Ministry of Attorney General
Justice Services Branch
Policy and Legislation Division

Consultation Paper on the

Uniform Civil Enforcement Money Judgments Act:

Potential Departures and Additions

March 2020

The "Consultation Paper on the *Uniform Civil Enforcement Money Judgments Act*" was produced in order to solicit input and discussion into reforming the existing *Court Order Enforcement Act*, to assess support for the adoption of the *Uniform Civil Enforcement Money Judgments Act*, and to identify potential departures from that Act. The Consultation Paper is not intended to constitute legal advice or to be a statement of the law in respect of the *Court Order Enforcement Act* or any new Act that may replace the *Court Order Enforcement Act,* should that Act be repealed. This paper should not be relied upon for those purposes. Individuals with questions regarding the legal effect of provisions relating to the enforcement of money judgments should seek legal advice from a lawyer.

PART ONE

I. Background

What is the Court Order Enforcement Act?

The *Court Order Enforcement Act* sets out the procedures that Judgment Creditors (successful plaintiffs) must use in order to satisfy their money judgment if a Judgment Debtor (defendant) is unwilling to pay the judgment (either in a lump sum or through voluntary payment arrangements over time).

Purpose of the Court Order Enforcement Act

The *Court Order Enforcement Act* has two purposes:

1) to enable a Judgment Creditor to collect money, which they are owed by court order.
2) to guarantee that enforcement mechanisms are reasonable; ensuring that a Judgment Debtor can retain a certain minimal amount of property and maintain basic needs.

II. The Court Order Enforcement Act Review

Why Reform the Court Order Enforcement Act?

The existing methods of seizure are generally inefficient, relatively expensive and time consuming to obtain. This is because the existing methods of seizure are court-centric and most have their roots in legislation from the 1800s, primarily the *Judgments Act* of 1838 (Britain) and *Common Law Procedure Act* of 1854 (Britain). These statutes were imported into British Columbia law by virtue of British Columbia being a colony of Britain and were then formalized into new legislation which became the *Court Order Enforcement Act*.

The historical nature of current enforcement processes results in an inability to seize some forms of property that either did not exist or were not contemplated when the current processes were created, such as intellectual property and licences, and therefore are not recognized as types of property that can be seized. Joint ownership also prevents enforcement. The inability to seize all types of property allows individuals to order their affairs so as to frustrate attempts to satisfy a judgment.

While judgment enforcement law has never reached a crisis point, over the years problems with judgment enforcement have been identified by a broad range of stakeholders, including lawyers, academics, lenders and court registry staff.

Alberta reformed its regime for enforcing money judgments with the enactment of the *Civil Enforcement Act* in 1996. Shortly after, Newfoundland and Labrador enacted a similar statute, the *Judgment Enforcement Act*. The Alberta Act was used as the starting point for the Uniform

Law Conference of Canada (ULCC) when it prepared the *Uniform Civil Enforcement of Money Judgments Act* in 2004 ("Uniform Act"). This Uniform Act was then revised for adoption in British Columbia by the BCLI in its 2005 Report on the *Uniform Civil Enforcement of Money Judgments Act*. More recently (May 2012), Saskatchewan enacted its *Enforcement of Money Judgments Act*. All provinces that have enacted new legislation have the same key features as the ULCC Uniform Act, with minor variations.

British Columbia needs to keep pace. The ability to efficiently enforce money judgments has an impact on competitiveness and the cost of doing business. Additionally, the Ministry's priority to have laws that are modern and fair is a reason to look at bringing B.C.'s statute into line with the developments in other provinces.

Objectives of Reform

The Ministry has approached reforms to the Act with the following objectives:

1) To simplify and clarify the procedures for enforcing judgments and reduce the need to apply to court for orders;
2) To eliminate (or at least minimize) technicalities that Judgment Debtors can use to shield non-exempt property from seizure; and
3) To continue to protect the rights of Judgment Debtors.
    - This includes ensuring that all actions taken to enforce a judgment are fair and commercially reasonable, as well as expanding and clarifying categories of exempt property to ensure that Judgment Debtors can maintain a basic standard of living.

III. Invitation to Comment

The Ministry is issuing this Consultation Paper to offer interested persons the opportunity to comment on the proposed new judgment enforcement legislation. A summary of the questions posed throughout the paper can be found in Appendix A.

Comments may be mailed or e-mailed to:

Policy and Legislation Division
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Ministry of Attorney General
PO Box 9222 Stn Prov Govt
Victoria, British Columbia V8W 9J1

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Unless clearly marked to the contrary, the Ministry will assume that comments received are not confidential and that respondents consent to the Ministry attributing their comments to them and to the release or publication of their submissions. Requests for confidentiality or anonymity will be respected to the extent permitted by the *Freedom of Information and Protection of Privacy Act*.

The deadline for providing feedback is **May 1, 2020**.

PART TWO

I. Introduction to the Uniform Civil Enforcement Money Judgments Act

The proposed *Money Judgments Enforcement Act* will be based upon the Uniform Act. In many cases it is proposed to adopt modifications to the Uniform Act that are reflected in Saskatchewan's *Enforcement of Money Judgments Act*. British Columbia's Act would not be drafted to be uniform with Saskatchewan's Act (or Alberta's Act). It is anticipated that there will be significant wording changes and a number of smaller policy departures from both the Uniform Act and the Saskatchewan Act.

Summary of changes proposed by the Uniform Act

The key aspects of the proposed Act may be summarized as follows:

- There is a shift to **statute-based** authority for seizure. There is no need for further court orders after judgment unless a dispute arises.
- **All** of a debtor's property is subject to seizure, unless specifically exempted by the legislation.
- A Court Bailiff may do anything with seized property that the Judgment Debtor could do with that property.
    - In theory this allows a Court Bailiff to do something other than sell seized property (i.e. lease or license the property), though it may be rare that there will be circumstances where this is the most commercially reasonable option.

The following summarizes the process for enforcement under the Uniform Act, provides more detail about the rights and duties created by the legislation, and explains how these changes may benefit the Judgment Creditor, debtor, and third parties:

- A Judgment Creditor must register their judgment if they want a Court Bailiff to assist them to satisfy their judgment. Registration is voluntary, so if a creditor is reasonably certain the judgment will be paid they will not be obligated to register.
- However, registration protects the Judgment Creditor. The result of registration is a "floating charge" over all of the Judgment Debtor's property, which gives the Judgment Creditor priority relative to other creditors who may register a security agreement or otherwise seek to secure their debt.
    - Registration should also benefit third parties; instead of searching the court registry to see if a judgment has ever been entered against a prospective borrower, they will be able to search a judgment registry accessible from the

same platform as the Personal Property Registry. Moreover, the registration will likely be updated to reflect the current amount owing on the judgment and, unlike a judgment in the court registry, the registration will be withdrawn once the judgment is satisfied.

- Once a judgment has been registered the Judgment Creditor is entitled to instruct a Court Bailiff to seize and sell the Judgment Debtor's property or take other enforcement action (there is no need for further court orders).
  - Again, instructing a Court Bailiff is also voluntary. Registration of a judgment and the priority established by registration allow a Judgment Creditor to choose to wait and pursue passive collection, as the floating charge (security interest over the Judgment Debtor's present and after acquired property) should make it difficult for the Judgment Debtor to obtain future credit or renegotiate expiring credit arrangements. Ultimately, the security provided to judgment creditors and difficulty obtaining credit should encourage voluntary payment.
  - The instruction to the Court Bailiff may be general (e.g., "seize and sell everything and anything") or specific (e.g., "seize the yacht at slip 3, pier 6, Fair Tides Marina").
- Upon receiving an instruction, a Court Bailiff is entitled to seize property by taking possession of the property or giving a notice of seizure. Unless the property is perishable or there are other unusual circumstances, there will generally be a period of time between seizure and sale. During this time there will be an opportunity for the Judgment Debtor or a third party with an interest in the property to acquire (re-acquire) the property by paying the value of the property.
- The ULCC proposes special rules for seizing certain types of property:
  - Fixtures and Crops;
  - Leases, contracts of sale, and security agreements;
  - Securities;
  - Intellectual Property;
  - Accounts; and
  - Co-owned and partnership property.
- There are additional special rules for securing an interest in and selling land.

  - To register an interest in land the Judgment Creditor must register the judgment in the Judgment Registry and also register their interest in the Land Title Registry.
  - As registration in the Land Title Registry secures the Judgment Debtor's interest there is no need to physically take possession or otherwise secure the land. However, notice will be given that the Court Bailiff is entitled to sell the land.
    - For commercial property the notice will start a one-month waiting period before the land can be sold. For a personal residence this is increased to a six-month waiting period and an initial notice setting out the details of how the house will be sold must be provided one month before sale.
- Exemptions have also been updated: the proposed legislation would not allow the Court Bailiff to take physical possession of property if it would likely be exempt.
- Existing exemptions have been carried forward and the ULCC and BCLI propose exempting the following additional property:
  - Food;
  - Compensation for loss of future income;
  - Compensation to be used to pay for future medical expenses;
  - Pets; and
  - Burial plots.
- The Act will also specify that proceeds from sales of exempt property are also exempt.

II. Transition Rules

There is a need to include a transition clause in order to transition effectively from the existing money judgment enforcement law to the new one. The proposed transition provisions would attempt to ensure that, with respect to enforcement proceedings that arose before the effective date of the new statute but which continue after it comes into force, people will be able to rely on legal advice given to them that pre-dates the new law.

It is proposed to divide enforcement actions into three categories:

(1) Early - where a writ of execution has been issued under the *Court Order Enforcement Act* (i.e., there is an order commanding a Court Bailiff to seize and sell sufficient goods of the debtor to satisfy the judgment) but no property has been seized;

(2) Middle - where property has been seized, but has not been sold; and
(3) Late - where property has been sold but the proceeds have not yet been distributed.

Proposed approach to transition:

(1) Early - If a writ of execution has been issued but no property has been seized, then require a creditor to register their judgment and proceed using the new law.
(2) Middle - If property has been seized but has not been sold, then do not require the registration of a judgment prior to the completion of the disposition and distribution; however, require the Court Bailiff to follow the new law when disposing of the property and distributing the proceeds.
(3) Late - If property has been sold, but the proceeds not distributed, then allow the Court Bailiff to complete the enforcement proceedings in accordance with the *Court Order Enforcement Act*.

Examples of the operation of the proposed transition clause are set out below.

Example 1 –Transition occurs early, before enforcement:

In 2018, a Judgment Creditor obtained a writ of seizure in accordance with the *Court Order Enforcement Act* and instructed a Court Bailiff to seize property based on this writ; however, the Court Bailiff had not located or seized property prior to the new Act coming into force.

When the new Act comes into force the writ of seizure (and instruction to the Court Bailiff under that writ) ceases to have effect. The Judgment Creditor is required to register their judgment and issue a new enforcement instruction to the Court Bailiff.

Example 2 – Transition occurs in the middle of enforcement:

In 2018, a Judgment Creditor obtained a writ of seizure in accordance with the *Court Order Enforcement Act*. The Court Bailiff seized property in accordance with the instructions following the writ. However, the Court Bailiff had not been able to sell this property prior to the new Act coming into force.

When the new Act comes into force the writ of seizure ceases to have effect. However, the Court Bailiff may sell the property that had been seized prior to the new Act coming into force; although, the Court Bailiff must follow the new law when disposing of the property (including providing notice in accordance with the new Act) and distributing the proceeds (including pro-rata sharing, if other Judgment Creditors have registered). If the judgment remains unsatisfied, any additional enforcement will require registration and the issuance of a new enforcement instruction to the Court Bailiff, as set out in example 1.

Example 3 – Transition occurs late in enforcement:

In 2018, a Judgment Creditor obtained a writ of seizure in accordance with the *Court Order Enforcement Act*. The Court Bailiff seized property in accordance with the instructions following the writ and has disposed of the property. However, the Court Bailiff had not been able to distribute the proceeds prior to the new Act coming into force.

When the new Act comes into force the writ of seizure (and instruction to the Court Bailiff under that writ) ceases to have effect. However, the Court Bailiff can distribute the proceeds from the property that was seized and sold prior to the new Act coming into force in accordance with the *Court Order Enforcement Act*. If the Court Bailiff also has unsold property then that property must be dealt with in accordance with the transition rules described in example 2 and, if the judgment remains unsatisfied, any additional enforcement will require registration, as set out in example 1.

III. Provisions that will not be carried forward to the new Act

As noted in Part One of this Consultation Paper, the proposed reforms will be carried out by repealing the existing law and replacing it with a new one. As a result, many sections of the current *Court Order Enforcement Act* will not be carried forward to the new *Money Judgments Enforcement Act*. In some cases, the principles behind a certain section will be carried forward into the new Act, while other sections will be entirely eliminated because they are no longer necessary. Most of the sections of the current law that will not be carried forward into the new law are listed below, along with a brief rationale. Sections that will be carried forward in an amended format, so that the underlying policy is maintained are not listed. Similarly, sections that may not be carried forward depending on the results of this consultation are not listed. For example, the underlying policy of section 10, if carried forward, would limit the seizure of an account to the amount owing on all registered judgments and any debts that must be satisfied in priority to these judgments. This section may not be carried forward if there is agreement that account debtors should be able (or be required) to pay the entire amount of the account debt to a Court Bailiff and that the Court Bailiff should, in turn, distribute any excess not needed to satisfy the judgments to the Judgment Debtor.

Interested parties are invited to comment on the proposed list of provisions not to be carried forward, found below.

Not to be carried forward:

- Attachment procedures and exemptions, section 3 (2) & (3)
- Payment by instalment, section 5

- Form of affidavits and orders, section 7
- Affidavit may be on information and belief, section 8
- Debts bound from time of service of order, section 9
- When judge may order payment by garnishee with costs, section 11
- Payment out of court, section 12
- Payment out of court without order, section 13
- Execution may issue on order, section 14
- Debt attachment book to be kept by registrar, section 22
- Procedure is regulated by this part, section 23
- Different debts may be included in one order, section 26

Comment:

The requirement under the *Court Order Enforcement Act* to obtain a court order to attach property owned by the Judgment Debtor has been replaced by the requirement to register the judgment in a judgment registry. Registration is simpler and less expensive than obtaining a court order.

Questions:

1) Do you have any concerns about not carrying forward the listed sections?
2) Do you have any general comments on the proposals contained in the *Uniform Civil Enforcement Money Judgments Act*?

PART THREE

It is generally proposed to follow the draft legislation prepared by the ULCC and BCLI and, in some cases to follow revisions to this draft legislation that are reflected in Saskatchewan's *Enforcement of Money Judgments Act*. However, several issues were identified as likely to benefit from broader consultation and consideration of alternatives. These issues include:

I. Pro-Rata Sharing among Judgment Creditors

1. Current approach to priority over money collected from enforcement activities

Currently, under the *Court Order Enforcement Act*, money is primarily distributed to creditors on a "first-to-instruct" basis. This means that a Court Bailiff distributes the proceeds of a seizure and sale to whichever Judgment Creditor instructed them first, regardless of when a creditor obtained their judgment. There is only pro-rata sharing among creditors if a creditor delivers a "certificate of claim" to a Court Bailiff, in accordance with the *Creditor's Assistance Act*.

A fundamental principle underlying the proposed legislation is the elimination of the requirement for a creditor to submit a certificate of claim, and the introduction of presumptive pro-rata sharing of any money to be distributed to multiple Judgment Creditors. There is concern that expanding the principle of pro-rata sharing as proposed in the BCLI Act may discourage the enforcement of money judgments.

2. Approach of other jurisdictions regarding priority over money collected from enforcement activities

Other modernized provincial limitations laws show a varied approach to dealing with prioritization when seized assets are shared among multiple creditors.

Evidence from Alberta indicates that the number of writs of enforcement decreased steadily in the first 10 years after the introduction of Alberta's *Civil Enforcement Act*. There is some speculation that the decrease in writs of enforcement was due to the introduction of pro-rata sharing by that legislation. It is suggested that pro-rata sharing may discourage enforcement when there are multiple creditors. This is because no creditor wishes to spend money to satisfy a judgment if other creditors will benefit without having to similarly risk their funds (i.e., all Judgment Creditors take a "wait and see" approach, hoping another creditor will instruct a Court Bailiff to seize property). Ultimately the goal is to improve the enforcement system for creditors. It is not desirable to impose an enforcement regime that creditors will find inefficient or will choose not to use.

However, there may be other reasons that enforcement activity decreased in Alberta. Alberta's *Civil Enforcement Act* also privatized the bailiff function, which may have affected enforcement costs or other aspects of the service. And, the legislation introduced other

changes to enforcement. It is also conceivable that the effectiveness of the new enforcement regime simply encourages debtors to pay their judgment, without the need for Judgment Creditors to resort to enforcement mechanisms. For these reasons it is not possible to tie the decrease in enforcement solely to pro-rata sharing.

It should also be noted that both Alberta and Saskatchewan give a creditor who instructs a Court Bailiff a preferential share of the proceeds of enforcement (i.e., a share that is deducted before the proceeds are distributed pro-rata). Alberta gives instructing creditors a minimum preferred share of $2,000 (e.g., if a car was sold for $4,000 the Judgment Debtor would get $2,000 and then $2,000 would be split pro-rata). If the proceeds of disposition exceed $15,000 then the active Judgment Creditor is entitled to an additional 15% of the amount by which the proceeds exceeds $15,000 (e.g., if a car was sold for $20,000 then the preferred share would be $2,750, which is $2,000 + $5,000 x 0.15).

Saskatchewan proposes a much smaller preferential share, which is only given to "each Judgment Creditor who gave an enforcement instruction <u>that led directly to receipt by the sheriff of money in the fund</u>" (emphasis added). This additional language seems to suggest that there is a higher test to qualify for the preferential share, as opposed to simply being the first to give a general enforcement instruction asking a Court Bailiff to seize and sell whatever can be found. Presumably a later instructing Judgment Creditor who provides a Court Bailiff with specific information about the location of a Judgment Debtor's property would have a better claim to the preferential share than the first Judgment Creditor who merely gives a general instruction without any information. In Saskatchewan the amount of the preferential share is based on the seize of the judgment (not the amount of the proceeds being distributed); $200, if the amount of the judgment is less than $1,000, $500 if the amount of the judgment is between $1,000 and $10,000 and $1,000 for judgments over $10,000 (i.e., regardless of whether a car is sold for $4,000 or $15,000 a Judgment Creditor's preferential share would only get a maximum of $1,000 if they are owed over $10,000).

3. Options for priority over money collected from enforcement activities

There appear to be three options for priority over money collected from enforcement activities:

<u>Option 1: A pro-rata sharing regime</u>

The benefit of a pro-rata regime is that it gives creditors comfort they will share in the proceeds of any enforcement proceedings and therefore will not be prejudiced if they wait to enforce. This comfort may, in turn, encourage creditors to enter into voluntary payment plans with a debtor, since they will not be concerned about subsequent Judgment Debtors. Pro-rata sharing is already a part of British Columbia Law by virtue of the *Creditor's Assistance Act*; therefore, the proposed legislation is not introducing a new concept, but rather is expanding its application.

The disadvantage of pro-rata sharing is that the distribution of funds collected by a Court Bailiff becomes complicated if there are intervening secured interests between the registrations of Judgment Creditors. The principle of pro-rata sharing among Judgment Creditors can prejudice the interests of a secured creditor. The difference between a first-to-register regime and a pro-rata regime in regards to the interests of a secured creditor is illustrated in the following examples:

Example 1 – two Judgment Creditors with a Secured Creditor registered after Judgment Creditor A but before Judgment Creditor B – value of asset, <u>less</u> than Judgment Creditor A is owed:

Judgment Creditor A registers a judgment amount of $10,000 and agrees to a payment plan with the debtor. Subsequently the Judgment Debtor seeks a line of credit. Secured Creditor sees the registration of the judgment but notes that the debtor has assets in the amount of $100,000. Because the debtor has more than enough assets to pay the judgment, the Secured Creditor feels comfortable extending a $50,000 line of credit and registers a security interest for $50,000. Shortly after the Secured Creditor registers their interest, Judgment Creditor B registers a judgment in the amount of $90,000 against the debtor and initiates enforcement proceedings. The amount owing is now $100,000 in total judgments and a $50,000 security interest.

The debtor's car is then seized and sold for $10,000. The order of registration is as follows:

1) Judgment Creditor A
2) Secured Creditor
3) Judgment Creditor B

Under a first-to-register regime, the first creditor to receive payment from the sale of the car would be Judgment Creditor A, because that was the first interest registered. Since Judgment Creditor A's registered debt is for $10,000, the full amount of the proceeds from the sale of the car would be directed toward the judgment debt, with no remainder existing to be distributed to the Secured Creditor or to Judgment Creditor B.

Similarly, under a pro-rata sharing regime, because Judgment Creditor A was the first to register, and the amount of the proceeds ($10,000) is what is owed to Judgment Creditor A, none of the money goes to the Secured Creditor. However, because of pro-rata sharing Judgment Creditor A does not get the whole $10,000 from the sale of the car, instead the $10,000 is split between Judgment Creditor A and Judgment Creditor B, proportionate to the ratio between each of their registered debts. Judgment Creditor A's debt is 10% of the total ($100,000) Judgment Debt and Judgment Creditor B's debt is 90% of that total. That means that with the car selling for $10,000, Judgment Creditor A would only receive $1,000 toward

their $10,000 debt and Judgment Creditor B would receive $9,000 toward their $90,000 debt. This means that even after the sale of a $10,000 car Judgment Creditor A will still be owed $9,000, the Secured Creditor owed $50,000, and Judgment Creditor B, despite being the last to register, is now owed $81,000. Moreover, because Judgment Creditor A only received $1,000 from the sale of the car, in the future, if property of the Judgment Debtor worth less than $9,000 is sold, then the same calculations will apply and the Secured Creditor would still not receive any funds. Essentially, in certain circumstances, pro-rata sharing can allow later registered Judgment Creditors to jump the priority queue established by the time of registration.

Example 2 – two Judgment Creditors with a Secured Creditor registered after Judgment Creditor A but before Judgment Creditor B – value of asset, <u>more</u> than Judgment Creditor A is owed:

Next, imagine that the car in the example above had sold for $12,000 instead of $10,000. Under a first-to-register system, Judgment Creditor A's full $10,000 debt would be satisfied, then the Secured Creditor would receive $2,000 toward their $50,000 debt and Judgment Creditor B would not receive anything towards their debt.

Under a pro-rata regime, $10,000 would be directed toward Judgment debts because this is the total amount that has been registered in priority to the Secured Creditor. The Secured Creditor would get $2,000. However, as above, because of pro-rata sharing the $10,000 would then be split (with $1,000 being paid to Judgment Creditor A, and $9,000 going to Judgment Creditor B). In this example, even though the Secured Creditor gets paid something, Judgment Creditor B still recovers more. And, since Judgment Creditor A is still owed $9,000, Judgment Creditor B will continue to jump ahead of the Secured Creditor in the future.

As the examples illustrate, under a pro-rata regime, a Secured Creditor who registers after only one Judgment Creditor will not recover in priority to any Judgment Creditors (even those who register after they do) until such time as the debt of the first Judgment Creditor to register has been satisfied. Accordingly, pro-rata sharing may create a strategic approach to enforcement wherein later-registered Judgment Creditors may be more likely to initiate enforcement proceedings where there is an intervening secured creditor, because they will collect more than if the first creditor to register enforces (due to the preferential share).

Aside from the complexity created by pro-rata sharing where there are multiple Judgment Creditors and secured creditors, Court Bailiffs and plaintiffs' counsel in Alberta suggest that pro-rata sharing discourages enforcement where there is more than one Judgment Creditor, because the instructing creditor assumes the risk and expense of enforcement for the benefit of

others, while being entitled to only a very minor preferential share. A review of the writs of enforcement in Alberta (which are used to initiate enforcement action) has confirmed that there was a steady decline in the issuance of such writs between the introduction of similar legislation in Alberta in 1998 and 2010. Since 2010, writs have stabilized at a rate of about a third of the amount issued pre-amendment. (see Civil Enforcement Agencies' Activity - Past Years Annual Report – Alberta Sheriff web site: https://albertacourts.ca/docs/default-source/default-document-library/civil-enforcement-agencies'-activity---past-years-annual-report.pdf?sfvrsn=4)

Finally, one may argue that it does not make sense to impose pro-rata sharing in cases where the debtor has sufficient funds to pay all debts because pro-rata sharing unnecessarily adds complexity and cost. It is possible that pro-rata sharing is really only necessary where debtors will not receive full payment of their debt, and the federal *Bankruptcy and Insolvency Act* is already a well-established code for dealing with circumstances where a debtor has insufficient funds. Moreover, the proposed regime of pro-rata sharing may be difficult to police because it does not give a Court Bailiff all of the powers granted to a trustee in bankruptcy. For example, a Court Bailiff does not have the presumptive right to information about the debtor's assets and it is necessary to rely upon creditors to self-report funds received directly from the debtor.

