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IN THE MATTER OF The Constitutional Questions Act, R.S.S., 1953, Chapter 78; and

*May 24, 25, 26, 27

IN THE MATTER OF a certain Order in Council of the Lieutenant Governor in Council referring for hearing and consideration by the Court of Appeal questions with respect to the Constitutional Validity, construction and application of certain Moratorium Legislation and Orders in Council issued thereunder.

*Nov. 15

THE CANADIAN BANKERS' ASSOCIATION, and THE DOMINION MORTGAGE and INVESTMENTS ASSOCIATION ..... APPELLANTS;

AND

THE ATTORNEY GENERAL OF SASKATCHEWAN ..... RESPONDENT.

Constitutional Law—The Moratorium Act—Constitutional validity—Insolvency legislation—The Moratorium Act, R.S.S. 1953, c. 98; B.N.A. Act, s. 91(21).

The Moratorium Act, Revised Statutes of Saskatchewan, 1953, c. 98, is *ultra vires* the Legislature of Saskatchewan.

Per (Kerwin C.J. and Taschereau, Locke and Cartwright JJ.): *The Moratorium Act,* as enacted in 1943, and as it appears as 1953, R.S.S., c. 98, is in pith and substance in relation to insolvency and, as those parts of it which might be justified as a proper exercise of provincial powers cannot be severed from those which clearly exceed those powers, the Act should be found *ultra vires* as a whole.

Per Rand J.: The Province in acting in relation to insolvency assumed the functions of Parliament and frustrated the laws of the Dominion in relation to the same subject.

Attorney General for Alberta v. *Attorney General for Canada* [1943] A.C. 356, followed. *Abitibi Power & Paper Co.* v. *Montreal Trust Co.* [1943] A.C. 536; *Attorney General of Ontario* v. *Attorney General of Canada* [1894] A.C. 189, distinguished.

Judgment of the Court of Appeal for Saskatchewan affirmed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), on a Reference to that Court by Order of the Lieutenant Governor in Council made pursuant to *The Constitutional Questions Act,* R.S.S. 1953, c. 78 whereby

*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, Locke, Cartwright and Abbott JJ.

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there was referred to that Court eleven questions (set out in the reasons for judgment that follow) relating to the constitutional validity, construction and application of the following Saskatchewan legislation: *The Moratorium Act, 1943,* c. 18; S.2(3) of *An Act to Amend The Moratorium Act,* (S.S. 1949, c. 31); *The Moratorium Act,* R.S.S. 1953, c. 98. On the issue the majority of the Court of Appeal, Procter, McNiven and Culliton JJ.A., were of opinion that the Act is valid while Martin C.J.S. and Gordon J.A. were of opinion that the Act is invalid.

C. F. H. Carson, Q.C., E. C. Leslie, Q.C. and *Allan Findlay, Q.C.* for Canadian Bankers Association, appellant.

C. F. H. Carson, Q.C., F. L. Bastedo, Q.C. and *Allan Findlay, Q.C.* for Dominion Mortgage Investment Association, appellant.

L. McK. Robertson, Q.C. and *J. C. Treleaven, Q.C.* for Attorney General for Saskatchewan, respondent.

E. P. Varcoe, Q.C. and *D. W. H. Henry, Q.C.* for Attorney General of Canada.

The judgment of Kerwin C.J. and of Taschereau, Locke and Cartwright JJ. was delivered by:

LOCKE J.:—The questions referred to the Court of Appeal of Saskatchewan under the provisions of the Constitutional Questions Act of that province are as follows:—

1. Had the Legislature of Saskatchewan jurisdiction to enact *The Moratorium Act, 1943,* being Chapter 18 of the Statutes of Saskatchewan, 1943, as it read prior to its amendment in 1949, and if not in what particular or respect has it exceeded its powers?
2. Had the Legislature of Saskatchewan jurisdiction to enact Subsections (2) and (3) of section 2 of *The Moratorium Act, 1943,* as enacted by subsection (3) of section 2 of An Act to amend The Moratorium Act, being Chapter 31 of the Statutes of Saskatchewan, 1949, and if not, in what particular or respect has it exceeded its powers?
3. Is *The Moratorium Act,* Chapter 98 of the Revised Statutes of Saskatchewan, 1953, *ultra vires* of the Legislature of Saskatchewan either in whole or in part, and, if so, in what particular or particulars, and to what extent?
4. Did or do any of the said enactments contain within their purview any relationship other than that between debtor and creditor and if so, to what extent did or do they apply to other relationships?

