March 1875).

<sup>136</sup> It was also claimed that even the *Insolvent Act of 1875* was not a government measure. It “was forced on the House by a powerful majority of gentlemen on both sides of the House ....” *House of Commons Debates* (26 February 1877) at 306 (Dymond).

<sup>137</sup> *House of Commons Debates* (26 February 1877) at 289. *House of Commons Debates* (26 February 1877) at 289.

advance to any policy position.<sup>138</sup> The 1879 Bill, which was reported out of committee, was not considered a government matter.<sup>139</sup> It was assumed that when the matter was put to a vote “the Government would divide” on the Bill.<sup>140</sup>

In 1879, one Senator accused the government of being neutral throughout the whole debate, not having “spoken a word”. The government “refuses to have policy in the matter, and pitches the whole subject over to a private member...”.<sup>141</sup> According to the *Monetary Times*, the government had “abdicated its functions and lost the control of the House”.<sup>142</sup> By 1880 the *Monetary Times* simply reported the “policy of the Government is therefore repeal”.<sup>143</sup>

<sup>138</sup> *House of Commons Debates* (7 March 1879) at 216 (Landry).

<sup>139</sup> *House of Commons Debates* (28 April 1879).

<sup>140</sup> *House of Commons Debates* (28 April 1879). This Member also supports the evidence that the original *Insolvent Act of 1869* was not a government matter. “Mr. Holton said the course taken by the Minister of Justice was precisely the one taken by the Government of which the Hon. gentleman was a Member in 1869. No one understood this to be a government measure ...” *House of Commons Debates* (28 April 1879) at 1576 (McDonald, Pictou). The *Journal of Commerce* reported in 1879 that it was well known “that differences of opinion prevail” among government Members on the subject of insolvency. See “The Insolvent Law” *J. of Commerce* (7 February 1879) 785; “The Insolvency Law” *J. of Commerce* (14 March 1879) 110.

<sup>141</sup> *Debates of the Senate* (9 May 1879) at 536-537 (Wark, Brown).

<sup>142</sup> “Insolvent Act Repeal” *Monetary Times* (2 May 1879) 1359; See also “Insolvent Act Repeal” *Monetary Times* (9 May 1879) 1389. The *Monetary Times* accused the government of shirking their responsibility. See “Bankrupt Law” *Monetary Times* (19 September 1879) 356.

<sup>143</sup> “Repeal of the Bankrupt Law” *Monetary Times* (27 February 1880) 1018. The timing of the elections, however, appeared to affect the repeal movement. Efforts to repeal bankruptcy law failed just prior to the elections of 1872 and 1878. In 1872 Cartier indicated that a majority of government Members were opposed to repealing bankruptcy law “on the eve of an election”. *House of Commons Debates* (25 April 1872) at 162. The pending election of 1878 also forestalled repeal as Members encouraged each other to consult with their constituents before taking a decisive vote. The 1878 repeal Bill failed. *House of Commons Debates* (7 March 1879) at 202. See “The Insolvent Amendment Bill” *Monetary Times* (9 March 1877) 1027. However, during the campaign of 1878, many Members of Parliament “pledged themselves to unconditional repeal”. “Insolvent Act Repeal” *Monetary Times* (9 May 1879) 1389. *House of Commons Debates* (7 March 1879) at 204 (Methot). Bicknell, “Establishing a Bankruptcy Court in Canada” (1913) 33 *Can. L.T.* 43-44.

Unlike the United States, therefore, bankruptcy law was not a party issue. The Conservatives in 1879 and 1880 were not willing to press bankruptcy reform and risk splitting party and electoral support. If politics had a role to play in explaining the law's demise, it was a negative one. There was insufficient support in the community for either party to adopt bankruptcy reform as policy.

*B The Economic Crisis and English and United States Repeal Movements*

The Canadian repeal debates took place during a severe economic downturn. Several authors have suggested that the economic crisis that began in 1873 contributed to the unpopularity of bankruptcy legislation.<sup>144</sup> The year 1873 marked the beginning of an international financial panic. Five years of falling prices and financial failure followed.<sup>145</sup> It was marked by periodic slumps and brief moments of recovery.<sup>146</sup>

The economic depression occurred at a crucial time in the life of the bankruptcy legislation. An examination of the number of commercial failures between 1873 and 1880 illustrate a sense of crisis. In 1875, the number of commercial failures doubled. Failures continued to increase, peaking in 1879.<sup>147</sup> Some members of the public believed that

<sup>144</sup> S.W. Jacobs, "A Canadian Bankruptcy Act: Is it A Necessity?" (1917) 37 Can. L.T. 604 at 605; Honsberger, "Historical Evolution of Bankruptcy", *supra* note 23 at 41.

<sup>145</sup> M. Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland & Stewart, 1987) at 249.

<sup>146</sup> K.Norrie & D. Owram, *A History of the Canadian Economy* (Toronto: Harcourt, 1991) at 293-298.

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Year	# of Failures	\$ Total Liabilities
1873	994	12,334,000
1874	966	7,696,000
1875	1968	28,843,000
1876	1728	25,517,000
1877	1892	25,523,000
1878	1697	23,908,000
1879	1902	29,347,000
1880	907	7,988,000
1881	635	5,751,000

bankruptcy legislation was the cause of the rising number of failures.<sup>148</sup> The movement for repeal also peaked in 1879-1880.

Canada was not the only country to debate bankruptcy law repeal during this period of financial uncertainty. Canadian Members of Parliament were well aware of emerging repeal movements in the United States and England. England debated the merits of repeal during the 1870s and finally produced comprehensive reform in 1883. Between 1869 and 1879 the English Parliament debated thirteen separate bankruptcy Bills. While suggestions for the abolition of the entire English bankruptcy regime never prevailed, the controversy nevertheless attracted the attention of Canadian Members of Parliament.<sup>149</sup> Members quoted at length from English periodicals such as *Saturday Review* and *Fortnightly Review* to show that the "evils which existed here also existed in

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1882	787	8,587,000
1883	1379	15,872,000
1884	1,308	18,939,000
1885	1,247	8,743,000

The statistics do not represent official numbers of bankruptcies under the *Insolvent Acts*. Rather they are based upon reports published in the *Monetary Times*. The statistics are drawn from Gaétan Gervais, "Le Commerce de Détail au Canada: 1870-1880" (1980) 33 R.H.A.F. 521 at 552, which are based on statistics re-produced in the *Monetary Times*. The other historian who reports on the number of commercial failures is T. Naylor, *The History of Canadian Business, Vol. 1: The Banks and Finance Capital* (Toronto: James Lorimer, 1975) at 83. However, there are some minor discrepancies in Naylor's statistics compared to other sources. The *Journal of Commerce* and the *Monetary Times* also reproduced the statistics from Dun Wiman's Annual Reports. See *J. of Commerce* (24 Jan 1879) at 717; "Failures in 1875" *Monetary Times* (5 November 1875) 518; "The Insolvent Act" *J. of Commerce* (19 January 1877) 632; *J. of Commerce* (19 Jan 1877) 632; "Failures in 1876" *Monetary Times* (21 July 1876) 94; "Failures of 1872" in Dun and Wiman, *The Canadian Mercantile Annual* (1872) 205.

<sup>148</sup> S.W. Jacobs, "A Canadian Bankruptcy Act: Is it a Necessity" (1917) 37 Can. L.T. 604 at 605.

<sup>149</sup> During the repeal debate of 1879, Girouard made reference to a petition published in the British press calling for the repeal of all bankruptcy laws in England. Further, Girouard made reference to the new reform efforts being undertaken by the English Lord Chancellor who introduced a reform Bill in 1879. *House of Commons Debates* (29 April 1879) at 1602 (Girouard). This English Bill appeared to influence the Canadian Select Committee of 1879. "The Insolvency Law" *J. of Commerce* (14 March 1879) 110. For a review of the reform efforts of the 1870s and 1880s in England, see V.M. Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding Up in Nineteenth Century England* (Oxford: Clarendon Press, 1995) at 183-184. Lester concludes that repeal was a minority viewpoint. J. Bicknell, "Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35 at 42-43.

England". The foreign press provided evidence that the bankruptcy discharge was also considered detrimental in the mother country.<sup>150</sup> The English repeal movement was "synchronized ... with the debates in the Canadian House of Commons on the same subject in 1879 and 1880".<sup>151</sup> As discussed in chapter 2, bankruptcy law challenged Victorians' sense of hard work, thrift and accumulation of wealth. English newspapers placed an emphasis on strict standards of commercial morality.<sup>152</sup> At the same time, the fact that England never repealed its legislation provided supporters of Canadian bankruptcy law with a principle that should be "steadily adhered to". Cogent reasons were required before departing "from the policy adopted in the Mother Country, the great commercial centre of the world".<sup>153</sup> The United States, however, also offered a model to be followed.

The legislative history of American bankruptcy law did not escape the attention of the Canadian Parliament.<sup>154</sup> Canadian opponents of bankruptcy law seized upon the growing American repeal movement. It was hoped that "this example would be followed by the Canadian Parliament".<sup>155</sup> The repeal of the American Bankruptcy Act of 1867 in

<sup>150</sup> *House of Commons Debates* (29 April 1879) at 1595 (Colby).

<sup>151</sup> J. Bicknell, "Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35 at 42. See also following references to the English repeal movement of 1870s. *House of Commons Debates* (7 March 1879) at 215; *House of Commons Debates* (29 April 1879) at 1618 (Cameron); *House of Commons Debates* (5 May 1879) at 1772 (Girouard).

<sup>152</sup> See chapter 2, note 125 and accompanying text.

<sup>153</sup> *House of Commons Debates* (29 April 1879) at 1613 (Weldon). *Debates of the Senate* (22 May 1872) at 750 (Carrall); Supporters of bankruptcy law referred to the fact that "an Insolvent Act was found on the statute book of every civilized country. Provision was made for the honest debtor in the old country and in the various States of the American Republic". *House of Commons Debates* (28 February 1877) at 354 (Ross Middlesex).

<sup>154</sup> *Debates of the Senate* (31 May 1872) at 911 (Deever). See also, "Editorial" (1878) 14 C.L.J.(N.S) 189.

<sup>155</sup> *House of Commons Debates* (26 February 1877) at 281 (Barthe).

1878 provided opponents of bankruptcy law in Canada with fresh ammunition.<sup>156</sup> The American experience of successive repeal of bankruptcy statutes provided an example to be adopted. In the United States:

three times ... had a bankrupt law been tried, and on each occasion, after a comparatively brief trial, had it been abolished. In connection with the civil war ... a bankrupt law had been introduced in the United States, and recently petition after petition had been presented against it by businessmen, and finally the American legislature had resolved upon its abolition.<sup>157</sup>

In the House of Commons it was noted that the American Bankruptcy Act of 1867 had been repealed "by an overwhelming vote in Congress, and by a majority in the Senate".<sup>158</sup> Opponents of bankruptcy law in Canada referred to the American policy decision "not to have a bankruptcy law".<sup>159</sup>

The economic crisis of the 1870s and the parallel repeal movements in the United States and England provide an important context for the Canadian debates. However, the poor economy and foreign bankruptcy developments do not explain fully why Canada

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<sup>156</sup> However, there were attempts to distinguish the American experience. Official corruption extending to the level of the judiciary was claimed as one reason for the repeal of the American bankruptcy law in 1878. The *Monetary Times* argued that such corruption was not prevalent in Canada. "Abolition of the American Bankrupt Law" *Monetary Times* (13 September 1878) 333.

<sup>157</sup> *House of Commons Debates* (26 February 1877) at 308 (Davies). In a detailed summary of the American legislative history, Senator Dickey noted the following facts. After the creation of the United States, 17 years elapsed before a bankruptcy law was submitted to Congress. He noted the 38-year hiatus between the enactment of the first and second American bankruptcy Acts, and the 24-year period between the second and third Acts. He concluded that in a hundred years the Americans "have been without a bankruptcy act for eighty five years". *Debates of the Senate* (11 March 1880) at 151 (Dickey).

<sup>158</sup> *House of Commons Debates* (29 April 1879) at 1618 (Cameron). This Member took great pains to trace the American legislative history, showing that each law was repealed very shortly after its enactment. However, supporters of bankruptcy law, like the *Journal of Commerce* urged Parliament not to follow the American lead. "The Insolvent Law" *J. of Commerce* (3 May 1878) 312; "The Insolvent Act" *J. of Commerce* (7 October 1878) 304.

<sup>159</sup> *House of Commons Debates* (24 March 1875) at 917 (Palmer). See also "Repeal of Bankruptcy Law in United States" (1878) 14 *Can. L.J. (N.S.)* 189; *House of Commons Debates* (29 April 1879) at 1604 (Girouard). Repeal of the American Bankruptcy Act of 1867 was also mentioned in the Dominion Board of Trade meetings. See Dominion Board of Trade, Annual Meeting 1879 at 171.

opted for repeal. To understand the failure of the law in 1880, it is necessary to examine how society divided over the two central goals of bankruptcy law: the discharge and the equitable distribution of the debtor's estate.

*C The Discharge: Two Competing Moral Paradigms*

The bankruptcy law discharge was one of the most contentious aspects of the legislation and two distinct positions were evident. On the one hand, debtors required a fresh start and it was unjust to burden the debtor with the shackles of debt for life. However, bankruptcy law interfered with the debtor's higher moral duty to repay all debts. Notions of forgiveness competed unsuccessfully with the idea that all debts had to be honoured.

The nineteenth century concept of a fresh start has some obvious parallels to modern justifications of the discharge.<sup>160</sup> There was, for example, an emphasis on the honest debtor who failed through unfortunate circumstances. However, unique to the nineteenth century was a stronger defence of the discharge as a tool of liberty, freeing the debtor not only from the shackles of debt but also the possibility of imprisonment.<sup>161</sup>

Many defended the discharge as an important goal of bankruptcy law. Sir John A. Macdonald claimed that "when a man made a clean breast of his affairs, and gave his estate honestly for the benefit of his creditors, he ought to have relief".<sup>162</sup> Edward Blake

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<sup>160</sup> Jackson, *Logic and Limits of Bankruptcy Law*; *supra* note 7; K. Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (New Haven: Yale University Press, 1997) at 91-113; M. Howard, "A Theory of Discharge in Consumer Bankruptcy" (1987) 48 Ohio St. L.J. 1047; G. Hallinan, "The Fresh Start Policy in Consumer Bankruptcy: An Historical Inventory and an Interpretative Theory" (1986) 21 Univ. Rich. L. Rev. 49.

<sup>161</sup> The *Insolvent Acts of 1869 and 1875* took on an added importance given that imprisonment for debt was still possible. Imprisonment for debt remained an important remedy for creditors. Some provincial legislatures took steps to enact reforms in this area. See generally Dunlop at 98. The *Insolvent Act of 1869*, s. 145 and the *Insolvent Act of 1875*, s. 127 provided that a debtor who had been imprisoned in any civil suit could apply to the court for his release after making an assignment in bankruptcy (in the case of the 1869 Act) or after having been placed into bankruptcy through compulsory proceedings. Provided that the debtor had entered bankruptcy in good faith and had not been guilty of fraudulent disposal of goods or breach of the Act, the judge could release the debtor. For critical commentary, see Edgar, *The Insolvent Act of 1869*, *supra* note 30 at 146.

<sup>162</sup> *House of Commons Debates* (11 May 1869) at 258.



argued that the discharge was “a wholesome provision which might be defended upon general principles”.<sup>163</sup> For another Member of Parliament, the law’s “first and principal object was the relief of the honest and unfortunate debtor”.<sup>164</sup> Even the modern terminology of “fresh start” found its way into the nineteenth century debates.<sup>165</sup>

In a direct challenge to the idea that debtors failed through moral weakness, Members of Parliament argued that honest but unfortunate debtors deserved a discharge.<sup>166</sup> John Abbott claimed that the majority of debtors were honest. He asked “why should a man who had been overwhelmed by a sudden depreciation in the value of produce—of pork, flour butter ... or by the wreck of a ship containing his goods” be deprived of a discharge?<sup>167</sup> Others argued that a man who fell into debt “through sickness or any other mishap ... should have the same means of getting free .... Why should he have no means of escape?”<sup>168</sup>

However, for nineteenth century Parliamentarians, liberty was the central feature of the discharge, as this letter to the Editor of the *Journal of Commerce* indicates:

Law ought to prevent the exercise of oppression and grant liberty to all to exercise their faculties so long as they do not interfere with the like liberty in others, therefore, it should protect the honest debtor who has been unfortunate, even though he be so through folly or bad judgment, and prevent his creditor from oppressing him.<sup>169</sup>

<sup>163</sup> *House of Commons Debates* (24 April 1872) at 136 (Blake).

<sup>164</sup> *House of Commons Debates* (3 April 1877) at 1105 (Macdonnell).

<sup>165</sup> “When a man failed honestly the law should step in and distribute his property among his creditors, and then he should be allowed to take a fresh start.” *Debates of the Senate* (22 May 1872) at 744 (Wark).

<sup>166</sup> *House of Commons Debates* (26 February 1877) at 305 (Paterson).

<sup>167</sup> *House of Commons Debates* (11 May 1869) at 262 (Abbott).

<sup>168</sup> *House of Commons Debates* (20 March 1875) at 829 (Orton).

<sup>169</sup> Letter of Experience to Editor of *J. of Commerce* (5 March 1877) in “Insolvency” *J. of Commerce* (8 March 1877) 116.

Debtors should not be kept "in a state of partial slavery". A discharge was a means to release debtors from their "shackles"<sup>170</sup> and to prevent creditor "harassment".<sup>171</sup> No man should have a "a mill stone around his neck" forever.<sup>172</sup> One Member appealed to the horrors of imprisonment for debt, and invoked the notion of freedom in defence of the law. Repeal of bankruptcy would mean "the finger of scorn would afterwards be pointed at him, as a man who had been deprived of the full rights of citizenship".<sup>173</sup>

The debtor was of no use to his community in a state of perpetual debt.<sup>174</sup> The right of discharge did not belong, therefore, to the "poor debtor", but rather it was in the "public interest".<sup>175</sup> The lack of discharge had an economic impact. Debtors who wished to remain in Canada would be forever dependent upon the will of creditors.<sup>176</sup>

There was another option. Debtors burdened with debts, it was claimed, would leave the country. This aspect of the debate also distinguishes it from modern

<sup>170</sup> *Debates of the Senate* (18 June 1869) at 357 (Sanborn).

<sup>171</sup> *House of Commons Debates* (7 March 1879) at 210 (Domville); *Debates of the Senate* (22 May 1872) at 744 (Wark).

<sup>172</sup> *House of Commons Debates* (2 May 1872) at 286 (Anglin); *House of Commons Debates* (21 April 1869) at 36 (Macdonald).

<sup>173</sup> *House of Commons Debates* (7 March 1879) at 211 (Ross West Middlesex).

<sup>174</sup> *House of Commons Debates* (21 April 1869) at 36 (Macdonald). The effect of the right of discharge on family members has been made in the modern context by Jackson. See Jackson, *Logic and Limits of Bankruptcy Law*, *supra* note 6.

<sup>175</sup> *House of Commons Debates* (3 April 1877) at 1111 (Blake). The *Monetary Times* also acknowledged that the discharge was a question of "whether it be for the good of society or of the insolvent himself .... the whole community are deeply interested in the wise disposition of it". "The Insolvency Law" *Monetary Times* (31 October 1873) 416. The 1879 proposal to increase the level of creditor support for a discharge to the level of 4/5 in number and value ran diametrically opposed to those who supported the discharge as a matter of general principle. The 4/5 rule placed the debtor entirely at the mercy of the creditors. Without the 4/5 level of support, a debtor "must remain for ever their victim, incapable of becoming again a useful member of society, or of embarking in any enterprise whatever". *House of Commons Debates* (29 April 1879) at 1620 (MacDonnell).

<sup>176</sup> *House of Commons Debates* (3 April 1877) at 1104.

discussions. One Member claimed that if a debtor could not obtain his discharge in Canada, "he would follow his 500,000 fellow Canadians to the United States".<sup>177</sup> Another referred to the lack of bankruptcy law in Ontario prior to Confederation, noting that "many useful members of society ... were obliged to leave the country, for judgments piled up one after another ...".<sup>178</sup> Canadian debtors built up American industry, while the Canadian economy suffered.<sup>179</sup>

The enactment of a national bankruptcy act did not completely end the problem of fleeing debtors. Given the negative connotations of financial failure and the possibility of receiving the official stigma of a second class discharge, it is not surprising that debtors continued to leave Canada.<sup>180</sup> The Minister of Justice, Edward Blake acknowledged in 1877 that some debtors continued to abscond to the United States; however, the problem was not as great. "[N]ow they had hope of settlement, while then they had no hope."<sup>181</sup>

Opponents of the discharge appealed to the necessity of maintaining high business morals. Bankruptcy law did not encourage ethical standards as it created opportunities for fraud. The legislation, "was now inflicting great damage on commercial men". "It

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<sup>177</sup> *House of Commons Debates* (24 March 1875) at 880 (Bunster).

<sup>178</sup> *House of Commons Debates* (26 February 1877) at 286 (McDougall). The problem of absconding debtors was particularly a problem in the Maritimes prior to Confederation. Before 1867 there was no bankruptcy law in force in this region. Debtors who could not find relief in the Maritimes, travelled to England and started up a small business in order to take advantage of English bankruptcy proceedings. This left Maritime creditors without much of an opportunity to recover debts. *House of Commons Debates* (9 June 1869) at 683. Similarly, in Prince Edward Island, "debtors had to go to prison, or leave the limits of town". *House of Commons Debates* (3 April 1877) at 1088 (Davies).

<sup>179</sup> *House of Commons Debates* (7 March 1879) at 211 (Ross, West Middlesex). See also "The Law Regarding Insolvency" *J. of Commerce* (22 November 1878) 431 where it was argued that the abolition of a discharge would lead to debtors to abscond.

<sup>180</sup> Burley's study of Brantford indicates that those who failed often could not face the public shame. Many fled and some even committed suicide rather than confront creditors, friends and families with their financial failure. D. Burley, *A Particular Condition in Life: Self Employment and Social Mobility in Mid Victorian Brantford* (Montreal: McGill-Queen's University Press, 1994) at 176-177 [hereinafter Burley, *Mid Victorian Brantford*].

<sup>181</sup> *House of Commons Debates* (26 February 1877) at 296 (Blake); at 304 (Young).

had become so demoralising” that debtors could not operate a business without adopting “this mode of getting rid of their liabilities”.<sup>182</sup> Alexander Mackenzie, the leader of the Opposition, argued that the law “had been found eminently conducive to public immorality”.<sup>183</sup> Another Member of Parliament concluded that bankruptcy law “was conceived in sin, and whose fruits had been iniquity from first to last”.<sup>184</sup> Bankruptcy law impaired a sense of responsibility, and rewarded debtors. The common claim heard in Parliament was that the legislation “encouraged commercial immorality”.<sup>185</sup> Bankruptcy law caused commercial failure.<sup>186</sup> If the Act caused failure, repeal would prevent commercial ruin.<sup>187</sup>

The link between bankruptcy law and commercial immorality was derived from the fundamental principle that “he who owed should pay”.<sup>188</sup>

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<sup>182</sup> *House of Commons Debates* (19 April 1869) at 24; Others referred to the existence of fraudulent debtor behaviour under the *Insolvent Act of 1864*. The Act “opened the door to ... fraud ... and perjury”. *House of Commons Debates* (4 May 1869) at 175.

<sup>183</sup> *House of Commons Debates* (11 May 1869) at 253.

<sup>184</sup> *House of Commons Debates* (7 March 1879) at 202 (Rymal). “The very principle of the law was immoral... it continued working moral, commercial and social ruin.” *House of Commons Debates* (28 February 1877) at 359 (Mousseau).

<sup>185</sup> *Debates of the Senate* (23 May 1872) 788. See also at 746, 747; *House of Commons Debates*, (23 April 1872) at 120, 121, 140. See also R.M.F. “Legislation Upon Insolvency” (1873) 2 *Can. Monthly* 419-422. “The belief of the men in rural districts had been that it was a piece of dishonesty, a crime, a sin for a man not to pay his debts .... He knew of villages where men would scorn to owe anything, and think it a crime if they did not pay their debts.” *House of Commons Debates* (26 February 1877) at 299 (Workman). “Recent Crimes and their Punishment” *Monetary Times* (29 September 1871) 246.

<sup>186</sup> “The effect of the law was to draw men into bankruptcy and create recklessness in the way of conducting business—in fact demoralize the whole community.” *Debates of the Senate* (28 May 1872) at 789.

<sup>187</sup> The debate over the *Insolvent Act of 1875* and its subsequent amendments and repeal took place in the midst of a serious depression that lasted from 1874 until 1878. Honsberger, “Historical Evolution of Bankruptcy”, *supra* note 23 at 29.

<sup>188</sup> *House of Commons Debates* (7 March 1879) at 206 (Houde). Insolvency laws were “an unmitigated nuisance, a school of immorality and rascality, and he believed that ... people should understand that when they contracted debt they should be strictly held to the payment thereof”. *House of*

It was of the highest importance that we should admit the obligation of every man to pay the debts which he had legally incurred; that principle must rest at the very foundation of every well regulated and well governed community .... Any law of a general character which tended to impair that obligation ... was an unsound and impolitic law, and ought not to be enacted by any Parliament.<sup>189</sup>

Debts were governed, therefore, by more than a formal legal contract.<sup>190</sup>

According to the *Monetary Times* the principle that debts should be repaid was a higher law "which no man can annul".<sup>191</sup> Founded upon an ethical obligation, the statute "could not dispense [the debtor's] conscience ... from paying his debts".<sup>192</sup> This principle was also recognized in the Canadian courts. In *Austin v Gordon*<sup>193</sup> an Ontario court cited Lord Mansfield's statement in the 1777 case of *Trueman v Fenton* that "all debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate".<sup>194</sup> Lord

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*Commons Debates* (25 March 1875) at 918 (Rymal); "Every law was unjust which did not force a man to carry out a contract." *House of Commons Debates* (7 March 1879) at 199 (Huntington). "Men should be made to feel the responsibility of their obligations, and not to be allowed to fall back upon the Insolvency Law." *House of Commons Debates* (25 April 1872) at 156 (Magill); "Everyman should meet his obligations, and if there was any other principle preferable to that he would like to know it." *Debates of the Senate* (22 May 1872) at 746 (Sanborn); "As between debtor and creditor, the law should contain a provision that when the debtor has failed to meet his engagements in full, the creditor shall have the utmost farthing the debtor can pay." R.M.F. "Legislation Upon Insolvency" (1873) 2 Can. Monthly 419 at 422.

<sup>189</sup> *House of Commons Debates* (20 March 1875) at 815 (MacIennan).

<sup>190</sup> "Regarding verbal and written promises lightly is one of the most common and dangerous mistakes into which our traders fall. Aside from the moral question involved, the merchant who indulges this vice throws away that which is of the utmost value to him .... Once established a reputation for negligence and recklessness in regard to one's obligations, the very essence of credit is gone." *Monetary Times* (11 August 1871) 107.

<sup>191</sup> "Dominion Board of Trade" *Monetary Times* (24 January 1873) 622.

<sup>192</sup> *House of Commons Debates* (7 March 1879) 206. "While a debtor might go through insolvency or make a compromise with his creditors for 50c on the dollar and be legally absolved from his liabilities, still, under the higher law, the moral law, he should pay every dollar of his debts." *House of Commons Debates* (3 April 1877) at 1094 (Paterson).

<sup>193</sup> ... (1872) 32 U.C.Q.B. 621.

<sup>194</sup> *Ibid.*, at 623 citing *Trueman v. Fenton* (1777) 2 Cowp. 548, 98 E.R. 1232.

Mansfield had developed the theory in English contract law that a moral obligation to pay was sufficient consideration to support a new promise and had further stated in *Trueman*: "Though all legal remedy may be gone, the debts are clearly not extinguished in conscience".<sup>195</sup> In England, Lord's Mansfield's theory of moral obligation was called into question in the early nineteenth century and by 1840 the English courts had clearly rejected the principle.<sup>196</sup> In 1849, the English Parliament made all promises to repay discharged debts unenforceable.<sup>197</sup>

The amendments to the English Bankruptcy Acts, which prohibited the enforcement of promises to repay discharged debts, were not adopted in the Canadian *Insolvent Acts*.<sup>198</sup> Notwithstanding the rejection of Mansfield's theory in England, it continued to be applied in Canadian courts.<sup>199</sup> The debtor in *Austin* had received a

<sup>195</sup> *Trueman v. Fenton* (1777) 98 E.R. 1232, 1234: On the evolution of Mansfield's theory see W.S. Holdsworth, *A History of English Law* vol. 8, (Boston: Little Brown, 1926) at 26-37; D. Boshkoff, "The Bankrupt's Moral Obligation to Pay his Discharged Debts: A Conflict Between Contract Theory and Bankruptcy Policy" (1971) 47 Ind. L.J. 36; J. Oldham, "Reinterpretations of Eighteenth Century English Contract Theory: The View from Lord Mansfield's Trial Notes" (1988) 76 Georgetown L.J. 1949 at 1962. B Schientag, *Moulders of Legal Thought* (Port Washington: Kinnikatt Press, 1943, reprint 1968) at 123-133.

<sup>196</sup> See note appended to *Wennall v. Adney* (1802) 3 B. & P. 249. Denman C.J. in *Eastwood v. Kenyon* (1840) 11 Ad. & E. 438, 113 E.R. 482 "gave the death blow to the theory that moral obligation could be regarded as valid consideration". W.S. Holdsworth, *A History of English Law* vol. 8, (Boston: Little Brown, 1926) at 37; W.J.V. Windeyer, *Lectures on Legal History* 2<sup>nd</sup> ed. (Sydney: Law Book, 1957) at 238.

<sup>197</sup> 12 & 13 Vict., c. 106, s. 204 (1849). In 1824, the English Parliament had earlier required that all agreements to repay discharged debts be in writing. D. Boshkoff, "The Bankrupt's Moral Obligation to Pay his Discharged Debts: A Conflict Between Contract Theory and Bankruptcy Policy" (1971) 47 Ind. L.J. 36 at 44. See e.g. *Jones v. Phelps* (1871) 20 W.R. 92 holding that a promise to pay a debt barred by a bankruptcy discharge was a nudum pactum.

<sup>198</sup> In *Austin v. Gordon* (1872) 32 U.C.Q.B. 621, 625, Wilson J. reviewed the English and Canadian statutes and concluded that "we have not yet adopted that legislation".

<sup>199</sup> On the relative importance of English precedent in Canadian courts during this period, see G. Blaine Baker, "The Reconstruction of Upper Canadian Legal Thought in the Late Victorian Empire" (1985) 3 L. & Hist. Rev. 219.

discharge but subsequently signed a promissory note with respect to a discharged debt. At issue was whether there was sufficient consideration to support the new promise. The court concluded that the note was valid:

And notwithstanding the bankrupt has been discharged by operation of the statute, and the certificate or order granted under it, it is still a continuing debt in conscience, and the consideration for a new promise to pay it.<sup>200</sup>

Similarly in *Adams v. Woodland*<sup>201</sup> the Ontario Court of Appeal held that a promise to pay a discharged debt was founded upon good consideration. Burton J. stated: "although ... payment of the debt remained simply a voluntary duty, binding only in *foro conscientiae*, still an express promise operated to revive the liability and take away the exemption". Referring to the policy of the English statutes to prohibit the enforcement of promises to repay a discharged debt, the court stated that "our Legislature has never thought proper to interfere in this direction". If a debtor:

throws away the shield that the law has furnished him, that is his affair, and there is no good reason, that I can discover in morals or in law, to prevent his doing so, or to warrant his appeal to Courts to relieve him from payment of a just debt, which he has voluntarily re-assumed.<sup>202</sup>

Not all debtors followed the honourable course after their discharge and according to some, bankruptcy law provided a temptation to ignore one's higher duty. In a pamphlet

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<sup>200</sup> (1872) 32 U.C.Q.B. 621, 625. The court noted that the English doctrine was "strange ... considering the policy of the Bankrupt law".

<sup>201</sup> (1878) 3 O.A.R. 213. This line of authority is no longer followed in the Canadian common law. Moral consideration is no longer adequate consideration at common law. However, in Quebec moral obligation is sufficient to support a promise. See *Tildesley v. Weaver* (1998) A.C.W.S.J. 372 (B.C.S.C.). The extent to which notions of moral obligation were different in Quebec in the nineteenth century needs to be explored further.

<sup>202</sup> *Ibid* at 214. Mansfield's theory was also followed in the United States where it became known as reaffirmation. Boshkoff notes that at the very moment that the theory was dying in England, it was being born in the United States. However, he suggests that by the time England had opted to repeal reaffirmation, it had taken hold in the United States. There was little appreciation of the conflict between the discharge and reaffirmation as the legislation was insufficiently debtor-orientated to challenge the rule. D. Boshkoff, "The Bankrupt's Moral Obligation to Pay his Discharged Debts: A Conflict Between Contract Theory and Bankruptcy Policy" (1971) 47 Ind. L.J. 36 at 49.

entitled "Fallacy of Insolvency Laws and their Baneful Effects" Thomas Ritchie, an importer from Belleville, Ontario, explored this theory:

...statutory law should be so framed as to lead men to observe the laws of nature, to have regard to the responsibilities of their position and observe the obligations they are naturally under to their fellow men. And conversely, the state has no right whatever to enact any law that will tempt men to break those, or even extend increased opportunity or facility to disregard the duties and responsibilities of their condition in life, and this all insolvency laws practically do.<sup>203</sup>

A debtor would always be able to approach his creditors who "were always willing to give [a release] to an honest, if unfortunate man".<sup>204</sup> Thomas Ritchie claimed that it was a "matter of rare occurrence" where an honest debtor cannot obtain a discharge from his creditor.<sup>205</sup> Debt was a private matter to be worked out between the parties without the assistance of the state.<sup>206</sup> Defaulting debtors were blamed for their own bad judgment.<sup>207</sup> Failure was not the result of bad luck but "of causes that were controllable and preventable—that as a general rule, it is a man's fault and not his misfortune if he

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<sup>203</sup> Thomas Ritchie, *The Fallacy of Insolvency Laws and their Baneful Effects* (1885) at 18. One Member in the Senate argued that the bankruptcy laws "changed the paper relations that should exist between debtor and creditor". *Debates of the Senate* (23 May 1872) at 787.

<sup>204</sup> *House of Commons Debates* (7 March 1879) at 197 (Boulton).

<sup>205</sup> T. Ritchie, *The Fallacy of Insolvency Laws and their Baneful Effects* (1885) at 18. The problem of "harsh and exacting" hold outs would be dealt with by the self interest of the "mean and inhuman" creditor who would fear reputation loss. The ability of debtors to obtain a release of their debts "would be no part or necessity of the law". *House of Commons Debates* (27 March 1878) at 1447 (Paterson).

<sup>206</sup> One Member suggested that "creditors and debtors should be left alone to settle their affairs, according to the principles of the common law". He noted that whenever the state had intervened, only evil had been the result. "Let us do away with Insolvent Laws, and in four or five years the commercial morals of the people would be good as to obviate the necessity for them." *House of Commons Debates* (29 April 1879) at 1610 (Bechard).

<sup>207</sup> The "blame generally lies at the debtor's own door." "Insolvencies in 1874" *Monetary Times* (29 January 1875) 854-855.



fails in business".<sup>208</sup> Unfortunate circumstances and unforeseeable events did not merit consideration.

Creditors also had to take responsibility for poor judgment. One letter to the editor of the *Journal of Commerce* claimed that the maxim that "everyman must ... take the consequences of his folly or wisdom" equally applied to creditors.<sup>209</sup> Thomas Ritchie's pamphlet similarly argued that if men entrusted their cargo to a rotten vessel in the face of easily obtainable knowledge, "they ought to suffer". Irresponsible creditors were asking the State to insure them "against the consequences of their own misconduct".<sup>210</sup> The credit system itself came under attack, with the *Monetary Times* claiming that "many bankruptcies have been caused by getting and giving too much credit".<sup>211</sup>

The other side of the moral equation did not go unnoticed. Anticipating arguments based on forgiveness, and the need to restore a debtor as a productive member

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<sup>208</sup> "Insolvency" *Monetary Times* (17 March 1876) 1071.

<sup>209</sup> Letter of Experience to Editor of *J. of Commerce* (5 March 1877) in "Insolvency" *J. of Commerce* (8 March 1877) 116. See also *Monetary Times* (21 January 1870) 357; "Opposition to the Insolvent Act" *Monetary Times* (3 May 1872) 867-868; "Fraudulent Insolvents" *Monetary Times* (8 July 1870) 759. For a detailed anecdote of a Montreal bankruptcy and the failure of creditors, see "A Failure With Its Lessons" *Monetary Times* (15 October 1875) 438.

<sup>210</sup> T. Ritchie, *The Fallacy of Insolvency Laws and Their Baneful Effects* (1885) at 9, 10. The author further developed his argument of personal responsibility. He claimed that credit was the "root of all evil" and caused 9/10's of all failures in Canada. Under a bankruptcy system which allowed for a pro rata distribution, creditors advanced funds on the "partial security" of the pro rata distribution. By doing so they neglected the true commercial basis for extending credit, "honesty, integrity, and ability". Credit was advanced where it should not be and was shifted from its true basis. Without a bankruptcy law those who "suffer loss ... have matters almost entirely in their own hand, in withholding credit or curtailing credit."

<sup>211</sup> "Abolition of Credit" *Monetary Times* (15 November 1872) 388. For a series of articles on the evils of the credit system, see "Credit" *Monetary Times* (19 July 1872) 45; "A Word About Debt" *Monetary Times* (1 August 1873) "Long Credit and Bad Debts: A Change Needed" *Monetary Times* (2 December 1870) 305; "Moral Standing of Merchants" *Monetary Times* (9 December 1870) 331; "Long Credits, Letter to Editor from Dry Goods" *Monetary Times* (16 December 1870) 349; "Cash vs. Credit" *Monetary Times* (16 December 1870) 353; "Dangers of the Credit System" *Monetary Times* (24 February 1871) 548; "The Cash System" *Monetary Times* (25 October 1872) 334; "Can we Curtail the Credit System" *Monetary Times* (15 August 1873) 152; "Diminishing Credit" *Monetary Times* (22 August 1873) 201; "Credit and Bad Debts" *Monetary Times* (19 September 1873) 274; "Extending Credits" *Monetary Times* (3 October 1873) 328;

of society, the *Monetary Times* questioned whether or not it was always wise to return a debtor to his community.<sup>212</sup> The fact that some debtors might flee to the United States “would be the best possible thing for themselves and the public”. Some might leave the country; but this “would be no loss, for the country has lost by their living in it”.<sup>213</sup> Society was better off without debtors “who have wasted other men’s substance”, and who were “a moral contagion in mercantile life”.<sup>214</sup>

The moral imperative that debts should be repaid had obvious consequences for the discharge.<sup>215</sup> The conflict between the responsibility to repay debts and the discharge led the *Monetary Times* to claim that “it does not seem, prima facie, as if a discharge were an essential part of the Insolvent Act at all ...”. The legal discharge “may be properly struck out of the Act altogether”.<sup>216</sup> Why the discharge proved to be unpopular can be related to the rural nature of the economy.

#### *D The Economy and Credit Relationships*

Critical attitudes to debt may be linked to the local nature of credit relations that depended upon trust and mutual exchange. Chapter 2 examined the moral economy in early modern England where credit was extended in small and local transactions. Failure

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<sup>212</sup> “Is it not, therefore, to the detriment of the community, and not to its benefit, to facilitate their getting into business again?” “A New Insolvency Law” *Monetary Times* (15 May 1874) 1163. In a later editorial the *Monetary Times* suggested that of the 1500 or so who failed in 1875, it was far better if they never returned to business. “And it is only mistaken kindness to help them back”. See “Failures in 1875” *Monetary Times* (5 November 1875) 519.

<sup>213</sup> “The Insolvency Law” *Monetary Times* (23 February 1877) 962.

<sup>214</sup> “Business Morality” *Monetary Times* (20 May 1870) 628.

<sup>215</sup> “Proposed Repeal of the Insolvency Laws” *Monetary Times* (19 April 1872) 826; “Two Important Measures” *Monetary Times* (14 March 1873) 796. The latter article suggested amendments to “render the release of the dishonest and extravagant more difficult to obtain”.

<sup>216</sup> “The Insolvency Law” *Monetary Times* (23 February 1877) 962; See also, “Shall the Insolvent Act be Repealed” *Monetary Times* (7 March 1879) 1116; “Insolvent Act Repeal” *Monetary Times* (28 March 1879) 1209.

to repay one's debt betrayed the community standard of ethical credit.<sup>217</sup> In the United States, there was a persistence even until the 1860s of a dual economy where local and national markets coincided. The survival of local markets in which the moral obligation to repay debts was strong, provided an obstacle to national bankruptcy reform in the United States at mid century.<sup>218</sup>

In Canada, the emergence of a national market is also an important theme in late nineteenth and early twentieth century Canadian economic history.<sup>219</sup> There is evidence that in the 1870s more legalistic and impersonal forms of credit had already begun to emerge.<sup>220</sup> However, old forms of business did not disappear. Local markets and personal credit relationships continued to have an influence in the Canadian economy in

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<sup>217</sup> See chapter 2 on the history of credit relationships in England.

<sup>218</sup> See chapter 3. On the dual economy, see Freyer, *Constitutional Conflict*, *supra* note 6 at 9. The persistence of local markets perpetuated what Tony Freyer has called, "associational" market relations in some areas of the country. See pp. 11, 39. On the persistence of the moral view of credit relations, see S. Sandage, *Deadbeats, Drunkards, and Dreamers: A Cultural History of Failure in America 1819-1893* (Ph.D. diss., Rutgers University, 1995) at 85-87; 272-289.

<sup>219</sup> Naylor indicates that the period of 1867-1914 has attracted a disproportionate share of historians' attention. T. Naylor, *The History of Canadian Business 1867-1914*, Vol. 1: *The Banks and Finance Capital* (Toronto: James Lorimer, 1975) at 103. See also Monod's study of the emergence of national retail organizations and the transformation of industry practices, including the shortening of credit, emergence of instalment and hire purchase contracts, and emergence of national markets. D. Monod, *Store Wars: Shopkeepers and the Culture of Mass Marketing 1890-1939* (Toronto: University of Toronto Press, 1996) at 161-203 [hereinafter Monod, *Store Wars*]; I. Drummond, *Progress Without Planning: The Economic History of Ontario: From Confederation to the Second World War* (Toronto: University of Toronto Press, 1987) at 277-293; G.D. Taylor & P.A. Baskerville, *A Concise History of Business in Canada* (Toronto: Oxford University Press, 1994) at 314 [hereinafter Taylor & Baskerville, *Business in Canada*].

<sup>220</sup> David Burley has argued the shift to a more impersonal form of credit had its beginnings in the commercial collapse of 1857. No longer could creditors solely make credit decisions on intangible matters such as honour or character. Suppliers and creditors increasingly made use of credit agencies who issued reports on the wealth and business prospects of the debtor. Creditors insisted on formalizing the credit relationship through mortgage or other security devices. Burley, *Mid Victorian Brantford*, *supra* note 180 at 114-126. However, Bilak has noted that mortgages were not the pre-eminent mode of security in rural areas and were more common in Upper Canada's urban commercial communities. D. Bilak, "The Law of the Land and Rural Debt and Private Land Transfer in Upper Canada: 1841-1867" (1987) 20 Soc. Hist. 177.

the 1870s. As the Canadian economy did not modernize overnight, resistance to new forms of business explain why bankruptcy law remained unpopular.

The nature of the Canadian economy in the period 1867 to 1880 was still primarily rural and agricultural.<sup>221</sup> In 1867, the population of 3.5 million was 80% rural.<sup>222</sup> By 1880, little had changed in this regard.<sup>223</sup> While the American economy came of age in the late nineteenth century, it would take some time before a national Canadian market emerged. Michael Bliss compared the economies of the two countries and concludes:

The age of Carnegie and Rockefeller and J. P. Morgan and young Henry Ford in the United States, from about 1875 to 1910, was in Canada still the age of the general storekeeper on the prairies, sawmills in the Gatineau, shoe factories in Quebec and textile mills and candy factories in New Brunswick.

Canadian markets were "scattered over vast distances and were minuscule by American or European standards".<sup>224</sup> The existence of a locally based rural economy shaped the nature of the debate over whether to repeal the federal bankruptcy law. In a more

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<sup>221</sup> I. Drummond, *Progress Without Planning: The Economic History of Ontario: From Confederation to the Second World War* (Toronto: University of Toronto Press, 1987) at 3.

<sup>222</sup> K. Norrie & D. O'ram, *A History of the Canadian Economy* (Toronto: Harcourt, 1991) at 277. The 1871 census reports that in Ontario, 49% of those stating an occupation, indicated farming. D. McCalla, *Planting the Province: The Economic History of Upper Canada 1784-1870* (Toronto: University of Toronto Press, 1993) at 219. For a study of the occupations of Canadians in 1871, see Gaétan Gervais, "Le Commerce de Détail au Canada: 1870-1880" (1980) 33 R.H.A.F. 521.

223	Urban	Rural
1871	0.7	3.0
1881	1.1	3.2
1891	1.5	3.3
1901	2.0	3.4
1911	3.3	3.9
1921	4.4	4.4

Richard Pomfret, *The Economic Development of Canada* (Toronto: Methuen, 1981) at 53.

<sup>224</sup> M. Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland & Stewart, 1987) at 286-287

traditional economy credit was extended on a more personal basis.<sup>225</sup>

The importance of character and trust in credit relationships was evident in pre-Confederation Canada as well as after 1867. Chapter 4 illustrated that, before 1867, character played a vital role in local credit markets.<sup>226</sup> The new constitutional framework of the B.N.A. Act did not immediately create a national economy. Confederation in 1867 can be viewed as a “means of achieving provincial or particularistic rather than national goals”. Taylor and Baskerville argue that most visions of Confederation were “firmly rooted in sectoral, regional and metropolitan contexts”.<sup>227</sup> Ben Forster’s study of mid and late nineteenth century Ontario found that when manufacturers began to market brand names directly to consumers, there was no immediate shift to a nationally based system of distribution and market. Forster argues that customers continued to prefer to buy from local suppliers and producers as “credit arrangements could be more flexible, and faulty goods might be more readily repaired”.<sup>228</sup>

David Burley’s study of nineteenth century Brantford illustrates that localism continued to have great appeal despite the emergence of a national market. Those who had succeeded in the local market continued to preach the message of self-help and responsibility. Success was defined in local terms:

Those for whom community particularism had proved beneficial clung to it and could not understand the inclination of others .... to abandon localism in favour of deference to more abstract and impersonal external

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<sup>225</sup> For a discussion of the importance of personal credit relationships in a local English economy, see chapter 2 and in particular, C. Muldrew, “Interpreting the Market: The Ethics of Credit and Community Relations in Early Modern England” (1993) 18 Soc. Hist. 163. For a discussion of the transformation of the American credit relationship, making bankruptcy more acceptable, see chapter 3 and in particular, Peter Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt and Bankruptcy* (Madison: State Historical Society of Wisconsin) at 284.

<sup>226</sup> Burley, *Mid Victorian Brantford*, *supra* note 180 at 114-126; Monod, *Store Wars*, *supra* note 219 at 186, 196; Taylor & Baskerville, *Business in Canada*, *supra* note 219 at 250.

<sup>227</sup> Taylor & Baskerville, *ibid.* at 230.

<sup>228</sup> B. Forster, “Finding the Right Size: Markets and Competition in Mid and Late Nineteenth Century Ontario” in R. Hall et. al. eds., *Patterns of the Past: Interpreting Ontario’s History* (Toronto: Dundurn Press, 1988) at 154.

considerations. To the successful, it seemed another abandonment of personal responsibility.<sup>229</sup>

Burley concludes that, if there were elements of a national economy emerging, "it was unseen by the capitalists of Brantford". He argues that the transformation of the economy grew within local contexts and "did not immediately or uniformly from place to place reach an appreciation of the self interested utility of a national political economy of protection".<sup>230</sup>

Character and morality in business dealings were very important in the 1870s and beyond. Success in business depended upon strong character. In a lecture given by the Cashier of the Bank of Toronto to the students of the British American Commercial College in Toronto, George Hague included character as one of the qualities to be "cultivated by a young man entering a commercial office". Character could be subdivided into among other things, honesty, truthfulness and promptness. "There is something better than money, which all businessmen should aim to secure, and that is character."<sup>231</sup>

One historian, who has examined the "Myth of the Self Made Man", argues that nineteenth century "philosophers of success" emphasized "hard work, charity and discipline .... He who was successful was he who had shaped a moral life."<sup>232</sup> The *Monetary Times* similarly noted that "Fair dealing is to be preferred .... 'Do unto others' ... is a sound business maxim as well an obligatory injunction of the moral code".<sup>233</sup> An

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<sup>229</sup> Burley, *Mid Victorian Brantford*, *supra* note 180 at 239.

<sup>230</sup> *Ibid.* at 239.

<sup>231</sup> "Hints to Young Men on Preparation for Business" *Monetary Times* (22 November 1872) 412.

<sup>232</sup> A. Smith, "The Myth of the Self Made Man in English Canada, 1850-1914" (1978) 49 *Can. Hist. Rev.* at 204-205.

<sup>233</sup> "Over-Reaching in Business" *Monetary Times* (12 September 1873) 249. It is interesting to note that the thrust of this article deals with the unfairness of traders who endeavoured to entrap each other in bargains. However the courts were not willing in this period to set aside contracts on the grounds of unfairness. Risk states: "Each individual was the best judge, and was to be the only judge, of the value and utility of an exchange, and each individual was to be responsible for his own economic fate, even though one transaction or a lifetime of disadvantage made that fate a cruel one." R.C.B. Risk, "The Golden Age: The Law About the Market in Nineteenth Century Ontario" (1976) 26 *U.T.L.J.* 307 at 338.

individual who pursued legitimate interests “based on high moral principles, combined with untiring industry and strict economy” would possess a “place of competency and business independence”.<sup>234</sup>

Michael Bliss’ study of attitudes of Canadian businessmen from 1883-1911 also reveals that the moral character of business relations continued beyond 1880. Bliss concludes that “there was not one favourable reference to the straightforward goal of making money”.<sup>235</sup> He found no statements “advocating materialism, greed, or concentration or getting wealthy”.<sup>236</sup> However, there was nothing wrong with accumulation as long as the right methods were used. “Industry, integrity, and frugality were still the qualities without which success in life was impossible.”<sup>237</sup> The other side of the coin saw “blanket condemnations of luxury and extravagance”.<sup>238</sup> The success ethic “had little or nothing to do with making money, [and] everything to do with the cultivation of moral character”.<sup>239</sup>

One late nineteenth century work, *The Canadian Album: Men of Canada; or Success by Example* was critical of the shift away from character to financial matters in some credit reporting. Private reports were still necessary in order to find out a man’s true standing. Further, the author suggested that even those who did not have the

<sup>234</sup> *Monetary Times* (20 May 1871) supplement, xii. [reprint from the *Chic. J. of Commerce*]

<sup>235</sup> M. Bliss, *A Living Profit: Studies in Social History of Canadian Business 1883-1911* (Toronto : McClelland and Stewart, 1974) at 16.

<sup>236</sup> *Ibid* at 16.

<sup>237</sup> *Ibid* at 19.

<sup>238</sup> *Ibid* at 20.

<sup>239</sup> *Ibid* at 32. Economic depression was therefore caused by “an excess of speculative fervour, unsound business practices”. This resulted in “crashes and failures, liquidation and belt tightening”. Depressions to some were a form of punishment for sins of the business community.

necessary financial standing still could be endorsed as credit-worthy based on character. Character produced capital.<sup>240</sup>

If strong character ensured success, failure was attributed to some moral weakness on the part of the debtor. Personal misconduct explained business failure rather than downturns in the economy or misfortune.<sup>241</sup> Failure implied a moral flaw. Common causes of mercantile failure included extravagance or imprudent purchases of unneeded items, speculation, overtrading<sup>242</sup> and intemperance.<sup>243</sup> One author claimed extravagance caused eighty per cent of failures.<sup>244</sup> Extravagance inevitably led to a dismal result:

Then follow the neglect of business; the accumulation of bills; the protesting of notes; the stoppage of credit, the loss of confidence; the meeting of creditors; the visit of the sheriff's officer; piano gone, carpets and curtains gone; the man broken-spirited, broken hearted, the morning that shone out so promising, already dark and beclouded. Then in too many instances, the bottle,—then the grave.<sup>245</sup>

Other commentators equally blamed rash speculation as a grave sin. Businessmen, entrusted with credit for legitimate purposes, invested in speculative ventures, "bringing

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<sup>240</sup> The discussion of *The Canadian Album: Men of Canada or Success by Example* is contained in Burley, *Mid Victorian Brantford*, *supra* note 180 at 194. See also, R.M.F., "Legislation Upon Insolvency" (1873) 2 Can. Monthly 419 at 420 who notes credit agencies continued to monitor "private character". Dun and Wiman published a credit rating handbook for the various provinces. It is interesting to note that there were two credit ratings contained in the book. The first related to "Pecuniary Strength" and the second related to "General Credit". See Dun & Wiman, *Mercantile Agency Reference Book and Key for the Dominion of Canada* (Dun & Wiman, 1876).

<sup>241</sup> See e.g., "The Hurry to Get into Business" *Monetary Times* (11 October 1872) 289. In this article the author claims that one of the causes of failure is rushing unthoughtfully into business when not prepared.

<sup>242</sup> "Overtrading" *Monetary Times* (12 January 1872) 550.

<sup>243</sup> "Causes of Mercantile Failures" *Monetary Times* (16 August 1872) 124.

<sup>244</sup> *Ibid.* See also "Why So Many Fail in Business" *Monetary Times* (3 March 1871) 564. [reprinted from the *Chicago Journal of Commerce*.] "But the extravagance in dress and equipage, and keeping up princely establishments, is the cause of a majority of American failures ...."

<sup>245</sup> "Causes of Mercantile Failures" *Monetary Times* (16 August 1872) 124.



upon others loss, perhaps suffering, and stamping themselves for all time to come as dangerous men whom it would be unsafe to trust".<sup>246</sup> Merchants who gained through speculation did not escape the stigma. Riches acquired through folly and on the failures of others was "akin to money gained by gambling".<sup>247</sup> Other vices linked to speculation included fraud and embezzlement.<sup>248</sup>

The newer form of the impersonal credit relationship did not immediately replace older notions of moral character. The retention of this more traditional view of credit contributed in a significant way towards the unpopularity of bankruptcy law as debtors bore the responsibility to repay all of their debts. Personal credit relationships, and the responsibility to repay debts, came into direct conflict with the bankruptcy law discharge. This was particularly the case in rural Canada.

The repeal of the bankruptcy statute in 1880 in many ways reflected the value that society placed in honouring debts. Bankruptcy law challenged this ideal and much of the opposition to the discharge was framed in these terms. Repeal, however, cannot be explained upon the basis of a disinterested debate over the fundamental nature of credit relationships. While one should not ignore the importance of these values to the debate, at the same time, specific interests appealed to these larger ideals to conceal or distract from their specific goals. Although much of the rural opposition was expressed in terms of moral obligation, farmers opposed bankruptcy law as it affected their status as creditors.

What specifically raised the ire of the rural community was that the *Insolvent Acts* were limited in application to traders. This limitation allowed merchants to escape from

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<sup>246</sup> *Ibid.*

<sup>247</sup> *Monetary Times* (20 May 1870) supplement p. xii, [reprint from the *Chic. J. of Commerce*] See also "Business and Gambling" *Monetary Times* (19 August 1870) 6.

<sup>248</sup> The paper argued in an article entitled "Recent Crimes and their Morals," that the causes of fraud and embezzlements were "speculation, gambling and fast living". "Recent Crimes and Their Morals" *Monetary Times* (29 September 1871). The article called for punishment of wrongdoers and pointed to the United States as an example "to see the sad effects of such mistaken leniency". Other fraudulent activity worthy of punishment was a bulk sale. Roguish debtors would use this device to avoid payments of their debts and disappear with the proceeds. "Selling Out in Bulk" *Monetary Times* (3 February 1871) 486.

their obligations while farmers were specifically excluded.<sup>249</sup> The trader rule had long been a feature of English bankruptcy legislation but had been repealed by the English Parliament in 1861.<sup>250</sup> In England there had also been a long debate over the merits of the rule, but in rural Canada the issue took on a different tone.<sup>251</sup> Farmers represented the greatest proportion of non-traders in the Canadian economy.<sup>252</sup>

The inequity of the Act's non-application to farmers was exacerbated in a typical exchange between a farmer and a trader.<sup>253</sup> A farmer, who sold grain to a miller or grain merchant on credit, risked having his claim extinguished by the miller's bankruptcy. Further, if the miller's bankruptcy led to the farmer's financial ruin, the trader rule prohibited the farmer from obtaining a discharge under the Act. Farmers obtained no

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<sup>249</sup> The trader rule threatened the passage of the *Insolvent Act of 1869*. The House of Commons rejected an 1869 proposal to extend the law to non-traders by a vote of 77-55. *House of Commons Debates* (15 June 1869) at 793.

<sup>250</sup> For a discussion of the trader rule in English history, see chapter 2.

<sup>251</sup> The well-known rationale for the rule differentiated between commercial and non-commercial debts. Traders required a special law as they were regularly exposed to risk. By way of contrast, non-traders who borrowed and fell into debt did so out of extravagance and not necessity. For a summary of the rationale of the rule, see *House of Commons Debates* (9 June 1869) at 676 (Irvine); R.M.F., "Legislation Upon Insolvency" (1873) 2 *Can. Monthly* 419 at 420. See also *House of Commons Debates* (20 March 1875) at 811 (Jones Halifax). Non-trading liabilities were "debts of honour". *House of Commons Debates* (20 March 1875) at 815 (Mitchell); *House of Commons Debates* (20 March 1875) at 813 (Blake); *House of Commons Debates* (20 March 1875) at 826 (Wilkes).

<sup>252</sup> One Member of Parliament, a self described farmer and representative of "the agricultural class", claimed that the farmer like everyone else was "subject to the uncertainties of life". Storms and hail could destroy crops, disease could "carry off flocks", and lightning could destroy his buildings. The law, however, offered no relief for his debts which was a "fatal discrimination that the law sanctioned". He indicated that he would vote for repeal. *House of Commons Debates* (7 March 1879) at 217 (Landry).

<sup>253</sup> One account of the repeal debates of the 1870s, written in 1913, confirms this point. Bicknell, in summarizing the opposition to the trader rule, concludes that "these objections were urged more especially by Members representing rural constituencies. Repeatedly it was pointed out by such Members that the majority of their constituents, farmers, mechanics and professional men, received no benefit from the Act, though compelled to bear their share of the loss resultant. J. Bicknell, "Establishing a Bankruptcy Court in Canada" (1913) 33 *Can. L.T.* 35 at 46.

benefits under the Act but were required to bear the loss if any of their debtors made an assignment in bankruptcy.<sup>254</sup>

The exclusion of farmers from the Act was held up as example of class legislation that discriminated against the rural sector. The Act also excluded other important occupations:

Farmers, lumbermen, miners and fishermen—the men who drag the riches from the soil, from the forests, from the bowels of the earth, and from the depths of the sea— the men in whose great hands lie the development of the country—these were all excluded from the operations of the Bill.<sup>255</sup>

However, in pointing out the unfairness of the exclusion of farmers, opponents of the trader rule did not call for a bankruptcy law of general application.<sup>256</sup> The solution to the discrimination was repeal. Abolition of bankruptcy law would place the trader and the farmer “on an equality”.<sup>257</sup> The criticism of bankruptcy law as class legislation<sup>258</sup>

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<sup>254</sup> See *House of Commons Debates* (20 March 1875) at 810 (Mills); 812 (Colby); 813 (Oliver); *House of Commons Debates* (23 April 1872) at 123 (Oliver). Further evidence of concern over how a non-trader creditor would fare upon the insolvency of their trader debtor can be seen in 1876. A proposed amendment would have forced insolvents to separately list trading and non-trading debts. Under the proposal, non-trading creditors would have been allowed to continue to enforce on their debts, notwithstanding the discharge of the trader. Therefore, under the example given, the farmer would be allowed to continue collecting from the miller, even after the miller's discharge. The amendment failed. See *House of Commons Debates* (7 April 1875) at 1115. The proposed amendment also failed in 1877. See *House of Commons Debates* (4 April 1877) at 1146-1150. However, this proposal resurfaced in the Select Committee's recommendations of 1879. See *House of Commons Debates* (29 April 1879) at 1598 (Colby).

<sup>255</sup> *House of Commons Debates* (20 March 1875) at 821.

<sup>256</sup> *House of Commons Debates* (20 March 1875) at 821.

<sup>257</sup> *House of Commons Debates* (25 February 1880) at 222 (McCuaig).

<sup>258</sup> Rural opposition to bankruptcy law was an issue in the election of 1878 and “rural constituencies ... looked to this Government to carry out the repeal of this law which they looked upon as class legislation.” *House of Commons Debates* (7 March 1879) at 209-210 (McCallum).

became a call for repeal in another name. The demand for repeal, however, continued to be expressed in traditional terms:<sup>259</sup>

[T]he Act was most unpopular in the rural districts .... In the rural districts, the people were clamorous for its repeal. They could not tolerate a law ... [which] allowed [a debtor] to avoid paying all his debts; in which discrimination was made between different classes of society .... They could not support that discrimination, and were willing ... [to] return to the good sound principle which bound every man to pay his legitimate debts.<sup>260</sup>

Thus, while it is important to analyse the competing values that were at stake in the debate over the discharge, it is also important to address the possible interests that were specifically affected by the retention or repeal of a bankruptcy statute. An analysis of the other goal of bankruptcy law, the equitable distribution of the debtor's assets, more clearly reveals a tension between local and distant creditors.

*E The of Distribution Assets and the Division between Local and Distant Creditors*

The rural nature of the economy also had an impact on how various creditors responded to the other important goal of bankruptcy law. The equal treatment of creditors, upheld by a pro rata distribution of the debtor's assets and the prohibition against preferential payments, had different effects on local and distant creditors.

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<sup>259</sup> One Member who criticized the trader rule as it discriminated against farmers, claimed that he would vote for repeal. He argued that "no occupation was attended with more risk than that of a farmer". As the benefits of the Act did not extend to farmers "he would vote for repeal of the act". *House of Commons Debates* (27 March 1878) at 1449 (Little). Another Member argued for repeal to protect farmers "from fraudulent dealers" and by voting for repeal "he would be rendering a great and important service to his constituents". *House of Commons Debates* (27 March 1878) at 1451 (Bourbeau). Other Members who indicated they would vote for repeal expressly indicated that they were representing a rural constituency. *House of Commons Debates* (7 March 1879) at 203 (Hesson). One Member regarded it as his duty, "as representing an agricultural constituency" to vote against the continuance of the Act. *House of Commons Debates* (7 March 1879) at 204 (Oliver). Mr. Methot, who described himself as representing "a rural district" had promised during the election campaign that "he would do all in his power to have this Insolvency Act repealed". *House of Commons Debates* (7 March 1879) at 204 (Methot).

<sup>260</sup> *House of Commons Debates* (7 March 1879) at 220 (Bechard). "The almost unanimous opinion of the people of the rural districts in this country was in favour of repeal." *House of Commons Debates* (29 April 1879) at 1618 (Cameron).

Bankruptcy law, by abolishing the common law race to the debtor's assets, reduced risks for distant or foreign creditors, and destroyed local advantage.

