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Reference re: Constitutional Creditor Arrangement Act (Canada)

**IN THE MATTER OF A Reference concerning the Constitutional
validity of the Companies' Creditors Arrangement Act.**

[1934] S.C.R. 659

Supreme Court of Canada

1934: March 27, 28, 29 / 1934: June 6.

**Present: Duff C.J. and Rinfret, Lamont, Cannon, Crocket and
Hughes JJ.**

Constitutional law -- The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, c. 36 (Dom.) -- Constitutional validity -- "Bankruptcy and Insolvency" (B.N.A. Act, s. 91(21)).

The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, c. 36, is intra vires of the Parliament of Canada. The matters dealt with come within the domain of "bankruptcy and insolvency" within the intendment of s. 91(21) of the B.N.A. Act.

The Act discussed with regard to its aim, its features, its comparison with existing bankruptcy or insolvency legislation, and the history of bankruptcy and insolvency law.

REFERENCE to the Supreme Court of Canada for hearing and consideration pursuant to the authority of s. 55 of the Supreme Court Act (R.S.C., 1927, c. 35) of the following question:

Is The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, chapter 36, ultra vires of the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars, or to what extent?

L.E. Beaulieu K.C. and F.P. Varcoe K.C., for the Attorney-General for Canada.
C. Lanctôt K.C. and L. St. Laurent K.C., for the Attorney-General for Quebec.
I.A. Humphries K.C., for the Attorney-General for Ontario.

Solicitor for the Attorney-General of Canada: W. Stuart Edwards.

Solicitor for the Attorney-General of Quebec: Charles Lanctôt.

Solicitor for the Attorney-General of Ontario: I.A. Humphries.

The judgment of Duff C.J. and Rinfret, Crocket and Hughes JJ. was delivered by

DUFF C.J.:-- The history of the law seems to show clearly enough that legislation in respect of compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law.

Under the Bankruptcy Act, as it now exists, proposals for compositions and arrangements cannot be dealt with before a receiving order or assignment has been made. This, however, was not always the case. Under the Bankruptcy Act of 1919, a proposal for composition or arrangement could be made prior to an assignment or receiving order.

The Winding-up Act contains brief provisions, in sections 65 and 66, which, in substance, differ very little indeed from the legislation now before us; although this, no doubt, is subject to the important qualification, that the provisions of the Winding-up Act apply only in the case of a company which is in course of being wound up. Similar provisions affecting the subject matter of this legislation are to be found in Canadian legislation before and after Confederation.

The powers conferred upon the court under the Companies' Creditors Arrangement Act, 1933, come into operation when a compromise or arrangement is proposed between a "company which is bankrupt or insolvent or which has committed an act of bankruptcy within the meaning of the Bankruptcy Act or which is deemed insolvent within the meaning of the Winding-up Act," and its "unsecured creditors or any class of them." The important difference, as already observed, between the provisions of the Companies' Creditors Arrangement Act and those of the Bankruptcy Act itself in relation to compromises and arrangements is that the powers of the first named Act may be exercised notwithstanding the fact that no proceedings have been taken under the Bankruptcy Act or the Winding-up Act. The Act, however, creates powers, which can be exercised in case, and only in case, of insolvency.

Furthermore, the aim of the Act is to deal with the existing condition of insolvency, in itself, to enable arrangements to be made, in view of the insolvent condition of the company, under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. Ex facie it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation. As Lord Cave impliedly states in *Royal Bank of Canada v. Larue* [[1928] A.C. 187], "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament."

Matters normally constituting part of a bankruptcy scheme, but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

The argument mainly pressed upon us in opposition to the validity of the legislation was that

It does not endeavour to treat equally all contracts of debts between the debtor and his creditors but allows the interest of some of them to be sacrificed in the interest of the company and of other classes of creditors.

We think an adequate answer to this objection is put forward in the argument on behalf of the Attorney-General for the Dominion. Apart altogether from the judicial control over the proceedings, there is the circumstance that the legislation applies to insolvent companies only; and, consequently, that it is within the power of any creditor to apply for a winding-up order or a receiving order. It seems difficult, therefore, to suppose that the purpose of the legislation is to give sanction to arrangements in the exclusive interests of a single creditor or of a single class of creditors and having no relation to the benefit of the creditors as a whole. The ultimate purpose would appear to be enable the court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well as to the shareholders. We think it is not unimportant to note the circumstance to which our attention was called by counsel for the Attorney-General for the Dominion that the court may order shareholders to be summoned although they are not authorized to vote.

The judgment of Lamont and Cannon JJ. was delivered by

CANNON J.:-- This is a reference by the Governor General in Council submitting for hearing and consideration of this Court the following question:

Is The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, chapter 36, ultra vires of the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars, or to what extent?

This Act is designed to apply to insolvent or bankrupt companies; and it is contended on behalf of the Dominion that Parliament could pass this legislation under section 91, par. 21, which gives it paramount jurisdiction to make laws concerning bankruptcy and insolvency. The provinces represent that in enacting it Parliament disregarded their exclusive jurisdiction under section 92, par. 13, in relation to property and civil rights in the province.

