

LAW REFORM
COMMISSION
OF
NOVA SCOTIA



Enforcement of Civil Judgments

Discussion Paper - November 2011

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**Law Reform Commission of Nova Scotia
November 2011**

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission*.

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WHAT DO YOU THINK?

The Law Reform Commission is interested in what you think about the issues raised in this Discussion Paper on enforcement of civil judgments.

This Discussion Paper does not represent the final views of the Commission. It is designed to encourage discussion and public participation in the work of the Commission. Your comments will assist us in preparing a Final Report for the Minister of Justice. The Final Report will contain recommendations on how the law should deal with this issue.

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In order for us to fully consider your comments before we prepare our Final Report, please contact us by:

JANUARY 31, 2011

Please note that the Final Report will list the names of individuals and groups who make comments or submissions on this Discussion Paper. Unless comments are marked confidential, the Commission will assume respondents agree to the Commission quoting from or referring to comments given. Respondents should be aware that the Nova Scotia *Freedom of Information and Protection of Privacy Act* may require the Commission to release information, including personal information, contained in submissions.

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INTRODUCTION

This Discussion Paper outlines the Commission's preliminary proposals for the reform of money judgment enforcement law in Nova Scotia. The major proposal in this paper is the adoption of much of the Uniform Law Conference of Canada's *Uniform Civil Enforcement of Money Judgments Act*,¹ with certain amendments. The paper explains the basic features of the *Uniform Act*, and addresses changes to it that we consider necessary and appropriate in the Nova Scotia context. An annotated version of the *Uniform Act* is included as Appendix B to this Discussion Paper, with commentary by the drafters. Further comment by this Commission is included following the relevant sections, to explain where our proposals differ from the *Uniform Act*.

The project follows in the footsteps of other law reform agencies which have dealt with civil enforcement of judgments; notably Ontario's Law Reform Commission,² Alberta's Law Reform Institute,³ the Uniform Law Conference of Canada⁴ and British Columbia's Law Institute.⁵ The Manitoba Law Reform Commission reported specifically on the issue of garnishment of wages.⁶ Modern reform legislation has been passed in Alberta,⁷ Newfoundland,⁸ and most recently in Saskatchewan,⁹ following a report by two legal scholars who were on the ULCC's civil enforcement working group.¹⁰

For a number of reasons, the Commission's task is less onerous than it might otherwise be. We do not start from scratch, as other provinces have, with a system of arcane and archaic rules deriving from different branches of common law, disparate statutes and rules of procedure. Nova Scotia's system is relatively well-developed through its existing

¹ Uniform Law Conference of Canada, *Uniform Civil Enforcement of Money Judgments Act*, online: http://www.ulcc.ca/en/us/Uniform_Civil_Enf_Money_Judgments_Act_En.pdf.

² Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters* (Parts I - III, 1981; Parts IV - V, 1983).

³ Alberta Law Reform Institute, *Enforcement of Money Judgments* (Report #61, Vol. 1 and 2, 1991).

⁴ *Supra*, note 1.

⁵ British Columbia Law Institute, *Report on the Uniform Civil Enforcement of Money Judgments Act* (Report #37, 2005).

⁶ Manitoba Law Reform Commission, *Review of the Garnishment Act* (Report #112, 2005).

⁷ *Civil Enforcement Act*, R.S.A. 2000, c.C-15.

⁸ *Judgment Enforcement Act*, S.N.L. 1996, c.J-1.1

⁹ *Enforcement of Money Judgments Act*, S.S. 2010, c. E-9.22.

¹⁰ Tamara M. Buckwold & Ronald C.C. Cuming, *Modernization of Saskatchewan Money Judgment Enforcement Law* (University of Saskatchewan, 2005).

execution order - which has served as a model for reform efforts in other jurisdictions - the *Creditors Relief Act*¹¹ and *Personal Property Security Act (PPSA)*¹² and the recent revisions to the *Civil Procedure Rules*. More significantly, due to recent reform efforts and the *Uniform Act* in particular, the current 'state of the art' across Canada is usefully gathered and laid out for our review.

The goal of our proposals is a more effective and accessible enforcement regime, maintaining focus on fairness and proportionality, within realistic resource limits. To that end we have adhered to certain guiding principles which have to some extent influenced reforms in other jurisdictions. The 1991 Report of the Alberta Law Reform Institute (ALRI) has been particularly influential. We repeat its core principles:

1. *Universal Exigibility*: All of a debtor's property should be subject to enforcement, excepting only such property as is deliberately excepted.
2. *Just Exemptions*: Such property as the debtor reasonably requires for the maintenance of his/her family should be deliberately exempt.
3. *Sharing among Creditors*: The proceeds of enforcement processes should be shared among enforcement creditors.
4. *Creditor Initiative*: the enforcement system should continue to be creditor driven.
5. *One Statute*: The entire enforcement system should be governed by one consistent, coherent and logically ordered statute.
6. *Judicial Supervision*: The enforcement system should operate with a minimum of judicial supervision, but there should be ready access to the court when directions are required.

In regard to the ALRI's sixth principle, we add that the underlying purpose of minimizing judicial involvement is to ensure that remedies are immediately available - once judgment is granted, as far as possible the judgment creditor ought to be able to immediately realize upon it, through the appropriate remedies, without returning to court for an additional order.¹³

In regard to the first principle, we note that Nova Scotia was an early pioneer in adopting a system of universal exigibility through a single remedy. The 1972 *Civil Procedure Rules* included an execution order which confirmed that all assets of the debtor other than those

¹¹ *Creditors' Relief Act*, R.S.N.S. 1989, c.112.

¹² *Personal Property Security Act*, S.N.S. 1995-96, c. 13 (*PPSA*).

¹³ Alberta Law Reform Institute, *Alberta Rules of Court Project: Enforcement of Judgments and Orders* (Consultation Memorandum No. 12.11, August 2004) at xiv.

specifically exempted are subject to a judgment creditor's claim, enforceable through seizure and sale by the Sheriff. The Nova Scotia execution order was a major step forward over a system that provided several distinct remedies for different sorts of assets, and was recommended as a model for other jurisdictions.¹⁴

Finally, we add that a concern to improve the enforcement of judgments must not be thought of as separate from or secondary to other efforts to improve Nova Scotians' access to justice. We may make every effort to facilitate access to justice in the sense of reducing costs and other barriers to litigation, but if at the end of the process the mechanisms for enforcing a successful claim are deficient, those efforts will be hollow. An enforcement system that is unduly complicated or costly, or that simply fails to deliver results, is certain to undermine the confidence of the public and foster cynicism about the administration of justice. Put simply, it is the responsibility of the state - part and parcel of the duty to maintain and promote the rule of law - to uphold its courts' judgments with strong and effective enforcement action.

This report deals with the recovery of money judgments issued by the Supreme Court of Nova Scotia, the Court of Appeal, the Federal Courts, and the Small Claims Court. It does not deal with the regime for enforcement of family maintenance orders, which are covered by a separate statute¹⁵ and a separate enforcement program within the Department of Justice, following a report of this Commission in 1992.¹⁶ Neither do we deal with bankruptcy and related federal creditor relief legislation, or the question of inter-jurisdictional enforcement of judgments granted in other jurisdictions.¹⁷

We have also decided not to deal with the issue of fraudulent conveyances and preferential transfers. Nova Scotia, like other provinces, has legislation to deal with conveyances and transfers that improperly remove assets from creditors' reach.¹⁸ The legislation is archaic and cumbersome, and reform is needed, for the protection of judgment and other creditors. There is, however, a working group of the Uniform Law Conference of Canada preparing a *Uniform Reviewable Transactions Act*. This work is fairly far along, a report having been presented to the ULCC at its most recent annual meeting, and the working

¹⁴ C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2^d. ed. (Scarborough, ON: Carswell, 1995) at 446-447.

¹⁵ *Maintenance Enforcement Act*, S.N.S. 1994-95, c. 6.

¹⁶ Law Reform Commission of Nova Scotia, *Final Report: Enforcement of Maintenance Obligations* (November 1992).

¹⁷ See *Reciprocal Enforcement of Judgments Act*, R.S.N.S. 1989, c. 388; *Enforcement of Canadian Judgments and Decrees Act*, S.N.S. 2001, c. 30.

¹⁸ *Assignments and Preferences Act*, R.S.N.S. 1989, c. 25; *Statute of Elizabeth*, 1570 (13 Eliz. 1, c. 5).

group undertaking to prepare draft legislation for the ULCC's meeting in 2012.¹⁹ In these circumstances we consider it wise to review the working group's proposals before offering our own recommendations for reform of this area of creditor relief law.

This project arose from a 2009 report prepared for the Commission by a team of researchers at Saint Mary's University, evaluating the Small Claims Court of Nova Scotia.²⁰ On the basis of survey research, that report concluded that the Small Claims Court was performing remarkably well at accomplishing its main objectives of providing quick, informal and affordable access to justice. The most widespread concern of survey respondents, however, had to do with the enforcement of Small Claims Court judgments.²¹ The researchers noted the following common themes among survey responses to do with enforcement:

- lack of enforcement of payments;
- lack of mandatory deadlines for payments;
- lack of penalties for non-payment; and,
- the need for greater support from sheriffs.²²

The report identifies enforcement as the most significant issue for reform, deriving principally from the complexity and expense of collection efforts following judgments, Small Claims Court claimants' unfamiliarity with systems for collection, and the lack of information available about the debtor's available assets.²³ We expect many of these will apply to enforcement of money judgments generally, especially where self-represented litigants are concerned.

In response to these concerns, the Nova Scotia Department of Justice requested that the Commission study the issue of civil judgment enforcement generally - that is, not just with regard to Small Claims Court judgments, but the judgments of other courts as well. In addition, the Commission had already undertaken a separate project on the issue of garnishment of wages as an enforcement tool, following an attempt to substantially revise the garnishment of wages provisions of the Nova Scotia *Civil Procedure Rules*. The garnishment project was incorporated into the more general project on enforcement of

¹⁹ Uniform Law Conference of Canada, *Reform Of Fraudulent Conveyances And Fraudulent Preferences Law, Part 2: Preferential Payments; Final Report Of The Working Group* (August 2011) (online: [www.ulcc.ca/en/poam2/4b%20Preferences%20final%20report%202011%20\(2\).doc](http://www.ulcc.ca/en/poam2/4b%20Preferences%20final%20report%202011%20(2).doc)) at 23.

²⁰ Marc W. Patry, Veronica Stinson, & Steven M. Smith, *Evaluation of the Nova Scotia Small Claims Court: Final Report to the Nova Scotia Law Reform Commission* (March 2009).

²¹ *Ibid.*, at 85.

²² *Ibid.*, at 86.

²³ *Ibid.*, at 90-93.

judgments. We deal with garnishment of wages in the discussion of *Uniform Act's* garnishment and exemption provisions, below.

THE CURRENT SYSTEM

A number of statutes, rules and regulations govern the enforcement of judgments in Nova Scotia. A successful plaintiff can obtain a certificate of judgment, which can then be registered for the purpose of binding land under the *Land Registration Act*.²⁴ A judgment creditor can also obtain a notice of judgment, which can then be registered for the purpose of binding personal property under the *Creditors Relief Act*²⁵ and the *PPSA*.²⁶ These enforcement actions are passive, in the sense that they do not require further action to be effective - by binding the debtor's property, they effectively limit the debtor's ability to sell, mortgage or otherwise use the property for security. Further action can be taken to seize and sell or otherwise liquidate the property - in the case of land, pursuant to the *Sale Of Land Under Execution Act*,²⁷ and in the case of personal property, under the *PPSA*.

The judgment creditor can also obtain an execution order under the *Civil Procedure Rules*.²⁸ In simple terms, the execution order instructs the sheriff to seize and liquidate all property and income of the debtor, subject to certain exemptions, and pay the proceeds to the creditor. In practice, the Sheriff acts only upon receiving information, typically from the creditor, as to the location of available assets and income, and requires any expenses to be paid up front by the creditor.

The *Small Claims Court Act*²⁹ provides that orders of that court can be enforced in the same manner as an order of the Supreme Court. Regulations under the *Act*³⁰ provide for the issuance of a Certificate of Judgment for registration in the land registry system, and an execution order that is similar, but not identical to, the execution order issued by the Prothonotary of the Supreme Court.

We have heard that this system is complicated and difficult for the self-represented litigant to navigate. More significantly, we have heard that litigants have found, even after obtaining and filing the various forms, that recovery remains difficult, costly and elusive. The sheriff requires the creditor to make up-front payment of some fees, which are

²⁴ *Land Registration Act*, S.N.S. 2001, c.6 (*LRA*).

²⁵ *Supra*, note 11.

²⁶ *Supra*, note 12.

²⁷ *Sale of Land Under Execution Act*, R.S.N.S. 1989, c.409.

²⁸ *Nova Scotia Civil Procedure Rules*, Rule 79.

²⁹ *Small Claims Court Act*, R.S.N.S. 1989, c. 430, s.31(1).

³⁰ *Small Claims Court Forms and Procedures Regulations*, N.S. Reg. 17/93, as am.

recoverable only if the sheriff is able to realize upon assets or income of the debtor. The sheriff does not independently identify and pursue the debtor's assets or income, and it can be very difficult for a judgment creditor to locate assets other than real property, and especially income. As well, debtors have many ways of shielding assets and income through modern property, trust and corporate law.

Available statistics suggest continuing difficulties with enforcement. At both Supreme Court and Small Claims Court levels, unsatisfied judgments generally exceed the number of satisfied judgments in any given year by a significant margin.³¹ These figures do not, however, identify the reasons for the failure to satisfy the judgments.

Our first set of questions therefore concerns the problems of the current system. Any recommendations we may finally propose must respond to the real difficulties that judgment creditors now face. While creditor remedies in Nova Scotia have undergone a number of reforms in recent years, especially through the *PPSA* and consequential amendments to the *Creditor's Relief Act* and *Civil Procedure Rule 79*, those changes have been piecemeal. In terms of efficiency and efficacy, what remains to be done? In particular:

a) are there certain kinds of assets that are, or are perceived to be, currently out of reach (e.g., equitable interests, trusts, intellectual property, retirement accounts, etc.), but ought to be available?

b) are there certain kinds of assets that, while technically available, are particularly difficult to claim (e.g., shares, public or privately-held)?

c) are the types of orders or remedies for executing against particular kinds of assets clear and accessible?

d) are the means of triggering enforcement action unduly cumbersome? In what ways?

e) is the court's present level of involvement (e.g., issuance of execution orders and notices for registration) unnecessarily burdensome - either for the court or creditors?

f) is the office of the sheriff properly instituted (in terms of resources, legal rights, duties, immunities and liabilities) to realize the best possible recovery results?

g) what other sorts of difficulties should we be concerned with?

³¹ Department of Justice, Court Services (August 8, 2011), *Certificates of Judgment and Execution Orders Total Satisfied 2004-2011* (unpublished).

THE UNIFORM ACT

In 2004, the Uniform Law Conference of Canada adopted the model *Uniform Civil Enforcement of Money Judgments Act*. Building on previous law reform efforts,³² including modern enforcement statutes in Alberta³³ and Newfoundland,³⁴ the *Uniform Act* was the product of three years research and review by a ULCC working group. Since its adoption by the ULCC, it has been the subject of further detailed examination by the British Columbia Law Institute,³⁵ which recommended its adoption in that province.

The *Uniform Act* was significantly influenced by the separate but contemporaneous work of two scholars at the University of Saskatchewan College of Law, who also served on the ULCC working group.³⁶ Their final report proposed a very similar unified enforcement statute, which resulted in recently passed legislation there.³⁷

Given this extensive background, rather than reinvent anew, we consider that our project may be usefully and efficiently advanced by considering the *Uniform Act* for adoption in Nova Scotia. In the following pages we outline its provisions and propose its adoption. In our view adoption of the *Uniform Act*, with certain amendments we discuss below, would significantly modernize and improve the provincial framework for collection of judgment debts.

Provisions of the Uniform Act - Overview

The *Uniform Act* confirms the policy of universal exigibility. All of a judgment debtor's property and interests in property are subject to enforcement proceedings, except for those that are expressly exempted in the statute.

The *Uniform Act* relies on a unified and streamlined method of enforcement. Once the notice of judgment is registered in the Personal Property Registry, the judgment creditor may give instructions directly to the sheriff. The judgment creditor is not required to obtain a writ or order from the court.

Thus, the court is not required to oversee the general administration of the civil enforcement system; the *Uniform Act* instead provides for access to court to resolve live disputes as expeditiously as possible, when they arise.

³² Ontario Law Reform Commission, *supra* note 2; Alberta Law Reform Institute, *supra* note 3.

³³ *Civil Enforcement Act*, R.S.A. 2000, c.C-15.

³⁴ *Judgment Enforcement Act*, S.N.L. 1996, c.J-1.1.

³⁵ British Columbia Law Institute, *supra* note 5.

³⁶ Buckwold & Cuming, *supra* note 10.

³⁷ *Enforcement of Money Judgments Act*, *supra* note 9.

The *Uniform Act* is largely in keeping with the present system of registration under the *Creditors' Relief Act* and the *PPSA*. Registration of a notice of judgment in the personal property registry creates an enforcement charge over the judgment debtor's present and after-acquired personal property, on a par with a perfected non-purchase money security interest, and Part 5 the *Uniform Act* integrates that charge into the *PPSA* regime and resolves various priority disputes in ways familiar from the *Creditors' Relief Act*.

For real property, the *Uniform Act* provides for registration in the personal property registry as a kind of province-wide judgment roll, or against specific interests in the land registry system. The charge is more or less equivalent to a mortgage, except that it has no priority over a mortgage to secure purchase money (Appendix B, s.129(2)(b)).

The proceeds of all enforcement proceedings are subject to rateable sharing among judgment creditors, but the *Uniform Act* provides for a preferential payment to the judgment creditor who takes the initiative to seize a particular asset.

Finally, the *Uniform Act* may require a somewhat broader role for the sheriff than is the case currently. The *Uniform Act* relies on creditor initiative to locate assets and give instructions, and in this respect does not contemplate a more proactive role for the Sheriff than is presently the case. It does, however, specify powers and specific processes for certain types of assets and income. These are not new powers or responsibilities; rather, they specify and elaborate on those the Sheriff has under the broad language of Nova Scotia's existing execution order, the operative provision of which is as follows:

The sheriff must seize, otherwise take control of, and accept as a receiver all property in which the judgment debtor has an interest, except property exempt from execution and property held by the execution debtor as trustee for another person. This includes moveables, currency, shares, bonds, debentures, other security, legacies, debts, rent, wages, and any other demand due or accruing due to the judgment debtor at any time.

But the *Uniform Act* specifies the means for seizing many of these forms of property, some of which - such as for businesses, shares in a business and intellectual property - are elaborate and may require outside expertise. In other respects, it creates wider discretion in the manner of disposing of assets - e.g., real property - that may require thoughtful judgment, expertise and creativity. And it may be that the *Uniform Act's* new disclosure provisions - such as a mandatory written questionnaire - will reveal assets of the debtor that under the existing rules go undisclosed. Therefore, though it operates on the familiar principles of creditor initiative and universal exigibility, we can anticipate that in practice the *Uniform Act* will result in additional enforcement work for the Sheriff. Particularly as to some of the more complicated provisions this may require specialized expertise, including external counsel or agents. To ensure the success of new judgment enforcement legislation in realizing better results for creditors, the Sheriff must be equipped and prepared to use every available means to seize every available asset identified by the creditor, in a timely fashion, or to obtain the assistance of a qualified agent in doing so.

Specific Provisions³⁸

Part 1 of the *Uniform Act* sets out the definitions. Of note is the expansive definition of "property", as follows:

"property" includes

- (a) things, as well as rights or interests in things;
- (b) a thing regarded in law or equity as property, or as an interest in property;
- (c) a right or interest that can be transferred for value from one person to another;
- (d) a right, including a contingent or future right, to be paid money or receive another kind of property;
- (e) a chose in action; and,
- (f) a cause of action.

The *Uniform Act* would apply to judgments of the Supreme Court, Small Claims Court and Federal Court, as well as appellate courts. It would also apply to restitution orders under the *Criminal Code of Canada* and other orders for payment of money that are enforceable in the same manner as a court judgment (e.g., *Workers Compensation Act* assessments). It would not apply to orders for maintenance and support (including interjurisdictional maintenance orders).

Part 2 contains the general provisions. Section 2(1) provides that all judgment enforcement action is to take place under the *Act*, unless expressly provided for by another enactment. Section 2(5) is an anti-contracting out provision, prohibiting waiver of any right given by the *Act*, prior to any dispute arising. Debtors will not be able to waive the *Act's* exemptions for property or income as a condition of entering into a transaction.

Section 3 provides for the 'domestication' of Federal Court judgments within the *Act's* enforcement processes.

Section 7 authorizes the Supreme Court to make a wide range of orders in fulfilling its oversight role, with appeal to the Court of Appeal within 30 days. A non-exhaustive list of orders, injunctions, and types of direction is included.

³⁸ We rely in part on the British Columbia Law Institute's summary of the *Uniform Act*, in its report, *supra* note 5, with thanks.

Section 10 adopts the standard of good faith and commercial reasonableness for the exercise of all rights and duties under the *Act*, and Section 11 provides a right of action for any reasonably foreseeable loss suffered by reason of a failure to act in accordance with the *Act* without lawful excuse or justification - or \$200 in case the amount of the loss is not readily provable. These are more or less transposed from the *PPSA*, ss.66 and 67, into the civil enforcement system. There is also a cause of action for damages, in section 12, for any interference with an enforcement officer's duties under the *Act*.

Part 3 describes the powers of the enforcement officer. These are to ensure that the powers of the office accord with the complexity of the task of seizing and selling or otherwise realizing a wide variety of tangible and intangible property such as accounts, businesses, securities, intellectual property, rights as a beneficiary under a trust, and causes of action.

Part 4 creates the preservation order, a statutory prejudgment remedy that is intended to replace *Mareva* injunctions, attachment orders, and the preservation order in *Civil Procedure Rule 42* with regard to preserving specific property or assets. It does not concern preservation of evidence. The effect is to streamline the court's prejudgment preservation order jurisdiction, while providing flexibility to order a number of specific preservation measures, as well as measures for the protection of the defendant; *e.g.*, express protections for reasonable living and business expenses, discretion to order security from the plaintiff, deadlines for bringing *inter parte* applications, etc. The grounds for a preservation order more or less mirror those for a *Mareva* injunction.

In addition to registration of the preservation order in the personal property registry, the *Uniform Act* provides for registration in the land registry system. This creates no property interest by itself, but serves as a lien or caveat, ensuring priority over later security interests if the plaintiff's action is successful. The Saskatchewan Report authors specifically rejected this option, on the basis that it would effectively bind the defendant's land prior to any validation of the plaintiff's claim. No lender would take a security interest or advance funds on a prior security in land subject to a preservation order that might later give priority to the plaintiff, following trial.³⁹ The Saskatchewan Report authors preferred an order which would be personally binding upon the defendant in the nature of an injunction, like a *Mareva* injunction, rather than creating a latent interest in the land itself.⁴⁰

Given that under the *Uniform Act* security will be required as a matter of course from the plaintiff, and that the plaintiff is required to demonstrate the necessity for the order in order to ensure adequate recovery, we favour making the preservation order registrable, in the nature of a lien. Some degree of pre-trial interference with the defendant's dealings is necessarily the case with any preservation-type order, after all, and is subject to the defendant's entitlement to damages if the plaintiff's action is denied.

³⁹ Buckwold & Cuming, *supra* note 10 at 26.

⁴⁰ *Ibid.*, at 24. This approach has been implemented in Saskatchewan: see *Enforcement of Money Judgments Act*, *supra* note 9, s.6.

Parts 5-7 contain the machinery for the administrative operation of the civil enforcement system under the *Uniform Act*. Part 5 sets out the mechanics for registration of a notice of judgment in the Personal Property Registry. This is more or less the same process as under the 'new' provisions of Nova Scotia's *Creditors' Relief Act*,⁴¹ integrating that *Act* and the *PPSA*. Registration results in the creation of an enforcement charge over the judgment debtor's existing and after-acquired personal property.

Registration in the personal property registry may also charge a debtor's real property, or a separate registration in the land registration system may be required (see Part 10, below).

Registration in the personal property registry is also a prerequisite to initiating enforcement proceedings under the *Uniform Act*. Consequently, the registry will serve as a single searchable registry within a province or territory where all judgments capable of immediate enforcement against a judgment debtor will be registered.

Part 6 contains the rules for determining priority between an enforcement charge and other interests in the judgment debtor's property. These rules are, in large part, modeled on the provisions in the *PPSA*, although there will be some fine-tuning required to ensure a fit with the Nova Scotia version of the *PPSA*.

Part 7 sets out the rules for enforcement instructions. The *Uniform Act* establishes enforcement instructions, like the execution order under Rule 79, as an all-purpose passport to enforcement of a judgment against a judgment debtor's property. One significant difference is the lack of involvement of the Prothonotary. Under the *Uniform Act*, a judgment creditor will be entitled to issue enforcement instructions directly to the sheriff, after registration of a notice of judgment in the personal property registry. The instructions may be general, or indicate specific assets and proceedings which the creditor wishes the sheriff to take.

Part 8 establishes a system for examining a judgment debtor and others to obtain information about the existence, location, and description of the judgment debtor's property. The instructing judgment creditor may utilize one or more of four available options: a) a written questionnaire; b) examination under oath before an enforcement officer; c) order for disclosure or examination under oath of a person other than the judgment debtor; and d) order for the judgment debtor to give authorization to a third party to release information about the debtor (such as legal name or other identifying information regarding certain transactions and assets) to the creditor or enforcement officer. The court may authorize further investigation by the enforcement officer, including entering premises and examining documents as to the debtor's assets. Information disclosed to an enforcement officer must be shared amongst any other judgment creditor.

⁴¹ Ss. 2A, 2B, 2C, 2D and 2E of the *Creditors' Relief Act*, *supra* note 11, as amended by s.78 of the *PPSA*.

Part 9 sets out the procedures and rules for enforcement proceedings against personal property. Part 9 is divided into six Divisions. Division 1 sets out general provisions, and Divisions 2-6 set out specific rules that apply to certain types of property.

Division 1 provides the default rules for enforcement officers in seizing and selling personal property. The *Act* expressly confirms that exigible property includes various forms of intellectual property rights, licenses, beneficial interests under a trust, etc. For the most part these are straightforward seizure and sale provisions, including protections for the debtor similar to those under the *PPSA* (redemption of seized property within a certain time, limits on seizable assets to only that necessary to cover outstanding judgments, refund of surplus to the debtor, etc.), but there are various provisions for specific types of assets, such as licenses and property subject to family court exclusive possession orders.

Division 2 deals with fixtures and crops. Fixtures and crops may be severed and sold from the real property, as under the *PPSA*. Notice must be given to any person with an interest in the land and time permitted to oppose or request a delay of the sale.

Division 3 contains rules that apply to the seizure and sale of a judgment debtor's interest under lease, conditional sales contract, or security agreement. Division 3 covers both situations where the judgment debtor is the lessor, seller, or secured party and where the judgment debtor is the lessee, buyer, or debtor. The seizure applies to the property as well as the stream of payments that may be due under the lease, sales contract or security agreement. The *Act* also provides a mechanism to nullify any provision in the contract to the effect that it may be terminated upon seizure. For reasons discussed below, however, we are not proposing adoption of this latter provision.

Division 4 governs seizure of an existing or future debt or account. An account is charged with an enforcement charge upon registration of a notice of judgment. Once the instructing creditor issues instructions, the enforcement officer seizes the account by giving a notice of seizure to the account debtor, and "as soon as practicable thereafter" to the judgment debtor. (Section 14 allows the enforcement officer to delegate the task of delivering these notices to the judgment creditor or its agent - such as a law firm). If there is no dispute, the funds are paid to the enforcement officer. A notice of seizure applies to future accounts owing from the account debtor to the judgment debtor at any time within 12 months after the date on which the notice of seizure is given to the account debtor. The obligation is not limited as to time if there is a series of recurring payments (*e.g.*, under a long-term lease, promissory note, or similar obligation) or there is an existing legal relationship between the account debtor and the judgment debtor, under which money later becomes payable (*e.g.*, under a month-to-month lease).

Banks would not be subject to the future account obligation, being required to deliver the proceeds in a deposit account only as of the date when the notice of seizure is delivered to the branch where the account is held.⁴²

Employment income is payable to the enforcement officer as of the next pay period after the notice of seizure is delivered, and is subject to deductions for income tax, employment insurance, Canada Pension Plan contributions, compulsory union or professional fees, registered pension plan contributions, health, disability and life insurance premiums and any other prescribed deductions, as well as the provisions for exemption of income detailed in Part 12 of the *Act*.

Amounts payable to the debtor under a trust - including when the debtor is entitled to trust moneys or is in a position to demand payment from the trustee through the rule in *Saunders v. Vautier* - are deemed to be accounts within Division 4.

Division 5 sets out the rules for seizing and selling corporate securities, based on the framework for owning and transferring securities established by another uniform statute prepared by the ULCC, the *Uniform Securities Transfer Act*.⁴³ The intention is to ensure that enforcement action is in keeping with modern securities practice; *e.g.*, the importance of security certificates, the modern role of securities intermediaries in holding shares, etc.

Division 5 also provides a code for seizing and selling securities in privately-held companies that are subject to transfer restrictions such as those common in shareholders' agreements. The transfer restrictions are voided, but the enforcement officer is bound to respect them as far as possible. The other shareholders have a preferential right to acquire the shares, and failing that may offer their own shares for sale along with the debtor's. Any artificially-low price for share acquisition by another shareholder is subject to a court order varying the price to ensure fair value.

For reasons discussed below, however, we are not proposing the adoption of the Uniform Act's provisions for overcoming transfer restrictions on closely-held shares.

Division 6 of Part 9 provides for seizure of intellectual property. Much intellectual property is administered under federal legislation, but the *Uniform Act* provides that the enforcement officer may stand in the debtor's shoes with regard to the relevant intellectual property registrations (patents, trademarks, etc.) and execute any documents in relation to any particular intellectual property, or else require the debtor to do so.

⁴² The "branch of account" rule is found in the *Bank Act*, S.C. 1991, c. 46, s.462 and the *Trust and Loan Companies Act*, S.C. 1991, c. 45, s.448; see British Columbia Law Institute, *supra* note 5 at 145.

⁴³ Adopted in Nova Scotia: see *Securities Transfer Act*, S.N.S. 2010, c.8.

Part 10 deals with the enforcement of judgments against land. The *Uniform Act* contains two options for proceeding against a judgment debtor's land, depending on the system used by the province to record judgments against real property interests. Option 1 applies to systems, like Nova Scotia's, which do not record judgments against specific parcels. Option 2 provides for registration of judgments against specific parcels.

Under Option 1, the registration of a judgment in the personal property registry would create an enforcement charge on all present and after-acquired land of the debtor in the province. The charge would have priority over most subsequent interests, or any interest registered after the registration of the judgment, subject to certain exceptions. The charge could be registered against a specific parcel as well, but if not it would have priority over any later interest only if the name of the judgment debtor as recorded in the notice of judgment recorded in the PPRS matched the name of the transferor on the parcel (there appears to be no explicit 'material difference' provision in the *Uniform Act*).⁴⁴ The judgment would not have priority over a mortgage registered prior to the judgment that secures a specific sum (even if amounts are advanced after the judgment is registered), or a subsequent mortgage which secures money used to buy an interest in land, as long as it is registered within 15 days of the debtor's acquisition of the mortgaged interest.⁴⁵

Part 10 further sets out the procedures for sale of land by the enforcement officer, including a six month waiting period (for redemption) after a notice of intention to sell is given. For law reform purposes more broadly, there is also the option to harmonize the enforcement sale and foreclosure sale procedures in this context.

Part 11 sets out the rules for enforcing judgments against co-owned and partnership property. These rules apply both to personal property and to land. Creation of an enforcement charge severs any joint tenancy, and property held by co-owners may be seized and sold in its entirety. Following notice to the co-owner, there is a 15-day waiting period prior to sale, during which a co-owner may purchase the judgment debtor's interest.

Partnership property is liable to seizure and sale, provided that the enforcement officer must give notice to the partner(s). The onus of challenging the sale is on the partners, who may make an application within 15 days of receiving notice. The court may order, *inter*

⁴⁴ See Buckwold & Cuming, *supra* note 10 at 204: “[The transferee] should not be put in the position of having to search several variations of the prospective transferor’s name in order to determine whether or not an enforcement charge has been registered against the property involved in the prospective transfer. The person should be required to do no more than obtain a search result using the name of the prospective transferor as it appears in the registration indication [sic] the transferor’s interest in the land titles registry. If no enforcement charges are revealed in this way, and if no charge has been registered against the title in the land titles registry, the person should be able to assume that no such charges exist.”

⁴⁵ Appendix B, at s.129(2). For further commentary see Buckwold & Cuming, *supra* note 10 at 205-206.

alia, that the partners may purchase the debtor's share for fair value, that the property be released from seizure, that some of it may be severed and sold, etc..

For reasons discussed below, we are not proposing adoption of Part 11 of the *Uniform Act*.

Part 12 of the *Uniform Act* sets out the exemptions. Part 12 is divided into three divisions, which deal respectively with a) the process of claiming an exemption and determining its validity, b) exempt property, and c) exempt income. Debtors must be given a written description of the exemptions and how to claim them when a notice of seizure or sale is delivered. The debtor may claim the exemption up to the point where the enforcement officer enters an agreement for sale of the asset, and thereafter may claim the money received from the sale up to the point when the funds are distributed to creditors. Division 1 extends the property exemptions available to a natural person to corporations that are effectively incorporated proprietorships.

The exempt property provisions in Division 2 are more generous to debtors than under s.45 of the Nova Scotia *Judicature Act*,⁴⁶ expressly including, *inter alia*, a principal residence of minimally reasonable value, damages for personal injury claims, regularly-used farmlands and equipment, fishing gear, personal property needed for the debtor's occupation, pets, burial plots, etc. There are no maximum values stated, but the *Uniform Act* provides an option to specify such in relation to items such as a motor vehicle and household implements. The drafters caution that in case maximum values are used, there should be an automatic cost of living increase mechanism in the regulations.⁴⁷

As discussed below, we are not proposing the adoption of the Uniform Act's exemptions, preferring the list in s.45 of the *Judicature Act*. We do agree with the necessity for an automatic, annual cost of living adjustment where maximum values are specified for certain exemptions.

The exemption for income in Division 3 applies to wages as well as fees for personal service contracts, and payments under an annuity or registered plan (RRSP, RRIF or DPSP). Regulations may provide for a minimum floor of income, and 50% of the debtor's net income (after regular deductions for income tax, employment insurance, Canada Pension Plan contributions, compulsory union or professional fees, registered pension plan contributions, health, disability and life insurance premiums) above the floor is exempt. Income generated on the capital of a personal injury damage award is included as income, except that 100% of the amount for future medical and personal care expenses, and income earned on that amount, is fully exempt. Note that leaving the 'floor' to regulations means that the *Act* does not deal with whether and how to accommodate a debtor's preexisting obligations to dependents. We consider that issue below.

⁴⁶ *Judicature Act*, R.S.N.S. 1989, c.240.

⁴⁷ Appendix B, at Division 2 (Introductory Comment).

Part 13 deals with applications for the appointment of a receiver. It also lists the powers of receivers and describes the supervisory role of the court.

Part 14 governs the distribution of proceeds from enforcement proceedings to judgment creditors. A distributable fund is constituted when the enforcement officer realizes proceeds from an enforcement proceeding. A judgment creditor has an eligible claim if he or she has delivered an enforcement instruction to the enforcement officer prior to the realization of proceeds from sale. Preferential payments are made for the enforcement officer's expenses, a creditor's court costs in obtaining a preservation order, to the creditor whose enforcement instructions led directly to the realization of proceeds, and others. After the payment of preferred claims, eligible claimants share the remainder on a *pro rata* basis. The enforcement officer prepares a distribution scheme, which is circulated amongst creditors and others, and is open for objection and potential amendment.

Parts 15 and 16 deal primarily with administrative matters: a process to resolve third person claims to apparently exigible property, and transition, regulations, forms, and fees.

Discussion & Proposal

We propose, for discussion purposes, that Nova Scotia adopt much of the *Uniform Act*, with appropriate amendments. Our proposed amendments to the *Uniform Act*, outlined below, have mainly to do with protecting the rights of third parties in enforcement proceedings against the debtor, and with preserving existing Nova Scotia processes where we have no indication that those processes are in need of reform. Nevertheless, we view the *Uniform Act* as a substantial improvement over existing enforcement processes in a number of respects.

One of the main purposes of the *Uniform Act* is the consolidation of various judgment creditors' remedies and debtor protections into one statute, with one streamlined process. The Nova Scotia system is not as antiquated and fragmented as some, but our processes for charging, securing and seizing debtors' assets, and then liquidating and distributing the proceeds among judgment creditors, are nonetheless spread amongst several of the *Civil Procedure Rules* - in particular Part 10 and Rule 79 - as well as the *Creditors Relief Act*, the *Personal Property Security Act*, the *Collections Act*, the *Sale of Land Under Execution Act* and the *Land Registration Act*, as well as the common law remedies. One of the major goals of adopting something like the *Uniform Act*, then, would be to create, as much as possible, a one-stop shop to assist creditors, debtors and enforcement officials in determining when and how to proceed with regard to the various assets that may be available. Much as the *PPSA* did for the area of security interests in personal property, and the *Maintenance Enforcement Act* did for purposes of enforcing spousal and family support orders, the *Uniform Act* would do for the enforcement of civil money judgments.

As well, the *Uniform Act* provides a modern, comprehensive system of powers and responsibilities for the enforcement officer, spelling out officers' authority to deal with a variety of complex assets that are not explicitly covered by our existing judgment enforcement legislation. There is also a more fully developed series of administrative

procedures for giving notice to interested parties, providing for variation, priorities and distribution among creditors, and so forth.

In addition, although it is not necessary to implement the *Uniform Act* solely for this purpose, it would have the advantage of centralizing the judgment rolls for the various land registry districts in the province. Rather than being required to file a judgment separately in each district, the judgment creditor would bind all the debtor's real property in the province by a single filing in the personal property registry.

There are drawbacks, of course. Among them is the potential to fossilize the relatively flexible Rule 79 in statutory form. There is reason to prefer that enforcement processes remain in Rule form, subject to relatively quick amendment from time to time, rather than to rely on amendment by the legislature, or through regulation, as the need arises. As well, there is the inherent cost of enacting a new statute and developing regulations, along with implementing new administrative systems (of the court, the sheriff, legal counsel and financial institutions, etc.) to accommodate new rules, forms and processes.

We are persuaded that the *Uniform Act* should be substantially adopted in Nova Scotia, with certain amendments. One of the reasons is precisely to ensure that creditor remedies and debtor protections are examined, debated and decided by the elected legislature, rather than by judges acting within the policy-making limits of their institution.

More significantly, a statute can effect changes in substantive law that would be unavailable in the context of the *Civil Procedure Rules*. Some of the remedies in the *Uniform Act*, for example, have the effect of shifting property rights in respect of otherwise hard to reach assets, such as intellectual property, from the debtor to the enforcement officer.

We invite comment on the proposal to adopt the *Uniform Act* in Nova Scotia, with amendments discussed below.

We do not propose the adoption of the *Uniform Act* simply as it is written. Particularly with regard to the exemptions, and those provisions that interfere with third party rights, there are important policy choices that must reflect Nova Scotia's own balance between the competing moral, economic and practical considerations at play. As well, existing Nova Scotia judgment collection law includes a number of existing processes that appear to be functioning effectively. In that context we see no reason to impose a new set of processes absent any indication that the *Uniform Act's* provisions are a substantial improvement on the current system.

In particular, we do not propose adoption of all of the *Uniform Act's* exemptions. As noted above, the *Uniform Act* exempt property provisions are broader than Nova Scotia's under the *Judicature Act*.⁴⁸ The current *Judicature Act* exemptions, at s.45, are as follows:

⁴⁸ *Judicature Act*, *supra* note 46.

45 (1) The following articles are exempt from seizure under execution:

- (a) the wearing apparel and household furnishings and furniture which are reasonably necessary for the debtor and his family;
- (b) all fuel and food reasonably necessary for the ordinary use of the family;
- (c) all grain and other seeds, and all cattle, hogs, fowl, sheep and other livestock which are reasonably necessary for the domestic use of the debtor and his family;
- (d) all medical and health aids reasonably necessary for the debtor and his family;
- (e) such farm equipment, fishing nets, tools and implements of, or other chattels, as are used in the debtor's chief occupation, not exceeding in aggregate value the sum determined by the Governor in Council;
- (f) one motor vehicle not exceeding in aggregate value the sum of three thousand dollars or such sum as may be determined by the Governor in Council.

The maximum value of chattels and equipment exempt from execution under s.45(e), above, has been limited to \$1000 since 1985.⁴⁹ The maximum value for a motor vehicle was set at \$3000 in 1985, and has not been adjusted since.

The *Uniform Act* exemptions, by contrast, also include (see Appendix B, at s.159(1)), a principal residence of a minimally reasonable size, farmlands and equipment, fishing equipment (not necessarily limited in amount), tools and equipment necessary for the debtor's occupation (not necessarily limited in amount), damages for personal injuries, including loss of future income and future care expenses (as well as income on such damages), and pets. The *Uniform Act* also includes burial plots and prepaid funeral and cemetery expenses, which are exempt from seizure in Nova Scotia under the *Cemetery and Funeral Services Act*.⁵⁰

While we appreciate the spirit of the *Uniform Act's* exemptions, in some cases they strike us as overly generous. And more importantly, we have no indication that the current s. 45 exemptions are creating undue hardship or are manifestly unfair. On the other hand, where the s. 45 exemptions are expressed in terms of a maximum amount (that is, with regard to a motor vehicle and personal property used for the debtor's occupation) we propose that they ought to be brought up to date through a process of systematic consultation, and then subject to an annual, automatic cost of living adjustment. The present values are now significantly out of date. Simply on a cost of living basis, \$1000 for personal property used for the debtor's occupation in 1985 is equivalent to roughly \$1900

⁴⁹ *Value of Chattels Exempt from Seizure Regulations*, N.S. Reg. 112/85, s. 1.

⁵⁰ R.S.N.S. 1989, c. 62, s.15(1), s.23(1).

today.⁵¹ A motor vehicle worth \$3000 in 1985 would be equivalent to one worth over \$5,500 today,⁵² and on the basis of our informal inquiries we expect that the price of a minimally suitable vehicle would substantially exceed that figure.

The *Uniform Act* also adopts, by reference, section 3 of the *Uniform Registered Plan (Retirement Income) Exemption Act* (see *Uniform Act*, s.159(3)). That provision exempts from seizure the interest of the debtor in a registered retirement savings plan (DPSP, RRIF or RRSP), as follows:

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

Nova Scotia has not adopted the *Uniform Registered Plan (Retirement Income) Exemption Act*.⁵³ As a consequence, retirement plans are subject to seizure through judgment enforcement processes, except to the extent protected under other legislation. This contrasts to pension plans, protected from seizure under the *Pension Benefits Act*,⁵⁴ and retirement investments structured under insurance contracts with a beneficiary designation, protected by the *Insurance Act*.⁵⁵ It bears mentioning as well that RRSPs and RRIFs are protected in bankruptcy proceedings.⁵⁶

We propose adoption of section 3 of the *Uniform Registered Plan (Retirement Income) Exemption Act* for purposes of civil money judgement enforcement.⁵⁷ The reasons for exempting private retirement funds from execution are well explained and assessed in a 2004 report of the Alberta Law Reform Institute.⁵⁸ The Report surveys a number of

⁵¹ *Bank of Canada Inflation Calculator*, online: Bank of Canada <<http://www.bankofcanada.ca/rates/related/inflation-calculator/>>.

⁵² *Ibid.*

⁵³ Neither has it prescribed retirement income plans as exempt from seizure under the *Pension Benefits Act*, R.S.N.S., c.340, s.71(2).

⁵⁴ R.S.N.S. 1989, c.340, s.71.

⁵⁵ R.S.N.S. 1989, c.231, s.198.

⁵⁶ *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (*BIA*), s.67(1)(b.3). The *BIA* exemption does not apply to property contributed to the plan in the 12 months before the date of bankruptcy.

⁵⁷ Amended text of s.3, modified for purposes of inclusion in the *Uniform Act*, is included below; see Appendix B, LRCNS commentary on s.159(3).

⁵⁸ Alberta Law Reform Institute, *Exemption of Future Income Plans* (Final Report No. 91, 2004). See also C.R.B. Dunlop, "Should Creditors Have Access to Future Income Savings Plans?" (2003) 66 *Sask. L. Rev.* 279.

previous Canadian studies which proposed similar, if more limited exemptions.⁵⁹ The Institute observes that retirement savings are critical to ensuring that retirees do not fall into poverty, requiring the support of the state.⁶⁰ With fewer Canadians able to access private pensions, and bearing in mind the inconsistency of protecting pensions and certain other forms of retirement savings while leaving registered plans open to seizure, the Institute recommends that registered plans recognized under the *Income Tax Act* ought to be completely exempt from enforcement processes.⁶¹ We agree.

In summary, we propose that the current Nova Scotia *Judicature Act* property exemptions be included in any Nova Scotia version of the *Uniform Act*, in place of those in the original *Uniform Act*. We propose that any exemptions which are limited to a maximum amount should be brought up to proper present-day values, and subject to an automatic, annual cost of living adjustment. We propose that retirement plans (RRSPs, RRIFs and DPSPs) ought to be entirely exempt.

We invite comment on the proposal to retain the property exemptions currently found in section 45 of the *Judicature Act* in a new civil judgment enforcement statute, updated where appropriate to reflect proper present-day values and subject to an annual, automatic cost of living adjustment.

We invite further comment on what items or categories of property ought to be included, or excluded, as property exempt from seizure under a new Nova Scotia civil judgment enforcement statute.

In particular, we invite comment on the proposed exemption of registered retirement savings plans.

We propose substantial adoption of the *Uniform Act's* exempt income provisions. The *Uniform Act* applies a 50% exemption to certain types of income, net of deductions, above a minimum floor. The exemption applies to employment income, income under a contract for services making provision for periodic payments, under a retirement plan (except as

⁵⁹ *Ibid.*, at 60-66, discussing Tamara M. Buckwold and Ronald C.C. Cuming, *Interim Report on Modernization of Saskatchewan Money Judgment Enforcement Law* (Regina, Saskatchewan: Queen's Printer, November, 2001); Uniform Law Conference of Canada, *Proceedings of the Eightieth Annual Meeting* (Halifax: The Conference, August, 1998) at 254-273; Uniform Law Conference of Canada, *Proceedings of the Eighty First Annual Meeting* (Winnipeg: The Conference, August, 1999) at 164-180; Personal Insolvency Task Force, *Final Report* (Ottawa: Industry Canada, 2002) at 17-24; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: The Committee, 2003) at 24-29; online: <<http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/bank-e/rep-e/bankruptcy-e.pdf>>.

⁶⁰ Alberta Law Reform Institute, *supra* note 58, at 44.

⁶¹ *Ibid.*, at 41-52.

exempt under other legislation), under an annuity, from a registered plan (deferred profit savings plan, an RRIF or an RRSP), and from the investment of personal injury damages attributable to loss of future income (see Appendix B, at s.164).

These amounts are available for seizure, net of deductions for income tax, employment insurance, Canada Pension Plan contributions, compulsory union or professional fees, registered pension plan contributions, health, disability and life insurance premiums (see Appendix B, at s.164). From the net amount, a minimum floor is to be prescribed by regulation, and 50% of the amount above the minimum is exempt from seizure (Appendix B, at s.165(1)), subject to a maximum amount, also to be prescribed by regulation. There is a further exemption for 100% of income from a personal injury award for future medical care expenses, and investment income received on such an award (Appendix B, s.165(2)).

Administratively, the *Uniform Act* includes within the exemption income the debtor has received - meaning the exemption applies to money in the debtor's hands, not just that owing or payable by the employer or other payor - as long as it remains segregated and identifiable or traceable from the debtor's other assets. The enforcement officer is required to give the debtor notice of any seizure (Appendix B, at s.62(1)) and at the same time deliver information on available exemptions and how to claim them (Appendix B, at s. 154). Although the enforcement officer must not seize property or income the enforcement officer believes is exempt, the process of claiming an exemption is otherwise left largely up to the debtor (Appendix B, at ss. 155-158).

There are a variety of variation orders for specific situations, available upon application to court (Appendix B, at s.168) and the judgment debtor is required to provide information on available sources of income upon request by the enforcement officer (Appendix B, at s.169) - that is, without the creditor necessarily undertaking the disclosure procedures available in Part 8 of the *Uniform Act*.

Nova Scotia has some recent experience in assessing models for exempting income from judgment enforcement. Among the changes in the recent revision of the *Civil Procedure Rules* was a new provision for garnishment of wages, Rule 79.08. As it was originally adopted, the new garnishment rule provided for only a minimum floor of exempt income, after tax, based on Statistics Canada's urban Low Income Cutoffs. The minimum floor increased depending on the number of dependents - from \$285 per week for a single debtor, to a maximum of \$750 per week for a debtor with six or more dependents.