5. Did or do any of the said enactments only enable the Lieutenant Governor in Council to effect a moratorium or general postponement of the payment of debts?

6. Did or do any of the said enactments empower the Lieutenant Governor in Council to stay for a limited period the commencement or continuance of proceedings in actions by landlords for the recovery of possession of land, or of proceedings against overholding tenants under Part IV of The Landlord and Tenant Act?

7. Did or do any of the said enactments empower the Lieutenant Governor in Council to prohibit for a limited period the issue of a writ of possession out of any one or more of the Courts of the Province in an action by a landlord against a tenant for the recovery of possession of land or in proceedings against an overholding tenant under Part IV of The Landlord and Tenant Act?

8. Did or do any of the said enactments empower the Lieutenant Governor in Council to prohibit for a limited period the execution of any such writ of possession?

9. Did or do any of the said enactments empower the Lieutenant Governor in Council to prohibit for a limited period the continuance of proceedings pending in any Court of the province in an action by a landlord against a tenant for the recovery of possession of land or against an overholding tenant under Part IV of The Landlord and Tenant Act?

10. Did or do any of the said enactments empower the Lieutenant Governor in Council to prohibit for a limited period the exercise or enjoyment by a person other than a creditor of all or any remedies, either judicial or extra-judicial for the enforcement of his civil rights within the province under or pursuant to a writ of possession issued in an action or under The Landlord and Tenant Act for recovery of possession of land and if so, would a Proclamation or Order in Council without Proclamation issued in exercise of such power prohibit such a person from exercising his right to apply under Queen's Bench Rule 476 for an order for the committal of a sheriff, or prohibit the entertaining of such an application under the said Rule?

11. Did or do any of the said enactments empower the Lieutenant Governor in Council to stay for a limited period the commencement of any civil action or proceeding in any Court of Saskatchewan or to stay any civil action or proceeding pending in any such Court or to stay the execution of any judgment or order of any such Court?

The Moratorium Act referred to in Question 3 appears as c. 98 in the Revised Statutes of Saskatchewan 1953. That Act is in the same terms as the Act of 1943, referred to in the first question, as amended by the Act of 1949, referred to in the second question. In so far as these three questions are concerned, it is accordingly the third only which requires consideration in disposing of the present appeal.

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Procter, McNiven and Culliton, JJ.A., a majority of the Court, found *The Moratorium Act* of 1953 to be "valid in whole but, it being a statute of general application, the validity of proclamations or orders in council made thereunder cannot be determined in advance." The Chief Justice of Saskatchewan and Gordon J.A. found the Act to be *ultra vires,* considering that while portions of it were *intra vires* they were so interwoven with those that were beyond the powers of the legislature that it was not possible to separate them and that the whole Act should be declared beyond its powers (1).

The Act to be considered reads:—

1. This Act may be cited as *The Moratorium Act.*

2. (1) The Lieutenant Governor may from time to time, in so far as within the legislative authority of the province, by proclamation published in *The Saskatchewan Gazette:*

(*a*) authorize the postponement of the payment of all or any debts, liabilities or obligations, existing or future, however arising, or of the enforcement of all or any liens, encumbrances or agreements of sale or other securities, whether created before or after the coming into force of this Act;

(*b*) prohibit in any judicial district or districts, or any part thereof, the issue of any process out of any one or more of the courts of the province in all or any cases of civil actions, or the execution of process already issued in such actions, or stay proceedings in civil actions and matters of any description pending in such courts, or extend or otherwise vary the exemption privileges which execution debtors now enjoy.

(2) The powers conferred upon the Lieutenant Governor by subsection (1) may be exercised in individual cases or with respect to any class or classes of cases, or in favour or for the protection of individuals or any class or classes of individuals, or by order in council without proclamation, and the Lieutenant Governor in Council may also by order in council without proclamation prohibit in any judicial district or districts, or any part thereof, the commencement or continuance of any specified proceeding or proceedings against any person or class or classes of persons, and any order in council made under this section shall take effect from the date specified therein.

(3) The Lieutenant Governor in Council may from time to time, in so far as within the legislative authority of the province, prohibit in any judicial district or districts, or any part thereof, or in the province or any part thereof the issue by any one or more creditors or any other person or persons of any process out of any one or more of the courts of the province in all or any classes of civil actions, or the execution of any process already issued in such actions, or the continuance of proceedings by such creditor or creditors, person or persons in civil actions and matters of any description pending in such courts, or the exercise or enjoyment by such creditor

(1) [1954] 4 D.L.R. 599.

or creditors, person or persons of all or any remedies either judicial or extra-judicial for the enforcement of civil rights by such creditor or creditors, person or persons within the province.

