ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

CREDITOR ACCESS TO FUTURE INCOME PLANS

Consultation Memorandum No. 11

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ALBERTA LAW REFORM INSTITUTE

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This consultation memorandum was written by C.R.B. Dunlop, a consultant to the Institute. The discussion of the law in the United States, Australia and the United Kingdom was written by C.L. Martens, one of the Institute's counsel.

Mr. Dunlop and Ms. Martens were greatly assisted by the members of the management committee and the two advisory committees, all of whom were generous in the donation of their time and expert knowledge to assist the Institute in carrying out this project. The members of the three committees are:

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PREFACE AND INVITATION TO COMMENT

The purpose of the Future Income Plans project is to consider whether registered retirement savings plans (RRSPs), deferred profit-sharing plans (DPSPs) and registered retirement income funds (RRIFs) should be exempt from creditors' remedies. The issue is significant because of the policy questions involved and the large sums of money invested annually in retirement savings plans. The Institute has decided to review the exemption of such plans in Alberta, and to consider reports on the subject by the Uniform Law Conference of Canada and the Personal Insolvency Task Force. The Institute will publish a report, including recommendations for change.

This consultation memorandum discusses the issues as they appear to the Institute. Readers are invited to comment. Your views will help the Institute to develop useful recommendations to the government on the exemption of RRSPs, DPSPs and RRIFs from creditors' remedies. Readers are also invited to comment on whether the Institute has identified the right issues and if not, to advise what the right issues are. In any reform project consultation is critical. The Institute is keen to get information, advice and opinions from all interested people and groups.

From time to time in this chapter, the drafters of this memorandum have criticized some reform proposals and expressed support for others. These opinions are by no means the views of the Institute Board which has not reached any conclusions on the recommendations to be made to government. Readers should feel free to reject views expressed here, and tell the Institute how the law should be changed. Your views are encouraged and welcomed.

Comments on this paper and the questions and issues raised by it should be in the Institute's hands by August 15, 2002. Comments may be made by any form of communication, but written responses are preferred.

Comments on the issues raised in this Memorandum should reach the Institute on or before August 15, 2002.

Comments should be addressed to:

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CITATIONS AND ABBREVIATIONS

FREQUENTLY CITED STATUTES

The footnotes provide the full citations for most statutes referred to in this consultation memorandum. However, the footnotes do not provide full citations for the following, frequently cited, statutes and regulations. The footnotes use the abbreviated references in the left column of the following table.

BIA	*Bankruptcy and Insolvency Act*, R.S.C. 1985
CEA	*Civil Enforcement Act*, R.S.A. 2000, c. C-15
CER	*Civil Enforcement Regulation*, Alta. Reg. 276/95
Insurance Act	*Insurance Act,* R.S.A. 2000, c. I-3
ITA	*Income Tax Act*, R.S.C. 1985, c. 1, (5th Supplement), as amended.

WORKS CITED

The footnotes in this consultation memorandum use the abbreviated references in the left column of the following table.

ALRI	the Alberta Law Reform Institute (in footnotes)
CCRA	Canada Customs and Revenue Agency
DPSP	deferred profit-sharing plan
the Institute	the Alberta Law Reform Institute (in text)
LIF	life income funds
LIRA	locked-in retirement accounts
LRIF	locked-in retirement income funds
Task Force	Personal Insolvency Task Force
RPP	registered pension plan
RRIF	registered retirement income fund
RRSP	registered retirement savings plan
ULCC	Uniform Law Conference of Canada

EXECUTIVE SUMMARY

Scope and Purpose of the Project

Should registered retirement savings plans (RRSPs), deferred profit-sharing plans (DPSPs) and registered retirement income funds (RRIFs) be exempt from the remedies of creditors? The issue is significant because of the policy questions involved and the large sums of money invested annually in retirement savings plans. The Institute has decided to review the exemption of such plans in Alberta, and to consider reports on the subject by the Uniform Law Conference of Canada and the Personal Insolvency Task Force. The Institute will publish a report, including recommendations for change. Chapter 1 of this consultation memorandum discusses the scope of this project.

Conflicting Policy

Canadian law espouses two major legal policies relevant to the present study. They are (1) the legal encouragement to save for retirement, evidenced by the tax deferral status of RRSPs, DPSPs and RRIFs; and (2) the necessity for an effective and efficient system for the enforcement of money judgments. These policies come into direct conflict in any project to exempt RRSPs and the like from creditors' remedies. Chapter 2 of this consultation memorandum outlines these two policies, and how the law in Canada and elsewhere has reconciled them.

Alberta Law

Alberta law permits a judgment creditor to enforce a money judgment against the RRSP of the debtor, that is, to divert the debtor's retirement savings to payment of debts. However, most pensions are exempt from enforcement, as are most RRSPs and annuities purchased from insurance companies. It is non-insurance RRSPs which are fully available to creditors. There is an apparent unfairness in this exposure of non-insurance RRSPs, compared to the virtually complete protection of most insurance RRSPs and annuities, and most pensions. Similar rules apply to DPSPs and RRIFs.

When pensions, annuities, RRSPs and RRIFs start to make payments to the depositor, the creditor's appropriate remedy is to attach the payments. Exemptions are again an issue. Most pension statutes expressly prohibit garnishment of pension benefits or payments. Insurance legislation will in some cases also exempt payments. However, payments out of a non-insurance RRSP or RRIF (after tax is deducted) will be fully garnishable. Again, creditors' remedies law treats differently payments which appear to be similar.

The above discussion assumes that the depositor-debtor is alive. When he or she dies, the situation becomes more complex. The beneficiary of the RRSP, DPSP or RRIF claims payment of the proceeds of the plan. The beneficiary's argument is usually that the plan does not become part of the depositor's estate but passes directly to the beneficiary. The beneficiary will be confronted by the creditors of the depositor's estate who claim that the proceeds of the plan do become part of the depositor's estate and are therefore liable to pay the creditors' claims before anything is paid to the beneficiary. A third claimant will be the creditors of *the beneficiary* who, at some stage, want the proceeds to satisfy their claims. The result is a free-for-all scramble for the plan proceeds which has caused the courts much trouble.

The Issues

The following is a summary of some of the issues raised in the Consultation Memorandum. The full text of the issues follows this summary. The issues are discussed more fully in chapter 3.

Issue 1 asks the threshold question whether Alberta law should recognize *any* exemption of RRSPs, DPSPs and RRIFs from creditors' remedies.

Proponents of an exemption argue that:

(1) Canadian law recognizes saving for retirement as a value worthy of protection and encouragement;
(2) pensions are exempt now and in the foreseeable future;
(3) pensions and RRSPs are sufficiently similar that they deserve similar treatment in creditors' remedies law; and
(4) the practical consequences of such an exemption are not significant.

Opponents of the proposal attack the assumptions underlying the exemption. They argue that:

(1) Some debtors will abuse an exemption of retirement savings plans.
(2) Pensions and RRSPs are different. Pension funds are locked in by legislation and are dedicated to retirement. Most RRSPs can be collapsed at will by the depositor, and are closer to tax sheltered bank accounts which can provide funds for non-retirement purposes.
(3) Saving for retirement should not be favoured by the law to the detriment of creditors who may be relying on prompt payment of their claims for their own retirement plans.

Issues 2 to 6–If it is concluded that RRSPs, DPSPs and RRIFs should enjoy some exemption from creditors' remedies, the next question is whether the exemption should be total (**Issue 2**) or should be surrounded by limits intended to lessen the possibility of abuse. Possible limits include:

- fixing a dollar cap on the amount of an RRSP, DPSP or RRIF which is exempt from enforcement (**Issue 3a**),
- limiting the exemption to RRSPs, DPSPs and RRIFs that are already locked in, and plans which the debtor elects to lock in at the time of execution (**Issue 3b**),
- permitting the creditor to claw back payments made into the plan during a fixed period (say, 3 years) before the date of the issue of the writ of enforcement (or an earlier date) (**Issue 3c**),
- making payments out of an RRSP, DPSP or RRIF garnishable subject to exemptions similar to those applying to wages and salaries (**Issue 4**), and
- giving the court a discretion to increase, decrease or eliminate the exemption of RRSPs, DPSPs and RRIFs from enforcement and garnishment, subject to a list of factors to be considered in each case (**Issue 5**),
- creating other anti-abuse safeguards (**Issue 6**).

Issues 7 to 13–Other issues to be considered in this project include the following:

- Should there be different exemptions of RRSPs, DPSPs and RRIFs from enforcement and garnishment, depending on whether the plans are offered by insurance or non-insurance vendors? (**Issue 7**)
- If the exemption of such plans is the same for insurance and non-insurance products, should the new exemption be limited to plans which name a

beneficiary and, if so, to family beneficiaries as in s. 580 of the present *Insurance Act*? (**Issue 8**)

- Should RRSPs, DPSPs and RRIFs and the proceeds from such plans be exempt from the creditors of the deceased depositor's estate? (**Issue 9**)
- Should such plans and their proceeds be exempt from the creditors of the beneficiary named in the plans? (**Issue 10**)
- Should the Alberta exemption of RRSPs, DPSPs and RRIFs follow national models like the Uniform Law Conference of Canada uniform bill, or the Personal Insolvency Task Force discussion paper, both of which propose differing exemptions of such plans? (**Issue 11**)
- Should the new exemption provision include locked-in retirement accounts (LIRAs), life income funds (LIFs) and locked-in retirement income funds (LRIFs), and payments out of such plans, despite their inclusion (in part) in Alberta pensions legislation? (**Issue 12**)
- Should any new exemptions legislation be publicized well in advance of the proclamation date so that creditors who have relied on the debtor's RRSP, DPSP or RRIF can alter their plans? (**Issue 13**)

LIST OF ISSUES

Chapter 1. Purpose and Scope of Project

A. Introduction

[1] The purpose of the Future Income Plans project is to consider whether registered retirement savings plans, deferred profit-sharing plans, and registered retirement income funds should be wholly or partly exempt from creditors' remedies.[1] The issue is significant because of the policy questions involved and the large sums of money at stake. Sellers of RRSPs and similar products stand to win or lose market share, in part because of changes in the exemptions rules.

[2] Alberta law now permits a judgment creditor to enforce a money judgment against the RRSP of the debtor. A civil enforcement agency, acting for a judgment creditor, can serve an enforcement order on the depository managing the plan. The likely effect of service of the order is to compel the depository to collapse the plan and pay the balance after tax to the agency for distribution to the enforcing creditor and any other creditors entitled to share in the proceeds of enforcement.[2] The law therefore permits creditors to divert the debtor's retirement savings to payment of debts.

[3] However, Alberta law generally does not permit creditors to enforce their judgments against pensions, or against annuities and RRSPs issued by insurance companies. Pension statutes contain sections which (more or less clearly) protect pensions from enforcement. The *Insurance Act* does the same job for insurance products, including most annuities and RRSPs. It is non-insurance RRSPs which are exposed fully to creditors. There is an apparent unfairness in this exposure of non-insurance RRSPs, compared to the virtually complete protection of insurance RRSPs and annuities, and most pensions.

[4] When pensions, insurance annuities, and RRSPs or RRIFs start to make payments to the depositor, the creditor's appropriate remedy is to attach the payments. Exemptions are again an issue. Some pension statutes expressly prohibit garnishment

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[1] This report uses abbreviations to identify registered retirement savings plans (RRSPs), deferred profit-sharing plans (DPSPs) and registered retirement income funds (RRIFs). See *Citations and Abbreviations*.

[2] An exception may be where the plan is "locked in," e.g., where the contributor cannot withdraw money from the plan before a certain date such as his or her 65th birthday.

of pension benefits or payments; others are silent, leading to the conclusion that such payments are garnishable. Insurance legislation will in some cases also exempt payments. However, payments out of a non-insurance RRSP or RRIF (after tax is deducted) will be fully garnishable. Again, creditors' remedies law treats differently payments which appear to be similar.

[5] The exemption of RRSPs and similar plans has been the subject of other law reform activities. In 1998 and 1999, the Uniform Law Conference of Canada (ULCC) approved a consultation report and a uniform bill which sought to correct what the Conference saw as an unfairness in the exposure of RRSPs to enforcement and garnishment.[3] The ULCC Uniform Bill is attached as Appendix 1 to this memorandum. The principal recommendations in the ULCC Consultation Report can be summarized as follows:

(1) All rights, property and interest of a depositor in RRSPs, DPSPs and RRIFs should be exempt from any enforcement process. The effect of this proposal is that such assets would not be available to creditors enforcing their judgments or to trustees in bankruptcy.

(2) The exempt status of these plans should continue only so long as they retain their status as RRSPs, DPSPs and RRIFs under the *Income Tax Act*.

(3) Payments out of such plans to a depositor or the legal representative of a depositor should be subject to exemptions like those which apply to wages and salary payments, but any amounts over the exemptions should be subject to garnishment.

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[3] Uniform Law Conference of Canada, *Proceedings of the Eightieth Annual Meeting* (Toronto : The Conference, August, 1998) at 254-273 [hereinafter "ULCC Consultation Report"]; Uniform Law Conference of Canada, *Proceedings of the Eighty First Annual Meeting* (Toronto: The Conference, August, 1999) at 164-180 [hereinafter "ULCC Uniform Bill"]. The ULCC website is helpful, online: <http://www.ulcc.ca/en/home/> (last accessed June 14, 2002). The full citation of books, reports and articles will be found in the Bibliography.

[6] The ULCC Consultation Report was the subject of extensive consultation, the results of which were divided but on balance favoured the proposals.[4]

[7] A second reform effort has been launched by the Superintendent of Bankruptcy. In 2000, the Superintendent created a Personal Insolvency Task Force (Task Force) to consider changes to the *Bankruptcy and Insolvency Act*. One committee of the Task Force proposed that people in bankruptcy should be able to claim an exemption of RRSPs and RRIFs surrounded by anti-abuse safeguards not in the ULCC proposal. The Committee report was considered and its proposals somewhat modified by the Task Force in September, 2001. The Corporate and Insolvency Law Policy Directorate has now published a discussion of the Personal Property Task Force proposals in *Consumer Insolvency Issues: A Discussion Paper*, portions of which are included in Appendix 2.[5] There is no guarantee that the Personal Property Task Force proposals will find favour with the Superintendent of Bankruptcy or with Parliament. However, they do amount to alternatives to the proposed ULCC Uniform Bill.

[8] During the summer of 2001, the Alberta Law Reform Institute (the Institute) conducted a feasibility study to consider whether it should conduct a project on the exemption of RRSPs, DPSPs and RRIFs. People and groups consulted, including government public servants, unanimously agreed that the present project was one which the Institute should take on. The Institute board decided in September, 2001, to undertake the Future Income Plans project. It asked C.R.B. Dunlop, a consultant to the Institute, and Cynthia Martens, counsel to the Institute, to conduct the project, assisted

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[4] At the date of this consultation memorandum, the ULCC Uniform Bill, *supra* note 3, 125, has not been enacted by any jurisdiction except Saskatchewan which has passed the ULCC Uniform Bill with some modifications. See Bill 23, *An Act exempting Registered Retirement Plans from certain Enforcement Processes*, 3d Sess., 24th Leg., Saskatchewan, 2002 (passed on May 29, 2002, but does not come into force until January 1, 2003) [hereinafter *Bill 23*].

[5] At the date of writing, the Task Force has not yet completed its final report. The ULCC Uniform Bill, Corporate and Insolvency Law Policy Directorate, Industry Canada, Consumer Insolvency Issues: A Discussion Paper, April 23, 2002 can be found at Industry Canada, online: <http://strategis.ic.gc.ca/pics/cl/consumer_e.pdf> (date accessed: June 14, 2002) [hereinafter "Task Force Discussion Paper"]. The Task Force has also proposed the inclusion in the BIA of an optional list of exemptions which may be chosen by the debtor in lieu of the provincial exemptions. The provinces would have no choice about opting in or out of this federal list; it is the debtor who would have the option of electing the federal or the provincial list to apply to his or her bankruptcy. Debtors from jurisdictions with limited exemptions might well opt for the federal list, although debtors from more generous provinces like Alberta are less likely to do so. See Task Force Discussion Paper at 9-14.

by a project management group, and by project advisory committees in Edmonton and Calgary.

B. Scope of Project

[9] The issue in the Future Income Plans Project is whether RRSPs, DPSPs and RRIFs, whether sold by insurance companies or not, should be wholly or partly exempt from the remedies of creditors of the owner of the plan. The objectives of this project are to study the present law, to publish a report on the problem, including recommendations for amendments to the *Civil Enforcement Act*, the *Civil Enforcement Regulation*, and the *Insurance Act* and to work with the government to carry the report forward into legislation.[6]

[10] The scope of the project needs to be clearly defined. The project will consider the exempt status of all RRSPs, DPSPs and RRIFs, but will not investigate other types of future income plans. In light of the ongoing discussions of reform by the Superintendents of Pensions, and the substantial differences between pensions and RRSPs, the project will not review the exemptions attaching to pensions, except briefly and by way of comparison.

[11] Debtors on the eve of insolvency have been known to transfer their assets to trustworthy relatives, or to transform their property from a non-exempt to an exempt form[7] in an effort to defeat their creditors. Both federal and provincial legislation provide processes for creditors to challenge such self-serving transfers, although counsel and bankruptcy trustees have expressed doubt to us about the effectiveness of the present law against the determined debtor. The Institute is aware of the problems in the law of reviewable transactions, and may consider a project in the future to review provincial[8] fraudulent conveyance and preference legislation. The Institute is

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[6] The final report will not propose any changes to the *Insurance Act* other than those directly related to the exemption of RRSPs, DPSPs and RRIFs from creditors' remedies.

[7] See *eg.*, *Ramgotra (Trustee of)* v. *North American Life Assurance Co.*, [1996] 1 S.C.R. 325, 3 W.W.R. 457 [hereinafter *Ramgotra*].

[8] Although one of the two major "provincial" acts is the English *Statute of Elizabeth*, passed in 1570, and still in force and in use in Alberta today.

unlikely to solve these complex and much debated problems as a footnote to the present report.

CHAPTER 2. PRESENT LAW

A. Introduction

[12] Canadian law espouses two major legal policies relevant to the present study. They are (1) the legal encouragement to save for retirement, and (2) the necessity for an effective system for the enforcement of money judgments. These policies come into direct conflict in any project to exempt RRSPs, DPSPs and RRIFs from creditors' remedies. This chapter will outline the two policies, and how Canadian law has reconciled them. It will also look at how other countries have addressed the problem.

B. Saving for Retirement

[13] It is obvious that people who retire from their work need resources to survive, although a recent Statistics Canada study argues that many Canadians have not saved enough to provide an adequate income during retirement.[9] Successive governments have been concerned with the plight of retired people,[10] and have provided modest public assistance and insurance plans for retirees, such as Old Age Security, the Canada Pension Plan, and other pension, insurance and welfare programs. The same governments have also encouraged people to save for retirement and to rely on their own resources instead of the public purse.

[14] Historically, many public and private employees relied on pension plans provided by their employers and regulated by superintendents of pensions across the country. Pension legislation usually exempts pensions from execution and garnishment.[11] Some employers offer private sector plans which are substitutes for or supplements to pensions, such as group RRSPs and DPSPs. Such plans are usually not caught by pensions legislation, and may offer less protection to the employee.

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[9] Statistics Canada, *The Assets and Debts of Canadians: Focus on Private Pension Savings (2001)*, online: <http://www.statcan.ca/english/freepub/13-595-XIE/9900113-595-XIE.pdf> [hereinafter "Stats. Can. *Assets and Debts*"] at 25-35.

[10] See *eg.*, Canada, *The Retirement Income System in Canada: Problems and Alternative Policies for Reform* / Report of the Task Force on Retirement Income Policy to the Government of Canada, 1979, 2 vols. (Ottawa: Canadian Govt. Pub. Centre, 1980).

[11] See *eg.*, *Employment Pension Plans Act*, R.S.A. 2000, c. E-8, s. 85.

RRSPS, DPSPS and RRIFs

[15] Government desire to encourage people to save for their own retirement was implemented in the RRSP tax deferral program, first enacted in 1957.[12] The intention was to register certain retirement savings programs which could act as an alternative or supplement to traditional pension plans. For the first 20 years, RRSPs were not particularly popular, the market being largely confined to deposits with insurance and trust companies. Cohen and Fitzgerald argue that the growth in investment in RRSPs began in the mid-1970s with the entry of the chartered banks in the market, accompanied by the now-familiar barrage of advertising.[13] Another incentive to growth was the increase in contribution limits to RRSPs in the 1991 changes to the *Income Tax Act*.[14]

[16] Whatever the reason, RRSPs have proven to be enormously popular. A recent Statistics Canada study found that, from 1993 to 1999, of the 13 million Canadian tax-filers aged 25 to 64, 61% contributed to an RRSP in at least one year compared to 45% who contributed to a registered pension plan (RPP). Tax-filers saved 44.5 billion dollars through RPPs and RRSPs in 1999; of that total, RRSP normal contributions reached 24.4 billion dollars (55%).[15] RRSP use increases as income increases, although other factors like geography and gender are relevant. A significant finding is

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[12] Cohen, B. & Fitzgerald, B., *The Pension Puzzle: Your Complete Guide to Government Benefits, RRSPs, and Employer Plans (2002)* (Etobicoke, Ont.: J. Wiley and Sons, 2001) [hereinafter "Cohen and Fitzgerald"], c. 7; Alberta Law Reform Institute, *Beneficiary Designations: RRSPs, RRIFs and Section 47 of the Trustee Act* (Report No. 68) (Edmonton: The Institute, September 1993) [hereinafter "ALRI *Beneficiary Designations*"] at 18-20. The following discussion concentrates on RRSPs, although the history is similar for RRIFs and DPSPs. See also *Re Coopérants, Mutual Life Insurance Society* (1993), 58 Q.A.C. 211; leave to appeal to S.C.C. refused (1994), 170 N.R. 79 (S.C.C.) [hereinafter *Re Coopérants*"]. On the *Re Coopérants* line of cases, see Maddaugh, P.D., "Are Deferred Annuities Policies of Insurance?" (1993) 2 Directions 14.

[13] Cohen and Fitzgerald, *ibid*. at 77.

[14] Hall, G.M., ed., *Mercer Handbook of Canadian Pension and Benefit Plans*, 11th ed. (North York, Ont.: CCH Canadian, 1996) [hereinafter "Mercer"] at 221.

[15] Statistics Canada, *Retirement Savings Through RPPs and RRSPs 1999*, (2001), online: <http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/74F0002XIB/74F0002XIB-e.html> at 16-17, 22-30.

that 59% of Canadians aged 25 to 64 who filed tax returns in 1999 did not use any of their RRSP room for contributions, despite the blandishments of the advertisers.[16]

[17] In a separate study on the assets and debts of Canadians, Statistics Canada concluded that, in 1999, "private pension assets," defined as including RRSPs, RRIFs, employer pensions, annuities and DPSPs, accounted for close to 29% of the value of all assets of Canadian family units. The total estimated value of private pension assets was just over 1 trillion dollars, of which 408 billion dollars was saved in RRSPs and RRIFs.[17] Private pension assets were the second-most significant asset of Canadian family units, the most valuable being the home. These assets must be considered in any discussion of readiness for retirement and financial security for the future.[18]

[18] The Canadian market now offers a bewildering array of RRSPs and RRIFs sold by banks, insurance companies, trust companies, credit unions, and mutual funds. The one quality which holds these products together is their compliance with the *Income Tax Act* requirements for an RRSP or a RRIF.[19]

[19] An RRSP is a retirement savings plan established by the taxpayer and registered by the Canada Customs and Revenue Agency (CCRA).[20] An RRSP can contain a wide range of assets, from a bank account to securities and mutual fund units, although there are some limits. The plan may or may not be self-directed.

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[16] *Ibid*. at 32-34.

[17] Stats. Can. *Assets and Debts*, *supra* note 9 at 9-11. Employer pension plans accounted for 604 billion dollars.

[18] *Ibid*.

[19] Our study does not include two categories of assets: (1) investment or savings vehicles available in the market but which do not conform to the requirements of the ITA for RRSPs and RRIFs, (2) RRSPs which have lost their tax-deferred status by, for example, being amended to include a charge to the bank holding the RRSP. Their exclusion is discussed in chapter 3 of this memorandum. Group RRSPs created by employers as supplements to or substitutes for pensions are treated as a collection of individual RRSPs by the ITA. See Mercer, *supra* note 14 at 223-225. That approach is followed in this memorandum.

[20] The root legislation is s. 146 of the ITA. CCRA publishes useful guides to the law. See *RRSPs and Other Registered Plans for Retirement* T4040; *When You Retire* P119. There are similar tax regimes for DPSPs (ITA, s. 147) and RPPs (ITA, s. 147.1). For a trenchant criticism of the RRSP program, see Austin, B., "Policies, Preferences and Perversions in the Tax-Assisted Retirement Savings System" (1996) 41 McGill L.J. 571 [hereinafter "Austin"]. ALRI acknowledges with gratitude the assistance of Wanda Rumball of Felesky Flynn LLP for her assistance on the tax aspects of this memorandum.

[20] An amount contributed to an RRSP is deductible in computing a taxpayer's income as long as the amount does not exceed the taxpayer's annual RRSP deduction limit, which is estimated for each taxpayer in the previous year's Notice of Assessment. The maximum limit for annual contributions to an RRSP is generally a function of a taxpayer's earned income (subject to a maximum) and is adjusted (reduced) by amounts contributed to other registered plans. The current maximum is $13,500. Any unused portion of the contribution limit may be used in subsequent taxation years. Over-contribution balances greater than $2,000 are generally subject to a tax of 1% per month. Income earned in an RRSP is not taxable while it remains in the plan. When money is withdrawn from the plan, it is taxable to the plan annuitant in the year of withdrawal. An RRSP can lose its tax exempt status if it ceases to fit within the rules set out in s. 146 of the *Income Tax Act*.