Option 2: A first-to-register regime

The benefit of a first-to-register regime is that it is simple and accords with the existing *Personal Property Security Act* ("PPSA") regime. In the absence of pro-rata sharing, Judgment Creditors would have priority to any proceeds of seizure based on the time they register their judgment (regardless of which judgement creditor instructed the Court Bailiff to seize). Such a regime would provide comfort to a Judgment Creditor that subsequent judgments would not prejudice their interests, which should encourage the first-registered Judgment Creditor to enter into voluntary payment plans.

A first-to-register regime would also allow for creditors to enter into private arrangements to alter the ordering of priority. The first-registered Judgment Creditor may be happy to let a subsequently registered Judgment Creditor satisfy their debt from a seizure in priority to the first-registered Judgment Creditor, if the subsequently registered Judgment Creditor pays them a small fee. For example, this may work where the first-registered Judgment Creditor has entered into a payment plan with the Judgment Debtor, which has been complied with. Subsequently the Judgment Debtor has another judgment registered against them. The subsequent Judgment Creditor is less patient and wishes to enforce immediately. The subsequent Judgment Creditor offers the first-registered Judgment Creditor a small percentage of their recovery in exchange for being given a priority enforcement position. If the first-

registered Judgment Creditor doesn't think that allowing the enforcement will irreparably harm the Judgment Debtor's business (and therefore jeopardize the payment plan that has been established) then they can allow the subsequently registered Judgment Creditor to have priority, which satisfies the subsequently registered Judgment Debtor – whose judgment gets satisfied promptly – and the first-registered Judgment Creditor – who gets additional money in exchange for accepting the risk that taking a lower priority may jeopardize them satisfying their entire judgment. If the first-registered Judgment Creditor is concerned that allowing another party to enforce in priority may jeopardize the payment plan then they can sit on their registration, which would mean that if the subsequently registered Judgment Creditor wanted to enforce that they would get paid first from any proceeds. In the event there are insufficient funds to pay all debtors, then the *Bankruptcy and Insolvency Act* regime is available for recourse.

The disadvantage of a first-to-register regime is that it may allow debtors to favour certain Judgment Creditors. For example, consider if a debtor is involved in two causes of action that overlap. The first cause of action arises in 2010 with Creditor A, and the second cause of action arises in 2015 with Creditor B. The debtor has a particularly acrimonious relationship with Creditor A, resulting in a contested court case with significant delays. The judgment for the cause of action with Creditor A is only obtained in 2016. In contrast, the debtor does not have an acrimonious relationship with Creditor B, and the judgment for the second cause of action is obtained in 2015. Thus, the judgment for the 2015 cause of action with Creditor B is registered before the judgment for the 2010 cause of action with Creditor A.

Another disadvantage is that subsequent creditors are prejudiced if an earlier registered creditor is not motivated to take enforcement action or make a deal to allow the subsequent creditor to take action.

If this option is chosen it may be necessary to provide the ability for Judgment Creditors to apply for an order to modify the statutory distribution to address circumstances where a first-to-register regime would result in unfairness or otherwise prevent enforcement.

Option 3: A no-priority regime

A "no-priority" regime carries forward the current enforcement practice (if the *Creditor Assistance Act* is not utilized). Essentially the proceeds of seizure go to the creditor who instructed the seizure (e.g., if there are three Judgment Creditors and the first two Judgment Creditors have registered their judgment but have not instructed a Court Bailiff, then if the third Judgment Creditor to register is the one to instruct the Court Bailiff then they get all the proceeds from a disposition made by that Court Bailiff). A no-priority regime addresses the disadvantage of an unmotivated creditor with an early registration. As with the first-to-register

regime, creditors can resort to the *Bankruptcy and Insolvency Act* regime if it is believed that a debtor has insufficient funds to pay all creditors.

A disadvantage of a no-priority regime is that it discourages creditors from entering into voluntary payment plans, because creditors will always be concerned about subsequent Judgment Creditors registering a judgment and starting enforcement actions that benefit only the subsequent Judgment Creditor. A no-priority regime may encourage competition between bailiff firms retained by different creditors to locate and seize assets.

Proposed Approach:

It is proposed that pro-rata sharing be incorporated into any new legislation. It is recognized that pro-rata sharing may introduce significant complexity into the distribution regime where there is a mix of secured creditors and Judgment Creditors; it is further recognized that pro-rata distribution may encourage creditors to be passive where there are multiple creditors. Nonetheless, while the proposed legislation does not seek uniformity with Alberta or Saskatchewan it is desirable for the legislation to broadly correspond to the approach taken by both Alberta and Saskatchewan, because creditors are likely to be businesses that operate in multiple provinces. Having pro-rata sharing of the proceeds of enforcement would keep British Columbia's legislation broadly in line with Alberta and Saskatchewan.

However, if pro-rata sharing is adopted, it will be necessary to address the details of the amount of the preferential share and how to qualify for the preferential share. There is no proposed approach to these details. We invite your views in the questions below.

Questions:

1) What type of regime should the Act have for addressing priority between Judgment Creditors?
    - Pro-rata sharing,
    - First-to-register, or
    - Maintain the status quo and have no priority between Judgment Creditors.
2) If pro-rata sharing is adopted, what should the amount of the preferential share be?
    - Should the preferential share be tied to the value of the proceeds from the sale of the Judgment Debtor's property or to the value of the judgment being enforced?
    - Should there be a requirement that a Judgment Creditor provide information that specifically assisted the Court Bailiff in seizing the property in order to qualify for the preferential share? Or, is being the first Judgment Creditor to give an instruction to a Court Bailiff always enough to get a preferential share for all enforcement activities while that instruction is in force?

3) If the status quo is maintained or a first-to-register regime is adopted, should the *Creditor's Assistance Act* continue to be used?
    - If so, should the *Creditor's Assistance Act* be amended?

II. Preservation orders

1. Current approach to preserving property prior to judgment

Currently Mareva injunctions and prejudgment garnishment are used to ensure that the debtor's property is available to satisfy a potential future judgment. A Mareva injunction prohibits a defendant from accessing or controlling certain property, while prejudgment garnishment allows debts owed to a debtor by others to be paid into court and preserved before the creditor gets a court judgment against the debtor.

2. Approach of other jurisdictions regarding preserving property prior to judgment

The ULCC and BCLI propose a statutory regime for obtaining "preservation orders". Preservation orders are intended to replace Mareva injunctions and prejudgment garnishment; they have been brought into force in Alberta and Saskatchewan. However, Mareva injunctions are still applied for and issued in Alberta despite the introduction of a statutory preservation order regime. It is less clear whether Mareva injunctions are still available in Saskatchewan. Section 129 (3) of Saskatchewan's *Enforcement of Money Judgments Act* provides:

> (3) Unless the court orders otherwise in an application made pursuant to Part II [Preservation Orders], the former law continues to apply to an injunction or other equitable relief in the form of a Mareva injunction or otherwise granted before section 1 of this Act comes into force.

The wording of subsection (3) suggests that the former law in relation to Mareva injunctions no longer applies after section 1 of the Saskatchewan Act came into force.

Some lawyers in British Columbia question the need for a statutory preservation order regime, noting that Mareva injunctions and prejudgment garnishment are not currently considered to be a problem.

3. Options for preserving property prior to judgment

There appear to be four options with respect to preservation orders:

Option 1: A solely statutory preservation order-based regime

The primary benefit of a solely statutory preservation order regime is clarity, as there would only be one method of preserving assets prior to judgment. In addition, the preservation order regime would place all forms of prejudgment protection of assets on a consistent footing. There would not be certain rules for protecting assets related to a specific known debt (i.e. prejudgment garnishment) and other rules where a plaintiff can establish a *prima facie* case

and a reasonable fear that assets may be removed from the jurisdiction of the court (i.e. Mareva injunction).

Furthermore, the effect of a preservation order and the requirements for obtaining an order would be clearly set out in legislation, which may make self-represented litigants more aware of the availability of this remedy and make it easier for them to fulfill the steps necessary to obtain an order. Finally, preservation orders expand the category of property that can be preserved to include any form of property, including land. Currently, Mareva injunctions only apply to personal property that the prospective creditor can convince a judge has at least a theoretically reasonable possibility of being removed from the jurisdiction.

Under this option it would be necessary to specifically abolish Mareva injunctions and prejudgment garnishment. Whether this provision is located in the body of the Act – as with section 80, which abolishes writs of elegit and fieri facias de terries in the *Court Order Enforcement Act* – or in the transition provisions likely does not need to be decided at this time.

Option 2: Do not add preservation orders, simply maintain the Mareva injunction & prejudgment garnishment

Some practitioners currently do not believe that there is an issue with the mechanisms available to preserve property prior to the commencement of an action. In addition, practitioners are very familiar with Mareva injunctions, as they are granted in common-law jurisdictions worldwide. Lawyers have noted that often rulings relating to Mareva injunctions in other jurisdictions are persuasive and are adopted in other jurisdictions worldwide, including British Columbia. There is concern that replacing the common-law Mareva injunction with a statutory preservation regime may retard the development of the law around the preservation of property and place British Columbia out of step with the rest of the world.

Prejudgment garnishment is also currently considered beneficial by many creditors. While procedural requirements may make prejudgment garnishment cumbersome, it seems that these requirements are necessary to protect the debtor.

The disadvantage of maintaining the status quo is that prejudgment relief will remain fragmented and may be less easily understood and accessed by non-lawyers. Self-represented litigants do not appear to be utilizing prejudgment relief much at this time and a statutory regime may bring more awareness to the ability to utilize these remedies. In addition, while retaining the Mareva injunction may ensure that British Columbia's laws in relation to the preservation of property remain in step with the rest of the world, not adopting a statutory protection order regime may result in British Columbia becoming out of step with Alberta and Saskatchewan. Those are the two closest jurisdictions to British Columbia in Canada and

therefore seemingly the most likely jurisdictions within which a British Columbian business may also operate.

Under this option, Part 4 of the ULCC/BCLI Act would not be carried forward into the proposed legislation. In addition, the *Court Order Enforcement Act* would not be completely repealed; provisions related to pre-judgment garnishment would be retained. A sub-option to maintaining the Mareva injunction would be to specifically acknowledge the ability to apply for an such an injunction in legislation (either in a new *Enforcement of Money Judgments Act* or other legislation, such as the *Law and Equity Act*, since it relates to prejudgment relief). Having a reference in the legislation to the ability to make such an application (without codifying a new preservation order) may make self-represented litigants more aware of this relief.

Option 3: Add preservation orders to Mareva injunctions & prejudgment garnishment

Having statutory preservation orders while retaining Mareva injunctions (either explicitly or simply by not specifically abolishing such injunctions by legislation) and prejudgment garnishment will place British Columbia in the same position as Alberta. By not abolishing the Mareva injunction British Columbia law in this area could continue to develop in concert with the rest of the world. Creditors could also continue to rely upon prejudgment garnishment in the specific instances where it is permitted. Under this option, statutory preservation orders would simply be an extra tool for creditors to use.

The argument against having a statutory preservation order regime in addition to the common-law Mareva injunction and prejudgment garnishment is that the addition of a new mechanism for prejudgment protection of assets creates unnecessary complexity for little benefit. Practitioners argue that between the Mareva injunction, prejudgment garnishment and "certificates of pending litigation" (which may be registered against land), the law in relation to the preservation of property prior to the commencement of legal proceedings is already well established and working. There is also concern that the use of preservation orders may retard the development of the common law for Mareva injunctions. Concern also exists regarding a possibility that the availability of two different orders for essentially the same purpose may result in divergences in the case law between the two methods of protecting property, leading to the strategic use of Mareva injunctions and preservation orders.

Option 4: Maintain Mareva injunctions & prejudgment garnishment, only add the ability to apply for preservation orders in relation to land

This option modifies option 3 to only add preservation orders in relation to land. As with option 3, by not abolishing the Mareva injunction British Columbia law in this area could continue to develop in concert with the rest of the world. Creditors could also continue to rely upon prejudgment garnishment in the specific instances where it is permitted. This option mostly

preserves the status quo. Prospective plaintiffs would still rely upon Mareva injunctions to preserve personal property; however, there would be an important change as a prospective plaintiff would be able to preserve land in circumstances where the ownership of the land itself is not in question (which is a current requirement to place a certificate of pending litigation on land).

The benefits and disadvantages of option 2 largely apply to this option. A potential advantage over option 3 is that option 4 only adds additional tools where needed, rather than creating a system where there are multiple options to preserve personal property, which may retard the development of the common-law in relation to Mareva injunctions even if British Columbia is not completely out of step with the rest of the world, as it could be if Mareva injunctions were abolished.

Proposed Approach:

It is proposed that Mareva injunctions and prejudgment garnishment be retained. This is already an area of the law that is well understood by lawyers. In addition, the draft Mareva injunction addresses many concerns about consistency and completeness and it is not certain that having statutory provisions setting out the process for applying for preservation orders would make the law clearer or easier for a lay person to use. However, there is currently a gap in the law that prevents a prospective plaintiff from preserving land (that is not the subject of the dispute) and this can be problematic if land is the only asset of any real value that the potential defendant has in British Columbia. Adopting Part 4 of the draft ULCC/BCLI legislation, but only applying it to land would fill this gap and ensure that a potential plaintiff in British Columbia is able to preserve all the same property as they can preserve in Alberta and Saskatchewan.

In addition, by having Part 4 included as part of the legislation, even if it only applies to land, it will be easier to expand Part 4 to apply to all property of a potential defendant, if the statutory preservation orders are adopted more broadly (replacing the Mareva injunction) and concerns about moving out of step with other jurisdictions is reduced.

Questions:

1) Should British Columbia:
    a. Adopt preservation orders to the exclusion of all present means of protecting assets before judgment;
    b. Maintain the status quo; or
    c. Adopt preservation orders but continue to allow creditors to apply for Mareva injunctions and prejudgment garnishment?

2) If you support option 3, should the legislation specifically acknowledge the availability of a Mareva injunctions as a method of preservation?
    - Should the legislation set out the procedure for applying for Mareva injunctions?
3) If you support option 3, do you have any concerns with retaining the pre-judgment garnishment provisions relatively unchanged?
    - If pre-judgment garnishment was to be changed at a later time, what changes would you like to see?
4) If you support option 4, should the legislation specifically acknowledge the availability of a Mareva injunctions and prejudgment garnishment?

III. Limitation periods for registering and enforcing judgments and for the expiry of judgments

Generally, a limitation period will not be necessary, because the priority provided by registering a judgment will be sufficient incentive to encourage registration. Moreover, it does not make sense to force a creditor to go through the administrative burden and costs of registering a judgment if the judgment is being paid voluntarily. However, it is beneficial to third parties for a judgment to be registered because it will be easier to search all the debts owed by a particular person. Therefore, it is likely desirable to have a limitation period that encourages Judgment Creditors to register their judgment if the debt is not being paid voluntarily and is likely to remain outstanding for a number of years.

Conversely, once a judgment is registered, it is questionable as to whether there is a benefit to imposing a limitation period on a creditor's efforts to enforce the judgment, thus requiring the Judgment Creditor to apply to court to renew their judgment and, in turn, renew the registration of that judgment. Such a limitation period may make sense currently, when a judgment may only be enforced by obtaining additional court orders and, in the absence of active enforcement proceedings, there is no pressure placed upon the Judgment Debtor to satisfy their judgment. However, a limitation period for the enforceability of a registered judgment may not make as much sense under the proposed legislation, when the very registration of a judgment may make it more difficult for the debtor to obtain credit from third parties, and thus indirectly places pressure on a debtor to satisfy a judgment against them.

1. Current limitation periods

Passed in 2012, the new *Limitation Act* imposes a two-year limitation period for most legal requirements. However, when the new *Limitation Act* was enacted, the status quo was preserved for judgments. Section 7 of the *Limitation Act* provides that, "a court proceeding must not be commenced to enforce or sue on a judgment for the payment of money … more than 10 years after the day on which the judgment becomes enforceable".

2. Approach of other jurisdictions regarding preserving property prior to judgment

Alberta and Saskatchewan have both maintained 10-year limitation periods for enforcing a judgment.

Alberta's *Limitations Act*:

> **Judgment for payment of money**
>
> **11** If, within 10 years after the claim arose, a claimant does not seek a remedial order in respect of a claim based on a judgment or order for the payment of money, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

Saskatchewan's *Limitations Act*:

> **Limitation period for judgments, orders**
>
> **7.1** With respect to a claim based on a judgment or order for the payment of money, no proceeding shall be commenced after 10 years from the date of the judgment or order.

3. Options for limitation periods

Currently there is no need to impose a limitation period for registration of a judgment by a Judgment Creditor because there is no ability to register a judgment. A Judgment Creditor must take positive action and apply for a court order if they wish to enforce. However, the cost of obtaining a writ is often a deterrent to taking enforcement action, as creditors are often reluctant to "throw good money after bad" and spend money pursuing uncertain enforcement actions.

In contrast, under the proposed legislation, the registration of a judgment places indirect pressure on a debtor to pay the debt. This is because registration gives a Judgment Creditor priority to the Judgment Debtor's property and this priority makes it more difficult for the debtor to obtain credit from third parties, who in most (i.e., non PMSI) cases will not be able to secure loans using a security agreement. The indirect pressure that results from registration may allow passive collection to be used as an enforcement strategy and if passive collection is a reasonable strategy then penalizing a Judgment Debtor for failing to take positive action within a specified period of time may be less reasonable.

Registration of judgments also benefits third parties, such as potential future lenders, by allowing them to learn of other creditors who already have a claim on a person's property. Since registration benefits more than just those parties who already hold registered debts, there is a broader public benefit associated with encouraging registration by imposing a limitation period that requires a Judgment Debtor to register their judgment within a specified period of time.

Prior to the expiry of the limitation period for registering a judgment, creditors would be free to engage in voluntary payment arrangements with debtors. Acknowledgement of the debt

(through payments or otherwise) would extend the limitation period; meaning that Judgment Creditors could allow a Judgment Creditor to pay in installments without worrying about the limitation period to register their judgment. In most cases judgments will likely be registered, even if there are voluntary payment arrangements, simply because registration protects Judgment Creditors interest against subsequent creditors. However, the existence of a limitation period for registration would help ensure that, if a judgment debt was not registered, a judgment debt would be registered if voluntary payment arrangements have broken down over a significant period.

While there appear to be benefits associated with imposing a limitation period for registering a judgment debt, once a judgment is registered there appears to be less reason to impose a limitation period requiring that the judgment be sued upon. Imposing a limitation period on a registered judgment would be counter intuitive; it would appear to encourage Judgment Debtors to attempt to avoid enforcement actions until the limitation period expires. Limitation periods may make sense when creditors have to take positive action to satisfy their judgment, such as obtaining a writ of enforcement. This is because an extended period of non-enforcement can be deemed to be an acknowledgement by a creditor that they will not be acting to recover their debt. However, the same is not true of registered judgments, because registration itself creates an enduring form of passive pressure for collection.

In summary, there appears to be a benefit to encouraging Judgment Creditors to register their judgment by imposing a limitation period for registration. Such benefits include the provision of notice to third parties of the existence of the debt. Moreover, allowing a judgment to remain registered and valid indefinitely would discourage delaying tactics on the part of the Judgment Debtor. Having a limitation period that causes registered judgments to expire appears to encourage debtors to hide assets and otherwise avoid collection, with the goal of postponing collection until a sufficient time has passed from the date of judgment for the debt to expire.

A Judgment Debtor may be entitled to a fresh start, if they are unable to pay a debt; however, this does not necessarily need to occur automatically through the operation of law. A debtor would have the option of making an assignment in bankruptcy to extinguish the judgment if they do not have sufficient funds to pay and are unable or unwilling to enter into a payment plan to satisfy the debt. After 10 years, practically speaking a creditor that has been unable to satisfy a debt may be willing to accept a steeply discounted payment to remove their registration, rather than waiting and hoping that the Judgment Debtor will acquire assets that will be worth instructing a Court Bailiff to seize.

There appear to be two options with respect to limitation periods:

1. Carry forward the current 10-year limitation period for any enforcement process.
2. Create or modify the applicable limitation periods for registering and/or enforcing a judgment.

Option 1: Carry forward the current 10-year limitation period for any enforcement process and do not impose any new limitation period to register a judgment debt

Carrying forward the 10-year limitation period would maintain the status quo and keep British Columbia in line with the limitation periods in Alberta and Saskatchewan. However, the 10-year limitation period would not encourage the registration of judgments and would allow debtors to escape their obligations under a judgment merely through avoidance and refusal to acknowledge a debt. On the other hand, the 10-year limitation period may provide a benefit to those who simply do not have the assets to satisfy a debt and who are unlikely to ever be able to fully satisfy the judgment, by preventing those debts from plaguing impecunious individuals for eternity. However, one must note that those individuals could instead make use of the federal *Bankruptcy and Insolvency Act* regime or, in conjunction with full disclosure of their financial position, offer a nominal sum to have the registration removed.

Option 2: Create a limitation period for registering a judgment and eliminate the limitation period for enforcing a judgment

Under this option there would be a two-year limitation period to register a judgment. In accordance with s. 24 of the *Limitation Act,* Judgment Creditors would have two years from the last payment or acknowledgment of a debt before they would lose their ability to register their judgment. Failure to register after two years would mean that the debt would be unenforceable.

This amendment would eliminate the 10-year limitation period for enforcement of judgments, such that enforcement of registered judgments would never become statute-barred. Judgment creditors may be required to renew their registration of the judgment with the judgment registry after a certain period; however, they would not need to apply to court to renew their judgment, explaining why they have failed to satisfy their debt. The practical effect of requiring a Judgment Creditor to pay to renew the registration of their judgment after 10 years (or some other arbitrary period) may have a relatively similar effect to a statutory limitation period. Creditors are generally unwilling to, "throw good money after bad" and therefore may be unlikely to pay even a reasonable renewal fee, if they have been unable to satisfy their judgment over the previous 10-years.

Proposed Approach:

A two-year limitation period for registration would appear to balance the goals of: (1) not forcing a creditor to take unnecessary administrative steps or incur any unnecessary costs in

order to satisfy their debt; and (2) having creditors inform the world of their claim on the debtor's property, if they are unable to obtain voluntary satisfaction of the debt and may be pursuing the Judgment Debtor's assets in the future. As noted, the benefit of registration likely means that most Judgment Creditors will register their judgment even if they enter into an amicable voluntary payment plan with a Judgment Debtor. Thus, this limitation period will have limited implications for creditors.

It is important to note that a creditor would have an unlimited time to collect their debt without registration, as long as they receive some money from the debtor or acknowledgement of the debt within a two-year period. The limitation period would only start to run once a debtor had refused to pay and refused to otherwise acknowledge the debt, following the statutory scheme set out in the *Limitation Act*. Therefore, a two-year limitation period would not discourage voluntary payment arrangements.

Dispensing with the 10-year limitation period to either enforce a debt or apply to court to renew the debt makes sense given that, under the proposed legislation, registration would allow for passive enforcement. Moreover, even though this change would mean that a debt would no longer automatically expire after a certain period, without positive action taken by a creditor or acknowledgment by a debtor, a Judgment Debtor would be able act to be relieved from the burden of judgment debts. A Judgment Debtor can end any debt by making an assignment in bankruptcy. Thus, the elimination of an ultimate limitation period with respect to registered judgment debts would simply mean that a Judgment Debtor would have to take positive action to eliminate a stale debt, rather than a Judgment Creditor being obligated to take positive action to maintain such a debt.

