

LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON THE REPLEVIN ACT

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE GARDE B. GARDOM Q.C.
ATTORNEYGENERAL FOR BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON THE REPLEVIN ACT

Replevin is a remedy which permits the speedy recovery of personal property that is wrongfully withheld from a person entitled to possession. The procedure to obtain the remedy is set out in the *Replevin Act*, a statute that is over 100 years old. That procedure is antiquated, and in this Report we recommend that it be replaced by a new remedy, contained in the Rules of Court, permitting the interim recovery of personal property.

CHAPTER I

THE REPLEVIN ACT

A. Introduction

It is a general policy of our legal system that the grant of a remedy to a person must await the outcome of a formal adjudication by the court of that person's entitlement to that remedy. For example, the unsecured creditor cannot call for the seizure and sale of his debtor's property until he has obtained a judgment for the money he is owed. Nor can a party be compelled to convey land pursuant to a contract unless the other party has obtained a judgment for specific performance of that contract. Numerous examples of this kind could be cited.

There are, however, a number of exceptions to this general rule. Most of these exceptions provide what is generally known as "interim relief." This class of remedy includes orders for interlocutory injunctions, orders for interim receivership and prejudgment garnishment. The general purpose of these remedies is to protect the plaintiff by preserving the status quo until the court makes a final determination of the rights of the parties, so the plaintiff, if successful, will not be deprived of the fruits of the litigation.

A further exception to the general rule exists with respect to claims to recover possession of personal property. Through a proceeding known as "replevin" a person who claims personal property that is in the possession of another may, in a summary way, obtain possession for himself without a formal adjudication of his right thereto.

In British Columbia such proceedings are regulated by the *Replevin Act*. That Act consists of two parts: the substantive provisions and the Replevin Rules which are printed as a schedule of the statute. Both are set out in full as an Appendix to this Report.

As the operation of the Replevin Act is a frequent source of complaint, it was added to our programme as a matter for study. In August 1977 we circulated a working paper on the Act. That paper addressed two basic issues. The first was whether this anomalous remedy, or something comparable to it should continue to be part of the law of British Columbia. The second issue was, assuming a replevinlike remedy should continue to be available, what changes are desirable to make the procedure compatible with modern needs and conditions. The working paper solicited comments on these matters and, to focus discussion on the second issue, a tentative proposal set out a scheme which would, in essence, replace the *Replevin Act* with a new form of interim relief to be contained in the Rules of Court.

The working paper was widely circulated among judges and members of the legal profession and the response which it evoked was surprisingly large in view of its narrow scope. The submissions that we received were very helpful in arriving at our final conclusions. The comments made on specific issues will be referred to elsewhere in this Report in the appropriate context.

We would like to thank all those who took the time to consider the working paper and wrote to us setting out their views.

B. Historical Background

Replevin proceedings, as they exist in British Columbia, differ somewhat from the common law action of replevin as it developed in England. The history of the common law action has been described in the following terms:

5. See, Winfield on Tort, 492. But, cf. *Evans v. Elliot*, 5 Ad. & El. 142, 111 E.R. 1120.

The old common law action of replevin had originally a very narrow range, being available only to a distrainee complaining of a wrongful distress. "This [restitution of goods by action of replevin] obtains only in one instance

of an unlawful taking, that of a wrongful distress": Blackstone, vol. III, p. 145. At first the plaintiff had to obtain a writ commanding the Sheriff to deliver the distress to the owner. But by the Statute of Marlbridge, 52 Hen. III, C. 21, provision was made whereby the Sheriff, immediately upon complaint to him made, proceeded to replevy the goods to the owner, without waiting for him to procure the writ from the Chancery. By a later statute, 13 Edw. I, c. 2, s. 1, the party replevying had to give pledges to prosecute his action against the distrainer, and by a still later statute, 11 Geo. II, c. 19, the Sheriff was required to take a bond with two sureties in a sum double the value of the goods distrained, which bond was to be assigned to the distrainer, on his request, and might be sued on by him in the event of the distrainee not prosecuting his action. See Blackstone, vol. III, pp. 1478; Maitland, *Equity and Forms of Action*, p. 355; Pollock and Maitland, vol. I, p. 353; vol. II, pp. 5758; Holdsworth, vol. III, pp. 2837.

Proceedings in replevin thus fell into two independent parts, namely, the replevy, which was the distrainee giving security that he would prosecute an action of replevin, whereupon the goods were restored to him; and the action so undertaken to be brought, in which the right to the goods was tried; see 12 Hals., 3rd ed., p. 161.

The common law action of replevin as it exists in England, therefore, is available only in cases where goods are wrongfully distrained or are otherwise wrongfully taken out of the possession of the claimant.

In Canada, the circumstances in which the remedy is available are somewhat wider. Section 2 of the *Replevin Act* provides:

Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities, or other personal property or effects have been wrongfully distrained, the person complaining of such distress as unlawful may bring an action of replevin, or where such goods, chattels, property, or effects have been otherwise wrongfully taken or detained, the owner or other person entitled to maintain an action for damages therefor may bring an action of replevin for the recovery of the goods, chattels, property, or effects; and in any such action may claim for and recover the damages (if any) sustained by reason of the unlawful distress, or of the unlawful caption and detention, or of the unlawful detention.