[21] RRSPs must mature and begin paying retirement income no later than the year the annuitant attains 69 years of age. Taxpayers whose RRSPs have not matured before that time typically transfer the property from their RRSPs to RRIFs, or cause the property to be invested in an annuity to begin paying retirement income. A RRIF is a plan registered by the CCRA and established by the taxpayer by the transfer of property from an RRSP, an RPP or another RRIF. A RRIF must pay to the taxpayer a minimum amount each year after the year it is set up. Such payments are taxable to the annuitant.[21]

[22] A DPSP is an arrangement by which an employer can share with some or all of its employees the profits from the business or related businesses up to an annual maximum contribution.[22] Like group RRSPs, DPSPs may be used by the employer to supplement or as a substitute for a pension plan. The amounts paid into such plans are usually calculated on the basis of profits. Allocations to an employee's account must become the employee's property if the employee has completed 24 months of DPSP membership, but they are not taxable as part of the employee's income as long as the allocations remain in the plan. Like RRSPs but unlike pensions, a retiring employee

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[21] Life income funds (LIFs), locked-in retirement accounts (LIRAs), and locked-in retirement income funds (LRIFs) raise special problems which are discussed later in this memorandum.

[22] See CCRA, *Deferred Profit Sharing Plans* IC77-1R4; Mercer, *supra* note 14 at 229-231; Cohen and Fitzgerald, *supra* note 12 at 69-70; Tyson, D.E., *Profit Sharing in Canada: The Complete Guide to Designing and Implementing Plans that Really Work* (Toronto: J. Wiley, 1996), see especially c. 9.

can withdraw his or her DPSP money as a lump sum and is not required to invest it in a LRIF or a RRIF. Generally, benefits received by an employee are taxable, except for the return of the employee's own contributions (permitted before 1991), and funds used to purchase specified annuities.

C. Enforcement of Money Judgments Against RRSPS, DPSPS and RRIFs in Alberta

[23] In 1991, the Institute published *Enforcement of Money Judgments: Report No. 61*, which proposed far-reaching changes in the Alberta judgment enforcement system.[23] The report begins with the uncontroversial proposition that just and efficient processes for the enforcement of judgment debts are essential. "What use is a judicial system that purports to resolve a dispute if the resolution it determines cannot be implemented effectively? Moreover, a just and efficient enforcement system is necessary if credit is to continue to play its fundamentally important role in the operation of our commercial system."[24]

[24] One way to make the judgment enforcement system more effective is to provide that all property of the judgment debtor can be subject to enforcement by the creditor, excepting only property that has been deliberately exempted from enforcement. The Institute in its first recommendation called for universal exigibility of property of the debtor.[25] Its second recommendation dealing with exemptions should be quoted in full:[26]

> Just Exemptions
> The deliberately exempted property should be sufficient to permit debtors to maintain themselves and their dependents at a reasonable standard and to have reasonable security that they will be able to continue to do so in the future.

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[23] Alberta Law Reform Institute, *Enforcement of Money Judgments*, 2 vols. (Report No. 61) (Edmonton: The Institute, March 1991).

[24] *Ibid*. at 21.

[25] *Ibid*. at 24-25.

[26] *Ibid*. at 25. See also c. 9 at 254-325, which set out detailed recommendations on exemptions.

[25] These recommendations were implemented in the *Civil Enforcement Act* which, with some significant exceptions, followed the Institute report.[27] The *Civil Enforcement Act*, read as a whole, makes it clear that all property of the debtor is subject to enforcement,[28] garnishment,[29] and receivership,[30] unless declared by the Act, the *Civil Enforcement Regulation*, or some other law to be exempt. Most exemptions under provincial legislation apply in bankruptcy.[31]

[26] This memorandum is primarily concerned with the enforcement of unsecured judgments, but it is appropriate to say something about a peculiar fetter on the rights of one class of secured creditors. A depository may lend money to someone who wishes to place the proceeds in an RRSP. Depositories who make such loans may secure themselves by taking an assignment of the RRSP or any proceeds from the plan. The courts are divided on such a transaction. One line of cases decides that the assignment is illegal because the *Income Tax Act* prohibits it.[32] The other group of cases finds the assignment to be legal and enforceable by the depository, its only effect being to strip the RRSP of its tax exemption status.[33] The issue may be settled by a case now before the Supreme Court of Canada.[34] One can quarrel with the

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[27] See also CER, Alta. Reg. 276/95; *Alberta Rules of Court*, Alta. Reg. 390/68, rr. 340-383.1 (enforcement); rr. 470-481.1 (garnishment).

[28] CEA, ss. 1(1)(u), 2(b), 43, 73, 88-93.

[29] *Ibid*., ss. 77-81.

[30] *Ibid*., s. 85.

[31] BIA, s. 67(1)(b). As to earnings of the bankrupt, see s. 68.

[32] *Phenix (Trustee of)* v. *Bank of Nova Scotia* (1989), 73 C.B.R. (N.S.) 290 (Sask. CA); *Re Leavitt* (1997), 50 C.B.R. (3d) 97 (B.C.C.A.); *Re Buwalda* (1997), 202 A.R. 310, 49 C.B.R. (3d) 281 (Q.B.); *cf. Belliveau* v. *Royal Bank* (2000), 224 N.B.R. (2d) 354, 14 C.B.R. (4th) 17 (C.A.). The cases turn on ITA, ss. 146(2)(c.3); 146(12). As to this and the next footnote, see articles by McCabe, M.J., "Execution Against an R.R.S.P" (1990), 76 C.B.R. (N.S.) 218 [hereinafter "McCabe"] at 235-237; and Williamson, J.R., "The No Offset Clause in RRSPs: A Contractual Exemption" (2001) 20 Natl. Banking L. Rev. [in two parts] 65, 81 [hereinafter "Williamson"].

[33] *Caisse Populaire St-Pierre Claver* v. *Caisse (Syndic)* (1993), 25 C.B.R. (3d) 218 (Que. S.C.); *Re Whaling* (1998), 117 O.A.C. 51 (C.A.); *cf. Caisse Populaire Laurier* v. *Cie. Trust Royal*, [1989] R.J.Q. 550, 30 Q.A.C. 86 (C.A.).

[34] *Blouin (Syndic de)*, [2001] R.J.Q. 321 (C.A.); leave to appeal to S.C.C., [2001] C.S.C.R. no. 164, *sub nom. Caisse Populaire Desjardins de Val-Brilliant* v. *Blouin*.

reasonableness of a rule which denies to a lender security on an asset purchased or made more valuable as a result of the loan. Creditors can secure themselves on other property, even when exempt. Why should RRSPs be different? The issue is complex and outside the scope of the present project, but the Institute flags the problem as one deserving attention in the near future.

1. Enforcement

[27] Section 2(b) of the *Civil Enforcement Act* provides that "except as otherwise provided for in this or any other enactment, all property of an enforcement debtor is subject to writ proceedings under this Act." The Act later makes it clear that personal and real property available to the creditor must be exigible, that is, "not exempt."[35] While the Act does not create special provisions applying only to RRSPs,[36] the meaning as a whole is plain: a judgment creditor can enforce a judgment against all property of a debtor, including interests in pensions, RRSPs, DPSPs and RRIFs, *unless they are declared to be exempt by some legislation*.[37]

[28] The majority of decided cases here and elsewhere in Canada make it clear that RRSPs and RRIFs are exigible assets.[38] There are very few cases on DPSPs, but the

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[35] CEA, ss. 1(1)(u), 2(b), 43, 73, 88-93.

[36] Other assets, like cash, instruments, secured obligations and securities, are given special treatment in Part 6 of the CEA.

[37] Exemptions are discussed later in this chapter.

[38] RRSPs have been held to be exigible or property of the bankrupt in the following provinces:
Alberta - *Capital City Savings & Credit Union Ltd*. v. *299474 Alta. Ltd.* (1989), 102 A.R. 93, 70 Alta. L.R. (2d) 215 (Q.B.) and (1990), 105 A.R. 255, 72 Alta. L.R. (2d) 231 (Q.B.) [hereinafter *Capital City Savings*].
British Columbia - *M.N.R.* v. *Guterres*, [1994] F.C.J. No. 1076 (F.C.T.D.); *Re Bodnarchuk,* [1995] 3 F.C. 300 (F.C.T.D.); *cf. Vancouver A and W Drive-Ins Ltd.* v. *United Food Services Ltd.* (1981), 38 B.C.L.R. 30 (S.C.) [hereinafter *Vancouver A & W*].
Saskatchewan - *Re Lifshen* (1977), 78 D.L.R. (3d) 444 (Q.B.), aff'd 25 C.B.R. (N.S.) 232; *Delaire* v. *Delaire* (1996), 147 Sask. R. 161 (Q.B.) (dicta) [hereinafter *Delaire*].
Manitoba - *C.I.B.C.* v. *Meltzer* (1991), 6 C.B.R. (3d) 1 (Man. Q.B.); *Re Sinclair* (1993), 63 F.T.R. 286 (Fed. Ct.).
Ontario - *National Trust* v. *Lorenzetti* (1983), 41 O.R. (2d) 772, 148 D.L.R. (3d) 575 (H.C.); *Re Katz* (1984), 52 C.B.R. (N.S.) 311 (Ont. S.C.) (dicta); *Morgan Trust Co.* v. *Dellelce*, [1985] 2 C.T.C. 370 (Ont. S.C.) [hereinafter *Morgan Trust*]; *Re Swanborough* (1985), 55 C.B.R. (N.S.) 98 (Ont. S.C.).
Quebec - *Re Douyon* [1982] C.S. 471 (Que.).
New Brunswick is an exception. See *Watt* v. *Trail* (2000), 583 A.P.R. 334 (N.B.C.A.); *cf. Re Greening*

(continued...)

answer is likely the same.[39] In Alberta, the leading case is *Capital City Savings*, decided (in two parts) before the enactment of the *Civil Enforcement Act*. In the first *Capital City* case,[40] Master Funduk concluded that an RRSP could be seized, but refused to collapse the plan on the evidence before him. In a later application, Master Quinn permitted the plan to be collapsed.[41]

[29] Under the *Civil Enforcement Act*, the process for seizing and collapsing an RRSP is likely as follows:

- The judgment creditor instructs a civil enforcement agency to seize the RRSP under s. 45 of the Act by serving the appropriate notices on the depository and the debtor.
- The agency (or perhaps the creditor) instructs the depository to collapse the plan, relying on s. 8 of the *Civil Enforcement Act*. The agency is simply exercising the power of the debtor to collapse his or her plan.[42]

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[38] (...continued)
(1989), 95 N.B.R. (2d) 386, 73 C.B.R. (N.S.) 24 (Q.B.).
See also Dunlop, C.R.B., *Creditor-Debtor Law in Canada*, 2d ed. (Toronto: Carswell, 1995) [hereinafter "Dunlop"] at 268-269, 274; Houlden, L.W. & Morawetz, C.H., *The 2001 Annotated Bankruptcy and Insolvency Act* (Scarborough, Ont.: Carswell, 2000) [hereinafter "Houlden and Morawetz"] at 316-318; Norwood D. & Weir, J.P., *Norwood on Life Insurance Law in Canada*, 2d. ed. (Scarborough, Ont. : Carswell, 1993) [hereinafter "Norwood"], cc. 9 and 11; Robinson, L.R., *British Columbia Debtor-Creditor Law and Precedents*, looseleaf (Scarborough, Ont.: Carswell, 1993) [hereinafter "Robinson"] at 5.39–5.41; and articles by Belzil, F., "Seizure of Personal Property" in Civil Enforcement Act (Continuing Professional Competence Seminar, Legal Education Society of Alberta, 9 April 1996); Biro, P.L., "The Erosion of Life Insurance RRSP Immunity from Creditor's Claims" (1993) 13 Est. & Tr. J. 153 [hereinafter "Biro"]; Kagna, A.B., "Execution Against Insurance RRSPs" (1995) 10 Natl. Credit./Debt. Rev. 42 ; Law, R.W., "From the Law Reports: Re Bliss" (1985) 7 Est. & Tr. Q. 1 [hereinafter "Law"]; McCabe, *supra* note 32; Springman, M.A. & Gertner, E., "Enforcement Against Life Insurance, Pensions, and RRSP's", in Springman, M.A. & Gertner, E., eds., *Debtor-Creditor Law: Practice and Doctrine* (Toronto: Butterworths, 1985) [hereinafter "Springman and Gertner"]; and Taylor, B., "Execution against R.R.S.P.s," (1985) 1 Natl. Credit./Debt. Rev. 13 [hereinafter "Taylor"].

[39] *Re Rogers* (1993), 18 C.B.R. (3d) 239 (N.S.T.D.); *cf. Re Neuls* (1985), 37 Sask. R 60; 17 D.L.R. (4th) 554 (Sask. C.A.).

[40] *Supra* note 38.

[41] *Ibid*.

[42] A trustee in bankruptcy would appear to have the power to deregister a non-exempt RRSP. See *Re Katz*, *supra* note 38; *Re Swanborough*, *supra* note 38; but see *Re McKenster* (1985), 10 C.C.E.L. 193, 58 C.B.R. (N.S.) 308 (N.S.T.D.). See also Kleiner, S., "Registered Retirement Savings Plans Owned by Bankrupts: Recent Change in the Law (1977), 24 C.B.R. (N.S.) 239; Houlden and Morawetz, *supra* note
(continued...)

- The depository must deduct the required withholding tax and any agreed-on fees payable to itself, and pay the balance to the agency for distribution to creditors entitled to share under Part 11 of the *Civil Enforcement Act*.

[30] Some RRSPs are said to be "locked in." Such plans provide that the depositor cannot withdraw money or collapse the plan before a certain date or the happening of an event. Our understanding is that locked in RRSPs are commonly used in two situations: (1) as a receptacle for money paid out of a pension plan after the termination of the employee's job,[43] and (2) where vendors offer plans with guaranteed interest rates, and demand in return that the money stay in the plan for a certain number of years. Locked-in plans are available in other situations, but the Institute does not have any information about percentages of locked-in plans in Alberta.

[31] It is sometimes said that locked in RRSPs are not exigible or are exempt. In the drafter's view, neither statement is true of non-insurance plans. If such RRSPs are not declared by statute to be exempt, they are exigible, that is, the bundle of rights of the depositor/debtor can be seized by a civil enforcement agency.[44]

[32] It is true that the seizure may be an empty victory. If the depositor cannot withdraw money or collapse the plan, neither can the civil enforcement agency. There is some dispute in the cases on the extent of the rights in the seizing sheriff or agency.[45] However, there may still be situations where it would be helpful to seize or get a receivership order against a locked-in plan, especially where the locked-in period

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[42] (...continued)
38 at 317.

[43] See Issue 12 which asks whether any exemption of RRSPs and RRIFs should extend to LIRAs, LIFs, and LRIFs.

[44] The *Capital City Savings* cases, *supra* note 38, held that this was Alberta law before the CEA, and that statute has expanded the range of the writ of enforcement. See also Superintendent of Bankruptcy, *Directive 22: Realization of Estate Assets* (issued 1988; reissued 1991 and 1993).

[45] Compare *Capital City Savings*, *supra* note 38; *Montreal Trust Co. of Canada* v. *Lafarge Canada Inc.* (1995), 126 Sask. R. 130 (Q.B.); and *Re MacKinnon* (1991), 3 C.B.R. (3d) 219 (N.S.T.D.). See also Springman and Gertner, *supra* note 38; Taylor, *supra* note 38; and McKee, D., "Debtor-Creditor Issues Affecting Annuity Contracts" (1993) 12 Est. & Tr. J. 242 [hereinafter "McKee"].

is nearly over. The objective of the creditor would be to seize the plan and put the agency on notice that, when the locked-in period expires, the depository is to collapse the plan and pay the proceeds to the agency on behalf of the creditors.

2. Garnishment

[33] One of the achievements of the *Civil Enforcement Act* was to extend substantially the range of money obligations which could be attached by the creditor.[46] Section 78(a) of the Act provides that "any current or future obligation is attachable by garnishment." Three definitions are significant. Section 77(1)(i) defines "obligation" to mean "a legal or equitable duty to pay money." A current obligation is defined as an obligation that on the day of service of a garnishee summons on the garnishee is payable, payable on demand or payable on satisfaction of a condition such as the presentation of a pass-book to a bank.[47] The definition of "future obligation" needs to be quoted in full:

> 77(1)(c) 'future obligation' means an obligation or any portion of an obligation that is not a current obligation and that
>
> (i) will arise or become payable in certain circumstances or at a certain time or times under
>
> (A) an existing agreement or trust,
>
> (B) an issued security, or
>
> (C) the will of a deceased person,
>
> (ii) will arise or become payable in the ordinary course of events from an existing employment relationship,
>
> (iii) is a statutory obligation that is likely to arise or become payable as a result of an event that has occurred, or
>
> (iv) may arise or become payable in respect of an existing cause of action.

The Act also provides for continuing garnishment under s. 79. A garnishee summons can be renewed under rule 479 of the *Alberta Rules of Court*.

[34] There is no case law directly on the garnishment of RRSPs and similar plans in Alberta. The cases from other jurisdictions may not apply here because they interpret different statutes. The non-Alberta cases are conflicting, but a majority conclude that RRSPs and the like are not garnishable until the depositor has agreed to or elected a payment scheme, or has agreed to collapse the plan, or unless the RRSP agreement

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[46] See generally Robinson Burns, S. "Garnishment" in Civil Enforcement Act (Continuing Professional Competence Seminar, Legal Education Society of Alberta, 9 April 1996).

[47] CEA, ss. 77(1)(a); 83(1).

provides otherwise.[48] While garnishment in the *Civil Enforcement Act* is a much broader remedy, Alberta courts may well come to the same conclusion.

[35] Most RRSPs provide that the depositor, during what is often called the accumulation phase, will pay money or transfer assets into the plan. Unless the plan is locked in, the depositor may draw out some or all of the money or assets in the plan, subject to tax. Assuming that the depositor does not make any withdrawal but continues to accumulate money or assets, the plan agreement will provide that, at some later time, the depositor must make an election as to the disposition of the plan. Usually, the choice is to cash in the RRSP and pay tax on the money received, or convert the RRSP into an annuity or a RRIF.

[36] Until the election is made, the RRSP cannot be described as a current obligation under s. 77(1)(a) of the *Civil Enforcement Act*, and it is doubtful that it is a future obligation, that is, a money obligation which "will arise or become payable in certain circumstances or at a certain time or times under ... an existing agreement or trust" (to choose the applicable elements of s. 77(1)(c)). The law will remain uncertain until the Alberta courts have an opportunity to flesh out the legislative framework.

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[48] A majority of the decided cases find that RRSPs are not garnishable. See *Vancouver A & W*, *supra* note 38; *Re Bliss* (1983), 44 O.R. (2d) 129 (Ont. H.C.); *Morgan Trust*, *supra* note 38; *DeConinck* v. *Royal Trust Corp. of Canada* (1988), 90 N.B.R. (2d) 321 (C.A.); *National Bank of Canada* v. *Creative Touch Millworks Inc.* (1988), 31 E.T.R. 312, [1988] 2 W.W.R. 180 (Sask. Q.B) [hereinafter *Creative Touch* cited to E.T.R.]; *Manufacturers Life Insurance Co.* v. *M.N.R.,* [1991] 2 C.T.C. 2171 (T.C.C.); *National Trust Co.* v. *R..*, [1997] 1 C.T.C. 2549 (T.C.C.); *Richmond Savings Credit Union* v. *Miller,* [1999] 4 C.T.C. 210 (B.C.S.C.); *cf. Discovery Trust Co.* v. *Abbott* (1982), 38 B.C.L.R. 55 (S.C.). These cases often talk about the trust nature of the RRSP and cite *Re McMahon* (1979), 108 D.L.R. (3d) 71 (B.C.C.A.).
Some Saskatchewan cases go so far as to hold that no debt arises, even when the debtor has collapsed the RRSP and asked for payment, until payment is actually received. See *Creative Touch*, above; *Delaire*, *supra* note 38; *Evenson* v. *Evenson* (1996), 142 Sask. R. 166 (Q.B.) (dicta).
A minority of cases say the RRSP is garnishable. See *Minister of National Revenue* v. *Gero*, [1980] 1 F.C. 69 (T.D.); *Bateman* v. *TD Bank* (1991), 64 B.C.L.R. (2d) 27 (S.C.) (dicta).
There is little authority on whether an RRSP is garnishable once a payment or payments have been agreed on, although *cf. Canada* v. *Waldteufel*, [1995] F.C.J. No. 307 (F.C.T.D.).
See also Dunlop, *supra* note 38 at 384; Norwood, *supra* note 38, cc. 9 and 11; Robinson, *supra* note 38 at 4.129–4.138; Springman and Gertner, *supra* note 38 at 29-30, 45-52; and articles by Biro, *supra* note 38; Bowman, S.W., "Third Party Demands–Application to RRSP–Measure of Damages" Case Comment DeConinck v. Royal Trust Corp. of Canada (1988), 36 Can. Tax J. 1514; Law, *supra* note 38; McCabe, *supra* note 32; McKee, *supra* note 45; McReynolds, S., "Sheltering RRSP Assets from Creditors at Death" (1984) 6 Est. & Tr. Q. 106 [hereinafter "McReynolds"]; Taylor, *supra* note 38; and Williamson, *supra* note 32.

[37] Matters become clearer when the depositor elects to purchase an annuity or a RRIF with the proceeds of the RRSP. Now there is a scheme of payments, which can be attached as a series of future obligations under a continuing garnishment. Assuming that there is no express exemption and assuming that the agreement does not provide otherwise,[49] the garnishee summons, issued under the *Alberta Rules of Court* and served on the depository, should catch present and future payments for the period of time set out in s. 79 until certain terminating events set out in s. 79 occur, or unless the summons is renewed.[50]

[38] We assume that a similar analysis applies to DPSPs, although there are very few cases.

3. Equitable execution

[39] Equitable execution includes receivership and other remedies developed by the courts of equity to enforce that court's decrees and to supplement the limited remedies available at common law.[51] Immediately before the enactment of the *Civil Enforcement Act*, most cases restricted equitable execution to situations where the debtor's property was exigible or garnishable, unless there were special circumstances justifying the more expensive and complex equitable remedy.[52] A few cases, including some in Alberta, used the special circumstances formula to justify a more generous use of the remedy, including the grant of equitable execution against assets expressly declared to be exempt by statute.[53]

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[49] Exemptions are discussed later in this chapter.

[50] Although see the line of Saskatchewan cases which hold that no garnishable debt arises, even when the debtor has collapsed the RRSP and asked for payment, until payment is actually received. See *Creative Touch*, *supra* note 48; *Delaire*, *supra* note 38; *Evenson* v. *Evenson*, *supra* note 48.

[51] Dunlop, *supra* note 38, c. 12. See also Bowes, R.H., "Receivers and Special Remedies" in *Civil Enforcement Act* (Continuing Professional Competence Seminar, Legal Education Society of Alberta, 9 April 1996); Robinson, *supra* note 38, c. 9.

[52] *Fox* v. *Peterson Livestock Ltd.* (1982), 17 Alta. L.R. (2d) 311 (C.A.).

[53] *Simon* v. *Simon* (1984), 45 O.R. (2d) 534, 42 C.P.C. 133 (S.C.); *Lavigne* v. *Robern* (1986), 56 O.R. (2d) 385 (S.C.); *Toronto Dominion Bank* v. *Berezowsky* (1987), 77 A.R. 297, 49 Alta. L.R. (2d) 337 (Q.B.) [hereinafter *Berezowsky*]; M.J.*R.* v. *A.R.* (1995), 167 A.R. 241, 28 Alta. L.R. (3d) 230 (Q.B.); *cf. Vancouver A & W*, *supra* note 13; but see *Pundit* v. *Ruhman* (1987), 76 A.R. 229, 49 Alta. L.R. (2d) 367 (Master); *Re Burke* (1988), 93 A.R. 318, 72 C.B.R. (N.S.) 255 (Q.B.).

[40] The availability of equitable execution against exempt assets appears not to be available under the *Civil Enforcement Act.* Section 85(1) provides in part that "where certain *exigible* property of an enforcement debtor cannot otherwise be conveniently realized, the Court [may grant equitable execution]."[54] "Exigible" is defined as follows:

> 1(1)(u) 'exigible' means, with respect to property, not exempt from writ proceedings or distress proceedings.

The case law on s. 85 appears to support the view that equitable execution, at least under the *Civil Enforcement Act*, cannot be used against exempt property.[55] A receivership order under s. 13 of the *Judicature Act*[56] is not literally caught by the restrictive wording of s. 85 of the *Civil Enforcement Act*, although Perras J. in *K.L.A.* concludes that some at least of the rules governing the grant of receivership orders under the *Judicature Act* have been "supplanted" by the criteria set out in ss. 85 and 86 of the *Civil Enforcement Act.*[57]

4. The exemption of insurance RRSPs and similar plans

[41] Numerous Alberta and federal statutes provide that certain types of property or income will be exempt from creditors' remedies. This memorandum noted earlier how pensions and insurance RRSPs, DPSPs and RRIFs are usually exempt from enforcement and garnishment, while non-insurance RRSPs, DPSPs and RRIFs are exigible and garnishable. This section will say more about the exemption sections in the *Insurance Act* which affect retirement savings plans.[58]

[42] Exemptions of life insurance have been traced back to the early nineteenth century and are common in Insurance Acts today.[59] The idea was originally to protect the widow and children of the deceased wage-earner, but the exemption provisions

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[54] Emphasis added.

