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# Ideas, Interests and Institutions and the History of Canadian Bankruptcy Law 1867-1880

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**IDEAS, INTERESTS, INSTITUTIONS AND  
THE HISTORY OF CANADIAN BANKRUPTCY LAW 1867-1880**

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**IDEAS, INTERESTS, INSTITUTIONS AND  
THE HISTORY OF CANADIAN BANKRUPTCY LAW 1867-1880**

Thomas G.W. Telfer\*

*I. Introduction*

Professor Michael Trebilcock's scholarship has long recognized the importance of history. For example, in *The Law and Economics of Canadian Competition Policy*<sup>1</sup> Professor Trebilcock and his co-authors seek to explain "why antitrust law was a relatively late arrival...and why it arrived first in North America."<sup>2</sup> The authors conclude that competition policy has always been a matter of politics that involves both "influential and often divergent economic interests and contested values or ideologies." The authors emphasized that institutions mediate the economic interests and the competing ideas.<sup>3</sup>

Michael Trebilcock and Ninette Kelley also make economic interests, contested ideas, and institutions the focus of *The Making of the Mosaic: A History of Canadian Immigration Policy*.<sup>4</sup> Trebilcock and Kelley recognize the interrelationship between ideas, interests and institutions. For example, the terms of public discourse may actually "disguise the true interests at play." Trebilcock and Kelley conclude that it will be:

strategic for an interest group to disguise its self interest under the rubric of a broader normative idea in order to engage the other members of the political community who may share the idea but not the interest.<sup>5</sup>

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<sup>1</sup> Michael Trebilcock *et. al.*, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2003) [hereafter "*Canadian Competition Policy*"].

<sup>2</sup> *Ibid.* at 12. See also Michael Trebilcock *et. al.*, *The Political Economy of Business Bailouts*, vol. 1 (Toronto: Ontario Economic Council, 1985); Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade*, 2d ed. (London: Routledge, 1999).

<sup>3</sup> *Canadian Competition Policy* at 12.

<sup>4</sup> Michael Trebilcock & Ninette Kelley, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998) [hereafter "*Making of the Mosaic*"].

<sup>5</sup> *Ibid.* at 9.

To understand the interaction of ideas and interests in the development of a particular public policy “requires a careful interpretation of the rhetoric of public discourse.”<sup>6</sup> Interest groups are central to public choice theory<sup>7</sup> that conceives of the political process as:

an implicit ‘market’ where the relevant actors – voters and special interest groups (demanders), politicians, bureaucrats, regulators (suppliers), and the media (intermediaries) – tend to be motivated by material self interest.<sup>8</sup>

Under this theory, public policy decision makers seek to maximize political support rather than opting for a course of action that would advance the broader public interest.<sup>9</sup> Finally, institutions “exert an independent influence on what interests and ideas in particular policy domains are given effect to or marginalized” in policy decisions.<sup>10</sup> Therefore, ideas and interests must be mediated through institutions “in order to be translated into public policy.”<sup>11</sup> Like Trebilcock and Kelley’s study of Canadian immigration policy, it is my hope to discover from “the Canadian historical experience, an understanding of the ideas, interests, and institutions that have been influential over time in shaping the evolution”<sup>12</sup> of Canadian bankruptcy policy.

## *II. Bankruptcy and Insolvency Law: 1867-1880*

### A. BANKRUPTCY IDEAS, INTERESTS AND INSTITUTIONS: AN OVERVIEW

After Confederation, Parliament passed bankruptcy legislation in 1869<sup>13</sup> and again in 1875.<sup>14</sup> However, calls for repeal began shortly after the federal *Insolvent Act of*

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<sup>6</sup> *Ibid.* at 11.

<sup>7</sup> See Denis Meuller, *Public Choice III* (New York: Cambridge University Press, 2003) at 1.

<sup>8</sup> *Making of the Mosaic* at 9.

<sup>9</sup> *Ibid.* at 9; *Canadian Competition Policy* at 16; Denis Meuller, *Public Choice III* (New York: Cambridge University Press, 2003) at 1.

<sup>10</sup> *Making of the Mosaic* at 11.

<sup>11</sup> *Ibid.* at 10.

<sup>12</sup> *Ibid.* at 12.

<sup>13</sup> *Insolvent Act of 1869*, S.C. 1869, c. 16.

1869 came into force and extended through to 1880. In that year, Parliament repealed the *Insolvent Act of 1875* and did not enact another general bankruptcy law until 1919.<sup>15</sup> This paper seeks to explain why Parliament abandoned its jurisdiction over bankruptcy and insolvency law shortly after Confederation. The question is analysed through the lens of ideas, interests, and institutions.

The bankruptcy law's two fundamental principles, the discharge and the equitable distribution of the debtor's assets, provided the framework for the debates. The debate over the discharge was not a purely disinterested competition of ideas. Although the principles of a moral obligation to repay and the release of the debtor from the burden of debt featured prominently in the debates, one economic interest tapped into the rhetoric of moral obligation to advance the cause for repeal. The *Insolvent Acts* excluded farmers, making them ineligible for a discharge.<sup>16</sup> Invoking the higher obligation to pay, the farming community through their MPs sought repeal in order to place farmers on an equal footing with commercial interests. Bankruptcy law's distribution of assets provided another focal point in the debates. Bankruptcy law destroyed local advantage as it abolished the common law race to the debtor's assets and prohibited the payment of preferential claims to local or friendly creditors. Urban-based Boards of Trade and Dominion Board of Trade (DBT) and the commercial interests they represented had the most to lose if Parliament repealed the legislation. Boards of Trade lobbied for the retention of the law but their efforts failed as they ultimately remained divided on the repeal issue.

Institutions also had an autonomous influence on policy choice.<sup>17</sup> Public policies are directly related to "historically changing institutional arrangements" of the state, and

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<sup>14</sup> *Insolvent Act of 1875*, S.C. 1875, c. 16.

<sup>15</sup> S.C. 1880, c. 1; *Bankruptcy Act of 1919*, S.C. 1919, c. 36.

<sup>16</sup> J.D. Edgar, *The Insolvent Act of 1869* (Toronto: Copp Clark, 1869) at 33-34.

<sup>17</sup> Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (London: Cambridge University Press, 1982) at ix.

political parties.<sup>18</sup> In the words of Douglass North, “History matters... because the present and future are connected to the past by the continuity of a society's institutions.”<sup>19</sup> The study of institutions has generated a large body of literature by “new institutionalists.”<sup>20</sup> This paper examines institutions such as the relative strength or weakness of the state,<sup>21</sup> political parties, bankruptcy administration, the courts,<sup>22</sup> and federalism.<sup>23</sup> The weakness of the state and divided political parties inhibited the implementation of stable and lasting bankruptcy legislation. The incompetency of Official Assignees, who administered the bankrupt’s estate, became a central point for those supporting repeal. The Ontario county courts also contributed to the unpopularity of the legislation by interpreting it in a way that favoured debtors. Finally, federalism had an independent effect on policy direction.<sup>24</sup> At the end of the 1870s, Ontario’s proposal of a provincial law that distributed the debtor’s assets on a pro rata basis without the controversial discharge provided Parliament with an opportunity to repeal the unpopular federal bankruptcy law.

