THE PROTECTION OF WAGES FROM GARNISHMENT IN ONTARIO

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In the postwar period, consumer credit in Canada has expanded at a phenomenal rate. From $1 billion in 1949, the amount outstanding has climbed to over $20 billion in 1975, and the per capita figures have gone from $77 in 1949 to $825 in 1975. Today the majority of Canadian families has used or is using consumer credit.[1]

The growth of consumer credit has without doubt contributed to Canada's economic development and rising living standards, but an unfortunate by-product has been the growing number of debtors unable to meet their repayment obligations. It is difficult to estimate the extent of this problem, largely because, as the Crowther Report noted, there is no uniform definition for a "bad" debt.[2] A bad debt may be a payment overdue for one month or it may result when legal action is taken. Thus, estimates of debtors in difficulty vary. Tremblay and Fortin, for instance, estimate the number of Quebec wage earners who may be in trouble at twenty per cent.[3] Many credit grantors, however, put their default rate at from two to three per cent. Perhaps the best perspective on the problem was provided by Lofquist: "As a percentage of the total borrowers [the debtors in trouble] may be a relatively small group, but in absolute terms they are many and increasing."[4]

When a debtor fails to meet a repayment schedule, his creditor usually resorts to self-help collection tactics, such as letters and telephone calls. Should these prove unproductive, a judgment may be sought, followed by the use of legal remedies to satisfy the judgment. These may include seizure of a debtor's goods, execution against lands or garnishment of wages or other assets. In practice, it appears that wage garnishment is the favoured collection tool; the other alternatives suffer from several drawbacks. Many small debtors do not own

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[1] CANADIAN CONSUMER FINANCE ASSOCIATION, CANADIAN CONSUMER CREDIT FACTBOOK 75 (1975).

[2] REPORT OF THE COMMITTEE ON CONSUMER CREDIT para. 3.6.11 (cmnd. 4596, 1971).

[3] M. TREMBLAY & G. FORTIN, LES COMPORTEMENTS ECONOMIQUES DE LA FAMILLE SALARIEE DU QUEBEC (1964).

[4] Lofquist, *Credit Counselling in Canada*, 77 CAN. BANKER 9, at 10 (July-Aug. 1970).

land, and if property is being purchased by way of mortgage, the mortgage holder has a prior claim. Seizure of personal goods may be severely restricted by a province's execution act.[5] Moreover, the debtor must actually own the goods seized. A debtor's major consumer durables such as his television set, furniture or motor car, may be under conditional sales agreements. As the holder of the installment contract usually retains title until the contract is fully paid off, such goods normally may not be seized by other creditors. The costs of seizure, storage, and an auction sale may make this remedy economically unproductive. Garnishment of other other assets, usually the small debtor's bank account, may also be unproductive. A creditor must provide the court with the particulars of the account for a garnishment to be issued, but even then, a hard pressed debtor seldom has much in his account.

The remedy of wage garnishment is ideally suited to the modern wage-based economy. A good deal of consumer credit is extended using future earnings as collateral; that is, credit is extended on the credit grantor's assessment that future earnings will allow the debtor to meet the repayment requirements.[6] Should the debtor not do so, then this "collateral" can be reached through garnishment proceedings. So, if the debtor is working, a wage garnishment will net the creditor at least a portion of his claim.

Because wage garnishment does diminish what is for most debtors the sole source of income, it poses a number of issues for extension of credit.[7] High consumer bankruptcy rates have been attributed to wage garnishment.[8] It has also been seen as the cause of debtor job loss because, rather than bear the administrative costs of making deductions, an employer may discharge his garnisheed employee.[9] In addition, garnishment has been seen as having a deleterious impact on a debtor's living standard. Mr. Justice Douglas of the United States Supreme Court claimed that "the percentage of wages garnished has been so high that a man and his family are often reduced to a starvation level."[10]

Because wages are, for many, the sole source of income, the protection of a portion of the pay packet from attachment is of some importance. Accordingly, exemption statutes have a long history in

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[5] *E.g.* The Execution Act, R.S.O. 1970, c. 152, s. 2 exempts clothing to the value of $1,000, household goods to a value of $2,000 and tools necessary to earn a living to a value of $2,000 from seizure.

[6] Caplovitz, in *Consumer Credit in the Affluent Society*, 33 LAW AND CONTEMP. PROBS. 641, at 643 (1968) noted, that "the new middle class is reasonably assured of job security and has a steady and even a rising income . . . . For the credit transaction to take place. . . the creditor must be assured that the debtor's income is secure. . . ."

