

LAW REFORM
COMMISSION
OF
NOVA SCOTIA



Enforcement of Civil Judgments

Final Report - August 2014

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Enforcement of Civil Judgments

**Law Reform Commission of Nova Scotia
August 2014**

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

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The Law Reform Commission receives funding from the Government of Nova Scotia and from the Law Foundation of Nova Scotia. The Commission gratefully acknowledges this financial support.

Acknowledgements

We acknowledge with thanks the many contributions of the members of our advisory group for this project (indicated positions are as of each individual's participation on the advisory group):

Annette Boucher QC	Prothonotary, Supreme Court of Nova Scotia
Donn Fraser	MacIntosh, MacDonnell & MacDonald
Christopher Madill	Stewart McKelvey
Justice John D. Murphy	Supreme Court of Nova Scotia
Laurel Purcell	Sheriff, County of Halifax
Gus Richardson, QC	AD+REM Alternative Dispute Resolution Services Inc
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We also appreciate the comments we received in response to our first and second Discussion Papers, from:

Frank Bennett
Vincent Calderhead
Canadian Bankers Association (per Nathalie Clark)
Civil Constables Association of Nova Scotia (per Michael Lutes)
Credit Counselling Services of Atlantic Canada Inc. (per John D. Eisner)
C.R.B. Dunlop
John Fitzpatrick, QC
Claire McNeil & Nicole Slaunwhite
Jonathan Saumier
D.A. Rollie Thompson, QC

We also gratefully acknowledge the assistance and advice of Professor Tamara Buckwold, Sheriff Allan Coley, Credit Counselling Services of Atlantic Canada Inc. (Rob Boulanger), Professor Ron C. C. Cuming, Sheriff Peter Legere, Valerie MacKenzie, Caroline McInnes, Sheriff David MacNeil, Janice McNenly, Justice Gerald R.P. Moir, the Nova Scotia Department of Justice (Kenneth Winch, Diane Zwicker, Yetta Withrow and Carla MacKinnon), the Nova Scotia Participatory Food Costing Project (Cynthia Watt), the Uniform Law Conference of Canada, and Donovan Waters, Q.C.

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SUMMARY

This report recommends the adoption of comprehensive, modern judgment enforcement legislation in Nova Scotia. Based on the Uniform Law Conference of Canada's *Uniform Civil Enforcement of Money Judgments Act*, the new legislation should provide a simplified, more effective process for enforcing judgments.

Nova Scotia's current judgment enforcement system is spread across a number of pieces of legislation, the common law, and the *Nova Scotia Civil Procedure Rules*. It lacks a robust, modern set of powers to seize different types of property, and its exemptions are significantly out of date. It is clear that many judgment creditors are not aware of the difficulties they may face in enforcing a judgment in their favour, and many are not aware of the resources available to help them. We are concerned as well that many judgment debtors are not aware of, or are given insufficient opportunity to claim the legal protections and exemptions that are available to them.

We recommend that new judgment enforcement legislation provide for a preservation order, to preserve assets which may be required to satisfy a future judgment, similar to a *Mareva* injunction. It should also provide for a streamlined system of registration of judgments in the Personal Property Registry. A judgment registered in the PPR should charge the debtor's land and personal property.

The legislation should provide for a number of avenues by which creditors may obtain information about the debtor's property and income, including a written questionnaire and an oral discovery proceeding.

All of the debtor's property, other than that specifically exempted, should be available for seizure. The legislation should provide a modernized set of powers and duties with regard to the seizure of various specific types of property, including fixtures and crops, an interest under a lease, conditional sales contract or security agreement, an existing or future debt or account, employment and other income, corporate securities, intellectual property, and land.

The legislation should exempt certain property from seizure, including a principal residence of reasonable value, property necessary for earning a livelihood, and damages arising from a personal injury.

We also recommend detailed provisions for exempting a portion of the debtor's income. A minimum floor should be set, below which no income may be seized. The threshold should increase depending on the number of the debtor's dependents, and increase automatically according to annual inflation. Medical expenses, child care and child support should be deducted from seizable income, along with amounts required to be withheld or deducted from take-home pay by law (e.g., pension contributions, union dues, etc.). Above the minimum floor, income should be subject to seizure according to a graduated scale which increases the proportion to be seized by 10% (to a maximum of 50%) as the debtor's income exceeds the minimum income threshold by increments of 10%.

Specific provisions should protect exempt income from seizure once it is paid into the debtor's bank account. Amounts which are segregated and identifiable as being from an exempt source should be exempt from seizure. The legislation should also exempt a minimum balance, equal to the debtor's exempt income for a month. Finally, we recommend that a notice of seizure of a bank account should exempt from the initial freeze of the account an amount corresponding to the debtor's exempt income for a month.

The Government of Nova Scotia should develop public education materials to accompany the new legislation. Debtors must be aware of their rights and responsibilities in the judgment enforcement process, including the exemptions and other procedural and substantive protections. Education materials should also be developed for creditors - especially those who are self-represented - to ensure they are aware of the resources available to help them locate assets and income of the debtor, and the particulars of the enforcement process.

Finally, this report examines the possibility of delegating certain duties of the Sheriff to licensed civil constables. It concludes that some duties may be delegated, including delivery of notices to debtors, employers, banks, and others. Seizure of tangible assets should not be delegated, nor the administration of the income exemption system. The office of the Sheriff should have supervision over the judgment enforcement system, including receiving and paying out seized moneys and other assets.

Recommendations:

1. The Province of Nova Scotia should adopt the *Uniform Civil Enforcement of Money Judgments Act* (the "*Uniform Act*"), subject to modifications as recommended in this report.
2. Judgment enforcement legislation should permit electronic service of documents, as long as the person to be served has confirmed in writing that service may be effected in the manner which the serving party proposes, or has previously been served in that manner and has indicated acceptance of such service.
3. Legislation should require that acceptance of electronic service must be expressly renewed at the outset of judgment enforcement proceedings, unless acceptance has been expressly indicated within one year prior.
4. Electronic service should be effective as of the time when receipt by the person being served is expressly confirmed.
5. Judgment enforcement legislation should bind the Crown in exercising any rights or remedies as a judgment creditor.
6. The legislation should permit the Crown to collect a debt through proceedings otherwise available to the Crown as specifically provided in other legislation.

7. Judgment enforcement legislation should provide that nothing in the legislation requires the Crown to disclose information that is required to be kept in confidence or protected from disclosure under the *Income Tax Act*, the *Freedom of Information and Protection of Privacy Act*, and the *Personal Health Information Act*.
8. Judgment enforcement legislation should expressly provide that no prejudgment remedy is available to secure property of the defendant in order to satisfy a judgment, except as expressly provided by the legislation.
9. Judgment enforcement legislation should substantially incorporate the attachment order currently provided for by *Civil Procedure Rule 44*.
10. Judgment enforcement legislation should substantially incorporate, in addition to priority provisions in the *Uniform Act*, provisions in the *Creditors' Relief Act* regarding priority status of liens arising from the provision of materials or services, and protection for buyers and lessees of certain goods which are not sold or leased in the ordinary course of business of the seller or lessor.
11. Judgment enforcement legislation should provide for the registration of judgments in the personal property registry to bind a debtor's interest in real property in Nova Scotia.
12. Upon registration of a judgment, a creditor should be entitled to instruct an enforcement officer to deliver to the judgment debtor a form questionnaire for disclosure of assets, as provided by section 45(1)(a) of the *Uniform Act*, with a mandatory return date ten (10) days following delivery of the questionnaire.
13. The questionnaire should be accompanied by plain language educational materials explaining the debtor's available exemptions and other rights and obligations.
14. Judgment enforcement legislation should provide that if an account is not payable to the debtor at the time it is seized, or is a future account, the account debtor shall, when the account becomes payable to the debtor, pay to the Sheriff the amount owed, or any lesser amount as stated in the notice of seizure.
15. Judgment enforcement legislation should provide an exemption for the debtor's principal residence of reasonable value. A creditor should be permitted to apply to court for an order of seizure and sale, where the value of the debtor's principal residence significantly exceeds what is reasonable for the needs of the debtor and his or her family.
16. Judgment enforcement legislation should exempt damages arising from personal injury, other than punitive damages.
17. Judgment enforcement legislation should exempt from seizure all rights, property and interests of a debtor in a registered plan. For purposes of the exemption "registered plan" should include a Registered Retirement Savings Plan, Registered Retirement Income Fund, Registered Deferred Profit Sharing Plan, Locked-in Retirement Account, Registered Disability Savings Plan, and Registered Education Savings Plan.

18. Judgment enforcement legislation should provide that a judgment debtor's interest in land may not be sold until the judgment has been registered for one year.
19. Judgment enforcement legislation should not include provisions of the *Uniform Act* that substantially abridge the property or contract rights of third parties.
20. Judgment enforcement legislation should incorporate provisions of the Nova Scotia *Civil Procedure Rules* regarding seizure of joint accounts (Rule 79.09 and 79.10) and partnership property (Rule 79.11).
21. A minimum income threshold for an individual judgment debtor should be set on the basis of Statistics Canada's Market Basket Measure for an individual in Halifax, subject to annual automatic adjustment for inflation. In 2014, the threshold should be \$1570 net income per month.
22. The resulting threshold should regularly be checked against the before tax Low Income Cut-off.
23. Alternative methods and statistical standards for a minimally adequate income should be reviewed on a regular, systematic basis, to ensure that the minimum income threshold is on the soundest possible footing.
24. A single minimum income threshold should be applicable province-wide rather than differentiated by community size.
25. The minimum income threshold amount should be based on a debtor's individual income as opposed to household income.
26. Judgment enforcement legislation should provide that where a debtor has claimed a dependant, the court may reduce the minimum income threshold only to the extent that the dependant in question is receiving income.
27. Married spouses, registered domestic partners and common law partners should be considered dependants for the purposes of the minimum income threshold, in addition to those deemed to be dependants under *Civil Procedure Rule 79.08* with reference to the *Income Tax Act*.
28. A per dependant increase in the debtor's minimum income threshold should be based on the average difference in MBM figures for Halifax as family size increases. This amount should be subject to annual, automatic adjustment for inflation, and regularly checked against the relevant LICO figures. If implemented in 2014, the threshold increase should be \$430 net income per month, per dependant.
29. Tax credits for low income Nova Scotians (e.g., HST credits, the Nova Scotia Affordable Living Tax Credit, and the Nova Scotia Poverty Reduction Tax Credit) should be exempt

from seizure to enforce a judgment, and should therefore not be considered income for purposes of calculating the debtor's income exemption.

30. New judgment enforcement legislation should permit deductions for child care expenses, medical expenses and child and spousal support payments, in addition to those deductions provided under the *Uniform Act*.
31. Judgment enforcement legislation should require the Sheriff to give effective notice to the debtor of permitted deductions, and provide an appropriate period of time for the debtor to claim applicable deductions, before any enforcement action is taken against the debtor's income.
32. The Sheriff should be responsible to receive, examine and verify the debtor's claimed deductions, and advise the employer of the resulting net income upon which the calculation of seizable income may be made.
33. A judgment debtor's income should be subject to seizure according to a graduated scale which increases the proportion to be seized by 10% (to a maximum of 50%) as the debtor's income, after deductions, exceeds the minimum income threshold by increments of 10%.
34. Judgment enforcement legislation should exempt from seizure funds in the debtor's bank account, to the extent they are segregated and identifiable as being from an exempt source, or as exempt pursuant to the legislation's provisions for exempting a portion of the debtor's income.
35. An exemption should also apply to a minimum balance in the debtor's account, equivalent to the debtor's exempt income for a month. The amount so protected would include any segregated and identifiable funds as described in the previous recommendation. The Sheriff should have discretion to vary the amount, to account for irregular income.
36. Financial institutions holding funds payable to the debtor should be liable for any amounts paid to the Sheriff where the institution ought to have been aware that the funds in the account were exempt. Liability would apply (a) with regard to bank accounts that had only ever held exempt funds, and (b) where that fact is, or ought to be known to the institution, either because the institution has been expressly notified of the fact, or because the amounts are from an exempt source (i.e., statutory benefits) identifiable as such by the institution.
37. Judgment enforcement legislation should provide that the notice of seizure of a bank account must exempt from restraint the debtor's monthly minimum threshold amount, and any further amounts that the Sheriff is able to conclude from available information will be exempt.
38. The legislation should similarly exempt from restraint a bank account which is entirely exempt, because it has only ever held exempt income, where that fact is known or ought to be known to the bank.

39. The legislation should require a creditor who delivers an instruction to seize income or a bank account to provide any information it has that may be relevant to calculating the debtor's income exemption, such as income level and number of dependents.
40. Suspension of provincial licenses and passports, and other such passive remedies, should not be available as a remedy in the civil money judgment enforcement context.
41. Judgment enforcement legislation should provide for a system of screening Atlantic Lottery Corporation prizes greater than one thousand dollars payable to a judgment debtor. Prizes so payable should be held by the Atlantic Lottery Corporation, and the Sheriff notified.
42. The Province of Nova Scotia should develop comprehensive public education materials which describe the nature of Nova Scotia's judgment enforcement system, and the rights and responsibilities of creditors, debtors, enforcement officers, and third parties such as financial institutions.
43. Educational materials should emphasize, for prospective plaintiffs, the steps that may be involved in collecting on a judgment, and the potential costs of those actions. For judgment creditors, detailed information about the use of the land registration system and the personal property registry, and other tools for locating assets and income of the debtor, should be included, along with guidelines for issuing instructions to enforcement officers. Materials should also emphasize, especially for debtors, the legislation's asset and income exemptions and how to claim them, as well as rights to notice and other procedural protections.
44. Materials should be distributed to self-represented parties at the time when pleadings are filed. They should be available online, and in print, through court offices, Service Nova Scotia locations, credit counseling agencies, family service agencies, and trustees in bankruptcy. Information for debtors should be given at the time a judgment is issued.
45. Authority of enforcement officers under judgment enforcement legislation should be delegated, to a limited extent, to civil constables with the appropriate training and supervision.
46. Civil constables should have delegated authority to investigate assets and income of the debtor, and to deliver forms and notices to debtors, creditors and third parties.
47. Physical seizure and sale of tangible property should not be delegated.
48. Calculation of exempt income, including verification of deductions and dependants, should not be delegated.
49. Delivery of forms and notices of seizure of income should be capable of being delegated.
50. The office of the Sheriff should have oversight and responsibility for the work of civil constables who undertake delegated judgment enforcement authority.

51. The office of the Sheriff should remain responsible to collect and distribute proceeds of enforcement action, resolve disputes over allowable debtor deductions and exemptions, and disseminate basic forms and information.
52. Civil constables should be required to receive training on how to exercise enforcement authority, including investigating assets, interviewing the debtor and third parties, and delivering sensitive documents.
53. The Government of Nova Scotia should consider a regional pilot project permitting delegation of enforcement responsibilities to licensed civil constables, before the system is implemented across the province.
54. New judgment enforcement legislation should provide that judgments registered against real property prior to the legislation's coming into force take effect outside the district in which they were registered only after the transition.
55. The legislation should specifically exclude the application of judgments registered in the Personal Property Registry prior to the transition date to the debtor's real property interests, before the transition. The legislation should permit such prior registered judgments to bind land, only after the transition date.
56. The legislation should provide that judgments which were registered before the coming into force of the new legislation should have priority status in relation to competing interests in personal property which arose before the coming into force of the new legislation according to the prior legislation (e.g., the *Creditors' Relief Act* and the *Personal Property Security Act*).

INTRODUCTION

This Report presents the Commission's recommendations for the reform of the civil judgment enforcement system in Nova Scotia. The major recommendation in this report is the adoption of much of the Uniform Law Conference of Canada's *Uniform Civil Enforcement of Money Judgments Act*,¹ with certain amendments. The report explains the basic features of the *Uniform Act*, and addresses changes to it that we consider necessary and appropriate in the Nova Scotia context. We offer further recommendations concerning the administration of judgment enforcement, including the role of the Sheriff, and the importance of public education materials for debtors and creditors.

The project follows in the footsteps of other law reform initiatives in the area of civil enforcement of judgments; notably by Ontario's Law Reform Commission,² Alberta's Law Reform Institute,³ the Uniform Law Conference of Canada (ULCC)⁴ and British Columbia's Law Institute.⁵ The Manitoba Law Reform Commission has reported specifically on the issue of garnishment of wages.⁶ Modern, comprehensive reform legislation has been passed in Alberta,⁷ Newfoundland & Labrador,⁸ Saskatchewan,⁹ and New Brunswick.¹⁰ The Saskatchewan *Act* is based on a report by two legal scholars who were also on the ULCC's civil enforcement working group.¹¹ The New Brunswick *Act* is based on a report by Gleixner, LeBlanc & Morisset.¹²

For a number of reasons, the Commission's task is less onerous than it might otherwise be. We do not start, as other provinces have, with a system of arcane and archaic rules deriving from

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

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

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

⁴ *Supra* note 1.

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

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

⁷ *Civil Enforcement Act*, RSA 2000, c C-15.

⁸ *Judgment Enforcement Act*, SNL 1996, c J-1.1

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

¹⁰ *Enforcement of Money Judgments Act*, SNB 2013, c 23 (not yet in force).

¹¹ Tamara M Buckwold & Ronald CC Cuming, *Modernization of Saskatchewan Money Judgment Enforcement Law* (University of Saskatchewan, 2005).

¹² Micheline A Gleixner, Natalie H LeBlanc & Sacha D Morisset, *A Plea for a New Brunswick Judgment Enforcement Act* (2012), online: <http://professeure.umoncton.ca/umcm-gleixner_micheline/files/umcm-gleixner_micheline/wf/wf/documents/Final%20NBEJA%20%282012%29.pdf>.

different branches of common law and equity, disparate statutes and rules of procedure. Nova Scotia's system is relatively well-developed through its existing execution order - which has served as a model for reform efforts in other jurisdictions - along with the *Creditors Relief Act*¹³ and *Personal Property Security Act (PPSA)*,¹⁴ and the recent revisions to the *Nova Scotia Civil Procedure Rules*. We also benefit from the fact that, due to recent reform efforts in other jurisdictions, the current 'state of the art' across Canada is more or less apparent.

Principles of Reform

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

1. *Universal Exigibility*: All of a debtor's property should be subject to enforcement, excepting only such property as is deliberately excepted.
2. *Just Exemptions*: Such property as the debtor reasonably requires for the maintenance of his/her family should be deliberately exempt.
3. *Sharing among Creditors*: The proceeds of enforcement processes should be shared among enforcement creditors.
4. *Creditor Initiative*: the enforcement system should continue to be creditor driven.
5. *One Statute*: The entire enforcement system should be governed by one consistent, coherent and logically ordered statute.
6. *Judicial Supervision*: The enforcement system should operate with a minimum of judicial supervision, but there should be ready access to the court when directions are required.¹⁵

The underlying purpose ALRI's sixth principle - minimizing judicial involvement - is to ensure that remedies are immediately available. Once judgment is granted, as far as possible the judgment creditor ought to be able to immediately realize upon it, through the appropriate remedies, without returning to court for an additional order.¹⁶

¹³ *Creditors' Relief Act*, RSNS 1989, c 112.

¹⁴ *Personal Property Security Act*, SNS 1995-96, c 13 (PPSA).

¹⁵ ALRI, supra note 3, at 3.

¹⁶ Alberta Law Reform Institute, *Alberta Rules of Court Project: Enforcement of Judgments and Orders* (Consultation Memorandum No 12.11, August 2004) at xiv.

In regard to the first principle, we note that Nova Scotia was a pioneer in adopting a system of universal exigibility through a single remedy. The 1972 *Civil Procedure Rules* included an execution order which confirmed that all assets of the debtor other than those specifically exempted are subject to a judgment creditor's claim, enforceable through seizure and sale by the Sheriff. The Nova Scotia execution order was a major step forward over a system that provided several distinct remedies for different sorts of assets, and was recommended as a model for other jurisdictions.¹⁷

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

Scope

This report deals with the recovery of money judgments issued by the Supreme Court of Nova Scotia, the Court of Appeal, the Federal Courts, and the Small Claims Court, as well as any other judgment or order that may be enforced as a civil judgment in Nova Scotia; e.g., workers compensation assessments¹⁸ and restitution orders under the *Criminal Code*.¹⁹

The report considers the rights and obligations of judgment creditors - that is, parties who have been successful in obtaining a judgment of moneys owing to them - as well as judgment debtors, enforcement officers, and third parties such as financial institutions and others who may owe money or other property to a judgment debtor. It addresses processes for the recovery of judgment monies owing, including:

- orders that may be available prior to judgment in order to protect a defendant's property so that it is available to satisfy a future judgment;
- registration of judgments, to secure the debtor's real and personal property;
- actions that the judgment creditor can take to discover the debtor's property and income;
- actions that an enforcement officer, or delegate, can take to seize and sell or otherwise liquidate the debtor's assets;

¹⁷ CRB Dunlop, *Creditor-Debtor Law in Canada*, 2^ded (Scarborough, ON: Carswell, 1995) at 446-447.

¹⁸ *Workers Compensation Act*, SNS 1994-95, c 10, s 146(5).

¹⁹ *Criminal Code*, RSC 1985, c C-46, s 741(1).

- protection of certain assets and income that the debtor and his or her family may require in order to remain healthy and productive members of society; and,
- the distribution of funds to judgment creditors with an outstanding claim.

This report does not deal with enforcement of family maintenance orders, which is covered by a separate statute²⁰ and a separate enforcement program, following a report by this Commission in 1992.²¹ Neither do we deal with bankruptcy and related debtor-creditor legislation, nor the local enforcement of judgments granted in other jurisdictions.²²

We have also decided not to deal with the issue of fraudulent conveyances and preferential transfers - that is, improper transfers of income and assets that should be available to satisfy creditors, including judgment creditors. During the course of this project, the Uniform Law Conference of Canada has had a working group developing a uniform statute on the subject. Though Nova Scotia's legislation, the *Assignments and Preferences Act*,²³ is in need of reform, we decided not to review it in the course of this project, in light of the ULCC's work. The ULCC has now adopted the *Uniform Reviewable Transactions Act*.²⁴ It should be separately considered for adoption in Nova Scotia, with appropriate stakeholder consultation.

Background

This project arose from a 2009 report prepared for the Commission by researchers at Saint Mary's University, evaluating the Small Claims Court of Nova Scotia.²⁵ On the basis of survey research, that report concluded that the Small Claims Court was accomplishing its main objectives of providing quick, informal and affordable access to justice. The most widespread concern of survey respondents, however, had to do with the enforcement of Small Claims Court judgments.²⁶ The researchers noted the following common themes among survey responses to do with enforcement:

- lack of enforcement of payments;
- lack of mandatory deadlines for payments;
- lack of penalties for non-payment; and,

²⁰ *Maintenance Enforcement Act*, SNS 1994-95, c. 6.

²¹ Law Reform Commission of Nova Scotia, *Final Report: Enforcement of Maintenance Obligations* (November 1992).

²² See *Reciprocal Enforcement of Judgments Act*, RSNS 1989, c 388; *Enforcement of Canadian Judgments and Decrees Act*, SNS 2001, c. 30.

²³ *Assignments and Preferences Act*, RSNS 1989, c 25; *Statute of Elizabeth*, 1570 (13 Eliz 1, c. 5).

²⁴ Online: http://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0035.pdf.

²⁵ Marc W Patry, Veronica Stinson, & Steven M Smith, *Evaluation of the Nova Scotia Small Claims Court: Final Report to the Nova Scotia Law Reform Commission* (March 2009).

²⁶ *Ibid* at 85.

- the need for greater support from Sheriffs.²⁷

The report identifies enforcement as the most significant issue for reform, deriving principally from the complexity and expense of collection efforts following judgments, Small Claims Court claimants' unfamiliarity with systems for collection, and the lack of available information about the debtor's available assets.²⁸ We expect many of these concerns apply to enforcement of money judgments generally, especially where self-represented litigants are concerned.

In response to these concerns, the Nova Scotia Department of Justice requested that the Commission study the issue of enforcement of civil judgments - including judgments of the Small Claims Court but those of other courts as well. In addition, the Commission had already been asked to consider the issue of garnishment of wages as an enforcement tool, following an unsuccessful attempt to substantially revise the garnishment of wages provisions of the Nova Scotia *Civil Procedure Rules*. The garnishment project was incorporated into the more general project on enforcement of judgments. We deal with garnishment of wages in the discussion of *Uniform Act's* income seizure and exemption provisions, below.

We convened an advisory group of experts in the field of judgment enforcement law and processes to identify issues in the current system and to consider ways of improving it.²⁹ We published a Discussion Paper in November of 2011, setting our preliminary proposals for reform.³⁰ The Discussion Paper proposed the adoption of comprehensive, modern legislation to replace the various statutes and rules of civil procedure which currently govern the enforcement of judgments in Nova Scotia. The proposed statute was based on the Uniform Law Conference of Canada's *Uniform Civil Enforcement of Money Judgments Act*,³¹ modified in certain respects.

We received a number of responses to the first Discussion Paper. We were urged by some to say more about the exemption for a debtor's income, and in particular to consider options for exempting a portion of income beyond the *Uniform Act's* formula. We were also encouraged to examine certain protections for exempt income that the *Uniform Act* did not include. We undertook significant further research and deliberation on this issue and published a second Discussion Paper in February of 2013. The specific proposals are addressed in a later section.

There was generally favourable response to the proposals in the second Discussion Paper, along with suggestions for further protections for the debtor's minimally necessary income. We address those comments, as well as the responses to our first Discussion Paper, in this Report.

²⁷ *Ibid* at 86.

²⁸ *Ibid* at 90-93.

²⁹ For a list of advisory group members see above, at page 3.

³⁰ Law Reform Commission of Nova Scotia, *Enforcement of Civil Judgments* (Discussion Paper, December 2011), online: <<http://www.lawreform.ns.ca/Downloads/Enforcement%20of%20Civil%20Judgments%20-%20Discussion%20Paper.pdf>>.

³¹ *Uniform Act*, *supra* note 1.

JUDGMENT DEBTS: THE NOVA SCOTIA CONTEXT

A good deal of care is called for in the balancing of effective judgment creditor remedies, on one hand, and the debtor's interests in economic security on the other. This is so with regard to all aspects of judgment enforcement legislation and its administration, but especially in connection with exemptions for minimally necessary assets, and the seizure of income on which the debtor may well depend for food, shelter, clothing and other necessities. Judgment debtors may be subject to pre-existing disadvantage and marginalization, which can be compounded by aggressive enforcement action against necessary assets and income.

This has important implications for values of social justice and equality. It is well established that single-mother headed households are more likely to live at the poverty line than other families in Canada. Single mothers are four times more likely to live in poverty than two-parent families.³² As of 2001, the average income of single mother headed families living under the poverty line was \$10,000 below Statistics Canada's LICO poverty line.³³ Aside from single-mother headed households, children, seniors, recent immigrants, off-reserve aboriginal persons and disabled persons are the groups most likely to comprise Canada's poor.³⁴ In Nova Scotia, African Nova Scotians are among the groups most vulnerable to living in poverty.³⁵ In fact, the incidence of poverty among visible minority groups is higher in Nova Scotia than it is in Canada, on average. While the 2006 Census showed that the poverty rate for self-described visible minority Canadians overall in Canada was 22%,³⁶ the rate in Nova Scotia was 25%.³⁷ This is in contrast to the poverty rate among persons who did not self-identify as from a visible minority group, which was 9% in both Canada and Nova Scotia.³⁸

In short, a judgment enforcement system that fails to ensure and protect a basic, adequate standard of living runs the risk of compounding situations of poverty that are closely connected with the marginalization of a number of identifiable, disadvantaged groups.

³² Colin Dodds & Ronald Colman, *Income Distribution in Nova Scotia* (Halifax: GPI Atlantic, 2001) at 40, online: <<http://www.gpiatlantic.org/publications/abstracts/incdist-ab.htm>>.

³³ *Ibid* at 41.

³⁴ Brian Murphy, Xuelin Zhang and Claude Dionne, *Low Income in Canada: a Multi-line and Multi-index Perspective* (Ottawa: Ministry of Industry, 2012) at 7.

³⁵ Nova Scotia, *Poverty Reduction Strategy* (Halifax: Province of Nova Scotia, 2009), online: <http://www.gov.ns.ca/coms/specials/poverty/documents/poverty_report_2009.pdf>.

³⁶ Canada, National Council of Welfare, *Poverty Profile: Special Edition, A Snapshot of Racialized Poverty in Canada*, online: (30 January 2012) <http://epe.lac-bac.gc.ca/100/205/301/ncw-cnb/2012-09-27/www.ncw.gc.ca/servlet/ncw_povertyprofile_specialedition_e.pdf>.

³⁷ *Ibid*, Statistical Tables, online: <http://epe.lac-bac.gc.ca/100/205/301/ncw-cnb/2012-09-27/www.ncw.gc.ca/1.3bd.2t.lils_40-eng.jsp@lid=391.htm>.

³⁸ *Ibid*.

In examining the issues addressed in this paper we learned that a large proportion of the execution orders issued in Nova Scotia are given on behalf of lending agencies to collect unpaid debt. For example, 242 out of 544 execution orders issued out of the Small Claims Court in 2011, or 44.5%, were issued on behalf of credit lending agencies.³⁹ For the Supreme Court, 648 out of 802 execution orders issued (excluding 609 issued in favour of the *Workers' Compensation Board*) or 80.8%, were issued on behalf of credit lending agencies.

Our firm impression is that judgment enforcement in this province is to a very large extent taken up with collecting on defaulted commercial credit. The situation is reflective of a trend of overindebtedness that has been growing not only in Nova Scotia, but around the world.⁴⁰

Consumer overindebtedness is a social phenomenon - the result of social and economic processes - and not simply a matter of any given party being unable to meet contractual obligations to another:

The main reasons for overindebtedness can be conceptualized in many ways: unemployment, business failures, personal problems, such as illness and divorces, or excessive consumption. These events do not turn consumers into overindebted debtors overnight. Rather, the process goes through several stages, and certain decisions made before the debtor is hopelessly indebted. The debtor's coping strategies are extremely important but the creditors' actions are also of equal importance. Lending practices often contribute to the process of overindebtedness. Also debt collection practices play a crucial role, either by allowing the debtor to make ends meet or by turning a situation

³⁹ We do not claim scientific accuracy here. These were judgment creditors identified as lenders by informal recognition; e.g., Canadian banks such as The Bank of Nova Scotia, Royal Bank of Canada, Bank of Montreal, TD Bank and Canadian Imperial Bank of Commerce; credit lending agencies and smaller banks and credit unions such as Wells Fargo, CapitalOne, Citibank, President's Choice Bank, Canadian Tire Financial Services, Laurentian Bank of Canada; financing corporations such as Customer First Financing, ORegan's National Leasing; and licensed pay day lenders such as NLN Atlantic Corp. Not every one of these judgments may arise from a credit transaction, of course. But on the other hand, these are only recognizable lenders; many other execution orders may arise from credit lending transactions.

⁴⁰ Kimberley Tran and Ronald Colman, "Financial Security and Debt in Atlantic Canada" (GPI Atlantic, September 2008), online: <<http://www.gpiatlantic.org/pdf/livstand/finsec.pdf>>. See also Iain Ramsay, "A Tale of Two Debtors: Responding to Over-Indebtedness in France and England – A Story from the *Trente Piteuses*" (Mar 2012) 75: 2 Mod L Rev 212; A. Mechele Dickerson, "Consumer Over-Indebtedness: A U.S. Perspective" (2008) 43 Texas Int L J 135; Claudia Lima-Marques and Antonio Benjamin, "Consumer Overindebtedness in Brazil and the Need for New Consumer Bankruptcy Legislation" in Niemi et al eds, *Consumer Credit, Debt and Bankruptcy* (Oxford and Portland, Oregon: Hart Publishing, 2009) at 55; Johanna Niemi, "Overindebted Households and Law: Prevention and Rehabilitation in Europe" in Niemi et al eds, *Consumer Credit, Debt and Bankruptcy* (Oxford and Portland, Oregon: Hart Publishing, 2009) at 91.

that is difficult to cope with into an unmanageable one. A wide range of legal regulations contribute to this process.⁴¹

In Canada, consumer indebtedness has grown markedly since 1990.⁴² One report indicates that “the indebtedness of Canadian households has grown six times faster than their revenues, and in 2009, their debts represented 145% of their revenues”.⁴³

Indications are that this trend is particularly acute in Nova Scotia. In 2012 Nova Scotia had some of the highest insolvency and bankruptcy rates in the country, second only to New Brunswick.⁴⁴ In fact, over the past 2 decades Nova Scotia appears to have consistently had the highest or the second highest bankruptcy and insolvency rates in Canada, and the numbers are rising. In 1990 there were only 2.3/1000 persons that were insolvent or declared bankrupt. In 2000, 4.7/1000 persons in Nova Scotia were insolvent with 0.8/1000 persons making a proposal and 3.9/1000 persons declaring bankruptcy. In 2012, 5.7/1000 persons in Nova Scotia were insolvent with 1.4 entering into a proposal and 4.3 declaring bankruptcy.⁴⁵

Consumer insolvency is on the rise even though real GDP per capita in Nova Scotia has steadily risen since 1990.⁴⁶ Further, income inequality has been growing in Nova Scotia over the past 20 years, with a greater percentage of GDP going to fewer members of the population.⁴⁷ While

⁴¹ Udo Reifner et al, “Consumer Overindebtedness and Consumer Law in the European Union” (Paper delivered to the Commission of the European Communities, Health and Consumer Protection Directorate-General, Erasmus University/Rotterdam School of Law, September 2003) at 15, online: <http://www.iaclaw.org/Research_papers/iff_OverindebtednessandConsumerLaw.pdf>.

