

# *The Registered Retirement Savings Protection Act*

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## I. INTRODUCTION

On 1 November 2007, a new judgment enforcement exemption came into effect in the Province of Manitoba. The Registered Retirement Savings Protection Act<sup>1</sup> (“The RRSP Act”), which received Royal Assent on 7 December 2006<sup>2</sup>, is designed to ensure that Registered Retirement Savings Plan (“RRSP”)<sup>3</sup> investments of debtors are not subject to the enforcement remedies that would otherwise be available to their creditors.

This paper will examine the following:

- A general overview of debtor-creditor law in Manitoba and The RRSP Act’s place within this regime,
- The parties affected by The RRSP Act,
- Similar legislation in other jurisdictions and law reform efforts,
- The legislative process that occurred to bring The RRSP Act into effect, and
- Potential issues that could arise with the implementation of The RRSP Act.

## II. OVERVIEW OF DEBTOR-CREDITOR LAW IN MANITOBA

### A. Division of Powers

When examining debtor-creditor law in Canada, it is important to recognize the roles of both the federal government and the provinces and the effect that the

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<sup>1</sup> *The Registered Retirement Savings Protection Act*, S.M. 2006, c. 29. Proclaimed in force 1 November 2007, M. Gaz. 2007.I.293.

<sup>2</sup> Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)*, 58 (7 December 2006) at 637.

<sup>3</sup> Registered Retirement Income Funds (RRIF) and Deferred Profit Sharing Plans (DPSP) are also not subject to enforcement.

laws of both levels of government have upon each other. The federal government has jurisdiction in the area of bankruptcy and insolvency,<sup>4</sup> while provincial governments have jurisdiction in property and civil rights.<sup>5</sup> Therefore, Manitoba's debtor-creditor regime is distinct from the federal *Bankruptcy and Insolvency Act*.<sup>6</sup> An important aspect of bankruptcy worth noting is that exemptions from divisible property include, "any property that...is exempt from execution or seizure under any laws applicable in the province."<sup>7</sup> This results in a significant connection between federal bankruptcy laws and provincial property rights. The *RRSP Act* will result in RRSPs held by bankrupt Manitobans to be exempt from the property that is divisible by their creditors.<sup>8</sup>

### ***B. Enforcement Remedies for Creditors in Manitoba***

The process in which creditors exercise their rights from judgment to enforce payment from their debtors has been described as, "[N]ot so much a 'system' as it is a collection of discrete procedures aimed at specific types of assets...[whereby] a creditor must resort to one or more of the remedies...in order to reach all of the debtor's property."<sup>9</sup> Why is this the case? The remedies available to creditors have their genesis in the common law,<sup>10</sup> can come from the courts of equity,<sup>11</sup> are guided by dedicated enforcement statutes,<sup>12</sup> are limited by

<sup>4</sup> *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, s. 91(21).

<sup>5</sup> *Ibid.*, s. 92(13).

<sup>6</sup> *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3.

<sup>7</sup> *Ibid.*, s. 67(1)(b).

<sup>8</sup> Bill C-62, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, 39<sup>th</sup> Parl. 2<sup>nd</sup> Sess., 2007, cl. 32(1) (as passed by the House of Commons 29 October 2007). This amendment adds RRSPs as a specific exemption to the divisible property of a bankruptcy throughout Canada, except those amounts added to the RRSP within 12 months of the bankruptcy.

<sup>9</sup> Manitoba Law Reform Commission, *Review of the Garnishment Act* (Winnipeg: Queen's Printer, 2005) at 2.

<sup>10</sup> The writ of *fiat facias* allowed for the seizure of goods, chattels, leases, and crops. The writ of *elegit* allowed for the possession of the debtor's land. Early common law exemptions from enforcement included only the wearing apparel and goods on the person. For an analysis of common law creditors' remedies, see C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2<sup>nd</sup> ed. (Scarborough, ON: Thomson Canada Ltd., 1994), chapter 4.

<sup>11</sup> Receivership occurs where the court appoints a receiver to collect the personal estate and any amounts owing to the debtor. Where equitable execution is ordered, the receiver has the power to sell the personal property of the debtor. Amounts held by the receiver are then distributed to the creditor(s). The *Mareva* injunction (*Mareva Campania Naviera S.A. v. International Bulk Carriers S.A.* [1980] 1 All E.R. 213 (C.A.)) is a creditor remedy directed at the person (rather than the property) whereby the debtor is ordered, prior to judgment, to not dispose of specified

ancillary statutes,<sup>13</sup> and are created, to a significant extent, by the *Court of Queen's Bench Act*<sup>14</sup> and the *Queen's Bench Rules*.<sup>15</sup>

The intricate nature and requirements of the different remedies available to creditors may lead to missteps by lawyers. An argument could fail due to the selection of an improper writ.<sup>16</sup> In other cases, the choice of one remedy could be significantly less attractive in its result when compared to another remedy.<sup>17</sup>

### C. The RRSP Act's Place in the Regime

While the creditor remedies regime in Manitoba is a smorgasbord of processes, *The RRSP Act* is poured over all of these processes, save one – *The Fraudulent Conveyances Act*.<sup>18</sup> The result is a near-blanket exemption for RRSPs. Subsection 3(1) of *The RRSP Act* states the following:

Subject to subsection (2), all rights, property and interests of a planholder in a registered plan are exempt from any enforcement process.

Subsection 3(2) lists the exceptions to the exemption:

Subsection (1) of this section and subsections 168(1) and 173(2) of The Insurance Act do not apply to an enforcement process...

- (a) to satisfy an order made under The Family Property Act or under similar legislation of any other province or territory of Canada; or
- (b) by a designated officer, as defined in section 52 of The Family Maintenance Act, in enforcement proceedings the officer may take under Part VI of that Act;
  - in respect of a registered plan.