Questions:

1) Should British Columbia adopt a two-year limitation period, within which a creditor must register a judgment, or should registration be voluntary?
2) Should British Columbia allow a registered judgment to remain registered and valid indefinitely (i.e., no limitation period once registered)?
    - If so, should the creditor have to pay a fee to renew their registration?

IV. Approach to seizure and exemption of Income

Employment remuneration is a specific type of income. Section 101 of the Uniform Act sets out specific rules related to the seizure of employment remuneration, specifying when seizure is effective in relation to a payment period, the duration of effectiveness for a notice of seizure, deductions that may be withheld by the person owing the employment remuneration, and providing an ability to apply for an order where the Judgment Debtor receives goods or services as part of their remuneration.

The BCLI proposes expanding section 101 to apply to all forms of income, not just employment remuneration. The rationale for extending section 101 to all forms of income is that ultimately the exemption provisions related to employment remuneration are extended to other forms of income and therefore, conceptually, it is more straightforward to treat all forms of income in a similar manner at the time of seizure.

1. Current

The *Court Order Enforcement Act* only has special rules related to the garnishment of wages. The word "income" only appears in the Act three times, once in relation to earning income, once referencing the *Income Tax Act* and once referencing a retirement income fund.

2. Approach of other jurisdictions regarding seizure of income

Alberta's *Civil Enforcement Act* only sets out special rules in relation to the seizure of employment remuneration.

> **Employment earnings**
>
> 81(1) For the purposes of garnishing an enforcement debtor's employment earnings from the enforcement debtor's employer, the following applies:

Similarly, Saskatchewan's *Enforcement of Money Judgments Act* follows the Uniform Act approach and only provides special rules related to the seizure of employment remuneration.

> **Seizure of employment remuneration**
>
> 64 (1) Subject to subsection (2), an employment remuneration account shall only be seized in accordance with this section.

3. Options regarding seizure of income

There appear to be two options with respect to seizure of income and employment remuneration, although option one would have two sub-options in relation to exemption of income and employment remuneration:

1. Only have special rules in relation to the seizure of employment remuneration
2. Extend the special rules for seizure of employment remuneration to all forms of income.

Option 1a: Only have special rules in relation to the seizure of employment remuneration exempt income from seizure

This option would follow the Uniform Act, there would be special rules for the seizure of employment remuneration, but not other forms of income. Exemption claims would be extended to all forms of income equally in a single provision, based on section 165 of the Uniform Act.

Option 1b: Only have special rules in relation to the seizure of employment remuneration exempt employment remuneration from seizure separately from other forms of income

This option would follow Saskatchewan, there would be special rules for the seizure of employment remuneration, but not other forms of income. In contrast with option 1a, there would be separate provisions exempting employment remuneration and income from seizure, based on sections 95 and 96 in the Saskatchewan Act.

Option 2: Extend the special rules for seizure of employment remuneration to all forms of income

Under this option the rules for seizing employment remuneration would apply to all forms of income and exemption claims would apply to all forms of income equally. The rules for seizure of income would be based on section 101 of the Uniform Act, as modified by the BCLI and the exemption of income provision would be based on section 165 of the Uniform Act.

Proposed Approach:

Option 1b: It is proposed that British Columbia follow Saskatchewan's model of only providing special rules for the seizure of employment remuneration and separately exempting employment remuneration and other forms of income.

Employment remuneration is distinct from other forms of income, such as rental payments made by a tenant or other accounts a Judgment Debtor may be entitled to receive. There does not appear to be the same need to apply special rules related to the seizure of employment remuneration to other forms of income because there is not generally the same withholding requirement for tax and other deductions. In addition, it is proposed that employment remuneration be dealt with separately because of proposed deeming provisions, intended to minimize exemptions and make seizure of employment remuneration easier. Finally, the Saskatchewan approach makes it clear that other forms of income are only subject to an exemption claim where a Judgment Debtor has unused exemption space in relation to

employment remuneration. Consolidating all forms of income increases the likelihood that account debtors in non-employment commercial relationships with a Judgment Debtor may have to deal with an exemption claim.

Questions:

1) Should all types of income have the same requirements in relation to seizure?
2) Should all types of income be exempted in a similar manner, or should income other than employment remuneration only be subject to an exemption claim if the amount of employment remuneration that may be claimed as exempt exceeds the amount received?

V. Expiry of a notice of seizure for wages

Generally, the Uniform Act proposes that, if the account debtor is obligated to make a series of periodic recurring payments to the Judgment Debtor, a notice of seizure applies until the amount recoverable is satisfied (section 97 (2)). However, the Uniform Act modifies this general principle for wages. Section 102 (2) provides that a notice of seizure, given to an account debtor who owes wages, only applies to subsequent payment periods ending within 12 months from the date on which the notice of seizure is given to the employer.

1. Current expiration period for notice of seizure for wages

Currently, wages can only be seized by a garnishing order issued within a few days of the end of the payment period. That means that a new order must be issued for each pay period, which for most employees is either bi-weekly or semi-monthly. This is an inefficient process that would is replaced in the Uniform Act by the ability to seize wages (employment remuneration) through a notice of seizure, much like the seizure of any other account. However, the Uniform Act treats wages differently to other situations where an account debtor is obligated to make a series of periodic recurring payments to the Judgment Debtor. Section 97 of the Uniform Act provides:

> **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 relationship exists between the account debtor and the Judgment Debtor under which money becomes payable by the account debtor to the Judgment Debtor.

Therefore, generally upon a seizure of an account if there is a legal relationship (such as a contract of employment) and the account debtor is obligated to make a series of periodic recurring payments (such as pay wages every two weeks), the notice of seizure would apply to any future account without limitation. However, section 101 (3), which applies specifically to employment remuneration, provides:

> (3) A notice of seizure … is effective and applies to all subsequent payment 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

The Uniform Act does not explain why the ULCC decided to depart from the general rule applying to seizing an account and impose a 12-month limitation period on the validity of a notice seizing employment remuneration.

2. Approach of other jurisdictions regarding seizure of wages

Alberta and Saskatchewan have both chosen to depart from the Uniform Act by extending the period for validity of a notice seizing wages to two years:

Alberta's *Civil Enforcement Act*:

> **When garnishee summons is in effect**
>
> > 79 (1) Subject to subsection (2), a garnishee summons issued on or after the coming into force of this subsection expires 2 years from the day on which the summons was issued.

Saskatchewan's *Enforcement of Money Judgments Act*:

> **Seizure of employment remuneration**
>
> > 64 (1) Subject to subsection (2), an employment remuneration account shall only be seized in accordance with this section.
> >
> > …
> >
> > (5) A notice of seizure served in accordance with subsection (3) or (4) is effective for the pay period to which the notice relates and for all subsequent pay periods ending within 24 months after the date on which the notice is served unless the sheriff notifies the account debtor otherwise.

3. Options regarding the duration of a notice seizing wages

There appear to be two options with respect to the duration of a seizure of employment remuneration:

1. Have the notice of seizure for employment remuneration expire after a specified period.
2. Have the notice of seizure for employment remuneration not expire.

Option 1: A notice of seizure for wages expires after a specified period

Under this option a notice of seizure of employment remuneration would expire after a specified number of months or years. The expiry of a notice of seizure in relation to employment remuneration could be specified by legislation or could be specified in regulation, which would provide greater flexibility to change the period of validity.

Option 2: A notice of seizure for wages would not expire

Under this option a notice of seizure would remain in effect until the judgment is satisfied, the seizure is withdrawn by the Court Bailiff, or the debtor ceases working for the employer.

Proposed Approach:

A notice of seizure in relation to employment remuneration should not expire. Any temporal limitation on the validity of a notice of seizure of employment remuneration is purely arbitrary. Making a notice of seizure of employment remuneration valid indefinitely will eliminate unnecessary administrative steps. Moreover, there does not appear to be any real benefit to an employer or Judgment Debtor by requiring a Court Bailiff to reissue a notice of seizure. Having a notice of seizure expire requires an employer to put a reminder into their system so that they know when the seizure has expired. Leaving the notice valid indefinitely ensures that the employer simply needs to continue the division of employment remuneration until they receive notice to stop. After two years such a division should be well-established and a minimal burden. Should an employer receive notice that they no longer need to pay the Court Bailiff too close to a payment date to stop the money being sent to the Court Bailiff there is provision in the Act for the Court Bailiff to pay the money to the Judgment Debtor.

Questions:

1) Should a notice of seizure for wages expire after a specified period, or should it endure until the debt is satisfied or the notice is otherwise cancelled?
    - If the notice of seizure should expire after a specified period, what should that period be?
    - If the notice of seizure should not be set to expire after a specified period, who should be able to cancel the notice, and by what means?

VI. Section 52 of the Court Order Enforcement Act – preference to 3 months wages

The Uniform Act does not carry forward a provision equivalent to section 52 of the *Court Order Enforcement Act*. Section 52 allows workers employed by the Judgment Debtor to apply for an order giving them preference for up to three months wages out of the proceeds of a seizure by a Court Bailiff, even where another party who is a Judgment Creditor was responsible for securing the seizure of the assets. The Judgment Creditor whose action resulted in the seizure is called the "execution creditor" in s. 52. The execution creditor is first reimbursed for his or her costs of obtaining judgment and execution, or of the order for sale of land. Next, the employee or employees who sought an order under s. 52 are reimbursed for the costs of obtaining that order, along with three months wages. Finally, the remaining assets are directed toward the claim of the execution creditor.

1. Approach of other jurisdictions regarding preserving property prior to judgment

Alberta and Saskatchewan have no equivalent to s.52.

2. Assessment of the utility of s.52

Before developing new legislation that does not carry forward an equivalent of section 52 it is necessary to confirm that section 52 is no longer relied upon.

There is reason to believe that section 52 is no longer relied upon because the *Employment Standards Act* provides an alternative and superior method of securing a priority claim on the proceeds of property seized by a Court Bailiff. Making use of section 52 to obtain an order establishing priority to the proceeds of seizure is awkward, because employees must first know that a Court Bailiff has seized an employer's property. Knowledge of a seizure may be readily ascertainable where the seized assets are obvious to the employees, such as inventory from a warehouse where the employees work, kitchen equipment from a restaurant, delivery trucks, etc.; however, there are a number of circumstances where property may be seized and employees may not be aware that they can even make a claim for unpaid wages.

In contrast, the *Employment Standards Act* provides a comprehensive code for protecting employees' rights, which includes protecting employees' rights to their wages. Section 74 of the *Employment Standards Act* gives workers the ability to make a complaint, which includes a complaint about a failure to pay wages. In turn, section 80 allows the director to review the complaint and issue a determination that the employer must pay up to six months of wages. Finally, subsections 87 (1) and (3) of the Act provide that unpaid wages constitute a lien on the employer's property and that "the amount of a lien… is payable and enforceable in priority over all liens, judgments, charges and security interests or any other claims or rights".

Ministry staff have been advised that the Director of Employment Standards currently utilizes Court Bailiffs to collect unpaid wages on behalf of employees. In addition, the Director provides all Court Bailiffs with copies of any determinations that wages are owed. Giving notice of these determinations establishes the lien rights of the employees over any funds Court Bailiffs may subsequently collect in relation to an employer. Since all Court Bailiffs are provided with copies of a determination, Employment Standards currently receives funds seized by Court Bailiffs even when the Court Bailiff is enforcing a writ for a Judgment Creditor and no other parties may have knowledge of the seizure.

The *Employment Standards Act* appears to provide a complete code for the collection of unpaid wages. Moreover, the *Employment Standards Act* protects twice the period of wages that is protected by the *Court Order Enforcement Act* (six months as opposed to three months) and the Act provides a mechanism for the Employment Standards Office to establish a priority for unpaid wages. Thus, it appears that no equivalent to section 52 is necessary in the new legislation.

However, it is theoretically possible that some employees do not wish to utilize the Employment Standards Office and would prefer to continue to have the ability to directly assert their rights to seized property. Therefore, we wish to consult and confirm that no employees are currently utilizing section 52 before making a final decision to not carry an equivalent to this section forward into any new legislation.

Questions:

1) Is section 52 of the *Court Order Enforcement Act* currently being used?
    - If so, why? What are the benefits of section 52, as opposed to the regime set out in the *Employment Standards Act*?

VII. Deeming of Election upon seizure of account

The Act specifically permits a Court Bailiff to seize an account in circumstances where it can be established that money is, may or can be owed by a third party ("account debtor") to the Judgment Debtor. Because of the variety of relationships that may exist between a Judgment Debtor and account debtor, to facilitate seizure it will be useful to deem the giving of a notice of seizure to an account debtor to be a demand by the Judgment Debtor to receive payment of the account at the earliest possible time. For example, if the account is a demand loan then it must be paid immediately; however, if the contract creating the account specifies that the Judgment Debtor must make a demand for payment on a particular calendar date (or dates) in the future then the delivery of a notice of seizure should be deemed to be a demand or claim for payment on the next and all subsequent dates specified in the agreement, until the debt has been satisfied or the notice of seizure is otherwise withdrawn.

In addition, some employment contracts allow an employee to choose to receive less money in exchange for benefits; for example, future stock options or life insurance. Section 168 (b) of the Uniform Act would allow a Judgment Debtor to make a court application to account for the value of these benefits and property received in place of money. However, such applications are an additional cost to the Judgment Debtor. Therefore, it is proposed to include a provision that states that the giving of a notice of seizure is also deemed to include a request to maximize money received (and minimize all benefits or other property received, other than health benefits) at the earliest possible time. This means that if an employer receives a notice of seizure in July and the Judgment Debtor, as employee, would be entitled to choose to put less money into life insurance or an elective pension in January, then January is the time that the deeming provision would take effect.

1. Approach of other jurisdictions

Section 41 (3) of Saskatchewan's *Enforcement of Money Judgments Act* provides:

Methods of seizure

41(1) …

(3) If a trustee is served with a notice of seizure pursuant to clause (2)(e):

(a) the trustee is deemed to have received a demand for the property from the Judgment Debtor effective as at the time when the Judgment Debtor is entitled to require a distribution of trust property, whether by the terms of the trust or otherwise; and

(b) the trustee shall deliver the property to the sheriff when the Judgment Debtor is entitled to receive it if at that time the sheriff is in possession of an enforcement instruction.

Saskatchewan has no general deeming provision for other types of accounts and has no enhanced deeming provision to ensure that non-monetary benefits and property is minimized.

Alberta's *Civil Enforcement Act* does not have deeming provisions in relation to the seizure of accounts or trusts. Therefore, if the Judgment Debtor needs to take positive action to obtain payment of an account then it will be necessary for the Court Bailiff to similarly take a positive step to assert the claim.

2. Options with respect to whether a seizure results in a deemed election by the Judgment Debtor

The overarching goal of the legislation is to make seizure easier and more straightforward, provided this does not result in unfairness to the Judgment Debtor or unduly burden a third party. The question is whether the deeming provision places an unreasonable burden on the account debtor.

There appear to be three options with respect to deeming that occurs upon the giving of a notice of seizure:

1. No deeming of a demand for payment upon the giving of a notice of seizure.
2. The giving of a notice of seizure is deemed to include a demand for payment.
3. The giving of a notice of seizure is deemed to include an instruction to minimize benefits and maximize money received.

Option 1: No deeming of a demand for payment upon the giving of a notice of seizure

Under this option, where a Judgment Debtor is required to take a positive action in order to be entitled to payment of an account the Court Bailiff would similarly be required to take a positive action. The Court Bailiff would need to rely upon a provision in the legislation that gives them the right to exercise any power or right necessarily incidental to enforcement of a judgment with respect to the property in order to make the demand for payment. The ability of a Court Bailiff to exercise any power or right necessarily incidental to enforcement of a judgment is section 13 in the Uniform Act and is section 38 in Saskatchewan's Act.

Option 2: The giving of a notice of seizure is deemed to include a demand for payment

Under this option the giving of a notice of seizure would be deemed to include an initial demand for payment (election to receive monies) and to include all subsequent demands for payments that the Judgment Debtor would be entitled to make in the future.

The proposed provision would address trust terms that require a beneficiary to take some positive action to receive a payment from the trust (i.e., make a request or a demand of the trustee). While such a term may be reasonable where the person who places property in trust is unsure how much income a beneficiary may need or want from a trust at any particular time, once the trust has been seized it may be inferred that the Court Bailiff (who accedes to the

position of the trust beneficiary by virtue of seizure) wishes to maximize payment in order to satisfy the debt as quickly as possible. Aside from trusts there are several other types of accounts (e.g., a demand loan) that may require an action by the Judgment Debtor to enforce.

Option 3: The giving of a notice of seizure is deemed to include an instruction to minimize benefits and maximize money received in relation to wages

Generally, employment remuneration does not require the Judgment Debtor, as employee to make a demand or request for payment. However, some employment contracts allow an employee to choose to receive certain benefits (e.g. voluntary pension contributions, life or critical illness insurance, deferred salary leave), in lieu of money.

Under this option the giving of a notice of seizure would be deemed include an election to minimize benefits in order to maximize the money that a Judgment Debtor would be entitled to receive as employment remuneration. This would apply to all benefits other than health benefits (Medical Service Plan premiums and extended health plan premiums) because of the prejudicial effect minimizing such contributions may have on a Judgment Debtor's health and the broader cost to society.

It should be noted that the Uniform Act proposes provisions that would allow a Judgment Creditor to apply to court to have a judge assign a monetary value to employment benefits and order an increase to the percentage of money that is deducted from a paycheque to reflect this value; however, court applications are expensive and having a deeming provision should reduce the need for such applications. Having the ability to apply to court to value non-monetary benefits minimizes any prejudice to a Judgment Creditor from not having a deeming provision in relation to health benefits (i.e. if a Judgment Debtor does choose to contribute to a "gold plated" extended health plan which includes cosmetic dentistry and unlimited, non-therapeutic, massage then the benefit of such a plan can be taken into account by the court).

Often an employee will only be able to make elections once a year, during a specified period of time, so the provision will need to be drafted to reflect the fact that the notice is deemed to include notice to the employer of an election to minimize benefits even if the notice of seizure is given outside of the designated period for employees to make elections with respect to their benefits.

Proposed Approach:

Options 2 and 3. Including both these options should streamline the seizure of accounts, to the benefit of the Judgment Creditor and account debtor. The Judgment Creditor benefits by their recovery being maximized and the account debtor benefits by having their obligations clearly

set out in legislation and easily referenced in the notice of seizure, minimizing the number of times that the account debtor needs to interact with a Court Bailiff.

Questions:

1) Should the giving of a notice of seizure be deemed to include a demand for payment for all types of accounts?
    - Should the giving of a notice of seizure only be deemed to include a demand for payment for trusts?
2) Should the giving of a notice of seizure be deemed to include a request/election to minimize all non-money benefits, other than health benefits, associated with employment?
    - Are there any other types of benefits that should be excluded from the application of this deeming provision?

VIII. Obtaining Information about Judgment Debtor's assets

Obtaining information about a Judgment Debtor's assets is important for a Court Bailiff to be able to effectively enforce a judgment.

1. Current means of obtaining information

Currently, the rules for obtaining information about a debtor's assets are found in the Supreme Court Civil Rules. There are two options that can be pursued. The subpoena to debtor process is outlined in Rule 13-3 of the Supreme Court Civil Rules. Under this process, the Judgment Debtor is summoned to a hearing in front of a registrar (or master). Under the subpoena to debtor process, the registrar (or master) who holds the hearing examines the debtor. The registrar (or master) can allow someone to examine the debtor.

The examination in aid of execution is set out in Rule 13-4. For an examination in aid of execution hearing, the Judgment Debtor is served with a notice, called an "appointment", to attend a hearing. At the hearing the Judgment Creditor, or its lawyer, asks the debtor questions about the debtor's income, assets and other finances. A court reporter is present to record the questions and answers.

2. Approach of other jurisdictions to obtaining information

Part 1.3 of Alberta's *Civil Enforcement Regulation* (sections 35.09 to 35.17) deals with procedures for obtaining information about a Judgment Debtor's assets. Debtors must provide a "financial report" and can be required to attend a hearing for questioning under oath.

Debtor to provide information

35.09 For the purposes of determining the ability of an enforcement debtor to satisfy the claims of enforcement creditors, an enforcement creditor may require the enforcement debtor to provide information in accordance with this Part.

Financial report of debtor

35.10 (1) An enforcement creditor may, on written notice to an enforcement debtor, require the enforcement debtor to provide to the enforcement creditor a financial report of the enforcement debtor verified by statutory declaration.

…

Questioning of debtor

35.11 (1) On service of a written notice on an enforcement debtor by an enforcement creditor, the enforcement creditor may require the enforcement debtor to attend for questioning under oath by the enforcement creditor with respect to matters referred to in section 35.12.

…

Part 3 of Saskatchewan's *Enforcement of Money Judgments Act* contains rules for obtaining information from the Judgment Debtor, including more detailed rules about the financial questionnaire that a Judgment Debtor can be required to complete and an examination of the debtor:

PART III
Obtaining Disclosure

Interpretation of Part

11 …

Voluntary questionnaire

12(1) An enforcing Judgment Creditor may serve a notice on the Judgment Debtor requesting the Judgment Debtor to complete a questionnaire that discloses the information set out in subsection 13(1).

…

Sheriff questionnaire

13…

…

Examination of Judgment Debtor

14(1) If a Judgment Debtor fails to return a completed questionnaire to the enforcing Judgment Creditor or the sheriff within the period mentioned in the notice served pursuant to section 12 or 13, the enforcing Judgment Creditor may instruct the sheriff to issue and serve on the Judgment Debtor a notice of an appointment for the examination of the Judgment Debtor for the purpose of determining information that may reasonably assist the enforcing Judgment Creditor with the enforcement of a judgment against the Judgment Debtor.

…

Consequences of failing to make a required disclosure

15(1) On application by an enforcing Judgment Creditor, the court may do one or more of the following:

(a) order a Judgment Debtor to provide to the sheriff complete and accurate information in response to a questionnaire that the Judgment Debtor is required to complete pursuant to section 13;
(b) order a Judgment Debtor to attend an examination that the Judgment Debtor is required to attend pursuant to section 14;
(c) order a Judgment Debtor to provide complete and accurate information in response to questions at an examination pursuant to section 14;
(d) order a specified person to disclose to the enforcing Judgment Creditor, or the sheriff, information contained in the specified person's records respecting the Judgment Debtor and any property in which the Judgment Debtor has an interest;
(e) order a person mentioned in subsection 13(3) to provide to the sheriff complete and accurate information in response to the questionnaire the person is required to complete pursuant to that subsection;
(f) …, make an order authorizing the sheriff, or a person appointed by the sheriff, to do one or both of the following:
(i) enter and search any place, premises or vehicle named in the order;
(ii) seize and remove from any place, premises or vehicle searched any records for the purposes of making copies;
(g) … order a Judgment Debtor, or other person in possession of the records, to refrain from destroying, altering, concealing or removing from Saskatchewan any records relating to the existence and location of property of the Judgment Debtor.

(2) …

(3) No person shall:
(a) fail to comply with an order made pursuant to subsection (1); or
(b) fail to provide complete and accurate information in any questionnaire or examination.

Disclosure of information on request

16(1) … the enforcing Judgment Creditor shall disclose [information they receive about property of a Judgment Debtor] to the sheriff.

(2) … the sheriff shall… disclose [that] information to another enforcing Judgment Creditor who has a judgment against the Judgment Debtor.

3. Options for obtaining information about the Judgment Debtor's property

There appears to be three options with respect to obtaining information about a Judgment Debtor's property:

1. Maintain the status quo, with the existing court rules-based methods of obtaining information;
2. The Saskatchewan model, which appears to be a refinement of the information gathering powers in Alberta;
3. A refinement of the Saskatchewan model, which would both formalize a tiered approach to information gathering, but in addition provide Court Bailiffs and Judgment Creditors with additional information gathering powers, where appropriate.

Option 1: Maintain the status quo

Under this option the Act would not have any provisions related to obtaining information about a Judgment Debtor's property. The advantage is that parties could continue to use the well-established Subpoena to Debtor process and Examination in Aid of Execution process set out in the Supreme Court Civil Rules. The disadvantage is that because these processes are court-based they are somewhat costly and time consuming.

