Case Name:

Reference re: Farmers Creditors Arrangement Act (Can.)

Between
Attorney General for British Columbia, appellant, and
Attorney General for Canada and others, respondents

[1937] J.C.J. No. 9

[1937] A.C. 391

[1937] 1 D.L.R. 695

[1937] 1 W.W.R. 320

18 C.B.R. 217

Judicial Committee of the Privy Council
London, England

Lord Atkin, Lord Thankerton, Lord Macmillan,
Lord Wright M.R. and Sir Sidney Rowlatt

Heard: November 26 and 27, 1936.
Judgment: January 28, 1937.

(15 paras.)

FROM THE SUPREME COURT OF CANADA

Canada -- Dominion Statute -- Constitutional validity -- Farmers' creditors -- Proposal for composition, extension of time, or scheme of arrangement -- Powers of Board of Review -- Legislation relating to "bankruptcy and insolvency" -- Valid -- British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91(21); s. 92(13) (16) -- Farmers' Creditors' Arrangement Act, 1934, St. Can. (24 & 25 Geo. 6, c. 53) -- Farmers' Creditors' Arrangement Act Amendment Act, 1935, St. Can. (25 & 26 Geo. 6, c. 20).

By the Farmers' Creditors Arrangement Act, 1934, of the Parliament of Canada, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935, a procedure was provided whereby (inter alia) a farmer who was unable to meet his liabilities as they became due might make a proposal for a composition, extension of time or a scheme of arrangement to his creditors. If the proposal was not accepted by the creditors the matter was referred to a Board of Review to formulate a proposal. If the creditors or the debtor declined to approve the Board's proposal the Board might nevertheless confirm it, and it was thereupon binding on the creditors and the debtor:

Held, that the Act was genuine legislation relating to "bankruptcy and insolvency" and was accordingly intra vires of the Dominion Parliament under s. 91, head 21, of the British North America Act, 1867.

The statutory conditions of insolvency which enabled a creditor or a debtor to invoke the aid of the bankruptcy laws, or the classes to which those laws applied, were not intended to be stereotyped under head 21 of s. 91 of the British North America Act so as to confine the jurisdiction of the Parliament of Canada to the legislative provisions then existing as regarded those matters.

Legislative provisions as to compositions, by which bankruptcy was avoided, but which assumed insolvency, were properly within the sphere of bankruptcy legislation.

In re Companies' Creditors Arrangement Act [1934] Can. S.C.R. 659 referred to.

Judgment of the Supreme Court of Canada [1936] Can. S.C.R. 384 affirmed.

APPEAL (No. 104 of 1936), by special leave, from a judgment of the Supreme Court of Canada (June 17, 1936) answering the following question referred to the Court by Order of the Governor-General in Council, dated November 18, 1935: "Is the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, ultra vires of the Parliament of Canada?" The Act provides a procedure whereby a farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or a scheme of arrangement to his creditors. If the proposal is accepted by the ordinary creditors and the secured creditors whose rights are affected concur, it is submitted to the Court for approval. If it is not accepted by the ordinary creditors, or if a secured creditor whose rights are affected by it does not concur, the matter is referred to a Board of Review to formulate a proposal. If the proposal is accepted by the creditors and approved by the Court, or if it is formulated by the Board of Review and is approved by the creditors and the debtor, or if, though not so approved, it is confirmed by the Board of Review, it shall be binding upon all the creditors and the debtor. The relevant sections of the Act are set out in the judgment of the Judicial Committee.

In the Supreme Court of Canada, Duff C.J., Rinfret, Crocket, Davis and Kerwin JJ. were of opinion that the Statute was intra vires: Cannon J. was of opinion that it was ultra vires, except s. 17, which he held was intra vires. The judgments of the Supreme Court are reported at [1936] Can. S.C.R. 384.