Bankruptcy law fundamentally changed the rules for debtor-creditor relations. The right of unsecured creditors to rank *pari passu* and receive a proportionate share of the debtor's estate has been an established principle of bankruptcy law since 1542.<sup>261</sup> In 1879, the Minister of Justice defended the virtues of a bankruptcy law upon the principle that a debtor's estate "shall be distributed among his creditors in equal proportions; he shall not be allowed to appropriate to one individual what ought in justice be distributed amongst the whole".<sup>262</sup> This was an important statutory change to the rights of creditors at common law.<sup>263</sup>

The common law priority rule of first come first served advantaged local creditors. The race of diligence, also a problem under American state collection law,<sup>264</sup> favoured creditors who were first able to enforce upon the debtor's assets. Creditors who obtained the first execution against the debtor were not required to share the benefits of execution with other creditors.<sup>265</sup> The pro rata distribution of the debtor's assets put all creditors, near and far, on an equal footing.

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<sup>261</sup> R. Goode, *Commercial Law*, 2nd ed. (London: Penguin, 1995) at 852. On the importance of the pro rata principle, see *Davidson v. Ross* (1876) 24 Gr. 22, 58. (Ont. Ch.); Law Reform Commission of British Columbia, *Report on Creditors' Relief Legislation A New Approach* (Vancouver: B.C. Law Reform Commission, 1979) at 6.

<sup>262</sup> *House of Commons Debates* (7 March 1879) at 213 (McDonald, Pictou). Edward Blake had earlier succinctly stated the classic argument for a bankruptcy law. "The law "recognized that ... there should be a speedy means of obtaining, by the mass of creditors, of the property of the debtor ... and its realization and distribution, pro rata among those creditors." *House of Commons Debates* (3 April 1877) at 1111 (Blake).

<sup>263</sup> For a discussion of this issue in the context of England, see chapter 2.

<sup>264</sup> See e.g., Edward J. Balleisen, *Navigating Failure: Bankruptcy in Antebellum America* (Ph.D. diss., Yale University 1995) at 162.

<sup>265</sup> See eg., *Beekman v. Jarvis* (1847) 3 U.C.Q.B. 280; *Topping v. Joseph* (1859) 1 E. & A. 292; *Rowe v. Jarvis* (1863) 13 U.C.C.P. 495; *Bank of Montreal v. Munro* (1864) 23 U.C.Q.B. 414. Modern sources discussing the common law rule include: Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters*, Part V (Toronto: Ministry of the Attorney-General, 1983) at 3; C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed., (Toronto : Carswell, 1995) at 545. Law Reform Commission of British Columbia, *Report on Creditors' Relief Legislation A New Approach*

The moment that the bankruptcy law was repealed, "it would be a race on the part of the creditors to the nearest and sharpest law officer they could find."<sup>266</sup> Whether to allow a race to the quickest or an orderly distribution was a fundamental problem for legislators in the 1870s. Creditors who traded at a distance advocated a regime providing for the equitable distribution of the debtor's estate.

John Abbott clearly understood how distant creditors fared under a common law system. Creditors who acted swiftly often received "the whole of the proceeds of the goods: the other creditors would have got nothing". It was often local creditors who had the ability to act quickly:

With reference to creditors who were not favoured enough to get the first judgment when a man got into difficulties and a creditor at a distance took proceedings for the recovery of his debt, the neighbour, father or brother of the debtor got judgment by confession, while some sham plea protracted the judgment in favour of the creditor at a distance, so that the neighbour or friend got the whole proceeds, to the exclusion of other creditors.<sup>267</sup>

Debtors who were knowledgeable of this legal framework were able to "give disgraceful preferences by allowing a favoured creditor to get a judgment by default, and secure priority of execution".<sup>268</sup>

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(Vancouver: B.C. Law Reform Commission, 1979) at 6; Alberta Law Reform Institute, *Enforcement of Money Judgments*, Vol. 1, Report No. 61 (Edmonton: Alberta Law Reform Institute, 1991) at 326.

<sup>266</sup> *House of Commons Debates* (27 March 1878) at 1447 (Young).

<sup>267</sup> *House of Commons Debates* (11 May 1869) at 259. See also *House of Commons Debates* (20 March 1875) at 818 (Kirkpatrick); (26 February 1877) at 283-284 where a Member raised the issue of a creditor who often lost all to other creditors who seized first under a preferential assignment. See also "Proposed Repeal of the Insolvency Laws" *Monetary Times* (19 April 1872) 826 fearing a return to the old rule of 'first come first served.' "Shall the Insolvent Act Be Repealed?" *Monetary Times* (7 March 1879) 1116; "Insolvent Act Repeal" *Monetary Times* (9 May 1879) 1389. "Did the hon. gentleman wish them to go back to the law of preference when everyone caused a confession of judgment and obtained an advantage over his neighbour, thus causing universal distrust throughout the whole country?" *House of Commons Debates* (26 February 1877) at 296 (Macdonald). See also *House of Commons Debates* (7 March 1879) at 215 (Haggart).

<sup>268</sup> J.D. Edgar, *The Insolvent Act of 1869*, *supra* note 30 at 128. *Insolvent Act of 1869* s. 116 provided that the Official Assignee prevailed over uncompleted executions.

Repeal of the federal bankruptcy law would have grave consequences for creditors trading across the country:

It was now not uncommon for merchants in the Provinces of Ontario and Quebec to send large quantities of goods to Manitoba, British Columbia, Nova Scotia, and New Brunswick, and merchants in those provinces to send their goods to distant provinces of the Dominion. If the Insolvent Act were repealed and the country fell back on the old system of confession of judgment and preferential assignment, the local creditors would lay hold of the estate and creditors at a distance would be placed at a great disadvantage .... If the measures by which the creditors could at least obtain a share of the debtor's estate in the case of failure were removed, a serious blow would be struck at all credit, and injury would be inflicted on the people of the distant provinces and the commercial community as a whole.<sup>269</sup>

Members of Parliament from various regions argued that repeal would seriously affect inter-provincial trade. A Member from Cape Breton claimed that repeal "would prevent creditors living at a distance getting their share of the assets ...". He stated that efforts to increase inter-provincial trade would fail, "for no merchant in the West would give credit to a trader in the Maritime Provinces, or *vice versa* unless their interests were protected".<sup>270</sup> Similarly, a Member from Quebec reminded his colleagues that Montreal merchants had advanced goods and credit goods "all over the Dominion". If bankruptcy law was repealed "the nearest creditor would take out judgment and the estate would be fastened up until the demands satisfied".<sup>271</sup>

The Civil Code of Quebec, however, softened the effect of repeal as it preserved a pro rata system of distribution.<sup>272</sup> Therefore, for those who traded within Quebec, a

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<sup>269</sup> *House of Commons Debates* (26 February 1877) at 304 (Workman).

<sup>270</sup> *House of Commons Debates* (26 February 1877) at 308 (Mackay, Cape Breton).

<sup>271</sup> *House of Commons Debates* (28 February 1877) at 364 (Laflamme).

<sup>272</sup> The law of Quebec was summarized in great detail in the *Debates of the Senate* in 1879 by Trudel. He quoted at length from the Civil Code. Of particular relevance is Article 1981 which provided, "The property of a debtor is the common pledge of his creditors, and where they claim together they share its price rateably, unless there are amongst them legal causes of preferences." See *Debates of the Senate* (9 May 1879) at 519-521. (Trudel). Girouard, in summarizing the distinct features of the Civil Code, noted that, in the common law provinces, repeal of the national bankruptcy regime would allow preferential assignments and priority of judgments. However, in the Civil Code the "principle was the very reverse of

national bankruptcy act was not a particular priority in comparison to the other common law provinces. The existence of this provincial law may have weakened support for a national act.<sup>273</sup> However, Quebec merchants who extended credit beyond the provincial boundary would “suffer”.<sup>274</sup> One Member recalled the state of affairs in Quebec before the *Insolvent Act of 1864* came into effect. He claimed that “it was not uncommon, and was sometimes considered a smart thing, for a debtor in any of the other Provinces to make a preferential assignment in favour of a trader residing in that Province, with a view to cheating the Montreal creditor”.<sup>275</sup>

An 1877 pamphlet also defended bankruptcy law on similar terms. It noted that Canadian commerce had grown and encompassed Prince Edward Island, British Columbia, and Manitoba. The author asked how creditors would protect themselves against local creditors without a bankruptcy law. The common law maxim of first come first served operated “*toujours au préjudice des créanciers éloignés*”. If Parliament abolished the bankruptcy regime, creditors would be forced to pursue each debt to judgment. Further, abolition would force creditors to terminate much of their business in other provinces. The advantage of bankruptcy law was that “*elle met tout le monde sur le même pied, et ne crée pas de préférence injuste pour l’un au détriment de tous les autres*”.<sup>276</sup>

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that. The moment a debtor became insolvent, the whole of his estate belonged to all his creditors equally.” *House of Commons Debates* (29 April 1877) at 1606 (Girouard).

<sup>273</sup> Bicknell argues that the Quebec Civil Code “provided a much more simple, much more expeditious, and much less unjust remedy .... the strongest opposition came from the province of Quebec”. J. Bicknell, “Establishing a Bankruptcy Court in Canada” (1913) 33 *Can. L.T.* 35 at 46.

<sup>274</sup> *House of Commons Debates* (27 March 1878) at 1448 (Jette).

<sup>275</sup> *House of Commons Debates* (29 April 1878) at 1607 (Girouard); *House of Commons Debates* (5 May 1879) at 1773 (Girouard).

<sup>276</sup> G. Beausoleil, *La Loi De Faillite* (Montreal: Plinguet, 1877) at 6. For similar views, see *House of Commons Debates* (28 February 1877) at 358 (Landerkin); *House of Commons Debates* (27 March 1878) at 1433 (Wood); *House of Commons Debates* (28 February 1877) at 364 (Laflamme).



One of the most important votes took place in 1879. Members of the House of Commons rejected the *Insolvent Bill of 1879*, and instead voted in favour of repeal. While the Senate blocked repeal, the crucial vote in 1879 indicated a definite trend of support for repeal. One Member of Parliament characterized the split in the House of Commons as follows:

On the division, the other evening, he thought the members opposed to [repeal] would not deny that the vote in favour of the continuance of the Insolvent Law represented the great commercial thought of this country. The representatives of almost every great commercial centre in the country voted in one direction .... the division .... showed the large preponderance of the commercial sentiment ... to be in favour of the continuance of the Insolvent Law.<sup>277</sup>

The express support for bankruptcy law from the commercial sector, and those most likely to be trading across great distance, perhaps was best revealed in the Senate. Faced with the House of Commons vote in favour of the repeal, supporters of bankruptcy law in the Senate mounted an aggressive campaign to prevent the law's demise. A Senator tabled a petition which demanded the retention of the law:

The large cities of the Dominion, Montreal, and Quebec, St. John, Toronto, Halifax and many others have large transactions beyond the mere province in which they are situated, and when the merchants of those cities go outside their own provinces they require a general law to regulate insolvency or bankruptcy, in order to make their transaction reasonably safe. If this Act is swept away they become subject to the local laws of the general provinces.<sup>278</sup>

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<sup>277</sup> *House of Commons Debates* (5 May 1879) at 1776 (Bechard). Evidence of a split between rural and commercial centres can be found in the debate over the 1879 Select Committee's report. Colby, a Member of the Committee, a self described Member from a rural district, appealed to his counterparts from other rural ridings not to vote for repeal. He argued that the rural Members should "allow the commercial community some means of taking possession of, and distributing insolvent estates. If the commercial community wanted such an act, why should we withhold it from them?" He asked if the commercial sector demanded such a law, as evidenced by the many telegrams from the Boards of Trade in Quebec, Hamilton and Toronto, "why should the representatives of the rural districts say 'you shall not have it.'" *House of Commons Debates* (29 April 1879) at 1602 (Colby).

<sup>278</sup> To support his claim of the detrimental impact of local legislation, Ryan read a letter from the solicitor of the British North American Bank who claimed that the common law would result in a return to a race to the debtor's assets. *Debates of the Senate* (8 May 1879) at 514 (Ryan).

The various Boards of Trade of the individual cities represented the merchants of these larger commercial centres. Throughout the 1870s these individual Boards of Trade sought to retain the federal bankruptcy legislation. Their efforts bear comparison to the developments in the United States. In the American context, one recent study argues that renewed demands for federal legislation in the late nineteenth century arose in response to a growth of inter-state trade and an increase in the number of creditors who experienced the problems of diverse state legislation. In the United States, therefore, there had been a change in the "expected net benefits of bankruptcy law". This coincided with a decline in the relative cost of seeking legislation due to the rise of interest groups organized on a national basis that lobbied for change.<sup>279</sup>

The efforts of the various Canadian Boards of Trade, and the speeches in Parliament indicating the possible prejudice to merchants if the law was repealed, illustrate a growth of inter-provincial trade even as early as the 1870s. The expected benefits of bankruptcy law were well documented. Boards of Trade had some success in delaying repeal until the end of the decade.<sup>280</sup> However, the failure of the Boards of Trade suggests that there was insufficient inter-provincial trade to convince a majority in Parliament of the benefits of a national law. Further, there was no unified national organization committed to lobbying Parliament to prevent repeal. The one national group

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<sup>279</sup> Compare B. Hansen, *The Origins of Bankruptcy Law in the United States, 1789-1898* (Ph.D. diss., Washington University, 1995) at 10.

<sup>280</sup> The Toronto and Montreal Boards of Trade convinced the Senate to block repeal in 1872. *Debates of the Senate* (23 May 1872) at 783 (Campbell). In 1873 and 1874, Boards of Trade persuaded the government to extend the Act of 1869 rather than to allow it to expire. "Two Important Measures" *Monetary Times* (14 March 1873) 796. Dominion Board of Trade, Annual Report 1874 at 13. See *House of Commons Debates* (19 February 1875); *House of Commons Debates* (20 March 1875) at 814 (Oliver). The action on the part of the Toronto Board of Trade in securing the extension, was acknowledged in a letter to the editor of the *Monetary Times*. See Letter of William Thomson, President Toronto Board of Trade to Editor of the *Monetary Times*, 3 November 1873 in "Insolvent Act" *Monetary Times* (7 November 1873) 438. Repeal Bills were delayed or withdrawn in 1877 owing to the efforts of the Montreal Board of Trade which urged amendment rather than repeal. See *House of Commons Debates* (26 February 1877) (Blake).

that did emerge during this period, the Dominion Board of Trade, was itself divided over the merits of bankruptcy law.

The Dominion Board of Trade (DBT), which came into prominence during the 1870s, offered local Boards of Trade a national voice. The Board met in the parliamentary buildings to ensure access to cabinet ministers. Ministers routinely attended their meetings. The DBT clearly saw itself as a policy generating body:

Of course our Commercial Parliament, as some have been pleased to call it, is purely suggestive or recommendatory but we seek to bring our views to bear on the government by respectfully placing before the Ministers the resolutions of the Board.<sup>281</sup>

The aim of the DBT was to "secure unity and harmony of action, in reference to commercial usages, customs and laws". In particular the DBT wanted to ensure that there was a "united opinion" in the commercial community to ensure that Parliament would carefully consider financial and commercial matters.<sup>282</sup> A review of the votes taken at the Annual DBT meetings indicates that there were major divisions within the organization on the subject of bankruptcy law.<sup>283</sup> In 1878, a Special Committee of the DBT divided on the issue of repeal. The Halifax, Ottawa, and Levis Boards of Trade instructed their representatives on the Special Committee to vote for repeal. The DBT in

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<sup>281</sup> Dominion Board of Trade, Annual Meeting 1874, at 27.

<sup>282</sup> Dominion Board of Trade, Annual Meeting, 1872, appendix.

<sup>283</sup> As early as 1872, the Board passed a resolution which called for some amendments to the *Insolvent Act of 1869*. However, the resolution also stated that "in the main [the Act] has been advantageous". The vote was 19-13 in favour of the resolution. Dominion Board of Trade, Annual Meeting 1872 at 75-77. In 1873, the DBT passed a resolution "strongly recommending that the Act be continued". However, some Members of the Board wanted the resolution to include wording to allow for amendments to be made to the Act. However, this was rejected by the Board on a 26-20 vote. The Minutes reproduce a circular published by the Montreal Board of Trade which called for the "united action of the mercantile community as represented by their Boards of Trade, or Chambers of Commerce, throughout the Dominion, for the continuance of the *Insolvent Act of 1869*". Dominion Board of Trade, Annual Meeting 1873 at 112-120. Further at the 1877 meeting, the debate on Insolvency law was re-opened and discussions included one Member calling for repeal. Dominion Board of Trade, Annual Meeting 1877 at 158.

the end recommended that the Act not be repealed.<sup>284</sup>

In 1879 the DBT issued a comprehensive report recommending several amendments to the Act. However, two of the members of the special committee signed a separate statement indicating that if the amendments were not accepted, they would prefer repeal. Many members of the DBT spoke in favour of repeal, with some pointing to the example of the American repeal of 1878. A motion supporting repeal of the *Insolvent Act of 1875* was defeated only by a 10-9 vote, foreshadowing the bitter debate that was to follow in the House of Commons.<sup>285</sup> Divisions within the commercial community hampered the campaign to retain the federal law. A truly national and united commercial organization that was committed to national bankruptcy reform did not emerge until 1913.<sup>286</sup> The repeal of the federal bankruptcy legislation in 1880 was symbolic of the weakness of the national economy.

#### *F The Role of Institutions*

Economic considerations, however, do not provide a complete explanation. This concluding section considers the relevance of institutions to the issue of repeal in 1880. The absence of a strong government department committed to reform hastened repeal. Finally, this section considers the impact of federalism on the debates.

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<sup>284</sup> Fears of a return to the common law may have swung the vote. Repeal meant "creditors living nearest to the debtor would have the advantage over those at a distance". Members of the DBT were reminded that the bulk of Montreal's business was in Ontario, and that before the passage of the Act "the creditors in Ontario had the advantage over the Montreal creditors". Dominion Board of Trade, Annual Meeting 1878 at 191. The Member from the Levis Board of Trade reminded the meeting that his town and county had no losses prior to the passage of the Act but "since this law has been passed it is ruinous". The representative from Levis noted that the Quebec City and Montreal Boards of Trade were opposed to repeal. Those cities had "larger interests than ours". Dominion Board of Trade, Annual Meeting 1878 at 189.

<sup>285</sup> Dominion Board of Trade, Annual Meeting 1879 at 25-36; 159-177. Again a reminder was given of the evils of the common law. "The moment there was a judgment against a man, there were creditors from Toronto, Hamilton, Montreal and other places all trying to get the better of each other ..." at 174.

<sup>286</sup> The Canadian Credit Men's Trust Association retained a solicitor to draft a federal bankruptcy law. The CCMTA draft Bill became the basis for the Bankruptcy Act of 1919. See T.G.W. Telfer, "The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest" (1994-95) 24 C.B.L.J. 357.

The capacity of the political system can constitute “formidable limiting conditions on public policy”. Political capacity can be measured, not only with respect to fiscal matters and issues of jurisdiction, but also with respect to “the professionalism and expertise of the legislators and public administrators”.<sup>287</sup> John Abbott had provided the expertise in drafting the original 1864 Act, which provided the basis for post-Confederation legislation. However, there was little sense that bankruptcy law was part of a larger regulatory state. Bankruptcy law was never adopted as a government reform measure and there was no specialized government department responsible for the legislation.

The Department of Justice had broad responsibility for the subject matter. Most of the correspondence in the Department of Justice files concerned minor administrative matters rather than larger policy issues. As there was no separate bankruptcy office, those who had a particular concern wrote directly to the Minister of Justice or to the Prime Minister. The correspondence includes, for example, an appeal for legal advice from a bankrupt,<sup>288</sup> requests for copies of legislation,<sup>289</sup> requests for legal advice from Official Assignees<sup>290</sup> and requests for legal advice from other departments involved in bankruptcy claims.<sup>291</sup> No policy memoranda or papers could be located in the Justice Files.

After 1875, much of the Department of Justice’s time was taken up with filling

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<sup>287</sup> Robertson, “Return to Institutionalism”, *supra* note 10 at 113

<sup>288</sup> Letter of E. W. Chipman to Edward Blake, 17 March 1876, *Department of Justice Files*, PAC RG 13 A2, Vol. 36, File No. 414.

<sup>289</sup> Letter of A. J. Fortrin to H. Renaryd, 26 May 1876, *Department of Justice Files*, PAC RG 13 A2, Vol. 37, File No. 675; Letter of A.J. Alport to Edward Blake, *Department of Justice Files*, PAC RG 13 A2, Vol. 37, File No. 716; Letter of Montreal Board of Trade to Minister of Justice, *Department of Justice Files*, PAC RG 13 A2, Vol. 38, File No. 535.

<sup>290</sup> Letter of S. K. Mathews to Edward Blake, 1 February 1877, *Department of Justice Files*, PAC RG 13 A2, Vol. 38, File No. 140; Letter of Mr. Bowerman to Edward Blake, 1 March 1877, *Department of Justice Files*, PAC RG 13 A2, Vol. 38, File No. 246; Letter of Robert Smith to Edward Blake, 23 December 1875, *Department of Justice Files*, PAC RG 13 A2, Vol. 35, File No. 1162.

<sup>291</sup> Letter of Department of Public Works to Department of Justice, 14 November 1877, *Department of Justice Files*, PAC RG 13 A2, Vol. 39, File No. 1194.

the post of Official Assignee. The position quickly became a patronage appointment. Under the 1869 Act, Official Assignees, who were responsible for administering the debtor's estate and distributing dividends to creditors, had been appointed by local Boards of Trade or Chambers of Commerce.<sup>292</sup> By 1875, the government assumed control over the appointment process but it quickly degenerated into a patronage scheme. The Department of Justice received numerous requests for appointments. It prepared countless lists of appointees, and settled territorial disputes between feuding assignees.<sup>293</sup> According to the *Journal of Commerce* appointments would now "be dictated more by political affinities than an appreciation of mercantile requirements".<sup>294</sup> There is little evidence to suggest that the government appointment process functioned as any form of supervisory mechanism.

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<sup>292</sup> *Insolvent Act of 1869* s. 31. Popham, *The Insolvent Act of 1869*, *supra* note 30 at 60. John Abbott advised the Montreal Board of Trade that they had "an unlimited discretion as to the persons they appoint". Letter of John Abbott to Montreal Board of Trade, 14 September 1869, *Montreal Board of Trade Papers*, MG28 III 44, Reel 2785, MB V, p. 152.

<sup>293</sup> The indexes contain numerous references to correspondence concerning assignees particularly in 1875 and 1876. See RG 13 A1 Vol. 452 1875, Files 735, 720, 721, 722, 723, 724, 725, 726, 1116; RG 13 A1 Index Vol. 453, 1876. For specific examples, see Letter of J.W. to H. Bernard, 27 July 1876, *Department of Justice Files*, PAC RG 13 A2, Vol. 37, File No. 788; Petition of Toronto Merchants for Appointment of John Clark to the Office of Official Assignee, *Department of Justice Files*, PAC RG 13 A2, Vol. 37, File No. 847. See also *Department of Justice Records*, PAC: RG 13 A2 Vol. 29, File No. 515, Vol. 33, No. 307, Vol. 36, File No. 414; Vol. 37, File No. 788, Vol. 37, File No. 847, Vol. 40, File No. 401; Vol. 38, File No. 140 and 246, Vol. 35, File No. 1162. Wotherspoon acknowledged the patronage problem. Wotherspoon, *The Insolvent Act of 1875*, *supra* note 62 at 73. Wotherspoon lists the Official Assignees by district at 73-75. Those who had acted as Official Assignees under the former Act, did not hesitate to make direct application for re-appointment. See e.g., Letter of Georges Hyacinthe to Governor General of Canada, 9 April 1875, RG 13 A2, Vol. 33, 1875, No. 307.

<sup>294</sup> "The Insolvency Law" *The J. of Commerce* (20 August 1875) 10. See also "The Insolvent Act of 1869" *Monetary Times* (20 December 1872) 493; "The Insolvent Act" *Monetary Times* (26 February 1875) 977. However, for a view supporting government appointments, see "The Act Respecting Insolvency" *Monetary Times* (26 March 1875) 1089. It was not long before Members of Parliament raised the issue of patronage. *House of Commons Debates* (27 March 1878) at 1444 (Young). This practice contrasted to the situation in the United States and England. In the United States, the bankruptcy order was issued to the existing marshals of the district. In England, between 1869 and 1883, the court appointed a receiver who held the property until the appointment of a trustee by the creditors. Wotherspoon, *The Insolvent Act of 1875*, *supra* note 62 at 73, 76.

Given the lack of government interest in the issue, it is important to acknowledge the role of private individuals and organizations in initiating policy suggestions. While individuals submitted specific reform suggestions to the government,<sup>295</sup> the bulk of resolutions and petitions came from private organizations,<sup>296</sup> and more specifically Boards of Trade. From the outset, Boards of Trade attempted to shape the direction of bankruptcy policy. Submissions from Boards of Trade influenced the report of the Select Committee Report in 1868 and helped shape the *Insolvent Act of 1869*.<sup>297</sup> Boards of Trade also provided input on the *Insolvent Act of 1875* and its various amendments.<sup>298</sup>

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<sup>295</sup> Macdonald frequently received correspondence from individuals and groups suggesting changes to the bankruptcy laws. Some suggested technical amendments or improvements. Letter of John A. Macdonald to J. P. Clark, 15 February 1869, *Macdonald Papers*, PAC MG26-A, Vol. 12, File 574, Reel c-27; Letter of John A. Macdonald to F. H. Grant, 24 May 1869, *Macdonald Papers*, MG26-A, Vol. 12, File 858, Reel c-27; Letter of Alex Morris to John A. Macdonald, 2 November 1878, *Macdonald Papers*, MG26-A, Vol. 353, File 162392-162403, Reel c-1714; Letter of John A. Macdonald to H. C. Ianesby, 28 March 1870, *Macdonald Papers*, MG26-A, Vol. 14, File 104, Reel c-28;

<sup>296</sup> Letter of Canada Guarantee Company to Minister of Justice, 20 March 1878, 26 March 1878, *Department of Justice Files*, PAC RG 13 A2, Vol. 40, File No. 401 (as to the liability of assignees).

<sup>297</sup> *Debates of the House of Commons* (7 November 1867) at 2. The Committee having concluded that the *Insolvent Act of 1864* was the most important legislation for study, decided "to address a series of questions to persons interested in its working and to those engaged in putting it in force". The Committee sent questions to one hundred and sixty two persons, including judges, Boards of Trade, Official Assignees, and to a large number of lawyers, merchants and accountants throughout Ontario and Quebec. *Report of the Committee on Bankruptcy and Insolvency* (17 April 1868) at 9. The discharge provisions of 1869 reflected the submissions of merchants who wanted to provide some obstacles in the Act. *Monetary Times* (21 January 1870) 357. See also, Dominion Board of Trade, Annual Meeting 1874 at 88.

<sup>298</sup> The government acknowledged that in drafting the *Insolvent Act of 1875*, the Minister had "given close attention to the suggestions of every Board of Trade". *House of Commons Debates* (19 February 1875) at 240. The DBT appointed a committee to "assist the Government and ... to mature the measure and present it to the House in as complete a form as possible". *Debates House of Commons* (3 April 1877) at 1106; *Debates House of Commons* (28 February 1877). Seven Members of the DBT met with the Minister of Justice on the "subject of amending and continuing the Insolvent Act of 1869". After the meeting, the committee reported that the Minister of Justice "promised to give due considerations to the suggestions" made by the committee of the DBT. Dominion Board of Trade, Annual Meeting 1875, at 59, 142. See "Report of the Committee of the Dominion Board of Trade on the Insolvency Law" (26 February 1874) reproduced in the DBT Annual Meeting 1874 at 154-159. On the efforts of the Montreal Board of Trade see Letter of Montreal Board of Trade to Edward Blake, 28 March 1876, *Department of Justice Files*, RG 13 A2, Vol. 36, File No. 420. On the 1879 DBT report on Insolvency, see "The Report of the Committee on Insolvency" (7 January 1879) in Dominion Board of Trade, Annual Meeting 1879 at 25-36.

Despite the design of a strong central government set out by the B.N.A. Act, federal bankruptcy policy was ambivalent and weak. Bankruptcy law was attacked by rural Canada as an illegitimate form of state interference in private contractual matters. In Canada there was no institutional support for a public interest rationale. By way of contrast, the English reforms of 1883 were initiated and implemented by a government with a strong policy direction. Senior civil servants formulated much of the policy expressed in the 1883 Act. The civil servants accepted that the state had a supervisory role to play. Bankruptcy law, in this new vision, was not just the concern of creditors, but affected the wider society. In England, a separate bankruptcy department was created and it grew to become one of the largest departments in the civil service at the end of the nineteenth century.<sup>299</sup> The Canadian regulatory state did not emerge until after the turn of the century.<sup>300</sup>

However, the professionalism of public administrators was not the only relevant institutional factor that led to lasting English reform. Jurisdictional issues were not relevant in a unitary state. Bankruptcy law could be debated on its merits without conflict over the division of powers. Federalism is the last institutional aspect to be examined.

While the inclusion of bankruptcy and insolvency in s. 91 provided the federal government with an important economic power to create national uniform legislation, during the 1870s there is evidence of a more provincially oriented focus to bankruptcy regulation. The division of powers had a direct impact on the nature of the debate and ultimately provided Parliament with an opportunity to repeal the federal law. Those who debated the merits of bankruptcy law operated within the constitutional framework of the B.N.A. Act.

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<sup>299</sup> See chapter 2 and in particular V. M. Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding Up in Nineteenth Century England* (Oxford: Clarendon Press, 1995) at 207-213, 221, 304 discussing the role of Joseph Chamberlain and the civil service.

<sup>300</sup> See R.C.B. Risk, "Lawyers, Courts and the Rise of the Regulatory State" (1984) 9 Dal. L.J. 31 at 33.



The ambit of the federal bankruptcy power arose quite early after Confederation. Even before the *Insolvent Act of 1869* had been passed, Prime Minister Macdonald admitted in private correspondence that he had had discussions on the possible conflict between federal and local jurisdiction if Parliament adopted a national act.<sup>301</sup> During the debate over whether to adopt a trader rule in 1869, one Member of Parliament raised the issue of provincial jurisdiction: "If this Parliament was to impose a uniform rule in a matter of this kind on all the provinces ... what was the value of the jurisdiction assigned to the Provincial legislatures with regard to property and civil rights?"<sup>302</sup>

The exclusive jurisdiction of the federal government over the field of bankruptcy and insolvency in s. 91(21) of the B.N.A. Act provided supporters of a national law with a strong argument against repeal.<sup>303</sup> If Parliament repealed the national act, the "Provincial legislature would have no power to substitute anything else for it, not even a law to provide for the discharge from arrest of an unfortunate debtor."<sup>304</sup> Provinces did not have jurisdiction over bankruptcy and insolvency as "insolvency matters belonged to this Parliament exclusively".<sup>305</sup> This claim did not go unchallenged as others argued that bankruptcy law interfered with the "jurisdiction of the Local Legislatures".<sup>306</sup> Federal bankruptcy law, according to one author, threatened the Quebec civil code.<sup>307</sup>

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<sup>301</sup> Letter of John A. Macdonald to C. Cameron, 31 May 1868, *Macdonald Papers*, PAC MG26-A, Vol. 11, File 786, Reel c-26.

<sup>302</sup> *House of Commons Debates* (9 June 1869) at 659.

<sup>303</sup> Edward Blake, a prominent Member of the Liberal Party, and the lawyer who later argued the landmark jurisdictional case before the Privy Council on behalf of the provinces, reminded the House that the federal government had "exclusive jurisdiction over both bankruptcy and insolvency". *House of Commons Debates* (9 June 1869) at 680 (Blake).

<sup>304</sup> Gray referred to a case in New Brunswick which held that the province did not have the jurisdiction to pass a law providing a discharge of a debtor from arrest. *House of Commons Debates* (2 May 1872) at 282 (Houde).

<sup>305</sup> *House of Commons Debates* (5 May 1879) at 1769 (Girouard).

<sup>306</sup> *House of Commons Debates* (5 May 1879) at 1779 (Vallee). The *Journal of Commerce* questioned whether the federal government had the right to "control the civil laws of the provinces" in the context of the landlords. "Insolvent Act and Amendments" *J. of Commerce* (12 April 1878) 239.

As the decade wore on, it became apparent that if the federal law were to be repealed, the provinces would play an important part in the regulation of debtor-creditor matters. For example, on three separate occasions, the House of Commons debated amendments to Bills that would have preserved some form of provincial autonomy. In 1872 an amendment to exempt the provinces of Nova Scotia and New Brunswick from the effects of the repeal Bill of 1872 was proposed. While the amendment to exclude Nova Scotia and New Brunswick did not pass, Sir John A. Macdonald was surprisingly open to the idea of allowing some provincial autonomy on the issue. He indicated that it was “perfectly open to the House to deal with the subject in one way with reference to Ontario and Quebec and in another way with reference to the Maritime Provinces”.<sup>308</sup>

In 1875, a Member from British Columbia opposed the application of the *Insolvent Act of 1875* to his newly admitted province. He claimed that British Columbia had previously adopted an English law that had worked well. The application of the Act of 1875 to British Columbia, “would be a step backwards”. Members from British Columbia feared that the application of a harsh law in their province would have the “effect of driving unfortunate men across to the States to find a home”. A vote to exclude B.C. from the operation of the law was lost in 1875.<sup>309</sup> Similarly, a Member suggested allowing the provinces to utilise their legislation on absconding debtors to supplement the provisions of a federal Bill.<sup>310</sup> While all three amendments were defeated, the debates foreshadowed the provincial solution that would emerge in 1880.

American experience provided an obvious parallel for Canadians looking for solutions to the bankruptcy issue. Even after the repeal of the American Bankruptcy Act

<sup>307</sup> G. Girouard, “Le Droit Constitutionnel du Canada” [1871] 1 R.C.L.J. 189, 263 at 272.

<sup>308</sup> The amendment to exclude Nova Scotia and New Brunswick did not pass. However, it was a 82-72 vote. See *House of Commons Debates* (18 May 1872) at 668 and for Macdonald’s passage, see (17 May 1872) at 266. Macdonald voted for the amendment.

<sup>309</sup> *House of Commons Debates* (20 March 1875) at 809 (DeCosmos). See also at 818 where another Member from British Columbia proposed to exclude the province from the application of the Act.

<sup>310</sup> *House of Commons Debates* (5 May 1879) at 1773 (Roberston).

in 1878, Canadians continued to watch developments south of the border. Supporters of Canadian bankruptcy law noted that many American Boards of Trade petitioned Congress for re-enactment of a federal law.<sup>311</sup> In the Canadian Senate, one Member pointed to the new efforts in the United States to re-enact national bankruptcy legislation in 1880 and pointed to the possible dangers of relying upon local legislation:

Congress is about to introduce a new one. The boards of trade in New York and Boston are busily engaged in drafting an insolvency act, and one of the leading commercial papers of the city of New York remarks that people are sick and tired of the grab system which had resulted from the repeal of the National Bankruptcy Law and the establishment of local state laws. I think that should be a warning to the people of Canada not to depend on local legislation in this matter.<sup>312</sup>

Canada also faced a similar problem if the national *Insolvent Act* were to be repealed. The common law of debtor-creditor relations rewarded the first diligent creditor, resulting in a race of diligence or "grab law". Only Quebec law provided for an equitable distribution of the debtor's assets.<sup>313</sup> However, the distribution of the debtor's assets was only one of the goals of bankruptcy law. The other central feature, the discharge, was no longer tolerated in nineteenth century Canada and repeal seemed inevitable. As the discharge proved to be the most controversial issue some began to think in terms of provincial legislation which sought only to provide some form of equitable distribution of the debtor's assets. The B.N.A. Act therefore provided the possibility that provinces might ameliorate the effects of federal repeal by providing their own distribution scheme under their jurisdiction over property and civil rights. If all the

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<sup>311</sup> *House of Commons Debates* (19 February 1880) at 107 (Cameron). See also *Debates of the Senate* (10 March 1880) at 121.

<sup>312</sup> *Debates of the Senate* (11 March 1880) at 141.

<sup>313</sup> In Quebec creditors could rely on articles 763-780 of the Code of Civil Procedure. See L. Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at 20. In Quebec "the right of the creditors of an insolvent to a just distribution of his assets among them all, has always been recognized by the law of Lower Canada". "Third Report of the Select Committee on Bankruptcy and Insolvency" (17 April 1868) at 8, House of Commons Journals. See also D.E. Thomson, "Bankruptcy Legislation in Canada" (1902) 1 Can. L.R. 173, 176. "Hence in Quebec the right of creditor to rateable distribution of the proceeds of an insolvent's effects may be said to be thoroughly established."

common law provinces could be convinced to enact such legislation, a federal bankruptcy law would no longer be required.

In 1879, Oliver Mowat, the premier of Ontario, raised the possibility of provincial legislation with Alexander Campbell, the government leader in the Canadian Senate. Mowat understood that “the Insolvent Law is likely to be abolished next session”. Mowat suggested a solution that separated the distribution of the debtor’s assets from the discharge.

Is not the release of the debtor at the bottom of all the evils or supposed evils of the Act? And is not the machinery of the Act useful and desirable for the distribution of the estate equally?<sup>314</sup>

He referred to the existence of Quebec provincial legislation “which did not recognize priority between execution creditors and I have been considering whether a like bill might not be adopted in Upper Canada in case the abolition referred to takes place”.<sup>315</sup>

In 1879, the Senate delayed repeal of the *Insolvent Act* to “enable the provinces to adopt suitable legislation”. Ontario subsequently announced its intention to pass the *Act to Abolish Priorities Among Execution Creditors*.<sup>316</sup> Royal Assent was given to the Ontario Act on 5 March 1880 which was the day after the *Bill to Repeal the Insolvent Acts* was read for the third time.<sup>317</sup> The new provincial legislation required that creditors

<sup>314</sup> Letter of Oliver Mowat to Alexander Campbell, 20 October 1879, *Alexander Campbell Papers*, PAC M-22. Mowat suggested that if provincial legislation was not viable then the federal government should consider cancelling the discharge provisions of the Act and retain the distributive features of the Act.

<sup>315</sup> Letter of Oliver Mowat to Alexander Campbell, 20 October 1879, *Alexander Campbell Papers*, PAC M-22.

<sup>316</sup> British Empire League, “Canadian Insolvency Legislation” (Report of Meeting of British Empire League 4 December 1895)

<sup>317</sup> The 1970 Study Committee on Bankruptcy and Insolvency Legislation (Canada: 1970) suggests that the coincidence “appears not to be accidental” (p 14). The federal repeal Bill was given Royal Assent on 1 April 1880. See Law Reform Commission of British Columbia, *Report on Creditors’ Relief Legislation A New Approach* (Vancouver: B.C. Law Reform Commission, 1979) at 6.

share rateably in the proceeds realized from the sale of the debtor's assets.<sup>318</sup> Provincial legislation could succeed as the most controversial aspects of bankruptcy law had been removed. The provincial legislation only provided for the distribution of the debtor's assets without allowing a discharge.

Alexander Campbell, speaking in the Senate, confirmed that he had corresponded with the Premier of Ontario, "the result of which was the preparation of the [Ontario] Bill ... which is intended ... to meet any evils which might arise from the passage of the [repeal] Bill now before the House". Campbell summarized the rationale for the Ontario legislation:

The law recently enacted by Ontario has been ... framed to take advantage of the laws ... in Quebec, and seeks to give ... a fair distribution of the assets of a debtor whose goods and chattels are taken in execution. Under the former laws of Ontario the first execution took everything. Under the law of Quebec ... the estate, when seized in execution, became the property of all the creditors.<sup>319</sup>

The coincidental timing of the Ontario Act with repeal was, according to one recent article, "a deviousness if not a deal on the part of and between the federal government and the Government of Ontario". The solution relieved the federal government from the "political fall out from much of the electorate who were critical of and angry at the operation of the Insolvent Acts". Parliament "chose to vacate the legislative field of bankruptcy and insolvency in favour of the provinces".<sup>320</sup>

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<sup>318</sup> "The Creditors' Relief Act" *J. of Commerce* (27 February 1880) 47; "The Creditors' Relief Act" *Monetary Times* (27 February 1880) 1019. Current secondary sources, however, point out that the Act was far from perfect and was not an effective replacement for a bankruptcy law. C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed., (Toronto: Carswell, 1995) at 548. Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters*, Part V (Toronto: Ministry of the Attorney General, 1983) at 5.

<sup>319</sup> *Debates of the Senate* (10 March 1880) at 124 (Campbell). The *Monetary Times* described the purpose of the Creditors Relief Act as "to secure an equitable distribution of assets in the event of the repeal of the Insolvent Act". "The Creditors' Relief Act" *Monetary Times* (27 February 1880) 1019. The *Canada Law Journal* stated that the Ontario Bill was "suggested by the expected repeal of the Insolvent Act this session though its coming into force is not made contingent upon that event". See "Editorial" (1880) 16 *Can. L.J. (N.S.)* 69.

<sup>320</sup> Honsberger, "Historical Evolution of Bankruptcy" *supra* note 23 at 42. Other secondary sources

If the federal division of powers made the repeal of bankruptcy law possible because of the tempering effects of provincial legislation, did federalism make repeal more likely? Members of the federal Parliament were well aware of the proposed Ontario legislation, which was "similar in principle to that prevailing in the Province of Quebec, for the just and equitable distribution of estates". Thomas Colby, who introduced the repeal Bill in 1880, raised the possibility of an Ontario pro rata distribution law in his opening remarks.<sup>321</sup> The government was of the view that "it is better in the interests of commerce and of the public, to allow ... the Insolvency Law to be repealed and to let the effect of the repeal tempered as it will be by recent legislation in Ontario, be experienced".<sup>322</sup> According to a recent study, Members in the federal House of Commons repealed the federal act, taking "comfort in the knowledge" that provincial legislation would "fill the void left by the federal abandonment of the field".<sup>323</sup> Without the possibility of provincial legislation, it would have been unlikely that the federal

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tie the enactment of the Ontario Creditors Relief Act to the repeal of the federal Insolvent Acts: Law Reform Commission of British Columbia, *Report on Creditors' Relief Legislation A New Approach* (Vancouver: B.C. Law Reform Commission, 1979) at 6; R.C.C. Cuming, "Research Paper on the British Columbia Creditors' Relief Act" (Prepared for the British Columbia Law Reform Commission, June 1974) at 2. Dunlop, *Creditor Debtor Law in Canada*, 2nd ed., (Toronto: Carswell, 1995) at 547. Alberta Law Reform Institute, *Enforcement of Money Judgments*, Vol. 1, Report No. 61 (Edmonton: Alberta Law Reform Institute, 1991) at 327; Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters Part V* (Toronto: Ministry of the Attorney General, 1983) at 4; Duncan, *The Law of Bankruptcy in Canada* at 20.

<sup>321</sup> *House of Commons Debates* (19 February 1880) at 104 (Colby). The *Monetary Times* reported on the possibility of an Ontario Law about one month before Colby's speech. *Monetary Times* (16 January 1880) 839.

<sup>322</sup> *Debates of the Senate* (10 March 1880) at 124 (Campbell). For a criticism of the Ontario legislation, see "The Creditors' Relief Act 1880" *J. of Commerce* (27 February 1880) 47. One Member of the Senate suggested that once others saw that the Provinces were providing legislation allowing the equitable distribution of assets, "they will be the first to rejoice in the repeal of this law. *Debates of the Senate* (10 May 1880) at 128 (Alexander).

<sup>323</sup> J. Murray Ferron, "The Bankruptcy Court and Administration in Ontario" (1990) 24 L. Soc. Gaz. 130. Some Members from outside Ontario and Quebec, fearing the return to the grab system of priorities on repeal, suggested that repeal be delayed to allow other provinces to enact pro rata legislation. *House of Commons Debates* (25 February 1880) at 219-220 (Burpee, St. John, Weldon, both from N.B.); at 220 (Brecken, PEI).

government would have opted for complete repeal. Like England, Parliament would have been forced to fashion some alternative solution. Providing the machinery for the distribution of the debtor's estate became a provincial role with the enactment of the Ontario *Creditors' Relief Act*. Federalism therefore contributed to the division of bankruptcy law into its two component parts, with the right of the debtor to obtain a discharge disappearing for almost forty years.

### **Conclusion**

This chapter has considered several factors which explain why the federal Parliament, after enacting comprehensive bankruptcy legislation in 1869 and 1875, abandoned the field in 1880. The lengthy debates of the 1870s took place within the economic context of the depression and the rising number of commercial failures. Opponents seized upon the demise of the American law and the unpopularity of English legislation as a rationale to abandon the Canadian regime.

While the depression and foreign repeal movements helped to raise awareness of bankruptcy as an economic issue, the continuation of personal credit relationships in local and rural markets was also significant. The rise of inter-provincial trade as a new market paradigm did not immediately supersede the importance of local markets. The nature of the economy had a direct impact on the tenor of the debate. Arguments of individual responsibility and the responsibility to repay debts had great appeal in the rural economy of the 1870s where character was still vital to the credit relationship. The concept of a bankruptcy discharge ran counter to these fundamental notions. The novel idea of a fresh start was not readily accepted in nineteenth century Canada. The defeat of federal bankruptcy legislation in many ways was an explicit rejection of the discharge. However, the debate over the discharge distracted from an equally important issue.

Bankruptcy law, in addition to providing relief for the debtor, also achieved an important goal for creditors. The equitable distribution of the debtor's assets also proved to be controversial and an analysis of this issue also explains why repeal occurred in 1880. The equitable treatment of creditors provided a strong rationale not to return to the common law system of first come first served. The extent to which the commercial

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sector feared a return to the common law system suggests that national markets were beginning to develop. However, the commercial interests in Parliament and in the DBT were not united on the bankruptcy law issue. Claims about the importance of an unfettered national market were in some ways premature, and the failure of a federal act suggests an overall weakness of the national economic vision.

Finally, it is important to acknowledge the importance of institutions. Despite the number of strong economic powers given to Parliament by the B.N.A. Act, the regulatory state had not yet emerged. Bankruptcy law was not a matter of government policy. The absence of a government department committed to advocating reform contrasts with the strong English state that implemented the landmark reforms of 1883. Further, federalism allowed the federal government to abdicate responsibility over bankruptcy and insolvency to the provinces. The possibility of a provincial solution to the distribution problem made repeal an attractive solution for Parliament.

Not all Members saw provincial legislation as a safe solution. Some doubted the constitutionality of provincial legislation and feared endless appeals to the Supreme Court.<sup>324</sup> The impact of federalism and the rise of the provincial rights movement are considered in more detail in chapter 6.

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<sup>324</sup> *House of Commons Debates* (19 February 1880) at 108 (McCuaig); at 109 (Weldon). The B.N.A. Act deprived the provinces "of all authority to deal with insolvency; and as long as this doubt exists, appeals to the Supreme Court will unavoidably follow". *House of Commons Debates* (25 February 1880) at 223 (McCuaig). See also *Debates of the Senate* (10 March 1880) at 125 (Scott); (11 March 1880) at 142 (Lewin). Lewin suggested that a year of litigation would be lost on the jurisdictional issue. The constitutionality of the Creditors' Relief Act was questioned as early as 1880. See "Creditors' Relief Act: Is it Constitutional?" *Monetary Times* (7 May 1880) 1321.



## CHAPTER 6

### **Living With Repeal and the Failure of Federal Reform: 1880 to 1903**

#### **Introduction**

After the repeal of federal bankruptcy legislation in 1880, Canada was without a national bankruptcy law until 1919. Studies that have commented on the emergence of the *Bankruptcy Act of 1919* have focused largely on the fact that the new federal law provided a uniform solution to the problem of diverse provincial legislation that developed after 1880.<sup>1</sup> This interpretation, however, ignores the fact that the provincial era did not transpire overnight.<sup>2</sup> Provincial reform developed slowly after 1880. It was not until 1903 that all the provinces had in place legislation which distributed the debtor's assets on a pro rata basis and prohibited preferential payments. Between 1880 and 1903, it was not certain whether provincial legislation would adequately fill the gap left by repeal of the federal bankruptcy law or whether the federal government would take action to re-instate a uniform act. Further, previous explanations that have emphasized the provincial efforts have ignored the fact that Parliament debated twenty reform bills between 1880 and 1903.<sup>3</sup> The continued debate at the national level reflected dissatisfaction with provincial reform efforts.

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<sup>1</sup> See e.g. J.M. Ferron, "The Bankruptcy Court and Administration in Ontario" (1990) 24 *Law Society Gaz.* 130 at 131; J. Honsberger, "Bankruptcy Administration in the United States and Canada" (1975) 63 *Cal. L. Rev.* 1515 at 1529; Report of the Study Committee on Bankruptcy and Insolvency (Canada, 1970) [hereinafter Tassé Report] at 15-16; J. Honsberger, "The Historical Evolution of The Bankruptcy and Insolvency Process in Canada" (unpublished) at 43; E.H. Levi & J.M. Moore, "Bankruptcy and Reorganization: A Survey of Changes" (1937) *U. of Chic. L. Rev.* 1 at 19; L. Duncan, "The Bankruptcy Act and Recent Developments in Bankruptcy Practice" (1923) 30 *J. Can. Banker's Assoc.* 410 at 411; L. Duncan, "The Operation and Effect of the Bankruptcy Act" (1922) 29 *J. Can. Banker's Assoc.* 502 at 503; E. Heaton, ed., *The Commercial Handbook of Canada of Interest to Traders Investors and Intending Settlers* (Toronto: 1905) at 31-32.

<sup>2</sup> Duncan's 1922 bankruptcy text claims, for example, that "in time a fairly complete code was built up". L. Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at 20 [hereinafter Duncan, *Bankruptcy in Canada*]. See also Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters* (Toronto: 1983) which refers to "shortly after the Legislative Assembly of Ontario enacted *The Creditors' Relief Act* in 1880, most of the other province introduced similar legislation".

<sup>3</sup> See Appendix 1.

The near forty year period, beginning with the repeal of the federal *Insolvent Act* and ending with the enactment of the *Bankruptcy Act of 1919* therefore can be divided into two distinct periods. This chapter focuses on 1880 to 1903 and includes a discussion of the rise of provincial legislation and a discussion of the various failed federal reform bills. After 1903 there was no further debate at the national level as to the need for a federal law until just before the War and this latter period is examined in chapter 7. Whereas chapter 5 offered an explanation for the repeal of federal legislation in 1880, this chapter seeks to explain why federal reform efforts failed and to explore the reasons why the provinces did not immediately rush to fill the void. Several factors explain the continued absence of federal legislation.

First, the discharge continued to be a source of controversy. Moral opposition to the bankruptcy law discharge persisted in a largely rural economy. Second, tension between local and distant creditors remained an important factor. Throughout this period, foreign creditors repeatedly pleaded with the federal government to enact national legislation. The reluctance of Parliament to commit to a uniform law and the slow response of the provinces to prohibit preferences suggests that local creditors benefited from the absence of federal and provincial legislation and that traditional local and rural markets continued to play an important role after 1880.

Explanations that focus solely upon economic considerations ignore the possibility that institutional factors can independently impede policy development. Federalism had a significant impact on bankruptcy reform between 1880 and 1903. After 1880, the federal government continued to be indifferent towards bankruptcy policy and was unwilling to expend political capital on a divisive issue. The disinterest of the federal government coincided with the rise of the provincial rights movement of the 1880s. However, unlike several of the more high profile federal provincial disputes of the provincial rights era, bankruptcy law was not a political battleground between Prime Minister Macdonald and the Ontario Premier Oliver Mowat. The federal government was content to allow the provinces to regulate debtor-creditor matters and to defer the constitutional question to the courts. Nevertheless, the jurisdictional issue was of great

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interest to creditors. By the late 1880s, the debate shifted away from substantive bankruptcy law to a discussion of the ambit of federal and provincial powers.

Between 1886 and 1893, several Ontario courts ruled on the validity of provincial legislation. The divided opinions of the Ontario Court of Appeal left the law in a state of confusion and inhibited reform at both the federal and provincial level. It was not until 1894 that the Privy Council resolved the uncertainty with its ruling in *A.G. of Ont. v. A.G. for Canada (Voluntary Assignments Case)*.<sup>4</sup> The decision, which upheld the validity of provincial legislation, contributed to the further growth of provincial laws and largely ended federal reform efforts.

Part I of this chapter examines the legislative history of provincial and federal reform efforts. Part II focuses on the continued debate over the discharge, the effect of repeal on local and distant creditors and the impact of American and English bankruptcy reforms. The chapter concludes with a discussion of the constitutional context.

## I Legislative History

### A Provincial Legislation

Between 1880 to 1903 the provinces did not immediately fill the void left by the repeal of the federal bankruptcy law. Once Parliament repealed the *Insolvent Act of 1875*, debtor-creditor relations reverted to pre-existing provincial laws.<sup>5</sup> The common law granted priority to the first creditor to file an execution.<sup>6</sup> In Ontario, one commentator recalled the old provincial law that had existed before the federal *Insolvent Act* and feared the evils that lay ahead:

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<sup>4</sup> *A.G. of Ont. v. A.G. for Can.* [1894] A.C. 189 (P.C.)

<sup>5</sup> For a discussion of provincial legislation, see L. Duncan, *Bankruptcy in Canada*, *supra* note 2 at 21; D.E. Thomson, "Bankruptcy Legislation in Canada" (1902) *Can. L. Rev.* 173 at 176; J.M. Ferron, "The Bankruptcy Court and Administration in Ontario" (1990) 24 *Law Soc. Gaz.* 130 at 131; R. Brown, "Comparative Bankruptcy Legislation" (1900) 5 *J. of Comp. Legis. & Int'l. L.* 251 at 260; L.J. Durantaye, *Traité de la Faillite* (Montréal: Chez L'Auteur, 1934) at 26-27.

<sup>6</sup> D.E. Thomson, "Bankruptcy Legislation in Canada" (1902) *Can. L. Rev.* 173 at 176. See chapter 4 note 142 and accompanying text; chapter 5 note 265 and accompanying text.

Confessions of judgment and preferential assignments will, in case of absolute repeal, repeat the injustice of twenty years ago; and while lawyers and sheriffs will reap fat harvests, creditors will be at a grave disadvantage.<sup>7</sup>

The *Monetary Times*, in a later article, described the effects of the common law scramble:

Let our reader imagine a concern that ... finds itself suddenly unable to continue the battle.... Fancy further ... when it gradually leaks out little by little that the game is up.... Soon chaos reigns. The sage banker, the ubiquitous attorney and principal creditor with wits unduly sharpened in view of prospective loss are upon the scene.... The scramble begins. Writs are issued all over the country by the score.... Numberless devices are resorted to gain priority.... Some judgements have been recovered with wonderful expedition. Some are perhaps irregular. Questions arise as to the relative exact minutes of time from which execution and assignment take effect.<sup>8</sup>

The *Monetary Times* indicated that the impact of the repeal would be to loosen the band of good faith between merchants. "The inevitable tendency ... will be to drive creditors to every sort of device to secure payments".<sup>9</sup> However, it was not always the most vigilant creditor who succeeded in filing first. Debtors in some ways could control the race to file executions by choosing to defend some lawsuits while allowing others to proceed to judgment uncontested.<sup>10</sup>

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<sup>7</sup> "Insolvent Act Repeal" *Monetary Times* (9 May 1879) 1389, 1390.

<sup>8</sup> "The Confusions of Modern Insolvency Law" *Monetary Times* (1 September 1882) 235. "We find Sir, that the practice of the profession since the Insolvent Act has been abolished has been this: that there has been generally a race as to who can put a sheriff in possession of the assets of the insolvent first, and the consequences are that the man who is a little quicker and a little sharper than his next door neighbour will run away with perhaps the whole of the estate in order to make his debt ...." *House of Commons Debates* (29 March 1882) at 608 (Robertson, Hamilton).

<sup>9</sup> "Creditors' Relief Act" *Monetary Times* (19 March 1880) 1111. See also "The Proposed Bankruptcy Bill" (1883) 3 Can. L.T. 559 at 560. "Is further asserted that the present state of things leads to sharp and unscrupulous conduct on the part of creditors seeking an advantage over each other, and to consequent bad faith and ill-feeling among merchants."

<sup>10</sup> "A Comparative View of English and Canadian Insolvency Legislation" (1902) *Department of Justice Files*, PAC RG 13, Vol. 2311, File 117/1902.

Without a pro rata distribution scheme, creditors were forced to initiate separate enforcement proceedings. Supporters of federal legislation had in the 1870s argued that a centralized bankruptcy system would be much cheaper than all the creditors pursuing the same debtor in separate lawsuits. Once Parliament repealed the *Insolvent Act of 1875*, it soon became clear that the advantages of a collective system had been lost.<sup>11</sup> The *Monetary Times* published the story of 15 creditors who had all taken the required legal steps to obtain judgments against the same debtor. One half of the assets of the debtor went to satisfy legal fees. According to the *Monetary Times*, a bankruptcy law would have only cost about 1/40th of the fees.<sup>12</sup> The solution to the “estate being squandered in ruinously expensive proceedings by each creditor on his own account,” was to provide for pro rata distribution.<sup>13</sup> While the *Insolvent Act* had many faults, “it was cheapness itself compared to the present process for the liquidation of such estates”.<sup>14</sup>

In what appeared to be an immediate solution for creditors, Ontario passed *An Act to Abolish Priorities of and Amongst Execution Creditors* in 1880 the day after the

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<sup>11</sup> For a discussion of this point from a modern theoretical perspective, see T. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge, Harvard Press, 1986).

<sup>12</sup> “Bankruptcy Laws” *Monetary Times* (31 March 1882) 1206; “Bankruptcy Distribution” *J. of Commerce* (27 April 1883) 1165.

<sup>13</sup> “Bankruptcy Distribution” *J. of Commerce* (27 April 1883) 1165. See also, “No Insolvent Law” *Monetary Times* (30 April 1880) 1293. “The beauties of being without an insolvent law are already commencing to shew [sic] themselves. At Ottawa, the other day, a couple of creditors of a trader frightened him into selling out his business and paying over the proceeds to them, leaving the other creditors out in the cold .... Some of these cases would have been remedied to a certain extent by the Creditors Relief Act if in force; other cases it will entirely fail to reach. It is evident this is only the beginning of sorrows; and it will be strange if by the end of a twelve month, this country does not wake up to a realization of the mistake that has been made by the total repeal of the Bankrupt Law.”

<sup>14</sup> See also, “The Proposed Bankruptcy Bill” (1883) 3 Can. L.T. 559 at 560. “It is also pointed out that unnecessary expense is incurred, by separate proceedings being taken by each creditor against a common debtor, instead of there being one process by which his assets might be distributed; and that litigation is encouraged to the ultimate loss of all parties concerned.” “Distribution of Insolvent Estates” *J. of Commerce* (12 October 1883) 240.

federal repeal Bill received third reading.<sup>15</sup> The Act, which became known as the *Creditors' Relief Act*, abolished priority among execution creditors and provided for a rateable distribution of the proceeds held by the Sheriff.<sup>16</sup> However, it did not come into effect until a date that was to be fixed by proclamation.<sup>17</sup> In fact, it did not come into force until 25 March 1884.<sup>18</sup> Soon after its passage, the *Monetary Times*, impatient with the failure of the province to proclaim the act, gave up hope that it would ever be proclaimed.<sup>19</sup> The paper speculated that the Ontario government was waiting to see if the federal government would re-enact a national law.<sup>20</sup> "The result is that we are now enjoying a sort of interregnum, during which the old rule of 'first come first served,' is applicable."<sup>21</sup>

Other provinces did not immediately follow the Ontario legislation. It was not until 1903 that the then existing provinces enacted legislation providing for the pro rata

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<sup>15</sup> 43 Vict., c. 10 (1880). "By a coincidence that appears not to be accidental, the Bill to Repeal The Insolvency Acts was read for the third time on 4 March 1880, while on 5 March 1880 assent was given in Ontario to "An Act to Abolish Priorities of And Amongst Execution Creditors." Tassé Report, *supra* note 1 at 14.

<sup>16</sup> On the prior regime of priority of executions and the new regime introduced by the Act, see *In Re Assignments and Preferences Act* (1893) 20 O.A.R. 489 at 501 (per MacLennan J.). See "Creditors Relief Act" *Monetary Times* (27 February 1880) 1019, and "Creditors Relief Act" *Monetary Times* (26 March 1880) 1144 for further details of procedural aspects of this act. The Act abolished priority between creditors. This Act only applied to creditors by execution. Money realized by other methods of enforcement such as equitable execution was not required to be distributed equally. Therefore the law was not comprehensive. Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters* (Toronto: Ministry of the Attorney-General, 1983) at 5.

<sup>17</sup> "Creditors' Relief Act" *Monetary Times* (19 March 1880) 1111.

<sup>18</sup> *House of Commons Debates* (5 May 1887) at 283 (Edgar) Edgar reviews the history of the Act and similar provisions in other provinces.

<sup>19</sup> "Without a Bankruptcy Law" *Monetary Times* (16 July 1880) 67.

<sup>20</sup> "What Law Instead of the Insolvent Act?" *Monetary Times* (9 April 1880) 1201.

<sup>21</sup> *Ibid.*

distribution of the debtors' assets.<sup>22</sup> Between 1880 and 1903, creditors faced the prospect of the common law race to the debtors' assets in a number of different regions.<sup>23</sup>

Both the *Monetary Times* and the *Journal of Commerce* criticized the *Creditors' Relief Act* for its expense and its failure to deal with the major problem of preferential assignments.<sup>24</sup> In the House of Commons, one Member of Parliament claimed that as the law existed, "a merchant can allow a judgment to go against him by a favoured creditor, and in that way cut off all the others from any recourse against him".<sup>25</sup> According to the *Monetary Times* debtors could with impunity pay favoured creditors:

[T]here is no machinery for setting aside prior preferential payments .... It is in the case of the fraudulent debtor, however, that some prompt remedy is

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<sup>22</sup> Quebec law was not in need of reform as existing civil law provided for a distribution of the debtors' assets. In Quebec creditors could rely on articles 763-780 of the Code of Civil Procedure. See Duncan, *Bankruptcy in Canada*, *supra* note 2 at 20. In Quebec "the right of the creditors of an insolvent to a just distribution of his assets among them all, has always been recognized by the law of Lower Canada". "Third Report of the Select Committee on Bankruptcy and Insolvency" (17 April 1868) at 8, House of Commons Journals. See also D.E. Thomson, "Bankruptcy Legislation in Canada" (1902) 1 Can. L.R. 173, 176.

<sup>23</sup> Manitoba: *The Queen's Bench Act*, 58-59 Vict., c. 6;  
British Columbia: *Creditors' Relief Act*, S.B.C. 1902, c. 17;  
Nova Scotia: *Creditors' Relief Act*, S.N.S. 1903, c.14;  
New Brunswick: *Creditors' Relief Act*, 3 Edw. 3, c. 3 (1903);  
Alberta: *Creditors' Relief Act* S.A. 1910(2), c. 4;  
N.W.T. Ord No. 25 (1893).

Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters*, Part V (Toronto: Ministry of the Attorney General: 1983) at 7. See also Law Reform Commission of British Columbia, *Report on Creditors' Relief Legislation: A New Approach* (Vancouver: Ministry of the Attorney General, 1979) at 7. Today all provinces except Prince Edward Island and Newfoundland have in place a form of Creditors' Relief Act. See C.R.B. Dunlop, *Creditor Debtor Law in Canada*, 2nd ed (Toronto: Carswell, 1995) at 546.

<sup>24</sup> "Bankruptcy Legislation" *Monetary Times* (24 April 1880) 1199; See also "Distribution of Insolvent Estates" *J. of Commerce* (2 May 1884) 600 for further criticisms of the Ontario *Creditors' Relief Act*. "So far as this province is concerned the Creditors' Relief Act is shewn to be inefficient and expensive."