That provision covers not only all the circumstances in which replevin would be available at common law, but all cases of wrongful detention. At common law replevin would lie for wrongful detention only if the defendant had originally acquired possession wrongfully, but it would not lie if the defendant had acquired possession lawfully and only the detention was wrongful. Section 2 is not subject to those, or certain other, limitations.

Section 2 is based on a mid-19th century Act applicable to Upper Canada:

... by statute of 1851, 14 & 15 Vict., c. 64, "An act to amend and extend the law relating to the remedy of Replevin in Upper Canada," the action was extended so as to include, not only the case where goods were wrongfully distrained, but also where "goods, chattels, deeds, bonds, ... papers, writings, valuable securities or other personal property or effects" were "otherwise wrongfully taken ... or wrongfully detained." Also the owner might recover damages for such unlawful caption or detention. The effect of this was, as the Act itself indicated, to make the action of replevin available, as alternative remedy, in any case in which the owner might maintain an action of trespass or trover.

Replevin legislation was first introduced into British Columbia in 1873. It consisted of the *Upper Canada Act* of 1851 and a number of procedural sections. In the 1897 statutes, on the recommendation of the Revision Commissioners, the procedural sections were dropped from the *Replevin Act*, although they appear to have retained their force. In 1899 the Replevin Rules, in their present form, were introduced and made part of the Act.

C. Procedure Under the Act

The Replevin Rules contained in the Schedule to the Act purport to set out a complete code of procedure relating to the remedy. Their contents are summarized below.

The Rules first abolish the common law writ of replevin and provide that an order of replevin may be obtained in an action commenced by writ of summons. Where the property sought to be replevied was wrongfully taken by the defendant or was taken under colour of distress, a replevin order may be obtained on *praecipe*, supported by an affidavit setting out specified facts. An order may also be sought on motion in all cases and the court may proceed on an *ex parte* application. The court may grant or refuse the order, either absolutely or upon such terms and conditions as appear just.

The Rules contemplate that the plaintiff who obtains an order should provide a bond to the Sheriff. Rule 6 requires that the bond be of "double the value of the property to be replevied" and this appears to reflect the present practice, although Rule 3 speaks of a bond "in less or more than double the value of the property". The bond must have two sufficient sureties and meet certain other requirements. The bond is assignable by the Sheriff to the defendant and may be used to indemnify the defendant for any loss arising out of the replevin if the plaintiff is unsuccessful in the main action.

A replevin order is to be executed by the Sheriff who, if the order was obtained on a motion, obtains possession of the property and delivers it to the plaintiff. If the order was obtained on a *praecipe* for a wrongful taking, the Sheriff merely seizes and holds the property and the plaintiff is obliged to obtain a further order, on motion, within 14 days, or the property is redelivered to the defendant.

A return to the order must be made by the Sheriff within 10 days, and he may not serve the writ of summons or order until the replevin has been completed. The Sheriff is given special powers to enter and search premises in executing the order. If the defendant has removed or concealed the property to be replevied, a further order may be obtained which gives the Sheriff the power to seize the defendant's goods of equal value and deliver them to the plaintiff who may then "hold them for ransom" until the property to be replevied is delivered up.

CHAPTER II DIFFICULTIES WITH THE REPLEVIN ACT

The *Replevin Act* and Rules are both archaic and obscure. Because the Replevin Rules are set out in a Schedule to the Act rather than in the Rules of Court, they have escaped the reforms which have updated and streamlined other procedural enactments. To grapple with the language and concepts of the Rules is no easy task. Rule 13, for example, provides:

If the Sheriff makes such a return of the property distrained, taken or detained, having been eloigned, as would have warranted the issuing of a *capias* in *withernam* by the law of England on the fifth day of December, 1859, then upon the filing of such return an order shall be issued on *praecipe* in the words or to the effect of Form No. 3 in the Schedule hereto, which shall have the same force and effect as a *capias* in *withernam* had, and before executing such order the Sheriff shall take security as provided by Rule 6.

Such obscurity is difficult to justify. Although Rule 13 is the worst offender in this regard, it is by no means the only one.

The Rules are internally inconsistent. As we have pointed out, in Rule 3 the amount of the bond appears to be in the discretion of the judge while under Rule 6 a bond for double the value of the property appears to be mandatory.

Rule 8 provides that the Sheriff shall not serve a copy of the writ of summons until the property has been replevied. There may be some justification for this if the order has been obtained on *praecipe* or *ex parte* motion and

purchase agreements, finance companies to whom such agreements are sold and assigned, or bailiffs employed by the vendors or their assignees, may take the law into their own hands and exert private force with impunity. *If they are unable to retake their property by peaceable means, and without provoking a breach of peace, the Courts are always open to them and they may institute replevin proceedings or take such other action as they may be advised in order to recover their property.*

What is the "other action" referred to?

Proceedings under the *Replevin Act* are by no means the only remedy available to the person who claims property which is in the possession of another. It is, for example, open to him to bring an ordinary action framed in detinue seeking a judgment for return of the property and to proceed under the Rules of Court.

Under the Rules, a claim based on detention of goods stands in much the same position as a claim for a debt or liquidated demand. If there is a default in appearance or pleading the plaintiff can enter final judgment for a delivery up of the goods by the defendant. If the defendant does enter an appearance to the action application can be made for summary judgment and an order for delivery can be made. The plaintiff may also proceed under Rule 46(3) which provides:

Where a party claims the recovery of specific property other than land and the opposing party does not dispute the title of the claimant but claims to be entitled to retain the property by virtue of a lien or otherwise as security for a sum of money, the Court may order that the claimant pay into Court or otherwise secure the amount of money in respect of which the security is claimed, and any further amount for interest and costs as the court may direct, and that on the payment being made or other security given, the property claimed be given up to the claimant.

