LAW REFORM COMMISSION OF BRITISH COLUMBIA

# REPORT ON DEBTOR-CREDITOR RELATIONSHIPS (PROJECT NO. 2)

# PART I DEBT COLLECTION AND COLLECTION AGENTS

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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


| | Pages | Paras. |
|---|---|---|
| PART ONE - INTRODUCTION | | 5-6 1-7 |
| PART TWO - DEBT COLLECTION GENERALLY | | |
| (a) The Dimensions of the Problem | 7-9 | 8-16 |
| (b) The Existing Law on Harassment | | 9 17 |
| (i) Criminal Liability | 9-10 | 18-21 |
| (ii) Civil Liability | 10-15 | 22-36 |
| (iii) Conclusions as to present law | 15 | 37-39 |
| (c) The Commission 's Proposals | | |
| General | 15-18 | 40-47 |
| Communicating with Employers of Alleged Debtors | | 18-20 48-55 |
| Communications with Other Strangers | | 20-21 56-60 |
| Telephone Calls | 21-22 | 61-63 |
| Simulated Legal Process | 22 | 64 |
| Recovery of Collection Expenses | | 22 65-66 |
| Use of Objectionable Forms and Letters | | 23-24 67-73 |
| Sanctions | 24-25 | 74-75 |
| Implications of the Commission's Proposals | | 25-26 76-80 |
| PART THREE - COLLECTION AGENTS | | |
| *Collection Agents Act, 1967* | | |
| (a) Coverage and General Scheme | 27-29 | 81-87 |
| (b) Licensing in the Interests of the Creditor | 29 | 88 |
| (i) The exemptions | 29 | 89-90 |
| (ii) The definition | 29 | 91 |
| (1) Debt consolidation | 29-30 | 92-93 |
| (2) Debt pooling | 30-33 | 94-102 |
| (3) Credit card companies | 33-34 | 103-107 |
| (4) Assignees | 34 | 108-109 |
| (c) Licensing in the Interests of Debtors | 34-35 | 110-112 |
| (i) Collection systems | 35 | 113-116 |
| (ii) House agents | 35-37 | 117-123 |
| (d) The Administrative System | 37 | 124 |
| (i) The scope of the licensing power | | 38-39 125-131 |
| (ii) Administrative procedure | 39-41 | 132-140 |

PART FOUR - BAILIFFS 42 141 - 145

PART FIVE - SUMMARY OF RECOMMENDATIONS
A. Debt collection generally 44
B. Collection agents 45
C. Bailiffs 46
D. General 46

TO THE HONOURABLE LESLIE R. PETERSON, Q.C.
ATTORNEY-GENERAL FOR BRITISH COLUMBIA

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

# REPORT ON DEBTOR-CREDITOR RELATIONSHIPS
## (Project No. 2)
## PART I - DEBT COLLECTION AND COLLECTION AGENTS

This Report has been prepared in the Commission's Study on Debtor-Creditor Relationships, which is Project No. 2 in the Commission's Approved Programme.

The Commission believes that implementation of its recommendations, a summary of which is contained in Part Five of this Report, will go some way towards alleviating some of the more intractable difficulties associated with the rapid expansion in the volume of consumer credit in the Province.

A detailed description and analysis of the Commission's proposals is set out in Parts Two, Three and Four of this Report. Part Two deals with the problem of harassment and intimidation of debtors. There is a large number of complaints made to both official and unofficial agencies about alleged abusive, intimidatory and harassing behaviour by persons attempting to collect alleged debts. The volume of complaints seemed to the Commission sufficient to justify an examination of the law governing debt collection procedures. The Commission concluded that the existing law was inadequate to deal with excessive and unreasonable behaviour. The Commission has accordingly recommended remedial legislation, applying to all persons attempting to collect debts, whether or not they are licensed collection agents.

Parts Three and Four of this Report deal specifically with the provisions of the *Collection Agents Act, 1967*. The Commission makes a number of recommendations for changes in both the scope and the administration of this legislation.

## PART ONE INTRODUCTION

1. The earliest legislation in Canada dealing directly with debt collections was the Ontario *Debt Collectors Act of 1896*.[1] That Act contained only one section, which penalized any person printing or publishing "any notice or form which is an imitation, or a colourable imitation of any of the forms appended to the *Division Courts Act*, and which is calculated to deceive the public by inducing the belief that such notice or form is a notice or form from the said court, or is part of the process of a division court", and also anyone "who issues or makes use of any such notice or form in connection with any collection agency or otherwise". Violations were punishable with a fine of $20.00 under the *Summary Convictions Act*. In 1927, the prohibition of the *Debt Collectors Act* was broadened to cover the publication or use of imitations or colourable imitations of "other legal process".[2]

2. The *Debt Collectors Act* remains on the statute book in Ontario.[3] It has no precise equivalent in the statutes of British Columbia, though there is a comparable prohibition, applying to collection agents and bailiffs only, in section 22(g) of the *Collection Agents Act, 1967*,[4] which is reproduced as Appendix "A" to this Report. Legislation broadly comparable to this latter statute exists in a number of other provinces.[5]

3. The general structure of most of the modern legislation is similar, and is based upon a pattern first reflected in a statute of Nova Scotia in 1921.[6] Despite their structural similarity, however, there are a number of differences between the various provincial statutes. In 1933, at a time when six provinces had collection agents legislation, the Conference of Commissioners on Uniformity of Legislation in Canada considered the desirability of preparing a uniform *Collection Agents Act*,[7] but, acting on the advice of the Ontario Commissioners, decided against proceeding further.[8]

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1. 5.O. 1896, c. 23.

2. *Statute Revision Amendment Act, 1927*, S.O. 1927, c. 28, s. 24.

3. R.S.O. 1960, c. 89. In 1969 the Ontario Legislature enacted another *Collection Agents Act* [S.O. 1968-69, c. 11]: This Act was proclaimed in force on February 9, 1971.

4. R.S.O. 1960, c. 58.

5. S.B.C. 1967, c. 10. *See also Alberta Collection Agencies Act*, S.A. 1965, c. 13; New Brunswick *Collection Agencies Act*, R.S.N.B. 1952, c. 31, as amended by S.N.B. 1959, c. 34 and S.N.B. 1970, c. 13; Nova Scotia *Collecting Agencies Act*, R.S.N.S. 1967, c. 38; Quebec *Collecting Agencies Act*, R.S.Q. 1964, c. 43; Saskatchewan *Collection Agents Act*, S.S. 1968, c. 11. The Manitoba *Consumer Protection Act*, R.S.M. 1970, c. C 200, also contains provisions [ss. 1(f), 76, 89, and part XII, which was added in 1970] dealing with collection agents.

6. *Collection Agents Act*, S.N.S 1921, C. 14.

7. Proceedings of the Sixteenth Conference of Commissioners on Uniformity of Legislation in Canada 20 (1933).

8. Proceedings of the Seventeenth Conference of Commissioners on Uniformity of Legislation in Canada 41-2 (1934). The justification for this view is interesting as a reflection of the general approach of the Commissioners at that time. "[I]t is doubtful if the legislation can be said to have been "tested by experience". It can probably be more properly said that such Acts are "untried Acts on these subjects". Certainly, no evidence has been presented ... to establish that the regulation of collection agencies is one of the commercial, business and industrial subjects in which "uniformity of law is an essential" thing. Further, it cannot be shown that the existing legislation embodies 'legal

4. British Columbia was among the first provinces to enact legislation, with the *Collection Agents' Licensing Act, 1930*[9]. That statute was progressively amended between 1930 and 1959,[10] and in 1967 it was repealed and replaced by the *Collection Agents Act*.[11]

5. Despite this history of fairly continuous scrutiny, however, and despite the growing concern with consumer credit and consumer protection, the debt collection process itself has been largely ignored. In particular, the legislative emphasis upon collection agents has tended to obscure the fact that a substantial proportion, perhaps the majority, of debts are collected directly by creditors, and not through the medium of collection agents. Such legal controls as do exist over debt collection are widely scattered across the entire body of the law. Accordingly, the Commission decided, as part of its Project No. 2 on Debtor-Creditor Relations, to examine these controls, as, they affect both collection agents and others.

6. Part Two of this Report deals with debt-collection generally, whether carried on by creditors themselves, or through the medium of collection agents or others, such as lawyers. Part Three deals specifically with the provisions of the *Collection Agents Act, 1967*, while Part Four is concerned with bailiffs. A summary of the Commission's recommendations is included in Part Five.

7. In January, 1971 the Commission completed a Working Paper on the subject of this Report. That Working Paper was circulated for comment to all licensed collection agencies in the province, as well as to a number of other persons and organizations, both within British Columbia and outside. All were asked to submit their written comment and criticism on the proposals tentatively advanced by the Commission. A good many responded, and the comment received has proved invaluable to the Commission in formulating the recommendations contained in this Report. In a number of instances, the views expressed in the Working Paper have been revised in the light of the comment received, and the Commission has. been confirmed in its views of the usefulness, indeed the necessity, of this consultative process.

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principles of which there is an approximation in the provinces.'" 1934 Proceedings 42.

9. S.B.C. 1930, c. 31.

10. S.B.C. 1932, c. 25; S.B.C. 1934, c. 37; S.B.C. 1938, c. 29; S.B.C. 1941-42, c. 18 [Section 17A, introduced by the 1941-42 amending act, included for the first time a provision comparable to that of the Ontario *Debt Collectors Act*. *See* text accompanying notes 1 and 2, supra]; S.B.C. 1955, c. 41; S.B.C. 1956, c. 26; S.B.C. 1959, c. 46. [This amendment, *inter alia*, shifted responsibility for the administration of the act from the Department of Municipal Affairs to the Attorney-General's Department].

11. S.B.C. 1967, c. 10.

## PART TWO DEBT COLLECTION GENERALLY

(a) The Dimensions of the Problem

8. The Special Joint Committee of the Senate and -the House of Commons on Consumer Credit stated in its 1967 Report that "collection agency practices sometimes harass the poor and unsophisticated."[12] Studies done in Ontario and Quebec have produced a good deal of information about alleged unscrupulous tactics employed by creditors and collection agents.[13] The Payne Committee on the Enforcement of Judgment Debts in Great Britain stated in its 1969 Report that "some creditors are prepared to use any method and to go to unacceptable lengths in order to collect their debt".[14] The Report includes examples of the sort of harassing tactics reported to the Committee.[15]

9. The Commission has not conducted its own field studies in order to determine the incidence of harassment in British Columbia. It is nevertheless satisfied that it does occur, and in a sufficient volume to warrant remedial action. information obtained from the Inspector of Collection Agents, the Consumer Affairs Officer, the Consumer Services Branch of the Department of Corporate and Consumer Affairs in Ottawa, the Better Business Bureau in Vancouver, and those responsible for the "Action Line" column in the "Vancouver "Province, among others, reveal a fairly large volume of complaints of harassment and intimidation.

10. There are a number of categories of complaint that seem to recur. It is frequently alleged, for example, that the wrong person has been contacted by a creditor or collector, because of a similarity of names and a lack of detailed research prior to making contact with the alleged debtor,[16] although in a number of cases it was alleged that the creditor or collector was notified of the error.

11. Another common complaint involves charges of repeated telephone calls to an alleged debtor, and of the use of rude, abusive and threatening tactics on the telephone. In one case, reported to the Better Business Bureau in Vancouver, it was charged that a collector had suggested to the wife of an alleged debtor who was seriously ill, that she should commit robbery, if necessary, in order to pay an alleged debt. In another case, obtained from the same source, it was claimed that a collector had telephoned an alleged debtor on twenty separate occasions during the course of a single day. The Director of the Vancouver Community Lawyer Program reported a case to the

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12. Report on Consumer Credit of Special Joint Committee of the Senate and the House of Commons on Consumer Credit and Cost of Living 6 (1967).

13. Reference to these studies is made by Prof. J.S. Ziegel in *Consumer Credit and the Low Income Family* 24-5 (a publication of the Canadian Welfare Council 1970).

14. Report of the Committee on the Enforcement of Judgment Debts, Cmnd. 3909, 1969, para. 1235.

15. *Id.* paras. 1232-4.

16. It has even been suggested that some creditors resort to this as a deliberate tactic, in situations where they would expect communication between the person contacted and the alleged debtor to result. The Commission has encountered no evidence of this at all.

Commission in which a middle-aged and sick lady, who had three children and had been deserted by her husband, was telephoned at 2:00 a.m. with a demand for full payment of a loan by noon the same day. The collector is reported to have told the lady that "by the time we are finished "with you, we are going to make the Nazis look like nuns" Recently, in Alberta, a collector was convicted on a charge that he had told a man in a telephone conversation that he was a City Detective, and that if a certain bill was not promptly paid, the man and his wife would be arrested.[17]

12. A third group of complaints relates to allegations that creditors or collectors contact friends, neighbours or members of an alleged debtor's family, either in person or by telephone, and discuss his financial affairs with them.

