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The Evolution of Bankruptcy Exemption Law in Canada 1867-1919:

The Triumph of the Provincial Model

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Introduction

When H.P. Grundy began to draft what was to become the Canadian Bankruptcy Act of 1919, English legislation provided a model for many elements of the new Canadian Act. Grundy, of the Manitoba Bar, had been retained by the Canadian Credit Men's Trust Association to draft a new Canadian bankruptcy bill to be submitted to Parliament.[1] At the time Grundy was retained to draft the new bill, Canada had been without a national bankruptcy law for nearly forty years. Parliament had opted to repeal the Insolvent Act of 1875 in 1880. After repeal, provincial legislation sought to deal with insolvent debtors but it was far from adequate on a number of fronts. Provincial law did not provide for involuntary bankruptcy proceedings or court approved compositions. Nor did provincial law enable a debtor to obtain a release from debts by way of a discharge. Further, existing provincial debtor creditor law was not uniform. Many hoped that Parliament's reestablishment of a national bankruptcy law would overcome the diversity of provincial legislation. In introducing the new Bankruptcy Bill in 1919, the Solicitor General emphasized that the object of the Bill "is to give uniformity in all commercial matters pertaining to bankruptcy."[2] However, he also indicated that there had been an attempt to unify the law of the various provinces but qualified the statement by noting that uniformity had been achieved only "as far as possible."[3]

In letter to the Department of Justice, Grundy admitted that "generally speaking the draft Act is based upon the English Act."[4] In particular, in drafting the discharge provisions Grundy closely followed the English model.[5] However, the drafter of the Bill admitted that "it is always better not to change the laws of the country to any greater extent than is really necessary."[6] In that respect Grundy chose to avoid some of the

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[1] On the origins of the 1919 Act see: Thomas G.W. Telfer, "The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest?" (1994-95), 24 C.B.L.J. 357.

[2] House of Commons Debates (6 March 1919) at p. 230.

[3] House of Commons Debates (6 March 1919) at p. 230.

[4] Letter of Grundy to Doherty, Minister of Justice, July 13, 1917, *Department of Justice Papers,* Public Archives of Canada (PAC), RG 13 A2 vol. 213, File No. 1074-1092.

[5] H.P. Grundy, "The Bankruptcy Act" (Address to the Toronto Bankers' Educational Association, May 11, 1920) (1919), 27 J. Can. Bankers' Assoc. 426 at p. 436.

[6] H.P. Grundy, "The Bankruptcy Act" (Address to the Toronto Bankers' Educational Association, May 11, 1920) (1919), 27 J. Can. Bankers' Assoc. 426 at p. 428.

administrative costs associated with English bankruptcy proceedings by allowing Canadian debtors to make a voluntary proceeding direct to a trustee in bankruptcy.[7]

However, in a more significant departure from the English model, the Bankruptcy Act of 1919 relied upon provincial exemption law to determine the types and values of personal, and in some cases real property, that a debtor might retain and shelter in a bankruptcy. The reliance on provincial exemption law continues to the present day.[8] Rather than specifying a minimal level of exempt property in the bankruptcy statute by way of a national list, as in England, the policy choice in 1919 ensured that there would be no uniformity of bankruptcy exemptions in Canada. At a time when Parliament was seeking to establish a national uniform bankruptcy law, provincial law prevailed on the issue of exemptions. This paper seeks to provide an explanation for the choice of the provincial exemption model in the federal Bankruptcy Act of 1919.

The *Personal Insolvency Task Force (PITF) Final Report*, published in 2002, suggests that the reliance upon provincial exemption law in the BIA can be traced to the influence of the U.S. Bankruptcy Act of 1898. The *PITF Final Report* offers a tentative conclusion that the provincial exemption model in the Bankruptcy Act of 1919 "was apparently copied" from the US Bankruptcy Act of 1898.[9] Under the US Bankruptcy Act of 1898, "a bankrupt's exemptions depended on the law of the state in which the bankrupt resided at the time of bankruptcy."[10]

Although the US Bankruptcy Act of 1898 may have been an influence, there are several other explanations which explain the policy choice to incorporate provincial exemptions laws into the Bankruptcy Act in 1919. First, the provincial model found in the 1919 Act was consistent with provisions found in the earlier Canadian bankruptcy legislation and bills that pre-dated the US Bankruptcy Act of 1898. Second, and perhaps more importantly, the diversity of provincial exemption laws precluded the adoption of a uniform bankruptcy exemption regime in 1919. Personal property exemption lists varied from province to province both in terms of value and types of property exempted. Additionally the existence of generous homestead exemptions in Manitoba, Saskatchewan, and Alberta and the absence of similar regimes in other provinces would have made it difficult for H.P. Grundy to draft some kind of compromise acceptable to each region. Beyond the statutory differences, a review of the case law reveals further regional differences and approaches to the interpretation of exemption statutes. Reconciliation of the provincial lists would have been nearly impossible.

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[7] Bankruptcy Act, S.C. 1919, c. 36, ss.6, 9, 15.

[8] Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1)(b) (BIA). See Thomas G.W. Telfer, "The Proposed Federal Exemption Regime for the Bankruptcy and Insolvency Act" (2005), 41 C.B.L.J. 279 at p. 280.

[9] *Personal Insolvency Task Force Final Report* (2002) at p. 24.

[10] *Ibid.*

If American law had any influence in Canada it was state homestead exemption statutes that provided a ready model for the Canadian western provinces of Manitoba, Saskatchewan and Alberta. The 160-acre homestead exemption could be found north and south of the border. The extensive homestead exemption that was adopted in the Canadian west but not in other provinces provided an important source of diversity among the provinces. However, Canadian provinces did not copy US state homestead law as a matter of convenience. The three western provinces were in a competition for immigrants with states to the south. Without such a homestead exemption north of the border there was a fear that immigrants would avoid the Canadian west in favour of the United States. The homestead exemption became a necessity in the Canadian west.

Thus when Grundy began to draft the 1919 Act, he was not starting with a clean slate, at least when it came to exemptions. The near forty-year period without a bankruptcy law had placed provincial debtor creditor law, including exemptions, at the forefront. The starting point for Parliament in 1919 was the old and diverse provincial law that had been enacted at various times and in response to various needs. [11]

Finally, it must be remembered that when Parliament adopted the Bankruptcy Act of 1919 it was re-asserting federal jurisdiction over bankruptcy and insolvency after a lengthy absence of nearly forty years. The Parliamentary Debates in 1919 reveal several attacks on the bill from a provincial rights perspective. Incorporating provincial exemptions within the federal Act removed a potential source of opposition to the bill in 1919.

Part I of the paper traces the origins of the provincial model of bankruptcy exemptions in Canada to the Insolvent Acts of 1869 and 1875 as well numerous failed reform bills that Parliament debated between 1880 and 1903. Part II examines the diversity of provincial exemption legislation that existed at the time that Grundy drafted his bankruptcy bill. Homestead exemption law merits separate treatment and is discussed in Part III which contains a consideration of the influence of American law on the Canadian west. Part IV considers the jurisprudence on provincial exemption law and identifies varying attitudes and regional approaches to the interpretation of exemption statutes. This provided yet another layer of diversity in the law. Part V provides an overview of bankruptcy exemptions found in the English Bankruptcy Act. Part VI concludes with an examination of the debates leading up to the final enactment of the Bankruptcy Act of 1919. A provincial model of bankruptcy exemptions was Grundy's and ultimately Parliament's only possible choice.

I. Legislative History of Bankruptcy Exemptions: Statutes and Failed Bills

The *British North America Act* granted jurisdiction over "bankruptcy and insolvency" to Parliament. While the jurisdiction over bankruptcy and insolvency was exclusive, the provinces retained the right to regulate debtor-creditor matters generally

[11] R. Hynes, A. Malani & E. Posner, "The Political Economy of Property Exemption Laws" (2004), 47 J. L. Econ. 19 at pp. 40-41 (existing law always provides a starting point for reform with old law always exerting an influence over reform).

under their "property and civil rights" jurisdiction. In contrast, the federal grant of power in the US Constitution refers to the making of "uniform laws…on the subject of bankruptcy." The American "uniformity" provision in the US Constitution called into question the constitutionality of US bankruptcy statutes that enable state exemptions to operate in the context of a bankruptcy.[12] In the absence of a "uniformity" clause in the British North America Act, there has not been a similar debate or constitutional litigation in Canada on whether there must be uniform bankruptcy exemptions. Canadian bankruptcy statutes, dating back to the nineteenth century, have always adopted provincial exemption levels.

Following Confederation, Parliament adopted the Insolvent Act of 1869.[13] Although the Act only applied to traders, it contained both a voluntary and involuntary proceeding and offered a limited right of discharge.[14] The new Canadian Act did not provide for a uniform federal exemption regime. Section 10 of the Insolvent Act of 1869 listed the property that vested in the assignee "excepting only such as are exempt from seizure and sale under execution, by virtue of the several statutes in such case made and provided."[15] Although the wording, which appears to be copied from the pre-Confederation Insolvent Act of 1864, did not specifically refer to provincial statutes, it was provincial law that set the exemption rules.[16] The clause drew no comment in the House of Commons debates.[17] Although several cases considered s. 10[18] the scope or purpose of the exemption was not considered by the courts.[19]

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[12] For a detailed review of the US constitutional litigation see Judith Schenck Koffler, "The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity" (1983) 58 N.Y.U. L. Rev. 22. See e.g. *Hanover Nat'l Bank v. Moyses,* 186 U.S. 181 (1902)

[13] Insolvent Act, S.C. 1869, c. 16.

[14] Although the government aspired to establish some measure of uniformity, imposing uniform application of the law across the country proved difficult. See James D. Edgar, "The Insolvent Act of 1869, With Tariff, Notes, Forms &c." (1870) 6 Loc. Ct. Gaz. 31.

[15] Insolvent Act, S.C. 1869, c. 16.

[16] An annotated text on the *Insolvent Act of* 1869 listed the relevant provincial exemption statutes following s.10 in the text: James D. Edgar, *The Insolvent Act of 1869: with Tariff Notes, Forms and a Full Index* (Toronto, Ont.: Copp Clark, 1869). The wording "by virtue of the several statutes" appears to be copied from the pre-Confederation statute of the Insolvent Act, S.C. 1864, c. 17. The Insolvent Act of 1864 Act, which applied in the Province of Canada, also excluded property "as are exempt from seizure and sale under execution, by virtue of the several statutes in such case and made provided": s.7.

[17] *House of Commons Debates* (9 June 1869) at 687.

[18] *Brown v. Wright*, [1874] O.J. No. 74, 35 U.C.R. 378 (QL) (Ont. Q.B.) (an assignment conveys all personal estate of the insolvent); *Deveber v. Austin* (1875), 16 N.B.R. 55 (S.C.) (only such interest as the insolvent held may pass to the assignee). Two other Insolvent Act 1869 cases mention s. 10 but do not mention the existence of an exemption: *Denison v. Smith* (1878), 43 U.C.Q.B. 503 at para. 7, and *Parlee v. Agricultural Insurance Co.* (1876), 16 N.B.R. 476 (S.C.)

[19] However, cf *In re Harrison, In re Potter* (1873), 15 N.B.R. 11 (S.C.) where the New Brunswick Supreme Court overturned an order of the court below which had recognized that s.10 of the federal Insolvent Act of

A change in government, and a perception that the 1869 Act was too favourable to debtors led to the enactment of the Insolvent Act of 1875.[20] The new legislation, which was also restricted to traders, abolished voluntary assignments and tightened access to the discharge. The Insolvent Act of 1875 also relied upon provincial exemption statutes. Section 16 excluded from the property of the estate "such real and personal property as are exempt from seizure and sale under execution, by virtue of the several Statutes in that case made and provided in the several Provinces of the Dominion."[21] Most of the cases on s. 16 do not directly consider the scope of exemptions.[22]

Exemptions were not at the forefront of the nineteenth century bankruptcy law debates. Throughout the 1870s Parliament debated the broader question of whether there should be a bankruptcy law at all.[23]

The initial exercise of federal jurisdiction over bankruptcy and insolvency was short-lived. In 1880, after a near decade long debate, Parliament repealed the Insolvent Act of 1875. It would be nearly forty years until Parliament again enacted a general bankruptcy statute. Without a national bankruptcy law, provincial legislation became the primary source of law that regulated debtors and creditors.

However, bankruptcy law did not disappear from the Parliamentary agenda. Between 1880 and 1903, Parliament debated a number of unsuccessful bankruptcy bills.[24] Every reform bill but one proposed to rely upon provincial exemption laws. The first and only reform bill to include a federal exemptions list was proposed in 1885. Bill No. 32, An Act Respecting Insolvency, emphasized the importance of uniformity:

1869 incorporated the New Brunswick Act to Exempt the Homestead of Families from Levy or sale on Execution, C.S.N.B. 1868 c. 25. The N.B. Supreme Court refused to recognize the provincial exemption in the bankruptcy. Followed in *Doe d. Smith v. Snarr* (1877), 17 N.B.R. 56 (S.C.).

[20] Insolvent Act of 1875, S.C. 1875, c.16.

[21] *Ibid.*

[22] See e.g. See e.g. *Maclellan v. Davidson* (1880), 20 N.B.R. 338 (S.C.) at para. 11; *McGee v. Campbell,* [1882] O.J. No. 74, 2 O.R. 130 (QL) (H.C.J.(Ch.Div.)) at paras. 42, 51, Wilson C.J; *Rumsey v. Hare* (1877), 12 N.S.R. 4 (C.A.) at 8, McDonald J; *Robertson v. McLeod* (1877), 17 N.B.R. 15 at 21, Allen C.J. However, see *Clarkson v. White* (1882), 4 O.R. 663 (H.C.J. (Ch. Div.)) (wages exempt); *Re Robinson* (1879), 25 (N.S.) Can. L.J. 287 (Toronto, January 22, 1879) (watch exempt as wearing apparel).

[23] See Thomas G.W. Telfer, "Access to the Discharge in Canadian Bankruptcy Law and the New Role of Surplus Income: A Historical Perspective" in Charles E.F. Rickett & Thomas G.W. Telfer, eds., *International Perspectives on Consumers' Access to Justice* (Cambridge, N.Y.: Cambridge University Press, 2003) 231.