An order for the recovery of personal property may be enforced by a writ of delivery directed to the Sheriff. If the property cannot be found the Sheriff may take possession of all the defendant's land and goods until the property in question is delivered up. A writ of sequestration may also issue to compel the delivery of goods.

Even if circumstances do not permit the plaintiff to obtain an early recovery of the property under one of the Rules cited above, other provisions allow him to preserve his position with respect to the property in appropriate circumstances. Rule 46(1) provides:

- (a) The Court may make an order for the detention, custody, or preservation of any property that is the subject matter of a proceeding or as to which a question may arise.
- (b) For the purpose of enabling an order under this rule to be carried out, the Court may authorize a person to enter upon any land or building.

Thus, where it appears that the defendant may deal with the property in a way which would prejudice the plaintiff if he should succeed, an order may issue which enjoins such dealings or an order may be made that the property be put into the possession of an officer of the Court.

It will be seen that in many cases relief which might be sought through replevin proceedings may also be obtained under the Rules applicable to ordinary proceedings for the recovery of personal property. In what circumstances then will a plaintiff wish to obtain a replevin order rather than proceeding under the Rules? Two such situations occur to us.

The first is that in which immediate recovery is essential to the plaintiff. To get an application for a replevin order before the court requires, at most, the usual time (as little as three days after service) for the return of a notice of motion on an interlocutory matter. On the other hand, judgment in default of appearance or summary judgment requires at least the lapse of the time limited for appearance (seven days).

14. See Rule 14(3). If judgment in default of pleading is sought, further time must elapse. Thus, even where it appears that the defendant will not vigorously defend the action or cannot mount a credible defence, in the ordinary course of events, remedies under the Rules cannot be invoked as quickly as replevin proceedings.

The second situation in which a plaintiff might prefer replevin is where the action is vigorously opposed and a credible defence is put forward which denies the plaintiff's title. In that case there is no Rule which would permit early recovery of the property by the plaintiff and, in the absence of replevin, the plaintiff would have to await the successful outcome of the trial. The *Replevin Act* permits the plaintiff to apply to recover the property in those circumstances.

It should be noted that the plaintiff's right to a replevin order is not absolute, even if he satisfies the preliminary conditions set out in Replevin Rule 2. Rule 3, which defines the powers of the court, is phrased in permissive terms and the court is explicitly given a discretion to "refuse the order".

In the working paper we raised the issue of whether replevin or a comparable remedy ought to be abolished or continue as part of the law of the Province. The arguments in favour of both points of view were set out. That for abolition was expressed in the following terms:

It is arguable that the existence of the remedy of replevin can no longer be justified. The argument proceeds along the following lines. First, as pointed out earlier in this chapter, replevin has become largely redundant in the sense that in a majority of cases the relief which it offers can be obtained under the Rules of Court. In the very few situations in which replevin provides a substantial advantage to a plaintiff, that advantage is not one the system ought to provide.

Moreover, viewed in a broad context of proprietary remedies, replevin is anomalous. The basic rule is that remedies must await outcomes. There are various exceptions to this rule, but almost invariably they are directed at allowing a party to preserve his position with respect to property or rights until the issues at stake are definitively determined. Two examples may clarify this. Where a person claims real property he may, before his rights are the subject of a formal adjudication, register a caveat or a *lis pendens* to prevent, or preserve his rights with respect to any further dealings with the property. But, a caveat or *lis pendens* does not give him a right to possession. That must await a successful outcome of his action. When an action is brought on a debt or liquidated demand, the *Attachment of Debts Act* permits the plaintiff to garnishee before judgment, certain debts owing to the defendant. But a prejudgment garnishing order does not immediately put the money garnished into the plaintiff's pocket. The funds are held in court until the main action is concluded and only then may the plaintiff, if successful, apply for payment out to him.

When contrasted with other prerejudgment remedies the anomalous position of replevin becomes evident. If successful in obtaining a replevin order the plaintiff has, subject to the posting of a bond, obtained the relief sought in his action and recovered physical possession of the subject matter of the dispute. He has achieved this without any formal adjudication of his right to possession.

How can such a departure from general principles be justified? Is there anything unique in a claim to recover personal property which warrants giving the plaintiff favourable treatment which is denied to those having other claims? Are breaches of the peace more likely to arise out of wrongful detention of personal property than out of wrongful possession of land or an unjustified refusal to pay a debt? Reflection on these questions leads to the conclusion that the existence of a summary remedy to recover personal property is explicable in historical terms only, and is not a manifestation of any coherent legal policy relevant today.

Thus, the argument concludes, the *Replevin Act* should be repealed and the remedy formally abolished. Some support for this view may be found in certain recent trends in the United States. There, various replevin statutes (or "claim and delivery" acts as they are sometimes called) have been held to be unconstitutional as a denial of "due process".

The argument for retention was set out as follows:

A number of counter arguments do exist. First, the relevance of the American experience is limited. The objections to the replevin legislation there seem to have arisen out of the extensive use made of it by secured creditors against consumer debtors. As far as one can ascertain from the reported Canadian cases replevin is seldom invoked with respect to consumer goods. In the majority of cases the subject matter of the dispute is equipment or inventory.