13. Another frequent complaint is that creditors and collectors contact the employer of the alleged debtor and inform him of the indebtedness or visit him at his place of work, and discuss his affairs with him in the presence of others, or leave embarrassing or compromising telephone messages for him there. In one case, reported to the Better Business Bureau in Vancouver, a telephone message was left for an employee at his place of work stating that a particular collection agency (no longer in business) had called, and informed the person who took the message that "they have issued a committal order against you". The alleged debt was in fact that of the wife, and on the basis of the available information, it was at least arguable that it was not a debt for which the husband was in law responsible.

14. A further group of complaints relates to situations in which it is claimed that, although a debt has been discharged by payment, the alleged debtor is nevertheless subjected to repeated demands for payment, whether by the creditor himself or by a collector acting on his behalf.[18]

15. In the Commission's opinion there is sufficient evidence of these and similar activities to warrant the conclusion that there is a problem that requires attention. This conclusion should not be taken as a general indictment of creditors or collection agents. The Commission's view would remain unaffected, however, even if it were shown that harassment was the exclusive habit of but a single creditor or agent. To adapt some words used in another context by the Royal Commission on the Cost of Borrowing Money, Cost of Credit and Related Matters in the Province of Nova Scotia:

> To dwell on the question whether some people in these businesses are a set of [rascals] or not is to miss the point completely. The real point is the extent to which inadmissible practices can be allowed to gain widespread acceptance so as to commend themselves not only to the few who may be depraved but to the many who are not but who simply do not stop to think about them.[19]

16. The Commission should also not be taken as suggesting that as between alleged debtors and creditors the former have a monopoly on virtue and the

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17. Victoria Daily Times, November 18, 1970, p. 26.

18. *See* Bill Fletcher, "Vancouver Sun", June 27, 1970, p. 24. In some cases, this is the result of computerized billing arrangements. In the 1971 Session of the British Columbia Legislature Mr. H. Capozzi, M.L.A., introduced a *Protection from Computers Act*, designed to deal with the problem, as a private member's bill: Bill 34, 1971.

19. Report of the Royal Commission on the Cost of Borrowing Money, Cost of Credit and Related Matters in the Province of Nova Scotia, para. 533 (1965).

latter on vice. It may be acknowledged that in many cases people have themselves alone to blame for their misfortunes, and in some cases debtors do seek to evade payment of lawful debts. It may also be acknowledged that the problem is aggravated by the fact that, as the Payne Committee put it, "the relationship of creditor and debtor often engenders antagonism".[20] It is also affected by the fact that, again to quote the Payne Committee, "the debtor class includes many who by misfortune or mischance have drifted into debt and they are peculiarly exposed and vulnerable".[21] Moreover, there are elements in the law affecting creditors' rights and remedies that place a high premium upon speed and decisiveness in the recovery of debts. This is especially true in the case of consumer debt, where the creditor may be unsecured. Nevertheless, to quote the Payne Committee once more, "it cannot be tolerated that just claims be pursued by unjust methods ... if reasonable methods of collecting debts fail the proper course for creditors is to invoke the machinery of the Courts".[22] The Commission agrees.

(b) *The Existing Law on Harassment*

17. The remedies available to one who claims to be the victim of abusive or intimidatory tactics are scattered across the entire body of criminal and civil law.

(i) *Criminal Liability*

18. Section 315(3) of the *Criminal Code* provides that "every one who, without lawful excuse and with intent to harass any person, makes or causes to be made repeated telephone calls to such person is guilty of an offence punishable upon summary conviction".[23] Section 316(1) of the Code penalizes "every one who ... by letter, telegram, telephone, cable, radio or otherwise, knowingly utters, conveys or causes any person to receive a threat (a) to cause death or injury to any person, or (b) to burn, destroy or damage real or personal property, or (c) to kill, maim, wound, poison or injure any animal or bird that is the property of any person".[24]

19. Section 291(1) of the Code provides that "every one who, without reasonable justification or excuse and with intent to extort or gain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or to cause anything to be done, is guilty

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20. *Supra* note 14, para. 1235.

21. *Id.* para. 1235.

22. *Id.* para. 1236.

23. Cf. also Rule 20 of the General Regulations of the British Columbia Telephone Company, which prohibits "the use of the Company's service or equipment for annoying any person and the use of offensive language while using or conversing over the Company's equipment". In the Vancouver Province of August 11, 1970, an advertisement on behalf of B.C. Tel claimed that "every month we're identifying persons responsible for obscene and nuisance calls and taking appropriate action". So far as can be ascertained, however, the only instance of proceedings being taken arising out of activities connected with debt collection is that referred to in paragraph 11 of this Report.

24. The offence under paragraph (a) is an indictable offence, and under paragraphs (b) and (C) either an indictable or a summary conviction offence.

of an indictable offence". In R. v. *Natarelli and Volpe,*[25] the Supreme Court of Canada held that to constitute a defence to a charge under section 291, "there must be reasonable justification or excuse not only for the demand but for the making of the threats or menaces by which the accused sought to compel compliance with the demand".[26] Mr. Justice Cartwright stated[27] that:

> When it is proved that threats have been made for the making of which there could be no justification or excuse, that the threats were made with intent to gain something and were calculated to induce the person threatened to do something, the commission of the crime defined in section 291 is established and it is unnecessary to inquire whether the person making the threats had a lawful right to the thing demanded or entertained an honest belief that he had such a right; that inquiry would be necessary only if the threats were such that there could be reasonable justification or excuse for making them.

By section 219(2) a threat to institute civil proceedings is not a threat for the purposes of section 219(1).

20. Section 121 of the *Criminal Code* provides that "every one who asks or obtains or agrees to receive or obtain any valuable consideration for him self or any other person by agreeing to compound or conceal an indictable offence" commits an indictable offence. There are a number of cases in which the courts have expressed the view that a threat to institute criminal proceedings as a means of compelling the payment of even a lawful debt,[28] is an abuse of the process of the court. The Professional Conduct Committee of the Law Society of British Columbia has ruled that "no member shall demand or appear to demand on behalf of a client, a payment of money or any other thing from any person to avoid a prosecution being launched against that person".[29]

21. Section 318 of the Code provides that "every one who demands, receives, or otherwise obtains anything, or causes or procures anything to be delivered or paid to any person under, upon, or by virtue of any instrument issued under the authority of law, knowing that it is based on a forged document, is guilty of an indictable offence". Reference should also be made to the indictable offence of extortion by libel under section 252. Finally, the *Criminal Code* provisions concerning theft (section 269), false pretenses (section 304), forgery (section 309) and the use of counterfeit or unauthorized marks or stamps (section 319) should be noted.

(ii) *Civil Liability*

22. Quite apart from criminal sanctions, there are a number of civil causes of action for damages that might, depending upon the circumstances of the case, be relevant to the problem of harassment. They include actions for trespass, assault and defamation, and possibly actions for the intentional or negligent infliction of nervous shock, abuse of legal process, and an action under the

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25. (1968) 1 C.C.C. 154.

26. *Id.* at 160.

27. *Ibid.*

28. *E.g.* R. v. *Bell*, [1929] 3 D.L.R. 931; R. v. *Thornton*, (1926) 46 C.C.C. 249. Cf. *Olds* v. *Paris,* (1918) 25 B.C.R. 453.

29. Law Society of British Columbia. Professional Conduct Handbook, Ruling 5, p. 49 (1970).

provisions of the recently enacted *Privacy Act*.[30] It is beyond the scope of this Report to examine in detail the requirements of each of these causes of action. It is sufficient to say that trespass and assault will rarely be relevant, while the precise status and scope of actions for damages for intentional infliction of nervous shock[31] and abuse of legal procedure,[32] is far from clear. In view of the fact that communication with neighbours, friends, relatives and employers of alleged debtors is one of the most frequent sources of complaint about extra-judicial collection procedures, however, the two actions of defamation and invasion of privacy will be given more extended consideration.

23. Defamation consists of the publication to a third person of matter containing a false imputation as to the character of another. If the publication takes a permanent form, for example, if it is in writing, it is described as a libel, and as actionable *per se*, that is, the law presumes that the person libeled has suffered loss, without the necessity for any proof by him of such loss. If the publication takes a more transitory form, for example, if it consists of spoken words, it is described as a slander, and is ordinarily only actionable if the person slandered proves that he has suffered some actual loss.

24. It is of the essence of defamation that it consists of a false statement damaging to the character or reputation of another. "The law will not permit a man to recover damages in respect of an injury to a character which he either does not, *or ought not*, to" [33] It follows that if the statement is in possess substance true, there is no actionable wrong. The law, however, presumes that every man is of good reputation, and consequently the plaintiff is not required to *prove* the falsity of an alleged defamatory statement. This is assumed in favour of the plaintiff, it being left to the defendant to show that the statement was true (the defence of justification).

25. In so far as allegations of harassment by creditors and collectors are based upon the fact that they communicate *accurate* information to others about a man's alleged indebtedness, therefore, the law of defamation will provide no remedy.

26. On the other hand, the claim of harassment may occasionally be based upon an allegation that false information has been communicated. In this case, the communication may be *prima facie* defamatory. It has long been settled, however, that merely to say falsely of a man that he owes money is not defamatory. As Chief Justice Begbie put it in *Wolfenden* v. *Giles*,[34] that "is to say what is true of every householder ... on most days of the month". On the other hand, it has been held defamatory to say falsely of a man that he refuses to pay his debts,

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30. S.B.C. 1968, c. 39.

31. *See* generally Williams, *Tort Liability for Nervous Shock in Canada*, in Linden (ed.), Studies in Canadian Tort Law 139 (1968).

32. *See* Fleming, Law of Torts 591-2 (3rd ed. 1965); Winfield on Tort 715-6 (7th ed. Jolowicz and Ellis Lewis, 1963).

33. *McPherson* v. *Daniels*, (1829) 10B. & C. 263, 272.

34. (1892) 2 B.C.R. 284.

or is deliberately delaying payment of them, or he is unable to pay them.[35]

27. Even if the statement be defamatory, however, it will not necessarily be actionable. Sometimes even a false statement may give rise to no liability. "In certain situations, the law allows a man to speak and write without restraint, even at the expense of another's good name and character. These are called Privileged Occasions."[36] There are two sorts of privileged occasions - those which confer an absolute immunity from suit, and those in which the immunity is a qualified one only.[37] In the present context, only the latter are relevant. They are described as being occasions "where the person who makes a communication had an interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it".[38] The statement is only privileged, however, if made pursuant to the purposes for which the privilege is granted. If it was made for other purposes, the privilege is abused, and will be lost. It is for this reason that it is described as a qualified privilege only.

28. There are no Canadian or English authorities directly in point on the question whether a qualified privilege attaches to a communication made by a creditor or collector to an employer as to an alleged indebtedness[39] of an employee. Although in the United States there are authorities going both ways, the better view seems to be that no privilege ordinarily attaches to such a communication,[40] and it is likely that this view would be adopted by Canadian Courts should the matter be litigated here. Here again it should be emphasized, however, that the statement, even if false, and although not subject to any privilege, will only be actionable if capable of a defamatory meaning.

29. It is apparent, then, that the law of defamation provides a remedy for harassment in what are at best a small number of relatively marginal cases of false and defamatory statements.

30. From the point of view of the alleged debtor, however, the point is not that the statement made to his employer is true or false, but rather that the information contained in the statement is really of no legitimate concern to his employer at all. In essence, his position is that it is an invasion of his privacy for his personal finances to be discussed with his employer or anyone else without his consent.

31. The right to protection against invasions of privacy has not been explicitly recognized, as such,[41] at common law. In British Columbia, however, section

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35. *Cf. Stubbs* v. *Russell*, [1913] A.C. 386; *Stubbs* v. *Mazure*, [1920] A.C. 66; *Winstanley* v. *Bampton*, [1943] K.B. 319.

36. Fleming, *supra* note 32 at 525.

37. *Id.* at 525-6.

38. *Adam* v. *Ward*, [1917] A.C. 309, 334.

39. But Cf. *Todd* v. *Dun, Winman & Co. & Chapman*, (1888) 15 O.A.R. 85; *Robinson* v. *Dun*, (1897) 24 O.A.R. 287.

40. *See First Nat'l City Bank* v. *Gonzalez*, 293 F.2d. 919 (1st Cir. 1961); *Neigel* v. *Seaboard Finance*, 173 A.2d.300 (N.J. 1961); *Rosenberg & Sons* v. *Craft*, 29 S.E.2d.275 (Va. 1944).

41. Fleming, *supra* note 32, ch. 23. But cf. Frederick, *Publicity and Privacy: Is it any of our Business*, (1970) 20. U. of To. L.J. 391.