[55] *K.L.A.* v. *R.C.S.* (1997), 211 A.R. 61, 55 Alta. L.R. (3d) 24 (*sub nom. Allen* v. *Shaw*) (Q.B.) [hereinafter *K.L.A.*]; *cf. Fruh* v. *Mair* (1998), 229 A.R. 375 (Q.B.).

[56] R.S.A. 2000, c. J-2.

[57] *K.L.A.*, *supra* note 55.

[58] We discuss briefly pension exemptions in c. 3, Issue 12.

[59] Dunlop, *supra* note 38 at 495-496.

were soon extended to exempt the cash surrender value of policies, and to cover beneficiaries other than widows and children. The exemption of the usual life insurance policy is not an issue in the present project.

[43] In addition to the life insurance policies, insurance companies have at least since Confederation sold annuities.[60] Whether annuities are fairly described as life insurance is a difficult issue, depending on the precise terms of the contract.[61] After the *Income Tax Act* was amended to give tax deferral status to RRSPs and similar plans, the insurance industry started to market such plans. Insurer and non-insurer vendors of retirement plans sold by insurers and non-insurers have tried to copy each other's products with the result that the insurance connection has become increasingly tenuous.[62]

[44] When the courts held that annuities sold by insurance companies were not life insurance,[63] the *Uniform Life Insurance Act*, followed by all common law provinces, amended the definition of life insurance to include annuities or agreements to enter into annuities. In 1981, the Alberta *Insurance Act*[64] was amended to provide that the term "life insurance" includes "an undertaking to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount, for a term dependent solely or partly on a human life, and such an undertaking shall be deemed always to have been life insurance."[65] The current *Insurance Act* sections are reproduced in Appendix 4.[66] After some early uncertainty, the recent court decisions have read

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[60] The history is described in *Re Coopérants*, *supra* note 12.

[61] Baer, M.G. & Rendall, J.A., eds., *Cases on the Canadian Law of Insurance*, 6th ed. (Scarborough, Ont.: Carswell, 2000) at 30-63; Rothberg, E.A.J., "Life Insurance and Creditor Protection: Review and Update, 2000" (2000) 19 Est. Tr. & Pensions J. 269 [hereinafter "Rothberg"].

[62] Rothberg, *ibid*. at 285-286.

[63] *Gray* v. *Kerslake*, [1958] S.C.R. 3, 11 D.L.R. (2d) 225 [hereinafter *Gray*].

[64] R.S.A. 1980, c. I-5.

[65] S.A. 1981, c. 49, amending s. 1(m.1) and adding s. 240.1 of the Act. On the amendment in 1981, see McCabe, *supra* note 32 at 227-228.

[66] *Insurance Act*, s. 555.

this extended definition generously in cases where exemptions from creditors were at issue.[67] The effect of the amendments was to extend the exemptions of life insurance to annuities, RRSPs and RRIFs, if they name the proper beneficiary and otherwise fit within the sections.

D. Enforcement of Claims against RRSPS, DPSPS and RRIFs in the Estate of the Deceased Debtor

[45] To this point, the discussion has assumed that the depositor/debtor is alive. When the depositor dies, the situation becomes more complex. The beneficiary of the RRSP, DPSP or RRIF claims payment of the proceeds of the plan. The argument is usually that the plan does not become part of the depositor's estate but passes directly to the beneficiary.

[46] The beneficiary will be confronted by the creditors of the depositor's estate who claim that the proceeds of the plan do become part of the depositor's estate and are

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[67] A substantial group of cases interpret the amended definition of "life insurance" to include RRSPs. See *eg.*, *Re Larocque* (1982), 38 O.R. (2d) 385 (S.C.); *China Software Corp.* v. *Lembigler* (1990), 45 C.P.C. (2d) 41; 4 C.B.R. (3d) 185 (B.C.S.C.); *Lofts* v. *Lofts,* [1991] 2 W.W.R. 586 (Sask. Q.B.); *C.I.B.C.* v. *Meltzer*, *supra* note 38; *Royal Bank* v. *Oliver*, (1992), 11 C.B.R. (3d) 82 (Sask. Q.B.); *Re Rogers*, *supra* note 39; *M.N.R.* v. *Anthony* (1995), 129 Nfld. & P.E.I.R. 91, 124 D.L.R. (4th) 575 (Nfld. CA); *Christensen Estate* v. *Christensen* (1996), 184 A.R. 194, 39 Alta. L.R. (3d) 101 (C.A.); *Re Sykes* (1998), 156 D.L.R. (4th) 105 (B.C.C.A.); *B.C. Enterprise Corp.* v. *Springall* (1999), 12 C.C.L.I. (3d) 203 (B.C.S.C.); *Bank of Montreal* v. *Mercer* (2001), 197 Nfld. & P.E.I. R. 290 (Nfld. S.C.). For a similarly expansive approach, see *Ramgotra*, *supra* note 7; and *Re Coopérants*, *supra* note 12. Compare *Re Neuls*, *supra* note 39 (a case before the amendment of the *Insurance Act*).
Some bankruptcy cases find the RRSP to be exempt but grant the bankrupt a conditional discharge. See *eg.*, *Re Larocque*, above; and *Re Rogers*, *supra* note 39.
The exemption does not apply where the RRSP agreement does not contain an undertaking by the depository to provide an annuity. See *Morgan Trust*, *supra* note 38. Nor would s. 580 apply to an RRSP which does not name as beneficiary one of the family members listed in the section.
Some earlier cases concluded that the equivalent of s. 580 of the *Insurance Act* exempts payments from an insurance annuity or RRIF to the beneficiary but not to the annuitant. See *Bank of Montreal* v. *Arrowsmith* (1984), 7 C.C.L.I. 256 (N.S.T.D.); *Bank of Montreal* v. *Freedman* (1984), 58 B.C.L.R. 289 (S.C.); *Crosson* v. *Crosson* (1985), 14 C.C.L.I. 246 (B.C.S.C.); *Berezowsky*, *supra* note 53. These cases were not followed and the section, interpreted literally, was applied to payments to the annuitant as well as the beneficiary in *Whalley* v. *Harris Steel Ltd.* (1997), 46 C.C.L.I. (2d) 250, 17 C.C.P.B. 1 (Ont CA); followed in *Bank of Montreal* v. *Mercer*, above.
See also Dunlop, *supra* note 38 at 495-500; Houlden and Morawetz, *supra* note 38 at 316-318; Norwood, *supra* note 38, cc. 9 and 11; Robinson, *supra* note 38, cc. 4 (garnishment), 5 (execution against personal property) and 9 (equitable execution); and Springman and Gertner; *supra* note 38; and articles by McCabe, *supra* note 32, McKee, *supra* note 45, McNairn, C.H.H., "Investments in Segregated Funds: Their Protection from Creditors" (1996) 27 Can. Bus. L.J. 161 [hereinafter "McNairn"] ; Rothberg, *supra* note 61; and Stephens, G., "Update on Creditor Protection" (1998) 18 Est. Tr. & Pensions J. 119.

therefore liable to pay the creditors' claims before anything is paid to the beneficiary. A third claimant will be the creditors of *the beneficiary* who, at some stage, want the proceeds to satisfy their claims. The result is a free-for-all scramble for the plan proceeds which has caused the courts much trouble.

1. Insurance RRSPs, DPSPs and RRIFs

[47] RRSPs and similar plans sold by insurance companies are governed by ss. 554, 555, 575 and 580 of the *Insurance Act*:[68]

> 554 In this Subpart,
> (b) "beneficiary" means a person, other than the insured or the insured's personal representative, to whom or for whose benefit insurance money is made payable in a contract or by a declaration;
>
> Annuity deemed life insurance
> 555 For the purposes of this Subpart, an undertaking entered into by an insurer to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount, is deemed to be and always to have been life insurance whether the annuity is for
> (a) a term certain,
> (b) a term dependent either solely or partly on a human life, or
> (c) a term dependent solely or partly on the happening of an event not related to a human life.
>
> Irrevocable designation
> 575(1) An insured may in a contract or by a declaration, other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured designate a beneficiary irrevocably, and in that event the insured, while the beneficiary is living, must not alter or revoke the designation without the consent of the beneficiary and the insurance money is not subject to the control of the insured or of the insured's creditors and does not form part of the insured's estate.
> (2) When the insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed as provided in subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.
>
> Insurance money not part of estate
> 580(1) When a beneficiary is designated, the insurance money, from the time of the happening of the event on which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.
> (2) While a designation in favour of a spouse, child, grandchild or parent, or any of them, of a person whose life is insured is in effect, the insurance

[68] Sections 574, and 576 to 579, which also deal with exemptions and other matters, are less significant to this discussion.

> money and the rights and interests of the insured in the insurance money and in the contract are exempt from writ proceedings.

[48] Both ss. 75 and 580(1) make it clear that the "insurance money," including the proceeds of RRSPs and similar plans, does not form part of the insured's estate.[69] The proceeds from a life insurance RRSP or similar plan pass directly to the beneficiary of the plan, and are not subject to claims by the creditors of the estate, at least in the administration of the estate.[70] There is some suggestion in the cases and commentators that creditors of the estate may bring separate and independent actions against the beneficiary.[71]

[49] Sections 575 and 580(1) are not exemption sections, like s. 580(2); their only effect is to take RRSPs and similar plans out of the estate of the depositor and therefore out of the grasp of the estate creditors. It is also significant that ss. 575 and 580(1) protect all designated beneficiaries, not just the family beneficiaries listed in s. 580(2).[72] Because of the definition of "beneficiary" in s. 554(b), ss. 575 and 580(1) are not likely to apply to a designation of the insured's estate or personal representative.[73]

[50] Section 580(2) does a different job from s. 580(1). Where a designation in favour of one or more of the listed family members is in effect, s. 580 creates an exemption of "the insurance money and the rights and interests of the insured in the insurance money and in the contract" from writ proceedings. Section 580(2) has a

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[69] Section 555. For an RRSP to fit within s. 555, it must contain "an undertaking entered into by an insurer to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount." See Fien, C.M., "Waugh Estate v. Waugh: More About the Nature of RRSPs" (1990-91) 10 Est. & Tr. J. 37 [hereinafter "Fien"] at 43-46.

[70] *Clark Estate* v. *Clark* (1997), 15 E.T.R. (2d) 113, [1997] 3 W.W.R. 62 (Man. C.A.) [hereinafter *Clark*]; *Fekete Estate* v. *Simon* (2000), 32 E.T.R. (2d) 202 (Ont. S.C.) [hereinafter *Fekete*]; see also *Olsen* v. *Olsen Estate* (1990), 30 R.F.L. (3d) 447 (Sask. Q.B.). See articles by McReynolds, *supra* note 48 at 107-109; Fien, *ibid.* at 43-46; McKee, *supra* note 45 at 250, 257-258; McNairn, *supra* note 67 at 173-174; Compare *Re Brown Estate,* [1993] 2 W.W.R. 513 (Sask. Q.B.); commented on in Norwood, D., "The Life Insurance Family Beneficiary" (1994) 13 Est. & Tr. J. 256 at 262.

[71] See next section on non-insurance RRSPs, DPSPs and RRIFs.

[72] McKee, *supra* note 45 at 250, 257-258; McNairn, *supra* note 67 at 173-174.

[73] McKee, *ibid.* at 258; McNairn, *ibid.* at 173-174.

significant role while the depositor is alive, but does it have any relevance after the depositor's death?

[51] Section 580(2) would appear to be unnecessary to defeat the claims of the estate creditors against the proceeds of the RRSP or similar plan, although it may have been intended to be a second safeguard for the family beneficiaries. Section 580(2) may possibly shield the family beneficiary who receives proceeds from the RRSP from claims by *the beneficiary's creditors*,[74] including actions brought by creditors of the estate against the beneficiary. Or s. 580(2) may offer no assistance to beneficiaries after the depositor's death.[75]

2. Non-insurance RRSPs, DPSPs and RRIFs

[52] Where the RRSP was not sold to the depositor by an insurance company, the *Insurance Act* offers no protection against creditors after the depositor's death.[76] Most cases involve a competition between the plan beneficiary and the estate creditors. The beneficiary argues that the plan never becomes part of the depositor's estate but passes directly to the beneficiary. The estate creditors argue the reverse, that the plan and its proceeds do become part of the depositor's estate and are therefore liable to pay the creditors' claims before anything is paid to the beneficiary.

[53] The law on this type of dispute has become complex and uncertain, especially in Alberta where the Institute is not aware of any decided cases on point.[77] In other jurisdictions, three broad solutions have found acceptance. The courts have held that (1) the RRSP is part of the depositor's estate and is available to the estate's creditors;[78] (2) the RRSP is not part of the depositor's estate and is unavailable to the estate's

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[74] *Insurance Act*, s. 580(1) does not perform this function. See McKee, *ibid.* at 250, 258.

[75] McKee, *ibid.* at 263-265; McNairn, *supra* note 67 at 173-174.

[76] The following discussion relies heavily on Corbin, B.S., "RRSPs: Partial Protection Against Creditors?" (2000) 20 Est. Tr. & Pensions J. 33 [hereinafter "Corbin (2000)"] and the many other articles and casenotes on the problem by Corbin.

[77] For a useful discussion, see ALRI *Beneficiary Designations*, *supra* note 12 at 14-17.

[78] *C.I.B.C.* v. *Besharah* (1989), 68 O.R. (2d) 443 (H.C.); *Waugh Estate* v. *Waugh* (1990), 37 E.T.R. 146; 63 Man. R. (2d) 155 (Q.B.); *Pozniak Estate* v. *Pozniak* (1993), 50 E.T.R. 114, [1993] 7 W.W.R. 500 (Man. C.A.). See also article by Fien, *supra* note 69.

creditors;[79] or that (3) the RRSP is not part of the depositor's estate but is available to the estate's creditors through a claim outside the estate directly against the beneficiary.[80] It is unclear which solution will be adopted in Alberta.

[54] When the dispute arises between the beneficiary and his or her creditors in a non-insurance situation, there would appear to be no barrier to the creditors exercising their rights against the RRSP proceeds.[81]

E. Exemptions of RRSPs, DPSPs and RRIFs in Other Canadian Common Law Jurisdictions

[55] Most Canadian common law jurisdictions are similar to Alberta in exempting only insurance RRSPs and similar plans, but some provinces have extended exemptions to non-insurance products.[82] These exemptions are discussed briefly below; the relevant sections are set out in Appendix 5.

[56] The Saskatchewan *Exemptions Act* exempts annuities in the following language:[83]

> 9(1) The property and interest of an annuitant in an annuity or of a person interested in or entitled to a contract for an annuity under the *Government Annuities Act* (Canada), and any moneys payable or paid under a contract for an annuity, shall be exempt from seizure, levy or attachment by or under the process of any court, and shall not be affected by any trust, charge or lien.

Section 9 has been held to exempt RRSPs as "a contract for an annuity."[84]

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[79] *Baltzan Estate* v. *Royal Bank*, [1990] 3 W.W.R. 374 (Sask Q.B.).

[80] *Clark*, *supra* note 70; *Fekete*, *supra* note 70; *Banting* v. *Saunders Estate* (2000), 34 E.T.R. (2d) 163 (Ont. S.C.). See also articles by McReynolds, *supra* note 48 and Corbin (2000), *supra* note 76.

[81] McKee, *supra* note 45 at 263-265; McNairn, *supra* note 67 at 173-174.

[82] McKee, *ibid.* at 256.

[83] R.S.S. 1978, c. E-14.

[84] *Churchill (Trustee of)* v. *Churchill* (1993), 17 C.B.R. (3d) 222 (Sask. Q.B.); *Royal Bank* v. *Miller* (1993), 19 C.B.R. (3d) 208 (Sask. Q.B.).

[57] At the date of this memorandum, Saskatchewan is the only province to pass a statute following (with some modifications) the ULCC Uniform Bill.[85] The act, which is likely to come into force on January 1, 2003, exempts most RRSPs, DPSPs and RRIFs.[86] It does not expressly repeal s. 9(1) of the *Exemptions Act*.

[58] The Prince Edward Island *Designation of Beneficiaries under Benefit Plans Act*[87] creates an exemption of a "plan" which is defined to include "a retirement savings plan, home ownership savings plan and a retirement income fund as defined in the *Income Tax Act* (Canada)." The exemption is similar to the *Insurance Act* exemption sections.

[59] The British Columbia *Law and Equity Act*[88] deals with RRSPs and RRIFs which are outside the scope of the *Insurance Act*. Payments from such plans are, after the death of the annuitant, enforceable by the beneficiary, and "the benefit is not part of the estate of the annuitant." The sections do not expressly create an exemption of such plans or the payments out of them.

[60] The Quebec *Trust Companies and Savings Companies Act* provides that "moneys constituting fixed-term annuities are unseizable in the hands of the trust company as fixed-term annuities transacted by insurers."[89] There is a substantial case law on the section.[90]

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[85] *Bill 23*, *supra* note 4.

[86] *Bill 23*, *ibid.*, s. 3(3) provides that the exemption does not apply "with respect to the enforcement of a maintenance order."

[87] R.S.P.E.I. 1988, c. D-9, ss. 1, 9 and 10.

[88] *Law and Equity Act*, R.S.B.C. 1996, c. 253, ss. 49-51.

[89] *Trust Companies and Savings Companies Act*, R.S.Q., c. S-29.01, s. 178.

[90] See *eg.*, *Canada* v. *Crevier*, [1993] F.C.J. No. 709 (F.C.T.D.); *R.W.* v. *C.H.*, [1994] Q.J. No. 1202 (Que. S.C.)*; Banque de Nouvelle-Écosse* c. *Thibault*, [2001] R.J.Q. 2099, J.Q. No. 3815 (C.A.).

[61] The Manitoba Law Reform Commission proposed in 1990 that the *Retirement Plans Beneficiaries Act*[91] be amended to provide that benefits payable to a beneficiary under plans like RRSPs and RRIFs should not become part of the estate of the depositor, and should not be subject to claims of the creditors of the depositor. The Commission further proposed that, while a family designation is in effect, the assets of the plan and the rights and interests of the depositor be exempt from execution or seizure.[92] Neither recommendation has yet been accepted.

F. The Law in Other Countries

[62] The problems with striking a balance between the competing policies of encouraging people to save for retirement and permitting creditors to satisfy their claims against debtors are not unique to Alberta, or even to Canada. The same issues have been the subject of litigation and legislation in the United States and other Commonwealth jurisdictions such as Great Britain and Australia.

[63] There are difficulties with directly comparing the approaches taken in other jurisdictions as the types of retirement savings mechanisms tend to differ from those used in Canada. However, though the forms and specifics of retirement plans differ in other jurisdictions, overall it appears that the practice of saving for retirement is encouraged greatly, even when causes hardship to creditors.

1. United States

[64] The United States has faced the precise dilemma which is addressed herein, being whether creditors should be permitted to realize against a debtor's retirement savings funds.[93]

[65] There are several different types of retirement savings plans available in the United States. One form of plan is referred to as a "401(k) plan" (referring to the section of the U.S. *Income Tax Act* governing the plan), which is offered through

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[91] S.M. 1992, c. R138.

[92] Manitoba Law Reform Commission, *Statutory Designations and the Retirement Plan beneficiaries Act* (Winnipeg: The Commission, 1990) at 16-17. The relevant part of the report is in Appendix 7.

[93] See Sabino, A.M. & Clarke, J.P., "The Last Line of Defense: The New Test for Protecting Retirement Plans from Creditors in Bankruptcy Cases" (1997) 48 Ala. L. Rev. 613 [hereinafter "Sabino and Clarke"].

employers. “Keogh” plans may be used by self-employed individuals. People may also save for their retirement using “Individual Retirement Accounts” (“IRAs”) which are afforded special tax treatment.

[66] Exemptions to which a debtor is entitled may be found in both federal and state legislation. As in Canada where exemptions differ from jurisdiction to jurisdiction, so do exemptions in the United States, particularly in the treatment of retirement savings plans.

[67] The federal *Employee Retirement Income Security Act (1974)* (“ERISA”) protects certain employee-based retirement savings plans from creditors, in particular, 401(k) plans and certain qualified profit-sharing plans.[94] Plans which qualify under ERISA are protected from both judgment creditors and creditors in bankruptcy. The U.S. *Bankruptcy Code* provides a list of exemptions in bankruptcy, but permits states to opt out of the *Code* and impose their own exemptions. Thirty five states have opted out of the federal bankruptcy exemptions and have provided their own legislated exemptions.[95]

[68] State creditor protection laws vary greatly. Some states do not provide any protection for retirement savings funds. Twenty six states exempt all individual retirement accounts, usually by imposing some form of “spendthrift trust”. Eighteen states and the District of Columbia allow the court to determine a reasonable exemption to support the debtor and dependents.[96] Other states provide limited protection and provide for certain clawbacks, or permit the court to exercise discretion in determining an appropriate exemption.[97]

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[94] Winke, D., "Are Your Retirement Assets Protected from Creditors" (Horizon Financial Planning Corp., September 22, 2001) online: <http://winke.com/hfpc/hfpc/retascr.htm>.

[95] Ray, J.C., "Protecting Pension Assets in Personal Bankruptcy" (1994) 68 St. John's L. Rev. 409 [hereinafter “Ray”] at 411.

[96] *Ibid*.

[97] For example, in Michigan retirement accounts and individual retirement annuities are exempt from the bankrupt’s estate, although any amounts contributed to the fund within 120 days before the debtor files for bankruptcy will not be protected; see Harter, P., "Seizure of Property by a Creditor–What Property is Exempt in Michigan?", online: <http://courts.co.calhoun.mi.us/quest053.htm>. In California the exemption may be defeated if the creditor can demonstrate that the plan is not being legitimately used for

(continued...)

[69] Prior to the U.S. Supreme Court's 1992 decision in *Patterson* v. *Shumate*,[98] the law was divided as to whether an ERISA-qualified retirement savings plan was exempt from the bankrupt's estate under the U.S. *Bankruptcy Code*. The *Bankruptcy Code* provided the following exclusion from the definition of "property of the estate" in s. 541(a)(1):

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title.

[70] The U.S. Supreme Court held that this provision encompassed any relevant non-bankruptcy law, regardless of whether it was state law or federal law, including ERISA. Thus, retirement savings plans which complied with ERISA would be exempt from the reach of creditors in bankruptcy.[99]

[71] There are three interesting aspects of the *Patterson* decision:

(i) the Court stressed the importance of treating retirement plans in bankruptcy in the same manner as they would be in a normal judgment situation. The Court stated that this is necessary to prevent[100]

> ... "a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy'" quoting Lewis v. Manufacturers National Bank, 364 U.S. 603, 609. ... Declining to recognize any exceptions to that provision within the bankruptcy context minimizes the possibility that creditors will engage in strategic manipulation of the bankruptcy laws in order to gain access to otherwise inaccessible funds.

(ii) the Court specifically recognized that in balancing the interests of creditors and the need to save for retirement, Congress placed greater emphasis on the need to save for retirement;[101] and

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97 (...continued)
retirement purposes; see Landau, J.B., "Bankruptcy and Enforcement of Judgments: Protecting Retirement Assets" (1998) 19 Cal. Law. 30.

98 [1992] 504 U.S. 753 [hereinafter *Patterson*].

99 Since *Patterson* the cases have been divided as to whether plans must both be ERISA- qualified as well as have specific tax aspects, see Ray, *supra* note 95.

100 *Supra* note 98 at 764.

101 *Ibid*. at 765.

(iii) the Court noted that its decision furthered "another important policy underlying ERISA, uniform national treatment of pension benefits...Construing "applicable non-bankruptcy law" to include federal law ensures that the security of a debtor's pension benefits will be governed by ERISA, not left to the vagaries of state spendthrift law."[102]

[72] The decision in *Patterson* was limited to ERISA-qualified retirement plans and does not apply to IRAs or other types of plans. State exemption laws govern the exigibility of IRAs and other non-ERISA qualified retirement plans.

[73] A potential consideration raised earlier is whether a debtor's ability to access funds for personal use prior to retirement should affect the exigibility of the retirement fund. This argument was rejected in *In Re Meehan*.[103] This case deals with a non-ERISA qualified retirement plan in Georgia. The court held that

> the District Court perceived an inequity in allowing debtors to shield IRA funds from creditors notwithstanding the debtors ability to withdraw the corpus for personal use. In addition to the District Court, bankruptcy courts have relied on this factor. Although we recognize the force of the trustee's argument, we conclude that the case law indicates otherwise. ... In light of the foregoing precedent, and in light of the congressional concern about protecting pension benefits as recognized by the Supreme Court in *Shumate*, we conclude that debtor Meehan's potential access to the IRA funds is not sufficient to deprive her of the [exclusion].

2. Australia

[74] The Australian government takes the position that saving for retirement is of the utmost importance, and has implemented a mandatory superannuation plan for everyone who is employed. There are three key elements to the "superannuation guarantee":[104]

(i) workers contribute a set percentage of their income through their employer into private savings (as of 2002 this amount is 9% of their income) into a

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[102] *Ibid*. at 766.

[103] (1997), C.A. 11-Q.L. 12 (U.S.C.A. 11th Cir.).