[7] *See generally* D. CAPLOVITZ, CONSUMERS IN TROUBLE (1974).

[8] R. DOLPHIN, AN ANALYSIS OF ECONOMIC AND PERSONAL FACTORS LEADING TO CONSUMER BANKRUPTCY (1965).

[9] *Supra* note 7, at 237-43.

[10] W. DOUGLAS, POINTS OF REBELLION 48 (1970).

English law. The Statute of Westminster II, in creating the writ of *elegit*, exempted from seizure a debtor's oxen and domestic animals used in plowing.[11] Common law had exempted a debtor's wearing apparel actually in use and, often, goods in the personal possession of the debtor.[12] In 1845, exemption of personal goods, bedding and tools of the trade were formulated in statute.[13]

Similarly, statute law has tended to treat wages, unlike accumulated capital or property, as being worthy of protection in garnishment proceedings. A portion of wages are usually protected from seizure, so that the garnished debtor is able to purchase necessaries for himself and his dependants. Furthermore, wages may be made unreachable by proceedings such as pre-judgment garnishment or contractual clauses such as the wage assignment. This paper will deal with the protection of wages in Ontario. Some of the general problems in developing an equitable exemption policy will be discussed, as will current issues in Ontario wage protection policy. However, to begin, a brief look at the development of garnishment.

I. DEVELOPMENT OF GARNISHMENT

Garnishment is defined as a statutory proceeding whereby a person's property, money or credits under the control of or owing by a third party are attached by the court to satisfy a judgment debt;[14] it appears to have developed in the courts of equity in medieval England. The direct historical antecedent of modern garnishment was the remedy of foreign attachment. This custom permitted a creditor in an action against a "foreign" defendant — usually a non-resident merchant, in this context "foreign" meaning non-civic — to attach the property of the defendant in the hands of third persons. Apparently the custom was developed quite early in the medieval era, for Levy noted that "by the close of the 14th century, foreign attachment was already an ancient custom."[15]

Foreign attachment, at least ostensibly, was a device to compel the appearance in court of a debtor. In this respect it had some parallels to common law attachment. The latter was most commonly the attachment of the body of the defendant, which dissolved when the defendant appeared in court. However, there is some evidence that common law

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[11] R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE (1952).

[12] *See* Hardistey v. Barney, Comb. 356, 90 E.R. 525 (K.B. 1697).

[13] The Small Debts Act, 8 & 9 Vict., c. 127.

[14] BLACK'S LAW DICTIONARY 810 (4th ed. 1968).

[15] Levy, *Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in the Light of English Experience*, 5 CONN. L. REV. 399, at 405 (1973).

attachment was used to attach a defendant's chattels, the purpose being to pressure the defendant to appear in court.

Nevertheless, foreign attachment, at least as it existed under the courts of equity in London, did have features quite unlike those of a common law proceeding. Lord Mansfield claimed that the very essence of the custom was that the defendant did not have notice.[16] Foreign attachment could attach and appropriate debts due to the debtor, unlike common law remedies which reached only tangible property.[17] Finally, by seizing the debtor's property prior to judgment, the owner was deprived of control over it until the creditor's claim was satisfied. This is in contrast to common law writs of execution, such as *fieri-facias* and *elegit*, which allowed seizure of a debtor's goods and lands only after judgment; and, of course, neither common law writ could reach assets of the debtor held by third parties.

Though foreign attachment was well established in the Mayor's Court of London and other city courts in the fifteenth century, apparently the remedy did not extend to other jurisdictions. Cababe noted that, prior to 1854, this execution procedure was not generally available and quoted the Common Law Commissioners in their report of 1853:

> We are not aware of any process...by which this [recovery of judgment from parties indebted to the debtor] can be directly done, though the course under writs of execution at the suit of the Crown, and by way of foreign attachment in the Mayor's Court of London and some other cities...shows that such a remedy would be practicable and useful.[18]

The Common Law Commissioners, then, saw the need to construct a simplified means for creditors to reach debts owed to their debtors. The existing procedures, such as foreign attachment, were seen as in need of overhaul. The Commissioners' recommendation was realized in the Common Law Procedure Act of 1854,[19] a part of which introduced the modern garnishment procedure.