2(1) of the *Privacy Act*[42] provides:

> It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

Section 2(2) declares:

> The nature and degree of privacy to which a person is entitled in any situation or in relation to any matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of another, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.

Section 3(1) provides, *inter alia*, that:

> An act or conduct is not a violation of privacy where (a) it is consented to by some person entitled to consent; (b) the act or conduct was authorized or required by or under a law in force in the Province or by a Court or any process of a Court.

To date this legislation has been the subject of only one reported case, *Davis* v. *McArthur*,[43] an action against a private investigator.

32. It will be seen that this statute does not purport to render every invasion of privacy actionable. The defendant's acts must not only be an invasion of the plaintiff's privacy but, in addition, they must have been committed "without a claim of right" and must fall outside the scope of the protective provisions of section 3(1).

33. Except to the extent that any conclusions can be drawn from the law of defamation as to whether communications with the employer of an alleged debtor might properly be regarded as an invasion of privacy, there is no Canadian law of value on this question. A number of common law jurisdictions in the United States have considered the point, however, and the approach taken there may well have relevance under the British Columbia *Privacy Act*.

34. The general approach of the Courts in the United States when faced with the problem of applying privacy concepts to collections efforts is best summarized in the following extract from the decision in *Norris* v. *Moskin Stores, Inc.*[44]

> The mere efforts of a creditor to collect a debt cannot without more be considered a wrongful and actionable intrusion. The creditor has and must have a right to take reasonable action to pursue his debtor and collect his debt. But the right to pursue the debtor is not a licence to outrage the debtor. The problem of defining the scope of the right of privacy in the debtor-creditor situation is the problem of balancing the interest of the creditor in collecting his debt against that of the debtor in his own personality ... [T]he debtor has a cause

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42. S.B.C. 1968, c. 39.

43. [1971] 2 W.W.R. 142; reversing (1969) 10 D.L.R. (3d) 250 (B.C.S.C.). There has apparently been only one other action instituted under the Act, which was later withdrawn. *See* Votes & Proceedings of the Legislative Assembly of British Columbia, Nos. 31 & 32, February 23, 1971.

44. 132 So. 2d.321, 323 (Ala. 1961).

of action for injurious conduct on the part of the creditor which exceeds the bounds of reasonableness.

This approach has recently been followed by the Maryland Court of Appeals in *Household Finance Corporation* v. *Bridge,*[45] where the court said:

> The problem of defining the scope or range within which the creditor might properly act in order to collect his debt, is the problem of balancing the interest of the creditor in collecting his debts against that of a debtor of ordinary sensibilities. Unless some latitude is given the creditor to invade, to a reasonable extent, the debtor's right of privacy, without incurring liability, we may well wind up with the result that the creditor will find it preferable to proceed immediately with legal action when a debt becomes in default, rather than run the risk of being answerable to a supersensitive debtor in an action for invasion of privacy.[46]

35. Thus, it has been held in the United States that merely to communicate to an employer the fact of his employee's alleged indebtedness is not an invasion of privacy. In *Harrison* v. *Humble Oil and Refining Company,*[47] there was held to be no cause of action against a creditor who called an employer, informed him of the employee's debt and sought permission to talk with the employee while on duty. Similarly, in *Berrier* v. *Beneficial Finance Incorporated*,[48] two telephone calls to the employer and a letter informing him of the debt and the possibility of garnishment of wages was also held to be insufficient to found an action for invasion of privacy. On the other hand, in *Housh* v. *Peth*,[49] excessive telephoning at an alleged debtor's home and place of employment were held sufficient to constitute an invasion of privacy, while in *Pack* v. *Wise*,[50] it was held that even if merely to inform the employer of the employee's debt by letter and a subsequent telephone call did not amount to an invasion of privacy, such a tort was committed when the creditor again wrote to the employer after being informed by the employee's lawyer of a defence to the claim and of the debtor's desire to have no further intrusions into his employment relationship.

36. Translated into the language of the British Columbia *Privacy Act*, this approach means that provided the creditor or collector uses only reasonable efforts to collect debts, he will not be acting "without a claim of right", and therefore no cause of action will arise. Specifically, merely to communicate with an employer will not, without more, give rise to liability under the Act. Much will turn upon the precise form and content of the communication. While it may be permissible to communicate with an employer directly, whether orally or in writing, it would probably be improper to do so indirectly, for example by leaving messages about the alleged indebtedness with another employee for transmission to the employer, by appearing at a person's place of work and discussing his indebtedness with him in the presence of others, or by

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45. 250 A.2d. 878 (Md. 1969).

46. *See also Hawley* v. *Professional Credit Bureau Inc.*, 76 N.W. 2d. 835 (Mich. 1956).

47. 264 F. Supp. 89 (D.S.C. 1967).

48. 234 F. Supp. 204 (N.D. Ind. 1964)

49. 133 N.E. 2d. 34 (Ohio 1956).

50. 155 So. 2d. 909 (La. 1963).

communicating with neighbours.[51]

(iii) *Conclusions as to present law*

37. The Commission has concluded that the present law is inadequate to deal with harassment of alleged debtors. The criminal law, for the most part, deals only with more extreme forms of intimidatory behaviour. While some forms of harassment doubtless are criminal, there are others which, though unreasonable, harsh, unconscionable or unscrupulous, are at present beyond the reach of the Criminal Code. With the possible exception of section 315(3), none of the Criminal Code provisions is directed to the problem of harassment as such, and the problems of proof under section 315(3) are likely to[52] be, at the very least, considerable, and in any event are sufficient to warrant a doubt as to its effectiveness as a restraint in the present context. Moreover, section 315(3) requires, as an ingredient of the offence, *repeated* telephone calls.

38. The present state of the civil law is also not conducive to confidence in its utility as a curb on the sorts of excesses referred to. The two torts that seem most likely to be serviceable are actions for defamation and invasion of privacy. Both actions must be brought in the Supreme Court, since both the County Court and the Small Claims Division of the Provincial Court are expressly precluded from exercising jurisdiction over actions for defamation,[53] and jurisdiction over actions under the *Privacy Act* is expressly conferred on the Supreme Court by that Act.[54] As a result, the costs of litigation may well be prohibitive to those most likely to be vulnerable to harassment. Moreover, many of those who are unable, for whatever reason, to pay their debts undoubtedly feel a sense of "moral guilt" and embarrassment at that fact, and are unlikely therefore to be enthusiastic about the possibility of a Supreme Court action with its attendant publicity. In the Commission's view these considerations represent a serious limitation upon the practical usefulness of existing remedies in tort as weapons against harassment, except in rare cases.

39. The Commission has therefore concluded that the present law is inadequate to deal with harassment of debtors. That conclusion was relatively easily reached. Far more difficult, however, has been the problem of suggesting reforms.

(C) *The Commission's Proposals*

*General*

40. There are some who argue that the only effective way to deal with harassment is to abolish collection agencies. The argument is that while creditors are generally engaged in the marketing of goods and services, and hence are likely to employ collection methods that do not adversely affect their goodwill,

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51. Cf. *Bowden* v. *Spiegel*, 216 P.2d. 571 (Cal. 1950); *Biederman's Inc.* v. *Wright*, 322 S.W. 2d. 892 (Mo. 1959); *Santiesteban* v. *Goodyear Tire & Rubber Co.*, 306 F.2d. 9 (5th Cir. 1962).

52. Proof will probably require the assistance of the police and the telephone Company, and this assistance is not likely to be sought by those most vulnerable to harassment.

53. *County Courts Act*, R.S.B.C. 1960, c. 81, s. 29(a); *Small Claims Act*, R.S.B.C. 1960, c. 359, s. 5.

54. *Privacy Act*, s. 5.

collection agencies are not subject to any such restraint. Indeed, it is suggested that there is an incentive for collection agencies to act harshly, lest they lose business to competitors. The practice of the "false-front" agency, referred to in paragraph 117 of this Report, lends some support to this point of view. The only explanation for the "false-front" agency is that it enables the creditor to take advantage of whatever abusive methods may be employed by the agency, without incurring the loss of goodwill that might be associated with direct use of such methods by the creditor himself.

41. While the Commission accepts that the temptation to employ intimidatory tactics is, for the reason suggested, greater for collection agents than for creditors, it is unable to accept the conclusion that collection agents should be abolished. The validity of that conclusion depends to some extent at least, upon the legal propriety of harassment. If effective controls over harassing behaviour can be devised, much of the force of the argument would be lost. Moreover, the abolition of collection agencies may well have the effect of placing some kinds of creditors, for example, professional men such as doctors and dentists, and small businesses, at a considerable disadvantage. Larger organizations have the resources to establish suitable arrangements for debt collection. Many others, however, do not, and the Commission has concluded that no sound reason exists for distinguishing between creditors upon this basis. Debts can be lawfully created and should be lawfully recoverable.[55]

42. The Commission prefers the approach taken in Great Britain by the Payne Committee on the Enforcement of Judgment Debts, which concluded that there should be "some provision making it unlawful to employ unreasonable extra-judicial methods for the collection of debts".[56] The Payne Committee's recommendation was implemented by section 40 of the *Administration of Justice Act, 1970*,[57] subsection (1) of which declares:

> A person commits an offence if, with the object of coercing another person to pay money claimed from the other as a debt due under a contract, he
>
> (a) harasses the other with demands for payment which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, is calculated to subject him or members of his family or household to alarm, distress or humiliation;
>
> (b) falsely represents, in relation to the money claimed, that criminal proceedings lie for failure to pay it;
>
> (c) falsely represents himself to be authorized in some official capacity to claim or enforce payment; or
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> (d) utters a document falsely represented by him to have some official character or purporting to have some official character which he knows it has not.

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55. It should be said that some of those who take the position that collection agents should be abolished also argue that claims arising out of retail debt should be prohibited as well.

56. Report, *supra* note 14, para. 1238.

57. 18 & 19 Eliz. II.

43. Subsection (1) (a) represents an attempt at a description of impermissible conduct. It is formulated in general terms in recognition of the difficulty of defining with any greater precision the kinds of conduct that constitute "harassment". In the Working Paper upon which this Report is based, the Commission tentatively recommended the enactment of a similar provision in British Columbia, and pointed out that comparably broadly-drawn legislation already exists in the Province, such as the *Privacy Act*.[58] Some of those who commented on the Commission's tentative proposals objected to the wording on the ground that it was too vague. The Commission does not agree with this criticism. The Courts are quite accustomed to making the sorts of judgment called for by this provision (they do so daily in cases involving allegations of negligence) and, in any event, the provision itself does include some guidance as to the considerations that should be taken into account in deciding whether a particular course of conduct constitutes "harassment".

44. The Commission therefore reaffirms the position tentatively taken in the Working Paper, and *recommends* that legislation based upon the English provision be enacted in British Columbia, applying to everyone who seeks to collect a debt, whether on his own behalf or on behalf of some other person. The debt collection process should be subject to the same legal restraints whether carried on by principals or through agents.

45. While the Commission has referred elsewhere[59] to the specialized character of legislative drafting, it would recommend that section 40(1) (a) of the *Administration of Justice Act, 1970*, if adopted, should be modified in a number of respects:

(a) The phrase "coercing another person to pay", in the English version, should be replaced by the phrase "obtaining payment". The Commission's view is that the English terminology may lead to an undesirably restrictive interpretation of the scope of the provision.

(b) The phrase "calculated to cause alarm "in the English provision should be replaced by the phrase "likely to cause alarm ... "Calculated" is a word of notoriously imprecise import in law and, if interpreted to mean "intended", the provision will lose much of its force and value. Attention should be focused upon the conduct itself, and not upon the actor's intentions in engaging in that conduct.

(c) It should be made clear that persons other than the alleged debtor, such as his wife and family, can be harassed by attempts to obtain payment by the alleged debtor.

46. To accomplish these results, the Commission recommends the enactment of a provision along the following lines:

*No person shall, with the object of obtaining payment by some other person of money alleged to be due and payable by that other person, directly harass that other person or any member of his family or household with demands for payment which, in respect of*

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58. S.B.C. 1968, c. 39.

59. 1970 Annual Report, pp. 15-16.

*(i) their frequency, or*

*(ii) the manner or occasion of their making, or*

*(iii) any threat or publicity by which they are accompanied, are likely to cause alarm, distress or humiliation to him, or to members of his family or household.*

47. The Commission also recommends that the general provision should be reinforced by provisions dealing with specific improprieties. These are dealt with separately in the following paragraphs.

