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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)

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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)*

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I. INTRODUCTION

The Great Depression of the 1930s had a profound effect on the livelihood of farmers, particularly in Canada's prairie provinces. In response to falling prices and increasing debt, the federal government passed the *Farmers' Creditors Arrangement Act* (*FCAA*) to provide relief for farmers facing insolvency.[1] In order to address local farm debt issues and political pressure, Saskatchewan passed the *Farm Security Act, 1944* (*FSA*).[2] However, Saskatchewan's *FSA* came at a time when prairie provinces were overreaching their constitutional jurisdiction to deal with rising debt, and the *FSA* was no exception. In the year prior to the

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1 *The Farmers' Creditors Arrangement Act, 1934*, SC 1934, c 53 [*FCAA*], as amended by *The Farmers' Creditors Arrangement Act Amendment Act, 1935*, SC 1935, c 20, as amended by *An Act Relating to the Application of The Farmers' Creditors Arrangement Act, 1934, in the Province of British Columbia*, SC 1935, c 61.

2 SS 1944(2), c 30 [*FSA*].

enactment of the *FSA*, Alberta's *Debt Adjustment Act, 1937* was declared ultra vires by the Privy Council.[3] Saskatchewan had a similar *Debt Adjustment Act*, which was rendered unconstitutional by implication of the Alberta reference decision.[4] Therefore, the Saskatchewan Liberal government moved quickly to replace the province's *Debt Adjustment Act* with new, constitutionally valid statutes. The *FSA*, while enacted by the new Co-operative Commonwealth Federation government, continued the line of providing support for farmers and other debtors and similarly ended up having its validity challenged. In particular, the validity of section 6 of the *FSA* was referred to the Supreme Court of Canada (SCC) in 1946. Unlike other provincial debt adjustment legislation of the time, many of which were found invalid as encroaching on the federal government's jurisdiction over bankruptcy and insolvency, section 6 of the *FSA* was found ultra vires as legislation in relation to interest, another area of federal jurisdiction.

This article takes a critical look at the *Reference as to the validity of Section 6 of the Farm Security Act, 1944 of Saskatchewan* ("*FSA Reference*").[5] It will trace the historical context of the *FSA* and the reference, as well as the attempts at provincial legislative reform that preceded them. Next, it will outline the arguments made at the Supreme Court and at the subsequent appeal to the Judicial Committee of the Privy Council. Tracing the evolution of these arguments is important for understanding the contemporary significance and conception of these legal issues, and helps clarify what was at stake, both practically and legally. Finally, this article will consider the aftermath of the reference and its historical legacy. The issues and themes raised in this case relate closely with aspects of farm business as well as issues

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3 See *Reference Re the Debt Adjustment Act 1937 (Alberta)*; *Attorney-General for Alberta v Attorney-General for Canada et al*, [1943] 2 DLR 1, 1 WWR 378 (PC) [*DAA Reference JCPC*].

4 See "Province Affected", *The Leader-Post* (1 February 1943) 1, online: *Google News* <news.google.com/newspapers?id=77tTAAAAIBAJ&sjid=cTgNAAAAIBAJ&pg=2496%2C2414519>.

5 [1947] SCR 394, [1947] 3 DLR 689 [*FSA Reference*].

around restructuring modern small and medium-sized enterprises (SMEs).[6] While the *FSA* had little contemporary economic impact, its legacy can be found in the contribution of the *FSA Reference* to the body of jurisprudence on the scope of the federal power over interest and in its influence on Saskatchewan's future attempts to address farm security in the 1980s. In particular, the *FSA Reference* further demarcated the division between provincial and federal jurisdiction relating to farm debt that was set out in the *Reference re legislative jurisdiction of Parliament of Canada to enact the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935* ("*FCAA Reference*"),[7] with federal authority being over bankruptcy and interest, and the provinces being able to legislate on judicial procedure and secured lending.

II. FARM INSECURITY, AND THE FEDERAL AND PROVINCIAL RESPONSES

A. THE FARM DEBT CRISIS

The Great Depression caused severe economic hardship in Canada. Dependent on exports, Canada's economy was especially vulnerable to the fluctuations of the global market.[8] The collapse

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6 On restructuring SMEs, see Janis P Sarra, "Micro, Small and Medium Enterprises (MSME) Insolvency in Canada" (2016) *Report for the Marketplace Policy Branch of Industry Canada*, online (pdf): *Allard Research Commons* <commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1309&context=fac_pubs>; Aurelio Gurrea-Martínez, "Implementing an Insolvency Framework for Micro and Small Firms" (2021) *IIR (2021)*, online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3715654>; World Bank Group, "Saving Entrepreneurs, Saving Enterprises: Proposals on the Treatment of MSME Insolvency" (2018), online: *World Bank Group* <openknowledge.worldbank.org/handle/10986/30474>; Riz Mokal et al, *Micro, Small, and Medium Enterprise Insolvency: A Modular Approach* (Oxford, UK: Oxford University Press, 2018).

7 [1936] SCR 384, [1936] 3 DLR 610 [*FCAA Reference*].

8 See Thomas GW Telfer & Virginia Torrie, *Debt and Federalism: Landmark Cases in Canadian Bankruptcy and Insolvency Law, 1894–1937* (Vancouver: UBC Press, 2021) at 103.

of prices and demand for staple products had left many Canadians unemployed and desperate.[9] The problem was acute for farmers on the prairies as crop values had been decreasing throughout the early 1930s. As noted by William Allen, while he was the head of the University of Saskatchewan's Department of Farm Management:

> [t]he Saskatchewan wheat crop of 1928 was valued at 247 million dollars which was about equal to the average value of the five crops from 1924 to 1928. Since 1928 the total values of [Saskatchewan's] wheat crops have declined tremendously. The 1929 wheat crop had about two thirds of the value of that of 1928; the 1930 crop, two fifths; the small crop of 1931, one fifth; the 1932 crop one quarter; the crop of 1933, the lowest average yield per acre on record for Saskatchewan, one fifth; and that of 1934, the smallest total yield since 1920, one quarter.[10]

Figure 1: Saskatchewan Wheat Cash Income [11]

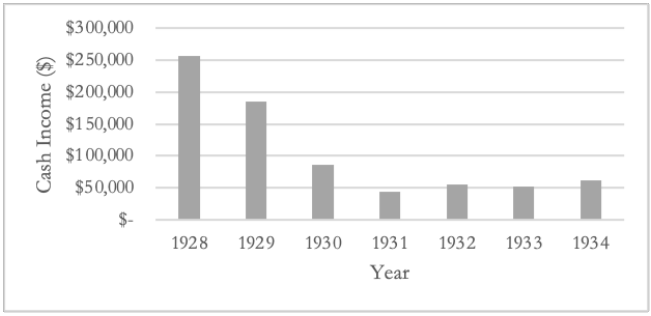

Figure 1 depicts the decrease in the total cash income from Saskatchewan's wheat crop from 1928 to 1934. This decrease in value was compounded with the fact that in the late 1920s good

9 See Alan Caswell Collier, *Relief Stiff: An Artist's Letters from Depression-Era British Columbia* (Vancouver: UBC Press, 2018) at 3.

10 See Wm Allen and E C Hope, *The Farm Outlook for Saskatchewan, 1935* (Saskatoon: University of Saskatchewan, 1935) at 1–2, cited in G E Britnell, "Saskatchewan, 1930–1935" (1936) 2:2 Can J Economics & Political Science 143 at 143.

11 See *FSA Reference*, *supra* note 5 (Factum of the Attorney General of Saskatchewan at 11 [SK Factum]).

yields and high prices allowed farmers to take on additional debt and expand, due to the ease of securing credit. Until 1900, land prices in the prairies had been low, but the arrival of the railroads led to land speculation by non-farmers, which drove up prices. Thus, to expand farmers needed to purchase increasingly overvalued land and did so with credit.[12] The increased debt load meant that when prices collapsed many farmers were unable to make their payments. In fact, from 1930–1935, the interest alone would have taken nearly two thirds of the wheat available for sale, and most of the rest would have been consumed by taxes.[13]

Due to the high number of farmers in the prairie provinces, farm debt became an important political issue.[14] With each passing year of drought and low prices, the issue of farm debt became more pressing, and the prairie legislatures came under pressure to provide legislative relief to farmers by protecting farms from debt enforcement efforts.[15]

B. Farmers' Creditors Arrangement Act

Under threat of Saskatchewan enacting robust debt moratorium legislation to address the farm debt crisis, Prime Minister Bennett announced that his government would enact federal debt adjustment legislation.[16] The *FCAA*, which was intended to be more moderate than Saskatchewan's proposed bill, came into force in 1934.[17] Bennett announced that the *FCAA* was one of his New Deal statutes, which were a series of statutes that purported

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12 See Jeremy Adelman, "Prairie Farm Debt and the Financial Crisis of 1914" (1990) 71:4 Can Historical Rev 491 at 496.

13 See Britnell, *supra* note 10 at 160.

14 See Virginia Torrie, "Federalism and Farm Debt during the Great Depression: Political Impetuses for the Farmers' Creditors Arrangement Act, 1934" (2019) 82:2 Sask L Rev 203 at 208–09 [Torrie, "Federalism and Farm Debt"]. See also Donald H Layh, *A Legacy of Protection: The Saskatchewan Farm Security Act: History, Commentary and Case Law* (Langenburg, SK: Twin Valley Books, 2009) at 2.