The whole argument before us was finally directed to one point: Are the proceedings contemplated by the Act, in pith and substance, bankruptcy or insolvency enactments within the fair and ordinary meaning of these words? One of the features which distinguishes this Act from the Bankruptcy Act now in force is that, under the latter, a composition or arrangement cannot be proceeded with before a receiving order or assignment has been made. Another difference is that under the Bankruptcy Act the secured creditor is dealt with on the footing that he may realize his security or value or surrender the same; it is only in respect of what he claims apart from the security that he is affected by the composition or arrangement. It was pointed out also that similar provisions giving binding effect to this approval by a certain majority of creditors are found in our legislation before and after Confederation.

The Insolvent Act of 1864, 27-28 Vict., ch. 17, sec. 9;

The Insolvent Act of 1869, Canada, 32-33 Vict., ch. 16, secs. 94 et seq.;

The Insolvent Act of 1875, Canada, 38 Vict., c. 16, secs. 54 et seq.

As far as Lower Canada is concerned, it may be of interest to note that chapter 87 of the Consolidated Statutes of Lower Canada, 1859, allowed the issue of a *capias* if the debtor "had refused to compromise or arrange with his creditors, or to make a cession de biens," and provides that the debtor may be discharged if, when the affidavit for *capias* was made, he had "not refused to compromise or arrange with his creditors."

Moreover, I find that, before and since Confederation, arrangements with the creditors have always been of the very essence of any system of bankruptcy or insolvency legislation. Civil rights and the sanctity of contracts are certainly affected by clause 5 under which a minority of creditors would be bound by the vote of a majority in number representing three-fourths in value of creditors present and voting, either in person or by proxy, if the agreement or compromise to which they agreed be sanctioned by the court. I find that this feature existed long before Confederation and was at that time generally accepted.

Pardessus, *Droit Commercial*, vol. 3, Jd. 1843, p. 92, no. 1232, says:

1232. Les créanciers d'un failli ont presque toujours intérêt à faire avec lui un arrangement quelconque, plutôt que d'éprouver les lenteurs et les embarras d'une union qui finit souvent par consumer la fortune du débiteur. Mais, comme rarement tous sont d'accord, et qu'il est naturel de présumer qu'un grand nombre prendra les arrangements les plus convenables à l'intérêt commun, on a cru devoir faire céder la volonté de la minorité à celle de la majorité; les créanciers présents ont donc été admis à décider pour les absents.

Cette minorité, ces absents, doivent au moins avoir l'assurance que de mûres réflexions ont dirigé ceux dont le vœu doit devenir une loi pour eux. Tel est l'objet des règles prescrites pour la validité du concordat.

Under number 1236, classes or categories having different interests are already recognized by this author, and he adds (No. 1237):

Le concordat est valablement consenti par la majorité des créanciers présents, pourvu que les sommes dues aux personnes qui forment cette majorité égalent les trois quarts de la totalité des créances vérifiées et affirmées, ou admises par provision, dues à des créanciers ayant droit de prendre part à la délibération du concordat.

Therefore, the very clause objected to in our Act of 1933 seems to be copied from the law of bankruptcy as it existed in France in 1843, when this work was published.

Under our system and the English Bankruptcy Act of 1914, bankruptcy legislation deals with the proceedings necessary for the distribution, under judicial authority, of the property of an insolvent person among his creditors. It assumes the commission of an "act of bankruptcy" followed by a petition to the court for a receiving order for the protection of the estate. The property of the debtor then vests in an official receiver. The debtor must

submit a statement of affairs to the official receiver who calls a meeting of the creditors. The debtor is examined; and if no composition or scheme of arrangement is approved, he is adjudged bankrupt; and his property becomes divisible among his creditors and vests in a trustee.

Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, "bankruptcy" proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as "insolvency proceedings" with the object of preventing a declaration of bankruptcy and the sale of these assets, if the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part. Provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation and were incorporated in our Insolvent Act of 1864; and such a deed of composition and discharge could be validly made either before, pending or after proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent. What was considered as being within the scope of the word "insolvency" when it was used in section 91 of the B.N.A. Act is to be found in the preamble of the 1864 Insolvency Act, which reads:

Whereas it is expedient that provision be made for the settlement of the estates of insolvent debtors, for giving effect to arrangements between them and their creditors, and for the punishment of fraud.

See also: *Cushing v. Dupuy* [(1880) 5 App. Cas. 409]; *Royal Bank of Canada v. Larue* [[1928] A.C. 187].

I therefore reach the conclusion that arrangements as provided for by this Act are and have been, before and since Confederation, an essential component part of any system devised to protect the creditors of insolvents and, at the same time, help the honest debtor to rehabilitate himself and obtain a discharge.

I would, therefore, answer the question submitted to us in the negative.

The question submitted is answered in the negative.