

LAW REFORM COMMISSION



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COMMISSION DE RÉFORME DU DROIT

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ON
ENFORCEMENT OF JUDGMENTS
PART III: EXEMPTIONS AND PROCEDURE UNDER "THE EXECUTIONS ACT"

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INTRODUCTION

In December 1973, the Hon. the Attorney-General requested that the Manitoba Law Reform Commission review "*The Executions Act*", C.C.S.M., c. E160 (the "Act"), and in particular, the provisions relating to the personal exemptions for debtors, having in mind the current economic conditions and the applicability to modern conditions of the kind and value of the exemptions.

This review of exemptions necessarily involved a look at the procedure followed by a creditor in executing a judgment; the procedure followed by a debtor in claiming exemptions; and the role of the Sheriff's Office in the enforcement of the judgment.

In the course of the study, we researched articles on the revision of debtors' exemption rights, and reviewed parallel legislation in a number of other jurisdictions. Advice was sought from the various provincial law reform commissions, several of which are currently engaged in similar studies.

The writs filed in the Sheriff's Office (Eastern Judicial District) provided a wealth of information on the practical application of the exemptions. Over 200 Queen's Bench writs and 150 County Court writs in the period between 1975-79 were examined. We contacted the solicitors whose names appeared on the writs. We requested and were generously given their views on the Act and on the interaction of the Act with other statutes dealing with creditor-debtor relations.

There was general consensus as to the need for exemptions but there were many differing views as to the

changes to be made in the Act. These reflected the natural split between debtor and creditor interests.

EXEMPTIONS AND PROCEDURE UNDER "THE EXECUTIONS ACT"

A. GENERAL

The right of a debtor to retain a portion of his property free from the claims of creditors is recognized in virtually every jurisdiction in Canada and the United States. The similarity in the exemptions provided reflects the fact that the policies underlying the provisions are universal as well, the primary concern being to preserve for the debtor and his family the basic necessities of life and the means of carrying on and earning a living as a productive member of society.¹

Articles on debtors' exemption rights have expressed concern about the failure in various jurisdictions to review the exemption laws and to update them to provide the protection which each jurisdiction intended to grant at an earlier time and would now grant if the legislation were re-examined.² It is stressed that the property should be exempt only if the exemption furthers the policies underlying the exemption laws.

The objectives of this type of legislation have been defined by Professor W.T. Vukovich as including:

1. the relief of the suffering by the wife and children caused by the husband's improvidence;
2. the preservation of the family unit by avoiding some of the harsher results of economic distress;

3. a means of avoiding the need for welfare and other public programs to support the debtor and his family;
4. the rehabilitation of the judgment debtor;
5. the encouragement of the payment of debts;
6. the provision of a means of support to allow the debtor to forego bankruptcy.³

Exemption laws also minimize the judgment debtor's losses through forced execution sales. The exemptions apply to items on which losses might be relatively important, and the value to a debtor of his clothing, personal effects, tools and furniture is significantly greater than execution sale prices would indicate. While it is doubtful that the minimization of losses on forced sales was a major purpose behind enactment of exemption laws, the resale value of the debtor's assets is one of the primary considerations of the Sheriff's officers when assessing which assets should be seized.

In general, the Canadian jurisdictions have expanded on the narrow English provisions which allow for the exemption of only the wearing apparel, bedding and tools of the debtor.

Variations of the basic exemptions of necessities for survival reflect the economy of the particular jurisdiction; for example, in Nova Scotia, "*The Judicature Act*" S.N.S. 1972, c. 2, provides for the exemption of the "fishing nets" used by the debtor in his occupation.

Manitoba's exemption provisions, like those of Alberta, Saskatchewan, and, to some extent, Ontario, were designed for a predominantly rural and agricultural society.

Enacted in 1892, most of the provisions have remained unchanged except for an upward revision of monetary limits where they occur. For comparative purposes the exemption provisions of 1892 and the exemptions currently provided in "The Executions Act" are set out below:

R.S.M. 1892, c. 53

43. Except as otherwise by any Act provided, the following personal and real estate are hereby declared free from seizure by virtue of all writs of execution issued by any Court in this Province, namely:-

(a) The bed and bedding in the common use of the judgment debtor and his family, and also his household furniture and effects not exceeding in value the sum of five hundred dollars;

(b) The necessary and ordinary clothing of the judgment debtor and his family;

(c) Twelve volumes of books, the books of a professional man, one axe, one saw, one gun, six traps;

(d) The necessary food for the judgment debtor and his family during sixty days;

Provided, however, that such exemption shall only apply to such food and provisions as may be in his possession at the time of seizure;

(e) Two cows, three oxen or three horses or mules, four sheep, two pigs, twelve fowls, and the food for the same for sixty days;

Provided, however, that such exemption as to horses shall apply only in case they are used by the judgment debtor in earning his living;

(f) The tools, agricultural implements and necessaries used by the judgment debtor in the practice of his trade, profession or occupation, to the value of five hundred dollars;

(g) The articles and furniture necessary to the performance of religious services;

. . . .

(j) All the necessary seeds of various varieties or roots for the proper seeding and cultivation of thirty acres;

. . .

Subsections (h), (i) and (k) dealing with homestead and farm exemptions will be discussed in the Commission's forthcoming report on "Enforcement of Judgments, Part II: Exemptions under *"The Judgments Act"*".

C.C.S.M. 1979, c. E160

What property is exempt.

30 (1) Except as otherwise by any Act provided, the following personal estate is hereby declared free from seizure by virtue of all writs of execution issued by any court in the province, namely:

- (a) The bed and bedding in the common use of the judgment debtor and his family, and also his household furniture and effects not exceeding in value the sum of fifteen hundred dollars.
- (b) The necessary and ordinary clothing of the judgment debtor and his family, and the necessary fuel for the judgment debtor and his family for six months.
- (c) Twelve volumes of books, the books of a professional man.
- (d) The necessary food for the judgment debtor and his family during eleven months, which may include grain, flour, vegetables, and meat, either prepared for use or on foot.
- (e) Four horses, mules, or oxen, six cows, one bull, ten sheep, ten pigs, one hundred fowl, besides the animals the judgment debtor may have chosen to keep for food purposes, and food for them during eleven months.
- (f) In the case of a judgment debtor who is a farmer, one tractor, one combine, and one motor vehicle that has been used by the judgment debtor for not less than one year.
- (g) The tools, agricultural implements, and necessaries, used by the judgment debtor in the practice of his trade, profession, or occupation to the value of twenty-five hundred dollars.
- (h) The articles and furniture necessary to the performance of religious services.
- (i) All the necessary seeds of various varieties or roots for the proper seeding and cultivation of one hundred and sixty acres besides the grain and vegetables the judgment debtor may have chosen to keep for food purposes.
- (j) The chattel property of The Metropolitan Corporation of Greater Winnipeg or of any municipality, local government district, school district, school division, or school area in the province.

Am. S.M. 1955, c. 19, s. 1; S.M. 1966-67, c. 16, s. 4; Am. S.M. 1970, c. 35, s. 17.
Note: As to execution against municipality or school district - See The Municipal Act or The Public Schools Act.

While such provisions as "one axe, one saw, one gun, six traps" have been repealed (in 1955), and more modern provisions enacted - "in the case of a judgment debtor who is a farmer, one tractor, one combine, and one motor vehicle" (1939) - outdated provisions remain. For example, the Alberta Institute of Law Research and Reform Working Paper cites the Manitoba provision of "four horses, mules or oxen" as originally designed to protect the farmer's team and as having minimal contemporary relevance.⁴ This provision has survived without any substantial change since 1892 when it read "three oxen or three horses or mules".

Specific and Selective Exemptions

The Act contains some specific exemptions, such as section 30(1)(e) outlining the livestock to be exempt, and paragraph (f) preserving a tractor, combine and motor vehicle for a farmer. The Act also includes some selective provisions - "bed and bedding in common use", "necessary and ordinary clothing", "necessary food during eleven months".

In general, the selective exemptions prove to be more flexible in application to changing economic conditions than the specific exemptions. The method of naming specific exempt articles has the advantage of avoiding ambiguity, but the exemptions rapidly become outdated. As Joslin puts it:

The real exemptions granted by the enactment have almost vanished and unless supplemented, the debtor's minimum protective shield has withered or disappeared to the extent that the specifically named article is no longer a necessity in the individual's life.⁵

The number of specific items which are exempt may also become

outdated, as is the case with the livestock provided in paragraph (e). Where a monetary limit is included, the currency of the figure can only be maintained by frequent legislative enactment. In practice, the Act rarely keeps up with the changes in the value of money.

