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**THE EXIGIBILITY OF RRSPs
ON ACCOUNT OF INCOME TAX ARREARS**

**By
Bohdan J. Skulski, B.A. Hons.**

**A thesis submitted to
The Faculty of Graduate Studies and Research
In partial fulfilment of
The requirements for the degree of**

Master of Arts

Department of Law

**Carleton University
Ottawa, Ontario
July 12, 1999**

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The Exigibility of RRSPs on Account of Income Tax Arrears

Submitted by **Bohdan J. Skulski, B.A. Hons.**
in partial fulfillment of the requirements for
the degree of Master of Arts

Thesis Supervisor

Chair, Department of Law

Carleton University
July , 1999

Abstract. The exigibility of RRSPs for the payment of income tax arrears is examined against the competing policy considerations of providing for retirement savings versus the payment of current obligations. The prevailing trend of the courts and the provincial legislatures has been to deny creditors access to RRSP funds. From the perspective of tax collection, this trend favours self-employed individuals, particularly members of the professions. Those persons not only have the greatest opportunity to maximize the benefit of RRSP savings, but in the absence of tax withholdings at source, are most likely to incur income tax arrears. The fisc is an involuntary creditor in relation to its tax debtors.

The judicial and legislative predisposition towards exempting RRSPs from execution, seizure or attachment, does not appear to take into consideration that the majority of RRSP funds are accumulated and subsequently withdrawn for reasons other than retirement savings. By denying the fisc access to these funds, the burden of the tax arrears is spread to those individuals who pay their taxes. The paper shows how the policy of exemption only favours the institutional fund managers, who are competitively maneuvering for market share control.

The analysis suggests that traditional common law hurdles to the garnishment of such funds could be overcome. However, given the disproportionate degree of concern which has been raised over retirement needs and the needs of dependents, the courts are unlikely to be swayed in their interpretation of the policy issues. Indeed, the garnishment of RRSPs on account of income tax arrears is more likely to be achieved through federal statutory amendment.

To my wife, Sandra, and our daughters, Katharine and Alexandra, without whose enduring patience, support and encouragement this project could not have been undertaken.

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INTRODUCTION

The object of this thesis is, as the title suggests, to examine the question of the exigibility of Registered Retirement Savings Plans ("RRSPs") by garnishment on account of income tax arrears. The issue does not concern the attachment of benefits payable under a RRSP, but rather the garnishment of monies contributed into the RRSP. The question involves two competing public policy issues, namely, the use of existing resources to service present debts versus the encouragement of planning and saving for future retirement needs. That is to say, should frugality and economy be encouraged at the expense of one's present creditors, particularly the Crown. In this regard, it is necessary to differentiate between legitimate estate planning and creditor proofing as opposed to judgment proofing to avoid payment of existing debts that may be due or about to become due.

The inquiry will include an examination of the operation and history of the provisions of the *Income Tax Act*¹ that govern the establishment and registration of RRSPs. Likewise, the focus of the examination will be directed at those provisions of the Act that authorize and enable administrative garnishment as a remedy to facilitate the collection of outstanding income taxes. In this respect, the inquiry will encompass an analysis of garnishment in general, both from the point of view of its origins, as well as, in terms of its development in common law. The object of the analysis will be to provide an overview of the inherent limitations of garnishment and to ascertain whether those limitations are equally applicable to administrative garnishment under the *Income Tax Act*. In particular, the examination will focus on the trust aspects of an RRSP to determine whether the monies that are the subject of the trust are garnishable to meet the liabilities of the settlor of the trust.

An examination of existing jurisprudence pertaining to attempts by the Crown, as well as, by other creditors to garnish or execute against monies sheltered in RRSPs, will form part of the overall

¹

R.S.C. 1985 (5th Supp.), c. 1, as amended, hereinafter referred to as the *Income Tax Act*.

inquiry. The reaction of provincial legislators and their efforts to place RRSPs beyond the reach of creditors, will be examined against this background of common law. In particular, the provisions of various provincial insurance statutes which have the effect of safeguarding from the creditors of plan holders, the interests of spousal and other close family beneficiaries of certain 'life insurance' type RRSPs, will form part of the analysis. Furthermore, the consequences of overriding such statutory provisions by way of administrative garnishment under the *Income Tax Act* will require examination in the constitutional context. Such examination will address, in this regard, the concepts of colourability, pith and substance, trenching and legislative paramountcy. Moreover, given that the *Federal Court Act*² provides that a writ of execution issued out of the Federal Court is subject to the rules, including the exemptions, of the superior court of a province in which execution is sought to be enforced, a discussion concerning the choice of the means of attachment is warranted. That choice is influenced, in this respect, by the fact that the common law favours execution against RRSPs by way of writ; whereas, administrative garnishment under the *Income Tax Act* avoids some of the obstacles imposed by certain exemptions provided in provincial legislation.

Lastly, the project will examine the claims of creditors against RRSPs in the context of the bankruptcy of the plan holder. This aspect of the inquiry will afford a further opportunity to flesh out the public policy issues identified at the outset, namely, the need to make provisions for retirement versus the obligation to pay current debts. The case law regarding the vesting of RRSPs in the trustee in the event of bankruptcy provides a useful insight between these two competing interests. Furthermore, the ramifications of the proposal to exempt RRSPs from forming part of the property of a bankrupt estate, a direction which was advocated during the recent course of bankruptcy law reform, will be analysed from a policy perspective. The potential impact of such a policy direction will

² R.S.C. 1985, c. F-7, hereinafter referred to as the *Federal Court Act*.

be shown to have been significant in terms of the recovery of Crown revenues. Given that the Crown, not unlike a tort claimant, is an involuntary unsecured creditor, the move would have further exacerbated the situation insofar as there is already little that can be done to avoid the risk of exposure to loss. That initiative will be examined in terms of its potential to have further fuelled the incidence of bankruptcy as debtors sought to shelter their retirement savings from creditors. Moreover, an empirical examination based on the age of the majority of bankrupts as compared to the age of RRSP contributors, will demonstrate that bankruptcy reform in this respect would have been ineffective as a means of achieving the social policy objective. Indeed, in the context of bankruptcy, the treatment of RRSPs as a means of securing retirement investment should compare no differently from other forms of investment which are exigible for the payment of debts.

The project will, in its overall analysis, attempt to reconcile the two competing public policy issues. However, in the course of so doing, recognition will be given to the interests of stakeholders other than just that of the Crown and tax debtors who attempt to shelter their assets in RRSPs. Those other stakeholders are the fund managers who hold the RRSP deposits on behalf of the individual plan holders. It is fund managers such as trust companies, chartered banks, and insurance companies that have contributed to the development of a lot of the jurisprudence related to the subject of the inquiry. Indeed, it is the fund managers who have for the most part opposed the efforts of creditors to realize against monies sheltered in RRSPs. Furthermore, it is those same fund managers who have lobbied to have legislation exempt RRSPs from attachment. The position could be viewed from a Weberian perspective in that economic interest groups attach great importance to the stability and predictability of legal procedure.³ Indeed, there can be little doubt that the cost to fund managers would in respect

³

Max Weber, *Economy and Society*, edited by Guenther Roth & Claus Wittich, Vol. 2, (Berkeley, Los Angeles & London: U. of California Press, 1978), at p. 813.

to the administration of RRSP contracts, be minimized if the law were to provide firm guarantees as to the legally binding nature of contracts.⁴ However, in many instances the position taken by the fund managers and their representatives, has been defended on the grounds that the encouragement of planning and saving for future retirement needs overrides all other public policy considerations. A critical analysis of this position will show it to be what one writer, albeit in a totally different context, describes as “self-interest cloaked as altruism.”⁵

LEGISLATIVE AND POLICY BACKGROUND

The RRSP is a creature of the *Income Tax Act*. However, because the object of the project is to examine the exigibility of RRSPs by means of administrative garnishment, the review of the enabling legislation and the related policy considerations will not address the tax consequences of the governing provisions. Furthermore, reference to administrative garnishment in this context is limited to those provisions of the *Income Tax Act* pursuant to which the exigibility of RRSPs is sought to be enforced.

Registered Retirement Savings Plans

The RRSP is an income deferral device created under the *Income Tax Act*. The legislation was first introduced in 1957 in order to benefit the individual who does not have a share, or sufficient share in a registered pension plan.⁶ The definition of a “retirement savings plan” is provided in subsection 146(1) of the Act, which in summary defines the meaning as:

(a) a contract between an individual and a person authorized to carry on an annuities business under which, in consideration of a payment by the individual, a retirement income commencing at maturity is to be provided for the individual, or

⁴ *Ibid.*, at p. 847.

⁵ Ronald Wright, *Stolen Continents: The New World Through Indian Eyes Since 1492*, (Toronto: Viking, 1992), at p. 296.

⁶ Solomon Spiro, “Registered Retirement Savings Plan,” (1974) 22 *Can. Tax J.* 1, at pp. 1 & 6.

(b) an agreement with an approved corporation or a bank, credit union or other approved financial institution (the trustee) whereby a contribution or periodic contributions may be used, invested or otherwise applied by that corporation or depository for the purpose of providing for the individual, commencing at maturity, a retirement income.⁷

The governance of RRSPs falls under the provisions of section 146 of the Act. Hence, when a “retirement savings plan” is registered pursuant to those provisions, it becomes a “registered retirement savings plan”. Once a plan is registered, an individual is allowed to deduct from his or her taxable income the amounts contributed to the plan to the extent of the deduction limit prescribed. These amounts are invested by the fund manager primarily in Canadian securities, which may earn interest, dividends, or capital gains, depending on the plan chosen by the individual. The earnings accumulate in the plan free of current tax, so that they grow more quickly than would the same investments made by the individual directly. When the accumulated premiums and accrued earnings are eventually paid out, they are included at that time in the taxable income of the individual.⁸ The individuals who are most likely to benefit from the legislation are:

Middle income employees, self-employed professionals and small businessmen [who] believe that they constitute an “excluded middle” in that they bear a disproportionate share of the tax burden. Their earnings are too high to enable them to benefit from the financial aid offered to those in the low income brackets, and are too low to enable them to reach for the sophisticated tax planning techniques available to those in the high income brackets.⁹

An analysis of the public policy considerations suggests that in terms of “tax inducements to encourage retirement income plans”, the RRSP legislative scheme is justified “primarily on the social ground that plans by individuals for income maintenance during periods of adversity or retirement should be encouraged.”¹⁰ That is to say, that:

⁷ Michael J. McCabe, “Execution Against An R.R.S.P.,” (1990) 76 *C.B.R. (N.S.)* 218, at p. 218.

⁸ 1997 *Canadian Master Tax Guide*, 52nd ed., (North York, Ont.: CCH Canadian, 1997), at pp. 774-775.

⁹ Spiro, *supra*, footnote 6, at p. 1.

¹⁰ Canada, *Report of the Royal Commission on Taxation*, Vol. 3, (Ottawa: Queen’s Printer, 1966), at p. 420.

It seems to be generally agreed that individuals should set aside a portion of their income in their working years to ensure an adequate command over goods and services in their retirement years. Such private provisions for retirement are thought to foster self-reliance and to reduce the need for the state to provide relief. If in fact this is a desirable social goal, the tax system is one tool available to government to influence retirement saving. Less positively, the government might wish to avoid tax procedures that would discourage such saving. Because Parliament has introduced legislative measures which favour retirement income plans and has broadened them over the years, it can be assumed that this social goal is accepted, at least within certain limits.¹¹

Garnishment in General

In terms of garnishment generally, it should be noted that “until the middle of the nineteenth century, money owing to a judgment creditor by a third person could not be reached by a judgment creditor: at common law, debts were not subject to seizure and sale.”¹² The courts held that the writ of *fiери facias* did not extend to “money, bank notes, securities for money, debts owing to the debtor, future earnings of the debtor, either by salary or by payments to the debtor’s business, or choses in action generally.”¹³ Execution by the writ was limited to the seizure of “tangible goods and chattels, that is, choses in possession as contrasted to choses in action.”¹⁴ This inadequacy of the common law was eventually addressed in England in 1854 with the passage of the *Common Law Procedure Act, 1854*,¹⁵ which contained a garnishment provision. The Legislature of Upper Canada followed suit in 1856 with the enactment of the *Common Law Procedure Act, 1856*,¹⁶ which was “almost identical

¹¹ *Ibid.*, at pp. 409 & 411.

¹² Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters, Part 2*, (Toronto: Ministry of the Attorney General, 1981), at p. 137. Note, however, that in Lower Canada the Commissioners’ Court possessed small debts jurisdiction since 1843 and could issue Warrants of *saisie-arrêt* (seizure by garnishment) pursuant to section 22 of the *Act to provide for the Summary Trial of Small Causes in Lower Canada* (Can.), 7 Vict., c. 19. It would seem that the provision may have originally been imported from France, namely, from *La coutume de la prévôté et viconté de Paris*, which among other things contained sections on the execution of judgments: see Claude de Ferrière, *Corps et compilation de tous les commentateurs anciens et modernes sur la Coutume de Paris*, Vol. 1, 2nd ed., (Paris, 1714), where provision for seizure by garnishment is provided in article 160 of title VIII (*Arrest, Exécutions & Gageries*); see also de Ferrière’s commentaries concerning article 160 which appear in Vol. 2, at p. 998.

¹³ Charles R.B. Dunlop, *Creditor - Debtor Law in Canada*, 2nd ed., (Toronto: Carswell, 1995), at p. 81.

¹⁴ *Ibid.*, at p. 80; for a statement of this rule, see *Scott v. Scholey* (1807), 103 E.R. 423, at p. 429.

¹⁵ (U.K.), 17 & 18 Vict., c. 125, s. 61.

¹⁶ (Can.), 19 & 20 Vict., c. 43, s. 194.

to the English legislation.”¹⁷ insofar as the garnishment provision was “copied almost verbatim.”¹⁸ Indeed, both statutes restricted the remedy to the attachment of ‘debts owing or accruing’. However, the formula resulted in considerable confusion as to the scope of the remedy due to:

... the distinction drawn in the case law between present debts (that is, debts due and payable, and debts that are due but payable at some future time) and conditional, contingent or future debts (that is, debts that are payable only upon the happening of a future event other than the mere effluxion of time).¹⁹

Based on this distinction, the extent to which debts could be attached by garnishment was limited²⁰ to “debts which are presently due and payable” and those “which are presently due as a matter of existing legal obligation though payable in the future.”²¹ On the other hand, it has been held that conditional, contingent or future debts are not available for attachment by garnishment.²² However, confusion continues to exist notwithstanding that the formula was subsequently changed in a number of Canadian jurisdictions to include ‘debts owing or accruing due’.²³ That is to say, that “there has been considerable difficulty in deciding whether a particular debt is a present debt or a conditional, contingent or future debt.”²⁴ This issue has to some degree been alleviated in jurisdictions that have introduced provisions for continuing garnishment. In such cases the process

attaches not only the debts that are payable by the garnishee to the debtor at the moment of service of the notice of garnishment, but also all debts that may or will become payable by

¹⁷ Ontario Law Reform Commission, *supra*, footnote 12.

¹⁸ Dunlop, *supra*, footnote 13, at p. 104.

¹⁹ Ontario Law Reform Commission, *supra*, footnote 12, at p. 138.

²⁰ See *Jones v. Thompson* (1858), 120 E.R. 430 (K.B.); and *Tapp v. Jones* (1875), L.R. 10 Q.B. 591.

²¹ U.K., *Report of the Committee on the Enforcement of Judgment Debts*, Cmnd 3909, (London: H.M.S.O., 1969), at p. 187.

²² See *Webb v. Stenton* (1883), 11 Q.B.D. 518 (C.A.); for further discussion, see Ontario Law Reform Commission, *supra*, footnote 12, at pp. 138-142; and Dunlop, *supra*, footnote 13, at pp. 374-385.

²³ Note, that British Columbia, Prince Edward Island and Yukon Territory “have adopted legislative provisions which are at least theoretically broader than the debts due and accruing due formula”: see Dunlop, *supra*, footnote 13, at pp. 372-373.

²⁴ Ontario Law Reform Commission, *supra*, footnote 12, at p. 139.

the garnishee to the debtor for the next 6 years after service. This plainly sweeps in future debts that are not yet payable or even due.²⁵

Needless to say, provision for continuing garnishment does not overcome all the limitations on the attachment of conditional, contingent and future debts. These will be examined more fully later in the paper. In the mean time, the analysis will concentrate on an examination of the administrative garnishment provisions available under the *Income Tax Act*.

Administrative Garnishment

The administrative garnishment remedy discussed in the context of this analysis, is also a creature of the *Income Tax Act*. The provisions of subsection 224(1) of the Act permit the Minister of National Revenue to collect unpaid taxes by serving a garnishment letter on any person who is or will be liable to make a payment to the tax debtor, and requiring that person to pay the amount to the Receiver General on account of the tax debtor's liability.²⁶ Subsection 224(1) specifically provides that

Where the Minister has knowledge or suspects that a person is, or will be within one year, liable to make a payment to another person who is liable to make a payment under this Act (in this subsection and subsections (1.1) and (3) referred to as the "tax debtor"), the Minister may in writing require the person to pay forthwith, where the monies are immediately payable,

²⁵

Director of Support & Custody Enforcement v. Drosos (1988), 27 C.P.C. (2d) 23 (Ont. Prov. Ct.), at p. 29. Note, that the case was based on what is now Rule 90 of the *Rules of the Ontario Court (Provincial Division) in Family Law Proceedings*, R.R.O. 1990, Reg. 199, as amended by O. Reg. 71/92 (formerly Rule 83 of the *Rules of the Provincial Court (Family Division)*, R.R.O. 1980, Reg. 810, as amended by O. Reg. 808/84), which provides:

90. A notice of garnishment attaches, from the time of service on the garnishee, every debt payable by the garnishee to the debtor.

- (a) at the time of service of the notice;
- (b) within six years after service of the notice; or
- (c) on the fulfilment of a term or condition within six years after service of the notice.

See, by way of comparison, subrule 60.08(12) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provides:

(12) For the purpose of subrule (11), a debt of the garnishee to the debtor includes a debt payable at the time the notice of garnishment is served and a debt,

- (a) payable within six years after the notice is served; or
- (b) payable on the fulfilment of a condition within six years after the notice is served.

²⁶

David M. Sherman (ed.), *Income Tax Act and Regulations, Department of Finance Technical Notes*, 9th ed., (Scarborough, Ont.: Carswell, 1997), at pp. i606-1607.

and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act.²⁷

The provision for administrative garnishment as a remedy to collect tax arrears dates back to section 26 of the *Income War Tax Act, 1917*.²⁸ The remedy has been described as "nothing more nor less than a statutory, non-judicial instrument of garnishment."²⁹ However, this is not to say, that administrative garnishment is necessarily equivalent in scope to the judicial remedy discussed earlier. In this regard, there has been a diversity of opinions. It has been held that the "distinction between [judicial] garnishee proceedings and the remedy afforded the Minister is that the demand need not be issued in judicial proceedings and further the demand is broader in scope as it attaches payments arising out of a debt or a liability."³⁰ Some of these features warrant further examination.

27

R.S.C. 1985 (5th Supp.), c. 1, s. 224(1), as amended; see also subsections 224(1.1) and (3) as follows:

(1.1) Without limiting the generality of subsection (1), where the Minister has knowledge or suspects that within 90 days

(a) a bank, credit union, trust company or other similar person (in this section referred to as the "institution") will lend or advance moneys to, or make a payment on behalf of, or make a payment in respect of a negotiable instrument issued by, a tax debtor who is indebted to the institution and who has granted security in respect of the indebtedness, or

(b) a person, other than an institution, will lend or advance moneys to, or make a payment on behalf of, a tax debtor who the Minister knows or suspects

(i) is employed by, or is engaged in providing services or property to, that person or was or will be, within 90 days, so employed or engaged, or

(ii) where that person is a corporation, is not dealing at arm's length with that person,

The Minister may in writing require the institution or the person, as the case may be, to pay in whole or in part to the Receiver General on account of the tax debtor's liability under this Act the moneys that would otherwise be so lent, advanced or paid and any moneys so paid to the Receiver General shall be deemed to have been lent, advanced or paid, as the case may be, to the tax debtor.

(3) Where the Minister has, under this section, required a person to pay to the Receiver General on account of a liability under this Act of a tax debtor moneys otherwise payable by the person to the tax debtor as interest, rent, remuneration, a dividend, an annuity or other periodic payment, the requirement applies to all such payments to be made by the person to the tax debtor until the liability under this Act is satisfied and operates to require payments to the Receiver General out of each such payment of such amount as stipulated by the Minister in the requirement.

28

S.C. 1917, c. 28, as amended by S.C. 1923, c. 52, s. 10, which provided in part as follows:

26. When the Minister has knowledge or suspects that any person is or is about to become indebted to a taxpayer he may, by registered letter, demand of such person that the moneys otherwise payable to the taxpayer be in whole or in part, paid over to the Receiver General of Canada on account of the said taxpayer's liability under the provisions of this Act ...

See also S.C. 1948, c. 52, s. 109(1); and R.S.C. 1952, c. 148, s. 120(1).

29

Royal Bank of Canada v. The Queen (1984), 84 DTC 6439 (F.C.T.D.), at p. 6445.

30

Re Lamarre (1978), 85 D.L.R. (3d) 392 (Alta. C.A.), at p. 395.

The non-judicial nature of administrative garnishment is an important distinguishing feature. It enables the Minister to collect tax arrears expeditiously without the need to have the entitlement to recover the specific sum of money adjudged.³¹ This is not to suggest, that the tax debtor is denied the opportunity to object or appeal from an assessment of tax. On the contrary, the *Income Tax Act* contains specific provisions for such recourse.³² Moreover, the Act prohibits the use of administrative garnishment until after the expiry of the 90 day period in which the tax debtor may object or appeal from the assessment.³³ Likewise, in the event of an objection or appeal, recourse to the remedy may not be had until the assessment has been confirmed or varied.³⁴ Based on these provisions, administrative garnishment under the Act has been held to be “more similar to seizure after judgment than to seizure before judgment.”³⁵ The tax debtor is not deprived of property without due process.³⁶ Given these safeguards,

... it would be preposterous to suggest that Her Majesty should have to sue to collect taxes following [an assessment or] a reassessment, in which proceedings the defence would presumably be that the taxes claimed by [the assessment or] the reassessment are not due, when, as a result of the Notice of Objection the same issue of tax liability will be litigated elsewhere in the normal manner.³⁷

While administrative garnishment is a statutory remedy as opposed to a judicial process, it is one of several alternative collection procedures available³⁸ under the *Income Tax Act* for the purpose of

³¹ Jack Walker & Harvey J. Ash, *Debtor - Creditor Relations: Cases and Materials*, (Toronto: Butterworths, 1978), at p. 3-1.

³² See the objection and appeal provisions of sections 165 and 169 of the *Income Tax Act*.

³³ See the collection restrictions under section 225.1 (particularly in subsection (c)) of the *Income Tax Act*; but see section 225.2 pursuant to which an application may be made to the Court for authorization to proceed forthwith.

³⁴ See subsections 225.1(2) and (3) of the *Income Tax Act*.

³⁵ *Re Lambert and M.N.R.* (1974), 74 DTC 6440 (F.C.T.D.), at p. 6442.

³⁶ See *Hutterian Brethren Church of Morinville v. Royal Bank of Canada* (1979), 79 DTC 5285 (Alta. C.A.), at p. 5286.

³⁷ *Pupatello v. M.N.R.* (1977), 77 DTC 5350 (F.C.T.D.), at pp. 5354-5355.

³⁸ *Ibid.*, at p. 5355.

collecting tax arrears. In terms of the choice of which of those procedures should be used, "it is entirely up to the Minister to decide ... [which] course of action is the one most likely to achieve the optimum result."³⁹ In this respect, the remedies are independent of each other. Indeed, administrative garnishment is not dependent on the issue of a certificate in lieu of judgment filed under the provisions of subsections 223(2) and (3) of the Act.⁴⁰ Moreover, it is not subject to any limitations on garnishment imposed by provincial law.⁴¹

In terms of the scope of administrative garnishment under the *Income Tax Act*, an early line of cases went so far as to suggest that the remedy forms an equitable charge on the debt owing by the garnishee,⁴² and where that charge competes with a claim of equal standing, priority would go to the creditor that first gave notice.⁴³ It was held that the administrative garnishment provision

... creates a charge not on moneys owing or accruing due as in the case of an attaching or garnishee order but on "moneys otherwise payable" *at the time of delivery of the demand*... The charge created by the section ... is a continuing charge crystallized by the state of affairs at the time of delivery of the statutory demand, and accordingly it is not affected by the subsequent knowledge of a debtor upon whom a demand under the statute has been made that the funds so charged have previously been assigned away to a third party.⁴⁴

However, subsequent cases have held that administrative garnishment does not create an equitable charge, operate as an absolute transfer of the property in the debt attached, or enjoy priority where

³⁹ *Quereshi v. M.N.R.* (1979), 79 DTC 5161 (F.C.T.D.), at p. 5162.

⁴⁰ *Sorenson v. M.N.R.* (1982), 82 DTC 6246 (F.C.A.); see also Peter A. Vita, "Collection Remedies of the Crown," in *Rights and Remedies in the Law of Creditor and Debtor*, Special Lectures of the Law Society of Upper Canada: 1988, (Don Mills, Ont.: DeBoo, 1988), at p. 414; but see *McCall v. The Queen* (1989), 89 DTC 5148 (F.C.T.D.), at p. 5149.

⁴¹ *St-Cyr v. Société d'Administration et de Fiducie and The King* (1951), 51 DTC 512 (Que. Sup. Ct.), at p. 514; but see the erroneous obiter comments expressed in *Bain v. Rosen* (1984), 84 DTC 6212 (Ont. Div. Ct.), at p. 6213; and in *Chhabra v. The Queen* (1989), 89 DTC 5310 (F.C.T.D.), at p. 5318.

⁴² *A.G. Can. v. Workmen's Compensation Board* (1968), 68 DTC 5073 (B.C.S.C.), where the obiter comments at p. 5074 suggest that there may still be some confusion regarding the issue.

⁴³ *Bank of Montreal v. Union Gas Co. of Canada Ltd.* (1969), 7 D.L.R. (3d) 25 (Ont. C.A.), at p. 781; cf. *Community Building Supplies Ltd. v. Kipling Paving Co. Ltd.* (1969), 10 D.L.R. (3d) 299 (Ont. H.C.); *Husky Oil Canada Ltd. v. Baldwin-Johnson Metal Building Ltd.* (1970), 74 W.W.R. 74 (Alta. S.C.); *Bank of Montreal v. A.G. Can.* (1970), 14 D.L.R. (3d) 619 (B.C.S.C.); *Hamilton Avnet International (Canada) Ltd. v. Canatron Controls Ltd.* (1978), 86 D.L.R. (3d) 697 (Ont. Co. Ct.); and *Bank of Montreal v. The Queen* (1979), 80 DTC 6024 (F.C.T.D.).

⁴⁴ *Ibid.*, at p. 780.

the debt had previously been assigned.⁴⁵ The controversy was subsequently put to rest with the enactment of subsection 224(1.2),⁴⁶ whereby the amount garnished becomes the property of Her Majesty in priority over any security interest. However, the application of the new provision is restricted to very specific circumstances that are outside the scope of this project.

Notwithstanding an attempt to read into the garnishment provisions of subsection 224(1) the common law limitation of attachment which would have restricted the remedy to "debts owing and accruing due",⁴⁷ the remedy in its current form provides for continuing garnishment thereby avoiding some of

⁴⁵ *Re Lamarre*, supra, footnote 30; cf. *Royal Bank of Canada v. A.G. Can.* (1977), 95 D.L.R. (3d) 608 (Alta. S.C.), aff'd in (1978), 105 D.L.R. (3d) 648 (Alta. C.A.); *Jamison v. Federal Business Development Bank* (1978), 78 DTC 6482 (B.C.S.C.); *Re Stephen's Welding Ltd.* (1980), 116 D.L.R. (3d) 543 (Alta. S.C.); *Rhyno v. Fireman's Fund Insurance Co. of Canada* (1980), 110 D.L.R. (3d) 362 (N.S.T.D.); *Canadian Imperial Bank of Commerce v. The Queen* (1981), 81 DTC 5345 (F.C.T.D.); *Re Marks & Spencer Canada Inc. and Dept. of National Revenue* (1983), 1 D.L.R. (4th) 336 (Nfld. T.D.); *Re Zurich Insurance Co. and Troy Woodworking Ltd.* (1984), 6 D.L.R. (4th) 552 (Ont. C.A.); *Re E.S. Fox Ltd. and Do-It Painting and Decorating Inc.* (1984), 24 A.C.W.S. (2d) 1089 (S.C.O.); *Walkers' Auto & Body Supplies (1972) Ltd. v. Independent Paint & Body Inc.* (1984), 10 D.L.R. (4th) 146 (Sask. Q.B.); *MacKay and Hughes (1973) Ltd. v. Martin Potatoes Inc.* (1984), 9 D.L.R. (4th) 439 (Ont. C.A.); *C.I.B.C. v. R.* (1984), 52 C.B.R. (N.S.) 145 (F.C.T.D.), aff'd in (1986), 60 C.B.R. (N.S.) 45 (F.C.A.); *Royal Bank of Canada v. R.* (1984), 52 C.B.R. (N.S.) 198 (F.C.T.D.), aff'd in (1986), 60 C.B.R. (N.S.) 125 (F.C.A.); and *Ontario Development Corp. v. The Queen* (1989), 89 DTC 5134 (F.C.T.D.); see also Michael Harrington, "Income Tax Garnishment: An Equitable Charge? Some Recent Cases," (1984) 1 *Nat'l Insolvency Rev.* 18; Judith M. Woods, "Crown Exceeds Its Grasp," (1989) 894 *Tax Topics* 8; and Peter A. Vita, "Claims by the Crown," in *Insolvency and Bankruptcy*, Conference Papers, (Toronto: Canadian Institute, 1991), at p. 16:14.

⁴⁶ R.S.C. 1985 (5th Supp.), c. 1, s. 224(1.2), as amended (S.C. 1994, c. 7, Sched. V, s. 91 and Sched. VIII, s. 130; S.C. 1994, c. 21, s. 101(3) and (4); and S.C. 1997, c. 12, s. 128), provides as follows:

(1.2) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act*, any other enactment of Canada, any enactment of a province or any law, but subject to subsections 69(1) and 69.1(1) of the *Bankruptcy and Insolvency Act* and section 11.4 of the *Companies' Creditors Arrangement Act*, where the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment

(a) to another person (in this subsection referred to as the "tax debtor") who is liable to pay an amount assessed under 227(10.1) or a similar provision, or

(b) to a secured creditor who has a right to receive the payment that, but for a security interest in the favour of the secured creditor, would be payable to the tax debtor

The Minister may in writing require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or the similar provision, and on receipt of that requirement by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty to the extent of that liability as assessed by the Minister and shall be paid to the Receiver General in priority to any such security interest.

Note, that a Requirement to Pay issued under subsection 224(1.2) takes priority over secured creditors. In this context, a "secured creditor" does not include a person who owns property absolutely. However, a general assignment of book debts does not confer absolute ownership. It is collateral security, and falls within the definition of "security interest" set out in subsection 224(1.3): *Alberta (Treasury Branches) v. M.N.R.* (1996), 133 D.L.R. (4th) 609 (S.C.C.), rev'g (1994), 24 C.B.R. (3d) 257 (Alta. C.A.). Furthermore, the provision is part of the general scheme established for the collection of taxes and as such falls squarely within head 3 of section 91 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3; moreover, the provision does not authorize an unreasonable seizure contrary to section 8 of the *Canadian Charter of Rights and Freedoms*, Sched. B to the *Canada Act 1982* (U.K.), 1982, c. 11: *TransGas Ltd. v. Mid-Plains Contractors Ltd.*, infra, footnote 532. The provision has been the subject of much criticism, see E. Bruce Leonard, "Revenue Canada's New Super Priority," (1988) 1 *Commercial Insolvency Reporter* 49; Rosemarie Wertschek, "So Brutal and Piratical ...," (1989) 912 *Tax Topics* 12; and Patrick S. Boyle, "Super Garnishment," (1989) 915 *Tax Topics* 2.

⁴⁷ *Hutterian Brethren Church of Smoky Lake v. Prov. Treas. (Alta.)* (1980), 80 DTC 6228 (Alta. C.A.), at p. 6230.

the historic difficulties associated with the attachment of future debts. Indeed, one commentator has posed the question, albeit in the context of a similar garnishment provision under the *Excise Tax Act*,⁴⁸ whether the provision could effectively “attach a debt resulting from a transaction made several months after the receipt of the demand.”⁴⁹ An affirmative answer to that question with respect to garnishment under both the *Excise Tax Act* and the *Income Tax Act* cannot be denied. Furthermore, it has been held that the remedy may avoid some of the difficulties associated with conditional and contingent debts insofar as it binds

... payments required to be made where all that is required to accelerate their maturity and make them payable is a demand by the taxpayer as the service of the Minister’s letter constitutes in law a demand by the taxpayer.⁵⁰

Lastly, it has been suggested by one commentator that unlike traditional judicial garnishment proceedings, the garnishment provision under the *Income Tax Act* is not limited to debtor-creditor

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R.S.C. 1985, c. E-15, as amended, hereinafter referred to as the *Excise Tax Act*; see subsection 84(1) which provides as follows:

(1) Where the Minister has knowledge or suspects that a person is or is about to make a payment to a tax debtor, the Minister may, by notice served personally or by registered or certified mail, require that person to pay to the Receiver General, on account of the tax debtor’s liability under this Act, the whole or any part of the moneys that would otherwise, within ninety days after the service of the notice, be paid or become payable to the tax debtor.

See also subsections 317(1) and (2) which provide as follows:

(1) Where the Minister has knowledge or suspects that a person is or will be, within ninety days, liable to make a payment to another person who is liable to pay or remit an amount under this Part (in this subsection and subsections (2), (3) and (6) referred to as the “tax debtor”), the Minister may, by a letter served personally or by registered or certified mail, require that person to pay forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor’s liability under this Part.

(2) Without limiting the generality of subsection (1), where the Minister has knowledge or suspects that within ninety days

(a) a bank, credit union, trust company or other similar person (in this section referred to as the “institution”) will loan or advance moneys to, or make a payment on behalf of, or make a payment in respect of a negotiable instrument issued by, a tax debtor who is indebted to the institution and who has granted security in respect of the indebtedness, or

(i) is employed by, or engaged in providing services or property to, that person or was or will be, within ninety days, so employed or engaged, or

(ii) where that person is a corporation, is not dealing at arm’s length with that person,

The Minister may, by a letter served personally or by registered or certified mail, require the institution or person, as the case may be, to pay in whole or in part to the Receiver General on account of the tax debtor’s liability under this Part the moneys that would otherwise be so loaned, advanced or paid, and any moneys so paid to the Receiver General shall be deemed to have been loaned, advanced or paid, as the case may be, to the tax debtor.

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J. Michel Deschamps, “Crown Priorities and Tax Collections: An Overview,” in *Report of the Proceedings of the Thirty-Seventh Tax Conference*, 1985 Conference Report, (Toronto: Canadian Tax Foundation, 1986), at p. 29:7.

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Ibid., at p. 6233.

relationships. The inference is that amounts held by a trustee in a RRSP could be garnished despite the fact that the relationship between the plan holder and the financial institution was one of beneficiary and trustee.⁵¹ This position will be examined in the course of the discussion that follows.

ANALYSIS OF THE LAW AND POLICY CONSIDERATIONS

The question of the exigibility of RRSPs has been the issue of numerous court decisions. However, the body of case law on the matter is far from settled. The means by which creditors may attach monies sheltered in RRSPs varies among jurisdictions, moreover, judicial reasoning has not always been consistent. The issue is not just one of a choice between attachment by writ of execution or by garnishment. Attempts by trustees in bankruptcy to bring the funds into the estates of bankrupts for distribution to the creditors have met with varying results. Factors affecting these outcomes include such issues as the contractual nature of the plan in terms of its being a pension, a deposit, or a form of insurance, the relationship between the plan holder and the fund manager, and the provincial legislation governing the capacity of the attachment process and the exemption of certain assets from attachment. Accordingly, it is proposed that the analysis of the case law proceed along the lines of the various factors that have influenced the varying outcomes. In this regard, it should be noted that it will not always be possible to compartmentalize the discussion around a single factor without making reference to decisions that were rendered in differing circumstances.

Creditors' Rights in Pension Funds

In terms of the exigibility of RRSPs on account of income tax arrears, it is suggested that the issue is not completely in parallel with the attachment of employee pension funds and benefits payable thereunder. Nevertheless, both issues share a mutual public policy consideration, namely, the social

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Stephen W. Bowman, "Collections Under the Income Tax Act," in *Report of Proceedings of the Forty-Second Tax Conference, 1990* Conference Report, (Toronto: Canadian Tax Foundation, 1991), at pp. 22:13-14.

objective of saving for future retirement needs. In this regard, it should be noted that in most provincial jurisdictions in Canada, the legislation governing the administration of pensions provides that pension benefits are not subject to execution, seizure or attachment and cannot be assigned or alienated. The provision for such exemptions impacts on the administration of federal legislation to the extent that the *Federal Court Act* and the *Bankruptcy and Insolvency Act*⁵² each provide that the process under each is subject to conformity with legislation of the particular province.⁵³ Hence, for example, in Ontario pension benefits do not form part of the property of the bankrupt divisible among his or her creditors, nor can a trustee demand the collapse or realization of a pension entered into by the bankrupt.⁵⁴

The leading case in this regard is *Bonus Finance Ltd. v. Smith*⁵⁵ wherein it was held that moneys payable under a pension plan are immune from attachment pursuant to the provisions of the *Pension Benefits Act*.⁵⁶ On the other hand, it was held in *Re Simon and Simon*⁵⁷ that access to pension benefits

⁵² R.S.C. 1985, c. B-3, hereinafter referred to as the *Bankruptcy and Insolvency Act*.

⁵³ See subsection 56(3) of the *Federal Court Act*, which provides as follows:

(3) All writs of execution or other process against property, whether prescribed by the Rules or authorized by subsection (1), shall, unless otherwise provided by the Rules, be executed, with respect to the property liable to execution and the mode of seizure and sale, as nearly as possible in the same manner as similar writs or process, issued out of the superior courts of the province in which the property to be seized is situated, are, by the law of that province, required to be executed, and the writs or other process issued by the Court shall bind property in the same manner as similar writs or process issued by the provincial superior courts, and the rights of purchasers thereunder are the same as those of purchasers under those similar writs or process.

See also paragraph 67(1)(b) of the *Bankruptcy and Insolvency Act*, which provides as follows:

(1) The property of a bankrupt divisible among his creditors shall not comprise

.....
(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, ...

⁵⁴ Lloyd W. Houlden & Geoffrey B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd ed., Vol. 1, (Toronto: Carswell, 1998), F§30 (Rel. 2 - 1998) at p. 3:110.

⁵⁵ [1971] 3 O.R. 732 (H.C.).

⁵⁶ S.O. 1965, c. 96, s. 22b (hereinafter referred to as the *Pension Benefits Act*), as amended by S.O. 1967, c. 72, s. 1, which provided as follows:

(1) Moneys payable under a pension plan shall not be assigned, charged, anticipated or given as security and are exempt from execution, seizure or attachment, and any transaction purporting to assign, charge, anticipate or give as security such moneys is void.

⁵⁷ (1984), 45 O.R. (2d) 534 (Div. Ct.).

could be had through the appointment of a receiver. At issue in that case was the enforcement of a maintenance order. The Court held that the appointment of a receiver was not an execution, seizure or attachment and, therefore, was not affected by the *Pension Benefits Act*.⁵⁸ The decision has been criticised as a "judicial end-run".⁵⁹ No doubt it takes somewhat of a stretch to argue that equitable execution is not an extension of execution. However, a more dispassionate point of view suggests that to "say that there is a judicial policy of liberality in the exercise of discretion on behalf of a family creditor is to exaggerate the significance of a few cases".⁶⁰ In terms of the exigibility of RRSPs, the possibility of recourse to equitable execution will be examined later.

The decision in *Bonus Finance Ltd. v. Smith*⁶¹ was followed in *Re Rice*⁶² wherein it was held that the proceeds of a pension plan defined under the *Pension Benefits Act* do not lose their character as pension funds when converted into a 'locked-in' RRSP designated as a deferred life annuity under the provisions of same Act.⁶³ It should be noted that the legislation did not provide that the pension fund itself was exempt from execution, seizure or attachment. Indeed, only the moneys payable under

⁵⁸ *Ibid.*, at p. 537.

⁵⁹ John R. Varley, "The Protection of Assets: Legitimate Shelters," in *Debtors and Creditors: From Protection to Collection*, Conference Papers, (Toronto: Canadian Institute, 1986), at p. A-26.

⁶⁰ Dunlop, *supra*, footnote 13, at p. 756. Note, that the *Pension Benefits Act* has since been amended, now R.S.O. 1990, c. P.8, see s. 66 which now provides as follows:

(1) Money payable under a pension plan is exempt from execution, seizure or attachment.

(2) Money transferred from a pension plan to a prescribed retirement arrangement or for the purchase of a life annuity under section 42, 43 or 48 or subsection 73(2) is exempt from execution, seizure or attachment.

(3) Money payable from a prescribed retirement arrangement or from a life annuity purchased in accordance with section 42, 43 or 48 or subsection 73(2) is exempt from execution, seizure or attachment.

(4) Despite subsection (1), payments under a pension plan or that result from a purchase or a transfer under section 42 or 43, clause 48(1)(b) or subsection 73(2) are subject to execution, seizure or attachment in satisfaction of an order for support enforceable in Ontario to a maximum of one-half of the money payable.

(5) Subsection (4) applies to orders for support enforceable in Ontario whether made before or after the 1st day of January, 1988.

⁶¹ *Supra*, footnote 55.

