LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON

THE ABSCONDING DEBTORS ACT and BAIL ACT:

TWO OBSOLETE ACTS

LRC 37

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

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TABLE OF CONTENTS

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

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

REPORT ON
THE ABSCONDING DEBTORS ACT and BAIL ACT:
TWO OBSOLETE ACTS

Both the *Absconding Debtors Act* and the *Bail Act* have been part of the statute law of British Columbia for many years. Both are a product of an old civil procedure, arrest on mesne process, that was abolished long ago. In this Report we examine those Acts and recommend their repeal.

INTRODUCTION

The functions of the Law Reform Commission of British Columbia are set out in section 3 of the *Law Reform Commission Act*. Those functions include a review of the statute law of the Province with a view to the "repeal of obsolete and unnecessary enactments. In our studies on DebtorCreditor Relationships, two Acts have emerged which seem to come within that description.

Those acts are the *Absconding Debtors Act* and the *Bail Act*. They are, to a degree, interrelated and appropriate for consideration in a single Report.

CHAPTER I THE ABSCONDING DEBTORS ACT

In a sense the title of the *Absconding Debtors Act* is somewhat misleading. It suggests that the Act provides a remedy to creditors, in circumstances when a debtor is about to abscond, which permits those creditors, to prevent that happening. It does not have that effect. The *Absconding Debtors Act* provides a remedy against the property which a debtor, who has already absconded, has left behind in the Province. That remedy is a writ of attachment which serves as the originating process in the creditor's action and ties up the debtor's property pending a disposition of the action.

The *Absconding Debtors Act* was first enacted in British Columbia in 1887. It is based on an Upper Canada Statute of 1856 which, in turn, is based on legislation enacted in 1832. The present *British Columbia Act* differs from the 1856 version only in minor respects.

The full text of the Act is set out as Appendix A to this Report. The procedure surrounding the issue of a writ of attachment under the Act is set out in sections 2 to 13. The following features of that procedure might be noted:

1. The Act sets out a specific mental element that must be established. It is not enough to simply show that the debtor has fled the jurisdiction. His departure must have been with the intent to defraud the applicant or avoid arrest or being served with process. The applicant (or his agent) must go on oath as to that mental element and be supported by affidavits of two persons who are "well acquainted" with the debtor and believe, on reasonable grounds which must be set out, that the debtor had the necessary fraudulent intent.

2. After a writ of attachment has been issued attempts must be made to serve it on the debtor, wherever he may be.

3. The debtor (assuming he is served with the writ or otherwise obtains knowledge of its existence) may put in special bail, obtain a release of his property, and defend the action on its merits.

4. Where a writ of attachment has been issued, a certificate of attachment may also be issued. Such a certificate may be registered in a Land Registry in the same fashion as a certificate of judgment and has a comparable effect.

The *Absconding Debtors Act* does not add to other rules of law in the sense that it would if it enabled a creditor to reach a debtor who would otherwise be immune from process. The ordinary Rules of Court provide for the

service of process on a defendant who is outside of British Columbia. Indeed, the new rules have considerably relaxed the formerly strict requirements in this regard. Thus a creditor may simply commence an ordinary action against an absconding debtor, take judgment in the usual way and execute against the property the debtor has left behind in the Province. The creditor might also petition for a receiving order under the *Bankruptcy Act*. To be an absconding debtor may *per se* be an act of bankruptcy as defined in that Act.

> 24.(1) A debtor commits an act of bankruptcy in each of the following cases:
>
> (d) if with intent to defeat or delay his creditors he does any of the following things, namely departs out of Canada, or, being out of Canada, remains out of Canada, or departs from his dwellinghouse or otherwise absents himself;

When would a creditor proceed under the *Absconding Debtors Act* in preference to an ordinary action? The one advantage the Act offers is the speed with which the creditor can tie up the debtor's exigible assets. The Act is, essentially, a prejudgment remedy against land and goods that is not unlike a prejudgment garnishing order to attach a debt (but, of course, available only in a much narrower context).