A section of this statute provided that a judge, on the *ex parte* application of a judgment creditor, could order that "all debts owing or accruing" to the judgment debtor from a third person be attached. The judgment debtor was able to dispute the attaching order, and this right of dispute was later given to the third party, the garnishee, by the Common Law Procedure Act of 1860.[20]

It should be noted that, unlike foreign attachment which was a pre-judgment remedy, the 1854 Act did not permit attachment until a creditor had obtained judgment from the court. Possibly the reason for this, as Levy notes, was the considerable criticism around the abuses of

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[16] C. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENT 4 (1891).
[17] *Supra* note 15, at 405.
[18] M. CABABE, ATTACHMENT OF DEBTS 2 (3d ed. 1900).
[19] 17 & 18 Vict., c. 125.
[20] 23 & 24 Vict., c. 126, ss. 28-30.

foreign attachment, particularly lack of notice.[21] However, Ontario procedure has not followed that of England, and up to November, 1977, pre-judgment garnishment was still available in the Small Claims Courts.[22]

In 1856, the Legislature of Upper Canada (later to become Ontario) passed the Common Law Procedure Act,[23] copying almost verbatim the English Common Law Procedure Act of 1854. By this Act, garnishment procedure was introduced in Ontario.[24] This statute contained several interesting points. First, the judgment creditor could apply *ex parte*, that is, without notice to the judgment debtor. Second, the required proof for the procedure need only be an affidavit from the judgment creditor or his solicitor that the judgment had not been satisfied and that a third party was obligated to the judgment debtor. Third, if the third party, the garnishee, appeared with regard to the order, the onus was on the garnishee to "show cause" why he should not pay the judgment creditor. In civil proceedings, the onus is usually on the plaintiff to prove any matter at issue by the balance of probabilities. Here is found a "reverse onus", the burden of proof being shifted to someone who, in fact, would not normally be involved in the original dispute.

During the same year of 1856, the County Courts Procedure Act[25] made this remedy available to creditors obtaining judgment through County Court. Garnishment procedure in the superior courts of Upper Canada and later Ontario has followed English practice in prohibiting garnishment until a plaintiff has obtained judgment. However, as noted above, the situation in the Division Courts (now known as Small Claims Courts) was markedly different. In an amendment to the Division

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[21] *Supra* note 15, at 421-23. Levy here notes that foreign attachment was by the nineteenth century much abused and cited several decisions of the House of Lords in 1867 that in effect severely curtailed the procedure in the Mayor's Court of London.

[22] The Small Claims Courts Amendment Act, 1977, S.O. 1977, c. 52 (*amending* R.S.O. 1970, c. 439).

[23] Can. Stats. 1856, c. 43, ss. 193-200.

[24] S. 194 reads:

> It shall be lawful for a Judge upon the *ex parte* application of such Judgment creditor, either before or after the oral examination, and upon his affidavit or that of his Attorney, stating that the Judgment has been recovered and that it is still unsatisfied and to what amount, and that any other person is indebted to the Judgmemt debtor and is within the jurisdiction, to order that all debts owing or accruing from such other person (hereinafter called the garnishee) to the Judgment debtor shall be attached to answer the Judgment, and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Judge or some officer of the Court to be specially named by such Judge, to shew cause why he should not pay the Judgment creditor the debt due from him to the Judgment debtor, or so much thereof as may be sufficient to satisfy the Judgment debt: Provided always that the section shall not apply in actions commenced or carried on against a Defendant as an absconding debtor.

[25] Can. Stats. 1856, c. 90, s. 2.

Courts Act in 1869, a creditor, prior to obtaining judgment, was permitted to issue a summons against a garnishee owing money to his debtor.[26] This right of pre-judgment garnishment, with an exception that will be discussed below, existed in the Ontario Small Claims Courts until 1977.

Under the British North America Act, property and civil rights were, with some exceptions, left to the provinces. Thus garnishment procedure continued to be under the jurisdiction of the province of Ontario. In 1881 Ontario, again following the lead of England, enacted the Judicature Act,[27] which left rules of procedure largely in the hands of judges.[28] With certain revisions, the garnishment procedure is still found in the rules of practice today.[29]

II. History of Ontario Wage Protection[30]

When examining the development of the protection of wages from garnishment in Ontario, it is first necessary to look at the English situation. In 1870, the Westminster Parliament passed the Wages Attachment Abolition Act[31] designed to "prevent the attachment of wages to satisfy judgments recovered in any Court of Record or inferior courts".[32] Exceptions were made, in that earnings could be attached for income tax and fines, but the inviolability of the wage packet from