15 See Telfer & Torrie, *supra* note 8 at 104.

16 See *ibid*.

17 See *ibid*.

to usher in a new social and economic order, but ultimately only effected fairly modest changes.[18] The Act created a process for farmers to make compromises with their creditors in order to avoid bankruptcy. Under the *FCAA*, a farmer could apply to a local Official Receiver, who would work with the farmer to develop a compromise proposal. If the farmer's creditors consented to the proposal, it would be submitted to the court for approval. If the creditors did not consent, the farmer could apply to the Board of Review, which could create a compulsory proposal. Most of these proposals involved some reduction of the farmer's debt and an extended period of repayment.[19]

From the perspective of the prairie provinces, the *FCAA* was not as effective as they wanted and needed. In 1936, total agricultural debt in Saskatchewan amounted to $450 million, but debt reductions through federal and provincial schemes had only amounted to $6.2 million.[20]

In 1935 the *FCAA* was amended such that the Act did not apply to any debt created after May 1, 1935 without the consent of the creditors.[21] In 1938 the Act was amended again to provide that by December 1939, no new proposals could be received in any province other than Alberta and Saskatchewan.[22]

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18 See *Winnipeg Free Press* (3 January 1935), cited in Alvin Finkel, *Business and Social Reform in the Thirties* (Toronto: James Lorimer Limited, 1979) at 36; Larry A Glassford, *Reaction and Reform: The Politics of the Conservative Party under R.B. Bennett 1927–1938* (Toronto: University of Toronto Press, 1992) at 173; William Christian & Colin Campbell, *Political Parties and Ideologies in Canada: Liberals, Conservatives, Socialists, Nationalists* (Toronto: McGraw-Hill Ryerson, 1974) at 96.

19 See Virginia Torrie, "Farm Debt Compromises during the Great Depression: An Empirical Study of Applications Made under the *Farmers' Creditors Arrangement Act* in Morden and Brandon, Manitoba" (2018) 41:1 Manitoba LJ 377 at 417.

20 See Britnell, *supra* note 10 at 166.

21 See *The Farmers' Creditors Arrangement Act Amendment Act, 1935*, SC 1935, c 20, s 8.

22 See *An Act to amend the Farmers' Creditors Arrangement Act, 1934*, SC 1938, c 47, s 9.

C. Provincial Attempts at Intervention

In response to the prairie farm debt crisis, the provinces had enacted their own legislation to deal with the situation. However, the provinces had mixed success with these approaches, as the most robust statutes were found to overreach provincial jurisdiction. One of these approaches was a direct attempt at debt adjustment. Alberta had enacted its first debt adjustment act in 1923, the last consolidated version of which was the *Debt Adjustment Act, 1937* (*DAA*).[23] This Act created the Debt Adjustment Board, which had two main purposes. First, on application by a debtor or creditor, the Board was to attempt to bring about an arrangement for the payment of the debt.[24] Second, the *DAA* prohibited certain kinds of actions from being commenced or continued without permission from the Board.[25] For example, proceedings for foreclosure of a mortgage and proceedings of those claiming a share of a farmer's crop were prohibited. At the beginning on the 1940s, the province began to face serious challenges to the constitutionality of the *DAA*. In May 1941, the Governor General in Council referred the question of the validity of the *DAA* to the SCC. In December of that same year, the Court decided that the *DAA* was invalid in whole as legislation in relation to bankruptcy and insolvency.[26] The Supreme Court's decision was later affirmed by the Judicial Committee of the Privy Council in February 1943.[27]

Saskatchewan had its own debt adjustment act at this time, which had virtually the same purpose and effect as the Alberta Act.[28] Therefore, its own policy of debtor protection and farm

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23 *Debt Adjustment Act*, SA 1923, c 43; *Debt Adjustment Act, 1937*, SA 1937, c 9, amending the *Debt Adjustment Act, 1933*, SA 1933, c 13 [*DAA*].

24 *Ibid*, s 21.

25 *Ibid*, s 8(1).

26 See *Reference Re Validity of the Debt Adjustment Act, Alberta*, [1942] SCR 31, 1 DLR 1 [*DAA Reference*].

27 See *DAA Reference JCPC*, *supra* note 3.

28 See *An Act to facilitate the Adjustment of Debts*, RSS 1940, c 87, as amended by *An Act to facilitate Negotiations between Certain Persons, and respecting Certain Tax Proceedings*, SS 1943, c 15.

security was severely damaged by the Privy Council's decision, prompting swift legislative reform.[29] In response, the Saskatchewan Legislature passed several debt related statutes in April 1943. One of these was the *Provincial Mediation Board Act* (*PMBA*),[30] which was clearly an attempt to revise the Debt Adjustment Board to only have powers within the province's jurisdiction. The *PMBA* repealed Saskatchewan's *Debt Adjustment Act* and created the Provincial Mediation Board. Like the Debt Adjustment Board, this new board was charged with the duty to attempt to bring about arrangements between debtors and creditors for the payment of the debt, on application by either the debtor or the creditor.[31] These agreements would be binding even without consideration.[32] The new Act only barred certain actions granted by some provincial tax statutes.

D. *FCAA*, 1943 AMENDMENT

While waiting for the Privy Council to rule on the constitutionality of Alberta's *DAA*, the prairie provinces created the Inter-Provincial Debt Conference to develop a proposal for a federal debt relief plan. In June 1942, Alberta, Saskatchewan, and Manitoba released a joint resolution from the Conference. The resolution argued that although the 1934 *FCAA* was created for the purpose of addressing a temporary economic disaster, the conditions it sought to address were inherent in the hazards of agriculture.[33] In order to address current and future economic and natural crisis, the prairie provinces called for the creation of a new tribunal that could reduce debts, reduce interest rates, alter the terms of payment, review and revise its own decisions, and stay proceedings arising

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29 See "Ruling Ends Debts Holiday", *The Calgary Herald* (1 February 1943) 5, online: *Google News* <news.google.com/newspapers?id=dS9kAAAAIBAJ&sjid=-3sNAAAAIBAJ&pg=1112%2C29126>.

30 RSS 1978, C P-33 [*PMBA*].

31 See *ibid*, s 5(1).

32 See *ibid*, s 5(2).

33 See Unanimous Resolution of the Inter-Provincial Debt Conference (Saskatoon, 30 June 1942), Calgary, Glenbow Library and Archives (M-1749-34).

on debts.[34] The resolution called for legislation that could apply these remedies with respect to farm debt regardless of the time at which the debts were incurred.[35]

Instead of passing the legislation proposed by the prairie provinces, Parliament repealed the old *FCAA* and passed the *Farmers' Creditors Arrangement Act, 1943* (*FCAA, 1943*) in July of that year.[36] The amendment extended the application of the Act to include Manitoba. While the prior *FCAA* had provided that the Act would not apply to debts incurred after May 1, 1935, the new Act provided that debts incurred after that date could be included, as long as two thirds of the debt had been incurred beforehand.[37] The Act also designated the Official Receiver as the Clerk of the Court and shifted the role of the Board of Review to the courts in the province.[38]

At the time, the *FCAA, 1943* was received with little fanfare. There was doubt as to whether total debt in Saskatchewan would be much reduced under the new Act. Frederick Cronkite, Dean of the College of Law, University of Saskatchewan, wrote:

> Considering the many limitations of this Act it is doubtful whether anything very substantial can be expected from its operation in a province of over a hundred thousand farmers. Reduction by voluntary agreement has probably been much more effective, and in many cases the agreement has no doubt been reached under the duress of debt adjustment legislation.[39]

An editorial in Saskatoon's Leader-Post described the Act as "still short of what was sought."[40] The editorial argued that there

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34 See *ibid*.

35 See *ibid*.

36 See *Farmers' Creditors Arrangement Act, 1943*, SC 1943–1944, c 26 [*FCAA, 1943*].

37 See *ibid*, s 7.

38 See *ibid*, ss 3, 15.

39 F C Cronkite, "The Judicial Committee and the Farm Debt Problem" (1943) 9:4 Can J Economics & Political Science 557 at 563.

40 "The Farm Debt Legislation", *The Leader-Post* (23 July 1943) 6, online: *Google News* <news.google.com/newspapers?id=trtTAAAAIBAJ&sjid=dTgNAAAAIBAJ&pg=1276%2C1905454> [*The Leader-Post*, "Farm Debt Legislation"].

was uneasiness that the board system was dropped in favour of judges, as the Board of Review had earned a measure of public confidence. It noted that the Act indicated that Ottawa still saw the prairie debt crisis as a temporary emergency, while the West believed that a permanent debt adjustment system was necessary.[41]

The *FCAA, 1943* did not lead to the end of legislative attempts to solve the prairie farm debt crisis. The next major attempt at provincial intervention would take place after the 1944 Saskatchewan general election.

III. POLITICAL CHANGE AND THE FARM SECURITY ACT

A. SASKATCHEWAN'S 1944 ELECTION

The 1944 Saskatchewan general election saw the fall of Premier Patterson's Liberal government in favour of Saskatchewan's relatively new Co-operative Commonwealth Federation (CCF) party. Until this point, the Liberal party had held a majority of seats in all but one election since the province was created.

The Saskatchewan section of the CCF was organized as a response to the economic difficulty experienced by farmers. It began as a rural political movement against the "capitalist profit system", which was attributed as the cause of the depression.[42] In 1934, several Saskatchewan agrarian grassroots protest groups joined together and entered into the national CCF.[43] Eight years later, Tommy Douglas became the leader of the Saskatchewan CCF and would shortly lead the party to power.[44]

Douglas's CCF ran on a platform of reform including protection for farmers. In June 1944, a notice was published in various newspapers titled "The CCF 4-Point Plan on L[and] and

41 See *ibid*.

42 See S M Lipset, "The Rural Community and Political Leadership in Saskatchewan" (1947) 13:3 Can J Economics & Political Science 410 at 413.

43 See Georgina M Taylor, "Saskatchewan" in Leo Heaps, ed, *Our Canada* (Toronto: James Lorimer & Company, 1991) 117 at 119.

