MANITOBA LAW REFORM COMMISSION

REVIEW OF *THE GARNISHMENT ACT*

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CHAPTER 1

INTRODUCTION

A. SCOPE OF REPORT

In 2003, the Hon. Gord Mackintosh, Minister of Justice and Attorney General, requested that the Manitoba Law Reform Commission consider undertaking a review of *The Garnishment Act*[1] for the purpose of modernizing the garnishment remedy for enforcement of judgments. However, due to lack of resources and higher priority projects on the Commission's agenda at the time, we were unable to begin work until the fall of 2004 when we were fortunate in retaining outside consultants to undertake the project: Messrs. James G. Edmonds and Sacha Paul, practitioners in the firm of Thompson, Dorfman, Sweatman.

It has been said that the just and efficient enforcement of civil debts is "fundamentally essential to the health of our society."[2] A judgment for the payment of money which cannot be enforced or is overly difficult to enforce is not just a hollow victory for the successful claimant but also inhibits respect for and confidence in the civil legal system. The determination and enforcement of obligations is one of the raisons d'être of the legal system and its success or "value" turns on the degree of fairness and efficiency inherent in its processes.

In its recent report on the enforcement of money judgments, the British Columbia Law Institute described the goals of any civil enforcement regime as: the timely payment of just debts, the protection of debtors and their dependants and the orderly and equitable distribution of the debtor's estate among judgment creditors.[3] There is an obvious tension between these goals since the promotion of one is often at the expense of another. The measure of success of such a system is the extent to which the system finds an appropriate balance between fairness and efficiency and between debtors, creditors and others touched by the enforcement process.

Garnishment is one of a variety of legal tools available to judgment creditors to enforce the payment of judgments or to secure payment of an as yet unattained judgment. It has been described as "a powerful and harsh remedy relatively uncontrolled by judicial or administrative supervision",[4] and it differs from other enforcement remedies in that it draws a "stranger" into the enforcement process: the garnishee.

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[1] *The Garnishment Act*, C.C.S.M. c. G20 (the Act).

[2] Alberta Law Reform Institute (ALRI), *Enforcement of Money Judgments* (Report #61, vol. 1 and 2, 1991) vol. 1 at 21.

[3] British Columbia Law Institute (BCLI), *Report on the Uniform Civil Enforcement of Money Judgments Act* (Report #37, 2005) 16.

[4] C.R.B. Dunlop, *Creditor Debtor Law in Canada* (1981) 211.

Pursuant to the reference from the Minister, our task is to make recommendations aimed at modernization of the garnishment remedy and, accordingly, we have excluded from our review other enforcement mechanisms such as examinations in aid of execution, writs of seizure and sale, execution against realty and the appointment of a receiver. However, in our view, a comprehensive review of the entire enforcement system is long overdue.

The civil enforcement scheme has been described as "fragmentary, uncoordinated and out of date,"[5] "inefficient, unpredictable and, in some cases, arbitrary and unjust."[6] It is not so much a "system" as it is a collection of discrete procedures aimed at specific types of assets. Each procedure is subject to exemptions and inherent limitations and a creditor must resort to one or more of the remedies described above in order to reach all of the debtor's property. These procedures have not kept pace with the changing way in which wealth is held today and the operation of the system is seen as cumbersome as courts are involved in its supervision and administration. The system, as a whole, does not promote fairness because it does not result in an equitable distribution of the proceeds of execution.[7]

True modernization cannot be achieved by reforming individual remedies and, indeed, the piecemeal approach runs contrary to the recent trend in other Canadian jurisdictions. In 1981, the Ontario Law Reform Commission recommended "... a reorganized, comprehensive and coordinated enforcement system, integrating virtually all enforcement measures under a single new statutory regime."[8] This call for fundamental reform of the system was echoed by the Alberta Law Reform Institute in 1991[9] and since heeded, in part, by the governments of Alberta and Newfoundland and Labrador.[10] In 2004, the Uniform Law Conference of Canada introduced a *Uniform Civil Enforcement of Money Judgments Act*[11] and recent reports from Saskatchewan and British Columbia have recommended its adoption.[12]

We echo the call for fundamental reform of the civil enforcement regime. Unfortunately, our current resources prevent us from undertaking such a comprehensive review.

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[5]BCLI, *supra* n. 3, at 9.

[6]Buckwold and Cuming, *Modernization of Saskatchewan Money Judgment Enforcement Law* (Final Report 2005, University of Saskatchewan) on-line: >http://usask.ca/law/files/index.php?id=923>, at 1.

[7]BCLI, *supra* n. 3, at 8-10.

[8]Ontario Law Reform Commission, *The Enforcement of Judgment Debts and Related Matters* (Part I, 1981) 5.

[9]ALRI, *supra* n. 2.

[10]*Civil Enforcement Act*, R.S.A. 2000, c. C-15; *Judgment Enforcement Act*, S.N.L. 1996, c. J-1.1.

[11]Uniform Law Conference of Canada [ULCC], *Uniform Civil Enforcement of Money Judgments Act*, online: <http://www.ulcc.ca/en/us/Uniform_Civil_Enf_Money_Judgments_Act_En.pdf> [hereinafter Uniform Act].

[12]Buckwold and Cuming, *supra* n. 6; BCLI, *supra* n. 3.

B. TERMINOLOGY

For the sake of clarity, the following is a brief description of the three terms used throughout this Report.

> "Garnishment" can be defined as a way to enforce a judgment by which money owed by the garnishee to the judgment debtor is attached to pay off the judgment debtor's debt to a judgment creditor;
>
> "Garnishor" is the creditor who initiates garnishment for the purpose of reaching property of a debtor held or owed by a third person;
>
> "Garnishee" is the person who has money or property in his possession belonging to a debtor (for example, an employer, a financial institution, etc.) and against whom a garnishing order is issued.

C. ACKNOWLEDGMENTS

The Commission wishes to thank Messrs. Edmonds and Paul for their detailed and comprehensive analysis of the current law and suggestions for reform which were of great assistance in reaching our final conclusions. It should be noted, however, that the recommendations contained in this Report are those of the Commission and are not necessarily in agreement with those of our consultants.

CHAPTER 2

BACKGROUND

A. INTRODUCTION

In our review of the garnishment regime, we have drawn heavily upon the important work of the Alberta Law Reform Institute [ALRI]. We are in agreement with the ALRI that the fundamental guiding principle of an enforcement regime is the promotion and maintenance of public confidence in the judicial system (which requires careful balancing of the interests of debtors and creditors). The ALRI suggests that the specific principles which will achieve this are:

1. *Universal Exigibility*: All debts owed to a judgment debtor should be garnishable unless specifically exempted by the Act.

2. *Just Exemptions*: A debtor should have an amount of his/her income and property protected so that he/she remains able to support him/herself and his/her family.

3. *Sharing Among Creditors*: There should be proportionate sharing among judgment creditors of the total amount of the judgment debtor's garnishable assets. Unless there are policy reasons to prefer one particular type of creditor, all creditors should share in the garnished funds and not have access to the funds on a "first come, first served" basis.

4. *One Statute*: The procedural and substantive rules for all types of garnishment should be found in one understandable Act thereby eliminating the need to refer to multiple sources for one action.

5. *Simplicity of Process*: Garnishment should be comprehensible to the creditor, the garnishee and the debtor. The goal is to remove, so far as is practicable, the need for lawyers to be involved in the procedural workings of garnishment.[1]

Applying this general principle to the garnishment remedy, we address the three substantive issues (exigibility, exemptions and sharing) and one procedural issue (simplicity of process). We cannot effectively address the "one statute" principle since we are looking at one remedy and the ALRI report was aimed at the entire system of civil enforcement. However, to the extent practicable, garnishment provisions should be confined to as few statutes as possible with a clear separation of substantive and procedural matters, the latter to be found in the *Queen's Bench Rules*.

[1]Alberta Law Reform Institute (ALRI), *Enforcement of Money Judgments* (Report #61, vol. 1 and 2, 1991).

B. SUBSTANTIVE ISSUES

1. Garnishment Generally

Creditors resort to the garnishment remedy for two purposes. The most common is for *post-judgment garnishment*, a process to enforce a judgment of the court that the defendant must pay the creditor a sum of money to satisfy a debt. There are three types of post-judgment garnishment:

1. "General garnishment" (or civil judgment garnishment): the enforcement of a judgment for a debt or damages;
2. "Maintenance garnishment": the collection of spousal or child maintenance. Such obligations may be created either by court order or by agreement between the creditor/recipient and the debtor/payor;
3. "Criminal penalty garnishment": the collection of unpaid fines, forfeited recognizance orders and restitution orders.

The second, less common use of the remedy is for *prejudgment garnishment*. This is a somewhat extraordinary remedy in that it permits the attachment of the alleged debtor's assets *before* judicial determination of the existence and amount of the debt. Since the prejudgment garnishment remedy differs considerably from post-judgment garnishment, it will be considered separately in Chapter 4.

2. History of the Garnishment Remedy

The law of civil enforcement is "a mixture of common law and equitable doctrine, modified by a mass of English and Canadian legislation contained in statutes and in rules of court."[2] The garnishment remedy was not available at common law or in equity but is a creature of statute, first enacted by the English Parliament in 1854.[3] Before enactment of the remedy, a creditor could not attach intangible property such as debts, wages, stocks, shares and money paid into court."[4] Although the English legislation applied to Manitoba by implication, the garnishment remedy was expressly enacted in 1875 and the first *Garnishment Act* appeared in 1891. The remedy has continued, relatively unchanged since that time with the exception of enhanced collection powers for maintenance orders and criminal penalties.

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[2]C.R.B. Dunlop, *Creditor Debtor Law in Canada* (1981) 2.

[3]*Common Law Procedure Act, 1854*, 17 & 18 Vict. c. 125, ss. 61-68, *Common Law Procedure Act, 1860*, 23 & 24 Vict. c. 126, s.. 26.

[4]*Halsbury's Laws of England* (4th ed., Vol. 17) Execution, paras. 523.

3. Overview of the Legislation

Every garnishment process is governed by *The Garnishment Act*. While the bulk of substantive provisions are found in this Act, it should be noted that there are 19 other statutes which contain one or more provisions relating to garnishment.[5] In addition, *The Court of Queen's Bench Act* provides the express authority for prejudgment garnishment and the *Queen's Bench Rules* contain the majority of procedural requirements for garnishment.[6]

The current Act has not been rationalized or reorganized since it was first enacted despite substantial amendment in the last thirty years. The Act contains a number of procedural provisions which should be in the *Queen's Bench Rules*.[7] There is also some duplication between the Act and the Rules. For example, section 14.6(2) and rule 60.08(6.5) both require a creditor to provide extra copies of documents to a garnishee who is then required to serve them on a joint debtor.

The goal of modernization should be the removal of impediments to effective use of the system. The present organization of the statute is cumbersome and numerous provisions are outdated in terms of their application and terminology. The Act should be reorganized and rewritten using modern language and concepts to make it easier for creditors, garnishees and debtors to understand, utilize and comply with the garnishment remedy.

In addition to the general and wage garnishment provisions, sections 12.1 and 13 to 14.2 address garnishment for maintenance orders (including extra provincial orders) and section 14.4 addresses criminal penalties.[8] These sections are like mini-statutes within the Act and there is some repetition or duplication between them. For example, a garnishee who receives multiple notices of

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[5]*The Builders' Liens Act*, C.C.S.M. c. B91, ss. 6(2) and 31; *The Prearranged Funeral Services Act*, C.C.S.M. c. F200, s. 13; *The Judgments Act*, C.C.S.M. c. J10, s. 13(4); *The Legal Aid Services Society of Manitoba Act*, C.C.S.M. c. L105, s. 17(7); *The Manitoba Public Insurance Corporation Act*, C.C.S.M. c. P215, s. 159; *The Public Schools Act*, C.C.S.M. c. P250, s. 50(4); *The Interprovincial Subpoena Act*, C.C.S.M. c. S212, s. 6; *The Teachers' Pensions Act*, C.C.S.M. c. T20, s. 70(1); *The Victims' Bill of Rights Act*, C.C.S.M. c. V55, s. 68; *The Workers Compensation Act*, C.C.S.M. c. W200, s. 23; *The City of Winnipeg Charter Act*, S.M. 2002, c. 39, ss. 91(3), 469 and 391(2) (excepting persons, debts or monies from garnishment); *The Provincial Court Act*, C.C.S.M. c. C275, s. 19(2); *The Family Maintenance Act*, C.C.S.M. c. F20, ss. 55, 59(3), 59.5(8) and 60; *The Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 9(2); *The Pension Benefits Act*, C.C.S.M. c. P32, ss. 3, 21.4, 31, 31.1, 37 and 38.1 (enforcement powers); *The Employment Standards Code*, C.C.S.M. c. E110, s. 133(1); *The Law of Property Act*, C.C.S.M. c. L90, s. 32(6) (debtor protection); *The Income Tax Act*, C.C.S.M. c. I10, s. 36 (application of federal legislation); *The Personal Property Security Act*, C.C.S.M. c. P35, s. 20 (priority).

[6]*The Court of Queen's Bench Act*, C.C.S.M. c. C280, s. 61; *Court of Queen's Bench Rules*, MR 553/88, r. 60.08 [general garnishment process applicable to both pre and post-judgment garnishment] and r. 46.14-46.15 [requirements specific to prejudgment garnishment].

[7]For example, s. 3 relating to service of process on the Minister of Finance.

[8]Some provinces, such as Saskatachewan, have enacted maintenance garnishment provisions in separate legislation rather than in the general garnishment legislation: *Enforcement of Maintenance Orders Act*, S.S. 1997, c. E-9.21. See also, *Attachment of Debts Act*, R.S.S. 1978, c. A-32, s. 2.1.

garnishment in respect of the same debtor must comply with the highest priority order first.[9] To determine which creditor has priority, a garnishee may have to find, read and understand two or three different sections of the Act.[10] In our view, the Act would be improved and a garnishee's task would be made easier if similar provisions were grouped together.