1936. Nov. 26, 27. J.W. de B. Farris K.C. and Wilfrid Barton for the Attorney General for British Columbia. The effect of the Act has been upheld as bankruptcy legislation coming under head 21 of s. 91 of the British North America Act, 1867 - "Bankruptcy and Insolvency." The submission of all the Provinces is the same, namely, that the Act is not in its pith and substance bankruptcy, but is colourable legislation. If it is bankruptcy legislation, then it involves the right to interfere incidentally with property and civil rights in the Province. If, on the other hand, it is not bankruptcy legislation as such, but is only colourable, then the matter undoubtedly comes within property and civil rights in the Province. The fundamental characteristic of bankruptcy and insolvency legislation is that it is designed in the interests of creditors as a class. It is to provide for the rateable distribution of the assets of the debtor among his creditors whether or not the debtor is willing. The present Act, on the contrary, has none of the characteristics of bankruptcy and insolvency legislation for the following reasons: (a) It is designed for the purpose of keeping the farmer on his farm, and not to distribute his assets. (b) It is not bankruptcy but the prevention of bankruptcy. (c) The proceedings of the Act are not in course of bankruptcy proceedings, but before such proceedings. (d) An act of bankruptcy is not the basis of the proceedings, but follows only thereafter in case of a failure to carry out a compromise under the Act. (e) The proposal of "compromise" so-called is not an ancillary of bankruptcy proceedings, but antecedent to and independent thereof. (f) The essential proposal for a compromise is in its features not a voluntary arrangement but a compulsory arrangement imposed by a Board on the creditors. (g) Such a scheme is made with a view not of the creditors' welfare as a class, or to distribution among them. It is made to defeat distribution. It may be without regard to their interests and solely in the interests of the debtor and with a view to protecting the value of the farm. (h) The scheme is not for the protection of the creditors, but at their expense. (i) It deals not with the assets of the debtor for the benefit of the creditors, but with the assets of the creditors for the benefit of the debtor. (j) The references in the Act to the Dominion Bankruptcy Act are colourable and establish no substantial connection between the two enactments. (k) The scheme treats a subject-matter which in part in some aspects may be ancillary to bankruptcy and insolvency legislation as itself the principal or primary subject-matter of legislation. (l) It has no general relation to bankruptcy and insolvency but is special legislation relative to farmers, and is or may be restricted to certain Provinces. [Reference was made to the relevant provisions of the Dominion Bankruptcy Act, R.S.C. 1927, c. 11, and to the Act under consideration.] The Act sets up a new scheme which in its purpose is not to administer the farmer's property as the assets of his creditors, but to administer it in defiance of that. [Reference was made to Brewers and Maltsters' Association of Ontario v. Attorney General for Ontario, [1897] A.C. 231, 238; Croft v. Dunphy, [1933] A.C. 158; Royal Bank of Canada v. Larue, [1928] A.C. 187, 196; L'Union St. Jacques de Montreal v. Bélisle, (1874), L.R. 6 P.C. 31, 36; and Attorney General of Ontario v. Attorney General for the Dominion of Canada, [1894] A.C. 189,] If those authorities, which show that in all schemes of bankruptcy the basis of the scheme is the distribution of the assets of the debtor among the creditors, are sound, the present Act came in as an independent Act with its own recital for the purpose not to distribute the assets among creditors, but to prevent that in order to promote production in Canada by moneys taken from the secured creditors and given for the benefit of the farmer. [Reference was also made to Attorney General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia, [1898] A.C. 700, 715; Attorney

General for Alberta v. Attorney General for Canada, [1928] A.C. 475, 486; and Cushing v. Dupuy, (1880), 5 App. Cas. 409, 415]. It is the pith and substance of the Act which must be looked at in testing what it purports to do. In Attorney General for Ontario v. Reciprocal Insurers, [1924] A.C. 328, 339, it was said that a Statute must be judged by its natural and reasonable effect: In City of Halifax v. Fairbanks' Estate, [1928] A.C. 117, 126, "it is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity." The Dominion of Canada does not acquire jurisdiction in regard to property and civil rights of the farmers merely because they are unable to pay their obligations as they arise: the Dominion can only deal with the farmer in that connection in the limited field of bankruptcy. It is not claimed that legislation must conform to what was bankruptcy at federation: it is not contended that matters not strictly bankruptcy legislation may not be included as ancillary or necessarily incidental. Legislation which is the antithesis of bankruptcy, however, such as the present, cannot be ancillary, and still remains within the field of the Province. There is no severable clause in the Act and the legislation is bad in tote. [Reference was made to In re Silver Brothers, Ld. [1932] A.C. 514. 520, and Brooks-Bidlake and Whittall, Ld. v. Attorney General for British Columbia, [1923] A.C. 450, 456-7].