This was a change from the former wage garnishment provision in the 1972 *Civil Procedure Rules*, Rule 53.05, which provided that up to 15% of the judgment debtor's gross wages could be garnished, with a minimum floor below which the debtor's net income, after deductions, should not ordinarily fall. In other words, the rule exempted at least 85% of the debtor's gross employment income, although subject to variation by the court. The minimum floor was \$275 per week for a debtor without dependents, and \$415 per week for a debtor supporting dependents, regardless of number.

Although Nova Scotia's old rule 53.05 was subject to the criticism that it was among the most generous of any province, the new rule met with vociferous objection.⁶² This was particularly on the basis that a sudden reduction of weekly take-home pay to poverty levels would be far more severe and potentially debilitating than would be appropriate in the judgment recovery context. The typical escape valves for debtors - the court's stay of execution power and the bankruptcy system - were thought to be too complex for some debtors to necessarily take advantage of, and not necessarily available in all cases where the low income cutoff amounts were nonetheless inappropriate. As well, there was concern that verifying the actual number of dependents would complicate the sheriff's task in pursuing garnishment.

In the end, following representations made on behalf of judgment debtors and further consultation, the Court more or less restored the old Rule 53.05, with certain changes. In particular, the minimum figures for net income were increased to account for inflation (to \$330 per week for a debtor without dependents, and \$450 per week for a debtor with any dependents). As well, the provision applying to existing bank balances was amended so as to render the deposit taking corporation liable to the debtor for paying money to the Sheriff which to the knowledge of "a person in charge of the account" is from an exempt source of income.

We prefer the *Uniform Act's* method of calculating and applying the percentage deduction of 50% to the amount over and above the minimum floor, net of deductions, rather than applying an 85% percent exemption to the debtor's gross wages, subject to a minimum floor of a certain amount of net wages after deductions. In our view the *Uniform Act's* calculation is better tailored to the individual situation of the judgment debtor. We favour leaving the minimum floor, and maximum ceiling, to regulation, with annual, automatic adjustment for inflation.

We agree with the drafters of the *Uniform Act*⁶³ that the minimum floor should be scalable on the basis of number of dependents, rather than a single figure for a debtor with any number of dependents. Aside from the obvious logic of such a provision, we note that Alberta, Newfoundland and Labrador, Northwest Territories, Nunavut, Prince Edward Island, Quebec, Saskatchewan and Yukon all provide some variation in the base exemption amount, based on number of dependents. In other words, the administrative issues in verifying number of dependents do not seem to be of overriding concern elsewhere.

Finally, we do not propose the adoption of the *Uniform Act's* requirement that exempt income paid into the hands of the debtor remains exempt only as long as it is segregated

⁶² Nova Scotia, Legislative Assembly, Law Amendments Committee (November 18, 2008) (Rollie Thompson & Clare MacNeil).

⁶³ See Appendix B, s. 165(1) (Commentary), recommending that the minimum amount set by regulation should be variable, depending on the number of the debtor's dependents.

from and identifiable or traceable from the debtor's other funds.⁶⁴ In our view it is not necessary to require the debtor to maintain a segregated fund for exempt income, in order that it remain exempt once in the debtor's hands. Further, we favour the provision of the existing *Civil Procedure Rules*, imposing a duty on a deposit-taking institution to withhold any payments from a debtor's existing account balance, where the institution is aware that the source is an exempt type or amount of income, including where the judgment debtor has specifically identified the funds as such.⁶⁵ The institution is liable to the debtor for amounts paid to the Sheriff, contrary to such duty. We propose that this provision be included in any Nova Scotia version of the *Uniform Act*. We acknowledge that this puts the onus on the debtor in some cases to make the deposit-taking institution aware that certain income is exempt.

We invite comment as to the proposal to adopt the *Uniform Act's* method of calculating exempt wages.

We invite comment as to the proposal to incrementally increase the base amount of the exemption for each of the debtor's dependents.

We invite comment as to the proposal to continue the liability of deposit-taking institutions with regard to moneys paid to the sheriff from the debtor's account, where a person in charge of the account is aware that the source of such moneys is exempt income. For example, should the duty be framed on an objective standard; i.e., where the institution ought to have been aware of an exempt source of income?

With regard to sale of the debtor's land, we propose substantial adoption of the *Uniform Act's* procedures.⁶⁶ This would entail a number of changes from the existing regime under the *Sale of Land Under Execution Act*,⁶⁷ the most notable of which is the removal of the requirement to advertise the property in a certain way. Instead, the enforcement officer would have discretion to devise the best means of disposing of the property, and would circulate that plan to interested parties for possible objection ahead of time.⁶⁸

Rather than adopt the *Uniform Act's* waiting period,⁶⁹ however, we propose to preserve the current waiting period pursuant to s.4 of the *Sale of Land Under Execution Act*⁷⁰ -

⁶⁴ See Appendix B, s.165(3).

⁶⁵ Nova Scotia *Civil Procedure Rules*, s.79.08(5).

⁶⁶ See Appendix B, at ss. 132-137.

⁶⁷ *Supra*, note 27.

⁶⁸ See Appendix B, at ss. 135(1).

⁶⁹ See Appendix B, at s.134.

⁷⁰ *Supra*, note 27, s.4.

being one year following registration of the judgment - as the minimum period before land may be sold. After a year has passed, only a minimal waiting period should be required following delivery of the notice of intention to sell pursuant to s. 134 of the *Uniform Act* - perhaps as little as thirty days, to accommodate the procedures required by s.135 of the *Uniform Act*.

We invite comment on whether to adopt the *Uniform Act's* procedures for sale of the debtor's land, subject to the one-year waiting period currently in place under the Nova Scotia *Sale of Land Under Execution Act*.

Finally, we are generally skeptical of those provisions of the *Uniform Act* that tend to trench upon the contractual rights of third parties. A number of its sections seek to void contractual provisions that may be a significant component of a freely-entered legal relationship between the judgment debtor and a fellow shareholder, partner, licensor, lessor, etc. By voiding transfer restrictions and termination provisions, the *Uniform Act* would effectively put the judgment creditor in a more favourable contractual position *vis-a-vis* such third parties than the judgment debtor would be, absent a judgment. We appreciate the tension between ensuring adequate recovery and protection of third party rights, and the risk of a debtor making himself judgment-proof through creative use of such devices. But at this point we simply disagree with overriding third party rights in principle, as a matter of balancing judgment creditors' rights against the rights of innocent third parties.

Therefore, for discussion purposes we propose that provisions of the *Uniform Act* which abridge or limit significant rights of innocent third parties ought not to be adopted. These include: s.52(3) (licenses); s.54(2) (co-owned property not in possession of the debtor); s.55(2), (3) and (4) (overriding licensor's refusal to consent to transfer); ss.90, 91, and 92 (overriding provisions in a lease, contract of sale or security agreement); s.125 (transfer restrictions on shares in closely-held companies); and Part 11 (co-owned and partnership property). We propose that the provisions of *Civil Procedure Rule 79* regarding joint accounts (Rule 79.09 and 79.10) and partnership property (Rule 79.11) should be substantially preserved in any new enforcement legislation.

We invite public comment on the proposal that provisions of the *Uniform Act* which seek to abridge or limit significant rights of innocent third parties ought not to be adopted.

BEYOND THE *UNIFORM ACT*

Aside from the provisions discussed above in respect of third party rights, the *Uniform Act* is mainly an administrative statute. For the most part it consolidates, clarifies and streamlines existing processes for enforcing judgments, and for securing assets in advance of judgment where appropriate. Our project, however, is concerned with improving the prospects for successful recovery in general, and is not limited to matters of administration. We are therefore concerned to examine other systems and enforcement actions that may improve the prospects for recovery in Nova Scotia. Here we examine

three separate areas for possible reform: passive enforcement remedies, the importance of education and available information, and the role of the enforcement officer.

Passive Enforcement

There are currently two primary forms of 'passive' enforcement available to judgment creditors in Nova Scotia. First, by recording the judgment in the judgment roll for a particular district under the *Land Registration Act*, the judgment creditor effects a charge on any real property interest of the judgment debtor in that registration district. The charge is on a par with a mortgage.⁷¹ In effect, the judgment encumbers the land, so that the debtor is prevented from selling or mortgaging it, or receiving advances on a prior mortgage, after the date when the judgment is registered. The judgment creditor need not locate any given parcel of land within the district. The remedy is passive, in the sense that the judgment creditor need not take further action for the charge to have its intended effect.

A similar form of charge is created over all non-exempt personal property of the debtor, by the registration of a notice of judgment in the personal property security registry.⁷²

We were urged to consider other forms of passive enforcement, and in particular suspension of drivers licenses, as well as hunting and fishing licenses. These remedies are currently available for the enforcement of family maintenance orders in Nova Scotia and elsewhere.⁷³ That regime also includes an automatic mechanism to withhold and garnish Atlantic Lottery Corporation prize moneys for persons in default of maintenance obligations.⁷⁴ As well, through an agreement with the federal government, the Director of Maintenance Enforcement can make a request for suspension of a defaulting payor's passport.

We are aware of the effectiveness of these remedies in drawing out assets and income that would otherwise remain hidden or unavailable to judgment creditors. Particularly in light of the fact that as a matter of policy the Sheriff's office no longer investigates and proactively locates and seizes assets, and that modern property, trust and corporate law provide judgment debtors with many means of removing assets from creditors' reach, these passive remedies are likely to be highly effective, as they have been with regard to family maintenance.

⁷¹ *LRA*, *supra* note 24, s. 66(1).

⁷² *Creditors' Relief Act*, *supra* note 11, s.2B.

⁷³ *Maintenance Enforcement Act*, *supra* note 15, s. 30 (suspension of driving privileges); s. 60B (denial or cancellation of *Wildlife Act* licenses).

⁷⁴ *Ibid.*, s. 60C.

Nevertheless, at this point we do not propose that such remedies be implemented in the civil money judgment enforcement system.⁷⁵ There is a highly punitive aspect to these remedies that, while appropriate in the area of family maintenance enforcement, is less so in the context of judgment recovery. Philosophically, non-payment of debt is not considered a matter for punishment; rather, the law makes every provision within reason to permit seizure and liquidation of the debtor's assets and income.

Moreover, family maintenance orders, by design, are tailored to the financial situation of the payor. There is no such necessary connection between a civil money judgment and the debtor's circumstances. Indeed, the debtor's default and the resulting judgment will in many cases be the result of a change in finances. A court motion to vary or stay the execution order in cases of hardship will be beyond the means of many such debtors.

We are also concerned about the moral hazards of making license suspension available, where the prospect of suspension could be used by unscrupulous creditors to threaten relatively vulnerable debtors. In turn, those debtors might feel obliged to liquidate or surrender assets or income that are subject to statutory exemptions. Or, they may be compelled to declare bankruptcy in order to shed the debt(s), which is not a concern with regard to maintenance orders.

Finally, we are mindful that many money judgments arise from the debtor's default on loans and credit. The decisions of lenders ought to reflect a careful examination of the debtor's exigible assets and income. We are concerned that with the threat of license suspension available to them, the balance that ought to govern lenders' credit assessments may be skewed.

We do, on the other hand, favour a system which would permit automatic seizure of non-exempt income payable from lottery prize moneys.

We invite public comment on whether there ought to be a regime for license suspension under provincial statutes, seizure of lottery prize moneys, and other forms of 'passive' or automatic remedy, in order to facilitate civil money judgment enforcement.

What other forms of passive or automatic enforcement, if any, ought to be available?

Information & Education

We have heard that much of the dissatisfaction with the present system arises from the successful plaintiff's realization, following a favourable judgment, that there remains much to do, and additional costs, in order to actually recover funds from the debtor. The

⁷⁵ We are grateful to Professor Tamara Buckwold, of the University of Alberta Faculty of Law, for assisting us in assessing the principal arguments for and against passive remedies in the context of civil money judgment enforcement.

further realization that the debtor's assets are insufficient to satisfy the judgment is of course a source of additional frustration. Judgment creditors often have no way of knowing whether the debtor has sufficient assets or seizable income in advance of an action; discovery in aid of execution is not available prior to judgment.

Some of this is a problem of managing expectations. We favour a program of educational materials, written in plain language and intended primarily for self-represented litigants. The Small Claims Court maintains a good example, titled *Enforcing a Small Claims Court Judgment: A Guide for Creditors*.⁷⁶ But at the initial stage of assessing whether to commence a law suit in the first place, when the litigant's eyes ought to be wide open, there is a much less detailed brochure that only hints at the steps and costs which may be necessary in some cases to enforce a judgment.⁷⁷ And there appears to be no similar document available for self-represented litigants in the Supreme Court.

We propose that more of the detailed information in the *Guide for Creditors* should be integrated into the Small Claims Court information brochure. In particular, the brochure should convey to prospective litigants the potentially difficult and costly road that may lie before them in terms of collecting on a judgment. A similar document should be available with regard to commencing an action in the Nova Scotia Supreme Court. These would be generally available on line and in print through the courts, and required to be distributed at the point of filing an action. These introductory materials would indicate to potential litigants the general nature of Nova Scotia's judgment enforcement system, including the role and responsibilities of the sheriff, the additional steps and costs that are involved in collection, and the fact that recovery is limited to the non-exempt assets and income of the debtor. The passage of a new *Enforcement of Money Judgment Act* in this province would provide an ideal opportunity for the development and roll-out of such materials.

We invite public comment on our proposal that the Province should develop educational materials on the Nova Scotia enforcement system, which would be distributed to potential litigants, and in particularly self-represented parties, at some point prior to any hearing in the matter.

What should such materials explain?

When, where and how should such materials be made available?

We also propose that more detailed materials be developed to assist Supreme Court judgment creditors in locating assets and taking advantage of enforcement processes.

⁷⁶ Small Claims Court of Nova Scotia, *Enforcing a Small Claims Court Order: A Guide for Creditors*, online: <www.courts.ns.ca/self_rep/small_claims_guide_for_creditors_10.pdf>.

⁷⁷ Department of Justice Court Services Division, *Small Claims Court*, online: <www.courts.ns.ca/self_rep/small_claims_info_brochure_10.pdf>.

While the Land Registry and personal property registry are available to members of the public on a subscription basis, they are cumbersome, particularly for the layperson, and self-represented judgment creditors may not know how to use them to best effect. For Supreme Court litigants, educational materials similar to the Small Claims Court *Guide for Creditors* document should be available on all of the enforcement processes available, explaining in plain language what types of assets and income may be subject to seizure, how to identify and locate them, and how to give instructions to the Sheriff on seizing them. These materials should include instructions for use of provincial registries and other services to locate assets. These too should accompany the roll-out of a new enforcement statute. If necessary, direct in-person support should be available for the use of the on-line registries and explanation of available enforcement processes. It may also be worthwhile to expand the availability of access to and in-person support for such registries to Access Nova Scotia locations, public libraries, and beyond.

We invite public comment on the proposal for the development of detailed materials, written in plain language, explaining available enforcement processes and information sources, and how to use them to best effect.

What should such materials cover?

When, where and how should such materials be made available?

What other sources of information (e.g., motor vehicle registry) ought to be available to judgment creditors, independent of the judgment debtor's disclosure, in order to assist creditors in locating and realizing upon the debtor's assets?

What can be done to improve the accessibility of provincial registries that may be of assistance in locating judgment debtors' assets?

Finally, we are mindful of the problem that without some mandatory mechanism, a judgment debtor may simply delay payment of the judgment, with little penalty save interest, until the creditor is forced to take some action at his or her initial expense. It seems to us that there ought to be some form of 'wake-up call', at little to no expense for the creditor, to trigger payment on the debtor's part. We propose that upon issuance of notice of judgment, the debtor ought to be issued a form questionnaire (disclosure of assets) under s.45(1)(a) of the *Uniform Act*, with a mandatory return date ten (10) days following delivery of the questionnaire. Failing to meet the deadline would trigger at minimum a visit from the enforcement officer, with appropriate enforcement action to follow, at the creditor's instruction.

We invite public comment on the proposal that as a matter of course, a judgment debtor should receive a form questionnaire on disclosure of assets under the Act, with a mandatory return date ten (10) days following delivery of the questionnaire.

The Role of the Enforcement Officer

As revealed by the Small Claims Court survey project,⁷⁸ the frustrations of judgment creditors - and particularly those who are self-represented - are many. But in many respects they necessarily arise from a system that relies on creditor initiative. That is, Nova Scotia civil judgment enforcement system relies on the creditor to locate and identify assets and income of the debtor, to give instructions to the Sheriff on seizure and garnishment, and in many cases to pay for the Sheriff's enforcement actions undertaken on the creditor's behalf. Notwithstanding that the Nova Scotia Execution Order directs and requires the Sheriff to seize the debtor's property for purposes of satisfying the judgment debt, in practice the Sheriff simply does not do so absent information about the debtor's assets, and some form of recompense, from the judgment creditor.

We do not propose a substantial shift in the concept of creditor initiative. It has been a policy choice of government for many years to avoid having the Sheriff take a more proactive role in locating and seizing assets. While the former system - in which some Sheriffs functioned practically as private investigators - was almost certainly more effective in realizing better results for judgment creditors, a return to that situation would require substantial investment of public funds.

In this regard we are drawn to the example of Alberta, which since 1996 has delegated the role and responsibilities of judgment enforcement officers (other than garnishment of income) to private civil enforcement companies. This is possible because there is in Alberta a cadre of agents with the capacity for managing property seizure, sale and distribution of proceeds under the Alberta *Personal Property Security Act*.⁷⁹ In effect, the income earned by the private agencies which enforce the personal property security regime in Alberta enables the private infrastructure to support the actions of the same agents acting pursuant to an enforcement order.⁸⁰ Pursuant to provisions in the Alberta *Civil Enforcement Act*,⁸¹ the Sheriff's office licenses and trains these private agencies, and investigates complaints of misconduct. Fees are regulated, to ensure that large purchasers of enforcement services are not given undue access or advantage over smaller creditors.⁸²

For its part, Saskatchewan chose not to implement such a privatized system, because there was not the same pool of qualified private creditor agencies.⁸³ Similarly, Nova Scotia has a

⁷⁸ *Supra*, note 20.

⁷⁹ R.S.A. 2000, c. P-7. See discussion in Buckwold & Cuming, *supra* note 10 at 6-7.

⁸⁰ Buckwold & Cuming, *supra* note 10, at 7.

⁸¹ *Supra*, note 7, Part 2.

⁸² Tamara Buckwold, "From Sherwood Forest to Saskatchewan: The Role of the Sheriff in a Redesigned Judgment Enforcement System," (2003) 66 *Sask. L. Rev.* 219 at 249.

⁸³ Buckwold & Cuming, *supra* note 10, at 7; Buckwold, *supra* note 82 at 250-251.

number of agencies offering bailiff services with regard to security under the *Personal Property Security Act*, but they do not currently perform the range of functions that would necessarily be entrusted to them as full-fledged civil judgment enforcement agencies. As Buckwold observes:

... [T]he Alberta civil enforcement agencies provide a service very different from that provided by private bailiffs, whose business is fundamentally the routine service of process and seizure of physical assets. Significant expertise is required in the operation of a civil enforcement agency, given that it involves the administration of two relatively complex statutory schemes, including the determination of such difficult legal questions as the applicability of exemptions law, priority in the distribution of proceeds, and the technicalities of seizure and disposition of complex assets (e.g. corporate shares). Moreover, these agencies do much more than follow the direction of their clients. They are called upon to provide advice regarding the legalities and practicalities of enforcement activity, with the support of retained legal counsel as required.⁸⁴

While potential savings for judgment creditors might arise from such privatization in Nova Scotia, we are mindful that the most immediate impact would be to reduce the province's cost burden. But we have no evidence to indicate that privatized enforcement would be less costly, or more effective, for the judgment creditor. We are also concerned that private enforcement agents are not, and are not seen to be, officers of the court, with all the stature and solemn responsibility that role requires.⁸⁵ As well, there is the matter of ensuring sufficient expertise and capacity. It may be that partial delegation of the Sheriff's role - such as delivery of notices or physical seizure of assets⁸⁶ - is preferable, if there is a convincing case for privatization as a means to improve the integrity and accessibility of the civil judgment enforcement system.

For purposes of this Discussion Paper we take no position on the privatization of the Sheriff's judgment enforcement responsibilities. We invite comment on the question.

We invite comment on whether the role of the Sheriff in enforcing civil money judgments ought to be delegated, in whole or in part, to private agents.

If the Sheriff's role is to be wholly or partly privatized, what protective measures should be adopted through the licensing legislation?

⁸⁴ Buckwold, *supra* note 82, at 251.

⁸⁵ Buckwold notes, on the other hand, that in Alberta there is general satisfaction with the conduct of civil enforcement agencies, and that complaints of misconduct requiring investigation by the Sheriff are rare; see *ibid.*, at 250.

⁸⁶ *Ibid.*, at 253.

We close with a related observation. The *Uniform Act* and the other proposals we have suggested here will generate concrete improvements in the judgment enforcement system. By way of streamlining administrative processes and through its substantive provisions, a new judgment enforcement statute for Nova Scotia will be a worthwhile and useful legislative initiative. But the prospects for significant improvement of civil judgment recovery also depend on public investment, and corresponding commitment to upholding court judgments through positive state action. Many of the primary concerns among self-represented judgment creditors have to do with the need for additional positive action from the state, and in particular the enforcement officer, in effectively using the enforcement tools available. On this, legislative reform, absent increased investment in enforcement processes, can only do so much.

APPENDIX A - MEMBERS OF THE ADVISORY GROUP

| | |
|---------------------------|---|
| Annette Boucher Q.C. | Registrar of the Nova Scotia Court of Appeal and Prothonotary of the Supreme Court of Nova Scotia |
| Donn Fraser | MacIntosh, MacDonnell & MacDonald |
| Christopher Madill | Stewart McKelvey |
| Justice John Murphy | Supreme Court of Nova Scotia |
| Laurel Purcell | Sheriff for the County of Halifax |
| Gus Richardson Q.C. | AD+REM Alternative Dispute Resolution Services Inc. |
| D.A. Rollie Thompson Q.C. | Professor, Schulich School of Law at Dalhousie University |

**APPENDIX B - *UNIFORM CIVIL ENFORCEMENT OF MONEY
JUDGMENTS ACT* (ANNOTATED)**

UNIFORM LAW CONFERENCE OF CANADA

UNIFORM CIVIL ENFORCEMENT OF MONEY JUDGMENTS ACT

Short Title

This Act may be cited as the Uniform Civil Enforcement of Money Judgments Act.

PART 1: INTERPRETATION

Definitions

1 (1) In this Act:

“account” means a monetary obligation, however created, other than an obligation evidenced by a negotiable instrument or security,

- (a) owing by a person to a judgment debtor,**
- (b) whether or not payable, and**
- (c) whether or not specific as to amount,**

and includes an obligation under a term deposit contract, an insurance contract, a letter of credit, a guarantee agreement or an indemnity agreement to make payment to the judgment debtor in discharge of any liability of the insurer, issuer, guarantor or indemnitor to the judgment debtor;

Comment: Section 1(2) of this Act incorporates the *Personal Property Security Act* definition of the term “security”.

“account debtor” means a person

- (a) who is obligated to a judgment debtor under an account, an intangible or chattel paper, or**
- (b) who will become so obligated under a future account,**

and, where the context permits, includes an insurer, issuer, guarantor or indemnitor who is obligated to make a payment to the judgment debtor;

Comment: The term “future account” is defined later in this section. The inclusion of an insurer within the meaning of an account debtor does not affect exemptions from seizure or attachment contained in the *Insurance Act* of a province/territory that are applicable to specified life insurance policies or proceeds of specified life insurance policies. Section 1(2) of this Act incorporates the *Personal Property Security Act* definition of the term “intangible”.

“amount recoverable” means, in relation to a judgment being enforced, the total of:

- (a) the unsatisfied amount of the judgment,**
- (b) any costs that the judgment creditor is entitled to recover,**
- (c) any unpaid interest on the judgment referred to in paragraph (a) or the costs referred to in paragraph (b),**

Appendix B - Uniform Civil Enforcement Of Money Judgments Act (annotated)

- (d) **any fees, taxable court costs and expenses paid or payable in respect of an enforcement officer's services in relation to the judgment,**
- (e) **any other amounts that are prescribed or that may be ordered by the court;**

“co-owned property” means property that a judgment debtor owns with one or more persons as a joint tenant or tenant in common;

“co-owner” means a person who owns co-owned property with a judgment debtor;

“court” means the [insert the name of superior court of the enacting province/territory] unless the context otherwise provides;

“dispose” means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things;

“distributable fund” means a fund described in section 180;

“enforcement charge” means a charge on property of a judgment debtor created by the registration of a notice of judgment;

“enforcement instruction” means written instructions delivered by a judgment creditor to an enforcement officer under Part 7;

“enforcement officer” means a person appointed under [insert the name of the provincial/territorial enactment under which a person or a private civil enforcement agency is appointed or authorized to carry out enforcement proceedings] and includes [insert the appropriate titles such as “deputy sheriff,” “bailiff,” “court bailiff” etc.] who are authorized under the laws of the province to carry out the functions and duties of an enforcement officer under this Act;

Comment: In most provinces/territories, the functions of an enforcement officer will be carried out by deputy sheriffs under the supervision of the Sheriff or, in the case of Newfoundland and Labrador, the High Sheriff, who is appointed under the *Sheriffs Act* or *Court Officials Act*. In some provinces, such as Alberta and British Columbia, functions related to the enforcement of civil judgments, which were traditionally carried out by a sheriff, have been privatized and these functions are performed by private agencies operating under a contract with the government. This definition permits each province/territory to adopt the organizational and administrative structures that are appropriate for the province/territory.

“enforcement proceeding” means any action, step or measure authorized by this Act to be taken for the purpose of enforcing a judgment but does not include the registration of a notice of

judgment under Part 5 or Part 10;

“exempt income” means that portion of a judgment debtor’s income that is not subject to an enforcement proceeding as provided by Part 12 of this Act;

“exempt property” means property of a judgment debtor that is not subject to an enforcement proceeding as provided by Part 12 of this Act;

“exemption” means an entitlement of a judgment debtor to claim property of a judgment debtor as exempt property and income of a judgment debtor as exempt income;

“exigible property”, except as otherwise provided in this Act, means real and personal property of the judgment debtor that is subject to an enforcement charge including property held in joint tenancy whether or not the property is in the possession of the judgment debtor;

“future account” means an account that becomes due and payable at any time after seizure of the account by an enforcement officer under Part 9, Division 4 or after a demand for payment by a receiver if a legal a relationship exists between the account debtor and the judgment debtor at the time an account debtor receives a notice of seizure or a demand for payment, as the case may be;

“instructing judgment creditor” means a judgment creditor who has delivered a subsisting enforcement instruction to an enforcement officer;

“judgment” means any judgment, order or decree of a court that requires the payment of money and includes

- (a) a judgment of [insert name of the superior court of the enacting province/territory], the Court of Appeal of [insert name of the enacting province/territory], the [insert the name of the small claims court of the enacting province/territory], the Supreme Court of Canada and a judgment issued under the *Federal Courts Act* (Canada),**
- (b) a certificate, duty or right that requires the payment of money and that may be enforced as or in the same manner as a judgment of the court, and**
- (c) a monetary order made under section 725 of the *Criminal Code* (Canada)**

but does not include

- (d) an order for contempt requiring the payment of money, and**
- (e) an order for maintenance or support;**

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Comment: With regard to paragraph (e), each province/territory should decide whether orders for the payment of maintenance and support should be included within the definition of “judgment” for the purposes of this Act.

“judgment creditor” means a person in whose favour a judgment has been granted and, when used in relation to a notice of judgment, means the person who is shown as the judgment creditor in the registration of the notice of judgment;

“judgment debtor” means a person against whom a judgment has been granted and, when used in relation to a notice of judgment, means the person who is shown as the judgment debtor in the registration of the notice of judgment;

Comment: Section 9 provides that this Act binds the Crown in exercising any rights or remedies as a creditor in enforcement proceedings; however, this Act does not apply to the Crown when a judgment orders the payment of money by the Crown.

“land” includes an interest in land, including any right, title or estate in it of any tenure, with all buildings and houses, unless there are words to exclude buildings and houses, or to restrict the meaning;

Comment: If the *Interpretation Act* of an enacting province/territory contains a definition of “land” that is as broad as this definition, it may not be necessary to include a definition of “land” in this Act. This definition of land is taken from the British Columbia *Interpretation Act*.

“notice of judgment” means a notice of judgment registered under Part 5 or Part 10 and includes an amendment of a notice of judgment;

“person” includes an individual, sole proprietorship, corporation, partnership, unincorporated association, unincorporated syndicate, unincorporated organization, trust, business trust, party, government or agent of a government, and the personal or other legal representatives of a person to whom the context can apply according to law;

Comment: If the *Interpretation Act* of an enacting province/territory contains a definition of “person” that is as broad as this definition, it may not be necessary to include a definition of “person” in this Act. In most provinces/territories, the term “corporation” is defined as including a society incorporated under the *Society Act* of the province/territory. If this is not the case, the definition of “person” should be modified to include a society incorporated under the legislation of the province/territory. This definition includes "government or agent of a government" to make it clear that whenever this Act refers to a "person", a government or an agent of government is entitled to take whatever action that a person could take.

“personal property” means property other than land and includes and interest in personal property;

Appendix B - Uniform Civil Enforcement Of Money Judgments Act (annotated)

Comment: The purpose of this definition is to bring within the definition of “personal property” all kinds of property that are described in the definition of “property” except land.

“property” includes

- (a) things, as well as rights or interests in things,**
- (b) a thing regarded in law or equity as property, or as an interest in property,**
- (c) a right or interest that can be transferred for value from one person to another,**
- (d) a right, including a contingent or future right, to be paid money or receive another kind of property,**
- (e) a chose in action, and**
- (e) a cause of action;**

Comment: This definition of “property” expands the common law definition of property to include valuable rights such as licenses that are transferable.

“receiver” means a receiver appointed under Part 13;

"record" means any book, document, notice, map, drawing, photograph, letter, voucher, paper and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise;

“registrar” means the registrar of the registry or other person who has the responsibility for administering the registry;

“registry” means the registry referred to in Part 5 that is prescribed by regulation;

“subsisting enforcement instruction” means an enforcement instruction, delivered by an instructing judgment creditor to an enforcement officer under Part 7 that remains in effect in accordance with Part 7.

(2) The following terms have the meanings given to them in the [insert the name of the *Personal Property Security Act* of the enacting province/territory or the Regulations made under that Act]:

- (a) accessions;**
- (b) building;**
- (c) building materials;**
- (d) chattel paper;**
- (e) crops;**
- (f) fixture;**
- (g) goods;**
- (h) instrument;**
- (i) intangible;**

- (j) money;**
- (k) new value;**
- (l) purchase;**
- (m) purchase-money security interest;**
- (n) secured party;**
- (o) security;**
- (p) security interest;**
- (q) serial numbered goods;**
- (r) value.**

- (3) A reference in this Act to “this Act” or “this enactment” includes a reference to the regulations made under this Act.**

PART 2: GENERAL

Introductory Comment: This Part contains general provisions that apply to the whole Act.

General

- 2 (1) Except as otherwise provided by any other enactment, a person wishing to enforce a judgment must do so in accordance with this Act.**
- (2) A notice of seizure must be in the prescribed form.**
- (3) Nothing in this Act authorizes the arrest or imprisonment of a person for default in payment of a judgment.**
- (4) Subject to this Act, anything done by an enforcement officer with the written consent of all interested persons, including a judgment debtor whose rights may be affected, is deemed to have been done in accordance with this Act.**
- (5) The waiver by a judgment debtor of any right or duty under this Act whether contained in a contract or otherwise is void if given before a dispute arises between the judgment debtor and the judgment creditor.**

Comment: The term “judgment” is defined in section 1 and is limited to a judgment, order, decree or certificate that requires the payment of money.

Under subsection (2), different forms of a notice of seizure may be prescribed for seizing different types of personal property.

Under subsection (5), the point in time where there is a dispute between a judgment debtor and a judgment creditor is a question of fact in each case. The existence of a dispute will usually precede the initiation of litigation. A person who is seeking the loan or credit may be persuaded to waive an entitlement to claim property as exempt from seizure if there is a default in repayment. In these circumstances, the waiver is given prior to any dispute arising between the parties and waiver is void.

Judgments of the Federal Court of Canada

- 3 (1) A notice of judgment may be registered under Part 5 of this Act with regard to a judgment issued by the Federal Court of Canada under the *Federal Courts Act* (Canada).**
- (2) If a notice of judgment is registered under Part 5 of this Act with regard to a judgment referred to in subsection (1), enforcement proceedings may be taken under this Act with regard to the judgment.**
- (3) This section does not apply to a judgment issued by the Federal Court of Canada under the *Federal Courts Act* (Canada) against the Crown in the Right of Canada as a judgment debtor.**

Comment: Section 56(3) of the *Federal Courts Act* (Canada) provides:

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

Section 56(3) of the *Federal Courts Act* does not accurately describe the process for enforcing judgments under the Uniform Act. Under the Uniform Act, writs of execution are no longer used. The process for enforcing a judgment is to register a notice of judgment in the prescribed registry in accordance with Part 5 of this Act. After registration, a judgment creditor is entitled to issue enforcement instructions to an enforcement officer who is thereby authorized to take enforcement proceedings. The registration of a notice of judgment creates an enforcement charge against property of a judgment debtor. Seizure of property under a writ of execution is no longer a prerequisite to property being charged or bound. The effect of section 3 of this Act is to expressly provide that a judgment of the Federal Court may be registered under this Act. Section 3 does not require that a judgment of the Federal Court be registered under this Act. The judgment creditor may choose to rely on the processes of execution found in the Federal Court Act and the Federal Court Rules. A judgment creditor may find that there are several advantages to registering a Federal Court judgment under this Act. First, upon registration of a notice of judgment in the prescribed registry under Part 5 of this Act, an enforcement charge is created that charges the judgment debtor's personal property described in the notice of judgment. Second, the judgment creditor may instruct an enforcement officer to use any of the enforcement proceedings under this Act. Third, if the judgment creditor gives an enforcement instruction to an enforcement officer, the judgment creditor will be entitled to share in the distribution of proceeds of enforcement proceedings taken by other judgment creditors of the same judgment debtor.

Appendix B - Uniform Civil Enforcement Of Money Judgments Act (annotated)

Ideally, the Parliament of Canada will amend section 56 of the *Federal Courts Act* and make judgments of the Federal Court enforceable in a province/territory where property is situated in the same manner as a judgment of the superior court of the province/territory.

References in other enactments to enforcement proceedings

- 4 (1) **A reference in any other enactment to an enforcement proceeding with regard to a judgment that is enforceable under this Act is deemed to be a reference to an enforcement proceeding under this Act.**
- (2) **A reference in any other enactment to** [insert names of statutes in the enacting province/territory such as *Attachment of Debts Act*, *Absconding Debtors Act*, *Creditors' Relief Act*, *Executions Act* or *Exemptions Act* that are repealed upon this Act coming into force] **is deemed to be a reference to this Act.**
- (3) **Nothing in this Act affects** [insert the name of statutes in the enacting province or territory related to family support such as *Maintenance Orders Enforcement Act* and the *Reciprocal Enforcement of Maintenance Orders Act*].

Comment: Each province/territory is expected to review its legislation and make various consequential amendments. It will be necessary to substitute the name of this Act in place of the name of enactments that will be repealed when this Act comes into force. All provincial / territorial enactments should be reviewed for references to various types enforcement proceedings that will no longer be used after this Act comes into force. Such references should be replaced with a reference to an enforcement proceedings under this Act. Terms that will need to be replaced include:

- 1 writ of *fiery facias*,
- 2 writ of seizure and sale,
- 3 writ of execution,
- 4 warrant of execution,
- 5 garnishment of a debt,
- 6 attachment of a debt, and
- 7 equitable execution.

Subsections (1) and (2) are default provisions that will apply if consequential amendments miss a reference to an Act that is repealed or an enforcement proceeding that will no longer be used after this Act comes into force.

This Act assumes that enforcement proceedings with regard to the enforcement of family maintenance and support orders will remain under another enactment that is specifically designed for that purpose. Nevertheless, each province/territory should review its family maintenance enforcement legislation and its relationship to this Act.

Delivery of notices, demands and documents

- 5 (1) **Unless otherwise provided in this Act, giving a notice or demand, or delivering a document or record by any of the following manners satisfies a requirement in this Act:**
- (a) **to an individual,**

Appendix B - Uniform Civil Enforcement Of Money Judgments Act (annotated)

- (i) **by leaving a copy**
 - (A) **with the individual,**
 - (B) **with the individual's agent,**
 - (C) **at the individual's residence,**
 - (D) **if the individual is the sole proprietor of a business and the matter to which the notice, demand, document or record refers relates to the business, at the address of the business, or**
 - (E) **in the manner prescribed by the regulations, or**
 - (ii) **by ordinary mail addressed to the individual at the address of the individual;**

- (b) **to a partnership,**
 - (i) **by leaving a copy**
 - (A) **with one or more of the partners who is not a limited partner,**
 - (B) **with a person who, at the time the notice or demand is given, or the document or record is delivered, has control or management of the partnership business,**
 - (C) **at the partnership's office during hours when it is open to the public, or**
 - (D) **in the manner prescribed by the regulations, or**
 - (ii) **by ordinary mail addressed to**
 - (A) **the partnership,**
 - (B) **any one or more of the partners who is not a limited partner, or**
 - (C) **any person who, at the time the notice or demand is given, or the document or record is delivered, has control or management of the partnership business, at the address of the partnership business;**

- (c) **to a corporation,**
 - (i) **by leaving a copy**
 - (A) **with an officer or director of the corporation or a person in charge of any office or place of business of the corporation,**
 - (B) **at the registered or head office of the corporation during hours when it is open to the public,**
 - (C) **if the corporation has its registered or head office outside [insert name of enacting province/territory], with the attorney for service for the corporation in [insert name of enacting province/territory], or**
 - (D) **in the manner prescribed by the regulations, or**
 - (ii) **by ordinary mail addressed to the corporation at the registered or head office of the corporation;**

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- (d) to a local government,**
 - (i) by leaving a copy**
 - (A) with the mayor or chief administrative officer of the local government,**
 - (B) at the local government's principal office during hours when it is open to the public, or**
 - (C) in the manner prescribed by the regulations, or**
 - (ii) by ordinary mail addressed to the local government at its the principal address;**

- (e) to the government,**
 - (i) by leaving a copy**
 - (A) at the office of the deputy minister of a government ministry or to the head office of a government agency,**
 - (B) with a lawyer on the staff of the [Attorney General] at [the seat of government of the enacting province/territory], or**
 - (C) in the manner prescribed by the regulations, or**
 - (ii) by ordinary mail addressed to the [Deputy Attorney General] at [the seat of government of the enacting province/territory]; or**

- (f) to an enforcement officer,**
 - (i) by leaving a copy**
 - (A) with the enforcement officer,**
 - (B) with the enforcement officer's agent,**
 - (C) at the enforcement officer's office during hours when it is open to the public, or**
 - (D) in the manner prescribed by the regulations, or**
 - (ii) by ordinary mail addressed to the enforcement officer at the address of the enforcement officer.**

- (2) A notice, demand or record or document delivered by mail is deemed, in the absence of evidence to the contrary, to be received on the earlier of**
 - (a) the date the addressee actually receives the notice; and**
 - (b) the expiry of 10 days after the date of mailing.**

Comment: The objective of subsection (1) is to provide a comprehensive description of the means by which notices and demands may be given, or documents and records may be delivered to various types of legal entities. To the extent that a province/territory already has comprehensive rules with regard to such matters, this section may incorporate those rules by reference. Provinces/territories that have enacted electronic commerce legislation should consider whether they wish to make such legislation applicable to this section.

In subsection (1)(d), a local government entity includes a municipality, township, county, regional district, and a school board. Each enacting province/territory may choose the term or terms that are appropriate for the province/territory. With regard to clause (e), a province/territory may choose to enact or incorporate an existing provision in another enactment

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that deals with service of notice to the government. If an enactment repealed by this Act, which related to garnishment of employment remuneration of civil servants provided for service on garnishing orders on the government by service on the Deputy Minister of Finance or similar official in the Ministry of Finance or similar ministry, a province/territory may wish to consider including a provision in Part 9, Division 4 that continues this practice despite the general rule found in clause (e). With regard to clause (f), administrative arrangements with regard to enforcement officers may vary widely among the provinces and territories, particularly if enforcement is through a system of private bailiffs. Each province/territory should review the means by which notices and demands may be given, or documents and records may be delivered to an enforcement officer.

Under subsection (2), if a person disputes that he or she received a notice, demand, document or record, the person may apply to the court under section 7 for an order extending the time for doing an act or other appropriate order. On such an application, the court may consider evidence with regard to the mailing of the notice, demand, document or record and evidence with regard to whether or not there was any confirmation of delivery by Canada Post. After taking into account any rights that have accrued prior to the making of the application and any prejudice that may be caused to innocent third parties by making the order requested by the applicant, the court may make whatever order is appropriate in the circumstances.

Knowledge

6 For the purposes of this Act:

- (a) an individual knows or has knowledge of information when the information is acquired by the individual under circumstances in which a reasonable person would take cognizance of it;**
- (b) a partnership knows or has knowledge of information when the information has come to the attention of one of the general partners or a person having control or management of the partnership business under circumstances in which a reasonable person would take cognizance of it;**
- (c) a corporation knows or has knowledge of information when the information:**
 - (i) comes to the attention of a managing director or officer of the corporation, or**
 - (ii) comes to the attention of a senior employee of the corporation with responsibility for matters to which the information relates, under circumstances in which a reasonable person would take cognizance of it, or**
 - (iii) is given or delivered in writing to the corporation's registered office or attorney for service;**
- (d) a local government entity knows or has knowledge of information when information has come to the attention of:**
 - (i) the mayor or chief administrative officer of the local government entity, or**
 - (ii) a senior employee of the local government entity with responsibility for matters to which the information relates under circumstances in which a reasonable person would take cognizance of it; and**

- (e) a government knows or has knowledge of information when information has come to the attention of a senior employee of the government with responsibility for matters to which the information relates under circumstances in which a reasonable person would take cognizance of it.**

Comment: The term “know” or “knowledge” is used in numerous sections in the Act. Each province/territory should make this section conform to the comparable section of its *Personal Property Security Act*. This section has been adapted from the section 1(2) of the British Columbia *Personal Property Security Act*.

Applications to court

- 7 (1) On application, the court may give directions in respect of, determine any matter or issue that arises out of, and make any order that it considers appropriate in respect of, enforcement proceedings under this Act.**
- (2) On an application under this section or another section of this Act, the court may, without limitation, make one or more of the following orders:**
- (a) a declaration of a right or injunctive relief, that is necessary to ensure compliance with this Act or to ensure the protection of the interests of any person in property that is subject to enforcement proceedings;**
 - (b) giving directions to any person regarding the exercise of that person’s rights or performance of that person’s functions or duties under this Act;**
 - (c) ordering a judgment debtor or any person in possession or control of property of the judgment debtor to deliver up the property to an enforcement officer or to another person named in the order;**
 - (d) enjoining a judgment debtor or any other person from disposing of or otherwise dealing with property of a judgment debtor;**
 - (e) giving directions respecting the carrying out of enforcement proceedings including without limitation, the method and terms of sale or disposition of property of a judgment debtor;**
 - (f) staying an enforcement proceeding with respect to all or any portion of a judgment debtor’s property on any terms and conditions that the court considers appropriate, if the court considers that it would be just and equitable to do so;**
 - (g) ordering a judgment debtor or other person to execute an assignment, transfer, document or record that is required to complete the sale or disposition of property by an enforcement officer or a receiver;**
 - (h) extending or abridging any period of time provided for under this Act;**
 - (i) enjoining any person from interfering with an enforcement officer while the enforcement officer is carrying out an**

- enforcement proceeding or otherwise taking measures to enforce a judgment under this Act;
- (j) directing a police authority with authority or responsibility for public safety in the locality where an enforcement proceeding will be carried out, including without limitation, a peace officer as defined in the *Criminal Code* (Canada), to prevent a breach of the peace and provide protection to an enforcement officer while an enforcement officer is carrying out a seizure of property or otherwise taking enforcement proceedings;
 - (k) providing for giving of a notice or demand, or delivery of a document or record by another method in substitution for the method provided by this Act;
 - (l) ordering that the registration of a notice of judgment in the registry be discharged;
 - (m) awarding costs in connection with an application to court made under this Act;
- (3) On application, the court may rescind or vary an order staying an enforcement proceeding if the application is based on new information or a change in circumstances.

Comment: This Act cannot anticipate every issue that may arise in relation to the enforcement of judgments. Therefore, it is desirable to provide a broad power to make an application to the court for an order that will deal with questions that may arise under the Act. “Court” is defined in section 1 as meaning the superior court of the province/territory. This section describes some of the circumstances when an application may be made to the court and the types of orders that a court may make. Subsection (2) is not an exhaustive list of orders that a court may make under this section.

If provision is made elsewhere in this Act for an application to court, sections 7 and 8 apply to such an application.

Appeal from an order of the court

- 8** (1) An appeal lies to the Court of Appeal from an order of the court made under this Act.
- (2) An appeal under subsection (1) from an order of the court must not be brought more than 30 days after the date of the order.
 - (3) An order under appeal remains in force pending the determination of the appeal, unless otherwise ordered by the court that made the order under appeal.

Comment: A province/territory may wish to rely on the ordinary rules that govern appeals; however, specification of the specific number of days within which an appeal must be brought may overcome any argument that might otherwise arise in some provinces and territories with regard to the different appeal periods that apply to interlocutory and final orders.

Crown is bound by this Act as a judgment creditor

- 9** This Act binds the Crown in exercising any rights or remedies as a

judgment creditor in enforcement proceedings.

Comment: This section is not required if an enacting provinces/territories already has legislation that provides that an enactment is binding on the Crown unless otherwise specifically provided. If an enacting province/territory does not have such legislation, the purpose of this section is to eliminate special priorities that the Crown, in the right of the province/territory, may have as a judgment creditor when enforcing a judgment under this Act. This section does not affect rights of the Crown under enactments that create a deemed trust or deemed security interest in favour of the Crown in relation to specified forms of property. This Act does not apply to the Crown when a judgment is rendered against the Crown. If a judgment for the payment of money is rendered against the Crown, in the right of the province/territory, it will be necessary to refer to enactments dealing with proceedings against the Crown.

Standard of conduct

- 10 (1) Any person, including a judgment creditor, an enforcement officer and a receiver, who is authorized by this Act to perform a function or duty or exercise a right or power must, in performing that function or duty or in exercising that right or power, do so in good faith and in a commercially reasonable manner.**
- (2) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.**

Comment: The standard of commercial reasonableness is the same standard that applies to the performance of functions and duties and the exercise of rights under *Personal Property Security Act* legislation.

Failure to comply with this Act

- 11 A person who suffers loss or damage as a result of another person's failure, without lawful justification or excuse, to comply with this Act has a cause of action against that other person with respect to that failure, and is entitled to a judgment for:**
- (a) damages in an amount equal to the loss or damage suffered, or \$200 or such other amount as may be specified by regulation, whichever is greater; and**
 - (b) costs of the proceedings under this section.**

Comment: It may be difficult to prove that a failure to comply with this Act was the proximate cause any loss or damage. Therefore, as an alternative, a court may award \$200 or such other sum as may be specified by regulation, without proof of actual loss or damage.

Interference with an enforcement proceeding

- 12 (1) On application by an enforcement officer or an instructing judgment creditor, the court may order that any person who, without lawful justification or excuse, interfered with or delayed the performance of any duty or function by an enforcement officer or a receiver that relates to an**

enforcement proceeding, pay to the enforcement officer an amount not exceeding the total of the following:

- (a) any additional costs incurred by the judgment creditor, the enforcement officer or the receiver as a result of the interference or delay;**
 - (b) the value of exigible property that could have been seized, and sold or otherwise disposed of, if the interference or delay had not occurred and that as a result of the interference or delay is no longer available for seizure and sale or disposition;**
 - (c) the amount by which exigible property has diminished in value as a result of the interference or delay;**
 - (d) costs of the application.**
- (2) Under subsection (1), a person against whom a claim is made has a defence to the claim if he or she establishes that, at the time of the interference, he or she believed on reasonable grounds that he or she had a lawful justification or excuse for his or her action.**

Comment: Any money received by a judgment creditor or an enforcement officer under subsection (1) constitutes a distributable fund under Part 14 of this Act.