*Communicating with Employers of Alleged Debtors*

48. In its Working Paper, the Commission tentatively proposed a provision making it an offence to "directly or indirectly communicate any information relating to the debts of any other person, to the employer of that other person ... without the consent of that other person". It was the Commission's view that the object of such communications is purely and simply coercive. The aim, at least the hope, is that the employer can be prevailed upon to persuade his employee to satisfy the creditor's claim, the employer's effectiveness in this enterprise depending to some extent upon his willingness to use or threaten to use the sanction of dismissal. The Commission also expressed the opinion that to the extent that such communications do result in the dismissal of employees, the general effect is anti-social, for, far from facilitating an escape from debt, it is likely to result in increasing difficulty for the alleged debtor. The Commission pointed out that the *Attachment of Debts Act*[60] had been amended in 1962 to preclude garnishment of wages before judgment, partly, no doubt, in recognition of the fact that many employers react adversely to garnishee orders against their employees' wages, and that garnishment could be used for leverage purposes against an employee without there being any debt legally declared to be owing by him. This has now been explicitly recognized in a recently proposed amendment to the *Attachment of Debts Act* which would prohibit the dismissal of an employee "solely by reason of the service of a garnishing order upon the employer" [61]

49. The Commission's tentative proposal provoked a good deal of critical reaction, the substance of which was succinctly stated by the *Associated Credit Bureaus of British Columbia* which, while agreeing that "creditors and collection agents should be restrained from using the employer's position of authority to intimidate the debtor into paying" suggested that the Commission's proposal would "prohibit communication rather than wrongful conduct". The *Associated Credit Bureaus* suggested that the main purposes of communication with employers are:

> ... (a) tracing of a skip-debtor, (b) verification of employment, (c) the establishment of an arrangement with the employer as an intermediary to the benefit of both the debtor and the creditor. It is the arrangements mentioned in (c) above which time after time in our experience have forestalled the more drastic remedies of garnishment, seizure and the like.
>
> The suggestion that the creditors and collection agents be restrained from communicating with the debtor's employer would have two undesirable results: (a) it would permit skip-debtors to avoid detection because the creditor was

60. *See* now *Attachment of Debts Act*, R.S.B.C. 1960, c. 20, s. 3(6).

61. An Act to *Amend the Attachment of Debts Act*, s. 9, Bill 74, 1971.

refused the right of finding his whereabouts through the employer, (b) it would accelerate the use of more drastic remedies and eliminate many satisfactory arrangements which are presently available under the system.

50. The Commission does not wish to make any recommendation that would prevent the "many satisfactory arrangements" achieved with the assistance of employers. On the other hand, it seems entirely reasonable to require that, before any discussions are held with a person's employer with a view to working out such arrangements, that person's consent should first be obtained. The Commission accordingly adheres to the recommendation originally made on this point.

51. The problem of skip-tracing is more difficult. In so far as skip-tracing involves contacting previous employers, it will involve no conflict with the Commission's recommendation. On the other hand, the final act in a successful tracing may well be an attempt to locate an alleged debtor at the place of business of his current employer, whether for the purposes of demanding payment, or serving a writ. The Commission's original proposal would have prohibited the communication of any "information relating to a debt" to an employer without the employee's consent. This formulation was used in an attempt to leave skip-tracing unaffected, since in the Commission's view, it is an entirely proper activity to seek to ascertain the whereabouts of an alleged debtor. The same approach has been taken under the Alberta *Collection Agencies Act*,[62] in terms of Regulations[63] prohibiting the conduct of inquiries "at the place of employment of a debtor, except with the approval of the debtor, or for the purpose of verifying the employment"

52. On the other hand, it has been forcefully represented to the Commission that if communications are to be permitted at all, it is impossible to limit the purpose of the communication. Professor T.G. Ison commented:

> The vital thing is not what the collection agency communicates to the employer, but what the collection agency can induce the employee to think it has communicated to the employer. What they can induce the employee to think is the measure of the coercion that they have applied. [T]he only way [to prevent coercion via the employer] is to proscribe any communication at all with the employer, or to the employee via the employer, or to the employee at his place of work, or to the employee via any employee or agent of the same employer.

53. Regulations recently promulgated under the *Collection Agencies Act*[64] of New Brunswick, prohibit collection agencies in that province from conducting any inquiries "at the place of employment of the debtor for any purpose in relation to the debtor, except with his approval".[65] This Regulation seems to be open to precisely the same criticism as was made of the Commission's original proposal by the Associated Credit Bureaus. In view of this, the Commission has been interested to learn from the Director of the New Brunswick Consumer Bureau that comparable objections were made in that

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62. S.A. 1965, c. 13.

63. Alta. Regulations 567/1965, as amended by Alta. Regulations 589/1965, s. 16(d) (ii).

64. R.S.N.B. 1952, c. 31, as amended.

province, but that the experience of the agencies under the new rules was that their difficulties were far less than they had expected.

54. Despite the experience in New Brunswick, however, and while acknowledging the force of the objection referred to in paragraph 52, the Commission has concluded that the approach taken in Alberta is preferable. The New Brunswick regulation seems to the Commission almost impossible to police - how, for example, does one prevent a collector in New Brunswick calling at a debtor's place of work, and simply inquiring whether the debtor does indeed work there - and it seems more realistic, therefore, to recognize this fact than to deny it.

55. The Commission accordingly recommends the enactment of a provision along the following lines, by way of a specific elaboration of the general provision recommended in paragraph 46:

*No person, with the object of obtaining payment by any other person of money alleged to be due and payable by that other, shall*

*(a) conduct any inquiries at the place of employment of that other, except for the purpose of verifying the employment, or*

*(b) directly or indirectly communicate any information concerning the alleged debts of any other person to his employer, unless the consent of that other is first obtained.*

*Communications with other Strangers*

56. It has been pointed out that one of the most frequent complaints of harassment relates to communications with members of the family of an alleged debtor, as well as with neighbours and friends. In its Working Paper, the Commission included among its tentative proposals one prohibiting the communication of information relating to the debts of another to any member of his family or to any person not having a legitimate business interest in receiving the information. The Commission took the view that attempts to obtain payment of alleged debts by recourse to extra-legal pressure exercised through any stranger to the debtor-creditor relationship, is improper. On the other hand, the Commission does not consider that there is any impropriety in a creditor communicating information to a husband about debts incurred by his wife, for which he is legally responsible, or to a guarantor in respect of the obligations of the principal debtor. It was for this reason that the Commission's original proposal sought to limit the prohibition to disclosures to persons not having a legitimate business interest in receiving the information.

57. Substantially similar criticism of this approach came from a number of sources. The Family and Children's Service in Victoria, for example, suggested that the effect would be that "a husband or wife could put the total family finances into considerable jeopardy without the other person being aware of it", while the Associated Credit Bureaus of British Columbia commented that "it is [the wife] and her children who would be most adversely affected by a garnishing order against her husband's income or a seizure of the family furniture .

58. The Commission considers these objections to be well-founded. At the same time, it is the opinion of the Commission that the legislation should be so drawn that, while communications to a spouse of a debtor, or the parents of a minor, may be permissible, a communication to the minor child of a debtor,

or to other more distant relatives, is quite improper. In the Commission's view, the law should attempt to distinguish between communications made for the purposes of obtaining payment of a debt to those adult persons who are directly affected by the indebtedness, and those who are not. While acknowledging that it is exceedingly difficult to crystallize these distinctions in any precise form of words, the Commission recommends the enactment of a provision along the following lines:

*No person shall, with the object of obtaining payment by any other person of money alleged to be due and payable by that other, directly or indirectly communicate any information concerning the alleged debts of that other, to any person not having a legitimate interest in receiving the information, unless the consent of that other is first obtained.*

59. In the Commission's original proposals, specific provision was made for protecting the right of a credit reporting agency to receive and disseminate information concerning a person's indebtedness. This gave rise to some difficulties of definition which were pointed out by a number of those who commented on the proposals. These difficulties are avoided by the recommendation contained in the preceding paragraph, since the prohibition is clearly stated to apply only to information communicated "*with the object of obtaining payment*". This would exclude the ordinary reporting activities of credit bureaus, which would, therefore, be unaffected by any of these recommendations.

60. The Commission also recommends that, if the proposals made in paragraphs 46, 55 and 58 of this Report are implemented, a further provision should be added making it clear that they are not intended in any way to apply to any reasonable steps taken for the purposes of enforcing any liability or obligation by legal process. The purpose of this provision is to make it clear beyond doubt that service of, for example, a garnishee order on an employer, or a writ on the wife of an alleged debtor, will not violate the prohibitions.

*Telephone Calls*

61. Under section 22(c) of the *Collection Agents Act*,[66] read together with section 26, it is an offence for any collection agent or collector to "send any telegram or make any telephone call, for which the charges are payable by the addressee or the person to whom the call is made, to a debtor for the purpose of demanding payment of a debt". In the Commission's view, this provision should be made applicable to any person seeking to collect an alleged debt.

62. The Commission pointed out in its Working Paper that cases of alleged harassment on the telephone are ordinarily extremely difficult to prove, and suggested that the only completely effective way to deal with harassment by telephone would be to prohibit telephone collections. A number of those who responded to the tentative proposals urged precisely such a course upon the Commission, while a number were strongly opposed to any such move. The Commission does not consider that such a step is warranted at present. Nevertheless, it does consider that some restraints should be imposed upon the time within which it is permissible for telephone calls to be made for debt collection purposes. A number of provinces do have such provisions, such

65. N.B. Reg. 70-79, s. 13(1) (f) (ii).

66. S.B.C. 1967, c. 10.

as New Brunswick[67] and Manitoba.[68] Section 100(j) of the *Manitoba Consumer Protection Act* prohibits a person from making or attempting to make "a telephone or personal call to or on a debtor to demand payment, or negotiate for payment ... (i) on a Sunday, or (ii) on a holiday, or (iii) on any other day except between the hours of seven o'clock in the morning and nine o'clock in the evening". It will be noted that this provision applies to both telephone and personal calls. In the opinion of the Commission, a comparable provision should be adopted in British Columbia.

63. The Commission accordingly recommends that legislation be enacted

*(a) prohibiting any person from sending any telegram or making any telephone call for which the charges are payable by the addressee or the person to whom the call is made, for the purpose of demanding payment of a debt;*

*(b) prohibiting the making of any telephone or personal call to or on a debtor for the purposes of demanding or negotiating for payment of a debt, on a Sunday, or on a holiday, or on any other day except between the hours of seven o'clock in the morning and nine o'clock in the evening.*

*Simulated Legal Process*

64. Section 22(g) of the *Collection Agents Act* prohibits licensed collection agents and collectors from using, without lawful authority

> any summons, notice, or demand or other document, expressed in language of the general style or purport of any form used in any Court in the Province, or printed or written or in the general appearance or format of any such form.

There does not appear to be any comparable prohibition applying to persons generally. In the Commission's opinion, the principle of section 22(g) should apply to everyone. It accordingly recommends legislation

*prohibiting any person from using without lawful authority any summons, notice, or demand or other document, expressed in language of the general style or purport of any form used in an Court in the Province, or printed or written or in the general appearance or format of any such form.*

*Recovery of Collection Expenses*

65. Section 22 (a) of the *Collection Agents Act* prohibits licensed collection agents from collecting or attempting to collect for a person for whom he acts any moneys in addition to the amount owing by the debtor. The apparent purpose of this provision is to prevent a creditor from avoiding paying the collection agent's commission, by authorizing the agent to recover any such commission from the alleged debtor. It would seem, however, that no offence is committed by the agent where the original contract provides that the alleged debtor should, in the event of default, pay any expenses incurred by the creditor in collecting the debt, for in this case, it could be argued that the collection expenses are, in the events that have occurred, a part of the amount owing under the contract. At present, the Courts do exercise some control over collection charges by virtue of an apparently inherent power to review such charges.[69]

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67. *Supra* note 65, s. 13(1)(g).

68. *Consumer Protection Act*, R.S.M. 1970, c. C 200.

69. *C.E.R. & S. Credit Union v. Brown*, (1969) 4 D.L.R. (3d) 95 (B.C.).

It is also possible that some contractual provisions for payment of collection fees by debtors in the event of default would run foul of the law relating to "penalty clauses".

66. The Commission originally proposed that the principle of section 22(a) should be extended to cover all collections, whether by licensed agents or others. This now appears an inapt recommendation. The existing provision is appropriate to, and should be retained in respect of, collection agents. It is quite inappropriate, however, in relation to contracts making provision for recovery of collection charges from the party in default. That is essentially a matter affecting the agreement between debtor and creditor. The Commission does not wish to recommend that collection costs should never be passed on to the debtor. It does recommend, however,

*that a scale of maximum collection charges be established.*

*Use of Objectionable Forms and Letters*

67. Section 7 of the *Collection Agents Act* provides that:

> In the event that a collection agent alters or changes any form of agreement or other form or letter, he shall file the form or letter showing the alteration or change made therein with the Inspector at least fourteen days before the form or letter is used, and shall not use the form or letter if, within that period, the Inspector sends to the collection agent his objection thereto in writing.

