LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON

CREDITORS' RELIEF LEGISLATION: A NEW APPROACH

LRC 42

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

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

REPORT ON
CREDITORS' RELIEF LEGISLATION

This Report involves a consideration of the *Creditor's Relief Act* and the way in which its policies can best be realized.

For reasons set out in the Report, it is the conclusion of the Commission that the Act should be repealed and replaced by new legislation. The primary function of the recommended legislation would be to ensure that adequate information is available to creditors concerning execution proceedings by competing creditors to permit fair and timely recourse to federal insolvency laws.

CHAPTER I INTRODUCTION

A. General

This is the third of a series of Reports concerning the enforcement of money judgments. The first two Reports concerned the *Attachment of Debts Act* and executions against land. Both Reports made recommendations in relation to the proprietary remedies available to the unsecured judgment creditor to enable him to proceed against specific types of assets belonging to his judgment debtor. The subject matter of this Report is not a particular remedy but a particular aspect of enforcement measures that is common to a number of remedies: the distribution of the proceeds realized on an enforcement measure.

An examination confined to this aspect presupposes that certain events have occurred in earlier phases of the proceedings. First, a creditor will have obtained a judgment against the debtor which forms the basis of his claim to the proceeds. Next, the creditor will have invoked one of the creditors' remedies at his disposal to proceed against the assets of the debtor. He may have issued a writ of execution ordering the sheriff to seize and sell the debtor's personal property, he may have attached a debt owing to the debtor, he may have taken proceedings to force a sale of the debtor's real property, or, less commonly, he may have obtained a charging order against certain property or secured the appointment of a receiver. He might also have obtained a judgment summons against the debtor to enforce payment with the threat of imprisonment. Whatever path is chosen, money will have become available to satisfy the judgment debt owing the creditor where none existed before, and that money may be in the possession of the sheriff, the court, a receiver or of the creditor himself.

But the creditor who invoked the execution process is not the only person who may have a claim to its proceeds. There are two other classes of potential claimants. The first is composed of persons who may have had some claim to the asset which generated the proceeds, such as a coowner of the asset or a secured party for whom the asset was collateral for a loan. The second class consists of other creditors who might also have wished to proceed against the debtor's assets. It is with the position of the second class of potential claimants that we are concerned. The rights of the first group are generally governed by rules of law which are beyond the scope of this Report.

At common law, a creditor acquired the right to have his judgment paid in priority to other creditors of the debtor by taking execution proceedings before other creditors did so. Mather states:

> Where a sheriff has several writs issued by different creditors against the same debtor, it is his duty to execute that writ first which was first delivered to him, and when he has sold sufficient to satisfy that writ, he should sell under the next in order, and so on, as long as there are goods unsold. If there remain writs unexecuted when all the goods are sold, he should pay the amounts of the several writs in order of priority of time and make a return *nulla bona* to the unsatisfied writs. *Aldred* v. *Constable*, 6 Q.B. 370; and *In Re Pearce, Ex Parte Crossthwaite*, 14 Q.B.D. 966; 54 L.J.Q.B. 316.

The common law position is simple: first in time, first in right. Thus if debtor D owes $1,000 to each of A, B and C, and C is the first creditor to deliver a writ of execution to the sheriff, C has a first claim on those of D's assets which may be seized under the writ. This is true irrespective of the order in which the loans were made or judgments taken on them. If, in our example, D's assets are only worth $1,000 or less, A and B receive nothing unless further assets can be found.

This result can, in many cases, be criticized as unfair. The failure of A and B to take execution proceedings may not reflect any lack of diligence on their part. On the contrary, their forbearance may have been designed to assist the debtor through a period of temporary financial difficulty. Clearly, if being firstintime also coincides with a superior moral claim to prior payment, that is purely fortuitous. A strong argument can therefore be made that the firstintime rule is not an appropriate way to regulate priorities among unsecured execution creditors.

The rule has in fact been abandoned in the context of bankruptcy legislation. While many policies may be pursued in the various forms such legislation might take, one universal feature is a provision for "the distribution of an insolvent's assets equitably amongst his creditors and persons to whom he is under liability," subject to any priorities which may reflect particular policies. In Canada, the authority to enact bankruptcy legislation is exclusively a matter for the Federal Parliament.

The law has also moved to abandon the firstintime rule through the enactment, by provincial governments, of socalled "creditors' relief" legislation such as our own *Creditors' Relief Act*. The basic principle of the Act is declared in section 3:

> Subject to the provisions hereinafter contained, there shall be no priority among creditors by execution from the Supreme Court or County Courts.

The balance of the Act is devoted to providing for proceedures which implement that principle. The full text of the Act is set out as Appendix A to this Report.

B. A History of Creditors' Relief Legislation

Creditors' relief legislation is a child of the late 19th century and its early history is intertwined with the insolvency law of the period. Before Confederation, a number of the colonies which later became Canada moved to enact or declare in force certain Imperial bankruptcy legislation. The Colony of Vancouver Island, for example, in 1862 enacted an Act to declare the law relative to Bankruptcy and Insolvency in Vancouver Island and its dependencies, while British Columbia, enacted An Ordinance to amend the law relative to Bankruptcy and Insolvency in British Columbia in 1865.

After Confederation, the provincial insolvency laws remained in force until 1875 when the Parliament of Canada enacted the *Insolvent Act* which then occupied the field. Had that continued to be the case, it is doubtful if creditors' relief legislation would ever have been enacted. So long as equal distribution under the *Insolvent Act* was available, the need for provincial legislation abrogating the firstintime rule was not obvious.

But in 1880, five years after it was enacted, the *Insolvent Act* was repealed, leaving Canada bereft of bankruptcy legislation. The full reasons for the repeal must be left to the historians, but a cursory examination of contemporary legal publications indicates considerable dissatisfaction with the administration of the Act:

> The *Insolvent Act* is no more. The strong feeling evinced against it last session had partly died away this year; but its doom was sealed. We trust it may be an omen of better times. [W]e are satisfied that nothing could be more unsatisfactory than the reign (under the Act) of official assignees. Creditors will feel now that pleasant sense of relief which comes over the backwoodsmen when the mosquito season is over.

The principle of equality among creditors did not, in the eyes of some, seem, sufficient to justify retention of the *Insolvent Act*. The Editor of the Canada Law Journal quoted favourably the following remarks of Lord Sherbrooke:

> First born of things divine, Equality may be a good thing. But even gold may be bought too dear, and I cannot help thinking that Equality becomes a curse when, in order to attain it, you are called upon to forfeit to strangers who have no claim at all the very thing which it is desired to equalise ... It is better that debts should be paid unequally than that the property should be destroyed in the effort to ascertain an equality which yields a purely metaphysical and imaginary satisfaction to the thirsty debtor.

It appears, however, that the repeal of the *Insolvent Act* was not universally applauded because a leading commercial province was quick to react. Even before the repeal became effective, Ontario enacted The *Creditors' Relief Act*, *1880*. That Act received Royal Assent on March 5th, 1880 and the Federal (repeal) Act received Royal Assent on April 1st, 1880. Contemporary comment concerning the new Act was ambivalent:

We shall now see how far the Act, prepared by the AttorneyGeneral, will meet the necessities of the case. We have had occasion to say some strong things against Sheriffs, who will be principally concerned in the administration of the new Act.

After an initial period of uncertainty, other provinces followed Ontario's lead and enacted essentially similar legislation. British Columbia did so in 1902, and the Act of 1902 is basically the same as the *Creditors' Relief Act* in force today.

In 1919, after a legislative hiatus with respect to bankruptcy of almost 40 years (apart from provincial legislation), the Parliament of Canada enacted the *Bankruptcy Act*. Since that time the Federal legislation has been periodically amended, reenacted and improved in its operation. At the time of writing the enactment of a new Bankruptcy Act seems imminent.

The reentry of the Federal Government into the field of bankruptcy did not, however, lead to a corresponding retreat by provincial governments with respect to legislation such as the *Creditors' Relief Act* enacted to fill, as far as they could, the insolvency "void." Most of that legislation remains in force to this day.

Thus in British Columbia there are two quite distinct procedures available to the creditor who feels that his position is being prejudiced by a prior execution. First, if all the necessary conditions are satisfied he may take steps to put the debtor into bankruptcy and share rateably in the estate. Secondly, he may apply under the *Creditors' Relief Act* to share in the proceeds of the execution if he is eligible.

C. Procedure under the Creditors' Relief Act

Earlier in this chapter we emphasized the analogy between creditors' relief legislation and bankruptcy legislation. This analogy cannot, however, be carried too far. While the *Creditors' Relief Act* contains some features which are found in bankruptcy legislation, it does not embody a fundamental policy of bankruptcy law: the discharge of a debtor from his debts after distribution of all his exigible assets among his creditors. The *Creditors' Relief Act* does not contemplate any final distribution of the debtor's assets nor does it in any way affect the rights of creditors to enforce fully their judgments against the debtor. Basically, the Act is procedural only. It provides a mechanism for the orderly and systematic distribution of the proceeds of enforcement measures taken by individual creditors among all creditors who have established claims at a time prior to the date set for distribution. Creditors can establish their right to share in the distribution by delivering writs of execution to the sheriff or by obtaining a certificate in the summary proceedings under the Act, that are more fully referred to below.

When a sheriff receives money levied under a writ of execution against the goods of a debtor, or receives money paid pursuant to certain garnishment proceedings; or when the registrar of the Supreme Court receives the proceeds of a sale of land under the *Execution Act,* the sheriff must make an entry in a book open to public inspection noting that the money has been received and the amount involved. At the end of one month from the date of the entry, the sheriff will distribute all money in his hands, which are the proceeds of the debtor's property, to all creditors who establish their claims to the sheriff within the one month period. The amount distributed will include all money received by the sheriff during that period. The sheriff is given power, exercisable on his own initiative, to make further levies against the debtor's goods; to seek a garnishing order attaching debts owing to the debtor; and to obtain money in court owing to the debtor.

