Privy Council Appeal No. 20 *of* 1942

The Attorney-General of Alberta - - - - *Appellant*

v.

The Attorney-General of Canada and others - - *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 1ST FEBRUARY, 1943

Present at the Hearing:

VISCOUNT MAUGHAM
LORD RUSSELL OF KILLOWEN
LORD MACMILLAN
LORD ROMER
LORD CLAUSON

[*Delivered by* VISCOUNT MAUGHAM]

This appeal by special leave is presented by the Attorney-General of Alberta against the decision of the Supreme Court of Canada dated the 2nd December, 1941, which answered certain questions concerning the constitutional validity of the Debt Adjustment Act, 1937, of the Province of Alberta as amended by five later Acts. These questions had been referred to the Supreme Court for hearing and consideration pursuant to section 55 of the Supreme Court Act (Revised Statutes of Canada, 1927, chapter 35) by the Governor-General in Council by an Order made on the 19th May, 1941. The Supreme Court decided that the Act in question is *ultra vires* of the legislature of Alberta. The Attorney-General for Saskatchewan as a respondent and the Attorneys-General for Manitoba, Ontario and New Brunswick as intervenants supported the appeal.

Distress of a very serious nature was rife in Alberta and the adjoining Prairie Provinces from at any rate the year 1920, and divers statutes were passed in those Provinces and in particular in Alberta directed to the relief of the inhabitants. In the view their Lordships have taken it does not seem to be necessary to give even a summary of these statutes beginning with the Drought Area Relief Act, Ch. 43 of 1922. The Act now under consideration (to be hereafter generally referred to as "the Act") is the last of a series of legislative attempts to relieve the distress of resident farmers and others while keeping within the legislative powers of the Province as laid down in the British North America Act, 1867, as amended. Their Lordships approach the important questions before them on the assumption that there was sufficient and it may be said grave need for legislation for the relief of distress in the Province. They desire, however, to point out that the question before them is not as to the expediency, still less as to the wisdom, of the present Act. The question is simply one as to the power of the Province to pass it. If the answer should be in the negative it must necessarily follow that the Dominion has full power to pass a statute dealing with the matter or such part of it as is beyond the power of the Province.

Before stating the nature of the Act it should be mentioned that it contains amendments designed to deal with the objection that a preceding Act encroached upon the matter of " Bankruptcy and Insolvency " which (under section 91 (21) of the British North America Act) is within the exclusive legislative authority of the Parliament of Canada. Mr. Justice O'Connor had decided in favour of this objection (*North American Life Assurance Company* v. *McLean* (1941) 1 W.W.R.430). Certain compulsory composition provisions mentioned by the learned Judge are now removed; but the important provisions of section 8 (which will be stated in detail later) remain. The consideration of the Act (as it now stands) came before the Supreme Court of Canada in the year 1940 in *Winstanley's* Case (*Attorney-General for Alberta* v. *Atlas Lumber Company Ltd.*). This was an action brought without " a permit " under the Act against a resident debtor in Alberta upon a promissory note. It was there held (the judgment of Duff C.J. being concurred in by Rinfret, Crocket, Davis, Kerwin, Hudson and Taschereau JJ., affirming the judgment of Ewing J.) that section 8 (*a*) of the Act so far as it extends to actions upon bills of exchange and promissory notes is repugnant to the enactments of the Dominion in the Bills of Exchange Act (chapter 16 of the Revised Statutes of Canada, 1927, and amendments thereto) and that the absence of a permit to bring the action was therefore not a defence.

The Act is now under consideration in a proceeding which involves its validity as a whole. It is in four Parts; but Part II has been repealed. There is a Preliminary Part containing definitions including one stating that a " resident debtor means a person who is a debtor and who is an actual resident of and personally living in the Province and includes the personal representative or representatives, son, daughter, widow or widower of a deceased resident debtor and includes a family corporation which is a debtor " as therein mentioned. There is also an elaborate definition of " resident farmer ". In section 3 there is provision for the constitution of a Debt Adjustment Board to consist of one, two, or three members appointed by the Lieutenant-Governor in Council. The powers of the Board can be exercised by any single member or by any person designated by the Board with the approval of the Lieutenant-Governor. Under section 6 the Board has power to make " inquiries . . . with regard to the property of any resident debtor or resident farmer " and may examine the debtor or any other persons under oath and has the same power as a commissioner under " The Public Enquiries Act ". Part I of the Act begins with section 8 which in its first subsection enacts as follows:—