The definition of “enforcement process” is as follows:

- (a) garnishment, execution, seizure or attachment; or

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assets. For an analysis of equitable creditors' remedies, see C.R.B. Dunlop, *supra* note 10 at 91 and 160.

<sup>12</sup> *Executions Act*, C.C.S.M. c. E160, *Fraudulent Conveyances Act*, C.C.S.M. c. F160, *Garnishment Act*, C.C.S.M. c. G20, *Judgments Act*, C.C.S.M. c. J10.

<sup>13</sup> *Consumer Protection Act*, C.C.S.M. c. C200, *Family Maintenance Act*, C.C.S.M. c. F20, *Limitation of Actions Act*, C.C.S.M. c. L150.

<sup>14</sup> *Court of Queen's Bench Act*, C.C.S.M. c. C280, ss. 55, 59, 60, 61.

<sup>15</sup> *Court of Queen's Bench Rules*, Man. Reg. 553/88, rr. 41, 44, 45, 46, 60.

<sup>16</sup> In *Watt v. Trail and Christie* (2000) 227 N.B.R. (2d) 334 (C.A.), the plaintiff first attempted to obtain judgment, unsuccessfully, by seizure and sale. The action was later argued successfully using equitable execution in *Watt v. Trail and Christie* (2001) 237 N.B.R. (2d) 319. (C.A.).

<sup>17</sup> A constructive trust gives the creditor a preferred status when compared to creditors who simply have the remedy of damages.

<sup>18</sup> *Fraudulent Conveyances Act*, *supra* note 12.

(b) any other remedy or legal process to enforce payment of an amount payable by a planholder.<sup>19</sup>

Garnishment<sup>20</sup>, execution, seizure,<sup>21</sup> and attachment<sup>22</sup> are all enforcement remedies available to creditors as per the *Court of Queen's Bench Act* and *Queen's Bench Rules*. These remedies do not apply to the RRSPs of a debtor except where the creditor (usually the former spouse or common law partner, but it could also be the caregiver of the debtor's child) has a *Family Maintenance Act* or *Family Property Act*<sup>23</sup> order. "Any other remedy or legal process to enforce payment" will include the remedies from equity, including equitable execution.<sup>24</sup>

Further evidence of this near-blanket exemption is found when considering "absconding debtors." Absconding debtors are those debtors who leave the province in order to frustrate the enforcement of a judgment. While the *Executions Act*<sup>25</sup> and the *Judgments Act*<sup>26</sup> both revoke the exemptions found in each of those particular acts where the debtor has absconded, *The RRSP Act* does not have such a provision. RRSPs would still be exempt and would not be revoked from an absconding debtor.<sup>27</sup>

One particular statute within the creditor remedies regime can nullify the RRSP exemption—*The Fraudulent Conveyances Act*. Section 5 of *The RRSP Act* states the following:

5(1) If a provision of this Act conflicts with a provision of another Act, this Act prevails unless the other Act expressly provides that it or the provision prevails despite this Act.

<sup>19</sup> *The Registered Retirement Savings Protection Act*, *supra* note 1, s. 1.

<sup>20</sup> *Supra* note 15, rr. 46.14, 46.15, 60.08, *Garnishment Act*, *supra* note 12.

<sup>21</sup> *Supra* note 15, r. 60.07, *Executions Act*, *supra* note 12.

<sup>22</sup> *Supra* note 15, rr. 46.01 to 46.13.

<sup>23</sup> *Family Property Act*, C.C.S.M. c. F25.

<sup>24</sup> The *Mareva* injunction would probably not be a "remedy...to enforce payment" because it does not enforce payment, but rather this injunction creates a personal order that the debtor not dispose of specified assets. However, it is difficult to see how a *Mareva* injunction would be of use to a creditor seeking to make a claim to the debtor's RRSP. The *Mareva* injunction is simply a motion that is a part of the plaintiff/creditor's main action to enforce the judgment against the debtor and the main action is unenforceable due to the RRSP exemption.

<sup>25</sup> *Executions Act*, *supra* note 12, s. 29 "The exemptions in this Act mentioned cannot be claimed by or on behalf of a debtor who is in the act of removing with his family from the province or is about to do so, or who has absconded, taking his family with him."

<sup>26</sup> *Judgments Act*, *supra* note 12, s. 15; same text as note 24.

<sup>27</sup> If the debtor moves to another province then the debtor's property in the RRSP would not likely be in Manitoba anymore—it would be in the new province, so there would be no need for an absconding provision. A question would arise if the debtor absconds to another country. Does the property in the RRSP still remain in Manitoba?

5(2) Despite subsection (1), nothing in this Act affects the operation of The Fraudulent Conveyances Act.

Moreover, section 2 of *The Fraudulent Conveyances Act* is as follows:

Every conveyance of real property or personal property and every bond, suit, judgment, and execution at any time had or made, or at any time hereafter to be had or made, with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures is void as against such persons and their assigns. [emphasis added.]

Subsection 5(2) will likely be used in the following instance: where the debtor, realizing his or her obligations to the creditor, intentionally contributes to his or her RRSP in spite of these obligations.<sup>28</sup>

### III. PARTIES AFFECTED BY *THE RRSP ACT*

The two parties that are most significantly affected by *The RRSP Act* are: (a) debtors and (b) creditors. It is also worth noting the other parties that are affected, albeit to a more modest extent. These parties include: (c) RRSP trustees and depositaries, (d) the spouse or common law partner of the debtor, and (e) the public.