[104] These elements and the following discussion of Australia's superannuation system is drawn from Mitchell, D. & O'Quinn, R.P., "Australia's Privatized Retirement System: Lessons for the United States" (1997) The Heritage Foundation Backgrounder, No. 1149.

superannuation plan of their choice. The mandatory savings can be augmented by tax-favoured voluntary contributions;

(ii) upon retirement, workers will have accumulated a large nest egg; and

(iii) a safety-net program guarantees that all retirees will receive an income that at a minimum matches the income they would have received under the former government-run program.

[75] Savings in superannuation funds are fully vested and portable between employers. They are locked in and must be preserved until the contributor reaches age 55. Early hardship withdrawals are virtually prohibited, as the circumstances under which they are permitted are very narrow and the guidelines are interpreted strictly.

[76] Superannuation funds are generally not exigible in bankruptcy, with the exception of spousal and child supports orders.

3. United Kingdom

[77] The United Kingdom has implemented different programs to encourage and assist people with saving for retirement. This is done through creditor protection of retirement assets and tax relief.[105]

[78] Almost all private pension schemes contain non-assignment provisions as a result of the *Income and Corporation Taxes Act 1988*, s. 590, which requires such provisions in order for a plan to qualify for tax relief. Many private pension schemes also contain rules which provide for the forfeiture of benefits should they become payable to creditors.[106]

[79] There are several limitations on the debtor's ability to assign benefits from certain pension plans. The *Social Security Pensions Act 1975*, s. 48(3) provides that a debtor's guaranteed minimum pension ("GMP") shall not pass on bankruptcy to any trustee or person acting on behalf of the bankrupt's creditors. The legislation does not

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105 United Kingdom Inland Revenue "Personal Pension Schemes" August 2001, online: <http://www.inlandrevenue.gov.uk/pensionschemes/pso2.htm> [hereinafter "U.K. Inland Revenue"].

106 Tennet, M. & Newman, P., "Enforcing Judgments Against Pension Rights" (Part I) (1993) 137 Sol. J. 424, (Part II) (1993) 137 Sol. J. 458.

go so far as to protect any amounts in excess of the GMP, although such amounts would likely be subject to the rules of the scheme, and the trustee is in no better position than the debtor in its ability to access funds from the scheme.

[80] Another problem with executing against pension plans is that many contain forfeiture clauses which are triggered by certain events such as bankruptcy or attempts by the contributor to alienate or charge any portion of the benefits. In such cases the benefits usually become part of a discretionary trust which is payable only to the debtor, and benefits will only be paid on the condition that they are not assigned after payment.[107]

[81] Private tax-assisted retirement savings plans in the United Kingdom have undergone significant changes in the past few years. In May of 2001 previous forms of retirement savings plans such as TESSAs and Individual Savings Accounts (ISAs) were replaced with a new form of retirement savings plans called personal pensions. Retirement savings plans which existed prior to the personal pension schemes are still valid but no new plans may be set up after May 1, 2001. Personal pensions may be set up through an employer or may be done privately. They are offered by many different institutions, including banks, building societies, life assurance companies, unit trusts and other similar bodies. The personal pension schemes are similar to Canadian RRSPs in that they are tax assisted retirement savings accounts. A major difference is that these funds are locked in and may not (subject to limited exceptions) be accessed until at least age 50. The exceptions include death of the contributor prior to age 50, or severe disability of the contributor.

[82] The tax relief that applies to these schemes includes:

i) tax relief on payments made into a personal pension scheme;

ii) the recipient is not taxed on any contributions made by an employer into the scheme;

iii) the employer is entitled to tax relief on the income contributions made into the scheme;

iv) the scheme does not pay tax on investments and income gained while funds are invested on behalf of the contributor; and

[107] *Ibid*.

v) some of the benefits from the scheme may be received free of tax.

[83] The maximum amount which may be paid into a personal pension scheme every year is percentage of the contributor's income, which increases on a sliding scale. A scheme must be approved by Inland Revenue and operated in accordance with certain guidelines.

[84] As the personal pension funds are intended to provide the contributor with benefits upon retirement they cannot be accessed before the contributor reaches age 50. Even then, the fund must be paid out mainly in the form of pension benefits (you may take 25% as a tax-free lump sum). The contributor cannot withdraw the money in the same way as with a savings account, even if the contributor is prepared to pay back the tax relief given on contributions.[108]

[85] As to the exigibility of personal pensions, in the United Kingdom a creditor has no greater rights than a debtor in the debtor's assets. Thus, the fact that a contributor has a very limited right to receive any payments from the plan until reaching the age of retirement would likely hinder a creditor from executing against a plan.

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[108] U.K. Inland Revenue, *supra* note 105.

CHAPTER 3. ISSUES

A. Introduction

[86] This consultation memorandum will now discuss the issues as they appear to the Institute. Readers are invited to comment. Your views will help the Institute to develop useful recommendations to the government on the exemption of RRSPs, DPSPs and RRIFs from creditors' remedies. Readers are also invited to comment on whether the Institute has identified the right issues, and if not, to advise what the right issues are. In any reform project consultation is critical. The Institute is keen to get information, advice and opinions from all interested people and groups.

[87] From time to time in this chapter, the drafters of this memorandum have criticized some reform proposals and expressed support for others. These opinions are by no means the views of the Institute Board which has not reached any conclusions on the recommendations to be made to government. Readers should feel free to reject views expressed here, and tell us how the law should be changed. Your views are encouraged and welcomed.

B. *Any* Exemption?

ISSUE No. 1

(a) Should there be any exemption of RRSPs and RRIFs from enforcement or garnishment by creditors of the depositor?[109]

(b) Should there be any similar exemption of DPSPs?

1. Arguments for the exemption

[88] The argument for an exemption of RRSPs and RRIFs begins from the assumption that Canadian law recognizes saving for retirement as a value worthy of protection and encouragement. Since 1957, the *Income Tax Act* has allowed a

[109] In the following discussion, no distinction is made between insurance and non-insurance RRSPs and DPSPs and RRIFs. See Issue 7.

generous tax deferral to savings in RRSPs, DPSPs and RRIFs.[110] Most pensions statutes exempt pensions entirely from execution and garnishment.[111] Several provinces allow more extended exemptions for annuities,[112] and Saskatchewan has passed a statute, following with some modifications the ULCC Uniform Bill, exempting all RRSPs, DPSPs and RRIFs.[113] There is enough similarity between pensions and RRSPs to justify at least similar treatment. There does not appear to be any political will to make pensions exigible and garnishable.

[89] The Ontario Law Reform Commission, in its 1981 *Report on the Enforcement of Judgment Debts and Related Matters*, concluded that a person's interest in his or her pension plan should not be exigible. The Commission stated the policy in terms which can be applied to RRSPs:[114]

> We believe that pension plans serve an important function by providing generally much-needed income to retired pensioners without any other substantial financial resources. To permit exigibility of an interest in a pension plan, however limited or contingent at the time of seizure, would serve ultimately to destroy or at least diminish the very source of future economic well-being.

[90] When the courts held that annuities sold by insurance companies were not life insurance,[115] the *Uniform Life Insurance Act*, followed by all common law provinces, amended the definition of life insurance to include annuities or agreements to enter into annuities. The courts have interpreted this extended definition generously in cases

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[110] Barbara Austin quotes a Department of Finance study which estimates that the cost of tax assistance through RPPs and RRSPs in 1991 was 14.915 billion dollars at the federal level. No estimates were available for the cost of tax assistance to DPSPs. See Austin, *supra* note 20 at 577.

[111] See for example *Employment Pension Plans Act*, R.S.A. 2000, c. E-8, s. 85(1).

[112] See c. 2, above.

[113] *Bill 23*, *supra* note 4. Section 3(3) provides that the exemption does not apply "with respect to the enforcement of a maintenance order."

[114] Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters*, Part 2 (Toronto: Ontario Ministry of the Attorney General, 1981) at 104. The Commission also proposed at 178-181 that most pension payments should be garnishable, subject to exemptions applicable to income payments.

[115] *Gray*, *supra* note 63.

where exemptions from creditors were at issue.[116] Legislature and courts alike have seen fit to encourage private saving for retirement and to protect such savings from creditors.

[91] An exemption of RRSPs and RRIFs does not necessarily run counter to the goals of judgment enforcement law. The principal goal of exemptions of assets or obligations from creditors' remedies is to preserve property necessary to the survival of the debtor and the debtor's family. RRSPs, DPSPs and RRIFs may not be necessary while the debtor is working, but will be crucial to his or her survival during the years of retirement (and unemployment). Exemptions in property exist now in addition to the possibility of welfare; in the same way, exemptions of RRSPs, DPSPs and RRIFs should not be rejected because most debtors can survive on Old Age Security (OAS) and the Canada Pension Plan (CPP), supplemented by the Guaranteed Income Supplement (GIS) and other welfare or assistance payments. The RRSP tax deferral is not much use if the corpus of the plan can be seized and disposed of by creditors. Exemptions law has always limited the assets which the creditor may reach; exempting savings for retirement is but another example.

[92] A conscientious owner of an RRSP may accumulate a substantial amount of money or valuable assets over a lifetime of saving. In a recent case in Newfoundland, the debtor, a retired doctor, owned insurance company RRIFs worth approximately $562,000. The RRIFs were held to be totally exempt as life insurance.[117] But a pension can also accumulate considerable value over a lifetime of employment. A substantial amount of capital is necessary to fund even a modest pension or retirement income. Moreover, the *Mercer* case can be seen as exceptional; trustees and lawyers experienced in bankruptcy and insolvency law tell us that most debtors either have no RRSP or have long since cashed it in before their financial affairs collapse completely.

2. Arguments against the exemption

[93] The purpose of a judgment enforcement system is to provide an efficient method for judgment creditors to collect their debts from debtors who are not willing to pay voluntarily. Creditors who have obtained judgments or who can meet the strict

[116] The cases on exemptions are discussed in c. 2 of this memorandum.

[117] *Bank of Montreal* v. *Mercer*, *supra* note 67.

requirements for an attachment order before judgment are entitled to payment or to freeze assets until judgment is obtained. Any exemption shrinks the pool of assets available to enforcement and garnishment. The effect may be to lead creditors to change their credit granting or credit collection policies with harmful economic and social consequences.

[94] The argument against extending exemptions to RRSPs and RRIFs partly turns on the potential for abuse. RRSPs and RRIFs can contain large amounts of money and assets, which can be extended by prohibited over-contributions to the plan.[118] Those who oppose the exemption note that the *Mercer* case is not exceptional; there have been numerous reported cases in Canada in the past ten years which considered Insurance Act exemption of RRSPs and RRIFs. Many of those cases were appealed to provincial courts of appeal and a few to the Supreme Court. Clearly, the issue has been significant enough to justify the expense of litigation.

[95] Opponents of the exemption minimize the similarity between pensions, which are locked in by legislation, and RRSPs, most of which can be collapsed at will by the debtor. It is said that pensions are really intended to provide money for retirement, while RRSPs are also a source of money during the working years of the debtor. RRSPs are closer to tax sheltered-bank accounts while pension funds are dedicated to retirement, and are tightly controlled by pension boards, supervised by government.

[96] Underlying these criticisms of the exemption of RRSPs may be a resentment about the RRSP tax deferral process, which tends to favour higher income people who have the disposable income to make such tax planning possible and desirable.[119] Exempting income payments from a RRIF on analogy to wages and salary is superficially easier than exempting the sometimes very large balance of an RRSP, especially where it is the only asset of the debtor. Debtors with RRSPs have already obtained a valuable tax deferral; why should society give them the second benefit of exemption from creditors who, it is assumed, have valid claims and judgments?

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[118] The tax penalty on over-contributions is severe. ALRI is not sure how many debtors would deliberately over-contribute in an effort to shelter wealth from their creditors.

[119] See Austin, *supra* note 20.

3. Comment

[97] Issue 1 pits our society's interest in an efficient and effective creditors remedies system against the opposed interest in saving for retirement and in protecting those savings. The society may want to prefer one policy over the other, or it may want to strike the proper balance between competing and equally valid goals. The above discussion may lead the reader to favour a *limited* exemption of RRSPs and RRIFs.

[98] The Institute invites your comments on Issue 1(a).

4. Treatment of DPSPs

[99] DPSPs have similarities to and differences from RRSPs and RRIFs. DPSPs are also tax deferral devices, intended to encourage people to save for retirement. They are devices used by employers as part of the compensation of employees, but so are pensions and group RRSPs. Many of the arguments about the exemption of RRSPs and RRIFs are relevant.

[100] Both DPSPs and group RRSPs can raise conflicts between the desires of employees and unions for generous wages and pensions as against management's interest in more flexibility, lower wages, and freedom from the restrictions of pension legislation. DPSPs raise complex issues of employment compensation, union-management relations, and pensions, none of which have much to do with individual RRSPs, although the connection is more obvious with group plans.

[101] The argument for including DPSPs in the exemption is that they work like group RRSPs and pensions, and should be treated similarly. It is significant that the ULCC Uniform Bill includes DPSPs. The importance of uniformity is explored more fully in Issue 11 below.

[102] The Institute invites your comments on Issue 1(b).

C. *Total* Exemption?

ISSUE No. 2

(a) Should RRSPs, DPSPs and RRIFs be totally exempt from *enforcement*, that is, seizure and collapse of the plan by creditors of the depositor?

(b) Should RRSPs, DPSPs and RRIFs be totally exempt from *garnishment*?

1. Total exemption from enforcement

[103] Assuming that RRSPs, DPSPs and RRIFs should be exempt in whole or in part from enforcement, two questions remain:

(1) Should the exemption from enforcement be total? That is, should the RRSP be completely exempt in all circumstances, regardless of the balance in the plan, the other assets of the debtor, and the respective merits of the debtor and creditor?

(2) If a total exemption is rejected, then what limits are appropriate?

[104] This section addresses the first issue.

[105] Those who argue that the exemption of RRSPs, DPSPs and RRIFs should extend to the totality of the plan rely on four major arguments:

(1) Encouraging saving for retirement is so important a social policy that it outweighs the importance of a workable and effective judgment enforcement system by exempting what in some cases may be an important, perhaps the only, asset of the debtor.

(2) Most pensions are totally exempt from enforcement or garnishment. RRSPs, DPSPs and RRIFs are the pension-substitutes available to self-employed workers and employees in workplaces with no pension plan. RRSPs, DPSPs and RRIFs are similar enough to pensions that they should enjoy the same exemption in creditor-debtor law. This point is even stronger where employers offer their employees group RRSP or DPSP schemes in addition to or in substitution for pension plans.

(3) Exemptions law must be simple enough to be used with confidence by lay people involved in credit management as well as by lawyers and

accountants. An overly subtle exemption rule is an invitation to litigation in situations where there may not be much to fight over. Most debtors have either cashed in their RRSPs or have small balances in their plans. A total exemption has the virtue of taking this particular asset off the bargaining table, without much cost to creditors except in rare cases. The message from several consultants was to "keep it simple."

(4) In situations where the debtor has defrauded his or her creditors, the law provides other remedies, including fraudulent conveyance and preference legislation.

[106] Those who oppose unlimited exemption of RRSPs, DPSPs and RRIFs often start by questioning the assumed similarity of such plans to pensions. They stress three significant differences:

(1) *Locked in or not?* Pensions are usually locked in, that is, not accessible until the plan is collapsed. Most RRSPs can be collapsed by the debtor, although specific plans may impose rules and penalties, and the debtor will have to pay tax on the money paid out of the plan to him or her.

(2) *What happens after termination?* Even if an employee terminates the employment before the normal retirement date, pensions legislation usually requires that the payout to the employee must be immediately paid into a locked-in pension, RRSP, or annuity. The employee cannot get the cash, unlike owners of RRSPs.

(3) *Control of plan by employee or depositor?* Pensions are administered by boards of trustees who are not bound by the wishes of individual employees as to the investment and administrative approach taken to the fund. RRSPs may be self-directed, leaving investment matters to the individual, so long as he or she meets the requirements of the *Income Tax Act* and of the individual depository as to appropriate investments in such a plan.

[107] The upshot is that pension funds are dedicated to retirement while most RRSP funds are within the reach of the depositor who may, in the words of an American

case, use the plan "as a personal bank"[120] and, one might add, a convenient tax shelter. If the parallel between pensions and RRSPs is rejected, then RRSPs deserve no exemption at all, or at least a weaker exemption. This result follows whether the RRSP is offered by an insurance company or another vendor.

[108] Whether pensions resemble RRSPs and similar plans turns on which aspects of the RRSP are emphasized. If the concentration is on the retirement savings elements of the RRSP, then the absolute exemption of pensions is more defensible. But if one emphasizes the investment plan, tax deferral side of RRSPs, if one looks at such plans as tax shelters for money which may be used later in the debtor's business or personal life, then a partial exemption seems more appropriate.

[109] Critics of the exemption of RRSPs rely on the reverse of the arguments advanced by the proponents of this reform. Saving for retirement is a good thing for everyone, but not at the expense of creditors who may be relying on prompt payment of their claims for their own retirement plans. To the simplicity argument, the answer is that no exemption at all is also a simple solution. Most of the exemptions in the *Civil Enforcement Act* are limited by a cash ceiling or some other rule which has not proven impossible to interpret and apply. Relying on the uncertainties and expense of a fraudulent conveyance action is no substitute for the seizure of the RRSP itself.

[110] Critics emphasize the potential for abuse of any exemption of RRSPs and similar plans by over-contribution and misuse. A member of one of our advisory groups raised the example of a creditor who borrows the money to fund his or her lifestyle, including a retirement savings plan, and then relies on the exemption to defeat all creditors including those who supplied the money for the plan. There is some difficulty in feeling much sympathy for this debtor, compared to the conscientious saver who runs into financial trouble, often without any fault.[121]

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[120] *In re Harris*, 188 B.R. 444 at 450-51 (Bankr. M.D. Fla. 1995), cited in Sabino and Clarke, *supra* note 93 at 643.

[121] Cf. *Re Wells* (1998), 178 Sask. R. 150 (Q.B.).

[111] The ULCC Consultation Report argued for total exemption from enforcement of RRSPs, DPSPs and RRIFs, based in part on the feedback from consultants.[122]

> The large majority of respondents concluded that such capping was not desirable given the existing contribution limits for these instruments [in the *Income Tax Act*], the great difficulty in identifying and administering an acceptable national dollar limit and the reality that life insurance and pension retirement instruments did not currently face similar restrictions.

ULCC was aware of the potential for debtor abuse of a total exemption, but urged that changes to the *Bankruptcy and Insolvency Act*, along with existing legal remedies, would control such abuse. The issue of debtor abuse is explored below.

[112] In a recent report on Saskatchewan judgment enforcement law, Tamara Buckwold and Ronald Cuming propose a total exemption of RRSPs from enforcement, subject to a minor limitation to be discussed below.[123]

[113] The Institute invites your comments on Issue 2(a).

2. Total exemption of RRSPs, DPSPs and RRIFs from *garnishment*?

[114] The ULCC Consultation Report proposed that payments out of RRIFs should be garnishable, subject to exemptions similar to those applying to wages and salaries. The ULCC rejected a total exemption of RRIFs from garnishment, and proposed instead that part be exempt and the rest be garnishable, similar to the garnishment of wages and salary.

[115] The ULCC relied on a questionnaire sent to its consultants. One question asked whether uniform legislation creating an exemption from exigibility for future income security plans should be based, among others, on the idea “that any payments out of an exempt RRIF would be subject to exigibility.” One assumes that the ULCC was

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[122] ULCC Consultation Report, *supra 3* at 263.

[123] Buckwold, T.M. & Cuming, R.C.C., *Interim Report on Modernization of Saskatchewan Money Judgment Enforcement Law* (Regina, Sask.: Queen's Printer, November, 2001) [hereinafter “Buckwold and Cuming”] at 118-120, 123. Buckwold and Cuming was published before the introduction and passage of the Saskatchewan statute which follows substantially the ULCC Uniform Bill, *supra* note 2, 44. See *Bill 23*, *supra* note 4.

referring to what Alberta lawyers often call garnishability. The ULCC Consultation Report summarized the responses:[124]

> This question presumes support for exempting an RRIF based on exempt funds by asking the further question of whether the payments out of the RRIF would themselves be subject to exigibility. In considering this issue the extent to which the core element of this income would be exempted under provincial legislation was of crucial import. Respondents varied between arguing that if the RRIF is exempt so too should be the entirety of the payments, to arguing that as with any income, retirement income should be exigible at least to the extent that such payments exceed minimum subsistence requirements. The C.L.H.I.A. [Canadian Life and Health Insurance Association] noted that recent case law (*Whalley* v. *Harris Steel Limited* (1998), 46 C.C.L.I. (2nd), (Ont. C.A.)) has held that payments from an exempt instrument are themselves also exempt. Accordingly, it may therefore be necessary to speak specifically to this issue if part or all of such payments were to be exigible.
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> Of the responses received, approximately 85% were of the view that any payments out of an exempt RRIF should be exigible subject to provincial garnishment minimum income level restrictions.

[116] The proposal in the ULCC Consultation Report was incorporated into ss. 4 and 5 of the ULCC Uniform Bill, which is Appendix 1 to this report.[125] Section 4(1) provides that a payment out of a registered plan to a planholder or the planholder's legal representative is not exempt from any enforcement process. "Registered plan" is defined in s. 2 to mean a DPSP, a RRIF or an RRSP. Section 4(2) excepts from s. 4(1) a transfer of property from one registered plan to another registered plan. Section 5 provides in part that the exemptions which apply to wages or salary should apply to payments from registered plans "with any necessary modification." It will be noted that the ULCC Uniform Bill extends the proposal in the ULCC Consultation Report from RRIFs to include RRSPs and DPSPs.

[117] The ULCC Uniform Bill in its commentary to s. 5 argues the policy underlying this part of the bill:[126]

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[124] ULCC Consultation Report, *supra* note 3 at 261. The *Whalley* case, cited in the passage, interprets an exemption section in the Ontario *Insurance Act*, and is doubtful authority for the broad proposition for which it is cited in the report.

[125] ULCC Uniform Bill, *supra* note 3, 125 at 168-171. The Saskatchewan Act implementing the ULCC Uniform Bill follows the ULCC language. See *Bill 23*, *supra* note 4.

[126] ULCC Uniform Bill, *ibid.* at 171.

> Thus while section 4 provides that these payments are individually exigible, and clause 5(a) allows the payments to be accessed by garnishment proceedings, clause 5(b) is intended to ensure that subsistence levels are maintained for the planholder and that only the amount in excess of such provincial limits are exigible. This is viewed as consistent with the overall policy goal of ensuring adequate retirement funds for a plan holder but not protecting funds from legitimate creditors with respect to the portion of those funds that are in excess of this policy goal.

[118] If Alberta were to adopt the ULCC proposal, the exemption sections which would apply to such payments would be a modified version of s. 81 of the *Civil Enforcement Act*, and ss. 39-40 of the *Civil Enforcement Regulation*. Substantial redrafting would be necessary.

[119] Wage and salary exemption sections assume that wage and salary payments are made regularly, and that exemptions can be based on the model of monthly payments. RRIFs may, but need not, involve regular payments; RRSPs and DPSPs usually do not. A total exemption of payments would extend to the situation where a debtor collapses the plan and receives a substantial sum of money. The ULCC proposal would prevent this result.

[120] The Task Force Discussion Paper makes a proposal similar to the partial exemption recommended by the ULCC.

> The income or proceeds that are drawn from the locked-in RRSP following a person's retirement would be treated as income and subject to the surplus income standards in s. 68 of the BIA."[127]

The Task Force does not expressly apply the same rule to withdrawals from an RRSP before retirement, eg., on partial or total collapse of the plan. The reasoning may be that such withdrawals are non-exempt and property of the bankrupt.

[121] An argument for a total exemption of payments would start from a rejection of the ULCC and the Task Force position. ULCC proposes a total exemption of RRSPs and RRIFs from enforcement, but only a partial exemption of payments from such plans. The objection is that ULCC has it backwards. There should be a partial

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[127] Task Force Discussion Paper, *supra* note 5 at 17. See also *Corporate and Insolvency Law Policy Directorate*, Industry Canada, Consumer Insolvency Issues: A Discussion Paper, April 23, 2002, Appendix F, pp. 63-68. Industry Canada, online: <http://strategis.ic.gc.ca/pics/cl/consumer_e.pdf> (date accessed: June 14, 2002) [hereinafter "Task Force Appendix F"] at 63, 66, 68.

exemption against *enforcement* against the balance in these plans because of the danger of abuse. On the other hand, *payments* from such plans are usually attached during the retirement years when people are in a poor position to earn more money by working overtime, working a second job, or finding a better job. Retirement is when the income is needed and cannot be replaced or supplemented. The amount of income a retired person can take from the fund is limited by the maximum annual contribution allowed under the *Income Tax Act* to RRSPs. Pension payments as well as payments from insurance RRSPs are usually totally exempt. The Buckwold andCuming report on Saskatchewan judgment enforcement law makes a similar recommendation.[128] Any enforcement process that renders retirees destitute simply ensures that they will become the responsibility of the state. Given that the income from a RRIF may make up most of the retiree's income, total exemption of payments is not unreasonable.

[122] The ULCC proposal incorporates the wage and salary exemption scheme, which is going to need considerable tailoring to deal with irregular payments from these plans. For example, if a depositor asks for an RRSP to be collapsed and the entire balance paid out, would the depositor be entitled to only one monthly exemption? The debtor who can plan for regular payments just below the monthly exemption will be much more favourably treated. Any partial exemption scheme will need to take into account the diversity of payments which can be made out of a retirement savings plan, as well as the greater difficulty for retirees to earn extra income. The "keep it simple" principle may support a total exemption from garnishment.