3. A proclamation or order in council made pursuant to section 2 shall state the period during which the proclamation or order shall remain in force, which period shall not be longer than two years from the date on which the proclamation or order takes effect.

The appellants contend that this is legislation in relation to bankruptcy and insolvency, within the meaning of Head 21 of s. 91 of the *British North America Act,* subjects which the preamble to that section declare to lie within the exclusive legislative authority of the Parliament of Canada.

In order to determine the true nature of this legislation, it is permissible and necessary, in my opinion, to consider certain of the legislation which has heretofore been passed by the Legislature of the Province restricting the rights of creditors to enforce their claims in the courts. A valuable summary of the earlier legislation, commencing with the passing of a Moratorium Act at the outbreak of the First Great War (c. 2, S.S. 1914), is to be found in the reasons for judgment delivered by Mr. Justice Procter. *The Debt Adjustment Act,* as first enacted by c. 88 of the Statutes of 1934-35, with minor amendments, appeared as c. 87 of the Revised Statutes of 1940. That Act, *inter alia,* set up a board styled the Debt Adjustment Board, the members of which were to be designated by the Lieutenant Governor in Council, and purported to vest extensive powers in that body, including the right upon the application of any debtor or any one or more of his creditors to issue a certificate which might be filed in the courts of the province and in all Land Title Offices, which had the effect of staying proceedings in the nature of execution or leading to the sale or foreclosure of real property or of any proceedings in court or otherwise which might lead to the seizure or sale of the property of the debtor. The Act further provided that without prior notice to the Board no legal proceedings of any kind should be taken to enforce, *inter alia,* any legal demand or debt where the amount claimed exceeded $100, with certain named exceptions. By s. 9 the Lieutenant Governor in Council was authorized by proclamation to declare what was in effect a moratorium of the same nature as that referred to in s. 2 of the Act of 1953.

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Similar legislation had been adopted in the Province of Alberta and a reference was directed by the Governor General in Council to determine its validity. The Alberta Act, as originally enacted in 1937 and as amended later in that year and in the years 1938, 1939 and 1941, was found to be *ultra vires* in whole by a judgment of the majority of this Court (1) (Crocket J. dissenting) delivered by Sir Lyman Duff C.J. An appeal to the Judicial Committee was dismissed by a judgment (2) delivered on February 1, 1943. That judgment proceeded upon the ground that the legislation was in relation to insolvency, a class of subject within the exclusive legislative authority of the Parliament of Canada, and constituted a serious and substantial invasion of the powers of Parliament. Having come to this conclusion, their Lordships expressed no opinion as to other matters which had been considered by the majority of this Court to affect the validity of the legislation.

On April 12, 1943, the *Provincial Mediation Board Act, 1943* by which, *inter alia,* the *Debt Adjustment Act* was repealed, and the *Moratorium Act,* referred to in the first question, were assented to. On the same date, the *Land Contracts (Actions) Act, 1943* which, *inter alia,* prohibited the commencement of any action for the foreclosure of the equity of redemption or the sale or possession of mortgaged premises or for specific performance or cancellation of an agreement for sale of land, except by leave of the Court of King's Bench, received the Royal assent.

The Provincial Mediation Board Act authorized the setting up of a board to be styled the Provincial Mediation Board, consisting of persons to be appointed by the Lieutenant Governor in Council. S. 5(1) reads:—

> Upon receipt of an application in writing by or on behalf of a debtor or any of his creditors, the board shall confer with and advise the debtor or his creditor and shall endeavour to bring about an amicable arrangement for payment of the debtor's indebtedness without recourse being had to legal proceedings, and for that purpose the board shall inquire into the validity of claims made against the debtor and his ability to pay his just debts, either presently or in the future, and shall endeavour to effect an agreement between the debtor and his creditors to provide for the settlement of the said debts, either in full or by a composition.

(1) [1942] S.C.R. 31. (2) [1943] A.C. 356.

Ss. 6 and 7 deal with proceedings to acquire title to land under various statutes relating to taxation which are prohibited, unless with the consent of the Board.

S.8 requires local registrars to inform the Board after the commencement of, *inter alia,* actions for foreclosure or sale of land or cancellation of agreements for sale or for the recovery of money where the amount claimed exceeds $100, other than in actions for tort and certain other types of actions.

