BOOK REVIEWS

Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919

Thomas G.W. Telfer
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Ruin and Redemption is a legal history of Canadian bankruptcy law from 1867 to 1919, written by Thomas G.W. Telfer, a Professor of Law at the Faculty of Law, University of Western Ontario. The book substantively builds on the author's earlier research on historical bankruptcy law in Canada.[1] In *Ruin and Redemption*, Professor Telfer draws together several periods in the history of Canadian bankruptcy law into a narrative account that spans over fifty years. The central questions of his study are: why did Canada enact bankruptcy legislation shortly after Confederation and repeal it in 1880?; and, why did Parliament take nearly forty years to enact the *Bankruptcy Act of 1919*?

Professor Telfer's research approach is attentive to social, economic and political factors affecting bankruptcy law debates. In particular the author focuses on the 'ideas, interests and institutions'[2] that helped shape Canadian bankruptcy law developments. The 'ideas' examined in the book include opinions on bankruptcy concepts such as the equitable distribution of the debtor's assets and the bankruptcy discharge. By 'interests' (or 'interest groups'), Telfer refers to organizations such as the Montreal and Toronto Boards of Trade, Canadian Bar Association (CBA) and the Canadian Credit Men's Trust Association (CCMTA), which were active in bankruptcy debates. The 'institutions' that feature in this history include courts and federalism among others, which 'exerted autonomous influence on policy choice.'[3] For example, courts tended to adopt 'debtor-friendly' interpretations of nineteenth-century

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[1] See *inter alia* Thomas G.W. Telfer, "The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest?" (1995) 24:3 CBLJ 357; Thomas G.W. Telfer, "'A Canadian World without Bankruptcy Law': The Failure of Bankruptcy Reform at the End of the Nineteenth Century" (2004) 8:1 Austl J Legal Hist 83; Thomas G.W. Telfer, "The Evolution of Bankruptcy Exemption Law 1867-1919: The Triumph of the Provincial Model" (2007) ARIL 18; Thomas G.W. Telfer, "Ideas, Interests, Institutions and the History of Canadian Bankruptcy Law, 1867-1880" (2010) 60:2 UTLJ 603.

[2] *Ruin and Redemption* at 7-13.

[3] *Ibid*. at 10.

bankruptcy law.[4] Some courts also tolerated collusion between debtors and creditors that belonged to the same family in order to give the debtor access to the bankruptcy statute, since this was only possible through a creditor-initiated filing.[5]

The historical account in *Ruin and Redemption* demonstrates the explanatory power of ideas, interests and institutions in the development of Canadian bankruptcy law, and offers a more fulsome answer in this context than legal origins theory, for example.[6] The author's attention to the social dimensions of bankruptcy debates enriches his historical narrative, and gives the twenty-first-century reader an fascinating glimpse into the societal context that surrounded these debates in nineteenth- and early twentieth-century Canada.

The book is comprised of an introductory chapter followed by three parts. Each part corresponds to a distinct era in the history of Canadian bankruptcy law and consists of a few chapters. Part One spans the period from Confederation to 1880, during which time Parliament passed and then repealed two bankruptcy statutes in succession. Part Two picks up the analysis in 1880 and examines roughly two decades until 1903, during which time Parliament debated 20 bankruptcy bills but failed to enact a federal bankruptcy law. Part Three traces the successful reform efforts of the early twentieth-century, which culminated in the enactment of the *Bankruptcy Act of 1919*. This part also includes the book's concluding chapter.

At the outset, one must take note that 'debtors' in the context of nineteenth-century bankruptcy laws referred only to individual 'traders'; this legislation excluded farmers and labourers from its scope.[7] Furthermore concerns to do with corporate debtors played a fairly minor role in both nineteenth- and early twentieth-century bankruptcy debates.[8]

In the introductory chapter Telfer sets out two fundamental policies of bankruptcy law: (1) the equitable distribution of the debtor's assets among her creditors, and (2) the ability of a debtor to obtain a discharge of her debts. Both principles notably differ from common law and provincial approaches to overindebtedness in the nineteenth-century. Without a bankruptcy law, the common law created a race among creditors to reach the debtor's assets, and neither the common law, nor provincial statutes to do with overindebtedness could provide the debtor with a discharge. Bankruptcy law therefore introduced fundamental changes to the status quo with respect to debtor-creditor relations, which helped some groups while disadvantaging others.

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4 *Ibid.* at 73-80.

5 *Ibid.*

6 *Ibid.* at 182-183.

7 *Ibid.* at 28.

8 *Ibid.* at 12-13, 172, 176. Although the 1919 Act applied to corporate debtors, the provisions relating to these debtors essentially served as a liquidation mechanism.

The explanatory framework adopted in *Ruin and Redemption* of ideas, interests and institutions surrounding each of these two bankruptcy polices helps account for the changing terrain of Canadian bankruptcy debates. Due to space constraints, this book review will touch on only a couple aspects of the marked change in prevailing ideas that took place surrounding the bankruptcy principles noted above.