If the money in the hands of the sheriff at the end of the day period is not sufficient to pay in full the claims of all creditors who have filed writs or certificates during that period of time, the sheriff (after paying the claims of creditors who are wage earners the full amount of their claims or an amount equal to three months' wages or salary whichever is less, and after deducting sufficient amounts to cover his costs and the costs of the creditors under whose enforcement measures the money was collected) may distribute the balance rateably among all creditors who have established claims. Alternatively, the sheriff may prepare a scheme of distribution and serve a copy of it on each creditor. The Act provides a procedure under which any creditor may contest the scheme and have the issue determined in a summary way.

After distribution, and upon receipt of further money by the sheriff or registrar, the process is repeated and any writs or certificates which have not been satisfied in the earlier distribution are automatically included in a subsequent distribution.

If, without any sale by the sheriff, a debtor pays the full amount owing in respect of executions and certificates in the sheriff's hands at the time of such payment, the sheriff will not invoke the distribution system. The money paid to the sheriff will be paid out to the execution creditors who have filed their claims at or prior to the date of payment. Similarly, if a debtor voluntarily and without any sale by the sheriff pays to him part of the amount

owing in respect of an execution or certificate in his hands, and there is at the time no other execution or claim in the sheriff's hands, the distribution system is not invoked and the money is paid out by the sheriff directly to the creditor. Any money realized by a sheriff as proceeds of a sale of property by him under an interpleader order is not distributed rateably among all creditors, but is paid directly to those creditors who were parties to the interpleader proceedings and who agree to contribute pro rata to the expenses of contesting any adverse claim.

The "certificate" referred to in the previous passages is one obtained under sections 5 to 19 of the Act which permit a creditor who has not obtained a judgment to share in the distribution. If a debtor permits an execution issued against him, under which any of his goods or chattels are seized by a sheriff, to remain unsatisfied in the sheriff's hands until within two days of time fixed by the sheriff for sale of the property, or for twenty days after seizure of the property, a creditor who has not yet obtained judgment against the debtor may make application for a certificate, whether or not the amount claimed by the creditors is due and payable at the date of application.

A certificate, when issued, is equivalent to a judgment and a writ of execution. The claim for a certificate is dealt with through a summary procedure in which the debtor or other creditors can file objections. In default of objection a certificate will be issued by the District Registrar. If an objection is filed, the issue is heard by a judge upon application for a hearing by the creditor claiming the certificate. Unless such an application is made, the claim will be taken to have been abandoned. The judge may determine any questions in dispute in a summary way, or may direct a trial in court. If there is a dispute as to material facts, and the sum in controversy appears to be over the monetary jurisdiction of the County Courts, the judge must direct a trial in the Supreme Court. If the sum in controversy does not exceed the monetary jurisdiction of the County Courts, the judge may direct the matter to be determined in a County Court. Once the certificate is obtained, it can be delivered to the sheriff, and the holder of the certificate is thereby entitled to share in distribution of the proceeds of the debtor's property in the sheriff's hands.

CHAPTER II THE WORKING PAPER

A. Introduction

In 1976 we prepared and circulated a Working Paper on the *Creditors' Relief Act*. There were two main parts to the Working Paper. The first part concerned the "inadequacies" of the Act and set out ways in which the Act might be modified to overcome them. In this context "inadequacy" has a special meaning. It is used to refer to the ways in which the stated policy of the Act to eliminate unjustified priorities among creditors is not fully realized owing, *inter alia*, to the narrow scope of the Act. The sedond part of the Working Paper discussed the issue of whether the legal and administrative framework to implement that policy ought to be provided by provincial laws in the light of analogous legal machinery that exists under federal insolvency legislation.

B. The "Inadequacies" of the Act

To avoid a tedious repetition of the "inadequacies" of the *Creditors' Relief Act* as we perceived them at the time our Working Paper was prepared, the relevant chapter of the Paper is set out as Appendix B to this Report and our principal conclusions reached are summarized below:

1. A levy to which the Act applies (arguably in some cases) does not include

   (a) a payment by a debtor to a sheriff or the creditor after a writ of execution is issued but before an actual seizure,

(b) where the enforcement measure is a proceeding with respect to land taken under the *Execution Act*,

(i) payments by any person to the creditor to obtain the relapse of a registered judgment,

(ii) payments into court or to a sheriff by any person where enforcement proceedings have been taken on a registered judgment but the land has not yet been sold;

(c) the proceeds of a garnishment under the *Attachment of Debts Act* except in exceptional circumstances;

(d) the proceeds of an execution against money or an instrument under section 12 of the *Execution Act*;

(e) the proceeds of enforcement measures taken on judgments entered in small claims courts; and

(f) the proceeds of enforcement measures such as

(i) an equitable receivership,

(ii) a judgment summonsy or

(iii) a charging order.

2. The application of the *Creditors' Relief Act* to the proceeds of enforcement measures taken under the *Family Relations Act* is uncertain.

3. The drafting of the *Creditors' Relief Act* is archaic and obscure.

4. The administration of the *Creditors' Relief Act* is not uniform across the province.

C. Possibilities for Reform

After identifyipg the ways in which the policies of the *Creditors' Relief Act* are not being realized, the Working Paper went on to define the characteristics of a statute in which the "equal distribution" policy of the Act was carried to its ultimate conclusion.

Such a statute would include within its scope and make available for equal distribution to all creditors of a debtor's payments or proceeds described in paragraphs (a) to (f) of item 1 in the summary set out above. It would also cover certain payments made directly by a debtor to a creditor where the payment was stimulated by legal proceedings taken by the creditor.

It was against this hypothetical statute, representing the extreme manifestation of the policies of the *Creditors' Relief Act*, that the Working Paper weighed the possibility of repeal.

D. Retention or Repeal

A chapter of the Worknpg Paper was devoted to the issue of whether the *Creditors' Relief Act* should be repealed or retained in modified form. The arguments favouring, and consequences of, each course of action were discussed. As this discussion is of considerable importance to our final conclusions, the contents of the relevant chapter are set out, *in extenso*, below in a slightly modified form.

SHOULD A CREDITORS' RELIEF ACT BE RETAINED

1. *Some Possible Consequences of Retaining a Modified Creditors' Relief Act*

(a) ___*Cost*

If all the proposals [describing the hypothetical "ideal" statute] were to be adopted, what would emerge is a *Creditors' Relief Act* vastly more complex than that presently in force. It follows that the administrative difficulties encountered under the present Act would be multiplied and the sheriff's need for professional legal and accounting expertise heightened.

It is worth noting that the full potential of the existing Act is not being realized. Our limited research indicates, for example, that the more sophisticated features of the Act which require the sheriff to take some initiative have little practical significance. For example, we were able to identify only one case in which a sheriff who had ever made an attempt to obtain, under section 31, money which had been paid into court under garnishment proceeding taken by one creditor of the debtor. The one attempt was apparently unsuccessful.

A *Creditors' Relief Act*, "ideal" or not, cannot operate in a vacuum. It calls for legal support services on a far larger scale than those presently allocated to it. It is not good enough for the sheriff to rely for advice, as in practice is often the case, on solicitors for individual creditors. Their interest, quite properly, is in advancing the position of their own clients, and that interest may often be at crosspurposes with the role of the sheriff under the Act, which is to advance the position of all creditors equally.

It therefore seems that the retention of a *Creditors' Relief Act* which is to be at all significant would require administrative machinery and support services far in excess of that now allocated to it. At present we have no basis for predicting the likely extent of these additional costs.

(b) *Impact on Litigation*

The decision to initiate litigation to enforce a right is one which is not lightly taken. One factor usually considered when making such a decision is the likelihood of realizing money on any judgment which might be recovered. A potential plaintiff will often be reluctant to sue if all that the trouble and expense of an action yields is a "dry" judgment.

We can only speculate how far the existence of the *Creditors' Relief Act* enters into such a calculation. How often, for example, would a creditor refrain from suing a debtor known to have assets, simply because other creditors might emerge who would, under the *Creditors' Relief Act*, assert a claim to the fruits of any judgment enforcement measures he might take. It is our instinct and experience that this is seldom the case, largely because the Act is limited in scope and because a large number of enforcement measures are available under which the execution creditor will have an exclusive right to the proceeds.

If an "ideal" *Creditors' Relief Act* were to be enacted, would it have a significant impact on the decision to sue? It might be argued that the enlarged scope of the Act might deter people from suing who are now prepared to do so. On the other hand, it may be that, because the possible loss of priority arising out of an

"ideal" *Creditors' Relief Act* is similar to a loss of priority which would arise, under present law, through an intervening bankruptcy, little would be added to the risk of litigation and an expanded Act would have little impact on the decision to sue.

(c) *Impact on Execution Practices*

The decision to take execution proceedings once a judgment has been obtained, may involve many of the same considerations as the decision to commence the legal proceedings which resulted in the judgment. The judgment creditor must weigh the cost of the proceedings against the likely return and, again, the existence of a creditors' relief scheme may influence his decision to a creater or lesser extent. It would be redundant to repeat our analysis of this influence, but one aspect deserves special consideration.

An "ideal" *Creditors' Relief Act* might encompass payments made directly by the debtor to the creditor who has initiated enforcement proceedings. Such a creditor could be compelled to remit that payment to the sheriff for distribution to all creditors who qualify under the Act. But very often such a payment is made in return for a "release" by the creditor of the particular property which had been charged or bound by the execution. It is our belief that a *Creditors' Relief Act* expanded in this way would have a significant effect on the willingness of creditors to enter into such arrangements.

The present practice with respect to proceedings against land provides a good example. Our research indicates that where enforcement proceedings are initiated through the registration of a certificate of judgment under section 35 of the *Execution Act*, less than .05% ultimately result in a sale of land by the sheriff yielding proceeds which are subject to the *Creditors' Relief Act* in its present form. While many factors may contribute to the dramatic disparity between proceedings commenced and those carried through to a sheriff's sale, it is our experience that in a large proportion of cases the enforcement proceedings are terminated by a direct payment by or on behalf of the debtor in consideration of a release of the charge on land created by the registration of the judgment.
Consider the following situation:

Judgment creditor C has obtained a judgment against D for $5000. C knows that D owns land worth $20,000 and registers his judgment in the appropriate Land Registry Office. D wishes to sell the land and approaches C offering to pay him the $5000 in satisfaction of the judgment to obtain a release of the land from the judgment. What should C do?