Wilfrid Barton followed. The passages at p. 471 of Blackstone's Commentaries, vol. II., c. 31, dealing with "Bankruptcy," show the acid tests of bankruptcy and insolvency legislation. They are to deliver up the assets and the administration of them for the benefit of the creditors as a body. It does not follow that because there is a form of composition in this Act that that brings it into the sphere of bankruptcy; such forms of composition have existed even before bankruptcy. The pith and substance of this Act is to prevent bankruptcy in the case of a farmer. Then by exempting him from the purview of bankruptcy legislation he is at once put back into the domain of property and civil rights in which the Dominion may not interfere.

I.A. Humphries K.C. for the Attorney General for Ontario. This legislation is not bankruptcy and insolvency: it may have the appearance of that type of legislation, but it is debt adjustment legislation, and it falls within property and civil rights within the Province. It is not really compromise legislation, but it is, as stated in the recital to the Act, to keep the farmer on the land. [Reference was made to Ex parte Bischoffsheim. In re Aylmer, (1887), 19 Q.B.D. 33; Lucas v. Martin, (1888), 37 Ch. D. 597, 607,; and in re Webb. Ex parte Board of Trade, [1914] 3 K.B. 387, 391]. With regard to the position of secured creditors, the bankruptcy legislation of Canada, which is very much on the same lines as the Imperial Bankruptcy Act of 1914, shows that the preservation of the rights of the secured creditors is contemplated. The present legislation shows that compromises and arrangements and schemes are contemplated and are provided for the purpose of preserving the rights not only of the debtor and the creditors, but for their mutual benefit: Cushing v. Dupuy, (1880), 5 App. Cas. 409, 415; Royal Bank of Canada v. Larue, 1928 A.C. 187; In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co., [1891] 1 Ch. 213. A true compromise is an arrangement between parties by which each makes concessions to the other. The most common kind is one in which a creditor diminishes the amount of his security. The Chief Justice in this case said that "it is not open to dispute in this Court that legislation in respect of 'compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law'," and he referred to In re Companies' Creditors Arrangements Act., [1934] Can. S.C.R. 659. The main element in that case is that there is a benefit to be derived for the general body of creditors upon arrangements being made on the consent of the majority properly approved by the Court.

What is the reasonable intent of the Act? What is its pith and substance? What is its aim and object? The Board of Review is the main teeth of the Act, and that Board can really make a new contract, and make a better bargain for the farmer. It is really debt adjustment and confiscatorial legislation dealing with subject-matters which are entirely within the Province-property and civil rights.

R.S. Robertson K.C., L.S. St. Laurent K.C., C.P. Plaxton K.C., Peter Wright and R. St. Laurent for the Attorney General for Canada, were not called upon.

The judgment of their Lordships was delivered by

1 LORD THANKERTON:-- This appeal, by special leave, challenges the constitutional validity of the Farmers' Creditors Arrangement Act, 1934, which was enacted by the Dominion Parliament as chapter 53 of the Statutes of Canada, 1934. The following question was referred to the Supreme Court of Canada by the Governor-General in Council on November 18, 1935, namely: "Is the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, ultra vires of the Parliament of Canada?"

