LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON

ATTACHMENT OF DEBTS ACT

LRC 39

1978

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 for British Columbia has the honour to present the following:

REPORT ON THE ATTACHMENT OF DEBTS ACT

Perhaps the most important creditor's remedy available which may be used to obtain satisfaction of a judgment is garnishment, a remedy created and regulated by the *Attachment of Debts Act*. We have thoroughly examined that Act and have concluded that it has certain shortcomings. First, certain procedural rules make garnishment unnecessarily complex and inconvenient in many situations. Secondly, there are many types of money obligations which cannot, in practice, be reached by garnishment. These limitations on creditors' rights do not stem from any rational social policy designed to maintain an appropriate balance between the rights of debtors and creditors.

In this Report, therefore, we make a number of recommendations aimed at rationalizing and improving the operation of the *Attachment of Debt Act*.

INTRODUCTION

A. The Report and Its Relationship to the Enforcement of Judgments Project

This Report is the first in a series that the Commission proposes to submit in its project on the enforcement of judgments. The law in this field is vast and complex and an examination of it was one of the items that was included in the original programme developed by the Commission in 1970. Since that time work has proceeded in a number of areas. Almost twenty internal research papers have been prepared on various aspects of the subject. Working papers have been prepared and distributed on the *Creditors' Relief Act*, those portions of the *Execution Act* which relate to proceedings against land, and on the *Attachment of Debts Act*. The latter working paper formed the basis of this Report. Work continues in relation to other topics within the project including equitable receivership and execution against shares.

There are a number of reasons why the *Attachment of Debts Act* was selected as the topic of our first Report in this project. First, the remedy which it provides (garnishment of a debt) is purely a creature of statute and is of comparatively recent origin. The jurisprudence which surrounds it, therefore, has tended to develop in isolation from that

which relates to other creditors' remedies, and makes it particularly suitable for consideration in a discrete Report. Secondly, the remedy is an important one and frequent complaints about the operation of the *Attachment of Debts Act* make recommendations for its improvement a matter of high priority. Finally, the issues at stake and the deficiencies of the law in relation to garnishment are much more straightforward than is the case with other remedies and, from the outset, we had a much clearer view of the lines along which reform might proceed.

But the *Attachment of Debts Act* cannot be totally isolated from the rest of the Project and the recommendations set out in this Report must be subject to a number of qualifications. The first is that, in retaining and strengthening garnishment as a creditors' remedy, we should not be taken as espousing a view that it should be the only remedy available to a judgment creditor who wishes to proceed against a monetary obligation which is the "property" of his debtor. Nothing in this Report, for example, would affect the availability of the charging order, and further research on that subject may lead us to a conclusion that in some circumstances receivership is a superior remedy which ought to be available.

Secondly, nothing in this Report would disturb the existing rule which governs the priority of a creditor who garnishees a debt in relation to other creditors of the same person. At present, the first creditor to serve garnishment process has priority. The fact that this issue is not the subject of recommendations in this Report does not necessarily imply that we are completely satisfied with the present position. This is an issue we propose to address in the context of our study on *Creditors' Relief Act*.

We have not made any recommendations with respect to exemptions from garnishment. There are two reasons f6r this. First, we understand that the whole subject of exemptions is under an internal review by the Ministry of Consumer and Corporate Affairs in the light of their responsibilities under the *Debtor Assistance Act*. We would prefer to await the outcome of that review before proceeding. Secondly, exemptions is one aspect of garnishment which cannot be isolated from exemptions in relation to other remedies. If recommendations are to be made, a Report on exemptions *per se* is the proper context.

Finally, the recommendations made in this Report contemplate no change in the character of garnishment as a "creditor controlled" remedy. By this we mean that decisions as to whether or not garnishment process will issue, against what debts it will issue and the time of its issue all rest with the judgment creditor, subject to intervention by the court to prevent inequitable results.

An alternative approach has been under consideration in other jurisdictions. In England the Payne Committee suggested the establishment of a new system based on a separate and autonomous body known as an "Enforcement Office" into which:

9. *Ibid*. at 88.

> ... will pass for enforcement all money judgments against a debtor who resides or carries on business within the jurisdiction of the office, wherever the judgments themselves may have been entered. In that way the Enforcement Office will from the start of enforcement be in a position to ensure the ordered control of the debtor's affairs which is fundamental to a proper system of enforcement. It will be able to ascertain and compare the claims and rights of the creditors, both against the debtor and as between themselves, to supervise the orderly liquidation of the judgment debts, to assist the creditor in obtaining from the debtor as much as he can properly afford, and to liquidate the debts as expeditiously as possible, to determine priorities between the creditors, disputes between the creditors and the debtor or third parties, and finally to protect the debtor against undue hardship or harassment.

A draft proposal of the same tenor has been made by the Law Reform Commission of New South Wales, and a scheme similar to that suggested has been in operation in Northern Ireland since 1971.

No serious study of this subject can ignore the views of the Payne Committee, and we do not intend to do so. The issues raised by the proposal for the establishment of an Enforcement Office are difficult ones. In our view, however, it is not necessary to come to any conclusion on them at this stage of our work, for whatever institutional changes or innovations might be proposed cannot relieve us of the necessity to examine and recommend improvements in specific execution remedies. This, indeed, was a necessity that also faced the Payne Committee, and the Report of that Committee contains a large number of specific suggestions for change.

The approach we have taken to this project, therefore, has been to examine the specific enforcement mechanisms that constitute the existing system and to make recommendations or proposals for reform on a case by case basis. It may be we are unable at this point to say that the cumulative effect of these recommendations will be to produce a regime that does satisfactorily meet the prescription for a system of enforcement embodying acceptable principles. We do not at this stage wish to prejudge that issue. Rather, upon completion of our series of specific studies, we intend to take a retrospective look at the entire field.

B. Background of the Report

As we stated earlier, this Report was preceded by a working paper. In that document we set out the results of our research to the date of its preparation, identified the deficiencies in the *Attachment of Debts Act* and its operation as we perceived them, and made a number of specific proposals for its improvement. on a number of issues the Commission had no settled views and alternative proposals which embodied different approaches to the same issue were put forward.

The working paper was widely circulated among judges, the legal profession and other interested persons and groups. The response to the working paper, while not overwhelming, might fairly be described as healthy. That response has been very helpful and the task of developing our final recommendations was considerably lightened by the assistance we received.

The submissions of two groups call for special comment. Upon receiving our working paper, the Commercial Law Subsection of the British Columbia Branch of the Canadian Bar Association struck a special committee to study it and communicate their response to us. A representative of the committee, Mr. Ian McKenzie, attended a Commission meeting and delivered a submission on their behalf. We also received letters from the District Registrars throughout the Province, a number of very useful suggestions and comments were made by both groups and we wish to record our thanks to them.

At a later stage of this project a "discussion draft" of this Report was given limited circulation. The comment received from the Commercial Law Subsection and others was helpful to us.

One aim of the recommendations that are contained in this Report is to make the remedy of garnishment available and effective in circumstances where that is not now the case. In pursuing that aim a constant challenge has been to balance the interest of the creditor who seeks to enforce his rights through garnishment, with the competing interests of the debtor, garnishee and third parties.

In meeting that challenge a competition of a different sort emerged one between that general aim of our recommendations and what might be called "manageability." Here, the essential question is whether there are circumstances in which permitting garnishment raises problems of administration so formidable that a retreat is called for, even though such a retreat is difficult to justify in terms of logic or fairness.
An example is the garnishment of a joint bank account, which the present law does not permit. It is unfair to the creditor that his debtor should be able to render himself judgment proof simply by concentrating his assets in a joint account. But, if an asset of this kind is to be made amenable to garnishment one cannot avoid the issue of the extent

to which the rights of the codepositor are to be protected and the means of doing so. Ease of administration favours the present position (no garnishment permitted) or ignoring the rights of the codepositor and making the account totally vulnerable to the creditor's claims. Justice and equity favours permitting garnishment of the account, but only to the extent of the debtor's beneficial interest in it. The just and equitable solution, however, carries with it a need for administrative and adjudicative machinery to ascertain the permissible limit of garnishment and see that it is observed. Should the interest of the creditor or of the codepositor be subordinated to administrative considerations?

An even more difficult example arises in the context of garnishment before judgment. At present, this remedy is available only to the plaintiff whose claim is based on a debt or liquidated demand. It is not available to the plaintiff seeking damages. This distinction is difficult to justify in logic, but the present position does carry with it the administrative advantage that there is no need to provide adjudicative machinery to "value" the plaintiff's claim for the purposes of garnishment. If prejudgment garnishment were to be made available to all plaintiffs seeking a money judgment such machinery would be essential. Again, the issue is whether administrative convenience should take precedence over the competing notions of fairness and logical consistency.

When should principle give way to convenience? This is the difficult issue highlighted by the two examples cited above, and the dogmatic pursuit of principle has no place in arriving at a conclusion. The only rational approach is to attempt a balancing of the benefits against administrative considerations. The difficulty, however, is that the benefits are not easy to assess. The information needed is not available through conventional datagathering techniques for statistical purposes. Nor is there any relevant experience from other jurisdictions which will act as a guide. The only real guidance available is our own experience as practising lawyers.

We asked ourselves the following questions with respect to each proposed "extension" of garnishment:

1. In our own experience are there a significant number of cases in which a client was in fact deprived of the fruits of the litigation, or in which a judgment was unenforceable, because garnishment was not available?

2. Where that is the case, would it have been "fair and just" to all concerned if garnishment had been available?

3. Would the "administrative difficulties" associated with a garnishment

    (a) have deterred the client from proceeding, or
    (b) placed an unfair burden on a person adverse in interest?

An affirmative answer to questions 1 and 2. and a negative answer to question 3 suggests that it is reasonable that garnishment should be available with respect to the particular issue under consideration.

This approach has led us to the conclusion that prejudgment garnishment ought to be available to the plaintiff who proceeds on an unliquidated claim. Similarly, it has led us to conclude that the garnishment of joint obligations should be permitted as a general ruler but also led us to create an exception to that rule with respect to the garnishability of debts owing to a partnership. The ultimate value of the approach we have taken must necessarily be speculative, but in the absence of less subjective information, it is the only one open to us.

We are keenly aware of the difficulties of judges who would be called upon to participate in the administration of a revised *Attachment to Debts Act*. They would often be required in summary proceedings, to make difficult decisions concerning issues of fact. Their task would be made even more onerous by some of our recommendations which define the permissible limits of garnishment in such abstract terms as "fairness" and "hardship" terms which, in essence, confer a discretion without any prescribed guidelines governing is exercise.

The exercise of discretion is always a troublesome matter, but we believe that the difficulties involved in the administration of the discretion that we have recommended will, with experience under a revised Act and the growth of a body of principles, be reduced to an unavoidable minimum.

CHAPTER I BACKGROUND

A. History of the Act

The origin of attachment has been ascribed to Roman law. Whether that is accurate or not, it seems certain that it was derived from the custom of "foreign attachment of London," which itself has an "ancient existence." The custom of foreign attachment has been described in the following terms:

> That if a plaintiff be affirmed in London ... against any person, and it is returned *nihil*, if the plaintiff will surmise that another person within the city is a debtor to the defendant in any sum, he shall have garnished against him, to warn him to come in and answer whether he be indebted in the manner alleged by the other; and if he comes and does not deny the debt, it shall be attached in his hands, and after four defaults recorded on the part of the defendant, such person shall find new surety to the plaintiff for the said debt; and judgment shall be that the plaintiff shall have judgment against him, and that he shall be quit against the other, after execution sued out by the plaintiff.

The remedy as it existed under the custom of London had features quite distinct from those of the common law remedies. It was said that the very essence of the custom was that the defendant should not have notice. Moreover, foreign attachment acted as a prejudgment remedy and subjected the debtor's property to preliminary attachments so as to deprive the owner of control over it until the plaintiff's claim was secured or satisfied. Most significant is the fact that, unlike the common law remedies which reached only tangible property, the custom attached and appropriated debts due.

Despite its acceptance in the Mayor's Court of London and in other city courts in the late fifteenth century, the foreign attachment remedy did not later develop or expand geographically. Prior to 1854 there was no process of execution under the general law of England "by means of which a judgment creditor could obtain payment of his debt from parties who are indebted to the judgment debtor ... " In 1853 the Common Law Commissioners reported that:

> We are not aware of any process, either in the Superior Courts of law or equity in suits between subject and subject, by which this can be directly done, though the course under writs of execution at the suit of the Crown, and by way of foreign attachment in the Mayor's Court of London and some other cities, as well as in the Courts of many foreign countries, shows that such a remedy would be practicable and useful.

The Commissioners went on to recommend that a creditor who has obtained judgment should be allowed to proceed, by a process similar to foreign attachment, against the debtors of his debtor, and that there should be a procedure for discovery of what debts are owing to the judgment debtor.

The Commissioners' recommendation was implemented by the *Common Law Procedure Act, 1854*, which was further developed in the *Common Law Procedure Act, 1860*. Attachment was restricted to the courts of common law until the enactment of the *Judicature Act, 1875* and Order 45 of the Rules of the Supreme Court (1875) which extended the remedy to Chancery.

In 1869 the Colony of British Columbia enacted the *Civil Procedure Ordinance, 1869* which incorporated, by reference, the English *Common Law Procedure Acts* of 1852, 1854 and 1860, as well as the English rules of practice and pleadings. Thus the remedy of garnishment after judgment became part of the law of British Columbia.

The *Attachment of Debts Act* was first enacted in 1903. Unlike the Common Law *Procedure Act, 1854*, the new *British Columbia Act* permitted prejudgment attachment. Section 3 provided that attachment could be obtained where "... in case a judgment has not been recovered, that an action is pending ... " Since 1903 the Act has been the subject of a number of minor amendments but its basic structure remains unchanged. The present Act is reproduced in full as an Appendix to this Report.

B. A Few Words

The remedy provided by the *Attachment of Debts Act* is relatively straightforward. It provides a procedure whereby execution proceedings may be taken against a certain type of asset: namely the right to receive a payment of money. Nonetheless a somewhat confusing vocabulary has arisen in connection with the remedy.

In 1854 when the attachment of debts provisions of the *Common Law Procedure Act* were framed, a term was needed to identify the third party, the person who owed the debt which was to be attached. The word "debtor" was inappropriate as it would lead to confusion with the party to the main action who "owned" the asset (the debt) against which proceedings were to be taken. The draftsman of the Act adopted the term "garnishee" to identify the third party who owes the
debt attached.

Garnishment, warning not to pay money, etc., to a defendant, but to appear and answer to a plaintiffcreditor's suit. It usually arose in cases of detinue thus: If a defendant alleged that certain deeds were delivered to him by the plaintiff and another person upon condition, such defendant prayed that the other person might be warned to plead with the plaintiff, as to whether the conditions were performed or not, he, the defendant, being willing to deliver the property to the person entitled to it; thereupon a process of garnishment, monition, or notice issued, and all parties were brought before the Court, that the cause might be thoroughly and justly determined. It was nearly allied to the proceedings in interpleader.

This caused a number of associated terms to be used in association with the attachment of debts. They include: "garnish," "garnishment," "garnishable," "garnishing," "garnishor," and the various tenses of the verb forms of the word. The difficulty is that any particular form of a word based on "garnish" may be used in a number of ways. Thus, although "garnishee' may refer to the third party, one might also speak of "a garnishee" in the sense of "an execution." "A garnishment" may also be used in the same way although "garnishment" may also be used as a word to refer to the remedy generally.

Both "garnish" and "garnishee" are often used as infinitives, thus one might say "to garnish a debt or "to garnishee wages ..." The words "garnishing" and "garnishable" tend to be restricted to use as adjectives as in "a garnishing order" or "a garnishable debt." The word "garnishor" is used exclusively to refer to the person who invokes the process. It is not easy to determine what is or is not proper usage in the area. In this Report we try to avoid the more exotic usages and in most cases our meaning should be clear from the context.

Some disorder also surrounds the language which may be used to describe the other parties. The person who invokes the remedy may be called "creditor," "judgment creditor," "plaintiff" or "garnishor." Different terms may be needed depending on whether the remedy has been invoked before judgment or after judgment or whether one wants a term applicable to both. Similarly, the other party might be referred to as the "debtor," "judgment debtor" or "defendant," depending upon the context.

Thus we may have a	(creditor) (judgment creditor) (plaintiff) (garnishees)	who	(attaches) (garnishes) (garnishees)	a garnishable debt

In the hands of a garnishee which is owed to a (debtor) (judgment debtor) (defendant) by means of a garnishing order.

There is one final area in which the vocabulary we use calls for some explanation. Chapter V we make certain recommendations concerning the garnishment of debts owed jointly to the debtor and to one or more other persons. A joint bank account is an example of this kind of debt but it is by no means the only example.

To describe the parties to such an arrangement we have adopted the language of "obligation" and the associated terms "obligor" and “obligee". An "obligor" is a person who owes an "obligation" and an "obliges" is a person to whom the obligation is owed.

Thus in the case of a joint bank account the (bank) owes an obligation to its joint (obligor)

(depositors)
(obligees).

CHAPTER II PROCEDURE UNDER THE ACT

A. Jurisdiction

The *Attachment of Debts Act* purports to regulate garnishment proceedings in all civil actions, whether originating in the Supreme Court of British Columbia, a County Court, or the Small Claims Division of the Provincial Court. The Act is also incorporated by reference into the *Family Relations Act* and the *Children of Unmarried Parents Act* to regulate some aspects of garnishment proceedings taken under those Acts.

With respect to garnishment proceedings arising in the Provincial Court, judges of that court have the exclusive jurisdiction to make orders and do other judicial acts. In the Supreme and County Courts, on the other hand, jurisdiction is given to both judges and registrars of the respective courts. In respect of most matters, such as the making of a garnishing order, their jurisdiction is concurrent. A registrar, however, has exclusive jurisdiction to order a variation of exemptions under section 3A of the Act, while a judge has exclusive jurisdiction to make certain orders under sections 10 14 and 15.

So long as the garnishee is within British Columbia a garnishing order made by the Supreme Court is effective throughout the Province, and any such limits that might exist with respect to a county court are expressly negated by section 2(2) which provides:

> In the application of the Act to proceedings in a County Court, the County Court and the Judge, Registrar, and Deputy Registrar thereof have and may exercise, without the territorial limits for which they are appointed as well as within those limits, all the powers, jurisdiction, and authority by this Act conferred on a Court and the Judges and the Registrars thereof respectively.

There is no comparable provision relating to the Small Claims Division of the Provincial Court but we understand that, in practice, they regard their garnishment process as having effect throughout the Province.

B. Garnishment: The Basic Procedure

A garnishing order is a "true" order in the sense that it is made by a person sitting in a judicial capacity on the basis of appropriate evidence. It is not obtained automatically at the request of the creditor as is the case with a writ of execution such as a writ of seizure and sale. In practice most garnishing orders are made by the registrar or a person designated by him. In theory, counsel for the judgment creditor should be present to speak to the order, but in prac-

tice, this requirement is routinely disregarded and process is issued informally so long as the supporting materials are in order,

Section 3 of the Act sets out what the supporting affidavit must contain, but section 6 specifies that the forms of affidavit set out in the schedule are "sufficient." The affidavit may be made on information and belief, and the maker of the affidavit need not disclose the source or basis of his belief beyond what is required by the language of the forms. The affidavit is construed strictly and the smallest technical error may invalidate it.

The garnishing order is made in one of the appropriate forms set out in the Schedule to the Act. The amount attached by the order normally includes an amount for costs relating to the order. Arrangements are then made, often through the sheriff, to serve a copy of the order on the garnishee. The Act sets out special provisions for the service of garnishment process on the Crown. The Act also provides that the judgment debtor be served with a copy of the order "forthwith" or by substituted service if personal service cannot be effected.