Debt adjustment laws such as bankruptcy and insolvency laws as well as legal regulation such as consumer protection laws, regulations on interest rates, default interest collection fees and debt enforcement are some examples of legal regulation that can contribute to the social processes involved in consumer overindebtedness.

⁴² Coalition des Associations de Consommateurs du Quebec, “Les offers de credit postale” (October 2010) at 7, online: <http://cacq.ca/spip.php?page=documents&id_document=25>.

⁴³ *Ibid*, quoting Roger Sauvé, “L’état actuel du budget de la famille canadienne, Rapport 2009,” (Institut Vanier de la famille 2010), 3.

⁴⁴ Office of the Superintendent of Bankruptcy Canada, *Annual Consumer Insolvency Rates by Province and Economic Region*, 2010–2012, online: <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01820.html>.

⁴⁵ *Ibid*.

⁴⁶ Real GDP per capita has increased in Nova Scotia from \$22,600 in 1990 to \$30,806 in 2009. Nova Scotia Department of Finance, “Annual Statistics: Economic Growth” online: <http://www.gov.ns.ca/finance/statistics/economy/gdp_default.asp>.

⁴⁷ Kyle Buott, Larry Haiven and Judy Haiven, *Labour Standards Reform in Nova Scotia: Reversing the War Against Workers* (Halifax: Canadian Centre for Policy Alternatives, February 2012) at 4, online: <<http://www.policyalternatives.ca/publications/reports/labour-standards-reform-nova-scotia>>.

productivity in Nova Scotia has increased over the past 25 years by 16%, workers are 4% poorer than they were 25 years ago.⁴⁸

This growing gap, combined with available credit at higher costs⁴⁹ means that more and more Nova Scotians are relying on credit and finding themselves without the means to repay. Since 2009 there has been a greater need for Canadians to access credit as a means to “bridge income loss from job loss, reduced hours of employment and small business failures”.⁵⁰ Much of this credit, however, has come from easier to access credit sources such as credit cards, payday loan companies and merchandise finance company loans that are more expensive than bank or credit union loans.⁵¹ Credit card debt is a leading cause of bankruptcies in Canada.⁵²

In short, to the extent that enforcement proceedings are devoted to debt recovery from defaulted credit, they reinforce and extend the social process of overindebtedness. In the context of consumer debt, this is not simply a matter of providing effective relief to successful plaintiffs who have been legally wronged. The prevalence of enforcement proceedings on behalf of lenders, and the social problem of overindebtedness which it signifies, is a further reminder of the need for care in legislative reform of judgment enforcement law. We do not propose to solve, or even turn the tide against overindebtedness through reform of judgment enforcement law and processes. Nor do we recommend that a different regime should govern judgment enforcement on behalf of credit lenders. But we do insist that reform must be undertaken with due regard for the vulnerability of those who experience overindebtedness as judgment debtors, and appropriate care not to compound the broader social problems which consumer overindebtedness both reflects and produces.

THE CURRENT SYSTEM

A number of statutes, rules and regulations govern the enforcement of judgments in Nova Scotia. A successful plaintiff can obtain a certificate of judgment, which can then be registered for the purpose of binding land under the *Land Registration Act*.⁵³ A judgment creditor can also obtain a notice of judgment, which can then be registered for the purpose of binding personal property under the *Creditors Relief Act*⁵⁴ and the *PPSA*.⁵⁵ These enforcement actions are passive, in the sense that they do not require further action to be effective - by binding the

⁴⁸ *Ibid* at 3.

⁴⁹ See Janis Sarra, “At What Cost? Access to Consumer Credit in a Post-Financial Crisis Canada” in Janis Sarra ed, *Annual Review of Insolvency Law 2011* (Toronto: Carswell, 2012) 409-477.

⁵⁰ *Ibid* at 409.

⁵¹ *Ibid*.

⁵² Tran and Colman, *supra* note 40 at 65.

⁵³ *Land Registration Act*, SNS 2001, c 6 (LRA).

⁵⁴ *Supra* note 13.

⁵⁵ *Supra* note 14.

debtor's property, they effectively limit the debtor's ability to sell, mortgage or otherwise convert or use the property for security. Further action can be taken to seize and sell or otherwise liquidate the property - in the case of land, pursuant to the *Sale Of Land Under Execution Act*,⁵⁶ and in the case of personal property, under the *PPSA*.

The judgment creditor can also obtain an execution order under the *Civil Procedure Rules*.⁵⁷ In simple terms, the execution order directs the Sheriff to seize and liquidate all property and income of the debtor, subject to certain exemptions, and pay the proceeds to creditors with an outstanding judgment. In practice, the Sheriff acts only upon receiving information, typically from the creditor, as to the location of available assets and income. The Sheriff typically requires any expenses to be paid up front by the creditor.

The *Small Claims Court Act*⁵⁸ provides that orders of that court can be enforced in the same manner as an order of the Supreme Court. Regulations under the *Act*⁵⁹ provide for the issuance of a Certificate of Judgment for registration in the land registry system, and an execution order that is similar, but not identical to, the execution order issued by the Prothonotary of the Supreme Court.

We have heard that this system is complicated and difficult for the self-represented litigant to navigate. More significantly, we have heard that litigants have found, even after obtaining and filing the various forms, that recovery remains difficult, costly and elusive. The Sheriff requires the creditor to make up-front payment of some fees, which are recoverable only if the Sheriff is able to realize upon assets or income of the debtor. The Sheriff does not independently identify and pursue the debtor's assets or income, and it can be very difficult for a judgment creditor to locate assets other than real property, and especially income. As well, debtors have many ways of shielding assets and income through modern property, trust and corporate law.

Available statistics suggest continuing difficulties with enforcement. At both Supreme Court and Small Claims Court levels, unsatisfied judgments generally exceed the number of satisfied judgments in any given year by a significant margin.⁶⁰ These figures do not, however, identify the reasons for the failure to satisfy the judgments.

THE UNIFORM CIVIL ENFORCEMENT OF MONEY JUDGMENTS ACT

In 2004, the Uniform Law Conference of Canada adopted the model *Uniform Civil Enforcement of Money Judgments Act*. Building on previous law reform efforts,⁶¹ including modern

⁵⁶ *Sale of Land Under Execution Act*, RSNS 1989, c 409.

⁵⁷ *Nova Scotia Civil Procedure Rules*, r 79.

⁵⁸ *Small Claims Court Act*, RSNS 1989, c 430, s 31(1).

⁵⁹ *Small Claims Court Forms and Procedures Regulations*, NS Reg 17/93.

⁶⁰ Correspondence from Nova Scotia Department of Justice, Court Services (November 25, 2013).

⁶¹ Ontario Law Reform Commission, *supra* note 2; Alberta Law Reform Institute, *supra* note 3.

enforcement statutes in Alberta⁶² and Newfoundland & Labrador,⁶³ the *Uniform Act* was the product of three years research and review by a ULCC working group. Since its adoption by the ULCC, it has been the subject of further detailed examination by the British Columbia Law Institute,⁶⁴ which recommended its adoption in that province.

The *Uniform Act* was significantly influenced by the contemporaneous work of two scholars at the University of Saskatchewan College of Law, who also served on the ULCC working group.⁶⁵ Their final report recommended a very similar unified enforcement statute, which resulted in recently passed legislation there.⁶⁶

Most recently, New Brunswick has adopted comprehensive enforcement legislation along the lines of the *Uniform Act* and the *Saskatchewan Act*.⁶⁷

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

Provisions of the *Uniform Act* - Overview

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

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

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

The *Uniform Act* is largely in keeping with the present system of registration under the *Creditors' Relief Act* and the *PPSA*. Registration of a notice of judgment in the personal property

⁶² *Civil Enforcement Act*, *supra* note 7.

⁶³ *Judgment Enforcement Act*, *supra* note 8.

⁶⁴ *British Columbia Law Institute*, *supra* note 5.

⁶⁵ Buckwold & Cuming, *supra* note 11.

⁶⁶ *Enforcement of Money Judgments Act* (SK), *supra* note 9.

⁶⁷ *Enforcement of Money Judgments Act* (NB), *supra* note 10.

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

For real property, the *Uniform Act* provides for registration in the personal property registry as a kind of province-wide judgment roll, or against specific interests in the land registry system. The charge is more or less equivalent to a mortgage, except that it has no priority over a mortgage to secure purchase money which is registered within 15 days of the registration of the transfer of the purchased interest to the debtor.⁶⁸

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

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

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

But the *Uniform Act* specifies the means for seizing many of these forms of property, some of which - such as for business assets, shares in a business and intellectual property - are elaborate and may require outside expertise. In other respects, it creates wider discretion in the manner of disposing of assets - *e.g.*, real property - that may require thoughtful judgment, expertise and creativity. And it may be that the *Uniform Act's* new disclosure provisions - such as a mandatory written questionnaire - will reveal assets of the debtor that under the existing rules go undisclosed.

Therefore, though it operates on the familiar principles of creditor initiative and universal exigibility, we can anticipate that in practice the *Uniform Act* will result in additional enforcement work for the Sheriff. This may require specialized expertise, including external counsel or agents. To ensure the success of new judgment enforcement legislation in realizing better results for creditors, the Sheriff must be equipped and prepared to use every available

⁶⁸ *Uniform Act*, *supra* note 1, s 129(2)(b).

means to seize every available asset identified by the creditor, in a timely fashion, or to obtain the assistance of a qualified agent in doing so.

Specific Provisions⁶⁹

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

"property" includes

- (a) things, as well as rights or interests in things;
- (b) a thing regarded in law or equity as property, or as an interest in property;
- (c) a right or interest that can be transferred for value from one person to another;
- (d) a right, including a contingent or future right, to be paid money or receive another kind of property;
- (e) a chose in action; and,
- (f) a cause of action.⁷⁰

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

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

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

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

⁶⁹ We rely in part on the British Columbia Law Institute's summary of the *Uniform Act*, in its report, *supra* note 5, with thanks.

⁷⁰ *Uniform Act*, *supra* note 1, s 1(1) ("property").

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

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

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

In addition to registration of the preservation order in the personal property registry, the *Uniform Act* provides for registration in the land registry system. This creates no property interest by itself, but serves as a lien or caveat, ensuring priority over later security interests if the plaintiff's action is successful. The Saskatchewan Report authors specifically rejected this option, on the basis that it would effectively bind the defendant's land prior to any validation of the plaintiff's claim. No lender would take a security interest or advance funds on a prior security in land subject to a preservation order that might later give priority to the plaintiff, following trial.⁷¹ The Saskatchewan Report authors preferred an order which would be personally binding upon the defendant in the nature of an injunction, like a *Mareva* injunction, rather than creating a latent interest in the land itself.⁷²

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

⁷¹ Buckwold & Cuming, *supra* note 11 at 26.

⁷² *Ibid* at 24. This approach has been implemented in Saskatchewan: see *Enforcement of Money Judgments Act* (SK), *supra* note 9, s 6.

subject to the defendant's entitlement to damages if the plaintiff's action is denied, and the plaintiff's obligation to post a bond or other security.

Parts 5-7 set out the machinery for the administrative operation of the civil enforcement system under the *Uniform Act*. Part 5 sets out the process for registration of a notice of judgment in the Personal Property Registry. This is more or less the same process as under the 'new' provisions of Nova Scotia's *Creditors' Relief Act*,⁷³ integrating that *Act* and the *PPSA*. Registration results in the creation of an enforcement charge over the judgment debtor's existing and after-acquired personal property.

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

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

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

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

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

⁷³ Ss. 2A, 2B, 2C, 2D and 2E of the *Creditors' Relief Act*, *supra* note 13, as amended by s 78 of the *PPSA*, *supra* note 14.

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

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

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

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

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

Banks would not be subject to the future account obligation, being required to deliver the proceeds in a deposit account only as of the date when the notice of seizure is delivered to the branch where the account is held.⁷⁴

⁷⁴ The "branch of account" rule is found in the *Bank Act*, SC 1991, c 46, s 462 and the *Trust and Loan Companies Act*, SC 1991, c 45, s 448; see British Columbia Law Institute, *supra* note 5 at 145.

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

Amounts payable to the debtor under a trust - including when the debtor is entitled to trust moneys or is in a position to demand payment from the trustee through the rule in *Saunders v. Vautier*⁷⁵ - are deemed to be accounts within Division 4.

Division 5 sets out the rules for seizing and selling corporate securities, based on the framework for owning and transferring securities established by another uniform statute prepared by the ULCC, the *Uniform Securities Transfer Act*.⁷⁶ The intention is to ensure that enforcement action is in keeping with modern securities practice; e.g., the importance of security certificates, the modern role of securities intermediaries in holding shares, etc.

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

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

Division 6 of Part 9 provides for seizure of intellectual property. Much intellectual property is administered under federal legislation,⁷⁷ but the *Uniform Act* provides that the enforcement officer may stand in the debtor's shoes with regard to the relevant intellectual property registrations (patents, trademarks, etc.) and execute any documents in relation to any particular intellectual property, or else require the debtor to do so.

Part 10 deals with the enforcement of judgments against land. The *Uniform Act* contains two options for proceeding against a judgment debtor's land, depending on the system used by the province to record judgments against real property interests. Option 1 applies to systems, like

⁷⁵ (1841) EWHC Ch J82: If all of the beneficiaries of a trust are of the age of majority and capable at law, and have an absolute, indefeasible interest in the trust, they may compel the trustee to terminate the trust and transfer the entire trust property to them.

⁷⁶ Adopted in Nova Scotia: see *Securities Transfer Act*, SNS 2010, c 8.

⁷⁷ E.g., *Trade-marks Act*, RSC 1985, c T-13; *Copyright Act*, RSC 1985, c C-42; *Patent Act*, RSC 1985, c P-4.

Nova Scotia's, which do not record judgments against specific parcels. Option 2 provides for registration of judgments in the land registry, against the debtor's specifically identified interest(s).

Under Option 1, the registration of a judgment in the personal property registry would create an enforcement charge on all present and after-acquired land of the debtor in the province. The charge would have priority over most subsequent interests, or any interest registered after the registration of the judgment, subject to certain exceptions. The charge could be registered against a specific parcel as well, but if not it would have priority over any later interest only if the name of the judgment debtor as recorded in the notice of judgment recorded in the PPRS matched the name of the transferor on the parcel - there is no explicit 'material difference' provision in the *Uniform Act*.⁷⁸ The judgment would not have priority over a mortgage registered prior to the judgment that secures a specific sum (even if amounts are advanced after the judgment is registered), or a subsequent mortgage which secures money used to buy an interest in land, as long as it is registered within 15 days of the registration of the debtor's acquisition of the mortgaged interest.⁷⁹

Part 10 further sets out the procedures for sale of land by the enforcement officer, including a waiting period after a notice of intention to sell is given.

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

Partnership property is liable to seizure and sale, provided that the enforcement officer must give notice to the partner(s). The onus of challenging the sale is on the partners, who may make an application within 15 days of receiving notice. The court may order, *inter alia*, that the partners may purchase the debtor's share for fair value, that the property be released from seizure, that some of it may be severed and sold, etc.

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

⁷⁸ See Buckwold & Cuming, *supra* note 11 at 204: “[The transferee] should not be put in the position of having to search several variations of the prospective transferor’s name in order to determine whether or not an enforcement charge has been registered against the property involved in the prospective transfer. The person should be required to do no more than obtain a search result using the name of the prospective transferor as it appears in the registration indication [sic] the transferor’s interest in the land titles registry. If no enforcement charges are revealed in this way, and if no charge has been registered against the title in the land titles registry, the person should be able to assume that no such charges exist.”

⁷⁹ *Uniform Act*, *supra* note 1, at s 129(2). For commentary see Buckwold & Cuming, *supra* note 11 at 205-206.

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

The exempt property provisions in Division 2 are more generous to debtors than under section 45 of the *Nova Scotia Judicature Act*.⁸⁰ They include, for example, a principal residence of minimally reasonable value, damages for personal injury claims, regularly-used farmlands and equipment, fishing gear, personal property needed for the debtor's occupation, pets, burial plots, etc. There are no maximum values stated, but the *Uniform Act* provides an option to specify a maximum value in relation to items such as a motor vehicle and household implements. The drafters caution that in case maximum values are used, there should be an automatic cost of living increase mechanism in the regulations.⁸¹

The exemption for income in Division 3 applies to wages as well as fees for personal service contracts, and payments under an annuity or registered plan (RRSP, RRIF or DPSP). Regulations may provide for a minimum floor of income, and 50% of the debtor's net income (after regular deductions for income tax, employment insurance, Canada Pension Plan contributions, compulsory union or professional fees, registered pension plan contributions, health, disability and life insurance premiums) above the floor is exempt. Income generated on the capital of a personal injury damage award is included as income, except that 100% of the amount for future medical and personal care expenses, and income earned on that amount, is fully exempt.

Leaving the 'minimum floor' of exempt income to regulations means that the *Uniform Act* does not set the floor nor prescribe a method for doing so. It also does not address whether and how to accommodate a debtor's preexisting obligations to dependents. We consider that issue in a later section.

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

Part 14 governs the distribution of proceeds from enforcement proceedings to judgment creditors. A distributable fund is constituted when the enforcement officer realizes proceeds from an enforcement proceeding. A judgment creditor has an eligible claim if he or she has delivered an enforcement instruction to the enforcement officer prior to the realization of proceeds from sale. Preferential payments are made for the enforcement officer's expenses, a

⁸⁰ *Judicature Act*, RSNS 1989, c 240.

⁸¹ *Uniform Act*, supra note 1, Division 2 (Introductory Comment).

creditor's court costs in obtaining a preservation order, to the creditor whose enforcement instructions led directly to the realization of proceeds, and others. After the payment of preferred claims, eligible claimants share the remainder on a *pro rata* basis. The enforcement officer prepares a distribution scheme, which is circulated amongst creditors and others, and is open for objection and potential amendment.

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

Adoption of the *Uniform Act*

We recommend that Nova Scotia adopt much of the *Uniform Act*, with certain modifications. Our recommended modifications of the *Uniform Act*, outlined below, have mainly to do with protecting the rights of third parties in enforcement proceedings against the debtor, with preserving existing Nova Scotia processes where we have no indication that those processes are in need of reform, and with improvements in light of our research into judgment enforcement law and process in other jurisdictions. Nevertheless, we view the *Uniform Act* on the whole as a substantial improvement over existing enforcement processes in a number of respects.

One of the main purposes of the *Uniform Act* is the consolidation of various judgment creditors' remedies and debtor protections into one statute, with one streamlined process. The Nova Scotia system is not as antiquated and fragmented as some, but our processes for charging, securing and seizing debtors' assets, liquidating and distributing the proceeds among judgment creditors, and exempting the debtor's minimally necessary assets and income, are nonetheless spread amongst several of the *Civil Procedure Rules* - in particular Part 10 and Rule 79 - as well as the *Creditors Relief Act*,⁸² the *Personal Property Security Act*,⁸³ the *Collection Act*,⁸⁴ the *Sale of Land Under Execution Act*⁸⁵ the *Land Registration Act*,⁸⁶ and the *Judicature Act*,⁸⁷ as well as common law and equitable remedies. One of the major goals of adopting something like the *Uniform Act*, then, would be to create, as much as possible, a one-stop shop to assist creditors, debtors and enforcement officials in determining when and how to proceed with regard to the various assets that may be available. Much as the *PPSA* did for the area of security interests in personal property, and the *Maintenance Enforcement Act* did for purposes of enforcing spousal

⁸² *Supra* note 13.

⁸³ *Supra* note 14.

⁸⁴ RSNS 1989, c 76. The procedures under the *Collection Act* for examination of judgment debtors and enforcing judgments have been abandoned in practice, since an amendment in 1969 which removed the possibility of imprisonment for unpaid debt without an appearance before a judge, and in light of the relative advantages of the Execution Order under the *Nova Scotia Civil Procedure Rules*; see Loane Skene, *The Collection Act: A Study Paper* (Nova Scotia Law Reform Advisory Commission, 1974).

⁸⁵ *Supra* note 56.

⁸⁶ *Supra* note 53.

⁸⁷ *Supra* note 80.

and family support orders, the *Uniform Act* would do for the enforcement of civil money judgments.

As well, the *Uniform Act* provides a modern, comprehensive system of powers and responsibilities for the enforcement officer, spelling out officers' authority to deal with a variety of complex assets that are not explicitly covered by our existing judgment enforcement legislation. There is also a more fully developed series of administrative procedures for giving notice to interested parties, providing for variation, priorities and distribution among creditors, and so forth.

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

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

We proposed adoption of the *Uniform Act* in our first Discussion Paper, inviting public comment. Most of the submissions which addressed the question supported the adoption of the *Uniform Act* as a general matter, subject to specific objections and points of clarification. The reasons echo those outlined above; namely, the benefits of modernizing and streamlining the various enforcement processes now available in a number of different pieces of legislation into a comprehensive, modernized statute.

There was not unanimous support, however. We heard that a new statute is not needed, since unlike in other jurisdictions, the current system in Nova Scotia is functional and needs only fine-tuning and updating. As well, there were concerns that a new statute will prompt increased litigation as its various provisions are contested and interpreted in court. It was also observed that in fact, the main barrier to more effective judgment enforcement is lack of public support and investment in the Sheriff's office, since 1996. A new statute will not improve that situation.

Finally, we heard that to the extent the purpose of the *Uniform Act* is to improve judgment enforcement on behalf of creditors, it may compound the marginalization and economic vulnerability of poor people, and encourage riskier credit lending decisions. As we have observed, a very large proportion of judgments appear to be registered for enforcement on behalf of lending agencies, and much of the work of the enforcement system is taken up collecting loans on behalf of such lenders. We can expect that improved performance in collecting judgment debts will disproportionately affect borrowers who default on commercial

loans.

We continue to be persuaded that the *Uniform Act* should be substantially adopted in Nova Scotia, with certain amendments. There was broad support for the adoption of a single, streamlined statute and process, with modern and effective enforcement powers. A statute can effect changes in substantive law that would be unavailable in the context of the *Civil Procedure Rules*. Some of the remedies in the *Uniform Act*, for example, have the effect of shifting property rights in respect of otherwise hard to reach assets, such as intellectual property, from the debtor to the enforcement officer. Broadly speaking, we also consider that creditor remedies and debtor protections should be examined, debated and decided by the elected legislature, rather than by judges acting more or less *ad hoc* within the policy-making limits of their institution. We agree with many if not most of the specific provisions of the *Uniform Act* - including more robust exemptions for the debtor's assets and income - and while we could recommend that each be adopted piecemeal, it makes more sense to bring the various remedies and provisions under one statute.

We agree that, practically speaking, the main barrier to more effective judgment recovery on behalf of creditors who do not have deep pockets to hire lawyers and enforcement agents - especially the small claims court litigants whose complaints gave rise to this project in the first place - is the lack of assistance given by public agencies. In particular, we have heard that the Sheriff's office, by dint of lack of resources, no longer searches out assets and income of the debtor, or provides much help at all to the creditor in doing so. We agree that a new statute will not improve that situation, and investment to improve support for self-represented litigants is required. This does not require legislative reform, but it does not mean that reforms which otherwise will improve the system should be disregarded.

We also agree that the interests of vulnerable persons need to be protected in judgment enforcement law, and that creditors should not be encouraged to make riskier lending decisions by virtue of a more aggressive enforcement system. We do not agree, however, that the way to do this is to leave in place laws and processes that are inadequate, complicated, or out-of-date. Those concerns should be addressed, in our view, primarily through an effective, modern series of exemptions for certain reasonably necessary assets and income of the debtor. Our recommendations for improved exemption legislation should result in better protection for such property, and to that extent discourage, rather than encourage, credit lending decisions that are likely to compound situations of financial vulnerability.

Recommendation:

The Province of Nova Scotia should adopt the *Uniform Civil Enforcement of Money Judgments Act* (the "*Uniform Act*") subject to modifications as recommended in this report.

MODIFICATIONS TO THE *UNIFORM ACT*

We recommend certain amendments to the *Uniform Act* for purposes of its adoption in Nova Scotia. Particularly with regard to the exemptions, and those provisions that interfere with third party rights, there are important policy choices that must reflect Nova Scotia's own balance between the competing moral, economic and practical considerations at play. As well, existing Nova Scotia judgment collection law includes certain processes that appear to be functioning effectively. We see no reason to impose a new set of processes absent any indication that the *Uniform Act's* provisions are a substantial improvement on the current system. Finally, there are certain provisions that we consider could be improved, with the benefit of examples from other jurisdictions that have undertaken reform of their judgment enforcement laws and processes.

In the following sections we also address concerns raised about certain provisions of the *Uniform Act* by those who commented on our Discussion Papers, even if we have concluded that those provisions should nevertheless be adopted.

Delivery of Documents

The *Uniform Act* requires that delivery of documents to an individual must be made by delivering a copy to that person, or to that person's agent, or by leaving a copy at the person's residence, or at the business address of a sole proprietorship, or by regular mail, or as otherwise provided by regulation. Other provisions deal with service upon a partnership, a corporation, governments, and enforcement officers. In response to our first Discussion Paper, it was suggested that there should be provision for electronic service or delivery of documents.

For example, the Alberta *Civil Enforcement Regulations*,⁸⁸ at section 35.05, provide as follows:

(2) Unless the Act or this Regulation expressly requires otherwise, a document that is to be served by one party on another party under the Act or this Regulation may be served or delivered by any method of communication that is

- (a) appropriate for the type of document, and
- (b) a normal method of communication between the parties,

including ordinary mail, fax, e-mail or recorded mail.

(3) For the purposes of subsection (2), communication by fax or e-mail is a normal method of communication between the parties if

- (a) previous communications have been sent or received by that method, or

⁸⁸ Alta Reg 276/95.

(b) the intended recipient of the communication has provided a fax number or an e-mail address to the sender.

(4) The Court or an agency may be served by fax or e-mail only if the court clerk or an officer of the agency has consented in writing to be served by that method in respect of the matter to which the document to be served pertains.

(5) A document may be served on an individual who is not required to be served by another method under this Part

(a) by being left with the individual, or

(b) by being sent by ordinary or recorded mail addressed to the individual.

...

(11) Service under this Part is effected

(a) if the document is left with an individual, on the date it is left,

(b) if the document is sent by recorded mail, in accordance with section 35.06,

(c) if the document is sent by fax or e-mail, when the sender of the fax or e-mail receives confirmation of the successfully completed transmission, ...

Nova Scotia *Civil Procedure Rule* 36.16(2) provides for electronic service of documents that are not required to be served in person, as follows:

A document may be delivered to a designated address by mail, hand, or, if both of the following apply, by electronic transfer, such as e-mail or fax:

(a) the transfer is by a method regularly used for delivering communications at the designated address;

(b) the receiving party does not, in writing, require that another method be used.

There are various notices required to be given under the *Uniform Act*. Virtually all will be highly significant to the person who is entitled to receive them - especially the debtor; e.g., registration of a judgment, notice of seizure, notice of available exemptions and how to claim them, and a notice of sale. Therefore the question of electronic delivery must be approached with care.

In our view, electronic service of documents should be permitted, as long as the person being served has confirmed in writing that service may be effected in the manner which the serving party proposes, or has previously been served in that manner and has indicated acceptance of such service. Legislation should require that acceptance of electronic service must be expressly renewed at the outset of judgment enforcement proceedings, unless acceptance has been

expressly indicated within one year prior. Electronic service should be effective upon express confirmation of receipt by the person being served.

Recommendations:

Judgment enforcement legislation should permit electronic service of documents, as long as the person to be served has confirmed in writing that service may be effected in the manner which the serving party proposes, or has previously been served in that manner and has indicated acceptance of such service.

Legislation should require that acceptance of electronic service must be expressly renewed at the outset of judgment enforcement proceedings, unless acceptance has been expressly indicated within one year prior.

Electronic service should be effective as of the time when receipt by the person being served is expressly confirmed.

Application to Crown

Section 9 of the *Uniform Act* provides for the *Act's* application to the Crown. Section 9 is as follows:

9 This Act binds the Crown in exercising any rights or remedies as a judgment creditor in enforcement proceedings.

The drafters of the *Uniform Act* explained, “the purpose of this section is to eliminate special priorities that the Crown, in the right of the province/territory, may have as a judgment creditor when enforcing a judgment under this Act.”⁸⁹

The provision is necessary in Nova Scotia in light of section 14 of the *Interpretation Act*,⁹⁰ which provides that, “No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner unless it is expressly stated therein that Her Majesty is bound thereby.”

Chiefly, the special priorities of concern are those that may afford the Crown priority of payment

⁸⁹ *Uniform Act*, *supra* note 1, s 9 (Commentary).

⁹⁰ RSNS 1989, c 235.

ahead of the claims of other judgment creditors of the debtor,⁹¹ and those that nullify the debtor's statutory exemptions where the Crown is a creditor.⁹²

The section does not address the Crown's special status and rights as a judgment debtor, which are separately dealt with under the *Proceedings Against the Crown Act*.⁹³ Neither does it bind the Crown in any other respect, for example as a third party which may have information relevant to enforcement proceedings against a debtor.

The comparable provision of the Saskatchewan *Enforcement of Money Judgments Act* is more extensive, as follows:

- (1) Subject to section 120, the Crown is bound by this Act in exercising any rights or remedies as an enforcing judgment creditor.
- (2) The Crown is otherwise bound by this Act only where expressly stated.
- (3) Notwithstanding subsections (1) and (2), nothing in this Act:
 - (a) prevents the Crown from collecting a debt through proceedings otherwise available to the Crown under its prerogative, at law, or pursuant to any other enactment;
 - (b) requires the Crown to disclose any information that is required to be held in confidence pursuant to section 70 of The Revenue and Financial Services Act; and
 - (c) requires the Crown to disclose personal information that is protected from disclosure pursuant to The Freedom of Information and Protection of Privacy Act or The Health Information Protection Act.⁹⁴

As mentioned, under section 9 of the *Uniform Act* the Crown is not bound as a third party with information about the debtor that may be relevant to enforcement proceedings. Nevertheless, for the sake of certainty we agree that the effect of subsections (b) and (c) of the Saskatchewan *Enforcement of Money Judgments Act* section 118 should be incorporated into any Nova Scotia version of the *Uniform Act*, with reference to the applicable Nova Scotia legislation.⁹⁵

⁹¹ See *Crowther v Canada* (1959) 17 DLR (2d) 437 (NSSC App Div).

⁹² See Alberta Law Reform Institute, *The Presumption of Crown Immunity* (Report No 71, July 1994) at 85-81.

⁹³ RSNS 1989, c 360, ss 19-21.

⁹⁴ *Supra* note 9, s 118.

⁹⁵ See *Income Tax Act*, RSNS 1989, c 217, s 96; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5; *Personal Health Information Act*, SNS 2010, c 41.

In our view, the *Act* should prevent the assertion of Crown prerogative and immunities in all cases where the Crown is acting as a judgment creditor, except where other legislation specifically authorizes special remedies such as a statutory lien in favour of the Crown - e.g., for resource royalties,⁹⁶ workers compensation assessments,⁹⁷ wage recovery orders by the Labour Board,⁹⁸ and so forth. We agree with the conclusions of the British Columbia Law Reform Commission,⁹⁹ and the Alberta Law Reform Institute,¹⁰⁰ against any underlying Crown priority in execution against property or to payment of enforcement proceeds, as well as immunity from exemption laws, other than in narrow circumstances where the legislature has decided that the public good clearly favours the Crown over the claims of other creditors and the interests of the debtor.

Section 9 of the *Uniform Act* accomplishes this, in conjunction with section 2(1), which requires all judgment enforcement action to be undertaken pursuant to the *Uniform Act's* provisions, except as provided in any other statute. For certainty's sake we would recommend a provision like Saskatchewan's section 118(3)(a), except that there should be no reference to the Crown's prerogative or any other proceedings available "at law". Only special remedies expressly defined in another statute - that is, those adopted where the legislature has concluded that the Crown's interest warrants priority over the normal protections for the debtor and the claims of other creditors - should be permitted to supersede the *Act's* processes for judgment enforcement.

Recommendations:

Judgment enforcement legislation should bind the Crown in exercising any rights or remedies as a judgment creditor.

The legislation should permit the Crown to collect a debt through proceedings otherwise available to the Crown as specifically provided in other legislation.

Judgment enforcement legislation should provide that nothing in the legislation requires the Crown to disclose information that is required to be kept in confidence or protected from disclosure under the *Income Tax Act*, the *Freedom of Information and Protection of*

⁹⁶ E.g., *Mineral Resources Act*, SNS 1990, s 114.

⁹⁷ *Workers' Compensation Act*, SNS 1994-95, c 10, s 147.

⁹⁸ *Labour Standards Code*, RSNS 1989, c 246, s 88.

⁹⁹ Law Reform Commission of British Columbia, *Report on the Crown as Creditor: Priorities and Privileges* (No. 57, 1982) at 35-40.

¹⁰⁰ Alberta Law Reform Institute, *supra* note 92, at 83-89.

Privacy Act, and the Personal Health Information Act.

Waiver

The anti-contracting out provision at section 2(5) of the *Uniform Act* prohibits a waiver of rights and protections, but only prior to a dispute arising. The provision ensures that parties are not able to require a contractual waiver of statutory rights as a condition of providing goods or services, including commercial credit. But after the dispute arises, the debtor is permitted to waive any of the rights and protections in the legislation - typically to facilitate settlement, in which both parties would normally expect the other to release all rights and claims arising from the dispute. We heard concerns, however, that vulnerable debtors may be bullied into waiving important statutory protections (e.g., exemptions) for the sake of settling the legal dispute.

The Saskatchewan *Enforcement of Money Judgments Act* limits its anti-waiver provision to the exemptions, but does not limit the scope of the provision as to time: “Any waiver or release given by a judgment debtor of the judgment debtor’s exemption rights pursuant to this Part is void.”¹⁰¹ On the other hand, the Saskatchewan *Act* provides that property abandoned or voluntarily surrendered by the debtor is not exempt.¹⁰² The debtor, in other words, is permitted to surrender his or her exemption rights.