The equitable distribution of the debtor's assets (also known as the principle of creditor equality) remained contentious through the nineteenth-century. A key reason for this was that a race to the debtor's assets held clear advantages for local creditors. These creditors were oftentimes the debtor's family members or neighbours, which provided an additional impetus for debtors and local creditors to prefer an unequal distribution of the debtor's assets. *Ruin and Redemption* shows that even under nineteenth-century bankruptcy legislation that promoted the idea of creditor equality, county courts frequently undermined this principle in favour of local creditors.[9] Distant creditors suffered disproportionally under the common law approach of "first come, first served." Although several interest groups representing this creditor group, such as the Montreal and Toronto Boards of Trade and the Dominion Board of Trade, managed to delay repeal of bankruptcy legislation until 1880, they could not stop it entirely.[10]

So it is interesting to learn how it ultimately took the growth of national organizations that represented large numbers of distant creditors, and were committed to bankruptcy reform, to help push the bankruptcy debate to the point of recognising creditor equality as a desirable policy. *Ruin and Redemption* describes how the development of commercial organizations like the CBA and the CCMTA, took place alongside broad commercial and economic changes in the late nineteenth- and early twentieth-century.[11] As this occurred the importance of the distinction between local and distant creditors also faded since more companies traded nationally. In considering other possible explanations for legal change, the author notes how "factors, like economic development, cannot be ignored"[12] and underscores how "the enactment of the *Bankruptcy Act of 1919* coincided with important economic changes and the growth of government."[13] Just as he notes earlier in the book that "the socio-economic history of late nineteenth- and early twentieth-century Canada cannot fully be understood without examining the role of bankruptcy legislation and how it sought to manage the question of debt, debtors and the competing interests of creditors."[14]

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9 *Ibid*. at 42-53.

10 *Ibid*. at 54-56.

11 *Ibid*. at 147-150, 157-162.

12 *Ibid*. at 183. See also Chapter 9 "Reform Achieved: The *Bankruptcy Act of 1919*" 145-173.

13 *Ibid*.

14 *Ibid*. at 5.

The interrelationship between economic development and the process of implementing a permanent bankruptcy law is intriguing. Telfer notes that "economic changes did not make federal bankruptcy reform inevitable in 1918-19; rather, they made it more possible."[15] Nevertheless it seems reasonable to assume that certain level of economic development was probably a necessary precondition to a permanent and national bankruptcy statute like the *Bankruptcy Act of 1919*. The enactment of the *Bankruptcy Act of 1919* also took place alongside the rise of the Canadian welfare state and greater federal regulation of economic and business matters.[16] The ideas, interests, and institutions that a greater level of economic development fostered — particularly the growth of a national economy — came to outweigh the earlier emphasis on local concerns in political debates.[17] A key example is the way more firms trading on a national basis "paved the way for new national interest groups"[18] that had an interest in greater national consistency on matters relating to credit and debt. One cannot help but wonder whether or not this phenomenon has explanatory power elsewhere? For example, could the more rapid pace of American economic development and growth of a national economy in the late nineteenth-century help explain why the US enacted a permanent bankruptcy statute more than twenty years earlier than Canada?[19] How might one reconcile this with the English experience, where bankruptcy legislation was first enacted in the sixteenth-century? Probing the relationship between economic development and bankruptcy law further could potentially shed more light on the role of bankruptcy in other socio-economic historical contexts. This is one way that *Ruin and Redemption* prompts one to think broadly and deeply about bankruptcy law and policy, and its role in the socio-economic history of Canada and other countries.

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15 *Ibid*. at 150.

16 *Ibid*. at 155.

17 *Ibid*. at 149.

18 *Ibid*. at 149.

19 *Ruin and Redemption, ibid*. at 15, 38, 54, 182-183, raising the possibility of comparisons between the 1898 US *Bankruptcy Act* and the Canadian *Bankruptcy Act of 1919*, and citing some American and European research that has explored various aspects of this question, such as: Bradley Hansen, "Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law" (1998) 72:1 Business History Review 86; Richard C. Sauer, "Bankruptcy Law and the Maturing of American Capitalism" (1994) 55:2 Ohio St LJ 291; Edward J. Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (Chapel Hill: University of North Carolina Press, 2001) at 14; Peter Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900* (Madison: State Historical Society of Wisconsin, 1974) at 248; Jérôme Sgard, "Do Legal Origins Matter? The Case of Bankruptcy Laws in Europe 1808-1914" (2006) 10:3 European Review of Economic History 389; David A. Skeel Jr., *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton: Princeton University Press, 2001), Chapter 1 "The Path to Permanence in 1898" 23-47.