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[26] The Division Courts Act, S.O. 1868-69, c. 23, ss. 5, 7. The Division Courts in Ontario were first established in 1792 by 32 Geo. III, c. 6. At the time, Upper Canada established what were called Courts of Request, with jurisdiction in civil matters where the claim was under 40 shillings. This court evolved into the Division Courts, known since 1970 as the Small Claims Courts. These courts have jurisdiction to adjudicate most civil disputes where the amount claimed does not exceed $1,000. Representation by legal counsel is discouraged (but not prohibited), jury trial is not available and the judge is to dispose of matters in a summary manner. This concept of limited jurisdiction civil courts became popular in the United States in the early 20th century and now many states have a Small Claims Court system. In theory the simplified procedure and low costs should benefit the "common man," though in practice the system is often a cheap collection agent for creditors. *See* Eye, *The Small Claims Court: Justice for the Poor or Convenience for the Businessman*, 1 PEPPERDINE L. REV. 71 (1973); Ison, *Small Claims*, 35 MODERN L. REV. 18 (1972).

[27] S.O. 1881, c. 5 (now R.S.O. 1970, c. 228).

[28] Garnishment first appeared in The Ontario Judicature Act, 1881, S.O. 1881, O.41; attachment of debts appeared in the same statute as R1.370.

[29] The various editions of HOLMSTEAD & GALE, THE JUDICATURE ACT OF ONTARIO (now O.R.P.) may be consulted to trace the development and changes in garnishment proceedings in Ontario courts.

[30] In preparing this section, one aim was to uncover the rationale behind the development of wage protection in Ontario. However, the Legislative Assembly did not keep a *Hansard* until 1944. Thus I checked press reports of parliamentary sessions and compared the original bills, deposited in the Ontario archives, with the amended copy after the Act had been dealt with by the House. Because of the paucity of available material, the rationale for wage exemption legislation often remains obscure.

[31] 33 & 34 Vict., c. 30.

[32] Vol. 4, SESSIONAL PAPERS (Commons) 1870, 767 (Bill 131, U.K.).

civil attachment remained policy until the Payne Committee's recommendations for attachment of earnings in 1969.[33]

In Ontario, on January 14, 1874, Bill 7, "An Act to Amend the Law Relating to the Attachment of Debts by exempting the wages and salaries of mechanics and others from liability to Attachment" was introduced in the Legislature.[34] The original Bill tabled in the Assembly was, in intent, identical to the English Act of 1870. However, the Bill as amended differed fundamentally from that introduced on first reading, and thus from the English statute. Rather than prohibiting attachment, the amended Bill exempted wages or salary from seizure or attachment "unless such debt shall exceed the sum of twenty-five dollars, and then only to the extent of such excess".[35] Thus, instead of a total prohibition of wage garnishment as established in England,[36] Ontario adopted the principle of a flat cash exemption with the excess available for garnishment.[37] However, the Bill did offer protection that was hitherto unavailable. The $25 exemption at that time represented at least two weeks pay for the average workman, so he would by no means be left destitute by a wage garnishment.

Exceptions to this $25 exemption soon emerged and were eventually consolidated in the Wages Act of 1910.[38] The $25 exemption was removed if a debt was for board and lodging or if the debtor was unmarried and without dependants.[39] In the operation of these exceptions, the onus was on the creditor to show the debtor ineligible for the exemptions under the Wages Act. Otherwise the $25 exemption was granted.[40]

The next change in the protection of wages occurred in 1920, when Bill 196 was introduced. This Bill, the Wages Amendment Act, 1920,[41] repealed section 7 of the existing Wages Act and changed the exemption from a flat amount of $25 to a percentage equal to seventy per cent of

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[33] REPORT OF THE COMMITTEE ON THE ENFORCEMENT OF JUDGMENT DEBTS (cmnd. 3909, 1969).

[34] 7 LEG. ONT. JO. 19 (1874).

[35] An Act to amend the law relating to the Attachment of Debts as respects the Wages and Salaries of Mechanics and Others, S.O. 1874 (3d. sess.) c. 13, s. 1.

[36] *See* discussion and questions raised by Wood, *Attachment of Wages*, 26 MODERN L. REV. 55 (1963), as to whether the English prohibition was, in fact, "total".

[37] S.O. 1874 (3d sess.) c. 13.

[38] S.O. 1910, c. 72.

[39] S.7 reads:

> Nothing in this section shall apply to any case where the debt has been contracted for board or lodging, and in the opinion of the judge before whom the matter is brought the exemption of $25 is not necessary for the support of the Debtor's family, or where the debtor is an unmarried person, having no family depending on him for support.

[40] BICKNELL AND SEAGER'S DIVISION COURT MANUAL 323 (5th ed. R. Soward 1939) notes that this procedure "was originally intended, no doubt, for the protection and relief of railway and other large employers of labour who...were obliged to await the results of a trial before paying the amount due by them."