At present the offer would almost always be accepted. But if C was required to remit the $5000 to the sheriff for distribution under an extended *Creditors' Relief Act* he would obviously be reluctant to do so. A distribution under the Act might yield to him an amount substantially less than the $5000, but in the meantime D will have sold the land and the proceeds of the sale may be placed beyond the reach of further process. C's most prudent course of action would be to force a sheriff's sale of the land which would yield $20,000 for distribution under the Act, thus maximizing the possibility that his judgment will be satisfied in full. One might, therefore, expect to see a significant increase in the number of execution proceedipgs which are concluded by a sheriff's sale of property, rather than being halted at some intermediate stage by a direct payment.

2. *Some Possible Consequences of Repealing the Creditors' Relief Act*

Unless some other priority scheme were to be developed, the repeal of the *Creditors' Relief Act* would mean that priority among execution creditors employing the same enforcement measure would be determined by the common law position the firstintime would prevail. What are the possible consequences of this?

First, it might be argued that the rule would foster and encourage a "get in quick" attitude toward litigation and execution. A creditor who would otherwise refrain from action or execution in order to assist the debtor through a period of temporary financial difficulty might be much less inclined to do so if his generosity were to result in a loss of priority to a competing creditor.

The firstintime rule, in effect would allow the prior execution creditor to exercise a complete monopoly over the assets of the debtor which are subject to his proceedings. The only way in which that monopoly might be broken is through the intervention of bankruptcy proceedings. One might, therefore, expect to see some increase in the incidence of bankruptcy proceedings invoked by subordinate creditors who have no other way to enforce the right to equal distribution once given to them by the *Creditors' Relief Act*.

A repeal of the *Creditors' Relief Act* should lead to an increase in efficiency in the sheriff's office. The Act is a cumbersome one to administer and it entails unavoidable cost and delay. The firstintime rule, on the other hand, is straightforward and would appear to be much simpler to administer.

It is difficult to say more about the effect of repeal. The firstintime common law rule presently governs priorities among execution creditors who employ garnishment (subject to section 31 of the Act), proceedings against land (short of an actual sheriff's sale) and a number of other remedies. In practice, the Act, in its present form, is relevant only to the distribution of money levied under a writ of seizure and sale. The narrow scope of the Act makes its possible repeal a much less radical step than might otherwise be the case, which leads us to believe that repeal would be unlikely to cause any great upheaval in the execution process.

3. *The Arguments in Favour of Retention*

Creditors' relief legislation is not fundamental to a system of law dealing with the enforcement of money judgments. It is appropriate, therefore, when reexamining the British Columbia *Creditors' Relief Act*, to consider the fundamental question: should any form of *pari passu* system of distribution outside bankruptcy be retained? Most common law jurisdictions in the world have answered the question in the negative and have retained the "first come, first served" rule established by the common law for determining priority among judgment creditors in nonbankruptcy situations. In view of the fact that creditors' relief legislation was initially adopted at least in part to fill the void created by the absence of federal bankruptcy and insolvency legislation, one may well conclude that the continued acceptance of creditors' relief legislation in many Canadian jurisdictions is due to social inertia rather than to a clear recognition on the part of legislators that the common law approach is inferior.

It may be argued, however, that legislators in those jurisdictions where creditors' relief legislation had been adopted, if they gave any thought to the matter at all, concluded that the lack of insolvency legislation was not the only reason for the enactment and retention of this kind of legislation. Not a single jurisdiction which prior to 1919 had creditors' relief legislation, repealed it after the enactment of the *Bankruptcy Act*. Indeed, most jurisdictions continued after this time to amend and improve their creditors' relief acts. One jurisdiction which is substantially under federal control very recently adopted updated and improved creditors' relief legislation. It seems clear that notwithstanding the existence of federal bankruptcy and insolvency legislation, creditors' relief statutes are viewed by many Canadian legislators as an important part of the law affecting debtorcreditor relationships.

There is, nonetheless, some basis for the position that *pari passu* distribution of the debtor's available assets among his creditors is socially undesirable. It can be argued that the common law system is superior in that it is likely to give priority to those creditors who incurred the initial management costs necessary to produce funds from which judgments against the debtor can be satisfied. In some cases, particularly where diffi-

cult collection remedies such as equitable execution are involved, these costs may be significant. It is obvious, however, that this objection is not fundamental. It would have no validity if creditors' relief legislation provided for adequate compensation to the collecting creditor. The existing *Creditors' Relief Act* does not but there is no reason why it might not do so.

It has been suggested earlier that a creditors' relief distribution scheme necessarily entails cumbersome and expensive administrative machinery. Even assuming the validity of this suggestion, it is not an obvious conclusion that a creditors' relief system is an unacceptable alternative to the common law. It may well be that the disadvantages resulting from delay in satisfying the judgments of some creditors, are offset by the advantages of *pari passu* distribution to all or most creditors. Moreover, while the cost, in terms of tax dollars spent in the operation of a sophisticated creditors' relief structure, may be greater than the cost of maintaining the rudimentary enforcement system of the common law, it is not at all clear that the total cost to all participants, including the state, the creditors and the debtor, is greater under a creditors' relief scheme. A properly designed collection and distribution system has the potential to eliminate the waste in the form of unproductive efforts and expenditures, which must surely be the by-product of a totally haphazard approach to debtor-creditor relations.

A further objection to creditors' relief schemes which is not so easily countered, however, is that such schemes place most creditors on a basis of equality even though, as a matter of public policy or of business morality, all creditors should not be treated equally. For example, it is often noted that in the consumer credit market, while some credit.grantors advance loans or give credit to a debtor at a time when he is a good financial risk, others deal with him at a time when he is obviously overcommitted. It is the latter type of creditor who thereafter frequently precipitates the breakdown of the debtor's financial viability by invoking the judgment collection machinery of the state. A *pari passu* system of distribution ignores the complete lack of social responsibility, and, in some cases, good business judgment, involved in the actions of some credit grantors. It is no longer a completely adequate response to this objection to argue that the first group of creditors can protect themselves and ensure priority by taking security interests in the debtor's property. With recent trends in consumer protection legislation toward the limitation or curtailment of the use of chattel security agreement, security interests in assets, other than real property, are ceasing to be of much value in the context of consumer debt.

While this argument deserves considerable respect, it too does not necessarily lead to the conclusion that the common law system of judgment enforcement is superior to a creditors' relief scheme, for there is no guarantee under the common law system of priorities that the creditors with the most meritorious claims will be the first to take steps to obtain and enforce judgments against the defaulting debtor. Indeed, such creditors are likely to be the ones who avoid harsh collection measures as long as possible, so as to give to the debtor every reasonable opportunity to discharge debt obligations voluntarily. By contrast, high risk lenders seldom hesitate to employ the collection apparatus of the state in the event of default. While the common law system rewards diligence, that may not, in many cases, be a virtue. A system under which, with minor exceptions, all creditors are treated equally, is certainly no worse than the common law in this respect.

Clearly nothing is lost through the adoption of a creditors' relief system for dealing with creditors of a debtor. On the other hand it is equally clear that such a system permits the realization of social policies other than *pari passu* distribution, which could not effectively be implemented at common law. As a matter of public policy a legislature may well decide that the claims of certain kinds of creditors of a debtor, such as deserted dependants, should be given priority over those of other creditors. A creditors' relief system provides a mechanism through which these policies can be implemented.

A properly designed and efficiently managed creditors' relief system is no doubt superior to the haphazard common law rules which determine priorities among creditors. Such a scheme could reduce the overall cost of judgment enforcement, eliminate priorities where they are not socially justifiable, and provide a structure within which meritorious claims to priorities are recognized.

None of the existing creditors' relief systems presently in operation in Canada go much beyond implementation of a *pari passu* scheme of distribution, however, although there is no reason to conclude that the full potential of this type of administrative structure has been realized. It could be used to draw together the many aspects of debtor-creditor relationships which, at the present time, exist independently and are frequently in conflict. Not only might this result in a reduction of direct administrative costs, but it could also reduce the social cost and human misery which too frequently occur under uncoordinated systems. The existing creditors' relief scheme could form a nucleus for the development of a highly integrated collection and debtor protection mechanism under which other aspects of debtorcreditor relationships such as the examination in aid of execution, exemptions, orderly payment arrangements, and debtor counselling could be administered.

The *Creditors' Relief Act*, in its present form, is deficient in a number of ways but it is certainly not beyond repair. Some of the "gaps" in the Act may be overcome through relatively minor admendments, such as those required to bring the major remedy of garnishment within the Act. Other changes, such as those designed to bring certain payments made directly to creditors within the Act, may seem to be more radical. But those changes are designed to advance and rationalize a policy which is fundamentally fair and which has been almost universally accepted in Canada.

4. *The Arguments in Favour of Repeal*

In considering whether the *Creditors' Relief Act* should be retained and improved or repealed, the issue is not whether the policy of the Act is sound and fair. That equality among unsecured creditors is, as an abstract proposition, desirable, is conceded. It is not, however, obvious that this policy is one which should be pursued in all contexts and in disregard of all other values which may be relevant. In particular, is it appropriate to impose an equal distribution scheme on enforcement measures which do not contemplate a total liquidation of the debtor's assets or should the operation of such a scheme be confined to bankruptcy?

In its pursuit of equality among unsecured creditors a *Creditors' Relief Act* is capable of yielding results which, in many cases, might be regarded as unfair. The basis of the Act is that a creditor, whose enforcement measure directly or indirectly produces money, should be required to give up that money for distribution among all unsecured creditors who establish claims. In effect, the fruits of the labour of creditor A must be yielded up for the benefit of creditors B and C as well.

For example, debtor D owes $2000 to A, $10,000 to B and $5,000 to C. If A proceeds to judgment against D and through various enforcement measures realizes $1,700, that money would be distributed as follows:

A $200
B $1,000
C $500

Even if A were adequately compensated for the costs of his enforcement measures (which is not the case under the present Act) he might be forgiven for regarding B and C as "parasites."

The advantage of B and C is heightened if the existence of A's successful enforcement measures creates a situation whereby they can assert their claims by obtaining certificates under the *Creditors' Relief Act* thereby avoiding the potentially more expensive alternative of obtaining a judgment through normal litigation. While the policy of equality may be sound in the abstract, if the pursuit of it encourages and indeed rewards, parasites, is commercial morality significantly advanced?