RECOMMENDATION 1

Legislative drafters should consider a reorganization of the legislation, rewritten using modern concepts and plain language.

In addition to provincial garnishment law, a creditor or garnishee may also need to review federal statutes which deal with garnishment, for example where the garnishee is a federal department or agency or where the debtor is a member of the federal civil service. The *Garnishment, Attachment and Pension Diversion Act* permits the garnishment of public servants' salaries and payments to federal contractors as well as the diversion of certain pension benefits.[11] The *Family Orders and Agreements Enforcement Assistance Act* permits garnishment of monies owed by the federal government to a debtor to satisfy maintenance obligations.[12] There are also a number of other federal statutes which contain garnishment provisions.[13]

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[9]The Act, ss. 4.2(2) and (3).

[10]Sections 4.2(2), 4.2(3) and 13.5(1) [maintenance orders] and s. 14.5 [criminal penalties].

[11]*Garnishment, Attachment and Pension Diversion Act*, R.S.C. 1985, c. G-2.

[12]*Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985, c. 4 (2nd Supp.) The types of payments which may be garnished include, among others, income tax refunds, Old Age Security, Canada Pension Plan and Employment Insurance benefits: *Family Support Orders and Agreements Garnishment*, SOR/88-181, s. 3.

[13]Provisions respecting the assignment and/or diversion of benefits: *Special Retirement Arrangements Act*, S.C. 1996, c. 46, s. 22; *Public Service Superannuation Act*, R.S.C. 1985, c. P-36, ss. 10(10) and 58; *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17, ss. 14, 36 and 70; *Royal Canadian Mounted Police Pension Continuation Act*, R.S.C. 1970, c. R-10, s. 18.1; *Governor General's Act*, R.S.C. 1985, c. G-9, s. 11; *Lieutenant Governors Superannuation Act*, R.S.C. 1985, c. L-8, s. 6; *Defence Services Pension Continuation Act*, R.S.C. 1970, c. D-3, s. 35.1; *Diplomatic Service (Special) Superannuation Act*, R.S.C 1985. c. D-2, s. 14; *Members of Parliament Retiring Allowances Act*, R.S.C. 1985, c. M-5, s. 60; *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11, ss. 9(7) and 20. Provisions authorizing garnishment by or of the government: *Excise Act, 2001*, S.C. 2002, c. 22, s. 289; *Employment Insurance Act*, S.C. 1996, c. 23, s. 126(4); *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 97.28; *Excise Tax Act*, R.S.C. 1985, c. E-15, ss. 84(1), 86(3) and 317; *Air Travellers Security Charge Act*, S.C. 2002, c. 23, s. 75; *Immmigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 147; *Canada Pension Plan Act*, R.S.C. 1985, c. C-8, s. 66(2.7); *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 224; *Old Age Security Act*, R.S.C. 1985, c. O-9, s. 37(2.7). Protection of debtors: *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 238; *Canada Shipping Act*, R.S.C. 1985, c. S-9, s. 203. Priority: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 70; *Winding-up and Restructuring Act*, R.S.C. 1985, c. C-3, s. 115. Stay of Garnishment: *Canada Deposit Insurance Corporation Act*, R.S.C. 1985, c. C-3, s. 39.15(b).

CHAPTER 3

POST-JUDGMENT GARNISHMENT

A. THE BASIS FOR POST-JUDGMENT GARNISHMENT

As noted in the introduction, garnishment is available to creditors seeking to collect certain kinds of debts including civil judgments for the payment of money, maintenance orders and criminal penalties such as fines and restitution orders.[1]

Whether or not a particular financial obligation may be garnished depends upon the type of debt being collected and, in some cases, the identity of the garnishing party. For example, the Maintenance Enforcement Program [the "MEP"], a provincial office created to enforce maintenance obligations, has access to a broad range of financial obligations, such as pension benefits, which are unavailable to general creditors or even to individual maintenance creditors.

General creditors have access to two kinds of financial obligations owed by a garnishee to a debtor.[2] First, a judgment creditor may garnish *wages*, defined as net employment income. The net employment income need not be a salary and may include commissions or fees earned by the employee. Second, a judgment creditor may garnish *debts due or accruing due*. The following are examples of debts due or accruing due:

- a debt evidenced by an invoice payable at some future date to be "accruing due" upon the issuance of the invoice;[3]

- trust funds which are due when all trust conditions have been satisfied;[4]

- a term deposit (payable upon demand of the judgment debtor);[5] and

- shareholder loans from a company to a direcctor, even where there is no evidence of

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[1]Sections 14.4 and. 14.5 of the Act.

[2]Section 4(1) of the Act.

[3]*Best Brand Meats Ltd. V. Jack Forgan Meat Ltd*., [1998] M.J. No. 301 per Master Lee.

[4]*Walsh, Micay and Company v. Rogalsky*, [1989] M.J. No. 739 per Master Lee.

[5] *Borg-Warner Acceptance Corporation v. Janzen Builders (1963) Holdings Limited* (1983), 24 Man. R. (2d) 48 (Q.B.) per Hamilton J.

the loan arrangement between the garnishee director and the debtor company.[6]

However, in Manitoba, the following have been held not to be a debt due or accruing due:

- money owed to a judgment debtor by an executor of an estate, when the executor had not yet collected funds from a sale of the deceased's property. This debt has been held to be a contingent debt and not an accruing debt;[7] and

- potential insurance proceeds, where the insured/judgment debtor has not filed proof of loss documentation, or has not otherwise complied with the requirements for payment under the insurance contract.[8]

Criminal penalty garnishment allows a slightly broader scope than general garnishment because, in addition to wages and debts due and accruing, a *collection officer* may garnish joint obligations.[9] A collection officer is a civil servant designated by the Minister to enforce payment of forfeited recognizance orders and fines. At present, staff of the MEP are designated collection officers and enforce criminal penalties as well as maintenance obligations.

Maintenance garnishment has the broadest scope of garnishable assets. In addition to obligations which are due or accruing due, maintenance creditors may garnish wages which are due and payable after service of the notice and also future obligations which become "owing or payable" after service of the notice on the garnishee until the day the garnishment order ends.[10] With the exception of wage garnishment (discussed below), no other creditor may garnish obligations which become payable after the service of the Notice of Garnishment.

The MEP (but not an individual maintenance creditor) may also garnish joint debts such as a joint bank account. Consistent with the broad scope afforded to maintenance garnishment, the MEP may garnish joint debts payable after the service of the Notice of Garnishment on the garnishee.

The MEP also has the extraordinary power to garnish pension benefits and pension benefit credits. Pension benefits are monies to which the debtor is currently entitled (i.e., the debtor is receiving his or her pension). A pension benefit credit, on the other hand, is money that has accumulated to the credit of the debtor in a pension plan, but to which the debtor has no immediate entitlement (i.e., the debtor has not yet retired).

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[6]*Dyadic Industries International Ltd. v. Award Cleaners Ltd.*, [1996] M.J. No. 504 (Q.B.) per Duval J.

[7]*Canadian Acceptance Corp. V. Desrochers*, [1975] 5 W.W.R. 185 (Man. Q.B.) per Solomon J.

[8]*Ruttledge & Dyker v. Rosin*, [1998] M.J. No. 59 per Master Sharp.

[9]Section. 14.6(1) of the Act and further discussion of "joint obligations", *infra* at 15-17.

[10]Section. 13.1 of the Act. A general garnishment order will remain in effect for one year while a maintenance garnishment order can remain in effect as long as the maintenance order.

The extended powers given to the MEP derive from social policy concerns about the non-payment of maintenance. Unlike the archetypal judgment creditor, for whom a judgment debt may be one of many debts owed,[11] maintenance creditors are more likely to depend on maintenance payments for basic necessities and to suffer hardship as a result of non-payment. Statistics from the early 1990s indicate that maintenance arrears were a significant problem for at least some jurisdictions – Ontario reported $470 million in delinquent support payments. The resulting hardship increases demands on the public income assistance system shifting the burden of supporting dependants from the primary payor to the public purse. Accordingly, provincial governments have taken a direct approach to the collection of maintenance including enhanced powers of collection.

B. THE SCOPE OF POST-JUDGMENT GARNISHMENT

The principle of universal exigibility, which promotes fairness among creditors, requires that all of a debtor's garnishment property be available to all judgment creditors. However, the Act presently limits the exigibility of certain assets by general creditors and, in doing so, attempts to merge a system of priorities within the defined scope of garnishment. In our view, scope and priority should be distinct concepts.

We agree that maintenance creditors should have priority to garnished funds but it does not follow that they should also have exclusive access to a broader range of the debtor's assets (perhaps with the exception of pension benefit credits, to be discussed later in this report). There is no principled reason to deny a general creditor access to, for example, joint obligations when there are no competing claims by higher priority creditors. Where creditors are to have a preference, it should be through a priority system and not by restricting access to assets.

RECOMMENDATION 2

All creditors should have access to the garnishable property of a judgment debtor, excepting only property that has been expressly excluded by legislation.

Having recommended that all creditors have access to all of a debtor's *garnishable* property, we turn to the question of the scope of garnishment. The current Act permits garnishment of *debts due and accruing due* and *wages*, concepts which are somewhat dated. Redefining the scope of garnishment using modern concepts and terminology will both broaden the scope of garnishiment and make the legislation easier to interpret and apply. In our view, the scope of garnishment set out in the legislation of Alberta and Newfoundland and Labrador, including "current obligations", "future obligations", conditional obligations" and "joint obligations" should be adopted in Manitoba.[12]

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[11]"Payroll Deductions for Family Support to Start Next Spring" (1991) 4 Canadian Human Rights Reporter, No. 38, at 6, cited in Law Reform Commission of Nova Scotia, *Enforcement of Maintenance Obligations* (Final Report 1992) 6.

[12]*Civil Enforcement Act*, R.S.A. 2000, c. C-15, s. 77 [Aberta Act]; *Judgment Enforcement Act*, S.N.L. 1996, c. J-1.1, s. 110.

1. The "Current Obligation"

While the concept of "debt" is easy to understand, that of a debt which is "accruing due" is not.[13] In *Bank of Montreal v. I.M. Krisp Foods Ltd.*, Jackson J. held that a Guaranteed Income Certificate (GIC) was a debt accruing due, but lamented the difficult language in the Saskatchewan *Attachment of Debts Act*:

> Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for the British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and his text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385).[14]

Adopting the ALRI recommendations, the Alberta Act defines a "current obligation" in a manner similar to the common understanding of the term "debt".

> 77(1) In this Part,
> (a) "current obligation" means an obligation, or any portion of an obligation, that on the day of service of a garnishee summons on the garnishee
> (i) is payable,
> (ii) is payable on demand, or
> (iii) is payable on satisfaction of a condition to which section 83(1)[15] applies;
> ...
> (i) "obligation" means a legal or equitable duty to pay money.[16]

We recommend that Manitoba substantially adopt this definition as it accurately describes, in plainer language, the types of obligations which are subject to garnishment.

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[13]Many Canadian jurisdictions base garnishment on "debts due or accruing due". See e.g., B.C.'s *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, s. 3, or Saskatchewan's *Attachment of Debts Act*, R.S.S. 1978, c. A32, s. 5.

[14]*Bank of Montreal v. I.M. Krisp Food Ltd.* (1996), 6 C.P.C. (4th) 90 Sask. C.A.) at para. 11.

[15]See Alberta Act, s. 83(1). This section deals with deposit accounts which require the holder of the account to be physically present when making a withdrawal and provides that this condition be waived.

[16]Alberta Act, s. 77(1).

RECOMMENDATION 3

The Act be amended by replacing
(a) "debt" with "obligation", to be defined as "a legal or equitable duty to pay money"; and
(b) "debt due or accruing due" with "current obligation" to be defined as "an obligation, all or part of which is, on the date of serving a Notice of Garnishment, payable or payable on demand".

2. Future Obligations

At present, wages payable in the future are the only "future obligations" subject to garnishment in Manitoba. In its report, the ALRI distinguished between current and future obligations by explaining:

> G owes D $1000. $500 is payable now, and $500 is payable a month from now. For the purposes of this part, the $500 that is payable now is a current obligation. The other $500 would be a future obligation.[17]

The Act currently allows a general creditor to issue one garnishment notice which will cover the wages of the debtor for up to one year. There is no need to issue a notice each payday, when the debt becomes "due or accruing due". A maintenance garnishment notice can last as long as the maintenance obligation, binding both wages and "all such money that becomes owing or payable from time to time after the day of service to the judgment debtor by the garnishee", for as long as the garnishing order remains in force.[18]

The ALRI recommended that future obligations be garnishable only where there is an existing legal relationship between the garnishee and the debtor at the time the Notice of Garnishment is served. This requirement is intended to discourage the overzealous creditor who might, for example, issue garnishment notices to all timber companies in the province, knowing that the debtor was looking for work in the timber industry.[19] Accordingly, the ALRI recommended, and Alberta adopted, a regime in which a judgment creditor may garnish financial obligations including agreements and contracts, trusts, securities (e.g., G.I.C.'s), wills of a deceased person,[20] employment income, statutes, and causes of action (e.g., breach of contract) which arise within one year after service of a Notice of Garnishment. Procedurally, garnishees are required to pay into court any

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[17]ALRI, *Enforcement of Money Judgments* (Report #61, 1991) vol. 2, at 106.

[18]The Act, s. 13.1.

[19]ALRI, *supra* n. 17, vol. 1, at 201.

