



A Plea for a New Brunswick Judgment Enforcement Act

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Finally, the ideas, comments and analyses are our own and we take full responsibility for any errors or omissions in this report.

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The report is available on Professor Gleixner's website at the Faculté de droit of the Université de Moncton: http://professeure.umoncton.ca/umcm-gleixner_micheline/NBJEA.

The report is also summarized in the article "The New Brunswick Judgment Enforcement Act: Has its Time Finally Come?" (2012) 63 UNBLJ 280.

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A Plea for a New Brunswick Judgment Enforcement Act ("NBJEA")

1. Preface and Invitation to Comment

This report is the result of the personal initiative of three lawyers, one academic and two practising lawyers, who have developed a keen interest and an expertise in creditor-debtor relations within the province of New Brunswick. Upon review of three reports resulting from studies undertaken in 1976, 1985 and again in 1994, all advocating a complete overhaul of the current system of enforcement of judgments in the province, the research team's initial objective was to formulate recommendations to encourage the government to embark on the necessary reform.

In addition, three other provinces, Newfoundland and Labrador¹, Alberta² and Saskatchewan³, have already enacted legislation consolidating judgment creditor remedies and modernizing their respective judgment enforcement laws. Moreover, the Uniform Law Conference of Canada ("ULCC") released a *Uniform Civil Enforcement of Money Judgments Act*⁴ in 2004, which the British Columbia Law Institute and the Law Reform Commission of Nova Scotia both endorsed, albeit with reservations, in their 2005 and 2011 reports respectively.⁵

While developing their research project, the team was informed that the Office of the Attorney General was actively working to develop a new *NBJEA* based on these Acts and reports. Armed with this news and a grant from the Law Foundation of New Brunswick, a new research project was developed to draft a report reviewing various issues which have not gathered a consensus either within the previous New Brunswick reports or within recent legislative reforms, either proposed or enacted, throughout the country.⁶ This report therefore aims to analyse each issue within New Brunswick's current legal and administrative framework by reviewing current legislation in other provinces as well as the *Uniform Act* and the proposed 1994 *NBJEA* in order to determine and recommend a new approach for our province.⁷

Although the precise wording of each legislative provision will be left to the experts, government legislative drafters, recommendations will be advanced on the substance of new guiding principles and basic rules, as well as the framework of a new judgment enforcement regime for the province with the objective of resolving problematic issues. It is the goal of the authors that this report will instigate discussion on the subject and evoke comments from members of the bar and the public. Given the government's desire to completely review and modernize the current system of enforcement of judgments and its importance for all members of the bar, litigants, creditors and debtors alike, and society in general, if we want to improve the current system, now is the time to act.

¹ *Judgment Enforcement Act*, SNL 1996, c J-1.1 [*Newfoundland Act*].

² *Civil Enforcement Act*, RSA 2000, c C-15 [*Alberta Act*].

³ *The Enforcement of Money Judgments Act*, SS 2010, c E-9.22 [*Saskatchewan Act*]. Although the Act was assented to May 20, 2010 it had not been proclaimed as of May 17, 2012.

⁴ *Uniform Civil Enforcement of Money Judgments Act*, ULCC 2004, online: ULCC <<http://www.ulcc.ca>> [*Uniform Act*].

⁵ British Columbia Law Institute, *Report on the Uniform Civil Enforcement of Money Judgments Act* (BCLI Report no. 37) (Vancouver: British Columbia Law Institute, 2005) at 1 [*British Columbia 2005 Report*]; Nova Scotia Law Reform Commission, *Enforcement of Civil Judgments* (Discussion Paper) (Halifax: Law Reform Commission of Nova Scotia, 2011) [*Nova Scotia 2011 Report*].

⁶ A complete overview is outside the scope of this study given the limited funds as well as the short timeframe involved with the government's upcoming timelines. Nonetheless, the research team also reviewed and considered the numerous papers, articles and quite extensive reports from across the country on enforcement of judgments law reform which are listed in the bibliography found in Schedule "A".

⁷ The proposed legislative framework of the *NBJEA* contemplated in this report does not integrate the new Family Support Orders Service ("FSOS") for the enforcement of family maintenance orders and agreements pursuant to the *Support Enforcement Act*, SNB 2005, c S-15.5 but includes the recovery of judgments issued by the Court of Queen's Bench, the Court of Appeal and the Federal Courts. The Small Claims Court of New Brunswick was repealed with the *An Act to Repeal the Small Claims Act*, SNB 2009, c 28. R 80 of the *Rules of Court*, *infra* note 25, came into force on July 15, 2010 with NB Reg 2010-99 and replaces the previous "small claims" process with a simplified process for making claims in the Court of Queen's Bench, Trial Division.

2. Introduction

Our democracy provides a legal system that enables judicial involvement in the event of a disagreement and a final determination of the rights of the parties is usually embodied in the form of a judgment. Creditors often believe that once a judgment is obtained, the judgment debtor will in turn pay the debt. The reality is far different. A judgment from the court does not guarantee that the judgment creditor will be fully, or even partially, reimbursed. Unfortunately, a money judgment rarely results in its immediate execution and payment of the debt owed by the defendant, thus forcing the plaintiff to undertake additional proceedings in order to enforce the judgment. Laskin, Gertner, Reiter, Springman and Trebilcock in *Debtor and Creditor* state that:

A common misconception of those unversed in the operation of the collection system is that when a judgment is signed against a debtor, payment follows automatically. As a matter of law [...] nothing could be further from the truth. The judgment itself has no immediate effect upon the property or person of the debtor; it merely establishes, irrefutably, the existence of a debt in the stated amount. It is then up to the judgment creditor to attempt to collect the debt found due.⁸

As a result, an effective and just civil justice system must provide the process by which individuals can enforce their judgments and obtain payment of monies they are owed.⁹

In addition to the regrettable necessity of resorting to judgment enforcement law, a creditor must also overcome additional obstacles on the path to debt recovery. These legal impediments have been described as follows by the British Columbia Law Institute:

The pronouncement of a money judgment rarely results in its immediate payment; instead, the judgment creditor usually must take steps to compel the judgment debtor to pay. These steps [...] can be as time-consuming, elaborate, and expensive as the steps required to establish liability [...] Rather than marking the successful completion of their efforts to gain monetary relief, the judgment often represents only the beginning of a more difficult and frustrating experience—enforcing the judgment to obtain payment.¹⁰

Although the mandate of the New Brunswick Department of Justice is to promote the impartial administration of justice and to ensure protection of the public interest¹¹, one questions whether these objectives are actually attained by creating a legal system to determine and recognize rights without providing adequate means to enforce those rights.¹² What is a judgment worth if one cannot enforce it? If members of the public and the business community do not have access to a fair and just legal system that includes an efficient and effective judgment enforcement component, it is their public confidence in the system which is damaged and thus the public interest.

Confidence in the civil justice system will only exist if this process can produce the results that judgment creditors are entitled to -- payment of their debt in a simple and efficient way. At present, that confidence is threatened. The process is difficult and frustrating and the outcomes, often because of the process, are not satisfactory.¹³

⁸ JB Laskin et al, *Debtor and Creditor: Cases, Notes and Materials*, 2d ed (Toronto: Emond-Montgomery, 1982) at 137.

⁹ Ontario, Ministry of the Attorney General, *Ontario Civil Justice Review*, (Supplemental and Final Report), (Toronto: Ministry of the Attorney General, 1996) at ch 6 *Specific Areas*, online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/suppreport/ch64a.asp#Note%204>> [*Ontario 1996 Report*].

¹⁰ *British Columbia 2005 Report*, *supra* note 5 at 1.

¹¹ New Brunswick, Department of Justice and Consumer Affairs, *Mandates*, online: New Brunswick Government <http://www2.gnb.ca/content/gnb/en/contacts/dept_renderer.146.html#mandates>.

¹² *British Columbia 2005 Report*, *supra* note 5 at 1.

¹³ *Ontario 1996 Report*, *supra* note 9.

The public's confidence in the civil justice system has also been discussed in the Nova Scotia 2011 Report, in which the Law Reform Commission of Nova Scotia emphasises the vital role of judgment enforcement law within our justice system:

Finally, we add that a concern to improve the enforcement of judgments must not be thought of as separate from or secondary to other efforts to improve Nova Scotians' access to justice. We may make every effort to facilitate access to justice in the sense of reducing costs and other barriers to litigation, but if at the end of the process the mechanisms for enforcing a successful claim are deficient, those efforts will be hollow. An enforcement system that is unduly complicated or costly, or that simply fails to deliver results, is certain to undermine the confidence of the public and foster cynicism about the administration of justice. Put simply, it is the responsibility of the state - part and parcel of the duty to maintain and promote the rule of law - to uphold its courts' judgments with strong and effective enforcement action¹⁴

This declaration reflects a growing consensus in Canada on the types of reform necessary to create a "modern, efficient and balanced enforcement system".¹⁵ In the *New Brunswick 1976 Report*, Kerr observed that our objective to strive for the pursuit of justice compels the enactment of a new judgment enforcement system which, on one hand, enables judgment creditors to recover their judicially recognized debts from recalcitrant judgment debtors while, on the other hand, protecting cooperative debtors who simply do not have the means to pay.¹⁶

Given the foregoing, the *NBJEA* is fundamental to our society and to a fair, just, efficient, effective and impartial system of justice.¹⁷ This is the objective the research team has strived towards.

2.1 The current judgment enforcement system in New Brunswick

As mentioned in the *British Columbia 2005 Report*, in order to demonstrate why reform of the law is necessary, it is essential to review the history and operation of the current civil enforcement system as well as the major arguments in favour of reform.¹⁸ Although relevant historical facts and legal arguments are referenced in the context of the analysis of each specific issue, this report does not intend to provide a detailed historical analysis of New Brunswick's legal framework on the enforcement of judgments and creditor-debtor relations. The *New Brunswick 1976 Report* provides an in-depth legal analysis of the law up to that time, which in turn was updated by the *New Brunswick 1985* and *1994 Reports*.¹⁹ In fact, the necessity and importance of a legislative reform and consolidation of New Brunswick's current judgment enforcement laws has been advocated for more than thirty-five years and is expressed as follows by Kerr following his extensive historical analysis:

From the description of the existing scheme of creditors' remedies, it is apparent that the system is a complex and poorly interrelated collection of procedures. Many of these procedures originated in the complex legal system that existed before the major legal reforms of the last century and a half. These old procedures have been substantially modified by legislation during the last century and most are now

¹⁴ *Nova Scotia 2011 Report*, *supra* note 5 at 7.

¹⁵ New Brunswick, Office of the Attorney General, *The Proposed New Brunswick Judgment Enforcement Act*, vol 1 (Executive Summary and Proposed Act), by John R. Williamson (Fredericton: Office of the Attorney General, 1994) at 6 [*New Brunswick 1994 Report*, vol 1].

¹⁶ Nouveau-Brunswick, Department of Justice, *Third Report of the Consumer Protection Project*, vol II, *Legal Remedies of the Unsecured Creditor After Judgment* by Karl J Dore & Robert W Kerr (Fredericton: Department of Justice, 1976)

at 240-241 [*New Brunswick 1976 Report*].

¹⁷ See Alberta Law Reform Institute, *Enforcement of Money Judgments* (Report No. 61), vol 1 (Edmonton: ALRI, 1991) at 3 ("[a] just and efficient process of debt enforcement is fundamental to society") [*Alberta 1991 Report*]; *British Columbia 2005 Report*, *supra* note 5 at 1.

¹⁸ *Ibid* at 3.

¹⁹ See also *ibid* which reviews the English, American and Canadian influences at 3- 8; Charles RB Dunlop, *Creditor-Debtor Law in Canada*, 2d ed (Toronto: Carswell, 1995).

substantially regulated by statute. The reforms have proceeded on a rather haphazard basis, however, unlike the reforms in the remainder of the legal system which have endeavoured with considerable consistency to simplify and rationalize the system.²⁰

Dunlop, a leading academic in the field, corroborates this conclusion and observes that:

it is undeniable that the present system of creditors' remedies law in Canada is in urgent need of reform. In most provinces, the law governing debtor-creditor relations is a patchwork of English and Canadian legislation and judge-made rules which do not fit together into a comprehensible or workable pattern. Much of the law is out of date, particularly when viewed against the backdrop of the economic and social changes which have occurred in recent years.²¹

Since the province's last report on this issue, New Brunswick has followed the national wave of legislative reform of secured financing law. Several legal advancements became effective in 1995. With the adoption of the *Personal Property Security Act*²², a new legal regime governing security interests in personal property created a central provincial computerized personal property registry ("PPSA Registry") as well as required the registration of judgments and eliminated the need to pursue judgment enforcement proceedings in order to assert priority as against a secured party.

Given that a debtor often has secured and unsecured debts, it is anomalous that legislative reform via the enactment of the PPSA has up to now privileged one set of creditors: the secured creditor.²³ Although complementary provisions were added to the *Creditors Relief Act*²⁴ as an interim step pending the introduction of a new judgment enforcement system, to this day, unsecured creditors must rely on an assortment of new and old legislation, which has remained essentially the same legislation and dates back to the 19th century. As a result, a person dealing with the enforcement of judgments, whether a legal expert, enforcement personnel, creditor or debtor, must consider and peruse over 10 statutes as well as the *Rules of Court of New Brunswick* in order to determine their rights and obligations.²⁵ In addition to its pure number, the current collection of statutes on this issue is comprised mostly of antiquated, fragmented, overly complex and confusing legislative provisions. According to Cuming, the *Creditors Relief Act* is one of the most poorly drafted Acts in the statute books.²⁶ The authors fully agree.

The current enforcement system is therefore unnecessarily complex and costly for all parties involved since its long neglect has "resulted in many of its core concepts becoming encrusted with technicalities and uncertainties".²⁷ Attempting to enforce a judgment in New Brunswick or to advise clients on the matter can be a frustrating and unwieldy experience for most lawyers and enforcement personnel let alone the self-represented litigant.²⁸ Survey research in Nova Scotia evaluating the Small Claims Court revealed that the most significant element in need of reform was

²⁰ *New Brunswick 1976 Report*, *supra* note 16 at 233.

²¹ Dunlop, *supra* note 19 at 9. See also *British Columbia 2005 Report*, *supra* note 5 at 9.

²² *Personal Property Security Act*, RSNB 1973, c P-7.1 [PPSA]. Although the Act was assented to on May 7, 1993, it only became effective on April 18, 1995.