Another drawback of the specific exemption method is that the experienced debtor may avoid his creditor's claims by putting his wealth into exempt goods. According to one of the solicitors in private practice whose advice was sought, this problem has arisen in respect of section 39 of the Act, which reads as follows:

Where a mechanic, artisan, machinist, builder, contractor, or other person, has furnished or procured any materials for use in the construction, alteration, or repair of a building or erection, the materials are not subject to execution or other process to enforce any debt, other than for the purchase thereof, due by the person furnishing or procuring the materials, and whether they are or are not, in whole or in part, worked into or made part of the building or erection.

In one case, the debtor was a contractor who was working on a major construction job, and was aware that he was being pursued by creditors. Immediately on receiving his money, he would purchase construction materials using cash, thus making himself judgment-proof under section 39. The addition of a section similar to section 7(3) of the Ontario "*Execution Act*", R.S.O 1970, c. 152, might prevent this type of evasion:

The exemptions provided in this Act do not apply to chattels purchased for the purpose of defeating claims of creditors.

and we would accordingly recommend its inclusion in the Act.

Selective exemptions, especially those requiring that the property be "necessary" (as in paragraphs (b), (g), (h) and (i)) can more easily adjust their scope and effect to changing economic situations. Prof. Vukowich writing on American exemption laws states:

The necessary limitation is used most often in statutes exempting household goods and supplies, clothing and items used in a person's trade or profession Even when the necessary limitation is used, a limitation in terms of dollar value sometimes is added, thus further restricting necessary exempt property to a legislatively determined standard of reasonableness. . . . The necessary criterion seems appropriate for the types of items to which it has been applied traditionally due to its adaptability to the times and the debtors' needs, its recognition of creditors' just interests, and its furtherance of the purposes of the exemption laws.⁶

Selective exemptions have their disadvantages as well. They may be ambiguous; it may be difficult to determine when a chattel is "necessary" for a debtor's trade or profession, or for his survival. The section which apparently gives the most problems for a creditor's solicitor is paragraph (b) exempting the necessities for a business up to the value of \$2,500. A debtor will often claim his motor vehicle as exempt under this section, informing the Sheriff's Office that the vehicle is a "tool of the trade". According to some solicitors, the Sheriff then refuses to make a seizure of the vehicle. This was confirmed by a number of the sheriff's officers who indicated their reluctance to seize a car when a special need is shown. Thus, a debtor, by claiming both equipment and a motor vehicle, may be getting a double exemption.

The solution may be to provide a clear definition of the term "tool of the trade", and to place the onus on the

debtor to show that the articles he is claiming fall under the exemptions provided. This is discussed later in this Report.

B. THE EXEMPTION PROVISIONS

After this general review, we can look at each exemption provision in turn, comparing each to equivalent provisions in other jurisdictions, particularly those in Alberta, Saskatchewan and Ontario, and stating the suggestions received for possible revisions.

Section 30(1)(a)

The bed and bedding in the common use of the judgment debtor and his family, and also his household furniture and effects not exceeding in value the sum of fifteen hundred dollars.

The provision of bed and bedding is taken from the English exemptions which allow the judgment debtor to keep his bedding, including a bedstead (Halsbury (4 ed.), Vol. 17, p. 479). Alberta, Saskatchewan and Ontario do not specifically exempt these items. Nova Scotia provides for the "necessary beds, bedding and linen . . . of the judgment debtor and his family" (s. 41(a)). The Prince Edward Island "*Judgment and Execution Act*", R.S.P.E.I. 1974, c. J2, s. 25(1)(a), exempts "bed and bedding" as in Manitoba. We received no suggestions on this provision.

The Sheriff's officers will rarely seize second-hand furniture and bedding. The primary consideration in any seizure is the re-sale value of the property. The

policy is not to seize where the deprivation suffered by the debtor and his family obviously outweighs the debt-paying value obtainable by levy and sale of such property by the creditor. As a result, the exemptions provided in the statute are expanded upon by the Sheriff's officers to include "*de facto* exemptions" where the market value of the goods is customarily so low as to warrant a general practice of non-seizure. John Kazanjian commented on this practice in a paper prepared for the Ontario Law Reform Commission.⁷ Some solicitors feel that too much discretion is exercised, causing a discrepancy between statute and practice.

The provision of furniture to a certain value is common to exemption laws in most Canadian jurisdictions, although the monetary limit varies. Saskatchewan places the limit at \$1,000, Alberta and Ontario at \$2,000. The Ontario Act requires that the furniture "form part of the permanent home of the debtor" (s. 2(2)). The U.S. *Uniform Exemptions Act*, Vol. 12 Annotated, limits the furniture exempt to that which is "reasonably necessary for one household" (s. 8(a)(1)).

The word "effects" is given a broad interpretation by the officers making the seizure, and once again, the officers said that they made few seizures of furniture. In searching the writs, we found the seizure of one piano on a County Court writ, and of stereo equipment on a Queen's Bench writ - both items which fall into a "luxury" category.

The Alberta "*Exemptions Act*", R.S.A. 1970, c. 129, provides a broader category in the statute itself: "furniture and household furnishings and household appliances up to

\$2,000" (s. 2(b)). The Saskatchewan "Exemptions Act", R.S.S. 1965, c. 96, has an identical provision (ss. 2(1), (2)), and the courts in that jurisdiction have held that such items as an electric range and refrigerator, and a piano, although possibly not "furniture", come within the terms of "furnishings and appliances", and can be claimed as exempt from seizure (*Hotham v. Bright*, [1923] 3 W.W.R. 94 (Sask.)). These selective provisions generally prove more flexible than the specific provision of one piano, one radio, and one television set, as in California.

Manitoba should consider adopting a broader provision for furniture like those of Alberta and Saskatchewan to allow for the exemption of modern necessities. The provision of bedding could be included in the broader term "household furnishings", making specific reference to "bed and bedding" unnecessary.

If the provision for furniture is to be retained in its present form, an increase in the monetary limit should be considered. Mr. S. Stefanson, the Sheriff for the Eastern Judicial District of Manitoba, would like to see the limit raised from \$1,500 to \$5,000. Mr. G. Therrien, the Chief of Farm Management in the Economics Branch of the Department of Agriculture, agreed that the \$1,500 amount is far from adequate considering the price of new furniture.

It should be made clear whether the figure refers to the value of the furniture when new, or to the resale value. The U.S. draft Act defines "value" as "the fair market value of the debtor's interest in the property". Bearing in mind the rise in the cost of living since 1955, we recommend that section 30(1)(a) be amended as follows:

- (a) the furniture and household furnishings and appliances reasonably necessary for one household (or to the value of \$4,500).

Section 30(1)(b)

The necessary and ordinary clothing of the judgment debtor and his family, and the necessary fuel for the judgment debtor and his family for six months.

The words "necessary and ordinary" limiting the clothing to be exempt provide a built-in cost of living escalator, as Mr. Stefanson points out. The amount and type of clothing which is exempt follow the times. The other provinces have similar provisions; the U.S. Act requires that the clothing be "reasonably held for the personal use of the individual or a dependent" (s. 8(a)(1)).

Further adjustment of the Manitoba provision seems unnecessary. A creditor will rarely rely on the used clothing of the debtor to satisfy his judgment, and we found no instances of clothing being seized.

The provision of "necessary fuel for six months" does not adapt as easily as the clothing exemption. This provision was drafted at a time when an individual would purchase a supply of fuel, usually in the form of coal. It was suggested that the provision should now read "the cost of fuel" for six months. We feel, however, this should be included in the paragraph dealing with food mentioned later under section 30(1)(d). We recommend that section 30(1)(b) be amended to read: the necessary and ordinary clothing of the judgment debtor and his family.

Section 30(1)(c)

Twelve volumes of books, the books of a professional man.

We received no comments on this provision, and

found only two seizures involving books. Both were of the debtor's interest in a law library, and the writs were issued on judgments for tax arrears.

Alberta and Saskatchewan both have provisions for the books of a professional man; Ontario does not specifically exempt books, but they are exempt under the section which reads "Chattels ordinarily used by the debtor in his business, profession or calling" to the value of \$2,000 (s. 2(5)). One solicitor suggested that this approach could be followed in Manitoba, incorporating the provision of books into the "tools of the trade" exemption. This would prevent inequities such as where a lawyer is able to claim as exempt a law library worth several thousand dollars under paragraph (c) and also equipment to the value of \$2,500 under paragraph (g), while other businessmen have a \$2,500 exemption only.