[123] The Institute invites your comments on Issue 2(b).

D. Any Limits on Exemption from Enforcement?

> **ISSUE No. 3**
> ***Partial* exemption from enforcement (seizure and sale)?**
> **Should there be limits on any exemption from enforcement?**
> **Limits suggested include the following:**
> **(a) Dollar cap?**

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[128] Buckwold and Cuming, *supra* note 123 at 119, 123.

(1) Should the exemption from enforcement be subject to a dollar cap?

(2) How should the dollar cap be determined?

(3) Should the exemption not apply to prohibited contributions, as determined by the *Income Tax Act*?

(b) Locked-in plans only?

(1) Should the exemption of RRSPs, DPSPs and RRIFs be limited to plans already locked in, and plans that the debtor elects to lock in at the time of execution?

(2) Should the debtor later be able to unlock a locked-in plan?

(c) Three year clawback?

Even if the RRSP is exempt, should the creditor be entitled to payments into the plan made during a fixed period (say, 3 years) before the date of the issue of the writ of enforcement?

1. Dollar cap?

[124] If the total exemption of RRSPs from enforcement is troubling, one obvious limit is a dollar cap. Other exemptions in the *Civil Enforcement Act* have a dollar ceiling. Even though the ceiling may be difficult to determine, it will help to allay the concerns of creditors by limiting potential abuses.

[125] The Task Force proposes a dollar cap on the amount of the RRSP exempt in bankruptcy.[129]

> The exemption would be capped to equal the maximum RRSP contribution limit in the year of bankruptcy (currently $14,500) times the number of years that the bankrupt's age exceeds 21, to a limit of age 65. As an example, a 41-year-old bankrupt will have an RRSP cap of $14,500 x 20 = $290,000.

The detailed recommendations are contained in "Detailed PITF Recommendations on RRSPs" which appears as Appendix F to the Task Force Discussion Paper.

[129] Task Force Discussion Paper, *supra* note 5 at 17.

[126] How much would this recommendation work out to? The Task Force Appendix F does some calculations.[130]

> The cap that we propose will equal the maximum RRSP contribution limit in the year of bankruptcy (currently $14,500) times the number of years that the bankrupt's age exceeds 21, to a limit of age 65. In other words, a forty-one year old bankrupt will have an RRSP cap of $14,500 * 20 = $290,000; a fifty-one year old will cap at $435,000; a sixty-one year old will cap at $580,000. This works out a rough parity with pension values, although it does not reflect the full accrual of interest and hence it may be substantially lower than the pension value of a high-earning employee. Further advantages of this formulation are that there are no actuarial calculations required, so it is simple and cheap to administer; the definition does not need to be adjusted with inflation because its key component (the annual contribution limit) is normally itself adjusted by RRSP regulation; and there is no need to analyze or litigate historical contribution patterns.

[127] In a footnote to the above passage, the Paper says:[131]

> Consultation with one insurance company indicates that the cap amount for a 65 year old person, at current interest rates, would equate to a taxable annual annuity of $49,180.32 if guaranteed for a 25 year payout to age 90, or $59,555.64 if guaranteed for life. At age 55, the cap amount equates to a taxable annual annuity of $37,710.48 (male, guaranteed for life), $35,510.28 (female, guaranteed for life) and $33,266.16 (guaranteed for 35 year payout to age 90, either sex)."

[128] Both the ULCC and the Task Force proposals draw on the maximum annual contribution rules in the *Income Tax Act* and regulations. The difference is that the ULCC exempts every dollar in an RRSP, while hoping that the maximum annual contribution will serve as a practical upper limit to the corpus of the plan. The Task Force however wants a legal limit to the exemption.[132] Those who favour a dollar cap are concerned about two kinds of problems: (1) the debtor who deliberately over-contributes to the plan, and (2) the debtor who has through shrewd or lucky investment increased the balance of the plan far beyond what a more conservative or unlucky debtor could achieve. The Task Force's ceiling penalizes both kinds of debtors, while preserving a reasonable amount which will be exempt.

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130 Task Force Appendix F, *supra* note 127 at 64.

131 *Ibid*. Do the varying exemptions for people of different ages raise a possible Charter challenge?

132 The Task Force uses the *current* maximum annual contribution which may be higher or lower than the limits in previous years when the contributions were made.

[129] But is the amount proposed by the Task Force reasonable?[133] Is their dollar cap too high? On the other hand, creditors can take some comfort from the fact that CCRA is often a creditor itself, and has an incentive to keep the annual contribution ceiling for RRSPs low.

[130] If the reader rejects the Task Force proposal but still wants a dollar ceiling to the exemption, how should the law go about calculating an appropriate cap? One might start by deciding on the income stream that the society is willing to protect during retirement. One could then work out the capital necessary to generate that income stream. Such an analysis would make the figure a bit less arbitrary, although still difficult. The virtue of the Task Force cap is that it is a national standard, based on the assessment by the drafters of the *Income Tax Act* as to the contributions necessary to sustain an adequate retirement income. It assumes that a judgment enforcement system should share the opinions of the tax authorities on what is a reasonable retirement income.

[131] As a practical matter, Albertans may be driven to choose between the ULCC total exemption and the Task Force dollar cap based on the maximum annual contribution. Any other home-made cap would involve reinventing a particularly difficult wheel. An arbitrary dollar cap of, say, $300,000, might be expected to draw public and political criticism, and the Institute has been told that the capital value of many longstanding pensions and RRSPs involves far more money.

[132] The ULCC opposes a dollar cap, partly because it creates a danger of differing rules across the country. The RRSP industry is national, the *Income Tax Act* and the *Bankruptcy and Insolvency Act* are federal, and Canadians move from province to province. There is a strong argument for a uniform approach to dollar caps. On the other hand, the Task Force's proposal pins the exemption to the maximum annual contribution to an RRSP under the *Income Tax Act*, also a national standard.

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[133] The Task Force is aware that the dollar ceiling will be controversial. See Task Force Discussion Paper, *supra* note 5 at 17.

[133] The ULCC argues that pension exemptions have no dollar limit, and RRSP exemptions should be the same. The assumption that pensions and RRSPs can be equated is not universally accepted.

[134] The argument for a dollar cap turns on the fear of abuse. It may be argued that the fear is unjustified. The Institute has been told that the tax penalties on over-contribution to RRSPs are so severe that few people over-contribute except by mistake. There are similar penalties in contributing assets to a self-directed plan which are prohibited. If the fear is that the shrewd investor may create a large RRSP, all of which is exempt, why should the law penalize this investor for foresight or good luck?

[135] A possible compromise would be to accept the ULCC total exemption proposal, with the limitation that it would not apply to contributions prohibited by the *Income Tax Act*. Two examples of prohibited contributions would be (1) over-contributions exceeding the taxpayer's annual limit, and (2) transfers to a self-directed plan of assets which one cannot put into an RRSP, like a gold bar. Do different considerations apply to the two examples? Is this limitation so difficult to apply that it will violate the "keep it simple" principle?

[136] It was suggested at one committee meeting that it is a mistake to see the ULCC and the Task Force reports as in conflict, because they start from different points and address different goals. The bankruptcy system is always concerned with insolvency. The end result of bankruptcy is that provable claims are discharged. In the provincial judgment enforcement system, the subject of the ULCC, debtors may or may not be insolvent. The provincial system will not lead to a discharge of all the debtor's financial obligations. A judgment against the debtor will generally not be discharged until it is paid or other events irrelevant to this project occur. There is little to prevent a creditor launching a series of executions and garnishments until the judgment debt is paid, or the creditor tires of the chase.[134]

[137] As a result, one might expect exemptions to be more restricted in bankruptcy than in the provincial judgment enforcement system. Because the *Bankruptcy and*

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[134] Although see CEA, s. 2(g) which provides that, in civil enforcement proceedings, "all rights, duties and functions of creditors, agencies and bailiffs under this Act must be exercised or discharged in good faith and in a commercially reasonable manner."

Insolvency Act usually follows provincial exemptions, the theory is difficult to test, but it may explain and justify the ULCC proposals for more generous exemptions for provincial law, and the Task Force's recommendations for more restricted exemptions in the context of bankruptcy. Creditors who prove their claims in bankruptcy have only one chance to collect their claims before they are discharged. From their point of view, generous exemptions are inappropriate.

[138] The debtor might respond that the suggested distinction is irrelevant. Exemptions are intended to protect property which is essential to the survival of the debtor and the debtor's family. It is not clear why an asset deemed essential in a judgment enforcement process should be seen as any more or less essential if the debtor becomes bankrupt. The debtor gets some support for this idea from the willingness of successive federal governments to incorporate provincial exemptions into the *Bankruptcy and Insolvency Act*, rather than creating a separate list.[135] The present Task Force proposals on RRSPs and the like may involve a departure from that policy.

[139] While insolvency may be a necessary precursor to bankruptcy, many debtors who find their assets seized or attached are also likely to be insolvent. The goal of bankruptcy is in part the rehabilitation of the bankrupt, but a similar idea underlies exemptions in provincial judgment enforcement law. The policy-balancing exercise necessary in this project will be similar in bankruptcy and in judgment enforcement law.

[140] The upshot is that it is not easy to decide between the recommendations of the ULCC and the Task Force on the basis of their starting point, although it is an essential element in weighing their proposals.

[141] The Institute invites your comments on Issue 3(a).

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[135] Other reasons include economic and policy differences among the provinces, and a desire to discourage forum-shopping between the bankruptcy and the judgment enforcement systems. Earnings of the bankrupt are dealt with separately under the BIA, s. 68.

2. Locked-in plans only?

[142] This section deals with locked-in RRSPs, by which is meant plans which provide that the depositor cannot withdraw money or collapse them before a certain date or the happening of an event.[136] It is sometimes said that locked in RRSPs are not exigible or are exempt. Neither statement is true of non-insurance plans. If such RRSPs are not declared by statute to be exempt, they are exigible, that is, the bundle of rights of the depositor/debtor can be seized by a civil enforcement agency.

[143] It is true that the seizure may be an empty victory. If the depositor cannot withdraw money or collapse the plan, neither can the civil enforcement agency. However, there may still be situations where it would be helpful to seize or get a receivership order against a locked-in plan, especially if it is locked in for a short period of time. The objective of the creditor would be to seize the plan and put the agency on notice that, when the locked-in period expires, the depository is to collapse the plan and pay the proceeds to the agency on behalf of the creditors.

[144] Our understanding is that locked in RRSPs are commonly used in two situations: (1) as a receptacle for money paid out of a pension plan after the termination of the employee's job,[137] and (2) where vendors offer plans with guaranteed interest rates, and demand in return that the money stay in the plan for a certain number of years. Locked-in plans are available in other situations, but the Institute does not have any information about percentages of locked-in plans in Alberta.

[145] It has been proposed that any exemption of RRSPs, DPSPs and RRIFs should be limited to locked-in plans. The Task Force Discussion Paper includes the following recommendation:[138]

> The exemption could be invoked in bankruptcy by converting the RRSP, shortly following bankruptcy, into a locked-in RRSP or annuity accessible only upon reaching retirement age. In effect, the RRSP would be converted into a locked-in RRSP similar to that prescribed by pension legislation when

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[136] Confusion can arise between the plan itself and the assets inside the plan (which may or may not be "locked-in.") The above discussion considers only an RRSP, DPSP or RRIF which provides that the plan cannot be collapsed before a certain date or event.

[137] See Issue 12 which asks whether any exemption of RRSPs and RRIFs should extend to LIRAs, LIFs and LRIFs.

[138] Task Force Discussion Paper, *supra* note 5 at 17.

> an employee's vested pension rights are terminated due to a loss of employment status.

[146] Appendix F of the Discussion Paper sets out the reasons for the proposal.[139]

> **Why the *mandatory lock-in*?** The policy rationale underlying an RRSP exemption only applies if the RRSP is truly intended for retirement purposes. This purpose, and hence this policy goal, is guaranteed by the lock-in. Without the conversion to locked-in status, the exemption might merely assist the debtor to preserve tax-deferred savings until shortly after the bankruptcy discharge. There is no policy reason for this. Creditor confidence in the system will be maintained if it is clear that the debtor no longer has access to the exempt capital until retirement; in effect, the RRSP is converted into a pension. The lock-in also accomplishes another indirect benefit; it will discourage the discharge court from diminishing the exemption through a conditional discharge order. The court will be less offended by a debtor whose exempt RRSPs are unavailable until retirement, similar to a pension holder.
>
> Some trustees have commented on the ostensible unfairness of preventing a discharged bankrupt in need from accessing his or her locked-in RRSP. Current provincial lock-in legislation allows the Superintendent of Pensions to make an exception to the lock-in in cases of financial hardship. This could be maintained or adapted in the legislation creating the locked-in RRSP vehicle.

[147] When the Task Force Discussion Paper is read together with Appendix F, it is clear that the Task Force is proposing an election by the debtor to convert the RRSP to a locked-in plan, together with a Certificate of Conversion to be completed by the financial institution.[140] The recommendation amounts to an offer of a Hobson's choice to the bankrupt; either lock in the plan or accept its inclusion in the property of the bankrupt to be collapsed by the trustee.

[148] Practical difficulties suggest themselves. For the Task Force proposal to work, the debtor and the depository must be prohibited in law from agreeing to unlock the locked-in plan at any time before the debtor becomes 65. But what if they do agree (illegally?) to unlock the RRSP, and the balance of the plan is then paid out to the debtor? Is the depository to be required to pay to the trustee (probably discharged) or the creditors the amount it paid out of the unlocked plan? How practically is a plan to be kept locked in until the debtor reaches the age of 65 if the parties want to unlock

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[139] Task Force Appendix F, *supra* note 127 at 63-64.

[140] *Ibid*. at 65-66, 68. What if the financial institution refuses or fails to issue the Certificate to Convert within the time limit?

it?[141] Is the money paid out to the debtor fair game for other creditors or is it property of the (probably discharged) bankruptcy? These problems would be avoided if the exemption was restricted to plans locked in at the time of enforcement, giving the debtor the freedom to unlock the plan later. Debtors today can sell exempt assets; why should that option be denied in the case of RRSPs?

[149] The Task Force proposal is of course limited to bankruptcy, but similar suggestions have been made in the provincial context. The basic idea is that only locked-in RRSPs are similar enough to pensions to enjoy their exempt status. The market may not in fact market locked-in plans aside from special situations, but the market would no doubt adjust and offer such plans if the Task Force proposal, modified to fit a non-bankruptcy situation, became the law of Alberta. Debtors should be discouraged from contributing to RRSPs money which is sometimes borrowed, and which is needed to pay debts. Restricting the exemption to locked-in plans might be an effective deterrent to the misuse of RRSPs.

[150] One might respond that RRSPs are intended, among other things, to provide a source of retirement income, whether the plan is locked in or not. At bottom, the Task Force idea assumes that only pension-like instruments deserve to be exempt. One may take a broader view and permit exemptions of unlocked RRSPs, even though saving for retirement is not the only purpose of such plans. The *Income Tax Act* does not limit the RRSP program to locked-in plans. Should Alberta judgment enforcement law impose such a limitation?

[151] The ULCC 1998 Consultation Report rejected the idea of limiting their exemption to locked-in plans.[142] One reason is that the ULCC proposed that funds held in RRSPs and DPSPs would retain their exempt status only so long as they retain their status as RRSPs and DPSPs under the *Income Tax Act*. This idea is discussed below as Issue 6(a). However, the ULCC thought that the locking-in limitation had serious flaws which made it practically undesirable and unworkable. The full discussion by the ULCC is lengthy, but the basic thrust is that locking in would make RRSPs and DPSPs less desirable in the market, might affect adversely credit granting,

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[141] ALRI is informed that depositories are unlikely to agree to unlock locked-in plans.

[142] ULCC Consultation Report, *supra* note 3 at 259, 264-267.

and would be an administrative quagmire. Uniformity on the details of locking-in made the idea inappropriate for a uniform statute. Locking-in makes no appearance in the ULCC Uniform Bill or in the Saskatchewan Act which implements (with modifications) the ULCC proposals.[143]

[152] The Institute invites your comments on Issue 3(b).

3. Three year clawback?

[153] The Task Force Discussion Paper proposes that payments made by a debtor into an RRSP during the three years before the date of the bankruptcy will vest in the trustee, even though the RRSP is otherwise exempt.[144]

> To counter abuse, all RRSP contributions made by the debtor (including contributions to a spousal RRSP) within three years of the date of the initial bankruptcy event would accrue to the trustee as property divisible among creditors. Contributions outside the three-year mark would continue to be subject to existing provincial fraudulent conveyance legislation.

[154] The Consultation Paper defends the proposal in uncompromising terms.[145]

> The anti-abuse or anti-avoidance provision seems to strike an appropriate balance. The irrebuttable test would likely address the problems of the current anti-avoidance provisions in the BIA: the exorbitant costs of pursuing such matters before the courts, the high evidentiary burden needed to satisfy a court of the debtor's intent to defraud his or her creditors, and the amount of time needed to resolve the proceedings.

The purpose appears to be to catch payments made on the eve of, and perhaps in anticipation of, bankruptcy, but without requiring trustees to establish a reviewable transaction under the *Bankruptcy and Insolvency Act* or under provincial fraudulent conveyance and preference legislation. "We need a cheap and effective anti-avoidance device to ensure creditor confidence."[146]

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[143] *Bill 23*, *supra* note 4.

[144] Task Force Discussion Paper, *supra* note 5 at 17.

[145] *Ibid*. at 17-18. An earlier suggestion (in the September, 2001 *Summary of PITF Issues and Recommendations*) that the clawback should be confined to "above-normal RRSP contributions" has apparently been abandoned.

[146] Task Force Appendix F, *supra* note 127 at 65.

[155] The argument for the three year clawback rule is set out in the Discussion Paper and in Appendix F. It would no doubt enable trustees to take automatically and more cheaply contributions made within the three years preceding the bankruptcy. One may object that the requirements of fraudulent conveyance and preference statutes exist for a reason, to effect a fair balance between debtor, creditor and transferee. In the rush to make things easier for trustees and creditors, the appropriate balance has arguably been abandoned.

[156] A further difficulty is to apply the clawback idea to a provincial judgment enforcement system. Would the creditor, acting through a civil enforcement agency, be entitled to demand the three years' contributions from the depository? Would the relevant base date be the date of the judgment or of the writ of enforcement? Or should it be earlier, eg., the date when the statement of claim was issued, or when the underlying claim arose? Should the clawback be automatic, or should it be available only for unusual or abnormal payments? If so, how do the legislature and the courts define what is usual or normal? Put simply, is this an idea so complex that it will not work except in the peculiar of cases? If the answer to the last question is yes, the law might be further ahead to forget about the clawback, and rely instead on a residual jurisdiction in the court to modify or eliminate the exemption in appropriate cases. On the last point, see Issue 5.

[157] The clawback idea may be more appropriate in the bankruptcy context where it is essential to gather up as much of the bankrupt's property as possible because the provable claims will be discharged at the end of the bankruptcy. The clawback may be less essential or desirable in a provincial judgment enforcement system where the judgment survives until it is paid or until other events occur which are not relevant here.[147] The reader is referred to the discussion of a similar issue under the heading **Dollar cap** above.

[158] The Institute invites your comments on Issue 3(c).

[147] The clawback is not part of the ULCC Uniform Bill or the Saskatchewan Act.

E. *Partial* Exemption from Garnishment

ISSUE No. 4

(a) Should payments out of RRSPs, DPSPs and RRIFs be partly exempt from and partly exposed to garnishment?

(b) Should the amount of the exemption be similar to the exemption of wages and salary?

[159] See discussion of issue 2(b) above. You may have answered this issue above, but the Institute invites your comments on Issue 4.

F. Judicial Discretion to Vary Exemption?

ISSUE No. 5

(a) Should the court be given a discretion to increase, decrease or eliminate the exemption of RRSPs, DPSPs and RRIFs from enforcement and garnishment?

(b) Should the court exercising the discretion be required to consider a list of factors similar to those in s. 81 of the *Civil Enforcement Act* or s. 39 of the *Civil Enforcement Regulation*?

1. Should the court be given a discretion to increase, decrease or eliminate the exemption?

[160] Many commentators on the proposed exemption of RRSPs, DPSPs and RRIFs are happy with the exemption in most cases, but worry about the occasional debtor who abuses the exemption and uses the plan as a device to defeat creditors. While the exemption may work as a general rule, these critics want some room to depart from it where abuse is evident.

[161] A similar problem faced the drafter of the wage and salary exemptions in the *Civil Enforcement Act.* The problem was solved by empowering the court to vary the exemptions in appropriate cases, and by giving guidance to the court as to relevant factors in such situations. A similar model might be helpful with any exemption of RRSPs, DPSPs and RRIFs.

[162] Section 81(1)(g) and (h) of the *Civil Enforcement Act*[148] provide narrowly limited powers in the court to vary exemptions in cases where the enforcement debtor earns employment income from more than one source or where the enforcement debtor's employment earnings from a particular source vary substantially between months. Section 39 of the *Civil Enforcement Regulation*[149] provides a much broader power to vary exemptions. The relevant subsections are as follows:

> 39(3) The Court, on application, may modify the minimum or maximum employment earnings exemption to which an enforcement debtor is entitled.
>
> 39(4) In considering an application under subsection (3), the Court should take into consideration at least the following:
> (a) the family responsibilities of the enforcement debtor;
> (b) the personal circumstances of the enforcement debtor;
> (c) the conduct of the enforcement debtor in the carrying out of the enforcement debtor's financial affairs;
> (d) the earnings of the enforcement debtor's spouse and dependants.

A useful case interpreting these provisions is *Fruh* v. *Mair*, a decision of Master Laycock.[150]

[163] The argument against a judicial discretion to vary exemptions is that it inserts an element of uncertainty in the exemptions process. On the other hand, one assumes that the requirement to apply to court for a variation will deter frivolous applications, and restrict the variations to a few exceptional situations. The list of factors should limit the court's discretion.

[164] The Institute invites your comments on issue 5(a).

2. List of factors?

[165] The list of factors in the wage and salary sections may or may not be appropriate for applications to vary the RRSP exemption. Are there factors which should be added or subtracted? For example:

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[148] CEA.

[149] Alta. Reg. 276/95.

[150] (1996), 42 Alta. L.R. (3d) 146 (Q.B.).

- Should it be relevant that the depositor is using the RRSP as a tax shelter and a bank account without any apparent consideration for retirement?[151]
- Should the court have power to eliminate the exemption entirely? To increase the exemption?
- Should the court consider the nature of the creditor (eg., voluntary or involuntary)?
- Should the court have a discretionary power to create or amend a clawback of contributions to the RRSP for a period of time before the application? What limits should be put on this power? (See Issue 3(c) above.)
- Should the exemption be varied only in exceptional or extraordinary circumstances?
- Can an application to vary the exemption be brought by the debtor as well as the creditor?

[166] The Institute invites your comments on Issue 5(b).

G. Anti-Abuse Limits and Safeguards?

ISSUE No. 6

(a) Are there any other anti-abuse limits which should be built in to exemptions of RRSPs, DPSPs and RRIFs? For example, should the exemptions from enforcement and garnishment cease to exist if the plan ceases to be an RRSP, DPSP or RRIF for the purposes of the *Income Tax Act*?

(b) Should the debtor be prohibited from claiming exemptions for more than one retirement savings plan?

1. Anti-abuse limits?

[167] A proposal to exempt RRSPs, DPSPs and RRIFs creates the fear that an unscrupulous debtor will abuse the exemption to hide assets from the creditors. The ULCC, in its ULCC Consultation Report, proposed as one limitation on abuse that the exemptions from enforcement and garnishment should cease to exist if the plan ceases

[151] This kind of factor has been taken into account in the United States. See *In re Harris*, *supra* note 120.

to be an RRSP, DPSP or RRIF for the purposes of the *Income Tax Act*. "Insofar as abuse of the exemption remains a particular concern for most respondents, this restriction was viewed as an appropriate method of targeting the exemption through utilization of the existing legislative framework."[152] The idea was criticized by the Canadian Insolvency Practitioners Association because it would require estate administrators of the bankruptcy process to continue after the date of the bankruptcy to monitor the tax status of the RRSP. This objection would have less force in the judgment enforcement system where, if the plan lost its tax deferral status, the creditor could then issue an instruction to seize or a garnishee summons.[153]

[168] The Institute invites your comments on Issue 6(a). Are there other appropriate anti-abuse limitations which the Institute should propose to government?

2. Prohibition against stacking exemptions?

[169] An entirely different suggestion to control debtor abuse is made by Buckwold and Cuming in their recent report on Saskatchewan judgment enforcement law. After proposing their exemption for RRSPs, the report goes on to attach a qualification.[154]

> However, a judgment debtor should not be entitled to stack retirement funds or income. Accordingly, subsection (8) [of their draft statute] would give the court the power to order that [the exemption of RRSPs or RRIFs] does not apply where the applicant establishes that the judgment debtor has vested rights in a pension plan or post-retirement income from other sources sufficient to provide support for the judgment debtor and dependents of the judgment debtor.

[170] The reference in the Buckwold and Cuming report to subsection (8) may be a slip. Subsection 4 of their draft statute provides in part:

> (4) On application, the court may order:
>
> (b) that [the exemption of RRSPs and RRIFs] does not apply to a judgment debtor who has vested rights in a pension plan, or income from other sources, that will provide sufficient financial support for the judgment debtor and dependents of the judgment debtor after the age of 65 years.