PART 3: ENFORCEMENT OFFICERS

Enforcement officer's powers to deal with property

- 13 (1) Subject to complying with the requirements of Parts 9 and 11 with regard to personal property and Parts 10 and 11 with regard to land, an enforcement officer who seizes a judgment debtor's personal property or gives a notice of intention to sell a judgment debtor's land may, during the continuance of the enforcement proceeding, do any act or thing with respect to that property that could have been or may be done by the judgment debtor and may exercise any power or right insofar as it is necessarily incidental to the enforcement proceeding with respect to that property or its disposition that the judgment debtor had at the time of seizure of personal property or the giving of a notice of intention to sell land or that the judgment debtor acquires after that time, including, without limitation, the power to do one or more of the following:**
- (a) sell, dispose or otherwise realize on the value of the property;**
 - (b) execute or endorse any document that could have been or may be executed or endorsed by the judgment debtor;**
 - (c) make an election;**
 - (d) exercise a right as a beneficiary under a trust;**
 - (e) give a release or discharge;**
 - (f) collect an account;**
 - (g) endorse a security;**
 - (h) present an instrument for payment and receive payment;**
 - (i) sue or take any action in the name of the judgment debtor to**

enforce payment of an obligation evidenced by an instrument;
(j) negotiate an instrument or security without recourse.

- (2) **An enforcement officer may use assistance and advice, including the paid assistance and advice of agents, brokers or advisors to carry out the duties and functions of an enforcement officer under this Act.**
- (3) **When an enforcement officer seizes personal property under this Act, the judgment debtor loses all rights and powers to deal with the seized property for the duration of the period that the seizure is effective.**

Comment: Part 9 contains specific requirements that must be followed by an enforcement officer with regard to the seizure and sale of personal property. Part 10 contains specific requirements that must be followed by an enforcement officer with regard to an enforcement proceeding against land. If property is co-owned by a judgment debtor and another person, Part 11 contains specific requirements that must be followed by an enforcement officer.

With regard to subsection (1)(j), an enforcement officer needs the statutory power to negotiate an instrument without recourse otherwise the enforcement officer could become liable on the instrument as an endorser.

Delegation of delivery functions to a judgment creditor

14 (1) An enforcement officer may delegate to a judgment creditor or an agent of the judgment creditor

- (a) **the giving of any notice or demand that the enforcement officer may give under this Act; and**
- (b) **the delivery of any document or record that the enforcement officer may deliver under this Act.**

- (2) **A judgment creditor may decline to accept a delegation referred to in subsection (1).**
- (3) **If a judgment creditor accepts a delegation under this section and gives the notice or demand, or delivers the document or record as required by this Act, the judgment creditor is entitled to recover from the judgment debtor an amount that is equal to the fees and costs that the enforcement officer would have been entitled to receive if the enforcement officer had given the notice or demand, or delivered the document or record.**
- (4) **If an enforcement officer receives a written declaration from the judgment creditor that the judgment creditor has given the notice or demand, or delivered the document or record in accordance with a delegation under subsection (1), and the enforcement officer takes or omits to take any action that the enforcement officer would be entitled to take or omit to take under this Act in reliance on that written declaration, the enforcement officer faces no liability for so acting.**

(5) A person who makes a written declaration referred to in subsection (4) that is false commits an offence.

Comment: To reduce the burden on enforcement officers, an enforcement officer is authorized to delegate these responsibilities to a judgment creditor or an agent of the judgment creditor. An agent of the judgment creditor will normally be either a law firm retained by the judgment creditor or a private bailiff or process server retained by the judgment creditor or the judgment creditor's law firm.

If an enforcement officer makes a delegation under subsection (1), with respect to the giving of a notice or demand, the notice or demand must be prepared by and issued over the name of the enforcement officer.

If a judgment creditor declines to accept a delegation by the enforcement officer, the responsibility of giving the notice or demand remains with the enforcement officer.

The fees, taxable costs and expenses that an enforcement officer is entitled to receive for giving a notice or demand or delivering a document or record are prescribed by regulation under Part 16.

Some provinces and territories have legislation providing that a person, who is not authorized to serve a notice or demand, holds himself or herself out as an enforcement officer or carries out any function of an enforcement officer, commits an offence. This type of provision is not included in this Act. If a province or territory wishes to include all of the statutory authority for the appointment of sheriffs or the authorization of private enforcement agencies in this Act, it may be necessary to include an offence section in this Act.

PART 4: PRESERVATION ORDERS

Introductory Comment: If a plaintiff is concerned that enforcement of a judgment, which may ultimately be rendered against the defendant in a proceeding, will be seriously hindered as a consequence of future dealings with the property of the defendant, the plaintiff may apply to the court for one or more orders described in section 17 that have the effect of "preserving" some or all of the defendant's assets for subsequent enforcement proceedings.

Under this Act, the process of pre-judgment garnishment is no longer be available and is replaced by the opportunity of applying for a preservation order. Pre-judgment garnishment is being replaced for several reasons. The primary weakness of the current pre-judgment garnishing order process is that the order is normally made on an *ex parte* application and there is no effective judicial determination of whether or not the circumstances warrant the use of a pre-judgment preservation measure. Consequently, such proceedings may be used by a plaintiff to gain a tactical advantage over a defendant by depriving the defendant of funds that the defendant may need to support his or her dependents, to operate her or his business or to defend against the plaintiff's claim. From the plaintiff's perspective, pre-judgment garnishment is limited to actions where the plaintiff's claim is for debt or a liquidated sum and the process has become encrusted with many technical requirements that may cause an order to subsequently be set aside.

This Part also seeks to make the law and procedure uniform with regard to injunctions in the nature of a Mareva injunction.

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In order to minimize the use of preservation orders as a tactical strategy to place pressure on a defendant to settle a dubious claim, the plaintiff will normally be required to post security before the preservation order becomes effective. If the plaintiff's action is dismissed or discontinued in the circumstances described in section 22(3), the security posted by the plaintiff will be available to compensate the defendant, or other affected person, who suffers pecuniary loss or damage as a consequence of the preservation order.

Definitions

15 In this Part:

“defendant” means the defendant, respondent or other person opposing a proceeding;

“plaintiff” means a plaintiff in a proceeding, a petitioner or other person asserting a claim for the payment of money, and includes a plaintiff by way of counterclaim;

“preservation order” means an order, made under section 17, to preserve or protect some or all of the property of a defendant;

“proceeding” means

(a) an action, suit, cause, matter, appeal or application which includes a claim for the payment of money; or

(b) a proceeding in another province or territory of Canada regardless of how it is commenced that includes a claim for the payment of money.

Application for preservation order

16 (1) On application by a plaintiff made with or without notice, a court may make a preservation order

(a) in a proceeding commenced in a court in the [province/territory] if a judgment that may be obtained by the plaintiff in the proceeding could be enforced under this Act; or

[(b) with regard to a proceeding commenced in a court in another province or territory of Canada, if:

(i) a judgment obtained by the plaintiff in the proceeding may be enforced in the province/territory under this Act;

(ii) the court in which proceeding was commenced made an order that is similar to a preservation order that may be made under this Part; and

(iii) it is alleged under oath that the defendant owns property in the province/territory.]

(2) On an application made under subsection (1), the court must consider any relevant fact or matter including but not limited to whether:

(a) the facts alleged in support of the plaintiff's claim, if proven at trial, are sufficient to establish the plaintiff's claim for the payment of money;

(b) if a preservation order is not granted, the enforcement of a judgment that may ultimately be rendered against the defendant in favour of the plaintiff is likely to be significantly impaired as a

result of any future disposition, dissipation, destruction, concealment or other dealing with the property of the defendant other than as may be permitted by an order made under this Part; and

- (c) the plaintiff or the defendant would suffer the greater harm from the granting or refusal of a preservation order.**

Comment: Subsection (1)(b) should be enacted only by those provinces and territories that have not enacted the *Uniform Enforcement of Canadian Judgments and Decrees Act*. If a province or territory has enacted the *Uniform Enforcement of Canadian Judgments and Decrees Act* and a preservation order is made in a proceeding in another province or territory, the preservation order qualifies as judgment that may be registered and enforced in the province as if were an order of the registering court.

If a province or territory has not enacted the *Uniform Enforcement of Canadian Judgments and Decrees Act*, subsection (1)(b) permits an application for a preservation order to be made in the circumstances described in clause (b).

If a default judgment has been entered against a defendant and an application is made to set aside the default judgment, a term or condition of an order setting aside the default judgment may be that the defendant consent to a preservation order. For example, if funds have already been realized by way of enforcement proceedings on the default judgment, a preservation order may be made that applies to all or part of the funds.

Subsection (2) describes the factors that a court must consider before deciding whether or not to make a preservation order. The consideration of these factors is somewhat similar to the process laid down by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311 with regard to applications for injunctive relief. In that case, Justices Sopinka and Cory, writing the judgment of the Court, described that process in the following manner:

First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

An application for a preservation order may often be made, in the first instance, without notice and before a statement of defence has been filed by the defendant. The factual basis of the application will normally be supplied by affidavit evidence. Under subsection (2)(a), the primary function of the court is to determine whether the facts alleged by the plaintiff, if proven at trial, are sufficient to establish the plaintiff's claim. If a defence is filed, the court must also consider the defence and any evidence tendered in support of the defence before deciding whether or not to make a preservation order. Under subsection (2)(b), the court must examine the effect on the plaintiff's likely ability to enforce of any judgment that may ultimately be rendered against the defendant in relation to possible future actions by the defendant in relation to her or his property. Under subsection (2)(c), the court must balance the potential harm to the plaintiff of not making a preservation order against the potential harm to the defendant if a preservation order is made.

Preservation orders

- 17 (1) Subject to subsections (2) and (3), on an application made under section 16, the court may make a preservation order it considers necessary with**

regard to the property of a defendant existing at the time of the making of the preservation order or acquired during the currency of the order including, without limitation, an order:

- (a) requiring the payment into court of an account that is due or may become due to the defendant;
 - (b) prohibiting the disposition, dissipation, destruction or concealment of, or any other dealing with, the property to which the preservation order applies;
 - (c) appointing a receiver, with or without security, in which case Part 13 applies;
 - (d) requiring the defendant or a person who has possession or control of exigible property of the defendant to deliver the property to a person identified in the order;
 - (e) authorizing an enforcement officer instructed by the plaintiff or a receiver appointed under clause (c) to take special conservatory measures or to sell or otherwise dispose of property if:
 - (i) the property is perishable, or
 - (ii) the property may decline substantially in value if it is not disposed of immediately;
 - (f) permitting the defendant to retain and use property affected by an order subject to the restrictions or conditions the court considers appropriate;
 - (g) if the court has reasonable grounds to conclude that the defendant is concealing property located in the [province/territory], requiring the defendant to disclose, under oath, the existence and location of the property.
- (2) The court must not make an order that prevents a defendant or other persons from disposing of or otherwise dealing with the property of the defendant for the purposes of meeting:
- (a) reasonable living expenses of the defendant and the dependents of the defendant;
 - (b) ordinary business expenses of the defendant; or
 - (c) the expenses of defending the proceeding.
- (3) The court must not make an order that:
- (a) affects income that the defendant or a dependent of the defendant would be entitled to claim as exempt under Part 12 if the defendant were a judgment debtor; or
 - (b) interferes with the rights of the defendant or a person other than the defendant to an extent greater than is necessary to preserve sufficient property of the defendant to satisfy a judgment that may ultimately be rendered against the defendant in favour of the plaintiff.

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- (4) If a sale or disposition of property is conducted under subsection (1)(e), the enforcement officer must pay the proceeds of the sale or disposition of the property, after deducting the fees and expenses of the enforcement officer, into court.**
- (5) If funds are paid into court under subsections (1)(a) or (4), the court may order payment out of court:**
- (a) to the enforcement officer, if the plaintiff obtains judgment in the proceeding against the defendant, of an amount not exceeding the amount of the judgment against the defendant;**
 - (b) to the defendant, if the proceeding commenced by the plaintiff is discontinued or dismissed; or**
 - (c) to the defendant, if the plaintiff obtains judgment in the proceeding against the defendant, with respect to any amount paid into court that is not required to satisfy the judgment in favour of the plaintiff.**

Comment: Preservation orders that a court may make under subsection (1) do not give the plaintiff a property interest in the property that is the subject of the order. The order restrains the defendant and others named in the order from dealing with the property in a manner that is inconsistent with the preservation order. The order may restrain persons named in the order from dealing with property of the defendant notwithstanding that the property is located outside the jurisdiction of the court.

A preservation order made under subsection (1)(a), replaces pre-judgment garnishment. A preservation order made under subsection (1)(b) is in the nature of a Mareva injunction. If a receiver is appointed under subsection (1)(c), the receiver would normally be expected to preserve the property; however, if the property is perishable or likely to depreciate quickly, an application may be made for order under clause (e). Subsection (1)(d) permits the court to order a third party, who is a bailee in possession of property of the defendant, to deliver up the property. Clause (d) does not permit the court to order a third party, who has a right or interest that entitles the third party to maintain possession against the defendant, to deliver up possession. A defendant may be permitted to remain in possession of tangible property that is subject to a preservation order. Therefore, the need to provide a broad power to take conservatory measures referred to in subsection (1)(e), which may be necessary when a secured party takes possession of collateral under a security agreement, will not usually arise in the context of a preservation order. For example, if the property is a hazard to health, it remains a matter for the defendant and perhaps the relevant government regulatory agency. Subsection (1)(g) reflects a type of order that has been made in applications for a Mareva injunctions.

With regard to any application made to the court, the court has power under section 7(2)(m), to make an order with regard to costs. Normally, a third party should be compensated for her or his costs incurred in relation to an application for a preservation order unless the third person has participated in a scheme with the defendant with the objective of rendering the defendant judgment proof.

The purpose of subsection (2) is to prevent preservation orders being used improperly as a tactic to bring pressure to bear on a defendant to agree to an unjustifiable settlement.

Continuation and termination of preservation order

- 18** Subject to section 19, a preservation order made under section 17 or extended or modified by an order made under section 23 is effective until the earlier of the following:
- (a) the date provided in the order made under either section 17 or section 23, whichever is the later;
 - (b) the date that the proceeding in which the preservation order was made, is discontinued, dismissed or otherwise terminated;
 - (c) the date that is 21 days after the entry in the records of the court that granted the judgment in favour of the plaintiff in the proceeding in which the preservation order was granted or any longer period that the court may order;
 - (d) the date on which the defendant or other person provides security in a form and in an amount considered sufficient by the court; or
 - (e) the date on which a judgment obtained by the plaintiff in the proceeding is satisfied.

Comment: With regard to clause (c), a plaintiff who obtains a judgment against a defendant in the proceeding needs a reasonable period after judgment is pronounced to register a notice of judgment in the registry under Part 5 of this Act.

Preservation order made without notice

- 19 (1)** If a preservation order is granted on an application made without notice, the order must specify a date, not more than 21 days after the day that the order is granted, on which the order expires.
- (2) A preservation order under subsection (1) obtained in an application without notice is not effective against:
- (a) a defendant until the earlier of:
 - (i) the time when a copy of the order is delivered to the defendant, and
 - (ii) the time when the defendant has knowledge of the order; and
 - (b) any other person named in the order until the earlier of:
 - (i) the time when a copy of the order is delivered to such person, and
 - (ii) the time when the defendant or person named in the order has knowledge of the order.
- (3) If an application under section 23 is made without notice to extend a preservation order made without notice, an order extending the preservation order must specify a date, not more than 21 days after the day that the order is granted, on which the order expires.
- (4) If an application under section 23 is made on notice to extend a preservation order made without notice:

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- (a) **the onus is on the plaintiff to establish that the preservation order should be continued; and**
- (b) **the court may terminate the preservation order if the court is satisfied that the plaintiff failed to make full and frank disclosure of the material information that existed at the time the plaintiff made the application for the preservation order without notice.**

Comment: If a province/territory has a general rule that *ex parte* orders and injunctions automatically expire after a period that is shorter than 21 days, unless the order is extended on notice to the defendant, a province/territory may wish to make the general rule apply to applications for *ex parte* preservation orders rather than the 21 day rule in subsection (1).

An example of when an application for a preservation order may be made without notice is when the plaintiff is seeking a preservation order under section 17(1)(a) requiring a bank or financial institution to pay into court those funds held to defendant's credit in an account maintained by the bank or financial institution. Such an application may be made without notice to either the defendant of the bank because if notice is given, the defendant may withdraw the funds prior to the delivery of the preservation order. If the application is made without notice, and the preservation order is physically given to the bank prior to the expiration of the order, the order is effective from the time of the physical delivery of the preservation order to the bank.

If an application is made on notice to extend a preservation order that was previously made without notice, the plaintiff must make her or his case for a preservation order in the same manner as if the application was initially made on notice. If the court extends the preservation order after hearing the application on notice, the preservation order continues in effect until one of the events described in section 18 occurs.

If a preservation order is made, without notice, seizing an account owing to the defendant, and the preservation order is given to the account debtor before an application is made, with notice, it will be necessary for the plaintiff to make an application with notice to the defendant and the account debtor, to confirm and extend the preservation order. This is different than the process of garnishment before judgment.

Effect of preservation order

- 20 Subject to section 21(2), a preservation order applies to the defendant and the other persons named in the order, but gives no property interest to the plaintiff.**

Comment: A preservation order does not give the plaintiff any property interest in the property that is subject to the order. Nevertheless, under section 21, a notice of preservation order may be registered in the land title office or land registry office against land of the defendant.

Registration of notice preservation order against land

- 21 (1) A notice of a preservation order in the prescribed form may be registered against the land of the defendant in the [insert the name of the land title or land registry offices in the enacting province/territory] in the same manner that a notice of judgment may be registered in accordance with Part 10 and the regulations.**

- (2) If a preservation order is no longer effective under section 18, Part 10 applies with regard to the discharge of the registration of a notice of preservation order against land in the same manner as if it were a notice of judgment.**

Comment: Despite that section 20 provides that a preservation order does not give any property interest, a notice of preservation order may be registered against all or some of the defendant's land. The effect of registering a notice of preservation order is dealt in Part 10 [section 130(2) of Option #1 and section 128(2) of Option #2]. The registration of a notice of preservation order is somewhat analogous to registering a claim of lien under builders lien or mechanic's lien legislation or the registration of a caveat. In such cases, if the plaintiff's claim is proven at trial, the claim has priority over interests that are registered after the registration of the caveat or claim of lien. If the plaintiff's claim is not proven at trial, the registration of the caveat or claim of lien must be removed and it has no effect on the priorities of interests registered after the caveat or claim of lien.

Under subsection (2), if a preservation order is no longer effective because it has expired or for some other reason, the defendant or another person can deliver a demand under Part 10 requiring the plaintiff or judgment creditor, as the case may be, to discharge the notice of preservation order. If the plaintiff/judgment creditor does not obtain a court order providing for the continuation of the registration of the notice of preservation order, the person who made the demand may submit a discharge of the notice of preservation order for registration.

Security required from plaintiff

- 22 (1) Unless a court otherwise orders, a preservation order and any order modifying or extending a preservation order under section 23 must include an order requiring the plaintiff to provide security in an amount and form that is sufficient to compensate the defendant or another person named in the order for loss or damage that may be caused by the preservation order in the circumstances specified in subsection (3).**

- (2) If the defendant or any other person suffers loss or damage as a consequence of the preservation order in any of the circumstances described in subsection (3), the court may order that there be paid, out of the security referred to in subsection (1), if any, to the defendant or other person named in the order referred to subsection (1), an amount to compensate for a pecuniary loss or damage suffered by the applicant as a result of the preservation order that was foreseeable at the time when the preservation order was made.**

- (3) The court may only make an order under subsection (2) if:**
- (a) the court in which the plaintiff's proceeding was commenced dismissed the proceeding because of a failure on the part of the plaintiff to pursue the claim;**
 - (b) the plaintiff discontinued the proceeding after an application was made by the defendant for an order dismissing the plaintiff's claim because of a failure on the part of the plaintiff to**

- pursue the claim;**
- (c) the court concludes that:**
- (i) in the proceeding, the plaintiff presented evidence that was false or misleading,**
 - (ii) on the application for a preservation order, the plaintiff did not make full and frank disclosure of relevant facts to the court, or**
 - (iii) there was other misconduct by the plaintiff in the proceeding or on the application for the preservation order; or**
- (d) at the date the proceeding was commenced, the plaintiff had no reasonable expectation of obtaining judgment.**

Comment: Unless the court otherwise orders, the court must order the plaintiff to post security as a condition of being granted a preservation order. The requirement that security will normally be posted is intended to guard against preservation orders being used as a tactical manoeuvre by a plaintiff to bring pressure on a defendant to settle a dubious claim. The amount and form of the security are left for the discretion of the court. If a plaintiff is able to demonstrate that her or his financial circumstances are such that he or she is unable to post security or security is not required in the circumstances, the court may in its discretion waive the requirement for security. Nevertheless, the presumption is that security must be ordered. The amount of the security will depend on the court's assessment of the loss or damage that it is reasonably foreseeable the defendant may suffer as a consequence of making a preservation order.

If a defendant or other person suffers loss as a consequence of preservation order in any of the circumstances described in subsection (3), the court may make an order for the payment of compensation out of the security provided by the plaintiff. The loss or damage that may be paid out of the security is limited to loss or damage that was foreseeable at the time that the preservation order was made.

Modification or extension of preservation order

- 23 (1) The plaintiff on whose application a preservation order is made, a defendant, or a person affected by a preservation order may apply to the court that made the preservation order to have the order extended, modified or terminated, including the addition, modification or termination of provision for security under section 22.**
- (2) If a preservation order is modified or terminated under subsection (1) with regard to land of the defendant, the plaintiff must register an amendment notice with regard to a notice of preservation order that is registered against the land.**

Comment: Self-explanatory.

Enforcement proceedings against property subject to preservation order

- 24 (1) Despite the making of a preservation order or the registration of a notice of a preservation order against the land of the defendant, and subject to subsection (3), enforcement proceedings may be commenced or continued in another proceeding against property that is subject to a**

preservation order, and

- (a) money realized through those enforcement proceedings may be distributed under Part 14 without regard to the claim of the plaintiff who obtained the preservation order if that plaintiff does not have an eligible claim within the meaning of Part 14 at the time the distributable fund is created under Part 14; and**
 - (b) the purchaser of land in those enforcement proceedings takes the land free of any enforcement charge that may be created by the registration of a notice of judgment in the proceeding in which the preservation order was made.**
- (2) On application, the court may make one or more of the following orders:**
- (a) an enforcement proceeding not be commenced or continued against property that is subject to a preservation order, without the leave of the court, until the preservation order terminates;**
 - (b) a distributable fund constituted under Part 14 in another enforcement proceeding against land that is the subject to a preservation order not be distributed without leave of the court.**

Comment: Self-explanatory.

Compensation if dealings with property are inconsistent with preservation order

25 (1) If a person other than the defendant knowingly assists or participates in the disposal, dissipation, concealment, destruction or other dealing with property that is the subject of a preservation order in a manner that is inconsistent with the terms of the preservation order, the court may order that person to compensate a plaintiff who:

- (a) obtained judgment against the defendant;**
- (b) is unable to satisfy the judgment from the assets of the defendant; and**
- (c) suffers actual loss as a result of that dealing.**

- (2) The amount of compensation that a person may be ordered to pay under subsection (1) must not exceed the fair market value of property that was dealt with by that person.**
- (3) The court must not make an order under subsection (1) against a person other than the defendant if the person's dealing that caused the loss was necessary to meet a legal duty of the person that:**
- (a) arose before the person acquired knowledge of the preservation order; and**
 - (b) was owed to a person other than the defendant.**

Comment: Compensation payable under this section is limited to actual loss. Before judgment, a plaintiff has not suffered in any actual loss by reason of an unauthorized dealing. Therefore, this remedy is limited to a claim by a judgment creditor who has obtained judgment.

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Subsection (3) applies if, for example, a lawyer holds funds of a client subject to an undertaking given to a third party before acquiring knowledge of the preservation order. The undertaking may have been given to another lawyer, who is acting for a vendor in a real estate transaction. The undertaking may require the payment out the funds upon the registration of a conveyance. If a copy of the preservation order is given to the lawyer after the undertaking was made but before the funds are paid out, the lawyer is under a legal duty to pay out the funds in accordance with the undertaking. This subsection will exempt the lawyer from liability in any claim for compensation by the plaintiff who obtained the preservation order.

PART 5: REGISTRATION OF NOTICE OF JUDGMENT AND CREATION OF AN ENFORCEMENT CHARGE

Introductory Note: Under this Part, registration of a notice of judgment in the prescribed registry creates an “enforcement charge” on the personal property of the judgment debtor that is analogous to a perfected non-purchase money security interest under *Personal Property Security Acts*. In most provinces/territories, the Personal Property Registry established under the *Personal Property Security Act* will likely be the prescribed registry. Subject to the specific priority rules in Part 6, the *Personal Property Security Act* rules govern the priority of an enforcement charge in relation to other interests in the property. Subject to certain preferences with regard to the distribution of proceeds of an enforcement proceeding under Part 14, there is no priority among enforcement charges.

When an enforcement charge is created, the personal property of the judgment debtor is immediately charged with the satisfaction of the judgment to which the notice of judgment relates. It will no longer be necessary for an enforcement officer to make a seizure of property before the property is charged by or subject to an enforcement charge. With regard to land, whether registration of a notice of judgment under this Part will create a charge on a judgment debtor’s land depends on whether a province/territory chooses to enact Option #1 or Option #2 under Part 10 [Land].

Under this Act, registration of a notice of judgment under this Part is a prerequisite to initiating enforcement proceedings and being eligible to participate in the distribution of proceeds of an enforcement proceeding taken by another judgment creditor with regard to the same judgment debtor.

Definition

26 In this Part, “exigible property of the judgment debtor” means exigible property of the judgment debtor that is personal property.

Registration of notice of judgment

27 (1) A judgment creditor may register a judgment in the registry by registering a notice of judgment in the prescribed form and in accordance with this Part and the regulations.

- (2) A notice of judgment may be registered under subsection (1) whether or not the time for filing an appeal has expired or an appeal has been filed.**
- (3) Whether or not an enforcement instruction has been delivered to an enforcement officer under Part 7 of this Act, upon the written request of a judgment creditor, an enforcement officer must deliver a demand to a judgment debtor requiring the judgment debtor to deliver to the enforcement officer or a person designated by the enforcement officer documentary evidence of the judgment debtor's full legal name.**
- (4) If a judgment debtor is a natural person, the documentary evidence required for the purposes of subsection (3) is determined by the following rules:**
 - (a) if the judgment debtor was born in Canada and the judgment debtor's birth is registered in Canada with a government agency responsible for the registration of births, the judgment debtor's birth certificate or equivalent document issued by the government agency;**
 - (b) if the judgment debtor was born in Canada but the judgment debtor's birth is not registered in Canada with a government agency responsible for the registration of births,**
 - (i) a current passport issued to the judgment debtor by the Government of Canada,**
 - (ii) if the judgment debtor does not have a current passport, a current social insurance card issued to the judgment debtor by the Government of Canada,**
 - (iii) if the judgment debtor does not have a current passport or social insurance card, a current passport issued to the judgment debtor by the government of a jurisdiction other than Canada where the judgment debtor habitually resides;**
 - (c) if the judgment debtor was not born in Canada but is a Canadian citizen, the judgment debtor's certificate of Canadian citizenship;**
 - (d) if the judgment debtor was not born in Canada and is not a Canadian citizen,**
 - (i) a current visa issued to the judgment debtor by the Government of Canada,**
 - (ii) if the judgment debtor does not have a current Canadian visa, a current passport issued to the judgment debtor by the government of the jurisdiction where the judgment debtor habitually resides, or**
 - (iii) if the judgment debtor does not have a current Canadian visa or a current passport, the birth certificate or equivalent document issued to the judgment debtor by the government agency responsible for the registration of**

- births at the place where the judgment debtor was born;
- (e) notwithstanding clauses (a) to (d), if the judgment debtor has changed or changes his or her name in accordance with change of name legislation, the judgment debtor's change of name certificate or equivalent document, and if a judgment debtor who changes his or her name after marriage habitually resides in a jurisdiction in which the name adopted is recognized by law without the issuance of a change of name certificate or equivalent document and no such document has been issued, the judgment debtor's written declaration of the name or names used by the judgment debtor after marriage accompanied by the certificate of marriage or equivalent document,
 - (f) if the law of the jurisdiction where the judgment debtor habitually resides recognizes both the name that a person had before marriage and the name adopted after marriage without the issuance of a change of name certificate or equivalent document and the judgment debtor uses both names, the documentary evidence required in accordance with clauses (a) to (d) with regard to the former name and documentary evidence referred to in clause (e) with regard to the latter name, and
 - (g) in a case not falling within clauses (a) to (f), any two of the following documents issued to the judgment debtor by the Government of Canada or a province or territory of Canada:
 - (i) a current motor vehicle operator's license,
 - (ii) a current motor vehicle registration,
 - (iii) a current medical insurance card.
- (5) Delivery to the enforcement officer who made the demand referred to in subsection (3) of a notarized copy of the documentary evidence referred to in subsection (4) constitutes compliance with the demand.
- (6) A judgment debtor must provide the documentary evidence demanded by an enforcement officer under subsection (3) within 10 days of receipt of the demand or such further time as the enforcement officer may stipulate or the court may order on an application by the judgment debtor.
- (7) On application, the court may order the judgment debtor to comply with a demand made by an enforcement officer under this section.

Comment: The terms "judgment" and "notice of judgment" are defined in section 1. In most provinces/territories, the Personal Property Registry established under the *Personal Property Security Act* will be the prescribed registry. The registration of a notice of judgment under subsection (1) is modeled on the registration of a financing statement under *Personal Property Security Acts*. The cost associated with the registrations and the maintenance of the registry will be recovered from the registration fees. With regard to the amendment or renewal of a registered notice of judgment, section 33 incorporates, with the necessary modifications, those provisions of

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the *Personal Property Security Act* that apply to a financing change statement.

Under section 28, registration of a notice of judgment creates an enforcement charge on the property of the judgment debtor as provided in that section. A judgment creditor must register a notice of a judgment before giving an enforcement instruction to an enforcement officer under Part 7. Consequently, the registry will serve as a single searchable registry within a province or territory where all judgments capable of immediate enforcement against a judgment debtor will be registered.

The form of a notice of judgment will be prescribed by regulation under Part 16 to be an electronic form capable of registration by means of an on-line registration process. The prescribed form will contain specified information fields that must be completed before a notice of judgment will be accepted for registration. Additional fields may be either alternative or optional fields. Examples of the information fields that will be included in the prescribed form include:

- (a) name of the judgment creditor;
- (b) name and additional identifying characteristics of the judgment debtor;
- (c) an exclusionary field to be used to exclude persons with names that may be similar to the judgment debtor;
- (d) particulars of the judgment including:
 - (i) the court from which the judgment was issued;
 - (ii) the number assigned to the court file or judgment;
 - (iii) the date of the pronouncement of the judgment;
- (e) particulars with regard to the judgment debtor's property including:
 - (i) the serial numbers of equipment of any serial numbered equipment if they are known to the judgment creditor; and
 - (ii) the location of property;
- (f) the length of the registration period for the notice of judgment chosen by the judgment creditor.

A judgment creditor must register a notice of a judgment before giving an enforcement instruction to an enforcement officer under Part 7. However, a registration of a notice of judgment is invalid if there is a seriously misleading defect or error in the name of the judgment debtor. Such invalidity arises as a consequence of the incorporation, by section 33(1)(e) of this Act, of section 43(7) of the *Personal Property Security Act* (British Columbia). A plaintiff may commence an action against a defendant using the name by which a defendant is commonly known or the name that a defendant used in his or her dealings with the plaintiff. This name may not be the defendant's legal name. Therefore, it is necessary to include a method by which a judgment creditor can compel the judgment debtor to provide documentary evidence in respect of his or her legal name and thereby enable the judgment creditor to register a valid notice of judgment. Subsections (3) to (7) will enable a judgment creditor to obtain evidence with regard to the judgment debtor's legal name. If a judgment debtor fails to comply with a court order under subsection (7), contempt of court proceedings may be brought in relation to the judgment debtor. Each province/territory should review its *Evidence Act*, and perhaps its Rules of Court, for the purpose of considering amendments that will permit questions to be directed to a defendant or other witnesses during a trial or proceeding that are intended to elicit information with regard to the legal name of the defendant and any other name or names under which a defendant holds property.

Creation of enforcement charge

28 Registration of a notice of judgment under section 27 creates an

enforcement charge securing the amount recoverable on:

- (a) all exigible property of the judgment debtor and all fixtures and crops existing at the time of registration and acquired by the judgment debtor after the registration of the enforcement charge and prior to its discharge; or**
- (b) such items or kinds of exigible property of the judgment debtor, including a fixture or crops, that are described in the prescribed manner in the notice of judgment.**

Comment: Registration of a notice of judgment in the registry automatically creates an enforcement charge that charges all of the judgment debtor's present and after acquired personal property unless the registration of the notice of judgment lists only specific items of the judgment debtor's property that will be subject to the enforcement charge. The term "enforcement charge" is used to distinguish this type of charge from consensual security interests or other charges that may encumber a judgment debtor's property. Notwithstanding that an enforcement charge charges a judgment debtor's property specified in the notice of judgment, if an enforcement proceeding is commenced with respect to specific property by way of seizure or otherwise, a judgment debtor is entitled to claim property described in Part 12 as property that is exempt from enforcement proceedings.

Effective period of enforcement charge

29 (1) An enforcement charge is effective from the time of the registration until the earliest of:

- (a) the expiration of the registration period stated in the notice of judgment and any renewal notice by which registration is effected; or**
- (b) the discharge of the notice of judgment.**

(2) An enforcement charge remains in effect even though an appeal is taken against the judgment.

(3) An enforcement charge relating to a judgment that is reversed on appeal is deemed never to have existed.

(4) Unless the court otherwise orders, an order staying enforcement proceedings with respect to a judgment or a payment order that prohibits enforcement of the judgment does not affect an enforcement charge or the registration of a notice of judgment.

Comment: The judgment creditor is permitted to choose the length of the registration. This adopts the approach of the Personal Property Security legislation with regard to the registration of a financing statement in relation to a consensual security interest. The registration fee will increase with the length of the registration period chosen by the judgment creditor. The judgment creditor may choose registration for an infinite period; however, the fee payable for choosing this option may discourage most judgment creditors from selecting this option.

If a judgment is satisfied or the judgment is no longer in force because the judgment is extinguished under the law of the province/territory due to the expiry of the limitation period for

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enforcing the underlying judgment, the judgment creditor is obliged under section 31 to register a discharge. If the judgment creditor fails to register a discharge, the judgment debtor may proceed under section 31 to register a discharge.

Some provinces/territories have Rules of Court or other enactments that provide that the filing of an appeal against a monetary judgment operates as an automatic stay of execution. Such provisions will continue to be effective as a stay of enforcement proceedings with respect to the judgment; however, such provisions will not prevent the creation or continuance of an enforcement charge by the registration of a notice of judgment. However, the court could, upon granting a judgment, or at any time before the registration of a notice of judgment, order that a notice of judgment with respect to the judgment not be registered until further order of the court.

Giving notice of a registration, amendment or renewal of notice of judgment

30 (1) Within [30] days after the registration of a notice of judgment or an amendment/renewal notice, the judgment creditor must give to each person named as a judgment debtor in the notice of judgment a copy of the verification statement issued by the registry that relates to the registration of the notice of judgment, amendment notice or renewal notice.

(2) For the purposes of subsection (1), “verification statement” has the meaning prescribed by regulation.

Comment: The number of days specified in this section should be consistent with number of days provided in the comparable provision of the Personal Property Security Act of the province/territory. In some provinces such as British Columbia, the statement must be sent within 20 days. This section is based on a similar provision in *Personal Property Security Act* legislation [section 43((14) and (15) of the BC PPSA].

Discharge or amendment of notice of judgment

31 (1) A judgment creditor who has registered a notice of judgment must:

- (a) register a discharge of the notice of judgment if:**
 - (i) the judgment to which the enforcement charge relates is satisfied, withdrawn or otherwise becomes unenforceable, or**
 - (ii) a court has ordered that the notice of judgment be discharged;**
- (b) register an amendment notice that amends the notice of judgment in accordance with the demand given by the judgment debtor under subsection (2), including without limitation , to release property that:**
 - (i) the judgment creditor has agreed to release from the enforcement charge, or**
 - (ii) is not property of the judgment debtor; or**
- (c) register a discharge or an amendment of the notice of judgment as may be appropriate if a person who is not the judgment debtor of the judgment creditor:**
 - (i) has a name that corresponds to name used in a notice of**

judgment to describe the judgment debtor, and
(ii) has property that is mistakenly charged by the enforcement charge created by the registration of that notice of judgment.

- (2) If a judgment debtor, a person referred to in subsection (1)(c) or a person with an interest in property charged by an enforcement charge considers that subsection (1) applies in respect of that notice of judgment, that person may give a written demand to the judgment creditor requiring the judgment creditor to discharge or amend the notice of judgment.
- (3) A judgment creditor who receives a demand under subsection (2) must, **within** [insert the number of days in the comparable section of the PPSA of the enacting jurisdiction] **after receipt of the demand:**
 - (a) discharge the notice of judgment;
 - (b) register an amendment notice to amend the notice of judgment in accordance with subsection (1)(b) or (c); or
 - (c) obtain and submit to the registrar for filing a copy of an entered court order, made under subsection (4), that the notice of judgment need not be discharged or amended.
- (4) On application by a judgment creditor who has registered a notice of judgment, by the judgment debtor named in that registration or by any other person with an interest in property charged by the enforcement charge created by that registration, the court may order that:
 - (a) the registration of the notice of judgment be maintained generally, or for any period and on any terms and conditions the court may consider appropriate; or
 - (b) the notice of judgment be amended or discharged on any terms and conditions the court considers appropriate.
- (5) If an order made under subsection (4) affects the registration of a notice of judgment, the registrar must amend or discharge the registration accordingly after a copy of that entered order is filed with the registrar.
- (6) If a judgment creditor referred to in subsection (3) does not comply with that subsection within the time required, the person who provided the demand may register in the registry a discharge of the notice of judgment or an amendment notice.
- (7) The registrar must register a discharge of notice of judgment, or an amendment notice, submitted by a person under subsection (6) if:
 - (a) the discharge of notice of judgment or the amendment notice is satisfactory to the registrar; and
 - (b) the person submits to the registrar proof satisfactory to the registrar that subsections (1) and (6) apply to the notice of

judgment.

- (8) No fee or expense shall be charged, and no amount of money shall be accepted by a judgment creditor for compliance with a demand made pursuant to subsection (2).**

Comment: This section adopts an approach that is similar to the compulsory discharge or amendment of registration provisions found in *Personal Property Security Act* legislation [see section 50 of the BC PPSA]; however, there are differences between the two Acts. The purpose of this section is to provide a relatively expeditious process by which a judgment debtor or other person can compel the registration of a discharge or an amendment of a notice of judgment in the circumstances described in subsection (1). If clause (c) of subsection (1) is applicable, an amendment notice may be required to exclude from the operation of the enforcement charge property of a person who is not a judgment debtor of the judgment creditor.

If a judgment debtor or other person makes frivolous or vexatious demands requiring the registration of a discharge or an amendment notice and the judgment creditor is required to make needless applications to the court under subsection (3), the person making the frivolous and vexatious demands can be penalized by an award of costs. Frivolous or vexatious demands do not appear to have been a problem under comparable PPSA legislation. However, if an award of costs against the judgment debtor or other person is not an effective deterrent to frivolous or vexatious demands, a judgment creditor may apply for an order under either subsection (3) that the registration is effective until a further order by the court regardless of any further demands by the judgment debtor or other person. Alternatively, the judgment creditor could apply for an order under section 7 in the nature of an injunction prohibiting the judgment debtor or other person from making further demands without permission of the court.

In subsection (5), each enacting province/territory must insert the number of days within which the judgment creditor, after receiving a demand, must either register a discharge or an amendment notice or obtain an order of the court that the registration need not be discharged or amended. This section is based on a comparable section in PPSA legislation. There is a significant variation in the number of days specified in PPSA legislation of the provinces and territories. Rather than attempting to seek uniformity among the provinces and territories with regard to the number of days, the number of days should be consistent with the number of days specified in the comparable provision of the PPSA of the enacting province or territory.

Registration does not constitute notice or knowledge of notice of judgment

- 32 Registration of a notice of judgment in the registry does not constitute notice to or knowledge by any person of the existence of the notice of judgment.**

Comment: The purpose of this section is to preclude the development of any concept of constructive notice with regard to a notice of judgment based merely upon the registration of a notice of judgment combined with the ability of a person to obtain knowledge of a notice of judgment by searching the registry.

Application of registration provisions of the Personal Property Security Act

- 33 (1) Except as otherwise specifically provided in this Act, the following sections of the *Personal Property Security Act* [The section number**

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references in this section refer to the British Columbia Act. Each enacting jurisdiction must substitute the corresponding section number of its *Personal Property Security Act.* **apply to matters arising under this Act:**

- (a) **section 42** [establishment of registry, seal, registrar, services provided];
- (b) **section 43(2)** [effective date & time of registration];
- (c) **section 43(3)** [no registration until fees paid];
- (d) **section 43(6)** [validity of registration not affected by defect, irregularity, etc. in notice of judgment];
- (e) **section 43(7)** [circumstances where defects in name of debtor or serial number of collateral that are seriously misleading may render registration invalid];
- (f) **section 43(8)** [if defect is seriously misleading, not necessary to prove anyone actually misled by it];
- (g) **section 43(9)** [failure to provide description of in relation to one item of property does not affect validity of registration with respect to other property];
- (h) **section 43(12)** [registrar may reject a notice of judgment if it does not comply with Act or regulations];
- (i) **section 43(13)** [registrar shall give reasons for rejecting registration];
- (j) **section 44(2)** [renewal of a registration];
- (k) **section 44(3)** [amendment of a registration];
- (l) **section 44(4)** [amendment of registration not otherwise provided];
- (m) **section 45** [registrations of transfers];
- (n) **section 46(2)** [removal of records from registry where registration no longer effective or notice of judgment discharged];
- (o) **section 48** [registry searches];
- (p) **section 51** [transfer of debtor's interest in property or change of judgment debtors]; **and**
- (q) **section 52** [actions against the Crown for loss suffered by reliance on a printed search result, failure to register a printed notice of judgment, etc.].

(2) **When applying the sections referred to in subsection (1), a reference to:**

- (a) **“collateral” is read as a reference to “property subject to an enforcement charge”;**
- (b) **“debtor” is read as a reference to a “judgment debtor”;**
- (c) **“financing statement” is read as “notice of judgment”;**
- (d) **“financing change statement” is read as “amendment/ renewal notice”;**
- (e) **“secured party” is read as a reference to a “judgment creditor”;**
and
- (f) **“security interest” is read as a reference to an “enforcement charge.”**

Comment: Self-explanatory.

PART 6: PRIORITY OF AN ENFORCEMENT CHARGE

Definitions

34 In this Part:

“buyer of goods” has the meaning given to buyer of goods in section 30(1) of the *Personal Property Security Act*; [The section number reference in this definition refers to the British Columbia Act. Each enacting jurisdiction must substitute the corresponding section number of its *Personal Property Security Act*]

“ordinary course of business of the seller” has the meaning given to it in section 30(1) of the *Personal Property Security Act*; [The section number reference in this definition refers to the British Columbia Act. Each enacting jurisdiction must substitute the corresponding section number of its *Personal Property Security Act*];

“seller” has the meaning given to seller in section 30(1) of the *Personal Property Security Act*; and [The section number reference in this definition refers to the British Columbia Act. Each enacting jurisdiction must substitute the corresponding section number of its *Personal Property Security Act*];

“serial numbered goods” has the meaning given to serial numbered goods in section 1(1) of the regulations made under the *Personal Property Security Act* other than one or more of the following:

- (a) goods held by the judgment debtor for sale or lease, or that have been leased by the judgment debtor as lessor;**
- (b) goods furnished or to be furnished under a contract of service;**
- (c) raw materials or work in progress; and**
- (d) materials used or consumed in a business.**

[The section number reference in this definition refers to the regulations made under British Columbia Act. Each enacting jurisdiction must substitute the corresponding section number of the regulations made under its *Personal Property Security Act* or the Act itself if the definition is included in the Act.]

Comment: Under section 1(2)(g) of this Act, the term “goods” has the meaning given to it in the *Personal Property Security Act*.

Priority of enforcement charge

35 (1) Except as otherwise provided in this Act, an enforcement charge has the same priority in relation to both prior and subsequent interests in personal property charged by it as a perfected non-purchase money security interest in that property would have under the *Personal Property Security Act*.

(2) Even though property charged by an enforcement charge would be

inventory or proceeds of inventory under the *Personal Property Security Act*, as those terms are defined in the *Personal Property Security Act*, the property is deemed not to be inventory or proceeds of inventory, as the case may be, for the purposes of this Act.

- (3) Subject to subsection (5), priority between a perfected security interest in serial numbered goods and an enforcement charge on the same goods is determined on the basis of the earlier of the following:

 - (a) the perfection of the security interest; and
 - (b) the registration of the notice of judgment creating the enforcement charge that is registered in the manner prescribed by the regulations made under the *Personal Property Security Act* for security interests in serial numbered goods.
- (4) A security interest referred to in subsection (3) is perfected by registration if it is registered in the manner prescribed by the regulations made under the *Personal Property Security Act* for security interests in serial numbered goods.
- (5) A security interest has priority over an enforcement charge with respect to advances secured by the security interest and made after the enforcement charge comes into existence only if:

 - (a) a registration relating to the security interest was effected before the enforcement charge was created; and
 - (b) the advances were made without knowledge by the secured party of the enforcement charge.
- (6) Despite that the secured party has knowledge of the enforcement charge, the security interest referred to in subsection (5) has priority with respect to:

 - (a) advances made under a legally binding obligation owed to a person other than the judgment debtor incurred by the secured party before acquiring knowledge of the enforcement charge; and
 - (b) reasonable costs incurred and expenditures made by the secured party for protection, preservation or repair of the property charged by the enforcement charge.
- (7) Priority between an enforcement charge and a security interest in respect of a fixture or crops is determined without regard to the fact that the fixture or crops are attached to land.
- (8) Subject to subsection (9), an enforcement charge charging a fixture or crops has priority over:

 - (a) an interest in the land on which the fixture is located or crops are growing that, at the date the enforcement charge is created, could have been registered but was not registered as provided by

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[insert the title of the Land Titles Act or similar Act under which interests in land are registered]; and

- (b) a registered or unregistered interest in the land on which the fixture is located or the crops are growing acquired from the judgment debtor after the charge was created;**
- but, does not have priority over an interest in the land acquired by a transferee unless:**
- (c) a search of the registry using the name of the transferor as recorded in the records of the land titles office discloses the enforcement charge; or**
 - (d) the enforcement charge is registered as provided in [insert the section number and title of the Land Titles Act or similar Act under which interests in land are registered in the province/territory];**

Comment: If a province/territory selects Option #2 in Part 10 (Land), clause (c) should be deleted.

- (9) An enforcement charge charging a fixture or crops does not have priority over a mortgage on the land, registered prior to the creation of the enforcement charge if the mortgage specifically charges the fixture or crops, securing a specific principal sum or a revolving line of credit up to a specified principal sum, even though:**
 - (a) advances are made under the mortgage after the enforcement charge was created; or**
 - (b) when the enforcement charge was created, there are no outstanding advances secured by the mortgage.**

Comment: Except as otherwise provided in this Act, the effect of subsection (1) is to make the priority rules of the *Personal Property Security Act*, which are applicable in determining the priority of a perfected non-purchase money security interest, applicable to determining the priority of an enforcement charge created under this Act in relation to other security interests. It does not determine priorities among enforcement charges.

The effect of subsections (3) and (4) is that an enforcement charge that charges serial numbered goods will only take priority over a security interest that is perfected by serial number registration or perfected by possession if there is a registration with respect to the charge that includes the serial number.

Protection of buyers and lessees of goods

- 36 (1) A buyer or lessee of goods sold or leased in the ordinary course of business of a seller or lessor who is a judgment debtor takes free of an enforcement charge charging the goods, whether or not the buyer or lessee knows of the charge, unless the buyer or lessee knows that the goods bought or leased have been seized under this Act.**
- (2) A buyer or lessee of goods takes free from an enforcement charge charging goods if the buyer or lessee:**

- (a) bought or leased the goods without knowledge of the enforcement charge or knowledge that the goods have been seized or are subject to other enforcement proceedings under this Act; and**
- (b) if the goods were serial numbered goods and, at the time of the purchase or lease, the goods were not described in the registration of the notice of judgment creating the enforcement charge in the manner prescribed by the regulations made under the *Personal Property Security Act* for security interests in serial numbered goods.**

Comment: Subsection closely parallels *Personal Property Security Act* legislation [section 30(2) in Saskatchewan and B.C.] by addressing the priority of buyers or lessees of goods that are sold or leased in the ordinary course of a judgment debtor's business. This section differs from its PPSA counterpart only with regard to its definition of the knowledge that will preclude operation of the section in favour of the buyer or lessee. Under PPSA section 30(2), an ordinary course buyer or lessee of goods that are subject to a security interest takes free of the security interest unless he or she knows that the sale or lease constitutes a breach of the security agreement that gives rise to the security interest. Under this Act, an ordinary course buyer or lessee of goods that are subject to an enforcement charge takes free of the enforcement charge unless he or she knows that the goods have been seized in an enforcement proceeding under this Act. Section 6 of this Act contains a definition of what constitutes "knowledge".