Secondly, there is little or no evidence that replevin proceedings are significantly abused or are frequently used in a frivolous or vexatious manner. Nor is there any evidence that replevin is used as a "tactical" manoeuvre designed to bring pressure on the opposing party rather than as a means to secure speedy recovery of property for *bona fide* purposes.

Finally, it is not wholly accurate to say that a summary remedy to recover possession is exclusive to personal property. In one area in which breaches of the peace are a matter of concern, that of landlord and tenant relationships, a summary procedure to obtain possession of real property is provided for.

Thus, the counterargument concludes that replevin still has a useful, albeit limited, role in our law and, so long as it is used responsibly and can be adequately controlled by the courts, there is little reason to abolish it.

Comment on the issue of retention or abolition was specifically invited, although not every person who responded to the working paper addressed it. Those who did were unanimously of the opinion that the law should provide some remedy for the speedy recovery of personal property. The only divergence of view, in some cases, concerned the legal nature and characteristics of the remedy.

We have concluded that, although the utility of the *Replevin Act* is confined to a relatively narrow range of circumstances, within its scope it provides a remedy that is generally regarded as useful and, if properly controlled, just. While we acknowledge that the remedy, in theory, is anomalous, that alone cannot justify its abolition. We are persuaded that replevin or a comparable remedy should be available.

CHAPTER IV

CONCLUSIONS ON REFORM

A. The Mechanics of Reform

Having concluded that the *Replevin Act* is in an unsatisfactory state but that some kind of remedy offering comparable relief should be available, a preliminary issue must be confronted. Should the *Replevin Act* be retained in something resembling its present form with recommendations for reform directed at correcting and rationalizing its operation; or should the Act be repealed in toto and a new enactment, having desirable characteristics, be developed to replace it?

The proposal set out in the working paper favoured the latter approach. This attracted no critical comment from those who responded and we presume it was thought to be satisfactory.

B. Legal Nature of the Remedy

At present, replevin is a cause of action in its own right. Should that also be true of the new remedy, the alternative being to characterize it as interim relief available on interlocutory application? In the working paper we favoured the "interim relief" approach. We recognized, however, that one advantage of allowing the remedy to exist as a distinct cause of action is that it could be made available on an action commenced by petition. We stated:

The Rules of Court provide two different ways in which legal proceedings may be commenced: writ of summons or originating application. As our proposal is framed, the relief provided would be obtained on an interlocutory application in an ordinary action, that is, one commenced by writ of summons. A claim to recover personal

property is not a matter enumerated in Rule 10(1) as one in respect of which proceedings may be commenced by originating application. Thus Rule 8(1) applies. It provides:

Except where otherwise authorized by an enactment or these rules, every proceeding in the Court shall be commenced by issuing a writ of summons.

We have considered the possibility of formulating our proposal ... so as to make the replevinlike relief provided one which should be sought on an originating application. The principal attraction of such an approach would be the speed with which the matter could be brought before the Court. The originating application procedure is particularly well suited to speedy relief which, as we have said, is one of the more useful features of proceedings under the existing *Replevin Act*.

Our reasons tentatively rejecting that approach were set out as follows:

The originating application approach does ... have its disadvantages and it is these which have led to our tentative rejection of it. The difficulty we see is that if interim recovery of property is a remedy to be pursued on an originating application, the claimant would be deprived of the benefit of a number of other Rules of Court relating to like claims, in particular those relating to default and summary judgment.

A claimant may wish to have as wide a range of interlocutory remedies available to him as possible and regard an application under proposed Rule 46(4) as a last resort, attempts to obtain judgment in default of appearance on pleading, or summary judgment having failed. It is our present view that the flexibility of the Rules relating to actions commenced by writ of summons outweighs the "speed" advantage of the originating application. In any event, under Rule 3(2) in an ordinary action time may be abridged in appropriate circumstances. We welcome comments on this issue.

Among those who responded to the working paper, there was some sentiment in favour of the petition. The majority, however, preferred the "interim relief" approach. As one respondent put it:

Using the petition as an instrument of swift justice is tempting, but on balance I think the summary remedies of default judgment and summary judgment discussed in the working paper are reasonably effective in the clear cases, and in the unclear cases the parties would be sent to trial under Rule 52 (11)(d) if the proceedings were commenced by petition. Where the interlocutory relief is going to be sought it is much easier to get out a writ and notice of motion than a petition.

The view set out in the working paper therefore retains its force as a conclusion of the Commission.

C. Legislative Distribution

A conclusion that the remedy should take the form of interim relief necessarily implies that the procedure to obtain that relief should be provided in a set of rules. It is our belief that those rules should be part of the Rules of Court that govern all civil actions. Our tentative conclusion as set out in the working paper, was that the new remedy should be wholly a creature of the Rules, but this view was challenged by several respondents. It was suggested that, rather than requiring that the substantive right to the remedy be inferred from the Rules, the right ought to be enshrined in the statute law of the Province.

There is ample precedent for that suggestion. For example, the Rules of Court clearly confer the right to apply for an interlocutory injunction or a receiver, although the substantive right is also set out in section 30 of the *Laws Declaratory Act*. On the other hand, a number of remedies, interpleader for example, are provided for in the Rules without any additional statutory authority.

The reasons for preferring additional statutory authority for the remedy were never fully articulated by those who suggested it. We believe, however, that the suggestion is based on a fear that remedy would have something

less than the full force of law if it was contained only in the Rules of Court. Whether the Rules do or do not have the force of statute law has recently been a matter of some controversy. The relevant issues are explored in Appendix B to this Report.

