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A Historical Account of the Orderly Payment of Debts Act Reference: Limiting Provincial Efforts to Protect Insolvent Debtors

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A Historical Account of the *Orderly Payment of Debts Act* Reference: Limiting Provincial Efforts to Protect Insolvent Debtors

This paper analyzes the history of the Alberta Orderly Payment of Debts Act *and the constitutional controversy that followed. The legislation sought to protect debtors by imposing restrictions on creditors. In 1960, the Supreme Court of Canada in* Reference re Validity of Orderly Payment of Debts Act, 1959 (Alberta) *ruled that the legislation was ultra vires on the basis that it interfered with the federal bankruptcy and insolvency power. The* Orderly Payment of Debts Act *reference is the capstone in a trilogy of cases in which provincial legislation was invalidated for encroaching upon the federal bankruptcy and insolvency power. The reference case represents a high-water mark for the expansion of the federal bankruptcy power and a curtailment of provincial authority to assist insolvent debtors. The paper argues that the* OPDA *reference is a landmark case in that it continued a trend of limiting provincial efforts to assist insolvent debtors by giving a broad reading of the federal bankruptcy and insolvency power.*

Cet article analyse l'historique de la Alberta Orderly Payment of Debts Act *(Loi albertaine sur le paiement ordonné des dettes) et la controverse constitutionnelle qui s'en est suivie. Cette loi visait à protéger les débiteurs en imposant des restrictions aux créanciers. En 1960, la Cour suprême du Canada, dans l'affaire* Reference re Validity of Orderly Payment of Debts Act, 1959 (Alberta)*, a jugé que la loi était ultra vires au motif qu'elle interférait avec le pouvoir fédéral en matière de faillite et d'insolvabilité. La référence à* l'Orderly Payment of Debts Act *est la pierre angulaire d'une trilogie d'affaires dans lesquelles la législation provinciale a été invalidée pour avoir empiété sur le pouvoir fédéral en matière de faillite et d'insolvabilité. L'affaire représente un point culminant pour l'expansion du pouvoir fédéral en matière de faillite et une réduction de l'autorité provinciale pour aider les débiteurs insolvables. L'article soutient que l'arrêt* OPDA *est un arrêt de principe dans la mesure où il a poursuivi la tendance à limiter les efforts des provinces pour aider les débiteurs insolvables en donnant une interprétation large du pouvoir fédéral en matière de faillite et d'insolvabilité.*

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Introduction

Alberta has had a historic tradition of enacting legislation to protect financially troubled debtors.[1] Alberta has not been alone in this venture, with Manitoba[2] and Saskatchewan[3] also passing legislation to deal with

1. For a review of Alberta debt adjustment legislation, see Virginia Torrie & Thomas GW Telfer, "Bankruptcy and Insolvency as an Expanding Field: A Historical Analysis of *Reference Re Debt Adjustment Act, 1937 (Alta.)*" (2022) 59:4 Alta L Rev 807, online: <ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1325&context=lawpub> [perma.cc/5RBH-2FBF] [Torrie & Telfer, "Bankruptcy and Insolvency"].

2. See *The Orderly Payment of Debts Act*, SM 1932, c 34 [*OPDA* MB]; *The Debt Adjustment Act, 1932*, SM 1932, c 8. On Manitoba debt adjustment legislation, see J Ragnar Johnson, "Manitoba Debt Adjustment Act 1932, Reviewed" (1933) 3:4 B Bar 1 at 4; FR, "Recent Manitoba Legislation" (1931) 1 Fortnightly LJ 25 at 29.

3. For a review of Saskatchewan debt adjustment legislation and *The Moratorium Act, 1943*, SS 1943, c 18 [*Moratorium Act*], see Thomas GW Telfer & Virginia Torrie, "Debt Postponement, Debtor

debtors in financial difficulty. As Iain Ramsay writes, "[h]istorically, certain western provinces have acted as agents for debtors located in their provinces and have developed debt repayment alternatives."[4] However, Ramsay also notes that some provincial schemes to assist debtors have been struck down as unconstitutional, "since they were in pith and substance bankruptcy and insolvency legislation."[5] The focus of this paper is on Alberta's *Orderly Payment of Debts Act*[6] ("*OPDA*") and the constitutional case decided by the Supreme Court of Canada in 1960. In *Reference re Validity of Orderly Payment of Debts Act, 1959 (Alberta)*,[7] the Supreme Court of Canada ruled that the legislation was ultra vires on the basis that the *OPDA* interfered with the federal bankruptcy and insolvency power found in the *British North America Act, 1867*[8] ("*BNA Act"*). The legislation was designed to aid debtors by permitting them to seek a consolidation order for judgments of $1,000 or less. Once that order was granted, registered creditors could not enforce their individual claims, thereby sheltering the debtor from multiple proceedings.

The *OPDA* was not the first attempt by Alberta to assist debtors. In the 1920s and 1930s, Alberta enacted debt adjustment legislation which enabled a Debt Adjustment Board to compel creditors to accept settlements with debtors. When the Privy Council struck down that legislation in 1943[9] for encroaching upon the federal bankruptcy and insolvency power, Alberta responded by passing something more modest. *The Debtors' Assistance Act*[10] created a new Debtors' Assistance Board that was charged with working alongside debtors and creditors in an effort to arrange for the voluntary settlement of debts. But the powers of the Debtors' Assistance Board were weak and the Board was unable to cope with the rising number of applications in the 1950s. In 1959, Alberta responded by passing the *OPDA*, drawing upon legislation that Manitoba had enacted during the Great Depression. But there was some doubt as to the constitutionality of the *OPDA*, so the Alberta government referred the Act to the Alberta

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Protection, and Creditor Interests: The Role of the Saskatchewan *Moratorium Act* Reference Case in Reinforcing the Bankruptcy and Insolvency Power" (2023) 86 Sask L Rev 41-82, DOI: <10.2139/ssrn.4475043> [Telfer & Torrie, "Debt Postponement"].

4. Iain Ramsay, "Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada" (2003) 53:4 UTLJ 379 at 402, DOI: <10.2307/3650893>.

5. *Ibid*. See e.g. *Reference re The Debt Adjustment Act, 1937 (Alberta)*, [1943] 2 DLR 1, [1943] 1 WWR 378 (PC) [*DAA Reference* cited to DLR]; *Canadian Bankers' Association v Attorney-General of Saskatchewan*, [1956] SCR 31, [1955] 5 DLR 736 [*Moratorium Act Reference* cited to DLR].

6. SA 1959, c 61 [*OPDA*].

7. [1960] SCR 571, 23 DLR (2d) 449 [*OPDA Reference* SCC cited to DLR].

8. 30-31 Vict, c 3 (UK).

9. See *DAA Reference*, *supra* note 5.

10. SA 1943, c 7.

Supreme Court (Appellate Division) [Court of Appeal] to determine its constitutional validity. The Court of Appeal ruled that the legislation was ultra vires which the Supreme Court of Canada later affirmed.

This paper explores the historic reasons why Alberta passed the *OPDA* and analyzes the Alberta Court of Appeal reference, the factums presented before the Supreme Court of Canada, and the ultimate decision of the Court. The paper seeks to situate the *OPDA Reference* on a continuum of three cases. The *OPDA Reference* is the third in a trilogy of cases, all of which struck down provincial debtor legislation as ultra vires. As noted above, in 1943, the Privy Council held that the Alberta debt adjustment legislation was unconstitutional.[11] In 1956, the Supreme Court of Canada ruled that the Saskatchewan *Moratorium Act* was ultra vires.[12] Each of the two earlier cases have been explored by the authors in companion articles[13] and this article adds to the literature on federalism by considering the *OPDA Reference.*

The *OPDA Reference* is consistent with the two earlier rulings. Each case in the trilogy concluded that provincial debt legislation interfered with the federal bankruptcy and insolvency power. Indeed, the *OPDA* may represent a high-water mark for the expansion of the federal bankruptcy power and a curtailment of provincial ability to assist insolvent debtors. This article argues that the *OPDA Reference* case is a landmark ruling for two reasons. First, the case reaffirmed the broad interpretation of Parliament's bankruptcy power. Second, after the Supreme Court of Canada ruled that the *OPDA* was ultra vires, Parliament amended the Bankruptcy Act in 1966 to provide for an orderly payment regime in federal legislation for provinces that wished to participate.[14] While other impugned provincial statutes have been merely struck down as beyond provincial jurisdiction,[15] the result of *OPDA Reference* was that the provincial legislation was subsumed into federal law. This was significant for the field because it simultaneously limited what the provinces could do to address overindebtedness and augmented Parliament's bankruptcy and

11. See *DAA Reference*, *supra* note 5 at para 53.
12. See *Moratorium Act Reference*, *supra* note 5 at para 43.
13. See Torrie & Telfer, "Bankruptcy and Insolvency," *supra* note 1; Telfer & Torrie, "Debt Postponement," *supra* note 3.
14. See *An Act to amend the Bankruptcy Act*, SC 1966-67, c 32, s 22.
15. See *The Debt Adjustment Act, 1937*, SA 1937, c 9 [*DAA*]; *Moratorium Act*, *supra* note 3; *The Farm Security Act, 1944*, SS 1944(2), c 30. For an analysis of these three provincial statutes, see Torrie & Telfer, "Bankruptcy and Insolvency," *supra* note 1; Telfer & Torrie, "Debt Postponement," *supra* note 3; Virginia Torrie, "Interest, Insolvency and Prairie Farm Debt: An Historical Analysis of Reference as to the Validity of Section 6 of the Farm Security Act, 1944 (Saskatchewan)" (2022) 55:3 UBC L Rev 803, online: <commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1275&context=ubclaw review> [perma.cc/AE3L-43LQ] [Torrie, "Interest"].

insolvency power. Part X of the *Bankruptcy and Insolvency Act*[16] ("*BIA*") still operates today, but currently only Alberta has opted into the orderly payment regime.[17]

The paper is divided into nine parts. Part I provides an overview of the Alberta *OPDA* while Part II examines the Manitoba origins of orderly payment legislation. Part III considers the specific legislative history of the *OPDA* in Alberta and provides an explanation for why Alberta passed the statute in 1959. That same year the Alberta government referred the constitutionality of the legislation to the Alberta Court of Appeal and Part IV examines that decision. Part V considers the factums presented by the parties at the Supreme Court of Canada while Part VI analyzes the Court's decision. Part VII offers an assessment of the decision and Part VIII explains the addition of Part X to the *Bankruptcy Act*. Part IX of the paper concludes.

I. *Overview of the* OPDA

Alberta passed the *OPDA* in 1959 for the purpose of aiding debtors who could not meet their debt obligations as they matured.[18] As Jacob Ziegel writes, the legislation "was basically a statutory prorating plan which enabled the debtor to consolidate his debts and pay them in approved instalments over a period of time."[19] However, as discussed below, the scheme did impose restrictions on some creditors.