This provision is reinforced by section 22(f) which prohibits the use of forms or letters objected to by the Inspector under section 7. Although as a matter of strict construction the Inspector's power seems limited to objections to *changes* and *alterations* in forms or letters, it is clear that it is intended to apply to initial documents too, and is so interpreted by the Inspector.

68. The grounds upon which the Inspector may object to a collection letter or form are not specified in the Act. In practice, the Inspector uses his power to object to any document which in his opinion may have a misleading or intimidatory effect. Thus, for example, he has objected to the use of collection letters headed "... v. to distress warrants in which the words "distress warrant" are printed at the head in large scroll type which might lead the recipient to believe that it is an official form, to collection letters containing the words "Please do not contact this office, nor our client after ... *as proceedings will have been started,*" (emphasis supplied), and to the statement "We have no desire to have your name listed as a bad or doubtful credit risk, nor to furnish this information to merchants and other places of business in the district of your residence." Under comparable provisions in Ontario, objection has been taken to the use by collection agencies of the words "Legal Department" in letters, on the grounds that this leads the debtor to believe that such letters have been sent by a lawyer.

69. The Inspector's refusal to allow letters of demand to be sent which overtly threaten a person's credit standing with an adverse report seems to the Commission to be perfectly proper. It is one thing to *make* an adverse credit report. It is quite another matter to *threaten* to make such a report. Under present law, however, the Inspector has no power to deal with covert threats of damage to credit standing. In the Commission's opinion, one such covert threat that can and should be controlled is the practice of making reference

in a communication to an alleged debtor of the association of the collector with a credit reporting business. This can be very easily dealt with by adding to the list of prohibited acts the making of any communication to an alleged debtor' that directly or indirectly makes any reference to any association with the making of reports as to credit-worthiness.

70. It has also been represented to the Commission that section 22(f) of the present legislation can be construed so as to create an offence whether or not the collector knows that the Inspector has taken objection to a form or letter. The Commission agrees that this provision should be clarified so as to prohibit the use of only those forms and letters in respect of which the Inspector has communicated any objection to the collection agent.

71. The Commission accordingly recommends:

*(a) that the use by any Person for purposes of demanding a payment of a debt of any form or letter to which the inspector has made known his objection be prohibited.*

*(b) that the making of any communication to an alleged debtor for purposes of obtaining payment of an alleged debt, that directly or indirectly suggests any connection between the sender or maker of the communication and the making of reports as to credit-worthiness, be prohibited.*

72. There is, in principle, no reason why persons who are not licensed collection agents should be free to send written communications that are prohibited to collection agents. On the other hand, to require every individual creditor to file every letter that he writes to his debtors with the Inspector of Collection Agents would be unreasonable, let alone unworkable. Even if it were possible to devise a workable scheme of prior restraints the cure might well turn out to be worse than the disease, for the Inspector would be so flooded with paper that there would be a substantial likelihood that no significant control could be exercised. It is for this reason that the emphasis of the legislation is upon "third party" collectors. In relation to these, an administrative scheme based on licensing is both workable and sensible.

73. The Commission can see no reason, however, why the Inspector should not have the power to intervene to prevent persons who are not licensed collectors from using forms or letters that would be objectionable if used by licensed collectors. Section 14 of the Alberta *Collection Agencies Act* of *1965*[70] provides:

(1) This section applies to persons who are not collection agencies or collectors.

(2) Where

(a) the Administrator has reason to believe that a person is using a form or form of letter to collect or attempt to collect a debt from a debtor, and

(b) the Administrator is of the opinion that the form or form of letter is objectionable on any of the grounds on which approval can be refused under section 13, the Administrator may issue an order directing that person to cease using that form or form of letter by a date specified in the order and not to use any other form or form of letter of a similar nature.

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70. S.A. 1965, c. 13.

Although limited in scope, the adoption of a comparable provision in British Columbia would afford a highly flexible machinery for dealing with at least some kinds of objectionable conduct. The Commission accordingly recommends:

> *that the Inspector be empowered to issue cease and desist orders to any person who, for purposes of demanding payment of a debt, uses any form or letter that in the opinion of the Inspector violates any provision of the Act.*

*Sanctions*

74. The Commission recommends that if any of its recommended prohibitions are enacted, violations should be made a summary conviction offence punishable with a fine sufficient to provide an effective deterrent.

75. The Commission has considered the desirability of recommending that, in addition to penal sanctions, violation of the recommended prohibitions should be attended by civil consequences as well. Three possibilities were canvassed:

(a) That a violation of the harassment provisions should be made a tort, actionable without proof of damage.

(b) That violations should constitute a complete defence to any action on the debt, subject to the discretion of the Court to order otherwise in appropriate cases.

(c) The adoption of a provision analogous to section 102(1) of the Manitoba *Consumer Protection Act, 1970*.[71]

After careful consideration, however, the Commission has decided against recommending the imposition of civil liability. The short ground for this conclusion 15 the Commission's opinion that the effectiveness of the penal sanction should be tested before more elaborate civil consequences are applied.

*Implications of the Commission's Proposals on Harassment*

76. In paragraph 16 of this Report, the Commission indicated its concurrence in the view expressed by the Payne Committee that "if reasonable methods of collecting debts fail the proper course for creditors is to invoke the machinery of the Courts". It has been suggested by some that implementation of the Commission's five proposals will force earlier recourse to the judicial machinery for the purposes of collecting debts, and that this will make debt collection more costly. It is suggested, further, that this may make credit more expensive and more difficult to obtain, especially for those in lower income groups who might be in greater need of credit.

77. This argument raises profound questions of social policy. If the argument is sound, its implications require a comprehensive re-examination of the entire credit system. Such a re-examination is beyond the resources, and probably beyond the powers of this Commission. Even if sound, however, the argument affords no reason for abstaining from any attempt to deal with present and undoubted abuses resulting from easy credit and the over-extension of credit, in the hope that a more comprehensive review might be undertaken in the future.

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71. *Supra* note 68.

78. It has been suggested by a number of those who commented upon the Commission's original proposals, that in view of their impact upon the work of the Courts, an examination should be undertaken to assess the adequacy of existing Court procedures and resources.

79. Although such an examination is beyond the scope of the present Report, two specific points were made to the Commission, which should be mentioned here. First, it was pointed out that while a default judgment can be obtained in the County and Supreme Courts within a relatively short period after the failure of the defendant to enter an appearance to defend the action, it takes anything up to three months to obtain a default judgment in the Small Claims Division of the Provincial Court. The reason for this is to be found in section 18(1) and (2) of the *Small Claims Act*[72] which provides that:

> Every summons in an action for debt shall contain a notice by the judge to the defendant that if the defendant pays into the judge's office, on or before a date to be fixed by the judge in the summons, the amount of the claim and costs set out in the summons, together with the fee for service allowed by the judge, the defendant will avoid further costs and that no formal judgment will be entered against the defendant and that the defendant will not be required to appear at Court as directed in the summons.
>
> Such notice in a summons for debt shall also state to the defendant that if he disputes the plaintiff's claim on any ground whatsoever he must, on or before the date fixed under subsection (1), file with the judge a notice of intention to appear at the trial of the cause, and the notice in the summons shall also state that in default of the defendant filing notice of intention to appear judgment may be given against him.

Section 19(1) of the Act provides that the date to be fixed by the judge under section 18(1) must be four clear days before the date fixed for the return of the summons. It is apparently the practice of some Provincial Judges presiding in the Small Claims Division to fix the relevant date well ahead of the date of issue of the summons. This, of course, considerably extends the time that must elapse before a default judgment may be obtained. While the Commission does not wish to make any specific recommendation in this connection, it does recommend that consideration be given to a reform of the default judgment procedure in the Small Claims Division.

80. The second point also relates to default judgments. It has been suggested to the Commission that the provisions governing service of summonses in the *Small Claims Act* are open to abuse. Under section 19 (2) of that Act, a summons may be served in three ways: (a) personally upon the defendant; (b) by leaving a copy at his last or most usual place of abode with some inmate thereof apparently sixteen years of age or older; or (c) mailing a copy to the defendant by registered mail to his last known post office address. Service may be proved by oral evidence of the person who effected the service or by an affidavit of service. A number of cases have been brought to the attention of the Commission in which it has been alleged that a default judgment has been entered against a defendant who had no knowledge of a summons ever having been served, and hence no opportunity to defend. These cases seem generally to arise where service was effected under clause (b) above. A recent

72. R.S.B.C. 1960, c. 359.

proposed amendment[73] to the *Small Claims Act* would add two new subsections to section 19, providing that:

> (4) Where, by reason of the absence of the person to be served, or from any other sufficient cause, the service of CL summons cannot be made, the judge may, upon affidavit showing grounds, make such order for substituted or other service, or for the substitution for service of notice by advertisement or otherwise, as may be just.
>
> (5) Service out of the province of a summons may be allowed by a judge in any case in which service out of the province may be allowed under the rules of the Supreme Court, upon application to the judge in accordance with the rules of practice and procedure of the Supreme Court.

The precise object of these amendments in unclear especially in view of the extremely flexible provisions of section 19(2), already referred to. In the Commission's opinion the proposed amendments do not deal with the point of concern. While the need for flexibility and economy in Small Claims Division procedure is recognized, it is the opinion of the Commission that the provisions of section 19(2) are capable of abuse. The Commission accordingly recommends that these provisions be reviewed.

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73. An Act to *Amend the Small Claims Act*, Bill 75, 1971, s. 2.

## PART THREE COLLECTION AGENTS

Collection Agents Act, 1967

(a) *Coverage and general scheme*

81. The scheme of this Act turns upon the requirement, in section 3, that "collection agents" and "collectors" must be licensed. No person may carry on business as a collection agent or act as a collector[74] without a licence.

82. The licensing requirement serves a two-fold purpose. First, it provides a basis for regulating and supervising the relationship between the licence holder and those for whom he acts. Second, it is the foundation for administrative scrutiny by the Inspector of Collection Agents of the relationship between licence holder and debtor - in other words, of the collections practices of the former.

83. The relationship between the licensed collection agent and the person for whom he acts is regulated in two ways. First, section 5(1)(b) requires a copy of every form of agreement between the agent and those for whom he acts to be filed. These forms of agreement must include details of the fees to be charged. Copies of any changes in the agreement must also be filed, and the Inspector is empowered to object to such changes.[75] Second, section 17(1)(b) imposes an obligation upon the collection agent to maintain a trust account into which money received on behalf of a client must be deposited, and section 17(2) lays down rules for the operation of this account. In addition, section 21 establishes rules governing payment over to the client of money collected on his behalf. These "trust" rules are reinforced, first, by a requirement of an annual auditor's report,[76] and an annual report by the agent on its affairs, both of which must be forwarded to the Inspector; and second, by the requirement that every licence application must be accompanied by a bond under the *Security Bonding Act*.[77] The licence expires on December 31st each year.[78]

84. Administrative scrutiny over the relationship between collector and debtor, which provides the second justification for the licensing requirement, is exercised in a number of ways. First, all forms and letters to be used in collecting debts must be filed with the Inspector.[79] Second, the Inspector may object to the use of any form or letter.[80] The grounds upon which objection may be taken are not specified, except that section 22(g) prohibits the "use,

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74. Section 3(1)-(3).

75. Section 7.

76. Section 19.

77. Section 20.

78. *Collection Agents Act*, 1967, section 6.

79. Section 5(1)(C).

80. Section 7.

without lawful authority, [of] any summons, notice, or demand or other document, expressed in language of the general style or purport of any form used in any Court in the Province, or printed or written or in the general appearance or format of any such form". By section 22(e) and (f) a collection agent is prohibited from using a form or letter if it has not been filed with the Inspector or he has taken an objection to it under section 7; and by section 26(b) non-compliance with any provision of the Act is made a summary conviction offence. Third, the Inspector is given the power by section 8(2) to refuse a licence if in his opinion the applicant is not "a suitable person to be licensed", while under section 9(1), he may cancel or suspend a licence for any violation of the Act, or if in his opinion the licensee is unfit to be licensed.

85. It is against the background of these two purposes that the scope of the definition of "collection agent" and the exemptions from the operation of the Act must be assessed.

86. A collection agent is defined in section 2 of the Act to mean a person, other than a collector, who in consideration of a commission or other remuneration,

(a) carries on the business of collecting debts for others;

(b) offers or undertakes to collect debts for others;

(c) solicits accounts for collection;

(d) receives money periodically from debtors for distribution to their creditors;

and includes a person who takes an assignment of a debt or debts due at the date of the assignment from a specified debtor or debtors.

A "collector" is defined as "a person who is not a collection agent but who is employed by a collection agent either generally or in a particular case to do anything referred to in the definition of "collection agent"." The most important feature of this definition is that it applies only to "third party" collectors. It totally excludes the case of the person who, directly or indirectly, collects his own debts.