²³ Tamara M Buckwold & Ronald CC Cuming. *Modernization of Saskatchewan Money Judgment Enforcement Law* (Final Report) (2005), [unpublished], online: Queen's Printer for Saskatchewan <http://www.qp.gov.sk.ca/orphan/JE_Final_Report.pdf> [Saskatchewan 2005 Report].

²⁴ *Creditors Relief Act*, RSNB 1973, c C-33.

²⁵ See *ibid*; *Garnishee Act*, RSNB 1973, c G-2; *Arrest and Examinations Act*, RSNB 1973, c A-12; *PPSA*, *supra* note 22; *Assignments and Preferences Act*, RSNB 2011, c 115; *Absconding Debtors Act*, RSNB 2011, c 100; *Memorials and Executions Act*, RSNB 1973, c M-9; *Land Titles Act*, RSNB 1973, c L-1.1; *Registry Act*, RSNB 1973, c R-6; *Judicature Act*, RSNB 1973, c J-2; *Rules of Court of New Brunswick*, NB Reg 82-73 [Rules of Court].

²⁶ Ronald CC Cuming, *The Enforcement of Money Judgments Act SS 2010, c E-9.22* (Analysis and Commentary, Version 1(c)) (2010) [unpublished] online: CBA Saskatchewan <https://www.cba.org/dev/Saskatchewan/main/pdf/MWM_2011_CLE3C-4C-4_Guide.pdf> at 4 [Saskatchewan 2010 Report]. Although Professor Cuming was referring to Saskatchewan's Act, the same comment can be applied to New Brunswick's *Creditors Relief Act*, *supra* note 24.

²⁷ *British Columbia 2005 Report*, *supra* note 5 at 11.

²⁸ See *New Brunswick 1994 Report*, vol 1, *supra* note 15 at 3-4.

the “complexity and expense of collection efforts following judgments”.²⁹ It would be most surprising if the majority of judgment creditors in the province of New Brunswick would not express a similar complaint.

2.2 Basic principles

In the preparation of this report, several overriding principles have emerged and have been endorsed by the authors. Given the objective of this proposed new system of enforcement is a modern, uniform, coordinated, efficient and flexible system of enforcement of judgments which will balance the interests of both creditors and debtors in a manner that is just and equitable³⁰, it is recommended that the government should be guided in its review by the following set of principles:

1) An effective enforcement system

Remedies are important to enable judgment creditors to overcome the repudiation of the debt by judgment debtors.³¹ As postulated by the British Columbia Law Institute, a just and effective judgment enforcement system must provide legal tools for judgment creditors to overcome the obstinacy of judgment debtors.³²

In order to promote fairness among creditors, universal exigibility should also be prioritized such that all of a debtor’s property should be subject to enforcement measures except property that is expressly exempted in the statute.³³

2) A consolidated single statute governing enforcement of judgments law and creditor remedies

Although the Alberta Law Reform Institute recommended in 1991 that the “system should be established by one piece of legislation that is logically arranged and describes enforcement processes in a manner that can be understood by people who are affected by it and not just by their lawyers”³⁴, the government did not implement the one statute recommendation and instead enacted the *Alberta Act* with part of the procedural elements relegated to the Regulation made pursuant to this Act in addition to the *Alberta Rules of Court*.

In 2004, the Alberta Law Reform Institute once again reviewed the consolidation of the judgment enforcement system and observed that “the result has been confusion and conflicts among the various legislative instruments. The *Act* and the *Regulation* are relatively coherent, but the Rules are less integrated with the statutory scheme.”³⁵ The Rules Project Committee concluded that “the confusion created by splitting one subject among several pieces of legislation outweighs any argument based on the ease of amendment”³⁶ and recommended the integration of all enforcement related matters under one legislation on the following basis:

1. If the law is concentrated in one place, it is more likely to be coherent and integrated. Dividing the law of creditors’ remedies between the *Civil Enforcement Act* and The Rules leads to repetition, confusion and direct conflict. These flaws can be largely eliminated if rules which are part of the scheme of

²⁹ *Nova Scotia 2011 Report*, supra note 5 at 8.

³⁰ New Brunswick, Office of the Attorney General, *Proposal for a System of Enforcement of Judgment Debts*, by John R Williamson (Fredericton: Law Reform Branch, 1985) at 5 [*New Brunswick 1985 Report*]. See also *Saskatchewan 2005 Report*, supra note 23 at 3.

³¹ Alberta Law Reform Institute, *Alberta Rules of Court Project: Enforcement of Judgments and Orders* (Consultation Memorandum No. 12.11) (Edmonton: ALRI, 2004) at xiii, 1-2 [*Alberta 2004 Report*].

³² *British Columbia 2005 Report*, supra note 5 at 1.

³³ *Alberta 1991 Report*, supra note 17 at 24-25; *Nova Scotia 2011 Report*, supra note 5 at 6; *Saskatchewan 2005 Report*, supra note 23 at 3; *British Columbia 2005 Report*, supra note 5 at 16; Manitoba Law Reform Commission, *Review of the Garnishment Act* (Report) (Winnipeg: Manitoba Law Reform Commission, 2005) at 10.

³⁴ *Alberta 1991 Report*, supra note 17 at 26; *Ontario 1996 Report*, supra note 9.

³⁵ *Alberta 2004 Report*, supra note 31 at 7.

³⁶ *Ibid* at 23.

enforcement of money judgments are moved into the *Act* or the *Civil Enforcement Regulation*.

2. The present system of civil enforcement involves the researcher in a lengthy voyage from the *Act* to The Rules and back. Putting the law in one place makes the job of the researcher easier and therefore less expensive and uncertain. However, a rule which applies to more than one remedy or statute likely has to remain in the rules.
3. In most cases, rules will be moved into the *Civil Enforcement Regulation* rather than the *Act*. At present The Rules are largely, although not entirely, procedural rather than substantive. Procedural rules require frequent amendment which is easier for regulations rather than statutes. Still, the regulations pursuant to an act are more likely to be drafted in harmony with their parent legislation.³⁷

Given the foregoing analysis, it is recommended that common law concepts and obsolete approaches to judgment enforcement should be abandoned for newer policy choices and technological advancements culminating in a single coherent general enforcement of judgment statute. By consolidating all rules and legal principles relating to creditor remedies and to the enforcement of judgments, a single code would clarify and streamline both new and existing processes including securing, seizing and liquidating assets.³⁸

3) A centralized, technologically sophisticated and efficient provincial administration

A modern system of enforcement of judgments should be administered by a centralized enforcement office that acts on a province-wide basis.³⁹ Although the administrative structure and role of the enforcement office will be further developed in Part 6, several underlying reasons for this recommendation were summarized in the Saskatchewan 2005 Report:

The proposed location of all enforcement activity in a single office is designed to replace the current fragmented system with one that is integrated and coherent. This would both eliminate the costs and inefficiencies associated with parallel processes and facilitate the development in the sheriff's office of a comprehensive expertise in supervision of the seizure and disposition of the all-inclusive range of assets that would be exigible under the *Act*. This may be expected to minimize the need for resort to the court for the resolution of matters of detail, thereby lowering the global cost of enforcement action.⁴⁰

4) Limited judicial supervision

Once judgment is granted, an effective and efficient judgment enforcement system should strive to enable a judgment creditor "to immediately realize upon it, through the appropriate remedies, without returning to court for an additional order".⁴¹ Minimizing judicial involvement will ensure that remedies are immediately available without having to request an additional court order. Nevertheless, the court should be available when directions are required to resolve substantive legal disputes or for special enforcement orders when ordinary measures are ineffective or inappropriate.⁴²

³⁷ *Ibid* at xv, 8.

³⁸ See *Alberta 1991 Report*, *supra* note 17 at 254; *Nova Scotia 2011 Report*, *supra* note 5 at 6, 28; *Saskatchewan 2005 Report*, *supra* note 23 at 2-3; *British Columbia 2005 Report*, *supra* note 5 at 16, 18.

³⁹ *Alberta 1991 Report*, *supra* note 17; *Nova Scotia 2011 Report*, *supra* note 5 at 6.

⁴⁰ *Saskatchewan 2005 Report*, *supra* note 23 at 4-5.

⁴¹ See *Nova Scotia 2011 Report*, *supra* note 5 at 6 citing *Alberta 2004 Report*, *supra* note 31 at xiv.

⁴² *Saskatchewan 2005 Report*, *supra* note 23 at 8; *Alberta 1991 Report*, *supra* note 17 at 3, 27-28; *Nova Scotia 2011 Report*, *supra* note 5 at 6; *British Columbia 2005 Report*, *supra* note 5 at 16. See also *Alberta Act*, *supra* note 2, s 5; *Newfoundland Act*, *supra* note 1, s 11; *Saskatchewan Act*, *supra* note 3, s 114; *Uniform Act*, *supra* note 4, s 7.

5) Protection of judgment debtor and third party interests

For the reform of the current system of judgment enforcement to be politically palatable, it must meet the general objective of the pursuit of justice and provide just, equitable and balanced remedies for all parties involved.⁴³ To attain this objective from both a creditor's and a debtor's point of view, the judgment enforcement system must enable the highest possible satisfaction of a creditor's claim while at the same time assuring the debtor that "he will not be deprived of the means to provide himself and his dependants with the continuing necessities of life".⁴⁴

As insisted upon by Buckwold and Cuming, "[d]ebtors and their families cannot be rendered destitute or financially dysfunctional by the implementation of judgment enforcement measures."⁴⁵ Judgment debtors and their dependants must therefore be protected from abusive creditor enforcement procedures and the property that a debtor reasonably requires for the maintenance of his or her family should be clearly exempted by statute.⁴⁶

In addition, judgment "debtors and affected third parties would be able to look to the court in circumstances in which judicial intervention may be warranted".⁴⁷ It is therefore recommended that the *NBJEA* provide mechanisms to resolve disputes arising during the enforcement process.⁴⁸ Given the previous principle of limiting judicial supervision, the *NBJEA* should therefore provide the enforcement officer with a wide discretion to determine the appropriate course of action and the respective rights of the interested parties, should a dispute arise between them.

However, the enforcement officer's decisions as well as any other proposed or actual course of action should be reviewable. Accordingly, any interested party could apply to the court within 15 days for a ruling that the enforcement officer's determination is incorrect. A review of the enforcement officer's decision should be possible in most cases but, unless a court order is obtained, the enforcement officer's determination would be final.

6) Collective enforcement and sharing among judgment creditors

Initially, the common law established the rule of "first in time, first in right" enabling the first enforcing judgment creditor to seize a judgment debtor's property to satisfy his or her judgment. Subsequent enforcement by any other judgment creditor was limited to the judgment debtor's remaining property. However, as explained by Williamson, this rule was generally seen as unfair:

One major concern is that being the first in time may have little or nothing to do with the equity of one's claim and may simply be the result of fortuitous circumstance. There is also the concern that such a system would cause a race to obtain judgment against the debtor that would be prejudicial to his economic survival and possible recovery from temporary economic hardship. This might result in a "get in quick" attitude on the part of creditors. Further, there is a more general sense that equality is equity and that there should be a basic rule that all creditors should share on a prorata basis.⁴⁹

Given the foregoing and considering the temporary federal legislative void in bankruptcy law from 1880 to 1919 that had previously prescribed the proportional sharing of the bankrupt's property among ordinary creditors, most Canadian provinces enacted creditor relief legislation which sanctioned the compulsory distribution of proceeds to all judgment creditors entitled by the statute

⁴³ *New Brunswick 1976 Report*, *supra* note 16 at 240.

⁴⁴ *Ibid* at 240-41.

⁴⁵ *Saskatchewan 2005 Report*, *supra* note 23 at 2

⁴⁶ *Alberta 1991 Report*, *supra* note 17 at 254; *Nova Scotia 2011 Report*, *supra* note 5 at 26-27; *British Columbia 2005 Report*, *supra* note 5 at 1.

⁴⁷ *Saskatchewan 2005 Report*, *supra* note 23 at 8.

⁴⁸ Notwithstanding their importance, this principle and its correlative measures of enabling interested parties to contest an enforcement officer's decision will not be repeated throughout this report.

⁴⁹ *New Brunswick 1985 Report*, *supra* note 30 at 308.

to share.⁵⁰ The *Creditors Relief Act* aimed to reverse the common law rule of “first in time, first in right” and abolish priorities among judgment creditors. Although federal legislation on insolvency was re-enacted in 1919 and included once again proportional sharing among ordinary creditors, most provinces, including New Brunswick, did little to amend their statutes. It remains unclear whether this legislative legacy resulted from a conscious and intentional choice, thereby confirming the intended objectives of the Act, or from simple legislative indifference.⁵¹

Nonetheless, the retention of the principle of proportionate sharing among judgment creditors, currently embodied in New Brunswick’s *Creditors Relief Act*, by almost all Canadian reports on the subject⁵² further confirms the authors’ recommendation that this principle continue to guide the *NBJEA* and its provisions.

7) A unitary approach to enforcement

A unitary, streamlined and integrated approach to enforcement is further recommended to ensure that not only legal experts but individuals wishing to avail themselves of the judgment enforcement system will comprehend the *NBJEA*. A unitary approach is thus recommended not only in the remedies available but in the nature of the enforcement process itself.

Proposed by the *Uniform Act* and adopted in Saskatchewan, this approach, which replaces the plethora of current remedies with a single remedy, is summarized as follows:

The EMJA provides for seizure and disposition of the judgment debtor’s exigible property by the sheriff in the manner best suited to the nature of the assets involved. It abandons the conceptually and functionally uncoordinated procedures and principles of the current system - *i.e.*, execution, garnishment, charging orders and others - in favour of a single, albeit multifaceted, integrated approach. This approach has been designed to produce practical results without the attendant doctrinal and functional complexity endemic to existing law.

Essentially there is one enforcement remedy: seizure of assets. However, seizure may be accomplished either by the sheriff directly or by a receiver appointed by the court in appropriate circumstances for that purpose. In either case, the ultimate disposition of the assets seized and distribution of the proceeds would be performed by the sheriff.⁵³

In addition, a unitary approach to enforcement and the principle of proportionate sharing among judgment creditors naturally lead to the notion of collective enforcement. It is recommended that the *NBJEA* not only authorize but also require the enforcement officer to enforce judgments on behalf of creditors whom have filed a Notice of Enforcement. The prerequisite to provide detailed enforcement instructions to the Sheriffs should be abolished. As a result, judgment creditors will no longer be required to discover or assess a judgment debtor’s property nor provide security for enforcement costs except as specified in the *NBJEA*.