The New Brunswick *Enforcement of Money Judgments Act* simply provides that a waiver or release of any of the exemptions by the debtor is void.¹⁰³

We acknowledge that allowing a debtor to waive exemption rights and other protections runs the risk of leaving debtors vulnerable to abusive tactics by creditors. The debtor, however, may wish to surrender an exempt asset rather than submit to ongoing wage garnishment, or otherwise forego an exemption in his or her best interests. We consider that the *Act’s* provision should permit waiver in order to settle disputes. As we have said elsewhere, education materials and other forms of legal information and assistance for judgment debtors should explain the legislation’s exemptions and other debtor protections clearly, so that debtors can make informed decisions.

Preservation Orders

The *Uniform Act* provides for certain remedies to secure assets of a defendant in advance of judgment, in part 4. It was suggested by some who commented on our first Discussion Paper

¹⁰¹ *Enforcement of Money Judgments Act* (SK), supra note 9, s 89(1). The earlier draft proposed by Buckwold & Cuming proposed that a waiver could be given after judgment; see Buckwold & Cuming, supra note 11 at 143-144.

¹⁰² *Enforcement of Money Judgments Act* (SK), supra note 9, ss 97(2)(b), 97(2)(c).

¹⁰³ *Enforcement of Money Judgments Act* (NB), supra note 10, s 84.

that Nova Scotia legislation based on the *Uniform Act* should clarify the relationship between the remedies in Part 4 and other remedies available for the same purpose - in particular the attachment order under the current Nova Scotia *Civil Procedure Rules*, and the *Mareva* injunction. In particular, should either or both the attachment order and the *Mareva* injunction be retained, notwithstanding the adoption of a statutory preservation order in a Nova Scotia version of the *Uniform Act*?

The Nova Scotia *Civil Procedure Rules* currently make provision for a number of orders designed to secure a defendant's assets in advance of trial.¹⁰⁴ These include: interim and interlocutory injunctions and receiverships (Rule 41); a preservation order (Rule 42); temporary recovery order (Rule 43); attachment (Rule 44); security for costs (Rule 45); and payment into court (Rule 46). In some cases, the court's powers to make these orders arise from or are governed by common law or equitable principles that are referred to, but not necessarily stated or clarified in the *Rules*. Specifically, the preservation order referred to in Rule 42 encompasses the court's power to make an order for the preservation of evidence or property by seizure, commonly referred to as an *Anton Piller* order, and to order an injunction against disposing of or removing property from the jurisdiction, referred to as a *Mareva* injunction. There is overlap among some of these orders - in particular the preservation order in Rule 42 and attachment under Rule 44, to the extent they are designed to secure assets to satisfy a judgment, in advance of trial, through various means.

The preservation order under Part 4 of the *Uniform Act* is designed to subsume the various remedies for preservation of assets to satisfy a judgment - especially the preservation order under Rule 42 (and by extension, the *Mareva* injunction), and attachment under Rule 44. The conditions for the granting of preservation-type orders have been harmonized and simplified,¹⁰⁵ and the specifics of the court's power have been consolidated and made more flexible.¹⁰⁶ In particular, the court is authorized to make any order necessary in the circumstances for the preservation of assets, including but not limited to a number of specific orders outlined in section 17(1).

In addition to the familiar protections - an indemnification against losses occasioned by the order, if the plaintiff's claim is ultimately unsuccessful, and the requirement that the plaintiff post security unless the court otherwise orders¹⁰⁷ - the *Uniform Act's* preservation order includes additional provisions for the protection of the defendant while the order is in place. Most notably, section 17(2) provides:

The court must not make an order that prevents a defendant or other persons from disposing of or otherwise dealing with the property of the defendant for the purposes of meeting:

¹⁰⁴ See *Nova Scotia Civil Procedure Rules*, Part 10.

¹⁰⁵ See *Uniform Act*, *supra* note 1, s 16(2).

¹⁰⁶ See *ibid*, s 17(1).

¹⁰⁷ See *ibid*, s 22.

- (a) reasonable living expenses of the defendant and the dependents of the defendant;
- (b) ordinary business expenses of the defendant; or
- (c) the expenses of defending the proceeding.

As well, section 17(3) exempts income of the defendant that would be exempt if the defendant were a judgment debtor.

The intention of the *Uniform Act's* drafters was clearly that the *Mareva* injunction, as well as attachment orders, would be replaced, and so eliminate overlap, confusion, and the prospect for abuse and misuse, particularly of the more ancient and arcane prejudgment garnishment remedy under the *Attachment of Debts Act*.¹⁰⁸

We agree that the preservation order should eliminate the *Mareva* injunction. The protections built in to the statutory preservation order should not be capable of being overridden simply by the plaintiff applying for a *Mareva* injunction issued pursuant to the Court's equitable jurisdiction. The *Act* should confirm that no prejudgment remedy is available to secure property of the defendant in order to satisfy a judgment, in advance of judgment, save for that provided for in the *Act*.

Recommendation:

Judgment enforcement legislation should expressly provide that no prejudgment remedy is available to secure property of the defendant in order to satisfy a judgment, except as expressly provided by the legislation.

We would include in Part 4 a remedy along the lines of the attachment order under the Nova Scotia *Civil Procedure Rule 44*. The main practical distinction is that the attachment order is issued by the Prothonotary, rather than a judge. Chiefly, we are concerned to maintain a prejudgment remedy which is available on short notice, without a court hearing, for exceptional cases. Particularly in non-urban areas we believe it is important to maintain access to such a remedy, provided the safeguards in Rule 44 are preserved.

¹⁰⁸ See *ibid*, Part 4 (Commentary); Buckwold & Cuming, *supra* note 11, at 19-24, Ronald C.C. Cuming & Donald H. Layh, *The Saskatchewan Enforcement of Money Judgments Act: Commentary and Analysis* (Regina: Queen's Printer, 2012) at 61.

Recommendation:

Judgment enforcement legislation should substantially incorporate the attachment order currently provided for by *Civil Procedure Rule 44*.

Personal Property - Priorities

The *Uniform Act's* provisions for the priority of an enforcement charge arising from a registered judgment more or less duplicate those that apply currently, through the *Creditors' Relief Act* and the *Personal Property Security Act*. There are certain provisions in the *Uniform Act* that clarify the effect of the current priority scheme but do not appear to alter it.¹⁰⁹ There are also new provisions that attempt to preserve the priority of an enforcement charge in bankruptcy proceedings.¹¹⁰

There are provisions in the Nova Scotia *Creditors' Relief Act* regarding priorities that are not found in the *Uniform Act*. We recommend that they be included in new Nova Scotia judgment enforcement legislation, which will replace the *Creditors' Relief Act* provisions regarding judgments. Among them are priority status for liens arising from work done or services supplied with regard to personal property subject to a judgment,¹¹¹ and protection for buyers and lessees of certain consumer goods which are sold or leased not in the ordinary course of business of the seller or lessor.¹¹²

Recommendation:

Judgment enforcement legislation should substantially incorporate, in addition to priority provisions in the *Uniform Act*, provisions in the *Creditors' Relief Act* regarding priority status of liens arising from the

¹⁰⁹ E.g., s 35(7) [priority of an enforcement charge over fixtures and crops determined regardless of whether attached to land], s 35(9) [mortgage has priority over enforcement charge if it secures fixtures or crops, and was registered prior to the creation of the enforcement charge]; s 39 [buyer/lessee deemed to have knowledge of an enforcement charge if knows of the registration of the enforcement charge, or if knows that property is subject to seizure].

¹¹⁰ E.g., ss 38(5) and 38(6).

¹¹¹ *Creditors' Relief Act*, *supra* note 13, s 2B(8).

¹¹² *PPSA*, *supra* note 14, ss 31(3), 31(4) [buyer/lessee takes consumer goods, other than fixtures or goods over \$1000) free of judgment interest if purchased or leased for value, without knowledge of the notice of judgment], applicable to judgments pursuant to *Creditors' Relief Act*, *supra* note 13, s 2B(6).

provision of materials or services, and protection for buyers and lessees of certain goods which are not sold or leased in the ordinary course of business of the seller or lessor.

Land Registry

Among those who commented on our first Discussion Paper there was general support for the centralization of judgment rolls pertaining to interests in land into a single judgment roll for the whole province. The *Uniform Act* provides an option - Option 1 - for the registration of judgments in the Personal Property Registry to secure the debtor's real and personal property and to commence any of the enforcement processes available under the *Act*. No additional registration would be required in the land registration system in order to bind the debtor's real property. Judgments registered in the PPR would bind all of the debtor's real property in the province, rather than in one land registration district alone.

This will require careful attention to the status of judgments registered in the current district judgment rolls after the new legislation comes into force. We examine this issue in a later section on transition.

Recommendation:

Judgment enforcement legislation should provide for the registration of judgments in the personal property registry to bind a debtor's interest in real property in Nova Scotia.

Requiring registered mortgages to specify amounts secured

It was suggested by one commenter that registered mortgages should be required to specify the amount secured. Mortgages that do not specify the amount secured leave open the question of how much equity in the property belongs to the debtor; therefore a judgment creditor is not able to assess whether forcing a judicial sale would be warranted. The information is not generally available from the mortgagee, and the mortgagor (the debtor) may not be inclined to reveal the information either.

We decline to recommend such a change to mortgage registration requirements. We note that mortgages that do specify an amount secured are not a reliable indicator of the mortgagor's equity in the property in any event.

As well, we note that procedures to obtain current information from the mortgagee and the

debtor are available under the *Uniform Act*.¹¹³

Procedure to commence enforcement processes

In response to our first Discussion Paper it was suggested that an enforcing creditor should be able to give instructions to the Sheriff upon receiving judgment, without the need for a Writ, Certificate or Execution Order. To clarify, the *Uniform Act* requires the creditor to obtain a notice of judgment from the court, which is then registered in the Personal Property Security Registry.¹¹⁴ This is more or less the current Nova Scotia procedure up to that point. The precise form and contents of the notice are left to regulation, but would normally be expected to include at least the names of the parties, the total amount of the judgment including costs, and the date. It would be issued by the Prothonotary, or in the case of Small Claims Court judgments, by the clerk of the court. Registration of the notice creates a charge on all the debtor's assets, including land, and is the basis for further enforcement action.

No further paperwork would be necessary from the court. In particular, it would not be necessary to have the court issue an Execution Order in order for the Sheriff to proceed, as is currently the case. Registration of the notice of judgment entitles the creditor to give enforcement instructions directly to the Sheriff, to proceed against specific assets in the manner specified, and in accordance with the *Act*.¹¹⁵

Mandatory Questionnaire

Our first Discussion Paper proposed that upon judgment, debtors would be issued a form questionnaire regarding assets and income, to be returned to the Sheriff within ten (10) days of judgment. Failing delivery on time, the Sheriff would attend upon the debtor, and take action as necessary depending on the debtor's response. The proposal was made in mind of the problem that without some mandatory mechanism, a judgment debtor may simply delay payment of the judgment, with little penalty save interest, until the creditor is forced to take some action at his or her initial expense. It seemed to us that there ought to be some form of 'wakeup call', at little to no expense for the creditor, to trigger payment on the debtor's part.

There was support for this proposal from some commenters, but concern from others that it would turn the Sheriff into a collection agent for the creditor. It was suggested that any examination of the judgment debtor regarding assets and income (and relevant exemptions) should be done before an agent of the court, under oath, with access to legal counsel for the debtor.

New Brunswick's new enforcement legislation includes provision for the Sheriff to require the

¹¹³ See in particular Part 8, providing for debtor and third-party disclosure by various means.

¹¹⁴ See *Uniform Act*, *supra* note 1, Part 5.

¹¹⁵ See *ibid*, Part 7.

debtor to deliver a statement of assets and liabilities,¹¹⁶ following a recommendation in the New Brunswick report that echoed our proposal.¹¹⁷

We continue to recommend a mandatory questionnaire, to be followed up by the Sheriff after ten days. One of the *Uniform Act's* innovations is an express provision for a questionnaire, as opposed to a full examination proceeding. We regard this as a commonsense and potentially useful device for obtaining necessary information to effect enforcement of a judgment, at minimal expense and effort. We recommend that return of the questionnaire should be mandatory within a certain timeframe, so that enforcement proceedings are not delayed unnecessarily.

We do not agree that the Sheriff's role in following up after a reasonable period will turn the Sheriff into a collection agent for the creditor. The Sheriff's role is to ensure the effective enforcement of court judgments, including, where necessary, obtaining information from debtors to realize on exigible assets and income. Our recommendation is in keeping with that role.

Plain-language education materials explaining the debtor's available exemptions and other rights and obligations should be provided along with the questionnaire.

Recommendations:

Upon registration of a judgment, a creditor should be entitled to instruct an enforcement officer to deliver to the judgment debtor a form questionnaire for disclosure of assets, as provided by section 45(1)(a) of the *Uniform Act*, with a mandatory return date ten (10) days following delivery of the questionnaire.

The questionnaire should be accompanied by plain language educational materials explaining the debtor's available exemptions and other rights and obligations.

Sharing of information regarding debtor assets

We heard some concern with section 48 of the *Uniform Act*, which requires that information disclosed to the Sheriff regarding the debtor's assets must be shared amongst judgment creditors upon written request. The concern was that a judgment creditor, having incurred the expense of conducting an examination of the debtor or otherwise investigating the debtor's assets, should not be required to disclose this (expensive) information to other creditors,

¹¹⁶ Enforcement of Money Judgments Act (NB), *supra* note 10, s 52-54.

¹¹⁷ Gleixner et al, *supra* note 12 at 21-22.

thereby permitting them to freeload. There was particular concern about the prospect of sharing information concerning an asset, only to have a subsequent judgment creditor seize and sell the asset (and receive a preferential payment for its expenses in having taken the initiative to undertake a sale).

The concept of the *Uniform Act*, however, is that all judgment enforcement activity is undertaken by an enforcement officer, rather than judgment creditors directly, and the proceeds of sale of the debtors' assets are distributed, *pro rata*, amongst all judgment creditors with a subsisting enforcement instruction. This is precisely to ensure against aggressive competition amongst creditors to seize and sell assets for themselves. Section 2(1) of the *Uniform Act* requires that all action to enforce a judgment must occur pursuant to the *Act's* procedures.

In this scheme, the specific purpose of section 48 of the *Uniform Act* is to ensure that a judgment debtor is not required to provide the same answers to multiple creditors acting individually, and judgment creditors are not required to seek information that the debtor has already provided. We do not recommend its omission from a Nova Scotia version of the *Uniform Act*.

Funds in Court

Section 110 of the *Uniform Act* provides that an enforcement officer may seize moneys in court that are or may become payable to the debtor. Upon receipt of notice of seizure, the court is to deliver to the enforcement officer any moneys that would be payable to the debtor immediately, or any amounts that may become payable thereafter.¹¹⁸

By contrast, Alberta's *Civil Enforcement Act* provides that, "money held in a court is not subject to garnishment".¹¹⁹

The issue is whether, and to what extent, the courts themselves may be subject to seizure, as account debtors who may owe money to the judgment debtor. In response to our first Discussion Paper it was suggested by one commenter that that the provision may simply be worded to require payment of moneys in court to the Sheriff upon demand - that is, avoiding language of seizure.

Saskatchewan's new *Enforcement of Money Judgments Act* provides for seizure of moneys in court, along similar lines as section 110 of the *Uniform Act*.

¹¹⁸ The wording of the *Uniform Act's* section governing future entitlement to moneys in court, s 110(2)(b), is somewhat obscure. The comparable provision in Saskatchewan's new *Enforcement of Money Judgments Act*, s 70(3), is much simpler: "Unless the court orders otherwise, a local registrar of the court who is served with a notice of seizure pursuant to subsection (2) shall pay the amount mentioned in subsection (1) to the Sheriff when it is or becomes payable to the judgment debtor." The provision only applies to money to which the debtor may become entitled within thirty days of the notice of seizure, however; s 70(1)(b).

¹¹⁹ *Civil Enforcement Act*, *supra* note 7, s 78(j).

We agree that moneys in court, which are or may become payable to the debtor, should be capable of seizure at the time when they become payable to the debtor. We do not recommend exempting moneys in court from seizure.

Future Accounts

In response to our first Discussion Paper we were alerted to a difficulty with section 99(a)(i) - that it may be read to require payment of an account to the Sheriff even though the account is not yet payable to the judgment debtor. The relevant section is as follows:

... an account debtor who receives a notice of seizure in respect of an account or future account must, unless a written statement under section 100 is delivered to the enforcement officer:

- (a) pay to the enforcement officer, within the time prescribed by regulation, ...
 - (i) the amount that the account debtor is obligated to pay to the judgment debtor *at the time when the account debtor received the notice of seizure* ... [emphasis added]

On one interpretation, the emphasized text requires the account debtor (e.g., a financial institution) to pay a future account (that is, one not yet payable to the judgment debtor) to the Sheriff at the time when the notice of seizure is delivered. We believe the provision only requires immediate payment of the amount which the bank (or other account debtor) owes to the judgment debtor at the time of the notice of seizure - in effect, future accounts would not be covered by this provision. But the language is obscure, and says nothing about when a future account is to be paid to the Sheriff.¹²⁰ Section 100 only slightly clarifies the matter:

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

- ...
- (c) states that the person is an account debtor but that the account was not payable at the date of the person received the notice of seizure and is not payable at the date when the statement made under this section is given by the account debtor;
- (d) in a case falling within clause (c), states, if it is known,
 - (i) the future times when any future accounts will or may become payable by the account debtor to the judgment debtor,

¹²⁰ A similar example occurs at s 110(2)(b) of the *Uniform Act*, pertaining to moneys in court.

- (ii) the happening of specified events on which any future accounts will or may become payable by the account debtor to the judgment debtor, and
- (iii) the amounts that will or may become payable under subclause (i) or (ii);

...

As worded, section 100 only applies to a person who is not obligated to make a payment under section 99 - it implies, but does not confirm that a future account debtor is not obligated pay the future account immediately. A simpler provision should be adopted. For example, section 62 of Saskatchewan's new *Enforcement of Money Judgments Act* provides as follows:

62(1) An account debtor who is served with a notice of seizure of an account shall:

(a) pay to the Sheriff, or the assignee of the Sheriff, within the time specified in the notice the lesser of:

(i) the amount payable at that date; and

(ii) the amount recoverable that is payable at that date as stated in the notice or otherwise stated in writing by the Sheriff;

(b) if the account is not due or is a future account, pay the lesser of the following to the Sheriff, or the assignee of the Sheriff, when the account becomes payable:

(i) the amount that the account debtor is obligated to pay;

(ii) the amount recoverable as stated in the notice or otherwise stated in writing by the Sheriff; ...

We recommend a provision to this effect in a Nova Scotia version of the *Uniform Act*.

Recommendation:

Judgment enforcement legislation should provide that if an account is not payable to the debtor at the time it is seized, or is a future account, the account debtor shall, when the account becomes payable to the debtor, pay to the Sheriff the amount owed, or any lesser amount as stated in the notice of seizure.

Location of accounts

Under section 95 of the *Uniform Act* an account (an obligation to pay money to the judgment debtor) is deemed to be located where it is recoverable. The Sheriff's power of seizure is limited to the territory of the Province; therefore an account is only seizable if it is recoverable in the province. In their commentary, the *Uniform Act's* drafters explained that the location where an account is recoverable depends on the nature of the debt and the agreement between the parties.¹²¹ But as one commenter on our first Discussion Paper asked, is there any obligation on a financial institution or other account debtor, in respect of monies it may owe to the judgment debtor, to verify the type of debt and its location - presumably for purposes of verifying whether the Sheriff may validly seize the account?

As explained in commentary following section 98 of the *Uniform Act*, the *Bank Act*¹²² and the *Trust and Loan Companies Act*¹²³ determine the question of location for purposes of seizing deposit accounts. In effect, the Sheriff must deliver notice of seizure at the branch where the account is held.

As for account debts that are not deposit bank accounts, the question of where an account is recoverable in law depends on a variety of factors that may or may not be known to the account debtor - e.g., the residence of the judgment debtor. In our view, the *Uniform Act* adequately covers the powers of the enforcement officer to seize accounts, and the corresponding obligation of the account debtor to deliver the account if it is indeed recoverable by the enforcement officer. We would not recommend a further provision expressly imposing a positive duty to verify the type of account or other information necessary to determine the location where it is recoverable. The account debtor will be liable for failing to deliver funds which are validly seized by the enforcement officer.

We also take this opportunity to express our view that the 'branch of account' rule should be abandoned or relaxed. The relevant legislation is under federal jurisdiction, but it has distinctive significance for this project. Given modern banking practices the branch of account has very little necessary relevance to the bank's client (the debtor), and yet creditors are stymied in seizing bank account assets unless they know the relevant branch. Under the *Bank Act* there are exceptions to the branch of account rule for tax collection,¹²⁴ and family maintenance orders,¹²⁵ such that in certain circumstances notice need only be served on a designated office of the bank in the province.¹²⁶ Relaxing the rule for purposes of civil judgment enforcement would

¹²¹ For further commentary see Cuming & Layh, *supra* note 108, at 225-227.

¹²² *Supra* note 74, s 462.

¹²³ *Supra* note 74, s 448.

¹²⁴ *Bank Act*, *supra* note 74, s 462(2.1).

¹²⁵ *Ibid*, s 462(3).

¹²⁶ See *Support Orders and Support Provisions (Banks and Authorized Foreign Banks) Regulations*, SOR/2002-264.

significantly improve enforcement prospects - particularly for unsophisticated judgment creditors who are unlikely to have the debtor's banking information on file.

Exempt Assets

The *Uniform Act* exempt property provisions are broader than Nova Scotia's. The current exemptions, at section 45(1) of the *Judicature Act*,¹²⁷ are as follows:

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

The maximum value of chattels and equipment exempt from execution under section 45(e), above, has been limited to \$1000 since 1985.¹²⁸ The maximum value for a motor vehicle was set at \$3000 in 1985, and has not been adjusted since.

Section 59(3) of the *Personal Property Security Act*¹²⁹ exempts the following property from an enforcement proceeding:¹³⁰

- (a) furniture, household furnishings and appliances used by the debtor or a dependent to a realizable value of five thousand dollars or to any greater amount that may be prescribed;
- (b) one motor vehicle having a realizable value of not more than six thousand five hundred dollars at the time the claim for exemption is made, or not more than any greater amount that may be prescribed, if the motor vehicle is required by the debtor in the course of or to retain employment or in the course of and necessary to the debtor's trade, profession or occupation or for transportation to a place of employment where public transportation facilities are not reasonably available;

¹²⁷ *Judicature Act*, *supra* note 80.

¹²⁸ *Value of Chattels Exempt from Seizure Regulations*, NS Reg 112/85, s 1.

¹²⁹ *PPSA*, *supra* note 14.

¹³⁰ *Creditors' Relief Act*, *supra* note 13, s 2D(2).

- (c) medical or health aids necessary to enable the debtor or a dependent to work or to sustain health;
- (d) consumer goods in the possession and use of the debtor or a dependent if, on application, the Court determines that
 - (i) the loss of the consumer goods would cause serious hardship to the debtor or dependent, or
 - (ii) the costs of seizing and selling the goods would be disproportionate to the value that would be realized.

The *Uniform Act's* exemptions, at section 159(1), are more extensive, as follows:

- (a) food required by the judgment debtor and his or her dependents during the 12 month period following the commencement of an enforcement proceeding;
- (b) aids and devices that assist the judgment debtor and his or her dependents in overcoming a disability, or a medical or dental condition;
- (c) ordinary clothing, not including jewellery, needed by the judgment debtor and his or her dependents;
- (d) household furnishings, utensils, equipment and appliances needed by the judgment debtor and his or her dependents to maintain a functional household [that are of a value not exceeding the amount prescribed by regulation];
- (e) an interest in a house, condominium, mobile home, house boat or equivalent facility, if it is used by the judgment debtor as a principal residence that is of a size and quality to enable the judgment debtor and his or her dependents to have a minimally reasonable standard of residential accommodation, and, if it is situated on land owned by the judgment debtor, the land on which it is permanently situated [to the extent of a value not exceeding the amount prescribed by regulation];
- (f) a motor vehicle, as defined in the [insert the title of the Motor Vehicle Act or similar enactment] [to the extent of a value not exceeding the amount prescribed by regulation] that is
 - (i) ordinarily used by the judgment debtor or his or her dependents, and
 - (ii) necessary to enable the judgment debtor to earn an income for the support of the judgment debtor and his or her dependents or to meet the reasonable educational or health needs of the judgment debtor or his or her dependents;
- (g) if the judgment debtor is earning income from an occupation or is actively engaged in earning income from carrying on a trade, business or calling,
 - (i) personal property that is ordinarily used by the judgment debtor and is necessary for earning income from the judgment debtor's occupation, trade, business or calling [that are of a value not exceeding the amount prescribed by

regulation],

- (ii) if a judgment debtor's primary occupation or business is farming,
 - (A) an area of land prescribed by regulation that is ordinarily used by the judgment debtor for farming,
 - (B) personal property, including an agricultural product, ordinarily used by the judgment debtor for farming that is necessary for the proper and efficient conduct of the judgment debtor's farming operation for a 12 month period following the commencement of an enforcement proceeding [that is of a value not exceeding an amount prescribed by regulation], and
- (iii) if a judgment debtor's primary occupation is fishing, personal property ordinarily used by the judgment debtor that is necessary for the proper and efficient conduct of a the judgment debtor's fishing operation for a 12 month period following the commencement of an enforcement proceeding [that is of a value not exceeding the amount prescribed by regulation];
- (h) money received by the judgment debtor pursuant to a legal entitlement to compensation for personal physical injury including
 - (i) loss of future income, and
 - (ii) payment of future medical or personal care expenses and any property acquired through the investment of such money and the investment of income received by the judgment debtor from such money;
- (i) domestic animals that are kept by the judgment debtor solely as pets [that are of a value not exceeding the amount prescribed by regulation];
- (j) a burial plot or plots intended for the internment of the judgment debtor, his or her dependents and members of his or her immediate family;
- (k) funds representing prepaid funeral and cemetery maintenance costs that are held on behalf of or credited to the judgment debtor and that relate to the judgment debtor and his or her dependents;
- (l) property of the judgment debtor [of a value not exceeding the amount prescribed by regulation] that
 - (i) has a religious or sentimental value to the judgment debtor, but
 - (ii) in the opinion of the enforcement officer, the costs of seizure and disposition of the property are likely to be approximately equal to or exceed the amount likely to be realized from disposition of the property; and
- (m) any property prescribed by regulation.

In summary, in addition to the property listed in section 45(1) of the *Judicature Act*, the *Uniform Act* exempts a principal residence of a minimally reasonable size, farmlands and

equipment, fishing equipment (not necessarily limited in amount), tools and equipment necessary for the debtor's occupation (not necessarily limited in amount), damages for personal injuries, including loss of future income and future care expenses (as well as income on such damages), and pets. The *Uniform Act* also includes burial plots and prepaid funeral and cemetery expenses, which are exempt from seizure in Nova Scotia under the *Cemetery and Funeral Services Act*.¹³¹

In our first Discussion Paper we proposed to incorporate the exemptions in section 45 of the *Judicature Act* into a Nova Scotia version of the *Uniform Act*, instead of the broader exemptions in the *Uniform Act*. We proposed that where the section 45 exemptions are expressed in terms of a maximum amount (that is, with regard to a motor vehicle and personal property used for the debtor's occupation), they ought to be brought up to date through a process of systematic consultation, and then subject to an annual, automatic cost of living adjustment.

Amongst those who commented on this proposal there was general agreement that the maximum values of exempt items in section 45 should be brought up to date, and subject to annual, automatic adjustment. There was not agreement, however, on the proposal to retain the exemptions in section 45, with some commenters preferring the *Uniform Act's* more extensive list of exemptions as more fair, and more in keeping with the purposes for exemption laws - that being to maintain the well-being of the debtor and his or her family as healthy and productive members of society. Attention was particularly directed at the proposal to omit the exemption for a principal residence, and for damage awards for personal injury.

We have concluded that the list of exemptions in the *Uniform Act* should be included, for the most part, in a Nova Scotia version. They are consistent with modern exemption law and do not strike us as unduly generous. We consider the principal residence and personal injury award exemptions in detail below.

Principal Residence

The chief concern of those who commented on this issue is the potential to deprive the debtor of a home, putting the debtor and his or her family at risk of homelessness or inadequate shelter, and increasing the burden on social assistance. This would be the case of persons for whom the cost of adequate alternative shelter significantly exceeded the cost of financing and maintaining their current principal residence. For families on social assistance in such a situation the public burden will be much greater, to the extent that social assistance would be required to subsidize rent for an individual or family that had previously lived in their own home.

Even for those who might find the monthly cost to be comparable, the loss of home equity might have serious implications for retirement - again with implications for social assistance.

These concerns have led to exemptions for a principal residence in a number of jurisdictions in Canada, and elsewhere. In Alberta, a debtor's principal residence up to a maximum of \$40,000

¹³¹ RSNS 1989, c 62, s 15(1), s 23(1).

is exempt.¹³² In British Columbia the cap is \$9,000, except in Vancouver and Victoria where it is \$12,000.¹³³ In Manitoba the cap is \$2,500 for a sole owner, or \$1,500 for a joint tenant.¹³⁴ In Newfoundland & Labrador the cap is \$10,000.¹³⁵ In Yukon it is \$3,000.¹³⁶ In Northwest Territories it is \$50,000,¹³⁷ in Nunavut \$35,000.¹³⁸ In Ontario it is \$11,300.¹³⁹ Quebec exempts a principal residence up to \$10,000, or if the creditor's judgment does not exceed \$10,000.¹⁴⁰ Saskatchewan's new judgment enforcement legislation exempts an "active residence" up to \$50,000.¹⁴¹

In the United States the residence exemption for purposes of bankruptcy protection also varies. The federal bankruptcy homestead exemption has a maximum of \$20,200. Certain states have unlimited homestead exemptions, and others cap the exemption at varying amounts above the federal minimum.¹⁴²

In a different context, Nova Scotia excludes the value of a principal residence for purposes of determining eligibility for social assistance, as long as the residence, "is assessed at less than twice the average assessed value of single family dwellings in the municipality in which the residence is located."¹⁴³

We are persuaded that a principal residence for the debtor and his or her dependents, of reasonable value, should be exempt from seizure. We would not assign a maximum value to the

¹³² *Civil Enforcement Act*, *supra* note 7, s 88(g); *Civil Enforcement Regulation*, *supra* note 88, s 37(1)(e). Where the debtor is a co-owner, the maximum value is reduced in proportion to the debtor's ownership interest.

¹³³ *Court Order Enforcement Act*, RSBC 1996, c 78, s 71.1(1); *Court Order Enforcement Exemption Regulation*, BC Reg 28/98, s 3.

¹³⁴ *Judgments Act*, CCSM c. J10, s 13(1).

¹³⁵ *Judgment Enforcement Act*, *supra* note 8, s 131(1)(h); *Judgment Enforcement Regulations*, NLR 102/99, s 48(1)(f).

¹³⁶ *Exemptions Act*, RSY 2002, c 80, s 2(e).

¹³⁷ *Exemptions Act*, SNWT 2010, c 4, s 2(1)(f); *Exemptions Regulations*, NWTR 051-2010, s 1(e).

¹³⁸ *Exemptions Act*, RSNWT (Nu) 1988, c E-9, s 2(1)(f); *Exemptions Regulations*, Nu Reg 006-2006, s 1.

¹³⁹ *Execution Act*, R.S.O. 1990, c E.24, s 2(2); *Execution Regulations: Exemptions*, O Reg 657/05, s 1.

¹⁴⁰ *Code of Civil Procedure*, RSQ, c C-25, s 553.2.

¹⁴¹ *Enforcement of Money Judgments Act* (SK), *supra* note 9, s 93(1)(l); *Enforcement of Money Judgments Regulations*, RRS c E-9.22 Reg 1, s 23(4). Cuming & Layh conclude that notwithstanding the terminology of an "active" residence rather than the more familiar "principal" residence, the debtor may not claim any more than one such property in Saskatchewan; see Cuming & Layh, *supra* note 108 at 294. A further exemption for "the homestead" up to 160 acres, at s 93(1)(k), has not been proclaimed in force.

¹⁴² See Alysia Davies, "Federal Exemptions' in Bankruptcy: Canada and Three Other Countries," (October 2008) online: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0228-e.htm>.

¹⁴³ *Employment Supports and Income Assistance Regulations* NS Reg 25/2001, s 2(f)(i).

exemption, given the wide range of circumstances which may affect what is reasonable for a given debtor - location and number of dependents, in particular. There appears to be no consistent method for setting such a value in the various jurisdictions which do so.

Instead, we would permit an application to be made by the creditor for the seizure and sale of the debtor's interest in a principal residence, if the value of the residence is significantly in excess of the value of a residence that could fulfill the reasonable living needs of the debtor and his or her dependents.¹⁴⁴

Recommendation:

Judgment enforcement legislation should provide an exemption for the debtor's principal residence of reasonable value. A creditor should be permitted to apply to court for an order of seizure and sale, where the value of the debtor's principal residence significantly exceeds what is reasonable for the needs of the debtor and his or her family.

Damage awards for personal injury

The *Uniform Act* provides an exemption for damage awards arising from personal injury, including amounts for loss of future income and for medical and personal care expenses. The section does not expressly address whether the exemption applies to other types of damages that may be awarded in personal injury cases, such as general damages (i.e., damages for pain and suffering), aggravated damages (for mental distress), or punitive damages (extra damages to punish the defendant for egregious conduct).