[24] See Thomas G.W. Telfer, "A Canadian 'World Without Bankruptcy': The Failure of Bankruptcy Reform at the End of the Nineteenth Century" (2004), 8 Aust. J. Legal Hist. 83 at p. 108 for list of Failed Reform Bills.

> The application of the law will be the same all over Canada:
> The foreign trade of Canada requires uniformity, both in the procedure and in the law:
> The foreigner will no longer have to study the particular laws of each Province of the Dominion, but he will understand that in dealing with a trader of British Columbia or Prince Edward Island, of Ontario or Quebec, he is dealing with a trader subject to the insolvency law of Canada.[25]

In contrast to the Insolvent Acts of 1869 and 1875 and all other reform bills, Bill 32 sought to impose the uniformity principle over exemptions. Bill 32 proposed a national exemption list:

> The following are exempt from seizure—
>
> (a) The beds used by the family of the insolvent;
>
> (b) The clothing, body clothes and linen of the insolvent and his family;
>
> (c) The stoves in use, as well as all the furniture, including two tables and eight chairs, a dozen knives and forks, a dozen plates, cups and saucers, two sugar bowls, two milk pots and coffee pots, three dozen spoons, a pot hook and it appurtenances, the whole assortment of kitchen utensils, two shovels, two axes, a gun, a saw, the chests of drawers employed in the service of the family, a sofa, the lamps in use, of less value than five dollars each, all the linen, four pictures, a clock, the trunks and portemanteaus in use;
>
> (d) Fuel and provisions sufficient for the insolvent and his family during thirty days;
>
> (e) A cow, four sheep, a hog and the feed thereof for thirty days;
>
> (f) All property given as unseizable by authentic deeds, and duly registered in the case of real property
>
> (g) All pensions or allowances for ailment.[26]

The proposed list resembled the types of items exempt under Ontario and Quebec exemption law but with the federal Bill offering more generous numbers of exempt items.[27] Parliament never debated the merits of Bill 32. All other reform Bills presented

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[25] Bill No. 32, *An Act Respecting Insolvency*, (1st reading 13 February 1885) preamble.

[26] Bill No. 32, *An Act respecting Insolvency*, 3rd Sess., 5th Parl., 1885, cl. 55 (1st Reading 13 Feb. 1885).

[27] For example, whereas the Ontario exemption statute provided for six knives and forks, Bill No. 32 offered a dozen. In Ontario six spoons were exempt whereas Bill No. 32 allowed 3 dozen spoons. See

between 1880 and 1903 proposed to rely upon provincial legislation to set bankruptcy exemptions.[28] Even the government sponsored 1894 Bill proposed to rely upon provincial exemptions.[29] The government initiative failed and, after 1903, bankruptcy law disappeared from the Parliamentary agenda until 1918.[30]

Apart from the isolated bill that proposed a uniform bankruptcy exemption scheme, the dominant mode of thinking about bankruptcy exemptions had been in terms of provincial law. This began with the Insolvent Acts of 1869 and 1875 and continued with most reform bills through to 1903. It is important to consider the state of provincial exemption law at the time Grundy drafted what was to become the Bankruptcy Act of 1919.

II. Provincial Exemption Law.

After the repeal of the Insolvent Act of 1875, the federal government was quite content to allow provinces to regulate debtor-creditor matters pursuant to their property and civil rights jurisdiction. Although provincial law governed the making of voluntary assignments to authorized trustees and the distribution of a debtor's assets in a pro rata manner,[31] provincial jurisdiction did not extend to the granting of a discharge. In the

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Execution Act, R.S.O. 1877, c. 66, s.2(3). When the Ontario Execution Act was next amended, the list of personal items was substantially increased enabling a debtor to retain among other items 12 spoons: Execution Act, R.S.O 1887, c. 64, s.2(3).

[28] Bill No. 9, An Act for the equitable distribution of Insolvents' Estates , cl. 14(2); Bill No. 99, An Act to Provide for the Distribution of the Assets of Insolvent Traders, 1883, cl. 10; Bill No. 79, An Act for the equitable distribution of Insolvents' Estates, 1884, cl. 14(2); Bill No. 71, An Act to provide for the distribution of Assets of Insolvent Debtors, 1884, cl. 9; Bill No. 4, An Act to provide for the Distribution of the assets of Insolvent Debtors, 1885, cl. 9 (1st Reading, 2 Feb 1885); Bill No. 4, An Act to provide for the Distribution of the assets of Insolvent Debtors (as amended by the Select Committee), 3rd Sess., 5th Parl., 1885, cl. 16; Bill No. 33, An Act for the equitable distribution of Insolvents' Estates, 1885, cl. 14(2); Bill No. 93 An Act to provide for the distribution of the assets of Insolvent Debtors, 1886, cl. 16.

[29] Bill S-C, Respecting Insolvency, 1894, cl. 19. The 1894 Bill, however, provided for a national exemption for "money earned or received by the insolvent nor any money earned or received by the insolvent after the date of insolvency as salary or wages for services performed or rendered by him. See also Bill S-A, *Respecting Insolvency*, 1895, cl. 19. Bill 84, *An Act Respecting Insolvency*, 1898, c. 14(2) did not contain an exemption for wages but merely purported to exclude "such assets as are exempt from seizure and sale under the laws of the several provinces." See also Bill No.53, *An Act Respecting Insolvency*, 1903, cl. 14(2).

[30] For an explanation of the failed reform efforts see Thomas G.W. Telfer, "A Canadian 'World Without Bankruptcy': The Failure of Bankruptcy Reform at the End of the Nineteenth Century" (2004), 8 Aust. J. Legal Hist. 83.

[31] In the absence of federal bankruptcy law, provinces enacted Creditors' Relief Acts, which provided for a pro rata distribution among judgment creditors and creditors that obtained a certificate under the legislation. See L. Robinson, "Distribution of Proceeds of Execution: An Examination of the Common Law, Creditors' Relief Legislation, Modern Judgment Enforcement Statutes and Proposals for Reform" (2003) 66 Sask. L. Rev. 309 at 314. Provinces also enacted legislation to permit a debtor to make an assignment of his or her assets to an authorized trustee for distribution to creditors. See e.g. *An Act Respecting Assignments for the Benefit of Creditors*, S.O. 1885, c. 10.

absence of a federal discharge, provincial exemption laws provided a limited means of protection from judgment creditors.

In designing exemption statutes, legislators have traditionally adopted a paternalistic view by wanting to define "what values are important to their society and to impose those values on debtors who are apparently seen as incapable of choosing well for themselves."[32] Thus most exemption statutes sought to define categories of exempt property as opposed to granting a debtor a lump sum amount from which any property might be selected. In relation to personal property, many provinces either provided a detailed specific list of exempt property (i.e. listing how many plates or named cooking utensils) or providing a more general selective list by exempting unspecified tools of trade. Limitations might be imposed on a specific or a selective list through a dollar amount.[33] If a specific or selective list was an attempt by the legislature to define values important to the society, a comparison of the various lists not only reveals different provincial attitudes towards exemptions but also a lack of uniformity across the country. This part of the article seeks to provide a survey of provincial law that was in effect at the time that Parliament was considering the adoption of the Bankruptcy Act of 1919. Where relevant it draws attention to earlier exemptions that had been abandoned by 1919. Homestead exemptions are considered in more detail in Part III that follows.

1. The Maritime Provinces

A) Prince Edward Island

A debtor unlucky enough to reside in Prince Edward Island faced a rather minimal set of exemptions. Prince Edward Island provided an exemption for "wearing apparel and bedding of [the debtor] and his family, and the tools and implements of his trade, one cooking stove, and one cow" to the value of $50.[34] No further changes were made to the Prince Edward Island exemptions until 1939.[35]

B) New Brunswick

New Brunswick opted for a selective list of general categories of personal property with a monetary cap. Debtors could retain as exempt property "the wearing apparel, bedding, kitchen utensils, and tools of trade or calling to the value of one

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[32] C. Dunlop, "Colloquy on Modernization of Money Judgment Law: Should Creditors Have Access to Future Income Savings Plans" (2003) 66 Sask. L. Rev. 279 at 288. Thomas G. W. Telfer, "Preliminary Paper on the Law of Personal Exemptions from Seizure" (Uniform Law Conference of Canada, Regina, 2004) at pp. 3-4.

[33] Thomas G. W. Telfer, "Preliminary Paper on the Law of Personal Exemptions from Seizure" (Uniform Law Conference of Canada, Regina, 2004) at p. 4.

[34] County Courts Amendment Act, S.P.E.I. 1878, c. 12, s. 67.

[35] Judgment and Execution Act, S.P.E.I. 1939, c. 24, s. 26.

hundred dollars."[36] These exemptions remained in place until 1923 when the New Brunswick legislature granted further exemptions.[37]

Although homestead exemptions are normally associated with the western provinces, New Brunswick enacted a rather limited, and short-lived, homestead exemption law in 1868.[38] It was repealed in 1877.[39] The law provided an exemption for the "Family Homestead" of the head of each family provided that the homestead did not exceed $600.[40] The term homestead was defined to include land and premises as well as leasehold and free hold.[41] The Act provided little protection for the debtor and his family where the value of the land and premises exceeded $600. Where an appraiser found that the land and premises could not be divided without inconvenience, the premises could be sold leaving the debtor to be paid $600 out of the proceeds of sale.[42] As will be discussed below in Part III, the western model of homestead exemption was not only far more generous but it aimed to preserve the family home.

C) Nova Scotia

The Nova Scotia Judicature Act of 1884 offered a rather modest exemption of "necessary wearing apparel and bedding of the debtor and his family, and the tools or instruments of his trade or calling, one stove." The statute also exempted the debtor's "last cow."[43] The following year Nova Scotia opted to provide a much more detailed list adding:

> (b) One stove and pipe therefor[e], one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs, six knives, six forks, six plates, six tea cups, six saucers, one shovel, one table, six chairs, one milk jug, one teapot, six spoons, one spinning wheel and one weaving loom, if in ordinary domestic use, and ten volumes of religious books, one water bucket, one axe, one saw, and such fishing nets as are in common use, the value of such nets not to exceed twenty dollars.[44]

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[36] Memorials and Executions Act, C.S.N.B. 1877, c. 47, s. 24. Memorials and Executions Act, C.S.N.B., 1903, c. 128, c. 128, s. 34 (identical provision).

[37] An Act to Amend Chapter 128 of the Consolidated Statutes 1903 respecting Memorials and Executions, S.N.B. 1923, c. 31, s. 34.

[38] An Act to Exempt the Homestead of Families from Levy or sale on Execution, C.S.N.B. 1868 c. 25. See e.g. *Pourrier v. Harding* (1873), 15 N.B.R. 120 (S.C.).

[39] C.S.N.B. 1877, c. 120.

[40] *Ibid.,* s. 1.

[41] *Ibid.,* s. 10.

[42] *Ibid.,* s.3.

[43] R.S.N.S. 1884, c. 104.

[44] An Act relating to Exemption from Seizure under Writs of Execution, S.N.S. 1885, c. 34, s. 1.

The statute also exempted necessary fuel and food "actually provided for family use" and not more than sufficient for ordinary consumption for thirty days.[45] Whereas the 1884 statute had exempted the debtor's "last cow" the 1885 Act granted an exemption for "one cow, two sheep, and one hog, and food therefor for thirty days."[46] The statute did not limit the monetary value of the claimed exemptions (apart from fishing nets). The exemptions listed in the 1885 Act remained in force through to the period when Parliament contemplated enacting a new Bankruptcy Act in 1919.[47]

2. Ontario

Ontario, like Nova Scotia, opted for lengthy specific lists of exempt property. The origins of the Ontario exemption list can be traced back to a pre-Confederation Province of Canada statute.[48] The first post Confederation Ontario exemption statute merely incorporated the pre-Confederation exemption lists.[49]

In 1887 Ontario made significant changes to the Execution Act.[50] While there were some minor changes,[51] Ontario significantly expanded the detailed list of exemptions. For example, Ontario decided that a debtor should have access to a wider range of personal items including a brush, comb, looking glass, an iron and towels. Household cleaning and washing utensils became exempt. The exemption for cutlery and dishes was doubled from six to twelve. Rather than 10 books, the statute permitted thirty books, perhaps in the hopes that a debtor might educate himself on debt or financial skills. While the list of items had been significantly expanded, the 1887 Act imposed a monetary limit of $150. The actual list in the 1887 Execution Act provides an insight not only into living conditions at the time but also reflects what the Legislative Assembly valued as essential property for its debtors:

> The beds, bedding and bedsteads (including a cradle) in ordinary use by the debtor and his family;… One cooking stove with pipes and furnishings, one other heating stove with pipes, one crane and its appendages, one pair of andirons, one

[45] *Ibid.* s. 1(c).

[46] *Ibid.,* s. 1(d).

[47] Judicature Act, S.N.S. 1920, Sch. Rules of the Supreme Court, order 40, r. 40.

[48] An Act to Exempt Certain Articles from Seizure in Satisfaction of Debts, S.C. 1860, c. 25, s. 4. On the history of Ontario exemptions see: Ontario Law Reform Commission, *The Execution Act: Exemption of Goods From Seizure* (1966) (Appendix A).

[49] An Act Respecting Writs of Execution, S.O. 1876, c. 63, s. 2. The 1876 Act added a provision to exempt bees to the extent of 15 hives. See s. 3. Bees had been generally exempt from seizure in a separate statute see: S.C. 1865, c. 8; An Act Respecting the Right of Property in Swarms of Bees, S.O. 1877, c. 96, s. 2.

[50] An Act Relating to Exemptions, S.O. 1887, c. 10, s.2.

[51] For example the tool of trade exemption had a new limit of $100. Whereas under the prior Act, a specified list of livestock was exempt, the new Act imposed a monetary limit of $75 for the group of livestock. An Act Relating to Exemptions, S.O. 1887, c. 10, ss. 1, (5)(6).