" 8.—(1) Unless the Board or any person designated by the Board under the provisions of this Act, issues a permit in writing giving consent thereto:—

(*a*) no action or suit for the recovery of any money which is recoverable as a liquidated demand or debt in respect of any claim enforceable by virtue of any rule of law or equity or by virtue of any statute, except money payable in respect of rates and taxes payable pursuant to any statute, and debts owing to a hospital for hospital services; and

(*b*) no proceedings by way of execution, attachment or garnishment; and

(*c*) no action or proceeding for the sale under or foreclosure of a mortgage on land, or for cancellation, rescission or specific performance of an agreement for sale of land or for recovery of possession of land, whether in court or otherwise; and

(*d*) no action or proceeding to sell land under or in satisfaction of any judgment or mechanic's lien; and

(*e*) no seizure or distress under an execution or under any lease or any tenancy howsoever created, lien, chattel mortgage, conditional sale agreement, crop payment agreement or in attornment as tenant under any agreement for sale or mortgage, and no sale or other proceeding thereunder either by virtue of rights of property at common law or under a statute passed prior to this Act;

(*f*) no proceedings by a lessor, mortgagee, vendor or other person claiming possession of a share of crop in any case where the provisions of The Crop Payments Act apply; and

(*g*) no action respecting such other class of legal or other proceedings as may be brought within the provisions of this section by order of the Lieutenant Governor in Council,

shall be taken, made or continued by any person whomsoever against a resident debtor in any case."

Sub-section (3) provides that the section shall not apply to any contract made or entered into by a debtor where the whole of the original consideration for the contract arose on or after the 1st of July, 1936; but shall apply to (amongst other things) any judgment obtained before the 1st of July, 1936.

By sub-section (5) the Board may at any time in its discretion cancel or suspend any permit which has been previously issued under the section by the Board.

Under section 9 no permit is to be granted in respect of any proceedings on a mortgage of farm-lands or an agreement for sale thereof, if those proceedings lead to foreclosure by reason only of the temporary impossibility owing to abnormal depreciation in values of realising the probable normal value of the security.

Under section 10 a creditor may apply for a permit to commence or continue any action against a resident debtor, and the Board in that case must make its proper enquiries and thereupon may issue a permit or refuse or adjourn the application for such period as it thinks fit.

By section 11 it is provided that the time during which proceedings are prohibited by the Board does not run against the creditor under the Limitation of Actions Act, 1935.

Part III of the Act relates to negotiations for agreements for the adjustment of debts of resident debtors.

Section 21 provides that any resident debtor or the creditor of any resident debtor can by written application call on the Board to investigate the resident debtor's financial position, and to endeavour to negotiate an agreement for the settlement of the debtor's debts, either in full or by a composition. The Board is to have all the extensive powers of inquiry conferred by the Act.

Any agreement between a resident debtor and a creditor made through the agency of the Board, however informal, is to be binding (sect. 22); and the Board (sect. 23) is to endeavour to bring about an agreement between the resident debtor and his creditors whereby that the secured and unsecured debts of the debtor are reduced to an amount which in the opinion of the Board is in accordance with the ability of the debtor to pay, either presently or in the future having regard to the productive capacity of the farm and its equipment and the average net prices of agricultural produce between the date of the debt being incurred and the date of adjustment (see sections 22 and 23).

Part IV contains provisions specially applicable to resident farmers.

Section 26 provides that a resident farmer who is in default on a proposal formulated and confirmed under the Farmers' Creditors Arrangement Act, 1934 (a Federal Act: 1934, S.C. 24-25 Geo. V. chapter 53) cannot be proceeded against by his creditor by any of the proceedings set out in section 8 of the Debt Adjustment Act, 1937, unless the Board issues a written consent under that section.

Section 27 provides that a chattel mortgage given by a resident farmer after 1st May, 1934, to secure a past debt shall be invalid, unless approved by the Board within sixty days.

By section 28 a resident farmer can be authorised by the Board, in order to supply his own necessities or fodder or seed grain, to sell free of encumbrance any goods or chattels subject to a chattel mortgage given by him.