The Act only applied to judgments not exceeding $1,000.[20] The *OPDA* excluded secured creditors who were entitled to seize upon their security.[21] The legislation enabled a debtor to apply to the clerk of the District Court where they resided for a consolidation order of debts.[22] Creditors named in the consolidation order were known as "registered creditors."[23] The consolidation order was "a judgment of the court in favour of each creditor named in the register for the amount stated therein, and…is an order of

16. RSC 1985, c B-3 [*BIA*].
17. British Columbia, Alberta, Saskatchewan, Manitoba, Northwest Territories, Nova Scotia and Prince Edward Island all established an OPD program at one point in time but have since cancelled them. See LW Houlden, Geoffrey B Morawetz & Janis Pearl Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Carswell, 2009), s 11.2. It is likely that the $1000 limit caused provinces to withdraw from the program. Further the availability of the more modern consumer proposals has made Part X largely defunct.
18. See *OPDA Reference* SCC, *supra* note 7 at para 16.
19. Jacob S Ziegel, "The American Influence on the Development of Canadian Commercial Law" (1976) 26:4 Case W Res L Rev 861 at 885, online: <scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=3047&context=caselrev> [perma.cc/SSZ9-NW33] [Ziegel, "The American Influence"].
20. See *OPDA*, *supra* note 6, s 4.
21. See *ibid*, s 16.
22. See *ibid*, s 4; *OPDA Reference* SCC, *supra* note 7 at para 14.
23. *OPDA*, *supra* note 6, s 2(c).

the court for the payment by the debtor of the amounts stated therein and at the time stated therein."[24] Once a debtor applied to the District Court, they were granted protection under section 13, which prevented registered creditors from bringing court action against the debtor.[25] The effect of the order was to consolidate debts into one judgment, bearing a five percent interest rate, regardless of whether the contractual rate of interest was greater.[26] Based on the information provided in the debtor's affidavit, the clerk would fix an amount to be paid by the debtor at specified intervals for distribution to registered creditors.[27]

The Act was more than just a voluntary settlement between debtors and creditors. Section 3 stipulated that creditor claims of less than $1,000 could be compelled to register, and that creditor claims greater than $1,000 could consent to become a registered creditor, otherwise the Act would not apply to them.[28] However, as Ford CJA of the Alberta Court of Appeal stated, unregistered creditors with claims greater than $1,000 were often "coerced into consenting to become a registered creditor" in order to protect themselves and avoid the prejudice that would result if they refused to do so.[29]

Section 7 allowed any creditor to file an objection to the particulars entered into the register, including the amount owing to them or another creditor or the times of payment. If no objection was received within twenty days, the clerk would note this in the register and issue the consolidation order.[30] Where an objection was filed as to the amount owing, the clerk would settle the amount to be paid under any judgment, or if the proposed payment scheme was objected to, the clerk could summarily dispose of

24. *Ibid*, s 10(2); *Reference re Orderly Payment of Debts Act, 1959 (Alberta)*, (1959) 20 DLR (2d) 503 at para 24, 29 WWR 435 (ABCA) [*OPDA Reference* ABCA]. Upon filing an application, the debtor would include an affidavit which sets forth certain information about him, and if married, his wife. This information included: the names, addresses, and amounts owed to each creditors; a statement of his assets, income, and if married, his wife's income; his business or occupation and employer's address, and if married, that of his wife's; the names and particulars of dependents, if any; amount payable for board and lodging and for rent or as payment on home property as the case requires; whether creditors' claims are secured and, if so, particulars of those claims. See *ibid*, s 4(2); *OPDA Reference* SCC, *supra* note 7 at para 14.

25. See *OPDA Reference* SCC, *supra* note 7 at para 16. There are two exceptions: (1) if it is permitted by the Act; or (2) by leave of the court. See *OPDA*, *supra* note 6, s 13(a)-(b); *OPDA Reference* SCC, *supra* note 7 at para 15.

26. See *OPDA Reference* ABCA, *supra* note 24 at para 5.

27. See *OPDA*, *supra* note 6, s 5(1)(b); *OPDA Reference* SCC, *supra* note 7 at para 31.

28. See *OPDA Reference* SCC, *supra* note 7 at para 13. The Act also does not apply to various types of debt, such as a debt to the Crown, public revenue, and taxes. See *OPDA*, *supra* note 6, s 3(2)-(3); *OPDA Reference* SCC, *supra* note 7 at para 13.

29. See *OPDA Reference* ABCA, *supra* note 24 at para 9.

30. See *OPDA*, *supra* note 6, s 6; *OPDA Reference* SCC, *supra* note 7 at para 47.

the objection and decide upon the terms of the order.[31] The clerk could at any time force the debtor to assign money that was owed or to be owed or to be earned by the debtor, and could issue and file a writ of execution "in respect of a consolidation order."[32] Upon a notice of motion, section 11 empowered a judge of the District Court to review a consolidation order made by the clerk, and could vary or set it aside. Further, the judge could impose terms and give direction to the debtor with respect to his property or any disposition thereof for the protection of the registered creditors.[33] Should a debtor default on the consolidation order, section 17 provided protection for registered creditors by permitting them to bring an application to the court under various circumstances. There was no litigation under the Act because Alberta held off proclaiming the statute until a reference on its constitutional validity could be heard.[34]

In sum, the *OPDA* offered the debtor several advantages. The Act prohibited registered creditors from initiating any process against the debtor. Further, a consolidation order could reduce interest charges and the time period for the repayment of debts was extended.[35] But in practice, only insolvent debtors would be interested in sheltering under this legislation. This raised constitutional questions about whether the legislation interfered with the federal bankruptcy and insolvency power.

In order to consider why Alberta enacted the *OPDA* in 1959, one must examine the legislative history of the statute. The following section considers the origins of orderly payment legislation in Manitoba.

II. *The Manitoba origins of the OPDA*

*T*he Alberta statute can be traced back to Manitoba's *Orderly Payment of Debts Act*,[36] which was passed in 1932 in the midst of the Great Depression. Manitoba passed the legislation "to assist the honest debtor to pay his debts in an orderly manner without the pyramiding cost and general harassing which is always an adjunct of court action."[37] But as discussed below, a creditor challenged the constitutionality of the Manitoba legislation not long after it came into force.

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31. See *OPDA*, *supra* note 6, s 9; *OPDA Reference* SCC, *supra* note 7 at para 35.
32. *OPDA*, *supra* note 6, s 14; *OPDA Reference* SCC, *supra* note 7 at para 15.
33. See *OPDA*, *supra* note 6, s 12; *OPDA Reference* SCC, *supra* note 7 at para 15.
34. See *OPDA Reference* SCC, *supra* note 7 at para 23.
35. See Glenn Gallins, "The Operation of Part X of the Bankruptcy Act in British Columbia" (1971) 6:2 UBC L Rev 419 at 419.
36. See *OPDA* MB, *supra* note 2.
37. "Manitoba Debt Payment Scheme Urged for Saskatchewan," *The Leader Post* (13 December 1932) at 3.

The new Manitoba *Orderly Payment of Debts Act* attracted media attention, with the *Winnipeg Evening Tribune* featuring the legislation in its lead headline on 5 September 1932. A bold headline declared, "New Debts Act Curbs Loan Sharks in Winnipeg."[38] The article proclaimed that "loan sharks in Winnipeg are finding their business methods seriously hampered by enforcement of the Orderly Payment of Debts act… Seizures of furniture for non-payment of rent also have become more difficult."[39] Given the restrictions on creditors, it is not surprising that the manager of a collection agency claimed that the legislation "exh[i]bits some glaring defects."[40] A letter to the editor of the *Winnipeg Evening Tribune* claimed that the legislation was an unwarranted government interference in "ordinary transactions of business."[41]

It did not take long before a litigant challenged the constitutionality of the Manitoba legislation. On 2 September 1932, the *Winnipeg Evening Tribune* reported that a landlord had appealed an order of a county court judge which had set aside the landlord's seizure of the tenant's goods. The landlord's objection declared that the County Court had no authority to make the order and that the *Orderly Payment of Debts Act* was unconstitutional on the basis that the provincial legislation dealt with the subject matter of bankruptcy and insolvency law and was therefore ultra vires.[42] A letter to the editor of the *Winnipeg Evening Tribune* similarly argued that "the province could not abrogate to itself powers which it does not possess."[43]

Although the landlord and the Attorney General were prepared to argue on the constitutionality of the legislation before the Manitoba Court of Appeal, the Court postponed argument on the constitutional question until it could first rule on the proper interpretation of the legislation.[44] On 14 November 1932, the Manitoba Court of Appeal ruled that, on an

38. "New Debts Act Curbs Loan Sharks in Winnipeg," *The Winnipeg Evening Tribune* (5 September 1932) at 3.
39. *Ibid*.
40. FF Cottrill (Manager of the Mutual Adjustment Bureau), "The Present Position of the Honest Debtor," *Winnipeg Free Press* (17 September 1932) at 6. Adjustment Bureau is another name for a collection agency. See Adam Hayes, "Adjustment Bureau" (last modified 26 October 2021), online: *Investopedia* <www.investopedia.com/terms/a/adjustment-bureau.asp> [perma.cc/P6PW-GKXD].
41. FFC, Letter to the Editor, "Orderly Payment of Debts Act," *The Winnipeg Evening Tribune* (24 September 1932) at 8.
42. As discussed below, the Manitoba Court of Appeal did not rule on the constitutional question. Therefore, the appellant's arguments have been reconstructed from media reports. See "New Debt Act Challenged in Appeal Court," *The Winnipeg Evening Tribune* (2 September 1932) at 3; "Orderly Payment Act to be Tested October 6," *The Winnipeg Evening Tribune* (26 September 1932) at 15.
43. FFC, *supra* note 41 at 8.
44. See *Bermack v Blank*, [1933] 1 DLR 187 at paras 11, 25, [1932] 3 WWR 507 (MBCA) [*Bermack*].

interpretation of the *Orderly Payment of Debts Act*, the County Court judge had improperly interfered with the landlord's right of seizure and allowed the appeal of the landlord.[45] The *Winnipeg Free Press* reported on the case and its headline read "Landlord's Right to Distrain Held Still Effective."[46] Having ruled in favour of the landlord on the interpretation point, the Court of Appeal found it unnecessary to hear argument on the constitutional question and provided no comment on the validity of the legislation.[47] Thus, the Manitoba Court of Appeal "refused to express an opinion" "[o]n the larger question as to whether the entire act is ultra vires."[48] While the Manitoba Court of Appeal left the matter open, the case foreshadowed the constitutional uncertainty that would lay ahead once Alberta decided to pass its own orderly payment of debts legislation.