> set of cooking utensils, one pair of tongs and a shovel, one coal scuttle, one lamp, one table, six chairs, one washstand with furnishings, six towels, one looking glass, one hair brush, one comb, one bureau, one clothes press, one clock, one carpet, one cupboard, one broom, twelve knives, twelve forks, twelve plates, twelve tea cups, twelve saucers, one sugar basin, one milk jug, one tea pot, twelve spoons, two pails, one wash tub, one scrubbing brush, one blacking brush, one washboard, three smoothing irons, all spinning wheels and weaving looms in domestic use, one sewing machine and attachments in domestic use, thirty volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use, the articles in this subdivision enumerated not exceeding in value $150.[52]

While the Ontario list is significantly longer than the Nova Scotia specific list, Ontario's higher monetary cap of $150 makes direct comparison difficult. The detailed list remained in effect in Ontario through to 1927,[53] although vestiges of the nineteenth century list continued to influence the Execution Act for some time after.

Like New Brunswick, Ontario also offered a limited form of protection of real property. The Free Grants and Homestead Act of 1868[54] was designed to encourage immigration, settlement and the clearance of lands.[55] The Colonial Office issued *Information for Emigrants to the British Colonies* and highlighted the Ontario legislation.[56] The Act allowed for the issuance of patents on free grants of land after a period of five years. During that time the settler was required to have cleared and cultivated 15 acres of land, built a house fit for habitation, and occupied the land for a period of five years.[57] During the period leading up to the issuance of the patent for the land, the land could not be liable for the satisfaction of any debt or liability. Further, for a period of twenty years after the issuance of the patent, the land was exempt from attachment, levy under execution, or sale for payment of debts.[58] These provisions

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[52] *Ibid.,* s. 1(3).

[53] There was one minor change in 1899 which permitted a debtor to obtain $100 in cash proceeds of sale of tool of trade in excess of $100. An Act Respecting Executions and Sheriffs, S.O. 1899, c. 7, s. 1. On the continuation of the 1887 Act see: Execution Act, S.O. 1909, c. 47, ss. 3-8; Execution Act, R.S.O. 1914, c. 80, s. 3. On amendments see Execution Act, S.O. 1927, c. 28, s. 6.

[54] S.O. 1867-1868, c. 8.

[55] On the purposes of the Act see preamble of Act to Encourage Settlement in the Free Grant Territory, S.O. 1870-71, c. 5. Few decisions considered this Act. See *Cann v. Knott* (1890), 19 O.R. 422 (H.C.J.); *Re Beatty and Finlayson* (1896), 27 O.R. 642 (H.C.J.)

[56] Colonial Office of Canada, *Information for Immigrants to the British Colonies* (1880) at p. 13. See also *A Handbook of Information for Intending Immigrants* (Ottawa: Department of Agriculture). [year].

[57] Free Grants and Homestead Act of 1868, S.O. 1867-1868, c. 8, s. 9.

[58] *Ibid.,* s. 14. The Act made any exception for any debt secured by valid mortgage obtained after the granting of the patent.

remained in force through to the period leading up to the enactment of the Bankruptcy Act of 1919.[59]

3. Quebec

Given that Ontario and Quebec shared the earlier pre-Confederation statute governing the province of Canada,[60] it is not surprising that both provinces favoured specific lists of exempt categories of personal property. The new Code of Civil Procedure for Lower Canada, which came into force in 1867,[61] provided a list of specific exemptions of personal property along similar lines to the earlier pre Confederation statute of 1860 in force in the Province of Canada.[62] Familiar exemptions for wearing apparel, and bedding could also be found. However, the new Code of Civil Procedure created new exemptions unique to Quebec at that time. "Consecrated vessels and things used for religious worship" were exempt as were wages and salaries not yet due.[63]

By 1888 as a result of amendments to the Code of Civil Procedure,[64] exemptions in Ontario and Quebec further diverged. Whereas Ontario as of 1887 provided an overall cap of $150 on its overall list of personal property, Quebec allowed a debtor to retain $50 worth of items out of cooking implements, kitchen utensils, specified furniture including a lamp and mirror, as well as a washing stand and toiletries. A separate list, without any monetary restriction, provided exemptions for a wide range of personal property including spinning wheels, axe, saw, gun, traps, fishing nets in common use, washing tub, three flat irons, and a broom. The second list also included fifty volumes of books, family portraits and all artwork completed by the debtor or his family. The division of personal property into two lists, one with a monetary restriction and the other without, makes direct comparison with Ontario difficult.

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[59] See Free Grants and Homestead Act, R.S.O. 1877, c. 24, s.18; Free Grants and Homesteads Act, R.S.O. 1887, c.25, s. 20; Free Grants and Homestead Act, R.S.O. 1897, c. 29, s. 25; Public Lands Act, S.O. 1913, c. 6, s. 45; Public Lands Act, S.O. 1913, c. 6, s. 45; Public Lands Act, R.S.O. 1914, c. 28, s. 46; Public Lands Act, R.S.O. 1927, c. 35, s. 46.

[60] An Act to Exempt Certain Articles from Seizure in Satisfaction of Debts, S.C. 1860, c. 25, s. 4. This Act drew criticism. See "Seizure under Execution in the Division Courts" (1860), 6 U.C.L.J. 177. In 1861, this Act as it applied to Lower Canada was amended to lower the maximum monetary values for food fuel from $40 to $20 and for tools of trade from $60 to $40. See An Act to Amend the 23rd Vict., c. 25, c. 85 of the Consolidated Statutes for Lower Canada, as respects the Exemption of Certain Articles from Seizure in Satisfaction of Debts, S.C. 1861, c. 27. On the 1861 amendments see "The Law of Exemption" (1861), 7 U.C.L.J. 262.

[61] See Brian Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Montreal: McGill-Queen's University Press, 1994) at p. 5.

[62] Code of Civil Procedure of Lower Canada, (Ottawa: Malcolm Cameron Printers, 1867) at Art. 556.

[63] *Ibid.,* Art. 558.

[64] R.S.Q. 1888, Art. 5917, amending Art. 556; Art. 5918 amending Art. 558.

Quebec also protected farmers, fishermen and tailors with specific exemptions. The agricultural exemptions in the 1888 Code of Civil Procedure were generous. In addition to exempting specified livestock, the Code provided an exemption (exclusively for farmers) for "one plough, one barrow, one working sleigh, one tumbril, one hay cart with its wheels, and the harness necessary for farming purposes."[65] Quebec provided an exemption for "all boats or vessels, tackle, nets, seines or other fishing utensils, and all provisions belonging to any fisherman and necessary for his subsistence or his fishing operations, between the first of May and the first of November."[66] Tailors and milliners could claim a sewing machine. In contrast to the Ontario $100 tool of trade exemption, Quebec limited this general exemption to $30.[67] Minor amendments followed in 1889[68] and 1890[69] but the general shape of Quebec exemption law did not change until after the enactment of the Bankruptcy Act of 1919.[70]

Quebec also enacted a separate exemption regime designed to promote settlement. The Act to Encourage Settlers of 1868[71] provided an exemption for land where a bona fide settler had been granted land in accordance with the regime governing the sale and management of public lands. Provided that the settler complied with that regime the land could not be seized or sold for any debts contracted prior to the grant of the land. The Act further specified that no one could seize or sell the settler's interest in the land.[72]

The Act to Encourage Settlers also provided a more generous exemption list of personal property than was available under the Code of Civil Procedure. For a period of 10 years following the issue of the patent for the land a debtor could claim numerous chattels as exempt property. Although there was much overlap between the two chattel exemption regimes, a bona fide settler had the advantage of being able to claim from the more generous settler list. In contrast to 30 days worth of food available under the Code of Civil Procedure a settler could claim three months of food for his family as well as the ability to claim "vehicles and other implements of agriculture" as well as additional livestock:

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[65] R.S.Q. 1888, Art. 5917, amending Art. 556.

[66] R.S.Q. 1888, Art. 5918 amending Art. 558.

[67] R.S.Q. 1888, Art 5917, amending Art. 556.

[68] S.Q. 1889, c. 50, ss. 3, 4 (increasing fuel and food exemption; removing stipulation that only a farmer could claim agricultural exemption; revising list of fishing exemption).

[69] S.Q. 1890, c. 58, s. 2 (adding a summer and winter vehicle as agricultural equipment; removing stipulation that only a tailor could claim sewing machine).

[70] See S.Q. 1922, c. 79, s. 1.

[71] S.Q. 1868, c. 20.

[72] *Ibid.* s. 1.

> Two horses or two draught oxen, four cows, six sheep, four pigs, eight hundred bundles of hay, other forage necessary for the support of these animals during the winter, and provender sufficient to fatten one pig, and to maintain three during the winter.[73]

The basic structure of the settler exemption scheme remained in place until after 1919. However, between 1868 and 1919 several amendments altered the scope of the exemption regime.[74] By 1909, Quebec limited the life of the homestead exemption for a period of fifteen years.[75] In the same year the province reduced the size of the homestead to 100 acres. Similarly the ability to claim the enhanced settler chattel exemption list continued only for a period of fifteen years.[76] The two separate exemption regimes, the more generous settler regime, and the more modest non-settler regime continued without modification until after 1919.[77]

4. The West

A) Manitoba

Like the eastern provinces, Manitoba also provided exemptions for various types of personal property. Between 1871 and 1913 the Manitoba list of exempt property was amended numerous times to add additional property.[78] By 1913 the list had stabilized until after the Bankruptcy Act of 1919 came into effect.[79] Although the list of items was not quite as detailed as the Ontario exemption list, the various categories of personal property reflected the agricultural nature of Manitoba. Further, the Manitoba exemptions were on the whole more generous than the exemptions found in the eastern provinces. While Ontario took the time to specify the various types of household furniture that could

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[73] *Ibid*., s. 2(5).

[74] See An Act for the Protection of Settlers, S.Q. 1882, c. 12, s. 2. Followed in Amendments to the Code of Civil Procedure, R.S.Q. 1888, Art. 1744; An Act to Amend the Law Respecting the Protection of Settlers and the Creation of Homesteads, S.Q. 1889, c. 27, Art. 1744. Revised Art. 1745;

[75] Code of Civil Procedure, R.S.Q. 1909, Art. 2091.

[76] Code of Civil Procedure, R.S.Q. Arts. 1744, 1745, 2092, 2093.

[77] See An Act Respecting the Protection of Settlers, R.S.Q. 1925, c. 78.

[78] Homestead Act of 1871, 34 Vict., c. 16; An Act Respecting the Administration of Justice, C.S.M. 1880, c. 37, ss. 85-89; An Act to Amend c. 37 of the C.S.M., S.M. 1883, c. 24; An Act to Amend c. 37 of the C.S.M, S.M. 1884, c. 16; An Act to Amend c. 37 of the C.S.M., S.M. 1885, c. 28; An Respecting the Administration of Justice, S.M. 1885, c. 17; An Act to Amend the Administration of Justice Act 1885, S.M. 1886, c. 35; An Act to Amend the Administration of Justice Act 1885, S.M. 1889, c. 36; An Act Respecting Executions and Attachments S.M. 1883, c. 30; Executions Act, R.S.M. 1891, c. 53; An Act to Amend the Executions Act, S.M. 1894, c. 12; An Act to Amend the Executions Act, S.M. 1895, c. 13; Executions Act, R.S.M. 1902, c. 58; An Act to Amend the Executions Act, S.M. 1909, c. 20; An Act to Amend the Executions Act, S.M. 1911, c. 18; Executions Act, R.S.M. 1913, c. 66.

[79] See An Act to Amend the Executions Act, S.M. 1924, c. 16; An Act to Further Amend the Executions Act, S.M. 1924, c. 17.

be retained, Manitoba granted a general exemption for household furniture up to a value of $500.[80] This was much more generous than the $150 exemption in the Ontario statute for the list of household effects. While Ontario permitted the debtor to retain 30 books, and Quebec 50, Manitoba allowed the debtor to retain 12 books plus books of a professional man.[81] Whereas Ontario, Nova Scotia and Quebec permitted food for thirty days, the Manitoba statute provided for an 11 month food exemption.[82] The Manitoba tools of trade exemption (which included agricultural implements) was a generous $500 in contrast to the exemptions in the eastern provinces (NB $100; NS $30; PEI $50; Que. $30; Ont. $100).[83] Like Quebec, Manitoba also permitted the retention of articles and furniture necessary for the performance of religious services.[84] Manitoba also provided specific exemptions for livestock and seeds.[85]

B) Northwest Territories, Alberta, Saskatchewan and the Yukon

The Northwest Territories, which also covered areas which were to become Saskatchewan and Alberta,[86] was at the forefront of the western settlement movement.[87] Like Manitoba, the Northwest Territories exemptions reflected the agricultural basis of the west. The commitment to attracting settlers can best be illustrated by a short-lived provision found in the 1884 Exemptions Ordinance. Section 4 of the Ordinance provided "that no judgment or action for debts, contracted outside of the North-West Territories, shall be enforced against any settler coming into the said North-West Territories within six years of the date of his arrival."[88] This provision was repealed in 1885.[89]

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[80] Executions Act, R.S.M. 1913, c. 66, s. 39(a).

[81] Executions Act, R.S.M. 1913, c. 66, s. 39(c).

[82] Executions Act, R.S.M. 1913, c. 66, s. 39(d).

[83] Executions Act, R.S.M. 1913, c. 66, s. 39(f).

[84] Executions Act, R.S.M. 1913, c. 66, s. 39(g).

[85] Executions Act, R.S.M. 1913, c. 66, s. 39(e)(j).

[86] Alberta continued to rely upon the Northwest Territories exemption ordinances even after its admission to Confederation as a province in 1905. See Exemptions Ordinance, C.S.N.W.T. 1898, c. 27; Exemptions Act R.S.A. 1922, c. 95.

[87] The legislative history of the Northwest Territory exemption legislation is discussed in *Re Claxton* (1890), 1 Terr. L.R. 282

[88] Exemptions Ordinance, O.N.W.T. 1884, c. 28, s. 4. See D. Colwyn Williams, "Law and Institutions in the North West Territories (1869-1905)" (1963), 31 Sask. Bar. Rev. 137 at pp. 141-142.

[89] See Exemptions Ordinance, O.N.W.T. 1885, No. 8 and Charles R.B Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed. (Toronto, Ont.: Carswell, 1995) at 454.

Although the initial Territorial Exemption Ordinance of 1879[90] contained a rather modest list of chattels, by 1911 the Territories made some additional changes.[91] Exemptions were available for clothing, food for six months as well as unspecified furniture and household furnishings of $500. Livestock in addition to animals kept for food, specified farm implements of no particular value as well as tools of trade up to $200 were exempt. In contrast to a number of the eastern provinces, the Northwest Territory dollar amounts and open lists were more generous.

