The Credit Consumer in Trouble: Remedies of Canadian Consumer Creditors

Ronald C.C. Cuming*

INTRODUCTION

It now has been recognized almost universally by scholars, judges, legislators and even the consumer credit industry that measures must be taken by society to avoid the socially unacceptable consequences which too often are by-products of an unregulated consumer credit market. For the last sixty years, social experimentation has been carried out in many jurisdictions in North America with a view to finding effective methods of dealing with this problem without inordinately disrupting a system which has been one of the factors contributing to the high standard of living enjoyed by most of us. A number of different methods designed to accomplish this goal have been studied and tried, including licencing of certain types of credit grantors so as to ensure that only those who meet certain standards of financial responsibility, honesty and fairness deal with the public; requiring full disclosure of the terms of credit contracts to credit consumers in the hope that this will allow them to avoid harsh credit agreements by contract shopping; giving credit consumers an ally in the form of a public official whose function is to represent their interests in conflicts with credit grantors; and limiting and regulating default remedies of credit grantors.

Although experience has shown that no method alone will provide an acceptable solution, it is becoming increasingly apparent that an effective legislative programme for consumer protection must necessarily concentrate on regulating the exercise of credit grantors' default remedies, since it is at this stage in most consumer credit transactions that much of the product of the gross inequality of bargaining power between credit grantors and credit consumers comes to the surface. Added to this is the fact that the general creditors' remedies which are available to consumer credit grantors are quite unsuited to twentieth century attitudes towards consumer debt. These remedies were developed as part of the legal structure of a creditor-oriented society which frowned on consumer debt and

* Assistant Professor of Law, University of Saskatchewan. This paper was presented at the Conference on Comparative Commercial Law held at McGill University, September 3-5, 1968.

which accepted with little reservation the principle that the state should do everything possible to assist creditors in collecting debts owing to them. The emergence of a credit-dominated society since the turn of the century has not been accompanied by a recognition that creditors must share some of the responsibility in cases where debtors become over-committed and are unable to meet their contractual obligations.

Added to this is the failure on the part of legislators to recognize the considerable divergence between the theoretical and actual effect of the exercise of many creditors' remedies. For example, while garnishment was designed to provide a method of enforcing a money judgment against a recalcitrant debtor, frequently its use means that the debtor loses his job and becomes a burden on society. The enforcement of a money judgment by execution against or the foreclosure of a security interest in the personal property of a debtor seldom produces much which can be applied toward the reduction of his debts, notwithstanding that the purpose of these remedies is to provide an alternative source from which to pay the debts. What is not taken into account is the fact that used consumer goods have very little resale value.

Potential hardship is magnified in Canadian jurisdictions because of antiquated bankruptcy laws which deny to most consumer debtors the ability to free themselves of an unbearable financial burden through personal bankruptcy proceedings. In addition, social welfare systems of most Canadian jurisdictions are quite primitive and still treat public aid recipients as second class citizens.

In this paper, I will briefly examine some of the more important remedies on which Canadian credit grantors rely in the event of default by consumer borrowers and retail instalment purchasers, hereafter collectively referred to as credit consumers. The two main sources to which credit grantors look for their remedies are the general debtor-creditor laws of the jurisdiction in which they carry on business and the adhesion or standard form contracts which they use when granting credit.

A. GENERAL DEBTOR-CREDITOR REMEDIES

Although a few Canadian jurisdictions still retain some of the less refined debt collecting methods, such as imprisonment,[1] which they inherited from medieval England, it is safe to say that their use is not of a great importance in the context of consumer credit

[1] See, *e.g.*, *Arrest and Examination Act*, R.S.N.B. 1952, c. 10, especially ss. 41-47.

transactions. However, every province makes provision for the enforcement of money judgments through garnishment of debtors' income and execution against their property, and it is apparent that credit grantors have not hesitated to use these remedies in appropriate situations. Generally speaking, these laws have remained substantially unaltered for many years, and still retain all of the harshness and inflexibility embodied in them when they were originally enacted. However, in fairness to some Canadian legislators, one must mention that for short periods in Canadian history, particularly during the Great Depression and drought of the 1930's, their hearts mellowed and in a few jurisdictions primarily in Western Canada these laws were modified by special debtor-relief legislation which was designed to deal with the abnormal hardships which debtors faced at that time. More recently, two Canadian provinces, in co-operation with the Federal Government, have adopted debtor-relief measures which, interestingly enough, are very similar conceptually and administratively to some of the depression legislation.[2] References will be made to these measures later in this paper.

1. Garnishment

One of the most potent weapons in a Canadian credit grantor's arsenal of remedies against defaulting debtors is the power to require that a portion of a debtor's income be seized at source and paid over to his creditors. Although there is little statistical evidence that garnishment is widely used by credit grantors, it is unreasonable to assume that they are ignoring such an effective remedy.

From a credit consumer protection point of view, the major objections to garnishment proceedings are not with respect to the conceptual basis of the remedy. If a recalcitrant debtor refuses to pay a debt, there should be little opposition to the use of a remedy which provides an efficient method of diverting a portion of his income to his creditors, provided that he gets enough of it to support himself and his family. However, the practical application of garnish-

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[2] After *The Orderly Payment of Debts Act*, 8 Eliz. II, S.A. 1959, c. 61 was ruled unconstitutional by the Canadian Supreme Court, (see *Reference Re Validity of the Orderly Payment of Debts Act*, [1960] S.C.R. 571; (1960), 23 D.L.R. 449) the *Bankruptcy Act* was amended to include wage earner plan provisions. Each province is given the right to adopt or reject these provisions. If they are adopted, the adopting province is responsible for their administration. The legislation is presently in force in Alberta and Manitoba. See, *Bankruptcy Act*, R.S.C. 1952, c. 14 as amended by 14-15 Eliz. II, c. 32, s. 22; S.O.R./67-192, *Canada Gazette*, Part II, vol. 101, No. 8, p. 680 (for Alberta), and S.O.R./67-239, *Canada Gazette*, Part II, vol. 101, No. 10, p. 800 (for Manitoba).

ment proceedings in most Canadian jurisdictions has several unacceptable consequences. The most glaring of these are the effect it may have on his employment, the cost to him and the almost universal inadequacy of exemptions.

(i) Exemptions

It is elementary economics and basic humanitarianism that a community which, like Canada, allows to credit grantors complete freedom in extending consumer credit to the general public, cannot justify giving to them the power to deprive debtors of adequate income to support themselves and their families. However, after examining garnishment exemption legislation in most Canadian jurisdictions, one must presume that this conclusion has been rejected or at best ignored by Canadian legislators.

There is very considerable divergence among the various granishment acts with respect to the amount of a debtor's income which is exempt from execution and the method of determining such exemption. Exemptions range all the way from unbelieveably parsimonious amounts such as a monthly allowance of $35 in New Brunswick [3] and $125 in Manitoba [4] for a married debtor, regardless of the number of his dependants, to near-adequate amounts such as a monthly allowance of $200 for a married debtor plus $40 for each dependant child in Alberta.[5] The legislative neglect in this area is dramatized by the fact that in some jurisdictions exemption laws have not been revised for many years. The most glaring instance is that in Ontario, the largest and wealthiest province in Canada and one which no doubt has experienced a tremendous expansion in the incidence of consumer credit, where garnishment exemption legislation was last amended in 1935.[6] It presently provides for an exemption of 70% of a debtor's gross income with a minimum exemption of $2.50 for each working day.[7] However, the mere fact that garnishment legislation has been recently amended apparently does not guarantee adequate exemptions. For example, Newfoundland passed

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[3] *Garnishee Act*, R.S.N.B. 1952, c. 97, s. 33, as amended by 9 Eliz. II, S.N.B. 1960, c. 36, s. 3.