The term "including" as used here can be interpreted as introducing a non-exhaustive list of examples of the more general concept or category.¹⁴⁵ In that case, all damages received by the debtor as compensation for personal injury would be included. On the other hand, the fact that the list includes certain obvious examples, but fails to include others that would be expected to appear, may be taken to exclude the omitted categories.¹⁴⁶

The ULCC's commentary in respect of this exemption suggests that only the expressly listed

¹⁴⁴ See Buckwold & Cuming, *supra* note 11 at 152-54.

¹⁴⁵ R Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, ON: LexisNexis Canada Inc, 2008) at 238-239.

¹⁴⁶ *Ibid* at 243-252.

damage awards would be exempt.¹⁴⁷

Should Nova Scotia's judgment enforcement legislation exempt damage awards for personal injury, and if so, what heads of damages should be exempt?

In response to our first Discussion Paper we heard concerns that permitting seizure of damage awards will act as a disincentive to commencing legal actions, and thereby frustrate the deterrence principles of tort law, including those which undergird the concept of punitive damages. It was suggested that this sends a message that debtors are less worthy as human beings, and undermines the rule of law.

Other commenters felt that at least damages for loss of future income and medical expenses should be exempt, or else risk leaving the judgment debtor dependent on social assistance.

The corresponding provision of Saskatchewan's new enforcement legislation takes a different approach:

(g) money, and property or income acquired through the investment of money:

(i) that can be separately identified as being received or as having been received by the judgment debtor pursuant to a legal entitlement to compensation for physical or mental injury; and

(ii) that is being used or will be used to meet the reasonable and ordinary living expenses of the judgment debtor and his or her dependants or to provide medical or other care facilities for the judgment debtor or his or her dependants;¹⁴⁸

On this, Buckwold and Cuming, in their report recommending the above provision for Saskatchewan, make two observations:

An individual who has received compensation for physical injury by way of a damages award, insurance payment or otherwise, and who is using those funds for purposes of ordinary living expenses and medical care, is almost certainly doing so because the physical injury giving rise to the compensation has disabled him or her from engaging fully or at all in other income earning activities. It is intrinsically objectionable to deprive such a person of financial resources that he or she patently deserves. However, a second and more compelling factor is the social dependency that would follow from that deprivation. As has already been noted, such dependency is both socially and

¹⁴⁷ See *Uniform Act*, *supra* note 1, s 159(1)(h) (Commentary): "Money received by the judgment debtor pursuant to a legal entitlement to compensation for personal physical injury: The capital of these types of compensation awards is intended to generate an income stream to pay for medical and personal care expenses."

¹⁴⁸ *Enforcement of Money Judgments Act (SK)* *supra* note 9, s 93(1)(g).

economically detrimental, not only to the affected individual but to the public.

These rationales only apply to funds that are, or will be, used for reasonable expenses and necessary to keep the plaintiff from requiring social assistance. They do not apply to the full range of damages that may be awarded as compensation for personal injury, as the *Uniform Act's* provision may entail. Awards for general damages - for pain and suffering that is non-calculable but no less real - are not awarded with reference to a plaintiff's reasonable needs or circumstances going forward. The same is true of punitive damages, which are not awarded with any attention to the plaintiff's situation, but are entirely concerned to punish the objectionable conduct of the defendant. Obviously, compensation for personal injury is designed to make the plaintiff 'whole', in the sense of remedying a loss which is another's fault, and the plaintiff certainly 'deserves' these funds, as Buckwold and Cuming observe. But the same is true of employment income and virtually all other income and property other than gifts, lottery winnings and inheritances.

We conclude that damages arising from personal injury claims for past and future personal care expenses, and loss of past and future income, as well as the interest on such damages, should be exempt.

We have also concluded that damages for mental and physical pain and suffering, including aggravated damages, as well as interest on such awards, should be exempt. We agree with the basic principle in *Holley v. Gifford Smith Ltd.*: "...it is not the policy of the law to convert into money for the creditors the mental or physical anguish of the debtor."¹⁴⁹

We recommend that punitive damages not be exempt. Punitive damages are not compensatory for any pecuniary or personal loss of the debtor; rather, they are awarded purely to punish the egregious conduct of the defendant. We have considered the potential that claims for punitive damages may be deterred, but in the balance we consider that judgment creditors should not be deprived of funds the debtor may obtain by way of such an award, when his or her losses have been otherwise fully compensated.

Recommendation:

Judgment enforcement legislation should exempt damages arising from personal injury, other than punitive damages.

¹⁴⁹ (1986) 26 DLR (4th) 230 (Ont CA) at para 55. The principle was endorsed in the judgment enforcement context in *Mullin v R - M & E Pharmacy*, (2005) 74 OR (3d) 378 (Sup Ct J).

Registered Plans

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

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

Nova Scotia has not adopted the *Uniform Registered Plan (Retirement Income) Exemption Act*.¹⁵⁰ As a consequence, retirement plans are subject to seizure through judgment enforcement processes, except to the extent they are protected under other legislation. This contrasts to private pension plans, protected from seizure under the *Pension Benefits Act*,¹⁵¹ and retirement investments structured under insurance contracts with a beneficiary designation, protected by the *Insurance Act*.¹⁵² As well, RRSPs and RRIFs are protected in bankruptcy proceedings.¹⁵³

In our first Discussion Paper we proposed adoption of section 3 of the *Uniform Registered Plan (Retirement Income) Exemption Act* for purposes of civil money judgment enforcement.¹⁵⁴ The reasons for exempting private retirement funds from execution are well explained and assessed in a 2004 report of the Alberta Law Reform Institute.¹⁵⁵ The Report surveys a number of previous Canadian studies which recommended similar, if more limited exemptions.¹⁵⁶ The Institute observes that retirement savings are critical to ensuring that retirees do not fall into

¹⁵⁰ Neither has it prescribed retirement income plans as exempt from seizure under the *Pension Benefits Act*, RSNS 1989, c 340, s 71(2).

¹⁵¹ *Ibid*, s 71.

¹⁵² RSNS 1989, c 231, s 198.

¹⁵³ *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (*BIA*), s 67(1)(b.3). The *BIA* exemption does not apply to property contributed to the plan in the 12 months before the date of bankruptcy.

¹⁵⁴ Law Reform Commission of Nova Scotia, *supra* note 30, at 23; see also amended text of section 3 for purposes of inclusion in the *Uniform Act* at B-131.

¹⁵⁵ Alberta Law Reform Institute, *Exemption of Future Income Plans* (Final Report No 91, 2004). See also CRB Dunlop, "Should Creditors Have Access to Future Income Savings Plans?" (2003) 66 Sask L Rev 279.

¹⁵⁶ *Ibid* at 60-66, discussing Tamara M Buckwold and Ronald CC Cuming, *Interim Report on Modernization of Saskatchewan Money Judgment Enforcement Law* (Regina, Saskatchewan: Queen's Printer, November, 2001); Uniform Law Conference of Canada, *Proceedings of the Eightieth Annual Meeting* (Halifax: The Conference, August, 1998) at 254-273; Uniform Law Conference of Canada, *Proceedings of the Eighty First Annual Meeting* (Winnipeg: The Conference, August, 1999) at 164-180; Personal Insolvency Task Force, *Final Report* (Ottawa: Industry Canada, 2002) at 17-24; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: The Committee, 2003) at 24-29; online: <<http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/bank-e/rep-e/bankruptcy-e.pdf>>.

poverty, requiring the support of the state.¹⁵⁷ With fewer Canadians able to access private pensions, and bearing in mind the inconsistency of protecting pensions and certain other forms of retirement savings while leaving registered plans open to seizure, the Institute recommended that registered plans recognized under the *Income Tax Act* ought to be completely exempt from enforcement processes.¹⁵⁸

New Brunswick's *Enforcement of Money Judgments Act* exempts RRSPs, RRIFs and DPSPs to the extent they are necessary to meet the reasonable needs of the judgment debtor and his or her dependants.¹⁵⁹

We continue to recommend that RRSPs, RRIFs and DPSPs should be exempt from seizure. There was no objection to this proposal in our first Discussion Paper.

In response to our proposal it was suggested that Registered Disability Savings Plans (RDSPs) should also be exempt. These are savings plans that permit funds to accumulate, tax free, for the future benefit of persons with long-term disabilities. We also heard suggestions that legislation should exempt Locked-in Retirement Accounts (LIRAs), and Registered Education Saving Plans (RESPs). LIRAs hold funds transferred from pension plans from which a plan member or other person entitled to benefits withdraws before retirement, on certain conditions. RESPs hold funds for the education of beneficiaries. We agree that both should be exempt from seizure in the context of judgment enforcement proceedings.

We considered whether a general exemption should apply to “registered plans”. Other plans which hold funds tax-exempt for public policy purposes may come into being in the future. We consider that each should be examined on its own terms. Section 159(1)(m) of the *Uniform Act* permits property which is not expressly listed as exempt to be designated as such by regulation.

Recommendation:

Judgment enforcement legislation should exempt from seizure all rights, property and interests of a debtor in a registered plan. For purposes of the exemption “registered plan” should include a Registered Retirement Savings Plan, Registered Retirement Income Fund, Registered Deferred Profit Sharing Plan, Locked-in Retirement Account, Registered Disability Savings Plan, and Registered Education

¹⁵⁷ Alberta Law Reform Institute, *supra* note 155 at 44.

¹⁵⁸ *Ibid* at 41-52.

¹⁵⁹ *Enforcement of Money Judgments Act* (NB), *supra* note 10, s 85(h). Assessment of the fund's ability to provide for the reasonable needs of the debtor and his or her dependents is to take into account the amount of income from the plan that will be exempt when the debtor retires, and other sources of retirement income that will be exempt from seizure (e.g., pensions): *ibid*, s 86(5).

Savings Plan.

Sale of Land

The *Uniform Act's* procedures for sale of land entail a number of changes from the current regime under the *Sale of Land Under Execution Act*.¹⁶⁰ The most notable of these is the removal of the requirement to advertise the property in a certain way. Instead, the enforcement officer would have discretion to devise the best means of disposing of the property, and would circulate that plan to interested parties for possible objection ahead of time.¹⁶¹

Among those who commented on our proposal to adopt the *Uniform Act's* provisions there were mixed views. We heard concern that leaving the procedures to individual Sheriffs in the different jurisdictions might lead to inconsistent procedures across the province. On the other hand, it was suggested that a more discretionary system would save costs.

We recommend the adoption of the *Uniform Act's* procedures, except with regard to the waiting period for sale, which we address below. The *Uniform Act's* provisions are more modern and robust than those currently provided for under the *Sale of Land Under Execution Act*, and provide the Sheriff with discretion to facilitate a speedy and efficient sale process. As with mortgage foreclosures, to ensure consistency a uniform practice for non-exceptional cases can be adopted across judicial districts by policy.

The *Uniform Act* provides for a waiting period before land may be sold.¹⁶² The waiting period only applies to land on which the debtor resides, or a farmstead owned by a corporation on which a director or officer of the corporation, or a dependent, resides. In our first Discussion Paper we proposed to retain the one-year waiting period which is currently provided by section 4 of the Nova Scotia *Sale of Land Under Execution Act*.¹⁶³ The one year waiting period applies to all land.

Comments on this proposal were mixed, with one commenter objecting that, in principle, enforcement action against land should be available once the appeal period has passed. This commenter agreed, however, with a period of six months.

We recommend that Nova Scotia's current one-year waiting period be incorporated into new judgment enforcement legislation. The legislation should provide that land may not be sold until

¹⁶⁰ *Supra* note 56.

¹⁶¹ *Uniform Act*, *supra* note 1, s 135(1).

¹⁶² *Uniform Act*, *supra* note 1, s 134(1).

¹⁶³ *Supra* note 56, s 4.

a year following registration of the judgment. The purpose is to give the debtor a limited opportunity to hold on to land by satisfying the judgment, or making an agreement with creditors for payment, within one year. It would have a limited application, since a principal residence of reasonable value will be exempt from seizure and sale in any event.

After a year has passed, only a minimal waiting period should be required following delivery of the notice of intention to sell pursuant to section 134 of the *Uniform Act* - perhaps as little as thirty days, to accommodate the procedures required by section 135 of the *Uniform Act*.

Recommendations:

Judgment enforcement legislation should provide that a judgment debtor's interest in land may not be sold until the judgment has been registered for one year.

Third Party Rights

We do not recommend adoption of certain provisions of the *Uniform Act* that tend to trench upon the property and contractual rights of third parties. A number of sections seek to void legal rights that may be a significant component of the relationship between a judgment debtor and a third party, such as a fellow shareholder, partner, licensor, seller or lessor. By voiding transfer restrictions and termination provisions, the *Uniform Act* would effectively put the judgment creditor in a more favourable position *vis-a-vis* such third parties than the judgment debtor would be, absent a judgment.

We appreciate the tension between ensuring adequate recovery and protection of third party rights, and the risk of a debtor making himself judgment-proof through creative use of such devices. In our consultations we heard that co-ownership is often an impediment to effective judgment enforcement and that alternative remedies (*e.g.*, procedures to partition land)¹⁶⁴ are cumbersome. But we simply disagree with overriding third party rights in principle, as a matter of balancing judgment creditors' rights against the rights of uninvolved third parties. As well, in the case of family property we are concerned about the implications for vulnerable spouses who will often be the co-owners in question.

Therefore, we recommend that provisions of the *Uniform Act* which abridge or limit significant rights of innocent third parties ought not to be adopted. These include: section 52(3) (licenses); section 54(2) (co-owned property not in possession of the debtor); section 55(2), (3) and (4)

¹⁶⁴ See *Partition Act*, RSNS 1989 c 333, pursuant to which a creditor or other party, having purchased the debtor's interest in co-owned land via a judicial sale, may commence an action to have the land partitioned.

(overriding licensor's refusal to consent to transfer); sections 90, 91, and 92 (overriding provisions in a lease, contract of sale or security agreement); section 125 (transfer restrictions on shares in closely-held companies); and Part 11 (co-owned and partnership property).

We recommend that the provisions of *Civil Procedure Rule 79* regarding joint accounts (Rule 79.09 and 79.10) should be substantially preserved in any new enforcement legislation. In particular, it should be possible to seize a portion of a joint account in which a judgment debtor has an interest, on the presumption that the debtor owns an equal share of the funds in proportion to the number of account holders.¹⁶⁵ Notice should be given by the financial institution to the creditor and the other account holders, and a period of time provided during which an application may be made to determine the debtor's interest in the account, before the funds are paid to an enforcement officer.¹⁶⁶

Judgment enforcement legislation should also preserve the substance of *Civil Procedure Rule 79.11* regarding partnership property. It should be possible to obtain a court order for enforcement against a partner's share of partnership property, where the partner has been sued as a member of the partnership, and the extent of the partner's interest in the assets of the firm is determined.¹⁶⁷ Legislation should also provide for a court order for enforcement against the non-partnership assets of a partner, on a judgment against the firm.¹⁶⁸

Recommendations:

Judgment enforcement legislation should not include provisions of the *Uniform Act* that substantially abridge the property or contract rights of third parties.

Judgment enforcement legislation should incorporate provisions of the *Nova Scotia Civil Procedure Rules* regarding seizure of joint accounts (Rule 79.09 and 79.10) and partnership property (Rule 79.11).

Costs

In our consultations we were encouraged to consider measures to limit the costs that a creditor may seek to recover in judgment enforcement proceedings. Creditor costs bear no necessary

¹⁶⁵ *Nova Scotia Civil Procedure Rules*, r 79.09(1).

¹⁶⁶ *Ibid*, r 79.09(5)-(7).

¹⁶⁷ *Ibid*, r 79.11(1). A separate provision, s 26 of the *Partnership Act*, RSNS 1989, c 334, permits a court order for execution against partnership property on a judgment against the partner personally.

¹⁶⁸ *Nova Scotia Civil Procedure Rules*, r 79.11(2).

connection to the amount of the debt, and can inflate the eventual judgment debt substantially. It was suggested that there should be a limit on costs, to a certain percentage of the debt - e.g., 10% - which would limit nuisance judgments and provide protection against undue liability for the creditor's collection costs.

We do not recommend a limit on recoverable costs for judgment enforcement. The costs to recover a judgment can be substantial, and the creditor must bear such costs unless they can be recovered from the debtor. In most cases creditors will consider the likelihood of recovery before proceeding with expensive procedures, and the Sheriff should encourage them to do so before proceeding. Under the *Uniform Act* the Sheriff, and creditors, are required to act in a commercially reasonable manner in directing or undertaking any enforcement action¹⁶⁹ - a clear direction to avoid disproportionate expenditure in pursuit of recovery.

EXEMPTION OF JUDGMENT DEBTORS' INCOME

This section considers the extent to which a judgment debtor's income ought to be exempt from seizure to satisfy a civil money judgment. We have organized the discussion around the following main issues:

- 1) what benchmark measure to use for determining a minimum threshold of income which is not subject to seizure;
- 2) how to apply the benchmark measure, including:
 - a. whether the minimum income threshold should be differentiated based on community size;
 - b. whether the minimum income threshold should take into account the debtor's household income;
 - c. how to account for the debtor's dependants;
 - d. whether to include certain tax benefits as income subject to seizure;
- 3) what deductions ought to be permitted in calculating an income exemption amount, in addition to the minimum income threshold (in particular, whether in addition to those legally required to be paid, such as CPP/EI, union dues and professional fees, a debtor ought to be able to deduct child care, child and spousal support, and/or medical expenses);
- 4) what proportion of the debtor's income above the minimum threshold should be subject to seizure; and,
- 5) how to protect exempt income once it is paid into the debtor's bank account.

The *Uniform Act* provides for a certain amount of the debtor's income to be exempt from seizure. In particular, in addition to a minimum threshold of income, 50% of the debtor's net

¹⁶⁹ *Uniform Act*, *supra* note 1, s 10(1).

income above the threshold would be left for the debtor. The exemption would apply to income from employment, under a contract for services making provision for periodic payments, from a retirement plan (except as exempt under other legislation), under an annuity, from a registered plan (deferred profit savings plan, an RRIF or an RRSP), and from the investment of personal injury damages attributable to loss of future income.¹⁷⁰

The *Uniform Act* provides deductions for income tax, employment insurance, Canada Pension Plan contributions, compulsory union or professional fees, registered pension plan contributions, health, disability and life insurance premiums.¹⁷¹ From the net amount of income, a minimum floor is to be prescribed by regulation, which is not subject to seizure. Fifty per cent of the amount above the minimum threshold is exempt from seizure,¹⁷² subject to a maximum exempt income amount, also to be prescribed by regulation. There is a further exemption for 100% of income from a personal injury award for future medical care expenses, and investment income received on such an award.¹⁷³

Civil Procedure Rule 79.08(3)

Nova Scotia's current income exemption provision is in *Civil Procedure Rule 79.08(3)*. Unless a judge orders otherwise, 15% of a debtor's gross wages may be seized. The Rule provides for a 'minimum floor' of \$330 net income per week for a judgment debtor without dependants and \$450 net income per week for a judgment debtor with dependant(s) - net income below these amounts may not be seized.

The minimum floor is a net figure arrived at "after deduction of amounts required by law to be deducted". In the case of *Di Benedetto v. Slaunwhite*,¹⁷⁴ Palmeto C.J. Co. Ct. held that the phrase "required by law" included compulsory deductions such as pension and union dues deductions as well as tax, Canada Pension Plan ('CPP') and Employment Insurance ('EI') premiums required to be deducted by law.¹⁷⁵

The income exemption has remained substantially the same since the introduction of the *1972 Civil Procedure Rules*. Rule 53.05 of the *1972 Civil Procedure Rules* provided that up to 15% of the judgment debtor's gross wages could be garnished, with a minimum income threshold below which the debtor's net income, after deductions, should not ordinarily fall. As with the current Rule 79.08(3), the rule exempted at least 85% of the debtor's gross employment income; however, the former rule provided for a minimum income threshold of \$275 per week for a

¹⁷⁰ *Ibid*, s 164 ("income").

¹⁷¹ *Ibid*, s 164 ("net income").

¹⁷² *Ibid*, s 165(1).

¹⁷³ *Ibid*, s 165(2).

¹⁷⁴ (1993), 119 NSR (2d) 366, 12 CPC (3d) 265.

¹⁷⁵ *Ibid* at 369.

debtor without dependants, and \$415 per week for a debtor supporting dependants, regardless of number.

New draft *Civil Procedure Rules* in 2008 provided an income exemption level equivalent to a minimum income threshold of exempt income, after tax, based on Statistics Canada's urban Low Income Cutoffs (the 'LICO') and scalable according to the number of dependants. The new rule would have eliminated a percentage deduction above this minimum income threshold. All of a debtor's income above the threshold would be subject to seizure.

The new Rule met with vociferous objection,¹⁷⁶ on the basis that a sudden reduction of weekly take-home pay to LICO-based low income levels would be far more severe and potentially debilitating than would be appropriate in the judgment recovery context. The typical escape valves for debtors - the court's stay of execution power and the bankruptcy system - were thought to be too complex for some debtors to necessarily take advantage of, and not necessarily available in all cases where the low income cutoff amounts were nonetheless inappropriate. As well, there was concern that verifying the actual number of dependants would complicate the Sheriff's task in pursuing garnishment.

In arriving at the current Rule 79.08(3), the Court more or less restored the old Rule 53.05, with certain changes. In particular, the minimum income threshold was increased to account for inflation (to \$330 per week for a debtor without dependants, and \$450 per week for a debtor supporting any number of dependants).

In our first Discussion Paper, we recommended adoption of the *Uniform Act's* income exemption provision. The *Uniform Act's* exemption accounts for taxes and a range of other compulsory deductions and expenses, and further shields a minimum income threshold. The enforcement officer is authorized to seize 50% of the remaining income. By contrast, the current Rule 79.08 of the *Civil Procedure Rules* allows for seizure of 15% the debtor's *gross* wages. No taxes, deductions or minimum subsistence amounts are factored in, until garnishment begins to reduce the debtor's income below the minimum income threshold amount of \$330 net wages per week for a single debtor and \$450 net wages per week for a debtor with dependants.

We continue to favour the *Uniform Act's* basic approach on the basis that it better accounts for the individual circumstances of the judgment debtor.

The difference between the two models is illustrated at Appendix II, which calculates exemption amounts for individuals and families in a variety of income brackets, under the current Rule 79.08, the *Uniform Act* exemption, and a third model, explained below, which takes a greater share as the debtor's net income increases. The *Uniform Act's* exemption consistently leaves more money in low income debtors' hands than the current Rule 79.08, which in our view does not adequately fulfill the purposes of an income exemption. For example, Rule 79.08 leaves a family of four living just at the poverty line with only about \$62 a week to pay for any costs

¹⁷⁶ Nova Scotia, Legislative Assembly, Law Amendments Committee (November 18, 2008) (Rollie Thompson & Clare MacNeil).

above the bare necessities.¹⁷⁷ This represents the loss of funds for basic recreation, clothing, school supplies, extracurricular activities, as well as the inability to meet unexpected expenses such as car and household repairs or rises in heating and food costs.

Minimum Income Threshold

As Buckwold and Cuming observe, “the purpose of modern exemption law is not only to enable the judgment debtor and his or her family to maintain a subsistence standard of living, but to permit them to function as healthy, productive and contributing members of society.”¹⁷⁸ A minimum threshold of income exempt from seizure should ensure that the debtor has sufficient funds to maintain an adequate standard of living. In particular, it should ensure that low-income debtors are not reduced to an unreasonable living situation, and further marginalized, by virtue of a judgment debt.

In this section we examine how to set the minimum floor. We first consider a number of models and statistical measures which may be used to fix a minimum threshold of income which ensures an adequate standard of living. We then address whether the minimum threshold should be differentiated according to the size of the community where the debtor resides, whether the threshold should take account of the debtor’s household income, and whether and how to account for dependants.

Low Income Measurement Options

There are three main measurements of low income - or ‘poverty lines’ - used in Canadian statistics: the Low Income Cutoffs (LICO), Low Income Measurement (LIM) and Market Basket Measure (MBM).¹⁷⁹ The following sections assess each on the basis of their relative fairness, effectiveness and practicality as a standard for determining a threshold amount, below which no income should be subject to seizure.

Low Income Cut Off (LICO)

The Low Income Cut Off (LICO) is an income threshold calculated by Statistics Canada which indicates the minimum level of income that an individual or family will need to afford a reasonable standard of living in Canada today.¹⁸⁰ Statistics Canada has been publishing the

¹⁷⁷ Appendix II indicates that a family of four living at the poverty line, based on a 2011 Market Basket Measure adjusted for inflation to 2014, after essentials such as food, rent, transportation and electricity, will be left with only approx \$62/wk.

¹⁷⁸ Buckwold & Cuming, *supra* note 11, at 155.

¹⁷⁹ See Murphy et al, *supra* note 34.

¹⁸⁰ Dennis Raphael, *Poverty and Policy in Canada: Implications for Health and Quality of Life* (Toronto: Canadian Scholars Press, 2007) at 40; Murphy et al, *supra* note 34 at 87.

LICO since 1959. The agency describes the LICO as its “most established and widely recognized approach to estimating low income cut-offs.”¹⁸¹

The LICO measurement indicates at what income level a family will be spending more of its income on necessities such as food, shelter, and clothing, than a large majority of Canadian families. The LICO begins with a basket of necessities consisting of food, shelter and clothing. Based on data from its most recent Family Expenditure Survey in 1992,¹⁸² Statistics Canada has calculated that an average Canadian family of the same size and similar geographic location spends 43% of its net income on these necessities.¹⁸³ Statistics Canada estimates that a family spending 20% of its income more than this can be said to be in ‘straitened circumstances,’¹⁸⁴ unable to afford a reasonable standard of living relative to others in their area. The LICO is expressed as an income figure below which the average family will be spending more than 63% of its income on the most basic necessities.

Though it depends on research regarding spending patterns, LICO is given as a general income figure - not a direct assessment of any given individual’s or family’s spending. A family with an income above the cut off figure would not be considered low income according to LICO, even if that particular family happened to be spending more than 63% of its income on food, shelter and clothing.¹⁸⁵

Two LICO measurements are published each year: one that provides a measurement of income before tax and one that provides a measurement of income after accounting for federal and provincial taxes (but no other taxes or deductions). The before tax LICO indicates a family’s spending power according to gross income, including government transfers such as tax credits. The after tax measure takes into account not just government transfers, but deductions for income taxes as well.¹⁸⁶

¹⁸¹ Murphy et al, *supra* note 34 at 6.

¹⁸² This is a major survey conducted periodically by Statistics Canada to gather information on the expenditures, income, and other characteristics of families and individuals in Canada. See Statistics Canada, Labour Market and Income Data Guide, online: (2000) <www.statcan.gc.ca/pub/75f0010x/4060196-eng.htm>.

¹⁸³ Statistics Canada, *Low Income Lines, 2011 to 2012* (Ottawa: Minister of Industry, 2012) at 6, online: <<http://www.statcan.gc.ca/pub/75f0002m/75f0002m2013002-eng.pdf>>.

¹⁸⁴ Sylvie Michaud, Cathy Cotton and Kevin Bishop, *Exploration of Methodological Issues in the Development of the Market Basket Measure of Low Income for Human Resources Development Canada* (Ottawa: Minister of Industry, 2004).

¹⁸⁵ Philip Giles, *Low Income Measurement in Canada* (Ottawa: Ministry of Industry, 2004) at 11, online, <www.statcan.gc.ca/pub/75f0002m/75f0002m2004011-eng.pdf>.

¹⁸⁶ *Low Income Lines*, *supra* note 183 at 8.

While Statistics Canada recommends the use of an after tax LICO¹⁸⁷ in order to get a clearer picture of disposable income after taxes, social policy organizations have preferred to use the before tax LICO. The after tax LICO only accounts for federal and provincial income taxes and does not account for payroll deductions, sales and consumption taxes, which some say have a greater impact on low income than more affluent persons.¹⁸⁸ Using the before tax LICO avoids an artificial deflation of income.¹⁸⁹

Statistics Canada's 1992 Family Expenditure Survey provided the base numbers upon which the LICO income figures were originally calculated. These have been updated each year since 1992 for inflation, according to the Consumer Price Index.¹⁹⁰ LICO numbers are differentiated according to family size and by community size in order to get a more realistic picture of income necessity.

LICO is a mixed consumption/equity basket. It takes account of the cost of food, shelter and clothing as an absolute value, but defines poverty-level income in a relative sense, in relation to the proportion of household income that a family with modest income will be required spend on these goods.¹⁹¹ The LICO figures combine a consumption basket approach (ie., imagining a basket of goods and services that are the bare minimum to ensure an adequate standard of living) and an equity approach.¹⁹²

This is important for our purposes, because an adequate standard of living is not a fixed quantity, but has much to do with a person's condition and place in society generally. It means having income,

not only to cover basic human needs, but also enough money to ensure that you are able to live in a safe environment, have a social life in your local area, feel part of your community, carry out your duties/activities in the family and neighbourhood and meet the essential costs of transport.¹⁹³

Calculating only what a family needs to survive takes no account of a family's quality of life relative to Nova Scotia society in general. A relative measure of low income gives some

¹⁸⁷ *Ibid.*

¹⁸⁸ See "What's Behind A Poverty Line?" (June 9, 2000), online: Canadian Council on Social Development <<http://www.ccsd.ca>>.

¹⁸⁹ *Ibid.*

¹⁹⁰ Michaud et al, *supra* note 184 at 6.

¹⁹¹ *Ibid.*

¹⁹² Greg deGroot-Maggetti, *A Measure of Poverty in Canada: A guide to the debate about poverty lines* (Citizens for Public Justice, 2002) at 4, online: <http://www.cpj.ca/sites/default/files/docs/A_measure_of_poverty_2.pdf>.

¹⁹³ Raphael, *supra* note 180 at 36.

indication as to what an individual or family needs to be able to continue to participate as members of their community.

The LICO is used by both government agencies and social policy organizations to indicate the income needed to provide for a reasonable standard of living for individuals and families.¹⁹⁴ The measurement has been in widespread use by numerous organizations for many years, and continues to be used by organizations studying the effects of poverty.¹⁹⁵

LICO figures are differentiated by community size, which Statistics Canada found to be a significant variable in determining poverty level income according to the average percentage of income spent on food, shelter and clothing. There are separate figures given for various family sizes.

The LICOs are subject to criticism, on the other hand, because they do not differentiate according to region - the figures are the same for a community of a given size, whether in British Columbia, Quebec or Nova Scotia. As well, the LICO baseline survey and calculations of average income level at which a household will have a minimally adequate standard of living have not been updated since 1992. The figures are only updated for inflation, and so do not track changes in the average percentage of income spent on necessities. For this reason LICO has been called a “de facto ‘absolute’ measure with regard to changes in real income.”¹⁹⁶ While adjustment for inflation may keep pace with the cost of the basic items in the basket, it has not necessarily kept pace with how general spending patterns on these goods have evolved - that is, the percentage of income devoted to these basic expenses above which an average family will be considered to be experiencing real hardship, relative to the Canadian average. Statistics Canada has indicated that it will not be rebasing the LICO in the future. As a consequence, LICO figures may become less and less reliable as an indicator of poverty going forward.¹⁹⁷

¹⁹⁴ See Raphael, *ibid* at 41; For example, Citizenship and Immigration Canada uses the LICO as a minimum income which persons must maintain in order to qualify to sponsor persons into the country: online, <<http://www.cic.gc.ca/english/information/applications/guides/5196ETOC.asp>>.

¹⁹⁵ See Raphael, *ibid* at 41; National Council of Welfare Campaign 2000, Canadian Council of Social Development, and even Citizenship and Immigration Canada use the LICO as a minimum income which persons must maintain in order to qualify to sponsor persons into the country. From Spyridoula Tsoukalas and Paul Roberts, *Legal Aid Eligibility and Coverage in Canada* (Ottawa: Canadian Council on Social Development, 2002) online: http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la5-rr03_aj5/p3.html: “Both Gallup and EKOS have conducted polls that provide a guide to what the general public considers to be poverty. One finds that there is an extremely close correspondence between public opinion and the LICO, with both rising over time in line with average income or the standard of living.”

¹⁹⁶ Richard Shillington and Michelle Lasota, *Existing Measures, Working Paper No. 2* (Infometrica Ltd., 2009) at 8, online, <<http://metcalffoundation.com/wp-content/uploads/2011/05/fog-working-paper-02.pdf>>.

¹⁹⁷ Murphy et al, *supra* note 34.

Low Income Measurement (LIM)

The Low Income Measurement (LIM) is another income threshold published by Statistics Canada. The LIM is given as a fixed percentage (50%) of median adjusted family income.¹⁹⁸ The LIM is, “a purely relative measure of low income based on the estimates for families and individuals gathered from T1 files, i.e. administrative tax return data.”¹⁹⁹

Statistics Canada explains its LIM calculation as follows:

First, each household’s income is adjusted using Statistics Canada’s equivalence scale. Then, we find the median income, i.e. the income where half the families have a higher adjusted income and the other half have a lower adjusted income. The LIM is then represented by half that median adjusted income. The LIM is defined on a national level, which means the line is the same in Ontario as in Prince Edward Island or British Columbia. Also, estimates are presented on the basis of the number of persons and are currently available for the 1997-2008 period.²⁰⁰

Because the LIM is a relative measure it is often used when doing international comparative work on poverty. However, the LIM is not an accurate threshold for the purposes of a low income cut off as it is a totally relative measure of poverty and is not designed to account for the actual conditions necessary for a family to have an acceptable standard of living. LIMs define poverty only according to a percentage of median national income. LIMs are not differentiated by community size or province. In contrast, both the LICO and the MBM, discussed below, take account of geographic differences in cost of living, to some extent, and so provide a more sensitive measurement of income required to have an adequate standard of living.