S.15, by which the *Debt Adjustment Act* was repealed, declared further that, notwithstanding such repeal, all orders made by Debt Adjustment Boards constituted under that Act were confirmed in so far as they related to any matter within the Board's jurisdiction and should continue in full force but should be subject to the amendment or cancellation by the Board. It appears to me unnecessary to decide as to whether the language of this portion of the section was intended to vest in the Provincial Mediation Board the power to make orders of the same nature as those which were authorized by the *Debt Adjustment Act,* in substitution for those theretofore made under that statute.

The powers vested in the Provincial Mediation Board, except in so far as they related to proceedings under various tax statutes, differed, as will be seen, substantially from those given to the Debt Adjustment Board by the Act of 1940. Whereas by s. 5 of the latter Act the Board might, by issuing a certificate, stay or prohibit all proceedings of the nature referred to, the Mediation Board, with the exception of the powers given to it by s. 15, was by s. 5 restricted to bringing the parties together, discussing the financial position of the debtor and endeavouring to induce the parties to agree upon some compromise.

S. 2 of the *Moratorium Act* was taken almost verbatim from s. 9 of the *Debt Adjustment Act of 1940.* S-s. 3 of s. 9, as it appeared in the latter Act, was deleted and the other slight changes do not affect the meaning of the section. However, whereas the moratorium, if it may be so called, which might be proclaimed under s. 9 of the *Debt Adjustment Act* was not limited as to time, by the *Moratorium Act* the period during which the proclamation or order shall remain in force was restricted to two years from the date of its taking effect.

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The first general bankruptcy law, following the repeal in 1880 of the *Insolvent Act of 1875,* was enacted by c. 36 of the Statutes of 1919. The situation in Canada in this respect thereafter differed from that which existed when *Attorney General of Ontario* v. *Attorney General of Canada* (1), was decided. In that case it was held that the provisions of s. 9 of *An Act respecting Assignments and Preferences by Insolvent Persons of the Province of Ontario* (R.S.O. 1887, c. 124) which related to assignments purely voluntary and postponed thereto judgments and executions not completely executed by payment, were merely ancillary to bankruptcy law and, as such, within the competence of the Provincial Legislature so long as they did not conflict with any existing bankruptcy legislation of the Dominion Parliament.

Due to the depressed state of agriculture, Parliament in 1934 made special provision for the relief of farmers by the *Farmers' Creditors Arrangement Act* (c. 53). The Act contained, *inter alia,* provisions whereby a farmer who was unable to meet his liabilities might file a proposal for a composition with the Official Receiver appointed under the Bankruptcy Act. Upon the filing of such a proposal all remedies of the creditor were suspended for a period of sixty days, or for such further time as the Court might determine and the continuation of bankruptcy proceedings prohibited for the like period. If such offer was not accepted by his creditors, a Board of Review established by the Act was required to endeavour to formulate an acceptable proposal. If this was approved by the debtor and the creditors, it was to be filed in the Court and thereupon it became binding upon the debtor and all the creditors. If not accepted by them, the Board might nevertheless confirm the proposal and, when approved by the Court, the parties concerned were bound by it.

By c. 25 of the Statutes of 1943 the Act of 1934, as amended, was repealed and the *Farmers' Creditors Arrangement Act, 1943* enacted, which, *inter alia,* permitted farmers in Alberta, Manitoba and Saskatchewan, who were unable to meet their debts as they became due, to file proposals for

(1) [1894] A.C. 189.

compositions under the Act where two-thirds of the total amount of such debts were incurred before the 1st of May 1935. This Act appears as c. 111, R.S.C. 1952.

By the *Bankruptcy Act, 1949* (c. 7, S.C. 1949) (Can. 2nd Sess.) the Act of 1919, as amended, was repealed. The new statute which appears as c. 14, R.S.C. 1952, as in the case of the earlier Acts, makes provision for the relief of insolvent persons (a term defined by the Act) who wish to make an assignment for the general benefit of their creditors or to make proposals for the compromise of their debts, as well as providing for the making of receiving orders upon a creditor's petition and for the ultimate discharge of such persons as well as those declared to be bankrupt under the conditions defined in the statute.