⁶² (1985), 55 C.B.R. (N.S.) 290 (Ont. S.C.).

⁶³ *Ibid.*, at p. 293; see also *Re Pawlowski* (1985), 55 C.B.R. (N.S.) 285 (S.C.O.).

a pension plan were so protected.⁶⁴ Nevertheless, the Court held that if payments under a pension plan are immune from execution, then the source of those payments, namely the fund itself, must also be immune so long as it is traceable to a pension plan within the definition of the *Pension Benefits Act* and maintained pursuant to the provisions of that Act.⁶⁵ However, the provisions of the Act were not applicable in *Re Hill*,⁶⁶ wherein a pension fund was on deposit in Ontario, but was standing to the credit of a bankrupt residing outside the province. The funds had not been converted into a deferred life annuity upon termination of participation in the pension plan; moreover, the bankrupt had elected for a cash refund. The British Columbia Supreme Court held that the funds were available for distribution to the creditors of the bankrupt.

The situation in Saskatchewan is much the same as that in Ontario insofar as it has been held in *Walton v. Walton*⁶⁷ that a pension is not available to the creditors of a bankrupt because it is exempt from seizure under the *Pension Benefits Act*.⁶⁸ However, where an exempt deferred profit sharing plan had been wound up and the proceeds were transferred to a RRSP with an option to obtain an annuity, it was held that the funds were available for distribution to the creditors of the bankrupt. The case of *Re Touche Ross Ltd. and Neuls*⁶⁹ turned on the fact that the transfer was voluntary in that the beneficiary had chosen to place the proceeds in a plan that was not exempt. Furthermore, annuities at that time did not fall within the definition of life insurance under the *Insurance Act*, and as such

⁶⁴ See R.S.O. 1980, c. 373, s. 27, formerly S.O. 1965, c. 96, s. 22b, see footnote 56 *supra*.

⁶⁵ *Re Rice*, *supra*, footnote 62, at p. 292.

⁶⁶ (1983), 50 C.B.R. (N.S.) 254 (B.C.S.C.).

⁶⁷ (1993), 23 C.B.R. (3d) 314 (Sask. C.A.).

⁶⁸ R.S.S. 1978, c. P-6, s. 19, which provided as follows:

19. Moneys payable under a pension plan shall not be assigned, charged, attached, anticipated or given as security and are exempt from execution and seizure, and any transaction purporting to assign, charge, attach, anticipate or give as security such money is void.

⁶⁹ (1985), 17 D.L.R. (4th) 554 (Sask. C.A.), rev'g in part (1983), 49 C.B.R. (N.S.) 129 (Sask. Q.B.).

were not exempt from execution, seizure or attachment. It should be noted that both the *Insurance Act*⁷⁰ and the *Pension Benefits Act*⁷¹ were subsequently amended to avoid similar situations. However, the consequences of those amendments will not be addressed at this point as the issue of annuities will be discussed at length later on. Nevertheless to the extent that exempt funds are transferred to RRSPs with an immediate or deferred annuity option, it has since been held in *Churchill (Trustee of) v. Churchill*⁷² that the funds are exempt from seizure by virtue of the *Exemptions Act*.⁷³

Similarly in Quebec, a pension plan reimbursement is exempt from seizure pursuant to the provisions of the *Supplemental Pension Plans Act*.⁷⁴ Accordingly it was held in *Vandry v. Normandin*⁷⁵ that a RRSP which was established as a result of the transfer of a pension plan reimbursement, was not available to a trustee in bankruptcy for distribution to the creditors. However, in New Brunswick it was held in *Re Greening*⁷⁶ that in the absence of legislation exempting pension funds from seizure, the refund of pension contributions transferred into a RRSP were available for distribution to the

⁷⁰ See R.S.S. 1978, c. S-26, s. 2(kk)(vii), as amended by S.S. 1984-85-86, c. 82, s. 3.

⁷¹ See *Pension Benefits Act*, 1992, S.S. 1992, c. P-6.001, s. 63(1), which now provides as follows:

(1) Subject to subsection (3), benefits, moneys that have been transferred to another plan, to a prescribed RRSP or to any other prescribed retirement plan that is registered pursuant to the *Income Tax Act* (Canada), including moneys earned by those transferred moneys:

(a) may not be assigned, charged, alienated or anticipated; and

(b) are exempt from execution, seizure or attachment.

⁷² (1993), 17 C.B.R. (3d) 222 (Sask. Q.B.); cf. *Royal Bank of Canada v. Miller* (1993), 19 C.B.R. (3d) 208 (Sask. Q.B.).

⁷³ R.S.S. 1978, c. E-14, s. 9(1), which provide as follows:

(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.

⁷⁴ R.S.Q. 1977, c. R-17, art. 28, which provides as follows:

28. No pension benefit, other benefit or right of refund under a plan shall be capable of assignment or alienation, including those constituted by additional voluntary contributions.

The pension benefits provided under a plan in respect of service after the qualification date are not, on or after the retirement of an employee, payable in any other form during the lifetime of the employee.

⁷⁵ (1985), 54 C.B.R. (N.S.) 249 (Que. Sup. Ct.).

⁷⁶ (1989), 73 C.B.R. (N.S.) 24 (N.B.Q.B.).

creditors of the bankrupt. Likewise in Alberta where pension funds otherwise exempt from seizure under the *Public Service Management Pension Plan Act*,⁷⁷ were voluntarily transferred into a RRSP, it was held in *Re Hirani*⁷⁸ that the funds were available for the benefit of the creditors of the bankrupt.

Policy Considerations

The overriding policy consideration against the attachment of employee pension funds and benefits payable thereunder was enunciated in *Bonus Finance Ltd. v. Smith*⁷⁹ wherein Houlden J., as he was then, found that “moneys for the purchase of a pension are paid in small amounts over an extended period of years and are designed to provide for the old age and infirmity of the recipient.”⁸⁰ At first blush one might argue that a similar policy consideration ought to prevail with respect to the exigibility of RRSPs. Indeed, the object of the employee pension plan and the RRSP is to provide savings for future retirement needs; however, there are also some differences in the manner in which each of these vehicles attains that objective.

In contrast to the view that “moneys for the purchase of a pension are paid in small amounts”,⁸¹ it is suggested that contributions to RRSPs are not necessarily made in small amounts. In the case of a self-employed person the amount of the contribution can be quite significant. That is not to suggest, that only the self-employed person has the opportunity to contribute to a RRSP; on the contrary, a person in receipt of a salary or wages may also contribute, but subject to certain restrictions. In this

⁷⁷ S.A. 1984, c. P-34.1, s. 42, which provides as follows:

42. A person's interest in a benefit is not subject to garnishee proceedings, attachment, seizure or any legal process, except pursuant to section 46 or in respect of a failure to account for public money within the meaning of the *Financial Administration Act*.

⁷⁸ [1983] 8 W.W.R. 233 (Alta. Q.B.).

⁷⁹ *Supra*, footnote 55.

⁸⁰ *Ibid.*, at p. 734.

⁸¹ *Ibid.*

regard, it should be noted that the *Income Tax Act* limits the amount of contributions to a RRSP that any person can deduct from taxable income for the purpose of income tax calculation.⁸² In the case of an employee, however, that limit is reduced by the amount of any contribution made by either the employee or the employer into a registered pension plan sponsored by the employer or other similarly prescribed retirement savings vehicle.⁸³ Hence, with the exception of cases where an employer does not sponsor some form of prescribed retirement savings plan, the opportunity of an employee to contribute into a RRSP is less than that of someone who is self-employed.

Furthermore, contributions to employee pension plans are frequently involuntary insofar as participation is a condition of employment. On the other hand, contributions into RRSPs are, for the most part, voluntary in nature. The contributors to RRSPs have the freedom of choice as to whether to use their earnings to pay creditors, or to save for retirement. The distinction between persons that are employed for salary or wages and those that are self-employed is not lost on creditors at the time credit is extended. The capacity to pay is determined on the basis of net disposable income. In the case of the employee, the creditor is well aware that involuntary contributions into the employer-sponsored pension plan are not available to satisfy the debt. The capacity of self-employed persons to service their liabilities is not subject to such involuntary constraints.

The dichotomy between debtors that are salary or wage earners and those that are self-employed plays a significant role when the Crown is the creditor in that "the Crown is not able to choose its debtors, particularly in regard to taxation."⁸⁴ In this respect, it is important to note that the *Income*

⁸² Note. that under the definition of "RRSP dollar limit" as contained in subsection 146(1) of the *Income Tax Act*, the maximum deductible contribution is currently limited to \$13,500.

⁸³ See the formula described in the definition of "RRSP deduction limit" as contained in subsection 146(1) of the *Income Tax Act*.

⁸⁴ Australia, Senate Standing Committee on Constitutional and Legal Affairs of the Commonwealth of Australia, *Report on the Priority of Crown Debts*, Parliamentary Paper 169/78, (Canberra: Australian Gov't Publ. Serv., 1977), at p. 6 and cited in Anne E. Hardy, *Crown Priority in Insolvency*, (Toronto: Carswell, 1986), at p. 5.

Tax Act provides that persons in receipt of salary, wages, or other remuneration are to have their taxes deducted and withheld at source.⁸⁵ Hence there is often little opportunity for employees to be substantially in arrears of income tax.⁸⁶ This is not to suggest that salary and wage earners do not attract income tax arrears, but when arrears are incurred the amounts are of a residual nature given that credit is allowed for the taxes deducted and withheld at source.

While the self-employed are required to remit their taxes in quarterly instalments,⁸⁷ there is no effective or practical mechanism to ensure that the remittance are made as required. Consequently, in terms of risk assessment the self-employed person has a greater opportunity of being in arrears to the extent of the full amount of tax payable for a given year. This is not to infer that the self-employed are non-compliant, but that they have a greater opportunity not to comply and, indeed, some take advantage of that opportunity repeatedly.⁸⁸

The whole issue over the exigibility of RRSPs is for the most part aimed at that small group of tax debtors who do not comply with the instalment provisions of the *Income Tax Act* and account for a disproportionate amount of the income tax arrears owing to the Crown.⁸⁹ Hence, it is suggested that

⁸⁵ See paragraph 153(1)(a) of the *Income Tax Act*.

⁸⁶ See Canada, *1994 Report of the Auditor General of Canada to the House of Commons*, Vol. 16, (Ottawa: Min. of Supply & Services, 1994), at p. 29-20 where it is stated that: "salaried employees ... have much less chance to become delinquent because their employers are withholding a portion of their earnings to cover taxes owed."

⁸⁷ See subsection 156(1) of the *Income Tax Act*, but see subsection 155(1) insofar as the remittance requirements imposed on self-employed farmers and fishermen are somewhat different.

⁸⁸ See Canada, *supra*, footnote 86, at p. 29-19 where it is stated that,

Taxpayers (*sic*) who have multiple assessments outstanding represent another potentially high-risk group. It may be more difficult to collect from this group than from one-time debtors because the debt is usually larger and older. A consistent pattern of failure to pay may also indicate an unwillingness to pay even if the taxpayer (*sic*) possesses the means to do so. As noted in paragraph 29.29, our analysis revealed a high incidence of repeat debtors. We also noted that current-year instalment payments were often applied to cover arrears balances. This may indicate a strategy by some taxpayers (*sic*) to perpetually defer payment of tax at least one year and to use unpaid tax as a source of financing.

⁸⁹ See Canada, *Minutes of Proceedings and Evidence of the Standing Committee on Public Accounts*, Issue No. 26, Tuesday February 14, 1995 (Chair: Richard Bélisle), (Ottawa: Canada Communication Group, 1995), where at p. 26-7 the Auditor General of Canada, Denis Desautels, states that "we noted that 25% of the debtors owed 82% of the [tax arrears] debt, and that over half were repeat or chronic debtors."

there may be legitimate policy grounds for differentiating between the attachment of employee pension funds and the seizure of RRSPs belonging to self-employed tax debtors. The distinction between these circumstances and the treatment thereof, has been summarized as follows:

Employees' pensions are protected, *but only because the contributions are not voluntary*. If a self-employed person puts money into a bank RRSP then the funds are not exempt and could be seized by a trustee [in bankruptcy]. [emphasis added]⁹⁰

The policy considerations for maintaining a distinction between employee pension plans as opposed to RRSPs were further examined in *Re Wyebec Developments and First Investors*,⁹¹ where it was determined that,

The interest of the owner of an R.R.S.P. can be readily determined at any time. He [or she] is the owner of the plan and is in complete control of it. The interest in an R.R.P. is contingent of many factors, such as timing of vesting, level of earnings and length of service. It is the contributions of the employer and those other factors which make it extremely difficult ... to calculate the interest of an employee at any time. Thus it would seem reasonable for the Legislature to protect the employee's interest from seizure. There is no interested vested until participants reach a certain age.

... the two vehicles for providing pension income are not the same and the holders of the respective interests cannot be said to be "similarly situated".

The holder of an R.R.S.P. has used this programme to effect a savings plan which he [or she] might use at the time of his [or her] retirement. *Because of the flexibility of such a plan it can be nevertheless utilized at any time*. The means of saving in this way is no different from someone who has savings in a bank account for retirement purposes or any other asset that may be designated for this purpose. One could not argue that these assets should be exempt from seizure by creditors because they are required for retirement. [emphasis added]⁹²

Notwithstanding these fundamental differences between the two types of retirement income vehicles, it is important to note that, where the debtor's obligation is to the Crown on account of income tax arrears, the courts may find that the obligation to pay the tax debt supersedes even the protection

⁹⁰ James A Carlisle, "Employee's Pensions Exempted From Seizure Under Bankruptcy Act," (1993) 10 *Bus. & L.* 49, at p. 50.

⁹¹ (1986), 32 D.L.R. (4th) 595 (Alta. Q.B.).

⁹² *Ibid.*, at p. 600; see also footnote 97, *infra*, and accompanying text.

otherwise afforded to the benefits payable under an employee pension fund. For example, in *Sun Life Assurance Co. of Canada v. Canada (Department of National Revenue)*⁹³ the Court overrode the provisions of the *Pension Benefits Act*⁹⁴ to the extent that a garnishee on account of income tax arrears prevailed over the prohibition against the attachment of benefits. The provisions of the Act were held to be applicable to ordinary creditors, but could not bind the federal Crown when it was clearly within the scope of its legislative jurisdiction, namely, the raising of revenue. The constitutional implications of provincial legislation binding the federal Crown will be addressed later in the context of the overall discussion of jurisdictional encroachment.

Creditors' Rights in Non-Insurance Type RRSPs

The whole question concerning the seizure and attachment of RRSPs is fraught with inherent variables that preclude a single concise overview of this area of the law. Such factors as the distinction between attachment, seizure and execution are merely the tip of the iceberg. A number of other issues have also had an impact in this regard.

The development of the law has been influenced by concerns over the existence of a trust relationship between the plan holder and the fund manager. The composition of RRSPs in terms of being a form of deposit or a policy for insurance has been held to be a contributing factor. Outcomes have differed depending on whether the execution creditor was the Crown or a private creditor.

Likewise, claims that RRSPs formed property that vests in the trustee in bankruptcy proceedings have asserted an influence on the interpretation of the law. In light of these variables, the review of the case law pertaining to the seizure and attachment of RRSPs will be undertaken primarily from a historical

⁹³ [1992] 4 W.W.R. 504 (Sask. Q.B.).

⁹⁴ See, footnote 68, *supra*.

perspective. In this regard, it should be noted that the development of the law in this area has been punctuated by continued attempts, often by fund managers, to constrain creditors from seizing, attaching or otherwise executing against RRSPs. Reaction to decisions perceived as adverse to the interests of fund managers has resulted in the introduction of new investment products. Some provincial jurisdictions have enacted or amended legislation to exempt RRSPs from seizure, attachment or execution. These influences have had a fundamental impact on the development of the law, and as such will of necessity have to be treated under the cover of separate headings.

One of the earliest cases involving the seizure or attachment of RRSPs was the Federal Court decision in *Re Gero*,⁹⁵ where the Crown sought to enforce the payment of income tax arrears through garnishment of the plan. Walsh J. held that there was no basis upon which the funds in the plan could be considered exempt from attachment. The decision was based on the rule in *Robitaille v. Hins-Dion*,⁹⁶ where Pigeon J. stated that,

It is quite clear that one cannot by a contract protect one's property from seizure by one's creditors except under a special enactment such as in the *Supplemental Pension Plans Act*, 1965 (Que.), c. 25, s. 31. Thus it is perfectly clear that one cannot make a bank deposit stipulating that the money will be exempt from seizure.⁹⁷

In arriving at the decision, Walsh J. considered the implications of the provisions of article 553 (7) of the *Code of Civil Procedure* in that any benefits payable to employees out of pension funds or the pension fund itself were exempt from seizure. The provisions were found to have no application as they only applied "to pensions of an employee, and not to a voluntary Retirement Savings Plan established by an individual for himself."⁹⁸ The decision was upheld on appeal and the monies in the

⁹⁵ (1979), 79 DTC 5228 (F.C.T.D.).

⁹⁶ (1978), 91 D.L.R. (3d) 609 (S.C.C.).

⁹⁷ *Ibid.*, at p. 611.

⁹⁸ *Re Gero*, *supra*, footnote 95, at p. 5229.

plan were ordered to be paid to the Crown net of statutory tax withholdings.⁹⁹ In this regard, the decision in *Re Gero*¹⁰⁰ effectively opened the door and provided creditors with a unique means to enforce judgments for unsatisfied debts. In the absence of any legislation to the contrary, RRSPs were subject to seizure and attachment.¹⁰¹ Moreover, should the fund manager fail to pay the monies over and permit the plan holder to withdraw the funds, the fund manager would be liable to the creditor.¹⁰²

Despite the initial success in *Re Gero*,¹⁰³ the playing field advantage favouring creditors was short lived as legislation was enacted in a number of jurisdictions to prevent creditors from realizing against RRSPs.¹⁰⁴ Furthermore, the courts were faced with common law arguments suggesting that the trust relationship between plan holders and fund managers was a bar against seizure and attachment. The decision of the British Columbia Court of Appeal in *McMahon v. Canada Permanent Trust Company*¹⁰⁵ sowed the seed for what was to become a fundamental departure from the reasoning in *Re Gero*.¹⁰⁶ The case revolved around the issue of an attempt to set-off against the funds in a RRSP. In holding that set-off¹⁰⁷ must fail due to a lack of mutuality of debts, it was found that the

⁹⁹ *Re Gero* (June 25, 1981), F.C.A., Pratte, Heald & Urie JJ. A. [unreported]; see also *Thore v. The Queen* (1997), 97 DTC 3324 (T.C.C.), where it was held that when execution is levied against a RRSP the creditor is entitled to the proceeds net of statutory withholdings.

¹⁰⁰ *Supra*, footnote 95.

¹⁰¹ See, for example, *M.N.R. v. Sinclair* (1993), 93 DTC 5239 (F.C.T.D.); see also Stephan Legouff, "Execution and Seizure Against RRSPs in Quebec (Part I)," (1984) 2 *Nat. Insolvency Rev.* 13, at pp. 13-14 for further discussion of the impact of *Re Gero*.

¹⁰² See *Parmar v. Banque Royale du Canada* (1992), 36 A.C.W.S. (3d) 695 (Que. C.A.).

¹⁰³ *Supra*, footnote 95; see also *The Queen v. Rumball* (1980), 81 DTC 5001 (F.C.T.D.).

¹⁰⁴ See, for example, *M.N.R. v. Waldeusfel* (1995), 95 DTC 5183 (F.C.T.D.), where it was held that art. 178 of the *Trust Companies and Savings Companies Act*, R.S.Q. 1977, c. S-29.01, as amended by S.Q. 1987, c. 95, exempted a RRSP from seizure in that it provides that:

Monies constituting fixed-term annuities are unseizable in the hands of the trust company as fixed-term annuities transacted by insurers.

¹⁰⁵ (1979), 32 C.B.R. (N.S.) 258 (B.C.C.A.), rev'g (1978), 29 C.B.R. (N.S.) 295 (B.C.S.C.).

¹⁰⁶ *Supra*, footnote 95.

¹⁰⁷ Note, that the amount which the fund manager attempted to set-off against the funds in the RRSP was the balance of a loan, the proceeds of which had been used to make the contribution into the RRSP; but see para. 146(2)(c.3) of the *Income Tax Act* [added by S.C. 1980-81, c. 40, s. 96(3)] which provides:

relationship between the fund manager and the plan owner was that of a trustee and a beneficiary as opposed to that of a debtor and a creditor.

The reasoning that “no debtor/creditor relationship is ever formed between trustee and cestui que trust,”¹⁰⁸ has been roundly criticized as “there are a number of early English decisions in which the courts had little trouble in superposing a creditor-debtor relationship over a trustee-*cestui que trust* relationship.”¹⁰⁹ Despite the existence of such cases, the decision in *McMahon v. Canada Permanent Trust Company*¹¹⁰ was followed in *Vancouver A & W Drive-Ins Ltd. v. United Food Services Ltd.*¹¹¹

In the latter case, Fulton J. held that the relationship between the plan holder and the fund manager was purely one of trust, and the plan holder could have only a beneficial interest in the fund, that is to say, an equitable and not a legal interest.¹¹² In the absence of a specific legislative provision

(2) The Minister shall not accept for registration for the purposes of this Act any retirement savings plan unless, in the Minister's opinion, it complies with the following conditions:

.....

c.3 the plan, where it involves a depository, includes provisions stipulating that

(i) the depository has no right of offset as regards the property held under the plan in connection with any debt or obligation owing to the depository, and

(ii) the property under the plan cannot be pledged, assigned or in any way alienated as security for a loan or for any purpose other than that of providing for the annuitant, commencing at maturity, a retirement income;

See, in this regard, *Re Shmou* (1984) 53 C.B.R. (N.S.) 120 (Man. C.A.), aff'd (1983) 51 C.B.R. (N.S.) 221 (Man. Q.B.); *Banque Nationale du Canada v. Marché de Poisson du Quai Lévesque* (1985) 68 N.B.R. (2d) 209 (Q.B.); *Guindon v. Hodgson* (1986), 36 A.C.W.S. (2d) 146 (Ont. Dist. Ct.); *Phenix (Trustee of) v. Bank of Nova Scotia* (1989), 73 C.B.R. (N.S.) 290 (Sask. C.A.), rev'd (1988), 71 C.B.R. (N.S.) 148 (Sask. Q.B.) [note “Corrigenda,” (1989) 76 C.B.R. (N.S.) xxx]; *Re Leavitt* (1995), 32 C.B.R. (3d) 85 (B.C.S.C.), aff'd in (1997), 50 C.B.R. (3d) 97 (B.C.C.A.); and *Re Buwalda* (1997), 49 C.B.R. (3d) 281 (Alta. Reg.); but see *Re Dowe* (1986), 62 C.B.R. (N.S.) 289 (B.C.C.A.), rev'd (1985), 59 C.B.R. (N.S.) 103 (B.C.S.C.); *Re Caisse* (1993), 25 C.B.R. (3d) 218 (Que. Sup. Ct.); and *Re Whaling*, (December 18, 1998), Ont. C.A., Krever, Labrosse & Doherty J.J.A. [unreported].

¹⁰⁸ Brian Taylor, “Execution against R.R.S.P.’s,” (1985) 1 *Nat. Creditor/Debtor Rev.* 13, at p. 15; see also Walker & Ash, *supra*, footnote 31, at p. 7-26, where the authors suggest that a RRSP will not be seizable where there is no debtor / creditor relationship between the plan holder and the holder of the premiums, namely, the fund manager.

¹⁰⁹ Melvin A. Springman & Eric Gertner, “Enforcement Against RRSPs And RRSP Assets By Unsecured Creditors,” (1983) 4 *Advocates’ Q.* 450, at p. 476 (the foregoing being a revised version of “The Exigibility of Life Insurance, Pensions and R.R.S.P.’s in Canadian Common Law Jurisdictions,” (1982) 2 *Insolvency Bulletin* Nos. 10, 11 & 12, at pp. 3-21, 2-11 & 2-15 reprinted in Canada, *Bankruptcy and Insolvency: Collection of Articles*, (Ottawa: Consumer & Corporate Affairs, 1984), at pp. 82-123; see up-dated version in Melvin A. Springman & Eric Gertner, *Debtor-Creditor Law: Practice and Doctrine*, (Toronto: Butterworths, 1985), at pp. 1-79).

¹¹⁰ *Supra*, footnote 105.

¹¹¹ (1981), 10 E.T.R. 35 (B.C.S.C.).

¹¹² *Ibid.*, at p. 46.

extending execution to equitable interests, a RRSP was neither seizable by writ nor attachable by garnishment.¹¹³ In arriving at this conclusion, Fulton J. stated that he was bound by the decision of the Court of Appeal. Interestingly his lordship “expressly chose not to follow”¹¹⁴ the reasoning in *Re Gero*¹¹⁵ despite the fact that “the Court of Appeal did not address itself to the issue of whether money owing out of a trustee/cestui que trust relationship was capable of attachment.”¹¹⁶ In fact, one commentator suggests that the difference between the *cestui que trust* - trustee relationship and that of a debtor-creditor is “superfluous, as debts arising out of either are capable of attachment”¹¹⁷ under the *Court Order Enforcement Act*.¹¹⁸ In essence, the legislation “provides that, to be garnishable, a debt, obligation or liability must arise out of trust or contract.”¹¹⁹

Needless to say, the decision in *Vancouver A & W Drive-Ins Ltd. v. United Food Services Ltd.*¹²⁰ was not the last word on the issue. Indeed, in *Bank of British Columbia v. 225280 B.C. Ltd.*¹²¹ the fund manager was not considered “to be a trustee but much closer to the holder of a term deposit”,¹²² and

113 *Ibid.*

114 Taylor, *supra*, footnote 108.

115 *Supra*, footnote 95.

116 Taylor, *supra*, footnote 108.

117 *Ibid.*

118 R.S.B.C. 1979, c. 75, s. 7 which states:

7. Except as hereafter mention, the expression “debts, obligation and liabilities” in section 4 [as it pertains to attachment procedures and exemptions], and that expression or any of the words composing it, when used in an order made under section 4, does not comprise an obligation or liability not arising out of trust or contract, unless judgment has been recovered on it against the garnishee, but, though not so as to restrict further the general sense of the words, the expression in the section or in any order shall be construed to include all claims and demands of the defendant, judgment creditor, or person liable under the order for payment of money against the garnishee arising out of trusts or contract where the claims and demands could be made available under equitable execution.

Now defined under “debts, obligations and liabilities” in R.S.B.C. 1996, c. 78, s. 3(1).

119 *British Columbia Statute Citator*, Release No. 64, (Aurora, Ont.: Canada Law Book, 1997), at p. 31-3.

120 *Supra*, footnote 111.

121 (1985), 65 B.C.L.R. 23 (S.C.), *cont’d* from (1985), 62 B.C.L.R. 294 (S.C.).

122 *Ibid.*, at p. 24.

as such the RRSP was subject to seizure and sale pursuant to, albeit a separate provision of the *Court Order Enforcement Act*.¹²³ The decision was subsequently followed in the Federal Court in respect to seizure of RRSPs by writ of execution on account of income tax arrears.¹²⁴ Likewise in the context of garnishment, it was held in *Discovery Trust Co. v. Abbott*¹²⁵ that the *cestui que trust* - trustee relationship between the plan holder and the fund manager, did not bar attachment pursuant to the garnishment provisions of the *Income Tax Act*. McLachlin J., as she was then, found that those provisions were not confined to a debtor-creditor relationship.¹²⁶ Furthermore, in *Bateman v. Toronto Dominion Bank*,¹²⁷ it was held that the debtor-creditor relationship between the fund manager and the plan holder could exist concurrently with the trust relationship in that the two relationships are mutually exclusive.¹²⁸

On the other hand, the reasoning in *McMahon v. Canada Permanent Trust Company*¹²⁹ and *Vancouver A & W Drive-Ins Ltd. v. United Food Services Ltd.*¹³⁰ was subsequently followed in a number of other jurisdictions where creditors sought to garnish RRSPs.¹³¹ The decision in *DeConinck*

¹²³ R.S.B.C. 1979, c. 75, s. 52 which states:

52. Any sheriff or other officer to whom any writ of execution is directed shall seize and take any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money, belonging to the execution debtor, and may and shall pay and deliver to the execution creditor any money or bank notes which are seized, or a sufficient part of it; and shall hold any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money as security for the amount by the writ of execution directed to be levied, or as much of it as has not been otherwise levied and raised; and the sheriff or other officer may sue in his own name for the recovery of the sums secured by it, if and when the time of payment of it has arrived.

¹²⁴ See *Re Guterres* (1994), 94 DTC 6603 (F.C.T.D.); and *M.N.R. v. Bodnarchuk* (1995), 95 DTC 5500 (F.C.T.D.).

¹²⁵ (1982), 38 B.C.L.R. 55 (S.C.).

¹²⁶ *Ibid.*, at p. 56.

¹²⁷ (1991), 86 D.L.R. (4th) 354 (B.C.S.C.).

¹²⁸ *Ibid.*, at p. 363.

¹²⁹ *Supra*, footnote 105.

¹³⁰ *Supra*, footnote 111.

¹³¹ See *Re Bliss, Kirsh and Doyle* (1983), 3 D.L.R. (4th) 425 (Ont. H.C.); and *National Bank of Canada v. Creative Touch Millworks Inc.*, [1989] 2 W.W.R. 180 (Sask. Q.B.).

v. Royal Trust Corp. of Can.,¹³² is of significance in this respect. Speaking for the New Brunswick Court of Appeal, Stratton C.J.N.B. held that the funds in a RRSP not only constitute a trust, but

... until a cestui que trust requests payment of the proceeds of an R.R.S.P. from his trustee, which he is able but not bound to do under the rule in *Saunders v. Vaulier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch.), no moneys are payable to him nor is his trustee liable to make payment to him within the meaning of s. 224(1) of the [Income Tax] Act.¹³³

The rule was subsequently followed by the Tax Court of Canada;¹³⁴ however, it does not appear to have been universally accepted. A recently reported case suggests that the Court has distanced itself from the idea that a RRSP constitutes a trust.¹³⁵ For all intents and purposes, it may be generally assumed that the rule is gradually being discarded, and rightly so. By way of a requiem, one might aptly argue that while “the distinction between the relationship of trustee/beneficiary and debtor/creditor may be fairly clear in theory, the practical effect of this distinction is without question anomalous.”¹³⁶ Aside from the dubious finding of a trust relationship, the major impact of the *DeConinck v. Royal Trust Corp. of Can.*,¹³⁷ decision is the proposition that only the plan holder is entitled to to collapse a RRSP. The significance of this proposition will be addressed later in the paper. Meanwhile, it should be noted, that where there is specific provision extending execution to equitable interests, RRSPs have been held to be exigible by writ of execution.¹³⁸

¹³² (1988), 42 B.L.R. 96 (N.B.C.A.), rev'g (1988), 87 N.B.R. (2d) 323 (Q.B.).

¹³³ *Ibid.*, at p. 102.

¹³⁴ *National Trust Company v. The Queen* (1996), 96 DTC 1832 (T.C.C.).

¹³⁵ See *Maritime Life Assurance Company v. The Queen* (1997), 97 DTC 1321 (T.C.C.), at p. 1323 where Bowie T.C.C.J. states that “It is common ground between the parties, and I agree with them, that the policies here in issue do not create a trust relationship between the Appellant and the policyholders.” [emphasis added]

¹³⁶ R. Warren Law, “From The Law Reports: *Re Bliss, Kirsh and Doyle et al.; Montreal Trust Co.: Debtor and Creditor - Garnishment - Whether interest in collapsible investor-directed R.R.S.P. garnishable*,” (1985) 7 E. & T.Q. 1, at p. 4.

¹³⁷ *Supra*, footnote 132.

¹³⁸ See *National Trust Co. Ltd. v. Lorenzetti* (1983), 148 D.L.R. (3d) 575 (Ont. H.C.); *Re Morgan Trust Company and Dellelce* (1985), 85 DTC 5492 (S.C.O.); *Capital City Savings & Credit Union Limited v. 299474 Alberta Ltd.* (1990), 78 C.B.R. (N.S.) 166 (Alta. Master), cont'd from (1989), 76 C.B.R. (N.S.) 286 (Alta. Master) and *Lachance-Gariépy v. Caron*, [1984] R.J.Q. 648 (C.A.), for discussion of the latter case see (unsigned), “Garnishment of Retirement Savings Plans,” (1985) 4 *Nat. Banking L. Rev.* 86.

Policy Considerations

In the earlier discussion of the policy considerations surrounding the exigibility of employee pension funds, salary or wage earners were distinguished from self-employed persons in terms of having less opportunity to incur income tax arrears and often a reduced capacity to invest in RRSPs. In the course of that discussion it was suggested that the issue of the exigibility of RRSPs was for the most part aimed at that group of tax debtors that owe a disproportionate amount of the tax arrears outstanding. However, as was suggested at the outset, there are two competing public policy questions that come into play, namely, the use of existing resources to service present debts versus the encouragement of planning and saving for future retirement needs. The horns of this dilemma were recognized in *Vancouver A & W Drive-Ins Ltd. V. United Food Services Ltd.*¹³⁹ The dynamics between the competing interests were summarized by Fulton J. as follows:

... people, particularly the self-employed, are encouraged to set up their own plans for retirement. [However,] ... a number of other [government] plans ... enjoy statutory protection now from having their interest in such plans made subject to execution, and ... the interest of employees in company pension plans generally cannot be reached either... Therefore, it is submitted, that [the] large group of self-employed persons - and indeed numbers of employed persons who do not have the benefit of group pension plans - who respond to the opportunity to provide for their own retirement in this way, should enjoy a similar protection.

.....

This is an attractive argument but it must ... be rejected if only on the ground that there is at least one other policy to the contrary... That is that one of the first obligations of a debtor is to pay his [or her] just debts and that his [or her] available assets should be devoted to that end. This policy is not only a just and equitable policy, [but it is] long settled in the law...¹⁴⁰

To permit otherwise, "would allow an unscrupulous [RRSP] depositor to insulate deposit arrangements ... from the claims of legitimate creditors."¹⁴¹ While this may reflect poorly on the attitude of some debtors, these are not just isolated situations. Indeed, it has been suggested, albeit

¹³⁹ *Supra*, footnote 111.

¹⁴⁰ *Ibid.*, at pp. 54-55.

¹⁴¹ *Bateman v. Toronto Dominion Bank*, *supra*, footnote 127, at p. 363.

in the context of bankruptcy and insolvency, that “the man who takes these things seriously, who worries about his creditors, feels shame over his debts, struggles with anything like persistence against the obligations he took on, that man is no more nor less than a sucker.”¹⁴² Given this sort of propensity, it is suggested, hopefully not too harshly, that the demand for consistency in the treatment of retirement vehicles needs to be examined critically.

Tax arrears are not the consequence of credit extension that was mutually negotiated between a lender and a borrower. Tax debtors, particularly those that unscrupulously shield their assets to avoid payment of their fair share, are in essence asking others to shoulder the burden of the financial upkeep of the nation. A review of the opposition to discharge case law provides anecdotal evidence of this type of behaviour in that there are a significant number of cases where bankrupts resorted to bankruptcy to expunge their income tax obligations.¹⁴³ Furthermore, in several instances the bankrupts had RRSP investments which they sought to shield from the reach of their creditors.¹⁴⁴ Accordingly, demands for consistency in the treatment of retirement vehicles may be somewhat of a smokescreen. A policy position that takes this dimension into consideration suggests that,

... a debtor should be required to use present resources to pay present debts. If the debtor wishes to secure future income, he or she should do so only after the present slate has been cleaned. The social policy of encouraging planning and saving for the future does not suggest that this should be done at the expense of one's present creditors. Society encourages such frugality and economy as is necessary to produce a fund *not required for present purposes* that can be invested for the future. The frugality and economy should be that of the individual whose future is thereby secured, not that of his or her creditors. The inconsistency of treatment between debtors who own the capital of their retirement security and those who do not should not be resolved at the expense of the creditors of the former.¹⁴⁵

¹⁴² Walter Stewart, *Belly Up: The Spoils of Bankruptcy*, (Toronto: McClelland & Stewart, 1995), at p. 6.

¹⁴³ See footnote 355, *infra*, and accompanying text.

¹⁴⁴ See footnote 358, *infra*, and accompanying text.

¹⁴⁵ Alberta Law Reform Institute, *Enforcement of Money Judgements*, Vol. 1, (Edmonton: ALRI, 1991), at p. 301.

Creditors' Rights in Insurance Policies

The lucrative RRSP market is not the sole domain of banks and trust companies. Qualified investments as defined under the provisions of the *Income Tax Act* include annuities purchased from Canadian corporations authorized to issue same, namely, insurance companies.¹⁴⁶ In terms of the exigibility of annuity RRSPs, it may be helpful to first examine the general state of the law as it pertains to execution against insurance policies to satisfy the claims of the creditors of the insured.

Historically the law has provided that "for the insured's interest in a life insurance policy to be attachable it must be vested in the insured, not dependent on any contingency and one which has a present fixed value."¹⁴⁷ On the other hand, any policy on which a preferred beneficiary or a beneficiary for value had been designated, was exempt from either attachment or garnishment.¹⁴⁸ Preferred beneficiaries, in this respect, were defined as close family members¹⁴⁹ of the insured; whereas, beneficiaries for value had to have given valuable consideration, other than marriage, for being so designated.¹⁵⁰ The law provided that a trust was created in favour of preferred beneficiaries,¹⁵¹ with

¹⁴⁶ See definition of "qualified investment" under subsection 146(1) of the *Income Tax Act*.

¹⁴⁷ Arthur S. Bourinot, "Creditors' Rights in Insurance Policies," [1932] 2 *D.L.R.* 529, at p. 537.

¹⁴⁸ *Ibid.*, at p. 536; cf. *Royal Bank of Canada v. Dumart*, [1932] O.R. 661 (C.A.), rev'g (1932), 41 O.W.N. 199.

¹⁴⁹ See subsection 164(2) of the *Insurance Act*, R.S.O. 1960, c. 190, which provided:

(2) Subject to section 173 [effect of adoption on relationship of beneficiaries], preferred beneficiaries are the husband, wife, children, adopted children, grandchildren, children of adopted children, father, mother and adopting parents of the person whose life is insured.

¹⁵⁰ See subsection 164(1) of the *Insurance Act*, R.S.O. 1960, c. 190, which provided:

(1) Beneficiaries for value are beneficiaries who have given valuable consideration, other than marriage, and who are expressly stated to be, or described as, beneficiaries for value in the policy or in an endorsement thereon or in a subsequent declaration signed by the insured.

¹⁵¹ See subsection 170(1) of the *Insurance Act*, R.S.O. 1960, c. 190, which provided:

(1) Where the insured, in pursuance of section 167 [power of insured to deal with contract by declaration or otherwise], designates as beneficiary or beneficiaries a member or members of the class of preferred beneficiaries, a trust is created in favour of the designated beneficiary or beneficiaries, and the insurance money, or such part thereof as is or has been apportioned to a preferred beneficiary, is not, except as otherwise provided in this Act, subject to the control of the insured or of his creditors and does not form part of the estate of the insured.

the result “that by the making of the declaration naming the preferred beneficiary, the beneficiary *ipso facto* acquired the absolute property in the insurance moneys.”¹⁵² The distinction between preferred beneficiaries, beneficiaries for value, and ordinary beneficiaries was subsequently abolished,¹⁵³ and in its stead provision was made for the insured to designate a beneficiary irrevocably.¹⁵⁴

Needless to say, where the designation is not irrevocable, the insured is free to change beneficiaries.¹⁵⁵ However, even if the designation is not irrevocable, when it is made in favour of a close family member of the person whose life is insured, the rights and interests of the insured in the insurance money or the contract are exempt from execution or seizure.¹⁵⁶ Based on these amendments to the law, it is suggested that the recourse available to creditors against the cash surrender value of a debtor’s life insurance policy has been greatly diminished. No doubt the original statement of the law in terms of a policy being attachable provided that it is “vested in the insured, not dependent on any contingency and one which has a present fixed value,”¹⁵⁷ still holds true. However, that opportunity is not always readily available. The cash surrender values of policies are not debts payable to the

¹⁵² Lloyd W. Houlden, “Life Insurance Contracts in Ontario,” (1963) 4 *C.B.R. (N.S.)* 113, at pp. 113-114; cf. *Re Nakashidze (No. 2)*, [1948] 2 D.L.R. 522 (S.C.O.).

¹⁵³ S.O. 1961-62, c. 63, s. 4.

¹⁵⁴ See subsection 157(1) of the *Insurance Act*, R.S.O. 1960, c. 190, as amended by S.O. 1961-62, c. 63, now subsection 191(1) of the *Insurance Act*, R.S.O. 1990, c. I.8, hereinafter referred to as the *Insurance Act*, which provides:

(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 office in Canada during the lifetime of the person whose life is insured, designate a beneficiary irrevocably, and in the event the insured, while the beneficiary is living, may 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.

¹⁵⁵ See subsection 1502(2) of the *Insurance Act*, R.S.O. 1960, c. 190, as amended by S.O. 1961-62, c. 63, now subsection 190(2) of the *Insurance Act*, R.S.O. 1990, c. I.8, which provides:

(2) Subject to section 191 [designation of beneficiary irrevocably], the insured may from time to time alter or revoke the designation by declaration.

¹⁵⁶ See subsection 162(2) of the *Insurance Act*, R.S.O. 1960, c. 190, as amended by S.O. 1961-62, c. 63, now subsection 196(2) of the *Insurance Act*, R.S.O. 1990, c. I.8, which provides:

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

¹⁵⁷ Bourinot, *supra*, footnote 147.

insured and hence not garnishable, unless or until the insured elects to terminate the policy.¹⁵⁸ Moreover, policies are often creditor-proofed through irrevocable beneficiary designation or by designating certain close family members.