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152 ULCC Consultation Report, *supra* note 3 at 259.

153 See also the suggestion in the comments to Issue 3(a) that the exemption could be made not to apply to contributions prohibited by the *Income Tax Act*, such as (1) over-contributions exceeding the taxpayer's annual limit, and (2) transfers to a self-directed plan of assets which one cannot put into an RRSP.

154 Buckwold and Cuming, *supra* note 123 at 123.

Subsection (8) provides that the onus of proof on such an application is on the applicant.

[171] We might add something like subsection (4) to the list of factors. But many people today have worked several jobs, accumulating rights in one or more pension plans as well as RRSPs. The Buckwold and Cuming proposal suggests that the person who accumulates plans is less entitled to the exemption than the person who works at one pensionable employment during his or her life, or works at a non-pensionable job but has a long-standing RRSP. Why? The *Income Tax Act* annual ceiling on contributions applies to both pensions and RRSPs, and does not allow a taxpayer to double the ceiling by contributing to both types of retirement plans. There is only one all-embracing ceiling for money paid to RPPs and RRSPs. Why is this limit in the tax system not enough to deal with the problem?

[172] The Institute invites your comments on issue 6(b).

H. Treat Insurance and Non-Insurance RRSPs, DPSPs and RRIFs the Same or Differently?

ISSUE No. 7

(a) Should the exemption from enforcement and garnishment of RRSPs, DPSPs and RRIFs be different or the same, depending on whether the plans are offered by insurance or non-insurance vendors?

(b) If there is to be one exemption provision, should it be in the *Civil Enforcement Act*, or in the *Insurance Act*, or in both statutes?

1. Treatment of insurance and non-insurance plans

[173] At present, RRSPs, DPSPs and RRIFs purchased from insurance companies are exempt from enforcement and garnishment if they name the proper beneficiary and otherwise fit within the exemption sections in the *Insurance Act*.[155] However, non-insurance RRSPs are not exempt from enforcement or garnishment. They are totally

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[155] Section 580.

exposed to execution and garnishment. The law therefore permits creditors to divert the debtor's retirement savings to payment of debts.

[174] From the beginning of this project to now, the overwhelming consensus among consultants has been that RRSPs, DPSPs and RRIFs offered by insurance and non-insurance providers are so similar that different exemption rules for the two groups is unfair and unreasonable, especially when compared to the exempt status of most pensions. The history of this market is that insurance and non-insurance vendors have continued to develop plans which copy the plans of other vendors. The Institute has not heard yet a defence of the difference in treatment of insurance and non-insurance products, but such a defence would be welcome.

[175] The Institute invites your comments on issue 7(a).

2. Exemption provision in which statute?

[176] If it is concluded that one exemption section should apply to insurance and non-insurance RRSPs, DPSPs and RRIFs, more difficult questions arise with regard to the exemption sections of the *Insurance Act*. For the following discussion, it is necessary to quote again ss. 555, 575 and 580:[156]

> Annuity deemed life insurance
> 555 For the purposes of this Subpart, an undertaking entered into by an insurer to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount, is deemed to be and always to have been life insurance whether the annuity is for
> (a) a term certain,
> (b) a term dependent either solely or partly on a human life, or
> (c) a term dependent solely or partly on the happening of an event not related to a human life.
>
> Irrevocable designation
> 575(1) An insured may in a contract or by a declaration, other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured designate a beneficiary irrevocably, and in that event the insured, while the beneficiary is living, must not alter or revoke the designation without the consent of the beneficiary and the insurance money is not subject to the control of the insured or of the insured's creditors and does not form part of the insured's estate.

[156] Sections 574, and 576 to 579, which also deal with exemptions and other matters, are less significant to this discussion.

> (2) When the insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed as provided in subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.
>
> Insurance money not part of estate
> 580(1) When a beneficiary is designated, the insurance money, from the time of the happening of the event on which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.
> (2) While a designation in favour of a spouse, child, grandchild or parent, or any of them, of a person whose life is insured is in effect, the insurance money and the rights and interests of the insured in the insurance money and in the contract are exempt from writ proceedings.

[177] If the exemption rule for insurance and non-insurance RRSPs, DPSPs and RRIFs is to be the same, one way to accomplish that goal would be to repeal s. 555. Assuming that the inclusion of annuities and RRSPs in the definition of life insurance serves purposes other than exemptions and should be left as is, a more modest idea is to amend ss.575 and 580 to exclude RRSPs, DPSPs and RRIFs from their operation, and to create one new exemption section to apply to both insurance and non-insurance products, and to be located in the *Civil Enforcement Act*.

[178] Such amendments to ss. 575 and 580 and their replacement by a new section in the *Civil Enforcement Act* would be radical surgery. However, the alternatives have serious drawbacks. (1) The Legislature could create two similar or identical exemption provisions, one in the *Insurance Act* and the second in the *Civil Enforcement Act*. The danger is that, over time, the sections will drift away from each other, leading to the present situation of one rule for insurance products, and a different rule for the rest. (2) The other possibility is to extend the present *Insurance Act* exemptions to non-insurance products. At the very least, substantial redrafting of ss. 575 and 580 would be needed to remove the specific references to insurance.

[179] The Institute invites your comments on issue 7(b).

I. Eliminate Limits on Exemption Presently in *Insurance Act*?

ISSUE No. 8

(a) Should the new CEA exemption section require an exempt RRSP or similar plan to contain an undertaking to provide an annuity?

(b) Should the new CEA exemption section eliminate specific references to insurance?

(c) Should the new CEA exemption section limit the exemption to plans which name a beneficiary? If so, should the section limit the exemption to plans which name certain family members as beneficiaries? Or should there be no limit to the choice of beneficiaries?

[180] If the *Insurance Act* exemptions for RRSPs, DPSPs and RRIFs are replaced with a new exemption section in the *Civil Enforcement Act*, one still needs to ask which elements of s. 580 of the *Insurance Act* should survive into the new CEA section. (For the sake of simplicity, the following discussion leaves aside s. 575, but similar considerations would apply.) Several problems arise.

1. Should the new CEA exemption section require an exempt RRSP or similar plan to contain an undertaking to provide an annuity?

[181] Section 580 is currently limited to plans which fit within s. 555, that is, they must contain "an undertaking entered into by an insurer to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount." It is doubtful whether all RRSPs, DPSPs and RRIFs contain such an undertaking, nor is it clear that any new exemption provision should be so limited.

[182] The Institute invites your comments on issue 8(a).

2. Should the new CEA exemption section eliminate specific references to insurance?

[183] Section 580 exempts "the insurance money and the rights and interests of the insured in the insurance money and in the contract." Apart from the difficulties the courts have encountered in interpreting this language, the references to insurance would need to be replaced by language appropriate for all RRSPs, DPSPs and RRIFs.

[184] The Institute invites your comments on issue 8(b).

3. Should the new CEA exemption section limit the exemption to plans which name a beneficiary? If so, should the section limit the exemption to plans which name certain family members as beneficiaries? Or should there be no limit to the choice of beneficiaries?

[185] Section 580 is limited to plans which designate a beneficiary who is "a spouse, child, grandchild or parent, or any of them."[157] Two questions arise.

(1) Is there any need for the exemption section to require a beneficiary at all? The Institute is told that the overwhelming majority of RRSPs, DPSPs and RRIFs designate beneficiaries, and it is probably prudent to do so. But is there any need for creditor-debtor law to require a beneficiary for an exemption to exist? It is arguable that the parties to an RRSP, DPSP or RRIF should be free to decide whether or not to designate a beneficiary without that decision affecting the exempt status of the plan.

(2) If it is concluded that the exemption should be limited to plans which name a beneficiary, should the legislation go further and require that the beneficiary be chosen from a list of certain family members? Should the legislation limit the choice of beneficiaries at all? If a depositor, perhaps unwisely, wishes to name his or her estate as the beneficiary, why should such a plan be any more or less entitled to the exemption than one where the spouse is named as the beneficiary?

[186] The Institute invites your comments on issue 8(c) .

J. Exempt from Creditors of the Estate?

ISSUE No. 9
Should RRSPs, DPSPs and RRIFs, and the proceeds from such plan, be exempt from the creditors of the deceased depositor's estate?

[157] The Alberta Law Reform Institute, *Recognition of Rights and Obligations in Same Sex Relationships* (Research Paper No. 21) (Edmonton: The Institute, January 2002), specifically noted s. 580 of the *Insurance Act* as a section "which may arguably violate the rights of individuals in same sex relationships under section 15(1) of the *Charter*" at 11-15. The *Insurance Act* is not expressly amended by *Bill 30: Adult Interdependent Relationships Act*, given first reading on May 7, 2002.

[187] We now turn to the difficult question whether an RRSP or similar plan should be exempt after the depositor's death against creditors of his or her estate. The estate creditors are normally entitled to be paid before legacies are distributed to the beneficiaries. However, as outlined in chapter 2, RRSPs are a special case.[158]

1. Insurance RRSPs, DPSPs and RRIFs

[188] Sections 575 and 580(1) of the *Insurance Act* make it clear that insurance RRSPs and similar plans, including the proceeds from such plans, do not form part of the insured's estate. The proceeds from the plans pass directly to the beneficiary, and are not subject to claims by the creditors of the estate, at least during the administration of the estate. There is some suggestion in the cases and commentators that estate creditors may bring separate and independent actions against the beneficiary.

[189] Section 580(2) does a different job from s. 580(1). Where a designation in favour of one or more of the listed family members is in effect, s. 580 creates an exemption of "the insurance money and the rights and interests of the insured in the insurance money and in the contract" from writ proceedings." The effect of s. 580(2) after the depositor's death is unclear.

2. Non-insurance RRSPs, DPSPs and RRIFs

[190] Where the RRSP was not sold to the depositor by an insurance company, the *Insurance Act* offers no protection against creditors after the depositor's death. Most cases involve a competition between the plan beneficiary and the estate creditors. The Alberta law on this type of dispute is unclear.

[191] In other jurisdictions, three broad solutions have found acceptance. The courts have held that (1) the RRSP is part of the depositor's estate and is available to the estate's creditors; (2) the RRSP is not part of the depositor's estate and is unavailable to the estate's creditors; or that (3) the RRSP is not part of the depositor's estate but is available to the estate's creditors through a claim outside the estate directly against the beneficiary. If the Alberta courts were to adopt solution (2), the problem of exemptions would not have to be addressed, except where the RRSP names the estate

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[158] The subject matter of Issues 9 and 10 was not considered in the work of the ULCC or the Task Force Discussion Paper, *supra* note 5.

as the beneficiary. But the Alberta courts may follow solutions (1) or (3), both of which raise the exemptions issue.

3. Analysis

[192] One might argue that an exemption of the RRSP after the death of the depositor is simply a continuation of the policy which led to the plan's protection during his or her life. The estate creditors will be largely the same as the depositor's creditors. The fundamental policy is similar, that is, the importance of saving for retirement and protecting the savings. An exemption which follows the model of the exemption for the living depositor could be subject to judicial amendment in special cases. In most situations, however, the exemption after death would simply carry forward the policy developed for the living depositor.

[193] But is the policy problem really similar? When the depositor is alive, the argument for exemption of the RRSP is the importance of encouraging and protecting saving for retirement. Once the depositor has died, that goal is irrelevant. The values in conflict after death are the creditors' right to an efficient and effective judgment enforcement system, and the beneficiary's interest in taking the proceeds of the plan free of the claims of the depositor's and the estate's creditors. It is no longer the depositor's plans for retirement but his or her charitable intentions which must be weighed against the claims of the creditors.

[194] The beneficiary may or may not be a worthy and needy recipient of the money. A depositor may name anyone as a beneficiary: a partner, a friend, a society or company, or the depositor's estate. Should all of these recipients of the depositor's charity be able to hold the RRSP and its proceeds immune from the claims of the estate creditors? If the general rule of estate administration is that creditors are paid before legacies are disbursed, why should that principle not extend to the RRSP, whether or not it is an asset of the estate. As Lord Hatherley observed about the Statute of Elizabeth, "persons must be just before they are generous, and ... debts must be paid before gifts can be made."[159]

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[159] *Freeman* v. *Pope* (1870), 5 Ch. App. 538, 540.

[195] One answer to Lord Hatherley's sweeping dictum would be to limit any exemption of RRSPs and the like to plans which name beneficiaries like the spouse or the children. One model would be the *Income Tax Act* which offers preferential tax treatment upon the death of a depositor where the beneficiary of an RRSP is the depositor's spouse, child or grandchild. The argument is that, if the ITA treats such plans differently, so should creditor-debtor law.

[196] The justification for this limited exemption is to provide for the depositor's family suffering from the loss of the breadwinner. But what if the surviving spouse was the breadwinner, or the more wealthy of the two? The depositor may have transferred substantial property to the spouse before death. The depositor may have been separated from the spouse, and may be supporting another family. One can imagine many situations where the exemption would not serve to protect people genuinely in need, and where more deserving recipients will not enjoy the exemption because they are not related to the depositor. Judicial discretion could reduce or eliminate the exemption of the spouse, children or grandchildren in appropriate cases, but it would be more difficult to give judges the positive power to create an exemption for other recipients, no matter how deserving.

[197] To summarize, the Institute is looking at three alternative approaches to exemptions of RRSPs, DPSPs and RRIFs from claims of the creditors of the deceased depositor's estate. They are that:

(1) there should be no exemption of RRSPs, DPSPs and RRIFs against the estate creditors, no matter who is named as beneficiary;

(2) there should be an exemption (total or partial) of such plans against the estate creditors, no matter who is the beneficiary;

(3) there should be an exemption against the estate creditors where the beneficiary is the spouse or the children or grandchildren, but no (or a lesser) exemption where the beneficiary is anyone else.

[198] As to live depositors, Issue 8 asks whether any new exemption section should limit the exemption to plans which name a beneficiary, or which names family beneficiaries. If the purpose of the live depositor exemption is to protect retirement income for the depositor, one may conclude that it is irrelevant whether the plan names a beneficiary, much less who the beneficiary is. The values in conflict in the

deceased depositor situation may be different enough to call for a more limited exemption.

[199] In the earlier discussion of the live depositor exemption, this report raised issues about whether the exemption should be total or limited by a dollar cap or a clawback rule, and whether it should be restricted to locked-in plans (Issue 3). Issue 5 asked if the legislation should give judges a discretion to modify or eliminate exemptions in specific cases, subject to consideration of a list of factors. Some of these limitations may be appropriate to the deceased depositor situation; others are not. The Institute seeks advice on what limits, if any, should be placed on an exemption of RRSPs, DPSPs and RRIFs after the death of the depositor.

[200] The Institute invites your comments on issue 9.

K. Exempt from Creditors of the Beneficiary?

ISSUE No. 10
Should RRSPs, DPSPs and RRIFs, and the proceeds from such plans, be exempt from the creditors of the beneficiary?

[201] At present, Alberta law probably permits creditors of the beneficiary to seize or attach the proceeds of an RRSP or similar plan paid to the beneficiary after the death of the depositor, unless the beneficiary has put the proceeds into an exempt asset, such as an insurance RRSP. In the case of insurance RRSPs owned by the deceased depositor, some doubt is created by s. 580(2) of the *Insurance Act* which may, as noted above, create an exemption for the RRSP proceeds, although the existence and duration of such an exemption is unclear.

[202] Should the law exempt RRSP proceeds paid to the beneficiary where he or she does not pay them into an exempt asset like an insurance RRSP, but simply holds them in a bank account? This situation seems doubly remote from the original policy to protect retirement savings and to provide for the welfare of the depositor's family. The beneficiary's other assets are not generally exempt; why should the proceeds of an RRSP be treated differently?

[203] If the law were amended to provide that the proceeds of the RRSP were exigible or garnishable, the beneficiary might find the proceeds attached by a creditor before he or she was able to pay them into an exempt asset. One solution would be to follow the example of the *Civil Enforcement Regulation* and create a 30 or 60 day exemption for the proceeds of an RRSP.[160] The intention would be to provide enough time for the beneficiary to pay the proceeds into his or her RRSP or another exempt asset. After that time, however, the proceeds would be exposed to the beneficiary's creditors, including those estate creditors who have been unable to satisfy their claims fully from the depositor's estate.

[204] If, on the other hand, it is thought appropriate to create an exemption for the RRSP beneficiary against his or her creditors, it would be necessary to ask whether the exemption should be total or limited by a dollar cap or a clawback rule, whether it should be restricted to locked-in plans (Issue 3), or subject to a judicial power to modify or eliminate the exemption in appropriate cases (Issue 5).

[205] The Institute invites your comments on Issue 10.

L. Should Alberta Legislation Follow National Legislative Models?

ISSUE No. 11
(a) Should the exempting sections follow as closely as possible the ULCC Uniform Bill?
(b) Should the province follow whatever exemption of RRSPs, DPSPs and RRIFs is added to the *Bankruptcy and Insolvency Act*?

[206] To this point, the memorandum has discussed the issues entirely on policy grounds. This is appropriate as the exemption of RRSPs, DPSPs and RRIFs raises value-laden problems which are practically important, and which the law ought to resolve. There is hardly any law reform project which should not first be approached as a question of policy.

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[160] CER, s. 37(2)(a).

[207] However, reform is rarely conducted in a vacuum, and this is no exception. The ULCC, after considerable consultation and consensus-building, has written a consultation report and a uniform bill on the exemption of RRSPs, DPSPs and RRIFs. The bill has been passed by no jurisdiction except Saskatchewan which has followed the ULCC Uniform Bill with modifications.[161]

[208] There is much to be said for Canadian jurisdictions adopting a uniform solution to the problem of exemption of future income plans, and in commercial law generally. The RRSP industry is national. The *Income Tax Act* and the *Bankruptcy and Insolvency Act* are federal statutes. Exemptions legislation has historically varied from province to province, but there are dangers in indulging parochialism in an industry so national in its legal and business character. The Canadian Bar Association through the Commercial Law Strategy is working to achieve greater uniformity in commercial law across the country.

[209] On the other hand, it is important for individual law reform commissions and institutes to work out their own policy first. Rather than using uniformity as a factor to determine the policy in this case, the first step should be to determine the policy and then to see if that policy can be achieved by the ULCC model. On this approach, policy comes first and uniformity second.

[210] Another way to approach the uniformity issue is to ask when a province should depart from a report or a draft statute adopted by the ULCC? A province might have such significant objections to the uniform act that it feels it necessary to reject it in principle. In this memorandum, the Institute has noted some criticisms of the ULCC Consultation Report and the ULCC Uniform Bill. The Institute welcomes your feedback on whether the criticisms are so significant and the ULCC proposals so far off the mark that the ULCC Uniform Bill should not be followed.

[211] Another difficulty is that there is a second national model to consider. The Task Force has proposed changes to the *Bankruptcy and Insolvency Act* which are restricted to bankruptcy but which necessarily have some impact on non-bankruptcy cases. It is not desirable to create one rule regarding exemptions of RRSPs where the debtor is in

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[161] See *Bill 23*, *supra* note 4.

bankruptcy, and a different rule for non-bankruptcy situations. Forum shopping happens, but it is not to be encouraged. The Task Force is not a law reform agency in the usual sense, much less a national uniformity body, but its recommendations must be given substantial weight, somewhat lessened because it is not clear what the Superintendent of Bankruptcy or Parliament will do with the recommendations.[162]

[212] The problem created by the Task Force would not be so difficult if its proposals were roughly the same as those of the ULCC. They are not. ULCC wants no cash ceiling on the exemption against enforcement; the Task Force wants a ceiling based on the maximum allowable annual contribution. The Task Force wants to limit the exemption to locked-in plans, or plans that become locked in during the bankruptcy. ULCC rejects locking-in. These are serious differences which require Alberta to choose between the two schemes, or think of its own solution. To say the least, the claims of uniformity are somewhat diluted.[163]

[213] The Institute might suggest that Alberta should wait for other provinces to lead the way in accepting the ULCC Uniform Bill, or for the federal government to pass its amendments to the *Bankruptcy and Insolvency Act*. On the other hand, the disparity in the present law is glaring, and the consultants are unanimous that the problem is one which the Institute is equipped to address. The Superintendent of Insurance has launched a review of the relevant parts of the *Insurance Act*, and the Institute's report should be part of that review. Even if the federal government moves quickly to amend the *Bankruptcy and Insolvency Act*, those amendments will have no effect on the substantial number of cases where judgment debts are enforced against debtors who are not in bankruptcy. If the Task Force exemption proposals do not become law, then any provincial exemption for RRSPs will continue to apply in bankruptcy. It is likely that the next few years will see a substantial law reform debate in several jurisdictions on the exemption of RRSPs. It is appropriate that the Institute should participate in that debate. It may be that exemptions raise economic and policy issues which are, as

[162] The Task Force has not issued its final report, and it is possible that it will depart from the positions taken in the Discussion Paper. Task Force Appendix F, *supra* note 127 at 67, suggests that provincial governments consider favourably its proposals as a guide to provincial law reform.

[163] Note the discussion in Issue 3 of the different starting points of the ULCC Uniform Bill, *supra* note 3, 125 and the Task Force Discussion Paper, *supra* note 5.

one consultant said, "province-specific." The claims of uniformity may be weaker when exemptions are at issue.

[214] The Institute invites your comments on Issue 11(a) and (b).

M. Should LIRAs, LIFs, and LRIFs be Exempt as Well?

ISSUE No. 12
Should the proposed exemptions for RRSPs and RRIFs extend to LIRAs, LIFs, and LRIFs and payments out of such plans?

[215] Throughout this memorandum, it has been assumed that RRSPs, DPSPs and RRIFs are to be defined as in the *Income Tax Act*. A problem arises when attention is turned to a group of plans developed to house the proceeds of pensions terminated before retirement date. The plans to be examined in this section are LIRAs, LIFs, and LRIFs. They need some explanation.[164]

[216] When an employee in a pensionable job terminates the employment before the normal retirement date, the employee has choices about the money in the pension plan. The employee may (1) leave the money in the pension plan, (2) transfer it to the new employer's pension plan (depending on the terms of the two plans), (3) purchase an annuity from an insurance company, or (4) buy a LIRA. What the employee cannot (usually) do is take the balance as cash, or transfer it into an RRSP which is not locked in.

[217] Assuming that the employee makes the most popular choice and purchases a LIRA, the employee may, at a date usually prescribed by the original pension plan, move the money from the LIRA into a LIF or an LRIF, both of which permit withdrawals of money. Most commentators regard LIRAs as RRSPs, and LIFs and LRIFs as types of RRIF. If this were the whole story, the Institute report could propose that RRSPs be defined to include LIRAs, and RRIFs be defined to include LIFs and LRIFs. The locked-in plans are close enough to the usual RRSP or RRIF to merit the same treatment in judgment enforcement law.

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[164] The following account is based on Cohen and Fitzgerald, *supra* note 12, cc. 15 and 16.

[218] The matter is complicated, however, by pensions legislation which contains exemption sections which may apply to LIRAs, LIFs and LRIFs. An example is the *Employment Pension Plans Act* (EPPA) which, in s. 85(1), creates an exemption of "benefits, money that has been transferred under section ... 38 ...and money earned by such transferred money."[165] The other relevant provisions are ss. 35 and 38 which, taken together, require a member of a pension plan who terminates his or her membership in the plan to, among other possibilities, pay the pension money into a LIRA. It may be that the exemptions attaching to pensions are extended, by the sections quoted above, to LIRAs, LIFs and LRIFs and to payments therefrom. The legislation is not as clear as it might be.

[219] Chapter 1 of this discussion memorandum indicated that this project would not consider the exemption of pensions. Given that decision, the Institute can deal with LIRAs, LIFs and LRIFs in three ways.

(1) The first is to leave their treatment to the exemption provisions of the relevant pension statutes, and to say that the sections of the *Civil Enforcement Act* relating to exemptions of RRSPs, DPSPs and RRIFs do not apply to LIRAs, LIFs and LRIFs. This is to treat these plans as so closely related to pensions that any exemption provisions belong in the pension statutes.

(2) If it is preferred to treat LIRAs, LIFs and LRIFs as specialized types of RRSPs and RRIFs, then their exemption should properly be a part of the Institute's general proposals for amendments to the *Civil Enforcement Act*. The Institute's report might recommend that:

    (1) the definition of RRSP in the *Civil Enforcement Act* be defined to include LIRAs;

    (2) the definition of RRIF in the same Act be defined to include LIFs and LRIFs; and

    (3) the sections in the *Civil Enforcement Act* exempting RRSPs, DPSPs and RRIFs should expressly apply to LIRAs, LIFs and LRIFs notwithstanding s. 85 of EPPA.

(3) The third possibility is to do nothing about LIRAs, LIFs and LRIFs in the Institute's proposed amendments, except to flag the problem for future

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[165] R.S.A. 2000, c. E-8.

> study. The effect would be that LIRAs, LIFs and LRIFs might be exempt under pension legislation *and* under the *Civil Enforcement Act*, although the exemptions would likely be different. This is not a happy solution for courts and trustees who need as clear an answer as possible on exemption issues.

[220] The Institute invites your comments on Issue 12.

N. Delay Implementation of the Exemption?

ISSUE No. 13
Should the exemption legislation be publicized well in advance of the proclamation date?

[221] It is possible that some creditors may have extended credit, loaned money, or commenced lawsuits in part because the debtor has a large and exigible RRSP, DPSP or RRIF.[166] The Institute has been told that most creditors do not intend to realize against such retirement plans, but a few may. Such creditors may complain if an exemption of such plans was created and implemented without adequate notice so that the creditors can seek further security or reconsider their plans to litigate.