Some light is thrown upon the question as to the true nature of the *Moratorium Act* by an examination of various so-called Debt Adjustment statutes passed earlier by the Saskatchewan Legislature. The first of these was the *Debt Adjustment Act, 1929* (c. 53) which authorized the appointment of a Commissioner who by s. 4 was charged with the duty of endeavouring to bring about an amicable arrangement between a resident farmer and his creditors for the payment of his debts, without recourse being had to legal proceedings, either in full or by a composition upon the application of either debtor or creditors. This Act was repealed by the *Debt Adjustment Act, 1931* (c. 59) and this, in turn, by the *Debt Adjustment Act, 1932* (c. 51). By c. 82 of the Statutes of 1933 the Act of 1932 was repealed and new legislation substituted. The Acts of 1929 and 1931 were restricted in their application to persons engaged in farming operations in the province. The 1932 Act extended as well to certain purchasers of property under agreements for sale and to retail merchants. The Act of 1933 applied to all persons resident in the province and to bodies corporate, other than banks, carrying on business in it. Provisions for the prohibition of a wide range of legal proceedings by a certificate of the Debt Adjustment Commissioner appeared in the Statutes of 1931 and 1932. Under the 1933 Act, a permit from the Debt Adjustment Board was required before actions of various natures, which were defined, might be undertaken, restricted, however, as to obligations under contracts to those made prior to April 1, 1933. The Act of 1933

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also gave to the Lieutenant Governor in Council powers similar to those described in s-s. (1) (*a*) and (*b*) of s. 2 of the *Moratorium Act, 1943*. The 1933 Act was amended and by s. 5 the Debt Adjustment Board, upon the petition of the debtor or of any creditor, authorized to enquire into the affairs of the debtor and:—

> make such order as it deems expedient for the relief of the resident and for a readjustment of the contractual relationship between the resident and his creditors.

This Act was assented to on April 7, 1934. The powers thus assumed to be given to the Debt Adjustment Board, as will be noted, closely approximated those vested in the Boards of Review by the *Farmers' Creditors Arrangement Act, 1934*, which was assented to on July 3 in that year.

It was on December 4, 1934, that the *Debt Adjustment Act, 1934* (c. 88, 1934-35) which repealed the existing legislation, with certain exceptions, was assented to. While the title of the Act remained unchanged, the statute did not contain any express direction to the Debt Adjustment Board to endeavour to bring about an agreement for a compromise between the debtor and the creditors nor any provision similar to s. 20, added to the 1933 Act by the amendment of 1934. As has been above stated, however, the power of the Board to issue a certificate staying proceedings of the nature above referred to, and the power given to the Lieutenant Governor in Council by s. 23 of the Act of 1933, were maintained and significantly extended by providing that the power conferred upon the Lieutenant Governor in Council might be exercised in individual cases in the same terms as s. 2(2) of the *Moratorium Act of 1943*. With some minor amendments which did not affect the nature of the Act, it appeared as c. 87 in the revision of the statutes in 1940.

While the duty theretofore imposed upon the Debt Adjustment Board of endeavouring to bring about a compromise between the debtor and his creditors was thus eliminated, it is perfectly clear that the powers continued in the Board to stay proceedings, and those conferred upon the Lieutenant Governor in Council by proclamation to stay and to prohibit proceedings against individuals were designed for the same purpose as the previous legislation.

The constitutional validity of the *Farmers' Creditors Arrangement Act* was considered on a reference to this Court by the Governor General in Council. The legislation was held by a majority of the Court to be *intra vires* ([1936] S.C.R. 384). An appeal to the Judicial Committee was dismissed ([1937] A.C. 391), it being held that the Act was genuine legislation relating to bankruptcy and insolvency. In delivering the judgment of the Board, Lord Thankerton said in part (p. 403):—

> It cannot be maintained that legislative provision as to compositions, by which bankruptcy is avoided, but which assumes insolvency, is not properly within the sphere of bankruptcy legislation.

I am of the opinion that had the *Debt Adjustment Act* of Saskatchewan (c. 87, R.S.S. 1940) been attacked, it would have been found to be *ultra vires* for the same reasons as those given in the judgment of the Judicial Committee in dealing with the Alberta Act (*Attorney General for Alberta* v. *Attorney General for Canada* (1). It is a proper inference, in my opinion, that the advisers of the Crown in Saskatchewan held the same view and that it was for this reason that the legislation of 1943 was enacted and the *Debt Adjustment Act* repealed.