[20]This limitation ensures that the obligation cannot be garnished while the testator is still alive.

amounts immediately payable to the debtor and then to forward any additional amounts to the court, as they become due.[21]

Alberta placed an additional limitation on garnishment of deposit accounts in order to reduce the administrative burden on the garnishee. If a bank were required continually to monitor an account for new deposits that must then be garnished, it might find the burden overly onerous and be tempted to close the account.[22] Although the ALRI recommended that only the amount in a bank account at the date of service of a Notice of Garnishment be subject to garnishment, the Act instead requires that the garnishee remit any funds received within 60 days of service of the notice.[23]

In Ontario, a garnishing order binds a garnishee for six years and covers all financial obligations that become payable in that time, so long as any condition precedent to payment is fulfilled. Ontario does not permit the garnishment of future obligations when the obligation is employment income, insurance proceeds or deposits into a bank account after the Notice of Garnishment is served.[24]

We can see no reason why a general creditor should not be entitled to garnish all future obligations but believe that the current wage garnishment regime works well. It balances simplicity of process (i.e., requiring the service of only one Notice of Garnishment for one year) with fairness to the garnishee and the debtor (i.e., requiring a judgment creditor to renew the Notice each year, to account for changes in circumstances). This regime should be continued.

For other future obligations, we recommend that Manitoba adopt the Alberta approach. In our opinion, requiring garnishees to administer a garnishing order for six years, as is the case in Ontario, creates an onerous burden on the garnishee. The 60 day time limit for deposit accounts and one year limit for other future obligations is a reasonable and equitable balance between the interest of the creditor and the garnishee.

We diverge from the Alberta approach on bank deposit accounts in one respect. We would add the requirement that a deposit account must already exist at the time of service of the Notice of Garnishment. This would, we hope, discourage creditors from simply serving garnishment notices on all financial institutions, thereby requiring them to monitor all of their actual or *potential* dealings

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[21]Alberta Rules of Court, AR 390/68, r. 474(3). The ALRI recommended this also in its report and model Act: see ALRI Report, *supra* n. 17, vol. 2, at 113.

[22]ALRI, *supra* n. 17, vol. 1, at 208.

[23]Alberta Act:

> 79(1) Subject to subsection (2), a garnishee summons expires one year from the day on which it was issued.
>
> 79(2) Subject to section 83(2), where a garnishee summons is issued in respect of a deposit account, the garnishee summons expires 60 days from the day on which it was issued.

Newfoundland and Labrador also adopted this approach and hence did not accept the ALRI recommendation that there be a total prohibition on future obligation garnishment on deposit accounts: *Judgment Enforcement Act*, S.N.L. 1996, c. J-1.1.

[24]Ontario, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 60.08(11)-(13).

with the judgment debtor over the course of one year.[25] This could be very onerous considering that the failure of a garnishee to remit garnished funds to the court (or the creditor, as the case may be) could result in the garnishee being liable for the debt. In our opinion, limiting garnishment to existing bank accounts relieves some of the burden on financial institutions when served with a garnishment notice.

RECOMMENDATION 4

The scope of garnishment should be expanded to permit post-judgment creditors to attach future obligations owed to a judgment debtor, subject to certain limitations.

RECOMMENDATION 5

Garnishment of future obligations should not be permitted where there is no legal relationship between the debtor and the garnishee at the time of the service of the Notice of Garnishment.

RECOMMENDATION 6

A Notice of Garnishment of a deposit account should remain in effect for 60 days from the date of service of the Notice, subject to a right of renewal. A Notice of Garnishment of all other future obligations should remain in effect for one year from the date of service of the Notice, subject to a right of renewal.

3. Conditional Obligations

A conditional obligation is one which requires that a debtor take specific steps (e.g., provide a certificate or some documentation to the garnishee) before the obligation becomes due. The debtor may protect this asset from garnishment simply by refusing to complete the required action. A regime for garnishment of conditional debts would have to either compel the debtor to fulfil the condition or to waive the condition. The ALRI recommended (and Newfoundland and Labrador accepted) that a court be empowered to order a debtor to fulfil the condition or to waive the condition, thus making the conditional obligation a current obligation.[26]

We are reluctant to adopt this approach as the power to change the bargain between the debtor and the garnishee is extraordinary and we do not believe that their contractual relationships

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[25]Banks in Manitoba are required to designate one branch in the province for the purposes of service of Notices of Garnishment or other maintenance enforcement process: *Support Orders and Support Provisions (Banks and Authorized Foreign Banks) Regulations*, SOR/2002-264, s. 2(1).

[26]ALRI, *supra* n. 17, vol. 1, at 222-224.

should be interfered with to this extent. The ability to garnish a future obligation should be adequate to capture the obligation once the condition is fulfilled. We believe this to be a satisfactory balance between the interests of the creditor and those of the debtor.

4. Joint Obligations

A joint obligation is one which is owed to the debtor jointly with one or more other persons, the most common example being a joint bank account. At present, the Act provides for garnishment of joint obligations for maintenance and criminal penalties only and then only by a designated official, in this case, the MEP. Every Canadian province, except British Columbia[27] and perhaps Nova Scotia, permits the garnishment of joint obligations.[28] In our view, the experience in Ontario, Alberta and Manitoba clearly shows that there is nothing objectionable about garnishing joint obligations as long as there are adequate limitations and protections for the interests of the joint account holder. Accordingly, on the principle of universal exigibility, joint obligations should be within the scope of garnishment for all creditors.

A judgment debtor may not have a full entitlement to the obligation and garnishment may unfairly impact a joint obligee (for discussion purposes, assume a joint account holder).[29] To protect the interests of the joint account holder, there must be a simple process to determine which portion belongs to the debtor and is therefore available for garnishment. The principle of simplicity of process requires it to be certain, quick and one which avoids recourse to the courts.

In the limited circumstances in which joint obligations are presently exigible, the Act presumes that the debtor is entitled to 100% of the joint obligation. The Act places the onus on the joint account holder to make an application to court and to prove the extent of his or her interest in the account. The MEP advises that this presumption is beneficial when a debtor creates a joint account for the purpose of sheltering money from garnishment. While the requirement to apply to court appears onerous, we are advised that it is the practice of the MEP to consider such applications administratively and to vary its garnishment notice when provided with sufficient proof of the joint account holder's interest.

In the case of a general creditor, there is no mechanism to provide for an administrative review and joint account holders would be forced to apply to court to prove their interest in the fund. This imposes an unfair burden on the joint account holder and we reject the 100% presumption for garnishment by general creditors (retaining the 100% presumption for maintenance garnishment).

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[27]See *Field v. Pacific Coast Savings Credit Union*, [1993] B.C.J. No. 1313.

[28]For examples of legislation that allows garnishment of joint obligations, see Ontario Rules, R.R.O. 1990, Reg. 194, r. 60 and the Alberta Act, ss. 77 and 82.

[29]We say that the debtor's interest may be less than 100% because there may be instances where a joint obligee holds the joint debt in trust for the debtor thereby resulting in the debtor having a 100% entitlement to the "joint" debt.

There are two other possible presumptions which Manitoba could adopt. Ontario has set a presumption of 50%, while Alberta presumes an amount proportionate to the number of joint account holders (e.g., 33% in the case of three joint obligees). We believe that the Ontario approach of a 50% presumption achieves the best balance of fairness among creditors, debtors and joint account holders. The Alberta approach, while logical, may not be practical as the creditor will have little information with which to challenge the proportionate division. The 50% presumption places the onus of proof on the parties better able to prove the actual entitlement: the debtor and the joint account holder. A creditor who has proof that the debtor's actual entitlement is more than 50% would also be free to make the case.

To ensure joint account holders are aware of the garnishment, they must be notified. Section 82(a) of Alberta's *Civil Enforcement Act* requires that the garnishee disclose the identity of joint account holders to the creditor who is then required to serve those joint account hodlers with notice of the garnishment. However, where such disclosure is illegal or would breach a legal duty, the Act requires that the garnishee serve the joint account holders and certify that it has done so in the garnishee's response. In our view, it should be the garnishee who notifies joint account holders in every case in order to protect the joint account holder's privacy. The method of service should be by registered mail rather than personal service.

The form of the notice should be established by regulation and should contain information advising of the right to challenge the order, the basis on which it may be challenged (e.g., that the joint owner has a greater than 50% interest in the joint obligation) and the method of challenging the garnishment order. The creditor should be required to provide a blank notice to the garnishee at the same time as the Notice of Garnishment and other forms. The Garnishee's Statement should also be amended to allow the garnishee to advise the creditor and the court of the joint nature of the obligation and the number, but not the identity, of joint account holders.

RECOMMENDATION 7

The scope of garnishment should be expanded to permit garnishment of joint obligations by all post-judgment creditors, subject to priority for maintenance and criminal penalty creditors, respectively.

RECOMMENDATION 8

In garnishment of joint obligations for maintenance and criminal penalties, the judgment debtor should be presumed to have an entitlement to the entire obligation. In garnishment for civil judgment debts, the judgment debtor should be presumed to have an entitlement of 50% of the obligation.

RECOMMENDATION 9

Any interested person should be entitled to challenge the presumption of ownership in a garnishment proceeding.

RECOMMENDATION 10

Any person served with a Notice of Garnishment of a joint obligation should notify the joint owner, in a form prescribed by regulation, of the garnishment order but should not disclose the joint owner's identity to the creditor or the court, unless ordered by the court.

5. Future Income Plans

The exigibility of assets forming part of a future income plan and payments from such plans have been the subject of recent law reform proposals in Canada. Future income plans include registered retirement plans (employment pension), registered retirement savings plans (RRSPs), deferred profit sharing plans (DPSPs) and registered retirement income funds (RRIFs).

All such plans are exigible unless declared exempt by some legislation.[30] Registered pension plans, annuity contracts and insurance contracts within an RRSP (insurance product RRSPs) enjoy statutory protection from execution.[31] Creditors cannot execute against *contributions* to a registered pension plan ("pension benefit credits") nor can they garnish *payments* from such plans (pension benefits"). By contrast, non-insurance product RRSPs, DPSPs and RRIFs (unprotected plans) are not exempt from execution. Unprotected plans may be seized by the sheriff pursuant to a writ of seizure and sale issued under *The Executions Act* before the plan pays out funds or is collapsed by the recipient.[32] While there is case law which suggests that an RRSP which has not been collapsed or has not yet paid out is not a *debt due or accruing due* and, therefore not subject to garnishment,[33] payments from unprotected plans are fully exigible.

Manitoba permits the attachment of pension benefits only by the MEP and for the limited purpose of enforcing maintenance orders, subject to the same exemptions that apply to wages.[34] Manitoba is the only province which also allows for limited garnishment of pension benefit credits,

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[30]Alberta Law Reform Institute, *Exemption of Future Income Plans* (Report #91, 2004) 16.

[31]*The Pension Benefits Act*, C.C.S.M. c. P32, s. 31, *The Executions Act*, C.C.S.M. c. E16-, s. 23 and *The Insurance Act*, C.C.S.M. c. I40, ss. 148 and 173.

[32]See *Delaire v. Delaire*, [1996] S.J. No. 514 (Q.B.) per Dawson J. See also *Walsh, Micay and Co., supra* n. 4.

[33]See e.g., *McMahon* (1979), 108 D.L.R. (3d) 71 B.C.C.A; *Guttman* [1984], 2 W.W.R. 443 aff'd [1984] 5 W.W.R. 529 (Man. C.A.).

[34]The Act, ss. 14(2) and (3). Most provinces have legislation that strictly forbids the assignment or garnishment of pension income unless the creditor is a maintenance creditor. See *e.g., Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352, s. 63; *Pension Benefits Act, 1992*, S.S. 1992, c. P-6.001, s. 63(1); *Pension Benefits Act*, S.N.B. 1987, c. P-5.1, s. 57(6).

(by the MEP alone) and only to enforce maintenance orders.[35] We are advised that, in practice, MEP uses this power sparingly and only as a last resort where, for example, the debtor has left Manitoba and there are no other assets available to satisfy the obligation or where the debtor evades payment by working "under the table", refusing to file income tax returns or quitting his or her job.

In 1999, the Uniform Law Conference of Canada (ULCC) introduced model legislation exempting unprotected plans from execution as long as they retain their status (as an RRSP, etc.) under the *Income Tax Act (Canada)*. However, the model Act permits garnishment of payments from such a plan to the plan holder (or personal representative), subject to the exemptions provided for wages.[36] In 2002, Saskatchewan adopted the model scheme in *The Registered Plan (Retirement Income) Exemption Act* so that contributions to a plan are protected but payments out of a plan are deemed to be a debt due or accruing due and available for garnishment, subject to the same exemptions applied to the garnishment of wages.[37] Payments from registered pension plans and insurance product plans retain their exemption.

Departing from the ULCC and Saskatchewan approach, the ALRI, in a recent report, recommended a total exemption for both contributions to and payments from *all* future income plans. ALRI's rationale is that the differential treatment of registered pension plans and insurance product plans compared to unprotected plans is "incoherent and unjust."[38]

> Our legal system has opted for total exemption from creditors' remedies of pensions and insurance RRSPS. We have noted little call for diluting these exemptions. Pensions, insurance and non-insurance retirement income plans all serve the same purpose: saving for retirement, as evidenced by their common tax treatment. RRSPs, DPSPs and RRIFs are pension-substitutes available to self-employed workers and employees in places with no pension plan. They are similar enough to pensions that they should enjoy the same exemption in creditor-debtor law. ... Put another way the category of assets deserving of protection is tax-protected vehicles for retirement saving. Pensions and RRSPs fall into this category and should have the same exemption.[39]

The exemption of retirement income is, the ALRI suggests, justified because such income is likely to be essential to the survival of the debtor and his or her dependants. Payments from such plans will most often be garnished during retirement years when the debtor is in a poor position to earn more money. Any enforcement process that renders the debtor destitute simply ensures that

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[35]The Act, s. 14.1.

[36]Uniform Law Conference of Canada [ULCC], *Uniform Civil Enforcement of Money Judgments Act* [the Uniform Act] <http://www.ulcc.ca/en/poam2/CLS2004_UCEMJA_En.pdf>, at 164-180.

[37]*The Registered Plan (Retirement Income) Exemption Act*, S.S. 2002 c. R-13.01, ss. 3 and 4.

[38]ALRI, *supra* n. 30, at 48.

[39]ALRI., *supra* n. 30, at 49-50.

"[t]hey simply become the responsibility of the state, which will harm all taxpayers."[40] In a contest between the interests of creditors and those of the state, the ALRI would give higher priority to the latter.

