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Debt, Deals, and Dominion: Insights on Canadian Insolvency Law from *Debt and Federalism* by Thomas G.W. Telfer and Virginia Torrie

Fenner Stewart[*]

INTRODUCTION

Debt and Federalism,[1] authored by Thomas G.W. Telfer and Virginia Torrie, delves into the development of insolvency law and its impact on Canadian federalism. Featured in the "Landmark Cases in Canadian Law" series, the book scrutinizes four pivotal cases:[2] the *Voluntary Assignments Case* (1894), *Larue* (1928), the *Companies' Creditors Arrangement Act Reference* (1934), and the *Farmers' Creditors Arrangement Act Reference* (1937). The authors argue that these cases "laid the groundwork" for the expansive federal authority that defines Canadian insolvency law today.[3]

THEMES

The book's main theme traces the evolution of bankruptcy and insolvency law in Canada from Confederation in 1867 to the 1937 Judicial Committee of the Privy Council (JCPC) decision in the *Farmers' Creditors Arrangement*

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1 Thomas GW Telfer & Virginia Torrie, *Debt and Federalism: Landmark Cases in Canadian Bankruptcy and Insolvency Law, 1984-1937* (Vancouver: UBC Press, 2021).

2 *Attorney General of Ontario v Attorney General for the Dominion of Canada*, [1894] UKPC 13 (JCPC) [*Voluntary Assignments Case*]; *The Attorney General of Quebec and the Royal Bank of Canada (Appeal No 28 of 1926) v Larue and others (Canada)*, 1928 CanLII 514 (JCPC) [*Larue*]; *Reference re constitutional validity of the Companies' Creditors Arrangement Act*, 1934 CanLII 72 (SCC) [*Companies' Creditors Arrangement Act Reference*]; and *The Attorney General of British Columbia (Appeal No 104 of 1936) v The Attorney General of Canada and others (Canada)*, [1937] UKPC 10 (JCPC) [*Farmers' Creditors' Arrangement Act Reference*].

3 Telfer & Torrie, *supra* note 1 at 5.

Act Reference. While the terms "bankruptcy" and "insolvency" are often used interchangeably, they have distinct meanings.[4] In Canada, an insolvent person is defined as someone who owes more than $1,000 and is unable to pay their debts as they become due, which signals financial distress.[5] Bankruptcy, a specific condition of insolvency, involves the legal process of distributing the debtor's estate among creditors.[6]

The authors outline two primary functions of bankruptcy law.[7] First, it facilitates fair asset distribution among creditors by initiating a stay of proceedings to halt individual creditor claims and ensure an orderly process to avoid disorderly competition for assets.[8] Second, it offers bankrupt individuals a fresh start after their assets are distributed.[9]

Insolvency law offers a comprehensive legal framework for debt-burdened persons to restructure their obligations with court supervision.[10] This framework allows for the reorganization of a debtor's finances to restore financial stability.[11] It supports short-term recovery while paving the way for long-term viability, thus presenting an alternative to bankruptcy proceedings.[12]

A secondary theme explored is Canadian federalism. The *Constitution Act, 1867* delineates jurisdictional "Subjects" between Parliament and the provincial legislatures,[13] with few exceptions.[14] "Property and Civil Rights" and "Matters of…local or private Nature" are seen by some as providing residual regulatory power to the provinces, a notion which tends to encourage jurisdictional conflicts, as exemplified in the discussed cases.[15]

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4 Bob Wessels, Hon Bruce A Markell & Jason Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* (Oxford: Oxford University Press, 2009) at 1.

5 *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, s 2 [*BIA*].

6 *Ibid*, ss 136–41.

7 Telfer & Torrie, *supra* note 1 at 3–4.

8 *Ibid* at 3; see also *BIA*, *supra* note 5, ss 14.06(5), 69.3(1), 102–41.

9 See e.g. *BIA*, *supra* note 5, s 168.

10 See e.g. *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, ss 4-6, 11.001, 11.02(1) [*CCAA, 1985*]. See also *Farm Debt Mediation Act*, SC 1997 c 21, ss 5–7.

11 See e.g. *ibid.*

12 Telfer & Torrie, *supra* note 1 at 73.

13 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91–92, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*]. See also *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paras 29, 66.

14 *Constitution Act, 1867*, *supra* note 13, ss 93, 95.

15 *Ibid*, s 92(13), (16). See also Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Bloomsbury Publishing, 2021) ("[t]he principal powers of the provinces [section 92(13) and (16)] have a much better claim to generality…. The default regulatory jurisdiction in Canada therefore lies with the provinces" at 138).