<sup>25</sup> *House of Commons Debates* (6 March 1883) at 119 (White, Cardwell). One merchant wrote to Macdonald and claimed that it was unjust that one creditor may take all that "he can get and leave other creditors to take whatever they can get". Letter of Charles Julyan to Macdonald (27 January 1884) *Macdonald Papers* PAC MG 26A, Vol. 344, Reel c-1765, No. 192552-192555.

needed. From all over the Province we hear of cases in which traders ... allow their friends to take judgments and sweep away all they have, while the suits of other creditors are staved off by every conceivable device .... All these things point to the one conclusion—viz: that a grave mistake was made when the bankrupt laws were repealed....<sup>26</sup>

While creditors could always refuse to release the debtor from the debt if faced with a harmful preference, the *Monetary Times* reported that this “check is not however, so effectual as might be expected since the very power of preference ... is used as a means of forcing settlements”.<sup>27</sup>

This practice led to calls for the abolition of preferences at the provincial level. In order to remedy the problem of preferences, Ontario enacted *An Act Respecting Assignments for the Benefit of Creditors* in 1885.<sup>28</sup> The preamble to the 1885 Act made it clear that the regulation of preferences was a central goal of the legislation:

Whereas great difficulty is experienced in determining cases arising under the present law relating to the transfer of property ... on the eve of insolvency and it is desirable to remedy the same.<sup>29</sup>

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<sup>26</sup> “Without a Bankruptcy Law” *Monetary Times* (16 July 1880) 67.

<sup>27</sup> “Bankrupt Laws” *Monetary Times* (3 December 1880) 639. “It would be difficult to conceive a more pernicious principle than that which permits a debtor in distressed circumstances to give a preference to such of his creditors as he cares to favour.” See also, “The Proposed Bankruptcy Bill” (1883) 3 Can. L.T. 559 at 560. The article commented on the existing state of law in Ontario dealing with preferences, and stated that the laws were a “dead letter, on account of the ease with which the provisions of the statutes may be evaded.” See also, “Insolvency Legislation” *Monetary Times* (20 April 1883) 481 for further criticisms of the Creditors’ Relief Act.

<sup>28</sup> (1885) 48 Vict., c. 26. The Act was amended by (1886) 49 Vict., c.25; (1887) 50 Vict., c. 19 and consolidated as R.S.O. 1887, c. 124. Tassé Report, *supra* note 1 at 15; Duncan, *Bankruptcy in Canada*, *supra* note 2 at 21.

<sup>29</sup> *An Act Respecting Assignments for the Benefit of Creditors* 48 Vict., c. 10 (1885); J. Bicknell, “The Advisability of Establishing a Bankruptcy Court in Canada”(1913) 33 Can. L.T. 35 at 40. For further procedural details of the law as originally proposed, see “Insolvency Legislation” *Monetary Times* (20 April 1885) 481; “Bankruptcy Legislation” *Monetary Times* (24 April 1885) 1199 wherein it was noted that the 1885 Act improved upon the original Ontario provision dealing with preferences. “Insolvency Legislation” *Monetary Times* (1 May 1885) 1227.



The 1885 Act improved upon an earlier pre-confederation Ontario statute.<sup>30</sup> In addition to prohibiting preferences the Act permitted a debtor to make an assignment of his or her assets to an authorized trustee for distribution to creditors.<sup>31</sup> Under s. 9, an assignment under the Act took precedence over all judgments and incomplete executions. The legislation did not include a discharge. Further, a debtor could not be compelled to make an assignment.<sup>32</sup>

Only Manitoba followed Ontario's lead in 1885. Other provinces were much slower to enact legislation that prohibited preferences.<sup>33</sup> New Brunswick did not enact similar legislation until 1895 and Nova Scotia followed in 1898.<sup>34</sup> The lack of such legislation in the Maritimes was a continual problem for foreign and distant creditors and created a demand for a federal law. In Nova Scotia, the provincial law's "tendency must

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<sup>30</sup> Ontario had previous provisions relating to this subject. For a legislative history of this Act, see Edward Blake's argument before the Privy Council in *A.G. of Ont. v. A.G. for Can.* [1894] A.C. 189 (P.C.) at 191; M.A. Springman et. al., *Fraudulent Conveyances and Preferences* (Toronto: Carswell, 1996) at 1-19. Prior legislation was enacted by the Province of Canada, in 1858. The legislation only applied to Ontario. *An Act for the Abolition of Imprisonment for Debt* 22 Vict., c. 90, and consolidated in 1859 See *Relief of Insolvent Debtors Act* C.S.U.C 1859, c. 26 ss 17-20. The statute was reported in the consolidation of the Ontario statutes in 1877. See *An Act Respecting the Fraudulent Preferences of Creditors by Persons in Insolvent Circumstances*, R.S.O. 1877, c. 118 and amended by 47 Vict., c. 10, s. 3. A. Bohémier, *La Faillite en Droit Constitutionnel Canadien* (Montréal: Les Presses de l'Université de Montréal, 1972) at 110.

<sup>31</sup> Tassé Report, *supra* note 1 at 16; "Bankruptcy Legislation" *Monetary Times* (24 April 1885) 1199.

<sup>32</sup> Duncan, *Bankruptcy in Canada*, *supra* note 2 at 21-22.

<sup>33</sup> Ontario: *An Act Respecting Assignments For the Benefit of Creditors* 48 Vict., c. 10 (1885)  
 Manitoba: c. 45 (1885)  
 N.W.T. No. 49 (1888)  
 B.C. c. 12 (1890)  
 N.B. c. 6 (1895)  
 N.S. c. 11 (1898)  
 P.E.I. c. 4 (1898)  
 Sask. c. 25 (1906)  
 Alta. c. 6 (1907)  
 See L. Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922).

<sup>34</sup> D.E. Thomson, "The Proposed Bankruptcy Bill" (1883) 3 Can. L.T. 559 at 560.

be to impede or entirely prevent the distribution of assets among creditors generally".<sup>35</sup> Preferences were so common in the Maritimes that the *Journal of Commerce* urged merchants dealing in the region to transact only on a cash basis.<sup>36</sup>

The *Journal of Commerce* referred to the slow progress of provincial reform as "feeble inefficient tinkerings of Provincial parliaments".<sup>37</sup> The difficulties were compounded by rudimentary means of communication. Legislation did not necessarily become immediately effective after being proclaimed:

One grave objection to this is that it will take a very long time before any sort of uniform practice is established in the different counties. [Many of] [o]ur County Court judges are old men, who have been schooled under the laws of twenty or thirty years ago, and whose ideas are more or less stereotyped. It is obviously hopeless to expect from all such judges, scattered over the country, and without any opportunity of intercommunication, an administration of a radically new law either broad and liberal or intelligibly consistent.<sup>38</sup>

Once provincial reform took hold, it did not escape criticism. Provincial legislation came under attack as "unworkable"<sup>39</sup> and for the fees charged by the

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<sup>35</sup> Third Report of Select Committee on Bankruptcy and Insolvency (17 April 1868). "Suppose a man, say in Quebec or Ontario, who has credited a trader in Nova Scotia for \$1000 worth of goods, and finds that trader making an assignment to some Bluenose friend, and giving preferences to local creditors, which reduce the dividend to outside creditors to thirty or forty cents in the dollar. And they may have to sign a discharge to get even that dividend." "Insolvency Legislation" *Monetary Times* (12 November 1897) 630.

<sup>36</sup> "Insolvency Legislation" *J. of Commerce* (13 May 1887) 1060; "Insolvency Legislation" *J. of Commerce* (28 October 1887) 802. In complaining about the lack of uniformity, the Solicitor for the Canadian Manufacturer's Association stated that in "New Brunswick the debtor prefers whom he chooses". "Necessity of Bankruptcy Legislation" *Monetary Times* (20 October 1893)

<sup>37</sup> "Insolvency Legislation" *J. of Commerce* (13 May 1887) 1060.

<sup>38</sup> "Creditors Relief Act" *Monetary Times* (26 March 1880) 1144. The new provincial legislation adopted principles "so at variance with any which have thus far governed the relations of debtor and creditor, that its enforcement cannot but cause derangement in existing business practices and customs". "Creditors Relief Act" *Monetary Times* (19 March 1880) 1111.

<sup>39</sup> "Bankruptcy Legislation in Ontario" *J. of Commerce* (26 March 1886) 765; "Insolvency Legislation" *J. of Commerce* (23 April 1886) 1020 wherein the *Journal* pointed out that there was no means of securing control of a debtor's estate which was in danger of being dissipated.

authorized trustee.<sup>40</sup> Further, provincial legislation did not provide a means for a creditor to compel a debtor to make an assignment nor provide for a discharge. Only Quebec provided compulsory means for creditors while in the rest of Canada, "the debtor must take the first step by making an assignment, and he may defer this step until his affairs are in such a desperate state that most of his assets have been dissipated".<sup>41</sup>

The major problem for creditors hoping to rely on provincial legislation was constitutional uncertainty. The validity of the Ontario *Assignments Act* was tested as early as 1886 and it went before the Court of Appeal on three separate occasions. It was not until 1894 that the Privy Council finally resolved the matter by upholding the validity of s. 9 of the Act. The effect of the decision was to further entrench provincial legislation and remove the immediate need for federal reform.

The repeal of the *Insolvent Act of 1875* opened the door for the provinces to further regulate debtor-creditor matters. The fact that it took over twenty years for provincial reform to occur is significant. The economic and constitutional explanations for this legislative pattern are explored in Part II of the chapter.

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<sup>40</sup> See "A Specimen— But Not a Model Estate" *Monetary Times* (19 October 1888) 448. In the estate cited as an example, of the \$857 realized, \$751 dollars went to the assignee. "The outcome of the estate as shown by the documents is called 'a most outrageous thing' .... There must be some misnomer in the designation of the Act. Instead of being termed 'an Assignment for the benefit of Creditors,' it should read 'Assignment for the benefit of Assignee'". See also "Insolvency Administration" *Monetary Times* (18 January 1889) 822. For further criticisms of compromise settlements generally, see "Compromise Settlements" *Monetary Times* (26 April 1889) 1242 and "Compromises" *Monetary Times* (3 May 1889). On other specific criticisms, see "Bankruptcy Legislation in Ontario" *J. of Commerce* (26 March 1886) 765.

<sup>41</sup> The state of provincial legislation is summarized in a series of Department of Justice Memoranda. See *Department of Justice Files*, PAC RG 13 Vol. 2310, File 23/1902; Vol. 2311, File 117/1902. See letter Charles Fitzpatrick, Minister of Justice to Lord Strathcona, High Commissioner for Canada in London (30 January 1903) in *Department of Justice Papers*, PAC RG 13, Vol. 2310, File 23/1902. "Insolvency Legislation" *J. of Commerce* (13 May 1887) 1060; Tassé Report, *supra* note 1 at 16-17; Charles Tupper, "Canadian Insolvency Legislation" Report of Meeting of British Empire League (4 December 1895) at 6; "Insolvency Legislation" (1902) 35 Can. L.J. 179 at 180.

### *B Federal Reform Bills*

Previous studies that have traced the legislative history of federal bankruptcy law have ignored the extensive debates at the federal level between 1880 and 1903. During this period, Parliament debated twenty bankruptcy reform Bills. While a Senate Bill managed to pass the upper chamber, all federal reform efforts during this period failed. Federal reform efforts coincided with the slow progress of provincial legislation. The issue of preferences was given as the very reason for new national legislation.<sup>42</sup> The commercial community was not satisfied with the provincial solution and began to demand new federal legislation.<sup>43</sup>

However, it became apparent quite early after the repeal of the federal *Insolvent Act* that the government was not going to take an active role in initiating any new Bills. In 1883 a Member of Parliament, frustrated with the lack of the government's role, stated:

...it is about time the Government of the day took some share in the management of this extremely important trade question .... They are, therefore, without excuse in not trying to direct the deliberations of the House on this important matter. They allowed the old law to be repealed three years ago without taking sides upon it; they now permit any member who pleases to bring in Bill and pass them to the second reading without affording an indication of their views....<sup>44</sup>

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<sup>42</sup> "Now, under our present system, the debtor can either make a preferential assignment to one of the creditors, thus defrauding the others." *House of Commons Debates* (29 March 1882) at 609. "The complaint made with a great deal of force is that, under the law as it exists, a merchant can allow a judgment to go against him by a favoured creditor, and in that way cut off all the others from any recourse against him." *House of Commons Debates* (6 March 1883) at 120. In 1885 a Special Committee of the House of Commons was appointed to "report upon the alleged necessity that exists for the adoption of some system of bankruptcy or insolvency, giving adequate protection against undue preferences". *House of Commons Debates* (6 February 1885) at 47. See also "Bankruptcy Laws" *Monetary Times* (31 March 1882) 1206 for a discussion of the impact of the repeal of the American Bankruptcy legislation in 1878. "Especially with reference to the debts constituting preferential claims in the different States, have complaints been frequent and loud."

<sup>43</sup> S.W. Jacobs, "A Canadian Bankruptcy Act: Is it a Necessity?" (1917) 37 *Can. L.T.* 604 at 605, 606.

<sup>44</sup> *House of Commons Debates* (6 March 1883) at 121 (Mr. Casey).

The *Journal of Commerce* echoed the sentiment:

The question of dealing with insolvent estates is one on which the Government ought to have a policy, and to maintain it as a unit. Instead of being prepared with any measure of their own, they have allowed private members to propose legislation, and they have been divided in opinion as to the mode of dealing with the bills introduced by those members.<sup>45</sup>

A *Canada Law Journal* article suggested several reasons why bankruptcy law generally did not attract government support. Bankruptcy law was sufficiently controversial to deprive it of the support of influential members of the government party. The success of the Bill therefore depended upon opposition votes. "No government, whether Liberal or Tory, will willingly expose itself to the risks of such a situation."<sup>46</sup>

As the government showed little initiative, a letter to the editor of the *Monetary Times* suggested that the drafting process be privatized in order to come up with the best bankruptcy Bill. The author proposed that Boards of Trade and the Government establish a "substantial money premium". The money, amounting to \$2000 or \$3000 would be:

awarded to whoever shall submit the best and most feasible suggestions for the most economical, speedy, and equitable settlement of insolvent estates. This would be an incentive for competent, experienced men to send in propositions or suggestions in a definite shape....<sup>47</sup>

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<sup>45</sup> "Insolvent Estates" *J. of Commerce* (15 October 1880) 276.

<sup>46</sup> B. Russell, "Provisions of the British North America Act for Uniformity of Provincial Laws" (1898) 34 *Can. L.J.* 513 at 523.

<sup>47</sup> "Insolvency Legislation" Letter of Biz to Editor of *Monetary Times*, 9 February 1883, *Monetary Times* (9 February 1883) 907. The author described how a decision would be reached in the matter. One copy of each of the proposals would be forwarded to each of the Boards of Trade "on which they could pronounce judgment and pass resolutions to be forwarded to the Minister of Justice, who could then prepare a bill embodying the proposals most acceptable to the business community". The same letter also appeared in the *J. of Commerce*. See Letter of W. Higgins to Editor of the *J. of Commerce* 6 February 1883, *J. of Commerce* (16 February 1883) 847.

The Macdonald papers contain a draft Bill accompanied by a letter from a solicitor who suggested that the government could use the measure for a "fair and reasonable remuneration according to their value".<sup>48</sup>

While Parliament never established a reward, Boards of Trade submitted numerous Bills throughout this period. However, without the assistance of the government, all of the private members' Bills were doomed to fail.<sup>49</sup> Further, the Boards of Trade were not always united in their approach and had different views on the best form of legislation.<sup>50</sup>

### 1 Separation of the Discharge from Equitable Distribution: 1880 to 1885

Memories of the evils of the discharge affected the tenor of the debates during the 1880s.<sup>51</sup> The distribution and discharge functions continued to be viewed as separate issues with most Bills seeking to exclude or extremely limit the discharge. One Bill proposed to grant a discharge only to "Past Insolvents".<sup>52</sup> Debtors who fell into financial difficulty after the passage of the Act could not take advantage of its provisions.<sup>53</sup> The

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<sup>48</sup> *Macdonald Papers*, PAC MG 26A, Reel c-1762, No. 188418.

<sup>49</sup> The Montreal Board of Trade issued a circular calling upon other local Boards to express their views on an Insolvency Act. Further, the Toronto Board of Trade referred the matter to its new Council. "Insolvency" *Monetary Times* (2 February 1883) 851, 852.

<sup>50</sup> "Insolvency Legislation" *Monetary Times* (12 October 1883) 405. See also, "Insolvency Legislation" *Monetary Times* (2 November 1883) 488; "Insolvency" *Monetary Times* (23 March 1883) 1063.

<sup>51</sup> A 1883 survey of 25 leading Montreal bankers and merchants showed unanimity as to the necessity for legislation of some kind. However, "the chief point of difference ... was as to the expediency of providing for the debtor's discharge, and as to permitting compositions". "Insolvency Legislation" *J. of Commerce* (9 February 1883) 810. The paper reported that those who were favourable to the discharge were inclined to make it conditional upon the payment of 50 cents on the dollar.

<sup>52</sup> Bill C-137 *For the Discharge of Past Insolvents*, 4th Sess., 4th Parl. (1882) (Beaty)  
 Bill C-8 *For the Discharge of Past Insolvents*, 1st Sess., 5th Parl. (1883)  
 Bill C-34 *For the Discharge of Past Insolvents*, 3rd Sess., 5th Parl. (1885).

<sup>53</sup> *House of Commons Debates* (6 March 1882) at 118 (Beaty).

Member who introduced the Bill indicated that he did not think that "there should be an Insolvent Act with a power of discharge running concurrently with the Act. Persons enter into trade and obtain goods from others knowing that they will be able to obtain a discharge and begin business again."<sup>54</sup> Despite its narrow focus and the limitations placed upon the granting of the discharge there was little support for the Bill.<sup>55</sup>

A number of Bills introduced between 1880 and 1885 proposed a compulsory bankruptcy regime without providing for a discharge.<sup>56</sup> Each Bill provided for a mechanism to liquidate and distribute the debtor's assets and prohibited preferential payments.<sup>57</sup> Immediately after Parliament repealed the *Insolvent Act of 1875*, John Abbott proposed a bill that dealt only with the distribution question.<sup>58</sup> Despite the fact

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<sup>54</sup> *House of Commons Debates* (29 March 1882) at 614 (Beaty).

<sup>55</sup> The Bill did not deal with the distribution question and generally followed the discharge provisions contained in the 1875 Act. Debtors required the consent of the majority of their creditors representing three quarters of the value of the claims in order to obtain a discharge. The discharge had to be confirmed by the court which had the discretion to suspend or declare the discharge to be second class. Debtors who failed to obtain the required consent could apply to the court for their discharge after one year. Bill C-8 *For the Discharge of Past Insolvents*, 1st Sess., 5th Parl. (1883). See ss 11, 17; "Insolvents' Discharges" (9 March 1883) 1005.

<sup>56</sup> Between 1880 and 1885, eleven Bills were introduced into the House of Commons. Of the eleven, 6 Bills did not contain a discharge provision. "One of the chief difficulties in the past has been, that we could not get the merchants themselves to agree to an insolvent act on account of so many of them wishing to leave out the discharge provision altogether." Letter of E.B. Greenshields, President of Montreal Board of Trade to Editor of *J. of Commerce* (11 January 1893) in "Bankruptcy Legislation" *J. of Commerce* (20 January 1893) 101.

<sup>57</sup> D.E. Thomson, the solicitor retained by the three Boards of Trade summarized the complaints of the advocates of the Bill. Firstly, a uniform law was required. "The fact that many wholesale houses have transactions in a number of different Provinces subjects them ... to a very great deal of difficulty and uncertainty from the variances that exist in the rules of law and procedure in force in the different Provinces." More specifically, many of the provinces did not prohibit unjust preferences. Further, the provincial laws led to "sharp and unscrupulous conduct on the part of creditors seeking an advantage over each other, and to consequent bad faith and ill-feeling among merchants". Thomson also lamented the expense involved in the multiplicity of proceedings. D.E. Thomson, "Proposed Insolvency Bill" (1883) 3 Can. L.T. 559 at 560. For further details of the united Board of Trade Bill, see "The Proposed Bankruptcy Bill" (1883) 3 Can. L.T. 572; "The Proposed Bankruptcy Bill" (1884) 4 Can. L.T. 62.

<sup>58</sup> Bill 101 *For the distribution of the Assets of Insolvent Debtors*, 2nd Sess., 4th Parl. (1880). *House of Commons Debates* (12 April 1880) at 1326. For a description of the Bill, see "Proposed Insolvency

that the Imperial Bank of Canada wrote to Macdonald advocating that Parliament adopt Abbott's Distribution Bill,<sup>59</sup> the Bill was never re-introduced. Its basic premise was, however, followed in a number of subsequent initiatives.

A Member of Parliament from Toronto introduced a distribution proposal in 1882 and re-introduced the Bill in 1883, 1884 and 1885 (the Beaty Bill).<sup>60</sup> The goal, as stated in the House of Commons, was to ensure a "simple, fair and equitable distribution of the assets of the insolvent ... and it provides that no creditor who may get a prior execution shall have any advantage over other creditors who may get subsequent executions".<sup>61</sup> However, there was nothing in the Bill which would "force creditors into granting [a debtor] a discharge or a composition".<sup>62</sup> The Toronto and Montreal<sup>63</sup> Boards of Trade, unhappy with the administrative provisions of the Bill (which they claimed would lead to

Legislation" *J. of Commerce* (16 April 1880) 268-267; "Insolvency Legislation" *J. of Commerce* (21 May 1880) 422.

<sup>59</sup> Letter of Imperial Bank of Canada to John A. Macdonald (27 April 1880) *Macdonald Papers*, PAC MG 26A, Vol. 367, File 170427-429, Reel c-1748.

<sup>60</sup> Bill C-136 To Provide for the Equitable Distribution of Insolvent Estates, 4th Sess., 4th Parl. (1882)  
 Bill C-9 To provide for the Equitable Distribution of Insolvent Estates, 1st Sess., 5th Parl. (1883)  
 Bill C-79 To provide for the Equitable Distribution of Insolvent Estates, 2nd Sess., 5th Parl. (1884)  
 Bill C-33 To provide for the Equitable Distribution of Insolvent Estates, 3rd Sess. 5th Parl. (1885)

<sup>61</sup> *House of Commons Debates* (29 March 1882) at 607 (Beaty). The Bill as presented in 1883 provided that assets were to be distributed on a pari passu basis (s.27(3)) and prohibited fraudulent preferences (s.73)

<sup>62</sup> *House of Commons Debates* (29 March 1882) at 607 (Beaty). Not all accepted the exclusion of the discharge. A copy of Mr. Beaty's Bill found in the Macdonald papers included this hand written notation: "This Act makes no provision for the discharge of the debtor ... No Act of the kind should pass without such a provision." Marked up Copy of Bill No. 9, 1883, p. 1. *Macdonald Papers*, PAC MG 26A, Reel c-1487, No. 11012.

<sup>63</sup> The Montreal Board of Trade had, as early as 1882, passed a formal resolution that deplored the absence of a law for distributing insolvent estates. "Concerning a Bankrupt Law" *Monetary Times* (7 April 1882) 240.



great expense and loss of creditor control over debtors' estate<sup>64</sup>) drafted their own separate Bills.<sup>65</sup> In 1883, the Boards agreed to meet to work out their differences.<sup>66</sup>

## 2 The 1885 Special Committee on Insolvency

Committees of the Toronto, Montreal and Hamilton Boards of Trade met on 30 October 1883<sup>67</sup> with a "view to securing united action on the part of the mercantile community".<sup>68</sup> After completion of the final version of a new Bill, the Boards "proposed that delegations ... shall wait upon the Government and urge upon them the necessity of submitting some such Bill as that now being framed".<sup>69</sup> The Boards of Trade met with

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<sup>64</sup> "Insolvency" *Monetary Times* (23 March 1883) 1063. For a detailed criticism of official court control, see Letter of H. W. Darling, President of Toronto Board of Trade (24 March 1883) to Editor of *Monetary Times*, "The Proposed Insolvency Act" *Monetary Times* (30 March 1883) 1095.

<sup>65</sup> "Insolvent Estates" *J. of Commerce* (16 March 1883) 972; "Bankruptcy Legislation" *J. of Commerce* (30 March 1883) 1037; "Insolvency Legislation" *J. of Commerce* (6 April 1883) 1071. "Distribution of Insolvent Estates" *J. of Commerce* (11 May 1883) 1232.

<sup>66</sup> The Montreal Bill was introduced into the House of Commons in 1883 and again in 1884. Bill C-99 (1883); Bill C-71 (1884); *House of Commons Debates* (2 April 1883) at 368; S.W. Jacobs, "A Canadian Bankruptcy Act: Is it a Necessity?" (1917) 37 *Can. L.T.* 604 at 606. For correspondence discussing the proposal, see Letter of John A. Macdonald to W.J. Patterson, Montreal Board of Trade (24 February 1882) *Macdonald Papers*, PAC MG 26A, Vol. 21, Reel C-33, No. 664-666; Letter of Montreal Board of Trade to John A. Macdonald (26 October 1882) *Macdonald Papers* PAC MG 26A, Vol. 296, Reel c-1693, No. 135260-135262. The Toronto Board of Trade Bill was never introduced in Parliament. For an overview of the Bill, see "The Toronto Board of Trade's Bankruptcy Bill" *Monetary Times* (14 September 1883) 294; Toronto Board of Trade, *An Act to Provide for the Equitable Distribution of Insolvent Debtors' Estates, Prepared in Compliance with a Resolution passed by the Board of Trade of the City of Toronto* (Toronto, June 1883).

<sup>67</sup> See "Insolvency Legislation" *J. of Commerce* (18 January 1884) 80. See also, D.E. Thomson, "The Proposed Bankruptcy Bill" (1883) 3 *Can. L.T.* 37.

<sup>68</sup> For a report of the meeting, see "Insolvency Legislation" *Monetary Times* (2 November 1883) 488. The Montreal Board of Trade initiated the meeting "with a view to assimilating the proposals of different commercial bodies". "Insolvency Legislation" *Monetary Times* (2 November 1883) 488.

<sup>69</sup> D. E. Thomson, "The Proposed Bankruptcy Bill" (1883) 3 *Can. L.T.* 559. The government also received another Bill in 1883 drafted by two Quebec solicitors who examined English, European and American precedents. The Bill applied to all classes of debtors and the discharge was based on a creditor control formula based on the length of time after the petition. Early applications required a very high level

Macdonald and the Ministers of Finance and Justice in late 1883 and the Government gave "an assurance that the subject would engage consideration".<sup>70</sup> The Boards received a further non-committal reply after an additional meeting with Macdonald in late 1884.<sup>71</sup>

In 1885, the joint proposal, "prepared under the direction of the Boards of Trade of Montreal, Toronto, Hamilton, and Winnipeg" was formally introduced in the House of Commons.<sup>72</sup> The solicitor who had acted as counsel to the Toronto Board of Trade summarized the evils that the Bill sought to address:

The fact that many of the wholesale houses have transactions in a number of different provinces subjects them ... to a very great deal of difficulty and uncertainty from the variances that exist in the rules of law and procedure in force in the different provinces.<sup>73</sup>

Further, provincial laws did not adequately prohibit preferential treatment of creditors. The existing state of provincial laws "leads to sharp and unscrupulous conduct

of consent while later applications required a lesser number. There is no indication in the correspondence of the interests represented by the Bill. See "Proposed Bankruptcy Act" *Department of Justice Files*, PAC RG 13 A2, Vol. 52, File 701.

<sup>70</sup> "Insolvency Legislation" *J. of Commerce* (28 December 1883) 608. "An appointment has been made by the members of the Government to meet deputations from the Boards of Trade of Montreal, Toronto and Hamilton at Ottawa on Saturday morning next, to discuss the proposals of these boards for the introduction by the Government during the ensuing session of a measure for the rateable distribution of the assets of insolvent debtors." "The New Insolvency Bill" *Monetary Times* (21 December 1883) 684.

<sup>71</sup> *Monetary Times* (19 December 19 1884) 696. Alexander Campbell wrote to Macdonald earlier in 1884 to ascertain the views of "our colleagues" on the "policy of an Insolvency Law". See Letter of Alexander Campbell to John A. Macdonald (8 May 1884) *Macdonald Papers*, PAC MG 26A, Vol. 197, Reel c-1591, No. 82455-57.

<sup>72</sup> Bill C-4 *For the Distribution of the Assets of Insolvent Debtors*, 3rd Sess., 5th Parl. (1885). It was acknowledged that the Bill was said to embody the "views of the commercial community of the Dominion". See *House of Commons Debates* (2 February 1885) at 29. The Toronto Board of Trade joined with other Boards to "apply almost continuous pressure on the government to act..". See G. H. Stanford, *To Serve the Community: The Story of Toronto's Board of Trade* (Toronto: University of Toronto Press, 1974) at 43.

<sup>73</sup> D. E. Thomson, "The Proposed Bankruptcy Bill" (1883) 3 Can. L.T. 559.

on the part of the creditors seeking an advantage over each other".<sup>74</sup> Additionally, "unnecessary expense is incurred, by separate proceedings being taken up by each creditor against a common debtor, instead of there being one process whereby his assets might be distributed".<sup>75</sup>

Bill C-4, in its original form, applied only to traders, provided for a comprehensive distribution scheme on a rateable basis and prohibited preferences. Only creditors could initiate proceedings as the Act did not provide for any voluntary scheme. The proposal specifically excluded the discharge. However, the exclusion of the discharge was controversial.<sup>76</sup> The government responded by appointing a Special Committee but Macdonald later claimed in private correspondence, that "it is not a Government Committee and we do not supervise in any way its proceedings".<sup>77</sup> The *Monetary Times* claimed that by appointing the Committee "the government has again shirked the responsibility of dealing with this question".<sup>78</sup>

The final form of the Bill reported out of Committee in 1885 included the right of a debtor to obtain a discharge.<sup>79</sup> The formula for creditor consent provided incentives for a debtor to request a discharge at the earliest sign of financial difficulty. After obtaining

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<sup>74</sup> *Ibid.* at 560.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*; "The Proposed Bankruptcy Bill" (1884) 4 Can. L.T. 62. On the first reading of the Bill, one Member of Parliament noted that the exclusion of the discharge resulted in a "very one-sided affair". See *House of Commons Debates* (2 February 1885) 29.

<sup>77</sup> Letter of John A. Macdonald to Messrs. Senton & Pigolet (20 February 1885) *Macdonald Papers*, PAC MG 26A, Vol. 23, Reel c-34, No. 116.

<sup>78</sup> "Bankruptcy Legislation" *Monetary Times* (20 March 1885) 1058. See also, "Insolvency Legislation" (1 May 1885) 1227: "If the Dominion Parliament again shirks its duty ... the mercantile community of this Province will have reason to thank the local legislature for an attempt to secure them some redress."

<sup>79</sup> "[A]fter many weeks of arduous labour the committee presented to this House the draft of a Bill which embodied in it a discharge clause." *House of Commons Debates* (5 May 1887) at 288-289 (Curran).

the required level of creditor support the debtor still had to make application to the court for confirmation of the discharge.<sup>80</sup>

The inclusion of the discharge in the final Committee report created division among those who had been advocating reform:

We found that amongst those who had been the strongest in urging on the House the necessity of insolvency legislation, there was not the slightest unanimity when that Bill came before the House, and those who were the most prominent in urging it said they would not have any such Bill.<sup>81</sup>

“Leading merchants,” said that they would have rather had the law remain the same than to have the country “exposed to the dangers of the discharge clause.” Having failed at the national level the “mercantile community ... applied to the local legislatures to have legislation enacted there”.<sup>82</sup> Despite receiving further petitions and letters<sup>83</sup> in support for the Bill, it was not debated further in the House of Commons.<sup>84</sup>

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<sup>80</sup> If the estate was able to pay out a dividend of 66 2/3 % or greater, a debtor was only required to obtain the consent of creditors representing a majority in number and value. If the estate was sufficient to pay 33 1/3% or greater (but less than 66 2/3%), a debtor had to acquire the consent of creditors representing the consent of two thirds in number and three quarter in value. See Bill C-4 as reported out of the Select Committee, *To Provide For the Distribution of the Assets of Insolvent Debtors* 3rd Sess., 5th Parl. (1885), s. 44. On the grounds of refusal, see ss 52-54. Debtors who were unable to obtain the required level of discharge could apply to the court after a 2 year wait. See s. 50.

<sup>81</sup> *House of Commons Debates* (5 May 1887) at 289 (Curran).

<sup>82</sup> *House of Commons Debates* 5 (May 1887) 289. Despite the stringent discharge provisions, the Montreal Board of Trade opposed their inclusion believing it would “lead to a crowd of new assignments and provide discharges for an unworthy class of debtors”. Montreal Board of Trade Council Annual Reports, 44th Annual Report, 1888, PAC MG-28, Reel M-2804, at 14.

<sup>83</sup> The Montreal Board of Trade reminded Macdonald of their earlier interview with him in which Macdonald had stated that the matter of Insolvency would be dealt with by Parliament. The Board complained that the Bill may not pass unless it was made a government measure. Letter to John A. Macdonald from the Montreal Board of Trade (30 March 1885). *Macdonald Papers*, PAC MG 26A, Reel c-1770, No. 200056. See also Petition from a series of Quebec Banks (30 March 1885) *Macdonald Papers*, Reel c-1497, No. 11073. See also Memorial of Bankers supporting Insolvency Law which makes reference to Committee that will be reporting a bill soon. Signatures include, Bank of Montreal and Molsons Bank (17 March 1885) *Macdonald Papers*, Reel c-1565, No. 61872-3. Telegram to John A. Macdonald, from Winnipeg Board of Trade (24 March 1885) *Macdonald Papers*, Reel c-1565, No. 61874. Telegram to John A. Macdonald (27 March 1885) *Macdonald Papers*, Reel c-1565, No. 61875. See “Bankruptcy Legislation” *Monetary Times* (24 April 1885) 1199 for a reference to a circular prepared by the Toronto

### 3 The Discharge Only Option Coupled with Provincial Legislation

The Select Committee Bill re-surfaced in 1886<sup>85</sup> and again in 1887,<sup>86</sup> in a form that bore little resemblance to the comprehensive proposal of 1885. Surprisingly only the discharge provisions survived.<sup>87</sup> The *Journal of Commerce* noted the irony of the proposal:

The joke—for it is nothing less—connected with this bill is, that while Parliament was urged ineffectually to pass a bill for the distribution of insolvent estates, without providing for discharge, it is now a fair way to provide for discharge, without first having legislation for distribution.<sup>88</sup>

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Board of Trade urging that the Bill reported by the Committee, presided over by John Abbott be passed by the House of Commons. The Montreal Board of Trade sent a deputation to Ottawa to urge that the Committee Bill become a government measure. See "Insolvency Legislation" *J. of Commerce* (27 March 1885).

<sup>84</sup> Bill C-4 was also re-introduced in 1886 as Bill C-93, *To Provide for the Distribution of the Assets of Insolvent Debtors*, 4th Sess., 5th Parl. (1886). Bill C-93 was not debated in 1886. *House of Commons Debates* (22 April 1885) 1280. The Bill was placed on the government order paper on this date. However it must not have been a high priority as the Bill was not debated. Other Bills were also introduced in 1885. Two were merely the re-introduction of earlier proposals. See Bill C-33 *For the More Equitable Distribution of Insolvent Estates* (Beaty Bill) 3rd Sess., 5th Parl. (1885); Bill C-34 *For the Discharge of Past Insolvents*, 3rd Sess., 5th Parl. (1885). Both of these proposals are discussed above. However, an additional proposal was also introduced in 1885. See Bill C-32 *Respecting Insolvency*, 3rd Sess., 5th Parl. (1885). Bill C-32 also included a discharge provision but it did not contain the elaborate creditor consent formulae. See s. 179. The only debate in 1885 was with respect to the terms of the Select Committee.

<sup>85</sup> Bill C-71 *For Discharge of Insolvent Debtors whose Estates have been Distributed Rateably Among their Creditors*, 4th Sess., 5th Parl. (1886).

<sup>86</sup> Bill C-9 *For Discharge of Insolvent Debtors whose Estates have been Distributed Rateably Among their Creditors*, 1st Sess., 6th Parl. (1887).

<sup>87</sup> See *House of Commons Debates* (5 May 1887) 282.

<sup>88</sup> "Insolvency Legislation" *J. of Commerce* (23 April 1886) 1021; "Insolvency Legislation" *J. of Commerce* (13 May 1887) 1060.

However, the scheme was not as ludicrous as suggested. The Bill combined a federal discharge with provincial law.<sup>89</sup> Those debtors who had made an assignment in favour of their creditors under provincial law could obtain their discharge under federal Act.<sup>90</sup> While on the one hand the legislation relied on various provincial regimes to give effect to a distribution, it had the unifying effect of granting a discharge to debtors on similar terms.

The Bill had a much wider goal than providing solely for the discharge. The Bill also aimed to eliminate the practice of preferential payments which was tolerated in the provinces. No discharge would be granted where a preference had been given. By 1887, only Ontario and Manitoba had in place legislation that prohibited preferences. The federal Bill sought to encourage other provinces to follow Ontario and enact similar legislation. In an attempt to garner support for the proposal, the mover of the Bill characterized the proposal as a temporary solution. Parliament had the ability to repeal it once it came into effect. 1887 marked Queen Victoria's jubilee and one Member of Parliament suggested that 1887 also be a jubilee year for debtors.<sup>91</sup>

In 1890, in response to a request for federal bankruptcy reform, Macdonald stated that no further action could be taken on the subject as "so much difference of opinion exists".<sup>92</sup> Parliament did not debate any further bills until 1894. However, Boards of Trade continued to press for reforms.<sup>93</sup>

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<sup>89</sup> Section 2 defined insolvent as "a debtor whose estate has been rateably distributed amongst his creditors under a Provincial Statute ... or who has made a general assignment of all his estate for the benefit of his creditors". See Bill C-9 *For Discharge of Insolvent Debtors whose Estates have been Distributed Rateably Among their Creditors*, 1st Sess., 6th Parl. (1887).

<sup>90</sup> The Bill provided for a right of discharge with the consent of the creditors. However the formula for consent provided incentives for a debtor to request a discharge at the earliest sign of financial difficulty. The more assets that the debtor had for distribution the fewer number of creditors were required to consent to the discharge. The Bill did not provide for a reform to the national law of distribution of estates but relied on provincial law. *House of Commons Debates* (5 May 1887) 282 to 291.

<sup>91</sup> *House of Commons Debates* (5 May 1887) at 284.

<sup>92</sup> In 1890 Macdonald's office stated that no further action could be taken on the subject as "so much difference of opinion exists". Letter of Macdonald's Office to W. B. Snetsinger (3 May 1890) *Macdonald Papers* PAC MG 26A, Vol. 27-A, Reel c-36, No. 92.

#### 4 The Failure of Government Reform: 1894-1895

Bankruptcy law did not leave the agenda of the Boards of Trade.<sup>94</sup> Not only were the provinces slow to respond, but the validity of provincial legislation had come under attack in a series of constitutional challenges beginning in 1886.<sup>95</sup> Boards of Trade reminded the government that they had “spent a great expense in framing a measure ... and have used every effort to induce the Government to facilitate the enactment of the same”.<sup>96</sup> In addition to petitioning Parliament, Boards of Trade continued to meet with the government directly.<sup>97</sup>

<sup>93</sup> For example, the Montreal Board of Trade drafted a Bill in 1892 that was also restricted to traders. It contained a comprehensive distribution scheme, included and the right of a debtor to apply for a discharge. Representatives of the Montreal, Toronto, Hamilton and London Boards of Trade met the new Prime Minister Thompson and his Minister of Finance and Agriculture on 15 December 1892, but the Bill never reached Parliament. See G. H. Stanford, *To Serve the Community: The Story of Toronto's Board of Trade* (Toronto: University of Toronto Press, 1974) at 43. A copy of the Bill was located in the Department of Justice Files. See “Proposed Insolvent Act” *Department of Justice Files*, PAC RG 13, Vol. 1879, File 438-1892. Attached to the Bill was a report of the Winnipeg Board of Trade opposing the Bill. There reasons for opposition are discussed below. See Montreal Board of Trade Council Annual Reports, Annual Report 1893, PAC MG-28 III 44 at 142. For details of this Bill, see “The Proposed Bankruptcy Act” *J. of Commerce* (25 November 1892); Letter of E. B. Greenshields, President of Montreal Board of Trade, to Editor of *J. of Commerce* (11 January 1893) in “Bankruptcy Legislation” *J. of Commerce* (20 January 1893) 101; “Bankruptcy Legislation” *J. of Commerce* (16 February 1894) 337.

<sup>94</sup> “The pressure of the commercial community represented by the Boards of Trade and Banks for the re-enactment of an Insolvent Act has never been relaxed since 1880.” Charles Tupper, “Canadian Insolvency Legislation” Report of Meeting of British Empire League (4 December 1895) at 5.

<sup>95</sup> See note 314 and accompanying text.

<sup>96</sup> “The Petition of the Board of Trade of the City of Toronto” (7 March 1888) *Macdonald Papers*, PAC MG 26A, Reel c-1566, No. 63195.

<sup>97</sup> See “An Insolvency Act Wanted” *Monetary Times* (3 November 1893) for evidence of meetings held with the government in 1891, November 1892 and in January of 1893. See also Montreal Board of Trade Council Annual Reports, Annual Report 1893, PAC MG-28 III 44, Reel M-2804 at 16 for evidence of meetings held in 1893.

The Conservatives made insolvency reform a government matter and introduced a measure in 1894. The death of Macdonald paved the way for the Conservatives to embrace reform. Macdonald's successor was Canada's leading insolvency expert. John Abbott, the author of the *Insolvent Act of 1864* and adviser to Macdonald on insolvency matters (Abbott headed up the 1885 Select Committee), became leader of the Conservatives and Prime Minister in 1891.<sup>98</sup> Abbott announced to representatives of wholesalers and manufacturers his intention to take charge of an Insolvency Bill.<sup>99</sup> Despite Abbott's brief tenure as Prime Minister, his initiative took hold.<sup>100</sup> In January of 1893, a committee of commercial men was established at the suggestion of the government "with whom the government might consult upon an insolvency measure".<sup>101</sup> The consultation continued through 1893 and into 1894. The government submitted a

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<sup>98</sup> J.J.C. Abbott, *The Insolvent Act of 1864* (Quebec: Desbarats and Cameron, 1864). On Abbott, see C. Miller, "Sir John Joseph Caldwell Abbott," in *Dictionary of Canadian Biography, 1891-1900* vol. 12 (Toronto: University of Toronto Press, 1990) 4 at 5, 7; P. Hutchinson, "Sir John J. C. Abbott: Barrister and Solicitor" (1948) 26 Can. Bar Rev. 934.

<sup>99</sup> See "An Insolvency Act Wanted" *Monetary Times* (3 November 1893). While difficult to assess, one of the possible explanations of the failure of Conservative bankruptcy policy in the 1890's may have been caused by their leadership problems. An election was held on 5 March 1891. The Conservatives returned to power but within sixty two days Macdonald died. He was replaced by an ailing John Abbott whose health did not permit him to pursue a bankruptcy Bill. Abbott died and was replaced by John Thompson. Thompson also died in office and was replaced by Mackenzie Bowell. Charles Tupper replaced Bowell. This all occurred in the period of 1891 to 1896. See J.M. Beck, *Pendulum of Power: Canada's Federal Elections* (Toronto: Prentice Hall, 1968) at 57, 72 to 83.

<sup>100</sup> Following the death of Macdonald, the Conservatives changed leaders four times.

John Abbott 16 June 1891 to 24 November 1892

John Thompson 5 December 1892 to 12 December 1894

Mackenzie Bowell 21 December 1894 to 27 April 1896

Charles Tupper 1 May 1896 to 8 July 1896

Shortly after relinquishing the leadership to John Thompson, John Abbott died on 24 November 1892 leaving the Conservatives without essential leadership on this issue.

<sup>101</sup> "An Insolvency Act Wanted" *Monetary Times* (3 November 1893). The article further noted that as of that date the committee to its knowledge had not been consulted.



confidential draft to some of the Boards of Trade and the newly formed Canadian Banker's Association.<sup>102</sup>

Some fourteen years after the repeal of the *Insolvent Act of 1875*, the federal government announced in the speech from the Throne on 19 March 1894 that an insolvency measure would be laid before Parliament.<sup>103</sup> In the Senate debates, the government explained why it had introduced the Bill:

[T]he commercial community of this Dominion ... have been pressing upon the Government for a number of years the necessity of passing an Insolvency Act, and the Government for a number of years have resisted it, until the pressure became so great that they believed it to be in the interest of the business community....<sup>104</sup>

Mackenzie Bowell, the Minister of Trade and Commerce, introduced the measure in the Senate where following further consultation with commercial groups,<sup>105</sup> it was passed after great debate.<sup>106</sup> However, the House of Commons did not even debate the matter.<sup>107</sup>

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<sup>102</sup> Proceedings of the Third Annual Meeting of the Canadian Banker's Association, 26, 27 July 1894; Charles Tupper, "Canadian Insolvency Legislation" Report of Meeting of British Empire League (4 December 1895) at 5; *Debates of the Senate* (17 April 1894) at 236. (Power). On receiving a copy of the Bill, the Association formed a committee to study the matter and forwarded a formal memorandum dated (17 February 1894) to the government. Further the Association instructed their solicitor to attend in Ottawa to interview officials in the Department of Finance. "Insolvency Legislation" (1897-98) 5 Can. Bankr. Assoc. J. 436. The Journal of Commerce reported that bankers met in January of 1894 to consider "the more salient features of the bill". "The Insolvency Bill" *J. of Commerce* (26 January 1894) 187; Address by Mr. Lash, to the Can. Bankr. Assoc. at the Third Annual Meeting (26 July 1894) 25.

<sup>103</sup> *Debates of the Senate* (19 March 1894) at 4.

<sup>104</sup> *Debates of the Senate* (18 April 1894) at 248; W. Proudfoot, "An Insolvent Law" (1894) 18 Can. L.T. 305 at 306.

<sup>105</sup> The Bill was "submitted to a most careful and exhaustive examination before a Select Committee and by the whole House during some four or five weeks". Charles Tupper, "Canadian Insolvency Legislation" Report of Meeting of British Empire League (4 December 1895) at 5. Bowell, in speaking on the motion to appoint the Committee, stated that, "I know that there will be number of bankers and representatives of boards of trade and commercial men, who, I have no doubt, would like to place their views before the committee. I have received several letters since the introduction of the Bill, in which the writers express a desire to interview myself personally ...." *Debates of the Senate* (13 April 1894) at 225.

<sup>106</sup> Given that the Parliamentary papers for the House of Commons for the nineteenth century were destroyed, it was hoped that the Senate papers which still exist may provide an opportunity to review the

In 1895 Bowell, who by that time had become Prime Minister, reintroduced the Bill in the Senate, but the government did not press the matter.<sup>108</sup>

The Bill as presented was a comprehensive one<sup>109</sup> and provided for the administration of an insolvent's estate and for a discharge. However, there was no consensus on fundamental aspects of the Bill with the debate focusing on the discharge and the trader rule. Several important provisions were radically altered as the Bill moved through the Senate.

The old English trader rule defined the parameters of the debate and the Senate discussed little else for days. Both the *Insolvent Acts of 1869 and 1875* had been restricted to traders and almost all of the reform bills of the 1880s were similarly structured. England had abolished the rule in 1861, but the term continued to have a significant impact on the Canadian debates. Parliament became entangled in definitional issues such as whether coffee-house keepers, keepers of saloons and wharfingers should be classified as traders.<sup>110</sup> One Senator summarized the various positions on the issue:

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workings of a special committee reviewing a bankruptcy Bill. The Reports of the Senate Committee were located but they contain no minutes of evidence or list of witnesses. The First Report dated (19 April 1894) simply reduced the quorum to nine members. The Second Report dated (8 May 1894) proposed that the Bill be reported as amended. The Third Report dated (8 June 1894) presented the Bill as amended.

<sup>107</sup> Bill C-152 *Respecting Insolvency*, 4th Sess., 7th Parl. (1898); See also G.H. Stanford, *To Serve the Community: The Story of Toronto's Board of Trade* (Toronto: University of Toronto Press, 1974) at 62; S.W. Jacobs, "A Canadian Bankruptcy Act: Is it a Necessity?" (1917) 37 Can. L.T. 604 at 606.

<sup>108</sup> In 1894, the Bill passed the Senate, but received only its first reading in the Commons, and was withdrawn on the promise that it would be reintroduced the next session. Before Parliament again met death had deprived the country of the services of Sir John Thompson; and the Government of Sir Mackenzie Bowell which succeeded, while introducing the measure, did not press it. The 1895 Bill was introduced in the Senate as Bill S-A *Respecting Insolvency*, 5th Sess., 7th Parl. (1895). See Charles Tupper, "Canadian Insolvency Legislation" Report of Meeting of British Empire League (4 December 1895) at 5.

<sup>109</sup> Bill S-C *Respecting Insolvency*, 4th Sess., 7th Parl. (1894); "An Insolvency Act" *Monetary Times* (9 February 1894); D. E. Thomson, "Bankruptcy Legislation in Canada" (1902) 1 Can. L.R. 173 at 176.

<sup>110</sup> Letter of A. McLeod to Editors of Canada Law Journal in "Insolvency Legislation" (1902) 35 Can. L.J. 411 at 412; *Debates of the Senate* (12 June 1894) at 512 (Ferguson).

The members of this House may be divided into four classes with respect to their views on this measure. Some ... think that we should not have an insolvency law at all .... There is another class who think that if we are to have an insolvency law it should be limited strictly to the class who have asked for it, that is traders .... There is another class ... who think that all classes should come under the insolvency law, but that they should be all dealt with in the same manner ... then there is the fourth class ... who think that [traders] ... should be put in a worse position than any other section of the community.<sup>111</sup>

The Senate Committee resolved to abolish the trader rule and proposed to allow creditors to initiate compulsory proceedings against all types of debtors.<sup>112</sup> However, many objected to compulsory proceedings against farmers and the Bill as finally presented only allowed compulsory proceedings against traders and excluded farmers entirely. No voluntary proceedings were allowed.<sup>113</sup> Ironically, the Senate settled on the basic model of the *Insolvent Act of 1875*.<sup>114</sup> Opposition in the House of Commons to the trader provisions was in part the cause of the government's decision not to press the matter and re-introduce it the following year.<sup>115</sup>

The 1894 Bill proposed to tightly control the granting of the discharge. A discharge could either be obtained through court application after one year or earlier if

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<sup>111</sup> Debates of the Senate (14 June 1894).

<sup>112</sup> The Senate Committee change was at the behest of the Boards of Trades and the Banker's Association which insisted upon the abolition of the trader rule. See "The New Insolvency Bill" *J. of Commerce* (4 May 1894) 916.

<sup>113</sup> The Senate divided on the issue 23-16 in favour of restoring the trader rule. *Debates of the Senate* (14 June 1894) at 560. See Charles Tupper, "Canadian Insolvency Legislation" Report of Meeting of British Empire League (4 December 1895) at 5.

<sup>114</sup> See Bill S-C *Respecting Insolvency*, 4th Sess., 7th Parl., ss 2-5. For a discussion of the trader rule, see *Debates of the Senate* (17 April 1894) at 229-249; *Debates of the Senate* (12 June 1894) 499-513; *Debates of the Senate* (14 June 1894) 550-561; See "The Bankruptcy Bill" *Monetary Times* (6 April 1894) 1250 for a discussion of the Bill as originally presented. For a discussion of the interim changes, see "The Insolvency Bill" *Monetary Times* (4 May 1894) 1878. See also, "The Proposed Insolvency Bill" *Monetary Times* (20 April 1894).

<sup>115</sup> Montreal Board of Trade Council Annual Reports, Annual Report 1894, PAC MG-28 III 44, Reel M-2804 at 20.

the debtor obtained the required level of creditor consent. Both methods required a confirmation hearing where creditors could object. There was little agreement, however, on the level of dividend an estate was required to pay out to creditors and the provision was amended a number of times as the Bill moved from the Senate to the Committee of the Whole.<sup>116</sup>

The Bill passed the Senate but failed to pass in the House of Commons despite having the approval of the government. Although the official reason given for the lack of approval by the House of Commons was the lateness of the session,<sup>117</sup> failure in 1894 can in part be attributed to the efforts of the newly formed Canadian Bankers' Association.<sup>118</sup>

While banks had been interested in insolvency legislation in the past and some had in fact lobbied for a general federal law,<sup>119</sup> they united to form a new association in

<sup>116</sup> See Charles Tupper, "Canadian Insolvency Legislation" Report of Meeting of British Empire League (4 December 1895) at 5. Debtors could arrange a compromise with their creditors and obtain an early discharge if they obtained creditor consent representing three-fourths in value of the claims and a majority in number. However, before the compromise could be approved, the court had to be assured that the dividend represented 50 per cent of the value of the claims. See Bill S-C *Respecting Insolvency*, 4th Sess., 7th Parl. (1894) ss 34-46. *Debates of the Senate* (19 June 1894) 591, 601. The debate over the required level of dividend is explored in Letter to the Editor of the *Monetary Times* from G. Hague (4 July 1894) *Monetary Times* (6 July 1894). "The Insolvency Bill" *Monetary Times* (4 May 1894) 1878.

<sup>117</sup> See *Debates of the Senate* (30 April 1895) at 108; Charles Tupper, "Canadian Insolvency Legislation" Report of Meeting of British Empire League (4 December 1895) at 5.

<sup>118</sup> A number of sources identify the banking community as the reason for the failure. See Charles Tupper, "Canadian Insolvency Legislation" Report of Meeting of British Empire League (4 December 1895) at 5, 6. See also "An Insolvency Law for Canada" which summarizes the history of federal legislation and raises the opposition of the banks as a reason for the failure of the legislation, *Laurier Papers*, PAC MG 26 Reel c-752, No. 18052. See also Seventh Annual Meeting of the Can. Bankr. Assoc. (26, 27 October 1898) (1898-99) 6 Can. Bankr. Assoc. 107; W. Proudfoot, "An Insolvent Law" (1894) 18 Can. L.T. 305 at 306.

<sup>119</sup> Letter to John A. Macdonald from Imperial Bank of Canada (2 June 1880). The Bank claimed that it was "in the interests of government and the country that some legislation be [drafted?] during the recess providing for the equitable distribution of the estates of insolvents". *Macdonald Papers*, PAC MG 26A, Reel C 1749, No. 171099. Letter to Macdonald from Imperial Bank of Canada (5 May 1879). "It is hoped in the interests of the country and of the Party that ... the absolute repeal of the Insolvent Act will not become law ...." *Macdonald Papers*, PAC MG 26A, Reel c-1716, No. 465219. See Petition from a series of Quebec Banks (30 March 1885) *Macdonald Papers*, Reel c-1497, No. 11073. See also Memorial of

1892.<sup>120</sup> On reviewing the draft Bill the banks objected to a provision which prejudiced their right to recover on negotiable paper from an insolvent debtor's estate.<sup>121</sup> Following the Senate Debates, the Association passed a resolution at its 1894 annual meeting stating that it was "not prepared to affirm that a general Bankruptcy Act would be beneficial to the community at large".<sup>122</sup>

As indicated above, the Government re-introduced the measure in 1895 but did not press the matter.<sup>123</sup> Reference was made to the pending election and the necessity to consult with the electorate before considering the Bill. The improved state of the economy also offered an excuse to delay consideration of the Bill. Continued divisions over the trader rule and the discharge, combined with the opposition of the banking community, made progress difficult. However, the most significant factor in explaining the demise of the government initiative was constitutional law.

The 1894 Privy Council decision in *A.G. of Ont. v. A.G. for Can.*<sup>124</sup> removed the immediate need for federal legislation. The decision upheld the validity of s. 9 of the

Bankers supporting Insolvency Law which makes reference to Committee that will be reporting a Bill soon. Signatures include, Bank of Montreal and Molsons Bank (17 March 1885) *Macdonald Papers*, Reel c-1565, No. 61872-3.

<sup>120</sup> Report of Proceedings of First Annual Meeting of the Can. Bankers' Assoc. (19 May 1892) (1892) 1 *Can. Bankr. Assoc. J.* 311.

<sup>121</sup> Banks insisted upon ranking for the full amounts of all notes held by them which would mean that in the majority of cases the banks would be paid in full to the exclusion of other creditors. Montreal Board of Trade Council Reports, Annual Report 1894, PAC MG-28 III 44, Reel M-2804 at 20; Address by Lash, to the Can. Bankr. Assoc. at the Third Annual Meeting (26, 27 July 1894) 25 at 26; *Debates of the Senate* (19 June 1894) 601-603

<sup>122</sup> *Can. Bankr. Assoc.*, Third Annual Meeting (26, 27 July 1894) 25 at 50-51. Nailer argues that "Canadian banks fought hard to prevent any new legislation". T. Nailer, *The History of Canadian Business* vol I (Toronto: James Lorinna, 1975) at 82.

<sup>123</sup> "...[A]t the end of the second reading in the Senate, towards the end of May, it met with so much opposition that the debate was adjourned, and there is now no immediate prospect of legislation on the subject." Fourth Annual Meeting of the Can. Bankr. Assoc. (11, 12 September 1895) (1895/96) 3 *J. Can. Bankers' Assoc.* 19.

<sup>124</sup> [1894] A.C. 189 (P.C.).

Ontario *Assignments and Preferences Act* and permitted the provinces to continue to regulate those matters which might be merely ancillary to bankruptcy law in the absence of federal legislation. Some Senators suggested that the federal law be delayed to allow the provinces time to enact reforms in accordance with the decision. The decision was cited as a reason not to proceed with federal reform. In 1895, the Senate voted to delay consideration of the Bill and it died on the order paper.<sup>125</sup> A full discussion of constitutional law issues is contained in Part III of this chapter.

### 5 Two Final Efforts and the End of Federal Reform Bills

With the election of Laurier and the Liberal government in 1896, there was the possibility that the new government would take new policy initiatives on bankruptcy. However, despite continued pressure from the Boards of Trade,<sup>126</sup> Laurier's government took little interest in the matter. It offered no government Bills and failed to support two private members' Bills drafted on behalf of the Montreal Board of Trade.<sup>127</sup>

As the century came to a close, Boards of Trade continued to debate bankruptcy policy. They held meetings to exchange ideas and proposed "to hold a conference of all Canadian Boards of Trade, with a view to making united representations to the Dominion Government".<sup>128</sup> Laurier's personal papers contain several direct appeals for a new law.<sup>129</sup> The Boards, continuing to be plagued by the provincial laws and the decline in

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<sup>125</sup> See *Debates of the Senate* (29 May 1895) at 159, 161, 164; Charles Tupper, "Canadian Insolvency Legislation" Report of Meeting of British Empire League (4 December 1895) at 6.

<sup>126</sup> See eg., Montreal Board of Trade Council Annual Reports, Annual Reports 1896, 1897, 1898, 1899, 1900, 1901 which all contain resolutions urging federal reform. PAC MG-28 III 44, Reel 2804, 2805.

<sup>127</sup> For a general discussion of the 1898 and 1903 Bills, see S.W. Jacobs, "A Canadian Bankruptcy Act: Is It A Necessity?" (1917) 37 Can. L.T. 604.

<sup>128</sup> For details of the proposed meeting, see "Insolvency Legislation" *Monetary Times* (7 January 1898).

<sup>129</sup> All following correspondence directed to Laurier, and can be found in Laurier papers, PAC MG26. Laurier was not unfamiliar with the issue as he received several letters before elected as Prime Minister. See Letter from E.J. Dubai Impetrator, dated (22 December 1883) Reel c-737, No. 162; Letter from Ran

foreign credit,<sup>130</sup> arranged to meet directly with the government.<sup>131</sup> Prior to the opening of Parliament in 1898, the Montreal Board of Trade met with government members of Parliament. However, the government failed to announce any new initiatives.

Therefore, a Bill prepared under the direction of the Montreal Board of Trade was introduced in the House of Commons in 1898.<sup>132</sup> In a letter to Thomas Fortin, the Member who sponsored the Bill, the Board expressed an urgent need for a national pro rata law, "a need emphasized by the fact that the system of preferential assignments prevalent in some provinces has rendered England and other European countries unwilling to give credit to Canadian Houses".<sup>133</sup>

and Son (29 March 1894) Reel c-737, No. 2954; Letter from Ran and Son (8 November 1895) which criticises Laurier for not making a case against the government's failure to reform the law, Reel 740, No. 3893; For post election letters, see Letter from Uer Incandescent Light Mfg. Co. (11 September 1896) Reel c-742, No. 6905; Letter from Vancouver Board of Trade (11 November 1897) Reel c-751 No. 17837; Letter from Socle Chemical Co. (9 August 1907) Reel c-850, No. 127611; Letter from Christie and Co. (17 February 1906) Reel c-850, No. 107231; Letter from Montreal Board of Trade (7 January 1897) Reel c-752, No. 18593; Letter from Ottawa Board of Trade (3 December 1897) Reel c-752 No. 18594; Letter from S. Greenshields and Son Dry Goods Wholesale (19 February 1898) Reel c-754, No. 20771; Resolution of Prince Albert Board of Trade (15 April 1898) Reel c-756 (15 April 1898); Letter from S.G. Little Dry Goods (9 May 1898) c-756, No. 23155; Letter from The Cosset Bros Harvesting Machinery (13 May 1898) Reel c-756 no. 23259; Letter from S. G. Little (16 May 1898) Reel c-756 No. 23341.

<sup>130</sup> "Few are found to justify the existence of provincial legislation .... and what is thought of this legislation by European houses, which have often to suffer from it, has been made known again and again. Some of them simply decline giving any credit in Canada while such a one-sided legislation exists." "An Insolvency Act" *Monetary Times* (4 February 1898).

<sup>131</sup> See "An Insolvency Act" *Monetary Times* (4 February 1898) which makes reference to a meeting between the Montreal and Ottawa Boards of Trade with government officials.

<sup>132</sup> See Bill C-84 *Respecting Insolvency*, 3rd Sess., 8th Parl. (1898). *House of Commons Debates* (17 March 1898) at 2004. "The bill has been prepared under the direction of the Montreal Board of Trade." *Ibid.* at 2009. For original correspondence and resolutions respecting the 1898 Bill, see Montreal Board of Trade Council Annual Reports, Annual Report 1898, PAC MG-28 III 44, at 49-50. S.W. Jacobs, "A Canadian Bankruptcy Act: Is it a Necessity?" (1917) 37 *Can. L.T.* 604 at 607. Thomas Fortin, who introduced the Bill, later wrote to Laurier referring to the Bill presented in 1898 at the request of the Montreal Board of Trade. See Letter of Fortin to Laurier (13 Mai 1899) *Laurier Papers* MG 26, Reel c-765, No. 33524.

<sup>133</sup> *House of Commons Debates* (17 March 1898) at 2008 (Fortin reading from letter of Montreal Board of Trade)

The 1898 Bill was in large measure based on the Senate Bill of 1894. Following the trend of earlier Bills, the 1898 proposal applied to traders and did not allow voluntary proceedings. Creditors could petition a trader into bankruptcy upon proof of an Act of insolvency.<sup>134</sup> The Bill provided the machinery for the distribution of the estate and included a discharge provision.<sup>135</sup> Farmers obtained two advantages under the Bill. The trader rule precluded compulsory proceedings against farmers. Additionally, a new provision ensured that traders who did receive a discharge continued to remain liable for debts owed to farmers. It had always been a complaint of the farming community that they were unable to recover debts from bankrupt merchants.<sup>136</sup> In addition, the Banker's Association succeeded in ensuring that the rights of banks would be safeguarded. The Bill provided that nothing in the Act "shall interfere with, or restrict, the rights and privileges conferred upon banks and banking corporation by the Bank Act".<sup>137</sup>

What the Bill lacked, however, was government support.<sup>138</sup> In Parliament, Laurier stated that he did not want to make it a government measure because "it might be treated

<sup>134</sup> The Bill proposed a new definition of trader: "This Act applies only to persons who as a means of livelihood, manufacture, buy or otherwise acquire goods, wares, merchandise or commodities, and sell or otherwise dispose of the same to others including commission merchants, whether they sell by auction or otherwise." See Bill C-84 *Respecting Insolvency*, 3rd Sess., 8th Parl. (1898) s. 3. Unlike the 1894 Bill, the 1898 Bill excluded corporations and proposed to allow the Winding Up Act to continue to deal with companies.