44 See *ibid* at 122.

M[ortgages]".[45] Among other things, this notice promised that quarter sections on which a farmer lived would be exempt from any proceedings for foreclosure or eviction, that farmers would be able to retain enough of a share from crops to provide for family living expenses and local obligations, and that in years where a farmer's crop averaged less than six dollars per acre any interest owing for that year would be cancelled and payment on principal would be postponed for a year. Later that month, the CCF won the provincial election and formed government with ninety percent of seats.[46]

In September 1944, Douglas gave a radio address announcing his intention to pass farm security legislation at the October legislative session. He declared that there would be a crop failure clause providing that if the crop value per acre were less than six dollars, no payment would be due and interest would be cancelled.[47]

B. The Farm Security Act, 1944

At the opening of the legislative session in 1944, the Speech from the Throne contained the following statement: "The Tenth Legislature will be called upon to fulfill certain duties: . . . 6. It must enact legislation that will bring to fulfillment the pledges upon which this Government was elected."[48] Indeed, it appears that the *FSA*, enacted during that session, fulfilled the CCF's election promises regarding farms and mortgages.[49]

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45 "The CCF 4-Point Plan on LAND and MORTGAGES", *The Leader-Post* (6 June 1944) 3, online: *Google News* <news.google.com/newspapers?id=4rpTAAAAIBAJ&sjid=bzgNAAAAIBAJ&pg=4225%2C3033768>.

46 See "Landslide for C.C.F.", *The Leader-Post* (16 June 1944) 1, online: *Google News* <news.google.com/newspapers?id=67pTAAAAIBAJ&sjid=bzgNAAAAIBAJ&pg=1892%2C3991381>.

47 See *CKCK Radio* (13 September 1944), cited in *FSA Reference*, *supra* note 5 (Factum of the Dominion Mortgage and Investment Association at 6 [DMIA Factum]).

48 Speech from the Throne, cited in *FSA Reference*, *supra* note 5 (DMIA Factum at 6).

49 See *FSA*, *supra* note 2.

Sections 2, 3, and 4 of the *FSA* affected the rights of vendors and mortgagees in relation to the proportion of crops they could be entitled to under the *Crop Payments Act*. In particular, section 4 provided that if the share of crops going to the farmer was insufficient to pay for the cost of harvesting, a living allowance, and the costs of seed and farming operations until the next year, then the share of a vendor or mortgagee could be reduced either by agreement or by order of the Provincial Mediation Board.[50]

Section 7 allowed for the exclusion of the mortgagor's 160-acre farm residence from any proceedings of foreclosure. The land would be exempt from a foreclosure sale as long as the farmer continued to live on the quarter section.[51]

Section 6 of the *FSA* was controversial. Section 6(2) inserted a statutory clause into every mortgage and agreement of sale. This subsection was divided into three paragraphs. First, in any year of "crop failure", the mortgagor or purchaser would not be required to make payments of principal during that year. Second, any payment of principal would be postponed for one year. Third, the principal outstanding would be automatically reduced by four percent, or by the rate at which interest would be payable on the

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50 Crop protection had also been a key feature of compromises under the *FCAA*, where in many cases farmers could provide a one third share of crops to avoid default and could retain a share of the crop sufficient to provide for farm maintenance. See Virginia Torrie, "Mechanisms of Debt Adjustment under the *Farmers' Creditors Arrangement Act, 1934*" (2021) 72 UNBLJ 132 at 165 [Torrie, "Mechanisms of Debt Adjustment"].

51 When Canada enacted the *Bankruptcy Act*, SC 1919, c 36, provinces were permitted to exempt certain property from the property that otherwise form the bankrupt estate and be liquidated and distributed to creditors. The homestead exceptions of the prairie provinces are conceptually related to the protection provided in the *FSA*. The former applied to bankruptcy proceedings, while the latter would apply in any foreclosure regardless of a state of bankruptcy. Provincial exceptions continue today, and there are differences between the provinces on what is exempted. There have been recommendations for a federal set of exceptions, but to date none has been enacted. See Thomas G W Telfer, "The Evolution of Bankruptcy Exemption Law in Canada 1867–1919: The Triumph of the Provincial Model" (2007) Annual Review of Insolvency Law 577 at 578–79; Personal Insolvency Task Force, *Final Report* (Ottawa: Industry Canada, Office of the Superintendent of Bankruptcy, 2002) at 24–26.

outstanding principal, whichever was greater. However, notwithstanding the reduction, interest would remain payable as if the principal had not been reduced.

It is notable that the CCF's promise to directly cancel interest for the year did not make it into the *FSA*. This is because interest is an area of federal jurisdiction under section 91(19) of the *British North America Act, 1867* (*BNA Act*).[52] To directly cancel interest would have been clearly ultra vires. Instead, the CCF took a more subtle approach. Section 6 mandated that the outstanding principal of a mortgage or agreement of sale would be reduced by the percentage at which interest would accrue that year. Although the CCF had said that its objective was to cancel interest, it clearly intended to give the impression that the *FSA* did not affect interest at all.

Under subsection 6(8), the Provincial Mediation Board was empowered to exclude from the operation of the section any mortgage or agreement of sale, or any class of mortgage or agreement of sale.

IV. SUPREME COURT OF CANADA

In May 1946, Prime Minister Mackenzie King's government referred the constitutionality of section 6 of the *FSA* to the Supreme Court of Canada. In 1945, investment and mortgage companies had applied to the federal government to have section 6 declared ultra vires, but the government had dismissed the application, announcing that it would be referring the section to the court for a ruling.[53]

The reference contained the following questions:

1. Is section 6 of the Farm Security Act, 1944, being Chapter 30 of the Statutes of Saskatchewan 1944 (second session) as amended by section 2 of Chapter 28 of the Statutes of Saskatchewan, 1945, or any of the provisions thereof ultra

[52] *British North America Act, 1867* (UK), 30 & 31 Vict, c 3 [*BNA Act*].

[53] See "Province loses its appeal on Farm Security act", *The Leader-Post* (22 November 1948) 1, online: *Google News* <news.google.com/newspapers?id=6-xTAAAAIBAJ&sjid=MTkNAAAAIBAJ&pg=1714%2C2281498>.

vires of the Legislative Assembly of Saskatchewan either in whole or in part, and if so, in what particular or particulars and to what extent?

2. If the said section 6 is not ultra vires, is it operative according to its terms in the case of mortgages
    a. securing loans made by His Majesty in right of Canada either alone or jointly with any other person under the National Housing Act, 1944, or otherwise;
    b. securing loans made by the Canadian Farm Loan Board; or assigned to the Central Mortgage and Housing Corporation.[54]

At the Supreme Court, the Provinces of Alberta and Saskatchewan argued that section 6 was constitutionally valid in whole. The Province of Quebec took a more limited view and argued only that certain provisions of section 6 should be declared valid. Canada and the Dominion Mortgage and Investment Association (DMIA) both argued that the section was invalid in whole.

The provinces sought to justify section 6 under several heads of power enumerated in section 92 of the *BNA Act*. The key heads of power relied upon were property and civil rights (section 92(13)), administration of justice (section 92(14)), and matters of a local or private nature (section 92(16)). Saskatchewan also relied on section 95 of the *BNA Act*, which allowed provinces to legislate on agriculture in the province if there is no conflicting federal legislation. This case came at a period when division of powers issues had generally been resolved in favour the provinces, with courts preferring to give a wide definition of property and civil rights.[55] When Mackenzie King referred the validity of Bennett's

54 *FSA Reference*, *supra* note 5 at 399.

55 See David Schneiderman, "Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century" (1998) 48:4 UTLJ 521 at 521–22; Virginia Torrie, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (Toronto: University of Toronto Press, 2020) at 58–59 [Torrie, *Reinventing Bankruptcy Law*]; John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002) at 150.

New Deal statutes to the Supreme Court, and on appeal to the Privy Council, virtually all of them were struck down in favour of the provinces.[56] However, the recent *Companies' Creditors Arrangement Act* (*CCAA*)[57] and *FCAA* references had served as countervailing forces in this respect, shifting power towards the federal government.[58]

Canada and the DMIA primarily argued that section 6 was unconstitutional on the basis that it trenched on federal jurisdiction under section 91 of the *BNA Act*. They argued that section 6 was primarily legislation in relation to bankruptcy and insolvency (section 91(21)) and interest (section 91(19)).[59] There had been recent cases that elucidated the reach of both of these federal heads of power. The *CCAA* and *FCAA* references showed that the federal government had a broad power over bankruptcy and insolvency that was not limited by traditional legislation on the matter. These cases clarified that under this power the federal

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56 See Saywell, *supra* note 55 at 227.

57 RSC 1985, c C-36 (enacted during the Great Depression as a bondholder remedy to help prevent large financial institutions from failing by allowing them to restructure their debtors). See Torrie, *Reinventing Bankruptcy Law*, *supra* note 55 at 7.

58 See *Reference re constitutional validity of the Companies' Creditors Arrangement Act (Dom)*, [1934] SCR 659, 4 DLR 75; *FCAA Reference*, *supra* note 7. Both of these were part of Bennett's "New Deal" statutes. Bennett referred the *CCAA* to the SCC in 1934, as it was not widely used for fear it was unconstitutional. The Court in the *CCAA* reference adopted a broad view of bankruptcy and insolvency, allowing it to include secured claims, which has previously been the purview of the provinces. The Court declined to formulate a substantive definition of bankruptcy and insolvency. When Mackenzie King took office in 1935, he referred the *FCAA* and others of Bennett's New Deal statutes to the SCC. The *FCAA* Reference solidified Parliament's authority to legislate in respect to secured creditors in the sphere of insolvency, even when used as a debtor protection mechanism. See Telfer & Torrie, *supra* note 8 at 98–99, 146.

