

5,1943

In the Privy Council.

No. 20 of 1942.

ON APPEAL FROM THE SUPREME COURT
OF CANADA.

UNIVERSITY OF LON
W.C.1.

26 OCT 1956

IN THE MATTER of a REFERENCE AS TO THE VALIDITY OF
THE DEBT ADJUSTMENT ACT 1937, STATUTES OF ALBERTA OF ADVAN
1937, Chapter 9 as amended, and as to the operation thereof. STUDIES

30631

BETWEEN

THE ATTORNEY-GENERAL OF ALBERTA - - Appellant

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AND

THE ATTORNEY-GENERAL OF CANADA,
THE CANADIAN BANKERS' ASSOCIATION,
THE MORTGAGE LOANS ASSOCIATION OF
ALBERTA, and THE ATTORNEY-GENERAL OF
SASKATCHEWAN - - - Respondents.

CASE OF THE RESPONDENT

THE ATTORNEY-GENERAL OF SASKATCHEWAN.

Record.

1. This is an appeal from a majority judgment of the Supreme Court of Canada (Duff C.J., Rinfret, Davis, Kerwin, Hudson and Taschereau JJ., Crocket J. dissenting) given on the 2nd December 1941 upon a Reference to that Court by the Governor-General in Council under Section 55 of the Supreme Court Act (Revised Statutes of Canada 1927 c. 35) of certain questions which are set out in paragraph 3 of this Case and which are concerned with the validity and operation of The Debt Adjustment Act 1937, being Chapter 9 of the Statutes of Alberta 1937, as amended by Chapter 2 of the Statutes of Alberta 1937 (3rd Session), by Chapter 27 of the Statutes of Alberta 1938, by Chapter 5 of the Statutes of Alberta 1938 (2nd Session), by Chapter 81 of the Statutes of Alberta 1939 and by Chapter 42 of the Statutes of Alberta 1941, the said Act as amended being hereinafter referred to as The Debt Adjustment Act 1937.

2. The said Reference was directed by the Governor-General in Council by an Order in Council dated the 19th May 1941 and made after consideration of a Report by the Minister of Justice, wherein the said Minister represented *inter alia* that the Supreme Court of Canada had by a Judgment dated the 20th December 1940 in the case of *Attorney-General for Alberta and Winstanley v. Atlas Lumber Company* (1941) 87 S.C.R.

Record.

affirmed the decision of the Court of Appeal of Alberta that The Debt Adjustment Act 1937 could not operate to preclude the holder of a promissory note from taking action thereon to enforce payment, that the Supreme Court of Alberta had by a Judgment dated the 14th March 1941 in the case of *The North American Life Assurance Company v. McLean* (1941) 1 W.W.R. 430 held that The Debt Adjustment Act 1937 was a statute in relation to insolvency and as such constituted an invasion of the exclusive legislative authority of the Parliament of Canada and was *ultra vires* of the Legislature of Alberta, and that the Attorney-General of the Province of Alberta urgently desired in the public interest an authoritative pronouncement on the validity of The Debt Adjustment Act 1937. 10

p. 4, l. 33.

3. The said Order of Reference referred the following questions to the Supreme Court of Canada for hearing and consideration, namely,

p. 4, l. 33.

(1) Is The Debt Adjustment Act (defining the same as in paragraph 1 of this Case) *ultra vires* of the Legislature of Alberta, either in whole or in part, and if so, in what particular or particulars or to what extent ?

p. 4, l. 40.

(2) Is the said Act as amended operative in respect of any action or suit for the recovery of moneys alleged to be owing under or in respect of any bill of exchange or promissory note ? 20

p. 4, l. 44.

(3) Is the said Act as amended operative in respect of any proceedings taken to enforce any judgment obtained in any action or suit for the recovery of moneys owing under or in respect of any bill of exchange or promissory note ?

p. 5, l. 1.

(4) Is the said Act as amended operative in respect of any action or suit for the recovery of money or interest thereon, or both, not being money or interest alleged to be owing under or in respect of any bill of exchange or promissory note, whether or not such money or interest is secured upon land situated in the said province, in the following cases, namely, where such action or suit is for the recovery of : 30

(A) the principal amount of such money and interest, if any, where the same is payable in the said province :

(B) the principal amount of such money and interest, if any, where the same are payable outside the said province :

(C) the interest only upon such money.

p. 5, l. 12.