In addition, without some amendment to the Supreme Court Civil Rules the court does not have the power to order third parties (such as mortgagors) to disclose information about the Judgment Debtor's property.

Option 2: The Saskatchewan model

Under this option the proposed Act would include provisions similar to those found in the Saskatchewan Act (and Alberta Regulation), which allow a Judgment Creditor or Court Bailiff to compel a Judgment Debtor to complete a questionnaire and, if the Judgment Debtor refuses to complete the questionnaire, provides an ability to question the Judgment Debtor in front of a court reporter (similar to an Examination in Aid of Execution).

Adding a questionnaire as an information gathering tool should lower the cost of collecting information initially. However, the restriction on only being able to proceed to an examination in front of a court reporter if the Judgment Debtor does not complete the questionnaire seems to leave a gap; because a Judgment Debtor may simply return a carelessly prepared or otherwise inaccurate questionnaire and be found to be in technical compliance with the requirements, necessitating a court application to progress to an examination.

Option 3: A Refinement of the Saskatchewan model

Under this option the Saskatchewan model would be refined into a tiered approach that would start with a questionnaire and have an examination in front of a court reporter, but this option would retain a hearing similar to the present Subpoena to Debtor hearing as the last tier. In addition, this new process would include the ability for a Court Bailiff or lawyer to request information directly from third parties at certain points of escalation up the tiers.

Information gathering would still initially commence with a questionnaire delivered to the Judgment Debtor, as in Saskatchewan. However, a Judgment Creditor would also be able to proceed to an examination in front of a court reporter if they have reason to believe that a returned questionnaire is incomplete or inaccurate (not only if a questionnaire is not returned). A Judgment Debtor can obtain an order that they don't have to attend an examination if they can satisfy the court that the Judgment Creditor has no reason to believe the questionnaire that

they returned is not complete and accurate. Essentially, questionnaires are presumptively allowed and the burden is shifted to a Judgment Debtor to establish they are unreasonable.

In addition to an examination, a Judgment Creditor can request information directly from a limited number of third parties (e.g. financial institution, investment broker, mortgagor) if a Judgment Debtor fails to complete the questionnaire at all. The third parties will only be able to be questioned by a Court Bailiff or the Judgment Creditor's lawyer in this questioning, not the Judgment Creditor directly. This interposes a professional who is subject to regulatory oversight between the parties. The list of parties who can be questioned at this stage will be specified in regulations and will be relatively limited.

If a Judgment Debtor fails to attend an examination in front of a court reporter, then a Judgment Creditor can apply to have them examined in court (similar to a Subpoena to Debtor). This third tier is intended to be reserved for only difficult Judgment Debtors who refuse to fully and frankly disclose their assets in the questionnaire and examination in front of a court reporter. A Judgment Debtor should be more compliant at this tier, because they will be subject to contempt for failing to attend a hearing or to provide full disclosure when attending. In addition, at this hearing, it is proposed that a Judgment Debtor be permitted to also apply for an order giving them the ability to question any third party about the Judgment Debtor's assets. To question a third party the Judgment Debtor or Court Bailiff would be required to satisfy the court that the third party is reasonably likely to have information about the Judgment Debtor's assets or that it would be prudent to question that third party to verify information provided by the Judgment Debtor.

Proposed Approach:

Option 3 is recommended. It includes useful innovations from Saskatchewan, such as the questionnaire, while retaining a hearing similar to a Subpoena to Debtor as an information gathering method. In addition, option 3 uses progressively more intrusive information gathering techniques, seeking to minimize the impact on a Judgment Debtor's privacy, while at the same time providing Judgment Creditors and Court Bailiffs with the tools necessary to learn about the assets of less forthcoming Judgment Debtors.

The most important innovation is the ability to obtain information from third parties where appropriate. Lawyers or Court Bailiffs can seek information directly from certain third parties without the need for a court application, if a Judgment Debtor is non-compliant and any party can obtain information from a third party by court order, if they satisfy the court that it is necessary.

Questions:

1) Which is your preferred option, and why?
2) Do you have any suggested refinements to the options listed?

IX. Interests in Land that are not registered in the Land Title Office

Some interests in land are not registered in the Land Title Office. For example, a debtor may have an equitable interest in land that is formally registered in the name of their spouse. In addition, long term leases appear to give a party an interest in land but in most cases these leases will be considered personal property. It is important that the legislation not inadvertently have a gap where actual interests in land cannot be seized, simply because they are not registered in the land title registry.

In addition, government grants a number of different types of interests in relation to both Crown land (which is not part of the Land Title Registry) and private land (which is part of the Land Title Registry). Where government has granted an interest that has been registered in the Land Title Registry the assumption is that seizure of the interest will be accomplished in the same manner as the seizure of any other interest in land. Issues arise if the interest is granted in relation to Crown land or is an interest that cannot be registered in the Land Title Registry

The overarching goal of the Act is to make all a Judgment Debtor's assets subject to seizure and disposition, unless specifically exempted. However, interests granted by the Crown raise several unique considerations and it may be appropriate to take a more restrictive approach to the seizure and disposition of these assets, even if they are not specifically exempted from seizure.

1. Current Law in relation to interests in land granted by the Crown

Currently, section 57 of the *Court Order Enforcement Act* only allows seizure of mineral titles, permits, licences or leases granted under the *Coal Act* or *Petroleum and Natural Gas Act*, and permits or leases as granted under the *Geothermal Resources Act*. Fixtures or personal property at the location of operations relating to these titles, permits, licenses or leases may also be seized and sold.

2. Approach of other jurisdictions regarding interests in land that are not registered in the Land Title Registry

Alberta and Saskatchewan have different approaches regarding interests in land that are not registered in the Land Title Registry. Alberta's legislation specifically addresses land not registered in the land title registry and Saskatchewan's legislation is silent with respect to unregistered interests in land.

Alberta's *Civil Enforcement Act* defers the details of how to seize interest in land that is not under the Land Titles Act to the regulations:

Registration required

26 A Judgment Creditor may not initiate any writ proceedings in respect of a money judgment

(a) …, or

(b) against land unless a writ issued in respect of that judgment is registered in the Personal Property Registry and

(i) in the case of land under the Land Titles Act, is registered under the Land Titles Act, and

(ii) in the case of land that is not under the Land Titles Act, is registered, filed or otherwise recorded in accordance with the regulations.

New judgment

27.1(1) In this section,

(a) …;

(b) "existing registration" means, in respect of an existing writ,

(i) a registration of the writ in the Personal Property Registry if that registration is still in force;

(ii) a registration of the writ under the Land Titles Act if that registration is still in force;

(iii) in the case of land that is not under the Land Titles Act, a registration, filing or recording of the writ in accordance with the regulations if that registration, filing or recording is still in force;

Alberta's *Civil Enforcement Regulation* identifies the person to receive a notice of seizure as the minister responsible for administering the land not brought under the Land Titles Act. In addition, the Court Bailiff in Saskatchewan must follow any directions of that minister when disposing of the land:

Definitions

45 In this Part, (a) …;

(b) "responsible Minister" means, in respect of land that has not been brought under the Land Titles Act, the member of the Executive Council

(i) who has responsibility for the administration of the land, or

(ii) whose consent to a disposition of the land by a person with an interest in the land is required by an enactment;

Land not under the Land Titles Act

48(1) This section applies only to the sale of an enforcement debtor's interest in land that has not been brought under the Land Titles Act.

(2) Part 7 of the Act, except for section 75 of the Act, and sections 46(a) and 47(1) of this Regulation apply to the sale of an enforcement debtor's interest in land that has not been brought under the Land Titles Act.

(3) The notice of intended sale required by section 70 of the Act and the notice of the method of sale required by section 74 of the Act must be served on

(a) the enforcement debtor,

(b) any subordinate claimant of whom the agency has knowledge, and

(c) the responsible Minister.

(3.1) For the purposes of this section, except in subsection (3)(a), notice may be provided by means of

(a) personal service on the person to be served,

(b) recorded mail addressed to the person to be served, or

(c) leaving the document containing the notice with, or sending it by recorded mail to an address described in subsection

(3.2) addressed to, the person to be served. (3.2) The address for the purposes of subsection (3.1)(c) is any of the following:

(a) the address of the place where the person to be served resides;

(b) if the person to be served carries on business at the address of the secured land that is the subject of the action, that address;

(c) if the address of the place where the person to be served resides is not known to the person attempting service and if the person to be served does not carry on business at the address of the secured land that is the subject of the action,

(i) the address of the person to be served shown on the current title to the secured land, or

(ii) if the person to be served is named as a secured party in a current registration of a security interest in the Personal Property Registry, the address of that person as shown in the registration;

(d) in the case of an offeror or tenderer, the address of the offeror or tenderer shown in the offer or tender for the secured property.

(3.3) Service is effected under subsection (3.1)(c)

(a) if the document is left at the address, on the date it is left, or

(b) if the document is sent by recorded mail, on the earlier of

(i) the date confirmation of receipt is signed, or

(ii) 7 days after the date on which the recorded mail is sent.

(3.4) For the purposes of subsection (3)(a), service of the notice of intended sale must be provided by means of personal service or recorded mail on the enforcement debtor.

(4) An agency that is carrying out a sale under this section must comply with any direction as to the method or conditions of sale that is given to the agency by the responsible Minister.

Saskatchewan's *Enforcement of Money Judgments Act* has a broad definition of land that would appear to include interests in Crown land or unregistered (equitable) rights and interests in land. However, the legislation does not directly address seizure of interests in land that are not registered in the land title registry in that province. The definition of "enforcement charge" suggests that there is no enforcement charge in interests in land if the judgment is not registered against title to that land in the land title registry. In addition, section 41 suggests that to initiate enforcement measures against land an enforcement instruction must include a land title registry search showing that the judgment has been registered against title:

Interpretation

2(1) In this Act:

(n) "**enforcement charge**" means:

(i) …; and

(ii) with respect to land, a charge created by registration of an interest based on a judgment against a title or against another interest in the land titles registry;

(bb) "**land**" includes title and any legal or equitable right, interest or estate less than title in or with respect to land;

Enforcement instruction

31(1) A Judgment Creditor who wishes to initiate enforcement measures shall provide the following to the sheriff:

(d) if an enforcement measure requested in the enforcement instruction relates to land, a land titles registry search result that:

(i) indicates that the judgment has been registered against a title or interest in land of the Judgment Debtor; and

(ii) is dated not earlier than five days before the date on which the enforcement instruction is given;

Methods of seizure

41(1) …

(2) Except as otherwise specifically provided in this Part, a sheriff may seize exigible property:
b.1) if the property is an interest in land, in addition to the other methods of seizure that may apply, by registering a sheriff's notice of seizure on the title at the land titles registry;

The Uniform Act follows the Alberta model and proposes that registering and otherwise dealing with interests in land not recorded under the Land Title Act be dealt with by regulation.

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) …

(b) in the case of land that is not recorded under the Land Title Act, make an application to register the notice of judgment against the land of the Judgment Debtor described in the application that is filed in accordance with the regulations.

3. Options for addressing unregistered interests in land

There appear to be three options with respect to interests in land that are not registered in the land title registry:

Option 1: Saskatchewan Model

Under this option there would be no specific provisions related to the enforcement charges over land not registered in the land title registry and the seizure and disposition of interests in land not registered in the land title registry.

Option 2: the Alberta/Uniform Model

Under this option, the legislation would simply advise that a court order is needed to seize unregistered interests. Rules associated with the seizure of interests in land not registered in the land title office would be addressed in the regulations to the Act.

Option 3: Specificlally address Issues associated with unregistered interests in the Act itself (modified Alberta/Uniform Model)

Under this option, the legislation would advise that the rules associated with the seizure of interests in land not registered in the land title office would primarily be addressed in the regulations to the Act. However, to prevent any theoretical enforcement gap the legislation would specifically state that registration of a judgment in the judgment registry creates an enforcement charge over all interests in land that are not capable of registration in the Land Title Registry (primarily interests in Crown land). Unregistered interests in titled land (i.e., land that is registered in the Land Title Registry) would (as with registered interests in land) not be subject to an enforcement charge until a charge is registered in the Land Title Registry. This gap is unavoidable if the integrity of the Land Title Registry as the final authority for interests in land is to be maintained. This is because the implication of an enforcement charge is that third party purchasers would acquire the land subject to the interest of the Judgment Creditor.

As proposed by the Uniform Act, the legislation would allow a Judgment Creditor to apply to court to register a Judgment Debtor's unregistered interest against land in the Land Title Registry. A court order allowing registration of the interest would include the right for a Court Bailiff to seize and dispose of that land.

A departure from the Uniform Act would be to prescribe certain types of unregistered interests a Judgment Debtor may have in titled land that can be registered by a Judgment Creditor against land without the need to apply for a court order. For example, a Judgment Creditor could be allowed to file an entry under the *Land (Spouse Protection) Act* against land where only the Judgment Debtor's spouse is on title. This right for a Judgment Creditor to register an interest against land ostensibly owned by the spouse is based on the principle that the Judgment Debtor would have the ability to protect their interest in that land and the Judgment Creditor assumes this ability. Similarly, the regulations could allow registration of a charge against land that is registered in the name of a trustee, where that trustee holds the land in trust for the benefit of the Judgment Debtor. Such a registration could be allowed even if the Judgment Debtor is not the sole beneficiary of the trust. The Judgment Debtor's interest in the land registered in the name of the trustee would be deemed to be the same as their interest in the trust. For example, if the Judgment Debtor is the sole beneficiary of the trust then a charge may be registered against the entire property and if they are one of three beneficiaries a charge may be registered against the land to reflect that one-third interest.

It is important to note that it is only proposed that the legislation create a rebuttable presumption that there is a right to register an interest against the land in these circumstances. A Court Bailiff would not be permitted to sell land (or even give a notice of seizure) if the registration was the result of a presumption. The registered title holder would be able apply to

court to have these registrations removed if they can provide evidence satisfactory to the court to rebut the presumption that the Judgment Debtor has an unregistered interest in the property (e.g., that the Judgment Debtor would not, in fact, have a right to a share of the family home on separation or would have no right to a share of the proceeds if the land was sold by the trustee). A Judgment Creditor would need to apply for a court order before a Court Bailiff could sell land where the charge has been registered based on a statutory presumption that the Judgment Debtor has an unregistered interest in the land. When applying for the order to permit seizure and sale the Judgment Creditor would have the burden of satisfying the court that the Judgment Debtor has an actual equitable interest in the land.

In addition to the provisions related to Unregistered interests in titled land, it is proposed that there also be limitations on seizing interests in Crown land set out in the legislation. These limitations are considered reasonable because there are special considerations associated with interests that government grants in Crown land. First, government grants a broad variety of interests in land and many of the offices responsible for these interests are not equipped to respond to notices of seizure (because seizure is currently not possible under the *Court Order Enforcement Act*). For example, a Mines permit is a key link for reclamation liability. Allowing a Mines permit to be seized and sold could raise issues related to liability for the government to be able to ensure reclamation occurs. At minimum a Court Bailiff would need to make inquiries of staff in the Ministry of Energy and Mines about the status of reclamation obligations in order to be able to inform prospective purchasers, such inquiries would place an administrative burden on staff, and there would likely be an additional burden as ministry staff would likely want to assess whether any purchaser of a mines permit from a Court Bailiff has the financial liquidity to be held accountable for a failure to uphold the reclamation obligations they would be assuming by purchasing the permit. Second, government has legal, equitable and fiduciary obligations to citizens that individuals and corporations do not have. For these reasons it is proposed that there be certain restrictions on seizing and disposing of interests granted by government in relation to Crown land.

The first limitation is that only interests enumerated in the Act (and regulations) would be able to be seized. This carries forward the present law, as currently only the four interests specifically enumerated in section 57 of the *Court Order Enforcement Act* can be seized. However, it is proposed that the list of interests Crown land capable of being seized would be moved into the regulations, because this would provide flexibility to add new types of interests. It is anticipated that the initial list specified in the regulations would be broader than section 57 and, over time, it is hoped that all interests in land granted by government would be included in the regulations. Having the list in regulations would allow government to expand its capacity to respond to notices of seizure for unique types of interests in Crown land in a measured and thoughtful manner.

Because of the burden that may be placed on government by allowing the seizure of interests that government has granted in Crown land, the policy is that recourse to such assets should be a last resort. Therefore, even if an interest in Crown land is set out in the regulations as being capable of being seized, it would be necessary for a Court Bailiff or Judgment Creditor to apply for an order allowing seizure. To obtain such an order the court would need to be satisfied that the Judgment Debtor does not have other property (or sufficient other property) that could be disposed of to satisfy the outstanding judgment debts. It is acknowledged that the necessity of such an application does add a monetary burden to the seizure of these assets. However, this obligation should not be unduly onerous as it would primarily involve an affidavit from the Court Bailiff identifying all of the property of the Judgment Debtor that they are aware of and the outstanding amount of the judgment(s) that need to be satisfied (and any interest that must be satisfied in priority to these judgments). The math showing the necessity of seizing an interest in crown land should be clear and if this information is presented to government then a consent order may even be possible.

The final restriction proposed is that once an interest in Crown land is seized then disposition would be restricted in a similar manner as licences. This means a Court Bailiff would need to have approval from the government before disposing of the interests in Crown land, although this approval could not be unreasonably withheld. It is important to note that, despite the restrictions on seizing and disposing of interests in Crown land, the Judgment Creditor's right to the Judgment Debtor's interest in Crown land would be protected by registration in the judgment registry and if a third parties acquired the Judgment Debtor's interest in Crown land they would acquire it subject to the Judgment Creditor's interest. Thus, while there are significant restrictions on seizing and selling unregistered interests in Crown land granted by the government, the protection of the Judgment Creditor's interest through registration helps balance the Judgment Creditor's interest in realizing the value of that asset against the government's interest in not being flooded with notices of seizure and disposition which will likely require staff to assess government obligations that must be met (First Nations, general public interest) before it is appropriate to allow interests in unregistered land to be disposed of by a Court Bailiff.

Proposed approach:

Option 3. It is recommended that generally a court order be required to register an unregistered interest in the Land Title Registry but that the Act deem certain unregistered interests be capable of registration without such an order (though a subsequent order would be needed in order to sell the interest in land). Much of the detail associated with the seizure and disposition of interests in unregistered land would be moved to the regulations. Unregistered

interests in Crown land would be subject to an enforcement charge on registration in the judgment registry, which should protect the Judgment Creditor's interest. However, there would be restrictions on seizure and disposition of unregistered interests in crown land. First the interest must be specifically listed in the regulations in order to be capable of being seized and disposed of, second, the Judgment Debtor would have to satisfy a judge that the interest is only being seized as a last resort and finally the government would have to approve any disposition by a Court Bailiff, though this approval would not be able to be unreasonably withheld .

Questions:

1) Do you have any concerns with Option 3 being the preferred approach?
2) Is it necessary to specify that registration of a judgment creates an enforcement charge over interests in land that are incapable of being registered?
3) Do you have concerns about deeming a Judgment Debtor to have an unregistered interest in land owned by certain third parties (such as spouses and trustees)?
    a. If yes, is there any way to address these concerns?
4) Are there any additional circumstances where a Judgment Debtor should be deemed to have an interest in land owned by a third party (i.e., are there any other people with whom a Judgment Debtor may have a special relationship that has the likelihood that the Judgment Debtor has an equitable interest in land)
5) Do you have any concerns about limiting the ability to seize and dispose of interest in Crown land?
6) What interests in Crown land are most important to be able to seize (i.e. what types of interests other than titles; permits, licences or leases granted under the *Coal Act*, *Petroleum and Natural Gas Act*; and *Geothermal Resources Act* should be included in the initial regulations)?

X. Intellectual Property

There are three elements associated with intellectual property:

1) The underlying intellectual property (e.g., copyrights, patents, trademarks);
2) Licences that are used to permit and monetize the use of intellectual property; and
3) The money that flows under a licence of intellectual property (e.g., royalty payments).

Specific provisions in relation to intellectual property appear necessary to address the unique challenges with respect to seizure and disposition of both the intellectual property itself and a licence to use intellectual property. Seizure of the money that flows under a licence of Intellectual property can be handled the same as the seizure of any other account.

In addition to intellectual property, the Uniform Act proposes specific provisions dealing with trade secrets.

1. Current

Writs of seizure are not currently granted in respect of copyright, trademarks, patents or industrial design. The inability to seize intellectual property arises because under common law incorporeal or intangible property were not subject to seizure and sale.[1]

2. Approach of other jurisdictions regarding intellectual property

Alberta's *Civil Enforcement Act* does not have specific provisions related to the seizure of intellectual property or trade secrets.

Section 47 of Saskatchewan's *Enforcement of Money Judgments Act* deals with the seizure of intellectual property and section 102 addresses the disposition of intellectual property. Saskatchewan has not adopted the Uniform Acts provisions related to trade secrets.

Interpretation

2(1) In this Act:

…

(z) "intellectual property" includes any property right or interest in:

(i) a copyright;

(ii) letters patent for an invention;

(iii) a trade mark;

(iv) an industrial design;

(v) integrated circuit topography;

(vi) plant breeder's rights; and

(vii) a transferable licence, interest or right derived from or associated with any of the intellectual property mentioned in subclauses (i) to (vi); whether the property right or interest arose or was recognized under the law of Canada or the law of any other country;

…

(hh) "personal property" means a right recognized in law or equity as personal property, including:

(i) goods, chattel paper, a document of title, an instrument, money, a security and an intangible as those terms are defined in The Personal Property Security Act, 1993;

(ii) intellectual property;

(iii) an interest in any licence; and

(iv) a cause of action;

Seizure of intellectual property

[1] Dunlop, C.R.B. "Creditor – Debtor Law In Canada", Carswell Legal Publications; 2nd edition (Dec 1 1994), pages 152-153

47 The sheriff may seize intellectual property by serving notice of seizure on the Judgment Debtor and, if appropriate:

(a) on the office in which the right or interest is registered; and

(b) on a licensor of the right or interest.

Disposition of a licence or intellectual property

102(1) If property seized is a licence, the property may be disposed of only in accordance with the conditions under which the licence was granted or which otherwise pertain to it.

(2) If property seized is intellectual property, disposition of the property occurs when the statutory requirements for a valid assignment of the property have been met.

3. Options for intellectual property

There appear to be three options with respect to the treatment of intellectual property:

Option 1: Not have special rules for the seizure and sale of intellectual property

Under this option intellectual property may be seized and disposed of, although there may be practical issues and problems. In the absence of specific provisions, the general procedures for seizing personal property would apply to intellectual property.

Option 2: Exempt intellectual property from being used to satisfy a judgment

The potential prejudice to the Judgment Debtor and third parties through the general rules of seizure and disposition may be a reason to exempt intellectual property from being used to satisfy a judgment, if there were no special rules.

Option 3: Follow the Saskatchewan model when making intellectual property subject to seizure and sale

Under this option the legislation would contain provisions based on Saskatchewan's sections 47 and 102. The key addition of section 47 is to impose an obligation to inform both the office in which the right or interest is registered and the licensor of the right or interest. The importance of section 102 is that it requires a Court Bailiff to dispose of intellectual property only in accordance with the conditions under which the licence was granted or which otherwise pertain to it. Section 102 also establishes additional requirements that must be met for disposition of the intellectual property to occur.

It is also important to note that the Saskatchewan legislation does not include a provision equivalent to subsection 127 (3) of the Uniform Act, which deals with trade secrets:

(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.

The omission of an equivalent to subsection (3) in the Saskatchewan Act, or any reference to trade secrets, appears to signal that trade secrets are not intended to be subject to seizure and sale.

Option 4: Have intellectual property subject to seizure and sale, but specifically address trade secrets and add additional provisions to better protect rights related to intellectual property

Under this option, sections 47 and 102 from Saskatchewan's Act would generally represent the starting point for BC's provisions; however, additional provisions would be added, to address the following policy issues discussed below:

How to define "intellectual property":

A small difference from the Saskatchewan legislation is that "intellectual property" would be defined as including "any proprietary right or interest…" instead of "any property right…". This change in wording has been recommended because it is apparently unsettled at law whether intellectual property is truly property; therefore "proprietary" is the preferred term used by lawyers practicing in the area of intellectual property to describe a person's rights in relation to an item or idea.