The results are somewhat different in the event the insured were to become bankrupt. Trustees in bankruptcy are bound by the exemptions from execution or seizure provided in provincial statutes;¹⁵⁹ but where a policy is payable to the estate or the heirs of the bankrupt, the trustee can step into the shoes of the insured and “seize the policy and surrender it.”¹⁶⁰ While these obstacles present an insurmountable problem to regular creditors, albeit to a lesser degree in the event of bankruptcy, it will be argued later that such restrictions are not applicable to the Crown when collecting arrears of income tax.

Policy Considerations

It is conceded that the possibility of creditors gaining access to the cash surrender value of life insurance policies held by their debtors is an emotive issue. One need have little imagination to conjure up visions of Ebenezer Scrooge squaring-off against Tiny Tim.¹⁶¹ The possibility of a widow being left threadbare with a brood of six or seven tattered children without sustenance or shelter as a result of the husband’s creditor being allowed to attach the cash surrender value of a meagre life insurance policy, begs judicial denial. One can almost hear the likes of a Lord Denning delivering the kiss of death to the cold-hearted creditor’s application with such words as:

¹⁵⁸ See *Bank of Nova Scotia v. Robson* (1987), 63 O.R. (2d) 159 (Ont. Dist. Ct.), at p. 160.

¹⁵⁹ See footnote 53, *supra*.

¹⁶⁰ Houlden & Morawetz, *supra*, footnote 54, F§36 (Rel. 2 - 1998) at p. 3:127; see *Re Mendelson*, [1940] 2 D.L.R. 382 (N.B.C.A.); *Fortier v. Nault* (1953), 34 C.B.R. 5 (Que. Sup. Ct.); and *Perras v. Chadwick & Company Limited* (1954), 34 C.B.R. 193 (Que. Q.B.).

¹⁶¹ See Edgar Johnson, *Charles Dickens: His Tragedy and Triumph*, Vol. 1, (New York: Simon & Schuster, 1952), at p. 487 where in a critical discussion of the leading characters in Dickens’ *Christmas Carol* the author states that “Cold-hearted arrogance and injustice storing up a dangerous heritage of poverty and ignorance - such is Dickens’s [sic] judgment of the economic system that Scrooge exemplifies.”

The defendant was an elderly farmer who was not well versed in business affairs. His home was a farmhouse which had belonged to his family for several generations. It was his only asset ...¹⁶²

Balanced against the allegation of hardship, is the adage of Lord Campbell C.J., which suggests that “we must not let hard cases induce us to make bad law.”¹⁶³ Hard fact situations tend to obscure the law. Lost in the clutter are the cases of self-employed professionals in arrears of income tax, who have effectively rendered themselves judgment-proof with the result that there is very little possibility that the assessed tax arrears will ever be collected except by attachment of insurance type RRSPs.

For example, the fact situation in *Maritime Life Assurance Company v. The Queen*,¹⁶⁴ involved two physicians, husband and wife, who permanently left Canada owing \$589,095.74 in combined income tax arrears.¹⁶⁵ Attachment of the only remaining assets, two RRSP insurance policies with a cash surrender value totalling \$187,582.77, was denied. It is against such a background of tax default and non-compliance that the attachment of insurance type RRSPs will be examined.

Creditors' Rights in Annuities

It is well established in the law that annuity contracts are not, in the ordinary sense,¹⁶⁶ life insurance.¹⁶⁷ It is important, however, in the context of the exigibility of annuity RRSPs to note the differences

¹⁶² *Lloyds Bank Ltd v. Bundy*, [1974] 3 All E.R. 757 (C.A.), at p. 757.

¹⁶³ *Ex parte Long* (1854), 19 J.P. 118 (Q.B.), at p. 118; see also (1884), 20 L.T.O.S. 73 (Q.B.), at p. 74 where the quote is stated as follows: “we must not allow hard cases to make bad law.”; but see (1854), 3 W.R. 18 (Q.B.), at p. 19 where his Lordship is reported as having said: “hard cases, it is said, make bad law.”

¹⁶⁴ *Supra*, footnote 135.

¹⁶⁵ *Ibid.*, see the statement of agreed facts appended to the decision at pp. 1326-1327.

¹⁶⁶ Note, that certain provincial insurance statutes deem annuities to be insurance, see *Insurance Act*, R.S.O. 1990, c. I.8, s.

¹⁶⁷ *McCabe*, *supra*, footnote 7, at p. 219; see also *Gray v. Kerslake* (1957), 11 D.L.R. (2d) 225 (S.C.C.); cf. *Re Scott and Manufacturers Life Insurance Co.* (1973), 41 D.L.R. (3d) 296 (Man. Q.B.); and *Re Beck* (1976), 70 D.L.R. (3d) 760 (Man. C.A.), aff’d (1975), 65 D.L.R. (3d) 541 (Man. Q.B.).

between life insurance and annuities. Life insurance provides for the payment of insurance money on death, on the happening of an event or contingency dependent on human life, or at a fixed or determinable future time.¹⁶⁸ An annuity contract, on the other hand, may provide that,

- (a) it will make certain payments, monthly, for a guaranteed period of ten years commencing when the annuitant becomes 60 years of age;
- (b) it will continue these payments for so long as the annuitant lives;
- (c) in the event the annuitant dies prior to age 60, the purchase price of the annuity will be paid to a designated beneficiary; or
- (d) if the annuitant dies within the guaranteed payment period, the payments will be made to his or her designated beneficiary.¹⁶⁹

In this respect it could be said that “an annuity contract is almost diametrically opposed to life insurance”, in that “in a contract for insurance there is an immediate hazard of loss thrown upon the insurer”; whereas, “in an annuity contract the hazard of loss is no longer upon the insurer but upon the recipient, who may die before any of the benefits are received.”¹⁷⁰ The differences between contracts for life insurance, pensions and annuities were examined by the Supreme Court of Canada in *Gray v. Kerslake*,¹⁷¹ where it was found that,

Life insurance in its characteristic forms involves, as its essence, a risk in a specified payment of money absolute from the moment the contract takes effect, That constitutes the security sought by the insured, the premiums for which in turn furnish the consideration to the insurer.¹⁷²

.....

Pensions may be looked upon as the payment of postponed wages, and their amount depends, certainly in most schemes, on the length of service, the contributions made and the wages from time to time received; they are not, in the general understanding and in a true sense

¹⁶⁸ See the definition of “life insurance” under section 1 of the *Insurance Act*, R.S.O. 1990, c. 18.

¹⁶⁹ McCabe, *supra*, footnote 7, at p. 219.

¹⁷⁰ *Ibid.*, at pp. 219-220.

¹⁷¹ *Supra*, footnote 167.

¹⁷² *Ibid.*, at p. 227.

looked upon as insurance.¹⁷³

.....

Annuities of the kind provided by the contract in question ... have, ... nothing in common with contracts of life insurance. Their usual purpose is simply to provide, by deposit either of a lump sum or of payments over a period of years, a sum of money sufficient, with accumulated interest, to provide an annuity to commence in one's later years, either for the life of the annuitant or for a fixed term of years. The sum repayable on death if the annuitant dies before he has reached the age when the annuity has commenced or before the stipulated number of annual payments have been made is nothing more than a refunding of moneys deposited for a defined purpose, when that purpose has wholly or partially failed owing to the death of the annuitant.¹⁷⁴

In the absence of any specific legislative provision expanding the definition of life insurance to include an annuity or an undertaking to provide an annuity,¹⁷⁵ the courts have held that annuity type RRSPs are exigible for the benefit of the creditors of the plan holder.¹⁷⁶ Otherwise, in order to be exempt from execution, seizure or attachment, an annuity contract must contain an indemnity against loss in respect of a risk or peril.¹⁷⁷ Hence, unless a statute deems an annuity to be a contract of life insurance, there must be undertaking to pay money that is triggered by some contingency tied to the life of an individual person.¹⁷⁸ In other words, if an annuity type RRSP is to be "a contract of insurance in the statutory sense, there must be a person whose life is insured."¹⁷⁹

The issue of the legislative inclusion of annuities under the definition of life insurance or the deeming of same to be life insurance has been a source of fodder for judicial debate. Indeed, some of that debate has led to tortuous statutory interpretation. On the one hand, undertakings to provide

¹⁷³ *Ibid.*, at p. 228.

¹⁷⁴ *Ibid.*, at p. 234.

¹⁷⁵ See footnote 189, *infra*.

¹⁷⁶ See *Re Comptoirs* (1981), 40 C.B.R. (N.S.) 118 (Que. S.C.); and *Re Touche Ross Ltd. and Neuls*, *supra*, footnote 69.

¹⁷⁷ *A.R. Thomson Ltd. v. Stock* (1995), 9 C.C.P.B. 196 (B.C.S.C.), at p. 201.

¹⁷⁸ *Robson v. Robson* (1995), 31 C.B.R. (3d) 197 (B.C.S.C.), at p. 202.

¹⁷⁹ *Re Larocque* (1982), 139 D.L.R. (3d) 569 (S.C.O.); cf. *Bank of Montreal v. Arrowsmith* (1984), 65 N.S.R. (2d) 190 (S.C.T.D.).

annuities, which are neither deemed by statute to be contracts of insurance nor provide an indemnity against the loss of life, have been held to be a form of investment and as such were exigible.¹⁸⁰ On the other hand, even where the legislation specifically provides that an annuity is deemed to be life insurance, some courts have been reluctant to exempt the moneys payable thereunder from the reaches of the creditors of the plan holder.¹⁸¹ The latter reasoning has not been universally followed, in fact, it has been criticized as having done “violence to the plain meaning of the words” of the legislation.¹⁸²

In terms of the exigibility of RRSPs, the decision in *Re Crevier*¹⁸³ illustrates some of the unique characteristics of annuity type RRSPs that do not have insurance features. In this case the retirement savings plan had been obtained through a chartered bank and there was no provision for indemnification against loss in respect of any risk or peril. The plan was essentially a form of investment with an undertaking to provide an annuity. It contained several options regarding the final distribution of the accumulated funds, including withdrawal prior to maturity of all or part of the monies. Otherwise upon maturity, the investment would convert into a fixed term annuity.¹⁸⁴ In effect the plan was little more than a long term savings account. Since the plan holder still had the option to withdraw the funds at any time prior to maturity, the funds could be attached. In this respect, the case provides a clear distinction between an annuity and an undertaking to provide an annuity.

¹⁸⁰ See *Robson v. Robson*, *supra*, footnote 178; cf. *A.R. Thomson Ltd. v. Stock*, *supra*, footnote 177; note, that both decisions were subsequently reversed on appeal in (1998), 2 C.B.R. (4th) 79 (B.C.C.A.).

¹⁸¹ See *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.); and particularly *Toronto Dominion Bank v. Berezowsky* (1987), 36 D.L.R. (4th) 235 (Alta. Q.B.), where it was held that insurance money under an annuity contract is exempt from seizure or execution only when it actually becomes payable to a named beneficiary. Note, that the decision was rendered notwithstanding the fact that the *Insurance Act*, R.S.A. 1980, c. I-5, as amended by S.A. 1981, c. 49 (see footnotes 190 & 191, *infra*), specifically provides that an annuity or an undertaking to provide an annuity shall be deemed to be and always to have been life insurance, and as such is by operation of s. 265(2) exempt from seizure where a spouse, child, grandchild, or parent of the insured has been designated as the beneficiary. See also *M.N.R. v. Maron and Maritime Life Ins. Co.*, [1983] R.D.J. 532 (F.C.T.D.).

¹⁸² See *Whalley v. Harris Steel Ltd.*, *infra*, footnote 197, at p. 172; see also *Legouff*, *supra*, footnote 101, at pp. 14-16.

¹⁸³ (1993), 93 DTC 5510 (F.C.T.D.).

¹⁸⁴ *Ibid.*, at pp. 5510-5511; see also *Re Croft*, [1998] R.J.Q. 1917 (Que. Sup. Ct.).

Policy Considerations

As has already been indicated at several junctures in this paper, the exigibility of RRSPs impacts on a number of competing public policy considerations. The issue primarily involves the encouragement of planning and saving for future retirement needs versus the use of existing resources to service present debts. However, there is an inherent risk associated with the reduction of the analysis to only these two conflicting interests. The matter is not one of over simplification. In fact, there is a benefit to be had in having the two opposing positions clearly identified. But in limiting the discourse to just these two points of view, the opportunity for further analysis quickly ceases. In effect the issue becomes a zero sum game between the debtor and the creditor. The drawback is that the adversarial conflict resolution model reduces the matter to a 'mechanistic'¹⁸⁵ application of contractual principles which frequently subordinate any secondary interests.

No one side in the conflict has a lock on the concern over secondary interests. No doubt dependents have a stake in the retirement income of the debtor. However, the issue is not just limited to the interests of the debtor's dependents. The insufficiency of retirement income can, despite suggestions to the contrary,¹⁸⁶ have a potential impact on the debtor's adult off-spring in terms of having a legal obligation to provide support where there is need.¹⁸⁷ In the absence of any recourse against the off-spring, the responsibility for the deficiency may fall on the public purse. On the other hand, there are

¹⁸⁵ See the application of the term, albeit in the constitutional sense, in Robert Stevens, "The Role of the Judiciary: Lessons from the End of Empire," in *Essays for Patrick Atiyah*, edited by Peter Cane & Jane Stapleton, (Oxford: Clarendon Press, 1991), at p. 153.

¹⁸⁶ See David R. Gobeil, "Retirement planning: Saving for the rest of your life," *CA Magazine*, Vol. 120, No. 9 (September, 1987), 67, where in the context of the prospect of retirement being unnerving, the author suggests at p. 67 that: "The traditional extended family is now history. The aged can no longer look to their children for care, but are expected to fend for themselves."

¹⁸⁷ See *Family Law Act*, R.S.O. 1990, c. F.3, s. 32, which provides as follows:

32. Every child who is not a minor has an obligation to provide support, in accordance with need, for his or her parent who has cared for or provided support for the child, to the extent that the child is capable of doing so.

See also *Godwin v. Bolso* (1996), 20 R.F.L. (4th) 66 (Ont. C.A.), aff'd (1993), 45 R.F.L. (3d) 310 (Prov. Div.); but see *Berendt v. Berendt* (1987), 11 R.F.L. (3d) 69 (Ont. U.F.C.).

impacts on the creditor in that the failure to realize on outstanding debts has consequences. At worst there is the risk of insolvency. More likely, however, is the fact that losses will translate into higher carrying costs or increased prices. The latter prospect is ultimately a burden that is redistributed in the market with the result that the consequences have to be borne by the public at large.

Creditors' Rights in Insurance Type RRSPs

The driving force behind the question of whether annuities fall within the definition of life insurance is the issue of access to the exemptions from claims of creditors afforded under insurance legislation. This strategy has been thwarted to the extent that courts have generally held that annuities fall outside the definition of life insurance since the payment of money under an annuity is not triggered by some contingency dependent on human life.¹⁸⁸ As a result, annuity type RRSPs were found to be exigible for the benefit of the creditors of the plan holder. Provincial and territorial insurance legislation, however, was subsequently amended to make provision for the inclusion of annuities.¹⁸⁹ The

¹⁸⁸ But see *Re Larocque*, *supra*, footnote 179, at p. 572, where it was held that there was an element of risk in an annuity contract that was contingently tied to a human life to the extent that it was found that,

While the nature of the risk to the insurer is different in an annuity from that in a standard life insurance contract, there is risk none the less. In the former, there is a risk that the annuitant will live longer than expected and in the latter that he [or she] will die earlier than expected.

¹⁸⁹ See definition of "life insurance" under section 1 of the *Insurance Act*, R.S.O. 1990, c. L8., which provides as follows:

1. "Life insurance" means an undertaking by an insurer to pay insurance money,

- (a) on death,
- (b) on the happening of an event or contingency dependent on human life,
- (c) at a fixed or determinable future time, or
- (d) for a term dependent on human life,

and, without restricting the generality of the foregoing, includes,

.....
(g) 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 and such an undertaking shall be deemed always to have been life insurance;

see also, *Insurance Act*, R.S.B.C. 1996, c. 226, s. 1 (definitions of "insurance" and "insurance money"); *Insurance Act*, R.S.A. 1980, c. I-5, s. 240.1, as amended by S.A. 1981, c. 49, s. 4; *Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26, s. 2(kk) & 2.1, as amended by S.S. 1984-85-86, c. 82, s. 3 & 4; *Insurance Act*, R.S.M. 1987, c. 140, s. 1 (definition of "life insurance"); *Civil Code of Québec*, S.Q. 1991, c. 64, art. 2393; *Insurance Act*, R.S.N.B. 1973, c. I-12, s. 1 (definition of "life insurance"), as amended by S.N.B. 1978, c. 30, s. 1; *Insurance Act*, R.S.N.S. 1989, c. 231, s. 3(o)(vii); *Insurance Act*, R.S.P.E.I. 1988, c. I-4, s. 1(k.1)(vii); *Life Insurance Act*, R.S.N. 1990, c. L-14, s. 2(u)(ii)(C); *Insurance Act*, R.S.N.W.T. 1988, c. I-4, s. 1 (definitions of "insurance money" & "life insurance"); and *Insurance Act*, R.S.Y. 1986, c. 91, s. 1 (definitions of "insurance money" & "life insurance").

amendments in the majority of the jurisdictions unequivocally stipulate that the definition of life insurance includes undertakings to provide annuities.¹⁹⁰ Indeed, some of the statutes further provide that such undertakings are deemed to have always been life insurance thereby extending the application of the legislation to contracts that were transacted prior to the amendments coming into force.¹⁹¹ On the other hand, the inclusion of annuities under some insurance statutes is less well defined to the extent that the provision appears limited to annuities that are already in effect as opposed undertakings to provide an annuity,¹⁹² let alone contracts that were transacted prior to the enactment of the amendments. Apart from these anomalies, it is now generally conceded that provincial and territorial legislation governing insurance, particularly life insurance, is applicable to annuity contracts or undertakings to provide annuities entered into by an insurer.

It has been acknowledged that the protection now afforded to owners of annuities was originally developed to protect from claims of creditors the rights of beneficiaries under insurance contracts.¹⁹³ Nevertheless, as a result of the statutory amendments for the inclusion of annuities under the definition of life insurance, that protection has been extended to annuity type RRSPs issued by

¹⁹⁰ See *Insurance Act*, R.S.O. 1990, c. 18, s. 1; see also *Insurance Act*, R.S.A. 1980, c. I-5, s. 240.1; *Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26, s. 2(kk); *Insurance Act*, R.S.N.B. 1973, c. I-12, s. 1; *Insurance Act*, R.S.N.S. 1989, c. 231, s. 3(o)(vii); *Insurance Act*, R.S.P.E.I. 1988, c. I-4, s. 1(k.1)(vii); and *Life Insurance Act*, R.S.N. 1990, c. L-14, s. 2(u)(ii)(C).

¹⁹¹ See *Insurance Act*, R.S.O. 1990, c. 18, s. 1; see also *Insurance Act*, R.S.A. 1980, c. I-5, s. 240.1; *Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26, s. 2.1; and *Insurance Act*, R.S.N.S. 1989, c. 231, s. 3(o)(vii).

¹⁹² See, for example, the combined effect of the definitions of "insurance" and "insurance money" under section 1 of the *Insurance Act*, R.S.B.C. 1996, c. 226, which provide as follows:

1. "Insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value on the happening of a certain event;

"insurance money" means the amount payable by an insurer under a contract, and includes all benefits, surplus, profits, dividends, bonuses and annuities payable under the contract; (emphasis added)

see also the combined effect of similar provisions respecting the definitions of "insurance money" and "life insurance" under section 1 of the *Insurance Act*, R.S.N.W.T. 1988, c. I-4; and under section 1 of the *Insurance Act*, R.S.Y. 1986, c. 91.

¹⁹³ Janice Walsh, "RRSP Products Have Varying Immunity To Claims of Creditors," (1993) 1 *RRSP Plan.* 6, at p. 6; see also Bruce Cohen, "Creditor-proof RRSPs challenged," *Financial Post* (September 30, 1995), at p. 48 where the author states:

Insurance-company RRSPs enjoy special status because of a loophole. The provincial laws - which predated [sic] the introduction and growth of RRSPs - provide creditor-proofing for life insurance. It is a widow-and-orphans issue.

insurers. The legislation effectively permits plan holders to take advantage of creditor-proofing opportunities otherwise only available in respect of life insurance policies. That is to say, that a plan holder may designate beneficiaries irrevocably with the result that the amount payable thereunder is beyond the control of the insured as well as that of his or her creditors and does not form part of the estate of the insured.¹⁹⁴ Moreover, where the designation of the beneficiary is made in favour of a close family member of the plan holder, the rights and interests of the plan holder in either the amount payable thereunder or the contract are exempt from execution or seizure.¹⁹⁵

The capacity to render insurance type RRSPs exempt from execution and seizure by either designating a beneficiary irrevocably or by making the designation in favour of a close family member, has provoked considerable judicial debate. As was indicated earlier, not all courts embraced the significance of the amendments.¹⁹⁶ For the most part, however, the trend has been to exempt annuity type RRSPs from execution and seizure.¹⁹⁷ Moreover, the trend has been followed in the realm of bankruptcy administration.¹⁹⁸ Indeed, the enabling federal legislation, the *Bankruptcy and Insolvency Act*, specifically provides that property vesting in the trustee for the benefit of the creditors is subject

¹⁹⁴ See *Insurance Act*, R.S.O. 1990, c. I.8, s. 191(1), the wording of which is provided in footnote 154, *supra*; see also *Insurance Act*, R.S.B.C., c. 226, s. 49(1); *Insurance Act*, R.S.A. 1980, c. I-5, s. 260(1); *Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26, 153(1); *Insurance Act*, R.S.M. 1987, C. 140, s. 168(1); *Civil Code of Québec*, S.Q. 1991, c. 64, art. 2458 & 2455; *Insurance Act*, R.S.N.B. 1973, c. I-12, s. 152(1); *Insurance Act*, R.S.N.S. 1989, c. 231, s. 193(1); *Insurance Act*, R.S.P.E.I. 1988, c. I-4, s. 139(1); *Life Insurance Act*, R.S.N. 1990, c. L-14, s. 22(1); *Insurance Act*, R.S.N.W.T. 1988, c. I-4, s. 89(1); and *Insurance Act*, R.S.Y. 1986, c. 91, s. 93(1).

¹⁹⁵ See *Insurance Act*, R.S.O. 1990, c. I.8, s. 196(2), the wording of which is provided in footnote 156, *supra*; see also *Insurance Act*, R.S.B.C., c. 226, s. 54(2); *Insurance Act*, R.S.A. 1980, c. I-5, s. 265(2); *Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26, 158(2); *Insurance Act*, R.S.M. 1987, C. 140, s. 173(2); *Civil Code of Québec*, S.Q. 1991, c. 64, art. 2457; *Insurance Act*, R.S.N.B. 1973, c. I-12, s. 157(2); *Insurance Act*, R.S.N.S. 1989, c. 231, s. 198(2); *Insurance Act*, R.S.P.E.I. 1988, c. I-4, s. 144(2); *Life Insurance Act*, R.S.N. 1990, c. L-14, s. 27(2); *Insurance Act*, R.S.N.W.T. 1988, c. I-4, s. 94(2); and *Insurance Act*, R.S.Y. 1986, c. 91, s. 98(2).

¹⁹⁶ See footnote 181, *supra*, and accompanying text.

¹⁹⁷ See, for example, *Lofts v. Lofts* (1990), 30 R.F.L. (3d) 217 (Sask. Q.B.); *China Software Corp. v. Leimbiger* (1990), 4 C.B.R. (3d) 185 (B.C. Master); and *Whalley v. Harris Steel Ltd.* (1994), 29 C.B.R. (3d) 168 (Ont. Gen. Div.), *aff'd* in (1997), 46 C.C.L.I. (2d) 250 (Ont. C.A.).

¹⁹⁸ See *Re Richardson* (1984), 54 C.B.R. (N.S.) 189 (Man. Q.B.); *Re Jobin* (1986), 63 C.B.R. (N.S.) 227 (Que. C.A.); *Canadian Imperial Bank of Commerce v. Meitzer* (1991), 6 C.B.R. (3d) 1 (Man. Q.B.); *Davis, Martindale & Co. v. Canada Life* (1994), 27 C.B.R. (3d) 75 (Ont. Gen. Div.); *M.N.R. v. Anthony* (1995), 32 C.B.R. (3d) 109 (Nfld. C.A.); *Re Kozak* (1995), 36 C.B.R. (3d) 86 (Alta. Q.B.); *Royal Bank of Canada v. North American Life Assurance Co.*, *infra*, footnote 276; *Christensen (Trustee of) v. Christensen* (1996), 41 C.B.R. (3d) 11 (Alta. C.A.), leave to appeal refused in (1996), 205 N.R. 399 (S.C.C.); and *Sun Life Assurance Co. v. Revenue Canada Taxation* (1997), 144 D.L.R. (4th) 653 (Alta. C.A.), *rev'g* (sub nom. *Re MacDonald*) (1991), 21 C.B.R. (3d) 211 (Alta. Q.B.).

to the exemptions provided under provincial legislation.¹⁹⁹ On the other hand, the designation of a beneficiary under what has been referred to as bank and trust company RRSP (one that has not been issued by an insurer),²⁰⁰ does not necessarily afford protection from the claims of creditors.

An examination of beneficiary designations under such non-insurance type RRSPs is proposed in that it will provide a comparative basis for the analysis of the policy considerations behind the exemptions afforded to plans offered by insurers. In this regard, it should be noted that in each of the provinces and territories legislation has been enacted to provide for the designation of beneficiaries under non-insurance type RRSPs.²⁰¹ The consequence of a designation under the *Succession Law Reform Act*²⁰² was examined in *Canadian Imperial Bank of Commerce v. Besharah*.²⁰³ The decision turned on the fact that the plan holder had complete control over the plan and could revoke the designation of the spouse as beneficiary.²⁰⁴ It was held that the proceeds devolved upon the estate of the plan holder to be paid out to the spouse as a specific legacy, but only after the claims of creditors have been satisfied.²⁰⁵ The same reasoning was followed in *Waugh Estate v. Waugh*,²⁰⁶ wherein the decision

¹⁹⁹ See footnote 53. *supra*.

²⁰⁰ See David J. McKee, "Debtor-Creditor Issues Affecting Annuity Contracts," (1993) 12 *E. & T.J.* 247, at p. 249.

²⁰¹ See *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 51(1); *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 49(2); *Trustee Act*, c. T-10, s. 47(2); *Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 45(23)(3); *Retirement Plan Beneficiaries Act*, S.M. 1992, c. 31, s. 2; *Retirement Plan Beneficiaries Act*, S.N.B. 1982, c. R-10.21, s. 2(1); *Beneficiaries Designation Act*, R.S.N.S. 1989, c. 36, s. 9(2); *Designation of Beneficiaries Under Benefit Plans Act*, R.S.P.E.I. 1988, c. D-9, s. 2; *Income Tax Savings Plans Act*, R.S.N. 1990, c. I-2, s. 4; *Retirement Plan Beneficiaries Act*, R.S.N.W.T. 1988, c. R-6, s. 3(1), as amended by S.N.W.T. 1995, c. 26, s. 3; and *Retirement Plan Beneficiaries Act*, R.S.Y. 1986, c. 153, s. 2; note, that while Quebec does not have specific legislation to provide for the designation of beneficiaries under all non-insurance type plans, provision for designations under fixed-term annuities offered by trust and savings companies is made under the *Trust Companies and Savings Companies Act*, S.Q. 1987, c. 95, art. 178, which effectively deems the annuity to be one transacted by an insurer, with the result that plan falls under the application of art. 2393, 2455, 2457 & 2458 of the *Civil Code of Québec*, S.Q. 1991, c. 64, see footnotes 104, 189, 194 & 195, *supra*.

²⁰² R.S.O. 1990, c. S.26.

²⁰³ (1989), 58 D.L.R. (4th) 705 (Ont. H.C.).

²⁰⁴ *Ibid.*, at p. 708; see also *M.N.R. v. Maron and Maritime Life Ins. Co.*, *supra*, footnote 181; *Re Crevier*, *supra*, footnote 183; *B.N.S. v. McKee's Estate* (1982), 39 N.B.R. (2d) 542 (Q.B.); and *Re Boisvert* (1997), 2 C.B.R. (4th) 113 (Que. Sup. Ct.).

²⁰⁵ *Canadian Imperial Bank of Commerce v. Besharah*, *supra*, footnote 203, at p. 709; for a discussion of the decision, see Barry S. Corbin, "From The Law Reports: *CIBC v. Besharah*: Registered retirement savings plans - Designation of beneficiary - Whether proceeds part of planholder's estate - Whether exempt from planholder's creditors," (1989) 9 *E. & T.J.* 265.

²⁰⁶ (1990), 37 E.T.R. 146 (Man. Q.B.).

turned in part on the definition of the term “plan” as provided under the former provisions of the *Retirement Plan Beneficiaries Act*.²⁰⁷ While that legislation permitted designations, its operation was limited to plans involving actual annuities as opposed to ones that were merely capable of conversion to an annuity.²⁰⁸ It should be noted that the decision represents a departure from the Court’s own finding in an earlier case,²⁰⁹ which some would argue had been decided incorrectly.²¹⁰

The questions surrounding the designation of beneficiaries under non-insurance plans have been the subject of considerable commentary,²¹¹ much of which falls outside the realm of this project. Suffice it to say, that in the majority of provincial and territorial jurisdictions the legislation provides that the definition of plans is not just limited to annuities, but includes all non-insurance RRSPs,²¹² thereby avoiding the problems encountered in *Waugh Estate v. Waugh*.²¹³ However, the question of the irrevocable designation of beneficiaries to avoid the result in *Canadian Imperial Bank of Commerce v. Besharah*,²¹⁴ largely remains outstanding in that very few jurisdictions have attempted to address

²⁰⁷ S.M. 1976, c. 27, s. 1.

²⁰⁸ *Waugh Estate v. Waugh*, *supra*, footnote 206, at pp. 149-150; for a full discussion of the decision, see Cy M. Fien, “*Waugh Estate v. Waugh*: More About the Nature of RRSPs,” (1990) 10 *E. & T. J.* 37.

²⁰⁹ See *Daniel v. Daniel* (1986), 41 Man. R. (2d) 66 (Q.B.), where at p. 71 it was held that the designation of a named beneficiary under the *Retirement Plan Beneficiaries Act*, S.M. 1976, c. 27, s. 2, excludes the plan from the estate of the deceased.

²¹⁰ See Peter L. Biro, “The Erosion of Life Insurance RRSP Immunity From Creditor’s Claims,” (1993) 13 *E. & T. J.* 189, at p. 196, fn. 20.

²¹¹ See Barry S. Corbin, “Designating Beneficiaries,” (1989) 9 *E. & T. J.* 199; Barry S. Corbin, “Designating Beneficiaries - Addendum,” (1989) 9 *E. & T. J.* 349; Ralph E. Scane, “Non-Insurance Beneficiary Designations,” (1993) 72 *Can. Bar Rev.* 178; Alberta Law Reform Institute, *Beneficiary Designations: RRSPs, RRIFs and Section 47 of the Trustee Act*, Report No. 68, (Edmonton: ALRI, 1993); and Biro, *supra*, footnote 210, at pp. 194-197.

²¹² See *Succession Law Reform Act*, c. S.26, s. 50 (definition of “plan”), as amended by S.O. 1994, c. 27, s. 63(4); *Trustee Act*, R.S.A. 1980, c. T-10, s. 47(1)(c)(iii), as amended by S.A. 1994, c. 23, s. 46(3); *Queen’s Bench Act*, R.S.S. 1978, c. Q-1, s. 23(1)(c), as amended by S.S. 1988-89, c. 18, s. 3(3); *Retirement Plan Beneficiaries Act*, S.M. 1992, c. 31, s. 1 (definition of “plan”); *Retirement Plan Beneficiaries Act*, S.N.B. 1982, c. R-10.21, s. 1 (definition of “plan”), as amended by S.N.B. c. 16, s. 1 and *General Regulation - Retirement Plan Beneficiaries Act*, N.B. Reg. 92-95, s. 3(a); *Beneficiaries Designation Act*, R.S.N.S. 1989, c. 36, s. 9(1)(b); *Designation of Beneficiaries Under Benefit Plans Act*, R.S.P.E.I. 1988, c. D-9, s. 1(d); *Income Tax Savings Plans Act*, R.S.N. 1990, c. I-2, s. 2(d)(i); *Retirement Plan Beneficiaries Act*, c. R-6, s. 1 (definition of “plan”), as amended by S.N.W.T. 1995, c. 26, s. 2; and *Retirement Plan beneficiaries Act*, c. 153, s. 1 (definition of “plan”); but see *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 49(1) (definition of “plan”), as amended by R.S.B.C. 1996 (Supp.), c. 253, s. 2 (not proclaimed as of December 31, 1997).

²¹³ *Supra*, footnote 206.

²¹⁴ *Supra*, footnote 203.

what seems to be a highly controversial issue.²¹⁵ On the other hand, the courts appear to have taken notice of the legislator's intent and have generally held that non-insurance type RRSPs with designated beneficiaries do not devolve²¹⁶ upon the estate of the plan holder.

Policy Considerations

In terms of the protection from creditors accorded to insurance type RRSPs, it has been argued that "nothing seems to justify the artificial distinction made between RRSPs issued by insurance companies and those issued by other authorized issuers."²¹⁷ The basis for the argument is founded in the long held view concerning the necessity of providing for surviving wives and children.²¹⁸ Given the fundamental differences between life insurance and annuities, one might counter argue that there is no justification for the artificial assimilation of these devices. The suggestion that life insurance has historically been a means by which "the breadwinner saved to provide retirement income for his family as well as relief for them in the event of sudden death,"²¹⁹ barely falls short of judicial sophistry. The provision of relief in the event of sudden death was no doubt the objective; however, to suggest that life insurance was a means of providing retirement income takes a stretch of the imagination. No doubt the creditor-proofing of life insurance was "a widows-and-orphans issue",²²⁰ but even the social

²¹⁵ See *Retirement Plan Beneficiaries Act*, S.M. 1992, c. 31, s. 12 (note, that unlike the initial draft Bill the legislation does not provide for creditor protection analogous to that accorded to insurance contracts: Barry S. Corbin, "From The Legislatures: Manitoba Overhauls its Retirement Plan Beneficiaries Act," (1992) 12 *E. & T. J.* 1); *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 49(16), as amended by R.S.B.C. 1996 (Supp.), c. 253, s.2 (not proclaimed as of December 31, 1997); *Designation of Beneficiaries Under Benefit Plans Act*, R.S.P.E.I., c. D-9, s. 9 & 10, as amended by S.P.E.I. 1992, c. 16, s. 1 (note, that while the legislation does not provide for irrevocable designations, where a designation has been made the plan money does not form part of the estate and is not subject to the claims of creditors; moreover, where the designation is in favour of a close family member, the plan is exempt from execution and seizure: Barry S. Corbin, "From The Legislatures: Prince Edward Island Levels the Playing Field by Creditor-proofing Non-insurance RRSPs," (1992) 12 *E. & T. J.* 114); and *Trust Companies and Savings Companies Act*, S.Q. 1987, c. 95, art. 178, when read in conjunction with *Civil Code of Québec*, S.Q. 1991, c. 64, art. 2458 (see discussion in footnote 201, *supra*: *M.N.R. v. Waldteufel* (1995), 95 DTC 5183 (F.C.T.D.)).

²¹⁶ See *Baltzan Estate v. Royal Bank*, [1990] 3 W.W.R. 374 (Sask. Surr. Ct.); *Re Botscher Estate* (1990), 39 E.T.R. 19 (B.C.S.C.); and *Re Reese Estate* (1994), 4 E.T.R. (2d) 38 (Alta. Surr. Ct.).

²¹⁷ Stephan Legoueff, "Execution and Seizure Against RRSPs in Quebec (Part II)," (1985) 2 *Nat. Insolvency Rev.* 18, at p. 19.

²¹⁸ David Norwood, "The Life Insurance Family Beneficiary," (1994) 13 *E. & T. J.* 256, at p. 263.

²¹⁹ *Christensen (Trustee of) v. Christensen*, *supra*, footnote 198, at p. 17.

²²⁰ Cohen, *supra*, footnote 193.

policy behind that position has been questioned.²²¹ Indeed, the "vital social policy set down by legislators of so long ago," was a response to the need to provide for "surviving wives and children - a major concern of the pioneer settlers."²²²

This is not to suggest that the policy behind provision for next of kin should be revised. However, the application of that policy in the context of retirement income needs to be examined. The inference that males are the sole breadwinners²²³ is not only wrong, but offensive. Social policies based on the idea of the subservient wife being solely reliant on the bread winnings of her husband are not only out of step with contemporary reality, but are offensive to the status of women. The historical power relationship between men and women that gave rise to such thinking has been seriously challenged. The image of the male and female relationship where "he names her housewife, fit only for the house, keeps her poor and utterly dependent, only to buy her with his money should she leave the house,"²²⁴ has for the most part been rejected. The position of male dominance protected by laws²²⁵ has been challenged through social activism and enhanced rights consciousness. Those efforts have been buttressed by such legislative enactments as provincial human rights codes and statutory bills of rights,²²⁶ the *Canadian Bill of Rights*,²²⁷ and the *Canadian Charter of Rights and Freedoms*.²²⁸ Indeed, the law has come a long way to eliminate discrimination and inequality based on gender. This

²²¹ Norwood, *supra*, footnote 218.

²²² *Ibid.*

²²³ See footnote 219, *supra*, and accompanying text, wherein the reference to the 'breadwinner' is made in the context of the relationship to 'his family', which fails to recognize, let alone acknowledge, the monetary contribution of women to the income of families

²²⁴ Andrea Dworkin, *Pornography: Men Possessing Women*, (New York: Plume, 1989), at p. 18.

²²⁵ *Ibid.*, at p. 13.

²²⁶ See discussion in Hogg, *infra*, footnote 362, Vol. II, §31.3(a) & (b), at pp. 31:6-31:8.

²²⁷ R.S.C. 1985, App. III.

²²⁸ Part I of the *Constitution Act, 1982*, R.S.C. 1985, App. II, No. 44, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, hereinafter referred to as the *Canadian Charter of Rights and Freedoms* or the *Charter*.

is not to say, that the last vestiges of influence of male-supremacist ideology have been completely purged. Such influences are often too subtle for effective redress solely through the legal system.

Despite the subtleties, there are signs of changing attitudes. Reform in the area of family law has cast doubt on a number of age old assumptions. At one time, for instance, if a husband purchased property and had it conveyed into his wife's name, the presumption of advancement permitted the courts to assume that the conveyance was a gift from the husband to the wife. The basis for the reasoning was that "wives' economic dependence on their husbands made it necessary as a matter of public policy to give them this advantage."²²⁹ That rule of law has since been abolished.²³⁰ The rule was both archaic and artificial in that it "did not reflect the nature of the relationship and lifestyle of contemporary married couples."²³¹

The assertion that a social policy is deeply rooted in history and tradition, must be critically examined in its contextual framework. Indeed, fundamentalist adherence to historical tradition is flawed to the extent that it denies the possibility of any gains being derived from social evolution. Moreover, the motives of the proponents for the adoption of such an unwavering position are often self-serving. In this respect, it has been suggested that "historical traditions are susceptible to even greater manipulation than are legal precedents."²³² The issue is one of limitation. That is to say, that:

²²⁹ *Pettit v. Pettit*, [1969] 2 All E.R. 385 (H.L.), at p. 389.

²³⁰ *Family Law Reform Act*, 1978, S.O. 1978, c. 2, s. 11 (subsequently repealed by S.O. 1986, c. 4, s. 71(1), but see *Family Law Act*, R.S.O. 1990, c. F.3, s. 5(1), which now provides for equalization in the division of net family properties); see also *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 56(2), which provides for an undivided half interest in family assets; *Matrimonial Property Act*, R.S.A. 1980, c. M-9, s. 36(1); *Matrimonial Property Act*, S.S. 1979, c. M-6.1, s. 50(1); *Marital Property Act*, R.S.M. 1987, c. M45, s. 23, as amended; *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 15(1); *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 21(1); *Family Law Reform Act*, c. 6, s. 12(1) (subsequently repealed by *Family Law Act*, S.P.E.I. 1995, c. 12, s. 63, see also s. 6(1), which provides for equalization in the division of net family properties); *Matrimonial Property Act*, S.N. 1979 c. 32, s. 29(1) (subsequently repealed by S.N. 1988, c. 60, s. 84(b), but see *Family Law Act*, R.S.N. 1990, c. F-2, s. 21(1), which now provides for entitlement to an equal division of assets); and *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 7(2), see also s. 6(1), which provides for entitlement to an equal division of family assets; see comments in John de Pencier Wright, *Division of Matrimonial Assets in Ontario*, (Aurora, Ont.: Canada Law Book, 1982), at pp. 60-61, 171 & 256.

²³¹ Donovan W.M. Waters, *Law of Trusts in Canada*, 2nd ed., (Toronto: Carswell, 1984), at pp. 346-347.

²³² Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution*, (Cambridge, Mass.: Harvard U. Press, 1991), at p. 98.

To acknowledge the manipulability of historical traditions is to recognize that all history is summary. The lens of the historical camera, in focusing on one event, necessarily blurs others.²³³

Against the background of this analysis, it is suggested that 'widows-and-orphans' arguments in favour of exempting RRSPs from execution and seizure are emotional appeals to a public policy that was formulated in the era dominated by an ideology of questionable merit. Such arguments not only aid in the preservation of the remnants of that ideology, but from the perspective of this paper, they raise the sceptre of 'Tiny Tim's's crutch'²³⁴ to distract attention from what might otherwise be viewed as self-serving commercial interests. RRSP investments are a 'cash cow' for financial institutions; accordingly, an analysis of these interests is proposed. The book value of the total accumulated assets in RRSP plans as at the end of 1994 was estimated at \$182.1 billion,²³⁵ hardly a paltry sum. Needless to say, that amount has since grown as a result of the contributions that were made in subsequent years: \$21.6 billion in 1995,²³⁶ and an estimated \$23.5 billion in 1996.²³⁷ In this regard, it has been said that "the government has created the framework and the scope for the financial institutions, and they have responded to the challenge with imagination and ingenuity."²³⁸ Small wonder, the profit potential in terms of administration and service fees is staggering.²³⁹ The personal compensation for

²³³ *Ibid.*, at p. 99.