[4] *The Garnishment Act*, R.S.M. 1954, c. 97, s. 6.

[5] Rule 565(1), *Consolidated Rules of the Supreme Court*, O.C. 716/44, consolidated by Alta. Reg. 561/57, as amended by Alta. Reg. 473/62 and Alta. Reg. 316/66, *Alberta Gazette*, vol. 62, No. 18, p. 729.

[6] See, *The Wages Amendment Act*, 25 Geo. V, S.O. 1935, c. 73, s. 2 (which changes the minimum exemption from $15 for each pay period to $2.50 per working day.)

[7] *The Wages Act*, R.S.O. 1960, c. 421, s. 7(1).

a new garnishment act in 1967 which provides for an exemption of $175 per month for a married person supporting four or more dependants.[8]

A few acts give power to a court to set exemptions which may vary from the statutory amounts in cases where a special application is made to it.[9] However, the appearance of flexibility which such a provision gives is in most cases an illusion. Most consumer debtors who find themselves in default and subject to garnishment proceedings are unlikely to make any attempt to seek greater protection, even if they are aware that it may be obtained, because of the well-recognized financial and dispositional obstacles faced by most low income people when litigation of any kind is involved.

All jurisdictions adopt one or other or a combination of the traditional methods of setting exemptions: specified dollar exemption, percentage of income exemption or percentage of income exemption with a minimum dollar exemption. While the latter is likely superior to either of the other two methods in that it combines a degree of flexibility with a guaranteed minimum, it requires frequent revision, a weakness common to all three. If garnishment is to be used to enforce consumer credit obligations — an issue which will be raised later on in this paper — the Canadian experience would lead one to conclude that it is necessary to tie the amount of exemption to some factor which at any given point accurately reflects the cost of maintaining a decent standard of living. While we can thank our United States neighbours for providing us with a precedent for this type of legislation, it would likely be unwise to follow too closely their provisions which tie exemptions to minimum wage levels.[10] Where minimum wage legislation exists in Canada, it is too often ignored as much as is garnishment legislation.

The picture would not be complete without a brief reference to the recently enacted wage earner plan legislation contained in the *Bankruptcy Act* and adopted by two provinces.[11] The *Act* provides that when a consolidation order is being prepared by the court clerk, he shall determine the amounts, if any, to be paid into court by the

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[8] See, *The Attachment of Wages Act*, S.N. 1966-67, No. 46, s. 2 (2) (b).

[9] See *e.g.*, *The Wages Act*, R.S.O. 1960, c. 421, s. 7(3).

[10] See, *Uniform Consumer Credit Code*, §5.105 (Final Draft) (hereinafter referred to as *U.C.C.C.*) and *Consumer Credit Protection Act, 1968*, Public Law 90-321, 82 Stat. 146, s. 303(a), passed by the United States Congress on May 22, 1968, to come into effect July 1, 1970. Both tie the amount of exemption to the national minimum wage established by the *Fair Labor Standards Act of 1938*, as amended, U.S.C., tit. 29, s. 206(a)(1).

[11] See, *supra*, n. 2.

applicant debtor, for distribution to his creditors.[12] Consequently, the clerk is given a free hand to set the debtors exemptions and he can pattern the exemption to the individual needs of the debtor. In this limited situation, the inadequacies of existing provincial wage exemption legislation can be avoided.

(ii) Costs of Garnishment

Following the rule that a judgment debtor must pay all party-and-party court costs, debtors against whom garnishment proceedings have been taken must pay the substantial court costs necessarily incidental to such proceedings. If this rule is to be retained, it follows that the least expensive method of getting a debtor's non-exempt income into his creditors' hands should be used. Unfortunately garnishment legislation in Canadian jurisdictions with one minor exception [13] does not embody this principle.[14]

No jurisdiction makes provision for continuing garnishment orders which avoid extra costs involved in issuing a new summons each time the debtor is to be paid. Nor are debtors protected against multiple garnishments which merely escalate costs without increasing the amount available to satisfy their debts.[15]

(iii) Interference with Employment

The one criticism of Canadian garnishment laws which cannot be met by measures short of prohibiting its use as a collection remedy in cases where wage earners are involved is that too often garnishment proceedings in which employers are garnishees result in dismissal of employee-debtors. This being the case, it is not difficult to recognize that the true value of garnishment to Canadian credit grantors lies not in the amounts which can be realized through the actual mechanism of the remedy, but in the coersive power it places

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[12] R.S.C. 1952, c. 14, s. 176(1)(b), as amended by 14-15 Eliz. II, S.C. 1966-67, c. 32, s. 22.

[13] See *Garnishee Act*, R.S.N.B. 1952, c. 97, ss. 2(1), 4(3) (which prohibits the use of garnishment proceedings where the amount originally owing exceeds $40 and where the amount remaining due exceeds $80).

[14] For example, in Saskatchewan the minimum legal costs, exclusive of service of process costs, payable by a debtor against whom a judgment for $300 is obtained and whose salary is attached is approximately $80.50 up to and including the first garnishment. For each garnishment thereafter the costs are approximately $29.00. See, *The Revised Rules of Court of the Province of Saskatchewan*, 1961, Tariff of Costs, schedules I B, II B.

[15] For an example of garnishment legislation which minimizes court costs without prejudicing debtors or creditors in any way, see *N.Y. C.P.L.R.* s. 5231 (McKinney 1963).

in their hands. Those who argue for the retention of garnishment in such circumstances must accept the conclusion that performance of consumer debt obligations is of sufficient importance to society that credit grantors be allowed to retain the power to place defaulting debtors in fear of losing their jobs. They must ignore the personal hardship to debtors and the social wastage which often results from the exercise of this power.

There is no indication that other Canadian jurisdictions plan to adopt measures similar to those contained in Quebec legislation [16] or those recently enacted in the United States which make it illegal for an employer to dismiss an employee because his wages have been attached.[17] It is difficult to be optomistic about the possible success of this type of legislation in view of difficulties involved in establishing an employer's motives for dismissing an employee.

The direct relation between effective collection remedies and the availability of credit to certain segments of the public is often raised in opposition to the suggestion that wage garnishment be withdrawn as a remedy in consumer credit transactions involving wage earners. This is particularly so in jurisdictions where credit grantors are deprived of the ability to take security in the form of wage assignments. Although credit grantors often refuse to admit that the damage to high risk credit consumers which may result from the use of harsh enforcement remedies often outweighs the social utility in granting them credit, it is important to recognize that the consumer credit industry must have effective remedies to deal with credit consumers who are able, but unwilling to pay.

A possible solution to the problem of achieveing the desired balance may be found in the concept of wage earner plans. Legislation

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[16] Art. 650 C.C.P. (which makes an employer liable in damages to an employee dismissed or suspended because his wages or salary is seized by garnishment).