C. Payment into Court

The substance of a garnishing order is the command that "all debts (etc.) ... be attached ... and paid into Court." The service of the order "binds" a debt due to the judgment debtor in the garnishee's hands from the time of service. The payment into court by the garnishee is often accompanied by a "notice" which is delivered to the judgment creditor. The garnishee is entitled to his costs of complying with the order on a solicitor and client basis. The judgment creditor is responsible for these costs and often an amount is withheld from the amount paid into court in respect of them:

If the garnishee does not pay the money into court in compliance with the order, the creditor may apply to a judge for further order. On the hearing of such an application, if the garnishee disputes his liability to the judgment debtor, the Judge may order that the issue be tried or he may summarily dispose of the matter in chambers. If the garnishee is found to be liable, or the liability is not disputed, the Judge may order that the garnishee pay into court or to the judgment creditor the amount due from the garnishee to the debtor or as much as is necessary to satisfy the judgment and costs. This second order is similar to a judgment against the garnishee and if it is not complied with, execution may issue against the garnishee.

A payment into court or satisfaction of an order by a garnishee is, as between the garnishee and the judgment debtor, a valid discharge of the garnishee's liability.

D. Payment out of Court

The procedure to obtain payment out of court to the creditor, of money garnished, is set out in section 10 of the Act. However, before steps can be taken under section 10, two conditions must be satisfied. First, the creditor must have obtained a judgment. Thus money garnished before judgment may not be paid out to the creditor unless and until he has taken judgment. Secondly, the Act seems to require that the debtor has been served with a copy of the garnishing order. Section 8(2) provides:

> A copy of the garnishing order shall be served forthwith ... upon the ... debtor ... and no order shall be made for payment to the plaintiff or judgment creditor of money paid into Court by the garnishee, as provided in section 18, [sic] until service of such copy has been proved by affidavit filed.

Section 10 provides four ways in which the creditor may obtain payment out of court. First, he may apply, on notice to the debtor, to a judge for a formal order for payment out under section 10(2). Two further methods are provided in section 10(3):

Money paid into Court under garnishing proceedings may be paid out to a judgment creditor or his solicitor without any order of the Court where

(a) ten days' notice of the intended payment out is given to the judgment debtor and the judgment debtor has not, on or before the day upon which the ten days expire, filed notice of his intention to dispute the payment out; or

(b) the judgment was obtained by default and three months have expired from the day upon which the money was paid into Court.

The notice referred to in clause (a) must be served personally on the debtor. The fourth way in which the creditor may proceed is to obtain the written consent of the debtor to payment out of court and to file that consent with the registrar or judge.

It will be seen that in only one set of circumstances will the creditor be able to obtain payment out of court without any further communication with the debtor where judgment was obtained by default and the creditor has allowed the money to sit in court for three months. In all other cases, either personal notice must be given to the debtor or the creditor must approach him with a view to obtaining his consent. This is in contrast to the distribution of the proceeds of execution under a writ of seizure and sale where no notice to, or acquiescence of, the debtor is necessary.

CHAPTER III THE SCOPE OF THE ACT: WHAT DEBTS ARE GARNISHABLE?

A. The Legislative Scheme

The British Columbia *Attachment of Debts Act*, like most Canadian garnishment legislation, appears to confine the remedy it provides to debts which are "due or accruing due." Unfortunately, the drafting of *the British Columbia Act* seems to reflect an uncertainty of policy, the scope of the remedy having been defined and redefined with results which are confusing rather than enlightening. The starting point is section 3(1) which provides that a judge or registrar, once the appropriate affidavit is filed, may order that:

> ... all debts due from the garnishee to the defendant, or judgment debtor, or person liable to satisfy the judgment or order, as the case may be, shall be attached to the extent necessary to answer the judgment recovered or to be recovered, or the order made, as the case may be.

One might have thought that a single provision defining the term "debts due" would have been enough to make the intent of the legislation clear, but the *British Columbia Act* devotes no fewer than four, and possibly five, sections to this exercise. Below we set out the relevant provisions and then attempt to articulate their joint meaning.

The first relevant "definition" is set out in section 3(7) which provides:

(7) In this section, the expressions "debt due" and "debts due" include debts, obligations, and liabilities owing, payable, or accruing due and wages that would in the ordinary course of employment become owing, payable, or due within seven days after the date on which an affidavit has been sworn under subsection (1) or subsection (2).

The expression "debts, obligations, and liabilities," is further defined in section 4:

4. Except as hereinafter mentioned, the expression "debts, obligations, and liabilities" in section 3, and that expression or any of the words composing it, when used in an order made under section 3, does not com-

> prise an obligation or liability not arising out of trust or contract, unless judgment has been recovered thereon against the garnishee, but (though not so as to restrict further than as aforesaid the general sense of the words) the said expression in the said section or in any such order shall be construed to include all claims and demands of the defendant, judgment debtor, or person liable under the order for payment of money against the garnishee arising out of trusts or contract where such claims and demands could be made equitable execution.

Two further definitions are set out in 2(1):

> 2. (1) In this Act, unless the context otherwise requires,
>
> "debt or moneys accruing due", and any expression of like import, includes wages or salary that would in the ordinary course of employment become due or payable within seven days after the day on which an affidavit has been sworn pursuant to subsection (1) of section 3;
>
> "wages" includes salary, commission, and fees, and any other money payable by an employer to an employee in respect of work or services performed in the course of employment of the employee; but it does not include deductions therefrom made by an employer under an Act of the Legislature of any province or the Parliament of Canada.

Finally, one must look at section 12 which may be still another attempt to articulate the scope of the garnishment remedy. The section provides:

> 12. If the claim or demand is not due at the time of the attachment, an order may be made for payment thereof at maturity, and execution may issue therefor when it matures.

What do all of these provisions mean? It is proposed first to examine them alone and without reference to the case law to see what sense can be made of them, and then review the cases to see whether they cast any light on this perplexing legislative maze.

The basic aim of the provisions appears to be to give an expanded meaning to the words "debts due" which appear in section 3(l). Section 3(7) seems to do this in two ways. First, "debts due will include "debts, obligations, and liabilities owing, payable or accruing due." Secondly, "debts due" is extended to include "wages that would in the ordinary course of employment become owing, payable, or due within seven days" after the swearing of the affidavit. The intent of the first part of section 3(7) seems to have been simple enough, namely, to make garnishable "debts accruing due," a formula included in most Canadian legislation. But the legislation speaks, not only of debts, but also of "obligations and liabilities" accruing due. Are these words simply redundant, or are they intended to expand the scope of the remedy to include obligations other than "debts" as the term is defined in the cases? If so, what is the difference between a "debt" accruing due and an "obligation" or "liability" accruing due?

Section 4 may have been intended to answer these questions by extending the scope of garnishment to include all money obligations which are amenable to equitable execution. It has been pointed out elsewhere that the scope of equitable execution has fluctuated, and that at some periods in its history it was a wideranging remedy capable of catching many assets of the debtor, including money obligations which could not be described as debts due or accruing due. It is at least arguable that the purpose of section 4 was to extend the normal scope of garnishment to include such money obligations.

The scope of the formula "debts due" in section 3 may be still further extended by section 12. Its relevance, or lack thereof, has been described in the following terms:

> The section is wonderfully evasive as to its meaning. Does it overrule the principle that there must be an existing indebtedness ... or is the expression "not due" intended to mean only "not payable." ... On the other hand,

> the section refers to "claims" and "demands," and would therefor seem to be more closely related to the "equitable execution" provision in s. 4, but the intention of the section is then still not clear.

There do not appear to be any reported cases which illuminate this obscure provision.

It was noted above that section 3(7) extends the meaning of "debts due" in two ways. The second part of the subsection provides that the expression "debts due" includes "wage" that would in the ordinary course of employment become owing, payable, or due within seven days after the date on which an affidavit has been sworn under subsection (1) or subsection (2)." The word "wages" is given an expanded meaning in section 2(1) quoted above.

B. English Cases on "Debts Due or Accruing Due"

After some uncertainty, the English courts, soon fixed on a relatively clear, if restrictive, interpretation of "debts due or accruing due." In *Jones* v. *Thompson*, the defendant had recovered a verdict against the intended garnishee, but no judgment had been signed. The court held that such a claim was one for unliquidated damages and could not be attached. The judges said that the words "or accruing" were intended to apply "to those cases in which there is *debitum in presenti solvendum in futuro* ... There must be a debt, though it need not be yet due."

This approach to "debts accruing due" was confirmed in the important decision of the Court of Appeal in *Webb* v. *Stenton*. In that case, the judgment debtor was entitled for his life to the income arising from a fund vested in trustees, payable halfyearly in February and August. The judgment creditor made an application in November for an order attaching the debtor's share of the income in the hands of the trustees. The Court of Appeal held that there was no debt "owing or accruing" at the time when the application was made. Fry L.J. explored the meaning of "debts accruing" in the following passage:

> In my opinion the defendants' counsel is right in contending that the words there, "is indebted," and the words "debts owing or accruing" refer to the same subject matter. It appears to me to be plain that to satisfy either of those two expressions there must be an actual present debt. I think further that the debt may be either equitable or legal ... I have further no doubt that the word "indebted" describes the condition of a person when there is a present debt, whether it be payable in *presenti or in futuro*, and I think that the words "all debts owing or accruing" mean the same thing. They describe all *debits in presenti*, whether *solvenda in futuro*, or *solvenda in presenti*.

The result of decisions like *Jones* v. *Thompson and Webb* v. *Stenton* is that the English courts have restricted garnishment to cases where the garnishee owes to the judgment debtor a debt which is subject to no conditions or contingencies except, perhaps, the effluxion of time. Therefore the courts have refused to permit garnishment in the following cases:

(1) Payments owing from a contractor to a subcontractor under a building contract which provided for an architect's certificate before payment was due.

(2) The portion of the proceeds of the surplus assets of a company in liquidation owing to a shareholder.

(3) A legacy of L50 left in a will to the judgment debtor, and which the executor was prepared to pay.

(4) Money owing by an automobile insurer as the result of an accident caused by the (insured) judgment debtor which had led to judgment for the plaintiff for L150.

(5) Money paid by the judgment debtor into a bank savings account.

There have been a few cases in which the English courts have stretched the concept of "debts accruing due" to cover situations which seem doubtful, but the general tendency of the English cases has been to interpret the formula narrowly. In part, this restrictive interpretation may have been accepted on the assumption, stated expressly in *Webb* v. *Stanton*, that those near debts which do not fall within the scope of garnishment can be reached by equitable execution. At the time that *Webb* v. *Stenton* was decided, the assumption may have been justified, but the equitable execution remedy has since been sharply reduced in scope, while garnishment has not similarly expanded. The result is that there are now a large range of neardebts which cannot be reached at all by the English creditor, although amending legislation has dealt with some of the problems.

C. Canadian Cases on "Debts Due or Accruing Due"

When the Canadian case law is examined the picture becomes more complex. Most Canadian jurisdictions followed the English legislation and limited garnishment to "debts due or accruing due," but a few provinces such as British Columbia adopted potentially wider legislative formulae. One must say "potentially" because the courts in British Columbia and elsewhere have often seemed to overlook the differences between the legislation before them, and the narrower English formula. The cases reveal a tendency to apply English cases directly and indiscriminately, and the result is considerable confusion about the present scope of garnishment in British Columbia. This part is devoted to an examination of the Canadian cases which construe the narrow "debts due or accruing due" statutory language.

In the earlier cases, various tests for determining the meaning of "debts due or accruing due" were suggested. An early Supreme Court of Canada decision, *Donohoe* v. *Hull Brothers & Co*., set out a principle which was at one time very popular but which is now regarded as unacceptably restrictive. Sedgwick J. articulated the test as follows:

> Now one elementary principle runs through all these cases, viz., to enable a judgment creditor to obtain an order compelling a third person (the garnishee) to pay to him a debt which he would otherwise have to pay the judgment debtor, the debtor must be in a position to maintain an action for it against the garnishee, and the debt must be of such a character that it would vest in the debtor's assignee or trustee in bankruptcy if he became insolvent. There are cases where, even with both of these conditions present, garnishee process will not lie, but these cases do not concern us now. There must in all cases be the beneficial interest, as well as the right of action against the garnishee, in the judgment debtor. Further, the claim of the debtor must be a debt: it must arise *ex contractu* not *ex delicto*.

The test, derived from *Cababe on Attachments*, is very narrow. There are many situations in which a person will not be able to maintain an action for a sum of money payable at a future date. Later Canadian cases have not followed the *Donohoe* test and have opted for a principle much closer to that developed by the English cases. In *Garner* v. *Strickland*, for example, the British Columbia Court of Appeal was presented with an argument based on the Donohoe test which they rejected:

> That contention to our minds robs the word "accruing" of all meaning ... There can be debts already owing but not yet recoverable by action because the parties have postponed the date of payment. The debt is a present debt, the payment is to be a future payment. There are many cases in which such debts have been held garnishable; we doubt if this proposition has ever been disputed ...
>
> There is an obvious distinction between an obligation to pay which is only conditional on the effluxion of time and an obligation which is merely inchoate until the other party has fully rendered services which are a condition precedent to the completion of the obligation. In the language of Lamont, J.A., in *Bapsi* v. *Farcas*, [1924] 1 D.L.R. 1154, the distinction is made between a "perfected debt" and a conditional one. He illustrates the difference aptly by comparing the money payable under a mortgage with that payable under an agreement for sale which is affected by questions of title, etc.

This reasoning is consistent with the position taken in English cases like *Webb* v. *Stenton*.

An analysis of the actual decisions in Canadian cases reveals a pattern much like the English law. Below we explore briefly the way in which Canadian courts, interpreting the restrictive "debts due or accruing due" language, have applied it to a number of situations.

1. ___Unliquidated Damages

A claim by the judgment debtor against a third person for unliquidated damages cannot be attached until judgment is entered. This is so even if the third person has paid money into court and even when the court has pronounced a judgment in favour of the judgment debtor but the judgment has not been entered. The result is otherwise where the parties have agreed to settle the action on payment by the third party of a fixed sum.

2. Claims on Fire Insurance Policies

The cases consistently hold that where the judgment debtor's insured asset has been destroyed by fire, the fire insurance policy cannot be garnished, even where proofs of loss have been filed,

28. *Jobin Marrin Co*. v. *Tyne*, (1917) 11 O.W.N. 279; *cf*. *Lloyd* v. *Milton and Derkson* (No. 5), [1940] 1 W.W.R. 1 (Sask. K.B.). until the insurer admits liability and agrees to pay rather than replace the asset.

3. Claims on Automobile Liability Insurance Policies

In *Century Indemnity Company* v. *Rogers*, the plaintiff who had been injured in an automobile accident recovered a judgment and then sought to attach the proceeds of the defendant's insurance. It was held by the Supreme Court of Canada that a garnishable debt existed because a clause in the insurance policy expressly created a debt owing to the insured once judgment was recovered. The Court specifically reserved on the question whether, in the absence of such a clause, there would have been a garnishable debt.

4. ___Life Insurance

A life insurance policy on the life of a deceased husband payable to his widow is garnishable by judgment creditors of the widow even where succession duty releases have not yet been filed.

5. Legacies

Where the judgment debtor is entitled to a specific bequest and the executors of the will have agreed to pay the legacy, the legacy can be attached. Without such an agreement the specific legacy is not a 'debt due or accruing. In the case of a bequest of a distributive share of an estate, apparently no garnishment will be effective, even if the executors or administrators have money and have agreed to pay, except where they have quantified the beneficiary's share and have instructed their lawyers to issue a cheque to the judgment debtor.

6. Beneficial Interest in Trust

Before *Webb* v. *Stenton* there were decisions holding that a beneficiary's interest in a trust could be attached, but the later Canadian cases refuse garnishment of such a near debt.

7. ___Rent

It is clear law that rent which is due can be garnished. As to rent not yet due at the date of attachment, the early Ontario cases, relying on apportionment legislation, held such rent to be a "debt accruing due," but later cases follow *Barnett* v. *Eastman* and hold that such rent cannot be attached.

8. Mortgage Payments

Unlike the case of rent, present and future payments owed by a mortgagor have been held to be "debts due or accruing due" which are garnishable by creditors of the mortgagee.

9. Payments on an Agreement for Sale of Land

The cases on present and future debts under an agreement for sale are complex, and it is not possible to predict with certainty how a court would classify such payments today. The two leading cases held that debts due or accruing due from a purchaser under an ordinary agreement for sale cannot be attached where it is still necessary for the vendor to prove title. In *Barsi* v. *Farcas*, Lamont, J.A. drew a distinction between mortgage debts and monies ddu or accruing under an agreement for sale:

> It was urged that the same principle should be adopted in respect of purchasemoney under an agreement for sale of land as applied in the case of mortgage moneys under a mortgage. In my opinion there is a clear distinction between moneys due or accruing under a mortgage and those under an agreement of sale. Under a mortgage, the debt becomes an unconditional liability at the time fixed for payment. Under an agreement of sale, the debt at the time fixed for payment is conditional upon the vendor's being able to make title, and where he has no title the purchasemoney never becomes payable.
>
> I am therefore, of the opinion that the debts sought to be attached in this case not being an unconditional liability for which the defendant could have maintained an action against (the garnishee), is not a debt due or accruing due within the meaning of the Act, and is therefore not garnishable.

There are two difficulties in accepting this statement as the final word. Both Barsi and Faas rely on the now rejected Donohoe test for determining whether a debt is "accruing due," namely, whether an action can be brought for the money. Moreover, there are other Canadian cases in which payments not yet due under an agreement for sale have been held to be garnishable, and one case holding that payments presently due cannot be attached. Faced with this range of results, it is difficult to state the law on this matter with any certainty.

10. Payments Owed to Subcontractors Under Building Contracts

It has been held in Alberta that where a subcontractor completes his work under a contract which makes the granting of an architect's certificate a condition to payment, the payment is still "accruing due" and can be garnisheed.

11. Payments Due on Promissory Notes

Where a promissory note is due, the debt can be attached. A promissory note payable on demand has been held to be a present debt and therefore garnishable. Where the payment on the note is not yet due, the weight of authority is that the payment is not "accruing due" and is therefore not garnishable.

D. Canadian Cases on the Wider British Columbia Formula

It has already been suggested that the British Columbia *Attachment of Debts Act* would appear to make exigible a wider range of financial obligations than the normal "debts due or accruing due" formula. In this part we consider the case law analyzing the seemingly wider sections of the *British Columbia Act* and legislation of other provinces which used, for varying periods of time, comparable provisions.

The source of the broader formula appears to be *The Queen's Bench Act* of Manitoba. Ontario used the narrow English legislation until 1887 when it was changed to a form substantially the same as the present *British Columbia Act*. In 1894 the Ontario judges, dissatisfied with the wider rule, had it changed back to the English wording. In Manitoba, however, the broader rule which existed at least as far back as 1875, continued to 1966 when the Manitoba legislature reverted to the narrower formula. Only in British Columbia have the wider provisions survived untouched to the present.

The cases reveal two approaches to the wider legislative formula. The approach which dominated the Ontario cases during the relevant period and the British Columbia cases up to about 1930 was to view the legislation as substantially extending the scope of garnishment. The case which most clearly articulates this view of the legislation is *Lanning Fawcett and Wilson Ltd*. v. *Klinkhammer*. In that case, the judgment debtor had threatened the garnishee with an action for wrongful dismissal and malicious prosecution. The parties had discussed settlement and had reached an agreement, but the garnishing order was served before payment of the sum agreed on. In both the County Court and the Court of Appeal it was agreed that the sum was garnishable, but very different reasons were advanced to support that conclusion.