[41] S.O. 1920, c. 42.

the wage due. This afforded some protection against inflation, for the difficulty with an exemption expressed as a cash amount is that inflation makes it increasingly inadequate as a protection for the debtor. However, the Act did allow considerable latitude for judicial discretion. Upon application from the creditor, a judge could reduce the percentage of the exemption if, having regard to the nature of the debt and the circumstances of the debtor, seventy per cent appeared unreasonable. Similarly, the debtor was given the option of applying to the court for an increase in the exemption based upon the size of his family, the wages he was earning and any other factors the judge deemed to be relevant.[42] The Act also removed the exception which denied an exemption for unmarried debtors and for board and lodging debts.

Changes were next made in 1927. As amended, the Wages Act, 1927[43] supplemented the percentage exemption with a flat cash exemption of $15. Thus, a minimum floor of $15 was established which would be totally exempt from garnishment, while seventy per cent of income above that minimum level was still exempt. This statute did address a problem arising from the simple percentage exemption, namely, that no matter how small the earnings of the debtor, the creditor was able to

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[42] The amendment to s. 7 reads:

(a) Seventy per centum of any debt due or accruing due to any mechanic, workman, labourer, servant, clerk or employee for or in respect of his wages, shall be exempt from seizure or attachment, provided however, that if a creditor of any such mechanic, workman, labourer, servant, clerk or employee, who had initiated proceedings by way of seizure or attachment of the wages of any such mechanic, workman, labourer, servant, clerk or employee, desires to contend that having regard to the nature of the debt and the circumstances of the debtor, it is unreasonable that as much as seventy per centum of such debtor's wages should be exempt, the judge may, upon a hearing of the matter, reduce the percentage of exemption herein allowed in any particular case;

(b) If the debtor desires to contend that in the circumstances of any particular case, having regard to the size of the debtor's family, the wages he is earning and any other matter or thing which the judge may deem it proper to take into account, the exemption hereby allowed should in any case be increased, the judge shall have power to increase and to make any order providing for an increase of exemption which he may consider just and reasonable under all the circumstances;

(c) In case of garnishment or attachment of wages either the debtor or creditor may, without awaiting the regular sittings of the court, apply to the judge upon at least five days' notice in writing to the other party or his solicitor for an order, finally disposing of the matter and upon the making of such order and the fixing thereby of the amount of the debtor's exemption, there shall, if the employer of the debtor has paid the whole or any part of the debtor's wages into court, be forthwith paid out of court to the debtor by the judge by way of exemption in case the amount paid in equals or exceeds the amount so allowed, and in case the amount paid in is less than the amount so allowed the whole amount paid in shall be paid out to the debtor.

[43] S.O. 1927, c. 45.

reach something. Under a flat percentage exemption, the debtor with a large wage income would retain a proportionately larger amount than a low wage debtor. This statute guaranteed a basic minimum, lowered from $25 to $15, to the wage earner. In addition, the 1927 Act reintroduced the provision regarding prohibition of exemption for board and lodging and for unmarried debtors without dependants which had been repealed in 1920.[44]

In 1935, the Wages Amendment Act, 1935[45] amended section 7 by removing the $15 flat exemption, replacing it with a $2.50 per day exemption. The following year, the Wages Amendment Act, 1936[46] was passed. This Act added a new provision, section 8,[47] to the Wages Act, which prohibited attachment of wages prior to obtaining judgment.[48] The next change came over twenty years later, in 1957, when a new subsection was added to section 7 of the Wages Act.[49] It prohibited seizure of more than thirty per cent of wages by means of a wage assignment.[50]

The wage assignment differs from garnishment proceedings in that it is a contractual agreement given as collateral security by a debtor to a creditor, rather than a judicial remedy enforced by the court. Usually there are two legal assignments in such a contract, the first for all wages owing and due from an employer to an employee and the second for all wages accruing to the employee from any debtor.[51] At one time in Ontario, wage assignments were almost invariably included in conditional sales contracts for, as Bates noted, such contracts were easily resold by the merchant through "discounting" to sales finance companies.[52] As a wage assignment was a contractual arrangement rather than a judicial remedy, until the 1957 amendment to the Wages Act,[53] the amount that could be taken by a creditor was not regulated by

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[44] S. 2(2)(aa).

[45] S.O. 1935, c. 43.

[46] S.O. 1936, c. 65.

[47] S. 8 reads:

> Proceedings to attach any debt due or accruing due to any mechanic, workman, servant, clerk or employee for or in respect of his wages shall be taken only where the claim of the creditor against the debtor is upon a judgment.