The 1898 Northwest Territory Ordinance on exemptions continued to remain effective in Alberta even after Alberta's admission to Confederation in 1905. Alberta did not adopt its own legislation until 1922 when it passed its own Exemptions Act.[92] Similarly, Saskatchewan continued to rely upon the Northwest Territory Ordinance on exemptions and reprinted the Ordinance in the earliest Revised Statutes of Saskatchewan in 1909 as the Exemptions Act.[93] Apart from a minor modification to its list of exempt chattels,[94] Saskatchewan exemption law remained unchanged until after 1919.[95]

The Yukon Exemptions Ordinance of 1902[96] can also be traced back to the Northwest Territory Ordinance of 1898. However, Yukon did not provide for a 160-acre homestead exemption. Rather "the house and buildings occupied by the execution debtor, and also the lot or lots on which the same are situate…to the extent of fifteen hundred dollars."[97] Major exemptions for personal property included a $500 furniture exemption as well as a $500 tools of trade exemption.[98] Yukon provided an exemption for food for the family for a period of six months however, this could include food prepared for "use or on foot."[99]

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[90] An Ordinance Exempting Certain Property from Seizure and Sale Under Executions, O.N.W.T. 1879, No. 8. See D. Colwyn Williams, "Law and Institutions in the North West Territories (1869-1905)" (1963), 29 Sask. B. Rev. 83 at p. 94.

[91] Exemptions Ordinance, O.N.W.T. 1911, c. 27. Earlier changes can be found in Exemptions Ordinance, R.O.N.W.T. 1888, c. 45; Exemptions Ordinance, S.N.W.T.1894, No. 26; Exemptions Ordinance, C.O. 1898, No. 14, s. 2; Exemptions Ordinance, S.N.W.T. 1901, c. 16.

[92] R.S.A. 1922, c. 95.

[93] R.S.S. 1909, c. 47.

[94] An Act to Amend the Exemptions Act, S.S. 1915, c. 31, s. 1 (adding extra livestock and harness equipment)

[95] Exemptions Act, S.S. 1918-1919, c. 24.

[96] C.O.Y.T. 1902, c. 25, s. 2.

[97] C.O.Y.T. 1902, c. 25, s. 2(6).

[98] C.O.Y.T. 1902, c. 25, s. 2(5).

[99] C.O.Y.T. 1902, c. 25, s. 2(3). See also Exemptions Ordinance, C.O.Y.T 1914, c. 31.

5. British Columbia

British Columbia's exemption law is unique compared to the other regions of the country. The province chose to avoid specific or even general lists of exempt chattels preferring to provide a debtor with a lump sum dollar amount as an exemption. Initial exemptions found the BC Execution Act of 1888[100] provided a modest exemption for wearing apparel, bedding, household utensils not exceeding 10 pounds together with tools of trade not exceeding 10 pounds. However, by 1897 that list had been deemed obsolete and repealed.[101] In fact, between 1897 and 1924 the Execution Act did not provide any specific or general exemptions for personal property. "All the goods, chattels, and effects of a judgment creditor" were liable to be seized and sold under a writ of execution.[102] It was not until 1924 that the British Columbia Execution Act provided a lump sum exemption of personal property to the value of $500.[103]

However, exemptions for personal property were to be found in the related Homestead Act. The legislation, which can be traced back to pre-Confederation colonial times, provided a personal property exemption as well as protecting a rather limited homestead. Section 17 of the Homestead Act protected goods and chattels at the option of the debtor to the value of $500.[104] The absence of either a specific or more general list of exempt items makes British Columbia's exemption law impossible to compare to other jurisdictions. Further, British Columbia's law was also unique in another aspect. A trader could not rely upon the personal property exemption to protect goods and merchandise that formed a part of the stock in trade of the business.[105]

Although British Columbia's Homestead Act can be traced to 1866,[106] the scope of the homestead exemption did not change in the period leading up to the enactment of the Bankruptcy Act of 1919. A homestead registered in accordance with the Act was free from forced seizure or sale for any debt or liability incurred after the registration of the homestead. However, the exemption only protected a value up to $2500.[107] Although the Act defined homestead in broad terms (including land, buildings, whether leasehold or freehold) the legislation did not provide any exemption for a particular size of lot or acreage.

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[100] See e.g. Execution Act, C.S.B.C. 1888, c. 42, s. 20.

[101] History and Disposal of Acts, R.S.B.C., 1897, Table No. 1.

[102] Execution Act, R.S.B.C. 1888, c. 72, s. 10; Execution Act, R.S.B.C. 1911, c. 79, s. 10.

[103] Execution Act, R.S.B.C. 1924, c. 83, s. 25.

[104] Homestead Act, R.S.B.C. 1897, c. 93, s. 17.

[105] Homestead Act, R.S.B.C. 1897, c. 93, s. 17.

[106] Homestead Act 1866, S.B.C. 1867, No. 6.

[107] Homestead Act, R.S.B.C. 1911, c. 100, s. 5.

III. Homestead Exemptions

1. United States

The American homestead exemption has had a significant influence upon Canadian law. At the time it was developed, the American homestead exemption was unknown and completely foreign to English law.[108] This exemption can be traced back to the (then) Republic of Texas law passed in 1839.[109] An often cited purpose of the homestead exemption is that it shielded homes and land from attachment or execution thereby protecting families from the debtor's misfortune.[110] A leading 1878 treatise on homesteads claimed that the "protection of the family from dependence and want is the expressed object of nearly all homestead exemption laws."[111] However, the homestead exemption was designed with a broader aim in mind. Texas used the homestead as a means to attract settlers. The state actively targeted and recruited prospective settlers with advertisements that appeared in American and foreign papers. The advertisements pointed to the existence of the homestead exemption.[112]

The homestead exemption spread to other states and by the end of the 1860s many states had adopted a homestead exemption with some incorporating the concept into their state constitution.[113] While the acreage of exempt property varied from state to state, a recent study demonstrates that 160 acres was a typical size for a homestead. In 1883, seven of the thirteen states granting a homestead exemption for farmland relied upon 160

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[108] George Haskins, "Homestead Exemptions" (1950), 63 Harv. L. Rev. 1289. The Texas homestead exemption can trace its roots to Spanish and Mexican law see: Joseph W. McKnight, "Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle" (1983), 86 S.W. Hist. Q. 369.

[109] Paul Goodman, "The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution" (1993) 80 J. Amer. Hist. 470; R. Hynes, A. Malani, & E. Posner, "The Political Economy of Property Exemption Laws" (2004) 47 J. L. & Econ. 19 at 23; Lena London, "The Initial Homestead Exemption in Texas" (1954), 57 S.W. Hist. Q. 432

[110] Paul Goodman, "The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution" (1993) 80 J. Amer. Hist. 470 at p. 471; A. Morantz, "There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth Century America" (2006) 24 L. & Hist. Rev. 245 at 253.

[111] Seymour D. Thompson, *A Treatise on Homestead Exemption Laws* (St. Louis, F.H. Thomas and Company, 1878) at p. 39.

[112] R. Hynes, A. Malani, & E. Posner, "The Political Economy of Property Exemption Laws" (2004) 47 J. L. & Econ. 19 at p. 23; M. Nackman, "Anglo-American Migrants to the West: Men of Broken Fortunes? The Case of Texas, 1821-1846" (1974) 5 W. Hist. Q. 441 at p. 452. One historian suggests that settlement was necessary not only for economic development but also settlers were required as an additional means of defence against Mexico. See: Lena London, "The Initial Homestead Exemption in Texas" (1954), 57 S.W. Hist. Q. 432 at p. 450.

[113] R. Hynes, A. Malani, & E. Posner, "The Political Economy of Property Exemption Laws" (2004) 47 J. L. & Econ. 19 at 23. See e.g. Bernard R. Trujillo, "The Wisconsin Exemption Clause Debate of 1846: An Historical Perspective on the Regulation of Debt" [1998] Wisc. L. Rev. 747.

acres as the standard. By 1920, twelve of eighteen states that granted a separate exemption for farmland used the 160-acre standard.[114] The 160 acre homestead exemption was no doubt related to the homesteading movement in the United States which involved grants of government surveyed lands of not more than 160 acres to settlers.[115]

2. The Emergence of Canadian Homestead Law in the West

Following the example of the many states to the south, Manitoba enacted the Homestead Act of 1871[116] which declared free from seizure "the land cultivated by the debtor provided the extent of the same be not more than one hundred and sixty acres."[117] In addition, the Manitoba Act also exempted "the house, stables, barns, fences on the debtor's farm."[118] In 1885, Manitoba increased the potential scope of the homestead exemption. While the 160 acre limit remained the same, the province recognized a number of different uses for the land extending the homestead exemption to "land upon which the defendant or his family actually resides, or which he cultivates, either wholly or in part, or which he actually uses for grazing or other purposes."[119] In the same year Manitoba created a new exemption for non-farm property. The 1885 Act provided protection for the "actual residence or home of any person other than a farmer" to a value of $2500.[120] The following year the value of the residence was lowered to $1500.[121] The basic 160-acre farm exemption and the $1500 residential exemption remained in effect during the period of debate over the Bankruptcy Act of 1919.

In 1884 the Northwest Territories added a homestead exemption of up to 80 acres.[122] In the following year the 1885 Ordinance exempted the "homestead of the

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[114] Paul Goodman, "The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution" (1993) 80 J. Amer. Hist. 470 at 472.

[115] Douglas W. Allen, "Homesteading Property Rights; Or 'How the West was Really Won" (1991), 34 J. L. Econ. 1 at p. 21-22.

[116] 34 Vict., c. 16.

[117] 34 Vict., c. 16, s. 2.

[118] 34 Vict., c. 16. In 1880 these exemptions were incorporated into the Administration of Justice Act, C.S.M. 1880, c. 37, s. 85(8).

[119] Administration of Justice Act, S.M. 1885, c. 17, s. 117(8).

[120] Administration of Justice Act, S.M. c. 17, S.M. 1885, c. 17, s.117(11). See Manitoba Law Reform Commission, *Report on The Enforcement of Judgments, Part II: Exemptions under "The Judgments Act"* (Winnipeg, Man.: Manitoba Law Reform Commission, 1980) at 2.

[121] An Act to Amend the Administration of Justice Act, 1885, S.M. 1886, c. 35, s. 3.

[122] Exemptions Ordinance, O.N.W.T. 1884, c. 28. See D. Colwyn Williams, "Law and Institutions in the North West Territories (1869-1905)" (1963), 31 Sask. Bar. Rev. 137 at p. 141.

defendant" up to 160 acres.[123] The 1885 Ordinance also provided, like Manitoba, a personal residence exemption of $1500. The homestead and personal residence exemption did not change between 1885 and 1919. Alberta and Saskatchewan, after admission to Confederation, also provided for a 160 acre homestead exemption. Alberta continued to rely upon the Northwest Territories Ordinance[124] and Saskatchewan's initial Exemptions Act was a reprinting of the Northwest Territories Ordinance.[125] One author argues that conditions in the west necessitated this exemption law. For a settler, success or failure was uncertain owing to climate and disease. Further, "settlers were easy prey for unscrupulous money lenders who could sit back and await crop failure or other disasters."[126]

However, it was not just the provinces that became interested in providing homestead protection for settlers. The federal government, in a perhaps forgotten aspect of the settlement of the west, took steps to adopt its own homestead policy. An examination of the debate over federal policy demonstrates that the western provinces were not just copying American law out of convenience. It became a necessity in the competition for immigrants.

In 1872 the Dominion Lands Act provided for grants of lands to settlers in the Canadian West. Like the United States, lots were 160 acres.[127] The direct influence of the United States on western Canadian land policy was "too powerful in the early [1870's] to be withstood."[128] Parliament thought that the federal lands policy could benefit from the U.S. experience. In the House of Commons debates on the Dominion Lands Act Members took note of the 160 acre quarter section being used in the United States homestead movement.[129] One historian suggests that the 160 acre quarter section was to be "an American product adjusted to the solidarity of the North American continent."[130]

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[123] Exemptions Ordinance, O.N.W.T. 1885, No. 8, s. 1(9).

[124] R.S.A. 1922, c. 95.

[125] R.S.S. 1909, c. 47.

[126] D. Colwyn Williams, "Law and Institutions in the North West Territories (1869-1905)" (1963), 29 Sask. Bar Rev. 83 at p. 94.

[127] *Ibid.,* at pp. 21-22.

[128] Lewis Thomas ed., Chester Martin, *"Dominion Lands" Policy* (Toronto: McClelland and Stewart, 1973) at p. 117.

[129] Lewis Thomas ed., Chester Martin, *"Dominion Lands" Policy* (Toronto: McClelland and Stewart, 1973) at p. 141.

[130] Lewis Thomas ed., Chester Martin, *"Dominion Lands" Policy* (Toronto: McClelland and Stewart, 1973) at p. 141.

Eager to encourage settlement in the West the federal government introduced the Canada Homestead Exemption Act in 1878.[131] It provided a mechanism for the registration of a piece of land of 80 acres in a rural community located within the Northwest Territories, District of Keewatin or any other part of Canada outside a province. Alternatively the Act protected a lot on which a dwelling house stands if in a city town or village. After registration, the homestead was not subject to seizure (unless the debt was a mortgage for the payment of the land itself). The homestead in either case was limited to $2000. The size of the homestead exemption was raised to 160 acres in 1893.[132] Parliament repealed the federal Homestead Act in 1894 allowing the Northwest Territories, and ultimately Saskatchewan and Alberta to legislate in this area.[133]

Given the lack of records for provincial legislative debates on homestead exemption laws the federal Parliamentary debates provide an insight into the rationale for homestead legislation. Members of Parliament recognized that the homestead laws protected the individual debtor as well as the family unit by preserving a portion of the family's wealth even in hard times. By protecting the homestead the law enabled the debtor to overcome adversity and misfortune. In contrast where the last dollar could be taken in execution the "debtor was unlikely to be of much service to himself or his community."[134] The homestead exemption would provide the debtor and his wife and children "something to fall back upon when they got into difficulties."[135]

However, there was a larger motivation. Parliament clearly intended the federal Homestead Act to attract settlers. "Nothing could be better adapted for the encouragement of settlers in a new country than some provision of this kind."[136] Wherever a homestead principle had been recognized, "it had been found very attractive to immigrants who desired to protect themselves and their families against their own discretion."[137] Indeed, Parliament was well aware of the homestead legislation that had been passed in the United States. Such American legislation had "afforded great

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[131] S.C. 1878, c. 15.