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<sup>18</sup> Theda Skocpol, “Reply: Against Evolutionism – Social Policies and American Political Development” (1994) 8 *Stud. Amer. Pol. Dev.* 140 at 142.

<sup>19</sup> Douglass North, “Economic Performance Through Time” *The Prize Lecture in Economic Science in memory of Alfred Nobel* (The Nobel Foundation: Mimeo, 1993) at vii.

<sup>20</sup> See e.g., André Lecours, ed., *New Institutionalism: Theory and Analysis* (Toronto: University of Toronto Press, 2005). On the debate over what is an institution see e.g., Philip Ethington & Eileen McDonagh, “The Eclectic Center of the New Institutionalism: Axes of Analysis in Comparative Perspective” (1995) 19 *Soc. Sci. Hist.* 467-477.

<sup>21</sup> R. Kent Weaver & Bert A. Rockman, “Assessing the Effects of Institutions” in R. Kent Weaver & Bert A. Rockman, eds., *Do Institutions Matter? Government Capabilities in the United States and Abroad* (Washington: Brookings Institution, 1993) at 32.

<sup>22</sup> Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (London: Cambridge University Press, 1982) at 27.

<sup>23</sup> André Lecours, “New Institutionalism: Issues and Questions” in André Lecours, ed., *New Institutionalism: Theory and Analysis* (Toronto: University of Toronto Press, 2005) at 6.

<sup>24</sup> R. Kent Weaver & Bert A. Rockman, “Assessing the Effects of Institutions” in R. Kent Weaver & Bert A. Rockman, eds. *Do Institutions Matter? Government Capabilities in the United States and Abroad* (Washington: Brookings Institution, 1993) at 31; David Brian Robertson, “History, Behaviouralism, and the Return to Institutionalism in American Political Science” in E.H. Monkkenon, ed., *Engaging the Past: The Uses of History Across the Social Sciences* (Durham: Duke University Press, 1994) at 137.

## B. CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

The *Constitution Act, 1867* established “bankruptcy and insolvency” as an exclusive power of Parliament.<sup>25</sup> The *Insolvent Act of 1869*<sup>26</sup> permitted involuntary proceedings, commenced by creditors, and voluntary proceedings, initiated by debtors. To obtain a discharge and a release of their debts debtors required creditor consent and subsequent court approval.<sup>27</sup> The legislation also permitted the court to issue a second-class discharge. Both a first- and second-class discharge released a bankrupt from his or her debts. However, the court awarded first-class discharges where the bankruptcy had arisen from unavoidable misfortune.<sup>28</sup> A court could order a second-class discharge where, for example, the insolvent had been guilty of misconduct or incurred debts without a reasonable expectation of payment.<sup>29</sup> The Act only applied to traders.<sup>30</sup> Only those engaging in buying and selling were within the scope of the Act and eligible for the discharge while farmers or professionals could not make a filing under the Act and obtain a discharge.

The *Insolvent Act of 1875* sought to address some of the defects in the 1869 Act. While there was some similarity between the two statutes, (e.g. they both applied to traders)<sup>31</sup> there was a consensus that the Act of 1869 had not gone far enough to protect creditors.<sup>32</sup> The *Insolvent Act of 1875* abolished voluntary proceedings.<sup>33</sup> The 1875 Act

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<sup>25</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(21), reprinted in R.S.C. 1985, App. II, No. 5. Although Parliament labelled the nineteenth century legislation as the *Insolvent Acts*, they operated as bankruptcy legislation. *Re Hurst, an Insolvent* (1876), 6 P.R. 329 (Ont. Pr. Ct.); *McWhirter v. Thorne* (1869), 19 U.C.C.P. 302.

<sup>26</sup> *Insolvent Act of 1869*, S.C. 1869, c. 36, s. 155. The original Act was a temporary 4-year measure. Parliament extended the Act twice: S.C. 1873, c. 2; S.C. 1874, c. 46.

<sup>27</sup> *Insolvent Act of 1869*, ss. 94, 98, 101.

<sup>28</sup> See J. Popham, *The Insolvent Act of 1869* (Montreal, Dawson Bros, 1869) at 138.

<sup>29</sup> *Insolvent Act of 1869*, s. 103. On the English experience, see Barbara Weiss, *The Hell of the English: Bankruptcy and the Victorian Novel* (Lewisburg: Bucknell University Press, 1986) at 45.

<sup>30</sup> See e.g., *Thomas v. Hall* (1874), 6 P.R. 172 (Ont. P.C.).

<sup>31</sup> See e.g., *Creighton v. Chittick* (1881), 7 S.C.R. 348.

<sup>32</sup> C. Beausoleil, *La Loi de Faillite* (Montreal: Plinguet, 1877) 2.

<sup>33</sup> Ivan Wotherspoon & C.H. Stephens, *The Insolvent Act of 1875* (Montreal: Dawson Brothers, 1875) at vi.

retained the class-based discharge regime but made the discharge more difficult to obtain by requiring that the debtor's assets meet a threshold of 33 cents on the dollar.<sup>34</sup> When the Conservatives returned to power in 1878, they were uncertain how to proceed and in 1879 established a Committee to study bankruptcy law.<sup>35</sup> The Committee produced Bill 85 that would have made discharge nearly impossible. The Bill required a debtor to obtain the consent of creditors representing 4/5 in number and 4/5 in value.<sup>36</sup> The Bill never became law, with Parliament eventually opting to repeal the *Insolvent Act of 1875* in 1880.<sup>37</sup>

### C. THE DISCHARGE

The Canadian bankruptcy debates took place during an international financial panic that began in 1873. Five years of falling prices and financial failure followed.<sup>38</sup> This economic crisis created an intense debate as political actors and interest groups sought to “provide compelling and convincing diagnoses” for the federal bankruptcy reform question.<sup>39</sup> The discharge was the most contentious aspect of the bankruptcy law debates with notions of forgiveness competing unsuccessfully with the idea that all debts had to be honoured. Sir John A. Macdonald claimed “when a man made a clean breast of his affairs, and gave his estate honestly for the benefit of his creditors, he ought to have relief.”<sup>40</sup> John Abbott, the drafter of the *Insolvent Act of 1864* asked, “why should a man

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<sup>34</sup> *Insolvent Act of 1875*, s. 58. Parliament raised the threshold to 50 cents on the dollar in 1877. S.C. 1877, c. 41, s. 14, 15.