[48] As pre-judgment garnishment was only available in Ontario in the Division (Small Claims) Courts, The Division Courts Amendment Act, 1936, S.O. 1936, c. 17, was passed during the same session to give effect to the Wages Act amendment. The complete abolition of pre-judgment garnishment was achieved in November 1977 by the passage of The Small Claims Courts Amendment Act, 1977, S.O. 1977, c. 52.

[49] S.O. 1957, c. 106, s. 7(6).

[50] S. 7(6) reads:

> Any provision of any contract hereafter made that provides for the assignment by the debtor to the creditor of a greater proportion of the debtor's wages than is liable to seizure or attachment under this section is invalid.

[51] *See* Bates, *The Wage Assignment*, 24 U. TORONTO FAC. L. REV. 123 (1966).

[52] *Id.* at 125.

[53] S.O. 1957, c. 106, s. 7(6).

statute. In fact, all the creditor needed to do to activate the wage assignment was to inform the employer named in the original assignment or a subsequent employer that payment was demanded.[54] Then, the full balance outstanding from the contract could be claimed from the debtor's wages without the seventy per cent protection of the wage packet given the debtor in garnishment proceedings.

The matter of wage assignment did become somewhat of a public issue in Ontario. Not only was this process disliked by organized labour; the provincial association of debt collectors also voiced opposition. In a brief to the Select Committee of the Ontario Legislature on Consumer Credit,[55] the Canadian Collectors Association criticized the wage assignment because it took precedence over a wage garnishment. Thus, a creditor who obtained a wage assignment was in a better position to collect than a creditor relying on the garnishment.

In 1968, Bill 4 was introduced,[56] which amended section 7(6) of the Wages Act[57] and added a new subsection, number 7.[58] It abolished the wage assignment except to credit unions. Upon the debtor's initiative, the same portion of wages that were liable to attachment under garnishment proceedings, *i.e.* thirty per cent, could be assigned to a credit union. This amendment endorsed the recommendation of the Ontario Legislative Committee on Consumer Credit that the wage assignment be prohibited and that creditors be compelled to seek their rights through the courts, where wage garnishments were subject to judicial discretion.[59]

The most recent change in the protection of wages from attachment came three years later with the Wages Amendment Act, 1971.[60] The Act altered section 7 by removing the $2.50 cash floor from the amount exempted from garnishment which had come into force in 1935. What remained was the 1920 provision limiting garnishment to thirty per cent of an employee's wages. The special exemptions which had allowed holders of debts for board or lodging to attach more than thirty per cent of a debtor's wages and which had removed the seventy per cent exemption from unmarried debtors without dependants were repealed.

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[54] Bates, *supra* note 51, at 126.

[55] SELECT COMMITTEE OF THE ONTARIO LEGISLATURE ON CONSUMER CREDIT, BRIEF 10 (submitted by Can. Collectors Ass'n., 26th Leg., 4th sess., 1963).

[56] The Wages Amendment Act, 1968, S.O. 1968, c. 142 (*amending* R.S.O. 1960, c. 421).

[57] S. 7(6) reads:
Subject to subsection 7, an assignment of wages or any portion thereof to secure payment of a debt is invalid.

[58] S. 7(7) reads:
A debtor may assign to a credit union to which *The Credit Unions Act* applies such portion of his wages as does not exceed the portion thereof that is liable to attachment or seizure under this section.

[59] FINAL REPORT OF THE SELECT COMMITTEE OF THE ONTARIO LEGISLATURE ON CONSUMER CREDIT, DOC. NO. 85 (27th Leg., 5th sess., 1967).

[60] S.O. 1971, c. 20.

Finally, the phrasing of section 7(6), which dealt with wage assignments, was made retroactive in order to protect debtors who had signed a wage assignment prior to the proclamation of this Act.[61] Thus, except as regarded credit unions, it effectively ended the use of the wage assignment.

Current wage protection policy in Ontario thus consists of a flat percentage exemption, which makes thirty per cent of wages available to the creditor through garnishment proceedings.[62] The policy of combining a percentage exemption with a cash floor guarantee was abandoned in 1971 when the latter was removed from the Wages Act, on the basis that the amount provided for was essentially worthless because of inflation. This was unarguable but, as will be shown below, other means are available to tie a cash floor guarantee to increases in the cost of living.

III. Issues in Wage Protection Policy

As noted in the introduction, exemption statutes for chattels and personal property have a long history in English law; as the importance of wages as a source of livelihood increased, protection of wages from civil attachment was enacted in many jurisdictions.