Providing enough notice of disposition to allow Judgment Debtor to pursue alternatives:

More substantively it is proposed that, for intellectual property, the period between seizure and disposition of property be longer than the 20-day period that would generally apply under section 65 of the Uniform Act. A longer waiting period before disposition is recommended for two reasons. First, the nature of intellectual property is such that its long-term value may be somewhat fragile; therefore, the Judgment Debtor should be provided a greater opportunity to either find other assets to satisfy the judgment, in order to eliminate the need for the Court Bailiff to dispose of the intellectual property, or to enter into a voluntary transaction. Second, if the Judgment Debtor does wish to enter into a voluntary transaction, the complexity of intellectual property itself may necessitate a need for a longer period to structure the transaction (i.e., it is likely harder for the Judgment Debtor to sell, lease or otherwise dispose of intellectual property than to sell other types of property, such as a vehicle).

Addressing the tension between maximizing recovery on disposition of intellectual property and maintaining the long-term value of the intellectual property:

In addition, it is proposed that any disposition of intellectual property other than outright sale (i.e., lease, licence) be subject to a 30-day waiting period before completion and a requirement

to provide notice with details of the disposition to the Judgment Debtor (and any third party who would be impacted by the disposition of intellectual property). This waiting period after disposition and notice is intended to provide a person impacted by the disposition of the intellectual property with an opportunity to object to the pending disposition. This ability to object to the disposition itself would be in addition to the general right a Judgment Debtor has in respect of any property to object to the manner of disposition (see subsection 98 (2) of Saskatchewan's legislation). The purpose of the notice and ability to object to the actual disposition of intellectual property is to permit the Judgment Debtor to specifically ask the court to consider the long-term value of the intellectual property when determining if a pending disposition by a Court Bailiff is reasonable.

The proposed legislation will have an overarching obligation on a Court Bailiff to act in a commercially reasonable manner, similar to section 115 of Saskatchewan's legislation and section 10 of the Uniform Act. However, considered in isolation, a particular disposition of intellectual property by a Court Bailiff may be considered reasonable. Moreover, the relief a court is able to provide when considering the proposed method of disposition is far narrower than would be possible once the court has information about the actual purchaser and terms of disposition before. The ability for a Judgment Debtor (or affected third party) to object to a disposition is important because of the nature of intellectual property. Intellectual property often has enduring long-term value in addition to the short-term value that may be realized at a point in time (through licensing, etc.) disposition may have a disproportionately prejudicial effect on a Judgment Debtor's ability to realize the value of the intellectual property in the future. For example, a Judgment Debtor may be licensing intellectual property exclusively to high-end manufacturers with sterling reputations. The Court Bailiff puts the intellectual property up for sale in an open (and therefore, likely unobjectionable) bidding process. A lower-end manufacturer, with a generally poor reputation for quality, is extremely motivated to acquire the ability to produce goods using the intellectual property and offers the highest bid. Considered in isolation, the high bid is clearly commercially reasonable; however, allowing this disposition may devalue the intellectual property in the eyes of consumers and reduce the ability of the Judgment Debtor to realize its value in the future. The ability for a Judgment Debtor to apply to court ensures that, where appropriate, balanced consideration is given to the long-term value of the intellectual property.

Protecting additional parties who may have an interest in intellectual property:

In order to ensure that all parties who may have an interest in intellectual property have an opportunity to redeem or otherwise protect their interest, it is proposed that the notice requirements when seizing intellectual property be broader than in Saskatchewan. It is proposed to also require notice to the following parties:

- the owner of the intellectual property, if a reasonable person would know that the Judgment Debtor is not the owner;
- any person who is a licensee of the intellectual property, who would be reasonably be considered to be impacted by the seizure or subsequent disposition; and
- the author of a work, if the Judgment Debtor is not the author and only owns the copyright.

The reasons for providing notice to these additional parties is set out below.

A Judgment Debtor may be in possession of intellectual property, which they merely have a right to use; this may not always be a licence (which would engage separate sections of the proposed Act that require a licensor be given notice). Requiring notice to an owner of intellectual property, where it is reasonably apparent that the Judgment Debtor is not the owner, ensures that owners of intellectual property are provided with an opportunity to protect their proprietary interest.

Licensees of intellectual property may also be impacted by the disposition of intellectual property by a Court Bailiff, particularly if their licence does not provide for geographic (or other forms of) exclusivity. The burden placed on a Court Bailiff by the requirement to give notice to licensees is reduced by the limitation that a reasonable person must consider a licensee to be impacted by seizure or subsequent disposition. For example, if the intellectual property relates to a patent on equipment that has been licensed to hundreds of manufacturers or retailers, then notice is likely not required. If there are only one or two licensees, then the impact of a second or third competitor using the intellectual property would be more significant and may require notice.

It is common for the copyright for a work to be owned by a publishing company, rather than the author. If a publishing company becomes a Judgment Debtor, then notice would provide an author with the opportunity to re-acquire their copyright prior to disposition by the Court Bailiff. Providing specific notice to authors also aligns the proposed legislation with section 83 of the *Bankruptcy and Insolvency Act*, which gives authors a reversionary interest in their copyrighted work if a Judgment Debtor is petitioned into (or to voluntarily make an assignment in) bankruptcy.

<u>Resolving the tension between protecting Court Bailiffs from having unreasonable duties and ensuring obligations associated with intellectual property are maintained:</u>

The seizure of intellectual property should place the Court Bailiff in the same position as the Judgment Debtor with respect to the ability to deal with the property; however, it should not relieve the Judgment Debtor of obligations associated with ownership. Some forms of

intellectual property require the owner to take active steps to assert their interest. For example, a trademark registration can be removed if the trademark loses its distinctiveness or is considered abandoned. This places an obligation on the owner of the trademark to challenge people who infringe on the trademark. Court bailiffs will likely be unwilling to assume the responsibility of policing potential infringement during the period between seizure and disposition.

Section 42 of Saskatchewan's Act generally makes a Judgment Debtor a bailee if a Court Bailiff seizes property by a means other than taking physical possession. However, arguably section 42 may be limited to property that can be seized by taking possession. It is proposed that for intellectual property (and potentially other assets) a Judgment Debtor retain responsibility for obligations associated with ownership even after they receive a notice of seizure and have a responsibility to advise a Court Bailiff of any responsibilities associated with ownership. The Court Bailiff should have the ability to delegate the obligations associated with intellectual property to legal counsel for the Judgment Creditor, if they are concerned about the Judgment Debtor's ability or willingness to fulfill these obligations. The policy goal is to enable the Court Bailiff to exercise the rights necessary to maximize the value of the property, while minimizing any obligations that may create a disincentive to seizure.

<u>Ensuring there is authority to dispose of intellectual property and clarifying when a disposition of intellectual property is deemed to have occurred:</u>

Providing for the seizure of intellectual property is only half of the equation. Once intellectual property is seized it is necessary to have a provision that ensures a Court Bailiff has clear authority to dispose of the property. In addition, due to the registration requirements associated with many forms of intellectual property, it is necessary to provide guidance for when a disposition is deemed to have occurred.

Making the Court Bailiff an agent of the Judgment Debtor may address many of the issues raised above with respect to disincentives to seizure. Agency should empower a Court Bailiff to Act while leaving a Judgment Debtor with ownership responsibilities. It may be necessary to have specific language to clarify that a Judgment Debtor may only take action to fulfill obligations associated with ownership (e.g., send a "cease and desist" letter in relationship to trademark infringement) after they notify the Court Bailiff.

As with other forms of property it is advisable to have a provision that clarifies that a Court Bailiff can seize and dispose of co-owned intellectual property in its entirety. Co-owners of intellectual property are afforded the same protections as other co-owners and are entitled to preferentially acquire the Judgment Debtor's interest in the intellectual property by paying fair market value for it prior to the intellectual property being offered for sale publicly.

Should there be an ability to waive a creator's moral right in relation to derogatory treatment, to enable the disposition of intellectual property:

Creators are deemed to retain moral rights. Even if a creator has assigned his or her rights to a work to a third party, he or she still maintains the moral rights. Moral rights allow a creator to object to alteration of a work, if they can satisfy a court that the alteration is prejudicial to their honor or reputation or otherwise may detract from the artist's relationship with the work. It is possible that a creator may attempt to use their moral rights to object to a disposition of their intellectual property. An example is a disposition of a song to an advertising company, which intends to use the song in a bathroom cleanser commercial. The Judgment Debtor, as owner, may have a case that associating their song with the bathroom cleanser (or with any product) is prejudicial to their reputation as a song writer and/or detracts from their relationship with their work. It is proposed that the Court Bailiff be able to waive a creator's moral rights in order to dispose of intellectual property. A Judgment Debtor should be able to apply for a time limited order delaying a disposition, if they can satisfy the court that they have sufficient other assets to satisfy the judgment if given sufficient time to either dispose of the assets themselves or to make the assets available to the Court Bailiff. This makes the waiver of moral rights something of a power of last resort; however, it places the obligation on the Judgment Debtor to make the argument that the Court Bailiff has not availed themselves of other assets.

Trade Secrets:

Trade secrets are not technically considered intellectual property; however, adding specific provisions ensures that if such proprietary interests are held by a Judgment Debtor that these interests can be used to satisfy a judgment, where appropriate.

Protecting the secrecy of trade secrets while permitting seizure

It is proposed that a Court Bailiff be required to seize a trade secret by notice, unless they obtain a court order allowing them to take possession of a physical manifestation of the trade secret (e.g., plans, formula, prototype). Given the potential prejudice associated with disclosure of a trade secret, it is proposed that the Court Bailiff (or Judgment Creditor) would need to satisfy a judge of all of the following:

- that seizing a physical manifestation of the trade secret is necessary to maintain the value of the trade secret as an asset for the benefit of the Judgment Creditor;
- that there are no other assets that are sufficient to satisfy the judgement (i.e., it is an asset of last resort); and
- that the Court Bailiff has reasonable measures in place to protect the secret until disposition.

Protecting a trade secret if a Court Bailiff takes possession of a physical manifestation of the secret

Although seizure by notice leaves the trade secret in the possession of the Judgment Debtor (or a third party), they will have the obligations of a bailee to maintain the value of the trade secret. Moreover, leaving a trade secret in possession of the party with the secret makes sense, as they are likely in the best position to maintain the secrecy of the trade secret. This is why seizure by notice should be the default. However, if the court decides that it is appropriate for a Court Bailiff to take physical possession of a trade secret, then the court should also determine what confidentiality obligations a Court Bailiff has while in possession of the trade secret. In making this determination the court should balance the commercial interests of the Judgment Debtor and third parties, who may utilize state-of-the-art methods to preserve secrecy, with the monetary interests of the Judgment Creditor and the efficiency and cost minimization interests of the Court Bailiff. A Court Bailiff will only be in possession of the trade secret so long as necessary to dispose of it. Therefore, it would seem unreasonable to require a Court Bailiff to invest in costly preservation methods, even if those methods are the industry standard, if less costly methods should provide a reasonable measure of protection for the limited duration that the secret will be in the Court Bailiff's possession.

Ensuring the unique nature of a trade secret is considered before permitting disposition

If the Court Bailiff has seized a trade secret by notice, there is no requirement for a Court Bailiff to satisfy the court that disposition is necessary to satisfy the judgment (i.e., that the property is a last resort). This is because disposition necessarily involves disclosure of the trade secret and any commercially reasonable disposition should fully realize the value of the secret (i.e., there should be no harm from the disclosure) and the Judgment Debtor can voluntarily dispose of other assets and pay their judgment debt (or enter into an agreement with the Court Bailiff to do so), if they wish to preserve their trade secret.

Ensuring dispositions adequately protect the trade secret

While a purchaser of a licence to use a trade secret would, presumably, have a self-interested incentive to maintain a trade secret. A Judgment Debtor should have the ability to object to a disposition of anything other than the entire proprietary interest in the trade secret on the grounds that the disposition will unreasonably diminish the future value of the trade secret. As with intellectual property, it is contemplated that while a disposition of the trade secret itself may be commercially reasonable (i.e., the consideration received reflects the fair market value of the secret at that point in time) the long-term impact of the disposition may be to significantly reduce the future value of the trade secret. In addition, a Judgment Debtor should also be able to object to a disposition because the terms of purchase insufficiently protect the

future value of the trade secret, either because the confidentiality obligations imposed on the purchaser are insufficient or because the purchaser lacks the financial means to satisfy any penalties for breaching the confidentiality provisions.

Proposed Approach:

The Proposed Approach is to generally adopt Saskatchewan's intellectual property provisions, but depart from Saskatchewan in the manner set out in Option 4, above, both expanding the protections provided in relation to intellectual property and specifically addressing the seizure and disposition of trade secrets as is proposed in the Uniform Act.

Questions:

1) Do you support some or all of the refinements proposed in Option 4, if not you may disregard questions 2-8?
2) Do you agree that the definition of "intellectual property" should use the word "proprietary" instead of "property"?
3) Should the period between seizure and disposition of intellectual property be longer than the 20-day period that would apply to other forms of personal property?
4) Should any interested party be given a specific right to oppose the disposition of intellectual property due to the long-term diminishment of the value of that property?
    - If yes, is 30 days sufficient time to make such an application
    - If there should be no specific right, do you believe that the overarching requirement for all enforcement actions under the Act to be "commercially reasonable" requires that the long-term value of the asset be considered?
5) Do you agree with expanding the notice requirements upon seizure of intellectual property to include an owner of the intellectual property other than the Judgment Debtor, a licensee of the property who would reasonably be considered to be impacted by a disposition, and an author, if the property being seized is a copyright?
6) The intent of placing a Court Bailiff in the shoes of the Judgment Debtor is to ensure that they are able to maximize the value of the intellectual property. Should there be specific provisions that limit a Court Bailiff's liability if they seize intellectual property?
    - Is it preferable to make the Court Bailiff the agent of the Judgment Debtor, instead of placing the Court Bailiff in the place of the Judgment Debtor, in order to minimize risk?
    - Does it strike the right balance of fairness to limit a Judgment Debtor's ability to deal with property while compelling them to retain obligations in relation to that property? Should the Judgment Debtor simply have a duty to bring obligations to the attention of Court Bailiffs? If so, would giving a Court Bailiff the ability to

delegate responsibilities associated with the intellectual property to others (including the Judgment Debtor) strike the right balance?

7) Should a Court Bailiff be able to waive moral rights, in limited circumstances?
8) Should the Act have provisions specifically addressing the seizure and disposition of trade secrets?
    - If not, should trade secrets be specifically exempted from seizure?
    - If so, do the proposed provisions adequately address the unique issues related to trade secrets?
    - Do you have suggestions related to provisions related to trade secrets?

XI. Trusts

Trusts represent unique challenges with respect to seizure, because an explicit purpose of a trust may be to protect assets from creditors. For example, the trust may have a discretionary component (e.g., the beneficiary only receives trusts monies if the trustee chooses), which means the trustee can suspend payment while the beneficiary is a debtor. Or, even if the trust generally provides that a Judgment Creditor is to receive payments at regular intervals, the terms of a trust may provide that a beneficiary's right to the trust funds are suspended (or made discretionary) if the trustee becomes aware that the beneficiary is a Judgment Debtor (e.g. is served with a notice of seizure). For example, a trust might be drafted to compel a trustee to transfer the assets of the trust to the control of a third party in another jurisdiction (Bahamas, Panama, etc.) upon learning that the assets of a trust may be subject to seizure. The trust is essentially suspended and this third party is not to return the funds to the trustee until they have satisfied themselves that the assets will not be seized by creditors.

Given the flexibility of trusts and the creativity of the lawyers who create them, attempting to impose statutory restrictions on trusts in order to make it easier to seize trust assets may only have a limited impact. Or, if successful anti-avoidance provisions are able to be added to the legislation, then the impact of those provisions may simply be that more trusts will be set-up so that the situs of the trust funds and the trustee are outside of British Columbia. Nonetheless, it seems prudent that some effort be made to make the seizure of trust funds as straightforward as possible and to minimize the ability to shield trust assets from creditors.

1. Current

Currently, property held in trust in British Columbia can be seized through the use of a garnishing order. However, the effectiveness of a garnishing order in seizing trust funds is limited; this is because, in a garnishing order, the amount attached is limited to the amount claimed to be due to a Judgment Debtor. The requirement to satisfy a judge that a trustee is obligated to pay a specific amount to the Judgment Debtor at a specific time is difficult to

accomplish, because, as noted above, trusts can be drafted with terms that make the timing of (and even right to) payments uncertain, effectively making trust payments immune from seizure. The relevant sections of the *Court Order Enforcement Act* that relate to the garnishment of trust accounts are set out below for reference:

Attachment procedures and exemptions

3 (1)In this section:

"debts, obligations and liabilities", subject to this Act, does not include an obligation or liability not arising out of trust or contract, unless judgment has been recovered on it against the garnishee but does include, without limitation, all claims and demands of the defendant, Judgment Debtor, or person liable under the order for payment of money against the garnishee arising out of trusts or contract if the claims and demands could be made available under equitable execution;

(2)A judge or a registrar may, on an application made without notice to any person by

…

(b)a Judgment Creditor or person entitled to enforce a judgment or order for the payment of money,

…

and stating in either case

(e) that any other person, hereafter called the garnishee, is indebted or liable to the defendant, Judgment Debtor or person liable to satisfy the judgment or order, and is in the jurisdiction of the court, and

(f) with reasonable certainty, the place of residence of the garnishee,

order that all debts due from the garnishee to the defendant, Judgment Debtor or person liable to satisfy the judgment or order, as the case may be, is attached to the extent necessary to answer the judgment recovered or to be recovered, or the order made, as the case may be.

Debts bound from time of service of order

9 (1)Service of a copy of an order that states that debts, obligations or liabilities owing, payable or accruing due to the defendant, Judgment Debtor or person liable to satisfy the judgment or order are attached or notice of it to the garnishee in a manner the judge or registrar directs, binds the debts, obligations or liabilities in the garnishee's hands from the time of service or notice.

…

Amount attached limited to amount due and reasonable costs

10 In the garnishing order, the amount attached is limited to the amount due or claimed to be due by the defendant, Judgment Debtor or person liable to satisfy the judgment or order, along with a reasonable sum for costs.

Procedure for enforcing charge

92 (1)If a Judgment Creditor has registered a judgment under this Act, and alleges that the Judgment Debtor is entitled to or has an interest in any land, or that any land is held subject to the lien created by registration of judgment under section 82, a motion may be made in Supreme Court Chambers, by the Judgment Creditor calling on the Judgment Debtor, and on any trustee or other person having the legal estate in the land in question, to show cause why any land in the land title district in which the judgment is registered, or the interest in it of the Judgment Debtor, or a competent part of the land, should not be sold to realize the amount payable under the judgment.

(2) If the Judgment Debtor is dead, the motion to show cause must call on those to whom the interest of the deceased in the land in question has passed, and on any trustee or other person having the legal estate in it.
(3) Any notice of application or order made on it under this section may, in any case where in the opinion of the court personal service cannot be reasonably effected, be served in a manner the court directs, and the court may in any case allow service of the notice of application or order to be made out of the jurisdiction.

2. Approach of other jurisdictions regarding trusts

Alberta's *Civil Enforcement Act* treats trusts the same as other "future obligations" and allows seizure through the giving of notice. There is no requirement to specify the amount owing and the fact that a notice of seizure seizes both debts owing at the time the notice is given and debts that arise within a year after the notice is given make it significantly easier to seize trust property:

Part 8

Garnishment

Interpretation

77(1) In this Part,

…

(c) "future obligation" means an obligation or any portion of an obligation that is not a current obligation and that

(i) will arise or become payable in certain circumstances or at a certain time or times under

(A) an existing agreement or trust,

(B) an issued security, or

(C) the will of a deceased person,

…;

General principles re garnishment

78 For the purpose of enforcing a writ by means of garnishment, the following applies:

(a) except as otherwise provided by this or any other enactment, any current obligation or future obligation is attachable by garnishment;

Similar to Alberta, Saskatchewan's *Enforcement of Money Judgments Act* treats trusts similar to other accounts, specifically deeming, in section 59, the obligation of a trustee to pay money to a Judgment Debtor as beneficiary of a trust to be an account payable to the beneficiary:

Interpretation

2(1) In this Act:

(a) "account" means a monetary obligation, however created, other than an obligation evidenced by a negotiable instrument or a security, due to a Judgment Debtor:

(i) by a person, partnership, trustee or governmental entity;

(ii) whether or not payable and whether or not specific as to amount; and

(iii) including 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 a liability of the insurer, issuer, guarantor or indemnitor to a Judgment Debtor; and, if the context requires, includes a future account;

(b) "account debtor" means a person, partnership, trustee or governmental entity:

(i) that is obligated under an account to a Judgment Debtor; or

(ii) that, subject to any conditions affecting the account, will become obligated to a Judgment Debtor under a future account; and, where the context permits, includes an insurer, issuer, guarantor or indemnitor;

Powers of the sheriff

38(1) Except as otherwise provided in this Act, a sheriff who has seized exigible property may, subject to any exemption, exercise any power or right necessarily incidental to enforcement of a judgment with respect to the property or its disposition that the Judgment Debtor had at the date of seizure or acquires after the seizure until the property has been disposed of or the seizure terminated, including, but not limited to:

…

(c) the powers of a beneficiary under a trust;

Methods of seizure

41(1) …

(2) Except as otherwise specifically provided in this Part, a sheriff may seize exigible property:

…

(e) subject to section 59, if property is held by a trustee for the benefit of the Judgment Debtor as beneficiary pursuant to trust conditions under which the Judgment Debtor's entitlement to receive the property is subject only to the demand of the Judgment Debtor or the effluxion of a period ending within 12 months after the date of seizure, whether on demand of the Judgment Debtor or otherwise, by serving notice on the trustee;

…

(3) If a trustee is served with a notice of seizure pursuant to clause (2)(e): (a) the trustee is deemed to have received a demand for the property from the Judgment Debtor effective as at the time when the Judgment Debtor is entitled to require a distribution of trust property, whether by the terms of the trust or otherwise; and (b) the trustee shall deliver the property to the sheriff when the Judgment Debtor is entitled to receive it if at that time the sheriff is in possession of an enforcement instruction.

(4) When effecting a seizure, or after having seized property by means other than by taking physical possession, a sheriff may take physical possession of exigible property that is in the possession of:

…

(e) a trustee who is in possession of the property pursuant to the terms of a trust; or

…

Seizure of trust interests

59(1) An obligation of a trustee to pay money to a Judgment Debtor as beneficiary of a trust is deemed to be an account payable to the beneficiary on the earlier of the following events:

(a) the day on which the conditions of payment imposed by the trust are fulfilled;

(b) the day on which, and to the extent that, the Judgment Debtor is entitled to be paid in discharge of the trust obligation in whole or in part.

(2) For purposes of subsection (1), a trustee is an account debtor to whom section 58 applies.

3. Options for seizure of trust accounts

It makes sense to follow Alberta and Saskatchewan, treating trusts the same as other accounts and have a notice of seizure seize both current and future payments owing to a Judgment Debtor. The question therefore is whether to depart somewhat from Alberta and Saskatchewan's legislation with respect to how long a notice of seizure remains in effect and, more significantly, whether to also add additional anti-avoidance provisions.

Option 1: Treat trusts like other accounts

Under this option, BC's legislation would include provisions similar to Saskatchewan, both treating trusts like other accounts (debts) owing to a Judgment Debtor and specifically giving a Court Bailiff the same rights as the Judgment Debtor would have as a beneficiary of a trust.

However, even under this option, it is proposed that BC legislation depart from Saskatchewan, by having a notice of seizure remain in effect indefinitely (i.e., the seizure of the trust assets and obligation on the trustee to pay the Court Bailiff any trust monies owing to the Judgment Debtor would remain in effect until further notice from the Court Bailiff). This reflects a broader proposal to remove arbitrary limits on the effective duration of notices of seizure that is proposed for employment remuneration and some other forms of income.

Option 2: Add anti-avoidance provisions

Under this option, the proposed legislation would treat trusts like other accounts. However, this option would depart from Alberta and Saskatchewan and deem a notice of seizure to include a demand/request for payment at every point in time the Judgment Debtor could (or is obligated to under the terms of the trust) make such a request. The legislation would also include a provision that would specifically prohibit a trustee from transferring trust property, or control of trust property, outside of BC upon receiving a notice of seizure.