<sup>135</sup> Bill C-84 *Respecting Insolvency*, 3rd Sess., 8th Parl. (1898) ss. 27-34.

<sup>136</sup> Bill C-84 *Respecting Insolvency*, 3rd Sess., 8th Parl. (1898) s. 38; *House of Commons Debates* (17 March 1898) at 2014.

<sup>137</sup> Bill C-84 *Respecting Insolvency*, 3rd Sess., 8th Parl. (1898) s. 113. *House of Commons Debates* (17 March 1898) 2019. This section has been continued into Canada's modern day legislation. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended, s. 212. See also discussion of Bill in Seventh Annual Meeting of the Can. Bankr. Assoc. (26, 27 October 1898) (1898-99) 6 Can. Bankr. Assoc. 107. It appears that there continued to be disagreement between the banking community and the Boards of Trade despite the inclusion of this clause. See Letter of Thomas Fortin to Laurier (13 Mai 1899) *Laurier Papers* PAC MG 26, Reel c-765 No. 33534. Not all supported different treatment for the banks. See S.W. Jacobs, "A Canadian Bankruptcy Act: Is it a Necessity?" (1917) 37 Can. L.T. 604 at 608.

<sup>138</sup> Thomas Fortin, the sponsor of the Bill in 1898 on behalf of the Montreal Board of Trade sent a telegram to Laurier on 12 May 1899. "Can I tell the Board of Trade reasons why government cannot



as a political measure, and above all things such a Bill should not be treated as a political one, but simply from a commercial point of view".<sup>139</sup> The 1898 Bill did not progress beyond first reading. The Bill was re-introduced in 1903,<sup>140</sup> but Laurier refused to support it and if the House pursued the matter he would "ask the House to reject it".<sup>141</sup> Laurier pointed to developments in the provinces as a reason not to pursue reform at the national

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support Insolvency Bill, a letter from you be better, please answer at once." Telegram to Laurier from Thomas Fortin (12 May 1899) *Laurier Papers*, PAC MG26, Reel c-765, No. 33487, 33524-6. No letter to the Board of Trade was found. See also Letter to Laurier, from the Dominion Commercial Travellers Association (3 June 1899) *Laurier Papers*, MG 26, Reel c-752, No. 18599. "That the information conveyed to us by Mr. Fortin that the Government had declined to assist in the passage of any insolvency legislation during the present session comes to us as a great surprise." See also resolution of same Association in favour of an Insolvency Law (13 May 1899) *Ibid.*, No. 18600.

<sup>139</sup> *House of Commons Debates* (17 March 1898) 49 (Laurier). On the lack of progress on the Bill, see B. Russell, "Provisions of the British North America Act for Uniformity of Provincial Laws" (1898) 34 *C. L.J.* 513 at 523.

<sup>140</sup> See Bill C-53 *Respecting Insolvency*, 3rd Sess., 9th Parl. (1903). The government faced continued pressure between 1898 and 1903. See e.g. resolution cited in *Monetary Times*, "Equitable Insolvency Laws" *Monetary Times* (11 July 1902) 47. While Laurier was in London, England a group of English exporters used the opportunity to meet with Laurier and express the need for federal reform. In reviewing the proposals of the English merchants for Canadian reform, the *Monetary Times* stated why previous federal bills had failed. "[T]hese attempts have been of a desultory nature and not founded upon a united opinion as to what remedy was really adapted to the case." "Canadian Insolvency Law" *Monetary Times* (15 August 1902). Resolution of the Canadian Manufacturers' Association (18 April 1899) urging passage of Insolvency Bill, *Laurier Papers*, PAC MG26, Reel c-765, No. 33017; Letter Montreal Board of Trade to Laurier (28 April 1899) authorizing meeting with Laurier, *Ibid.*, Reel c-765, No. 33077; Resolution of Canadian Manufacturer's Association (10 March 1900) *Ibid.*, Reel c-774, No. 13210; Letter to Laurier from representative of Toronto Board of Trade (25 March 1900) *Ibid.*, c-774, No. 43391; Letter to Laurier from Montreal Chamber of Commerce (25 June 1901) inquiring whether a representative should attend and meet with Laurier. "Je dois ajouter que nous souffrons plus que toute autre ville de la Puissance, Montréal étant le principal centre de la distribution." *Ibid.*, (1 May 1902) *Ibid.*, Reel c-793, No. 64770; Letter to Laurier from Rossland BC Board of Trade (1 May 1902) referring to letters from England which indicated Canadian trade would be improved with new law. *Ibid.*, Reel c-793, No. 64770; Letter to Laurier from Corporation of Colonial and General Agencies Limited (4 July 1902) requesting a meeting, *Ibid.*, Reel c-794, No. 66354.

<sup>141</sup> *House of Commons Debates* (18 May 1903) 3248.

level. With that assertion, Laurier closed a political chapter on the debate in the House of Commons on bankruptcy laws.<sup>142</sup> Parliament did not debate any further Bills until 1918.

### 6 Insolvent Companies

The various Bills debated between 1880 and 1903 all focussed on the individual debtor. Insolvent companies did not feature in the debates as the issue continued to be dealt with by special legislation. However, it should be noted that in 1882, after little debate, Parliament enacted *An Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies and Trading Corporations*. The Act later became known as the *Winding Up Act*. After the repeal of the federal *Insolvent Act of 1875*, creditors realised that there was no easy method available to wind up insolvent companies. The Act provided for a court appointed liquidator who wound up the company in accordance with any duties imposed by the court.<sup>143</sup> Parliament amended the law in 1884 and again in 1889.<sup>144</sup>

The Bill provoked little debate. What debate did arise centred on the issue of the discharge. In order to make the Bill more palatable, Members of Parliament made clear on a number of occasions that the goal of the Act was not to discharge the insolvent company. After liquidation there was nothing to discharge. "The corporation being left without any assets, has nothing whatever left which would enable it to subsist any longer,

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<sup>142</sup> While no bills were introduced, some groups did not give up the fight. See letter to Laurier from the Montreal Board of Trade (8 March 1904) *Laurier Papers*, PAC MG26 Reel c-809, No. 83171; Letter to Laurier from Montreal Chamber of Commerce (21 March 1905) *Ibid.*, Reel c-821, No. 95879. See also 1905 article in the *Monetary Times* lamenting the lack of a federal law. "Federal Insolvency Legislation" *Monetary Times* (6 October 1905) 429, 430.

<sup>143</sup> 45 Vict., c. 23 (1882) J. Honsberger, "The Historical Evolution of The Bankruptcy and Insolvency Process in Canada" (unpublished) at 42, 43; Tassé Report, *supra* note 1 at 15; J. Honsberger, "Bankruptcy Administration in United States and Canada" (1975) 63 Cal. L. Rev. 1515 at 1529; A. Bohémier, *Faillite et Insolvabilité*, tome 1 (Montréal: Editions Themis, 1992) at 12; A. Bohémier, *La Faillite en Droit Constitutionnel Canadien* (Montréal: Les Presses de l'Université de Montréal, 1972) at 44.

<sup>144</sup> (1884) 47 Vict., c. 39; (1889) 52 Vict., c., 32; (1906) S.R.C. c. 144. The amendments in 1889 allowed solvent companies to also take advantage of the legislation.

therefore the discharge is immaterial."<sup>145</sup> There was no debate or mention of the possibility of some form of corporate rescue or reorganization. It was simply an administrative act to wind up the number of "ephemeral corporations which have become insolvent".<sup>146</sup> Insolvent companies were entirely distinct from the larger bankruptcy reform debate. A principled debate over the issue of the reorganization of companies would have to wait until the twentieth century.<sup>147</sup>

## II Explaining the Failure of Reform

The failure of federal reform bills can be attributed to several factors. First, there was little agreement over the discharge as numerous Bills specifically excluded the ability of a debtor to obtain a release. The opposition to the discharge in part reflected the continued strength of traditional arguments which appealed to notions of individual responsibility. Second, the absence of federal bankruptcy legislation and the tolerance of preferences in a number of provinces reflected the strength of the local economy. The tension between local and distant creditors was evident during this period. Finally, constitutional litigation created uncertainty over the validity of provincial legislation and impeded reform at both the federal and provincial level. The uncertainty was resolved in 1894 by the Privy Council. Its ruling entrenched the provincial model of debtor-creditor regulations and delayed the immediate need for federal legislation.

### A *The Discharge*

The discharge again was a leading feature of the debates of 1880-1903. Supporters of the discharge appealed to notions of forgiveness while opponents of the discharge continued to argue that debtors had a moral obligation to repay all debts.

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<sup>145</sup> *House of Commons Debates* (5 May 1882) at 1314; *Debates of the Senate* (1 March 1882) at 36.

<sup>146</sup> *Debates of the Senate* (1 March 1882) at 37. See also "Insolvent Bill" (3 March 1882) 78; "Insolvent Companies Bill" *Monetary Times* (14 April 1882) 1264.

<sup>147</sup> See *House of Commons Debates* (18 May 1903) at 3252. "We have reached an era now when railways, insurance and telegraph companies occupy a very important position in reference to all our great commercial enterprises."

However, whereas in the 1870s it had always been assumed that a bankruptcy law had to include a discharge, Parliament in the 1880s debated a number of Bills that specifically excluded the discharge. Many viewed the discharge as an entirely separate issue that need not be included in a bankruptcy Bill.<sup>148</sup>

The *Journal of Commerce* called for Parliament to resuscitate a distribution scheme and “leave the evil [of the discharge] ... buried”.<sup>149</sup> It was important to recall the origins of bankruptcy law and “remember that there were bankruptcy laws in force, long before any provision was embodied in them for a debtor’s discharge”.<sup>150</sup> The Chief Justice of Ontario in *Clarkson v Ontario Bank*,<sup>151</sup> in support of his conclusion that a bankruptcy law did not have to include a discharge, referred to the fact that “the earliest Bankrupt Act of Henry VIII, and several Acts following it, made no provision for

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<sup>148</sup> “Insolvency” *Monetary Times* (12 January 1882) 767. For a supportive reply to this editorial, see Letter from Creditor to Editor of *Monetary Times*, *Monetary Times* (19 January 1882) 801. See also “Bankruptcy Laws” *Monetary Times* (31 March 1882) 1206. The President of the Toronto Board of Trade stated that assets should be sold independently of the discharge in order that the disgrace of the insolvency be separated from the question of the disposal of the debtor’s assets. Henry Darling, President of Toronto Board of Trade, Circular to Members of Parliament, reprinted in “Insolvency Legislation” *J. of Commerce* (11 May 1885) 645.

<sup>149</sup> “Insolvency Legislation” *J. of Commerce* (21 May 1880) 422. Returning to this early model “will have a wholesome effect, and will tend to prevent speculative assignments which were so frequent under the late Insolvent Act”. “The Proposed Bankruptcy Bill” (1883) 3 Can. L.T. 572. The *Monetary Times*, in calling for a new pro rata distribution rule, argued that it was “an obvious mistake to suppose that there is any necessary connection” between the discharge and the rateable distribution. “Wanted— A Better Law” *Monetary Times* (18 November 1881) 603, 604. “[T]he question of discharge is not necessarily bound up with the distribution of assets.” “Insolvency Legislation” *J. of Commerce* (18 January 1884) 80. “The difficulty lies in combining and regulating these two objects.” *Debates of the Senate* (17 April 1894) at 235 (Gowan). E.R.C. Clarkson, an accountant, also identified these two goals in a pamphlet published in 1885. E.R.C. Clarkson “Bankruptcy Legislation” (1885).

<sup>150</sup> “Jurisdiction over Insolvency” *Monetary Times* (17 April 1883) 180.

<sup>151</sup> (1888) 15 O.A.R. 166 (Ont. C.A.).

discharge; that first merciful relaxing of the Law was first heard in Queen Anne's reign, after the lapse of two centuries".<sup>152</sup>

According to the *Monetary Times*, any attempt to link a distribution scheme with a discharge provision would result "in neither being granted." Those who were interested in ensuring a law providing for a distribution of assets could not afford to defeat that purpose by asking for legislation on the discharge as well.<sup>153</sup> It was far better to proceed by treating the two functions as separate issues. Once a federal distribution scheme was in place, the discharge could be dealt with by way of a separate Bill.<sup>154</sup>

### 1 Arguments in Favour of the Discharge

Support for the discharge continued to be based upon notions of forgiveness, and the importance of freeing a debtor from the burdens of debt. For example, one Member of Parliament argued that "it would be better for all parties if insolvent debtors were allowed to start afresh".<sup>155</sup> The lack of a discharge prevented the unfortunate debtor "from becoming a free man and being set on his feet again".<sup>156</sup> A letter to Laurier lamented the fate of helpless debtors who were obliged to remain idle while others less

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<sup>152</sup> *Clarkson v. Ontario Bank* (1888) 15 O.A.R. 166 at 176 (Ont. C.A.). Hagarty C.J. also relied on Marshall C.J.'s decision in *Sturges v. Crowninshield* 4 Wheaton 122 (1819) for the proposition that a bankruptcy law did not have to include a discharge.

<sup>153</sup> "Insolvency" *Monetary Times* (2 February 1883) 851.

<sup>154</sup> "[M]erchants appear to have thought it wise not to imperil provisions for the distribution of assets by the introduction of what does not necessarily appertain to that object, and have left the question of the debtor's discharge to be dealt with separately, so that should the discharge of bankrupts be called into question at anytime hereafter, the distribution of assets may not be involved in an issue with which it has nothing to do, and the existing injustice may not be re-enacted. "Distribution of Insolvent Estates" *J. of Commerce* (11 May 1883) 1233; "Bankruptcy: Rateable Distribution" *J. of Commerce* (26 January 1883) 744; "Insolvency Legislation" *J. of Commerce* (18 January 1884) 81.

<sup>155</sup> *House of Commons Debates* (5 May 1887) at 288.

<sup>156</sup> *House of Commons Debates* (17 March 1898) at 2029.

skilled succeeded. Families “who have seen better days are obliged to accept humble positions and a good useful Father is helpless or brokenhearted”.<sup>157</sup>

Without a legislative discharge, debtors had to rely on the good will of creditors. According to one author this resulted in a “civil lynch law” whereby creditors refused the discharge and took all means short of violence to persecute the debtor in order to recover the amount owed.<sup>158</sup> A debtor who had fled to the United States to avoid his creditors wrote to Laurier with a personal plea for insolvency reform:

Is it humane or Christian, that a man who have lost their all by fire, by endorsing for a friend who abused their confidence, by unforeseen land slides in business and otherwise, should have the gates of mercy closed to them forever.<sup>159</sup>

Many debtors had little choice but to flee to the United States. Absconding debtors had been a problem prior to Confederation and the issue had been raised briefly during the debates of the 1870s. The repeal of federal bankruptcy legislation in 1880 put further pressure on debtors.<sup>160</sup> Members of Parliament pointed to the increasing problem of fleeing debtors. Creditors who insisted upon their “pound of flesh” had the effect of “driving many a man out of the country to do business in the United States”.<sup>161</sup> Without a discharge the debtor had no option but to “go to a new country where he can make a

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<sup>157</sup> Letter of Christie & Co. to Laurier (17 February 1906) *Laurier Papers*, PAC MG 26, Vol. 403, Reel c-850, No. 107234.

<sup>158</sup> Letter to the Editor of the Monetary Times from J.L.F. (14 April 1883) *Monetary Times* (20 April 1883) 1181. See also *House of Commons Debates* (6 March 1883) 120. See also *House of Commons Debates* (6 March 1883) at 120.

<sup>159</sup> Letter of Debtor to Laurier (18 December 1909) *Laurier Papers*, PAC MG 26, Vol. 603, Reel c-884, No. 163911.

<sup>160</sup> Between 1880 and 1896, Bliss notes that several hundred thousand Canadians migrated to the United States. See M. Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland & Stewart, 1987) at 249. This shift in population must be re-evaluated in light of the repeal of federal bankruptcy legislation.

<sup>161</sup> *House of Commons Debates* (29 March 1882) at 608 (Gault); See also *House of Commons Debates* (18 May 1903) at 3250.

fresh start without having around his neck the millstone of debt which he cannot throw off in Canada".<sup>162</sup> One such Canadian debtor, who moved to Erie Pennsylvania, wrote to Laurier demanding that an insolvency law be enacted. He referred to the:

multitude of men banished from Canada for the reason that they can never be free so long as you neglect to give them protection [from] the merciless visits of the Sheriffs and the Bailiffs .... My own case represents many thousands of men obliged to live in another country, rather than return to be pounced on and harassed by some Loan Co., Bank, or ... lawyer, for debts and Judgments beyond hope of ability to pay.<sup>163</sup>

However, sympathy for exiled debtors was not the sole reason to support a bankruptcy law discharge. The problem of absconding debtors had a detrimental impact on Canadian business. Fleeing debtors meant the loss of "our good but unfortunate trading population".<sup>164</sup> Driving "men out of the country" was a loss and not a gain to the community.<sup>165</sup> One company, concerned with the extent of migration to the United States, wrote to Laurier and claimed that "an Insolvent Act would reclaim so much good active brain power, and that it would be equal almost, if not quite as good as one year's Immigration to Canada".<sup>166</sup>

While support for a discharge was often framed in terms of the underlying value of forgiveness and sympathy for an unfortunate debtor, the credit community had a particular interest in seeking bankruptcy legislation which contained a discharge. The absence of the discharge had negative consequences for creditors. For example, the

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<sup>162</sup> *House of Commons Debates* (5 May 1887) at 283 (Edgar).

<sup>163</sup> Letter of Debtor to Laurier (18 December 1909) *Laurier Papers* MG 26, Vol. 603, Reel c-884, No. 163911.

<sup>164</sup> *House of Commons Debates* (5 May 1887) at 283 (Edgar).

<sup>165</sup> Letter of J.L.F. to editor of *Monetary Times*, *Monetary Times* (9 February 1883) 885; See also *House of Commons Debates* (18 May 1898) at 3254

<sup>166</sup> Letter of Christie & Co. to Laurier (17 February 1906) *Laurier Papers*, PAC MG 26, Vol. 403, Reel c-850, No. 107234. See also letter of Soclean Co. to Laurier (9 August 1907) *Laurier Papers* PAC MG 26, Vol. 470, Reel c-850, No. 127611 referring to the fact that many people were compelled to leave Canada following the bursting of the Toronto boom.

inability of debtors to obtain a release of their old debts meant fewer customers for creditors wishing to sell goods on credit.<sup>167</sup> Further, the lack of discharge drove debtors to “means flavouring of trickery and deception” in order to re-establish their livelihood.<sup>168</sup> In an effort to avoid the enforcement of a judgment the debtor or the assets often disappeared.

The intensity of competition between creditors increased dramatically without a bankruptcy law. Without a discharge, “it is in the power of one vindictive creditor to hinder the debtor from making further restitution to his other creditors. Is this wise or right?”<sup>169</sup> Other creditors “not attempting to blackmail but are acting honestly, obtain a reduced amount and they are injured .... thus the preferential creditors who are paid some special amounts get something more while the other creditors get less than they should receive.”<sup>170</sup> Thus while a discharge could be sold as assisting poor unfortunate debtors, creditors who had experienced the brief absence of discharges found that the provision could operate in their favour.

E.R.C. Clarkson, a Toronto accountant, and one of the drafters of the 1883 Toronto Board of Trade Bill,<sup>171</sup> published a pro bankruptcy pamphlet in 1885 outlining the advantages of a bankruptcy regime. In referring to the discharge, Clarkson

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<sup>167</sup> “The lack of any legal discharge for an old debt may prove an injustice towards new creditors.” Letter of J.L.F. to editor of *Monetary Times*, *Monetary Times* (9 February 1883) 885.

<sup>168</sup> “Insolvency Legislation” (1902) 35 Can. L.J. 179 at 180.

<sup>169</sup> Letter of J.L.F. to editor of *Monetary Times*, *Monetary Times* (9 February 1883) 885.

<sup>170</sup> *House of Commons Debates* (5 May 1887) 284. *House of Commons Debates* (5 May 1887) at 284 (Edgar). “There are always some creditors who find it in their interest to hold out in order that they may be paid in full.” (Emphasis added). *House of Commons Debates* (5 May 1887) at 291 (Dupont). See also *House of Commons Debates* (6 March 1883) at 122. For an example of a debtor who was unable to obtain a voluntary discharge from his creditors, see Letter of George Smith to Macdonald (13 October 1885) *Macdonald Papers* PAC MG 26A, Vol. 420, Reel c-1773, No. 203878-203880.

<sup>171</sup> Toronto Board of Trade, *An Act to Provide for the Equitable Distribution of Insolvent Debtors' Estates*, Prepared in Compliance with a Resolution passed by the Board of Trade of the City of Toronto (Toronto, June 1883) (by H.W. Darling, W.F. McMaster, R.W. Elliot, Hugh Blain Committee of Toronto Board of Trade, in Conjunction with Alex Turner, W.F. Findlay, Committee of the Hamilton Board of Trade, assisted by E.R.C. Clarkson, Accountant and D.E. Thomson, Solicitor).



recognized the need to guard against the contingencies of business. Businesses were subjected to a number of uncontrollable factors and the discharge was a form of statutory insurance.

Commerce flourishes by circumstances, contingent, transitory, almost as liable to change as the wind .... Failure may be caused by the insolvency of others, by errors of judgment, by many causes, which one cannot control, and yet we may be honest, have the dearest and strongest ties to stimulate our exertions, and fail.<sup>172</sup>

A debtor was "subject to vast fluctuations and influenced by occurrences which no human foresight can estimate, provide against, or avoid".<sup>173</sup>

However, in outlining the advantages of a bankruptcy regime, Clarkson made it clear that the legislation served creditor interests. He argued that the legislation was "more calculated to protect the creditor than the debtor". While the discharge offered a debtor "an avenue of escape from the positive slavery of irretrievable debt" it also provided a "wider and more practical means of detecting and punishing fraud".<sup>174</sup>

<sup>172</sup> E.R.C. Clarkson, "Bankruptcy Legislation" (1885). The insurance of a discharge ensured that businessmen would be able to re-emerge from their debts and return to the world of commerce where they would make valuable contributions. See Letter of John Livingstone to editor of *J. of Commerce* (21 May 1894) in "Insolvency Laws" *J. of Commerce* (25 May 1894) at 1075, 1076. By 1894, the Journal of Commerce recognized that despite the hopes that a new bankruptcy law would provide a deterrent to over trading, "attempts to make men moral by Civil statute must prove ineffectual". "Bankruptcy Legislation" *J. of Commerce* (16 February 1894) 37; *House of Commons Debates* (18 May 1903); "Insolvency" *J. of Commerce* (30 June 1882) 621.

<sup>173</sup> E.R.C. Clarkson, "Bankruptcy Legislation" (1885) 8, 14. Clarkson had assisted the Toronto Board of Trade in preparing their Bill in 1883. The recognition of unfortunate circumstances was also addressed by T.G. McMaster, "A Dominion Insolvency Act" (1899-1900) 7 *J. Can. Bankers' Assoc.* 128 at 133. See also *House of Commons Debates* (18 May 1903) 3250 (Sproule East Grey). Business failure was attributed in many circumstances to uncontrollable influences. See also "Bankruptcy Legislation" *J. of Commerce* (23 December 1892) 985. For somewhat of a shift in view compare "Causes of Insolvency and Business Failure" *Monetary Times* (5 January 1882) 743 and "Causes of Business Failures" *Monetary Times* (29 March 1895) 1259.

<sup>174</sup> E.R.C. Clarkson, *Bankruptcy Legislation* (Toronto: 1885) at i.

Clarkson acknowledged that the prior legislation seemed to allow dishonest debtors to escape with a perfunctory application to a local judge. In part, the fault lay with county court judges who had defeated the true intent of the legislation. According to Clarkson, judges had improperly exercised their discretion and allowed dishonest debtors to obtain their discharges. These local judges had been “trammelled by sectional considerations”. The solution lay in new legislation which would ensure that the power to grant the discharge would be vested in higher courts.<sup>175</sup>

While appeals for a bankruptcy law discharge were often framed in terms of higher notions of forgiveness with an emphasis placed on the plight of debtors and their dependents, the lack of a discharge had a specific effect on creditor interests. Members of Parliament remarked that it was not debtors who demanded bankruptcy reform.<sup>176</sup> While most reform Bills between 1880 and 1884 specifically excluded the discharge, after 1885 all Bills contained a provision to release a debtor from his debts. By 1885, there was an implicit recognition that debtors must be offered some incentive to make an early assignment of their assets to an assignee for distribution. For example, the discharge formula in the 1885 and 1887 Bills created an incentive for debtors to assign early.<sup>177</sup> Not all, however, agreed with the merits of the discharge.

## 2 Arguments Against the Discharge

Opponents of bankruptcy law argued that “the country has profited by the repeal of the Act”. Members of Parliament claimed that debtors and creditors conducted business on a more responsible basis after repeal.<sup>178</sup> As no discharge was available under

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<sup>175</sup> *Ibid.* at 4-8.

<sup>176</sup> *Debates of the Senate* (17 April 1894) at 236 (Gowan); *Debates of the Senate* (19 June 1894) at 593 (McCallum).

<sup>177</sup> “[T]here should be an inducement to a man, when he gets into difficulty, to place his affairs honestly in the hands of his creditors, knowing that the law will give him a discharge if he has acted honestly.” *House of Commons Debates* (5 May 1887) at 285.

<sup>178</sup> *Debates of the Senate* (17 April 1894) at 240 (Kaulbach). Others noted that business was conducted on a more “conservative line”. “The conservative course which we have taken is the best and we

provincial law, debtors were, according to the *Monetary Times*, encouraged to act fairly with their creditors because if they did not “they cannot free themselves from liability for their debts”.<sup>179</sup> Repeal of the *Insolvent Act of 1875*, it was argued, had eliminated reckless credit.<sup>180</sup> In an 1882 letter to John A. Macdonald, one merchant celebrated the demise of the *Insolvent Act*. Its abrogation, according to the author, had done more for the prosperity of the country than Macdonald’s National Policy.<sup>181</sup>

Throughout the 1880s and 1890s Members of Parliament continued to make the argument that debtors had a responsibility to repay debts:

[E]very man ought to be responsible for his liabilities, and ought to pay his debts. He uses his own judgment when he goes into debt .... I do not think it is right for the representatives of the people in any Parliament in the world to interfere to protect any man from the consequences of failing to pay the debts which he has contracted; it is unfair to men who have dealings with each other.<sup>182</sup>

The notion of individual responsibility was “a good and sound principle, an old principle [and] a very moral principle against which nobody can say anything”.<sup>183</sup> A debtor who went into business knowing that the policy of the law was to provide a discharge did not have the “same moral incentive to pay his debts in full as if the law recognized his

had better continue in the line in which we have done during the past few years.” *Debates of the Senate* (17 April 1894) at 236 (Mr. Power); *Debates of the Senate* (17 April 1894) at 237 (Gowan).

<sup>179</sup> Creditors on the other hand who advanced credit unwisely “will have themselves to blame if their debtors do not ultimately have to pay or go out of business”. “Without a Bankrupt Law” *Monetary Times* (16 July 1880) 67.

<sup>180</sup> *Debates of the Senate* (17 April 1894) at 240 (Kaulbach). “I think it is more likely that honesty will be promoted without an insolvency law than by any artificial system providing for the insolvency of the debtor and distribution of the estate.” *House of Commons Debates* (29 March 1882) at 608 (Boulton).

<sup>181</sup> Letter of E. Giles to John A. Macdonald (15 May 1882), *Macdonald Papers* PAC MG 26A, Vol. 384 pt 1, Reel c-1756, No. 180377-180328.

<sup>182</sup> *House of Commons Debates* (5 May 1887) 287 (Bechard). See also p. 290. In 1895 it was stated that the granting of a discharge was “immoral. I do not see why we should interfere and make it legal for a man not to pay his debts.” *Ibid.*, (29 May 1895) at 155 (McDonald C.B.)

<sup>183</sup> *House of Commons Debates* (5 May 1887) at 287 (Bechard).

obligation to do so". The discharge provisions were an "evasive repeal" of the requirement to pay debts in full. Bankruptcy law weakened the "moral effect" of the obligation to repay creditors.<sup>184</sup> A debtor had no vested right to his business as it belonged to his creditors until they were paid in full. As there was little chance of full payment being made:

Let it once be recognized that an insolvent is commercially a dead man, and that his estate should be wound up as if he were also physically dead....<sup>185</sup>

After repeal of the federal insolvency legislation, opponents of the discharge continued to make the argument that debtors, "in almost every case" had the option to approach their creditors to obtain a consensual discharge. If a debtor failed due to a misfortune in business, or sickness in the family, there was a "legitimate remedy in the large hearty sympathies of our fellow citizens".<sup>186</sup> Only responsible debtors obtained extensions from their creditors. Others were blameworthy and did not deserve special treatment.<sup>187</sup> After all, the majority of those who failed were "men who spend their evenings in saloons [and] who spend their days at horse races and in idleness".<sup>188</sup>

<sup>184</sup> Letter of A. McLeod to Editors of Canada Law Journal in "Insolvency Legislation" (1902) 35 Can. L.J. 411 at 413. To grant to an insolvent trader the legal means for discharging his debts was "immoral". *Debates of the Senate* (29 May 1895) at 155.

<sup>185</sup> "A New Insolvent Act" (1893/94) 1 Can. Bankr. Assoc. 193 at 195.

<sup>186</sup> *House of Commons Debates* (5 May 187) at 286 (Paterson, Brant). See also *House of Commons Debates* (6 March 1883) 121 (Cameron, North Victoria).

<sup>187</sup> "Every honest debtor can get his discharge from his creditors without the necessity of a sweeping whitewashing Act like this." *House of Commons Debates* (6 March 1883) at 121 (Cameron, North Victoria). See also at 120 (White, Cardwell; Cameron, North Victoria).

<sup>188</sup> *Debates of the Senate* (19 June 1894) at 597 (Ferguson, Welland).

The solution of creditor forgiveness was consistent with the view that debtor-creditor affairs were a private matter.<sup>189</sup> It was not right for Parliament to interfere in private contracts and protect debtors from the consequences of debt.<sup>190</sup> The discharge compelled creditors, against their will, to accept part payment for settlement of the entire debt.<sup>191</sup> The basis of legislation in civilized countries had been "never to impair contracts which have been legitimately made under existing laws".<sup>192</sup>

Character continued to play an important role. Bankruptcy law shifted the fundamental base of credit decisions:

The practical effect of an insolvency law is to shift the only *just* grounds on which credit ought to be dispensed, namely integrity and ability of the recipient, to the *false* ground furnished by the *assurance* of getting an equal division of the assets of a debtor in case of insolvency. Who does not recognize the far reaching evils of such a result.<sup>193</sup>

Without a bankruptcy law, creditors had to "know the character of the man to whom he is ... to sell goods."<sup>194</sup>

Arguments against the discharge based upon individual responsibility and the importance of character can be taken at face value as representing an ideology of high

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<sup>189</sup> "For centuries laws have been enacted to regulate affairs between debtor and creditor, but I believe if the parties were left to settle such affairs themselves, they would be much better arranged." *House of Commons Debates* (29 March 1882) at 608 (Wallace, Norfolk).

<sup>190</sup> *House of Commons Debates* (5 May 1887) at 287 (Bechard).

<sup>191</sup> *House of Commons Debates* (5 May 1887) at 285 (Paterson, Brant).

<sup>192</sup> *Debates of the Senate* (29 May 1895) at 150. For example, the Montreal Board of Trade was of the view in 1883 that the issue of a discharge be "left entirely to the option of the creditors". "Insolvency Legislation" *J. of Commerce* (2 February 1883) 778.

<sup>193</sup> Letter of Thos. Ritchie to Editor of *Monetary Times* (2 April 1894) in "Fallacy of Insolvency Laws" *Monetary Times* (13 April 1894) 1275. Ritchie was the author of an 1885 pamphlet entitled "Fallacy of Insolvency Laws" referred to in chapter 5. It was claimed that creditors were more careful before extending credit, taking the time to know the character of the debtor before advancing funds. *Debates of the Senate* (17 April 1894) at 236 (Mr. Power).

<sup>194</sup> *Debates of the Senate* (17 April 1894) at 237 (Gowan).

ethical standards in credit relationships. However, on further analysis moral claims can be linked to a protectionist sentiment. The discharge encouraged recklessness in trade and enticed inexperienced men into business. The bankruptcy law discharge introduced a new form of competition for more established trading houses.

“Ridiculous competition” caused the downfall of not only the inexperienced new entrants but also led to the demise of established businesses. It was therefore better that the discharge not be enacted for its enticement would lead to the failure of many.<sup>195</sup> The repeal of the law had “restored confidence and induced men of capital to invest amongst us as they felt assured they would not be wiped out by a lot of bankrupt speculators”.<sup>196</sup>

Thomas Ritchie, a well known opponent of insolvency laws and author of an 1885 anti-bankruptcy law pamphlet, complained that bankruptcy laws had the evil effect of shifting credit from its true basis. “Unscrupulous and scheming traders” are thus assisted by the generous dispensers of credit.<sup>197</sup> A bankruptcy law:

gave an opportunity for persons of no standing whatever to enter into speculative ventures by importing largely and thus trading on the capital of British and foreign merchants and manufacturers, which these would not permit were they not secured by a law in this country providing for a *pro rata distribution of assets in case of insolvency*.<sup>198</sup>

In a pamphlet, “Fallacy of Insolvency Laws and Their Baneful Effects,” 1885, he similarly argued that with a bankruptcy law in place:

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<sup>195</sup> *House of Commons Debates* (5 May 1887) at 290 (Dupont); *Debates of the Senate* (29 May 1895) at 153.

<sup>196</sup> Letter of E. Giles to John A. Macdonald (15 May 1882), *Macdonald Papers* PAC MG 26A, Vol. 384 pt 1, Reel c-1756, No. 180377-180378.

<sup>197</sup> Letter of Thos. Ritchie to Mackenzie Bowell (April 1885) *Macdonald Papers* PAC MG 26A, Vol. 152 pt. 1, Reel c-1565, No. 61881-61885

<sup>198</sup> Letter of Thos. Ritchie to Editor of *Monetary Times* (2 April 1894) in “Fallacy of Insolvency Laws” *Monetary Times* (13 April 1894) 1275. (The editorial note attached to the letter indicates that “Mr. Ritchie will find himself in a decided minority among merchants ... But he will not much mind this having the courage of his convictions.”) For a detailed reply to Ritchie’s letter, see John Livingstone letter to Editor of *J. of Commerce* (21 May 1894) in “Insolvency Laws” *J. of Commerce* (25 May 1894) at 1076, 1077.

importers with very limited capital, and often with none at all, are enabled and permitted to speculate illegitimately on the capital of others to the great embarrassment and injury of those other importers who are striving to do an honest and fair business in proportion to their means.

While Ritchie never discloses explicitly the reason for his strong views on the subject, he was one of the principal importers in the city of Belleville.<sup>199</sup>

Opposition to the bankruptcy discharge might be linked to the growing anti-competition trend of the 1880s and 1890s. During this period associations attempted to reduce competition through price fixing agreements. Included in the anti-competitive activities were campaigns by local merchants associations to limit the number of stock sales by debtors whose assets were sold at cut rate prices. Further, local associations pressured wholesalers to "stop extending credit to incompetents or price cutters setting up in business to compete with established customers". Lists of "deadbeats were compiled and local merchant associations organized restrictions on credit".<sup>200</sup>

It is not surprising, therefore, that many celebrated the exodus of debtors to the United States. To the charge that the country was losing valuable traders, opponents of the discharge argued that it was better for the country that dishonest debtors left.<sup>201</sup> Repeal gave those "who are the fittest to remain" an opportunity to rid the economy of

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<sup>199</sup> See letter to John A. Macdonald from M. Bowell (4 April 1885) *Macdonald Papers*, PAC MG 26A, Reel C 1565 which discloses that Ritchie was an important importer in Belleville. For other works of Ritchie, see Letter to John A. Macdonald (31 March 1885) *Macdonald Papers*, PAC MG 26A, Reel c-1565, No. 61876; Letter to MacKenzie Bowell (April 1885) *Macdonald Papers*, PAC MG 26A, Reel c-1565, No. 61881; Letter to John A. Macdonald from Belleville Board of Trade, Thomas Ritchie President (31 March 1885) *Macdonald Papers*, PAC MG 26A, Reel c-1565, No. 61884; Letter to John A. Macdonald (24 April 1885) *Macdonald Papers*, PAC MG 26A, Reel c-1565, No. 61893; *Insolvency Law Pamphlets*, *Macdonald Papers* PAC MG 26A Reel c-1565, No. 61895 and 61897.

<sup>200</sup> M. Bliss, *A Living Profit: Studies in the Social History of Canadian Business 1883-1911* (1974) at 38; M. Bliss, *Northern Enterprise Five Centuries of Canadian Business* (Toronto: McClelland and Stewart Inc., 1987) at 360; This aspect of the argument surfaced in 1894 when the Senate debated the required minimum level of dividend. It was argued that the lower the level of dividend the more goods would be thrown onto the market to the disadvantage of the honest trader. *Debates of the Senate* (19 June 1894) at 597 (Ferguson, Welland).

<sup>201</sup> "It is no misfortune to the country to lose men who will not do justice to their creditors." *House of Commons Debates* (5 May 1887) at 287 (Bechard).

“the weak and incapable men”.<sup>202</sup> The inability of debtors to return to the economy was a positive aspect of the “law of natural selection”. The discharge would only detract from the “aggregate wealth of the community” by allowing incompetents to begin again. Allowing debtors to obtain a release would “deliberately invert the law of natural selection, and start a crusade against nature”.<sup>203</sup>

The debate over the discharge continued to rage as a conflict of values, pitting forgiveness against individual responsibility. However, in the 1880s and 1890s there was a recognition that the discharge had an impact on creditor interests. Supporters focused on the fact that the discharge provided incentives for debtors to co-operate and would reduce fraud. Opponents used arguments about character and individual responsibility to craft a claim that was essentially protectionist in nature. The bankruptcy discharge introduced a new form of competition and allowed upstart entrepreneurs to obtain credit and threaten older firms. The other aspect of bankruptcy law, the distribution of the debtor’s assets in a fair and equitable manner, also reveals a conflict over the effects of the legislation. Local creditors benefited from repeal while those trading beyond local markets urged a national law.

*B Preferences and the Distribution of the Debtor’s Assets*

Beyond the discharge, the debate also focused on the need for a national law providing for an equitable distribution of the debtor’s assets. During 1867-1880 many feared that the repeal of the federal legislation would lead to a return to a race to the debtor’s assets and a recurrence of preferences. Chapter 5 discussed the clash between the interests of those who continued to trade on a local basis and creditors who extended credit across regional and provincial boundaries. Repeal was emblematic of the weakness of the national economic vision and suggests that some creditors may have favoured a return to the system of grab law and preferences.

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<sup>202</sup> “Without a Bankruptcy Law” *Monetary Times* (16 July 1880) 67.

<sup>203</sup> “A New Insolvent Act” (1893/94) 1 *J. Can. Bankers’ Assoc.* 193 at 195.



After 1880, it was open to the provinces to enact legislation that dealt with the distribution of the debtor's assets.<sup>204</sup> However, the common law scramble and preferences were tolerated in some provinces for several years after 1880. This reflected a more traditional economy rooted in localism that contrasted sharply with the national vision. Between 1880 and 1903 national and local visions of the economy continued to be discussed.

### 1 The National Economic Vision and the Voice of Foreign Creditors

Supporters of a national law appealed to the apparent transformation of the economy. In the "so-called" bygone era of local trade, transactions were of "very small character" and bankruptcy reform had not been so vital. However with the "great advance we have made in trade and commerce" bankruptcy reform was an essential issue.<sup>205</sup>

The national economic vision was strengthened by appeals to Canada's new nationhood:

We are all proud to be able to say, since a recent period, that Canada has become a nation. We find expressions of that sort in speeches of many of our most eminent public men. Now, if Canada has become a nation ... it seems to me, she should act as a nation, and a civilized nation, at this time of the nineteenth century, ought to have a law of this kind on its Statute books.<sup>206</sup>

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<sup>204</sup> Preferences and the equitable distribution of the debtor's asset are fundamentally linked. The *Monetary Times* published the story of a debtor who had paid out two favoured creditors at the expense of the bulk of the other creditors. The paper noted that while it was possible to blame the debtor in this particular case, the "real blame lies with the law which makes such a distribution possible and leaves other creditors without redress". The solution, according to the paper was to enact legislation which provided for the "rateable distribution of the effects of all insolvents". "Wanted— A Better Law" *Monetary Times* (18 November 1881) 608, 609; "Wanted— A Better Law" *Monetary Times* (25 November 1881) 688.

<sup>205</sup> *House of Commons Debates* (18 April 1894) at 246.

<sup>206</sup> *House of Commons Debates* (17 March 1894) 2020 (Fortin).

The Canadian nation had been transformed by the millions that had been spent on an improved infrastructure, including the new transcontinental railway of 1885. The improvements opened the door for increased national and international trade:

Before our eyes, with a rapidity never before dreamed of, improved facilities of communication and transport are drawing the whole world closer together. The world's commerce is the prize for which not any great manufacturer's strive but nations now strive ... International law is slowly emerging from chaos; and will never again contract its sphere. Inevitably it must keep pace with the ever widening scope of international commerce.<sup>207</sup>

Canada could not take advantage of the new opportunities for expanded trade until Parliament reformed the bankruptcy laws. The confused state of the laws defeated the very purpose of the new infrastructure. Uniformity would encourage "freer and safer trade".<sup>208</sup>

The Canadian economy continued to be transformed. Monod's study of the evolution of shop-keepers traces the growth of the mass markets and the shift in distribution patterns away from merchants towards manufacturers with a more national outlook. In the 1880s and 1890s major structural changes began to occur in the distribution of goods. This included direct marketing, manufacturer controlled advertising and mass merchandising. By 1900, large department stores began to challenge independent shopkeepers. While some existed in the 1870s, by the 1890s the "power of their size" began to manifest itself. Chain stores were the fastest growing retail organization in early twentieth century Canada.<sup>209</sup>

Taylor and Baskerville also describe:

the decline of both the general wholesaler and the small retailer, the growth of chain stores and mail-order catalogues, brand name packaging, and the advertising industry .... The railway network helped make possible direct linkages between manufacturers and retailers and provided urban merchants

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<sup>207</sup> D.E. Thomson, "Canadian Bankruptcy Legislation" (1902) 1 Can. L. Rev. 174 at 178.

<sup>208</sup> *Ibid.* at 177; *Debates of the Senate* (12 June 1894) at 513 (Ferguson); See also "Insolvency Legislation" (1902) 35 Can. L.J. 179 at 180.

<sup>209</sup> D. Monod, *Store Wars: Shopkeepers and the Culture of Mass Marketing 1890-1939* (Toronto: University of Toronto Press, 1996) at 103, 116, 124

access to rural communities. Standardization of products and product quality abetted the efforts of enterprising retailers seeking to build national market systems.<sup>210</sup>

The Railways not only offered a new distribution scheme for independent retailers but the lines also brought increasing competition from stores which were becoming increasingly specialized and threatening to the independent proprietor.<sup>211</sup> Thus bankruptcy law was a necessary commercial statute designed to encourage and foster national markets.

It was important to establish uniform legislation because great distances separated many businesses. Manufacturers located in the Atlantic region were interested in debtors' estates on the Pacific Coast.<sup>212</sup> "We want a law that will govern this question from sea to sea."<sup>213</sup> The solicitor for the Canadian Furniture Manufacturers' Association wrote a lengthy letter to the *Monetary Times* lamenting the lack of a national law. "Businessmen whose transactions are carried on throughout the various provinces of the Dominion keenly feel the want of uniformity of the law."<sup>214</sup>

A federal measure was required in order to prevent provincial legislatures from adopting measures which favoured local creditors at the expense of distant ones:

The consequence is that we have manufacturing houses near the Atlantic coast deeply interested in debtors' estates on the far Pacific and yet if they

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<sup>210</sup> G.D. Taylor & P.A. Baskerville, *A Concise History of Business in Canada* (Toronto: Oxford University Press, 1994) at 314.

<sup>211</sup> I. Drummond, *Progress Without Planning: The Economic History of Ontario: From Confederation to the Second World War* (Toronto: University of Toronto Press, 1987) at 278.

<sup>212</sup> House of Commons Debates (17 April 1894).

<sup>213</sup> *House of Commons Debates* (12 June 1894) at 507. The *Journal of Commerce* recognized in 1887 that "business transactions are carried on by creditors who trade in all the different Provinces, and who ought to be protected by the operation of a law dealing with insolvents, uniform in its operation throughout the Dominion". "Insolvency Legislation" *J. of Commerce* (13 May 1887) 1060; See also "Insolvency Legislation" *J. of Commerce* (13 May 1887) 802. See also "An Insolvency Act Wanted" *Monetary Times* (3 November 1893) 543.

<sup>214</sup> Letter of Solicitor for the Canadian Furniture Manufacturers' Association to Editor of the *Monetary Times* (17 October 1893) in "Necessity of Bankruptcy Legislation" *Monetary Times* (20 October 1893) 484.

do not take particular action within a limited time they are debarred from participating in those estates.

The federal Parliament had to act "so that those who are residing in one province will not be able to absorb the whole of the estate to the disadvantage of those who are interested in that same estate living at the other extremity of the Dominion".<sup>215</sup> For example, one member of Parliament referred to the case of a trader in Toronto who "sold his stock for cash, paid one or two local creditors and went to the United States. The other creditors got nothing."<sup>216</sup>

Foreign creditors had an even more difficult time competing with local creditors. One Canadian article suggested that it was a common practice for Canadian creditors to benefit at the expense of foreign ones:

Only a few months ago, the general sympathy of the Canadian commercial community was on the side of offenders against common mercantile morality, who put into practice the questionable expedient of pilfering Peter to pay Paul, by emptying the pockets of their European creditors to meet the claims—preferential or otherwise—of the Canadian banks or syndicates ....

According to the *Monetary Times* the state of the law protected the "the operations of the dishonest Canadian trader at the expense of the foreign trader".<sup>217</sup>

In 1895, the government claimed that its reform Bill faced opposition because:

...foreign creditors have been deprived of their share of the estate of debtors. In those provinces where there is no such law and the creditor can take advantage of his position and his proximity to the debtor, and thereby get an assignment by which he can secure his debts at the expense of another, that is a reason why they would oppose a general act.<sup>218</sup>

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<sup>215</sup> *Debates of the Senate* (17 April 1894) at 238 (Lougheed); *Debates of the Senate* (29 May 1895) at 150 (MacInnes); *Debates of the Senate* (29 May 1895) at 161 referring to the fact that local creditors tended to receive more of the debtor's assets than those trading to remote regions of the country.

<sup>216</sup> *House of Commons Debates* (17 March 1898) at 2008 (Fortin).

<sup>217</sup> "Reform in Bankruptcy Laws" *Monetary Times* (12 November 1897) 637.

<sup>218</sup> *Debates of the Senate* (29 May 1895) at 163 (Bowell). It was also acknowledged in the same speech that the government was under pressure to place on the books a measure to protect foreign

The legislative history of this period has illustrated that Canadian Boards of Trade were largely responsible for the submission of numerous reform proposals. However, foreign merchants also demanded reform. English merchants who believed they were dealing with their "own kindred on similar principles of mercantile morality as are legalized in the United Kingdom," soon discovered that the state of provincial law operated to their detriment.<sup>219</sup> As early as 1881, English merchants submitted a petition to Prime Minister Macdonald indicating that, "creditors, especially at a distance are practically at the mercy of the dishonest debtor...".<sup>220</sup> Thus, foreign merchants and Canadian wholesalers were "unable to protect their own claims against the scheming and rascality of dishonest debtors".<sup>221</sup>

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merchants. See also *House of Commons Debates* (17 March 1898) at 2028 referring to foreign creditors fearing that other creditors would be paid ahead of them.

<sup>219</sup> "Reform in Bankruptcy Laws" *Monetary Times* (12 November 1897) 637. Naylor argues that British wholesale houses lost large sums after the repeal of the federal legislation. See T. Naylor, *The History of Canadian Business* vol. 1 (Toronto: James Lorimer, 1975) at 82; "Interesting Paper on the Subject of Insolvency" *Toronto Mail* (23 April 1881) 10 in Macdonald Papers, Ontario Archives MG 335, Reel 10, No. 11059. "I know that there is a strong feeling on the part of the mercantile community in England that an Act of this kind should be passed in order that they may know where they stand." *Debates of the Senate* (12 June 1894) at 508 (Clemow).

<sup>220</sup> *Macdonald Papers*, PAC MG 26A, Reel c-1497, No. 11056, petition (22 June 1881). See also Reel c-1568 No. 66364-66369. See also *Monetary Times* (8 July 1881) 42. For other relevant correspondence from England in 1881, see Reel c-1497, No. 11052, letter from Chamber of Commerce, Manchester England to S. Morley, House of Commons, England (18 March 1881) Reel c-1497, No. 11058, letter from Chamber of Commerce of Liverpool to S. Morley, House of Commons, England (21 June 1881); Reel c-1568, No. 66361, letter from S. Morley to John A. Macdonald (18 December 1881) requesting an interview with the Prime Minister and to present a memorial from the merchants of Liverpool, Manchester, and London, "in reference to the existing state of the Insolvency Laws in Canada". Reel c-1497 No. 110591 letter of Rylands and Sons Limited, London to John A Macdonald (12 May 1881).

<sup>221</sup> "Proposed Canadian Insolvency Legislation" *Monetary Times* (4 July 1902) 15; "That creditors and especially those at a distance are practically at the mercy of the debtor, experience having shown that there is no available means of preventing debtors from disposing of all their assets by preferential payments or otherwise favoured Canadian Creditors." Memorial from Trade Association of Manchester to Prime Minister Macdonald (16 May 1884) *Macdonald Papers*, PAC MG 26A, Reel c-1497, No. 11004 and 11005.

Between 1880 and 1903 there was significant English interest in the state of Canadian bankruptcy law. Both Macdonald and Laurier received pleas from English merchants.<sup>222</sup> Despite petitions, resolutions of English and Canadian associations,<sup>223</sup> articles in English journals<sup>224</sup> and direct meetings with politicians,<sup>225</sup> little headway was made in enacting a federal law.

In particular, English creditors complained about preferential payments to local creditors. In 1885, Macdonald justified the appointment of the Special Committee by

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<sup>222</sup> See e.g. Letter of European Exporters' Association of Toronto to Laurier (17 May 1899). The Association was formed to protect the interests of British Exporters doing business with Canada. See *Laurier Papers* PAC MG 26, Reel c-765, No. 33672; Letter of The Corporation of Colonial and General Agencies to Laurier (4 July 1902) *Laurier Papers* PAC MG 26, Reel c-794, No. 66354.

<sup>223</sup> Resolution of British Empire League, requesting a law abolishing preferences and providing for a pro rata distribution. "Canadian Insolvency Legislation" Report of Meeting of the British Empire League (4 December 1895) 10. "Canadian Insolvency Legislation" *Monetary Times* (17 January 1896) 916. For a copy of a subsequent resolution of the League passed in 1897, see "Insolvency Legislation" *Monetary Times* (24 December 1897). See also Resolution of the Textiles Section of the London Chamber of Commerce, reprinted in "Without an Insolvency Act" *Monetary Times* (23 May 1884). Resolution of Corporation of Colonial and General Agencies, on behalf of British Exporters in "Canadian Insolvency Law" *Monetary Times* (15 August 1902) 208. See also report of resolution of Canadian Boards of Trade at "Equitable Insolvency Laws" *Monetary Times* (11 July 1902) 47.

<sup>224</sup> "The discreditable preferences under the Canadian law have come strikingly to the front within the past few weeks, and are now occupying the attention of several Chambers of Commerce in this country." The London Chamber of Commerce Journal, cited in "Without an Insolvency Act" *Monetary Times* (23 May 1884) 1314. See also, letter to Prime Minister Laurier, from the Montreal Board of Trade (10 March 1899). "You doubtless became aware when visiting Great Britain of the unfavourable impression of Canadian business morality prevailing in commercial circles in that country owing to the absence here of a general insolvency law, and utterance in trade journals there and intimations from business correspondents continue to show clearly how prejudicial to the credit of Canada is the absence of legislation to creditors in Great Britain a fair share of Canadian insolvent's estate." *Laurier Papers*, PAC MG 26, Reel c-752, No. 18597.

<sup>225</sup> "The English merchants who have connections with Canada feel the want of an insolvent law in this country. The deputation that waited on Sir John Macdonald, in London made this plain." *Monetary Times* (8 July 1881) 42. "The commercial classes in England also have called the attention of the Government to the fact that there is no law relating to bankruptcy and insolvency, and have specially referred to what was alleged to be the opportunity of traders to grant undue preferences." *House of Commons Debates* (6 February 1885) at 47 (Macdonald). See also "Insolvency Legislation" *J. of Commerce* (18 February 1898) 242 outlining the various efforts of English merchants.

pointing to the fact that “the commercial classes in England ... have specially referred to what was alleged to be the opportunity to traders of granting undue preferences”.<sup>226</sup> In a meeting of the British Empire League in 1894 to discuss the state of Canadian Insolvency laws, a member raised the following problem:

A warehouseman either in England or in Canada might have done business with his Canadian customer for years ... but he could not be certain when he sold him a parcel that before the time came to pay for the goods the customer might not have given a preferential claim, or made a preferential assignment covering the merchant's goods in payment of an old debt, or to his bankers....<sup>227</sup>

Charles Tupper, a Conservative member of Parliament and former High Commissioner to England stated that he had been approached by English merchants who indicated the “great insecurity in trading” with Canada on account of being subjected to risk and losses:

I had occasion again and again to listen with great mortification to statements made by commercial men in ... [London] ... pointing out ... the losses they had sustained, because a few parties in Canada had obtained their property and were enabled to divide it among their friends and others....<sup>228</sup>

A Member of Parliament in 1903 referred to several complaints by English merchants who indicated that “there was ... no protection to them when they sold goods to Canadians, because, in the event of failure, the Canadian creditors gobbled up the estate and there was practically nothing left for anybody”.<sup>229</sup>

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<sup>226</sup> *House of Commons Debates* (6 February 1885) 47 (Macdonald).

<sup>227</sup> “Canadian Insolvency Legislation” Report of the Meeting of the British Empire League, December 4, 1895, p.7 A subsequent meeting of the League was reported on in 1897 in the *Monetary Times*. See “Insolvency Legislation” *Monetary Times* (24 December 1897). See also Petition of UK Merchants complaining that there were no means available to prevent preferential assignments. *Macdonald Papers*, PAC MG 26A, Reel c-1568, No. 66364-66369.

<sup>228</sup> *House of Commons Debates* (1 April 1898) at 2926 (Tupper).

<sup>229</sup> *House of Commons Debates* (18 May 1898) at 3249 (Monk).

Distance proved particularly troublesome for English merchants who could not compete with American creditors. "Propinquity ... permit[s] the American seller to see his customer personally, or through his travellers and thus size up his character, surroundings, and standing."<sup>230</sup> A letter from the Canadian High Commissioner in England to the Minister of Justice raised a similar concern:

What is implied by this statement is, that the American trader has better means of protecting himself than the British trader .... the American trader being so much nearer, knows sooner than his English competitor what is going on in this country; and the absence of a general and effective insolvency law enables the American creditor to get an advantage over the British trader, in the event of any assignment or insolvency proceedings.<sup>231</sup>

Canadian importers often favoured trading with American firms as British firms insisted upon more cumbersome and expensive terms of trade.<sup>232</sup>

Not only did greater distances render their collection activities difficult, but creditors had to familiarize themselves with the patchwork of various provincial laws. Foreign creditors were "perplexed and exasperated" in having to consult numerous provincial statutes. Legal advisers to overseas creditors were "obliged to take a preliminary course in the geography of Canada" before rendering an opinion.<sup>233</sup>

When a merchant in London or Berlin, or may be in Australia, or Hong Kong, desires to know what security he will have that his goods will not be taken to pay the home creditors of his debtor, and leave the foreigner in the lurch, it must be obvious that it would be of the greatest importance that he should be able to deal with the Dominion as a unit.<sup>234</sup>

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<sup>230</sup> "Uniform Insolvency Legislation" *J. of Commerce* (22 November 1901) 2134.

<sup>231</sup> Letter of Lord Strathcona, Canadian High Commissioner in England to Charles Fitzpatrick, Minister of Justice (10 December 1902) Department of Justice Papers PAC RG 13, Vol. 2310, File 23/1902.

<sup>232</sup> "Uniform Insolvency Legislation" *J. of Commerce* (22 November 1901) 2134.

<sup>233</sup> B. Russell, "Provisions of the British North America Act for Uniformity of Provincial Laws" (1898) 34 Can. L.J. 513 at 523.

<sup>234</sup> *Ibid.* at 523. See also Petition of UK Merchants to John A. Macdonald, *Macdonald Papers*, PAC MG 26A, Vol. 24, Reel c-1497, No. 11046-11051 which refers to the inability of commercial lawyers to give advice "owing to the confused state of the law, differing as it does in the different provinces". An 1885



The absence of a national law increased the cost of credit and the price of goods.<sup>235</sup> A letter written to Prime Minister Macdonald claimed that Canadian merchants were being economically squeezed at both ends of their transactions. Canadian importers purchased goods on foreign credit “which is said to be suffering from want of legislation”. In attempting to sell their goods across Canada, Canadian importers faced the perennial problem of losing out to more favourably placed local creditors.<sup>236</sup> The absence of national legislation, therefore, increased the cost of goods. All imports bore the double “impost” of risk premium. The British merchant added onto the price to reflect the risk of trading into Canada. Canadian wholesalers who resold the imported goods also added on a premium for the risk of inter-provincial trade.<sup>237</sup>

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federal reform Bill specifically identified uniformity as a goal in its preamble: “The application of the law will be the same all over Canada: The foreign trade of Canada requires uniformity, both in the procedure and in the law: The foreigner will no longer have to study the laws of each province of the Dominion, but he will understand that in dealing with a trader of British Columbia or Prince Edward Island, of Ontario, or Quebec, he is dealing with a trader subject to the law of Canada.” See Bill C-32 *Respecting Insolvency*, 3rd Sess., 5th Parl. (1885). It is unclear why Nova Scotia and New Brunswick were left out of the preamble.

<sup>235</sup> Charles Tupper, “Canadian Insolvency Legislation” Report of Meeting of British Empire League (4 December 1895) at 10. “The people of this country consider that its credit has been injured in England for the want of some such law.” *Debates of the Senate* (29 May 1895) at 156; “[T]he passage of this Bill in my opinion, would greatly promote our credit in foreign countries; it would largely contribute to the growth of confidence on the part of those from whom we might desire to ask credit.” *House of Commons Debates* (17 March 1898) at 2020 (Fortin sponsor of Bill on behalf of the Montreal Board of Trade). See also, *Debates of the Senate* (17 March 1898) 2028, (Mr. Beausoleil); “Canadian Insolvency and Long Credits” *Monetary Times* (5 May 1899) 1449; “Reform in Bankruptcy Laws” *Monetary Times* (12 November 1897) 637; *Monetary Times* (8 July 8, 1881); “Without an Insolvency Law” *Monetary Times* (23 May 1884) 1314; “Insolvency Legislation” (24 December 1897) 815; “Proposed Canadian Bankruptcy Legislation” *Monetary Times* (4 July 1902).

<sup>236</sup> Letter to John A. Macdonald from William Lukes (16 April 1885) *Macdonald Papers*, PAC MG 26A, Reel c-1565, No. 61889.

<sup>237</sup> “Insolvency Legislation” *J. of Commerce* (5 November 1897) 712. Provincial diversity affected the ability of Canadian merchants to obtain credit from overseas. *House of Commons Debates* (17 March 1898) at 2020-2022. A resolution by the Toronto Board of Trade passed on 7 March 1888 referred to the laws of some provinces which allowed debtors to perpetrate fraud and preferences, “thereby injuring the credit of Canada abroad.”. Petition of the Board of Trade of the City of Toronto, 7 March 1888,

Efforts to expand British trade were like “whipping the horses of a coach while ‘slippers’ are left on the wheels”.<sup>238</sup> The English Associated Chambers of Commerce told Macdonald that unless Parliament enacted a bankruptcy law, “it would be a great impediment to trade between Great Britain and the Dominion of Canada”.<sup>239</sup> The standard form petition from English merchants demanding a federal bankruptcy law claimed that if the current state of affairs continued it would “seriously impair the general commercial credit of the Dominion to the great injury of the common interests of the country”.<sup>240</sup>

The absence of reform at the federal and provincial level therefore had a significant impact on distant creditors selling goods in the Canadian market. Despite pressure from foreign creditors, federal legislation seemed only a remote possibility and provincial legislation, designed to cure the problem of preferences was not immediately forthcoming. The lack of reform suggests that the local economy continued to play an important role in late nineteenth century Canada.

## 2 The Local Vision of the Economy and the Tolerance of Preferences

Although the Canadian economy had undergone significant change, many areas continued to operate in traditional ways. Taylor and Baskerville note that despite the growth of department stores and mail order catalogues, many areas of Canada continued to be isolated from the changes. Outside central Canada wholesalers and retailers

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*Macdonald Papers*, PAC MG 26A, Reel c-21566, No. 63195. See also “An Insolvency Law” *J. of Commerce* (3 November 1893) 847.

<sup>238</sup> “Insolvency Legislation” *J. of Commerce* (5 November 1897) 712.

<sup>239</sup> “Sir John A. Macdonald on Canadian Commercial Relations” undated clipping from *The Times* in *Macdonald Papers*, PAC MG 26A, Vol. 165, No. 67380-67381 (File dated 28 November 1885).

<sup>240</sup> See e.g. Petition of UK Merchants, *Macdonald Papers*, PAC MG 26A, Vol. 24, Reel c-1497, No. 11046-11051. The poor state of Canadian legislation led the *Journal of Commerce* to urge the federal government to act “so that Canada may cease to be among creditors abroad, a byword suggestive of unjust preferences [and] antiquated laws”. “Insolvency Legislation” *J. of Commerce* (26 June 1885) 977.

continued to supply local markets in rural areas.<sup>241</sup> Monod calls into question the axiom of business and economic historians that “the maturation of the industrial economy involved the destruction of the personal enterprise”. In fact Monod’s study shows that independent retailers did not disappear with the emergence of mass market merchandisers. He acknowledges the emergence of large national firms; however, his study concentrates on the small proprietorships that succeeded and concludes that the individual shopkeeper transformed the ways of doing business. They were forced through the pressures of competition to emulate the business practices of big businesses.<sup>242</sup>

Even the growth of corporations did not overturn the older paradigm of the economy. Corporations were increasing in number and some in the 1890s saw this as the emergence of a new trend:

[T]oday the most conspicuous economic fact in the world is that what we may call individualism in trade and industry of all kinds is rapidly dying out, while its place is being taken by those very joint stock companies which [Adam] Smith deemed so inefficient, and the growth of which there seems to be hardly any limit.<sup>243</sup>

The author saw corporations being substituted for private effort in production and distribution. “In other words there will be soon no field for individualism in our material affairs.”<sup>244</sup> Others saw the small independent trader being swamped by large corporations making it more difficult to compete. “The tendency, therefore, and it is a very strong one, is towards, the extinction of all small enterprises.”<sup>245</sup> However, these

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<sup>241</sup> G.D. Taylor & P.A. Baskerville, *A Concise History of Business in Canada* (Toronto: Oxford University Press, 1994) at 314.