By section 29 a resident farmer who is a lessee of land under a crop share lease may be authorised by the Board to retain for his own use crop deliverable to the lessor.

Part V contains miscellaneous provisions of which section 36 is the most noticeable. It provides for an appeal by any person who deems himself aggrieved by the action of the Board in granting or refusing a permit or its other orders " to a Judge of the Supreme Court sitting with a jury of six persons ". Subsection 8 provides that the question as to the action of the Board in withholding or granting a permit or in giving any direction under the Act is " to be a question of fact for the determination of the jury under proper instructions from the judge and there shall be no appeal from such determination or from any judgment or Order made thereon." The question of fact is nowhere defined. Section 32 is a penal section. It provides for the imposition of a penalty, namely a fine not exceeding two hundred and fifty dollars, and in default of payment, a term of imprisonment with hard labour not exceeding three months, or both on any person " who wilfully takes or continues any action or proceeding or makes or continues any seizure, or sells or disposes of a chattel in violation of the provisions of this Act or the regulations."

The questions referred, and the answers given by the majority of the Supreme Court of Canada (Duff C.J.C., Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.) are as follows:—

" Question 1: Is the Debt Adjustment Act, 1937, being chapter 9 of the Statutes of Alberta, 1937, as amended by chapter 2 of the Statutes of Alberta, 1937 (3rd session), chapter 27 of the Statutes of Alberta, 1938, chapter 5 of the Statutes of Alberta, 1938 (2nd Session), chapter 81 of the Statutes of Alberta, 1939, and chapter 42 of the Statutes of Alberta, 1941, *ultra vires* of the Legislature of Alberta, either in whole or in part, and if so, in what particular or particulars or to what extent?

Answer: The said Act as amended is *ultra vires* of the legislature of Alberta in whole.

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

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

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

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

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

(*a*) the principal amount of such money and interest, if any, where the same are payable in the said province;

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

(*c*) the interest only upon such money?

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

Question 5: If the answer to any of the parts (*a*), (*b*) and (*c*) of question 4 is in the negative, is the said Act as amended operative in respect of any proceedings taken to enforce any judgment obtained in any action or suit in respect of which such answer is given?

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

Crocket J. who dissented was of opinion that the Act is not *ultra vires* or inoperative except in so far as its provisions conflict with existing valid legislation of the Parliament of Canada.

The contention on behalf of the Appellant was that the Act was concerned only with matters coming within the classes of subjects enumerated in the following heads of section 92 of the British North America Act, namely:—

"(13) Property and Civil Rights in the Province."

"(14) The administration of justice in the province, including the constitution, maintenance and organisation of provincial courts both of civil and of criminal jurisdiction and including procedure in civil matters in those courts."

"(16) Generally all matters of a merely local or private nature in the province."

The contentions of the respondents the Attorney-General of Canada, the Canadian Bankers' Association and the Mortgage Loans Association of Alberta which ranged over a wide ground may be stated thus:—First, a denial of the contention that the Act was within any of these heads; secondly, an argument that the Act is legislation within the words "Bankruptcy and Insolvency" in section 91 (21) of the British North America Act; thirdly, a claim that the Act is legislation in relation to various other subjects enumerated in section 91 and affects *inter alia* the regulation of trade and commerce, bills of exchange and promissory notes, interest, and the status of banks and companies incorporated under the authority of the Parliament of Canada, and, fourthly, that the Act is in conflict with a number of Acts validly enacted by the Parliament of Canada.