<sup>35</sup> James Bicknell, “Establishing a Bankruptcy Court in Canada” (1913) 33 Can. L.T. 43.

<sup>36</sup> Bill 85, *An Act to Repeal the Insolvent Act of 1875, and the Acts Amending it, and to Make Provision for the Liquidation of the Estates of Insolvent Debtors*, 1st Sess., 4th Parl., 1879, s. 44.

<sup>37</sup> S.C. c. 1, 1880.

<sup>38</sup> M. Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland & Stewart, 1987) at 249; K. Norrie & D. Owrn, *A History of the Canadian Economy* (Toronto: Harcourt, 1991) at 293-298.

<sup>39</sup> See e.g., Colin Hay, “Ideas, Interests and Institutions in the Comparative Political Economy of Great Transformations” (2004) 11 Rev. Int'l Pol. Econ. 204 at 207.

<sup>40</sup> *House of Commons Debates* (11 May 1869) at 258.



who had been overwhelmed by a sudden depreciation in the value of produce...” be deprived of a discharge?<sup>41</sup> A letter published in the *Journal of Commerce* argued that bankruptcy law should provide relief to the honest and unfortunate debtor “even though he be so through folly or bad judgment.”<sup>42</sup> A discharge was a means to release debtors from their “shackles”<sup>43</sup> or the “mill stone” of debt.<sup>44</sup>

On the other hand, Alexander Mackenzie, the Leader of the Opposition, and future Prime Minister of Canada, argued that bankruptcy law “had been found eminently conducive to public immorality.”<sup>45</sup> Bankruptcy law “was conceived in sin, and whose fruits had been iniquity from first to last.”<sup>46</sup> A law that impaired the moral obligation to pay was “an unsound and impolitic law” and should not be enacted by any Parliament.<sup>47</sup> In a pamphlet entitled *Fallacy of Insolvency Laws and their Baneful Effects*, the author asserted that the state had no right to enact any law that would give increased opportunity for debtors to disregard “the duties and responsibilities of their condition in life.”<sup>48</sup> Court files also provide evidence of anti-debtor sentiment. One creditor reminded the debtor that he was going to “pay for all this yet...and you will have to suffer.”<sup>49</sup> Another creditor charged that the “the penitentiary would be a very appropriate residence” for such a “worthless creature.”<sup>50</sup>

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<sup>41</sup> *House of Commons Debates* (11 May 1869) at 262 (Abbott).

<sup>42</sup> Letter to Editor of *J. of Commerce* (5 March 1877) in “Insolvency” *J. of Commerce* (8 March 1877) 116.

<sup>43</sup> *Debates of the Senate* (18 June 1869) at 357 (Sanborn).

<sup>44</sup> *House of Commons Debates* (2 May 1872) at 286 (Anglin).

<sup>45</sup> *House of Commons Debates* (11 May 1869) at 253.

<sup>46</sup> *House of Commons Debates* (7 March 1879) at 202 (Rymal).

<sup>47</sup> *House of Commons Debates* (20 March 1875) at 815 (MacLennan).

<sup>48</sup> Thomas Ritchie, *The Fallacy of Insolvency Laws and their Baneful Effects* (1885) at 18.

<sup>49</sup> Letter of Dickie & Kennedy, The Buckeye Spring Hoe Broadcast Seeder and Drill and Horse Rakes, to McMichael and Hughson, 4 June 1877; *Re McMichael & Hughson* (23 June 1877); Kent County Court Insolvency Files, 1874-1881, RG 22-2675 (AO).

<sup>50</sup> Letter of A. Watts, Importer, Brampton to H. Cumming, 18 August 1878; *Re J. Taylor* (19 April 1877); Kent County Court Insolvency Files, 1874-1881, RG 22-2675, (AO).

The negative public perception of bankruptcy and the notion that a debtor had a moral obligation to pay may have contributed to the number of debtors who absconded to avoid bankruptcy. Wentworth county records show that eight per cent of the files involved debtors<sup>51</sup> who fled to the United States or another province rather than face the humiliation and stigma that bankruptcy would bring.<sup>52</sup> With a relatively porous border, absconding debtors headed for destinations that included Milwaukee,<sup>53</sup> New York City (with intention to sail to England),<sup>54</sup> Lewiston, NY,<sup>55</sup> and Detroit.<sup>56</sup> While some debtors took family with them,<sup>57</sup> others avoided the shame of having to confront their family with news of debt and default. One Hamilton lumber merchant left his family a letter stating “he was a ruined man and that he had left for good.”<sup>58</sup>

While bankruptcy attracted negative public sentiment, it is important to ask whether any underlying interest relied on public discourse to their advantage. Trebilcock and Kelley remind us that the terms of public discourse may actually “disguise the true interests at play.”<sup>59</sup> Further, public policy does not always respond to the “common good” but rather the aim for MPs is to construct “winning coalitions” even if the policy

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<sup>51</sup> Wentworth County Court Insolvency Files, 1864-1880, RG 22-5762 (AO).

<sup>52</sup> See e.g., *Consolidated Bank of Canada v. William Harris* (17 March 1879); *Sarah Catherine Birley v. Lewis D. Birley* (3 July 1879); Wentworth County Court Insolvency Files, 1864-1880, RG 22-5762 (AO).

<sup>53</sup> *Joseph Chemer & Havier Chemer v. James Ball* (19 April 1875); Wentworth County Court Insolvency Files, 1864-1880, RG 22-5762 (AO).

<sup>54</sup> *Bank of British North America v. Robert Yates & David Garson* (20 December 1875); Wentworth County Court Insolvency Files, 1864-1880, RG 22-5762 (AO).

<sup>55</sup> *Cassandra Wisker v. James Barnes* (23 May 1877); Wentworth County Court Insolvency Files, 1864-1880, RG 22-5762 (AO).

<sup>56</sup> *John Wood v. John Callaghan* (8 May 1877); Wentworth County Court Insolvency Files, 1864-1880, RG 22-5762 (AO).

<sup>57</sup> *George Taylor & Francis Ninety v. Daniel Murphy* (14 March 1873); *Joseph Chemer & Havier Chemer v. James Ball* (19 April 1875); Wentworth County Court Insolvency Files, 1864-1880, RG 22-5762 (AO).

<sup>58</sup> *Bank of British North America v. Julius McCarty* (23 March 1874); Wentworth County Court Insolvency Files, 1864-1880, RG 22-5762 (AO).