²³⁴ See reference at p. 34, above.

²³⁵ See Table A (Accumulated assets in selected retirement income programs, at December 31) in Canada, *Trusted Pension Funds: Financial Statistics, 1994*, (Ottawa: Statistics Canada, 1996), at p. 6; note, that based on the fair market value, including accumulated earnings, the value of the deposits is estimated to exceed \$230 billion: Alan Freeman, "Canadians put \$19-billion in RRSPs," *The [Toronto] Globe & Mail* (December 2, 1994), at p. B8; and Susan Noakes, "Fretting over federal budget," *Financial Post* (February 11, 1995), at p. R1.

²³⁶ See Basic Table 4 (All Returns by Age and Sex) in Canada, *Taxation Statistics on Individuals: Analyzing 1995 Individual Tax Returns and Miscellaneous Statistics, 1997 ed.*, (Ottawa: Revenue Canada, 1997), at p. 103.

²³⁷ Bruce Little, "Canadians better off than they seem: CIBC," *The [Toronto] Globe & Mail* (November 27, 1997), at p. B10.

²³⁸ Solomon Spiro & John M. Solursh, "More on Retirement Savings Plans," (1974) 12 *Can. Tax J.* 539, at p. 551.

²³⁹ Note, that the cost of fees and charges ranges from 1% to 2% per annum, see Robert Carter, "Asset-based fee offers commission alternative," *National Post* (March 10, 1999), at p. D2; see also Bruce Cohen, "Trust plan promises creditor-proof RRSPs," *Financial Post* (January 18, 1996), at p. 31, where the service charges of one fund manager are broken down as follows: "1% a year on bonds and 2% for equities. A 50-50 bond/equity portfolio would pay 1.5%. That's on top of any brokerage charges for transactions."

successful fund managers is enormous.²⁴⁰ The fierce competition for new RRSP business and the offering of enticements to attract that business,²⁴¹ require no elaboration. The profit incentive speaks for itself. Creditor-proofing in terms of offering "protection of assets from creditors,"²⁴² no longer has a pejorative connotation. It is merely a marketing strategy in a growth industry.

Offering annuities as a form of life insurance is merely an extension of that strategy. The insurance industry has no qualms about the motive; indeed, one company executive openly stated at a legal symposium: "We sell RRSPs under the guise of annuities."²⁴³ That is to say, that RRSPs are "technically packaged as insurance products even though they work just like guaranteed investment certificates."²⁴⁴ The motivation is readily appreciated by industry insiders, especially fund managers and their professional advisors. So much so that the situation has become the butt of good natured humour among legal practitioners.²⁴⁵ In effect, the crocodile tears over 'widows-and-orphans' are mostly for the benefit and consumption of judges and legislators.

On the other hand, the potential for abuse has not been totally lost on the judiciary. The sheltering of annuities under provincial insurance legislation has been recognized as "an easy route ... available

²⁴⁰ See (unsigned), "Fund managers' salaries 'have gone through roof'," *Ottawa Citizen* (June 30, 1998), at p. D9, where it is stated that

The compensation has just gone through the roof. The money that fund managers receive today dwarfs compensation packages of a decade ago. Equity portfolio managers with a lot of experience and sizable funds used to make \$200,000 or \$300,000 or \$400,000 a year, ... Now somebody who is running a visible fund, who has managed to garner a five-star ranking ..., inevitably gets calls with some frequency to go to work for somebody else, for at least a million dollars and sometimes more than that.

²⁴¹ See Barry Nelson, "RRSP buyers beware," *The [Montreal] Gazette* (February 14, 1995), at p. C3.

²⁴² Jack Bernstein, "Creditor Proofing," in *Report of Proceedings of the Forty-Second Tax Conference*, 1990 Conference Report, (Toronto: Canadian Tax Foundation, 1991), at p. 21:1.

²⁴³ See Bruce Cohen, "Trust firms seek creditor protection for RRSP accounts," *Financial Post* (February 21, 1992), at p. 19.

²⁴⁴ *Ibid*; see also Frank Bennett, *Creditors' and Debtors' Rights*, Law Society of Upper Canada Bar Admission Course Materials, 1985-1986 Supplement, (Toronto: Carswell, 1985), at p. 20 where it is stated that a RRSP plan, which "contains an insurance element ... is in effect an insurance policy with savings provisions". [emphasis added]

²⁴⁵ See Varley, footnote 59, *supra*, where at p. A-10 of his conference paper the author states as follows:

"It has therefore now become accepted that insurance company-issued RRSPs (sorry - I mean Retirement Annuity Life Insurance Policies) are immune from seizure ..."

to many debtors to avoid creditors' claims."²⁴⁶ Nevertheless the supremacy of the provincial legislatures has prevailed to the extent that within the competence of their legislative jurisdiction and the overall constitutional framework, the legislatures "can make or unmake any law."²⁴⁷ Needless to say, concern over risk of attempts to evade creditors has not been universally shared. In fact, it has been argued that "this risk is relatively small, particularly in light of the contribution limits on RRSPs."²⁴⁸ It is suggested with all due respect to the proponent of that argument that the position has at best not been fully thought out or at worst it is naive. The risk to creditors, especially the Crown, is significant. This issue will be further examined later in the context of bankruptcy reform where it will be shown that the majority of monies deposited into RRSPs are not used for retirement purposes, let alone for the provision of next of kin.

The fact that provincial legislators have effectively deemed annuities to be life insurance, has not addressed the etymological dilemma, which continues to persist. The diverse meaning of the terms 'life insurance' and 'annuity' forms the basis of the quandary. It reveals a shortcoming of legal reasoning, which "is tied to the word, the word which is turned around and around, interpreted, and stretched in order to adapt it to varying needs, and, to the extent that one has to go beyond, recourse is had to "analogies" or technical fictions."²⁴⁹ This is not to suggest that the authority of legislatures to enact legal fictions is being questioned, but the deeming of annuities to be life insurance does not change the fundamental meaning of the terms. The purpose of life insurance still remains the provision for the next of kin of the deceased; whereas, an annuity has an *inter vivos* objective, which is to

²⁴⁶ *Re Sykes* (1993), 18 C.B.R. (3d) 148 (B.C.S.C.), at p. 151.

²⁴⁷ Patrick Fitzgerald & King McShane, *Looking at Law: Canada's Legal System*, 3rd ed., (Ottawa: Bybooks, 1988), at p. 26.

²⁴⁸ Manitoba Law Reform Commission, *Statutory Designations and the Retirement Plan Beneficiaries Act*, Report No. 73, (Winnipeg: MLRC, 1990), at p. 17.

²⁴⁹ Weber, *supra*, footnote 3, at p. 787.

provide for the annuitant's retirement. In the case of life insurance, death triggers the provision for the beneficiary; whereas, in terms of the provision of retirement income under an annuity, the designated beneficiary is at best a volunteer. From a policy perspective, the shielding of RRSPs from creditors comes back to the issue of two competing policy objectives, namely, the use of existing resources to service present debts versus the encouragement of planning and saving for future retirement needs. In attempting to balance these competing interests, it has been noted that

... 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.²⁵⁰

RRSPs IN THE CONTEXT OF BANKRUPTCY

This section of the paper in essence is a continuation of the preceding discussion except that the focus of the discussion is constrained to creditors' rights in RRSPs in the context of bankruptcy. From an epistemological standpoint the introduction of the bankruptcy variant offers a unique perspective on the law and policies governing the exigibility of RRSPs. The impact of bankruptcy on the typical debtor/creditor relationship results in a fundamental departure from the obligations to which the parties contracted for. The debtor, having received the full benefit of the considerations under the contract, is by operation of the *Bankruptcy and Insolvency Act* relieved of all or part of the obligations contracted for. In effect, the creditor is faced with a partial, if not a complete, loss of the reciprocal consideration under the contract. The situation is only further exacerbated in the case of the involuntary creditor who is placed in the debtor/creditor relationship as a result of a wrong-doing on the part of the debtor either in tort or due to statutory non-compliance. In this regard, bankruptcy is often the end of the road for the creditor.

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D. Shawn McReynolds, "Sheltering RRSP Assets from Creditors on Death," (1983) 6 E. & T. Q. 106, at p. 115.

That is to say, that bankruptcy frequently represents the last opportunity for the creditor to salvage any portion of the debt due. These remarks are not to be construed as a condemnation of bankruptcy. On the contrary, the public policy behind the need to provide relief from debt in certain instances is well appreciated. However, in view of the potentially absolute nature of that relief, bankruptcy provides a unique opportunity to examine the issue of the exigibility of RRSPs from the vantage of the competing interests and the policy considerations for the balancing of those interests. Furthermore, the formulation and evolution of bankruptcy legislation provides a unique forum for an examination from a federal perspective of the policy objectives behind the legislative treatment of the Crown in its capacity of a creditor.

Property of the Bankrupt

While an extensive discussion of the *Bankruptcy and Insolvency Act* is beyond the scope of this project, certain provisions of the legislation impact on the treatment of RRSPs vis-à-vis exigibility on behalf of creditors. In terms of a quick overview, it should be noted that an individual can be adjudged bankrupt as the result of either a voluntary assignment²⁵¹ or a petition by one or more creditors.²⁵² Regardless of how the proceedings are commenced, once a person is adjudged bankrupt, the trustee takes possession of all the property of the bankrupt.²⁵³ In this respect, the bankrupt is required to deliver all of his or her property to the trustee.²⁵⁴ Likewise, any person who has possession or power over the bankrupt's property is required to deliver same to the trustee.²⁵⁵ It is the responsibility of the trustee to distribute among the creditors the proceeds realized from the

²⁵¹ R.S.C. 1985, c. B-3, s. 49(1), as amended by S.C. 1997, c. 12, s. 29(1).

²⁵² R.S.C. 1985, c. B-3, s. 43(1).

²⁵³ R.S.C. 1985, c. B-3, s. 16(3), as amended by R.S.C. 1985, c. 31 (1st Supp.), s.3.

²⁵⁴ R.S.C. 1985, c. B-3, s. 158(a) & (b).

²⁵⁵ R.S.C. 1985, c. B-3, s. 17(1).

property comprising the estate of the bankrupt. In order to participate in the distribution creditors must first have proven their claims.²⁵⁶ On the other hand, should the trustee, for whatever reason, refuse or neglect to take proceedings for the benefit of the estate of the bankrupt, a creditor may seek an order of the Court to commence the proceedings in his or her own name.²⁵⁷ In such an event the creditor would be entitled to any benefit derived from the proceeding to the extent of the claim proven.²⁵⁸ Based on the foregoing overview, one might assume that the treatment of RRSPs in bankruptcy should be a straight forward matter. Indeed, since a RRSP is an asset of the bankrupt, it would vest in the trustee for distribution to the creditors. Not so. The *Bankruptcy and Insolvency Act* expressly provides that property of the bankrupt otherwise divisible among the creditors, does not comprise that which is exempt from execution or seizure pursuant to provincial law.²⁵⁹

The treatment of RRSPs in bankruptcy has been the issue of a number of court decisions. In the absence of provincial legislation to the contrary, the courts have generally held that RRSPs vest in the trustee for distribution to the creditors.²⁶⁰ On the other hand, where the provincial law, usually an insurance statute, exempts RRSPs from execution or seizure, the courts have held that the funds in such plans do not vest in the trustee and are not available for distribution to the creditors.²⁶¹ Similarly, where the source of the funds in a RRSP can be traced to moneys transferred from a

²⁵⁶ R.S.C. 1985, c. B-3, s. 121(1), as amended by S.C. 1992, c. 27, s. 50(1).

²⁵⁷ R.S.C. 1985, c. B-3, s. 38(1).

²⁵⁸ R.S.C. 1985, c. B-3, s. 38(3).

²⁵⁹ R.S.C. 1985, c. B-3, s. 67(1)(b), as amended by S.C. 1997, c. 12, s. 59(2), the wording of which is provided in footnote 53, *supra*.

²⁶⁰ See *Re Lifshen* (1977), 25 C.B.R. (N.S.) 12 (Sask. Q.B.), *aff'd* in (1977), 25 C.B.R. (N.S.) 232 (Sask. C.A.); *McMahon v. Canada Permanent Trust Company*, *supra*, footnote 105; *Re Compcois*, *supra*, footnote 176; *Re Katz* (1984), 52 C.B.R. (N.S.) 311 (Ont. Reg.); *Re Owen* (1985), 55 C.B.R. (N.S.) 161 (Sask. Q.B.); *Re Touche Ross Ltd. And Neuls*, *supra*, footnote 69; *Re Swanborough* (1985), 55 C.B.R. (N.S.) 98 (Ont. Reg.); *Phenix (Trustee of) v. Bank of Nova Scotia*, *supra*, footnote 107; *Re Leavitt*, *supra*, footnote 107; and *Sonnichsen (Trustee of) v. National Bank of Canada*, (June 19, 1995), Man. Q.B., Darichuk J. [unreported].

²⁶¹ See *Re Larocque*, *supra*, footnote 179; *Re Richardson*, *supra*, footnote 198; *Re Jobin*, *supra*, footnote 198; *Davis, Martindale & Co. v. Canada Life*, *supra*, footnote 198; *M.N.R. v. Anthony*, *supra*, footnote 198; *Re Kozak*, *supra*, footnote 198; and *Christensen (Trustee of) v. Christensen*, *supra*, footnote 198; but see *Re Croft*, *supra*, footnote 184.

pension plan, which amounts are otherwise shielded from creditors by virtue of exemptions under provincial pension legislation, such funds do not constitute property divisible among a bankrupt's creditors.²⁶² The funds are effectively locked-in²⁶³ and beyond the reach of creditors.²⁶⁴ This result extends to the administration of the estate of a bankrupt where it is generally accepted that a trustee in bankruptcy "stands in the shoes of the bankrupt and can do what the bankrupt can do."²⁶⁵ However, the trustee "acquires no greater rights than those of the bankrupt,"²⁶⁶ hence, when a bankrupt contributor to a RRSP plan is locked-in, the trustee is also bound.²⁶⁷ In terms of estate planning, the interplay between provincial statutory exemptions and the *Bankruptcy and Insolvency Act* has proven to be fertile ground for creativity. The parameters are relatively simple. The provincial legislation exempts RRSPs from execution or seizure; whereas, the *Bankruptcy and Insolvency Act* provides that but for a few exceptions, a discharge order releases the bankrupt from all claims provable in bankruptcy,²⁶⁸ including those of the Crown.

²⁶² See *Re Pawlowski*, *supra*, footnote 63; *Re Rice*, *supra*, footnote 62; *Churchill (Trustee of) v. Churchill*, *supra*, footnote 72; and *Royal Bank of Canada v. Miller*, *supra*, footnote 72; see also *Caisse de Securite du Spectacle v. Thorne Riddell Inc.* (1987), 3 A.C.W.S. (3d) 85 (Que. C.A.); but see *Re Touche Ross Ltd. and Neuls*, *supra*, footnote 69; *Re Greening*, *supra*, footnote 76; and *Re Hirani*, *supra*, footnote 78.

²⁶³ See *Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 41(1)(b) & 63(1), and *Pension Benefits Regulation*, R.R.O. 1990, Reg. 909, s. 21(1.1) [as amended by O. Reg. 409/94, s. 3(1)] & (2)(a) [as amended by O. Reg. 564/92, s. 1(2) & (3) and O. Reg. 409/94, s. 3(2), (3) & (4)]; see also *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352, s. 30(1) & 33(2)(b), and *Pension Benefits Standards Regulation*, B.C. Reg. 433/93, s. 29(7)(b); *Employment Pension Plans Act*, S.A. 1986, c. E-10.05, s. 27(1) & (2); *Pension Benefits Act*, 1992, S.S. 1992, c. P-6.001, s. 29(1) & 32(2)(b); *Pension Benefits Act*, R.S.M. 1987, c. P32, s. 21(3)(a) & (b) [as amended by S.M. 1995, c. 3, s. 37] & 21(13)(a), and *Pension benefits Regulation*, Man. Reg. 188/87 R, s. 18.1(1) & (8)(g)(i) [as amended by Man. Reg. 230/92, s. 14]; *Supplemental Pension Plans Act*, S.Q. 1989, c. 38, s. S. 98 & 99, and *Regulation Respecting Supplemental Pension Plans*, O.C. 1158-90, s. 28(4) & 29(2); *Pension Benefits Act*, S.N.B. 1987, c. P-5.1, s. 36(1)(a)(ii) & 56(1), and *Pension Benefits Regulation*, N.B. Reg. 91-195, s. 20(a); *Pension Benefits Act*, R.S.N.S. 1989, c. 340, s. 50(1)(b) & 68(1), and *Pension Benefits Regulation*, N.S. Reg. 269/87, s. 18(1) & (2); *Pension Benefits Act*, S.P.E.I. 1990, c. 41, s. 49(1)(b) & 67(1); and *Pension Benefits Act*, 1997, R.S.N. 1996, c. P-4.01, s. 34 & 40(1)(a)(ii), and *Pension Benefits Act Regulations*, Nfld. Reg. 114/96, s. 2(p) [definition of "locked in retirement account"], 2(2) & 17.

²⁶⁴ See R.S.O. 1990, c. P.8, s. 66(2), the wording of which is provided in footnote 60, *supra*; see also *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352, s. 63(1)(b); *Employment Pension Plans Act*, S.A. 1986, c. E-10.05, s. 59(1) [as amended by S.A. 1992, c. 13, s. 43]; *Pension Benefits Act*, 1992, S.S. 1992, c. P-6.001, s. 63(1)(b); *Pension Benefits Regulation*, Man. Reg. 188/87 R, s. 18.1(8)(h)(ii) [as amended by Man. Reg. 191/95, s. 2]; *Civil Code of Quebec*, S.Q. 1991, c. 64, art. 2393, 2449 & 2458 and *Trust Companies and Savings Companies Act*, S.Q. 1987, c. 95, art. 178; *Pension Benefits Act*, S.N.B. 1987, c. P-5.1, s. 57(4); *Pension Benefits Act*, R.S.N.S. 1989, c. 340, s. 71(2); *Pension benefits Act*, S.P.E.I. 1990, c. 41, s. 70(2); and *Pension Benefits Act*, 1997, R.S.N. 1996, c. P-4.01, s. 33 and *Pension Benefits Act Regulations*, Nfld. Reg. 114/96, s. 2(2).

²⁶⁵ *Re Katz*, *supra*, footnote 260, at p. 312.

²⁶⁶ Frank Bennett, "Some Implications of Bankruptcy in Estate Planning," (1979) 4 E. & T. Q. 308, at p. 314.

²⁶⁷ (unsigned), "Treatment of registered retirement savings plans as an asset of a bankrupt's estate," (1978) 8 *Insolvency Bulletin* 90, at p. 90.

²⁶⁸ R.S.C. 1985, c. B-3, s. 178(2).

No doubt, the opportunity to shield RRSPs from the consequences of bankruptcy, may be welcome news for debtors, but it should not come as any great surprise that the enthusiasm for this result has not been universally shared. In this respect, the outcome evokes a degree of sympathy for the creditors' lot. The issue is one of correlation between benefit and burden. The debtor is absolved of the obligation for debt with the result that the burden shifts to the creditor while the debtor is permitted the continued enjoyment of a benefit that was obtained with funds that might otherwise have been available to service the obligation. The issue is further exacerbated where there is a direct linkage between the benefit and the burden. Indeed, notwithstanding that the *Income Tax Act* specifically provides that funds held in a RRSP can neither be offset against any debt or obligation²⁶⁹ nor pledged, assigned or in any way alienated as security for a loan,²⁷⁰ one cannot help but commiserate with the situation where the capital in a RRSP is expressly funded from the proceeds of a loan.²⁷¹ In the event of bankruptcy, the plan holder could retain the continued benefit of plan while the lender would be shouldered with the burden of the unpaid loan.

A somewhat analogous situation exists when a tax debtor deposits funds into a RRSP, but does not have sufficient funds to pay the remaining taxes due. In such a case, the tax debtor would not only be entitled to the benefit of a tax deduction to the extent of the amount contributed to the RRSP, but any future income generated by the deposit would be free of tax so long as the funds remain sheltered in the plan. An assignment in bankruptcy could effectively rid the tax debtor of the burden of the tax obligation yet allow the benefits under the RRSP to be retained.²⁷²

²⁶⁹ See subparagraph 146(2)(c.3)(i) of the *Income Tax Act*.

²⁷⁰ See subparagraph 146(2)(c.3)(ii) of the *Income Tax Act*.

²⁷¹ For examples of such fact situations, see *McMahon v. Canada Permanent Trust Company*, *supra*, footnote 105; *Phenix (Trustee of) v. Bank of Nova Scotia*, *supra*, footnote 107; *Re Leavitt*, *supra*, footnote 107; and *Christensen (Trustee of) v. Christensen*, *supra*, footnote 198.

²⁷² For examples of such an outcome, see *M.N.R. v. Anthony*, *supra*, footnote 198; and *Sun Life Assurance Co. v. Revenue Canada Taxation*, *supra*, footnote 198.

The opportunity for unscrupulous debtors to insulate RRSP deposits from the claims of legitimate creditors has not been lost on the judiciary.²⁷³ In terms of the potential for abuse, it has been well recognized that the exemption of RRSPs could avail many debtors of an easy route to avoid the claims of creditors.²⁷⁴ Needless to say, attempts to shield RRSPs in bankruptcy have met with strong opposition on the part of creditors. A number of different approaches have been used to counter such attempts, but the degree of success on this front has not been overly consistent. For the most part, it has been held that "a trustee can have no greater rights in a contract than does the bankrupt policyholder,"²⁷⁵ particularly since those contractual rights enjoy the sanction of legislation. Nevertheless it would be useful to examine the various means that have been used to gain access to RRSPs in bankruptcy, especially since those avenues ultimately culminated in a practice that has had the benefit of review by the Supreme Court of Canada.²⁷⁶

Despite the fact that certain RRSPs may not be available to the trustee for distribution to creditors, the value of those plans may come into play at the time of discharge from bankruptcy. In this regard, it should be noted that the authority of the courts to grant the discharge of a bankrupt is discretionary insofar as discharge may be granted absolutely, refused, suspended, or granted conditionally.²⁷⁷ Based on post-bankruptcy earnings and income or the availability of after-acquired property, a court may refuse to grant absolute discharge where no undue hardship would be imposed on the bankrupt as a result of the discharge being made conditional upon the payment of a sum of money. Indeed, there are a number of cases where the decision to grant discharge conditional upon the payment of a sum

²⁷³ See footnote 141, *supra*, and accompanying text.

²⁷⁴ See *Re Sykes*, *supra*, footnote 246, at p. 151.

²⁷⁵ *McKee*, *supra*, footnote 200, at p. 260.

²⁷⁶ *Royal Bank of Canada v. North American Life Assurance Co.* (1996), 132 D.L.R. (4th) 193 (S.C.C.), *aff'd* (1994), 115 D.L.R. (4th) 536 (Sask. C.A.) & (1993), 18 C.B.R. (3d) 1 (Sask. Q.B.).

²⁷⁷ R.S.C. 1985, c. B-3, s. 172(1) & (2).

of money was influenced by the existence of RRSPs that were otherwise exempt.²⁷⁸ While the foregoing remedy offers creditors a measure of relief, the quantum of the gain frequently does not approach the amount of benefit retained by bankrupts as a result of being permitted to shield RRSPs from the creditors. The perception of inequity merely spurred creditors to seek other recourse.

A novel tactic was attempted in *Re Pearson*²⁷⁹ wherein the spouse of the bankrupt was the beneficiary under the plan, but had not been appointed irrevocably. The plan nevertheless was exempt from seizure or execution pursuant to provincial insurance legislation due to the beneficiary being a close family member.²⁸⁰ The trustee standing in the shoes of the bankrupt sought to change the beneficiary in order to circumvent the exemption. It was held that the rights and interests of the bankrupt in the plan had crystallized at the time the bankruptcy occurred and it was not open to the trustee to alter the status of those rights and interests subsequent to the bankruptcy.²⁸¹ The decision is not the last word on the matter in that there is *obiter* to the contrary.²⁸² However, given the plethora of commentary on the subject, it is likely that most plan holders would shield their RRSPs through irrevocable beneficiary designations.²⁸³ Consequently, the remedy would be of limited value to creditors even if a court could be persuaded to adopt the proposition. It has been suggested that the result in *Re Pearson*²⁸⁴ could be overcome by petitioning the beneficiary into bankruptcy.²⁸⁵ At first

²⁷⁸ See *Re Larocque*, *supra*, footnote 179; *Re Atkin* (1987), 65 C.B.R. (N.S.) 296 (S.C.O.); *Re MacKinnon* (1991), 3 C.B.R. (3d) 219 (N.S.T.D.); and *Re Francis* (1999), 85 A.C.W.S. (3d) 996 (Ont. Gen. Div.).

²⁷⁹ (1977), 23 C.B.R. (N.S.) 44 (S.C.O.).

²⁸⁰ See footnotes 156 and 195, *supra*.

²⁸¹ *Re Pearson*, *supra*, footnote 279, at p. 49.

²⁸² See *Re Richardson*, *supra*, footnote 198, at p. 192.

²⁸³ See *Biro*, *supra*, footnote 210, at p. 201.

²⁸⁴ *Supra*, footnote 279.

²⁸⁵ Harry Fogal & Douglas A. Palmsteer, "Protection of Assets: Legitimate Shelters," in *Debtors and Creditors: From Protection to Collection*, Conference Papers, (Toronto: Canadian Institute, 1989), at p. A-9.

blush the idea may appear attractive, but on further scrutiny it is a non-starter. The option was foreclosed by the decision in *Re Larocque*,²⁸⁶ wherein both the plan holder and the beneficiary spouse were bankrupt, yet the exemption provided under the insurance statute prevailed. No doubt from the vantage of creditors, the continued failure to penetrate the exemption accorded to RRSPs under the provincial insurance legislation was a significant setback; however, the matter was not put to rest. Rather than fold camp and slink off into the night, creditors changed their tack. Having failed to work around the consequences of the designation of irrevocable beneficiaries, the focus of the attack was redirected upstream and concentrated on the validity of such designations. In effect the designations were challenged from the point of view of property settlements that are void against the trustee. The approach initially enjoyed considerable success. Given the ramifications of the strategy, the subject will be treated separately under the heading that immediately follows.

Settlements and Fraudulent Conveyances

The challenge against the validity of an irrevocable designation of a beneficiary is based on the argument that the transaction has rendered the plan holder insolvent. The basis of the proposition rests on earlier life insurance and estate cases. The testamentary designation of beneficiaries to the proceeds of life insurance was at issue in *Re Benjamin*.²⁸⁷ It was held that the designation amounted to a settlement and although the beneficiaries were entitled to the proceeds, that entitlement did not prejudice the rights of creditors to recover from the beneficiaries. The law was stated as follows,

It may be open to the creditors to assert their claim in an action, on the ground that, at the time the declaration contained in the will was made, or even at the death of the testator, he was not in a position to make a voluntary settlement in favour of the beneficiaries, but that would be an issue to be decided upon the evidence as to his solvency at that time ...²⁸⁸

²⁸⁶ *Supra*, footnote 179.

²⁸⁷ (1926), 59 O.L.R. 392 (H.C.J.).

²⁸⁸ *Ibid.*, at p. 395.

The foregoing statement of the law was subsequently affirmed in an unrelated appellate decision in *Re Thomson*.²⁸⁹ The combined effect of these decisions effectively established the foundation for what would later become the proposition that the irrevocable designation of a beneficiary under a RRSP is void against a trustee if as a result of the designation the bankrupt is unable to pay the claims of creditors.

It should be noted in this respect that the *Bankruptcy and Insolvency Act* provides that any settlement of property made within one year prior to bankruptcy is void against the trustee.²⁹⁰ Likewise any settlement made within five years prior to bankruptcy is also void provided the settlor was unable to pay his or her debts without the aid of the property comprising the settlement or the settlor's interest in the property did not pass on the execution of the settlement.²⁹¹ In respect of the irrevocable designation of beneficiaries, one of the initial leading cases involving the application of the foregoing provisions was that of *Re Geraci*,²⁹² wherein it was held that,

... a settlement of insurance no less than any other settlement may be attacked as a fraud upon creditors. Hence, a statute provides for such an attack, as does s. 60(1) of the Bankruptcy Act [now subsection 91(1) of the *Bankruptcy and Insolvency Act*], and that statute is competently enacted to that end, provincial legislation of a saving character cannot be invoked to defeat s. 60(1) in a bankruptcy situation. The reference to such legislation in the Bankruptcy Act [now in paragraph 67(1)(b) of the *Bankruptcy and Insolvency Act*] must be taken to be a limited one, operable within but not against the scheme of protecting creditors against fraudulent settlement by the bankrupt.²⁹³

²⁸⁹ [1940] O.W.N. 546 (C.A.).

²⁹⁰ R.S.C. 1985, c. B-3, s. 91(1), as amended by S.C. 1997, c. 12, s. 75, which provides as follows:

(1) Any settlement of property made within the period beginning on the day that is one year before the date of the initial bankruptcy event in respect of the settlor and ending on the date the settlor became bankrupt, both dates included, is void against the trustee.

²⁹¹ R.S.C. 1985, c. B-3, s. 91(2), as amended by S.C. 1997, c. 12, s. 75, which provides as follows:

(2) Any settlement of property made within the period beginning on the day that is five years before the initial bankruptcy event in respect of the settlor and ending on the day the settlor became bankrupt, both dates included, is void against the trustee if the trustee can prove that the settlor was, at the time of making the settlement, unable to pay all the settlor's debts without the aid of the property comprised in the settlement or that the interest of the settlor in the property did not pass on execution thereof.

²⁹² (1970), 14 C.B.R. (N.S.) 253 (Ont. C.A.), rev'g (1969), 13 C.B.R. (N.S.) 86 (S.C.O.).

²⁹³ *Ibid.*, at p. 258.

The application of the foregoing principle, which was initially established in the context of an ordinary life insurance policy that did not involve any RRSP features, soon migrated to the RRSP arena as creditors continued to seek a solution to the consequences of earlier decisions that permitted debtors to safeguard RRSPs under the legislated guise of life insurance. The issue was examined by a number of courts and a steady volume of case law was established upholding the principle that such irrevocable designations constitute settlements that are void as against the trustee and the creditors.²⁹⁴ The evolution of the law in this regard has been the subject of much commentary,²⁹⁵ much of it critical of the result. It has been suggested that the outcome is an absurdity²⁹⁶ or, at least, that it is "an unprecedented extension of the existing law and should not be followed."²⁹⁷

The brunt of the criticism is focused on logic that fails to distinguish between a conversion of property and a settlement of property. No one disputes that the designation of an irrevocable beneficiary involves the taking of non-exempt property and converting it to property that is exempt. The objections are levied against what is perceived to be an illogical extension of the recourse against settlements to include situations when the property in question is in effect settled upon the settlor. In other words, how can there be a settlement when nothing has been transferred? What the

²⁹⁴ See *Re Malloy* (1984), 51 C.B.R. (N.S.) 37 (Ont. C.A.), aff'd (1983), 48 C.B.R. (N.S.) 308 (S.C.O.); *Re Wozniuk* (1987), 76 A.R. 42 (Master); *Alberta Treasury Branches v. Guimond* (1987), 70 C.B.R. (N.S.) 125 (Alta. Q.B.); *Lloyds Bank Canada v. Robinson* (1988), 70 C.B.R. (N.S.) 306 (Man. Q.B.); *Camgoz (Trustee of) v. Sun Life Assurance Co.* (1988), 72 C.B.R. (N.S.) 319 (Sask. C.A.), aff'd (1988), 70 C.B.R. (N.S.) 131 (Sask. Q.B.); *Klassen (Trustee of) v. Great West Life Assurance Co.* (1990), 1 C.B.R. (3d) 263 (Sask. Q.B.); *Re MacDonald* (1991), 21 C.B.R. (3d) 211 (Alta. Q.B.); *Canadian Imperial Bank of Commerce v. Melzer*, supra, footnote 198; *Royal Bank of Canada v. Oliver* (1992), 11 C.B.R. (3d) 82 (Sask. Q.B.); *Re Yewdale* (1995), 121 D.L.R. (4th) 521 (B.C.S.C.); and *Re Leger* (1995), 34 C.B.R. (3d) 133 (Ont. Reg.).

²⁹⁵ See (unsigned), "Case Comment: *Re Geraci*," (1969) 13 C.B.R. (N.S.) 95; (unsigned), "Case Comment: *Re Geraci*," (1970) 14 C.B.R. (N.S.) 259; Bruce Cohen, "Life insurance not creditor-proofed, court ruling says," *Financial Post* (April 2, 1991), at p. 12; Bruce Cohen, "New blow against 'creditor-proofing'," *Financial Post* (July 15, 1991), at p. 17; David McCulloch, "From The Law Reports: *Klassen (Trustee of) v. Great West Life Assurance Co.*: Bankruptcy Act, s. 91 property settlements - Money transfers to RRSP annuity policy void - Not shielded by statutory creditor-proof exemptions," (1991) 11 E. & T.J. 1; McKee, supra, footnote 200; Biro, supra, footnote 210; Gary Nachshen, "Annotation: *Royal Bank of Canada v. North American Life Assurance Co.*," (1994) 4 C.C.P.B. 2; Ronald C.C. Cumming, "Section 91 (Settlements) of the Bankruptcy and Insolvency Act: A Mutated Monster," (1995) 25 Can. Bus. L.J. 235; Anita B. Kagna, "Execution Against Insurance RRSPs," (1995) 10 Nat. Creditor/Debtor Rev. 42; and Peter L. Biro, "Exigibility of Life Insurance RRSPs," *Canadian Employment Benefits & Pension Guide*, No. 419 (October 24, 1995), at p. 1.

²⁹⁶ Cumming, supra, at p. 242, fn. 32.

²⁹⁷ *Royal Bank of Canada v. Oliver*, supra, footnote 294, at p. 88.

proponents of the objections either dismiss or fail to appreciate is that the sum value of the exempt property settled in the settlor is less than that of the non-exempt property from which it was converted. The settlor still continues to enjoy the benefits of the property so converted, but the capacity to deal freely with that property has been reduced as a result of the 'residual contingent interest'²⁹⁸ settled on the irrevocable beneficiary. The dismissal of the residual contingent interest as a "mere expectancy with no commercial value,"²⁹⁹ is insular, if not somewhat cavalier, considering the immunity from the claims of creditors which is associated with that interest. To minimize the value of this inherent benefit is to ignore the cost impact of the diminished recourse available to creditors in the event the settlor were to default in payment. The procurement of a future cash flow, which is beyond the reach of creditors, represents a clear benefit to the settlor and possibly to the beneficiary, in the event of the settlor's death. In this respect, the benefit can hardly be categorized as having no commercial value. From a creditor's perspective, the value of the immunity associated with the residual contingent interest can be quantified to the extent that it correlates to the shortfall suffered as a result of having claims frustrated by the immunity. In failing to take into consideration the cost to creditors, the insular appraisal undermines the certainty of contracts which forms the very basis of all commercial activity.

The issue of recourse to the settlement provisions of the *Bankruptcy and Insolvency Act* as a means to void the conversion of non-exempt RRSPs into plans that enjoy exempt status under provincial law, was addressed by the Supreme Court of Canada in *Royal Bank of Canada v. North American*

²⁹⁸ Cuming, *supra*, footnote 295, at p. 239; see also the definition provided in *Sovereign General Insurance Co. v. Dale*, [1989] 2 W.W.R. 338 (B.C.S.C.), wherein at p. 343 it was held that,

Until a vesting occurs, the expression "interest" is probably nothing more than a convenient label to describe a future expectation which may never become a reality... Until vesting, if that ever occurs, the expectation of the beneficiary is not real property, or personality; it is not a chose in action; it is not merchantable; it is not exigible. At most it is an expectancy based on a contingency.

²⁹⁹ *Ibid.*, at p. 249.

*Life Assurance Co.*³⁰⁰ In a unanimous decision, Gonthier J. held that self-settlements involving the exchange of non-exempt property for exempt property, are not caught under the settlement provisions of the *Bankruptcy and Insolvency Act*.³⁰¹ On the other hand, the settlement of the future contingent interest on the designated beneficiary was found to be void under those provisions of the Act.³⁰² However, the exempt status accorded the plan under provincial insurance law was held to remain in effect,³⁰³ and given express continuance of that exemption under the *Bankruptcy and Insolvency Act*,³⁰⁴ the plan was not available for distribution to the creditors. The argument in *Re Yewdale*,³⁰⁵ which suggests that a transaction purporting to settle property contrary to the settlement provisions of the Act is void *ab initio* with the result that the property reverts to its original form,³⁰⁶ was not followed. The Court rejected the notion that in the circumstances of the case at bar, the exemption and the settlement provisions of the *Bankruptcy and Insolvency Act* were in conflict.³⁰⁷ Indeed, Gonthier J. goes to great lengths to avoid choosing "one provision over the other on the basis of policy considerations."³⁰⁸ He attempts to reconcile the provisions without having to undertake the 'lesser of two evils' type analysis³⁰⁹ which has led to such conclusions as that found in the trial

300 *Supra*, footnote 276.

301 *Ibid.*, at pp. 204-205.

302 *Ibid.*, at pp. 208 and 215.

303 *Ibid.*, at pp. 208 and 216.

304 See footnotes 53 and 259, *supra*, and accompanying text.

305 (1995), 121 D.L.R. (4th) 521 (B.C.S.C.).

306 *Ibid.*, at p. 530, where it is stated that,

An asset can only be properly exempted under s. 67(b) [of the *Bankruptcy and Insolvency Act*, now s. 67(1)(b)] if the transaction creating the asset is valid. If the transaction is void under s. 91 (or any other provision), the exempted asset must be considered to revert to its form prior to the invalid transaction. If its prior form was not an exempted asset, s. 67(b) is not applicable.

307 *Royal Bank of Canada v. North American Life Assurance Co.*, *supra*, footnote 276, at p. 212.

308 *Ibid.*

309 *Ibid.*, at p. 211.

decision in *Re Geraci*,³¹⁰ wherein Houlden J. held that: “it is better to permit injury to the creditors in what must prove a rare instance than to inflict the undoubted hardship of a life’s investment.”³¹¹ However, with all due respect to Gonthier J., the disclaimers and the somewhat convoluted reasoning invoke a fleeting kinship to Shakespeare’s quip: “The lady [read: gentleman] doth protest too much, methinks.”³¹² Indeed, an element of subjective reasoning may be found in the statement:

I do not believe that Parliament intended the funds in exempt life insurance plans to be subject to execution and seizure by creditors, simply on the basis that a settlement occurred when a beneficiary was designated. After all, it is the designation which makes the asset exempt under the provincial law incorporated into s. 67(1)(b) [of the *Bankruptcy and Insolvency Act*]. Are we really to believe that Parliament intended the very Act which renders an asset exempt to be the cause of its losing its exempt status? I do not think so. Like Houlden J., I think that it would be preferable to respect the exempt status of a life insurance policy even where the policy became exempt as a result of a s. 91 settlement.³¹³

The outcome of the decision is such that trustees and creditors can no longer look to the settlement provisions of the *Bankruptcy and Insolvency Act* to overcome the burden associated with the designation of irrevocable beneficiaries.³¹⁴ While the Court may have closed the door on the settlement approach, it allowed by way of *obiter dicta* what one commentator has referred to as a “window [of opportunity] for the trustee”³¹⁵ to challenge such transactions under provincial fraud legislation.³¹⁶ Moreover, it was suggested in the alternative, that similar recourse would also be available under the *Statute of Elizabeth*,³¹⁷ albeit only in those jurisdictions where the statute is still

310 *Supra*, footnote 292.

311 *Ibid.*, at p. 94.

312 William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, (Harmondsworth, U.K.: Penguin, 1937), at p. 93, Act 3, Scene 2.

313 *Royal Bank of Canada v. North American Life Assurance Co.*, *supra*, footnote 276, at p. 212.

314 Cf. *Sun Life Assurance Co. v. Revenue Canada Taxation*, *supra*, footnote 198.

315 James L. McCaw, “RRSP’s, Insurance Policies and Annuities: The Trustee’s Perspective,” (1998) 15 *Nat. Insol. Rev.* 33, at p. 34.

316 *Royal Bank of Canada v. North American Life Assurance Co.*, *supra*, footnote 276, at pp. 217-221.

317 *Act against fraudulent Deeds, Alienations, &c.*, 1570 (13 Eliz. I), c. 5, made perpetual by *Act for the Continuance and Perfecting of divers Statutes*, 1587 (29 Eliz. I), c. 5; see also *Act against covinous and fraudulent Conveyances*, 1585 (27 Eliz. I), c. 4.

in force.³¹⁸ In this respect, it should be noted that most jurisdictions in Canada have enacted legislation to enable conveyances of property to be set aside where the conveyances have been made with the intention of delaying, hindering or defrauding creditors.³¹⁹ Exceptions are provided to allow for conveyances which have been made for good consideration and in good faith to a person who had neither notice nor knowledge of the fraud.³²⁰

Needless to say, the evidentiary burden under provincial fraud legislation is more onerous in that issues of intent and good faith have no application to settlements under the *Bankruptcy and Insolvency Act*.³²¹ The burden is therefore much greater in jurisdictions where the legislation imposes an insolvency requirement. In such cases, it needs to be proven that the conveyance sought to be impugned had been made at a time when the debtor was insolvent, unable to pay his or her debts in full, or knew that he or she were on the eve of insolvency.³²² The stricture of the insolvency requirement can, however, be avoided through recourse to the *Statute of Elizabeth*,³²³ which does not provide for such a requirement.³²⁴ Provincial fraud legislation nevertheless offers a unique opportunity to address the problems associated with the designation of irrevocable beneficiaries.