In subsection (2), the words "or knowledge that the goods have been seized or are subject to any other enforcement measure" have been included to ensure that a person who knows that goods have been seized cannot make the argument that he/she did not know that they were subject to a charge.

Purchasers of chattel paper

37 (1) The interest of a purchaser of chattel paper has the same priority in relation to an enforcement charge that it has in relation to another security interest in the chattel paper perfected by registration as provided in the *Personal Property Security Act*.

(2) A purchaser of chattel paper who takes possession of the chattel paper pursuant to a disposition by an enforcement officer or receiver has priority over a security interest in the chattel paper that was perfected by registration pursuant to section 25 of the *Personal Property Security Act*. [The section number reference in this section refers to the British Columbia Act. Each enacting jurisdiction must substitute the corresponding section number of its Personal Property Security Act.]

Comment: Under subsection (1), if an enforcement officer seizes chattel paper but does not take physical possession of chattel paper and the judgment debtor subsequently sells the chattel paper to a purchaser, the purchaser has the same priority in relation to the enforcement charge that the purchaser would have in relation to a security interest perfected by registration as provided in the PPSA. Section 31(6) of the BC PPSA provides that a purchaser of chattel paper who takes possession of the chattel paper in the ordinary course of business and for new value has priority

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over any security interest in it that was perfected by registration under section 25 of the PPSA if the purchaser does not know at the time of taking possession that the chattel paper is subject to a security interest.

The purpose of subsection (2) is to put the purchaser from an enforcement officer in the same priority position in relation to a prior registered interest in the chattel paper as the purchaser would be if the purchaser had taken possession of the chattel paper in a purchase from the judgment debtor.

Relationships among interests in seized property

- 38 (1) An interest in property is not subordinate to an enforcement charge by reason only of the fact that the interest is subordinate to another enforcement charge.**
- (2) If an interest in property is subordinate to an enforcement charge a person who acquires the property as a result of enforcement proceedings acquires the property free of the subordinate interest.**
- (3) An interest in property that is subordinate to an enforcement charge is subordinate to the extent of the amount recoverable under the judgment to which the enforcement charge relates at the time the enforcement proceedings are taken against the property.**
- (4) Nothing in this Part is to be construed so that it creates a priority among enforcement charges.**
- (5) A trustee in bankruptcy of a judgment debtor succeeds to the interest of a judgment creditor under an enforcement charge created before the date of the bankruptcy.**
- (6) Subsection (5) does not give the trustee priority over a security interest in serial numbered goods perfected by registration of a financing statement that does not include the serial number of the goods if the security interest would otherwise be effective against the trustee pursuant to the *Personal Property Security Act*.**

Comment: Under subsection (1), if a security interest in property is registered after the creation of enforcement charge and a subsequent enforcement charge is created after the registration of the security interest, the security interest is not subordinate to the second enforcement charge merely because it is subordinate to the first enforcement charge.

The purpose of subsection (4) is to ensure that nothing in Part 6 is interpreted as creating a priority among enforcement charges based on the time when enforcement charges are created. Subject to the certain preferences in the distribution of a distributable fund under Part 14, the balance of a distributable fund is distributed among all eligible claims on a *pro* basis.

The purpose of subsection (5) is to prevent “priority flips” that may otherwise occur upon bankruptcy or insolvency when an enforcement charge is registered in the registry prior to a

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security interest. Without this subsection, upon the bankruptcy of the judgment debtor, a subsequently perfected security interest would have priority over the enforcement charge. This subsection gives the trustee in bankruptcy the power to enforce the priority of an enforcement charge created under this Act over subordinate interests of secured creditors. The constitutionality of this approach in judgment enforcement legislation has yet to be tested in the courts; however, a similar section has existed in the Newfoundland and Labrador *Judgment Enforcement Act* as section 48(2) since 1997. Furthermore, in *Re Giffen*, [1998] 1 S.C.R. 91, the Supreme Court of Canada considered the relationship between section 20(b)(i) of the *Personal Property Security Act* (British Columbia) and priorities established by the *Bankruptcy and Insolvency Act*. At 119, Iacobucci J., writing the judgment of the Supreme Court of Canada, held that section 20(b)(i) did not have the effect of reordering the priorities established by section 136 of the *Bankruptcy and Insolvency Act*. The Court held that section 12(2) of the *Personal Property Security Act* provides a lessee with a proprietary interest in goods that vests in the trustee upon a bankruptcy of the lessee. The trustee, as a representative of the unsecured creditors is entitled to assert this proprietary interest. Similarly, section 38(5) provides that the trustee succeeds to the interest of the judgment creditor under an enforcement charge and the trustee is entitled to assert this charge, on behalf of all unsecured creditors, against a subordinate security interest. Any proceeds that are realized by the trustee as a consequence of realizing upon the enforcement charge will be distributed by the trustee among all creditors in accordance with the distribution scheme of the *Bankruptcy and Insolvency Act*. This section does not give the holder of an enforcement charge any priority over unsecured creditors in a distribution under the *Bankruptcy and Insolvency Act*. Another benefit of this subsection is that it removes the inducement that a subordinate secured creditor would otherwise have to petition a judgment debtor into bankruptcy merely for the purpose of advancing its priority status in relation to enforcement charges created under this Act.

Under subsection (6), an enforcement charge affecting non-inventory serial numbered goods created by a registration that includes the serial number of the goods will have priority over a security interest perfected by registration of a financing statement that does not include the serial number. If a trustee in bankruptcy of a judgment debtor “succeeds to the interest” of the judgment creditor holding that charge, one could conclude that the trustee thereby takes priority over the security interest. However, that result would reverse the priority rule specified by the PPSA in a case involving a competition between a trustee and the holder of a security interest in serial number goods held by the debtor as equipment. In those circumstances, the PPSA provides that a security interest perfected by registration of a financing statement that does not include the serial number of the goods prevails against the trustee. Accordingly, subsection (6) is designed to ensure that the PPSA rule governs.

Circumstances when a person is deemed to have knowledge of enforcement charge

- 39 For the purposes of this Part, a person, including a buyer or lessee of goods, is deemed to have knowledge of an enforcement charge if that person has knowledge that:**
- (a) a notice of judgment is registered against the owner of the property including the seller or lessor of goods; or**
 - (b) the property, which is charged by an enforcement charge, is the subject of enforcement proceedings or has been seized.**

Comment: Under section 32, registration of a notice of judgment does not constitute and form of constructive notice of the notice of judgment. Knowledge is an element in some of the priority rules that pertain to enforcement charges such as the rules found in sections 35(5) and (6), and 36.

PART 7: ENFORCEMENT INSTRUCTIONS

Introductory Comment: An enforcement proceeding may not be commenced until an enforcement instruction is delivered to an enforcement officer by a judgment creditor who has registered a notice of judgment under Part 5. This Part contains the rules with regard giving an enforcement instruction or a supplemental enforcement instruction, and the withdrawal or termination of an enforcement instruction.

Delivery of enforcement instruction to enforcement officer

- 40** **(1) A judgment creditor who wishes to initiate an enforcement proceeding must deliver an enforcement instruction to an enforcement officer.**
- (2) An enforcement instruction must**
- (a) be in the prescribed form; and**
 - (b) identify the enforcement proceedings that the enforcement officer is requested to undertake.**
- (3) An enforcement instruction must be accompanied by the following:**
- (a) a statement in the prescribed form, signed by the either the judgment creditor giving the enforcement instruction or the lawyer acting on behalf of that judgment creditor, that there is no court order, and no action taken under or in accordance with any statute or regulation, known to the person signing the statement that would impede or preclude enforcement of the judgment;**
 - (b) a search result issued by the registry indicating that**
 - (i) a notice of judgment has been registered in the registry with regard to the judgment to be enforced, and**
 - (ii) the registration of that notice of judgment remains in effect;**
 - (c) if an enforcement officer is instructed to seize specified serial numbered goods, a search result issued by the registry and dated not more than 5 days before the date on which the enforcement instruction is delivered to the enforcement officer, indicating that the notice of judgment registered by the judgment creditor identified the serial number of the goods;**
 - (d) a copy of the judgment to be enforced;**
 - (e) if an enforcement proceeding that an enforcement officer is instructed to take is the subject of a direction by the court, a copy of the entered court order as certified by the court;**
 - (f) payment of the fee prescribed for the delivery of an enforcement instruction to an enforcement officer or, if agreed to by the**

- enforcement officer, provision of an undertaking, in a form satisfactory to the enforcement officer, for the payment of the enforcement officer's fees;**
- (g) any other prescribed records.**
- (4) Unless the court otherwise orders, an enforcement officer may refrain from taking an enforcement proceeding until the enforcement officer receives:**
- (a) an undertaking, satisfactory to the enforcement officer, for the payment of the enforcement officer's fees and estimated expenses relating to the enforcement proceeding; and**
- (b) if required by the enforcement officer, security, satisfactory to the enforcement officer, to secure that payment of the enforcement officer's fees and estimated expenses.**
- (5) Unless the court orders otherwise, an enforcement officer may, in addition to or instead of realizing on any security provided under subsection (4)(b), enforce an undertaking referred to in subsection (4)(a) for payment of the enforcement officer's fees and expenses to the extent those fees and expenses were incurred in relation to the enforcement instruction with respect to which the undertaking was provided, in the same manner as if the undertaking were an enforceable contract between the enforcement officer and the person who provided the undertaking.**
- (6) Subject to subsection (4), an enforcement officer to whom an enforcement instruction is delivered must, promptly after receipt of the instruction and documents and records referred to in subsection (3), undertake the enforcement proceeding contained in the enforcement instruction if, in the opinion of the enforcement officer, the enforcement proceeding is**
- (a) in accordance with this Act; and**
- (b) in accordance with any court order made in relation to it.**
- (7) In this section, "serial numbered goods" has the same meaning as in section 34.**

Comment: The prescribed form of enforcement instruction referred to in subsection (2) should contain information fields that will call upon the judgment creditor to provide the following types of information to the extent that they are known to the judgment creditor:

- (a) The name and address of the judgment creditor,**
- (b) The name and address of the law firm, if any, that is acting for the judgment creditor in giving the enforcement instruction to the enforcement officer,**
- (c) If the name of the judgment creditor that appears on the judgment is different than the name of the judgment creditor delivering the enforcement instruction, there should be a reference to documentation that explains the change in the name of the judgment creditor,**
- (d) The name of the judgment debtor as it appears on the judgment;**
- (e) Any alias or alternative name used by judgment debtor or by which the judgment debtor may be known;**

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- (f) The current address of the judgment debtor if it is known to the judgment creditor;
- (g) The amount recoverable on the judgment;
- (h) The enforcement proceeding or proceedings that the judgment creditor requests the enforcement officer to utilize; and
- (i) A description and location of exigible property of the judgment debtor that is known to the judgment creditor.

A judgment creditor may deliver an enforcement instruction to an enforcement officer to utilize a specific enforcement proceeding or proceedings in relation to specified items of the judgment debtor's property. Alternatively, a judgment creditor may give an enforcement instruction that instructs the enforcement officer to utilize whatever enforcement proceedings are necessary to satisfy the amount recoverable.

The types of orders referred to in subsection (3)(a) that will preclude enforcement of the judgment include an order staying enforcement proceedings and a receiving order made under the *Bankruptcy and Insolvency Act*. The type of action under a statute that will preclude an enforcement proceeding includes the filing of an assignment into bankruptcy by the judgment debtor under the *Bankruptcy and Insolvency Act*.

The requirement of subsection (3)(d) that an enforcement instruction to be accompanied by a copy of the judgment to be enforced means that a judgment must be formally entered in the records of the court before an enforcement instruction may be given to an enforcement officer.

Under subsection (6), an enforcement officer may decline to undertake an enforcement proceeding if the enforcement officer receives an enforcement instruction that is not in accordance with this Act or a court order made with regard to the enforcement proceeding. Alternatively, the enforcement officer may apply to the court under section 7 for directions. The requirement in clause (a) that an enforcement proceedings must be in accordance with the Act includes the requirement imposed by section 10 that the exercise of any function or power must be done in good faith and in a commercially reasonable manner. If the enforcement instruction is a proper instruction and the enforcement officer declines to undertake a enforcement proceeding contained in the instruction, a judgment creditor may apply to the court under section 7 for an order directing the enforcement officer to undertake the enforcement proceeding.

Enforcement officer's authority

- 41 (1) Unless otherwise provided in another enactment, an enforcement officer has the power and authority to undertake enforcement proceedings contained in an enforcement instruction with respect to property located anywhere in the province/territory without the need for further authority from the court.**
- (2) An enforcement proceeding taken by an enforcement officer is not invalid merely because it is carried out in the province/territory at a place outside the area within which the enforcement officer is, under the laws of the province/territory or under the terms of the enforcement officer's contract, authorized to operate.**
- (3) If an enforcement officer receives subsisting enforcement instructions from 2 or more instructing judgment creditors, the enforcement officer has the power and authority to undertake any or all the enforcement**

proceedings contained in the enforcement instructions that are necessary to satisfy the amount recoverable under the judgments relating to each subsisting enforcement instruction.

Comment: An enforcement officer's authority to take enforcement proceedings is derived from the judgment granted by the court and the enforcement instruction given to the enforcement officer by the judgment creditor. It is no longer necessary for a judgment creditor to request the court to issue a writ of seizure and sale or other form of a writ of execution before commencing an enforcement proceeding.

Supplementary enforcement instruction

42 (1) An enforcement instruction given to an enforcement officer may be amended or supplemented by a supplementary enforcement instruction.

(2) A supplementary enforcement instruction must:

- (a) be in the prescribed form; and**
- (b) identify any enforcement proceedings that the enforcement officer is being requested to undertake or refrain from undertaking if a prior enforcement instruction instructed the enforcement officer to take the enforcement proceeding.**

(3) An instructing judgment creditor

- (a) must, in any of the following cases, promptly give to the enforcement officer a supplementary enforcement instruction or withdraw the enforcement instruction if:**
 - (i) all or any portion of the judgment is discharged by court order, payment of money or transfer of property,**
 - (ii) enforcement proceedings with respect to the judgment are stayed by an order of the court, by an agreement or otherwise,**
 - (iii) material circumstances affecting the enforcement of the judgment have changed, to the knowledge of the judgment creditor, since the giving of the enforcement instruction,**
 - (iv) the instructing judgment creditor receives, from the enforcement officer, a written demand to deliver a supplementary enforcement instruction or withdraw the enforcement instruction; and**
- (b) may, in any other case, deliver to the enforcement officer a supplementary enforcement instruction.**

Comment: Under subsection (2), the prescribed form should contain information fields that will call upon the judgment creditor to provide the following types of information:

- (a) The amount of any money or value of property referred to in subsection (3)(a)(i),
- (b) The amount recoverable that remains under the judgment,
- (c) A description of any circumstances referred to in subsection (3)(a)(iii),
- (d) Any changes to information provided by the judgment creditor in a previous enforcement instruction, and
- (e) Any other prescribed information.

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Under subsection (3), examples of where the enforcement officer may, clause (a)(iv), demand a supplementary instruction include:

- (a) The enforcement officer receives information that the judgment debtor has become a bankrupt under the *Bankruptcy and Insolvency Act*, or
- (b) The enforcement officer becomes aware of a court order staying enforcement proceedings.

If a judgment creditor fails to deliver a supplementary instruction when required by the Act, the judgment creditor may be liable for damages under section 11 to any person who suffers loss or damage as a consequence of such a failure. The judgment debtor or other person with standing may make an application under section 7 for an order directing the judgment creditor to deliver a supplementary instruction to the enforcement officer and that all enforcement proceedings be stayed until the judgment creditor complies with the Act and the orders of the court.

Withdrawal of enforcement instruction

43 (1) An instructing judgment creditor may withdraw an enforcement instruction at any time by giving a notice in writing to the enforcement officer.

(2) If an instructing judgment creditor withdraws an enforcement instruction under subsection (1):

- (a) the enforcement officer must release from seizure any property that had been seized under the authority of the enforcement instruction unless the enforcement officer has received an enforcement instruction from another instructing judgment creditor to seize that property of the judgment debtor, and**
- (b) the instructing judgment creditor is obligated to pay the enforcement officer any fees and expenses to which the enforcement officer is entitled to receive for services provided in relation to actions taken by the enforcement officer under the enforcement instruction that is withdrawn.**

Comment: Self-explanatory.

Termination of enforcement instruction

44 (1) If an enforcement instruction requests an enforcement officer to undertake an enforcement proceeding or to do any act that is not in accordance with this Act or a court order, the enforcement officer may terminate the enforcement instruction by giving a notice in writing to the instructing judgment creditor.

(2) An enforcement officer may terminate an enforcement instruction by giving a notice in writing to the instructing judgment creditor

- (a) when all enforcement proceedings that the enforcement officer is instructed to take under the enforcement instruction are completed;**
- (b) if the enforcement officer is unable to locate any property of the judgment debtor that will satisfy the enforcement instruction; or**
- (c) at any time after 6 months has elapsed from the date that the**

enforcement instruction or the last supplementary enforcement instruction relating to it was received, if no enforcement proceeding undertaken by the enforcement officer under the enforcement instruction is continuing.

PART 8: OBTAINING DISCLOSURE

Introductory Comment: An effective process for compelling a judgment debtor to disclose information with regard to the name or names under which a judgment debtor holds property as well as the description and location of such property is a crucial aspect of a judgment creditor's ability to enforce satisfaction of a judgment.

Compelling disclosure of information

45 (1) Subject to subsection (2), an instructing judgment creditor may do one or more of the following:

- (a) deliver an enforcement instruction requiring a judgment debtor to complete and return a questionnaire to the enforcement officer that discloses:**
 - (i) all property in which the judgment debtor has an interest and any relevant information about that property including, without limitation, its whereabouts, any serial numbers or other identifying information by which the property can be identified, the name or alias under which it is registered, its estimated market value, the outstanding balance of any mortgage, lien or other encumbrance against the property and the identity of the person who holds the mortgage, lien or encumbrance,**
 - (ii) all debts, accounts or other funds that are currently due and payable, or that will in the future become payable, to the judgment debtor, and any relevant information about each of those debts, accounts or other funds including, without limitation, the amount that is or will become payable, from whom it is payable, when it became or becomes payable and the name of the person to whom it is to be paid, and**
 - (iii) any other information specified by an instructing judgment creditor that may reasonably assist the judgment creditor with the enforcement of a judgment against the judgment debtor including, without limitation, copies of any documents or records in the possession or control of the judgment debtor that contain information pertaining to the matters specified in subclauses (i) and (ii), or that are specified by the enforcement officer;**
- (b) deliver an enforcement instruction requiring a judgment debtor to attend before the enforcement officer, or before any person designated by the enforcement officer at a set time and place for**

- examination under oath to answer questions about any matter referred to in clause (a);**
- (c) apply to the court for an order requiring a judgment debtor or any other person the court considers appropriate to
 - (i) disclose to a person appointed by the court information that the disclosing person possesses about any matter referred to in clause (a), or**
 - (ii) attend before the enforcement officer, or before any person designated by the court at a set time and place for examination under oath to answer questions about any matter referred to in clause (a); and****
 - (d) apply to the court for an order requiring a judgment debtor to provide an authorization, in form and content satisfactory to the court, authorizing the person to whom the authorization is addressed to disclose to the judgment creditor or the enforcement officer, as the court may direct, information contained in the recipient's records respecting the judgment debtor and any property in which the judgment debtor has an interest.**
- (2) Under subsection (1)(d), a court may make an order requiring a judgment debtor to provide an authorization addressed to:**
- (a) [insert name of the vital statistics registry in the enacting province/territory],**
 - (b) [insert name of the motor vehicles registry in the enacting province/territory],**
 - (c) [insert name of the medical services plan in the enacting province/territory].**
- (3) Nothing in subsection (1) requires a lawyer to disclose communications that are subject to lawyer-client privilege.**

Comment: Subsection (1) describes four methods that may be utilized to compel a judgment debtor to disclose information.

- (a) A questionnaire directed to a judgment debtor under clause (a) is most expeditious and cost effective means of obtaining information from a judgment debtor. The judgment debtor's responses to the questionnaire are not under oath; however, it is an offence if a judgment debtor fails to complete the questionnaire or fails to provide complete and accurate information in response to the questionnaire.
- (b) If it is be desirable to obtain answers from a judgment debtor under oath, clause (b) provides for examination of the judgment debtor under oath; however, this will be a more costly method of obtaining information from the judgment debtor.
- (c) If information with regard to the matters referred to in clause (a) is within the knowledge of persons other than the judgment debtor, clause (c) provides for an application to be made to the court for an order that the judgment debtor or other person that the court considers appropriate disclose the information or attend for examination under oath. Examples of an "other person" may include a spouse of the judgment debtor, a banker to the judgment debtor, or a judgment debtor's accountant or broker.

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- (d) Judgment creditors may have difficulty ascertaining the legal name or other name that a judgment debtor has used in transactions involving property owned by the judgment debtor. Such information may be in the possession of various types of agencies that will not provide such information without the authorization of the person to whom the information pertains. Under clause (d), the court may order the judgment debtor to provide the required authorization. Subsection (2) contains examples of several government agencies that may have information about a judgment debtor that may provide assistance with regard to the enforcement of a judgment. A province/territory may consider permitting a court to require a judgment debtor to authorize the disclosure by such agencies to a judgment creditor of specified information. Clauses (a) to (c) are placed within square brackets to indicate that these agencies or government departments are optional examples.

Time within which to respond to demand for disclosure

- 46** A judgment debtor who is required to complete and return a questionnaire under section 45(1)(a) or to attend at an examination under section 45(1)(b), or a person who is required to disclose information under section 45(1)(c) or to authorize disclosure of information under section 45(1)(d), must comply with that requirement within 10 days after receipt of the applicable demand or order or within such further time as the enforcement officer may stipulate or the court may order.

Comment: Self-explanatory.

Consequences of failing to make a required disclosure

- 47(1)** On application, the court may do one or more of the following:
- (a) order a judgment debtor to provide to the enforcement officer complete and accurate information in response to
 - (i) a questionnaire that the judgment debtor is required to complete under section 45(1)(a), or
 - (ii) an examination that the judgment debtor is required to attend under section 45(1)(b);
 - (b) if a judgment debtor fails to complete a questionnaire that the judgment debtor is required to complete under section 45(1)(a) or fails to attend an examination that the judgment debtor is required to attend under section 45(1)(b) or if the court is satisfied that the response to a questionnaire or an examination is incomplete or erroneous, authorize the enforcement officer or a person appointed by the enforcement officer to enter any specified premises of the judgment debtor in which it is reasonable to assume are located records and documents disclosing the existence or location of property of the judgment debtor, and to
 - (i) examine those records and documents, or
 - (ii) take temporary possession of those records and documents and remove them from the premises for the purpose of making copies;
 - (c) order a judgment debtor or other person referred to in section

45(1)(c) to refrain from destroying, hiding or removing from the province any records or documents indicating the existence and location of property of the judgment debtor.

- (2) An order must not be made under subsection (1)(b) unless the court is satisfied that information, specified in the application, regarding property of a judgment debtor cannot otherwise be reasonably obtained.**
- (3) A person commits an offence who, without lawful excuse,
 - (a) fails to comply with an order made under subsection (1)(a) or (c), or section 45(1)(c) or (d); or**
 - (b) fails to provide complete and accurate information in any questionnaire, examination or disclosure in accordance with a court order made under subsection (1)(a) or section 45(1)(c).****
- (4) An offence is not committed under subsection (3) and an order must not be made under subsection (1) unless the requirement that a judgment debtor complete a questionnaire under section 45(1)(a), the requirement that a judgment debtor attend an examination under section 45(1)(b) or the requirement that a person disclose information or attend an examination under section 45(1)(c), as the case may be, was personally delivered to the person to whom the requirement is directed.**

Comment: Prosecution of an offence under subsection (3) is a last resort if the judgment debtor does not properly respond to a court order made under subsection (1).

Enforcement officer must disclose information to other judgment creditors who request

48 If information respecting a judgment debtor or property of a judgment debtor is disclosed to an enforcement officer under this Part, the enforcement officer must, on receiving a written request to do so, disclose requested information to another instructing judgment creditor who has a judgment against the judgment debtor.

Comment: The purpose of this section is to ensure that information gathered by an enforcement officer on behalf of one judgment creditor is made available to all instructing judgment creditors. A judgment debtor should not be put through the disclosure process by a series of judgment creditors and other instructing judgment creditors not be put to the expense of compelling disclosure of information that a judgment debtor has already disclosed to the enforcement officer.

PART 9 - ENFORCEMENT PROCEEDINGS AGAINST PERSONAL PROPERTY

Division 1: PERSONAL PROPERTY GENERALLY

Introductory Comment: This Part deals with the seizure and sale of personal property. It is

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divided into several Divisions. Division 1 applies generally to the seizure and sale of all forms of personal property except to the extent that a subsequent Division excludes the application of all or some part of Division 1 or creates special rules that apply to a specific type of personal property

Definitions

49 In this Part,
"exigible property" means exigible property as defined in section 1 that is personal property;

"license" includes, without limitation, any right or interest, whether or not exclusive, that entitles the licensee to manufacture, produce or reproduce, sell, or otherwise deal with property, to transport persons or property, to provide services, to perform or copy a work or to engage in an undertaking that is granted under any statutory authority, which right is transferable by a judgment debtor with or without the consent of the grantor of the license.

Application of this Division

- 50** (1) Except as otherwise provided in this Part, all personal property of a judgment debtor, whether legal, equitable or statutory, is subject to seizure and disposition or to an order of the court including, but not limited to:
- (a) a chose in action;
 - (b) a license;
 - (c) a copyright, patent, trade-mark, industrial design, trade secret or other form of intellectual property; and
 - (d) a beneficial interest in a trust.
- (2) Unless otherwise provided in this Part, this Division applies to enforcement proceedings under this Part.

Comment: Self-explanatory.

Enforcement officer entitled to seize sufficient exigible property

- 51** Except as otherwise provided in this Act, when an enforcement officer receives enforcement instructions from an instructing judgment creditor with regard to a judgment debtor, he or she is entitled to seize sufficient exigible property of the judgment debtor that when sold or otherwise disposed of by the enforcement officer will satisfy, in whole or in part:
- (a) the amount recoverable under the judgments of any instructing judgment creditor with regard to that judgment debtor; and
 - (b) the amount of any claim known to the enforcement officer that must be paid out of a distributable fund constituted under Part 14 in priority to the eligible claims of the instructing judgment creditors referred to in clause (a).

Comment: An enforcement officer's authority to seize a judgment debtor's personal property is

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derived from this Act upon receiving enforcement instructions from a judgment creditor. It is no longer necessary to request the court to issue a writ of execution to give an enforcement officer authority to seize and sell a judgment debtor's personal property. In section 1(1), "exigible property" is defined as property that is subject to an enforcement charge.

An enforcement officer may seize exigible property, whose value at a sale conducted by an enforcement officer, may exceed the amount recoverable. This may arise in the following examples:

- (a) The seized property is the only exigible asset that the enforcement officer can find with sufficient value to satisfy the amount recoverable, or
- (b) It would not be commercially reasonable to expect the enforcement officer to seize and sell many items of small value, if the judgment could be satisfied by the seizure of one item despite the fact that the price that the one item may bring at an enforcement officer's sale will exceed the amount recoverable.

Any surplus remaining after paying out the amount recoverable on the judgments of all instructing judgment creditors is payable to the judgment debtor.

Methods of seizure by an enforcement officer

52 (1) An enforcement officer is entitled to seize exigible property of a judgment debtor:

- (a) **if property is tangible property, subject to subsection (2),**
 - (i) **by taking physical possession of property;**
 - (ii) **without taking immediate physical possession, by giving a notice of seizure at the place where the property is located to**
 - (A) **the judgment debtor or an adult member of the judgment debtor's household, or**
 - (B) **an adult person who is in possession or control of the property;**
 - (iii) **without taking immediate physical possession, by posting a notice of seizure to a conspicuous place on the property or in a conspicuous place in close proximity to the seized property;**
- (b) **if property is intangible property other than an account under Division 4, a security or securities entitlement under Division 5, or a license, by giving a notice of seizure**
 - (i) **to the judgment debtor, or**
 - (ii) **to the person whose obligation comprises the property;**
- (c) **if property is an account, by effecting seizure under Division 4;**
- (d) **if property is a security or security entitlement, as those terms are defined in Division 5, by effecting a seizure under Division 5;**
- (e) **if property is intellectual property, by effecting seizure under Division 6;**
- (f) **if property is a license, other than a license of intellectual property, by giving a notice of seizure to the judgment debtor and the licensor;**
- (g) **if property is a license of intellectual property by giving a notice of seizure to the judgment debtor, the licensor, and if**

- appropriate to the office in which the intellectual property is registered;
- (h) if property is a negotiable instrument, by taking possession of the instrument;
 - (i) if property is a fixture or crops, by giving a notice of seizure to the judgment debtor and the owner of the land to which the fixture is affixed or on which the crops are growing;
 - (j) by any other method that is ordered by the court.
- (2) An enforcement officer must not seize personal property of a judgment debtor if the seizure interferes with the possession, or a right to possession, of a person that was lawfully acquired before the creation of the enforcement charge on the property.
- (3) If an enforcement officer effects the seizure of a license that contains a provision that the license is or may be terminated by or by reason of its seizure, such a provision is not effective and an enforcement officer is entitled to maintain the seizure of the license despite that provision.
- (4) If it is subsequently determined under Part 12 that one or more of the items of property seized under subsection (1) is exempt property or is not required to satisfy the amount recoverable under the judgments of the instructing judgment creditors, and the property has not been disposed of by the enforcement officer, the property must be released from seizure by the enforcement officer as soon as practicable after the determination is made.
- (5) In this section, “intellectual property” has the same meaning as in section 126.

Comment: In this Part, exigible property of the judgment debtor means personal property of the judgment debtor that is subject to an enforcement charge including property held in joint tenancy whether or not the property is in the possession of the judgment debtor. Clause (a) applies to tangible personal property. Subclause (ii) applies if it is not practicable for the enforcement officer to take immediate physical possession of seized property. Under paragraph (B), an adult person may be an employee of the judgment debtor or a custodian of the judgment debtor’s property. Subclause (iii) applies if an enforcement officer is unable to take immediate physical possession of seized property and there is nobody in possession or control under subclause (ii) to whom a notice of seizure can be given.

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Under clause (b), intangible property includes a chose in action.

With regard to clause (d), Division 5 provides a complete code in respect of the seizure of a security or security entitlement as those terms are defined in Division 5.

With regard to clause (i), Division 2 contains specific provisions with regard to the severance or sale of fixtures and crops.

Clause (j) enables the court to make an order with regard to the method of seizing forms of personal property that do not readily fit into the preceding clauses. Examples may include foreshore leases and water lots.

Under subsection (2), an enforcement officer must not take physical possession of personal property of the judgment debtor that is in the possession of a third party if taking physical possession will interfere with the possession or right to possession of the third party that was lawfully acquired before the creation of an enforcement charge on the property. For example, if the judgment debtor has leased the property to a third person or has sold the property to a third person under a contract of sale, taking physical possession of the property would interfere with the rights of the lessee or buyer respectively. In these circumstances, the enforcement officer may seize the lessor's or seller's interest under Division 3 of this Part.

If a judgment debtor has an immediate right to possession of property in the possession of a third party, section 54 applies.

In subsection (3), exempt property is defined in section 1. If, in the circumstances described in subsection (3), the property is sold by an enforcement officer and there are excess proceeds of sale, section 184(1)(i) provides that the balance remaining in a distributable fund is paid to the judgment debtor or person who is otherwise entitled to the funds.

If a notice of seizure is not given to the judgment debtor at the time of seizure, section 62 requires an enforcement officer to give the judgment debtor a notice of seizure as soon as practicable after the seizure.

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| <p>LRCNS Comment: We do not propose the adoption of s.52(3) (termination of licenses), for reasons explained at page 28 of this Discussion Paper.</p> |
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Seizure powers of enforcement officer

53(1) Subject to subsection (2), for the purpose of carrying out a seizure of exigible property under this Part, an enforcement officer:

- (a) is entitled to enter a location or premises occupied by the judgment debtor to carry out a seizure of a judgment debtor's property;**
- (b) who has reasonable grounds to believe that property of the judgment debtor is located on premises of a person other than the judgment debtor, may, after giving notice to the owner or occupant of the premises, enter the premises to carry out the seizure of the judgment debtor's property and remove the seized property;**

- (c) **is entitled to use reasonable force to gain access to a location or premises referred to in clause (a) or (b) to carry out a seizure of a judgment debtor's property;**
 - (d) **who gained lawful entry to a location or premises referred to in clause (a) or (b) to carry out a seizure of a judgment debtor's property, is entitled to gain entry by any means that are reasonable in the circumstances to any interior room, enclosure or container within the location or premises;**
 - (e) **who used force to gain entry to a location or premises referred to in clause (a) or (b) must make the location or premises reasonably secure before leaving; and**
 - (f) **is entitled, at or after the time of seizure of a judgment debtor's property, to take possession of, and remove the property from the location or premises where the seizure occurred.**
- (2) **An enforcement officer may not enter or use force for the purposes of gaining access to a residence, unless the enforcement officer does so in accordance with**
- (a) **permission granted by the occupant of the residence; or**
 - (b) **an order of the court.**

Comment: This section describes an enforcement officer's general powers to seize personal property. With regard to those forms of personal property that are dealt with in one of the subsequent Divisions of this Part, an enforcement officer may have additional powers of seizure. For example, an account owing to a debtor may, under Division 4, be seized by delivering a notice of seizure to the account debtor.

This section does not entitle an enforcement officer to conduct a search of the judgment debtor's person to find exigible property in the form of jewels or money that may be located on the person.

Property in possession of or under control of third parties

- 54 (1) If a judgment debtor has an immediate right to possession of exigible property, an enforcement officer may seize and remove that property from the possession of a person who:**
- (a) **acquired the property or the right to possession of the property subject to the enforcement charge;**
 - (b) **is a gratuitous bailee or custodian of the property who is in possession with the consent of the judgment debtor; or**
 - (c) **subject to section 57, is a landlord of the judgment debtor who exercised a right of distress in respect of property of the judgment debtor.**
- (2) **Despite section 52(3), and subject to Part 11, an enforcement officer is entitled to seize and remove exigible property that is co-owned by a judgment debtor even though, at the time of seizure, the property is in the possession of, or is subject to the right of possession of a co-owner other than the judgment debtor.**

- (3) A third party referred to in subsections (1) or (2) must:**
- (a) do whichever of the following is applicable:**
 - (i) immediately deliver the property to the enforcement officer, or**
 - (ii) if the property is not at the location where a copy of the notice of seizure is given to the third party, inform the enforcement officer of the place at which the enforcement officer may take physical possession of the property and take reasonable steps to ensure that the property remains at that place until the enforcement officer takes possession of the property; and**
 - (b) comply with the direction of the enforcement officer to do any one or more of the following:**
 - (i) immediately take any action that is necessary to transfer the property to the enforcement officer,**
 - (ii) take or refrain from taking any action in relation to the property as directed by the enforcement officer, and**
 - (iii) if the third party is, as against the judgment debtor, entitled to retain the property, or if the third party does not have possession or control of the property, inform the enforcement officer of that fact and that, as a result, the third party is not required to comply with subclauses (i) and (ii) of this clause.**
- (4) A direction given by an enforcement officer under subsection (3)(b)(i) or (ii), is not binding on a person who is in possession of the property, other than a third party referred to in subsection (2), to the extent that the directions are inconsistent with possessory rights of the third party that arose before the enforcement charge charged the property.**
- (5) If a person complies with a direction given an enforcement officer made under this section, the enforcement officer must compensate that person for expenses reasonably incurred by the third party in compliance with that direction.**
- (6) If a person declines to comply or continue to comply with a direction given by an enforcement officer under subsection (3)(b)(ii), the third party must immediately surrender and deliver up possession of the property to the enforcement officer.**
- (7) If an enforcement officer seizes and removes exigible property of a judgment debtor from the possession of a person other than the judgment debtor, that person is discharged from any responsibility that the person may have had to hold the property for, or to return it to any person.**

- (8) If an enforcement officer seizes and removes exigible property of the judgment debtor from the possession of a person other than the judgment debtor and the enforcement officer is subsequently satisfied that the person has a right to retain the property, the enforcement officer must revoke the seizure and release the property to that person.**
- (9) If an enforcement officer seizes and takes possession of exigible property of the judgment debtor from the possession of a person other than the judgment debtor and that person does not assert any claim to possession of the seized property as soon practicable after the seizure of the property, the enforcement officer is not liable for any pecuniary loss suffered by that person.**

Comment: The term “exigible property” is defined in section 49 as meaning property of the judgment debtor, including property held in joint tenancy, whether or not owned or in the possession of the judgment debtor that is subject to an enforcement charge. Co-owned property and the rights of co-owners in respect of seized property are dealt with more extensively in Part 11.

LRCNS Comment: We do not propose the adoption of s.54(2) (co-owned property not in possession of the debtor), for reasons explained at page 28 of this Discussion Paper.

Licenses

- 55 (1) When an enforcement officer seizes a judgment debtor’s right under or interest in a license referred to in section 52(1)(f), the enforcement officer may dispose of it only in accordance with the terms and conditions under which the license was granted or that otherwise pertain to it.**
- (2) If it is a term of a license that the license may not be transferred without the consent or agreement of the licensor, the licensor must not unreasonably withhold his or her consent or agreement to a sale, transfer or other disposition by the enforcement officer who effected the seizure of the license.**
 - (3) If a licensor refuses to consent or agree to a transfer of a license by an enforcement officer who effected the seizure of the license, the enforcement officer may:
 - (a) release the seizure; or**
 - (b) apply to the court with notice to the licensor for an order requiring the licensor to consent or agree to the transfer of the license.****
 - (4) On an application made under subsection (3), after considering the reason why the licensor has refused to consent or agree to the transfer of the license and the interests of the instructing judgment creditors including whether or not the judgment debtor has other property from**

which the amount recoverable under the judgments to which the seizure relates may be satisfied, the court may order that the licensor consent or agree to a transfer of a license with or without conditions.

Comment: If a license provides that it is not transferable, subsections (2) to (4) do not apply. If a license provides that it is transferable subject to the consent or agreement of the licensor, and the proposed transferee is a competitor, for example, the licensor may have a good reason for not consenting to a transfer. If refusal appears to be arbitrary or the judgment debtor does not appear to have any other property from which the judgments of the instructing judgment creditors may be satisfied, the court may be persuaded to override a refusal to consent or agree to a transfer.

LRCNS Comment: We do not propose the adoption of ss.55(2), (3) and (4) (overriding licensor's refusal to consent to transfer), for reasons explained at page 28 of this Discussion Paper.

Products of aquaculture

56 (1) In this section,

"aquaculture" means the cultivation of plants and animals that, at most stages of their development or life cycles, live in an aquatic environment;

"fish" means fish, including shellfish and crustaceans and marine mammals;

"products of aquaculture" includes plants, fish and animals that

- (a) are in their unmanufactured state,**
- (b) are in the possession of a person whose business or occupation is aquaculture, and**
- (c) at most stages of their development or life cycles, live in an aquatic environment;**

(2) When an enforcement officer seizes products of aquaculture, sections 77 to 81 apply to the harvesting, harvesting expenses and sale of products of aquaculture by the enforcement officer.

Comment: Products of aquaculture are personal property. If they are harvested and sold before they have matured, the proceeds of sale will likely be much less than if the sale or disposition is postponed until they have matured. In clause (a) of the definition of products of aquaculture, "unmanufactured state" means a product that has not been processed or canned.

Property subject to a landlord's statutory right of distress

57 When an enforcement officer seizes exigible property of a judgment debtor that is subject to the right of distress by a lessor of land by virtue of the tenant's default in payment of rent, the enforcement officer must neither maintain the seizure nor sell the property unless the enforcement officer has reasonable grounds to believe that the price recoverable on the sale of the seized property will be more than sufficient to pay

- (a) the amount of rent owing at the date of seizure, to any maximum provided by [insert name of the tenancy legislation of the province / territory]; and**

(b) the costs of seizure and sale.

Comment: If a province/territory does not have landlord and tenant legislation that protects their right of distress against seizure of a tenant's property by a judgment creditor, this section may be omitted. If a province/territory has landlord and tenant legislation that provides that a judgment creditor may only seize the property of a judgment debtor located on a landlord's premises if any arrears of rent (usually to a maximum is one year's arrears of rent) are paid to the landlord, this section should be included. Under the latter type of legislation, a judgment creditor is entitled to recover the amount paid to the landlord from the proceeds of execution; however, the requirement that a judgment creditor pay the landlord before proceeding with the seizure is a significant deterrent to seizing a judgment debtor's property located on rented premises. This section overcomes this problem by permitting the enforcement officer to proceed with the seizure if the conditions stipulated in the section are satisfied. When an enforcement officer seizes personal property of a judgment debtor, the enforcement officer is required to:

- (a) ascertain whether the premises, where the seized property is located, are occupied by the judgment debtor as a tenant;
- (b) if so, ascertain from the landlord if there are any arrears of rent owing by the judgment debtor and, if so, the amount of the arrears; and
- (c) if there are arrears of rent owing, determine whether or not the price likely to be recovered on a sale of the seized property will likely be more than sufficient to pay the arrears of rent and the costs of the seizure and sale.

The enforcement officer may be able to make these determinations prior to making an actual seizure. If the determinations are not made until after the seizure of the property, and the enforcement officer determines that the likely proceeds of a sale will not be sufficient, the enforcement officer must release the seizure.

If the enforcement officer maintains the seizure and sells the seized property, the landlord has a claim for payment from the distributable fund under Part 14 that ranks with judgment creditors who have an eligible claim notwithstanding that the landlord has not reduced his or her claim for arrears to a judgment against the judgment debtor. The landlord's claim is limited to the proceeds in the distributable fund that are attributable to the sale of the judgment debtor's property that was seized from the landlord's premises. The landlord's claim is also limited to the arrears of rent for the period (normally one year) specified in the landlord and tenant legislation of the province or territory.

A coincidental amendment to landlord and tenant legislation of the province/territory will be necessary to remove any current obligation that requires an enforcement officer to pay arrears of rent to the landlord prior to seizure of a judgment debtor's property. The legislation should continue to specify

- (a) whether or not a landlord is entitled to any special preference or with regard to a claim for arrears of rent; and
- (b) if so, the maximum period for which a preference may be claimed by the landlord.

Property subject to exclusive possession order under family property legislation

58 **If an enforcement officer seizes exigible property of a judgment debtor that is subject to an order for exclusive possession under [Insert title of family property legislation in the enacting province/territory], the enforcement officer may only maintain the seizure and proceed with the enforcement proceeding if the order for exclusive possession was made after the**

creation of an enforcement charge that is being enforced in the enforcement proceeding.

Comment: Family property legislation in many provinces and territories provides that the court may make an order giving exclusive possession of family property to one of the spouses. Such orders often relate to both real and personal property. With respect to land, family property legislation usually provides that an order for exclusive possession may be registered against an interest in land. The priority between such an order and other interests in land is normally determined either in accordance with rules found in the family property legislation or in accordance with priority rules that apply to interests in land generally. In many provinces and territories, the family property legislation is silent with regard to the priority between an order for exclusive possession of personal property and other interests in personal property. This section creates a priority rule. Each enacting province and territory should review its family property legislation with regard to the priority between an order for exclusive possession of personal property and other interests. The effectiveness of exclusive possession orders will be significantly enhanced if provinces and territories enact legislation that

- (a) permits an exclusive possession order to be registered in the registry prescribed under this Act; and
- (b) provides that upon registration, subsequently registered interests are subordinated to a registered order for exclusive possession.

Until provision is made for the registration of orders for exclusive possession in the registry, this section will apply. If an order for exclusive possession exists and an enforcement officer seizes property that is subject to the order, the onus is on the spouse in whose favour an order was made to satisfy the enforcement officer that the order was made prior to the registration of a notice of judgment giving rise to the enforcement charge that is being enforced. Normally, this would be done by providing the enforcement officer with a copy of the order.

Appointment of bailee to hold seized property

- 59 If an enforcement officer seizes exigible property without taking physical possession of it, the enforcement officer may appoint any person including the judgment debtor to hold the seized exigible property as the enforcement officer's bailee if the person signs a written undertaking to act as bailee.**

Comment: Under section 52, an enforcement officer may seize personal property without taking physical possession and removing the property from the location where the seizure occurred. In some circumstances, it may not be practical for the enforcement officer to immediately remove the seized property from the location where it was seized. In these circumstances, the enforcement officer may appoint a person to be a bailee of the enforcement officer. If the person declines to serve as a bailee, the enforcement officer must either remove the seized property or take other steps to protect the seized property such as placing a deputy or agent in possession of the property.

Obligations of bailee appointed by enforcement officer

- 60 (1) A person who is a bailee of property under section 59:**
- (a) **must hold it as a bailee of the enforcement officer subject to the terms and conditions contained in the written undertaking signed by the bailee;**
 - (b) **is subject to the obligations of a bailee of property for value at**

- common law; and
- (c) **must deliver the property to the enforcement officer on demand of the enforcement officer.**

- (2) **A person who is a bailee of property under section 59 may terminate the bailment on giving reasonable notice to the enforcement officer and surrendering possession of the property to the enforcement officer.**

Comment: At common law, a bailee must use the care that a careful, vigilant person would use in relation to his or her own property of a similar nature. A bailee is responsible for the negligence of himself or herself and his or her agents or employees and for their fraud or malice if their acts are done within the scope of their employment. A bailee is not an insurer of the property; however, if the property is lost, stolen or damaged, the onus is on the bailee to prove that he or she was not negligent.

Bailee entitled to costs incurred in preserving and protecting property

- 61 (1) **A person who is a bailee of property under section 59, other than the judgment debtor, is entitled to reasonable costs incurred in**
 - (a) **preserving and protecting the property; and**
 - (b) **delivering the property to the enforcement officer.**

- (2) **If a person who is a bailee of property under section 59 is the judgment debtor, the enforcement officer may agree, as a term of the bailment agreement, to compensate the judgment debtor with regard to reasonable costs incurred in**
 - (a) **preserving and protecting the property; and**
 - (b) **delivering the property to the enforcement officer.**

Comment: If the bailee is the judgment debtor, there is no entitlement to compensation for costs incurred by the bailee. However, there may be circumstances when an enforcement officer decides that a judgment debtor should be compensated for reasonable out-of-pocket expenses. For example, a judgment debtor may need to incur heating or refrigeration costs in order to preserve and protect the property.

When notice of seizure must be given to the judgment debtor and others

- 62 (1) **Unless a notice of seizure is given to a judgment debtor at the time of a seizure by an enforcement officer, a notice of seizure of the a judgment debtor's property must be given to the judgment debtor as soon as practicable after the seizure of property.**

- (2) **If property of a judgment debtor is seized and removed from the possession of a person other the judgment debtor, the enforcement officer must give a copy of the notice of seizure to such person at the time of the seizure or as soon as practicable after the seizure.**

Comment: Under section 52, an enforcement officer may seize a judgment debtor's property when the judgment debtor is not personally present. In such cases, a copy of the notice of seizure must be given to the judgment debtor as soon as practicable after the seizure.

Irregularities

- 63 (1) A seizure or disposition of property by an enforcement officer under this Part is not invalidated by an irregularity in**
- (a) a notice of seizure, demand for delivery, direction, statement, enforcement instruction or registration of a notice of judgment creating an enforcement charge that is being enforced by the enforcement officer; or**
 - (b) the procedure by which the seizure or disposition is carried out; or**
- (2) Despite subsection (1), if the court is satisfied that a person is or is likely to be prejudiced by an irregularity in the procedure by which the seizure was carried out or the disposition of the seized property is proposed to be conducted, the court may**
- (a) order that the seized property be released from seizure by the enforcement officer; or**
 - (b) give directions with regard to the proposed disposition of the seized property.**

Comment: The irregularities referred to in subsections (1) are those such as typographical errors in names, addresses or dates that do not have the effect of misleading anyone. These types of irregularities should not have the effect of invalidating a sale of seized property that is otherwise valid. A proposed sale is not invalidated unless a person affected by the irregularity satisfies the court that he or she is or is likely to be prejudiced by the irregularity. If a defect in the registration of a notice of judgment is seriously misleading, the effect of section 33(1)(e) [which incorporates section 43(7) of the *Personal Property Security Act* (British Columbia)] is that the registration of the notice of judgment is invalid.