(5) If the answer to any of the parts (A), (B) and (C) of question 4 is in the negative, is the said Act as amended operative in respect of any proceedings taken to enforce judgment obtained in any action or suit in respect of which such answer is given ? 40

p. 6, l. 1.

4. On the 20th May 1941 the Right Honourable The Chief Justice of Canada made an Order for Inscription of the said Reference, directing

inter alia that the said Reference be inscribed for hearing by the Supreme Court of Canada on the 24th June 1941, that the Attorneys-General of the Provinces of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan and likewise the Canadian Bankers' Association and the Mortgage Loans Association of Alberta be notified of the hearing and be served with copies of the printed case by the Attorney-General of Canada, and that the said parties so notified and served as well as the Attorney-General of Canada be at liberty to file factums of their respective arguments and to appear and be heard by Counsel on the argument of the said Reference.

Record.

5. Pursuant to the said Order for Inscription, the Appellant herein and each of the Respondents filed factums of their respective arguments, this Respondent adopting and relying on the factum filed by the Appellant, which in general contended that The Debt Adjustment Act 1937 was *intra vires* of the Legislature of Alberta, while the factums of the three first-named Respondents in general contended that The Debt Adjustment Act 1937 was *ultra vires* of the said Legislature. In further pursuance of the said Order the questions propounded by the said Reference came before the Supreme Court of Canada for hearing and consideration on the 24th, 25th and 26th June 1941 in the presence of counsel for all the parties to this Appeal and also of counsel for the Attorney-General of the Province of Quebec, and the said Court constituted as set out in paragraph 1 hereof directed the said Reference to stand over for consideration.

pp. 8-35.

pp. 36-57.

6. On the 2nd December 1941 the said Supreme Court delivered Judgment, and certified to His Excellency the Governor-General in Council that the opinions in answer to the questions referred to the Court were as follows :—

p. 58.

By the Court (the said majority thereof) :—

Question 1 : The said Act as amended is *ultra vires* of the Legislature of Alberta in whole.

p. 59, l. 30,
et seq.

Question 2 : The said Act as amended is not operative in respect of any of the matters mentioned.

Question 3 : *Idem.*

Question 4 : *Idem.*

Question 5 : *Idem.*

By Crocket, J. :—

Question 1 : No, except in so far as its provisions may be found to conflict with any existing Dominion legislation strictly relating to any of the classes of subjects specially enumerated in s. 91 of the B.N.A. Act or as being necessarily incidental to the particular subject-matter, upon which the Parliament of Canada has undertaken to legislate as falling within one or other of the said enumerated heads.

p. 60, l. 1,
et seq.

Record.

Questions 2, 3, 4, 5 : As the four questions involve the same considerations as have prompted me to incorporate in my answer to Question 1 the exception there indicated, I am unable to answer the other four questions without a similar qualification.

7. The provisions of The Debt Adjustment Act 1937 may be summarised as follows :—

A. Parts I and III deal with debtors resident in the province of Alberta, defined in section 2 (E) as resident debtors.

Part II has been repealed.

Part IV deals with farmers living and farming in the said 10 Province, defined in section 2 (EE) as resident farmers.

Part V contains a series of general provisions.

B. A Board is constituted to be known as The Debt Adjustment Board and to consist of members (one, two or three) appointed by the Lieutenant-Governor in Council (section 3).

The Board is empowered to make full enquiry and make examinations under oath with regard to the property of any resident debtor or resident farmer (section 6).

C. Unless the Board gives a written consent thereto no proceedings can be taken or continued against a resident debtor in respect 20 of debts arising or judgments obtained before the 1st July 1936.

(A) to recover money as a liquidated demand or debt.

(B) by way of execution, attachment or garnishment.

(C) to sell under or foreclose a mortgage on land, to cancel, rescind or enforce specific performance of an agreement for the sale of land, or to recover possession of land, in Court or otherwise.

(D) to sell land under a judgment or a mechanic's lien.