#### A. Debtors

What types of debtors are affected by this legislation? The simple answer is those debtors who are “planholders” as per the definition in section 1 of *The RRSP Act*. The following investment vehicles are included as exempt plans: (i) RRSPs, (ii) Registered Retirement Income Funds (“RRIF”) and (iii) Deferred Profit Sharing Plans (“DPSP”). Who can invest in RRSPs? Subsection 146(1) of the *Income Tax Act (“ITA”)*<sup>29</sup> defines a “retirement savings plan” as being contract/arrangement between an individual and the RRSP trustee or depositary. Individuals do not include corporations and therefore corporations cannot hold RRSPs.<sup>30</sup>

However, this legislation affects sole proprietorship and partnerships. In fact, Manitoba legislators were of the view that small business owners were a constituent in need of protection. During debate on second reading,

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<sup>28</sup> A situation where it could be argued that there is no “intent to defeat, hinder, delay or defraud creditors” would be one where the planholder has pre-authorized a direct, monthly transfer of funds from their bank account to their RRSP account.

<sup>29</sup> *Income Tax Act*, R.S.C. 1985 (5<sup>th</sup> Supp.), c. 1.

<sup>30</sup> This is obvious on its face as corporations do not retire. The term “individuals” does include trusts, though. Testamentary trusts will hold RRSPs following the death of a planholder.

Conservative opposition member from Lac du Bonnet, Mr. Gerald Hawranik, submitted that Bill 6 would be “good news for small business owners who have, by and large, registered retirement savings plans to take care of themselves in their retirement.”<sup>31</sup> The NDP government was also of this view.<sup>32</sup> The Canadian Federation of Independent Business supported the bill by sending a representative to the Standing Committee on Social and Economic Development.<sup>33</sup>

## B. Creditors

What types of creditors does this legislation affect? Unsecured creditors are affected by this legislation because the debtor’s RRSPs will be exempt from enforcement. This legislation does not affect secured creditors. Section 146 of the *ITA* defines who can invest in RRSPs and what the Minister of National Revenue accepts as a registered plan:

- (1) Definitions – In this section...
  - ‘Retirement savings plan’ means
    - (a) a contract between an individual and [an authorized person], or
    - (b) an arrangement under which payment is made by an individual or the individual’s spouse or common-law partner [in trust or by investment contract] to be used...by that corporation...for the purpose of providing for the individual, commencing at maturity, a retirement income...
- (2) The Minister shall not accept for registration...unless...it complies with the following conditions...
  - (c.3) the plan, where it involves a depository, includes a provision stipulating that
    - (i) the depository has no right of offset...and
    - (ii) the property held under the plan cannot be pledged, assigned or in any way alienated as security for a loan...

On its face, the *ITA* seems to indicate that an RRSP cannot be used as security for a loan because the tax advantages of an RRSP are not transferable (except in very limited circumstances, see section II.D.). This is true. But where an RRSP is used as security for a loan, then, depending on the form of the RRSP (deposit contract, or trust), one of two outcomes can occur:

- The RRSP becomes de-registered at that time and is therefore no longer an RRSP,<sup>34</sup> or

<sup>31</sup> *Supra* note 2, 58 (30 November 2006) at 437, (Mr. Gerald Hawranik).

<sup>32</sup> *Ibid.* (Hon. Greg Selinger).

<sup>33</sup> Manitoba, Legislative Assembly, *Standing Committee on Social and Economic Development*, 58 (4 December 2006), at 13.

<sup>34</sup> *Re Whaling* (1999) 6 C.B.R. (4<sup>th</sup>) 1 (Ont. C.A.) at ¶16. In this case, the Whalings’ executed a loan (using their CIBC RRSP as security) with CIBC in May 1992. In November 1992, the Mr. Whaling made an assignment in bankruptcy. In December 1992 the trustee in bankruptcy asked the CIBC to de-register the RRSP so that the assets may be distributed to creditors. But

- The property in the RRSP that is used as security shall be included in the planholder's income.<sup>35</sup>

It is important to establish exactly who a creditor is. Often what comes to one's mind is a lender of money such as a bank or a credit union. This is the one of the types of creditors that the MLA for Springfield, Mr. Ron Schuler, mentioned during third reading of Bill 6: "I think this legislation is there to protect small businesses from unscrupulous bankers like that [described earlier in his speech], that they would go so far as to try to strip an individual of their last little bit of savings."<sup>36</sup> Other types of creditors that often come to mind are suppliers and contractors. However, creditors affected by this legislation (and the enforcement regime in general) are not simply creditors established by contract. Unintended creditors established by the judgment of damages for actions in tort are also creditors within the parameters of this legislation. Debate in the legislature and submissions in committee failed to mention or recognize these unique creditors. Section V.D. will examine this issue more closely.

### C. RRSP Trustees and Depositories

This legislation affects RRSP trustees and depositories to a limited extent. In marketing their services, they could include the fact that RRSPs are exempt from creditor enforcement.<sup>37</sup> From a practical standpoint though, this motivation to purchase these services would likely be of less significance than the traditional reasons to invest in RRSPs: (i) saving for retirement and (ii) tax deferral on income and gains from investments.

### D. Spouses and Common Law Partners

Spouses and common law partners of debtors have an interest in the debtor's RRSPs by virtue of two conditions:

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"changes in the plan gave the CIBC the right to off set the funds in the plan against the Whalings' debts and constituted a pledging of the funds in the RRSPs as security. Consequently, the plan no longer complied with s. 146(2) [of the *ITA*]," and therefore the RRSP was, in fact, de-registered in May 1992. What is interesting in this case is that there was no action by the Whaling's, the CIBC, or the Minister to de-register the RRSP at this time. So not only did the bankrupt estate of Mr. Whaling have to pay the bank as a secured creditor, but there was also a tax liability incurred because of the de-registration.