Method of disposition to realize upon value of seized property

- 64 (1) Subject to section 10, an enforcement officer must, unless the court orders otherwise, dispose of seized property in the manner that the enforcement officer, acting reasonably, considers offers the best opportunity to maximize the proceeds that may be anticipated from a disposition of the seized property by the enforcement officer.**
- (2) On application, the court may delay the disposition of seized property if the court is satisfied that the method of disposition selected by the enforcement officer is unlikely to attract an offer to purchase the property at a price that could be obtained by another method of disposition or by utilizing the same method of disposition at a later time.**
- (3) Unless the court orders otherwise, any judgment creditor may bid at a sale conducted by the enforcement officer and purchase the seized property.**

Comment: The range of methods of disposition of seized property includes but is not limited to public auction, sealed tenders and a private sale. With regard to some types of property, there may be an organized market that handles large volumes of transactions. In such cases, the

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enforcement officer may realize upon the value of the seized property by selling it in that market. Under section 13(2), an enforcement officer may use assistance and advice, including the paid assistance and advice of agents, brokers or advisors in order to carry out a sale of seized property.

If an enforcement officer wishes to proceed with a sale of seized property in circumstances when a proposed sale is unlikely to bring the best price, this section reverses the common law rule that would require an enforcement officer to apply to the court for the issuance of a special form of writ of execution. Under subsection (1), no such special authority is required; however, this subsection imposes a duty on an enforcement officer to dispose of seized property in a manner that offers the best opportunity to maximize the proceeds from the disposition of the seized property. In addition, section 10 also imposes a duty on an enforcement officer to act in good faith and in a commercially reasonable manner. If there is any disagreement with the manner or timing of a proposed disposition of seized property by an enforcement officer, subsection (2), places the onus is on the judgment debtor or other affected person to make an application to the court.

Notice of disposition - redemption period

65 (1) **At least __ days** [Insert the number of days that is consistent with the comparable PPSA of the province/territory. For example, in the BC PPSA, section 59(6) provides for a 20 day notice period] **before disposing of property seized under this Division, an enforcement officer who effects a seizure under this Part must give a notice of disposition in the prescribed form to:**

- (a) **the judgment debtor;**
- (b) **any person who is known by the enforcement officer to be a co-owner of the property;**
- (c) **any person with a security interest in the property if the security interest was perfected by registration under the *Personal Property Security Act* before the day on which the notice of sale is given to the judgment debtor, even though that the security interest is subordinate to an enforcement charge being enforced by the enforcement officer;**
- (d) **any person with a security interest in the seized property if that security interest was perfected by possession before the seizure of the property by the enforcement officer;**
- (e) **any other person with an interest in the property who has given a written notice to the enforcement officer of that person's interest before the day on which the notice of sale is given to the judgment debtor; and**
- (f) **any judgment creditor who has an enforcement charge on the seized property who has not delivered a subsisting enforcement instruction to the enforcement officer.**

(2) **The notice of disposition referred to in subsection (1) must contain:**

- (a) **a description of the property to be sold;**
- (b) **a statement of the amount recoverable under the judgments of all instructing judgment creditors;**
- (c) **an estimate of the amount of other claims referred to in section**

184(1) that must be paid from the distributable fund before a distribution is made to judgment creditors with eligible claims under section 184(1)(h);

- (d) a statement that, on payment of the amounts referred to in clause (b) and the claims referred to in clause (c), a person who is entitled to receive the notice may obtain release of the property from seizure; and**
- (e) a statement as to the method of disposition to be utilized by the enforcement officer with respect to the disposition of the property.**

Comment: With regard to subsection (1)(f), if a judgment creditor who has not given a subsisting enforcement instruction to the enforcement officer, receives a notice of the proposed sale, the judgment creditor will be entitled to share in the distribution of the proceeds of disposition by delivering an enforcement instruction to the enforcement officer prior to a distributable fund being constituted. A distributable fund is constituted when the enforcement officer receives proceeds from an enforcement proceeding.

Release of seized property

- 66 Promptly after payment of the amounts referred to in section 65(2)(d), the enforcement officer must release the property referred to in the notice of sale from seizure.**

Comment: Self-explanatory.

Circumstances when notice of sale not required

- 67 An enforcement officer may sell exigible property seized under this Part without giving the notices mentioned in section 65 in any of the following cases:**
- (a) the property is perishable, unsanitary or a hazard to health;**
 - (b) the enforcement officer believes on reasonable grounds that the property will decline substantially in value if it is not disposed of immediately after seizure;**
 - (c) the property is of a type that is to be disposed of by sale on an organized market that handles large volumes of transactions between many different sellers and many different buyers;**
 - (d) the seized property is personal property of which the cost of care and storage pending disposition of the property will be disproportionately large in relation to its value;**
 - (e) the seized property is unique or designed for a special purpose, and**
 - (i) the enforcement officer receives an offer to buy the property at a reasonable price,**
 - (ii) it is not probable that another reasonable offer will be received, and**
 - (iii) interested persons have been given as much notice of the sale as is practicable in the circumstances;**

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- (f) each person entitled to receive a notice consents in writing to the sale;**
- (g) a court on the application of the enforcement officer with or without notice to any person is satisfied that a notice is not warranted.**

Comment: This section is similar to the comparable section in PPSA legislation [s. 59(17) in the BC PPSA]; however, comparable PPSA sections do not contain the equivalent of clause (e).

Disposition of property not required to satisfy amount recoverable

- 68** **If, after a seizure, the enforcement officer who conducted the seizure determines that there is property that is in excess of that required to satisfy the amount recoverable under the judgments of instructing judgment creditors and the amounts referred to in section 65(2)(b) and (c), and before returning the excess property to the judgment debtor, the enforcement officer receives a further enforcement instruction to seize exigible property of the judgment debtor, the enforcement officer may retain the excess exigible property to satisfy the further enforcement instruction.**

Comment: Self-explanatory.

Purchaser's entitlement to a discharge of enforcement charges

- 69** **A person who purchases personal property from an enforcement officer which is seized under this Part and who pays to the enforcement officer an amount equal to the lesser of**
- (a) the amount recoverable on all judgments of all instructing judgment creditors; and**
 - (b) an amount that could reasonably be expected to be obtained on a sale conducted in an enforcement proceeding,**
- takes the judgment debtor's interest in the property free of any enforcement charge being enforced by the enforcement officer and any interest that is subordinate to such an enforcement charge and the enforcement charge of any judgment creditor who has an eligible claim under Part 14 with regard to the distributable fund constituted by the receipt of proceeds of sale from the seized property even though a judgment creditor does not receive full satisfaction of his or her judgment.**

Comment: In the circumstances described in this section, a purchaser at a sale conducted by an enforcement officer who pays the lesser of the amounts described in clauses (a) and (b) takes the property free and clear of any enforcement charges against the property. If the purchaser pays the amount described in clause (b), the purchaser should take free of the enforcement charges because that is all that the property is worth at an enforcement officer's sale. If the purchaser comes within this section and a judgment creditor refuses to discharge the registration of his or her notice of judgment, on application by the purchaser, the court may order that the registration of the notice of judgment be discharged.

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The phrase in clause (b) “a price that could reasonably be expected to be obtained on a sale conducted as part of an enforcement proceeding ...” will likely be a price that is less than the “fair market value” of the property.

The property purchased by a purchaser at an enforcement officer's sale remains subject to any security interests that have priority over an enforcement charge under this Act.

Protection of enforcement officer

70 (1) An enforcement officer is not liable for damages resulting from the seizure or disposition of property of a judgment debtor that is in excess of property required to satisfy the amount recoverable under the judgments of all instructing judgment creditors and all claims that must be paid out a distributable fund under section 184(1) before the eligible claims of judgment creditors under section 184(1)(h), if the enforcement officer:

- (a) at the time of seizure, has reasonable grounds to believe that
 - (i) the property is exigible property of the judgment debtor;
 - and
 - (ii) the seized property is required to satisfy the amounts referred to in this subsection; and
- (b) as soon as practicable after he or she determines that the value of property seized by the enforcement officer or proceeds from the disposition seized property are in excess of that required to satisfy the amounts referred to in this subsection,
 - (i) releases the excess property from seizure, or
 - (ii) pays the excess proceeds of disposition to the judgment debtor or person otherwise entitled.

(2) Subject to section 161, an enforcement officer is not liable for any damages resulting from the seizure or disposition of property in accordance with this Act that is subsequently determined to be exempt property under Part 12 of this Act.

(3) An enforcement officer is not liable for any damages resulting from the seizure or disposition of property in accordance with this Act if it is subsequently determined that the registration of the notice of judgment that created on the enforcement charge on the property was invalid.

Comment: Under subsection (1), if an enforcement officer has reasonable grounds to believe that the seized property is the only property of the judgment debtor, after excluding exempt property, that will satisfy the amounts referred to in subsection (1), the enforcement officer is not liable for any damages as long as any excess proceeds of disposition are paid to the judgment debtor or person otherwise entitled.

Division 2: FIXTURES AND CROPS

Introductory Comment: The term “fixture” is defined in section 1(2) by incorporating the definition of that term from the *Personal Property Security Act* (PPSA) of the enacting

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province/territory. Most PPSA Acts do not define the term "fixture" except to the extent of excluding building materials from the scope of its meaning. Building materials that are essential to the integrity of a structure are excluded because if it were otherwise, a secured party seeking to enforce a security agreement or a judgment creditor seeking to enforce a judgment could destroy the integrity of the structure by removing some or all of the building materials. Subject to this exclusion, *Personal Property Security Acts* leave the term "fixture" to be defined by the common law. This Act takes the same approach.

The term "crops" is defined by section 1(2) of this Act by incorporating the definition of that term from the PPSA of the enacting province/territory. Most PPSA Acts define "crops" to mean crops, whether matured or otherwise.

Division 1 of this Part applies to this Division except to the extent that its provisions are inconsistent with provisions in this Division.

Seizure of a fixture or crops

71 Subject to this Division, a fixture or crops may be seized and sold as personal property.

Comment: With regard to fixtures, at common law, when an item of personal property becomes affixed to the land, it becomes part of the land and it is no longer subject to enforcement proceedings as personal property. The common law rule is subject to an exception with regard to trade fixtures owned by a lessee or licensee. Under PPSA legislation, a personal property security interest can be given in relation to a fixture and a secured party may realize upon his or her security by seizing and severing the fixture from the land. Under this Act, registration of a notice of judgment creates an enforcement charge on personal property that has the same priority in relation to other interests in property as a perfected non-purchase money security interest. The enforcement charge should be treated in the same manner as a security interest. Therefore, if the judgment to which an enforcement charge relates is not satisfied, an enforcement officer may seize and sever a fixture that is charged by an enforcement charge.

With regard to crops, at common law, growing crops that are sown by a person in possession of the land and intended to be reaped at maturity are regarded as personal property that is seizable under a writ of execution. Crops may be subject to a security interest under PPSA. If the owner of the land is not the judgment debtor, and crops are seized by an enforcement officer, the owner should be reimbursed for any damage caused by the removal of the crops.

Before a fixture or crops may be seized and severed or sold, they must be charged by an enforcement charge created under Part 5. The priority rules with regard to the priority of an enforcement charge on fixture in relation to other interests are found in section 35(7) to (9).

Notice of intention to sever or sell

- 72 (1) An enforcement officer who seizes a fixture or crops must give each person who appears on the records of [insert the name of the land title or land registry office of the enacting province/territory] as having an interest in the land to which the fixture is affixed or the crops are growing at the time of the seizure a notice of intention to sever or sell the fixture or crops that contains**
- (a) descriptions of the land, and the fixture that is affixed to the land or the crops that are growing on the land; and**
 - (b) a statement that the fixture or crops will be severed from the land unless payment is made to the enforcement officer on or before a day that is not less than 15 days after the day when the notice is given of an amount that is the lesser of**
 - (i) amount recoverable under all the judgments to which the seizure of the fixture or crops relates, and**
 - (ii) the market value of the fixture if it were severed from the land or the market value of the crops as crops.**
- (2) Without limiting section 5, a notice of intention to sever or sell referred to in subsection (1) is sufficiently given to a person if it is sent by mail addressed to that person using the name and address that appears in those records referred to in subsection (1).**
- (3) An enforcement officer must not sever a fixture or crops seized under this Division from the land to which the fixture is affixed or on which the crops are growing until at least 15 days after the day on which the notice of intention to sever or sell is given under subsection (1).**

Comment: A notice of intention to sever or sell provides a person with an interest in the land with an opportunity to make an application to the court under section 73 for an order postponing the severance and sale of the fixture or crops and an opportunity to retain the fixture or crops under section 74.

Application for order postponing severance

- 73 A person who is entitled to receive a notice of intention to sever or sell under section 72 may apply to the court for one or both of**
- (a) an order postponing severance of a fixture or crops from the land; and**
 - (b) the determination of an issue relating to the seizure of a fixture or crops.**

Comment: Self-explanatory.

Retention of a fixture or crops by person with a subordinate interest

- 74 (1) A person who has an interest in land that is subordinate to an enforcement charge under which a seizure is made under this Division**

may, before the fixture or crops are sold or severed from the land, retain the fixture or crops by paying to the enforcement officer who made seizure the amount referred to in section 72(1)(b).

- (2) On payment of the amount referred to in subsection (1):
- (a) a person who pays an amount that is equivalent to or greater than the market value of the fixture or crop becomes the owner of the fixture or crop subject to any security interest or lien that has priority over the enforcement charge;
 - (b) a person who pays an amount that is less than the market value of the fixture if it were severed from the land or the crop as a crop is deemed to have a security interest in the fixture or crop, to which the *Personal Property Security Act* applies, to the extent of the amount paid and interest thereon at the rate set for unpaid judgments, calculated from the date when the payment was made to the enforcement officer; and
 - (c) an enforcement charge referred to in subsection (1) under which the seizure was made no longer charges the fixture or crops.

Comment: A person whose interest in the land is subordinate to an enforcement charge should not be required to pay more than the market value of the fixture or crops to prevent the removal of a fixture or crops notwithstanding that on the distribution of a payment among eligible judgment creditors, the payment will not be sufficient to satisfy the amount of their judgments in relation to their respective enforcement charges.

Severance or sale

75 (1) If an enforcement officer severs a fixture from the land to which it is affixed or crops from the land on which they are growing, he or she must do so in a manner that causes no greater damage to the land and to other property situated on the land, and subjects the occupier of the land to no greater inconvenience than is necessarily incidental to the severance and removal of the fixture or crops.

- (2) If an enforcement officer sells a fixture or crops that have not been severed from the land, the person who buys the fixture or crops from the enforcement officer is subject to the obligations of an enforcement officer referred to in subsection (1).

Comment: Self-explanatory.

Reimbursement for damage caused by severance and removal

76 (1) If a fixture or crops are severed from the land, a person, other than the judgment debtor, who had an interest in the land at the time of the seizure of the fixture or crops:

- (a) is entitled to reimbursement by the enforcement officer for damage to that person's interest the land caused during the

- severance and removal of the fixture or crops; but
- (b) is not entitled to reimbursement for diminution in the value of that person's interest in the land caused by the absence of the fixture or the need to replace it.
- (2) The amount of a reimbursement referred to in subsection (1) must be determined by
- (a) the enforcement officer upon the request of a person seeking reimbursement; or
 - (b) if the person does not accept the amount of reimbursement determined by the enforcement officer, the court on application by the person seeking reimbursement.
- (3) When an entitlement to reimbursement arises under subsection (2), the amount of the reimbursement paid by an enforcement officer is added to the costs of enforcement.

Comment: Under subsection (1)(a), an owner of a building, who is not the judgment debtor, is entitled to reimbursement for damage to, for example, walls and floors that occurs during the removal of a fixture that is large and heavy piece of equipment but such person is not entitled to reimbursement for diminution of the value of that person's interest in the land caused by the removal of a fixture such as an escalator or an elevator and the need to replace it in order to make the premises usable by present occupants or attractive to future potential occupants.

No sale of crops before harvest except by court order

- 77 (1) Unless the court orders otherwise, if a judgment debtor has an undivided interest in crops, the enforcement officer may seize crops and, without limitation, may do one or more of the following:
- (a) arrange for the harvest of the crops and divide them in proportion to the interests of the judgment debtor and any other person or persons;
 - (b) sell the crops and divide the proceeds in proportion to the interests of the judgment debtor and any other person or persons; or
 - (c) sell the judgment debtor's interest in the crops at a fair market price to another person or persons holding an interest in them.
- (2) In circumstances other than those referred to in subsection (1), and subject to subsection (3), an enforcement officer must not sell crops until they have been harvested.
- (3) On application, the court may make an order permitting the sale of crops and that have not been harvested if the court is satisfied that the sale will be commercially reasonable.
- (4) For the purposes of determining whether a sale is commercially reasonable under this section, the court may

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- (a) examine the terms of the proposed sale and compare them to the sale proceeds that would likely result if a sale takes place after harvest;
- (b) consider the risk that through the forces of nature there may not be any harvest if the sale is deferred; and
- (c) consider any other matter the court considers relevant.

Comment: Self-explanatory.

Judgment creditor may be required to provide security for harvesting expenses

- 78** Unless a judgment debtor undertakes to harvest crops seized by an enforcement officer, the enforcement officer may require the instructing judgment creditor, who delivered the instruction to seize the crops, to provide security for the payment of harvesting expenses that may be incurred by the enforcement officer.

Comment: Self-explanatory.

Release of seizure if security for harvesting expenses not provided

- 79** If an enforcement officer has required a judgment creditor to provide security under section 78 and the judgment creditor does not provide the required security, the enforcement officer may release the crops from seizure.

Comment: Self-explanatory.

Harvesting expenses are a first charge on proceeds of sale

- 80** (1) If crops seized under this Division are harvested by an enforcement officer, expenses incurred by the enforcement officer who made the seizure constitute a first charge on, and are payable out of, the proceeds realized from the disposition in priority to any other claim to, or right in the crops or their proceeds, including, without limitation, a security interest, lien, charge, encumbrance, mortgage or assignment, whether or not arising under a statute.
- (2) If any of the harvesting expenses incurred by an enforcement officer were paid by a judgment creditor, that portion of the charge to which the enforcement officer is entitled under subsection (1) that relates to those harvesting expenses vests in the judgment creditor who paid the expenses and that charge has the same priority as it would have under subsection (1) were it held by the enforcement officer.

Comment: Self-explanatory.

Marketing legislation

- 81** After seizing crops, an enforcement officer has the same rights and duties as the judgment debtor regarding the sale of the crops under any marketing legislation that is applicable to their disposition.

Comment: Self-explanatory.

Division 3: INTEREST UNDER A LEASE, CONTRACT OF SALE OR SECURITY AGREEMENT

Introductory Comment: This Division provides for the seizure and disposition of either party's interest under a lease of personal property, a contract for the sale of personal property, or a security agreement.

Definition

82 In this Division, "contract of sale" means a contract under which the seller retains ownership of or title to the subject matter of the contract until a condition is met, but does not include a security agreement to which the *Personal Property Security Act* applies.

Comment: Self-explanatory.

Application of Division 1 to this Division

83 In there is a conflict between a provision in Division 1 and a provision in this Division, this Division prevails.

Comment: Self-explanatory.

Seizure of lessor's, seller's or secured party's interest

84(1) An enforcement officer may:

- (a) if a judgment debtor is a lessor, seize the lessor's interest, arising under a lease, in property in the possession of the lessee;
- (b) if a judgment debtor is a seller, seize the seller's interest, arising under a contract of sale, in property in the possession of the buyer;
- (c) if a judgment debtor is a secured party, seize the secured party's interest, arising under a security agreement, in property in the possession of the debtor.

(2) A seizure under subsection (1) may be effected

- (a) by giving a notice of seizure to:
 - (i) the lessee under a lease,
 - (ii) the buyer under a contract of sale, or
 - (iii) the debtor under a security agreement; or
- (b) if a lease, contract of sale or security agreement constitutes chattel paper, by seizure of the chattel paper.

Comment: A seizure under this section is effective when the a notice of seizure is given to the lessee, buyer or debtor as the case may be. Section 62 requires that a notice of seizure be given to a judgment debtor as soon as practicable after a seizure.

Section 1(2) of this Act incorporates the PPSA definition of "chattel paper". Priority rules

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relating to purchasers of chattel paper are found in section 37.

Seizure includes payment obligation

85 When an enforcement officer makes a seizure referred to in section 84, any money payable to the judgment debtor under the lease, contract of sale or security agreement, as the case may be, must be paid to the enforcement officer for so long as the seizure remains in effect.

Comment: This section makes it clear that when a seizure is made under section 84, the seizure applies to both the judgment debtor's property interest in the lease, contract of sale or security agreement as well as the stream of payments that would but for the seizure be payable to the lessor, seller or lender, as the case may be. Under section 13, an enforcement officer's powers include the power to assign a payment obligation to a third party for value.

Obligation of lessee, buyer or debtor to make payments to enforcement officer

86 (1) Subject to subsection (2), after a seizure referred to in section 84, the lessee, buyer or debtor to whom the notice of seizure is given must, for so long as the seizure remains in effect, pay to the enforcement officer, all payments that are then due and payable to the judgment debtor and that subsequently become payable to the judgment debtor, under the lease, contract of sale or security agreement as the case may be.

(2) If an enforcement officer assigns a payment obligation referred to in section 85 the lessee, buyer or debtor to whom notice of the assignment is given must, for so long as the assignment remains in effect, pay to the assignee all payments that are then due and payable to the judgment debtor or that subsequently become payable to the judgment debtor under the lease, contract of sale or security agreement.

Comment: Self-explanatory.

Enforcement officer may exercise same rights as lessor, seller or secured party

87 While the interests of a lessor, seller or secured party are held under seizure, the enforcement officer may exercise, in relation to the property to which the lease, sale or security agreement pertains and in relation to the lessee, buyer or debtor or in relation to any third party claiming an interest in the property, the same rights and powers that the lessor, seller or secured party had at the date of seizure or acquires before discharge of the seizure.

Comment: Self-explanatory.

Seizure of lessee's, buyer's or debtor's interest

88 (1) An enforcement officer may:

- (a)** if the judgment debtor is a lessee, seize the lessee's interest, arising under a lease, in property in the possession of the lessee;
- (b)** if the judgment debtor is a buyer under a contract of sale, seize the buyer's interest, arising under the contract of sale, in

- property in the possession of the buyer;**
- (c) if the judgment debtor is a debtor under a security agreement, seize the debtor's interest, arising under the security agreement, in property in the possession of the debtor.**

- (2) A seizure under subsection (1) is effected by giving a notice of seizure to:**
- (a) the lessor under a lease;**
 - (b) the seller under the contract of sale; or**
 - (c) the secured party under the security agreement.**

Comment: This section applies to a true lease as well as a lease-to-purchase. A seizure under this section is effective when the a notice of seizure is given to the lessor, seller or secured party, as the case may be. Section 62 requires that a notice of seizure must be given to the judgment debtor as soon as practicable after a seizure.

Enforcement officer may exercise same rights as lessee, buyer or debtor

- 89** While the interests of a lessee under a lease, a buyer under a contract of sale or a debtor under a security agreement are held under seizure, the enforcement officer may exercise, in relation to the property to which the lease, contract of sale or security agreement pertains and in relation to the lessor, seller or secured party or in relation to any third party claiming an interest in the property, the same rights and powers that the lessee, buyer or debtor had at the time of seizure or acquires prior to discharge of the seizure.

Comment: This section enables an enforcement officer to remedy any default under a lease, contract of sale or security agreement if the judgment debtor could have remedied the default.

Effect of contractual provisions on seizure

- 90** An enforcement officer may effect and maintain seizure of the interest of a lessee, buyer or debtor referred to in section 88 even though it is a term of the lease, contract of sale or security agreement under which the lessee's, buyer's or debtor's interest in, or right to possession of, the property arose that the property may not be seized or that the lease, contract of sale or security agreement may be terminated by reason of a seizure of the property.

Comment: Many leases, sales contracts and security agreements contain a clause that if the subject property is seized in enforcement proceedings against the lessee, buyer or debtor, as the case may be, there is a deemed default by the lessee, buyer or debtor. Upon such a default, the lessor, seller or secured party, as the case may be, is entitled to terminate the contract and seize the property. At common law, the invocation of such a entitlement may be interpreted as terminating the seizure or rendering it illegal because maintaining the seizure interferes with the lessor's, seller's or secured party's possessory right. The purpose of this section is to entitle the enforcement officer to seize and maintain a seizure despite the existence of the type of clause described above. Whether or not the enforcement officer can effectively realize on the value of the judgment debtor's interest in the property will depend on the application of the immediately following sections.

LRCNS Comment: We do not propose the adoption of s.90 (permitting seizure of an interest under a lease, contract of sale or security agreement notwithstanding contractual terms to the contrary), for reasons explained at page 28 of this Discussion Paper.

Alternatives if the lessor, seller or secured party seeks to exercise a contractual or statutory right to terminate judgment debtor's interest

- 91** When the interest in property of a lessee, buyer or debtor referred to in section 88 is seized and the lessor, seller or secured party seeks to exercise a contractual or statutory right to terminate the interest of the lessee, buyer or debtor in the property or to take possession of the property, the enforcement officer may do any or all of the following:
- (a) release the seizure, with or without conditions;
 - (b) apply to the court for an order maintaining the interest of the lessee, buyer or debtor in the property;
 - (c) in the case of seizure of the interest of a buyer or debtor, apply to the court for an order directing sale of the property by the enforcement officer.

Comment: Under clause (a), an enforcement officer may decide to release a seizure if he or she is satisfied that the proceeds that will likely be obtained at a sale by the enforcement officer would not be sufficient to warrant maintaining the seizure. Alternatively, a seizure may be released on the condition, for example, that the secured party will, in circumstances where the judgment debtor is in default under the security agreement, seize and sell the property and, after satisfying her or his claim, pay over any remaining balance to the enforcement officer. If the judgment debtor is a lessee, clause (c) does not permit an application to be made to the court for an order directing a sale of the property. In the case of a contract for sale or a security agreement, the prerequisite for making an order of sale is described in section 92.

LRCNS Comment: We do not propose the adoption of s.91 (permitting override of contractual or statutory rights of third parties), for reasons explained at page 28 of this Discussion Paper. For that reason it is unnecessary to adopt s.92.

Prerequisite for an order for sale

- 92** (1) Subject to subsection (2), on an application made under section 91(c), the court may order that the property of a judgment debtor be sold.
- (2) An order for sale must not be made under this section unless the court is satisfied that the proceeds of the sale will exceed the total of
- (a) the present value of the amount owing to the seller or secured party under the contract of sale or security agreement; and
 - (b) the fees, taxable costs and expenses of the enforcement officer relating to the sale of the property.

Comment: This section protects the value of the seller's or secured party's interest in the property. The proceeds of sale constitute a distributable fund under Part 14; however, section 181(2) provides that nothing in Part 14 shall be construed so as to prejudice any right to money

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based on an interest including a security interest if that interest has priority over the relevant enforcement charges.

If enforcement charge has priority over lessor or secured party's interest

93 **If an enforcement charge that is being enforced against property in an enforcement proceeding under section 88, has priority over the lessor's, seller's or secured party's interest in that property, the enforcement officer may enforce the enforcement charge without regard to the lessor's, seller's or secured party's interest and sections 91 and 92 do not apply.**

Comment: Self-explanatory.

Division 4: ACCOUNTS OWING TO THE JUDGMENT DEBTOR

Introductory Comment: This Division replaces the process known as garnishment of debts that are due or accruing due by an account debtor to a judgment debtor. The procedure with regard to the garnishment of debts varies among the provinces and territories. In most jurisdictions, the judgment creditor applies for a garnishing order or a garnishee summons that is issued by the court after cursory examination by court registry officials who ensure that the basic requirements of the garnishment process have been satisfied. The judgment creditor is responsible for arranging for service on the garnishee and the judgment debtor. If, at the time of service on the garnishee, there is still a debt that is due or accruing due from the garnishee to the judgment debtor, the garnishee is obliged to pay into court an amount that is the lesser of the amount of the debt and the amount of stated in the garnishing order or garnishee summons. The judgment creditor must apply for payment out of court to satisfy his or her judgment. In some province/territory, a debt may also be seized under a writ of execution. The garnishment process has become encrusted with many technicalities and uncertainties.

An debt or an account that is due or accruing due by an account debtor to a judgment debtor is a form of personal property. As such, it should be subject to seizure by an enforcement officer in the same manner as other forms of personal property. However, accounts have some special characteristic that require a special provisions that are found in this Division. In particular, an account owing to a judgment debtor that is salary or wages requires special provisions.

Attachment of debts by garnishment is no longer available under this Act. Similarly, garnishment before judgment is no longer available under this Act; however, a preservation order may be obtained prior to judgment under Part 4.

Application of Division 1

94 **In the event of a conflict between a provision of Division 1 and a provision of this Division, the provision of this Division prevails.**

Comment: Self-explanatory.

Location of an account

95 **For the purposes of this Division, an account is deemed to be located where it is recoverable.**

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Comment: The term “account” is defined in section 1. Under this Act, property may only be seized by an enforcement officer if the property is located within the province/territory. An account is deemed to be located at the place where it is recoverable. There are two types of account debts, namely, ordinary debts and specialty debts. An ordinary debt is recoverable either where the parties agree that the debt is payable, or where the debtor resides. A specialty debt is created by a document under seal and it is recoverable at the place where the document under seal is located.

An enforcement officer is limited to carrying out her or his functions within the province/territory where he or she is appointed. If an account is not located in the province/territory, an enforcement officer does not have the authority to seize the account. The reason for this rule is that if it were otherwise, an account debtor could find himself or herself subject to conflicting demands issued by enforcement officers in different provinces/territories.

If an account is not located in a province or territory because it is not recoverable in the province/territory, an application may be made under Part 13 for the appointment of a receiver. If the court appoints a receiver under section 173(1)(c), the court may give the receiver the power under section 173(1)(g) to bring proceedings in the province/territory or elsewhere for the purpose of taking control and custody of the judgment debtor's property including the recovery of accounts.

If a judgment debtor has a large number of accounts receivable or other accounts some of which may be located in another province or territory, an enforcement officer may purport to seize all of the accounts and, under section 13, assign the accounts to a factor for collection. The consideration that a factor is prepared to pay for a mass of accounts will depend on the factor's assessment of how many of the accounts are collectible.

Seizure of an account

96 (1) An enforcement officer may seize an account including a deposit account referred to in section 98 or a future account by giving a notice of seizure to the account debtor.

(2) Subject to Part 11, an enforcement officer may seize an account referred to in subsection (1) even though the account is owing to the judgment debtor and one or more other persons as a co-owners.

(3) When an account debtor is given a notice of seizure referred to in subsection (1) or a notice that an enforcement officer has assigned an account, the account debtor is deemed to have received from the judgment debtor a demand to discharge the account or in the case of a future account, an instruction to discharge the account when it becomes due and payable

(a) in the case of a notice of seizure, by payment to the enforcement officer; and

(b) in the case of a notice that the enforcement officer has assigned an account, by payment to the assignee of the enforcement officer.

(4) An enforcement officer who takes an action referred to in subsection (1)

must, as soon as practicable thereafter give a notice of seizure to the judgment debtor.

- (5) An enforcement officer who takes an action referred to in subsection (2) must, as soon as practicable thereafter give a notice of seizure to the judgment debtor and any person known to the enforcement officer to be a co-owner of the account.**
- (6) If an enforcement officer assigns an account to an assignee prior to giving a notice of seizure to the judgment debtor under subsections (4) or (5), the enforcement officer must, as soon as practicable thereafter give a notice of seizure to the judgment debtor and any person known to the enforcement officer to be a co-owner of the account.**

Comment: Under the definition of “account” in section 1, an account is an obligation owing to a judgment debtor. The term "future account" is defined in section 1 as an account that becomes due and payable after its seizure. The definition of the term "account debtor" in section 1 includes a person who will become obligated to the judgment debtor under a future account.

An account is charged by an enforcement charge when the enforcement charge is created by registering a notice of judgment under Part 5. Seizure of an account is the means by which the account debtor becomes obliged to pay the account to either the enforcement officer or an assignee of the enforcement officer.

The period of time during which a notice of seizure is effective is determined by section 97. The ability to seize a future account will overcome many current problems that are associated with determining whether at the time when a garnishing order is issued there is a debt that is due or accruing due.

Under subsection (3), a notice of seizure is deemed to include a demand for payment of an account or future account. Different forms of a notice of seizure may be prescribed for seizing different types of property. The notice of seizure prescribed for the seizure of an account or future account should include a demand for payment of the account. The form may also include a statement that the judgment debtor is no longer entitled to receive or accept payment of a seized account or future account.

Effect of giving notice of seizure

- 97 (1) Subject to subsection (2) and section 98, a notice of seizure applies to**
 - (a) any account that is owing to the judgment debtor at the time that the notice of seizure is given to the account debtor; and**
 - (b) any future account that becomes due and payable by the account debtor to the judgment debtor at any time within 12 months after the date on which a notice of seizure is given the account debtor.**
- (2) Until the amount recoverable is satisfied, a notice of seizure applies to any future account that becomes due and payable after the date on which a notice of seizure is given to the account debtor without any limitation with regard to the period of time referred to in section (1)(b), if, at the**

time the notice of seizure is given to an account debtor

- (a) the account debtor is obligated to make a series of periodic recurring payments to the judgment debtor; or**
- (b) a legal a relationship exists between the account debtor and the judgment debtor under which money becomes payable by the account debtor to the judgment debtor.**

Comment: The definition of “future account” in section 1 requires that a legal relationship must exist between an account debtor and the judgment debtor at the time when the notice of seizure or notice of assignment is given to an account debtor. This requirement precludes a judgment debtor from giving a notice of seizure to all persons with whom the judgment debtor may enter into a contract within the period of the next 12 months.

Under subsection (2)(a), if an account debtor is obligated to make a series of periodic recurring payments to the judgment debtor under a long-term lease, promissory note or similar obligation, the notice of seizure is effective and applies to each recurring payment obligation notwithstanding that the payment obligation continues beyond the 12 month period referred to in subsection (1)(b). Subsection (2)(b) applies where, for example, a legal relationship of landlord and tenant exists at the time when the notice of seizure is given to the tenant; however, it is only a month-to-month tenancy. The effect of subsection (2)(b) will require the tenant to pay the rent to the enforcement officer each month until the amount recoverable is satisfied.

Seizure of a deposit account

98 (1) In this section:

- “central cooperative credit society” has the same meaning as in the *Canadian Payments Act* (Canada);**
- “central cooperative credit society” has the same meaning as in the *Canadian Payments Act* (Canada);**
- "deposit account" means a savings, passbook, chequing or similar demand account at a deposit taking financial institution, but does not include**
 - (a) an account, a contract or an arrangement under which money is deposited for a fixed term, whether or not the term may be abridged, extended or renewed, or**
 - (b) an agreement to pay to the judgment debtor a specified sum of money with or without interest at a specified date in the future;**
- “deposit taking financial institution” means an institution that**
 - (a) is, or is eligible to become, a member of the Canadian Payments Association established under the *Canadian Payments Act* (Canada), or**
 - (b) is a credit union that is a shareholder or member of a central cooperative credit society.**

- (2) If a notice of seizure is given to a deposit taking financial institution with regard to a deposit account, the deposit taking financial institution must pay the money in the account to the enforcement officer even though the agreement between the deposit-taking institution and the depositor may require the depositor to give notice of a withdrawal or present a passbook**

or a document, other than a negotiable instrument, as a condition of the depositor's entitlement to enforce the obligation.

- (3) Despite section 97, a notice of seizure given to a deposit taking financial institution with regard to a deposit account affects only the obligation of the deposit taking financial institution existing at the time the notice of seizure is given.**

Comment: This section creates special rules with regard to the seizure of deposit accounts with deposit taking financial institutions. This section relieves deposit taking financial institutions of some of the burdens that would otherwise apply under section 97. Without this section, deposit taking financial institutions would be required to monitor all existing deposit accounts of a judgment debtor for a period of 12 months and remit to the enforcement officer any funds that may be credited to such accounts during the 12 month period following receipt of a notice of seizure.

With regard to the seizure of deposit accounts, the "branch of account" rule found in the *Bank Act*, S.C. 1991, c. 46, s. 462 and the *Trust and Loan Companies Act*, S.C. 1991, c. 45 will continue to apply. Under these sections, giving a notice of seizure to deposit taking financial institution only has the effect of seizing deposit accounts at the branch where the notice of seizure is given.

Obligations of account debtor

- 99 Subject to section 101, an account debtor who receives a notice of seizure in respect of an account or future account must, unless a written statement under section 100 is delivered to the enforcement officer:**
- (a) pay to the enforcement officer, within the time prescribed by regulation, the lesser of**
 - (i) the amount that the account debtor is obligated to pay to the judgment debtor at the time when the account debtor received the notice of seizure less any amounts deducted under sections 104 or 108; and**
 - (ii) the amount recoverable as stated in the notice of seizure; and**
 - (b) notify the enforcement officer of any person known by the account debtor to be a person who is a co-owner of the account or future account.**

Comment: Under section 96(5) an enforcement officer who seizes a co-owned account must give a notice of seizure to the co-owners.

Dispute by account debtor that obligation to judgment debtor exists

- 100 Within 15 days after receiving a notice of seizure from an enforcement officer, a person who is not obligated to make a payment to the enforcement officer under section 99 must deliver to the enforcement officer a signed written statement in which the person does one or more of the following as applicable:**
- (a) states that the person is not an account debtor and provides the**

- basis of that assertion;**
- (b) states that the account has been assigned, charged or has been paid into court;**
 - (c) states that the person is an account debtor but that the account was not payable at the date of the person received the notice of seizure and is not payable at the date when the statement made under this section is given by the account debtor;**
 - (d) in a case falling within clause (c), states, if it is known,**
 - (i) the future times when any future accounts will or may become payable by the account debtor to the judgment debtor,**
 - (ii) the happening of specified events on which any future accounts will or may become payable by the account debtor to the judgment debtor, and**
 - (iii) the amounts that will or may become payable under subclause (i) or (ii);**
 - (e) states that the person is an account debtor but is not legally obligated to make payments to the enforcement officer, stating the basis of this assertion.**

Comment: On application made under section 7, the court may determine the validity of any statement or claim that a person is not obligated to make a payment to the enforcement officer.

If an account debtor, to which this section applies, fails to deliver a written statement under this section, judgment may be taken against the account debtor under section 112.

If the person to whom a notice of seizure is given delivers a statement to the enforcement officer that no account debt is owed to the judgment debtor, and the enforcement officer has reasonable grounds to believe that the account may be owed by a person who is related to the person to whom the notice of seizure was given, an application may be made under Part 8 to obtain information with regard to whether an account is owed to the judgment debtor by a related person or in the case of a corporation, by a subsidiary or parent corporation or a corporation controlled by a same person.

Seizure of employment remuneration

101 (1) In this section, “employment remuneration” means amounts payable to a judgment debtor pursuant to a contract of service in relation to a pay period and includes the market value of all goods and services that the judgment debtor has received or is entitled to receive in relation to that pay period in lieu of money.

- (2) In order to be effective with respect to the next payment of employment remuneration to a judgment debtor after a notice of seizure is given to an account debtor, a notice of seizure must be given to the account debtor at least 14 days before the end of a pay period of the judgment debtor.**
- (3) A notice of seizure that is given outside the time period referred to in subsection (2) is effective and applies to all subsequent pay periods of the**

judgment debtor ending within 12 months from the date on which the notice of seizure is given to the account debtor unless the enforcement officer notifies the account debtor that the notice of seizure is withdrawn.

- (4) An account debtor who has received a notice of seizure in relation to employment remuneration is required to pay to the enforcement officer the amount of employment remuneration payable to the judgment debtor for each pay period after deducting**
 - (a) amounts that the account debtor is required by law or contract to deduct from employment remuneration of the judgment debtor for income tax, employment insurance, Canada Pension Plan contributions, compulsory union or professional fees, registered pension plan contributions, health, disability and life insurance premiums and such other amounts as are prescribed;**
 - (b) the amount that is exempt income under Part 12; and**
 - (c) such amount for compensation of the account debtor as is prescribed under section 108.**

- (5) If property or services are provided by an account debtor to a judgment debtor in full or partial satisfaction of the employment remuneration payable to the judgment debtor in relation to a pay period, the enforcement officer, the account debtor or the judgment debtor may apply to the court, on giving notice to all instructing judgment creditors, for one or both of the following:**
 - (a) a determination, for the purposes of subsection (4), of the employment remuneration that is payable to the judgment debtor by the account debtor in relation to that pay period;**
 - (b) an order that specifies the amount that the account debtor must pay to the enforcement officer in relation to that pay period.**

- (6) At the end of the first pay period for which the notice of seizure is effective and, after that, as requested by the enforcement officer, the account debtor must provide to the enforcement officer a statement setting out, for the pay period in question**
 - (a) the judgment debtor's total employment remuneration;**
 - (b) all amounts deducted from that remuneration under subsection (4); and**
 - (c) the amount paid to the judgment debtor.**

Comment: With regard to the period of notice in subsection (2), garnishment legislation in most provinces/territories provides the provincial government and some local governments with a longer notice period than that specified in subsection (2) before they were required to deduct and remit garnisheed salaries or wages. A longer period may have been justifiable before the introduction of computerized payrolls when governments were among the largest employers in a province. Such special provisions may no longer be necessary. Other large employers must cope with the standard provision. Each province/territory should review its current payroll procedures and determine whether a period that is longer than the time referred to in subsection (1) is required for the government to respond to a notice of seizure of employment remuneration with

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regard to employees of the government.

Under subsection (5), an employee who receives remuneration in the form of stock options that have a nominal value that is in excess of their market value will be able to apply for an order determining the real value of the stock option and the amount of remuneration that is subject to seizure.

Seizure of RRSPs, RRIFs and DPSPs

102 (1) Section 5(a) of the *Uniform Registered Plan (Retirement Income)*

***Exemption Act* [or the section of an Act of the province/territory that enacts the provisions of the Uniform Act] applies to property of a judgment debtor under this Act that is a DPSP, RRIF and a RRSP.**

(2) In this section,

“DPSP” means a deferred profit savings plan as defined in section 147 of the federal Act;

“federal act” means the *Income Tax Act (Canada)*;

“RRIF” means a registered retirement income fund as defined in section 146.3 of the federal Act;

“RRSP” means a registered retirement savings plan as defined in section 146 of the federal Act.

Comment: The definitions of “DPSP”, “RRIF” and “RRSP” are taken from the *Uniform Registered Plan (Retirement Income) Exemption Act*. The *Uniform Registered Plan (Retirement Income) Exemption Act* specifically refrained from exempting payouts to planholders of RRSPs, RRIFs and DPSPs; however, payouts are deemed to be wages or salary for the purposes of enforcing a judgment. Section 5 of the Act provides:

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

Section 5(b) of the *Uniform Registered Plan (Retirement Income) Exemption Act* is implemented by including payouts to a judgment debtor from RRSPs, RRIFs and DPSPs in the definition of “income”, along with employment income, in Division 3 of Part 12 of this Act. A portion of a judgment debtor's net income for a prescribed period is exempt from seizure in accordance with a formula contained in Division 3 of Part 12 of this Act.

Trust obligation deemed to be an account

103(1) An amount or obligation payable by a trustee under a trust to a judgment debtor as beneficiary of the trust is deemed to be in satisfaction of an account owing to the beneficiary and payable by the trustee as an account debtor when and to the extent that, under the law of trusts or otherwise, the judgment debtor is entitled to payment or to demand payment of money to discharge the trust obligation in whole or in part.

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- (2) A trustee referred to subsection (1) who is given a notice of seizure by an enforcement officer must comply with all obligations of an account debtor under this Act who is given a notice of seizure by an enforcement officer.**

Comment: By deeming a payment by a trustee to a beneficiary under a trust to be a payment in satisfaction of an account, this section overcomes an objection that may be based on an argument that amounts payable by a trustee to a beneficiary are not subject to seizure because they are not based on a debtor-creditor relationship. The inclusion of amounts payable to the judgment debtor who is entitled to “to demand payment” applies to amounts payable to a beneficiary of a trust under the rule in *Saunders v. Vautier*. If a trustee receives a notice of seizure, any payment under the trust that would otherwise have been made to the judgment debtor in the 12 month period following delivery of the notice of seizure to a trustee must be paid to the enforcement officer.

Set-off permitted

- 104 Subject to section 105, an account debtor is entitled to exercise a right of set-off against an account seized by an enforcement officer to the same extent as the account debtor could exercise a right of set-off against the claim of the judgment debtor to payment of the account.**

Comment: The same opportunity to exercise the right of set-off will apply to the seizure of an account as applies to the garnishment of a debt.

Set-off not permitted

- 105 An account debtor is not entitled to set off against an account seized by the enforcement officer a claim or obligation that arose after the notice of seizure is given to the account debtor unless the claim or obligation could have been set off against an assignee of the account.**

Comment: Self-explanatory.

Payment discharges account debtor

- 106 Payment to an enforcement officer in accordance with a notice of seizure discharges an account debtor’s obligation to a judgment debtor to the extent of the amount paid to the enforcement officer.**

Comment: Self-explanatory.

Assigned accounts

- 107(1) Despite that an account has been assigned or is the subject of a security interest, an account debtor who is given a notice of seizure by an enforcement officer**
- (a) may, unless the account debtor has received notice that the account has been assigned by the enforcement officer, pay to the enforcement officer the lesser of**
 - (i) the amount of the account payable, and**
 - (ii) the amount recoverable as stated in the notice of seizure or otherwise stated in writing by the enforcement officer; and**

- (b) must, within 20 days of payment of the account to the enforcement officer, notify the assignee or the secured party of the payment.**
- (2) Payment to an enforcement officer as provided for in subsection (1) is a defence to any action brought for failure to honour an assignment or security interest to the extent of the amount paid to the enforcement officer.**
- (3) Upon receipt of a written notice of a claim by an assignee or secured party referred to in subsection (1), the enforcement officer may**
 - (a) pay to the assignee or secured party, the amount paid to the enforcement officer by the account debtor under to in subsection (1); or**
 - (b) proceed as provided in Part 15.**

Comment: Priority between an enforcement charge and either an assignment of an account or a security interest is determined by the priority rules contained in Part 6. Under this section, if an account debtor receives a notice of seizure after receiving a notice of assignment with regard to same account debt, the account debtor may either determine which has priority and make payment accordingly or pay the amount of the account debt to the enforcement officer. Under subsection (2), payment to the enforcement officer is a defence to any action brought for failure to honour the assignment to the extent of the amount paid to the enforcement officer. The reason why this section permits an account debtor to pay an account to the enforcement officer and get protection from any claims by an assignee or secured party is that an account debtor should not be expected to incur the cost and risk of determining whether the notice of seizure has priority over a notice of assignment or security interest. If the account debtor pays the account debt to the enforcement officer, the latter has the burden of determining the priorities. If the enforcement officer determines that the assignment or the security interest have priority, the enforcement officer is obliged, prior to making any distribution under Part 14, to satisfy any entitlements that have priority. If there is a dispute between the enforcement officer and the assignee with regard to priorities, this dispute may be resolved under Part 15 [Third Person Claims].

The defence provided to the account debtor by subsection (2) is limited to the amount paid enforcement officer under subsection (1). If the amount paid to the enforcement officer does not equal the whole account debt owing by the account debtor to the judgment debtor, the account debtor remains liable to an assignee or secured party, as the case may be, for the balance.

Compensation for account debtor

- 108 An account debtor who pays money to an enforcement officer to discharge an account may retain, from the amount that would otherwise be payable to the enforcement officer, the amount prescribed as compensation for complying with the notice of seizure.**

Comment: An account debtor who receives a notice of seizure is an innocent third party who is drawn into an enforcement proceeding. An account debtor who pays an account to the enforcement officer will often incur additional administrative expenses and perhaps legal fees. This section permits provinces/territories to prescribe an amount that an account debtor is entitled

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to retain from the amount that would otherwise be payable to the enforcement officer as compensation for complying with a notice of seizure.

Seizure of money in possession of enforcement officer that is payable to judgment debtor

109 If an enforcement officer has funds in his or her possession or control that are payable under this Act to a person who is a judgment creditor in a legal proceeding and in a different legal proceeding that person is a judgment debtor in respect of whom the enforcement officer has received an enforcement instruction, the enforcement officer may seize the funds by giving a notice of seizure to the judgment debtor.

Comment: Self-explanatory.

Seizure of money in court that is payable to judgment debtor

110 (1) If a judgment debtor is or may become entitled to money that is held in court as a consequence of legal proceedings between the judgment debtor and another person, an enforcement officer may seize the money in court by giving a notice of seizure to the [insert the name of the court official that is appropriate for the enacting jurisdiction].

- (2)** On receiving a notice of seizure under subsection (1), the [insert the name of the court official referred to in subsection (1)] must pay an amount to the enforcement officer that is the lesser of the amount of the funds in court and the amount recoverable
- (a)** immediately, if the judgment debtor is entitled to receive immediate payment of the funds in court; or
 - (b)** when the judgment debtor becomes entitled to receive payment of the funds in court, if the judgment debtor is not entitled to receive immediate payment of the funds but may become entitled receive payment of all or part of the funds in court if a judgment is issued in favour of the judgment debtor,
- (3)** Except for sections 106 and 107, none of the other sections of this Part apply to the seizure of money in court.

Comment: Self-explanatory.

Application to release portion of seized account

111 On request of a judgment debtor, an enforcement officer who has seized an account under this Division may, or, if ordered by the court on application by the judgment debtor, must, release from the seizure an amount sufficient to permit the judgment debtor to maintain property leased to the account debtor or to perform a contract with the account debtor under which the account became or will become payable.