As the history of the various *Debt Adjustment Acts* shows, legislation which at the outset merely made available the services of a Debt Adjustment Commissioner to assist farmers in financial difficulties to work out some compromise with their creditors was extended to include, *inter alia,* retail merchants and then all persons and all bodies corporate carrying on business in the province, other that municipal corporations and school districts. The powers to stay legal proceedings given to the Debt Adjustment Boards thereafter and to the Lieutenant Governor in Council to postpone the time for payment of all debts were clearly designed to be utilized for the relief of debtors who were unable to meet their liabilities as they matured by effecting a compromise with their creditors. While the provisions added to the existing Act by c. 59 in 1934, which assumed to empower the Board to dictate the terms of a compromise, were omitted in the legislation of the following year and did not appear thereafter, the extension of the powers of the Lieutenant Governor in Council by s. 9 of the

(1) [1943] A.C. 356.

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Act of 1934-35 to the cases of individual debtors, powers which were continued in the revision of 1940 and which might be exercised by Order in Council without proclamation, show that the real purpose of the Act was unchanged.

The practical effect of the legislation of 1943 was that the powers of the Lieutenant Governor theretofore contained in s. 9 of the *Debt Adjustment Act* were reenacted in the *Moratorium Act,* while a new body called the Provincial Mediation Board was charged with the duty of conferring with the debtor and his creditors in an endeavour to effect a compromise. It was only in certain proceedings that the Mediation Board might intervene, its powers being much less extensive than those of the Debt Adjustment Boards, but the power to postpone the debts of any insolvent person or corporation continued to be available, though the period in which the debts might be so postponed was limited to two years.

Power to declare a moratorium for the relief of the residents of a province generally in some great emergency, such as existed in 1914 and in the days of the lengthy depression in the thirties, is one thing, but power to intervene between insolvent debtors and their creditors, irrespective of the reasons which have rendered the debtor unable to meet his liabilities, is something entirely different. *The Moratorium Act,* as enacted in 1943 and as it appears as c. 98 of the Revised Statutes of Saskatchewan of 1953, is, in my opinion, in relation to insolvency and, as I consider that those parts of it which might be justified as a proper exercise of provincial powers cannot be severed from those which clearly exceed those powers, the Act should be found *ultra vires* as a whole.

The decision of the Judicial Committee in *Abitibi Power & Paper Co.* v. *Montreal Trust Co.* (1), so strongly relied upon by the respondents, does not, in my opinion, affect the matter. In that case the purpose of the impugned legislation was to stay proceedings in the action brought under the mortgage granted by the Abitibi Company until the interested parties should have an opportunity of considering such plan for the reorganization of the company as might be submitted by a Royal Commission appointed for such purpose. As to the objection that this was beyond provincial

(1) [1943] A.C. 536; 4 D.L.R. 1.

powers, Lord Atkin said (p. 548) that such a restriction would appear to eliminate the possibility of special legislation aimed at transferring a particular right or property from private hands to a public authority for public purposes. In pith and substance it was held that the Acts were to regulate property and civil rights within the province. The considerations which lead me to the conclusion that the *Moratorium Act* is in pith and substance in relation to insolvency did not affect the question to be determined in that case.

In view of my conclusion, I express no opinion upon the questions as to whether the legislation might also be invalid as an infringement of the rights given to holders of bills of exchange by the *Bills of Exchange Act,* or the activities of banks under the *Bank Act,* or of companies incorporated by letters patent under the *Dominion Companies Act.*

I would allow this appeal with costs.

I would answer Question 3 as follows:—

The Moratorium Act, c. 98 of the Revised Statutes of Saskatchewan, 1953, is *ultra vires* of the Legislature of Saskatchewan.

In view of this conclusion, the other questions should not, in my opinion, be answered.

RAND J.:—This reference raises questions similar to those considered in that of the Alberta Debt Adjustment Act, the judgment of the Judicial Committee in which is reported in [1943] A.C. 356. The only significant difference lies in the fact that in the present case the material provisions of the Alberta statute are, in substance, contained in two statutes, the Moratorium Act and the Mediation Act. The earlier Debt Adjustment legislation of Saskatchewan followed the pattern of that of Alberta from which, as to validity, it does not seem to be distinguishable; but after the ruling of 1943 the distribution of its provisions mentioned was made and the Debt Act repealed. The validity of the Moratorium Act is challenged on the ground that it is, in substance, legislation in relation to Insolvency and Bankruptcy.