III. *Origins of the Alberta Orderly Payment of Debts Act*

The *OPDA* was not the first time that the Alberta legislature sought to assist debtors. Throughout the 1920s and 1930s, Alberta passed debt adjustment legislation.[49] The legislation created a Debt Adjustment Board, the members of which were appointed by the Lieutenant Governor in Council.[50] Unless the Board issued written permission, certain enumerated actions could not be commenced or continued against a debtor in the province. Further, the Board could compel creditors to accept settlements with debtors.

In 1939, the Alberta Court of Appeal summarized the purpose of debt adjustment legislation:

> These Acts were passed when debtors as a class throughout the country were in financial distress and broadly speaking these Acts gave to the

45. *Ibid* at paras 12, 24.
46. "Landlord's Right to Distrain Held Still Effective," *Winnipeg Free Press* (15 November 1932) at 4 ["Landlord's Right"].
47. See *Bermack*, *supra* note 44 at paras 11, 25.
48. "Landlord's Right," *supra* note 46 at 4. The constitutionality of the Manitoba legislation remained an open question until the Supreme Court ultimately ruled three decades later that the Alberta *Orderly Payment of Debts Act* was unconstitutional. Following the *OPDA Reference* SCC, a Manitoba County Court similarly declared that the Manitoba *Orderly Payment of Debts Act* was ultra vires "as an invasion of the exclusive Federal power in relation to bankruptcy and insolvency." See *Peterson Re* (1961), 30 DLR (2d) 372 at para 18, 35 WWR 584 (MB Co Ct). A search on Westlaw revealed only one additional reported case on the Manitoba *Orderly Payment of Debts Act.* See *Dominik v Stryk*, [1935] 4 DLR 269, [1935] 2 WWR 555 (MBCA) (but there is nothing in the judgment which addresses the overall policy or purpose of the statute).
49. For a comprehensive historical overview of the debt adjustment legislation and a review of the constitutional jurisprudence, see Torrie & Telfer, "Bankruptcy and Insolvency," *supra* note 1. See also JR Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954) at 91-122.
50. See *DAA*, *supra* note 15, as amended by SA 1937(3), c 2, SA 1938, c 27, SA 1938(2), c 5, SA 1939, c 81, SA 1941, c 42, s 3.

> Board power to prevent a creditor from using oppressively the machinery provided by law to enable a creditor to assert his rights against his debtor. The aim of all these Acts is to protect the debtor by curtailing the procedural rights of the creditor.[51]

In 1941, the constitutionality of Alberta's *Debt Adjustment Act* ("*DAA*") was referred to the Supreme Court of Canada. The Supreme Court of Canada concluded that the *DAA* was ultra vires the province as legislation on bankruptcy and insolvency, an area reserved exclusively for the federal government.[52] The decision was upheld by the Privy Council in 1943.[53]

The Privy Council found that the *DAA* as a whole constituted an invasion on Parliament's powers in relation to bankruptcy and insolvency and interfered with Parliament's legislation on that subject:

> On these grounds their Lordships have come to the conclusion, in agreement with the Supreme Court on the one hand, that the [*DAA*] as a whole constitutes a serious and substantial invasion of the exclusive legislative powers of the Parliament of Canada in relation to bankruptcy and insolvency, and on the other hand that it obstructs and interferes with the actual legislation of that Parliament on those matters.[54]

To fill the vacuum left by the Privy Council decision, Alberta passed the *Debtors' Assistance Act* in 1943.[55] The legislation created a Debtors' Assistance Board that was charged with working alongside debtors and creditors in an effort to arrange for voluntary settlements. There was a direct link between the 1943 Privy Council ruling on debt adjustment legislation and the new *Debtors' Assistance Act.* Alberta Premier Ernest Manning indicated that the "[Debtors' Assistance] board…is a carry-over from old provincial debt legislation enacted in the late 1930s and ruled ultra vires by the privy council in 1943."[56]

The Debtors' Assistance Board was to "advise and assist debtors in adjusting their debts and in working out satisfactory arrangements for

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51. *Mutual Life Assurance Co v Levitt*, [1939] 2 DLR 324 at para 14, 1 WWR 530 (ABCA).
52. See *Reference as to Validity of The Debt Adjustment Act, Alberta*, [1942] SCR 31, [1942] 1 DLR 1.
53. See *DAA Reference*, *supra* note 5.
54. *Ibid*. For a detailed discussion of Alberta's debt adjustment legislation, see Torrie & Telfer, "Bankruptcy and Insolvency," *supra* note 1.
55. See *Debtors' Assistance Act*, *supra* note 10. Saskatchewan also had debt adjustment legislation and in the wake of the Privy Council's decision it enacted *The Provincial Mediation Board Act, 1943*, SS 1943, c 15 and the *Moratorium Act, supra* note 3. See Telfer & Torrie, "Debt Postponement" *supra* note 3.
56. "Small Debts Legislation Hits Opposition Fire," *The Calgary Herald* (1 April 1959) at 24 ["Small Debts Legislation"].

the settlement of their debts with their creditors."[57] The Board could "aid debtors in obtaining postponements, adjustments or extensions of time for the payment of their debts in proper cases."[58] However, there were no powers of the Board that could compulsorily bind creditors to any settlements. The Board's powers were weak, with Premier Manning stating, "[t]he board has few powers and can't cope with [anything] other than a voluntary settlement."[59]

On 7 April 1959, Alberta passed the *Orderly Payment of Debts Act.*[60] The *OPDA* was similar to the Manitoba legislation[61] and Alberta Premier Manning indicated that the Alberta enactment was "patterned" after Manitoba legislation.[62] When a committee of the Legislative Assembly considered the Bill, Premier Manning explained that "[t]he [*OPDA*] was born…after the debtor's assistance board began receiving increased applications in recent years."[63] Thus the *OPDA* must be seen as a direct result of the ineffectiveness of the *Debtors' Assistance Act* and the Board's inability to deal with rising applications under that Act. John Honsberger notes that at the time of the passing of the OPDA, consumer bankruptcies were rising.[64] Thus, Alberta may have been acting to provide debtors with a realistic way to avoid bankruptcy. Unlike the *Debtors' Assistance Act*, the *OPDA* could compulsorily bind certain creditors to a distribution scheme. At the outset, opposition parties asked whether the legislation was constitutional.

During the committe review of the Bill, the *Calgary Herald* reported on 1 April 1959, that the proposal "ran into a quietly effective opposition buzz-saw."[65] The *Edmonton Journal* wrote that there were so many

57. *Debtors' Assistance Act*, *supra* note 10, s 5(a).
58. *Ibid*, s 5(d). For a modern version of this statute, see *Debtors' Assistance Act,* RSA 2000, c D-6.
59. "Small Debts Legislation," *supra* note 56.
60. See *OPDA*, *supra* note 6. See also *OPDA Reference* ABCA, *supra* note 24 at para 12. The new *OPDA* was featured in the government's speech from the throne in February 1959. See "Text of Speech from Throne," *The Edmonton Journal* (6 February 1959) at 24.
61. See *An Act to Amend the Bankruptcy Act*, (1966) 8 CBR (NS) 209 at para 62; John D Honsberger, "Philosophy and Design of Modern Fresh Start Policies: The Evolution of Canada's Legislative Policy" (1999) 37:1-2 Osgoode Hall LJ 171 at 183, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1534&context=ohlj> [perma.cc/V7P2-88JF].
62. See "Fine-Toothed Comb Applied to Debt Consolidation Bill," *The Edmonton Journal* (1 April 1959) at 9 ["Fine-Toothed Comb"]. Jacob Ziegel writes that Alberta "copied" the Manitoba legislation. See Jacob S Ziegel, "The Philosophy and Design of Contemporary Consumer Bankruptcy Systems: A Canada-United States Comparison" (1999) 37:1-2 Osgoode Hall LJ 205 at 250, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1536&context=ohlj> [perma.cc/YNK4-6LFX] [Ziegel, "Philosophy and Design"].
63. "Small Debts Legislation," *supra* note 56. At the time of the passing of the *OPDA* there were rising numbers of consumer bankruptcies. See Honsberger, *supra* note 61 at 183.
64. See Honsberger, *supra* note 61 at 183.
65. "Small Debts Legislation," *supra* note 56.

opposition questions that "Premier Manning must have felt like a quiz contestant."[66] Even at the committee stage there were doubts about the validity of the legislation. One opposition member expressed concern that court clerks would be placed in the position of judges as a consolidation order issued by a clerk was considered a judgment under the legislation. The MLA stated, "[t]here's a fair amount of legal authority to show that you can't do this sort of thing at all."[67] The MLA "wondered if it wasn't outside of provincial competence to have a court clerk functioning as a judge."[68] Further, the MLA concluded that "it's doubtful if the province has the jurisdiction to do this."[69] Premier Manning defended the statute's constitutionality. As the Alberta *OPDA* had been based upon the Manitoba regime, Premier Manning indicated that "no one [in Manitoba] has suggested it was ultra vires," and concluded by saying that "senior lawyers in the attorney-general's department agreed it was within the province's authority."[70]

Premier Manning's confidence in the validity of the *OPDA* soon waned. The *Calgary Herald* noted that the validity of the Bill "was questioned by some lawyer members of the opposition."[71] In a reversal of policy, Premier Manning finally admitted that "law officers of the crown were in some doubt" about the validity of the legislation.[72] To resolve the doubt, two weeks after passing the legislation, the government decided to refer the constitutionality of the *OPDA* to the Alberta Court of Appeal. On 21 April 1959, Premier Manning's cabinet passed an Order in Council under the provisions of *The Constitutional Questions Act*,[73] "referring to the appellate division of the Supreme Court of Alberta for hearing or consideration the following question: Is *The Orderly Payment of Debts Act*, being Chapter 61 of the Statutes of Alberta, 1959, *intra vires* the legislature of Alberta, either in whole or in part, and if so, in what part or parts, and to what extent?"[74]

IV. *Alberta Court of Appeal decision*

Whether the legislation was valid had serious implications for creditors. If the legislation were to be upheld, other provinces might enact similar

66. "Fine-Toothed Comb," *supra* note 62.
67. "Small Debts Legislation," *supra* note 56.
68. *Ibid*.
69. "Fine-Toothed Comb," *supra* note 62.
70. "Small Debts Legislation," *supra* note 56.
71. "Debt Bill Validity Faces Test," *The Calgary Herald* (24 April 1959) at 6.
72. *Ibid*. See also "Debt Bill Being Tested in High Court," *The Calgary Herald* (4 June 1959) at 54.
73. RSA 1955, c 55.
74. *OPDA Reference* ABCA, *supra* note 24 at para 13.