We recommend therefore that section 30(1)(c) be repealed.

Section 30(1)(d)

The necessary food for the judgment debtor and his family during eleven months, which may include grain, flour, vegetables and meat, either prepared for use or on foot.

The provision of "grain, flour, vegetables and meat, either prepared for use or on foot" to feed the debtor and his family was designed for a time when farmers lived off the produce of their land. Mr. Therrien suggested that the exemption may still be practical when related to livestock producers, but both he and Mr. Stefanson agreed that most farmers now purchase their food in the same way as urban families.

The eleven-month period specified is probably based on the same consideration as the Saskatchewan limitation of "enough food until the next ensuing harvest", but the Manitoba provision allows for the needs of urban as well as rural debtors.

"*The Garnishment Act*", C.C.S.M. c. G20, as amended in May, 1979, provides an exemption of income sufficient to cover the costs of the debtor and his family, including the costs of food and fuel. That Act now exempts a minimum of \$250 per month for a debtor with no dependents, and \$350 per month for a debtor with dependents. (Although the amendments have received Royal Assent they have not to date (October 22, 1979) been proclaimed.)

It was suggested that with food and fuel costs provided for under "*The Garnishment Act*", reference to these items in "*The Executions Act*" was no longer necessary. Several of the members of the Commission see shortcomings in this approach. Where the exemptions under "*The Garnishment Act*" do not apply, as in the case where the debtor is unemployed or self-employed, the debtor would be left without an exemption for food and fuel should the creditor choose to execute against his personal property.

We would therefore recommend that section 30(1)(d) be amended to read: the necessary food and fuel for the judgment debtor and his family, or costs thereof, for six months and that section 30(2), dealing with the choice of proportion of food exempted, be repealed.

Section 30(1)(e)

Four horses, mules, or oxen, six cows, one bull,
ten sheep, ten pigs, one hundred fowl, besides

the animals the judgment debtor may have chosen to keep for food purposes, and food for them for eleven months.

The provision of "four horses, mules, or oxen" was probably designed to save the farmer's team, as mentioned previously. Mr. Stefanson felt that the words "mules, or oxen" could be deleted. Mr. Therrien said that he knew of few farmers who use horses, mules or oxen for chores, but was willing to leave the provision unchanged to provide for those who did. Both suggested an upward revision of the amount of livestock which was exempt, but differed as to how great an increase was needed. Mr. Stefanson felt that an increase in the number of cows from six to twelve would be sufficient. Mr. Therrien, on the other hand, suggested rewriting the section as follows: "fifteen dairy cattle, twenty beef cattle, one hundred pigs, one hundred sheep, two thousand fowl, where the value thereof does not exceed the sum of \$15,000".

A selective provision is used in Alberta (s. 2(d)) and in Saskatchewan (ss. 2(1) and (4)), where a debtor is allowed to claim "horses or animals . . . (in Saskatchewan, all animals) . . . reasonably necessary for the proper and efficient conduct of the execution debtor's agricultural operations for the next ensuing twelve months". This type of exemption seems preferable to the Manitoba approach, although Mr. Stefanson considered that such a broad exemption was designed for large ranch operations as in Alberta, and in Manitoba would simply permit a debtor to evade his creditors. If a similar provision is adopted, there should be some method of determining when animals are "reasonably necessary".

The Sheriff's officers follow the Act strictly when seizing livestock, probably because this type of asset has a good market value. This value diminishes however if

livestock are seized and held by the Sheriff for an extended period of time. As Kazanjian points out:

The interaction of time with the character of the assets suggests a need for special treatment, and if special procedures can't be devised to account for the wasting quality, then there may be reason for the asset to be exempted outright.

Several seizures of livestock were recorded, mostly on writs issued from the Queen's Bench Office:

- seizure of "all cattle, and machinery not exempt by law"
amount owing: \$17,282.44;
- seizure of "all machinery, livestock, grain and vehicles"
amount owing \$5,908.22;
- seizure of "four milk cows"
amount owing \$441.01 (County Court);
- seizure of 80 head of cattle
amount owing \$10,381.74.

Only one of these executions proceeded as far as physical seizure and sale.

It has been suggested that farming no longer requires the special protection given by this and other provisions in "*The Executions Act*", and that there should now be a balance between protection for urban and rural debtors. Opinion is divided on this point.

The Alberta Institute provided us with some comments which they received on the question of farm protection. The opinion of consumer experts was that the family farm is still the economic backbone of the province, and that rural and urban debtors have to be distinguished when giving exemptions.

Those involved in agriculture, on the other hand, expressed the opinion that Alberta is no longer a predominantly rural society. The suggestion was that the special protection for farmers should be repealed so as to encourage a review of the type of lending programs available to farmers.

It should be mentioned that there was disagreement on the question of whether a reduction in credit remedies (ie. an increase in the property exempt from seizure) affects the price and availability of credit. In general, the comments we received indicate that while creditors are aware of the exemptions, they do not restrict credit because of them. The exemptions can be avoided altogether by taking a specific security on any of the items, to which we refer later.

It was pointed out by an Alberta commentator that "realistically the type of creditor now involved in farm lending does not rely on a writ of execution to secure payment". This sentiment was echoed by one Winnipeg solicitor who indicated that where the debtor is a farmer, it is easier and more effective to register a certificate of judgment against his land than to direct a seizure of his chattels.

One suggestion, made with the Ontario economy in mind, was to provide farmers with a "tools of the trade" exemption as is given to non-farmers.⁹ This approach of treating farming like any other business was put forward by the Commission in its 1978 Working Paper on "*The Judgments Act*". At that time a majority of the members suggested the elimination of special treatment for farmers, leaving them to rely on the provision of a stay of sale proceedings for one year. Others expressed the view, however, that farmers still require special treatment:

The cyclical nature of farming is such that it is unreasonable to expect that a farmer would be able to satisfy his creditors within a period of a year. . . . The enactment of like provisions will not necessarily create equality. Despite stabilization and insurance programs, grain farmers are still most vulnerable to effects of weather. . . an overriding factor of their own production as well as on price fluctuation.¹⁰

A recent Maclean's article described farming as one of the most "stomach-knotting" occupations there is, with an uncertain market, vagaries in the weather, a¹¹ shortage of workers and cut-throat competition for land".

Mr. Therrien believed that there should be a continuing recognition of the farming tradition which still existed alongside the business aspect. In his opinion, any attempt to abolish the special farm protection would face strong opposition from government members with farming interests. Mr. Stefanson was particularly concerned that the farmer be adequately protected, and there was agreement from the solicitors that the social utility of the provisions outweighed any disadvantages.

Some support was expressed for the suggestion that exemptions be abolished and seizure stayed for a year, giving the farmer an opportunity to rehabilitate himself or to come to an arrangement with his creditors. It was felt that this solution would recognize the unique cyclical nature of farming and would also prompt the creation of more lending programs for farmers. The stay of execution would avoid any costly dislocation in the short run, while still acceding in the long run to the interests of an effective enforcement system by bringing the property into the pool of assets.

Mr. Therrien felt that this approach might work, but that it involved the assumption that farming was a business, albeit with a cyclical nature and variation in prices. He was not prepared to accept that the transition from a "way of life" to a business was complete.

The thinking of the Commission is that the special farm protection in "*The Executions Act*" should be retained but we would recommend that it be amended to read:

(e) all animals reasonably necessary for the proper and efficient conduct of the judgment debtor's agricultural operations for the next ensuing twelve months.

The farming provisions may only be valid when the farmer is an individual and not a corporation. We therefore recommend the addition of a section similar to Ontario section 7(4) which reads:

The exemptions prescribed in this Act are not available to a corporate debtor.

While it is true that many farmers incorporate simply to protect the family farm, the provision would seem to be a sensible one, and a farmer could be informed of this exception to the exemptions when considering incorporation.

Section 30(1)(f)

In the case of a judgment debtor who is a farmer, one tractor, one combine, and one motor vehicle that has been used by the judgment debtor for not less than one year.

Assuming that the special provisions for farmers are retained, some revision of the equipment exemption, which was enacted in 1939, is required.

Mr. Stefanson would like to see the addition of a swather to the list of equipment. Without a swather, the provision of a combine is effective only where straight combining is possible. Mr. Stefanson also suggested that there should be a provision for dairy farmers as follows:

In the case of a judgment debtor who is a dairy farmer producing milk under contract, milking and cooling equipment, and utensils necessary to the production of fluid milk.