(E) to seize or distrain under an execution or under any tenancy or lien etc. or to sell by right derived from statute or 30 common law.

(F) by lessor etc. claiming share of crop under The Crop Payments Act.

(G) in respect of matters added to this section by Order in Council (section 8).

D. The Board is not allowed to consent to proceedings on a mortgage of farm-lands or an agreement for sale thereof, if those proceedings lead to foreclosure by reason only of the temporary impossibility owing to abnormal depreciation in values of realising the probable normal value of the security (section 9).

E. The creditor may apply for the Board's consent under section 8, and the Board in that case must make its proper enquiries and thereupon consent or refuse or adjourn the application for such period as it thinks fit (section 10).

F. The time during which proceedings are prohibited by the Board does not run against the creditor under the Limitation of Actions Act 1935, until the Board's permit in writing is issued (section 11).

10 G. The resident debtor or the creditor can by written application call on the Board to investigate the resident debtor's financial position, and to endeavour to negotiate an agreement, for the settlement of the debtor's debts (section 21), which though informal shall be binding being made through the agency of the Board (section 22) and shall fix all the debtor's debts in accordance with his present or future ability to pay (section 23) and shall bind though made without consideration (section 25).

20 H. A resident farmer who is in default on a proposal formulated and confirmed under The Farmers' Creditors Arrangement Act (Federal: 1934, chapter 43) cannot be proceeded against by his creditor by any of the proceedings set out in section 8 of The Debt Adjustment Act 1937, unless the Board issues a written consent under that section (section 26).

I. A chattel mortgage given by a Resident farmer after 1st May 1934 to secure a past debt shall be invalid, unless approved by the Board within a time fixed (section 27).

J. A resident farmer, can be authorised by the Board in order to supply his own necessities or fodder or seed grain, to sell free of encumbrance any mortgaged property, real or personal (sections 28 and 29).

30 K. Any person aggrieved by the Board's orders can appeal to a Judge of the Supreme Court sitting with a jury of six persons (section 36).

L. The Debt Adjustment Act 1937 may be suspended by Order in Council if and when and so far as necessary to avoid any conflict with future Federal legislation as to the adjustment of debts (section 38).

M. The Debt Adjustment Act 1937 is not to be construed to authorise the doing of any act or thing not within the competence of the Legislature (section 39).

40 **8.** The Debt Adjustment Act 1937 is one of a series of statutes enacted during the past twenty years for the relief of distress, in the Province of Alberta.

Record.

By the Drought Relief Act, chapter 43 of 1922, the Lieutenant-Governor in Council was empowered to prohibit proceedings against farmers resident in specified distressed areas of the Province except by leave of a judge.

By the Debt Adjustment Act chapter 23 of 1923, a Director was appointed and empowered to advise farmers and their creditors and negotiate amicable settlement of the farmers' debts. The Director had certain limited powers to prevent or stay proceedings for the seizure or sale of a farmer's property by filing a certificate, but proceedings could nevertheless be commenced or continued by leave of a judge. 10

By the Debt Adjustment Act 1931, the machinery of debt-adjustment and of relief from proceedings, subject to a judge's leave to proceed, was made generally available to farmers throughout the Province. Mortgagees of farm lands and unpaid vendors thereof had an alternative right to apply for leave to proceed to a Board of Review.

By the Debt Adjustment Act, chapter 13 of 1933, a Debt Adjustment Board was for the first time constituted, and actions against Resident Farmers or Resident Home Owners were for the first time prohibited, except by leave of the Board. A right of appeal to a judge from the Board's grant or refusal of leave to proceed was provided respectively for the debtor or the creditor. 20

p. 38, l. 29,
et seq.

9. The Attorney-General of Canada contended that The Debt Adjustment Act 1937, firstly, not being legislation in relation to Property and Civil Rights in the Province within section 92 (13) of the British North America Act 1867, or to the Administration of Justice in the Province, including the Constitution, Maintenance and Organisation of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts within section 92 (14) of the said Act, or to Matters of a merely local or private nature in the Province within section 92 (16) of the said Act, was not authorised by any provision of the said section 92 ; secondly, being legislation in relation to Bankruptcy and Insolvency within section 91 (21) of the said Act, was repugnant to valid Acts of Parliament in relation to bankruptcy and insolvency, namely, the Bankruptcy Act, the Farmers' Creditors Arrangement Act, the Companies' Creditors Arrangement Act and the Winding Up Act or invalid as being an invasion of a legislative field already occupied ; thirdly, contained no severable provision which standing by itself might be constitutional ; and that the Debt Adjustment Act 1937 was *ultra vires* as to the whole. 30 40

p. 43, l. 1,
et seq.

