

## Money Judgment Enforcement Consultation Paper

### I. Introduction

Saskatchewan has, since the proclamation of *The Personal Property Security Act* in 1981, enjoyed the significant benefits of modern, fully integrated secured transactions legislation. Easily adaptable to the current digital age, this original legislation has been followed throughout common-law Canada and has itself been updated several times since its initial introduction.

In stark contrast, the procedure for the enforcement of money judgments outside the context of secured transactions has not changed significantly for decades and has never been consolidated into a cohesive comprehensive procedure. Instead *The Executions Act*, *The Exemptions Act*, *The Limitation of Civil Rights Act*, *The Creditors' Relief Act*, *The Queen's Bench Act* and *The Attachment of Debts Act*, among others, combine to create a legislative labyrinth that requires expertise and effort that cannot fairly be considered commensurate with the eventual reward.

Access to justice is undermined when duly rendered judgments cannot be effectively and efficiently executed. Clients of the justice system should not require extensive legal assistance to simply enforce their judgments. This is particularly so where users of the small claims system or victims receiving restitution under the *Criminal Code* are seeking to enforce their judgments through registration as if they were decisions of the Court of Queen's Bench. For their part, judgment debtors are equally poorly served by a process that does not make their rights and responsibilities clear and which provides for exemptions that fail to change with the times.

For these reasons, among others, the Department of Justice is actively considering implementation of a new *Money Judgments Enforcement Act* to replace the existing fragmented and outdated enforcement procedures. This Bill will represent a comprehensive consolidation of money judgment enforcement remedies available to a Saskatchewan judgment creditor.

The Bill would repeal a number of existing outdated *Acts* including:

- The Executions Act
- *The Limitation of Civil Rights Act*
- *The Creditors' Relief Act*
- *The Attachment of Debts Act*
- *The Exemptions Act*
- the equitable receiver provisions in *The Queen's Bench Act* applicable to enforcement of money judgments.

The purpose of this consultation document is to outline the Department's proposals for addressing this issue and to ask for comments with respect to certain choices that have been made with respect to the implementation of the proposed Bill.

## II. Re-creation of the Wheel?

Fortunately, in considering this issue, Saskatchewan Justice has the considerable benefit of both recently passed Bills in other provinces and extensive academic reports issued at both the national and local levels. Both Alberta and Newfoundland and Labrador have recently implemented whole scale legal reform of their judgment enforcement law with the implementation of consolidated Money Judgment Enforcement Acts. The Alberta Law Reform Institute, the Uniform Law Conference of Canada (ULCC), and most recently the British Columbia Law Institute have all released extensive reviews of this area recommending detailed draft legislation. These reports are largely complementary and, as might be expected with a ULCC project, they build on each other with increasing uniformity. In addition to these national sources we also have the benefit of a detailed report on the *Modernization of Saskatchewan Money Judgment Enforcement Law* with a proposed draft Bill as prepared by Professors Buckwold and Cuming that takes into account developments elsewhere in Canada in this area. The ULCC report was itself based substantially on the Cuming-Buckwold report.

(For the Cuming-Buckwold report see:

[http://www.qp.gov.sk.ca/orphan/JE\\_Final\\_Report.pdf](http://www.qp.gov.sk.ca/orphan/JE_Final_Report.pdf);

for the ULCC report see:

[http://chlc.ca/en/us/Uniform\\_Civil\\_Enf\\_Money\\_Judgments\\_Act\\_En.pdf](http://chlc.ca/en/us/Uniform_Civil_Enf_Money_Judgments_Act_En.pdf) ).

With this wealth of detailed analysis and specific precedents available, the intention of Saskatchewan Justice is **not** to produce yet another detailed report. Instead, we will be seeking to distil this existing material into a “Saskatchewan made Bill” that takes into account local conditions and legal traditions. Clearly the Cuming-Buckwold (C-B) report will be of particular import as a precedent for our work in this regard and it should be considered as the starting point for all our discussions on a go forward basis. Rather than re-create the wheel, this consultation paper will outline the basic elements of the proposed, largely uniform, legislation while seeking to identify the made in Saskatchewan issues that fundamental reform of this area of the law will present.