Adequate compensation may make A's position somewhat more acceptable but it is not a complete answer. Not all enforcement measures are successful, and there is no acceptable way to pass the costs of abortive enforcement measures on to other creditors in principle, A may be quite willing to pursue an expensive or complicated enforcement measure, even if there is a high risk that it may not succeed, if he knows that any proceeds realized will be applied to satisfy his judgment. He may be unwilling to take that risk if he will receive only a fraction of the proceeds. What policy is served by such a result?

On the other hand A would have no cause for complaint if the enforcement proceedings which he initiated took the form of bankruptcy. An equal distribution scheme is an integral part of such a remedy and A would know from the outset that he would have no exclusive claim to the proceeds of the debtor's estate.

The *Creditors' Relief Act* represents a significant legislative intrusion into normal collection practices. To compel a creditor to consider, and perhaps contest, the claims asserted by competing creditors, and to force him generally to interact with an administratively complicated distribution scheme, all add up to a considerable measure of inconvenience. In how many cases is this justified?

The intrusion is heightened if the scope of the Act is expanded. Earlier it was asserted difficulties would arise if certain direct payments by debtor to creditor are made subject to the Act. The effect of this would be to force sales of land and other property in circumstances where neither debtor nor creditor wish it. This is a nuisance to the creditor and may visit considerable hardship on the debtor.

Finally, the existence of Federal insolvency legislation is relevant to a consideration of repeal. It is not unusual to find both Federal and Provincial governments, through legislation, pursuing similar policies with respect to the same subject matter. Leaving aside questions of constitutional law, such a situation does not necessarily lead to the conclusion that one or the other should withdraw from the field. But where other factors suggest that a withdrawal by one may be appropriate, the presence of the other serves to rebut any argument that such a withdrawal would leave an undesirable void.

This is the case with the *Creditors' Relief Act*. If the Act were to be repealed and the firstintime rule reinstated, the creditor who was not first would not be left without a remedy. In most cases he could have recourse to the *Bankruptcy Act* to ensure that a distribution occurred if he wished to pursue that course of action.

E. The Call for Submissions

In the Working Paper the Commission departed from its usual practice in that it took no tentative position on the issues that were raised. In the concluding chapter the Working Paper stated:

> It is fair to say that a majority of the Commission would prefer to see the *Creditors' Relief Act* repealed. That preference, however, does not represent a strongly held Commission view and we are not, at this stage, prepared to characterize it as a tentative conclusion or proposal for reform. To do so would be misleading. The issues and options are set out in the sense that there is no Commission position which calls for rebuttal or support, and comment is sought on that basis.
>
> It follows that our need for response is heightened and we earnestly solicit the views of all interested parties and their legal advisors on the matters which we have raised. in particular:

1. Should the *Creditors' Relief Act* be repealed.

2. If a decision were taken to retain a *Creditors' Relief Act*, how far should it be modified, having regard to the proposals set out in chapter IV and any other areas of concern.

The Working Paper, although it received a wide circulation, was the subject of a response that was disappointingly small. The response that we did receive was divided on the issues on which comment was sought.

The very paucity of the response received, however, permits certain inferences to be drawn. It seems clear that there is no groundswell of support for a vastly expanded *Creditors' Relief Act* nor for the repeal of the Act. In fact it might be fair to say that the fate of the Act is not a matter of high concern at all. That being the case, we feel that we have a great deal more freedom in reaching our final conclusions than would be the case if we were faced with the task of choosing between or reconciling two opposing positions, each having a large number of proponents who vigorously support a fixed position. In particular, we regard ourselves as free to look beyond the particular proposals and suggestions set out in the working paper as the focus of our final recommendations and, instead, adopt a new approach as we have, in fact, done.

CHAPTER III OUR GENERAL CONCLUSIONS

In the Working Paper the Commission as a whole expressed a rather hesitant preference for the repeal of the *Creditors' Relief Act*. In reexamining the issues at stake, the arguments for and against repeal, and the response that we received that preference has been reinforced in certain respects.

It is now our firm conclusion that it is unnecessary and undesirable that *provincial laws* should provide a legal and administrative framework for the *compulsory* distribution of the proceeds of an execution (however defined) among all creditors of the execution debtor. In stating this conclusion, the two aspects of it that have been emphasized call for amplification:

> "provincial laws": our conclusion is not an adverse judgment on the basic principle of equality among creditors. Its validity is conceded. It is simply our belief that this principle is most efficiently and rationally pursued under federal legislation relating to insolvency.
>
> "compulsory": This word is emphasized to make it clear that we see a definite role for provincial laws and institutions in effecting voluntary arrangements between debtors and their creditors that may involve a distribution scheme. In other words, the *Debtor Assistance Act* does not fall within the scope of our conclusion.

It is consistent with our conclusion that the *Creditors' Relief Act* should be repealed, and to the extent that it provides the legal framework for a scheme of distribution among creditors, nothing should be enacted to replace it. Its distribution function ought to be left to federal bankruptcy law. The Act, however, has one other function that might be worth preserving.

At bottom, the *Creditors' Relief Act* is designed to assist the creditor who feels that his position is threatened by the seizure, under execution, of his debtor's major asset by a competing creditor who at common law would have priority to the proceeds of the execution. It does this in two ways. First, it provides for the maintenance of a "book," open to public inspection in which particulars of the prior execution will have been entered. Thus the creditor is given an opportunity to discover his peril and time to reach a reasoned decision as to whether or not he should take steps to intervene in the execution. If he decides to intervene, he might commence bankruptcy proceedings or he might assert his claim pursuant to the provisions of the Act so as to share in the proceeds of the execution. Those provisions are, of course, the second way in which the Act assists the competing creditor.

We have concluded the last option is one that should no longer exist and that the choice of the creditor should be limited to bankruptcy proceedings or simply doing nothing. But to make a rational choice between those two possibilities, the creditor still must have some way of knowing that a choice is called for. If he has no knowledge of the prior execution, or no easy means, such as the creditors' relief book, of learning about it, the option of commencing bankruptcy proceedings is not meaningful.

It follows from this that even without a distribution scheme such as that provided under the *Creditors' Relief Act* there way be a legitimate need for a public register of some kind in which executions and analogous proceedings are recorded so that competing creditors have a full and fair opportunity to exercise their rights under federal insolvency laws. Through the provision of the "creditors' relief book," the Act partially meets this need. The principle of the creditors' relief book is, therefore, worth preserving.

It is our conclusion that the *Creditors' Relief Act* ought to be repealed and replaced by legislation that embodies a new approach that of making execution "information" accessible. The following chapter is devoted to describing the desirable characteristics of such legislation.

CHAPTER IV RECOMMENDED LEGISLATION

A. Introduction

In the previous chapter we set out our conclusion that new legislation was called for legislation replacing the *Creditors' Relief Act* designed to serve a new and limited function. That function would be to make available to a creditor information concerning execution measures taken by competing creditors and provide a reasonable opportunity to that creditor to take bankruptcy proceedings if he wishes to do so. We now turn to more specific features that we believe should be embodied in such legislation.

Set out in Part B of this chapter is draft legislation, tentatively entitled the "*Execution Recoveries Registration Act*." Hereafter it is referred to simply as "the Act." Part C of this chapter consists of a commentary on the Act and the features that it contains.

Before proceeding to the text of the Act, we feel obliged to offer two notes of caution. First, the Act was prepared internally at the Law Reform Commission and, as none of our staff have any formal training in the drafting and prepartition of legislation, many technical and stylistic improvements may be possible. The language of the Act should not be regarded as fixed.

Secondly, in preparing the Act we have attempted to avoid assumptions concerning the technology that will be utilized by those who will implement and administer the Act. The approach taken to the mechanics of the registry system will depend very much on the "traffic" it will be called upon to bear. By this we mean the volume of registrations to be stored within the registry and the number of inquiries to which it must respond.

If the traffic is "light" it may be that the functions contemplated by the Act can be carried out manually. If the traffic is "heavy", the recommended registry may function most effectively if computer technology is utilized for storage and for the speedy and comprehensive retrieval of information. Satisfactory statistical information is not available at this time concerning various aspects of the operation of the Act which would allow us to make a confident prediction in this regard.

Our discussions with persons experienced in systems planning lead us to believe that our scheme would present no particular problems, whichever approach is taken to the establishment of the registry.

B. The Draft Act

EXECUTION RECOVERIES REGISTRATION ACT

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Interpretation

1. In this Act

(a) "caveat" means a caveat lodged under section 6.

(b) "continuing realization" means

(i) a writ of continuing garnishment,

(ii) an arrangement between a recovery debtor and a sheriff whereby periodic payments are made to the sheriff toward the satisfaction of a judgment, or

(iii) a sale or realization of property over a period of time by a sheriff or receiver.

(c) "court official" means the registrar or district registrar of the Supreme Court of British Columbia, a County Court or the Provincial Court.

(d) "notification creditor" means a judgment creditor who has caused a notification entry to be made.

(e) "notification debtor" means a judgment debtor against whose name a notification entry has been made.

(f) "notification entry" means an entry in the register made under section 7(1).

(g) "recovery" means

(i) money realized on a sale of property by a sheriff pursuant to a writ of seizure and sale,

(ii) money realized on a sale of land by a sheriff pursuant to the *Execution Act*,

(iii) money paid to a sheriff in full or partial satisfaction of a judgment debt on which enforcement proceedings have been taken,

(iv) money paid into a court in compliance with postjudgment garnishment process,

(v) money paid into a court in compliance with prejudgment garnishment process if a final judgment has been entered in favour of the recovery creditor,

(vi) money realized through the enforcement of a charging order and held by a court, and

(vii) money realized by a receiver appointed by a court on the application of an unsecured recovery creditor.

(h) "recovery agent" means

(i) a sheriff, with referencd to a recovery set out in sections 1 (g) (i) , 1 (g) (ii) and 1 (g) (iii),

(ii) the court official of the court with reference to a recovery set out in sections l(g) (iv), l(g)(v) and l(g)(vi), and

(iii) the receiver with reference to a recovery set out in section l(g)(vii).