87. The exemptions are set out in section 4:

This Act does not apply to

(a) barristers or solicitors in the regular practice of their professions;

(b) persons acting as officers of or under the process or authority of any Court;

(c) trust companies registered under the *Trust Companies Act*, and trustees acting under the terms of any will, marriage settlement, or deed of trust;

(d) chartered banks;

(e) insurance agents licensed under the *Insurance Act*, in respect of the collection of insurance premiums;

(f) real-estate agents licensed under the *Real Estate Act* and their employees, in respect of collections incidental to their business as real-estate agents within the meaning of that Act;

(g) persons appointed by, or under the provisions of any Act, in respect of the collection of debts in the due performance of their duties;

(h) a person employed to collect debts for one other person only who carries on business in the Province, in respect of the collection of debts due to that person arising out of the business so carried on by him;

(i) Sheriffs and other officers appointed under the *Sheriffs Act*;

(j) credit unions incorporated under the *Credit Unions Act, 1961*, in respect of services provided by the credit union to its members that are approved by the Inspector.

(b) *Licensing in the interests of the creditor*

88. Viewed against the background of the "trust fund" purpose of the licensing requirement, both the definition of collection agent and the exemptions from the operation of the Act make sense.

(i) *The exemptions*

89. With the possible exception of the exemption for "a person employed to collect debts for one other person only who carries on business in the Province, in respect of the collection of debts due to that person" arising out of the business so carried on by him[81] all the exempted categories concern persons who in one form or another are subject to obligations in the nature of trust obligations in respect of money received by them on behalf of clients.

90. In the single case mentioned, the collector would be either an agent, in which case he would be under fiduciary obligations to his principal, or an employee, in which case he would be subject to the supervision and control of his employer. In either case, the imposition of a statutory trust requirement for the protection of the principal or employer, as the case may be, would be unnecessary.

(ii) *The definition*

91. The principal question here is as to the adequacy of coverage of the existing definition.

(1) *Debt consolidation*

92. Debt consolidation is a technique for dealing with the over-committed debtor with a multiplicity of creditors. The consolidator provides a loan to the debtor to enable him to repay his creditors, thus leaving the consolidator as a single creditor. There is a sense in which the maker of consolidation loans performs a function analogous to that of a collection agent, on behalf of the original creditors, and prior to the 1967 revision the legislation specifically included "the ... consolidating of debtors' accounts" within the definition of "business of a collection agent".[82] The latest revision omits any reference to debt consolidation, however, and consolidators need not be provincially

81. Section 4(h).

82. *Collection Agents' Licensing Act*, R.S.B.C. 1960, c. 62, s. 2. The reference to pooling and consolidation was first added to the legislation in 1956: S.B.C. 1956, c. 26, s. 2.

licensed, though most companies offering consolidation loans must be licensed under the *Federal Small Loans Act*.[83]

93. In the Commission's view, it is more realistic to treat debt consolidation as eliminating the need for recourse to conventional collections devices on behalf of the original creditors. If any collections activity is involved, it is that of the lender, who would either be collecting his own debt, or using the services of a licensed collector. While many questions might perhaps be raised, and indeed have been raised, about debt consolidation (notably with respect to the costs of borrowing) these questions seem more appropriately dealt with elsewhere than in collection agents legislation.[84] Accordingly, the Commission does not recommend that debt consolidators be once again included within the scope of this legislation. Certainly, there is no "trust fund" justification for including them.

(2) *Debt pooling*

94. Debt consolidation must be distinguished from debt pooling, which is a device whereby some intermediary arranges, on behalf of a debtor with numerous creditors, that they will accept payment from the intermediary rather than the debtor. The debtor pays a single sum to the pooler, who then distributes it among the creditors. The debtor under a pool has only one payment to make, instead of many; the creditors, by agreeing to the arrangement, lessen the possibility of bad debts; and the pooler receives a commission for his services. The debt pooler performs a function barely distinguishable from that of a collection agent, and it is not surprising therefore to find that paragraph (d) of the definition covers this case. Generally speaking, the debt pooler charges the debtor a registration fee for his services, and, in addition, charges the creditors a commission for acting as intermediary.

95. The attention of the Commission has been drawn to two problems in relation to debt pooling. The first problem arises from the fact that in some cases the pooler does not obtain the agreement of all a person's creditors to the pooling arrangement. The debtor may be quite unaware of the fact that some of his creditors are not being paid, receiving a rude awakening with service of a writ, or the appearance of the bailiff. The second problem that has caused the Commission some concern is the size of charges made by the poolers for administering the pool.

96. Neither problem is directly touched by the provisions of the *Collection Agents Act*. While all agreements made between pooler and debtor, on the one hand, and pooler and creditors, on the other, are, by virtue of section 5(1)(b), required to be filed with the Inspector, there is no machinery under the Act that enables the Inspector to ensure that, in respect of any particular pooling agreement, all the creditors are parties to the arrangement. Further, while the same provision requires disclosure in the agreements of "particulars of the fees proposed to be charged", the Inspector has no statutory authority to review any proposed fees with a view to their reasonableness. The Inspector has, on occasion, been able to secure a revision of fees considered excessive, but that has been the result of exercising his persuasive, not his legal powers.

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83. R.S.C. 1952, c. 251, as amended by S.C. 1956,

84. Cf. e.g., *Consumer Protection Act*, S.B.C. 1967, c. 14.

97. Both problems, in the Commission's view, need attention. In view of the provisions of Part X of the *Bankruptcy Act,*[85] some consideration has been given to the possibility of prohibiting private pooling arrangements. Part X of the *Bankruptcy Act* offers, in essence a government supervised pooling scheme. An over-committed debtor can apply to a clerk of the appropriate court to have his outstanding indebtedness consolidated and paid off in an orderly fashion over a three-year period, or longer in certain cases. The debtor is required to make application to the clerk before disclosing all his indebtedness and also all sources of income including bills of his spouse. The various creditors are then advised the debtor has made an application, and, in due course, if it is a proper case, the clerk is empowered to issue a consolidation order, which has all the force and effect of a judgment and imposes upon the debtor an obligation to pay a specified sum into court each month. Every three months the clerk makes a distribution to the main creditors. The only cost to the debtor is a $10 fee payable at the time of application. The chief advantages from the point of view of the over committed debtor are that, from the date of the consolidation order, interest on all his debts runs at 5% rather than at the considerably higher rates charged for borrowing, and, in addition, the creditors are precluded from taking any garnishee or other execution proceedings for so long as the debtor continues to pay into court the amount fixed by the clerk.

98. The Commission has a number of reservations, however, as to the effectiveness of Part X arrangements as they now exist. First, Part X has only been in force in British Columbia since June, 1970. The scheme is not well-known (only about 50 orders have been made in the first nine months of operation in Vancouver), and there is some doubt whether existing administrative facilities could cope adequately with any significant increase in the volume of application. In any event, it is yet too early to assess the effectiveness of the scheme. Second, it only applies to a restricted range of debts, both as to type and amount, and third, the creditor with security is free despite the issuance of a consolidation order, to rely on his security. Finally, as a general matter, the entire operation of Part X is under reconsideration as the result of the recently published *Report of the Study*[86] Committee on Bankruptcy and Insolvency Legislation.

99. The Commission has therefore concluded that it would be unwise to attempt to rely upon Part X of the *Bankruptcy Act* as a ground for prohibiting, and as a complete substitute for, private pooling arrangements. Nevertheless, it is the opinion of the Commission that legislation should be enacted to control pools.

100. A number of jurisdictions in the United States have statutes which afford useful precedents that might be followed in this Province, and extracts

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85. R.S.C. 1952, c. 14. Part X was added by S.C. 1966, c. 32, s. 22. It was proclaimed in force in British Columbia on June 1, 1970: Can. Gaz. Part I, June 13, 1970, p. 1350.

86. Report of the Study Committee on Bankruptcy and Insolvency Legislation, Department of Corporate and Consumer Affairs, Government of Canada, paras. 3.1.01-3.1.42.

from the legislation of Ohio,[87] Oregon[88] and Washington[89] are included in Appendix "C" to this Report. It will be noticed that those statutes share a number of common features. First, each requires that the contract between the debtor and the pooler should be in writing,[90] and should contain certain specified information. This includes[91] a complete list of the debts to be pooled, and the names of the creditors, details of the number and amount of the payments to be made by the debtor, (which in the case of Washington and Oregon are required to be reasonably within the ability of the debtor to pay) and the charges made by the pooler. Second, the legislation places an upper limit upon the total charges that may be made by the pooler for his services,[92] and also controls the size of any registration fee charged.[93] Third, in the case of the Ohio and Oregon legislation, provision is made for controlling the rate at which the pooler may take his charges over the duration of the pool. In Oregon, he may not do so "at a faster rate than the rate of distribution to any unsecured creditor", [94] while in Ohio "Fees shall be amortized over the length of the contract and no more than the monthly amortized amount may be applied to charges while the contract is in full force and effect."[95] Finally, while the Ohio and Oregon legislation only provide expressly for criminal penalties for non-compliance, the Washington statute declares that:[96]

> If a licensee contracts for, receives or makes any charge in excess of the maximums permitted by this act, except as the result of an accidental, and bona fide error, the licensee's contract with the debtor shall be void and the licensee shall return to the debtor the amount of all payments received from the debtor or on his behalf and not distributed to creditors.

101. In the opinion of the Commission, the adoption of comparable provisions in British Columbia is desirable. The Commission accordingly recommends the enactment of legislation

*(a) requiring all debt pooling agreements to be in writing, and to contain full details of*

*(i) the debts subject to the agreement;*

*(ii) the number and amount of the payments to be made by the debtor;*

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87. Ohio Revised Code, 1969 Supp. S 12.

88. Oregon Rev. Stat. S 697.610-992.

89. Rev. Code Wash. Ann. S 18.28.

90. Ohio, S 69-1212; Oregon, S697-743; Washington, S 18.28.100.

91. Ohio, S 69-1212; Oregon, S697-743; Washington, 18.28.100.

92. Ohio, S 69-1212; Oregon, S 697-740; Washington, S 18.28.080.

93. *Ibid.*

94. Oregon, S 697-740.

95. Ohio, S 69-1212.

96. Washington, S 18.28.090.

*(iii) the charges to be made by the pooler;*

*(b) imposing a maximum limit upon any registration fee charged by the pooler, and upon the total fee chargeable for his services;*

*(c) prescribing the rate at which the pooler may deduct his fees or charges from the payments made by the debtor;*

*(d) declaring void any contract providing for charges exceeding those permitted by the legislation, and providing for a return to the debtor of any money paid by him, and not distributed to creditors.*

102. *Debt Counselling* - The problem of ensuring adequate advice and counselling to over-committed debtors is a matter that lies beyond the scope of this Report. Nevertheless, in the process of preparing this Report the Commission has been impressed with the number of situations in which financial difficulty might have been avoided with suitable disinterested advice. The Commission has made no detailed study of how debt counselling facilities might be organized, and mentions the matter here merely as one which, in its opinion, deserves further study and consideration.

(3) *Credit card companies*

103. The notion that credit card companies might be included within the definition of collection agent is derived from a somewhat unusual provision of the Saskatchewan *Collection Agents Act.*[97] Section 2(b)(vi) of that Act brings within the definition of collection agent a person who for a fee or other consideration or hope or promise thereof, enters into an arrangement under the terms of which he agrees or undertakes to pay to a vendor any amount in respect of goods or services sold or supplied by the vendor to a person other than the collection agent.

104. This clause describes the standard operations[98] of a conventional credit card company, which pays a vendor of goods purchased under the card a cash sum (less a commission) and then bills the card-holder[99] for the face value of the purchase. Whether, in law, the credit card company is to be regarded as collecting its own debt, or that of the vendor, depends upon the precise nature of the legal relationships established between the three parties to the arrangement. Unfortunately, this is far from clear.[100] Certainly, the card-holder receiving his bills from the card issuer, not the merchant, could be forgiven for treating the former as his creditor, and it is at least arguable that as a matter of law, the credit card company is collecting its own debts; or perhaps acting as paying agent for the debtor.

105. The relationship between the card issuer and the merchant nevertheless resembles, at least superficially, that between collection agent and creditor. There is, however, the important practical difference that the collection agent

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97. S.S. 1968, c. 11.

98. It also describes the operations of sales finance companies engaged in the provision of vendors Credit. It appears, however, that the Act has not been administered so as to apply to such companies.

99. For a description of one such scheme, *see* Paton, *The Chargex Credit Card Plan: A Comment on Law and Policy*, in NEILSON (ed), Consumer And The Law in Canada 138-164 (1970).