10. The Canadian Bankers Association (the second-named Respondents) on behalf of the banks chartered by the Bank Act passed by the

Parliament of Canada, contended that The Debt Adjustment Act 1937 was legislation in relation to classes of subjects under section 91 of the British North America Act 1867, and not in relation to any class of subject under section 92 thereof, and that the answer to the first question propounded in the said Reference should be that the Act as a whole is *ultra vires*, and that all the said questions other than the first question should be answered in the negative.

Record.

10 **11.** The Mortgage Loans Association of Alberta (the third-named Respondents) contended that section 8 of the Act derogated from the Dominion's sovereignty in its field, that it did not relate to or fall under any of the heads of section 92 of the British North America Act 1867, that it encroached upon the field of jurisdiction now occupied by the Dominion under section 91 of that Act, and that the Act was *ultra vires* in its entirety, and that the first question should be answered "Yes, in whole" and the other questions "No."

p. 49, l. 18,
et seq.

12. The said majority judgment of the Judges of the Supreme Court may be stated shortly thus :

p. 60, l. 20,
et seq.

20 Section 8 of The Debt Adjustment Act 1937 converts a right enforceable by the owner into a conditional right, enforceable only by a permit from the Debt Adjustment Board. The Board's authority is exercisable upon debts arising either from statutes or legal rules, which the legislature cannot repeal or vary, and in the case of creditors whose powers status or business it cannot regulate. Yet the Board's authority in such matters is arbitrary. No rule or principle is laid down to direct the Board in giving or refusing or adjourning an application for a permit. The Board acts in accordance with its own conception of its duty. Under section 10 the Board has to make enquiries, but the Board can decide what enquiries. The appeal to a jury given by the amending statute is an appeal from the arbitrary determination of one authority to the arbitrary determination of another. Hence creditors are deprived of the right to enforce their debts and receive instead the chance of the Board's permit to enforce them. This change is not a mere procedural matter, but strikes at the substance of the creditors' rights. The Act is therefore repugnant to provisions of Dominion statutes which create or recognise obligations in the nature of debts etc. : e.g. provisions of the Bills of Exchange Act, section 125 of The Bank Act and section 44 of The Companies Act. The Province in setting up this Board is exceeding its authority. By section 91 of the British North America Act the Parliament of Canada has exclusive control over certain types of business, banks or Dominion railways or ocean-shipping companies. Lending money is one main part of banking. By refusing permits to enforce payments of loans made by banks to their customers, the Board

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p. 60, l. 38.

p. 61, l. 11.

p. 61, l. 25.

p. 61, l. 34.

Record.
 p. 62, l. 6. could exercise considerable regulation of the business of banking. Therefore section 8 (1A) is *ultra vires*. Even assuming that debts falling entirely in the class of "civil rights in the province" could be dealt with by a provincial law of the type of section 8 (1A), section 8 (1A), without that limitation, and it could not be construed as being so limited, is entirely void . . . Section 8 (1B) is also *ultra vires*. The Board can likewise in its arbitrary discretion and discrimination refuse execution in respect of any debt. The Act affects the jurisdiction of provincial Courts but its pith and substance is to set up the provincial Board to exercise an arbitrary and discriminatory control. The Act relates to remedy and procedure, but it is in substance part of a design to regulate rights. In the case of creditors who are Dominion companies, having other than provincial objects, their incorporation is vested in Parliament, while their status and powers are for the exclusive legislation of Parliament by the joint effect of the residuary powers under section 91 and the powers conferred under "Trade and Commerce" while the province may legislate by laws of general application affecting the kind of business the companies carry on in the province. However, interference with affairs of creditors under section 8 would not come under such provincial laws of general application. Thus, a Dominion company which lends money on various types of security in a province, may find itself unable under 8 (1) (A) and (B) to enforce its security in the usual way. Such legislation being not competent, paragraphs (C) (D) (E) and (F) are incompetent. Section 8 (1) is repugnant to section 2 of The Interest Act. Its scope is shown by paragraph (G), also by section 41, which withdraws from the operation of the Act debts due to The Canadian Farm Loan Board or The Soldiers' Settlement Board and proceedings to enforce the same. Subsection 1 must be taken as a whole. It is invalid as a whole. Despite subsection 3, the whole of section 8 is invalid.