(i) "recovery creditor" means the person entitled to enforce a judgment for money on which a recovery has been made.

(j) "recovery debtor" means the person against whom a judgment for money, on which a recovery has been made, is enforced.

(k) "register" means the register established and maintained by the registrar pursuant to section 3(1).

(1) "registrar" means the registrar as provided in section 3(2) and includes a deputy registrar.

(m) "registrar's certificate" means a certificate issued under section 5(4).

(n) "sheriff" includes a deputy sheriff.

Application of the Act

2. This Act does not apply to

(a) a recovely under an order made under the *Family Relations Act* or the *Divorce Act* (Canada) for the periodic payment of maintenance,

(b) a recovery on a judgment for less than $2,500, or

(c) a recovery, other than a recovery pursuant to a continuing realization, of less than $1,000.

Register

3. (1) A register shall be established and maintained within the Province for the purpose of this Act.

Registrar

(2) The register shall be maintained by an officer to be called the registrar together with a deputy registrar and such employees as are necessary; all of whom may be appointed under the *Public Service Act*.

Register open to public

(3) The register shall be open to public inspection in accordance with the regulations.

Registration of recoveries

4. (1) An entry may be made in the register with respect to each recovery to which this Act applies.

Contents of entry

(2) An entry may be made in the register with respect to a recovery shall specify

(a) the name of the recovery debtor,

(b) the date of the recovery and the date of the entry,

(c) the amount of the recovery,

(d) the name of the recovery creditor,

(e) the action number of the proceeding in which the recovery was made,

(f) the court and registry in which the proceeding was taken,

(g) if the recovery was pursuant to a continuing realization,

(h) the nature of the process under which the recovery was made,

(i) the identity of the recovery agent, and

(j) such other information as may be prescribed by regulation.

Recovery by sheriff

(3) Each sheriff, with respect to each recovery in which he is the recovery agent, shall deliver a notice in Form A of the Schedule to the registrar within 5 days, or such longer period as may be prescribed by regulation, from the date of the recovery.

Notice of recovery

(4) Where the recovery agent is a court official the recovery creditor may deliver notice in Form A of the Schedule to the registrar.

Idem

(5) A receiver who is a recovery agent shall deliver a notice in Form A of the Schedule to the registrar within 5 days, or such longer period as may be prescribed by regulation, from the date of the recovery.

Entry after notice

(6) Upon a notice in Form A of the Schedule being delivered to a registrar, he shall

(a) cause an entry to be made in the register with respect to the recovery described in the notice, and

(b) comply with section 8.

Entry on continuing realization

(7) An entry in the register in respect of the first recovery pursuant to a continuing realization covers all subsequent recoveries under that realization.

Order of entries

(8) Subject to any regulation made under section 14(a), entries in the register shall be maintained in alphabetical order according to the family name of the recovery debtor.

Effect of entry

5. (1) A recovery agent shall not pay to a recovery creditor any amount in respect of a recovery unless

(a) the recovery is the subject of a subsisting entry in the register and 45 days have elapsed since the later of

(i) the date of the entry, or

(ii) the date of the restoration of the entry under section 9(2), and

(b) no subsisting caveat is lodged pursuant to section 6(2) with respect to the recovery.

Registrar's certificate

(2) A recovery agent shall require that the matters set out in clauses (a) and (b) of subsection (1) be evidenced by a registrar's certificate.

Idem

(3) A registrar's certificate issued with respect to the first recovery under a continuing realization is also evidence of the matters set out in clauses (a) and (b) of subsection (1) with respect to subsequent recoveries under that realization unless a copy of a caveat has been delivered to the recovery agent pursuant to section 6(2).

Idem

(4) Upon the request of a recovery creditor or a recovery agent the registrar shall issue to him a certificate in Form B of the Schedule in respect of the recovery.

Idem

(5) A registrar's certificate is, in favour of a recovery creditor and a recovery agent, conclusive proof of its contents.

Idem

(6) Where the registrar issues a certificate with respect to a recovery pursuant to subsection (4) he shall cause a note of the certificate and the date thereof to be made in the entry relating to the recovery.

Caveat

6. (1) A person who has filed a petition for a receiving order against a recovery debtor pursuant to the *Bankruptcy Act* (Canada) may lodge a caveat in Form C of the Schedule with respect to any recovery entered under section 4 in the name of that debtor.

Lodging of caveat

(2) A caveat is lodged by delivery of the caveat to the registrar and

(a) if the recovery agent is a receiver, by delivery of a copy of the caveat to the receiver, or

(b) if

(i) the recovery agent is a court official or a sheriff,

(ii) the recovery was pursuant to a continuing realization, and

(iii) a registrar's certificate has been issued under section 5(4),

by delivery of a copy of the caveat to the court official or sheriff.

Idem

(3) A person who lodges a caveat shall deliver a copy thereof to the recovery creditor forthwith.

(4) Where a caveat is delivered to the registrar he shall forthwith cause a note of the caveat to be made in every subsisting entry in the register relating to the recovery debtor specified in the caveat.

Discharge of caveat

(5) A recovery creditor may discharge a caveat by delivering to the registrar a notice in Form D of the Schedule.

Idem

(6) Where a caveat or a notice in Form D of the Schedule is delivered to the registrar he shall forthwith make a note thereof on the entry in the register to which it relates.

Notification entry

7. (1) A notification entry may be made in the register with respect to any judgment for money of the Supreme Court of British Columbia or a County Court if the amount unsatisfied at the time the entry is made is equal to or exceeds $2,500.

Idem

(2) A notification creditor may deliver a notice in Form E of the Schedule to the registrar who shall cause a notification entry to be made in the register.

Idem

(3) A notification entry in the register shall specify

(a) the name of the notification debtor,

(b) the name and address of the notification creditor,

(c) the court, registry and action number of the proceeding in which the judgment was recovered,

(d) the date the judgment was recovered,

(e) the date of the entry in the register and the expiry date of the entry, and

(f) such other information as may be prescribed by regulation.

Notice to creditor

8. (1) Upon a notice in Form A of the Schedule being delivered to the registrar he shall search the register for a subsisting notification entry relating to the recovery debtor.

(2) If it appears that the recovery debtor is also the notification debtor specified in a notification entry, the registrar shall cause a notice in Form F of the Schedule to be sent by post to the notification creditor at the address specified in the entry.

(3) Subsection (2) does not apply if the notification creditor is also the recovery creditor.

Deletion of entries

9. (1) A registrar may delete from the register

(a) an entry relating to a recovery, other than one made pursuant to a continuing realization, that has been concluded by payment to the recovery creditor,

(b) an entry relating to a recovery in which a registrar's certificate has been issued under section 5(4) if 30 days have elapsed since the certificate was issued and the recovery was not pursuant to a continuing realization,

(c) an entry relating to a recovery pursuant to a continuing realization if the entry is more than one year old,

(d) a notification entry that has expired, or

(e) a notification entry relating to a judgment that has been satisfied.

Restoration of entries

(2) Where an entry has been deleted from the register under subsection (1)(c) the registrar shall, on the application of a recovery creditor or a recovery agent, cause the entry to be restored if the realization has not concluded.

Trust for Costs

10. Upon a recovery being made, a portion of the recovery equal to the taxable costs of the recovery creditor in relation to the recovery is appropriated to those costs and the recovery agent is deemed to hold it in trust for the recovery creditor.

Delivery of document

11. (1) Where delivery of a document to a person is required or provided for under this Act the document shall be deemed to have been delivered

(a) if served on the person, or

(b) if sent by prepaid registered mail to the person at his least address known to the deliverer.

Idem

(2) Where delivery is by registered mail the document shall be deemed to be delivered on the third day after deposit in the Canada Post office at any place in Canada.

Protection of officials

12. (1) The registrar and his officers, employees, representatives and persons acting on his behalf and recovery agents other than receivers are not liable in their personal or official capacities for any loss or damage suffered by a person by reason of anything done or omitted to be done in good faith in respect of the duties imposed by this Act.

(2) Notwithstanding any other law, the liability of the Crown in right of the Province for loss or damage suffered by any person in respect of the acts or omissions of the persons referred to in subsection (1) shall be determined as if subsection (1) had not been enacted.

Penalty

13. Any person

(a) who signs or lodges a caveat, or

(b) who signs, or delivers to the registrar, a notice in Forms D or E of the Schedule, knowing that it contains false information is guilty of an offence and is liable to a fine of $5,000.

14. The LieutenantGovernor in Council may make regulations

(a) for the maintenance of the register on electronic or magnetic media,

(b) for the establishment of a central office and one or more suboffices for the maintenance and use of the register,

(c) adding to, deleting or modifying any of the forms in the Schedule,

(d) for access and use of the register including

(i) search fees,

(ii) office hours, and

(e) concerning notification entries including

(i) registration fees,

(ii) the expiration of notification entries, and

(iii) the deletion of notification entries.

R.S.B.C. 1960, c. 85

15. The *Creditors' Relief Act* is repealed.

R.S.B.C. 1960, c. 135

16. The *Execution Act* is amended

(a) in section (2) by striking out “and a claim established under the *Creditors' Relief Act* from” the definition of "judgment",

(b) in section 34 by repealing the definition of judgment and substituting the following:

"judgment" means a judgment, decree, or order of the Court of Appeal, Supreme Court, or any County Court or Small Debts Courts, or of a Judge of any of those Courts, by which judgment, decree, or order, a sum of money is payable to any person and includes an order made under any other Act that entitles a person to register the order in a land titles office;

(c) by repealing sections 41 and 57, and

(d) by repealing section 58 and substituting the following:

58. Subject to section 40(3) and subject to the *Execution Recoveries Registration Act* the moneys received by the Registrar of the Court shall be distributed by him among all judgment creditors whose judgments formed a lien and charge against the land at the date of the order for sale and priority among such judgment creditors is determined by the order of registration of their judgments against the title to the land.

Transition

17. (1) Subject to subsection (2) of this Act does not apply to a recovery made before this Act comes into force.

(2) Notwithstanding section 12, a recovery which, before this Act came into force was governed by the *Creditors' Relief Act*, shall continue to be governed by that Act as if it had not been repealed.