<sup>35</sup> In *Re Boulin* [2003] 1 S.C.R. 666 at ¶46, Dechamps J. notes "that there is no prohibition on using the moneys held in a trust RRSP as security" but there are consequences in doing so—the requirement to include these amounts in the taxpayer-borrower's income. See also: *Income Tax Act*, *supra* note 29, s. 146(10).

<sup>36</sup> *Supra* note 2, 58 (6 December 2006) at 570, (Mr. Ron Schuler).

<sup>37</sup> C.R.B. Dunlop, "Should Creditors Have Access to Future Income Savings Plans?" 66 Sask. L. Rev. 279 at 289.

1. The beneficiary status that allows the spouse, in the event of the death of the holder of the RRSP prior to maturity, to rollover the deceased's RRSP into their own portfolio without incurring an immediate capital gains tax liability<sup>38</sup>, and
2. The ability to transfer RRSP amounts without immediate capital gains tax liability where there has been a breakdown of the relationship.<sup>39</sup>

## E. The Public

The affect of the legislation upon the public as a whole is uncertain. The Minister of Finance, the Hon. Greg Selinger, inferred that there could be future implications to the public if such a statute were not in place. In introducing the bill at second reading, Mr. Selinger noted, "A large portion of Manitoba's population is approaching retirement and the prospect of a longer life span. It is important that governments not only continue to encourage individuals to save for the years when they will not have employment income, but also to protect those retirement savings."<sup>40</sup> It remains unknown just how many future retirees the *RRSP Act* will keep from the social assistance roles. Conversely, there is the potential that these creditors may themselves require social assistance should they be unable to collect debts.

## IV. SIMILAR LEGISLATION AND LAW REFORM EFFORTS

### A. Uniform Law Conference of Canada, 1999

In 1997, the Uniform Law Conference of Canada tabled a discussion paper regarding the exigibility of future income security plans (RRSPs, DPSPs, and RRIFs).<sup>41</sup> The next year the Conference received a consultation report that had sought the views of selected stakeholders in regards to this issue.<sup>42</sup> The results of this report found that a strong majority of respondents favoured legislation to protect RRSPs, citing the need for equal treatment of RRSPs with Registered Pension Plans ("RPPs"), which are currently exempted by legislation. The

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<sup>38</sup> *Income Tax Act*, *supra* note 29, s. 146(1): definition of "annuitant."

<sup>39</sup> *Ibid.* s. 146(16).

<sup>40</sup> *Supra* note 2, 58 (30 November 2006) at 436, (Hon. Greg Selinger).

<sup>41</sup> Uniform Law Conference of Canada, *Minutes of Meeting* (held August 17, 1997) at 54.

<sup>42</sup> *Ibid.* (held August 16, 1998) at 45. The stakeholders included: the Canadian Bar Association, bankers, insolvency practitioners, consumers' associations, credit institutes, credit unions, life insurers, financial advisors, chartered accountants, Revenue Canada, insolvency trustees, pensioners groups, and women's groups. See: "Working Group Report: Uniform Bill and Commentary—Creditor Access to Future Income Security Plans" (Appendix B of the Uniform Law Conference of Canada, August 1999) at 175.

primary concern expressed was the perceived inadequacy of the public pension and social welfare system and the need for protection of all retirement plans. This was considered a societal issue that outweighed the impact upon creditor's rights.<sup>43</sup> Other concerns included: (i) debtor abuse whereby the debtor uses his or her RRSPs to shelter assets from creditors and (ii) the need for certain exceptions to the exemption. Debtor abuse could be addressed by already existing fraudulent conveyances legislation and by the "locking-in" of RRSPs.<sup>44</sup> There was consensus that family maintenance should be an exception to the exemption, but some respondents also had concerns for other creditors, including tort judgment creditors and criminal restitution creditors.<sup>45</sup> The consultation report recommended that RRSPs, DPSPs, and RRIFs should be exempt from exigibility.<sup>46</sup> The 1998 Conference decided that a draft Act, based upon this report's recommendations, would be tabled at the 1999 Conference.<sup>47</sup>

The 1999 Conference resolved to adopt the *Uniform Registered Plan (Retirement Income) Exemption Act*.<sup>48</sup> Section 3 of this Act exempted RRSPs, DPSPs, and RRIFs from "any enforcement process."<sup>49</sup> While no exceptions to the exemption were included, commentary accompanying the *Uniform Act* recognized that the provinces could include exceptions to this exemption.<sup>50</sup>

## **B. Saskatchewan—Registered Plan (Retirement Income) Exemption Act, 2002**

The *Registered Plan (Retirement Income) Exemption Act* received Royal Assent in Saskatchewan on 30 May 2002.<sup>51</sup> This Act is almost identical to the *Uniform Registered Plan (Retirement Income) Exemption Act*. Furthermore, Saskatchewan's Act does include the suggested exception to the exemption of RRSPs when enforcing family maintenance orders.<sup>52</sup> The similarity of the two

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<sup>43</sup> Darcy McGovern, "Consultation Report: Creditor Access to Future Income Security Plans" (Appendix F of the Uniform Law Conference of Canada, August 1998) at 262.

<sup>44</sup> *Ibid.* at 264.

<sup>45</sup> *Ibid.* at 263 and 267.

<sup>46</sup> *Ibid.* at 269.

<sup>47</sup> *Supra* note 41 (held August 16, 1998) at 47.

<sup>48</sup> *Ibid.* (held August 15, 1999) at 44.

<sup>49</sup> "Working Group Report: Uniform Bill and Commentary—Creditor Access to Future Income Security Plans" *supra* note 42 at 169.