- More specifically the legislation would likely specify that any term in a trust requiring a trustee resign, appoint a new trustee, and/or transfer assets outside the jurisdiction is void and of no force and effect, unless permitted by court order, once the trustee receives a notice of seizure
- A trustee would be made personally liable for any shortfall in the trust account after receiving a notice of seizure.

Proposed Approach:

Treat trusts like other accounts (including indefinite seizure and deeming that the Judgment Debtor requests payments be made, if such requests are necessary) and add the anti-avoidance provisions proposed in Option 2, above.

Questions:

1) Do you have any concerns with the seizure of a trust continuing indefinitely?
    - If so, are there any modifications that would make this provision acceptable?
2) Do you have any concerns with seizure of a trust resulting in a deemed election to receive trust property (i.e., deem a notice of seizure to include a demand/request for payment)?
    - If so, are there any modifications that would make this provision acceptable?
3) Do you have any concerns with seizure of a trust making certain trust terms related to the trustee and location of assets null and void?
    - If so, are there any modifications that would make these provisions acceptable?
    - If so, do you have specific concerns related to making a trustee personally liable if they violate the proposed provisions?
4) Do you have any suggestions for additional provisions that would help ensure trust assets are available for seizure?

XII. Severance of Joint Tenancy

The Uniform Act proposes allowing Court Bailiffs to seize and dispose of co-owned property, this would include property owned in joint tenancy. Joint tenancy is a type of co-ownership that gives each co-owner a right of survivorship in the other co-owner's share of the property. This means that on the death of one co-owner, that co-owner's interest in the property automatically transfers to the surviving co-owners. This right of survivorship could have significant implications for a Judgment Creditor if a Judgment Debtor should die before property held in joint tenancy is disposed of by the Court Bailiff. Joint ownership is most commonly associated with land, however personal property, such as cars and bank accounts may also be jointly owned and have a right of survivorship.

To address the risk that a Judgment Creditor could lose the ability to access the Judgment Debtor's share of jointly owned property through the death of the Judgment Debtor, the Uniform Act would sever joint tenancy in personal property upon the registration of a judgment in the judgment registry. Joint tenancy in land would be severed upon the registration of a judgment in the land title registry:

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.

Severance of joint tenancy has significant implications for co-owners, as it extinguishes the automatic right of survivorship. The policy goal of protecting the interests of innocent co-owners is seen in subsection 140 (2) wherein partnership property is excluded. The interests of co-owners are also protected in subsection 140 (3), which deems the severance to have never occurred if the registration of the judgment is discharged.

> (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.

1. Approach of other jurisdictions

Alberta's *Civil Enforcement Act* severs joint tenancies when a Court Bailiff has entered into an agreement to sell the debtor's land:

> **Severance of joint tenancy, etc.**
>
> **76** (1) Writ proceedings against an enforcement debtor's interest as a joint tenant of land sever the joint tenancy when an agency has entered into an agreement to sell the debtor's interest.

To prevent a Judgment Creditor from losing recourse to this property if the Judgment Debtor should die, Alberta specifies that the Judgment Creditor's interest in the Judgment Debtor's interest in the land shall continue despite the land passing to the surviving joint tenant:

> (2) If a writ is registered against land in which an enforcement debtor holds an interest in joint tenancy and the enforcement debtor dies, the writ shall continue to bind the land in an amount equal to the lesser of
>
> (a) the amount owing on the writ, and
>
> (b) the value that the debtor's interest in the land would have been if the joint tenancy had been severed immediately before the debtor's death.

Saskatchewan's *Enforcement of Money Judgments Act* follows the Uniform Act and severs joint tenancies when a judgment has been registered:

Effect of registration with respect to personal property

22 (4) Subject to subsection (5), if a Judgment Debtor holds any exigible property as a joint tenant, registration of a judgment:

(a) severs the joint tenancy; and

(b) the enforcement charge created on registration is created on the Judgment Debtor's interest as a tenant in common

However, Saskatchewan has not carried forward an equivalent to subsection (3), which was proposed by BCLI; therefore, in Saskatchewan, even if the registered judgment is discharged and the jointly owned property has not been sold, the joint tenancy will still have been severed.

2. Options for severance of joint tenancy

The policy goal of severing the joint tenancy is to protect the Judgment Creditor from losing access to a Judgment Debtor's property through the operation of the law of joint tenancies. However, severing a joint tenancy may also prevent the Judgment Creditor from benefiting in the event that a joint tenant, other than the Judgment Debtor, dies. Were the joint tenancy to persevere, the death of another joint tenant would result in an increase in the value of the Judgment Debtor's interest in the property; this would mean that there would be a more valuable asset for a Court Bailiff to seize. If the joint tenancy is automatically severed, then if another owner of the property in question were to pass away, the Judgment Creditor would not benefit.

There appear to be three options with respect to severing joint tenancies.

Option 1: Saskatchewan model

Saskatchewan's model of simply severing joint tenancy on the registration of a judgment is the simplest approach. This approach appears to assume that in most cases where a judgment is registered it will be necessary for the jointly held property to be sold. Should the property not be sold, the tenancy in common can be converted back to a joint tenancy by a subsequent act of the co-owners. However, this requirement to convert a tenancy in common back to a joint tenancy imposes a cost on the Judgment Debtor and/or surviving co-owner (filing fees to the Land Title Registry and likely legal fees).

Saskatchewan had the benefit of drawing from the ULCC/BCLI model when drafting its legislation, so its departure from the Uniform Act was a conscious decision.

Option 2: ULCC/BCLI model

The Uniform Act is similar to Saskatchewan; however, it includes a provision that deems the severance of a joint tenancy to have never occurred if the property is not sold, or otherwise disposed of, and the registration of the judgment is discharged. The benefit of this model is that there are no costs to the Judgment Debtor or co-owners (like in Option 1) if there is no need for the Court Bailiff to dispose of the jointly owned property.

However, this model does create an additional administrative burden on the Land Title Registry. That office would be responsible for indicating that the interests in land switch from joint tenancy to tenancy in common upon the registration of a judgment, and then reinstating the joint tenancy if the registration of the judgment is discharged and the Judgment Debtor's interest in the property is not transferred to a new owner.

Option 3: Alberta model

If there is support for the Alberta model, it may only be necessary to include a provision in the proposed Act, equivalent to Alberta's subsection 76 (2), ensuring that the death of a Judgment Debtor would not cause a Judgment Creditor to lose their interest in the jointly owned property. It may not be necessary to specify, as Alberta does, that when a Court Bailiff enters into an agreement that this severs a joint tenancy. It is well established in real property law that a joint tenant may sell their interest in jointly held property and that doing so severs the joint tenancy. The Uniform Act already proposes a provision specifying that the Court Bailiff can do anything with property that a Judgment Debtor could. Therefore, if a Court Bailiff is already entitled to sell jointly held property, the general law of joint tenancies would seem to apply to sever the joint tenancy without the necessity of specifically stating that in the Act.

It should be noted that the Alberta provision only applies to land owned in joint tenancy. However, if the Alberta model is supported there does not appear to be any reason why the protection of a Judgment Creditor's interest in jointly held property on death could not be extended to personal property.

It should be noted that the Alberta model existed before the Uniform Act was drafted by the ULCC. The ULCC was aware of this model and chose to instead propose that joint tenancy be severed by the registration of a judgment.

Proposed Approach:

Option 3 - the Alberta model appears to address the primary concern associated with joint tenancies (that a Judgment Creditor may lose access to an asset) by preserving a Judgment Creditor's claim to the Judgment Debtor's interest in jointly owned property if the Judgment Debtor should die. The Alberta model appears to avoid unnecessary severance of joint tenancy, which, as noted, has implications for the Judgment Debtor, other joint tenants, and the Judgment Creditor. It is additionally proposed that any provision apply to both land and personal property owned jointly (or which otherwise has a right of survivorship). For property other than land, it may be necessary to protect third parties who transfer property based on a right of survivorship, if the third party is unaware of the Judgment Debtor's claim to the property. This would restrict a Court Bailiff to trace the proceeds into the hands of the joint owner.

Questions:

1) Do you support option 3?
    - If not, which option should British Columbia utilize to sever joint tenancies?
    - Please explain the reason for the option you have chosen.
2) If you support Option 3, do you agree that the general law of joint tenancy is sufficient to sever the joint tenancy if a Court Bailiff were to sell a Judgment Debtor's interest in land?
    - If so, do you agree it is only necessary to ensure that the death of a Judgment Debtor will not cause a Judgment Creditor to lose their interest in the Judgment Debtor's jointly owned property?
3) Do you agree that, for property other than land, third parties (banks, ICBC) should be protected, if they transfer property into the sole name of the joint co-owner?

XIII. Prohibition on seizing property that may be exempt

The Uniform Act sets out a list of exempt property. Section 161 of the Uniform Act places the onus on the Court Bailiff to not seize property that they believe to be exempt. Section 155 (1), allows the Judgment Debtor to claim an exemption if a Court Bailiff seizes property that the Judgment Debtor believes is exempt:

> **161** (1) [A Court Bailiff] must not seize an item of a Judgment Debtor's property if the [Court Bailiff] believes on the basis of information known to the [Court Bailiff] at the time of the enforcement proceeding that the item of property is exempt property.
>
> **155** (1) If personal property of a Judgment Debtor is seized by [a Court Bailiff], 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 [Court Bailiff] who effected the seizure.

Section 154 (4) extinguishes the right to claim an exemption if the Judgment Debtor does not make the claim prior to the property being disposed of by the Court Bailiff and section 70 provides the Court Bailiff with a general immunity for actions in good faith.

1. Approach of other jurisdictions

Section 90 (1) of Saskatchewan's *Enforcement of Money Judgments Act* provides that "The sheriff shall not seize property of a Judgment Debtor that the sheriff believes is or is likely to be exempt" (emphasis added). Subsection 90 (3) of Saskatchewan's legislation is based upon section 155 of the Uniform Act and requires a Judgment Debtor to exercise their right of exemption within five business days of receiving notice about types of property that are exempt from seizure. Finally, subsection 90 (6) provides that a sheriff shall release property for which a notice of exemption is received, if it is determined to be exempt. In the event of a dispute the parties can apply to court.

Section 88 of Alberta's *Civil Enforcement Act* makes certain property exempt from writ proceedings. Because writs still must be obtained in Alberta, making the property exempt from writ proceedings removes all discretion. There is no requirement for the Judgment Debtor to claim property as exempt.

It is only where property is exempt up to a maximum prescribed value that there is the potential that it may be seized. Where property is exempt up to a prescribed value, section 89 (3) of *Alberta's Civil Enforcement Act* provides as follows:

> (3) A bailiff may seize personal property to which this section applies except where the bailiff knows or should reasonably know that the property could not be sold for more than the total of the amounts [that have priority over the claims of enforcement creditors].

The concept expressed by section 89 (3) is likely captured by proposed section 10 of the Uniform Act, which places an overarching obligation on the Court Bailiff to act in a commercially reasonable manner.

2. Options for seizure of property that may be exempt

The policy goal of protecting a Judgment Debtor from unnecessary seizure is laudable; however, a complete prohibition on seizure of potentially exempt property (and requiring Court Bailiffs to self-police with respect to exemptions) introduces uncertainty/risk into the process of seizure. The Uniform Act imposes an obligation on the Court Bailiff when "performing [a] function or duty or in exercising that right or power, do so in good faith and in a commercially reasonable manner." The risk of being found to be offside of this requirement may result in non-exempt property not being seized.

There appear to be two options with respect to protecting a Judgment Debtor's exempt property:

Option 1: Prohibit a Court Bailiff from seizing property that may be claimed as exempt

Follow the Uniform/Saskatchewan Model – under this option if a Court Bailiff believes property may be exempt, then they must not seize. The Judgment Debtor would only need to deliver a notice of exemption claim to the Court Bailiff if the Judgment Debtor believes that exempt property was seized.

Option 2: Prohibit a Court Bailiff from taking physical possession of potentially exempt property; Allow seizure by notice

Generally

The purpose of the prohibition on seizing exempt property appears to be to prevent the Judgment Debtor from being deprived of its use while the exemption claim is settled. However, the Judgment Debtor could be protected from losing use of exempt property by prohibiting the Court Bailiff from taking physical **possession** of any property that may be exempt (i.e., the Court Bailiff would only be permitted to seize potentially exempt property by delivering a notice of seizure to the Judgment Debtor). The legal implications of allowing the Court Bailiff to seize exempt property is that, until an exemption is claimed and recognized, the Judgment Debtor would be considered a bailee and have a positive obligation to preserve the property.

In addition, the following property should be dealt with specifically:

Motor vehicles

The Uniform Act proposes that motor vehicles only be exempt up to an amount prescribed by regulation. Therefore, it may be reasonable to draft the legislation to allow a Court Bailiff to take possession of a vehicle as long as they reasonably believe the proceeds from the disposition of the vehicle will be greater than the exemption amount and any fees associated with the disposition of the vehicle.

Similarly, if a Judgment Debtor has more than one motor vehicle, presumptively a Court Bailiff should be able to take possession of as many vehicles as they wish; provided the Court Bailiff leaves the Judgment Debtor with at least one vehicle. However, if the Judgment Debtor owns more than one vehicle, the Court Bailiff should be prohibited from disposing of any seized vehicle(s) before a Judgment Debtor has had an opportunity to elect which vehicle to claim as exempt (i.e., they can claim the seized vehicle as exempt and redeem the seized vehicle by exchanging it for the one that wasn't seized).

Principal residence

The Uniform Act proposes that the principle residence of a Judgment Debtor be exempt from seizure up to a maximum prescribed interest. Registration of a judgment against land is not seizure. However, registration of a judgment as a charge on the land can essentially act as a bar to sale. The legislation would clarify that a Judgment Creditor can maintain the registration of a judgment against land that is a residence, even if the Judgment Debtor's interest in that land is assessed to be less than the amount prescribed by regulation as being exempt. The rationale is that, unlike all other exempt assets, land is likely to appreciate in value over time; therefore, the registration of an interest in that land should be maintained, to ensure that if the Judgment Debtor ever did sell that land, the Judgment Creditor's claim would have to be paid if the Judgment Debtor's portion of the proceeds exceeded the maximum allowable exemption.

Proposed Approach:

Option 2, allow potentially exempt property to be seized by notice. It would be clearer to allow a Court Bailiff to seize any property of the Judgment Debtor, unless or until that property is claimed as exempt by the Judgment Debtor. The Judgment Debtor would be protected by a prohibition on seizure by possession if property may be exempt. This approach would better protect a Judgment Creditor's interest in property and make a Court Bailiff's job more straightforward. Finally, there is the potential for greater recovery, because a Court Bailiff could give a notice of seizure with respect to items that have a maximum exempt value (e.g., antique furniture and/or expensive audio visual equipment – household furnishings, fur coats - clothing, bicycles, computers, etc.) and place an obligation on the Judgment Debtor to establish that the value of these items is less than the prescribed value when claiming the exemption.

Questions:

1) Do you agree with the Option 2 as the proposed approach?
    - Should a Court Bailiff be allowed to take possession of motor vehicles as long as they believe that they can dispose of the motor vehicle for more than the maximum claimable exemption amount?
    - Should a Court Bailiff be allowed to maintain the seizure of land that is the principal residence of a Judgment Debtor even if the land is assessed to be worth less than the maximum claimable exemption amount?

XIV. Co-owners not able to apply for exemptions if not dependents

Subsection 153 (5) of the Uniform Act only permits a dependent of a Judgment Debtor to claim property of the Judgment Debtor as exempt property, if the Judgment Debtor does not do so. However, co-owners of the property may equally be prejudiced by a Judgment Debtor who fails to claim an exemption and it may be appropriate for co-owners to be able to assert an exemption claim on behalf of a Judgment Debtor in some circumstances.

1. Approach of other jurisdictions

Neither Saskatchewan's *Enforcement of Money Judgments Act* and Alberta's *Civil Enforcement Act* permit a co-owner to assert an exemption claim on behalf of a Judgment Debtor.

2. Options related to whether co-owners should have a right to claim exemptions

The policy of allowing dependants to make an exemption claim on behalf of a Judgment Debtor is fairness. It is unfair to penalize dependants for the failure of a Judgment Debtor to make a claim that would preserve property upon which they are likely reliant (e.g., the Judgment Debtor does not claim an exemption for the family car).

Co-owners may not suffer the same prejudice as a dependant due to the sale of co-owned property; nonetheless, they may still be unfairly impacted by the sale of the co-owned property through enforcement proceedings (e.g., a co-owner of a tractor with the Judgment Debtor may prefer to have the tractor, than to have their share of the proceeds from the sale of the tractor). This is particularly true if a Judgment Debtor does not assert their exemption rights. The ability to seize and dispose of co-owned property will be introduced by this Act and there are other provisions that seek to balance the interests of co-owners with the interests of Judgment Creditors. Giving co-owners the ability to assert an exemption claim on behalf of a Judgment Debtor in certain circumstances may be a reasonable balancing of a co-owner's interest in not losing property unnecessarily against a Judgment Creditor's interest in being paid.

In some cases, a Judgment Debtor may be making a conscious choice to allow exempt co-owned property to be sold by the Court Bailiff and used to satisfy their debt. Where the will of the Judgment Debtor is known (i.e., they are consciously choosing not to exercise their exemption rights) it does not make sense to allow a co-owner to exercise the exemption rights. If the co-owner could not prevent the Judgment Debtor from voluntarily disposing of their interest then there is likely little rationale in preventing a Judgment Debtor from consciously choosing to not make an exemption claim. However, where the Judgment Debtor flees the jurisdiction or otherwise disappears and there is no evidence of a conscious desire on the part of the Judgment Debtor to allow seizure and disposition of otherwise exempt property, then in these circumstances maybe it is appropriate to allow co-owners to assert an exemption claim until such time as the Judgment Debtor's will is known.

In addition, it may be appropriate to allow a non-dependent co-owner to assert an exemption claim where the Judgment Debtor has an ownership interest in more than one item that may be claimed as exempt. For example, a Judgment Debtor may have an interest in two cars, one is a car solely owned by the Judgment Debtor and the other is a car that is co-owned. If the Judgment Debtor claims the solely owned car as exempt, then it may be appropriate for the co-owner to make an exemption claim on the co-owned vehicle and apply to court for an order

that the solely owned vehicle is not exempt. Allowing the competing co-owner exemption claim allows the court to better balance the interest of the co-owner, while still ensuring that a Judgment Debtor benefits from the exemption.

There appear to be four options with respect to protecting a Judgment Debtor's exempt property:

Option 1: Limit exemption claims to a Judgment Debtor and their dependants

Under this option, only a Judgment Debtor, a dependent (spouse or child) of a Judgment Debtor or person for whose financial support the Judgment Debtor is otherwise totally or in substantial part responsible may make a claim. Any provision would be based upon subsection 153 (5) of the Uniform Act.

Option 2: Allow co-owners to make exemption claims on the same basis as dependants

Under this option, a co-owner would be permitted to make an exemption claim on the same basis as a dependant. The provision would be based upon subsection 153 (5) of the Uniform Act, which would be modified to include a reference to co-owners. The rationale for expanding the scope of exemption claims to include co-owners is that they should be prejudiced as little as possible for co-owning property with a Judgment Debtor.

Option 3: Expand exemption claims to co-owners where Judgment Debtor's will is unknown

Under this option, a co-owner would be able to make an exemption claim on behalf of a Judgment Debtor if the Judgment Debtor cannot be found and their intent with respect to the potentially exempt property is not known. A Court Bailiff would only be required to recognize an exemption claim by a co-owner if the Court Bailiff has been unable to personally serve the Judgment Debtor with a notice of seizure in respect of the potentially exempt property. The rationale for giving co-owners the ability to claim an exemption on behalf of a Judgment Debtor is a presumption that if the Judgment Debtor had been served, the Judgment Debtor would have availed themselves of the exemption. If at any time the Judgment Debtor is located, served with a notice of seizure and still does not make an exemption claim, then it would be clear that the Judgment Debtor wished for the property to be sold and the proceeds used to satisfy their debt and the property would be subject to seizure.

Option 4: Allow co-owners to make a competing exemption claim when a Judgment Debtor has claimed other property of the same type as exempt

Under this option, a co-owner would be able to make an exemption claim if the Judgment Debtor owns more than one item of potentially exempt property and has claimed a different item of property as exempt. For example, the Judgment Debtor and a parent are both on title

for one car and the Judgment Debtor has sole ownership of a second car. The Judgment Debtor claims an exemption on the car they solely own, leaving the car co-owned with the parent to be sold. In this example, the proposed provision would allow a co-owner to make a competing exemption claim in respect of the co-owned car and apply to have a judge determine which item of property should be exempt from enforcement proceedings.

Proposed Approach:

Option 3 & 4 – It is recommended that co-owners should be able to make an exemption claim both where a Judgment Debtor cannot be found and where the Judgment Debtor could have claimed other property as exempt. The ability to seize co-owned property is an important innovation introduced by the legislation, because it makes a vast new source of assets available to creditors; however, the impact of enforcement on innocent co-owners may be substantial. Therefore, it is reasonable to maximize the opportunities co-owners have to prevent the disposition of their property.

Questions:

1) Should co-owners be able to make an exemption claim?
    - If yes, when should a co-owner be able to make an exemption claim?
        1. On the same basis as a dependant?
        2. Only if the Judgment Debtor's intent is unknown?
        3. Only if there is other property of the same type that has been claimed as exempt?
        4. Both options 2 & 3?
2) Is there a need for any additional limitations or requirements, to prevent misuse of exemption claims by a co-owner?

XV. Scope of protection from seizure for Registered Plans

The BCLI add subsection 159 (3) to the Uniform Act, proposing to bring the protection provided to registered plans (RESPs, etc.) by section 71.3 the *Court Order Enforcement Act* into any new money judgment enforcement legislation. This Part only deals with whether the scope of protection currently provided to registered plans that related to retirement savings should be carried forward. Part 16, following, asks if the definition of "registered plans" should be expanded to include education (RESP) and disability (RDSP) savings plans.

1. Current protection provided to registered plans

Subsection 71.3 (2) of the *Court Order Enforcement Act* provides "(2) Despite **any other enactment**, all property in a registered plan is exempt from **any** enforcement process." (emphasis added). Section 71.3 (3) does specify four specific instances where the protection

bestowed by subsection (2) does not apply. Nonetheless, the base protection provided by subsection (2) remains broad. Moreover, section 71.3 (1) defines "enforcement process" as including "any other remedy or legal process to enforce payment of a debt". The wording "…remedy **or** legal process…" suggests that remedies are things other than the enforcement processes set out in the legislation, because these are legal processes. Therefore, it appears that "enforcement process" necessarily includes self-help remedies that a creditor might use to enforce their debt. In summary, the protection provided by section 71.3 appears to be much broader than the protection provided to other types of exempt property under the *Court Order Enforcement Act*. This broader protection would continue if an equivalent to section 71.3 were included under any proposed legislation.

2. Approach of other jurisdictions

Both provinces include similarly broad wording in their sections exempting registered plans from seizure. Section 3 (1) of Saskatchewan's *Registered Plan (Retirement Income) Exemption Act* follows the wording in the *Court Order Enforcement Act* very closely and provides:

> **Exemption from enforcement processes**
>
> 3(1) Subject to subsection (3) but notwithstanding any other Act or law, all rights, property and interests of a planholder in a registered plan are exempt from any enforcement process.

Similarly, section 92.1 (2) of Alberta's *Civil Enforcement Act* provides:

> (2) Property in a registered plan, including any current obligation or future obligation under the plan, is exempt from any enforcement process, but a payment out of a registered plan to a plan holder is not exempt.

Both provinces adopt the wording from the *Uniform Registered Plan (Retirement Income) Exemption Act* in respect of the protection provided.

3. Options in relation to protection of registered plans

The policy goal of section 71.3 of the *Court Order Enforcement Act* is to protect registered retirement savings from creditors to ensure that people have sufficient money to fund their retirement and are less likely to need government support, such as a Guaranteed Income Supplement. Another important goal of protecting registered plans from seizure is consistency. This is because there has never been a way for creditors to seize a debtor's interest in a pension or in retirement savings plans administered by insurance companies.