legislation thus restricting collection activities. The decision on the constitutionality of the legislation involved both national and Alberta interest groups. The Alberta Court of Appeal directed that argument would be held on 1 June 1959, and that a copy of the Order in Council containing the reference question be served upon the following parties:

(1) Canadian Bankers Association;
(2) Credit Granter's Association of Edmonton;
(3) Retail Merchants Association of Canada (Alberta) Inc;
(4) Canadian Credit Men's Trust Association Ltd;
(5) Canadian Consumer Loan Association (Canada);
(6) Attorney-General of Canada.[75]

The Attorney-General of Canada did not appear to oppose the legislation.[76] The burden of establishing that the legislation was ultra vires fell to creditors that opposed the Act. Rather than allowing the creditor interest groups to have separate representation in the reference, the Alberta Court of Appeal appointed George Hobson Steer as counsel "to argue the case on behalf of creditors or other persons who might be opposed to the provisions of the Act."[77] Steer was an experienced appellate lawyer who had appeared in many cases before the Supreme Court of Canada and the Judicial Committee of the Privy Council.[78] Steer would ultimately represent the creditors in the *OPDA* appeal before the Supreme Court of Canada and prepared a factum on their behalf. This case marked the first time that Steer was able to challenge the constitutionality of provincial debt legislation. As early as 1933, Steer believed that Alberta's *DAA* was ultra vires and "on more than one occasion hoped to test" the validity of the Act in court but he never had the chance.[79] No doubt he would have been pleased with the Privy Council ruling that the *DAA* was ultra vires. The enactment of the *OPDA* presented an ideal opportunity for Steer to test out his ideas on the validity of provincial debt legislation. Before the Alberta Court of Appeal, Steer claimed that the *OPDA* was ultra vires

75. *OPDA Reference* SCC, *supra* note 7 at paras 2-8.
76. See *OPDA Reference* ABCA, *supra* note 24 at para 2.
77. *OPDA Reference* SCC, *supra* note 7 at para 9.
78. See e.g. *Reference re Bill of Rights Act (Alberta),* [1947] 4 DLR 1, [1947] 2 WWR 401 (PC); *In Re Bowater's Newfoundland Pulp & Paper Mills Ltd*, [1950] SCR 608, [1950] 4 DLR 65. Steer's career is profiled in a lengthy law review article published in 1982. See WF Bowker, "Fifty-Five Years at the Alberta Bar: George Hobson Steer, Q.C." (1982) 20:2 Alta L Rev 242, DOI: <10.29173/alr1813>.
79. See Bowker, *supra* note 78 at 263.

as it encroached upon several federal heads of power: banking, bills of exchange, interest, and bankruptcy and insolvency.[80]

While Steer presented arguments against the validity of the Act, the Attorney General of Alberta and JB Feehan, representing three credit associations, argued that the legislation was valid. The Attorney General of Alberta stated that the *OPDA* was within the competence of the provincial legislature, claiming that the province had the jurisdiction to enact the legislation pursuant to sections 92(13) (property and civil rights), 92(14) (administration of justice in the province), and 92(16) (matters of a local nature in the province) of the *BNA Act*. In addition, the Attorney-General also argued that the *OPDA* was not in conflict with the federal bankruptcy and insolvency power under section 91(21) of the *BNA Act.*[81]

The Alberta Court of Appeal unanimously agreed that the *OPDA* was ultra vires. Ford CJA and Macdonald JA wrote separate decisions.[82]

1. *Ford CJA*

Ford CJA agreed with Macdonald JA that the Act was in pith and substance related to insolvency and was therefore ultra vires. Ford CJA believed there was too much similarity between the *OPDA* and the *DAA*, which had been struck down as being ultra vires by the Privy Council in 1943.[83] While Ford CJA acknowledged that in this case there was no board with the power to make an arrangement or composition of debt, he found that the *OPDA* was "strikingly similar" to the *DAA*. He found that the *OPDA w*as obviously intended to benefit debtors who were unable to pay their debts as they matured and that it replaced creditor rights under the Act.[84]

In his view, the *OPDA* contained the same element of compulsion as in the *DAA*, where, upon application by a debtor, the creditor would be compelled to accept the amount and rate of payment as decided by the clerk of the court. Any creditor whose claim is $1,000 or less "may be compelled under the statute to be registered."[85] The ability for creditors to enforce "their separate rights to obtain a judgment according to the contract…are gone," and the creditors' rights to recover were limited to a "proportionate share of whatever the clerk or court decides shall be paid at different times

80. See *OPDA Reference* ABCA, *supra* note 24 at para 34. Steer also argued that the *OPDA* gave to the Clerk of the Court the powers of a judge contrary to the provisions of section 96 of the *British North America Act, 1867* (*ibid*).

81. See *ibid* at paras 32-33.

82. Porter JA concurred with the decisions of Ford CJA and Macdonald JA. Johnson JA concurred with the decision of Macdonald JA.

83. See *DAA Reference*, *supra* note 5 at para 53.

84. See *OPDA Reference* ABCA, *supra* note 24 at para 6.

85. *Ibid* at para 5.

on the total judgment as appears in the consolidation order."[86] Ford CJA concluded that "[i]t is clear that the element of compulsion exists here in some respects similar to that under *The Debt Adjustment Act*."[87]

Ford CJA found that the statute contained the essential elements of insolvency legislation.[88] For Ford CJA, this view was strengthened by the fact that a debtor would typically show to the clerk and the creditors that the debtor was unable to pay debts as they matured, which fell squarely within the definition of an act of bankruptcy.[89] He found further support for this point in the fact that the property of the debtor would be managed by the court for the benefit of the registered creditors and the property would be divided among the registered creditors if the debtor eventually failed. In addition, Ford CJA found there was an element of compulsion even on unregistered creditors.[90] While creditors with claims over $1,000 did not have to register under the *OPDA*, Ford CJA concluded that any unregistered creditors would be prejudiced unless they too became registered creditors. While an unregistered creditor could pursue its claim, Ford CJA wondered how successful pursuit of that claim would be when "the property of the debtor has been taken over by the court and divided among the registered creditors."[91] Unregistered creditors "would be coerced into consenting to become a registered creditor."[92] Ford CJA reasoned that the *OPDA "*infringes upon the *Bankruptcy Act* of the dominion."[93] Thus, Ford CJA found the statute to be in relation to bankruptcy and insolvency and ultra vires in whole.[94]

2. *Macdonald JA*

Macdonald JA found that the Act was designed to aid people who could not meet their obligations as they came due. The Act forced creditors to abide by the terms of the Act and creditors would be coerced to accept whatever terms the clerk of the court decided was within the financial means of the debtor.[95] He found that the purpose of the legislation was to assist insolvent persons[96] and that the "Act is [therefore] *ultra vires* on the ground that in 'pith and substance' it relates to insolvency, a field

86. *Ibid* at para 6.
87. *Ibid* at para 7.
88. See *ibid* at para 8.
89. See *Bankruptcy Act*, RSC 1952, c 14, s 20.
90. See *OPDA Reference* ABCA, *supra* note 24 at para 9.
91. *Ibid*.
92. *Ibid*.
93. *Ibid*.
94. See *ibid* at para 10.
95. See *ibid* at para 40.
96. See *ibid* at para 42.

that belongs exclusively to the dominion under sec. 91 of the *B.N.A. Act, 1867*."[97] The Alberta Court of Appeal sent a clear message. Provinces were not entitled to enact legislation that was designed to assist insolvent debtors.

Alberta appealed the decision to the Supreme Court of Canada. Notice of the appeal was served upon the Attorney General of Canada and all the Attorney Generals for each of the provinces. The Attorney General of Canada did not appear. The Provinces of Ontario and Saskatchewan supported Alberta's appeal claiming that the *OPDA* was within the legislative competence of the Province of Alberta. The only other party to appear was George Steer, who argued the case on behalf of creditors or other persons who might be opposed to the provisions of the *OPDA*.[98] Only Alberta, Saskatchewan, and Steer submitted factums to the Supreme Court of Canada. The following section reviews the constitutional arguments found in these three factums.

V. *Supreme Court of Canada factums*

1. *Alberta*

Alberta submitted that the pith and substance of the Act came within section 92 of the *BNA Act* under the subheadings of (13) property and civil rights, (14) the administration of justice, and (16) local matters. In addition, the province submitted that the Act did not fall within and did not conflict with any federal legislation concerning section 91(21) bankruptcy and insolvency.[99]

Alberta noted that the right to bring an action and enforce a debt was a civil right within the province. Therefore, the manner and time to bring such actions came within provincial jurisdiction. It argued that the purpose of the Act did nothing more than to postpone the period of time over which debts were payable. The Act only enabled the court to direct the payment of debts in an orderly manner. Thus, the "true intent and purpose" of the Act was in relation to provincial powers over property and civil rights and the administration of justice within the province. It argued that provincial legislation had been upheld on similar grounds.[100]

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97. *Ibid* at para 44.
98. See *OPDA Reference* SCC, *supra* note 7 at para 10.
99. See *OPDA Reference* SCC, *supra* note 7 (Factum of the Attorney General of Alberta at 3-4) [AB Factum]. Alberta also argued that the legislation did not interfere with the federal powers of bills of exchange, banking and interest (*ibid* at 3).
100. See *ibid* at 4, citing *Regina v Bush* (1888), 15 OR 398 at 403, [1888] OJ No 211 (QB); *Micas v Moose Jaw*, [1929] 3 DLR 725 [1929] 1 WWR 725 (SKCA); *Maley v Cadwell*, [1934] 1 WWR 51 at 56, [1933] SJ No 69 (SKCA); *Beiswanger v Swift Current*, [1930] 3 WWR 519 at 519, [1931] 1 DLR 407 (SKCA); *Roy v Plourde*, [1943] SCR 262, [1943] 3 DLR 81; *Montreal Trust Co v Abitibi Power*

In response to the Court of Appeal decision, Alberta stated that the Act could not be dealing with bankruptcy or insolvency because:

1. There is no reduction in the amount of the debts.
2. There is no taking over of the assets or estate of the debtor.
3. There is no composition or arrangement as between the creditor and debtor.
4. The debtor cannot be discharged from his obligations except by payment in full of his debts.
5. The Act is not directed or intended to apply only to insolvent debtors.[101]

Alberta emphasized this last point since the Court of Appeal had concluded that the legislation had been designed to assist insolvent debtors. To respond to the concern that only insolvent debtors would utilize the Act, Alberta submitted that the legislation could not be bankruptcy legislation because the financial situation of the debtor was not important for the application of the Act: "Any debtor may apply under the Act regardless of his financial position and the fact that he may be in a harassed financial position is not important."[102] It argued that the Act was not directed towards insolvent debtors. There was nothing in the legislation to suggest that debtors applying under the Act would be insolvent. Alberta even went so far as to say that a majority of debtors relying on the legislation could meet their obligations as they became due. Even if it could be said that some debtors who applied under the legislation were insolvent, "this would not make the legislation bad if in fact they had not been declared to be bankrupts."[103]

Alberta also argued that the Act did not amount to bankruptcy legislation, as that area normally deals with rateable distribution of assets. The provincial legislation merely dealt with actions in court and the manner in which a judgment may be imposed was a provincial matter. It also submitted that the Act did not conflict in any way with existing federal legislation.[104]

In response to the position of the Court of Appeal that the Act contained a similar element of compulsion as the *DAA*, the province argued that the *OPDA* did not take away any right of action and that the clerk could

& Paper Co, [1943] 4 DLR 1, [1943] 3 WWR 33 (PC) [*Abitibi Power*]; *Ladore v Bennett*, [1939] 3 DLR 1, [1939] 2 WWR 566 (PC) [*Ladore*]; *Day v Victoria (City)*, [1938] 4 DLR 345, [1938] 3 WWR 161 (BCCA).