As a matter of principle, we believe that laws relating to the same subject matter should not be contained in more than one enactment if that situation can be avoided. In the absence of clear authority that our recommendations would otherwise be emasculated, we would prefer that the remedy be a creature of the Rules of Court only.

D. The Proposed Rule

As we pointed out in Chapter III, the Rules of Court already allow the interim recovery of property subject to a possessory lien. This is part of Rule 46 which provides generally for the detention, preservation and recovery of property. It was Rule 46 that, in the working paper, we selected as the appropriate vehicle for the new remedy. Rule 46 now provides:

RULE 46 DETENTION, PRESERVATION, AND RECOVERY OF PROPERTY

Property, Which is the Subject Matter of a Proceeding

- (1) (a) The Court may make an order for the detention, custody, or preservation of any property that is the subjectmatter of a proceeding or as to which a question may arise,
 - (b) For the purpose of enabling an order under this rule to be carried out, the Court may authorize a person to enter upon any land or building. (MR 657, 659; ER 29/2r 29/4.)

Fund Which is the Subjectmatter of a Proceeding

- (2) Where the right of a party to a specific fund is in dispute in a proceeding, the Court may order the fund to be paid into Court or otherwise secured. (ER 29/2.)

Recovery of Property Subject to Lien, Etc.

- (3) Where a party claims the recovery of specific property other than land and the opposing party does not dispute the title of the claimant but claims to be entitled to retain the property by virtue of a lien or otherwise as security for a sum of money, the Court may order that the claimant pay into Court or otherwise secure the amount of money in respect of which the security is claimed, and any further amount for interest and costs as the Court may direct, and that on the payment being made or other security given, the property claimed be given up to the claimant. (MR 664; ER 29/6.)

Allowance of Income from Property

- (4) Where property is the subjectmatter of a proceeding and the Court is satisfied that it will be more than sufficient to answer all claims thereon, the Court at any time may allow the whole or part of the income of the property to be paid, during such period as it may direct, to a party who has an interest therein or may direct that part of the personal property be delivered or transferred to a party, (MR 665; ER 29/8.)

In the working paper we proposed that the following be substituted as a new Rule 46:

RULE 46 DETENTION, PRESERVATION, AND RECOVERY OF PROPERTY

Property Which is the Subject Matter of a Proceeding

- (1) (a) The Court may make an order for the detention, custody, or preservation of any property that is the subjectmatter of a proceeding or as to which a question may arise,
- (b) For the purpose of enabling an order under this rule to be carried out, the Court may authorize a person to enter upon any land or building. (MR 657, 659; ER 29/2, 29/4.)

Fund Which Is the Subjectmatter of a Proceeding

- (2) Where the right of a party to a specific fund is in dispute in a proceeding, the Court may order the fund to be paid into Court or otherwise secured. (ER 29/29)

Allowance of Income From Property

- (3) Where property is the subjectmatter of a proceeding and the Court is satisfied that it will be more than sufficient to answer all claims thereon, the Court at any time may allow the whole or part of the income of the property to be paid, during such period as it may direct, to a party who has an interest therein or may direct that part of the personal property be delivered or transferred to a party. (MR 665; ER 29/8.)

Recovery of Specific Property

- (4) Where a party claims the recovery of specific property other than land, the Court may order that the property claimed be given up to the claimant pending the outcome of the action upon such terms as to security or otherwise as it thinks just.

Indemnity for Wrongful Recovery

- (5) Where an order is made under subrule (4) and the claimant's action is dismissed, the opposing party is entitled to be indemnified against any loss suffered or damage sustained arising out of the delivery of the property to the claimant or compliance with any other order made and any money paid into Court or otherwise secured under this Rule shall be so applied.

The following features on the proposed rule might be noted:

1. Proposed subrules (1) (2) and (3) are identical to existing subrules (1), (2) and (4).
2. The substance of the new remedy is contained in proposed subrule (4) with a right of indemnity provided in subrule (5).
3. Former subrule (3) which provided for possessory liens would be subsumed in the new remedy.
4. Under proposed subrule (4) the court would have an unfettered discretion concerning
 - (a) whether an order should be made,
 - (b) whether the order should be absolute or subject to terms.
 - (c) the nature of the terms,
 - (d) the kind and amount of monetary security if that is a term of the order.

In the responses to the working paper some concern was expressed over our formulation of the proposed rule. That concern was largely directed, not at the contents of the rule, but at what were perceived as omissions. These are discussed below under separate headings.

E. Relationship to Other Rules of Court

A factor which influenced our tentative conclusion that the new remedy should form part of the Rules of Court was the fact that certain other rules would automatically apply, thus avoiding a necessity to restate them. The following Rules would be particularly relevant;

3. (2) The Court may extend or abridge the period within which a person is required or authorized by these rules or by an order to do or abstain from doing any act.
44. (8) If satisfied that no notice is necessary or in case of urgency the Court may make an order *ex parte* and, on the application of a person affected by the order, may set it aside or vary it as it thinks just.
59. (2) In case of urgency,
 - (a) an application may be made personally to the master or to a judge of the Court, and
 - (b) the Court may hear an application and make an order by telephone.

Thus, with respect to an application for the interim recovery of goods the claimant could, in appropriate circumstances, apply to have time for hearing abridged, proceed *ex parte*, and even obtain an order by telephone if the case warranted it.