59 The Privy Council had recently clarified the scope of Parliament's power over interest. It rejected the argument that Parliament's jurisdiction was limited to usury laws and ruled that the word was used in its ordinary connotation and extended to contractual interest. See *Independent Order of Foresters v Lethbridge Northern Irrigation District*, [1940] 2 DLR 273, [1940] AC 513, (PC) [*Lethbridge* cited to DLR].

government could legislate over secured creditors, which had traditionally been an area reserved to the provinces.[60] Many of the compromises reached under the *FCAA* included reductions in the debt principal owed by the farmer.[61] In this way the *FSA* presented a similarity with these compromises, as one of the key parts of section 6 reduced outstanding principal, although to a far more modest degree than the *FCAA* compromises.[62]

At the time of the *FSA Reference*, the Privy Council had also recently clarified the scope of Parliament's power over interest in *Lethbridge*.[63] Before that decision, there had been uncertainty over the scope of the federal power over interest. In *Lethbridge*, responding to the argument that the federal power over interest was limited to laws on usury, or unlawful rates of interest, the Privy Council, without laying down a decisive definition of interest, ruled that the word was used in its "ordinary connotation" and extended to contractual interest.[64] Therefore, by the time of the *FSA Reference* it was well-established that provincial laws modifying interest were ultra vires, and when the *FSA* was passed opposition parties had argued that it would be found ultra vires as such.[65]

One common point of argument for several parties was on the doctrine of colourability. This constitutional principle applies when a legislature passes a statute that purports to deal with an issue within its jurisdiction but is really a disguised attempt to address an issue that is outside its jurisdiction. Put another way, the doctrine means that "you cannot do that indirectly which you are prohibited from doing directly."[66] Canada argued that although

60 See Telfer & Torrie, *supra* note 8 at 146.

61 See Torrie, "Mechanisms of Debt Adjustment" *supra* note 50 at 146.

62 See *FSA*, *supra* note 2, s 6(2); *ibid* at 147.

63 See *Lethbridge*, *supra* note 59.

64 *Ibid* at para 8.

65 See "The Farm Security Judgment" *The Leader-Post* (23 November 1948) 5, online: *Google News* <news.google.com/newspapers?id=7OxTAAAAIBAJ&sjid=MTkNAAAAIBAJ&pg=1078%2C2440947>.

66 Madden v Nelson and Fort Sheppard Railway Co, [1899] AC 626 at 627, JCJ No 3 (PC).

section 6 purported not to affect interest, it was designed with the intention of cancelling interest. It was, therefore, a colourable attempt to indirectly legislate on interest.[67] Saskatchewan countered that there may be multiple ways to bring about a legislative purpose; some may be valid, and some may be invalid. For example, a province could require a vendor to collect a sales tax levied on the consumer, but it would be unable to levy the sales tax on the vendor, as that would be an indirect tax.[68] Just because section 6 creates practically the same result as legislation reducing interest, it does not mean that it is a colourable attempt to legislate on interest.[69]

The Supreme Court began hearing the arguments in October 1946, and delivered its judgment in May 1947.

A. Arguments

Saskatchewan and Alberta

Saskatchewan began with an in-depth historical outline of the state of farm debt in the province. In order to stabilize the province's agricultural industry and limit a farmer's liability in years of crop failure, the province argued that section 6 was valid provincial legislation in relation to property and civil rights, matters of a local or private nature, or agriculture in the province.

In relation to property and civil rights, Saskatchewan and Alberta argued that provincial jurisdiction in that area should be given a wide interpretation, subject only to the limitations imposed in section 91 of the *BNA Act*.[70] The true subject matter of the *FSA* was contracts involving agreements of sale and mortgages

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67 See *FSA Reference*, *supra* note 5 (Factum of the Attorney General of Canada at 9 [CA Factum]).

68 See Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2019) at 15.5(g).

69 See *FSA Reference*, *supra* note 5 (SK Factum at 68).

70 See *Citizens Insurance Company of Canada and The Queen Insurance Company v Parsons (Canada)*, [1881] 7 AC 96 (PC) [*Parsons*].

of farmland.[71] Saskatchewan pointed to the parallel of contracts involving the employment of persons living in the province, which were clearly a matter of property and civil rights in the province.[72] Section 6 was similarly a matter of property and civil rights in the province because it implied a contractual provision between the parties.

The Saskatchewan legislature designed section 6 to mitigate against the hazards of farming and reduce the risks of grain producers. Saskatchewan argued that, therefore, in pith and substance, it fell under section 95 of the *BNA Act*.[73] Section 95 had previously been interpreted broadly and would extend to the matter of section 6 of the *FSA* provided that the field was not already been covered by Parliament.[74] The province pointed out that "Agriculture" had been viewed by courts as including more than just the cultivation of fields.[75] It argued that a provision which confines its application to transactions concerning farmers should be a valid exercise of section 95.[76] The operations and transactions of farmers must include the purchase, lease, and mortgage of farmland. Therefore, a province could competently legislate on farmers' legal obligations under section 95.[77]

Unlike Saskatchewan, Alberta argued that section 6 was also valid as an exercise of the province's power over the administration of justice.[78] Section 6(2) provided for a limited moratorium for the payment of principal during the year of a crop failure. A province could declare a moratorium on debts in the province for a limited period and a specific purpose under its power to legislate on the administration of justice in the

71 See *FSA Reference*, *supra* note 5 (SK Factum at 36); *FSA Reference*, *supra* note 5 (Factum of the Attorney General of Alberta at 7 [AB Factum]).

72 See *FSA Reference*, *supra* note 5 (SK Factum at 39).

73 *Ibid* at 26.

74 See *Canada (Attorney General) v British Columbia (Attorney General)*, [1930] 3 WWR 449, 1 DLR 194.

75 See *FSA Reference*, *supra* note 5 (SK Factum at 30).

76 See *The King v Eastern Terminal Elevator Co*, [1925] SCR 434, 3 DLR 1.

77 See *FSA Reference*, *supra* note 5 (SK Factum at 34).

78 See *FSA Reference*, *supra* note 5 (AB Factum at 5).

province.[79] In fact, a province could "abolish any existing right of action, or postpone it by moratorium, under its power to legislate in relation to property and civil rights."[80] Therefore, section 6 was intra vires, as the province had exclusive jurisdiction to postpone for one year the payment of principal under a mortgage.[81]

Both provinces then argued that section 6 was not within the sole jurisdiction of Parliament. First, in relation to section 95, Saskatchewan pointed out that both federal and provincial governments had jurisdiction to make laws in relation to agriculture.[82] However, there was no such federal legislation on the same subject as the *FSA*. The closest was the *FCAA*, but it related to farmers who were unable to pay their obligations as they came due. The former related to all farmers suffering crop failure regardless of their ability to pay. Section 6 of the *FSA* specifically excluded any farmer affected by the *FCAA* from its application. If Parliament had not occupied the field, then the provincial legislation was valid under section 95.[83]

Second, the provinces argued that section 6 was not legislation in relation to interest. Section 6(2) stated that when the principal was reduced, interest would be payable as if the principal had not been reduced. Clearly, interest was specifically excluded from the application of the section.[84] The provinces argued that the section was not an attempt to do indirectly what could not be done directly, as the legislature could constitutionally address a purpose by one approach even if it would have been unable to use a different approach.[85] Therefore, the fact that the net result of section 6(2) was practically the same as if it had reduced the interest did not mean that the section was invalid.[86] Additionally,

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79 See *R v Bush*, [1888] 15 OR 398 at 403, OJ No 211.

80 *Maley v Cadwell*, [1934] 1 WWR 51 at para 21, 1933 CanLII 191 (SKCA).

81 See *FSA Reference*, *supra* note 5 (AB Factum at 6).

82 See *FSA Reference*, *supra* note 5 (SK Factum at 56).

83 *Ibid* at 57.

84 *Ibid* at 59. See *FSA Reference*, *supra* note 5 (AB Factum at 10).

85 See *City of Montreal v Canada (Attorney General)*, [1923] AC 136, 70 DLR 248 (PC).

86 See *FSA Reference*, *supra* note 5 (SK Factum at 69).

Alberta argued that a province could reduce the principal of a debt as long as it did not interfere with the right to recover the interest owing under the debt.[87] In this case, the fact that the measure of the reduction of the principal was the rate of interest could not cause the reduction to be unconstitutional. Alberta drew an analogy with *Royal Trust Company v British Columbia (Minister of Finance)*[88] where it was held that a province could tax a person's property based on the net value of property both within and without the province, even though it could only actually tax the property within the province. Therefore, it would be valid for a province to use something on which it could not legislate as a measure for something on which it could legislate.[89] Even if there was an incidental effect on interest, that would not be sufficient to hold the section ultra vires.[90] The section was not generally relating to interest, so even if some provisions affected interest, it did not mean that the section as a whole was in relation to interest.[91]

Third, the provinces argued that section 6 was not legislation in relation to bankruptcy and insolvency. The key reason was that section 6 applied without regard to a farmer's financial condition. The only criterion was whether the farmer had suffered a crop failure.[92] The fact that the statute served to prevent a person from reaching insolvency did not prove that it related to insolvency.[93] The provinces distinguished Alberta's *Debt Adjustment Act*, which was found ultra vires.[94] Unlike that Act, the *FSA* did not deprive

87 See *FSA Reference*, *supra* note 5 (AB Factum at 9).

88 [1921] 3 WWR 749, 61 DLR 194 (PC).