At first instance, Howay Co. Ct. J. started from the assumption that the claims for damages, even after the garnishee's admission of liability, would not have been garnishable in England because the sum agreed on had not been settled:

> There is no doubt whatever that under the law as it exists in England neither of these sums can be attached. Older XLV., r. 1 of the English Rules shews that in order to be attachable the "moneys must be debts owing or accruing". The strictness with which this Order has been construed is shewn by such cases as ... *Webb* v. *Stenton*. But the point which I have to consider here is whether the words of our statute ... are wide enough to include these claims, or either of them. Under section 3 are attachable "all debts, obligations, and liabilities owing, payable or accruing due," so that I must concern myself with the construction and meaning of the words "obligations and liabilities." It is to be observed that the trend of legislation in connection with this subject has been towards bringing additional property of the debtor into liability to satisfy a judgment, and also to enable moneys to be retained pending the decision of the defendant's liability.

He went on to refer to Manitoba cases which permit attachment of sums which would not be garnishable under the English rules, and he then addressed himself to the judgment debtor's claim for damages for wrongful dismissal:

> It will be noticed that the liability in this case was one arising out of contract a claim for damages for breach of contract to carry the defendant safely. Section 4 of our statute dealing with the meaning of the term "debts, obligations, and liabilities" states that these words shall include all claims and demands of the defendant against the garnishee arising out of trusts or contracts where such claims and demands could be made available under equitable execution. "There is no doubt that such provision widens the range of debts, obligations and liabilities which may be garnishable. It means that certain claims and demands which could not be reached by ordinary proceedings in law, but which might be the subject of equitable relief and could be made available by the appointment of a receiver, can now be attached by garnishing order": *per* Dubuc J. in *Lake of Woods Milling Co*. v. *Collin* (1900), 13 Man. L.R. 154 at pp. 17071.

On appeal it was agreed that the sum was properly attached but, it appeared to be on the basis that the settlement agreement did fix the sum to be paid in settlement of the dispute. Such a sum would have been capable of attachment under the narrow or the wide rule. McPhillips, J.A., however, went further and expressly endorsed the County Court Judge's view of the law as "entirely correct."

The second approach taken by the judges to the provisions in question has been to hold that they are not wider, in any significant sense, than the "debts due or accruing due" formula. A leading case to adopt this position is *Lake of the Woods Milling Co*. v. *Collin*. In that case, property which had been insured by the judgment debtor was destroyed by fire and, before the judgment debtor had filed proofs of loss, a garnishing order was served on the insurer.

Killam C.J. reviewed the history of the relevant legislation and then subjected the Manitoba equivalent of section 3(7) of the *British Columbia Act* to the following analysis:

> Now, while the words "obligations and liabilities" are very wide, it is clear from the nature and course of this legislation and from the accompanying provision for working it out, that only a pecuniary liability can be attached. This consideration excludes any liability or obligation arising from a mere contractual relation under which the garnishee has bound himself to do any other act than the payment of money, unless and until he has made such a breach that a money demand has arisen against him.
>
> And the words "debts, obligations and liabilities" are further limited by the words "owing, payable or accruing due."
>
> These insurance moneys were not payable when the attaching order was made. It is not a case of an existing cause of action with a condition which affects the remedy only ...
>
> And the money was not "accruing due." The decisions in England upon a statute in *pari materia* are applicable to show that these words refer only to such liabilities as are *debits in presenti, solvenda in futuro*.
>
> It seems to me that there is in these definitions no justification for describing a liability which is not absolute, but is dependent upon a condition which may or may not be fulfilled, as "owing." The word seems naturally to import absolute liability. The English cases as to "debts owing or accruing" have a bearing even upon the wider language of our statute.

Thus the apparently broader Manitoba legislation was narrowly interpreted as though it were the English law.

Killam C.J. did not refer to the equivalent of section 4 of the *British Columbia Act*, but Dubuc J., did discuss it. He observed that it widened the scope of the Act, but went on to note that recent English cases had so limited the scope of equitable execution that it was unlikely that a situation would arise in which the provision would make a difference, unless special circumstances are proven.

The differing interpretation of the "broad" provisions is reflected in other cases. An examination of the garnishment cases decided during the relevant periods in Ontario, Manitoba, and British Columbia reveals that where the liberal *Lanning* analysis of the sections was accepted, garnishing orders were granted in situations where such orders would be refused under the English formula or under the British Columbia provisions, narrowly interpreted. The Ontario judges were hostile to the broader rule which existed between 1887 and 1894, but they conceded that it was wider, and sought to apply it. Thus the rule was relied upon to permit the garnishment of a claim on an insurance policy before the claim had been adjusted or admitted by the insurance company. In *McLean* v. *Bruce*, the interest of a residuary legatee under a will was attached, although it was not yet clear what, if anything, would be coming to him. Again express reference was made to the expanded rule. Other cases conceded that the 18871894 rule was broader than the English formula, but reached the same result as under the narrower rule.
In Manitoba, there had been one decision before *Lake of the Woods* which had relied on the wider wording of the Manitoba rules to permit garnishment of a tort claim for unliquidated damages. After *Lake of the Wood*, however, the Manitoba cases generally followed the restrictive interpretation of their legislation. Thus garnishment was refused against a conditional debt, a promissory note not yet due, and a claim against a fire insurance policy before filing of proofs of loss. In *Empire Sash and Door Company* v. *McGree*, the judgment creditor was successful in attaching monies owing on a building contract requiring an architect's certificate before the certificate had been given, but the same result may be achieved under narrower legislation. Thus the Manitoba cases after *Lake of the Woods* loyally followed that decision and the English model.

The British Columbia cases do not fall into any simple pattern. Initially, the courts, following the *Lanning* case, adopted the liberal interpretation of the legislation and extended the scope of garnishment. The later cases, however, adopted a narrow *Lake of the Woods* interpretation of the Act. The *Lanning* case, on the facts as found by the Court

of Appeal, would have been decided in the same way under the narrower rule. In two subsequent cases, however, judges used the *Lanning* interpretation to sanction the attachment of money owing on agreements for the sale of land where title had not yet been proven. In both cases, the courts expressly noted that the British Columbia legislation was wider than the English formula. In *Rayner* v. *Neurauter*, garnishment was permitted of money owing on a contract with a railway company to take out ties, despite the fact that the company had not yet inspected and accepted the work. Again reference was made to the breadth of the legislation.

The British Columbia cases from approximately 1930 to the present involve an almost complete about face. Without exception, they evidence a narrow and restrictive view of the legislation, and most of them cite *Lake of the Woods*. The most surprising feature of the later cases is their failure to cite *Lanning* or any of the cases which followed it. The new British Columbia attitude is articulated most clearly in *Lampman* and *Laidlaw Ltd*. v. *Levine*, a decision of the Court of Appeal. In that case, the judgment debtor had agreed to sell land to the garnishee for a cash price to be paid on execution of a conveyance. At the date of garnishment, no conveyance had been made. Sheppard, J.A. stated:

> The plaintiff contends that this garnishing order will attach "all debts, obligations and liabilities owing, payable or accruing due" and is not restricted to debts due and accruing due as in other jurisdictions; therefore this garnishing order should be given an extended meaning so as to attach the balance of purchase moneys under the executory agreement. That contention has not been made good.
>
> > It is to be observed that the words "all debts, obligations and liabilities" are further limited by the words "owing, payable or accruing due" and these limiting words "owing, payable or accruing due" require the debt, obligation or liability of the garnishee to be absolute and not conditional. It was so held in *Garner* v. *Strickland and Western Forest Industries Ltd*., a judgment of this court.

After referring to *Lake of the Woods* it was held that the debt was conditional and therefore not "owing, payable or accruing due" and that the garnishing order should be set aside.

The same kind of reasoning has led British Columbia judges, since 1940, to refuse garnishment of salary not yet due, conditional debt obligations, and payments from a disability insurance policy not yet due. As no fewer than five of these decisions are those of the Court of Appeal, one must conclude that the *Lake of the Woods* interpretation is now firmly fixed in British Columbia law.

E. Other Matters

1. ___Funds in Court

There can be many situations in which funds may be held by a court which are, or may become payable to a person. Money may be paid into court in settlement of a damage claim or pursuant to one of a number of rules of law which provide for such payments. If the person to whom the money may be payable is a judgment debtor, can those funds be made available to his creditor?

The legal system has experienced considerable difficulty in devising effective creditor's remedies against funds of the debtor held by the court or *in custodia legis*. Before 1851, the English courts had developed no universally accepted mechanism to reach funds in court, and the case of *Watts* v. *Jeffreyes* in that year was only able to bridge the gap by adopting a doubtful interpretation of the *Judgments Act, 1838*. Since that time, courts and legislatures have developed various devices to reach funds and assets in court, but none have proved to be completely straight forward or successful.

One reason for the incapacity of the law to develop a clear remedy may be that, except where legislation has expressly dealt with the problem, the ownership of funds in court is not clearly settled. The 19th century English cases

sometimes describe the Crown or the AccountantGeneral as holding funds in court in trust for the litigants. Other cases reject the trust analysis in favour of the theory that the state has only "custody" or "control" of the funds. This ambiguity in the ownership of funds in court appears to have been imported to British Columbia.

The legal uncertainty as to the nature of the litigantdebtors' rights to funds in court has led to some confusion as to the remedies available to the creditor against such funds. In England since the enactment of the *Common Law Procedure Acts* of 1854 and 1860, garnishment of funds in the hands of the clerk of the court, the sheriff, and other court officials has been attempted infrequently. The general conclusion is that garnishment is not available.

The leading English case is *Dolphin* v. *Layton* which holds that the proceeds of a judgment paid into the county court are not garnishable. The reasons are exceedingly short, but the argument of counsel was that there was no debt due from the garnishee (the registrar of the county court) to the judgment debtor. This same reasoning underlies the line of cases which establish the charging order remedy against funds in court, and the modern English practice texts take the position that the charging order, not garnishment, is the proper method to attach such funds. On the other hand, the proceeds of an execution in the possession of the sheriff have been held to be attachable.

The position in Canada is less clear. Two early cases hold that funds in court or held by a division court clerk for a suitor are garnishable by a creditor of that suitor, but later cases have gone the other way, sometimes by distinguishing the earlier cases and sometimes by refusing to follow them. The better view today would appear to be that funds in court are not garnishable.

In some cases the legal position has been altered by statute. *The County Courts Act* of Manitoba, for example, provides that money held by a clerk of a count court are garnishable.

2. Joint Bank Accounts

It is necessary to refer briefly to the difficult problem of garnishment of a joint bank account. Where the judgment debtor is one of two or more holders of such an account, the courts have had difficulty in deciding whether such an account is garnishable and, if so, to what extent. The English court, starting from the proposition that a joint debt cannot be attached in respect of the debt of one joint debtor, have applied the same reasoning to the joint bank account and have refused garnishment entirely except where the debt is owed by all joint bank account holders.

94. *Davis* v. *Nash et al*., (1958) 25 W.W.R. 630.

95. *Empire Fertilizers Ltd*., v. *Cioci*, [1934] O.W.N. 535 (C.A.). This case does not appear to have altered the basic position with respect to the nongarnishability of joint debts. It seemed to turn on the particular character of the account in question. The British Columbia courts (at the Supreme Court level) have followed the English cases. The Ontario Court of Appeal, on the other hand has held a joint bank account to be completely exposed to garnishment resulting from a debt of one of the joint bank account holders.

F. Conclusions

The problem which has haunted the courts since the enactment of the *Common Law Procedure Act, 1854* has been the arbitrary character of the distinction between those obligations which can be attached by the garnishment procedure and those which cannot. Whether one adopts the narrower English formula of "debts due or accruing due" or the broader formula contained in the *British Columbia Act*, it is clear that some financial obligations will fall within the scheme of the legislation whereas others, not substantially different in kind, are outside the legislation and cannot be reached by garnishment. The latter seem to fall into three categories.

(1) debts subject to a condition other than, perhaps, the effluxion of time,

(2) inchoate financial obligations which may ripen into a debt at some time in the future (such as claims for unliquidated damages), and

(3) debts which are not in existence in any form at the time of the garnishment order but which come into existence later (such as future wages).

Most of these obligations would be property of the bankrupt for the purposes of the *Bankruptcy Act*, and they all form part of the present or future wealth of the debtor which should be available to pay his financial obligations. However, because the *Attachment of Debts Act* is of limited scope to begin with, and because it has been restrictively interpreted, the remedies available to the creditor under the Act are often ineffective to reach such obligations.

CHAPTER IV THE SCOPE OF THE ACT: WHEN IS THE REMEDY AVAILABLE?

A. General

What, if any, limitations are there on the availability of the remedies provided by the *Attachment of Debts Act?* Or, to turn the question around, what circumstances must exist as a condition precedent to the granting of a garnishing order under the Act? First, there must be a garnishable debt in existence. What constitutes such a debt was discussed in the previous chapter. Secondly, the creditor, or his agent must have a sufficient belief in the existence of the debt to swear an affidavit to that effect.

The second requirement places significant limitations on the availability of the remedy which do not exist with respect to execution pgainst other personal property. It is not necessary, for example, when issuing a writ of seizure and sale, that the creditor swear to his belief in the existence of assets of the debtor which may be seized by the sheriff. The writ is issued and has effect automatically. Under the *Attachment of Debts Act*, however, before a garnishing order may be issued the creditor or his agent must file an affidavit in which he swears:

> That to the best of my information and belief ... the garnishee, is indebted, under obligation, or liable to the said judgment debtor ...

There may be many situations in which the creditor suspects, with good cause, that a potential garnishee owes money to the debtor, but that suspicion falls short of the "information and belief" necessary to swear the affidavit. For example, if the debtor resides in a small community with only one bank, logic suggests that he maintains a garnishable account at that bank. But logical deduction is not "information and belief" and it seems the creditor, being unable, properly, to swear the affidavit, would be without a remedy. Examples could be multiplied.

A third requirement is that the garnishee must be within the jurisdiction of the court and the creditor must, in his affidavit swear to his belief in that fact. Moreover, the creditor must spdcify in his affidavit "with reasonable certainty, the place of residence of the garnishee" and provide a "description of the garnishee."

The final, and perhaps most obvious, requirement is that there must be some legal right or relationship which forms the basis of the proceedings. In most cases this is satisfied by the existence of an unsatisfied judgment debt owed by the debtor to the creditor. Thus, in the supporting affidavit the creditor must set out certain particulars of the judgment and swear to the amount remaining due "after making all just discounts." If the garnishing order is sought before judgment, other requirements are imposed which are discussed below.

B. Garnishment Before Judgment

The *Attachment of Debts Act* is almost unique in that it makes a remedy available to a potential judgment creditor before any judgment actually comes into existence. Prejudgment garnishment is not, however, available to every potential judgment creditor. He must first satisfy all the requirements which exist with respect to postjudgment garnishment, as well as a number of additional requirements.

Prejudgment garnishment is not available unless an action has actually been commenced and the status of the garnishor is that of plaintiff. Moreover under section 3(1) the plaintiff must swear as to:

> (iv) the actual amount of the debt, claim, or demand; and
>
> (v) that the same is justly due and owing, after making all just discounts ...

In other words, the plaintiff's action against the defendant must be one for a "debt, claim, or demand" which is "justly due and owing." The drafting of the section suggests an attempt to confine prejudgment garnishment to cases where the plaintiff's claim is one of debt rather than damages. There has been a long series of cases which have sought to interpret the somewhat uncertain words "debt, claim, or demand ... that ... is justly due and owing." The uncertainty is compounded by the fact that the *British Columbia Act* differs from the legislation in other Canadian jurisdictions which have commonly used the phrase "debt or liquidated demand" to describe those causes of action in which prejudgment garnishment is available.

Illustrative of the kinds of problems which have arisen is *Mitchell* v. *Fournier.* In that case, the plaintiff's claim, as endorsed on the writ, was for

> ... the sum of thirty-five hundred dollars ($3,500.00), being the value of goods and/or chattels owned by the plaintiff and improperly misappropriated by the Defendant.

The plaintiff obtained a garnishing order before judgment, and the defendant applied to have it set aside and to have the moneys attached and paid into court paid out to him. Manson J. characterized the issue as being the identification of the true nature of the plaintiff's claim and concluded that it was not a claim sounding in debt:

> In the case at Bar we have a claim in the nature of damagds but in the form of a liquidated claim. The mere phrasing of the endorsement on the writ cannot change the true nature of the claim. This is in actuality an action in trover ... If the plaintiff succeeds in his action his judgment will be, as the action is framed, for damages ... The damages are to be determined not by the *"ipse dixit"* of the plaintiff in the endorsement, but in one of the ways provided for in the Supreme Court Rules.

This kind of analysis has led the courts to hold that prejudgment garnishment is available where the plaintiff's claim was for a disputed'balance due on a mortgage, specific damages for breach of contract, arrears under a maintenance order, and claims framed in *quantum meruit*, but to refuse it with respect to claims for unliquidated damages, whether for breach of contract or tort, or for contingent debts. The cases are uncertain about claims for interest.

To provide the basis for a determination of whether or not the plaintiffs claim is one which will support a prejudgment garnishing order, the plaintiff is obliged to set out, in his affidavit "the nature of the cause of action" on which his claim is based. If the description is inadequate the affidavit is defective and no order will be issued.

Another limitation on garnishment as a prejudgment remedy is that it may not be used to attach wages. Thus the creditor is obliged to swear in his affidavit that "the indebtedness, obligation or liability of the ... garnishee is not for salary or wages."

C. Other Factors Affecting Availability

A rule has developed in England that garnishment will not be permitted where the result would be to give the garnishing creditor an inequitable or unfair advantage over other creditors or where the result would be unfair to the judgment debtor or to other possible claimants of the money owed. An example is the recent Court of Appeal decision in *George Lee & Sons* v. *Olink*. In that case, the plaintiff obtained judgment against the executrix of an estate for a debt owed by the deceased. He then sought a garnishing order *nisi* against the firm of solicitors who were acting for the executrix. The order was granted although at the time of the application there was a very serious doubt whether the estate was solvent. The garnishee appealed to the Court of Appeal to have the garnishing order absolute set aside. Russell L.J. stated:

> In this field it seems to me that it is proper to seek an equitable and fair answer: for example, in *Martin* v. *Nadel* it was not thought proper to make the garnishee order absolute When it might be unfair to the garnishee because there was a risk that the garnishee might in that case have to account a second time for the same sum in the courts of another country. In *Roberts* v. *Death* the order was not made absolute because there was a suggestion that the money due from the garnishee to the judgment debtor was due to the latter as trustee for another.
>
> In my view the proper course in a case such as this is one which is analogous to that adopted in *Roberts* v. *Death*, where the money due from the garnishee was ordered to be paid into court to abide the outcome of an inquiry into the suggestion that the sum was due to a the judgment debtor as trustee for another. Accordingly, in my view in this case the order absolute should be set aside; the garnishee should be ordered to pay into court the sum in question; there should be ordered an inquiry by the district registrar for his decision whether this estate is solvent or insolvent, the inquiry to be conducted with all speed ...

There is no clear line of Canadian authority in which the courts purport to assert or exercise a similar discretion to limit the remedy. A suggestion that such an inherent power exists, however, is made in the recent case of *Ridgeway Pacific Construction* v. *United Contractors*. The plaintiff was a subcontractor on a highway project and the defendant was the head contractor. The plaintiff sued the defendant for money owing on work done with respect to the project and issued a prejudgment garnishing order attaching money owed to the defendant hbad contractor. The head contractor's liability to his subcontractors was covered by a "labor and material payment bond" which would ultimately pay at least half of the plaintiff's claim. The head contractor therefore brought an application for an order to set aside the plaintiff's garnishing order. One argument raised was that, because of the existence of the bond, the garnishing order should be set aside as an abuse of the process of the Court. The argument did not succeed on the facts, but the comments of Meredith J. suggest that in a proper case he would be prepared to set aside a garnishing order where abuse of process could be established:

> Counsel for the defendant advances a further argument ... that the attachment proceedings are an abuse of the process of the Court ... The argument as I understand it is that, however frequently employed, the attachment process is an extraordinary one to be used only for the legitimate purpose of securing to the plaintiff the amount claimed not for purposes of extortion, harassment or embarrassment. If it can be shown that the purposes of the plaintiff are not legitimate then the attachment proceedings may be set aside as an abuse. Thus in *Whittimore* v. *Herbert*, (1878) 18 N.B.R. 361 (C.A.) garnishing proceedings were set aside where the Court held that a combination of moves initiated by the plaintiff, including the commencement of the action in which the plaintiff failed to reveal the true foundation of its claim, and the simultaneous garnishee of the defendant's bank account and another account allegedly owing the defendant, were calculated to result in the paralysis of the operations of the defendant and his financial ruin, and that the attachment was designed for other than legitimate purposes, and thus struck the proceedings out as an abuse of process.