<sup>50</sup> *Ibid.* It was expected that one of these exceptions would be maintenance enforcement.

<sup>51</sup> Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 45 (30 May 2002) at 1722.

<sup>52</sup> S.S. 2002, c. R-13.01, s. 3(3).

acts should not be surprising for two reasons: (i) the Uniform Act was based upon the Saskatchewan creditor enforcement regime, and (ii) the 1998 Uniform Conference's consultation report was presented by Mr. Darcy McGovern. In 2002, Mr. McGovern, as a representative of legislative services of the Department of Justice, appeared before the Saskatchewan Legislature's Committee of the Whole regarding Bill 23, which would become the *Registered Plan (Retirement Income) Exemption Act*.<sup>53</sup> It should be noted that the debates in the Saskatchewan Legislature did not distinguish between the various possible types of creditors, whether they be banks or those who had suffered a personal injury.<sup>54</sup>

## V. LEGISLATIVE PROCESS

### A. Planning Stage

The 4 December 2006 submission by the Canadian Federation of Independent Business ("CFIB") at the Standing Committee on Social and Economic Development gives an indication of the planning behind this legislation. In Committee, Mr. Shannon Martin of CFIB said:

By way of background, in 2004, Department of Finance officials approached CFIB to seek our members' views on this issue. As a result, we asked the following question: Should the Manitoba government introduce legislation to protect RRSPs from debt collection? Two thirds of our members supported this legislation, 25 percent of our members rejected the idea, and 9 percent of our members were undecided.<sup>55</sup> [emphasis added.]

### B. Introduction of Bill 6

Bill 6, *The Registered Retirement Savings Protection Act*, was introduced to the legislature on 28 November 2006. The motion to introduce the bill was adopted.<sup>56</sup>

### C. Second Reading

The bill was addressed in second reading debate by all three parties, but there was more consensus than there was conflict. The finance minister presented the NDP government's two main reasons for the bill: (i) the social importance of having sufficient financial resources in retirement, and (ii) an issue of fairness<sup>57</sup>—

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<sup>53</sup> *Supra* note 51, 45 (29 May 2002) at 1682.

<sup>54</sup> See Sections II.B. and V.D. for discussion on the different types of creditors.

<sup>55</sup> *Supra* note 33.

<sup>56</sup> *Supra* note 2, 58 (28 November 2006) at 317.

<sup>57</sup> *Ibid.* 58 (30 November 2006) at 436, (Hon. Greg Selinger).

RPPs were protected from enforcement by legislation<sup>58</sup>, while RRSPs were not. The finance minister also assured the Legislature that RRSPs would still be subject to creditor enforcement orders with respect to family maintenance and division of family property.<sup>59</sup>

Speaking for the Conservative opposition, Mr. Hawranik was agreeable to the substance of the bill, but took the opportunity to attack the government in regards to taxes on small business.<sup>60</sup> Liberal leader, the Hon. Jon Gerrard of River Heights, described the bill as a “positive move”<sup>61</sup> but did have a reservation about the bill. He was concerned that the legislation could have an effect upon an individual’s ability to borrow. Mr. Gerrard suggested “that an individual might have a choice in being able to use some of the assets in a registered retirement savings plan that could be borrowed against in a way that wouldn’t mean that they would have to take the assets out.”<sup>62</sup> This was the only mention of the debtor’s freedom to contract during the debates and committee meeting and there was no response by the government to Mr. Gerrard’s suggestion.

#### **D. Committee**

The Standing Committee on Social and Economic Development met on 4 December 2006, calling one witness—the CFIB’s Mr. Martin. As mentioned in section II.A., Mr. Martin brought to the Committee’s attention the survey of its members, the majority of whom were in favour of the government introducing legislation to protect RRSPs from judgment enforcement.

Mr. Hawranik expressed concern that when an RRSP matures to become an RRIF, the income that is paid out to the retiree would be subject to enforcement remedies. Mr. Selinger’s response was that income received by retirees of RPPs were also subject the same remedies and that the legislation fairly accommodated both types of pensions.<sup>63</sup> The discussion in section V.A. will examine Mr. Hawranik’s concern. All clauses of the bill passed committee stage without amendment.

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<sup>58</sup> *Pension Benefits Act*, C.C.S.M. c. P32, ss. 31, 31.1 and *Garnishment Act*, *supra* note 12, ss. 14, 14.1, 14.2, 14.3.

<sup>59</sup> *Supra* note 2, 58 (30 November 2006) at 437, (Hon. Greg Selinger).

<sup>60</sup> *Ibid.* (Mr. Gerald Hawranik).

<sup>61</sup> *Ibid.* at 438, (Hon. Jon Gerrard).

<sup>62</sup> *Ibid.* See section II.B. and notes 34 and 35 for a discussion on how an RRSP can be used as security for a loan and the consequences of doing so. Although it is not clear if Mr. Gerrard’s use of the term “borrowed against in a way” means using the RRSP as security or simply listing the RRSP as an asset on a loan application. If an RRSP is used as security then there are serious consequences: see notes 34 and 35.

<sup>63</sup> *Supra* note 33 at 23.