Although "Bankruptcy and Insolvency" is assigned clearly to Parliament, these cases demonstrate that conflicts still arose from Parliament's exercise of its authority because this exercise appeared, to some, to infringe upon the provincial jurisdiction over "Property and Civil Rights."

STRUCTURE

Debt and Federalism is structured into six chapters: an introduction, four substantive chapters, and a conclusion. The introduction sets forth the principles of bankruptcy and insolvency law and presents the central thesis: Parliament's initial restraint in exerting its bankruptcy and insolvency jurisdiction fostered preconceptions regarding provincial authority.[16] These preconceptions were dispelled as the judiciary broadly interpreted Parliament's power, for better or worse, which thereby moulded the modern interpretation of the law.[17] It then explains how each of the four substantive chapters addresses one of the four landmark cases.

Chapter One reviews the *Voluntary Assignments Case* (1894). Parliament enacted the *Insolvent Act of 1869*, which was then replaced in 1875.[18] These laws ignited controversy by discharging a bankrupt's debts during a period when defaulting on debts was widely regarded as a moral failing.[19] Parliamentarians, wary of this sentiment and its potential effect on their prospects,[20] repealed the bankruptcy legislation in 1880, which created a regulatory gap.[21] To address this gap, provincial legislatures enacted laws under their "Property and Civil Rights" jurisdiction.[22] In the *Voluntary Assignments Case*, the JCPC assessed the validity of Ontario's *Act respecting Assignments and Preferences*.[23] The core issue was whether this enactment exceeded provincial jurisdiction.[24] The JCPC found it did not, and distinguished that bankruptcy inherently involves compulsion, whereas Ontario's enactment pertained to assignments, which are voluntary in

16 Telfer & Torrie, *supra* note 1 at 4, 6–9.

17 *Ibid* at 5.

18 *Insolvent Act of 1869*, SC 1869, c 16; *Insolvent Act of 1875*, SC 1875, c 16.

19 Telfer & Torrie, *supra* note 1 at 141.

20 For more on this point, see Thomas GW Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto, Buffalo & London: University of Toronto Press, 2014) at 9.

21 Telfer & Torrie, *supra* note 1 at 15–16.

22 See e.g. *An Act respecting Assignments and Preferences by Insolvent Persons*, RSO 1887, c 124 [*Act respecting Assignments and Preferences*].

23 Telfer & Torrie, *supra* note 1 at 16; *ibid*.

24 Telfer & Torrie, *supra* note 1 at 16.

nature.[25] This distinction allowed provinces to support local commerce in an era of federal retrenchment.[26]

Chapter Two moves from 1894 to *Larue* in 1929, highlighting a jurisdictional conflict triggered by Parliament's *Bankruptcy Act of 1919*.[27] The *1919 Act* aimed at standardizing bankruptcy procedures across Canada; this clashed with provincial debtor-creditor laws that were in place since the 1880s.[28] The case delved into a creditor's remedy under Québec's civil law known as a "judicial hypothec," which revealed how the *1919 Act* conflicted with the judicial hypothec's mechanism.[29] The authors explain that the judicial hypothec allowed an unsecured creditor to register a judgment for a default in the land registry, thereby gaining rights akin to a secured creditor against the bankrupt's estate.[30] Québec argued that the *1919 Act*'s disregard for the judicial hypothec represented an unacceptable intrusion on provincial authority over property rights.[31] However, the JCPC rejected this argument, affirming Parliament's power to dictate creditor priority.[32]

Chapter Three moves from 1929 to the *Companies' Creditors Arrangement Act Reference* (1934).[33] Still in force to this day, the *CCAA* provides financially distressed companies with a mechanism for restructuring. Its framework promotes customized solutions through consensual approaches.[34] A restructuring plan requires the approval of creditors holding two-thirds of the debt to obtain a court's endorsement.[35] Without agreement on the plan, the company is likely to face bankruptcy.[36]

Before the *CCAA*, restructuring was a common practice, which was regulated through contractual debt agreement clauses with provincial

25 Telfer & Torrie, *supra* note 1 at 16, 33.
26 *Ibid* at 15–16, 28, 33.
27 SC 1919, c 36 [*1919 Act*]; *ibid*.
28 Telfer & Torrie, *supra* note 1 at 43.
29 *Ibid* at 44.
30 *Ibid*.
31 *Ibid*.
32 *Ibid* at 67–68, 71.
33 *Ibid* at 73–75; *Companies' Creditors Arrangement Act, 1933*, SC 1932–33, c 36.
34 *Ibid*, ss 4–7, 11.02, 36.
35 *Ibid*, s 6.
36 PwC Canada, "What is CCAA?", online: <www.pwc.com/ca/en/services/insolvency-assignments/what-is-ccaa.html> ("[i]f a class of creditors or the Court does not approve the Plan, the company does not automatically go into bankruptcy, but the Stay is lifted. However, once the Stay has been lifted, the pressures that caused the company to initially file for CCAA protection from its creditors will likely return and, accordingly, it is quite likely that the company will be placed into receivership or bankruptcy").