These possibilities were not vigorously pointed out in the working paper and that is what may have led one person to write:

If I am reading the proposed changes correctly, you are ... advocating the abolition of the present procedure whereby the applicant can proceed *ex parte*. I would ... disagree with that proposal.

We wish to make it clear that our scheme does not contemplate the elimination of *ex parte* proceedings.

Should we go further and specifically restate the right to proceed *ex parte* in the proposed Rule 46? One respondent suggested that this would be a useful move. He pointed to Rule 45(2), which restates the right to proceed *ex parte* in an application for an interim injunction, as a precedent. While this suggestion is not without merit, on the whole we believe that it is inconsistent with what we perceive to be a cardinal aspect of the philosophy that underlies the drafting of the Rules of Court. A provision that governs a number of rules need not be restated in the individual rules to which it applies. We are confident that with further experience under the Rules a better understanding of the relationship between various parts of the Rules will emerge that would render a restatement redundant.

F. The Court's Discretion

As we pointed out earlier, our drafting of the proposed Rule contemplated that it would subsume the existing provision concerning possessory liens. One respondent commented:

I wonder whether the deletion of any reference to the position of a lien holder which is presently contained in Rule 46(3) is wise. In cases where interlocutory relief is sought for the restoration of property, I think the applicant would have to show that the respondent prima facie had no right, or a disputed right to possession of the property. In the case of a respondent who has a lien, his right to possession is clear and unchallengeable, and I think a Court would have some difficulty in justifying an order for the return of the property even with security were it not for the express provisions of a rule to this effect.

This raises a more general question about the way in which the proposed rule would be applied by the courts.

Giving the courts an unfettered discretion, as proposed in the working paper was satisfactory to a majority of those who responded, Two submissions, however, advocated a modification of the Rule so as to provide guidelines to the court relating to the exercise of its discretion. As one submission put it:

The Replevin rules assumed that the respondent had, prima facie, some higher right than the applicant, and therefore required the posting of a bond by the applicant. But this failed to recognize the fact that if possession did confer some right, then a distinction had to be drawn between the respondent who had recently and without obvious warrant despoiled the applicant of his peaceful possession (and was prima facie the wrongdoer) and the respondent who had acquired possession peacefully or with some warrant (and was prima facie entitled to retain it pendente lite).

I recognize that [your] proposed Rules gives the Court complete discretion whether to return the goods upon terms or unconditionally, but I wonder whether the temptation is not going to be to order security because it is safer to do so and does not involve drawing nice distinctions in the course of a Chamber application, would it be wrong to try to get some guidelines, so that the Judges do not assume they are looking at the old Replevin Rules in a new form ...?

While we appreciate the apprehension reflected in that submission, we are not persuaded a set of guidelines is appropriate.

At bottom, the only "guideline" that emerges from the suggestion is one that the Court should approach the new rule with an open mind and without preconceptions. How does one exhort a court to do so without insulting it? It is our expectation that judges will exercise their jurisdiction under the new rule in such a fashion without an explicit direction to that effect. If experience demonstrates that this expectation is not borne out, the Rule could be amended to provide guidelines to meet specific situations in which the rule is thought to have been wrongly applied.

It may, however, be possible to clarify the proposed rule in a way that stops short of guidelines. The submission quoted above continued:

At a minimum I think the point could be brought home by saying ... be given up to the claimant pending the outcome of the action, either unconditionally or upon such terms ..." Compare rule 18 2(d). Perhaps all the words in that paragraph might be used.

That is a useful suggestion and one which we are inclined to adopt in the formulation of a recommended Rule.

G. Powers of the Sheriff

Replevin Rule 10 sets out certain powers of a sheriff in relation to the execution of replevin orders.

10. In case the property to be replevied or any part thereof is secured or concealed in any dwelling, house or other building or enclosure of the defendant, or of any other person holding the same for him, and in case the Sheriff publicly demands from the owner and occupant of the premises deliverance of the property to be replevied, and in case the same is not delivered to him within four hours after such demand, he may,

and shall if necessary, break open such house; building, or enclosure for the purpose of replevying such property or any part thereof and shall make replevin according to the order.

Rule 11 also sets out certain powers to search.

The powers to break open a dwelling conferred by Rule 10 go far beyond what we understand to be the powers of sheriffs in relation to ordinary writs of execution. These extraordinary powers were not carried forward in the new Rule proposed in the working paper.

One sheriff who responded suggested that this omission would create difficulties:

Sections 10 and 11 of the Replevin Rules are very clear as to the Sheriff's powers, otherwise we would be very limited in effectiveness to carry out the Order, in most cases the defendant refuses to turn the goods over to the Sheriff.

We are not persuaded Replevin Rules 10 and 11 should be carried forward.

Extraordinary powers of search and entry, without judicial order, should be conferred only where the need for them is demonstrated in the clearest possible way. No such case has been made out for Rules 10 and 11. In any event, Rule 46(1)(b) of the Rules of Court and our proposed rule provides:

46 (1)(b) For the purpose of enabling an order under this rule to be carried out, the Court may authorize a person to enter upon any land or building.

That, we believe, should provide adequately for the enforcement of orders for the recovery of goods.

H. Consequential Amendments

The repeal of the *Replevin Act*, as recommended in this Report raises a need for the modification of a number of other enactments which refer to the Act or to replevin proceedings.