101. AB Factum, *supra* note 99 at 5.
102. *Ibid*.
103. *Ibid* at 6.
104. See *ibid* at 7.

not force a settlement.[105] In contrast to the *DAA*, Alberta claimed that the *OPDA* would not prevent a creditor from presenting a bankruptcy petition: "There is no coercion on creditors to oblige them to reduce or settle their debt."[106]

2. *Saskatchewan*

Saskatchewan adopted similar arguments to Alberta and claimed that the Alberta Court of Appeal had erred in holding that the *OPDA* was ultra vires on the ground that the pith and substance of the legislation related to insolvency. Saskatchewan characterized the purpose of the Act as simply to provide debtors with "an orderly method or system of paying their debts."[107] There was no provision that dealt with bankruptcy or insolvency law. It argued that the *OPDA* did not actually cancel any debts, so it did not constitute debtor relief.[108] Saskatchewan also argued that the *OPDA* did not contain a provision for either voluntary assignment or composition which are hallmarks of bankruptcy and insolvency law.[109]

Saskatchewan submitted that the *OPDA*, unlike the *DAA*, was not for the general protection of debtors and did not coercively administer the affairs of applicant debtors. In response to the Alberta Court of Appeal decision, Saskatchewan stated that registered creditors were not coerced at all because they could, on application to the court, still take other proceedings for recovery and secured creditors could at any time repossess the security. The Attorney General of Saskatchewan claimed that the *OPDA* could not be bankruptcy and insolvency legislation because it did not relieve anyone from an enforceable liability to pay debts and did not reduce debts. Further, the *OPDA* was not in relation to bankruptcy and insolvency law as there was no provision providing for the compulsory distribution of assets.[110]

Like Alberta, Saskatchewan also claimed that the *OPDA* was not limited to insolvent debtors and any debtor could make an application under the Act: "The fact that he may be in a difficult financial position does not in itself render him an insolvent."[111] The *OPDA* was not ultra vires simply because some insolvent debtors may use the legislation.[112]

105. See *ibid* at 8.
106. *Ibid* at 10. Finally, Alberta submitted that the act would not grant judicial powers to the Clerk of the Court, and even if it did that would not cause the Clerk to be considered a judge under section 96 of the *British North America Act, 1867* (*ibid* at 10-11).
107. *OPDA Reference* SCC, *supra* note 7 (Factum of the Attorney General of Saskatchewan at 4).
108. See *ibid* at 4-5.
109. See *ibid* at 6.
110. See *ibid* at 9.
111. *Ibid*.
112. See *ibid* at 10.

The arguments of Alberta and Saskatchewan on this point were tenuous at best given that, in practice, insolvent debtors would seek relief under the legislation. Otherwise, why did Alberta pass the legislation if not to protect debtors in difficult financial circumstances? The Supreme Court of Canada would ultimately reject the provincial position on this point.

3. *Creditors and others opposed*

The Attorney General of Canada did not appear before the Supreme Court of Canada to oppose the *OPDA*. The burden of challenging the validity of the legislation fell to George Steer who represented creditors and others opposed to the constitutionality of the Act (the "creditors"). Steer had been appointed by the Alberta Court of Appeal to represent the creditors' interests in the reference case and continued in this role before the Supreme Court of Canada. Steer's main argument, that the legislation was in relation to bankruptcy and insolvency law, ultimately carried the day before the Supreme Court of Canada.[113]

The creditors' principal argument responded to the claim made by Saskatchewan and Alberta that the *OPDA* was not limited to insolvent debtors or debtors in financial difficulty. The creditors argued that in reality the legislation was directed at debtors in financial difficulty and was thus ultra vires in relation to bankruptcy and insolvency. Although the creditors noted that the Act made no mention of insolvency and that insolvency was not a precondition of applying under the Act, the creditors argued that this was not conclusive of the true effect of the Act. The creditors argued that "the nature and circumstances of the persons who will resort to it must be considered."[114] The creditors pointed to section 4(2) of the Act, which sets out the nature of the affidavit containing information of the debtor's financial circumstances and suggested that the primary concern would be whether the debtor could meet their obligations. The creditors submitted that a consolidation order would only be made in cases where a debtor was unable to meet liabilities as they came due, meaning the main purpose of the Act was to apply in situations where a debtor is insolvent.[115] The creditors also pointed to the power that the Act granted to the court and the clerk to take control over a debtors assets and argued that these were essentially the same as powers found in the *Bankruptcy Act*[116] and

113. One of the creditors' preliminary arguments was that legislation did not exclude claims based on federally regulated matters. Thus, the *OPDA* could preclude a federally regulated chartered bank from collecting a debt. Banking was a federal matter which a province could not impair. See *OPDA Reference* SCC, *supra* note 7 (Factum of Creditors and Others Opposed at 7-8) [Creditor Factum].
114. *Ibid* at 9.
115. See *ibid* at 8-9.
116. See *Bankruptcy Act*, *supra* note 89.

the *Farmers' Creditors Arrangement Act.*[117] The creditors stated that it "seem[ed] to be obvious…[that] the Act is to be employed by persons who are in insolvent circumstances," and therefore, they submitted that the Act could not be taken to deal with anything but insolvency and must be ultra vires.[118]

VI. *Supreme Court of Canada decision*

On May 16, 1960, the Supreme Court of Canada unanimously held that the *OPDA* was ultra vires. On the same day, the Assistant Deputy Attorney General of Alberta confirmed that due to the ultra vires ruling of the Supreme Court of Canada, the *OPDA* would not be proclaimed into force.[119] Both the *Calgary Herald* and the *Edmonton Journal* featured the Supreme Court of Canada decision on the front page of their papers.[120]

The judgment must be viewed as a third in a trilogy of cases in which an appellate court struck down provincial legislation as an interference with the federal bankruptcy and insolvency power. Alberta's *DAA*[121] and Saskatchewan's *Moratorium Act*[122] faced a similar fate. The *OPDA Reference* is consistent with the two earlier decisions. It repudiated a provincial attempt to protect debtors and reinforced a strong federal bankruptcy and insolvency power.

The Supreme Court of Canada delivered three judgments. Kerwin CJ wrote the majority decision, and Locke J and Cartwright J wrote concurring judgments.[123] The outcome of the decision was a continuation of an expanding federal and bankruptcy and insolvency power and a further rejection of provincial attempts to protect debtors from creditors. The decision did not contain any broad sweeping statements on bankruptcy policy or federalism. Justice Rand, who wrote an often cited concurring decision on the Saskatchewan *Moratorium Act* in the *Canadian Bankers'*

117. RSC 1952, c 111.

118. See Creditor Factum, *supra* note 113 at 10. The creditors also argued that the *OPDA* substantially altered rights of parties who acquired rights under the federal heads of power of banking, bills of exchange and interest (*ibid*). Finally, the creditors submitted that the act conferred on the Clerk judicial powers of a judge, such as the power to render judgment. They argued that this was in contravention of Section 96 of the *British North America Act, 1867* (*ibid* at 15).

119. See "New Debts Act Ruled Invalid by High Court," *The Edmonton Journal* (16 May 1960) at 1 ["New Debts Act"].

120. See "Debt Act Ruled Invalid," *The Calgary Herald* (16 May 1960) at 1; "New Debts Act," *supra* note 119.

121. See *DAA Reference*, *supra* note 5.

122. See *Moratorium Act Reference*, *supra* note 5.

123. Taschereau, Fauteux, Abbott, Judson, and Ritchie JJ concurred with Kerwin CJ; Martland J concurred with Locke J; Martland J also concurred with Cartwright J.

Association v Attorney-General of Saskatchewan,[124] had retired from the court a year earlier.[125]

1. *Kerwin CJ*

Kerwin CJ agreed with the Court of Appeal that the *OPDA* was ultra vires as its pith and substance was in relation to bankruptcy and insolvency.[126] Kerwin CJ rejected the contention of Alberta and Saskatchewan that the *OPDA* was not intended to apply to insolvent debtors. Kerwin CJ relied upon the broad definition of insolvency set out in the Privy Council decision on the validity of the *Farmers' Creditor Arrangement Act*:

> 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.[127]

After reviewing the provisions of the *OPDA*, Kerwin CJ stated: "I can read these provisions in no other way than showing that they refer to a debtor who is unable to pay his debts as they mature."[128] Kerwin CJ concluded that the provisions of the *OPDA* were consistent with the need to protect insolvent debtors. According to Kerwin CJ, it would only make sense that the Act applied to insolvent debtors as the court was given the authority to impose terms with respect to custody and disposition of a debtor's property to protect registered creditors. Further, the central provision that protected debtors, that no action could be issued by registered creditors, would only serve to benefit insolvent debtors. Finally, Kerwin CJ noted that the section that required the debtor to make an assignment of moneys owing "is surely consonant only with the position of an insolvent debtor."[129] Kerwin CJ concluded this point by observing that a debtor under the *OPDA* who ceased to meet liabilities as they generally came

124. See *Moratorium Act Reference*, *supra* note 5.
125. Rand J retired on April 27, 1959. See "The Honourable Ivan Cleveland Rand" (last modified 4 September 2008), online: *Supreme Court of Canada* <www.scc-csc.ca/judges-juges/bio-eng.aspx?id=ivan-cleveland-rand> [perma.cc/J3Q3-LCVR].
126. See *OPDA Reference* SCC, *supra* note 7 at para 12.
127. *Attorney General for British Columbia v Attorney General for Canada et al*, [1937] 1 DLR 695 at para 9, [1937] 1 WWR 320 (PC) [*FCAA Reference* JCPC].
128. *OPDA Reference* SCC, *supra* note 7 at para 16.
129. *Ibid*.

due would have committed an act of bankruptcy under the *Bankruptcy Act*, making the debtor vulnerable to an involuntary bankruptcy petition. As one author noted in the McGill Law Journal, Kerwin CJ's concept of insolvency was very broad such that "few Provincial Debt Adjustment Acts would be declared *intra vires* by the use of such a definition."[130]

2. *Locke J*

Locke J also dismissed the appeal finding that the *OPDA* was ultra vires. Locke J first traced the ordinary meaning of the words "bankruptcy" and "insolvency." Since at least 1835, insolvency has generally referred to the inability to meet one's obligations as they come due.[131] Locke J found that, although the Act does not require a debtor to be insolvent, it should be construed as such, since it would be impossible to accept that the Act was intended to be used by debtors who were able to pay but did not feel inclined to do so. Locke J concluded:

> While the Act does not require that the debtor who applies must be insolvent in the sense that he is unable to pay his debts as they become due, it must, in my opinion, be so construed since it is quite impossible to believe that it was intended that the provisions of the Act might be resorted to by persons who were able to pay their way but do not feel inclined to do so. In my opinion, this is a clear invasion of the legislative field of insolvency and is, accordingly, beyond the powers of the legislature.[132]

Looking at the matters that might be included within bankruptcy and insolvency, he found that compositions and schemes or arrangements have long been treated as being within the scope of bankruptcy and insolvency.[133] Locke J stated that the *OPDA* was "an attempt to substitute for the provisions of *Bankruptcy Act* and the *Farmers' Creditors Arrangement Act* relating to proposals for an extension of time or a scheme of arrangement."[134] Locke J therefore concluded that the *OPDA* conflicted with those two federal statutes.