In the view of their Lordships, there is no need, at any rate on this occasion, for any new statement as to the true construction of the British North America Act. The main propositions are now well-established, and are re-stated here mainly as a matter of convenience. It is well-settled that in case of conflict between the enumerated heads of section 91 and the heads of section 92 the former must prevail. The words in section 91 and particularly the emphatic sentence, "and for greater certainty but not so as to restrict the generality of the foregoing terms of this section it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated" must be given their natural effect. The final words of the section inserted from abundant caution were these:—"and any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces". It follows that legislation coming in pith and substance within one of the classes specially enumerated in section 91 is beyond the legislative competence of the Provincial Legislatures under section 92. In such a case it is immaterial whether the Dominion has or has not dealt with the subject by legislation, or to use other well-known words, whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament. The Dominion has been given *exclusive* legislative authority as to "all matters coming within the classes of subjects" enumerated under 29 heads, and the contention that, unless and until the Dominion Parliament legislates on any such matter the Provinces are competent to legislate, is therefore unsound. (*Attorney-General for Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* [1898] A.C. 700 at p. 715; 1 Cam. 542). There were, however, cases in which matters which were only incidental or ancillary to the main subject which was within the exclusive legislative powers of the Dominion Parliament were dealt with by the provincial legislation in the absence of Dominion legislation. Since the year 1894 it has been a settled proposition that if a subject of legislation by the Province is only incidental or ancillary to one of the classes of subjects enumerated in section 91 and is properly within one of the subjects enumerated in section 92, then legislation by the Province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation. (*A.G. of Ontario* v. *A.G. for Canada* [1894] A.C. 189; 1 Cam. 447.) It is this proposition which from the nature of the case too often leads to difficulty. Legislation since the year 1867 has assumed many forms in dealing with the greater complexity of modern trade and civilisation. It is sometimes

difficult to determine whether a particular matter, the subject of a Provincial Act, is in " pith and substance " within one of the enumerated heads of section 91 or whether it is merely ancillary or incidental to one of the subjects there enumerated. This may raise questions as to the precise meaning to be attached to one or more of the enumerated heads of section 91 and section 92; and finally, there may be a doubt whether the legislative field is or is not clear.

It must not be forgotten that where the subject-matter of any legislation is not within any of the enumerated heads either of section 91 or of section 92, the sole power rests with the Dominion under the preliminary words of section 91, relative to " laws for the peace, order and good government of Canada ".

Their Lordships propose now to consider the contention that the Act in its main character and object constitutes an attempt to legislate in relation to " bankruptcy and insolvency ", the 21st head of subjects in section 91. Some observations may usefully be made on the meaning of the words " bankruptcy and insolvency ". Bankruptcy in England is a creature of the legislature and at the date of the British North America Act (and until 1869) was available only for traders. The only relief afforded to non-traders was provided by divers Acts " for the relief of insolvent debtors." The common law, it should be remembered, permitted debtors who could not pay their debts to be committed to prison by any creditor; and the State assumed no liability to keep them from starvation. That was assumed to be left to the benevolence of any creditor who had caused the imprisonment. (See Holdsworth; History of English Law; Vol. VIII, pp. 229 *et seq.*) When a debtor was in difficulties there was generally an unseemly race by creditors to obtain a first charge upon his property by obtaining judgments and executions. It was obviously necessary in any legislative effort to introduce a little humanity into the matter in dealing both with traders who had committed defined acts of bankruptcy and with other insolvent debtors, that is to say, all persons who were unable to pay their debts and obligations as they became due. This circumstance had been recognised in England before the passing of the British North America Act.

In 1867 the statutory law of Bankruptcy in England depended on the Bankruptcy Law Consolidation Act 1849 as amended by the Bankruptcy Act 1861 (24 & 25 Vict. c. 134) of which the full title was " An Act to amend the law relative to Bankruptcy and Insolvency in England." The collocation of the two words may be noted. Like all subsequent Acts of the same nature the Act of 1849 as amended aimed in substance at two things, justice to the creditors as a body and some measure of consideration to the debtor. The latter's property (speaking generally) was taken from him upon adjudication and vested in trustees for the benefit (subject to certain exceptions which need not be here mentioned) of all the creditors. The Bankruptcy Court had large powers of examining the debtor as to his affairs. If he had acted without dishonesty and certain kinds of impropriety he would ultimately get his discharge. During the proceedings he was protected from arrest and vexatious litigation by his creditors. After obtaining his discharge he would be free from his previous liabilities (with certain exceptions) and could start in business again. The Act of 1861 also made certain provisions for non-traders and elaborate provision for the suspension of bankruptcy proceedings and for substituting a deed of arrangement subject to the approval and under the control of the Court; and further it enabled creditors to wind up a debtor's estate under a deed of composition subject to the jurisdiction of the Court without taking any proceedings in bankruptcy at all (Bankruptcy Act, 1861, sections 185 to 200). After the notice of the filing and registration of such deed no process against the property or person of the debtor was permitted without leave of the Court. The previous Acts " for the relief of insolvent debtors " were repealed (sect. 230). It is manifest from a perusal of the Acts mentioned that they were passed on the assumption that the debts due to the creditors were enforceable by action and execution against the debtor and his property. That fact was one of the main reasons for the Act of 1861. Imprisonment for debt was in full operation in England (see sections 98 to