Recent amendments to the *Attachment of Debts Act* have created discretionary powers to modify or nullify the effect of garnishing orders. In 1971 section 3B was added to the Act giving the Registrar or a Judge the discretion to release a garnishment and substitute for it an order for payment of the judgment debt by instalments. In 1975 section 3B was amended and the relevant subsections now provide:

(1) Where a garnishing order is made against a defendant or judgment debtor, he may apply to the Registrar or a Judge of the Court in which the order is made for a release of the garnishment, and where a judgment has been entered against him, for payment of the judgment by instalments.

(2) Where, under subsection (1), the Registrar or Judge considers it just in all the circumstances, he may make an order releasing the garnishment in whole or in part, and where he does so and a judgment has been entered, he shall fix the amounts and terms of payment of the judgment by instalments.

Subsection (2) seems to make it clear that the discretion now exists to set aside a prejudgment garnishing order whenever it is just to do so.

It might also be noted that a number of situations in which the English courts exercise their discretion to deny a garnishing order are ones which would be within sections 14 and 15 of the *British Columbia Act*. Those provisions read:

14. Where, after an order for the attachment of debts, obligations, or liabilities has been made, it is suggested by the garnishee that the debt, obligation, or liability sought to be attached belongs to or is claimed by some third person, or that a third person has a lien or charge upon it, a Judge may order the third person to appear and state the nature and particulars of his claim upon the same.

15. After hearing the allegations of the third person under the order, and of any other person whom by the same or any subsequent order the Judge may order to appear, or in case of the third person or other person not appearing when ordered, the Judge may order payment by the garnishee, or may order any issue or question to be tried or determined, and may bar the claim of the third person or other person, or may make such other order as he may see fit, upon such terms, in all cases with respect to the lien or charge (if any) of the third person and as to costs as the Judge thinks just and reasonable.

D. Exemptions

If the obligation sought to be garnisheed is "wages" within the meaning of the Act, a further limitation on the creditor's rights arises. Some or all of the wages may be exempt from garnishment. The basic exemption provisions are subsections (4) to (6) of section 3. They read:

(4) Except as otherwise provided in this Act, seventy per cent of any wages due by an employer to an employee is exempt from seizure or attachment under a garnishing order issued by any Judge or Registrar; but in no case shall the amount of the exemption allowed under this subsection be less than

(a) in the case of a person without dependents one hundred dollars per month, or pro rata for a shorter period; and

(b) in the case of a person with one or more dependents, two hundred dollars per month or pro rata for a shorter period.

(5) Clause (a) of subsection (4) does not apply where the debt is contracted for board or lodging; and clause (b) of subsection (4) does not apply where the debt is contracted for board or lodging and in the opinion of the Judge or Registrar, the exemption set out in clause (b) thereof is not necessary for the support and maintenance of the debtor's dependants.

(6) Notwithstanding any other provision of this Act, where the wages of a person are seized or attached by virtue of, or under

(a) a Court order for alimony or maintenance; or

(b) a duly executed separation agreement; or

(c) an order under the *Wives' and Children's Maintenance Act*, or the *Reciprocal Enforcement of Maintenance Orders Act*,

the exemption allowed to that person is fifty per cent of any wages due where the wages due do not exceed six hundred dollars per month, and is thirty-three and onethird per cent for wages in excess of six hundred dollars per month; but in no case shall the amount of the exemption allowed under this subsection be less than one hundred dollars per month, or pro rata for a shorter period.

Under section 3A of the Act either creditor or debtor may apply to the Registrar or a judge for an order that the exemption be varied. Upon thd hearing of such an application, an order may be made confirming, the exemption provided by section 3, or increasing or decreasing the exemption within certain limits.

In this Report we make no recommendations concerning wage exemptions although we recognize that the approach of the Act to this very difficult issue is not entirely satisfactory. In our working paper we stated:

> Section 3(4) of the Act exempts a certain portion of a wage earners salary from attachment by his creditors. The adequacy of that exemption and related concerns raise issues which are not peculiar to this remedy. It is our view that it would be unwise to deal with exemptions from garnishment in isolation from exemptions which relate to other remedies. At a later stage of this study we propose to undertake a broad consideration of exemptions from all forms of execution.

That continues to be the view of the Commission.

CHAPTER V CONCLUSIONS AND RECOMMENDATIONS

A. Exigibility

The lengthy chapter describing the scope of the Act and analyzing the law concerning what debts are or are not garnishable may have given some hint of our dissatisfaction concerning the state of the law. We identified three categories of financial obligations which cannot be reached by garnishment process:

(1) debts subject to a condition other than, perhaps, the effluxion of time

(2) inchoate financial obligations which may ripen into a debt at some time in the future (such as claims for unliquidated damages), and

(3) debts which are not in existence in any form at the time of the garnishment order but which come into existence later (such as future wages).

The limited range of garnishment is really a reflection of the fact that it is a "one shot" remedy. An order is issued and it either attaches a debt or it does not at the time it is served. It has either an "immediate" effect or none at all.

The attitude of the courts in limiting the remedy is an eminently defensible one. To permit garnishment of the sorts of obligation listed above could have the effect of giving the judgment creditor a better or more immediate right than

the judgment debtor, and could place the garnishee in the intolerable position of having to pay money to comply with the garnishing order when he would not need to do so if a comparable demand were made by the judgment debtor on the other hand most of those obligations would, in the normal course of events, ripen into a garnishable debt. The error of the unsuccessful judgment creditor lies in attempting to garnishee too early rather than in selecting an inappropriate remedy. The effective use of the remedy, however, calls for a degree of diligence and prophetic insight on the part of the creditor which borders on the superhuman. The realities of legal practice seldom permit such perfection and as a result the garnishing order is, in many cases, a much less useful remedy than it might be.

Another difficulty created by the "immediate" nature of garnishment process is that it makes the attachment of recurring or periodic debts a cumbersome exercise which is often not worth undertaking. For example the creditor who seeks to satisfy his judgment through the garnishment of rent payable to the debtor must prepare, issue, and serve a fresh garnishing order with respect to each rental period. Similar problems arise with respect to the garnishment of wages.

There is no reason why garnishment should be subject to this limitation. The law has no difficulty in accommodating the consensual transfer of a debt that has not yet come into existence, and the assignment of future accounts is a well recognized method of taking security in the commercial world. We believe that many of the difficulties and uncertainties which creditors face in proceedings under the *Attachment of Debts Act* would be alleviated by the creation of a new remddy, garnishment process which is effective for some specified period of time and attaches any debt that becomes due during that period. An example of such a remedy already exists under British Columbia law in sections 36(2) and 36(3) of the *Family Relations Act*.

The introduction of such an innovation into the *Attachment of Debts Act* would permit the retention of the law which has arisen defining "debt" due," thus preserving the garnishee's position, while strengthening the creditor's position by making the timing of the order largely irrelevant. It would overcome what we see as the main deficiencies of the Act without seriously disrupting the normal course of the garnishee's or judgment debtor's conduct. It is therefore our conclusion that the *Attachment of Debts Act* should provide, in addition to the "immediate" garnishment process, a new form of "continuing garnishment process." Because, our recommendations relating to the issue of such process, to refer to it as a "garnishing order" will be inaccurate. We therefore adopt the terminology of "writ" to characterize the individual types of garnishment process in our recommendations.

The Commission recommends:

1. *The* Attachment of Debts Act *should provide for two types of remedy:*

    (a) a writ of immediate garnishment, and

    (b) a writ of continuing garnishment.

2. *In these recommendations:*

    (a) "writ of immediate garnishment" means a document which, upon service on the garnishee, attaches any debt due from the garnished to the debtor at the time of service.

    (b) "writ of continuing garnishment" means a document which, upon service on the garnishee, attaches any debt which is due at the time of service or which becomes due from the garnishee to the debtor at any time during a term specified in the writ.

(c) "garnishment process" means a writ of immediate garnishtent, a writ of continuing garnishment or both as the context may require.

B. The Issue of Postjudgment Garnishment Process

Compared with simple execution under a writ of seizure and sale, the procedure to invoke the remedy of garnishment is much more complex. A basic argument which might be advanced to justify this different treatment is that certain restraints on the issue of garnishment process are necessary to prevent abuse by the creditor. If it were not for the procedural hurdles and the necessity to swear an affidavit he might issue process directed to a large number of persons on the merest speculation, in the hopes of, perhaps, reaching one or two who are liable to the debtor. The nuisance created for innocent garnishees, the argument continues, is a social cost which far outweighs the social interest in assisting the creditor.

In our working paper we stated:

> We concede the need for some restraint on the otherwise uncontrolled issue of garnishment process but are not persuaded that the procedural requirements contained in the Act are the only or even the best way of preventing the abuse apprehended. Costs, for example, might be used to deter frivolous garnishment.

We went on to make certain proposals, in relation to costs, aimed at achieving the deterrent effect thought desirable.

Our tentative view on "the need for some restraint" and the proposals which reflected that view were the subject of some critical comment. It was put to us that our concerns were unfounded for two reasons. First, there is no evidence that garnishment process is being used irresponsibly at present and there is no reason to believe that attitudes are likely to change. Secondly, there is a built-in deterrence to the frivolous issue of process. We are told that the investment of a lawyer's time and resources and disbursements necessary to prepare, issue and serve process make garnishment a sufficiently expensive step that no other deterrent is'necessary. It is simply not economical to garnishee on the basis of unfounded speculation. This argument has led us to reconsider the tentative view set out in the working paper and our approach to costs, as reflected in the recommendations in the following chapter, has been modified.

1. Writs of Immediate Garnishment

With respect to garnishment process issued after judgment which attaches only those debts which are due at the time of service of the order, the writ of immediate garnishment, we consider that the benefits which accrue from the present affidavit requirements are, at best, marginal and do not justify their continued existence, It must be remembered that these procedural requiremental imposed on all garnishment process, generate costs. If these costs must be absorbed by the creditor, it is unfair, and if they are passed along to the judgment debtor, it increases his burden of debt.

The tendency of this Commission, in other contexts, has been to view with scepticism the imposition of formalities and procedural requirements for their own sake, or where their utility is not evident. We see no compelling reasons why "immediate" garnishment process should not be available as of right to the creditor, without the necessity of swearing an affidavit, so long as machinery exists to enable the judgment debtor or garnishee to dispute its issuance if such a dispute is well founded. The present requirements seem to generate needless costs and they unjustifiably reduce the scope of the remedy by excluding debts with respect to which the creditor is unable to swear an affidavit as to his "belief" in their existence.

The Commission recommends:

3. A writ of immediate garnishment should be issued as of right on demand in the same fashion as a writ of summons.

2. Writs of Continuing Garnishment

The procedure which should be adopted to issue writs of continuing garnishment raises other problems. It is our belief that their use should be confined to those cases in which the immediate garnishing order available under the existigg Act is ineffective. Those are cases in which there may be no "debt due" at the time of service, but a debt may arise in the future, or in which a debt becomes due periodically. We do not believe a writ of continuing garnishment should be used, for example, to attach a bank account.

This preference arises out of certain other difficulties we see with the Act. In a following section we discuss the lack of clear and adequate provisions relating to the way in which the garnishee should respond (deny liability or comply) to garnishment process. Specific requirements can be most easily imposed with respect to writs of immediate garnishment and we therefore believe that the provisions which govern the issue of process should encourage the use of "immediate" process whenever it is appropriate. If both immediate and continuing writs are equally available, the tendency of creditors would be to seek, in all cases, the more potent continuing remedy, thus thwarting what we regard as the correct policy.

It is also our belief that the writ of continuing garnishment should be available only where there is some connection between the judgment debtor and the garnishee: circumstances or a relationship whereby the garnishee's liability might reasonably be expected to arise. To permit the issue of continuing process where no such connection exists might place the garnishee in a very difficult position.

For example, a creditor, knowing that his judgment debtor is a logger (unemployed at present), may wish to take steps to secure a right to future wages. If that debtor had established a pattern of working, in season, for one particular employer, that might amount to a reasonable "connection" for the purposes of a writ of continuing garnishment. The creditor might, however, wish to garnishee every employer in the forest industry in hope of reaching the one who finally employs him. This, we believe, should not be permitted. It would put all of those employers in the position of having to check their records periodically (perhaps as often as every pay period) to see if the debtor had been recently hired.

The Commission recommends:

4. A writ of continuing garnishment may be issued only if

(a) there are facts or circumstances, or a relationship between the debtor and the garnishee whereby there are reasonable grounds for expecting that a debt due from the garnishee to the debtor may come into existence, and

(b) a writ of immediate garnishment would not be adequate having regard to the nature of the debt sought to be attached.

Having specified the circumstances in which continuing process should be available there remains the issue of confining its use to those circumstances. Two alternatives were explored in the working paper. The first was to assimilate the continuing garnishment process to a "true" order which is made by a judicial decision maker on the basis of evidence which indicates that the use of the remedy is appropriate. The second approach is to permit the automatic issue of continuing garnishment process but to penalize its improper use if the creditor's right to the remedy is disputed and the process is set aside.

Each approach has its virtues and its drawbacks. The first approach would provide much closer control over the use of the process but it may prove to be a *de facto* limitation on the availability of the remedy. It would undoubtedly be the more expensive approach and it might place an undesirable burden on court resources through "overloading" judicial decision makers by requiring that they deal with large numbers of relatively straight forward applications.

The second approach, automatic issue with penalties for improper use, overcomes the objections to the first but would provide a much less effective control mechanism. Penalties may not always be effective to deter improper use of the remedy, nor will all instances of improper use necessarily be disputed by the garnishee. The second approach shifts responsibility for supervising the use of the remedy from the courts to the garnishee or debtor.

At the time the working paper was circulated we had no concluded views on which approach to adopt. Accordingly alternative proposals were set out and comment was invited. The submissions which we received were divided on this matter. We have carefully reexamined the issue and the interests at stake and have concluded that the second approach is to be preferred.

The Commission recommends:

5. (1) *A writ of continuing garnishment should be issued as of right in the same fashion as a writ of immediate garnishment.*

(2) *A garnishee or a debtor may apply to the court for an order that a writ of continuing garnishment be set aside.*

(3) *On an application under (2) the onus should be on the creditor to show cause why the order should not be set aside and, unless the creditor establishes that recommendation 4 has been satisfied.*

(4) *Where a writ of continuing garnishment is set aside pursuant to an application under (2) the court may award the applicant costs in an amount not exceeding 3 times the costs to which he would otherwise be entitled.*

C. The Availability of Prejudgment Garnishment

The availability of garnishment before judgment raises a number of difficult issues. British Columbia law, like that of most Canadian jurisdictions, permits prejudgment garnishment of debts, but there is no analogous right to use a writ of seizure and sale or other remedies before judgment. This distinction flows from the historical roots of those remedies which were developed by the common law entirely as postjudgment procedures. Garnishment developed from the more flexible custom of foreign attachment, which was never accepted by the common law courts or by Chancery, but which influenced greatly the Canadian and American legislation. In the United States, the prejudgment attachment and garnishment remedies were not limited to debts but were extended to cover tangible assets as well. In Canada, the prejudgment seizure of tangible, assets was limited to absconding debtors[9]. but garnishment before judgment was permitted generally, even where the debt attached was wages. More recently, prejudgment wage garnishment has fallen into disfavour but the remedy remains against non-income debts such as bank accounts.

[9]. *See Supreme Court Rules*, Rule 58(1), 58(5).

The present position is difficult to justify on policy grounds. Assume that debtors A and B have each saved $1,000.00. If debtor A places that money in his bank account, it can be garnisheed before judgment. But debtor B can spend his $1,000.00 on goods, secure in the knowledge that his new possessions cannot be touched until after judgment.

Should garnishment continue to be available to the plaintiff who has not yet obtained a judgment? The argument in favour of the present position is that debts are particularly vulnerable to fraudulent manipulation by the potential judgment debtor bent on defeating his creditors. Debts can be called in, hidden and dissipated much more easily than other forms of assets while the defendant "stalls" the action. Thus, the argument concludes, the special protection given by the *Attachment of Debts Act* with respect to such assets is justified. It is our conclusion that, subject to a number of qualifications, prejudgment garnishment should continue to be available.

We have, however, several reservations concerning the present availability of the remedy and believe that certain changes in the law are called for. The first reservation concerns the position of the defendant who succeeds in the main action in which the garnishment process was issued. Assuming there is no basis for payment out of court at an early stage, his money will not be returned to him until the main action is disposed of. The defendant may, therefore, be deprived of the use of his money for a considerable length of time.

Can he recover compensation for that loss? While most funds in court bear interest, money paid in under the *Attachment of Debts Act* does not. There would seem to be no legal basis for a claim against the plaintiff unless some sort of abuse of process can be established. It is our view that defendants should have a clear right to compensation in cases where they have been deprived of money through a prejudgment garnishment based on a claim which ultimately fails. A plaintiff who takes the benefit of this extraordinary remedy should also be compelled to accept the burden of righting any wrongs which he may create.

The Commission recommends:

6. *The Act should specify that where there has been a payment into court pursuant to garnishment process issued before judgment and the defendant is entitled to have money paid out of court to him because*

   (a) he has succeeded in the main action;

   (b) the plaintiff has recovered a judgment for less than the amount garnisheed; or

   (c) the garnishment process has been set aside or released because it was improperly issued

   then the defendant should be entitled to recover compensation for the loss of use of the money held in court (or the difference between the amount of money held in court and the amount of the judgment recovered by the plaintiff as the case may be) from the plaintiff.

7. *An application for an order for compensation under recommendation 6 may be made in the action in which the garnishment occurred and upon such an application being made the court may*

   (a) dispose of the matter summarily; or
   (b) order the trial of an issue.

Our second reservation relates to the circumstances in which prejudgment garnishment is available. The working paper considered the issue of its availability in the following terms:

> If prejudgment garnishment is to be retained, one must then address the broader issue of whether it should be restricted to actions in which the plaintiff's claim is for debt or a liquidated demand or whether the remedy should be available in any case, whatever the cause of action. The present distinction seems illogical. If the plaintiff's action can be cast in the form of a debt claim, then the valuable prejudgment garnishment remedy is available to him, but if his action sounds in damages, no matter what the merits, the plaintiff must wait until judgment ...

> While recognizing the potential unfairness of the present position which gives a valuable remedy to some plaintiffs while denying it to others, we have grave reservations about extending the remedy to plaintiffs claiming damages. Prejudgment garnishment is, after all, an extraordinary exception to the general rule that execution remedies should be available only to creditors who have gone to judgment. If perfect equity can be achieved only at the cost of additional and complex procedures [to value the plaintiff's claim for the purpose of garnishment] that price may be too high, and it may be justifiable to limit the remedy to those situations in which it is "convenient."

In the working paper it was proposed that the scope of prejudgment garnishment should remain unchanged.