[17] See, *e.g.*, *Conn. Gen. Stat.* (1958), 52-361 (h) (which makes an employer liable to an employee for losses suffered if he is discharged, disciplined or suspended because of garnishment unless his wages have been garnished seven or more times); *Hawaii Rev. Laws* (1955), c. 90A, Part III, *Laws 1967, Act No. 285* (which makes it an offence to discharge an employee on the grounds that his employer was summoned as a garnishee in a cause where the employee is the debtor); *N.Y. C.P.L.R.*, s. 5252 (McKinney 1963) (which makes an employer liable in damages to any employee who is discharged or laid off because an income execution has been served. The protection is not available if more than one income execution against an employee is served within a twelve month period). Also see *U.C.C.C.*, §5.106 (which makes dismissal of an employee because of garnishment or attempted garnishment by a creditor an offence); *Consumer Credit Protection Act, 1968, supra*, n. 10, s. 304(a) (which makes it an offence for an employer to dismiss an employee because his earnings have been subject to garnishment for any one debt).

establishing wage earner plans has been in operation in Quebec for many years [18] and has been revived in Manitoba and Alberta.[19] It is sufficient to note, for our purposes, that a wage earner plan provides a method which allows honest credit consumers who can pay their debts if given a reasonable opportunity, to obtain relief from creditor-harassment while they are repaying their debts on an instalment basis.

2. Execution Against Property Other Than Wages

As with garnishment, one of the most important aspects, from a credit consumer protection point of view, of money judgment execution laws in Canadian jurisdictions is the liberality of their exemption provisions. Every jurisdiction has accepted the principle that debtors should be protected by having certain basic property which is necessary for the maintenance of them and their families exempt from seizure under writs of execution.[20] However, few have been consistent enough to recognize that debtors' needs change from time to time necessitating periodic re-examination of exemption provisions.[21] Generally speaking, exemption laws of Canadian jurisdictions are quite inadequate and require revision so as to bring them in line with the present need of judgment debtors.[22]

The relevant legislation in all jurisdictions states exemptions in one of two ways: by designating as exempt specific items of property belonging to debtors, sometimes with a maximum value limit on the items; [23] or by setting a dollar value for exempt property and allowing a debtor to choose items he wishes to retain so long as their total value does not exceed the maximum.[24]

The frequency with which execution is relied upon by Canadian credit grantors to enforce consumer credit obligations is also not documented. However, at least in jurisdictions where exemptions are not adequate it is likely that the remedy is not being ignored. While a sale of used consumer goods by a sheriff is likely to produce little by way of proceeds which can be applied to a judgment debt, the

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[18] See arts. 652-659 C.C.P.

[19] *Supra*, n. 2.

[20] Only four Canadian provinces provide for homestead exemptions: Alberta, British Columbia, Manitoba and Saskatchewan.

[21] For example, the relevant New Brunswick legislation was last amended in 1933. See *The Memorials and Executions Act*, 23 Geo. V, S.N.B. 1933, c. 39.

[22] An extreme case is that of Prince Edward Island. Under the *Judgment and Execution Act*, R.S. P.E.I. 1951, c. 78, s. 26(1) limits the total value of exempt property to $100.

[23] See, *e.g.*, *The Exemptions Act*, R.S.S. 1965, c. 96, s. 2.

[24] See, *e.g.*, *Execution Act*, R.S.B.C. 1960, c. 135, s. 25.

coercive effect of a threatened seizure of necessaries often can be used to enforce direct payment from a defaulting debtor.

A serious criticism of most Canadian executions law, more basic than inadequacy of exemptions, is that the use of the remedy against low income debtors often fails to accomplish much more than to create hardship for them without doing much to satisfy their obligations. This results from the fact that most of the consumer goods such debtors are likely to own have very little resale value, particularly when they are sold at a sheriff's sale. Under these circumstances the remedy is being used as a punishment rather than an alternative source from which their debts can be satisfied. If execution is retained in its present form, we must adopt a new theoretical basis for its existence.

In addition to the use of wage earner plans in appropriate cases, a partial solution to the above-noted problems may be found in the principle of judicial supervision of the use of execution as a collection remedy in consumer credit transactions. Two Canadian jurisdictions have adopted this approach, applying it to all seizures of personal property under writs of execution.[25] Procedurally, this legislation provides that when a sheriff makes a seizure under a writ of execution, he is required to give the judgment debtor a form entitled "Notice of Objection to Removal of Goods" in addition to a notice of seizure.[26] If the debtor signs and returns the form within a specified period of time, the goods seized cannot be sold without a court order, which must be sought by the execution creditor.[27] The court deals with the matter in a summary hearing, and is given wide powers to make such disposition of the case as it deems proper.[28] In making his determination, a judge is able to introduce flexibility in exemption provisions without the need for amended exemptions legislation. In addition, he can hear expert evidence with respect to the availability of a market for the goods seized and decide whether or not a sale is justified.

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[25] Alberta and the Northwest Territories. See *The Seizures Act*, R.S.A. 1955, c. 307, as amended by 14 Eliz. II, S.A. 1965, c. 87, 17 Eliz. II, S.A. 1968, c. 92; *Seizures Ordinance*, O. & R.N.W.T. 1959, (1st session), c. 8. Judicial discretion in setting debtors' exemptions is also provided for in Saskatchewan legislation. See *The Limitation of Civil Rights Act*, R.S.S. 1965, c. 103, s. 25. However, unlike the Alberta and Northwest Territories provisions, it requires the debtor to make a special application to the court for relief. This considerably impairs the effectiveness of the legislation, and it is seldom used.

[26] *The Seizures Act, supra*, n. 25, s. 25.

[27] *Ibid.*, ss. 27(1), 29.

[28] *Ibid.*, s. 29.

B. CONTRACTUAL PROVISIONS AFFECTING REMEDIES OF CREDIT GRANTORS

1. Contractual Provisions Insulating Assignees of Instalment Sales Obligations from Defences of Buyers

One of the most controversial issues arising out of the various attempts in North American jurisdictions, particularly in the United States, to protect credit consumers concerns the position of assignees of retail instalment sales obligations. Briefly stated, the basic North American pattern for the financing of retail instalment sales of consumer goods and services, with the exception of sales made under revolving credit accounts or with credit cards, involves the sale and assignment of consumer instalment sales contracts by retail sellers to sales finance companies or banks. In order to avoid the common law rule that an assignee of a contract is subject to all the contractual obligations of his assignor, special clauses are included in instalment sales contracts, usually called cut-off clauses, under which instalment purchasers recognize that their contracts are to be assigned and that the assignees are to be free of all defences or claims they may have against the sellers with whom they contracted. In many situations an additional attempt is made to insulate the assignees and facilitate the prosecution of claims against defaulting buyers by the use of promissory notes in the original transactions between the instalment sellers and the buyers. These notes, which are usually for the financed amount of the contract price, are endorsed by the sellers to the purchasers of the consumer obligations. The intended end result is that the financing organizations are the holders in due course of negotiable instruments and assignees of contracts which give them a defence-free position when they seek to enforce payment either by an action on the contracts or foreclosure of security interests, if any.