<sup>242</sup> D. Monod, *Store Wars: Shopkeepers and the Culture of Mass Marketing 1890-1939* (Toronto: University of Toronto Press, 1996) at 99-101.

<sup>243</sup> T. Fyshe, “The Growth of Corporations” (1894-5) 2 *J. of Can. Bankers’ Assoc.* 197.

<sup>244</sup> *Ibid.* Individualism would be restricted to higher spheres of thought, invention, discovery and art.

<sup>245</sup> “A New Insolvent Act” (1893-94) 1 *J. of Can. Bankers’ Assoc.* 193 at 196. Fyshe carried the analysis to an extreme. He envisioned control moving from private firms to that of corporations. Subsequently, he foresaw smaller corporations merging into larger and larger corporations to the extent that

claims were premature. Taylor and Baskerville point out that even in the early 1900s, most business enterprises were "small proprietary firms operating in local markets".<sup>246</sup>

Therefore the world of large corporations trading in mainly urban and national markets was yet to come. Even the completion of the transcontinental railway in 1885 did not overcome the vast political and social differences between the various regions. Regional diversity was advanced as a positive element that should be preserved.<sup>247</sup> Between 1875 and 1910, Canadian markets were small and scattered over great distances.<sup>248</sup> The Winnipeg Board of Trade's response to the Montreal Board's Bill of 1892 illustrates how closely tied merchants remained to the rural economy.

The small merchants scattered throughout the country are dependent entirely upon the farmers, and they in turn have no source of income except their crops. Necessarily the merchant must give credit if he expects to do business, and his ability to meet his liability to the Wholesale Houses who supply him with goods, depends entirely upon the results of each harvest.<sup>249</sup>

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competition would no longer be required. "We are beginning to see the weakness and waste of numerous small organizations, and the folly of competition run mad. Indeed, competition, while it has been of much service to the world, is becoming less and less useful, where not absolutely hurtful, and now begins to give evidence that it is approaching the period of old age .... we may regard the rapid disappearance of competition with comparative equanimity." T. Fyshe, "The Growth of Corporations" (1894-5) 2 J. of Can. Bankers' Assoc. 197 at 208. On this point, Fyshe appears to be advocating a move to larger and more powerful banks. For a rebuttal to the article, see John Knight, "From Another Point of View: Being Some Thoughts About Trade and the Growth of Corporations" (1894-95) 2 J. of Can. Bankers' Assoc. 255.

<sup>246</sup> G.D. Taylor & P.A. Baskerville, *A Concise History of Business in Canada* (Toronto: Oxford University Press, 1994) at 249.

<sup>247</sup> Vipond draws parallels between the desire for regional diversity and the issue of Home Rule. See R. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: SUNY Press, 1986) at 90 [hereinafter Vipond, *Liberty and Community*].

<sup>248</sup> M. Bliss, *Northern Enterprise Five Centuries of Canadian Business* (Toronto: McClelland and Stewart Inc., 1987) at 286-287.

<sup>249</sup> "Report of a Committee of the Winnipeg Board of Trade on a Draft of an Insolvent Act submitted by the Montreal Board" PAC *Department of Justice Files*, RG 13, Vol. 1879, File 438/1892.

The census illustrates that the population continued to be predominantly rural even as of 1901. The shift in favour of an urban population did not occur until after World War I.<sup>250</sup>

Rural opposition continued to play an important role during this period. Members of Parliament pointed to "differences of opinion between the city and the rural constituencies on the subject". Upon repeal, few complaints had emerged from rural Members while urban members demanded reform.<sup>251</sup>

In 1885, the English Associated Chambers of Commerce interviewed Macdonald on his visit to England. Macdonald claimed that despite the various pressures for federal reform he had found it difficult to pursue the matter in the House of Commons. The majority of Members of Parliament "represented rural constituencies and they had all the prejudices of a rural population. The rural population did not like a bankruptcy act."<sup>252</sup> Similarly in 1894 the *Journal of Commerce* reported that the government would not succeed in passing Bill C-4 as representatives of rural districts "may make difficulty when the bill is before Parliament".<sup>253</sup>

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250	Urban	Rural
1871	0.7	3.0
1881	1.1	3.2
1891	1.5	3.3
1901	2.0	3.4
1911	3.3	3.9
1921	4.4	4.4

Richard Pomfret, *The Economic Development of Canada* (Toronto: Methuen, 1981) at 53.

<sup>251</sup> *House of Commons Debates* (29 March 1882) at 608 (Shaw).

<sup>252</sup> "Sir John A. Macdonald on Canadian Commercial Relations" undated clipping from *The Times* in *Macdonald Papers*, PAC MG 26A, Vol. 165, No. 67380-67381 (File dated 28 November 1885). It was pointed out to Macdonald in an 1885 letter that the unanimous resolution of the Tillsonburg Board of Trade against the re-enactment of a bankruptcy law, corroborated Macdonald's statement to the English press that rural constituencies were against a bankruptcy law. See letter of Sinclair to Macdonald (5 March 1885) and Letter of H. J. Caulfield to Macdonald (3 March 1885) in *Macdonald Papers* PAC MG 26A, Vol. 413 pt. 1, Reel c-1770, No. 199648-199651.

<sup>253</sup> "The Insolvent Bill" *J. of Commerce* (10 April 1885) 523. Rural opposition to the discharge also surfaced in the debates in 1887. See *House of Commons Debates* (5 May 1887) at 290 (Dupont).

Conditions of trade differed in rural and local markets. The Winnipeg Board of Trade, in a report that opposed the 1892 Montreal Board of Trade Bill, illustrated the contrast between the newer and established provinces.

In an old and thickly populated Country where there are numerous and easy means of communication with every town or village and when business has become settled and established and is conducted on strict principles, it would be an advantage to have such a law if the machinery is not too cumbersome.

In Manitoba and the Northwest Territories, business conditions did not allow for commerce to be carried out in accordance with the same strict principles that governed the established provinces. In the West, "distances were greater, the population very sparse, and the means of communication slow and exceedingly limited". The proposed insolvency Bill required the institution of numerous legal proceedings all of which were an expense particularly when "the distance of the debtor's place of residence from the Court house would in Manitoba average at least 75 miles". The requirement that the first meeting of creditors had to take place in the district where the debtor resides would involve a great expense to creditors, the majority of whom resided in Winnipeg. This might mean trips of 75 to 150 miles in order to attend a meeting of creditors.

The premise of the equal treatment of all creditors contained in the bankruptcy act ran counter to the notion of offering assistance to a local friend or family member which lay at the heart of more traditional forms of business. Preferences were consistent with older forms of business. The *Journal of Commerce* in an 1893 editorial argued that traditional or "old fashioned business" was based on the premise that:

a trader effected most of his dealings with his friends and near neighbours, and it was they who counselled him during his career and gave him support—that only an outsider could go the length of bringing his affairs to a crisis by some unfriendly act—that friends and near neighbours must be thought of first in times of peril.

Preferences were therefore tolerated by many as it promoted "home trade ... and to prevent the over-running of territory by new and venturesome competitors". Although bankruptcy laws had been on the books in England since 1542:

it will be obvious that it contemplated the protection of home interests only, and not those abroad; and in like manner the law-makers in these British

Provinces prior to Confederation did not contemplate that a wholesale merchant or manufacturer would cover so large an area of territory in his traffic as he does now-a-days—from land's end to land's end—otherwise some interprovincial arrangement would have prevailed for their protection. The drawing of provincial boundaries created domains within which residents had privileges that outsiders could not claim. Thus preferences became engrafted on our business systems in some of the Provinces.

Preferences therefore “naturally excite the ire of creditors at a distance”.<sup>254</sup>

Indeed there was a further reason to excuse preferences in favour of close friends or neighbours. Often loans from close connections were loans of compassion without the stipulation of interest. Loans of this category were fundamentally different than the purchase of goods on credit or a bank loan that carried an interest component. A borrower who received a compassionate loan was under a “moral obligation ... to return the thing borrowed—or if it be of a nature to become merged in his business, then a preference seems a natural equivalent to its non-return”.<sup>255</sup>

The rationale in support of preferences nevertheless came into conflict with the interests of distant creditors. Nova Scotia, which did not abolish preferences until 1898, was often singled out as a troublesome province for creditors. The *Monetary Times* claimed that Ontario and Quebec merchants that sold goods into Nova Scotia found that the debtor often “made an assignment to some Bluenose friend ... giving preferences to local creditors”.<sup>256</sup> Similarly, in New Brunswick, “a debtor classifies his debts into four classes—first, to clerks, second, to his relatives, third, debts owing to Canadians, and

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<sup>254</sup> “Bankruptcy Legislation” *J. of Commerce* (20 January 1893) 95. In 1881, the *Canada Law Journal* re-published portions of an English article that advocated the abolition of bankruptcy laws. The focus of Lord Sherbrooke’s argument lay in his criticism of equality: “I cannot help thinking that Equality becomes a curse when, in order to attain it, you are called upon to forfeit to strangers who have no claim at all, the very thing which it is desired to equalize ....” (emphasis added). Lord Sherbrooke, from *Nineteenth Century* reprinted in “Bankruptcy Reform in England” (1881) 17 *Can. L.J.* 357.

<sup>255</sup> “Bankruptcy Legislation” *J. of Commerce* (20 January 1893) 95.

<sup>256</sup> “Insolvency Legislation” *Monetary Times* (12 November 1897) at 630.

fourth, debts owed to the English.<sup>257</sup> The President of the Montreal Board of Trade pointed out in a speech to their 1897 annual meeting that the evil of provincial law was the preferences given to one or two friends. He used an example of a debtor in the Maritimes who made payments to seven friends and local creditors to the detriment of the thirty two other creditors who received nothing.<sup>258</sup>

The arguments of distant creditors during this period were not new. They had been raised during the 1870s by creditors who had discovered the ability to trade beyond regional markets. By the 1880s and 1890s the national market became more significant and this era saw the first intervention of foreign creditors into the debate. The continued failure of reform at the national level despite the strong lobbying efforts of foreign and national merchants is significant. Part of the explanation must lie in the benefits available to local creditors under a common law regime. The failure of national reform and the slow movement at the provincial level suggests that localism remained a factor.

### C *The Influence of English and American Reforms*

In contrast, both the United States and England enacted major reforms during this period. Politicians and the Canadian legal community were well aware of the English reforms of 1883<sup>259</sup> and the new American legislation of 1898 but these foreign developments had little impact on the Canadian setting. The early reviews of the English reforms of 1883 were not favourable.<sup>260</sup>

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<sup>257</sup> "Sir John A. Macdonald on Canadian Commercial Relations" undated clipping from *The Times in Macdonald Papers*, PAC MG 26A, Vol. 165, No. 67380-67381 (File dated 28 November 1885).

<sup>258</sup> Montreal Board of Trade Council Annual Reports, PAC MG-28 III 44, Reel M-2804 at 15.

<sup>259</sup> For a discussion of the English reforms of 1883, see chapter 2. For a Canadian summary of the reforms, see "The New English Bankruptcy Bill" *Monetary Times* (13 April 1883) 1148; "The English Bankruptcy Act" *Monetary Times* (13 April 1885) 1030; "The English Bankruptcy Act of 1883" *Monetary Times* (15 October 1886) 441; Lord Sherbrooke, from *Nineteenth Century* reprinted in "Bankruptcy Reform in England" (1881) 17 Can. L.J. 357.

<sup>260</sup> In 1880, the *Journal of Commerce* suggested that Canadian legislation be delayed in order that a review of pending English and American legislation could be undertaken. "Insolvency Legislation" *J. of Commerce* (26 November 1880) 471. On occasion, some looked to French models of bankruptcy law. "Concerning a Bankrupt Law" *J. of Commerce* (7 April 1882) 240. It was also Macdonald's initial position



The *Journal of Commerce* concluded that the English proposal “so far as Canada is concerned ... is not likely to prove of any assistance as a groundwork for legislation on the distribution of insolvent estates”. The *Journal's* major criticism focused on the loss of creditor control and the substitution of an official regime comprising of “official receivers, registrars, comptroller of bankruptcy, board of trade officials and numerous other dead weights”.<sup>261</sup> As the nineteenth century drew to a close, the English model became more attractive as Canada foundered on without any federal law.<sup>262</sup> Once provincial legislation became entrenched, the point of comparison no longer was with former Canadian bankruptcy acts but rather the existing English bankruptcy act.<sup>263</sup> Many considered English law as a worthy model to follow. It was important to follow England because “there are so many decisions in the courts, and the experience gathered there is so large, that it would be of very considerable value in the interpretation of our own Act”.<sup>264</sup> If the “great business country of England” had decided to reform its bankruptcy law, that was an indication that “it might be desirable in our circumstances”.<sup>265</sup> A 1902 article proclaimed:

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that Canadian reform should be delayed until the effect of the English legislation was well known. “Insolvency Legislation” *J. of Commerce* (29 August 1884) 308; “Sir John A. Macdonald on Canadian Commercial Relations” undated clipping from *The Times* in *Macdonald Papers*, PAC MG 26A, Vol. 165, No. 67380-67381 (File dated 28 November 1885).

<sup>261</sup> “Bankruptcy Legislation” *J. of Commerce* (23 March 1883) 1006; “The English Bankruptcy Act” *Monetary Times* (22 August 1884) 208; Compare the more favourable report on the English Bill in “Insolvency Legislation” *J. of Commerce* (20 April 1883) 1132.

<sup>262</sup> See e.g. “Bankruptcy” *Monetary Times* (14 March 1890) 500; Letter of Charles Julyan to Macdonald (27 January 1884) *Macdonald Papers* PAC MG 26A, Vol. 344, Reel c-1765, No. 192552-192555.

<sup>263</sup> “A Comparative View of English and Canadian Insolvency Legislation” Department of Justice Papers, PAC RG 13, Vol. 2311, File 117/1902.

<sup>264</sup> *Debates of the Senate* (17 April 1894) at 231. Similarly, the *Canada Law Journal* in 1902 called for new Canadian legislation to be based on the English Bankruptcy Act of 1883 “Insolvency Legislation” (1902) 35 Can. L.J. 179 at 180.

<sup>265</sup> *Debates of the Senate* (17 April 1894) at 246 (Vidal).

With giant strides Canada has during recent years, been taking her place as a daughter worthy to share in the destiny of this prolific mother of nations. Has not the time come when we should take a leaf from the rich book of England's experience on the subject of bankruptcy legislation- a subject confessedly vital to modern national and international relations.<sup>266</sup>

Although English legislation provided a powerful precedent, the English Act of 1883 did not fit the needs of nineteenth century Canada. In the Senate it was pointed out that there were various economic and geographic differences between Canada and the mother country. Before a parallel could be drawn, it was essential to consider the relative conditions of the two countries. England was a small country of about 70,000 square miles with a population in 1895 of about 40 million. The English were a "peculiarly commercial people" within a confined and restricted area of their small country. Canada by way of contrast was an extensive country with people scattered across the land. It was therefore difficult in the Canadian setting to meet the "wants and wishes and requirements of different localities".<sup>267</sup>

The 1880s and 1890s also marked a watershed era for the history of United States bankruptcy legislation. Congress debated numerous reform proposals before finally settling on the Bankruptcy Act of 1898. The Canadian financial press and Members of Parliament followed the American developments with interest.<sup>268</sup> Further, a lengthy Department of Justice memorandum comparing American and Canadian bankruptcy Bills of 1898 shows that the government seriously examined developments south of the border.

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<sup>266</sup> D.E. Thomson, "Canadian Bankruptcy Legislation" (1902) 1 Can. L.R. 174 at 178.

<sup>267</sup> *Debates of the Senate* (29 May 1895) at 151.

<sup>268</sup> The Journal of Commerce reported in great detail the bankruptcy Bill which was being considered by the Judiciary Committee of the United States Senate in 1882. "The Insolvency Question" (14 April 1882) 270. "[I]t cannot be otherwise than beneficial to examine what is being proposed elsewhere". "Bankruptcy Legislation" *J. of Commerce* (1 December 1882) 491 which refers to a report of the New York Chamber of Commerce on the condition of bankruptcy law in England, France and the United States. See also, "Bankruptcy Legislation" *J. of Commerce* (8 December 1882) 522; "Bankruptcy Legislation" *J. of Commerce* (29 December 1882) 619; "Insolvency Legislation" *J. of Commerce* (26 January 1883) 748; *Debates of the Senate* (17 April 1894) at 239 (McClellan); *Debates of the Senate* (20 June 1894) at 609; *House of Commons Debates* (17 March 1898) at 2020. See also "American Bankruptcy Law" *Monetary Times* (8 May 1896) 1432.

The comparative study did not lead to any new initiatives.<sup>269</sup> What was more of an interest to Canadians, however, was the similar federal structure of the American constitution. The similar tension between national and local legislation provoked more commentary than the substantive provisions of the American legislation.<sup>270</sup>

For the financial press, if Congress could enact a national bankruptcy law, the Canadian Parliament could do the same. The *Journal of Commerce* reported that creditors south of the border favourably received the American Bankruptcy Act of 1898. The *Journal* urged that a similar federal measure be adopted in Canada.<sup>271</sup> Congress had enacted such a measure as it “realized the national character of this subject and has yielded to the imperative need for uniformity”.<sup>272</sup>

After reporting that the new American initiative was the fourth attempt by Congress to enact a national law, one paper remarked on how “the experience of Canada in bankrupt legislation is very much the same as that of the United States”. Both countries were somehow “going on without any general bankrupt law”.<sup>273</sup> “Bankruptcy

<sup>269</sup> “Canadian and United States Insolvency Bills” Department of Justice Papers, PAC RG 13, Vol. 2310, File 23/1902. This memorandum was originally prepared for Oliver Mowat who served briefly as Laurier’s Minister of Justice in 1896-1897 before being appointed as the Lieutenant Governor of Ontario.

<sup>270</sup> Numerous decisions commented on the differences and similarities between the United States and Canadian constitutions. See *Dupont v. La Cie de Moulin* (1888) L.N. 225 at 226; *Edgar v. Central Bank* (1888) 15 O.A.R. 193 at 195, 200; *The Queen v. Chandler* (1869) 12 N.B.R. (C.A.); *Clarkson v. Ontario Bank* (1888) 15 O.A.R. 169 at 175, 176. The latter two cases cited *Sturges v. Crowninshield* 17 U.S. 122 (1819). See also comments by A.H.F. Lefroy “The Privy Council on Bankruptcy” (1894) 30 Can. L.J. 182 at 188.

<sup>271</sup> “How the US Bankruptcy Law Works” *J. of Commerce* (19 January 1900) 189. However, the *Journal of Commerce* was later sceptical of the United States approach. See “Amending the US Bankruptcy Legislation” *J. of Commerce* (20 July 1900) 183; “Working of the American Bankruptcy Act” *J. of Commerce* (14 December 1900) 1564.

<sup>272</sup> D.E. Thomson, “Bankruptcy Legislation in Canada” (1902) 1 Can. L. Rev. 174 at 177.

<sup>273</sup> “Bankruptcy Legislation at Washington” *Monetary Times* (22 August 1890) 221.

bills, both in Canada and the United States, have been occasional and not constant. Today they appear, tomorrow they vanish.”<sup>274</sup>

The *Journal of Commerce* noted that several American states were “revising their local systems to fill the gap”. “We have been passing through the same experience in respect to these matters as our neighbours to the south and are now in precisely the same position as they are.” The Montreal based Journal relied on a passage from the New York Post to make a similar plea for national legislation.<sup>275</sup> The Montreal paper later added in another editorial that “Dominion legislation is as much as a necessity as Federal legislation in the neighbouring republic”.<sup>276</sup>

Opponents of bankruptcy law equally appealed to American federalism to argue for local control. To overcome the argument that Canada should follow England, one Senator in 1895 noted that England had a bankruptcy law as it did not have a dual government. By way of contrast, Canada and the neighbouring republic “have the machinery ... by which laws of this character can be made to suit the varying circumstances of the several sections of the country. I therefore differ ... as to the necessity for uniformity.”<sup>277</sup>

In 1898 the United States was able to overcome local resistance to a national act and the new legislation represented the “maturation of American capitalism”.<sup>278</sup> The adoption by Congress of the Bankruptcy Act of 1898 stands in contrast to a Canadian market that was less fully developed.

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<sup>274</sup> “The Bankruptcy Bill” *Monetary Times* (6 April 1894) 1250.

<sup>275</sup> “Insolvency Laws” *J. of Commerce* (11 September 1885) 479.

<sup>276</sup> “Insolvency Legislation” *J. of Commerce* (28 June 1889) 1093. Charles Tupper, the Canadian High Commissioner to the United Kingdom, in a 1895 speech to the British Empire League noted that the United States had previously failed to enact national legislation. “[T]he practice of the United States in the matter of insolvency legislation has not been without its effect on the Canadian public.” Charles Tupper, “Canadian Insolvency Legislation” Report of Meeting of British Empire League (4 December 1895) at 6.

<sup>277</sup> *Debates of the Senate* (29 May 1895) at 151.

<sup>278</sup> See R.C. Sauer, “Bankruptcy Law and the Maturing of American Capitalism” (1994) 55 *Ohio St. L.J.* 291.

### III Federalism and Bankruptcy Law

While the strength of local markets impeded reform at the end of the nineteenth century, federalism also had a significant impact. Provincial legislation, which sought to fill in the gap left by the repeal of federal bankruptcy law, was called into question by a series of decisions in Ontario. The constitutional uncertainty served to constrain reform at both the federal and provincial level. The ultimate ruling of the Privy Council in 1894, which upheld in part the validity of provincial legislation, served to further entrench the provincial model of debtor-creditor relations and remove the immediate need for federal legislation.

The period under study in this chapter coincided with the growing conflict between Oliver Mowat, Liberal Premier of Ontario and John A. Macdonald. Ramsay Cook characterizes the period as "an almost constant clash of loyalties and interests between the federal and provincial governments".<sup>279</sup> The episodes are well known and have been documented by a number of scholars. The disputes included the role of the Lieutenant-Governor and the appointment of Queen's Counsel;<sup>280</sup> the Rivers and Streams dispute and the use of the federal disallowance power;<sup>281</sup> the Manitoba boundary dispute;<sup>282</sup> and the division of powers in relation to prohibition and the regulation of the

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<sup>279</sup> R. Cook, *Provincial Autonomy, Minority Rights and the Compact Theory 1867-1921* (Ottawa: Queen's Printer, 1969) at 1 [hereinafter Cook, *Provincial Autonomy*]; R.C.B. Risk, "Canadian Courts Under the Influence" (1990) 40 U.T.L.J. 687 at 696 [hereinafter Risk, "Canadian Courts Under the Influence"].

<sup>280</sup> Vipond, *Liberty and Community*, *supra* note 247 at 47-73; P. Romney, *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899* (Toronto: Osgoode Society, 1986) at 242-255 [hereinafter Romney, *Mr. Attorney*]; See e.g., *Lenoir v. Ritchie* (1879) 3 S.C.R. 575; *A.G. for Canada v. A.G. for Ontario* [1898] A.C. 247. See also *The Liquidators of the Maritime Bank of Canada v. New Brunswick* [1892] AC 437 (P.C.) as to the power of provincial executives.

<sup>281</sup> Eg., Vipond, *Liberty and Community*, *supra* note 247 at 76-81, 126-130; R. Risk and R. Vipond, "Rights Talk in Canada in the Late Nineteenth Century: 'The Good Sense and Right Feeling of the People'" (1996) 14 L. & Hist. Rev. 1 at 5-11; Romney, *ibid.* at 255-256; C. Stychin, "The Rivers and Streams Dispute: A Challenge to the Public/Private Distinction in Nineteenth Century Canada" (1988) 46 U.T. Fac. L. Rev. 341.

<sup>282</sup> Cook, *Provincial Autonomy*, *supra* note 279 at 21; C. Armstrong, "The Mowat Heritage in Federal-Provincial Rights" in D. Swanson, *Oliver Mowat's Ontario* (Toronto: Macmillan, 1972) at 93.

liquor trade.<sup>283</sup> By comparison bankruptcy law as a constitutional issue has drawn little scholarly comment.<sup>284</sup> *A.G. of Ont. v. A.G. for Canada (Voluntary Assignments Case)*<sup>285</sup> plays little or no part in the lengthy debates among constitutional scholars over the wisdom of the decisions of the Privy Council of the 1880s and 1890s.<sup>286</sup>

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<sup>283</sup> See *Russell v. R.* (1882) 7 A.C. 829 (P.C.); *Hodge v. The Queen* (1883) 9 A.C. 117; *Local Prohibition Reference (A.G. Ontario v. A.G. Canada)* [1896] A.C. 348. See Risk, "Canadian Courts Under the Influence", *supra* note 279; Vipond, *Liberty and Community*, *supra* note 247 at 164-172; Romney, *Mr. Attorney*, *supra* note 280 at 260-274; R.C.B. Risk, "The Scholars and the Constitution: P.O.G.G. and the Privy Council" (1996) 23 Man. L.J. 496 at 497-499; R.C.B. Risk, "Constitutional Thought in the Late Nineteenth Century" in W. Pue, ed., *Glimpses of Canadian Legal History* (Winnipeg: Legal Research Institute, 1991) at 205; D. Schneiderman, "Constitutional Interpretation in an Age of Anxiety: A Reconsideration of the *Local Prohibition Case* (1996) 41 McGill L.J. 411. See also W. Lahey, "Constitutional Adjudication, Provincial Rights and the Structure of Legal Thought in Late Nineteenth Century New Brunswick" (1990) 39 U.N.B. L.J. 185.

<sup>284</sup> Cairns lists *Hodge v. The Queen* (1883) 9 A.C. 117; *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* [1892] A.C. 437; *A.G. Ont. v. Mercer* (1883) 8 A.C. 767 as being the "several key decisions [which] raised the status of the provinces". A. Cairns, "The Judicial Committee and Its Critics" (1971) 4 Can. J. Pol. Sci. 301 at 306. Risk notes that of the 125 federalism cases decided between 1867 and 1900 some are still well known. "Every Canadian lawyer, historian, and political scientist knows about *Russell*, *Parsons*, *Hodge*, and the *Local Prohibition Reference*." R.C.B. Risk, "Constitutional Thought in the Late Nineteenth Century" in W. Pue, ed., *Glimpses of Canadian Legal History* (Winnipeg: Legal Research Institute, 1991) at 205.

<sup>285</sup> *A.G. Ont. v. A.G. Can.* [1894] A.C. 189 (P.C.). Although many constitutional studies give brief mention to bankruptcy law and the constitution there are two specialist works. A. Bohémier, *La Faillite en Droit Constitutionnel Canadien* (Montréal: Les Presses de l'Université de Montréal, 1972); P. Carrigan, "La Compétence Législative en Matière de Faillite et d'Insolvabilité" (1979) 57 Can. Bar Rev. 47. Bohémier's work is one of the few to give attention to the nineteenth century litigation leading up to the Privy Council decision.

<sup>286</sup> The literature on this subject is vast. See eg., A. Cairns, "The Judicial Committee and Its Critics" (1971) 4 Can. J. Pol. Sci. 301; F. Vaughan, "Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative Explanation" (1986) 19 Can. J. of Pol. Sci. 495; M. Greenwood, "Lord Watson, Institutional Self Interest, and the Decentralization of Canadian Federalism in the 1890s" (1975) 9 U.B.C. L.R. 244. For more recent scholarship which challenges the traditional centralist critiques of the Privy Council, see P. Romney, "The Nature and Scope of Provincial Autonomy: Oliver Mowat, the Quebec Resolutions and the Construction of the British North America Act" (1992) 25 Can. J. Pol. Sci. 3; Vipond, *Liberty and Community*, *supra* note 247; P. Romney, "Why Lord Watson was Right" in J. Aizenstat, *Canadian Constitutionalism: 1791 to 1991* (Ottawa: Canadian Study of Parliamentary Group, 1992); P. Romney, "Constitutional Inadequacy" (1993) 8 Can. J. Law & Soc. 183; The literature is aptly referenced in B. Baker, "The Province of Provincial Rights" (1995) 45 U.T.L.J. 77.

In part, the absence of commentary may be explained by the fact that the *Voluntary Assignments Case* was not part of a protracted political battle between Macdonald and Mowat.<sup>287</sup> Macdonald never formally challenged Mowat on the issue and was content to allow the provinces to regulate the area in the absence of federal legislation. However, the lack of contemporary constitutional commentary does not mean that the issue was insignificant to creditors and merchants trading in the 1880s and 1890s. While the outcome of the other disputes had severe repercussions for the balance of power and the nature of federalism, creditors awaited with great eagerness the resolution of the bankruptcy and insolvency issue. For many, there was no other constitutional issue with real and tangible economic effects attached. Most participants in the economy were debtors or creditors in some form and watched impatiently as the jurisdictional question of bankruptcy stumbled its way through the 1880s and 1890s. By comparison, whether the provinces or the federal government could appoint Queen's Counsel could hardly have mattered. This Part examines the uncertainty caused by the Ontario Court of Appeal rulings and the impact of the *Voluntary Assignments Case* on bankruptcy law reform.

In the late 1880s and early 1890s, the federal government came under increasing pressure to exercise its jurisdiction over bankruptcy and insolvency.<sup>288</sup> The *Journal of Commerce*, for example, pointed out that at Confederation a great deal of emphasis had been placed on the need to abolish local customary laws. However, through its inaction, the federal government had allowed questions of "language, race and religion" to divide the various sections of the country. To this list, the Journal added commercial legislation. "Petty provincialism" in commercial dealings plagued the country:

If we cannot have one civil law and one language for the whole country, we should at least have one commercial law and one criminal law and most of us were of the opinion that the wisdom of our statesman had secured these

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<sup>287</sup> Mowat's Creditors' Relief Act and the Assignments Act were not the "cause of much friction between Ottawa and Ontario. Romney, *Mr. Attorney*, *supra* note 280 at 260.

<sup>288</sup> "Bankruptcy" *J. of Commerce* (14 March 1890) 592. "The Dominion government has practically abandoned one of its chief prerogatives to the provinces."

to us. Our commercial interests would certainly not suffer from an insolvent act ... applicable to all parts of the country.<sup>289</sup>

In an 1899 editorial the *Journal* commented on the state of provincial legislation:

Recent legislation in insolvency matters in different sections of the Dominion has, we regret to say, developed traces of Provincial jealousy subversive to the principles of right and justice and directly at variance with the true spirit of confederation. Almost every Province in the Dominion has been cutting and patching at the various insolvent acts in such a way as to cause irritation and soreness and keep the country backward and divided. Instead of this, these petty inter-provincial business jealousies should be thrown to the wind and the general good of the country considered.<sup>290</sup>

Proponents of a uniform law pointed to the explicit wording in the B.N.A. Act granting the federal government jurisdiction over bankruptcy and insolvency. By way of contrast, provincial laws regulating insolvency were "enacted by an authority which is hampered by limitations and doubts".<sup>291</sup> "It is worse than useless to leave the matter to be dealt with by the Local Legislatures, since their action is hampered alike by lack of sufficient powers and the absence of all precedents."<sup>292</sup>

Why were there national customs, insurance, banking and railway statutes while insolvency matters had been abandoned to the provinces? The "underlying principle actuating the framers of the constitution was that all matters of general interest should be confided to our legislative power here, and surely there is no matter of such general interest as the subject of insolvency".<sup>293</sup>

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<sup>289</sup> "Bankruptcy Legislation" *J. of Commerce* (14 March 1890) 592.

<sup>290</sup> "Faulty Insolvency Legislation" *J. of Commerce* (19 April 1899) 655; "Faulty Insolvency Legislation II" *J. of Commerce* (26 April 1899) 693. See also, "Federal Insolvency Legislation" *Monetary Times* (6 October 1905) at 429, 430.

<sup>291</sup> "Federal Insolvency Legislation" *Monetary Times* (6 October 1905) 429, 430.

<sup>292</sup> "Bankrupt Laws" *Monetary Times* (3 December 1880) 640.

<sup>293</sup> *House of Commons Debates* (17 March 1898) at 2021, 2024. To achieve proper uniformity a national act has to work effectively with provincial legislation. Therefore this meant that the "best talent" from the provinces had to be consulted in the framing of the new national act. It was argued that the Insolvent Act of 1869 reflected the fact that it had been drafted by a Quebec lawyer and that in part it failed



Given John A. Macdonald's strong views of federalism, one might have suspected that he would have supported the federal exercise of its bankruptcy and insolvency power and opposed provincial encroachment. However, the historical record reflects the fact that Macdonald used provincial jurisdiction as a reason to delay federal reform. In 1882, in private correspondence, Macdonald questioned whether a bill which provided only for the distribution of an insolvent's estate was "within the competence of the Federal Parliament".<sup>294</sup> In the House of Commons Macdonald questioned whether or not an 1883 Bill was an "interference with property and civil rights?"<sup>295</sup>

Macdonald also used the constitutional question as a means of deflecting foreign pressure for federal reform. In 1884, he told a deputation from the London (England) Chamber of Commerce that "special difficulties were found to exist in Canada, owing to the concurrent powers of the Dominion and Local Legislatures".<sup>296</sup> Macdonald pointed out that the Federal Parliament had no right to interfere with provincial law affecting contracts save for the exception of the federal power over bankruptcy and insolvency. As the Federal Government had been unable to enact a federal law owing to its unpopularity, there was little action that could be taken as Parliament had no power to deal with preferences other than in a bankruptcy law. Therefore, preferences must be left to the provinces to regulate. The federal government was "powerless to deal with the subject unless by the enactment of a general law of bankruptcy or insolvency".<sup>297</sup>

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to take into proper account the different provincial regime in Ontario, New Brunswick and Nova Scotia. "Insolvency" *Monetary Times* (19 January 1883) 795.

<sup>294</sup> Letter of John A. Macdonald to W.J. Patterson, Montreal Board of Trade (24 February 1882) *Macdonald Papers*, PAC MG 26A, Vol. 21, Reel c-33, No. 664-666.

<sup>295</sup> *House of Commons Debates* (6 March 1883) at 119 (Macdonald).

<sup>296</sup> See report of meeting in "Insolvency Legislation" *J. of Commerce* (29 August 1884) 308.

<sup>297</sup> "Sir John A. Macdonald on Canadian Commercial Relations" undated clipping from *The Times* in *Macdonald Papers*, PAC MG 26A, Vol. 165, No. 67380-67381 (File dated 28 November 1885).

Macdonald was aware of developments at the provincial level but chose not to use the disallowance power.<sup>298</sup> The government was content to allow the judicial system to rule on the constitutional issue. The question of the validity of provincial legislation arose as early as 1869. In that year Nova Scotia amended a statute which provided for relief of insolvent debtors. John A. Macdonald, as Minister of Justice allowed the statute to stand despite the fact that it "would seem to be *ultra vires*". Macdonald referred to the fact that the case of *The Queen v. Chandler*<sup>299</sup> had struck down a similar provision in New Brunswick. He was confident that if the question arose in Nova Scotia a similar result would be reached.<sup>300</sup>

The Minister of Justice's 1881 report on the Ontario *Creditors' Relief Act* recommended that the power of disallowance not be used:

Taking [the Creditors' Relief Act] section by section, much can be said in favour of the view that its provisions are within the legislative authority of the provincial legislature, but taking its effect as a whole, much can be said in support of the contention that it entrenches upon the subject of bankruptcy and insolvency....

However, several factors led the Minister of Justice to recommend against disallowance. First, there was doubt as to the constitutional issue. In particular, the Ontario statute expressly stated that there was no intent to interfere with federal insolvency laws. Further the Ontario statute was applicable to both solvent and insolvent debtors. If disallowance

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<sup>298</sup> Under the B.N.A. Act, disallowance is, in the words of Vipond, "a sweeping veto power which gives the federal government an unqualified right to strike down or nullify any act of a provincial legislature within one year of its passage". Vipond, *Liberty and Community*, *supra* note 247 at 114. See in particular chapter 5 of Vipond's text and ss 56 and 90 of the B.N.A. Act.

<sup>299</sup> (1869) 12 N.B.R. 556 (C.A.).

<sup>300</sup> Report of the Honourable Minister of Justice, approved by His Excellency the Governor-General in Council (12 August 1869) in W.E. Hodgins, *Dominion and Provincial Legislation: 1867-1895* (Ottawa, 1896) at 472 on the validity of "An Act to Amend ch. 137 of the Revised Statutes of Nova Scotia, Relief of Insolvent Debtors". Macdonald reached a similar conclusion with respect to an 1870 Nova Scotia statute "An Act to Improve the Administration of Justice". Report of the Honourable Minister of Justice, approved by His Excellency the Governor General in Council (23 September 1870) in W.E. Hodgins, *Dominion and Provincial Legislation: 1867-1895* (Ottawa, 1896) at 475.

was not used, "any person wishing to test the constitutionality of the Act in any of the courts, will be at liberty to do so".

What perhaps is the most striking aspect of the report was the express acknowledgment that an additional factor in support of allowing the Ontario Act to stand was "the fact that the insolvency laws of the Dominion have been repealed".<sup>301</sup> In the absence of federal legislation, the federal government appeared to be quite content to allow provincial legislation to fill the void. Other provincial statutes based on the Ontario Creditors' Relief Act were not disturbed.<sup>302</sup>

In 1886, the Minister of Justice also recommended against the use of disallowance with respect to the Ontario *Assignments Act*. It was "more than doubtful whether it is within the legislative authority of the provincial legislature". However, as the issue was pending before the courts, the question could "be more conveniently settled in that way than in any other".<sup>303</sup> Macdonald similarly refused to disallow other provincial statutes passed in Manitoba, Quebec and Nova Scotia despite the fact that there was "great doubt as to the authority of a legislature to enact such laws as these, as they are in the nature of Insolvent Acts".<sup>304</sup>

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<sup>301</sup> Report of the Honourable Minister of Justice, approved by His Excellency the Governor-General in Council (11 March 1881) in W.E. Hodgins, *Dominion and Provincial Legislation: 1867-1895* (Ottawa, 1896) at 170.

<sup>302</sup> British Columbia legislation, "An Act to Abolish Priority of and Amongst Execution Creditors" was allowed to stand on the same basis. Report of the Honourable Minister of Justice, approved by His Excellency the Governor General in Council (27 July 1881) in W.E. Hodgins, *Dominion and Provincial Legislation: 1867-1895* (Ottawa, 1896) at 1078. For the report on the Northwest Territory Ordinance No. 25, see Report of the Honourable Minister of Justice, approved by His Excellency the Governor General in Council (18 May 1894) in W. E. Hodgins, *Dominion and Provincial Legislation: 1867-1895* (Ottawa, 1896) at 1269.

<sup>303</sup> Report of the Honourable Minister of Justice, approved by His Excellency the Governor-General in Council (24 February 1886) in W.E. Hodgins, *Dominion and Provincial Legislation: 1867-1895* (Ottawa, 1896) at 198.

<sup>304</sup> Report of the Honourable Minister of Justice, approved by His Excellency the Governor-General in Council in W.E. Hodgins, *Dominion and Provincial Legislation: 1867-1895* (Ottawa, 1896) at 854. On Quebec and Nova Scotia legislation, see Report of the Honourable Minister of Justice, approved by His Excellency the Governor General in Council (25 February 1886) in W.E. Hodgins, *Dominion and Provincial Legislation: 1867-1895* (Ottawa, 1896) at 312. Report of the Honourable Minister of Justice,

As early as 1885 some predicted constitutional challenges to provincial legislation. In an circular distributed to Members of the Federal Parliament, the President of the Toronto Board of Trade urged the federal government to assume its jurisdiction over bankruptcy. Until national legislation was in place, he argued "the estates of debtors are liable constantly to be swallowed up in a contestation involving appeals to the Privy Council to determine where the powers of local legislatures in dealing with civil rights end".<sup>305</sup>

In 1887, the provinces adopted a resolution at the Interprovincial Conference of premiers<sup>306</sup> calling for an amendment to the British North America Act to expressly give to the provinces the necessary jurisdiction to enact insolvency legislation in the absence of any federal law. Such an amendment was required owing to the fact that it was "doubtful" how far the provincial jurisdiction extended but more importantly, it was in the "public interest that each province should be a liberty to deal with the matter subject to any federal law which may be thereafter enacted".<sup>307</sup>

A Petition presented to the federal government, dated 7 March 1888 also indicated the uncertainty over provincial jurisdiction. The petition urged that a measure be passed to give each province "liberty to deal with the matter ... so that there may be no doubt as

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approved by His Excellency the Governor General in Council (26 March 1885) in W.E. Hodgins, *Dominion and Provincial Legislation: 1867-1895* (Ottawa, 1896) at 522.

<sup>305</sup> Henry Darling, Circular to Members of Parliament, reprinted in "Insolvency Legislation" *J. of Commerce* (11 May 1885) 645. Similarly, the *Monetary Times* also questioned the constitutionality of the Ontario legislation. "Bankruptcy Legislation" *Monetary Times* (20 March 1885) 1058; "Insolvencies in Canada" *Monetary Times* (2 July 1885) 13, 14.

<sup>306</sup> The 1887 conference adopted a series of resolutions on provincial grievances against Ottawa, including resolutions concerning the provincial view of sovereignty and disallowance. See Cook, *Provincial Autonomy*, *supra* note 279 at 41-44. Romney, *Mr. Attorney*, *supra* note 280 at 257.

<sup>307</sup> Resolution 14, Premiers Conference Quebec 1887 as reported in Montreal Board of Trade Council Annual Reports, 45th Annual Report 1887, PAC MG-28 III 44, Reel M-2804 at 13. The premiers also called for an assimilation of provincial laws to ensure consistency between the provinces.

to the jurisdiction of the Provincial legislatures in legislating upon the subject in a thorough and comprehensive manner".<sup>308</sup>

There were also some constitutional doubts about federal reform efforts of the 1880s and 1890s. As discussed in Part I, a number of early federal reform proposals in the 1880s did not contain a discharge provision. The absence of a discharge provision made the Bills, according to some, beyond the competence of the federal government.<sup>309</sup> The *Monetary Times* pleaded that the subject of bankruptcy law not be added to the growing list of questions of disputed jurisdiction.<sup>310</sup>

The constitutionality of federal bankruptcy legislation, however, could not have been seriously questioned. The validity of federal legislation had been upheld in a number of cases during the 1870s.<sup>311</sup> Furthermore, in 1880 the Privy Council in *Cushing v. Dupuy* ruled that a provision in the *Insolvent Act*, which limited the right of appeals in Quebec to the provincial Court of Queen's Bench, was valid.<sup>312</sup>

It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realisation, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any

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<sup>308</sup> *Macdonald Papers*, PAC MG 26A, Reel C 1566, No. 63195.

<sup>309</sup> "Insolvency Legislation" *J. of Commerce* (28 December 1883) 609.

<sup>310</sup> "Jurisdiction over Insolvency" *Monetary Times* (17 April 1883) 180. The paper referred to the "existing craze ... in legal and constitutional circles, for disputing the respective jurisdiction of the Federal and legislative authorities".

<sup>311</sup> *Crombie v. Jackson* (1874) 34 U.C.Q.B. 575; *Kinney v. Dudman* (1876) 11 N.S.R. 19 (S.C.); *Rumsey v. Hare* (1877) 12 N.S.R. 4 (C.A.); *Ex Parte Ellis* (1878) 17 N.B.R. 593 (C.A.); *In Re Killam* (1878) 14 Can. L.J. (N.S.) 242-243.

<sup>312</sup> *Cushing v. Dupuy* (1880) 5 A.C. 409 at 415, 416 (P.C.). *Cushing v. Dupuy* was followed in *Beausoleil v. Frigon* (1880) 1 D.C.A. 70 (Que. C.A.) which ruled that federal jurisdiction over matters of bankruptcy included the right to modify civil procedure in each province. *Beausoleil* overruled an earlier Quebec decision, *Fraser's Institute & More* (1875) L.C. J. 133 which had held that s. 50 of the *Insolvent Act* of 1869 was ultra vires.

law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as a general law relating to those subjects might affect them.<sup>313</sup>

*Cushing*, however, did not answer the question of how far provincial jurisdiction extended in the absence of a federal bankruptcy statute. As federal reform efforts stumbled, the larger constitutional question focused on the validity of provincial laws.

It was not long before several Ontario Courts began to rule on the validity of the *Act Respecting Assignments and Preferences by Insolvent Persons*.<sup>314</sup> Early decisions upheld the constitutionality of the statute.<sup>315</sup> In 1888, the Ontario Court of Appeal agreed to hear argument on four separate cases. The outcome of the case attracted national interest. While the Court of Appeal hearing was pending, Members of Parliament noted that the outcome could affect the efficacy of the 1887 Bill which relied on the provincial distribution mechanisms.<sup>316</sup>

On 20 March 1888, the Ontario Court of Appeal added to the uncertainty by issuing a split decision on the four concurrent appeals (hereinafter referred to as

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<sup>313</sup> The Supreme Court of Canada cited *Cushing* with approval in the 1883 case of *Shields v. Peak* in upholding s. 136 of the *Insolvent Act of 1875: Shields v. Peak* (1883) 8 S.C.R. 579 affirming (1881) 6 O.A.R. 639 (C.A.) which affirmed (1880) 31 U.C.C.P. 112 (Ont. H.C.)

<sup>314</sup> See eg. the early decisions of *Broddy v. Stuart* (1886) 7 Can. L.T. 6; *Clarkson v. Ontario Bank* (1887) 13 O.R. 666. The Quebec Court of Appeal followed *Broddy v. Stuart* and *Clarkson v. Ontario Bank* in upholding the validity of a provision of the Quebec Code of Civil Procedure. See *Parent v. Trudel* (1887) 13 Q.L.R. 136 (Que. C.A.). Other provincial legislation had also been challenged and upheld. See *McLeod v. Vroom* [1881] Tru. 131 (N.B.S.C.) where a New Brunswick court upheld the validity of the provincial Bills of Sale Act. See also *Bleasdell v. Townsend* (1883) 3 Can. L.T. 509 (Man. Q.B.); *Johnston v. Poyntz* (1881) 2 R. & G. 193.

<sup>315</sup> The first case which tested the validity of the Ontario Statute appears to be *Broddy v. Stuart* (1886) 7 Can. L.T. 6. A.H.F. Lefroy, "The Privy Council on Bankruptcy" (1894) 30 Can. L.T. 182 at 184. The case was followed in the first instance in *Clarkson v. The Ontario Bank* (1887) 13 O.R. 666.

<sup>316</sup> See *House of Commons Debates* (4 May 1887) 35.

*Clarkson et. al.*).<sup>317</sup> All four cases dealt with the validity of *An Act Respecting Assignments for the Benefit of Creditors*. The Ontario legislation consisted of what Patterson J. referred to as "two branches".<sup>318</sup> The first branch voided preferential transfers. The second allowed a debtor to voluntarily make an assignment to a named assignee for the benefit of creditors. Assets were distributed on a pro rata basis. Assignees were given the exclusive power to set aside preferences. Further, s. 9 provided that an assignment for the benefit of creditors took priority over all judgments and incomplete executions. No compulsory proceedings were available and debtors did not receive a discharge of their liabilities. A debtor could "only be discharged from his debts so far as his estate pays them. All the rest he will continue to owe."<sup>319</sup>

In each of the appeals, an insolvent debtor had made a preferential transfer to a creditor prior to making an assignment for the benefit of creditors. The assignees as plaintiffs challenged the preferences under the Ontario statute. The defendants, the recipients of the preference, argued that the Ontario legislation was ultra vires. The four Justices of the Court of Appeal were "equally divided on the point".<sup>320</sup> Hagarty C.J. and Osler J. both held that the Act was ultra vires while Burton J. and Patterson were of the view that the statute was valid.

Hagarty C.J. adopted a very broad view of the ambit of "bankruptcy and insolvency". The words, according to Hagarty C.J., "embrace the whole subject as to inability to pay debts" and the necessity to provide a fair means of distribution.<sup>321</sup> He

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<sup>317</sup> *Clarkson v. Ontario Bank* (1888) 15 O.A.R. 166; *Edgar v. Central Bank of Canada* (1888) 15 O.A.R. 196; *Kennedy v. Freeman* (1888) 15 O.A.R. 216; *Hunter v. Drummer* (1888) 15 O.A.R. 232; For a discussion of these cases, see "Is the Act Respecting Assignments for Creditors Constitutional?" *Monetary Times* (30 March 1888) 1221.

<sup>318</sup> *Edgar v. Central Bank* (1888) 15 O.A.R. 193 at 204.

<sup>319</sup> See Duncan, *Bankruptcy in Canada*, *supra* note 2 at 21-22 and eloquent description of the statue by Master Dalton in *Union Bank v. Neville* (1891) 21 O.R. 152 at 154.

<sup>320</sup> "Is the Act Respecting Assignments for Creditors Constitutional?" *Monetary Times* (30 March 1888) p. 1221.

<sup>321</sup> *Clarkson v. Ontario Bank* (1888) 15 O.A.R. 167 at 176.

concluded that the Ontario statute was *ultra vires* even though it did not provide for compulsory proceedings or include a discharge. Osler J. agreed and stated that the release of a debtor's obligations was not an essential feature of the legislation:

From a creditor's point of view, provisions of primary importance in any law dealing with the condition of insolvency, are those which concern the distribution of the debtor's estate, the prevention of unjust or fraudulent preferences and the equitable adjustment of their own claims.<sup>322</sup>

The views of Hagarty C.J. and Osler J. were entirely consistent with the contemporary view of bankruptcy law. Numerous reform Bills of the 1880s specifically excluded the discharge as many viewed the release of the debtor as an independent matter that was not necessarily linked to the distribution question.<sup>323</sup>

Further, Hagarty C.J. and Osler J. addressed the implications of allowing the provinces to regulate the area. Hagarty C.J. claimed that if the Act was valid each of the provinces could pass its own bankruptcy law. "This could have hardly been contemplated at confederation." To ensure uniformity in the disposition of debtors' assets "throughout the provinces so intimately connected in commercial relations," it was "natural" that the Dominion government have the exclusive right to legislate on the subject. According to Hagarty C.J. provincial statutes were incomplete and "piece meal".<sup>324</sup>

Osler J. held that the Ontario legislation was not within the subject matter of property and civil rights because it controlled the rights of extra-provincial creditors. The Ontario legislation "directly affects the rights of all ... creditors in this or the other

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<sup>322</sup> *Ibid.* at 173 (Hagarty C.J.), 192 (Osler J.) Hagarty relied on the fact that both England and Canada had enacted voluntary proceedings. Therefore, according to his argument, bankruptcy proceedings did not necessarily have to include compulsory proceedings. Hagarty omitted to note that voluntary proceedings had been abolished in Canada in 1875 and that all subsequent reform bills followed the 1875 model.

<sup>323</sup> One commentator concluded that "Parliament might return to an ancient law .... If it chose to enact in Canada the Bankrupt Act of Henry VIII., which did not provide for the discharge of the bankrupt it might do so. The Act would be valid". See discussion in E.D. Armour, "The Constitution of Canada: Part I" (1891) 11 Can. L.T. 11 at 247.

<sup>324</sup> *Clarkson v. Ontario Bank* (1888) 15 O.A.R. 167 at 178, 177, 182.



provinces, or elsewhere". While using this fact to demonstrate a constitutional point, Osler J. echoed the numerous arguments of merchants who traded across provincial boundaries:

If one object of an Insolvent Act be to insure uniformity in the distribution of the assets of the insolvent, it is not attained by legislation of this kind, under which, if within the competence of the local legislatures, the assets of the same debtor carrying on business in more than one province may be distributed upon as many different principles or systems as there are provincial Acts dealing with the question.<sup>325</sup>

Patterson J. and Burton J. held that the specific provisions at issue in the appeal were *intra vires*.<sup>326</sup> Both Justices, however, refused to rule on the constitutionality of s. 9, which provided that assignments took priority over judgments and executions.<sup>327</sup> The split decision and the absence of a clear ruling on s. 9 left the law in a state of confusion and paralyzed further legislative reform.<sup>328</sup>

The *Monetary Times* correctly declared that the fact that the four courts of first instance had been in favour of the legislation meant that "for the present the weight of

<sup>325</sup> *Clarkson v. Ontario Bank* (1888) 15 O.A.R. 167 at 190, 193. While not referred to, the sentiment of Osler J. and Hagarty C.J. was perhaps best captured by Weurtele J. in an earlier case on the constitutionality of the federal Winding-Up Act. "It is therefore in the interest of the trade and commerce of the whole Dominion that there should be one uniform law for all the provinces, regulating proceedings in the case of insolvent debtors, unrestricted in its operation by provincial boundaries; that it should be possible to obtain a national execution, and not merely a limited provincial one, against the estate of an insolvent debtor, who might hold property in several provinces, or transfer it from his own province into another." *Dupont v. La Cie de Moulin* (1888) 11 L.N. 225 at 227 (Ont. Superior Court). As authority, Weurtele J. relied on American sources including Wharton on Private International Law wherein Wharton stated that "Bankruptcy, according to the practise of those countries whose jurisprudence is based on Roman Law, is a species of national execution against the estate of an insolvent." Weurtele J. concluded that "this definition gives the reason for the grant of power on this subject to Parliament".

<sup>326</sup> The *Journal of Commerce* described Patterson and Burton as "two of the weakest" judges on the court. "A General Insolvency Act" *J. of Commerce* (3 July 1891) 17, 18.

<sup>327</sup> *Edgar v. Central Bank* (1888) 15 O.A.R. 193 at 200 (Burton J.), 216 (Patterson J.).

<sup>328</sup> A. Bohémier, *La Faillite en Droit Constitutionnel Canadien* (Montréal: Les Presses de l'Université de Montréal, 1972) at 111.

authority is in favour of the legislation".<sup>329</sup> However, in a later editorial, the paper suggested that constitutional uncertainty extended to another Ontario Act. Creditors could no longer safely rely on the *Creditors' Relief Act*:

There is an uncertainty about the matter which is harassing. Desirous though many merchants may be of taking proceedings under this Act for the distribution of certain debtor's estate they may very naturally hesitate to do so when they reflect upon the possibility of such action being nullified by some subsequent decision of the Supreme Court at Ottawa or the Privy Council of Great Britain....<sup>330</sup>

While the country waited for a final resolution of the matter by a higher court, the interim was a "chaotic state of affairs, which assuming the Act to be ultra vires, allows the first-comer among claimants to be first served".<sup>331</sup> The Court of Appeal's 1888 decision created, according to the *Journal of Commerce*, "a state of chaos" and was a "grave scandal".<sup>332</sup>

E.D. Armour, Toronto lawyer and editor of the *Canadian Law Times*, concluded that "in Ontario the law is in an unsatisfactory state .... The leading decision [*Clarkson et al.*] shows such a difference, such a variety of opinion, that it seems hopeless to reduce the different expressions of opinion to any definite form."<sup>333</sup> The article, written before the *Voluntary Assignments Case*, captured the sense of constitutional uncertainty:

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<sup>329</sup> "Is the Act Respecting Assignments for Creditors Constitutional?" *Monetary Times* (30 March 1888) 1221. See comment to this effect in *Union Bank v. Neville* (1891) 21 O.R. 152 at 158 (C.A.).

<sup>330</sup> "The Creditors' Relief Act" *Monetary Times* (4 May 1888) 1365. The Ontario Court of Appeal later in obiter stated that the ability of Ontario to enact such legislation was not doubted. See *In Re Assignments and Preferences Act* (1893) 20 O.A.R. 489 at 500 (C.A.).

<sup>331</sup> "The Creditors' Relief Act" *Monetary Times* (4 May 1888) 1365. See also "The Creditors' Relief Act--Is it Constitutional?" *Monetary Times* (7 May 1880) 1321. As soon as the Creditors' Relief Act was proposed in 1880, "[a] question has been mooted very freely in both commercial and legal circles ... whether this act ... is constitutional?" The article stated that the strongest argument in favour of the law's validity was that it fell within the provincial jurisdiction of the "administration of justice".

<sup>332</sup> "A General Insolvency Act" *J. of Commerce* (3 July 1891) 17, 18.

<sup>333</sup> E.D. Armour, "The Constitution of Canada: Part I" (1891) 11 Can. L.T. 11 at 244. As to Armour, see R.C.B. Risk, "Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work" (1996) 46 U.T.L.J. 427 at 430-431, 447.

The ninety first section of the Act assigns to Dominion Parliament power to make laws respecting bankruptcy and insolvency; but recent Ontario decisions have, by their net results, though with grave differences of opinion, allowed the Provincial legislatures such a large measure of power respecting the administration of insolvent estates that for the present the jurisdiction to deal with the subject must be deemed concurrent.<sup>334</sup>

The *Journal of Commerce* also expressed concern. The conflict of opinion in the Ontario Courts appeared to have "set aside" a "most important prerogative of Parliament". While the constitutional "deadlock exists it is futile to make any appeal to Parliament to pass a general *Insolvent Act* for the whole Dominion". The Provinces, "from a jealous regard for their supposed rights, would seek to veto any such act".<sup>335</sup> The *Journal of Commerce* concluded that the federal government was "bound to protect and maintain its own honour and dignity by securing such a decision from the Privy Council as would ratify the plain intention of the B.N.A. Act". The exclusive jurisdiction of the federal government was "so free from ambiguity" that the *Journal of Commerce* predicted that "if a case were ever taken to the Privy Council the whole difficulty as to bankruptcy legislation would be far on the way to solution".<sup>336</sup>

Even after the split decision in *Clarkson et al.*, in 1888 the Minister of Justice concluded that disallowance ought not to be used against the amended *Assignment Act*. Despite the fact that two justices had upheld the validity of the provincial statute and that further appeals might confirm this view, the Minister of Justice declined to act. He concluded that the Act was "undergoing a discussion before the Courts of Ontario, and

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<sup>334</sup> E.D. Armour, "The Constitution of Canada: Part I" (1891) 11 Can. L.T. 11 at 149. On the intention of the framers to provide exclusive jurisdiction over bankruptcy and insolvency, see "A General Insolvency Act" *J. of Commerce* (3 July 1891) 17.

<sup>335</sup> "A General Insolvency Act" *J. of Commerce* (3 July 1891) 17, 18.

<sup>336</sup> *Ibid.*

pending a decision" he did not advise the exercise of the disallowance power.<sup>337</sup> *Clarkson et al.*, however, was only the first step in a lengthy judicial debate.<sup>338</sup>

In 1891, the Ontario Court of Appeal added to the confusion by declaring s. 9 of the Ontario Act ultra vires in *Union Bank v Neville*.<sup>339</sup> The provision interfered with the normal execution process as the assignment for the benefit of creditors took priority over all incomplete executions. In first instance, Master Dalton upheld the validity of the Ontario provision. He noted that the purpose of the *Assignment Act* combined with the *Creditors' Relief Act* was "to secure the body of creditors against the rapacity of some of their own number".<sup>340</sup> On appeal, Galt J. held the Act was ultra vires. It was "plain that the provisions are to have effect only in cases of insolvent debtors or persons on the verge of insolvency".<sup>341</sup> The *Journal of Commerce* reported that the decision made "confusion worse confounded"<sup>342</sup> while the *Monetary Times* advised that after the decision "it will be unsafe for insolvents to rely on the provisions of that statute".<sup>343</sup>

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<sup>337</sup> Report of the Honourable Minister of Justice, approved by His Excellency the Governor General in Council (1 June 1888) in W.E. Hodgins, *Dominion and Provincial Legislation: 1867-1895* (Ottawa, 1896) at 204. The constitutionality of provincial legislation was also being tested in Manitoba where the Manitoba Court of Appeal upheld the validity of the Manitoba assignments legislation: *Stephens v. McArthur* (1890) 6 Man. L.R. 496 (C.A.).

<sup>338</sup> A. Bohémier, *La Faillite en Droit Constitutionnel Canadien* (Montréal: Les Presses de l'Université de Montréal, 1972) at 111.

<sup>339</sup> *Union Bank v. Neville* (1891) 21 O.R. 152 (C.A.).

<sup>340</sup> *Ibid.* at 156 (Master Dalton).

<sup>341</sup> *Ibid.* at 161 (C.A.).

<sup>342</sup> "A General Insolvency Act" *J. of Commerce* (3 July 1891) 17; For comment, see Letter of E.B. Greenshields, President of the Montreal Board of Trade to Editor of *J. of Commerce* (11 January 1893) in "Bankruptcy Legislation" in *J. of Commerce* (20 January 1893) 101. Bohémier argues that "cette décision j'était donc un doute grave sur la validité du statut ontarien". A. Bohémier, *La Faillite en Droit Constitutionnel Canadien* (Montréal: Les Presses de l'Université de Montréal, 1972) at 113.

<sup>343</sup> "Assignments for the Benefit of Creditors" *Monetary Times* (25 August 1893). The article pointed out the steps required to be followed in order to create a common law assignment.

To clarify the matter, the Ontario government referred the following question to the Court of Appeal.<sup>344</sup>

Had the Legislature of Ontario jurisdiction to enact the 9th section of the Revised Statutes of Ontario, c. 124, and entitled, 'An Act Respecting Assignments and Preferences by Insolvent Persons.'<sup>345</sup>

In a 2-1 decision (with Osler J. expressing no opinion<sup>346</sup>) the Court of Appeal concluded that s. 9 was ultra vires. For Hagarty C.J. s. 9 could not be separated from the balance of the legislation. Relying on his opinions in *Clarkson et al.*, Hagarty C.J. found no reason to alter his view that the legislation was invalid. Burton J., who had previously reserved on the validity of s. 9 held the provision to be ultra vires. But the Court of Appeal decision did not settle the matter. The *Canadian Law Times* indicated that "no doubt the case will not end here". Many anticipated an appeal to the Privy Council.<sup>347</sup>

The Ontario Court of Appeal had issued three separate rulings on the matter. *Clarkson et al* had been a split decision, while both *Union Bank v. Neville* and *In Re Assignments and Preferences Act* held that s.9 of the Ontario statute to be ultra vires. The outcome of the appeal to the Privy Council was anything but certain. The *Canadian Law Times* optimistically predicted that the *Assignment and Preferences Act* as well as the *Creditors' Relief Act* would be struck down.<sup>348</sup> The files of the Department of Justice on the appeal to the Privy Council illustrate not only a confused state of affairs but also a desperate sense of urgency to end the constitutional uncertainty.

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<sup>344</sup> Oliver Mowat enacted legislation in 1890 which allowed the Ontario government to refer constitutional matters to the Ontario Court of Appeal. The decisions were appealable to the Privy Council. See Romney, *Mr. Attorney, supra* note 280 at 275.

<sup>345</sup> *In Re Assignments and Preferences Act, section 9* (1893) 20 O.A.R. 489 (C.A.). For a brief reaction to this case, see "The Assignments Act" (1893) 13 Can. L.T. 125.

<sup>346</sup> Osler had previously upheld the legislation in *Clarkson et al.* In the reference, Osler said that "for reasons given by him on a former occasion, he did not feel called on to answer a question submitted in this way". See *Re Assignments and Preferences Act s 9* (1893) 20 O.A.R. 489 at 499.

<sup>347</sup> "The Assignments Act" (1893) 13 Can. L.T. 125.

<sup>348</sup> *Ibid.*

The Court of Appeal in the reference case issued its opinion on 9 May 1893. Three days later, the Ontario Attorney-General wrote to the Minister of Justice indicating the pressure the provincial government was under and the need for a quick resolution of the matter.<sup>349</sup> A letter to the Department of Justice asked that the solicitors representing the federal government in England request an immediate hearing and decision in the case.<sup>350</sup> However, by November of 1893 the matter still had not been resolved and Ontario explained why they wanted a quick resolution:

...it is of great public importance to get a decision of the Privy Council at the earliest possible day. I understand that merchants and persons in business are looking very anxiously for it, and are in perplexity from the doubts which exist. I understand that the profession are also expressing like anxiety, because in the present unsettled condition of the question involved, they do not know how to advise their clients.<sup>351</sup>

According to Lefroy, "perhaps no decision of the Judicial Committee has been awaited with more interest, at all events in the profession".<sup>352</sup>

However, there was more at stake than constitutional principle.<sup>353</sup> While constitutional theory lay at the heart of the matter, the ruling had dire consequences for numerous creditors and merchants. This constitutional dispute involved more than elites

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<sup>349</sup> *Department of Justice Files*, PAC RG13, Vol. 2374, File 198/1893, letter dated (12 May 1893).