³¹⁸ *Royal Bank of Canada v. North American Life Assurance Co.*, *supra*, footnote 276, at pp. 221-222.

³¹⁹ See *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, s. 2; see also *Fraudulent Conveyances Act*, R.S.B.C. 1996, c. 163, s. 1; *Fraudulent Preferences Act*, R.S.A. 1980, c. F-18, s. 1; *Fraudulent Preferences Act*, R.S.S. 1978, c. F-21, s. 3; *Fraudulent Conveyances Act*, R.S.M. 1987, c. F160, s. 2; *Civil Code of Québec*, S.Q. 1991, c. 64, art. 1631; *Assignments and Preferences Act*, R.S.N.B. 1973, c. A-16, s. 2(1); *Assignments and Preferences Act*, R.S.N.S. 1989, c. 25, s. 4(1); *Frauds on Creditors Act*, R.S.P.E.I. 1988, c. F-15, s. 2(1); *Fraudulent Conveyances Act*, R.S.N. 1990, c. F-24, s. 3; and *Fraudulent Preferences and Conveyances Act*, R.S.Y. 1986, c. 72, s. 2; note, that the Northwest Territories have no fraudulent conveyance statute.

³²⁰ See *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, s. 3; see also *Fraudulent Conveyances Act*, R.S.B.C. 1996, c. 163, s. 2; *Fraudulent Preferences Act*, R.S.A. 1980, c. F-18, s. 6; *Fraudulent Preferences Act*, R.S.S. 1978, c. F-21, s. 8; *Fraudulent Conveyances Act*, R.S.M. 1987, c. F160, s. 4; *Civil Code of Québec*, S.Q. 1991, c. 64, art. 1633 (but see art. 1633); *Assignments and Preferences Act*, R.S.N.B. 1973, c. A-16, s. 3(1); *Assignments and Preferences Act*, R.S.N.S. 1989, c. 25, s. 5; *Frauds on Creditors Act*, R.S.P.E.I. 1988, c. F-15, s. 3(1); *Fraudulent Conveyances Act*, R.S.N. 1990, c. F-24, s. 4; and *Fraudulent Preferences and Conveyances Act*, R.S.Y. 1986, c. 72, s. 7.

³²¹ *Royal Bank of Canada v. North American Life Assurance Co.*, *supra*, footnote 276, at pp. 206 and 217.

³²² See *Fraudulent Preferences Act*, R.S.A. 1980, c. F-18, s. 2(a); *Fraudulent Preferences Act*, R.S.S. 1978, c. F-21, s. 3; *Assignment and Preferences Act*, R.S.N.B. 1973, c. A-16, s. 2(1); *Assignment and Preferences Act*, R.S.N.S. 1989, c. 25, s. 4(1); *Frauds on Creditors Act*, R.S.P.E.I. 1988, c. F-15, s. 2(1); and *Fraudulent Preferences and Conveyances Act*, R.S.Y. 1986, s. 2.

³²³ *Act against fraudulent Deeds, Alienations, &c.*, 1570 (13 Eliz. I), c. 5.

³²⁴ *Royal Bank of Canada v. North American Life Assurance Co.*, *supra*, footnote 276, at p. 222.

While it is recognized that the foregoing discussion only provides a summary overview, further analysis of the intricacies of the legislation is outside of the scope of this paper. Suffice it to say, that a thorough examination of the issues can be had elsewhere.³²⁵ On the other hand, given that the designation of irrevocable beneficiaries has on several occasions been challenged under provincial fraud legislation, a review of those cases will provide some insight as to the efficacy of the remedy.

It was held in *Re Geraci*,³²⁶ both at trial and on appeal, that a beneficiary designation could be attacked as a fraudulent conveyance without attracting the protection against creditors provided under insurance legislation.³²⁷ The intent to delay and hinder a judgment creditor was established in *Sovereign General Insurance Co. v. Dale*,³²⁸ but it was held that the designation of the beneficiary did not constitute a disposition of property.³²⁹ The validity of the latter decision is questioned given that it has had the benefit of a Supreme Court review in *Royal Bank of Canada v. North American Life Assurance Co.*,³³⁰ wherein Gonthier J. held that,

All the provincial fraud provisions are clearly remedial in nature, and their purpose is to ensure that creditors may set aside a broad range of transactions involving a broad range of property interests, where such transactions were effected for the purpose of defeating the legitimate claims of creditors. Therefore, the statutes should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects ... Given the need for a broad and liberal interpretation, I would suggest that there is a strong case for concluding that a life insurance beneficiary designation is both a "juridical act", and a "disposition" or "conveyance" of "property".³³¹

325 See Dunlop, *supra*, footnote 13, at pp. 591-623.

326 *Supra*, footnote 292.

327 *Ibid.*, at p. 89 (at trial) and p. 259 (on appeal).

328 *Supra*, footnote 298, at p. 340.

329 *Ibid.*, at p. 343; see also discussion in Christian Allard, "B.C. RRSP conversion was not a fraudulent conveyance," *The Lawyers Weekly* (January 27, 1989), at p. 8.

330 *Supra*, footnote 276.

331 *Ibid.*, at pp. 220-221; cf. *Re Sykes* (1998), 2 C.B.R. (4th) 79 (B.C.C.A.), rev'g (1993), 18 C.B.R. (3d) 148 (B.C.S.C.); see also Susan A. Goodeve, "Commentary: The Supreme Court Considers the Fate of Retirement Assets on Bankruptcy," (1996) 6 *Can. Curr. Tax* 95; and Steven Weisz & James Skinner, *Exigibility of Life Insurance RRSPs and RRIFs on Bankruptcy*, (1996) 3 *RRSP Plan* 216.

It was further held by Gonthier J., that his comments “concerning the issue of whether a life insurance beneficiary designation is a “property conveyance” apply equally in the case of the *Statute of Elizabeth*.”³³² In this respect, it is noted that there are reported cases where the Statute has been successfully applied to void beneficiary designations and avail the creditors of the funds in the policies.³³³ Lastly, in *M.N.R. v. Melnick*,³³⁴ the transfer of funds into a RRSP and the irrevocable designation of a beneficiary were found to have prejudiced the collection of tax arrears. Accordingly, pursuant to the *action paulienne* provisions of the *Civil Code of Québec*³³⁵ it held that such a transfer was not capable of being set up against the Crown.

Policy Considerations

As was indicated at the outset of this chapter, the formulation and evolution of bankruptcy legislative process offers an opportunity to examine the policy considerations behind the treatment of the Crown as a creditor. It should be noted, in this regard, that the federal government has consulted extensively with private sector stakeholders to obtain input and advice on bankruptcy and insolvency policy.³³⁶ The consultation was conducted under the auspices of an advisory committee³³⁷ and formed part of the process leading to the development of Bill C-5 and the subsequent amendments³³⁸ to the *Bankruptcy and Insolvency Act*. As part of its priorities, the committee was charged with examining

³³² *Ibid.*, at p. 222; see also *Cadogan v. Kennett* (1776), 98 E.R. 1171, wherein at p. 1172 Lord Mansfield held that the *Statute of Elizabeth* “cannot receive too liberal a construction, or be too much extended in suppression of fraud.”

³³³ See *Nicholson v. Milne* (1989), 74 C.B.R. (N.S.) 263 (Alta. Q.B.); and *Technurube Building Construction Ltd. v. McKinley* (1989), 76 C.B.R. (N.S.) 106 (Alta. Master).

³³⁴ (1997), 97 DTC 5478 (F.C.T.D.).

³³⁵ S.Q. 1991, c. 64, art. 1631.

³³⁶ Diane Law & Janice Jeffis, *Report on the Bankruptcy and Insolvency Committee Consultations*, (Ottawa: Industry Canada, 1998), at p. i.

³³⁷ Note, that an overview of the composition of the committee and the issues that were addressed, is contained in William J. Drake *et al.*, “Bankruptcy and Insolvency Advisory Committee,” in *Insolvency: Getting Our Act Together*, 1994 Seminar National Papers, (Toronto: Canadian Insolvency Practitioners Association., 1994), at pp. 1:1-1:3; see also Jacob S. Ziegel, “Phase II of Amendments to the Bankruptcy and Insolvency Act and Beyond,” in *Twentyfourth Annual Workshop on Commercial and Consumer Law*, Workshop Papers and Other Materials, (Toronto: U. of Tor., 1994), at p. 286.

³³⁸ S.C. 1997, c. 12.

a number of exemption issues in bankruptcy, including the status of RRSPs. The mandate with respect to RRSPs was as follows:

While some RRSPs and other similar plans are exempted, others are not. The objective is to re-establish a fair balance between the rights of the creditors and those of the debtor. The issue is to examine whether the debtor is entitled to keep the amounts put into those plans. In the affirmative, what would be the criteria for keeping these amounts and what measures may be developed against abuses?³³⁹

A working group on consumer proposals and bankruptcies was asked to examine whether RRSPs should be exempted from vesting in the trustee for distribution to creditors. Members of the group had opposing views on the issue,³⁴⁰ and could not reach consensus. The advisory committee was provided with two options, each accompanied by a variation, as follows:

Option 1: Exempt all RRSPs (while considering certain guidelines such as a minimum period of time and a maximum amount), but allow the trustee to apply to the court to seize them.

Variation on option 1: Exempt all RRSPs (while considering certain guidelines such as a minimum period of time and a maximum amount), but submit an application for discharge to the court when RRSPs are involved.

Option 2: Maintain the status quo.

Variation on option 2: When, under the present rules, an RRSP is not an exempt asset, allow the bankrupt to apply to the court to have it declared exempt.³⁴¹

Given that the amendments emanating out of the consultation process did not address the issue of exempting RRSPs, it would seem reasonable to assume that the government opted for the maintenance of the status quo. This observation does not, however, shed any light on the policy objectives that came into play in the decision. The only indication in this regard are the considerations deliberated at the working group level. The argument favouring the maintenance of the status quo

339 *Drake et al., supra*, footnote 337, at p. 1:10.

340 Canadian Bar Association, "Issue Papers of Working Group on Consumer Proposals and Bankruptcies," in *Update: Bankruptcy and Insolvency Act Review and Possible Future Amendments*, Bankruptcy and Insolvency Section Update, (Toronto: CBA, 1994), at p. 1:5.

341 *Ibid.*, at pp. 1:6-1:7.

was basically one of fact, namely, that the funds would remain in the bankrupt's estate and thereby dividends to creditors would not be reduced.³⁴² The objecting position was based on the problem of inconsistency in the treatment of various retirement plans depending on the funding of the plans and the protection afforded thereunder.³⁴³

The foregoing objection encompasses several distinct issues. Plans which do not involve actual sums of money being set aside in a separate fund are not exigible as there are no amounts to levy against. On the other hand, such plans as RRSPs, which involve the actual transfer of money into a separate fund, may be available to creditors. Aside from the differing impacts on exigibility due to the manner in which plans are funded, there are also inconsistencies in the protection accorded to certain plans. RRSPs issued by life insurance companies offer protection from creditors pursuant to provincial legislation; whereas, but for a few exceptions, other RRSPs do not enjoy the same benefit.

It is noted, by way of contrast to the view opposing the status quo, that retirement savings vehicles are not just limited to pensions, RRSPs and other like plans. A number of individuals, for example, rely on the acquisition of capital assets to meet their retirement needs. For instance, some people follow the investment strategy of maintaining stock portfolios or acquiring real estate. The equity in these investments increases as the value of the assets appreciates over time and as loans and mortgages are reduced. Once these individuals retire, the capital holdings are liquidated to provide the funds necessary to sustain living standards. These types of investments, however, are not exempt in the event of an intervening bankruptcy. In this regard, the lack of safeguards to protect such retirement savings vehicles raises similar concerns over consistency in treatment. But the analogy also isolates another common feature, namely, that the acquisition of non-exempt retirement investments

³⁴² *Ibid.*, at p. 1:6.

³⁴³ *Ibid.*, at pp. 1:5 and 1:7.

is a voluntary pursuit. Such situations are clearly governed by the maxim of *caveat emptor*; otherwise, the quest for consistency would soon take on impractical proportions. On the other hand, perhaps the concern raised is not so much one of consistency, but rather it may be an attempt to placate the self-serving commercial interests of fund managers discussed earlier. Hence, with all due respect to the efforts of the members of the working group, it is suggested that their analysis appears to fall short in identifying the public policy considerations that are pertinent to the issue.

By maintaining the status quo, the government avoided a pitfall which was inherent to the other options, namely, the uncertainty of behaviour modification on the part of bankrupts. The analysis had focused on economic consistency, but failed to address the behavioural consequences of change. Likewise, the impact on the revenues of the Crown does not appear to have been considered. The latter is hardly surprising considering the predominantly private sector makeup of the stakeholders consulted. These factors, nonetheless, would need to be examined before any departure from the status quo could realistically be considered. While the Supreme Court of Canada may have only envisaged problems occurring in “rare cases”,³⁴⁴ the potential impetus for behaviour modification on the part of bankrupts cannot be ignored. The *obiter dictum* of the Court on this point is regrettable in that it legitimizes an interpretation of reality which is difficult to reconcile with anecdotal evidence to the contrary. Indeed, there is an increasing number of unscrupulous persons who “take the fullest advantage of the system”³⁴⁵ in an attempt “to insulate deposit arrangements ... from the legitimate claims of creditors.”³⁴⁶ Such contrivances would, if left unchecked, “permit a bankrupt to defeat his [or her] creditors rather easily.”³⁴⁷ The abuse of the bankruptcy process whereby some bankrupts are

³⁴⁴ *Royal Bank of Canada v. North American Life Assurance Co.*, *supra*, footnote 276, at p. 211.

³⁴⁵ *Lloyds Bank Canada v. Robinson*, *supra*, footnote 294, at p. 310.

³⁴⁶ See footnote 141, *supra*, and accompanying text.

³⁴⁷ *Klassen (Trustee of) v. Great West Life Assurance Co.*, *supra*, footnote 294, at p. 266.

able to “shed themselves of considerable debt without making any meaningful sacrifices,” has been referred to as a “fiscal carwash.”³⁴⁸ The term illustrates, albeit in a somewhat pejorative fashion, the relative ease with which bankruptcy can be manipulated for strategic purposes.

A recent analysis of this emerging phenomena suggests that there has been a rise in bankruptcies that are strategically tax driven.³⁴⁹ That is to say, that an increasing number of tax debtors “go bankrupt to avoid paying taxes.”³⁵⁰ The study shows that between 1992 and 1995 the overall amount of indebtedness owed by individual bankrupts has increased by 10%; whereas, the tax liability component of that indebtedness has risen by 149% or \$465.4 million.³⁵¹ In 1992, tax arrears comprised 10% of the overall personal bankruptcy indebtedness; whereas, in 1995, tax debts formed 22% of the overall amount from which individuals sought relief through bankruptcy.³⁵²

While the foregoing findings are indicative of an adverse trend, the study does not provide sufficient empirical data to permit any definitive conclusions to be drawn about the behavioural motivation of the bankrupts. No doubt, the results of the analysis are worrisome to the fisc in terms of lost revenues. But this alone does not suggest that “many bankrupts are *not* in particularly difficult circumstances and are simply taking advantage of bankruptcy laws to avoid [paying their taxes or] repaying their debts.”³⁵³ In terms of motivation, another study has shown that 14% of personal bankruptcies are triggered by debts due to Revenue Canada,³⁵⁴ presumably on account of income tax

³⁴⁸ *Re Irwin* (1992), 16 C.B.R. (3d) 93 (B.C.S.C.), at p. 101.

³⁴⁹ See Lindsay Frank, “Strategic Consumer Bankruptcies,” in *Report of the Conference on the Contemporary Challenges of Consumer Bankruptcies in a Comparative Context*, Conference Papers, (Toronto: U. of T. Faculty of Law, 1998), at pp. 5:1-5:2.

³⁵⁰ *Ibid.*, at p. 5:2.

³⁵¹ *Ibid.*, at pp. 5:2 and 5:16.

³⁵² *Ibid.*

³⁵³ Saul Schwartz & Leigh Anderson, *An Empirical Study of Canadians Seeking Personal Bankruptcy Protection*, (Ottawa: Carleton U./Industry Canada, 1998), at p. 12.

³⁵⁴ *Ibid.*, at p. 43.

arrears. But again, that analysis did not distinguish between situations where the bankrupts did not have the means to pay and where the sole object was to avoid having to pay. On the other hand, as was indicated earlier, there is ample anecdotal evidence to suggest that recourse to bankruptcy has been used by some tax debtors to avoid the payment of income taxes. Access to that evidence can be had through a review of cases where the Crown sought to oppose the discharge of bankrupts owing taxes. A extensive analysis of such cases,³⁵⁵ is appended to this paper.³⁵⁶ While anecdotal, the

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See *Re Doucet* (1983), 48 C.B.R. (N.S.) 31 (S.C.O.); *Re Romberg* (1984), 50 C.B.R. (N.S.) 98 (S.C.O.); *Re Wortsman* (1984), 53 C.B.R. (N.S.) 45 (S.C.O.); *Re Markel* (1986), 63 C.B.R. (N.S.) 7 (B.C.C.A.); *Re Johnson* (1987), 62 C.B.R. (N.S.) 108 (S.C.O.); *Re Munro* (1987), 70 C.B.R. (N.S.) 260 (Sask. C.A.), rev'd (1986), 62 C.B.R. (N.S.) 269 (Sask. Q.B.); *Re Scott* (1987), 65 C.B.R. (N.S.) 306 (S.C.O.); *Re Nelems* (1987), 18 B.C.L.R. (2d) 114 (S.C.); *Westmore v. McAfee* (1988), 67 C.B.R. (N.S.) 209 (B.C.C.A.); *Re Gatzke* (1988), 70 C.B.R. (N.S.) 290 (B.C.S.C.), aff'd in (1990), 79 C.B.R. (N.S.) 67 (B.C.C.A.); *Re Polman*, (October 20, 1988), B.C.S.C., Leggat J. [unreported]; *Re Smith* (1988), 71 C.B.R. (N.S.) 112 (S.C.O.); *Re Miller* (1988), 71 C.B.R. (N.S.) 118 (S.C.O.); *Re Gallagher* (1988), 71 C.B.R. (N.S.) 115 (S.C.O.); *Re Chow* (1989), 73 C.B.R. (N.S.) 225 (Sask. Q.B.); *Re Good* (1989), 74 C.B.R. (N.S.) 297 (Sask. Q.B.); *Re Katari* (1989), 74 C.B.R. (N.S.) 178 (S.C.O.); *Re Phenix* (1989), 76 C.B.R. (N.S.) 82 (Sask. Q.B.); *Re Steward* (1989), 76 C.B.R. (N.S.) 181 (B.C.S.C.), aff'd in (1991), 4 C.B.R. (3d) 240 (B.C.C.A.); *Re LaMothe* (1989), 80 C.B.R. (N.S.) 288 (Que. Sup. Ct.); *Re Rogers* (1989), 77 C.B.R. (N.S.) 315 (Que. Sup. Ct.); *Re Powell* (1990), 78 C.B.R. (N.S.) 76 (B.C.C.A.); *Re Nelson* (1990), 77 C.B.R. (N.S.) 303 (S.C.O.); *Re Robinson* (1990), 80 C.B.R. (N.S.) 201 (S.C.O.); *Re Miller* (1990), 80 C.B.R. (N.S.) 308 (S.C.O.); *Re McAfee* (1990), 80 C.B.R. (N.S.) 36 (B.C.S.C.); *Re Kierdorf* (1990), 80 C.B.R. (N.S.) 6 (S.C.O.), com'd from (1990), 78 C.B.R. (N.S.) 94 (S.C.O.); *Re Resnick* (1990), 80 C.B.R. (N.S.) 223 (Ont. Reg.); *Re Resnick* (1990), 1 C.B.R. (3d) 94 (Ont. Reg.); *Re Tomkins* (1990), 80 C.B.R. (N.S.) 35 (Ont. Reg.); *Re Pent* (1990), 80 C.B.R. (N.S.) 111 (Ont. Reg.); *Re Sanish* (1990), 1 C.B.R. (3d) 220 (Sask. Q.B.); *Re Gleeson* (1990), 80 C.B.R. (N.S.) 127 (Ont. Reg.); *Re Woods* (1990), 2 C.B.R. (3d) 223 (B.C.S.C.); *Re Ross* (1990), 2 C.B.R. (3d) 140 (B.C.S.C.); *Re Demkow* (1991), 4 C.B.R. (3d) 50 (Man. Q.B.); *Re Findog* (1991), 3 C.B.R. (3d) 241 (Ont. Gen. Div.); *Re MacDonald*, supra, footnote 198; *Re Krizinger* (1991), 6 C.B.R. (3d) 157 (B.C.S.C.); *Re Heller* (1991), 6 C.B.R. (3d) 250 (Ont. Reg.); *Re Matheson* (1991), 11 C.B.R. (3d) 204 (B.C.S.C.); *Re Chodos* (1992), 9 C.B.R. (3d) 230 (Ont. Gen. Div.); *Re Janowsky* (1992), 14 C.B.R. (3d) 230 (B.C.S.C.), aff'd in (1993), 19 C.B.R. (3d) 77 (B.C.C.A.); *Re Donahue* (1992), 15 C.B.R. (3d) 183 (B.C. Master); *Re Irwin*, supra, footnote 348, rev'd in (1994), 112 D.L.R. (4th) 164 (B.C.C.A.); *Re Losier*, (April 19, 1993), Alta. Q.B., Reg. Funduk [unreported]; *Re Kerr*, (April 20, 1993), Alta. Q.B., Reg. Funduk [unreported]; *Re Wypich* (1993), 19 C.B.R. (3d) 38 (Ont. Reg.); *M.N.R. v. Sillito* (1993), 20 C.B.R. (3d) 240 (Alta. Q.B.); *Re Toal* (1993), 20 C.B.R. (3d) 120 (Alta. Reg.), aff'd in (1993), 22 C.B.R. (3d) 209 (Alta. Q.B.), and in (1996), 39 C.B.R. (3d) 39 (Alta. C.A.); *Re Rossi*, (September 22, 1993), Sask. Q.B., Reg. Newis [unreported]; *Re Snider* (1993), 22 C.B.R. (3d) 256 (Alta. Reg.); *Re Mann*, (November 2, 1993), Sask. Q.B., Reg. Newis [unreported], aff'd in (January 5, 1994), Sask. Q.B., Lawton J. [unreported]; *Re Lees*, (December 6, 1993), Man. Q.B., Reg. Bolton [unreported]; *Re Bick*, (March 3, 1994), Que. Sup. Ct., Kennedy J. [unreported]; *Re Couchman* (1994), 47 A.C.W.S. (3d) 240 (B.C. Master); *Re Martiens*, (March 31, 1994), Alta. Q.B., Reg. Funduk [unreported], aff'd in (June 28, 1994), Alta. Q.B., Dea J. [unreported]; *Re Achilles* (1994), 47 A.C.W.S. (3d) 239 (B.C. Master); *Re Muboyayi*, (May 2, 1994), N.B.Q.B., Deschênes J. [unreported]; *Re Duncan*, (May 2, 1994), Sask. Q.B., Reg. Newis [unreported], aff'd in (June 23, 1994), Sask. Q.B., Sirois J. [unreported]; *Re Debow*, (June 29, 1994), N.S.T.D., Davison J. [unreported]; *Re Somers* (1994), 28 C.B.R. (3d) 140 (Ont. Gen. Div.), rev'd (1994), 49 A.C.W.S. (3d) 224 (Ont. Master); *Re Crennan*, (January 4, 1995), Sask. Q.B., Reg. Newis [unreported]; *Re Emmerton* (1995), 52 A.C.W.S. (3d) 484 (Alta. Master); *Re Goodman* (1995), 52 A.C.W.S. (3d) 722 (Ont. Gen. Div.); *Re De Jager*, (March 20, 1995), Ont. Gen. Div., Adams J. [unreported]; *Re Chadi* (1995), 168 A.R. 241 (Reg.); *Nelson (Trustee of) v. Nelson* (1995), 33 C.B.R. (3d) 292 (Sask. Q.B.); *Re O'Reilly*, (June 21, 1995), Ont. Gen. Div., Spence J. [unreported]; *Re Safati* (1995), 34 C.B.R. (3d) 40 (N.S. Reg.); *Re DeWagner* (1995), 57 A.C.W.S. (3d) 538 (Ont. Reg.); *Re Letts* (1995), 37 C.B.R. (3d) 38 (Sask. Reg.); *Re Eustace* (1996), 61 A.C.W.S. (3d) 1048 (Sask. Q.B.); *Re McDonald* (1996), 62 A.C.W.S. (3d) 230 (Alta. Reg.); *Re Mills*, (April 17, 1996), Sask. Q.B., Reg. Herauf [unreported]; *Re Edwards* (1996), 64 A.C.W.S. (3d) 732 (Ont. Reg.); *Re King and Johnson* (1996), 146 Sask. R. 293 (Q.B.); *Re McCann*, (August 21, 1996), Ont. Gen. Div., Dep. Reg. Schneider [unreported]; *Re Dewson* (1996), 65 A.C.W.S. (3d) 110 (B.C. Master); *Re Ehler*, (September 24, 1996), Sask. Q.B., Reg. Herauf [unreported]; *Re Raymer* (1996), 43 C.B.R. (3d) 263 (Ont. Dep. Reg.); *Huard v. M.N.R.* (1996), 45 C.B.R. (3d) 242 (Ont. Gen. Div.), rev'd (August 29, 1996), Ont. Gen. Div., Dep. Reg. Schneider [unreported]; *Re Graham and Graham*, (January 16, 1997), Sask. Q.B., Reg. Herauf [unreported]; *Re Brennan* (1997), 45 C.B.R. (3d) 175 (N.S.T.D.); *Re Degagne*, (February 7, 1997), Sask. Q.B., Reg. Herauf [unreported]; *Re Hansen*, (February 25, 1997), Sask. Q.B., Reg. Herauf [unreported]; *Re Lemaigre* (1997), 46 C.B.R. (3d) 236 (Sask. Reg.); *Re Baldwin* (1997), 69 A.C.W.S. (3d) 803 (B.C. Reg.); *Re Duff*, (May 1, 1997), Sask. Q.B., Reg. Herauf [unreported]; *Re Munro* (1997), 72 A.C.W.S. (3d) 427 (Ont. Gen. Div.); *Re Grosso* (1997), 49 C.B.R. (3d) 251 (Sask. Reg.); *Re Novak* (1997), 74 A.C.W.S. (3d) 160 (Ont. Gen. Div.); *Re Kerr* (1997), 49 C.B.R. (3d) 1 (Ont. Dep. Reg.); *Re Chambers* (1997), 3 C.B.R. (4th) 249 (Sask. Reg.); *Re Rahall* (1997), 49 C.B.R. (3d) 268 (Alta. Q.B.); *Re Ridyard* (1997), 1 C.B.R. (4th) 284 (B.C.S.C.); *Re Evans* (1997), 50 C.B.R. (3d) 214 (Alta. Reg.); *Re Baird* (1997), 157 Nfld. & P.E.I.R. 350 (Nfld. T.D.); *Re Ponting*, (February 19, 1998), Sask. Q.B., Reg. Herauf [unreported]; *Re Moss* (1998), 78 A.C.W.S. (3d) 14 (Man. Reg.); *Re Temple* (1998), 78 A.C.W.S. (3d) 226 (B.C. Master); *Re Kormos*, (April 7, 1998), Sask. Q.B., Reg. Herauf [unreported]; *Re Friesen*, (May 1, 1998), Sask. Q.B., Reg. Herauf [unreported]; and *Re Waffle*, (June 19, 1998), Sask. Q.B., Reg. Herauf [unreported].

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See Appendix "A" attached.

findings support the earlier contention that self-employed persons, whose taxes are not deducted at source, represent a greater risk to the fisc in terms of the accumulation of tax arrears and the potential loss of tax revenues due to insolvency. Indeed, professionals and other self-employed individuals accounted for 79.5% of the cases examined. The analysis indicates that the tax liabilities the debtors sought to have discharged on average amounted to \$173,632 and involved an accumulation of arrears over 4.7 taxation years.

A number of other variables were also examined. For instance, in 56.1% of the cases recourse to bankruptcy was tax driven insofar as the debtors were attempting to use the process as a means to expunge the accumulated tax arrears.³⁵⁷ The trend is further compounded by a recidivism rate of 14% on the part of tax debtors who had previously been adjudged bankrupt. The judicial response to the problem has by and large been to grant discharges conditional upon the bankrupts making additional payment over and above the amounts that had already been realized by the trustee. The analysis shows that discharge was granted conditionally in 76.6% of the cases. It should be noted, however, that the same findings indicate that 15.9% of the bankrupts had RRSPs.³⁵⁸

It would appear, based on the foregoing analysis, that under the existing bankruptcy regime there is fertile opportunity for certain unscrupulous tax debtors to structure their affairs so as to avoid the payment of taxes. This is not to say, that the *Bankruptcy and Insolvency Act* should be amended to deter such activities. Indeed, the consequence of any amendment in this regard could result in denying honest debtors access to the process. The findings suggest that the existing provisions of the

³⁵⁷ For an independent and qualified confirmation of the existence of this trend, see J. Murray Ferron, "Some file bankruptcy to escape tax obligation," *Toronto Star* (April 13, 1996), at p. B3.

³⁵⁸ See *Re Doucet*, *supra*, footnote 355; *Re Wortsman*, *supra*, footnote 355; *Re Polman*, *supra*, footnote 355; *Re Chow*, *supra*, footnote 355; *Re LaMothe*, *supra*, footnote 355; *Re Rogers*, *supra*, footnote 355; *Re Woods*, *supra*, footnote 355; *Re MacDonald*, *supra*, footnote 198; *Re Heller*, *supra*, footnote 355; *Re Matheson*, *supra*, footnote 355; *Re Chodos*, *supra*, footnote 355; *Re Lees*, *supra*, footnote 355; *Nelson (Trustee of) v. Nelson*, *supra*, footnote 355; *Re Letts*, *supra*, footnote 355; *Re Brennan*, *supra*, footnote 355; *Re Baldwin*, *supra*, footnote 355; and *Re Ridyard*, *supra*, footnote 355; see also *Re Larocque*, *supra*, footnote 179; *Re Atkin*, *supra*, footnote 278; *Re Shakell* (1988), 70 C.B.R. (N.S.) 270 (S.C.O.); *Re MacKinnon*, *supra*, footnote 278; *Re Varma* (1995), 30 C.B.R. (3d) 263 (Man. Reg.); *Re Henderson* (1997), 45 C.B.R. (3d) 146 (Ont. Gen. Div.); and *Re Etter*, (October 28, 1997), N.S.T.D., Reg. Hill [unreported].

legislation are sufficient to enable a vigilant tax administrator to address strategic behaviour driven by questionable aims. There is, however, an administrative burden associated with the maintenance of vigilance against potential non-compliance, and the cost of that burden is borne out of the public purse. No doubt, cost is an inherent feature in the administration of any legislative program, but there are other factors which need to be considered. The efficacy and efficiency of a public revenue regime is dependent on an equitable balance between intrusion into the legitimate private affairs of the citizen and the establishment of reasonable safeguards to ensure compliance. There are cost implications on either side of the equation. The maintenance of compliance safeguards involves administrative costs; on the other hand, the absence of safeguards can result in the loss of revenues. In this context, it is suggested that the exemption of RRSPs in bankruptcy would adversely impact on the administration of public revenues. Potential losses in revenue would not just be limited to the value of the RRSPs to which access was no longer available. The risk to the fisc would be further exacerbated to the extent that increases in the incidence of bankruptcy have been correlated to corresponding increases in exemption limits.³⁵⁹ In this respect, the exemption of RRSPs would only further fuel the rate of tax driven bankruptcies. Hence, any change in policy direction regarding the exemption of RRSPs would need to take into consideration these behavioural implications.

This is not to suggest that the anecdotal findings presented in this paper represent statistically viable conclusions. They do not. The findings are merely an indication of an adverse trend. Definitive conclusions concerning that trend would require empirical analysis that is beyond the scope of this paper. On the other hand, the suggestion by the Supreme Court of Canada that the potential for abuse

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See Philip Shuchman, "A Brief Survey of Empirical Research on Personal Bankruptcy in the USA with Comments on Legislative Impact," in *Debtors and Creditors: A Socio-Legal Perspective*, edited by Iain Ramsay, (Abingdon, U.K.: Professional Books, 1986), at p. 306, wherein some econometric studies suggest that,

... the frequency of personal bankruptcy filings could not be attributed to economic conditions. Rather, the cause of the greater frequency of personal bankruptcy filings was due in largest measure to the changes in the bankruptcy law... The major cause of increased bankruptcy filings was thought to be the generous federal exemptions.

would be limited to "rare cases"³⁶⁰ does little to minimize the degree of exposure. At best, it is a seemingly cavalier dismissal of that risk. At worst, the esteemed authorship of the remark gives stature and weight to the assessment without the benefit of any empirical analysis. In all fairness, however, it would be noted that the comment was made in reliance on an observation made by a lower court in a separate case. As such, the comment has no support other than the eminence of the judge that made the initial observation. Nevertheless, once embraced by the Supreme Court of Canada, can such *obiter dictum* be dismissed lightly? As the highest court in the land, the Court has a valid claim to legitimacy on what Weber categorized as rational grounds³⁶¹ in that it is "the final authority on the interpretation of the entire body of Canadian law, whatever its source."³⁶² Moreover, the Court has on at least one occasion indicated that its *obiter dictum* should not be disregarded.³⁶³ The issue here is not the binding nature of the doctrine of *stare decisis*. The comment clearly did not go to the *ratio decidendi* of the case. It was but a casual *obiter* remark and did not in any way "set out the law with the intention that lower courts follow and apply it."³⁶⁴ On the other hand, there is a danger that the authority of the Court could give unwarranted weight to the comment from the point of view of policy analysis. In the parlance of McLuhan, the "medium is the message" in terms of personal and social consequences.³⁶⁵ Although that statement was initially directed at the

³⁶⁰ *Royal Bank of Canada v. North American Life Assurance Co.*, *supra*, footnote 276, at p. 211.

³⁶¹ Weber, *supra*, footnote 3, Vol. 1, at pp. 215-226.

³⁶² Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (loose leaf), Vol. 1, (Scarborough, Ont.: Carswell, 1997), §8.5(a), at p. 8:8.

³⁶³ See *Sellars v. R.* (1980), 110 D.L.R. (3d) 629 (S.C.C.), at p. 631; see also Geoffrey S. Gilbert, "Stare decisis - Value of Obiter Dictum - Supreme Court of Canada," (1982) 60 *Can. Bar Rev.* 373, wherein at p. 378 the author states:

Whatever the Supreme Court now says becomes binding authority. The age-long right of litigants in the adversarial process to argue their case afresh if there has been no previous authority on point is gone. If the Supreme Court ever discusses a point, irrelevant to its instant decision but pertinent to a subsequent case, the lower court is bound by its *obiter*.

But see Arthur Peltomaa, "Obiter Dictum of the Supreme Court of Canada: Does it Bind Lower Courts?" (1982) 60 *Can. Bar Rev.* 823.

³⁶⁴ Peltomaa, *ibid.*, at p. 832.

³⁶⁵ Eric McLuhan & Frank Zingrone, *Essential McLuhan*, (New York: Basic Books, 1995), at p. 151

consequences of electronic technology and media,³⁶⁶ one need only juxtapose the Court in the place of the electronic media in order to draw the parallel to circumstances in the instant case. Indeed, the fact that it is the Supreme Court of Canada that stated that risk of abuse would only arise in rare cases, lends legitimacy to the observation. However, since the statement does not set out any rule of law, it should not be given any import from the point of view of policy analysis. Hence, rather than concentrate on the frequency of potential abuse, the better approach would be to examine the dynamics of RRSP contributions to determine the degree to which such plans are used to meet the policy objective of providing for retirement needs.

An analysis of fund withdrawals³⁶⁷ suggests that the primary purpose is not necessarily retirement related. This finding is based on the conservative assumption that the majority of RRSP contributors would normally draw on their retirement investments some time subsequent to the attainment of the age of 55. In reality, however, 63.1% of contributors withdraw funds prior to reaching the age of 55.³⁶⁸ This is not to suggest, that in each instance the plans have been completely collapsed. Nevertheless, the fact remains that persons under the age of 55 account for 53.3% of the overall funds withdrawn.³⁶⁹ These percentage interpretations are free of anomalies to the extent that the

³⁶⁶ See Marshall McLuhan & Quentin Fiore, *The Medium is the Message: An Inventory of Effects*, (New York: Bantam Books, 1967), at p. 8 wherein the authors state that,

The medium, or process, of our time - electric technology - is reshaping and restructuring patterns of social interdependence and every aspect of our personal life... Societies have always been shaped more by the nature of the media by which men [and women] communicate than by the content of the communication.

³⁶⁷ See Basic Table 4 (All Returns by Age and Sex) in Canada, *Taxation Statistics: Analyzing 1988 T1 Individual Tax Returns and Miscellaneous Statistics*, 1990 ed., (Ottawa: Revenue Canada, 1990), at pp. 154-167; Canada, *Taxation Statistics: Analyzing 1989 T1 Individual Tax Returns and Miscellaneous Statistics*, 1991 ed., (Ottawa: Revenue Canada, 1991), at pp. 160-173; Canada, *Taxation Statistics: Analyzing 1990 T1 Individual Tax Returns and Miscellaneous Statistics*, 1992 ed., (Ottawa: Revenue Canada, 1992), at pp. 166-179; Canada, *Taxation Statistics: Analyzing 1991 T1 Individual Tax Returns and Miscellaneous Statistics*, 1993 ed., (Ottawa: Revenue Canada, 1993), at pp. 118-131; Canada, *Taxation Statistics: Analyzing 1992 Individual Tax Returns and Miscellaneous Statistics*, 1994 ed., (Ottawa: Revenue Canada, 1994), at pp. 94-107; Canada, *Tax Statistics on Individuals: Analyzing 1993 Individual Tax Returns and Miscellaneous Statistics*, 1995 ed., (Ottawa: Revenue Canada, 1995), at pp. 92-105; Canada, *Tax Statistics on Individuals: Analyzing 1994 Individual Tax Returns and Miscellaneous Statistics*, 1996 ed., (Ottawa: Revenue Canada, 1996), at pp. 72-85; and Canada, *supra*, footnote 236 at pp. 90-103.

³⁶⁸ See Appendix "B" attached.

³⁶⁹ See Appendix "C" attached.

findings reflect averages based on an analysis of the most current multiple year period for which there is available data.. Moreover, the findings are substantiated by other independent studies and analyses.³⁷⁰ It should be further noted, that the trend indicates that withdrawals by the under 55 age group are increasing. The percentage of contributors, who withdrew funds prior to reaching the age of 55, has increased from 59.4% in 1988 to 67.4% in 1995. Similarly, the under 55 age group, which accounted for 49.4% of the total withdrawals in 1988, has risen to account for 54.8% of the funds withdrawn in 1995. While there is no available data to confirm the disposition of the funds withdrawn, the general consensus of opinion is that the moneys were not used for retirement purposes.³⁷¹ The most plausible explanation offered is that the contributors liquidated their RRSP savings "either from necessity (such as job loss), to meet unusual financial obligations (to assist in purchasing a home or to pay off a mortgage, for example), or simply for personal enjoyment purposes."³⁷²

Posited against the foregoing analysis are the findings of three separate studies³⁷³ of the demographic profiles of individual bankrupts. The analyses contained in these studies establish a consistent trend which indicates that no less than 85% of individual bankrupts are below 50 years of age. While there is no data to establish the correlation between bankrupts and persons who withdraw their RRSP savings, there is clearly a commonality in the age of the majority of each of the two groups. However, in the absence of an empirical coincidence study of the two groups, the age commonality factor alone is of limited value in terms of policy analysis. It does, nevertheless, cast doubt on the wisdom of any

³⁷⁰ See Hubert Frenken, "RRSPs - not just for retirement," *Perspectives on Labour and Income*, Vol. 4, No. 4 (Winter 1992), 9; Herbert Frenken & Linda Standish, "RRSP withdrawals," *Perspectives on Labour and Income*, Vol. 6, No. 1 (Spring 1994), 37; Canada, *Canada's Retirement Income Programs: A Statistical Overview*, (Ottawa: Statistics Canada, 1996), at p. 83; and Canada, *Retirement Savings Through RPPs and RRSPs: 1991 to 1995*, (Ottawa: Statistics Canada, 1997), at pp. 32-34.

³⁷¹ *Ibid.*

³⁷² *Ibid.*, at p. 10.

³⁷³ J.W. Brighton & J.A. Connidis, *Consumer Bankruptcies in Canada*, (Ottawa: Consumer and Corporate Affairs Canada, 1982); Lance W. Roberts & David R. Forde, *A Sociodemographic Profile of Consumer Bankrupts in Canada*, (Winnipeg: Sociometrix, 1994); and Schwartz & Anderson, *supra*, footnote 353.

attempt to exempt RRSP in bankruptcy without the benefit of further analysis. Given the doubtful basis for extending such an exemption, maintenance of the status quo can be supported by reference to the reasoning of Descartes, who in the presence of doubt argued that,

... reason already persuades me that I ought no less carefully withhold my assent from matters which are not entirely certain and indubitable than from those which appear to me manifestly to be false ...³⁷⁴

In closing this segment of the discussion, it should be pointed out that the ongoing conflict between creditors, debtors, and fund managers over the exigibility of RRSPs does not stop with bankruptcy. No doubt, the bankruptcy process in some instances represents the last opportunity for creditors to realize on the debts that are due them, but not all debtors seek to shelter their RRSPs through recourse to bankruptcy. It would not be correct to suggest that the advances in the development of the law pertaining to the availability of RRSPs for the payment of debts culminate in the realm of bankruptcy. It is but one of a number of fronts on which the struggle of the competing interests has been waged. Outside of the bankruptcy context, attempts to realize against the funds in RRSPs have been countered with the argument that the funds are not due or payable³⁷⁵ and, hence, are not attachable through garnishment.