Our views in this regard have undergone a considerable modification. A starting point was a submission made to us that there may be large numbers of situations in which the plaintiff is seeking a judgment for a "sum certain" but, for technical reasons, his claim is for damages and prejudgment garnishment is not available. An example suggested is the case where an agent has ordered goods or services from the plaintiff. If the agent had been acting within the scope of his authority the plaintiff's claim would be against the principal for debt, but if the agent hdd exceeded his authority and an action cannot be maintained against the principal, his remedy is to sue the agent for breach of warranty of authority. In both cases the plaintiff's claim is founded on the same facts: the supply of goods or services. In an action against the principal, prejudgment garnishment would be available but in an action against the agent, because technically the claim is for damages, its availability is doubtful. It has been urged on us that a law which deprives a litigant of a remedy on this basis is indefensible. It is a throwback to the 19th Century with its technicalities relating to pleading and the old forms of action. This argument is persuasive, but if it is to be adopted one must then address the issues of what is the proper scope of prejudgment garnishment and how is it to be defined.

It is arguable that the prespnt scope of the Act is too wide. If a plaintiff issues a prejudgment garnishing order in circumstances now permitted by the Act the defendant's means and ability to satisfy the judgment which may result seem to be irrelevant. If he applies to have the order set aside, evidence that he has assets to satisfy the potential judgment or that the plaintiff's interest is otherwise securedf does not form a basis for the release of the garnishment (subject to the uncertain effect of section 3B of the Act). In our view such a result is wrong.

The only basis upop which a prejudgment remedy of this kind can be justified is that, in the absence of the remedy, there is a substantial dagger that the judgment will prove to be unenforceable and the plaintiff will be deprived of the fruits of the litigation. But if this is the true justification for prejudgment garnishment, it does not make sense to draw any distinction between a plaintiff whose claim is based on debt and a plaintiff who claims damages. Both may be equally insecure and in need of the remedy. It should be equally available to both. It is therefore our conclusion the *Attachment of Debts Act* should set out rules relating to prejudgment garnishment which reflect this view.

The Commission recommends:

8. *Prejudgment garnishment should be available to every plaintiff seeking a money judgment.*

9. *Prejudgment garnishment should not be available unless there are grounds for believing that a judgment obtained by the plaintiff may not be satisfied if prejudgment garnishment is not permitted.*

Our third reservation concerns the hardship which may flow from the remedy. There is no doubt that prejudgment garnishment can operate harshly. A welltimed order can "result in the paralysis of the operations of the defendant and his financial ruin." It can financially cripple the defendant to the extent that he may be deprived of the means to defend the action. As Meredith J. stated in *Ridgeway Pacific Construction* v. *United Contractors*:

> I recognize that in all probability freezing a substantial sum of the defendant's money, if the defendant is found ultimately not liable for payment, works a regrettable hardship on the defendant, indeed a hardship which could in some circumstances be disastrous.

In an earlier chapter we pointed out that jurisdiction now exists to set aside such an order where it is "just in all the circumstances." This should allow the courts to avoid the "hardship" cases; however experience under the new provisions is limited. In any event the language of section 3B which provides for the release of a garnishment is permissive and, at bottom, the defendant's entitlement to a release is a matter of discretion.

It troubles us to see such an important aspect of prejudgment garnishment dealt with in this way. We would prefer to see the Act deal with the hardship issue in relation to prejudgment garnishment in specific terms.

The Commission recommends:

10. *The Act should specify that prejudgment garnishment is not permitted unless, having regard to the potential hardship and inconvenience to the defendant and the potential benefit to the plaintiff, it achieves a result that is just and equitable in the circumstances.*

D. The Mechanics of Prejudgment Garnishment

1. The Issue of Process: Debt or Liquidated Demand

In the working paper we raised the most critical issue associated with making prejudgment garnishment available to all plaintiffs seeking a judgment for money.

The obvious difficulty in extending prejudgment attachment to damage actions is to decide how much the plaintiff should be entitled to garnishee before the determination, at trial, of the exact sum due to him by the defendant. The problem could perhaps be overcome by permitting plaintiffs in nondebt actions to obtain a prejudgment order *ex parte* from a judge who would fix the likely amount to be recovered by the plaintiff. Such a determination would be for the purpose of the garnishment only, and should not affect the normal trial and judgment on the issue of damages.

Valuing the plaintiff's claim has not been an issue in the past owing to the restrictions on the availability of prejudgment garnishment. While special procedures may be desirable with respect to unliquidated claims we see no reason why they should be imposed with respect to all prejudgment garnishments. We think there is much to be said for adopting a simpler procedure in those cases where the plaintiff's claim would presently permit prejudgment garnishment, and we have concluded the issue of postjudgment process provides an appropriate model.

To the matters that would justify setting aside postjudgment process should be added a requirement that the issue of prejudgment process did not violate our earlier recommendations concerning its availability. We also believe that, at this stage, there should be some onus on the plaintiff to establish the merits of the underlying claim.

The evidentiary burden that should rest on the plaintiff in this respect raises a number of difficult issues. The aim is to strike an appropriate balance which will discourage prejudgment garnishment on unmeritorious claims and yet not set an impossibly high standard that would, in practice, make the remedy worthless. Our conclusions concerning this balance are set out in the recommendation below.

The Commission recommends:

11. *Prejudgment garnishment process should be issued as of right in the same fashion as postjudgment garnishment process where the plaintiff's claim against the defendant is for a debt or liquidated demand.*

12. (1) Where prejudgment garnishment process is issued under recommendation 11, the defendant may apply to the court at any time before judgment for an order that the process be set aside.

(2) On an application under (1) unless the court is satisfied that

(a) issue of the process did not violate recommendations 9, 10 or 11,

(b) if the prejudgment process was a writ of continuing garnishment, that the issue of the grocess complied with recommendation 4, and

(c) the plaintiff has sufficiently demonstrated the merits of his claim, the process should be set aside.

(3) For the purposes of C21 the merits of a claim are sufficiently demonstrated if:

(a) one or more affidavits filed on behalf of the plaintiff

(i) set out and verify the facts on which, the plaintiff's claim is based, and where a defence is alleged

(ii) set out and verify any additional facts which rebut that defence, or

(iii) deny the facts on which the defence is based; and

(b) there appears to be no defence that has a reasonable prospect of defeating the claim other than a defence which, to succeed, depends on a finding, favourable to the defendant, on a fact that is in dispute.

(4) Where process is set aside under (2) the court may award to the defendant costs in an amount not exceeding three times the costs to which he would otherwise be entitled.

2. The Issue of Process: Unliquidated Claims

Where the plaintiff's cause of action is for an unliquidated amount the automatic issue of process is inappropriate. An obvious concern is the possibility that the plaintiff might attempt issue process based on a claim which greatly exceeds the amount he is likely to recover, and the procedures which surround the issue of process should seek to minimize this concern.

It should be noted at the outset that one disincentive to irresponsible garnishment flows from recommendation 6. If the plaintiff is liable to compensate the defendant for the loss of use of money arising out of an excessive garnishment he has little to gain by purporting to claim an unreasonable amount.

To that disincentive should be added what we see as the main bulwark against inflated claims; a requirement that process be issued only with the leave of the court. It would be the duty of the court to make sure that the garnishment sought was appropriate in the sense that the general criteria that apply to the issue of prejudgment process are met (for example whether recommendations 9 and 10 and, if applicable, recommendation 4 are satisfied) and to determine the amount which should be specified in the garnishment process.

We think that it would be undesirable at this stage to call upon a judge to attach a money value to the plaintiff's claim in every case. In the first instance the onus should be on the plaintiff to simply specify the amount of money

he seeks to garnishee. That amount may be equal to the amount he expects to recover but it should be open to him to specify a much smaller amount without prejudice to his ultimate recovery. The judge would then consider, on the basis of the evidence before him, whether the plaintiff, if successful, was likely to recover judgment for a sum equal to or greater than the amount specified (and the fruit of any previous garnishments).

If the judge is satisfied that the amount specified is less than or equal to the plaintiff's likely recovery, and prejudgment garnishment is otherwise available, he may then give leave for the issue of process in the amount specified. If the amount specified in the plaintiff's application exceeds the amount the judge feels the plaintiff is likely to recover, he should be able to give leave to issue process for an amount less than that specified.

The Plaintiff should also be under a burden to adduce evidence concerning the merits of his claim comparable to that imposed by recommendation 12.

The Commission recommends:

13. (1) Where the plaintiff's claim against the defendant is not for a debt or liquidated demand, prejudgment garnishment process should be issued only with the leave of the court.

(2) An application for leave to issue prejudgment garnishment process should specify the amount sought to be attached by the process.

(3) The court should not give leave to issue prejudgment garnishment process for the amount specified in the application unless the court is satisfied that

(a) issue of the process will not violate recommendations 9 or 10,

(b) if the process sought is a writ of continuing garnishment, recommendation 4 is satisfied,

(c) based on the evidence adduced in the application the plaintiff, if successful, is likely to recover a judgment in the action for an amount greater than or equal to the amount specified in the application, and

(d) the plaintiff has sufficiently demonstrated the merits of his claim.

(4) For the purposes of (2) the merits of a claim are sufficiently demonstrated if:

(a) one or more affidavits filed on behalf of the plaintiff

(i) set out and verify the facts on which the plaintiff's claim is based, and where a defence is alleged

(ii) set out and verify any additional facts which rebut that defence, or

(iii) deny the facts on which the defence is based; and

(b) there appears to be no defence has a reasonable prospect of defeating the claim other than a defence which, to succeed, depends on a finding, favourable to the defendant, on a fact that is in dispute.

(5) In an application the court should have the power to give leave to issue prejudgment garnishment process for an amount less than that specified in the application.

(6) The specification of an amount in an application under (2) should not be an admission by the applicant that his claim is limited to that amount.

We have also considered whether the plaintiff's application for leave should be made *ex parte* or on notice to the defendant. One potential danger of notice is that before the application can be heard, the defendant may call in the debt sought to be garnisheed and put that asset beyond the plaintiff's reach.

On balance we feel that applications for leave will be more fairly resolved if the defendant is given notice and has an opportunity to oppose the granting of leave. The plaintiff's position could be preserved by other means.

The Commission recommends:

14. Leave to issue prejudgment garnishment process should not be granted unless notice of the application for leave has been given to the defendant.

15. Where an application for leave to issue prejudgment garnishment process is pending the plaintiff should be permitted to serve on the proposed garnishee a notice in prescribed form and service of the notice should bind the debt in his hands until the application has been dismissed or the debt has become subject to garnishment process issued with leave of the court.

3. Evidentiary Issues

We have also considered the issues of where the burden of adducing evidence should lie when an application is made for leave to issue prejudgment garnishment process or to set aside such process which had issued as of right under recommendation 11. In the first instance we feel that burden should lie on the plaintiff who is seeking the benefit of this extraordinary remedy.

It would, however, be unfair to make this a hard and fast rule. Some of the matters the court must take into consideration are negatives in the sense that certain facts or a particular state of affairs must not exist. A negative, by its very nature, is difficult to prove. Moreover the existence or nonexistence of particular circumstances may be a matter known only to the defendant.

An example is the "hardship" criteria. Under recommendation 10 prejudgment garnishment may not be permitted where it will result in hardship to the defendant. The person best situated to assess the impact of a prejudgment garnishment on the defendant is the defendant himself. The plaintiff may, quite properly, have no knowledge of the defendant's personal circumstances but this lack of knowledge should not *prima facie* deprive him of a remedy to which he is otherwise entitled. It does not seem unreasonable to give that plaintiff the benefit of a presumption that no hardship will result while at the same time permitting the defendant to adduce evidence to rebut it.

The same thinking applies, although with somewhat less force, to the requirement set out in recommendation 9, that a plaintiff is not entitled to prejudgment garnishment unless he is "insecure" in the sense that he may be deprived of the fruits of the litigation unless garnishment is permitted. In this instance the plaintiff may be in a position to adduce some evidence which is relevant to the issuer such as the defendant's past conduct in relation to his financial obligations. But it may also involve a consideration of matters known only to the defendant such as his present means and future expectations. On balance we believe that it is fair to give plaintiffs the benefit of a presumption under recommendation 9.

The Commission recommends:

16. In any application under recommendation 12 or 13(2) the burden of adducing evidence should be on the plaintiff, but the plaintiff should have the benefit of a rebuttable presumption that the garnishment does not offend recommendations 9 or 10.

4. Substitute Security

A suggestion which arose out of the submissions made to us in response to the working paper is that the *Attachment of Debts Act* should permit other security to be substituted for money which has been paid into court pursuant to a prejudgment garnishment. As we pointed out earlier, such money does not accrue interest and it was put to us that this can lead to unfair results if the money is held in court for a lengthy period of time. In particular it was suggested to us that the money might be replaced by an interestbearing security.

We see considerable value in that suggestion. It is one which would operate to the advantage of both plaintiff and defendant. If the plaintiff ultimately succeeds in his action a larger amount would immediately be available to satisfy his judgment and the defendant would receive the corresponding benefit of having his indebtedness reduced. If the defendant succeeds, some funds are immediately available to satisfy his claim, under recommendation 6, for his loss of use of the money garnisheed; and this mitigation of the defendant's loss benefits the plaintiff.

There may also be circumstances in which it would be useful to allow the defendant to create a security interest in property which he owns and to permit that security to stand in place of the money garnisheed.

The Commission recommends:

17. Where money has been paid into court pursuant to prejudgment garnishment process and no application is pending to set aside the process

(a) The plaintiff or defendant may apply to the court for an order

(i) that the applicant be permitted to lodge with the court a satisfactory interestbearing security, and that the money garnisheed be paid out to the applicant, or

(ii) that the money garnisheed be used to purchase an interest bearing security satisfactory to the court, or

(b) The defendant may apply to the court for an order that he be permitted to create a mortgage or other charge over his own property, naming the registrar of the court as the secured party and that upon the mortgage or charge being perfected the money garnisheed be paid out to him.

18. (a) Where a security is lodged or purchased under recommendation 17, it stands in place of the money garnisheed and it may be

(i) transferred, or

(ii) liquidated and the proceeds distributed as the court may direct on judgment being pronounced in the action, and

(b) a mortgage or charge created under recommendation 17(b) stands in place of the money garnisheed and it may be

(i) ordered to be assigned to the plaintiff,

or,

(ii) declared to be discharged as the court may direct on judgment being pronounced in the action.

19. Where a defendant is entitled to compensation under recommendation 6, and a security has been lodged or purchased under recommendation 17(a), any interest ultimately obtained by, or credited to, the defendant should be taken into account in assessing that compensation.

E. Features of the Writ of Continuing Garnishment

1. The Term of the Writ

In our definition of "writ of continuing garnishment" in recommendation 2 we referred simply to a "term specified in the writ" and were silent on what the length of that term should be. It is to that issue we now turn.

What is the longest period that is fair or reasonable to allow continuing process to be in effect? A garnishing order issued under section 36 of the *Family Relations Act* is effective for three months. That seems unnecessarily short. It may take a much longer time to discharge a debt through garnishment of a small sum periodically attached. We would prefer to see a somewhat more generous term. Any choice is necessarily arbitrary, but we believe that a term of one year would be fair and adequate so long as the court has the right to order that a shorter term apply.

The Commission recommends:

20. The term of a writ of continuing garnishment should not exceed one year.

21. On the application of a debtor or garnishee the court should be able to order that the term of a writ of continuing garnishment be reduced.

There will undoubtedly be cases in which the term specified in a writ, whether it be for one year or some lesser period, is too short. The periodic attachment of a small sum for one year may not fully satisfy the creditor's judgment. Or, the garnishee's inchoate obligation may take longer to ripen into a debt than was anticipated at the time the order was issued (e.g., the disposition of a debtor's claim for damages against the garnishee is delayed). In such a case it would be open to the creditor to issue a new writ but this may cause the creditor to lose his priority to competing creditors who have also issued garnishment process. As we said in the introduction to this Report, it is not our intention to disturb existing priority rules at this time. We therefore believe the Act should permit a creditor to apply for an extension of the term of a writ of continuing garnishment.

The Commission recommends:

22. A creditor may, during the term of a writ of continuing garnishment; apply to the court for an order extending the term of the writ, and such an order may be granted on sufficient cause being shown.

23. An order made under recommendation 22 may extend the term beyond the period of one year from the time the writ was issued, but the term should not be extended more than one year beyond the time the extension was applied for.

2. Other Variations

We have already discussed variation of a writ of continuing garnishment in the context of its term and have noted that section 3B allows a post judgment garnishment to be released and replaced by an order for the payment of the judgment by instalments. It is our belief, however, that our proposals for a continuing writ make a wider discretion to vary garnishment process desirable.

It is not difficult to postulate situations in which the remedy may operate unfairly to the detriment of the debtor. For example the debtor's claim against the garnishee may be one for damages for personal injuries and a substantial portion of that claim might be for lost wages. If the creditor is permitted to attach the whole debt, when it arises out of that claim, he will be in a much better position than if he had garnisheed the wages *per se* had they been earned. In the latter case the debtor would have had the protection of the wage exemptions provided by section 3 of the Act. In such circumstances it does not seem unfair that a judge should have jurisdiction to reduce the amount attached by the order.

Another troublesome situation arises when a creditor garnishees periodic payments generated by an asset. If the debtor had been using those payments to discharge obligations relating to the acquisition of the asset he is placed in a very precarious position. For example

> D buys a house from M, giving a small down payment and a mortgage back to M for the balance. D's mortgage payments are $350 per month. D then leases the house to G for $400 per month. C obtains a judgment against D and issue a writ of continuing garnishment against G with respect to the rent.

While it may be acceptable to permit C to take execution proceedings against D's interest in the house itself we have some reservations about allowing C to totally choke off D's "cash flow" through garnishment. If this causes M to start foreclosure proceedings, both D and L may suffer unnecessarily and if D loses the house, C may ultimately suffer as well. Again, this is an area in which discretion might be exercised to reduce the amount attached by garnishment process.

The categories of "hard cases" cannot be closed and we believe a wide discretion to vary the effect of garnishment process should exist.

The Commission recommends:

24. Subject to recommendation 20, the court should have a wide discretion to order the variation of garnishment process, or make it subject to terms, to achieve a result which is just in all the circumstances.

F. Widening She Scope of Garnishment Proceedings

1. ___General

While the writ of continuing garnishment which we recommend should have the effect, in practice, of enabling the creditor to reach obligations of the debtor which were formerly beyond his grasp, this is achieved through a change in procedure rather than substance. Exigibility has not been widened. There are other ways in which the Act might

be modified to make it more effective. A first step is to expand, slightly, the range of obligations which are amenable to garnishment.

2. Funds in Court

It is our conclusion that garnishment process should be effective to attach funds held in court, or which may be paid into court, if those funds are, or may become, payable to the debtor.

The Commission recommends:

25. The service of a writ of immediate garnishment on the registrar of a court should be effective to attach any funds held by that court which are payable to the debtor.

26. The service of a writ of continuing garnishment on the registrar of a court should be effective to attach any funds held by that court during the term of the writ which are, or during the term of the writ become, payable to the debtor.

The rights given by recommendations 25 and 26 should not be totally unqualified. It should be a condition precedent to an effective garnishment that proceedings in which money may be paid into court have actually been commenced. Thus if G negligently injures D it should not be open to D's judgment creditor to serve garnishment process on a court registrar simply because it is possible that D may in the future commence an action in that particular registry against G and that G may pay money into court. We also believe that it would be helpful to the registrars on whom process would be served if the creditor were required to identify, in the process, the action in which the money was paid, or may be paid into court by specifying its action number or style of cause, as the practice of the registry in question may require.

The Commission recommends:

27. Garnishment process served on a registrar under recommendations 25 or 26 should identify the proceedings in which the money has been, or may be, paid into court by specifying the action number, style of cause, or both as the practice of the registry in question may require.