The consequences of such an arrangement to buyers can be very damaging. In most cases the only effective remedy a buyer has in the event that the seller does not fully perform his obligations under the sales contract is to withhold payment of the balance of the purchase price. However, he is prevented from doing so under this type of arrangement. He must pay the financing organization the total balance owing and pursue any remedy he may have against the seller. This is likely to be little consolation when the seller has gone out of business, is not worth suing or is a door-to-door salesman who has long since disappeared.

The argument in favour of the financing organization's position is not without persuasive force. It often is based on the fact that if

the sales transaction had been financed by a loan made directly to the buyer, no one would suggest that the lender should be prejudiced by any dispute between the seller and the buyer. It is argued that there is no good legal or policy reason for drawing a distinction between these two commonly used consumer finance methods. What is overlooked in this argument is the fact that in most cases in which a consumer buyer is defrauded or sold inferior quality goods or services by an unscrupulous or insolvent vendor, the transaction would not have been possible unless this simple method of financing was available. If prospective purchasers were required to go to a bank or a small loans company to obtain cash, they would be more likely to obtain some financial counselling from the lending organization. In addition they would be given an opportunity to have a second thought about the transaction away from the high-pressure influence of the seller. Very often the success of unscrupulous sellers depends upon their ability to obtain a purchaser's signature to a document after a skillful and often false sales talk. However, the factor which weighs heaviest against the argument advanced by the sales finance industry is that it is best able to control unscrupulous or financially unsound credit sellers. If sales finance organizations refuse to purchase chattel paper from credit sellers who have a reputation for transiency or for sharp practice or who do not have sufficient financial backing to sustain a solvent business enterprise, the number of such sellers would be greatly reduced. The contention that this type of supervision and control is possible is supported by the fact that there already exists a close relationship between credit sellers and sales finance organizations which purchase their chattel paper. It would not be unrealistic to require the latter to investigate sellers in the same manner and to the same extent that they often investigate prospective purchasers.

While the legal structure of this method of financing was early sanctioned by the Canadian Supreme Court [20] and for many years was substantially unchallenged in all but one Canadian jurisdiction,[30] recent developments in several other jurisdictions indicate that this is not likely to continue to be the case. Following

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[20] *Killoran* v. *Monticello State Bank*, (1921), 61 S.C.R. 528, (1921), 57 D.L.R. 359.

[30] See, *Limitations of Civil Rights Act*, R.S.S. 1965, c. 103, s. 18 which bars a seller from suing for the balance of the purchase price of goods sold on an instalment basis. The legislation has been held to prevent any holder of a note given in conjunction with a sale to which it applies who is aware of the circumstances out of which the note arose from enforcing any claims based on the note, either because of his imputed knowledge of the payee's defective title or because he is deemed to have knowledge that there is no consideration for the

the lead taken by several courts in jurisdiction in the United States,[31] a few Canadian courts have refused to accept without question the claim to a defence-free status made by sales finance organizations. Although they have not been as *ouvert* in their acceptance of the public policy arguments in favour of buyers as their counterparts in the United States,[32] there is little doubt that this is an important factor in their approach.

A common element in every case in which a sales finance company has been found not to be a holder in due course of the promissory note is the conclusion that the course of dealings between the company and the seller were such that in effect they were carrying on a common business venture. Accordingly, the sales finance company could not claim to occupy the position of an independent, innocent third party traditionally required by the law merchant as a condition of a holder in due course status.[33] The findings of fact upon which these courts have based their conclusion that a common business venture exists indicate that several factors are relevant to this determination. The seller's use in the sales transaction of form contracts and notes which comtemplate assignment of the contract and endorsement of the note to a particular sales finance company which supplied them, while not itself crucial, is a frequently noted *indicia* of the fatal relationship.[34] Findings that, before a sale to a particular buyer was made by the seller, the approval of the

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maker's promise. See, *C.A.C.* v. *Fisher*, [1958] S.C.R. 546, at pp. 557-558; *Crescent Finance Corp.* v. *Olesen*, (1958), 13 D.L.R. (2d) 557 (Sask. C.A.); *Traders Finance Corp.* v. *Casselman*, [1960] S.C.R. 242.

[31] See, *e.g.*, *Mutual Finance Co.* v. *Martin*, 63 So. 2d 649 (Fla. S.C., 1953); *Commercial Credit Co.* v. *Childs*, 137 S.W. 2d 260 (Ark. S.C., 1940); *Commercial Credit Corp.* v. *Orange County Machine Works*, 214 P. 2d 819 (Cal. S.C., 1950).

[32] See, *e.g.*, *Mutual Finance Co.* v. *Martin*, *supra*, n. 31, at p. 653, in which the Supreme Court of Florida observed:

> "We think the buyer — Mr. and Mrs. General Public — should have some protection somewhere along the line. We believe the finance company is better able to bear the risk of the dealer's insolvency than the buyer and in a far better position to protect his interests against unscrupulous and insolvent dealers."

[33] See, *Federal Discount Corp.* v. *St. Pierre*, (1962), 32 D.L.R. (2d) 86 (Ont. C.A.); *Citizens Finance Co.* v. *Sanford*, (1964), 43 D.L.R. (2d) 206 (Ont. H.C.); *Rand Investments Ltd.* v. *Bertrand*, (1966), 58 D.L.R. (2d) 372 (B.C.S.C.); *Keelan* v. *Norray Distributing Ltd.*, (1967), 62 D.L.R. (2d) 466 (Man. Q.B.); *Interprovincial Building Credits Ltd.* v. *Soltys*, (1967), 64 D.L.R. (2d) 194 (Man. Q.B.). However, see *Imperial Oil* v. *Fortier*, (1968), 70 D.L.R. (2d) 290 in which the Quebec Court of Queen's Bench, Appeal Side, refused to adopt the common business venture approach.

[34] *Ibid.*

sales finance company was sought;[35] that the seller and the sales finance company have common corporate officers;[36] that they dealt with each other very frequently,[37] or that the finance company provided wholesale financing to the seller,[38] were relied on in several decisions.

While judicial innovation is welcomed in this area, a satisfactory solution can be found only in legislation. In those jurisdictions where courts are relied upon to give the necessary protection, uncertainty and confusion often results. If sales finance organizations are careful enough to avoid close connections with seller, they will likely be found to be a holder in due course of negotiable notes. Accordingly, it would be completely fortuitous if a particular purchaser is protected.

Unfortunately, Canadian legislatures have been very slow to recognize the problems created by this form of credit granting. This may be explained partially by the fact that the Canadian Constitution divides legislative jurisdiction over the elements involved. The negotiable instruments aspect of the matter falls within the legislative power of the Federal Government[39] while jurisdiction over its contractual aspect belongs to the provinces.[40] With the exception of the Province of Saskatchewan where instalment sellers and their assignees have no right to demand payment of the balance of the purchase price of goods sold under a retail instalment sales contract which involves the taking of a security interest in goods sold,[41] only one jurisdiction, Manitoba, has taken effective legislative steps to protect instalment buyers.[42] The effect of the Manitoba legislation is to make assignee of instalment sales contracts subject to the same

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[35] See, *e.g.*, *Keelan* v. *Norray Distributors Ltd.*, *supra*, n. 33.