oversight.[37] In the 1920s, however, to attract U.S. investors, Canadian businesses started to eliminate these clauses from contracts, which reduced restructuring options.[38] The Great Depression's escalating economic crisis prompted Parliament to act, which led to the enactment of the *CCAA*.[39]

The Canadian commercial law bar contended that the *CCAA* overstepped Parliament's authority.[40] Québec supported this viewpoint,[41] arguing that Parliament's jurisdiction did not extend to overriding the exclusive provincial control over contracts.[42] Canada's rebuttal invoked the double aspect doctrine, which acknowledges the possibility of jurisdictional overlap in certain instances.[43] Ultimately, the Supreme Court of Canada had the final word by upholding the *CCAA* as a legitimate exercise of Parliament's power, thereby appearing to alter the division of powers as many assumed it existed since 1894.[44]

Chapter Four delves into the *Farmers' Creditors' Arrangement Act Reference* (1937). The *Farmers' Creditors Arrangement Act* was enacted to aid debt-laden farmers who were hit hard by the Great Depression and the concurrent drought in the prairie provinces.[45] The *FCAA* permitted farmers to propose repayment plans through an official receiver.[46] With the creditors' agreement, these plans would be submitted to the court for approval.[47] In cases where creditors did not consent, the farmer could appeal to the Board of Review, which had the authority to devise a viable proposal or, if not possible, the farmer would face bankruptcy.[48]

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37 Telfer & Torrie, *supra* note 1 at 73–74.

38 *Ibid* at 74.

39 *Ibid*.

40 *Ibid* at 78.

41 *Ibid* at 81.

42 *Ibid* at 82.

43 *Ibid* at 83. Fenner L Stewart, "POGG Post References re Greenhouse Gas Pollution Pricing Act" (2023) 108 SCLR 29 ("[t]he genius of protecting only the core of each subject is that exclusivity and overlap can co-exist. To explain, *The Constitution Act, 1867* does not specify that each subject needs to be exclusive in its entirety. This ambiguity permits the judicial branch to interpret the exclusivity requirement as mandating that only a portion of each subject's exclusivity must be protected. With its core protected, a subject's peripheral authority can be subject to the double aspect doctrine without violating the constitutional demand that exclusivity be guaranteed" at 43).

44 Telfer & Torrie, *supra* note 1 at 98–99.

45 *Ibid* at 103; *Farmers' Creditors Arrangement Act*, SC 1934, c 53 [*FCAA*].

46 Telfer & Torrie, *supra* note 1 at 106.

47 *Ibid*.

48 *Ibid*.

The *FCAA* shared key features with the *CCAA*, both facilitating debt restructuring to avert bankruptcy.[49] The *CCAA*'s prior validation weakened the provincial arguments contesting the *FCAA*. Provinces contended that the *FCAA* differed from the *CCAA* by emphasizing that only farmers could initiate proceedings and that creditor consent was not mandatory for a plan to proceed.[50] Nevertheless, neither the Supreme Court of Canada nor the JCPC deemed these distinctions significant enough to overturn the *FCAA*.[51]

The book concludes with a review of the landmark cases. Telfer and Torrie re-evaluate the impact of contingencies on outcomes, noting how the three twentieth-century cases aligned with a move towards centralization as a reaction to severe financial distress, notably because of the Great Depression. They offer a thought-provoking conclusion: without these contingencies, Canada's insolvency and bankruptcy landscape could have developed quite differently from the framework insolvency practitioners recognize today.[52]

REFLECTIONS

Debt and Federalism is aptly named. The constitutional grant of bankruptcy and insolvency powers to Parliament was inevitably going to challenge Canadian federalism, being a carve-out from what would otherwise have been the provinces' core jurisdiction over property rights. Circumstances amplified the inherent tension: Parliament ceased regulating bankruptcy just after Confederation, leaving provinces to bridge the gap for decades, fostering a sense of entitlement. When Parliament attempted to assume authority from 1919 to 1936, provinces resisted. This resistance guaranteed that the histories of debt and federalism would become unavoidably intertwined.