CONDITIONAL, CONTINGENT AND FUTURE DEBTS

As discussed at the outset, the historical prohibition against the garnishment of conditional, contingent or future debts has been somewhat relaxed to the extent that some jurisdictions now provide for the attachment of future debts which become due or payable within a given period of time. The concept of a debt being due or payable in this context means that the creditor is entitled

³⁷⁴ René Descartes, *The Philosophical Works of Descartes*, translated by Elizabeth S. Haldane & G.R.T. Ross, Vol. 1, (Cambridge: Cambridge U. Press. 1973), at p. 145.

³⁷⁵ Note, that the terms 'due' and 'payable' are synonymous in the context of garnishment: *The Queen v. Timagami Financial Services Ltd.* (1982), 82 DTC 6268 (F.C.A.), at p. 6269.

to enforce payment and the debtor is under a legally enforceable duty to pay.³⁷⁶ It should be noted, in this respect, that attachment under the garnishment provisions of subsection 224(1) of the *Income Tax Act* has been extended to a term of one year.³⁷⁷ Nevertheless, there is still confusion as to what constitutes a conditional debt and one which is accruing due but merely payable at some time in the future. The analysis which follows will address the differences between the two concepts.

Future vs. Conditional or Contingent Debts

In drawing a distinction between a debt which is payable upon the happening of a future event and one which becomes payable as a result of the mere effluxion of time,³⁷⁸ it has been held that,

... if a debt is in existence at the time the garnishee summons is served, it need not be presently payable to be attached. A garnishee summons attaches debts payable in the future because of the phrase "accruing due".

.....

The language used to deny garnishment usually relates to a finding that the debt is a conditional one and therefore not "accruing due".

.....

Not only must the condition be certain; the consequences of the failure to fulfill it must be the garnishee will not have to pay the debt. A condition must by its nature relieve the garnishee from its obligation to pay the judgment debtor and thereby prevent the debt from accruing due.³⁷⁹

In the context of the garnishment of RRSPs, the decision in *DeConinck v. Royal Trust Corp. of Can.*,³⁸⁰ represents a significant divergence in the development of the law. Faced with what might otherwise have been a future debt, the Court treated it as being conditional. The Court followed³⁸¹

³⁷⁶ See *The Queen v. Timagami Financial Services Ltd.*, *supra*, footnote 375, at p. 6269; *The Queen v. Derbecker* (1984), 84 DTC 6549 (F.C.A.), at pp. 6549-6550; and *Canada (Attorney General) v. Yannelis* (1995), 130 D.L.R. (4th) 632 (F.C.A.), at p. 638.

³⁷⁷ Note, that the extension of the provision to include debts that become payable within one year overcomes the problem in *The Queen v. Cyrus J. Moulton Ltd.* (1976), 76 DTC 6239 (F.C.T.D.), at p. 6247.

³⁷⁸ See footnote 19, *supra*, and accompanying text.

³⁷⁹ *Bank of Montreal v. I.M. Krisp Foods Ltd.* (1996), 140 D.L.R. (4th) 33 (Sask. C.A.), at pp. 37 & 44.

³⁸⁰ *Supra*, footnote 132.

³⁸¹ *Ibid.*, at p. 100.

a number of earlier cases which held that the relationship between a RRSP fund manager and the plan holder was one of a trustee and a beneficiary as opposed to that of a debtor and a creditor.³⁸² A number of early English decisions, which suggest that a debtor-creditor relationship can be superimposed on a trustee-beneficiary relationship,³⁸³ appear to have been ignored. Based on the rule in *Saunders v. Vautier*,³⁸⁴ the Court did, however, acknowledge the possibility that a beneficiary and trustee relationship could evolve into that of debtor and creditor. The gist of the rule being that “where there is an absolute vested gift made payable at a future event, the court will not enforce the trust for accumulation, in which no person has any interest but the legatee.”³⁸⁵ The rule is based on the theory that the rights to the management and the disposition of the funds rest with the trustee; whereas, the beneficiary has the right of enjoyment.³⁸⁶ Hence, the beneficiary is able to request payment from the trustee of the proceeds of the fund.

In applying the rule to the facts in *DeConinck v. Royal Trust Corp. of Can.*,³⁸⁷ the Court held that until the beneficiary requested payment of the RRSP proceeds, which the plan holder was “able but not bound to do under the rule”, no moneys would become payable.³⁸⁸ Accordingly, the plan manager as trustee was not liable to make payment to the plan holder within the meaning of the garnishment provisions of subsection 224(1) of the *Income Tax Act*.³⁸⁹ The existence of a future debt was not only

382 See *McMahon v. Canada Permanent Trust Company*, *supra*, footnote 105; *Vancouver A & W Drive-Ins Ltd. v. United Food Services Ltd.*, *supra*, footnote 111; and *Re Bliss, Kirsh and Doyle*, *supra*, footnote 131.

383 See *Nash v. Pease* (1878), 47 L.J.R. (N.S.) 766 (Div. Ct.); *Webb v. Sienton*, *supra*, footnote 22; *Fellows v. Thornton* (1884), 14 Q.B.D. 335; and *Re Greenwood* (1901), 1 Ch. 887; see also discussion in *Springman & Gertner*, *supra*, footnote 109.

384 (1841), 41 E.R. 482 (Ch.).

385 *Waters*, *supra*, footnote 231, at p. 963.

386 *Ibid.*, at pp. 962-963.

387 *Supra*, footnote 132.

388 *Ibid.*, at p. 102.

389 *Ibid.*

denied, but any liability on the part of fund manager was held to be contingent upon the plan holder requesting payment of the proceeds. The decision, in effect, stands for the proposition that only the plan holder is entitled to collapse a RRSP.³⁹⁰

Where in addition to a simple demand for payment, other conditions are imposed, such as the surrender of a pass book or that of a certificate, the courts have been consistent in refusing the attachment of the funds sought to be garnished.³⁹¹ Such stringency, however, has not been applied to situations where a simple demand for payment was the sole condition of surrender. It is in this regard, that some commentators suggest that the decision in *DeConinck v. Royal Trust Corp. of Can.*,³⁹² is difficult to reconcile with earlier jurisprudence,³⁹³ wherein the service of a garnishee was found to operate as a demand made by the debtor.³⁹⁴ The case of *Hutterian Brethren Church of Smoky Lake v. Prov. Treas. (Alta.)*,³⁹⁵ is on point insofar as it was held therein, that in the absence of any other surrender conditions, garnishment under subsection 224(1) of the *Income Tax Act* constituted sufficient demand to accelerate payment maturity.³⁹⁶ Indeed, insistence on the plan holder being the only one entitled to collapse a RRSP had already been rejected previously in *Re Gero*³⁹⁷ on the basis of being contrary to the whole principle of garnishment.

³⁹⁰ Stephen W. Bowman, Thomas E. McDonnell & Rick B. Thomas, "Current Cases: Third-Party Demands - Application to RRSP - Measure of Damages: *DeConinck v. Royal Trust Corporation of Canada*," (1988) 36 *Can. Tax J.* 1514, at p. 1517.

³⁹¹ See *Bagley v. Winsome*, [1952] 1 All E.R. 637 (C.A.), at p. 639; and *Hutterian brethren Church of Smoky Lake v. Prov. Treas. (Alta.)*, *supra*, footnote 47, at p. 6233; see also *Lake of the Woods Milling Co. v. Collin* (1900), 13 Man. R. 154 (C.A.); *Lampman & Laidlaw Ltd. v. Levine* (1960), 32 W.W.R. 136 (B.C.C.A.); and *Prince Albert Credit Union Ltd. v. Diehl* (1985), 23 D.L.R. (4th) 600 (Sask. C.A.).

³⁹² *Supra*, footnote 132.

³⁹³ Bowman, McDonnell & Thomas, *supra*, footnote 390, see also Bowman, *supra*, footnote 51, at p. 22:14.

³⁹⁴ See *Joachimson v. Swiss Bank Corporation*, [1921] 3 K.B. 110 (C.A.), at pp. 121, 126 & 131; see also *Borg-Warner Acceptance Corp. v. Janzen Builders (1963) Holdings Ltd.* (1983), 150 D.L.R. (3d) 569 (Man. Q.B.).

³⁹⁵ *Supra*, footnote 47.

³⁹⁶ *Ibid.*, at p. 6233.

³⁹⁷ *Supra*, footnote 95, at p. 5229; see also *Re Crevier*, *supra*, footnote 183.

This is not to suggest, that all courts have consistently held that payment maturity was accelerated as the result of a garnishee issued pursuant to the provisions of subsection 224(1). They have not.³⁹⁸ Nonetheless, the analysis in *DeConinck v. Royal Trust Corp. of Can.*,³⁹⁹ has done little to clarify the situation. It is suggested that the decision is based on questionable reasoning and has only served to further muddy what were already murky waters. It was only through the rejection of the proposition that a debtor-creditor relationship could be superimposed on trustee-beneficiary relationship, that the Court was able to conclude that garnishment would not accelerate payment maturity. In the absence of the finding of a trustee-beneficiary relationship, the Court would have been faced with the hurdle of distinguishing its position from the reasons in *Hutterian Brethren Church of Smoky Lake v. Prov. Treas. (Alta.)*⁴⁰⁰ and *Re Gero*.⁴⁰¹ The existence of an uninterrupted trustee-beneficiary relationship was crucial to the outcome of the case. The merits of that proposition, however, are somewhat dubious and have, as was pointed out earlier, been rejected in a number of other cases.⁴⁰²

On the other hand, the foregoing rationale has not been rejected altogether. It was subsequently applied in the decision in *National Trust Company v. The Queen*.⁴⁰³ Not surprisingly, it was held therein, that a garnishee under subsection 224(1) of the *Income Tax Act* did not constitute a demand sufficient to collapse a RRSP prior to its maturity. Further discussion of the case is not warranted. Suffice it to say, that the criticism which was levied against the analysis in *DeConinck v. Royal Trust*

³⁹⁸ See *M.N.R. v. Maron and Maritime Life Ins. Co.*, *supra*, footnote 181; and *Re Morgan Trust Company and Dellelce*, *supra*, footnote 138.

³⁹⁹ *Supra*, footnote 132.

⁴⁰⁰ *Supra*, footnote 47.

⁴⁰¹ *Supra*, footnote 95.

⁴⁰² See *Discovery Trust Co. v. Abbott*, *supra*, footnote 125; *Bank of British Columbia v. 225280 B.C. Ltd.*, *supra*, footnote 121; and *Bateman v. Toronto Dominion Bank*, *supra*, footnote 127; see also *Maritime Life Assurance Company v. The Queen*, *supra*, footnote 135.

⁴⁰³ *Supra*, footnote 134; see also *Re Giguère* (1998), 2 C.B.R. (4th) 292 (Que. Sup. Ct.), at p. 302.

Corp. of Can.,⁴⁰⁴ is equally applicable to cases that follow suit. A somewhat similar outcome, although based on different reasoning, may be found in *Manufactures Life Insurance Company v. M.N.R.*⁴⁰⁵ The terms of the RRSP policy therein stipulated that the demand for payment had to be made in writing and that the fund holder would have to consent to the demand.⁴⁰⁶ It was found that since the plan holder could not unilaterally collapse the RRSP plan, the fund manager was not liable to make payment to the plan holder.

It is interesting to note the inference, albeit indirect,⁴⁰⁷ that support for the position taken in the foregoing case is based in part on the decision in *DeConinck v. Royal Trust Corp. of Can.*⁴⁰⁸ While the inference was only made by way of *obiter dictum*, it is nevertheless disturbing given that the reasoning in *Manufactures Life Insurance Company v. M.N.R.*⁴⁰⁹ was subsequently cited with approval in *Maritime Life Assurance Company v. The Queen*.⁴¹⁰ In relying on the authority of that case, the Court indirectly, perhaps unwittingly, embraced the dubious proposition which forms the basis for the decision in *DeConinck v. Royal Trust Corp. of Can.*⁴¹¹ Such an outcome would not be unique,⁴¹² but for the fact that the Court had expressly rejected the existence of a trust relationship between the plan holder and the fund manager.⁴¹³ This leads one to wonder whether either of the

⁴⁰⁴ *Supra*, footnote 132.

⁴⁰⁵ (1991), 91 DTC 1055 (T.C.C.).

⁴⁰⁶ *Ibid.*, at pp. 1056-1057.

⁴⁰⁷ *Ibid.*, at p. 1057.

⁴⁰⁸ *Supra*, footnote 132.

⁴⁰⁹ *Supra*, footnote 405.

⁴¹⁰ *Supra*, footnote 135.

⁴¹¹ *Supra*, footnote 132.

⁴¹² See *National Trust Company v. The Queen*, *supra*, footnote 134.

⁴¹³ *Maritime Life Assurance Company v. The Queen*, *supra*, footnote 135, at p. 1323.

decisions in *Manufactures Life Insurance Company v. M.N.R.*⁴¹⁴ or *Maritime Life Assurance Company v. The Queen*,⁴¹⁵ were based on a fully reasoned interpretation of the law or on an attempt to justify some predisposed sentiment. Methinks perhaps that a little of the latter may have been allowed to creep into the process.

This raises the question of what would have been the outcome had the Court in *DeConinck v. Royal Trust Corp. of Can.*⁴¹⁶ embraced the principle in *Hutterian Brethren Church of Smoky Lake v. Prov. Treas. (Alta.)*.⁴¹⁷ The service of the garnishee under subsection 224(1) of the *Income Tax Act* would no doubt have placed the Crown in the shoes of the tax debtor.⁴¹⁸ On this point the commentators are generally in agreement.⁴¹⁹ Once it stands in the shoes of the tax debtor, the Crown “enjoys the same rights as the tax debtor,” but at the same time, it “is subject to the same obligations and restrictions as the tax debtor.”⁴²⁰ While one cannot contractually exempt one’s assets from seizure,⁴²¹ a tax debtor cannot be prevented from entering into a RRSP contract, which restricts or limits the manner in which the funds held thereunder can be dealt with. In this respect, the Crown “is bound by the contract entered into by the tax debtor and has no greater rights.”⁴²² Hence, where a contract

⁴¹⁴ *Supra*, footnote 405.

⁴¹⁵ *Supra*, footnote 135.

⁴¹⁶ *Supra*, footnote 132.

⁴¹⁷ *Supra*, footnote 47.

⁴¹⁸ *Ibid.*, at p. 6233.

⁴¹⁹ See Bowman, McDonnell & Thomas, *supra*, footnote 390, at pp. 1515-1516; Keith Yamauchi, “Revenue Canada: Certain Collection Remedies,” in *Insolvency: New Rules For An Old Game*, 1989 Seminar National Papers, (Toronto: Canadian Insolvency Association, 1989), at p. 3:5; Bowman, *supra*, footnote 51, at p. 22:14; Werner H.G. Heinrich, “Judicial Response to Director’s Liability and Crown Garnishment Priorities,” in *Report of Proceedings of the 1991 British Columbia Tax Conference*, Conference Report, (Toronto: Canadian Tax Foundation, 1991), at p. 4:53; and Ronald N. Robertson & Emond F.B. Lamek, “Tax Collection and Insolvency: An Update,” in *Report of Proceedings of Forty-Fifth Tax Conference*, 1993 Conference Report, (Toronto: Canadian Tax Foundation, 1994), at p. 8:15.

⁴²⁰ Bowman, McDonnell & Thomas, *supra*, footnote 390, at p. 1515-1516.

⁴²¹ See *Robitaille v. Hins-Dion*, *supra*, footnote 96, at p. 611.

⁴²² Yamauchi, *supra*, footnote 419, at p. 3:5.

stipulates that the funds are locked-in and not redeemable prior to maturity,⁴²³ the restriction applies equally to the Crown as it does to the plan holder. In such an instance the debt is clearly contingent. On the other hand, a debt which is payable on demand is not a contingent debt.⁴²⁴ Accordingly, if a simple request by the tax debtor is all that is required to cause a payment to be made, then a demand under subsection 224(1) of the *Income Tax Act* will be effective to cause the funds to be paid.⁴²⁵ The fact situations in each of *Manufactures Life Insurance Company v. M.N.R.*,⁴²⁶ *National Trust Company v. The Queen*,⁴²⁷ and *Maritime Life Assurance Company v. The Queen*,⁴²⁸ fell between these two positions. The first case involved a plan holder who could not require the payment of funds without the consent of the fund manager.⁴²⁹ In the second fact situation, the plan holder could effect withdrawal, but only "upon thirty (30) days written notice" and then "subject to the terms and conditions of the investments."⁴³⁰ The third case was fraught with conflicting provisions insofar as the head policy permitted termination of the contract and withdrawal of the cash surrender value, but the RRSP endorsement purported to deny that option.⁴³¹ However, it should be noted, that in the latter instance, the fund manager permitted surrender as a matter of an "established and invariable practice."⁴³² The other cases are moot on the point of acquiescence to requests for the pay-out of

⁴²³ See *Re Kozak*, *supra*, footnote 198; and *Sonnichsen (Trustee of) v. National Bank of Canada*, *supra*, footnote 260.

⁴²⁴ See *The Queen v. Bidner* (1984), 32 A.C.W.S. (2d) 96 (F.C.A.).

⁴²⁵ *Bowman*, *supra*, footnote 51, at p. 22:14.

⁴²⁶ *Supra*, footnote 405.

⁴²⁷ *Supra*, footnote 134.

⁴²⁸ *Supra*, footnote 135.

⁴²⁹ *Manufacturers Life Insurance Company v. M.N.R.*, *supra*, footnote 405, at p. 1056.

⁴³⁰ *National Trust Company v. The Queen*, *supra*, footnote 134, at p. 1833, fn. 1; note, that the asset in the plan involved a term deposit in a guaranteed investment certificate (hereinafter referred to as a "GIC"), and the usual condition associated with the surrender of such instruments is an abatement of interest payable thereon.

⁴³¹ *Maritime life Assurance Company v. The Queen*, *supra*, footnote 135, at pp. 1322 & 1324.

⁴³² *Ibid.*, at p. 1323.

cash surrender values, but the sheer volume of the withdrawals analyzed in Appendices “B” and “C” indicates that the practice is far from remote. The available evidence would seem to suggest that surrenders under such circumstances are a perfunctory exercise. Any conditions or restrictions alluded to, appear to be little more than a slight of hand created for the sole purpose of providing a smokescreen to ward off unwanted intrusions by creditors.

In effect, the courts may be paying lip service to restrictive covenants which are otherwise ignored by the contracting parties. Rigid adherence to the very letter of such contractual provisions without any regard to the reality of the industry norms, merely perpetuates what one commentator refers to as “illegitimate exemptions.”⁴³³ The courts, nonetheless, continue to hold that “there is a substantial distinction between [a] contractual right to collapse a plan and that same right given as a matter of practice which could be changed at any time.”⁴³⁴ Such pronouncements effectively render garnishment useless in that the creditor “cannot exercise for the debtor, or force the debtor to exercise, any right which the debtor has under the RRSP.”⁴³⁵

It has been suggested that the foregoing outcome could be avoided through seizure by writ of execution.⁴³⁶ Recourse in this respect involves more than just the seizure of the debtor’s interest in a chose in action.⁴³⁷ The sheriff’s capacity to enforce execution extends “beyond the collection of debts due and payable at the time of seizure.”⁴³⁸ Indeed, in situations where “the pre-condition for

⁴³³ Charles R.B. Dunlop, “Debtor’s Rights,” in *Report of Proceedings of 1986 Insolvency Seminar*, National Papers, (Toronto: Canadian Insolvency Association, 1986), at pp. 3:9-3:10 & 3:15.

⁴³⁴ *Yorkshire Trust Company v. 239745 B.C. Ltd.* (1983), 45 B.C.L.R. 361 (S.C.), at p. 364; cf. *Maritime Life Assurance Company v. The Queen*, *supra*, footnote 135, at p. 1325.

⁴³⁵ Max Mendelsohn, “Pre-Litigation Sheltering of Assets (Part I),” (1988) 5 *Nat’l Insolv. Rev.* 42, at p. 44.

⁴³⁶ See Melvin A. Springman, “Finding The Assets: Opening Up The Shelters,” in *Debtors and Creditors: From Protection to Collection*, Conference Papers, (Toronto: Canadian Institute, 1986), at p. B-30.

⁴³⁷ Springman & Gertner, *supra*, footnote 109, at p. 471.

⁴³⁸ *Ibid.*, at p. 472.

the realization of moneys or investments in an RRSP is the formal collapsing of the plan by the debtor, ... the writ appears to empower the sheriff to fulfill this condition.”⁴³⁹ Reliance on writs of execution; however, is a poor substitute for garnishment. In terms of simplicity, effectiveness and efficiency, garnishment “is less onerous (and therefore less costly) than the seizure process.”⁴⁴⁰ Moreover, from the perspective of the collection of income tax arrears, the process subjugates the Crown to the rules, including exemptions, of the superior court in which execution is sought to be enforced.⁴⁴¹ The consequences of that result would not only place insurance type RRSPs beyond the reach of the fisc,⁴⁴² but any potential argument suggesting that exemptions under provincial insurance legislation are not applicable to the federal Crown would effectively be rendered moot.

In the alternative, recourse may also be available through the process of equitable execution.⁴⁴³ In this regard, there is some authority for the appointment of a receiver to receive the interest of a judgment debtor in a RRSP fund and in the investments and moneys comprising the fund.⁴⁴⁴ The proposition, however, is not entirely without doubt.⁴⁴⁵ Notwithstanding any such misgivings, it should be noted that the appointment of a receiver would still not overcome the issue of exemptions

⁴³⁹ *Ibid.*, at p. 471; see also footnote 138, *supra*, and accompanying text.

⁴⁴⁰ Roderick J. Wood, “The Reform of Judgment Enforcement Law in Alberta,” (1995) 25 *Can. Bus. L.J.* 110, at pp. 120-121.

⁴⁴¹ See subsection 56(3) of the *Federal Court Act*, the wording of which is provided in footnote 53, *supra*; see also footnote 159, *supra*, and accompanying text.

⁴⁴² See subsections 191(2) & 196(2) of the *Insurance Act*, R.S.O. 1990, c. I.8, the wording of which is provided respectively in footnotes 154 & 156, *supra*; see also footnotes 194 & 195, *supra*.

⁴⁴³ See section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. 43, as amended by S.O. 1994, c. 12, s. 40, which provides:

(1) In the Ontario Court (General Division), an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just and convenient to do so.

(2) An order under subsection (1) may include such terms as are considered just.

See also *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 41.

⁴⁴⁴ See *Vancouver A & W Drive-Ins Ltd. v. United Food Services Ltd.*, footnote 111, *supra*, at pp. 46-48; see also *Royal Bank of Canada v. Arnold Homes (Ingersoll) Limited* (1979), 29 C.B.R. (N.S.) 319 (S.C.O.).

⁴⁴⁵ See *Yorkshire Trust Company v. 239745 B.C. Ltd.*, footnote 434, at pp. 364-365, wherein doubt was cast on the availability of the remedy where, despite the right to collapse a plan and withdraw the assets, the interest of the annuitant is not vested.

for seizure under provincial insurance legislation.⁴⁴⁶ Moreover, in terms of expediency, equitable execution is procedurally even more onerous than seizure by writ; hence, it does not offer a particularly viable alternative for collecting income tax arrears under such circumstances.

Policy Considerations

It has been suggested that it is the weak and incomplete character of garnishment, as opposed to any coherent or carefully thought out social policy, that has caused creditors to be denied access to certain assets of their debtors.⁴⁴⁷ There can be little doubt that in the context of the attachment of RRSPs, the simplicity, effectiveness and efficiency of the garnishment process has been severely tempered. In this respect, there is a compliance impact⁴⁴⁸ on one of the principal enforcement remedies used in the collection of income tax arrears.⁴⁴⁹ The administrative garnishment provisions of the *Income Tax Act* offer an otherwise expedient means to avoid the expenditure of “time and money necessary to obtain and enforce a conventional garnishment order through the courts.”⁴⁵⁰ To continue to deny the remedy the capacity to attach funds in RRSPs would be to effectively frustrate the entire principle of garnishment.⁴⁵¹ The issue at play, however, may not necessarily be that of the weak and incomplete character of garnishment.

Contrary to the suggestion made earlier, the claims of alleged deficiencies in the character of garnishment may be providing a convenient scapegoat and, thereby, may be deflecting legitimate

⁴⁴⁶ See footnote 442, *supra*; cf. *China Software Corporation v. Leimbigler*, *supra*, footnote 197.

⁴⁴⁷ Dunlop, *supra*, footnote 433, at pp. 3:9-3:10 & 3:15.

⁴⁴⁸ Bowman, McDonnell & Thomas, *supra*, footnote 390, at p. 1518.

⁴⁴⁹ Bohdan J. Skulski, “Tax Collection in Recessionary Times,” in *Report of Proceedings of the Forty-Fourth Tax Conference, 1992 Conference Report*, (Toronto: Canadian Tax Foundation, 1993), at p. 8:16.

⁴⁵⁰ Bowman, McDonnell & Thomas, *supra*, footnote 390, at p. 1514.

⁴⁵¹ Robertson & Lamek, *supra*, footnote 419, at p. 8:14; but see *Richmond Savings Credit Union v. Miller* (1999), 85 A.C.W.S. (3d) 952 (B.C.S.C.).

criticism away from what appears to be questionable analysis of the social policy. The character of garnishment may not be flawed to the extent that has been suggested, but the continuation of the myth offers ready support for certain outcomes where the analysis may be inherently biased. The fact situation in *Maritime Life Assurance Company v. The Queen*⁴⁵² offers some insight in this regard. The RRSP plans in that case were each composed of two forms, the first being a policy of insurance providing for the payment of an annuity on a specified maturity date. The second document was an endorsement to qualify the registration of the policy as a RRSP. The former made provision for the termination and receipt of the cash surrender value at any time prior to maturity; whereas, the latter indicated that the right to surrender may not be exercised. In attempting to reconcile the inconsistency, the Court acknowledged that the prohibition against surrender was not a requirement for eligibility for RRSP registration, but rationalized the quandry as follows:

They [the paragraphs prohibiting surrender] stand on exactly the same footing as many other paragraphs of the Appellant's forms, which, no doubt had not been seen by the policyholders before they received their policies, and had not been specifically requested by them to be included therein. Counsel [for the Crown] did not refer me to any authority for the proposition that such a provision included in a policy of insurance without specific concurrence of the policyholder, may be considered void, or in some other way inoperative. Such a conclusion *would potentially be most disruptive of the insurance industry*, where policies are issued every day containing clauses that the insured has not specifically requested, and has no reason to expect to find included, whether in the main body of the policy, or in an endorsement attached to it. [emphasis added]⁴⁵³

The apparent condonation of a practice where a person neither gets to see certain terms of a contract nor has any reason to expect such terms to be included in a contract would seem somewhat strange coming from the bench. The proposition is not likely to curry favour with the higher courts.⁴⁵⁴ The wisdom of the observation aside, it would seem that the Court ignored the fact that a large number

⁴⁵² *Supra.* footnote 135.

⁴⁵³ *Ibid.*, at p. 1325.

⁴⁵⁴ See *Crocker v. Sundance Northwest Resorts Ltd.* (1988), 51 D.L.R. (4th) 321 (S.C.C.), wherein the Court, albeit in a tort case, disallowed a contractual waiver defence in circumstances where the plaintiff had not been alerted to the existence of same.

of plan holders make significant withdrawals from their RRSPs prior to maturity.⁴⁵⁵ Needless to say, those persons would, no doubt, have been more than just surprised if early withdrawal privileges were to have been denied to them. The benefit of having ready access to those savings is hardly a secret; in fact, it is an option which is frequently touted in the popular press.⁴⁵⁶ The promotion of early withdrawals in this respect is not a strategy that necessarily flies in the face of the government's policy direction. Indeed, specific withdrawal provisions to enable individuals to finance the purchase of a home,⁴⁵⁷ have been enacted "as a measure to stimulate home construction and job creation."⁴⁵⁸ Similar withdrawal provisions are presently under consideration to assist individuals fund the cost of retraining or further education.⁴⁵⁹ The aim of the latter initiative is directed at the increasing demand on people "to upgrade their skills to retain their jobs, or to obtain new ones."⁴⁶⁰

In view of the foregoing, it is suggested that the somewhat cavalier dismissal of the contractual inconsistency in *Maritime Life Assurance Company v. The Queen*⁴⁶¹ warrants closer examination. The concern of the Court over the potential disruption to the insurance industry raises some interesting questions. The issue complained of, may not be so much a case of disruption, but rather one of potential impact on shifts in market shares. Creditor-proofing represents an important

⁴⁵⁵ See Appendices "B" & "C" and the discussion at pp. 74-75, *supra*; see also Bruce Cohen, "RRSP withdrawals still high after recession," *Financial Post* (December 4, 1996), at p. 6.

⁴⁵⁶ See Gloria Taylor, "Borrowing from nest egg to pay for kids' school sweet deal," *Winnipeg Free Press* (January 19, 1999), at p. B1; Delean, *infra*, footnote 486; Paul Delean, "RRSPs now far more than retirement plans," *Ottawa Citizen* (February 16, 1999), at p. F9; Paul Delean, "Make use of flexible RRSP deposit, withdrawal rules," *National Post* (February 17, 1999), at p. C10; and Gail Vaz-Oxlade, "Dipping into your RRSP," *Chatelaine*, Vol. 72, No. 2 (February 1999), at p. 22; see also [unsigned], "\$1-billion taken from RRSPs to buy homes," *The [Toronto] Globe & Mail* (March 31, 1999), at p. B11; but see Tim Cestnick, "Why it's unwise to withdraw from your RRSP early," *The [Toronto] Globe & Mail* (February 23, 1999), at p. R9; and Bob Labreque, "Examine all sides of Home Buyers Plan before joining," *Ottawa Sun* (March 13, 1999), at p. 31.

⁴⁵⁷ See the "home buyers' plan" provisions of section 146.01 of the *Income Tax Act*.

⁴⁵⁸ Sherman, *supra*, footnote 26, at p. 1228.

⁴⁵⁹ See the draft "lifelong learning plan" provisions of clause 51 (proposed section 146.02 of the *Income Tax Act*) and explanatory notes in Canada, *Legislative Proposals and Explanatory Notes Relating to Income Tax*, (Ottawa: Department of Finance, 1998), at pp. 83-91 & 241-259.

⁴⁶⁰ Canada, *Building Canada for the 21st Century: The Budget Plan 1998*, (Ottawa: Department of Finance, 1998), at p. 85.

⁴⁶¹ *Supra*, footnote 135.

marketing consideration in the competition over RRSP deposits.⁴⁶² In terms of market share, life insurance companies historically accounted for “the largest number of RRSP registrations.”⁴⁶³ This is hardly surprising given that “statutory protection has been one of the hallmarks of provincial insurance legislation.”⁴⁶⁴

On the other hand, plans managed by fund managers other than insurance companies have not always fared as well.⁴⁶⁵ What is surprising, however, is that despite the competitive edge enjoyed by insurance companies, banks and other financial institutions have not always seen “fit to lobby the provincial and federal governments for the protection of their clients’ plans.”⁴⁶⁶ The rationale for this stance is not readily apparent, but it would seem reasonable to assume that the dual relationship which banks and other financial institutions frequently enjoy with their depositors, may in part account for the phenomenon. Unlike insurance companies, banks and other financial institutions not only accept amounts for deposit, but frequently lend money to their depositors with little or no provision for collateral security. The universal extension of RRSP creditor protection would, in the event of default under the loans, effectively place such deposits beyond the reaches of those particular lenders. There has, nonetheless, been some representation made to have non-insurance type RRSPs put on an equal footing with products offered by life insurance companies.⁴⁶⁷ On the

⁴⁶² See Monica Townson, “Can a RRSP Be Creditor-Proof,” *Financial Post Magazine* (September 1993), at p. 68; Cohen, *supra*, footnote 239; Matthew Elder, “RRSPs and creditor protection,” *Financial Post* (August 13, 1997), at p. 22; Angela Barnes, “A look at RRSPs from the downside,” *The [Toronto] Globe & Mail* (February 12, 1999), at p. B14; and Tony Johnson, “Why RRSP investors like guaranteed funds,” *National Post* (February 20, 1999), at p. E9; see also *J’ai un REER qui travaille avec brio*, a RRSP advertising brochure (E-RER-10-93-02) circulated by La caisse populaire Desjardins, wherein it is stated: “Si vous recherchez un REER qui vous protège en cas de coups dur, choisissez le REER insaisissable de votre caisse Desjardins. ... Le REER insaisissable peut inclure tous les types de REER offerts par Desjardins.

⁴⁶³ Spiro & Solursh, *supra*, footnote 238, at p. 548.

⁴⁶⁴ Robert Jarman, “Case Comments: Will the proceeds of an RRIF always escape a taxpayer’s creditors: *Royal Bank of Canada v. North American Life Assurance Company*,” (1996) 96 DTC 7023, at p. 7023.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Don L. Neuls, “Viewpoints: RRSPs inadequately protected,” *Regina Leader Post* (March 9, 1984), at p. A7.

⁴⁶⁷ See Cohen, *supra*, footnote 243.

other hand, it is interesting to note that despite the fact that the playing field may not be level, there have been shifts in market shares.

The capacity of the insurance industry to attract RRSP deposits has been eroded on a number of fronts. The protection from creditors offered by life insurers has not been sufficient to maintain the leading edge. Life insurance annuities have not always been seen as the most profitable form of investment.⁴⁶⁸ Turmoil in the insurance industry raised concerns over financial stability and depositors became hesitant about investing money in RRSPs offered by insurers.⁴⁶⁹ The banking industry, on the other hand, decided to diversify. Rather than continue to rely on such staid investment products as GICs, the big banks responded aggressively by setting-up mutual fund operations to grab a share of the fast growing market.⁴⁷⁰ The consequence of these pressures was soon to be reflected in shifts in market shares. Initially mutual funds attracted the lion's share of RRSP contributions, but as investment strategies evolved, diversification between stocks, bonds, GICs and other savings vehicles became increasingly popular.⁴⁷¹ But low interest rates⁴⁷² and risky market conditions⁴⁷³ have subsequently created anxiety among RRSP investors.⁴⁷⁴ The reactions

⁴⁶⁸ Harry Fogul, "Protection of Assets: Legitimate Shelters," in *Debtors and Creditors: From Protection to Collection*, 3rd Annual Conference Report, Vol. 1, (Toronto: Canadian Institute, 1990), at p. 13.

⁴⁶⁹ Janet McFarland, "RRSP investors shying away from insurers," *Financial Post* (January 6, 1995), at p. 5; see the discussion regarding the impact on RRSPs resulting from insurer insolvency in Peter M. Viitre, "Some Life Insurance RRSPs Offer Protection on the Insolvency of the Insurer," (1995) 2 *RRSP Plan* 158.

⁴⁷⁰ David K. Foot & Daniel Stoffman, *Boom, Bust & Echo: How to Profit from the Coming Demographic Shift*, (Toronto: Macfarlane Walter & Ross, 1996), at p. 46.

⁴⁷¹ Eric Beauchene, "Markets still luring more RRSP money," *Ottawa Citizen* (October 15, 1997), at p. D2.

⁴⁷² See Mark MacKinnon, "RRSP contributions expected to fall this year," *The [Toronto] Globe & Mail* (February 15, 1999), at p. B7; Delean, *infra*, footnote 480; and Delean, *infra*, footnote 474.

⁴⁷³ See Rob Carrick, "Loading up with stocks adds risk to RRSP," *The [Toronto] Globe & Mail* (February 13, 1999), at p. B7; MacKinnon, *supra*, footnote 472; Delean, *infra*, footnote 480; Tracey LeMay, "Cash Is King Among RRSP Investors," *National Post* (February 26, 1999), at p. D1; Delean, *infra*, footnote 474; Shirley Won & Andrew Bell, "Funds' RRSP sales tumble," *The [Toronto] Globe & Mail* (March 3, 1999), at p. B15; Tony Wanless, "RRSP parking spaces on ly temporary," *National Post* (March 12, 1999), at p. D4; and Kristin Goff, "Mutual fund sales slow during peak season," *The [Ottawa] Citizen* (March 16, 1999), at p. E1.

⁴⁷⁴ See Carolyn Leitch, "RRSP contributions hit record in 1997," *The [Toronto] Globe & Mail* (December 3, 1998), at p. B7; and Paul Delean, "It's last call for 1998 RRSPs," *The [Montreal] Gazette* (March 1, 1999), at p. F3.

among RRSP contributors have been varied. Despite some initial optimism to the contrary,⁴⁷⁵ contributions into mutual and equity funds have dropped substantially.⁴⁷⁶ Notwithstanding the prevailing interest rates, the current investment trend has been towards money market products. Deposits in GICs have risen significantly.⁴⁷⁷ Other similarly guaranteed investment vehicles, including equity-linked notes,⁴⁷⁸ insurance industry segregated funds,⁴⁷⁹ and bonds⁴⁸⁰ have generated interest among RRSP contributors. Needless to say, investment markets have been in a state of flux. The dynamics of the market in turn have brought about changes in RRSP contribution patterns. The placement of new contributions, however, has not been the sole cause for the shift in market shares. Existing funds have been moved from one investment vehicle into another in response to changing market conditions. Initially, there was an outflow of contributions from GICs into mutual funds,⁴⁸¹ but the trend has since reversed as plan holders switch back to term deposits.⁴⁸²

It is difficult to gauge the impact of the financial planning community on the strategic market positions of fund managers as there appears to be little consistency in the advice offered by financial planners. Investment strategies vary any where from extolling the virtues of the maximum

⁴⁷⁵ See Susan Heinrich, "Mutual funds face slow RRSP season," *National Post* (December 16, 1998), at p. D1; and Andrew Bell, "Mutual fund sales sluggish despite RRSP deadline," *The [Toronto] Globe & Mail* (February 25, 1999), at p. B12.

⁴⁷⁶ See Bell, *infra*, footnote 486; Bell, *ibid.*; Delean, *supra*, footnote 472; Heinrich, *infra*, footnote 478; Susan Heinrich, "Last-minute RRSP rush fails to boost fund sales," *National Post* (March 3, 1999), at p. D4; Won & Bell, *supra*, footnote 473; and Bell, *infra*, footnote 481.

⁴⁷⁷ See Bell, *infra*, footnote 486; Bell, *supra*, footnote 475; LeMay, *supra*, footnote 473; Delean, *supra*, footnote 474; Heinrich, *infra*, footnote 478; Heinrich, *ibid.*; and Won & Bell, *supra*, footnote 473.

⁴⁷⁸ See Johnson, *supra*, footnote 462; LeMay, *supra*, footnote 473; Delean, *infra*, footnote 480; and Susan Heinrich, "Canadians' love affair with RRSPs cooling off," *National Post* (March 2, 1999), at p. A1.

⁴⁷⁹ See Brian Lewis, "Slim times cut RRSP offerings," *Windsor Star* (February 15, 1999), at p. B5; Johnson, *supra*, footnote 462; Won & Bell, *supra*, footnote 473; and Jonathan Chevreau, "Mutual fund RRSP sales slump 29% from last year," *National Post* (March 16, 1999), at p. D1.

⁴⁸⁰ See Lewis, *ibid.*; and Paul Delean, "Protected capital offers security, but at a high cost," *Ottawa Citizen* (February 16, 1999), at p. F1; but see Jonathan Chevreau, "Deflation looms as threat to investors," *National Post* (March 2, 1999), at p. D1.

⁴⁸¹ See Won & Bell, *supra*, footnote 473; and Andrew Bell, "RRSP sales not seen as a key market mover," *The [Toronto] Globe & Mail* (March 4, 1999), at p. B13.

⁴⁸² See LeMay, *supra*, footnote 473; and Won & Bell, *supra*, footnote 473.

diversification offered by self-directed RRSPs⁴⁸³ to staying away from RRSPs investments altogether. The latter camp is divided between proponents of investing outside of tax shelters and advocates of debt reduction over retirement savings.⁴⁸⁴ Some planners propose an income tax minimization approach, which calls for the maintenance of high return investments under an RRSP umbrella; whereas, assets producing capital gains would be kept outside of the shelter.⁴⁸⁵ Others have concentrated their efforts on examining the tax advantages of such potentially high yield opportunities as labour sponsored venture funds.⁴⁸⁶ Meanwhile, in an attempt to recoup its lost share of the investment market, the insurance industry has turned its attentions to the development of investment products outside of the realm of RRSPs.⁴⁸⁷

It is suggested that the concerns expressed in *Maritime Life Assurance Company v. The Queen*⁴⁸⁸ over potential disruption of the conduct of the insurance business, are totally unwarranted. The insurance industry and, for that matter, all of the institutional participants in the RRSP investment community, appear to be quite resilient to market disruptions. Fund managers and financial planners react to market changes adroitly. Opportunities are neither lost nor squandered. The strategies which have been developed to maximize profits from the up-coming generation-to-generation transfer of wealth,⁴⁸⁹ are but one example of the inherent business acumen. The insurance industry is a highly

⁴⁸³ See Paul Marck, "Self-directed means control," *Windsor Star* (February 15, 1999), at p. B5.

⁴⁸⁴ See Paul Delean, "Contributions to RRSPs can be delayed," *Ottawa Citizen* (February 16, 1999), at p. F9.

⁴⁸⁵ See Jeff Buckstein, "For some investors, RRSP contributions deserve back seat," *The [Toronto] Globe & Mail* (February 9, 1999), at p. C3; and Barnes, *supra*, footnote 462.

⁴⁸⁶ See Andrew Bell, "Sales slow before RRSP deadline," *The [Toronto] Globe & Mail* (February 12, 1999), at p. B13; Dunnery Best, "Venture funds a top tax tool, and a solid RRSP option," *The [Toronto] Globe & Mail* (February 13, 1999), at p. B7; and Paul Delean, "RRSPs more than retirement plans," *Calgary Herald* (February 14, 1999), at p. G1.