[36] See, *e.g.*, *Federal Discount Corp.* v. *St. Pierre*, *supra*, n. 33; *Rand Investments Ltd.* v. *Bertrand*, *supra*, n. 33.

[37] See, *e.g.*, *Federal Discount Corp.* v. *St. Pierre*, *supra*, n. 33; *Rand Investments Ltd.* v. *Bertrand*, *supra*, n. 33; *Interprovincial Building Credits Ltd.* v. *Soltys*, *supra*, n. 33.

[38] See, *Interprovincial Building Credits Ltd.* v. *Soltys*, *supra*, n. 33.

[39] See, *British North America Act, 1867*, 30-31 Vict., 1867, c. 3, s. 91(18).

[40] *Ibid.*, s. 92(13).

[41] See, *supra*, n. 30.

[42] Very little protection in this regard is given to instalment purchasers by legislation recently enacted in British Columbia and Ontario which requires an instalment seller to deliver with the note he assigns to a finance company a copy of the instalment sales contract or a statement which discloses the credit terms of the transaction. Notice of executory consideration does not alter the position of a holder in due course. See *Consumer Protection Act*, 15-16 Eliz. II, S.B.C. 1967, c. 14, s. 15; *Consumer Protection Act*, 14-15 Eliz. II, S.O. 1966, c. 23, s. 27.

obligations, liabilities and duties of the assignor.[43] Whether or not these provisions will be interpreted in such a way as to affect a sales finance company's claim to holder in due course status remains to be seen.

Due to the considerable confusion presently existing, the overall Canadian picture is generally unsatisfactory from any point of view. What is needed is a concerted federal-provincial legislative effort to provide the necessary protection for instalment buyers.[44] A wide range of possible approaches is available, judging from the number of different kinds of provisions designed to deal with the problem which have been adopted by jurisdictions in the United States.[45] However, it is unlikely that measures other than those which subject assignees of instalment obligations to all of the defences available against their assignors will be satisfactory from a consumer protection point of view.

2. Secured Consumer Credit Transactions

Security has traditionally played an important part in Canadian consumer credit granting. The ability to rely on a security interest in the property of a credit consumer in the event of default by him is frequently the most valuable remedy that a credit grantor has. As has been the case with other creditor remedies, the unregulated use of secured consumer credit transactions has resulted in socially unacceptable consequences for some credit consumers, and community intervention has become necessary.

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[43] See *The Consumers' Credit Act*, 14 Eliz. II, S.M. 1965, c. 15, s. 12. The section goes farther than is necessary in that it subjects an assignee to his assignor's liabilities and obligations in addition to subjecting him to defences good against his assignor.

[44] The problem was on the agenda of two federal-provincial conferences held in December of 1966 and April of 1967.

[45] See, *e.g.*, *Cal. Civil Code*, ss. 1804.2, 1810.9 (West, 1964) (which nullifies the legal effect of cut-off clauses and prohibits the use of promissory notes); *N.Y. Pers. Prop. L.*, ss. 403(1), 403(3)(a) (McKinney, 1962) (which prohibits the use of promissory notes, but gives an assignee a defence-free position if purchaser does not complain of a defect in the seller's performance within fifteen days of being notified of the assignment); *Pa. Stat. Ann.* (1966 supp.), tit. 69, s. 1402 (which gives a forty-five day period for the purchaser to complain of defects); *Md. Ann. Code (1957)*, art. 83, ss. 130(d), 147 (which prohibit cut-off clauses and allow the use of notes which are identified as notes arising out of instalment sales contracts and which do not protect the assignee against the buyer defences); Ill. R.S., c. 121 1/2, s. 517; *U.C.C.C.* §2.404. Alternative B (which allows an assignee to claim a defence-free position if the purchaser has not notified it of the seller's default in performance within 30 days and if the assignee can meet certain conditions of independence and good faith).

(i) Security Interests in Necessaries

Canadian legislators have been very hesitant to place limitations on the type of property in which security interests may be taken by consumer credit grantors. This is difficult to explain in view of the universal acceptance of the principle that certain basic items of property necessary for the support of a debtor and his family should be placed out of the reach of his creditors seeking to enforce a money judgment through writs of execution. In most jurisdictions, a credit grantor can take a security interest in these same items, and in the event of default by the debtor he can realize on it. The most common type of agreement involving a security interest in necessaries is a blanket chattel mortgage over all of a credit consumer's assets, often taken by small loans companies.

Three Canadian jurisdictions have enacted legislation which is an exception to the general Canadian pattern. *The Exemptions Acts* of both Saskatchewan and Alberta [46] prohibit the enforcement of chattel mortgage security interests in property which is exempt from seizure under a writ of execution. With minor exceptions, prohibition does not extend to purchase money security interests and security interests given to secure the purchase of necessaries. The Manitoba *Bills of Sale Act* [47] is considerably more limited in scope in this regard since it limits the prohibition to security interests in exempt property when taken to secure antecedent or future debt.

The policy of withdrawing the prohibition against the enforcement of security interests in exempt items when a purchase of necessaries is involved considerably weakens the effectiveness of legislation, making available to credit grantors and credit consumers an easy method of avoiding its provisions. Unless exemptions provisions in a jurisdiction are so liberal as to include items of property which are not required by a prospective credit consumer for the continued maintenance of himself and his family, the taking of a security interest in an otherwise exempt item to secured credit to purchase necessaries merely jeopardizes the prospective borrower's interest in one item necessary for his support for the purchase of another. Once a prospective borrower is in the position of having to encumber necessaries to purchase other necessaries, it is likely that his circumstances are such that social aid is the only answer to his problem.

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[46] See *Exemptions Act*, R.S.A. 1955, c. 104, s. 4; *Exemptions Act*, R.S.S. 1965, c. 96, s. 3.

[47] R.S.M. 1954, c. 17, s. 35.

(ii) Additional Security

Other than the above-noted provinces which prohibit credit grantors from taking security interests, other than purchase-money security interests, in necessaries, only one Canadian jurisdiction, Ontario, has adopted legislative measures specifically designed to limit the ability of retail instalment sellers to demand from purchasers additional security either at the time of contracting or during the currency of the purchase agreements. *The Personal Property Security Act*[48] of Ontario restricts the effectiveness of after-acquired property clauses when consumer goods are involved by invalidating any security interest in such goods unless the debtor acquires rights in them within ten days after the secured party has given value. *The Consumer Protection Act*[49] of Ontario makes unenforceable any provision in a retail instalment sales contract which purports to create security interests in property of the purchaser other than that sold under the contract.[50]

(iii) Revolving Credit Accounts, Add-on and Consolidation Contracts

A very serious deficiency in credit consumer protection programmes in all Canadian jurisdictions is the failure to recognize the full implications of the use by credit grantors of multiple-stage credit agreements.[51] Revolving credit and loan agreements are becoming very common in most jurisdictions in Canada and problems of consumer protection peculiar to this type of transaction are likely to become prevalent in the very near future.

Canadian credit grantors are completely free to use multiple-purchase instalment contracts which have the effect of giving to

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[48] 15-16 Eliz. II, S.O. 1967, c. 73, s. 13(2)(b).

[49] 14-15 Eliz. II, S.O. 1966, c. 23, s. 19.