⁵⁰ Dunlop, *supra* note 19 at 415-17. See also *Saskatchewan 2010 Report*, *supra* note 26 at 141; Lyman R Robinson, “Distribution of Proceeds of Execution: An Examination of the Common Law, Creditors’ Relief Legislation, Modern Judgment Enforcement Statutes and Proposals for Reform” (2003) 66 Sask L Rev 309 at paras 8-14. The *Creditors Relief Act*’s history and objectives were also undertaken in the *New Brunswick 1985 Report*, *supra* note 30 at 308-13.

⁵¹ *Saskatchewan 2010 Report*, *supra* note 26 at 141. See also Robinson, *supra* note 50.

⁵² *Saskatchewan 2005 Report*, *supra* note 23 at 3; *British Columbia 2005 Report*, *supra* note 5 at 1. The “consensus in Canada” refers to Dunlop, *supra* note 19 at 1-3. The only exception cited in the *New Brunswick 1985 Report*, *supra* note 30 at 310 was British Columbia Law Institute, *Report on Creditor’s Relief Legislation: A New Approach* (Vancouver: British Columbia Law Institute, 1979).

⁵³ *Saskatchewan 2005 Report*, *supra* note 23 at 8. See also *British Columbia 2005 Report*, *supra* note 5 at 16. The *Newfoundland Act* and the *Alberta Act* also make great strides in this direction even though both statutes preserve garnishment as a distinct remedy, operating alongside seizure of assets.

As will be discussed in Part 7 on Registration and Part 10 on Distribution, the *NBJEA*, guided by the unitary approach of collective enforcement, should enable the enforcement officer to determine the number of enforcing judgment creditors and the total amount to be enforced prior to seizure in order to efficiently assess the appropriate enforcement strategy.

8) Optional creditor control over enforcement proceedings

Notwithstanding the principle of collective enforcement, the *NBJEA* should provide a judgment creditor with the option of “driving” or controlling the enforcement process should he or she so desire. The aim of involving the judgment creditor stems from both the wish of the creditor to remain involved and the social benefit of minimizing the cost of resolving disputes when settlement is reached between the parties without any third party involvement. As noted in the *New Brunswick 1976 Report*, “[s]uch a settlement is part of the normal conduct of business by the parties and is readily absorbed into the normal costs of the business. Maintenance of private involvement through to the final remedy stage encourages the maximum extent of private settlement.”⁵⁴

Given the objective of the *NBJEA* to provide accessible and efficient enforcement services, creditor involvement should be encouraged and authorized but only on a voluntary basis. In other words, when a judgment creditor, unsophisticated or otherwise, must resort to enforcement services, a choice should be offered to remain involved in the enforcement process or to rely on the services of the enforcement office. This flexibility is a hallmark of the new enforcement system and an innovative element in the *NBJEA*, which will be further clarified below. It is expected, however, that most unsophisticated creditors or creditors with limited resources will rely on the expertise and experience of the enforcement office. Creditors in such situations should not be compelled to dictate every detail of the enforcement proceedings. The remedy is invoked by the Notice of Enforcement accompanied with enforcement instructions from the judgment creditor to the enforcement officer as explained in Section 6.2.5. These instructions may be very detailed, or they may be general.

Given the basic principles above, it is clear that the protection of judgment debtor and creditor interests remains a priority and will therefore be further discussed in the following sections on preservation orders, obtaining disclosure and exempt property before embarking on a review of the proposed framework, administration and procedures contemplated for the *NBJEA*.

⁵⁴ *New Brunswick 1976 Report*, *supra* note 16 at 253.

3. Preservation Orders

3.1 The current law in New Brunswick

Prejudgment remedies are pre-emptive legal devices designed to assist a creditor dealing with a debtor in default. The main objective is to protect the debtor's assets from illegitimate disposition or removal from jurisdiction pending the adjudication of the claim for damages so that the assets will be available for recovery, seizure and sale following a judgment.

Multiple pre-judgment remedies exist in one form or another in the various Canadian provinces and commonwealth states. The most common are the Mareva injunction and the attachment of debts before judgment (or prejudgment garnishment).

3.1.1 Mareva injunction

Although most Canadian provinces have enacted statutes or regulations governing this remedy, the Mareva injunction (sometimes also referred to as a "freezing order") is a legal remedy devised by the English courts. Its name originates from one of the first cases in which this injunctive remedy was granted: *Mareva Campania Naviera SA v International Bulk Carriers SA*, in which Lord Denning stated that "[i]f it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets".⁵⁵

The purpose of a Mareva injunction is to protect the interests of the plaintiff during the litigation process for damages by limiting the defendant's ability to dispose of or remove assets from the jurisdiction until final disposition of the litigation between the parties. The goal is to ensure that exigible property will be available to satisfy a judgment.

In its leading decision on the subject in *Aetna Financial Services Ltd. v. Feigelman*⁵⁶, the Supreme Court of Canada confirmed the existence and availability of the Mareva injunction in Canada. The Court held that the plaintiff must put forward a "*strong prima facie case*"⁵⁷ and there must be assets of the defendant susceptible to execution as well as a "real risk that the remaining significant assets of the defendant are about to be removed or so disposed of by the defendant as to render nugatory any judgment to be obtained after trial".⁵⁸ The Court further confirmed that the general rule requiring that the balance of convenience favour the issuance of the order still existed and that the overriding consideration was whether the defendant had threatened to "so arrange his assets as to defeat his adversary, should that adversary ultimately prevail and obtain judgment, in any attempt to recover from the defendant on that judgment".⁵⁹

Although the court's power to grant Mareva injunction comes from its inherent equitable jurisdiction, the Mareva injunction is governed, in New Brunswick, by Rule 40.03 of the *Rules of Court* which provides that "[w]here a person claims monetary relief, the court may grant an interlocutory injunction to restrain any person from disposing of, or removing from New Brunswick, assets within New Brunswick of the person against whom the claim is made".⁶⁰ Furthermore, the court is required to take into account the nature and substance of the claim or defence, and consider whether there is a risk of the assets being disposed of or removed from New Brunswick.⁶¹

⁵⁵ [1975] 2 Lloyd's Rep 509 at 510. Prior to the development of the Mareva injunction, courts had long held that a plaintiff could not obtain an interlocutory injunction to restrain the defendant from disposing of or dealing with his or her assets: *Lister & Co v Stubbs*, [1886-90] All ER Rep 797.

⁵⁶ *Aetna Financial Services Ltd v Feigelman*, [1985] 1 SCR 2 [*Aetna Financial Services*]

⁵⁷ *Ibid* at para 30

⁵⁸ *Ibid* at para 25

⁵⁹ *Ibid*.

⁶⁰ *Rules of Court*, *supra* note 25, r. 40.03(1)

⁶¹ *Ibid*, r. 40.03(2)

Notwithstanding its statutory approval by the enactment of Rule 40.03, the New Brunswick Court of Appeal concluded, in *Canadian Imperial Bank of Commerce v Price*, that the Mareva injunction is an extraordinary remedy that should only be granted in appropriate cases under the following four guidelines applicable to the plaintiff:

- (1) The plaintiff must make full and frank disclosure of all material matters within his or her knowledge.
- (2) The plaintiff must give particulars of the claim, including a basis for the claim and the amount claimed. The plaintiff must also fairly state his knowledge of the defendant's defence. The material presented to the judge must establish a prima facie case on the merits.
- (3) The plaintiff must give grounds for believing that the defendant has assets within the jurisdiction. The assets should be established with as much precision as possible so that, in appropriate cases, the injunction may be issued against specific assets. The Court will be reluctant to tie up all of the assets of a defendant who is a Canadian citizen and resident in the jurisdiction.
- (4) The plaintiff must persuade the court that the defendant is removing, or that there is a risk that he or she is about to remove, assets from the jurisdiction in order to avoid a possible judgment. Alternately, it may be shown that the defendant is disposing of assets in a manner out of the ordinary course of business so as to make tracing of assets remote or impossible.⁶²

However, where assets are moved in and out of a jurisdiction in the ordinary course of business, the applicant will have difficulty meeting the standard and the injunction will likely not be ordered.⁶³ The Mareva injunction is an extraordinary remedy, and even though the order, if granted, will not injure the defendant, it still may not be granted.

While Rule 40.03 provides New Brunswick creditors with recourse to a Mareva injunction, the Rule does not address relief ancillary to such injunctions. Indeed, circumstances may be such that a creditor cannot fully ascertain which specific assets should be covered by the Mareva order and thus protected. Circumstances may require the creditor to seek this information from third parties or the debtor himself.

In order to make an injunction effective, the English Court of Appeal concluded that it had the power to make such ancillary orders as are necessary to ensure that the injunctive relief given to the plaintiff is effective, in particular the power to order discovery in aid of a Mareva injunction if it is necessary for the effective operation of the injunction.⁶⁴ Similarly, there are precedents in Canadian jurisprudence for ancillary orders compelling the defendant or third parties to disclose information regarding the debtor's assets⁶⁵ as well as orders allowing the examination under oath of the debtor for the purpose of identifying and locating assets.⁶⁶ However, Rule 40.03 does not address such ancillary orders and its current wording leaves some doubt as to the court's jurisdiction to make any such orders.

3.1.2 Attachment of debts before judgment

In New Brunswick, garnishment of debts owed to judgment debtors is one of the many methods of enforcing judgments. Attachment of debts before judgment is not available, however, except as

⁶² (1988), 81 NBR (2d) 181 (CA) at 187-88 [*Price*].

⁶³ In *Aetna Financial Services*, *supra* note 56 at paras 41-43, the Supreme Court of Canada ultimately found that a Mareva injunction was not appropriate. The defendant was a federally incorporated company with authority to carry on business in Canada, and in the course of doing so, moved assets in and out the jurisdiction (Manitoba in this case). No improper purpose was exposed, and there was no evidence of an intention to move assets out of Canada.

⁶⁴ *AJ Bekhor & Co Ltd v Bilton*, [1981] 2 All ER 565 at 576.

⁶⁵ See e.g. *Boczkiewicz v Creative Capital Connection Inc*, 2006 ABQB 732.

⁶⁶ See e.g. *Sekisui House Co v Nagashima*, 1982 CanLII 800 (BCCA).

provided by the *Absconding Debtors Act*⁶⁷. This Act aims to facilitate the recovery of a debt from a debtor (not necessarily a judgment debtor) who departs from the province, or is keeping himself concealed within the province, but has not concealed his property from his creditors. Essentially, upon the sworn affidavits of the creditor and another person stating that they believe that the debtor is out of the province, a judge may issue a Warrant to Seize Property to the sheriff, who will in turn execute the said warrant and seize the property in question. The property can then be sold and the proceeds distributed to the various creditors of the absconding debtor. However, it is a relatively unused piece of legislation.⁶⁸

Unlike other provinces, New Brunswick does not currently have legislation giving a plaintiff the ability to garnish funds of the defendant or sums owed to him by third parties prior to judgment. In provinces where pre-judgment attachment is available, a plaintiff can move to have sums garnished and paid into court, preserving the money until the action is decided on its merits.⁶⁹ However, the requirements for obtaining such an order are generally that (1) the plaintiff must have commenced an action and (2) the claim must be for a "debt or liquidated demand".

As the remedy is extraordinary and could lead to abuse, courts require strict observance of the statutory requirements set down to govern such orders. Generally, a plaintiff is required to file an affidavit establishing the nature and the amount of the claim against the defendant. In some other jurisdictions, a plaintiff will need to satisfy the court that he will likely suffer prejudice if the prejudgment attaching order is not granted.⁷⁰ The property subject to a prejudgment attaching order is generally the same as that caught by a post judgment garnishing order.

3.2 The case for reform and recommendations

The case for inclusion of pre-judgment remedies in the *NBJEA* is strong, given the unavailability of prejudgment garnishment, the need for coherence and consistency in the application of all prejudgment remedies and the relatively high threshold currently governing Mareva injunctions. The *NBJEA* is a great opportunity to enact a single piece of legislation that provides for all available prejudgment remedies to unsecured creditors. As the objective is to create a coherent, comprehensive and consolidated system of judgment enforcement, it is only fitting that prejudgment remedies be included. Plaintiffs seeking a prejudgment remedy would find all available avenues in one single piece of legislation, which would set the procedure and specific requirements in order to obtain relief.

The *NBJEA* should therefore address all prejudgment remedies by adopting in substance Part 4 of the *Uniform Act*, which creates a single prejudgment remedy called "preservation order".⁷¹ This single remedy effectively replaces orders for preservation of assets such as Mareva injunctions and includes the possibility of attaching debts before judgment. The *NBJEA* would detail the specific requirements for applying for and obtaining such an order.

As with a Mareva injunction, a preservation order would not adversely affect the rights of secured creditors of the debtor since the order would not confer ownership of the assets to the applicant nor give the applicant a security interest in the assets.⁷² The property affected by the preservation order would be subject to the ordinary rules for judgment enforcement set out elsewhere in the *NBJEA*, once judgment is properly obtained. As such, the property that has been protected pending litigation could be seized to satisfy the judgment of one judgment creditor even though the preservation order may have been obtained by another.

⁶⁷ *Absconding Debtors Act*, *supra* note 25, s 2.

⁶⁸ There appear to be fewer than 10 reported decisions dealing with the *Absconding Debtors Act*.

⁶⁹ For example, pre-judgment attachment is allowed by the Saskatchewan *Attachment of Debts Act*, RSS 1978, c A-32, s 2.

⁷⁰ See e.g. *Osman Auction Inc v Belland*, 1998 ABQB 1095.

⁷¹ See also *Saskatchewan Act*, *supra* note 3, at Part II. The *Newfoundland Act*, *supra* note 1, s 27 refers to an "attachment order".

⁷² *Bank of Montreal v Faclaris* (1984), 48 OR (2d) 348 (HC).

The *NBJEA* should set out the grounds for issuing preservation orders, while assuring that our courts retain appropriate discretion when assessing applications. Generally guided in principle by the case law, which has thus far governed various prejudgment remedies, the *NBJEA* would set out the basic requirements to be satisfied by a party seeking a preservation order.

3.2.1 General principles governing preservation orders

Four general principles should govern preservation orders.

1) The relative strength of the applicant's action for a judgment

Given that all prejudgment remedies are interlocutory in nature, the *NBJEA* should restrict the availability of preservation orders to plaintiffs who can demonstrate, at the very least, some reasonable chance of obtaining a judgment. The issue of the specific threshold to be applied is difficult. On the one hand, a very high threshold would limit the availability of preservation orders to those cases where there is little to no doubt as to the outcome of the case. On the other hand, a less stringent threshold would make preservation orders more accessible, at the risk of tying up assets pending the litigation of cases with mitigated chances of success.