Mr. Therrien initially suggested simply the addition of a monetary limit of \$20,000, based on the current value of tractors and combines - between \$10,000-50,000 and \$15,000-75,000 respectively. When we discussed this further with him, he told us that a grain farmer requires a variety of equipment: a tractor, seeding equipment, a harrow, a combine, a swather and a hauler. A large farmer could easily invest \$50,000-90,000 or more in his equipment, but if pressed, could probably manage with \$30,000-40,000 (resale value).

A simple monetary limit with no specification of equipment is a possible alternative. It would encourage the farmer to rearrange his investments, spreading the exemption over as much equipment as possible. In determining an appropriate amount, the needs of dairy farmers as well as grain farmers should be considered. The danger remains that while preserving a means of living for those engaged in some types of agricultural operations (like a large dairy farm), the monetary limit would also provide others with total insulation at the creditor's expense.

Alberta (s. 2(d)) and Saskatchewan (ss. 2(1)(4)) employ the same selective provisions for machinery as for livestock:

farm machinery, dairy utensils and farm equipment reasonably necessary for the proper and efficient conduct of the execution debtor's agricultural operations for the next twelve months.

The broad term "agricultural operations" provides for both dairy and grain farmers, and the specification of certain dairy equipment would satisfy Mr. Stefanson's concerns. In both Saskatchewan and Alberta there is a provision for one tractor and one car or truck if required for agricultural purposes.

There were several seizures of farm machinery recorded in the writs: tractors, combines, swathers and a sprayer. Often the large pieces of equipment are under chattel mortgages or are rented, and as a result, the exemptions under the Act do not apply. Mortgages also make the equipment inaccessible for the non-secured creditor seeking satisfaction of his judgment.

We therefore recommend that section 30(1)(f) be amended to read:

The farm machinery, dairy utensils and farm equipment reasonably necessary for the proper and efficient conduct of the judgment debtor's agricultural operations for the next ensuing twelve months; one motor vehicle if required for agricultural purposes.

Section 30(1)(g)

The tools, agricultural implements, and necessaries, used by the judgment debtor in the practice of his trade, profession or occupation to the value of twenty-five hundred dollars.

The businessman finds his only exemptions under this section, and given that the wording has not been changed since 1892, and the monetary limit since 1955, he might well argue that some adjustments are required.

Identical provisions are used in the other provinces, with the only variation being in the ceilings placed on the exemptions. Alberta provides a \$5,000 limit, followed by Manitoba at \$2,500, Ontario at \$2,000 for non-farmers (\$5,000 for farmers), and Saskatchewan at \$1,000.

Mr. Stefanson suggested that this limit be raised to \$10,000 to include an automobile required by the judgment debtor. Mr. Therrien suggested an increase to \$5,000 only.

Alberta specifically exempts "one car or truck required by the debtor for agricultural purposes or in his trade or calling" (s. 2(f)). The proposed U.S. *Uniform Exemptions Act* gives a business exemption as follows:

An individual is entitled to an exemption not exceeding \$1,000 in aggregate value, of implements, professional books, and tools of the trade; and to an exemption of one motor vehicle to the extent of a value not exceeding \$1,500 (section 8(c)).

Seizures falling under this general category of chattels used in a debtor's trade or calling were of "garage equipment and supplies", "printing equipment", and one of a "drive-thru spray booth". The reports make no mention of whether the \$2,500 exemption has been given, and the officers told me that often all the assets available are paper seized and an inventory made, leaving it to the creditor's solicitor to decide what is to be physically seized and sold.

Business stock-in-trade is never exempt.

As mentioned previously, subsection (g) has created problems with the definition of "tools of the trade" and with excessive claims by the debtor to an exemption of both a motor vehicle, and trade or business equipment. We found several writs where cars had been exempt from seizure as required in the debtor's business. It would seem that if the debtor states that his car is a "tool of the trade", the officers do not include it in the list of seizable assets.

A motor vehicle is often the only asset to which a creditor has recourse, and where the writ is issued on a County Court judgment, the value of the motor vehicle may be sufficient to cover the amount owing. Fifty percent of the County Court writs examined recorded seizure of motor vehicles. With regard to the Queen's Bench judgments, there were very few such seizures except in claims for maintenance.

The exemption of a motor vehicle would appear to be valid where it is actually a "tool of the trade", but the exemption, if abused, deprives the creditor of an important means of satisfying his judgment. As one solicitor with experience in family law told us, effecting a seizure of the car may be the only way of persuading the debtor to settle. It was suggested by one of the solicitors that it should be clearly set out in the Act that to be exempt, a car must be used "in the course of employment" and the onus should be on the debtor to show that the motor vehicle is required for this purpose. Where the debtor is not self-employed, a letter from his employer could substantiate his claim.

Several members of the Commission suggested that in order to provide for the debtor who commutes to and from work in his car where no other means of transportation is

available, it should be specified that the car is exempt where it is used "in the course of, or to retain, employment".

The general opinion is that the creditor should be able to have the car seized, subject to the objection of the debtor by way of a statement to the Sheriff's Office or by Notice of Motion returnable to the County Court. This procedure may offer a solution to the problem of ambiguity in other sections as well.

We therefore recommend that section 30(1)(g) be amended to read:

the tools, implements, professional books, and necessities used by the judgment debtor in the practice of his trade, profession or occupation to the value of \$7,500 dollars; one motor vehicle, market value of \$3,000, if required by the judgment debtor in the course of or to retain employment.

Section 30(1)(h)

The articles and furniture necessary to the performance of religious services.

We received no comments on this provision of chattels required for religious purposes. In the 1892 Act, the section was the same but the marginal note read "Articles of church use" which suggests that the exemption was intended to apply to churches and not to individuals. The term "religious services" has been interpreted by the courts as the "celebration of Divine service or otherwise officiating in any church, chapel, etc." (*R. v. Wasył Kapij* (1905) Man. R.110).

The provision is peculiar to Manitoba, and is perhaps unnecessary. A creditor would be unlikely to seize any such

articles, and if applied to an individual, the provision could be abused by a judgment debtor claiming exemptions under this section merely to avoid seizure. On the other hand, there is no record of such abuse and the possibility remains that greater hardship would be imposed by the taking of a religious item which the debtor regards as a spiritual necessity than by the taking of his furniture which the present law exempts as a necessity of life.¹² In all probability, the items would have little resale value and would not be seized by the officers, whether statutorily exempt or not.

We recommend no change to this clause.

Section 30(1)(i)

All the necessary seeds of various varieties or roots for the proper seeding and cultivation of one hundred and sixty acres besides the grain and vegetables the judgment debtor may have chosen to keep for food purposes.

It was suggested by Mr. Therrien and his predecessor, Mr. Josephson, that the one hundred and sixty acres mentioned in this section should be increased to three hundred and twenty acres to bring it in line with the definition of a homestead in s. 2(e) of "*The Dower Act*" C.C.S.M., c. D100.

We received no other comments on this provision except in general terms with regard to the special provisions for farmers. It should be mentioned that in considering "*The Judgments Act*", C.C.S.M., c. J10, this Commission provisionally recommended that the special exemption of one hundred and sixty acres for farmers be eliminated, not expanded, to place urban and rural debtors on an equal footing.

Saskatchewan allows an exemption of "seed grain sufficient to sow all his land under cultivation at the rate of two bushels per acre, the execution debtor to have the choice of seed . . ." (section 2(8)). The Alberta Act, section 2(g), exempts "seed grain sufficient to seed the execution debtor's land under cultivation". It would seem preferable not to restrict the amount of seed by limiting the acreage, as in the present Manitoba section, but to allow the debtor to seed all his land in order to make possible a larger crop return.

We therefore recommend that section 30(1)(i) be amended to read:

the seed grain sufficient to seed all the judgment debtor's land under cultivation.

Section 30(1)(j)

The chattel property of The Metropolitan Corporation of Greater Winnipeg or of any municipality, local government district, school district, school division, or school area in the province.

Our only comment here is that in any revision to "*The Executions Act*" this paragraph should be amended by replacing the words "The Metropolitan Corporation of Greater Winnipeg" with the words "The City of Winnipeg".

Section 30(3) and (4)

In clause (e) of subsection (1), the word "horses" includes colts and fillies, and the words "oxen" and "cows" include steers and calves and heifers respectively.

The exemption under clause (e) of subsection (1), as to horses over the age of four years applies only where they are used by the judgment debtor in earning his living.