⁴⁸⁷ See Jonathan Chevreau, "Insurance emerging as key tool," *Financial Post* (October 3, 1997), at p. 23; and Risha Gottlieb, "The 'secret' alternative to the RRSP," *Toronto Star* (December 10, 1998), at p. K8.

⁴⁸⁸ *Supra*, footnote 135.

⁴⁸⁹ See Colin Freeze, "Boomers 'won't blow' \$1-trillion windfall," *Ottawa Citizen* (July 10, 1997), at p. A1; and (unsigned), "Boomers to inherit \$1-trillion," *The [Toronto] Globe & Mail* (May 27, 1998), at p. C3; see also Jane Birnbaum, "Of Inheritance and Raptured Relations: A Final Accounting," *The New York Times* (July 9, 1995), at p. 8, wherein it is estimated that the baby boomers in the U.S. stand to inherit in excess of \$10-trillion.

sophisticated member of the RRSP investment community. In this regard, it is hardly in the need of judicial intervention to prevent disruption which might be caused as a result of the garnishment of RRSP funds. On the contrary, it would seem that the members of the bench might do better to avoid directing too much concern over the fortunes of the RRSP investment community. Indeed, the survival instincts of the participants are sufficiently well honed to have caused attention to be drawn to a proclivity to maximize self-interests over that of investors and others, and this apparent preoccupation has, on occasion, given rise to:

... concerns that private pension fund managers respond to indicators that do not always lead toward the most productive long-term investments. There is concern, for example, that pension fund managers are judged by performance criteria that emphasize paper gains at the expense of fundamentals [and] that promote the manipulation of financial portfolios rather than real asset formation ...⁴⁹⁰

The foregoing analysis suggests that, from the point of view of policy objectives, there does not seem to be any justification for according undue consideration to the interests of the insurance industry over the garnishment claims of creditors, particularly the claims of the Crown for tax arrears. The position adopted in *Maritime Life Assurance Company v. The Queen*,⁴⁹¹ needs, therefore, to be rationalized from a different perspective. It should be noted, in this regard, that the policy objectives behind the responsibility of individuals to provide for future retirement needs vis-à-vis the obligation to pay taxes have already been canvassed at length. Hence, one might argue that the position taken in the foregoing case can only be rationalized from the individual perspective of the judge who actually rendered the decision. It is suggested with all due respect, that the matter goes to the issue of the “vagaries of the ‘personal’ element in fact finding.”⁴⁹² However, in all fairness, it should be

⁴⁹⁰ Canada, *Report of the Parliamentary Task Force on Pension Reform*, Minutes of Proceedings and Evidence of the Special Committee on Pension Reform, Issue No. 38, Tuesday October 25, 1983 - Wednesday November 23, 1983 (Chair: Douglas C. Firth), (Ottawa: Supply & Services Canada, 1983), at pp. 39-40.

⁴⁹¹ *Supra*, footnote 135.

⁴⁹² Jerome Frank, *Courts on Trial: Myth and Reality in American Justice*, (Princeton, N.J.: Princeton U. Press, 1949), at p. 46.

pointed out that the resistance against allowing garnishment to succeed against RRSP funds is relatively widespread. Even when faced with the reality of an accepted industry practice which effectively permits RRSP plans to be collapsed at will prior to maturity, the prevailing tendency is to deny the application of garnishment to the circumstances. Substantial distinctions are made between contractual rights and ones which are given as a matter of practice.⁴⁹³ Incidental rights, it is argued, should not be allowed to prevail over primary rights,⁴⁹⁴ but no thought is ever given to the possibility that the whole thing may be nothing more than a cleverly orchestrated sham.⁴⁹⁵

In effect, the insurance company gets to continue to retain its market niche by offering a product which is creditor-proof; whereas, the debtor plan holder has the benefit of both the protection as well as opportunity to withdraw at any time the contributions paid into the plan. Who ever said that you could not have it both ways. The outcome of the situation would seem to suggest that there may be a reluctance on the part of certain members of the bench to reconcile themselves with the subtle differences between judgment-proofing and attempts to avoid payment of legitimately incurred debts. Perhaps it is just collective naivete or simply a case of judicial myopia. The reasons may not be important, but there is still a reality which has to be reconciled. The inescapable fact is that there are individuals who have little interest or no intention of paying their taxes. In some instances, it is a

⁴⁹³ See footnote 434, *supra*, and accompanying text.

⁴⁹⁴ Geneviève Faribault, "Exemption from Seizure as it applies to: Life Insurance Policies, Individual and Group Annuities and Registered Retirement savings Plans," (1981) 1 *Insolvency Bulletin* 3, at p. 5, reprinted in Canada, *Bankruptcy and Insolvency: Collection of Articles*, (Ottawa: Consumer & Corporate Affairs Canada, 1982), at p. 33.

⁴⁹⁵ See *Snook v. London & West Riding Investments Ltd.*, [1967] 1 All E.R. 518 (C.A.), wherein at p. 528 it was held that,

... if any, legal concept is involved in the use of this popular and pejorative word ... that [is], if it has any meaning in the law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. One thing ..., however, is clear in legal principle, morality and the authorities ..., that for acts or documents to be a "sham", with whatever legal consequences follow from this, all parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of the "shammer" affect the rights of a party whom he [or she] deceived.

Note, that the foregoing definition was adopted into Canadian jurisprudence in *M.N.R. v. Cameron* (1972), 72 DTC 6325 (S.C.C.), at p. 6328.

matter of indifference or disregard towards tax obligations.⁴⁹⁶ In other cases, the issue is one of outright refusal to pay taxes.⁴⁹⁷ Some tax debtors are quite comfortable with the idea of having others pay their share of the cost of running the country.⁴⁹⁸ Others take the view that the maintenance of a certain standard of living takes precedence over the payment of taxes.⁴⁹⁹ The fact situation in *Re Katari*,⁵⁰⁰ provides a good illustration of the latter category of tax debtor. Taking into consideration the tax debtor's predisposition towards avoiding the payment of tax, the Court balanced the pertinent policy implications, as follows:

... arrears of income tax are in a different category than other debts. Such arrears represent moneys which the bankrupt was obliged by law to forward to Revenue Canada Taxation, and as a result of the bankrupt's failure to carry out his duty he has made an assignment in bankruptcy and now seeks a discharge from such bankruptcy. The majority of Canadian citizens pay their tax when due and as a result have substantially less money available for the purchase of goods and services. The bankrupt in this case was able to retain the moneys which rightfully belonged to Revenue Canada and to enjoy the goods and services which such moneys provided.

.....

The [bankrupt's] family has in the past enjoyed a higher standard of living than they were entitled to enjoy as a result of the bankrupt's failure to pay his income tax and now there must be a taking into account with a resulting reduction in lifestyle in order to repay the government of Canada. A taxpayer who does not have his income tax deducted at source should not be in a better financial position than an employee taxpayer whose employer deducts income tax on a monthly basis ...⁵⁰¹

Lastly, in terms of tax debtors who have little interest or no intention of paying their taxes, there are those individuals who deliberately order their affairs in such a way as to avoid their tax

⁴⁹⁶ See *Re Munro*, *supra*, footnote 355, at p. 277; *Re Donahue*, *supra*, footnote 355, at p. 185; *Re Bick*, *supra*, footnote 355, at p. 3; *Re Debow*, *supra*, footnote 355, at p. 8; *Re Duff*, *supra*, footnote 355, at p. 2; and *Re Grosso*, *supra*, footnote 355, at p. 255.

⁴⁹⁷ See *Re Resnick*, *supra*, footnote 355, at p. 224; *Re Satish*, *supra*, footnote 355, at p. 221; *Re Gleeson*, *supra*, footnote 355, at p. 129; *Re Mariens*, *supra*, footnote 355, at pp. 1 & 6; *Re Somers*, *supra*, footnote 355, at p. 144; *Re Safatli*, *supra*, footnote 355, at p. 47; *Re Toal*, *supra*, footnote 355, at p. 40; and *Re Grossman* (1998), 3 C.B.R. (4th) 267 (Alta. Reg.), at p. 273.

⁴⁹⁸ See *Re Gallagher*, *supra*, footnote 355, at p. 116; *Re Chow*, *supra*, footnote 355, at p. 229; *Re Losier*, *supra*, footnote 355, at p. 1; *M.N.R. v. Sillito*, *supra*, footnote 355, at pp. 244-245; *Re Chadi*, *supra*, footnote 355, at p. 243; and *Re Kerr*, *supra*, footnote 355, at p. 3.

⁴⁹⁹ See *Re Johnson*, *supra*, footnote 355, at p. 111; *Re Katari*, *supra*, footnote 355, at pp. 183-183; *Re Goodman*, *supra*, footnote 355, at pp. 2-3; *Re McCann*, *supra*, footnote 355, at p. 1; and *Re Gates* (1998), 3 C.B.R. (4th) 263 (Alta. Reg.), at p. 265.

⁵⁰⁰ *Supra*, footnote 355.

⁵⁰¹ *Ibid.*, at pp. 183-184.

obligations.⁵⁰² The fact situation in *A.G. Can. v. Rahey*,⁵⁰³ reflects the lengths some tax debtors have gone to in order to render themselves free of seizure or attachment for the payment of taxes:

When his testimony was completed I was left with the impression that Carl Rahey has contrived to filter substantial sums of money through an elaborate screen of corporate and trust arrangements erected for the purpose of defeating his creditors.

.....

... it is unnecessary that I make specific determinations concerning the complex dealings cited by the applicant and I think it is sufficient that I refer only to several extraordinary banking schemes under which any interception of the revenues of Community Hotel Company Limited has been frustrated, arrangements under which interests in real estate are held in trust by other parties for no apparent reason, questionable inter-company transactions, a profit-sharing scheme under which the respondent Linda Rahey receives a salary but performs no services, a mortgage given to a creditor for double the amount of the actual debt and alleged trusts in favour of Mr. Rahey's daughter which are entirely undocumented.⁵⁰⁴

.....

... it is my opinion that the byzantine complexity of the respondents' affairs constitutes a more than substantial impediment in the way of normal modes of recovery ...⁵⁰⁵

Attempts to impede garnishment and execution are not solely constrained to the avoidance of tax obligations. The phenomena may be encountered in debtor-creditor relations where the Crown is not a party to the proceedings. In the recent case of *Baskind v. Lauzon*,⁵⁰⁶ garnishment was sought in order to attach the defendant's draws from a closely held corporation despite the fact that such draws do not constitute a debt due. The defendant took the position that he was under no moral obligation to honour his debts.⁵⁰⁷ The facts of the case indicated that he had organized his affairs so as to insulate his capital and income from judgment. The Court resolved the issue by characterizing the draws as salary and, therefore, open to garnishment. The result was rationalized on the basis of there

⁵⁰² See *A.G. Can. v. Rahey* (1980), 36 C.B.R. (N.S.) 280 (N.S.T.D.); and *Re Raymer*, *supra*, footnote 355.

⁵⁰³ *Ibid.*

⁵⁰⁴ *Ibid.*, at pp. 282-283.

⁵⁰⁵ *Ibid.*, at p. 284.

⁵⁰⁶ (1998), 82 A.C.W.S. (3d) 477 (Ont. Gen. Div.).

⁵⁰⁷ Michael Wilhelmson, "Garnished company to pay owner's judgment debt," *The Lawyers Weekly* (October 16, 1998), at p. 6.

being a great deal of equitable jurisdiction in the area of debtor-creditor law.⁵⁰⁸ It has been suggested that the “case will be held up by creditors faced with this sort of situation because it shows a willingness on the part of the court to cut through and get to what is really happening, and not let the debtor take advantage of all the obstacles that a creditor must jump over.”⁵⁰⁹ In this regard, the garnishment of RRSPs demands similar treatment.

CONSTITUTIONAL RAMIFICATIONS

The apparent hesitation or unwillingness of the courts to declare RRSPs open to administrative garnishment pursuant to the provisions of subsection 224(1) of the *Income Tax*, is not without recourse. The options, however, are limited. The issue could be pursued to the Supreme Court of Canada in an attempt to obtain a definitive ruling, but that does not presuppose that the Court would necessarily render a favourable decision. In the alternative, the provisions of subsection 146(2), which stipulate the prerequisite conditions under which a RRSP can be registered, could be amended. The amendment would provide that plans be subject to garnishment pursuant to subsection 224(1) notwithstanding any law or enactment of a province. Needless to say, whichever option were to be exercised, resistance by the RRSP investment community would be inevitable. The obvious argument would be that the application of the administrative garnishment provisions of subsection 224(1) under the circumstances was unconstitutional. The basis of the argument being that such an action would constitute an unwarranted intrusion into the exclusive provincial jurisdiction over property and civil rights.

The issue has not been canvassed by commentators to any great extent. Indeed, what little opinion has been expressed on the subject, is divided. On the one hand, it has been suggested that the Crown

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Ibid.*

would be able to enforce the garnishment of RRSPs protected by provincial legislation, as such provisions are not normally binding on the federal Crown.⁵¹⁰ At the other extreme, it has been advanced that in the application of administrative garnishment to collect income tax arrears, the Crown is subject to provincial execution laws.⁵¹¹ These positions need to be reconciled.

Distribution of Legislative Powers

It has been suggested that “most of the major constitutional cases have turned on the competition between one or more of the federal heads of power , on the one hand, and property and civil rights, on the other.”⁵¹² In terms of the present inquiry it is necessary to examine the scheme of distribution of federal and provincial legislative powers under the *Constitution Act, 1867*.⁵¹³ The relevant provisions are respectively subsections 91(3) and 92(13), which read:

91(3) The raising of Money by any Mode or System of Taxation.

.....

92(13) Property and Civil Rights in the Province.

Faced with competing claims under the various heads of power, the courts have developed a number of options to resolve an impasse; however, for the purposes of this paper it is necessary only to touch upon some of those options. The first involves ‘colourability’ which is invoked “when a statute bears formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction.”⁵¹⁴ In *Re Insurance Act of Canada*,⁵¹⁵ for example, the Judicial Committee of the Privy

⁵¹⁰ Walsh, *supra*, footnote 193, at p. 8.

⁵¹¹ Norwood, *supra*, footnote 218, at p. 259.

⁵¹² Hogg, *supra*, footnote 362, at §21.1. at p. 21:2.

⁵¹³ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (formerly *British North America Act, 1867*) hereinafter referred to as the *Constitution Act, 1867*.

⁵¹⁴ Hogg, *supra*, footnote 362, §15.5(f) (Rel. I -1998), at p. 15:16.

⁵¹⁵ [1932] A.C. 41 (P.C.).

Council struck down a federal tax statute which was classified as a disguised attempt to regulate insurance. Similarly in *A.-G. Alta. v. A.-G. Can.*,⁵¹⁶ a provincial tax was classified as a disguised attempt to regulate banking. In the context of the *Income Tax Act*, however, there can be no recourse to the application of ‘colourability’ in that it was held in *Caron v. The King*,⁵¹⁷ that “money raised by an income tax act is unquestionably money raised by a mode or system of taxation.”⁵¹⁸ Moreover, in *Reference Re Anti-Inflation Act*,⁵¹⁹ it was stated that,

The Parliament of Canada is authorized to raise money “by any mode or system of taxation”, and it would be an unusual case where this power, so apparently limitless, could be challenged as colourably used and thus make it appropriate for the Court to consider [sic] extrinsic material to show colourability.⁵²⁰

Given this unequivocal constitutional endorsement, the focus of this paper must now shift from the *Income Tax Act* as a whole, to an examination of the ‘matter’ of subsection 224(1) on its own. The ‘matter’ of a law has been characterized as the answer to the question: “what in fact does the law do and why?”⁵²¹ It has also been referred to as “a name for the content or subject matter of the law,” or the “leading feature or the true nature and character of the law,” in the sense that it is “the pith and substance of the law.”⁵²² In this respect, the decision in *Pembina on the Red Development Corp. v. Triman Industries Ltd.*,⁵²³ provides a thorough review of administrative garnishment in the overall contextual framework of the *Income Tax Act*. The case involved the considerably more onerous and

⁵¹⁶ [1939] A.C. 117 (P.C.).

⁵¹⁷ [1924] A.C. 999 (P.C.).

⁵¹⁸ *Ibid.*, at p. 1003.

⁵¹⁹ (1976), 68 D.L.R. (3d) 452 (S.C.C.).

⁵²⁰ *Ibid.*, at p. 469.

⁵²¹ Hogg, *supra*, footnote 362, at §15.5(a), at p. 15:7.

⁵²² *Ibid.*

⁵²³ (1991), 85 D.L.R. (4th) 29 (Man. C.A.), *aff’d* (1990), 2 C.B.R. (3d) 129 (Man. Q.B.).

intrusive provisions of subsection 224(1.2), which interfered with the pre-existing property rights of secured creditors.⁵²⁴ Despite the fact that the Crown was denied priority over such rights due to technical deficiencies and ambiguities in the language of the provisions, the decision is instructive from a constitutional perspective insofar as it was found that,

The purpose of the Act is not only to levy tax, but to collect it. ... The machinery for collection and enforcement under the Act is part of the very subject matter of s. 91(3) of the *Constitution Act, 1867* and not merely incidental to the raising of revenue ...⁵²⁵

.....

... the dominant or most important characteristic of the legislation in general falls squarely within the ambit of the raising of revenue under s. 91(3) of the *Constitution Act, 1867*. It is clearly necessarily incidental to the effective working of the Act.⁵²⁶

.....

... collection is an integral part of Parliament's taxation scheme and clearly authorized by s.91(3) of the *Constitution Act, 1867*. That is the pith and substance of the section. Necessity or the wisdom of the technique is not the issue; rather the question is whether the collection provisions fit within the scope of federal legislation.⁵²⁷

⁵²⁴ See footnote 46, *supra*.

⁵²⁵ *Supra*, footnote 523, at p. 34; cf. *Alberta (Treasury Branches) v. M.N.R.*, *supra*, footnote 46, at p. 617; see also *Canadian Asbestos Services Ltd. v. Bank of Montreal* (1992), 93 DTC 5001 (Ont. Gen. Div.), wherein at p. 5007 it was held that the "collection procedures are all part of the pith and substance of the Federal Legislation [the *Income Tax Act*]."

⁵²⁶ *Ibid.*, at p. 35.

⁵²⁷ *Ibid.*, at p. 36; cf. *M.N.R. v. Moss* (1997), 50 C.B.R. (3d) 294 (F.C.T.D.), at p. 307; see also *Reference Re Goods and Services Tax Act* (1992), 94 D.L.R. (4th) 51 (S.C.C.), wherein at pp. 65-67 it was held that,

The GST Act has significant effects within provincial jurisdiction, but it is impossible to say that the purpose of the Act is to produce these effects. The purpose of the Act is to raise revenue for the federal government, and the effects produced by the scheme on matters within provincial jurisdiction are incidental to this purpose.

It must still be decided, however, whether these incidental effects are sufficiently a part of the scheme of the GST Act that they are justifiable, despite the incursion upon provincial jurisdiction, on the "necessarily incidental" doctrine. The appropriate test has been stated by this court on a number of occasions, but in substance what is required is a high degree of integration between a scheme enacted pursuant to a valid federal objective, and those portions of the scheme which impinge upon provincial jurisdiction.

.....

The first step is to decide whether the impugned scheme in fact touches matters within provincial jurisdiction. If it does not, the inquiry ends, but if it does, then it is necessary to ask whether the legislation in question is enacted pursuant to some valid federal head of power. If the legislation is not enacted pursuant to a valid federal purpose, then of course it must be struck down. However, if it is enacted pursuant to a valid federal purpose, then it is necessary to determine whether the impugned provisions are "sufficiently integrated with the scheme that [they] can be upheld by virtue of that relationship". If the impugned provisions are not sufficiently integrated into the scheme as a whole, then they cannot be sustained as a valid exercise of federal power. However, if the test of integration is passed, then the provisions are supportable as an exercise of federal jurisdiction notwithstanding that they affect matters falling within the jurisdiction of the provinces.

.....

On the question of integration, I am of the opinion that Canada is correct to say that to sever the revenue-raising portions of the GST Act from those portions which do not raise revenue would be to change the character of the tax fundamentally, from a value-added tax to a federal retail sales tax.

.....

... the GST Act is enacted pursuant to a federal head of power under s.91 of the *Constitution Act, 1867*, and ... while the scheme it establishes does intrude upon matters traditionally falling under the provincial power over property and civil rights, the scheme is sufficiently well integrated into the GST Act as a whole that the intrusion upon provincial jurisdiction is justified.

The inclusion, however, of the *obiter dictum* remark that it was “not strictly necessary to decide whether the section, notwithstanding its strong constitutional footing, nonetheless offends subsection 92(13),”⁵²⁸ does raise some doubts. It is suggested, with all due respect, that the statement is superfluous. Indeed, once it was established that taxation was the pith and substance of the section, the fact that it affected property and civil rights was of no consequence. Support for this position may be found in case of *Friends of the Oldman River Society v. Canada (Minister of Transport)*,⁵²⁹ wherein it was held that,

... if the Guidelines Order is found to be legislation that is in pith and substance in relation to matters within Parliament’s exclusive jurisdiction, that is the end of the matter. It would be immaterial that it also affects matters of property and civil rights ...⁵³⁰

The wording of subsection 224(1.2) was subsequently amended to overcome the technical deficiencies and ambiguities in language, which had been identified earlier.⁵³¹ Needless to say, the intrusive nature of the amendment gave rise to further constitutional challenges. The constitutional validity of the provision was examined by the Saskatchewan Court of Appeal in *TransGas Ltd. v. Mid-Plains Contractors Ltd.*,⁵³² and the decision was later unanimously upheld by the Supreme Court of Canada. It should be noted, that the Court of Appeal concluded that,

In determining whether s. 224(1.2) is or is not *ultra vires*, it matters little ... that the moneys which can be attached do not in themselves constitute “taxes”. The more germane consideration is that such moneys are rendered attachable to satisfy taxes which the person to whom the moneys are payable ought to have remitted but did not. Nor ... is it accurate to

528 *Ibid.*, at p. 37.

529 (1992), 88 D.L.R. (4th) 1 (S.C.C.).

530 *Ibid.*, at p. 40; see also *Reference Re Goods and Services Act*, *supra*, footnote 527, wherein at p. 81 it was held that,

The GST thus falls squarely within s. 91(3). It is in pith and substance a mode or system of taxation, so one need not inquire any further about whether it might be justified as necessarily incidental to the legislative scheme. The fact that it may affect activities within provincial regulatory competence is of no moment.

531 Note, that the current wording of the amended provision is provided in footnote 46, *supra*.

532 1993), 101 D.L.R. (4th) 238 (Sask. C.A.), *aff’d* in (1994), 120 D.L.R. (4th) 715 (S.C.C.).

characterize the section as “a unique form of debt recovery legislation” as opposed to “taxation legislation”. It is a measure aimed at the realization of a tax indebtedness and is in that sense “taxation legislation”.

.....

... purpose of the impugned provision is clear - to effect expedient collection of the withheld tax money and thereby prevent its misappropriation [*sic*] or diversion to the tax debtor's other creditors. As such, it is part of the general scheme established by the government of Canada for the collection of taxes and falls squarely within s. 91(3) of the *Constitution Act, 1867*.⁵³³

Having dealt in general terms with the encroachment of section 224 on the provincial jurisdiction over property and civil rights, the issue will now be examined from the point of view where such encroachment is inconsistent or in conflict with an otherwise valid provincial statutory provision. Given that insurance type RRSPs are afforded protection from creditors under provincial insurance legislation, it is not difficult to envisage the ensuing clash. The potential conflict will, therefore, be analyzed in light of the constitutional doctrines of trenching and paramountcy.

The doctrine of trenching which enables the federal Crown to encroach on subject-matters entrusted to the provincial legislatures was expressed in the decision of the Judicial Committee of the Privy Council in the case of *Tennant v. Union Bank of Canada*.⁵³⁴ It was found therein, that it would be practically impossible to exercise the federal power over banking without interfering with property and civil rights in a province. Moreover, in the exercise of that power, Parliament could confer upon a bank privileges as a lender which provincial law does not recognize. So long as the federal legislation strictly related to the subjects enumerated in section 91 of the *Constitution Act, 1867*, it would be of paramount authority despite the fact that it trenched upon matters assigned by section 92 to the provincial legislatures.⁵³⁵ It was held that the legislative authority conferred upon Parliament by the wording of subsection 91(15) is not confined,

⁵³³ *Ibid.*, at p. 248.

⁵³⁴ [1894] A.C. 31 (P.C.).

⁵³⁵ *Ibid.*, at pp. 45-47.

... to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. It extends to the issue of paper currency, which necessarily means the creation of a species of personal property carrying with it rights and privileges which the law of the province does not, and cannot, attach to it. It also comprehends "banking", an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker.⁵³⁶

Trenching, "in this sense, is regarded as a valid encroachment on provincial power."⁵³⁷ Hence, despite the fact that subsection 224(1) of the *Income Tax Act* trenches upon the provincial jurisdiction over property and civil rights, it is argued that the powers and procedures thereunder are necessary and appropriate for the due functioning of the taxation system in Canada. Remaining to be determined, however, is the issue of whether the provision can prevail over the creditor protection provided under provincial insurance legislation. In this respect, the constitutional doctrine of paramountcy is "tied up with the trenching doctrine."⁵³⁸ It has been suggested that the doctrine of paramountcy has been adopted by the courts to address the situation "where there is a federal law and a provincial law which are (1) each valid, and (2) inconsistent."⁵³⁹ In terms of inconsistency, it

⁵³⁶ *Ibid.*, at p. 46.

⁵³⁷ Neil Finkelstein, *Laskin's Canadian Constitutional Law*, 5th ed., Vol. I (Toronto: Carswell, 1986), at p. 255.

⁵³⁸ *Ibid.*, at pp. 262-263 where it states that "it cannot escape notice that paramountcy is tied up with the trenching doctrine in the ... four propositions laid down in *A.-G. Can. v. A.-G. B.C.*, [1930] A.C. 111 (P.C.)," see. at p. 118:

(1.) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92: see *Tennant v. Union Bank of Canada*, [1894] A.C. 31 (P.C.).

(2.) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see *A.-G. Ont. v. A.-G. Can.*, [1896] A.C. 348 (P.C.).

(3.) It is within the competence of the Dominion Parliament to provide for matters which, through otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91: see *A.-G. Ont. v. A.-G. Can.*, [1894] A.C. 189 (P.C.); and *A.-G. Ont. v. A.-G. Can.*, [1896] A.C. 348 (P.C.).

(4.) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see *Grand Trunk Railway of Canada v. A.-G. Can.*, [1907] A.C. 65 (P.C.).

⁵³⁹ Hogg, *supra*, footnote 362, at §16.1, at p. 16:3.

was held in *Smith v. The Queen*,⁵⁴⁰ that unless the federal and provincial provisions in question conflict “in the sense that compliance with one involves a breach of the other,”⁵⁴¹ they can operate concurrently. This conclusion, according to the learned author, marks out “the narrowest possible meaning of ... paramountcy,” and as such, it “does not seem to be the state of the authorities.”⁵⁴² That position has been summarized as follows:

Provincial legislation may operate if there is no federal legislation in the field or if the provincial legislation is merely supplemental to federal legislation that is in the field. Duplicative provincial legislation may operate concurrently only when inseverably connected with supplemental provincial legislation, otherwise duplicative provincial legislation is [based on the negative implication (or covering the field) test] suspended and inoperative. Repugnant provincial legislation is always suspended and inoperative.⁵⁴³

With all due respect, however, it should be noted that since the time the foregoing position was enunciated, the Supreme Court of Canada has examined the doctrine of paramountcy on a number of occasions. These decisions indicate “that the negative implication test no longer has any place in Canadian constitutional law.”⁵⁴⁴ Indeed, in the decision in *Multiple Access Ltd. v. McCutcheon*,⁵⁴⁵ the Court had the opportunity to examine the position at length. Yet, despite the “powerful negative implication (or covering the field) argument [that] was available, ... the Court sustained the provincial law on the basis that there was no ‘actual’ or ‘operational’ conflict, in the sense of impossibility of dual compliance.”⁵⁴⁶ Dickson J. (as he was then) espoused the view that the doctrine

⁵⁴⁰ (1960), 25 D.L.R. (2d) 225 (S.C.C.).

⁵⁴¹ *Ibid.*, at p. 246.

⁵⁴² William R. Lederman, “The Concurrent Operation of Federal and Provincial Laws in Canada,” in *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada*, edited by William R. Lederman, (Toronto: Butterworths, 1981), at p. 256.

⁵⁴³ *Ibid.*, at p. 263.

⁵⁴⁴ Hogg, *supra*, footnote 362, at §16.4(a), at p. 16:10; see also at pp. 16:10-16:13 for a discussions of the other decisions.

⁵⁴⁵ (1982), 138 D.L.R. (3d) 1 (S.C.C.).

⁵⁴⁶ Peter W. Hogg, *Constitutional Law of Canada*, 2nd ed., (Toronto: Carswell, 1985), at p. 363 (note, that the reference was deleted in subsequent editions).

of paramountcy need only be invoked when it is impossible to comply with both legislative enactments. He stated that,

... the cases where overlapping provincial legislation has not been rendered inoperative cannot be validly distinguished on the basis that in each of them there were elements of difference between the provincial and federal legislation; there is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament.

.....

In principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconvenient things"; compliance with one is defiance of the other.⁵⁴⁷

It should be noted in this respect, that "a provincial law that is supplementary or duplicative of a federal law is not deemed to be inconvenient with the federal law."⁵⁴⁸ Based on the foregoing authorities, it is clear that creditor protection afforded under provincial insurance legislation is inconsistent with subsection 224(1) of the *Income Tax Act* in that it bars execution, seizure or attachment. In this respect, the conflict can be avoided on two fronts. It can be argued pursuant to the provisions of the *Interpretation Act*,⁵⁴⁹ that in the absence of an express provision binding the Crown, the provincial insurance legislation does not bind the Crown.⁵⁵⁰ This goes to the question of

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Multiple Access Ltd. v. McCutchen, *supra*, footnote 545, at pp. 23-24; cf. *Bank of Montreal v. Hall* (1990), 65 D.L.R. (4th) 361 (S.C.C.), wherein at p. 386 La Forest J. stated that,

... the determination that there is no repugnancy cannot be made to rest on the sole consideration that, at the end of the day, the bank might very well be able to realize on its security if it defers to the provisions of the provincial legislation. A showing that conflict can be avoided is a provincial Act is followed to the exclusion of the federal Act can hardly be determinative of the question whether the provincial and federal acts are in conflict, and hence, repugnant. That conclusion ... would simply beg the question. The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the federal legislative purpose. Absent this compatibility, dual compliance is impossible. Such is the case here. The two statutes differ to such a degree in the approach taken to the problem of realization that the provincial cannot substitute for the federal.

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Hogg, *supra*, footnote 362, at §16.4(a), p. 16:8.

⁵⁴⁹

R.S.C. 1985, c. I-21, s. 17, which provides as follows:

17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

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See *St-Cyr v. Société d'Administration et de Fiducie and The King*, *supra*, footnote 41, at p. 514.

whether a provincial legislature would have the capacity to bind the federal Crown. The issue is not without some doubt. Based on the decision in *Gauthier v. The King*,⁵⁵¹ it is arguable that the federal Crown was not bound by provincial legislation. On the other hand, in *Dominion Building Corp. v. The King*,⁵⁵² it was held by implication that “there was no constitutional impediment to a provincial law binding the federal Crown.”⁵⁵³ In this regard, it has been suggested that “where the federal Crown is engaging in activity which is regulated by provincial law, it should be bound by the law.”⁵⁵⁴ But that would not be applicable in the circumstances where the federal Crown is engaged in taxation. The general question need not be resolved at this juncture; indeed, the matter has been examined elsewhere by others.⁵⁵⁵ The answer in the context of this paper, however, comes back to the problem where a provincial law and a federal law each operate within their respective valid jurisdiction, but are inconsistent to the extent that dual compliance is not possible. The impasse in this case would be resolved by the application of the doctrine of paramountcy. The inconsistent or conflicting provision under the provincial insurance legislation would be rendered inoperative to the extent that it hampered the effective operation of section 224(1).⁵⁵⁶

Charter Concerns

While the doctrine of paramountcy might be available to resolve any inconsistency or conflict between two otherwise valid laws, it would offer no relief from what might otherwise be construed to be an unreasonable search in contravention of the provisions of the *Canadian Charter of Rights*

⁵⁵¹ (1918), 40 D.L.R. 353 (S.C.C.).

⁵⁵² [1933] A.C. 533 (P.C.).

⁵⁵³ Hogg, *supra*, footnote 362, at §10.9(d), at p. 10:19.

⁵⁵⁴ *Ibid.*, at p. 10:20.

⁵⁵⁵ *Ibid.*, at §109(d) & (f), at pp. 10:18-10:22; and Finkelstein, *supra*, footnot 537, at pp. 664 & 668;

⁵⁵⁶ *Sun Life Assurance Co. of Canada v. Canada (Department of National Revenue)*, *supra*, footnote 93, at p. 511.

and Freedoms.⁵⁵⁷ The provisions of subsection 224(1) have not been reviewed to any great extent in this regard. On the other hand, the enhanced garnishment provisions of subsection 224(1.2), which were discussed earlier, have been subjected to a close scrutiny. Given that those provisions are considerably more onerous and intrusive, an analysis of the outcome of that scrutiny should provide valuable insight as to how subsection 224(1) might fare in terms of the garnishment of RRSP funds.

It was argued at first instance in *TransGas v. Mid-Plains Contractors Ltd.*,⁵⁵⁸ that subsection 224(1.2) authorized an unreasonable search in violation of the rights guaranteed under the *Charter*. The argument must be examined against the background of the *obiter dictum* in *Hunter v. Southam Inc.*,⁵⁵⁹ wherein Dickson J. (as he was then) stated that,

... the interests protected by s. 8 are of a wider ambit than those enunciated in *Entick v. Carrington* [(1765), 95 E.R. 807 (C.P.)]. Section 8 is an entrenched constitutional provision. It is not therefore vulnerable to encroachment by legislative enactments in the same way as common law protections. There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass. It guarantees a broad and general right to be secure from unreasonable search and seizure.

.....

Like the Supreme Court of the United States, I would be wary of foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests beyond the right of privacy, but for the purposes of the present appeal I am satisfied that its protections go at least that far.⁵⁶⁰

The allusion to the possibility that a wider interpretation could be given to the purpose of section 8 of the *Charter* has since been repeated with approval.⁵⁶¹ Notwithstanding the foregoing *dicta*, it was

⁵⁵⁷ See section 8 of the *Canadian Charter of Rights and Freedoms*, which provides as follows:

8. *Everybody has the right to be secure against unreasonable search and seizure.*

⁵⁵⁸ (1991), 86 D.L.R. (4th) 251 (Sask. Q.B.).

⁵⁵⁹ (1984), 11 D.L.R. (4th) 641 (S.C.C.).

⁵⁶⁰ *Ibid.*, at pp. 651-652.

⁵⁶¹ See *R. v. Dymont* (1988), 55 D.L.R. (4th) 503 (S.C.C.), wherein at p. 512 La Forest J. stated that,

That case [*Hunter v. Southam Inc.*] dealt specifically with s. 8. It underlines that a major, though not necessarily the only, purpose of the constitutional protection against unreasonable search and seizure under s. 8 is the protection of privacy of the individual.

held at trial in *TransGas Ltd. v. Mid-Plains Contractors Ltd.*,⁵⁶² that subsection 224(1.2) did not violate section 8 of the Charter because the guarantee against unreasonable search and seizure did not extend to the seizure of property unless the seizure involved an invasion of privacy. The Court took the position that the possibility of the broader interpretation had since been foreclosed.⁵⁶³ Likewise on appeal, the Saskatchewan Court of Appeal refused to extend the scope of section 8 to cover what it termed “pure economic interests.”⁵⁶⁴ However, in the alternative that subsection 224(1.2) were to intrude upon the interests protected under section 8, the Court turned to the decision in *R. v. McKinlay Transport Ltd.*,⁵⁶⁵ to determine the reasonableness of such an intrusion.

In that case the Supreme Court of Canada found that a requirement for the production of information and documents issued pursuant to subsection 231(3) of the *Income Tax Act* constituted a seizure within the meaning of section 8 since it infringed upon the expectation of privacy. The seizure, however, was not found to be unreasonable. It was held that the standard of what is ‘reasonable’ in

⁵⁶² *Supra*, footnote 558.

⁵⁶³ *Ibid.*, at pp. 274-275, wherein MacPherson C.J.Q.B. states that,

While I have reservations as to the validity of the reasons for importing into s. 8 the limitations respecting property rights that logically apply under s. 7, I am nevertheless bound by what the Supreme Court of Canada as determined. While in *Southam*, *supra*, Dickson J. (as he was then), speaking for the full court, at p. 652 seemed to leave an open door whereby “the right to be secure against unreasonable search and seizure might protect interests beyond the right to privacy ...”, that door, in my view, was effectively closed by *Reference re: Section 94(2) of the Motor Vehicle Act* [(1985), 24 D.L.R. (4th) 536 (S.C.C.)] ..., and also by *Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research, Restrictive Trade Practices Commission)* (1990), 67 D.L.R. (4th) 161 [(S.C.C.)] ..., where, in each of the five judgments, there appears to be a recognition of privacy being an essential element (see La Forest J. at pp. 219 and 229, Lamer J. (as he was then) at p. 175, Wilson J. at pp. 209-10, L’Heureux-Dubé J. at pp. 284, 287, 289 and Sopinka J. at pp. 290 and 304). More recently we have the Supreme Court decision in *R. v. Kokesch* (1990), 61 C.C.C. (3d) 207 ..., where Sopinka J., in delivering the majority judgment, said at p. 228:

From the point of view of individual privacy, which is the essential value protected by s. 8 of the Charter, this illegal intrusion into private property must be seen as far from trivial or minimal. [emphasis in original]

It might be argued that *Reference re: Section 94(2) of the Motor Vehicle Act*, *supra*, and *Kokesch*, *supra*, were concerned primarily with “search” and not “seizure”, and that therefore less restrictive limitations should be applied in determining the rights secured by an unreasonable seizure. However, the broad sweep of the language used in *Kokesch*, *supra*, is to my mind sufficiently compelling to overcome any such argument.

⁵⁶⁴ *TransGas Ltd. v. Mid-Plains Contractors Ltd.*, *supra*, footnote 532, at p. 254.

⁵⁶⁵ (1990), 68 D.L.R. (4th) 568 (S.C.C.).

a given context, must be flexible.⁵⁶⁶ There is a distinction between seizures in the criminal or *quasi*-criminal context, and seizures in the administrative or regulatory context to which a lesser standard of reasonableness may apply depending upon the legislative scheme under review.

Applying this standard of review to subsection 224(1.2), the Saskatchewan Court of Appeal held that the provision did not infringe section 8. The Court stated that enhanced garnishment was:

... an instrument for collection of federal taxes. Since it would be impractical to require a government to resort to a court to collect such taxes, Parliament has established an expedient means whereby "withheld" tax deductions may be collected through administrative means.

Although no issue arises between the Minister and Mid-Plains, this garnishment or seizure does not prevent the respondents from seeking adjudication in court on the "entitlement" issue. TransGas, when faced with competing claims, paid the money into court so that entitlement to the moneys could be determined by the court. ... Accordingly, given the rights and protection afforded by law to the respondents in terms of the "entitlement" issue before the court, we hold that any alleged "seizure" under s. 8 is not unreasonable.⁵⁶⁷

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Note, that section 1 of the *Charter* provides that,

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

See also the proportionality test established by Dickson C.J.C. in *R. v. Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.), wherein at p. 227, speaking for the majority, Dickson C.J.C. outlined the considerations to be taken in relation to applying section 1 of the *Charter*. Two central criteria were established:

First, [relating to] the objective, which ... must be of "sufficient importance to warrant overriding a constitutionally protected right or freedom" ... The standard must be high in order to ensure that objectives which are trivial or discordant with principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Secondly, ... [after] a sufficiently significant objective is recognized, [it must be shown] ... that the means are reasonable and demonstrably justified [involving] ... "a form of proportionality test" ... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.

He then went on to enumerate, at pp. 227-228, the three components of the proportionality test:

[1] the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations ... they must be rationally connected to the objective.

[2] the means, even if rationally connected to the objective ... should impair "as little as possible" the right or freedom in question ...

[3] there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

.....
The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

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TransGas Ltd. v. Mid-Plains Contractors Ltd., *supra*, footnote 532, at pp. 255-256.

The decision, however, does not rule out the possibility of a section 8 challenge under different circumstances. Indeed, it was suggested that “different considerations might apply if ... [the] garnishment affected rights of personal dignity or privacy as well as property rights.”⁵⁶⁸ The case of *British Columbia (Deputy Sheriff) v. Canada*,⁵⁶⁹ is instructive in this regard. While the decision involved the enforcement of a certificate in lieu of judgment under subsections 223(2) and (3) of the *Income Tax Act*, the *obiter dictum* therein suggests that it is equally applicable to the administrative garnishment provisions of the Act. It was found that,

... the seizure of chattels under the *Income Tax Act* without any notice to the taxpayer of an intention to seize the chattels and without giving the taxpayer reasonable time, following the notice, to discharge the tax debt, in circumstances where there is no reasonable ground for a belief that the taxpayer intends to avoid the payment of the tax debt, may constitute an unreasonable course of conduct and an unreasonable seizure. The same is true of garnishment [provisions] ... under the enforcement scheme of the Act since they are equally within the definition of “seizure” ... [in section 8 of the *Charter*].

.....

A person who is subject to a seizure may well suffer losses far in excess of the amount of the debt that is discharged through the seizure. Those losses may extend beyond the direct value of the goods seized and may extend to injury to reputation and credit. The process is therefore likely to involve a serious invasion of a reasonable expectation of privacy.