Therefore, where a debtor has fled the jurisdiction and might dispose of a major asset (say land) before his creditor can obtain judgment and execute in an ordinary action, that creditor might well prefer to proceed under the *Absconding Debtors Act* so he can tie up the debtor's land immediately.

This hypothetical case assumes that the creditor can confidently swear as to the debtor's fraudulent intent and find two acquaintances of the debtor who are prepared to do likewise. In fact, the very onerous evidentiary requirements suggest that Act will seldom be invoked. We have made some attempt to find out to what extent (if at all) the Act is actually used. An inquiry was circulated to all court registrars, registrars of title, and sheriffs asking how often since 1970 process under the Act had been issued or delivered to them, and the latest date thereof.

Although the replies which we received yielded qualitative rather than quantitative informations it clearly emerged that, while the issue of process under the *Absconding Debtors Act* is not unheard of, it might fairly be described as "rare".

That the Act contains an unrealistic evidentiary requirement, and that the Act is seldom used, do not of themselves lead to a conclusion that the Act is obsolete. The evidentiary requirement might be modified and this, in turn, could lead to a more widespread use of the Act. There are, however, other factors that lead us to a conclusion that the repeal of the Act is appropriate. The most important objection to the Act is that it creates an unacceptable anomaly.

So long as there is a time lag between the time legal proceedings are commenced and the time a judgment is entered a creditor will always face the possibility that his debtor may be disposed to behave fraudulently and take steps to liquidate his exigible property and then disappear or dissipate the proceeds. In some cases these transactions might be attacked under the various statutes that provide for reviewable transactions, but very often the creditor will be without a remedy. Thus a creditor may have a legitimate need for a procedure that is available before judgment that will enable him to safeguard his interests.

The *Absconding Debtors Act* provides such a procedure but it is not available to all potential judgment creditors. It is available only to the creditor whose debtor has left the jurisdiction with the necessary fraudulent intent. If the debtor remains in the jurisdiction, the creditor remains vulnerable to a fraudulent disposition of property. Why should the Act favour one type of creditor over another on this basis? An examination of the law at the time the Act was developed suggests an answer to this question.

In 1832 imprisonment for debt was an important creditors' remedy and was widely used. It was open to a creditor, in an appropriate case, to issue a writ of *capias ad respondendum* as originating process in his action. This writ directed the sheriff to arrest the defendant who would then secure his release by giving security, in the form of

civil bail, for both his appearance in the action and for any resulting judgment. This procedure, sometimes.referred to as "arrest on mesne process," was, of course, not available to a creditor where his debtor had fled the jurisdiction and the *Absconding Debtors Act* seems designed to assist that creditor by creating a new remedy to replace the one lost.

Essentially, the *Absconding Debtors Act* was meant to complement the use of *capias ad respondendum* as originating process. This view is borne out by a close reading of the Act. Throughout, the writ of attachment is treated as originating process comparable to a writ of capias. Section 12, for example provides:

> The special bail ... shall be put in and perfected in like manner as if the defendant had been arrested on a writ of *capias ad respondendum* for the amount sworn to on obtaining the attachment ...

At the time the Act was developed, to limit the availability of this prejudgment remedy against property to the creditor whose debtor had absconded may have been justifiable. Other creditors had a prejudgment remedy against the person. But the latter process has long been unavailable. Today arrest on mesne process for debt is regarded as unacceptable and has been abolished. However, abolishing *capias ad respondendum* as originating process while retaining the *Absconding Debtors Act* yields the anomalous result that the creditor whose debtor has absconded is in a more favourable legal position than the creditor whose debtor has remained in the jurisdiction. In our view this distinction cannot be allowed to stand.

This view does not involve a conclusion that prejudgment process is *per se* a bad thing. We recognize that in many cases creditors and potential litigants may have a legitimate need for the protection that prejudgment process can offer. This is a matter we are actively pursuing in the course of our studies on execution against land and on the attachment of debts one thing that is clear to us at this stage is that the *Absconding Debtors Act* does not provide an appropriate legal framework for a more general prejudgment remedy. It is over 150 years old in concept; its language and substance are directed to a society and a legal regime that ceased to exist many years ago; and it adopts unacceptable criteria for the granting of relief. The Act is beyond repair and should be repealed as obsolete.