[222] The ULCC asked its consultants whether a new exemption of RRSPs and similar plans should be made to apply only to "new debt," apparently meaning debt incurred after the passage and proclamation of the new exemption. Some of the consultants who considered the issue were unhappy with this idea. They stressed the need for simplicity and clarity in the law, and preferred that the exemption should apply to all debts and all RRSPs, DPSPs and RRIFs, whether created before or after the passage and proclamation of the exemption.[167]

> Notwithstanding the risk to existing or potential judgment creditors, there was a preference expressed for having the exemption apply to all debt, all RRSPs and DPSPs following a prolonged delay for a well publicized

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[166] Task Force Appendix F, *supra* note 5 at 67, finds that "many banks and other lenders have advanced credit on the strength of the debtor's asset base which includes non-exempt RRSPs."

[167] ULCC Consultation Report, *supra* note 3 at 262.

> proclamation date that would allow potentially affected creditors the time to make informed decisions.

The ULCC observed that the decision on this issue "would appear to turn largely on an assessment of the number of creditors, particularly accidental creditors, who may not have commenced existing legal actions had they known that RRSP and DPSP funds would not be exigible, and on the proposed duration of an advance publication of the change."[168]

[223] The ULCC recommended that the exemption apply to all debt and to all RRSPs and DPSPs with the proclamation date for the legislation publicized well in advance.[169] The ULCC Consultation Report accompanying the ULCC Uniform Bill affirmed this decision, but concluded that no special transition provision was required in the bill.

[224] The Task Force Appendix F proposes "a sufficient lead time between the passage of the proposed exemption provisions, and their in-force date." "Sufficient" means two or three years.[170]

[225] Like the ULCC, the Institute believes that the need for a transition provision turns on whether there are creditors who would be adversely affected by the creation of an exemption. The Institute seeks the help of credit granters on this factual issue. Do credit granters ask borrowers whether they have RRSPs, DPSPs and RRIFs? If so, are credit granters relying on such plans as exigible or garnishable assets if the loan goes bad, or is the intention only to learn about the borrowers' character and financial responsibility? If the law were to create an exemption of RRSPs, DPSPs and RRIFs, how would such a change affect credit grantors or their lending practices? The Institute needs help on these basic questions.

[226] As to the legal issue, the Institute needs to know if a transitional problem exists. If not, any new exemption could be proclaimed immediately. If some sort of transitional provision is appropriate, should it take the form of distinguishing between

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[168] *Ibid.* at 268-269.

[169] *Ibid.* at 270.

[170] Task Force Appendix F, *supra* note 127 at 67-68.

old and new debt, or is such a distinction too uncertain? Or should the legislation be tabled, but the proclamation delayed for one or two years to allow creditors to modify their credit granting decisions? Is it relevant that a transitional provision may serve to allay the fears of the creditor community to the broader proposal?

[227] ULCC's discussion was limited to RRSPs and DPSPs, and did not mention RRIFs. Is there a reason for excluding RRIFs from any recommendation on transition, if the new exemption applies to RRIFs?

[228] The Institute invites your comments on Issue 13.

APPENDIX 1

Uniform Law Conference of Canada Uniform Bill

The Uniform Registered Plan (Retirement Income) Exemption Act

Short title

1. This Act may be cited as *The Uniform Registered Plan (Retirement Income) Exemption Act.*

Interpretation

2. In this Act:
"DPSP" means a deferred profit sharing plan as defined in section 147 of the federal Act;
"enforcement process" means attachment, garnishment, execution, seizure or other legal process for the enforcement of a debt;
"federal Act" means the *Income Tax Act* (Canada);
"planholder" means:
   (a) with respect to a DPSP, a beneficiary within the meaning of section147 of the federal Act;
   (b) with respect to an RRIF, an annuitant as defined in section 146.3 of the federal Act; and
   (c) with respect to an RRSP, an annuitant as defined in section 146 of the federal Act;
"registered plan" means a DPSP, an RRIF or an RRSP.
"RRIF" means a registered retirement income fund as defined in section 146.3 of the federal Act;
"RRSP" means a registered retirement savings plan as defined in section 146 of the federal Act.

Comment: Section 2 contains the definitions for the Act. The *Income Tax Act* (Canada) is used as the key for the various definitions to ensure ongoing consistency with that legislation. Some jurisdictions may need to add "as amended from time to time" to the definition "federal Act" if this is not covered by their *Interpretation Act*.

Exemption from enforcement processes

3. Notwithstanding any other Act or regulation, all rights, property and interest of a planholder in a registered plan are exempt from any enforcement process.

Comment: Section 3 provides the central legal statement of this Act setting out that the contents of a "planholder's" "registered plan" are exempt from any legal process. This wording is absolute in its scope and subject only to the express exceptions set out within the Act itself. To the extent that individual jurisdictions wish to create further exceptions to this exemption, such as allowing exigibility to enforce maintenance orders, such exceptions would need to be added to this draft.

Payments out of registered plans

4.(1) Subject to section 5 but notwithstanding any other Act or regulation, a payment out of a registered plan to a planholder or the legal representative of a planholder is not exempt from any enforcement process.
(2) For the purposes of subsection (1), a transfer of property held in one registered plan to another registered plan does not constitute a payment out of a registered plan.

Comment: Subsection 4(1) sets out that while the contents of the registered plan are exempt, individual withdrawals or payments out of such a plan are not exempt subject to the provisions in section 5. Subsection 4(2) is intended to clarify that a simple transfer from one registered plan to another does not constitute a "payment out" which would expose such transferred funds to enforcement proceedings. It should be noted that the extension of protection in subsection (2) is limited only to other "registered plans" and does not include other tax deferral instruments such as education or home purchase plans. This is intended to reflect the overall policy direction that this exemption from exigibility be targeted solely for retirement funds and not for other tax deferral or lifestyle choices.

Enforcement against payments out

5. For the purposes of enforcing a creditor's rights against payments out of a registered plan to a debtor planholder:
(a) the amount of a payment out of the registered plan is deemed to be a debt due or accruing due to the person for or with respect to the person's wages or salary within the meaning of [*insert name of relevant statute*]; and
(b) the exemptions set out in [*insert section number(s) of that Act*] apply, with any necessary modification.

Comment: Section 5 is intended to provide a link to existing enforcement procedures in the implementing jurisdiction. Clause (a) deems a payment out of a registered plan to be subject to garnishment proceedings under the appropriate provincial legislation (in Saskatchewan for example, the appropriate reference is to *The Attachment of Debts Act*). Clause (b) creates limits on such proceedings by expressly providing that the provincial limits on the amount which can be garnisheed in a given situation should also apply in this situation (For example, see section 22 of *The Attachment of Debts Act*). Thus while section 4 provides that these payments are individually exigible, and clause 5(a) allows the payments to be accessed by garnishment proceedings, clause 5(b) is intended to ensure that subsistence levels are maintained for the planholder and that only the amount in excess of such provincial limits are exigible. This is viewed as consistent with the overall policy goal of ensuring adequate retirement funds for a plan holder but not protecting funds from legitimate creditors with respect to the portion of those funds that are in excess of this policy goal.

Coming into force

6. This Act comes into force on proclamation.

Comment: Section 6 provides that the Act comes into force on proclamation. It could also provide for [or on a specified future date]. The preference would of course be to have a uniform proclamation date across Canada in order to best reflect a new national approach to this issue. Consultations reflect that a period of approximately one year prior between passage of the Bill and proclamation would be sufficient time to allow affected parties to adjust to the proposed new regime.

**The "square-bracketed" provisions refer to *The Attachment of Debts Act* in the Province of Saskatchewan for illustration purposes. Each jurisdiction will, of course, refer to the appropriate equivalent legislation in their jurisdiction.

Section 22 of that Act provides as follows:

ATTACHMENT OF WAGES OR SALARY

Exemption from attachment

22(1) Subject to the other provisions of this section, no debt due or accruing due to an employee, for or in respect of wages or salary, is liable to attachment unless the debt exceeds the sum mentioned in subsection (2), and then only to the extent of the excess.

(2) The amount of an employee's wages or salary exempt from attachment in any month is $500 plus $100 for each of his dependants that he supports.

(3) For the purpose of subsection (2), "dependant" means:

- (a) a wife, husband, brother, sister, parent or grandparent; or
- (b) a person under the age of sixteen years; or
- (c) a person being sixteen years of age or more who:
  - (i) is in regular attendance at a school; or

(ii) by reason of mental or physical disability is unable to earn a livelihood.

(4) An employer who has been served with a garnishee summons to attach wages due or accruing due to his employee may retain the amount of the wages of the employee that is exempt from attachment and pay that amount to the employee.

(5) If the plaintiff or judgment creditor claims that an employee, in addition to a fixed money wage or salary is given board or lodging or the use of a house, or any other thing of value, in part payment or compensation for his services, the plaintiff or judgment creditor may apply, on not less than five days' notice, to the judge for an order appraising the money value of the board or lodging, use of house or other thing, and the value thus ascertained shall be deducted from the amount of the exemption to which the defendant or judgment debtor would otherwise be entitled.

(6) In case of an attachment of wages or salary, the defendant or judgment debtor or plaintiff or judgment creditor may without awaiting the regular sittings of the court, apply to a judge, upon at least five days' notice in writing to the other party or his solicitor, for an order fixing the amount of exemption and finally disposing of the matter, and the judge may order accordingly.

(7) Where the debt due or accruing due is wages or salary for a period of less than one month, the part thereof exempt from attachment is that sum that bears the same proportion to the amount of the exemption allowed by subsections (2) and (5) as the period for which the wages or salary is due or accruing due bears to one month of four weeks.

(8) Nothing in this section applies to a garnishee summons issued under:

(a) Repealed. 1984–85–86, c.77, s.2.

(b) a judgment or order respecting:

(i) an action founded upon a separation agreement;

(ii) a debt contracted for board or lodging; or

(iii) hospital expenses payable to a hospital or recoverable by a municipality or by the Minister of Municipal Affairs under *The Local Improvement Districts Act* or *The Local Improvement Districts Relief Act.*

(9) If the amount of the exemption to which the defendant or judgment debtor is entitled, or a portion thereof, is paid into court, it is not necessary for him to claim the amount or the portion, but he is entitled, in the absence of notice of an application under subsection (5) or subsection (6), to have it paid out to him at any time on application to the local registrar accompanied by an affidavit showing such facts as so entitle him.

(10) Where a defendant or a judgment debtor does not make an application under subsection (9) for payment out to him of the amount to which he is entitled and that has been paid into court, prior to the expiration of two months after the date:

(a) the amount is paid into court;

(b) judgment is recovered against the debtor;

whichever date is the later, the judgment creditor may, either ex parte or on such notice as the court or judge directs, apply to the court or a judge to have the amount, or so much of the amount as is sufficient to satisfy his judgment, paid out to him, and where an application is made the court or judge may make such order as is deemed advisable in the circumstances.

Historical Note: R.S.S. 1965, c. 101, s. 22; 1966, c. 93, s. 4; 1973, c. 5, s. 1; 1979, c. 4, s. 3; 1979-80, c. 2, s. 4; 1984-85-86, c. 77, s. 2.

APPENDIX 2

Personal Insolvency Task Force Report

Canada, Industry Canada, Corporate and Insolvency Law Policy Directorate, *Consumer Insolvency Issues: A Discussion Paper* (Ottawa : Industry Canada, April 23, 2002).

Pages 14-18 and notes.

V. Exemption of RRSPs in Bankruptcy

A. The issue

The issue is whether Registered Retirement Savings Plans (RRSPs) should be exempt from seizure under the BIA.

It has been argued that retirement savings should have the same protection against seizure, whether in a pension plan or an RRSP. The debate surrounding this issue is essentially one of ensuring the fair treatment of debtors whether they benefit from a pension plan or an RRSP and the rights of creditors to expect the highest possible return upon distribution of a bankrupt's estate.

This section considers two options for the treatment of RRSPs in bankruptcy: to retain the current regime, or to adopt the PITF recommendation to exempt RRSPs from seizure in bankruptcy.

B. Background

RRSPs held by banks, brokerages or in self-directed RRSP accounts currently form part of the bankrupt's estate and are available to creditors, while funds invested in Registered Pension Plans (RPPs) are exempt by virtue of provincial and federal pension benefits legislation.

The exemption of RRSPs from seizure in bankruptcy was first considered by the Advisory Committee in Bankruptcy and Insolvency in its 1986 report, which recommended exempting RRSPs to a maximum of $50,000.[45] In 1994, the Bankruptcy and Insolvency Advisory Committee also recommended that RRSPs be exempt from seizure; this recommendation was not adopted.

In a 1998 consultation report, the Uniform Law Conference of Canada reported that it would be advantageous to address the issue of exempting RRSP savings from debt enforcement.[46] It also identified the need to co-ordinate provincial exemptions with amendments to the BIA to counter potential abuses of any future expanded exemption regime. At its 1999 meeting, the conference adopted the *Uniform Registered Plan (Retirement Income) Exemption Ac*t, uniform legislation that would impose an absolute exemption of RRSPs from any enforcement process.[47] To date, none of the provinces has adopted the provisions of the uniform Act.[48]

C. Model features and assessment

1. Current Canadian regime

Features

RPPs—such as those created for government employees and by private-sector employers—are currently exempt from execution, seizure or attachment under provincial and federal pension benefits legislation. These funds benefit from ironclad protection. In fact, benefits received from a pension plan during one's retirement are also protected from seizure and if eventually transferred into a locked-in RRSP vehicle, the RRSP also remains exempt.[49]

Whether RRSPs are exempt is determined by their characterization as life insurance products. The PITF identifies three different types of RRSPs:[50]

- conventional RRSPs: those held or administered by banks, brokerages or self-directed funds. They are subject to execution by creditors and will form part of a debtor's estate in bankruptcy.
- insurance-type RRSPs: these are most commonly structured as annuities held by provincially regulated insurance companies. This type will be exempt from seizure under certain circumstances, primarily where the designated beneficiary is the spouse, parent or child of the plan holder. In some cases the beneficiary must be irrevocable.[51]
- locked-in RRSPs: these are created when a former employee withdraws from an employer's RPP after the pension rights have vested. This amount will be exempt under the applicable pension legislation and cannot be accessed until an individual retires.

The vast majority of RRSPs are held in the conventional RRSP category. Insurance-type RRSPs tend to be more expensive and are less common than conventional RRSPs.

Assessment

The PITF observes that:

> While employees with employment pension plans can safely accumulate retirement savings in exempt pensions, self-employed individuals and non-pensioned employees normally lose their RRSP investments upon bankruptcy, notwithstanding that their contributions may have been advanced many years before their insolvency. However, under provincial law, prudent self-employed individuals and non-pensioned employees, or those with good advisors, are able to creditor-proof their retirement funds through insurance-type RRSP savings. Most people are unaware of this option.[52]

Since the public-policy basis for encouraging Canadians to contribute a portion of their earnings for retirement through RRSPs is to help ensure that senior citizens have reasonable assets with which to retire, then granting conventional RRSP vehicles the same protection obtained with locked-in and insurance-type RRSPs and RPPs would seem to make sense.

Despite these criticisms, there are some valid arguments calling for the maintenance of the current regime. There are differences between an RPP and an RRSP. Unlike RRSP owners, employees in RPPs cannot redeem at will their monetary interest in those pensions. Moreover, self-employed persons are free to enjoy the same protection by converting their investments into an insurance-type or other locked-in RRSP.

Some individuals use RRSPs primarily as a tax-deferring mechanism or to maintain a certain lifestyle. In this respect, it may argued that conventional RRSPs should not be treated differently from other non-exempt assets. Exempting RRSPs may encourage strategic bankruptcies as debtors attempt to eliminate large creditors with little or no consequences to their assets or lifestyle. Finally, since one of the fundamental purposes of bankruptcy legislation is to maximize returns to creditors in an insolvent estate, removing the RRSP portion of a bankrupt's property may significantly reduce or eliminate altogether returns to creditors in a large number of bankruptcies.

2. PITF recommendations

Features

The PITF has attempted to devise a mechanism for RRSP exemption that would accommodate and balance the competing interests in this debate. Realizing that the integrity of the bankruptcy system would suffer if debtors were able to shield their RRSPs through strategic bankruptcies, it has also proposed an anti-abuse provision.

The essential elements of the PITF model for the exemption of RRSPs can be summarized as follows:

- The exemption could be invoked in bankruptcy by converting the RRSP, shortly following bankruptcy, into a locked-in RRSP or annuity accessible only upon reaching retirement age. In effect, the RRSP would be converted into a locked-in RRSP similar to that prescribed by pension legislation when an employee's vested pension rights are terminated due to a loss of employment status.
- To counter abuse, all RRSP contributions made by the debtor (including contributions to a spousal RRSP) within three years of the date of the initial bankruptcy event would accrue to the trustee as property divisible among creditors. Contributions outside the three-year mark would continue to be subject to existing provincial fraudulent conveyance legislation.
- The income or proceeds that are drawn from the locked-in RRSP following a person's retirement would be treated as income and subject to the surplus income standards in s. 68 of the BIA.
- The exemption would be capped to equal the maximum RRSP contribution limit in the year of bankruptcy (currently $14,500) times the number of years that the bankrupt's age exceeds 21, to a limit of age 65. As an example, a 41-year-old bankrupt will have an RRSP cap of $14,500 x 20 = $290,000.
- The provincial Insurance Act exemptions over RRSP-type annuities ought to be inapplicable in bankruptcy. The proposed federal RRSP exemption in the BIA would replace it.

The detailed recommendations appear in Appendix F.

Assessment

The PITF has proposed an innovative model and has made a strong case for the exemption of RRSPs in bankruptcy. The lock-in provision would ensure that the savings are used for retirement purposes and not for the purposes of a strategic bankruptcy.

The incremental formula for determining a debtor's maximum exemption amount would allow older individuals to keep more of their savings as they near retirement. This proposal will likely generate a great deal of debate. Creditors will probably not look favourably on older debtors being able to potentially shield hundreds of thousands of dollars by locking in their RRSPs shortly after declaring bankruptcy. These amounts are potentially much greater than the $50,000 cap recommended in the 1986 report of the Advisory Committee in Bankruptcy and Insolvency. However, it would be difficult to argue that $50,000 was anything but a token exemption amount. In fact, the amount exempted in an RRSP under the PITF model would very likely be less than the present value of the entitlement under an RPP for an RPP holder of the same age.

The anti-abuse or anti-avoidance provision seems to strike an appropriate balance. The irrebuttable test would likely address the problems of the current anti-avoidance provisions in the BIA: the exorbitant costs of pursuing such matters before the courts, the high evidentiary burden needed to satisfy a court of the debtor's intent to defraud his or her creditors, and the amount of time needed to resolve the proceedings.

D. Conclusions

The differences in treatment between RPPs and RRSPs has been criticized as being unfair to those who are unable to benefit from the protection offered by an RPP. However, there are important distinctions between these two retirement plans, which lead some to argue for the maintenance of the status quo. Contributions to RPPs are often mandatory and the invested funds are usually not available until retirement. In contrast, RRSPs can be collapsed at any time and may be used for purposes other than providing retirement income.

The proposed PITF model attempts to strike a balance between the interests of debtors and creditors, by exempting RRSPs subject to constraints. It would protect a substantial portion of the funds in an RRSP, but still leave the amounts which may be protected in an RRSP almost certainly lower than those protected in a comparable RPP.

Endnotes

[45] The Committee was established by the Minister of Consumer and Corporate Affairs in 1985 to examine the bankruptcy system and recommend amendments to it.

[46] Uniform Law Conference of Canada, *Creditor Access to Future Income Security Plans, Consultation Report* (Ottawa: Civil Section, Uniform Law Conference of Canada, August 1998), p.1.

[47] Section 3.

[48] The Uniform Act will not be examined in this section, because it deals mainly with reforms to provincial legislation.

[49] L.W. Houlden and G.B. Morawetz, *Annotated Bankruptcy and Insolvency Act, 2001* (Scarborough, Ontario: Carswell Thomson, 2000), pp. 282–283.

[50] PITF draft report, unpublished.

[51] Section 49 of the British Columbia *Insurance Act*, R.S.B.C. 1996, c.226.

[52] PITF draft report, unpublished.

Pages 63-68 and notes (Appendix F)

F. Detailed PITF Recommendations on RRSPs[168]

Issue

The PITF proposes that RRSPs be eligible for exemption in bankruptcy on the basis of several inter-related elements. The principal elements are:

a) The exemption can only be utilized in bankruptcy by converting the RRSP, shortly following the date of bankruptcy, into a "locked-in" RRSP or annuity that will be accessible only upon reaching retirement age. This will require revisions to existing federal legislation as there is no such conversion currently available. In effect, the RRSP will be converted into a "locked-in" RRSP similar to that prescribed by pension legislation when an employee's vested pension rights are terminated due to a loss of employment status.

(b) All RRSP contributions made by the debtor (including contributions to a spousal RRSP), made within three years of the date of the initial bankruptcy event, will accrue to the trustee as property divisible among creditors. This will be an irrebuttable vesting which is not dependent upon any fraud test or judicial determination. Contributions outside the three-year mark will continue to be subject to fraudulent conveyance attack under existing provincial legislation.

(c) The income or proceeds from the locked-in RRSP, when it is in pay following retirement age, will be treated as income that is subject to the surplus income standards in BIA s. 68.

Discussion

Why the *mandatory lock-in*? The policy rationale underlying an RRSP exemption only applies if the RRSP is truly intended for retirement purposes. This purpose, and hence this policy goal, is guaranteed by the lock-in. Without the conversion to locked-in status, the exemption might merely assist the debtor to preserve tax-deferred savings until shortly after the bankruptcy discharge. There is no policy reason for this. Creditor confidence in the system will be maintained if it is clear that the debtor no longer has access to the exempt capital until retirement; in effect, the RRSP is converted into a pension. The lock-in also accomplishes another indirect benefit: it will discourage the discharge court from diminishing the exemption through a conditional discharge order. The court will be less offended by a debtor whose exempt RRSPs are unavailable until retirement, similar to a pension holder.

Some trustees have commented on the ostensible unfairness of preventing a discharged bankrupt in need from accessing his or her locked-in RRSP. Current provincial lock-in legislation allows the Superintendent of Pensions to make an exception to the lock-in in cases of financial hardship.[169] This could be maintained or adapted in the legislation creating the locked-in RRSP vehicle.

Ought there to be a *cap* on the dollar value of this exemption? There is no cap on exempt pensions. However the PITF noted two situations that may necessitate a cap. One is that some RRSPs may grow extremely large as a result of shrewd or speculative investments in a self-directed RRSP. A comparable problem arises where the individual has over-contributed to the RRSP, above the tax-free limit. Both of these cases may result in the RRSP having a value far exceeding any comparable pension plan, and exceeding any limit that creditors could comfortably stomach. Any cap must bear some relationship to the present value of comparable pension savings. If the cap is to reflect retirement needs, it must vary with age: a low cap for young debtors, and a large cap for older debtors who will sooner need to draw on their retirement vehicles. A modest fixed cap (for example, $50,000 as suggested by the 1986 Colter Commission) will perpetuate the favoured bankruptcy treatment of pensioned employees over self-employed individuals and non-pensioned employees.

The cap that we propose will equal the maximum RRSP contribution limit in the year of bankruptcy (currently $14,500) times the number of years that the bankrupt's age exceeds 21, to a limit of age 65. In other words, a forty-one year old bankrupt will have an RRSP cap of $14,500 * 20 = $290,000; a fifty-one year old will cap at $435,000; a sixty-one year old will cap at $580,000. This works out a rough parity with pension values, although it does not reflect the full accrual of interest and hence it may be substantially lower than the pension value of a high-earning employee.[170] Further advantages of this formulation are that there are no actuarial calculations required, so it is simple and cheap to administer; the definition does not need to be adjusted with inflation because its key component (the annual contribution limit) is normally itself adjusted by RRSP regulation; and there is no need to analyze or litigate historical contribution patterns.[171]

Why a *three-year contribution clawback*? This formulation serves the purpose of preserving, for the debtor, retirement funds which were saved and accumulated long before bankruptcy. It appropriates for the creditors only those retirement funds which were accumulated in a period when one can reasonably infer - not with precision, but as a generality - that such contributions could otherwise have gone toward debt repayment. Under this formulation, a debtor who has been contributing for many years will preserve all but a fraction of the RRSP, whereas a debtor who started contributing only shortly before bankruptcy - perhaps in anticipation of the bankruptcy - has little justification to preserve these recent contributions from creditors. If the period were shorter, we would be inviting debtors (for example, strategic tax debtors) to make a significant RRSP contribution (perhaps by utilizing unused RRSP eligibility limits) and then to hold creditors off for the requisite short period in order to bullet-proof the RRSP.

Why an *irrebuttable test*? Without an irrebuttable test, the trustee will have to launch a fraudulent conveyance attack to acquire the RRSP funds. The cost of this step will normally be beyond the amounts justified by most bankruptcy filings. In effect, the cost will be at the trustee's risk. Moreover, fraud allegations invite the application of solicitor-client costs in the event that the trustee is unsuccessful, along with the significant risk that costs will be assessed against the trustee personally. In short, the cost and risk of such litigation will hardly ever be justifiable or fundable out of the existing assets in the estate. We need a cheap and effective anti-avoidance device to ensure creditor confidence. Note that the mandatory clawback must apply to contributions made to a spousal RRSP during the mandatory clawback period; otherwise, the clawback can be flouted by simply making contributions to a spousal RRSP during the clawback period.