[50] The obscure wording of section 14 of *The Personal Property Security Act* of Ontario, *supra*, n. 48 which states: "A purchase-money security interest in consumer goods does not attach to any collateral other than such goods" in addition to invalidating security interests taken by retail instalment sellers except security interests taken in the goods they sell, may also invalidate security interests taken by lenders in borrowers' property other than that purchased with the loans. "Purchase-money security interest" is defined in the section 1(s) of the *Act* as "a security interest that is, (i) taken or reserved by the seller of the collateral to secure payment of all or part of its price, or (ii) taken by a person who gives value that enables the debtor to acquire rights in or the use of the collateral, if such value is applied to acquire such rights."

[51] Revolving loan and credit agreements have not been entirely ignored however. Interest disclosure legislation in most jurisdictions contains provisions dealing with them. See, *e.g.*, *The Cost of Credit Disclosure Act*, 16 Eliz. II, S.S. 1967, c. 85, s. 4.

them a security interest in all of the goods purchased under such contracts. Frequently, most of these agreements are drawn in such a way as to continue the entire security interest so long as a balance is owing on any of the items purchased. Default in a payment at any stage of the contract's existence may result in foreclosure of the security interest in all of the collateral, since payment of the total purchase price of any single item does not extinguish security interest in it.[52]

(iv) Wage Assignments

In view of the similarity between credit practices in the United States and those in Canada it seems unusual that the abuses of wage assignments which became widespread in many jurisdictions in the United States during the early part of this century,[53] judging from the lack of public reaction, do not seem to have been as prevalent in Canada. Only two Canadian jurisdictions [54] have adopted legislation designed to protect wage earners from the potentially disastrous consequences often resulting from the use of wage assignments to secure consumer credit.

The many abuses generally associated with the use of wage assignments, particularly those involving the assignment of future wages, in consumer credit transactions frequently have been described. Four major objections to this form of securing consumer debt are usually singled out. A wage assignment often involves the assignment of a wage earner's entire future income. This introduces the possibility that he will be deprived of a means of maintaining himself and his family or will be induced to frequently change his job or to quit work altogether in order to avoid enforcement of the assignment. It also places into the hands of the assignee a great deal of power over the wage earner which can be used to force his submission to the assignee's demands regardless of their justice or legality. The latter abuse is further facilitated by the fact that unless wage assignments are contested in courts, they ordinarily do not involve the participation of legal agencies of society. Consequently a wage earner's interests can be ignored and fraud, deception and sharp practice will go unnoticed. As is the case with garnishment, the effect that the remedy may have on a wage earner's employment is likely its most objectionable feature. A wage assignment, when

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[52] For an example of the abuses which can arise from the use of this type of contract, see *Williams* v. *Walker-Thompson Furniture Co.*, 350 F. 2d 445 (D.C.C.A., 1965).

[53] See, Fortas, *Wage Assignments in Chicago*, (1933), 42 Yale L.J. 526.

[54] Manitoba and Ontario.

enforced, necessarily involves the assignor's employer who may decide that the assignor is not worth the trouble and expense incidental to processing the assignment.

Attempts at providing solutions to some of these problems are contained in Manitoba legislation.[55] A wage earner's improvidence is sought to be controlled by provisions which require that his wife consent in writing to an assignment of future wages before the assignment is valid. Commenting on corresponding provisions in legislation of several jurisdictions in the United States, one observer noted that the only value such a provision is likely to have is to prevent the use of wage assignments to secure debts owing to mistresses.[56] In addition, the Manitoba legislation adopts the approach, very common in the United States, that an employer be given a veto over his employees' ability to assign their wages. Presumably, if an employer consents, he is unlikely to dismiss an employee for giving an assignment of his wages.

After retaining for many years legislative provisions which provided a wage assignment exemption,[57] the Ontario legislature accepted the conclusion that the problems arising out of wage assignments could not be solved by measures other than complete prohibition of their use.[58] In view of the fact that a growing number of jurisdictions in the United States which have had extensive experience in attempting to regulate wage assignments have come to this conclusion,[59] it is likely the only workable solution.

(v) Insecurity Acceleration Clauses

Only one jurisdiction, Saskatchewan, has adopted legislation which prohibits the use of contractual provisions in retail instalment sales contracts which give instalment sellers the right to arbitrarily accelerate buyers' obligations under such contracts.[60] This fact gives little cause of alarm because Canadian courts have taken a hostile

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[55] *Law of Property Act*, R.S.M. 1954, c. 138, s. 33.

[56] Fortas, loc. cit., *supra*, n. 53, at p. 558.

[57] *The Wages Act*, R.S.O. 1960, c. 421, s. 7(6), as amended by 9-10 Eliz. II, S.O. 1960-61, c. 103, s. 1.

[58] *Ibid.*, as amended by 17 Eliz. II, S.O. 1968, c. 142, s. 1 (assignment to credit unions are exempted from the probibition).

[59] See, *e.g.*, *Conn. Gen. Stat. Rev.*, ss. 52.361(g), 36.236; *D.C. Code Ann. (1961)*, tit. 28, s. 2305(a); *ND. Code Ann.*, ss. 13-03-17, 13-03-22. Also see, *U.C.C.C.* § § 2.410, 3.403.

[60] *Conditional Sales Act*, R.S.S. 1965, c. 393, s. 26. *The Personal Property Security Act* of Ontario, 15-16 Eliz. II, S.O. 1967, c. 73, s. 18, requires good faith in the exercise of the right to accelerate payment or performance under an insecurity clause.

attitude toward insecurity clauses and have substantially limited their effect. Most courts will allow acceleration under an insecurity clause only when the secured party acts in good faith and upon facts which actually make the debt insecure.[61]

(vi) Enforcement of Security Interests in Collateral

Following the basic modern pattern for secured business transactions, must secured consumer credit agreements contemplate that in the event of default by the credit consumer the credit grantor will be entitled to have the collateral seized and sold, and the proceeds of the sale will be applied to the debt. If there is an excess over the balance owing, it is to be returned to the credit consumer; if there is a deficiency between the amount owing and the sale proceeds the credit consumer must pay it.

However, some very important differences exist between a secured business transaction and a secured consumer credit transaction. One of the most significant of these is the above-noted fact that due to the very rapid resale value depreciation of consumer goods and the high cost of foreclosing security interests in them, a sale of seized or repossessed consumer goods in which a security interest has been taken often yields little which can be applied to reduction of the debt secured. Consequently, foreclosure of the security interest results in double loss to the defaulting credit consumer who must repay most of the debt but lose the goods in which the security interest was taken. In comparison, used production machinery or new inventory frequently retains its resale value. Another difference results from the fact that it is very difficult to ensure that a sale of collateral seized by a credit grantor is carried out honestly and efficiently so as to maximize proceeds and minimize the size of the deficiency claim. The amounts involved in business transactions are usually sufficient to justify judicial proceedings to attack a dishonest or improvident foreclosure sale. However this is seldom the case in consumer credit transactions. To a limited extent these differences have been recognized in several Canadian jurisdictions.