CHAPTER II THE BAIL ACT

Under the rules of procedure which apply in British Columbia the failure of a defendant to appear to defend the action or respond to the plaintiff's claim does not impede the action. The plaintiff is free to continue the proceedings to judgement. This rule, however, is basically a product of the 19th Century reforms in England and the prior law was not so favourable to the plaintiff.

Foldsworth states that it is "a very old principle of law that there could be no proceedings against an absent defendant." This principle led the law to seek ways to aid the plaintiff in compelling the defendant to appear. The principal way in which this was done was the evolution of a practice whereby the plaintiff could, in an appropriate case, issue a writ of *capias ad respondendum* as the originating process in his action. The effect of such a writ was discussed in the previous chapter.

This practice led to a number of complex digtinctions between claims which were "*bailable*", that is claims in which the plaintiff could use *capias* as originating process, and those which were not. These distinctions turned on the nature of the plaintiff's claim, the court in which he was proceeding, and the amount in issue. Among bailable

actions further distinctions devem loped between "bail above" ("special bail" security that any resulting judgment would be satisfied) and "bail below" ("common bail" security for appearance only).

"Bail below" (common bail) was often a sham. The following passage from Dickens illustrates the point nicely:

> Bail you to any amount, and only charge halfacrown. Curious trade, isn't it? said Perker ... What! Am I to understand that these men earn a livelihood by waiting about here, to perjure themselves before the judges of the land, at the rate of halfacrown a crime! exclaimed Mr. Pickwick, quite aghast at the disclosure. Why I don't exactly know about perjury, my dear sir, replied the little gentleman. Harsh word, my dear sir, very harsh word indeed. Its a legal fiction, my dear sir, nothing more.

The procedural aspects of civil bail were scarcely less complex than the substantive issues of when, and what kind of, bail may be taken. The procedure to obtain bail was the subject of a number of remedial statutes enacted in England to simplify the mechanics of entering and perfecting bail. It is these statutes upon which the British Columbia *Bail Act* is based. The full text of the Act is set out as Appendix B to this Report.

The *Bail Act* was introduced into the British Columbia Statutes at the time of the 1897 revision and is based on English legislation earlier in force by virtue of the *English Law Act*.

It should be stressed that the Bail Act relates only to civil bail. The *Criminal Code* contains its own provisions relating to bail in criminal matters and those provisions are applicable to proceedings on offences under Provincial law.

As a result of the 19th Century procedural reforms, claims which are hailable by virtue of the common law have ceased to exist, and the only bailable claims are those so designated by statute. Two enactments which provided for bailable claims have recently been repealed. The most significant of the two was the *Arrest and Imprisonment for Debt Act*, repealed in 1975, which permitted the arrest of a debtor about to flee the jurisdiction. The other repealed enactment is Rule 3 of Order 70A of the Supreme Court Rules 1943. It provided:

> In an action for alimony the Court or a judge thereof may in a propel case make an order for the arrest of the defendant, according to the practice regulating bailable proceedings.

That enactment and related rules survived the promulgation of a new set of Supreme Court Rules in 1960 because they were expressly validated and confirmed by section 4(4) of the Court Rules of *Practice Act*. That provision was repealed and replaced in 1976 and bail in alimony proceedings is no longer available.

And what is left? A computer assisted search of the British Columbia Statutes indicates that very little is left. Only two Acts appear to create bailable proceedings. One is the *Absconding Debtors Act* discussed in the previous chapter. The other is section 148 of the *Companies Clauses Act* which provides that an officer of a company incorporated under a special Act who refuses to deliver up company documents or property may be held to bail. That provision itself is obsolete.

If the *Absconding Debtors Act* is repealed as we suggest, the *Bail Act* would become totally unnecessary. It too should be repealed.

CHAPTER III CONCLUSION

The Commission's recommendations are that:

1. *The* Absconding Debtors Act *be repealed, and*

2. *The* Bail Act *be repealed*.

Both Acts are obsolete and may safely be removed from our statute book.

DOUGLAS LAMBERT, *Chairman*
LEON GETZ
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March 17, 1978.