<sup>59</sup> *Making of the Mosaic* at 9.

has the effect of reducing social welfare.<sup>60</sup> In the bankruptcy context, rural based MPs advanced arguments against the discharge. Farmers and rural areas represented a high proportion of the population in the 1870s.<sup>61</sup> What specifically raised the ire of the rural community was the trader rule that excluded farmers from the Act. A farmer, who sold grain to a miller on credit, risked having his claim extinguished by the miller's discharge.<sup>62</sup> Further, if the miller's bankruptcy led to the farmer's ruin, the trader rule prohibited the farmer from obtaining a discharge.<sup>63</sup> The rationale in support of the rule suggested that traders required a special law to guard against economic risk. Non-traders borrowed out of extravagance and not out of necessity.<sup>64</sup>

Rural MPs did not accept this rationale. One MP, a representative of "the agricultural class," argued that the farmers were also "subject to the uncertainties of life." Storms could destroy crops, disease could "carry off flocks," and lightning could destroy his buildings.<sup>65</sup> During the 1870s, rural MPs repeatedly pointed out that "the majority of their constituents" including farmers did not receive any benefits from the Act but were "compelled to bear their share of the loss."<sup>66</sup> Rural opposition to bankruptcy law became an issue in the election of 1878 and rural constituencies urged the Government to repeal the legislation as they viewed it as "class legislation."<sup>67</sup>

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<sup>60</sup> *Canadian Competition Policy* at 16. See Dennis Mueller, *Public Choice III* (New York: Cambridge University Press, 2003) at 1.

<sup>61</sup> K. Norrie & D. Ooram, *A History of the Canadian Economy* (Toronto: Harcourt, 1991) at 277. The 1871 census reported 49% of respondents claimed farming as their occupation. See also Richard Pomfret, *The Economic Development of Canada* (Toronto: Methuen, 1981) at 53.

<sup>62</sup> J. Bicknell, "Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35 at 46.

<sup>63</sup> See *House of Commons Debates* (20 March 1875) at 810 (Mills); James Bicknell, "The Advisability of Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L. Times 35.

<sup>64</sup> R.M.F., "Legislation upon Insolvency" (1873) 2 Can. Monthly 419 at 420.

<sup>65</sup> *House of Commons Debates* (7 March 1879) at 217 (Landry).

<sup>66</sup> J. Bicknell, "Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35 at 46.

<sup>67</sup> *House of Commons Debates* (7 March 1879) at 209-210 (McCallum).

However, in pointing out the unfairness of the trader rule, there was no call for a bankruptcy law of general application.<sup>68</sup> Equality of treatment could best be achieved by repeal.<sup>69</sup> The demand for repeal, however, continued to be expressed in traditional terms. Rural Canada could not tolerate a law which “allowed [a debtor] to avoid paying all his debts.” People were willing to “return to the good sound principle which bound every man to pay his legitimate debts.”<sup>70</sup>

#### D. THE EQUITABLE DISTRIBUTION OF THE DEBTOR’S ASSETS

Bankruptcy law prohibited preferential payments that debtors often made to related parties or local creditors.<sup>71</sup> The federal legislation also abolished the common law race to the debtor’s assets by providing for a pro rata distribution to all unsecured creditors.<sup>72</sup> This had the effect of reducing risk for distant or foreign creditors, and destroyed local advantage. The common law rewarded priority of execution providing an advantage to local creditors.<sup>73</sup> While a distant creditor may have commenced proceedings first, neighbours, fathers, or brothers might convince the debtor to consent to judgment “so that the neighbour or friend got the whole proceeds.”<sup>74</sup> Those who feared the repeal of the *Insolvent Act of 1875* claimed that distant creditors would be disadvantaged and “injury would be inflicted on the people of the distant provinces.”<sup>75</sup>

When the House of Commons voted in favour of repeal in 1879 bankruptcy law supporters in the Senate mounted a campaign to prevent the law’s demise. One Senator tabled a petition noting that merchants in large cities including Montreal, Quebec, St.

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<sup>68</sup> *House of Commons Debates* (20 March 1875) at 821.

<sup>69</sup> *House of Commons Debates* (25 February 1880) at 222 (McCuaig).

<sup>70</sup> *House of Commons Debates* (7 March 1879) at 220 (Bechard).

<sup>71</sup> See e.g., *McLeod v. Wright* (1877), 17 N.B.R. 68 (S.C. (Eq. App.)).

<sup>72</sup> See e.g., *Jones v. Kinney* (1885), 11 S.C.R. 708 at para. 4.

<sup>73</sup> J.D. Edgar, *The Insolvent Act of 1869* (Toronto: Copp Clark, 1869) at 128.

<sup>74</sup> *House of Commons Debates* (11 May 1869) at 259.

<sup>75</sup> *House of Commons Debates* (26 February 1877) at 304 (Workman); G. Beausoleil, *La Loi De Faillite* (Montreal: Plinguet, 1877) at 6.

John and Toronto had large transactions in other provinces. This made a general bankruptcy law essential “in order to make their transaction reasonably safe.”<sup>76</sup> Although the Senate blocked repeal in 1879, both Houses voted for repeal the next year. Why that occurred requires an examination of the role of interest groups and institutions.

In the United States, the enactment of the Bankruptcy Act of 1898 has been linked to the emergence of chambers of commerce and boards of trade.<sup>77</sup> Canadian Boards of Trade as well as a national body, the DBT emerged as interest groups in the 1870s. From the outset, local Boards of Trade influenced the shape of the *Insolvent Act of 1869*,<sup>78</sup> the *Insolvent Act of 1875* and their various amendments.<sup>79</sup> Local Boards of Trade also took an interest in the repeal question. For example, the Toronto Board of Trade told Prime Minister Macdonald that the Board was “unanimously of opinion” that repeal would be “most disastrous to business interests of the country.”<sup>80</sup>

The DBT offered local Boards of Trade a national voice. The DBT clearly saw itself as a “Commercial Parliament” and sought to bring its “views to bear on the government” by ensuring that its resolutions came to the attention of the relevant Ministers.<sup>81</sup> The DBT aimed to “secure unity and harmony of action” for commercial laws.<sup>82</sup> However, on the issue of bankruptcy law there was no unity.<sup>83</sup> In 1878, the DBT convened a Special Committee on bankruptcy. The Halifax, Ottawa and Levis Boards of

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<sup>76</sup> *Debates of the Senate* (8 May 1879) at 514 (Ryan).

<sup>77</sup> D. Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton: Princeton University Press, 2001) at 36, 39; B. Hansen, “Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law” (1998) 72 *Bus. Hist. Rev.* 86.

<sup>78</sup> House of Commons, Select Committee, “Third Report of the Select Committee on Bankruptcy and Insolvency” in *House of Commons Journals* (17 April 1868) at 9.

<sup>79</sup> Dominion Board of Trade, Annual Report 1874 at 13 [hereafter DBT]; *Petition of the Boards of Trade, of Banking Institutions, and of Merchants and Manufactures of Montreal, 30 April 1872*; RG6-A-1; Vol. 11, File No. 704, Secretary of State Papers (PAC).