107 of the Act of 1861. The law as to imprisonment for debt was amended by the Debtors Act 1869). In England it has always been held that, subject to the statutory exception as to debts payable at some certain future time, the petitioning creditor's debt and the debts provable must be debts recoverable by legal process. For example a debt barred by the Statute of Limitations is not a debt on which a bankruptcy petition can be presented, nor is it one provable in bankruptcy (see Halsbury's Laws of England, 2nd Edition, Vol. 2, pp. 59 and 268). The Dominion Act is very similar to the English Bankruptcy Acts so far as those matters are concerned and there appears to be no reason for thinking that a similar principle would not be applied in Canada to the words " debt due ". It should be added that in the *usual* case of a moratorium proclamation the debts become payable at a certain fixed time and therefore such debts are not within the above mentioned principle. (*In re Sahler* (1915) 84 L.J. K.B. 1275.) In the Dominion of Canada there was no general Bankruptcy Act until the year 1919 (Bankruptcy Act 1919 c. 36). The existing law in the Dominion is to be found in R.S.C. 1927, chap. 11 as amended by 21-22 George V, chap. 17 and chap. 18; and 22-23 George V, chap. 39. This legislation relates both to bankruptcy and insolvency, that is, it contains provisions for vesting the property of debtors in trustees (*a cessio bonorum* as it is sometimes called) and also for assignments and compositions by insolvent debtors without bankruptcy. It is however provided that Part I of the Act as amended dealing with acts of bankruptcy, bankruptcy petitions and receiving orders is not to apply " to wage-earners or to persons engaged solely in farming or the tillage of the soil ".

In 1934 an Act entitled " The Farmers' Creditors Arrangement Act, 1934," was passed by the Parliament of Canada. It is stated that it shall be read and construed as one with the Bankruptcy Act, and it provides elaborate provisions for compositions and schemes of arrangement by farmers unable to meet their liabilities as they become due. The proposals for such compositions or schemes have to come from the farmers and to be approved by the Court. Powers in relation to proposals were given to " Boards of Review " not very unlike those given to the Board under Parts III and IV of the present Act.

The validity of this Act was challenged in a proceeding instituted by the Attorney-General for British Columbia, and there was an appeal from the judgment of the Supreme Court of Canada to the Privy Council. (*A.G. for British Colombia* v. *A.G. for Canada* [1937] A.C. 391.) The judgment of the Board delivered by Lord Thankerton contains a full statement of the main provisions of the Act there in question. The Board, affirming the decision of the Supreme Court of Canada held that the Act was *intra vires* of the Dominion Parliament under sect. 91 (21). The following passage in the judgment is material to the present appeal:—" Their Lordships are unable to hold that the statutory conditions of insolvency which enabled a creditor or the debtor to invoke the aid of the bankruptcy laws, or the classes to which these laws applied, were intended to be stereotyped under head 21 of S. 91 of the British North America Act so as to confine the jurisdiction of the Parliament of Canada to the legislative provisions then existing as regards these matters. Further, it cannot be maintained that legislative provision as to compositions, by which bankruptcy is avoided, but which assumes insolvency, is not properly within the sphere of bankruptcy legislation."

In the opinion of their Lordships there can be no doubt as to the pith and substance of the Act. It is legislation in relation to Insolvency, that is, in relation to a class of subject within the exclusive legislative authority of the Parliament of Canada. Its plain purpose is to relieve persons resident in the Province and their estates from an enforceable liability to pay debts incurred before the 1st July 1936 and in many cases to compel the creditors to accept compositions approved by the Board. This is effected by precluding persons from any access to the Courts of Alberta to enforce their rights against any persons resident in the Province without the permission of the Board which may never be obtained. It no doubt does not for all purposes destroy the rights of the creditors; but it deprives them of the

remedies by which alone in the vast majority of cases those rights can be enforced. If judgments in respect of the debts in question have already been obtained it precludes or stays any proceedings by way of execution, attachment or garnishment unless the permit of the Board has been obtained. Proceedings to enforce mortgages or other similar or analogous legal proceedings in relation to the recovery of land, are subject to the same restriction. The debts or liquidated demands may have been incurred outside the Province. It is plain from many sections of the Act (e.g. sections 6, 8, 9, 21, 23, 26 and 28) that its main purpose is to relieve resident debtors where they are unable to pay their debts as they become due.