Mr. Therrien suggested that ss. (3) and (4) are unnecessary if the first part of section 30(1)(e), dealing with "four horses, mules, or oxen" is deleted. According to Mr. Stefanson, the words "over the age of four years" in s. 30(4) should be deleted to provide for riding academy operators.

Both these subsections would become unnecessary if Manitoba adopted a selective provision for livestock, similar to those in Alberta and Saskatchewan, and we would therefore recommend their repeal.

Section 38

No sale of any farm or garden crops, whether grain or roots, shall take place until after they have been harvested or taken and removed from the ground.

Mr. Stefanson suggested an addition to this provision as follows: "The debtor shall have the choice of whether his grain (to be sold by the Sheriff) is to be sold through the Canadian Wheat Board or through a private feed mill". His concern was that the private feed mills will give a low price in a forced sale, while the Wheat Board will give the proper market value.

Several seizures of crops were recorded in the writs:

- seizure of "all machinery, livestock, grain and vehicles"
amount owing: \$5,908.22;
- seizure of 5,000 bushels of grain
amount owing: \$10,823.02;
(This grain was released from seizure when a dispute arose as to the title of the land on which the crops were found.)

We recommend that this section be amended to provide for a choice by the debtor of whether his grain is sold through the Canadian Wheat Board or a private feed mill.

C. POSSIBLE ADDITIONS TO THE EXEMPTIONS UNDER "THE EXECUTIONS ACT"

Medical Aids

The exemption of medical aids has been suggested by writers in several jurisdictions. The U.S. Act, section 5(2), outlines exemptions of "health aids reasonably necessary to enable the individual or a dependent to work or to sustain health", and stated that the section contemplates the exemption of such items as a wheel chair for an individual unable to walk, an air conditioning unit for an individual afflicted with asthma, or an elevator for an individual unable to climb stairs.

An Ontario report suggests a list of medical aids to be exempt which includes "hearing aids, eyeglasses and prosthetic or orthopedic equipment". The report suggests that "given the high price of medical equipment, the likely intensity of the debtor's need for it and the scant possibility of fraud or abuse", a monetary ceiling would serve little purpose save to impede the effective operation of the exemption.¹³ A provision listing medical aids would provide extra assurance that a levy on such items, which is unlikely in any event, would not occur.

We recommend that an exemption for medical aids should be included in the Act.

Mobile Homes

The addition of an exemption for mobile homes would

recognize the developing trend towards this type of dwelling unit which is particularly strong in the western provinces. The 1976 Census gives the following figures on mobile homes in Canada:¹⁴

	TOTAL Occupied Private Dwellings	Mobile Homes	PERCENTAGE Mobile Homes/ Total
CANADA	7,166,095	166,885	2.32
British Columbia	828,265	40,755	4.92
Alberta	575,280	27,360	4.75
Saskatchewan	291,150	10,245	3.51
MANITOBA	328,000	7,685	2.34
Ontario	2,634,620	21,575	.81
Quebec	1,894,110	26,390	1.39
Nova Scotia	243,100	13,565	5.58
New Brunswick	190,435	11,725	6.15
P.E.I.	32,925	1,560	4.73
Newfoundland	131,665	4,170	3.16
Yukon	6,495	825	12.70
N.W.T.	10,020	1,030	10.27

According to a recent article, a mobile home on a serviced lot costs between \$30,000 to \$40,000, as compared with \$70,000 for a conventional home.¹⁵ The image of mobile homes is changing and it would appear that more and more young couples are looking seriously at mobile homes simply because of the saving involved.

Both Alberta and Saskatchewan provide for the exemption of a mobile home. Saskatchewan exempts the "trailer or portable shack occupied by the execution debtor as living quarters", a provision which reflects an outdated image of mobile homes.

The Alberta exemption of "a mobile home to the value of \$3,000" would seem preferable, but the \$3,000 limit is probably too low given the current prices of mobile homes.

John Kazanjian considered the exemption of mobile homes in his 1975 Ontario paper on exemptions, and pointed out that there was a decline in resale prices for mobile homes, unlike the resale prices of houses, which would support such an exemption. He concluded that the best approach would appear to be found in the development of suitable methods of enforcement, such as the stay of execution which treats the mobile home in the same way as the homestead to which it is functionally related.¹⁶

While in law a mobile home is a chattel and not real property and must therefore be under "*The Executions Act*", we agree with John Kazanjian that any exemptions in this regard should be similar to those applying to ordinary homes and we would therefore recommend that there be a one year stay of execution with regard to mobile homes analogous to the provisions of "*The Judgments Act*".

D. LUMP SUM EXEMPTIONS - The British Columbia Alternative

The British Columbia "*Execution Act*" R.S.B.C. 1960, c. 139, provides as follows:

25(1) . . . the goods and chattels of any debtor, at the option of such debtor, or, if dead, of his personal representative, are exempt from forced seizure at law or in equity to the value of two thousand dollars.

This lump sum exemption, unique to British Columbia, has several advantages over the "shopping list" of exempt property. It gives the debtor freedom to retain the articles which he

considers necessary, rather than those the state outlines for him. There are no specific provisions to become outdated, and no problems of ambiguity as with the selective provisions. If tied to a cost of living escalator, the exemption would update itself making constant legislative review unnecessary.

There are disadvantages to the lump sum exemption as well. The B.C. Ministry of Consumer and Corporate Affairs kindly provided us with their assessment of this provision:

The advantage of a fixed dollar amount for the exemption rather than a list of specific chattels is mainly simplicity and ease of amendment. Its disadvantages are probably that in order to make it a meaningful amount, it would be too great in some instances and not enough in others.

Consider the situation of a person living in the interior or northern part of the province who is employed but must have a reasonably reliable vehicle in order to reach his place of employment. This could absorb the whole of his exemption entitlement by itself. Conversely, an unmarried debtor with no dependents living in a major urban centre might find that the exemption is more than adequate and indeed allowed the retention of some items of property of a luxury nature.

. . .

In the context of bankruptcy the deficiencies are most noticeable. A debtor in British Columbia contemplating bankruptcy can look forward to being treated a great deal worse than debtors in many other provinces. Even the proposed new federal bankruptcy legislation would have provided a minimum \$3000 exemption where the provincial legislation is below this amount.

. . .

In summary, the fixed dollar amount for personal property exemptions could be reasonably workable if the dollar amount was adequate,

Several other disadvantages of the lump sum exemption became apparent as a result of our research and discussions with those involved with executions. A lump sum exemption requires the appraisal of all the execution debtor's property before a seizure can be made. Mr. Stefanson commented that his officers would have difficulty making such an assessment, and said that he preferred the present Manitoba approach because it offers a guideline for the officers to follow. There is also the possibility that giving the debtor his discretion would mean a failure to choose items which were required for the family's survival, thus defeating the primary purpose of the exemption laws.

Other law reform commissions have considered the lump sum approach as an alternative, but have in general suggested retention of the "shopping list" of exemptions similar to Manitoba's. The draftsmen of the U.S. Uniform Exemptions Act rejected the idea of lump sum exemptions in favour of a system of specific and selective exemptions with a built-in cost of living escalator clause applying the Consumer Price Index.

One suggested variation of the lump sum approach was to provide "an exemption of real and personal property to the extent of X dollars, subject to a cost of living escalator clause, and (for non-farmers) a 'necessary equipment' exemption, and for farmers specific and selective property exemptions". Alberta presented this proposal in their Working Paper (1978), but received no comments from the legal profession or from agricultural interests. It would seem to suffer from the same disadvantages as the British Columbia provision, and would tend to disregard the different classes of debtors and the true purpose of the exemptions which is to help debtors toward economic recovery by exempting only those items necessary to survive and earn a livelihood.

The Commission, therefore, having considered all the above suggestions, decided not to recommend a lump sum exemption provision.

E. PROCEDURE

Most of the information in this section was provided by the Sheriff's Office. The staff very kindly went over the procedure followed in executing a writ and permitted a survey of the files to see how the exemptions have been applied.

In the case of an execution following judgment, the creditor applies to the appropriate court office armed with his judgment, and fills out a writ. The Rules of Court also require a form of *praecipe* to be filed. According to the Queen's Bench office, however, in practice, only the County Court procedure of filing a writ is followed, a copy of which is placed on file in the court office. In the County Court this writ empowering the Sheriff to seize the debtor's goods is known as a writ of execution; in the Court of Queen's Bench it takes the form of a writ of *fieri facias*, colloquially referred to as a writ of *fi.fa.*

The writ directs the Sheriff to seize a sufficient amount of the debtor's goods to satisfy the amount shown. This amount is not necessarily the total amount of judgment, but can be a lesser amount which the creditor has been unable to collect either himself or through other enforcement remedies.