89 See *FSA Reference*, *supra* note 5 (AB Factum at 10).

90 See *FSA Reference*, *supra* note 5 (SK Factum at 71). *FSA Reference*, *supra* note 5 (AB Factum at 11).

91 See *Ladore v Bennett*, [1939] 2 WWR 566, 3 DLR 1 (PC); *Day v Victoria (City)*, [1938] 3 WWR 161, 4 DLR 345 (BCCA).

92 See *FSA Reference*, *supra* note 5 (SK Factum at 72). *FSA Reference*, *supra* note 5 (AB Factum at 11).

93 *See L'Union St Jacques de Montreal v Bélisle*, [1874] UKPC 53, (1874) 6 AC 31 [*L'Union St Jacques*].

94 See *FSA Reference*, *supra* note 5 (SK Factum at 75–76).

creditors from enforcing their claims. Moreover, section 6 did not single out the insolvent and had no mechanism to compel compositions.[95]

Alberta submitted that if the third paragraph of section 6(2), which reduced the principal outstanding but left the amount of interest payable unchanged, were invalid, it could be severed from the rest of the section and the remainder could be upheld.[96]

Quebec

Quebec's factum addressed the issue of section 6 in a different manner than the other two provinces. The province presented a qualified argument for the validity of section 6, focusing primarily on the first and second paragraphs of section 6(2). It essentially invited the court to sever paragraph 3 from the rest of the section, leaving the remainder operational. Because Quebec did not address paragraph 3, it was the only party that did not submit any arguments in relation to interest.

The province first submitted that paragraphs one and two of section 6(2) were valid within the province's jurisdiction over property and civil rights.[97] It argued that the words "property and civil rights" in section 92(13) of the *BNA Act* included rights arising from contract and should have been understood in their largest sense.[98] There was no doubt that section 92(13) included the power to legislate on mortgages and agreements of sale in the province.[99]

The province then argued those paragraphs did not relate to bankruptcy and insolvency. It pointed out that the federal jurisdiction over bankruptcy and insolvency allowed Parliament to interfere with property and civil rights in the province.[100] If the

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95 See *ibid* at 77.

96 See *FSA Reference*, *supra* note 5 (AB Factum 15).

97 See *FSA Reference*, *supra* note 5 (Factum of the Attorney General of Quebec at 5 [QC Factum]).

98 See *Parsons*, *supra* note 70.

99 See *FSA Reference*, *supra* note 5 (QC Factum at 6).

100 See *ibid* at 10.

paragraphs fell within the scope of bankruptcy and insolvency, then section 6 would be ultra vires, even in the absence of federal law. Bankruptcy and insolvency law involved schemes that grant debtors relief from their obligations to creditors, but paragraphs one and two did not provide any debt relief to a debtor. They maintained the entire debt and postponed payment for one year. Thus, they could not be legislation in the area of bankruptcy and insolvency.[101]

In addition, Quebec argued that paragraphs one and two did not violate any federal bankruptcy and insolvency laws. The federal power to legislate on bankruptcy and insolvency contained the power to make the legislation complete and effective even if some part fell within a provincial head of power.[102] Therefore, if the federal government did not legislate on a matter ancillary to bankruptcy and insolvency, a province could legislate on the same matter within its power over property and civil rights. Quebec argued that the only possible conflicting federal law was the *FCAA, 1943*. That statute created certain ways for debtors to be liberated from their obligations that they could not pay as they come due. It created a compromise with creditors when a debtor reached the point of insolvency. In contrast, the provincial law only postponed the date at which the debt came due.[103] A provincial law could not be unconstitutional merely by the fact that the civil rights of an insolvent debtor could be affected, if the purpose of the law was not to address insolvency.[104] The effect of paragraphs one and two on the federal law was merely incidental. It would be giving a federal parliament too much power to hold that a provincial law could not incidentally affect a federal subject. That would cause the provincial powers to be absorbed into the federal powers.[105] The fact that legislation had the effect of preventing people from

101 See *ibid* at 12.

102 See *ibid* 13.

103 See *ibid* at 14.

104 See *Reference re constitutional validity of the Companies' Creditors Arrangement Act (Dom)*, *supra* note 58.

105 See *FSA Reference*, *supra* note 5 (QC Factum at 14).

reaching insolvency did not mean that the legislation was within the category of insolvency.[106]

Quebec's factum only referenced paragraph 3 of section 6(2) to say that Parliament could not have legislated on the matter because it fell within section 92(13) of the *BNA Act*.[107]

Canada

Canada argued that section 6 of the *FSA* was invalid in whole. First, Canada submitted that section 6 was ultra vires as legislation in relation to interest. It pointed out that paragraph 3 of section 6(2) specifically outlined that "interest shall continue to be chargeable, payable and recoverable as if the principle had not been so reduced".[108] This imposed a new interest obligation on the mortgagor to pay interest on a principal amount that did not exist. This had the effect of increasing the rate of interest agreed to in the contract because the interest payment was the same, but the principal amount was smaller.[109] Legislation that reduced a rate of interest was in relation to interest, so the same must be true for increasing the rate of interest.[110]

Canada argued that the pith and substance of section 6 as a whole was to cancel the mortgagor's obligation to pay interest. The provision automatically reduced the principal by the rate of interest, but the interest on the unreduced amount remained payable. There would be no purpose in tying the reduction of principal to the rate of interest unless the purpose were to cancel the interest. The effect in the first year would be the same as if the interest had been cancelled directly.[111] The true intent was to cancel the interest, which was ultra vires the province. A

106 See *ibid* at 15–16.

107 See *ibid* at 16.

108 *FSA Reference*, *supra* note 5 (CA Factum at 8).

109 See *ibid*.

110 See *Lethbridge*, *supra* note 59 at para 11.

111 See *FSA Reference*, *supra* note 5 (CA Factum at 8).

superficially compliant form of legislation would not make it valid.[112]

Second, Canada argued that section 6 was invalid as legislation in relation to bankruptcy and insolvency. Although the section applied to all mortgagers and purchasers, the real intent was to help those who, by reason of crop failure, would be unable to pay their obligations as they came due.[113] In fact, the Provincial Mediation Board was granted wide powers under section 6(8), which would allow it to limit the application of the section only for mortgagors and purchasers who were unable to pay their obligations.[114]

Third, Canada submitted that section 6 conferred powers of a court on the Provincial Mediation Board, which was not properly constituted for such power.[115] The Provincial Mediation Board was authorized by section 6 to declare the rights of parties and to make orders that seem just to the matter in dispute. The powers to make an authoritative determination of facts and to make a declaration of the rights of the parties were judicial powers, which could only be validly held by a court. However, to create a court, the province must comply with sections 96, 99, and 100 of the *BNA Act*, which it did not in this case.[116] Therefore, section 6 created a judicial body that had not been properly constituted.[117]

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112 See *Attorney-General for Ontario v Reciprocal Insurers*, [1924] AC 328 at 337, 1 DLR 789 (PC) [*Reciprocal Insurers*].

113 See *FSA Reference*, *supra* note 5 (CA Factum at 10).

114 See *ibid* at 11.

115 See *ibid* at 12.

116 See *Toronto Corporation v York Corporation and Attorney General for Ontario*, [1938] AC 415 at 427, 1 DLR 593 (PC) [*Toronto v York*].

117 See *FSA Reference*, *supra* note 5 (CA Factum at 13). The province could validly create an administrative tribunal without complying with sections 96, 99, and 100 of the *BNA Act*—which require, *inter alia*, that judges be appointed and removable by the Governor General and have their salaries set by Parliament—as long as that tribunal does not possess the judicial powers of a court. Generally, a judicial power is the power to make an authoritative determination of the rights and obligations of persons. Canada argued that the PMB's power to determine if there has been a crop failure amounted to a determination of the rights and obligations of the parties. See *Shell Company of Australia Ltd v Federal Commissioner of Taxation*, [1931] AC 275 at 295, 2

Alternatively, if section 6 was not invalid in whole, Canada submitted that certain provisions were invalid and not severable.[118] Paragraph 3 of subsection 2 and subsections 3 and 4 were all invalid and were interwoven in the section to the extent that they could not be severed. It could not be presumed that if any provision were found to be ultra vires the legislation would have been enacted without it.[119]

Dominion Mortgage and Investment Association

The DMIA intervened to argue that section 6 was wholly invalid. Although the DMIA had declined to make any submissions in the *CCAA* and *FCAA* reference cases,[120] it took the position, like Canada, that the prairie farm debt crisis had been a temporary issue that did not need further legislation. In April 1943, the DMIA had released a pamphlet warning that additional farm debt legislation would destroy farm mortgages at the expense of creditors. It argued that many western farmers were able to meet their obligations and did not require further debt reduction. It warned that legislation in favour of debtors would have a chilling effect where farmers would not sell farms except for cash or very large down payments. If true, this would mean that only those with very large capital would be able to buy farms.[121] Due to the severity of the farm debt crisis, the DMIA had been willing to accept legislative intervention to reduce and delay debt repayment, and had conferred with Parliament on the drafting of the *FCAA*.[122] It likely had not been consulted on the *FSA* and evidently took the

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WWR 231 (PC) [*Shell Co of Australia*]; *Huddart, Parker & Co Pity Ltd v Moorehead* (1909), [1909] 8 CLR 330 (HCA).

118 See *FSA Reference*, *supra* note 5 (CA Factum at 13–14).

119 See *Manitoba (Attorney General) v Canada (Attorney General)*, [1925] 2 DLR 691 at 696, 2 WWR 60 (PC) [*Manitoba*].

120 See Telfer & Torrie, *supra* note 8 at 116.

121 See Dominion Mortgage and Investments Association ("DMIA"), *The Prairie Farmer and His Debts: What is in the public interest—more or less debt legislation?* (Toronto: DMIA, 1943).