## III. Scope of Proposed Bill

Each of these Bills and reports take somewhat different approaches to certain issues but the core aspects of the C-B approach are common to them all. They provide for the creation of a registered judgment interest, the universal exigibility of assets subject only to appropriate exemptions and the overall consolidation and modernization of creditors’ remedies.

Under this approach, the registration of a notice of judgment in the prescribed registry is a condition precedent to utilizing any of the enforcement proceedings contained in the *Act*. In Saskatchewan, the prescribed registry will be the Personal Property Registry established under *The Personal Property Security Act, 1993*. The effect of this requirement will be to create a single searchable public registry where all enforceable judgments will be registered.

With regard to execution against a judgment debtor's interest in land, it will still be necessary in instances where there is no exact match to the debtor's name to register a notice of judgment in the land registry at ISC before the judgment debtor's interest in the land is charged by a judgment.

### **Enforcement charge**

Registration of a notice of judgment in the prescribed registry creates an enforcement charge for the amount of the judgment against all exigible personal property of the judgment debtor at the time of the registration and acquired by the judgment debtor after the registration of the notice of judgment and prior to its discharge. It will no longer be necessary for a sheriff to seize a judgment debtor's property before the property is bound or attached by a judgment enforcement proceeding.

The enforcement charge has the same priority in relation to both prior and subsequent interests in personal property charged by it as a perfected non-purchase money security interest in that property would have under *The Personal Property Security Act, 1993*.

Under this system, a judgment debtor's personal property is charged with the enforcement of the judgment as soon as the notice of judgment is registered in the prescribed registry. Subject to some exceptions, a person who subsequently acquires an interest in property that is subject to an enforcement charge takes that interest subject to the enforcement charge.

One of the effects of this approach is the integration of the priority rules involving consensual security interests in personal property created under the PPSA and enforcement charges arising under this *Act*. Furthermore, when a judgment creditor has an enforcement charge on a judgment debtor's property with priority over subsequently acquired interests, the judgment creditor may be more willing to grant the judgment debtor more time to satisfy a judgment before instructing a sheriff to seize and sell the property.

### **New enforcement options**

Property that is subject to an enforcement charge may be seized and sold by a sheriff to satisfy the judgments of judgment creditors who give enforcement instructions to a sheriff.

A key factor in realizing on a judgment is the extent of information that is available or accessible regarding the judgment debtor's income and assets. The ability to access information critical to judgment enforcement would be enhanced under the proposed legislation. The Sheriff would be given enhanced tools to investigate and obtain information about the property of a judgment debtor in addition to the traditional examination in aid of execution available to the creditor.

The *Act* will contain specialized enforcement proceedings that take into account the unique characteristics of several forms of property including land, securities, debts and accounts owing to a judgment debtor, interests under leases, contracts of sale and security agreements, fixtures and crops, and intellectual property. Previously, certain assets became functionally exempt from enforcement due to complexity or an outright lack of capacity to enforce against those assets. An important aspect of this new proposal is that all assets will be available for enforcement purposes unless expressly exempt.

For example, intellectual property and securities are two more modern forms of assets that are not directly or adequately addressed in the current legislative regime particularly in light of the federal jurisdictional overlap. The *Act* addresses the intellectual property issue by defining intellectual property and by effecting seizure through a notice of seizure to the judgment debtor as well as, where appropriate, to the office where the interest is registered and any licensor of the right or interest. The Sheriff then acts in the stead of the debtor to effect any necessary transfer of interest under the Federal legislation. With respect to securities, the *Act* will dove-tail with the proposed *Securities Transfer Act* and related amendments to *The Personal Property Security Act, 1993* to ensure that certificated and uncertificated securities and security entitlements may be seized in a manner that is both consistent with existing securities practice and that will allow creditors to seize securities that may be subject to existing claims. Priority would then be determined on the basis of the priority rules set out in *The Securities Transfer Act* and *The Personal Property Security Act, 1993*.