Comment: An example of the application of this section is the seizure of rental payments that are payable by a tenant to the judgment debtor who is a lessor. Under the terms of the lease, the judgment debtor may have covenanted to provide heat, electricity and other services as well as

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keep the premises in good repair. In most cases, the judgment debtor relies on the rental payments to pay the fuel and utility bills associated with the rented premises. In these circumstances, the court may release a sufficient portion of the rental payments to permit the judgment debtor to provide the services that the judgment debtor has covenanted to provide.

Judgment against account debtor who fails to honour seizure of account

112 (1) On application by an instructing judgment creditor who delivered an enforcement instruction to seize to an account and on being satisfied that the account debtor received the notice of seizure or had actual notice of its contents, and that the account debtor, without legal excuse, failed to comply with section 99 or 100, the court may order that judgment be entered against the account debtor in favour of an instructing judgment creditor in an amount that is the total of

- (a) the amount that the account debtor is obligated to pay to the enforcement officer under the notice of seizure; and**
- (b) the costs of the proceedings and the enforcement officer's fees, taxable costs and expenses relating to the seizure.**

(2) A judgment creditor who makes an application under subsection (1) may give notice to all instructing judgment creditors requesting a proportional contribution to the cost of the application and taxable costs of a judgment creditor who makes a contribution in response to such a request are regarded as taxable costs under section 184(1)(c).

(3) Money received by an enforcement officer on a judgment against the account debtor made under an order made under subsection (2) must be dealt with by the enforcement officer in accordance with section 180(4).

Comment: If money is recovered on a judgment entered against an account debtor under this section, the effect of subsection (3) and section 180(4) is to require distribution of the money among those eligible claimants who would have been entitled to a distribution if the account debtor had paid the account to the enforcement officer at the time that the account was seized by giving a notice of seizure to the account debtor rather than those judgment creditors who are eligible claimants at the time that the funds are received by the enforcement officer.

Division 5: SECURITIES AND SECURITY ENTITLEMENTS

Introductory Comment: This Division applies to the seizure and sale of a “security” or a “security entitlement” as those terms are defined in the draft *Uniform Securities Transfer Act* (USTA). Because of the relationship between this Act and the USTA in respect of securities and security entitlements, this Division incorporates by reference many of the definitions of the USTA. This will avoid any conflict with regard to the terminology used in the two Acts.

Sections 115 to 118 of this Act describe the method and mechanics by which the seizure of a security or a security entitlement must be carried out by an enforcement officer. Sections 119 to 122 of this Act describe the effect of a seizure. It will be important for users of the USTA to be able to determine from reading the USTA when an effective seizure of a security or security entitlement occurs. Sections 56 to 59 of the draft USTA inform its readers with regard to what

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constitutes a valid seizure of a security or security entitlement. It will be important to ensure that there is no inconsistency between the provisions of this Act and the USTA.

Definitions

113 (1) The following terms, have the same meaning as in the [insert name given to the USTA in the province/territory]:

“appropriate person”,
“bearer form”,
“broker”,
“certificated security”,
“clearing agency”,
“commodity contract”,
“corporation”,
“endorsement”,
“entitlement holder”,
“entitlement order”,
“financial asset”,
“instruction”,
“investment fund”,
“investment fund security”,
“issuer”,
“purchase”,
“purchaser”,
“registered form”,
“representative”,
“securities account”,
“securities intermediary”,
“security”,
“security certificate”,
“security entitlement”,
“transfer agent”, and
“uncertificated security”.

(2) If there is a conflict between a definition of a term incorporated by reference under subsection (1) and a definition contained in another Division or Part of this Act, the definition provided by subsection (1) applies to this Division.

Comment: The definition of term “security” is one of the definitions of the USTA that is incorporated by this section for the purposes of this Division. Where the term “security” is used in this Division, the definition of “security” in the USTA applies. With regard to other Divisions and Parts of this Act, the definition of “security” found in the *Personal Property Security Act* applies. The latter definition is incorporated by section 1(2) of this Act.

Application of sections Division 1 to this Division

114 (1) Sections 51, 52(1)(d) and 70 of Division 1 of this Part apply to an enforcement proceeding under this Division.

(2) Subject to subsection (1), Division 1 of this Part does not apply to enforcement proceedings under this Division.

Comment: This Division describes the method by which a security or security entitlement may be seized and the process under which the value of a seized security or security entitlement may be realized by the enforcement officer. With the exception of sections 51, 52(1)(d) and 70, Division 1 does not apply to this Division. Section 51 is a section with general application to personal property and it gives an enforcement officer authority to seize personal property upon receiving an enforcement instruction from a judgment creditor. Section 51 provides that an enforcement officer is entitled to seize exigible property of a judgment debtor that is a security or security entitlement by effecting a seizure under this Division. Section 70 is a section of general application to personal property that provides an enforcement officer with protection from liability for damages in the circumstances described in the section.

Seizure of certificated security

115 (1) Except as otherwise provided in subsection (2) or section 118, a certificated security may be seized only by actual seizure of the security certificate by an enforcement officer.

(2) A certificated security for which the security certificate has been surrendered to the issuer may be seized by an enforcement officer giving a notice of seizure in the prescribed form to the issuer at the issuer's chief executive office.

(3) If a judgment debtor claims that a security certificate is lost, or that a security certificate has been destroyed or wrongfully taken, the court, on an application by an instructing judgment creditor, with notice to the judgment debtor and the issuer, may order

(a) the judgment debtor to

(i) request the issuer to issue a new security certificate under section 103 of the [insert the name given to the USTA by the enacting jurisdiction];

(ii) satisfy any reasonable requirements imposed by the issuer with regard to the issue of a new security certificate; and

(b) the applicant or the judgment debtor, to provide with the issuer an indemnity bond as may be required under section 103 of the [insert the name given to the USTA by the enacting jurisdiction].

(4) If an order is made by the court under subsection (3) and the judgment debtor does not within 15 days after the making of the order request the issuer to issue a new security certificate, the court, on the application of the applicant under subsection (3), may make an order that the judgment debtor forfeits some or all of the exemptions that the judgment debtor would otherwise be entitled to claim under Part 12.

Comment: A “certificated security” is defined in the USTA as meaning a security that is represented by a certificate. The term “issuer” has an extended definition in the USTA that includes a person who directly or indirectly creates a fractional interest in rights or property if the

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fractional interest is represented by a security certificate.

Seizure of uncertificated security

- 116** Except as otherwise provided in section 118, an uncertificated security may be seized only by an enforcement officer giving a notice of seizure in the prescribed form to the issuer at the issuer's chief executive office.

Comment: An "uncertificated security" is defined in the USTA as meaning a security that is not represented by a certificate.

Seizure of a security entitlement

- 117** Except as otherwise provided in section 118, a security entitlement may be seized only by an enforcement officer giving a notice of seizure in the prescribed form to the securities intermediary with whom the judgment debtor's securities account is maintained.

Comment: A "security entitlement" is defined in the USTA as meaning the rights and property interest of an entitlement holder with respect to a financial asset. A "securities intermediary" is defined in the USTA as meaning:

- (1) a clearing agency, or
- (2) a person, including a broker, bank or trust company that in the ordinary course of its business maintains security accounts for others and is acting in that capacity.

Seizure where judgment debtor's interest is subject to security interest

- 118** The interest of a judgment debtor in any of the following may be seized by an enforcement officer giving a notice of seizure in the prescribed form to the secured party:
- (a) a certificated security for which the security certificate is in the possession of a secured party;
 - (b) an uncertificated security registered in the name of a secured party;
 - (c) a security entitlement maintained in the name of a secured party.

Comment: Self-explanatory.

Effect of seizure of certificated security

- 119 (1)** If a certificated security in bearer form is seized under this Division, the enforcement officer who makes the seizure may, in accordance with this Division
- (a) dispose of the security; or
 - (b) otherwise realize upon its value.
- (2)** If a certificated security in registered form is seized under this Act, the enforcement officer is an appropriate person to endorse the security for the purposes of [Insert the name given to the USTA by the enacting jurisdiction].

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- (3) **Subject to** [Insert the appropriate section number and name of the USTA. In the June 18, 2002 preliminary draft, the section number is section 97.] **if an enforcement officer presents a certificated security in registered form to the issuer with a request to register a transfer of the security, the issuer is required to register the transfer.**

Comment: In the case of a certificated security in bearer form, the enforcement officer, may realize upon the value of the security by delivering it to a securities intermediary with an instruction to sell.

In the case of a certificated security in registered form, an enforcement officer, as the appropriate person, may endorse the security and request the issuer to register a transfer of the security. Subject to section 97 of the USTA, the issuer is required to register the requested transfer. Section 97 of the USTA provides that an issuer must register a transfer if the conditions set out in that section are met. Section 97(1)(e) provides that the issuer must register the transfer as requested if the transfer does not violate any restriction on transfer imposed by the issuer in accordance with section 72. Section 72 of the USTA provides:

- 72 A restriction on the transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless
- (a) the security is a certificated security and the restriction is noted conspicuously on the security certificate.
 - (b) the security is an uncertificated security and the registered owner has been notified of the restriction.

With regard to transfer restrictions on a security of a corporation that is not an offering or distributing corporation, section 125 of this Division applies.

If a certificated security is transferred into the name of the enforcement officer, the latter, as the registered owner of the certificated security, is entitled to receive all notices, dividends, etc.

Effect of seizure of uncertificated security

120 (1) If an uncertificated security is seized under this Division:

- (a) **the issuer must not act upon or comply with any instruction, direction, request or consent given by the judgment debtor for the duration of the period that the seizure is effective; and**
 - (b) **if the issuer would be required to comply with a direction or request to transfer the security if it were given by the judgment debtor when the security was not under seizure, the enforcement officer who made the seizure may require the issuer to register a transfer of the security from the name of the judgment debtor to the name of the enforcement officer.**
- (2) **On completion of a transfer of a security referred to in subsection (1),**
- (a) **the enforcement officer as the registered owner of the security is entitled**
 - (i) **to receive any information from the issuer that the judgment debtor would otherwise be entitled to receive;**
 - (ii) **present or give an instruction to the issuer that the judgment debtor would otherwise be entitled to present or**

- give;
 - (iii) give any instructions, directions, or consent to the issuer that the judgment debtor would otherwise be entitled to give,
 - (iv) exercise any voting rights in respect of the security;
 - (b) the issuer must comply with any instruction, direction, request or consent given by the enforcement officer if the issuer would be required to comply with the instruction, direction, request, or consent were it given by the judgment debtor when the interest of the judgment debtor was not under seizure;
 - (c) if the issuer is or becomes obliged to make any payment or distribution with regard to an uncertificated security that the issuer would otherwise have been obliged to make to the judgment debtor, the issuer is obliged to make the payment or distribution to the enforcement officer.
- (3) If the substance of a duty imposed on an issuer by another statute, regulation or rule is the subject of this section, compliance with this section by the issuer satisfies the duty imposed by that other statute, regulation or rule.

Comment: If an uncertificated security is seized by an enforcement officer, he or she may require the issuer to register a transfer of the security into the name of the enforcement officer. As the registered owner of the security, the enforcement officer is entitled to sell the security.

If, prior to the seizure by the enforcement officer, the judgment debtor entered into a control agreement with a secured party, the judgment debtor may be precluded by the control agreement from requesting a transfer of the registration of the uncertificated security. In these circumstances, the enforcement officer will likewise be precluded from requesting a transfer of the registration of the uncertificated security.

Effect of seizure of security entitlement

121 (1) If a security entitlement is seized under this Act:

- (a) the enforcement officer who made the seizure is:
 - (i) entitled to receive any information that the judgment debtor would otherwise be entitled to receive,
 - (ii) an appropriate person who is entitled to originate an entitlement order directed to the securities intermediary that the judgment debtor would otherwise be entitled to originate, and
 - (iii) entitled to give any directions or consent to the securities intermediary that the judgment debtor would otherwise be entitled to give;
- (b) a securities intermediary must comply with any entitlement order, direction or consent given by the enforcement officer if the securities intermediary would be required to comply with an entitlement order, direction or consent were it given by the judgment debtor when the interest of the judgment debtor was

- not under seizure;
 - (c) the securities intermediary must not act upon or comply with any entitlement order, direction, consent or other instruction given by the judgment debtor for the duration of the period that the seizure is effective; and
 - (d) if the securities intermediary is or becomes obliged to make any payment or distribution with regard to a security entitlement that the securities intermediary would otherwise have been obliged to make to the judgment debtor, the securities intermediary is obliged to make the payment or distribution to the enforcement officer.
- (2) If the substance of a duty imposed on a securities intermediary by another statute, regulation or rule is the subject of this section, compliance with this section by the securities intermediary satisfies the duty imposed by that other statute, regulation or rule.

Comment: Self-explanatory.

Effect of seizure of the interest of judgment debtor that is subject to prior security interest

122 If a judgment debtor's interest in a security or security entitlement is seized under this Division and a judgment debtor's interest is subject to a prior security interest:

- (a) the enforcement officer who made the seizure acquires all of the rights and powers of the judgment debtor in relation to the seized property and may take any action in relation to that property that could have been taken by the judgment debtor; and
- (b) the judgment debtor loses all rights and powers to deal with the seized property for the duration of the period that the seizure is effective.

Comment: Self-explanatory.

No prejudice to prior security interest of securities intermediary

123 (1) Despite sections 117 and 121, the seizure of a security entitlement does not affect a prior security interest of a securities intermediary in the security entitlement for the amount owed by the judgment debtor to the securities intermediary at the time of seizure.

- (2) A securities intermediary is deemed to have taken possession of the security when the appropriate entries have been made in the records of the securities intermediary.

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Comment: Securities intermediaries often advance funds to a client for the purpose of acquiring investments and the securities intermediary takes a security interest in the security entitlement of the client as security for the amount of the funds that are advanced.

When securities intermediary may complete a sale

124 (1) If a notice of seizure of a security entitlement is served on a securities intermediary after the securities intermediary has received an entitlement order directing the transfer or redemption of a financial asset to which the security entitlement relates, and the securities intermediary entered into commitments with third parties to implement the entitlement order, the securities intermediary may complete the entitlement order without regard to the notice of seizure.

(2) If, in the circumstances described in subsection (1), the entitlement order directs the proceeds of any transfer or redemption be paid to the judgment debtor or be credited to the judgment debtor's securities account and payable to the judgment debtor on demand, the securities intermediary must, upon receipt of the proceeds, pay the proceeds to the enforcement officer.

Comment: Section 113 of this Division incorporates the USTA definition of "entitlement order". The purpose of subsection (1) is to permit a security intermediary to complete a transaction in circumstances where canceling the transaction, after receiving a notice of seizure, could result in a liability for the security intermediary who has already entered into commitments on the strength of the entitlement order received from the judgment debtor.

Instructions to sell are often accompanied by simultaneous instructions to buy, and it may be difficult, if not impossible, to isolate one transaction from another. However, the judgment debtor may be liquidating financial assets and the judgment debtor may have given directions to the securities intermediary that upon the completion of a transaction of a series of transactions, the remaining balance is to be paid to the judgment debtor or held in a securities account. In these circumstances, subsection (2) requires the securities intermediary, who has received a notice of seizure, to pay the funds over to the enforcement officer.

Transfer restrictions

125 (1) Except as otherwise provided in this section, if an enforcement officer seizes a security of a corporation other than a corporation that is an offering corporation [insert the term used in the *Business Corporations Act* of the enacting province/territory to describe corporations that are "offering" corporations. For example, Alberta uses the term "distributing" corporation.] the enforcement officer is not bound by a prohibition of or restriction on the transfer, disposition of, or dealing with, a seized security that is contained in the by-laws, articles or internal rules of the issuer of that security or a unanimous shareholders' agreement relating to that security to the extent that compliance would prevent the enforcement officer from selling the security at all or within a reasonable time or for a reasonable price.

- (2) After seizing a security referred to in subsection (1), the enforcement officer may give a written demand to the issuer to provide the names and addresses of all registered holders of that security to the enforcement officer within 15 days.**
- (3) The enforcement officer who seizes a security referred to in subsection (1) may give a written demand to the judgment debtor other registered holders of that security, and the issuer of that security, requiring disclosure to the enforcement officer of any transfer restrictions or preferential rights to acquire that security.**
- (4) If a person who is given a demand referred to in subsection (3) does not disclose any transfer restrictions or preferential rights that are related to the seized the security within 15 days of receiving the demand, that person may not subsequently assert any transfer restrictions or preferential rights in relation to that security against the enforcement officer or a person who acquires that security from the enforcement officer.**
- (5) Prior to selling a security referred to in subsection (1), an enforcement officer must give a notice of intended sale that sets out the method or sale or disposition to:**

 - (a) the issuer;**
 - (b) any person who, to the knowledge of the enforcement officer, has a preferential right to acquire the seized security on a voluntary sale by the judgment debtor; and**
 - (c) every registered holder of that security as disclosed by the issuer pursuant to subsection (2).**
- (6) A notice of intended sale**

 - (a) may be sent to the address of a registered holder of the security as set out in the records of the issuer disclosed by the issuer pursuant to subsection (2); and**
 - (b) is deemed to have been given to all holders of that security of the issuer when it is given to all registered holders of the security disclosed by the issuer pursuant to subsection (2).**
- (7) Despite subsection (1) and subject to subsections (9) to (13), an enforcement officer must in selling a seized security use a method of sale that**

 - (a) follows as closely as possible the method that the judgment debtor would be required to follow in order to sell the security; and**
 - (b) provides the issuer and other persons who own a security of that issuer with a reasonable opportunity to redeem or buy the security before it is offered for sale to any other person.**

- (8) After complying with subsection (5), an enforcement officer must not take any further steps to sell the security until 15 days have elapsed from the day that the notice of intended sale was given.**
- (9) On application by the issuer of a seized security or a person who owns a security of that issuer, the court may, after considering**
- (a) the interests of the issuer and persons who own securities of the issuer in maintaining any restrictions on the sale or disposition of the security,**
 - (b) the interests of the judgment creditor including whether or not the judgment debtor has other exigible property from which the amount recoverable under the judgments to which the seizure relates may be satisfied, and**
 - (c) whether the judgment being enforced was obtained as a consequence of collusion between the judgment creditor and the judgment debtor for the purpose of circumventing a prohibition or restriction on the transfer of the security by the judgment debtor**
- order that the method of sale or disposition of the seized security by the enforcement officer must comply with restrictions on the transfer, disposition of, or other dealing with, the seized security contained in the by-laws, articles or internal rules of the issuer or in a unanimous shareholders' agreement relating to the seized security.**
- (10) Subject to subsections (11) to (13), a person who would otherwise be entitled to buy or redeem a security referred to in subsection (1) for a predetermined price or at a price fixed by reference to a predetermined formula is entitled to buy or redeem the security from the enforcement officer for that price.**
- (11) If an instructing judgment creditor believes that the price at which the security may be bought or redeemed under subsection (10) is conspicuously less than the value of the security, the judgment creditor may make an application to the court to fix the price at which the security referred to in subsection (1) may be bought or redeemed.**
- (12) On an application made under subsection (11) and subject to an order of the court made under subsection (9), the court may fix the price that a person who would otherwise be entitled to buy or redeem the security must pay to acquire or redeem the security if the court determines that:**
- (a) the corporate by-laws, articles or internal rules of the issuer, or unanimous shareholders' agreement relating to the seized security under which a person would be entitled to buy or redeem the security for a predetermined price or at a price fixed by reference to a predetermined formula was made, agreed to by the judgment debtor or created within the period beginning on**

- the day that is 5 years before the day on which the enforcement charge that charges the security was created;
- (b) the price at which the security may be bought or redeemed under subsection (10) is conspicuously less than the value of the security; and
 - (c) permitting a person to buy or redeem the security at the predetermined price or the price fixed by reference to a predetermined formula will have the effect of preventing the applicant from recovering the amount recoverable under the judgments to which the seizure relates because the judgment debtor does not have enough other exigible property from which his or her judgment may be satisfied.
- (13) If, on an application made under subsections (11) and (12), the court decides to fix the price at which the seized security may be redeemed by the issuer or purchased by another holder of the security, the price fixed by the court must bear a reasonable relationship to the value of the security after taking into account the effect that a prohibition of or restriction on transfer, disposition of, or dealing with the security by the transferee has on the value of the seized security.
- (14) Subject to subsections (11) to (13), at any time before the sale or other disposition of a security referred to in subsection (1), the issuer or any person who owns a security of that issuer other than the judgment debtor may pay to the enforcement officer an amount that is the lesser of:
- (a) an amount sufficient to:
 - (i) discharge the judgments of all instructing judgment creditors who have delivered a subsisting enforcement instruction to the enforcement officer,
 - (ii) pay the enforcement officer's fees, taxable costs and expenses incurred to the date of payment in connection with enforcing the judgment against the security, and
 - (iii) pay the taxable costs of the judgment creditor who made the application under subsection (11); or
 - (b) an amount equal to the value of the security.
- (15) Upon payment of the amount referred to in subsection (14):
- (a) the enforcement officer must release the seized security from seizure and notify the issuer of the release;
 - (b) a person, other than the judgment debtor, who paid an amount equal to the value of the security is entitled to be recorded as the registered owner of the security by the issuer;
 - (c) a person who paid an amount that is less than the value of the security is deemed to have acquired a security interest in the security, to which the *Personal Property Security Act* applies, to the extent of the amount paid and interest thereon at the rate set

for unpaid judgments, calculated from the date when the payment is made to the enforcement officer.

- (16) If no person exercises a right to redeem or buy the security under subsection (10) or (14) within the 15 days referred to in subsection (8), another owner of that security and, if the seizure by the enforcement officer did not include all of the securities of the issuer owned by the judgment debtor, the judgment debtor may request the enforcement officer to offer for sale, along with the seized security, all the securities of the issuer owned by that person on terms identical to those applicable to the seized security, by tendering to the enforcement officer**
- (a) executed transfer documents in respect of all of securities of that issuer owned by that person; and**
 - (b) proof satisfactory to the enforcement officer of compliance with the by-laws, articles or internal rules of the issuer or the terms of a unanimous shareholders' agreement relating to the seized security that affect the disposal of the security.**
- (17) Nothing in subsection (16):**
- (a) precludes an enforcement officer from selling only the seized security if, in the opinion of the enforcement officer, all of the securities tendered for sale under subsection (16) cannot be sold; or**
 - (b) permits an enforcement officer to sell, without the consent of the person who has tendered securities for sale, fewer than the total number of securities tendered for sale under subsection (16).**
- (18) Unless a written notice of intention to exercise the right referred to in subsection (10) or (14) is not given to the enforcement officer within 15 days referred to in subsection (8), the enforcement officer may proceed to dispose of a security referred to in subsection (1).**
- (19) If an enforcement officer has given a notice of an intended sale to the persons mentioned in subsection (5) and no person has exercised his or her right under subsections (10) or (14) before the security referred to in subsection (1) is sold, the method of sale set out in the notice of intended sale is deemed to have met the requirements of this Act.**
- (20) A person who purchases a security referred to in subsection (1) from an enforcement officer as provided in this Division:**
- (a) acquires all of the rights and obligations in the security or associated with it that the judgment debtor had prior to the seizure of the security by the enforcement officer;**
 - (b) is entitled to be registered as owner of the security in the records of the issuer in place of the judgment debtor; and**
 - (c) takes the security subject to any lien that the corporation may**

have on its shares for a debt of the judgment debtor to the corporation that was incurred before the security was seized by the enforcement officer.

(21) If, at the time of the purchase, a purchaser referred to in subsection (20) has knowledge of a unanimous shareholders' agreement to which the judgment debtor was a party at the time of the seizure, the purchaser is deemed to be a party to the unanimous shareholders' agreement.

Comment:

This section is directed at securities issued by a closely-held corporation that is not an “offering corporation” as that term is defined in section 1(1) and (6) of the Ontario *Business Corporations Act*, a “distributing corporation” as that term is defined in section 1(p) of the Alberta *Business Corporations Act*, or a “public company” as that term is defined in section 1 of the British Columbia *Business Corporations Act*, or such similar term that is used in corporations statutes of other provinces/territories. Section 1(1) of the Ontario *Business Corporations Act* defines “offering corporation” as meaning a corporation that is offering its securities to the public within the meaning of subsection (6)” The Alberta *Business Corporations Act*, in section 1(p), defines “distributing corporation” as meaning a corporation

- (i) any of whose shares, or securities that may or might be exchanged for or converted into shares, were part of a distribution to the public, and
- (ii) that has more than 15 shareholders.

The objective of this section is to strike a balance between the right of a judgment creditor to satisfy a money judgment rendered by a court by seizing and realizing upon the value of any exigible property of the judgment debtor including securities and the desire of other shareholders to determine their future business “partners” by placing transfer restrictions on the transferability of the corporation’s securities. If such transfer restrictions could never be overridden, a person could render themselves judgment proof by transferring their assets to a non-offering or non-distributing corporation.

The balance referred to in the previous paragraph is achieved by several provisions. Under subsection (1), an enforcement officer who seizes a security is not bound by a prohibition or restriction on transfer of the seized security that would be applicable to the judgment debtor; however, under subsection (7)(a), the enforcement officer must, in disposing of a seized security, follow, as closely as possible, the process that the judgment debtor would be required to follow if the judgment debtor wishes to voluntarily dispose of his or her shares. Under subsection (7)(b), other shareholders of the company are given an opportunity to purchase a seized security before the enforcement officer offers it for sale to other persons. Under subsection (16), if shareholder is unhappy with the prospect of a stranger acquiring the seized security, he or she may tender his or her securities for sale by the enforcement officer along with the judgment debtor’s security. Furthermore, under subsection (9), upon the application of issuer or another owner of the security, the court, after considering that factors referred to in subsection (9), may make an order requiring the enforcement officer to comply with any applicable transfer restrictions.

If there is a blanket prohibition on transfer of a security, subject only to a consent to transfer being granted in the absolute discretion of the board of directors or the shareholders, subsection (7)(a) requires the enforcement officer who seized the security to request the consent to transfer. If the consent is denied, the enforcement officer would not, under subsection (1), be bound by the prohibition; However, the issuer or another holder of the same security could apply to the court

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under subsection (9) for an order that the enforcement officer is bound by the prohibition on transfer without the consent of the board or the shareholders.

Under subsection (7)(b), other holders of the security must be given a reasonable opportunity to purchase the seized security before the enforcement officer offers the seized security to any other person. In order to prevent the acquisition of additional shares from changing the balance of power or control of a corporation, an unanimous shareholder's agreement may limit the number of shares that other holders of the security may acquire.

The 15 day period specified by subsection (8) provides the judgment debtor with a final opportunity to satisfy the judgment before the sale of the securities by the enforcement officer and it provides other holders of the security with an opportunity to exercise any rights they may have to acquire the seized security.

With regard to subsection (11), if a nominal value is attached to a security and another holder of the security is entitled to purchase the security at that value if the judgment debtor voluntarily disposes of the security, an instructing judgment creditor may make an application to the court to fix the price at which the security may be redeemed or purchased. If such an application is made, the court, before making an order, must consider the factors referred to in subsection (12). If a corporation has a process by which its securities are valued on a periodic basis and another holder of the security is entitled to purchase the security at that value if the judgment debtor wishes to voluntarily dispose of the security, an instructing judgment creditor may make an application to the court to determine whether or not the value is conspicuously less than value of the security.

In subsection (12)(a), the 5 year period corresponds to the "reach-back" period in section 91(2) of the *Bankruptcy and Insolvency Act*. In subsection 12(b), the description of the price being "conspicuously less" than the value of the security is drawn from section 100 of the *Bankruptcy and Insolvency Act*. Under the Uniform Act, the applicant has the burden of proving that the price at which a security may be redeemed by the issuer or purchased by another holder of the security is conspicuously less than the value of the security. The value of a security that is subject to a prohibition of or restriction on transfer cannot be determined by reference to a market value because there is no open market for such securities. Nevertheless, a value can be determined by an assessment of the assets and liabilities of the corporation. In most cases, an applicant will likely need to adduce evidence from qualified appraisers. Under subsection 12(c), the applicant must demonstrate that he or she is unable to satisfy its judgment from other exigible property of the judgment debtor.

A person who is deemed to have acquired a security interest under subsection (15)(c) may perfect that security interest by registering a financing statement in accordance with the *Personal Property Security Act* or by obtain possession of a security certificate.

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| <p>LRCNS Comment: We do not propose the adoption of s.125 (overriding transfer restrictions on shares in closely-held companies), for reasons explained at page 28 of this Discussion Paper.</p> |
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Division 6: INTELLECTUAL PROPERTY

Definition

126 In this Division, "intellectual property" includes, without limitation any

property right or interest in a

- (a) copyright,**
- (b) letters patent for an invention,**
- (c) trade-mark,**
- (d) industrial design,**
- (e) integrated circuit topography,**
- (f) plant breeders' rights,**
- (g) trade secret, and**
- (h) a transferable license, interest or right derived from or associated with clause (a) to (f) whether the license, interest or right arose or is recognized under the law of Canada or any other country.**

Seizure and disposition of intellectual property

127 (1) An enforcement officer may seize intellectual property by giving a notice of seizure to the judgment debtor and where appropriate to

- (a) the office in which the right or interest is registered;**
- (b) a licensee of the rights under or interest in intellectual property.**

(2) When a seizure of intellectual property is made by an enforcement officer,

- (a) the judgment debtor loses the power dispose of or otherwise deal with it; and**
- (b) the enforcement officer**
 - (i) acquires the rights and powers to dispose of and otherwise deal with it, and**
 - (ii) is entitled to take any action with regard to it that, before the seizure, could have been taken by the judgment debtor.**

(3) If an enforcement officer seizes intellectual property that is a trade secret,

- (a) the seizure and taking possession of the trade secret by the enforcement officer does not put secret information into the public domain; and**
- (b) an enforcement officer must take reasonable precautions to maintain the secrecy of the trade secret.**

Comment:

Most forms of intellectual property including copyright, patents, trade-marks, industrial designs and plant breeders' rights are governed by federal legislation. An enforcement officer may seize these forms of intellectual property; however, a transfer by the enforcement officer is subject to the applicable federal legislation and any rights that have been acquired under that legislation.

Under section 13(1) of this Act, an enforcement officer has the power to execute or endorse any document that could have been or may be executed or endorsed by the judgment debtor. Under section 7(2)(g), the court, on application, may order a judgment debtor or other person to execute an assignment, transfer or other document or record that is required to complete the sale of other disposition of property by an enforcement officer.

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With regard to copyright, the *Copyright Act* makes a distinction between the right to assign the copyright and a waiver of “moral rights” in respect of the work. Moral rights, which are dealt with in s. 14.1 and 14.2 of the *Copyright Act*, relate to control over the integrity of the work. Under s. 14.1(2) of the *Copyright Act*, moral rights may not be assigned but may be waived in whole or in part. An assignment of copyright does not by that act alone constitute a waiver of any moral rights. Section 13(1) entitles the enforcement officer to take any action that could have been taken by the judgment debtor. Under this power, the enforcement officer could waive a judgment debtor’s moral rights in respect of a work. If the exercise of this power by the enforcement officer is not recognized under the *Copyright Act*, the enforcement officer may apply under s. 7 of this Act for an injunctive relief that directs the judgment debtor to waive her or his moral rights either in whole or in part.

Trade secrets are not governed by federal legislation. With regard to trade secrets, a secret formula or process that has been developed by a judgment debtor may have a marketable value. A trade secret is a property right: In *R.I. Crain Limited v. Ashton* [1949] O.R. 303 at 388-89 (H.C.J.), Chevrier J., quoting from *Progress Laundry Co. v. Hamilton* 270 S.W. 834 at 835 (Ky. 1925) described a trade secret as “... a property right [that] differs from a patent in that as soon as the secret is discovered, either by an examination of the product or any other honest way, the discoverer has the full right of using it.” Some of the attributes of a trade secret were described by Chevrier J., quoting from *Glucol Manufacturing Co. v. Shulist*, 214 N.W. 152 at 153 (Mich. 1927), at 308-309, as:

“...a secret formula or process not patented, but known only to certain individuals using it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on.”

The importance of maintaining the secrecy of information relating to a trade secret was the subject of a comment in *Faccenda Chicken Ltd. v. Fowler*, [1986] 1 All E.R. 617 at 625 (C.A.) where the Court stated that the obligation not to use or disclose information clearly covered such things as “... secret processes of manufacture ... or designs or special methods of construction ... and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret.”

If the owner of intellectual property has granted a license or other interest in the property under which the owner is entitled to receive royalty or other payments, such payments are subject to seizure under Part 9, Division 4 [Seizure of Accounts].

PART 10: LAND

Introductory Comment: Enforcement proceedings against land are included in this Act. Some provinces/territories may wish to enact this Part as an amendment to their *Land Title Act* or similar statute.

The process by which a judgment is enforced against a judgment debtor’s land varies significantly among the provinces and territories. In particular, the manner in which a judgment is recorded against land of the judgment debtor varies significantly. For example, in British Columbia, judgments do not become a charge on land until the judgment is registered against the judgment debtor’s interest recorded on a specific title to land identified by a lot and plan number. Subject to some exceptions relating to Crown liens and property tax liens, an examination of the title to parcel of land in either British Columbia or Alberta will reveal any charges or

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encumbrances against a judgment debtor's interest in the land. In Saskatchewan, judgments are registered in a general registry of judgments maintained by the Land Titles Office under the *Land Titles Act*. In Newfoundland and Labrador, judgments are registered in a judgments registry. In some provinces, a writ of execution is filed in the Land Registry or the Land Title Office. In order to accommodate some of the fundamental differences in the manner and effect of registering a judgment against land, the Uniform Act provides two options for registering an enforcement charge against land.

Option #1 (sections 128 - 131) reflects the current practice in Newfoundland and Labrador and the recommendations contained in the Saskatchewan Interim Report on the Enforcement of Money Judgments by Professors Buckwold and Cuming. Option #2 (sections 128 - 131) is intended to be enacted by those provinces/territories that do not wish to have a judgment be a charge against land until it is registered in accordance with the *Land Title Act* or similar Act of the province/territory.

Option #2 reflects the current practice in Alberta and British Columbia.

In this Part, the terms “register” and “registration” are used to describe the process of lodging judgments and other documents in the Land Titles Office or Land Registry Office. If a province/territory uses terms such as “file” or “filing” to describe this process, these terms may be used in place of or in conjunction with the terms “register” and “registration”.

OPTION #1 (sections 128 - 131)

Creation of enforcement charge on land

128 (1) The registration of a notice of judgment in the registry under section 27 creates an enforcement charge on all land held by the judgment debtor at the time of registration and any land acquired by the judgment debtor after the registration and before its discharge.

- (2) An enforcement charge referred to in subsection (1) charges land of a judgment debtor despite any provision in this or any other Act that declares land to be free from seizure and sale to enforce a judgment.**
- (3) Unless otherwise ordered by the court, an enforcement charge created under subsection (1) remains in effect even though an appeal is taken against the judgment or an order is made staying enforcement of the judgment.**

Comment: Wherever the term “registry” is used in this Part, it means “registry” as defined in section 1. In section 1 “registry” is defined to mean the registry prescribed by regulation under this Act. In most provinces/territories, the Personal Property Registry established under the *Personal Property Security Act* will likely be prescribed as the registry for the purpose of this Act. If a province/territory decides to enact this Part as an amendment to the *Land Title Act* or a similar statute, it will be necessary to define the term “registry” in that Act in the same manner as it is defined in this Act.

Under this option, registration of a notice of judgment in the registry under section 27 creates an enforcement charge on the property of a judgment debtor including land without the need of registering a notice of judgment in the land title or land registry office. However, the priority of

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this charge created in this manner is determined under the next section.

Priority of enforcement charge

129 (1) Subject to subsection (2), an enforcement charge referred to in section 128 has priority over:

- (a) an interest in the land that, at the date the enforcement charge was created, could have been registered but was not registered as provided by [insert the title of the *Land Titles Act* or similar statute of the enacting jurisdiction];**
 - (b) a registered or unregistered interest in the land acquired from the judgment debtor after the enforcement charge was created; but, does not have priority over an interest in the land acquired by a transferee unless:**
 - (c) a search of the registry using the name of the transferor as recorded in the records of the land titles office discloses the enforcement charge; or**
 - (d) the enforcement charge is registered as provided in section 130 of this Act [or insert the section number and title of the *Land Titles Act* or similar statute of the enacting jurisdiction that provides for the registration of judgments].**
- (2) An enforcement charge created referred to in section 128, whether or not registered under section 130, does not have priority over:**
- (a) a mortgage, registered before the enforcement charge was created, that secures:**
 - (i) a specific principal sum, even though advances and obligations under the mortgage are made or incurred after the enforcement charge referred to in section 128 was created or was registered under section 130, or**
 - (ii) a revolving line of credit up to a specific principal sum, even though advances and obligations under the mortgage are made or incurred after the enforcement charge referred to in section 128 was created or was registered under section 130 and even though, at any time during the term of the mortgage, there may not be any outstanding advances to be secured;**
 - (b) a mortgage, registered after the enforcement charge was created,**
 - (i) if and to the extent that the mortgage secures value given and used to acquire the interest mortgaged, and**
 - (ii) if the mortgage is registered in accordance with [insert the name of the *Land Titles Act* or similar statute in the enacting jurisdiction] not later than 15 days following the registration of the transfer by which the judgment debtor acquired the interest mortgaged.**
- (3) A person who buys land from a judgment debtor that is exempt as provided in section 159 takes free from the enforcement charge if:**

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- (a) the consideration given by the buyer is equivalent to the market value of the judgment debtor's land; and**
- (b) the buyer becomes registered owner of the land.**

Comment: The effect of subsection (1) is that an enforcement charge against a judgment debtor's land created under section 128 has priority over the interests referred to in clauses (a) and (b), however, unless a notice of judgment is registered in the land titles office or land registry, as the case may be, in accordance with section 130, the enforcement charge created under section 128 does not have priority over a registered interest in land if, at the time that the registered interest was acquired, a search of the records of the registry, using the name of the grantor as that name appears in the records of the land titles office or land registry, would not disclose the enforcement charge. Under this option, a person who contemplates acquiring an interest in land would obtain a search result from the registry designated for the purposes of Part 5 using the name of the grantor. If a search using this name does not reveal any enforcement charges, the grantee is entitled to assume, that there are no enforcement charges on the land of the grantor.

The effect of subsection (1)(a) is to reverse the effect of judicial decisions that gave an unregistered transfer priority over a registered judgment based on the *nemo dat quod non habet* rule.

Subsection (3) recognizes that land of the judgment debtor specified in section 159 is exempt from enforcement proceedings and the proceeds from the sale of exempt property remain exempt under section 163 as long as they remain segregated and identifiable in the hands of the judgment debtor. The purpose of subsection (3) is to enable the judgment debtor sell exempt land and permit the purchaser to acquire the land free of the enforcement charge. An enforcement charge applies to all property of the judgment debtor. Therefore, as a practical matter, it will be necessary to obtain and register a discharge with respect to the exempt land that a judgment debtor proposes to sell. Section 131(2)(c) requires the judgment creditor to provide a discharge if subsection (3) applies; however, if, upon receiving a request for a discharge, the judgment creditor does not believe that the land qualifies as exempt property or the does not believe that the consideration being paid by the transferee is equivalent to market value, an application may be made to the court under section 131(5) for an order confirming that the registration of the notice of judgment need not be discharged.

Registration of an enforcement charge under Land Titles Act

130 (1) If a notice of judgment is registered as provided in section 27, an application may be made by the judgment creditor, in accordance with [insert the name and applicable section number of the *Land Titles Act* or similar statute on the enacting jurisdiction], to register a notice of judgment on the land identified in the application.

- (2) If a notice of preservation order in the same proceeding is registered on the land of the judgment debtor under Part 4, a notice of judgment referred to in subsection (1) is deemed to be registered at the time when the notice of preservation order was registered.**
- (3) The registration of a notice of judgment as provided in subsection (1) creates an enforcement charge on the land described in the registration.**
- (4) Subject to subsection (2), an enforcement charge referred to in**

subsection (3) is effective for the purposes of this Part from the time of the registration of a notice of judgment under this section.

- (5) Registration of a notice of judgment under this section does not constitute notice to or knowledge by any person of the existence of the notice of judgment.**

Comment: If the name under which an interest in land of the judgment debtor is recorded in the records of the land titles office or land registry, when used to search the registry designated for the purposes of Part 5 of this Act, would not disclose an enforcement charge on the property judgment debtor, the judgment creditor will need to register a notice of judgment in the land titles office or land registry, as the case may be, in order create an enforcement charge against the judgment debtor's interest in land.

Discharge of registration

131 (1) In this section:

- (a) “judgment debtor” includes any person named in a registration as a judgment debtor, and**
- (b) “judgment creditor” includes any person named in a registration as a judgment creditor.**

- (2) A judgment creditor must discharge a registration of a notice of judgment if:**

- (a) the judgment to which the registration relates has been satisfied, withdrawn or is otherwise not enforceable;**
- (b) the person named in the registration is not a judgment debtor of the person named as judgment creditor in the registration; or**
- (c) the registration affects land of a judgment debtor that is exempt as provided by section 159 and the land is sold to a buyer for consideration equivalent to the market value of the land.**

- (3) A judgment debtor or a person with an interest in property affected by the registration of notice of judgment may deliver a written demand to the judgment creditor requiring the discharge of a registration in cases referred to in subsection (2) and the judgment creditor must discharge the registration.**

- (4) A person giving a demand referred to in subsection (3) may register a discharge of the registration, in the form prescribed, if he or she provides the registrar with proof satisfactory to the registrar that**

- (a) the demand was delivered to the judgment creditor; and**
- (b) the judgment creditor did not, within 15 days after it is delivery of the demand,
 - (i) comply with a demand, or**
 - (ii) file with the registrar an order of the court confirming that the registration of the notice of judgment need not be discharged.****

- (5) On application to the court by a judgment creditor, a judgment debtor or person with an interest in property affected by an enforcement charge, the court may order that the registration creating the enforcement charge be maintained, amended or discharged.**
- (6) A demand referred to in subsection (3) may be delivered in accordance with section 5 of this Act or by mail addressed to the address of the judgment creditor as it appears in the registration of the judgment.**
- (7) A fee or expense may not be charged, and no amount may be accepted, by a judgment creditor for compliance with a demand made pursuant to subsection (3).**

OPTION #2

Creation of enforcement charge on land

- 128 (1) If a notice of judgment is registered in the registry in accordance with Part 5 of this Act, a judgment creditor may,**
- (a) in the case of land registered under the [insert the title of the *Land Titles Act* or similar Act in the enacting province/territory] make an application in accordance with [insert the title of the *Land Titles Act* or similar Act in the enacting province/territory] to register the notice of the judgment against the title to the land of the judgment debtor described in the application;**
 - (b) in the case of land that is not recorded under the [insert the title of the *Land Titles Act* or similar Act in the enacting Province or Territory], make an application to register a the notice of judgment against the land of the judgment debtor described in the application that is filed in accordance with the regulations.**
- (2) If a notice of preservation order in the same proceeding is registered on the land of the judgment debtor under Part 4, a notice of judgment referred to in subsection (1) is deemed to be registered at the time when a notice of preservation order was registered.**
 - (3) The registration of a notice of judgment in accordance with subsection (1) creates an enforcement charge on the land of a judgment debtor against which the notice of judgment is registered.**
 - (4) Subject to subsection (2), an enforcement charge referred to in subsection (3) is effective for the purposes of this Part from the time of the registration of a notice of judgment under this section.**
 - (5) An enforcement charge referred to in subsection (3) charges land of a judgment debtor despite any provision in this or any other Act that declares land to be free from seizure and sale to enforce a judgment.**

- (6) Unless otherwise ordered by the court, an enforcement charge referred to in subsection (3) remains in effect even though an appeal is taken against the judgment or an order is made staying enforcement of the judgment.**

Comment: Under this Option, a judgment does not become a charge on land until the judgment is registered in accordance with the *Land Titles Act* or similar Act in the province/territory. Before a notice of judgment may be registered under the *Land Titles Act* or similar Act, the judgment creditor must register a notice of judgment in the registry under Part 5 of this Act.

Priority of enforcement charge

129 (1) Except as otherwise provided in this or any other Act, an enforcement charge created under section 128 has priority over

- (a) an interest in land that, at the date the enforcement charge is created, could have been registered but was not registered as provided by [insert the title of the *Land Titles Act* or similar Act of the enacting Province or Territory];**
- (b) a registered or unregistered interest in land acquired from the judgment debtor after the enforcement charge was created.**

(2) An enforcement charge created under section 128 does not have priority over

- (a) a mortgage, registered before the enforcement charge was created, that secures:**
 - (i) a specific principal sum, even though advances and obligations under the mortgage are made or incurred after the enforcement charge was created under section 128, or**
 - (ii) a revolving line of credit up to a specific principal sum even though advances and obligations under the mortgage are made or incurred after the enforcement charge was created under section 128 and even though, at any time during the term of the mortgage, there may not be any outstanding advances to be secured;**
- (b) a mortgage, registered after the enforcement charge was created,**
 - (i) if and to the extent that the mortgage secures value given and used to acquire the interest mortgaged, and**
 - (ii) if the mortgage is registered in accordance with [insert the name of the *Land Titles Act* or similar statute in the enacting jurisdiction] not later than 15 days following the registration of the transfer by which the judgment debtor acquired the interest mortgaged.**

(3) A person who buys land from a judgment debtor that is exempt as provided in section 159 takes free from the enforcement charge if:

- (a) the consideration given by the buyer is equivalent to the market value of the interest; and**
- (b) the buyer becomes registered owner of the interest.**

Appendix B - Uniform Civil Enforcement Of Money Judgments Act (annotated)

Comment: Under this option, a person who contemplates acquiring an interest in land must search the title to the land to determine whether an enforcement charge is registered against the interest of the grantor. It will not be sufficient to search the registry designated for the purposes of Part 5 using the name of the grantor.

The effect of subsection (1)(a) is to reverse the effect of judicial decisions that gave an unregistered transfer priority over a registered judgment based on the *nemo dat quod non habet* rule.

Discharge of registration

130 An enforcement charge on land of a judgment debtor must be discharged:

- (a) **if the registration of a notice of judgment in the registry is discharged, by making an application to register a discharge in accordance with** [insert the title of the *Land Titles Act* or similar Act of the enacting province/territory];
- (b) **if the** [insert the name of the **Registrar of Titles** or similar official] **is satisfied on an application made in the prescribed manner that the judgment to which the enforcement charge relates is satisfied, withdrawn or otherwise not enforceable.**

Comment: The reference in clause (a) to the “registry” is a reference to the registry referred to in Part 5 of this Act.

Registration does not constitute notice or knowledge of notice of judgment

131 Registration of a notice of judgment under section 128 does not constitute notice to or knowledge by any person of the existence of the notice of judgment.

SECTIONS APPLICABLE TO BOTH OPTIONS DESCRIBED ABOVE.

Sale of judgment debtor's land

132 (1) Subject to sections 10, 133 and 134, an enforcement officer is entitled unless a court orders otherwise, to dispose of land of a judgment debtor that is subject to an enforcement charge in the manner that the enforcement officer, acting reasonably, considers offers the best opportunity to maximize the proceeds that may be anticipated from a disposition of the land.

(2) Unless the court orders otherwise, any judgment creditor may bid at a sale conducted by the enforcement officer and purchase land of a judgment debtor.

Comment: Self-explanatory.

Notice of intention to sell

133 (1) Before selling or otherwise disposing of land under this Part, an enforcement officer must give a notice of intention to sell to

- (a) the judgment debtor; and**
- (b) each co-owner of the land whose interest is registered in accordance with [insert the name of the *Land Title Act* or similar statute governing the registration of interest in land in the province or territory].**

(2) After a notice of intention to sell is given under subsection (1), the enforcement officer may enter on or gain access to the land for the purpose of conducting any inspection that is reasonably required to effect a sale of the land.

Comment: A notice of intention to sell signifies the commencement of the process for selling a judgment debtor's land that is subject to an enforcement charge. Under Part 11, if land is co-owned by the judgment debtor and another person or persons, a co-owner may exercise a right to purchase the judgment debtor's interest during the waiting period described in the next section.

LRCNS Comment: As explained at pages 27-28 of this Discussion Paper, we propose to adopt a one year waiting period, following registration of the judgment, before notice of intention to sell may be given under s.133 of the Uniform Act. This follows current Nova Scotia practice under the *Sale of Land Under Execution Act*, R.S.N.S. 1989, c.409, s.4. Therefore, the waiting period following issuance of the notice of intention to sell under s.134, below, may be fairly minimal - as little as thirty days, to accommodate the procedures required by s.135.