In 1990, we considered the differential treatment of unprotected plans in our report on statutory designations of beneficiaries and stated:

> On balance, we believe that assets which are subject to designation under *The Retirement Plan Beneficiaries Act* should be protected from creditors. ... Employee pension benefits which are governed by *The Pension Benefits Act* are protected from creditors; other plans, such as RRSPs, which are also pension supplements or substitutes should be treated in the same way.[41]

We suggested that the risk of abuse of such protection was slight and accordingly recommended that RRSP and RRIF benefits payable to a beneficiary be treated in the same way as similar benefits from pension plans and insurance product RRSPs; they should not form part of the deceased debtor's estate and should be exempt from claims by the deceased's creditors. While other recommendations relating to the validity of beneficiary designations for private plans were adopted,[42] the Legislature chose not to implement this recommendation.

We agree with the ALRI that the exemption from execution of contributions to and payments from pension and insurance product RRSPs is widely accepted. In our view, this is a principled exception to the universal exigibility principle. However, the exclusion of such protection for contributions to unprotected plans is not. The same policy rationale underlying the exemption for pension plan contributions applies to unprotected plans. Fairness and equity require that all future income plans be treated in exactly the same manner. We can think of no principled reason for the differential treatment and we agree with the ULCC, the ALRI and Saskatchewan approach that contributions to all such plans should be exempt from execution, except for maintenance enforcement, as long as they maintain their status as a retirement savings plan under the *Income Tax Act (Canada)*.

For social policy reasons, the MEP should continue to have the extraordinary power to garnish pension benefit credits to enforce maintenance obligations. We did consider whether the MEP should have a statutory duty to exhaust all other remedies before seeking to garnish pension benefit credits but, as this is already the policy and practice of the MEP, legislation to this effect is not necessary.

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[40]ALRI, *supra* n. 30, at 44.

[41]Manitoba Law Reform Commission (MLRC), *Statutory Designations and The Retirement Plan Beneficiaries Act* (Report 373, 1990) 17.

[42]*The Retirement Plan Beneficiaries Act*, C.C.S.M. c. R138. The Act was amended to treat RRSPs and RRIFs in a similar manner as pension plans by amending the definition of "plan" to include, in addition to a pension plan or fixed term or life annuity, "a retirement savings plan or retirement income fund as defined in the *Income Tax Act (Canada)*".

RECOMMENDATION 11

With the exception of garnishment by the Maintenance Enforcement Program, contributions to future income plans, including RRSPs, DPSPs and RRIFs, should be exempt from execution.

With respect to payments from future income plans, we diverge from the ALRI approach and agree with the ULCC and Saskatchewan approach. These payments are similar to employment income and should be exigible, subject to the statutory wage exemption. We would go even further, however, and require that payments from registered pension plans and insurance product plans also be exigible, again subject to the wage exemption. This would achieve fairness and uniformity in the treatment of all future income plans and is consistent with our position, discussed below, that all income which is a substitute for or similar to employment income should be subject to the same exemptions applied to wages.[43]

RECOMMENDATION 12

Payments from future income plans, including registered pension plans and annuity or insurance contract RRSPs, should be available for garnishment subject to exemptions provided for wages.

If this recommendation is adopted, Manitoba would become the only jurisdiction in Canada to permit creditors other than maintenance creditors to garnish registered pension and annuity income. However, in our view, the current exemption cannot be justified and the change would create a better balance between the interests of creditors and debtors.

C. EXEMPTIONS FROM GARNISHMENT

Under the principle of universal exigibility, all money or assets owed to a debtor would be subject to garnishment. The ideal garnishment regime balances the interests of creditors and debtors by providing for *just exemptions*. Under the principle of just exemptions, a debtor should retain enough income to meet the basic needs of the debtor and his or her dependants. Currently, employment income is the only exigible asset which qualifies for an exemption. If the scope of garnishment is to be broadened, then so too must the application of the exemption.

The Act exempts a portion of a debtor's monthly employment income from garnishment. Although the Act uses the rather outdated term "wages", it is defined broadly to include net employment income, commissions and fees. Sections 5 to 7 of the Act provide that 70% of the debtor's monthly wages are exempt with a minimum monthly exemption of $250 for a single debtor

[43]Buckwold and Cuming, *Modernization of Saskatchewan Money Judgment Enforcement Law* (Final Report 2005, University of Saskatchewan) on-line: >http://usask.ca/law/files/index.php?id=923>, at 163-164, proposing statutory provisions which would apply the exemptions to "non-employment income".

or $350 for a debtor with one or more dependants. Maintenance debtors are simply entitled to the minimum monthly exemption of $250. Any interested party may apply to the clerk of the court for an order increasing or decreasing the exemptions.

1. Employment Income

The Manitoba wage exemption no longer preserves enough income to meet a debtor's basic needs. No one can reasonably be expected to live on $250 per month (or two or more people on $350). The minimum may have been sufficient when first implemented in 1979 but it is woefully inadequate today.[44]

The obvious advantage of a fixed amount is its ease of calculation which benefits garnishees. However, it works to the disadvantage of debtors because the exemption becomes meaningless as the cost of living rises. Fixed amounts cannot help but become outdated over time, as we noted in our earlier report on garnishment exemptions.[45] The Legislature likely intended that the exemption be increased from time to time as it created the power to do so by regulation in section 15 of the Act. Unfortunately, this has not happened and the current minimum exemption does not leave low-income debtors with a living income.

Another difficulty with the fixed minimum exemption is that it treats all debtors with dependants the same way, regardless of the number of dependants. There is a significant difference in the financial needs of a person with one dependant compared with one with six dependants. A single parent with three children would receive more from provincial social assistance (which cannot be garnished by general creditors) than if he or she continued to work.

The failure of the exemption to reflect the varying economic needs of families may encourage some debtors to quit working. As noted by Buckwold and Cuming "[a] good income exemption system should accommodate not only changes in the economy, but also the different income levels of judgment debtors."[46] To this we would add that it must accommodate the different obligations of debtors as well. In our earlier report on garnishment exemptions, we suggested that the minimum exemption be based on a percentage of an average minimum wage salary but this would not easily allow for a varying exemption based on the number of dependants.

Another option is to use provincial social assistance rates set by regulation as a basis for calculating the minimum exemption. Like the minimum wage rate, social assistance rates are increased in response to changing economic conditions but, unlike the minimum wage rate, social assistance rates are calculated to ensure that recipients can obtain the most basic necessities and to

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[44]The minimum exemption leaves a single debtor $3,000 per year and a debtor with dependants $4,200. According to Statistics Canada, a family of four living in Winnipeg on less than $35,455 or a single person making less than $18,841, falls below the low income cut-off, the income level below which people are said to live in "straitened circumstances", more commonly known as the "poverty line". Canadian Council on Social Development, http://www.ccsd.ca/factsheets/fs_lic01.htm (date accessed: September 2005).

[45]MLRC, *The Enforcement of Judgments: Part I: Exemptions Under "The Garnishment Act"* (Report #28, 1979).

[46]Buckwold and Cuming, *supra* n. 43, at 162.

accommodate both the number and ages of the recipient's dependants.[47]

To encourage self-sufficiency, debtors should be better off working than receiving social assistance and, accordingly, the minimum monthly exemption should be based on, but exceed, social assistance rates. Thus, a minimum exemption calculated by multiplying the basic provincial social assistance amount by 120% would make a debtor better off than receiving social assistance. The disadvantage of this approach is that it will be more difficult for a garnishee to ascertain than a fixed rate. However, this could be overcome with better instructions in the Wage Memorandum.

A less effective option would be to increase the fixed amount. Slightly more than half of Canadian provinces and territories use a fixed rate but the amount varies considerably. In British Columbia, a debtor with no dependants is entitled to $100 per month, whereas a similar debtor in Newfoundland enjoys an exemption of $1,019 per month.[48] In Saskatchewan, where the cost of living is similar to Manitoba's, debtors are allowed $500 per month plus $100 for each dependant.[49] Alberta, generally accepting the ALRI's recommendations, has set a minimum exemption of $800 plus $200 per dependant and a maximum exemption of $2,400 plus $200 per dependant.[50]

Since Manitoba's social assistance rates currently allow $471 per month for a single person, a monthly exemption of $600 plus $100 for each dependant would be more appropriate than the current amount.

RECOMMENDATION 13

The exemption for employment income should remain at 70%. However, debtors should be entitled to a minimum exemption of a monthly income equivalent to 120% of the amount of provincial social assistance that the debtor and his or her dependants would receive. Alternatively, the minimum exemption of monthly income could be set at $600 plus $100 for each dependant.

2. Other Sources of Income

In addition to increasing the amount of the exemption, its application should be extended to other sources of income. Ideally, all sources of income which are similar to or serve as a replacement for employment income, such as retirement income, certain damage awards and statutory benefits and

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[47]In Manitoba, the social assistance rates are set out in tables in the *Employment and Income Assistance Regulation*, Man. Reg. 404/88 R.

[48]*Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, s. 3(5)(a); *Judgment Enforcement Regulations*, 1999, N.L.R. 102/99, s. 49(1)(a).

[49]*Attachment of Debts Act*, R.S.S. 1978, c. A-32, s. 22(2).

[50]Alberta Act, s. 81, *Civil Enforcement Regulation*, Alta Reg. 276/1995, s. 39.

maintenance income, should enjoy the same exemption as employment income.

(a) Pension benefits and retirement income

Pension benefits are presently exigible only for maintenance debts and, where garnished, the wage exemption is applied under sections 14(2) and (3) of the Act. While we have recommended in this report that pension benefits, like payments from DPSPs and RRIFs, should be exigible for all post-judgment debts, we believe that the wage exemption should also apply.

(b) Damages for lost income

Personal injury awards commonly include amounts for lost income, loss of future earnings and the cost of future care (e.g., the need of a personal attendant by a quadriplegic plaintiff). This type of award is intended to allow the plaintiff to live and meet his or her day-to-day needs and special care expenses.

Section 88.7 of *The Court of Queen's Bench Act* currently provides that the wage exemption is to be applied to *periodic payments* of damages for loss of future earnings but is silent on the matter of earnings lost before judgment or lump sum awards. Buckwold and Cuming recommend a broader exemption for personal injury damage awards and income from such awards used to meet living expenses of the debtor and his or her dependants or to provide medical or other care facilities for the debtor.[51] They justify the exemption on the basis that

> ... the physical injury giving rise to the compensation has disabled [the debtor] from engaging fully or at all in other income earning activities. It is intrinsically objectionable to deprive such a person of financial resources that he or she patently deserves. However, a second and more compelling factor is the social dependency that would follow from that deprivation. As has already been noted, such dependency is both socially and economically detrimental, not only to the affected individual but to the public.[52]

In the rare instance where a judgment of the court awarding damages does not specify which portion relates to wages, none of the judgment should be treated as wages for the purposes of the wage exemption. Neither should awards for non-pecuniary and punitive damages be exempt. Non-pecuniary damages are intended to compensate the plaintiff simply because the plaintiff is injured and has suffered; they are not intended to replace wages. Punitive damages are awarded when a defendant has acted egregiously and are intended to punish the defendant rather than compensate the plaintiff; thus they should not be treated as wages for the purposes of the wage exemption.

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[51]Buckwold and Cuming, *supra* n. 43, at 150. They would exempt both statutory accident benefits and personal injury awards.

[52]Buckwold and Cuming, *supra* n. 43, at 154.

(c) Statutory benefits

Persons injured in motor vehicle or workplace accidents or as a result of a criminal act may be entitled to statutory benefits or awards intended to replace lost income. An injured motorist, worker or crime victim (or their dependants) may be entitled to an income replacement indemnity under *The Manitoba Public Insurance Corporation Act*, wage loss benefits or a retirement allowance under *The Workers Compensation Act* or compensation for lost income under *The Victims' Bill of Rights Act*.[53]

Section 159 of *The Manitoba Public Insurance Corporation Act* provides that compensation paid under the Act (e.g., death benefits, permanent impairment awards) is exempt from garnishment with the exception of an income replacement indemnity or a retirement income which are deemed to be wages under *The Garnishment Act*. Compensation paid pursuant to section 23 of *The Workers Compensation Act* is exigible but wage loss benefits are deemed to be wages for the purposes of *The Garnishment Act*. All compensation under sections 47-50 and 68 of *The Victims' Bill of Rights Act* (e.g., lost income and permanent impairment awards) is deemed to be wages, regardless of whether it is paid by periodic payments or lump sum.

Statutory benefits for permanent impairment or awards for non-pecuniary losses should not be exempt. These awards are not meant to replace wages and, accordingly, should be fully exigible. It is not clear why permanent impairment awards under *The Workers Compensation Act* are exigible while similar compensation under *The Manitoba Public Insurance Corporation Act* and *The Victims' Bill of Rights Act* is not. Statutory benefits should be treated consistently and benefits, other than for loss of income and future care expenses, should be fully exigible.

(d) Maintenance income

Maintenance for a partner or spouse is intended to assist the recipient with his or her everyday needs and is deemed to be income by the *Income Tax Act (Canada)*. Since maintenance is intended to provide for the everyday needs of the recipient, it should also be partially exempt from garnishment in the same manner as wages.

Since May 1997, child maintenance payments are not deemed to be income of the recipient for the purposes of the *Income Tax Act (Canada)*. There are valid policy reasons for protecting money required for the needs of children and such payments are not exigible for garnishment.[54]

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[53] *The Manitoba Public Insurance Corporation Act*, C.C.S.M. c. P215; *The Workers Compensation Act*, C.C.S.M. c. W200; *The Victims' Bill of Rights*, C.C.S.M. c. V55.

[54] The change to the *Income Tax Act (Canada)* affect orders or agreements made after May 1, 1997 and orders or agreements made prior to that date only where the parties have opted into the new regime. Accordingly, there may be child maintenance payments which are still treated as income.