<sup>80</sup> J. Morrison, *President Toronto Board of Trade, Telegram to Sir John A. Macdonald, 1 March 1880*; Macdonald Papers, MG 26-A, Reel C-1748, pp. 169691 to 169665 (PAC).

<sup>81</sup> DBT, Annual Meeting 1874 at 27.

<sup>82</sup> DBT, Annual Meeting, 1872, Appendix.

<sup>83</sup> DBT, Annual Meeting 1872 at 75-77; DBT, Annual Meeting 1877 at 158.

Trade instructed their representatives on the Special Committee to vote for repeal.<sup>84</sup> In 1879, the DBT issued a comprehensive report recommending several amendments to the Act. Many members of the DBT spoke in favour of repeal. Members of the DBT defeated a motion supporting repeal of the *Insolvent Act of 1875* by a 10-9 margin.<sup>85</sup> The division within the commercial community combined with the strong opposition from the rural community contributed to the demise Canada's bankruptcy regime. A national and united commercial organization, committed to national bankruptcy reform, did not emerge until 1913.<sup>86</sup>

## E. INSTITUTIONS

### (i) The state and party systems

The capacity of the political system can limit public policy developments. Political capacity includes the expertise of those passing the laws and individuals who administer the legislation. There was no separate bankruptcy office or department. Bankruptcy law was not part of a larger regulatory state.<sup>87</sup> Those with a particular concern wrote directly to the Minister of Justice or to the Prime Minister.<sup>88</sup> The various governments of the day showed little interest in the legislation and never adopted the legislation as a government matter. The Conservatives sought to distance themselves from the *Insolvent Act of 1869*.<sup>89</sup> The Liberals, elected in 1873, did not consider bankruptcy law as a government matter. A majority of Members from both sides of the

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<sup>84</sup> DBT, Annual Meeting 1878 at 191; DBT, Annual Meeting 1878 at 189.

<sup>85</sup> DBT, Annual Meeting 1879 at 25-36; 159-177.

<sup>86</sup> See Thomas Telfer, "The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest" (1994-95) 24 C.B.L.J. 357.

<sup>87</sup> David Brian Robertson, "History, Behaviouralism, and the Return to Institutionalism in American Political Science" in E.H. Monkkenon, ed., *Engaging the Past: The Uses of History Across the Social Sciences* (Durham: Duke University Press, 1994) 10 at 113.

<sup>88</sup> See e.g., Letter of Dame C. Labelle to Minister of Justice, 15 June 1878; Department of Justice Files, RG 13-A-2, Vol. 41, File No. 1878-849 (PAC).

<sup>89</sup> *House of Commons Debates* (25 April 1872) at 162 (Cartier).

House supported the *Insolvent Act of 1875*.<sup>90</sup> Edward Blake, the Liberal Minister of Justice, claimed that since Confederation, governments had never promoted bankruptcy law.<sup>91</sup>

After returning to power in 1878, the Conservatives appointed the 1879 Select Committee, without committing the government to any position.<sup>92</sup> Many assumed that when the 1879 Reform Bill came to a vote the Conservative government would divide.<sup>93</sup> The Conservative government came under attack in 1879 for refusing “to have policy in the matter.”<sup>94</sup> As the repeal debates intensified in 1879 and 1880, the Conservatives were unwilling to press bankruptcy reform and risk electoral support particularly in the large number of rural ridings. MPs’ response to the bankruptcy law crisis no doubt involved a “political calculus” that considered the prospects for re-election in the context of a repeal or reform vote.<sup>95</sup>

#### (ii) Bankruptcy Administrative Machinery

The Official Assignee had responsibility for the day-to-day administration of the bankrupt’s estate and the distribution of dividends to creditors.<sup>96</sup> Under the 1869 Act, local Boards of Trade or Chambers of Commerce appointed Official Assignees.<sup>97</sup> In 1875, the government assumed control over appointments but it quickly degenerated into

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<sup>90</sup> *House of Commons Debates* (26 February 1877) at 306 (Dymond).

<sup>91</sup> *House of Commons Debates* (26 February 1877) at 289.

<sup>92</sup> *House of Commons Debates* (7 March 1879) at 216 (Landry).

<sup>93</sup> *House of Commons Debates* (28 April 1879).

<sup>94</sup> *Debates of the Senate* (9 May 1879) at 536-537 (Wark, Brown); “Insolvent Act Repeal” *Monetary Times* (2 May 1879) 1359.

<sup>95</sup> See Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (London: Cambridge University Press, 1982) at 12.

<sup>96</sup> The Official Assignee in theory represented the interests of the insolvent and the creditors. *Re Andrews* (1877), 2 O.A.R. 24 (C.A.) at 30.

<sup>97</sup> *Insolvent Act of 1869*, s. 31; Letter of John Abbott to Montreal Board of Trade, 14 September 1869, Montreal Board of Trade Papers, MG28 III 44, Reel 2785, MB V, p. 152 (PAC).

a patronage scheme<sup>98</sup> with “political affinities” dictating appointments.<sup>99</sup> The ineffectiveness of Assignees led some to call for greater state intervention in the administration of bankruptcy estates<sup>100</sup> or making all Assignee appointments subject to a competency examination.<sup>101</sup>

Creditors often complained of long delays between the commencement of proceedings and the actual receipt of a dividend.<sup>102</sup> One creditor protested that the estate had been in the hands of the Official Assignee for over a year and that all the creditor had received was “long letters.” The creditor demanded, “if we do not hear from you soon with some money we [will be] taking legal measures to enforce a dividend.”<sup>103</sup> Creditors also objected to the Assignee’s fees.<sup>104</sup> One insolvent, having gone through bankruptcy four times in five years, claimed that he would have been wealthier if not for the “avariciousness” of the Assignee.<sup>105</sup> In *Thomas v. Hall*<sup>106</sup> the court focused on the misconduct of the Official Assignee. The judge could not “understand how any respectable gentleman filling the office of official assignee” could “assist the defendant in the perpetration of this fraud.”<sup>107</sup>

Official Assignee misconduct also became a major focus in the press and

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<sup>98</sup> See e.g., Petition of Toronto Merchants for Appointment of John Clark to the Office of Official Assignee, Department of Justice Papers, RG 13 A2, Vol. 37, File No. 847 (PAC).

<sup>99</sup> “The Insolvency Law” *J. of Commerce* (20 August 1875) 10.

<sup>100</sup> “The Bankruptcy Question (letter to the editor from WM Munro)” *Daily Globe* (23 February 1874) 2.

<sup>101</sup> “The Insolvency Law” (1875) 1 *J. Com. Fin. & Ins. Rev.* 10.