Legislative measures designed to protect retail instalment purchasers were adopted in a few Canadian jurisdictions prior to the turn of the century. Following the equitable rules of redemption which were developed by the courts to protect mortgagors and which still remain substantially uncodified in most Canadian jurisdictions, these measures were designed to protect the buyer's "equity" in the

[61] See, *e.g.*, *Sawyer-Massey Co.* v. *Dagg*, (1911), 18 W.L.R. 612 (Sask. C.A.).

goods purchased from oppressive foreclosures by sellers.[62] The modern versions of this legislation require that in the event of default by the purchaser, the seller must hold the repossessed goods for a specific period of time after seizure during which the purchaser can redeem.[63] Two jurisdictions have adopted legislation expressly giving the buyer a right to redeem by paying the amount in default exclusive of the operation of an acceleration clause.[64] Judicial disagreement still exists on the question as to whether or not buyers in other Canadian jurisdictions have this right.[65] Before the seller can resell the collateral and look to the buyer for the deficiency, he must serve a notice on him within a specified period of time before the foreclosure sale. The notice must contain specified information of a kind important to a buyer who wishes to redeem.[66] Four jurisdictions have taken steps to avoid the rigidity of black-letter redemption provisions by providing for judicial regulation of enforcement rights of certain types of secured parties.[67] This approach ensures that debtors will be given every reasonable opportunity to redeem when it appears that redemption is likely to be a reality.

Likely the most troublesome aspect of the foreclosures of a security interest in consumer goods is the above-noted fact that very frequently the credit consumer suffers a double loss. The goods are seized and sold, and because little which can be applied to the debt

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[62] See, *e.g.*, *Conditional Sales Act*, 51 Vict., S.O. 1888, c. 19, ss. 4, 5.

[63] *Conditional Sales Act*, R.S.S. 1965, c. 393, s. 16(1).

[64] *Ibid.*, s. 27. In Quebec, 1561g C.C. provides that the buyer has a right to redeem the repossessed goods upon paying the balance of the sale price. See *Tremblay* v. *Tremblay*, [1949] B.R. 539. Furthermore, under 1561h C.C., the buyer and/or any of his creditors retain the right to pay the instalments due to the seller and to take back the thing sold, provided such right be exercised within twenty days of repossession. See *Jetté* v. *Généreux Motor Ltd.*, [1958] C.S. 187. These provisions apply to every sale, promise of sale and conditional lease of moveable property. See 1561j, and *Tremblay* v. *Tremblay* and *Jetté* v. *Généreux Motor Ltd.*

[65] See, *e.g.*, *Peresluka* v. *General Motors Acceptance Corp.*, (1966), 56 D.L.R. (2d) 717 (Man. Q.B.), compare *Delta Acccptance Corp.* v. *Novitz*, (1968), 67 D.L.R. (2d) 208 (Ont. County Ct.).

[66] *Conditional Sales Act*, R.S.S. 1965, c. 393, ss. 16(3)-16(6).

[67] See *Seizures Act*, R.S.A. 1955, c. 307, ss. 25-29, 48 (applicable to all secured credit transactions where a security interest is taken in the debtors chattel property); *Seizures Ordinance*, O. & R.N.W.T. 1959, (1st sess.) c. 8, ss. 2, 16-20; *Consumer Protection Act*, 15-16 Eliz. II, S.B.C. 1967, c. 14, s. 18 (applicable to all secured instalment sales contracts); *Limitation of Civil Rights Act*, R.S.S. 1965, c. 103, s. 19 (applicable only to agricultural implements, farm truck and certain basic household items). The two former Acts are superior from a consumer protection point of view in that a debtor need not make application himself for relief, whereas under the latter two this is necessary.

is realized from the sale, a very large deficiency claim must be satisfied. Various methods have been adopted by Canadian jurisdictions to meet this problem. Likely the most extreme measure is that contained in Saskatchewan legislation which limits retail instalment sellers' remedies to repossession of the goods sold.[68] Although there is no empirical evidence to indicate that as a result of this legislation retail instalment sellers are more careful in selecting credit risks, it is apparent that instalment purchasers are completely protected against large deficiency claims. On the other hand, the legislation makes no allowance for situations where instalment purchasers will suffer loss from the repossession of goods where a relatively small amount of the purchase price is still owing. Legislation in Alberta, Manitoba, Newfoundland and Quebec requires retail instalment sellers to elect between proceeding against defaulting instalment purchasers by seizure of the goods sold or by obtaining judgment against them for the balance owing without repossession of the goods.[69] The effect of this legislation is a substantial reduction in loss to instalment purchasers in that no deficiency judgment can be claimed if the seller repossesses, and the purchaser can keep the goods if a judgment for the balance owing is sought. *The Consumer Protection Act* of Ontario contains the only specific provision designed to prevent loss to instalment purchasers in cases where they are in default after having paid a substantial portion of the purchase price of the goods in which a security interest has been taken.[70] However, as noted above, the enforcement rights of instalment sellers are subject to judicial scrutiny in four jurisdictions, and repossession rights may be altered by a court in appropriate circumstances.

While most Canadian jurisdictions have enacted legislation which substantially limits the enforcement rights of secured retail instalment sellers few have taken significant steps to regulate the foreclosure of security interests taken in consumer loan transactions.[71] Some basic differences exist between a secured loan and a secured credit sales transaction. However, what most Canadian legislators

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[68] *Limitation of Civil Rights Act*, R.S.S. 1965, c. 103, s. 18.

[69] *Conditional Sales Act*, R.S.A. 1955, c. 54, s. 19, amended by 14 Eliz. II. S.A. 1965, c. 15, s. 3; *The Consumers' Credit Act*, 14 Eliz. II, S.M. 1965, c. 15, s. 4; *Conditional Sales Act*, S.N. 1955, No. 62, s. 12; art. 1561f C.C.P. (the section has a very limited scope of application. See art. 1561j).

[70] 14-15 Eliz. II, S.O. 1966, c. 23, s. 20 (two-thirds).

[71] The similarity of the problems arising out of the two types of credit transactions has been partially recognized in Alberta and the Northwest Territories which provide for the same type of judicial supervision over foreclosure of security interests taken under both types of transactions. See *supra*, n. 67.

have failed to recognize is that many of the problems of consumer protection arising out of the foreclosure of security interests in consumer goods are common to both transactions. For example, the double loss problem resulting from the lack of a market for used consumer goods is just as acute in cases where the foreclosed security interest was part of a loan transaction as it is where it is part of a credit sales transaction.

C. POLICING UNCONSCIONABILITY IN CONSUMER CREDIT TRANSACTIONS

Legislation which gives to courts the power to examine consumer credit agreements which come before them for enforcement and to regulate the exercise of credit grantors' remedies arising from them so as to avoid oppression of credit consumers, seems to be a logical extension to a programme of public scrutiny and control of socially undesirable practices of credit grantors. Recent legislative developments in several Canadian jurisdictions indicate that this fact is being recognized.

The appearance of unconscionable transactions relief legislation in Canadian jurisdictions considerably pre-dates similar developments in the United States. *The Money Lenders Act*[72] of Ontario passed in 1912 provided a pattern for legislation which now exists in all provinces.[73] These acts give wide powers to the courts to police against usury and harsh and unconscionable results which otherwise would result from the enforcement of consumer credit contracts.[74]

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[72] 2 Geo. V, S.O. 1912, c. 30, ss. 5-8. Notwithstanding the early enactment of the Ontario Legislation, nation-wide option of it did not occur until the Supreme Court of Canada ruled that it was within the legislative jurisdiction of the provinces. See *Attorney-General for Ontario* v. *Barfried Enterprises Ltd.*, [1963] S.C.R. 570.

