

LAW REFORM COMMISSION OF BRITISH COLUMBIA

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Backgrounder

LRC 42—Report on Creditors' Relief Legislation: A New Approach

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Whenever a creditor obtains a judgment against a debtor and successfully enforces that judgment, they might not be the only person who has a claim to the money that has become available. There are two other classes of potential claimants. The first consists of those who have some claim to the asset that generated the proceeds, such as a co-owner 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. This report is concerned with the second class of potential claimants.

The first chapter of the report contains an introduction to both the common-law and statutory positions relating to competing claims between unsecured creditors. At common law, a creditor acquired the right to have its judgment paid in priority to other creditors of the debtor by taking execution proceedings before other creditors did so. The common law position was simple: first in time, first in right. This result can, in many cases, be criticized as unfair. The failure of a creditor to take execution proceedings may, for example, not reflect any lack of diligence on its part, but may simply be as a consequence of the creditor having allowed the debtor some additional time to recover from a temporary period of financial difficulty. A strong argument can be made that the first-in-time rule is not an appropriate way to regulate priorities among unsecured execution creditors. This is the position taken in the *Creditors' Relief Act*, which adopts a policy of *pro rata* distribution of a debtor's property among creditors. 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.

The *Creditors' Relief Act* was first enacted to partially fill the hiatus created by the lack of Federal insolvency legislation at the turn of the twentieth century. The balance of chapter one sets out the history of the legislation and then provides an explanation of the procedure under the Act in British Columbia.

Chapter two of the report is devoted entirely to a 1976 Working Paper on the *Creditors Relief Act* prepared by the Law Reform Commission of British Columbia. It begins by provid-

ing a summary of the principal conclusions reached in the Working Paper on the inadequacies of the Act. It then sets out at length the contents of a chapter from the Working Paper examining whether the *Creditors' Relief Act* should be repealed or retained in a modified form. The arguments favouring, and possible consequences of, each course of action are discussed.

The general conclusions of the Law Reform Commission are contained in chapter three. Essentially the view is taken 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 among all creditors of the execution debtor. The commission is not against the basic principle of equality among creditors but believes that this principle is most efficiently and rationally pursued under federal legislation relating to insolvency. A recommendation is therefore made to repeal the *Creditors' Relief Act*. The report does conclude, however, that there is an aspect of the Act which is worth preserving. One of the ways in which the Act is designed to help a creditor is through the maintenance of a "book," open to public inspection in which particulars of prior execution will have been entered. This enables a creditor to assess the strength of their position and decide whether or not to intervene. The commission believes that legislation should be introduced making information concerning execution measures taken by competing creditors accessible. This would enable a creditor to make a rational choice between commencing bankruptcy proceedings and simply doing nothing. Chapter four sets out draft legislation.

Further Developments

The report's recommendations have not been implemented by legislation. The *Creditors' Relief Act* is still in force, renamed the *Creditor Assistance Act*, R.S.B.C. 1996, c. 83.