122 See Torrie, "Federalism and Farm Debt", *supra* note 14 at 180.

position that the *FSA* was an attempt to solve a problem that no longer existed.

Like Canada, the DMIA argued that section 6 was invalid as legislation in relation to interest and insolvency. In addition to making similar arguments on interest as Canada, the DMIA argued that section 6 destroyed the right granted by the *Interest Act* to stipulate a rate of interest in a contract or agreement and removed from a lender the freedom to contract with respect to interest. This interference could have the effect of causing lenders to reject applications for new loans and for renewals could force lenders to accept interest rates that are inappropriate in the circumstances.[123]

The DMIA also argued that section 6 interfered with Parliament's existing insolvency legislation. Although section 6(7) said that the section would not apply to a debtor who had the benefit of the *FCAA*, the effect would be that that many farmers who could apply for relief under that act would instead take advantage of the benefit under section 6 of the provincial *FSA*. Under Parliament's legislation, debtors could benefit based on their assets, liabilities, and debts, but the Province's legislation imposed an arbitrary arrangement regardless of the assets or liability of the debtor or any other relevant consideration. The legislation would operate as an arbitrary arrangement for the benefit of insolvent farmers. The result was an unauthorized attempt to destroy the creditor's right to part of their claim and creditors would be deprived of the protection granted by Parliament's legislation. Even if section 6 were ancillary to "Bankruptcy and Insolvency", the province would be precluded from legislating on it because Parliament had already occupied the field.[124]

B. THE COURT'S DECISION

The Supreme Court decided that section 6 of the *FSA* was ultra vires as legislation in relation to interest. The decision involved

[123] See *FSA Reference*, *supra* note 5 (DMIA Factum at 8–9).

[124] See *ibid* at 10–11.

three concurring judgements and one dissenting judgement. Justice Kerwin wrote the plurality decision on behalf of himself and Chief Justice Rinfret. Justice Rand's decision remains the one most commonly cited, owing to his definition of interest.[125]

KERWIN J (RINFRET CJ CONCURRING)

While Saskatchewan had argued that the pith and substance of the legislation was agricultural security and the reduction of risks to farmers, Kerwin J found it was plain that the pith and substance was interest.

He noted that if a farmer suffered crop failure, the principal owing under a mortgage or agreement would be reduced by the rate of interest, as virtually all mortgages had interest rates greater than four percent. Two things were clear from this. First, the interest for the year was cancelled. Second, because the same amount of interest was payable, the effective interest rate was higher than agreed upon.[126] Because legislation reducing the rate of interest payable under a contract was legislation in relation to interest, the legislation here was definitely in relation to interest as well.[127]

Justice Kerwin distinguished the decisions in *Ladore v Bennett* and *Day v Victoria*, which had been relied upon by Saskatchewan and Alberta to argue that the *FSA* could be valid even if it incidentally affected interest. In his opinion, the *FSA*'s provision in relation to interest was at the core of the section. It was not severable from the remainder of the section, so section 6 was ultra vires in whole.[128]

After deciding the matter on the issue of interest, it was not necessary to deal with the other issues.

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125 This is based on a review of the citing cases as found on Lexis Advance's QuickCITE and Westlaw's KeyCite. Based on this research, 65 cases have cited the *FSA Reference* and 47 of those cited it for Justice Rand's definition of interest.

126 See *FSA Reference*, *supra* note 5 at 398.

127 See *Lethbridge*, *supra* note 59.

128 See *FSA Reference*, *supra* note 5 at 399.

RAND J

Justice Rand noted that the precise effect of paragraph 3 of section 6(2) was difficult to ascertain only from the text of the statute.[129] Rand J outlined the following definition of interest:

> Interest is, in general terms, the return or consideration or compensation for the use or retention by one person of a sum of money, belonging to, in a colloquial sense, or owed to, another . . . . But the definition, as well as the obligation, assumes that interest is referrable to a principal in money or an obligation to pay money. Without that relational structure in fact and whatever the basis of calculating or determining the amount, no obligation to pay money or property can be deemed an obligation to pay interest.[130]

The effect of section 6(2) must have been that the interest should be measured as if the principal had not been reduced. Therefore, the statute would effectively increase the interest rate as the principal was diminished. This meant the legislation was in relation to interest.[131]

He also dealt with the submission that section 6 was valid under section 95 of the *BNA Act* as in relation to agriculture in the province. He pointed out that not all legislation which may benefit agriculture was for that reason alone legislation within the scope of section 95. Legislation that operated to change interest rates could not be justified as legislation in relation to agriculture.[132]

Although section 6 was a modification of civil rights, an inseverable part of its substance was legislation in relation to interest and was, therefore, ultra vires. Rand also distinguished *Ladore v Bennett* and *Day v Victoria* in this respect.[133]

Based on this conclusion, Rand J did not address the other issues.

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[129] See *ibid* at 411.

[130] *Ibid* at 411–12.

[131] See *ibid* at 412.

[132] See *ibid* at 412–13.

[133] See *ibid* at 414.

KELLOCK J

Justice Kellock found that section 6(2) provided that notwithstanding the reduction to the principal, interest would continue to be payable as if the principal had not been reduced. If the principal outstanding were automatically reduced, it would follow that interest ceased to accrue on the amount of the reduction, as there is no such thing as interest on non-existent principal. The only way interest could be payable as if the principal were not reduced would be by increasing the interest rate on the outstanding principal.[134] In effect, the statute increased the rate of interest which was beyond the power of the provincial legislature.[135]

Kellock J decided that paragraph 3 of section 6(2) was not severable. It could not be presumed that the legislature would have enacted the other provisions without that one.[136] Therefore, section 6 was ultra vires in whole and it was not necessary to consider the other issues.

TASCHEREAU J

In dissent, Justice Taschereau found that section 6 was valid provincial legislation. He agreed that the pith and substance was farm security in the province, which was within the powers of Saskatchewan. Taschereau J, considering section 95 of the *BNA Act*, gave a wide meaning to "agriculture". He decided that legislation to

134 See *ibid* at 416–18.

135 See *Lethbridge*, *supra* note 59.

136 See *FSA Reference*, *supra* note 5 at 419–20. Canada had argued that unless it can be presumed that the legislature would have enacted legislation in a truncated form, a provision is not severable. This is not a presumption in the sense that an invalid provision will be held to be severable unless the presumption is rebutted. Instead, one must look at the context of the whole matter to determine whether the legislature may have enacted the legislation without any invalid provisions. Generally, if a provision is seen as core to the enactment, it will not be severable. In this case, because paragraph 3 was seen as a key provision it could not be severed. See *Manitoba*, *supra* note 119 at 696; *Alberta (Attorney General) v Canada (Attorney General)*, [1947] 4 DLR 1 at 6, 2 WWR 401 (PC).

relieve farmers of financial difficulties and reduce risk amounted to legislation in relation to agriculture.[137] Section 95 allowed Parliament to legislate on agriculture in the provinces, and such laws prevail over any conflicting law in the province. In this case, Parliament did not have any legislation on the same subject matter as the *FSA*, so there was no federal statute that could prevail over it.[138]

Taschereau J also would have found that section 6 was valid as legislation in relation to property and civil rights within the province. The section involved civil debt created by contract, and rights arising from contracts were within provincial jurisdiction.[139] The Legislature may insert a statutory clause into a contract which affected the civil rights of the parties, even if the rights of the parties were destroyed.[140]

He determined that section 6 was not legislation in relation to interest. The section specifically mandated that interest was to remain unchanged in order to prevent such an attack. However, this resulted in an increased rate on the principal outstanding. Taschereau J applied *Ladore* and *Day* and found that the effects of section 6 on interest were only incidental. The main purpose was to assist farmers during times of crop failure. This purpose could not be challenged only because it may have incidentally affected interest.[141]

Justice Taschereau was the only justice to consider the remaining contentions submitted by Canada. He found that the section was not in relation to bankruptcy and insolvency. It did not make any distribution of the assets of the debtor or make any compromise characteristic of bankruptcy and insolvency.[142] The

137 See *FSA Reference*, *supra* note 5 at 401.

138 See *ibid* at 402.

139 See *Parsons*, *supra* note 70.

140 See *FSA Reference*, *supra* note 5 at 403.

141 See *ibid* at 404–06.

142 See *ibid* at 406.

section dealt with a civil debt independent of the solvency of the debtor, which was within the power of a province.[143]

In addition, he maintained that the contention that the legislation granted the power of a court to a body not competently constituted could not be accepted.[144] The only function of the Board was to decide if there had been crop failure or not. It could not make a declaration of the rights of the parties and did not fulfil a "judicial" or "quasi-judicial" function.[145] The rights and obligations of the parties came from the statute itself, not the Board. The Board must act "judicially" in the sense that it must act fairly and impartially, but the members were nothing more than administrative officers performing their duties.[146]

In fixing the statute within the jurisdiction of the province, Taschereau J would have ruled the section intra vires.

V. JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Saskatchewan appealed the Supreme Court of Canada's decision in December of 1947. The appeal was heard by the Judicial Committee of the Privy Council in July 1948. Viscount Simon delivered the committee's judgement in November 1948.[147] The same constitutional questions were considered at the Privy Council as at the SCC. Canada responded to the appeal and the DMIA again submitted a factum as an intervenor. Alberta and Quebec did not participate at this appeal.

A. ARGUMENTS

143 See *L'Union St Jacques*, *supra* note 93.

144 See *FSA Reference*, *supra* note 5 at 406.

145 See *Shell Co of Australia*, *supra* note 117 at 10.

146 See *FSA Reference*, *supra* note 5 at 407.

147 See *Saskatchewan (Attorney General) v Canada (Attorney General)*, [1949] 2 DLR 145, 1 WWR 742 (PC) [*FSA Reference JCPC*].