Not all jurisdictions require the same demonstration of a “strong case” to obtain preservation remedies. In practice, the distinction between, for example, a “*prima facie* case”⁷³ and a “strong prima facie case”⁷⁴ is not helpful and difficult to apply. In most cases, courts are asked to issue Mareva and other types of interlocutory orders on limited affidavit evidence. As such, strong consideration should be given to making the relative strength of the applicant's case a factor to be considered without being determinative in and of itself.

It is therefore recommended that the *NBJEA* adopt the factors outlined in the *Alberta Act* to govern the discretion of the court in granting preservation orders.⁷⁵ The *Alberta Act* provides that the court may grant an “attachment order” if it is satisfied that “there is a reasonable likelihood that the claimant's claim against the defendant will be established” and that “there are reasonable grounds for believing that the defendant is dealing with the defendant's exigible property, or is likely to deal with that property, (i) otherwise than for the purpose of meeting the defendant's reasonable and ordinary business or living expenses, and (ii) in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant”.⁷⁶

In comparison, the *Uniform Act* provides, *inter alia*, that the court may grant a preservation order when “the facts alleged in support of the plaintiff's claim, if proven at trial, are sufficient to establish the plaintiff's claim for the payment of money”⁷⁷. It is believed that the language in the *Uniform Act* is best suited for *ex parte* applications. Indeed, the provision suggests that the court will proceed solely on the record put forth by the creditor. While most applications for a preservation order will no doubt be made without initial notice to the debtor, the *NBJEA* should adopt language that will guide the court no matter the circumstances and should reflect that the debtor may well challenge the request for a preservation order.

Likewise, the *NBJEA* should not strictly require an applicant to demonstrate that ultimate success in the litigation is a foregone conclusion. Rather, a creditor should be required to show that he or she has a good cause of action. The authors argue that the overriding principle should be whether it is just and convenient that a preservation order be issued in light of all of the circumstances, which, in principle, requires an examination of the relative strength of the creditor's claim based on the record before the court. As such, the “reasonable likelihood that the claimant's claim against the defendant will be established” appears more flexible and suited.

⁷³ *Price*, *supra* note 62 at 187-88; *Montreal Trust Co of Canada v Occo Developments Ltd*, 1998 CanLII 17591 (NB QB) at 3.

⁷⁴ Suggested, at least, by the Supreme Court of Canada in *Aetna Financial Services*, *supra* note 56 at para 7.

⁷⁵ *Alberta Act*, *supra* note 2, s 17(2). See also *New Brunswick 1994 Report*, vol 1, *supra* note 15, 1994 *NBJEA*, s 17(2)(a).

⁷⁶ *Alberta Act*, *supra* note 2, s 17(2)(a).

⁷⁷ *Uniform Act*, *supra* note 4, s 16(2).

- 2) The risk that removal or disposition of property will hinder or frustrate the enforcement of an eventual judgment

Prejudgment remedies have often been predicated on the requirement to show an intention on the part of the defendant to dispose of, or otherwise make his property unavailable to thwart the enforcement of an eventual judgment. The authors believe that this should not be a factor governing the issuance of preservation orders. Intent is always difficult to establish and must, in virtually all cases, be inferred from the circumstances.

The specific intent of the defendant is, most often, not the primary consideration of a party applying for a preservation order. The goal is to preserve exigible assets and not to police the defendant's motives. As such, preservation orders should be available where an applicant can show that the unavailability of assets will seriously hinder collection efforts once judgment is obtained. This criterion also aims to address the need to allow a defendant to meet reasonable and ordinary business or living expenses or, otherwise stated, protect the usual or ordinary use of assets by individual and commercial debtors.

Therefore this criterion would require the applicant to show that the defendant has or may dispose of property other than for ordinary purposes, such as meeting personal or business expenses, without regard to motive *per se*.

- 3) It is just, in the circumstances, to issue a preservation order

In addition to being satisfied as to the relative strength of the applicant's case and the existence of a risk that, without a preservation order, the enforcement of an eventual judgment will be seriously hindered, we recommend that the *NBJEA* include a third criterion. Akin to the balance of convenience prong of the well-known three-part test that governs interlocutory injunctions, the court must be satisfied that it is just, in the circumstances, to issue a preservation order.

- 4) The preservation order should cause no more inconvenience to the defendant than is necessary

Finally, the *NBJEA* should adopt the principle of minimum disruption as a governing factor for preservation orders.⁷⁸ Preservation orders should only go as far as it is necessary to be effective and should not be overreaching. As much as possible, the order should allow the defendant to use property for normal and ordinary business or individual purposes. To that extent, the preservation order should not affect more property than is reasonably necessary to satisfy an eventual judgment in light of the applicant's claim.

3.2.2 Procedure and evidence to seek a preservation order

As stated earlier, the *NBJEA* would establish the procedure to seek preservation orders. The procedure would address such issues as the possibility of obtaining a time-limited preservation order *ex parte* and the ability to obtain ancillary orders, such as orders for the examination of the defendant or third parties.

Evidentiary requirements would demand that the applicant make full and frank disclosure because preservation orders are injunctive and must require that the applicant comes to court with "clean hands". Full disclosure would include all known facts material to the application, including those facts that do not favour the applicant's case, including any and all known defences to the claim.

The applicant's affidavit should also contain evidence that the defendant has exigible property in the province and provide as much detail about the assets. Where the applicant does not have specific

⁷⁸ New Brunswick, Office of the Attorney General, *The Proposed New Brunswick Judgment Enforcement Act*, vol 2 (Summary Report and Commentary), by John R. Williamson (Fredericton: Office of the Attorney General, 1994) at Sum Rpt-25 [*New Brunswick 1994 Report*, vol 2] citing Institute of Law Research and Reform, *Prejudgment Remedies for Unsecured Claimants* (Report No. 50) (Edmonton: Institute of Law Research and Reform, 1988); *New Brunswick 1994 Report*, vol 1, *supra* note 15, 1994 *NBJEA*, s 18.

proof or knowledge of the defendant's assets, the affidavit should set out the grounds for believing there are such assets in the province.

3.2.3 Safeguards

Preservation orders, by their nature, restrict the defendant's freedom to use or deal with his property while the plaintiff has not yet fully proved his claim. Especially worrisome is the potential to deprive the defendant of the use of income earning assets or the benefit of goods sold in the context of a business undertaking. This potential abuse by plaintiffs of the Mareva injunction was judicially recognized by the Supreme Court of Canada in *Aetna Financial Services*:

This sub-rule or exception can lead to serious abuse. A plaintiff with an apparent claim, without ultimate substance, may, by the Mareva exception to the Lister rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons, cannot afford to await the ultimate vindication after trial.⁷⁹

As such, appropriate safeguards must tightly control prejudgment remedies since these extraordinary remedies could be abused and used for improper purposes or sheer tactical advantage in litigation where the defendant may indeed have a valid defence to the claim. It is therefore recommended that the procedure set out by the *NBJEA* for obtaining preservation orders contain safeguards to protect defendants. Likewise, *ex parte* orders should, of course, be time limited.

Under the *Uniform Act*, a creditor is normally required to post security to obtain a preservation order.⁸⁰ If the creditor's action fails or is discontinued in some circumstances, the security obtained from the creditor can be used to compensate the debtor or a third party who suffered damages as a result of the preservation order being issued. In addition, the *NBJEA* should expressly stipulate that the applicant is deemed to have given an undertaking as to damages which may be suffered by the defendant should the action against him ultimately fail, as is currently the case under Rule 40.04.⁸¹

Finally, the *NBJEA* should also provide the defendant a right to vacate the order by providing adequate substitute security.

⁷⁹ *Aetna Financial Services*, *supra* note 56 at para 43.

⁸⁰ Under the *Uniform Act*, the applicant is, by default, required to post security. *Contra New Brunswick 1994 Report*, vol 1, *supra* note 15, 1994 *NBJEA*, s 23(3) (gives discretion to the Court to require security).

⁸¹ *Ibid* at 2.3, 1994 *NBJEA*, s 23(1).

4. Obtaining disclosure

Before being able to satisfy a judgment, it is imperative to discover all the necessary information with respect to the debtor's financial affairs and property.⁸² In order to choose the most effective remedy, an enforcement officer, or a judgment creditor providing enforcement instructions, must first determine whether the debtor has any exigible assets that can be seized. It is also important to discover whether the debtor has transferred any assets, and if so, to whom. In the event a debtor has transferred assets, it may be necessary to initiate additional court proceedings in order to have the transfer or assignment declared fraudulent.⁸³

4.1 The current law in New Brunswick

Currently, the law in New Brunswick offers a judgment creditor two options for gathering necessary information with respect to the debtor. On one hand, a judgment creditor can use the *Arrest and Examinations Act*. Pursuant to section 30, a judgment creditor may examine a judgment debtor as to any property and as to any debts owing to or by him. The debtor is orally examined under oath before a judge or a clerk of the court⁸⁴. After an examination under the *Arrest and Examinations Act*, a judgment debtor may be ordered to pay the whole amount in one sum or make instalments.⁸⁵

On the other hand, a judgment creditor can use the *Rules of Court* to determine a judgment debtor's financial situation. Rule 61.14, entitled *Examination in Aid of Enforcement*, allows for the examination under oath of a judgment debtor by the judgment creditor. The goal of the examination is to discover the debtor's assets, income, debts and any means to satisfy the judgment. This rule also allows for the creditor to enquire about the disposal of any property since the cause of action began.⁸⁶ The advantage of using the *Rules of Court* is that the examination of the debtor is recorded and a transcript can be produced.⁸⁷ As such, the transcript can be used as evidence should the need arise. Where proceedings to have a transfer or an assignment declared fraudulent are necessary, the transcript will be of pivotal importance.

Since these two examination methods are similar and serve the same general purpose, the question arises as to whether it is necessary to retain both and whether better measures can be adopted in the *NBJEA*.

4.2 The case for reform and recommendations

One of the first difficulties encountered by judgment creditors is the frustration that ensues when debtors refuse to cooperate and disclose their financial situation and their assets. The problems with recalcitrant and uncooperative debtors are magnified when the judgment creditor attempts to obtain information about the debtor's assets.⁸⁸ Clearly, enforcement measures to obtain disclosure are essential tools for the judgment creditor and the enforcement officer to decide whether to undertake further enforcement measures. However, when a debtor fails or refuses to provide complete disclosure, the entire process can be frustrated.

In such situations, the court will not grant a contempt order unless a creditor has made several attempts to convene the judgment debtor to an examination and an application before the court is truly the "last resort". The remedy is not readily granted because it calls for the court to order a warrant for the debtor's arrest. Courts are thus hesitant to enforce orders for examination.⁸⁹

⁸² *New Brunswick 1985 Report*, *supra* note 30 at 84.

⁸³ Tamara M Buckwold & Ronald CC Cuming. *Modernization of Saskatchewan Money Judgment Enforcement Law* (Interim Report) (2001) [unpublished], online: Queen's Printer for Saskatchewan <<http://www.qp.gov.sk.ca/orphan/reporta.pdf>> at 18 [*Saskatchewan 2001 Report*]. See also *Assignments and Preferences Act*, *supra* note 25.

⁸⁴ In practice, most of these examinations are conducted before the clerk of the court.

⁸⁵ *Arrest and Examinations Act*, *supra* note 25 s 45(1).

⁸⁶ *Rules of Court*, *supra* note 25, r. 61.14.

⁸⁷ *Ibid* at r. 33.13-33.14.

⁸⁸ *Alberta 2004 Report*, *supra* note 31 at para 284.

⁸⁹ *Ibid* at para 282.

Although the frustration may be warranted to a certain extent, the consequence of “enforcing” a court order means finding a debtor in contempt, which could result in imprisonment. This consequence is seen as excessively harsh and the court faces the quandary of deciding what to do with a disobedient judgment debtor. More often than not, the court will threaten rather than imprison the debtor.⁹⁰ The Alberta 2004 Report acknowledged the procedure is “frustrating, expensive and ineffective”.⁹¹ The authors reiterate this observation based on their personal experience in New Brunswick.

The ULCC highlights the importance of obtaining information from the debtor by affirming that “[a]n effective process for compelling a judgment debtor to disclose information [...] is a crucial aspect of a judgment creditor’s ability to enforce satisfaction of a judgment”.⁹² It is therefore recommended that measures compelling disclosure be incorporated in the *NBJEA*, whether in the Act itself or in the form of a regulation. In fact, the Alberta Law Reform Institute examined in 2004 the provincial rules of procedure and determined that the debtor examination rules should be included either in the judgment enforcement legislation or in its regulations.⁹³ As a result, several regulations of the *Alberta Act* deal specifically with debtor disclosure.⁹⁴

Despite the obvious need and importance of having the debtor’s financial information, the challenge remains how to obtain this information. Judgment creditors have essentially four sources of information available to them in order to gather information on the debtor.⁹⁵ First, the judgment creditor may have personal knowledge of the debtor’s financial affairs. Second, the creditor can perform a search in the public registries. The remaining two options involve the examination of the judgment debtor or a third party.

The first option is outside the formal structure of a system of enforcement and as such, will not be part of the recommendations with respect to a new Act. However, the last three sources of information are essential to an effective judgment enforcement system. As such, these options must be included in the *NBJEA*.

It goes without saying that in order to execute on a judgment it is imperative to discover the breadth and scope of a debtor’s assets. To attain this objective, it is recommended that the *NBJEA* provide the enforcement officer the same authority given to the Director pursuant to the *Support Enforcement Act*.⁹⁶ Pursuant to this Act, the Director can demand information about a payer’s location, contact information, salary, employment, assets, or any other information that is considered necessary to enforce the order. The information demands can be made to anyone, and may be done through direct searches of designated information banks. The enforcement services provided by the Office of Support Enforcement will be further discussed in Section 6.2.2.

Furthermore, it is recommended that the *NBJEA* adopt an approach similar to that found in the *Newfoundland Act*, which allows the enforcement officer or the judgment creditor to choose the disclosure remedy more suited to the circumstances rather than compelling to creditor to follow mandatory steps, as is the case under the *Saskatchewan Act*. Such a model as the latter appears inflexible and would create additional delays and expenses for the enforcing party. The proposed system would thus have the flexibility required to promote efficiency and limit enforcement costs for the benefit of all parties involved.