### E. Third Reading

On third reading, debate in support of the government's bill was brought forward by the opposition Conservatives and the Liberals without response from the NDP government. Conservative MLA, Mr. Schuler of Springfield, considered the positive effect that the legislation would have upon small business owners to be the most important aspect of the bill.<sup>64</sup> Fellow Conservative, Mr. Hawranik, was also supportive of the bill but echoed the concern that he expressed in committee.<sup>65</sup> Mr. Gerrard noted that the Liberals would support the legislation but also "expect[ed] [that] over time we may need to come back and visit and that there are issues which individuals will come forward with."<sup>66</sup>

### F. Royal Assent and Proclamation

Bill 6 was given Royal Assent on 7 December 2006 with a coming into force date to be fixed by proclamation.<sup>67</sup> Proclamation was granted on 5 May 2007, fixing the coming into force date to be 1 November 2007.<sup>68</sup>

### G. Genesis of The RRSP Act

It is important to ask the question, what was the genesis of *The RRSP Act*? The answer to this question can be looked at from two legitimate perspectives. First, it could be claimed that *The RRSP Act* was a reactive and preventative measure that would protect people's retirement investments. The debates in the Legislature show that protection of retirement investments was a basis for *The RRSP Act*.<sup>69</sup> It could also be claimed that *The RRSP Act* was a response by the Legislature to both the 1999 recommendation by the Uniform Law Conference and the 2002 Saskatchewan legislation. There is acknowledgment of the Saskatchewan legislation in the debates<sup>70</sup> and of the Uniform Law Conference recommendation in committee.<sup>71</sup>

If *The RRSP Act* was born, in part, out of the Uniform Law Conference and the Saskatchewan Act (which itself was influenced by the Uniform Law Conference), then are there any issues that the Uniform Law Conference raised

<sup>64</sup> *Supra* note 2, 58 (6 December 2006) at 569, (Mr. Ron Schuler).

<sup>65</sup> *Ibid.* at 571, (Mr. Gerald Hawranik).

<sup>66</sup> *Ibid.* at 571, (Hon. Jon Gerrard).

<sup>67</sup> *Ibid.* 58 (7 December 2006) at 637.

<sup>68</sup> *Supra* note 1.

<sup>69</sup> *Supra* note 2, 58 (30 November 2006) at 436, (Hon. Greg Selinger), at 437 (Mr. Gerald Hawranik), and at 438 (Hon. Jon Gerrard).

<sup>70</sup> *Ibid.* at 437 (Mr. Gerald Hawranik) and at 571 (Mr. Ron Schuler).

<sup>71</sup> *Supra* note 33 at 23 (Hon. Greg Selinger).

or issues that were deferred to the provinces by the Conference that should have also been of concern to, acknowledged by, and/or addressed by the Legislature? As mentioned in Section III.A., the Uniform Law Conference's recommended Act did not include any exceptions to the exemption of RRSPs, but it did acknowledge that "to the extent that individual jurisdictions wish to create further exceptions to this exemption, such as allowing exigibility to enforce maintenance orders, such exceptions would need to be added to this draft."<sup>72</sup> Aside from the unanimous agreement that family maintenance orders should be an exception, there was no discussion in the Legislature as to any other possible exceptions. Section V.D. will examine other types of creditors that could be considered for an exception to the exemption.

## VI. POTENTIAL ISSUES

### A. Income Paid by an RRIF is Subject to Creditor's Remedies

As noted in the committee section (IV.D.), a concern of the debtor is that, once the RRSP matures into an RRIF and income is being paid to the debtor, the creditor will enforce an existing judgment by garnishment of the income being paid. Aside from the fairness issue that was the minister of finance's response to Mr. Hawranik's concern, the minister also expressed the need for "a balanced approach" between the protection for debtors and the corresponding impact upon creditors.<sup>73</sup>

Concerns similar to Mr. Hawranik's have also been expressed in regards to the Saskatchewan Act. C.R.B. Dunlop notes that "if...one assumes that the obligation to pay [a monthly RRIF payment] is a debt due or accruing due, can the plan holder claim the wage or salary exemption?"<sup>74</sup> While the intent of the Legislature is to treat RPPs and RRSPs/RRIFs equally (see Section V.C. for fairness issues), there are details that create what seem to be minor differences that could be significant differences in certain circumstances. With RPPs, payments of pension benefits are treated as wages<sup>75</sup> and can be garnished in the same manner as any garnishing order for wages (this means that typically, 70% of the wages are exempt from garnishment).<sup>76</sup> Pension benefits can be periodic payments or lump-sum payment (this may be possible upon request before

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<sup>72</sup> "Working Group Report: Uniform Bill and Commentary —Creditor Access to Future Income Security Plans", *supra* note 42 at 169.

<sup>73</sup> *Supra* note 33 at 23 (Hon. Greg Selinger).

<sup>74</sup> *Supra* note 37 at 294.

<sup>75</sup> *Garnishment Act*, *supra* note 12, s. 14(2).

<sup>76</sup> *Ibid.* s. 5.

retirement due to disability).<sup>77</sup> But *The RRSP Act* remains silent as to whether payments from RRSPs or RRIFs are to be treated as wages. If the planholder of an RRSP becomes ill prior to retirement age and decides to take amounts out of his or her RRSP, these amounts may not be treated as wages by the *Garnishment Act* and thus 100% of the amount would be subject to enforcement. The status of payments from RRIFs is also undecided. Section 14(4) of the *Garnishment Act* may or may not include payments from RRIFs as being “pension benefits.” Prior to the introduction of Bill 6, the Manitoba Law Reform Commission released a *Review of the Garnishment Act*.<sup>78</sup> This review recommended that the wage exemption be extended to payments from RRSPs, DPSPs and RRIFs.<sup>79</sup> There is no provision in *The RRSP Act*, nor was an amendment made to the *Garnishment Act*, that provides for this exemption.

## B. Effect upon the Ability to Borrow and the Cost of Borrowing

Mr. Gerrard brought this issue to the Legislature’s attention during the second reading of the bill but there was no government response. Will the fact that a prospective lender has no method to bring an effective enforcement process against a borrower’s RRSPs cause a loan (that otherwise would have been made) to be denied? Will this increase the interest rate to account for a higher risk loan? It could depend on the other assets of the borrower. Where other assets would cover the unsecured loan or where another asset can be used as security, then the effect of the RRSP exemption should be minimal. It would more likely be in instances where the RRSP is the only significant asset of the borrower that this issue could arise.