RECOMMENDATION 14

With the exception of compensation for lost income and future care expenses, compensation payable under* The Manitoba Public Insurance Act *and* The Victims' Bill of Rights Act *should be exigible for garnishment.

RECOMMENDATION 15

Money which is similar to or a substitute for employment income such as:
(a) pension benefits and payments from RRSPs, DPSPs and RRIFs;
(b) personal injury awards or income therefrom that is being used or will be used to meet the reasonable and ordinary living expenses of the debtor and the judgment debtor's dependants or to provide medical or other care facilities for the judgment debtor; and
(c) spousal maintenance;
should be deemed to be employment income for the purposes of the wage exemption.

Implementation of this recommendation may require some consequential amendments to *The Pension Benefits Act*, *The Executions Act*, *The Insurance Act*, *The Court of Queen's Bench Act* and the *Queen's Bench Rules.*

3. Extending the Reach of the Exemption

Employment income is subject to the wage exemption while in the hands of the employer but not once it has been deposited into the debtor's bank account. Thus, where a creditor garnishes the debtor's bank account in addition to or in lieu of the employer, the debtor may lose the benefit of the wage exemption. Consider the following example:

> The creditor, C, serves a garnishing order on the employer, E. The debtor, D, is paid $1000 per month and, after application of the 70% wage exemption, E pays D $700 (70% of net wages) and remits the remaining $300 to the court. D then deposits his or her cheque into the bank only to find that C has scooped the rest of the employment income by serving a garnishing order on the bank.

When the exemption was first enacted in 1887, most employees were likely paid in cash whereas the trend today is payment by cheque or direct deposit into the employee's bank account. The question which arises is this: are wages paid into a bank account still "wages" for the purposes of the exemption?

The authorities suggest that money paid into a bank account loses its identity as "wages" and

thus does not receive the benefit of the wage exemption.[55] In Alberta, wages paid directly into a bank account by an employer may receive a wage exemption if the debtor applies to court for an order applying the wage exemption to specific funds.[56] This would not capture the situation in which the debtor is paid by cash or cheque which he or she then deposits into an account, since the funds are not deposited directly by the employer.

In our opinion, once employment income is deposited into a bank account, whether by the debtor or by direct deposit, it becomes a current obligation owing by the bank to the debtor and is no longer considered wages for the purposes of the exemption. However, as in Alberta, debtors should have the right to apply to court for an order exempting all or part of the money.

Once deposited, the employment income will be mixed with other money belonging to the debtor or a joint owner. How will a court or a garnishee apply the exemption? Most deposit institutions provide itemized account statements which identify the payor and it should be relatively easy to trace deposits in respect of employment income although it may not be as simple to determine what portion of the account is "employment income" when the Notice of Garnishment is served.

For example, the employer deposits $1000 into the debtor's account on the 1st of every month. The creditor serves a Notice of Garnishment on the bank on the 18th of the month and there is only $200 in the account. Is the exemption $700 (70% of the monthly wage) or $140 (70% of the employment income remaining? In our view, the debtor should only be entitled to the wage exemption on the amount of employment income paid into the account over the past month. As such, assuming the debtor has no dependants, this debtor would be entitled to an exemption of $700 for the month. The entire $200 remaining in the account would be subject to garnishment.

RECOMMENDATION 16

Debtors should be entitled to apply to court for an order exempting monies in a bank account where the debtor can show that the monies are employment income or deemed employment income, provided that the exemption is calculated on deposits attributable to employment income deposited during the month and not just on the money in the account on the day of the Notice of Garnishment.

4. Room and Board Debts

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[55]See e.g., *Stevenson v. Stanek* (1981), 11 Sask. R. 51 (Q.B.). The only contrary authority is *Holy Spirit Parish Credit Unions Society Limited v. Kwiatkowski* (1969), 68 W.W.R. 684 (Man. Q.B.). In that case, the Court held that money in a bank account qualified as wages because the bank was the agent of the employer. The decision in this case turns more on the unique pay arrangement in that case, rather than on a general principle that wages paid directly to bank accounts are "wages" for the purposes of garnishment. In this case, the employer opened a bank account for each of its employees at a bank and, each pay day, deposited wages into the dedicated bank account. The employee could only access the money by attending at the bank and withdrawing it him/herself. Such a system would be rare today, as it was in 1968.

[56]Alberta Act, s. 83(3).

Section 6 of the Act provides an exception to the exemption for room and board debts, effectively giving priority to a landlord creditor. This provision was first enacted in 1902 when room and board arrangements were likely more common and, presumably, the exemption was deemed unnecessary because the creditor was supplying the debtor's basic needs. Given that room and board arrangements are no longer common, this provision is likely obsolete.

The Ontario Law Reform Commission noted that the room and board exception was repealed in Ontario in 1971 and recommended against its reintroduction.[57] The ALRI recommended the repeal of this exception and it no longer appears in the Alberta Act.[58] We can find no modern justification for preferring landlords to other creditors. A landlord, like any creditor, can apply to court to vary the exemption in the appropriate circumstances.

RECOMMENDATION 17

Section 6 of the Act, dealing with room and board, should be repealed.

D. PROCEDURAL REQUIREMENTS

Procedural requirements for post-judgment garnishment vary across Canada, but there are procedural issues which all garnishment statutes must address. In this section, we examine the following issues: the application process, the garnishee's response, the obligation challenge process, the exemption challenge process, the priority and satisfaction process, payment out of court and costs. The general rules apply to both pre- and post-judgment garnishment but there are specific rules applicable to the former which will be discussed in Chapter 4.

Two of the principles described in the introduction apply to the analysis of the garnishment procedure: simplicity of process and sharing among creditors.

1. The Application Process

In order for a judgment creditor to commence garnishment proceedings, the creditor must file two copies of a Notice of Garnishment and an affidavit with the Registrar of the Court of Queen's Bench. The purpose of these two documents is to:

(a) describe the amount of money the judgment debtor owes to the judgment creditor;
(b) identify the garnishee; and
(c) describe the nature of the obligation which the garnishee owes to the judgment

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[57]Ontario Law Reform Commission, *The Enforcement of Judgment Debts and Related Matters: Part II* (Report #68, 1981) 175.

[58]ALRI, *supra* n. 17, vol. 1, at 311-312.

debtor.

The registrar issues a garnishing order which the creditor then serves on the garnishee and the debtor along with the Notice of Garnishment, a blank Garnishee's Statement (to be completed by the garnishee) and a Wage Memorandum (where the garnished obligation is employment income).[59] In the case of maintenance garnishment, the MEP is required to provide extra copies of the Notice of Garnishment, Garnishee's Statement and Wage Memorandum for the garnishee to deliver to the debtor and any joint owner of the debt.[60]

It appears that the current requirements for the application are generally adequate. However, we have been advised of one area of potential confusion as many creditors do not know that they may be able to claim costs. All that should be needed to clear up this confusion is a requirement that the supporting affidavit contain a request for costs in accordance with the applicable tariff, if they are being claimed.

RECOMMENDATION 18

Creditors should have the option of claiming costs, in accordance with the applicable tariff, in the affidavit in support of a garnishing order.

2. The Garnishee's Response

The greatest area of concern with the garnishment process is the difficulties experienced by garnishees in complying with the garnishing order. In our discussions with the Registrar of the Court of Queen's Bench (Winnipeg Centre), we learned that some garnishees are confused by the Wage Memorandum and have problems calculating the exemptions to which the debtor is entitled.

To calculate the exemption, a garnishee must know whether the debtor has dependants. While an employer would likely have this information, the primary responsibility should be on the creditor, and not the garnishee, to identify any exemptions available to the debtor. Accordingly, the creditor should disclose, in both the affidavit in support of garnishment and in the Wage Memorandum, whether the debtor is entitled to an exemption and the number of dependants, if any. If the garnishee knows that the debtor has dependants, the garnishee should be able to adjust the available exemption accordingly. If the creditor does not provide this information and the garnishee does not otherwise know, the garnishee should be entitled to presume that the debtor has no dependants.

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[59]Q.B. Rules, r. 60.08(6.1).

[60]Q.B. Rules, r. 60.08(6.2). The Wage Memorandum, described in s. 12 of the Act, is prepared by the creditor and discloses the debtor's residence and nature and place of occupation and provides the garnishee with information on duration and priority, exemptions, variation of exemptions and release of garnishment.

The garnishee will be informed through the Wage Memorandum that the debtor is entitled to the general exemption, the maintenance exemption or an exemption modified by the court. Once informed, the garnishee would be able to calculate the amount available for garnishment. Both the creditor and the debtor should be entitled to challenge the garnishee's exemption calculation. For example, a creditor may challenge the number of dependants or the debtor may seek to rebut the presumption of no dependants.

RECOMMENDATION 19

Creditors should disclose in the affidavit in support of garnishment and the Wage Memorandum any exemption to which the debtor may be entitled and the number of the debtor's dependants, if known.

RECOMMENDATION 20

In the absence of knowledge or information regarding the exemption or dependants, the garnishee may presume that the debtor is entitled to the exemption for a debtor without dependants.

RECOMMENDATION 21

Both the creditor and the debtor should be entitled to challenge the basis of the garnishee's exemption calculation.

Pursuant to *Queen's Bench Rule* 60.08(9), the garnishee must pay the amount indicated in a general Notice of Garnishment into court within seven days of service or of the debt becoming payable, whichever is later. After service of a Notice of Garnishment by a maintenance creditor, section 13.3(1) of the Act requires a garnishee to pay the amount stipulated, within seven days, to the person named in the order (the MEP or the recipient) or, where the payee is not specified, to the court which issued the order.

Where the garnishee does not pay as ordered, pays less than the amount ordered or wishes to dispute the Notice of Garnishment, he or she must file a Garnishee's Statement within seven days after service. The Garnishee's Statement requires that the garnishee explain the non-compliance (e.g., the garnishee does not owe a debt to the creditor; the garnishee has already been served with a maintenance garnishment order).[61]

The garnishee must deliver copies of the Notice of Garnishment, Garnishee's Statement and Wage Memorandum to the debtor and, in the case of maintenance garnishment, on any joint owner

[61] *Q.B. Rules*, r. 60.08(11.1)

of the debt.[62]

We have no additional recommendations on the issue of the garnishee's response, other than to note that we have recommended that the garnishing creditor should indicate the available exemption and that the garnishee be entitled to presume that there are no dependants if the garnishee does not know and no information is provided by the creditor.

There are other minor procedural details which should be altered. The Notice of Garnishment should contain an explicit prohibition against sanctioning employees because of the garnishment.[63] The Notice should also advise the garnishee of the duration of the garnishing order, i.e., obligations which arise over the year following service.

RECOMMENDATION 22

The Notice of Garnishment should explicitly prohibit sanctions against the debtor and should specify the duration of the garnishing order.

3. The Obligation Challenge Process

As noted above, under *Queen's Bench Rules* 60.08(11), (11.1) and (11.2), a garnishee who objects to a garnishment order may do so in the Garnishee's Statement. Rule 60.08(12) also provides that any interested party may make a motion to the court to determine any matter in dispute in respect of a Notice of Garnishment. Thus, where, for example, the creditor disputes the garnishee's objection, he or she might ask the court to determine the validity of the objection and to direct the garnishee accordingly.

The current Act and Rules also provide for a challenge to the garnishment of joint obligations which are presently exigible only for maintenance and criminal penalty garnishment. A joint obligee, e.g., a joint account holder, may challenge the presumption that the debtor is entitled to the total obligation and apply for an order that the debtor's interest in the obligation is less than the amount garnished.[64] This hearing is generally conducted summarily by a master but, if there is a genuine issue of fact or law, the master may remit the matter to a judge.[65] In our view, this process is satisfactory and we would recommend no change.

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[62]*QB Rules*, r. 60.08(6.2).

[63]Currently, *The Employment Standards Code*, C.C.S.M. c. E110, s. 133(1)(a) prohibits any detrimental action by an employer/garnishee to an employee/debtor because of the garnishment order.

[64]Note that, earlier in this report, we have recommended a presumption of 50% for garnishment by general creditors and 100% for garnishment for maintenance and criminal penalties.

[65]Sections 13.2(3) and 14.6(3) of the Act and QB Rules, r. 60.08(12-(12.2).

4. The Exemption Challenge Process

Section 8 of the Act outlines the exemption challenge process. A creditor or a debtor may make an application to the clerk of the court to increase or decrease the exemption available to the debtor. The clerk's order may be appealed to a judge within 14 days of the order. The Act limits the power of both the clerk and judge to vary the exemption by providing an absolute maximum exemption of 90% of the debtor's wages and a minimum exemption of $250 per month (for a debtor with no dependants) and $350 per month (for a debtor with one or more dependants).

Even if our earlier recommendations regarding an exemption based on the number of dependants and the presumption of no dependants were accepted, we foresee no problem with the current challenge process but would defer to legislative drafters to decide whether amendments to the Act are necessary.

5. Priority and Sharing Among Creditors

As a matter of public policy, Manitoba has decided that there is a pressing social need to give maintenance creditors preferred access and higher priority to a debtor's assets, a practice followed in nearly every Canadian province and territory.[66] In Manitoba, criminal penalty creditors are next in line followed by, lastly, general creditors.

As we noted earlier, the Act merges priority (the first claim) with access (scope of garnishment) but these concepts should be distinct. There is little justification for limiting a creditor's access to assets when there is an appropriate system in place to ensure that priority creditors have first claim. The current system of priority is generally satisfactory but it is not succinctly explicit in the legislation. A garnishee who receives more than one garnishing order and wishes to determine which must be paid first will be required to look at sections 4.2(2) and (3), 13.5 and 14.5 of the Act. In our view, the Act would be greatly simplified by placing all provisions relating to priority in one section.

RECOMMENDATION 23

All provisions relating to duration and priority of garnishment orders should be combined into one section of the Act.