100. *Ibid.*

ordinarily pays the creditor only upon successful collection of a delinquent account, whereas a credit card company ordinarily pays a vendor before any question of delinquency by the debtor arises. The essential condition for the imposition of a licensing trust fund requirement - namely, the holding of money belonging to another - does not normally exist therefore in the case of a credit card company. Consequently, the necessity to impose a trust for the protection of the vendor would rarely exist.

106. In any event, it is the Commission's view that it would be improper to attempt, through the *Collection Agents Act*, to deal with the wide variety of difficult problems arising in connection with the use of credit cards. In general, the Commission thinks that statutes should, so far as possible, deal with related topics, and it does not regard the points of resemblance between collection agents and credit card companies as being sufficiently close to justify their being disposed of in a single statute. Moreover, to deal with credit card companies in this way would be, at best, a piecemeal approach to the problem, which the Commission regards as inadequate and improper.[101] In any event, various aspects of the law affecting the use of credit cards will be considered in other parts of the Commission's programme.

107. Accordingly, the Commission does not favour the adoption of a provision comparable to section 2(b) (vi) of the Saskatchewan legislation.

(4) *Assignees*

108. The definition of "collection agent" in the present legislation includes "a person who takes an assignment of a debt or debts due at the date of the assignment from a specified debtor or debtors". This clause is broad enough to include a person who takes a single assignment, but does not otherwise take assignments of debts for collection. Though doubtless the Inspector does not require the occasional assignee to be licensed, the Commission considers that the definition ought to be amended to make it clear that only those who are in the business of taking assignments for collection should be licensed.

109. The Commission accordingly recommends that:

*only persons in the business of taking assignments should be subject to the licensing requirements of the Act.*

(c) *Licensing in the Interests of Debtors*

110. The second purpose of the licensing requirement is to establish a basis for continuous administrative scrutiny of the activities of licensed agents by the Inspector, with a view to controlling relations between collector and debtor.

111. The Act specifically authorizes the Inspector to regulate the content of

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101. The experience with section 2(b) (vi) of the *Saskatchewan Act* lends some support to this decision. That provision has never been applied, it seems, to any of the well-known "national" credit card organizations, but only to one particular company. Moreover, Saskatchewan Regulation 110/1969, exempts "a merchant who, as incidental to his principal business, enters into an arrangement with other merchants under the terms of which he agrees or undertakes to pay to such merchants any amount in respect of goods or services sold or supplied by such merchants to persons to whom he has issued credit cards". This was apparently intended to deal specifically with the case of a large retail department store which made an arrangement of the kind described with smaller stores in a shopping centre operated by it.

*written communications* with the debtor. Thus, it is an offence to use a collection letter or form that has not been filed with the Inspector.[102] The Inspector may object to any form or letter proposed to be used by the agency, and it is an offence to use a form or letter to which objection has been taken.[103] In addition, the Act specifically prohibits the use of communications resembling legal process.[104]

112. There are at least two cases, not covered by the present legislation, in which administrative supervision of written communications, based on a licensing requirement, seems inappropriate.

(i) *Collection systems*

113. The first case to which the existing legislation does not apply, but to which in the Commission's view it ought to be extended, is that of the seller of collection systems. Many persons, especially professionals such as doctors and dentists, do not have the time or the inclination to engage in separate collections efforts with individual debtors. At the same time, they probably do not have a sufficient volume of collections, at least on a routine basis, to warrant using the services of an independent collection agency, except as a last resort in particularly difficult cases.

114. To meet the needs of creditors of this kind, a number of organizations actually or ostensibly skilled in collections techniques, prepare and offer for sale collections systems made up of a series of collection letters. These are purchased by the creditor who uses them in effect as his own collection system. Neither the seller of the system nor the creditor is a collection agent within the meaning of the Act, and both are, therefore, outside the scope of the provisions.

115. In the Commission's view the producers and sellers of such systems should be subject to the same controls as apply to collection agents themselves. In the *Ontario Act* this is done by including in the definition of a collection agency, "any person who sells or offers to sell forms or letters represented to be a collection system or scheme".[105]

116. The Commission accordingly recommends:

*that the definition of "collection agent" be amended so as to include those who sell or offer to sell forms or letters represented to be a collection system or scheme.*

(ii) *"House Agents"*

117. Second, is the case of the so-called "house agent":

> These house agencies are actually the creditor himself (and so exempt from the law) but take the name of a fictitious collection agency (and so intimidate the debtor). Their common method of operation is to send out legal-like letters

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102. Sections 22(e) and 26(b).

103. Sections 22(f) and 26(b). For examples of letters objected to by the Inspector, *see* paragraph 68.

104. Section 22(g).

105. Section 1(a).

> on the letterhead of a false-front collection agency threatening to sue, to garnish wages, and to ruin a debtor's credit rating. This device is used principally by book and magazine publishers and distributors ... The letters usually presuppose a favourable judicial finding in a way that a licensed collection agency would not be allowed to do and make threats on the basis of the presupposition.[106]

Though the Commission has not encountered any evidence suggesting that this sort of activity is widespread in British Columbia, it is nevertheless thought that the potential abuse is sufficiently serious to warrant attention.

118. The legislation of three provinces contains provisions attempting to deal with the false-front collection agency - Saskatchewan, Manitoba and Ontario. The *Saskatchewan Act* defines a "collection agent" to include a person who "collects debts owed to him under a name which differs from that under which he is the creditor".[107] These front agencies are required to be licensed,[108] though they are exempt from the bonding requirements of the Act.[109] Manitoba adopts a similar definition of "collection agent".

119. The *Ontario Act*,[110] which is set out in Appendix "B", achieves the same result by different means. Section 5 of the Act provides that "no creditor shall deal with his debtor for payment of the debt except under the name in which the debt is lawfully owing or through a registered collection agency". This, of course, does not prohibit the front agency. It merely requires that such an agency be registered.

120. To the extent that these provisions provide a basis for at least some control over the activities of front agents, they do represent an advance on the situation in British Columbia. In the Commission's opinion, a provision should be added to the British Columbia legislation, based upon section 5 of the *Ontario Act*. The Commission accordingly recommends the adoption of a provision along the following lines:

*No creditor shall deal with his debtor for payment of the debt except under the name in which the debt is lawfully owing, or through a licensed collection agent or a person exempted under section 4.*

121. Enactment of such a provision would necessitate a consequential amendment to section 4(h) of the British Columbia legislation, which exempts "a person employed to collect debts for one other person only who carries on business in the Province, in respect of the collection of debts due to that person "arising out of the business so carried on by him . Unless modified, this would operate to exempt the "house agent", whether operating under a fictitious name or not. The exemption should be reworded to make it clear that it applies only to the case of the corporate collection department, collecting in the name of the corporation. This can best be accomplished by amending section 4(h) to exempt "persons employed to collect debts for one

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106. Mcguigan, Cases and Materials on Creditors' Rights 15 (2 ed. 1967).

107. *Saskatchewan Collection Agents Act*, S.S. 1968, c. 11, s. 2(b) (iv).

108. Section 4.

109. Sections 21(1) and 22(2).

110. S.O. 1968-69, c. 11.

other person only who carried on business in the Province, in respect of debts due to that person arising out of the business so carried on by him, if a relationship of employment exists, and all collection activities are carried on in the name of the employer".[111]

122. Even if this proposal is accepted, however, it may be objected that the effect of the amendment is to lend legitimacy to what is, in substance, a deceptive trade practice. More specifically, the objection is that the purpose of a front agency is to create a misleading appearance of third party intervention between creditor and debtor in order to obtain whatever benefits might flow from such intervention.

123. The Commission considers this to be a forceful objection. One way of meeting it might be to attempt a definition of what is, in effect, a range of prohibited relationships between creditors and collection agents, perhaps along lines similar to those used to define "insider" in the *Companies and Securities Acts*.[112] The Commission considered this approach, but rejected it as unworkable on the ground that the arrangements that might be resorted to in order to establish a relationship between creditor and collector are so diverse as to elude definition, and any such formula could easily be evaded. The Commission does think, however, that the problem could be dealt with through a redefinition of the scope of the Inspector's licensing power, and the Commission's proposals in this regard are set out in paragraph 129 of this Report.

(d) *The Administrative System*

124. The administrative system established under the *British Columbia Act* is relatively simple. By section 8(1) the Inspector is authorized to "make such inquiries and require such information as he deems desirable" before issuing a licence, and if it appears to him that the applicant "is not a suitable person to be licensed", he "shall refuse to issue the licence".[113] Similarly, he may cancel or suspend an existing licence if the licensee has made an untrue statement in his application, or violates any provision of the Act, "or for any reason is, in the opinion of the Inspector, licence"[114] unfit to hold the licence. In the latter case, the Inspector must hold a hearing if the licensee so requests,[115] though there is no comparable requirement in the case of applications for the issuance of a licence. The Act says relatively little about the procedure to be followed[116] at the hearing. In either event, an appeal may be taken from any decision of the Inspector to a Judge of the County Court, by way of a trial *de novo*.[117]

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111. Cf. California Business and Professions Code, article 6854(D).

112. *Companies Act*, R.S.B.C. 1960, c. 67, s. 107; *Securities Act*, S.B.C. 1967, c. 45, s. 106.

113. Section 8(2).

114. Section 9(1).

115. *Ibid.*

116. Cf. however, section 9(2). Compare sections 8-18 of the *Ontario Act*. *And see* below, paras. 132-140.

117. Section 11.

(i) *The scope of the licensing power*

125. In view of the drastic effect which the refusal, and especially the suspension or cancellation of a licence may have upon a person's ability to earn his livelihood in the occupation of his choice, the Commission thinks it is proper to consider the scope of the licensing power vested in the Inspector.

126. The Royal Commission of Inquiry into Civil Rights in Ontario (the McRuer Commission) took the position in its First Report[118] that:

> It is essential for the guidance of licensing agencies that the government policy be reflected in the legislative definition of the standards required to enable a person to obtain and retain a licence. While in most areas a rigid and exhaustive code cannot be laid down for the administration of the licensing policy and it is necessary to leave to the licensing tribunal the power to exercise a well-informed discretion, the scope of the policy should be made clear in the defined standards.

The Commission is completely in accord with this view. In the Commission's opinion, the use of words and phrases such as "unfit" and "not suitable" in connection with the licensing power confers too broad a discretion upon the Inspector, and does not meet the minimum requirements indicated by the McRuer Commission. This Commission has accordingly considered whether it is possible to formulate more precise standards to govern the exercise of the licensing power, and has concluded that this is possible.

127. In the Working Paper upon which this Report is based, the Commission suggested that the provisions of the *Ontario Act* defining the scope of the licensing power in that province, offered a suitable model for adoption in British Columbia. On further consideration, however, the Commission has come to the conclusion that the approach taken in section 78 of the Manitoba *Consumer Protection Act*[119] is preferable. Subsection (1) of that section provides that:

> The director may refuse to grant a licence as a vendor, direct seller, or collection agent
>
> (a) to any person who has been convicted of any offence against the Criminal Code (Canada) or against this Act, or of any other offence committed in Canada, that, in the opinion of the director, involves a dishonest act or intent on the part of the offender; or
>
> (b) to any undischarged bankrupt; or
>
> (c) to any person who, within the last preceding ten years, has been a bankrupt or has been a director of a corporation that became bankrupt while he was a director, unless, in each case, the creditors in the bankruptcy have been paid in full; or
>
> (d) to any person whose licence under this Act, or whose registration under *The Real Estate Brokers Act* or *The Mortgage Brokers Act*, has been cancelled or is, at the time of application, under suspension; or
>
> (e) to any corporation, one of the directors or managers of which could be refused a licence under clause (a), (b), (c) or (d).

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118. Report No. 1, Volume 3, page 1100 (1968).

119. R.S.M. 1970, c. C 200.

128. The Commission recommends:

(a) *that the* Collection Agents Act *be amended to include a provision comparable to section 78(1) of the Manitoba* Consumer Protection Act*;*

(b) *that the existing provision in the* Collection Agents Act *authorizing the suspension or cancellation of a licence where the applicant has made an untrue statement in his application, should be extended to cover original applications .*

129. In paragraph 120 of this Report, it was recommended that the law should, as in Ontario, prevent creditors from dealing with debtors for payment except under the name in which the debt is lawfully owing or through a licensed collection agent or person exempted under section 4. This would require the front agency, which is simply the creditor in disguise, to be licensed. The Commission's view, however, is that this does not go far enough, and that such agencies should not be permitted to obtain a licence. It is the Commission's opinion that this can best be accomplished by authorizing the Inspector to refuse a licence to any person who, in his opinion, proposes to carry on business in a form that is likely to convey a misleading appearance that debts are being collected on behalf of others. The creditor will thus have the following options: (a) to collect in his own name (whether through a "collection department" or otherwise); (b) to collect through an exempted person such as a solicitor; (c) to collect through an independent licensed agency. The suggested provision is broad enough to empower the Inspector to refuse a licence not only to the "house agent" but also to an ostensibly independent agency established specifically for the purpose of collecting the debts of a single creditor exclusively.