Before issuing a writ, a creditor should have done some research into the means of the debtor, his fortune, its state of investment, the form in which it exists, the amount of his income, its source and any other relevant particulars. Only with this information can a creditor properly decide how to execute his judgment. A look at the registers

of bankruptcy notices may reveal that proceedings against the debtor would be fruitless; if there is a bankruptcy, or the debtor company is being wound up, an execution then incomplete is ineffective.¹⁷ The Motor Vehicles Branch records will indicate whether there is a vehicle registered in the debtor's name, and the creditor should check for a conditional sales contract and for any mortgages on the vehicle.

One practitioner advised us that he always conducted a search of the debtor's assets and would only issue a writ if he discovered some seizable assets. He provided the Sheriff with a list of these assets when directing him to make a seizure. Execution is an expensive process and is worthwhile only if there are goods available.

Thirty-eight percent of the over 200 Queen's Bench writs examined were marked "No seizable assets", and returned to the creditors' solicitors for further instructions. There are several possible explanations for this high number of unsuccessful writs. It could indicate that many creditors' solicitors do not research the debtor's assets before issuing a writ. A second possibility is that the officers, on attending at the debtor's home or business, find that he no longer owns or has the items specified by the creditor.

Thirdly, the Sheriff's officers may be giving exemptions which the creditor did not anticipate, and which may constitute an expansion on the exemptions provided in the Act. There was general dissatisfaction among those canvassed (including lawyers, collection agencies, etc) with the enforcement procedure followed by the Sheriff's office. Several of the solicitors were of the opinion that the present exemptions would be satisfactory if they were strictly enforced,

but at present, the Sheriff's officers tend to use too much discretion in determining which assets to seize. They suggested that the difficulty in enforcing a judgment through the Sheriff's Office adversely affects the value of the paper judgment obtained by the creditor. The creditor has a claim which has been proven in court and yet he may not be able to realize the amount owing to him.

The Ontario Law Reform Commission points out in their Twelfth Annual Report (1979):

. . . the vagaries and frustrations which not uncommonly plague post-judgment debtor collection . . . arise in large measure from the ambiguity, complexity and often antiquated nature of debtor-creditor law Moreover, the unsatisfactory state of debtor-creditor law detrimentally affects the administration of justice by sheriffs, bailiffs and other officials having carriage of enforcement matters.

In many cases, the solicitors used a writ solely for its coercive value, knowing that a threatened seizure and sale of the debtor's property was one of the most effective methods of persuading the debtor to make some payments. One of the solicitors indicated that a visit by the Sheriff's officer normally brings the judgment debtor to realize that he must settle with the judgment creditor and a settlement is reached. Another solicitor informed us that all the debtors against whom he has proceeded by way of a writ have paid cash.

It is interesting to note that wage garnishment, another of the creditor's remedies, was intended as a "one-shot remedy", the utility of which is based on its potential coercive effect to cause the debtor to make some other arrangements with the creditor.¹⁸ Perhaps this was also the intention when "*The Executions Act*" was drafted.

At the present time the writ can remain on the Sheriff's files for ten years, acting as a kind of lien on the debtor's property and can be renewed once this period has expired. The Commission believes that if the writ is to remain in effect there should be a requirement (similar to section 6 of "*The Judgments Act*") that it be renewed prior to the expiration of a period of two years.

Once the writ is issued, the Sheriff's officers attempt to make contact with the debtor, and then attend at his home or place of business to make a demand for the amount owing. The officers suggest to the debtor that he arrange a system of repayment with the creditor, and offer to handle any payments that the debtor is able to make.

Our legislation lacks a provision for notifying the debtor of his right to exemptions. At present, the Act only specifies that the officers must leave a copy of the inventory of goods seized on the premises (section 22(1)), and that the officers must not seize property exempt by the Act (section 40).

As far as we could determine, the only reported Manitoba case on this issue dates from 1916 with the case of *Robin Hood Milling Co. v. Maple Leaf Milling Co.* (1916), 9 W.W.R. 1453. In considering the sections equivalent to section 30(1)(g) and section 40 of the present Act, the court concluded that the sheriff must call on the debtor to make a choice of articles to the value specified which he wanted to claim as exempt. Where the debtor refused or neglected to make this selection, then the Sheriff might do so for him and seize the balance.

A member of the judiciary suggested that the officers could be provided with booklets to give to the debtor, informing him about possible repayment schemes, consolidation of

debts and of the exemptions to which he is entitled. Such a booklet could also include information on obtaining legal advice, and on Legal Aid - something which is sorely needed. Of the over 200 writs examined, only 10 had any record of a debtor's solicitor and many of the people with whom we spoke were of the opinion that neither creditors nor debtors are aware of their rights. The U.S. exemption proposals include a notice to the debtor of the creditor's claim which must give a summary statement of exemptions provided by the law of the state, and a summary of procedures for claiming exemptions and for objecting to a levy on exempt property.

**Notice of Levy and Sale of Your
Property and of Your Right
to Exemptions**

The purposes of this notice are to tell you that your property is being taken by levy for the purpose of paying the judgment against you for \$....., entered in favor of on, 19.., in the Court of, and to inform you of your right to exemptions under the laws of this state. These laws protect certain property from being taken for the enforced payment of debts. Such property is called exempt property. If you are a resident of this state, property of the kinds listed below may be exempt and thus may not be taken by levy and sold to pay the judgment except as provided by law. If you are a nonresident, your right to exemptions will be governed by the law of the jurisdiction of your residence.

(Following this is a list of exempt property)

We would accordingly recommend the addition of a section to the Act outlining the procedure for notifying a debtor of the creditor's claim and of his right to exemptions.

The discussion in the above section of this paper deals with areas which have been considered by the courts and which were mentioned by the solicitors as requiring review. It is not a comprehensive examination of the execution procedure and omits reference to attaching orders and writs of sequestration, which are included in the general term "executions". These two types of execution, particularly the latter, do not occur as regularly as writs of *fi. fa.* in the Queen's Bench and a writ of execution in the County Court. The attaching order, which directs execution prior to judgment in specified situations (Q.B. Rule 582) and the writ of sequestration (Q.B. Rules 486, 487) require special attention and treatment by the Sheriff's Office to prevent the removal or destruction of assets by the debtor.

Walking Possession

When the debtor is unable or unwilling to make any payments, the officers make a "walking seizure" or "paper seizure" of exigible goods belonging to the debtor. The debtor signs an agreement giving the Sheriff constructive possession, and undertaking not to remove the goods in consideration of the Sheriff's officer not remaining on the premises. The debtor is in effect made a sub-bailiff of the goods.

The walking possession agreement, which includes an inventory of the goods placed under seizure, is sent to the creditor's solicitor who then decides whether to direct physical seizure.

According to the Sheriff's Office, an execution will rarely go as far as physical seizure and sale. This is confirmed by an analysis of issued writs, and would again suggest that it is the coercive value of the writ which makes

it attractive to the creditors - perhaps because procedural difficulties make this its only value.

There is another factor to be considered. A forced sale is rarely worthwhile because the proceeds may only cover the costs involved in the seizure and sale: towing or hauling expenses, the cost of storage for eight days and the cost of advertising the sale for the same period as outlined in the Act, (section 22(2)), the auctioneer's fees, and the poundage and costs of the Sheriff's Office. Once these costs are satisfied, there may be little left to send to the creditor. Where there are two or more creditors each will receive only a pro rata share.

As a result, most executions end with walking possession agreements where there are any exigible assets at all. These agreements were challenged in England as being an abandonment of the goods, but have been held to constitute a valid seizure: *Watson v. Murray* [1955] 2 Q.B. 1. In *National Bank of Scotland v. Arcam Demolition and Construction*, [1966] 2 Q.B. 593, Lord Denning stated that it was not necessary, in point of law, for the agreement to be made by the debtor himself, nor was it invalid if the debtor did not authorize it or even objected to it. All that is required is an agreement by a responsible person in the house to see that the goods are not removed. We came across several instances where, in the absence of the debtor, a relative had signed the Acknowledgment of Seizure at the officer's request.