<sup>102</sup> See e.g., *Re Girdlestone* (14 February 1879); *Re W.H. Davy* (28 February 1878); Kent County Court Insolvency Files, 1874-1881, RG 22-2675 (AO).

<sup>103</sup> W.E. Ewan & Son, Wholesale Clothiers, letter to J.H. Delamere, 12 June 1878. See also: Special Summons in the First Division Court of the Provincial County of Hamilton, 3 February 1877; *John Johnson v. J.H. Delamere as Official Assignee of estate of James Langton*; James Langton Fonds, 1875-1879, F 176, MU 1695 (AO).

<sup>104</sup> Letter of Fraser & Fraser, Barristers, London Ont. to H. Cumming, 4 November 1878; *Re P. McKerral* (8 December 1873; Kent County Court Insolvency Files, 1874-1881, RG 22-2675 (AO).

<sup>105</sup> “Zeke Trimble on the Insolvency Laws” (1869) 2 *Diogenes* 11.

<sup>106</sup> (1874), 6 P.R. 172 (Ont. P.C.).

<sup>107</sup> *Ibid.* at para. 16.



commercial journals. The Official Assignee was the “*pettifogging paid and unlicensed lawyer of the insolvent.*” It was easy to see that “he will use every means in his power *to slip his client through*, regardless of creditors!”<sup>108</sup> Assignees were not fit to hold office as they were “merely broken down tradesmen.” This led people to “think the whole bankrupt law machinery is a humbug.”<sup>109</sup> Critics charged that Assignees took high fees yet the Assignee’s work consisted of merely “drawing papers, notices, attendances before the judge, drawing final order” etc.<sup>110</sup> Assignees prolonged proceedings to “increase the expense....Nobody gets paid.” Official assignees “took it all.”<sup>111</sup>

As momentum grew in favour of repeal the *Canada Law Journal* claimed that there would be few to “mourn repeal of the Act except an army of official assignees.”<sup>112</sup> There was a sense that under the *Insolvent Act of 1875* the Official Assignees had benefited most of all.<sup>113</sup> A political cartoon published in the *Canadian Illustrated News* represents this best. Entitled “Othello’s Occupation Gone!”<sup>114</sup> the cartoon shows a “disconsolate official assignee” who had heard of the repeal of the Insolvency Law. With his hat, gloves and pipe strewn on the floor, and official papers littered everywhere, the Assignee with his head in his hand contemplates his next career as a “To Let” sign hangs in his window and a “Bankrupt Stock” notice is displayed on the wall.<sup>115</sup> One such Assignee fearing the prospects of unemployment wrote to Prime Minister Macdonald on the eve of repeal seeking another federal patronage appointment, perhaps in Customs.

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<sup>108</sup> Scarboro, “Correspondence: Assignees in Bankruptcy Matters – The Operation of the Act (Letter to the Editors of the Canada Law Journal)” (1868) 4 Can. L.J. (N.S.) 83 (Emphasis original).

<sup>109</sup> Scarboro, “Correspondence: Insolvent Acts – Assignees” (1868) 4 Can. L.J. (N.S.) 159.

<sup>110</sup> *Ibid.*

<sup>111</sup> James Bicknell, “The Advisability of Establishing a Bankruptcy Court in Canada” (1913) 33 Can. L.T. 35.

<sup>112</sup> “Editorial” (1878) 14 Can. L.J. (N.S.) 189.

<sup>113</sup> “Notes From the Capital” *The Mainland Guardian* (New Westminster) (28 May 1879) 3.

<sup>114</sup> See William Shakespeare, “Othello, the Moor of Venice” in Michael Neill, ed., *Othello: The Oxford Shakespeare* (New York: Oxford University Press, 2006) Act III, Scene III at 304.

<sup>115</sup> “Othello’s Occupation Gone!” *Canadian Illustrated News: Images in the News: 1869-1883* vol. XIX, No. 19 (10 May 1879) 289.

A.W. Roberts claimed that “I will be out in the cold should the Act be repealed.”<sup>116</sup>

(iii) The Courts

The judicial interpretation of the Insolvent Acts did not meet the expectations of those who had been opposed to bankruptcy law from the outset.<sup>117</sup> The *Insolvent Acts* of 1869 and 1875 enabled courts to issue second-class discharges.<sup>118</sup> A review of reported cases reveals only two instances of an appellate court imposing a second-class discharge.<sup>119</sup> Ontario county court records confirm the infrequency of the second-class discharge. A study of these records discloses only a single instance of a single second-class discharge for the period 1869-1880.<sup>120</sup>

Ontario county court files also illustrate that judges did not strictly apply the *Insolvent Act of 1875*. Although the Act only permitted creditors to commence proceedings, the legislation became a voluntary regime for many debtors. This has a distinct parallel to earlier U.S. Bankruptcy legislation. The U.S. Bankruptcy Act of 1800 only allowed creditors to begin proceedings. Bruce Mann’s study found both direct and indirect evidence of creditor collusion with the debtor to obtain an order of bankruptcy.<sup>121</sup> For indirect evidence, he noted the number of files where a family member filed a bankruptcy claim against a relation. Mann notes that it is difficult to determine whether related creditors initiated the petition vindictively or compassionately. Both motives are

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<sup>116</sup> A.W. Roberts, Port Perry, letter to Sir John A. Macdonald, 19 February 1880; Macdonald Papers, MG 26-A, Reel C-1748, pp. 169522 to 169524, (PAC).

<sup>117</sup> Appellate courts did not adopt a consistent pro debtor or pro creditor approach to interpretation. Pro debtor cases include: *Re Russell* (1882), 7 O.A.R. 777 (C.A.); *Forrester v. Thrasher* (1882), 2 O.R. 38 (H.C.J.) at para. 36; Cf. *Re Hill* (1882), 7 O.A.R. 694 (C.A.); *Re Hutchinson* (1877), 12 N.S.R. 40.

<sup>118</sup> *Re Gooding* (1880), 5 O.A.R. 643 (C.A.) at para. 9.

<sup>119</sup> *In re Mooney* (1876-77), 11 N.S.R. 563; *Re Donald Matheson* (1872-85), 9 N.S.R. 538.

<sup>120</sup> *Adam Rutherford Bell v. George McPherson* (26 June 1876) (second-class discharge ordered 3 June 1887); Lanark County Court Insolvency Minute Books, RG 22-2873 (AO).