3. Joint Obligations

The difficulties of garnisheeing a joint obligation (an obligation owed by the garnishee to two or more persons jointly, one of whom is the debtor) was discussed in an earlier chapter in the context of joint bank accounts, where problems will most often arise. We find the present position, that such a debt is not garnishable; unsatisfactory. A debtor should not be able to evade his creditors simply by concentrating his assets in a joint bank account. But any rule short of total immunity from garnishment, has the potential to jeopardize the interest of an innocent joint obligee. This danger can, in our view, be minimized through procedures which require the garnishee to disclose the existence of joint obligees and which restrict the right to payment out of court in such cases.

How much of the joint debt should be garnishable? Various approaches are possible. The act might, for example, specify a rebuttable presumption that the debtor is beneficially interested in one half or one third of the debt, as the case may be, depending on the number of joint obligees, and permit garnishment of his presumed beneficial interest only. Or, the whole debt could be attached. The latter rule seems to be the Ontario position with respect to certain joint bank accounts.

It is our view that, garnishment of the whole debt should be permitted, but this should not destroy the rights of joint depositors or obligees who may have a beneficial interest in the account or debt. The garnishee should pay the entire amount of his indebtedness into court, leaving it to the creditor, debtor, and other joint obligees to take steps to determine the extent of the various beneficial interests in the money.

The Commission recommends:

28. *A debt owed by a garnishee to two or more persons jointly (a joint obligation) should be attachable by a creditor of one of those persons, and the entire amount due, or enough to satisfy the judgment debt, should be paid into court in response to garnishment process.*

29. *Where it appears that a debt attached was a joint obligation the money may be paid out of court to the creditor only upon the order of the court, and no such order should be made without notice to call joint obligees of, and, the debtor.*

30. *Any joint obligee of debt attached under recommendation 28 or the creditor may apply to the court at any time before, or during, an application under recommendation 29 for a determination of the extent of the debtor's beneficial interest in the debt garnished.*

31. *Upon an application under recommendation 30 the court may order payment out to any joint obligee other than the debtor, that portion of the money garnisheed to which that obligee appears to be beneficially entitled.*

Generous provision should be made for the legal costs of joint obligees who must take steps to assert their interests.

The Commission recommends:

32. (1) *Any joint obligee should be entitled to his legal costs, on a solicitor and client basis, if he succeeds in establishing a beneficial interest in the debt garnished and has behaved reasonably in all the circumstances.*

(2) *Those costs may be awarded against the creditor, the debtor, or both, but if costs are awarded against the debtor, the obligee may compel the creditor to pay them and the creditor may add the amount so paid to the judgment debt.*

Our recommendation with respect to notice by the garnishee of the joint obligee's existence is set out under a subsequent heading.

4. ___Setoff

When garnishment proceedings are taken, the garnishing creditor generally has no better right to compel payment into court than the debtor has to compel payment. It follows that any right which could be raised by the garnishee against the debtor to resist payment may also be raised against the creditor. This right will usually take the form of a right of setmoff. Payment into court may, therefore, be reduced by the amount of the setoff. This is a reasonable rule but it is one which may give rise to certain problems.

Under our recommendations, a writ of continuing garnishment will attach debts as they become due, but the relationship between garnishee and debtor may be such that a right of setoff, or similar right comes into existence before

the debt is due which has the effect of "cancelling" the debt when it becomes due, leaving nothing for the order to attach. For example, consider the following sequence of events,

January - D lends G $1,000 which will become due and is to be repaid on March 1.
February - C obtains a judgment against D for $1,000.
February 15 - C issues a writ of garnishment and serves it on G.
February 20 - G "lends" D $1,000 payable on demand.
March 1 - G purports to setoff his $1,000 loan to D against his indebtedness to D.

Unless a court was prepared to hold that G's "loan" to D was, in fact, a repayment which violates the writ, G's assertion of a setoff may succeed against C so as to nullify the effect of the writ. That fact pattern has an air of fraud about it, but the right of setoff can arise in more innocuous ways too. For example, when a lease or tenancy agreement is silent on the matter of when rent is payable, it seems that, technically, it is not due until the end of the term. Nonetheless many tenants adopt a practice of paying for the term in advance. Woodfall says of this:

> Payment before the day [due] is voluntary and ... no satisfaction at law of the rent but it provides a good equitable defence to any action for the rent by the landlord who has received it ... [It] is an advance to the landlord, with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay rent ...

Thus in a periodic tenancy, in which the tenant pays in advance when he is technically not required to do so, what is created is a periodic series of setoffs which cancels the tenant's obligation to pay rent as it periodically becomes due. A writ of continuing garnishment served on the tenant might be held to be ineffective in such a case.

We do not believe that a right of setoff or similar right, should be effective in the circumstances outlined above, that is where the right came into existence after service of the writ. We do, however, recognize that there may be situations in which it would be reasonable to allow the garnishee the right. Such a case would arise if, in the first example, G's loan to D of February 20 was pursuant to a commitment entered into before February 15.

The Commission recommends:

33. (1) A crossclaim in favour of a garnishee against a debtor, arising after service of a writ of continuing garnishment, should not be effective as against the creditor to resist, or reduce a debt garnished by, the order, unless the garnishee establishes

(a) that the crossclaim arose pursuant to a binding commitment entered into before service of the writ, or

(b) the garnishee behaved reasonably in all the circumstances and it would be inequitable to deny him the right to rely on or assert the crossclaim.

(2) In this recommendation "crossclaim" means a right of setroff or right which could be raised by counterclaim or otherwise by a garnishee to resist, or raised in reduction of, a claim brought by the debtor on the obligation garnisheed.

5. Insurance Funds

The service of a writ of continuing garnishment should enable a creditor to reach an inchoate obligation owed by the garnishee to his debtor when it becomes a debt which is due. An example of such an obligation is a claim for damages in tort, which would be attached when the debtor obtains judgment against the garnishee or enters into a

binding agreement to settle the claim. If the garnishee is insured, however, the situation becomes clouded because, in practice, the insurer stands in the shoes of the garnishee for the purposes of dealing with the claim.

Given the following facts, what should the result be:

> C obtains judgment against D. D is injured on G's business premises in circumstances where G appears to be liable for damages. G is insured by I. C issues a writ of continuing garnishment and serves it on G. I then settles the claim with C or C obtains a judgment against G. I is prepared to pay.

Should the insurer be bound by the writ served on his insured in all cases? Should he be bound only if he has notice? Should the insurer be bound at all?

One possible approach would be to bind an insurer with respect to garnishment process served on his insured if he has notice, placing a duty on the insured garnishee to notify the insurer of any orders so served. If the garnishee fails to comply with this duty he could be made liable to a section 10 "judgment" in favour of the garnishorcreditor. We have difficulty with this approach. It puts the garnishee at considerable peril and he is, after all, an innocent party visavis the proceedings in which the garnishing order was issued. Moreover, a section 10 "judgment" against the garnishee may be worthless to the creditor who really wants to reach the insurance funds themselves.

It is our view that when a garnishee is insured, the creditor should also be allowed to serve the writ on any insurer of the garnishee who may ultimately be called upon to satisfy the debtor's claim against the garnishee. The effect of service should be to attach the insurance funds in the hands of the insurer when they become payable in satisfaction of the debtor's claim. The failure of an insurer to comply should not adversely affect the garnishee so as to make him liable to the creditor.

The Commission recommends:

> *34. If a garnishee is insured with respect to a potential debt which may become due to the debtor, the creditor may serve a copy of the garnishment process on the insurer, and such service should bind any insurance proceeds which may become payable to the debtor as if the insurer were directly liable to the debtor.*
>
> *35. If a garnishee is insured with respect to a potential debt which may become due to the debtor, payment by the insurer to the debtor should not, as between the garnishee and the creditor, constitute noncompliance with the garnishment process or subject the garnishee to liability to the creditor.*
>
> *36. Section 18 of the Act should be modified so as to protect an insurer who complies with garnishing process served on him under recommendation 34.*

6. The Provincial Government and its Agencies

(a) *The Crown*

The only specific reference in the *Attachment of Debts Act* to the garnishability of money owed by the Crown to a debtor is in section 5 which sets out a procedure to attach wages owed to Provincial "civil servants." Nonetheless it seems clear the Act applies to the Crown. The *Interpretation Act* provides:

> 13. Unless an enactment otherwise specifically provides, every Act, and every enactment made thereunder, is binding on Her Majesty.

A difficulty, however, arises under the *Crown Proceedings Act*.

That Act defines "proceedings against the Crown" to include "a proceeding in which the Crown is a garnishee." Section 4 of the Act gives jurisdiction to the Supreme and County courts with respect to proceedings against the Crown but section 5 provides:

Nothing in this Act authorizes proceedings against the Crown under the *Small Claims Act*.

The effect of these provisions is that the Crown may not be subject to garnishment process issued out of Small Claims Court except (perhaps) with respect to money owed as wages. We cannot see any reason why this should be the case and feel that amendments to the *Crown Proceeding Act* are called for.

The Commission recommends:

37. Section 5 of the Crown Proceedings Act *should be amended to provide that garnishment proceedings are an exception to the prohibition.*

(b) *British Columbia Hydro*

Although the Crown, with the exception noted above, appears to be bound by the provisions of the *Attachment of Debts Act* the position of the British Columbia Hydro and Power Authority is quite another matter. The Authority has the benefit of an extraordinary provision of the Act under which it is constituted. The relevant subsections of section 53 read:

> 53. (1) Notwithstanding any specific provision in any Act to the contrary, except as otherwise provided by or under this Act, the Authority is not bound by any statute or Province.
>
> (3) Money owing, payable or accruing due from the Authority as salary or wages to any of its members or employees may be attached under the *Attachment of Debts Act* or the *Small Debts Courts Act* the same as moneys owing, payable or accruing due from subjects of the Crown, and for that purpose all of the provisions of those Acts apply to the Authority.

The *Attachment of Debts Act* is not among the statutes which bind the Authority thus, with the exception of wages, it appears that money owed by the Authority may not be garnisheed.

We understand that, in practice, the Authority does not rely on section 53 to resist garnishment but this is a matter of Authority policy which may be subject to change from time to time. This policy should be transformed into a strict legal requirement.

The Commission recommends:

38. The British Columbia Hydro and Power Authority Act *should be amended by adding the* Attachment of Debts Act *to the list of Acts which apply to the Authority set out in section 53(6).*

G. Narrowing the Scope of Garnishment Proceedings

1. General

Our research has identified a number of situations in which the *Attachment of Debts Act* in its present form, or as amended to reflect our previous recommendations, may attach obligations which for various reasons ought not to be garnishable. All are discussed below.

2. Partnership Debts

We have recommended that debts owed by a garnishee to the debtor and other joint obligees should be attachable. One exception to this rule should be debts owing to a partnership of which the debtor is a partner. Such debts are not now garnishable and we believe this should continue to be the case.

This is consistent with the policy of section 26 of the *Partnership Act*:

> 26. (1) A writ of execution shall not issue against any partnership property except on a judgment against the firm.
>
> (2) The Supreme Court or a Judge thereof, or a Judge of a County Court within his territorial jurisdiction, may, on the application by summons of any judgment creditor of a partners make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.
>
> (3) The other partner or partners is or are at liberty at any time to redeem the interest charged, or, in the case of a sale being directed, to purchase the same.

While we are not totally happy with that provision, its reform is beyond the scope of this Report. In the meantime, we see no reason why garnishment should be in a better position with respect to partnership assets than any other creditor's remedy.

The Commission recommends:

39. The Partnership Act *should specify that garnishment process is a "writ of execution" for the purposes of section 26(1) of that Act.*

3. Negotiable Instruments

At the time garnishment process is served on a garnishee he may already have taken steps to satisfy his obligation to the judgment debtor through issuing a negotiable instrument such as a cheque. To what extent should he be required to undo what he has done and attempt to comply with the garnishment process? An example may clarify the issue involved:

C has obtained a judgment against D and has issued garnishment process to attach money owed by G to D. What should G's duties and liabilities be if the process is served on him:

(a) after D has cashed G's cheque at D's own bank but before the cheque is presented for payment to G's bank;

(b) after D has received G's cheque but before D has cashed it; or

(c) at a time when G's cheque is in the mail to D?

In all of these situations it would be open to the garnishee to stop payment on the cheque and pay the money into court.

There is a surprising lack of British Columbia authority concerning the garnishees legal position in such circumstances. In C (a) and (b) he is probably safe if he does nothing. As we understand the general law relating to negotiable instruments, the debt of a creditor who takes or accepts a cheque in payment is deemed to be satisfied (conditional upon the cheque being honoured).

26. *McCallum* v. *Munton*, [1936] 2 W.W.R. 32 (Alta. S.C.); *Edmunds* v. *Edmunds*, [1904] P. 362. In (a) and (b) presumably the garnishee could rely on that rule to resist a motion to enforce the garnishment brought by C under section 10 of the Act. This view is supported by cases in other jurisdictions.

In the third case, however, the garnishees position is less certain. D cannot be said to have taken or accepted the cheque in payment since he had not received it at the time the garnishment process was served. The danger is that D may ultimately receive the cheque, and that cheque may then find its way into the hands of a holder in due course. The garnishee, G, therefore, may be placed in the position of having to pay twice.

We think it is beyond question that the garnishees position should be protected when he has parted with possession of a negotiable instrument which covers the debt garnisheed.

The Commission recommends:

> *40. "Debts, obligations, and liabilities" should not include a monetary obligation to the extent that it is covered by a negotiable instrument drawn by the garnishee if*
>
> *(a) at the time garnishment process is served on the garnishee the instrument has been delivered or mailed to the debtor or a person designated by the debtor, and*
>
> *(b) the instrument has not been dishonoured.*

4. Garnishment of a Secured Debt

(a) ___*General*

Nothing in the *Attachment of Debts Act* or our recommendations prevents the garnishment of a secured debt. In most cases there is no reason why such a debt should not be attachable. For example, if G mortgages his inventory to D to secure a demand loan of $10,000 made by D to G, and C, a judgment creditor of D garnishees that debt. G is perfectly safe if he pays the money into court. Section 18 of the Act makes the payment into court a valid discharge of the debt and would provide G with a complete answer to any move by D to demand payment or enforce the security.

There are, however, two situations involving secured debt in which other considerations apply and this position Ought to be modified.

(b) ___*Debts Covered by Chattel Paper*

"Chattel paper" is a term which is used to describe a certain class of commercial document which evidences both a monetary obligation and a "security interest" in specific goods. The commonest example of chattel paper is the conditional sales agreement under which a person purchases goods such as an automobile on time. Chattel paper might also include a chattel mortgage or certain kinds of leases of goods.

A common feature of transactions in which chattel paper is generated is that a person who advances credit often assigns his rights to a professional financer. The automobile dealer, for example, who sells a car on time under a conditional sale agreement will usually assign his rights under the agreement to a finance company in return for cash or credit. Such assignments take various forms. Sometimes the assignee will take physical possession of the paper or sometimes it will be left in the possession of the assignor to collect the money owed by the account debtor as agent for the assignee. There are two characteristics of the commercial practice which surrounds these assignments which are worth noting:

1. Chattel paper is treated as a distinct species of asset having many characteristics of a negotiable instrument (it is "quasi negotiable"), and

2. The debt and security aspects of chattel paper are invariably transferred together.

Generally speaking professional financers deal in chattel paper at face value in the sense that if a prospective assignor has possession of the paper and the paper appears regular they do not feel that any further inquiry into the assignor's entitlement to payment is called for. This practice may, however, leave them vulnerable to a prior garnishment of the underlying account debt which is unknown to, or has been concealed by, the assignor.

There is a growing trend in contemporary legislation relating to secured transactions to recognize the quasinegotiable quality of chattel paper and to give the force of law to what is now regarded as reasonable commercial practice. In our own Report on Personal Property Security we adopted a provision that would give a purchaser for value of chattel paper, who takes possession of it, priority over a variety of non-possessary interests.

We feel that this policy should also be recognized in the context of garnishment and that the reasonable expectations of a chattel paper financer, who behaves in accordance with normal commercial practice, should prevail over the rights of a creditor of an assignor who has garnisheed the underlying account debt.

The simplest way to achieve this result is a prohibition against the garnishdent of a debt which is covered by chattel paper. This would not totally deprive creditors of recourse against this kind of asset but would merely require creditors to proceed against the chattel paper itself rather than the underlying account debt.

Section 12 of the *Execution Act* provides:

> 12. Any Sheriff or other officer to whom any writ of execution is directed may and shall seize and take any money or banknotes, and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the execution debtor, and may and shall pay and deliver to the execution creditor any money or banknotes which are so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money as a security or securities for the amount by such writ of execution directed to be levied, or so much thereof as has not been otherwise levied and raised; and the Sheriff or other officer may sue in his own name for the recovery of the sum or sums secured thereby, if and when the time of payment thereof has arrived.

In the view of many, the words "securities for money" are broad enough to permit the seizure of chattel paper but, since this kind of asset is not specifically mentioned, it may be preferable, if garnishment is to be prohibited, to put the exigibility of chattel paper under a writ of seizure and sale beyond all doubt by an appropriate amendment to section 12.

The Commission recommends:

41. A debt which is covered by chattel paper should not be subject to garnishment.

42. Section 12 of the Execution Act *should be amended to clarify the exigibility of chattel paper.*

(c) *Debts Secured by a Pledge*

As we said earlier, garnishment will not usually pose a threat to the interest of a garnishee who has given security for the debt garnisheed because section 18 of the Act gives the garnishee a statutory discharge. A section 18 discharge, however, will not fully restore the rights of the garnishee if the security which he.gave was accompapied by the physical delivery of the collateral into the possession of the secured party (the judgment debtor). Such transaction is commonly referred to as a "pledge."

A section 18 discharge may be cold comfort to the garnishee who has pledged his property and wants it back, and in our view he should not be obliged to comply with garnishment process until his property is returned or appropriate security is given for its return. Since it is the creditor who benefits from the garnishment we believe he should bear the burden of providing appropriate security, such as a bond, for the return of the garnishees property.

The Commission recommends;

43. A garnishee who has pledged collateral as security for a debt garnisheed should be under no obligation to comply with the garnishment until

(a) the collateral has been returned to him or

(b) the creditor has given satisfactory security for the return of the collateral.

5. Payments into Court

It is desirable that the existence of a writ of continuing garnishment should not disrupt the normal course of the garnishees conduct or affect his substantive rights any more than is necessary. In the absence of any specific guidance in the Act, it might be thought that the service of continuing process would affect his right to pay disputed money into court other than in compliance with the writ. For example, if the garnishee is being sued by the debtor for damages he may wish to pay money into court pursuant to the rules of court. The existence of the writ should not prevent him from doing so.

Such a payment should not prejudice the garnisheeing creditor, as we have recommended that funds in court should be attachable. We would, however, place a duty on the garnishee who makes such a payment into court to notify the creditor of that fact. Thus the creditor would be given an opportunity to issue fresh process directed to the registrar of the court into which the money was paid,

The Commission recommends:

44. The service of a writ of continuipg garnishment should not affect the right of the garnishee or his "insurer to interplead or pay money into court under any applicable rule of law; but if that is done notice of the payment should be given to the creditor,

6. Multi-Component Garnishees

Difficult situations can arise when the garnishee, invariably a limited company, is a lapse undertaking which consists of a number of branches or, aspects of its operation. At present, the requirements of the Act concerning service of process on the garnishee can be met by serving the registeredoffice of the garnishee. From the creditor's view this is a desirable position. The address for service is a matter of public record and the creditor need not inquire into the internal structure of the garnishee to determine which component ought to be served. This situation is also acceptable if the garnishee's accounting, payroll and recordkeeping operations are centralized.

If these operations are decentralized, however, there may be an unavoidable delay between the time the garnishee is served and the time the process can effectively be complied with by the appropriate component of the garnishee's undertaking. For example, to which of the garnishee's possibly many components the process relates will not always be obvious, and some time may be necessary to make appropriate inquiries.