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130. Arnold H Isaacson, "Reference Re Validity of the Orderly Payment of Debts Act, 1959 (Alta.), C. 61" (1962) 8:3 McGill LJ 220 at 222, online: <lawjournal.mcgill.ca/wp-content/uploads/pdf/7088584-isaacson.pdf.> [perma.cc/7C2X-VK5P].

131. See *OPDA Reference* SCC, *supra* note 7 at paras 25-26, citing *Parker v Gossage* (1835), 5 LJ Ex 4; *Regina v Saddlers Company* (1863), 10 HLC 404 at 425; *FCAA Reference* JCPC, *supra* note 127 at para 9.

132. *OPDA Reference* SCC, *supra* note 7 at para 50.

133. See *ibid* at para 54.

134. *Ibid* at para 55. Locke J relied upon *FCAA Reference* JCPC, *supra* note 127 and *Reference re Constitutional Creditor Arrangement Act (Canada)*, [1934] SCR 659, [1934] 4 DLR 75 [*CCAA Reference*].

3. *Cartwright J*

Cartwright J agreed with the conclusion of Locke J stating, "that in its true nature and character the Orderly Payment of Debts Act is legislation in relation to matters coming within the class of subjects specified in head 21 of s. 91 of the British North America Act, and is wholly ultra vires of the Legislature of the Province of Alberta."[135]

4. Supreme Court of Canada's Discussion of Earlier Authorities that had Upheld Provincial Legislation

All three sets of reasons included an extensive discussion of earlier authorities that had upheld provincial legislation. All three justices sought to distinguish the 1894 Privy Council decision of the *Voluntary Assignments Case*.[136] In that case, Lord Herschell had upheld section 9 of the *Ontario Assignments and Preferences Act* as valid provincial legislation given that there was no federal and bankruptcy law that existed at the time. Lord Herschell was of the view that the Ontario legislation did not interfere with the federal bankruptcy and insolvency power. According to Locke J, the fact that there was existing bankruptcy legislation was "fatal" to the argument that the *Voluntary Assignments Case* meant that the *OPDA* was valid.[137] Kerwin CJ further concluded that "in my view it is doubtful whether in view of later pronouncements of the Judicial Committee [the *Voluntary Assignments Case*] would at this date be decided in the same sense, even in the absence of Dominion legislation upon the subject of bankruptcy and insolvency."[138]

In an attempt to distinguish the result in the *Voluntary Assignments Case*—that the provincial law was intra vires—the Supreme Court of Canada failed to acknowledge Lord Herschell's important dictum in that case. While Lord Herschell had ruled that the Ontario legislation was valid, he included an important statement on the breadth of the federal bankruptcy and insolvency power.

In the penultimate paragraph of his opinion, Lord Herschell identified the scope of the federal bankruptcy power in very broad terms:

> [A] system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act

135. *OPDA Reference* SCC, *supra* note 7 at para 64. Cartwright J also took the opportunity to review the cases which had upheld provincial legislation. These are discussed in the next section.

136. See *Attorney General of Ontario v Attorney General for the Dominion of Canada,* [1894] JCJ No 1, [1894] AC 189 (PC) [*Voluntary Assignments Case* cited to JCJ].

137. See *OPDA Reference* SCC, *supra* note 7 at para 61.

138. *Ibid* at para 19. One author writing in the McGill Law Journal concluded that the *Voluntary Assignments Case* "which invoked the doctrine of an unoccupied field, is now dead." See Isaacson, *supra* note 130 at 231.

> from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature.
>
> Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament.[139]

The statements were obiter dictum as there was no federal bankruptcy law in force. But the dictum would later be transformed into constitutional principle once the *Bankruptcy Act* was passed in 1919 and would influence the interpretation of the federal bankruptcy power in the 1920s and beyond. In the 1920s, the federal bankruptcy and insolvency power came under attack from Québec and it would take the 1928 decision in *Royal Bank of Canada v Larue*[140] to resolve the constitutional impasse. In *Larue*, the Privy Council relied upon Lord Herschell's dictum in the *Voluntary Assignments Case* and ruled that the Dominion had the right under the *Bankruptcy Act* to postpone creditors' rights established by provincial law.[141]

By 1960, it appears that Lord Herschell's dictum had run out of steam and was ignored by the Supreme Court of Canada in the *OPDA Reference.* In seeking to distinguish the *Voluntary Assignments Case*, the Supreme Court of Canada missed an opportunity to rely upon a broad reading of the bankruptcy and insolvency power found in Lord Herschell's dictum in the *Voluntary Assignments Case*. The dictum, if it had been cited, would have strengthened the court's overall conclusion that the *OPDA* was ultra vires. In the end, perhaps it did not matter as the Supreme Court of Canada found sufficient reasons to find that the Act improperly dealt with bankruptcy and insolvency matters. Given that the Court sought to distinguish the *Voluntary Assignments Case*, it is perhaps not surprising that Lord Herschell's dictum was ignored.

All three justices also sought to distinguish two other cases which had upheld provincial legislation.[142] The court distinguished the 1943 Privy Council decision in *Abitibi Power and Paper Co v Montreal Trust Co*,

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139. *Voluntary Assignments Case*, *supra* note 136 at para 27. For a further discussion of this case, see Thomas GW Telfer & Virginia Torrie, *Debt and Federalism: Landmark Cases in Canadian Bankruptcy and Insolvency Law, 1894–1937* (Vancouver: UBC Press, 2021) [Telfer & Torrie, *Debt and Federalism*].

140. [1928] 1 DLR 945, [1928] 1 WWR 534 (PC) [*Larue* cited to DLR].

141. See Telfer & Torrie, *Debt and Federalism*, *supra* note 139.

142. For commentary on the distinguishing of these two cases, see Micheline Gleixner, "Reconsidering Legislative Competence over Consumer Credit in Canada" (2016) Annual Rev Insolvency L 153 at 190, n 140.

which had ruled that the provincial legislation was valid.[143] The legislation in question stayed proceedings under a mortgage granted by Abitibi until all the parties had an opportunity to consider a reorganization plan that might be submitted to a Royal Commission. This was held to be a valid exercise of provincial power over property and civil rights. Similarly, the Supreme Court of Canada distinguished *Ladore v Bennett* in which the Privy Council had ruled that provincial legislation was a valid exercise of the provincial power over municipal institutions.[144] The fact that the municipal institutions, who were covered by the legislation, became insolvent did not make the legislation unconstitutional.

Cartwright J best summarized why the above three cases had no application when assessing the validity of the *OPDA*. He stated that in those cases where provincial legislation had been found to be intra vires, two conditions had been present:

> (i) that the impugned legislation was not in pith and substance primarily in relation to Bankruptcy and Insolvency but rather in relation to one or more of the matters enumerated in s. 92; and
> (ii) that in so far as it affected the rights and obligations of an insolvent and its creditors it did not conflict with existing valid legislation of Parliament enacted in exercise of the power contained in head 21 of s. 91.[145]

In this case, based on the reasons of Locke J, Cartwright J found that neither of these two conditions existed, and thus the *OPDA* was ultra vires.

VII. *Commentary on decision*

The *OPDA Reference* represented the third time that a higher court had struck down provincial legislation on the basis that it interfered with the bankruptcy and insolvency power. In 1943, the Privy Council had ruled that the Alberta *DAA* was ultra vires.[146] In 1956, the Supreme Court of Canada had held that the Saskatchewan *Moratorium Act* was also ultra vires.[147] Only four years later, with the ruling in the *OPDA Reference*, it appeared that there was little room for provinces to assist insolvent debtors without risking an interference with the federal bankruptcy and insolvency power. Ironically, the Supreme Court of Canada in the *OPDA Reference* did not attempt to draw the three cases together. Indeed, the reasoning in the *OPDA Reference* would have been reinforced had the Supreme Court

143. See *Abitibi Power*, *supra* note 100.
144. See *Ladore*, *supra* note 100.
145. *OPDA Reference* SCC, *supra* note 7 at para 73.
146. See *DAA Reference*, *supra* note 5.
147. See *Moratorium Act Reference*, *supra* note 5 at para 43.

of Canada situated the *OPDA* alongside the earlier cases on the *DAA* and the Saskatchewan *Moratorium Act*.[148] It would not be until 1978 that the Supreme Court of Canada grouped these three cases together as standing for similar principles.[149] Nevertheless, the *OPDA Reference* makes a significant statement about the ability of provinces to enact legislation to protect insolvent debtors.

The importance of the *OPDA Reference* comes from the Supreme Court of Canada's broad interpretation of insolvency leaving little room for provinces to argue that debt adjustment legislation is within property and civil rights jurisdiction.[150] In a case comment on the *OPDA Reference* published in the McGill Law Journal, Arthur Isaacson argued that, following the *OPDA Reference*, "if the Act under dispute has anything to do with a debtor who is 'unable to pay his debts as they become due' …it is a matter of insolvency and hence exclusively within the federal field of legislative jurisdiction."[151] After the *OPDA Reference*, "it would henceforth seem that any provincial legislature dealing with subjects analogous to bankruptcy and insolvency legislation would be on very unsure ground."[152] For Isaacson, the result in the *OPDA Reference* was correct and complied "with the true intention of the Fathers of Confederation. It was their wish and purpose to create a strong central government and a vigorous national economy by a broad interpretation of Dominion Powers and a restrictive interpretation of provincial powers."[153] The legacy of the *OPDA Reference* is indeed the continuation of a broad interpretation of the federal bankruptcy power.