*The RRSP Act* does not prevent property in the RRSP from being used as security for a loan. However, when an RRSP is used as security, then the RRSP will either, (i) become de-registered and thus the investment will no longer be an RRSP,<sup>80</sup> or (ii) the amount of property in the RRSP that is used to secure the loan shall be included in the borrower’s income.<sup>81</sup> The negative tax consequences of obtaining a loan in this manner should cause a potential borrower to pause for thought.

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<sup>77</sup> *Pension Benefits Act*, *supra* note 58, ss. 21(6)(b), 37(j).

<sup>78</sup> *Supra* note 9.

<sup>79</sup> *Ibid.* at 25.

<sup>80</sup> *Income Tax Act*, *supra* note 35, s. 146(2)(c.3).

<sup>81</sup> *Ibid.* s. 146(10). See also: section II.B. and notes 34 and 35.

### C. Fairness – Distinctions between RRSPs and RPPs

A valid fairness argument that does not appear to have been considered by the Legislature would have been to make RPPs subject to enforcement remedies.<sup>82</sup> *Wells v. Foster* states the common law rule regarding assignment of a pension. Parke, B. stated the following:

The correct distinction made in the cases on this subject is, that a man may always assign a pension given to him entirely as a compensation for past services...In such a case, the assignee acquires a title to it both in equity and at law.<sup>83</sup>

Thus a pension is simply another form of property. If a pension can be assigned to anyone then the pension will also be available to satisfy a debt owed by the new owner. Furthermore, should the original pension holder retain possession then the pension would be available to satisfy a debt owed. This is still true today. But pension statutes<sup>84</sup> have done away with the assignment of pensions to others. However, these statutes, along with family law statutes, allow for pensions to be assigned/transferred by the pension holder to his or her spouse or common-law partner (or former spouse) in certain circumstances. The effect of this ability to assign/transfer pensions creates the spouse as the sole class of potential creditors to an RPP holder.

An historical examination of English and Canadian pension statutes shows a willingness of legislators to include clauses to prevent judgment enforcement against pensions and to not allow for the assignment or transfer of pensions. An early example of this is from 1706, when Queen Anne granted a £5 000 annual pension (as well as the to-be-built Blenheim Palace and an estate at Woodstock) to the Duke of Marlborough<sup>85</sup>. When a claim was made against that pension, the Court determined:

That neither the said Duke of Marlborough, or [his heirs]...shall have Power by any Act, Assurance or Conveyance in Law whatsoever, to hinder, bar, or disinherit any [heirs] from holding, enjoying, or taking the fame according to the Limitations thereof made by this Act, but that every such Act, Assurance, or Conveyance, shall be and is hereby declared and enacted to be void.<sup>86</sup>

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<sup>82</sup> Removal of the RPP exception was discussed briefly by the Uniform Law Conference. See: Darcy McGovern, *supra* note 43 at 255.

<sup>83</sup> *Wells v. Foster* [1841] 8 M. & W. 149 at 152, 151 E.R. 987 (Ex. Pl.).

<sup>84</sup> *Pension Benefits Act*, *supra* note 58, s. 31(1): “[a pension plan] is exempt from execution...and cannot be assigned, charged, anticipated or given as security”.

<sup>85</sup> *Publick Acts, Anne 5 Annæ, c.4*.

<sup>86</sup> In *Davis v. Marlborough (The Duke of)* (1818) 1 Swans. 74, 36 E.R. 303, Lord Chancellor Eldon refused to grant an order for a receiver of the £5 000 pension where the plaintiff claimed that this pension was assigned to him by Lord Marlborough.

Military pensions<sup>87</sup> and old age pensions<sup>88</sup> have also been exempted from enforcement and not assignable. In Manitoba, non-government RPPs have been exempt from enforcement since 1976.<sup>89</sup> To abandon a policy that has become institutionalized would likely be a difficult sell to the voters.<sup>90</sup>

An argument against fairness is the fact that RPPs and RRSPs are not the same. One of the main intentions of both types of plans is to defer present income in favour of an income upon retirement. RPPs cannot be cashed out prior to retirement except in rare circumstances.<sup>91</sup> Withdrawals from RRSPs, however, can take place at the whim of the planholder—provided that the planholder is willing to forgo the tax deferral that would occur if the withdrawal took place in retirement. One of the reasons for the legislation, as stated by Mr. Selinger, was the importance of governments “to encourage individuals to save for [retirement].”<sup>92</sup> Since RRSPs do not have to be used for retirement, this reasoning becomes less persuasive.

#### D. Impact upon Creditors

An underlying reason for the encouragement of retirement savings and RRSPs is for Manitoba and Canada to have retirees who require less social assistance and/or dependence on the public pension system. Thus, the protection of debtor’s RRSPs would seem to be a logical policy in order to establish a population of self-sufficient retirees.

There may be issues with the inflexibility of *The RRSP Act* though. If there are no means for the creditor to pursue an effective enforcement remedy to satisfy his or her judgment in a timely manner,<sup>93</sup> then this will obviously be to the detriment of the creditor. While there is probably little public sympathy for typical creditors who voluntarily choose to lend money or sell on credit—banks for example—there are other types of creditors.

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<sup>87</sup> *Pension Act*, S.C. 1919, c. 43, s. 21(3).

<sup>88</sup> *Old Age Pensions Act*, S.C. 1927, c. 35, s. 16.

<sup>89</sup> *Pension Benefits Act*, S.M. 1975, c. 38, s. 27.