Waiting period between notice of intention to sell and offering land for sale

134 (1) Unless otherwise permitted by the court, an enforcement officer must not

offer or advertise land of a judgment debtor for sale until a waiting period of [insert period of time chosen by the enacting jurisdiction] has elapsed from the day on which the notice of intention to sell is given to the judgment debtor if

- (a) the judgment debtor is a natural person and the judgment debtor or a dependent of the judgment debtor resides on the land;**
- (b) the judgment debtor is a corporation, the primary business of the corporation is farming and an officer or director of the corporation or a dependent of the officer or director resides on the land; or**
- (c) the court otherwise orders.**

- (2) The court may extend or shorten the waiting period referred to in subsection (1).**

Comment: The purpose of the waiting period required by this section is to provide a judgment debtors who reside on the land or who are resident farmers with a final opportunity to satisfy the judgments relating to enforcement charges on the land before it is sold. The length of the waiting period that is fixed by regulation by each province/territory should correspond with the length of the redemption period that is normally granted in foreclosure proceedings relating to land used for residential purposes.

Method of disposition

135 (1) At least 30 days before offering land for sale, an enforcement officer must deliver a notice of the method of disposition in the prescribed form to:

- (a) the judgment debtor;**
- (b) judgment creditors who have given a subsisting enforcement instruction to the enforcement officer;**
- (c) a person with an interest in land that is subordinate to an enforcement charge on the land; and**
- (d) any other person specified by the regulations.**

- (2) The notice of the method of disposition referred to in subsection (1) must set out**

- (a) the method of disposition including any proposed terms of the disposition; and**
- (b) any additional information prescribed by regulation.**

- (3) The notice of the method of disposition may set out a minimum price for which the land will be sold.**

- (4) If a person referred to in subsection (1) objects to the proposed method of disposition, proposed terms of disposition or minimum price, a notice of objection must be given in writing to the enforcement officer within 15 days after receiving delivery of the notice of the method of disposition.**

- (5) If a notice of objection is given to an enforcement officer within the time referred to in subsection (4), the enforcement officer must not complete a disposition of the land unless authorized to do so by the court.
- (6) On application, the court may
- (a) approve or modify the proposed method of disposition, the proposed terms of disposition or the minimum price set by the enforcement officer; or
 - (b) delay the disposition by the enforcement officer if the court is satisfied that the method of disposition selected by the enforcement officer is unlikely to attract an offer to purchase the land at a price that could be obtained by another method of disposition or by utilizing the same method of disposition at a later time.
- (7) A sale of land by an enforcement officer under this Part is not invalidated by an irregularity in
- (a) a notice of intention to sell, direction, statement, enforcement instruction or registration of a notice of judgment creating an enforcement charge that is being enforced by the enforcement officer; or
 - (b) the procedure by which the sale is carried out.
- (8) Despite subsection (7), if, on application, the court is satisfied that a person is or is likely to be prejudiced by an irregularity in the procedure by which a sale of land under this Part is proposed to be conducted, the court may
- (a) order that the notice of intention to sell given by the enforcement officer under section is invalid and the enforcement officer may not proceed with the proposed sale; or
 - (b) give directions with regard to the proposed sale.
- (9) An enforcement officer is not liable for damages resulting from the disposition of land under this Part if:
- (a) at the time of disposition, the enforcement officer has reasonable grounds to believe that
 - (i) the land is exigible property of the judgment debtor; and
 - (ii) the land is required to satisfy the amount recoverable under the judgments of all instructing judgment creditors and all claims that must be paid out a distributable fund under section 184(1) before the eligible claims of judgment creditors under section 184(1)(h);
 - (b) as soon as practicable after he or she determines that the proceeds from the disposition land are in excess of that required to satisfy the amounts referred to clause (a), the excess proceeds of disposition are paid to the judgment debtor or person otherwise entitled; or

- (c) **it is subsequently determined that the registration of the notice of judgment that created on the enforcement charge on the property is invalid.**

Comment: If a province/territory has procedures that apply to the method of sale of land where there is a default under a mortgage, those procedures may be adopted or modified and used in place of those described in subsections (1) to (5).

The irregularities referred to in subsections (6) are those such as typographical errors in names, addresses or dates that do not have the effect of misleading anyone. These types of irregularities should not have the effect of invalidating a sale of land that is otherwise valid. A proposed sale is not invalidated unless a person affected by the irregularity satisfies the court that he or she is or is likely to be prejudiced by the irregularity. If a defect in the registration of a notice of judgment in the Personal Property Registry is seriously misleading, the effect of section 33(1)(e) [which incorporates section 43(7) of the *Personal Property Security Act* (British Columbia)] is that the registration of the notice of judgment, as provided by Part 5, is invalid.

Transfer of land following a sale

- 136 (1) After completion of the sale of land under this Part, the enforcement officer must execute a conveyance** [or insert the term used in the enacting jurisdiction such as “deed”, “transfer”, etc.] **to the purchaser.**
- (2) **A conveyance** [or substitute the term used in subsection (1) to describe a conveyance] **executed by an enforcement officer is proof of the enforcement officer’s authority.**
- (3) **If an enforcement officer executes a conveyance of judgment debtor’s land under this Part, the** [insert the name of the appropriate official in the Land Titles Office of the enacting province/territory such as the Registrar of Titles] **must, unless otherwise ordered by the court and subject to subsection (5), transfer the land to the purchaser and issue a new title accordingly after there is filed with the** [insert the name of the appropriate official in the Land Titles Office referred to above]:
- (a) **an application for the registration of the conveyance** [or substitute the term used in subsection (1) to describe a conveyance];
 - (b) **the conveyance** [or substitute the term used in subsection (1) to describe a conveyance] **executed by the enforcement officer in accordance with subsection (1);**
 - (c) **a certificate of the enforcement officer certifying that the enforcement officer has complied with the requirements of this Part; and**
 - (d) **such other records as may be prescribed by regulation.**
- (4) **After land is registered in the name of the purchaser under subsection (3), all interests that charged the land of the judgment debtor and that were subordinate to an enforcement charge under which the enforcement proceeding was conducted, are cancelled.**

- (5) **If the court makes an order on an application under section 135(6), the [insert name of appropriate Land Titles official named in subsection (3)] must not transfer the interest until the [insert name of official from above] is satisfied by the enforcement officer that:**
- (a) **the time for filing an appeal of that order has expired and no appeal has been filed;**
 - (b) **all persons who have a right to appeal that order have given written undertakings not to appeal the order; or**
 - (c) **if the order was appealed, the appeal was dismissed or withdrawn, and the order is no longer subject to a further appeal.**
- (6) **If an enforcement officer sells land for which a title has not been issued [under the *Land Titles Act* or similar enactment], a transfer of the land executed by the enforcement officer in the form prescribed by regulation conveys the land to the purchaser.**

Comment: If a province/territory has procedures that apply to the sale of land by a sheriff, court bailiff or enforcement officer, these procedures may be adopted or modified in place of those in this section.

Purchaser from enforcement officer takes free of subordinate interests

- 137 (1) A person who purchases land from an enforcement officer under this Part and who pays to the enforcement officer an amount equal to the lesser of**
- (a) **the amount recoverable under the judgments of all instructing judgment creditors; and**
 - (b) **a price that could reasonably be expected to be obtained on a sale conducted as part of an enforcement proceeding**
- takes the judgment debtor's land free of all interests that are subordinate to the enforcement charge being enforced by the enforcement officer and the enforcement charge of any judgment creditor who has an eligible claim under Part 14 with regard to the distributable fund constituted by the receipt of proceeds of sale from the land, despite that a judgment creditor does not receive full satisfaction of the judgment.**
- (2) **A purchaser referred to in subsection (1) is entitled to have any subordinate interests referred to in subsection (2) discharged and removed from the purchaser's title.**

PART 11: CO-OWNED AND PARTNERSHIP PROPERTY

LRCNS Comment: We do not propose the adoption of Part 11 (co-owned and partnership property), for reasons explained at page 28 of this Discussion Paper. We propose that the provisions of the Nova Scotia *Civil Procedure Rules* which apply to seizure of joint accounts (Rule 79.09 and 79.10) and partnership property (Rule 79.11)

should be substantially retained in any Nova Scotia version of the Uniform Act.

Definitions

138 In this Division:
“deposit account” has the same meaning as in section 98(1),
“partnership property” has the same meaning as in the [insert the title of
the *Partnership Act* of the enacting province/territory].

Comment: In most provinces and territories, “partnership property” is defined in the *Partnership Act* of the province or territory in manner similar to the definition in the British Columbia *Partnership Act*. The latter Act defines “partnership property” as meaning property and rights and interests in property

- (a) originally brought into the partnership stock,
- (b) acquired, whether by purchase or otherwise, on account of the firm, or
- (c) acquired for the purposes and in the course of the partnership business.

Application of this Part

139 Unless otherwise provided, this Part applies to enforcement proceedings under Parts 9 and 10.

Comment: Part 9 applies to the seizure and sale of personal property. Part 10 deals with enforcement proceedings in relation to land.

Severance of joint tenancy

140 (1) If co-owned property is owned by a judgment debtor and one or more persons in joint tenancy, the creation of an enforcement charge on the judgment debtor’s property severs the joint tenancy and the enforcement charge charges only the judgment debtor’s interest in the property as a tenant in common.

(2) Subsection (1) does not apply to partnership property.

(3) If a joint tenancy in co-owned property is severed under subsection (1) and the enforcement charge that caused the severance is discharged before the disposition of the property by an enforcement officer, the joint tenancy is deemed not to have been severed under subsection (1) unless in the interval between the severance of the joint tenancy and the discharge of the enforcement charge, there has been some other act or event that would have severed the joint tenancy.

Comment: “Co-owned property” is defined in section 1 as meaning “property that a judgment debtor owns with one or more persons as a joint tenant or tenant in common”. If property owned by a judgment debtor is co-owned by the judgment debtor and one or more persons in joint tenancy, the creation of an enforcement charge under this Act severs a joint tenancy. An enforcement charge on personal property is created by the registration of a notice of judgment under Part 5. With regard to land, under Option #1 of Part 10, an enforcement charge is created by registration of a notice of judgment under Part 5. Under Option #2 of Part 10, an enforcement charge on land is not created until a notice of judgment is registered in the Land Title Office.

Appendix B - Uniform Civil Enforcement Of Money Judgments Act (annotated)

Under subsection (3), if an enforcement charge is discharged before the enforcement officer sells or otherwise disposes of the property, the joint tenancy is deemed not to have been severed unless, in the interval, there has been some other act or event that would have severed the joint tenancy. For example, if in the interval, one of the joint tenants has mortgaged his or her interest, the co-owned property would continue to be owned as tenants in common.

Presumption of equal and separate shares

141 Subject to an order made under section 146, co-owners of property charged by an enforcement charge are presumed to own equal and separate shares in the property.

Comment: The term “co-owner” is defined in section 1. Under section 140, creation of an enforcement charge on property co-owned by a judgment debtor and one or more other persons in joint tenancy severs the joint tenancy and a tenancy in common results. Under this section, tenants in common, whether as a result of section 140 or otherwise, are presumed to own equal and separate shares in the property. This presumption may be rebutted on an application made to the court made under section 146.

Seizure of co-owned personal property

142 (1) If an enforcement officer seizes personal property of a judgment debtor that is co-owned property, the enforcement officer is entitled to take possession of, receive, and collect the seized property in its entirety.

- (2) If co-owned personal property that is seized under subsection (1) is an account or chattel paper, an account debtor who pays an account or a person who satisfies a payment obligation under chattel paper, by payment to the enforcement officer or an assignee of the enforcement officer, is discharged to that extent from his or her obligation to**
- (a) the judgment debtor; and**
 - (b) a co-owner of the account or chattel paper to the extent that the amount paid exceeds the interest of the judgment debtor.**

Comment: Under Part 9, an enforcement officer is entitled to seize exigible personal property of a judgment debtor that is subject to an enforcement charge. “Exigible property” is defined in section 1. Even though an enforcement officer is entitled to seize co-owned property in its entirety, under section 145(3) each co-owner, other than the judgment debtor, is entitled to receive a share of the proceeds in that is proportionate to his or her share in the property.

Giving notice to co-owners

143 (1) Within 5 days from the date on which an enforcement officer seizes co-owned property that is personal property or gives a notice of intention to sell land, the enforcement officer must give to each co-owner that is known to the enforcement officer:

- (a) a copy of the notice of seizure in respect of personal property or a copy of the notice of intention to sell in respect of land; and**
- (b) a notice of the right under section 144 to purchase the judgment debtor’s interest in the co-owned property.**

- (2) An enforcement officer must not sell or otherwise dispose of co-owned property until a date that is at least 15 days from the date that notices referred to in subsections (1) are given.**

Comment: With regard to the seizure of personal property, unless a notice of seizure is given to a judgment debtor at the time of a seizure, section 62 requires the enforcement officer to give a notice of seizure to the judgment debtor as soon as practicable after the seizure. With regard to land, section 133(1) requires that a notice of sale be given to the judgment debtor.

Right of co-owners to purchase judgment debtor's interest

144 (1) Within the 15 day period referred to in section 143(2), a co-owner, other than the judgment debtor, has the right to purchase the judgment debtor's interest in co-owned property by

- (a) giving a written notice of intention to exercise this right to the enforcement officer; and**
- (b) paying an amount to the enforcement officer that equals the fair market value of the judgment debtor's interest in the property or providing security, in form and content satisfactory to the enforcement officer, to secure such payment.**

- (2) After the expiration of the period referred to in subsection (1), a co-owner, other than the judgment debtor, may purchase the judgment debtor's interest in the co-owned property under section 145.**

Comment: During period referred to in subsection (1), co-owners have a right to purchase the judgment debtor's interest in co-owned property before the enforcement officer disposes of the property under Part 9. If the fair market value under subsection (1)(b) exceeds the amount recoverable under the judgment an instructing judgment creditor, the balance remaining in the distributable fund is paid to the judgment debtor under section 184(1)(i).

Sale of co-owned property and disposition of proceeds of sale

145 (1) Subject to an order made under section 146, an enforcement officer who seizes a judgment debtor's personal property, which is co-owned property, is entitled to dispose of the property in its entirety under Part 9.

- (2) Subject to an order made under section 146, an enforcement officer who gives a notice of intention to sell a judgment debtor's land, which is co-owned property, is entitled to sell or dispose of the judgment debtor's interest as a tenant in common under Part 10.**
- (3) When an enforcement officer receives, collects, sells or otherwise disposes of co-owned property referred to in subsection (1) or (2), the enforcement officer must divide the proceeds in accordance with the respective interests of the co-owners as follows:**
- (a) by application of the portion attributable to the judgment**

- debtor's interest in the property to the distributable fund constituted under section 180; and
- (b) by payment of the portion attributable to the interest of a co-owner, who is not a judgment debtor, to such person or the person entitled to it.
- (4) Unless otherwise ordered by the court, all costs of the seizure, collection and disposition of co-owned property must be deducted from the portion attributable to the judgment debtor's share under subsection (3)(a).

Comment: Under subsection (3), if the portion attributable to the judgment debtor under clause (a) exceeds the amount recoverable under the judgment of an instructing judgment creditor, any balance remaining in the distributable fund is paid to the judgment debtor under section 184(1)(i).

Application to court

146 (1) On application by an enforcement officer, an instructing judgment creditor or a person who has an interest or asserts an interest in co-owned property, the court may make one or more of the following orders:

- (a) determine that a person does or does not hold an interest as joint tenant or as a tenant in common with the judgment debtor in co-owned property;
- (b) determine that a judgment debtor's interest in co-owned property as a tenant in common is greater or less than that specified in section 141;
- (c) extend the period time referred in section 144 to permit a co-owner to exercise the right referred to in section 144; or
- (d) determine the fair market value of a judgment debtor's interest for the purpose of section 144.
- (2) The onus of proof that a person other than the judgment debtor holds an interest in seized property and the extent of that interest is on such person.

Comment: Self-explanatory.

Enforcement proceedings against partnership property

- 147 (1) If a judgment debtor is a general partner in a partnership, an enforcement officer may take one or more of the following actions to satisfy the amount recoverable under the judgment of an instructing judgment creditor:**
- (a) seize personal property that is partnership property of a partnership in respect of which the judgment debtor is a partner and take possession, receive or collect the seized property in its entirety;**
 - (b) under Part 10, give a notice of intention to sell or otherwise dispose of land that is partnership property of a partnership in respect of which the judgment debtor is a partner.**
- (2) When enforcement proceedings are taken under subsection (1) against partnership property, an enforcement officer is not bound by any restrictions, limitations or other terms of a partnership agreement or an article of the partnership relating to the judgment debtor's interest in partnership assets or the effect of enforcement proceedings against partnership assets.**

Comment: This section represents a change from the law found in the *Partnership Act* of most provinces and territories. In most provinces and territories, the *Partnership Act*, contains a provision that is similar to the following provision of the British Columbia *Partnership Act*:

- 26 (1) A writ of execution must not issue against partnership property except on a judgment against the firm.

Notice of enforcement proceedings in relation to partnership property

- 148 (1) Before selling partnership property in an enforcement proceeding referred to in section 147, an enforcement officer must give a copy of the notice of the seizure in respect of the seizure of personal property or a copy of the notice of intention to sell in respect of land, accompanied by the statement referred to in subsection (2) to:**
- (a) all general partners who are identified in the records maintained pursuant to [insert the title of the *Partnership Act* or the Act pertains to partnerships],**
 - (b) any other person known by the enforcement officer to be a general partner in the partnership or a co-owner of the property, and**
 - (c) any person known to the enforcement officer to have a security interest in the property.**
- (2) The statement referred to in subsection (1) must state that unless an application is made to the court not later than 15 days from day that the notice referred to in subsection (1) is given, the joint tenancy in partnership property that is subject to the enforcement proceeding will be severed.**
- (3) The notice referred to in subsection (1) and the statement referred to in**

subsection (2) may be delivered to the address of the person as it appears in the records of the partnership as provided in [insert the title of the *Partnership Act* or the Act pertains to partnerships] or such other address as is known to the enforcement officer.

- (4) An enforcement officer must not sell or otherwise dispose of partnership property until a date that is at least 15 days from the date that notice referred to in subsection (1) and the statement referred to in subsection (2) are given.**

Comment: Self-explanatory.

Disposition of partnership property

149 (1) When an enforcement officer sells or otherwise disposes of partnership property under this Part, the proceeds must be divided and paid as provided in section 145(3).

- (2) Unless otherwise ordered by the court, all costs of the seizure, collection and disposition of partnership property must be deducted from the portion of the proceeds attributable to the judgment debtor under section 145(3).**

Comment: Self-explanatory.

Application to court

150 (1) On application by a person entitled to receive the notice referred to in section 148(1), and after considering the interests of the applicant and the interests of a judgment creditor whose judgment is being enforced, the court may, without limitation, make one or more of the following orders:

- (a) an order permitting a partner who is not the judgment debtor to exercise an option or automatic accruer contained in the partnership agreement or articles of the partnership if the court is satisfied that the price to be paid is not conspicuously less than the market value of the judgment debtor's interest;**
- (b) an order permitting a partner who is not the judgment debtor to purchase the judgment debtor's interest in the partnership property by paying the purchase price in instalments over the period of time specified;**
- (c) an order suspending an enforcement proceeding against partnership property and appointing the enforcement officer or another person as a receiver of the judgment debtor's share of the profits of the partnership or of any money payable or to be paid to the judgment debtor or property of the partnership to be transferred to the judgment debtor while the order is in effect;**
- (d) an order suspending enforcement proceedings against partnership property on specified conditions;**
- (e) an order that an enforcement officer release some or all of a**

- partnership's personal property from a seizure made by the enforcement officer;
- (f) an order that an enforcement charge be discharged in respect of some or all of a partnership's property;
 - (g) an order permitting the sale by an enforcement officer of some or all the partnership property that is subject to an enforcement proceeding.
- (2) When an order is made pursuant to subsection (1)(a), section 125(11) to (13) applies.
- (3) When an order is made under subsection (1)(b):
- (a) the partner who is given the right to purchase the property does not acquire an interest in the property until the full purchase price is paid; and
 - (b) unless the court orders otherwise, the right to purchase the property terminates if the purchaser defaults in making any payment of the purchase price as required by the order.
- (4) On application, the court may terminate or modify an order made under subsection (1).
- (5) If an application referred to in subsection (1) is not made prior to expiry of the 15 days referred to in section 148(4):
- (a) the enforcement officer may proceed with the disposition of the partnership property; and
 - (b) a joint tenancy in respect of partnership property is severed when the enforcement officer enters into an agreement for the sale of the property.

Comment: Section 125(11) to (13) applies in the case of a seizure of a share or security of a corporation that is not an offering corporation or distributing corporation, if a holder of the same class or type of security has a right to purchase the seized shares or security at predetermined price or at a price established by a predetermined formula.

Appointment of a receiver of partnership profits, income and money

- 151** On application, the court may appoint an enforcement officer or another person as a receiver of the judgment debtor's share, as a partner of a partnership or limited partner of a limited partnership, of the profits or income of the partnership whether already accrued or accruing and of any money that is due and payable or may be coming to the judgment debtor in respect of the partnership or property of the partnership to be transferred to the judgment debtor while the order is in effect.

Comment: This section is similar to provisions found in the *Partnership Act* of some provinces and territories.

PART 12: EXEMPTIONS

Introductory Comment: All present and after acquired property of a judgment debtor is subject to an enforcement proceeding after an enforcement charge on the property is created by the registration of a notice of judgment. However, it is not in society's interest to have a judgment debtor and his or her dependents become a charge on the welfare of the state because a judgment creditor has seized and sold all the property and income of a judgment debtor. This Part provides exemptions from enforcement proceedings for specified types of property and a specified portion of a judgment debtor's income. These exemptions are intended to enable the judgment debtor to support herself or himself and his or her dependents at a reasonable standard of living and to retain property that is necessary to enable the judgment debtor to continue to earn income.

This Part is divided into three Divisions. Division 1 describes the process for claiming an exemption and how determinations are made with regard to whether or not an exemption claim is valid. Division 2 describes the types of property that may be claimed as exempt property. Division 3 defines income for the purpose of this Part and defines the portion of a judgment debtor's income that is exempt from an enforcement proceeding.

Division 1: GENERAL

Application of this Division

152 Unless otherwise provided, Division 1 applies to the whole of this Part.

Comment: Self-explanatory.

Who may claim an exemption under this Part

153 (1) Save as provided in this Part, only a natural person is entitled to claim an exemption.

- (2)** A natural person who holds the controlling interest in a corporation that is a judgment debtor may claim property of the judgment debtor as exempt property if that natural person would be entitled to claim the exemption if the natural person were the judgment debtor.
- (3)** Subsection (2) applies only with respect to tangible personal property that a natural person personally uses to earn income for the corporation where:
 - (a)** the principal portion of the net income earned by the corporation is paid to the natural person claiming the exemption by way of dividends or as employment remuneration; and
 - (b)** the amount paid as dividends or as employment remuneration is the primary source of income for the natural person claiming the exemption.
- (4)** Subsection (2) does not apply to an item of property if the natural person claiming the exemption owns or has the use of an equivalent item of property not owned by the judgment debtor.

- (5) A dependent of a judgment debtor for whose financial support the judgment debtor is totally or in substantial part responsible is entitled to claim property of the judgment debtor as exempt property to the extent that the judgment debtor does not claim an exemption that the judgment debtor is entitled to claim.**
- (6) In the case of a deceased judgment debtor, a person who is the principal beneficiary of the judgment debtor's estate is entitled to claim property of the judgment debtor's estate as exempt property if**
 - (a) the person would have been able to claim an exemption under subsection (5) if the judgment debtor was alive; and**
 - (b) the property could have been claimed as exempt property by the judgment debtor if the judgment debtor was alive.**
- (7) The total quantity and value of property of a judgment debtor that may be claimed as exempt by a person mentioned in subsection (5) and by the judgment debtor must not exceed the quantity and value of exempt property available to the judgment debtor alone.**
- (8) If a judgment debtor does not claim the exemption with respect to exempt income that he or she is entitled to claim under Division 3, a person for whose financial support the judgment debtor is totally or in substantial part responsible is entitled to claim the exemption on behalf of the judgment debtor.**
- (9) The onus of proof that the requirements of this section are satisfied is on the person claiming the exemption.**

Comment: The term “exempt property” is defined in section 1. The reason for permitting a person who holds a controlling interest in a judgment debtor corporation to claim property of corporation as exempt property under subsection (2) is that a person should not be deprived of an exemption because the person chooses to utilize a closely-held corporation to carry on his or her business. The corporation may own tools, equipment or a motor vehicles that the person would be entitled to claim as exempt property if the business was carried on as a sole proprietorship. Subsections (3) and (4) place limitations on ability to claim an exemption under subsection (2).

Subsections (5) to (8) describe the circumstances when a dependent of a judgment debtor may claim an exemption that the judgment debtor would otherwise have been entitled to claim. An example of where these subsections may be utilized is where the spouse of the judgment debtor is living in a residence that is owned by the judgment debtor and the judgment debtor disappears or fails to claim the exemption.

Under section 2(5), a waiver of a right under this Act whether contained in a contract or otherwise including a waiver of an exemption is void if it was made before a dispute arises between the judgment debtor and the judgment creditor.

Requirement of providing judgment debtor with written information on exemptions

154 When an enforcement officer seizes personal property or income of a

judgment debtor or gives a notice of intention to sell or otherwise dispose of land of a judgment debtor, he or she must at the time of seizure or as soon thereafter as practicable give to the judgment debtor a written notice, in the prescribed form, that:

- (a) describes the types and maximum value, if any, of property that may be claimed as exempt from disposition in an enforcement proceeding;
- (b) describes the portion of a judgment debtor's income that may be claimed as exempt from seizure;
- (c) describes the procedure for claiming an exemption and the procedure for determining the validity of a claim to an exemption;
- (d) includes a copy of the prescribed notice of exemption claim that must be used to claim an exemption; and
- (e) describes the effect of exemptions in respect of co-owned property.

Comment: Self-explanatory.

Giving notice of exemption claim to enforcement officer

155 (1) If personal property of a judgment debtor is seized by an enforcement officer, a judgment debtor who claims that the seized property or the proceeds of such property are exempt must give a notice of exemption claim in the prescribed form to the enforcement officer who effected the seizure.

- (2) **If an enforcement officer gives a notice of intention to sell a judgment debtor's land, a judgment debtor who claims that the land is exempt property must give a notice of exemption claim in the prescribed form to the enforcement officer who gave the notice of intention to sell to the judgment debtor.**
- (3) **If income of a judgment debtor is seized, and the exempt income that the judgment debtor is entitled receive under Division 3 of this Part is not received by the judgment debtor, the judgment debtor must give a notice of exemption claim in the prescribed form to the enforcement officer who effected the seizure.**
- (4) **If a notice of exemption claim is not received by the enforcement officer who seized a judgment debtor's personal property before he or she enters into an agreement to sell or otherwise dispose of the seized property, the judgment debtor is no longer entitled to claim an exemption in respect of the seized property.**
- (5) **If a notice of exemption claim is not received by the enforcement officer who issued a notice to sell or otherwise dispose of a judgment debtor's land before the enforcement officer enters an agreement to sell or**

otherwise dispose of the land, the judgment debtor is no longer entitled to claim an exemption in respect of the land.

- (6) If a notice of exemption claim is not received by the enforcement officer who seized a judgment debtor's personal property or who issued a notice to sell or otherwise dispose of a judgment debtor's land under until after the enforcement officer enters into an agreement to sell or otherwise dispose of the judgment debtor's property, the enforcement officer may proceed with the sale or disposition of the property and the judgment debtor's notice of exemption claim is limited to that portion of the distributable fund referred in subsection (7) that results from the sale of the judgment debtor's exempt property**
- (7) If an enforcement officer receives a notice of exemption claim in respect of a portion of a distributable fund that represents proceeds of disposition of property claimed to be exempt property or exempt and the exemption claim is determined to be valid under section 156 or 157, the judgment debtor is entitled to receive payment from the distributable fund of the proceeds of disposition of the judgment debtor's property determined to be exempt and any amount determined to be exempt income after deducting the enforcement officer's fees, taxable costs and expenses in respect of the property and income to which the claim of exemption relates.**
- (8) If a notice of exemption claim by a judgment debtor with regard to exempt income of a judgment debtor or proceeds of disposition from the sale of exempt property of a judgment debtor is not received by the enforcement officer before the enforcement officer distributes the distributable fund under Part 14, the exemption claim of the judgment debtor is invalid and must be rejected.**

Comment: The term "exempt income" is defined in section 1. Under section 161, an enforcement officer is directed not to seize property that is likely exempt.

Determination of validity of exemption claim by enforcement officer

156 (1) Within 10 days of receiving a notice of exemption claim, an enforcement officer must determine whether to accept or reject the exemption claim either in whole or in part and must notify the judgment debtor of the determination.

- (2) Except as otherwise provided in this Act, a determination of whether to accept or reject a judgment debtor's exemption claim must be made based on the circumstances that are known to the enforcement officer to at the time when the determination is made by the enforcement officer.**

Comment: The enforcement officer must make his or her determination of the validity of the exemption claim based on the circumstances that are known to the enforcement officer at the time

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when determination is made. Circumstances may change between the time of seizure and the time of determination. For example, the judgment debtor may have a fewer or greater number of dependents or the nature of the judgment debtor's occupation may have changed.

Review by the court of enforcement officer's determination of validity of exemption claim

157 (1) Within 10 days after receiving notification of an enforcement officer's decision to accept or reject an exemption claim, an application may be made to the court by the judgment debtor, a judgment creditor who has given a subsisting enforcement instruction to the enforcement officer who seized the property, requesting the court to determine whether to accept or reject the exemption claim either in whole or in part.

(2) The court must determine validity of the exemption claim on the basis of the circumstances that are known to the court at the time of the determination of the application by the court.

Comment: If circumstances have changed between the time of the determination by the enforcement officer or new circumstances are brought to the attention of the court, these circumstances must be considered.

Onus of proving that seized property or income is exempt

158 Under section 156 and 157, the onus of proving a judgment debtor's property is exempt from an enforcement proceeding is on the judgment debtor.

Comment: Self-explanatory.

Division 2: PROPERTY EXEMPTIONS

Introductory Comment:

There is a significant degree of diversity among the provinces/territories with regard to the types of property and maximum value of items within a type of property that may be claimed as exempt from enforcement proceedings. The types of property that may be claimed as exempt are often related to the cultural and economic history of a province/territory. Consequently, the descriptions of the types of property that may be exempt are intended to reflect and accommodate this diversity. In determining the types of property that should be exempt, a number of models have been examined including the provisions of judgment enforcement legislation across Canada have been examined. In addition, the exemptions from seizure that are found in the *Personal Property Security Acts* of the maritime provinces have been examined.

The approach taken in this Division is to describe types of property that are reasonably required by a judgment debtor to maintain a reasonable standard of living for the judgment debtor and his or her dependents and that are reasonably required by a judgment debtor to enable him or her to continue to earn income. With regard to some types of property such as medical aids and devices, all items of that type of property are exempt regardless of their value. With regard to some types of property, some provinces/territories may wish to prescribe a maximum value of property that may be claimed as exempt. It is not necessary to prescribe a maximum value for any type of property; however, with regard to some types of property, text appears in square brackets at the end of the description of the type of property indicating that a province/territory may wish to

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prescribe a maximum value if it is determined to be necessary. If a province/territory decides to prescribe a maximum value, it is recommended that the regulations to the Act provide for a regular adjustment of the maximum value to reflect increases in the cost of living. Without an automatic adjustment feature, history suggests that such values will continue unchanged for long periods of time that may extend to several decades.

If a province/territory does not prescribe a maximum value with regard to a type of property that may be claimed as exempt, the enforcement officer will be required to make the determination under section 156 with regard to whether or not an exemption claim should be allowed. If there is a disagreement with the enforcement officer's determination of the validity of the exemption claims, an application may be made to the court to review the enforcement officer's determination.

Exemptions with regard to life insurance and pensions are not dealt with in this Act. The exemption with regard to life insurance is dealt with in a uniform manner by the Insurance Acts of the provinces/territories. Exemptions with regard to pensions are comprehensively dealt with in both the federal and provincial/territorial legislation.

Exemptions of specific types of property

159 (1) A judgment debtor is entitled to claim the following property as property that is exempt from an enforcement proceeding:

- (a) food required by the judgment debtor and his or her dependents during the 12 month period following the commencement of an enforcement proceeding;**
- (b) aids and devices that assist the judgment debtor and his or her dependents in overcoming a disability, or a medical or dental condition;**
- (c) ordinary clothing, not including jewellery, needed by the judgment debtor and his or her dependents;**
- (d) household furnishings, utensils, equipment and appliances needed by the judgment debtor and his or her dependents to maintain a functional household [that are of a value not exceeding the amount prescribed by regulation];**
- (e) an interest in a house, condominium, mobile home, house boat or equivalent facility, if it is used by the judgment debtor as a principal residence that is of a size and quality to enable the judgment debtor and his or her dependents to have a minimally reasonable standard of residential accommodation, and, if it is situated on land owned by the judgment debtor, the land on which it is permanently situated [to the extent of a value not exceeding the amount prescribed by regulation];**
- (f) a motor vehicle, as defined in the [insert the title of the *Motor Vehicle Act* or similar enactment] [to the extent of a value not exceeding the amount prescribed by regulation] **that is**
 - (i) ordinarily used by the judgment debtor or his or her dependents, and**
 - (ii) necessary to enable the judgment debtor to earn an income for the support of the judgment debtor and his or her****

- dependents or to meet the reasonable educational or health needs of the judgment debtor or his or her dependents;
- (g) if the judgment debtor is earning income from an occupation or is actively engaged in earning income from carrying on a trade, business or calling,**
 - (i) personal property that is ordinarily used by the judgment debtor and is necessary for earning income from the judgment debtor's occupation, trade, business or calling [that are of a value not exceeding the amount prescribed by regulation],**
 - (ii) if a judgment debtor's primary occupation or business is farming,**
 - (A) an area of land prescribed by regulation that is ordinarily used by the judgment debtor for farming,**
 - (B) personal property, including an agricultural product, ordinarily used by the judgment debtor for farming that is necessary for the proper and efficient conduct of the judgment debtor's farming operation for a 12 month period following the commencement of an enforcement proceeding [that is of a value not exceeding an amount prescribed by regulation], and**
 - (iii) if a judgment debtor's primary occupation is fishing, personal property ordinarily used by the judgment debtor that is necessary for the proper and efficient conduct of a the judgment debtor's fishing operation for a 12 month period following the commencement of an enforcement proceeding [that is of a value not exceeding the amount prescribed by regulation];**
 - (h) money received by the judgment debtor pursuant to a legal entitlement to compensation for personal physical injury including**
 - (i) loss of future income, and**
 - (ii) payment of future medical or personal care expenses and any property acquired through the investment of such money and the investment of income received by the judgment debtor from such money;**
 - (i) domestic animals that are kept by the judgment debtor solely as pets [that are of a value not exceeding the amount prescribed by regulation];**
 - (j) a burial plot or plots intended for the internment of the judgment debtor, his or her dependents and members of his or her immediate family;**
 - (k) funds representing prepaid funeral and cemetery maintenance costs that are held on behalf of or credited to the judgment debtor and that relate to the judgment debtor and his or her dependents;**

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- (l) **property of the judgment debtor** [of a value not exceeding the amount prescribed by regulation] **that**

 - (i) **has a religious or sentimental value to the judgment debtor, but**
 - (ii) **in the opinion of the enforcement officer, the costs of seizure and disposition of the property are likely to be approximately equal to or exceed the amount likely to be realized from disposition of the property; and**
 - (m) **any property prescribed by regulation.**
- (2) **If a maximum value of property that may be claimed as exempt property under subsection (1)(e) is prescribed, the court, on application by a judgment debtor or a dependent of the judgment debtor, may order a stay of an enforcement proceeding in respect of the property of the judgment debtor specified in the application until a further order of the court, if the court is satisfied that**
- (a) **the prescribed amount of the exemption will not enable the judgment debtor and his or her dependents to have a minimally reasonable standard of residential accommodation, or**
 - (b) **disposition of the property in an enforcement proceeding will cause serious hardship to the judgment debtor or his or her dependents having regard to the needs of the judgment debtor and his or her dependents and other circumstances considered to be relevant to a determination of the application.**
- (3) **Section 3 of the *Uniform Registered Plan (Retirement Income) Exemption Act* [or the section of an Act of the province/territory that enacts the provisions of the Uniform Act] applies to property of a judgment debtor under this Act that is a Registered Retirement Savings Plan, Registered Retirement Income Fund and Deferred Profit Sharing Plan.**

Comment: The following lettered paragraphs contain comments with regard to the corresponding clauses in subsection (1) that describe the types of property that are exempt from enforcement proceedings.

- (a) Food: The reason for exempting food that a judgment debtor may require during the 12 month period following an enforcement proceeding is that in some areas of Canada, a judgment debtor may grow, hunt, fish or otherwise acquire food during a season that must supply the judgment debtor and his or her dependents with food from that source until the next season that may be 12 months away.
- (b) Aids and devices that assist in overcoming a disability, or a medical or dental condition: No maximum value should be prescribed for this type of property. There are some very expensive medical aids that should not be subject to seizure regardless of their value. A specially equipped motor vehicle may be claimed under this clause or under clause (f).
- (c) Clothing: The adjective “ordinary”, which modifies the term “clothing“, is intended to exclude from the exemption those extra-ordinary items of apparel such as mink coats.
- (d) Household furnishings: Only those furnishings that are required to maintain a functional household are exempt. A judgment debtor must give the enforcement officer a notice of exemption claim that records those furnishings that the judgment debtor claims are required

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- to maintain a functional household. If the judgment debtor claims a 52 inch plasma screen television set as exempt property, the enforcement officer, subject to review by the court, must determine whether it is required to maintain a functional household.
- (e) House or equivalent residence: It is only a residence that will enable a judgment debtor and his or her dependents to maintain a minimally reasonable standard of residential accommodation that is exempt. If a judgment debtor is a single person and he or she claims a 5 bedroom and 3 bathroom house, the enforcement officer, subject to review by the court, must determine whether a house of that size is required to enable the judgment debtor to maintain a minimally reasonable standard of residential accommodation.
 - (f) Motor vehicle: Self-explanatory.
 - (g) (i) Personal property used to earn income: Self-explanatory.
(ii) Farm Land: Under clause (A), it is not necessary for the judgment debtor to have his or her principal residence on the exempt farm land. Some provinces/territories may wish to locate this exemption in other legislation that deals with the security of farms such as the *Farm Security Act* in Saskatchewan. Under clause (B), agricultural products will include items such as seed and fertilizer.
(iii) Fishing: This is an important exemption in those provinces/territories where fishing is an important component of the economy and it is part of the cultural heritage of the province/territory.
 - (h) Money received by the judgment debtor pursuant to a legal entitlement to compensation for personal physical injury: The capital of these types of compensation awards is intended to generate an income stream to pay for medical and personal care expenses. The income received from the investment of these funds is dealt with under Division 3.
 - (i) Domesticated pets: This exemption is designed to prevent the use of a threat to seize the family pet as a lever to persuade a judgment debtor to waive an exemption with regard to more valuable property, such as a motor vehicle, that the judgment debtor would otherwise be entitled to claim.
 - (j) Burial plots: Many provinces/territories have legislation that protects burial plots from seizure. If a province/territory already has legislation that prohibits seizure of burial plots, the legislation should be reviewed, and if necessary, amended to ensure that no duplication exists.
 - (k) Prepaid funeral and cemetery costs: The comment in respect of burial plot also applies to this exemption.
 - (l) Property with religious or sentimental value but low market value: The objective of this clause is to prevent the use of a threat to seize a family heirloom as a lever to persuade a judgment debtor to waive an exemption with regard to more valuable property that the judgment debtor would otherwise be entitled to claim.
 - (m) This clause permits individual provinces/territories to supplement the above described types of property.

Subsection (3) incorporates by reference section 3 of the *Uniform Registered Plan (Retirement Income) Exemption Act* or the relevant section of an existing Act of the province/territory that has enacted the provisions of the Uniform Act. Section 3 of the Uniform Act provides:

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

The commentary to section 3 of the *Uniform Registered Plan (Retirement Income) Exemption Act* provides:

This wording is absolute in its scope and subject only to the express exceptions set out within the Act itself. To the extent that individual jurisdictions wish to create further exceptions to this exemption, such as allowing exigibility to enforce maintenance orders,

such exceptions would need to be added to this draft.

LRCNS Comment: We do not propose the adoption of the list of exempt property in section 159(1) of the Uniform Act, for reasons explained at pages 22-23 of this Discussion Paper. Instead we propose substantial adoption of the exemptions in s.45 of the *Judicature Act*, R.S.N.S. 1989, c.240. For that reason it is not necessary to adopt s.159(2)(a).

Regarding s. 159(3), Nova Scotia has not adopted the *Uniform Registered Plan (Retirement Income) Exemption Act*. We propose that s.3 of that *Act* be substantially adopted in Nova Scotia for purposes of civil money judgement enforcement, for reasons explained at pages 23-24 of this Discussion Paper. Therefore, in place of s.159(3) we propose the adoption of s.3 of the *Uniform Registered Plan (Retirement Income) Exemption Act*, with appropriate amendments for the context of the *Uniform Act*, as follows:

Notwithstanding any other *Act* or regulation, all rights, property and interests of a judgment debtor under this *Act* in a Registered Retirement Savings Plan, Registered Retirement Income Fund and Deferred Profit Sharing Plan are exempt from any enforcement proceeding.

Property that may not be claimed as exempt

- 160 (1) If a judgment debtor carries on a business, the inventory of the business may not be claimed as property that is exempt from an enforcement proceeding.**
- (2) Despite any other provision of this Act, unless the court orders otherwise, exempt property must not include:**
- (a) property abandoned by a judgment debtor and not reclaimed prior to the date of seizure; or**
 - (b) property that the possession or control of which was voluntarily surrendered by a judgment debtor, other than for repair or short term storage or use, to a person who is not a dependent of the judgment debtor.**

Comment: Subsection (2)(b) applies where a judgment debtor has loaned or leased property, which would otherwise be exempt if it was in the possession of the judgment debtor, to a third person other than a dependent. In these circumstances there is no justification for maintaining the exemption if the judgment debtor has made the decision that he or she does not need the property.

Some provinces/territories have legislation that prohibits claiming property as exempt if the enforcement proceeding is based on a judgment to satisfy a debt incurred for the purpose of acquiring that property. This Act does not contain such a provision because in a system of *pro rata* sharing among judgment creditors, the application of such a provision is uneven. This may be illustrated by an example. Assume that judgment creditor “A” has a judgment for a debt incurred for the purpose of acquiring a car and judgment creditor “B” has a judgment for damages for defamation. If judgment creditor “B” instructs the enforcement officer to seize the car, the judgment debtor may claim an exemption for a car. However, if judgment creditor “A” instructs the enforcement officer, no exemption may be claimed. However, the proceeds of the seizure and sale are distributed on a *pro rata* basis among all judgment creditors who have an eligible claim

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under Part 14 including judgment creditor “B”.

Property must not be seized if it is likely exempt

161 (1) An enforcement officer must not seize an item of a judgment debtor’s property if the enforcement officer believes on the basis of information known to the enforcement officer at the time of the enforcement proceeding that the item of property is exempt property.

- (2) An enforcement officer must release property from seizure**
- (a) if the enforcement officer subsequently determines that the property is exempt property; or**
 - (b) if a maximum value of exempt property is prescribed for the type of seized property and the enforcement officer determines that the realizable value of the seized property at a sale in an enforcement proceeding will likely be less than the maximum value prescribed for that type of exempt property.**

Comment: Self-explanatory.

Procedure if property claimed as exempt exceeds maximum value of permitted exemption

162 (1) An enforcement officer may sell property that a judgment debtor claims as exempt property if

- (a) the property is of a type for which a maximum value of the exemption has been prescribed; and**
- (b) the value of the judgment debtor's interest in the property exceeds the maximum value prescribed for that type of exempt property.**

- (2) On a sale of the judgment debtor's property referred to in subsection (1), any proceeds of sale up to the prescribed value of exempt property for that type of exempt property must be paid over to the judgment debtor.**

Comment: This section is needed only if a maximum value of property that may be claimed as exempt property is prescribed with regard to one or more of the types of exempt property that are listed in section 159.

Proceeds of exempt property remain exempt as long as they remain segregated

163 (1) If a judgment debtor receives proceeds from the sale or disposition of exempt property under this Division, such proceeds remain as exempt property as long as they remain segregated from and identifiable or traceable in relation to other funds of the judgment debtor regardless of whether the proceeds are proceeds:

- (a) from the sale or other disposition of the exempt property under this Division;**
- (b) that are paid to the judgment debtor in a foreclosure or similar proceeding relating to exempt property; or**
- (c) of insurance relating to the exempt property.**

- (2) For the purposes of subsection (1), "traceable" means proceeds that can be traced in equity or at law from the sale or other disposition of exempt property.

Comment: The purpose of protecting the proceeds from seizure is to permit the judgment debtor to acquire property of that class or another class that will be exempt property. The language of proceeds being identifiable or traceable is taken from the definition of "proceeds" found in PPSA legislation.

Division 3: INCOME EXEMPTION

Definitions

164 For the purpose of this Division,
"DPSP" means a deferred profit savings plan as defined in section 147 of the federal Act;

"employment remuneration" has the same meaning as in section 101(1);

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

"income" means property in the form of money or other form of personal property that a judgment debtor has received or has the right to receive as payment

- (a) of employment remuneration,
- (b) under a contract for personal services providing for a series of periodic payments,
- (c) under a retirement pension to the extent that it is not exempt from seizure or attachment under the laws of Canada or [insert name of enacting province/territory],
- (d) under an annuity,
- (e) from a registered plan,
- (f) from the investment of that portion of money received by the judgment debtor pursuant to a legal entitlement for compensation for a personal physical injury that is attributable to loss of future income, and
- (g) from a source prescribed by regulation;

"net income" is determined by

- (a) deducting from employment remuneration those amounts that are required to be deducted by law or contract for income tax, employment insurance, Canada Pension Plan contributions, compulsory union or professional fees, registered pension plan contributions, health, disability and life insurance premiums and such other amounts as are prescribed, and
- (b) deducting from other income of a judgment debtor those amounts that are required to be deducted by law for income tax;

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“prescribed period” means the period prescribed by regulation with regard to which a proportion of net income received by a judgment debtor is exempt from seizure;

“registered plan” means a DPSP, an RRIF or an RRSP;

“RRIF” means a registered retirement income fund as defined in section 146.3 of the federal Act;

“RRSP” means a registered retirement savings plan as defined in section 146 of the federal Act.

Comment: The definitions of “DPSP”, “registered plan”, “RRIF” and “RRSP” are taken from the *Uniform Registered Plan (Retirement Income) Exemption Act*.

With regard to the definition of “income”, the types of payments included in this definition of income are subject to seizure under Part 9, Division 4. Under section 165(1), a portion of a judgment debtor’s income is exempt from enforcement proceedings. Prior to this Act, a portion of employment income was normally exempt from attachment in an enforcement proceeding. The rationale for exempting a portion of employment income from attachment is that a judgment debtor requires a minimum level of income to support herself or himself and his or her dependents. The same rationale applies to the other forms of income included in this definition of income.

This definition of “income” includes income that a judgment debtor “has received” or has a right to receive. Therefore, if the judgment debtor has received a payment of income by means of a direct deposit to a deposit account, the funds remain “income” for the purposes of this Division and the exemption provided by section 165 applies as long as the funds remain segregated from other funds of the judgment debtor in accordance with section 165(3).

Clause (a) of the definition of income refers to income received by an employee under a contract of service and clause (b) refers to income received by an independent contractor under a contract for personal services if the contract provides for a series of periodic payments. The effect of including both of these forms of income means that a judgment debtor is entitled to the exemption provided by section 165 with regard to either form of income.

Clause (c) in the definition of income has a limited application because pension legislation, at both the federal and provincial level exempts most forms of pension income from seizure or attachment. However, pensions income payable by a foreign corporation or a foreign government is not covered by Canadian pension legislation. In many cases, this latter type of pension income may not be amenable to a notice of seizure; however, it may be received by a receiver appointed under Part 13. Where income is received by a receiver, section 152(2), entitles a judgment debtor to the same exemptions that would apply if income had been seized by an enforcement officer.

Clause (e) includes payments to a judgment debtor out of an RRSP, RRIF and DPSP within the definition of “income” for the purposes of this Division. The effect of including such payments within the definition of “income” means that they are included in income with regard to which a judgment debtor is entitled to an exemption in accordance with section 165. Under the *Uniform Registered Plan (Retirement Income) Exemption Act*, payouts to planholders of RRSPs, RRIFs

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and DPSPs are not exempt from enforcement processes; however, the payouts are deemed to be wages or salary for the purposes of determining a judgment debtor's entitled to an exemption. This Act seeks to replicate the effect of the *Uniform Registered Plan (Retirement Income) Exemption Act*. Sections 4 and 5 of the *Uniform Registered Plan (Retirement Income) Exemption Act* provide:

4. (1) Subject to section 5 but notwithstanding any other Act or regulation, a payment out of a registered plan to a planholder or the legal representative of a planholder is not exempt from any enforcement process.
- (2) For the purposes of subsection (1), a transfer of property held in one registered plan to another registered plan does not constitute a payment out of a registered plan.
5. For the purposes of enforcing a creditor's rights against payments out of a registered plan to a debtor planholder:
 - (a) the amount of a payment out of the registered plan is deemed to be a debt due or accruing due to the person for or with respect to the person's wages or salary within the meaning of [insert name of relevant statute]; and
 - (b) the exemptions set out in [insert section number(s) of that Act] apply, with any necessary modification.