The danger to the garnishee is that while these inquiries are being made the money attached may be paid to the debtor by the relevant component because it is unaware of the process and the garnishee may be vulnerable to an enforcement ordet undet section 10 of the Act. While we have considerable sympathy with garnishees in this kind of situation, we do not believe it would be appropriate to improve their position by altering the service requirements of the Act.

In our view the proper approach to this, and related problems, is to modify section 10 by clarifying the courts discretion to refuse to make an enforcement order.

The Commission recommends:

45. Section 10 of the Act should be modified to provide that where

(a) a garnishee has made reasonable efforts to comply with garnishment process, and

(b) in all the circumstances it would be unjust to make an enforcement order against the garnishee

the court may refuse to make an enforcement order.

An exception to the general rule that service may be made on the registered office of a company exists when the garnishee is a chartered bank. This exception arises out of section 96(4) of the *Bank Act* which provides:

> A writ or process originating a legal proceeding or issued therein or in pursuance thereof or an order or injunction made by a court affects and binds only property in the possession of the bank belonging to, or moneys to the credit of, a person at the branch where such writ, process, order or injunction or notice thereof is served.

Such an exception is sensible in the context of banking and we believe its principle might usefully be eitended to "nearbanks."

The Commission recommends:

46. Where a debt sought to be attached is money on deposit in a savings institution having more than one branch, the garnishment process should be directed to and served on the appropriate branch.

A final issue in this area concerns the effect of garnishment process when both debtor and garnishee carry on business in other jurisdictions as well as British Columbia. In response to our working paper, a concern was expressed that garnishment process issued in British Columbia, to attach a debt incurred by the local branch of a garnishee to a

local branch of a debtor, might also attach a debt owed by, say, the Alberta branch of the garnishee to the Alberta branch of the debtor.

While we do not necessarily agree that such a result could arise under the Act in its present form, it would be desirable to put the matter beyond doubt.

The Commission recommends:

> *47. Garnishment process issued in British Columbia should not attach debtsarising out of a business transaction in another jurisdiction where both the debtor and the garnishee carry on business in that jurisdiction.*

H. The Garnishee's Response

1. General

The *Attachment of Debts Act* provides no clear guidance concerning the procedure to be followed by a garnishee after he has been served with a garnishing order. Section 2 of the Act which provides for the issue of process, and the Forms of order in the schedule do not set out any time limit for payment into court.

The only guidance in the Act as to the time for compliance is found in the opening words of section 10(1) which states that "If the garnishee does not forthwith pay into court ... [the creditor may apply for an order]." How effectively is the "payment forthwith" requirement brought to the attention of the garnishee? The word "forthwith" does not appear in the body of the Forms of garnishing order set out in the schedule to the Act, but, below the substance of the orders, Forms D and P each set out, in fine print, a "notice to garnishee." Those notices state, *inter alia* "If you do not pay into court forthwith ... [etc.]."

The "notice to garnishee" appended to Form F (garnishing order before judgment) also specifies "If you dispute your liability, you should forthwith file a dispute note." What precisely is the "dispute note" referred to? The Act says nothing about such a document. The "notice to garnishee" appended to Form D (garnishing order after judgment) is slightly different:

> If you dispute your liability, you should forthwith file a dispute note, and the Registrar will then send you notice of the day upon which you are to appear in Court.

We find this warning grossly misleading. First, it implies that some sort of hearing as to the garnishees liability is an automatic consequence of a dispute. We suggest that this is not the case. It is our reading of section 10 that the decision as to whether or not there are to be subsequent proceedings under that section is one for the creditor. The onus to bring an application under section 10 appears to be on the creditor and, faced with a dispute, he may not choose to do so. The implication that subsequent proceedings, including the possibility that the garnishee must "appear in court," are automatic may induce the garnishee to make a payment into court when he is not liable simply to avoid the expense and trouble of litigating the question of his liability. If he knew that his dispute might end the matter he would be more likely to risk the *possibility* of litigation, as opposed to the *inevitability* of litigation suggested by the notice.

A curious feature of that "notice" is the reference to notification *by the registrar* of subsequent proceedings. We see nothing in the Act which provides for a departure fram the usual rule that the burden of giving notice of an application to a party concerned is on the applicant rather than the court. And what is the legal effect of failing to file a "dispute note" as suggested by the notices? As far as we can tell, none.

In our view, the basic notion of a "dispute note" is a sound one. A garnishees failure to comply with an order may reflect a genuine dispute as to the existence of a debt or it may arise out of mere inactivity or wilful disobedience. The Act fails to draw a distinction between these possibilities and the creditor's only recourse, an application under section 10, seems designed to encompass all.

The difficulty is that the creditor who seeks an order under section 10 may not know the basis of the garnishees noncompliance. If he is aware of a dispute, he may not wish to bring an application under section 10 at all, while he may well wish to pursue the garnishee whose non-compliance is a result of sheer inertia.

Assuming the garnishee does pay into court, there is nothing in the body of the Act which provides for notice of that fact to the creditor. In practice it seems the creditor is obliged to check the court registry from time to time or contact the garnishee to determine if there has been a payment into court.

The notices appended to the forms suggest that the policy of the Act is to "formalize" the garnishee's response, but the results are far from satisfactory. We feel the operation of the Act would be improved by provisions which impose notice requirements, both as to payment into court and disputes, and specified time limitations. These provisions should appear in the body of the Act and clearly spell out the proper course of action for the garnishee.

The garnishee should remain free to dispute his liability in the context of a section 10 application but, if he failed to give proper notice of that dispute within the time provided by the Act, he should be penalized in costs even if he is successful as to the issue of his liability.

The Commission recommends:

48. *A garnishee should be required to respond to a writ of immediate garnishment within 14 days of the service of the writ on him.*

49. *A response to a writ of immediate garnishment means*

    (a) *payment into court of the money garnisheed and the filing of a notice of response indicating that fact, or*

    (b) *the filing of a notice of response indicating a dispute,*

50. *A copy of any notice of response to a writ of immediate garnishment should be delivered to the creditor.*

51. *Failure to file or deliver, a notice of response indicating a dispute within the time specified should not preclude the garnishee from disputing his liability at subsequent proceedings, but he should be liable to the creditor for the costs of those proceedings, even if his dispute as to liability succeeds.*

The foregoing recommendations relate to immediate process. Writs of continuing garnishment raise other problems. Here it is inappropriate to call upon the garnishee to dispute his liability within some specified time after service because the debt garnisheed may not come into existence for some time. We therefore see a need for a mechanism which would allow the creditor to deliver, from time to time during the term of the writ, some sort of notice which would require. The garnishee to respond, that is pay into court or deny liability at the time of the response. A failure to respond to such a notice could carry the same consequences as a failure to respond to a writ of immediate garnishment.

The Commission recommends;

52. A creditor who has issued a writ of continuing garnishment may, at any time during the term of the writ, deliver a notice to the garnishee demanding a response to the notice within 14 days,

53. A response to a notice delivered under recommendation 52 means:

(a) payment into court of any money due at the time of the response, and the filing of a notice of response indicating that fact; or

(b) the filing of a notice of response indicating that, as of the date of the response, the garnishee's liability is disputed.

54. A copy of any notice of response, to a notice of demand delivered under recommendation 52, should be delivered to the creditor.

55. Recommendation 51 should apply to a failure to respond to a notice delivered under recommendation 52.

2. __Forms

A primary function of a document which is garnishment process is to "crystallize" the order or command contained therein. A second, and very important function is to communicate information to the garnishee. This function is reflected in the fact that "standard" forms are specified in a schedule to the Act and that an attempt is made to add to the information contained in the body of the order through a "notice to garnishee."

We see a potential third function for the document: to assist the garnishee in complying with the order. We believe it would be a useful innovation if, attached to or accompanying all garnishment process, there were forms which could be used by the garnishee in making an appropriate response to the order. For example, the Act might specify a standard "notice of response" for this purpose, to be attached in duplicate, to a writ of immediate garnishment, with the style of cause completed. Alternative responses could be set out. All the garnishee need do to respond to the writ is to "tick off" the applicable response, tear off the notices and deliver them to the court and to the creditor. Space on such a standard form should also be provided for the garnishee to indicate the existence and particulars of any joint obligees or other third parties interested in the debt garnisheed who are known to him. Space might also be provided where the garnishee is invited to set out the basis of his dispute. An appropriate range of responses to a writ of immediate garnishment might be:

The sum of $ _____ is paid into court

or

The garnishee disputes his liability to the debtor because _____

_____

_____

To the best of the garnishees knowledge no person other than the debtor is interested in the money garnisheed.

or

The following persons may be interested in the money garnisheed

name	address
name	address

The Commission recommends:

56. All garnishment process served on a garnishee should be attached to or accompanied by forms of response which are appropriate to the type of process involved.

57. The forms of response should provide space in which the garnishee can indicate the existence and particulars of any third parties beneficially interested in the debt garnisheed who are known to him.

I. Service of Garnishment Process on the Debtor

Section 8(2) of the Act provides:

> A copy of the garnishing order shall be served forthwith, or within such time as may be allowed by the Judge or Registrar by memorandum endorsed on the order, upon the defendant debtor, or person liable to satisfy such judgment or order, and no order shall be made for payment to the plaintiff or judgment creditor of moneys paid into Court by the garnishee, as provided in section 18, [sic.] until service of such copy has been proved by affidavit filed.

What does this provision mean? The "service forthwith" requirement seems to apply to all garnishing orders. But a failure to comply only prevents payment out of court. The section would appear, therefore, to affect only those orders which, in fact, attach a debt. Is the policy of the section to require service on the debtor of all garnishing orders or only those orders which attach a debt? If it is the former, then the penalty for noncompliance is ineffective. If it is the latter, it may be impossible to comply "forthwith" since the efficacy of the order may not be determined until the garnisheels liability is established under section 10.

Our view is that either policy may be appropriate, depending on the nature of the garnishment process in question. Where a writ of immediate garnishment is served, whether or not a copy of the writ need be served on the debtor should depend upon whether or not it attaches a debt. To require such service where no debt has been attached will only result in further expense with no corresponding benefit to the debtor.

The Commission recommends;

58. A creditor should be required to deliver a copy of a writ of immediate garnishment and the garnisheels notice to the debtor if that writ has attached a debt.

When should the law require that the copy be served? There are several possibilities:

(a) within some specified time of its issue

(b) within some specified time of service on the garnishee

(c) within some specified time of payment into court

(d) any time after service on the garnishee but before payment out of court

(e) any time after service on the garnishee but before some specified time before payment out of court

The most appropriate rule would appear to be one which combines the effect of rules (c) and (e).

Rule (a) we reject. A longer period than that specified might elapse between issue of the order and service on the garnishee. This would enable the debtor to call the debt and defeat the order.

Of the remaining possibilities the debtor would probably prefer rule (b). If he cannot avoid the garnishment, he may at least avoid some embarrassment resulting from it. For example if his bank account is attached and he does not receive early notice, he may write a number of N.S.F. cheques which would needlessly damage his credit reputation. This would be particularly unfair if the order were issued before judgment. Rule (b), however, would create difficulty for the creditor. If the time specified is short enough to satisfy the debtor's needs, it may expire before the creditor knows whether or not a debt has been attached. He may, therefore, feel he has to serve every order on the debtor simply to protect his position with respect to those orders which are effective.

Rule (d) we also reject. The debtor may have a legitimate reason to dispute payment out of court, and if the creditor is able to withhold notice of the garnishment until payment out is sought, the debtor's rights may be, in practice, sterilized.

Rule (e) would meet the difficulties we see with rule (d) but would not necessarily satisfy the debtor's needs discussed under rule (b).

Rule (c) would appear to be an appropriate compromise of the competing claims discussed under rule (b) but the debtor may remain vulnerable to an immediate application for payment out as discussed under rule (d). Thus some combination of rules (c) and (e) seems called for.

The Commission recommends:

59. Delivery under recommendation 58 should be within 10 days of the time the creditor receives notice of the garnishee's payment into court.

The desirable effect of rule (e) will be incorporated in a later recommendation.

The writ of continuing garnishment raises different issues. Here we believe the debtor should receive notice in all cases. He would have the right, under our recommendations, to apply to shorten its term or have it varied and he might wish to do this before the writ actually attaches a debt. It is therefore less appropriate to wait and see if the writ is effective. He should have early notice of the process in all cases. The timing of service could be governed by rule (b), as the difficulties faced by the creditor in our discussion of that rule are irrelevant in this context.

The Commission recommends:

60. A copy of a writ of continuing garnishment should be delivered to the debtor, in all cases, within 14 days of the service of the writ on the garnishee.

What should be the effect of a failure by the creditor to comply with the requirements relating to the service of garnishment process on the debtor? To nullify the effect of the garnishment seems too drastic. On the other hand, something more than a mere moral exhortation is needed to make those requirements meaningful.

The Commission recommends:

> *61. Any creditor who fails to comply with recommendations 58 to 60 should be deprived of his costs of the garnishment proceedings unless he establishes that his failure was not his fault.*

Recommendations 58 to 61 are based on tentative proposals which were set out in the working paper. The proposals, *per se*, appeared to be uncontroversial and attracted little comment, A number of submissions were, however, directed to the way in which copies of garnishment process might be delivered to the debtor. It appears that the service of legal process can present difficulties in isolated locations in the interior of the Province. As one respondent put it:

> Sec. 8 of the *Attachment of Debts Act* requires that a copy of a Garnishing Order be served personally on the defendant. This creates considerable hardship in rural areas where the Sheriff may have to travel up to 80 miles to attempt service and then finds the defendant not to be available. Instead of seeking an Order for substituted service, it should be possible to have this document served by double registered mail.

We are persuaded that there should be some inexpensive alternative to personal service of garnishment process on the debtor.

The Commission recommends:

> *62. (1) For the purposes of recommendations 58 to 60 where delivery of garnishment process is required, the process should be deemed to be delivered*
>
> *(a) if served on the debtor, or*
>
> *(b) if sent by registered mail to the last address of the debtor, known to the creditor*
>
> *(2) Where delivery is by registered mail the process should be deemed to be delivered on the third day after deposit of the process in the Canada Post Office at any place in Canada.*

J. Payment out of Court

The procedure to obtain payment out of court seems unnecessarily complex. As discussed above, in all cases the creditor must have served a copy of the garnishing order on the judgment debtor. He must then

(a) apply to a judge for a formal order, upon notice to the debtor, for payment out of court; or

(b) apply to the registrar for payment, having given the debtor ten days notice of his intention to do so; or

(c) obtain the debtor's consent to payment out; or

(d) if judgment was obtained by default, allow three months to elapse and then apply to the registrar for payment out.

What rationale underlies the requirement that the judgment debtor be served with a copy of the order; and that having been done, what is accomplished by the service of further process on him relating to payment out?

The aim of the latter service seems to be to give the judgment debtor an opportunity to dispute payment out. But what is there to dispute at that stage, judgment having been entered? The main issues which might be raised by the judgment debtor are that the judgment had been satisfied by other means, other persons have an interest in the funds, or that for some other reason the garnishment was irregular. But does the possibility that the judgment debtor might wish to dispute payment out justify cost and delay of the extra process requirements? In our view it does not.

A single delivery of process on the judgment debtor should be sufficient to put him on notice that garnishment proceedings have been taken and that thereafter it is up to him to "police" events which occur subsequently. He should be free to dispute the garnishment proceedings at any time if grounds are available to him to do so, but the onus should be on him to safeguard his own interests rather than require that the creditor give notice or obtain the judgment debtor's consent when the time comes for payment out.

If the delivery requirements set out in recommendations 58 to 60 are met, we believe that is sufficient notice to enable the debtor to guard his interests under the Act, and the creditor should be permitted to obtain payment out of court without further order or notice to the debtor provided a number of conditions are satisfied.

The Commission recommends:

63. The creditor should be able to obtain payment out of court, without an order, if

(a) judgment has been entered;

(b) no step has been taken by any party entitled to do so to set aside, vary or otherwise dispute the garnishment proceedings;

(c) a copy of the garnishment process was delivered to the debtor;

(d) there does not appear to be any third party interested in the debt garnisheed; and

(e) 30 days have elapsed since the later of

(i) the money was paid into court, or

(ii) conditions (a) and (c) were satisfied.

We also believe that the court should have jurisdiction to order payment out even though all the conditions of recommendation 63 have not been satisfied. This jurisdiction might, for example, be invoked by a creditor at the conclusion of a trial to obtain immediate payment out of money garnisheed before judgment.

The Commission recommends:

64. The court may, on notice to the debtor, make an order for payment out of court to the creditor even though all the conditions of recommendation 63 are not satisfied. Provision should also be made to allow payment out of court with the debtor's consent.

The Commission recommends:

65. Notwithstanding recommendation 63, money may be paid out of court to the creditor if the written consent of the debtor is filed, so long as condition (d) of recommendation 63 is satisfied.

K. Costs

1. The Existing Rules

The *Attachment of Debts Act* is vague concerning the costs to be awarded in garnishment proceedings. General references to costs are made in section 10 and 15, and section 9 provides that the costs of garnishment proceedings may be claimed in the order itself. Those references are given substance by Appendix B of the *Supreme Court Rules* (party and party costs). Item 28 of the basic tariff specifies:

> 28. All process under *Attachment of Debts Act* when no issue tried or heard 15.00
>
> Where an issue is tried or heard, the costs of such issue. including the costs of the application upon which such issue was directed (if any), shall be taxed under the appropriate items as in an action,

The costs in County court may be from $5 to $15 depending on the amount of the judgment.

Section 17 of the *Attachment of Debts Act* provides:

> The garnishee upon paying into Court the amounts payable in respect of the debts, obligations, and liabilities attached, or the amount limited by the garnishing order, or upon complying with an order of the Court or a Judge thereof made respecting the debts, obligations, or liabilities due or owing by him, is entitled to his costs as between solicitor and client. The costs, if not ordered to be satisfied in another way, shall be paid by the garnishing plaintiff. This provision does not apply if the garnishee unsuccessfully resists payment, either in whole or in part, in which case the Judge shall deal with the costs.

Given a garnishee who wishes to comply with an order served on him and who puts the matter in the hands of his solicitor, what costs might be claimed? Items 1, 3 and 4, (conference, telephone and attendance to file) of schedule No. 4 of Appendix C to the *Supreme Court Rules* (solicitor and client costs) are all items which might reasonably be claimed. They would total $40.

2. ___The Function of Costs

The basic functions of costs are the same in the context of garnishment as in other aspects of litigation, The first is to discourage the frivolous or abusive use of legal process through the potentially penalizing effect of an award of costs. We see this function as one of considerable importance in relation to the modifications of the Act which we recommend. This view is reflected in recommendations 5(4) and 12(3) which would empower the courts to award treble costs in cases where process has been improperly issued.

A second function is to provide partial compensation for costs incurred by persons who have had to resort or respond to legal process to enforce or defend their rights. An example of such compensation is contained in recommendation 32 which is aimed at enhancing the position of a joint obligee whose share of joint funds has been paid into court pursuant to garnishment process. One gap in the compensation scheme remains.

3. The Garnishee's Costs

The Act does not seem to provide for costs to the garnishee who is put to the trouble of searching his records for any evidence of his indebtedness to the debtor, and, if none appears to exist, who files a "dispute note" as suggested by the "notice" appended to the process served upon him. He may be entitled to costs if the creditor takes subsequent proceediggs under section 10 and his dispute is successful, but even then that entitlement is not explicit in the

Act. The only clear statement setting out the garnishee's right to costs is section 17 which applies only when there is payment into court. The garnishee should be given an explicit right to costs where he formally disputes and no subsequent proceedings are taken by the creditor.

It is our belief that the Act should fix a minimum sum to which the garnishee is entitled in respect of his costs of responding to garnishment process. This would give the garnishee a right to compensation and might induce the creditor to limit the in the issue of process to what is reasonable circumstances.