[73] See *Unconscionable Transactions Act*, 13 Eliz. II, S.A. 1964, c. 99; *Consumer Protection Act*, 15-16 Eliz. II, S.B.C. 1967, c. 14, ss. 17-20; *Unconscionable Transactions Relief Act*, 13 Eliz. II, S.M. 1964, c. 13 (2nd Sess); *Unconscionable Transactions Relief Act*, 13 Eliz. II, S.N.B. 1964, c. 14; *Unconscionable Transactions Relief Act*, 10-11 Eliz. II, S.N. 1962, No. 38; *Unconscionable Transactions Relief Act*, 13 Eliz. II, S.N.S. 1964, c. 12, amended by 15 Eliz. II, S.N.S. 1966, c. 83; *Unconscionable Transactions Relief Act*, R.S.O. 1960, c. 410; *Unconscionable Transactions Relief Act*, 13 Eliz. II, S.P.E.I. 1964, c. 35; *Unconscionable Transactions Relief Act*, 16 Eliz. II, S.S. 1967, c. 86; art. 1040c C.C.

[74] See, *e.g.*, *The Unconscionable Transactions Relief Aet*, R.S.O. 1960, c. 410, s. 2 provides:

> "Where in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable, the court may, (a) re-open the transaction and take an account between the creditor and the debtor; (b)

Although there is a great deal of similarity among the various acts, a few basic differences give to some a much wider scope. Five *Acts* apply to both lender and vendor credit transactions;[75] the remaining five likely apply only to the former. Under eight *Acts*, a court can intervene only where it finds that "the cost of the loan is excessive *and* the transaction is harsh and unconscionable".[76] Accordingly, if the credit charge is reasonable but the other terms of the transaction, such as the provision with respect to repayment or the rights of the lender in the event of default by the borrower, are harsh and unconscionable, the court will not have power to give the necessary relief. Only two *Acts* give power to a court to relieve against a harsh consequence to a credit consumer arising out of the enforcement of a consumer credit transaction.[77] Under all other *Acts*, the consequence must be harsh *and* unconscionable. Only one *Act* gives power to a court to prevent harsh and unconscionable consequences whether such consequences would result from the exercice of a seller's rights provided for in the contract or would result from the exercise of rights eminating from some other source.[78] Three *Acts* provide a small degree of protection to a credit consumer against the claim by an assignee of the obligation that he took it without notice of some factor which renders the transaction harsh or unconscionable.[79] They require that unless the debtor signs an

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notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and cost of the loan; (c) order the creditor to repay any such excess if the same has been paid or allowed on the account by the debtor; (d) set aside either wholly or in part or revise or alter any security given or agreement made in respect of the money lent, and if the creditor has parted with the security. order him to indemnify the debtor."

[75] The Nova Scotia, Prince Edward Island and Saskatchewan *Acts* define the term "money lent" to include *inter alia*, "credit granted to or on account of any person in any transaction that, whatever its form may be, is substantially one of credit granting." The British Columbia *Act* leaves no doubt on this point. See ss. 2, 18. In Quebec, article 1040d C.C. provides: "A seller with a right of redemption is deemed a borrower for the purposes of the three preceding articles. So also is a buyer with a term, by instalment or subject to a condition, and a possessor with a promise of sale or option to purchase..."

[76] Alberta, British Columbia. New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Quebec.

[77] Manitoba and Saskatchewan.

[78] *Consumer Protection Act*, 15-16 Eliz. II, S.B.C., c. 14, s. 20. It is difficult to understand why the section applies to instalment seller and not to consumer lenders also.

[79] Manitoba, Nova Scotia, Saskatchewan.

acknowledgement before a solicitor stating that he is aware of the significance of the financial terms of the agreement, an assignee is presumed to have knowledge of all the circumstances surrounding the transaction.

Notwithstanding the inadequacies of much of this legislation, the concept of a flexible system of judicial control over consumer credit transaction has been introduced by it, and further developments in this direction can be expected. Although it is very unlikely that this approach alone, in the absence in specific legislative regulation, can provide the necessary protection, its usefulness as a method of avoiding oppression in the peripheral situations where specific regulation is impractical or where such regulation has not kept up with new developments is apparent.

CONCLUSION

Present Canadian laws affecting credit consumers are quite unsatisfactory from a consumer protection viewpoint. They are unnecessarily complex and often contradictory. Many of them are based on archaic concepts and reflect a lack of understanding on the part of judges and legislators of the problems involved. Since they are the product of an *ad hoc* method of dealing with the problems of consumer protection they fail to provide a systematic and integrated approach.[80] Being a part of this structure, laws which establish and regulate credit grantors' remedies in the event of default by credit consumers suffer from the same deficiencies.

Canadian legislators and credit grantors have been slow to to recognize that while the consumer credit industry needs adequate collection remedies, there is no social utility in the use of remedies which may have disastrous consequences for defaulting credit consumers. Too often Canadians have looked upon consumer credit as a substitute for an economic system which guarantees to the poor a decent standard of living. Accordingly, they have accepted that harsh remedies are needed for the protection of credit grantors who deal with high-risk credit consumers. What is often overlooked is

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[80] A welcomed departure from this pattern is contained in the *Proposed Draft Act Respecting the Protection of Consumers*, April, 1967, prepared by a special committee appointed by the Attorney-General for Manitoba. The *Draft Act* is a code of credit consumer protection laws containing provisions dealing with unconscionable transactions relief, disclosure of costs of borrowing, prepayment privileges, relief against acceleration and forfeiture, time sales, chattel foreclosure, direct sellers, assignees, a consumer protection bureau and licencing of credit grantors.

the fact that the exercise of these remedies frequently forces credit consumers against whom they are used to cease being productive members of society or to seek relief through bankruptcy. It remains as true now as at any other time in history that credit should be granted only where it can be repaid either voluntarily or through a collection remedy which does not cause undue economic hardship to a credit consumer and which does not deprive him of the ability to support himself and his family.

However, there is plenty of room for optimism. Canadians are now entering a new era of consumer protection.[81] The problems associated with consumer credit are being studied,[82] suggestions are being made and legislative experiments are being carried out.[83] Likely the most important aspect of developments in this area is that the credit consuming public is rapidly becoming more sophisticated. Pressure is being placed on the leaders of Canadian society to provide solutions to problems which have been ignored by them for many years.

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[81] For a survey of the entire Canadian consumer credit picture, see Ziegel, J., *Consumer Credit Regulation: A Canadian Consumer-Oriented View Point,* (1968), 68 Colum. L. Rev. 488.

[82] See, for example, *Final Report of the Select Committee of the Ontario Legislature on Consumer Credit,* 1965; *Royal Commission on the Cost of Borrowing Money, Cost of Credit and Related Matters in the Province of Nova Scotia, Interim Report,* 1964, *Final Report,* 1965; *Report on Consumer Credit of the Select Joint Committee of the Senate and House of Commons on Consumer Credit and Cost of Living,* February, 1967.

[83] For a comprehensive list of recent credit consumer protection legislation, see Ziegel, *supra,* n. 81, at p. 489, n. 3.