### **Improve existing enforcement options**

The *Act* provides for improvements to long-standing asset enforcement procedures such as garnishment. The existing complicated employment garnishment process is replaced by the ability through a single seizure notice to seize debts that occur on a periodic basis any time after the notice is given to the account debtor and, in the case of employment remuneration, amounts payable any time during a 12 month period after delivery of the notice of seizure.

The distribution of the proceeds of an enforcement proceeding continues to follow the principle of a pro rata distribution among those judgment creditors who have given an enforcement instruction to a sheriff. Pro rata distribution will also apply to the proceeds of the sale of any kind of property and proceeds from the seizure of debts including employment remuneration. This distribution would of course remain subject to the traditional preferred claims such as taxable court costs, sheriff's fees and expenses, and preferences granted by other enactments.

Creditors that have taken the initiative to commence enforcement procedures will receive dedicated proceeds prior to general distribution.

### **Pre-judgment Preservation Order**

The *Act* will also create a new Preservation Order that will replace pre-judgment garnishment, *Mareva* injunctions and any other prejudgment enforcement remedies with a new comprehensive asset protection order to be known as a Preservation Order. Once an action has been commenced, an application can be made by the plaintiff to the court for a Preservation Order with respect to the defendant's assets. The court will then have a broad range of options available to it to protect against the dissipation of assets where necessary while at the same time ensuring that this significant prejudgment remedy is not abused.

### **IV. Differences**

Notwithstanding the considerable uniformity between the C-B report and the other Bills and reports, there are of course differences between the models on certain points. Most significantly, the role of the office of the Sheriff in the money judgment enforcement process differs drastically between jurisdictions and the nature and extent of exemptions differs between models as well.

In Alberta the role of the sheriff has been privatized whereby private bailiffs perform the functions of the sheriff under the direction of the creditor subject only to review by the court on application of the debtor. The court does however retain control of the garnishment process. Newfoundland and Labrador and the British Columbia Law Institute, take a more traditional approach whereby the role of the sheriff as an officer of the court is retained and the sheriff plays a key role in enforcement proceedings. In the C-B report, the role of the Sheriff is significantly enhanced with the sheriff playing the central role not only in enforcement but also in the discovery and the registration and instruction stages.

### **Exemptions**

With respect to exemptions, there are of course notable differences in what each jurisdiction chooses to cover as well as the extent to which such items are covered. To a large extent these reflect existing regional and social choices and as was acknowledged in the ULCC report exemptions is one area that may well ultimately resist efforts at jurisdictional uniformity.

Separate and apart from the reality that item by item exemptions uniformity may prove elusive, there is also a split between the general model to be followed with respect to exemptions. The ULCC report outlines this difference as the choice between an approach that describes types of property that are reasonably required by a judgment debtor to maintain a reasonable standard of living for the judgment debtor and his or her dependants and that are reasonably required by a judgment debtor to enable him or her to continue to earn income and the more familiar (to Saskatchewan) maximum dollar limit test that exempts listed types of property up to a particular dollar level. The advantage of the first approach is flexibility whereas the second approach offers greater certainty.

## V. “Made in Saskatchewan” Bill

Saskatchewan Justice has been required to make a series of decisions in the adaptation of the C-B report and the Uniform Model to a Saskatchewan made *Money Judgment Enforcement Act*. These choices are made to reflect both the legal tradition in Saskatchewan and to manage the cost factor of implementing a major new program while ensuring that the policy goals of the Government of Saskatchewan in this important area are met.

### **Sheriff services**

The first such decision is with respect to the model for the delivery of Sheriff services as described above. Under the current system, the Sheriff is a court official and as such, plays an important role of balancing the interests between the judgment creditor and debtor. This role of an unbiased arbiter involves independence from the judgment creditor and requires the exercise of discretion by the Sheriff. Under the proposed Saskatchewan amendments, the Sheriff’s role would continue to be that of a neutral court official. However, there would be enhanced powers for the role, particularly in the area of investigations and additional resources would be dedicated to ensure effective delivery of the service. The office of the Sheriff would be re-organized to achieve maximum effectiveness, in terms of geographical location and specialization in the area of judgment enforcement.