The history of the Ontario policy shows the changing basis of the province's approach. A portion of wages was protected, first expressed as a flat cash amount and later as a percentage of the wage packet. In evaluating this policy, and the broader issue of the adequacy of wage protection, it is first worthwhile to briefly consider the position taken by other provinces.

First, several provinces express exemptions as flat cash amounts. The Attachment of Wages Act of Newfoundland,[63] for instance, contains a schedule of exemptions based on the family situation of the debtor. A married debtor supporting a spouse is allowed $375 exempt per month; one dependant increases the exemption to $445, and each additional dependant increases the exemption by $30; an unmarried, widowed or divorced debtor with one or more dependants is exempted $375 plus $30 for each dependant in excess of one; and "others" are given $280. Similarly, in Saskatchewan,[64] a married person supporting from one to three dependants is given $300; unmarried or widowed with from

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[61] S. 7(6) reads:
Subject to subsection (7) [which allowed Credit Unions to save wage assignment], an assignment of wages or any portion thereof to secure payment of a debt whether heretofore or hereafter given is invalid.

[62] The Wages Act, R.S.O. 1970, c. 486, *as amended by* S.O. 1971, c. 20.

[63] The Attachment of Wages Act, R.S.N. 1970, c. 16, s. 2(1), *as amended by* S.N. 1977, c. 5, s. 1.

[64] The Attachment of Debts Act, R.S.S. 1965, c. 101, *as amended by* S.S. 1973, c. 5.

one to three dependants, $300; unmarried or widowed with four or more dependants, $325; and all others are given $150.

A flat percentage exemption with a cash floor guarantee is the approach used by British Columbia[65] and Manitoba.[66] Both provinces exempt seventy per cent of a debtor's wages from attachments. In British Columbia, an exemption of not less than $100 per month is established for a debtor without dependants and $200 a month for a debtor with dependants. Manitoba established a similar $100 a month for a debtor without dependants and $165 for a person with one or more dependants. In Quebec,[67] seventy per cent of the excess of wages over and above an exempted amount may be seized. The exempted amount is $30 per week plus $5 for each dependant in excess of two.

In Prince Edward Island,[68] a discretionary policy is followed. Wage exemption levels are calculated by the court clerk on a case basis, though "in no case shall the exemption under this section leave the judgment debtor with less income than he would receive if he were . . . wholly dependent . . . on payments made under the Welfare Assistance Act".[69] Thus, though exemption is largely a matter of discretion, no debtor would be reduced to a level below that of a welfare case.

Looking at these approaches, insofar as the welfare of the debtor is concerned, the flat cash exemption offers the least protection. Rapid inflation quickly reduces the value of the amount established by statute as exempt. To keep protection at an acceptable level, regular review and amendment would be required by the provincial legislatures.

The percentage exemption, as found in Ontario, does deal with this problem; a constant proportion of earnings are protected from attachment. However, regardless of the income, the creditor can take something. A debtor on $150 a week could be attached along with a counterpart on $1,500 a week. This situation appears contrary to public policy established by minimum wage legislation and welfare assistance levels. These programmes protect a basic income level below which no citizen should fall. An exemption statute which could allow a debtor to fall below this level appears unacceptable.

The discretionary exemption, as found in Prince Edward Island, may suffer several shortcomings. Questions of equitable administration could certainly be raised. A debtor's exemption could be set by arbitrary or capricious criteria rather than according to his need; furthermore, such a system would likely be costly and cumbersome to

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[65] Attachment of Debts Act, R.S.B.C. 1970, c. 20, *as amended by* S.B.C. 1971, c. 6.
[66] The Garnishment Act, R.S.M. 1970, c. G-20, s. 6.
[67] QUE. CODE OF CIVIL PRO., arts. 625-45.
[68] The Garnishee Act, R.S.P.E.I. 1974, c. G-2.
[69] S. 17.

operate. The work load of such a system on court clerks could become heavy, leading to inefficient operation and high administrative costs.[70]

The percentage exemption with protection of a minimum income level appears to be the most satisfactory system. However,the approach taken by British Columbia and Manitoba suffers from the same problem found with the flat cash exemption. An amount expressed as a dollar and cent figure is quickly reduced in real value by inflation. However, means are available to tie this minimum exemption to an escalator. The United States Wage Garnishment Law,[71] for instance, ties the exemption to a multiple of the hourly minimum wage. In this Act, the maximum amount of weekly earnings available for garnishment may not exceed twenty five per cent of weekly disposable income or the amount by which weekly disposable earnings exceed thirty times the minimum hourly wage. To illustrate, as of 1976, a debtor with weekly earnings of $69 or less would have all his pay exempted. For a debtor earning over $69 but under $92, any amount above $69 could be attached. And, for a debtor earning over $92, twenty five per cent could be attached.[72] By linking the minimum income level to an index that is regularly reviewed by a legislative assembly, the minimum amount protected is likely to reflect the true cost of living.