Market Basket Measures (MBMs)

The final benchmark for measuring low income in widespread use in Canada is the Market Basket Measure (‘MBM’) developed by Human Resources Development Canada. The MBM threshold amount represents the cost of a ‘basket’ of essential goods and services. The MBM is meant to provide more of an absolute or concrete indication of living conditions than either the LICO or the LIM. The MBM was created by Human Resources Development Canada (now Human Resources and Skills Development Canada or “HRSDC”) in order to address criticism of the LICO and LIM’s more relative indicators of poverty.²⁰¹

¹⁹⁸ Statistics Canada, *Low Income Measures (2007-2008)* online: <<http://www.statcan.gc.ca/pub/75f0002m/2009002/s3-eng.htm>>.

¹⁹⁹ Andrew Sharp and Christopher Ross, *Living Standards Domain of the Canadian Index of Wellbeing (CIW)* (November 2011) at 35, online: Centre for the Study of Living Standards <<http://www.csls.ca/reports/csls2011-17.pdf>>.

²⁰⁰ *Ibid* at 48.

²⁰¹ Raphael, *supra* note 180 at 42.

The MBM threshold imagines a basket of goods and services which a family must be able to afford, or else it will be considered to be living below the poverty line. These goods and services include food, shelter, clothing, footwear, transportation, personal care, household needs, furniture, basic telephone service, school supplies and modest levels of reading material, recreation and entertainment.²⁰² The measure is given as an income figure, net of taxes and payroll deductions including CPP, EI, Registered Pension Plan, union and professional dues deductions, child/spousal support payments, work related child care expenses, out of pocket medical expenses and public health insurance premiums.²⁰³ The cost of the basket of goods and services is assessed separately for each province and for different regions within the province.

Relying on a method that estimates a basic level of income needed to purchase basic necessities, the MBM conceives of poverty as more of an absolute condition, rather than accommodating considerations of income equality or directly accounting for relative social deprivation. A goods and services measure like the MBM is a more intuitive and easier to understand concept of poverty than one that is based, to some extent, on a relative conception of minimally adequate income.

When the MBM was first developed some commentators cautioned that because decision-making authority for the contents of the goods and services 'basket' that comprise the MBM rests with HRSDC²⁰⁴ the measure may be manipulated to suit political aims, as opposed to the lived reality of low income families.²⁰⁵ Consultation with social policy agencies appeared to have quelled some of the initial concern, but the 2010 review of the MBM²⁰⁶ met with skepticism, in particular, where calculations of shelter costs are concerned.²⁰⁷ For example, the MBM's estimate for the cost of shelter in Halifax for a family of four fell 26%, from \$10,034 to \$7,476 a year.²⁰⁸ Clearly, this is not an accurate reflection of minimally reasonable shelter costs for a low income family of four living in Halifax. From Canada Mortgage Housing Corporation's (CMHC)

²⁰² Michael Hatfield, Wendy Pyper, Burton Gustajtis, *First Comprehensive Review of the Market Basket Measure of Low Income, Final Report* (Gatineau: Human Resources and Skills Development Canada, 2010) at 1.

²⁰³ Michaud et al, *supra* note 184 at 8.

²⁰⁴ *Ibid* at 2.

²⁰⁵ See, for example, John Kolkman, "Issue Update: The Market Basket Measure – Rebased or Debased?" (Winter 2011) online: Edmonton Social Planning Council <www.edmontonsocialplanning.ca>.

²⁰⁶ See Hatfield et al, *supra* note 202.

²⁰⁷ Michael Goldberg, Seth Klein, Steve Kerstetter, "How to Destroy a Good Poverty Line", online: (20 February 2012) Canadian Centre for Policy Alternatives <<http://www.policyalternatives.ca/publications/commentary/how-destroy-good-poverty-line>>; see also, Kolkman, *supra* note 205.

²⁰⁸ *Ibid*.

Fall 2013 *Rental Market Report*, the price of a 2-bedroom apartment in Halifax is \$11,712 per year.²⁰⁹

In response, the calculation of average shelter costs was adjusted to exclude homeowners without mortgages, whose shelter costs are generally lower.²¹⁰ But the discrepancy suggests caution going forward concerning the methodology used to choose and price the goods and services in the MBM basket.

Basic Needs Poverty Line

Another means by which to establish a minimum income threshold is to calculate the cost of the minimum goods necessary to keep a family at subsistence levels. Such a basic necessities rate is given by the Fraser Institute's Basic Needs Poverty Line. The Basic Needs Poverty Line defines poverty not in terms of inequality but in terms of insufficiency.²¹¹ To this end, the measure itemizes and costs basic necessities without which a family can be said to have reached an unacceptable level of deprivation.²¹²

While the methodology is similar to calculating the MBM threshold amount, the basic needs included are far less extensive than those considered by the MBM measure. For example, the 2006 Basic Needs Poverty Line for a family of four was \$22,852, before tax. The MBM for Halifax, by contrast, was \$30,353 net of taxes, payroll deductions, child care, child and spousal support, medical expenses and health insurance premiums.

The philosophy behind the Basic Needs Line is that poverty is a condition of lacking the most basic needs - food, clothing, shelter, and household essentials.²¹³ Unsurprisingly, there are far fewer people living in poverty defined by the Basic Needs Line than by the LICO or MBM measures.²¹⁴ The Basic Needs Line is not intended to reflect a reasonable standard of living, or reflect considerations of social inclusion.

²⁰⁹ Average rent for a 2-bedroom apartment in Halifax in October 2013 was \$976/mo, according to CMHC. A 2-bedroom apartment in Truro cost \$772/mo; \$722/ mo in Cape Breton; and \$715/mo in New Glasgow. See Canada Mortgage Housing Corporation, *Rental Market Report: Nova Scotia Highlights* (Fall 2013) at 5, online: <http://www.cmhc-schl.gc.ca/odpub/esub/64503/64503_2013_B02.pdf?fr=1393869205157>.

²¹⁰ See *Low Income Lines*, *supra* note 183 at 10.

²¹¹ Chris Sarlo, *Poverty in Canada 2006* (Vancouver: Fraser Institute, 2006) at 2, online: The Fraser Institute <www.fraserinstitute.org>.

²¹² *Ibid* at 1. These goods include food, shelter, clothing, health care, personal care, essential furnishings, transportation and communication, laundry, home insurance and miscellaneous).

²¹³ *Ibid*.

²¹⁴ *Ibid*.

Social Assistance Rates

The Manitoba Law Reform Commission recommended using the province's social assistance rates to calculate minimum exemption amounts for the *Garnishment Act*.²¹⁵ The Commission considered that using social assistance rates would provide a ready-made figure, periodically recalculated in response to changing economic conditions, which is tailored to accommodate different family sizes. The Commission recognized, however, that as an incentive to debtors to work, exemption amounts should be set above social assistance rates. To this end, the Commission recommended a minimum income exemption of 120% of social assistance rates - in 2006, a monthly exemption of \$600 plus \$100 for each dependant.²¹⁶

Social assistance rates are calculated well below measurements of low income provided by the LICO, LIM or MBM measurements.²¹⁷ These rates do not account for a reasonable standard of living, nor do they provide for the dignity, security and substantive equality of low income families.²¹⁸ They accommodate a certain degree of deprivation by design, in order to discourage dependency.

²¹⁵ Manitoba Law Reform Commission, *Review of the Garnishment Act*, supra note 6 at 23.

²¹⁶ *Ibid* at 22 to 23. Pursuant to Manitoba's *Garnishment Act*, CCSM c G.20, s 5, a debtor is provided with an exemption rate of \$250/mo or \$350/mo with one or more dependants. Pursuant to the definition of "wages" at s 1 of the Act, this amount is net of deductions.

²¹⁷The following are Income Assistance Rates for Nova Scotia posted by the Nova Scotia Department of Community Services, online: <http://gov.ns.ca/coms/employment/income_assistance/BasicAssistance.html>:

Shelter Allowance		
<i>Family Size</i>	<i>Rent or Own a Home</i>	<i>Boarding</i>
1	\$300*	\$223
2	\$570	\$242
3+	\$620	\$282
Personal Allowance		
<i>Shelter situation</i>	<i>Adult Dependant child age 18 to 20 Dependant child to age 18</i>	
Rent, own home, board	\$255 \$255	\$133 *
In hospital 30 days or more	\$105 \$105	Not applicable
In a residential rehabilitation program	\$81 \$81	Not applicable

²¹⁸ See Stella Lord, "Fast Facts: Let's Make Poverty Reduction a Priority" online: (1 March 2011) Canadian Centre for Policy Alternatives <http://www.policyalternatives.ca/publications/commentary/fast-facts-let%E2%80%99s-make-poverty-reduction-priority>. Lord reports that:

In Nova Scotia in 2009, the assistance provided to a single parent with one child was \$3,969 below the poverty line using the MBM.

A couple with two children would need \$8,488 dollars to bridge the gap between assistance and the poverty line and a person with disabilities, \$6,382. A single person considered 'employable' would have only \$6,359 to live on when \$15,579 is the amount considered the minimum required for an individual to meet their very basic needs.

Minimum Wage

The U.S. *Consumer Credit Protection Act* provides a maximum level of income that may be seized in the event of a garnishment of wages.²¹⁹ Weekly garnishments may not exceed the lesser of 25% of an employee's disposable earnings²²⁰ or 30 times the federal hourly minimum wage.²²¹ Some individual states also peg their income exemptions to a multiplication of their respective minimum wages. Illinois, for example, provides an exemption rate of 45 times the minimum wage amount, giving the debtor an exemption equal to a full week's pay at minimum wage.²²²

Nova Scotia's minimum wage is currently set to reflect what some social policy organizations have dubbed a "living wage"²²³ - that is, a wage that is capable of providing for a reasonable standard of living. Using a 'living wage' approach provides an accessible and efficient means of determining a minimum income threshold which affords a reasonable standard of living.

There is no guarantee, however, that the Nova Scotia minimum wage will continue to reflect a reasonable standard of living. Though it is currently adjusted for annual inflation,²²⁴ there is no certainty that it will not be adjusted up or down for reasons other than ensuring a living wage in current economic conditions. More importantly, the calculation does not differentiate according to family or community size and therefore does not provide as accurate an account of income needed to ensure a reasonable standard of living.

In a document compiled by the Halifax Inner City Initiative (HICI), a community initiative sponsored by the North End Council of Churches, participants in a study of low income in Halifax's North End were asked to comment on their experience on Income Assistance. The average income of a female recipient of income assistance in the North End of Halifax at the time of the report in 2003 was \$4430/yr and \$3360/yr for male recipients. Recipients commented that income assistance did not give them enough money each month to live on. They calculated that a living wage adequate to cover their expenses would be \$9.60/hr (or closer to \$18,000/yr in gross wages, ie., approaching the before tax LICO figure). See Halifax Inner City Initiative, at p 4 online: <http://tamarackcommunity.ca/downloads/vc/HAL_final_report.pdf>.

²¹⁹ U.S. Department of Labour, "Fact Sheet #30: The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title 3 (CCPA) online: (2009) U.S. Wage and Hour Division <www.dol.gov/whd/regs/compliance/whdfs30.pdf>.

²²⁰ Disposable earnings means the amount left after legally required deductions are made. See *ibid* at 2.

²²¹ *Ibid*.

²²² *Illinois Code of Civil Procedure* (735 ILCS 5/12 - 803).

²²³ As of April 1, 2014, Nova Scotia's minimum wage will be \$10.40/hr: *The Royal Gazette* (Wednesday, January 29, 2014) at 171. See John Jacobs, "Making the Minimum Wage a Living Wage in Nova Scotia" online: (2007) Canadian Centre for Policy Alternatives <<http://www.policyalternatives.ca/publications/commentary/making-minimum-wage-living-wage-nova-scotia>>.

²²⁴ *Minimum Wage Order (General)*, NS Reg 5/99, s 6.

Other Jurisdictions

Approaches to the minimum income threshold vary widely throughout Canada. In Ontario, there is no minimum income threshold amount.²²⁵ In Alberta, 50% of net income above a minimum income exemption is subject to seizure.²²⁶ The minimum exemption is \$800 per month, plus \$200 per dependant.²²⁷ Prince Edward Island's *General Regulations* under the *Garnishee Act* provide a detailed scheme of exemptions based upon an itemized list of basic needs. Basic needs such as food, clothing, shelter, fuel and utilities, and health care services are itemized and costed to provide an exemption amount. It is not clear how often or how regularly the market basket is updated.²²⁸

No province explicitly ties its minimum income threshold to a low income threshold such as LICO, LIM, MBM or the Basic Needs Line. New Brunswick's new *Enforcement of Money Judgments Act*²²⁹ exempts income to the extent it is "necessary to meet the reasonable needs of the judgment debtor and his or her dependants",²³⁰ and the Sheriff may - but is not required to - have regard to the Surplus Income Directive published by the federal Superintendent of Bankruptcy.²³¹ The Superintendent uses LICO-derived figures, updated annually, to establish a minimum threshold of income.

Saskatchewan's *Enforcement of Money Judgments Act*,²³² provides for a minimum threshold amount approaching the LICO and MBM amounts: \$1500 plus \$300 for each dependant, per month.²³³ Similarly, Nunavut's *Exemptions Regulations*²³⁴ provide for an income exemption of \$1500 per month plus an additional \$300 per month per dependant.

Appendix III summarizes the income exemption provisions under judgment enforcement legislation for each jurisdiction in Canada.

LICO or MBM?

We consider that the serious candidates for setting a minimum income threshold are the LICO and the MBM. Both are updated annually, both are in widespread use and widely accessible,

²²⁵ *Wages Act*, RSO 1990, c W.1, s 7(2), providing an exemption of 80% of net wages.

²²⁶ *Civil Enforcement Act*, *supra* note 7, s 81(1)(d).

²²⁷ *Civil Enforcement Regulations*, *supra* note 88, s 39(2).

²²⁸ *General Regulations*, PEI Reg EC 382/72, s 3.

²²⁹ *Supra* note 10.

²³⁰ *Ibid*, s 85.

²³¹ See Gleixner et al, *supra* note 12 at 29.

²³² *Supra* note 9, s 95(2).

²³³ See *Enforcement of Money Judgments Regulations*, *supra* note 141, s 23(7)(b).

²³⁴ Nu Reg 006-2006, s 2(2)(a).

both account for family size and both reflect geographic differences in cost of living. Both aim to determine a level of income which provides a reasonably adequate standard of living, as opposed to mere subsistence.

Both the LICO and MBM measures are subject to concerns about their reliability going forward. The LICO will no longer be rebased, but only indexed to inflation, and so will become unreliable as a relative measure of minimally necessary income. The MBM, on the other hand, has been criticized as subject to potential political manipulation.

The particular benefits of the LICO measurement are its accessibility, its widespread use, and the fact that it reflects a relative conception of poverty as a matter of social inequality. On the other hand, the MBM is a straightforward costing of necessary goods and services, without which a family would find itself in an unreasonable living situation.

We conclude that a minimum income threshold calculation should be informed by both measures. A minimum income threshold should not fall below the MBM's minimally necessary basket of goods and services, but neither should it fall below the more relative standard of the LICO.

The LICO and MBM thresholds for an individual in Halifax in 2011 (the most recent figures provided for the MBM) are as follows:²³⁵

Low Income Measurement for Individual for 2011 in Halifax	Income Amount
LICO (before tax)	\$20,065
LICO (after tax)	\$16,328
MBM	\$18,136

The amounts provided by the before tax LICO and the most recent MBM threshold (from 2011) are very close. But after factoring in income taxes, and CPP and EI deductions, the before tax LICO does not provide the minimum income necessary to afford the MBM's basket of necessary goods and services. The before tax LICO for an individual in a community the size of Halifax in the year 2012 (the most recent year available) was \$20,366. This roughly equals a monthly net income of \$1417/mo, after federal and provincial income tax, EI and CPP deductions. Accounting for inflation since 2012,²³⁶ the individual's net income would be \$1443/month, \$332/week, or \$17,317/year. This happens to roughly correspond to the current income exemption level under Rule 79.08(3) of the *Civil Procedure Rules* (\$330/wk). But the MBM requires disposable annual income of \$18,831²³⁷ - or \$1569 per month - for an individual to

²³⁵ See *Low Income Lines, 2011 to 2012*, supra note 183.

²³⁶ Based on the Nova Scotia Consumer Price Index (All-items) from 2012 to January 2014.

²³⁷ Adjusted for inflation since 2011, based on the Nova Scotia Consumer Price Index (All-items) from 2011 to January 2014.

afford necessary goods and services. On that basis, under our recommended legislation the minimum net income threshold in 2014 should be approximately \$1570/mo, or \$361/wk, after taxes, EI and CPP deductions, and other deductions and expenses required by law.

What is more important, however, is to emphasize the principles that ought to govern the selection of a standard. The LICO and MBM may well be eclipsed by other, better standards in the future. At a minimum the figure should be aimed at providing a reasonable standard of living in terms of necessary goods and services, with due regard for social equality and inclusion, without which the debtor's marginalization may be compounded. Ideally the standard's baseline should be updated regularly, and the measure should be in widespread use and therefore subject to constant independent scrutiny and review.²³⁸

Recommendations:

A minimum income threshold for an individual judgment debtor should be set on the basis of Statistics Canada's Market Basket Measure for an individual in Halifax, subject to annual automatic adjustment for inflation. In 2014, the threshold should be \$1570 net income per month.

The resulting threshold should regularly be checked against the before tax Low Income Cut-off.

Alternative methods and statistical standards for a minimally adequate income should be reviewed on a regular, systematic basis, to ensure that the minimum income threshold is on the soundest possible footing.

Differentiating a Minimum Income Threshold According to Community Size

This section considers whether the minimum income threshold can or should be differentiated according to the size of the community in which the debtor resides. Both MBM and LICO differentiate their income figures on the basis of community size.

Having different minimum income thresholds for different community sizes would introduce a fair bit of complexity to the system. The question is whether a single figure for the whole of Nova

²³⁸ For example, researchers are projecting that food prices across Canada may increase between 0.3% and 2.6% overall in 2014. These projections see meat costs rising as much as 2.1%; the cost of eggs rising by as much as 2%; and grains rising up to 2.0% in 2014. Such rises in food prices are greater than rises in the Consumer Price Index and must be taken into consideration in making annual adjustments to the low income threshold. Low income families with tighter budgeting margins will be the least able to absorb rising costs of food prices. See Dr Sylvain Charlebois et al, *Food Price Index 2014* (Guelph: University of Guelph, 2014) at 9, online: <<http://www.uoguelph.ca/cpa/UniversityofGuelph-FoodReport2014-December32013.pdf>>.

Scotia can represent an adequate standard of living, regardless of community size. We conclude that it can.

A report from the Nova Scotia Food Security Network, the Food Action Research Centre and Mount Saint Vincent University on the cost and affordability of a nutritious diet in Nova Scotia reported that the cost of a nutritious food basket was higher in rural areas than in urban areas in Nova Scotia.²³⁹ The report provided actual costs of a nutritious food basket for each district health authority. The following are numbers from that report for the average monthly cost of a basic nutritious diet for a reference family of four in each of the district health authorities:²⁴⁰

South Shore	South West Nova	Anna-polis Valley	Col-chester East Hants	Cumber-land	Pictou County	Guys-borough Anti-gonish	Cape Breton	Halifax
\$847.73	\$825.77	\$851.19	\$843.22	\$878.21	\$878.21	\$882.28	\$917.53	\$823.35

The report observes that, “a basic nutritious diet for the reference household of four living in a rural area would cost \$860.11 in June 2012, which is \$37.15 per month higher than the cost of a basic nutritious diet purchased in urban grocery stores.”²⁴¹

There is also transportation. While a family of four in Halifax, for example, may spend \$272/mo or \$3264/yr on bus passes for the family, a family of four in rural Nova Scotia is practically required to bear the cost of an automobile. One study indicates that the average cost of operating a private vehicle can be \$478.34/mo, or \$5740.08/yr. Another estimates driving costs to be \$6482.16/yr, or \$540.18/mo.²⁴²

There are substantial differences between shelter costs inside and outside Halifax. Average rents for a 2-bedroom apartment in Halifax in the fall of 2013 reached \$976 /mo while a 2-bedroom

²³⁹ Nova Scotia Food Security Network and the Food Action Research Centre, *Can Nova Scotians Afford to Eat Healthy?: Report on 2012 Participatory Food Costing* (Halifax: Mount Saint Vincent University, 2013) at 13, online: http://foodarc.ca/wp-content/uploads/2013/08/2012-Food-Costing-Report_Final_website.pdf.

²⁴⁰ *Ibid* at 12.

²⁴¹ *Ibid* at 13.

²⁴² *Ibid* at 16. Recent data on driving costs from the Canadian Automobile Association indicate that the average driving cost (18,000km/yr) when insurance, license and registration, depreciation and car financing is taken into consideration, is \$6482.16/yr. While this is the cost of driving a brand new Civic LX with a finance expense of \$836.64 (ie., 7.25% interest) and a depreciation cost of \$3069.36/yr, even if one does not account for this cost, the cost of driving in Canada is still over \$2000/yr on average without yet taking fuel, maintenance and repairs and depreciation costs (on a used car) into account. Canadian Automobile Association, *Driving Costs: 2013 Edition* at 5, online: http://www.caa.ca/wp-content/uploads/2012/06/CAA_Driving_Cost_English_2013_web.pdf.

apartment cost only \$772/mo in Truro; \$722/mo in Cape Breton; and \$715/mo in New Glasgow.²⁴³

These differences represent a cost savings of approximately \$2800/yr for renting an apartment outside of HRM (ie., given that the average cost of rent as indicated by rents above are about \$684/mo). However, taking into consideration that food on average costs approximately \$446 more a year for a family outside of Halifax, and the fact that these same families will most likely have to operate their own private vehicle, the savings in shelter costs outside of Halifax may be entirely taken up by food and transportation costs.

The MBM calculation accounts for differences between provinces in cost of living, and also for transportation costs. The most recent MBM numbers available from Statistics Canada, for an individual and a family of four, are as follows:²⁴⁴

	Rural Area	Less than 30,000	30,000 to 99,999	Halifax	Cape Breton
1 person	18,101	18,721	17,740	18,136	16,928
4 persons	37,269	37,443	35,480	36,272	33,856

According to the MBM, then, there is only a very small difference in the cost of a minimally reasonable standard of living between Halifax and rural areas with populations under 10,000. Interestingly, areas such as Truro and New Glasgow that have populations above 10,000, but under 30,000 have the highest costs of living according to the MBM – higher than even Halifax. Cape Breton, on the other hand, has the lowest cost of living outside of Sydney. Even so, the difference between the highest cost of living areas and the lowest was only \$1793 per year for an individual, or \$149 per month.

We conclude that the small degree of variation in cost of living between the different counties in Nova Scotia does not justify the added administrative complexity of a minimum income threshold differentiated by community size. We recommend that a single threshold should be applicable to all areas in Nova Scotia, set on the basis of the MBM figure for an individual in Halifax.

Recommendation:

A single minimum income threshold should be applicable province-wide rather than differentiated by community size.

²⁴³ Canada Mortgage Housing Corporation, *supra* note 209.

²⁴⁴ See *Low Income Lines, 2011 to 2012*, *supra* note 183 at 30.

Household or Individual Income

The minimum income threshold may be applied to the debtor's individual income. Alternatively, the debtor's household income - that is, the income produced by all members of the debtor's household - may be considered.

The calculation of surplus income provided in the *Bankruptcy and Insolvency Act* [BIA],²⁴⁵ for example, takes account of household income. Pursuant to section 68(3) of the BIA, a portion of the bankrupt's income is deemed to be 'surplus,' and recovered by the estate for the benefit of creditors.²⁴⁶ Surplus income is defined as:

[T]he portion of a bankrupt individual's income that exceeds that which is necessary to enable a bankrupt individual to maintain a reasonable standard of living, having regard to the applicable [Superintendent's Standards].

The Superintendent's Surplus Income Directive uses before tax LICO thresholds to establish a Superintendent's Standard - an amount of income above which a bankrupt's income will be determined to be surplus.²⁴⁷ Fifty per cent of the bankrupt's surplus income must be paid to the bankrupt's estate, except for bankrupts whose surplus income is less than \$200 per month.²⁴⁸

This is similar to the *Uniform Act's* method of determining what portion of a judgment debtor's income should be available for seizure, except that a bankrupt's monthly income is determined with reference to the income of the bankrupt's household.²⁴⁹ A bankrupt's household includes any person who either benefits from or contributes to the income or expenses of the household

²⁴⁵ See s 68(1) of the *Bankruptcy and Insolvency Act*, *supra* note 153.

²⁴⁶ *Ibid.*

²⁴⁷ Directive No. 11R2-2013, *Surplus Income* [hereinafter, Surplus Income Directive], at Appendix A:

The Superintendent's Standards ("S") are derived from the Low Income Cutoffs (LICO) released by Statistics Canada. The Superintendent uses the before-tax LICO for urban areas with 500,000 people and over. The 2013 standards are updated by adding to the 2011 LICO, the 2012 Consumer Price Index (CPI) (1.50%) plus a 1.80% adjustment reflecting the 2013 CPI expectation.

²⁴⁸ *Ibid.*, s 5(7). Deductions include minimum statutory remittances (income tax, pension and employment insurance deductions) and other mandatory deductions paid (in the case of a salaried employee) or business expenses and deductions as permitted by the *Income Tax Act* or similar provincial legislation, minimum statutory remittances and installment tax payments made (in the case of a person who is self employed); child and/or support payments; child care expenses; expenses associated with a medical condition; court-imposed fines or penalties that are in the process of being paid; expenses permitted by the *Income Tax Act* (or similar provincial legislation) that are a condition of employment; any other debt where a stay of proceedings has been lifted by the Court, and a recourse authorized; and interest paid on debts that are not dischargeable in bankruptcy under paragraph 178(1)(g) of the *Act*. See ss 5(2) and 5(3).

²⁴⁹ *Ibid.*, s 3.

and is not limited to spousal relationships.²⁵⁰ The surplus income amount is arrived at after the entire household income is taken into account. The percentage of income contributed by the debtor to the overall household income is then applied to the household's surplus income to determine what amount is to be paid to the estate.

Where a family member refuses to disclose his or her income to a trustee in bankruptcy, the following applies:

Where the non-bankrupt spouse refuses or neglects to divulge his or her income or expenses, the trustee shall, for the purposes of determining surplus income, apply 50 percent of the applicable Superintendent's standards (Appendix A) corresponding to the number of persons in the family unit.²⁵¹

In other words, the bankrupt's minimum income threshold (which varies depending on family size) is reduced by 1/2 to account for the assumed contribution of the non-disclosing spouse. The amount of the bankrupt's 'surplus' income - that is, income above the threshold which is payable to the bankrupt's estate - is therefore greater.

For example, for a family of three, the Superintendent's Standard (ie., the minimum income threshold amount provided for by LICO) for 2013 is \$3070. Where a bankrupt's spouse refuses to disclose his or her income, the bankrupt's minimum exemption would be reduced to \$1535. A bankrupt whose personal monthly income is \$2513 would have a surplus income of \$978. Half of that would be required to be paid to the trustee (ie., \$489).

Calculating an individual debtor's surplus income available to creditors based upon the percentage of household income he or she contributes is a complicated methodology. Among other things, it requires disclosure of the income of other members of the debtor's household, or some provision to deem an appropriate deduction where other members of the household refuse to disclose their income.

As well, while a household income measurement will in many cases give a more accurate indication of a debtor's actual ability to pay, it also assumes quite a lot – in particular, that members of the household share income openly and equally. In fact, one in five Canadians say that they have experienced some form of emotional or financial abuse in their current or previous relationship,²⁵² and 25% of women and 12% of men who reported emotional or financial abuse declared that they were denied knowledge about or access to family income.²⁵³ A woman subject to financial abuse in the home may be totally dependent upon her own income even though her overall household income appears higher. Garnishing her income at the higher

²⁵⁰ *Ibid*, s 4.

²⁵¹ *Surplus Income Directive*, *supra* note 247, at para 6(2).

²⁵² Statistics Canada, *Family Violence in Canada: A Statistical Profile* (Ottawa: Minister of Industry, 2011) at 5, online: <<http://www.statcan.gc.ca/pub/85-224-x/85-224-x2010000-eng.pdf>>.

²⁵³ *Ibid* at 14.

amount may compound an already volatile situation, and may make her more vulnerable to abuse. And, as a matter of general policy in Canada, spouses are not typically held liable for debts of their partners.²⁵⁴

In our second Discussion Paper we proposed that the minimum income threshold should be calculated on the basis of, and applied to, the individual income of the debtor alone. Those who commented on this issue were not in favour. In particular, it was observed that if the debtor's minimum income threshold increases according to family size (as we recommend below), and the debtor's claimable deductions can include household expenses (*e.g.*, child care and medical expenses), then the available income must be calculated on a household basis.

In the following sections we do recommend that the minimum income threshold should increase according to family size, and certain household expenses should be claimable as deductions. Nevertheless, we conclude that the minimum income threshold should be applied to the debtor's income alone. No other jurisdiction in Canada includes household income for purposes of an income exemption in the judgment enforcement context,²⁵⁵ though most provide an increased threshold amount for dependents regardless of whether the dependent is earning income. A household income calculation is more complex, and requires provisions for disclosure of household members' income or an arbitrary deeming feature, as we have indicated. We are concerned as well that inclusion of household income fails to account for the vulnerability of spouses who may be subject to abuse, or are denied access to family financial information and resources.

The civil enforcement legislation in Alberta,²⁵⁶ Northwest Territories,²⁵⁷ and Nunavut²⁵⁸ provide that on application, the court may reduce the debtor's income exemption where a debtor's dependant is receiving an income. We do not recommend so broad a variation power, which would risk basing the income exemption in effect on a household income model. Rather, we recommend that where a debtor has claimed a dependant, the court may reduce the minimum income threshold claimed in respect of that dependant only to the extent that the dependant in question is receiving income.

²⁵⁴ See generally, Robert A Klotz, "Sexually Transmitted Debts," (2008) 27 CFLQ 245.

²⁵⁵ New Brunswick's new *Enforcement of Money Judgments Act*, *supra* note 10, s 86(4), not yet in force, permits but does not require the Sheriff to have regard to the Superintendent of Bankruptcy's Surplus Income Directive in deciding how much of the debtor's income will be subject to seizure.

²⁵⁶ *Civil Enforcement Regulations*, *supra* note 88, s 39(4)(d).

²⁵⁷ *Exemptions Act*, SNWT 2010, c 4, s 7(5).

²⁵⁸ *Exemptions Act*, RSNWT (Nu) 1988, c E-9, s 9(4).

Recommendations:

The minimum income threshold amount should be based on a debtor's individual income as opposed to household income.

Judgment enforcement legislation should provide that where a debtor has claimed a dependant, the court may reduce the minimum income threshold only to the extent that the dependant in question is receiving income.

Dependants

The minimum threshold may be scaled according to the number of dependants that rely upon a debtor for support. The LICO and MBM thresholds are published for individuals and for households of two, three, and so on, but having recommended that the threshold should be based on an individual debtor's income, we must consider how to take account of the extra expense of the debtor's dependants. The low income measurement figures based on household income cannot be used directly for this purpose; instead, a per dependant figure must be provided.

Who Should Qualify as a Dependant?

Rule 79.08(3)(a) provides that a dependant for the purposes of the rule is a dependant as defined by the *Income Tax Act*.²⁵⁹ The *Income Tax Act* provides that a dependant is "a person who at any time in the year is dependent on the individual for support and is the child or grandchild of the individual or of the individual's spouse or common-law partner"²⁶⁰ or "the parent, grandparent, brother, sister, uncle, aunt, niece or nephew, if resident in Canada at any time in the year, of the individual or of the individual's spouse or common-law partner"²⁶¹ that is under the age of 18 or is dependent financially because of a mental or physical disability.²⁶² Common law partners and married spouses are not included in the definition of dependant under the *Income Tax Act*, which provides for them separately.

Supporting a spouse financially affects a debtor's standard of living. If an income exemption is to provide for a reasonable standard of living, it must take into consideration the financial

²⁵⁹ RSC 1985, c 1 (5th Supp).

²⁶⁰ *Ibid*, s 118(6)(a).

²⁶¹ *Ibid*, s 118(6)(b).

²⁶² This does not include a child for whom the debtor is obligated to pay child support; instead this amount will be taken into consideration by allowing the debtor to deduct child support payments, as will be discussed in the following sections.

consequences of a debtor providing for a spouse or common law partner. For this reason, we recommend that a spouse, registered domestic partner or common law partner²⁶³ should also be considered to be a dependant for purposes of a minimum income threshold.

Other jurisdictions, such as Alberta, provide that a dependant for the purposes of an exemption includes “the spouse or adult interdependant partner of the enforcement debtor”.²⁶⁴ Similarly, Saskatchewan, Newfoundland and Labrador, Northwest Territories and Quebec expressly provide an additional income exemption amount for a debtor’s spouse.²⁶⁵

Recommendation:

Married spouses, registered domestic partners and common law partners should be considered dependants for the purposes of the minimum income threshold, in addition to those deemed to be dependants under *Civil Procedure Rule 79.08* with reference to the *Income Tax Act*.

Calculating a ‘Per Dependant’ Amount

How should a minimum income threshold account for dependants? According to the 2012 before tax LICO figures, a household in a community the size of Halifax will require roughly an extra \$5,588/yr, \$466/mo, or \$107/wk, before tax, for each extra household member, on average, in order to live at a reasonably minimal standard of living. Adjusted for inflation to 2014,²⁶⁶ this represents an additional amount of \$475/month, before tax, or \$337 net income per month, after income tax, CPP and EI deductions.

²⁶³ Common law partner should have the same meaning as that in the *Maintenance and Custody Act*, RSNS 1989, c 160, s 2(aa): “common-law partner” of an individual means another individual who has cohabited with the individual in a conjugal relationship for a period of at least two years”.