4.2.1 Questionnaires

Even though an examination might be necessary in certain circumstances, this method entails added costs and time for all parties involved. As such, an intermediate step, consisting of a questionnaire, has been suggested as well as embraced in other jurisdictions. There does not

⁹⁰ *Ibid* at para 283.

⁹¹ *Ibid* at para 284.

⁹² *British Columbia 2005 Report*, *supra* note 5 at 20.

⁹³ *Alberta 2004 Report*, *supra* note 31 at xiv-xv.

⁹⁴ *Civil Enforcement Regulation*, Alta Reg 276/1995.

⁹⁵ *New Brunswick 1985 Report*, *supra* note 30 at 87-88.

⁹⁶ *Supra* note 7, s 12(3).

seem, however, to be a consensus in New Brunswick on the use of this additional method for determining a debtor's financial affairs. Initially rejected by the *New Brunswick 1976 Report*, the use of a questionnaire was recommended in 1985⁹⁷ and rejected again in 1994 when a voluntary written questionnaire was proposed instead.⁹⁸

According to the Alberta 1991 Report, the proposed questionnaire raises several problems including the likelihood that debtors would ignore such a questionnaire or the information provided by the debtor would be incomplete. Creating a standardised questionnaire that covers every situation would also be problematic. Furthermore, even if such a questionnaire could be created, it is likely that it would be complicated for a great number of debtors. In sum, the proposed questionnaire could be just as frustrating as the present system that attempts to force a debtor to attend an examination. The Alberta Law Reform Institute nevertheless recognized the benefits of using questionnaires noting they would eliminate the need for oral examination in the majority of cases and the information would be acquired more quickly. Furthermore, the information obtained in the questionnaire would be easier to share with creditors compared to the present system where examination transcripts are expensive and often difficult to acquire.⁹⁹

Given these important advantages, governments in Saskatchewan, Newfoundland and Labrador and Alberta as well as the *Uniform Act* all contemplate the use of questionnaires or financial reports as initial measures to obtain judgment debtor disclosure.¹⁰⁰ Moreover, New Brunswick has also adopted the use of the financial statement in the *Support Enforcement Act* as prescribed by regulation.¹⁰¹

A questionnaire represents the opportunity for the judgment debtor to cooperate and to offer up full disclosure in order to avoid an oral examination.¹⁰² The goal of this exercise would be to inform the enforcement officer and judgment creditors whether the debtor falls under the "will not pay" or the "cannot pay" category. With this information the enforcement officer and the judgment creditors can then decide not only whether enforcement actions are justified but which enforcement strategy would be the most effective for all interested parties.¹⁰³

If necessary, an enforcement officer or a judgment creditor should be allowed to ask for further information or written particulars from a person having completed a questionnaire.¹⁰⁴ An improvement on the usage and effectiveness of the questionnaire will be possible by adopting a standardised form. Supplemental instructions could be available online, via Service New Brunswick's website for example, to help with the completion of the form. The adoption of these modifications would undoubtedly improve the efficiency of the system.¹⁰⁵

The Nova Scotia 2011 Report acknowledges that absent a mandatory mechanism, a judgment debtor may delay payment of the judgment without penalty other than interest. At this point the creditor is forced to take some action at his or her expense.¹⁰⁶ The Report therefore proposes some form of 'wakeup call', which costs little or nothing to the creditor, to trigger a payment on the debtor's part. The debtor, upon being issued a Notice of Judgment, should then be issued a form questionnaire as proposed under paragraph 45(1)(a) of the *Uniform Act*. The debtor would then have ten (10) days to return the questionnaire. If the debtor fails to return the questionnaire by the deadline, the 'wakeup call' would be at minimum a visit from the enforcement officer, with possible enforcement action to follow.¹⁰⁷

⁹⁷ *New Brunswick 1985 Report*, *supra* note 30 at 89.

⁹⁸ *New Brunswick 1994 Report*, vol 2, *supra* note 78 at Sum Rpt-31.

⁹⁹ *Alberta 1991 Report*, *supra* note 17 at 59.

¹⁰⁰ *Saskatchewan Act*, *supra* note 3, Part III; *Newfoundland Act*, *supra* note 1, Part IV; *Civil Enforcement Regulation*, *supra* note 94, Part 1.3; *Uniform Act*, *supra* note 4, Part 8.

¹⁰¹ *Supra* note 7, s 30(1).

¹⁰² *New Brunswick 1994 Report*, vol 2, *supra* note 78 at Sum Rpt-31.

¹⁰³ *Alberta 1991 Report*, *supra* note 17 at 60.

¹⁰⁴ *New Brunswick 1994 Report*, vol 2, *supra* note 78 at Sum Rpt-32.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Nova Scotia 2011 Report*, *supra* note 5 at 32.

¹⁰⁷ *Ibid.*

Given the increased role of the new enforcement office advocated as the foundation of the *NBJEA*, it is further recommended that New Brunswick adopt the approach suggested by the Law Reform Commission of Nova Scotia. Upon the filing of a Notice of Enforcement, the enforcement officer would serve a financial disclosure questionnaire on the debtor, or any person that has information concerning the property of the judgment debtor, which must then be completed and returned. Pursuant to the principle of providing optional creditor control over enforcement proceedings, the *NBJEA* should also permit a judgment creditor to serve the judgment debtor with the questionnaire and require that it be completed and returned to the enforcement officer disclosing his or her financial situation.

4.2.2 Debtor examinations

The authors believe that in simple and straightforward situations, all of the disclosure tools are not necessary and judgment creditors should be able to obtain the necessary information through the use of questionnaires or financial statements. In more difficult scenarios, an examination would be possible to supplement information obtained through the questionnaire or to compel the debtor to answer questions if the questionnaire has been ignored or cannot address the complexity of the situation.

As such, the *NBJEA* should provide that the enforcement officer or a judgment creditor could compel the judgment debtor to attend an examination under oath before the enforcement officer for the purpose of discovering the debtor's financial situation and determining his or her ability to pay the debt. Generally, no transcript would be available following the examination unless requested and paid for by the judgment creditor.

Unlike the *Uniform Act*, which requires a judgment creditor to apply for a Court order compelling third parties to provide information known about the judgment debtor's financial affairs¹⁰⁸, the authors recommend that this authority devolve to the enforcement officer, as is the case in Newfoundland and Labrador and Alberta¹⁰⁹. As a result, any person that has information concerning property of the judgment debtor, including an employee of the judgment debtor, or, if the debtor is a corporation, the directors, officers and employees of a corporation, may be required to submit to an examination before the enforcement officer. Finally, in the most difficult circumstances, the court could lend assistance by issuing any necessary order including a contempt order.

4.2.3 Penalties and conduct money

As previously mentioned, measures must be contemplated and members of the public forewarned that penalties and other consequences are possible in the event a judgment debtor or any other person refuses to cooperate and honestly disclose the required information. For example, the *Saskatchewan Act* provides for situations in which a debtor does not obey a court order or does not answer a questionnaire completely and honestly.¹¹⁰ According to section 122(1), every person who contravenes certain statutory obligations is guilty of an offence and liable on summary conviction to a maximum fine of \$1,500 for a first offence and \$10,000 for a second or subsequent offence. Likewise, a corporation would be liable to a maximum fine of \$10,000 for a first offence and \$100,000 for a second or subsequent offence.

It is recommended that strong consideration be given to adopting the same approach under the *NBJEA*. Such a feature would be consistent with the approach taken in the New Brunswick *Support Enforcement Act*, which provides that a person who violates or fails to comply with any of its provisions or order issued pursuant to it commits an offence punishable under Part II of the *Provincial Offences Procedure Act*¹¹¹ as either a category C or E offence. The *Support*

¹⁰⁸ *Uniform Act*, *supra* note 4, ss 45(1)(c)-(d); *Saskatchewan Act*, *supra* note 3, s 15(1).

¹⁰⁹ *Newfoundland Act*, *supra* note 1, ss 65-66; *Civil Enforcement Regulation*, *supra* note 94, ss 35.09-35.18.

¹¹⁰ *Saskatchewan Act*, *supra* note 3, ss 15(3), 122(1).

¹¹¹ SNB 1987, c P-22.1.

Enforcement Act further provides that a person who knowingly provides misleading or false information commits an offence punishable as a category E offence.¹¹²

With regards to conduct money payable to the judgment debtor, the Alberta Law Reform Institute acknowledged the problem with requiring creditors to provide conduct money for examinations in aid of judgment enforcement. The Alberta 2004 Report distinguished examinations for discovery from examinations in aid, noting that the latter occurs after judgment when the rights of the parties have been settled.¹¹³ In such circumstances, judgments have been rendered but the debtor has not paid. At this point the creditor should not be obliged to pay more money in order to find out why the debtor has not paid. For these reasons, the Alberta Law Reform Institute was of the view that conduct money for examinations in aid should no longer be required.¹¹⁴ The authors agree.

¹¹² *Supra* note 7, ss 52(1), 56(3), 56(5).

¹¹³ *Alberta 2004 Report*, *supra* note 31 at para 58.

¹¹⁴ *Ibid.*

5. Exempt property

5.1 The current law in New Brunswick

Judgment creditors, and their lawyers, who enter the post-judgment world often are left with the impression that judgments will indeed never be satisfied. Expressions like “judgment-proof” are tossed around to describe judgment debtors who seemingly evade payment of their debts. However, aside from those who truly have no assets, judgment debtors are rarely “judgment-proof” but only perhaps “judgment-resistant”. In reality, enforcement of a judgment is only possible as against “exigible” property and income of the judgment debtor, which entails that some property and income are exempt from seizure or receivership.

5.1.1 Personal property, money and income

Exigible property can be seized by a judgment creditor pursuant to Rule 61 of the *Rules of Court* as well as subsection 26(1) of the *Memorials and Executions Act*. This legislative enactment provides, however, that some personal property is exempt from seizure. As set out at subsection 33(1), exempted property includes:

- (a) the furniture, household furnishings and appliances reasonably necessary for the debtor and his family;
- (b) the necessary and ordinary wearing apparel of the debtor and his family;
- (c) all necessary food and fuel for the debtor and his family for three months;
- (d) two horses and sets of harness, two cows, ten sheep, two hogs and twenty fowl, and food therefor for six months;
- (e) any tools, implements and necessities used by the debtor in the practice of his trade, profession or occupation having a cumulative market value of not more than six thousand five hundred dollars, and one motor vehicle having a market value of not more than three thousand dollars, if required by the debtor in the course of or to retain employment or in the course of and necessary to his trade, profession or occupation, but the exemptions provided in this paragraph do not apply to a corporate debtor;
- (f) seed grain and potatoes required for seeding and planting purposes to the following quantities: forty bushels of oats, ten bushels of barley, ten bushels of buckwheat, ten bushels of wheat and thirty-five barrels of potatoes;
- (g) dogs, cats, and other domestic animals belonging to the debtor;
- (h) medical or health aids reasonably necessary to enable the debtor or any member of his family to work or to sustain health.

In addition, the *PPSA* provides a different list of exempt personal property. According to subsection 58(3) a debtor may claim the following items of collateral to be exempt from seizure by a secured party:

- (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;

- (c) medical or health aids necessary to enable the debtor or a dependent to work or to sustain health; and
- (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.

Although money in the possession of the debtor and other types of “securities for money” can be seized by a judgment creditor pursuant to subsection 26(1) of the *Memorials and Executions Act*, the seizure of income is mostly achieved through garnishment, for most debtor income comes from third party sources. The enabling statute, the *Garnishee Act*, provides, however, a statutory exemption for wages due to the judgment debtor for his or her personal labour and services on a hiring.¹¹⁵ Quite arbitrarily it would seem, professional income, income from self-employment or from a business are not necessarily considered “wages” and would not be fully protected, if at all.¹¹⁶ Additionally, as is discussed below, some income or money derived from a Registered Retirement Savings Plan (“RRSP”) may also be exempted.

5.1.2 Insurance, pension funds and RRSPs

New Brunswick has also exempted from seizure life insurance money or rights that have been designated in favour of certain beneficiaries. Subsection 157(2) of the *Insurance Act*¹¹⁷ specifically provides:

While a designation in favour of a spouse, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the insurance money and the rights and interests of the insured therein and in the contract are exempt from execution or seizure.

In addition, since the *Insurance Act* extends the definition of “life insurance” to an undertaking, entered into by an insurer in the ordinary course of its business, to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount, an RRSP, a Registered Retirement Income Funds (“RRIF”) or a Deferred Profit Sharing Plan (“DPSPs”) (all as defined in the federal *Income Tax Act*¹¹⁸) held with a life insurer and designated as payable to the insured’s “spouse, child, grandchild or parent” are also exempt from seizure.¹¹⁹

Likewise, money may be transferred, in certain circumstances, from a pension fund to a prescribed retirement savings arrangement or utilized to purchase a life annuity under the *Pension Benefits Act*.¹²⁰ A “prescribed retirement savings arrangement” includes (a) a locked-in retirement account, being a registered retirement savings plan as defined in the federal *Income Tax Act*, (b) a life

¹¹⁵ *Garnishee Act*, *supra* note 25, s 31. Wages can however be garnished in the case of a failure to pay spousal or child support or to pay federal taxes.

¹¹⁶ In *National Sea Products Ltd v Caissie*, 1987 CarswellNB 267. The Court held that section 31 of the *Garnishee Act* would not apply to protect money owed to a self-employed fisherman for fish sold and relates to “the contract for personal services and labour only”.

¹¹⁷ RSNB 1973, c I-12.

¹¹⁸ RSC 1985, c 1 (5th Supp).

¹¹⁹ *Supra* note 117, s 1 “life insurance” (g).

¹²⁰ *Pension Benefits Act*, SNB 1987, c P-5.1, s 36(1).

income fund, being a registered retirement income fund as defined in the federal *Income Tax Act*, as well as (c) a life or deferred life annuity.¹²¹

As with life insurance, the *Pension Benefits Act* provides that money paid out of a pension fund to another pension plan, to a retirement savings arrangement or for the purchase of a deferred life annuity as well as any interest in or under a retirement savings arrangement or a deferred life annuity and any money payable under any such retirement savings arrangement or deferred life annuity are exempt from execution, seizure or attachment or other process of law.¹²²

Thus, if the source of the funds in the prescribed form of RRSP or RRIF is a pension fund, it is exempt from execution, seizure or attachment. In other words, current legislation exempts RRSPs and other products purchased from insurance companies, while other (i.e., non-insurance) RRSPs appear to be available to creditors as a means to satisfy a judgment debt. These rules, arguably, also apply to RRIFs and DPSPs. The complete protection of pension plans contrasted against the relative exigibility of RRSPs creates a striking unfairness which will be further discussed in the recommendations below. It is also worth noting that a statutory exemption enables creditors under orders for support or maintenance enforceable in New Brunswick to seize or attach refunds of contributions with interest and other exempted property under the *Pension Benefits Act* to a maximum of fifty per cent of the payment unless otherwise ordered by a court of competent jurisdiction.¹²³

In New Brunswick, as in most Canadian provinces, pensions are exempt from judgment enforcement procedures, as is income derived from same. However, the judicial interpretation of these statutory exemptions has nevertheless enabled judgment creditors to seize some personal retirement savings to satisfy money owed under a judgment.