On the other hand the Board has the duty upon the application of a resident debtor or any creditor of such a person to " endeavour to bring about an amicable arrangement for the payment of the resident debtor's indebtedness ", and to effect a settlement either in full or by a composition; and the proposed settlement is to be one by which the debts, secured or unsecured, are reduced to an amount which is in accordance with the ability of the debtor to pay presently or in the future. The Board clearly has power to refuse any permit to a creditor who does not accept the settlement suggested by the Board. Their Lordships agree with the Supreme Court that it is impossible to escape the conclusion that Part III of the Act contemplates the use of the Board's powers under section 8 to enable it to secure by a method amounting to compulsion the consent of the parties to the proposed arrangement.

Their Lordships also agree with the opinion expressed by the Supreme Court that, as regards debts where the creditor and the debtor reside in the province and the debt is payable in the province, the creditor is deprived of his right to present a bankruptcy petition under the (Dominion) Bankruptcy Act. For the reasons already given, fortified by a consideration of all the relevant sections in that Act, it must be held that in respect of an obligation to which the Act (of 1937) applies there is no " debt owing " to the creditor within the meaning of section 4 of the Bankruptcy Act. It is not immaterial to note that the Act would be practically useless if upon its true construction it had the result of leaving any creditor or creditors with a debt or aggregate debts amounting to five hundred dollars at liberty to present a bankruptcy petition. In their Lordships opinion the Act of 1937 seriously interferes with the existing legislation of the Dominion.

On these grounds their Lordships have come to the conclusion, in agreement with the Supreme Court, on the one hand, that the Act as a whole constitutes a serious and substantial invasion of the exclusive legislative powers of the Parliament of Canada in relation to bankruptcy and insolvency, and on the other hand that it obstructs and interferes with the actual legislation of that Parliament on those matters. Moreover, if some of the less important provisions contained in the Act were to be regarded as merely ancillary to general Acts relating to bankruptcy and insolvency, such as those already referred to, that conclusion would not avail the appellant since in their Lordships' view the ancillary matters must be regarded as being within the domain of bankruptcy and insolvency, and the Provincial Legislature is precluded from entering into that now occupied field (*Royal Bank of Canada* v. *Larue* [1928] A.C. 187; 2 Cam. 455).

Having arrived at this conclusion it would not be in accordance with the practice of the Board for their Lordships to express their opinions on the other important matters discussed and decided in the judgment of Chief Justice Duff concurred in by Rinfret, Davis, Kerwin, Hudson and Taschereau JJ. On these matters their Lordships think it right to express no opinion, and they desire to adopt the observations of Lord Sumner in delivering the judgment of the Board in the case of *Att. Gen. for Manitoba* v. *Att. Gen. for Canada* [1929] A.C. 260, 2 Cam. p. 534) as to the difficulties in which the Provincial legislatures find themselves in matters like this, and the desire of their Lordships not to appear to say anything which might restrict their authority in any case distinguishable from the present.

It should be mentioned that an argument was based on section 39 of the Act. It is there said in effect that the provisions of the Act shall not be so construed as to authorise the doing of anything not within the legislative powers of the Province. The section cannot in this case at least assist the appellant. If apart from section 39 the Act is *ultra vires* it must be construed and treated as such; it remains a nullity and the section is plainly inoperative.

Their Lordships' attention was called to the fact that a result of the Act's total invalidity would be that the protection afforded by section 11 would disappear, and that rights which, in view of the Act, had not been enforced might have become time-barred. The hardship and injustice of such a result are undeniable, but they can only be avoided by an Act of the Legislative Assembly of the Province of Alberta.

In the result, the appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed without costs, and that the opinion of the Supreme Court should be affirmed.

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In the Privy Council

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DELIVERED BY VISCOUNT MAUGHAM

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