130. The Commission accordingly recommends

*that the* Collection Agents Act *be amended so as to empower the Inspector to refuse a licence to any person where, in his opinion, that person proposes to carry on business in a form that is likely to convey a misleading appearance that debts are being collected on behalf of others.*

131. An allied problem is the collection agency carrying on business under a name or style conveying a misleading appearance as to the nature of the business carried on. It has been brought to the Commission's attention that there are a number of agencies carrying on business under names which might create the impression that together with their collection activities, they are also engaged in credit reporting, whether or not this is the fact. In its Working Paper, the Commission recommended that this ought to be prohibited. On further consideration, however, the Commission has come to the conclusion that this proposal would be disruptive and difficult to implement effectively and, especially in the light of the recommendation in paragraph 71(ii) of this Report as to objectionable forms and letters, the Commission has decided to make no recommendation on this point.

(ii) *Administrative procedure*

132. The Commission has studies of the entire field of administrative law and procedure in progress, and does not wish at this point to anticipate the detailed conclusions of those studies. Nevertheless, there are aspects of the licensing procedure under the *Collection Agents Act* as to which some elaboration is, in the opinion of the Commission, desirable.

133. First, sections 8(1) and 9(1) seem deficient as descriptions of the procedure to be followed by the Inspector in deciding whether to issue, suspend or cancel a licence. The former provision merely authorizes the Inspector to "make such inquiries and require such information as he deems desirable" before issuing a licence, while the latter permits the Inspector "after due investigation and hearing, if a hearing is requested by the licensee" to suspend or cancel an existing licence. Both provisions are subject to the right, given by section 11, to appeal by way of a trial *de novo* to a Judge of the County Court against any decision of the Inspector.

134. It is the view of the Commission, that the Act should expressly require that where the Inspector rejects an application for a licence under section 8(1), the applicant should be given written notice of the rejection, and of the reasons therefor, and that he should also be informed of his rights under section 11.

135. The Commission accordingly recommends:

(i) *that where an application for a licence is rejected, the applicant should be notified in writing of the rejection, and of the reasons therefor;*

(ii) *that the notice referred to in clause (i) should advise the applicant of his rights of appeal against the rejection.*

136. The Commission also recommends that:

*Before suspending or cancelling a licence, the Inspector should be required to give the licensee written notice of the grounds for the proposed suspension or cancellation, and to advise him of his right to an opportunity to be heard on the proposed suspension or cancellation.*

137. Section 9, as presently drafted, appears to cast the Inspector in both an investigative and an adjudicative role. The question whether this combination is a desirable one is not considered in this Report, however, since it involves issues as to administrative procedure, that are the subject of separate study by the Commission in its Civil Rights Project, and which are much broader than the administration of the *Collection Agents Act* alone. It may be that this aspect of the Inspector's functions will require reconsideration in the light of the conclusions reached in that study.

138. Section 9 makes no reference to the right of the licensee to be represented by counsel at any hearings conducted by the Inspector. The Commission agrees with the view expressed by the Ontario Royal Commission of Inquiry into Civil Rights that "every person is entitled to expert assistance in the presentation of his case before a tribunal which is empowered to make decisions affecting his rights".[120] The status of the right to representation before "administrative" tribunals, in the absence of specific statutory authority, is in doubt.[121] To put the matter beyond doubt, the Commission recommends that:

*the right to legal counsel should be specifically provided for.*

139. While section 10(1) of the Act does require the Inspector to immediately

120. Report No. 1, Vol. 1, p. 215 (1968).

121. *See R. v. Pantalets*, [1943] 1 DLR 569. Cf. [1965] Can. Tax J. 343.

notify a person whose licence has been suspended or cancelled, it does not expressly require that that person be furnished with a written statement of the grounds for the decision. In view of the fact that section 11(1) provides for an appeal against that decision, it seems especially important that the licensee be provided with a statement of the reasons for cancellation or suspension.

140. The Commission accordingly recommends that:

Section 10(1) be amended

*(a) to provide that where a licence is suspended or cancelled, the licensee be provided with a written statement of the reasons for the suspension or cancellation; and*

*(b) to provide that the notice advise the licensee of his rights of appeal against the suspension or cancellation.*

## PART FOUR BAILIFFS

141. A bailiff is defined in section 2 of the *Collection Agents Act, 1967* as "a person who for remuneration, acts or assists any person to act or holds himself out as being available to act for or on behalf of any other person in the repossession or seizure of chattels or in any eviction". Section 3(4) of the Act provides that "no person shall act or hold himself out as a bailiff unless he is the holder of a valid and subsisting licence as a collection agent ..." The effect of this provision is that every bailiff must be licensed and bonded. It also means that every collection agent may perform the functions of a bailiff, and vice versa.

142. In so far as the performance of normal bailiff functions is concerned, it seems that the common law rules governing trespass and assault are generally adequate to deal with most of the excesses likely to occur.[122] There are, in addition, the provisions of the *Replevin Act*.[123] In so far as the possibility exists that the conduct of bailiffs in performing these functions amounts to harassment within the meaning of the proposed provision on harassment, they will, of course, be subject to that provision.

143. Nevertheless, there are potential abuses in connection with repossessions and evictions which would not be covered by the Commission's proposals on harassment. Subsections (h), (i) and (j) of section 100 of the Manitoba *Consumer Protection Act*, for example, cover a number of cases that would be outside the scope of those proposals. Those subsections provide that:

> No person, whether on his own behalf or on behalf of another, directly, or through others, shall ...
>
> (h) except with the leave of the court, remove any goods claimed under seizure or distress in the absence of the debtor, his spouse, his agent or an adult resident in the debtor's home; or
>
> (i) seize or levy distress against any goods other than those specifically charged or mortgaged, or to which lawful claim may be made under any statute or judgment; or
>
> (j) make a telephone or personal call or attempt to make a telephone or personal call to or on a debtor to demand payment, or negotiate for payment, or seize or levy distress against goods
>
> (i) on a Sunday, or
>
> (ii) on a holiday, or
>
> (iii) on any other day except between the hours of seven o'clock in the morning and nine o'clock in the evening.

144. It will be seen that these provisions apply to all persons, and if adopted in British Columbia, would cover repossessions by both licensed bailiffs and others. They do not seem to the Commission to impose any unreasonable

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122. *See*, for example, *Fraser* v. *Wilson*, (1969) 6 DLR (3d) 531 (Man. Q.B.).

123. R.S.B.C. 1960, c. 339.

restraints upon persons effecting repossessions, and the Commission accordingly recommends:

*that provisions comparable to section 100 (h), (i) and (j) of the Manitoba Consumer protection Act be adopted in British Columbia.*

145. In its Working Paper, the Commission drew attention to the provisions of section 10a(l) of the Ontario *Bailiffs Act*, 1960-61[124] which provides that "no person shall engage in business as a bailiff while an employee of or engaging in the business of a collection agency". The Commission solicited opinion as to the desirability of a comparable provision in British Columbia. The preponderant view was that such a separation of functions should not be required by law, principally on the ground that it would be unworkable in the smaller rural communities of the Province. The Commission has been persuaded of the validity of this view, and accordingly does not make any recommendations on this point.

124. S.O. 1960-61, c. 5, as amended by S.O. 1964, c. 5, s. 4.

## PART FIVE SUMMARY OF RECOMMENDATIONS

The recommendations of the Commission are set out below, together with a reference to the place in the Report where each may be found.

A. *Debt Collection Generally*

1. Legislation should be enacted making it an offence to harass an alleged debtor or any member of his family or household with demands for payment which are likely to cause distress or humiliation. The legislation should make it clear that harassment may take place by reason of the frequency of demands for payment, or by the manner or circumstances in which they are made, or by accompanying threats or publicity.(para. 46)

2. The general offence of harassment should be reinforced by the following specific provisions:

   (a) A prohibition upon communication with an employer of an alleged debtor without the debtor's consent, except for the purpose of verifying the employment. (para. 55)

   (b) A prohibition upon communications made for the purpose of obtaining payment of a debt, to any other person not having a legitimate interest in receiving the information, unless the alleged debtor consents. (para. 58)

3. Neither the general nor the specific prohibition should apply in respect of any reasonable steps taken to enforce any liability or obligation by legal process. (para. 60)

4. The following additional prohibitions should be enacted:

   (a) A prohibition upon the making of collect telephone calls or telegrams for the purposes of demanding payment. (para. 63)

   (b) A prohibition upon making telephone calls for purposes of obtaining payment of a debt on Sunday and holidays, and on weekdays except between the hours of 7:00 a.m. and 9:00 p.m. (para. 63)

   (c) A prohibition upon the use of simulated legal process. (para. 64)

   (d) A prohibition upon the use of forms or letters to which the Inspector of Collection Agents has made known his objection. (para. 71)

   (e) A prohibition upon persons seeking to collect debts making known any association with a credit reporting agency. (para. 71)

5. The Inspector of Collection Agents should be empowered to issue cease and desist orders to persons who use objectionable forms or letters. (para. 73)

6. A scale of maximum collection charges should be established. (para. 66)

7. Default judgment procedure in the Small Claims Division of the Provincial Court should be reviewed. (para. 79)

8. The provisions of the *Small Claims Act* concerning service of process should be reviewed. (para. 80)

B. *Collection Agents*

1. (a) All debt pooling agreements should be in writing, setting out full details of the debts to be pooled, the number and amount of payments to be made by the debtor and the charges to be made by the pooler.

   (b) A maximum limit should be imposed upon registration fees charged by debt poolers, and upon the total fee charged.

   (c) The rate at which the pooler may deduct his charges should be controlled.

   (d) Contracts providing for payment to the pooler of amounts exceeding those permitted by legislation should be declared void, and provision made for return to the debtor of any sums paid by him and not distributed to his creditors. (para. 101)

2. Only those persons in the business of taking assignments of debts for collection should be required to be licensed as collection agents.(para. 109)

3. The sellers of collection systems should be required to be licensed under the *Collection Agents Act.* (para. 116)

4. Creditors should be required to collect debts either under the name in which they extended credit, or through an independent licensed collection agency, or exempted person. (para. 120)

5. The grounds upon which a licence may be refused, cancelled or suspended should be specified in the Act. The Inspector's power should be limited to refusing a licence to, or cancel1ing or suspending the licence of any person who

   (a) has been convicted of any offence, whether under the Criminal Code or otherwise, that in the opinion of the Inspector involves a dishonest act or intent;

   (b) is an undischarged bankrupt;

   (c) has been bankrupt within the preceding ten years, or has been a director of a corporation that became bankrupt while he was a director, unless, in each case the creditors in the bankruptcy have been paid in full, and to

   (d) any person whose licence under the Act, or under the *Real Estate Act* or the *Mortgage Brokers Act* has been cancelled or is, at the time of application,

under suspension;

(e) has made an untrue statement in an application for a licence under the Act, and to

(f) any corporation, one of the directors or manager of which could be refused a licence on any of the preceding grounds;

(g) carries on or proposes to carry on business as a collection agent under a name or style suggesting that that person is also engaged in credit reporting, or (para. 128)

(h) proposes to carry on business in a form that, in the opinion of the Inspector, is likely to convey a misleading appearance that debts are being collected on behalf of others. (para. 130)

6. Any person whose application for a licence is rejected should be entitled to a written statement of the reasons for the rejection, and a statement of his right to appeal against it. (para. 135)

7. Where the Inspector proposes to suspend or cancel a licence, the licensee should be given written notice of the allegation giving rise to the proposed suspension or cancellation, and of his right to a full hearing on them. (para. 136)

8. Express provision should be made for the right of legal representation in hearings conducted by the Inspector. (para. 138)

9. Where a licence is cancelled or suspended, the licensee should be provided with a written statement of the reasons for the decision, and a statement of his right to appeal against it. (para. 140)

C. *Bailiffs*

1. Removal of goods claimed under seizure or distress in the absence of the debtor or his spouse, an agent or an adult resident in the debtor's home, should be prohibited except under court order.

2. Seizure of or distress against goods other than those specifically charged, or to which lawful claim may be made under any statute or judgment should be prohibited.

3. Seizure of or levying of distress against goods should be prohibited on Sundays and holidays, and on weekdays except between the hours of 7:00 a.m. and 9:00 p.m. (para. 144)

D. *General*

The recommendations in the Report should be implemented by way of amendment to the *Collection Agents Act*, which would be retitled the *Debt Collection Act*.

E. D. FULTON
Chairman

R. GOSSE
Commissioner

F. U. COLLIER
Commissioner

March 19, 1971