The fact that pensions and insurance are protected from seizure by both legal and self-help means, and the above-mentioned desire for consistency, may be why the protection provided to registered plans in the *Court Order Enforcement Act* is so broad. However, given the breadth of the protection it is open to consider whether this protection should continue and, if it should continue, whether the protection should be stated in an Act that has a much narrower general focus (i.e. utilizing specific enumerated mechanisms to enforce a money judgment) or if, due to the breadth of the protection, the provision should be moved to another Act of broader application, such as the *Law and Equity Act*.

There appear to be three options with respect to protecting a Judgment Debtor's registered plans:

Option 1: Exempt registered plans from all methods of enforcing a debt in the new Act

Under this option section 71.3 would be carried forward into the new Act substantially unchanged. Subsection (6) would not be carried forward because it is superfluous. It is noted that Saskatchewan's *Registered Plan (Retirement Income) Exemption Act*, while differently worded, generally reproduces all of the subsections in BC's section 71.3 but for subsection (6).

Option 2: Only exempt registered plans from methods of enforcing a debt set out in the new Act

Under this option, a modified version of section 71.3 would be included in the new Act. In particular, the definition of "enforcement process" in subsection (1) and subsection (2) would be modified to narrow the application of the section to enforcement by legal processes. This would likely result in paragraph (e) being amended to remove the reference to "any other remedy…"

Option 3: Exempt registered plans from all methods of enforcing a debt - in another Act

Under this option a version of section 71.3 that protects assets from any type of enforcement remedy would be moved to another Act, such as the *Law and Equity Act*, rather than being located in the new Act. The rationale for moving the provision is that its application is broader than the Act in which it is, or would, be located.

A draft provision is not included for this option because the provision would be the same as under option 1, it would simply be located in another Act.

Proposed Approach:

Option 3, locate the provision in another Act. The status quo of protecting registered plans from both legal and other methods of enforcing a judgment has not been the subject of complaint to date. In addition, the purpose of the section is to provide registered plans with

the same protection as pensions and savings products offered by insurance companies. Pensions and insurance products are likely protected from non-legal enforcement remedies; therefore, extending the protection beyond legal enforcement maintains the original policy objective.

Questions:

1) Should the legislation protect registered plans from both non-legal remedies and legal processes?
    - If legislation should protect registered plans from non-legal remedies, should that provision be located in the proposed legislation, located in another existing Act or located in its own separate new Act?
    - If legislation to protect registered plans from non-legal remedies is located in a separate Act should the proposed legislation have a provision that specifically references the exemption in that other Act?
        - i.e. Should the proposed legislation have a provision stating something to the effect of, "In accordance with section X of the X Act, registered plans as defined in that Act are exempt from seizure under this Act.

XVI. Additional Property Exemptions

In addition to the property that the Uniform Act would make exempt from seizure, government is considering exempting the following additional property:

- Registered **Disability** Savings Plans (RDSPs) & Registered **Education** Savings Plans (RESPs)
- 1 computer (up to maximum value specified by regulation)
- 1 cell phone (up to maximum value specified by regulation)
- 1 bicycle (up to maximum value specified by regulation)

Government is also considering allowing the list of exemptions to be expanded by regulation. To allow additional property to be exempted to reflect new types of property and societal changes that result in certain property changing from being considered a luxury to being a necessity.

1. Approach of other jurisdictions

Alberta exempts RDSPs and RESPs from seizure, Saskatchewan does not. Neither Alberta nor Saskatchewan specifically exempts computers, cell phones or bicycles from seizure. However, paragraph 93 (1) (c) of Saskatchewan's *Enforcement of Money Judgments Act* provides that, "(c) household furnishings, utensils, equipment and appliances;" are exempt from seizure

[emphasis added]. British Columbia's *Court Order Enforcement Act* currently only exempts "household furnishings and appliances".

Neither Alberta nor Saskatchewan allows their list of exempt property to be expanded by regulation.

2. Options for additional property exemptions

The policy goal of protecting certain specified property of a Judgment Debtor is to ensure that they are able to maintain a reasonable standard of living.

Advocates for the exemption of RDSPs suggest that, like seniors, disabled persons use these funds in place of other income sources. Moreover, in many cases the funds are contributed to by third parties and these parties may be less willing to contribute if they know that the disabled person may lose access if they become a Judgment Debtor.

Similarly, RESPs are invested for the benefit of children, though they remain the property of the parent until it is withdrawn. It is noted that creditors would not be able to access money if, instead of investing in an RESP, a parent simply gifted the money to a child. However, it is undesirable to encourage parents to simply gift money to their children to provide for their future education instead of investing in an RESP because the parents lose control and the money may be spent. Finally, due to matching grants given by government there is substantial prejudice if funds are withdrawn from an RESP.

Computers and cell phones are examples of property that were not contemplated at the time the Act was enacted. Such property does not easily fit within the definition of household **furnishings** and likely would benefit from specific policy consideration. Generally, it is accepted that having a computer and cell phone is not an unusual luxury and is beneficial for tasks from banking to shopping to using the library. It is likely reasonable for a Judgment Debtor to retain the use of at least one computer and one cell phone for personal use. However, like a vehicle, having multiple computers or having the very latest (and most expensive) computer or cell phone would be considered a luxury, unless those items are used to earn income, in which case the Judgment Debtor may be entitled to claim the property as exempt on that basis. The Act would seek to balance a Judgment Debtor's interest in having a computer or cell phone with a Judgment Creditor's interest in having their debt satisfied without a Judgment Debtor being able to retain conspicuous luxuries. In all cases the sale of a computer of cell phone must be commercially reasonable and a Court Bailiff would need to assess whether selling a used computer or phone would result in proceeds that exceed the exemption amount.

While bicycles certainly existed when the *Court Order Enforcement Act* was enacted, their utility and nature of use have changed over time. It is becoming increasingly common for individuals to commute by bicycle and considerable effort is being made at the Federal, Provincial and

Municipal levels to encourage transportation choices other than use of a personal vehicle. For this reason, it makes sense to specifically exempt bicycles from seizure. However, as noted above for computers and cell phones, there is also the potential for bicycles to be valuable luxury items and specifically exempting bicycles up to a certain amount will also make Court Bailiff's aware that these luxury bicycles can and should be seized and disposed of, with the Judgment Debtor entitled to the exempt portion of the proceeds, so that they can purchase a less valuable replacement. In exempting bicycles, it is likely prudent to define vehicle to include electric bicycles, which can have significant value, because electric bicycles are more likely to be used in place of a car or other vehicle. Thus, a person would be entitled to an exemption for both a bicycle and electric bicycle, but not a bicycle, electric bicycle and a car.

Questions:

1) Do you support adding RDSPs to the list of exemptions?
    - If not, please explain the reason for the objection.
2) Do you support adding RESPs to the list of exemptions?
    - If not, please explain the reason for the objection.
3) Do you support adding one computer to the list of exemptions?
    - If not, please explain the reason for the objection.
    - If so, what would be an appropriate maximum value to allow?
4) Do you support adding one cell phone to the list of exemptions?
    - If not, please explain the reason for the objection.
    - If so, what would be an appropriate maximum value to allow?
5) Do you support adding one bicycle to the list of exemptions?
    - If not, please explain the reason for the objection.
    - If so, what would be an appropriate maximum value to allow?
6) Do you support adding electric bicycles to the definition of vehicle?
    - If not, please explain how electric bicycles should be classified for the purposes of exempt property.
7) Do you support providing authority that would allow additional property to be exempted from seizure by regulation?
    - If not, please explain the reason for the objection.

XVII. Appointment of Receivers

Part 13 of the Uniform Act contains nine sections related to the appointment, supervision and powers of a receiver. However, British Columbia already has well established court rules and procedures established for the appointment of receivers. Therefore, it is not clear that there is a pressing need to displace the general rules associated with the court appointment of receivers. In addition, some sections proposed in the Uniform Act may be inappropriate for

British Columbia. For example, section 177 of the Uniform Act would allow a Court Bailiff to assume a supervisory role over a receiver. However, because British Columbia has private Court Bailiffs enforcing money judgments, rather than Court Bailiffs who work as employees of the Sheriff's office, it is questionable whether it would be appropriate for the court to delegate supervision of a receiver to a private business.

1. Approach of other jurisdictions

Saskatchewan's *Enforcement of Money Judgments Act* substantially follows the Uniform Act. Although Saskatchewan's Act only has five sections, as opposed to the nine in the Uniform Act, in substance most of the policies expressed in the Uniform Act are incorporated into Saskatchewan's Act.

Relevant section of Saskatchewan's Act:

PART VIII
Receivership

Receivership

72(1) On application by the sheriff or an enforcing Judgment Creditor, the court may:

(a) appoint a receiver, with or without security, of specified exigible property or specified kinds of exigible property if the court concludes that seizure or sale of the property through enforcement measures otherwise provided in this Act would be inappropriate or inefficient because of:

(i) the nature or location of the property;

(ii) a third party interest in the property;

(iii) the immunity of the Crown in right of Saskatchewan or the Crown in right of Canada;

(iv) a logistical impediment to seizure and sale of the property resulting from the conduct of the Judgment Debtor or otherwise;

(v) potential costs and expenses of seizure and sale; or

(vi) any other reason;

(b) order the Judgment Debtor or other person in possession of exigible property to deliver it to a receiver appointed pursuant to this section; and

(c) order an account debtor to pay the account to a receiver when it is payable.

(2) Subject to this Part and Part II, on an application pursuant to subsection (1), the court has the powers set out in subsection 65(1) of *The Queen's Bench Act, 1998*, free of the limitations pertaining to the appointment of receivers imposed by the law as it existed on the day before the coming into force of this Act.

(3) Unless otherwise stated in the order, an order made pursuant to subsection (1) has the following effects:

(a) it enjoins the Judgment Debtor from disposing of or dealing with the property other than for the purposes of meeting ordinary business and living expenses of the Judgment Debtor and the Judgment Debtor's dependants;65

(b) it enjoins a person other than the Judgment Debtor who is in control or possession of the property, or who may acquire control or possession of the property, from disposing of or dealing with the property other than in a manner consistent with the exercise of legal rights deriving from an interest in the property that has priority over an enforcement charge relating to a subsisting enforcement instruction;

(c) it empowers the receiver to collect and take possession or control of the property;

(d) it requires the receiver to deliver possession or control of the property to the sheriff, and to remit to the sheriff any sum collected by the receiver in excess of the receiver's costs and fees;

(e) it authorizes the receiver to take conservatory measures to protect the property or its value;

(f) it authorizes the receiver to exercise any power or right necessarily incidental to enforcement of a judgment with respect to the property or its disposition that the Judgment Debtor had at the date of appointment of the receiver or that the Judgment Debtor acquires after that date until the property has been delivered to the sheriff or the order terminates;

(g) it discharges any person who delivers property to the receiver or who pays an account to the receiver from the person's obligations to the Judgment Debtor with respect to the property delivered or the account paid.

(4) An order made pursuant to this section may permit the Judgment Debtor or person in possession of the property to retain and use it in the manner set out in the order.

(5) On an application made pursuant to this section, the court shall consider any relevant fact or matter, including the following:

(a) any conduct of the Judgment Debtor or another person that is likely to make enforcement of the judgment to which the application relates difficult or costly;

(b) the extent to which an order would result in undue hardship to the Judgment Debtor, the Judgment Debtor's dependants or a person in possession or control of the property;

(c) the probable costs of a receivership in relation to the amount that is likely to be recovered by a receiver to be applied to satisfaction of the judgment to which the application relates.

(6) The court shall not make an order pursuant to this section:

(a) if the amount recoverable with respect to which enforcement is sought is less than the prescribed amount; or

(b) if it relates to exigible property that, in the opinion of the court, has a value greater than is sufficient to satisfy:

(i) the amount recoverable with respect to which enforcement is sought;66

(ii) the costs of obtaining the order; and

(iii) the costs and remuneration of the receiver.

(7) Unless the court orders otherwise:

(a) property collected by or taken into the control of a receiver is deemed for the purposes of Part X to be property seized by the sheriff;

(b) property delivered to the possession or control of the sheriff pursuant to clause (3)(d) is deemed to be property seized by the sheriff;

(c) a receiver has the same protection and immunities from liability when acting as a receiver pursuant to this Act as a sheriff acting pursuant to this Act; and

(d) a receiver shall not sell or otherwise dispose of the property to which the appointment relates until instructed to do so by the sheriff of the judicial centre at which the order appointing the receiver was made.

Duration of order appointing receiver

73(1) An order appointing a receiver made pursuant to section 72 is in effect for:

(a) 30 days in the case of an application without notice application; and

(b) six months in the case of an application with notice.

(2) On application to the court, the order mentioned in subsection (1) may be renewed for a further period or successive periods of the duration specified.

Role of the sheriff in receiverships

74(1) A receiver appointed pursuant to this Part shall provide the following to the sheriff at the judicial centre at which the order was made:

(a) a report regarding the administration of the receivership, as the sheriff may require;

(b) a copy of all records relating to the administration of property of which the receiver has taken possession or control;

(c) a final report and account on completion of the receiver's duties.

(2) The sheriff may:

(a) instruct the receiver to sell property in accordance with Part XI;

(b) examine and approve the receiver's accounts and reports, fix the remuneration of the receiver, discharge the security provided by the receiver, if any, and terminate the receivership; or

(c) require the receiver to apply to the court for an order approving the receiver's accounts or reports, fixing the remuneration of the receiver, discharging the security provided by the receiver, or terminating the receivership.67

(3) A sheriff shall serve on the Judgment Debtor and on all enforcing Judgment Creditors notice of the sheriff 's intention to:

(a) discharge the security provided by the receiver; or

(b) terminate the receivership as provided in subsection (2).

(4) A sheriff shall not discharge the security provided by the receiver or terminate the receivership until 15 days after the date on which the last of the notices mentioned in subsection (3) has been served.

(5) A decision made by the sheriff pursuant to clause (2)(b) may be reviewed by the court on application by any interested party.

Supervision by the court

75 On application, including an application by a receiver, the court may do one or more of the following:

(a) remove and replace a receiver;

(b) approve a receiver's accounts or reports;

(c) fix the remuneration of a receiver;

(d) discharge the security given by a receiver;

(e) terminate the receivership;

(f) exercise its general jurisdiction over receivers.

Effect of termination of a receivership

76 On termination of a receivership, any property of the Judgment Debtor not delivered to the possession or control of the sheriff shall be delivered to the Judgment Debtor.

In contrast, Part 9 of Alberta's *Civil Enforcement Regulation* is much less prescriptive. Alberta simply gives the court the power to appoint a receiver, specifies some considerations to inform the appointment, and sets out some qualifications required to be appointed.

Relevant sections from Alberta's Regulations:

Part 9
Receivers and Special Remedies

Court appointed remedies

85(1) Notwithstanding any rule of law or equity to the contrary, where certain exigible property of an enforcement debtor cannot otherwise be conveniently realized, the Court on the application of an enforcement creditor may do one or more of the following:

(a) appoint a receiver of the property;
(b) order the enforcement debtor or any person in possession or control of the property to deliver up the property to an agency or to another person named in the order;
(c) enjoin the enforcement debtor or any other person from disposing of or otherwise dealing with the property;
(d) make any other or additional order that the Court considers necessary or appropriate to facilitate realization of the property.

(2) Where the Court appoints a receiver under subsection (1), the Court may in the order direct that the order apply to property acquired by the enforcement debtor after the order is granted.

Considerations re appointment of receivers

86 In determining whether to appoint a receiver under section 85, the Court must consider at least the following:

(a) whether it would be more practical to realize on the property through other proceedings authorized by this Act;
(b) whether the appointment of a receiver would be an effective means of realizing on the property;
(c) the probable cost of the receivership in relation to the probable benefits to be derived by the appointment of a receiver;
(d) whether the appointment of a receiver would cause undue hardship or prejudice to the enforcement debtor or a third person;
(e) the likelihood of the writs against the enforcement debtor being satisfied without resorting to the property in question.

Receivers

87 With respect to receivers, the following applies:

(a) a person may not be appointed as a receiver unless that person
  (i) has satisfied the qualifications, if any, set out in the regulations, and
  (ii) has agreed in writing to act as a receiver in respect of the matter for which the appointment is to be made;

(b) the Court may give a receiver those powers that the Court considers necessary or appropriate for the realization of the property, including, without limiting the generality of the foregoing, the power to manage or sell the property or bring any proceedings in relation to the property;
(c) unless otherwise ordered by the Court, a receiver may take into the receiver's custody and control the property over which the receiver is being appointed.

2. Options for the appointment of receivers

There appear to be two options with respect to the appointment of receivers:

Option 1: Codify the process for appointing a receiver

Under this option the Act would follow the ULCC/BCLI model and contain very detailed provisions related to receivership, based on those found in Saskatchewan. These provisions would displace the court rules already in place for receivership when enforcement related to a money judgment to which the proposed Act applied. It would likely be necessary to retain the receivership provisions currently in the Supreme Court Civil Rules to retain the ability to appoint receivers for certain, rare, judgments that do not require a creditor to utilize the proposed Act.

Were this option to be selected it is likely that Court Bailiffs would not be given as much of a role in the receivership as is proposed in section 74 of Saskatchewan's Act.

Option 2: Minimalist approach to the appointment of a receiver

This option would follow Alberta and simply clarify in the legislation that there is the ability for a court to appoint a receiver. It is not clear that it is necessary to codify what the court must consider when determining whether to appoint a receiver given the common-law that has already arisen around such considerations. The benefit to codification is clarity, the risk with it is that the considerations are narrowed and made static. Similarly, there does not seem to be any indication that the court requires guidance as to the qualifications a person must possess in order to be appointed as a receiver. In the absence of existing issues, it would be preferable to not codify these requirements

Recommendation:

It is recommended that British Columbia's legislation not include detailed provisions related to the appointment and supervision of receivers. In the apparent absence of issues with Rule 10-2 of the Supreme Court Civil Rules, and the common law that has arisen in relation to the appointment of receivers, there does not appear to be a need for codification.

Questions:

1) Should British Columbia codify the process for appointing receivers?

a. If yes, should Rule 10-2 be amended or should the provisions be in any new money judgment enforcement legislation?
b. If yes, what aspects of receivership should be codified?
c. If yes, should a Court Bailiff be given the authority to supervise receivers?

XVIII. How to deal with claims to proceeds from disposition by a Court Bailiff

When a Court Bailiff disposes of property it is necessary for the Court Bailiff to deal with the proceeds. The Uniform Act and Saskatchewan establish "distributable funds" that are to be paid to Judgment Creditors and other parties; however, there is additional complexity because certain proceeds are excluded from the distributable fund.

Section 180 (1) of the Uniform Act provides that "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." However, exempt property (or portion exempt) and the portion of the proceeds to which a third party is entitled are said to not form part of the distributable fund. Section 181 (2) of the Uniform Act provides that interests with priority over the judgments being enforced are not prejudiced by any provision that relates to distribution.

A key question is whether such claims should be dealt with as part of the distribution of a fund. The purpose of excluding the property from the fund is to ensure that the third-party claimant is not prejudiced by the enforcement action. However, if legislation were to be worded such that distribution of a fund does not prejudice the third-party (i.e., they get paid out in priority) then there may be no reason to deal with these claims separately from the order of distribution for the fund.

1. Approach of other jurisdictions

Both Alberta and Saskatchewan exclude certain third person claims to proceeds from the disposition of property by a Court Bailiff.

Alberta follows the Uniform Act formulation relatively closely; however, Alberta is more specific in excluding priority claims from a distributable fund. Section 96 of Alberta's *Civil Enforcement Act* states:

> **Applies to all distributions**
> **96 (1) …**
> (3) Nothing in this Part other than section 102 shall be construed so as to prejudice any right to money that is based on an interest, including a security interest or an encumbrance,
> (a) in the money, or
> (b) in the property from which the money is derived, where that interest has priority over the relevant writs.

(4) Where a distributing authority receives money in which a person has a security interest or other interest that has priority over the claims of enforcement creditors, the distributing authority must pay to that person the money to which the person is entitled, and **any money paid under this section does not form part of a distributable fund**.

Section 107 of Saskatchewan's *Enforcement of Money Judgments Act* uses a different, more explicit, formulation for what is and is not included in a distributable fund:

Fund to be constituted

107…

(2) Subject to subsection (5), the fund mentioned in subsection (1) shall comprise the following:

(a) money received by the Court Bailiff in relation to an enforcement charge, whether or not the money is received as a result of an enforcement measure with respect to the Judgment Debtor's property;

(b) money that is otherwise identified in this Act or any other Act or law as distributable or allocated to an amount recoverable from the Judgment Debtor, or any portion of that money;

(c) the portion of the proceeds of a sale of property of the Judgment Debtor pursuant to a security interest, charge or lien having priority over an enforcement charge affecting the property <u>in excess of the amount required to discharge the obligation to which the security interest, charge or lien relates</u>;

(d) the portion of the proceeds of sale of property subject to a landlord's right of distress, after deducting the amount to which the landlord is entitled;

(e) money received by the Court Bailiff in relation to a judgment or order, that is:

(i) issued in favour of a Judgment Creditor against a person other than the Judgment Debtor by reason of that person's failure to perform an obligation imposed by this Act with respect to the enforcement of a judgment against the Judgment Debtor; or

(ii) issued after finding that a Judgment Creditor or other person provided inaccurate information about the amount or priority of their claim or whose objection to a distribution is not successful.

…

(5) **The fund shall not include**:

(a) an amount payable to or received by:

(i) a recipient or a trustee on the recipient's behalf pursuant to *The Enforcement of Maintenance Orders Act, 1997*; or

(ii) the Crown or a trustee on its behalf pursuant to *The Income Tax Act, 2000*, *The Revenue and Financial Services Act* or any other prescribed Act;

(b) an amount payable to a [third person] claimant as provided in clause 83(4)(b);

(c) the amount recovered from seizure of property in enforcing a [intentional physical inury or criminal code] judgment mentioned in clause 97(3)(a) or (b) that would otherwise have been exempt, which amount, subject to subsection 110(1), shall be paid to the person in whose favour the judgment or order mentioned in the relevant clause was issued;87

(d) the amount recovered from seizure of property in enforcing a judgment [in an action arising from the conversion, breach of fiduciary obligation or fraud] mentioned in clause 97(2)(d), which amount, subject to subsection 110(1), shall be paid to the person in whose favour the judgment mentioned in clause 97(2)(d) was issued; or

(e) any prescribed amount.

Section 110 (3) of Saskatchewan's *Enforcement of Money Judgments Act* sets out the order of distribution for the fund; however, section 110 (1) provides the Court Bailiff with priority over all other claims:

Distribution

110 (1) The fees and costs of a sheriff and a receiver incurred in carrying out enforcement measures constitute a claim having priority over any other claim.

2. Options related to treatment of claims to proceeds from disposition by a Court Bailiff

There appear to be two primary options with respect to protecting a Judgment Debtor's exempt property and a number of sub-options:

1. Deal with priority claims prior to the establishment of a fund:
    a. Use the Uniform Act approach;
    b. Use the Alberta approach; or
    c. Use the Saskatchewan approach;
2. Deal with all claims to proceeds in a distribution scheme for a fund.

Option 1a: Use the Uniform Act approach

Under this option, the Act would simply say that priority claims are not prejudiced. The distribution provision setting out the order of priority for entitlement to the distributable fund would not explicitly deal with distribution to priority claims, therefore, the unstated implication would be that priority claims are to be paid out separately from the distributable fund.

Option 1b: Use the Alberta approach

Under this option, the Act would say that priority claims are not prejudiced and would go on to specify that the money does not form part of a distributable fund.

Option 1c: Use the Saskatchewan approach

Under this option, one provision would make the general statement that what is included in the fund excludes amounts due to people with priority claims and a second provision would set out additional amounts that are specifically excluded from a distributable fund.

Option 2: Deal with all claims to proceeds in a distribution scheme for the fund

Under this option, if a third party has a right to property then their right to the proceeds from the disposition of that property will be dealt with as part of the order of distribution, rather than being excluded from a distributable fund. There are a number of implications to this policy change:

1) The payment of money to the third party would be included in the notice of distribution;
2) Certain payments would have priority over the third party claim to proceeds.