SASKATCHEWAN

On appeal, Saskatchewan reiterated that section 6 was not legislation in relation to interest and was instead valid provincial legislation in relation to agriculture, property and civil rights, and matters of a merely local or private nature.[148] In addition, it argued that the section did not relate to bankruptcy and insolvency, nor to any area within the exclusive jurisdiction of Parliament.[149] The province largely adopted the reasons expressed in its SCC factum for why the SCC's decision should be reversed.[150]

CANADA

Canada began by outlining several principles relevant to the appeal:[151]

1. If provincial legislation does not fall under sections 92, 93, or 95 of the *BNA Act* it is ultra vires.[152]
2. If a provincial statute is in relation to one of those matters, it still must not fall within one of the classes under section 91.[153]
3. The subject matters in section 92 and 95 must not be interpreted as including any matter enumerated under section 91.[154]
4. Provincial legislation within its authority is ultra vires if it is inconsistent with any other provisions of the *BNA Act* (e.g., sections 96, 99, 100).[155]
5. If provincial legislation within its authority is consistent with all other provisions of the *BNA Act*, it still must not

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148 See *ibid* (Factum of the Attorney General of Saskatchewan at 6 [SK Factum]).

149 *Ibid* at 6.

150 *Ibid* at 6–7.

151 See *FSA Reference JCPC*, *supra* note 147 (Factum of the Attorney General of Canada at 7–8 [CA Factum]).

152 See *Parsons*, *supra* note 70.

153 See *ibid*.

154 See *John Deere Plow Co Ltd v Wharton*, [1915] AC 330, 18 DLR 353 (PC).

155 See *Toronto v York*, *supra* note 116.

conflict with valid federal legislation and must not invade a field occupied by Parliament.[156]

6. To apply these principles, one must consider the pith and substance, or true nature and character of the legislation.[157]
7. Legislation must be valid in substance and not merely formally by a "colourable" device.[158]

Canada submitted that Chief Justice Renfrit and Justice Kerwin were correct to hold that the main purpose of section 6 was to affect interest, and that this effect was not merely incidental.[159]

Canada argued that Taschereau J was wrong in holding section 6 to be valid as legislation in relation to Agriculture and Property and Civil Rights. In pith and substance, the section was in relation to interest because it changed the interest obligations in the affected contracts. The reduction of principal was a colourable device to carry out the purpose of cancelling interest. The changes to interest were not only incidental—that was the key purpose of the legislation.[160]

Canada then argued that Taschereau J was also wrong to hold that section 6 was not in relation to bankruptcy and insolvency. The underlying assumption of the legislation was the inability of the debtor to pay their obligations as they came due, and the Board was empowered to limit the operation to cases where the farmers were insolvent.[161] Note that the *CCAA* and *FCAA* references had confirmed that the federal government's jurisdiction over bankruptcy and insolvency went beyond technical aspects and procedure. Parliament was free to define the conditions of bankruptcy and insolvency and make compositions and

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156 See *DAA Reference JCPC*, *supra* note 3.

157 See *Reciprocal Insurers*, *supra* note 112; *Alberta (Attorney General) v Canada (Attorney General)*, [1939] 4 DLR 433, 3 WWR 337 (PC) [*Bank Taxation case*]; *Canada (Attorney General) v Quebec (Attorney General)*, [1947] 1 DLR 81, 3 WWR 659 (PC).

158 See *Reciprocal Insurers*, *supra* note 112; *Bank Taxation case*, *supra* note 157.

159 See *FSA Reference JCPC*, *supra* note 147 (CA Factum at 9).

160 See *ibid* at 10–11.

161 See *ibid* at 11.

arrangements.[162] Canada was suggesting that section 6 amounted to legislation on insolvency compositions.

Canada further argued that Tashereau J was also wrong to hold that the powers of the Board were not judicial. The powers of the Board to find facts were of the same character of the power of a Superior or District Court.[163]

Canada submitted that the section should be held as invalid for these reasons, and for the reasons outline in its SCC factum.[164]

Dominion Mortgage and Investment Association

The DMIA joined the appeal as respondent and maintained that even though Saskatchewan framed section 6 as legislation in relation to agriculture or property and civil rights, it was really in relation to interest and bankruptcy and insolvency.

First, the Association argued that although paragraph 3 of section 6(2) purported to relate to the principal amount of the debt, the use of interest as the measure for the reduction showed that the true purpose was to cancel interest. The reference to four percent was of no significance, as virtually all mortgages and agreements of sale stipulated rates of interest greater than four percent. Saskatchewan had admitted that the result was practically the same as if it had reduced the interest, but contended that this did not affect the validity of the legislation.[165]

The amount required to pay off the mortgage after the reduction was the amount of the reduced principal plus the interest as if the principal had not been reduced. This meant that the mortgagee was deprived of interest on the amount by which the principal was statutorily reduced. Thus, the legislation had the effect of cancelling interest.[166]

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162 See Telfer & Torrie, *supra* note 8 at 128.

163 See *FSA Reference JCPC*, *supra* note 147 (CA Factum at 11).

164 See *ibid* at 12–13.

165 See *FSA Reference JCPC*, *supra* note 147 (Factum of the Dominion Mortgage and Investment Association at 6 [DMIA Factum]).

166 See *ibid* at 7.

Saskatchewan had submitted that the principal would be reduced by the rate of interest specified in the contract. However, it was the contention of Kellock J that in successive years the principal would actually be reduced by a rate greater the interest rate in the contract, thereby effecting an increase in the rate of interest, which the province is unable to do. Interest was the dominant factor of the legislation, since the reduction of the principal was the rate of interest, without regard to other circumstances. The effect was to destroy the right to stipulate any rate of interest agreed upon, which was a right granted by Parliament in the *Interest Act*. Therefore, it conflicted with valid federal legislation.[167]

B. Decision

Viscount Simon, speaking for the Judicial Committee of the Privy Council, decided that section 6 was invalid as legislation in relation to interest. He noted that the contention that it was legislation in relation bankruptcy and insolvency was unsound, and he agreed with Taschereau J on that matter.[168]

Viscount Simon held that the section could not be justified under section 95 of the *BNA Act*. He agreed with Rand that there was a distinction between legislation "in relation to" agriculture and legislation that may have a favourable effect on the industry. However broadly "Agriculture in the Province" could be construed, this legislation was not valid on that ground.[169]

He also found that the legislation could not be valid in relation to property and civil rights. The provinces generally had unrestricted power over civil rights, of which contractual rights are one kind. However, allowance must be made to the powers enumerated under section 91 of the *BNA Act*. The federal power over "Interest" and "Bills of Exchange and Promissory Notes" both served as exceptions which restricted the provincial power. A

167 See *ibid* at 7–8.

168 See *FSA Reference JCPC*, *supra* note 147 at 146–47.

169 See *ibid* at 149.

provincial statute which varied the rate of interest in a contract would be in conflict with the federal power over interest.[170]

Viscount Simon agreed with the majority of the SCC that paragraph 3 of section 6(2), which reduced the loan principal by the rate of interest but stipulated that the interest payable remained the same, had the effect of increasing the rate of interest on the principal outstanding. Provincial legislation which altered a stipulated rate of interest conflicted with section 2 of the *Interest Act*. Although provincial legislation could be valid even if it incidentally affected an area of federal jurisdiction,[171] in this case interest lay at the heart of the legislation. The effect was not incidental.[172]

Affirming the judgement of the Supreme Court, Viscount Simon found that paragraph 3 was not severable from the rest of the enactment. Section 6(2) was the main provision of the section, so the section was invalid in whole.[173]

VI. ANALYSIS

The day after the Privy Council handed down its decision, Regina's Leader-Post newspaper printed the entirety of the decision.[174] On the same day, the Leader-Post printed an editorial that was highly critical of section 6 of the *FSA*.[175] The editorial said that nobody should have been surprised by the outcome, as the Liberal opposition had argued at the time it was passed that it would be ultra vires for directly affecting interest. The author wrote that to date, no cancellations had been made under the clause and the

170 See *ibid* at 150.

171 See *DAA Reference JCPC*, *supra* note 3.

172 See *FSA Reference JCPC*, *supra* note 147 at 150–51.

173 See *ibid* at 152.

174 See "Full text of Privy Council's Farm Security act decision", *The Leader-Post* (23 November 1948) 3, online: *Google News* <news.google.com/newspapers?id=7OxTAAAAIBAJ&sjid=MTkNAAAAIBAJ&pg=1236%2C2418814>.

175 See "The farm security judgment" *The Leader-Post* (23 November 1948) 5, online: *Google News* <news.google.com/newspapers?id=7OxTAAAIBAJ&sjid=MTkNAAAAIBAJ&pg=1078%2C2440947>.

government had made no attempt to enforce the provision. Repeating the warnings from the DMIA's April 1943 pamphlet, the editorial suggested that, if anything, the section had had a negative impact on farming. The author argued that the result was that farm owners had refused to sell except for cash or very large down payments, which made it difficult for anyone to expand except for large successful farms.[176]

In the years after section 6 was declared unconstitutional, Saskatchewan did not pass any new debt adjustment legislation. However, in 1951, Douglas's government passed an amendment to the *FSA* which finally repealed the old section 6 and inserted a new version.[177] The new section 6 was nearly the same as the old version, with only one substantial change: it no longer included paragraph 3 of section 6(2), which had provided that any outstanding principal would be reduced by the rate of interest, but all interest would remain payable. Therefore, the new version of section 6(2) only provided that every mortgage and agreement of sale would include a condition that in a year of crop failure the mortgagor or purchaser would not be required to make any payments of principal that year, and any principal payments falling due that year or falling due thereafter would be postponed one year. Recall that while Saskatchewan had argued that paragraph 3 was severable, the justices of the Supreme Court and the Privy Council were of the opinion that paragraph 3 was the key to the whole provision and was therefore not severable. Whether the legislature had intended that paragraph 3 should be severable at the time section 6 was first enacted, the 1951 amendment provided *ex post facto* evidence that the intent of section 6 was to postpone the payment of debt principal even if the principal could not be reduced by the rate of interest, which had effectively fulfilled Douglas's promise to cancel interest in years of crop failure.