<sup>350</sup> *Ibid.* (20 May 1893).

<sup>351</sup> *Ibid.* Letter to Mr. Christopher Robinson, from the Attorney-General of Ontario (3 November 1893). See also letter to Department of Justice from Attorney-General of Ontario in response to a federal request for a delay. "There was great pressure for an immediate decision amongst merchants and lawyers."

<sup>352</sup> A.H.F. Lefroy, "The Privy Council on Bankruptcy" (1894) 30 Can. L.J. 182.

<sup>353</sup> For constitutional scholars the stakes may have been limited to the issue of federalism. See R.C.B. Risk, "Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work" (1996) 46 U.T.L.J. 427 at 449.

asserting theory in what Vipond calls a “process of cultural self definition”.<sup>354</sup> “Real lobbyists and litigants”, in the words of Blaine Baker, had a stake in the outcome.<sup>355</sup>

The Privy Council finally agreed to hear argument on 12 and 13 December 1893. The federal government took the position that it had made a deliberate decision not to have a bankruptcy and insolvency system. The provincial legislation attempted to reverse the decision and was in defiance of the Dominion Parliament. The Provincial legislation was not something “ancillary to a system which the Dominion might have prescribed”. Rather what the province had done was to declare that “laws shall exist in the province which the Dominion has decided ... shall not exist”.<sup>356</sup>

Edward Blake argued the appeal for the Ontario Attorney-General. Blake had earlier been the federal Liberal Minister of Justice and had presided over the amendments to the *Insolvent Act of 1875* and was one of the leading Canadian constitutional lawyers in the post-Confederation generation.<sup>357</sup> His argument and exchanges with the bench were reprinted in 1894 “as a further slight contribution to the discussion of the Constitution Act”.<sup>358</sup> Blake raised a number of constitutional arguments but more importantly, he made the members of the Privy Council aware of the practical implications of the ruling.

The central question, however, for Blake was not just the meaning of “bankruptcy and insolvency” but rather the meaning of those terms in the absence of federal legislation. The earlier Privy Council case of *Cushing v. Dupuy* had expressly stated that

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<sup>354</sup> R. Vipond, *Liberty and Community*, *supra* note 279 at 9.

<sup>355</sup> B. Baker, “The Province of Post-Confederation Rights” (1995) 45 U.T.L.J. 77 at 86.

<sup>356</sup> *A.G. of Ont. v. A.G. for Can.* [1894] A.C. 189 at 194 (P.C.). For a further discussion of the federal government’s argument, see A.H.F. Lefroy, “The Privy Council on Bankruptcy” (1893) 30 Can. L.J. 183. Lefroy based his summary on “a careful study of the transcript from the shorthand notes of the argument”.

<sup>357</sup> R. Vipond, *Liberty and Community*, *supra* note 247 at 51. Blake argued some of the major constitutional case of the late nineteenth century.

<sup>358</sup> *The Insolvency Case in the Privy Council, Argument of Mr. Blake for the Appellant* (Toronto: Bryant Press, 1894) Archives of Ontario, *Blake Papers*, MV 266 C2 Box 128, Env. 35 [hereinafter *Argument of Blake in the Insolvency Case*].

the B.N.A. Act “intended to confer on [the federal government] the power to interfere with property and civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them”.<sup>359</sup> While *Cushing* seemed to carve out a great deal of potential for federal interference in provincial matters, for Blake the larger the area created for the federal power, “the more essential that it is that you should keep free the hands of the Local Legislature” to deal with property and civil rights until the federal power was exercised. “The more ample the power you assign to the Dominion Parliament to meddle with the sphere of the Local Legislature...the more important it is to decide that at any rate until Parliament chooses to act the other Legislature shall not be disabled from acting.”<sup>360</sup> According to Blake the federal government urged an interpretation that would prohibit the provincial legislature from interfering while the Dominion was idle. This construction “would lead to obscurity and confusion and paralysis the moment it was adopted”. It would “paralyze the action of the one Legislature without any attempt on the part of the other Legislature to act”.<sup>361</sup>

Blake painted a contrasting image of the two branches of government. The federal government had not enacted any legislation since 1880. Further “there has never since been any attempt to pass any fresh law”. He stated to the Privy Council that it was unlikely that any federal legislation “will soon pass”.<sup>362</sup>

The constitution provided two mechanisms for federal action. First, the federal power of disallowance could have been used to prevent the provincial law from coming into force. Second, the Dominion government, “having determined upon the policy of Bankruptcy and Insolvency for themselves”, could at any time intervene and pass federal

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<sup>359</sup> *Cushing v. Dupuy* at 415-416.

<sup>360</sup> *Argument of Blake in Insolvency Case, supra* note 358 at 20-21.

<sup>361</sup> *Ibid.* at 8, 20.

<sup>362</sup> *Ibid.* at 4, 5. Blake did not mention the numerous federal private member bills that had been debated throughout the 1880s and the early 1890s. Nor did Blake note that a year earlier, the then Prime Minister Abbott, had announced a new government initiative.



legislation which would have put into abeyance the provincial statute. As neither option had been exercised, Blake characterized the Dominion attitude as:

acting a little like the dog in the manger; they will not act themselves. They will not take the food; nor do they propose to allow that it shall be obtained by anybody else.<sup>363</sup>

Provincial steps, by way of contrast, had remedied an urgent situation created by the repeal in 1880. It was in this context, that “the Local Legislature came to act” and passed the Creditors’ Relief Act which provided for a rateable distribution of the debtor’s assets. However, the legislation was defective in that “the evils of preferences continued”. Ontario took the additional step of enacting the legislation which was the subject matter of the appeal.<sup>364</sup> Provincial legislation had attempted to cure the “great evils” created by the repeal in 1880 such as the “game of grab” whereby individual creditors obtained unequal distributions. The federal policy of repeal, Blake told the English bench, bore “very hardly ... on foreign creditors and interfered with the general credit and interests of the country”.<sup>365</sup>

On the more specific question of whether the provincial law was a bankruptcy statute, Blake limited his definition of bankruptcy and insolvency to a “procedure compellable by creditors” which enabled assets to be distributed on a pro rata basis. Blake added that the terms also encompassed a provision providing for a discharge.

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<sup>363</sup> *Ibid.* at 11.

<sup>364</sup> *Ibid.* at 16-17. Blake’s position was consistent with the Ontario correspondence earlier forwarded to the Department of Justice prior to the appeal. The Attorney General’s Office had urged the federal government to inform the Privy Council that the Ontario Act in question was: “The only substitute for a Bankruptcy or Insolvency Law which this province has and that in consequence of the difference of opinion in the various sections of the Dominion, the Government has hitherto been unable to frame a law which the Canadian Parliament is prepared to adopt.” Letter to Department of Justice from Attorney-General of Ontario (20 May 1893) *Department of Justice Files*, PAC RG13, Vol. 2374, File 198/1893.

<sup>365</sup> *Argument of Blake in Insolvency Case*, *supra* note 358 at 16.

Logically, as the Ontario statute did not provide for either compulsory proceedings or a discharge, it could not be viewed as coming within the federal power.<sup>366</sup>

On this definitional point, the Privy Council adopted Blake's argument in part.<sup>367</sup> Lord Herschell delivered the opinion for the Board.<sup>368</sup> Lord Herschell concluded that assignments for the benefit of creditors had long been known under the common law and were independent of any system of bankruptcy and insolvency legislation. The validity of an assignment under the provincial law did not depend on the insolvency of the assignor.

While Lord Herschell stated that it was not necessary to define what was covered by "bankruptcy and insolvency" under s. 91, nevertheless, he concluded that there were certain common features to all systems of bankruptcy and insolvency:

But it will be seen that it is a common feature to all systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be distributed or not.<sup>369</sup>

Voluntary provisions were only an alternative. Counsel for the Attorney-General for Canada could not point to any "bankruptcy or insolvency legislation which did not

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<sup>366</sup> *Ibid.* at 9-13. Blake appears to have drawn his argument from *Broddy v. Stuart* (1886) 7 Can. L.T. 6 at 7 wherein Armour J. in upholding the validity of the Ontario Act, stated, "Besides how can it be said that this Act deals with insolvency when there is no compulsory liquidation, no enforced taking of a debtor's estate from him for distribution among creditors, no proceedings *in rem*, and no discharge of the debtor."

<sup>367</sup> It was also obvious to the counsel representing the federal government who had the difficult task of writing to his client after the Privy Council had reserved that "there can be no doubt from the course of remarks through the hearing that the decision will be in favour of the province". *Department of Justice Files PAC RG 13A2 Vol. 2374, File 198/1892.* Letter (15 December 1893) to Department of Justice from Bompas, Bischoff, Dogson et al. Lefroy also noted that Blake, "carried the members of the Board with him throughout" except for his argument that a discharge was an essential feature of bankruptcy law. See A.H.F. Lefroy, "The Privy Council on Bankruptcy" (1894) 30 Can. L.J. 182 at 184.

<sup>368</sup> Others present were Lord Watson, Lord MacNaghten, Lord Shand and Sir Richard Couch.

<sup>369</sup> *A.G. of Ont. v. A.G. for Can.*, [1894] A. C. 189, 200 (P.C.).

involve some power of compulsion by process of law to secure" to secure distribution to the creditors.<sup>370</sup>

Having found that compulsory proceedings were an essential element of a bankruptcy and insolvency, the provisions of the provincial statute, "relating as they do to assignments purely voluntary, do not infringe upon the exclusive legislative power conferred upon the Dominion Parliament".<sup>371</sup>

The Privy Council also ruled that the federal bankruptcy and insolvency power might necessarily include the regulation of matters within the provincial jurisdiction. The conclusion was consistent with the Privy Council's earlier ruling in *Cushing*:

They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated .... Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament.

Without federal legislation, it was open to the provinces to regulate those ancillary matters. The absence of federal legislation clearly influenced the decision of the Privy Council:<sup>372</sup>

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<sup>370</sup> *Ibid.* See J. Honsberger who argues that "bankruptcy must mean more than this as the function of compulsion upon the debtor is already performed through the ordinary writs of execution and other writs and procedures in aid of execution". J. Honsberger, "The Nature of Bankruptcy and Insolvency in a Constitutional Perspective" (1972) 10 Osgoode Hall L.J. 199 at 206. See also A. Bohémier, *La Faillite en Droit Constitutionnel Canadien* (Montréal: Les Presses de l'Université de Montréal, 1972) at 122-124.

<sup>371</sup> *A.G. of Ont. v. A.G. for Can.* [1894] A.C. 189, 200 (P.C.).

<sup>372</sup> Hogg argues that the Privy Council was "explicitly influenced by the absence of any federal legislation". P. Hogg, *Constitutional Law of Canada* 2<sup>nd</sup> ed. (Toronto: Carswell, 1985) at 25-13. Hogg states in the context of general principles, "courts do occasionally make reference to the absence or presence of such laws, and it seems likely that in practice they are sometimes influenced in favour of the validity by the failure of the other jurisdiction to act". at 15-34. Risk notes that in the argument in the *Local Prohibition Case*, which was decided in 1896, Lord Herschell "spoke often about federalism, especially about the value of diversity and of permitting the provinces to make their own choices in the absence of any dominion legislation...". See Risk, "Canadian Courts Under the Influence", *supra* note 279 at 729.

But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.<sup>373</sup>

For constitutional scholars, the importance of the ruling was the clear statement of the federal power. For Lefroy, writing in 1894, the importance of the decision was the Privy Council's observation that the federal government might by way of ancillary provisions deal with the effect of executions that would be otherwise within the competence of the provinces. This interpretation, according to Lefroy, carried out "the intention of the framers of the [British North America] Act". The case according to Lefroy was one of the "first instances of the Dominion Parliament 'scoring' before the Privy Council".<sup>374</sup>

However, what mattered more to creditors was the fact that the Privy Council had not invalidated the provision of the Ontario statute. Further, the finding that the provinces could continue to regulate ancillary matters in the absence of a federal law had a substantial impact on the direction of bankruptcy reform. The decision, contributed to the continued growth of provincial regulation and removed the immediate need for federal reform.

The decision actually preceded the introduction of the 1894 federal reform Bill. On the first reading of the Bill, the government admitted in reply to a question that it had not yet received an official copy of the decision and did not have any further information than the brief press reports.<sup>375</sup> By the next time the Bill came up for debate, Members of Parliament quoted lengthy passages from the decision.<sup>376</sup> Once the tenor of the decision became known, it spelled the end for the federal Bill. It was urged that federal reforms be

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<sup>373</sup> *A.G. of Ont. v. A.G. for Can.*, [1894] A.C. 189, 200 (P.C.)

<sup>374</sup> A.H.F. Lefroy, "The Privy Council on Bankruptcy" (1894) 30 Can. L.J. 182 at 186, 190, 193.

<sup>375</sup> *Debates of the Senate* (3 April 1894) at 97.

<sup>376</sup> *Debates of the Senate* (17 April 1894) at 246-247 (Scott).

delayed for at least another 12 months to allow provinces to enact legislation in accordance with the decision of the Privy Council.<sup>377</sup>

After the *Voluntary Assignments Case*<sup>378</sup> attention in Parliament shifted to the ability of the provinces to regulate the matter. The special needs,<sup>379</sup> or “the peculiar circumstances which may locally exist” could be accommodated by provincial legislation.<sup>380</sup>

For instance, in the east there may be circumstances connected with the trade of the country which might require a different enactment for the legislation required on the Pacific.<sup>381</sup>

The interests of all were best served by the provinces exercising their jurisdiction over property and civil rights.<sup>382</sup>

In 1895, the decision of the Privy Council was used to oppose the re-introduction of a national insolvency Bill in the Senate on the basis that the provincial reform path should be allowed to continue.<sup>383</sup> Charles Tupper, Canada’s High Commission to England and later the Prime Minister who led the Tories to defeat in 1896, told the British Empire League on 4 December 1895 that “the recent decision of the Privy Council ...

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<sup>377</sup> *Debates of the Senate* (17 April 1894) at 233.

<sup>378</sup> *A.G. of Ont. v. A.G. for Can.* [1894] A.C. 189 (P.C.).

<sup>379</sup> Charles Tupper, “Canadian Insolvency Legislation” Report of Meeting of British Empire League (4 December 1895) at 5.

<sup>380</sup> *House of Commons Debates* (17 April 1894) at 239.

<sup>381</sup> *House of Commons Debates* (17 April 1894) at 239.

<sup>382</sup> *Debates of the Senate* (17 April 1894) at 239 (McClelan).

<sup>383</sup> See *Debates of the Senate* (29 May 1895) at 151.

seems to have had the effect of stimulating local legislation on insolvency".<sup>384</sup> New Brunswick enacted preference legislation in 1895 followed by Nova Scotia in 1898.<sup>385</sup>

The election of Laurier in 1896 further strengthened the provincial cause. Laurier restored the tradition of federal non-involvement and allowed provincial reforms to take their natural course.<sup>386</sup> By 1899 Laurier's government was systematically tracking the evolution of provincial legislation. The Canadian Minister of Justice instructed memoranda to be prepared on:

the provisions of the laws of each Province relating to the distribution of assets of persons who are practically insolvent, pointing out in what regard the laws of any one province fail to make complete provision for such distribution, what Provinces, if any give a preference to any class of creditors, and what remedy a general insolvent law would afford which may not be adequately afforded by Provincial legislation at the present time.<sup>387</sup>

The Laurier administration was determined to prove that provincial legislation was adequate. In 1902, W.S. Fielding, the Minister of Finance, (and former premier of Nova Scotia)<sup>388</sup> wrote to Charles Fitzpatrick, the Minister of Justice, and inquired as to

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<sup>384</sup> Charles Tupper, "Canadian Insolvency Legislation" Report of Meeting of British Empire League (4 December 1895) at 6.

<sup>385</sup> See note 33 and accompanying text.

<sup>386</sup> Laurier's government was more sympathetic to the provincial cause and his cabinet included three former Liberal Premiers, Oliver Mowat of Ontario, W.S. Fielding of Nova Scotia, and Andrew Blair of New Brunswick. See Cook, *Provincial Autonomy*, *supra* note 279 at 45. Miller argues that Mowat had limited influence on the Laurier administration. See C. Miller, "Mowat, Laurier and the Federal Liberal Party" in D. Swainson, ed., *Oliver Mowat's Ontario* (Toronto: Macmillan, 1972). Laurier's cabinet also included David Mills, leading provincial political thinker, who served as Minister of Justice from 1897 to 1902. See M. Greenwood, "David Mills and Co-ordinate Federalism 1867-1903" (1977) 16 U.W.O. L.R. 93. One editorial accused Laurier of equalling Macdonald's skill of dodging difficult issues. The real cause of delay was the "inveterate tendency of Canadian politicians to shillyshally, to weigh this vote against that, to temporise, and to put off doing anything as long as they possibly can". "The Insolvency Fiasco" *Dry Goods Review* (May 1898) in *Laurier Papers*, MG 26, Vol. 75, Reel c-756, No. 23342.

<sup>387</sup> *Department of Justice Papers*, PAC RG 13, Vol. 2310, File 23/1902.

<sup>388</sup> Fielding earlier as leader of the Liberals in Nova Scotia had called for a repeal of the union and attended the 1887 Premiers Conference. See Cook, *Provincial Autonomy*, *supra* note 279 at 35. Greenwood describes Fielding's policy as premier of Nova Scotia as seconding the Mowat version of the

the state of provincial law. In his letter, Fielding referred to prior British complaints about cases where English creditors had "suffered severely" in the Maritime provinces.

Since that time, Provincial legislation respecting preferential assignments, &c., has, I think, largely, if not wholly, removed the difficulty. My impression is that the Provincial laws now cover the ground pretty fully.<sup>389</sup>

Laurier used the pending reforms in the provinces as the reason for bowing out of the field.<sup>390</sup> In 1898, in response to the introduction of another private members' bankruptcy Bill, Laurier referred to the superior state of Quebec provincial law respecting insolvency. He argued that if other provinces followed then there would be no need for the federal government to legislate in the area.<sup>391</sup> By 1903, with provincial reforms firmly entrenched, there was no reason to press on with endless debates at the federal level. Laurier ended the debate on the 1903 Bill with a statement that left the matter clearly to the provinces:

but since the matter has been brought to the attention of the House, most of the provinces have amended their laws with regard to insolvent estates and I understand that these are now pretty satisfactory except in one or two provinces. It is to be hoped that the provinces themselves will attend to this kind of legislation, and adopt laws of such a character as to be acceptable.<sup>392</sup>

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constitution. M. Greenwood, "Lord Watson, Institutional Self Interest and the De-Centralization of Canadian Federalism in the 1890s" (1975) 9 U.B.C. L.R. 244 at 246.

<sup>389</sup> Letter of W. S. Fielding to Charles Fitzpatrick (19 February 1902) Department of Justice Papers, PAC RG 13, Vol. 2311, File 117/1902.

<sup>390</sup> In the Journal of the Can. Bankr. Assoc. it was reported that, "it did not meet with any countenance or support from Government, for the alleged reason that the Provincial Acts are satisfactory". President's Address to Eighth Annual Meeting of the Can. Bankr. Assoc., 25-26 October 1899, (1899-1900) J. of Can. Bankers' Assoc. 113.

<sup>391</sup> *House of Commons Debates* (17 March 1898) at 2032. In fact his Minister of Trade and Commerce, Richard Cartwright later used the efforts of the provinces as a reason why the Government was not pressing the matter. See *House of Commons Debates* (1 April 1898) at 2929. In 1899, Laurier refused to move on federal reform as progress had been made in Nova Scotia and New Brunswick. See *House of Commons Debates* (17 May 1899) at 3254.

<sup>392</sup> *House of Commons Debates* (18 May 1903) at 3256. The House of Commons voted 74 -42 against the reform Bill.

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

### **Conclusion**

Between 1880 and 1903 it was not certain whether federal or provincial legislation would prevail in the regulation of insolvent debtors. After repeal of the *Insolvent Act* Parliament continued to debate a series of reform bills. Similarly the provinces also began to introduce legislation which attempted to ameliorate the effects of repeal. However, provincial legislation was slow to emerge and many regions tolerated preferences until the end of the century. The inadequacy of provincial legislation in many respects kept pressure on Parliament to re-enter the field. Boards of Trade continued to draft reform bills throughout this period in the absence of government interest. The slow pace of provincial legislation and the failure of all federal reform bills can be explained by a number of factors.

The discharge continued to be controversial. Early in the period, there was little consensus over the need for a discharge and several bills specifically excluded the provision. The debate again pitted notions of individual responsibility against forgiveness, but there was an eventual recognition that the discharge had an effect on creditor interests. For example, supporters of bankruptcy law, while appealing to the importance of releasing a debtor from the burden of debt, also argued that the discharge would encourage debtor co-operation, reduce fraud and thereby enhance creditor collection efforts. After 1885 most federal bills included a discharge provision. However, the sentiment that a debtor had a moral obligation to repay debts remained strong and there was little consensus that a discharge was beneficial.



The tension between local and distant creditors continued to be an important factor during this period. Repeal had severe economic implications for distant and foreign creditors who were disadvantaged by the common law race to the assets and the toleration of preferences. National creditors appealed to the sense of Canada's new emerging nationhood as the nineteenth century came to a close. Foreign creditors, equally frustrated by the absence of legislation, made numerous pleas for reform. The federal government remained intransigent despite the pressures for reform, and a number of provinces left debtors and creditors to the scramble of the common law. Provincial delay and the absence of federal legislation must be explained by the benefits available to local creditors under the common law. Claims of a new national economy continued to be premature as local and rural markets played an important role in late nineteenth century Canada.

However, a similar conclusion was also reached in chapter 5 to explain the repeal of the federal bankruptcy legislation in 1880. Some might argue that by 1903, economic change might have been sufficient to support a national law. The pleas of foreign creditors, the rising cost of credit and reduced trade opportunities must have provided Parliament with very strong reasons to embark on a reform program. However, if there were signs of a new national economy, a further factor prevented reform. The debates took place within the context of federalism.

Constitutional law played a significant role in the evolution of bankruptcy and insolvency law between 1880 and 1903. Constitutional uncertainty, particularly between 1886 and 1894, inhibited reforms both at the federal and provincial level. Once the Privy Council ruled in 1894, it was open for the remaining provinces to put reforms in place. After 1903, no further bankruptcy Bills were debated in Parliament until 1918.

**Appendix 1****Federal Reform Bills 1880-1903****1880 (2nd Sess., 4th Parl.)**

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

**1882 (4th Sess., 4th Parl.)**

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

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

**1883 (1st Sess., 5th Parl.)**

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

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

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

**1884 (2nd Sess., 5th Parl.)**

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

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

**1885 (3rd Sess., 5th Parl.)**

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

Bill C-32 *Respecting Insolvency*

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

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

**1886 (4th Sess., 5th Parl.)**

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

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

**1887 (1st Sess., 6th Parl.)**

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

**1894 (4th Sess., 7th Parl.)**

Bill S-C *Respecting Insolvency,*

Bill C-152 *Respecting Insolvency*

**1895 (5th Sess., 7th Parl.)**

Bill S-A *Respecting Insolvency*

**1898 (3rd Sess., 8th Parl.)**

Bill C-84 *Respecting Insolvency*

**1903 (3rd Sess., 9th Parl.)**

Bill C-53 *Respecting Insolvency*

## CHAPTER 7

### **Reform Achieved: The Bankruptcy Act of 1919**

#### **Introduction**

The *Bankruptcy Act of 1919*, in the words of one author, was “a very radical change in the relationship of debtors and creditors”.<sup>1</sup> The legislation marked the reassertion of the federal government’s jurisdiction over bankruptcy and insolvency and ended a near forty-year absence from the field.<sup>2</sup> The Act of 1919 would remain in force for the next thirty years and set the framework for much of twentieth century Canadian bankruptcy law.<sup>3</sup> The *Canadian Law Times* proclaimed that the new *Bankruptcy Act* was “certainly an event in Canada’s legal history”.<sup>4</sup>

The Act of 1919 contained several important provisions that improved upon provincial legislation. In addition to creating uniformity, the legislation allowed creditors

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<sup>1</sup> F.G.T. Lucas, “The New ‘Bankruptcy Act’” (1920) 40 Can. L.T. 668.

<sup>2</sup> The 1919 Act was Canada’s first federal bankruptcy statute since the repeal of the Insolvent Act in 1880. For a discussion of the Insolvent Acts of 1869 and 1875 and the repeal in 1880, see chapter 5. For a discussion of the evolution of provincial legislation and the numerous failed reform efforts between 1880 and 1903, see chapter 6.

<sup>3</sup> The next major revision of bankruptcy law occurred in 1949. Can. S. 1949, c. 7. One author called the 1949 Act a “reprise of the 1919 Act”. J.M. Ferron, “The Bankruptcy Court and Administration in Ontario” (1990) 24 L. Soc. Gaz. 130 at 131. The Tassé Report, written in 1970, states: “The present Bankruptcy Act, enacted in 1949, is based upon the Bankruptcy Act of 1919 which in turn was based upon the Bankruptcy Act of England, first enacted in its present form in 1883”. Report of the Study Committee on Bankruptcy and Insolvency Legislation (Canada, 1970) at xiii. [Hereinafter Tassé Report]. Jacob Ziegel notes that although the 1919 Act has been amended many times, “the 1919 Canadian Bankruptcy Act still provides the conceptual framework for the current Bankruptcy and Insolvency Act”. See J. Ziegel, “Canada’s Phased in Bankruptcy Law Reform” (1996) Am. Bankr. L.J. 383.

<sup>4</sup> “Editorial: Bankruptcy” (1920) 40 Can. L.T. 546. The editorial proclaimed the historic event despite the fact that “the enactment is purely a copy or transcript of the latest English Bankruptcy Act”. Nineteenth century federal legislation was largely forgotten with one source incorrectly claiming that “the first Canadian act was adopted in 1919”. United States Senate, Strengthening of Procedure in the Judicial System: Report to the President on the Bankruptcy Act and Its Administration in the Courts of the United States (72d Cong., 1 Sess., Senate Document) at 65. Other studies also have seem to have forgotten about the nineteenth century *Insolvent Acts*. See eg., M. Priest & A. Wohl, “The Growth of Federal and Provincial Regulation of Economic Activity, 1867-1978” in W. T. Stanbury, ed., *Government Regulation Scope, Growth, Process* (Montreal: The Institute for Research on Public Policy, 1980) 69 at 119.

to initiate compulsory bankruptcy proceedings, and permitted formal composition proceedings. More importantly, the new federal legislation allowed debtors to apply for a discharge and obtain a release of their debts. This chapter examines the period 1903 to 1919 and offers an explanation of why federal legislation re-emerged after a long absence. In addition it examines why the discharge came to be accepted as an essential part of the legislation. It considers economic change in the context of federalism and the emergence of the regulatory state.<sup>5</sup>

Bankruptcy law re-emerged as a national issue largely as a result of the numerous economic changes that had occurred since the turn of the century. If the American Bankruptcy Act of 1898 represented the maturation of American capitalism, the Canadian *Bankruptcy Act of 1919* also followed significant economic change.<sup>6</sup> Chapters 5 and 6 demonstrated that the national economic vision may have been premature in the nineteenth century. Localism, the dominance of rural markets and personal credit relationships were important factors that explained the unpopularity of national bankruptcy legislation and the ultimate demise of the *Insolvent Acts of 1869 and 1875*. By 1914, however, there were increasing manifestations of the transformation of the Canadian economy. The "Great Boom of 1900-1913" saw rapid urbanization and industrialization on an unprecedented scale. National manufacturing companies emerged and large retail department stores began to dominate Canada's central cities. Transcontinental rail links forged inroads into new markets.<sup>7</sup> New national interest

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<sup>5</sup> Broad economic change may influence policy direction over time. Yet the federal character of the state may have an autonomous influence on policy choice. Additionally, the law itself may have an independent role to play in that law reform may depend on the innovations known to lawyers. English bankruptcy law was a significant influence. On the interplay between macroeconomic change and state structures, see L. Dodd, & C. Jillson, "Conversations on the Study of American Politics: An Introduction" in L. Dodd & C. Jillson eds., *The Dynamics of American Politics* (Boulder: Westview, 1994) 1 at 10. On the influence of law, see Alan Watson, "Legal Change: Sources of Law and Legal Culture" (1983) 131 U. Penn. L. Rev. 1121 at 1154 and D. Horowitz, "The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change" (1994) 42 Amer. J. of Comp. L. 233 at 250-252.

<sup>6</sup> Compare R. Sauer, "Bankruptcy Law and the Maturing of American Capitalism" (1994) 55 Ohio St. L.J. 291

<sup>7</sup> The term Great Boom is used in R. Bothwell, I. Drummond & J. English, *Canada 1900-1945* (Toronto: University of Toronto Press, 1987) at 55-83. The general economic changes are discussed in more detail below.

groups emerged to demand uniform commercial legislation. Federal bankruptcy legislation could no longer be delayed in an expanding national market.

Further, credit relationships had become less dependent upon character as newer, more depersonalized, forms of credit emerged. Failure became more acceptable as society began to recognize that certain factors beyond the debtor's control could lead to a downfall. A discharge for honest debtors therefore became more acceptable.

The acceptability of the discharge may on one level represent a transformation of values. The discharge was no longer perceived as an evil, as in the nineteenth century, but it was proclaimed as a necessary form of business regulation. The new acceptability of the discharge, however, also reflected the underlying interests of creditors who demanded reform. The *Bankruptcy Act of 1919*, while it enabled debtors to obtain their discharge, had little to do with concepts of debtor rehabilitation. Canada opted for a discharge because it met the legal needs of the credit community. Provincial legislation did not adequately deal with debtors. The absence of compulsory proceedings and the lack of a discharge created collection difficulties for creditors as debtors often engaged in deceptive conduct. Creditors came to accept the necessity of the discharge as a means of improving the standard of debtor conduct and a way to enhance their collection efforts. The Canadian Credit Men's Trust Association (CCMTA), an organization that represented various authorized trustees operating under the provincial assignment statutes, was well placed to recognize the needs of creditors and the Bill reflected their influence. The conservative English provisions provided the ideal solution and the CCMTA's solicitor, who drafted the Bill, closely followed the English model.

The Act of 1919 cannot be explained entirely by reference to the path of economic development. Other factors influenced the timing of the legislation. Federalism continued to play a role.<sup>8</sup> The division of powers and the ability of the

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<sup>8</sup> The importance of constitutional structures as a factor that impedes reform has been recognized by others. Corry argues that "The division of constitutional authority into ten separate spheres naturally puts difficulties in the way of governmental action, affecting our economic and social relationships, which stubbornly refuse to be compartmentalized". J.A. Corry, *The Growth of Government Activities Since Confederation* (Ottawa, 1939) at 6. Other regulatory matters were also subject to jurisdictional dispute arising from the federal nature of the constitution which made it "more difficult to regulate". See C.D. Baggaley, *The Emergence of the Regulatory State in Canada 1867-1939* (Ottawa: Economic Council of Canada, 1981) at 205.

provinces to regulate voluntary assignments and the administration of debtors' estates constrained reform at the national level even after the economy began to move in a national direction.<sup>9</sup> The Privy Council decision in 1894, which upheld the validity of the Ontario *Assignments Act*, contributed to the growth of provincial regulation of debtor-creditor matters and removed the immediate need for federal reform legislation until after the turn of the century. However, the War provided the federal government with an opportunity to re-assert its authority over the field. Bankruptcy reform coincided with an unprecedented growth of federal regulation during the war.

Part I of this chapter examines the legislative history leading up to the emergence of a new bankruptcy Bill in 1918 and further considers some of the relevant provisions of the *Bankruptcy Act of 1919*. Part II focuses on the numerous economic factors that explain the re-emergence of bankruptcy law as a national issue and why the discharge became acceptable in 1919. Part III discusses the relevance of federalism and the growth of the regulatory state.

## I Legislative History

### A *The Difficulties with Provincial Legislation*

By 1903 provincial regulation of debtor-creditor matters was well established.<sup>10</sup> Provincial legislation shared several common elements. Under provincial statutes, debtors made voluntary assignments to authorized trustees who liquidated the debtors' assets for the benefit of the creditors. The authorized trustee, appointed by the provincial government, acted under the supervision of creditors. No court applications were required during the liquidation.<sup>11</sup> The legislation prohibited unjust preferences and

<sup>9</sup> On the influence of institutions and their effect on policy development, see D. Ernst, "Law and American Political Development 1877-1938" (1998) 26 *Rev. Am. Hist.* 205; D. B. Robertson, "History, Behaviouralism, and the Return to Institutionalism in American Political Science" in E. H. Monkkenon, ed., *Engaging the Past: The Uses of History Across the Social Sciences* (Durham: Duke University Press, 1994) at 113; K. Thelen and S. Steinmo, "Historical Institutionalism in Comparative Politics" in S. Steinmo, K. Thelen and F. Longstreth, eds., *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge: Cambridge University Press, 1992) 1.

<sup>10</sup> See chapter 6.

<sup>11</sup> The best overview of the provincial system can be found in O. Wade, "Insolvency Including Assignments and Winding Up Proceedings under the Dominion and Ontario Winding Up Acts" (1919-20)

abolished priority between execution creditors. Authorized trustees distributed the debtor's assets on a pro rata basis. However, provincial law did not provide for a discharge.<sup>12</sup>

One of the largest organizations of authorized assignees or trustees to emerge under the provincial regimes was the Canadian Credit Men's Trust Association (CCMTA).<sup>13</sup> Several defects in the provincial assignment Acts led the CCMTA to demand new legislation.<sup>14</sup> The CCMTA identified at one of its meetings "four defects or omissions" in the provincial legislation:

Firstly, the lack of uniformity relating to insolvency laws in Canada; secondly, the absence of machinery for compelling an insolvent debtor under certain circumstances to turn over to a trustee for creditors his property for pro rata distribution among creditors (involuntary bankruptcy); thirdly, the ratification by the court of composition and extension agreements when approved by a certain majority of creditors (say 75 per cent) thereby binding the minority, and fourthly, the right of an honest but unfortunate debtor to obtain his discharge.<sup>15</sup>

The listed defects had significant consequences for creditors. For example, the

9 Can. Chart. Acct. 167. See also J. Honsberger, "Bankruptcy Administration in the United States and Canada" (1975) 63 Cal. L. Rev. 1483 at 1530.

<sup>12</sup> There were constitutional difficulties with provincial legislation providing for compulsory proceedings or a discharge. In *A.G. of Ont. v. A.G. for Canada* [1894] A.C. 189 at 200 the Privy Council stated, "In reply to a question put by their Lordships the learned counsel for the respondent were unable to point to any scheme of bankruptcy which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate." Counsel for Ontario had argued that the provincial legislation did not interfere with federal jurisdiction as it did not contain a discharge provision.

<sup>13</sup> Tassé Report, *supra* note 3 at 16.

<sup>14</sup> The CCMTA originally demanded uniformity in provincial legislation, but later sought federal legislation. Their four stated defects could not have been remedied by provincial amendments. See *infra* note 142.

<sup>15</sup> "Proposed Bankruptcy Act" *Monetary Times* (1 September 1917) 14. As to uniformity, see Letter to Canadian Bankers' Association from CCMTA (14 November 1916), *Canadian Bankers' Association Papers*, Can. Bankers' Assoc. Archives, (87-536-01, Legislative Reports from Council). The letter to the Bankers' Association claimed that "greater uniformity of laws would foster and develop a better national spirit and make for a greater nation". See also A.C. McMaster, "The Canadian Bankruptcy Act" (1912-13) 2 Can. Chart. Acct. 236 at 238.



lack of a compulsory provision in provincial legislation prevented a creditor from forcing a debtor to turn over his or her assets.<sup>16</sup> The most significant defect in provincial legislation was the inability of the debtor to obtain a discharge.<sup>17</sup> The absence of a discharge created collection problems for creditors. To avoid creditors, debtors traded in the name of their wife or behind the name of a company or took the dramatic step of leaving the country.<sup>18</sup> Debtor misbehaviour led to a growing acceptance on the part of creditors that some legislative reform was required.<sup>19</sup>

### *B The New Federal Bankruptcy Bill*

Like many previous bankruptcy Bills, the 1919 Act originated in the private sector. The CCMTA originally sought the assistance of the Canadian Bar Association to draft uniform assignment acts for submission to the provinces.<sup>20</sup> However, the CCMTA

<sup>16</sup> The exception to this statement was the province of Quebec. See H.P. Grundy, "The Bankruptcy Act" (Address to the Toronto Bankers' Educational Association, 11 May 1920) (1919) 27 J. of Can. Bankers' Assoc. 426 at 427. See also G. T. Clarkson, "The Bankruptcy Act" (1920-21) 10 Can. Chart. Acct. 154 at 155.

<sup>17</sup> J. Honsberger, "Bankruptcy Administration in the United States and Canada" (1975) 63 Cal. L. Rev. 1515 at 1530.

<sup>18</sup> A.C. McMaster, "The Bankruptcy Act" (1912-13) 2 Can. Chart. Acct. 236 at 237. One author summarized options available to debtors under the provincial regime. Debtors had the option of leaving the country, carrying on business in the names of their wives, forming companies, awaiting the Statute of Limitations, or obtaining releases from those creditors who were willing to grant them. See J. Bicknell, "The Advisability of Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35 at 44.

<sup>19</sup> The specific problem of creditors being defrauded by transfers between spouses is discussed in Lori Chambers, *Married Women and Property Law in Victorian Ontario* (Toronto: Osgoode Society, 1997) at 148-165. The introduction of the Married Women's Property Act 1884 enabled a wife to manage, encumber and dispose of property. With the introduction of this regime, "husbands and wives could transfer property from a liable to a non-labile spouse, misrepresent who actually owned what property, and evade debts with impunity". Chambers at 11.

<sup>20</sup> Resolution of CCMTA attached to letter of CCMTA to CBA (5 July 1916) *CBA Papers* PAC MG 28 I 169 [hereinafter *CBA Papers*]. See also Minutes of Annual Meeting of the Canadian Bankers' Association (9 November 1916) in Minute Book I, *Canadian Bankers' Association Papers*, Canadian Bankers' Association Archives. In response to the CCMTA request, the CBA's President advised the CCMTA that insolvency had been discussed at the first annual meeting of the CBA and that the matter had been referred to its Quebec committee. Letter of James Aikins to CCMTA (6 July 1916). For other correspondence of the CBA discussing the CCMTA, see letter of James Aikins to R.C. Smith (7 July 1916);

was concerned that legislation drafted by the CBA would not protect the CCMTA's interests.<sup>21</sup> Thus the CCMTA retained H.P. Grundy, a solicitor from Winnipeg, and "instructed him to draft a Bill based on creditor control and retaining the essential features of the provincial assignment acts".<sup>22</sup> Grundy explained his retainer:

The subject has been discussed at the meetings of the Legislative Committee and the National Council of the Association during the past two years and finally at its last Legislative Committee meeting the writer was requested to undertake the work of drafting an Act which would give the commercial interests of Canada the benefit of the usual provisions in similar acts of other countries as to 'involuntary bankruptcy' and the 'discharge of an honest debtor', but would on the other hand eliminate the heavy expense and delays complained of by the commercial interests in England, United States and Australia.<sup>23</sup>

Grundy prepared a memorandum for the CCMTA outlining the principles of his proposed Bill which provided for uniformity, involuntary bankruptcy, composition proceedings and a discharge.<sup>24</sup> He presented his draft Bill to the Minister of Justice on 21

Letter of Smith to Aikins (13 July 1916); Letter of CCMTA to James Aikins (16 September 1916) *CBA Papers*. The Quebec Committee of the CBA presented an interim report on 26 April 1917. It recommended compulsory bankruptcy, assignee as officer of the court, uniformity and the recognition of provincial laws of privileges and hypothecs. However, it was not prepared to make a recommendation on a discharge. "It is urged that such a clause is in fact confiscatory in its nature and contrary to sound principle." See Quebec Council of CBA, "Insolvency Legislation" (26 April 1917) *Jacobs Papers PAC MG27 III C3 Vol. 1, No. 152* at 153.

<sup>21</sup> "In 1917 the Canadian Bar Association drafted an Act which was not satisfactory. Mr. Grundy was then asked to draft an Act." "Proposed Bankruptcy Act" *Monetary Times* (5 April 1918) 14.

<sup>22</sup> Tassé Report, *supra* note 3 at 16. A United States government report also includes a section on the history of Canadian Bankruptcy Legislation. See Thayer, "Report on Bankruptcy Administration in Canada" in *Administration of Bankrupt Estates* House Committee Print, 71st Congr., 3d Sess., 1931, 146-147. The larger report became known as the Donovan Report and subsequent references will be to the Donovan Report. Garrison, "Donovan Bankruptcy Report: A Summary of Its Findings and a Discussion of Certain Criticisms" (1930) 16 ABA J. 493; "The Donovan Report on the Bankruptcy Administration" (1930) 16 ABA J. 431.

<sup>23</sup> Letter of H.P. Grundy to James Aikins (15 January 1917) *CBA Papers*. Grundy, not wanting to alienate the potentially powerful ally in the CBA, added that his clients "would greatly appreciate the active support and assistance of the Canadian Bar Association and the Provincial Bar Associations in this matter".

<sup>24</sup> Two different forms of the memorandum are reprinted in the following sources. "Bankruptcy Legislation: Credit Men's Proposed Legislation and Recommendations" *Monetary Times* (9 March 1917)

June 1917<sup>25</sup> and later sent a detailed eleven-page letter explaining the provisions of his Bill.<sup>26</sup> However, the government did not take any action during 1917.<sup>27</sup>

S.W. Jacobs, a Member of Parliament who had been studying bankruptcy reform for the Liberal Party, introduced the Bill the following year<sup>28</sup> as a non-government measure.<sup>29</sup> All members of the government expressed support for the Bill and agreed to appoint a Special Committee. However:

it was not the intention to allow the bill to become law this Session. What was desired was that members of the public interested in such a measure should thus have an opportunity this year to become familiar with its terms and at a later session if the draft measure proved agreeable to the financial interests generally it might become law.<sup>30</sup>

22; "Federal Bankruptcy Legislation: Reasons Given Before CCMTA why there Should be a Dominion Bankruptcy Act" (1916-1917) 6 Can. Chart. Acct. 282.

<sup>25</sup> "As requested by the Honourable Arthur Meighen, I enclose you herewith a copy of the Credit Men's Journal containing a draft Bankruptcy Act which I have prepared during the winter months at the request of the CCMTA." Letter of H.P. Grundy to C.J. Doherty, Minister of Justice (21 June 1917) *Department of Justice Papers*, PAC RG13 A2 Vol. 213, File No. 1081.

<sup>26</sup> Letter of Grundy to Doherty, Minister of Justice (13 July 1917) *Department of Justice Papers* PAC RG13 A2 Vol. 213, File No. 1074-1092.

<sup>27</sup> Letter of C.J. Doherty to Henry Detchon, Manager of the CCMTA (21 September 1917). The Minister of Justice personally wrote to the General Manager of the CCMTA to advise that the government would not be able to take action during that session. See also *Letter of Doherty to Grundy* (25 June 1917); *Letter of Doherty to Grundy* (17 July 1917) *Department of Justice Papers*, PAC RG13 A2 Vol. 1081.

<sup>28</sup> *House of Commons Debates* (27 March 1918) at 205. For a brief biographical note on Jacobs, see Wallace, ed., *MacMillan Dictionary of Canadian Biography*, 4th ed. (Toronto: 1977).

<sup>29</sup> The Liberal Party appointed a sub-committee of its National Advisory Committee in 1916, to "study and report upon the question of ... adopting a Federal Insolvency Law". S.W. Jacobs was appointed as chair of the sub-committee. Letter of National Liberal Advisory Committee to S.W. Jacobs (3 January 1916) *Jacobs Papers*, PAC MG27 III C3 Vol. 1 No. 1. Jacobs asked the committee members to acquaint themselves with the laws of Great Britain, France and the United States. See *Letter of Jacobs to A.R. McMaster* (7 January 1915) *Jacobs Papers*, PAC MG27 III C3 Vol. 1 No. 12. A meeting of the Liberal Committee was scheduled to be held on 18 July 1916, at Laurier's office to discuss committee work; however, no reports or synopsis of the meeting could be located. See *letter of National Liberal Advisory Committee to Jacobs* (19 June 1916) *Jacobs Papers* PAC MG27 III C3 Vol. 1 No. 115.

<sup>30</sup> Canadian Bankers' Association Circular No. 3L (12 April 1918); Meeting of the Executive Council of the Canadian Bankers' Association (19 March 1918), Minute Book II Executive Council, *Canadian Bankers' Association Papers*, Canadian Bankers' Association Archives.

On 10 April 1918, the House of Commons appointed a Special Committee to review the Bill.<sup>31</sup> The Special Committee heard from wholesalers, retail trade associations, accountants, commercial travellers, bankers and lawyers. However, Parliament decided that before the Bill could be resubmitted the government “should have expressions of opinion from other bodies which had not been represented on the delegations heard”.<sup>32</sup> At the conclusion of the hearings, the Special Committee recommended that the Bill be reprinted for distribution “amongst the public libraries and the industrial, commercial, financial and legal bodies of the country”.<sup>33</sup> The Bill was allowed to stand until the following session. With his clients concerned as to whether any action would be taken on the committee report, Grundy sent an urgent telegram to Jacobs asking if the House of Commons had adopted the committee’s recommendation to reprint and widely distribute the Bill.<sup>34</sup> Jacobs assured Grundy that much interest had been expressed in the Bill and that it looked “as if [at the] next session it will go through as one of the first measures”.<sup>35</sup>

<sup>31</sup> House of Commons, Special Committee on Bill No. 25, Respecting Bankruptcy PAC RG14 87-88/146 Wallet on Bankruptcy at 12 April 1918 [hereinafter “Special Committee on Bankruptcy”].

<sup>32</sup> S.W. Jacobs, “The Proposed Bankruptcy Act,” (Address to the CBA, 1918) (1918) 3 Proceedings of the CBA, 164 at 165. A typewritten copy of the speech can also be found in *Jacobs Papers*, PAC MG27 III C3 Vol. 11, No. 3914. The transcripts of the *Special Committee on Bankruptcy*, *ibid.* are available for the following groups: Retail Merchants’ Association of Canada (17 April 1918); Commercial Travellers’ Association (primarily concerned over the definition of the employees’ preferred claim and whether commission earned would be excluded) (21 April 1917); Institute of Chartered Accountants (many technical amendments were suggested; recommended that trustees be members of their Institute) (27 April 1918). A large number of letters supporting the Bill were located in the *Department of Justice Papers*, PAC RG13 A2 Vol. 221, File No. 735. All but the letter from Clarkson come from the Western provinces, predominantly Winnipeg. E.C. Clarkson & Sons Trustees, 6 April 1918 (Interviewed Grundy who was “in charge of the Bill for the promoters. I am wholly in favour of this Bill”).

<sup>33</sup> *House of Commons Journals* (10 May 1918) at 239.

<sup>34</sup> Telegram of Grundy to Jacobs (15 May 1918) *Jacobs Papers*, PAC MG27 III C3 Vol. 1, No. 237. “Would you kindly see that the same is not overlooked in the final rush.” See also Letter of Grundy to Jacobs (17 April 1918) *Jacobs Papers*, PAC MG27 III C3 Vol. 1, No. 238.

<sup>35</sup> Letter of Jacobs to Grundy (23 May 1918) *Jacobs Papers* PAC MG27 III C3 Vol. 1, No. 239. Jacobs’ personal papers contain a number of letters regarding the Bankruptcy Bill. See Letter of Robert

The war-time Union government, led by Robert Borden, introduced the Bankruptcy Bill on 6 March 1919 and the House debated second reading on 28 March.<sup>36</sup> However, the debate was suspended and weeks passed without any activity on the Bill. Word leaked out that the government was considering shelving the Bill, with one source claiming it was due to the opposition of the banks.<sup>37</sup> Grundy's response, although invoking the national interest, indicated more strongly his client's disappointment over the potential defeat of their privately drafted Bill. Grundy wrote to Jacobs:

I have heard some rumours that the Government may not have the time to put through the Act at this session, and if such is the case the parties whom I represent will be very greatly disappointed. They have spent a lot of time and money getting the Act into shape, and it is a measure which will be of great benefit to Canada, and they feel, I know, that the measure should be pressed through.<sup>38</sup>

In closing his letter to Jacobs, Grundy suggested that Jacobs see some of the ministers in order to save the Bill.<sup>39</sup> Some "agitation from without" such as a resolution from the CCMTA was also required.<sup>40</sup>

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Stuart, Public Accountant (29 March 1918) Vol. 1, No. 179; Letter of Ewart, Scott, MacLaren and Kelly (Ottawa Law Firm inquiring on behalf of different wholesale merchants) (5 April 1918) Vol. 1, No. 192; Letter of Editor of Sanitary Engineer (1 April 1918) Vol. 1, No. 196; Letter of Peter Ryan, Registrar, Toronto (10 April 1918) Vol. 1, No. 206; Letter of A.C. Sutton (solicitor representing Vancouver Board of Trade) (23 April 1918) Vol. 1, No. 216; Letter of Canadian Lumbermen's Association (enclosing resolution in favour of the Bill) (26 April 1918) Vol. 1, No. 221; Letter of F.R. Russell (representing Wholesaler's Section of the Board of Trade) (3 May 1918) Vol. 1, No. 226; Letter of Retail Merchants' Association of Canada (6 May 1918) Vol. 1, No. 228.

<sup>36</sup> *House of Commons Debates* (6 March 1919) at 229 and (28 March 1919) at 991. The Union coalition was formed in 1917 and confirmed in winter election of that year: R. Brown & R. Cook, *Canada 1896-1921: A Nation Transformed* (Toronto: McClelland & Stewart, 1974) at 272-273 [hereinafter Brown & Cook, *A Nation Transformed*].

<sup>37</sup> "I hear from a source somewhat high up that there is just a possibility that the Bill may not go through. Sinister influences, which I have reason to believe are connected with the Banking Federation, are apparently at work and unless we make a determined effort the Bill may not go through this session." Letter of S.W. Jacobs to L. Garneau (11 April 1919) *Jacobs Papers*, PAC MG27 III C3 Vol. 2, No. 395.

<sup>38</sup> Letter of Grundy to Jacobs (8 April 1919) *Jacobs Papers*, PAC MG27 III C3 Vol. 1, No. 387.

<sup>39</sup> *Ibid.*

<sup>40</sup> Letter of Jacobs to Grundy (17 April 1919) *Jacobs Papers*, PAC MG27 III C3 Vol. 2, No. 388.

Grundy additionally represented the Toronto Board of Trade in the "deputation which waited this morning [25 April 1919] on the Solicitor General regarding the Bankruptcy Act ... and strongly urged that an effort be made to have the Bill passed at the present session".<sup>41</sup> Grundy noted that he did not believe that the Bill would pass unless "strong pressure is brought to bear not alone upon the Government but on the Members of Parliament". He suggested a joint resolution of the Toronto and Montreal Boards of Trade be forwarded to the government and urged that the Boards at once notify their members by wire that the legislation should be passed.<sup>42</sup> Debate resumed in the House of Commons on 1 May 1919. The Bill passed later that year and came into effect on 1 July 1920.<sup>43</sup>

*C The Bankruptcy Act of 1919*<sup>44</sup>

The *Bankruptcy Act of 1919* was an improvement not only upon provincial legislation, but also on the earlier more limited nineteenth century *Insolvent Acts of 1869 and 1875*. The legislation provided a scheme to collect and distribute the assets of the debtor and enabled debtors to receive a discharge for the first time in nearly forty years.

The legislation addressed a number of the original concerns of the CCMTA.

<sup>41</sup> Letter of H.P. Grundy to Secretary of the Toronto Board of Trade (25 April 1919) *Toronto Board of Trade Papers*, PAC MG28 III 56 Vol. 235, File Bankruptcy 1918-1936.

<sup>42</sup> *Ibid.* See Resolution of Montreal Board of Trade (14 May 1919) attached to letter of same date to Jacobs, *Jacobs Papers*, PAC MG27 III C3 Vol. 2, No. 514.

<sup>43</sup> In accordance with s. 98, the Bankruptcy Act was to come into "operation at a date to be named by proclamation of the Governor in Council". The *Bankruptcy Act of 1919* s. 98. The proclamation, dated 31 December 1919, stated that the Act was to come into force on 1 July 1920. "A Proclamation", 31 December 1919 reproduced in *The Bankruptcy Act with Amendments 1920: Together with Rules and Forms Thereunder* (Ottawa: Thomas Mulvey King's Printer, 1920) See also F.G.T. Lucas, "The New Bankruptcy Act" (1920) 40 Can. L.T. 668.

<sup>44</sup> There are several sources which describe the *Bankruptcy Act of 1919* in great detail. See L. Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922); H.P. Grundy, "Synopsis of the Canadian Bankruptcy Act" (1919-20) 1 C.B.R. 325; J.A.C. Cameron, "Annotation: Bankruptcy Act" [1920] 53 D.L.R. 135; G.T. Clarkson, "The Bankruptcy Act" (1920-21) 10 Can. Chart. Acct. 154; F.G.T. Lucas, "The New 'Bankruptcy Act'" (1920) 40 Can. L.T. 668; O. Wade, "The Dominion Bankruptcy Act" (1920-21) 10 Can. Chart. Acct. 234; N.L. Martin, "A New Bankruptcy Act" (1918-19) 8 Can. Chart. Acct. 24.

Voluntary proceedings had become well developed under provincial assignment Acts and there was little objection to the provisions which allowed debtors to file for bankruptcy.<sup>45</sup> Insolvent debtors, whose liabilities to creditors exceeded \$500, were entitled to make an assignment to an authorized trustee.<sup>46</sup>

The real change from the provincial model was the introduction of compulsory proceedings. The compulsory provisions of the *Bankruptcy Act of 1919* reflected creditors' concerns with debtor misbehaviour and their attempt to regain control over the assets before the debtor disposed of them.<sup>47</sup> A creditor that was owed \$500 could petition a debtor into bankruptcy upon the court finding that the debtor had committed an "act of bankruptcy" within six months of the petition.<sup>48</sup> Acts of bankruptcy included fraudulent transfers, disposing of property with the intent to defeat creditors, and departing Canada or a dwelling house with intent to defeat or delay creditors.<sup>49</sup> The Acts of Bankruptcy in the 1919 Act were largely taken from the English legislation of 1914.<sup>50</sup>

There was a significant difference between a debtor who voluntarily made an

<sup>45</sup> Under the *Insolvent Act of 1875* only compulsory proceedings had been available. See chapter 5.

<sup>46</sup> *Bankruptcy Act of 1919*, s.9.

<sup>47</sup> Retailers reacted strongly against the proposal to create an involuntary procedure. The Retail Merchants succeeded in convincing the federal government to insert a provision to prohibit a malicious prosecution of bankruptcy proceedings against a debtor. *Bankruptcy Act of 1919*, s. 97. For a discussion of this issue, see *House of Commons Debates* (9 May 1919) at 2272, 2274, 2276; *Special Committee on Bankruptcy* (17 April 1918), *supra* note 31 at 2; S.W. Jacobs, "The New Bankruptcy Act" *Jacobs Papers*, PAC MG27 III C3 Vol. 11, No. 3943, File Bankruptcy Bill and other Legislation.

<sup>48</sup> Section 4 of the *Bankruptcy Act of 1919* dealt with creditors' petitions for Receiving Orders. See O. Wade, "The Dominion Bankruptcy Act" (1920-21) 10 *Can. Chart. Acct.* 234 at 239.

<sup>49</sup> *Bankruptcy Act of 1919*, s. 3. Another provision also concerned itself with debtor misbehaviour. A debtor could be fined or imprisoned for committing a bankruptcy offence. See s. 89, 95.

<sup>50</sup> On involuntary provisions, see *Bankruptcy Act of 1919*, ss 3-8. Grundy notes that the English concept of Bankruptcy Notices was not followed as it was too cumbersome and relied on a creditor obtaining a final judgment. See H.P. Grundy, "A Synopsis of the Canadian Bankruptcy Act" (1919) 1 *C.B.R.* 325 at 331. On the Acts of Bankruptcy, see F.G.T. Lucas, "The New 'Bankruptcy Act'" (1920) 40 *Can. L.T.* 668 at 669-670. On the hearing of the petition, the court could grant, stay or dismiss the petition *Bankruptcy Act of 1919*, s. 4(5); 4(6); 4(7). See also "The New Bankruptcy Act" *Monetary Times* (18 July 1919).

assignment and a debtor who was petitioned into bankruptcy. While the Act allowed both types of debtors to apply for a discharge, the Act referred to any debtor who voluntarily assigned as "an authorized assignor". By way of contrast, where a debtor had been forced into bankruptcy, the Act labelled the debtor as a "bankrupt". The difference in appellation served a purpose. According to Grundy, a certain "odium" was attached to the word "bankrupt" and "a debtor will naturally prefer to take the course which has the least odium attached to it".<sup>51</sup>

The *Bankruptcy Act of 1919* applied to both individuals and companies.<sup>52</sup> With respect to individuals the new legislation abolished the historic trader rule.<sup>53</sup> The rule, which had been abandoned by England in 1861, had featured in the *Insolvent Act of 1875* as well as almost all previous federal reform Bills. The abolition of the rule in 1919

<sup>51</sup> H.P. Grundy, "A Synopsis of the Canadian Bankruptcy Act" (1919-20) 1 C.B.R. 325 at 328. Beyond the different terms attached to a debtor, there was also a distinct advantage to make a voluntary assignment rather than await creditors to initiate compulsory proceedings. Where a debtor made a voluntary assignment, the estate was made up only of the debtor's property as of the date of the assignment. Property acquired after the assignment was not available for distribution to the creditors. However, if a debtor became bankrupt pursuant to a receiving order all after acquired property belonged to the creditors. The distinction was not known in English law. See L. Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at 33; L. Duncan, "The Bankruptcy Act and Recent Developments in Bankruptcy Practice" (1923) 30 J. Can. Bankers' Assoc. 410 at 411. The distinction was removed by a 1923 amendment. See E. Levi & J. Moore, "Bankruptcy and Reorganization: A Survey of Changes" (1937) 5 U. of Chic. L. Rev. 1 at 22. See 13-14 Geo. 5, c. 31, s. 15 (1923). H.P. Grundy inserted the distinction in his original Bill in order to place a debtor who was compelled into bankruptcy under a "very serious disadvantage". H.P. Grundy, "The Bankruptcy Act" in Canadian Legal History Project Archives, AWCLH A-41.

<sup>52</sup> *Bankruptcy Act of 1919*, s. 2. The original Bill C-25 allowed corporations to make voluntary assignments. However, no compulsory proceedings were allowed against corporations. This distinction was abandoned in the final form of the Bill. *House of Commons Debates* (6 March 1919) at 932 (Guthrie). See Bill C-25 *Respecting Bankruptcy*, 1st Sess., 13th Parl. (1918) s. 3, 5. The Bankruptcy Act incorporated the main provisions of the Winding Up Act. It was thought that the Winding Up Act procedure was very expensive and tedious and an attempt was made to provide a more simple and less expensive procedure for insolvent corporations in the 1919 Act. See *Bankruptcy Act of 1919*, s.36. See *House of Commons Debates* (2 May 1919) at 2009 (Guthrie); H.P. Grundy, "A Synopsis of the Bankruptcy Act" (1919-20) 1 C.B.R. 325 at 340.

<sup>53</sup> The rule did not disappear without a debate. The debate is discussed in the concluding section of this chapter on the Constitution. The issue is further discussed in T.G.W. Telfer, "The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest?" (1994-95) 24 C.B.L.J. 357 at 387-389.



meant that both traders and non-traders could voluntarily file for bankruptcy and were equally subject to compulsory proceedings. However, the Act retained an important distinction. Compulsory proceedings could not be initiated against small wage earners whose earnings did not exceed \$1500 a year or persons solely engaged in farming or tillage of the soil.<sup>54</sup>

Another innovation on the provincial model was a court sanctioned composition procedure.<sup>55</sup> Composition proceedings allowed a debtor to make a compromise proposal before bankruptcy occurred.<sup>56</sup> However, the fact that the provision did not apply to secured creditors undermined its effectiveness.<sup>57</sup> The *Bankruptcy Act of 1919* also allowed corporations to take advantage of the composition proceedings.<sup>58</sup> But there was little discussion of corporate reorganizations as a rationale for the legislation.<sup>59</sup> While debtor proposals remain the subject of much debate today, composition agreements in

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<sup>54</sup> *Bankruptcy Act of 1919*, s. 8. The current *Bankruptcy and Insolvency Act* prohibits compulsory proceedings against individuals whose principal occupation is "fishing, farming, or the tillage of the soil". Similarly, those whose earnings that do not exceed \$25,000 per year and who do not carry on a business cannot be petitioned into bankruptcy. See *Bankruptcy and Insolvency Act* s. 48.

<sup>55</sup> "Proposed Bankruptcy Act" *Monetary Times* (1 September 1917).

<sup>56</sup> *House of Commons Debates* (1 May 1919) at 1983. The debtor asked the trustee to convene a meeting of creditors who could vote to accept the compromise. The formula required a majority in number holding two thirds in amount of the proved debts. After court approval, the agreement was binding on all creditors. *Bankruptcy Act of 1919*, s.13(3). See also O. Wade, "The Dominion Bankruptcy Act" (1920-21) 10 *Can. Chart. Acct.* 234 at 253.

<sup>57</sup> On the provisions that favoured secured creditors, see note 66 and accompanying text. Jacob Ziegel refers to the composition proceedings as "rudimentary". See "The Modernization of Canada's Bankruptcy in a Comparative Context" (1998) 33 *Tex. Int'l. L.J.* 1 at 4.

<sup>58</sup> F.G.T. Lucas, "The New Bankruptcy Act" (1920) 40 *Can. L.T.* 668 at 675. *Bankruptcy Act of 1919* ss. 2(k) (definition of corporation); 2(o) (definition of debtor) and 13 (composition procedure). Note that incorporated banks, savings banks, insurance companies, trust companies, loan companies, railway companies and building societies having a capital stock were specifically excluded from the definition of corporation. See also H.P. Grundy, "The Bankruptcy Act" (1919) 27 *J. Can. Bankers' Assoc.* 426 at 432 and "The New Bankruptcy Act" *Monetary Times* (18 July 1919).

<sup>59</sup> A later study concluded that practitioners "feel that reorganization and rehabilitation cannot be accomplished under the Bankruptcy Act ... which aims at liquidation rather than reorganization". E. Levi & J. Moore, "Bankruptcy and Reorganization: A Survey of Changes" (1937) 5 *U. Chic. L. Rev.* 1 at 27.

1919 were not the main focus of the reforms.<sup>60</sup> Parliament adopted the provision with little debate.<sup>61</sup> The *Bankruptcy Act of 1919* was more concerned with liquidation and the efficient administration of insolvent estates.<sup>62</sup> Corporate rescue in the early twentieth century was often a matter of direct government intervention and subsidization.<sup>63</sup>

Preferences, which had caused so many difficulties after the repeal of federal legislation in 1880, drew little attention during the debates. Chapter 6 highlighted the fact that some provinces tolerated preferences until late in the nineteenth century. In the nineteenth century many foreign and distant creditors had demanded national legislation

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<sup>60</sup> In introducing the Bill, the Minister listed the chief objects as uniformity, expeditious administration, and the right of an honest debtor to a discharge. *House of Commons Debates* (28 March 1919) at 932. While composition was listed as one of the four principles that needed to be reformed, H.P. Grundy in an address to the CCMTA mentioned only uniformity, involuntary proceedings and the discharge as "three main reasons for such an Act". "Federal Bankruptcy Act: Reasons Given Before Canadian Credit Men's Trust Association Why There Should be a Dominion Bankruptcy Act" (1916-1917) 6 Can. Chart. Act. 282.