Including the payment of money to the third party in the notice of distribution should not be problematic. In fact, in certain cases, including this information may help explain to Judgment

Creditors why the sale of certain assets (e.g., a million-dollar yacht) resulted in such a small distributable fund.

Including everything in the order of distribution should better clarify the order of priority. Conceptually there is one pot of money created by the disposition of a particular asset. Having a single section that generally sets out the order of priority to this money, including the portion that may be claimed as exempt or by a third party, would seem clearer than having three separate sections that have to be read together in order to determine who is entitled (i.e. one section that mostly deals with the priority entitlement to the money, but two separate sections that exclude certain portions from that distribution).

Questions:

1) Should all the proceeds from the disposition of an item of property be considered a single fund and should one provision deal with the order of distribution of these proceeds?
    - If so, how should the claims excluded by other legislation be incorporated into a single coherent order of priority? The following order of distribution is proposed:
        1. Court bailiff fees and expenses;
        2. an amount payable to a co-owner or successful third person claimant,
            - i.e. a person who establishes the property sold (or portion of the property) did not belong to the Judgment Debtor;
        3. an amount payable pursuant to Crown or a trustee on its behalf pursuant to the *Income Tax Act*, *Revenue and Financial Services Act* or any other prescribed Act;
        4. an amount payable pursuant to the *Enforcement of Maintenance Orders Act*;
        5. An amount that is exempt for all but a certain class(es) of person,
            - Judgments owing for intentional physical injury or criminal code convictions,
            - Judgments arising from conversion, breach of fiduciary obligation or fraud;
        6. Exempt property;
        7. From this point it is proposed to follow the order set out in Saskatchewan's 110 (3).
    - If it is preferred to exclude certain property from the distributable fund, is this necessary due to the relationship of the proposed legislation to other legislation, if so how?

- If it is preferred to exclude certain property from the distributable fund, what model should be used to address the exceptions and clarify what is not to be included as part of the distributable fund?
    - Uniform Act model?
    - Alberta Act model?
    - Saskatchewan Act model?
    - Other model?

XIX. Should the Act include the Doctrine of "Marshalling"

Under the Doctrine of Marshalling, if a person has more than one creditor, a junior creditor (who is subordinate in interest and only has an interest in one security) can apply for an order requiring a senior creditor (who can enforce against both the junior creditor's security and other types of security) to enforce against security other than the junior creditor's security.

The Doctrine of Marshalling is a common-law concept; it should be available to junior creditors without the necessity of a specific reference in the proposed statute. However, it may be desirable to extend the Doctrine of Marshalling to non-creditor third parties who have an interest in the Judgment Debtor's property (e.g., co-owners). A Court Bailiff's ability to seize and sell co-owned property will be an innovation in BC law. The proposed legislation already seeks to minimize the prejudice to these third parties and extending the Doctrine of Marshalling to third parties may serve to further minimize unnecessary disruption to third parties.

1. Approach of other jurisdictions

No other jurisdiction has extended the Doctrine of Marshalling to co-owners or people with a third party claim to an interest in the Judgment Debtor's property.

2. Options related to the Doctrine of "Marshalling"

There appear to be three options with respect to the incorporation of the Doctrine of Marshalling into the proposed Act:

Option 1: Do not extend marshalling to non-creditor third parties

Under this option the legislation would not extend the Doctrine of Marshalling to co-owners or other people with a third party claim to an interest in the Judgment Debtor's property. Junior creditors would still be able to rely upon the common-law.

Option 2: Add a provision to the proposed legislation that simply enables a co-owner to apply for an order requiring a Court Bailiff to enforce against other property

Essentially, under this proposal a co-owner, or third-party claimant, would be able to apply to court to prevent the sale of property in which they have an interest if they can satisfy the court that the Judgment Debtor has other assets that could be used to satisfy the outstanding judgments.

The advantage to this option is that it would be relatively straightforward. The disadvantage is that some concepts applicable to secured parties may not neatly transfer to co-owners and parties with other interests in the property.

Option 3: Codify a modified version of the Doctrine of Marshalling that will apply to third parties

With this option, the Doctrine of Marshalling would be used as a model for protections provided to third parties. However, the regime would be codified in the proposed legislation.

Proposed Approach:

There does not appear to be a downside to extending the Doctrine of Marshalling to co-owners and parties with an interest in a portion of the Judgment Debtor's property. The expense of such actions should minimize improper use. Plus, most cases should settle without the necessity of an application. A co-owner will need to collect information about a Judgment Debtor's other assets for the action to be successful. If a co-owner (third party) provides a Court Bailiff with valid information about the Judgment Debtor's other assets, then a Court Bailiff will likely be willing to suspend disposition (or release the property to the co-owner with a notice of seizure) and attempt to satisfy the judgments with that other property.

Codification would allow refinement of the Doctrine of Marshalling as it applies to the enforcement of money judgments. The legislation could specify how to resolve conflicts, if there are a number of third parties who have an interest in the Judgment Debtor's property and they each give the Court Bailiff information that includes assets in which the others have an interest.

Questions:

1) Should the proposed legislation extend the Doctrine of Marshalling to the disposition of property in which a third party has an interest?
    - If so, should we simply rely upon common-law or attempt to codify the concept as it applies to the enforcement of money judgments?

XX. Additional Questions

1) Both Saskatchewan and Alberta define "judgment" to include: any order, decree, duty or right, certificate or other right for the payment of money that may be enforced as, or in the same manner as, a judgment of the court. This allows these non-court orders to be directly registered in the judgment registry and enforced by Court Bailiffs in those jurisdictions. Eliminating the need to file or otherwise register the judgment with the court prior to enforcement appears to make sense.
    - Do you have any concerns with this proposal?
2) Currently section 1 of the *Commercial Tenancy Act* gives a statutory priority to a Landlord's right of distress and prevents a tenant's personal property on the landlord's premises from being seized unless the landlord is paid the outstanding rent. This priority exists even if the judgment pre-dates the right of distress. The Uniform Act (section 57) proposes enshrining the landlord's priority in the money judgment enforcement legislation in a slightly modified fashion. Saskatchewan has departed from the Uniform Act and provides "an enforcement charge has priority over a right of distress… exercised after the enforcement charge came into existence."
    - Should BC maintain a landlord's statutory priority, regardless of when the right of distress arose? Or, should BC follow Saskatchewan and treat a landlord's right of distress the same as any other debt, with priority established at the time the right arose?
3) The Uniform Act (section 65) sets out a "redemption period" and requires notice to several parties aside from the Judgment Debtor, including subordinate creditors. Upon payment of the amount recoverable under all judgments the property is to be "released" from seizure (section 66). However, the Act does not explicitly state the effect of redeeming the property.

    In contrast, section 69 of the Uniform Act specifies that a "purchaser" takes the Judgment Debtor's interest in the property free of any judgments being enforced or any interests subordinate to the judgment. And, section 74 of the Uniform Act, which gives a person with a subordinate interest in land the ability to retain a fixture or crop by payment of the amount owing on judgments, specifies the interest that the subordinate purchaser takes in the property.
    - Should the proposed Act specify the interest that a person who redeems personal property (under an equivalent to section 66 of the Uniform Act) takes in the property?
4) BC will likely generally follow Saskatchewan with respect to provisions related to the seizure of securities. The general intent of the provisions is to give a Court Bailiff the ability to deal with securities in the same way that the Judgment Debtor could in order

to facilitate sale. There is no intent to impose liability on the Court Bailiff in relation to securities that have been seized.

- Do you have any concerns with utilizing Saskatchewan's legislation as a starting point for provisions dealing with the seizure of securities?
- Do you have any recommendations for provisions that you believe would make securities a more attractive asset to seize and sell?
- Do you agree with the provisions that attempt to address the unique issues associated with the seizure and sale of securities of closely held corporations?

5) There is currently no Canadian legislation with provisions specific to the seizure and sale of cryptocurrency.
    - Should the proposed Act include provisions to facilitate the seizure and sale of cryptocurrency? Or should the proposed approach to obtaining information about a Judgment Debtor's assets be enough to obtain the codes necessary to seize and dispose of cryptocurrency?
    - If there are additional issues related to the seizure and disposition of cryptocurrency please describe these issues and, if possible, suggest how the legislation should attempt to address the issues?
6) It has been suggested that the new legislation should potentially depart from the Uniform Act (and Alberta and Saskatchewan) and specifically enshrine a "case management" model of judgment enforcement, somewhat similar to the Family Maintenance Enforcement Program. Under the proposed model the program would have broad powers of seizure and sale; however, the enforcement program would take a more interventionist and holistic approach and focus on establishing and monitoring reasonable and sustainable payment plans.
    - Would you support such an approach?
    - Should the establishment of a Family Maintenance Enforcement Program-type office be limited to certain types of debts, either by monetary value and/or by the type of debtor or debt (individual vs. commercial, tort vs. contract)?

Appendix A: Summary of Questions

Part 2

III. Provisions that will not be carried forward to the new Act

1. Do you have any concerns about not carrying forward the listed sections?
2. Do you have any general comments on the proposals contained in the *Uniform Civil Enforcement Money Judgments Act*?

Part 3

I. Pro-Rata Sharing among Judgment Creditors

1) What type of regime should the Act have for addressing priority between Judgment Creditors?
    - Pro-rata sharing,
    - First-to-register, or
    - Maintain the status quo and have no priority between Judgment Creditors.
2) If pro-rata sharing is adopted, what should the amount of the preferential share be?
    - Should the preferential share be tied to the value of the proceeds from the sale of the Judgment Debtor's property or to the value of the judgment being enforced?
    - Should there be a requirement that a Judgment Creditor provide information that specifically assisted the Court Bailiff in seizing the property in order to qualify for the preferential share? Or, is being the first Judgment Creditor to give an instruction to a Court Bailiff always enough to get a preferential share for all enforcement activities while that instruction is in force?
3) If the status quo is maintained or a first-to-register regime is adopted, should the *Creditor's Assistance Act* continue to be used?
    - If so, should the *Creditor's Assistance Act* be amended?

II. Preservation orders

1) Should British Columbia:
    d. Adopt preservation orders to the exclusion of all present means of protecting assets before judgment;
    e. Maintain the status quo; or
    f. Adopt preservation orders but continue to allow creditors to apply for Mareva injunctions and prejudgment garnishment?

2) If you support option 3, should the legislation specifically acknowledge the availability of a Mareva injunctions as a method of preservation?
    - Should the legislation set out the procedure for applying for Mareva injunctions?
3) If you support option 3, do you have any concerns with retaining the pre-judgment garnishment provisions relatively unchanged?
    - If pre-judgment garnishment was to be changed at a later time, what changes would you like to see?
4) If you support option 4, should the legislation specifically acknowledge the availability of a Mareva injunctions and prejudgment garnishment?

III. Limitation periods for registering and enforcing judgments and for the expiry of judgments

1) Should British Columbia adopt a two-year limitation period, within which a creditor must register a judgment, or should registration be voluntary?
2) Should British Columbia allow a registered judgment to remain registered and valid indefinitely (i.e., no limitation period once registered)?
    - If so, should the creditor have to pay a fee to renew their registration?

IV. Approach to seizure and exemption of Income

1) Should all types of income have the same requirements in relation to seizure?
2) Should all types of income be exempted in a similar manner, or should income other than employment remuneration only be subject to an exemption claim if the amount of employment remuneration that may be claimed as exempt exceeds the amount received?

V. Expiry of a notice of seizure for wages

1) Should a notice of seizure for wages expire after a specified period, or should it endure until the debt is satisfied or the notice is otherwise cancelled?
    - If the notice of seizure should expire after a specified period, what should that period be?
    - If the notice of seizure should not be set to expire after a specified period, who should be able to cancel the notice, and by what means?

VI. Section 52 of the Court Order Enforcement Act – preference to 3 months wages

1) Is section 52 of the *Court Order Enforcement Act* currently being used?
    - If so, why? What are the benefits of section 52, as opposed to the regime set out in the *Employment Standards Act*?

VII. Deeming of Election upon seizure of account

1) Should the giving of a notice of seizure be deemed to include a demand for payment for all types of accounts?
    - Should the giving of a notice of seizure only be deemed to include a demand for payment for trusts?
2) Should the giving of a notice of seizure be deemed to include a request/election to minimize all non-money benefits, other than health benefits, associated with employment?
    - Are there any other types of benefits that should be excluded from the application of this deeming provision?

VIII. Obtaining Information about Judgment Debtor's assets

1) Which is your preferred option, and why?
2) Do you have any suggested refinements to the options listed?

IX. Interests in Land that are not registered in the Land Title Office

1) Do you have any concerns with Option 3 being the preferred approach?
2) Is it necessary to specify that registration of a judgment creates an enforcement charge over interests in land that are incapable of being registered?
3) Do you have concerns about deeming a Judgment Debtor to have an unregistered interest in land owned by certain third parties (such as spouses and trustees)?
    a. If yes, is there any way to address these concerns?
4) Are there any additional circumstances where a Judgment Debtor should be deemed to have an interest in land owned by a third party (i.e., are there any other people with whom a Judgment Debtor may have a special relationship that has the likelihood that the Judgment Debtor has an equitable interest in land)
5) Do you have any concerns about limiting the ability to seize and dispose of interest in Crown land?
6) What interests in Crown land are most important to be able to seize (i.e. what types of interests other than titles; permits, licences or leases granted under the *Coal Act*, *Petroleum and Natural Gas Act*; and *Geothermal Resources Act* should be included in the initial regulations)?

X. Intellectual Property

1) Do you support some or all of the refinements proposed in Option 4, if not you may disregard questions 2-8?
2) Do you agree that the definition of "intellectual property" should use the word "proprietary" instead of "property"?

3) Should the period between seizure and disposition of intellectual property be longer than the 20-day period that would apply to other forms of personal property?
4) Should any interested party be given a specific right to oppose the disposition of intellectual property due to the long-term diminishment of the value of that property?
    - If yes, is 30 days sufficient time to make such an application
    - If there should be no specific right, do you believe that the overarching requirement for all enforcement actions under the Act to be "commercially reasonable" requires that the long-term value of the asset be considered?
5) Do you agree with expanding the notice requirements upon seizure of intellectual property to include an owner of the intellectual property other than the Judgment Debtor, a licensee of the property who would reasonably be considered to be impacted by a disposition, and an author, if the property being seized is a copyright?
6) The intent of placing a Court Bailiff in the shoes of the Judgment Debtor is to ensure that they are able to maximize the value of the intellectual property. Should there be specific provisions that limit a Court Bailiff's liability if they seize intellectual property?
    - Is it preferable to make the Court Bailiff the agent of the Judgment Debtor, instead of placing the Court Bailiff in the place of the Judgment Debtor, in order to minimize risk?
    - Does it strike the right balance of fairness to limit a Judgment Debtor's ability to deal with property while compelling them to retain obligations in relation to that property? Should the Judgment Debtor simply have a duty to bring obligations to the attention of Court Bailiffs? If so, would giving a Court Bailiff the ability to delegate responsibilities associated with the intellectual property to others (including the Judgment Debtor) strike the right balance?
7) Should a Court Bailiff be able to waive moral rights, in limited circumstances?
8) Should the Act have provisions specifically addressing the seizure and disposition of trade secrets?
    - If not, should trade secrets be specifically exempted from seizure?
    - If so, do the proposed provisions adequately address the unique issues related to trade secrets?
    - Do you have suggestions related to provisions related to trade secrets?

XI. Trusts

1) Do you have any concerns with the seizure of a trust continuing indefinitely?
    - If so, are there any modifications that would make this provision acceptable?
2) Do you have any concerns with seizure of a trust resulting in a deemed election to receive trust property (i.e., deem a notice of seizure to include a demand/request for payment)?
    - If so, are there any modifications that would make this provision acceptable?

3) Do you have any concerns with seizure of a trust making certain trust terms related to the trustee and location of assets null and void?
    - If so, are there any modifications that would make these provisions acceptable?
    - If so, do you have specific concerns related to making a trustee personally liable if they violate the proposed provisions?
4) Do you have any suggestions for additional provisions that would help ensure trust assets are available for seizure?

XII. Severance of Joint Tenancy

1) Do you support option 3?
    - If not, which option should British Columbia utilize to sever joint tenancies?
    - Please explain the reason for the option you have chosen.
2) If you support Option 3, do you agree that the general law of joint tenancy is sufficient to sever the joint tenancy if a Court Bailiff were to sell a Judgment Debtor's interest in land?
    a. If so, do you agree it is only necessary to ensure that the death of a Judgment Debtor will not cause a Judgment Creditor to lose their interest in the Judgment Debtor's jointly owned property?
3) Do you agree that, for property other than land, third parties (banks, ICBC) should be protected, if they transfer property into the sole name of the joint co-owner?

XIII. Prohibition on seizing property that may be exempt

1) Do you agree with the Option 2 as the proposed approach?
    - Should a Court Bailiff be allowed to take possession of motor vehicles as long as they believe that they can dispose of the motor vehicle for more than the maximum claimable exemption amount?
    - Should a Court Bailiff be allowed to maintain the seizure of land that is the principal residence of a Judgment Debtor even if the land is assessed to be worth less than the maximum claimable exemption amount?

XIV. Co-owners not able to apply for exemptions if not dependents

1) Should co-owners be able to make an exemption claim?
    - If yes, when should a co-owner be able to make an exemption claim?
        5. On the same basis as a dependant?
        6. Only if the Judgment Debtor's intent is unknown?
        7. Only if there is other property of the same type that has been claimed as exempt?
        8. Both options 2 & 3?

2) Is there a need for any additional limitations or requirements, to prevent misuse of exemption claims by a co-owner?

XV. Scope of protection from seizure for Registered Plans

1) Should the legislation protect registered plans from both non-legal remedies and legal processes?
    - If legislation should protect registered plans from non-legal remedies, should that provision be located in the proposed legislation, located in another existing Act or located in its own separate new Act?
    - If legislation to protect registered plans from non-legal remedies is located in a separate Act should the proposed legislation have a provision that specifically references the exemption in that other Act?
        - i.e. Should the proposed legislation have a provision stating something to the effect of, "In accordance with section X of the X Act, registered plans as defined in that Act are exempt from seizure under this Act.

XVI. Additional Property Exemptions

1) Do you support adding RDSPs to the list of exemptions?
    - If not, please explain the reason for the objection.
2) Do you support adding RESPs to the list of exemptions?
    - If not, please explain the reason for the objection.
3) Do you support adding one computer to the list of exemptions?
    - If not, please explain the reason for the objection.
    - If so, what would be an appropriate maximum value to allow?
4) Do you support adding one cell phone to the list of exemptions?
    - If not, please explain the reason for the objection.
    - If so, what would be an appropriate maximum value to allow?
5) Do you support adding one bicycle to the list of exemptions?
    - If not, please explain the reason for the objection.
    - If so, what would be an appropriate maximum value to allow?
6) Do you support adding electric bicycles to the definition of vehicle?
    - If not, please explain how electric bicycles should be classified for the purposes of exempt property.
7) Do you support providing authority that would allow additional property to be exempted from seizure by regulation?
    - If not, please explain the reason for the objection.

XVII. Appointment of Receivers

1) Should British Columbia codify the process for appointing receivers?

a. If yes, should Rule 10-2 be amended or should the provisions be in any new money judgment enforcement legislation?
b. If yes, what aspects of receivership should be codified?
c. If yes, should a Court Bailiff be given the authority to supervise receivers?

XVIII. How to deal with claims to proceeds from disposition by a Court Bailiff

1) Should all the proceeds from the disposition of an item of property be considered a single fund and should one provision deal with the order of distribution of these proceeds?
    - If so, how should the claims excluded by other legislation be incorporated into a single coherent order of priority? The following order of distribution is proposed:
        1. Court bailiff fees and expenses;
        2. an amount payable to a co-owner or successful third person claimant,
            - i.e. a person who establishes the property sold (or portion of the property) did not belong to the Judgment Debtor;
        3. an amount payable pursuant to Crown or a trustee on its behalf pursuant to the *Income Tax Act*, *Revenue and Financial Services Act* or any other prescribed Act;
        4. an amount payable pursuant to the *Enforcement of Maintenance Orders Act*;
        5. An amount that is exempt for all but a certain class(es) of person,
            - Judgments owing for intentional physical injury or criminal code convictions,
            - Judgments arising from conversion, breach of fiduciary obligation or fraud;
        6. Exempt property;
        7. From this point it is proposed to follow the order set out in Saskatchewan's 110 (3).
    - If it is preferred to exclude certain property from the distributable fund, is this necessary due to the relationship of the proposed legislation to other legislation, if so how?
    - If it is preferred to exclude certain property from the distributable fund, what model should be used to address the exceptions and clarify what is not to be included as part of the distributable fund?
        - Uniform Act model?
        - Alberta Act model?
        - Saskatchewan Act model?
        - Other model?

XIX. Should the Act include the Doctrine of "Marshalling"

1) Should the proposed legislation extend the Doctrine of Marshalling to the disposition of property in which a third party has an interest?
    - If so, should we simply rely upon common-law or attempt to codify the concept as it applies to the enforcement of money judgments?

XX. Additional Questions

1) Both Saskatchewan and Alberta define "judgment" to include: any order, decree, duty or right, certificate or other right for the payment of money that may be enforced as, or in the same manner as, a judgment of the court. This allows these non-court orders to be directly registered in the judgment registry and enforced by Court Bailiffs in those jurisdictions. Eliminating the need to file or otherwise register the judgment with the court prior to enforcement appears to make sense.
    - Do you have any concerns with this proposal?
2) Currently section 1 of the *Commercial Tenancy Act* gives a statutory priority to a Landlord's right of distress and prevents a tenant's personal property on the landlord's premises from being seized unless the landlord is paid the outstanding rent. This priority exists even if the judgment pre-dates the right of distress. The Uniform Act (section 57) proposes enshrining the landlord's priority in the money judgment enforcement legislation in a slightly modified fashion. Saskatchewan has departed from the Uniform Act and provides "an enforcement charge has priority over a right of distress… exercised after the enforcement charge came into existence."
    - Should BC maintain a landlord's statutory priority, regardless of when the right of distress arose? Or, should BC follow Saskatchewan and treat a landlord's right of distress the same as any other debt, with priority established at the time the right arose?
3) The Uniform Act (section 65) sets out a "redemption period" and requires notice to several parties aside from the Judgment Debtor, including subordinate creditors. Upon payment of the amount recoverable under all judgments the property is to be "released" from seizure (section 66). However, the Act does not explicitly state the effect of redeeming the property.

    In contrast, section 69 of the Uniform Act specifies that a "purchaser" takes the Judgment Debtor's interest in the property free of any judgments being enforced or any interests subordinate to the judgment. And, section 74 of the Uniform Act, which gives a person with a subordinate interest in land the ability to retain a fixture or crop by payment of the amount owing on judgments, specifies the interest that the subordinate purchaser takes in the property.

- Should the proposed Act specify the interest that a person who redeems personal property (under an equivalent to section 66 of the Uniform Act) takes in the property?

4) BC will likely generally follow Saskatchewan with respect to provisions related to the seizure of securities. The general intent of the provisions is to give a Court Bailiff the ability to deal with securities in the same way that the Judgment Debtor could in order to facilitate sale. There is no intent to impose liability on the Court Bailiff in relation to securities that have been seized.
    - Do you have any concerns with utilizing Saskatchewan's legislation as a starting point for provisions dealing with the seizure of securities?
    - Do you have any recommendations for provisions that you believe would make securities a more attractive asset to seize and sell?
    - Do you agree with the provisions that attempt to address the unique issues associated with the seizure and sale of securities of closely held corporations?
5) There is currently no Canadian legislation with provisions specific to the seizure and sale of cryptocurrency.
    - Should the proposed Act include provisions to facilitate the seizure and sale of cryptocurrency? Or should the proposed approach to obtaining information about a Judgment Debtor's assets be enough to obtain the codes necessary to seize and dispose of cryptocurrency?
    - If there are additional issues related to the seizure and disposition of cryptocurrency please describe these issues and, if possible, suggest how the legislation should attempt to address the issues?
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    - Would you support such an approach?
    - Should the establishment of a Family Maintenance Enforcement Program-type office be limited to certain types of debts, either by monetary value and/or by the type of debtor or debt (individual vs. commercial, tort vs. contract)?