What should that fixed minimum sum be? It should be high enough to cause the creditor to weigh carefully the question of whether or not process should be issued, but not so high as to be prohibitive. It should bear a reasonable relationship to the garnishee's cost of responding to process. On the whole we believe that $25 is sufficient. While this is somewhat less than might be claimed under Appendix C, the effect of recommendation 56 should be to avoid, in most cases, any need for the garnishee to employ a solicitor.

The Commission recommends:

66. *The garnishee's right to costs for successfully disputing process should exist whether or not the creditor takes proceedings under section IG, and that right should be explicit in the Act,*

67. *The Act should specify that the garnishee is entitled to minimum costs of $25 for responding to garnishment process.*

The $25 minimum may be inadequate to compensate the garnishee for complying with a writ of continuing garnishment which attaches a number of debts as they periodically become due, Special provision should be made for such cases.

The Commission recommends:

68. *Where a writ of continuing garnishment attaches more than one debt and more than one payment into court is necessary, the garnishee should be entitled to retain, out of the money attached, a sum equal to the lesser of*

(a) $10 or

(b) 3% of the amount attached with respect to the second and subsequent debts attached.

It is also appropriate to provide for costs in relation to a response to a notice delivered under recommendation 52.

The Commission recommends:

69. *The Act should specify that a garnishee is entitled to costs of $5.00 for responding to a notice delivered under recommendation 52.*

The force of the previous recommendation would be severely weakened if the creditor were permitted to pass the costs on to the debtor, by adding them to the judgment debt, in cases where the process was not effective to attach a debt. This should be specifically prohibited by the Act.

The Commission recommends:

70. If garnishment process is not effective to attach a debt, the debtor should not be liable to the creditor for:

(a) the creditor's costs or disbursements or

(b) the garnisheels costs paid by the creditor

with respect to the process,

4. Small Claims Court

In developing our recommendations concerning costs, the focus of our attention has been costs incurred in relation to garnishment process issued out of the Supreme or county courts. But the *Attachment of Debts Act* also regulates garnishment process issued out of a small claims court and there the basic policy is that no costs should be awarded except for disbursements and witness fees. At this time we can see no justification for a departure from that policy in the context of garnishment.

The Commission recommends:

71. Recommendations 5(4), 12(3), 32, 51, 55, 66, 67, 68 and 69, in so far as they relate to or provide for costs, should not apply to garnishment process issued by a small claims court.

72. Recommendation 71 should not affect the jurisdiction or practice of a small claims court in relation to the award of costs for disbursements and witness fees.

CHAPTER VI SUMMARY OF RECOMMENDATIONS

The Commission's recommendations are summarized below.

The Commission recommends:

1. The Attachment of Debts Act *should provide for two types of remedy:*

(a) a writ of immediate garnishment, and

(b) a writ of continuing garnishment.

2. In these recommendations:

(a) "writ of immediate garnishment" means a document which, upon service on the garnishee, attaches any debt due from the garnishee to the debtor at the time of service.

(b) "writ of continuing garnishment" means a document which, upon service on the garnishee, attaches any debt which is due at the time of service or which becomes due from the garnishee to the debtor at any time during a term specified in the writ.

(c) "garnishment process" means a writ of immediate garnishment, a writ of continuing garnishment or both as the context may require.

3. *A writ of immediate garnishment should be issued as of right on demand in the same fashion as a writ of summons.*

4. *A writ of continuing garnisbnent may be issued only if*

   (a) *there are facts or circumstances, or a relationship between the debtor and the garnishee whereby there are reasonable grounds for expecting that a debt due from the garnishee to the debtor may come into existence, and*

   (b) *a writ of immediate garnishment would not be adequate having regard to the nature of the debt sought to be attached.*

5. (1) *A writ of continuigg garnishment should be issued as of right in the same fashion as a writ of immediate garnishment.*

   (2) *A garnishee or a debtor may apply to the court for an order that a writ of continuing garnishment be set aside.*

   (3) *On an application under (2) the onus should be on the creditor to show cause why the order should not be set aside and, unless the creditor establishes that recommendation 4 has been satisfied.*

   (4) *Where a writ of continuing garnishment is set aside pursuant to an application under (2) the court may award the applicant costs in an amount not exceeding 3 times the costs to which he would otherwise be entitled.*

6. *The Act should specify that where there has been a payment into court pursuant to garnishment process issued before judgment and the defendant is entitled to have money paid out of court to him because*

   (a) *he has succeeded in the main action;*

   (b) *the plaintiff has recovered a judgment for less than the amount garnisheed; or*

   (c) *the garnishment process has been set aside or released because it was improperly issued*

   then the defendant should be entitled to recover compensation for the loss of use of the money held in court (or the difference between the amount of money held in court and the amount of the judgment recovered by the plaintiff as the case may be) from the plaintiff.

7. *An application for an order for compensation under recommendation 6 may be made in the action in which the garnishment occurred and upon such an application being made the court may*

   (a) *dispose of the matter summarily; or*

   (b) *order the trial of an issue.*

8. *Prejudgment garnishment should be available to every plaintiff seeking a money judgment,*

9. *Prejudgment garnishment should not be available unless there are grounds for believing that a judgment obtained by the plaintiff may not be satisfied if prejudgment garnishment is not permitted.*

10. *The Act should specify that prejudgment garnishment is not permitted unless, having regard to the potential hardship and inconvenience to the defendant and the potential benefit to the plaintiff, it achieves a result that is just and equitable in the circumstances.*

11. *Prejudgment garnishment process should be issued as of right in the same fashion as postjudgment garnishment process where the plaintiff's claim against the defendant is for a debt or liquidated demand.*

12. *(1) Where prejudgment garnishment process is issued under recommendation 11, the defendant may apply to the court at any time before judgment for an order that the process be set aside.*

(2) On an application under (1) unless the court is satisfied that

(a) issue of the process did not violate recommendations 9, 10 or 11

(b) if the prejudgment process was a writ of continuing garnishment, that the issue of the process complied with recommendation 4, and

(c) the plaintiff has sufficiently demonstrated the merits of his claim, the process should be set aside.

(3) For the purposes of (2) the merits of a claim are sufficiently demonstrated if:

(a) one or more affidavits filed on behalf of the plaintiff

(i) set out and verify the facts on which the plaintiff's claim is based, and where a defence is alleged

(ii) set out and verify any additional facts which rebut that defence, or

(iii) deny the facts on which the defence is based; and

(b) there appears to be no defence that has a reasonable prospect of defeating the claim other than a defence which, to succeed, depends on a finding, favourable to the defendant, on a fact that is in dispute.

(4) Where process is set aside under (2) the court may award to the defendant costs in an amount not exceeding three times the costs to which he would otherwise be entitled.

13. *(1) Where the plaintiff's claim against the defendant is not for a debt or liquidated demand, prejudgment garnishment process should be issued only with the leave of the court.*

(2) An application for leave to issue prejudgment garnishment process should specify the amount sought to be attached by the process.

(3) The court should not give leave to issue prejudgment garnishment process for the amount specified in the application unless the court is satisfied that

(a) issue of the process will not violate recommendations 9 or 10,

(b) if the process sought is a writ of continuing garnishment, recommendation 4 is satisfied,

(c) based on the evidence adduced in the application the plaintiff, if successful, is likely to recover a judgment in the action for an amount greater than or equal to the amount specified in the application, and

(d) the plaintiff has sufficiently demonstrated the merits of his claim.

(4) For the purposes of (2) the merits of a claim are sufficiently demonstrated if:

(a) one or more affidavits filed on behalf of the plaintiff

(i) set out and verify the facts on which the plaintiff's claim is based, and where a defence is alleged

(ii) set out and verify any additional facts which rebut that defence, or

(iii) deny the facts on which the defence is based; and

(b) there appears to be no defence that has a reasonable prospect of defeating the claim other than a defence which, to succeed, depends on a finding, favourable to the defendant, on a fact that is in dispute.

(5) In an application the court should have the power to give leave to issue prejudgment garnishment process for an amount less than that specified in the application.

(6) The specification of an amount in an application under (2) should not be an admission by the applicant that his claim is limited to that amount,

14. Leave to issue prejudgment garnishment process should not be granted unless notice of the application for leave has been given to the defendant,

15. Where an application for leave to issue prejudgment garnishment process is pending the plaintiff should be permitted to serve on the proposed garnishee a notice in prescribed form and service of the notice should bind the debt in his hands until the application has been dismissed or the debt has become subject to garnishment process issued with leave of the court,

16. In any application under recommendation 12 or 13(2) the burden of adducing evidence should be on the plaintiff, but the plaintiff should have the benefit of a rebuttable presumption that the garnishment does not offend recommendations 9 or 10.

17. Where money has been paid into court pursuant to prejudgment garnishment process and no application is pending to set aside the process

(a) the plaintiff or defendant may apply to the court for an order

(i) that the applicant be permitted to lodge with the court a satisfactory interest-bearing security, and that the money garnisheed be paid out to the applicant, or

(ii) that the money garnisheed be used to purchase an interestbearing security satisfactory to the court, or

(b) the defendant may apply to the court for an order that he be permitted to create a mortgage or other charge over his own property, naming the registrar of the court as the secured party and that upon the mortgage or charge being perfected the money garnisheed be paid out to him,

18. (a) Where a security is lodged or purchased under recommendation 17, it stands in place of the money garnisheed and it may be

(i) transferred, or

(ii) liquidated and the proceeds distributed as the court may direct on judgment being pronounced in the action, and

(b) a mortgage or charge created under recommendation 17(b) stands in place of the money garnisheed and it may be

(i) ordered to be assigned to the plaintiff, or,

(ii) declared to be discharged as the court may direct on judgment being pronounced in the action.

19. Where a defendant is entitled to compensation under recommendation 6, and a security has been lodged or purchased under recommendation 17(a), any interest ultimately obtained by, or credited to, the defendant should be taken into account in assessigg that compensation.

20. The term of a writ of continuing garnishment should not exceed one year.

21. On the application of a debtor or garnishee the court should be able to order that the term of a writ of continuing garnishment be reduced.

22. A creditor may, during the term of a writ of continuing garnishment, apply to the court for an order extending the term of the writ, and such an order may be granted on sufficient cause being shown.

23. An order made under recommendation 22 may extend the term beyond the period of one year from the time the writ was issued, but the term should not be extended more than one year beyond the time the extension was applied for.

24. Subject to recommendation 20, the court should have a wide discretion to order the variation of garnishment process, or make it subject to terms, to achieve a result which is just in all the circumstances.

25. The service of a writ of immediate garnishment on the registrar of a court should be effective to attach any funds held by that court which are payable to the debtor.

26. The service of a writ of continuing garnishment on the registrar of a court should be effective to attach any funds held by that court during the term of the writ which are, or during the term of the writ become, payable to the debtor.

27. Garnishment process served on a registrar under recommendations 25 or 26 should identify the proceedings in which the money has been, or may be, paid into court by specifying the action number, style of cause, or both as the practice of the registry in question may require.

28. A debt owed by a garnishee to two or more persons jointly (a joint obligation) should be attachable by a creditor of one of those persons, and the entire amount due, or enough to satisfy the judgment debt, should be paid into court in response to garnishment process.

29. Where it appears that a debt attached was a joint obligation the money may be paid out of court to the creditor only upon the order of the court, and no such order should be made without notice to call joint obligees of, and, the debtor.

30. Any joint obligee of debt attached under recommendation 28 or the creditor may apply to the court at any time before, or during, an application under recommendation 29 for a determination of the extent of the debtor's beneficial interest in the debt garnished.

31. Upon an application under recommendation 30 the court may order payment out to any joint obligee other than the debtor, that portion of the money garnisheed to which that obligee appears to be beneficially entitled.

32. (1) Any joint obligee should be entitled to his legal costs, on a solicitor and client basis, if he succeeds in establishing a beneficial interest in the debt garnished and has behaved reasonably in all the circumstances.

(2) Those costs may be awarded against the creditor, the debtor, or both, but if costs are awarded against the debtor, the obligee may compel the creditor to pay them and the creditor may add the amount so paid to the judgment debt.

33. (1) A crossclaim in favour of a garnishee against a debtor, arising after service of a writ of continuing garnishment, should not be effective as against the creditor to resist, or reduce a debt garnished by, the order, unless the garnishee establishes

(a) that the crossclaim arose pursuant to a binding commitment entered into before service of the writ, or

(b) the garnishee behaved reasonably in all the circumstances and it would be inequitable to deny him the right to rely on or assert the crossclaim.

(2) In this recommendation "crossclaim" means a right of setroff or right which could be raised by counterclaim or otherwise by a garnishee to resist, or raised in reduction of, a claim brought by the debtor on the obligation garnisheed.

34. If a garnishee is insured with respect to a potential debt which may become due to the debtor, the creditor may serve a copy of the garnishment process on the insurer, and such service should bind any insur-

ance proceeds which may become payable to the debtor as if the insurer were directly liable to the debtor.

35. *If a garnishee is insured with respect to a potential debt which may become due to the debtor, payment by the insurer to the debtor should not, as between the garnishee and the creditor, constitute noncompliance with the garnishment process or subject the garnishee to liability to the creditor.*

36. *Section 18 of the Act should be modified so as to protect an insurer who complies with garnishing process served on him under recommendation 34.*

37. *Section 5 of the* Crown Proceeding Act *should be amended to provide that garnishment proceedings are an exception to the prohibition.*

38. *The* British Columbia Hydro and Power Authority Act *should be amended by adding the* Attachment of Debts Act *to the list of Acts which apply to the Authority set out in section 53(6).*

39. *The* Partnership Act *should specify that garnishment process is a "writ of execution" for the purposes of section 26(1).*

40. *"Debts, obligations, and liabilities" should not include a monetary obligation to the extent that it is covered by a negotiable instrument drawn by the garnishee if*

    (a) at the time garnishment process is served on the garnishee the instrument has been delivered or mailed to the debtor or a person designated by the debtor, and

    (b) the instrument has not been dishonoured.

41. *A debt which is covered by chattel paper should not be subject to garnishment,*

42. *Section 12 of the* Execution Act *should be amended to clarify the exigibility of chattel paper.*

43. *A garnishee who has pledged collateral as security for a debt garnisheed should be under no obligation to comply with the garnishment until*

    (a) the collateral has been returned to him or

    (b) the creditor has given satisfactory security for the return of the collateral.

44. *The service of a writ of continuing garnishment should not affect the right of the garnishee or his insurer to interplead or pay money into court under any applicable rule of law; but if that is done notice of the payment should be given to the creditor.*

45. *Section 10 of the Act should be modified to provide that where*

    (a) a garnishee has made reasonable efforts to comply with garnishment process, and

    (b) in all the circumstances it would be unjust to make an enforcement order against the garnishee

    the court may refuse to make an enforcement order.

46. Where a debt sought to be attached is money on deposit in a savings institution having more than one branch, the garnishment process should be directed to and served on the appropriate branch.

47. Garnishment process issued in British Columbia should not attach debts arising out of a business transaction in another jurisdiction where both the debtor and the garnishee carry on business in that jurisdiction.

48. A garnishee should be required to respond to a writ of immediate garnishment within 14 days of the service of the writ on him.

49. A response to a writ of immediate garnishment means

(a) payment into court of the money garnisheed and the filing of a notice of response indicating that fact, or

(b) the filing of a notice of response indicating a dispute.

50. A copy of any notice of response to a writ of immediate garnishment should be delivered to the creditor.

51. Failure to file or deliver, a notice of response indicating a dispute within the time specified should not preclude the garnishee from disputing his liability at subsequent proceedings, but he should be liable to the creditor for the costs of those proceedings, even if his dispute as to liability succeeds.

52. A creditor who has issued a writ of continuing garnishment may, at any time during the term of the writ, deliver a notice to the garnishee demanding a response to the notice within 14 days.

53. A response to a notice delivered under recommendation 52 means:

(a) payment into court of any money due at the time of the response, and the filing of a notice of response indicating that fact; or

(b) the filing of a notice of response indicating that, as of the date of the response, the garnishee's liability is disputed.

54. A copy of any notice of response, to a notice of demand delivered under recommendation 52, should be delivered to the creditor.

55. Recommendation 51 should apply to a failure to respond to a notice delivered under recommendation 52.

56. All garnishment process served on a garnishee should be attached to or accompanied by forms of response which are appropriate to the type of process involved.

57. The forms of response should provide space in which the garnishee can indicate the existence and particulars of any third parties beneficially interested in the debt garnisheed who are known to him.

58. A creditor should be required to deliver a copy of a writ of immediate garnishment and the garnishee's notice to the debtor if that writ has attached a debt.

59. Delivery under recommendation 58 should be within 10 days of the time the creditor receives notice of the garnishee's payment into court.

60. A copy of a writ of continuing garnishment should be delivered to the debtor, in all cases, within 14 days of the service of the writ on the garnishee.

61. Any creditor who fails to comply with recommendations 58 to 60 should be deprived of his costs of the garnishment proceedings unless he establishes that his failure was not his fault.

62. (1) For the purposes of recommendations 58 to 60 where delivery of garnishment process is required, the process should be deemed to be delivered

(a) if served on the debtor, or

(b) if sent by registered mail to the last address of the debtor, known to the creditor.

(2) Where delivery is by registered mail the process should be deemed to be delivered on the third day after deposit of the process in the Canada Post Office at any place in Canada.

63. The creditor should be able to obtain payment out of court, without an order, if

(a) judgment has been entered;

(b) no step has been taken by any party entitled to do so to set aside, vary or otherwise dispute the garnishment proceedings;

(c) a copy of the garnishment process was delivered to the debtor;

(d) there does not appear to be any third party interested in the debt garnisheed; and

(e) 30 days have elapsed since the later of

(i) the money was paid into courts or

(ii) conditions (a) and (c) were satisfied.

64. The court may, on notice to the debtor, make an order for payment out of court to the creditor even thoggh all the conditions of recommendation 63 are not satisfied.

65. Notwithstanding recommendation 63, money may be paid out of court to the creditor if the written consent of the debtor is filed, so long as condition (d) of recommendation 63 is satisfied,

66. The garnisheets right to costs for successfully disputing process should exist whether or not the creditor takes proceedings under section 10, and that right should be explicit in the Act.

67. The Act should specify that the garnishee is entitled to minimum costs of $25 for responding to garnishment process.

68. *Where a writ of continuing garnishment attaches more than one debt and more than one payment into court is necessary, the garnishee should be entitled to retain, out of the money attached, a sum equal to the lesser of*

(a) $10 or

(b) 3% of the amount attached with respect to the second and subsequent debts attached.

69. *The Act should specify that a garnishee is entitled to costs of $5.00 for responding to a notice delivered under recommendation 52.*

70. *If garnishment process is not effective to attach a debt, the debtor should not be liable to the creditor for:*

(a) the creditor's costs or disbursements or

(b) the garnishee's costs paid by the creditor with respect to the process.

71. *Recommendations 5(4), 12(3), 32, 51, 55, 66, 67, 68 and 69, in so far as they relate to or provide for costs, should not apply to garnishment process issued by a small claims court.*

72. *Recommendation 71 should not affect the jurisdiction or practice of a small claims court in relation to the award of costs for disbursements and witness fees.*

CHAPTER VII CONCLUSION

We wish to repeat our thanks to the many persons who responded to our working paper. We also wish to acknowledge our debt to Professor C.R.B. Dunlop, now of the Faculty of Law, University of Alberta. The contents of Chapter III are based on his scholarly research.

Professor A. Zysblat, Mr. Justice J. D. Lambert and the late Ronald C. Bray, all former members of the Commission, participated actively in this study.

Finally we wish to thank our Counsel, Arthur L. Close, who was responsible for the drafting and preparation of this Report and the working paper on which it is based.

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Commission member Kenneth C. Mackenzie did not participate in the making of this Report.

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