2 Before the Supreme Court, the argument was presented by counsel on behalf of the Attorney General for Canada and on behalf of the Attorneys-General for Ontario, Quebec, New Brunswick, British Columbia, Manitoba and Saskatchewan. On June 17, 1936, the judgment of the Supreme Court was delivered, and in the formal order the opinion of the Court is expressed as follows: "The Chief Justice, Mr. Justice Rinfret, Mr. Justice Crocket, Mr. Justice Davis and Mr. Justice Kerwin are of the opinion that the statute is intra vires; Mr. Justice Cannon is of the opinion that the statute, except s. 17, is ultra vires and that s. 17 is intra vires."

3 The Attorney General for British Columbia now appeals against that judgment, and is supported by the respondent the Attorney General for Ontario; the Attorney General for Canada defends the judgment.

4 The appellant raises no question as to s. 17 of the Act, which relates to interest, and falls under head 19 of s. 91 of the British North America Act of 1867, but he maintains that the rest of the Act does not truly form legislation relating to "bankruptcy and insolvency," but is an invasion of the sphere of the Provincial Legislatures in relation to "property and civil rights in the Province" or "matters of a merely local or private nature in the Province," which is secured to them by heads 13 and 16 of s. 92 of the British North America Act.

5 The appellant submitted that the fundamental characteristic of legislation in relation to bankruptcy and insolvency is that it is conceived in the interests of the creditors as a class, and provides for distribution of the debtor's assets among them, and he maintained that the Act here in question is not only lacking in such a characteristic, but is inconsistent therewith, and he gave twelve reasons, which may be compendiously stated as follows: The Act is mainly designed to keep the debtor farmer on the land at the expense of his creditors; it deals with a stage prior to bankruptcy and insolvency, and is designed to prevent bankruptcy by means of a composition which is compulsory on creditors and defeats their interests; it deals with assets belonging to creditors for the benefit of the debtor; the references to bankruptcy are merely ancillary to the main design; and the Act has no general relation to bankruptcy and insolvency, as it refers to farmers only, and may refer to certain Provinces only.

6 The long title of the Act of 1934 is "An Act to facilitate compromises and arrangements between farmers and their creditors." The relevant sections of the Act of 1934, as amended by the Act of 1935, may now be referred to. The provisions and rules of the Bankruptcy Act are made applicable by sub-ss. 2 and 3 of s. 2 of the Act, which provide: "(2.) Unless it is otherwise provided or the context otherwise requires, expressions contained in this Act shall have the same meaning as in the Bankruptcy Act, and this Act shall be read and construed as one with the Bankruptcy Act, but shall have full force and effect notwithstanding anything contained in the Bankruptcy Act, and the provisions of the Bankruptcy Act and Bankruptcy Rules shall, except as in this Act otherwise provided, apply mutatis mutandis in the case of proceedings hereunder including meetings of creditors.

7 (3.) In any case where the affairs of a farmer have been arranged by a proposal approved by the Court or confirmed by the Board as hereinafter provided, Part I. of the Bankruptcy Act shall notwithstanding section seven thereof thereafter apply to such farmer but only failure on the part of such farmer to carry out any of the terms of the proposal shall be deemed to be an act of bankruptcy. Provided that such failure shall not be deemed an act of bankruptcy if, in the opinion of the Court, such act was due to causes beyond the control of such farmer."

8 The main provisions of the Act, on which the controversy turns, are contained in ss. 6 to 11, which relate to compositions, and s. 12, under which a Board of Review may be established; these sections provide as follows:

"COMPOSITIONS.

> 6. - (1) A farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or scheme of arrangement either before or after an assignment has been made.
>
> (2) Such proposal shall be filed with the Official Receiver who shall forthwith convene a meeting of the creditors and perform the duties and functions required by the Bankruptcy Act to be performed by a trustee in the case of a proposal for a composition, extension of time or scheme of arrangement.
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> 7. A proposal may provide for a compromise or an extension of time or a scheme of arrangement in relation to a debt owing to a secured

creditor, or in relation to a debt owing to a person who has acquired movable or immovable property subject to a right of redemption, but in that event the concurrence of the secured creditor or such person, shall be required, except in the case of a proposal formulated and confirmed by the Board of Review as hereinafter provided.