As Roderick Wood has stated, since 1919, when the first Canadian bankruptcy act was passed, "there has been a progressive expansion of the federal presence in the field."[154] In 1928, the new *Bankruptcy Act* survived a constitutional challenge by Quebec in *Royal Bank v Larue*.[155] In the 1930s, the federal government forged two new federal statutes under its bankruptcy and insolvency power. The *Companies' Creditors*

148. Ford CJA, in the Alberta Court of Appeal, had relied on *DAA Reference*, *supra* note 5 and through a comparison of *OPDA* and *DAA* concluded that both acts contained an "element of compulsion" on creditors. See *OPDA Reference* ABCA, *supra* note 24 at para 7.
149. See *Robinson v Countrywide Factors Ltd*, [1978] 1 SCR 753, 72 DLR (3d) 500 at para 123 [*Robinson*].
150. See Isaacson, *supra* note 130.
151. *Ibid* at 225.
152. *Ibid* at 231.
153. *Ibid*.
154. Roderick J Wood, "The Paramountcy Principle in Bankruptcy and Insolvency Law: The Latest Word" (2016) 58:1 Can Bus LJ 27 at 29.
155. See *Larue*, *supra* note 140.

Arrangement Act[156] and the *Farmers' Creditors Arrangement Act*[157] also "withstood constitutional challenges by the provinces" in the 1930s.[158] The expansion of the federal bankruptcy power continued in 1943, 1956, and again in 1960, in a trilogy of successive decisions.[159] Collectively the three cases ruled that provincial legislation that imposed debt adjustment, a moratorium, or an orderly payment of debts regime proceedings were ultra vires.[160] The *OPDA Reference,* the last decision rendered in the trilogy,[161] perhaps represents the high-water mark for the expansion of the federal bankruptcy and insolvency power and the curtailment of provincial power.

As Jacob Ziegel writes, later courts adopted a "willingness…to allow greater play for the concurrency doctrine and to permit provincial legislatures to play a supplementary role in the insolvency area so long as the provincial law does not come into direct conflict with federal legislation."[162] He argues that "[t]his more tolerant and accommodative approach clearly…inspired the majority" in the Supreme Court of Canada's 1978 decision in *Robinson v Countrywide Factors Ltd.*[163] In that case, a majority of the Supreme Court of Canada affirmed the constitutional validity of provisions of Saskatchewan's *Fraudulent Preferences Act*,[164] which applied exclusively in insolvency to address transactions where a debtor intended to delay or prejudice their creditors or give preferential treatment to a creditor.[165] Roderick Wood claims that *Robinson "*marked the beginning of a new era in which courts were more inclined to see the provincial statutes as valid provincial enactments in reference to property and civil rights, and in which constitutional disputes were to be resolved

156. SC 1932-33, c 36 [*CCAA*].
157. SC 1934, c 53 [*FCAA*].
158. Wood, *supra* note 154 at 29. See also *CCAA Reference*, *supra* note 134; *Reference re Farmers' Creditors Arrangement Act (Canada)*, [1936] SCR 384, [1936] 3 DLR 610 [*FCAA Reference* SCC], aff'd *FCAA Reference* JCPC, *supra* note 127.
159. See *DAA Reference*, *supra* note 5; *Moratorium Act Reference*, *supra* note 5; *OPDA Reference* SCC, *supra* note 7.
160. See Wood, *supra* note 154 at 29.
161. Bernard Boucher and Yves Fortin also group these three cases together: "A long series of provincial laws on the matter of orderly payment of debts, adjustment of debts and moratoriums have been declared ultra vires." See Bernard Boucher and Jean-Yves Fortin, "Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3" in Bernard Boucher, *Faillite et insolvabilité: une perspective québécoise de la jurisprudence canadienne* (Montréal: Thomson Reuters, 2013), Notion générales, D—Constitutionnalité, s 3.4 [translated by author].
162. Jacob Ziegel, "Should Proof of the Debtor's Insolvency be Dispensed with In Voluntary Insolvency Proceedings?" [2007] Annual Rev Insolvency L 21 at 40 [Ziegel, "Proof of Debtor's Insolvency"].
163. *Ibid.*
164. RSS 1965, c 397.
165. *Robinson* is discussed further in Telfer & Torrie, "Debt Postponement," *supra* note 3.

on the basis of the paramountcy principle."[166] Ziegel argues that this new tolerant and accommodative approach was missing in the *OPDA Reference* "which…addressed consumer debt issues that were predominantly of local concern."[167] However, in 1960, such an accommodative approach was not required, as the outcome of the *OPDA Reference* was consistent with the two earlier cases in the trilogy.

By the 1960s Canadian federalism jurisprudence had evolved such that it was not possible to enact effective legislation to deal with overindebtedness at the provincial level. Earlier cases had constrained the provinces too much in regard to discharging debts, and they were unable to bind non-consenting creditors and secured creditors. Interestingly, the constitutional jurisprudence in the area of bankruptcy and insolvency federalism from the 1920s through the *OPDA Reference* fairly consistently favoured Parliament at the expense of provincial jurisdiction.[168]

VIII. *Postscript: An Orderly Payment of Debts Regime in federal bankruptcy legislation*

While the *OPDA Reference* has not been regularly cited as a constitutional law precedent,[169] the decision also has an important legislative legacy: Part X of the *BIA*. Following the decision in the *OPDA Reference*, both Manitoba and Alberta requested that the *Bankruptcy Act* be amended to provide for an orderly payment of debts regime.[170] In 1966, Parliament added Part X to the *Bankruptcy Act* to create an orderly payment of debts regime for the provinces.[171] Introducing the amendment to the *Bankruptcy*

166. Wood, *supra* note 154 at 29. The interplay between the federal bankruptcy power and provincial powers continues to be an issue before the Supreme Court of Canada. See e.g. *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5. Wood's article considers a second trilogy of Supreme Court of Canada cases on the federal bankruptcy and insolvency power: *Alberta (Attorney General) v Moloney,* 2015 SCC 51; *407 ETR Concession Co v Canada (Superintendent of Bankruptcy)*, 2015 SCC 52; *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd,* 2015 SCC 53.

167. Ziegel, "Proof of Debtor's Insolvency," *supra* note 162 at 40.

168. See *Larue*, *supra* note 140; *CCAA Reference*, *supra* note 134; *FCAA Reference* SCC, *supra* note 158, aff'd *FCAA Reference* JCPC, *supra* note 127; *DAA Reference*, *supra* note 5; *Moratorium Act Reference*, *supra* note 5; *Reference as to the Validity of Section 6 of the Farm Security Act, 1944 (Saskatchewan)*, [1947] SCR 394, [1947] 3 DLR 689. A notable exception was *Ladore*, *supra* note 100 (where the Privy Council upheld the validity of impugned provincial legislation which effectively amalgamated four insolvent municipalities).

169. Only a few cases have mentioned the *OPDA Reference*: *Robinson*, *supra* note 149 at paras 10, 18, 21, 123; *Paccar Financial Services Ltd v Sinco Trucking Ltd (Trustee of)* (1989), 57 DLR (4th) 438 at para 27, [1989] 3 WWR 481 (SKCA); *St-Denis de Brompton (Municipality) c Filteau,* (1986), 59 DLR (4th) 84 at para 28, [1986] RJQ 2400 (QCCA); *Schill v Weimer* (1981), 132 DLR (3d) 25, [1982] 2 WWR 16 (SKCA); *Manitoba (Securities Commission) v Winnipeg Mortgage Exchange Ltd* (1980), 113 DLR (3d) 257 at para 18, 36 CBR (NS) 78 (MBCA); *Ontario (Attorney General) v Wentworth Insurance Co* (1968), 69 DLR (2d) 448 at para 16, [1968] 2 OR 416 (ONCA).

170. See Honsberger, *supra* note 61 at 184.

171. See *An Act to amend the Bankruptcy Act*, *supra* note 14.

Act in Parliament, the Solicitor General indicated that there was a direct link[172] between the Supreme Court of Canada decision in the *OPDA Reference* and the enactment of Part X. Part X only operated in those provinces which accepted the regime.[173]

> An act of the province of Alberta, called the orderly payment of debts act, was held by the Supreme Court of Canada to be ultra vires the provincial legislatures as impinging upon the federal jurisdiction over bankruptcy and insolvency conferred by section 92(21) of the British North America Act upon the federal parliament. Both Manitoba and Alberta then requested that federal legislation be enacted of the same character as the provincial legislation. The present bill enacts a new part of the Bankruptcy Act, part X, which closely follows the provincial legislation which was declared ultra vires.[174]

A review of Alberta's *OPDA* and the 1966 *Bankruptcy Act* amendment indicates that Part X mirrored the provisions of Alberta's Act.[175] The Tassé Report described the operation of Part X in this way:

> In any province where Part X is in force, a small debtor who is not in business and who is unable to pay his debts as they mature may apply to the court for a consolidation order. While an order is outstanding, and so long as the debtor is not in default in making the payments required by the order, no process may be issued against the debtor in respect of any debt to which the consolidation order applies.[176]

This description could be equally applied to the 1959 Alberta *OPDA*. Part X effectively added the provincial model of orderly payment of debts to the *Bankruptcy Act*. The orderly payment of debts regime is still contained in Part X of the current *BIA*. Although Part X has been amended several times over the years, it is still largely identical to the 1966 version.[177] Perhaps the most outdated aspect of the part is that it still only applies to judgments of less than $1,000.[178] A further drawback of Part X is its requirement of

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172. See *House of Commons Debates*, 27-1, vol 6 (13 June 1966) at 6361-6362 (Hon LT Pennell). See also Ziegel, "Philosophy and Design," *supra* note 62 at 250 (where Ziegel argues that the *OPDA Reference* "forced" the government of the day to add Part X to the *Bankruptcy Act*).
173. See Houlden & Morawetz, *supra* note 17; *BIA*, *supra* note 16, s 242.
174. *House of Commons Debates*, *supra* note 172 at 6361-6362.
175. See *OPDA*, *supra* note 6; *An Act to amend the Bankruptcy Act*, *supra* note 14. John Honsberger notes that the *Bankruptcy Act* amendment that created Part X was "substantially similar to the earlier legislation in Alberta and Manitoba." See Honsberger, *supra* note 61 at 184.
176. Canada, *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Ottawa: Information Canada, 1970) (Chair: Roger Tassé) at 32 [Tassé Report].
177. See *BIA*, *supra* note 16, Part X.
178. See *ibid*, s 218. It is obvious that the $1000 limit needs to be changed. It is beyond the scope of the paper to consider the effectiveness of the current Part X as it operates in Alberta. For older studies on the effectiveness of Part X, see Gallins, *supra* note 35; Patricia Louise French, *In Balance:*

creditor unanimity in order for this section to be used by debtors, rather than requiring the approval of a simple majority of creditors. Furthermore, Part X does not apply to secured debts. The addition of consumer proposal provisions to the *BIA* in 1992[179] provide a superior, more robust and modern version of what Part X was intended to provide. The constraints of Alberta's jurisdiction in crafting the *Orderly Payment of Debts Act*—including creditor unanimity and the inapplicability to secured debts—are replicated in the *BIA* even though they did not have to be once the legislation was federal. This limited the relief that Part X could offer to insolvent debtors.[180] Thus, Part X represents a step along the road towards effective, federal consumer proposals, but its deficiencies—rooted in constraints on provincial jurisdiction over indebtedness and the fact that it never applied throughout Canada—greatly limited its usefulness. Part X is now basically a defunct part of the *BIA*.