[132] An Act to Amend the Homestead Exemption Act, S.C. 1893, c. 19.

[133] The ultimate demise of the federal Homestead Act was connected with the eventual adoption of a Northwest Territories homestead law which came into conflict with the federal Act. The Supreme Court of the Northwest Territories in 1890 held in *Re Claxton* (1890) 1 Terr. L.R. 282 (S.C.) that the territorial legislation was ultra vires. See also *Massey v. McClelland* (1895), 2 Terr. L.R. 179 (S.C.). This prompted Parliament to increase the federal homestead exemption to 160 acres in 1893 to replicate what had been in the Territorial legislation. House of Commons Debates (30 March 1893) at pp. 3547-3548; Debates of the Senate (1 April 1893) at p. 509. By 1894 Parliament opted to leave this area to the Territory and repealed the federal Homestead Act. An Act to Repeal the Homestead Exemption Act, S.C. 1894, c. 29.

[134] House of Commons Debates (29 March 1878) at pp 1512-1513.

[135] House of Commons Debates (29 March 1878) at p. 1520.

[136] House of Commons Debates (29 March 1878) at p. 1522.

[137] Senate Debates (23 April 1878) at p. 738.

inducements to immigrants to go into the country."[138] The US experience had demonstrated that a homestead exemption law had preserved law and order "for a large portion of the suffering population, instead of being tenants, were proprietors of the houses and lots which they occupied."[139] Indeed, without Canadian homestead legislation there was a fear that immigrants would move "from this country to the United States to avoid those debts." The Homestead legislation should encourage people to go west to the new country "without any anxiety, whatever, as to debts." "Otherwise it would be putting a premium on exportation and to going to the United States as against going to our own country."[140]

The overall emphasis on immigration is confirmed by pamphlets targeted at prospective immigrants. These documents highlighted the state of homestead exemption laws in Canada.[141] For example, pamphlets targeted at immigrants drew attention to the Manitoba homestead laws although in not always an entirely accurate way. One individual was quoted in *Reports of Tenant Farmers on the Dominion of Canada as a Field for Settlement* as boasting a 460 acre homestead exemption in Manitoba.[142]

The case law from the western Canadian courts highlighted the importance that homestead exemptions played in the expansion and development of the west. In *Re Demaurez*[143] the creditors claimed that as the debtor was an immigrant and as an alien he was not entitled to claim an exemption. The court rejected this argument holding:

> Our liberal exemption legislation was doubtless enacted with a view to encouraging immigration, and immigrants from foreign countries were welcome as well as those coming from the older provinces of Great Britain. An immigrant from foreign soil must remain an alien for three years at least after coming here, and if the Exemption Ordinance did not apply to him until he became naturalized, the object of the Ordinance, so far as immigrants were concerned, would be in a great measure defeated.[144]

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[138] House of Commons Debates (29 March 1878) at p. 1516.

[139] House of Commons Debates (29 March 1878) at p. 1512.

[140] House of Commons Debates (29 March 1878) at p. 1517.

[141] *A Handbook of Information for Intending Immigrants* (Ottawa: Department of Agriculture, 1877); *Information for Emigrants to the British Colonies* (Colonial Office, 1880); *Reports of Tenant Farmers' Delegates on the Dominion of Canada as a Field for Settlement* 2nd series (Ottawa, Department of Agriculture).

[142] Canada Department of Agriculture, *Reports of Tenant Farmers' Delegates on the Dominion of Canada as a Field for Settlement* 2nd Series (Ottawa, 1881) at p. 131.

[143] *Re Demaurez* (1901), 5 Terr. L.R. 84.

[144] *Ibid.,* at para 74. See also *Yorkshire Guarantee & Securities Corp. v. Cooper* (1903), 10 B.C.R. 16 (S.C.) at para 29 making note of broader exemptions available in Canada.

The Manitoba Court of Appeal in *Harris v. Rankin*[145] reached a similar conclusion holding that "The policy of the Act is to obtain *bona fide* settlers on the public lands and to retain them there."[146] At least in Manitoba, the homestead exemption statute encouraged and in fact required the cultivation of the land. If the homestead exemption statute encouraged immigration, the requirement in Manitoba to keep the land under cultivation was of broad benefit to the community:

> It is of interest to a community, such as ours, that as much land should be brought and kept under cultivation as possible, and probably the legislature had this larger object in view as well as the mere personal one of providing means of subsistence for the family.[147]

American law influenced the concept and very definition of a homestead in Canada. Several Canadian decisions cite the leading American treatise on exemptions. *Thompson on Homesteads*,[148] which defines a homestead as "a secure asylum of which the family cannot be deprived by creditors," is relied upon by a number of western courts.[149] The court in *Re Hetherington* elaborated on the homestead concept:

> The leading and fundamental idea connected with a homestead is unquestionably associated with that of a place of residence for family, where the independence and security of a home may be enjoyed without danger of loss, harassment or disturbance by reason of the improvidence of the head or any other member of the family.[150]

As will be discussed below, American exemption law would play an important part in the interpretation of Canadian exemption statutes with some courts embracing American doctrine while others rejected it. Homestead exemption laws, although borrowed from the United States, became a necessity in the competition for immigrants in the Canadian and the American west.[151] American state law contributed to the

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[145] (1887), 4 Man. R. 115 (C.A.)

[146] (1887), 4 Man. R. 115 (C.A.) at p. 132.

[147] *Brimstone v. Smith* (1884), 1 Man. R. 302 at p. 305.

[148] See: Seymour D. Thompson, *A Treatise on Homestead Exemption Laws* (St. Louis, F.H. Thomas and Company, 1878).

[149] *Hart v. Rye,* [1914] 5 W.W.R. 1280 (Alta. S.C.); *Re Bell* (1922), 32 Man. R. 9 (C.A.); *Re Hetherington* (1910), 3 Sask. R. 232.

[150] *Re Hetherington* (1910), 3 Sask. R. 232 at para. 7; see also *Hart v. Rye,* [1914] 5 W.W.R. 1280 (Alta. S.C.) (quoting *Re Hetherington*). Other courts relied upon a dictionary definition see: *John Abell Engine and Machine Works Co. v. Scott* (1907), 6 Terr. L.R. 302 at para. 2. See also *Re Claxton* (1890), 1 Terr. L.R. 282 (N.W.T.C.A.) at p. 293.

[151] A more modern study also suggests that the western regime reflected a desire to attract settlers. See University of Alberta, Institute of Law Research and Reform, *Exemptions from Execution and Wage Garnishment: Working Paper* (Edmonton: University of Alberta, 1978) at p. 5.

diversity of provincial law and this would later make uniform bankruptcy exemptions in Canada all but impossible.

3. Summary

The diverse exemption statutes did not escape the attention of the legal profession. A 1914 article in the *Canada Law Journal* highlighted some of the differences in the provincial exemption statutes:

> It is scarcely necessary to emphasize further how great the contrast between a western and eastern province. Thousands of dollars exemption in the west one finds reduced to hundreds in the east, across the Atlantic to a mere bagatelle. While clothing is exempt in Ontario, the exemption of furniture is on a critically exact detailed list, the exemption of food gives the judgment debtor a chance to live 30 days, but his food must be cheap.[152]
>
> The exemption of cattle and domestic fowl suffers similar shrinkage, the exemption of tools and implements likewise, and while there is a slight pampering in the way of bees, there is no provision running up into the thousands for land and buildings in Ontario.[153]

The article noted that as of 1914 in Canada there was "no uniform standard…fixing the execution debtor's exemption rights."[154] The western provinces are "liberal, the execution creditor thinks too liberal: the older provinces are more exacting and give less offence to the execution creditor."[155] The article offered several reasons for the wide differences. The western provinces required "the honest worker whether he has...execution creditors or not."[156] Further, the western provinces were "making a clean start with equal rights to debtor and creditor."[157] In the new country:

> many a healthy, honest, but unfortunate, worker with a family may there once again hold up his head and have a home for his wife and children. Those lusty developing provinces, it is said, need the industrial influx; the unfortunate citizen needs whereon to lay his head.[158]

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[152] "Exemptions from Execution" (1914) 50 Can. L.J. 321 at 324. The *Execution Act*, R.S.O. 1914, c. 80, s. 3(d) provided "all necessary fuel, meat, fish, flour and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value $40."

[153] "Exemptions from Execution" (1914) 50 Can. L.J. 321 at 324.

[154] *Ibid.* at 322.

[155] *Ibid.*

[156] *Ibid.*

[157] *Ibid.* at 323.

[158] *Ibid.*

Far from criticizing the lack of uniformity, the article praised the western provinces while criticizing the "strict eastern provinces"[159] for knowing "little", and caring "less about the policy of developing exemption laws."[160]

Provincial exemption law as it stood at the time Grundy began to draft the new Bankruptcy Act was diverse and likely impossible to harmonize. Although exemption statutes shared many similar features in their attempt to preserve certain necessaries for the debtor and his family, the scope of necessary items of personal property varied from province to province not only in terms of the listed items but also in terms of dollar amounts. As the homestead exemption in the west had played a substantial role in the settlement of the region, removing it in the name of uniformity of bankruptcy exemptions would have been politically precarious.

IV. Exemption Jurisprudence

Case law provided another layer of diversity. Although the statutes provided the underpinning for the diversity in the case law, a study of the reported cases between 1867 and 1919 highlights the fundamental differences between those provinces with a 160-acre homestead exemption and those provinces without. The study also reveals regional differences in the interpretation of exemption statutes. Even where two or more provinces had similar exemption regimes there was no consistent approach to the interpretation of exemption statutes.

As indicated above several provinces provided for a homestead exemption. Manitoba, Saskatchewan and Alberta shared a 160-acre homestead limit and these three provinces along with the Northwest Territories (prior to 1905) generated most of the litigation on exemptions.[161] The decisions of the western courts not only reveal judicial attitudes towards homestead exemptions but also highlight differences between the various regimes.

Although the basic personal property exemptions available in all provinces shared a common purpose of maintaining some minimal level of subsistence for the debtor, the homestead exemptions went much further than that. The case law on the 160 acre exemption in the west reveals that beyond immigration or settlement the homestead exemption had much broader purposes that were of direct benefit to the debtor or his family. These broader purposes could not be replicated in provinces without a homestead exemption. The idea that physical shelter was offered to the debtor and his family from creditors frequently appears in the case law. In Saskatchewan the court held:

> The purpose of the Exemption Ordinance being to preserve the debtor and his family a home in which they can dwell without risk of disturbance from creditors,

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[159] *Ibid.* at 324.

[160] *Ibid.*

[161] Although, British Columbia, Ontario and Quebec also provided a form of homestead exemption few cases came out of these provinces on homestead law.

> it follows that to secure the protection of the Ordinance there must be actual occupancy of the place as a home.[162]

In the Northwest Territories the homestead exemption ordinance was "passed with the object of providing a home for execution debtors 'so as to give them shelter beyond the reach of financial misfortune.'"[163] In 1922 the Manitoba Court of Appeal went so far as to say that the $1500 residential home exemption "is not designed for any purpose other than to provide shelter for the debtor and his family as a matter of public policy."[164] Consistent with the theme of providing a shelter for the debtor and his family, the courts denied attempts by partnerships to claim an exemption.[165]

Beyond physical security, a homestead exemption also provided financial security in ways that could not be realized by debtors facing the rather meager lists of exempt chattels found in other provinces:

> I am of opinion that it would altogether interfere with the intention of the Exemption Ordinance, if a person was prevented from raising money on the security of his homestead. It might in many instances be very essential for the support and maintenance of himself and family that the homesteader should raise money, and the only security available which he might have to offer would be his homestead.[166]

In a decision of the same year, the Saskatchewan Court of Appeal was of the view that in protecting the homestead the "legislature did not interfere with [the debtor's] right to mortgage or [e]ncumber it, or deal with in any way he might choose."[167] The protection would be maintained as long as the debtor did not voluntarily convert it into property which was not eligible for the homestead exemption.

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[162] *Re Hetherington* (1910), 3 Sask. L.R. 232 at para. 7.

[163] *Eastern Townships Bank v. Drysdale* (1905), 6 Terr. L.R. 236 at para. 5. See also *John Abell Engine and Machine Works Co. v. Scott* (1907), 6 Terr. L.R. 302 at para. 2 (intention of homestead exemption was to secure farmers, as against their creditors, a means of livelihood by which they could support themselves and their families).

[164] *Re Bell* (1922), 32 Man. R. 9 (C.A.) at para. 102.

[165] See e.g. *Steenerson v. Bank of Toronto*, [1922] 3 W.W.R. 922; *MacKinnon v. Beals* (1917), 10 Alta. L.R. 503 (S.C.(A.D.)) at para. 9; *Dobrovitch v. Canadian Credit Men's Trust Association* (1924), 19 Sask. L.R. 77 (C.A.).

[166] *Baker v. Gillum* (1908), 1 Sask. L.R. 498, 9 W.L.R. 436 at para. 5, Wetmore C.J.

[167] *Purdy v. Colton* (1908), 1 Sask. L.R. 288 (C.A.) at para. 8; *Ashcroft v. Hopkins* (1909), 2 Alta. L.R. 253 (Alta. S.C.) (to same effect on chattel mortgages). The exemption of a homestead from seizure did not extend to rents or profits from the land beyond what was listed as exempt personal property in the Exemptions Act. Thus, while a debtor might retain necessary food for the family for six months and food for livestock for certain months there was no general exemption for crops. See *Wilkins v. Miner* (1926), 22 Alta. L.R. 329 (S.C.(A.D.)).