Act in force on proclamation

18. (1) The provisions of this Act, except this section, come into force and effect on the date fixed by the LieutenantGovernor by his proclamation.

(2) This section comes into force and effect on Royal Assent.

EXECUTION RECOVERIES REGISTRATION ACT

FORM A

To the registrar

Please enter particulars of the following recovery in the register:

1. Recovery debtor: _____

2. Date of recovery: _____

3. Amount of recovery: _____

4. Recovery creditor: _____
(Name)
_____
(Address)

* 5. Recovery agent: _____

6. Court, registry and action number of recovery proceeding:
_____

7. Nature of process under which recovery made:

+ 8. The recovery was/was not made pursuant to a continuing realization.

(Signed) _____
Recovery creditor or recovery agent or solicitor for either.

_____

* If the recovery agent is a sheriff or a court official it is sufficient to specify the title of the recovery agent.

\+ Strike out words that are not applicable.

EXECUTION RECOVERIES REGISTRATION ACT

FORM B
Certificate

1. On _____ an entry was made in the register setting out the following
(Date)
particulars of a recovery:

(a) Recovery debtor: _____

(b) Date of recovery: _____

(c) Amount of recovery: _____

(d) Recovery creditor: _____
(Name)

_____
(Address)

(e) Recovery agent: _____

(f) Court, registry and action number: _____

(g) Nature of process: _____

* (h) The recovery was/was not made pursuant to a continuing realization.

2. At the date hereof no caveat is/a subsisting caveat has been lodged with respect to the recovery.

_____ _____
(Date) Registrar

_____
* Strike out words that are not applicable

EXECUTION RECOVERIES REGISTRATION ACT

FORM C
Caveat

TAKE NOTICE that:

_____
(Name)

_____
(Address)

_____
(City, Province)

the caveator has filed a petition for a receiving order pursuant to the *Bankruptcy Act* (Canada) against:

_____
(Name)

_____
(Address)

_____
(City, Province)

the person named as recovery creditor in an entry made in the register on _____
(Date)

with respect to a recovery by _____
(Name of recovery creditor)

Particulars of the petition are:

_____

(Court and registry)

_____

(Registry number)

_____

(Date of filing)

(Signed) _____

(Caveator or his solicitor)

EXECUTION RECOVERIES REGISTRATION ACT

FORM D

Discharge of Caveat

TAKE NOTICE that a petition for a receiving order filed by _____
(Caveator)
against _____ was dismissed/discontinued on the day of 19.
(Recovery debtor)

The caveat lodged with respect to an entry in the register on a recovery against _____ by _____ is discharged.
(Recovery debtor) (Recovery creditor)

_____

* Strike out words that are not applicable.

EXECUTION RECOVERIES REGISTRATION ACT

FORM E

TO the registrar

Please enter particulars of the following judgment in the register as a notification entry:

1. Notification debtor: _____

2. Notification creditor: _____
(Name)

3. Court, registry and action number of proceeding in which judgment was recovered:
_____

4. Date judgment was recovered: _____

(Signed) _____

(Notification creditor of his solicitor)

EXECUTION RECOVERIES REGISTRATION ACT

FORM F

TO:

_____
(Name) Notification

_____ creditor
(Address)

TAKE NOTICE that on _____ a recovery was entered pursuant to the
(Date)

Execution Recoveries Registration Act against the name of _____ as recovery debtor.

Further particulars may be obtained through a search of the register.

_____ _____
(Date) Registrar

C. Some Notes on the Draft Act

1. *Key Concepts*

The Act is built around the notion of a "recovery." This is defined in section l(a) and, essentially, means money which is in the hands of a third party, that has been recovered through a judgment enforcement measure. Three associated terms are: "recovery agent" (the third party that holds the money), "recovery creditor" (the person enforcing the judgment) and "recovery debtor" (the person against whom the judgment is enforced).

The Act established a public "register" (section 3) in which all recoveries may be entered. A "recovery" may be entered on the application of a "recovery creditor" (section 4) or a "recovery agent" (sections 4(3) and 4(5) depending on the character of the "recovery agent."

The significance of the register is that a "recovery agent" is prohibited from paying money to a "recovery creditor" in respect of a "recovery" unless that recovery has been the subject of a subsisting entry in the "register" for 45 days and no competing creditor has taken steps to put the "recovery debtor" into bankruptcy (section 5(1)). These facts must be evidenced by a "registrar's certificate" (section 5(2)).

The competing creditor referred to in the previous paragraph who wishes to block a payment by a "recovery agent" to a "recovery creditor" must give notice of the bankruptcy proceedings he has taken by lodging a "caveat" with the registrar. (section 6).

2. ___*Scope of the Act*

The scope of the Act is largely determined by the definition of "recovery." The Act, however, also excludes certain money that would otherwise fall within the definition of "recovery" (section 2). The fruits of execution on maintenance orders are excluded on the basis that they constitute a special type of recovery and one that survives a bankruptcy in any event.

Section 2 would also exclude from the Act recoveries on small judgments and small recoveries on a judgment of any kind. A basic premise of the Act is to provide a competing creditor with a fair opportunity to exercise his rights under the *Bankruptcy Act* to ensure his participation in the recovery proceeds. The realities of the situation, however, are that no rational creditor is going to bear the cost of initiating bankruptcy proceedings so as to share in a trivial sum of money. That being the case, they derive no benefit from the registration of small recoveries and it makes no sense to burden the registry system with them nor subject the recovery creditor to the requirements of the

Act. The figures adopted by the Act represent, we believe, the minimum amounts necessary to make bankruptcy a realistic alternative.

3. *The Continuing Realization*

Not every execution is a "one shot" effort and often, under the same execution process, money will be realized over a period of time. The situations of this kind that have been identified are set out in the definition of "continuing realization". A distinction is drawn between a "continuing realization" and a one time recovery, to avoid a multiplicity of entries in the register with respect to the same process, something that would lead to unnecessary inconvenience and confusion.

The Act does provide that an entry made in the register, and a registrar's certificate issued, in respect of the first recovery under a "continuing realization" covers all subsequent recoveries under it. (sections 4(7) and 5(3)). The "continuing realization" is also given special recognition in subsections 2(c), 6(2)(b) and 9(1).

The Act has been prepared on the basis that the recommendations made in our Report on the *Attachment of Debts Act* for a new type of garnishment process, the "writ of continuing garnishment," will be implemented.

4. *The Notification Entry*

While the registry system contemplated by the Act is geared to periodic searches by potential competing creditors, there is no reason why it should not offer an additional facility to those whb have taken judgment on their claims.

The Act contemplates, in section 7, that a creditor having a judgment that is unsatisfied to the extent of $2500 or more should be able to cause a special type of entry to be made against the name of his judgment debtor.

The effect of such an entry would be that if a recovery is entered against the name of that debtor a notice of the recovery is automatically sent to the judgment creditor (section 8). This special type of entry is referred to in the Act as a "notification entry" and the terms "notification creditor" and "notification debtor" are used to describe the parties.

The Act leaves the question of fees for notification entries to the regulations, but we would expect the fees to be based on the length of time the notification entry is to subsist, giving the notification creditor some choice in that regard, and, if computer technology is utilized, the generality or specificity of the desired "match" between the name of the notification debtor and the names of recovery debtors that will trigger a notice.

5. ___*Trust for Costs*

If a competing creditor takes advantage of the Act and puts the debtor into bankruptcy to prevent the payment of the recovery to the recovery creditor, it seems only fair that the recovery creditor should be able to salvage his costs relating to the procedures that put money in the hands of the recovery agent. Section 10 creates a trust that should survive the bankruptcy and have the effect of giving the recovery creditor priority to the recovery to the extent of those costs.

This provision may be unnecessary if the latest version of the new bankruptcy legislation is enacted in its present form. It would make the recovery creditor a preferred creditor with respect to those costs.

6. ___*Administration of the Act*

The Act contemplates the maintenance of the registry in a single central office for recoveries throughout the Province. However, the Act would permit the creation, by regulation, of suboffices, at which searches could be made and documents received and issued(section 14(b)).

The dayto-day administration of the Act would be in the hands of the Registrar upon whom various duties are imposed. Certain housekeeping provisions are contained in section 7. They allow entries to be deleted upon the occurrence of certain events and are aimed at keeping the registry information current by expunging obsolete entries.

One aspect of administration on which the Act is silent is the issue of ministerial responsibility. This is deliberate. Since the Act is concerned with one aspect of the enforcement of legal process, a matter clearly within the concept of the administration of justice it would be preferable that the administration of the Act should come within the responsibilities of the AttorneyGeneral. It may well be that, as the Court Services Branch proceed with the modernization of record keeping of the civil side of the superior court registries, our recommendations can be conveniently implemented as part of that process.

On the other hand, we recognize that a central registry already exists with respect to chattel securities and that our scheme might conveniently be integrated with it and administered by the RegistrarGeneral. That would, of course, bring the recommended Act within the responsibility of the Minister of Consumer and Corporate Affairs.

This is a matter on which we make no formal recommendation.

CHAPTER V CONCLUSION

A. Summary

It is our conclusion that the *Creditors' Relief Act* should not be retained as part of the statute law of the Province. It was first enacted to partially fill the hiatus created by the lack of Federal insolvency legislation at the turn of the century. That hiatus has ceased to exist for almost 60 years.

The policy underlying the Act, the equal distribution of a debtor's property to his creditors, is a good and fair one. We believe, however, that this policy can be more rationally pursued and realized in the context of Federal bankruptcy laws. The repeal of the *Creditors' Relief Act* would restore the common law firstintime rule as the one governing priority among creditors taking execution proceedings to enforce their judgments.

We do, however, see a role for Provincial lpgislation in ensuring that a person who may wish to pursue his remedy under the bankruptcy laws has an opportunity to do so. The function of such legislation would be to make information concerning certain execution proceedings available. The legislation we favour was fully described in the previous chapter.

The Commission recommends that:

1. *The* Creditors' Relief Act *be repealed*.

2. *Legislation comparable to the* Execution Recoveries Registration Act *set out in chapter IV be enacted*.

B. Acknowledgements

The Commission wishes to thank all those who took the time to respond to the working paper that we circulated on the *Creditors' Relief Act*. As we said at the outset, they were few in number, but their contribution is not less appreciated on that account.