The Mediation Act provides for negotiation between a debtor and his creditors through the interposition of a provincial functionary. Taken by itself it is quite innocuous;

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nothing can result beyond compromise to which both parties agree; and it may be doubted that it would have been passed in the absence of legislation furnishing effective authority to deal with cases in which negotiation has failed. The Moratorium Act, on the other hand, empowers the Governor in Council to postpone the payment of debts generally, to suspend proceedings on a great variety of claims, and to prohibit any form of process, legal or extra-legal, against property of a debtor or against a lessee. The order may be general or confined to a single individual. The two statutes were assented to on the same day. Together they enable to be done what the Debt Adjustment Act, which they repealed, enabled. For this purpose, proceedings under the Mediation Act merely furnish limited grounds on the basis of which relief by way of suspension of remedies could plausibly be afforded debtors: under the Moratorium Act, the Governor in Council can exercise its powers on any grounds or for any reasons and on such terms as, in an uncontrolled discretion may seem proper. Obviously that action can be related to agreements or arrangements proposed by the Mediation Board.

On behalf of the Attorney General of the province it was urged that Saskatchewan is in a unique economic setting. The basis of its economical life is agriculture; its physical environment lends itself to sudden and extreme climatic fluctuations which produce corresponding tides in the volume and value of its products; and because of these abnormal factors, the exercise of the powers proposed has become a matter of local necessity. This is undoubtedly the philosophy behind the legislation and its frank avowal but confirms what would otherwise be fairly inferred. But it should be remarked that the operation of the statutes is not conditioned on the existence from time to time of any such temporary state of things.

The contention involves assumptions of fact which only a distant future could confirm. The unreliability of speculation regarding the economic resources of a province is significantly demonstrated in the case of Alberta in the contrast of the realities of today with what were accounted its dismal prospects of twenty years ago. But were the conditions

as described, however local or private they may be, by themselves they cannot furnish any warrant for invading an exclusive field of Dominion jurisdiction.

It may well be that special legislative consideration is called for; that can be assumed, although with the fact we are not concerned; but the responsibility for dealing with the affairs of debtors who, we must take it, are in financial straits, is one that has been exclusively allocated to Parliament. The enactment of the series of Farmers' Creditors Arrangement Acts from c. 53 of 1934 to the present c. 111, R.S.C. 1952 was an exercise by Parliament of that power and the residual legislation now in force is in large measure limited to the relief of farmers in the prairie provinces. The administration of such matters is essentially individual, and it is this that the statute under consideration has placed in the hands of the Governor in Council. In the light of that Dominion legislation, it would be a mistake to assume that the policy of Parliament would be one whit less sympathetic and sound in the interests of all concerned than that of a legislature.

The Moratorium Act provides no means for bringing to the attention of the Governor in Council the plaints of individuals for relief. The Governor in Council is charged with appreciating general conditions within the province which may call for appropriate general action; that is the normal course of government; but it would be unique in our modern polity that that body should be constituted a local tribunal to receive from individuals petitions for relief in respect of matters that are of a class ordinarily administered by courts of law. That the design of the two provincial statutes contemplates communication to the Governor in Council by the Mediation Board is confirmed by the proceedings in *Gumienny* v. *Mustatia* (unreported) the judgment in which is part of the material on this appeal. In that case the Board, in the language of its officer, "requisitioned" an Order in Council for the benefit of the debtor; and in the absence of procedure by which the Council is to be moved to action, it would be stultifying ourselves to ignore such an evidence that the provisions of one statute were intended to supplement those of the other in furnishing powers of coercion of the nature of those contained in the original Debt Adjustment Act. But the pertinency of the

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decision is its demonstration of the purpose of the Moratorium Act to furnish relief analogous to if not identical with that provided by the earlier statute.

But the Moratorium Act alone, in the scope of its language and its clear intent, is adequate to the virtual administration of the affairs of any debtor who is embarrassed, who cannot meet his obligations as they mature. It would be the judgment of the Executive to the hazard of which the interests of the creditors would be exposed. What is contemplated is individual relief which enables debtors to do in substance what would otherwise subject them to the law of Parliament.

Each of the two words, Bankruptcy and Insolvency, must be given its full force. Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors. To this proceeding not only a personal stigma may attach but restrictions on freedom in future business activity may result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.

Insolvency, on the other hand, seems to be a broader term that contemplates measures of dealing with the property of debtors unable to pay their debts in other modes or arrangements as well. There is the composition and the voluntary assignment, devices which, in appropriate circumstances, may avoid technical bankruptcy without too great prejudice to creditors and hardship to debtors. These means of salvage from the ravages of misfortune are of the essence of insolvency legislation, and they are incorporated in the Bankruptcy Act.