At one time, British Columbia, Alberta, Saskatchewan, Manitoba, Northwest Territories, Nova Scotia and Prince Edward Island were participating provinces in the Part X scheme.[181] However, currently only Alberta participates in the orderly payment of debts program under the *BIA*.[182] The Alberta program is managed by Money Mentors.[183] It is perhaps ironic that Alberta remains the only current province to have adopted the orderly payment of debts regime found in Part X of the *BIA*.[184] This situation achieves the original intent of the Legislature of Alberta in 1959 when it enacted the *OPDA*.

Conclusion

The *OPDA Reference* is the capstone decision in a trilogy of cases in which the Supreme Court of Canada invalidated provincial legislation

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Predicting Debt Repayment Performance on Orderly Payment of Debts (MSc Thesis, University of Alberta, 2003) [unpublished].

179. 1992, c 27, s 32.

180. For a list of classes of debts excluded under Part X, see *BIA*, *supra* note 16, s 218(2)-(3).

181. See Houlden & Morawetz, *supra* note 17.

182. See Office of the Superintendent of Canada, "Your Debts are Getting Out of Control" (last modified 6 May 2019), online: *Government of Canada* <www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br04064.html> [perma.cc/WM9K-673P]. See also email from Dan Brandenburg, Innovation, Science and Economic Development Canada to Noah Soenen, Research Assistant (1 June 2022) (confirming Alberta is the only current province that has adopted the orderly payment of debts regime). Note that the Office of the Superintendent of Bankruptcy Canada website also displays outdated information indicating that Alberta, Saskatchewan, and Nova Scotia all have an orderly payment of debts program. See Office of the Superintendent of Canada, "Definitions" (last modified 24 March 2015), online: *Government of Canada* <www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01467.html> [perma.cc/7B4L-2MZS].

183. See "Alberta Orderly Payment of Debts Program," online: *Money Mentors* <moneymentors.ca/debt-help/opd/> [perma.cc/SR7R-BAXJ].

184. There were hopes that an amendment to the *Bankruptcy Act* in 1975 would make the Part X apply uniformly across the country. See Ziegel, "The American Influence," *supra* note 19 at 886.

*f*or encroaching upon bankruptcy and insolvency, an area of increasingly exclusive federal jurisdiction.[185] Alberta's *DAA* and Saskatchewan's *Moratorium Act* were struck down in earlier decisions on the same grounds.[186] While a fair number of cases have been decided based on a broad conception of the bankruptcy power, what sets the *OPDA Reference* apart is the court's expansive interpretation of the federal power coupled with the strict limits it placed on the provinces' scope to assist insolvent debtors in the context of an impugned provincial statute.[187] The *OPDA Reference* perhaps represents the high-water mark for the expansion of the federal bankruptcy and insolvency power and the curtailment of provincial efforts to assist insolvent debtors. Following changing trends in constitutional jurisprudence, future high court decisions concerning the scope of the federal bankruptcy and insolvency power would be decided within a framework which allowed broader conceptions of provincial jurisdiction and "interplay and…overlap"[188] with federal legislation, even if provincial enactments were ultimately rendered ineffective by federal paramountcy.[189]

The *OPDA Reference* also stands out for the Court's lack of engagement with the cardinal statement that had influenced earlier ground-breaking federalism decisions dealing with bankruptcy and insolvency law:[190] Lord

185. These three cases were first grouped together by the Supreme Court of Canada in *Robinson*, *supra* note 149 at para 123.

186. See *DAA Reference*, *supra* note 5; *Moratorium Act Reference*, *supra* note 5.

187. See *Moratorium Reference Act*, *supra* note 5 at paras 38, 49, 54-55; *DAA Reference*, *supra* note 5 at paras 25, 71.

188. *OPSEU v Ontario (AG)*, [1987] 2 SCR 2 at para 22, 41 DLR (4th) 1, Dickson CJC. See also Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and the First Nations" (1991) 36:2 McGill LJ 308 at 309, 311-313, 334-335, online: <lawjournal.mcgill.ca/wp-content/uploads/pdf/2178338-Ryder.pdf> [perma.cc/92WR-K6CB]; Virginia Torrie, "Should Paramountcy Protect Secured Creditor Rights? *Saskatchewan v Lemare Lake Logging* in Historical Context" (2017) 22:3 Rev Const Stud 405 at 418, 423, online: <www.constitutionalstudies.ca/wp-content/uploads/2021/02/05_Torrie-4.pdf> [perma.cc/EN4U-KFZU] [Torrie, "Should Paramountcy Protect"].

189. In more recent times, the prevailing way of resolving conflict between the federal bankruptcy and insolvency power and the provincial property and civil rights power is through the doctrine of federal paramountcy and the "interplay and … overlap" principle. The framework for the current approach was established by the Supreme Court of Canada in the following five cases: *Deputy Minister of Revenue v Rainville*, [1980] 1 SCR 35, 105 DLR (3d) 270; *Deloitte Haskins & Sells Ltd v Workers' Comp Board*, [1985] 1 SCR 785, 19 DLR (4th) 577; *Federal Business Development Bank v Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 SCR 1061, 50 DLR (4th) 577; *British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24, 59 DLR (4th) 726; *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453, 128 DLR (4th) 1. See Wood, *supra* note 154 at 29, n 13; Torrie, "Should Paramountcy Protect," *supra* note 188 at 407.

190. See *Larue*, *supra* note 140 at para 11 (where Viscount Cave quoted from Lord Herschell's judgment which entrenched his obiter statement as part of Canadian constitutional law); *CCAA Reference*, *supra* note 134; *FCAA Reference* SCC, *supra* note 158, aff'd *FCAA Reference* JCPC, *supra* note 127. See also Telfer & Torrie, *Debt and Federalism*, *supra* note 139 at 16-17.

Herschell's obiter dictum in the *Voluntary Assignments Case*.[191] Although Lord Herschell ultimately ruled that the Ontario legislation in question was intra vires, he characterized the federal bankruptcy power as follows:

> [A] system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature.[192]

The Supreme Court of Canada did not acknowledge this statement in the *OPDA Reference*. Ignoring the dictum can be seen as a missed opportunity to strengthen the Court's decision to invalidate Alberta's *OPDA*, and suggests that Lord Herschell's statement had lost its steam by 1960. An alternative interpretation may be that the court was interested in avoiding drawing a connection with a case which had validated provincial legislation dealing with overindebtedness. In either event, the *OPDA Reference* marks a turning point away from nineteenth century statements in favour of more modern jurisprudence in bankruptcy and insolvency law.

The significance of the Court's decision in *OPDA Reference* reverberated through federal insolvency lawmaking with the addition of Part X to the Bankruptcy Act in 1966.[193] Following the Supreme Court of Canada's ultra vires ruling in the *OPDA Reference*, Manitoba and Alberta requested that the federal government amend the *Bankruptcy Act* to provide for an orderly payment of debts regime. Parliament acquiesced to the provinces' request, amending the *Bankruptcy Act* in 1966 to include Part X. With the amendment, the Legislature of Alberta achieved its original intent of enacting the *OPDA* in 1959. Unusually, federal bankruptcy law gave effect to provincial purposes regarding overindebtedness in participating provinces.

With this decision, the constitutional power to resolve issues of overindebtedness was drawn squarely, and finally, into the federal sphere of lawmaking in a result that is diametrically opposite to that in the *Voluntary Assignments Case*.[194] This aligns with a broader trend which witnessed the progressive expansion of the federal bankruptcy and insolvency power from the *Bankruptcy Act of 1919* through the mid-twentieth century.[195]

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191. See *Voluntary Assignments* Case, *supra* note 136.
192. *Ibid* at 200-201.
193. See *An Act to amend the Bankruptcy Act*, *supra* note 14.
194. See Stephanie Ben-Ishai & Thomas GW Telfer, *Bankruptcy and Insolvency Law in Canada: Cases, Materials, and Problems* (Toronto: Irwin Law, 2019) at 47-58.
195. See *Larue*, *supra* note 140; *CCAA*, *supra* note 156; *FCAA*, *supra* note 157; *DAA Reference*, *supra* note 5; *Moratorium Act Reference*, *supra* note 5; *OPDA Reference* SCC, *supra* note 7.

Uniquely, the *OPDA Reference* was the backdrop for the brokering of a "constitutional compromise" which facilitated the federal enactment of provincial policy through Part X of the *Bankruptcy Act*. This decision paradoxically expanded the federal bankruptcy power but contributed to the non-uniformity of that power by allowing space for provincial variation through federal legislation. The *OPDA Reference* and the legislative changes that flowed from it are thus deserving of landmark status because they represent the quintessence of the incremental and patchwork approach to the development of the Canadian bankruptcy and insolvency system,[196] which have attracted criticism from scholars and policy makers.[197]

196. See Tassé Report, *supra* note 176 at 24-25. The patchwork approach dates to the time of Confederation. See Tassé Report, *supra* note 176 at 24-25; Thomas GW Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867–1919* (Toronto: University of Toronto Press, 2014) at 171; Virginia Torrie, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (Toronto: University of Toronto Press, 2020) at 34.

197. See Jacob Ziegel, "Canada's Dysfunctional Insolvency Reform Process and the Search for Solutions" (2010) 26:1 BFLR 63; Thomas GW Telfer, "Canadian Insolvency Law Reform and 'Our Bankrupt Legislative Process'" (2010) 1 Annual Rev Insolvency L 583 at 587; See generally Tamara M Buckwold, "Reform of Fraudulent Conveyances and Fraudulent Preferences Law, Part II: Preferential Transfers" (Report prepared for the Uniform Law Conference of Canada, Civil Law Section, August 2008), online (pdf): *Law Reform Commission of Saskatchewan* <lawreformcommission.sk.ca/PartII-Preferences.pdf> [perma.cc/RZ5A-GGX9].