In the early stages of this study a research paper was prepared for us by Professor Ronald C.C. Cuming, then of the University of British Columbia Faculty of Law and now Chairman of the Law Reform Commission of Saskatchewan. Our working paper drew heavily on Professor Coming's research. We wish to acknowledge his contribution to this project.

Finally, we wish to thank Commission Counsel, Arthur L. Close, who was responsible for the production of this Report and the working paper that preceded it.

PETER FRASER, *Acting Chairman*
LEON GETZ
PAUL D. K. FRASER
KENNETH MACKENZIE

January 2, 1979.

APPENDIX B

EXTRACT FROM WORKING PAPER NO. 21

CHAPTER III THE INADEQUACY OF THE PRESENT ACT

A. Introduction

The policy of the *Creditor's Relief Act* is to eliminate unjustified priorities among creditors. This policy is not fully realized, however, and the purpose of this chapter is to explore a number of situations in which a priority may continue to exist notwithstanding the Act.

B. Execution Against Personal Property: What is a "Levy?"

The Act is invoked when the sheriff has received money by virtue of an enforcement measure. From this point, the mechanism which ultimately produces *pari passu* distribution among creditors begins to operate. In the context of writs of execution against personal property of the debtor, this point is reached when "a sheriff levies money upon an execution against property of the debtor." While the Act contains no definition of the word "levy," some guidance is to be found in the case law. Canadian and English courts have established that seizure and levy are not synonymous. A levy necessarily involves the acquisition of money as a result of seizure of goods. But there need not be a sale in order for there to be a levy, so long as the money is paid to the sheriff by compulsion of the seizure and the means taken to realize.

It seems clear from the judicial approach taken to section 4, that the *Creditors' Relief Act* would not apply in the following situations:

(a) Where a debtor makes payment to a sheriff after a writ of execution has been issued but before seizure has been made. This is likely to be the case even though the payment has been induced by a threat of seizure by the sheriff.

(b) Where a mortgagee makes payment to a sheriff to clear a charge created by a writ of execution on property on which he has a mortgage. In such a case the courts have concluded that the money is not levied nor is it the property of the debtor.

(c) Where the debtor makes payment directly to a creditor either before a writ of execution is issued or after the writ is issued but before seizure. In neither case has there been a levy. The position is less certain in cases where the payment is made directly to a creditor after seizure by a sheriff. There appears to be no authority on this point.

The meaning which has been attached to "levy" seems to have narrowed the scope of the Act. Thus certain payments of money, which the policy of the Act suggests should be available to all creditors, are, in fact, available only to the creditor whose execution proceedings stimulated the payment.

C. Proceeds of Judgment Enforcement Against Real Property

Technically, it is incorrect to refer to "seizure" of land under execution in British Columbia. Although some of the sections of the *Execution Act* use the terminology of execution against land, execution legislation in British Columbia does not recognize the use of the writs of *elegit* or *fieri facias de terris* as a method of enforcing a judgment. It does, however, permit a judgment creditor to establish a lien or charge against the interest of a judgment debtor in real property within the province by filing a certificate of judgment in the appropriate land registry office. Ultimately, the land can be sold and the proceeds applied toward payment of the judgment. Partly because of this system and partly because the *Creditors' Relief Act* was initially drafted so as to apply to personal property interests only and was never properly adapted to the proceeds of real property interests, the basic policy underlying the *Creditors' Relief Act* is being only partially implemented.

The *Creditors' Relief Act* itself makes no reference to the proceeds of enforcement against the real property of a judgment debtor. It applies to these proceeds by virtue of sections 57 and 58 of the *Execution Act*. Section 57 provides that money realized by the sale of land under the *Execution Act* shall be deemed to be money levied under execution within the meaning of the *Creditors' Relief Act*. Section 58 provides that the registrar shall distribute such money to persons to whom the sheriff would, under the *Creditors' Relief Act*, distribute money realized under a writ of execution.

According to section 57 of the *Execution Act*, only money actually realized from the sale of land is distributed on a *pari passu* basis under the *Creditors' Relief Act*. This being the case, the scope of application of the Act is narrower with respect to the proceeds of real property interests of a judgment debtor than it'is with respect to his personal property interests. As indicated above, a levy against goods can occur even though the goods have not been sold. This is not the case with land.

Since a "levy" occurs with respect to real property only when that property is sold, the *Creditors' Relief Act* will not apply in the following situations:

(a) Where payments into court are made by a judgment debtor at any time prior to the date of sale.

(b) When payments into court are made by third parties such as mortgagees or purchasers whose interests in the property are subject to the lien or charge created by a registered judgment.

(c) Where payments are made directly to the judgment creditor by the judgment debtor or a third party who is induced to do so by the existence of the judgment filed against the property.

The result is that certain judgment creditors may gain priority over other creditors of the debtor, in circumstances in which it is not at all clear that the policy of the Act should not apply.

It should be noted that there is no requirement under the *Execution Act* that a debtor or third person pay into court or to the sheriff money intended to satisfy a judgment against real property. In most cases, this money will be paid directly to the judgment creditor in return for release of the lien created by his judgment. This practice is recognized in section 60(2) of the *Execution Act*.

D. Proceeds of Garnishment

The British Columbia *Creditors' Relief Act* contains a specific provision section 31(3) which seems designed to ensure that money realized by a creditor in garnishment proceedings is brought within the distribution system of the Act. For some reason, however, this provision was included in the Act as a subsection of a section which sets out the power of a sheriff, or of a creditor in case the sheriff fails to act, to obtain an order attaching funds owing to a debtor where the debtor does not have sufficient assets to satisfy the writs or certificates in the sheriff's hands.

When read in isolation, s. 31(3) of the *Creditors' Relief Act* appears to bring into the distribution system any money which is obtained through garnishment proceedings. The section provides:

> (3) Any creditor, whether a judgment creditor or not, who attaches a debt shall be deemed to do so for the benefit of himself and all creditors entitled under this Act. Payment of the attached debt shall be made to the sheriff, who, in making distribution shall apportion to the garnishor a share in the whole amount to be distributed under the provisions of this Act, pro rata with the other creditors, according to the amount owing upon his judgment or claim; but the shares so distributed to him shall not exceed the amount recovered by the garnishee proceedings unless he has placed a writ of execution in the sheriff's hands.

By virtue of section 31(4), the money so recovered is deemed to be money levied under execution. Accordingly, as soon as it is paid to the sheriff, by section 4, the money is held for distribution to all creditors who file writs or certificates within the time period specified in that section.

However, when subsection 3 is viewed merely as a part of section 31, an entirely different picture emerges. In *Anderson & Son* v. *Dawber*, the British Columbia Court of Appeal considered the scope of section 31(3) in this context. McDonald J. stated:

> The decision of the appeal depends on the construction of s. 31 of the said Act, but the case of the said lumber company must be considered by itself as it differs from those other appellants in this that when the appellant's attaching summons was served there were no writs of execution in the sheriff's hands, though there were several such in his hands at the time the money was paid into court by the garnishee.
>
> In my opinion, all the subsections of s. 31 of the said Act are controlled by the opening sentences of subsection 1. The sheriff's interest in the monies attachable arises only when there are executions in his hands, and there are, or appear to be, insufficient goods of the debtor to satisfy them and his own fees. Clement, J. appears to have given a wider application to this section: *Robert Ward & Co*. v. *Wilson* (1907) 13 B.C.R. 273, but with deference I am not prepared to go as far as that decision goes.

This case has established the prevailing interpretation of section 31(3) of the *Creditors' Relief Act*, and as a result the scope of the Act has been substantially narrowed in the context of garnishment proceedings. An attaching creditor will gain priority for the full amount recovered under a garnishing order obtained under the *Attachment of Debts Act* if he is able to serve the order before two or more creditors have placed writs of execution or certificates in the hands of the sheriff.

Moreover, the garnisheeing creditor will gain priority for the full amount recovered under his order if at the time of service of the order the sheriff has two or more writs of execution in his hands but there appears to be sufficient goods to satisfy these writs. This is so even though there are other claims of creditors which are likely to be established within the one month period contemplated by s. 4 and it is clear that the debtor does not have sufficient assets to satisfy all of these claims.

Section 31 of the British Columbia *Creditors' Relief Act* was copied from section 37 of *The Creditors' Relief Act* as originally enacted in Ontario, The Ontario Legislature has long since amended its Act to separate the Ontario equivalents of British Columbia's section 31(1) and 31(3).

E. Proceeds of Execution Against Money and Instruments

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 bank notes which are so seized, or a sufficient part thereoff 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.

The direction in section 12 and a similar direction in section 14 that the Sheriff pay the proceeds to *the execution creditor* are difficult to reconcile with the *Creditors' Relief Act* since any money which is obtained in this way by the sheriff is money levied under a writ of execution. The Act requires this money to be distributed on a *pari passu* basis to all creditors who establish claims within the time prescribed by section 4. There seems to be an obvious conflict between the *Execution Act* and the *Creditors' Relief Act* with respect to what a sheriff is required to do when distributing the money realized under section 12 of the *Execution Act*. This is probably due to a failure to make the necessary changes in the *Execution Act* when the original *Creditors' Relief Act* was passed in 1902.

In the light of the conflict it is at least arguable that the creditor who causes the Sheriff to proceed against cash, instruments and other "securities for money" may claim priority over other creditors.

F. Proceeds of Other Enforcement Measures

A judgment can also be enforced against the debtor's assets through measures other than execution against personalty, proceedings against real property and attachment of debts. While the other enforcement measures available to a creditor are, in practice, not as important as execution and garnishment, they are occasionally used. These other enforcement measures are equitable receivership equitable charging orders, and charging orders granted under the *Judgments Acts*. Since the *Creditors' Relief Act* makes no specific reference to these enforcement measures, it seems a creditor will gain priority over other creditors if he can successfully employ one of them.

A creditor may also pursue certain nonproprietary remedies. He may take judgment summons proceedings under the *Small Claims Act* or the *County Court Act* or seek a payment order under section 58 of the *Supreme Court Act*. Since the *Creditors' Relief Act* makes no specific reference to these enforcement measures, and since the statutory provisions relative to judgment summons proceedings do not specifically require that payments made pursuant to an order be made to the sheriff, the creditor who has a payment order will gain priority over other creditors with respect to payments made by the debtor.