The officers must still ascertain that the goods they are purporting to seize are on the premises. The signature of the debtor on the Acknowledgment of Seizure by itself

cannot be treated as an admission by the debtor that the goods were lawfully seized if they were not in fact on the premises at the time of the purported seizure, nor is it an admission that the goods were there (*R. v. Vroom*, [1975] 4 W.W.R. 113 (Alta.CA)).

The Commission therefore recommends that the Act be amended to include reference to walking possession agreements.

Seizure of Exempt Goods and Over-seizure

Since walking possession agreements have been held to be valid seizures of the goods, the question arises as to the applicability of section 40 of "*The Executions Act*" preventing seizure of exempt goods, to this type of seizure.

In many cases, especially where a small business is involved, the Sheriff's report indicates that there has been a walking seizure of all assets - office furniture, equipment, etc. When asked whether the seizure could include exempt articles, the officers said that they often list all the debtor's goods on the inventory attached to the seizure form, and send this to the creditor's solicitor who then decides what to seize and sell.

As Mr. J.G. Donald, Departmental Solicitor for the Attorney-General's Department, points out in his 1977 paper on the duties of the Sheriff, "I think it is important for Sheriff's officers to realize that taking 'walking possession' constitutes seizure in the full sense of the term". Some revision of section 40 is necessary to ensure that exempt goods are not seized under walking possession agreements.

The problem of "over-seizure", where the amount of

goods seized is in excess of the amount required to satisfy the judgment, also arises from seizure of all the debtor's assets under walking possession agreements. In *Re Dalton* (a bankrupt), [1963] Ch. 336, this question was raised.

It appears from the evidence in the present case and from *Watson v. Murray (supra)* that it is quite common in the case of executions at retail shops for execution to be levied on the entire stock, but with walking possession and permission to continue normal trading. Where this initially involves excessive and therefore wrongful and tortious execution, the practice, although perhaps convenient and not really damaging to the debtor seems to us to be one which should not be followed. An appropriate amount of the stock should be seized.

One method of preventing "over-seizure" and the seizure of exempt goods would be to educate the debtor as to his rights, and to provide a procedure whereby the debtor could contest the creditor's right to seize. The proposed U.S. Act, section 14, provides an elaborate procedure for notification and for filing an objection (section 14). The Ontario "*Execution Act*", section 8, provides that:

Where a dispute arises as to,

- (a) whether or not a chattel is eligible for exemption from seizure . . . or
- (b) whether or not chattels claimed to be exempt exceed the value of the exemption provided . . .

the debtor or creditor may apply to the county or district court of the county or district in which the chattel is located for the determination of the question, and the court shall determine the question after a hearing upon such notice to such persons as the court directs.

Alberta and Saskatchewan have similar provisions.

A member of the judiciary was asked for his reaction to the idea of a hearing in the event of a disputed claim, or where the debtor was claiming goods which were not statutorily exempt, but which were required by the debtor and his family. His opinion was that greater use of the courts should be avoided if possible, and that in any case, the cost of such proceedings would be prohibitive. He preferred the idea of broadening the exemption provisions, leaving it open to the debtor to show where they should be further expanded, or to the creditor to ask for a narrowing of the exemptions.

It should be remembered that in practice the Sheriff's officers are unlikely to seize an article which the debtor has indicated is necessary for his survival. Indeed, some of the solicitors feel that the officers are, if anything, over-cautious and unwilling to seize even items which could fall into a luxury category. A balance must be struck between allowing the officers too much freedom in assessing what should be seized, and restricting their discretion to the point where the system is no longer workable. Clearly worded and up-to-date exemption provisions would make such a balance easier to achieve.

We would recommend the addition of a section to the Act outlining the procedure to be followed in the event of a disputed claim.

Indemnification

Where there is to be a physical seizure, the Sheriff asks for indemnification from the creditor's solicitor who assumes responsibility for wrongful seizure and/or sale. Where a small claims judgment is involved, the Sheriff also requires a bond of twice the value of the goods which the creditor is asking him to seize.

The request for indemnification has brought a response from several solicitors who feel that this places further and unjustifiable responsibility on the creditor. In 1977, a member of the profession wrote to this Commission and to Mr. P.T. Guttormsson, the Administrator of Court Services, to request a review of the indemnification procedure. The result was a paper on the duties of the Sheriff by Mr. J.G. Donald, Departmental Solicitor for the Attorney-General's Department.

Mr. Donald concluded that the Sheriff is entitled to ask for indemnification where there is uncertainty as to whether or not particular goods and chattels are the property of the judgment debtor.

In this situation, the Sheriff should consider the possible consequences of seizure as opposed to failure to seize. If he seizes the goods in question, he may be faced with a lawsuit by the rightful owner for conversion or trespass. . . . He would almost certainly be found liable for any resulting damage.

The paper stated that "the Sheriff does not have the right to be indemnified if he is reasonably satisfied there were goods and chattels of the judgment debtor in his bailiwick," but in practice, as several of the solicitors pointed out, the Sheriff requests indemnification prior to every physical seizure.

The principal objection of the solicitors to this procedure is that it places a further onus on the creditor instead of shifting the onus to the debtor or, as one solicitor suggested, to the Sheriff to satisfy himself as to the title of the judgment debtor in the goods which are seized. In his letter to the Commission, the solicitor stated that

"the situation is even more blatantly offensive due to the fact that the Sheriff collects poundage, not on the basis of services rendered, but on the basis of the amount realized, as a real estate agent would for the sale of a property, and on the other hand, requires a solicitor to give him that form of indemnification".

While appreciating the concern of the Sheriff's Office as outlined in the study paper, the Commission feels that a solicitor should not be required to give personal indemnification before physical seizure will be carried out. The Sheriff should be protected in some other way against potential third party actions, and we so recommend.

Proceeds of Forced Sale

The Commission considered the addition of a section similar to Ontario section 3(1) which provides that:

Where exemption is claimed for a chattel referred to in (the section outlining exemptions) that has a sale value in excess of (the monetary limit) plus the costs of the sale and other chattels are not available for seizure and sale, the chattel is subject to seizure and sale under a writ of execution and (the monetary limit figure) shall be paid to the debtor out of the proceeds of the sale.

The provision provides protection for the debtor and ensures that he retains at least the dollar figure exempt under the statute. At the same time, it might encourage the officers to seize items which, although exempt under the Act, are in excess of the value allowed. The *de facto* exemptions currently given by the Sheriff's officers follow a general pattern of exempting all articles mentioned without regard to the value limit.

We would therefore recommend that a section similar to the said Ontario section 3(1) be enacted. However, to be effective the provision requires a revision of the monetary limits which is long overdue. Once the new limits are set, the Commission further recommends that they be attached to a cost of living escalator to achieve automatic revision.

F. THE SECURED CREDITOR

A major concern expressed by those engaged in the field of creditor-debtor relations was that secured creditors may seize chattels despite their being covered by the exemptions under "*The Executions Act*". A study of this area of execution law was outside the terms of reference given to the Commission when the matter was referred to it. Since it is not desirable to delay submission of this report, a brief discussion only is included and it is recommended that a further research project be undertaken as soon as possible.

One practitioner told us that most of his cases did not involve judgment, but repossession by a secured creditor. Many of the securities contain all-inclusive clauses which state that the agreement secures not only the article on which the security was obtained, but all of the debtor's assets. When a debtor falls behind on payments, or perhaps goes bankrupt, the creditors may attempt to repossess the secured item and also to seize everything that the debtor owns.

Section 31 of "*The Bills of Sale Act*" (R.S.M. 1970, B40, repealed by S.M. 1973, c. 7, s. 2) covers all securities registered prior to September 1, 1978 and provides for certain limited exemptions. The broad wording of the section could include almost any mortgage.

"The Personal Property Security Act", (C.C.S.M., c. P35) covering securities registered since September 1st, 1978, does not invoke "The Executions Act". We asked the advice of Mr. Patrick Sinnott, the Registrar of the Personal Property Registry, on the interaction of these two Acts. Sections 57 and 58 deal with the creditor's right to repossess. It would seem that barring any protection provided in "The Consumer Protection Act" (C.C.S.M. c. C200) where the creditor has a security on an article which is exempt under "The Executions Act" he can repossess with immunity.

Both Alberta (s. 4) and Saskatchewan (s. 31(1)) give the debtor the right to claim an exemption where exempt goods are covered by a chattel mortgage. Alberta qualifies this exemption and provides that only "food, clothing and bedding are exempt where the price of the article forms the subject matter of the judgment upon which the execution is issued" (s. 5).