Although the three western provinces shared a common 160-acre exemption there were differences in the wording of the homestead statute that raised the issue of how the courts would treat the issue of abandonment and reoccupation of a homestead. The requirement of occupation of land was a common theme in the cases[168] leaving a debtor without an exemption where the land was sold. The homestead exemption did not extend to the proceeds of sale.[169] Where the debtor was not in occupation of the land it was prima facie not exempt and there was an onus on the debtor to show that his absence from the land "was merely temporary and for a definite temporary purpose, and that he had a constant and abiding intention to return as soon as that purpose was accomplished."[170]

In contrast to the other western provinces, the Manitoba Homestead Exemption Act of 1871 limited the exemption to "land cultivated by the debtor" up to 160 acres. This provision came before court in *Brimstone v. Smith*[171] in 1884. The court rejected American jurisprudence which required the mere passive act of residing. Smith J. was of the view that the Manitoba statute required something "to be done with the land in order to support the exemption."[172] It was the labour of the debtor that was key:

> I therefore think the debtor should be held more strictly to the very words of the statute…and that in each particular instance of ceasing to cultivate, he must satisfy the Court it occurred for some grave reason and has not continued [for] an unreasonable period.[173]

Here the debtor was denied the exemption as he had left the farm and leased the property leaving the land uncultivated. The Manitoba Court of Appeal in *Harris v. Rankin*[174] also adopted a strict approach to the interpretation of the homestead exemption. The provision "must be construed strictly and it can, I think render exempt only the lands actually under cultivation, and not the whole of a parcel of one hundred and sixty acres of which a part is under cultivation."[175]

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[168] *Overton v. Gerrity,* [1916] 10 W.W.R. 1113 (Sask. S.C.).

[169] *Massey-Harris Co. v. Schram* (1902), 5 Terr. L.R. 338 (N.W.T.S.C.) at para. 6; *Bocz v. Spiller* (1905), 6 Terr. L.R. 225.

[170] *Re Dallin* (1911), 4 Sask. L.R. 158 (S.C.) at para. 2.

[171] (1884) 1 Man. R. 302.

[172] *Ibid.,* at p. 305.

[173] *Ibid.,* at pp. 305-306.

[174] (1887), 4 Man. R. 115 (C.A.).

[175] *Ibid.,* at p. 135. A post 1919 case appeared to relax the strict requirement for cultivation. See *Re Bell* (1922), 32 Man. R. 9 (C.A.) at para. 99 (emphasizing occupation to maintain a homestead).

The case law also demonstrates a source of diversity with respect to two interpretative issues. As exemption statutes are a derogation of the common law rights of creditors one line of cases suggested that exemption statutes should be construed strictly. However, there is a competing line of cases that takes the view that exemption statutes are remedial and is to be given a liberal interpretation to protect the debtor.[176] Manitoba was the prime source of many judicial opinions that adopted a strict interpretative approach to exemption statutes. As discussed above, *Brimstone v. Smith*[177] and *Harris v. Rankin*[178] adopted a strict approach to Manitoba's exemption statute emphasizing the fundamental importance of the requirement to cultivate the land.

In *The London & Canadian Loan and Agency Co. v. Connell*[179] the court considered whether a widow could claim the homestead exemption of her deceased husband. As the statute was silent on the issue, counsel for the defendant urged the court to rely upon American authorities for the proposition that "as the exemption law is a remedial one, and has for its main object the protection of the debtor's wife and family, it should receive a liberal construction and be given as wide an effect as possible."[180] Taylor C.J. rejected this principle concluding that "I am not aware of any decision by a Court in this country that these exempting statutes are to receive such a liberal construction."[181] He held that exemption statutes were a derogation of the common law (i.e. in the absence of such an Act a creditor would have the right to proceed against the property) and Acts that confer exceptional exemptions "correlatively trenching on general rights are subject to the principle of strict construction."[182] The court refused to recognize the homestead exemption as claimed by the widow and children of the debtor.

A Manitoba court also rejected American authority in *Codville v. Pearce.*[183] The court considered a claim by a debtor to exempt a two-storey building under the Manitoba "actual residence or home exemption." Only the top floor of the building was occupied by the debtor with the lower portion built for use as a store. The creditor, relying upon US authority, argued that since there was no occupation of the lower portion it was

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[176] See Thomas G.W. Telfer, "Preliminary Paper on the Law of Personal Exemptions from Seizure" (Uniform Law Conference of Canada, 2004) at p. 2; C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed. (Toronto: Carswell, 1995) at p. 455.

[177] (1884), 1 Man. R. 302.

[178] (1887), 4 Man. R. 115 (C.A.).

[179] (1896), 11 Man. R. 115.

[180] *Ibid.* at p. 118.

[181] *Ibid.* at p. 118.

[182] *Ibid.* at p. 118.

[183] (1901), 13 Man. R. 468. H.P. Grundy, the drafter of the Canadian Bankruptcy Act of 1919 appeared as co-counsel for the defendant debtor.

possible to divide the building for purposes of execution. The defendant also relied upon US authority for the proposition that exemption statutes were to be construed liberally.

The court ultimately held that the whole building was exempt but on the narrow factual grounds that both parts of the building were used as the actual residence. Although the court divided on the actual result in the case, the majority and minority concurred in their opposition to a liberal interpretation of the Act. Avoiding the question whether buildings could be divided Killam C.J. was of the view that statutes that "prevent a creditor from resorting to property which is in the disposition of his debtor….should be narrowly construed."[184] Dubuc J. set out the American authorities on both sides of the dispute stating: "I do not think that any of these extreme views were intended by our Legislature in enacting the exemption provisions." The Court "is not supposed…to give the statutory provision a wider scope than may be reasonably presumed to have been intended."[185] Bain J. in dissent was prepared to grant the creditor a lien or charge over the lower part of the building. After all exemption statutes "should be construed as far as possible so as not to withdraw from creditors any more of a debtor's property than it actually exempts."[186]

Citing American authorities that had construed homestead exemptions "liberally in favour of the homesteader", Dubuc J. in *Dixon v. McKay*[187] noted that "the provisions respecting exemption have not received such a wide and extensive application in our own courts."[188] Bain J., citing the earlier decisions in *Harris* and *London and Canadian Loan,* noted that "it has been held that these provisions giving exemptions from seizure must be construed strictly."[189] Here the debtor had abandoned the homestead without demonstrating an intention to return. The court found that the exemption was lost. Noting that many American decisions had preserved the homestead exemption even where there was a considerable absence, Bain J. concluded that "while these [American] courts construe exemptions much more liberally than this Court can, they still adopt the rule as…pointed out in [the earlier Manitoba case of] *Brimstone v. Smith* that the intention to return and occupy must be clearly shown."[190] The strict construction of

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[184] *Ibid.* at p. 472.

[185] *Ibid.* at p. 476.

[186] *Ibid.* at p. 477.

[187] (1899), 12 Man. R. 514 (Q.B.). Dubuc J. dissented on the result relying upon the intention of the debtor as the governing factor.

[188] *Ibid.,* at p. 518.

[189] *Ibid.,* at p. 520.

[190] *Ibid.,* at p. 521. Cf. *Hart v. Rye,* [1914] 5 W.W.R. 1280 (Alta. S.C.)

Manitoba exemption statutes was applied consistently[191] during the period leading up to 1919 with some exceptions.[192]

Decisions in British Columbia also tended to interpret exemption legislation in favour of the creditor.[193] A number of B.C. cases asked whether an exemption was a mere privilege (i.e. to be effective the exemption must be asserted or lost) or an absolute right which existed whether claimed or not.[194] The courts in British Columbia generally held that an exemption was a privilege even though the exemption provision referred to "goods and chattels of any debtor, *at the option of such debtor*…to the value of $500."[195] In 1878 the court in *Johnson v. Harris*[196] concluded that:

> The law says, if a man wants the benefit of a certain privilege which is different from that which men ordinarily possess, let him come forward, claim his right, and prove it before the proper tribunal, and there he shall have the benefit of it. If he waits until it is too late, that is his own fault. He is not to expect all the world to know or believe in his peculiar privileges.[197]

In *Sehl v. Humphreys*[198] the court emphasized that the personal property exemption was "an exceptional privilege."[199] By delaying in claiming an exemption the debtor misled the sheriff and the judgment creditor and as a consequence lost the ability to assert an exemption.[200] The court in *Re Ley*[201] reached a similar conclusion: "That

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[191] See also *Young v. Short* (1885), 3 Man. R. 302; *Roberts v. Hartley* (1902), 14 Man. R. 284. Later decisions take a more debtor friendly approach mainly in relation to amendments to the legislation. See *Robin Hood Milling v. Maple Leaf Milling,* [1916] 9 W.W.R. 1453 (Man. K.B.); *Kippan v. McCaw* (1923), 34 Man. R. 64.

[192] There are some exceptions. See e.g. *Nelson v. Gurney,* [1877] Man. R. Temp. Wood. 173 (Q.B.) (statute is very broad and thus includes horse and harness); *Canada Law Book v. A.B.* (1908), 17 Man. R. 345 at para. 1 (decision avoided a narrow construction of Act).

[193] See e.g. *Hudson's Bay v. Hazlett* (1896), 4 B.C.R. 450 (S.C.) (goods and chattels did not include book debts).

[194] This issue continued to be raised well past 1919 but its roots can be traced back to the nineteenth century. For the modern treatment see C.R.B Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed. (Toronto: Carswell, 1995) at pp. 468-469.

[195] See e.g. Homestead Act, R.S.B.C. 1897, c. 100, s. 17 (emphasis added).

[196] (1878) 1 B.C.R. (Pt. 1) 93 (S.C.).

[197] *Ibid.,* at para. 13.

[198] (1886), 1 B.C.R. (Pt. 2) 257 (S.C.).

[199] *Ibid.,* at para. 3.

[200] *Ibid.,* at para. 4.

[201] (1900), 7 B.C.R. 94 (S.C.).

under our Act the exemption is not an absolute right but a privilege and therefore may be waived as well as lost by laches."[202]

Although two cases at the turn of the century chose to ignore precedent, holding that an exemption was an absolute right,[203] the British Columbia Court of Appeal in *Roy v. Fortin*[204] clarified the matter in 1915 by concluding that exemptions were a privilege that had to be asserted or lost. A majority of the Court of Appeal rejected the notion that an exemption was an absolute right. MacDonald C.J.A. refused to accept the suggestion that the sheriff was required to set aside $500 as an exemption in favour of the debtor. This suggestion "finds no sanction in any part of the Act and is against the whole tenor of it."[205]

The dissent in *Roy* not only foreshadowed more modern justifications for exemptions but also acknowledged the role that exemptions played in immigration policy. McPhillips J.A. concluded that the Legislature had intended that judgment debtors "who, by misfortune, have become unable to pay their debts in full shall be left something and not be cast upon the community with nothing, penniless with the likelihood of becoming a public charge." According to McPhillips J.A. the right of exemption "must be construed favourably to the class which the legislature plainly intends shall be protected from the undue rapacity of creditors." Finally, McPhillips acknowledged that exemptions had a special role to play in the history of the country. "[P]eople are invited to come into the country, a new country, with this statutory guarantee held out to them and it may be said in passing that the exemption accorded in this Province is slight indeed in comparison to that accorded in other provinces of Canada."[206] While there are isolated examples of British Columbia cases which give more of an emphasis to debtor interests,[207] the overall tenor of the decisions favoured creditors. The dissenting opinion in *Roy* did not find favour in subsequent British Columbia cases between 1915 and 1919.

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[202] *Ibid.,* at para. 1. See also *Re Sharp,* [1896] B.C.J. No. 22 (S.C.).

[203] *Yorkshire Guarantee & Securities Corp. v. Cooper* (1903), 10 B.C.R. 16 (S.C.); *Dickinson v. Robinson* (1905), 11 B.C.R. 155 (S.C.). ("Or suppose he is absent and his notice goes astray, must he go home and find not even a stove to cook his food in?") at para. 1.

[204] (1915), 22 B.C.R. 282 (C.A.).

[205] *Ibid.,* at para. 4. The majority position was adopted in *Re Trenwith* (1922), 3 C.B.R. 371 (B.C.S.C.).

[206] *Roy v. Fortin* (1915), 22 B.C.R. 282 (C.A.) at para. 26.

[207] See e.g. *Pilling v. Stewart,* [1895] B.C.J. No. 27 (S.C.) at para. 1 ("The intention of the Act was that a debtor should not be stripped of all he possessed in the world, but should be left a sufficiency to enable him to start again."). *Yorkshire Guarantee & Securities Corp. v. Cooper* (1903), 10 B.C.R. 16 (S.C.) (refusing to adopt a strict construction which would deny debtor an exemption where only a single item claimed); *Dickinson v. Robinson* (1905), 11 B.C.R. 155 (S.C.) (exemption a right not a privilege).

Manitoba and British Columbia stand apart from the other provinces and territories in their decidedly pro-creditor attitude towards exemption statutes. Although the privilege/right issue does not arise on a regular basis in other provinces or territories, the British Columbia position on exemption as a privilege appears to have been followed only in Manitoba.[208] The early Ontario case of *Davidson v. Reynolds*[209] suggests that a debtor has a "right" to select a chattel. In *Re Demaurez*[210] the Northwest Territory Supreme Court rejected the notion that the debtor should have asserted an exemption as a privilege. "It was objected that [the debtor] should have pointed out what he claimed as exempt. I think the law is that the sheriff is bound to leave him what is exempt, the debtor having the right, if he chooses to exercise it, to a choice from the greater quantity of the same kind of articles which are exempted."[211] The Saskatchewan Court of Appeal followed *Demaurez* in *Purdy v. Colton*[212] holding that an exemption was a right. Even where a debtor did not claim an exemption "it is the duty of the sheriff to leave the exemptions which the law allows."[213]

While there are instances of a strict construction approach being applied in other provinces or territories,[214] there is no similar trend that can be identified like the one in Manitoba that required as a matter of general principle a strict construction of all exemption statutes.[215] There are numerous examples in the provinces and territories beyond Manitoba and British Columbia that adopt a more debtor friendly interpretation.[216] A number of decisions confirm that exemptions were designed to

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[208] See e.g. *Young v. Short* (1885), 3 Man. R. 302 (Q.B.) at p. 304.

[209] (1865), 16 U.C.C.P. 140 (U.C.C.P.). See also *Temperance Ins. Co. v. Coombe* (1892), 28 Can. L.J. 88 (Ont. County Ct.) (exemptions are at the absolute disposal of the debtor).

[210] (1901), 5 Terr. L.R. 84 (S.C.).