<sup>121</sup> Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of Independence* (Cambridge: Harvard University Press, 2002) at 228-239.

possible but “the ones filed by fathers against sons bear the mark of one generation helping fallen members of the next to their feet.”<sup>122</sup>

In Canada, the *Insolvent Act of 1875* required the plaintiff creditor to complete an affidavit stating, “I do not act in this matter in collusion with the defendant not to procure him any undue advantage against his creditors.”<sup>123</sup> Notwithstanding the no collusion affidavit, a study of Ontario county court insolvency procedure books illustrates that it was not uncommon for the court to accept a writ of attachment filed by a creditor with the same last name as the debtor. Lanark county courts accepted 5.5 per cent of these files, Huron 3.5 per cent, Oxford 2.6 per cent and Lambton 0.5 per cent.<sup>124</sup> Filings by a father against a son are evident.<sup>125</sup> For example, William Henry Cooper filed against William Henry Cooper the younger on 6 March 1877 and by September of that year, the son received his discharge.<sup>126</sup> Women also played a role in the initiation of involuntary proceedings against a debtor with the same last name.<sup>127</sup> While appellate courts were prepared to censure collusion between related parties,<sup>128</sup> the county courts tolerated some level of collusion when it came to the initiation of bankruptcy proceedings.

The conduct of the county court judges did not escape the scrutiny of the press. The *Daily Globe* complained that courts had adopted the practice of granting every petition for a discharge even where there was opposition by creditors. Insolvency law was

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<sup>122</sup> *Ibid.* at 232-233.

<sup>123</sup> *Insolvent Act of 1875*, s. 4.

<sup>124</sup> Lanark County Court Insolvency Minute Books, RG22-2873; Huron County Court Insolvency Procedure Book: 1864-1885, RG22-2466; Oxford County Court Insolvency Docket Book 1869-1880, RG22-3963; Lambton County Court Insolvency Procedure Book: 1865-1880, RG22-2764. The Peel County sample was too small to include in the statistics listed above. Peel County Court Insolvency Minute Book 1867-1880, RG 22-4163 (AO).

<sup>125</sup> *John Gamble Geddes the Elder v. John Gamble Geddes the Younger* (7 January 1880) Wentworth County Court Insolvency Files, 1864-1880, RG 22-5762 (AO).

<sup>126</sup> *William Henry Cooper v. William Henry Cooper the younger* (6 March 1877); Huron County Court Insolvency Procedure Book: 1864-1885, RG22-2466 (AO).

<sup>127</sup> *Agnes Buchan v. Charles Buchan* (15 May 15, 1879); Huron County Court Insolvency Procedure Book: 1864-1885, RG22-2466; *Jane Caskey v. James Caskey* (23 November 1876); Lanark County Court Insolvency Minute Books, RG22-2873 (AO).

<sup>128</sup> See e.g., *Parke v. Day* (1875), 24 U.C.C.P. 619; *Snarr v. Smith* (1880), 45 U.C.Q.B. 156.

“surely not intended chiefly to whitewash individuals and apply the sponge to the liabilities of defaulting debtors.”<sup>129</sup> An 1869 pamphlet claimed that a debtor could get through his bankruptcy on easy terms “as any calculating rogue can generally succeed in wresting from his reluctant creditors.”<sup>130</sup> The press went beyond general attacks on the bankruptcy system and directly condemned the bankruptcy judges on a more personal basis. The *Globe* dubbed county court judges as “diminutive aristocrats.”<sup>131</sup> An 1869 St. John *Morning Freeman* editorial claimed, “County Court Judges are not always men who should be entrusted with the great discretionary powers the bill confers on them.”<sup>132</sup> The *Globe* explained the pattern of pro debtor rulings. The “county judge was, perhaps, too apt to take the view that the insolvent was a fellow townsman and a decent sort of citizen who ought not to be too harshly dealt with.”<sup>133</sup> Although there was persistent anti-debtor rhetoric, county courts may have been responding to the other side of the debate. Pro debtor rhetoric existed and county courts, being courts of first instance, may have been reflecting that aspect of public opinion. Theda Skocpol concludes that courts are “profoundly rhetorical institutions bound to be affected by moral understandings deeply embedded in categories of political discourse.”<sup>134</sup>

#### (iv) Federalism

Despite the clear wording of the federal power under the *Constitution Act*, a number of litigants challenged the validity of the *Insolvent Acts*. However, the appellate

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<sup>129</sup> “Bankrupts in Court” *Daily Globe* (24 February 1872) 2.

<sup>130</sup> E.T. Bromfeld, *Practical Hints to the Retail Merchant or How to Make Business Successful: With An Appendix Containing Advice to the Embarrassed Debtors and Remarks on the Present Law of Bankruptcy in Canada* (Toronto: 1869) Canadian Institute for Historical Microreproductions (CIHM) No. 53131.

<sup>131</sup> “Farmers and Insolvency Laws” *The Globe* (Toronto) (25 December 1884) 4.

<sup>132</sup> *Morning Freeman* (St. John) (17 June 1869) 2.

<sup>133</sup> “The Law of Insolvency” *The Globe* (Toronto) (11 April 1892) 4. See also Iain D.C. Ramsay, “Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales” (2005) 7 *Theoretical Inquiries in Law* 625 at 641 (suggesting judges will have an interest in furthering their own role and interests).

<sup>134</sup> Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Cambridge University Press, 1992) at 371.

courts, including the Supreme Court of Canada<sup>135</sup> and the Privy Council,<sup>136</sup> consistently upheld the validity of the federal act.<sup>137</sup> Despite these rulings, the federal division of powers became a source of political debate. In the House of Commons, defenders of bankruptcy law pointed to the exclusive jurisdiction of the federal government over the field of bankruptcy and insolvency in the *Constitution Act, 1867*.<sup>138</sup> Others argued that bankruptcy law interfered with the “jurisdiction of the Local Legislatures.”<sup>139</sup> Federal bankruptcy legislation diminished the value of provincial property and civil rights jurisdiction.<sup>140</sup> The strong belief in provincial rights caused Parliament to consider some form of provincial autonomy within the federal bankruptcy scheme. Autonomy might involve excluding a specific province altogether from the federal scheme or creating some form of preferential treatment for some provinces.<sup>141</sup> As proposals for a provincial autonomy model under the federal Act failed, many began to think of provincial legislation that would help fill the gap if Parliament repealed the legislation. Repeal would mean reverting to the common law race of diligent creditors. The division of powers would enable provinces to ameliorate the effects of repeal by passing legislation providing for their own pro rata distribution scheme under the property and civil rights jurisdiction. A provincial solution would mean that a federal bankruptcy law would no longer be required.

In 1879, Oliver Mowat, the premier of Ontario, raised the possibility of provincial legislation with Alexander Campbell, the government leader in the Canadian Senate.

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<sup>135</sup> See e.g., *Shields v. Peak* (1883), 8 S.C.R. 579 at para. 5.

<sup>136</sup> *Cushing v. Dupuy* (1880), L.R. 5 App. Cas. 409 (P.C.) at para. 13.