1. *Small Claims Act*

Section 4 (g) of the *Small Claims Act* gives judges of the Small Claims Division of the Provincial Court jurisdiction:

(g) In actions of replevin under the *Replevin Act*, where the value of the goods, chattels, property, or effects does not exceed one thousand dollars;

A judge of the Small Claims Division wrote to us in the following terms:

I agree with the main conclusions of the Commission that the *Replevin Act* be repealed. Unfortunately from the point of view of the Small Claims Court replacing it with an interlocutory remedy within the rules of, presumably, the Supreme Court would in my view remove the remedy entirely from the Small Claims Court ...

It would appear to me that since replevin is a substantive relief and not simply a matter of procedure, this court, as a creature of statute, would require specifically to be given jurisdiction.

Although replevin is not frequently sought in Small Claims Court, it is used occasionally.

- (2) Where the right of a party to a specific fund is in dispute in a proceeding, the Court may order the fund to be paid into Court or otherwise secured. (ER 29/2.)

Allowance of Income From Property

- (3) Where property is the subjectmatter of a proceeding and the Court is satisfied that it will be more than sufficient to answer all claims thereon, the court at any time may allow the whole or part of the income of the property to be paid, during such period as it may direct, to a party who has an interest therein or may direct that part of the personal property be delivered or transferred to a party. (MR 665; ER 29/8.)

Recovery of Specific Property

- (4) Where a party claims the recovery of specific property other than land, the Court may order that the property claimed be given up to the claimant pending the outcome of the action either unconditionally or upon such terms relating to giving security, time, mode of trial or otherwise as it thinks just.

Indemnity for Wrongful Recovery

- (5) Where an order is made under subrule (4) and the claimant's action is dismissed, the opposing party is entitled to be compensated by the claimant for any loss suffered or damage sustained arising out of the delivery of the property to the claimant or compliance with any other order.

3. The *Small Claims Act* be amended by repealing section 4(g) and substituting a provision that,
- (a) clarifies the jurisdiction of the Small Claims Division to make a final order for delivery of personal property in specie, and
 - (b) gives the court jurisdiction to make an interlocutory order under recommended Rule 46,
- with respect to property of a value within the monetary jurisdiction of the Court.

4. Sections 7, 9 and 10 of the *Distress Act* be amended as set out in Appendix C.

5. The *County Courts Act* be amended

- (a) by replacing section 30(d) with a provision in the following terms
 - (d) in all actions for the recovery of property other than land where the value of the property does not exceed \$15,000,
- (b) by repealing section 31,
- (c) by replacing section 67(h) with a provision in the following terms:
 - (h) actions for the recovery of property other than land shall be brought in the County Court within the territorial limits of which the property is located, or where the defendants, or any one of the defendants, reside, or carry on business,

- (d) by deleting the word "replevin" where it appears in section 116(d) and adding after "proceeding", "or action for the recovery of property other than land".

B. Acknowledgments

The Commission wishes to thank all those who took the time to consider our working paper and respond to it. we also wish to thank Commission Counsel, Arthur L. Close, who drafted this Report and the working paper that preceded it.

DOUGLAS LAMBERT, *Chairman*
PAUL D. K. FRASER
PETER FRASER
LEON GETZ

May 19, 1978.

APPENDIX B

STATUTORY FORCE OF THE RULES OF COURT

A. Introduction

The Rules of Court that now govern civil procedure in the Supreme Court and the County Courts are of recent origin. Their history has been described in the following terms:

These rules came about through the combined efforts of members of the bar and representatives of the Department of the Attorney General. They are a recognition of the fact that up to the time of their passage the previous Rules of Court were by and large a copy of the English rules of 1883. Because of their antiquity the rules were becoming quite outdated. Patchwork amendments had been made to them over the years but the time finally came when this was not good enough and a complete overhaul was undertaken. A committee of the Attorney General's Department was struck and after study and consultation produced the 1976 rules.

The rules were enacted by Order in Council in 1976 and came into force early in 1977.

The enactment of the Rules was accompanied by an Act that amended the procedural provisions of a large number of provincial statutes. Section 80 of that Act added to the *Court Rules of Practice Act*. The following provisions as part of section 4:

- (2) The Supreme Court Rules, made by order of the LieutenantGovernor in Council under OrderinCouncil 1627/76 and filed as B.C. Regulation 310/76, are confirmed and validated and shall regulate the procedure and practice in the Supreme Court.
- (3) The LieutenantGovernor in Council may, by order, amend, add to, or repeal any provision of the Supreme Court Rules.

Do the words "confirmed" and validated" have the effect of giving the Rules the force of statute law. The issue is an important one because the Rules purport to encompass aspects of certain matters, such as evidence, that have traditionally been regarded as "substantive" law.

B. The Controversy

The status of the Rules of Court, has been considered recently by Bouck J. of the Supreme Court of British Columbia in *Lavaris v. MacMillan Bloedel Ltd.* In issue was whether the Rules of Court deprived the Court of certain inherent jurisdiction to order security for costs. In the course of his judgment Bouck J. considered the effect of section 4(2) of the *Court Rules of Practice Act* and concluded that:

The 1976 Rules of Court are not substantive law but a special form of delegated legislation retaining the same characteristics as the rules they replace in the sense that they are not a complete code and continue to be the servants and not the masters of the proceedings they govern. The words "confirmed and validated" were simply a method of expression employed by the legislature to signify the 1976 rules had been "laid before the legislative assembly" in accordance with s. 2(2) of *The Court Rules of Practice Act*.