Why not require the debtor to make the lock-in election at the time of acquiring the RRSP, or at the time of each contribution? This does not solve the problem of poorly advised debtors making short-sighted decisions. In general, people do not plan for insolvency. There is no reason for them, years before, to make a choice which, years later, will determine whether their retirement savings are destroyed by insolvency. Few people will contribute to an RRSP that locks in their money until retirement, and thereby eliminates its use as an emergency fund, in exchange for the peripheral benefit of future creditor-proofing. Few will purchase such an RRSP with no liquidity unless it is offered with a significantly higher return. Prudent or well-advised debtors will make the safe choice, others will not; and we will have the same unsatisfactory differentiation which persists today: well-advised debtors, or those with foresight, purchase exempt RRSPs, most do not and lose all their retirement savings in the event of bankruptcy.

What about insurance-type RRSPs, which are currently exempt under provincial legislation? The PITF was of the view that the proposed exemption ought to be preclusive of provincial RRSP exemptions, in other words that the provincial Insurance Act exemption over RRSP-type annuities ought to be inapplicable in bankruptcy; this federal RRSP exemption in the BIA will replace it.

This exemption requires little administrative expense by the debtor or the trustee, save for the filing with the applicable financial institution of an Election to Convert by the debtor, completion of a Certificate of Conversion by the financial institution, and receipt of same by the trustee. Both of these forms can be incorporated into the Forms under the Bankruptcy and Insolvency Act. The conversion must be effected either prior to, or within 90 days of the date of bankruptcy, subject to any court-ordered extension of this time period to cover cases of inadvertent good faith failure to convert (for example, some debtors will not remember where their RRSPs are held). The financial institutions will likely make such a form readily available as part of their service. Likewise the clawback ought to be relatively cheap to administer.

Given that many RRSPs will be small, and the debtor often disorganized, some trustees are concerned about the added administrative costs. The creditors ought not to be forced to fund the trustee's cost of assisting the debtor to access this exemption. Trustees should be free to charge the debtor a fee, payable out of the RRSP, for administering the paperwork. Normally this fee will be modest. Unless this fee can be charged, trustees may have a built-in disincentive against assisting the debtor to complete the paperwork and thus reducing the assets in the estate.

To give effect to the availability of the locked-in RRSP as surplus income when it is in pay following retirement age, there must be a change to BIA s. 68 in one respect. The current s. 68 provides that pension income is included in the surplus income calculation, but a s. 68 order can never be enforced against exempt income.[172] Under current law a retired bankrupt who is netting, say, $50,000 in pension income, can be ordered to pay some portion of this to the estate, but the order cannot currently be enforced. The bankrupt can flout the order with impunity under current law. This conflicts with our proposed provision that the RRSP, when converted and when in pay, should be treated as surplus income and be available for this purpose. The rationale for the current limitation has never been apparent. S. 68 should clearly provide that a surplus income order can be enforced against exempt income.

The tax authorities will be concerned about strategic use of this exemption. In the PITF’s view, this concern will be largely abetted by the irrebuttable clawback, along with the continued applicability of provincial fraudulent conveyance grounds for attacking fraudulent conduct.

Special rules may have to be carved out for the following situations:

(i) where RRSP investments have been divided before bankruptcy in favour of a spouse or common-law partner by virtue of a separation agreement or matrimonial court order.

(ii) the exemption ought not to prevent support enforcement measures against the RRSP that are permitted under provincial or federal legislation, i.e. claims that fall within BIA s. 178(1)(b) or (c).

There should be a sufficient lead time between the passage of the proposed exemption provisions, and their in-force date. Many banks and other lenders have advanced credit on the strength of the debtor's asset base which includes non-exempt RRSPs. The reasonable expectations of these creditors would be defeated if the exemption were put in place before they can protect themselves. A two to three year lead time will suffice so that any lenders in this situation can, if they see fit, call the loan, arrange for alternative assurances or other security, or conceivably obtain a judgment against the debtor so as to access the non-exempt RRSPs before the new exemption comes into force.

This proposal will require legislative reform to statutes outside the BIA. The feasibility of this proposed change ought to be investigated with the responsible ministries. One can utilize, as a starting point, the provisions in provincial legislation which govern "locked-in" RRSPs deriving from an ex-employee's withdrawal from an RPP plan upon termination of employment after the pension rights have vested.[173] Presumably the BIA could specify the general rules pertaining to the lock-in, and could refer to a regulation which prescribes a set of acceptable lock-in RRSPs.

The PITF also considered whether this change ought to apply to the non-bankruptcy situation. Artificialities will be created if the exemption applies only in bankruptcy and not in the normal debtor-creditor situation. It should be noted that in 1999 the Uniform Law Conference of Canada adopted a Report recommending universal provincial exemption of RRSPs from any enforcement process (save that payments out of the RRSP are to be treated as wages). The Report does not address the problem of abuse. If the provinces adopt a comparable version of RRSP exemption as contemplated by our recommendation, the mandatory clawback might be most effective if it operated for a three year period before, say, the date of commencement of the first lawsuit against the debtor which remains unsatisfied. This date would limit strategic use of the exemption, outside of the bankruptcy context, by discouraging debtors from prolonging lawsuits for the sole purpose of enhancing the RRSP exemption.

Recommendation

RRSPs should be eligible for exemption in bankruptcy on the following basis:

(a) The exemption will be available only by converting the RRSP, shortly following the date of bankruptcy, into a "locked-in" RRSP or annuity that will be accessible only upon reaching retirement age. In effect, the RRSP will be converted into a "locked-in" RRSP similar to that prescribed by pension legislation when an employee's vested pension rights are terminated due to a loss of employment status.

(b) All RRSP contributions made by the debtor (including contributions to a spousal RRSP), within three years of the date of the initial bankruptcy event, will accrue to the trustee as property divisible among creditors. This will be an irrebuttable vesting which is not dependent upon any fraud test or judicial determination. Contributions outside the three-year mark will continue to be subject to fraudulent conveyance attack under existing provincial legislation.

(c) The income or proceeds from the locked-in RRSP, when it is in pay following retirement age, will be treated as income that is subject to the surplus income standards in BIA s. 68. The trustee will be entitled to enforce the surplus income obligation against such income.

(d) The exemption will be capped by a formula equal to the maximum RRSP contribution limit in the year of bankruptcy times the number of years that the bankrupt's age exceeds 21, to a limit of age 65.

The exemption will require the filing with the applicable financial institution of an Election to Convert by the debtor, completion of a Certificate of Conversion by the financial institution, and receipt of same by the trustee. These forms can be incorporated into the Forms under the BIA. The conversion must be effected either prior to, or within 90 days of the date of bankruptcy, subject to any court-ordered extension of this time period to cover cases of inadvertent good faith failure to convert.

Trustees should be entitled to charge the debtor a fee, payable out of the RRSP, for administering the conversion paperwork.

The provincial Insurance Act exemptions over RRSP-type annuities ought to be inapplicable in bankruptcy. This proposed federal RRSP exemption in the BIA will replace it.

Special consideration is required for the following situations: (i) where RRSP investments have been divided before bankruptcy in favour of a spouse or common-law partner by virtue of a separation agreement or matrimonial court order; and (ii) the exemption ought not to prevent support enforcement measures against the RRSP that are permitted under provincial or federal legislation, i.e., claims that fall within BIA s. 178.

There should be a two or three-year transitional period before the exemption comes into force.

ENDNOTES

[168] PITF draft report.

[169] For example, see Ontario Pension Benefits Act, s. 67(5)-(7).

[170] Consultation with one insurance company indicates that the cap amount for a 65 year old person, at current interest rates, would equate to a taxable annual annuity of $49,180.32 if guaranteed for a 25 year payout to age 90, or $59,555.64 if guaranteed for life. At age 55, the cap amount equates to a taxable annual annuity of $37,710.48 (male, guaranteed for life), $35,510.28 (female, guaranteed for life) and $33,266.16 (guaranteed for 35 year payout to age 90, either sex).

[171] An alternative formulation that was considered (but rejected), would multiply the current contribution limit by the number of years that the bankrupt has been in the workforce. This is unsatisfactory as it is inapplicable to spousal RRSPs, where the bankrupt has never had an income but has received spousal contributions over the years; and it requires a factual determination of the date of an historical event, many years past, that will lead to uncertainty and litigation.

[172] BIA, s. 68(2)(b).

[173] For example, Ontario Pension Benefits Act, ss. 66 and 67, and Regulation 21 thereunder.

APPENDIX 3
Buckwold and Cuming Interim Report

Tamara M. Buckwold & Ronald C.C. Cuming, *Interim Report on Modernization of Saskatchewan Money Judgment Enforcement Law* (Regina, Sask. : Queen's Printer, November 2001).

Pages 118-120 and notes.

Exempt Property

Section 62:

(1) Subject to subsection (5), the following personal property of a judgment debtor is exempt:

(a) clothing, not including jewellery;

(b) such health aids or other devices as may be required or ordinarily used by the judgment debtor or a dependent of the judgment debtor due to physical or mental infirmity;

(c) household furnishings necessary to allow the judgment debtor and the judgment debtor's family and dependents to maintain a functional household;

(d) one motor vehicle necessary to allow the judgment debtor to earn income for the support of the judgment debtor and the dependents of the judgment debtor, including an automobile or small truck required for transportation to a place of employment when public transportation facilities are not reasonably available for that purpose;

(e) a motor vehicle, not in addition to a vehicle referred to in subsection (d), required by the judgment debtor to meet the judgment debtor's or his or her dependents' reasonable educational, health, or recreational needs;

(f) items of tangible personal property required for use by the judgment debtor to earn income for the support of the judgment debtor and the dependents of the judgment debtor;

(g) the corpus of a registered retirement savings plan or registered retirement income fund in the name of the judgment debtor and the amount of the corpus paid out upon retirement of the judgment debtor;

(h) money or property acquired through the investment of money received by the judgment debtor pursuant to a legal entitlement to compensation for personal physical injury, not including injury to property;

(i) a burial plot or burial plots intended for the interment of the judgment debtor, a dependent of the judgment debtor or a member of the judgment debtor's family;

(j) property of the judgment debtor that is of such low value or property in which the judgment debtor's interest is of such low value that the costs of seizure and sale are, in the opinion of the sheriff, likely to be approximately equal to or greater than the amount realized from disposition of the property or the debtor' interest, as the case may be; and

(k) an interest in a house, house trailer or equivalent facility, and land on which it is permanently situated, used by the judgment debtor as a principal residence, of a size and quality that allow the judgment debtor and the family and dependents of the judgment debtor to have a reasonable standard of living accommodation.

(2) The judgment debtor is entitled to select from a greater quantity of items referred to in subsection (1)(c), (d), or (e) the item or items that are exempt.

(3) When, upon being informed of the right to make a selection as provided in subsection (2) the judgment debtor does not within a reasonable period of time make the selection, the sheriff shall make the selection for the judgment debtor, and such selection shall be deemed to have been made by the judgment debtor.

(4) On application, the court may order:

(a) seizure and sale of an item of property of the judgment debtor in which the judgment debtor has an interest falling with clause (c), (d), (e), (f), or (k) of subsection (1), if the court has determined that the value of the item is significantly in excess of the value of similar items of property available in the market that could fulfill the function set out in the relevant subclause;

(b) that subsection (1)(g) does not apply to a judgment debtor who has vested rights in a pension plan, or income from other sources, that will provide sufficient financial support for the judgment debtor and dependents of the judgment debtor after the age of 65 years.

(5) An order under subsection (4)(a) shall direct that, out of the sale proceeds of the item, the judgment debtor be given sufficient money to replace the item sold or

the judgment debtor's interest in the item sold with an item or interest in an item that can fulfill the requirements set out in the relevant clause of subsection (1).

(6) An order under subsection (5) may direct payment to a person who, at the time of the application, is in possession of property of the judgment debtor and is entitled to claim that property as exempt pursuant to section 60(5).

(7) An order for sale referred to in subsection (4)(a) may be made where the judgment debtor is the owner of the item or a joint owner of the item with another person.

(8) In an application under subsection (4), the onus of proof that:

(a) an item mentioned in subsections (1)(c), (d), (e), (f), or (k) is significantly in excess of the value of functionally equivalent items available in the market; or

(b) a judgment debtor has vested rights in a pension plan or income from other sources that will provide sufficient financial support for the judgment debtor and dependents of the judgment debtor after the age of 65 years;

is on the applicant.

Explanatory Notes

7. Subsection (1)(g) recognizes that retirement savings and income can be as important to the maintenance of a judgment debtor as earned income. Section 63(1) of *The Pension Benefits Act*,[115] provides that pension benefits and money transferred from a pension account to an RRSP or other registered retirement plan under the *Income Tax Act* are exempt from execution, seizure or attachment. Under section 158(2) of *The Saskatchewan Insurance Act*, payments under an annuity that contains a designation in favour of a spouse, child, grandchild or parent of the annuitant are exempt from execution even though the designation provides for only a marginal, contingent interest.[116] Given the clear public policy choice contained in this legislation, consistency dictates that investments in RRSPs or RRIFs and post-retirement payments from these schemes be exempt as well. However, a judgment debtor should not be entitled to stack retirement funds or income. Accordingly, subsection (8) would give the court the power to order that subsection (1)(g) does not apply where the

applicant establishes that the judgment debtor has vested rights in a pension plan or post-retirement income from other sources sufficient to provide support for the judgment debtor and dependents of the judgment debtor.

ENDNOTES

[115] S.S. 1992, c. P-6.001.

[116] See *Royal Bank of Canada* v. *North American Life Insurance Co*., [1996] 3 W.W.R. 457 (S.C.C.).

APPENDIX 4
Insurance Act, R.S.A. 2000, c. I.3

Annuity deemed life insurance

555 For the purposes of this Subpart, an undertaking entered into by an insurer to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount, is deemed to be and always to have been life insurance whether the annuity is for
(a) a term certain,
(b) a term dependent either solely or partly on a human life,
or
(c) a term dependent solely or partly on the happening of an event not related to a human life.

1999, c. I-5.1, s. 555

Designation of Beneficiaries

Designation of beneficiary

574(1) An insured may in a contract or by a declaration designate the insured's personal representative or a beneficiary to receive insurance money.
(2) Subject to section 575, the insured may alter or revoke the designation by a declaration.
(3) A designation in favour of the "heirs", "next of kin" or "estate" of the insured, or the use of words of similar meaning in a designation, is deemed to be a designation of the personal representative of the insured.

1999, c. I-5.1, s. 574

Irrevocable designation

575(1) An insured may in a contract or by a declaration, other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured designate a beneficiary irrevocably, and in that event the insured, while the beneficiary is living, must not alter or revoke the designation without the consent of the beneficiary and the insurance money is not subject to the control of the insured or of the insured's creditors and does not form part of the insured's estate.
(2) When the insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed as provided in subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.

1999, c. I-5.1, s. 575

Designation in will

576(1) A designation in an instrument purporting to be a will is not ineffective by reason only of the fact that the instrument is invalid as a will, or that the designation is invalid as a bequest under the will.
(2) Despite the Wills Act, a designation in a will is of no effect against a designation made later than the making of the will.
(3) When a designation is contained in a will, if subsequently the will is revoked by operation of law or otherwise, the designation is revoked.
(4) When a designation is contained in an instrument that purports to be a will, if subsequently the instrument if valid as a will would be revoked by operation of law or otherwise, the designation is revoked.

1999, c. I-5.1, s. 576

Trustee for beneficiary

577(1) An insured may in a contract or by a declaration appoint a trustee for a beneficiary and may alter or revoke the appointment by a declaration.
(2) A payment made by an insurer to a trustee for a beneficiary discharges the insurer to the extent of the payment.

1999, c. I-5.1, s. 577

Beneficiary predeceasing life insured

578(1) If a beneficiary predeceases the person whose life is insured and no disposition of the share of the deceased beneficiary in the insurance money is provided in the contract or by a declaration, the share is payable
(a) to the surviving beneficiary,
(b) if there is more than one surviving beneficiary, to the surviving beneficiaries in equal shares, or
(c) if there is no surviving beneficiary, to the insured or the insured's personal representative.
(2) When 2 or more beneficiaries are designated otherwise than alternatively but no division of the insurance money is made, the insurance money is payable to them in equal shares.

1999, c. I-5.1, s. 578

Enforcement of payment by beneficiary

579 A beneficiary may enforce for the beneficiary's own benefit, and a trustee appointed pursuant to section 577 may enforce as trustee, the payment of insurance money made payable to the beneficiary or trustee in the contract or by

a declaration in accordance with the provisions of the contract or declaration, but the insurer may set up any defence that it could have set up against the insured or the insured's personal representative.

1999, c. I-5.1, s. 579

Insurance money not part of estate

580(1) When a beneficiary is designated, the insurance money, from the time of the happening of the event on which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.

(2) While a designation in favour of a spouse, child, grandchild or parent, or any of them, of a person whose life is insured is in effect, the insurance money and the rights and interests of the insured in the insurance money and in the contract are exempt from writ proceedings.

1999, c. I-5.1, s. 580

APPENDIX 5
Exempting Legislation from Other Canadian Provinces

***Law and Equity Act*, R.S.B.C. 1996, c. 253**

49 (1) In this section:

"annuitant" means an annuitant as defined in section 146 (1) of the *Income Tax Act* (Canada);

"registered plan" means a retirement savings plan that
(a) was created before, or is created after, this section comes into force, and
(b) is registered under the *Income Tax Act* (Canada).

(2) If, in accordance with the terms of a registered plan, an annuitant designated a person to receive a benefit payable under the registered plan in the event of the annuitant's death,
(a) the designation is effective if it is in writing and signed by the annuitant, or if it is contained in a will or other testamentary instrument,
(b) the person designated may enforce payment of the benefit, and
(c) the benefit is not part of the estate of the annuitant,
and section 50 (1) to (3) of the *Insurance Act* applies to that designation.

(3) An annuitant may alter or revoke a designation made under a registered plan.

(4) This section does not apply to a designation of a beneficiary to which the *Insurance Act* applies.

(5) This section is retroactive and is deemed to have been in force on, from, and after January 1, 1971.

[Notes:
1. Sections 50 and 51 of the *Law and Equity Act* contain similar sections relating to registered home ownership savings plans and registered retirement income funds.
2. Section 50 (1) to (3) of the *Insurance Act* deals with a designation of a beneficiary in an invalid will, and is irrelevant for our purposes.]

***Designation of Beneficiaries under Benefit Plans Act*, R.S.P.E.I. 1988, c. D-9**

1. In this Act
(d) "plan" means
(i) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement or a fund, trust, scheme, contract or arrangement for other benefits for employees, former employees, directors, former directors, agents, or former agents of an employer or their dependants or beneficiaries, or
(ii) a fund, trust, scheme, contract, or arrangement for the payment of a periodic sum for life or for a fixed or variable term,
and includes a retirement savings plan, home ownership savings plan and a retirement income fund as defined in the *Income Tax Act* (Canada).

9. Where a beneficiary is designated, any benefit payable to the beneficiary is not, from the time of the happening of the event upon which it becomes payable, part of the estate of the participant, and is not subject to the claims of the creditors of the participant.

10. Where a designation in favour of a spouse, child, grandchild or parent of a participant is in effect, the assets of the plan and the rights and interests of the participant therein and in the plan are exempt from execution or seizure.

***Exemptions Act*, R.S. S. 1978, c. E-14**

Government Annuities

Interest in annuity exempt

9(1) The property and interest of an annuitant in an annuity or of a person interested in or entitled to a contract for an annuity under the *Government Annuities Act* (Canada), and any moneys payable or paid under a contract for an annuity, shall be exempt from seizure, levy or attachment by or under the process of any court, and shall not be affected by any trust, charge or lien.
(2) Nothing in this Act is intended to conflict or be inconsistent with any enactment or provision of the *Government Annuities Act* (Canada) or any amendments thereto.

APPENDIX 6
Saskatchewan Bill to Implement ULCC Uniform Bill

Bill No. 23 of 2002

An Act exempting Registered Retirement Plans
from certain Enforcement Processes

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(Assented to , 2002)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Short title

1 This Act may be cited as *The Registered Plan (Retirement Income) Exemption Act*.

Interpretation

2 In this Act:

"DPSP" means a deferred profit sharing plan as defined in section 147 of the federal Act;

"enforcement process" means attachment, garnishment, execution, seizure, or other legal process for the enforcement of a debt;

"federal Act" means the *Income Tax Act* (Canada);

"planholder" means:

(a) with respect to a DPSP, a beneficiary within the meaning of section 147 of the federal Act;

(b) with respect to an RRIF, an annuitant as defined in section 146.3 of the federal Act; and

(c) with respect to an RRSP, an annuitant as defined in section 146 of the federal Act;

"registered plan" means a DPSP, an RRIF or an RRSP;

“RRIF” means a registered retirement income fund as defined in section 146.3 of the federal Act;
“RRSP” means a registered retirement savings plan as defined in section 146 of the federal Act.

Exemption from enforcement processes

3(1) Subject to subsection (3) but notwithstanding any other Act or law, all rights, property and interests of a planholder in a registered plan are exempt from any enforcement process.
(2) Subsection (1) applies notwithstanding any provision in any other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.
(3) Subsection (1) does not apply with respect to the enforcement of a maintenance order as defined in *The Enforcement of Maintenance Orders Act, 1997*.

Payments out of registered plans

4(1) Subject to section 5 but notwithstanding any other Act or law, a payment out of a registered plan to a planholder or the legal representative of a planholder is not exempt from any enforcement process.
(2) For the purposes of subsection (1), a transfer of property held in one registered plan to another registered plan does not constitute a payment out of a registered plan.
(3) A transfer of property held in one registered plan to another registered plan does not constitute a fraudulent or preferential transfer under *The Fraudulent Preferences Act*.

Enforcement against payments out

5 For the purposes of enforcing a creditor’s rights against payments out of a registered plan to a debtor planholder:
(a) the amount of a payment out of the registered plan is deemed to be a debt due or accruing due to the person for or with respect to the person’s wages or salary within the meaning of *The Attachment of Debts Act*; and
(b) the exemptions set out in section 22 of *The Attachment of Debts Act* apply with any necessary modification.

Coming into force

6 This Act comes into force on proclamation.

APPENDIX 7
Manitoba Law Reform Commission Report

Manitoba Law Reform Commission, *Statutory Designations and the Retirement Plan Beneficiaries Act* (Report #73) (Winnipeg : The Commission, October 1990).

Pages 16-17 and notes.

F. EFFECT ON CREDITORS

We previously noted that, by virtue of the terms of *The Insurance Act*, insurance monies which are subject to a statutory designation are free of the claims of creditors and that no similar provision exists for designations made under *The Retirement Plan Beneficiaries Act*. We noted authorities indicating that monies passing pursuant to designations under that Act were nonetheless available to the claims of the deceased's creditors.[18] Is this appropriate? Should certain assets subject to a designation be free from the claims of creditors while others are not, or is the existence of a designation essentially irrelevant? The competing interests are well stated in the following comment made in the context of RRSPs:

> It may very well be the public policy … that all RRSPs should be given the same protection from creditors. Employee pension benefits are exempt from execution, seizure or attachment, and, as RRSPs were intended to give privately employed individuals the same benefits as members of registered pension plans then, arguably, all RRSPs should receive the same protection from creditors. Conversely, it is a long-standing principle of equity that creditors should be preferred to volunteers and, if RRSPs are viewed as a method by which an individual may save for retirement and that individual dies before he or she has a chance to enjoy that retirement, it does not seem unfair that those RRSP funds should, as a last resort, be available to satisfy the deceased's creditors.[19]

We recognize that sometimes RRSPs are not in fact used as pension supplements or substitutes. On occasion, they are used as a form of savings vehicle and are terminated well in advance of retirement; for example, some people use them to save for a down-payment on a home. Indeed, a change to the law which would shield from creditors assets which are subject to designation under *The Retirement Plan Beneficiaries Act* might on occasion give rise to attempts to evade creditors. However, we think that this risk is relatively small, particularly in light of the contribution limits on RRSPs.

On balance, we believe that assets which are subject to designation under the *Retirement Plan Beneficiaries Act* should be protected from creditors. As the Act's title indicates, these assets are being held primarily in retirement plans. Employee pension benefits which are governed by *The Pension Benefits Act* are protected from creditors; other plans, such as RRSPs, which are also pension supplements or substitutes should be treated in the same way. We recommend:

RECOMMENDATION 7

That, where a beneficiary is designated, any benefit payable to him or her is not, from the time of the happening of the event upon which it becomes payable, part of the estate of the participant, and is not subject to the claims of the creditors of the participant.

RECOMMENDATION 8

That, while a designation in favour of a spouse, child, grandchild or parent of a participant is in effect, the assets of the plan and the rights and interests of the participant therein and in the plan are exempt from execution or seizure.[20]

ENDNOTES

[18] *Canadian Imperial Bank of Commerce* v. *Besharah* (1989), 58 D.L.R. (4th) 705 (Ont. H.C.); *Waugh Estate* v. *Waugh* (1990), 63 Man. R. (2d) 155 (Q.B.).

[19] D.S. Reynolds, "Sheltering RRSP Assets from Creditors on Death" (1983), 6 E. & T.Q. 106 at 115.

[20] Mrs. McGonigal abstained from these recommendations and did not participate in discussion of the issue, due to a possible perception of conflict of interest.

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