[211] *Ibid.,* at para. 75. But cf *Re Claxton* (1890), 1 Terr. L.R. 282 (S.C.) at p. 288.

[212] (1908), 1 Sask L.R. 288 (C.A.)

[213] *Ibid.,* at para. 9.

[214] See e.g. *McCrae v. Frooks* (1911), 17 W.L.R. 287 (Yukon Trial) (tool of trade exemption not available where debtor has abandoned trade or occupation); *Jones v. Jesse* (1909), 10 W.L.R. 627 (Sask. Dist. Ct.) (notes as proceeds not exempt); *Re Hetherington* (1910), 3 Sask. L.R. 232 (strict construction required); *Trottier v. National Manufacturing Co.* [1912] 7 W.W. R. 1389 (Sask. S.C.) (in balancing of the conveniences one should favour the creditor); *McLeod v. Girvin Central Telephone Assn.,* [1926] 1 W.W.R. 38 (Sask. K.B.) (rejecting argument that car is a tool of trade); *Burns v. Christiansen* (1921), 16 Alta. L.R. 394 (automobile not a tool of trade); *Pickering v. Thompson* (1911), 24 O.L.R. 378 (H.C.J.) (widow not entitled to claim tool of trade exemption which could only have been claimed by her deceased husband).

[215] There are too few decisions from Quebec to reach any general conclusions about that province. See *Bilodeau v. Jalbert et Jalbert* (1891), 17 Q.L.R. 297; *Butler v. Prevost* (1906), 7 Q.P.R. 465; *Lecavalier v. Brunelle* (1907), 8 Q.P.R. 245; *Thompson v. Buchan & Buchan* (1909), 8 Q.P.R. 246.

[216] See e.g. *McBride v. Brooks* (1911), 4 Sask. L.R. 124 (S.C.) (exception for purchase price not applicable where joint liability); *Caryk v. Kiefer* (1922), 15 Sask. L.R. 64 (hotel exempt even though exemption

ensure that the debtor retained some level of subsistence to support himself and his family. Indeed, "to take a debtor's bed and bedding in the use of himself and family for any debt has always been esteemed a great cruelty."[217] Nova Scotia's exemption of the debtor's "last cow" "was a humane provision to prevent a [debtor's] young children, when he was unable to support them, from being deprived of all means of sustenance."[218] The Saskatchewan Court of Appeal concluded that "the object of exemption law is to prevent persons from being deprived of all means of carrying on their trade."[219] The Ontario Court of Appeal in *Mitchell v. Coffee*[220] sought to apply legal principles "in the most liberal spirit, for the private benefit of the plaintiff and the promotion of public convenience."[221] The Court felt "every disposition to restrain within its strict boundaries a law which authorizes the sale of one man's property for another's debt, and which is often productive of cruel hardship and abominable oppression."[222] Here the court reluctantly found that the landlord had not exceeded his right.

In the subsequent case of *Osler v. Muter*[223] the Ontario Court of Appeal in upholding a claim for exempt property stated: "it is considered right that this description of property should be left to a debtor for the support of himself and his family and to be free from the claims of creditors."[224] In this case the debtor had insured his property which was exempt from seizure. A fire destroyed the property and the debtor received funds from the insurance company. The trial judge had relied upon American authorities and concluded that the insurance funds were exempt. Notwithstanding the creditor's concern that the funds might be diverted for some purpose other than the replacement of the chattels the Court of Appeal held that the insurance funds were exempt.

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provided for "house and buildings"); *Hotham v. Bright,* [1923] 3 W.W.R. 94 (Sask. K.B.) (piano exempt as "household furnishings"); *Davidson v. Reynolds*(1865), 16 U.C.C.P. 140 at para. 3.

[217] *Bernard v. Tetu* [1890-91] 1 W.L.T.R. 142 at p. 143. However, where a chattel was abandoned or put in storage the exemption was held to be lost.

[218] *McLean v. Watson* (1858), 3 N.S.R. 406 (C.A.) at p. 407.

[219] *Dobrovitch v. Canadian Credit Men's Trust Association* (1924), 19 Sask. L.R. 77 (C.A.) at para. 20. The court ultimately rejected the notion that this principal should apply to partnerships.

[220] (1880), 5 O.A.R. 525 (C.A.). The facts in issue involved the scope of a landlord's right of distress and thus did not technically involve an execution remedy. Nevertheless the statements of the court would be indicative of attitudes towards exemptions more generally.

[221] *Ibid.,* at para. 27. See also *Wright v. Hollingshead* (1895), 23 O.A.R. 1 (C.A.) (object of statute passed in favour of debtor).

[222] *Ibid.,* at para. 30.

[223] *Osler v. Muter* (1892), 19 O.A.R. 94 (C.A.)

[224] (1892), 19 O.A.R. 94 (C.A.) at para. 6. However, cf. *McMartin v. Hurlburt* (1877), 2 O.A.R. 146 (C.A.) (refusing to recognize an exemption where value of horse exceeded $60).

Whereas the trend in Manitoba had been to reject American cases, a number of other decisions outside of Manitoba relied upon US authorities to interpret exemption statutes in a more liberal way.[225] Thus in *Re Kolbe Estate*[226] the Saskatchewan Court of King's Bench quoted from the American treatise, *Freeman on Executions* for the following proposition:

> Generally, and perhaps universally, the necessities of the now dependent family have been recognized, and as far as possible provided for by laws, under which the exempt property is preserved from the grasp of creditors, and set aside for the use of the family.[227]

The court recognized that the Saskatchewan Exemptions Act endorsed this principle in that the widow could claim as exempt property assets which had belonged to her deceased husband. Similarly, Brown C.J.K.B. in *McDougall v. McDougall*[228] relied upon American authority for the proposition that a claim of ownership to land was not essential to claim a homestead exemption. While mere possession would not suffice, a legal or equitable interest, a life estate or a term for an estate for limited number of years would suffice "for the law protects every estate which could be seized and sold on execution."[229] The court recognized a homestead exemption where the debtor had a half interest in the land. The Alberta Supreme Court relied upon American authorities and read the Exemptions Ordinance broadly to conclude to that a buggy was exempt property falling under the description of "wagon" in the Act.[230]

Two Ontario decisions under the Insolvent Act of 1875 perhaps represent the most liberal end of the spectrum. In *Re Robinson*[231] the court considered the scope of Ontario exemption law in the context of Insolvent Act. Section 16 of the Insolvent Act vested in the Assignee all property of the debtor except real and personal property exempt under provincial law. The court considered whether a watch and chain valued at $20 was exempt under Ontario law. The only relevant category of exemption was a possible claim that the watch was "necessary and ordinary wearing apparel of the debtor and his

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[225] The Canada Law Journal reproduced an article from the Albany Law Journal on tools of trade. See "Mechanics Tools" (1879) 15 Can. L.J. 43.

[226] [1918] 3 W.W.R. 310 (Sask. K.B.)

[227] *Ibid.,* at para. 7. See also *Re Nicholas Conlin Estate* (1914), 7 Alta. L.R. (S.C.); *Standard Trusts Co. v. Briggs* (1926), 22 Alta. L.R. 113 (Alta. S.C.); *Re Tatham* (1901), 2 O.L.R. 343 (H.C.J.). Not everyone agreed with the tenor of the decisions in this area. See Bram Thomson, "The Homestead and Exempted Property in Saskatchewan" (1919), Can. L.T. 335. However cf *Re Wright Estate,* [1921] 1 W.W.R. 800 (Sask. K.B.) (exemption for widow does not apply where land not in use by widow or necessary for support).

[228] (1919), 12 Sask. L.R. 289 (K.B.).

[229] *Ibid.,* at para. 12.

[230] *Ashcroft v.Hopkins* (1909), 2 Alta. L.R. 253 (Alta. S.C.).

[231] (1879), 25 (N.S.) Can. L.J. 287 (Toronto, January 22, 1879).

family." The court found in favour of the debtor concluding that the common and inexpensive watch and chain were necessary and ordinary wearing apparel:

> A watch is a very useful and sometimes a necessary gear; it will inform us as to time, and direct our movements in regard to appointments….In some occupations a person cannot do without a watch. Thousands of the human race wear external habiliments which may not be necessary but are ordinary and in common use. Fashionable apparel and showy ornaments are among the foibles of our ages, still men and women do not think so, so that they embellish their persons with ornamental things and external habiliments of many kinds, and when within their means and in common use among the inhabitants they appear to become ordinary apparel.[232]

In *Clarkson v. White* the court held that a bankrupt's necessary earnings were exempt. The case was also decided in the context of the Insolvent Act 1875 but the Insolvent Act did not expressly provide for a wage exemption. The court acknowledged that although the Insolvent Act "does not in terms except personal earnings from passing to the assignee" nevertheless "in the working out of the Act these are practically exempt."[233] The court did not refer to provincial law as s. 16 of the Insolvent Act mandated. The court held that:

> The policy of the Insolvency and Bankruptcy Acts as practically worked out, is to exempt the personal earnings of the undischarged bankrupt from being claimed by the assignee in so far as that claim would interfere with the reasonable and proper maintenance of the insolvent and family according to their station in life. The incentive to labour in order that a man may provide for his own household, is not to be lightly interfered with.[234]

The court relied upon English case law and in particular the decision in *Ex parte Vine*[235] wherein James L.J. concluded that there should be an exception to the principle that all of the debtor's property should vest in the assignee. That exception was "absolutely necessary, in order that the bankrupt might not be an outlaw, a mere slave to his trustee; he could not be prevented from earning his own living."[236] The court's willingness to exempt wages, even without a statutory basis for such an exemption, demonstrated a flexible approach that favoured the debtor.

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[232] *Ibid.,* at p. 288.

[233] (1882), 4 O.R. 663 (H.C.J. (Ch. Div.)) at para. 18, Boyd C.

[234] *Ibid.,* at para. 13, Boyd C.

[235] (1878), 8 L.R. Ch. D. 366 cited in *ibid.* at para 17.

[236] (1878), 8 L.R. Ch. D. 366 cited in *ibid.* at para 17.

Although the statutes contributed towards much of the diversity in the case law,[237] one can identify certain trends in the case law stemming from varying judicial attitudes towards the exemption statutes. While one can point to examples of liberal and conservative decisions in each region, broader trends are also evident. The case law in British Columbia was broadly in favour of characterizing an exemption as a privilege that must be asserted or lost. Manitoba rejected American authorities in favour of a strict interpretation of exemption statutes. In contrast, outside of Manitoba several courts relied upon American authorities to support a liberal interpretation. There was more of a willingness outside of Manitoba and British Columbia to recognize the importance of exemption law as providing for a level of subsistence for the debtor and his family. As member of the Manitoba Bar, and having appeared in at least one exemption case in which US authorities were raised, H.P. Grundy would have been well aware of varying approaches to the interpretation of exemption statutes.

V. English Bankruptcy Exemptions

Apart from relying upon provincial laws to set bankruptcy exemptions, Grundy could have chosen to follow the English bankruptcy statute as he did for many other aspects of his Bankruptcy bill. However, beyond the diversity of provincial exemption law, the weakness of the English bankruptcy exemptions themselves provided a problem. English bankruptcy exemptions have always been very modest in contrast to exemptions available to debtors in the Canadian provinces. The common law took the position (outside of bankruptcy) that the sheriff was able to seize and sell all the personal goods and chattels of the debtor that could be found and sold, with the exception of wearing apparel in actual use.[238] In 1696, the court in *Hardistey v. Barney*[239] concluded that "the sheriff may take anything but wearing clothes, nay, if the party if hath two gowns, he may take one of them."[240] By 1838 the common law recognized that "a man's clothes

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[237] In some instances a court would draw attention to the different wording of exemption statutes in other provinces. Thus in *Meunier v. Doray* (1905), 6 Terr. L.R. 194 (F.C.) the Northwest Territory Supreme Court drew attention to the fact that while the Territorial Ordinance protected the real and personal property of a "debtor and his family" the Manitoba Exemption statute at that time made no provision to shelter any property of the debtor's family. See also *National Trust v. Stancul,* [1915] 7 W.W.R. 1389 (Sask. S.C.); *Canadian Imperial Bank of Commerce v. Holiski,* [1920] 1 W.W.R. 667 (Sask. K.B.); Cf. *Young v. Short* (1885), 3 Man. R. 302 (Q.B.) at p. 304; *Roberts v. Hartley* (1902), 14 Man. R. 284.

[238] C. R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed. (Toronto: Carswell, 1995) at 85. *Hardistey v. Barne*y (1696), 90 E.R. 525 (K.B.); *Sunbolf v. Alford* (1838), 3 M & W 247, 150 E.R. 1135 (Ex.). See also *Burrows v. Johnston,* [1928] 4 D.L.R. 865 (Sask. C.A.) at 867; *Stott v. Raby,* [1934] 3 W.W.R. 625 (Alta. S.C.).

[239] (1696), 90 E.R. 525 (K.B.)

[240] *Ibid.*

cannot be taken off his back in execution."[241] Thus, wearing apparel, even though not in the actual possession of the debtor was exempt at common law.[242]

Although English bankruptcy statutes can be traced to 1543,[243] England did not provide for a bankruptcy exemption until 1705. The English Parliament provided an exemption for necessary wearing apparel plus an additional exemption of 5% of the estate, not to exceed 200 pounds in the event that the estate paid a dividend of at least eight shillings in the pound. Where the dividend was less, the bankruptcy administrator was to determine the level of the exemption.[244] The exemption provision, as well as the newly enacted discharge, were designed to encourage the bankrupt to cooperate.[245]

By 1914 English bankruptcy exemptions had only modestly progressed. The exempt property only extended to "the tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole."[246] Apart from trust property, all other property of the bankrupt vested in the trustee.[247]

In commenting on the scope of the English bankruptcy exemptions, an editorial in Canada Law Journal compared the English exemptions with provincial law. The editorial noted that "while making comparisons it is perhaps not improper to emphasize that, England knows and cares less than our eastern provinces, and the eastern provinces infinitely less of this class of debtor's relief than the sturdy and rapidly-developing western districts."[248]

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[241] *Sunbolf v. Alford* (1838), 3 M & W 247, 150 E.R. 1135 at p. 1138 (Ex.).