.....

So I do not believe that the state should seize the goods of a subject in circumstances where the subject might well be expected to discharge his [or her] debt to the state voluntarily if he [or she] knew that if he [or she] did not do so within a short period he [or she] might be subject to such a seizure. A seizure in these circumstances, is likely ... to be unreasonable.⁵⁷⁰

On the other hand, the Court held that the scheme for the enforcement of income tax obligations would not be unconstitutional on the basis of being contrary to section 8 of the *Charter*, if the scheme were to be confined,

... to cases where notice had been given to the taxpayer of the imminence of the seizure if payment of the tax obligation was not made promptly, and to cases where it was established

⁵⁶⁸ *Ibid.*, at p. 254.

⁵⁶⁹ (1992), 90 D.L.R. (4th) 680 (B.C.C.A.).

⁵⁷⁰ *Ibid.*, at pp. 692-693; see *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.* (1982), 135 D.L.R. (3d) 1 (S.C.C.); cf. *Mister Broadloom Corp. (1968) Ltd. v. Bank of Montreal* (1983), 4 D.L.R. (4th) 74 (Ont. C.A.), leave to appeal refused in (1984), 3 O.A.C. 320 (S.C.C.).

by a process involving a proper measure of impartiality that such a notice could not be given without jeopardizing the prospects of enforcing the obligation.⁵⁷¹

In light of these strictures, an examination is warranted of the safeguards which are in place to protect tax debtors from unreasonable seizure. In this respect, there are certain constraints under the *Income Tax Act* which limit the scheme of the collection of income tax arrears to ensure such protection. While all amounts assessed are payable forthwith upon assessment,⁵⁷² section 225.1 restricts the collection of unpaid amounts. The provision precludes various enforcement actions from being taken until 90 days have elapsed from the issuance of the notice of assessment⁵⁷³ or until such time as any objection to or appeal from the assessment has been disposed of.⁵⁷⁴ Immediate enforcement action can otherwise only be taken upon express judicial authorization in such circumstances where delay might reasonably jeopardize the collection of the amount payable.⁵⁷⁵

In addition to the foregoing statutory safeguards, tax debtors also have the benefit of protection which is accorded as a matter of policy. If the balance owing is not paid following the demand for payment contained in the notice of assessment, further requests for payment will be made, either by

⁵⁷¹ *Ibid.*, at p. 695.

⁵⁷² See R.S.C. 1985 (5th Supp.), c. 1, s. 158.

⁵⁷³ See R.S.C. 1985 (5th Supp.), c. 1, s. 225.1(1), which provides:

(1) Where a taxpayer is liable for the payment of an amount assessed under this Act, other than an amount assessed under 152(4.2), 169(3) or 220(3.1), the Minister shall not, for the purpose of collecting the amount,

(a) commence legal proceedings in a court,
(b) certify the amount under section 223,
(c) require a person to make a payment under subsection 224(1),
(d) require an institution or a person to make a payment under subsection 224(1.1),
(e) require the retention of the amount by way of deduction or set-off under section 224.1,
(f) require a person to turn over moneys under subsection 224.3(1), or
(g) give notice, issue a certificate or make a direction under subsection 225(1)

until after the day that is 90 days after the day of the mailing of the notice of assessment.

⁵⁷⁴ See R.S.C. 1985 (5th Supp.), c. 1, s. 225.1(2), (3), (4) & (5).

⁵⁷⁵ See R.S.C. 1985 (5th Supp.), c. 1, s. 225.2.

mail or by telephone.⁵⁷⁶ The use of administrative measures, including garnishment, to enforce the payment of income tax obligations is usually a last recourse to deal with debtors who do not pay voluntarily.⁵⁷⁷ In this regard, mutual accommodation is sought. If, after having accessed all reasonable means of retiring the tax arrears, the tax debtor is still unable to pay the balance in full, payment arrangements will be considered.⁵⁷⁸ Indeed, it is recognized that,

legitimate financial difficulties do arise from time to time which preclude the immediate retirement of a tax liability. In such instances, arrangements may be made to retire the tax debt over time commensurate with the taxpayer's ability to pay and without creating undue hardship. Moreover, where a taxpayer is not able to enter into payment arrangements owing to an inability to pay, collection of the arrears will normally be suspended until the taxpayer's financial situation improves.⁵⁷⁹

It is acknowledged that the garnishment of RRSP funds under subsection 224(1) of the *Income Tax Act*, would involve a seizure within the meaning of section 8 of the *Canadian Charter of Rights and Freedoms*. However, given the safeguards which are available, it is suggested that it would not constitute an unreasonable seizure. Constitutional concerns over the use of the garnishment remedy in such a case would be surmountable. Subsection 224(1) in this respect would be a reasonable infringement of the expectation of privacy. Likewise, the intrusion into the provincial jurisdiction over property and civil rights would be permissible insofar as the object would be within the federally valid jurisdiction over taxation. In this context, the administration of that jurisdiction requires decisions over policy, which includes "the establishment of a policy as to the means of and methods of enforcement."⁵⁸⁰

⁵⁷⁶ See Revenue Canada, Income Tax Information Circular IC98-1, "Collections Policies" (July 13, 1998), at p. 2.

⁵⁷⁷ Skulski, *supra*, footnote 449, at pp. 8:16-8:17.

⁵⁷⁸ Revenue Canada, *supra*, footnote 576.

⁵⁷⁹ Skulski, *supra*, footnote 449, at p. 8:17.

⁵⁸⁰ *R. v. Hauser* (1979), 98 D.L.R. (3d) 193 (S.C.C.), at p. 200; cf. *Hutterian Brethren Church of Morinville v. Royal Bank of Canada*, *supra*, footnote 36, at p. 5287.

CONCLUSION

It would be simplistic to dismiss the controversy over the exigibility of RRSPs by garnishment on account of income tax arrears as nothing more than a matter of statutory interpretation. The courts are quite capable of dealing with issues of statutory interpretation. Nor is it simply a question of competing policy considerations. Indeed, there are no doubts about the role of Parliament in regulating competing policy considerations. The issue of the garnishment of RRSPs, however, is a great deal more convoluted in that it impacts on the agenda of powerful economic interests. In this regard, there is no shortage of champions ready to represent those interests and, if need be, to influence the processes of statutory interpretation and policy consideration.

It is arguable that the wording of subsection 224(1) of the *Income Tax Act* is sufficiently broad to permit the effective garnishment of moneys in a RRSP, but the issue is not without doubt. The breadth of the provision was recently examined in the case of *National Trust Company v. The Queen*.⁵⁸¹ wherein the Federal Court of Appeal held that the phrase 'liable to make payment' contained in subsection 224(1), was not just limited to the existence of a debtor-creditor relationship.⁵⁸² The case, however, was decided on narrow grounds. The plan holder had made a demand for payment; hence, the plan manager was liable to make payment both in contract and in law. The majority of the Court expressly chose not to deal with the issue of whether a trust and a debt could co-exist; likewise, any discussion of the practical and commercial nature of RRSPs was avoided.⁵⁸³ A minority concurring opinion was filed, but it does not bring closure to the matter. Nevertheless, it is instructive in the context of this paper in that the reasons set out illustrate the ongoing dilemma, as follows:

⁵⁸¹ (1998), 162 D.L.R. (4th) 704 (F.C.A.), rev'g (1996), 96 DTC 1832 (T.C.C.).

⁵⁸² *Ibid.*, at p. 715.

⁵⁸³ *Ibid.*, at p. 719.

The language of the section [subsection 224(1)] is broad and encompasses the *trustee/cestui que trust* relationship. In my view, to confine it to a creditor-debtor relationship would be to ignore its breadth. In the future, however, when dealing with situations which require a trustee to breach its fiduciary obligation it would be helpful if the legislation set out clearly that this was the intent and the desired result. While the collection of tax is of the utmost importance, so also is the maintenance of the *trustee/cestui que trust* relationship which, I would note, is what the respondent sought at all times to uphold.

I would also stress that the applicability of this subsection to a trustee is limited. The only reason the respondent falls within the confines of subsection 224(1) is because the tax debtor instructed the trustee to pay the proceeds of his RRSP directly to him ... If the terms of the trust forbid the tax debtor from cashing out the trust, the respondent would not fall within the confines of subsection 224(1). Similarly, if there had been no request for payment made by the tax debtor the respondent would not be required to make payment as subsection 224(1) would not apply.⁵⁸⁴

The decision does not bode well for the outcome of any future cases which might come before the Court on the issue of the garnishment of RRSPs. The collection of tax may be of importance, but not at the cost of having to decide whether a trust and a debt can co-exist or that subsection 224(1) constitutes sufficient authority to collapse a RRSP where the plan holder has that right but has not exercised it. Instead, the Court has chosen to follow the decision in *DeConinck v. Royal Trust Corp. of Can.*⁵⁸⁵ The statement that “until a cestui que trust requests payment of the proceeds of an RRSP from his trustee ... no moneys are payable to him nor is his trustee liable to make payment to him within the meaning of subsection 224(1),”⁵⁸⁶ was cited with approval in this regard.⁵⁸⁷ In light of such dicta, there is little reason to believe that the Court would be prepared to deal with the practical and commercial nature of RRSPs. Nevertheless, should the Court ever decide that the accepted industry practice of allowing withdrawals on demand was no more than a perfunctory exercise and allow the application of garnishment to achieve the same end, the matter would not end there. There appears

⁵⁸⁴ *Ibid.*, at pp. 720-721.

⁵⁸⁵ *Supra*, footnote 132,

⁵⁸⁶ *Ibid.*, at p. 102.

⁵⁸⁷ *National Trust Company v. The Queen*, *supra*, footnote 581, at p. 718.

to be reluctance on the part of the Supreme Court of Canada towards allowing creditors access to RRSPs. For example, in the decision in *Royal Bank of Canada v. North American Life Assurance Co.*,⁵⁸⁸ it was held that,

... the policy of exempting life insurance investments and policies from execution or seizure under the ... [*Bankruptcy and Insolvency Act*], where family members are designated as beneficiaries, is sound. Given the importance in providing for the welfare of dependents upon the death of the insured, an insurance policy may be characterized as a necessity.⁵⁸⁹

It has been suggested that the direction taken by the courts in this regard, reflects the movement of government policy towards providing creditor protection to certain savings.⁵⁹⁰ This may be an accurate interpretation of the policy position of the provincial governments, but it does not necessarily embrace the position of the federal government. Indeed, the *Income Tax Act* has never contained any provision exempting RRSPs from execution or seizure.⁵⁹¹ The encouragement of individuals to save for their retirement so they do not “become a burden for the government of the day in their retirement years.”⁵⁹² is no doubt an accurate reflection of government policy. But even here, there is flexibility. What has been termed as the traditionally paternalistic attitude of “insisting that pension moneys be used to provide retirement income,”⁵⁹³ is not applicable to RRSPs. The

⁵⁸⁸ *Supra*, footnote 276.

⁵⁸⁹ *Ibid.*, at p. 201; note, that the Court further confirmed this sentiment at p. 211, by citing with approval from the decisions in *Re Geraci*, *supra*, footnote 292, as follows:

... it is better to permit injury to the creditors in what must prove a rare instance than to inflict the undoubted hardship of a forfeiture of a life's investment: (1969), 13 C.B.R. (N.S.) 86 (S.C.O.), at p. 94;

and

It does seem unjust that moneys paid in good faith over a period of years to secure a man's wife and children should be available to his creditors: (1970), 14 C.B.R. (N.S.) 253 (Ont. C.A.), at p. 259.

⁵⁹⁰ S. Wendy Del Mul, “Case Comment on *Christensen (Trustee of) v. Christensen*,” (1996) 41 C.B.R. (3d) 22, at p. 25.

⁵⁹¹ See Steven Kleiner, “Registered Retirement Savings Plans Owned by Bankrupts: Recent Change in the Law,” (1977) 24 C.B.R. (N.S.) 239, at p. 241.

⁵⁹² [unsigned], “RRSPs: Loopholes or Cornerstones?”, *Mercer Bulletin*, Vol. 44, No. 2 (February 1994), at p. 1.

⁵⁹³ Stephen Stuart, “Locked-In RRSPs,” (1991) 10 E. & T.J. 385, at p. 389.

promotion of early withdrawal privileges to enable the financing of housing or education, is indicative of the departure in policy direction. The fact that the majority of withdrawals are made by persons less than 55 years of age, is a clear indication that RRSPs have evolved beyond just being a means of retirement savings. In this respect, the issue of the exigibility of RRSPs for the payment of income tax arrears has little to do with retirement savings or financial security for next of kin. The issue is simply a question of judgment-proofing. Indeed, the vendors of RRSP products are quite candid about the matter as can be seen from the following excerpt out of an advertising supplement:

Ils présentent également une protection contre les saisies, formule intéressante pour les personnes qui travaillent à leur compte et qui sont susceptibles de poursuites en responsabilité civile, et une forme d'assurance-vie.⁵⁹⁴

The financial industry is quite unabashed by the prospect of assisting their clients to avoid their creditors. It is part of a strategy to secure market shares. The stakes are high. There is in excess of \$230 billion involved.⁵⁹⁵ Administration and service fees are charged at a rate of 1% to 2% on top of brokerage fees.⁵⁹⁶ The industry employs some 40,000 people.⁵⁹⁷ The industry cares little about the fortunes of creditors. Their presence is useful only to the extent that it stimulates creativity in product development. Given the protection against creditors which is accorded under provincial insurance legislation, it is a small wonder that banks are lobbying to get into the insurance business. The "easing [of] restrictions on banks' involvement in the insurance industry" would open the opportunity "to sell annuities."⁵⁹⁸ This is not the only front on which financial institutions are making progress. Indeed, having failed to secure creditor protection through the auspices of the advisory

⁵⁹⁴ [unsigned], "Votre Guide REER 1999 (2e partie)," Supplément Publicitaire, *L'actualité*, Vol. 24, No. 3 (March 1, 1999) 65, at p. 73.

⁵⁹⁵ See footnote 235, *supra*.

⁵⁹⁶ See footnote 239, *supra*.

⁵⁹⁷ Dennis Mills & Jerry White, *A Life Less Taxing: A Canadian Tax Evolution*, (Toronto: Warwick, 1998), at p. 107.

⁵⁹⁸ See Eric Beauchene, "Consumer protection key to bank reform," *Ottawa Citizen* (March 23, 1999), at p. C1.

committee on bankruptcy and insolvency reform,⁵⁹⁹ the industry has turned to other venues. The matter has been brought before the Uniform Law Conference of Canada, which is devoted to harmonizing statute law in Canada. A study has been undertaken of the public policy issues generated “by the manner in which retirement savings in a pension fund and retirement funds held in a RRSP are addressed differently under provincial and federal legislation in the context of debt enforcement.”⁶⁰⁰ Consultations have been held with interest groups. The list of stakeholders consulted⁶⁰¹ reads much the same as the membership of the advisory committee,⁶⁰² which examined the issue earlier in the context of bankruptcy and insolvency reform. Given the interests which were represented, the resolution subsequently passed hardly comes as a surprise, namely:

That a draft *Uniform Future Income Security Plan Exemption Act* and commentaries be prepared in accordance with the discussions for the consideration of the 1999 Conference, that would have the following constituent elements:

- (a) the extension of the exemption from exigibility of RPPs [registered pension plans] to RRSPs and DPSPs [deferred profit sharing plans];
- (b) that funds held in RRSPs and DPSPs would enjoy the protection of this exemption only so long as they retain their status as RRSPs and DPSPs under the *Income Tax Act*;
- (c) that the exemption from exigibility be extended to an RRIF [registered retirement income fund] based on these exempt funds;
- (d) that any payments out of an exempt RRIF would be subject to exigibility;
- (e) that the exemption would apply to “all debt and to all RRSPs and DPSPs” with the proclamation date for the legislation publicized well in advance; and
- (f) that the option of complementary amendments to the *Bankruptcy and Insolvency Act* be considered through the Bankruptcy and Insolvency Advisory Committee consultation process

⁵⁹⁹ See footnote 337, *supra*, and accompanying text.

⁶⁰⁰ Uniform Law Conference of Canada, “Creditor Access to Future Income Security Plans: Consultation Report,” in *Report of the Proceedings of the 1998 Annual Meeting, 1998 Conference Report*, (Ottawa: ULCC, 1998), at p. 1.

⁶⁰¹ *Ibid.*, see Appendix B (Consultation List - ULC Creditor Access to Income Security Plans Paper and Questionnaire).

⁶⁰² See Drake, *supra*, footnote 337, at pp. 1:3 & 1:10.

to provide that continued RRSP/DPSP status under the *Income Tax Act* is a statutory condition of discharge for any bankrupt who utilizes this exemption and that failure to comply with this condition would annul the order of discharge and re-establish the debt.⁶⁰³

The considerable amount of effort which has been put forth to safeguard RRSPs from creditors, warrants a closer scrutiny of the beneficiaries of that effort. Needless to say, that the vested interests of the fund managers have been canvassed sufficiently and as such do not require further discussion. The fund managers would suggest that the issue is not about market shares, but about the retirement needs of their clients and their families. But who exactly are these clients who merit such attention? Surely it is not every taxpayer, since 65% of their number do not contribute into RRSPs.⁶⁰⁴ Likewise, the net would be cast too widely if it were to be suggested that retirement income protection is required by everyone who contributes into a RRSP. The reality is that RRSPs have become "an important savings instrument for other purposes besides retirement."⁶⁰⁵ Indeed, in excess of 50% of RRSP withdrawals are for reasons other than retirement.⁶⁰⁶ Surely this process of elimination does not conclude with the suggestion that the remainder of the contributors are in need of such protection. That would be to say, that those contributors are either at risk of bankruptcy or otherwise wish to avoid or evade their creditors. No doubt there are those that have a genuine need to reduce exposure through judgment-proofing. Creditors who voluntarily extend credit to those individuals have the opportunity of ascertaining the risks involved.

⁶⁰³ See "Civil Section Resolutions" in Uniform Law Conference of Canada, *supra*, footnote 600, at p. 1.

⁶⁰⁴ See Christopher Regan, "A Case for Abolishing Tax-Deferred Savings Plans," in *When We're 65: Reforming Canada's Retirement Income System*, (Toronto: C.D. Howe Institute, 1996), at p. 68; Keith G. Banting & Robin Boadway, "Reforming Retirement Income Policy: The Issues," in *Reform of Retirement Income Policy: International and Canadian Perspectives*, edited by Keith G. Banting & Robin Boadway, (Kingston, Ont.: Queen's U. School of Policy Studies, 1997), at p. 18; Mills & White, *supra*, footnote 597, at p. 118; Dian Cohen, *The New Retirement: Financial Strategies for Life After Work*, (Toronto: Doubleday, 1999), at p. 92; and Linda McQuaig, "Hoopla over RRSPs leaves out 10 million 'invisible' Canadians," *National Post* (March 8, 1999), at p. C5.

⁶⁰⁵ Jack M. Mintz & Thomas A. Wilson, "Private Provision of Retirement Income: Tax Policy Issues," in *Reform of Retirement Income Policy: International and Canadian Perspectives*, edited by Keith G. Banting & Robin Boadway, (Kingston, Ont.: Queen's U. School of Policy Studies, 1997), at p. 212.

⁶⁰⁶ See Appendices "B" and "C".

The accumulation of income tax arrears places the Crown in the unique position of a non-consensual or involuntary creditor. Individuals whose taxes are deducted at source have little opportunity to incur tax arrears.⁶⁰⁷ That dubious privilege rests with those persons whose taxes are not deducted at source, namely, the self-employed. The majority of outstanding taxes in this regard, are owed by repeat and chronic tax debtors.⁶⁰⁸ It is also the self-employed that have the most to benefit from RRSPs in that they have no access to employer pension plans.⁶⁰⁹ In terms of strategic attempts to escape having to pay income taxes, experience has shown that the self-employed are the main abusers of the bankruptcy process.⁶¹⁰ Members of the professions, including physicians and lawyers, are the major culprits in this respect.⁶¹¹ From a tax compliance point of view, it is the self-employed, in particular the repeat and chronic tax debtors, who stand to benefit the most from any protection that is accorded to RRSPs. Ironically, it has been suggested that such protection is directed in part at the inequitable treatment of the self-employed, who unlike most employees, do not have the opportunity to contribute into pension plans which are immune from creditors.⁶¹²

The main public policy argument for affording RRSPs protection from execution, seizure or attachment, has been to provide for the retirement needs of contributors, particularly the self-employed, and their families.⁶¹³ The position taken has been justified by analogy to life insurance where the objective is to provide for dependents upon death.⁶¹⁴ It is suggested, with all due respect,

⁶⁰⁷ See footnote 86, *supra*, and accompanying text.

⁶⁰⁸ See footnote 89, *supra*, and accompanying text.

⁶⁰⁹ Mills & White, *supra*, footnote 597, at p. 106; see also footnote 6, *supra*.

⁶¹⁰ See Appendix "A".

⁶¹¹ *Ibid.*

⁶¹² *M.N.R. v. Anthony*, *supra*, footnote 198, at pp. 119-120.

⁶¹³ *Ibid.*, at pp. 119 & 130.

⁶¹⁴ See *Christensen (Trustee of) v. Christensen*, *supra*, footnote 198, at p. 17; see also *M.N.R. v. Anthony*, *supra*, footnote 198, at p. 119.

that the debate is not over 'widows-and-orphans'. At stake are two competing public policy issues, namely, the encouragement of planning and savings for future retirement needs versus the use of existing resources to service present debts, in particular the payment of income taxes. The debate, however, has been side-tracked by the self-serving agenda of fund managers. Their interests are, indeed, well served by any reference to the 'widows-and-orphans' issue. It stirs the emotions and distracts the observer away from the main agenda, namely, the concerns over market shares.

In terms of competing interests between debtors and creditors, judicial concern over 'widows-and-orphans' is well entrenched. The decisions of the Supreme Court of Canada abound with examples. There is an overriding concern for the support of families,⁶¹⁵ to the extent that the needs of families come ahead of those of creditors.⁶¹⁶ Provision for the welfare of dependants has been characterized as a necessity. The policy of exempting assets from seizure, where those assets provide for that welfare, has been held to be sound.⁶¹⁷ The feminization of poverty has been found to be an entrenched social phenomenon.⁶¹⁸ These concerns should not be dismissed lightly. Speculation over the possibility that radical feminist ideology has unduly influenced the development of the law,⁶¹⁹ serves no useful purpose in this debate. Such arguments merely play into the hands of the fund managers, who are only too appreciative of any distraction away from their agenda. On the other hand, when courts attempt to intervene in such areas of government policy as the provision of protection against creditors, there is the peril of opening-up the potential for abuse.⁶²⁰

⁶¹⁵ See *Marazetti v. Marazetti* (1994), 116 D.L.R. (4th) 577 (S.C.C.), at p. 602.

⁶¹⁶ See *Wallace v. United Grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1 (S.C.C.), at p. 26.

⁶¹⁷ See *Royal Bank of Canada v. North American Life Assurance Co.*, *supra*, footnote 276, at p. 201.

⁶¹⁸ See *Moge v. Moge* (1992), 99 D.L.R. (4th) 456 (S.C.C.), at p. 482.

⁶¹⁹ See Ian Hunter, "Courting criticism," *Ottawa Citizen* (March 30, 1999), at p. A15, wherein the author, a professor emeritus in the Faculty of Law at the University of Western Ontario, argues that the judgments of the Supreme Court of Canada "are today three parts ideology (usually culled from radical feminist sources) to one part law."

⁶²⁰ *Dei Mul*, *supra*, footnote 590, at p. 25.

It would be a disservice to attribute the potential for abuse solely to the intervention of the courts in the domain of government policy. The evolution of the law regarding the garnishment of RRSPs has been orchestrated on a number of fronts. No doubt vested interests have not hesitated to present a slanted point of view. It has been suggested, for example, that garnishment of RRSPs pursuant to subsection 224(1) of the *Income Tax Act* had been “turned back in a series of cases on the grounds that the Crown is bound by the provision of provincial execution laws.”⁶²¹ An examination of the cases cited,⁶²² reveals that the remedy which had been sought was a garnishee order under the *Federal Court Rules*,⁶²³ and the administrative garnishment provisions of subsection 224(1) were not in any way involved. Needless to say, that not all commentators can be relied upon to present an accurate interpretation of the law. On the other hand, close scrutiny of those cases where the Crown sought to garnish RRSPs on account of income tax arrears, reveals little attempt having been made to bring the background dynamics to the attention of the courts. Empirical analysis has not been introduced to balance the interpretation of policy objectives. The strategic jockeying by fund managers to retain market shares has not been examined. The resultant inconsistencies in outcomes are to certain a degree attributable to a “lack of incentive to focus on these issues.”⁶²⁴

The case law surrounding the garnishment of RRSPs, particularly on account of income tax arrears, demonstrates the perils associated with judicial intervention in the realm of public policy. The reference to public policy in this respect, is in the political context as opposed to the legal principle which enables courts to declare a contract invalid or illegal because it contravenes the ends of

⁶²¹ Norwood, *supra*, footnote 218, at p. 259.

⁶²² See *M.N.R. v. Abounassar and Canada Life Assurance Company*, (April 29, 1982), F.C.T.D., Marceau J. [unreported]; *M.N.R. v. Kanaan and Canada Life Assurance Company*, (April 29, 1982), F.C.T.D., Marceau J. [unreported]; *M.N.R. v. Roy and Confederation Life Insurance Co.*, (April 29, 1982), F.C.T.D., Marceau J. [unreported]; and *M.N.R. v. de Cotret and Confederation Life Insurance Co.*, (June 25, 1982), F.C.T.D., Décary J. [unreported].

⁶²³ C.R.C. 1978, c. 663, r. 2300.

⁶²⁴ See David A. Skeel Jr., “Rethinking the Line Between Corporate Law and Corporate Bankruptcy,” (1994) 72 *Texas L. Rev.* 471, at p. 529.

society.⁶²⁵ The likelihood of overlap between a government's political policies and social ends, however, is recognized. The adage that public policy is "a very unruly horse,"⁶²⁶ is equally applicable to the discovery of political policy as it is social ends. In either instance, "once you get astride it you never know where it will carry you."⁶²⁷ The determination of public policy is difficult in that values shift with time. The competing interests can only be resolved if such shifts are taken into consideration. The appeal from the decision in *Re Malenfant*⁶²⁸ will be an opportunity for the Supreme Court of Canada to examine ramifications of a trustee exercising a bankrupt's withdrawal privileges from an insurance policy. If public policy ramifications are effectively analyzed and argued, the case may prove to be of value in the determination of whether garnishment can effect the collapse of a RRSP where the plan holder has withdrawal privileges.

It should be noted, that the question regarding the exigibility of RRSPs for the payment of income tax arrears, is posed against a background of rising concerns over the provision of such social programs, as education, pensions, and health and medical care.⁶²⁹ It has been suggested, moreover, that due to declines in the standard of living, productivity, and international competitiveness, tax revenues may be insufficient to maintain social programs at existing levels.⁶³⁰ Given these observations, governments have two choices, namely, live with the reality or provide additional

⁶²⁵ Gerald H.L. Fridman, *The Law of Contract*, (Toronto: Carswell, 1976), at p. 317.

⁶²⁶ *Richardson v. Mellish* (1824), 130 E.R. 294 (C.P.), at p. 303; but see Lord Alfred T. Denning, *The Discipline of Law*, (London: Butterworths, 1979), at p. 172, wherein the quote is attributed to Hobart C.J.; see also *Fender v. Mildmay*, [1937] 3 All E.R. 402 (H.L.), at p. 406, wherein Lord Atkin makes reference to the "unruly horse" of Hobart C.J. Note, that a cursory review of the index and marginal notes in Sir Henry Hobart, *The Reports of that Reverend and Learned Judge, The Right Honorable Sir Henry Hobart Knight and Baronet, Lord Chief Justice of His Majesties Court of Common Pleas; and Chancellor to both Their Highnesses Henry and Charles Princes of Wales*, 3rd ed., (London: for William Lee, Allen Bank & Charles Harper, 1671), as well as the headnotes contained in the 5th ed. (by Edward Chilton, reprinted in 80 E.R. 151-490), reveals no mention of the statement.

⁶²⁷ *Ibid.*

⁶²⁸ (1997), 2 C.B.R. (4th) 303 (Que. C.A.), leave to appeal granted in (1998), 229 N.R. 396 (S.C.C.).

⁶²⁹ See Cohen, *supra*, footnote 604, at p. 35, 56, & 59.

⁶³⁰ See Jonathan Chevreau, "Taxed to death; retire at death," *National Post* (March 23, 1999), at p. D1; and Cohen, *ibid.*, at p. 8.

funding for the services demanded. It is suggested, that politically the former option is a non-starter; hence the latter option is the only viable alternative. A number of possibilities are available to raise the additional funding. Existing programs could be cut back, but this would be counter-productive given that the objective would be to increase program spending. The already high level of taxation could be raised; however, any further increases could result in diminishing returns.⁶³¹ Borrowing would no doubt be a means of raising the necessary funds; however, the existing national debt is already prohibitively high and the related carrying charges consume a disproportionate amount of the national budget. The only viable alternative appears to be a reduction in the cost of administering the business of government. This does not imply program reductions. The option looks to means of improving the effectiveness and efficiency of program administration. In the context of tax collection, this would mean maximizing revenue recoveries. The garnishment of RRSPs belonging to chronic and repeat tax debtors would contribute to this objective.

Given the reluctance of the courts to permit the use of subsection 224(1) of the *Income Tax Act* as a means of attaching the RRSPs of tax debtors, legislative amendments are proposed. It is suggested that provisions of subsection 146(2) of the Act be amended to the extent that the prerequisite conditions for the registration of RRSPs would provide for garnishment under subsection 224(1). The amendment could be deemed to be applicable to all RRSPs and would operate notwithstanding any federal statute, including the *Bankruptcy and Insolvency Act*, any enactment of a province or any

⁶³¹

See Victor A. Canto, Douglas H. Joines & Arthur B. Laffer, "Tax Rates, Factor Employment, Market Production, and Welfare," in *Foundations of Supply-Side Economics: Theory and Evidence*, edited by Victor A. Canto, Douglas H. Joines & Arthur B. Laffer, (New York: Academic Press, 1983), at pp. 9 & 17, wherein the authors argue that,

... tax revenue will increase initially with increases in the tax rates, but at a decreasing rate. The marginal tax revenue raised decreases with increases in tax rates, finally reaching some point where the marginal tax revenue raised is zero.

.....

... it is possible for tax rates to be so high as to generate less revenue than would be raised from lower tax rates.

See also Arthur B. Laffer, "The Complete Flat Tax," in *The Financial Analyst's Guide to Fiscal Policy*, edited by Victor A. Canto, Charles W. Kadlec & Arthur B. Laffer, (New York: Praeger, 1985).

other law.⁶³² In this manner, RRSPs would be exigible for the payment of income tax arrears, but the recourse would not be available to all creditors at large. The protection against execution, seizure or attachment provided under provincial legislation would to a large extent be preserved. The approach would avoid the argument that such interference in the construction and interpretation of contracts was an encroachment on provincial jurisdiction over property and civil rights.⁶³³ The object of the amendment would be within the federally valid jurisdiction over taxation.

⁶³² Note, that but for some minor exceptions, each of the enhanced garnishment provisions of subsection 224(1.2) and the deemed trust provisions of 227(4.1) of the *Income Tax Act*, operate notwithstanding any other provision of the Act, the *Bankruptcy and Insolvency Act*, any other enactment of Canada, any enactment of a province or any other law.

⁶³³ See David G. Roberts, "Registered Retirement Savings Plans," (1989) 37 *Can. Tax J.* 64, at p. 86.

Appendix "A"

Analysis of Oppositions to Discharge Involving Claims for Income Tax Arrears

Name of Bankrupt	Self-Employed	Professional	Other	Tax Liability	No. of Years Outstanding	Status of Discharge	Tax Driven	RRSP Impact	Multiple Bankruptcy
Doucet		dentist		350,000	unknown	conditional	1	1	
Romberg	entrepreneur			22,011	unknown	conditional	1		
Wortsmann	entrepreneur			146,000	unknown	denied	1	1	1
Markel		physician		37,911	unknown	absolute			
Johnson		physician		124,000	3	conditional	1		
Munro		dentist		34,366	unknown	conditional	1		
Scott	consultant			54,000	unknown	conditional	1		
Nelems		physician		62,000	1	absolute			
McAfee		lawyer		247,701	unknown	conditional			
Gatzke	entrepreneur			112,000	unknown	suspended			
Polman		physician		78,000	unknown	conditional		1	
Smith	consultant			70,000	unknown	conditional	1		1
Miller	entrepreneur			508,710	1	conditional	1		
Gallagher			commission	22,271	7	conditional	1		
Chow		lawyer		321,550	9	conditional	1	1	
Good		physician		180,000	3	absolute			
Katari	entrepreneur			40,000	7	conditional	1		
Phenix		dentist		166,000	unknown	conditional			
Steward		physician		123,000	3	conditional			
LaMothe			commission	281,000	unknown	conditional	1	1	
Rogers			commission	47,912	9	denied	1	1	1
Powell		dentist		89,586	unknown	conditional			
Nelson	consultant			27,000	unknown	conditional			
Robinson	entertainer			46,389	4	conditional	1		
Miller		physician		225,000	6	conditional	1		
Sub-Total	9	13	3	3,416,407	53		15	6	3

Appendix "A" Cont'd

Name of Bankrupt	Self-Employed	Professional	Other	Tax Liability	No. of Years Outstanding	Status of Discharge	Tax Driven	RRSP Impact	Multiple Bankruptcy
Balance Forward	9	13	3	3,416,407	53		15	6	3
McAfee		lawyer		150,941	8	suspended	1		
Kierdorf	entrepreneur			unknown	unknown	absolute			
Resnick			unknown	140,000	unknown	denied	1		
Resnick	entrepreneur			17,558	1	conditional			1
Tompkins			unknown	unknown	unknown	denied	1		1
Petit	sub-trade			19,912	unknown	denied	1		
Satish		physician		118,184	unknown	conditional	1		
Gleeson		physician		146,000	unknown	conditional	1		1
Woods		accountant		66,254	unknown	denied		1	
Ross		physician		120,000	2	conditional			
Demkiw		lawyer		74,026	unknown	absolute	1		
Fingold		lawyer		6,543	unknown	conditional			
MacDonald		lawyer		70,000	unknown	conditional		1	
Kritzinger		physician		60,000	1	conditional			
Heller		lawyer		52,000	unknown	conditional		1	1
Matheson		physician		193,662	4	conditional		1	
Chodos		lawyer		42,700	unknown	conditional		1	
Janowsky		lawyer		54,437	2	conditional			
Donahue		accountant		108,000	unknown	conditional	1		
Irwin		lawyer		326,276	3	conditional			
Losier			unknown	76,000	6	conditional	1		
Kerr			commission	unknown	unknown	conditional			
Wypich			unknown	105,851	unknown	conditional			1
Sillito		lawyer		280,000	5	conditional	1		
Toal		physician		267,000	4	conditional	1		
Rossi		physician		324,000	unknown	conditional	1		
Sub-Total	12	31	8	6,235,751	89		27	11	8

Appendix "A" Cont'd

Name of Bankrupt	Self-Employed	Professional	Other	Tax Liability	No. of Years Outstanding	Status of Discharge	Tax Driven	RRSP Impact	Multiple Bankruptcy
Balance Forward	12	31	8	6,235,751	89		27	11	8
Snider			salary	38,000	unknown	conditional			
Mann	entrepreneur			1,227,124	2	suspended			
Lees	entrepreneur			27,583	unknown	denied		1	
Bick			salary	unknown	unknown	conditional	1		1
Couchman			unknown	96,000	unknown	conditional			
Martens	entrepreneur			87,105	5	conditional	1		
Achilles	promoter			227,000	unknown	conditional	1		
Muboyayi		physician		451,440	unknown	conditional			
Duncan	entrepreneur			151,277	unknown	conditional			1
Debow		physician		382,000	unknown	conditional	1		
Somers		lawyer		364,000	unknown	conditional	1		
Crenian	developer			1,431,407	unknown	conditional			
Emmerton	carpenter			94,850	unknown	conditional	1		
Goodman	entrepreneur			384,277	unknown	conditional			
De Jager		physician		unknown	unknown	conditional	1		
Chadi			commission	64,062	5	conditional	1		
Nelson	consultant			41,256	unknown	conditional		1	
O'Reilly		lawyer		310,000	4	suspended	1		
Safati			salary	171,636	unknown	conditional	1		
DeWagner			unknown	27,000	unknown	conditional	1		
Letts	entrepreneur			85,390	unknown	conditional	1	1	
Eustace		physician		116,764	unknown	conditional	1		
Eustace		physician		132,386	unknown	conditional	1		
McDonald	contractor			30,705	unknown	conditional	1		
Mills			unknown	17,013	unknown	conditional			
Edwards			unknown	unknown	unknown	conditional			1
Sub-Total	23	38	16	12,194,026	105		42	14	11

Appendix "A" Cont'd

Name of Bankrupt	Self-Employed	Professional	Other	Tax Liability	No. of Years Outstanding	Status of Discharge	Tax Driven	RRSP Impact	Multiple Bankruptcy
Balance Forward	23	38	16	12,194,026	105		42	14	11
King	entrepreneur			235,522	unknown	conditional			
Johnson	entrepreneur			235,522	unknown	conditional			
McCann		lawyer		unknown	unknown	conditional	1		
Dewson			commission	140,220	2	conditional	1		
Ehlert	farmer			25,878	1	suspended			
Raymer	entrepreneur			100,000	5	denied	1		1
Huard		physician		133,264	2	suspended			
Graham	entrepreneur			203,494	7	conditional	1		
Graham	entrepreneur			5,799	7	conditional	1		
Brennan		physician		321,571	unknown	conditional		1	
Degagne	painter			17,422	6	conditional	1		
Hansen	trucker			27,220	1	conditional	1		
Lemaigre			unknown	5,912	3	absolute			
Baldwin	consultant			81,645	unknown	conditional		1	1
Duff			pensioner	17,470	9	conditional	1		
Munro			commission	78,000	4	conditional	1		
Grosso	entrepreneur			93,494	4	suspended	1		
Novak		lawyer		54,000	unknown	absolute			
Kerr			unknown	583,030	8	conditional	1		
Chambers	entrepreneur			21,646	3	conditional			
Rahall	entrepreneur			9,373	1	denied			
Ridyard		physician		1,412,665	6	conditional	1	1	
Evans		accountant		59,486	10	conditional	1		1
Baird		lawyer		600,000	11	conditional	1		
Ponting	entrepreneur			26,806	3	conditional	1		
Moss	contractor			361,449	7	denied	1		
Sub-Total	37	45	21	17,044,914	205		58	17	14

Appendix "A" Cont'd

Name of Bankrupt	Self-Employed	Professional	Other	Tax Liability	No. of Years Outstanding	Status of Discharge	Tax Driven	RRSP Impact	Multiple Bankruptcy
Balance Forward	37	45	21	17,044,914	205		58	17	14
Temple									
Kormos	farmer		unknown	151,062	7	suspended	1		
Friesen	unknown			51,901	9	conditional	1		
Waffle	unknown			58,631	4	conditional			1
				56,713	6	conditional			
Total	40	45	22	17,363,221	231		60	17	15
Analysis	37.4%	42.1%	20.6%	173,632	4.7		56.1%	15.9%	14.0%
Conditional (82)									
Denied (10)						76.6%			
Suspended (8)						9.3%			
Absolute (7)						7.5%			
						6.5%			
Physicians (22)		48.9%							
Lawyers (16)		35.6%							
Dentists (4)		8.9%							
Accountants (3)		6.7%							

Appendix "B"

Analysis of the Ages of RRSP Income Recipients

Age Group	1988	1989	1990	1991	1992	1993	1994	1995	Average
Under 25	13,080	13,430	18,240	21,170	18,560	18,470	20,320	20,750	18,003
25-29	41,130	45,040	53,280	62,270	54,800	61,620	55,000	67,150	55,036
30-34	63,230	65,880	76,030	83,690	79,030	85,540	98,360	107,260	82,378
35-39	62,720	60,120	78,330	87,970	87,020	90,060	99,890	120,710	85,853
Sub-Total	180,160	184,470	225,880	255,100	239,410	255,690	273,570	315,870	241,269
40-44	51,570	53,240	65,900	75,280	86,610	92,350	101,810	121,620	81,048
Sub-Total	231,730	237,710	291,780	330,380	326,020	348,040	375,380	437,490	322,316
45-49	40,410	41,330	50,890	66,490	72,470	85,490	88,790	106,160	69,004
Sub-Total	272,140	279,040	342,670	396,870	398,490	433,530	464,170	543,650	391,320
50-54	31,920	35,690	41,260	48,270	52,210	64,810	72,880	82,630	53,709
Sub-Total	304,060	314,730	383,930	445,140	450,700	498,340	537,050	626,280	445,029
55-59	49,950	45,870	50,840	61,660	62,370	68,800	70,850	85,140	61,935
60-64	62,130	62,370	70,840	80,640	83,440	83,950	90,750	94,950	78,634
65 and Over	95,660	100,520	101,430	119,710	151,010	136,970	125,150	123,300	119,219
Total	511,800	523,490	607,040	707,150	747,520	788,060	823,800	929,670	704,816
Analysis (%)									
Under 40 as % of Total	35.2%	35.2%	37.2%	36.1%	32.0%	32.4%	33.2%	34.0%	34.2%
Under 45 as % of Total	45.3%	45.4%	48.1%	46.7%	43.6%	44.2%	45.6%	47.1%	45.7%
Under 50 as % of Total	53.2%	53.3%	56.4%	56.1%	53.3%	55.0%	56.3%	58.5%	55.5%
Under 55 as % of Total	59.4%	60.1%	63.2%	62.9%	60.3%	63.2%	65.2%	67.4%	63.1%

Analysis of RRSP Income (\$ 000) Based on Age of Recipients

[illegible]

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