Currently, after the priority creditors have been paid, a garnishee is required to comply with other garnishment orders in the order in which they are served. In our view, the "first come, first

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[66] *Enforcement of Maintenance Orders Act, 1997,* S.S. 1997, c. E-9.21, s. 33; *Maintenance Enforcement Act,* R.S.P.E.I. 1988, c. M-1, s. 15(1); *Family Maintenance Enforcement Act,* R.S.B.C. 1996, c. 127, s. 28(1); *Maintenance Enforcement Act,* S.N.S. 1994, c. 6, s. 45); *Maintenance Enforcement Act,* R.S.A. 200, c. M-1, s. 20; *Support Orders Enforcement Act,* R.S.N.L. 19990, c. S-31, s. 28. Ontario appears to treat maintenance and judgment creditors equally: *Family Responsibility and Support Arrears Enforcement Act, 1996,* S.O. 1996, c. 31, s. 30(1).

served" method of determining a creditor's entitlement to garnished funds should be changed to a system in which creditors may share in the garnished funds proportionately to the respective amounts they are owed. This would not affect the garnishee's obligation but would change the manner in which garnished funds are paid out of court.

The case of *Skromeda Sheet Metal Ltd. v. Britannia Builders Ltd.* can be used to illustrate this concept.[67] In 1990, Skromeda obtained a prejudgment garnishing order which resulted in $4,737.99 being paid into court (the prejudgment fund). Dominion Lumber, which had an outstanding judgment against Britannia for $5,831.11, found out about the prejudgment fund and obtained a stop order in 1991. In 1992, when Skromeda obtained judgment for $39,122.00, Dominion Lumber sought payment out of the prejudgment fund arguing that it had priority. The Court held that Skromeda was entitled to its costs in creating and preserving the prejudgment fund but that the remainder should be split equally between the two creditors.

If we apply the principle of proportional sharing to the facts in *Skromeda*, the division of garnished assets between the two creditors would be as follows:

Total Judgments Owing $44,953.11
Garnished Funds $4,737.99

Dominion Lumber owed $5,831.11; entitled to 13% of garnished funds or $615.94
Skromeda owed $39,122.00, entitled to 87% of garnished funds or $4,122.05[68]

However, a higher priority creditor must be satisfied first. As between creditors of higher priority (e.g., maintenance creditors), they should share the garnished funds in the same manner, i.e., proportionately to the debt they are owed. If there is money left over after the division of the money among creditors of a higher priority, then lower priority creditors should share proportionately.

RECOMMENDATION 24

General creditors should share in the proceeds of garnishment rateably, subject to the satisfaction of higher priority garnishment orders and to the payment of costs of the garnishing creditor.

This system would work best if all creditors wishing to claim a share of garnished funds paid into court were required to file a Notice of Claim with the court in which the first garnishing order was made. The Notice of Claim should include a copy of the judgment or order which evidences the claim and the creditor's affidavit in support. The affidavit should identify all other creditors who have filed a Notice of Claim or have an interest in the funds garnished. Creditors should not be able to

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[67] *Skromeda Sheet Metal Ltd. V. Britannia Builders Ltd.*, [1992] M.J. No. 212 (Q.B.), per Monnin J.

[68] For the sake of simplicity, we do not include any costs to which creditor No. 2 may have been entitled in respect of the garnishment proceedings.

claim costs associated with filing a Notice of Claim.

There would be no need to serve the Notice of Claim on the garnishee as they no longer have any interest in the money once they have complied with the original Notice of Garnishment. Of course, should additional creditors wish to have the garnishee pay more money into court, they would be required to serve the garnishee with a new Notice of Garnishment. Before applying for a garnishing order, creditors will want to ascertain how much of a previously garnished obligation is remaining in court, if any. This should be possible by searching the Registrar's records.

RECOMMENDATION 25

General creditors seeking a share of funds paid into court under garnishment orders should be required to file a Notice of Claim in the Court of Queen's Bench supported by an affidavit disclosing, among other things, the identity of other creditors claiming a share. However, no costs should be claimed in respect of the filing of the Notice of Claim.

RECOMMENDATION 26

A searchable database should be established by the Court of Queen's Bench to enable creditors to determine the amount of garnished funds paid into court on account of a specific debtor.

6. Payment Out of Court

There are two ways for a creditor to have money paid out of court. For amounts under the small claims court limit (currently $7,500), where no *stop order* has been granted and upon receipt of the creditor's affidavit indicating the amount of the debt outstanding, that the applicable appeal period has expired and compliance with the rules of service, the Registrar may disburse the monies paid into court. The Registrar cannot issue payment until ten days after payment of the money into court and service of the Notice of Garnishment on the debtor. For amounts exceeding the small claims court limit, the creditor must make a motion to the court for payment out.[69]

Any person claiming an entitlement to a fund held currently or in future by the court for another person may apply, without notice, for a *stop order*, the effect of which is to stop further dealings with the funds except upon notice to the claimant. The claimant must, unless ordered otherwise by the court, undertake to comply with any award of damages caused by the stop order. Where a stop order has been granted, only the court (and not the Registrar) has the power to order

[69] *QB Rules*, r. 73.03.

payment out, regardless of the amount.[70]

The process to obtain monies out of court should be simple. The more often a creditor must apply to a judge to have money paid out, the less simple and more costly is the process.

In light of our recommendations regarding sharing among creditors, only those creditors who have filed a Notice of Claim should be able to have garnished money paid out of court. The only exception to this arises in the context of prejudgment garnishment. A post-judgment creditor should not be able to have prejudgment garnishment money paid out of court until the plaintiff's action is concluded by settlement or by order of the court. Prejudgment garnishment is intended to ensure that a plaintiff will have money available to satisfy his or her judgment and it would defeat this purpose if other creditors could have the prejudgment garnished funds paid out of court, especially where the merits of that action have not been determined by a court. A post-judgment creditor would still be free to file a Notice of Claim and entitled to share rateably with the plaintiff once the action is concluded.

RECOMMENDATION 27

Funds paid into court under a prejudgment garnishing order should not be paid out until the underlying action is concluded.

7. Garnishee Costs

A garnishing creditor may claim costs for filing a Notice of Garnishment. The costs range from $25 for Class I proceedings (i.e., matters under the small claims limit) to $75 for all other proceedings.[71]

Under section 13.3(3) of the Act, only in the case of maintenance garnishment does a garnishee have an entitlement to costs for complying with the garnishment order. A maintenance garnishee is entitled to "any costs to which he or she is entitled when a garnishing order is originally served" and a fee of $1 for each payment the garnishee makes under the garnishment order. Oddly, the Act and QB Rules are silent on the costs to which a garnishee is entitled when a garnishing order is originally served.

Garnishees should be entitled to modest costs for complying with the garnishing order. The ALRI recommended costs of $25 for each payment in[72] but we prefer a regime similar to that in place for maintenance garnishment. In our view, $25 for the first payment and $1 for each subsequent

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[70]*QB Rules*, r. 73.04.

[71]*QB Rules*, Tariff A, s. 3(1)(b).

[72]ALRI Report, *supra* n. 17, vol. 1, at 191.

payment is a reasonable amount. However, these costs should be deducted from the monies paid into court (i.e., the creditor's share) and not reduce the exemption to which the debtor is entitled.

RECOMMENDATION 28

Garnishees should be entitled to claim costs in the amount of $25 for each payment under a garnishing order, and $1 for each subsequent payment, which costs should be deducted from the amount paid into court by the garnishee.

8. Other Matters

If the garnishee does not pay funds into court or as directed, the creditor may make a motion to have the garnishee pay the obligation. The *Queen's Bench Rules* ensure that when the garnishee complies with a Notice of Garnishment, its obligation to the debtor is deemed to be satisfied (to the extent of the payment). Finally, a creditor is obliged to give notice to the garnishee of termination of the order when the debt is satisfied.[73] This system should be continued in any new garnishment legislation.

[73] *QB Rules*, r. 60.08(13)-60.08(16).

CHAPTER 4

PREJUDGMENT GARNISHMENT

Prejudgment garnishment is not universally accepted in Canada. Some jurisdictions (e.g., Alberta) allow it, while others (e.g., Ontario) do not. The general rule is that defendants are not required to post security when they are sued[1] and thus prejudgment garnishment is a conceptual departure from the general rule. Conceptual problems may, however, be overlooked if there are practical benefits to prejudgment garnishment.

We are advised that prejudgment garnishment is a powerful tool which promotes settlement. In those cases where a defendant obviously owes a debt to the plaintiff, prejudgment garnishment can lead to an expeditious resolution of a dispute as to the amount owed. If defendants cannot access their funds, they will be motivated to settle the action before trial and avoid needless delay and legal costs. On the other hand, a defendant may be deprived of funds required for his or her defence and thus may be forced to settle a claim in a less favourable manner. The practical problem with prejudgment garnishment is that it could be subject to abuse.

Notwithstanding any conceptual problems with the remedy, prejudgment garnishment should remain available in appropriate cases as long as improved protection against abuse is enacted (discussed below).

A. THE BASIS FOR PREJUDGMENT GARNISHMENT

The basis for prejudgment garnishment is a claim for a *debt or liquidated demand* and the plaintiff is required to demonstrate with some certainty the amount of money claimed against the defendant.[2] The meaning of *debt or liquidated demand* was considered by the Manitoba Court of Appeal in *GRH Ventures Ltd. v. DeNeve*:

> Where the claim is for a "debt or liquidated demand" then the writ will include a specific demand for that sum plus specified costs. In short, the phrase "debt or liquidated demand" arises in different contexts in various jurisdictions, and there are many cases, ancient and modern, which touch upon the meaning of that phrase.

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[1] *Lister & Co. v. Stubbs*, [1886-90] All E.R. 797.

[2] Section 61 of *The Court of Queen's Bench Act*, C.C.S.M. c. C280, provides:

> In an action in which the plaintiff claims the payment of a debt or liquidated demand, the court may, on motion and in accordance with The Garnishment Act, order garnishment before judgment of a debt due and payable by a third party to a defendant.

The import of these cases is synthesized in Odgers' Principles of Pleading and Practice (21st ed. 1975) at p. 44 in these terms:

> "When the amount to which the plaintiff is entitled can be ascertained by calculation, or fixed by any scale of charges or other positive data, it is said to be 'liquidated' or made clear provided that it is expressed in sterling. But when the amount to be recovered depends upon the circumstances of the case and is fixed by opinion or by assessment or by what might be judged reasonable, the claim is generally unliquidated."[3]

As such, a prejudgment garnishment order will not be available in a personal injury action, since the "value" of the claim is not known until judgment or settlement. This is true of any action involving a claim for unliquidated damages.

In our view, the basis for prejudgment garnishment should be narrowed to claims based on debt alone. Our preference for debt-based claims is two-fold. Such claims can be easily assessed on their merits by the court in a summary manner and it will limit attempts to allege that an unliquidated demand was a liquidated demand for the purpose of garnishing before judgment.

RECOMMENDATION 29

Section 61 of* The Queen's Bench Act *should be amended to restrict prejudgment garnishment to actions for debt.

B. THE SCOPE OF PREJUDGMENT GARNISHMENT

The scope of the financial obligations subject to prejudgment garnishment is already narrower than for other kinds of garnishment. There is an express prohibition on the garnishment of wages and the only other kind of obligation available for garnishment is a *debt due and payable*.

There has been much judicial consideration of the term *debt due and payable* which should not be disturbed by an attempt to modernize. There is a risk that amending the definition would result in costly litigation to define the scope of prejudgment garnishment available under the amended terminology.

In our view, the principle of universal exigibility should not apply to prejudgment garnishment. Prejudgment garnishment serves a very different purpose from post-judgment garnishment and, as a somewhat extraordinary remedy for creditors, its use should be limited to the narrowest and clearest of cases.

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[3] *GRH Ventures Ltd. v. DeNeve*, [1987] M.J. No. 137 (Man. C.A.), per Huband, J.A.

C. PROCEDURE

The process begins with the plaintiff's (creditor's) motion to the court, with or without notice to the defendant (debtor).[4] The creditor's affidavit in support of the motion must:

- state that the plaintiff has a good cause of action against the defendant;
- include the amount of the claim with allowance for all just set-offs, credits or counterclaims;
- describe the nature of the obligation owed by the proposed garnishee and the defendant/debtor.

Where the motion is made without notice, the onus is on the moving party to make full and fair disclosure of all material information.[5] Non-compliance constitutes grounds to set aside the order (but not much else, as discussed below).

The court may grant the garnishment order with or without conditions (e.g., that the plaintiff post security)[6] whereupon the Registrar issues a Notice of Garnishment.[7] The creditor then follows the same process as for post-judgment garnishment, serving the Notice and Garnishee's Statement on the garnishee and the debtor.

Either the garnishee or the defendant debtor may challenge the order. To challenge the order successfully, a debtor must not only show a good defence to the claim but also that the order is unjust or causes undue hardship.[8] The court may, after a hearing, set aside the prejudgment garnishment order and remit the money paid into court to the debtor.

We have little difficulty with the process itself but some concern about the potential for abuse of the remedy.[9] In our view, more can be done to prevent creditors from improperly obtaining prejudgment garnishment and, in particular, stronger penalties for abuse should be implemented to provide disincentives for plaintiffs inclined to take advantage.

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[4]QB Rules, r. 46.16(2) and (2).

[5]QB Rules, r. 39.01(6).

[6]QB Rules, r. 46.14(3).

[7]QB Rules, r. 46.14(4).

[8]QB Rules, r. 46.14(6). See *Medpak Ltd. v. Matz*, [1979] 1 W.W.R. 1 (Man. Q.B.), *Torlen Supply & Services Inc. v. Conagra Ltd.*, [1998] M.J. No. 54 (Man. Q.B.), aff'd [1999] M.J. No. 134 (C.A.)..

[9]*Evans v. Silicon Valley IPO Network* (2004), 237 D.L.R. (4th) 106 (B.C.C.A.) [2004] B.C.J. No. 492. A creditor sought to "jump the queue" and garnish monies which were the subject of a freezing order. Counsel for the creditor failed to inform the motions judge of the freezing order, that the creditor intended to place himself ahead of other creditors by garnishing and he had not served other creditors. The order was set aside but no other penalty imposed on the creditor or his counsel other than some disapproving comments.