Based on current jurisprudence, whether or not an RRSP will be subject to an order for seizure depends on the nature of the RRSP in issue. If it is a trust-based RRSP, based on the reasoning in *Watt v. Trail*¹²⁴, it cannot be subject to an Order for Seizure and Sale commenced by a judgment creditor, but could be subject to other post-judgment enforcement remedies, such as equitable execution via the appointment of a receiver.¹²⁵ If the RRSP is not trust-based, it may be subject to an Order for Seizure and Sale pursuant to the reasoning in *Belliveau v Royal Bank of Canada*.¹²⁶ Although not considered by New Brunswick courts, the same reasoning may also apply to RRIFs.

5.1.3. Land

The current judgment enforcement process in New Brunswick allows for the seizure and sale of land without distinction as to its use. Thus, a judgment creditor can take enforcement proceedings against land whether the effect is to seize the debtor's principle residence or any other type of land (vacant lot, recreational land, etc.).

However, access to land as a means of judgment enforcement has restrictions. First, section 11 of the *Memorials and Executions Act* provides that the lands of a person may be seized and sold under execution as personal estate to satisfy his debts but the sheriff shall not sell the lands until the personal estate, if any is found, is exhausted. As such, enforcement against land requires that an Order for Seizure and Sale be returned by the sheriff as *nulla bona*, confirming that no seizable personal property has been found. Second, enforcement against land also requires that the sale by the sheriff be advertised at least four times during a period of sixty days prior to the day of the sale.

¹²¹ *General Regulation - Pension Benefits Act*, NB Reg 91-195, s 20. No reference is made in the General Regulation to a DPSP as a prescribed "retirement savings arrangement".

¹²² *Pension Benefits Act*, *supra* note 120, ss 57(4)-(5).

¹²³ *Ibid*, s 57(6).

¹²⁴ *Watt v Trail*, [2000] NBJ No 298 (CA) [*Watt No 1*].

¹²⁵ *Watt v Trail*, [2001] NBJ No 188 (CA), affg [2000] NBJ No 515 (QB). This case involved the same parties as *Watt No 1*.

¹²⁶ *Belliveau v Royal Bank of Canada*, 2000 CanLII 21559 (NBCA).

In practice, enforcement against land is often the option of last resort, given that land will frequently be subject to the interest of a secured mortgagee and may also be jointly held with an innocent third party. As such, the judgment creditor must factor in not only the cost of the sheriff's sale, but also the rights of secured creditors to be repaid first and the right of the third party to his or her equity in the land. Furthermore, the judgment creditor must also take into account the possibility of unregistered interest in land pursuant to the *Marital Property Act*¹²⁷ or by some other resulting trust. It is worthy to note that the *Memorials and Executions Act* does not specifically address the situation of co-ownership in land, whether by joint tenancy or tenancy in common.

5.2 The case for reform and recommendations

As stated throughout this paper, there is a strong case for reform of New Brunswick's judgment enforcement law, given that it is currently governed by an uncoordinated set of rules found in several statutes, regulations and common law principles without the necessary consistency and cohesiveness. The complexity of ascertaining what property and income is exigible to satisfy a judgment debt illustrates this well.

Indeed, the determination of what property and/or income is exigible to satisfy a judgment debt in New Brunswick requires reference to the *Memorials and Executions Act*, the *PPSA* and the *Garnishee Act*, while factoring in the specific exemptions created by the *Pension Benefits Act* and the *Insurance Act*. In addition, reference to the *Securities Transfer Act*¹²⁸ is required where a judgment creditor wishes to seize securities or security entitlements, such as shares in a business corporation.

Upon reading subsection 33(1) of the *Memorials and Executions Act*, one cannot avoid the conclusion that it is antiquated and does not reflect modern realities. The prohibition against the garnishment of wages, but not of other types of income and the differential treatment of RRSPs and registered pension plans also raises concerns of unfairness.

The enactment of the *NBJEA* is the perfect opportunity to modernize, consolidate and clarify rules with respect to property, including income, exigible for the enforcement of judgments as well as security interest. There is no justifiable reason to distinguish between exigible property for secured and unsecured creditors. It is therefore recommended that New Brunswick follow in the footsteps of Alberta, Newfoundland and Labrador and Saskatchewan, which have all enacted a comprehensive modern statute to govern the entire enforcement system including exemptions of property from seizure.

In addressing property exempted from judgment enforcement, the authors recommend that the *NBJEA* follow the principle of the universal exigibility of property, subject only to specific exemptions and the need to afford debtors sufficient protection to see to their personal security and their basic needs as well as those of their dependants.¹²⁹ As such, all property of a judgment debtor should be subject to enforcement, garnishment and receivership by the judgment creditor, except property that has been specifically exempted by the *NBJEA*.

A guiding principle to decide what property should be afforded protection through total or partial exemption is the need for debtors to maintain personal security and a reasonable standard of living for themselves and their dependants and to continue to earn income. As expressed by one of the basic principles guiding this report, debtors and their families cannot be rendered destitute or financially dysfunctional by enforcement measures undertaken by creditors. Moreover, as Walsh observed, "[e]xemption policy is aimed at avoiding the complete destruction of the debtor as an economic and social entity".¹³⁰

¹²⁷ *Marital Property Act*, SNB 1980, c M-1.1.

¹²⁸ *Securities Transfer Act*, SNB 2008, c S-5.8.

¹²⁹ *Saskatchewan Act*, *supra* note 3 at s 37(1): "Except as otherwise provided in this Act, all property is subject to seizure and disposition pursuant to this Act and to an order of the court made pursuant to this Act."

¹³⁰ Catherine Walsh, *An Introduction to the New Brunswick Personal Property Security Act*, (Fredericton, New Brunswick Geographic Information Corporation, 1995) at 264 citing *Alberta 1991 Report*, *supra* note 17 at 254-55.

5.2.1 Pension funds and retirement savings plans

The exemption of RRSPs and similar plans from seizure and garnishment has been considered by other jurisdictions that have moved towards modern judgment enforcement legislation and has been discussed by various law reform commissions. In 1999, the ULCC adopted the *Registered Plan (Retirement Income) Exemption Act*, which directly addressed the availability of RRSPs for seizure and garnishment, and sought to eliminate the unfairness created by the differential treatment.¹³¹ Similarly, the *Uniform Act* moves to exempt all rights, property and interest in RRSPs, DPSPs and RRIFs from seizure and further exempts a portion of payments out of such plans.

There are many reasons to exempt RRSPs and, at least, some of the income that can be paid out from such accounts from seizure and garnishment. First, Canadian law encourages retirement savings, namely through legislation that encourages Canadians not to rely solely on the public safety net (i.e., Canada Pension Plan, Old Age Security, etc.) and save for retirement by deferring tax on personal retirement savings. Given the relatively low number of Canadians who have access to a pension plan (employer sponsored or otherwise), RRSPs are a key component of retirement planning and, for many, it is virtually the only vehicle to ensure security beyond one's working life. With pension plans continuing to experience challenges with funding deficits growing and membership in private sector plans declining, RRSPs remain essential to many and will continue to be.

Policy on enforcement of judgments should therefore adequately reflect the goal of encouraging retirement saving and the important role that RRSPs play in our society. RRSPs are essential for most New Brunswickers to ensure an adequate standard of living. There are, obviously, differences between registered pension plans and RRSPs, as pointed out by the Alberta Law Reform Institute, in its 2002 report entitled *Creditor Access to Future Income Plans*:

Opponents of the exemption minimize the similarity between pensions, which are locked in by legislation, and RRSPs, most of which can be collapsed at will by the debtor. It is said that pensions are really intended to provide money for retirement, while RRSPs are also a source of money during the working years of the debtor. RRSPs are closer to tax sheltered-bank accounts while pension funds are dedicated to retirement, and are tightly controlled by pension boards, supervised by government.¹³²

While those differences between RRSPs and traditional pension plans exist, RRSPs remain, for the vast majority of Canadians, the substitute to a pension plan where access to a plan is not possible. There are simply insufficient reasons to justify not creating an exemption for RRSPs, RIFs and DPSPs, as concluded by the Alberta Law Reform Institute:

Alberta law generally does not permit creditors to enforce their claims or judgments against pensions, or annuities and RRSPs issued by insurance companies. However, non-insurance RRSPs can be taken by creditors under a writ of enforcement. When pensions, insurance annuities, RRSPs and RRIFs start to make payments to the depositor, exemptions again depend on who sells the retirement savings plan. Pension and insurance legislation will generally exempt obligations to pay out of a pension, RRSP or a RRIF. However, money obligations payable out of a non-insurance RRSP or RRIF (after tax is deducted) will be fully garnishable.

Such distinctions are hard to explain. Insurance and non-insurance vendors of RRSPs, DPSPs and RRIFs have copied each other's products to the point that the products are today largely indistinguishable from each other. Yet the insurance product is totally exempt while the similar plan purchased from another vendor is

¹³¹ *The Uniform Registered Plan (Retirement Income) Exemption Act*, ULCC 1999, online: ULCC <<http://www.ulcc.ca/en/poam2/index.cfm?sec=1999&sub=1999ha>>.

¹³² Alberta Law Reform Institute, *Creditor Access to Future Income Plans* (Consultation Memorandum No. 11), (Edmonton: ALRI, 2002) at 38.

completely exposed to creditors' remedies. No respondent to our consultation memorandum sought to defend directly this apparent unfairness. If the products are virtually the same, it seems unjust and intolerable that they should be treated so differently in exemptions law. The injustice is more clear where employers offer private sector plans, like group RRSPs or DPSPs, as substitutes for or supplements to pensions. Such substitute plans serve much the same purpose as pensions but are not protected by pension exemption provisions.¹³³

A total exemption for RRSPs, RIFFs and DPSPs as defined in the federal *Income Tax Act* should therefore be included in the *NBJEA* to protect these sources of future income from seizure.¹³⁴ In addition, income withdrawn or paid out of those plans (i.e., current obligation or future obligation) should be partially exempted, making it subject to the same monetary caps which define the exemption for employment and other income proposed below.

5.2.2 Income

The authors further recommend that the *NBJEA* generally adopt the exempted income provisions of the *Uniform Act*. This would bring about substantial changes in New Brunswick law as protected income would no longer be limited to "wages", but would also incorporate, to certain levels, other types of income, including payments out of an RRSP, RIFF or DPSP. As such, basic levels of income required to afford debtors security and the ability to provide for basic needs would be assured without undue regard to the type of income.

Strict adoption of the *Uniform Act* in this regard is not recommended, however, since the definition of "income" found in its section 164 appears too restrictive to capture some forms of professional income or income from self-employment. Rather, the *NBJEA* should adopt the approach taken in the *Newfoundland Act*, which has a more general and inclusive definition of income as "property of a debtor which he or she has received or has the right to receive which is in the nature of income"¹³⁵ or the approach taken in the *Saskatchewan Act* which provides for a prescribed amount of employment income to be exempted and further provides that a debtor who receives income that is not employment income is entitled to "an income exemption in an amount that approximates the exemption to which the judgment debtor would be entitled if all income received by the judgment debtor were employment remuneration".¹³⁶

Furthermore, income exemptions in the *NBJEA* should be calculated as suggested in the *Uniform Act*, which provides that a judgment debtor is entitled to his net income to the extent of a prescribed minimum amount and fifty percent of his net income which exceeds the minimum prescribed amount, but subject to a prescribed maximum total exemption. The *Uniform Act* further provides that prescribed amounts should be set according to what a debtor needs to support himself and his dependants, with the prescribed amount varying depending on the number of dependants. Harmonisation on this issue with other judgment enforcement legislation as well as the *Bankruptcy and Insolvency Act*¹³⁷, which has clear guidelines¹³⁸ to determine a bankrupt's surplus income, should be an objective of the *NBJEA*. Furthermore, the *NBJEA* should allow both creditors and debtors to apply for adjustments or variations of income exemptions in prescribed circumstances.

5.2.3 Sale of land

The *NBJEA* should also address the sale of land as a means of judgment enforcement. The present requirement that all exigible personal property be sold before enforcement against land can take

¹³³ Alberta Law Reform Institute, *Exemption of Future Income Plans* (Final Report No. 91) (Edmonton: ALRI, 2004) at 43.

¹³⁴ *New Brunswick 1994 Report*, vol 1, *supra* note 15 at 19.

¹³⁵ *Newfoundland Act*, *supra* note 1, s 129.

¹³⁶ *Saskatchewan Act*, *supra* note 3, s 96(1). See also *New Brunswick 1994 Report*, vol 1, *supra* note 15, 1994 *NBJEA*, s 156 ("income" defined as "property of an enforcement debtor which he or she has the right to receive which is the nature of income from any source including an office, employment, property or business").

¹³⁷ RSC 1985, c B-3.

¹³⁸ Superintendent of Bankruptcy Canada, *Directive No. 11R2-2012, Surplus Income*, on line at: Superintendent of Bankruptcy Canada <<http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02787.html>>.

place should be removed. Notwithstanding this legislative amendment, the sale of land will remain, in most cases, a method of enforcement not to be taken lightly by judgment creditors. The associated enforcement costs will inevitably remain, as will the competing interest of secured creditors and co-owners, which operate to reduce the actual potential of the proceeds obtained from the sale of land to satisfy the judgment debt. Notwithstanding this reform, additional measures to protect debtor interests will be discussed in Section 9.2.5 dealing with enforcement measures regarding land.