Section 4 and section 5(a) of the *Uniform Registered Plan (Retirement Income) Exemption Act* are implemented by incorporating these provisions into Part 9, Division 4 [Seizure of Accounts]. Section 5(b) of the *Uniform Registered Plan (Retirement Income) Exemption Act* is implemented by including RRSPs, RRIFs and DPSPs in the definition of income in this Division.

The definition of "prescribed period" is used to calculate the amount of income that is exempt from seizure. It is recommended that the length of the prescribed period should be a common length of a pay period for employees in the province/territory such as 14 days or a calendar month.

Exempt income

165 (1) Except as otherwise provided in this Act, a judgment debtor is entitled to an income exemption with regard to his or her net income

- (a) **to the extent of the minimum amount prescribed in respect of a prescribed period; and**
 - (b) **fifty percent of the amount by which a judgment debtor's net income in respect of the prescribed period exceeds the minimum amount but the total amount of the income exemption must not exceed the maximum amount prescribed.**
- (2) **A judgment debtor is entitled to an income exemption with regard to all income the judgment debtor received or has a right to receive from**
- (a) **money received by the judgment debtor pursuant to a legal entitlement to compensation due to a personal physical injury for payment of future medical or personal care expenses; and**
 - (b) **income received from property acquired through the investment of money referred to in clause (a).**

(3) **If a judgment debtor receives income that is exempt income, it remains as**

exempt income as long as it remains segregated from and identifiable or traceable in relation to other funds of the judgment debtor.

(4) For the purposes of subsection (3), “traceable” means income that can be traced in equity or at law from identifiable exempt income.

Comment: Subsection (1) describes the formula that is applied to a judgment debtor's net income with regard to the forms of income included in the definition of “income”. With regard to this formula, each province/territory must prescribe the minimum amount under clause (a) that is exempt from seizure and the maximum amount that is exempt from seizure. The minimum prescribed amount should be based on the amount that is reasonably required to support the judgment debtor and his or her dependents for the prescribed period. The prescribed amount should vary depending on the number of dependents of the judgment debtor.

Subsection (2) creates an absolute exemption with regard to income derived from money received by the judgment debtor pursuant to a legal entitlement to compensation due to a personal physical injury for payment of future medical or personal care expenses. When a court makes an award for this head of damage, the court determines the present value of a capital amount that will generate income that will be sufficient to pay for the future medical and personal care expenses of the plaintiff. The calculation of the present value assumes that the capital will be invested and produce a rate of return on the investment that will compensate for any inflation that occurs over the future period during which the judgment debtor is expected to incur medical and care expenses. Since the income from the investment is taxable, the required amount of capital is grossed-up to provide the after-tax stream of income. This stream of income is intended to provide for the payment of a judgment debtor's medical and personal care expenses and should be exempt from seizure.

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| <p>LRCNS Comment: We do not propose the adoption of s.165(3), for reasons explained at pages 26-27 of this Discussion Paper. Further, we propose the adoption of the provision of Nova Scotia's existing <i>Civil Procedure Rules</i> which imposes a duty on deposit-taking institutions not to pay amounts to the Sheriff that the institution knows is from an exempt source.</p> |
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Exemption where income attributable to only part of prescribed period

166 If a judgment debtor is employed by an employer for only part of a prescribed period referred to in section 165(1), the minimum and maximum amounts of exempt income prescribed under section 165 that are applicable to employment remuneration from that employer must be reduced by the proportion that the length of the period of employment is to the length of the prescribed period.

Comment: If employment remuneration that a judgment debtor is entitled to receive from an employer is attributable to only part of the prescribed period, this section assumes that the judgment debtor is receiving income from another income source for the balance of the prescribed period. If the judgment debtor is not receiving any income for the balance of the prescribed period, an application may be made to the court under section 168 to vary the amount of the income exemption.

Exemption where income attributable to period longer than prescribed period

167 If a judgment debtor is entitled to receive income that is attributable to a period that is longer than the prescribed period referred to in section 165, the minimum and maximum amounts of exempt income prescribed under section 165 must be increased proportionately.

Comment: Self-explanatory.

Variation of exemption by court

- 168** On application by a judgment debtor, an instructing judgment creditor, an enforcement officer or a receiver, the court may:
- (a) increase the maximum amount of the income exemption under section 165 to account for special circumstances of the judgment debtor or dependents of the judgment debtor;
 - (b) reduce the amount of exempt income to account for money or property received or available to by the judgment debtor that is not income;
 - (c) determine the minimum and maximum amount of exempt income if
 - (i) income is received by the judgment debtor at irregular intervals,
 - (ii) the amount of income received by the judgment debtor varies from period to period, or
 - (iii) the circumstances of the judgment debtor are such that application of a minimum or maximum amounts prescribed under section 165 are inappropriate;
 - (d) declare income which the judgment debtor is entitled to receive from a particular income source to be exempt from seizure if
 - (i) the costs to the payor of complying with the notice of seizure and the enforcement officer's fees, taxable costs and expenses will likely exceed the amount payable to the enforcement officer under the notice of seizure,
 - (ii) income, which is not income as defined in section 164, if it were added to the judgment debtor's exempt income, is approximately equivalent to the minimum amount of the exemption to which the judgment debtor would be entitled under section 165 if the income were part of the judgment debtor's income as defined in section 164;
 - (e) if the judgment debtor is entitled to receive income from more than one source and the income from a particular source exceeds the maximum income exemption under section 165(1), declare that the judgment debtor's income exemption apply to only one particular source of income;
 - (f) confirm or vary an order made under this section.

Comment: Under clause (b), the amount of exempt income may be reduced if, for example, a judgment debtor has realized capital gains or has received money by way of a gift or inheritance.

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Clause (c)(i) will be applicable if, for example, a judgment debtor elects to receive a lump-sum payment out from a Registered Retirement Savings Plan. If such a payment is seized under Part 9, the minimum and maximum exemption amounts prescribed by section 165 may not be appropriate and an application may be made to determine the portion of the payment that is exempt.

An example of the application of clause (d)(ii) is where the minimum amount prescribed under section 165 for a prescribed period is \$1000; however the judgment debtor's income as defined in section 164 only amounts to \$700. If a judgment debtor has income that is not income as defined in section 164, such as interest income of \$300, the court may declare that the \$300 of interest income is income that is exempt from seizure.

Requirement that judgment debtor provide information on sources of income

169 (1) A judgment debtor is required to provide the enforcement officer with information requested by the enforcement officer with regard to:

- (a) the judgment debtor's sources of income;**
 - (b) when a payment of income is likely to be made the judgment debtor; and**
 - (c) the effective date of any election if the judgment debtor's entitlement to receive income is dependent an election by the judgment debtor.**
- (2) If a judgment debtor's entitlement to receive income is dependent on an election by the judgment debtor, the judgment debtor must give the enforcement officer sufficient notice prior to the effective date of the election to enable the enforcement officer to contact the payor of the income prior to any payment being made.**
- (3) If a judgment debtor, fails to provide the enforcement officer with the information required by this section or fails to provide the information within time period specified by the enforcement officer or as required by subsection (2), the court, on application by the enforcement officer may cancel the income exemption to which the judgment debtor would otherwise be entitled under section 165.**

PART 13: RECEIVERS

Introductory Comment: The appointment of a receiver has traditionally been regarded as a form of equitable execution; however, most provinces/territories have legislation and rules of court that pertain to the appointment of receivers. This Part provides for the appointment of a receiver if such an appointment is warranted.

Appointment of receiver

170 Subject to section 171, on application made with or without notice by an instructing judgment creditor or an enforcement officer who has received a subsisting enforcement instruction, the court may appoint a receiver with or without security, with respect to the property of the

judgment debtor including without limitation:

- (a) specified property of a judgment debtor;**
- (b) specified kinds of property of a judgment debtor;**
- (c) all property of the judgment debtor.**

- (2) An order made under subsection (1) applies to property owned by a judgment debtor at the time of the appointment of the receiver and that is acquired by a judgment debtor during the period of the appointment of the receiver.**
- (3) An order made under subsection (1) must not appoint a receiver for a period of more than 6 months unless**
 - (a) the application is made with notice to the judgment debtor and the court after considering the matters referred to in section 172 is satisfied that a longer period of appointment is warranted; or**
 - (b) an application is made with notice to the judgment debtor to extend the appointment of the receiver.**
- (4) On an application to extend the appointment of a receiver, the onus is on the applicant to satisfy the court after considering the matters referred to in section 172 that an extension of the appointment of the receiver is warranted.**

Comment: Under subsection (1), only a judgment creditor who has delivered a subsisting enforcement instruction to an enforcement officer may apply for an appointment of a receiver because the enforcement officer has a role in the supervision of a receiver and receiving the net proceeds of a receivership for distribution in accordance with Part 14.

The requisite qualifications and experience that a receiver should have should be left for the court to determine after considering the complexity of the tasks that will likely be undertaken by the receiver. In some circumstances, a court may appoint the enforcement officer, the judgment creditor or an employee of a judgment creditor as the receiver if the court is satisfied that the person has the requisite qualifications to serve as a receiver. This section does prohibit the appointment of a judgment creditor as a receiver. If a province or territory believes that it necessary to set some minimum qualifications, the regulation making power in Part 16 permits the Lieutenant-Governor in Council to may make regulations "... respecting the qualifications for and appointment of receivers".

The appointment of a receiver can be an intrusive enforcement measure that should not continue indefinitely. The period of the appointment should not normally extend beyond 6 months unless the court determines, after considering the circumstances referred to in section 172, that a longer period of appointment is required.

Circumstances when receiver must not be appointed

171 A receiver must not be appointed with regard to property of a judgment debtor if the appointment of a receiver will

- (a) derogate from an interest in property that was acquired by a person other than the judgment debtor before the application**

- for the appointment of a receiver; or
- (b) interfere with a right to possession of property of a person other than the judgment debtor that was acquired before the application for the appointment of a receiver.**

Comment: An example of where the appointment of a receiver may derogate from an interest in the property acquired by another person is where the judgment debtor leased the property to that person before an application is made to appoint a receiver.

Circumstances court must consider on application to appoint a receiver

172 On an application for the appointment of a receiver, the court must consider any relevant fact or matter including, but not limited to, the following:

- (a) whether an appointment of a receiver is an effective means of realizing on the property;**
- (b) the practicability of enforcing the judgment through other enforcement proceedings under this Act;**
- (c) whether the money that a receiver may reasonably be expected to realize from the property of the judgment debtor is likely to be sufficient to:**
 - (i) pay the costs relating to the appointment, supervision and discharge of the receiver,**
 - (ii) pay the expenses and remuneration of the receiver,**
 - (iii) pay the fees, taxable costs and expenses of the enforcement officer with regard to distribution of money realized by the receiver, and**
 - (iv) provide money for distribution among those judgment creditors who have an eligible claim under Part 14;**
- (d) the conduct of the judgment debtor or other person that has made enforcement of the judgment more difficult or costly; and**
- (e) the extent to which the appointment of a receiver may result in undue hardship or prejudice to the judgment debtor, a dependent of the judgment debtor or to a person in possession or control of property of the judgment debtor.**

Comment: Under clause (d), the appointment of a receiver may be justified on the basis that the judgment debtor has attempted to arrange his or her affairs in a manner that makes the use of other types of enforcement proceedings more difficult.

Under clause (e), an example of where the appointment of a receiver may result in undue prejudice to a judgment debtor is where the appointment of a receiver would trigger a demand for repayment of a demand loan or would prejudice the infusion of new capital into a business.

Order appointing receiver

173 (1) An order appointing a receiver may:

- (a) empower the receiver to collect, receive and take custody and control of property of the judgment debtor wherever the property is located or recoverable and to take such other action**

- the receiver's expenses and remuneration;
- (e) if a demand is made by the enforcement officer designated under subsection (2), provide the enforcement officer with copies of all records relating to the collection, receipt and administration of property of the judgment debtor that have come into the possession or control of the receiver.

- (4) The court may make any an additional order that the court considers necessary or appropriate in respect of the powers of the receiver.

Comment: Under subsection (1)(d), the court may permit limited or specified dispositions or other dealings with the property by the judgment debtor for the purposes of meeting ordinary business and living expenses of the judgment debtor and the judgment debtor's family.

Powers of a receiver

174 (1) Unless otherwise ordered by the court, a receiver must take custody and control of the judgment debtor's property over which the receiver is appointed.

(2) Unless otherwise ordered by the court, a receiver may do any act or thing that could have been or may be done by the judgment debtor in relation to the judgment debtor's property over which the receiver is appointed.

(3) A receiver has the power to take conservatory measures, including sale, to protect the property identified in the order or its value.

(4) In addition to the powers provided by this Act, a receiver appointed under this Act has the powers of a receiver in equity that are not inconsistent with this Act.

(5) A receiver may exercise the powers of a receiver under this Act or [insert the name and section number of applicable provincial /territorial enactment or rule of court that sets out the powers of a receiver] **free of those limitations pertaining to the appointment of receivers imposed by law or equity as it existed prior to the date this Act came into force.**

Comment: The purpose of subsection (5) is to overcome previous limitations that required a receiver appointed by way of equitable execution to abide by the maxim that "equity follows the law".

Application of exemptions from enforcement proceedings

175 (1) Part 12 applies to property of a judgment debtor that is subject to an order made under this Part appointing a receiver.

(2) A receiver appointed under this Part must provide a judgment debtor with any exemption from enforcement proceedings that a judgment debtor or a dependent of the judgment debtor would be entitled to claim

under Part 12 if the judgment debtor's property or income was subject to an enforcement proceeding by an enforcement officer.

- (3) Part 12 applies to the giving of a notice of exemption claim by a judgment debtor to a receiver and to the determination by the receiver of the validity of an exemption claim.**

Comment: Self-explanatory.

Execution of documents

- 176 For the purposes of disposing or otherwise dealing with property of a judgment debtor that is subject to an order under this Part, a receiver may execute or endorse any document that could have been or may be executed or endorsed by the judgment debtor.**

Comment: The powers to execute and endorse documents under this section are virtually identical to the powers given to an enforcement officer under section 13(1)(b).

Supervision of receivers

- 177 (1) Subject to subsection (2), if authorized by an order of the court made at the time of the appointment of a receiver or at any later time, the enforcement officer designated under section 173(2) may:**
- (a) approve the form of the security if the receiver is ordered to provide security;**
 - (b) give directions to the receiver on any matter relating to the duties of the receiver;**
 - (c) approve the receiver's accounts;**
 - (d) fix the remuneration of the receiver;**
 - (e) discharge, remove or replace the receiver; and**
 - (f) discharge any security provided by the receiver.**
- (2) If an enforcement officer is appointed as a receiver under this Part, the court must not make an order giving the enforcement officer any authority referred to in subsection (1).**
- (3) Within 10 days after receiving notice of a decision, approval, direction or determination, made or given by an enforcement officer under subsection (1), on application by the receiver, the judgment debtor or a judgment creditor who has delivered a subsisting enforcement instruction to the enforcement officer, the court may review the decision, approval, direction or determination and the court may:**
- (a) revoke any approval given by the enforcement officer;**
 - (b) revoke any decision, direction or determination given by an enforcement officer;**
 - (c) refer any matter back to the enforcement officer with directions;**
 - (d) substitute the court's approval, direction or determination in place of any made by the enforcement officer;**

(e) **fix the remuneration of the receiver.**

- (4) **The powers that the court may exercise with regard to the appointment of a receiver under in this Part are in addition to other powers provided in [insert the name of any statute or rule of court of the enacting province/territory that sets out powers that the court may otherwise exercise in its jurisdiction over receiver].**

Comment: The objective of this section is to reduce the cost of a receivership order by permitting the court to delegate to an enforcement officer some of the court's traditional supervisory responsibilities with regard to receivers. In those provinces/territories where the enforcement officer is an officer of the court, this may be a suitable approach. In those provinces/territories where enforcement officers have been privatized, the courts may not wish to delegate these responsibilities to an enforcement officer.

Disposition of judgment debtor's property on termination of receivership

178 (1) Upon termination of a receivership, any property of a judgment debtor that remains in the possession or under the control of the receiver must be delivered or transferred to the enforcement officer designated under section 173(2).

- (2) **If an enforcement officer receives the delivery or transfer of property from a receiver under subsection (1), the enforcement officer must deal with the property in the same manner as if the property was the subject of an enforcement proceeding by the enforcement officer.**

Comment: If the enforcement officer receives the delivery or transfer of property from a receiver under this section and the he or she does not have any subsisting enforcement instructions from a judgment creditor, the enforcement officer must deliver or transfer the property to the judgment debtor or other person who is entitled to the property.

PART 14: DISTRIBUTION

Definitions

179 In this Part “eligible claim” means the amount recoverable by a judgment creditor on a judgment at the time when a distributable fund is constituted if the judgment creditor has

- (a) **an enforcement charge on property of the judgment debtor, and**
- (b) **delivered a subsisting enforcement instruction to the enforcement officer.**

Comment: The terms “amount recoverable”, “distributable fund” and “subsisting enforcement instruction” are defined in section 1.

Creation and composition of distributable fund

180 (1) A distributable fund is constituted when an enforcement officer receives money toward satisfaction of a judgment in respect of which the

enforcement officer has received a subsisting enforcement instruction.

- (2) A distributable fund constituted under this section is comprised of:**
- (a) money received by an enforcement officer toward the satisfaction of a judgment after the receipt of an enforcement instruction regardless of the source of the money or a designation or allocation of the money made by the person paying it whether or not the money is received as a result of an enforcement proceeding in respect of a judgment debtor's property;**
 - (b) money that is otherwise identified in this Act or another enactment as distributable or allocated to an enforcement charge on property of a judgment debtor; and**
 - (c) money paid to an enforcement officer in respect of fees, taxable costs and expenses of the enforcement officer incurred in connection with an enforcement instruction relating to a judgment debtor.**
- (3) A judgment creditor who, after giving an enforcement instruction to an enforcement officer, receives a payment from any source in satisfaction of his or her judgment including a judgment granted against an account debtor under section 112(1) must pay the amount received to the enforcement officer to whom the enforcement instruction was given for distribution by the enforcement officer under this Part.**
- (4) When a distributable fund is constituted by an enforcement officer receiving money under a judgment granted under section 112(1), the distributable fund is deemed**
- (a) to be constituted in relation to the judgment debtor named in the notice of seizure referred to in section 112(1); and**
 - (b) to have been constituted on the date when the notice of seizure referred to in section 112(1) was given to the account debtor referred to in that section.**

Comment: A distributable fund is constituted if an enforcement officer receives money with regard to the satisfaction of a judgment at any time after the enforcement officer receives an enforcement instruction. Money received by the enforcement officer is not limited to money derived from an enforcement proceeding conducted by the enforcement officer. If the judgment debtor or another person makes a payment to the enforcement officer with regard to a judgment, a distributable fund is constituted that must be distributed by the enforcement officer in accordance with this Part. If an enforcement officer receives more than one subsisting enforcement instruction and a judgment debtor makes a payment to the enforcement officer, the judgment debtor cannot allocate the payment among the judgment creditors.

Under subsection (2)(b), "money that is otherwise identified in this Act" includes money paid over to an enforcement officer by a receiver. Money otherwise identified in another Act may include:

- (a) proceeds from enforcement proceedings against land if an enacting jurisdiction includes the

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- enforcement proceedings against land in a separate Act rather than in Part 10 of this Act.
- (b) any balance remaining if property of a judgment debtor, which is subject to an enforcement charge, is sold under the PPSA to enforce a security interest or lien that has priority over the enforcement charge.

Enacting jurisdictions should review their PPSA for the purpose of ensuring that it contains a provision similar to section 61(2) of the Newfoundland & Labrador PPSA. It provides:

- (2) If a security agreement secures an indebtedness and the secured party has dealt with the collateral under section 58, or has disposed of it, the secured party must account for a surplus and must, subject to section 150 of the Judgment Enforcement Act and to subsection (5) of this section or the agreement otherwise of all interested persons, pay a surplus in the following order to
- (a) a creditor or person with a security interest in the collateral whose security interest is subordinate to that of the secured party and
 - (i) who has registered, before the distribution of the surplus, a financing statement that includes the name of the debtor or that includes the serial number of the collateral if the collateral is goods of a kind that are prescribed as serial numbered goods, or
 - (ii) whose security interest was perfected by possession when the secured party seized or repossessed the collateral;
 - (b) another person with an interest in the surplus who has given a written notice to the secured party of that person's interest before the distribution of the surplus; and
 - (c) the debtor and another person who is known by the secured party to be an owner of the collateral.

Under subsection (3), if a judgment creditor receives a payment in satisfaction of a judgment from the judgment debtor or from another source without invoking any of the enforcement proceedings under this Act, the payment does not come within this Act and the funds are not subject to distribution under this Act. In effect, the payment is treated in the same manner as a payment prior to judgment. Depending on the circumstances surrounding the making of the payment, the payment may be attacked under legislation dealing with fraudulent transactions. The term "enforcement proceeding" is defined as including the giving of an enforcement instruction to an enforcement officer. Therefore, if a judgment debtor makes a payment to the judgment creditor after the judgment creditor delivered a subsisting enforcement instruction to an enforcement officer, the payment comes within this Act and the judgment creditor must pay the money over to the enforcement officer for distribution in accordance with this Part.

The effect of subsection (4) is that only those judgment creditors who would had eligible claims at the time a notice of seizure was given to an account debtor are regarded as having eligible claims in a distribution of money received by an enforcement officer under a judgment against an account debtor under section 112(1).

Distribution of distributable fund

181 (1) A distributable fund must be distributed by the enforcement officer as provided in this Part.

- (2) If an interest including a security interest in, or lien over, the money in a distributable fund or the property from which the money is derived, has priority over the enforcement charges being enforced, nothing in this**

Part may be construed so as to prejudice any right to the money in a distributable fund that is based on that interest, security interest, or lien.

- (3) The application of this Part is not affected by the priority of any enforcement charge relative to any other interest in property of the judgment debtor, including a mortgage, security interest, lien or charge.**

Comment: Subsection (2) applies, for example, if under section 92 the court permits a sale of the seized property to satisfy a judgment against a buyer under a contract sale and the court is satisfied that the proceeds of sale will exceed the present value of the amount owing to the seller under the contract of sale and the costs of enforcement proceeding. If a sale is permitted, the proceeds which are received by the enforcement officer constitute a distributable fund. However, under this section, the entitlement of the security interest of the seller to the money in a distributable fund is preserved and the enforcement officer is obliged to satisfy the claim of the secured party with the prior security interest before making any distribution to other eligible claimants.

Subsection (3) makes it clear that:

- (a) The priorities established by Part 6 do not govern distributions among judgment creditors; and
- (b) Judicial decisions in some provinces, which held that the *pro rata* distribution provisions of creditors' relief legislation did not apply when a security interest intervened among several writs of execution in the hands of a sheriff, are not applicable to this Act.

Time for determining entitlement to distribution

182 When a distributable fund is constituted under section 180, the determination of those judgment creditors who have an eligible claim is made by the enforcement officer as of the time the distributable fund is constituted.

Comment: Between the time of a seizure by an enforcement officer and the time that the enforcement officer receives proceeds from the sale or other disposition of the seized property, additional judgment creditors may deliver enforcement instructions to the enforcement officer and thereby become eligible claimants who are entitled to share in the distribution of the distributable fund under this Part.

Enforcement officer's request to judgment creditors for information about claim

183 (1) An enforcement officer may deliver a demand in writing to each instructing judgment creditor with an eligible claim or other person who may have a claim on the distributable fund, requiring delivery to the enforcement officer of a statement in writing that:

- (a) states the unsatisfied amount recoverable under the judgment or claim as of the date of the statement;
- (b) discloses any funds or property received in satisfaction or partial satisfaction of the judgment or claim after an enforcement instruction relating to the judgment or claim was delivered to the enforcement officer; and
- (c) asserts any claim to a preference in the distribution of the

distributable fund under section 184 to which the judgment creditor or other person is entitled.

- (2) If a person fails to respond to a demand referred to subsection (1) within 10 days from the date the demand is received, the person is deemed to have waived a right to share in the distribution of the distributable fund.**
- (3) If a person fails to claim a preference in respect of the distribution of a distributable fund under section 184 within 10 days from the date the demand referred to in subsection (1) is received, the person is deemed to have waived a right to a preference in the distribution of the distributable fund.**
- (4) Unless an enforcement officer had knowledge at the time of the distribution that the information provided in response to a demand made under subsection (1) was incorrect:
 - (a) a distribution made by the enforcement officer in reliance on the information is not invalidated; and**
 - (b) the enforcement officer is relieved of any liability for making a distribution in reliance on the information.****

Comment: Self-explanatory.

Order of distributions from distributable fund

184 (1) Except as hereinafter provided, and subject to section 181(2), a distributable fund must be distributed:

- (a) first, to the amount of the fees, taxable court costs and expenses of the enforcement officer earned or incurred in connection with the enforcement proceedings that relate to the money comprising the distributable fund, which amount must be paid to the enforcement officer or to the judgment creditor or other person to the extent that such fees, costs or expenses have been paid to the enforcement officer;**
- (b) second, to taxable court costs of a judgment creditor not falling within clause (a) incurred in a proceeding to obtain a preservation order under Part 4, third person or interpleader proceeding under Part 15, or an application to the court, to the extent that money in the distributable fund can be attributed to such a proceeding or application which amount must be paid to the judgment creditor or other person who incurred or paid such costs;**
- (c) third, if the distributable fund consists of exempt income of the judgment debtor or proceeds of disposition from the sale of property of exempt property of the judgment debtor and the judgment debtor's exemption claim has been determined to be valid under section 156 or 157, the amount determined to be exempt must be paid to the judgment debtor in accordance with**

- section 155(7);
- (d) fourth, to the eligible claim of each instructing judgment creditor whose enforcement instruction led directly to the contribution of money to the distributable fund up to an amount not exceeding the lesser of
 - (i) the sum of
 - (A) \$2000 or such other sum that is prescribed by regulation, or such other amount as a court may order, plus
 - (B) after the payments referred to in clauses (a) to (c) are made, 15% of the amount by which the remaining balance of the distributable fund exceeds \$15 000 or such other sum that is prescribed by regulation, and
 - (ii) the amount of money in the distributable fund that is directly attributable to the enforcement proceeding of that instructing judgment creditor;
 - (e) fifth, to eligible claims that by virtue of any other enactment or law in force in the [province/territory] are entitled to priority over the claims of judgment creditors generally;
 - (f) sixth, to eligible claims of judgment creditors who were parties to an interpleader proceeding under Part 15 or who made a proportional contribution to the cost of such a proceeding to the extent that money in the distributable fund can be attributed to those proceedings, which amount must be paid on a *pro rata* basis to the judgment creditors in those proceedings;
 - (g) seventh, to taxable costs not falling within clauses (a), (b) or (c), that are payable out of the distributable fund under a court order;
 - (h) eighth to
 - (i) judgment creditors with an eligible claim to the extent of their eligible claims have not been satisfied, and
 - (ii) if the distributable fund is comprised of the proceeds of sale of property seized from the premises of a landlord who had a right of distress with respect to arrears of rent that were owing by the judgment debtor at the time of the seizure of the property, to the payment to the landlord of amount equal to the lesser of
 - (A) arrears of rent owing by the tenant at the time of the seizure of the property to a maximum provided by [insert the title of the enacting jurisdiction's landlord and tenant legislation], and
 - (B) the proceeds of sale of the property seized from the landlord's premises;
 - (i) ninth, any amount remaining must be paid to the judgment debtor or person entitled to it unless, prior to payment to the judgment debtor, the enforcement officer receives a new

enforcement instruction from a judgment creditor of the judgment debtor in which case:

- (i) the money must not be paid to the judgment debtor; and**
 - (ii) the money is considered to be an amount received by the enforcement officer under section 180 as a result of an enforcement proceeding and a new distributable fund is constituted under section 180 with regard to such money.**
- (2) If the remaining balance in a distributable fund is inadequate to discharge the full amount of the claims payable to persons referred to in a clause of subsection (1), the remaining balance must be allocated to each eligible claim referred to in that clause in the proportion that that the amount of each eligible claim is to the total amount to be distributed under the clause.**
- (3) If an enforcement officer receives money as a result of an enforcement proceeding, and the enforcement officer is not able to determine which of two or more enforcement instructions led directly to contribution of money to the distributable fund, then for the purposes of determining the entitlement under subsection (1)(d), the earliest enforcement instruction received by the enforcement officer is presumed to be the instruction that led directly to the contribution of money to the distribution fund.**
- (4) The priority of an enforcement charge in relation to another interest in the judgment debtor's property is not affected by order of distribution of the distributable fund.**

Comment: Subsection (1) sets out the order in which funds in a distributable fund must be distributed. Each clause of subsection (1) describes a claimant or class of claimants whose claims must be satisfied in full before moving down to the claimants described in the following clause. If there is not enough money to discharge the full amount of all claimants in one class, subsection (2) provides that the remaining balance in the distributable fund is distributed among the claimants in that class on a *pro rata* basis. The following lettered comments relate the clauses of subsection (1) with the corresponding letters:

- (a) Fees, taxable court costs and expenses of the enforcement officer:** If the term “taxable court costs” is not a term that is used in an enacting province/territory, a term with equivalent meaning should be substituted in clauses (a), (b), and (g).
- (d) The preference of judgment creditor whose enforcement instruction led directly to the contribution of money to the distributable fund compensates that judgment creditor for the time that the judgment creditor devoted to the finding exigible property of the judgment debtor and the unrecoverable costs that the judgment creditor has risked in his or her effort to find exigible property.**
- (e) Claims that are entitled to priority under another enactment:** Examples of such claims include family maintenance and support claims under family maintenance enforcement legislation, wage claims under employment standards legislation and claims under workers' compensation legislation.
- (h) Under this clause, the remaining balance in the distributable fund is distributed on a *pro rata* basis among:**

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- (i) judgment creditors to the extent of remaining balance of their eligible claims, and
- (ii) landlords, if at the time of seizure, they had a right of distress under landlord and tenant legislation of the province/territory. Under section 57, an enforcement officer may only maintain a seizure of a judgment debtor's property located on a landlord's premises if the enforcement officer has reasonable grounds to believe that the amount recoverable in a sale of the property will be more than sufficient to pay the arrears of rent owing to the landlord at the date of seizure up to whatever maximum is provided in landlord and tenant legislation of the enacting jurisdiction.

Subsection (3) deals with situation where, for example, an enforcement officer receives instructions from two judgment creditors to seize a pleasure boat. Both instructions contain similar information with regard to the *Canada Shipping Act* registration number of the boat and the boat's location. For the purpose of determining which judgment creditor is entitled to the preference under clause (d), subsection (3) gives the preference to the judgment creditor who gave the earliest instruction to the enforcement officer.

Delay of distribution after property seized

185 An enforcement officer may not make a distribution from a distributable fund until at least 15 days after

- (a) if the distributable fund consists of proceeds from the disposition of personal property, the date when the enforcement officer seized the personal property; and
- (b) if the distributable fund consists of proceeds from the disposition of land, the date when the enforcement officer receives the proceeds from the disposition of the land.

Comment: In most instances where tangible personal property is seized, it will take at least 15 days to sell the property. However, with regard to the seizure of cash and securities that are disposable in an established market, there must be a reasonable length of time (15 days) to permit third persons, who may have a claim to the seized property, to assert a claim. Third person claims are dealt with in Part 15.

Circumstances when enforcement officer may delay distribution

186 If the distributable fund does not exceed \$2000 or such other amount that is prescribed by regulation, and two or more judgment creditors have eligible claims that exceed the amount in the distributable fund, the enforcement officer may postpone the distribution

- (a) until the accumulated funds with regard to a judgment debtor exceed \$2000 or such other amount that is prescribed by regulation; or
 - (b) a new distributable fund has been constituted with the same eligible claimants;
- provided that a distribution must not be postponed**
- (c) if the amount of the distributable fund will fully satisfy all eligible claims; or
 - (d) for a period longer than 90 days.

Comment: Self-explanatory.

Preparation and distribution of enforcement officer's distribution scheme

- 187** Prior to making a distribution under this Part, an enforcement officer must prepare a distribution scheme in accordance with section 184 and deliver it to:
- (a) the judgment debtor;
 - (b) judgment creditors with eligible claims;
 - (c) a secured party, lien holder or person with an interest referred to in section 181(2);
 - (d) a person with a security interest that was subordinate to the enforcement charge on personal property of the judgment debtor that was sold in an enforcement proceeding that led directly to the contribution of funds to the distributable fund; and
 - (e) any person with a registered interest on the land of the judgment debtor that was extinguished by a sale of the land in an enforcement proceeding that led directly to the contribution of funds to the distributable fund.

Comment: Self-explanatory.

Objection to and amendment of enforcement officer's distribution scheme

- 188 (1)** A judgment creditor or other person who would receive, as provided in the distribution scheme, less than full payment of the person's claim may object to the distribution scheme or aspects of it by giving a notice of objection to the enforcement officer within 10 days from the date of receipt of the distribution scheme.
- (2) If a notice of objection referred to in subsection (2) does not state the reasons for the objection, the enforcement officer may disregard the objection and proceed with the distribution.
 - (3) An enforcement officer may amend a distribution scheme prepared under section 187 in response to a notice of objection given under subsection (1) if the basis for the objection is an error in calculation or a clerical error.
 - (4) If an enforcement officer amends the distribution scheme under subsection (3), the enforcement officer must deliver a copy of the amended distribution scheme to all persons to whom the distribution scheme was previously delivered and section 187 and subsections (1) to (3) of this section apply to the amended distribution scheme.
 - (5) Not later than 10 days from the date that a notice of objection is given to an enforcement officer, the judgment creditor or other person who gave the notice of objection must apply to the court with notice to the

enforcement officer for an order determining the validity of the objection.

- (6) Unless the court orders otherwise, a notice of the application under subsection (5) must be given to each person named in the distribution scheme.**
- (7) On an application under subsection (5) or on application of the enforcement officer who prepared the distribution scheme, the court may, without limitation, make one or more of the following orders:
 - (a) an order dismissing the application and confirming the distribution scheme prepared by the enforcement officer;**
 - (b) an order directing the enforcement officer to amend the distribution scheme;**
 - (c) if the application is successful, order that the costs of the application be paid out of the distributable fund to the applicant; or**
 - (d) if the application is not successful, order the applicant to pay the costs of the proceedings and such additional amounts to persons affected as the court determines is appropriate to compensate for costs incurred and loss suffered as a result of a delay in distributing the distributable fund caused by the application to the court.****
- (8) Despite section 180, a payment of costs or other amount referred to in subsection (6) to the enforcement officer or another person is not treated as part of an existing distributable fund or as constituting a new distributable fund.**
- (9) If the court orders an enforcement officer to amend a distribution scheme, the enforcement officer must deliver a copy of the amended distribution scheme to all persons to whom the distribution scheme was previously delivered under section 187.**

Comment: Self-explanatory.

Payments out of distributable fund

- 189 (1) An enforcement officer must proceed with the distribution in accordance with the distribution scheme or the distribution scheme as amended under section 188(3) if:
 - (a) on the expiry of 10 days from the date the distribution scheme was delivered to the persons referred to in section 187 or such further time as the court may order, the enforcement officer has not received a notice of objection; or**
 - (b) on the expiry of 10 days from the date the distribution scheme was delivered to the persons referred to in section 187 or such further time as the court may order, the enforcement officer has****

received a notice of objection but on expiry 10 days from the date that the enforcement officer received a notice of objection, he or she has not received notice of an application to the court by the person who gave the notice of objection for an order determining the validity of the objection.

- (2) Despite subsection (1), an enforcement officer who receives a notice of objection may, upon expiry of 10 days from the date the distribution scheme is delivered to the persons referred to in section 187 or such further time as the court may order, distribute, in accordance with the distribution scheme, so much of the distributable fund as can be distributed without prejudice to the claim of the person who has given a notice of objection.

Comment: Self-explanatory.

Reporting and correcting errors in distribution

- 190 (1) If a judgment creditor or another person receives a payment by way of a distribution that is greater than the amount to which the person is entitled, the judgment creditor or other person must**
- (a) immediately notify the enforcement officer; and
 - (b) pay to the enforcement officer the amount by which the payment received exceeds the payment to which the judgment creditor or other person is entitled.

- (2) If a judgment creditor or another person
- (a) receives a payment by way of a distribution that is greater than the amount to which the judgment creditor or other person is entitled; and
 - (b) does not immediately on the demand of the enforcement officer or other person affected, repay to the enforcement officer the amount to which he or she was not entitled,
- the court on the application of the enforcement officer or other person affected by the distribution may order that judgment be entered in favour of the enforcement officer, as the representative of the class of persons who have eligible claims under section 184(1), against a judgment creditor or a person in an amount equal to the amount to which the judgment creditor or other person was not entitled.

- (3) If an enforcement officer receives an amount under either subsection (1) or (2), the enforcement officer must recalculate the distribution and distribute the additional money as if the payment were part of the original distribution.

Comment: Self-explanatory.

PART 15: THIRD PERSON CLAIMS

Introductory Comment: Whenever property is subject to an enforcement proceeding by an enforcement officer or property is taken into the custody or control of a receiver, the rights of third persons, who may be unknown to the enforcement officer or receiver, may be adversely affected. This Part contains the procedure that must be followed, if a third person seeks to assert a claim to property that is subject to an enforcement proceeding. If a person with a third person claim does not assert his or her claim in a timely fashion after learning that an enforcement proceeding is being taken in respect of the property, the enforcement officer or receiver, or person who buys the property from an enforcement officer or receiver is protected from any subsequent claim by the third person.

Definition

191 In this Part “third person claim” means a claim to property or to a right to possession of property that is subject to an enforcement proceeding and, if the claim is valid, the property would not be property of the judgment debtor or, in the case of a right to possession, the right to possession could be asserted against the judgment debtor.

Comment: An example of a third person claim is a claim based on an interest under a resulting or constructive trust.

Notice of third person claim to property

192 (1) Subject to subsection 194, a person who asserts a third person claim must give a notice of third person claim in the prescribed form to the enforcement officer who has conduct of the enforcement proceeding or who is designated in an order appointing a receiver under section 173(2).

(2) If an enforcement officer is the enforcement officer designated under an order made under section 173(2) and the enforcement officer receives a notice of third person claim in respect of property that is in the custody or control of a receiver, the enforcement officer must give the receiver a copy of the notice of third person claim.

Comment: Self-explanatory.

Limitations if third person claim not made in timely fashion

193 (1) If a person with a third person claim has knowledge of the enforcement proceeding in respect of the property under circumstances in which a reasonable person would take steps to assert a claim to the property but a notice of third person claim is not given to the enforcement officer until after the disposition of the property in the enforcement proceeding, a third person claim may not be asserted against the enforcement officer or receiver, a person who purchases the property from the enforcement officer or receiver, or a successor in interest from the buyer in respect of the property but may be asserted against the proceeds of disposition of the property that remain after deducting the fees, taxable costs and expenses of the enforcement officer or the receiver in relation to the

disposition of the property.

- (2) If a person with a third person claim has knowledge of the enforcement proceeding in respect of the property under circumstances in which a reasonable person would take steps to assert a claim to the property but a notice of third person claim is not given to the enforcement officer until after the property is sold or otherwise disposed of by the enforcement officer or receiver and the proceeds of disposition or other money have been distributed under Part 14, the person is precluded from asserting a third person claim against the enforcement officer or receiver, a person who purchases the property from the enforcement officer or receiver, or successor in interest from the buyer.**
- (3) A person who has an interest as a joint tenant or tenant in common with the judgment debtor in the property that is the subject of an enforcement proceeding is not entitled to assert a third person claim.**

Comment: Unless a third person asserts a third person claim in a timely manner, this section relieves an enforcement officer of any liability in relation to a seizure if, at the time of the seizure, the enforcement officer had reasonable grounds to believe that the seized property was the property of the judgment debtor or the judgment debtor had an interest in the property that was exigible.

Stay of sale or stay of distribution of proceeds from sale of property that is subject to a third person claim

- 194** If a notice of third person claim is received by an enforcement officer or a receiver prior to the disposition of the property, the property that is subject to the notice of third person claim must not be sold, and funds in the possession of an enforcement officer arising from an enforcement proceeding in respect of that property must not be distributed, until
- (a) the third person claim is withdrawn by the third person;**
 - (b) the court makes an order that the third person claim is invalid;**
- or**
- (c) the court otherwise orders.**

Procedure relating to third person claims

- 195 (1) After receipt of a notice of third person claim, an enforcement officer must give a notice in the prescribed form with a copy of the notice of third person claim to all judgment creditors who have delivered a subsisting enforcement instruction to the enforcement officer.**
- (2) A judgment creditor who receives the notice referred to in subsection (1) may dispute the third person claim by giving a notice of dispute to the enforcement officer not later than 10 days after receiving the notice referred to in subsection (1).**
 - (3) A judgment creditor who does not give a notice of dispute to the enforcement officer as provided by subsection (2) is deemed to have**

accepted the validity of the third person claim.

- (4) Nothing in subsection (3) affects the rights of a judgment creditor in any proceedings other than as referred to in this Part.**

Comment: Self-explanatory.

Release of seized property

196 (1) If a notice of dispute is not received in accordance with section 195(2) by the enforcement officer who gave the notice under the section 195(1), the enforcement officer must release from seizure the property claimed in the notice of third person claim.

- (2) On the application of an enforcement officer who releases property as provided in subsection (1), the court may, if enforcement officer acted in accordance with this Act, make one or more of the following orders:**
- (a) an order relieving enforcement officer from liability in respect of the seizure;**
 - (b) an order dismissing an action brought against the enforcement officer in respect of the seizure.**

Comment: In determining whether an enforcement officer acted in accordance with this Act, the court should consider whether, at the time of the seizure of the property, the enforcement officer had reasonable grounds to believe that the seized property was the property of the judgment debtor.

Notice by enforcement officer of intention to interplead

197 If a notice of dispute is delivered under section 195(2) to the enforcement officer who gave the notice under the section 195(1), the enforcement officer must give a notice of intention to interplead to the disputing judgment creditor indicating that the validity of the notice of third person claim is to be determined through interpleader proceedings as provided by the *Rules of Court* unless the judgment creditor withdraws his or her notice of dispute within 5 days after receiving the notice of intention to interplead.

Comment: Self-explanatory.

Application by enforcement officer for interpleader order

198 (1) If, after expiry of the 5 days referred to in section 197, a notice of dispute is not withdrawn by the judgment creditor, the enforcement officer must apply for an interpleader order.

- (2) If a person asserting a third person claim withdraws the claim or the judgment creditor accepts the claim before or on the return of the notice of motion for an interpleader order, the court may order the person asserting the third person claim or judgment creditor to pay the costs of the other party and the enforcement officer's costs.**

- (3) Notice of an application for an interpleader order by an enforcement officer must be given to the person who gave notice of the third person claim and each judgment creditor who gave a notice of dispute of third person claim to the enforcement officer unless the notice of dispute has been withdrawn.

Comment: Self-explanatory.

Possession of disputed property during interpleader proceeding

199(1) Pending the outcome of an interpleader proceeding under section 198, an enforcement officer who is a party to those proceedings may, after provision of such security or bond as the enforcement officer may require, permit the person asserting a third person claim or another person to have possession or control of the property that is the subject of the interpleaded proceeding.

- (2) When a bond or security is taken under subsection (1), the enforcement officer is deemed to remain in possession or control of the property during the currency of the bond or security and the obligor under the bond is deemed to be the enforcement officer's bailee who is under obligation to deliver possession or control of the property to the enforcement officer on demand.

Comment: Self-explanatory.

Sale of perishable property

200 If the property specified in a notice of third person claim is perishable property or property that cannot be stored at a cost that is likely to be less than value of the property, the court may order that the property be sold by the enforcement officer in the same manner as if no claim had been made to the property.

Comment: Self-explanatory.

Onus of proof in interpleader proceeding

201 (1) Unless the court orders otherwise, in an interpleader proceeding under this Part:

- (a) if the property in dispute was in the possession or control of the judgment debtor or an agent of the judgment debtor at the date of seizure, the onus of proof that the third person claim is valid is on the person asserting the third person claim;
- (b) if the property in dispute was in the possession or control of any person other than the judgment debtor or an agent of the judgment debtor at the date of seizure, the onus of proof that the third person claim is not valid is on the judgment creditor;
- (c) if the property in dispute is an account, the onus of proof that the third person claim to the account is valid is on the person asserting the third person claim.

- (2) If the property in dispute in an interpleader proceeding under this Part was in the possession or control of the person asserting the third person claim at the time of the seizure of the property by the enforcement officer or other enforcement proceeding, and the court is satisfied that the person asserting the third person claim and the judgment debtor have colluded to delay or prevent enforcement proceedings against the judgment debtor's property, the court may place the onus of proving the validity of the third person claim on the person asserting the third person claim.**

Comment: Self-explanatory.

PART 16: TRANSITION, REGULATIONS, FORMS AND FEES

Transition provision

- 202 A registration of a judgment against a judgment debtor's land under [insert the name of the *Land Title Act* or similar Act] continues until the expiration of the registration and for that period of time the registration is deemed to be a registration of a notice of judgment that creates an enforcement charge on the judgment debtor's land under Part 10 of this Act.**

Comment: Prior to the time when the Uniform Act comes into force, judgments will have been registered against the land of the judgment debtor in accordance with the Act of the province or territory governing registrations against land. The advantages of deeming a registration of judgment against land made prior to the coming into force of the Act to be a registration of a notice of judgment under this Act are twofold. First, the procedure for obtaining an order for sale under this Act is much more streamlined than the current procedure in many provinces/territories. Second, the distribution of the proceeds of sale will take place under this Act. If this were not the case, it would be very confusing to have one distribution scheme apply to judgments registered prior to this Act and a different distribution scheme apply to notices of judgment registered under this Act.

In addition to this section, clause (n) of the next section enables the Lieutenant-Governor in Council to make regulations respecting the transition from the law existing immediately before the commencement of this Act to this Act.

Regulation making power

- 203 The Lieutenant-Governor in Council may make regulations**
- (a) defining, for the purpose of this Act, a term that is not otherwise defined by this Act;**
 - (b) respecting the registry and its operations under this Act;**
 - (c) respecting the posting of a bond for the purpose of supporting security or an undertaking required under this Act;**
 - (d) respecting the description of property that is to be included in notices of judgment and prescribing the kinds of goods that may be described wholly or in part by serial number and the**

- requirements of a description by serial number;
- (e) respecting the identification of judgment debtors in registrations;
- (f) respecting the records to be entered, maintained, amended and deleted for the purpose of this Act;
- (g) prescribing property and income that is exempt and prescribing the value of property of a specific type that may be claimed as exempt from seizure;
- (h) respecting the calculation of net income including allowable deductions;
- (i) governing the selection of exempt property by judgment debtors and their representatives;
- (j) respecting the determination of persons who qualify as dependents for the purpose of this Act;
- (k) respecting the seizure of property, including the removal, handling, storage and release of seized property;
- (l) respecting the qualifications for and appointment of receivers;
- (m) respecting compensation for account debtors;
- (n) respecting the transition from the law existing immediately before the commencement of this Act to this Act;
- (o) defining a word for the purpose of the Act or the regulations which is not defined in the Act; and
- (p) generally to give effect to the purpose of this Act.

Comment: Under clauses (b) and (f), a regulation that may be required with regard to the operation of the registry is a regulation providing that when a notice of judgment is no longer effective, it may be removed from the records of the registry in accordance with the regulations. The purpose of such a regulation is to enable the registry to remove data from the registry's data bank when the registration of a notice of judgment including any renewal has expired. Otherwise, over time, the registry's data information system would become burdened with information that is no longer relevant.

Prescribed Forms

204 (1) When this Act states that a notice or document must be in a prescribed form, the form and the contents or information required on that form or document may be

- (a) prescribed by regulation; or
- (b) the minister responsible for this Act.

(2) The minister responsible for this Act may delegate the responsibility of prescribed forms and the contents or information required on a form or document

- (a) in the case of forms or documents that are required to be registered in the registry, to the registrar of the registry;
- (b) in the case of forms or documents that are required to be registered in accordance with the [insert the name of the *Land Titles Act* or similar Act], to the [insert the Registrar of Titles or

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- similar official]; and
- (c) **in the case of forms that are required to be used in an enforcement proceeding, to the chief enforcement officer of the province/territory.**

(3) If, by this Act, a form or document must contain specified information or statements, the regulations may require the form or document to contain information or statements that are additional to those specified by this Act.

Comment: Self-explanatory.

Prescribed Fees

205 The minister responsible for this Act may establish fees that must be paid for registrations, filing of documents, searches, commissions, enforcement instructions, examinations under oath, questionnaires, services, documents, copies, orders, enforcement proceedings and other things necessary for the purpose of this Act.

Comment: Self-explanatory.