8. Whenever a proposal relates to the rights of a secured creditor or of a person who has acquired movable or immovable property subject to a right of redemption, such creditor or person may value his security and shall be entitled to vote only in respect of the balance of his claim after deducting the amount of his valuation; provided, however, that no proposal shall be approved by the court which provides for the payment to such secured creditor or person on account of such security of any amount in excess of his valuation, or for granting to him any new security for an amount in excess of his valuation.

9. Subsections three and five of section sixteen of the Bankruptcy Act shall not apply in the case of a proposal for a composition, extension of time or scheme of arrangement made by any farmer.

10. Whenever a proposal has been approved by the court or whenever a proposal has been formulated and confirmed by the Board, as hereinafter provided, the court may order the farmer to execute any mortgage, conveyance or other instrument necessary to give effect to the proposal.

11. - (1) On the filing with the Official Receiver of a proposal, no creditor whether secured or unsecured, shall have any remedy against the property or person of the debtor, or shall commence or continue any proceedings under the Bankruptcy Act, or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy, or the realization of any security unless with leave of the court and on such terms as the court may impose: Provided, however, that the stay of proceedings herein provided shall not be effective for more than ninety days from the date of filing of the proposal with the Official Receiver, unless the court makes one or more orders extending the time for the purpose of any proceedings in connection with the proposal. [1935, Ch. 20, s. 3, Am.]

(2) On a proposal being filed the property of the debtor shall be deemed to be under the authority of the court pending the final disposition of any proceedings in connection with the proposal and the court may make such order as it deems necessary for the preservation of such property.

PROVINCIAL BOARDS OF REVIEW.

12. - (1) The Governor in Council may, whenever he considers it expedient, establish in any province a Board of Review which shall exercise in such province the jurisdiction hereinafter provided.

(2) A Board shall consist of a Chief Commissioner and two Commissioners who shall be appointed by the Governor in Council and shall hold office during pleasure and shall receive such remuneration as the Governor in Council may provide.

(3) The Chief Commissioner shall be a judge of the court of the province invested with original or appellate jurisdiction in bankruptcy by the Bankruptcy Act, and one Commissioner shall be appointed as a representative of creditors and one Commissioner shall be appointed as a representative of debtors. In the event of any Commissioner other than the Chief Commissioner being unable to hear and deal with any case for any reason considered sufficient by the remaining Commissioners, then the remaining Commissioners shall name an ad hoc Commissioner to hear and deal with such case with all the powers of the Commissioner whose place he takes. In the event of the Chief Commissioner being unable to hear and deal with any case on the request of the other Commissioners the Minister shall name an ad hoc Chief Commissioner with all the powers of the Chief Commissioner. [1935, Ch. 20, s. 4, Am.]

(4) In any case where the Official Receiver reports that a farmer has made a proposal but that no proposal has been approved by the creditors, the Board shall, on the written request of a creditor or of the debtor, endeavour to formulate an acceptable proposal to be submitted to the creditors and the debtor, and the Board shall consider representations on the part of those interested.

(5) If any such proposal formulated by the Board is approved by the creditors and the debtor, it shall be filed in the court and shall be binding on the debtor and all the creditors.

(6) If the creditors or the debtor decline to approve the proposal so formulated, the Board may nevertheless confirm such proposal, either as formulated or as amended by the Board, in which case it shall be filed in the Court and shall be binding upon all the creditors and the debtor as in the case of a proposal duly accepted by the creditors and approved by the Court. [1935, Ch. 20, s. 5, Am.]

(7) Every request to formulate a proposal shall be dealt with by the full Board, but a determination of the majority shall be deemed to be the determination of the Board: Provided that the Board may direct any one or more of its members on its behalf to inspect and investigate any or all circumstances of any request for review and report to the Board. [1935, Ch. 20, s. 6, Am.]

(8) The Board shall base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm.