The *NBJEA* should contain, however, an exemption for equity in a principal residence.¹³⁹ Such legal exemptions have not existed in New Brunswick thus far. In keeping with the principle of universal exigibility of all of the judgment debtor's property, it is recommended that the prescribed amount for a principal residence be modest. The need to exempt some property from enforcement proceedings reflects the need to assure that debtors are not deprived from the basic necessities of life. While the need for shelter is part of the basic necessities of life, no individual has a right to "own the roof over one's head". Consequently, the *NBJEA* should provide a small exemption for the equity in a judgment debtor's principal residence, so as to allow the debtor to pay the reasonable expenses of securing and moving to a new shelter should the principal residence be seized and sold.¹⁴⁰

Given the foregoing, it is recommended that the *NBJEA* include specific exemptions for property, pension funds, retirement plans and equity in a principal residence as well as income to be excluded from seizure or garnishment. In addition, the general exemptions currently found in the *Memorials and Executions Act* and the *Personal Property Securities Act* would generally remain, but with some modernization of the language, inspired by the *Uniform Act*. As such, property that should be exempted would include:

- food required by the debtor and his or her dependents;
- necessary clothing of the debtor and his or her dependents up to a certain prescribed value;
- household furnishings, utensils, equipment and appliances up to a certain prescribed value;
- one motor vehicle having a prescribed realizable value
- medical or health aids necessary to enable the debtor or a dependent to work or to sustain health
- interest in the judgment debtor's principal residence, including a mobile home, up to a certain prescribed value
- domestic animals which are kept as pets and not used for a business purpose;
- personal property used by and necessary for the debtor to earn income from his or her occupation, trade, business or calling up to certain prescribed values which would take into account certain commercial activities, such as farming and fishing;
- basic prescribed levels of income;
- a pension plan; and
- RRSPs, RIFFs and DPSPs as defined in the *Income Tax Act*.

The authors propose that the maximum value for some exempted property be set by regulation to ensure that these values can be easily and efficiently revisited and adjusted according to changing times and increases in cost of living.

¹³⁹ See *Uniform Act*, *supra* note 4, s 159(1)(e). See also *Newfoundland Act*, *supra* note 1, s 131(1)(h); *Saskatchewan Act*, *supra* note 3, s 93(2); *Alberta Act*, *supra* note 2, s 88(g).

¹⁴⁰ *New Brunswick 1994 Report*, vol 1, *supra* note 15 at 18.

6. Enforcement, administration and initiation

6.1 The current law in New Brunswick

The current system of judgment enforcement in New Brunswick could best be described as a creditor-driven self-help system. Once a judgment is obtained, it is up to the judgment creditor to take enforcement measures in an attempt to collect. The avenues available to a judgment creditor are found in several acts and in the *Rules of Court*. The number of different legislative sources governing enforcement is well illustrated in the definition of “enforcement proceedings” found at section 2.1 of the *Creditor Relief Act*:

“enforcement proceeding” means any proceeding authorized by the *Absconding Debtors Act*, *Arrest and Examinations Act*, *Creditors Relief Act*, *Garnishee Act*, *Judicature Act*, *Memorials and Executions Act* or the *Rules of Court* to be taken for the purpose of enforcing a money judgment or for the purpose of enforcing the claims of creditors against the personal property of a debtor.

Since the creation of the *PPSA* Registry in 1995 enabling the reform of secured financing law, registration of the judgment must be effectuated by a judgment creditor to enter the judgment enforcement system, creating at once a charge on the judgment debtor's present and after-acquired personal property and the ability to enforce the judgment. Under the current system, enforcement measures must be initiated and driven by the creditor. In essence, a creditor can choose to enforce a judgment, subject to some restrictions, via a seizure and sale of real and personal property, a garnishment of debts owed to the judgment creditor or a court payment order punishable by contempt.

To access these enforcement remedies, an unsophisticated creditor or a creditor faced with a complex case must resort to expensive legal advice once again to enforce a judgment given the current absence of any public assistance from the government. Faced with a recalcitrant debtor, an application to the clerk of the court is required to either request an Order for Seizure and Sale pursuant to Rule 61 of the *Rules of Court* or to request a debtor examination of the judgment debtor as to his or her means of discharging the judgment pursuant to the *Arrest and Examinations Act* following which a payment order may be ordered. Another enforcement initiative available to judgment creditors is a court application for an attaching order pursuant to the *Garnishee Act*. These enforcement measures will be further discussed in detail.

In addition to the complexity and the additional cost, not only for legal services, but also collection costs such as security deposits to the sheriff and service fees, judgment creditors are then responsible to serve and provide notice of the solicited order to the relevant party and supervise its execution. The limited assistance provided by the enforcement system is provided by the sheriff in his or her role in the execution of an Order for Seizure and Sale. Given the self-help nature of the current enforcement remedies and the proposed central role of the enforcement office, the role of the sheriffs within this system must be further clarified.

6.1.1 Current role of the sheriffs

With the Chief Sheriff for the province appointed by the Lieutenant-Governor in Council¹⁴¹, there are currently eight regional sheriff services located in each of the judicial districts of the province which provide “a system for the service of documents, the execution of court orders in civil matters, jury management, the transportation of individuals in custody, and the provision of court security for the Court of Queen's Bench, the Court of Appeal and the Provincial Court in certain areas of the province”.¹⁴²

¹⁴¹ *Sheriffs Act*, RSNB 1973, c. S-8, 2(2).

¹⁴² Minister (Minister's Office), Justice and Consumer Affairs, online: New Brunswick Government <http://www2.gnb.ca/content/gnb/en/contacts/dept_renderer.146.1418.html#mandates>.

Notwithstanding their responsibility of executing court orders in civil matters, it is generally known that sheriffs currently play a limited role in the enforcement of judgments.¹⁴³ With security deposits generally ranging from \$2000 to \$3000 required by sheriffs to cover anticipated expenses of seizure and sale, and the relatively low number of successful seizures, it is not surprising that New Brunswick's enforcement system is criticized and denounced by judgment creditors and their legal advisors. This perceived inability or unwillingness of the sheriffs to aggressively undertake and pursue the enforcement of judgments is not limited to New Brunswick.

In Saskatchewan, the legal profession complained that their creditor clientele was not satisfied that the sheriffs were getting "the job done".¹⁴⁴ Buckwold and Cuming surmised that the "perceived reluctance of the sheriff to take aggressive action is to a great extent a product of three related realities,"¹⁴⁵ which it is hereby suggested are equally applicable to New Brunswick.

The first of these realities is the sheriff's potential liability for action taken in error in the course of enforcement under a writ of execution. At present, the sheriff may be strictly and personally liable in trespass for overstepping his or her authority to enter premises for purposes of effecting seizure, or in conversion for the seizure of property that is apparently but not in fact property of the judgment debtor. Exacerbating the problem is the fact that the law governing the liability of the sheriff is antiquated, obscure and poorly understood. It is unsurprising, then, that sheriffs are reluctant to act unless they feel impervious to an award of damages, whether by virtue of their confidence that liability will not arise under the circumstances, or of the protective cover of security posted by the instructing judgment creditor. [...]

The second reality affecting the willingness of sheriffs to proceed represents an administrative policy choice that has little to do with the legal design of the enforcement system. That is, sheriffs generally will not act unless appropriate security for costs is posted by the instructing judgment creditor. This reluctance is the inevitable produce of a user-pay system. [...]

Finally, the sheriffs' perceived inaction may be explained in part by the lack of required personnel and resources. This problem is closely linked with that just mentioned.¹⁴⁶

These obstacles whether tangible or not will be hopefully either removed, surmounted or circumvented by the *NBJEA* and the proposed judgment enforcement system.

6.2 The case for reform and recommendations

A review of the numerous studies undertaken across the country and their respective reports reveals a few fundamental issues in the choice of administrative structures for the enforcement of judgments. As with most governmental policies, potential answers to these questions should be examined against the standards of effectiveness, efficiency, systemic cost and fairness always guided by the basic principles previously outlined in Part 2.

6.2.1 Private or public enforcement system?

The first question is whether the government ought to maintain a provincial judgment enforcement system implemented under the authority of a single public office, or whether the enforcement system should encompass direct enforcement action by way of garnishment or other creditor's remedies provided by the private sector.

Although it can be said that "judgment enforcement is a system for the recovery of private debt, the cost of which should be borne by its creditor beneficiaries"¹⁴⁷, it must be borne in mind that the

¹⁴³ See e.g. CBA conference, November 4, 2011 "Juge, greffier, sheriff : ce qu'ils ont à nous dire". [CBA Conference].

¹⁴⁴ *Saskatchewan 2005 Report*, *supra* note 23 at 6.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid* at 6-7.

basic interest of the creditor has been recognized by a court of justice and whose decision is the result of a judicial process expressed by a judgment prior to the enforcement stage.¹⁴⁸ It therefore becomes, at this stage, a question of public interest and public confidence in the rule of law.

The *New Brunswick 1976 Report* suggests several reasons compelling a government to retain a public judgment enforcement system.¹⁴⁹ Given the importance of credit in our consumer culture driving the current global economy, the elimination of a stable, co-ordinated, predictable and efficient judgment enforcement system would undoubtedly affect the credit industry's willingness to answer public demand for easy, accessible and flexible credit. Greater caution in extending credit may not only lead to consumer frustration but may have a lasting and profound impact on New Brunswick's economy.¹⁵⁰

In addition, an enforcement system which is exclusively creditor driven and controlled may be more efficient in recovering judgment debts to the satisfaction of creditors yet be more prone to harassment of debtors and unforgiving towards defaulting judgment debtors, as Wood explains:

In order to analyze this issue it is necessary to briefly discuss the advantages and disadvantages of the exercise of self-help remedies of creditors. The obvious advantage to creditors is that they obtain a cheap and summary method of pursuing their claims against debtors. It is possible that this may benefit non-defaulting debtors to the extent that the superior remedies will result in a greater availability of credit. The disadvantage is that it may lead to illegal or abusive repossession tactics by creditors, and creates greater opportunities for confrontation between private citizens. Illegal or abusive repossession tactics may harm others who are not parties to the credit transaction. Late night repossession of automobiles or the use of physical intimidation impose external costs on third parties by threatening the security of their neighbourhood and the integrity of their community.¹⁵¹

Furthermore, under a system relying on private action there is neither the will nor the means to adequately adapt enforcement measures to the debtor's individual situation.¹⁵² Finally, although federal insolvency and bankruptcy legislation can provide limited protection to insolvent debtor and creditor interests, the province's exit from judgment enforcement law would prevent the provincial government from adapting such legislation for the benefit of the province's debtors and creditors alike.

Although the implementation of a public enforcement system unequivocally results from this philosophical inquiry, it also raises the question as to the role the public sector should play within the system. Although the current private enforcement system in Alberta is the result of a general philosophy that the cost of private debt recovery be financed by the private sector which was justified given the system maximized creditor initiation and control, this view was not initially advanced in 1991. On the contrary, the Alberta 1991 Report rejected the privatisation of enforcement procedures:

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.

¹⁴⁷ 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 para 82.

¹⁴⁸ *New Brunswick 1976 Report*, *supra* note 16 at 270.

¹⁴⁹ *Ibid* at 246-49.

¹⁵⁰ *Ibid* at 247. The negative impact of restrained lending by the credit industry resulting from the current financial crisis has been repeatedly demonstrated in the American economy as well as the European markets.

¹⁵¹ Roderick J Wood, "Enforcement Remedies of Creditors" (1996) 34 Alta L Rev 783 at 10 (QL).

¹⁵² *New Brunswick 1976 Report*, *supra* note 16 at 249-50.

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.

We would recommend that there be no change in the present exclusivity of the sheriff's function in relation to seizure in enforcement proceedings.¹⁵³

These conclusions were affirmed in the *New Brunswick 1994 Report* and are hereby reaffirmed. As explained by Buckwold and Cuming, the privatisation of the enforcement system is also economically unrealistic given our current provincial security interest legislation, which enables secured creditors to directly enforce their security interests without employing a private enforcement agency.¹⁵⁴ "Since the same official is also responsible for the seizure of property for purposes of the enforcement of money judgments, the private infrastructure used to that end is supported in substantial part by income generated by seizures of collateral under personal property security agreements."¹⁵⁵

Given the foregoing, the resulting conclusion leads to a provincial public administration with a unitary and integrated approach to enforcement. As discussed throughout this report, the proposed *NBJEA* provides many advantages, among which are the following:

- Complete and accurate information about a debtor is more likely to be available to government rather than to private agencies.
- Enforcement measures could be adjusted more appropriately to the resources of the debtor on the basis of this better information.
- Consolidation of claims by a single government agency for collection would also assist in working out a collection program that the individual debtor can meet. In addition, such consolidation could reduce bookkeeping and similar processing costs.
- Involvement of government in the provision of creditor remedies provides a mechanism for monitoring the enforcement system.¹⁵⁶

6.2.2 A central, provincial and co-ordinated enforcement office

In accordance with the above conclusions, previous recommendations on the administrative structure of New Brunswick's new enforcement of judgment system are hereby reiterated. As was recommended in the province's three previous reports on the enforcement of judgments, a unified, centralized and co-ordinated enforcement office is recommended.¹⁵⁷ As Williamson advocated in 1994: "exclusive authority must be vested in one enforcement office to co-ordinate all enforcement proceedings against a debtor".¹⁵⁸ As a result, enforcement proceedings and orders should originate and be conducted through the enforcement office rather than the judicial system or the clerk's office.

The full endorsement of previous reports is limited, however, to the *New Brunswick 1976 Report*. Contrary to the New Brunswick 1985 and 1994 Reports which gave the enforcement office a limited role of coordinating the system¹⁵⁹, the creation of a government office to control and implement

¹⁵³ *Alberta 1991 Report*, *supra* note 17 at 71-72.

¹⁵⁴ *Saskatchewan 2005 Report*, *supra* note 23 at 7.

¹⁵⁵ *Ibid.*

¹⁵⁶ *New Brunswick 1976 Report*, *supra* note 16 at 249-50.

¹⁵⁷ *Ibid* at 275-276; *New Brunswick 1985 Report*, *supra* note 30 at 6-13; *New Brunswick 1994 Report*, vol 2, *supra* note 78 at Sum Rpt -2-4.

¹⁵⁸ *Ibid* at Sum Rpt-4.

¹⁵⁹ *Ibid* at Sum Rpt-8.

judgment enforcement measures is once again recommended by the authors of this report. In addition to the aforementioned benefits of a provincial public enforcement office, there are numerous advantages ensuring its efficacy and increasing the efficiency within the administrative structure, such as:

- Coordination by centralizing all enforcement proceedings;
- Consistency in the operation of the enforcement system enabling better planning and preparation by creditors and ensuring fair treatment of debtors;
- Efficiency through the experience, professionalism and expertise developed within a central co-ordinated office;
- Technological advancements have eliminated various obstacles to a provincial co-ordinated office which can easily be implemented through the existing administrative structure of Sheriff Services;
- Accuracy and accessibility of province-wide and updated data on enforcement proceedings;
- Elimination of the costs and inefficiencies associated with parallel processes;
- Development in the enforcement office of a comprehensive expertise in the supervision of the seizure and disposition of assets;
- Lowering the global cost of enforcement action by minimizing the need to resort to the court and supplanting the role of the clerk in hearing debtor examinations and issuing payment orders and orders of seizure and sale.¹⁶⁰

Our recommendations are further corroborated by a recently successful legislative reform in the province on enforcement proceedings. Interestingly, New Brunswick enacted and proclaimed the *Support Enforcement Act* in 2008, which created a new Office of Support Enforcement. The Director of Support Enforcement with the FSOS located in each judicial district is responsible for the administration of this Act.