The second bankruptcy principle, the discharge, also has an interesting history. Although late nineteenth-century bankruptcy laws included the possibility of a discharge,[20] it was the most contentious aspect of the legislation. As Telfer states, "[n]otions of forgiveness competed unsuccessfully with the idea that all debts had to be honoured."[21] Rural opposition to bankruptcy law and the discharge was a significant factor in these debates. *Ruin and Redemption* aptly quotes Ninette Kelly and Michael Trebilcock's observation that public discourse "may disguise the true interests and ideas at play"[22] in respect of these farmer interests. Farmers were excluded from the scope of bankruptcy legislation since they were not considered traders, and yet the bankruptcy of a trader that did business with a farmer, such as a miller, could expose the farmer to financial ruin. Rather than proposing that the scope of bankruptcy legislation be extended to include farmers, however, farmers and their representatives in Ottawa put pressure on Parliament to repeal bankruptcy legislation altogether.[23] Calls for repeal were often presented in moral terms, thus aligning the rural sector with a broader public discourse about commercial morality.[24]

Commercial and economic development by the early twentieth-century shifted debates concerning the discharge, just as it had those concerning the principle of creditor equality. By the time efforts were underway to pass the *Bankruptcy Act of 1919*, rural sector and farm interests no longer represented as high a proportion of the Canadian population as they had in 1870.[25] The political clout of the farm lobby was diminished in comparison with the growth of urban concerns, the national economy, and new commercial organizations, such as the CCMTA. *Ruin and Redemption* summarizes this change by stating, "[i]n the nineteenth century, rural opposition was a chief impediment to bankruptcy reform, but in 1919 there were few rural-based objections to the bankruptcy bill."[26] In the process bankruptcy debates also moved past the nineteenth-century question of "whither bankruptcy law?" Moral arguments gave way to commercial ones that advocated expanding the scope for bankruptcy law to include wage-earners, professionals and retailers, for example.[27] Quite significantly, creditor groups came to regard the discharge as protecting their

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[20] *Ibid.* at 76-77. Two types of discharge were technically available: a first class, and a second class discharge. The second class discharge was meant to stigmatize the debtor by signalling the debtor had engaged in reckless conduct, however, the county courts seldom granted second-class discharges.

[21] *Ibid.* at 59.

[22] *Ibid.* at 71, citing Ninette Kelley & Michael Trebilcock, *Making the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998) at 9.

[23] *Ruin and Redemption, ibid.* at 72.

[24] *Ibid.* at 67-71.

[25] *Ibid.* at 71, 149.

[26] *Ibid.* at 149.

[27] *Ibid.* at 149-150.

interests, by giving the debtor a reason to stay put and cooperate in the bankruptcy process, rather than abscond.[28] In other words, the public discourse shifted, and persuasive arguments from nineteenth-century debates, such as those put forward by rural sector, no longer held sway.

The *Bankruptcy Act of 1919* "'still provides the conceptual framework for the current Bankruptcy and Insolvency Act,'"[29] which underscores the usefulness of history for interpreting contemporary bankruptcy law and developments.[30] One example of this is how farmers secured a provision in the 1919 Act which prevented their creditors from forcing them into bankruptcy, despite farmer interests being a side-issue in the 1919 debates. This provision remains part of Canadian bankruptcy law to this day.[31] One might view the special provision in the 1919 Act protecting farmers as a twentieth-century manifestation of the moral obligation to pay. This would accord with the approach adopted by the farm lobby in the 1980s and 1990s, which relied on an enduring farmer aversion to the concept of the discharge to secure specialized farm debt legislation for facilitating farmer-creditor compromises.[32] Interestingly the contemporary farmer position still seems to rests on the moral obligation to pay, even though it is a modernized version of this idea. This example goes a bit beyond the scope of the book in order to further illustrate the important role ideas and interests can play in legal change (even when they are not central to the main thrust of reform efforts). This speaks to the explanatory power of the historical approach adopted in *Ruin and Redemption* to interpreting Canadian bankruptcy law.

Ruin and Redemption is principally a history of Canadian bankruptcy law, but also serves as a case study in legal change. Professor Telfer examines how different ideas, interests and institutions helped shape legal developments in the bankruptcy field, against an evolving social, economic and political backdrop. The book is deeply researched, which comes through in its textured and nuanced treatment of historical developments (and which a short book review cannot fully capture.) The result is an engaging historical account of Canadian bankruptcy law and debates from the time of Confederation to the enactment of Canada's first permanent bankruptcy law in 1919. Accordingly the book will appeal primarily to academics and legal historians, as well as lawyers more generally.

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28 *Ibid*. at 162-172.

29 *Ibid*. at 184-186, citing Jacob Ziegel, "Canada's Phased-In Bankruptcy Reform" (1996) 70:4 Am Bank LJ 383 at 386.

30 *Ruin and Redemption* at 9-10. See also Skeel, *supra* note 18 at 13-14. Both noting the importance of history to interpreting later legal developments.

31 *Ruin and Redemption,* at 73, citing Stephanie Ben-Ishai & Virginia Torrie, "Farm Insolvency in Canada" (2013) 2 Journal of the Insolvency Institute of Canada 33.

32 Ben-Ishai & Torrie, *ibid.*