p. 62, l. 15.
 p. 62, l. 29.
 p. 62, l. 35.
 p. 63, l. 3.
 p. 63, l. 10.
 p. 63, l. 15-20.

The subject-matter of section 26 of The Farmers' Creditors' Arrangement Act are so related that they are withdrawn from provincial legislation by the British North America Act 1867, section 91, last paragraph. The Act is an attempt to invade the Dominion field of Bankruptcy and Insolvency. Take the case of a debt payable in the province on a contract made in the province by a debtor resident in the province to a creditor resident in the province, that creditor by section 8 (1) cannot present a bankruptcy petition, since there would be no "debt owing" under section 4 of the Bankruptcy Act, and that section is really striking at the right itself. Also Part III is meant to enable the Board in cases of insolvency to enforce consent to arrangements they impose by debtor and by creditor. The whole Statute is meant to protect embarrassed Alberta debtors. The Board has the exclusive possession of the

p. 63, l. 25,
 to p. 64, l. 14.
 p. 64, l. 1.

key to the Courts. This invades the field of Insolvency and Bankruptcy. Though no opinion is expressed, the Province might create a Board with some of the powers given here. It is not possible in this Statute which confers unlawful powers by its principal enactments to disentangle those powers which are lawful. The competent elements not being severable from the incompetent, the whole is *ultra vires*, and the questions should be answered accordingly.

Record.
p. 64, l. 5.

p. 64, l. 27.

13. The dissenting judgment of Crocket J. may shortly be stated
10 thus:—

Provincial legislation upon matters *prima facie* falling within the 16 classes of section 92 of the B.N.A. Act cannot be superseded by Dominion legislation, unless the latter expressly relates to the classes of subject enumerated in section 91 or is necessarily incidental thereto. *Citizens' Ins. Co. v. Parsons* [1881] 7 A.C. 96, and other cases down to *Att.-Gen. for Canada v. Att.-Gen. for B.C.* [1930] A.C. 111.

20 The words "Property and Civil Rights in the Province" in section 92 (13) are used in the widest sense. *Parsons Case, supra*, at page 109.

The "Administration of Justice" in section 92 (14) are also words so used. *Reg. v. Bush*, 15 Ont. R. 398.

30 After reviewing the cases of *Att.-Gen. of Ontario v. Att.-Gen. of Canada* [1894] A.C. 189; *Att.-Gen. of Canada v. Att.-Gen. of Ontario, Quebec and Nova Scotia* [1898] A.C. 700; *Ladore v. Bennett* [1939] A.C. 468, Crocket, J., expressed the view that the case of *Att.-Gen. of Alberta and Winstanley v. Atlas Lumber Co.* [1941] 87 S.C.R., did not conclude the invalidity of The Debt Adjustment Act 1937 in respect of all matters under section 91, and that the words there must be limited to preserve to the provinces the autonomy which they were meant to enjoy from the scheme of the B.N.A. Act as a whole.

p. 64, l. 36.

The purpose of The Debt Adjustment Act was to control the enforcement of contractual obligations for the payment of money so as to safeguard resident debtors against ruinous enforcement in abnormal financial conditions of creditors' claims.

p. 71, l. 6.

The provisions of the Act are predominantly directed to procedure in civil matters in Alberta Courts.

p. 71, l. 14.

40 None of the provisions are directed to insolvency legislation or banks or banking legislation or to contracts of Dominion companies, though such subjects and rights are collaterally affected.

p. 71, l. 21.

Crocket, J., found it impossible to answer the questions, being "academic rather than judicial," with definiteness, and accordingly answered them as appears in paragraph 6 hereof.