G. Funds Paid Out to Creditors Under Section 20

The British Columbia *Creditors' Relief Act* provides:

> 20 (1) In the case the debtor, without any sale by the sheriff, pays the full amount owing in respect of the executions and claims in the sheriff's hands at the date of such payment, and no other claim has been filed with the district registrar, or in case all executions and claims in the sheriff's hands are withdrawn and any claims served are paid or withdrawn, no notice shall be entered as required by s. 4, and no further proceedings shall be taken under this Act against the debtor by virtue of the execution having been in the sheriff's hands.
>
> 20 (3) In case a debtor voluntarily and without any sale by the sheriff pays to the sheriff part of the amount owing in respect of an execution or claim in the sheriff's hands, and there is at the time no other execution or claim in the sheriff's hands, the sheriff shall apply the same on the execution or claim so in his hands, and s. 4 does not apply to the money so received by the sheriff.

These sections appear to have been included in the Act to ensure that funds of the debtor were not unnecessarily held by the sheriff for the one month period set out in section 4. Presumably it was thought that if the debtor's non-liquid assets remain and there are no other creditors claiming against him then there is no good reason to hold the money paid by him to the sheriff and it should be paid out immediately to any creditors who have established their claims.

While it is desirable to avoid having funds of the debtor unnecessarily tied up in the hands of the sheriff, these sections of the Act are not free from difficulty. Having regard to the policy of the Act it is difficult to understand why section 20(3) permits payment out to a creditor even though other creditors may well have taken steps to obtain a certificate under section 5 of the Act by filing an affidavit of the claim with the District Registrar. In this respect, section 20(3) is inconsistent with section 2O(1) which permits payment out only when no other executions or claims have been filed with the sheriff and no other claims have been filed with the District Registrar.

A difficulty with both sections is that they may result in a preference being given to the creditor or creditors to whom the funds are paid. If, after some of his assets are seized by the sherifl, a debtor liquidates other assets in order to pay the claims of some creditors and thereby avoids the operation of the Act, other creditors, who at the time of payment out have not established

their claims, may well be prejudiced if the debtor's available assets have been significantly reduced by liquidation and payment. There is no assurance that such creditors could file a claim under section 5 even if they become aware of the debtor's intentions since the prerequisites to filing under the section may not have been met. For example, if the sheriff has in his hands the writ of a creditor, and pursuant to that writ he seizes goods of the debtor, if the execution creditor can induce the debtor to sell assets other than those seized and pay out the writ before the expiry of 20 days mentioned in section 5, no other creditor can begin summary proceedings to block the payment out to the execution creditor under section 20(1). The only way a creditor could block payment out under 20(3) is, it seems, to obtain a judgment, issue a writ of execution and place it in the sheriff's hands. Since such payments are authorized by statute, it is questionable whether or not they could be attacked under the *Fraudulent Preferences Act*.

H. Funds in Court

Section 23 of the *Creditors' Relief Act* provides that a sheriff, or any party interested, may make application to a court to have paid over to the sheriff for distribution under the *Creditors' Relief Act* any funds in court belonging to the execution debtor. The section does not, however, ensure that all funds in court belonging to the debtor are made available for distribution under the *Creditors' Relief Act*. The sheriff is entitled to demand only that portion of the funds in court which is equal to the amount of claims in his hands at the date of application. Unless the application is made at the end of the one month period set out in section 4 of the *Creditors' Relief Act*, it is possible that after the date of application further claims may be filed by creditors. But in the meantime, the balance of the funds may have been paid out to the debtor.

I. Enforcement Measures on Small,.Claims, Judgments

The British Columbia *Creditors' Relief Act* purports to abolish priorities among creditors by execution from the Supreme Court and County Court.

> The precise time when the Registrar issues a warrant against the goods of a party shall be entered by him in the execution book and be endorsed on the warrant, and when more than one such warrant is delivered to the Sheriff to be executed, he shall execute them in the order of time of such delivery.

Further, section 144(2) of the *County Court Act* is in direct conflict with section 20 of the *Creditors' Relief Act*. At the time of writing legislation is before the British Columbia Legislature which would repeal ss. 140 to 145 of the *County Courts Act*. *See* 1976 British Columbia Bill No. 69 *Miscellaneous Statutes (Court Rules) Amendment* Act, 1976 (given first reading June 8, 1976). It does not, however, expressly apply to the proceeds of enforcement measures used in connection with judgments obtained in small claims courts. Consequently, the common law priority system applies to small claims court proceedings. The only exception arises where a small claims court judgment is being enforced against land under sections 3460 of the *Execution Act* which specify that the proceeds are to be distributed by the court registrar to those creditors who would be entitled under the *Creditors' Relief Act*. Accordingly, the priority of a creditor who seeks to enforce a small claims judgment may depend upon the enforcement measure adopted.

One can only speculate why all enforcement proceedings were not brought within the operation of the Act. The fact that small claims judgments have, until recently, involved small sums of money, may have induced the drafters of the *Creditors' Relief Act* to confine its operation to proceedings out of the Supreme Court and County Courts. Delay and administrative costs being endemic to a *pari passu* distribution system, it may have been thought that the *Creditors' Relief Act* was unsuited to small claims enforcement proceedings. This does not, however, explain why it was decided that the Act should apply to the proceeds of the sale of land realized under the *Execution Act* pursuant to a small claims court judgment.

J. Proceeds of Enforcement Measures Taken Under the Family Relations Act

The *Family Relations Act* contains specific provisions relating to the enforcement of alimony or maintenance orders made by the Supreme Court or a superior court of another jurisdiction and of maintenance orders made by a judge of the provincial court under Part IV of the *Family Relations Act*. Such orders may be enforced in one or more of the following ways:

(a) A copy of the order may be registered in a Land Registry Office. When registered it is a charge against the land of the person against whom the order is made and is deemed to be a judgment of a County Court. Under the *Execution Act* such a judgment may be enforced by an order for sale of the land.

(b) A provincial court judge, upon *ex parte* application of a person who has obtained an order, may make an order which is deemed to be an order made under section 3 of the *Attachment of Debts Act*. Accordingly, the order will be enforced through ordinary garnishment proceedings. The order may provide for payment into court or directly to the person entitled.

(c) Where an order has not been complied with, the person who obtained the order may apply to a judge for a warrant of execution. The warrant shall be executed in like manner as an execution under the *Small Claims Act*.

(d) When an order has not been complied with, a provincial court judge may issue A summons or warrant requiring the persons against whom the order was made to appear before him and show cause why the order should not be enforced. After the hearing the judge may enforce the order by proceedings, including probation or imprisonment, which, under the *Summary Convictions Act*, are available to enforce a pecuniary penalty, compensation, or sum of money ordered to be paid on conviction by order of a judge. Thus the threat of imprisonment may induce the person against whom the order has been made to comply with it.

Neither the *Family Relations Act* nor the *Creditors' Relief Act*, however, provides any guidance in determining whether the proceeds of an enforcement measure taken under the *Family Relations Act* fall within the scope of the *Creditors' Relief Act*. In the absence of any specific provisions, one might conclude that the *Creditors' Relief Act* is applicable only to the extent that the specific enforcement measure under which the proceeds are recovered would otherwise be subject to it. But this has anomalous results.

If an order under the *Family Relations Act* is enforced by a sale of land pursuant to the *Execution Act*, the proceeds of the sale must be distributed by the Court Registrar to the persons to whom the sheriff would, under the *Creditors' Relief Act*, distribute monies levied under a writ of execution. Accordingly, the person obtaining the order would be obliged to share the proceeds of the sale with all of the other creditors of the debtor. If, however, the order is enforced by execution against goods, the person obtaining the order will gain full priority since the execution is treated as an execution under the *Small Claims Act*. As noted earlier, the *Creditors' Relief Act* does not appear to apply to the proceeds of writs of execution issued under the *Small Claims Act*.

If the order is enforced by garnishment, the *Creditors' Relief Act* may or may not apply to the proceeds, depending upon whether or not the conditions set out in section 31 of the *Creditors' Relief Act* exist at the date of garnishment and whether or not the attachment order provides for payment into court or directly to the person at whose request the order was granted.

It is unclear whether or not a maintdnance order can form the basis of a claim for a certificate under sections 5 to 19 of the *Creditors' Relief Act*.

It seems obvious that those who drafted the *Family Relations Act* gave little consideration to the relationship between the dependant spouse, child or parent who has been granted a maintenance order and other creditors of the person against whom the order is issued. There is some indication in the *Family Relations Act* that the Legislature intended to give to such persons priority over other creditors since it gave to them collection remedies not given to other creditors. If this is the intended policy, it is far from realized in the present legislation.

K. Other Difficulties

The previous chapter examined a number of theoretical imperfections in the *Creditors' Relief Act*, but these are by no means the only ones which exist. One need not read more than two or three sections of the Act to conclude that its drafting leaves much to be desired. The Act is both archaic and obscure to the modern reader.

While the same could be said of many British Columbia statutes, we suggest that the deficient drafting is a matter for particular concern in an Act which is invoked frequently and calls for constant administration. In fact, this complex piece of legislation is fully understood by few members of the legal profession or by the public officials involved in its operation. It should come as a surprise to no one that there is a gulf between the theory and the reality of creditors' relief law in British Columbia. This gulf is displayed in the replies to a questionnaire which was sent to all sheriffs in British Columbia in the early stages of this study.

The replies reveal that the Act is not being administered uniformly throughout the Province. Differences in practices relate to some very basic features of this Act. For example, there is little agreement among British Columbia sheriffs as to what money must, in certain situations, be distributed under the Act. Moreover, the replies show that in some situations practices are followed which are clearly illegal. For example, all sheriffs distribute, under the *Creditors' Relief Act*, money realized from the sale of a judgment debtor's assets under a warrant of execution issued by a small claims court.

The administration of the Act requires facilities which sheriffs do not have at their disposal. At present they must rely on the assistance of solicitors for individual creditors to provide the information and expertise required, and, since few solicitors are thoroughly familiar with the *Creditors' Relief Act*, this assistance is seldom available.