²⁶⁴ See *Civil Enforcement Regulation*, *supra* note 88, s 36(a)(i). An adult is an “Adult Interdependant Partner” pursuant to the *Adult Interdependant Relationships Act*, SA 2002, c A-4.5 at s 3 where, “the person has lived with the other person in a relationship of interdependence for a continuous period of not less than 3 years, or of some permanence, if there is a child of the relationship by birth or adoption, or the person has entered into an adult interdependant partner agreement.”

²⁶⁵ *Enforcement of Money Judgments Act* (SK), *supra* note 9, s 84; *Judgment Enforcement Regulations*, 1999, NLR 102/99, s 49(1)(a); *Exemptions Act*, SNWT 2010, c 4, s 1; *Code of Civil Procedure*, RSQ, c C-25, art 553(11)(a).

²⁶⁶ Based on the Nova Scotia Consumer Price Index (All-items) from 2012 to January 2014.

Before Tax LICO by Family Size in a Community with a Population of 100,000 to 499,999 for 2012²⁶⁷

Household size	100,000 to 499,999
1 person	20,366
2 persons	25,353
3 persons	31,168
4 persons	37,843
5 persons	42,920
6 persons	48,408
7 or more persons	53,894

MBM figures are given only for a family of four, but a formula is provided for calculating relevant figures for different family sizes. There is a greater discrepancy between the differences as family size increases using MBM as opposed to LICO figures, but averaging the differences between MBM formula-based figures for households of between one and seven members in Halifax, for 2011, and adjusting for inflation to 2014,²⁶⁸ a household requires an additional \$5165 per year, \$430/mo or \$199/wk, per dependent.

Again, the LICO-based average net income figure does not provide enough to afford the necessities indicated by the MBM.

We recommend that a per dependant allowance for the debtor's minimum income threshold should be based on the average difference in MBM figures as family size increases, from one to seven-member households. This too should be subject to annual, automatic adjustment for inflation, and regularly checked against the LICO thresholds. If new judgment enforcement legislation were to come into effect in 2014, the per dependant increase would be approximately \$430 net income per month.

²⁶⁷ See *Low Income Lines, 2011 to 2012*, *supra* note 183 at 27.

²⁶⁸ Based on the Nova Scotia Consumer Price Index (All-items).

Recommendation:

A per dependant increase in the debtor's minimum income threshold should be based on the average difference in MBM figures for Halifax as family size increases. This amount should be subject to annual, automatic adjustment for inflation, and regularly checked against the relevant LICO figures. If implemented in 2014, the threshold increase should be \$430 net income per month, per dependant.

Low Income Tax Credits

In addition to employment wages and other forms of income that the *Uniform Act* regards as income for purposes of the income exemption,²⁶⁹ the debtor may also receive tax credits for low income persons - in particular the Harmonized Sales Tax (HST) credit, the Nova Scotia Affordable Living Tax Credit (NSALTC), and the Nova Scotia Poverty Reduction Tax Credit. These are statutory benefits paid to Nova Scotians with low and modest incomes²⁷⁰ to offset the disproportionate burden of sales taxes on their incomes. Given the public policy purposes for these benefits, we recommend that they should be excluded from seizure and therefore not counted as income for purposes of the income exemption.

We have shown these benefits as income in Appendix II, in order to illustrate their effect on disposable household income under various income exemption models. In keeping with our recommendation, we have excluded them from the calculation of amounts seized under each model.

²⁶⁹ See *Uniform Act*, *supra* note 1, s 164. The definition of "income" includes money or other personal property payable as employment remuneration, under a contract for personal services, from any non-exempt pension plan, under an annuity, from a registered savings plan, as income on personal injury damages for loss of future income, and any source prescribed by regulation.

²⁷⁰ For an individual, the HST credit is payable below net income of approximately \$42,000, the NSALTC is payable below net income of approximately \$35,000. The Poverty Reduction Tax Credit is payable to individuals and couples without children, who received income assistance, with an adjusted income of less than \$12,000, in the previous year. For a family of four (two children), the HST credit is payable below a family net income of approximately \$50,000, and the NSALTC is payable below a family net income of approximately \$37,500. The amount of the benefit varies, decreasing as net income rises.

Recommendation:

Tax credits for low income Nova Scotians (e.g., HST credits, the Nova Scotia Affordable Living Tax Credit, and the Nova Scotia Poverty Reduction Tax Credit) should be exempt from seizure to enforce a judgment, and should therefore not be considered income for purposes of calculating the debtor's income exemption.

Personal Deductions

Child and spousal support payments, union dues, professional license fees, child care expenses and medical expenses, along with other such expenses, may significantly affect a person's actual standard of life. Failure to account for such expenses will disproportionately disadvantage certain debtors - especially single parents and persons with disabilities.

Currently, in practice, child or spousal support payments are permitted as a deduction only when they are withheld at source through the Nova Scotia Maintenance Enforcement Program, but not otherwise. The income garnishment system accounts for income deducted at source by the employer - such as MEP - but not voluntary payment directly by the payor. For those debtors whose income is close to or below the current minimum income threshold, then,²⁷¹ there is an incentive to have payments registered and enforced by MEP, so that they can take advantage of the deduction.

The *Uniform Act* provides for the following deductions: income tax, employment insurance, Canada Pension Plan contributions, compulsory union or professional fees, registered pension plan contributions, health, disability and life insurance premiums.²⁷² Only amounts net of these expenses (plus the minimum income threshold) are available for 50% seizure. These are more or less the same deductions permitted under the current rules for calculating the minimum income threshold, which is based on net income.²⁷³ In the Nova Scotia case of *Di Benedetto v. Slauenwhite*,²⁷⁴ Palmeto C.J.Co.Ct. held that compulsory deductions such as pension contributions and union dues must be deducted in order to determine the minimum floor under the *Civil Procedure Rules*.

²⁷¹ Because only when garnishment at 15% of gross income may reduce a debtor's income below the minimum income threshold does net income, and therefore at source deductions, become relevant.

²⁷² *Uniform Act*, *supra* note 1, s 164 "net income".

²⁷³ Note that these deductions are not accounted for in calculating the debtor's income subject to 15% garnishment, which is on the basis of gross income. It is only when garnishment begins to bump up against the minimum reserve threshold that deductions are accounted for.

²⁷⁴ *Supra*, note 174.

Under the *BIA* calculation of surplus income, on the other hand, the following deductions are allowed, on top of the deductions provided for in the *Uniform Act*:

- Child support payments;
- Spousal support payments;
- Child care expenses;
- Expenses associated with a medical condition.²⁷⁵

As discussed above, accounting for these expenses is critical for ensuring that low income debtors are able to maintain a reasonable standard of living. Median full-time child care costs in Nova Scotia range from \$685 per month for pre-school, to \$825 per month for an infant.²⁷⁶

In terms of child support, a debtor earning a salary equivalent to the LICO for a community the size of Halifax (\$20,741 gross income per year)²⁷⁷ can expect to pay \$147/mo for one child; \$294/mo for two children; \$408/mo for three children, and so on.²⁷⁸ Such non-discretionary expenses can reach into the hundreds of dollars, and have a significant effect on the debtor's actual standard of living.

Consider the situation of a family of four in Halifax, with two full-time wage earners making a combined gross income of \$63,300 per year (see Appendix II). With a monthly net income of approximately \$3718/mo, the family will have approximately \$1219/mo after necessities such as food, shelter, transportation and electricity are paid for.²⁷⁹ This amount will be left to pay for expenses such as childcare, school supplies, phone, clothing and footwear, personal care and household cleaning supplies, and recreation. As indicated above, the family can reasonably expect to pay between \$685 to \$825/mo for each child for full-time child care in Nova Scotia. The family will experience disproportionate hardship in any case, but the burden will be extreme if the family's income is subject to seizure pursuant to a judgment, without accounting for child care costs. The same will be true for medical expenses and child and spousal support payments.

²⁷⁵ *Surplus Income Directive*, *supra* note 247 at s 5(3).

²⁷⁶ Child Care Human Resources Sector Council, *You Bet We Still Care: A Survey of Centre-Based Early Childhood Education and Care in Canada* (Ottawa: Child Care Human Resources Sector Council, 2013) at 15. The Nova Scotia Participatory Food Costing Project has reported that the average cost of after school childcare per day in Nova Scotia is \$12/per day. The minimum wage family receives a partial subsidy for childcare costs, resulting in costs of approximately \$175.37/ mo per child. See Nova Scotia Participatory Food Costing Project, *supra* note 239 at 13.

²⁷⁷ Representing the 2012 LICO (the most recent available) adjusted by the Nova Scotia Consumer Price Index (All-items) to January 2014.

²⁷⁸ To a maximum of \$408 for 6+ children. See [Federal Child Support Guidelines \(SOR/97-175\)](#).

²⁷⁹ The expenses for necessities are set out at Appendix II: \$867.42/mo for food; \$976/mo for rent; \$272/mo for transportation; and \$177.39/mo for electricity. It should be noted that these expenses are fairly conservative. This amount assumes a family of four will be living in a two-bedroom apartment in Halifax and will have access to public transportation.

It was suggested in response to our second Discussion Paper that child care cost deductions could be capped, as in the *Income Tax Act*. Section 63 of the *Income Tax Act* allows a taxpayer to claim a deduction for child care expenses. In a family with two income earners, the earner with the lowest income is able to claim the deduction. Child care expenses are defined as payments made to caregivers providing child care services; day nursery schools and daycare centers; educational institutions, for the part of the fees that relate to child care services; day camps and day sports schools where the primary goal of the camp is to care for children (ie., as opposed to a sports study program); boarding schools, overnight sports schools, or camps where lodging is involved. The list is not exhaustive - advertising expenses and placement agency fees to locate a provider may qualify as expenses. A taxpayer can claim these expenses if the childcare is necessary to allow the taxpayer or the child's parent, or the taxpayer's spouse or common-law partner to undertake the following:

- earn income from employment;
- carry on a business either alone or as an active partner;
- attend school under the conditions identified under "Educational program"; or
- carry on research or similar work, for which you or the other person received a grant.

There are maximum allowable deduction amounts as follows:

- \$7,000 for each child under seven years of age at the end of the year;
- \$4,000 for each child over seven years of age at the end of the year and under 16 years of age at any time during the year; or
- \$4,000 for each child over 15 years of age throughout the year who has a physical or mental infirmity and is dependent on the taxpayer, or the taxpayer's spouse or common-law partner.

There are additional limits for expenses relating to boarding schools or overnight camps. These maximums are \$175/wk for the first child, \$250 per week for the second child and \$100/wk for the third child.

It appears to us the *Income Tax Act* child care caps do not reflect the actual costs of child care in Nova Scotia. Median child care costs are reported to be \$685 per month for preschool and \$825 for infant care.²⁸⁰ For that reason we do not recommend that the *Income Tax Act* maximum deductions be used to cap child care costs that may be claimed for purposes of income seizure under new judgment enforcement legislation. A cap may be reasonably imposed, provided it is on the basis of reliable evidence of actual child care costs across the province.

²⁸⁰ Child Care Human Resources Sector Council, *supra* note 276.

Recommendation:

New judgment enforcement legislation should permit deductions for child care expenses, medical expenses and child and spousal support payments, in addition to those deductions provided under the *Uniform Act*.

Administration of Deductions

The deductions currently permitted under Rule 79.08(3) are those which an employer can typically verify from information at hand - *e.g.*, deductions at source, and the existence of one or more dependants as claimed for tax purposes. Allowing deductions for child care, child and spousal maintenance, and medical expenses raises the issue of how such deductions ought to be claimed, and by whom they should be verified. This is not necessarily a matter for legislation, but at a practical level it of course has implications for the effective and efficient administration of the judgment enforcement system.

The chief difficulty of accounting for such expenses is the administrative burden of providing the opportunity for the debtor to claim them, verifying the debtor's claim, and factoring them into the calculation of net seizable income.

Currently in Nova Scotia, the Sheriff sends a blank worksheet to be filled out by the employer, which provides a calculation of income to be withheld and paid to the Sheriff. Deductions for income tax, CPP and EI are provided for in calculating a net income figure below which no income is seizable, as are deductions required by law, such as union dues, mandatory pension contributions, and health insurance. There is also space to include "Other" deductions, which in practice is taken to include spousal or child support payments being garnished at source through the Maintenance Enforcement Program ('MEP'), garnishment orders made by the Canada Revenue Agency, and so forth.

The form is returned to the Sheriff, and the employer begins to withhold amounts from the employee's pay. The Sheriff will examine the form for obvious errors, but is otherwise not involved in calculating amounts for garnishment. We have heard of occasional instances in which employers have asked for clarification of certain matters - such as what is a permitted 'Other' deduction - but generally there is little direct interaction with employers.

The Sheriff's responsibilities under new legislation would, however, include the review and verification of allowable deductions. This will require additional work, with corresponding increased resources, in the Sheriff's office. The Sheriff presently has very little direct contact with debtors. We do not consider that such new responsibilities would be unduly onerous, however, given the important interests at stake. Child care expenses should be fairly

straightforward in most cases. Similarly, child and spousal support should be relatively simple to ascertain and verify.

Medical expenses may present a more difficult challenge. Questions arise, for example, as to whether dental services, birth control, a personal care worker, or foods for a medically-restricted diet constitute a medical or health expense. This is a degree of discretion not typically exercised by the Sheriff, and the legislation and attendant policies and procedures will have to be very clear. Reference to Canada Revenue Agency's guidelines for medical expense tax credits may be helpful.²⁸¹

In response to this proposal in our second Discussion Paper, one commenter suggested that rather than the Sheriff, the Prothonotary ought to have authority to administer the deductions, prepare the necessary documents for delivery by enforcement officers, and collect the funds. This would be a change from the current system at least to the extent that the Sheriff's office currently administers the garnishment of wages under the *Civil Procedure Rules* - issuing forms and worksheets to employers, checking the employer's calculations for obvious errors, and collecting funds in accounts which the Sheriff maintains.

Prince Edward Island delegates the administration of deductions to the Prothonotary's office. However, the system of deductions in that province is highly individualized – the regulations set out an itemized list of available deductions per debtor with a dollar figure attached to each. The Prothonotary meets with the debtor and based on the debtor's actual expenses, sets out an individualized income exemption level.

By contrast, the system of exemptions we recommend is more uniform and systematic. The Prothonotary does not currently administer the judgment enforcement process, including seizure of wages. We continue to be of the view that the Sheriff is the appropriate office to administer an income exemption, including personal deductions, subject of course to the jurisdiction of the Court to resolve issues and uncertainties that may arise from time to time, on application by an interested party.

In a later section we recommend that delegation of certain enforcement activities from the Sheriff's office to private enforcement agents should be permitted, where it would be cost-effective and otherwise appropriate. Administration of the income seizure calculation should not be delegated, however. The sorts of enforcement activities that we consider may be delegated - including locating income and assets, and delivering notices to debtors, employers and others - do not involve the sort of discretion and care that will be involved in scrutinizing personal deduction claims. That should remain the direct responsibility of the Sheriff's office.

²⁸¹ See Canada Revenue Agency, Income Tax Folio S1-F1-C1: *Medical Expense Tax Credit*, online: <<http://www.cra-arc.gc.ca/tx/tchncl/ncmtx/fls/s1/fl/s1-fl-c1-eng.html>>.

Recommendations:

Judgment enforcement legislation should require the Sheriff to give effective notice to the debtor of permitted deductions, and provide an appropriate period of time for the debtor to claim applicable deductions, before any enforcement action is taken against the debtor's income.

The Sheriff should be responsible to receive, examine and verify the debtor's claimed deductions, and advise the employer of the resulting net income upon which the calculation of seizable income may be made.

Percentage of Income Subject to Seizure

How much of the debtor's 'disposable' income, above the minimum income threshold and net of permitted deductions, should the debtor be required to forfeit, by virtue of being liable for a judgment debt?

As indicated in Appendix III, there is no uniform figure or approach across Canadian jurisdictions. The options include a straightforward percentage of gross income,²⁸² a percentage of net income,²⁸³ and a percentage of net income above a minimum income threshold.²⁸⁴ New Brunswick does not permit garnishment of the debtor's income at all.²⁸⁵

In response to our first Discussion Paper, we were also encouraged to consider a graduated proportion, which would vary depending on the debtor's income.²⁸⁶ The greater the income of the debtor, the greater the proportion of net income that would be subject to seizure. One version of such a graduated scale is used in Scotland.²⁸⁷ We proposed such a graduated scale in our second Discussion Paper. Amongst those who commented on the paper there was general support, and no objection.

²⁸² *E.g.*, 15% in Nova Scotia.

²⁸³ *E.g.*, 30% in Manitoba and British Columbia.

²⁸⁴ *E.g.*, 50% in Alberta.

²⁸⁵ New Brunswick's new *Enforcement of Money Judgments Act*, *supra* note 10, not yet in force, will permit seizure of income except to the extent it is necessary to meet the reasonable needs of the judgment debtor and his or her dependants; see s 85(g).

²⁸⁶ Professor DA Rollie Thompson, Correspondence, 1 Mar 2012.

²⁸⁷ See the Schedule of *The Diligence against Earnings (Variation) (No.2) (Scotland) Regulations 2009*, made pursuant to the *Debtors (Scotland) Act 1987*, 1987 c 18.

For purposes of this analysis we have considered in Appendix II the effect of a graduated scale that would increase the seizure rate by 10%, for every 10% of extra income above the minimum income threshold (as provided by the MBM, adjusted for inflation) up to a maximum of 50% (ie., once the debtor is earning 41% or more above the applicable minimum income threshold). This is a simple, easy to apply method that recognizes the usefulness of a progressive system of deduction based upon income.

Appendix II illustrates that for a family living just above the poverty line, a graduated deduction could make a substantial difference to the family's quality of life.²⁸⁸ For example, for a family of four in Halifax the cost of basic expenses such as phone, clothing and footwear, personal care, and household cleaning supplies (and not accounting for medical expenses, insurance costs and recreational costs) has been estimated at \$323.01/mo.²⁸⁹ With seizure of 50% of net income above the minimum income threshold, a family of four in Halifax living only 10% above the threshold would only be left with \$133.28/wk to cover all other expenses, ie., emergency or unanticipated expenses such as rises in heating or food costs, car or home repairs, insurance costs and any costs associated with children's schooling, social activities or basic recreation costs for the family. Scaling the percentage to be seized would afford that family an additional \$114 per month to cover such expenses.

The figures at Appendix II represent a conservative estimate of costs – for example, assuming a family of four living in a 2-bedroom apartment, maintaining a single vehicle at \$478.34 per month. A family which is not able to save on shelter and transportation in this manner will find the \$133.28 per week in disposable income has quickly disappeared. Living so close to the poverty line leaves a family vulnerable: it means there will be no savings and no ability to cover unexpected expenses such as rising costs of fuel, power, or food, or unanticipated car and household repairs. Effective judgment enforcement necessarily results in some hardship for the debtor, but the system should not compound economic vulnerability of this sort. A graduated scale is another way to ensure that low income debtors are not further marginalized and/or thrown onto social assistance.

A scaled model would be somewhat more complex to administer, but not much. Whether or not a scaled model is used, the income exemption we recommend will depend first of all on verifying net income, claimable deductions, and dependants. Only after this baseline is established, and the minimum income threshold accounted for, is the percentage deduction to be applied. The extra complexity of a scaled model arises in determining which percentage to apply in any given case, but this can be provided to employers in the form of a chart, with pre-established ranges of net weekly income to which the scaled percentages would apply. For the sake of illustration,

²⁸⁸ The difference between the *Uniform Act's* formula and the Graduated Scale in the second illustration at Appendix II.

²⁸⁹ The Nova Scotia Participatory Food Costing Project has estimated the following costs as of 2012: \$29.91 for telephone; \$191 for clothing and footwear; \$73.03 for personal care expenses; and \$22.77 for household cleaning supplies, per month, for a family of four in Nova Scotia. Adjusted for inflation the total is 323.01. See *Can Nova Scotians Afford to Eat Healthy?* *supra* note 239 at 16.

using a minimum net income threshold of \$1570/mo for an individual and an additional \$430/mo for each dependant, the chart would appear as follows:

Individual

\$1570/mo (net) and under	- no deduction
\$1571-1727/mo	- deduct 10% above base of \$1570 and deductions
\$1728-1884/mo	- deduct 20% above base of \$1570 and deductions
\$1885-2041/mo	- deduct 30% above base of \$1570 and deductions
\$2042-2198/mo	- deduct 40% above base of \$1570 and deductions
\$2199 and up/mo	- deduct 50% above base of \$1570 and deductions

Individual with One Dependant:

\$2000/mo (net) and under	- no deduction
\$2001-2200/mo	- deduct 10% above base of \$2000 and deductions
\$2201-2400/mo	- deduct 20% above base of \$2000 and deductions
\$2401-2600/mo	- deduct 30% above base of \$2000 and deductions
\$2601-2800/mo	- deduct 40% above base of \$2000 and deductions
\$2801 and up/mo	- deduct 50% above base of \$2000 and deductions

Individual with Two Dependants:

\$2430/mo (net) and under	- no deduction
\$2673-2673/mo	- deduct 10% above base of \$2430 and deductions
\$2674-2916/mo	- deduct 20% above base of \$2430 and deductions
\$2917-3159/mo	- deduct 30% above base of \$2430 and deductions
\$3160-3402/mo	- deduct 40% above base of \$2430 and deductions
\$3403 and up/mo	- deduct 50% above base of \$2430 and deductions

Individual with Three Dependants:

\$2860/mo (net) and under	- no deduction
\$2861-3146/mo	- deduct 10% above base of \$2860 and deductions
\$3147-3432/mo	- deduct 20% above base of \$2860 and deductions
\$3433-3718/mo	- deduct 30% above base of \$2860 and deductions
\$3719-4004/mo	- deduct 40% above base of \$2860 and deductions
\$4005 and up/mo	- deduct 50% above base of \$2860 and deductions

Individual with Four Dependants:

\$3290/mo (net) and under	- no deduction
\$3291-3619/mo	- deduct 10% above base of \$3290 and deductions
\$3620-3948/mo	- deduct 20% above base of \$3290 and deductions
\$3949-4277/mo	- deduct 30% above base of \$3290 and deductions

\$4278-4606/mo	- deduct 40% above base of \$3290 and deductions
\$4607 and up/mo	- deduct 50% above base of \$3290 and deductions

Once established, the chart would be subject to annual, automatic indexing for inflation.

In summary, a scaled model better protects a reasonable standard of living for debtors earning close to poverty-level incomes. It helps to ensure that a judgment debt will not compound situations of financial marginalization, vulnerability and desperation. The model recognizes that those debtors that can pay more should pay more - up to half of 'disposable' income. As the above table indicates, the administration of a graduated scale of deductions should not be overly complex.

Recommendation:

A judgment debtor's income should be subject to seizure according to a graduated scale which increases the proportion to be seized by 10% (to a maximum of 50%) as the debtor's income, after deductions, exceeds the minimum income threshold by increments of 10%.

Exempt Income in the Debtor's Bank Account

Extending an income exemption to moneys once paid into a bank deposit account owed to the debtor raises very difficult issues. At that point, the exempt income may be mingled with non-exempt moneys, and the debtor may have spent exempt and non-exempt funds alike from the account. An income exemption cannot simply apply to the debtor's bank account *per se*.

Rather, some express provision is necessary to bridge the gap, so that exempt income in the debtor's bank account is not seized, but that non-exempt funds may be. The provision should apply to the exempt portion of a debtor's employment and other income, as well as funds from an exempt source such as statutory social benefits, pensions, etc.²⁹⁰ The provision must be carefully drawn, however, so that non-exempt moneys are available to satisfy the judgment.

Section 165(3) of the *Uniform Act* provides, "If a judgment debtor receives income that is exempt income, it remains as exempt income as long as it remains segregated from and identifiable or traceable in relation to other funds of the judgment debtor."

²⁹⁰ *E.g.*, *Workers' Compensation Act*, SNS 1994-95, c 10, s 77 (1): "Except with the approval of the Board, no person shall assign, seize, charge, attach or otherwise encumber or transfer any compensation payable pursuant to this Part."; *Pension Benefits Act*, *supra* note 150, s 71 (1): "Money payable under a pension plan is exempt from execution, seizure or attachment."; *Employment Support and Income Assistance Act*, SNS 2000, c 27, s 9: "Assistance provided pursuant to this Act is not assignable and is not subject to seizure or garnishment except as may be required in order to recover an overpayment."

This was at one time considered the position in English common law: see *Woods v Royal Bank of Scotland*, 1913 SLT (Sh Ct) at 499, where workers compensation payments were held to continue to be exempt as long as they were identifiable and not intermingled. Absent these conditions the general view is that the funds lose their protected character once paid.²⁹¹ Though Canadian authority is scarce, the tendency is against extending the exemption once the unseizable funds are converted to some other asset.²⁹²

Nova Scotia *Civil Procedure Rule* 79.08(5) provides:

A deposit-taking corporation must not pay to the Sheriff any part of a balance owing to a judgment debtor that, to the knowledge of a person in charge of the account, came from either of the following sources at any time, and the deposit-taking corporation remains liable to the judgment debtor for an amount paid in violation of this Rule:

- (a) a portion of wages that are exempt under Rule 79.08(3);
- (b) income, such as income assistance or a Canada Pension Plan payment, that is exempt from execution under legislation.

In our first Discussion Paper we recommended that the provisions of Rule 79.08(5) ought to apply, rather than the *Uniform Act's* requirement that moneys remain segregated in order to be exempt from seizure. We did so on the basis that the debtor, who may not have the wherewithal to open a second account for solely exempt funds, should not be under the onus to do so in order that a statutory exemption for necessary income will continue to apply to the funds in question. We asked whether an objective standard of knowledge was preferable, such that the bank would be liable if it *ought* to have known that funds were exempt, rather than Rule 79.08(5)'s requirement of actual knowledge.

Those who commented on the recommendation to retain the substance of Rule 79.08(5) were not in favour. The debtor's bank would not normally know whether income was being seized directly from the employer, and therefore whether any part of a payroll deposit was exempt. The bank would be in no position to calculate the exempt amount for itself, taking account of dependants, at-source deductions, and deductible expenses. It would have to be up to the Sheriff to ascertain and verify this information and advise the bank of the amount to be paid from each deposit, for a debtor whose income was not being garnished at source. In that case, as most of the commenters agreed, the primary duty should be on the Sheriff to ensure that only non-exempt funds are seized from the debtor's account.

²⁹¹ See Scottish Law Commission, *Report on Diligence on the Dependence and Admiralty Arrestments* (No. 164, 1998) at para 9.110.

²⁹² See generally *Poulin c. Serge Morency & Associés Inc.*, [1999] 3 SCR 351 at paras 35-39; *Re Lewer*, 2010 NSSC 98.

As well, commenters raised the issue of mingled funds. Both the amount that is exempt on a percentage calculation, and that which is from an exempt source (such as statutory benefits), may be mingled in an account with non-exempt funds. In this case, as the funds are spent and replenished from time to time, the bank would not be able to determine what portion of the account remains exempt.

We also heard that Rule 79.08(5) is inadequate to the extent that it relies on the knowledge of a person at the bank - when in fact no person may have actual knowledge of the sources from which an account's funds are derived. In that case the entire contents of an account may be delivered to the Sheriff, with no liability on the bank or anyone else.

It was suggested that that the bank ought to be liable to the debtor when *any* funds from exempt government sources are delivered to the Sheriff, regardless of actual or objective knowledge. The imposition of strict liability was urged on the basis of the following factors:

- the severity of the consequences for the low-income debtor and their family;
- the fact that funds being electronically deposited from garnishee-exempt government sources are typically easily identified from bank records;
- the comparatively low number of enforcement orders that would be served on any particular bank branch;
- as between the debtor and the deposit-taking institution, the comparative resources available to establish, at the time of seizure, that funds on deposit are exempt; and
- which party is better situated to bear the burden of having to make the determinations.

The suggestion encounters at least the difficulty of how to deal with mingled funds. If the debtor's only income is from exempt sources, then the account may be assumed to be entirely exempt. If the debtor's account mingles exempt and non-exempt funds, however, then there is no way to determine which of the funds, or what proportion, are or ought to be exempt. Unless the debtor is required to maintain exempt funds separately, some sort of proportional deeming feature, with a certain defined 'look back' period would be needed to deal with accounts containing both exempt and non-exempt funds.

Other Jurisdictions

There is no consistent approach among other jurisdictions. Newfoundland & Labrador's provision is similar to the *Uniform Act's* in requiring that exempt income be maintained in a separate account in order to remain exempt once in the debtor's hands:

- (1) Where an income exemption certificate under this Part is in effect and a debtor receives property or money
 - (a) from a retirement fund;
 - (b) as income other than from a retirement fund; or

(c) under section 144,
unless intermingled with funds or property, other than funds or property referred to in this subsection, the property or the money and a deposit account into which it is paid are exempt.

...

(3) For the purpose of subsection (1), the debtor

(a) may claim the exemption with respect to only one deposit account which shall be referred to as the "income account";

(b) shall advise the Sheriff which deposit account is the income account; and

(c) shall provide the information with respect to the income account that the Sheriff reasonably requires.²⁹³

There is at least one other option, and that is to assign an exemption to a certain portion of the existing funds in a debtor's account. Saskatchewan's modernized enforcement legislation, the *Enforcement of Money Judgments Act*, provides an exemption as follows:

if money or an account has been seized, the portion that, combined with income of the judgment debtor that is exempt pursuant to section 95 or 96, is required to maintain the judgment debtor and his or her dependants for a period of one month following the date of seizure, up to the prescribed amount.²⁹⁴

Regulations under the *Saskatchewan Act* provide that the maximum prescribed amount that may be retained in a bank account under section 93(1)(m) is \$1500 per month, plus \$300 per month per dependant.²⁹⁵ This is also the prescribed monthly minimum threshold of income - i.e., the minimum income threshold - below which no income may be garnished from an employer.²⁹⁶

The section is only intended to cover the situation of a debtor whose regular income is below the minimum income threshold. In that case the debtor is entitled to retain sufficient funds in the account to make up the difference - that is the purpose of section 93(1)(m). In other words, if a debtor's monthly income is less than the monthly subsistence minimum, but the debtor has funds in a bank account that will make up the difference, the debtor may keep those funds (but no more) even though they would not otherwise be exempt.

The underlying expectation is that in other cases, a debtor's exempt income will remain exempt, even though it is paid into a bank account. Therefore section 93(1)(m) is not intended to address

²⁹³ *Judgment Enforcement Act*, *supra* note 8, s 143.

²⁹⁴ *Enforcement of Money Judgments Act (SK)*, *supra* note 9, s 93(1)(m).

²⁹⁵ *Enforcement of Money Judgments Regulations*, *supra* note 141, s 23(5).

²⁹⁶ *Ibid*, s 23(7).

or to affect the exemption applicable to funds in the account which were exempt as they were paid as income - those should remain exempt from seizure, regardless of whether they exceed the monthly minimum. There appears to be no provision in the Saskatchewan *Act* that directly extends the exemption to funds in the debtor's account, however.²⁹⁷

The Scottish Executive considered the issue of protecting exempt funds, once in the debtor's bank account, in a 2002 consultation paper on enforcement of civil obligations.²⁹⁸ The paper reviewed a number of options for such protection, including (a) the protection of a minimum balance, (b) protection of funds based on their source (*e.g.*, social benefits and the exempt portion of wages), and (c) exempting bank accounts entirely, in cases where exempt income was deposited into them.

The paper noted practical difficulties with all of these approaches. The chief difficulty with the exempt minimum balance was a question of timing; *i.e.*, how to ensure that the minimum amount is set in accordance with the debtor's pay period. As the paper noted, an exempt monthly amount would offer insufficient protection for someone who receives income less frequently - *e.g.*, quarterly, such as with certain grants, or for a self-employed person whose income is irregular. If the account was seized the day after receipt of the quarterly installment, or an irregular contract payment, removal of all but the deemed monthly exemption could work significant hardship.²⁹⁹

The main difficulty with protecting bank balances according to source is that noted above: how to determine what portion of an account may be from exempt sources, if those funds are mingled with non-exempt funds and then spent from time to time. There is also the issue of the extent to which savings deriving from past earnings should be protected. The paper considered that the only workable way to protect exempt income on a 'sources' basis would be to provide for segregated bank accounts.³⁰⁰

New York state has taken a different approach to the 'sources' problem, exempting from seizure

²⁹⁷ This in mind, the section can be read to a different effect. If exempt income is held to lose its exempt character once it is no longer income but an asset of the debtor, or because it has been mingled with other non-exempt funds, then the section appears to provide that the debtor's bank account is protected only to the extent that the funds in it, along with the debtor's exempt income for the month, will not exceed the minimum monthly exemption (\$1500 plus \$300 per dependant). On this interpretation, the Sheriff may seize those funds in an account which are not necessary in order for the debtor to have the minimum exemption at hand for a month. If the debtor's exempt income for the month will equal or exceed the minimum exemption, then all of the funds in the account may be seized even though they may have been exempt as they were paid as income. The debtor would still be entitled to the full amount of his or her exempt income as it is paid, but would not have additional savings to fall back on.

²⁹⁸ *Enforcement of Civil Obligations in Scotland – A Consultation Document* (The Scottish Executive 2002) at 119-122.

²⁹⁹ *Ibid* at paras 5.238-5.239.

³⁰⁰ *Ibid* at paras 5.247-5.248.

a minimum balance of \$2,625 in any account into which exempt statutory benefits have been deposited during the 45 days prior to the delivery of the notice of restraint.³⁰¹ In effect, the law deems a certain, somewhat arbitrary figure to be exempt, if the account contains any funds from exempt sources.