### **Exemptions**

With respect to the exemptions model issue identified above, Saskatchewan Justice is inclined to favour the certainty and familiarity of the “maximum dollar amount” to property exemptions over the flexibility and, arguably, individual fairness that a “reasonably necessary” exemptions approach would promote. It must be acknowledged that the dollar limit approach currently employed in *The Exemptions Act* failed to reflect changing times. It is proposed that the dollar values themselves be set in the regulations rather than the *Act* to better facilitate timely and ongoing changes to these dollar values where appropriate. While this approach does not easily accommodate regional differences in the manner that a “reasonably necessary” approach would, it should avoid the need to litigate the applicability of exemptions on a case by case basis particularly in the early stages of implementation of the Bill. The C-B report makes a compelling policy argument in favour of the “reasonably necessary” model and it must be acknowledged that the initial jurisprudence on this matter would likely quickly settle this issue. Nevertheless, the preferred choice is for the existing model with greater ability to amend the dollar amounts by regulation to ensure they remain current.

Saskatchewan has an additional “made in Saskatchewan” policy issue with respect to exemptions that must also be resolved. In Saskatchewan a home owner who has a judgment or other debt against him or her enjoys a \$32,000 exemption for their home under *The Exemptions Act*. Under *The Saskatchewan Farm Security Act*, a farmer has equivalent protection. For at least 75 years in Saskatchewan, judicial interpretation of this protection and the accompanying provisions has concluded that there may be no forced sale of a home with a value in excess of the exempted amount in order to pay out all or part of the judgment with that surplus as long as the owner maintains active residence. In other words, where a homeowner has a house worth \$100,000 free and clear, and they owe a judgment of \$20,000, there is no requirement in Saskatchewan

that the house be sold, the \$32,000 exemption be held separate and the balance used to pay the judgment. Instead, in Saskatchewan that property is held to be free from such forced sale.

Insofar as this does not result from an express statutory provision but rather a judicial interpretation of existing statutes, when the new *Act* is put in place this issue will have to be specifically addressed. It is proposed that the *Act* will provide that as long as active residence is maintained, no home subject to this exemption may be the subject of a forced sale in order to access a possible surplus to the dollar exemption. In other words, the existing Saskatchewan policy will be expressly continued. In addition, the current dollar exemption will be updated and applied to both voluntary sales by the judgment debtor and to involuntary dispositions of a home.

### **Enforcement against land**

Judgment enforcement against land will also require a Saskatchewan solution that works with the significant enhancements that have already occurred to the Saskatchewan land titles process.

The Saskatchewan Writ Registry is a database established under section 161 of *The Land Titles Act, 2000*, that contains writs of execution and maintenance orders. It replaced the General Record of Saskatchewan Land Titles Offices with respect to writs and maintenance orders. Under the former *Land Titles Act*, writs and maintenance orders registered in the General Record bound and formed a lien and charge on all the lands of which the debtor was or became the registered owner.

Under *The Land Titles Act, 2000*, all writs and maintenance orders must be registered in the Saskatchewan Writ Registry to affect land in Saskatchewan. A writ or maintenance order that was not registered in the General Record of any former Land Titles office prior to June 25, 2001, is registered in the Saskatchewan Writ Registry by registration of a financing statement in the Personal Property Registry. For writs of execution, this had the effect of registering the writ in both the Personal Property Registry and the Saskatchewan Writ Registry. For maintenance orders, registration occurs only in the Saskatchewan Writ Registry, notwithstanding that the Personal Property Registry was used to effect the registration.

Since those writs and maintenance orders already bound land in the debtor's name, when a title was converted to electronic format, the Saskatchewan Writ Registry was searched. If a writ or maintenance order was registered in the Saskatchewan Writ Registry and there was an exact match to the owner on a title, the writ or maintenance order was registered against the converted title as the next charge.

Under the present *Act*, whenever a new title or interest is registered and the name of the owner or interest holder exactly matches the name of a debtor in the Saskatchewan Writ Registry, the writ or maintenance order will automatically be registered against the title or interest. An exact match occurs if the name of the debtor in the Saskatchewan Writ Registry matches the first two given names and the surname or the corporation name, character for character. At any time, the creditor may apply to register the writ or maintenance order against any title or interest the creditor wants, even though the name of the title owner or interest holder is not an exact match to the name of the debtor in the Saskatchewan Writ Registry.