The usual mark of insolvency is the inability to meet obligations as they mature; it constitutes an act of bankruptcy, and furnishes ground for proceeding against the debtor under the Bankruptcy Act. Provincial voluntary assignment legislation consisting of procedure enabling a debtor to deal with his creditors in the distribution of his assets is, in the absence of Dominion legislation, as *Attorney General for Ontario* v. *Attorney General of Canada* (1) shows, unobjectionable, but we are not here dealing with

(1) [1894] A.C. 189.

that situation. If the province steps in and actively assumes the general protection of such a debtor, by whatever means, it is acting in relation to insolvency, and assuming the function of Parliament; it is so far administering, coercively as to creditors, the affairs of insolvent debtors. In this it is frustrating the laws of the Dominion in relation to the same subject.

That the province may, in certain circumstances and in proper aspects, enact moratorium legislation was not seriously disputed and may be accepted; its validity will depend upon the facts, circumstances and means adopted, determining its true character. That the scope of the statute here may embrace an order of valid moratorium relief does not aid the argument: the total powers are inextricably interwoven and it is quite impossible to say that, even if the good could be severed from the bad, the legislation would, in a truncated form, have been enacted.

The case of *Abitibi Power & Paper Co.* v. *Montreal Trust Co.* (1) is relied upon. There, by leave of the court under *The Winding Up Act,* an action was brought by the trustee for bondholders for the foreclosure and sale of mortgaged property. In the course of the proceedings an order for sale was made but the sale proved abortive. A Royal Commission was appointed to inquire into the affairs of the mortgagor company with a view to recommending an equitable plan for solving its financial difficulties. Its report emphasized the interest of the Government and the public in the pulp and paper industry, and a scheme of arrangement was outlined. In the meantime the mortgagee had given a further notice of motion for sale which was ordered to stand over pending the report. Following the latter the challenged legislation was passed, staying the action professedly to enable an opportunity to all parties concerned to consider the scheme. It was argued that its real object was to compel the bondholders to accept a plan of reconstruction, and that otherwise it was within the Dominion field of bankruptcy. The language of Lord Atkin makes clear the view that the Judicial Committee took of the character of the legislation:

> (Leave) once granted, the action proceeded as a provincial action, subject to the provincial law regulating the law in such an action and

(1) [1943] A.C. 356

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subject to the sovereign power of the legislature to alter those rights in respect of property within the province. It could not be denied that the action proceeded subject to the possibility of being stayed under the ordinary rules of procedure as, for instance, for security for costs, default in pleading or discovery, or in special circumstances which the court might think demanded a stay.

and as to the object, he says:—

In the present case their Lordships see no reason to reject the statement of the Ontario legislature, contained in the preamble to the Act, that the power to stay the action is given so that an opportunity may be given to all the parties concerned to consider the plan submitted in the report of the Royal Commission.

If any implication is to be drawn it seems to me to be this, that coercion as the object would have invalidated the legislation. Coercion of some degree here is the only object that can fairly be attributed to the grant of such wide powers as are given the Lieutenant Governor in Council.

Counsel on both sides agreed that the only question put which calls for consideration is No. 3, dealing with the validity of the Moratorium Act, and I confine myself to that.

The appeal must therefore be allowed and the answer of the court below to question No. 3 modified accordingly.

KELLOCK J.:—I agree with the opinion of my brother Locke. I should only like to add that in my opinion, the decision of the Judicial Committee in *Abitibi Power & Paper Co.* v. *Montreal Trust Co.* (1), is clearly distinguishable. The *ratio decidendi* was stated by Lord Atkin at p. 548, viz:

> Their lordships see no reason to reject the statement of the Ontario legislature contained in the preamble to the Act that the power to stay the action is given so that an opportunity may be given to all the parties concerned to consider the plan submitted in the report of the Royal Commission . . . The pith and substance of this Act is to regulate property and civil rights within the province.

I would therefore allow the appeal with costs and would answer question 3 as follows:

The Moratorium Act, c. 98 of the Revised Statutes of Saskatchewan, 1953, is *ultra vires* the legislature of Saskatchewan. In this view no other question need be answered.

(1) [1943] A.C. 536.

ABBOTT J.:—I agree with the reasons of Mr. Justice Rand and Mr. Justice Locke.

I would therefore allow the appeal with costs and would answer question 3 as follows:

The Moratorium Act, c. 98 of the Revised Statutes of Saskatchewan, 1953, is *ultra vires* the Legislature of Saskatchewan.

In this view no other question need be answered.

Appeal allowed.

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