<sup>137</sup> See e.g., *Kinney, Assignee v. Dudman* (1876), 11 N.S.R. 19 (C.A.); *In re Frederick B.K. Marter* (1887), 15 N.S.R. 413 (C.A.); *Re Barrett* (1880), 5 O.A.R. 206 (C.A.). For a single dissenting point of view see: *McLeod v. Wright* (1877), 17 N.B.R. 68 (S.C. (Eq. App.)) (Wetmore J.) at para. 75.

<sup>138</sup> *House of Commons Debates* (9 June 1869) at 680 (Edward Blake); *House of Commons Debates* (5 May 1879) at 1769 (Girouard).

<sup>139</sup> J. of Commerce (12 April 1878) 239; G. Girouard, “Le Droit Constitutionnel du Canada” (1871) 1 R.C.L.J. 189, 263 at 272.

<sup>140</sup> *House of Commons Debates* (9 June 1869) at 659.

<sup>141</sup> *House of Commons Debates* (17 May 1872) at 266 (Macdonald); *House of Commons Debates* (20 March 1875) at 809 (DeCosmos).

Mowat understood that “the Insolvent Law is likely to be abolished next session.” Mowat suggested a solution that separated the distribution of the debtor’s assets from the discharge:

Is not the release of the debtor at the bottom of all the evils or supposed evils of the Act? And is not the machinery of the Act useful and desirable for the distribution of the estate equally?<sup>142</sup>

Mowat told Campbell that he had been considering a bill “which did not recognize priority between execution creditors...for Upper Canada” in the event of repeal of the federal legislation.<sup>143</sup> Mowat suggested that if provincial legislation was not viable then the federal government should consider cancelling the discharge provisions of the Act and retain the distributive features of the Act.<sup>144</sup>

In 1879, the Senate delayed repeal of the *Insolvent Act* to “enable the provinces to adopt suitable legislation.” Ontario subsequently announced its intention to pass the *Act to Abolish Priorities Among Execution Creditors*.<sup>145</sup> Royal Assent was given to the Ontario Act on 5 March 1880 which was the day after the *Bill to Repeal the Insolvent Acts* was read for the third time.<sup>146</sup> The timing of the Ontario Bill and the federal Repeal bill was not a coincidence.<sup>147</sup> The new provincial legislation required that creditors share rateably in the proceeds realized from the sale of the debtor’s assets but did not provide for a discharge.<sup>148</sup> Alexander Campbell, speaking in the Senate, confirmed that correspondence with the Premier of Ontario had resulted in the preparation of the Ontario

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<sup>142</sup> Letter of Oliver Mowat to Alexander Campbell, 20 October 1879, Alexander Campbell Papers, M-22 (PAC).

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> Charles Tupper, “Canadian Insolvency Legislation” (Report of Meeting of British Empire League, 4 December 1895) CIHM No. 00296.

<sup>146</sup> *Study Committee on Bankruptcy and Insolvency Legislation* (Canada: 1970) at 14. The federal repeal Bill received Royal Assent on 1 April 1880.

<sup>147</sup> Charles Tupper, “Canadian Insolvency Legislation” (Report of Meeting of the British Empire League, 4 December 1895) CIHM No. 00296 at 4.

<sup>148</sup> “The Creditors’ Relief Act” *J. of Commerce* (27 February 1880) 47.

Bill that would “meet any evils which might arise from the passage of the [repeal] Bill now before the House.”<sup>149</sup>

If the federal division of powers made the repeal of bankruptcy law possible because of the tempering effects of provincial legislation, did federalism make repeal more likely? Members of Parliament were well aware of the proposed Ontario legislation.<sup>150</sup> The government concluded that it was in the interests of commerce and the public “to allow ... the Insolvency Law to be repealed and to let the effect of the repeal tempered ...by recent legislation in Ontario.”<sup>151</sup> Ontario, soon to be followed by other provinces, gained a new source of patronage in establishing any required administrative structures.<sup>152</sup> Federalism contributed to the divorce of equitable distribution of the assets from the discharge and made repeal of the federal act possible.

### *III. Conclusion*

Ideas, interests and institutions had a significant role in leading to the repeal of the federal legislation in 1880. The discharge and the distribution of assets provided the focal point of much of the public discourse. Beyond identifying the public rhetoric, it is important to ask whether any specific interests relied upon aspects of the public discourse to advance their cause. The rural farming community relied on public rhetoric on the moral obligation to pay in order to repeal legislation that discriminated against them. Supporters of a national law, such as the DBT, divided on the repeal question and did not have sufficient influence to prevent repeal. Weak governments and the divided political parties contributed to repeal. The misconduct of Official Assignees and the debtor friendly county courts provided a source of opposition to the law. Finally, federalism made repeal in 1880 more likely given that provinces could regulate debtor creditor matters under their property and civil rights jurisdiction.

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<sup>149</sup> *Debates of the Senate* (10 March 1880) at 124 (Campbell).

<sup>150</sup> *House of Commons Debates* (19 February 1880) at 104 (Colby).

<sup>151</sup> *Debates of the Senate* (10 March 1880) at 124 (Campbell).

<sup>152</sup> A.W. Roberts, Port Perry, letter to Sir John A. Macdonald, 19 February 1880; Macdonald Papers, MG 26-A, Reel C-1748, pp. 169522 to 169524; (PAC).

Developments after 1880 demonstrate the importance of ideas, interests and institutions. Between 1880 and 1903, Parliament debated twenty reform bills that proposed to reinstate some form of bankruptcy regime. All failed. By 1903, most provinces followed Ontario's lead in providing for a pro rata distribution scheme and some enacted legislation that prohibited preferential payments. The Privy Council's refusal in 1894 to strike down a provision in Ontario preference legislation<sup>153</sup> reinforced the notion that reform should continue at the provincial level.<sup>154</sup> Bankruptcy law did not re-surface as a national issue until just before World War I. The growing importance of national trade led many to see the flaws in a diverse provincial scheme. The discharge came to be recognized as an essential form of business regulation. The Canadian Credit Men's Trust Association (CCMTA), a national interest group, retained a solicitor to draft a bankruptcy bill. Whereas the DBT had failed in the nineteenth century, the CCMTA's bill ultimately became a government Bill in 1919 and the Bankruptcy Act of 1919. While nineteenth century governments exhibited indifference, the new 1919 Act coincided with the emergence of the growing regulatory state after the war.<sup>155</sup>

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<sup>153</sup> *Ontario (Attorney General) v. Canada (Attorney General)*, [1894] A.C. 189 (P.C.).

<sup>154</sup> Thomas Telfer, "A Canadian 'World Without Bankruptcy': The Failure of Bankruptcy Reform at the End of the Nineteenth Century" (2004) 8 *Aus. J. Leg. Hist.* 83.

<sup>155</sup> Thomas Telfer, "The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest" (1994-95) 24 *C.B.L.J.* 357.