(9) The Board may decline to formulate a proposal in any case where it does not consider that it can do so in fairness and justice to the debtor or the creditors.

(10) For the purposes of the performance of its duties and functions hereunder a Board shall have the powers of a Commissioner appointed under the Inquiries Act.

(11) Notwithstanding anything contained in the Bankruptcy Act, an insolvent debtor resident in the Province of Quebec, engaged solely in farming or the tilling of the soil, whose liabilities to creditors provable as debts under the Bankruptcy Act exceed five hundred dollars, may make an assignment for the general benefit of his creditors in any case where the Board declines to formulate a proposal and certifies that in its opinion the debtors' affairs can best be administered under the Bankruptcy Act. [1935, Ch. 20, s. 7, Am.]"

9 In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration. The justification for such proceeding by a creditor generally consists in an act of bankruptcy by the debtor, the conditions of which are defined and prescribed by the statute law. In a normal community it is certain that these conditions will require revision from time to time by the Legislature; as also the classes in the community to which the bankruptcy laws are to apply may require reconsideration from time to time. Their Lordships are unable to hold that the statutory conditions of insolvency which enabled a creditor or the debtor to invoke the aid of the bankruptcy laws, or the classes to which these laws applied, were intended to be stereotyped under head 21 of s. 91 of the British North America Act so as to confine the jurisdiction of the Parliament of Canada to the legislative provisions then existing as regards these matters.

10 Further, 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. (In re Companies' Creditors Arrangement Act, [1934] Cam S.C.R. 659.)

11 It will be seen from the sections above quoted that the Act here in question relates only to a farmer who is unable to meet his liabilities as they become due, and enables him to make a proposal for a composition, extension of time or scheme of arrangement either before or after an assignment has been made, for which a precedent existed in the Canadian Bankruptcy Act of 1919. As defined in s. 2, an assignment means an assignment made under the Bankruptcy Act by a farmer. If the creditors fail to approve of the farmer's proposal, the Board of Review, on the written request of a creditor or the debtor, is to endeavour to formulate "an acceptable proposal" for submission to the creditors and the debtor; if the creditors or the debtor decline to approve the Board's proposal, the Board may nevertheless confirm their proposal, and it is to bind the creditors and the debtor.

12 Subject to the contention by the appellant, now to be dealt with, their Lordships are of opinion that these provisions fall within head 21 of s. 91 of the British North America Act.

13 The appellant maintains that the real object of these provisions is to keep the farmers on the land for the benefit of agricultural production, and that this object is to be attained by the operations of the Board of Review, who have power to sacrifice the interests of the creditors for the benefit of the debtor farmer; he further maintains that under s. 7 the secured creditor may be deprived of that which is his property. To deal first with the last contention, their Lordships are clearly of opinion that s. 7 does not enable any creditor to be deprived of his security, but does enable the proposal for composition to provide for the reduction of the debt itself, or an extension of time for its payment, which is a familiar feature of compositions.

14 The appellant laid stress on the provisions of sub-s. 8 of s. 12, but that does not appear to their Lordships to be an illegitimate or unusual element to be taken into account in the consideration of composition schemes, and, indeed, the retention of the business under the management of the debtor may well be a consideration in the interests of the creditors as well as of the debtor. Its fair application appears to be well secured by the provisions of sub-ss. 3, 4 and 9. A judicial Chief Commissioner is provided for under sub-s. 3; under sub-s. 4 the Board's proposal is to be designed as an acceptable one to both parties, and this element is emphasized by sub-s. 9. Their Lordships are unable to accept the contention that the Act is not genuine legislation relating to bankruptcy and insolvency.

15 Accordingly, the appeal fails, and their Lordships will humbly advise His Majesty that the appeal should be dismissed, without costs, and that the opinion of the majority of the Supreme Court should be affirmed.

Solicitors for the Attorney General for British Columbia: Gard, Lyell & Co.

Solicitors for the Attorney General for Canada: Charles Russell & Co.

Solicitors for the Attorney General for Ontario: Blake & Redden.

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