<sup>90</sup> Darcy McGovern, *supra* note 43 at 255.

<sup>91</sup> *Pension Benefits Act*, *supra* note 58, ss. 21(6)(b), 37(j). “Retirement age” and “early retirement age” is specified in the pension plan itself. See sections 21(7) and 21(10).

<sup>92</sup> *Supra* note 2, 58 (30 November 2006) at 436, (Hon. Greg Selinger).

<sup>93</sup> If the debtor with RRSPs was in their twenties, then this source would not be available to a creditor, provided the debtor did not make any withdrawals from the RRSP for 40 or more years. *Limitation of Actions Act*, C.C.S.M. c. L150, s. 2(1)(L1) sets the limitation period for enforcement of a Canadian judgment to 10 years after the date on which the judgment became enforceable.

Some respondents to the questionnaire of the consultation report to the Uniform Law Conference in 1998 were concerned that a blanket exemption of RRSPs should not be given to all types of debts.<sup>94</sup> Where a debt is created unintentionally (for example, where a tortfeasor is found to be responsible for a personal injury) the circumstances could result in the debtor (with the protected RRSPs) in a much better financial position (both presently and in the future) than the injured creditor. It is doubtful that the legislature's intention is to create situations where the creditor is worse off than the debtor. If this legislation and the enforcement regime prove to be inflexible, these situations could arise. Unfortunately, there is no evidence in the Legislature's debates or committee proceedings that indicates any distinction of the types of creditors. This may have been because this was not a concern of the legislators or perhaps the legislators did not realize that *The RRSP Act* would impact all creditors without distinction. Or maybe the wait-and-see approach, as described by Mr. Gerrard,<sup>95</sup> was the intent of the Legislature: *The RRSP Act's* weaknesses could be addressed in the future.

## VII. CONCLUSION

*The RRSP Act* is a piece of legislation that continues the long-standing policy of protecting retirement savings from creditor enforcement remedies. However, the legislation does not address these important issues.

1. Will there be differences between the amounts that can be garnished from RPP payments and amounts garnished from RRIF payments?
2. Will lenders require borrowers to use their RRSP as security for a loan—resulting in serious and unforeseen tax consequences?
3. Will RRSP holders be permitted to use protected savings for non-retirement purposes—an advantage rarely available to RPP holders?
4. Will there be situations where a creditor's unfortunate circumstances outweigh the debtor's need to maintain their retirement savings?

Mr. Gerrard's comment in third reading recognized the Legislature's need to keep abreast of any unresolved issues:

Certainly, there are aspects of this bill that I expect over time we may need to come back and visit and that there are issues which individuals will come forward with...<sup>96</sup>

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<sup>94</sup> Darcy McGovern, *supra* note 43 at 263.

<sup>95</sup> *Supra* note 2, 58 (6 December 2006) at 571, (Hon. Jon Gerrard).

<sup>96</sup> *Ibid.*

With the extension of an enforcement exemption to RRSPs, one might ask the question, “Are there other savings plans that are also deserving of protection?” Can the reasoning behind this legislation, ensuring sufficient financial resources in retirement, be extended to Registered Educational Savings Plans (“RESPs”)<sup>97</sup> and Registered Disability Savings Plans (“RDSPs”)?<sup>98</sup> The answer to these questions may be as follows. If governments and the public are not able (or willing) to provide a sufficient social safety net for retirees or the disabled, or sufficient educational funding for post-secondary students, then these same governments can legislate to ensure that the personal/family savings to be used for their intended purposes will be protected from creditor enforcement remedies.

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<sup>97</sup> Currently, RESPs are not exempt from enforcement. *MacKinnon v. Deloitte & Touche Inc.* (2007) 30 C.B.R. (5th) 81 (Sask. Q.B.) at ¶126: “To my knowledge, neither Parliament nor any Provincial or Territorial Legislature has passed legislation exempting registered education savings plan from enforcement.” It is the parent who is the planholder and thus has the property interest. In *Re Payne* (2001), 29 C.B.R. (4th) 153 (Alta. Q.B.), it was held that the RESP is not a trust arrangement between a settlor-parent and beneficiary-child held in trust by the trust company-trustee (despite the definition of “beneficiary” in the *Income Tax Act*, *supra* note 35, s. 146.1(1)). It is not exclusively for the benefit of a child because the RESP may be collapsed by the parent at any time prior to maturity. It should be noted that there may be a trust relationship for RESPs, but this is actually where the parent is the trust’s settlor, the trust company managing the trust is the trustee, and the parent is also the trust’s beneficiary (until the specified date of maturity, at which time the child, provided they are a student, becomes the beneficiary).

<sup>98</sup> Department of Finance, Canada. Budget Plan, Chapter 3 (Budget 2007), online: <<http://www.budget.gc.ca/2007/bp/bpc3e.html>>. The 2007 federal budget announced plans, to be implemented in 2008, to create a new tax deferral, similar to RRSPs, for savings plan of families with disabled children or adults. Arguments can be made, perhaps even stronger than the arguments made by those supporting *The RRSP Act*, that RDSPs should be protected from creditor enforcement whether the RDSP is considered to be in hands of the parent until maturity (as is the case with RESPs—see note 96) or when the RDSP is being held in trust solely for the benefit of the disabled adult.

Since the time of writing, this has been passed into law. See *Budget and Economic Statement Implementation Act, 2007* (2007, c. 35) Part 4. Online:

<[http://laws.justice.gc.ca/en/showtdm/an/2007\\_35/?showtoc=&instrumentnumber=35](http://laws.justice.gc.ca/en/showtdm/an/2007_35/?showtoc=&instrumentnumber=35)>