Although section 6 was re-enacted, it was the *FSA*'s section 7, which stayed all orders of foreclosures respecting mortgages, that

176 See *ibid*.

177 See *An Act to amend The Farm Security Act, 1944*, SS 1951(1), c 33.

had the most lasting impact.[178] The legislation was ignored for 40 years, but when large numbers of mortgages fell into default in the early 1980s, legal counsel for farmers started to use section 7, catching mortgagees by surprise and preventing them from registering final orders of foreclosure with respect to homesteads.[179] In 1988, Saskatchewan repealed the *FSA* and replaced it with the *Saskatchewan Farm Security Act* ("*SFSA*"), which was intended to strengthen farm security and protect farm land and assets from seizure.[180] As a statute created by combining several existing statutes and incorporating certain new parts, the *SFSA* bore little resemblance to the 1944 *FSA* in its scope and length. However, the *SFSA* included a modified version of the *FSA*'s immunity from foreclosure orders and added additional protections for homesteads.[181] It is noteworthy that the new *SFSA* did not include any analogue to the crop failure clause in section 6 of the *FSA*. The *SFSA* served to consolidate the most significant provisions of prior legislation that related to secured financing involving farmers, and therefore incorporated parts of other depression-era debt statutes, such as *An Act to amend the Limitation of Civil Rights Act, 1933*.[182] In this way, statutes that were designed to address the specific economic hardship of the depression continue to influence farm security and secured financing to this day.

Other than some news coverage when the Privy Council delivered its judgement, the *FSA* and the reference were met with little contemporary attention. This is in comparison with the *FCAA Reference*, which made headlines in major news periodicals in

178 See Layh, *supra* note 14 at 1, n 2.

179 See *ibid* at 21.

180 *The Saskatchewan Farm Security Act*, SS 1988–89, c s-17.1 [*SFSA*]. See Layh, *supra* note 14 at 1.

181 See Layh, *supra* note 14 at 159.

182 SS 1937, c 94. For additional context on the influence of the *LCRA* on modern secured financing law, see Ronald CC Cuming, "Section 18 of the Saskatchewan *Limitation of Civil Rights Act*: A Good Idea or Troublesome Relic?" (2015) 78:1 Sask L Rev 1 at 2.

Canada, the United States, and England.[183] However, from a legal perspective, the *FSA Reference* has had a lasting impact.[184] The Supreme Court decision has continued to be referenced in 65 cases, in 47 of which it has been cited for the definition of "interest" put forward by Justice Rand. The Privy Council decision has continued to be referenced by all levels of Canadian courts, most notably for Viscount Simon's comments on the doctrine of colourability and determining the true nature and character of legislation.[185] The reference also reinforced the division between the possible provincial and federal approaches to farm debt as held in the *FCAA Reference*. Legislating on interest in order to alleviate financial difficulty for farmers was found to be firmly within the exclusive power of Parliament, along with bankruptcy and insolvency. The remaining path for provinces was to legislate on judicial procedure and secured financing law.[186] However, these two approaches are not wholly distinct and continue to present possible operational conflicts. In a recent decision,[187] the SCC was invited to rule that Part II of the *SFSA*[188] conflicted with section 243(1) of the *Bankruptcy and Insolvency Act* ("*BIA*"),[189] which

183 See Telfer & Torrie, *supra* note 8 at 102.

184 See Karim Renno, "Dimanches rétro: la fonction essentiel de l'intérêt est de compenser le créancier pour le non-paiement d'une somme d'argent qui lui est due de sorte que la législation provincial qui prévoit le paiement d'intérêts est intra vires", Case Comment on *FSA Reference*, *supra* note 5 (22 September 2014), online : *CanLII Connects* <canliiconnects.org/en/commentaries/29866>.

185 See e.g. *Calgary (City) v Bell Canada Inc*, 2020 ABCA 211; *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74; *Sahaluk v Alberta (Transportation Safety Board)*, 2015 ABQB 142; *Saputo Inc v Canada (Attorney General)*, 2011 FCA 69; *Masters' Association of Ontario v Ontario (Attorney General)*, 2010 ONSC 3714.

186 See Cuming, *supra* note 182.

187 See *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 [*Lemare*].

188 *SFSA*, *supra* note 180. Part II provided, *inter alia*, that before commencing an action with respect to farmland, a person must await a 150-day notice period and engage in mediation.

189 RSC 1985, c B-3.

authorizes the court to appoint a receiver on application by a creditor after 10 days' notice to the debtor. A majority of the Court found that the *BIA*'s 10-day notice should be treated as a floor, rather than a ceiling for waiting time.[190] Therefore, there was no operational conflict between the two statutes, and the *SFSA* did not frustrate the *BIA*'s purpose because "[t]he purpose of permissive federal legislation is not frustrated simply because provincial legislation restricts the scope of that permission."[191] Although the Supreme Court maintained a high standard for applying paramountcy on the basis of frustration, in cases where a federal scheme is not as permissive, similar provincial statutes could be found to conflict with or frustrate the purpose of federal legislation.[192]

VII. CONCLUSION

Whatever the true effect of section 6, Canada's position that the prairie farm debt crisis was a temporary economic issue appeared to be correct in the short term. Since the *FSA* was first passed, farm income on the prairies had continued to increase. Cash income on wheat in the prairies from 1935 to 1939 was, on average, $159.4 million per year, from 1940 to 1944 it was $237.6 million per year, and from 1945 to 1949 it increased to $462.6 million.[193] While Mackenzie King's government may have felt affirmed in preventing long-term farm debt adjustment legislation, from a modern perspective we can see that this approach was short-sighted. In 1934, with no bankruptcy and insolvency legislation geared towards farmers, the federal government was in a position where

190 See *Lemare*, *supra* note 187 at para 46.

191 *Ibid* at para 73.

192 See *ibid*. See e.g. *Bank of Montreal v Hall*, [1990] 1 SCR 121, 2 WWR 193 [*Hall*]. In *Hall*, the SCC found that sections of Saskatchewan's *Limitation of Civil Rights Act* conflicted with sections of the *Bank Act* and were therefore inoperative to that extent due to paramountcy. The Court in *Lemare* distinguished *Hall*, as that case dealt with a complete federal remedy that was intended to operate exclusive of provincial legislation.

193 See G E Britnell, "Perspective on Change in the Prairie Economy" (1953) 19:4 Can J Economics & Political Science 437 at 442.

it could only adopt a reactive approach to the farm debt crisis.[194] Even in 1943 when the *FCAA* was amended, the federal government held to the view that the crisis was temporary and that there was no need for long-term legislation.[195] This position would only hold true until the 1980s when economic conditions caused farm debt to be a pressing social and political issue again.[196] Faced with a crisis of rising farm debt and farmers facing insolvency and foreclosure, the federal government found itself in the same situation it was in fifty years prior, with a need to reactively pass legislation to relieve a pressing economic concern.[197] The difficulty with this reactive approach is that legislatures often cannot respond quickly or effectively enough to avert the bulk of the crisis.[198] In this way, the federal approach to the *FSA* and the 1930s farm debt crisis can serve as a cautionary tale to modern governments as they attempt to craft legislation to deal with current and future social and economic problems. As an attempt to address farm over-indebtedness, the issues presented in the *FSA Reference* may have contemporary relevance in the effective and efficient restructuring of SMEs.[199]

The balance of federalism in Canada meant that provinces needed to draft legislation carefully and address problems creatively when dealing with issues of debt in order to avoid trenching on federal jurisdiction. Section 6 of the *FSA* represented such an attempt to assist farmers who may have struggled with debt payments in years of low crop values. Although the language

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194 See Stephanie Ben-Ishai & Virginia Torrie, "Farm Insolvency in Canada" (2013) 2 J Insolvency Institute Can 33.

195 See *The Leader-Post*, "Farm Debt Legislation", *supra* note 40.

196 See Ben-Ishai & Torrie, *supra* note 194.

197 See *Farm Debt Review Act*, SC 1986, c 33.

198 See Ben-Ishai & Torrie, *supra* note 194.

199 See Sarra, *supra* note 6; Gurrea-Martínez, *supra* note 6; The World Bank, *supra* note 6; Mokal et al, *supra* note 6. See further the recently adopted prepackaged insolvency scheme for SMEs: *Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021* (India), online (pdf): <web .archive.org/web/20220101050015/https://ibbi.gov.in/uploads/legalframwork/04af067c22275dd1538ab2b1383b0050.pdf>.

of the section was written in such a way so as to appear that it did not affect interest at all, the specific language itself leads to the finding that the section was legislation in relation to interest and provided an opportunity for the courts to clarify the scope of the federal power over interest. Tracing the development of these legal issues through the SCC and the Privy Council is important for understanding the historical context as it shows the contemporary conception of the legal problem and elucidates the contingency of the decision.

In the modern era, there are more sophisticated policy option to address structural risk in farming than debt adjustment, such as subsidized business risk management programs like crop insurance and income stabilization. However, the ways provinces attempted to regulate farm debt from the 1920s to 1940s through moratoria and adjustment represented novel approaches at the time and are an important part of the historical legacy of the depression.