Finally, the Scottish paper considered whether to entirely prohibit seizure of a bank account if the funds were - to any extent - from exempt sources (i.e., employment income garnished at source, or statutory benefits). The paper considered that such an approach would be inequitable, to the extent that debtors who were not garnished at source would have no protection. As well, of course, the protection would be unfair to the plaintiff, since a bank account may hold much more than the funds derived from exempt income.³⁰²

Ultimately, the Scottish Parliament decided to protect a minimum balance, in an amount equal to the minimum monthly minimum income threshold.³⁰³

In its 2010 Report on *Personal Debt Management and Debt Enforcement*, the Law Reform Commission of Ireland considered the above models, and similarly recommended that there should be protection for a minimum exempt amount. It echoed the Scottish Executive and Scottish Law Commission as to the complexity and ultimate unworkability of other models.³⁰⁴ The Irish Commission did not specify the minimum amount to be left in the debtor's account, but recommended that it be consistent with the monthly income exemption in respect of seizing employment income.³⁰⁵ In effect, the Sheriff would be bound to leave in the account at least the amount of the debtor's monthly income exemption - a percentage of the debtor's income. This differs from the Scottish approach, which shields only the minimum income threshold - a fixed number. In practice, the actual amount left to the debtor under the Irish recommendation would be variable - depending on the debtor's actual exempt monthly income. In Nova Scotia, this would be the amount calculated as exempt pursuant to the Commission's recommended approach - i.e., a scalable percentage (from 100% down to 50%) of net monthly income after deducting necessary expenses, over and above the MBM-derived minimum income threshold. In effect, the monthly income exemption would roll over, month by month, such that only amounts saved, in excess of the debtor's monthly exempt take-home pay, would be subject to seizure from the debtor's bank account.

³⁰¹ NY Civil Practice Law and Rules (CPLR), 5205(L)(1).

³⁰² *Ibid* at paras 5.249-5.250.

³⁰³ See section 206 of the *Bankruptcy and Diligence etc. (Scotland) Act 2007*, inserting a new s 73F into the *Debtors (Scotland) Act 1987*.

³⁰⁴ Law Reform Commission (Ireland), *Personal Debt Management and Debt Enforcement* (No 100, 2010) at paras 5.50-5.51.

³⁰⁵ *Ibid* at para 5.53. The Commission did not recommend a level or formula for determining exempt income, considering that the issue was beyond its capacity as a law reform agency; see para 5.95. The Commission offered general guidance as to how the legislature ought to decide the level of protected income.

The Irish Commission did not separately recommend that exempt statutory benefits, once paid into the debtor's bank account, should be exempt from execution. Like the Scottish Executive, the Commission expressly rejected an approach that would attempt to exempt funds in a bank account according to source.³⁰⁶ But under the Irish recommendation statutory benefits, if exempt from seizure at source, would form part of the exempt income to which the debtor is entitled on a monthly basis. Therefore, in principle the amount to be left in the debtor's bank account at the time of seizure would include an amount equivalent to a debtor's monthly exempt statutory benefits.

Discussion & Recommendations

We consider that new judgment enforcement legislation should incorporate both the segregated account and minimum balance models. That is, judgment enforcement legislation should first of all protect exempt funds, once in the debtor's bank account, to the extent they are segregated and identifiable. An account which has only ever held exempt statutory benefits and/or exempt earnings (e.g., wages garnished at source) would be fully protected. Educational materials should make this option clear to debtors.

To the extent that the debtor is not in a position to rely on that protection, however, the *Act* may also make provision for retention of a minimum balance. In cases where no such segregated account is identifiable, or a segregated account contains less than the debtor's monthly exemption, the Sheriff would be bound to leave in a non-segregated account an amount equal to the debtor's monthly exemption (including exempt employment income and statutory benefits).

As noted above, the monthly minimum balance approach encounters difficulty in the case of a debtor who receives irregular income or who is paid at intervals greater than one month. For example, a debtor may receive a grant at three-month intervals, or be paid a lump sum at the completion of a months-long contract (or a deposit at the outset). Protecting only an amount equivalent to the debtor's monthly exempt income would leave the debtor without sufficient funds to make it to the next expected payment.

Our expectation is that for debtors in this situation, once the bank account is seized, the Sheriff will be in a position to review the debtor's situation and the account's history, and determine the appropriate exemption. Therefore, the legislation should provide that the Sheriff has discretion to vary the amount to be left in the debtor's account, to ensure that the debtor is left with sufficient funds to cover minimally reasonable expenses until the next expected payment, in keeping with the purposes for exempting an amount equal to the debtor's monthly income exemption.

Finally, we recommend imposing liability on financial institutions not to pay funds to the Sheriff

³⁰⁶ *Ibid* at para 5.51. And, the Irish Commission did not expressly recommend that statutory benefits should be exempt as paid at source, considering that the question raised policy concerns beyond its capacity as a law reform agency; see para 5.98. But the Commission appeared to lean strongly in favour of that option; see para 5.99.

where the institution is, or ought to be aware that the funds are exempt. Amongst those who commented on this proposal in our second Discussion Paper, there was general favour. But we heard from one commenter that in principle, a financial institution, as a third party, should not bear any liability for amounts improperly seized by the Sheriff. Similarly, in response to our proposal in the first Discussion Paper to retain the substance of Rule 79.08(5), it was objected that financial institutions will not be in a position to know whether wages are garnished at source (such that the funds paid into the account are exempt), whether the debtor has dependents, and how to determine what portion of mingled funds remain exempt.

We conclude that financial institutions should be liable for funds paid to the Sheriff where the institution is, or ought to be aware that the funds are exempt. In light of what we have said about the limits of carrying forward an income exemption to funds in a bank account, this would be a modest obligation. It would apply where an account had only ever contained exempt income, separately identifiable as such, and that fact was known to the institution by reason of having been expressly brought to the bank's attention, or because the source was clearly identifiable as such (i.e., statutory benefits). Practically speaking, it would protect against overzealous or otherwise mistaken enforcement action by the Sheriff or the Sheriff's delegate in at least a few cases. The Sheriff would remain primarily responsible not to seize exempt funds.³⁰⁷

A financial institution's liability would not normally apply to the minimum balance which the Sheriff is obliged to leave to the debtor, since that amount will depend on circumstances which will generally not be known to a financial institution holding a bank account. The institution will not normally know the debtor's net income, whether the debtor has dependants, and whether the debtor has separate accounts at different institutions - only one of which will be exempt to the extent of the minimum balance. It will primarily remain the Sheriff's obligation to ensure that the minimum balance is left to the debtor.

We do not regard such an obligation to be out of keeping with the financial institution's role, though it may be a third party. Financial institutions owe general duties of care to their clients with regard to the proper safekeeping of funds. They have sophisticated means to keep track of relevant information concerning those funds, and can inquire where necessary as to the source of deposits from statutory benefit programs.³⁰⁸ If the institution has been told that a certain account contains only exempt funds, or it can retrieve that information from information it has with regard to deposits, it is not unreasonable to expect it to protect those funds against an invalid notice of seizure by the Sheriff, or a private agent acting as the Sheriff's delegate, who is not aware that the funds are exempt.

³⁰⁷ See *Uniform Act*, *supra* note 1, s 161(1): "(1) An enforcement officer must not seize an item of a judgment debtor's property if the enforcement officer believes on the basis of information known to the enforcement officer at the time of the enforcement proceeding that the item of property is exempt property."

³⁰⁸ See generally NY CPLR 5222(H), prohibiting banking institutions in New York state from restraining up to \$2,625 in a judgment debtor's account, where funds from exempt statutory benefits have been deposited into the account in the 45 days prior to the delivery of the notice of restraint by the enforcement officer.

Recommendations:

Judgment enforcement legislation should exempt from seizure funds in the debtor's bank account, to the extent they are segregated and identifiable as being from an exempt source, or as exempt pursuant to the legislation's provisions for exempting a portion of the debtor's income.

An exemption should also apply to a minimum balance in the debtor's account, equivalent to the debtor's exempt income for a month. The amount so protected would include any segregated and identifiable funds as described in the previous recommendation. The Sheriff should have discretion to vary the amount, to account for irregular income.

Financial institutions holding funds payable to the debtor should be liable for any amounts paid to the Sheriff where the institution ought to have been aware that the funds in the account were exempt. Liability would apply (a) with regard to bank accounts that had only ever held exempt funds, and (b) where that fact is, or ought to be known to the institution, either because the institution has been expressly notified of the fact, or because the amounts are from an exempt source (i.e., statutory benefits) identifiable as such by the institution.

Process of seizing bank accounts

The problem of freezing bank accounts before the debtor's exempt income can be ascertained has been raised a number of times in the course of our research and consultations.³⁰⁹ We have heard vivid examples of low-income debtors discovering that their sole bank account has been frozen, while the Sheriff gathers the necessary information to determine what portion of the account may be exempt. For some low income debtors with minimal access to credit, or support from friends and family on which to rely, this can be exceedingly stressful. Money in the bank account of a low-income debtor will very often be needed immediately, for necessities such as shelter and food. For vulnerable families, the resulting financial crisis may trigger threats of eviction and/or child protection proceedings. Bounced cheques or pre-authorized payments may result in the cancellation of utility services.

³⁰⁹ See Johnson M Tyler, "Exempt Income Protection Act Better Protects Strapped Debtors," NYLJ (January 27, 2009).

It was suggested by some commenters therefore that the Sheriff must obtain the necessary information to determine what portion of a bank account is exempt, prior to any enforcement action being taken against the account.

The problem is that any advance notice to the debtor that an account is to be seized provides the opportunity for the debtor to withdraw the funds entirely. In our view it is not tenable to suggest that the Sheriff, aware of an asset that may be available to satisfy a judgment, must delay seizing it while the necessary information is gathered from the debtor, the employer, and others.

The *Uniform Act* includes certain provisions and processes to guard against unduly depriving the debtor of exempt assets by the initial seizure. Section 161 imposes a positive duty on the Sheriff to avoid seizing exempt property, whether the debtor has given notice of the exemption or not, as follows:

(1) An enforcement officer must not seize an item of a judgment debtor's property if the enforcement officer believes on the basis of information known to the enforcement officer at the time of the enforcement proceeding that the item of property is exempt property.

(2) An enforcement officer must release property from seizure

(a) if the enforcement officer subsequently determines that the property is exempt property; or

(b) if a maximum value of exempt property is prescribed for the type of seized property and the enforcement officer determines that the realizable value of the seized property at a sale in an enforcement proceeding will likely be less than the maximum value prescribed for that type of exempt property.

Saskatchewan's corresponding provision, s 90(1) of the *Enforcement of Money Judgments Act*, imports a slightly more objective standard:

The Sheriff shall not seize property of a judgment debtor that the Sheriff believes is *or is likely to be* exempt. [emphasis added].

Beyond the Sheriff's overarching duty, the *Uniform Act* sets out an extensive procedure by which exemptions are to be claimed and applied. At the time of seizure, or as soon as practical afterward, the Sheriff must provide the debtor with notice of the seizure, and written materials describing the *Act's* exemptions and how to claim them. The debtor must deliver notice of any exemption he or she wishes to claim, before the property is sold or disposed of. The Sheriff must determine the validity of the exemption claim within ten days, and release the property if it is determined to be exempt. If the debtor does not deliver a claim of exemption before the property is disposed of, the debtor is not entitled to claim the exemption with respect to the property itself; however, the debtor is entitled to claim a portion of the funds received from any sale or disposition of exempt property, at any time until the funds are distributed to creditors.

The *Uniform Act* requires the debtor to provide information concerning income (from which exemptions can be determined) upon request by the Sheriff, but does not oblige the Sheriff to ask for such information.

Saskatchewan's *Enforcement of Money Judgments Act* provides a similar procedure, although it specifies that the debtor has five (5) business days to claim an exemption after notice of seizure is given. The *Uniform Act* appears to leave the debtor's deadline to regulation.

We believe the procedures in the *Uniform Act* can be improved upon, to prevent as far as possible the freezing of assets - and particularly funds in a bank account - that are bound to be exempt. We have already recommended that funds in a deposit account equal to the debtor's monthly exempt income should be exempt from seizure. Those funds will never be available to satisfy a judgment. It follows that to the extent the precise amount of the exemption is capable of being ascertained in advance of seizure, the initial notice of seizure should not have the effect of freezing those funds.

The state of New York has adopted protections along these lines. In 2009, the *Exempt Income Protection Act* amended the New York *Civil Practice Law and Rules (CPLR)* to exempt a minimum balance of \$2,500 in an account into which statutory benefits have been deposited within 45 days prior to the service of a restraining notice.³¹⁰ Pursuant to mandatory cost-of-living adjustments in the law,³¹¹ the amount is now \$2,625. As well, banks are prohibited from restraining this amount upon service of a restraining notice.³¹² In effect, banks are obliged not to freeze those funds. The protection is not limited to accounts that have received statutory benefits; a similar anti-freeze provision applies to funds held by an institution, up to an amount equivalent to two months minimum wage (currently \$1,740).³¹³

We agree with the basic approach, but would incorporate the income exemptions we have recommended in this Report. We recommend that the notice of seizure of a bank account should itself exempt from restraint the debtor's monthly minimum threshold amount, and any further amounts that the Sheriff is able to conclude from available information will be exempt. In other words, though the account may be seized, the responsible financial institution should be permitted and required to honour transactions up to the monthly minimum threshold amount, and any greater amount specified by the Sheriff in the initial notice of seizure, and any later variation.

Similarly, the bank should be permitted and required to honour transactions where the account is entirely exempt, because it has only ever held exempt funds and that fact is known, or ought to be known to the bank.

³¹⁰ NY CPLR 5205(L)(2).

³¹¹ *Ibid*, 5205(L)(3).

³¹² *Ibid*, 5222(H).

³¹³ *Ibid*, 5222(I).

The *Act* should require the creditor to provide any information it has that may be relevant to calculating the debtor's income exemption, such as income level and number of dependents, at the time the creditor delivers an instruction to seize a bank account. As provided by the *Uniform Act*, the Sheriff will be required to release further funds in a seized account as he or she is provided with further information which would entitle the debtor to a greater monthly exempt income amount.

Recommendations:

Judgment enforcement legislation should provide that the notice of seizure of a bank account must exempt from restraint the debtor's monthly minimum threshold amount, and any further amounts that the Sheriff is able to conclude from available information will be exempt.

The legislation should similarly exempt from restraint a bank account which is entirely exempt, because it has only ever held exempt income, where that fact is known or ought to be known to the bank.

The legislation should require a creditor who delivers an instruction to seize income or a bank account to provide any information it has that may be relevant to calculating the debtor's income exemption, such as income level and number of dependents.

BEYOND THE *UNIFORM ACT*

Aside from the provisions discussed above in respect of third party rights, the *Uniform Act* is mainly an administrative statute. For the most part it consolidates, clarifies and streamlines existing processes for enforcing judgments, and for securing assets in advance of judgment where appropriate. In this section we consider reforms beyond those in *Uniform Act*, and in particular passive enforcement remedies, the importance of education and available information, and the role of the enforcement officer.

Passive Enforcement

There are currently two primary forms of 'passive' enforcement available to judgment creditors in Nova Scotia. First, by recording the judgment in the judgment roll for a particular district under the *Land Registration Act*, the judgment creditor effects a charge on any real property interest of the judgment debtor in that registration district. The charge is on a par with a

mortgage.³¹⁴ In effect, the judgment encumbers the land, so that the debtor is prevented from selling or mortgaging it, or receiving advances on a prior mortgage, after the date when the judgment is registered. The judgment creditor need not locate any given parcel of land within the district. The remedy is passive, in the sense that the judgment creditor need not take further action for the charge to have its intended effect.

Registration of a notice of judgment in the personal property security registry creates a similar form of charge over all non-exempt personal property of the debtor.³¹⁵

We were urged to consider other forms of passive enforcement, and in particular suspension of drivers licenses, as well as hunting and fishing licenses. These remedies are currently available for the enforcement of family maintenance orders in Nova Scotia and elsewhere.³¹⁶ That regime also includes an automatic mechanism to withhold and garnish Atlantic Lottery Corporation prize moneys for persons in default of maintenance obligations.³¹⁷ As well, through an agreement with the federal government, the Director of Maintenance Enforcement can make a request for suspension of a defaulting payor's passport.

We acknowledge the likely effectiveness of these remedies in drawing out assets and income that would otherwise remain hidden or unavailable to judgment creditors, particularly in light of the fact that as a matter of policy the Sheriff's office no longer investigates and proactively locates and seizes assets, and that trust and corporate law provide judgment debtors with many means of removing assets from creditors' reach.

Nevertheless, we do not recommend that such remedies be implemented in the civil money judgment enforcement system.³¹⁸ There is a highly punitive aspect to these remedies that, while appropriate in the area of family maintenance enforcement, is less so in the context of judgment recovery. Philosophically, non-payment of debt is not considered a matter for punishment; rather, the law makes every provision within reason to permit seizure and liquidation of the debtor's assets and income.

Moreover, family maintenance orders, by design, are tailored to the financial situation of the payor. There is no such necessary connection between a civil money judgment and the debtor's circumstances. Indeed, the debtor's default and the resulting judgment will in many cases be the

³¹⁴ *LRA*, *supra* note 53, s 66(1).

³¹⁵ *Creditors' Relief Act*, *supra* note 13, s 2B.

³¹⁶ *Maintenance Enforcement Act*, *supra* note 20, s 30 (suspension of driving privileges); s 60B (denial or cancellation of *Wildlife Act* licenses).

³¹⁷ *Ibid*, s 60C.

³¹⁸ We are grateful to Professor Tamara Buckwold, of the University of Alberta Faculty of Law, for assisting us in assessing the principal arguments for and against passive remedies in the context of civil money judgment enforcement.

result of a change in the debtor's income. A court motion to vary or stay the execution order in cases of hardship will be beyond the means of many such debtors.

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

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

An exception should be made for lottery winnings. In our first Discussion Paper we proposed that there should be provision for automatic seizure of lottery winnings payable to the debtor from the Atlantic Lottery Corporation. One respondent disagreed, on the basis that that this was adequately covered by other processes - which we presume includes seizure by the Sheriff directly from the lottery agency, or seizure from the debtor's own bank account once the funds are deposited.

We do not agree that relying on the creditor to become aware of lottery winnings, and to give instructions to the Sheriff to seize those winnings, will be as effective as automatic seizure of prizes above a certain amount directly from the lottery agency. Although we do not otherwise recommend punitive maintenance enforcement-style remedies, we continue to recommend a system for seizure of lottery winnings.

Recommendation:

Suspension of provincial licenses and passports, and other such passive remedies, should not be available as a remedy in the civil money judgment enforcement context.

Judgment enforcement legislation should provide for a system of screening Atlantic Lottery Corporation prizes greater than one thousand dollars payable to a judgment debtor. Prizes so payable should be held by the Atlantic Lottery Corporation, and the Sheriff notified.

Information & Education

New judgment enforcement legislation should be accompanied by extensive public education materials. It is important that judgment creditors understand the processes available to them, and how to effectively use them. It is also critical that debtors understand the scope and limits of potential enforcement actions that may be taken against them, and their procedural and substantive rights in the process. While the *Uniform Act* requires that information about the available exemptions and how to claim them be given to judgment debtors at the time that assets or income is seized,³¹⁹ we recommend that accessible, plain language materials covering all of the debtor's rights and responsibilities be available generally, and given to the debtor specifically at the time the judgment is issued. We are concerned that there is currently a lack of knowledge among many debtors - especially the most vulnerable - and that as a consequence debtors may fail to claim exemptions and procedural protections that are available to them.

Education materials should also be developed to explain the process of judgment enforcement to potential litigants. Much of the dissatisfaction with the present system arises from the successful plaintiff's realization, following a favourable judgment, that there remains much to do, and additional costs, in order to actually recover funds from the debtor. The further realization that the debtor's assets are insufficient to satisfy the judgment is of course a source of additional frustration. Judgment creditors often have no way of knowing whether the debtor has sufficient assets or seizable income in advance of an action; discovery in aid of execution is not available prior to judgment.

Some of this is a problem of managing expectations. We recommend the development of educational materials, written in plain language and intended primarily for self-represented litigants. The Small Claims Court maintains a good example, titled *Enforcing a Small Claims Court Judgment: A Guide for Creditors*.³²⁰ But at the initial stage of assessing whether to commence a law suit in the first place, when the litigant's eyes ought to be wide open, there is a much less detailed brochure that only hints at the steps and costs which may be necessary in some cases to enforce a judgment.³²¹

Supreme Court litigants can find information on enforcing a judgment in a section on the Courts of Nova Scotia website which provides forms and information on obtaining and enforcing default judgments.³²² But this section is not intended to come to litigants' attention at the time of filing an action, and there is no detailed guide similar to the Small Claims Court's *Guide for Creditors*.

³¹⁹ *Uniform Act*, *supra* note 1, s 154.

³²⁰ Small Claims Court of Nova Scotia, *Enforcing a Small Claims Court Order: A Guide for Creditors*, online: <www.courts.ns.ca/self_rep/small_claims_guide_for_creditors_10.pdf>.

³²¹ Department of Justice Court Services Division, *Small Claims Court*, online: <www.courts.ns.ca/self_rep/small_claims_info_brochure_10.pdf>.

³²² Courts of Nova Scotia, Supreme Court Forms, online: http://www.courts.ns.ca/supreme/sc_forms.htm.

We recommend that more of the detailed information in the *Guide for Creditors* should be integrated into the Small Claims Court information brochure. In particular, the brochure should convey to prospective litigants the potentially difficult and costly road that may lie before them in terms of collecting on a judgment. The same or a substantially similar document should be available with regard to commencing an action in the Nova Scotia Supreme Court.

These materials should be generally available on line and in print through the courts. They should be given to self-represented parties at the point of filing pleadings. These introductory materials should indicate to potential litigants the general nature of Nova Scotia's judgment enforcement system, including the role and responsibilities of the Sheriff, the additional steps and costs that may be involved in collection, and the fact that recovery is limited to the non-exempt assets and income of the debtor. As well, these materials should set out the rights of judgment debtors, including exemptions and how to claim them. The passage of a new *Enforcement of Money Judgments Act* in this province would provide an ideal opportunity for the development and roll-out of such materials.

During our consultations there was broad support for this proposal. It was suggested that these materials should be available through court offices, Service Nova Scotia locations and online, as well as credit counselling agencies, family services agencies, and trustees in bankruptcy.

Recommendation:

The Province of Nova Scotia should develop comprehensive public education materials which describe the nature of Nova Scotia's judgment enforcement system, and the rights and responsibilities of creditors, debtors, enforcement officers, and third parties such as financial institutions.

Educational materials should emphasize, for prospective plaintiffs, the steps that may be involved in collecting on a judgment, and the potential costs of those actions. For judgment creditors, detailed information about the use of the land registration system and the personal property registry, and other tools for locating assets and income of the debtor, should be included, along with guidelines for issuing instructions to enforcement officers. Materials should also emphasize, especially for debtors, the legislation's asset and income exemptions and how to claim them, as well as rights to notice and other procedural protections.

Materials should be distributed to self-represented parties at the time when pleadings are filed. They should be available online, and in print,

through court offices, Service Nova Scotia locations, credit counseling agencies, the Legal Information Society of Nova Scotia, family service agencies, trustees in bankruptcy, public libraries and Nova Scotia Legal Aid offices. Information for debtors should be given at the time a judgment is issued.

The Role of the Enforcement Officer

As revealed by the Small Claims Court survey project,³²³ the frustrations of judgment creditors - particularly those who are self-represented - are many. But in many respects they necessarily arise from a system that relies on creditor initiative. The Nova Scotia civil judgment enforcement system requires the creditor to locate and identify assets and income of the debtor, to give instructions to the Sheriff on seizure and garnishment, and in many cases to pay for the Sheriff's enforcement actions undertaken on the creditor's behalf. Notwithstanding that the Nova Scotia Execution Order directs and requires the Sheriff to seize the debtor's property for purposes of satisfying the judgment debt, in practice the Sheriff simply does not do so absent information about the debtor's assets, and some form of recompense, from the judgment creditor.

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

In this section we consider the options for delegating some of the responsibilities of the Sheriff to private enforcement officers. We invited comment on this issue in our first Discussion Paper. The response was mixed. On one hand, it was argued that judgement enforcement is a matter of public policy - at bottom, ensuring the rule of law - that ought to be done by public agents, with appropriate public funding to permit them to do the job. There were concerns about the scope for abuse, particularly of lower-income debtors, in light of some commenters' experience with aggressive action by collection agencies in this province. Collection agents are licensed and regulated under the *Collection Agencies Act*,³²⁴ but that does not eliminate the prospect for bullying.

On the other hand, it was observed that the Sheriff's performance has left many judgment creditors dissatisfied, owing to lack of resources and competing priorities - especially court

³²³ *Supra* note 25.

³²⁴ *Collection Agencies Act*, RSNS 1989, c 77.

security and prisoner transfer, which are the Sheriff's main responsibilities. It was suggested that the role and responsibilities of the Sheriff ought to be delegated to provincial civil constables who are licensed and regulated under the *Police Services Act*.³²⁵ The judgment creditor, having registered a judgment in the Personal Property Registration System, would present enforcement instructions directly to a licensed enforcement officer - a provincial civil constable. The civil constable would investigate assets and income of the debtor, undertake enforcement action as appropriate, and charge a fee from the judgment creditor directly.

As it was suggested to us, this role would not extend to private bailiffs or process servers, who presently offer services in serving legal notices and seizing property under the *Personal Property Security Act*, but who are not regulated or licensed in those activities.

Civil Constables, by contrast, are appointed by the Solicitor General on the recommendation of the Police Commission pursuant to the *Police Services Act*. The appointment is for two years with a provision for re-appointment. A civil constable is required to post a bond. Section 4 of the *Police Services Act* provides for the powers of a civil constable, as follows:

A provincial civil constable may execute, anywhere in the Province, process of a civil nature, including any notice, order, warrant and summons other than a notice, order, warrant, summons or other process required to be executed or served by the Sheriff or functionary appointed under another enactment or by another Officer, person or body.

As peace officers, civil constables may also serve criminal subpoenas but not summons.

The Police Commission regulates civil constables, including the receipt and administration of public complaints. The Commission can require a civil constable to appear before it to answer the complaint.

Civil constables are not currently authorized to perform judgment enforcement action.

We have concluded that some of the authority and responsibilities of the Sheriff with respect to judgment enforcement should be capable of being delegated to licensed civil constables. We examine the question of how far, and in what respects, to permit delegation below.

We also considered whether to permit delegation more broadly, to firms or individuals offering private bailiff services in Nova Scotia. The Nova Scotia *Personal Property Security Act* regulates enforcement of private security agreements (e.g., vehicle loans) by means of various remedies - notably seizure and sale. The *Act* provides that the secured party may undertake these remedies directly - unlike in the context of judgment enforcement, the secured party is not required to proceed through the Sheriff, or an authorized enforcement agency. In practice, the work of seizing and selling personal property which is subject to a security agreement is often done by private bailiffs. There are a number of persons and corporations offering such bailiff services across Nova Scotia.

³²⁵ *Police Services Act*, RSNS 1989, c 349.

The business of personal property security enforcement is largely unregulated. Anyone in Nova Scotia can serve documents on behalf of a creditor or other party. Private bailiffs are not licensed or required to be bonded, nor are they supervised by any government official or agency. Anecdotally, we have heard that the bulk of the work of existing bailiff services is what is referred to as 'process service' - serving documents such as civil litigation originating notices, divorce papers and other court papers.³²⁶ Much of their work in this regard, and to a lesser extent with regard to personal property security, comes from law firms.

We do not recommend delegation of enforcement officers' authority, other than to civil constables.

In terms of what duties ought to be subject to delegation, and under what conditions, Professor Buckwold outlines three principal options.³²⁷ The first is to leave enforcement entirely to the judgment creditor. In this model the creditor is responsible for identifying assets (as is now the case) and enforcing the creditor's rights against those assets, including hiring agents to do so. In Nova Scotia, the creditor is presently responsible for enforcement against assets under the *Personal Property Security Act*, but not for judgment enforcement, which is entirely under the authority of the Sheriff.

Buckwold presents a number of arguments against leaving judgment enforcement to the creditor or the creditor's agent:

- 1) The system enables persons motivated by self-interest, however justified, to divest others of their property on an involuntary basis. The personal property security regime is different, on this dimension, since the creditor's right of seizure arise from a security agreement to which the debtor has consented.
- 2) Increased prospect for excessive or forcible seizure, including the avoidance of the debtor's statutory exemptions, and possibly the rights of third parties with an interest in the debtor's assets.
- 3) Increased risk of unwarranted seizures based upon substantially unfounded default judgments.
- 4) Abandonment of *pro rata* sharing among judgment creditors, leading to increased competition among creditors to seize and sell valuable assets.
- 5) Prospect of increased debtor evasion of enforcement processes.

³²⁶ One bailiff reported that since the increase in the Small Claims Court's jurisdiction to \$25,000, 75% of his work or more originates in that court.

³²⁷ Tamara Buckwold, "From Sherwood Forest to Saskatchewan: The Role of the Sheriff in a Redesigned Judgment Enforcement System" (2003) 66 Sask L Rev 219 at 244-54.

6) Less efficiency as asset seizures and sales are undertaken by creditors themselves, lacking experience and know-how in the area, rather than professional enforcement agents.³²⁸

No Canadian jurisdiction leaves judgment enforcement to the creditor.

The second model is that in Alberta, which since 1996 has delegated the role and responsibilities of judgment enforcement officers (other than garnishment of income) to private civil enforcement companies. In Alberta the Sheriff's role is essentially administrative. The office of the Sheriff is responsible for the appointment and supervision of qualified private civil enforcement agencies and bailiffs. The process of enforcement is executed by private civil enforcement agencies. Pursuant to provisions in the Alberta *Civil Enforcement Act*,³²⁹ the Sheriff's office licenses and trains these private agencies, and investigates complaints of misconduct. Fees are regulated, to ensure that large purchasers of enforcement services are not given undue access or advantage over smaller creditors.³³⁰

We do not recommend a privatized system, such as Alberta's. The privatized model is feasible in Alberta because there is in that province a cadre of agents with the capacity for managing property seizure, sale and distribution of proceeds under the Alberta *Personal Property Security Act*.³³¹ In effect, the income earned by the private agencies which enforce the personal property security regime in Alberta enables the private infrastructure to support the actions of the same agents acting pursuant to an enforcement order.³³²

For its part, Saskatchewan chose not to implement such a privatized system, because there was not the same pool of qualified private creditor agencies.³³³ Similarly, Nova Scotia has a number of agencies offering bailiff services with regard to security under the *Personal Property Security Act*, but they do not perform the range of functions that would necessarily be entrusted to them as full-fledged civil judgment enforcement agencies. As Buckwold observes:

... [T]he Alberta civil enforcement agencies provide a service very different from that provided by private bailiffs, whose business is fundamentally the routine service of process and seizure of physical assets. Significant expertise is required in the operation of a civil enforcement agency, given that it involves the administration of two relatively complex statutory schemes, including the determination of such difficult legal questions as the applicability of exemptions law, priority in the distribution of proceeds, and the

³²⁸ *Ibid* at 245-46. See also Gleixner et al, *supra* note 12 at 32-33.

³²⁹ *Supra* note 7, Part 2.

³³⁰ Buckwold, *supra* note 327 at 249.

³³¹ *Supra* note 7. See discussion in Buckwold & Cuming, *supra* note 11 at 6-7.

³³² Buckwold & Cuming, *supra* note 11 at 7.

³³³ Buckwold & Cuming, *supra* note 11, at 7; Buckwold, *supra* note 327 at 250-251.

technicalities of seizure and disposition of complex assets (e.g. corporate shares). Moreover, these agencies do much more than follow the direction of their clients. They are called upon to provide advice regarding the legalities and practicalities of enforcement activity, with the support of retained legal counsel as required.³³⁴

Considering what system Saskatchewan ought to adopt under a new judgment enforcement statute, Buckwold presents a number of arguments against the Alberta model:

- 1) As a philosophical matter, a publicly funded and administered Sheriff's office should provide the core compliment of a streamlined enforcement system.
- 2) A system of private Sheriffs is economically unfeasible in Saskatchewan and particularly problematic in rural areas, where market conditions are not conducive to private agents setting up shop.
- 3) The private system requires detailed procedures and rules to ensure that all aspects of the enforcement process are properly conducted with due regard to the interests and rights of those affected by it.³³⁵

The third option involves a hybrid situation, whereby some of the functions of the Sheriff's department are delegated to other persons. Buckwold suggests that delegation might include:

- 1) dissemination of basic forms and information;
- 2) delivery of notices or other documents;
- 3) physical seizure of assets;
- 4) sale of assets in unchallenged cases; and,
- 5) asset identification and investigation.

In each case, the Sheriff's office would issue the proper documentation such as notices of seizure, and the agencies would be paid on a fee for service basis by the judgment creditor. Monies seized, and those deriving from sale or other disposition, would be paid into court, to be distributed among creditors.

Under the Saskatchewan recommendation the administration of the enforcement system would be by a Sheriff who would be responsible for administration of the preliminary asset discovery process. These would include a demand for written disclosure and a demand for production of records and documents. The Sheriff would also be responsible for the seizure and disposition of the assets of a judgment debtor on receipt of an enforcement instruction from a judgment

³³⁴ Buckwold, *supra* note 327 at 251.

³³⁵ *Ibid* at 250-52.

creditor who holds an enforcement charge against those assets.³³⁶

We conclude that judgment creditors should be able to enlist licensed civil constables to assist with judgment enforcement. In particular, civil constables should have the authority of enforcement officers under the new legislation to investigate assets and income of the judgment debtor, and to deliver notices and other documents. Civil constables would be paid on a fee for service basis by the judgment creditor.