Section 62(1) of *The Court of Queen's Bench Act* permits a court to award damages against a plaintiff who fails to obtain judgment or obtains judgment for less than the amount claimed. Further than that, there are no specific penalties for abuse other than in the case of a failure to make full and fair disclosure in a motion without notice. Such a breach is simply grounds to set aside the order although a court has a general power upon revoking an order to "make such other order as is just".[10] More explicit penalties will provide guidance to courts and creditors.

Courts should have the express power to award costs, and specifically solicitor-client costs where orders have been granted on the basis of improper or inadequate disclosure. In addition, courts should have the power to order the moving party to provide an undertaking for damages, something which is already permitted by the Rules but which should be explicitly extended to the prejudgment garnishment remedy.[11] Finally, courts should have the authority to order the creditor who improperly obtains an order to pay interest to the defendant debtor from the day the money was paid into court until the order is terminated.

RECOMMENDATION 30

The Court of Queen's Bench should have the power to require plaintiffs to provide an undertaking for damages as a condition of prejudgment garnishment.

RECOMMENDATION 31

The Court of Queen's Bench should have the power to require the plaintiff to pay costs and interest to the debtor where money has been improperly garnished before judgment.

[10]QB Rules, r. 39.01(6) and 46.14(6).

[11]For example, QB Rule 40.03 provides "On a motion for an interlocutory injunction, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party."

CHAPTER 5

LIST OF RECOMMENDATIONS

1. Legislative drafters should consider a reorganization of the legislation, rewritten using modern concepts and plain language. (p. 7)

2. All creditors should have access to the garnishable property of a judgment debtor, excepting only property that has been expressly excluded by legislation. (p. 10)

3. The Act should be amended by replacing
   (a) "debt" with "obligation", to be defined as "a legal or equitable duty to pay money"; and
   (b) "debt due or accruing due" with "current obligation" to be defined as "an obligation, all or part of which is, on the date of serving a Notice of Garnishment, payable or payable on demand". (p. 12)

4. The scope of garnishment should be expanded to permit post-judgment creditors to attach future obligations owed to a judgment debtor, subject to certain limitations. (p. 14)

5. Garnishment of future obligations should not be permitted where there is no legal relationship between the debtor and the garnishee at the time of the service of the Notice of Garnishment. (p. 14)

6. A Notice of Garnishment of a deposit account should remain in effect for 60 days from the date of service of the Notice, subject to a right of renewal. A Notice of Garnishment of all other future obligations should remain in effect for one year from the date of service of the Notice, subject to a right of renewal. (p. 14)

7. The scope of garnishment should be expanded to permit garnishment of joint obligations by all post-judgment creditors, subject to priority for maintenance and criminal penalty creditors, respectively. (p. 16)

8. In garnishment of joint obligations for maintenance and criminal penalties, the judgment debtor should be presumed to have an entitlement to the entire obligation. In garnishment for civil judgment debts, the judgment debtor should be presumed to have an entitlement of 50% of the obligation. (p. 16)

9. Any interested person should be entitled to challenge the presumption of ownership in a garnishment proceeding. (p. 16)

10. Any person served with a Notice of Garnishment of a joint obligation should notify the joint owner, in a form prescribed by regulation, of the garnishment order but should not disclose the joint owner's identity to the creditor or the court, unless ordered by the court. (p. 17)

11. With the exception of garnishment by the Maintenance Enforcement Program, contributions to future income plans, including RRSPs, DPSPs and RRIFs, should be exempt from execution. (p. 19)

12. Payments from future income plans, including registered pension plans and annuity or insurance contract RRSPs, should be available for garnishment subject to exemptions provided for wages. (p. 20)

13. The exemption for employment income should remain at 70%. However, debtors should be entitled to a minimum exemption of a monthly income equivalent to 120% of the amount of provincial social assistance that the debtor and his or her dependants would receive. Alternatively, the minimum exemption of monthly income could be set at $600 plus $100 for each dependant. (p. 22)

14. With the exception of compensation for lost income and future care expenses, compensation payable under *The Manitoba Public Insurance Act* and *The Victims' Bill of Rights Act* should be exigible for garnishment. (p. 25)

15. Money which is similar to or a substitute for employment income such as:
    (a) pension benefits and payments from RRSPs, DPSPs and RRIFs;
    (b) personal injury awards or income therefrom that is being used or will be used to meet the reasonable and ordinary living expenses of the debtor and the judgment debtor's dependants or to provide medical or other care facilities for the judgment debtor; and
    (c) spousal maintenance;

    should be deemed to be employment income for the purposes of the wage exemption. (p. 25)

16. Debtors should be entitled to apply to court for an order exempting monies in a bank account where the debtor can show that the monies are employment income or deemed employment income, provided that the exemption is calculated on deposits attributable to employment income deposited during the month and not just on the money in the account on the day of the Notice of Garnishment. (p. 26)

17. Section 6 of the Act, dealing with board and room, should be repealed. (p. 27)

18. Creditors should have the option of claiming costs, in accordance with the applicable tariff, in the affidavit in support of a garnishing order. (p. 28)

19. Creditors should disclose in the affidavit in support of garnishment and the Wage Memorandum any exemption to which the debtor may be entitled and the number of the debtor's dependants, if known. (p. 29)

20. In the absence of knowledge or information regarding the exemption or dependants, the garnishee may presume that the debtor is entitled to the exemption for a debtor without dependants. (p. 29)

21. Both the creditor and the debtor should be entitled to challenge the basis of the garnishee's exemption calculation. (p. 29)

22. The Notice of Garnishment should explicitly prohibit sanctions against the debtor and should specify the duration of the garnishing order. (p. 30)

23. All provisions relating to duration and priority of garnishment orders should be combined into one section of the Act. (p. 31)

24. General creditors should share in the proceeds of garnishment rateably, subject to the satisfaction of higher priority garnishment orders and to the payment of costs of the garnishing creditor. (p. 32)

25. General creditors seeking a share of funds paid into court under garnishment orders should be required to file a Notice of Claim in the Court of Queen's Bench supported by an affidavit disclosing, among other things, the identity of other creditors claiming a share. However, no costs should be claimed in respect of the filing of the Notice of Claim. (p. 33)

26. A searchable database should be established by the Court of Queen's Bench to enable creditors to determine the amount of garnished funds paid into court on account of a specific debtor. (p. 33)

27. Funds paid into court under a prejudgment garnishing order should not be paid out until the underlying action is concluded. (p. 34)

28. Garnishees should be entitled to claim costs in the amount of $25 for each payment under a garnishing order, and $1 for each subsequent payment, which costs should be deducted from the amount paid by the garnishee. (p. 35)

29. Section 61 of *The Queen's Bench Act* should be amended to restrict prejudgment garnishment to actions for debt. (p. 37)

30. The Court of Queen's Bench should have the power to require plaintiffs to provide an undertaking for damages as a condition of prejudgment garnishment. (p. 39)

31. The Court of Queen's Bench should have the power to require the plaintiff to pay costs and

interest to the debtor where money has been improperly garnished before judgment. (p. 39)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 31st day of December 2005.

Clifford H.C. Edwards, President

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner

Kathleen C. Murphy, Commissioner

Alice R. Krueger, Commissioner

REVIEW OF *THE GARNISHMENT ACT*

EXECUTIVE SUMMARY

A. INTRODUCTION

In response to a reference from the Minister of Justice and Attorney General, the Manitoba Law Reform Commission has made 30 recommendations aimed at modernizing the civil remedy of garnishment. Garnishment, one of a variety of enforcement legal tools, allows a creditor to attach money owed by a third person (e.g. an employer) to the debtor. It has been described as a powerful and harsh remedy relatively uncontrolled by judicial or administrative supervision and it differs from other enforcement remedies in that it draws a stranger into the enforcement process. In its report, the Commission points out that true modernization of any individual remedy cannot be achieved without a comprehensive and fundamental reform of the entire civil enforcement regime.

B. BACKGROUND

The fundamental goal of an enforcement regime is fostering public confidence in the judicial system. The specific mechanisms addressed in this Report include universal exigibility of a debtor's property, just exemptions, equitable sharing among creditors and simplicity of process.

In general, garnishment is most commonly used to enforce a judgment of the court that the defendant must pay the creditor a sum of money (*post-judgment garnishment*). In fewer instances, it can also be used to attach an alleged debtor's assets *before* judicial determination of the existence and amount of the debt (*prejudgment garnishment*).

Every garnishment process is governed by *The Garnishment Act* and the *Court of Queen's Bench Rules* but there are also 19 other provincial statutes and a number of federal statutes which contain one or more provisions relating to garnishment. The Commission notes that the current Act has not been rationalized or reorganized since it was first enacted despite substantial amendments in the past thirty years. The goal of modernization should be the removal of impediments to effective use of the system. The present organization of the legislation is cumbersome and numerous provisions are outdated in terms of their applicability and terminology. There is also some duplication or overlap between the Act and the Rules. The Commission therefore recommends that the legislation be reorganized and rewritten using modern concepts and plain language to make it easier for creditors, garnishees and debtors to understand, utilize and comply with the garnishment remedy

C. POST-JUDGMENT GARNISHMENT

Post-judgment garnishment is used to enforce or collect a civil judgment for a debt or damages, spousal (partner) and child maintenance, unpaid fines, forfeited recognizance orders and restitution orders ("criminal penalties"). Whether or not a particular debt or financial obligation may be garnished depends upon the type of debt and, in some cases, the identity of the garnishing party. All creditors have access to *wages* and *debts due or accruing due* from a garnishee to the debtor. In Manitoba, however, the Maintenance Enforcement Program (MEP), which has statutory authority to enforce maintenance debts and criminal penalties, has exclusive access to *joint obligations* (obligations owed to the debtor jointly with one or more other persons, such as a joint bank account) and *future obligations* (obligations which become owing or payable sometime after service of a notice of garnishment) and has extended powers of garnishment and priority to garnished funds.

The Commission recommends a redefinition of the scope of garnishment, moving away from out-dated concepts of a debt due and accruing due and wages and substituting those of *current, joint* and *future obligations*. To promote fairness among creditors, the Commission recommends the universal exigibility of a debtor's property, subject to specific and principled exceptions. While collection of maintenance debts and criminal penalties should continue to have priority over civil debts, there is no reason why a general creditor should not have access to joint and future obligations when there are no outstanding debts for maintenance or criminal penalties.

In garnishment of future obligations, the Commission suggests the prerequisite of an existing legal relationship between the debtor and the garnishee, a time limit of 60 days for garnishment of deposit accounts and one year for all other financial obligations. In the garnishment of joint obligations, the Commission proposes different presumptions regarding the debtor's entitlement to the joint obligation. At present, in garnishment by the MEP, a debtor is presumed to be entitled to the entire joint obligation, placing the onus on the debtor or joint obligee to prove otherwise. No change is recommended to this rule but the Commission recommends a variation for garnishment by general creditors so that the debtor is presumed to have an entitlement to one-half of the obligation. Again, this presumption should be open to challenge by the joint obligee, the debtor or the creditor upon application to court.

To protect the joint obligee's privacy, the Commission recommends that it be the garnishee who is required to notify the joint obligee of the garnishment proceeding. This notice should be in a form prescribed by regulation and served by registered mail.

The Commission then addresses the exigibility of future income plans such as registered pensions, RRSPs, DPSPs and RRIFs. There is significant disparity in the treatment of such plans with the latter generally exigible and pensions and insurance product RRSPs generally exempt from execution. In the Commission's view, fairness and equity require that all future income plans be treated the same way and, accordingly, assets forming part of any future income plan which is a retirement savings plan under the federal *Income Tax Act* should be exempt.

However, the Commission recommends a different approach for payment from future income plans. These payments will often form the debtor's primary source of income and are similar to or a replacement for employment income. Therefore payments from all future income plans, including registered pension plans and insurance product RRSPs, should be exigible, subject to the statutory wage exemption. The repeal of the protection for pension income and annuity income is necessary to achieve fairness and uniformity in the treatment of retirement income and to create a better balance between the rights of creditors and debtors.

D. EXEMPTIONS FROM GARNISHMENT

In the Commission's view, a garnishment regime should protect debtors by providing for *just exemptions*, allowing a debtor to retain enough income to meet his or her basic needs and those of his or her dependants. Although no change is recommended to the general exemption of 70% of the debtor's wages, the mandatory minimum exemption of $250 per month for a single debtor or $350 for a debtor with dependants (regardless of the number) is woefully inadequate and must be increased.

The ideal exemption should accommodate changes in the economy and the different income levels and support obligations of debtors. A fixed amount exemption may be simple to calculate but becomes meaningless over time. The failure to reflect the varying economic needs of families may force some debtors out of employment. The exemption should put a debtor in a better position than he or she would be if receiving public income assistance. Accordingly, it is recommended that the minimum monthly exemption be equivalent to 120% of the provincial income assistance rates. The disadvantage of this approach is that it will be more difficult for a garnishee to ascertain than a fixed rate, a difficulty which could be overcome with better instructions in the Wage Memorandum. Alternatively, the exemption could be set at $600 per month plus $100 for each dependant.

In addition, the Commission recommends applying the wage exemption to other sources of income which are similar to or a substitute for employment income such as retirement income, certain damage awards, statutory benefits under *The Manitoba Public Insurance Act* and *The Victims' Bill of Rights Act* and maintenance income. It also addresses the application of the wage exemption to wages deposited into the debtor's bank account resulting in loss of their exempt status. The Commission therefore recommends that debtors should be entitled to apply to court for an order exempting monies in a bank account where it can be shown that the monies are employment income.

E. PROCEDURAL REQUIREMENTS

This section of the Report examines the application process, the garnishee's response, the obligation and exemption challenge processes, priority and payment out of court and costs. The current application requirements are generally adequate but it is recommended that creditors have the option of claiming costs and be required to disclose any exemption to which the debtor may be entitled and the number of dependants, if known. In the absence of such information, the garnishee may presume that the debtor is entitled to the exemption for a debtor without dependants, subject to the creditor's

and the debtor's right to rebut the presumption. As well, the Notice of Garnishment should explicitly prohibit sanctions against the debtor and should specify the duration of the garnishing order.