The justification for this inroad into s. 4 is argued to be twofold: firstly, people would be unwilling to sell exempt articles unless they could be at least assured of repossessing them in the event of default; secondly, it would be unfair to unjustly enrich the debtor by allowing him to assert an exemption for property for which he has not paid and which was originally owned by the creditor.¹⁹

The debtor is protected where the chattel mortgage was taken by the creditor for a loan, and in the case of a "blanket form" mortgage, covering all the goods of the debtor, the exemption provides an important protection against a seizure of necessities.

What concerned several of the solicitors was the

conflict between the statutes dealing with debtor-creditor rights and the lack of protection which results for the debtor. It was suggested that Manitoba requires an Act similar to the Saskatchewan "*Limitation of Civil Rights Act*" (R.S.S. 1965, c. 103, as am. by S.S. 1970, c. 37). The Act deals with the rights of a creditor under a security agreement, and provides that before a creditor can repossess an article "by reason only of failure of the debtor to make a payment under the agreement", he must comply with the provisions of the Act. The debtor must be notified of the creditor's intention to repossess and of his right to a hearing. At the hearing, the judge may order the delivery of the article to the creditor subject to such conditions as the judge deems just, or he may order delivery and postpone the operation of the order, again subject to certain conditions.

It has also been suggested that the Manitoba statute void any waiver of rights under these provisions, to prevent the nullifying of its effect. This has occurred in Saskatchewan where security forms commonly include a waiver of rights under "*The Limitation of Civil Rights Act*". Both Saskatchewan and Alberta have a no-waiver clause in their provisions for exempt articles under chattel mortgages.

One solicitor recommended that the creditor be allowed his remedy of seizure if he has a specific document of security against the chattel whether or not that chattel would otherwise be exempt under "*The Executions Act*". He suggested that should this priority prove too onerous, the debtor could be allowed to apply for a stay of execution on the basis of any hardship created.

The U.S. Act provides protection along these lines by placing a limitation on the enforcement of certain securities

on exempt goods. The creditor is prevented from taking possession of the item or otherwise enforcing the security interest according to its terms without an order or process of the court. The court may or may not order or authorize process respecting the item if it finds upon the hearing both that the individual lacks the means to pay all or part of the debt secured and that continued possession and use of the item is necessary to avoid undue hardship for the individual or a dependent (section 11).

Support was expressed for the idea of uniform Canadian exemption legislation to standardize or consolidate the exemptions and to prevent the confusion created when one piece of property is subject to three or four different statutes. It was suggested that such legislation could fall under "*The Consumer Protection Act*", and that it should have three divisions: personal property of a non-commercial nature; commercial property - business assets, both real and personal, and intangible rights such as patents and processes; and motor vehicles and equipment. The U.S. *Uniform Exemptions Act* could provide a model for such legislation.

As mentioned above, the Commission recommends that a further review of the area of secured transactions and executions arising thereunder is required as soon as possible. Special provision is necessary to cover the situation where an article which is exempt under "*The Executions Act*" is also subject to a security agreement.

RECOMMENDATIONS

For ease of reference, our recommendations are summarized below:

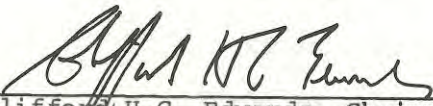
1. There should be a provision added to ensure that the exemptions provided in "*The Executions Act*" are not applied to chattels purchased for the purpose of defeating the claims of creditors (p. 7).
2. Section 30(1) should be amended as follows:
 - (a) the furniture and household furnishings and appliances reasonably necessary for one household (or to the value of \$4,500) (pp. 9-11).
 - (b) the necessary and ordinary clothing of the judgment debtor and his family (p. 12).
 - (c) *repeal* (pp. 12-13).
 - (d) the necessary food and fuel for the judgment debtor and his family, or costs thereof, for six months (pp. 13-14).
 - (e) all animals reasonably necessary for the proper and efficient conduct of the judgment debtor's agricultural operations for the next ensuing twelve months (pp. 14-19).
 - (f) the farm machinery, dairy utensils and farm equipment reasonably necessary for the proper and efficient conduct of the judgment debtor's agricultural operations for the next ensuing twelve months; one motor vehicle if required for agricultural purposes (pp. 19-21).
 - (g) the tools, implements, professional books, and necessaries used by the judgment debtor in the practice of his trade, profession or occupation to the value of \$7,500; one motor vehicle, market value of \$3,000, if required by the judgment debtor in the course of or to retain employment (pp. 21-24).
 - (h) the articles and furniture necessary to the performance of religious services (pp. 24-25).
 - (i) the seed grain sufficient to seed all the judgment debtor's land under cultivation (pp. 25-26).
 - (j) the chattel property of The City of Winnipeg or of any municipality, local government district, school district, school division, or school area in the province. (p. 26).
3. Section 30(2), dealing with the choice of proportion of food exempted, should be repealed (p. 14).


4. The definition of the livestock exempt, and the limitation on the exemption of horses, contained in section 30(3) and (4) of the Act should be repealed (pp. 26-27).
5. Section 38 of the Act should be amended to provide for a choice by the debtor of whether his grain is sold through the Canadian Wheat Board or a private feed mill (pp. 27-28).
6. An exemption for medical aids should be added (p.28).
7. There should be a one-year stay of execution with regard to mobile homes analogous to the stay provided for ordinary homes under "*The Judgments Act*" (pp. 28-30).
8. The exemptions should not be available to a corporate debtor. This was suggested with regard to the farming provisions but should apply to all exemptions. The exemptions are designed to provide the necessities for survival to an individual, not a corporation(p.19).
9. It should be provided that if a writ is to remain in effect it must be renewed prior to the expiration of a period of two years (similar to section 6 of "*The Judgments Act*") (p. 36).
10. There should be a provision added outlining the procedure for notifying a debtor of the creditor's claim and of his right to exemptions (pp. 33-37).
11. The Act should be amended to include reference to walking possession agreements (pp. 38-40).
12. There should be a provision outlining the procedure to be followed in the event of a disputed claim (pp. 40-42).
13. The sheriff should be protected in some way against potential third party actions other than by the personal indemnification of the creditor's solicitor (pp. 42-44).
14. A provision should be added to ensure that, in the event of a forced sale of an exempt article in excess of the value limit, the monetary sum provided


in the statute will be paid to the debtor out of the proceeds of the sale. Value limits throughout the Act should be attached to a cost of living escalator to achieve automatic revision (pp. 44-45).

15. A more complete study of secured transactions and executions thereunder should be made as soon as possible in order to develop a provision to cover the situation where an article which is exempt under "The Executions Act" is also the subject of a security agreement (pp. 45-48).

This is a Report pursuant to section 5(3) of "The Law Reform Commission Act" dated this 22nd day of October 1979.


Clifford H.C. Edwards, Chairman


R.G. Smethurst, Commissioner


Val Werier, Commissioner


Patricia G. Ritchie, Commissioner


David G. Newman, Commissioner


A. Burton Bass, Commissioner


Evan H.L. Littler, Commissioner

FOOTNOTES:

1. Alberta Institute of Law Research and Reform, "Exemptions from Execution and Wage Garnishment". Working Paper, 1978, p. 4.
2. G.S. Joslin, "Debtors' Exemption Laws: Time for Modernization" (1959), 34 *Ind. L.J.* 355.
3. W.T. Vukowich, "Debtors' Exemption Rights" (1974) 62 *Geo. L.J.* 779, at 784-786.
4. *Supra* n. 1, at 17.
5. *Supra* n. 2, at 357.
6. *Supra* n. 3, at 846.
7. J.A. Kazanjian, "Assets Subject to Seizure" 1975, Ontario at 34.
8. *Id.*, at 22.
9. *Id.*, at 56-57.
10. M.L.R.C. Working Paper, "The Enforcement of Judgments: Part II - Exemptions under "The Judgments Act"", January 1978, at 24.
11. W. Skene, "It Isn't Easy Down on the Farm" *Maclean's*, June 18th, 1979, p. 46.
12. *Supra* n. 7, at 50.
13. *Id.*, at 49.
14. Census figures, 1976.
15. Peter Carlyle-Dordge, "Home is Where You Are Able to Park It", *Maclean's*, June 18th, 1979, p. 48.
16. *Supra* n. 7, at 54.
17. J.F. Josling, *Execution of a Judgment* (1974), 48-49.
18. M.L.R.C. Working Paper, "The Enforcement of Judgments: Part II - Exemptions under "The Judgments Act", January 1979, at p. 26.
19. *Supra* n. 1, at 37.