He also held that even if the Rules were substantive law the Court was not deprived of its inherent jurisdiction. Thus his observations concerning the effect of section 4(2) of the *Court Rules of Practice Act* might be, strictly speaking, regarded as *obiter dicta*.

The view of Bouck J. concerning the substantive force of the Rules has been challenged by John W. Horn in a recent article. Horn points out that prior British Columbia rules had been declared by statute to be "valid and binding" and cites a series of cases, including two decisions of the Supreme Court of Canada, that have construed the meaning of such a declaration. The effect of the cases is that, not only are the rules free from any taint of *ultra vires*, but they have substantive force, even to the extent of overruling a prior inconsistent statute. None of these authorities appear to have been referred to Bouck J.

Horn asserts that the legislature in using the words "confirmed and validated" with reference to the 1976 Rules intended them to have the same effect as "valid and binding" which had been used with reference to earlier rules. He concludes that the judgment in *Lavaris v. MacMillan Bloedel Ltd.* "is of questionable authority" and ought not to be "the last word heard on the subject."

C. The Status of Amendments to the Rules

Assuming, for the moment, that the Rules of Court are valid substantive law by virtue of section 4(2) of the *Court Rules of Practice Act*, what is the status of an amendment to the Rules such as one that would implement our principal recommendation? Since under section 4(3) only the Rules set out in Order in Council 1627/76 are "confirmed and validated" it might be argued that amendments do not fall within the ambit of the confirmation.

It appears to us to be the better view that such a result is precluded by section 27 of the *Interpretation Act*

11. *Ibid.*, s. 1. which provides:

27. In an enactment a citation of or reference to another enactment of use Province or of Canada shall be construed as a citation of or reference to the other enactment as amended from time to time whether amended before or after the commencement of the enactment in which the citation or reference occurs.

The term "enactment" includes a "regulation", which in turn includes an Order of the Lieutenant-Governor in Council. Thus, to the extent that section 4(2) clothes the Rules of Court, as originally promulgated, with the force of substantive law, any amendments are similarly endowed.

D. Conclusion

For the purposes of this Report we are prepared to proceed on the basis that the Rules of Court and amendments thereto have the force of substantive law. We are persuaded that it was the policy of the Legislature to achieve that result. Whether or not they have, as a narrow and technical issue of law, done so, is a matter on which we express no views. We are confident, however, that if it were definitively held that those parts of the Rules which purport to establish or modify substantive law are ineffective, it would be a matter of sufficient importance to induce swift remedial action by the Legislature.

We believe that the most appropriate and convenient approach to the implementation of our recommendations is through an addition to the Rules, and we do not believe that we should be deterred from pursuing that course by the decision in *Lavaris*.

APPENDIX C

Introductory Note

This appendix sets out the changes that should be made to certain provisions of the *Distress Act* as a consequence of the repeal of the *Replevin Act*. In the sections set out below, those parts in a roman typeface reflect their present wording with lines drawn through those parts to be deleted. Words to be added to a provision appear in italics.

DISTRESS ACT R.S.B.C. 1960, c. 115

Right of lodger to replevy reclaim chattels.

7. If, after being served with the before mentioned declaration and inventory, and after the boarder or lodger has paid or tendered to the superior landlord, bailiff, or other person employed by him the amount (if any) which, by the last preceding section, the boarder or lodger is authorized to pay, the superior landlord, bailiff, or other person levies or proceeds with a distress on the chattels of the boarder or lodger, the superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress, and the boarder or lodger may replevy commence a proceeding for possession of the chattels in any Court of competent jurisdiction, and the superior landlord is also liable to an action for damages at the suit of the boarder or lodger, in which action the truth of the declaration and inventory may likewise be inquired into. R.S. 1958, c. 95, s. 7.

Goods distrained for rent may be appraised and sold.

9. Where any chattels have been distrained for rent due upon any demise, lease, or contract, and the tenant or owner of the chattels distrained does not, within five days next after distress taken and notice thereof (with the cause of taking) left at the dwellinghouse or other most notorious place on the premises charged with the rent distrained for, law commence a proceeding for possession of the chattels and serve notice thereof on the person distraining, then, after such distress and notice and expiration of the five days, the person distraining shall cause the chattels so distrained to be appraised by two appraisers, who shall be sworn before a Magistrate or Commissioner for Taking Affidavits, having authority and jurisdiction in the place where the oath is administered; and after such appraisal shall and may lawfully sell the chattels so distrained for the best price that can be got for the same, towards satisfaction of the rent for which the chattels have been distrained, and of the charges of the distress, appraisal, and sale, leaving the overplus (if any) in the hands of the Sheriff for the owner's use. [2 Will. & M., s. 2]; R.S. 1948, c. 95, s. 9.

Corn, hay, etc., loose, may be seized, detained and sold.

10. A person having rent due upon a demise, lease or contract may seize any sheaves or cocks of corn, or corn loose in the straw, or hay in any barn or granary, or upon any hovel, stack, or rick, or upon any part of the land charged with such rent, and may lock up or detain the same in the place where the same shall be found, for or in the nature of a distress, such section, may sell the same, provided that such corn, grain, or hay so distrained be not removed by the person distraining, to the damage of the owner thereof, out of the place where the same shall be found and seized, but be kept there (as impounded) of being replevied, until sold under section 9 or restored to the owner. 12 will. & M., c. 5, s. 31; R.S. 1948, C. 95, s. 10.