Seizure and sale of tangible property, even in uncontested cases, presents a different challenge in terms of entering onto property, seizing items, and conducting a sale. In our view this ought to remain exclusively within the authority of the Sheriff. As the Alberta Law Reform Institute observed:

We do believe that private bailiffs should not be used for enforcement seizures. The use of private bailiffs would require substantial supervision and quality inspection. We think that the public resources required for training, testing of qualifications, and supervision of the operations of private bailiffs would be better directed to the maintenance of high standards of competence and efficiency in the sheriff's office.

Moreover, the seizure process produces a situation that can potentially jeopardize the public peace. We consider it desirable that a public official, an officer of the peace who owes his or her first duty to the court and not to the creditor, carry out the seizure. We think that enforcement seizures in the context of a judgment debt are quite distinct from seizures under security interests, where the debtor has agreed that in the case of default the property will be removed from his or her possession.³³⁷

Recommendation:

Authority of enforcement officers under judgment enforcement legislation should be delegated, to a limited extent, to civil constables with the appropriate training and supervision.

Civil constables should have delegated authority to investigate assets and income of the debtor, and to deliver forms and notices to debtors, creditors and third parties.

Physical seizure and sale of tangible property should not be delegated.

³³⁶ *Ibid* at 242.

³³⁷ Alberta Law Reform Institute, *supra* note 3 at 71-72.

We also consider that civil constables, exercising delegated judgment enforcement authority, should not be responsible for administering the seizure of debtors' income, other than delivering notice to employers or account debtors such as financial institutions. Seizure of income will require the careful examination of the debtor's income level, verification of number of dependants, and verification of child and spousal support, child care costs, and medical expenses. This should remain the direct responsibility of the Sheriff.

Civil constables will be hired by creditors and are to that extent in a conflict of interest with regard to receiving, examining and verifying the debtor's proof of deductions. Private enforcement agencies will be paid from funds recovered, or directly by the creditor – and their future business will depend on maximizing returns. As we know, a very large proportion of judgment enforcement activity in Nova Scotia is on behalf of commercial lenders, who will in effect be offering bulk business to successful enforcement agents. We believe that examining the debtor's claims for personal expense deductions, and deciding the validity of those claims, is too sensitive and discretionary a role for private enforcement agents.

It was suggested by one commenter that the Prothonotary ought to have authority to administer the seizure of income, including ascertaining and verifying the debtor's exempt income, preparing the necessary documents for delivery by enforcement officers, and collecting the funds. This would be a change from the current system at least to the extent that the Sheriff's office currently administers the garnishment of wages under the *Civil Procedure Rules* - issuing forms and worksheets to employers, checking the employer's calculations for obvious errors, and collecting funds in accounts which the Sheriff maintains.

Prince Edward Island delegates the administration of deductions to the Prothonotary's office. However, the system of deductions in that province is highly individualized – the regulations set out an itemized list of available deductions per debtor with a dollar figure attached to each. The Prothonotary meets with the debtor and based on the debtor's actual expenses, sets out an individualized income exemption level.

By contrast, the system of exemptions we have proposed is more uniform and systematic. We have no indication that the provisions for seizing income we have proposed are beyond the capabilities of the Sheriff's office, with appropriate training, support, and resources.

We continue to be of the view that the Sheriff should be responsible to administer the seizure of income, subject to the jurisdiction of the Court to resolve issues and uncertainties that may arise from time to time, on application by an interested party.

On the other hand, a private enforcement agency may be enlisted by the judgment creditor to locate income of the debtor, and to deliver information, forms and notices of seizure to the debtor, the employer and other third parties.

Recommendation:

Calculation of exempt income, including verification of deductions and dependants, should not be delegated.

Delivery of forms and notices of seizure of income should be capable of being delegated.

The office of the Sheriff should have oversight and responsibility for the work of civil constables who undertake judgment enforcement action. The office must have sufficient resources for this new supervisory role, even while its direct enforcement responsibilities are being delegated. Sheriffs will continue to collect and distribute funds, resolve disputes over allowable debtor deductions and exemption calculations, and disseminate basic forms and information. Delegation on this model permits enforcement action to remain under the authority of Sheriff, and so meets, to some extent, the concern that judgment enforcement ought to remain a public responsibility.

Civil constables should be required to receive training on how to investigate assets, interview the debtor, and deliver sensitive documents. The substance of such training, and its administration, should be left to government, but we expect that the Department of Justice and the office of the Sheriff would develop and administer the training.

The Government of Nova Scotia should consider a regional pilot project permitting delegation of enforcement responsibilities to licensed civil constables, before the system is implemented across the province.

Recommendations:

The office of the Sheriff should have oversight and responsibility for the work of civil constables who undertake delegated judgment enforcement authority.

The office of the Sheriff should remain responsible to collect and distribute proceeds of enforcement action, resolve disputes over allowable debtor deductions and exemptions, and disseminate basic forms and information.

Civil constables should be required to receive training on how to exercise enforcement authority, including investigating assets, interviewing the debtor and third parties, and delivering sensitive

documents.

The Government of Nova Scotia should consider a regional pilot project permitting delegation of enforcement responsibilities to licensed civil constables, before the system is implemented across the province.

TRANSITION

The legislation we recommend, based on the *Uniform Act*, will replace the *Sale of Land Under Execution Act*, the *Collection Act*, the judgment registration and enforcement provisions of the *Creditors Relief Act*, section 45 of the *Judicature Act*, sections of *Civil Procedure Rule 42* which provide for a preservation order in respect of assets to satisfy a later judgment, Rule 44 (Attachment Order), Rule 79 (Enforcement by Execution Order), and sections of the *Land Registration Act* and the *Registry Act* concerning registration of judgments. As well, various statutes which refer to enforcement processes and orders will need to be amended to refer to the new legislation, and new terminology (e.g., from “execution” to “enforcement proceeding”).

The move to new judgment enforcement legislation will not result in significant disruption, practically speaking. Nova Scotia’s existing judgment enforcement system, particularly under the *Creditors Relief Act* and the *Civil Procedure Rules*, operates on principles and processes which are similar to the *Uniform Act’s*. Generally the transition can be governed by the *Interpretation Act*,³³⁸ and in particular section 23(3):

- (3) Where an enactment is repealed and other provisions are substituted for it,
- (a) every person acting under the enactment shall continue to act as if appointed under the provisions so substituted until another is appointed in his stead;
 - (b) every bond and security given by a person appointed under the enactment remains in force, and all offices, books, papers and things made or used under the enactment shall continue to be used as before the repeal as far as consistent with the substituted provisions;
 - (c) every proceeding taken under the enactment shall be taken up and continued under and in conformity with the provisions so substituted, as far as consistently may be;
 - (d) in the recovery or enforcement of penalties and forfeitures incurred and in the enforcement of rights, existing or accruing under the enactment or in a proceeding in relation to matters that have happened before the repeal, the procedure established by the substituted provisions shall be followed as far as it can be adapted thereto; and

³³⁸ *Interpretation Act*, RSNS 1989, c 235.

(e) when any penalty, forfeiture or punishment is reduced or mitigated by any of the provisions so substituted, the penalty, forfeiture or punishment if imposed or adjudged after the repeal shall be reduced or mitigated accordingly.

[Emphasis added]

For the most part, therefore, after new judgment enforcement legislation has taken effect, enforcement actions should be taken in accordance with the new legislation, including in respect of judgments given prior to the transition date. The same will be the case with respect to enforcement actions which have already begun, where there are further steps in the process to be completed (e.g., sale of land, distribution of seized funds) or the proceeding is of a continuing nature (e.g., Mareva injunctions, seizure of income).

There may be some difficulty in the transition to the new exemption provisions, in cases where the creditor is relying on certain assets and income to be available. We have recommended asset exemptions that are more extensive than those currently provided by the *Judicature Act* and the *Personal Property Security Act*. We also recommend income exemption provisions that are more sensitive to debtors' individual circumstances and may leave more income in the hands of some debtors. But as we know, many judgments arise from credit-lending transactions, in which the creditor will often have assessed the debtor's credit-worthiness with regard to his or her exigible assets and income, and structured the transaction accordingly. A more extensive series of exemptions - for example, exempting the debtor's principal residence - will shift the balance of risk of non-recovery.

In our view, however, the needs of debtors for shelter, the means of earning a livelihood, and minimally reasonable income must prevail, to the extent there is a conflict. In other words, the exemptions we recommend in this report should apply immediately upon the coming into force of new legislation, regardless of whether a judgment is given before or after the transition date.³³⁹ The Sheriff must have regard to the new exemption provisions, even though he or she may have been instructed to proceed against an asset or seize income while the former legislation was in place.

There are two substantive areas which require special attention for transition purposes. The first is the registration of judgments against real property. Currently, under the *Land Registration Act*, judgments are registered in separate judgment rolls for each registration district. There are 18 districts in the province. Judgments only bind the debtor's ownership interest in land within the district in which the judgment is registered - the debtor's interests in land outside the district are unaffected. Judgments must be registered within 5 years of the judgment, and can be renewed for a further five years, up to three times - for a maximum of 20 years from the date of judgment, in other words.

As well, there remain some judgments registered under the *Registry Act*, prior to the coming into force of the *Land Registration Act* in 2003, which have been grandfathered; they do not

³³⁹ See generally Cuming & Layh, *supra* note 108 at 370-71.

need to be renewed, but will remain valid within the district in which they were registered for 20 years from the date of judgment.

Under the *Uniform Act*, judgments registered in the Personal Property Registry will bind all of the debtor's real property in the province - there will be no separate real property registry for judgments, and no separate registration required in individual land registration districts.

The question is, upon the transition to new judgment enforcement legislation, what should happen with judgments registered in the district judgment rolls prior to the transition date, which have not yet expired?

Clearly, judgments registered in any of the district judgment rolls should not be simply given province-wide effect from the date of registration. Title searches in other districts must not be retroactively undermined. Instead, new legislation should make it clear that judgments registered prior to the transition date take effect only within the district in which they were registered, up to the transition date. The legislation should permit such prior registered judgments to have province-wide effect only after the transition date.

For the same reason, notices of judgment already registered in the Personal Property Registry prior to the coming into force of new legislation must not have the effect of binding the debtor's land retroactively. New legislation should specifically exclude their application to the debtor's real property interests, prior to the transition date. The legislation may permit such prior judgments to bind land, only after the transition date. The language must be clear that the land bound after the transition date is only land held by the debtor at that time.

The practical effect will be that for a transition period of up to 20 years, for purposes of certifying title to land, searches will need to be made of the Personal Property Registry, the relevant district judgment roll (from the date of the title holder's acquisition of the interest if prior to the transition date), and all other district judgment rolls (from the date of transition). Ideally, the judgment search portal should be presented so as to permit a single search of the relevant databases.

The second potentially significant transition issue is the priority status of judgments registered in the Personal Property Registry prior to the transition date, in relation to competing security interests. In fact, the current priority rules for judgments under the Nova Scotia *Creditors' Relief Act* and the *PPSA* are substantially similar to those under the *Uniform Act*.³⁴⁰ The language of the *Uniform Act* priority provisions, however, is significantly different in a number of areas, and the differences may be interpreted to produce differences in the priority of certain competing interests, once the new legislation comes into force. Therefore, to prevent any potential disruption or uncertainty with regard to priorities that ought to have been settled before the coming into force of the new legislation, we recommend a provision to the effect that judgments

³⁴⁰ With the exception of certain provisions in the *Creditors' Relief Act* which are not found in the *Uniform Act*. In an earlier section (see "Priorities", above), we recommend that those provisions be substantially incorporated into new judgment enforcement legislation.

which were registered before the coming into force of the new legislation should have priority status in relation to competing interests which arose before the coming into force of the new legislation according to the prior legislation.³⁴¹

Recommendations:

New judgment enforcement legislation should provide that judgments registered against real property prior to the legislation's coming into force take effect outside the district in which they were registered only after the transition.

The legislation should specifically exclude the application of judgments registered in the Personal Property Registry prior to the transition date to the debtor's real property interests, before the transition. The legislation should permit such prior registered judgments to bind land, only after the transition date.

The legislation should provide that judgments which were registered before the coming into force of the new legislation should have priority status in relation to competing interests in personal property which arose before the coming into force of the new legislation according to the prior legislation (e.g., the *Creditors' Relief Act* and the *Personal Property Security Act*).

³⁴¹ For a similar approach in Saskatchewan's new judgment enforcement legislation, see *Enforcement of Money Judgments Act*, *supra* note 9, s 130(2).

APPENDIX I – CURRENT LICO, LIM AND MBM FIGURES**Before tax LICOs for 2012 by town and family size:³⁴²**

	Rural Area	Less than 30,000	30,000 to 99,999	100,000 to 499,999	500,000 and over
1 person	16,279	18,520	20,240	20,366	23,647
2 persons	20,266	23,055	25,196	25,353	29,440
3 persons	24,914	28,343	30,976	31,168	36,193
4 persons	30,250	34,414	37,610	37,843	43,942
5 persons	34,308	39,031	42,656	42,920	49,839
6 persons	38,695	44,021	48,109	48,408	56,209
7 or more persons	43,080	49,010	53,562	53,894	62,581

After tax LICOs for 2012 by town and family size:³⁴³

	Rural Area	Less than 30,000	30,000 to 99,999	100,000 to 499,999	500,000 and over
1 person	12,819	14,671	16,366	16,573	19,597
2 persons	15,602	17,857	19,920	20,170	23,850
3 persons	19,429	22,233	24,804	25,117	29,699
4 persons	24,237	27,739	30,945	31,335	37,052
5 persons	27,600	31,587	35,238	35,681	42,191
6 persons	30,609	35,031	39,080	39,571	46,791
7 or more persons	33,618	38,475	42,921	43,461	51,391

2011 after-tax LIM for household of four persons³⁴⁴

Year	After Tax Income
2011	39,860

³⁴² This is the most recent LICO figure provided by Statistics Canada at the time of writing. See *Low income cut-offs (1992 base) before tax*, <<http://www.statcan.gc.ca/pub/75f0002m/2013002/tbl/tbl02-eng.htm>>.

³⁴³ This is the most recent LICO figure provided by Statistics Canada at the time of writing. See *Low income cut-offs (1992 base) after tax*, <<http://www.statcan.gc.ca/pub/75f0002m/2013002/tbl/tbl01-eng.htm>>.

³⁴⁴ Statistics Canada, *Low income measures by income concept, for household size of four persons*, <<http://www.statcan.gc.ca/pub/75f0002m/2013002/tbl/tbl03-eng.htm>>.

**2011 MBM Thresholds for a family of two adults and two children in Nova Scotia
(always after tax)³⁴⁵**

Community	Threshold
Rural	37,269
Population under 30,000	37,443
Population 30,000 to 99,999	35,480
Halifax	36,272
Cape Breton	33,856

³⁴⁵ Statistics Canada, *Market Basket Measure thresholds (2011-base) for reference family of two adults and two children, by MBM region*, <<http://www.statcan.gc.ca/pub/75f0002m/2013002/tbl/tbl04-eng.htm>>.

APPENDIX II - INCOME EXEMPTION MODELS IN PRACTICE: INDIVIDUAL AND FAMILY OF FOUR IN HALIFAX (10% NET WAGE INCREMENTS)

Individual in Halifax (Minimum Income Threshold = \$1570 net income per month)ⁱ

	Monthly Income = minimum income threshold	Monthly Income = Minimum income threshold plus 10%	Monthly Income = Minimum income threshold plus 20%	Monthly Income = Minimum income threshold plus 30%	Monthly Income = Minimum income threshold plus 40%	Monthly Income = Minimum income threshold plus 50%
Net Income	1570 (~1917 gross)	1727 (~2125 gross)	1884 (~2354 gross)	2041 (~2588 gross)	2198 (~2829 gross)	2355 (~3071 gross)
HST + NSALTC (exempt)ⁱⁱ	33.67+21.25=54.92	33.67+21.25=54.92	33.67+21.25=54.92	33.67+21.25=54.92	33.67+21.25=54.92	33.67+21.25=54.92
Rule 79.08 (15% of gross wages, subject to floor of 330/wk net wages)	136 subject to seizure 1488.92 remaining for debtor	293 subject to seizure 1488.92 remaining for debtor	353 subject to seizure 1585.92 remaining for debtor	388 subject to seizure 1707.92 remaining for debtor	424 subject to seizure 1828.92 remaining for debtor	461 subject to seizure 1948.92 remaining for debtor
Uniform Act (50% of net income above minimum income threshold)	No income subject to seizure 1624.92 remaining for debtor	79 subject to seizure 1702.92 remaining for debtor	157 subject to seizure 1781.92 remaining for debtor	236 subject to seizure 1859.92 remaining for debtor	314 subject to seizure 1938.92 remaining for debtor	393 subject to seizure 2016.92 remaining for debtor
Graduated scaleⁱⁱⁱ (varying % Of net income above minimum income threshold)	No income subject to seizure 1624.92 remaining for debtor	16 subject to seizure (10%) 1765.92 remaining for debtor	63 subject to seizure (20%) 1875.92 remaining for debtor	141 subject to seizure (30%) 1954.92 remaining for debtor	251 subject to seizure (40%) 2001.92 remaining for debtor	393 subject to seizure (50%) 2016.92 remaining for debtor
Food, Shelter, Transportation & Electricity^{iv}	1116	1116	1116	1116	1116	1116
Remainder^v	Rule 79.08: 372.92 or 85.82/wk <i>Uniform Act:</i> 508.92 or 117.12/wk Graduated Scale: 508.92 or 117.12/wk	Rule 79.08: 372.92 or 85.82/wk <i>Uniform Act:</i> 586.92 or 135.07/wk Graduated Scale: 649.92 or 149.57/wk	Rule 79.08: 469.92 or 108.14/wk <i>Uniform Act:</i> 665.92 or 153.25/wk Graduated Scale: 759.92 or 174.89/wk	Rule 79.08: 591.92 or 136.22/wk <i>Uniform Act:</i> 743.92 or 171.20/wk Graduated Scale: 838.92 or 193.07/wk	Rule 79.08: 712.92 or 164.07/wk <i>Uniform Act:</i> 822.92 or 189.38/wk Graduated Scale: 885.92 or 203.88/wk	Rule 79.08: 832.92 or 191.69/wk <i>Uniform Act:</i> 900.92 or 207.34/wk Graduated Scale: 900.92 or 207.34/wk

Notes:

- i. The MBM for a family of four living in Halifax in the year 2011 was \$36,272. For an individual the figure is \$18,136. This roughly corresponds to a monthly net income of \$1511/mo, after legally required deductions. Accounting for inflation, based on the Nova Scotia Consumer Price Index (All-items) from 2011 to January 2014, under our recommended legislation the minimum income threshold for an individual would be \$1570/month in 2014.
- ii. Additional income attributable to the Harmonized Sales Tax (HST) credit, and the Nova Scotia Affordable Living Tax Credit (NSALTC). As discussed above (see page 87), we recommend that the HST rebate and NSALTC, which are available only to low and modest income Nova Scotians, should be exempt from seizure and not included as income for purposes of calculating the income exemption.
- iii. The graduated scale model as recommended in this Discussion Paper. Increases the proportion to be seized by 10% for every 10% increase in the debtor's income over the minimum threshold.
- iv. Food cost of \$245/mo, representing the averaged (male, female between 31-50 yrs) monthly price of a nutritious food basket from 2012, indexed to inflation to represent 2014 costs for an individual; see Nova Scotia Food Security Network and the Food Action Research Centre, *Can Nova Scotians Afford to Eat Healthy?: Report on 2012 Participatory Food Costing* (2013) at 10, online: <http://foodarc.ca/wp-content/uploads/2013/08/2012-Food-Costing-Report_Final_website.pdf>.

Shelter cost of \$703/mo, representing the average cost of a bachelor apartment in Halifax; see Canada Mortgage and Housing Corporation, "Rental Market Report: Halifax CMA" (Fall 2013), online: <http://www.cmhc-schl.gc.ca/odpub/esub/64387/64387_2013_A01.pdf?fr=1394467845874>.

Transportation cost of \$78/mo, based on the cost of a monthly transit pass for Halifax public transit. The cost will be higher for individuals in rural areas who require a car.

Electricity cost of \$89.85, based on the average bi-monthly rate posted by Nova Scotia power for 1000 kwh in 2014: <<https://www.nspower.ca/en/home/for-my-home/billing-and-payments/2014-electricity-rates/default.aspx>>.

- v. Remainder for debtor (after basic necessities food, shelter, transportation, electricity) for additional rent, heating and transportation costs, insurance, school supplies and other school-related costs, personal hygiene, household cleaning products, clothing, footwear, telephone, television, recreation, etc.

Family of Four in Halifax (Minimum Income Threshold = \$2860 net income per month)ⁱ

	Monthly Income = minimum income threshold	Monthly Income = Minimum income threshold plus 10%	Monthly Income = Minimum income threshold plus 20%	Monthly Income = Minimum income threshold plus 30%	Monthly Income = Minimum income threshold plus 40%	Monthly Income = Minimum income threshold plus 50%
Net Income	2860 (~3871 gross)	3146 (~4358 gross)	3432 (~4813 gross)	3718 (~5275 gross)	4004 (~5742 gross)	4290 (~6208 gross)
CCTB + HST + NSALTC (exempt)ⁱⁱ	411.39+67.33+12.30= 491.02	345.16+52.99+0= 398.15	278.91+38.59+0= 317.50	234.31+24.19+0= 258.50	222.79+9.79+0= 232.58	211.27+0+0= 211.27
Rule 79.08 (15% of gross wages, subject to floor of 450/wk net wages)	581 subject to seizure 2770.02 remaining for family	654 subject to seizure 2890.15 remaining for family	722 subject to seizure 3027.50 remaining for family	791 subject to seizure 3185.50 remaining for family	861 subject to seizure 3375.58 remaining for family	931 subject to seizure 3570.27 remaining for family
Uniform Act (50% of net income above minimum income threshold)	No income subject to seizure 3351.02 remaining for family	143 subject to seizure 3401.15 remaining for family	286 subject to seizure 3463.50 remaining for family	429 subject to seizure 3547.50 remaining for family	572 subject to seizure 3664.58 remaining for family	715 subject to seizure 3786.27 remaining for family
Graduated scaleⁱⁱⁱ (varying % Of net income above minimum income threshold)	No income subject to seizure 3351.02 remaining for family	29 subject to seizure (10%) 3515.15 remaining for family	114 subject to seizure (20%) 3635.50 remaining for family	257 subject to seizure (30%) 3719.50 remaining for family	458 subject to seizure (40%) 3778.58 remaining for family	715 subject to seizure (50%) 3786.27 remaining for family
Food, Shelter, Transportation & Electricity^{iv}	2499	2499	2499	2499	2499	2499
Remainder^v	Rule 79.08: 271.02 (62.37/wk) <i>Uniform Act:</i> 852.02 (196.08/wk) Graduated Scale: 852.02 (196.08/wk)	Rule 79.08: 391.15 (90.02/wk) <i>Uniform Act:</i> 902.15 (207.62/wk) Graduated Scale: 1016.15 (233.85/wk)	Rule 79.08: 528.50 (121.63/wk) <i>Uniform Act:</i> 964.50 (221.97/wk) Graduated Scale: 1136.50 (261.55/wk)	Rule 79.08: 686.50 (157.99/wk) <i>Uniform Act:</i> 1048.50 (241.30/wk) Graduated Scale: 1220.50 (280.88/wk)	Rule 79.08: 876.58 (201.73/wk) <i>Uniform Act:</i> 1165.58 (268.24/wk) Graduated Scale: 1279.58 (294.48/wk)	Rule 79.08: 1071.27 (246.54/wk) <i>Uniform Act:</i> 1287.27 (296.25/wk) Graduated Scale: 1287.27 (296.25/wk)

Notes:

- i. The minimum income threshold for an individual of \$1570/month, plus \$430 per dependant (\$1290 for all three, assuming a non-earning spouse), per month.
- ii. Income attributable to Canada Child Tax Benefit (CCTB), Harmonized Sales Tax (HST) credit, and the Nova Scotia Affordable Living Tax Credit (NSALTC). Families with children under the age of six years may also receive the Universal Child Care Benefit (UCCB), not accounted for here. The CCTB and UCCB are exempt from seizure; see *Income Tax Act*, RSC 1985, c 1 (5th Supp.), s 122.61(4); *Universal Child Care Benefit Act*, SC 2006, c 4, s 5. As discussed above (see page 87), we recommend that the HST rebate and NSALTC, which are available only to low and modest income Nova Scotians, should be exempt from seizure and not included as income for purposes of calculating the income exemption.
- iii. The graduated scale model as recommended in this Report. Increases the proportion to be seized by 10% for every 10% increase in the debtor's income over the minimum threshold.
- iv. Food cost of \$867.42/mo, representing the average cost of a nutritious food basket for a reference household of four in Nova Scotia, indexed to inflation for 2014; see Nova Scotia Food Security Network and the Food Action Research Centre, *Can Nova Scotians Afford to Eat Healthy?: Report on 2012 Participatory Food Costing* (2013) at 10, online: <http://foodarc.ca/wp-content/uploads/2013/08/2012-Food-Costing-Report_Final_website.pdf>.

Shelter cost of \$976/mo, representing the average cost of a 2 bedroom apartment in Halifax; see Canada Mortgage and Housing Corporation, "Rental Market Report: Halifax CMA" (Fall 2013), online: <http://www.cmhc-schl.gc.ca/odpub/esub/64387/64387_2013_A01.pdf?fr=1394467845874>.

Transportation cost of \$478.34/mo, based on the average cost of operating a private vehicle; see Nova Scotia Food Security Network and the Food Action Research Centre, *Can Nova Scotians Afford to Eat Healthy?: Report on 2012 Participatory Food Costing* (2013) at 15-16, online: <http://foodarc.ca/wp-content/uploads/2013/08/2012-Food-Costing-Report_Final_website.pdf>.

Electricity cost of \$177.39/mo. See *Can Nova Scotians Afford to Eat Healthy? Ibid* at 16. This amount approximately corresponds with the cost of 1000kwh/mo based on rates posted by Nova Scotia power for 2014: <<https://www.nspower.ca/en/home/for-my-home/billing-and-payments/2014-electricity-rates/default.aspx>>.
- v. Remainder for the family (after basic necessities of food, shelter, transportation, electricity) for additional rent, heating and transportation costs, insurance, school supplies and other school-related costs, personal hygiene, household cleaning products, clothing, footwear, telephone, television, recreation, etc.

APPENDIX III- COMPARISON OF INCOME EXEMPTION PROVISIONS IN CANADIAN LEGISLATION

Jurisdiction	Minimum income threshold	Percentage exempt	Variation
<p>Alberta</p> <p><i>Civil Enforcement Act, RSA 2000, c C-15; Civil Enforcement Regulation, Alta Reg 276/95.</i></p>	<p>Minimum earnings exemption of \$800 per month, plus \$200 per dependant; maximum exemption of \$2,400 per month, plus \$200 per dependant (s 39(2) of Regulation).</p>	<p>50% of net income above minimum (s 81(1) of Act)</p>	<p>Court may vary the minimum or maximum exemption on application (s 39(3) of Act).</p>
<p>British Columbia</p> <p><i>Court Order Enforcement Act, RSBC 1996, c 78</i></p>	<p>Exemption must not be less than \$100 per month for a person without dependants, and \$200 per month, for a person with one or more dependants (s 3(5)).</p> <p>For shorter periods, a proportion of those amounts will be used (s 3(5)).</p> <p>Wages under the Act do not include employer's deductions made further to statute (s 1).</p>	<p>70% of net wages due are exempt (s 3(5)).</p>	<p>Court may increase or reduce the exemption on application (s 4(1)).</p> <p>An order may not increase the exemption to more than 90% of wages due or to make wages less than \$100 per month for a person without dependants or less than \$200 per month for a person with one or more dependants (s 4(4)).</p>
<p>Manitoba</p> <p><i>Garnishment Act, CCSM c G.20</i></p>	<p>\$250 per month or \$350 per month for a person with one or more dependants (s 5).</p> <p>For wages seized further to a maintenance order, the exemption is \$250 per month (s 7).</p> <p>"Wages" do not include</p>	<p>70% of net wages exempt (s 5).</p>	<p>Court may increase or decrease the exemption on application (s 8(2)).</p> <p>An order may not increase the exemption to more than 90% of wages or reduce the wages to an amount less than the exemption to which the</p>

Jurisdiction	Minimum income threshold	Percentage exempt	Variation
	employer deductions (s 1).		employee would otherwise be entitled under the Act (s 8(5)).
<p>New Brunswick</p> <p><i>Enforcement of Money Judgments Act</i>, SNB 2013, c 23. (not yet in force)</p> <p>Wages are currently not subject to seizure.</p>	<p>income is exempt to the extent it is necessary to meet the reasonable needs of debtor and dependants (s 85)</p> <p>reference may be made to Superintendent of Bankruptcy's Surplus Income Directive (s 86(4))</p>	<p>Where Superintendent's Directive applies: 50% of net income above a minimum standard (applies to household income)</p>	<p>The judgment debtor may apply to the court to vary the Sheriff's determination of a permitted exemption (s 86(2)).</p>
<p>Newfoundland & Labrador</p> <p><i>Judgment Enforcement Act</i>, SNL 1996, c J-1.1; <i>Judgment Enforcement Regulations</i>, 1999, NLR 102/99</p>	<p>\$649 per month, for a person without spouse or dependants; for a person supporting one or more dependants, \$963 per month, plus \$47 for each dependant in excess of one; \$1,019 for a married person supporting a spouse; \$1,059 for a married person supporting a spouse and one dependant; \$1,059 for a married person supporting a spouse and more than one dependant, plus \$47 for each dependant in excess of one (s 49 of Regulations).</p> <p>Income amounts are net of deductions.</p>	<p>Not applicable</p>	<p>Court or Sheriff may vary exemption amount (s 140 of Act).</p>
<p>Northwest Territories</p> <p><i>Exemptions Act</i>, SNWT 2010, c 4; <i>Exemptions Regulations</i>, NWTR-051-2010</p>	<p>\$1000 per month, plus \$250 dependant (s 2 of <i>Regulations</i>).</p>	<p>70% of net wages (s 7(2) of Act)</p>	<p>Supreme Court may reduce an exemption (s 7(5) of Act)</p> <p>Court may vary the minimum amount (s 2 of</p>

Jurisdiction	Minimum income threshold	Percentage exempt	Variation
			<i>Regulations)</i>
Nunavut <i>Exemptions Act, RSNWT 1988, c E-9; Exemptions Regulations, Nu Reg 006-2006</i>	\$1500 per month plus \$300 per dependant (s 2(2)(a) of Regulations)	70% of the debtor's net pay per month to a maximum of \$3500/mo plus \$300/mo per dependant (s 2(2)(b) of Regulations)	Court may reduce exemption where the spouse or dependant of a debtor is receiving remuneration (s 9(4) of Act).
Ontario <i>Wages Act, RSO 1990, c W 1</i>		80% of net wages exempt (s 7(2)). "Wages" excludes amounts which an employer is required by law to deduct (s 7(1)).	On motion, a judge may order an increase or decrease in the exemption (s 7(4-5)).
Prince Edward Island <i>Garnishee Act, RSPEI 1988, c G-2; General Regulations, PEI Reg EC 382/72</i>	For food, \$30 for each person over 12 years of age, up to two persons; \$25 for each additional person over 12 years of age; \$20 for each child under 12 years of age; plus a "reasonable allowance" for a special diet required by the judgment debtor or a dependant. For clothing, \$15 for the head of the household, and \$10 for each additional person. For household and personal items, a maximum of \$15 for each family unit (\$6 for the first person over 12 years of age; \$4 for the second	Not applicable	

Jurisdiction	Minimum income threshold	Percentage exempt	Variation
	<p>person over 12 years of age; \$2 for any person who is under 18 years of age and who is not in receipt of an allowance; \$2 for each additional person over 18 years of age).</p> <p>Allowances for living accommodations, fuel and utilities, and health care services (s 3 of Reg).</p>		
<p>Quebec</p> <p><i>Code of Civil Procedure</i>, RSQ, c C-25</p>	<p>\$180 per week, plus \$30 per week for each dependant in excess of two (consort, child, or relative); \$120 in all other cases (Art 553(11)).</p> <p>Employer contributions to pension, insurance or social welfare funds are not included in calculating salaries and wages.</p>	<p>70% of gross wages over the base amount (Art 553 (11)).</p>	
<p>Saskatchewan</p> <p><i>Enforcement of Money Judgments Act</i>, SS 2010, c 9.22; <i>Enforcement of Money Judgments Regulations</i>, RRS c E-9.22 Reg 1</p>	<p>\$1500 per month plus \$300 for each dependant (s 23(7)(b) of Regulations)</p>	<p>70% of employment remuneration of judgment debtor (s 23(7)(a) of Regulations).</p>	<p>Debtor may apply to court to increase employment remuneration exemption to account for special circumstances of the judgment debtor or his or her dependants (s 95(3) of Act). A creditor or Sheriff may apply to decrease the employment remuneration exemption to account for property received by or available to judgment debtor that is not employment remuneration. (s 95(4) of Act).</p>

Jurisdiction	Minimum income threshold	Percentage exempt	Variation
<p>Yukon</p> <p><i>Garnishee Act, RSY 2002, c 100</i></p>	<p>\$600 per month for a debtor without dependants; \$1,000 per month for a debtor supporting at least one dependant; and additional \$150 for the fourth dependant and for each additional dependant for the fourth one is provided in the case of a debtor supporting at least four dependants (s 22(1)).</p> <p>Any part of wages which an employer is required to deduct by statute is not included in calculating the exemption amount (s 23).</p>	<p>70% of net wages (s 22(1)).</p>	<p>Creditor able to apply for reduction, and debtor able to apply for increase, of the exemption (s 22(2-3)).</p>