This existing process and system would be used to facilitate the new enforcement process. Whenever a new title or interest is registered and the name of the owner or interest holder exactly matches the name of a judgment debtor, the registered judgment interest will automatically be registered against the title or interest. An exact match occurs if the name of the judgment debtor matches the first two given names and the surname or the corporation name, character for character.

At any time, the creditor may apply to register the judgment interest against any title or interest the creditor wants, even though the name of the title owner or interest holder is not an exact match to the name of the judgment debtor. The name of the Saskatchewan Writ Registry will likely be changed to reflect the ability for a judgment to be registered directly without the need for a writ.

### **Consequential amendments**

Saskatchewan will also need to give specific consideration to the impact of the proposed new *Act* on judgment enforcement with respect to farmers and maintenance orders. *The Saskatchewan Farm Security Act* and *The Enforcement of Maintenance Orders Act*, reflect established social policy choices that will need to be continued but adapted to reflect the new and improved procedures in *The Money Judgments Enforcement Act*. Exemptions are of particular import in these *Acts* and care will have to be taken to ensure that modernization of the exempted property and any prescribed values occurs in an equitable manner for both judgment debtors and creditors.

Finally, it must also be acknowledged that there will be a large number of consequential amendments concomitant to the implementation of a new *Money Judgments Enforcement Act*. These will range from simple *Act* and section reference amendments to more extensive changes to existing stand alone judgment enforcement procedures in existing legislation. With legislation that is so central to the operation of the judgment enforcement system, the identification and implementation of consequential amendments throughout the existing legislative framework becomes an extensive technical exercise that can prove as challenging as the development of the *Act* itself.



## **VI. Request for Comments**

As noted at the outset, there is no question that legal reform in the area of money judgment enforcement is long overdue. The issue is not whether to make changes but rather how such changes are to be made. This paper is intended to provide notice to the public of the proposed changes and to ask for comments regarding the proposed Saskatchewan legislation outlined above.

Interested parties may also wish to review the new legislation in Alberta and Newfoundland and Labrador and to review the referenced money judgment reports, with particular attention to the C-B report. In particular, comments would be welcome on whether we should proceed with the established “maximum dollar amount” approach to property exemptions over the flexibility and, arguably, individual fairness that an “as reasonably necessary” exemptions approach would promote. This is a practical issue that would benefit considerably from the insights of those familiar with the existing judgment enforcement system.

## **VII. Summary**

The proposed *Money Judgments Enforcement Act* will be a “made in Saskatchewan solution” that is built on a uniform national response to the need for a comprehensive, modern and effective money judgment enforcement process. This *Act* responds to the call for improved creditor’s remedies such as seizure of existing and future debts (the equivalent of continuing garnishment), use of modern *PPSA* process and the re-invigoration of out-of-date remedies such as receivership. Built on the concept of the universal exigibility of all debtor assets that are not expressly exempted, the new *Act* provides for one stop shopping for enforcement remedies; an approach that will substantially enhance access to justice for both the sophisticated and unsophisticated creditor. At the same time, Saskatchewan’s traditional policy positions with respect to debtor protection and the need for continuing governance of the court are maintained.

Fundamentally, access to justice is enhanced when the system ensures that a duly obtained money judgment has full force and effect. Judgment enforcement should only be subject to carefully considered exemptions for clear policy reasons. It should not be defeated by complexity, cost or simple inadequacy. *The Money Judgments Enforcement Act* is intended to be an overdue answer to these concerns.

## **VIII. Contact Information**

We wish to thank-you for taking the time to consider these issues. We would appreciate receiving any comments you may have regarding the proposed *Money Judgments Enforcement Act*.

Please provide your comments by December 15, 2006, to the Department of Justice, Legislative Services Branch.

By mail: 800 - 1874 Scarth Street,  
Regina, Saskatchewan  
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By fax: (306) 787-9111

By e-mail: [dmcgovern@justice.gov.sk.ca](mailto:dmcgovern@justice.gov.sk.ca)

Attention: Darcy McGovern.