14. This Respondent respectfully submits that the Legislature of Alberta, being convinced that it was contrary to public policy that during a time of abnormal economic depression the property of debtors in the Province especially cultivated land should be sacrificed by forced sale at depreciated values, passed The Debt Adjustment Act 1937 in order to suspend in relation to certain debts the creditors' right to proceed and thereby to permit in such cases the postponement of payment by the debtors, and that the Act in its pith and substance is in relation to that matter. 10

15. This Respondent respectfully submits that the Act is in relation to the classes of subjects in Section 92 of the British North America Act enumerated under the following subsections :

Subsection 13. Property and Civil Rights in the Province.

- Do. 14. The Administration of Justice in the Province, including the Constitution, Maintenance and Organisation of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts. 20
- Do. 16. Generally all Matters of a merely local or private Nature in the Province.

This Respondent further respectfully submits that the Act is not in relation to any of the classes of subject in Section 91 of the British North America Act, and particularly, is not in relation to any of the following subsections :

Subsection 15. Banking, Incorporation of Banks, and the Issue of Paper Money.

- Do. 18. Bills of Exchange and Promissory Notes. 30
- Do. 19. Interest.
- Do. 21. Bankruptcy and Insolvency.

This Respondent further respectfully submits that if the Act affects any of the classes of the said section 91, it does so collaterally and as a necessary incident of effective legislation by the Province under section 92, and that it is therefore lawfully enacted by the Province within the principles of *Ladore v. Bennett, supra* and *Lymburn v. Mayland* [1932] A.C. 318.

16. This Respondent further submits respectfully that the Act does not impair the status or powers of Dominion companies, and does not

invade any legislative field already fully occupied by Acts passed by the Parliament of the Dominion, and does not interfere with civil rights outside the Province and is valid with regard to all debts not regulated by Dominion Statutes and not contracted with a Dominion agency.

17. It is further respectfully submitted by this Respondent that if any provisions of the Act are *ultra vires* such provisions are severable and the parts remaining are valid and that in no case should the Act be declared invalid as a whole, and further that the effect of section 39 of the Act should be to render any provision thereof which conflicts with Dominion
10 legislation not *ultra vires* but inoperative within the Dominion field only.

18. This Respondent therefore submits that the said majority judgment of the Supreme Court was wrong, and should be reversed for the following amongst other

REASONS.

- (1) Because the Act is in relation to Property and Civil Rights within the Province and to Administration of Justice including Procedure in Civil Matters within the Province and to Matters of a merely local and private nature within the Province. same
- 20 (2) Because the Act is not in relation to any matter assigned to the exclusive legislative authority of the Parliament of Canada. same
- (3) Because the Act is within the powers of the Legislature of Alberta and is incidental thereto. same
- (4) Because the Act is not invalid as being in conflict with Dominion legislation validly enacted in the Dominion field.
- (5) Because the Act is not such as the Dominion Parliament could have validly enacted.
- 30 (6) Because if contrary to these Respondents' contention any of the provisions of the Act are *ultra vires*, they are severable and the remaining parts are valid.
- (7) Because by virtue of section 39 of the Act, any provision of the Act which conflicts with Dominion legislation is merely inoperative in the Dominion field and is not *ultra vires*.

J. W. ESTEY.

FREDERICK W. WALLACE.

In the Privy Council.

No. 20 of 1942.

ON APPEAL FROM THE SUPREME
COURT OF CANADA.

IN THE MATTER of a REFERENCE AS TO THE VALIDITY
OF THE DEBT ADJUSTMENT ACT 1937, STATUTES OF
ALBERTA 1937, Chapter 9 as amended, and as to
the operation thereof.

BETWEEN

ATTORNEY-GENERAL OF
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AND

ATTORNEY-GENERAL OF
CANADA, THE CANADIAN
BANKERS' ASSOCIATION,
THE MORTGAGE LOANS
ASSOCIATION OF ALBERTA
AND THE ATTORNEY-
GENERAL OF SASKAT-
CHEWAN - - - - *Respondents.*

CASE OF THE RESPONDENT
THE ATTORNEY-GENERAL OF
SASKATCHEWAN.

BLAKE & REDDEN,
17, Victoria Street, S.W.1.