<sup>61</sup> *House of Commons Debates* (1 May 1919) at 1983.

<sup>62</sup> See generally on the procedure H.P. Grundy, "A Synopsis of the Canadian Bankruptcy Act" (1919-20) 1 C.B.R. 325 at 332. As to the purpose of the legislation: "It is not the common experience after an assignment takes place, that the business is carried on; it is wound up. One of the chief objects of the Bill is to see that it shall be wound up properly." *House of Commons Debates* (1 May 1919) at 1990. The primacy of liquidation would later be confirmed with the amendments to the Act in 1923 which effectively nullified the ability to make compositions. The 1923 amendment required that before a composition proceeding could be invoked one had to first be in a state of bankruptcy. "As a result of the 1923 amendments to the Bankruptcy Act, no debtor was permitted to make a proposal unless he had first been declared bankrupt and the first meeting of creditors had been held." Tassé Report, *supra* note 3 at 19.

<sup>63</sup> Rail subsidies and government loan guarantees were part and parcel of the building of two new transcontinental railways. The Canadian Northern and the National Transcontinental-Grand Trunk Pacific were completed in 1915. These two systems faced financial difficulty and were nationalized with the formation of Canadian National Railways between 1917 and 1922. The collapse of the Northern threatened the solvency of at least two provinces and have had a significant impact on the finances of the Canadian government. Norrie and Owrarn argue that small and medium sized companies were allowed to collapse with impunity while "those who are the biggest, and especially those who have the biggest debts, seem, throughout Canadian history, to have been rescued in one form or another". K. Norrie and D. Owrarn, *A History of the Canadian Economy* (Toronto: Harcourt, 1991) at 438 [hereinafter Norrie & Owrarn, *History of the Canadian Economy*]. See also G.D. Taylor & P.A. Baskerville, *A Concise History of Business in Canada* (Toronto: Oxford University Press) at 274-284; M. Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland & Stewart, 1987) at 328-329; 391-392. F. Lewis & M. MacKinnon, "Government Loan Guarantees and the Failure of the Canadian Northern Railway" (1987) 47 J. Econ. Hist. 175 at 177, 194.

as a means of prohibiting preferential payments to local creditors. However, as provinces moved to prohibit preferential payments, the issue was no longer prominent. There was no need in 1919 to justify national legislation on the basis of outlawing preferential payments. By 1919, provincial legislation was in place and the federal act merely achieved uniformity on this issue.<sup>64</sup> The provisions combined English law with wording drawn from provincial assignment statutes.<sup>65</sup>

If one of the objectives of bankruptcy law is an equitable distribution of the debtor's assets, one author argues that the Act "fell short of its mark because the Act did not guarantee equal treatment of all creditors".<sup>66</sup> Creditors were ranked as secured creditors, preferred creditors,<sup>67</sup> ordinary creditors and deferred creditors.<sup>68</sup> The final form of the *Bankruptcy Act of 1919* was favourable to secured creditors. Section 6 of the Act allowed secured creditors to realise on their security outside of the Act.<sup>69</sup> In the Senate debates, one member drew attention to this provision. The government noted that the

<sup>64</sup> However, provincial legislation continued to remain in force despite the enactment of the federal legislation resulting in a "non-harmonious overlay of federal and provincial legislation". The overlap continues to the present day in the area of preferences. See J. Ziegel, "The Modernization of Canada's Bankruptcy Law in a Comparative Context" (1998) 33 *Tex. Int'l. L.J.* 1 at 5.

<sup>65</sup> *Bankruptcy Act of 1919*, s.31. See H.P. Grundy, "A Synopsis of the Canadian Bankruptcy Act" (1919-20) 1 C.B.R. 325 at 337; L. Duncan, *The Law and Practice of Bankruptcy Administration in Canada* (Toronto: Carswell, 1922) at 32. See also *House of Commons Debates* (15 May 1919) at 2470 (Guthrie).

<sup>66</sup> J. Ziegel, "The Modernization of Canada's Bankruptcy Law in a Comparative Context" (1998) 33 *Tex. Int'l. L.J.* 1 at 5.

<sup>67</sup> The issue of preferred creditors impinged on the equality of creditors. Preferred creditors receive statutory priority and are paid ahead of ordinary creditors. Under the original form of the Bill, wages or salary of any clerk or servant not exceeding \$225 that accrued three months prior to bankruptcy were paid in priority to all other creditors. The Commercial Travellers Association appeared before the Special Committee and claimed that the priority clause did not take into account the commissions earned by travelling salesmen. The Bill was amended to include travelling salesmen. *Special Committee* (21 April 1918), *supra* note 31 at 2-3. *Bankruptcy Act of 1919*, s. 51(1). Compare Bill C- 25, s. 102.

<sup>68</sup> J. Ziegel, "The Modernization of Canada's Bankruptcy Law in a Comparative Context" (1998) 33 *Tex. Int'l. L.J.* 1 at 5.

<sup>69</sup> Of note is that this proviso did not even expressly allow for the court to interfere with the rights of secured creditors and order otherwise. *Bankruptcy Act of 1919*, s. 6.

ability of secured creditors to enforce upon their security outside of bankruptcy was available under "the Old Act. That section will not be disturbed."<sup>70</sup>

A further provision dealt with the rights of the banks. Section 88 provided that "[n]othing in the provisions of this Act shall interfere with, or restrict the rights and privileges conferred upon banks and banking corporations by The Bank Act".<sup>71</sup> The origins of section 88 can be traced to a similar provision in an 1898 Bill that failed to pass the House of Commons.<sup>72</sup> The original 1918 Bill, however, omitted the banker's clause. The Canadian Banker's Association succeeded in having the clause inserted into the revised Bill. To ensure that such clause was not removed when the Bill came before Parliament the following year, the Canadian Bankers' Association passed a resolution that the President in consultation with the Association's Confidential Committee "endeavour to safe-guard wherever necessary the interests of the banks during the progress of the Bankruptcy Bill through Parliament at the forthcoming session".<sup>73</sup> In fact the CCMTA had made it clear to the Canadian Bankers' Association that it was "not the intention of the promoters of the bill to interfere in any way with the security which banks held under the provisions of the Bank Act".<sup>74</sup> Section 88 became law in 1919.<sup>75</sup>

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<sup>70</sup> *Debates of the Senate* (28 May 1919) at 565.

<sup>71</sup> *Bankruptcy Act of 1919*, s. 88. For a criticism of the preferred status of banks under The Bank Act, see O. Wade, "The Dominion Bankruptcy Act" (1920-21) 10 *Can. Chart. Acct.* 234 at 236. See also S.W. Jacobs, "A Canadian Bankruptcy Act: Is it A Necessity?" (1917) 37 *Can. L.T.* 604.

<sup>72</sup> *House of Commons Debates* (17 March 1898) at 2019. In 1898, the banks had specifically requested that such provisions be included in any bankruptcy bill. See discussion of this issue in chapter 6.

<sup>73</sup> Compare Bill C-25 (original) with Bill C-25 as amended. See Bill C-25, s. 159 and *Bankruptcy Act of 1919*, s. 88. As for the influence of the Canadian Bankers' Association, see *Minutes of the Annual General Meeting of the Canadian Bankers' Association* (14 November 1918), Minute Book II Executive Council, Canadian Bankers' Association Papers, Canadian Bankers' Association Archives.

<sup>74</sup> Favourable treatment of secured creditors may have been the price the CCMTA paid to obtain the support of the Canadian Bankers' Association. Canadian Bankers' Association Circular No. 3L (12 April 1918), *Canadian Bankers' Association Papers*, Canadian Bankers' Association Archives. In order to clarify the rights of secured creditors, the Bankers' Association sought to include a clause relating to the valuation of their security that anything done by the secured creditor in compliance with the section would "in no way effect, prejudice or vary any right or remedy such creditor may have against any other person or under any security". The House of Commons rejected the suggestion as the rights of secured creditors were already protected. Letter of A. J. Brown to Henry Ross, Secretary of the Canadian Bankers' Association

The most important innovation of the *Bankruptcy Act of 1919* was the reintroduction of the discharge. Discharges had not been available since the repeal of the federal law in 1880. The discharge provisions in the *Insolvent Acts of 1869 and 1875* had been based on creditor consent.<sup>76</sup> Creditor consent had also been at the core of early English and bankruptcy law. However, England abandoned the notion of creditor consent in its 1883 Act<sup>77</sup> and the Canadian *Bankruptcy Act of 1919* was based in large part on the English legislation. In particular, the discharge provisions contained in ss. 58 to 62 were "practically the same as the corresponding provisions of the English Act".<sup>78</sup> While the requirement of creditor consent was removed, discharges were to be granted in the discretion of the court. The Act entitled debtors to make application for a discharge any time after being adjudged bankrupt or making an assignment. The Act allowed the trustee or creditors to object to the application for discharge. The court, on hearing the debtor's application could grant or refuse an absolute order of discharge or suspend the operation of the order for a specified period. Alternatively the court could make an order conditional upon payment of a portion of the debtor's after-acquired earnings.<sup>79</sup>

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(28 October 1918) Enclosure to Circular 5-P (4 November 1918) *Canadian Bankers' Association Papers*, Canadian Bankers' Association Archives. *House of Commons Debates* (9 May 1919) at 2265 (McMaster).

<sup>75</sup> While evidence from the parliamentary debates indicates that the banks did make submissions on specific provisions in an attempt to influence the shape of the legislation, see *House of Commons Debates* (9 May 1919) one Member of Parliament indicated that they were not the driving force behind the Bankruptcy Act. He asked: "Who is asking for this legislation?" While the government never responded with a straight answer, the member who posed the question ruled out the banking community as the impetus for the Bill. "The bankers care very little, because under the Banking Act they can take everything; they can take the last cow." *Debates of the Senate* (28 May 1919) at 565.

<sup>76</sup> See *Insolvent Act of 1869* s. 94; *Insolvent Act of 1875* ss. 49-66 discussed in chapter 5.

<sup>77</sup> D. Boshkoff, "Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings" (1982) 131 U. Penn. L. Rev. 69 at 103-104.

<sup>78</sup> H.P. Grundy, "A Synopsis of the Canadian Bankruptcy Act" (1919-20) 1 C.B.R. 325 at 344.

<sup>79</sup> The *Bankruptcy Act of 1919*, s. 58, 59. See also N.L. Martin, "A New Bankruptcy Act" (1918-1919) 8 Can. Chart. Acct. 24 at 29. No provision existed for an automatic discharge as exists in modern Canadian legislation. If a debtor did not make an application, he remained a bankrupt indefinitely. The automatic procedure was not added until 1949. See E. Martel, "The Debtor's Discharge from Bankruptcy" (1971) 17 McGill L.J. 718 at 724.

Section 59 listed various factors which focused on the debtor's conduct and whether or not his insolvency was attributable to circumstances for which he could be held responsible.<sup>80</sup> If any of the listed facts set out in s. 59 were proven, the court was entitled to refuse, suspend or make a conditional order of discharge. The ultimate discretion for the granting of the discharge lay with the courts and not creditors.

It was the duty of the court to "to decide the extent to which the debtor has been responsible for his own misfortune". Where there was no dishonesty or wilful negligence, it was a matter of public policy that the court grant a discharge.<sup>81</sup> The courts would therefore assume a function that creditors had been unable to carry out.<sup>82</sup> The private remedy of individual creditor release encouraged dishonest competition among creditors. The private release did not operate as a check on debtor misconduct, as creditors sought their immediate best deal and did not concern themselves with the larger public goal of improving commercial morality:

Under the bill it is recognized that the Court, seized of all the circumstances, would be in a better position to decide as to whether the debtor should be given his discharge, than creditors whose interest in the Estate is in many cases too immediate and personal to permit unbiased judgment.<sup>83</sup>

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<sup>80</sup> *Bankruptcy Act of 1919*, s. 59. Other facts on which the discharge could be refused, suspended or granted conditionally included failing to keep proper books, continuing to trade after knowing to be insolvent, failing to account for any loss of assets, making a frivolous defence to a creditor's action, bringing a frivolous action, making an undue preference, incurring liabilities with a view to making his assets equal to fifty cent in the dollar, previously being bankrupt or guilty of any fraud or fraudulent breach of trust. See also F.G.T. Lucas, "The New Bankruptcy Act" (1920) 40 Can. L.T. 668 at 672.

<sup>81</sup> "Canadian Bankruptcy Law" *Monetary Times* (15 March 1918) 18 (reprint of Jacobs' speech to Ontario Bar Association). See also Bicknell, who in 1913 referred to the reasons why the English had introduced the bankruptcy reforms in 1883. "The dealings of an insolvent debtor with his estate are not matters which concern only him and his creditors; the community is also vitally interested .... Therefore, the Act, while just and generous to the honest and unfortunate trader, penalizes the incompetent and dishonest and endeavours to protect the trading community from his incompetency and dishonesty." J. Bicknell, "The Advisability of Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35 at 43.

<sup>82</sup> A similar point was made in the English House of Commons in 1883 during the debates on their major reform bill. Increasing public oversight over bankruptcy proceedings was at the very basis of the English reforms. See chapter 2.

<sup>83</sup> S.W. Jacobs, "The Proposed Bankruptcy Act" (1918) 3 Proceedings of the CBA, 164.

Creditors were willing to give up this role of monitoring debtor behaviour in favour of a judicial system which provided better control over debtors.

At its core, therefore the new discharge provisions were a discretionary remedy to be granted by the courts whenever the debtor achieved an acceptable level of conduct. The discretion, which allowed the courts to impose conditions, contrasts with the fixed legislative rules prescribed by the U.S. Bankruptcy Act of 1898 which granted debtors an unconditional fresh start.<sup>84</sup> Part II examines why bankruptcy law re-emerged as a national issue and explains how the discharge came to be accepted as a central feature of the 1919 Act.

## II Economic Change and the Transformation of the Discharge

After the repeal of the *Insolvent Act* in 1880, Parliament debated numerous Bills in an attempt to restore a national bankruptcy regime. After 1903, bankruptcy law disappeared from Parliament's agenda until 1918. The absence of activity after 1903 can in part be explained by the shifting cycles of the economy. Canada experienced an economic boom between 1897 and 1912. These were years of "ongoing prosperity [and] continuous rises in the general Canadian standard of living ...".<sup>85</sup> The years 1910-1912 were particularly strong and officials from the Department of Finance predicted an even stronger 1913.<sup>86</sup> The economic boom coincided with the disappearance of bankruptcy law from the Parliamentary calendar. Laurier was committed to the policy of allowing the provinces to regulate debtor-creditor matters without federal interference. A prosperous economy provided Laurier with a rationale to support the status quo.

Pleas for national bankruptcy legislation reflected a concern for missed

<sup>84</sup> J. Ziegel, "The Modernization of Canada's Bankruptcy Law in a Comparative Context" (1998) 33 *Tex. Int'l. L.J.* 1 at 4; D. Boshkoff, "Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings" (1982) 131 *U. Penn. L. Rev.* 69.

<sup>85</sup> Norrie & Owram, *History of the Canadian Economy*, *supra* note 63 at 406.

<sup>86</sup> D. Owram, *The Government Generation: Canadian Intellectuals and the State 1900-1945* (Toronto: University of Toronto Press, 1986) 16-17 [hereinafter Owram, *Government Generation*]. Owram argues that while it is difficult to characterize the period as one of industrial revolution, "the experience of the country—especially central Canada—in the years 1898-1912 had many of the social characteristics of such a revolution".

opportunities in a buoyant economy, as is illustrated by one merchant's letter to Prime Minister Laurier in 1907 calling for a national bankruptcy law in order to allow exiled debtors to return to Canada:

Now when the times are prosperous in Canada, these people cannot return to share in the good times without the risk of any small success being taken from them by creditors still holding judgements against them.<sup>87</sup>

Laurier had responded to a similar letter the year before and had claimed that there was no immediate need for insolvency legislation:

The country is so prosperous just now that your request is the only one in that sense that I have received during the last twelve months and I am pretty sure the moment would be very inopportune to act on your suggestion. As you wanted me to give you a frank answer, I have just given it to you as frank as it possibly could be.<sup>88</sup>

However, 1913 marked the beginning of a sharp recession. The tide of industrial optimism, which had risen higher and higher, "on ever more foamy waves of optimism since 1909", reversed.<sup>89</sup> Capital investment from abroad fell.<sup>90</sup> As credit tightened, industrial production slowed, resulting in serious unemployment in urban areas. In rural areas, credit restrictions had more severe consequences. Banks refused to extend loans and mortgage companies threatened foreclosure leading to a flight to the cities as

<sup>87</sup> Letter of Soclean Chemical Co. to Sir Wilfrid Laurier (9 August 1907) *Laurier Papers*, PAC MG26 Vol. 470, Reel c-850, No. 127611. The letter earlier stated, "It seems to me a most disgraceful and cruel state of things, that in the case of an honest debtor, getting into difficulties it may be through no fault of his own, or from any cause whatever he cannot get a discharge and a chance to recover himself and pay his just debts, but may be hounded for life by any unsatisfied creditor. As a result of this condition of affairs many people after the bursting of the Toronto boom were compelled to leave the country, and many more are still compelled to do business in other people's names."

<sup>88</sup> Letter of Sir Wilfrid Laurier to Christie and Co., Wholesale Dealers in Lumber, Shingles, Laths, Cedar, Fence Posts, Piling and All Kinds of Building Material (24 February 1906) *Laurier Papers*, PAC MG26 Vol. 403, Reel c-850.

<sup>89</sup> Brown & Cook, *A Nation Transformed*, *supra* note 36 at 199. Brown and Cook attribute the decline to the tightening of credit by the London money markets, and the growing distrust by foreign financiers of Canadian securities.

<sup>90</sup> D. Owram, *Government Generation*., *supra* note 86 at 73.



“farmers, their sons, their tenants and hired men, along with a continuing flood of immigrants ... poured into the cities to join the growing ranks of unemployed in the fruitless search for work..”<sup>91</sup> The western cities were particularly hard hit. Between 1913 and 1915 building permits for Winnipeg, Regina, Calgary and Vancouver fell 85 percent and land prices plummeted.<sup>92</sup>

Statistics for the number of commercial failures from 1902 to 1918 show a period of relative stability from 1902 to 1912. However, the number of failures rose in 1913 and dramatically increased in 1914 and 1915.<sup>93</sup> If the economic boom had removed the

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<sup>91</sup> Brown & Cook, *A Nation Transformed*, *supra* note 36 at 199. On the impact of the recession on western farmers, see J. Adelman, “Prairie Farm Debt and the Financial Crisis of 1914” (1990) 71 C.H.R. 491.

<sup>92</sup> Norrie & Ooram, *History of the Canadian Economy*, *supra* note 63 at 412-414.

<sup>93</sup> “Canada plunged into a recession. Unemployment rose across the country. Land prices tumbled—especially in the west—and bankruptcies skyrocketed. Companies with assets worth some \$8.7 million failed in 1913; the next year saw \$13.7 million in failures.” *Ibid.* at 414. The use of the term bankruptcies is a misnomer. The statistics below are drawn from the *Monetary Times*. The term “Commercial Failures” is not defined in the *Monetary Times*.

Year	Number of Commercial Failures in Canada
1902	1101
1903	978
1904	1246
1905	1347
1906	1184
1907	1278
1908	1640
1909	1442
1910	1262
1911	1332
1912	1357
1913	1719
1914	2898
1915	2261
1916	1685
1917	1097
1918	873

“Commercial Failures in Canada, 1902 to 1915” *Monetary Times* (7 January 1916) 64; “Commercial Failures in Canada, 1903-1918” *Monetary Times* (28 March 1918) 46; See also *Monetary Times* (7 January 1916) 156. For statistics of the number of bankruptcies after the passage of the *Bankruptcy Act of 1919*, see Lyell, “The Bankruptcy Act in Operation” *Monetary Times* (14 January 1921) 26.

bankruptcy law issue from the public mind, the downturn of 1913 clearly re-established the matter for debate.<sup>94</sup>

However, it was not just the downturn in the economy that paved the way for new legislation. The structural changes that had occurred in the Canadian economy during the boom years prior to 1913 were also significant. Chapters 5 and 6 demonstrated that the national economic vision may have been premature in the nineteenth century and that localism and rural opposition remained an important factor in the unpopularity of national bankruptcy legislation. By 1914, there were signs of transformation of the Canadian economy. Thus, Canadian bankruptcy legislation can perhaps be explained by "the natural evolution in law of a country emerging from provincialism into national stature".<sup>95</sup>

Canada's delay in enacting a permanent bankruptcy statute until 1919 contrasts with the earlier American effort of 1898. The postponement of Canadian reform may represent a difference in the timing of economic development. Canadian industrialization and urbanization occurred much later than in the United States. The economic boom that occurred in Canada between 1898 and 1912 resembled the period of prosperity which followed the American Civil War. Owram argues that in both cases, "new challenges were posed to a community that had previously looked at itself in agrarian and rural terms".<sup>96</sup> There was a fear, that "the political, constitutional, and social system that

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<sup>94</sup> The efforts of the CCMTA began in 1916 but the issue regained prominence around 1912-13. See A.C. McMaster, "The Bankruptcy Act" (1912-1913) 2 *Can. Chart. Acct.* 236. For a media report on the address, see "Advocating a Bankruptcy Act" *Monetary Times* (1 February 1913) 285. By 1914 the government took notice of the matter and *Saturday Night* reported that "the news that the Hon. C.J. Doherty, Minister of Justice, is contemplating the enactment of a Federal Bankruptcy Act for the relief of insolvent debtors comes none too soon". *Saturday Night* (10 January 1914) 1. There is evidence to suggest that the Minister of Justice considered the issue as early as 1912. See MBT Seventh Annual Report, 1912, *MBT Papers* MG 28 III 44, Reel M2806. The only effort to revisit the issue during the years of prosperity was the 1911 draft bill prepared by the Associated Chambers of Commerce of Quebec. The Department of Justice Files do not contain a copy of the draft bill; however, it is referred to in two letters found in the *CBA Papers*. Letter of James Aikins to R.C. Smith, Vice President of CBA (1917). See also Letter of H.P. Grundy to James Aikins (15 January 1917) *CBA Papers*, Vol. 1, File 2.

<sup>95</sup> E. Levi & J. Moore, "Bankruptcy and Reorganization: A Survey of Changes" (1937) 5 *U. of Chic. L. Rev.* 1 at 2.

<sup>96</sup> Owram, *Government Generation*., *supra* note 86 at 78.

Canada had known in the nineteenth century was doomed to extinction".<sup>97</sup>

The population of Canada dramatically increased after the turn of the century. Between 1881 and 1901, the population increased by 24%. However, between 1901 and 1921, it grew by 64%.<sup>98</sup> By 1911 both Ontario and British Columbia were more urban than rural. The urban growth tended to be concentrated in a few centres. Toronto's population increased from 181,215 to 521,893 between 1891 and 1921 and Montreal more than doubled its population during the same period.<sup>99</sup> The decline in rural population was matched with a concern in the farming community of declining political influence and that legislative policies in future would represent urban interests.<sup>100</sup>

The debate over the trader rule is perhaps representative of the changed dynamic between rural and urban interests. The exclusion of farmers from compulsory proceedings in the 1919 Act followed similar provisions found in many late nineteenth century failed federal reform Bills and the US Bankruptcy Act of 1898.<sup>101</sup> By excluding

<sup>97</sup> *Ibid.* at 23.

<sup>98</sup>	Urban	Rural
1871	0.7	3.0
1881	1.1	3.2
1891	1.5	3.3
1901	2.0	3.4
1911	3.3	3.9
1921	4.4	4.4

Richard Pomfret, *The Economic Development of Canada* (Toronto: Methuen, 1981) at 53; Brown & Cook, *A Nation Transformed*, *supra* note 36 at 50.

<sup>99</sup> Winnipeg's population grew from 25,639 to 179,087. Brown & Cook *ibid.* at 98-99; Owram, *Government Generation*, *supra* note 86 at 18; R. Bothwell, I. Drummond, & J. English, *Canada 1900-1945* (Toronto: University of Toronto Press, 1987) at 65.

<sup>100</sup> Owram, *ibid.* at 20.

<sup>101</sup> See Bill S-C (1894); Bill C-84 (1898); Bill C-53 (1903) as discussed in chapter 6. In the United States the exclusion preserved the "integrity, dignity and independence" of the farming community. See D.R. Papke, "Rhetoric and Retrenchment: Agrarian Ideology and American Bankruptcy Law" (1989) 54 Mo. L. Rev. 871. Olmstead argues that the amendment had its origins in opponents of bankruptcy who "frequently came from the plantation or planter class". J. Olmstead, "The Development of Bankruptcy Laws" (1924-25) 1 Amer. Bankr. Rev. 151 at 153; E. Levi & J. Moore, "Bankruptcy and Reorganization: A Survey of Changes" (1937) 5 U. Chic. L. Rev. 1 at 12.

farmers, the Bill sought to remove any rural objections. Rural opposition had long been a factor in the demise of many nineteenth century bankruptcy Bills. However, in 1919, there were few rurally based objections to the Bill.<sup>102</sup> Instead, debate turned to the issue of the more urban concerns of retailers, wage earners and professionals such as doctors and lawyers.

For example, the Retail Merchant's Association opposed the exclusion of wage earners from compulsory proceedings. Retailers faced the unpleasant prospect of their own bankruptcy at the behest of wholesalers without being able to force their own customers into bankruptcy because of the wage earner exclusion.<sup>103</sup> Others were concerned with the plight of professionals under the Act. One Senator argued that there was no need to extend bankruptcy law to "lawyers, doctors, ministers, gentlemen who are commonly known as capitalists, public men, judges, and various other persons who are not traders, but whose credit is largely based on moral grounds".<sup>104</sup>

There was some attempt to restore the trader rule, but the Solicitor General reminded Parliament of the difficulty of defining a suitable class. The definition of trader in the 1875 Act ran to almost two pages and covered almost all classes of business known

<sup>102</sup> The rationale for the exclusion of farmers from compulsory proceedings had not changed. The arguments of the 1890s were repeated as it was noted that the farmer might fall on hard times because of natural causes beyond his control. If he were given time to recover, instead of facing bankruptcy, a big crop would allow his creditors to be repaid in due course. See *House of Commons Debates* (15 May 1919) at 2477 (Guthrie). The issue of farm debt however did not disappear and would re-surface during the depression of the 1930s and led to a series of specific statutes designed to protect rural interests. See eg., J.A. Corry, *The Growth of Government Activities Since Confederation* (Ottawa, 1939) at 166.

<sup>103</sup> Further even if a customer was not a wage earner, in order to support a bankruptcy petition, a creditor had to rely on a debt of at least \$200, a sum larger than most retail purchases. *Special Committee* (17 April 1918), *supra* note 31 at 8-11. The RMA suggested that the dollar amount supporting a petition be reduced to \$25. The RMA claimed that the "exclusion of wage earners and farmers was "an unfair discrimination and they think it should be struck out". *Special Committee* (17 April 1918), *supra* note 31 at 24-25. In response to the suggestion of the RMA that the wage earner exception clause be removed, S.W. Jacobs claimed that retailers would be disadvantaged by the bankruptcy of small debtors. *Special Committee* (17 April 1918), *supra* note 31 at 10.

<sup>104</sup> *Debates of the Senate* (29 May 1919) at 592 (Michener); S.W. Jacobs, who had introduced the Bill on behalf of the CCMTA, called for a return to the trader rule to protect Members of Parliament and judges. *House of Commons Debates* (15 May 1919) at 2477-2478 (Jacobs).

at the time. Commerce had evolved and the 1875 definition was no longer relevant as many nineteenth century avenues of trade no longer existed in 1919.<sup>105</sup> The proposal to restore the trader rule was lost.<sup>106</sup>

Other economic changes were evident. Small owner operated firms were gradually giving way to companies. New national distribution networks emerged as mail-order houses and department stores grew in number.<sup>107</sup> After the turn of the century corporations began to take on an ever-increasing role.<sup>108</sup> Public financing became a common source of capitalization. In 1900, 53 companies were formed with Dominion Charters. By 1911-12, this number had grown to 658. In 1909, a major merger movement began as larger national companies emerged out of the consolidation of smaller local enterprises.<sup>109</sup> Large national banks with head offices in the financial centres appeared with "branches spread over the Dominion". New interest groups, organized on a national basis such as the Canadian Bar Association and the Canadian Credit Men's Trust Association emerged and advocated an end to the diversity of

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<sup>105</sup> Further, both England and the United States had abolished the trader rule. *House of Commons Debates* (15 May 1919) at 2477 (Guthrie).

<sup>106</sup> *House of Commons Debates* (15 May 1919) at 2478.

<sup>107</sup> J. Benidickson, "The Combines Problem in Canadian Legal Thought: 1867-1920" (1993) 43 *U.T.L.J.* 799 at 801.

<sup>108</sup> This contrasted to the nineteenth century where "small firms, often with a local orientation, typified most industries". T. Naylor, *The History of Canadian Business*, Vol. 2 (Toronto: James Lorimer, 1975) at 280; On the growth of corporations, see W. Marr & D. Patterson, *Canada: An Economic History* (Toronto: Gage, 1980) at 239 and I. Drummond, *Progress without Planning: The Economic History of Ontario from Confederation to the Second World War* (Toronto: University of Toronto Press, 1987) at 112-113.

<sup>109</sup> Brown & Cook, *A Nation Transformed*, *supra* note 36 at 90-92; J. Benidickson, "The Combines Problem in Canadian Legal Thought" (1993) 43 *U.T.L.J.* 799 at 801. Benidickson notes that there were 97 mergers involving 221 firms. Algoma Steel, Ford of Canada, Canadian General Electric, Canadian Westinghouse and Canada foundries "were doing a business on a massive scale and they were growing fast". R. Bothwell, I. Drummond & J. English, *Canada 1900-1945* (Toronto: Univ. of Toronto Press, 1987) at 74.

provincial legislation.<sup>110</sup> Further empirical work needs to be completed to determine the extent to which trade patterns shifted from a local to a more national or inter-regional basis during this period.

The national economic vision which had been advocated earlier with some optimism was coming to fruition. The lack of uniformity of provincial legislation was one of the key problems identified by the CCMTA.<sup>111</sup> Arguments for more uniform insolvency laws were not new and had been raised in the nineteenth and early twentieth centuries.<sup>112</sup> However, owing to the increasing difficulties that businesses encountered with the variety of provincial insolvency laws when trading across provincial boundaries, arguments for uniformity took on an added importance.<sup>113</sup> The president of the newly formed Canadian Bar Association, James Aikins,<sup>114</sup> launched the movement for uniform commercial legislation in a speech to the CCMTA in 1914. "He touched off a spark that was instantly fanned into flame, and the agitation ... will be spread throughout the Dominion from coast to coast."<sup>115</sup> Aikins called for uniformity in many areas of commercial law including bankruptcy and insolvency.<sup>116</sup>

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<sup>110</sup> J. Bicknell, "The Advisability of Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35. On the rise of the Canadian Bar Association and the CCMTA see T.G.W. Telfer, "The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest?" (1995) 24 C.B.L.J. 357 at 362.

<sup>111</sup> See letter of Grundy to Doherty (13 July 1917) *Department of Justice Papers* PAC RG13 A2.

<sup>112</sup> D.E. Thomson, "Bankruptcy Legislation in Canada" (1902) Can. L.R. 173 at 177.

<sup>113</sup> See also "Bankruptcy Act Will Help Business World: New Measure Wipes Out Variety of Provincial Laws" *Financial Post* (5 July 1919); *House of Commons Debates* (2 May 1919) at 2004; A.C. McMaster, "The Bankruptcy Act" (1912-1913) 2 Can. Chart. Acct. 236 at 238-239; and L. Duncan, "Harmonization of Dominion and Provincial Legislation with the Bankruptcy Act" (1922) 42 Can. L.T. 113.

<sup>114</sup> See L. Gibson & D. Gibson, "Sir James Aikins' Seamless Web: Finding Fortune and Fame as a Lawyer in the Adolescent Canadian West" (1992) 21 Man. L.J. 161 at 186.

<sup>115</sup> "Uniform Laws for Various Provinces: Inaugurated at Banquet of Credit Men After an Address by Sir James Aikins" *Manitoba Free Press* (22 December 1914) in *CBA Papers*, Vol. 1 File 2, Correspondence (1914-1917). For a full text of the speech, see J. Aikins, "Uniformity in Provincial Legislation" (Address to CCMTA, 21 December 1914) National Library of Canada.

<sup>116</sup> J. Aikins, "Uniformity in Provincial Legislation" (Address to CCMTA, 21 December 1914). Other areas where uniformity was desired included the regulation of insurance. See C.D. Baggaley, *The*

Aikins identified the unique Canadian problem that led to dissimilarity in provincial legislation:

Our provinces are far flung, and feelings of mistrust, lack of sympathy or cordiality ... which may have happened between the respective bodies of citizens in the different provinces, arise very largely from the fact that the separated communities do not know or understand each other, or their aims or ideals.<sup>117</sup>

Provincial boundaries were only "artificial or imaginary lines [and] should not be allowed to interfere with the free working of principles which are in their nature universal".<sup>118</sup>

Aikins warned that "a provincial spirit, a spirit of isolation and exclusive selfishness, would in time mean national atrophy and retrogression".<sup>119</sup>

Others also called for greater uniformity. S.W. Jacobs argued that uniformity would do "away with the old feudal idea which in some parts of Canada would seek to prevent outsiders from having similar rights to those of their own province".<sup>120</sup> In another article, Jacobs argued that "trade should not be limited by local or provincial

*Emergence of the Regulatory State in Canada 1867-1939* (Ottawa: Economic Council of Canada, 1981) at 232.

<sup>117</sup> J. Aikins, "The Advancement of the Science of Jurisprudence in Canada" (1915) 1 *Proceedings of the CBA* 3 at 6. Aikins appealed to Canadian nationalism. "True it is that owing to our historic beginnings, there will be diversity in our population, but that will not prevent oneness. That very diversity in our unity may make for our safety and ennoblement. Different grafts on the one national stem, nourished by the same soil, refreshed by the same showers, gladdened by the same sunshine, bringing forth blossoms of various hues, the people of Canada should produce the one rich fruit—one pure and virile Canadianism."

<sup>118</sup> J. Aikins, "Uniformity in Provincial Legislation" (Address to CCMTA, 21 December 1914) *National Library of Canada*, at 10.

<sup>119</sup> J. Aikins, "Commercial Law Must Be Standardized: Lack of Uniformity in Legislation here is Costly to Canadian Business" *Monetary Times* (7 January 1916) 46.

<sup>120</sup> "Canadian Bankruptcy Law: Montreal Barrister Makes Strong Plea for Its Enactment" *Monetary Times* (15 March 1918) 18. "An instance of this may be cited from one of the Maritime Provinces where a few years ago, and probably still to this day, traders assigning for the benefit of their creditors had the right, under the provincial act, to mention, in the deed of assignment, the parties whom they wished to have preferred over other parties and the court was bound to give sanction to such preferred creditors, to the detriment of others not so preferred."

considerations".<sup>121</sup> In a speech to the Ontario Bar Association Jacobs stated that trade was in the national interest and "local or provincial considerations should be brushed aside ....". Uniformity would lead to the "breaking down of petty rivalries and provincial differences".<sup>122</sup> Regulation of bankruptcy law on a national basis was necessary as "Canada is now, or is fast becoming a nation, and that the commercial activities of its subjects should not in any way be limited by provincial boundaries".<sup>123</sup> Bankruptcy legislation was required "owing very largely to the fact that nearly all business concerns of any importance now do an interprovincial business..".<sup>124</sup>

The lack of uniformity had a significant impact on foreign creditors who regarded the diverse provincial laws as a "farce". The establishment of uniform legislation would, it was argued, "greatly improve this country's foreign credit". Diverse regulation added to the cost of credit. Before extending a loan foreign creditors had to familiarize themselves with the various provincial regimes.<sup>125</sup> The Solicitor General warned Parliament that English exporters claimed that unless something was done to reform insolvency proceedings in Canada, "it is ultimately going to injure our credit".<sup>126</sup> If the growth of a national economy increased the expected benefits of a uniform bankruptcy law, the emergence of new national organizations such as the Canadian Bar Association and the Canadian Credit Men's Trust Association enabled demands for uniform legislation to be effectively co-ordinated.<sup>127</sup>

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<sup>121</sup> S.W. Jacobs, "A Canadian Bankruptcy Act—Is it A Necessity?" (1917) 37 Can. L.T. 604.

<sup>122</sup> "Need for Bankruptcy Act" *Monetary Times* (15 March 1918) 9.

<sup>123</sup> J. Bicknell, "The Advisability of Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35.

<sup>124</sup> *Debates of the Senate* (26 May 1919) at 501 (Lougheed).

<sup>125</sup> O. Wade, "Insolvency including Assignments and Winding-Up Proceedings under the Dominion and Ontario Winding-Up Acts" (1919-1920) 9 Can. Chart. Acct. 167 at 182.

<sup>126</sup> *House of Commons Debates* (2 May 1919) at 2004 (Guthrie).

<sup>127</sup> On the increase in expected benefits of a national law and the relative decline in the costs of seeking



However, the growth of the national economy, was only part of the economic transformation that paved the way for the acceptance of a federal bankruptcy law. As business and debtor creditor relationships became less individualized economic failure become less associated with personal blame. Peter Coleman's study of the history of American bankruptcy law argues that creditors came to accept a bankruptcy law discharge for several reasons. Coleman argues that, creditors originally extended loans on the basis of personal judgments of individual qualities. Business and credit later became depersonalized with the emergence of the corporation and the growing reliance on the sale of stocks and bonds to raise funds. This was combined with the institutionalization of credit. Credit was extended not so much on the personal qualities of the debtor but rather on the evaluation of impersonal balance sheets or credit reports. Additionally the growth of interstate trade led to customers becoming "pieces of paper rather than faces and personalities". Legal relations became more formalized and actions for debt "carried no moral judgment about either plaintiff or defendant". With these economic changes came a swing in the pendulum from hostility to bankruptcy to what he calls tolerance and outright approval.<sup>128</sup>

Similar developments are observable in the Canadian setting. Chapters 4, 5 and 6 discussed the importance of personal credit relationships as forming the basis of the opposition to the discharge. Earlier chapters argued that in local and rural economies, credit relationships were largely personal and loan transactions often carried moral obligations to repay. This paradigm came under attack as the economy urbanized and national corporations replaced small personal proprietorships. A letter found in the S.W. Jacobs Papers lamented the shift in business from the individual proprietor to the corporate form:

A merchant may find that he can do better for himself as a limited liability company than on his own good name, with the result that one misuse or abuse leads to another. He gets extravagant and instead of losing his good

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legislation in the United States, see B. Hansen, *The Origins of Bankruptcy Law in the United States 1789-1898* (Ph.D. diss., Washington University, 1995); B. Hansen, "Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law" (1998) 72 *Bus. Hist. Rev.* 86.

<sup>128</sup> Peter Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for debt and Bankruptcy, 1607-1900* (Madison: State Historical Society of Wisconsin, 1974) at 273-286.

name the Company goes into liquidation. Their personal reliability and responsibility are not financially disturbed but the old theory of a merchant being as good as his word is shaken and those who have suffered wonder how it happened.<sup>129</sup>

Credit transactions became formalized. The hire purchase and instalment sales grew in prominence. Monod argues that there was a fundamental shift in the philosophy underlying the granting of credit. Whereas previously credit had been granted on more personal level, the new institutional form of credit was based on a legal relationship:

In contrast to the retailer who liked to think of interest as a moral punishment inflicted upon those who intended to defraud, the instalment seller treated it as an intrinsic part of the commodity's price. He or she did so because the customer was generally unknown to the creditor except through a contractual agreement. Once believed to be the paramount expression of the community's moral wealth, credit was here being used as the measure of its business sense. It had become the weapon of a legal system that had already shed its pre-capitalist commitment to regulating the substantive fairness of economic exchanges. Store credit was making its fundamental twentieth century transition from a quasi-communitarian to a purely commercial exchange.<sup>130</sup>

As a result, "the personal-credit nexus [was] broken".<sup>131</sup>

The growth in the number of corporations and the move away from an individual and locally based economy and the emergence of more formal credit relationships shifted the focus away from individual and moral responsibility for financial failure to an explanation of failure based upon circumstances beyond the debtor's control. Financial failure as a wider social problem was recognized, for example, by the 1915 Ontario Commission on Unemployment. The Commission claimed that in the past personal causes of unemployment had received a disproportionate amount of attention. Traditionally in the nineteenth century, debtors who failed, "had nobody to blame but themselves". A modern economy necessarily involved unemployment. The Commission concluded that

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<sup>129</sup> Letter of Alexander Smith to S.W. Jacobs, (3 February 1916) Jacobs Papers, PAC MG27 III C3 Vol.1 No. 47.

<sup>130</sup> D. Monod, *Store Wars: Shopkeepers and the Culture of Mass Marketing 1890-1939* (Toronto: University of Toronto Press, 1996) at 165.

<sup>131</sup> *Ibid.* at 186.

unemployment was not primarily the fault of the unemployed. As Owram notes, their conclusion pointed to more government intervention.<sup>132</sup>

An examination of some of the media accounts of the causes of bankruptcy indicates a growing recognition that some businesses failed as a result of factors beyond the debtor's control. In the nineteenth century, little credence had been given to external causes of bankruptcy. An 1882 article that appeared in the *Monetary Times* entitled "Causes of Insolvency and Business Failure" listed the six principal causes of insolvency. All were linked to some form of personal failing. The author added that "failures sometimes happen from circumstances implying no blame to the trader. But these instances are infrequent, and we cannot in this age of business intelligence place any of the above causes among their number."<sup>133</sup> By 1913, the *Monetary Times* was still proclaiming "the large majority of failures occur because of the deficiencies of the traders themselves, rather than because of the influence of happenings beyond their control".<sup>134</sup> However, the paper was prepared to acknowledge that almost twenty per cent of failures could be attributed to circumstances beyond the debtor's control.<sup>135</sup> Later reports in the financial press also recognized that in some circumstances failure could be attributed to

<sup>132</sup> Owram, *Government Generation*., *supra* note 86 at 6-7, 76-77.

<sup>133</sup> "Causes of Business Failure" *Monetary Times* (5 January 1882) 743. The six causes were as follows. 1. Ignorance of business. 2. Inadequate capital 3. Entering an overcrowded area of business 4. Lacking knowledge of accounts 5. Extravagance 6. Fraud. See also "Bankruptcy Analyzed" *Monetary Times* (11 October 1886) 404. The article also refers to English statistics, "A careful study of them leaves no doubt that only a very small fraction can justly be attributed to misfortune". Statistics prepared by the commercial agency Bradstreet's in 1895 list competition as a cause of only 9 of 1,842 business failures and external causes as approximately 10% of all business failures. "Causes of Business Failures" *Monetary Times* (29 March 1895) 1259.

<sup>134</sup> "Business Failures" *Monetary Times* (22 February 1913) 414.

<sup>135</sup> "Business Failures" *Monetary Times* (22 February 1913) 414. The *Monetary Times* reviewed earlier statistics of external causes.

1908	22.5%
1909	19
1910	18
1911	21.1
1912	19.7

external circumstances.<sup>136</sup> A bankruptcy statute that granted relief to the honest but unfortunate debtor became acceptable.

In 1918 and 1919, debate in Parliament proceeded upon the basic assumption that a discharge was an essential part of any bankruptcy system and there was little debate on the fundamental question of whether it was right to release a debtor from his or her obligations. By way of contrast, the discharge had been challenged in the nineteenth century on the basis that debtors had a moral obligation to repay debts. Parliament did not debate the specific discharge provisions of the 1918 and 1919 Bills. Instead, it focused on a clause by clause analysis of other more technical matters and constitutional issues.

Many were prepared to acknowledge that the primary function of bankruptcy legislation was to discharge the debtor. H.P. Grundy, the author of the original bankruptcy Bill, stated that discharge was one of the three main reasons for a bankruptcy act.<sup>137</sup> S.W. Jacobs wrote that the discharge was said to be "the very soul of a

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<sup>136</sup> By 1922, the *Financial Post* still proclaimed that "for some years past the principle has been laid down that business success was largely personal." However the article also acknowledged that a significant portion of failures could be attributed to external circumstances. "Why Business Men Failed" *Financial Post* (24 February 1922) 18. Statistics for external causes are as follows:

1918 14%  
 1919 14.1  
 1920 16.9  
 1921 25.2

However, see "Failures in Canada" *Monetary Times* 29 March 1918 which analyze the statistics differently. Specific conditions or non- personal causes are listed as follows.

1915 35.9%  
 1916 30.1  
 1917 25.4

For general statistics, see "Less Insolvency in 1916" *Monetary Times* (2 February 1917) 28. See also Henry Lye, "Credit Men and Retailers Records: Causes of Business Failures" *Monetary Times* (21 July 1916) and Edward E. Purinton "Why do Men Fail" (1919-20) 9 *Can. Chart. Acct.* 29.

<sup>137</sup> "Federal Bankruptcy Act: Reasons Given before Canadian Credit Men's Trust Association Why There Should be a Dominion Bankruptcy Act" (1916-17) 6 *Can. Chart. Acct.* 282. Grundy also made this point in a later writings. H.P. Grundy, "Synopsis of the Canadian Bankruptcy Act" (1919-20) 1 *C.B.R.* 325; H.P. Grundy, "The Bankruptcy Act" (1919) 27 *J. Can. Bankers' Assoc.* 426 See also L. Duncan, "Bankrupts Must Have Discharge to Go into Trade: New Laws Designed to Protect the Honest Debtor" *Financial Post* (24 February 1922) at 8.

Bankruptcy Act".<sup>138</sup> In introducing the Bill, Jacobs claimed that "the main purpose of a Bankruptcy Act ... is to see to it that a debtor ... obtains a discharge".<sup>139</sup> The following year, the Solicitor General stated that the "one great object to be attained by a Bankruptcy Act in Canada is the discharge of the honest debtor".<sup>140</sup> There were no objections to these statements of general principle and the fact that they went unchallenged is noteworthy and contrasts to earlier nineteenth century debates.

The discharge had therefore been transformed from a nineteenth century evil to an essential form of business regulation. This transformation of values coincided with changes to credit relationships and the emergence of a more national economy. The end of the economic boom in 1913, combined with the emergence of a more modern economy, provided a suitable framework for the debate of bankruptcy law as a national issue. Localism and individualism were no longer obstacles to reform.

#### *A The Transformation of the Discharge: A Reconsideration*

The acceptability of the discharge, however, did not entirely represent the triumph of forgiveness, and concerns for the rehabilitation of the debtor. While general statements stressing the importance of the discharge might be linked to the interests of debtors,<sup>141</sup> or a growing recognition that failure was caused by factors beyond the debtor's control, a further examination of this issue clearly reveals that creditor interests lay behind the provisions. The *Bankruptcy Act of 1919* met the specific legal needs of the credit community.

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<sup>138</sup> S.W. Jacobs, "A Canadian Bankruptcy Act—Is it A Necessity?" (1917) 37 Can. L.T. 604 at 608.

<sup>139</sup> *House of Commons Debates* (27 March 1918) at 206. See also "Proposed Bankruptcy Act" *Monetary Times* (1 September 1917) 14.

<sup>140</sup> *House of Commons Debates* (2 May 1919) at 2004 (Guthrie). See also *House of Commons Debates* (1 May 1919) at 932.

<sup>141</sup> There were some attempts to justify the inclusion of the discharge on a rationale that appealed to debtor sentiments. For example, a 1914 *Saturday Night* editorial reminded its readers that Canada was "practically the only civilized country which has not a Bankruptcy Court with powers to free a man from a financial burden he is unable to bear". *Saturday Night* (10 January 1914) 1. Another author, writing in 1913, claimed that without a bankruptcy act a man had debts "hanging around his neck like a mill stone". A.C. McMaster, "The Bankruptcy Act" (1912-1913) 2 Can. Chart. Acct. 236 at 241.

In the absence of a federal bankruptcy discharge a debtor was required to pay his debts in full "if he has the means at any time in his lifetime to do so".<sup>142</sup> Provincial statutes of limitation and exemption laws "endeavoured to prevent a debtor from forever being weighed down with an impossible load of debt". However, these limited provincial measures did not distinguish between "the rash speculator" and the "unfortunate tradesman".<sup>143</sup> The inability of debtors to obtain a general release of their debts created problems for creditors on several fronts.

The large number of individuals heavily burdened with debt were of no use to creditors as new customers as it was "no advantage to creditors to have a debtor die poor".<sup>144</sup> A wholesaler who conducted business in Ontario and the four Western provinces wrote to the Department of Justice and complained of the lack of individuals who were able to enter into business:

In the West, with large numbers of young men who have joined the forces, it is necessary for the proper carrying on of business here that a number of the older men should go back into business, but as a result of unwise Real Estate speculation, many of these are tied up with old judgments and debts that they cannot under any circumstance ever pay.<sup>145</sup>

More specifically, without a discharge, debtors tended to engage in deceptive conduct designed to thwart the collection efforts of creditors. Debtors continued to flee to the United States to obtain "a new lease on life". The lack of a discharge deprived Canada of "active and enterprising individuals". If there had been a proper Bankruptcy law they would have "remained at home and would now be taking part in the development of Canada".<sup>146</sup> One wholesaler wrote to Laurier and suggested that a new

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<sup>142</sup> F.G.T. Lucas, "The New 'Bankruptcy Act'" (1920) 40 Can. L.T. 668 at 669.

<sup>143</sup> J. Bicknell, "The Advisability of Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35 at 37.

<sup>144</sup> Christie and Co. Wholesale Dealers in Lumber [etc.] (17 February 1906) *Laurier Papers*, PAC MG26 Vol. 403, Reel c-850, No. 107231.

<sup>145</sup> Letter of R.J. White and Co. Ltd. Wholesale Dry Goods to Department of Justice (17 April 1918) *Department of Justice Papers*, PAC RG13 A2 Vol. 221, File 735.

<sup>146</sup> *Saturday Night* (10 January 1914) 1. The article claimed that exiled Canadian debtors were to be found in "every leading city of the American Union". *Saturday Night* (10 January 1914) 1. This point was

bankruptcy law would "reclaim so much good brain power, and that it would be equal almost, if not quite as good as one year's immigration to Canada".<sup>147</sup>

Without a discharge, debtors had an incentive to engage in "crookedness and deception".<sup>148</sup> Debtors sequestered assets,<sup>149</sup> and arranged their affairs so as to become judgment proof.<sup>150</sup> Provincial proceedings that allowed for a pro rata distribution after the filing of an execution, proved futile as writs of execution were often valueless.<sup>151</sup> In a letter to the Department of Justice, one creditor complained that "by the time we obtain judgement and the Sheriff makes the seizure, the bulk and most desirable portion of the assets ... have been disposed of".<sup>152</sup> Individual enforcement was "a most wasteful method of procedure both as to costs and to the amount realised on property through a sheriff's

also made at a Liberal Party convention in Winnipeg. See letter of Henry Detchon to the Minister of Justice (17 September 1917) *Department of Justice Papers*, PAC RG13 A2 Vol. 213, File 1081. See also letter of Soclean Chemical Company to Sir Wilfrid Laurier (9 August 1907) *Laurier Papers*, PAC MG26 Vol. 470, Reel c-850, No. 127611. See also *House of Commons Debates* (18 May 1903) at 3249.

<sup>147</sup> Letter of Christie & Co. to Laurier, 17 February 1906, *Laurier Papers*, PAC MG26 Reel c-850, No. 107231.

<sup>148</sup> A.C. McMaster, "The Bankruptcy Act" (1912-1913) 2 *Can. Chart. Acct.* 236 at 241.

<sup>149</sup> *Saturday Night* (10 January 1914) 1.

<sup>150</sup> This included transferring property to a wife to evade legitimate debts. In Ontario the enactment of the Married Women's Property Act, 1884 abolished the role of the husband as trustee over the women's property. Under the Act, women were entitled to hold and convey property. This created opportunities for spousal transfers to avoid debts. Chambers found over 130 cases of attempted fraud in unreported court documents: Chambers, *Married Women and Property Law*, *supra* note 19 at 155-155.

<sup>151</sup> F.G.T. Lucas, "The New Bankruptcy Act" (1920) 40 *Can. L.T.* 668 at 669. Lyell, "Bankruptcy Act Means Better Business Methods" *Monetary Times* (23 July 1920) 34. See also A.C. McMaster, "The Bankruptcy Act" (1912-1913) 2 *Can. Chart. Acct.* 236 at 237.

<sup>152</sup> Letter of H.G. Smith Limited, Regina to Department of Justice (16 April 1918) *Department of Justice Papers*, PAC RG13 A2 Vol. 221, File No. 735. The only method available under provincial law for a creditor to seize assets was to "obtain judgement, issue execution and realize on his assets through the sheriff, which is a very expensive and unsatisfactory proceeding and generally results in a creditor getting little or nothing". H.P. Grundy, "The Bankruptcy Act" (1919) 27 *J. Can. Bankers' Assoc.* 426 at 427. See also "The New Bankruptcy Act" *Monetary Times* (18 July 1919) 22; O. Wade, "Insolvency including Assignments and Winding-Up Proceedings under the Dominion and Ontario Winding-Up Acts" (1919-1920) 9 *Can. Chart. Acct.* 167 at 168.

sale".<sup>153</sup>

Perhaps those best placed to recognize the problem of debtor misconduct were the authorized trustees appointed by the provincial government to administer the insolvent estates under the provincial voluntary assignment acts. Under the provincial system firms emerged that specialized in the liquidation of debtors' estates.<sup>154</sup> The interests of these trustee organizations became invariably linked to the interests of creditors:

These auxiliary Trust Companies of Mercantile Concerns are not in truth Trust Companies at all. They were formed to collect debts, arrange compositions and extensions of time with defaulting debtors, and to wind up insolvent Estates under the old Provincial System of Trust Assignment; and they have no other trust capacity or power. In the capacity for which they were formed they were Agents or Trustees only of the Creditors and they acted accordingly. They are still merely auxiliaries or adjuncts of Credit and other Mercantile concerns ....<sup>155</sup>

One of the largest organizations of authorized trustees was the CCMTA. Its activities included "furnishing complete and accurate reports on the standing of any customer," and securing "improved legislation".<sup>156</sup>

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<sup>153</sup> H.P. Grundy, "Synopsis of the Canadian Bankruptcy Act" (1919-20) 1 C.B.R. 325 at 326; J. Honsberger, "Bankruptcy Administration in the United States and Canada" (1975) 63 Cal. L. Rev. 1515 at 1530; A.C. McMaster, "The Bankruptcy Act" (1912-1913) 2 Can. Chart. Acct. 236 at 237.

<sup>154</sup> Donovan Report at 147. The occupation of trustee "yielded a fair return for the services rendered". The report claimed that the CCMTA's other departments, such as its credit information services, could not have operated "were it not for the profit made in their trustee business". (p 161).

<sup>155</sup> B. Thompson, "Canadian Bankruptcy Act—Monopoly of the Trusteeship and of the Law" (1921) 41 Can. L.T. 96 at 102. The author claimed that the organizations were unfit to be trustees under the Canadian Bankruptcy Act as the Act "contemplates and requires ... a Trustee to be absolutely independent". "These auxiliary Trust Companies of the Credit System not only represent a class of creditors exclusively of all others, but they are so intimately—in interest, finance and management—entwined with one class of Creditor that it is impossible to dis sever them." (p 103).

<sup>156</sup> "Canadian Credit Men's Association: Review of Purposes and Activities of Recently Organized League" *Financial Post* (18 June 1912) 18. However, not all aspects of the legislation involved making changes to the provincial model. The CCMTA sought to retain certain beneficial provisions of the provincial legislation. The drafter of the Bill desired to retain certain elements of the provincial assignment Acts that had been of benefit to his clients. Grundy, in drafting the provisions on the administration of debtors' estates, rejected the court-supervised model found in the English and American systems and allowed debtors to make voluntary assignments directly to trustees. In some aspects, he followed the model of the provincial assignments Acts on the basis of lower court costs and greater control by trustees in the



The problem of fraudulent transactions originally led the CCMTA to seek donations from its members to fund the prosecution of debtors. The President of the Association claimed that through their efforts fraudulent debtors had been arrested and in a number of cases the CCMTA succeeded in "discovering concealed assets". The President of the CCMTA boasted that their vigorous pursuit of debtors "very materially" reduced the amount of fraud.<sup>157</sup> However, individual prosecution of debtors would have proven costly and the CCMTA soon recognized the benefits of general bankruptcy legislation. The legislation that emerged was originally drafted on behalf of the CCMTA and represented a desire to improve the creditor collection.

The CCMTA instructed H.P. Grundy to draft a bill that would "carefully guard the granting of discharges".<sup>158</sup> Grundy made it clear that the new legislation was not a debtors' act. According to Grundy, the intention of the legislation was that "discharges shall not be obtained readily by debtors where business methods are below the standard fixed by the requirements of the Act".<sup>159</sup> Grundy did not want a loose discharge provision as it "is as much a hardship on the honest debtor ... as it is on the creditor class".<sup>160</sup> He predicted that under the new Canadian Act, "debtors will not in all cases

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administration of estates. Therefore, debate over bankruptcy reform not only included a desire for change but also an attempt to maintain some elements of the status quo in favour of creditors. For a discussion of how Grundy retained beneficial aspects of the provincial regimes, see T.G.W. Telfer, "The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest?" (1994-95) 24 C.B.L.J. 357 at 365-374.

<sup>157</sup> H. Detchon, "Prosecution of Fraudulent Debtors: Work of the Canadian Credit Men's Trust Association is Clearing the Financial Atmosphere" *Monetary Times* (7 January 1916) 60. However, the subsequent efforts of the CCMTA to push for a bankruptcy act illustrate that their success in pursuing individual fraudulent debtors was an exaggeration. The idea of a fraudulent debtor fund designed to financially support individual actions was an inefficient response to the problem. It would have been difficult to attract funds from creditors who had no stake in the outcome. Further, even creditors with a small claim in the estate of a fraudulent debtor could have chosen to free ride on the contributions of others. The modern system of a trustee with the power to investigate fraud funded by the assets of the estate is far superior to the rudimentary fund established by the CCMTA.

<sup>158</sup> Letter of H.P. Grundy to C.J. Doherty, Minister of Justice (13 July 1917) *Department of Justice Papers*, PAC RG13 A2 Vol. 213, File 1074-1092, 1917.

<sup>159</sup> H.P. Grundy, "The Bankruptcy Act" Canadian Legal History Project Archives, Manitoba AWCLH A-41 at 13, 14.

<sup>160</sup> H.P. Grundy, "The Bankruptcy Act" (1919) 27 J. of Can. Bankers' Assoc. 426 at 435.

receive their discharge as a matter of course .... [C]onditions on which a debtor receives this great benefit are carefully safeguarded.”<sup>161</sup>

Lewis Duncan, author of the first major Canadian bankruptcy text, attempted to allay fears that the Act offered a discharge to any debtor who made an assignment. According to Duncan the Act did no such thing. The legislation gave “creditors very considerable and far reaching rights”. If creditors knew of their rights they could protect themselves and guard against fraud. It was “more important that creditors should be properly advised and know their rights in bankruptcy than that debtors should be advised and made acquainted with [their] rights ...”<sup>162</sup>

The bankruptcy discharge drew a distinction between debtors who failed through “no fault of their own”<sup>163</sup> and “dishonest and incompetent traders [who] should be stigmatized as undischarged bankrupts”.<sup>164</sup> Those who had “wilfully wrecked” their business were not deserving of a discharge.<sup>165</sup>

Grundy argued that provincial legislation “gave no encouragement or preference to an honest debtor or one who conducted his business along clean modern, up to date lines”. Under the new Act “the dishonest debtor is handicapped by being unable to get a discharge”. Grundy concluded that the effect of the policy would be “to promote better, cleaner, and more modern methods of doing business thereby effecting a large saving to

<sup>161</sup> H.P. Grundy, “The Bankruptcy Act” Canadian Legal History Project Archives, Manitoba AWCLH A-41 at 13, 14.

<sup>162</sup> L. Duncan, “The Operation and Effect of the Bankruptcy Act” (1922) 29 J. Can. Bankers’ Assoc. 503 at 505. See also A.C. McMaster, “The Canadian Bankruptcy Act” (1912-13) 2 Can. Chart. Acct. 236 at 238.

<sup>163</sup> *Saturday Night* (10 January 1914). See also Duncan, “Bankrupts Must Have Discharge to Go into Trade” *Financial Post* (24 February 1922).

<sup>164</sup> J. Bicknell, “The Advisability of Establishing a Bankruptcy Court in Canada” (1913) 33 Can. L.T. 35 at 51.

<sup>165</sup> S.W. Jacobs, “The Proposed Bankruptcy Act,” (1918) 3 Proceedings of the CBA, 164; *House of Commons Debates* (27 March 1918) at 206 (Jacobs); S.W. Jacobs, “A Canadian Bankruptcy Act—Is it A Necessity?” (1917) 37 Can. L.T. 604 at 609.

commercial and financial interests".<sup>166</sup>

Judicial interpretation of the legislation would allow the courts to bring their influence to bear "in favour of a high standard of commercial morality to bear directly on the debtors".<sup>167</sup> A debtor was only entitled to a discharge if he had been "an honest man"; his insolvency was a result of "causes beyond his control"; and if he co-operated with the trustee.<sup>168</sup> Grundy claimed "...if the judges follow the same conservative course which has been adopted by the English Bankruptcy Judges very few abuses will arise".<sup>169</sup>

The CCMTA and their solicitor, in reviewing the need for a discharge, made "careful inquiries and investigations" of foreign bankruptcy acts<sup>170</sup> and concluded that the recently amended English Bankruptcy Act of 1914 provided the ideal solution.<sup>171</sup>

It was found, on examining the provisions of the English Act and upon making inquiries among the creditor class in England, that the discharge provisions contained in the English Act gave satisfaction to the public at large, to both the creditor and the debtor class. They are very conservative and the dishonest debtor has not much of a chance. The honest debtor has.

<sup>172</sup>

The English provisions were the "result of many years [of] careful study, practice

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<sup>166</sup> H.P. Grundy, "A Synopsis of the Canadian Bankruptcy Act" (1919-20) 1 C.B.R. 325 at 347.

<sup>167</sup> A. C. McMaster, "The Bankruptcy Act" (1912-1913) 2 Can. Chart. Acct. 236 at 240.

<sup>168</sup> F.G.T. Lucas, "The New Bankruptcy Act" (1920) 40 Can. L.T. 668 at 671.

<sup>169</sup> Letter of Grundy to Doherty, Minister of Justice (21 June 1917) *Department of Justice Papers*, PAC RG13 A2 Vol. 213, File No 1081, at 10.

<sup>170</sup> H.P. Grundy, "The Bankruptcy Act" (1919) 27 J. of Can. Bankers' Assoc. 426 at 435. Grundy studied various foreign models with the view of giving "the commercial interests of Canada the benefit of the usual provisions in similar acts of other countries as to "involuntary Bankruptcy" and the "discharge of an honest debtor" but would on the other hand eliminate the heavy expense and delays complained of by the commercial interests in England, United States and Australia. Letter of H.P. Grundy to James Aikins (15 July 1917) *CBA Papers*, *supra* note 20, Vol. 1, File 2 (Correspondence 1914-1917).

<sup>171</sup> Grundy relied on the 1915 English text book *Williams on Bankruptcy* as his principal source of English law. Grundy called the English text "a very valuable work". See H.P. Grundy, "The Bankruptcy Act" in Canadian Legal History Project Archives, AWCLH A-41.