[242] On the evolution of the common law of creditors' remedies see William Holdsworth, *A History of English Law* Vol. VII (London: Meuthen and Sweet and Maxwell, 1925) at pp. 228-233; William T. Vukowich, "Debtors' Exemption Rights" (1973-74), Georgetown L. J. 779 at p. 782.

[243] 34, 35 Henry VIII, c. 4. See William Holdsworth, *A History of English Law* Vol. VII (London: Meuthen and Sweet and Maxwell, 1925) at p. 236.

[244] V. Countryman, "Bankruptcy and the Individual Debtor—And a Modest Proposal to Return to the Seventeenth Century" (1982-83), 32 Catholic. U. L. Rev. 809 at p. 812 See 4 Anne, ch. 17 (1705). See also V. Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-Up in Nineteenth Century England* (Oxford: Clarendon Press, 1995) at p. 77.

[245] Lester, *ibid.*

[246] Bankruptcy Act of 1914, s. 38 (U.K.). See e.g. *Re Roberts* [1900] 1 Q.B. 122 (C.A.).

[247] Outside of bankruptcy the UK Small Debts Act 1845, 8 & 9 Vict., c. 127, s. 8 provided an exemption for "the wearing apparel and bedding of any judgment debtor or his family, and the tools and implements of his trade, the value of such apparel, bedding, tools and implements not exceeding in the whole the value of 5 L. shall not be liable to seizure under any execution or order of any court against his goods and chattels." See *Re Dawson,* [1899] 2 Q.B. 54; A. Resnick, "Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy" (1978), 31 Rutgers. L. Rev. 615 at p. 620.

[248] "Exemptions From Execution" (1914), 50 Can. L.J. 321.

VI. Bankruptcy Act of 1919 and the Triumph of Provincial Exemptions

After World War I, there was renewed interest in the establishment of a national bankruptcy statute. The Canadian Credit Men's Trust Association (CCMTA), one of the largest organizations of trustees operating under the provincial statutes identified several defects in the provincial legislation that had emerged since the repeal of the federal bankruptcy statute in 1880.[249] First, provincial law was not uniform. Second, provincial legislation provided no compulsory proceedings. Third, provincial legislation did not adequately deal with composition agreements. Finally, the CCMTA noted that provincial legislation did not provide for a debtor's discharge.[250] Calls for uniform bankruptcy legislation dated back to the nineteenth century.[251] However, in 1918 and 1919, there was no widespread call for a uniform exemption regime within a new bankruptcy statute.[252] Indeed an editorial in the Canada Law Journal suggests that reconciliation of the varied approaches in England and the provinces would not have been possible:

> The history of law of such exemptions in England, in the eastern provinces of Canada, and in the west, is interesting. It would be a keen criticism, on the score of fair play, against the various law districts of the empire to urge that the right to exemption is based on the same standard in all those law districts. If it is, one has trouble to reconcile the law of exemptions in a typical western province with that enforced in eastern provinces and still more in England.[253]

The new Bankruptcy Act of 1919 was based largely upon the English Bankruptcy Act of 1914 and the conservative discharge provisions reflected that it was drafted on behalf of and in the interests of creditors. H.P. Grundy explained that although he had relied upon numerous English provisions, there were some "material differences"

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[249] On the origins of the 1919 Act see Thomas G.W. Telfer, "The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest" (1994-95) 24 C.B.L.J. 357.

[250] "Proposed Bankruptcy Act" *Monetary Times* (1 September 1917) 14. As to uniformity, see Letter from CCMTA to Canadian Bankers' Association (14 November 1916) in *Canadian Bankers' Association Papers* (Can. Bankers' Assoc. Archives, Legislative Reports from Council, 87-536-01). The letter to the Bankers' Association claimed that "greater uniformity of laws would foster and develop a better national spirit and make for a greater nation". See also A.C. McMaster, "The Canadian Bankruptcy Act" (1912-13) 2 Can. Chart. Acct. 236 at 238.

[251] See Daniel E. Thomson, "Bankruptcy Law in Canada" (1894) 1 The Barrister 39; Daniel E. Thomson, "Address on Bankruptcy Legislation in Canada" (Delivered before the Canadian Manufacturers' Association, 29 March 1900) (Toronto: Dudley Burns, 1900); B. Russell, "Provisions of the British North America Act For Uniformity of Provincial Laws" (1898) 34 Can. L.J. 513; "Insolvency Legislation" (1899) 35 Can. L.J. 179.

[252] In contrast, "Uniform Laws for Various Provinces" *Winnipeg Free Press* (22 December 1914). The Free Press reported on a speech by James Aikins in which he noted the confusion arising from the different provincial exemptions laws. He noted that it was important for creditors doing business in several provinces to "know the distinctions between the laws of those provinces relating to exemptions from execution or seizure of debtor's property."

[253] "Exemptions from Execution" (1914), 50 Can. L.J. 321 at p.323.

between the Canadian and English Acts. He thought some differences were advisable as "there is a certain amount of danger in adopting the Act of another country as a foundation and remodeling it to make it apply to the different customs and conditions existing in the country of its adoption."[254]

The drafter of the Canadian Act chose to ignore s. 38 of the English Bankruptcy Act which excluded from the property of the estate tools of trade, necessary wearing apparel and bedding not exceeding twenty pounds.[255] The Canadian Bankruptcy Act of 1919 opted to rely upon provincial exemptions rather than establishing a national exemption provision. Section 25 provided:

> The property of the debtor divisible amongst his creditors (in this Act referred to as the property of the debtor) shall not comprise the following particulars:
>
> ...
>
> (ii) Any property which as against the debtor is exempt from execution or seizure under legal process in accordance with the laws of the province within which the property is situate and within which the debtor resides.[256]

There was no substantive debate in the House of Commons or Senate on whether there ought to be a uniform exemption provision.[257] The Special Parliamentary Committee appointed in 1918 to review the terms of the Bill briefly raised the issue of uniformity of exemptions with the Retail Merchants of Canada (RMA). Mr. Chevrier, on behalf of the RMA, noted "uniformity of exemptions is something which should be in the measure."[258] However, exemptions were connected to "local conditions" and in his view the provinces were liable to be the best judge of those conditions.[259]

The provincial model was entirely consistent with earlier nineteenth century bankruptcy statutes and bankruptcy reform bills. Further, provincial exemptions may well have been an area of controversy that the government was unwilling to raise. It was not perceived as an essential issue and consensus on a set of uniform exemptions then, as it is now, would have been difficult to achieve. To simply copy the modest English provisions would have weakened support for the Bill among rural members of Parliament, particularly from the West, and would have created divisions over the Bill.

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[254] H.P. Grundy, "The Bankruptcy Act", Canadian Legal History Project Archives (AWCLHJ A-41).

[255] Bankruptcy Act, *1919* (U.K.), 9 & 10 Geo. V., c.59, s. 38(2).

[256] Bankruptcy Act, S.C. 1919, c. 36, s.25. This provision was included in the bills introduced in 1918 and 1919. See Bill No. 25, *An Act Respecting Bankruptcy* 1918, cl. 48; Bill No. 18 1919, cl. 25.

[257] See *Debates of the Senate* (5 June 1919) at 644: discussing the wording of s. 25 but not considering the broader issue of exemptions.

[258] House of Commons, Banking and Commerce Committee, "title of report" (17 April 1918) at 29.

[259] *Ibid.* The witness was critical of the provincial exemptions which were more tailored to an individual than a merchant conducting business.

Further, Parliament was re-asserting its jurisdiction over bankruptcy and insolvency after a period of nearly 40 years. Provincial debtor-creditor law, including the various exemption regimes, had become entrenched in the absence of any federal bankruptcy regime. The 1919 Act only went so far in overturning those provincial regimes and the drafters may not have wanted to have the Bill characterized as being too disruptive to the property and civil rights jurisdiction of the provinces.

As it was, the Bill faced several challenges from the provincial rights perspective. The introduction of new federal legislation, after a long period of provincial regulation, led to inevitable challenges to federal jurisdiction during the House of Commons debates:

> My honourable friend speaks of England having legislated in a much wider manner. Of course, Great Britain is not a federation, and is not bound by a written constitution. Great Britain can cover the whole ground. But our claim is that under the Constitution with powers divided so fairly between the provinces and the Dominion, this Act may trespass upon provincial rights.[260]

During the Parliamentary debates, the bankruptcy Bill was attacked on the basis that it interfered with provincial jurisdiction over property and civil rights. It was claimed that s. 11, which provided that a receiving order (an order which placed a debtor into bankruptcy) took precedence over all provincial attachments and executions, was unconstitutional.[261] Further, the argument was made that the Bill was a "direct infringement of civil rights in the province of Quebec. I do not see how this law and our law in Quebec can be reconcilable."[262]

The Solicitor General, in introducing the Bill in 1919, reminded Parliament "under s. 91 of the *British North America Act*, the question of bankruptcy and insolvency is one of the questions which was left to the jurisdiction of the Dominion of Parliament.[263] The Solicitor General admitted that the Bankruptcy Bill proposed to infringe upon property and civil rights. "[B]ut the *British North America Act* says that to this extent we may infringe upon property and civil rights ...."[264] The Solicitor General

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[260] *Debates of the Senate* (28 May 1919) at 563 (Dandurand).

[261] See Bill C-18, s. 11. *House of Commons Debates* (1 May 1919) at 1982 (Guthrie). This view was ultimately rejected by the Privy Council. See *Quebec (Attorney General) v. Larue*, [1928] A.C. 187 (P.C.). The constitutionality of specific aspects of the *Bankruptcy Act* 1919 was challenged on a number occasions in the 1920s. See e.g. *Re Canadian Western Steel Corp.* (1922), 2 C.B.R. 494 (Ont. C.A.); *Re Stober* (1923), 4 C.B.R. 34 (Que. S.C.); *Interprovincial Flour Mills v. Western Trust Co.,* [1923] 1 W.W.R. 1068 (Sask. C.A.); *Royal Bank v. Kuproski* (1925), 7 C.B.R. 8, [1925] 3 W.W.R. 417 (Alta. C.A.); *Stuart v. Sutterby* (1930), 12 C.B.R. 267 (Ont. C.A.).

[262] *House of Commons Debates* (2 May 1919) at 2008 (Cannon).

[263] Lefroy's interpretation of *Cushing v. Dupuy* (1880), 5 A.C. 409 (P.C.) was read into the record. *House of Commons Debates* (28 March 1919) at 991 (Guthrie). See also *Debates of the Senate* (26 May 1919) at 501 (Lougheed).

[264] *House of Commons Debates* (1 May 1919) at 1987 (Guthrie).

claimed that the federal government was "not seeking to infringe on the rights of any province more than is necessary to give effect and validity to the particular legislation now in question".[265]

The attack on the proposed federal bankruptcy bill (from a provincial rights perspective) demonstrates that any attempt to incorporate a uniform bankruptcy exemption regime in the new federal Act would have been met with considerable opposition. The only solution available after a long absence of federal legislation was the provincial one.

Conclusion

Bankruptcy exemptions continue to be determined by provincial law under the BIA. The *Personal Insolvency Task Force Final Report* noted the there is a "wide disparity among the provinces and territories with respect to the types of property that are exempt from seizure." According to the Task Force this has resulted in a conflict with bankruptcy theory which "proceeds from the premise that bankrupts and their creditors should be treated alike regardless of the residence or place of business of the debtor or the creditor."[266] The Task Force's recommendation for an optional federal exemption list (at the option of the debtor) has not been taken up in recent bankruptcy reform Bills.[267] Provincial bankruptcy exemptions appear to be the model for the foreseeable future.

The decision to adopt a provincial model in 1919 was consistent with nineteenth century precedent. Parliament itself had consistently thought in terms of provincial bankruptcy exemptions dating back to the Insolvent Acts of 1869 and 1875 and the reform bills that followed. In the absence of a federal bankruptcy law after 1880, provincial exemption statutes had become a means of providing some form of debtor relief. However, the provincial exemption statutes across the country were enacted at various times and for a variety of purposes resulting in a set of laws in 1919 that would have been near impossible to unify. Exemptions ranged from a rather meager $50 list of items in Prince Edward Island to 160-acre homestead exemptions in the Canadian west. The American homestead statutes became an important and necessary precedent for the Canadian west in the competition for immigrants. State homestead exemption statutes contributed to the diversity of exemptions across Canada. Regional differences also existed at the judicial level in relation to the interpretation of the various statutes.

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[265] *House of Commons Debates* (2 May 1919) at 2008 (Guthrie). When the debate moved to the Senate, the government was also forced to defend the constitutionality of the Bill. See *Debates of the Senate* (28 May 1919) at 563 (Lougheed). Commentators on the new bill also had to justify its constitutionality. See e.g., H.P. Grundy, "Synopsis of the Canadian Bankruptcy Act" (1920-21) 1 C.B.R. 325; James Bicknell, "The Advisability of Establishing a Bankruptcy Court in Canada" (1913) 33 Can. L.T. 35 at 36; L. Duncan, "The Operation and Effect of the Bankruptcy Act" (1922) 29 J. of Can. Bankers' Assoc. 502; G. T. Clarkson, "The Bankruptcy Act" (1920-21) 10 Can. Chart. Acct. 154; O. Wade, "The Dominion Bankruptcy Act" (1920-21) 10 Can. Chart. Acct. 234.

[266] *Personal Insolvency Task Force Final Report* (Ottawa, 2002).
[267] See Bill C-55, now S.C. 2005, c. 47 and Bill 62.

One recent study on the political economy of exemption law suggests, "the best predictor of current levels of exemptions is historical exemptions." Thus existing law always supplies "the starting point from which legislators bargain over reform, and so very old laws exert influence over the present and recent past."[268] This was the challenge that faced Grundy, and later Parliament in 1919. The starting point at the end of World War I was the diverse state of provincial law. This had an extraordinary amount of influence on the bankruptcy exemption issue. Parliament had withdrawn from the bankruptcy and insolvency field in 1880 its attempt to reassert its jurisdiction over the field in 1919 could only be accomplished politically by allowing the provinces to set bankruptcy exemptions. The consequence of that decision continues to have an impact on bankrupts and creditors today.

[268] R. Hynes, A. Malani, & E. Posner, "The Political Economy of Property Exemption Laws" (2004), 47 J. L. & Econ. 19 at p. 40-41.