The composition of this volume undoubtedly presented a formidable challenge, necessitating expertise across history, constitutional law, and insolvency law—disciplines that are not intuitively connected. Nevertheless, Telfer and Torrie exhibit impressive dexterity, seamlessly navigating these disciplines. Their work combines rigor with clarity to trace the evolving relationship between debt and federalism from Confederation to 1937, a period that saw the emergence of modern bankruptcy and insolvency law.

49 *Ibid* at 102–03, 136.

50 *Ibid* at 118–23.

51 *Ibid* at 135.

52 *Ibid* at 157–58.

In the book's latter half, a pivotal discussion questions whether the SCC and JCPC adequately addressed how the *CCAA* and the *FCAA*, respectively, "qualified the rights of property."[53] The point of the analysis appears to be that, if they had, they might have rendered both enactments "*ultra vires* of Parliament."[54] This argument unfolds in Chapters Three and Four,[55] before suggesting on the book's closing pages that had these enactments been found *ultra vires*, then modern bankruptcy and insolvency law would have "more closely" resembled "a nineteenth-century view" of section 91(21), reflecting "the mind's eye of the framers" of the *Constitution Act, 1867*.[56]

This claim may be the most contentious in the book. If "framers" refers to the Fathers of Confederation, who endowed the federal government with powers of reservation and disallowance to manage the division of powers in a "quasi-imperial"[57] manner, the "mind's eye" assumption is less convincing.[58] Conversely, if "framers" alludes to the members of the JCPC, who helped to amend Canadian constitutionalism into its federal form, their hypothesis holds greater promise.[59] Yet, some facts still rest uneasily: Lord Watson did not become the "pre-eminent Canadian specialist" on the JCPC until 1888, after sitting on his second case from Canada.[60] It was at this time that he started to pen the "text for symmetrical federalism."[61] Thus, when the *Voluntary Assignments Case* was released less than six years later, federalism was amidst Watson's radical reframing—one that was more "political" than judicial,[62] and more "cavalier" than orthodox.[63] Thus,

53 *Ibid* at 74.

54 *Ibid*.

55 *Ibid* at 74, 79–82, 93, 95–100, 102–03, 106, 108–15, 117–23, 134–37.

56 *Ibid* at 157–58.

57 KC Wheare, *Federal Government*, 4th ed (Oxford: Oxford University Press, 1963) at 19.

58 Frederick Vaughan, *The Canadian Federalist Experiment: From Defiant Monarchy to Reluctant Republic* (McGill-Queen's University Press, 2003) at 122–23.

59 *Ibid* at 125–31.

60 John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*, 2nd ed (Toronto: University of Toronto Press, 2004) at 117. See also *St Catharines Milling and Lumber Co v R*, [1888] UKPC 70 (JCPC).

61 Saywell, *supra* note 60 at 142. See also MT Stormonth-Darling, "Lord Watson" (1899) 11 Jurid Rev 272 at 279; Viscount Haldane, "The Work for the Empire of the Judicial Committee of the Privy Council" (1922) 1:2 Cambridge LJ 143 at 150; Lord Denning, *Borrowing from Scotland* (Glasgow: Jackson & Co, 1963) at 34; AC Cairns "The Judicial Committee and Its Critics" (1971) Can J Political Science 301 at 324–25; WR Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53:3 Can Bar Rev 597 at 607–08.

62 Vaughan, *supra* note 58 at 127.

63 Saywell, *supra* note 60 at 115.

the notion that a stable view of bankruptcy and insolvency law existed, as suggested, is difficult to imagine, considering the turmoil at the time.

Some might question the value of delving into a book focused on four landmark insolvency law cases, especially when the most recent one dates back 87 years. However, this skepticism is misplaced. *Debt and Federalism* stands as a work of considerable depth and nuance, proving itself an indispensable resource for grasping the intricacies of Canadian insolvency law. While current precedents may shape the present form of rules, these landmark cases illuminate the potential directions those rules can take. These cases open windows to important moments in rule formation, revealing the arguments and extralegal factors, like economic conditions or the predilections of the presiding judge, that may have tipped the scales in favour of one outcome over another. Understanding these elements, along with their temporal relevance, can prove invaluable in evaluating the factors that could facilitate or deter rule change.

That said, measuring the value of legal history, or history in general, should not be solely based on, nor confined to, units of utility. Attempting to see the past with clarity carries inherent value. It broadens one's imagination beyond present framings to ways of being that are very different than our own. The ability to be transported often comes down to the talent of the storyteller to steal the reader from the present. By this standard, Telfer and Torrie deserve praise; *Debt and Federalism* is a thought-provoking escape, which should appeal to anyone with an interest in Canadian history, legal or otherwise.