<sup>172</sup> H.P. Grundy, "The Bankruptcy Act" (1919) 27 J. Can. Bankers' Assoc. 426 at 435.

and experience on the part of business men, financial interests, legislators and other interests in the mother country".<sup>173</sup> "If they are good enough for England, or if they are necessary in England, they are necessary in Canada. A debtor should be just as careful and just as honest in his business dealings in Canada as he is in England."<sup>174</sup> Therefore, in drafting his Bill, Grundy based the discharge provisions on the English sections with "practically no changes. They are almost verbatim."<sup>175</sup> It was important to model the new legislation on the English Act in order "to profit by the experience of the mother country in dealing with the discharge of debtors and further to obtain the benefit of many English decisions".<sup>176</sup> The Solicitor General claimed it was not possible to alter the Bill:

The English law has been in force so long that every section has been judicially interpreted and if we start changing the wording we change the meaning of the authority. It has been so carefully reviewed, amended and interpreted that it would be wise for us to take the benefits of their experience rather than make changes.<sup>177</sup>

The willingness to embrace English Bankruptcy legislation as the perfect model was consistent with the general trend in the Canadian common law legal community at that time to accept laws and ideals from the Empire as worthy of emulation.<sup>178</sup>

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<sup>173</sup> H.P. Grundy, "The Bankruptcy Act" Canadian Legal History Project Archives, Manitoba AWCLH A-41 at 13.

<sup>174</sup> H.P. Grundy, "The Bankruptcy Act" (1919) 27 J. Can. Bankers' Assoc. 426 at 436.

<sup>175</sup> *Ibid.*

<sup>176</sup> H.P. Grundy, "Synopsis of Canadian Bankruptcy Act" (1919-20) 1 C.B.R. 325 at 327, 344; See H.P. Grundy, "The Bankruptcy Act" in Canadian Legal History Project Archives, AWCLH A-41 at 13.

<sup>177</sup> *House of Commons Debates* (9 May 1919) at 2267 (Guthrie). Similarly counsel for the Canadian Bankers' Association argued that if the English legislation was not followed "we will not be able to take advantage of the English text books and of the cases which have been decided in England interpreting the English Act". Letter to Secretary of the Canadian Bankers' Association (28 October 1918) Enclosure to Circular 5-P (4 November 1918) *Canadian Bankers' Association Papers*, Canadian Bankers' Association Archives.

<sup>178</sup> B. Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late Victorian Empire" (1985) 3 L. & Hist. Rev. 219 at 274. See also B. Hibbits, "A Bridle for Leviathan: The Supreme Court and the Board of Commerce" (1989) 21 Ottawa L.R. 65 at 105; B. Hibbits, "A Change of Mind: The Supreme Court and the Board of Railway Commissioners, 1903-1929" (1991) 41 U.T.L.J. 60 at 89.

However, not all agreed that England provided the ideal model. The Retail Merchants Association claimed that there was no need to follow English legislation. "In Canada, our commerce, in custom and in laws, is not so defined or developed, as to warrant the English Act being taken as proper for us yet."<sup>179</sup> When the Bill moved to the House of Commons, one Member questioned whether "an Act that has proved satisfactory in an old country like England will be equally satisfactory in a comparatively new country with large areas yet to be developed?"<sup>180</sup> One Senator claimed:

[I]t does not follow that a bankruptcy law that has grown up in England during a long time and to suit their circumstances will necessarily, if transplanted, be suitable to Canada.<sup>181</sup>

An editorial in the *Canada Law Times* suggested that the English provisions were "unworkable, or very cumbersome". Despite the pleas not to copy the English Act, "wise men here who never saw a Bankruptcy Act in operation but only in print, persisted in their notion that what is English Law is perfect for Canada".<sup>182</sup>

The Retail Merchants Association was fully supportive of a bankruptcy discharge, but, they argued that the 1919 Act went too far in favouring the interests of creditors.<sup>183</sup> The Bill, as drafted was "not for the facilitating of the discharge to an honest debtor". The legislation was designed only to protect business firms against "the errors of judgment on the part of credit men". The Bill was an instrument designed to "menace and terrify".<sup>184</sup> The RMA claimed that the Bill "strikes us as purely a creditors' Act ....

Further analysis of the Parliamentary debates and votes during this time would reveal the extent to which there was any split between the Quebec members and members from the common law provinces.

<sup>179</sup> *Special Committee* (17 April 1918), *supra* note 31 at 4.

<sup>180</sup> *House of Commons Debates* (2 May 1919) at 2007 (Maharg).

<sup>181</sup> *Senate Debates* (26 May 1919) at 504 (Ross).

<sup>182</sup> "Editorial: Bankruptcy" (1920) 40 Can. L.T. 546 at 547.

<sup>183</sup> The Retail Merchants' Association claimed its membership differed from the Credit Men's Trust Association, half of whose membership were said to be wholesalers and do business on credit *Special Committee* (17 April 1918), *supra* note 31 at 5, 9, 29.

<sup>184</sup> *Ibid.* at 3.

[A] maze of technicalities would lose the debtor on his way to freedom.”<sup>185</sup>

The English model fitted closely with the needs of the CCMTA and creditors more generally. When contrasted to the pro-debtor American Bankruptcy Act of 1898, the English model had greater appeal. In 1898, the United States abandoned the notions of creditor consent and conditional discharges that had featured in its earlier legislation. The American legislation radically departed from the English model and ended any link between payments to creditors and the entitlement to a discharge. Whereas the English Act of 1883 had shifted control of the discharge from creditors to the court, the U.S. Bankruptcy Act did not grant discretion to bankruptcy judges. Congress had fixed the discharge rules and the role of the court was to simply rule on whether the statutory grounds for denial had been proven and either grant or deny a discharge. The U.S. 1898 Act “signalled a clear ... parting of the ways between England and the United States regarding the discharge”.<sup>186</sup>

There was little mention of American reforms north of the border. The general perception of American bankruptcy law was that it favoured the debtor. In a letter to the Minister of Justice, Grundy claimed that the American model was rejected “by reason of the laxity which existed, not only in the Act itself, but also with judges in granting discharges to bankrupts”.<sup>187</sup> Lewis Duncan, an early bankruptcy scholar, was also critical of the American discharge provisions:

<sup>185</sup> *Ibid.* at 6.

<sup>186</sup> C. Tabb, “The Historical Evolution of the Bankruptcy Discharge” (1991) 65 *Am. Bankr. L.J.* 325 at 362-364. See also D. Boshkoff, “Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings” (1982) 131 *U. Penn. L. Rev.* for a discussion of the differences between the English and American models.

<sup>187</sup> Letter of H.P. Grundy to C.J. Doherty, Minister of Justice (13 July 1917) *Department of Justice Papers*, PAC RG13 A2 Vol. 213 File 1074-1092, 1917. There was an awareness of United States legislation. S.W. Jacobs, while studying the matter for the Liberal Party, wrote to an American law firm in 1916 inquiring about the standard American Bankruptcy text. Jacobs indicated in his letter that his Committee was studying “the question of the introduction of a federal bankruptcy act in Canada, on lines similar to your federal act”. See Letter of Jacobs to William Travers Jerome (4 February 1916) *Jacobs Papers*, PAC MG27 III C3 Vol. 1. at 48 and 49. However, there is no evidence to suggest that American reforms were ever seriously considered.

Laxity in the administration of this part of the Act has been one of the principal causes of dissatisfaction with United States bankruptcy statutes, which have too often been administered as if they were a clearing house for the liquidation of debts, a sort of constant jubilee.<sup>188</sup>

The English discharge, which focused on the conduct of the debtor, had greater appeal.

The transformation of the discharge, therefore, did not entirely represent a disinterested shift in values. Underlying the demands for reform lay specific creditor interests. While new forms of credit relationships in the new national economy may have made the discharge more acceptable generally, the *Bankruptcy Act of 1919* met the needs of the credit community.

Economic considerations do not provide a complete explanation of the timing of the legislation. Despite the clear wording in the B.N.A. Act, it was not certain that reform would take place at the federal level. Federalism and the impact of the War must also be considered.

### III The Reassertion of Federal Authority

If one accepts that the legislation was a response to economic change, then the timing of the legislation may have turned on sufficient advances in the economy to support national legislation. A study of economic trends may lead to general conclusions about the suitability of legislation to match economic needs. However, without further empirical analysis it is difficult to equate the year 1919 to a certain defined measure of growth. Further, one might suggest that there had been sufficient growth to support national legislation before 1919. Federalism and the intervention of the war offers some additional insights on the timing of the legislation. Federalism also shaped the nature of the debates as constitutional issues often took precedence over a discussion of the substantive merits of the Bill.

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<sup>188</sup> L. Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at 38. Levi & Moore concluded in their comparative study that the Canadian discharge provisions were more carefully designed than those in the American Act "to safeguard the financial community against the dishonest and the wastrel". E. Levi & J. Moore, "Bankruptcy and Reorganization: A Survey of Changes" (1937) 5 U. Chic. L. Rev. 1 at 22.

### A *The Influence of the Provincial Model*

While the economic boom that occurred in the early part of the twentieth century provided the federal government with ample reason not to raise the bankruptcy issue, federalism also operated as an important constraint on reform. The *Voluntary Assignments Case*<sup>189</sup> of 1894 had settled the question as to the validity of provincial legislation in the absence of a federal bankruptcy act. The Privy Council decision contributed to the growth of provincial legislation and undermined the need for federal intervention. After 1894, the validity of provincial law was challenged on occasion. However, the courts were unwilling to disturb the Privy Council ruling.<sup>190</sup> The Prince Edward Island Court of Appeal upheld the validity of the provincial Judgment Debtors Act. The Privy Council decision combined with the continued absence of federal bankruptcy legislation influenced the Court's ruling:

[I]t is quite clear since the decision of the Privy Council in *Attorney-General of Ontario v. Attorney-General of Canada* ... that though it may be open to the Dominion Parliament to deal with this matter as part of bankruptcy law, it does not follow that it is excluded from the legislative authority of the Provincial Legislature, when there is no bankruptcy and insolvency legislation of the Dominion Parliament in existence.<sup>191</sup>

The absence of any federal initiative after 1903 and the continuation of provincial regulation had a significant impact. The provincial model had become so entrenched that by the time that the need for new legislation was raised, the initial response was to look to the provinces. The CCMTA did not originally envisage national legislation.<sup>192</sup> It sought uniformity in provincial legislation. If provincial laws could be reformed to create a uniform regime, such a course would "facilitate trade not only between the provinces, but

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<sup>189</sup> *A.G. of Ontario v. A.G. for Canada* [1894] A.C. 189 (P.C.).

<sup>190</sup> E.g. *Tooke Brothers v. Brock & Patterson* (1907) 3 N.B. Eq. R. 496.

<sup>191</sup> *McKinnon v. McDougall* (1907) 3 E.L.R. 573 (P.E.I.C.A.) at 576. The constitutionality of federal and provincial statutes dealing with companies continued to be litigated. See A. Bohémier, *La Faillite en Droit Constitutionnel Canadien* (Montreal: Presses de L'Université de Montréal, 1972) at 102.

<sup>192</sup> Letter of James Aikins to R.C. Smith, Vice Pres. of CBA (20 May 1915) *CBA Papers*, *supra* note 20.



with other nations".<sup>193</sup> The natural reaction of the CCMTA was to seek reform of the various provincial regimes under which the authorized trustees had long been operating. Fearing an imposition of a costly court supervised bankruptcy system in use in other countries, the CCMTA preferred the provincial regime as it avoided "all the red tape of the administration of [a] bankruptcy act".<sup>194</sup> The CCMTA did not want to lose control over the liquidation of debtors' estates as a result of the renewed agitation for a federal bankruptcy law.<sup>195</sup> It therefore passed a resolution in 1916 that "the Canadian Bar Association be asked to draft out a uniform assignments act for submission to all the provinces".<sup>196</sup> The CCMTA eventually abandoned the concept of pursuing uniformity at the provincial level in favour of a new federal law<sup>197</sup> which sought to retain some of the

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<sup>193</sup> Letter to Canadian Bankers' Association from CCMTA (14 November 1916), *Canadian Bankers' Association Papers*, Can. Bankers' Assoc. Archives, (87-536-01, Legislative Reports from Council).

<sup>194</sup> Letter of CCMTA to Sir James Aikins, President of the CBA (5 July 1916) *CBA Papers*, *supra* note 20. See also H. Detchon, "Uniform Assignment Act Necessary: Irritating Phase of Canadian Business Should be Removed" *Monetary Times* (5 January 1917) 154.

<sup>195</sup> "This Association[CCMTA], which has as members and shareholders over one thousand wholesale merchants and manufacturers in Canada, has for some years past viewed with some little uneasiness the agitation throughout Canada, and in particularly in eastern Canada, for a Bankruptcy Act." Letter of H.P. Grundy to James Aikins (15 January 1917) *CBA Papers*, *supra* note 20. "Whereas the present assignments acts of most of the provinces of Canada allow of the expeditious winding up of estates under the supervision of the creditors without the burdensome costs incident to the establishment of the bankruptcy courts." Resolution of CCMTA attached to letter of CCMTA to CBA (5 July 1916) *CBA Papers*, *supra* note 20.

<sup>196</sup> Resolution of CCMTA attached to letter of CCMTA to CBA (5 July 1916) *CBA Papers*, *supra* note 20. See also Minutes of Annual Meeting of the Canadian Bankers' Association (9 November 1916) in Minute Book I, *Canadian Bankers' Association Papers*, Canadian Bankers' Association Archives. See also, J. Honsberger, "The Historical Evolution of The Bankruptcy and Insolvency Process in Canada" [unpublished] at 47. Provincial branches of the CCMTA were asked to seek \$10 from each member to be paid to the CBA fund which was to be applied "exclusively in connection with expenses incurred ... with the campaign for uniformity of laws". Letter to Canadian Bankers' Association from CCMTA (14 November 1916), *Canadian Bankers' Association Papers*, Can. Bankers' Assoc. Archives, (87-536-01, Legislative Reports from Council).

<sup>197</sup> While no specific reason is given for the change in strategy, it is likely that problems of uniformity contributed to the Bill being submitted to the federal government. The CCMTA could focus its lobby efforts on one government rather than trying to achieve reform separately at the provincial level. Further, there would be no constitutional difficulties with federal legislation, given the express grant of power. The CCMTA foresaw that reform of the provincial level could lead to the legislation being *ultra vires* and

advantageous administrative provisions of the provincial law.<sup>198</sup> Provincial jurisdiction did not extend to compulsory proceedings or allow a discharge.<sup>199</sup> These two elements were key concerns of the CCMTA and thus constitutionally necessitated a federal bill.<sup>200</sup>

However, when Parliament debated the Bankruptcy Bill some Members of Parliament continued to see merit in the idea of reforming provincial legislation. One Senator, duly impressed with the efficiency of the provincial legislation, suggested that it be allowed to continue. Rather than introducing an elaborate federal bill, the Senator suggested that Parliament "pass a short act to the effect that any debtor who had complied properly and honestly with the terms of the provincial Act should be entitled to receive a discharge". During the 1880s, the model of a federal discharge in combination with provincial distribution schemes had taken the form of an actual federal bill.<sup>201</sup>

Another Senator pointed to the fact that the repeal of the *Insolvent Act* had forced the provinces to deal with the question of preferences which "they have dealt with rather effectually". In the Maritimes, for example, "there was no substantial grievance about the

originally asked the CBA to only draft federal legislation if reform of the provincial law would be *ultra vires*. See Resolution of CCMTA attached to letter of CCMTA to CBA (5 July 1916) *CBA Papers, supra* note 20.

<sup>198</sup> In an article published in 1917, the General Manager of the CCMTA reviewed the state of provincial law: H. Detchon, "Uniform Assignment Act Necessary: Irritating Phase of Canadian Business Should be Removed" *Monetary Times* (5 January 1917) 154.

<sup>199</sup> The Privy Council in 1894 concluded that it was not necessary to define what was covered in the words "bankruptcy and insolvency". However, the Privy Council stated: "In reply to a question put by their Lordships the learned counsel for the respondent were unable to point to any scheme of bankruptcy and insolvency which did not involve some compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate." *A.G. of Ontario v. A.G. for Canada* [1894] A.C. 189 at 200. While the Privy Council never expressed a view on whether a discharge was an essential part of the federal field, Blake had made the argument that the provincial law was not a bankruptcy law as it did not contain a compulsory provision and there was no discharge: *The Insolvency Case in the Privy Council, Argument of Mr. Blake for the Appellant* (Toronto: Bryant Press, 1894) Archives of Ontario, *Blake Papers*, MV 266 C2 Box 128, Env. 35 at 9-13.

<sup>200</sup> Reform at the federal level also allowed the CCMTA to coordinate its lobbying efforts more effectively.

<sup>201</sup> *Debates of the Senate* (26 May 1919) at 503 (Power). See Bill C-71, 4th Sess., 5th Parl., (1886); C-9, 1st Sess., 6th Parl., (1887).

distribution of assets". The only difficulty was the absence of a legislative discharge, a fact which forced debtors to do business in the name of another. As provincial legislation was effective, the Senator proposed that a federal discharge should only be available where provincial distribution laws had been complied with. There was no need to create "other machinery that will run at the same time as the provincial legislation". Machinery already existed for the distribution of debtors' estates which could be used "economically without creating another system of vast bankruptcy machinery".<sup>202</sup> Other Members of Parliament, rather than advancing the specific merits of provincial reform, chose to attack the constitutionality of the federal Bill.

When Parliament debated the Bankruptcy Bill in 1919, there was a specific acknowledgment that the federal structure of the constitution had posed unique problems for bankruptcy reform in Canada:

Only this Parliament can pass a bankruptcy law which will have uniform force and effect throughout the Dominion. One difficulty in the way is the fact that there is so many legislative jurisdictions in this country. In Great Britain, the Bankruptcy Act is a comparatively simple thing, there being but one central authority for the United Kingdom. But in Canada there is the Dominion Parliament, as well as nine provincial legislatures, and during the last forty years all the provincial legislatures have made some attempt to pass laws approximating very nearly to bankruptcy and insolvency laws.<sup>203</sup>

The introduction of new federal legislation, after a long period of provincial regulation, led to inevitable challenges to federal jurisdiction:

My honourable friend speaks of England having legislated in a much wider manner. Of course, Great Britain is not a federation, and is not bound by a written constitution. Great Britain can cover the whole ground. But our claim is that under the Constitution with powers divided so fairly between the provinces and the Dominion, this Act may trespass upon provincial rights.<sup>204</sup>

The federal bankruptcy Bill was attacked in the Parliament on several occasions on the basis that it interfered with provincial jurisdiction over property and civil rights. It

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<sup>202</sup> *Debates of the Senate* (26 May 1919) at 503 (Ross).

<sup>203</sup> *House of Commons Debates* (28 March 1919) at 992 (Guthrie).

<sup>204</sup> *Debates of the Senate* (28 May 1919) at 563 (Dandurand).

was claimed that s. 11, which provided that a receiving order (an order which placed a debtor into bankruptcy) took precedence over all provincial attachments and executions, was unconstitutional.<sup>205</sup> Further, the argument was made that the Bill was a "direct infringement of civil rights in the province of Quebec. I do not see how this law and our law in Quebec can be reconcilable."<sup>206</sup> Another Member from Quebec similarly attacked the constitutional validity of the process to appoint trustees.<sup>207</sup>

The extension of the Act to include non-traders was also attacked on constitutional grounds. The abolition of the trader rule had the effect of "encroaching on private rights. It allows creditors to find out private secrets of all kinds and, in fact, it is a grave violation of property rights .... this is clearly odious to private rights." It was argued that the federal government could not regulate non-traders as the bankruptcy and insolvency power was limited to trade and commerce matters.<sup>208</sup>

One Senator quoted passages from Clement on the Canadian Constitution and claimed that "the regulation of non-traders had never been done before and I doubt very much if it is warranted by the Constitution".<sup>209</sup> Another Senator argued that Parliament had no power to "invade the rights of individuals who are not traders and who do not fall under the Federal jurisdiction." Parliament could not "appropriate jurisdiction over them" when it had been previously a matter of provincial jurisdiction.<sup>210</sup> It was acknowledged that Parliament could interfere with matters of procedure and registration matters which normally fell within the ambit of provincial powers. However, the regulation of non-traders interfered with civil rights.<sup>211</sup>

<sup>205</sup> See Bill C-18, s. 11. *House of Commons Debates* (1 May 1919) at 1982 (Guthrie).

<sup>206</sup> *House of Commons Debates* (2 May 1919) at 2008 (Cannon).

<sup>207</sup> *House of Commons Debates* (1 May 1919) at 1987 (Archambault).

<sup>208</sup> *House of Commons Debates* (15 May 1919) at 2004 (Archambault).

<sup>209</sup> *Debates of the Senate* (28 May 1919) at 562 (Beique).

<sup>210</sup> *Debates of the Senate* (28 May 1919) at 563 (Dandurand).

<sup>211</sup> *Debates of the Senate* (26 May 1919) at 563 (Beique). See also S.W. Jacobs, "The New Bankruptcy Act" (1919) 4 *Proceedings of the C.B.A.* 173 at 175. Jacobs, intent on restoring the trader rule

These arguments were given little weight, however, in the face of the clear wording of the federal bankruptcy and insolvency power in the B.N.A. Act.<sup>212</sup> The Solicitor General, in introducing the Bill in 1919, reminded Parliament that “under s. 91 of the British North America Act, the question of bankruptcy and insolvency is one of the questions which was left to the jurisdiction of the Dominion of Parliament”. Pursuant to its powers under s. 91, Parliament had enacted the earlier *Insolvent Acts*. He explained how the legislation had been repealed and that the provinces had enacted legislation in the interval. The validity of provincial legislation had at one time been “doubted”. However the matter was clarified by the Privy Council. While it was acknowledged the decision did indeed open the door for provincial legislation, the Solicitor General made it very clear that the scope of “provincial powers were exceedingly limited”. Their legislation could not “compel a debtor to go into bankruptcy or provide for a discharge to the honest debtor”.<sup>213</sup>

The Solicitor General admitted that the Bill proposed to infringe upon property and civil rights. “[B]ut the British North America Act says that to this extent we may infringe upon property and civil rights ....”<sup>214</sup> To reinforce the point, reference was made to the leading constitutional text, Lefroy’s *Canada’s Federal System*.<sup>215</sup> The Solicitor General claimed that the federal government “was not seeking to infringe on the rights of any province more than is necessary to give effect and validity to the particular

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wrote to one Senator and discussed possible definitions of the term. See Letter of S.W. Jacobs to Senator Bostock (31 May 1919) *Jacobs Papers* PAC MG27 III C3 Vol. 2, No. 547.

<sup>212</sup> The 1918 Bankruptcy Bill included a provision specifying that the Act was to “extend to all the provinces of the Dominion of Canada”. Bill C-25, s. 2. The Special Committee later struck the provision from the Bill. See *Special Committee on Bankruptcy* (16 April 1918), *supra* note 31.

<sup>213</sup> Lefroy’s interpretation of *Cushing v Dupuy* (1880) 5 A.C. 409 (P.C.) was read into the record. *House of Commons Debates* (28 March 1919) at 991 (Guthrie). See also *Debates of the Senate* (26 May 1919) at 501 (Lougheed).

<sup>214</sup> *House of Commons Debates* (1 May 1919) at 1987 (Guthrie).

<sup>215</sup> *House of Commons Debates* (1 May 1919) at 1988.

legislation now in question".<sup>216</sup>

Commentators writing on the new federal bankruptcy Bill also found it necessary to justify the intervention of the federal government on a constitutional basis.<sup>217</sup> S.W. Jacobs argued that under the British North America Act bankruptcy and insolvency were within the "purview of the Federal authority". It had been the intention of the Imperial Parliament that bankruptcy and insolvency legislation "should have universal application throughout the Dominion".<sup>218</sup> J.A.C. Cameron, the author of a comprehensive annotation to the *Bankruptcy Act*, noted that a question had arisen as to the jurisdiction of the Dominion Parliament to enact the legislation. Cameron claimed that a review of the Privy Council authorities led one to the conclusion that the federal legislation was *intra vires*.<sup>219</sup>

#### *B The Impact of the War and the Growth of Federal Regulation*

The challenges to federal authority did not prevail. The private Bill of 1918 became a government matter the following year as Ottawa re-asserted its jurisdiction over bankruptcy and insolvency. Whereas in the past, most bankruptcy bills had been sponsored by private members, in 1919 the Solicitor General introduced the Bill as a government proposal. However, the attempts to justify the use of the federal power must be considered in the context of the war. The very need for bankruptcy legislation was linked to the effects of the war and its aftermath. S.W. Jacobs, who introduced the Bill in 1918, set the tone of the debate:

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<sup>216</sup> *House of Commons Debates* (2 May 1919) at 2008 (Guthrie). When the debate moved to the Senate, the government was also forced to defend the constitutionality of the Bill. See *Debates of the Senate* (28 May 1919) at 563 (Lougheed).

<sup>217</sup> See e.g., H.P. Grundy, "Synopsis of the Canadian Bankruptcy Act" (1920-21) 1 C.B.R. 325; J. Bicknell, "The Advisability of Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35 at 36; L. Duncan, "The Operation and Effect of the Bankruptcy Act" (1922) 29 J. of Can. Bankers' Assoc. 502; G. T. Clarkson, "The Bankruptcy Act" (1920-21) 10 Can. Chart. Acct. 154; O. Wade, "The Dominion Bankruptcy Act" (1920-21) 10 Can. Chart. Acct. 234. And, see the later article by J. Greenberg who similarly introduced the subject by beginning with the constitution. "The Bankruptcy Law in Canada" (1931) 5 J. of Nat'l Assoc. of Referees in Bankr. 119.

<sup>218</sup> S.W. Jacobs, "A Canadian Bankruptcy Act-Is it a Necessity?" (1917) 37 Can. L.T. 604.

<sup>219</sup> J.A.C. Cameron, "Annotation: Bankruptcy Act" [1920] 53 D.L.R. 135 at 137-141.

I think I can claim for this Bill that it is essentially a war measure at this particular time. We must be prepared when the war comes to a close, to be able to handle the situation which is bound to arise in this country as a result of the long-contained struggle and of the readjustments that will have to be made .... Many people will find at the end of the war that it will be necessary for them to reconsider their position ....<sup>220</sup>

The Retail Merchants' Association, in its submission to the Special Committee, also recognized the significance of the war:

It appears to us that during the present commercial strain, owing to the war, as well as after the war is terminated, provision should be made whereby an honest debtor should be able to secure a release from debts in which he may have become entangled through misfortune or through no fault of his own.<sup>221</sup>

Parliament's adoption of the *Bankruptcy Act of 1919* must be considered in light of the unprecedented growth of government regulation in the Canadian economy. Monod argues that the war pushed the state into increasing its influence over commerce.<sup>222</sup> For example, the Union Government created various boards and agencies to assist in the coordination of the economy during the war. These included the Fuel Control Office, the War Trade Board, the War Purchasing Commission, the Food Board, and the Railway War Board.<sup>223</sup> In addition, the 1914 War Measures Act gave Cabinet broad powers to make orders or regulations necessary "for the security, defence, peace, order and welfare of Canada".<sup>224</sup> The war legitimized various forms of government intervention.<sup>225</sup> No

<sup>220</sup> *House of Commons Debates* (27 March 1918) at 206 (Jacobs).

<sup>221</sup> *Special Committee* (17 April 1918), *supra* note 31 at 24.

<sup>222</sup> Monod, *Store Wars*, *supra* note 130 at 260. See also C.D. Baggaley, *The Emergence of the Regulatory State in Canada 1867-1939* (Ottawa: Economic Council of Canada, 1981) at 50. However, J.A. Corry notes that in comparison the Canadian economy was controlled less than other major participants. See J.A. Corry, "The Growth of Government Activities In Canada 1914-1921" (1940) *Canadian Historical Association Annual Report* 65.

<sup>223</sup> B. Hibbits, "A Bridle for Leviathan: The Supreme Court and the Board of Commerce" (1989) 21 *Ottawa L. Rev.* 65 at 67.

<sup>224</sup> *War Measures Act 1914*, S.C. 1914, c.2, s. 6. See B. Hibbits, "A Bridle for Leviathan: The Supreme Court and the Board of Commerce" (1989) 21 *Ottawa L.R.* 65 at 82. Hibbits in a separate article

other government had relied on the power of the state to intervene in so many different ways. While some thought that the state had gone too far, others viewed it as just the beginning of an increased role for the state.<sup>226</sup>

It was not just the war itself that led to greater government intervention. The realities of the aftermath of the war were anticipated before the conflict came to a close. Industries that supported the war effort, such as munitions, faced the possibility of collapse following the end of the conflict.<sup>227</sup> Many of the provinces enacted debt moratorium legislation to deal with the economic problems of the war.<sup>228</sup> While the number of commercial failures dropped towards the end of the war,<sup>229</sup> many feared the

describes that the Borden Government "had become more powerful than any other government in Canadian history". B. Hibbitts, "A Change of Mind: The Supreme Court and the Board of Railway Commissioners, 1903-1929" (1991) 41 U.T.L.J. 60 at 96. S.W. Jacobs, who introduced the bankruptcy Bill in 1918, complained that Parliament was "practically being superseded by Orders in Council". Letter of S.W. Jacobs to Peter Ryan (17 April 1918) *Jacobs Papers*, PAC MG27 III C3 Vol. 1, No. 213.

<sup>225</sup> On the general growth of federal regulation, see J. A. Corry, "The Growth of Government Activities in Canada 1914-1921" (1940) *Canadian Historical Association Papers* 63.

<sup>226</sup> Brown & Cook, *A Nation Transformed*, *supra* note 36 at 321.

<sup>227</sup> B. Hibbitts, "A Bridle for Leviathan: The Supreme Court and the Board of Commerce" (1989) 21 *Ottawa L. Rev.* 65 at 67.

<sup>228</sup> Legislation in Manitoba, for example, prevented secured creditors from foreclosing on mortgages for a period of six months. Ontario legislation required holders of mortgages to obtain an order of the court before selling the property. Appleton, "Ending Moratia in Canada" (1919) 27 *J. Can. Bankers' Assoc.* 438. The article discusses legislation enacted in Ontario, Manitoba, Saskatchewan and British Columbia. For other articles, see the following *Monetary Times* articles. "More About Moratia" *Monetary Times* (21 August 1914) 10; "Talking in London of Provincial Moratorium" *Monetary Times* (16 October 1914) 30; "Canada Does Not Need Moratorium" *Monetary Times* (9 October 1914) 45; "How the Moratorium Works" *Monetary Times* (6 November 1914) 9; "Canadian Moratia Were Infants" *Monetary Times* (1915 Annual) 62; "Canadian Moratorium Laws" *Monetary Times* (29 January 1915) 9; "Moratia and Deferred Payments" *Monetary Times* (26 February 1915) 14; "Our Moratorium Laws" *Monetary Times* (2 February 1917) 9; "Excessive Moratorium Legislation" *Monetary Times* (23 April 1918) 10.

<sup>229</sup> Norrie & O'ram, *History of the Canadian Economy*, *supra* note 63 at 415- 418. See "Commercial Failures in Canada, 1902 to 1915" *Monetary Times* (7 January 1916) 64; "Commercial Failures in Canada, 1903-1918" *Monetary Times* (28 March 1918) 46. See statistics summarized at note 12.



impact of the removal of the moratorium legislation.<sup>230</sup>

Before the end of the war the government began planning for the return of its veterans. In 1915 it created the Military Hospitals Commission and the following year it created a Board of Pension Commissioners to deal with the anticipated problem of veteran care. By 1917 many began to ask what would happen to the economy once the hundreds of thousands of troops returned from overseas.<sup>231</sup> Brown and Cook argue that “by 1918, the free wheeling economic activity and business practices of the pre-war years had been replaced by government regulation”.<sup>232</sup>

At the same time as Parliament considered the Bankruptcy Bill, another major piece of legislation was also being contemplated. In 1919, the government appointed a special Parliamentary Committee to investigate the problem of the escalating cost of living. The deliberations of the committee led to the enactment of the *Board of Commerce Act* and the *Combines and Fair Prices Act* in 1919. The legislation created the Board of Commerce which could limit profits and fix prices with the goal of stabilizing the cost of living. The Board was responsible for, in the words of one historian, “exposing the villainous retail profiteers, encouraging production and bringing down high prices”.<sup>233</sup> Another commentator argues that the Board of Commerce was “a direct assertion of the new, more activist role sought by many for the state in the interests of the public”.<sup>234</sup>

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<sup>230</sup> See for example the following letters found in the *Department of Justice Papers*, PAC RG13 A2 Vol. 221, File 735. “[T]he necessity for such legislation will inevitably arise after the war, when the moratoriums will be lifted.” Letter of National Biscuit and Confection to Department of Justice (16 April 1918). “We think this is one of the things most needed in Canada especially after the war moratoriums are lifted.” Letter of Ramsay Bros. to Department of Justice (16 April 1918).

<sup>231</sup> Owram, *Government Generation*, *supra* note 86 at 88-89. In 1918 a new Department of Soldiers Civil Re-establishment was created to oversee the demobilization effort. Brown & Cook, *A Nation Transformed*, *supra* note 36 at 322.

<sup>232</sup> Brown & R. Cook, *ibid.* at 248.

<sup>233</sup> Monod, *Store Wars*, *supra* note 130 at 253; and, see generally B. Hibbitts, “A Bridle for Leviathan: The Supreme Court and the Board of Commerce” (1989) 21 *Ottawa L.R.* 65 at 71.

<sup>234</sup> Owram, *Government Generation*, *supra* note 86 at 110.

In the immediate post war period the federal government continued to accept areas of responsibility which been previously assumed to have been in the area of provincial responsibility. In 1919, the federal government created a Department of Health in response to an earlier influenza outbreak in 1917-18. Despite the fact that this area had been traditionally in the realm of the provinces, the new department was given wide authority over a range of health issues. In the same year the federal government introduced legislation providing financial assistance for technical education. The federal government also introduced grants for highway construction and established employment offices in the immediate post war years. As Brown and Cook note:

These measures, part of the continuing momentum of the powerful central government of the war years, did not meet with any serious resistance from the provinces, though the years of unquestioned federal ascendancy were now rapidly drawing to a close.<sup>235</sup>

Thus bankruptcy reform must also be considered in the context of federalism and the shifting balance of power between the provinces and the federal government. It was not certain that reform would emerge from the federal government. After 1903, the provincial model of debtor-creditor regulation became entrenched and continued to operate well after the economy began to evolve in a national direction. The re-emergence of bankruptcy law as a reform issue coincided with the outbreak of the War in 1914. The War allowed the federal government to reassert its authority over the field of bankruptcy and insolvency and justify intervention on a national basis and shift the matter away from the provinces.

### Conclusion

The *Bankruptcy Act of 1919* is a significant milestone in the history of Canadian bankruptcy law. It marked the re-emergence of federal legislation after an absence of almost forty years. Canada was at last joining the United States and England as a nation with a permanent bankruptcy regime. The Act finally fulfilled the expectations of the drafters of the B.N.A. Act who had provided for a federal bankruptcy and insolvency

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<sup>235</sup> Brown & Cook, *A Nation Transformed*, *supra* note 36 at 325. On the efforts of the federal government after the war, see J.A. Corry, "The Growth of Government Activities in Canada 1914-1921" (1940) *Canadian Historical Association Papers* 63 at 72.

power.

The *Bankruptcy Act* improved upon provincial legislation and created a uniform regime. The legislation included a compulsory bankruptcy provision, allowed debtors to make composition agreements with creditors and enabled debtors to apply for a release of their debts. While many have acknowledged the importance of the 1919 Act as providing the basis for Canada's modern bankruptcy law,<sup>236</sup> two further issues need to be considered. First, what explains Canada's long delay in enacting a permanent statute and secondly what factors contributed towards the transformation of the attitudes towards the discharge from a nineteenth century evil to an essential feature of the 1919 Act?

Canada's delay in adopting a permanent national Act contrasts with the earlier American reforms of 1898 and the landmark English legislation of 1883. The postponement may represent a difference in the timing of economic development in the three countries. The re-emergence of bankruptcy law as a national reform issue in Canada prior to the War can be explained in part by the growth in interprovincial trade and the emergence of new national firms. Whereas uniformity had been previously raised as an issue, claims of the importance of national markets had been premature in the nineteenth century. Further, the modernization of credit relationships and the new attitudes towards financial failure led to a wider acceptance of the discharge.

The transformation of the discharge represented more than a shift in values. By 1919 creditors recognized the discharge as part of the larger bankruptcy scheme which enhanced collection goals. The near forty year absence of the discharge provided numerous examples of debtors engaging in deceptive or fraudulent conduct under defective provincial legislation. The CCMTA, which had gained prominence during the provincial era, was well placed to recognize the needs of creditors and ensured that the Bill contained a discretionary discharge that was aimed at controlling the conduct of debtors. The English statute provided the perfect model and was a further independent influence on the Canadian law. The transformation of the discharge therefore represented not only a decline of the personal credit relationship but more importantly it also signified an acceptance on the part of creditors that an English based discretionary discharge was the best solution to fulfil their needs. The newer attitudes towards debt and financial

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See note 2.

failure were relevant in that they gave the Bankruptcy Bill greater general appeal and allowed the uncontroversial principle of the discharge to be asserted without disclosing creditor interests.

The timing of reform did not depend entirely upon the path of economic development and was also influenced by the federal structure of the Canadian constitution. Federalism continued to have an impact and impeded federal reform initiatives in the late nineteenth and early twentieth centuries even after Canada had experienced significant economic growth. After the *Voluntary Assignments Case* in 1894,<sup>237</sup> provincial legislation became entrenched and when the reform issue again arose it was not certain that new legislation would emerge from Ottawa. The intervention of the war allowed the federal government to re-assert its authority over bankruptcy and insolvency. While the transformation of the Canadian economy made uniform legislation desirable, it is equally important to identify the significance of the division of powers on the reform process.<sup>238</sup>

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<sup>237</sup> *A.G. of Ontario v A.G. for Canada* [1894] A.C. 189 (P.C).

<sup>238</sup> On the interplay between macroeconomic change and state structures, see L. Dodd, & C. Jillson, "Conversations on the Study of American Politics: An Introduction" in Dodd & Jillson eds., *The Dynamics of American Politics* (Boulder: Westview, 1994) 1 at 10. On a specific application of the approach which places an emphasis on the confluence of various factors to explain policy development including the fragmentation of power at the federal level, see eg Sven H. Steinmo, "American Exceptionalism Reconsidered: Culture of Institutions" in L. Dodd & C. Jillson, eds.

## CHAPTER 8

### Conclusion

In 1919, after a near forty year absence, Parliament reasserted its jurisdiction over bankruptcy and insolvency and passed what many believed to be an essential form of business regulation. Canada was at last joining the United States and England in adopting what was to become a more permanent form of bankruptcy legislation. The *Bankruptcy Act of 1919*, although amended a number of times, provided the conceptual framework for much of twentieth century Canadian bankruptcy law.<sup>1</sup> The legislation applied to all types of debtors, both individual and corporate. It allowed both voluntary and involuntary proceedings and enabled debtors to apply for a discharge. The Act that was repealed in 1880, by contrast, was limited in application to traders and only allowed involuntary proceedings. The general consensus in 1919 as to the desirability of a national bankruptcy act containing a discharge stands in stark contrast to the debates of the nineteenth century. What had been deemed an evil and immoral form of regulation in the nineteenth century became a necessity in 1919.

Bankruptcy and insolvency was one of the many important economic powers granted to Parliament under the British North America Act in 1867. From the beginning, however, bankruptcy law proved to be controversial. The original *Insolvent Act of 1869* was passed as a temporary measure and was limited in scope to traders. In 1875, Parliament abolished voluntary proceedings and in subsequent amendments it further restricted access to the discharge. Amendments, however, did not satisfy the Members of Parliament calling for repeal. The repeal movement, which began soon after the 1869 Act came into effect, culminated in 1880 with the repeal of the *Insolvent Act of 1875*. Between 1880 and 1903, Parliament debated a number of bankruptcy bills. Only one bill bore the imprint of government policy and all bills failed to garner sufficient votes in Parliament.<sup>2</sup>

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<sup>1</sup> J. Ziegel, "Canada's Phased in Bankruptcy Law Reform" (1996) *Amer. Bankr. L.J.* 383.

<sup>2</sup> See Appendix 1 to chapter 6.

Why Canada repealed bankruptcy legislation in 1880 and did not pass a national uniform statute until 1919 has been the central question of this thesis. Opposition to nineteenth century bankruptcy law, the absence of federal legislation for a period of nearly forty years and the success of the 1919 Act can be explained by examining evolving attitudes towards the discharge and how the equitable distribution of the debtor's assets favoured or disadvantaged local and distant creditors.

Bankruptcy law at its core is concerned with distributing the debtor's assets on an equitable basis and providing the debtor with a discharge. These two central goals dramatically interfered with the common law debtor-creditor relationship. Much of the debate in the nineteenth century focused on the morality of the discharge and whether it interfered with a debtor's higher obligation to repay debts. The collective nature of bankruptcy proceedings and the distribution of the debtor's assets on an equal basis were also central to the debate. Bankruptcy law's interference with the traditional common law scramble for the debtor's assets affected the specific interests of local and distant creditors. Bankruptcy law represented, therefore, both a conflict of values over the morality of the discharge and a distinct divergence of interests between local and distant creditors over the advantages and disadvantages of a pro rata distribution. This clash of ideas and interests took place within a changing economy that was moving away from its local and rural base. Institutional factors such as federalism and the emerging regulatory state also had an independent effect on the legislative history.

#### *A The Discharge and the Competing Values*

In the nineteenth century, the discharge proved to be the most contentious reform issue. The discharge provisions of the *Insolvent Acts of 1869 and 1875* were based upon creditor consent and the requirements for obtaining consent became more stringent as the decade progressed. While both Acts allowed debtors to apply for a discharge, the court had the discretion to award either a first or second class discharge. The classification system enabled the courts to pass judgment on the moral trustworthiness of the debtor. The call for repeal in 1880 was directly linked to the discharge. Many argued that

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releasing debtors from their obligations was not a proper role for the state. After repeal in 1880, Parliament considered a number of bankruptcy bills that specifically excluded the discharge.

One cannot understand Parliament's actions without examining the underlying attitudes towards the discharge. Two distinct positions were evident. On the one hand, debtors required a fresh start and it was unjust to burden a person with debt for life. Honest but unfortunate debtors deserved a discharge and the opportunity to start again. Forgiveness of debt was advocated for those who had been subject to the uncertainties of the market or who suffered from sickness or other mishap.

Notions of forgiveness, however, competed unsuccessfully with the idea that all debts had to be honoured. The common claim heard in Parliament from the 1870s through to the end of the century was that bankruptcy law encouraged commercial immorality. The link between commercial immorality and bankruptcy law was derived from the fundamental obligation to repay debts. Bankruptcy law interfered with this higher value. No law should lead a debtor to betray one's duty to one's fellow men. Debt was a private matter to be worked out between the parties. Members of Parliament, leading business newspapers and even the courts recognized a debtor's moral obligation to his creditors.<sup>3</sup>

In the nineteenth century, critical attitudes towards the discharge and the popular appeal of individual responsibility may be linked to the local nature of credit relationships that depended upon trust and mutual exchange. The obligation to repay debts mattered more in a rural and local economy where the personal character of the debtor was the foundation of the credit relationship. Opponents of bankruptcy law focused on the immorality of the discharge and led a vociferous campaign to eliminate the ability of debtors to obtain a release of their debts. While there is evidence that in the 1870s a more legalistic and impersonal form of credit relationship was beginning to appear, local and rural markets continued to play a significant role in the economy. Older notions did not

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<sup>3</sup> See e.g., Thomas Ritchie, *The Fallacy of Insolvency Laws and Their Baneful Effects* (1885) as discussed in Chapter 6. Two Ontario courts accepted that moral obligation was sufficient consideration to support a reaffirmation agreement after the discharge. See *Austin v Gordon* (1872) 32 U.C.Q.B. 621; *Adams v. Woodland* (1878) 3 O.A.R. 213, discussed in chapter 5.

disappear as credit-worthiness depended upon an assessment of character. The arguments of commercial immorality had great appeal in the largely rural economy of the 1870s and continued to be raised throughout the 1880s and 1890s.

If repeal and the continued failure of federal reform Bills between 1880 and 1903 can be attributed to the unpopularity of the discharge and its challenge to the higher obligation to repay debts, it is significant to note that by 1919 opposition to the discharge largely disappeared. While notions of commercial morality dominated the debates of the nineteenth century, after the War the discharge was an accepted feature of the bankruptcy statute. Statements in the House of Commons that emphasized the fundamental importance of the discharge were not challenged. Reports in the financial press recognized that financial failure could be explained by circumstances beyond the debtor's control.<sup>4</sup> The transformation of the economy explains the demise of notions of commercial morality. The emergence of corporations as a significant form of business organization and the growth of legalistic credit relationships such as the hire purchase and instalment agreements broke down the older forms of personal credit relationships.<sup>5</sup> This acceptance of the discharge as an essential aspect of bankruptcy regulation in Canada in the twentieth century parallels earlier developments in the United States and England.<sup>6</sup>

The debate over the discharge, however, did not entirely represent a disinterested debate over the fundamental nature of credit relationships. At times, appeals to larger values concealed specific interests. For example, rural opposition to bankruptcy law might also be explained by the fact that farmers were excluded from the legislation. As the *Insolvent Act of 1875* only applied to traders, farmers obtained no benefits under the

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<sup>4</sup> Compare "Causes of Business Failures" *Monetary Times* (5 January 1882) 743 with "Business Failures" *Monetary Times* (22 February 1913) 414 as discussed in chapter 7.

<sup>5</sup> See discussion of D. Monod, *Store Wars: Shopkeepers and the Culture of Mass Marketing 1890-1939* (Toronto: University of Toronto Press, 1996) at 165, 186 in chapter 7.

<sup>6</sup> On the growing acceptability of bankruptcy law in a modernizing American economy, see P. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy* (Madison: State Hist. Soc. of Wisc., 1974) as discussed in chapter 3. In England, see B. Weiss, *The Hell of the English: Bankruptcy and the Victorian Novel* (Cranbury N.J.: Bucknell Univ. Press, 1986).



Act. However, in their occasional status as creditors, farmers were required to bear the loss if any of their debtors were forced into bankruptcy. The injustice of this form of class legislation and the exclusion of the farming community also formed the basis of opposition to the legislation. While framing the call for repeal on the basis that bankruptcy law allowed merchants to escape from their obligations, the farming community was also responding to how the legislation affected their particular interests.

Thus while it is important to analyze the competing values that were at stake in the debate over the discharge, it is also important to address the possible interests affected by bankruptcy law. The lengthy debate over the evils of the discharge that extended through to the 1890s diverted attention away from an equally important debate over the equitable distribution of the debtor's assets.

*B The Distribution of the Debtor's Assets and the Tension between Local and Distant Creditors*

Creditors who traded across regional boundaries focused on the other goal of bankruptcy law, first to prevent repeal and later to call for its reinstatement. Bankruptcy law offered a major advantage over the common law as it provided a distribution of the debtor's assets to all creditors on a pro rata basis. By way of contrast, the common law system of "first come first served" rewarded creditors who acted quickly. Creditors who traded at a distance were disadvantaged by such a regime and favoured a national bankruptcy law and its equitable distribution policy which prevented local creditors from seizing all of the debtor's assets. Bankruptcy law, by abolishing the common law race to the debtor's assets, reduced risks for foreign creditors and destroyed local creditor advantage. Distant creditors were also disadvantaged by preferential payments to family or local friendly creditors. Throughout the 1870s, Members of Parliament warned that repeal would have grave consequences for inter-provincial trade. Merchants, it was argued, would refuse to extend credit or ship goods across distances if Parliament repealed the law.

Express support for a bankruptcy law in the 1870s came from the urban Boards of Trade located in Toronto and Montreal. These Boards of Trade sought to prevent repeal and had some success in delaying the law's demise. The Dominion Board of Trade, a

national organization representing the various local Boards, also advocated the retention of the law. The efforts of the Boards of Trade suggest that there were signs of inter-provincial trade as early as the 1870s. However, not all agreed with the goal of uniform national legislation. The Dominion Board of Trade was itself divided over the issue and repeal suggests that the national vision of the economy was premature and that some creditors may have preferred to trade under the common law system.

After 1880, bankruptcy law did not disappear from the parliamentary agenda as national and increasingly foreign merchants and creditors continued to demand uniform legislation. Foreign merchants complained that it was common practice for Canadian creditors to benefit at the expense of overseas creditors. Both Macdonald and Laurier received numerous pleas and petitions from overseas merchants seeking a national bankruptcy law that prohibited debtors from making preferential payments. Not all provinces took immediate steps to prohibit preferences.

The absence of a national law in the 1880s and 1890s reflected the continued strength of the local and rural economy. The premise of equal treatment of creditors ran counter to the notion of offering assistance to a local friend or family member which lay at the heart of more traditional forms of business. Preferences were tolerated in many regions as they justly rewarded local enterprise at the expense of outsiders and foreigners. Loans to family members or friends were fundamentally different from credit obtained from businesses or banks. Preferences were expected where credit had been extended by a neighbour or family member.<sup>7</sup> The failure of federal bills throughout the 1880s and 1890s, and the slow pace of provincial reform to prohibit preferences, suggests that localism remained a factor. It also suggests that the many arguments against the bankruptcy discharge on the basis of individual responsibility may have concealed local interests seeking to retain the advantages of the common law.

The success of the *Bankruptcy Act of 1919* reflected a fundamental shift between local and distant creditor interests. New national interest groups emerged just prior to the War to demand uniform legislation. As more firms engaged in inter-provincial trade,

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<sup>7</sup> See discussion of "Bankruptcy Legislation" *J. of Commerce* (20 January 1893) 95 in chapter 6.

there was a decided shift in the expected benefits of national uniform legislation.<sup>8</sup> Uniformity would do away with the older notion that outsiders did not have the same rights as those within the province.<sup>9</sup> Whereas in the nineteenth century those benefits were debatable in a more local economy, by 1919 numerous businesses stood to benefit from a national law. Further, the emergence of new national interest groups, such as the Canadian Bar Association and the Canadian Credit Men's Trust Association, provided the means for an effective lobbying effort. The Canadian Bar Association led the general call for uniformity of all commercial legislation, and the CCTMTA seized upon the bankruptcy issue and retained a lawyer to draft new legislation.<sup>10</sup> The advantages of a national uniform legislation could no longer be denied. The debate over bankruptcy law in Canada therefore represented more than an emotional debate over the morality of the discharge. Local and distant creditors had a direct stake in the debate over whether to have a national law.

Canadian economic development, therefore, affected the shifting fortunes of local and distant creditors and the evolving attitudes towards debt. If repeal in 1880 was symbolic of the weakness of the national economy, the *Bankruptcy Act of 1919* reflected an economy that was being transformed from its rural and local base.

### C *The Role of Institutions*

By linking legislative change directly to economic development there may be a tendency to view the legislation as inevitable or precisely matching the evolution of business and commerce. The influence of the economy upon attitudes towards debt and the successes and failures of local and distant creditors should not be underplayed. However, other factors had an independent effect on policy direction. The economy began to change well before 1919 and one must also examine the institutional context to

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<sup>8</sup> See B. Hansen, "Commercial Organizations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law" (1998) 72 *Bus. Hist. Rev.* 86.

<sup>9</sup> S.W. Jacobs, "A Canadian Bankruptcy Law—Is it a Necessity?" (1917) 37 *Can. L.T.* 604.

<sup>10</sup> E.g. J. Aikins, "Commercial Law must be Standardized: Lack of Uniformity in Legislation here is Costly to Canadian Business" *Monetary Times* (7 January 1916).

determine if there were any impediments to reform. Bankruptcy law was debated within the institutional framework of federalism and the emerging regulatory state.

During the 1870s there was little sense that bankruptcy law was part of a larger regulatory state. Bankruptcy law was never adopted as a government reform measure and there was no specialized government department responsible for the legislation. As a regulatory measure, bankruptcy law had no institutional backing. While the Department of Justice had broad responsibility for the legislation, there was little support for the law as a public policy measure. The Department of Justice and the Prime Minister were more concerned with sorting out patronage appointments to fill the position of Official Assignee. By way of contrast, the English reforms of 1883 were initiated and implemented by a government with a strong policy direction. Senior civil servants formulated much of the policy expressed in the 1883 Act. The civil servants accepted that the state had a supervisory role to play. Bankruptcy law, in this new vision, was not just the concern of creditors but it affected the wider society.<sup>11</sup> Nearly forty years later, the passage of the *Canadian Bankruptcy Act of 1919* coincided with an unprecedented growth of federal regulation during the War. In Parliament, the Bill was justified as an important War measure to deal with the economic dislocation following the end of the conflict.

Federalism also had a significant effect upon the legislative history of Canadian bankruptcy law. The division of powers and the ability of the provinces to regulate debtor-creditor matters provided Parliament with the option to abandon a controversial subject matter. Repeal in 1880 coincided with Ontario's enactment of a *Creditors' Relief Act* to provide for an equal distribution of the debtor's assets. Federalism took on a more significant role after 1880 as the bankruptcy law debate shifted to a discussion over the scope of federal and provincial powers. Between 1886 and 1893, several Ontario courts ruled on the validity of provincial legislation.<sup>12</sup> The divided opinions of the Ontario

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<sup>11</sup> V.M. Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt and Company Winding-Up in Nineteenth Century England* (Oxford: Clarendon Press, 1995).

<sup>12</sup> *Broddy v. Stuart* (1886) 7 Can. L.T. 6; *Clarkson v. Ontario Bank* (1887) 13 O.R. 666; *Clarkson v. Ontario Bank* (1888) 15 O.A.R. 166; *Edgar v. Central Bank of Canada* (1888) 15 O.A.R. 196; *Hunter v.*

Court of Appeal left the law in a state of confusion, and inhibited reform at both the federal and provincial level. It was not until 1894 that the Privy Council resolved the uncertainty with its ruling in the *Voluntary Assignments Case*.<sup>13</sup> The decision, which upheld the validity of provincial legislation, contributed to the further growth of provincial laws and largely ended federal reform efforts until after World War I. Provincial law became entrenched as the primary means of regulating debtor-creditor matters. It would take the War and the efforts of a new national lobby group to shift the focus away from provincial regulation.

The period of study coincides with the rise of the provincial rights movement at the end of the nineteenth century. The more highly publicized disputes between Ontario and Ottawa contrasts with Macdonald's tacit acceptance of provincial regulation of debtor-creditor matters. The repeal of the federal Act and the adoption of the Ontario *Creditors' Relief Act* followed correspondence between Oliver Mowat and Macdonald's government leader in the Senate. After 1880, Macdonald did not take issue with provincial legislation and expressly chose not to use the power of disallowance. In 1883, in the House of Commons, he cast doubt on a private member's bill on the basis that it might interfere with provincial jurisdiction<sup>14</sup> and in 1884 Macdonald raised jurisdictional complexities as a means to deflect foreign demands for reform.<sup>15</sup> Bankruptcy law was a controversial subject and the ability of the provinces to pass debtor-creditor legislation provided Macdonald and subsequently Laurier with a valid excuse not to proceed with federal legislation. Literature on the provincial rights movement has given little attention to the issue of bankruptcy law and the constitution, as it did not form part of the series of direct confrontations between Ontario and the federal government. Macdonald's explicit

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*Drummer* (1888) 15 O.A.R. 232; *Union Bank v. Neville* (1891) 21 O.R. 152; *Re Assignments and Preferences Act* (1893) 20 O.A.R. 489.

<sup>13</sup> *A.G. of Ont. v. A.G. for Can.* [1894] A.C. 189 (P.C.).

<sup>14</sup> *House of Commons Debates* (6 March 1883) at 119.

<sup>15</sup> "Insolvency Legislation" *J. of Commerce* (29 August 1884) at 308.

decision not to challenge provincial jurisdiction in this area is worthy of attention and illustrates that not every jurisdictional issue was part of a confrontational strategy.

Institutional factors must also be examined in order to complete the explanation. Bankruptcy law represented not only a competition of values over the morality of the discharge, but the debates also illustrated a direct conflict of interests between local and distant creditors. This clash of ideals and interests took place in the context of a changing economy and within the institutional framework of federalism and the emerging regulatory state.

*D Comparisons with the United States and England*

Chapters 2 and 3 illustrate that bankruptcy law was equally controversial in the United States and England. Developments in the United States paralleled the Canadian pattern of a brief experiment with national legislation followed by repeal. The United States enacted three short-lived statutes in 1800, 1841 and 1867 before settling on a national act in 1898. If one includes the Province of Canada Act of 1843, the Canadian experience is quite similar. There was little bankruptcy legislation passed in the pre-Confederation period and the Province of Canada Act of 1843 was allowed to expire in 1849. Nova Scotia debated bankruptcy bills prior to 1867 but all failed to pass the assembly. Dating back to the pre-Confederation period, and including the repeal of the Canadian Act in 1880, both Canada and the United States experienced long periods without bankruptcy legislation.

Federalism is the common factor. Local legislation in both Canada and the United States attempted to fill the gap left by the absence of a national statute. The ability of local legislatures to provide some form of debtor-creditor regulation alleviated some of the pressure on federal governments to adopt national legislation. Further, constitutional litigation over the validity of local legislation contributed to the delay in enacting a permanent bankruptcy statute in the United States and Canada. The rulings in *Ogden v. Saunders*<sup>16</sup> and *A.G. Ont. v. A.G. Canada*,<sup>17</sup> by upholding the validity of local legislation,

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<sup>16</sup> 12 Wheat. 213 (1827).

<sup>17</sup> [1894] A.C. 189 (P.C.).

removed the immediate need for federal legislation in the United States after 1827, and in Canada after 1894.<sup>18</sup>

The rural nature of the economy and the division between local and distant creditors are also common themes in both Canada and the United States.<sup>19</sup> The enactment of national bankruptcy legislation in the United States in 1898 and in Canada in 1919 coincided with the rise of nationally organized interest groups that were able to lobby effectively for uniform legislation.<sup>20</sup>

While there are clear parallels to the legislative history of bankruptcy law between Canada and the United States, English bankruptcy law had a more direct impact on the substance of Canadian law. The Canadian *Bankruptcy Act of 1919* was based upon the English legislation of 1883. However, the fact that the English reforms of the nineteenth century were not recognized until 1919 is significant. In the nineteenth century, not only was the English Act of 1883 ignored, but Canada also refused to recognize the earlier landmark reforms of 1861. Nineteenth century Canada did not follow the bankruptcy reform initiatives of the English Parliament.

English legal historians have pointed out that, despite the continued expression by Victorians of their moral outrage towards bankruptcy law, pragmatic realities and the drive for a more cost effective and efficient regime carried the day. England's repeal of the classification of discharges and the removal of the trader distinction in 1861 are examples of this pragmatism at work. The trader rule and the classification of discharge both featured in the *Insolvent Acts of 1869 and 1875*. While the English Parliament

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<sup>18</sup> On the effect of constitutional litigation in the United States as a possible effect of impeding reform, see Barbara Mathews, *'Forgive us Our Debts': Bankruptcy and Insolvency in America 1763-1841* (Ph.D., Brown University, 1994) at 179-180; D. Boshkoff, "Limited Conditional and Suspended Discharges in Anglo-American Bankruptcy Proceedings" (1982) 131 U. Pa. L. Rev. 69 at 111.

<sup>19</sup> The associational economy described in Tony Freyer's work on the American antebellum period has a specific parallel to the rural and local economy of nineteenth century Canada. T. Freyer, *Producers versus Capitalists Constitutional Conflict in Antebellum America* (Charlottesville, Univ. of Va. Press, 1994).

<sup>20</sup> Compare B. Hansen, "Commercial Organizations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law" (1998) 72 Bus. Hist. Rev. 86.

moved to liberalize its bankruptcy regime in the nineteenth century, Canada moved in the opposite direction. During the 1870s Canada tightened the discharge provisions and abolished voluntary proceedings. Parliament chose to ignore the English innovations of 1861 and 1883.

If one assumes that pragmatism is derived from experience and particular needs, one can conclude that the English reforms of 1883 were suitable to the advanced state of the English economy. While Victorians in England continued to raise moral concerns and call for harsher legislation, these more traditional arguments lost their force in a modernizing England. By way of comparison, the rhetoric of the English debate had more appeal in the Canadian setting where traditional credit relationships continued to hold sway.

#### *E Conclusion*

The study of the evolution of formal bankruptcy rules allows one to distinguish more accurately between insolvent debtors and what the law recognized as a bankrupt. One author who examined the early bankruptcy statutes of England claimed that the term "bankrupt" was often mentioned but rarely understood. Debtors who encountered financial difficulty were described as bankrupts, without officially becoming a bankrupt under the statute. English bankruptcy statutes from 1571 to 1861 only applied to traders.<sup>21</sup> Similarly, Canada also utilized the trader rule in the nineteenth century. The definition of trader itself offers comment on what legislators in 1875 saw as relevant occupations to the commercial world. More importantly, however, only debtors who met the definition in the statute were eligible for bankruptcy. If historians wish to describe bankruptcy rates or levels of financial failure, the legal distinction must be kept in mind.<sup>22</sup> A large number of debtors were ineligible for formal bankruptcy proceedings.

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<sup>21</sup> See I. Duffy, *Bankruptcy and Insolvency in London during the Industrial Revolution* (New York: Garland, 1985) at 304 criticizing economic historians for describing the bankruptcy rates without making reference to the legal definition. See also W J Jones, *The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period* (Philadelphia: American Philosophical Society, 1979) at 6.

<sup>22</sup> For example Norrie and Owram state that in recession 1913 unemployment rose, land prices tumbled and "bankruptcies sky-rocketed." K. Norrie and D. Owram, *A History of the Canadian Economy* (Toronto: Harcourt 1991) at 414. David Burley's study includes statistics on the rates of "insolvencies"



The exclusion of a large number of debtors from bankruptcy proceedings between 1869 and 1880 and the absence of any bankruptcy law for a period of nearly forty years had severe implications for debtors and the Canadian economy. Edward Balleisen's study of the American Bankruptcy Act of 1841, which was favourable to debtors, concludes that the lenient treatment of bankrupts and the ease of obtaining a discharge, "release[d] the economic energies of American bankrupts". The ability of bankrupts to return to the economy encouraged risk taking and allowed thousands of debtors to pursue new ventures after their encounter with bankruptcy law.<sup>23</sup> A similar conclusion could be drawn with respect to the American Act of 1898. In Canada, after the repeal of the federal legislation, there could be no energizing of the economy through the return of debtors to the economy. Debtors, in many instances, opted out of the Canadian economy altogether.

Throughout the debates there are references to the number of debtors who fled to the United States due to their inability to obtain a release of their debts. In the early nineteenth century, Laurier received letters from Canadians who had sought refuge from their creditors in the United States. Exiling Canadian debtors, it was argued, meant the loss of "our good but unfortunate trading population".<sup>24</sup> Between 1880 and 1896 several hundred thousand Canadians migrated to the United States.<sup>25</sup> The reason for this shift in population must be re-evaluated in light of the repeal of the federal bankruptcy legislation in 1880.

Canadian historians who have examined business failure have largely focussed on the salvage of large infrastructure projects by the government. The tendency for Canadian governments to intervene and subsidize failing industries stands in contrast to

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1851-1881. The evolving regulatory framework and the eligibility of debtors to qualify as bankrupts is not discussed, see chapter 1 note 17.

<sup>23</sup> Edward J. Balleisen, *Navigating Failure: Bankruptcy in Antebellum America* (Ph.D. diss., Yale University 1995) at 452.

<sup>24</sup> House of Commons Debates (5 May 1887) at 283 (Edgar).

<sup>25</sup> M. Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland & Stewart, 1987) at 249.

its unwillingness to adopt comprehensive bankruptcy legislation providing for the discharge of a wide class of debtors. Individual enterprises formed a significant part of the Canadian economy and future studies of business history will have to take into account the limited range of legal options available to the financially troubled debtor before 1919.

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