Moreover, a case can be made for varying this minimum exemption with the family obligations of the debtor. Income tax exemptions and welfare benefit rates are amongst the programmes that take account of the number of dependants. As noted above, provinces such as Newfoundland and Saskatchewan base their exemptions on this principle. However, in both cases the exemption is expressed as a cash amount; inflation would likely make an exemption so expressed inadequate. A better construction might be to link this exemption to a multiple of the minimum wage. For instance, a debtor with one dependant might be allowed a minimum guaranteed exemption of seventy times the minimum hourly wage per weekly pay period; the multiple could be indexed upwards with the number of dependants.

Finally, it appears desirable to retain a percentage of income above the minimum exemption which is protected from attachment. The argument for this is to give a debtor incentive to continue in employment. If all but a bare subsistence could be attached, a debtor may well decide that welfare or unemployment insurance would be a more attractive alternative. Why continue at a job if wages are reduced to a

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[70] *See* discussion and questions raised by INSTITUTE OF LAW RESEARCH AND REFORM, WORKING PAPER: EXEMPTIONS FROM EXECUTION AND WAGE GARNISHMENT (University of Alberta, Jan. 1978).

[71] 15 U.S.C. s. 1673 (1970).

[72] U.S. DEP'T OF LABOR, THE FEDERAL WAGE GARNISHMENT LAW (Publication 1324, 1976).

bare subsistence level, especially if alternatives such as unemployment insurance are available?

Turning from the issue of formulating an equitable exemption policy, changes in the method of paying wages may give rise to circumstances in which exemptions are not operative. Increasingly, large employers do not issue pay cheques directly to employees. Rather, wages due are paid directly into employees' bank accounts. Thus, a well-timed garnishment on a bank account could reach what are in effect wages; as assets are being garnished in the form of a balance in a bank account, the wage exemption provided in statute may not apply. Furthermore, pre-judgment garnishment procedure, such as the Garnishee Summons in the Ontario Small Claims Courts,[73] could have been used to attach such a bank account. If so, the prohibition against pre-judgment garnishment of wages, dating from 1936,[74] may not have offered adequate protection.

The status of such an action appears to be unclear. In a Manitoba case, the court ruled that a salary paid directly into a bank account was to be accorded the exemption due wages under statute.[75] However, Jakabfy reported a recent occasion in Sudbury where an employer paid wages directly into a bank account. The creditor "garnished the bank account of the debtor on the very day his pay arrived and consequently the hundred per cent garnishee resulted."[76]

To conclude by looking specifically at Ontario policy, the preceding discussion suggests several changes should be made. First, a minimum income level should be completely protected from garnishment. Due to the pressures of inflation, it appears the most appropriate construction would be to link this exemption to the minimum wage. For example, a debtor could be guaranteed a weekly exemption of forty times the province's hourly minimum wage. Second, this minimum guaranteed exemption should be varied with the number of dependants of a debtor. Again, an approach indexed to the minimum wage would keep such an exemption in line with the increasing cost of living. For instance, a debtor with one dependant might be guaranteed a weekly exemption of seventy times the hourly minimum wage; this multiple could vary as the number of dependants increased. Third, the possible exception to wage exemption through changes in wage payment methods should be addressed. As the historical review of Ontario policy shows, protection of a portion of wages from garnishment has been the clear

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[73] The Small Claims Court Amendment Act, 1977, S.O. 1977, c. 52.

[74] The Wages Amendment Act, 1936, S.O. 1936, c. 65 (*amending* R.S.O. 1927, c. 176).

[75] Holy Spirit Parish Credit Union Soc'y v. Kwiatkowski, 68 W.W.R. 684 (Man Q.B. 1969).

[76] Letter from Jacob Jakabfy to author, June 9, 1976.

intent of the Legislative Assembly since 1874; prohibition of pre-judgment wage garnishment has been policy since 1936. Statute law should be brought up to date with current wage payment methods. Finally, the current Ontario practice of exempting a percentage of income from garnishment seems worthwhile. Such a policy gives incentive to a debtor to continue in employment, which may not be the case if only a subsistence amount, likely equivalent to the welfare rate, is protected from attachment.