In the Commission's view, the current system of priority is generally satisfactory but its legislative expression should be simplified by placing all provisions in one section of the Act. It is therefore recommended that, after satisfaction of the claims of priority creditors, general creditors share in the proceeds rateably, subject to the payment of the garnishing creditor's costs. General creditors seeking a share of monies paid into court should be required to file a Notice of Claim in the Court of Queen's Bench provided that funds paid into court under a prejudgment garnishment order are not disbursed until the underlying action is concluded. It is also recommended that a searchable database be established by the Court of Queen's Bench to enable creditors to determine the amount of garnished funds paid into court on account of a specific debtor. As well, garnishees should be entitled to claim costs in the amount of $25 for each payment under a garnishment order and $1 for each subsequent payment, which costs should be deducted from the amount paid into court by the garnishee.

F. PREJUDGMENT GARNISHMENT

Although prejudgment garnishment is not universally accepted in Canada, the Commission is of the view that its practical benefits justify its retention. However, recognizing the potential for abuse, it recommends a number of safeguards including limiting the remedy to actions for debt alone as well as requiring plaintiffs to give an undertaking for damages and to pay costs and interest to a debtor where money has been improperly garnished before judgment.

EXAMEN DE LA *LOI SUR LA SAISIE-ARRÊT*

SOMMAIRE

A. INTRODUCTION

À la suite d'un renvoi du ministre de la Justice et procureur général, la Commission de réforme du droit du Manitoba a fait 30 recommandations visant la modernisation du recours civil à la saisie-arrêt. La saisie-arrêt, l'un des nombreux instruments juridiques d'exécution, permet au créancier de saisir l'argent dû par un tiers (par ex. un employeur) au débiteur. On a pu dire qu'il s'agissait d'une mesure forte et dure de recours qui est relativement sans contrôle judiciaire ou administratif, et qui diffère des autres recours d'exécution en ce sens qu'elle introduit un intrus dans le processus d'exécution. Dans son rapport, la Commission souligne que toute véritable modernisation des recours individuels passe nécessairement par une réforme complète et fondamentale de l'ensemble du régime d'exécution civile.

B. CONTEXTE

Un régime d'exécution vise avant tout à favoriser la confiance du public dans le système judiciaire. Les mécanismes spécifiques traités dans ce rapport sont, entre autres, la saisissabilité universelle de la propriété d'un débiteur, les parties insaisissables légitimes, le partage équitable entre les créanciers et la simplicité du processus.

En général, la saisie-arrêt est plus communément utilisée pour exécuter un jugement du tribunal enjoignant au défendeur de payer au créancier une somme d'argent (*saisie-arrêt postérieure au jugement*). Dans un nombre plus restreint de cas, elle peut aussi servir à saisir les biens d'un présumé débiteur *avant* la détermination judiciaire de l'existence et du montant de la dette (*saisie-arrêt antérieure au jugement*).

Les actes de procédure relatifs à une saisie-arrêt sont régis par la *Loi sur la saisie-arrêt* et les *Règles de la Cour du Banc de la Reine*, mais il existe aussi 19 autres lois provinciales et un certain nombre de lois fédérales qui contiennent une ou plusieurs dispositions visant la saisie-arrêt. La Commission fait valoir que la loi actuelle n'a pas été rationalisée ou restructurée depuis son adoption initiale, malgré des modifications importantes adoptées au cours des trente dernières années. La modernisation devrait viser à retirer les entraves à une utilisation efficace du système. La structure législative actuelle est lourde, et de nombreuses dispositions sont désuètes en ce qui concerne leur applicabilité et leur terminologie. Il existe aussi un certain recoupement ou chevauchement entre la Loi et les Règles. La Commission recommande, par conséquent, que la loi soit restructurée et réécrite selon les notions modernes et dans un langage clair et simple pour qu'il soit plus facile pour les créanciers, les tiers saisis et les débiteurs de comprendre et d'utiliser le recours à la saisie-arrêt et de s'y conformer.

C. SAISIE-ARRÊT POSTÉRIEURE AU JUGEMENT

La saisie-arrêt postérieure au jugement est utilisée pour exécuter un jugement civil ou pour effectuer un recouvrement en vertu de ce dernier en ce qui concerne une dette ou des dommages, une pension alimentaire pour conjoint (partenaire) et pour enfants, des amendes impayées, des ordonnances de confiscation d'engagement et des ordonnances de dédommagement (« sanctions pénales »). La saisie-arrêt éventuelle d'une dette ou d'une obligation financière précise dépend du type de dette et, dans certains cas, de l'identité de la partie saisissante. Tous les créanciers ont accès au *salaire* et aux *sommes dues ou à échoir* par un tiers saisi au débiteur. Au Manitoba, cependant, le Programme d'exécution des ordonnances alimentaires, qui a le pouvoir conféré par la loi d'exécuter les dettes et les sanctions pénales, est le seul à pouvoir accéder aux *obligations conjointes* (obligations envers le débiteur et conjointes avec une ou plusieurs personnes, comme un compte conjoint) et aux *obligations futures* (obligations à échoir quelque temps après la signification d'un avis de saisie-arrêt) et a étendu les pouvoirs de saisie-arrêt et la priorité sur les fonds saisis.

La Commission recommande une redéfinition de la portée de la saisie-arrêt, qui abandonnerait les notions désuètes de somme due ou à échoir et de salaire pour les remplacer par celles d'*obligations en cours*, *conjointes* et *futures*. Pour promouvoir l'équité entre les créanciers, la Commission recommande la saisissabilité universelle d'un bien du débiteur, sous réserve d'exceptions spécifiques et motivées. Bien que le recouvrement de créances alimentaires et de sanctions pénales devrait continuer de prendre rang avant celui des dettes civiles, il n'existe aucune raison pour qu'un créancier ordinaire soit privé de l'accès à des obligations conjointes ou futures en l'absence de créances alimentaires ou de sanctions pénales en souffrance.

En cas de saisie-arrêt d'obligations futures, la Commission propose de poser comme condition préalable à l'existence d'un rapport juridique entre le débiteur et le tiers saisi, un délai de 60 jours pour la saisie-arrêt de comptes de dépôt et d'un an pour toutes les autres obligations financières. En cas de saisie-arrêt d'obligations conjointes, la Commission propose différentes présomptions en ce qui concerne le droit du débiteur à l'égard de l'obligation conjointe. Actuellement, en cas de saisie-arrêt dans le cadre du Programme d'exécution des ordonnances alimentaires, le débiteur est présumé avoir droit à la totalité de l'obligation conjointe, laissant la charge de la preuve contraire au débiteur ou au créancier obligataire. Aucune modification à cette règle n'a été recommandée, mais la Commission souhaite que soit changée la saisie-arrêt par des créanciers ordinaires de sorte que le débiteur soit présumé avoir droit à la moitié de l'obligation. Là encore, cette présomption devrait pouvoir être contestée par le créancier obligataire, le débiteur ou le créancier au moyen d'une demande au tribunal.

Pour protéger la vie privée du créancier obligataire, la Commission recommande qu'il incombe au tiers saisi d'aviser le créancier obligataire de la procédure de saisie-arrêt. Cet avis devrait avoir une forme établie par le règlement et être signifié par courrier recommandé.

La Commission traite ensuite de la saisissabilité de régimes de revenu futur comme les régimes de retraite agréés, les régimes enregistrés d'épargne-retraite, les régimes de participation différée aux bénéfices et les fonds enregistrés de revenu de retraite. Il existe une grande disparité dans le traitement de ces régimes, les fonds enregistrés de revenu de retraite étant généralement saisissables tandis que

les pensions et les régimes enregistrés d'épargne-retraite avec services d'assurances sont généralement exempts de saisie-exécution. Selon la Commission, l'équité exige que tous les régimes de revenu futur soient traités de la même manière et que les biens qui font partie de tout régime de revenu futur constituant un régime enregistré d'épargne-retraite au sens de la *Loi de l'impôt sur le revenu* fédérale soient donc insaisissables.

Toutefois, la Commission recommande une approche différente pour le paiement à partir de régimes de revenu futur. Ces paiements constitueront souvent la principale source de revenu du débiteur et sont semblables à un revenu d'emploi ou le remplacent. Par conséquent, les paiements à partir de tout régime de revenu futur, y compris des régimes de retraite agréés et des régimes enregistrés d'épargne-retraite avec services d'assurances devraient être exigibles, sous réserve de l'exemption de salaire prévue par la loi. L'annulation de la protection du revenu de retraite et du revenu de rente est nécessaire pour atteindre l'équité et l'uniformité dans le traitement des revenus de retraite et pour créer un meilleur équilibre entre les droits des créanciers et des débiteurs.

D. EXEMPTIONS DE SAISIE-ARRÊT

Selon l'avis de la Commission, le régime de saisie-arrêt devrait protéger les débiteurs en prévoyant des *parties insaisissables légitimes*, ce qui permet à un débiteur de conserver suffisamment de revenu pour ses besoins essentiels et ceux de ses personnes à charge. Bien qu'aucune modification de l'exemption générale de 70 % du salaire du débiteur ne soit recommandée, le montant insaisissable minimal obligatoire de 250 $ par mois pour un débiteur n'ayant personne à charge, ou de 350 $ pour un débiteur ayant des personnes à charge (sans égard au nombre) est tout à fait inadéquat et doit être majoré.

L'exemption idéale devrait tenir compte des variations de l'économie et des différents niveaux de revenu et obligations alimentaires des débiteurs. Un montant insaisissable à taux fixe peut être facile à calculer, mais perd tout son sens à mesure que le temps passe. Si l'on ne tient pas compte des besoins économiques variables des familles, cela peut forcer certains débiteurs à quitter leur emploi. La partie insaisissable devrait permettre au débiteur d'avoir plus en fin de compte que s'il recevait de l'aide sociale. Par conséquent, il est recommandé que la partie insaisissable mensuelle soit équivalente au minimum à 120 % des taux provinciaux d'aide au revenu. L'inconvénient de cette approche, c'est qu'il sera plus difficile à déterminer qu'un taux fixe pour un tiers saisi, difficulté qui pourrait être surmontée grâce à de meilleures instructions dans la déclaration relative au salaire. À titre subsidiaire, la partie insaisissable pourrait être fixée à 600 $ par mois, plus 100 $ par personne à charge.

De plus, la Commission recommande d'appliquer la partie insaisissable du salaire aux autres sources de revenu qui constituent un remplacement de revenu d'emploi ou y sont analogues, comme le revenu de retraite, certains jugements en dommages-intérêts, les prestations obligatoires en vertu de la *Loi sur la Société d'assurance publique du Manitoba* et de la *Déclaration des droits des victimes* et le revenu provenant d'une pension alimentaire. Elle traite aussi de l'application de la partie insaisissable du salaire à un salaire déposé dans le compte bancaire du débiteur et qui entraîne la perte du caractère insaisissable. La Commission recommande donc que les débiteurs soient en droit de faire

une demande au tribunal en vue d'obtenir une ordonnance qui rende insaisissables les sommes se trouvant dans un compte bancaire s'il peut être montré que les sommes constituent un revenu d'emploi.

E. MODALITÉS D'APPLICATION

Cette section du rapport examine le processus d'application, la réaction du tiers saisi, les processus de contestation de l'obligation et de la partie insaisissable, la priorité de rang et le versement de la somme consignée et des frais. Les exigences actuelles en matière de requête sont généralement suffisantes, mais il est recommandé que les créanciers aient la possibilité de réclamer les frais et soient tenus de divulguer toute partie insaisissable à laquelle le débiteur peut avoir droit et le nombre de personnes à charge, s'il est connu. En l'absence de ces renseignements, le tiers saisi peut présumer que le débiteur a droit à la partie insaisissable de tout débiteur sans personne à sa charge, sous réserve du droit du créancier et du débiteur de réfuter la présomption. Par ailleurs, l'avis de saisie-arrêt devrait explicitement interdire les sanctions à l'égard du débiteur et préciser sa durée.

Selon la Commission, le régime actuel de priorité de rang est généralement satisfaisant, mais son expression législative devrait être simplifiée de façon à regrouper toutes les dispositions dans un seul article de la Loi. Il est donc recommandé qu'une fois réglées les créances des créanciers prioritaires, les créanciers ordinaires se partagent le produit au prorata, sous réserve du paiement des dépens du créancier saisissant. Les créanciers ordinaires qui demandent une part des sommes consignées au tribunal devraient être tenus de déposer un avis de demande à la Cour du Banc de la Reine, à condition que les fonds versés au tribunal en vertu d'une ordonnance de saisie-arrêt avant jugement ne soient pas versés avant la fin de l'action sous-jacente. Il est aussi recommandé qu'une base de données consultable soit créée par la Cour du Banc de la Reine pour permettre aux créanciers de déterminer le montant des fonds saisis qui sont consignés au tribunal pour le compte d'un débiteur spécifique. En outre, les tiers saisis devraient être en droit de réclamer des frais de 25 $ pour chaque paiement effectué en vertu d'une ordonnance de saisie-arrêt et de 1 $ pour chaque paiement subséquent; ces frais devraient être déduits du montant consigné au tribunal par le tiers saisi.

F. SAISIE-ARRÊT ANTÉRIEURE AU JUGEMENT

Bien que la saisie-arrêt antérieure au jugement ne soit pas universellement reconnue au Canada, la Commission est d'avis que ses avantages pratiques justifient son maintien. Reconnaissant les abus possibles, elle recommande néanmoins un certain nombre de mesures de protection dont la limite des recours aux seules actions en recouvrement de dette et que les demandeurs soient tenus de donner un engagement relatif à des dommages-intérêts et de payer des dépens et les intérêts au débiteur si des fonds ont été abusivement saisis avant jugement.