FSOS is responsible for monitoring and enforcing support orders and agreements that are required to be filed by the court administrator without delay. Once a support order or agreement is filed with FSOS, the beneficiary has eight days to opt out of the program and receive payments directly from the payer. If the beneficiary chooses to use the FSOS to collect support, the Director takes steps when necessary to ensure the payer makes the required payments and may,

- (a) take any measures for the enforcement of a support order that the Director considers advisable,
- (b) commence, conduct, continue or discontinue proceedings to enforce a support order in the name of the Director for the benefit of a beneficiary or a beneficiary's child,
- (c) sign all documents with respect to the enforcement of a support order,
- (d) enforce the payment of arrears owing under a support order [...].¹⁶¹

Federal and provincial laws give FSOS the authority to use various enforcement measures to collect overdue support payments. According to the FSOS website, these methods include, but are not limited to the following:

¹⁶⁰ *Ibid* at Sum Rpt-9; *Saskatchewan 2005 Report*, *supra* note 23 at 5.

¹⁶¹ *Support Enforcement Act*, *supra* note 7, s 7.

- Initiate a payment order. This is commonly known as a garnishment. Some examples of monies that can be garnished include: wages, pensions, income tax refunds, GST credits, workers' compensation benefits, and bank accounts, including jointly held accounts.
- Demand information about a payer's location, contact information, salary, employment, assets, or any other information that is considered necessary to enforce the order. [...]
- Report a payer to a credit bureau if the payer owes an amount greater than three months of support payments.
- Suspend or revoke a payer's driver's license if the payer owes an amount greater than four months of support payments.
- Make corporations liable for support owed by a payer if the payer or the payer's family owns the corporation.
- Ask the federal government to suspend, refuse to issue, or refuse to renew the payer's passport and/or federal aviation or marine license if the payer owes an amount greater than three months of support payments.
- Bring the case to Court for a Judge or Court Administrator to decide on additional enforcement action. This is called an enforcement hearing.¹⁶²

During a recent conference, the new FSOS office, program and enforcement methods created by the *Support Enforcement Act* were touted as a great improvement and seem to be much more efficient and successful in enforcing support orders and maintaining a steady flow of child and spousal support payments to families and children.¹⁶³ In fact, FSOS collects more than \$43 million in support every year in New Brunswick.¹⁶⁴

In addition to this recent success, New Brunswick created Service New Brunswick (SNB) in 1992 in response to pressure to enhance access and delivery of government services. This crown corporation, a single-window government service centre, has the mandate to make government services more accessible through one-stop service centres, through the Internet and over the phone.¹⁶⁵ The SNB Online website represents a significant transformation in the way citizens access government information, services and products. According to the Institute for Citizen-Centered Service,

[b]uilding an integrated, cost-effective, citizen-centric service delivery for accessing government services is the key to success in the SNB initiatives. Service New Brunswick leverages the use of technology to maximise and achieve customer satisfaction. Citizens want government services that are as accessible, convenient and seamless as possible, and the New Brunswick government has responded by adopting the one-window approach.¹⁶⁶

The potential of a central source to facilitate the enforcement of judgment has also been embraced by the Law Reform Commission of Nova Scotia in its recent report: "One of the major goals of adopting something like the *Uniform Act*, then, would be to create, as much as possible, a one-stop

¹⁶² FSOS, online: New Brunswick Government <<http://www.gnb.ca/0062/fsos/newsite/fsos-page2-e.asp#8>>.

¹⁶³ CBA conference, *supra* note 143.

¹⁶⁴ FSOS, online: New Brunswick Government <<http://www.gnb.ca/0062/fsos/newsite/fsos-what-e.asp>>.

¹⁶⁵ Institute for Citizen-Centred Service, *Services New Brunswick*, online: Institute for Citizen-Centred Service <<http://www.iccs-isac.org/en/pubs/Case%20Study%20-%20New%20Brunswick.pdf>>.

¹⁶⁶ *Ibid.*

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.”¹⁶⁷

With these resounding successes and templates, a new public judgment enforcement system is no longer a mere possibility, but can become a reality in New Brunswick. Learning from these experiences, enforcement services can and should be funded by the users or the individuals responsible for the need to access such services. As observed in the *New Brunswick 1976 Report*, “[i]n so far as the debtor is unwilling to pay a genuine claim, it is probably in accord with the normal sense of justice that the debtor should bear the cost of his own default. Where the debtor is unable to pay, however, the imposition of additional collection costs only adds injury to injury.”¹⁶⁸ In order to avoid undue enforcement costs for all parties involved, measures and procedures will be recommended below to streamline the enforcement process and to determine more efficiently and more rapidly a debtor’s capacity and willingness to pay. Consequently, if the cost of enforcement is not a material net loss to government, there is no reason for it to be under resourced or to have recourse to other parties to execute enforcement remedies.¹⁶⁹

Nonetheless, even if limited public funds are required, as is currently the case, the *New Brunswick 1976 Report* justifies this public expenditure: “The direct public cost of the system is shared by everyone in society through the general tax burden. Society in return receives a benefit from easier maintenance of public peace when remedies are processed through public facilities.”¹⁷⁰

6.2.3 Delegation of functions

Although a government enforcement office is recommended, the question remains whether all enforcement functions falling under the jurisdiction of the public enforcement office be performed by a public officer.

To integrate the current flexibility provided by the *Sheriffs Act* which contemplates that a person may be appointed a sheriff’s officer for a limited purpose and time¹⁷¹, the *NBJEA* should adopt paragraph 13(2) of the *Uniform Act* which provides that an “enforcement officer may use assistance and advice, including the paid assistance and advice of agents, brokers or advisors, to carry out the duties and functions of an enforcement officer under this Act”. This permitted delegation not only provides flexibility but favours the efficient use of experts to carry out enforcement measures.

In addition, the creditor controlled enforcement system implemented by the other provinces and proposed in the *Uniform Act* endorses the delegation of delivery functions to the instructing judgment creditor. According to section 14 of the *Uniform Act*, an enforcement officer may delegate to a judgment creditor or an agent of the judgment creditor the giving of any notice or demand that the enforcement officer may give as well as the delivery of any document or record that the enforcement officer may deliver under the Act. Notwithstanding this authorized delegation, the *Uniform Act* requires that the notice or demand must be prepared by and issued over the name of the enforcement officer and that, if a judgment creditor refuses, the responsibility of giving the notice or demand remains with the enforcement officer.¹⁷²

The ULCC’s justification for this delegated responsibility is a reduction of the burden on enforcement officers.¹⁷³ It then recognizes that generally a law firm, a private bailiff or process server will be retained by the judgment creditor. If the *NBJEA* and its regulation specifically prescribe allowable fees, taxable costs, and expenses that an enforcement officer is entitled to receive for giving a notice or demand or delivering a document or record, one wonders whether the ULCC’s justification is warranted. It is our understanding that the sheriffs currently offer this service to private individuals for \$75. Given the private cost involved in hiring a law firm, bailiff or process

¹⁶⁷ *Nova Scotia 2011 Report*, *supra* note 5 at 20. See also generally *ibid* at 20-21.

¹⁶⁸ *New Brunswick 1976 Report*, *supra* note 16 at 245.

¹⁶⁹ *Saskatchewan 2005 Report*, *supra* note 23 at 6-7.

¹⁷⁰ *New Brunswick 1976 Report*, *supra* note 16 at 242.

¹⁷¹ *Sheriffs Act*, *supra* note 141, s 11.

¹⁷² *Uniform Act*, *supra* note 4, s 14.

¹⁷³ *Ibid*, ULCC comment on s 14 at 17.

server, the recovery of this cost from the debtor, the enforcement officer's expertise, the office's internal efficiencies as well as the official status of the officer and its perceived impression on the judgment debtor, the only justification to offer that a judgment creditor serve any notices or demands on the judgment debtor is to encourage creditor involvement in accordance with the principle of optional creditor control discussed in Part 2, not reduce the enforcement officer's burden.

6.2.4 Qualifications and liability of enforcement officers

While the *New Brunswick 1985 Report* suggested that enforcement officers have legal training, the 1994 Report proposed that "while legal training would still be of assistance, it is of less concern in light of the reduced role of the enforcement officer".¹⁷⁴ Contrary to these previous reports, the authors recommend that the *NBJEA* mandate an increased role of the enforcement officer and enable the officer to exercise quasi-judicial discretion related to many aspects of the enforcement system. In fact, since many of the enforcement officer's responsibilities derive from the court or the clerk of the court, similar qualifications and legal training are warranted. The enforcement officer's authority will be further discussed in Part 9 in juxtaposition with specific enforcement measures.

In addition to their qualifications, the enforcement officer's personal liability is also an important obstacle to efficient enforcement services as previously ascertained by Buckwold and Cuming (see Section 6.1.1) and must be addressed by the *NBJEA*. Pursuant to common law principles, a sheriff who sells property under an Order for Seizure and Sale that is regular on its face and was issued out of a court of competent jurisdiction is protected by the order, unless the property is not in fact the property of the judgment debtor.¹⁷⁵ In addition, a sheriff may be liable to the judgment debtor for damaging the debtor's property or for illegal seizure, if he or she does not act properly in the course of satisfying the judgment through seizure and sale of the judgment debtor's exigible assets.¹⁷⁶

Although subsection 4(8) of the *Proceedings Against the Crown Act*¹⁷⁷ provides that "no proceedings lie directly against an officer or agent of the Crown, in the name of the officer or agent or in the name of his or her office, in respect of anything done or omitted to be done by the officer or agent in the course of the performance or purported performance of his or her duties", it is nevertheless recommended that the *NBJEA* clarify and expand the current limited protection provided by the *Sheriffs Act* to sheriffs for "having taken, detained in custody, imprisoned or discharged from custody any person under the process or order".¹⁷⁸ The enforcement officer and his or her delegates would therefore be relieved of the "burden of potential liability for action taken reasonably and in good faith, notwithstanding that it may have been in error, thereby largely freeing him or her of the threat of liability".¹⁷⁹

6.2.5 Initiation of the enforcement process – Notice of Enforcement

Although the enforcement system of support and maintenance orders provides for automatic enforcement procedures as soon as the order or agreement takes effect, the same policy reasons do not apply to the enforcement of civil judgments. An overwhelming consensus requires some positive step by judgment creditors to initiate the enforcement process. In addition, all reformed judgment enforcement systems, as well as the *Uniform Act*, provide that the judgment creditor not only initiate but control, contribute and remain involved in the process. However, as previously advocated by the authors, a guiding principle of the *NBJEA* is that, with the exception of initiating the enforcement proceeding, the creditor's detailed involvement should not be required but optional.

According to section 40 of the *Uniform Act*, a "judgment creditor who wishes to initiate an enforcement proceeding must deliver an enforcement instruction to an enforcement officer" and "identify the enforcement proceedings that the enforcement officer is requested to undertake".

¹⁷⁴ *New Brunswick 1994 Report*, vol 2, *supra* note 78 at Sum Rpt-9-10.

¹⁷⁵ *Overn v Strand*, [1931] SCR 720. See also Buckwold, *supra* note 147 at para 34.

¹⁷⁶ *Ibid.*

¹⁷⁷ RSNB 1973, c P-18

¹⁷⁸ *Supra* note 141, s 14.

¹⁷⁹ *Saskatchewan 2005 Report*, *supra* note 23 at 6-7.

Similarly, the *Saskatchewan Act* further requires “a description of property known or believed by the judgment creditor to be property of the judgment debtor, and the location of that property” along with a registry search and specified serial numbers of any goods to be seized.¹⁸⁰ Under these enforcement systems, the enforcement officer is not required to implement any enforcement measures unless the sheriff has received proper enforcement instruction according to these acts.¹⁸¹ In addition, an enforcement officer is authorized to refrain from taking an enforcement proceeding until he or she receives a satisfactory undertaking or security for the payment of the enforcement officer’s fees and estimated expenses relating to the enforcement proceeding unless the court orders otherwise.¹⁸²

Notwithstanding the creditor-driven approach of the *Uniform Act*, an enforcement officer may, however, decline to undertake an enforcement proceeding should the enforcement instruction be contrary to the Act or a court order or cannot be undertaken in good faith and in a commercially reasonable manner.¹⁸³ In the *Saskatchewan Act*, a sheriff may refuse to proceed as instructed if the requested measure is not commercially “reasonable or practicable”, is “not permitted by law” or that all of the requirements of the Act have not been met.¹⁸⁴ As commented by Cumming, “[t]o use a method of enforcement involving high costs that produces little or nothing to be applied to the judgment would be to act in a commercially unreasonable manner”.¹⁸⁵ The enforcement officer is therefore not bound to enforce the judgment in the manner requested by the judgment creditor, and it seems the enforcement officer possesses significant scope to determine the appropriate enforcement measure, if any.¹⁸⁶

In practice, however, unless the enforcement instruction is invalid or will not yield any recovery beyond enforcement costs, the officer will most likely proceed as instructed. The legislative provisions as drafted in the *Saskatchewan Act* or the *Uniform Act* limit the enforcement officer’s discretion and, in the event there is a more efficient enforcement measure which may have a lesser impact on the judgment debtor and may have been even negotiated with the debtor, the officer may not be able to act without the judgment creditor’s consent.

On a procedural level, the contemplated initiation process of these Acts does not differ substantially from the current enforcement system in place in New Brunswick. Notice must be given in both cases, either by the current Order for Seizure or Sale or the proposed enforcement instructions. Judgment creditors must still investigate at their own expense the judgment debtor’s situation and current assets in order to determine appropriate enforcement proceedings and instruct the enforcement officer accordingly. Moreover, an undertaking or security must still be provided and the judgment creditor remains liable for the sheriff’s costs incurred in connection with the requested enforcement measure. As a result, if the related provisions of the *Uniform Act* or the *Saskatchewan Act* are enacted in New Brunswick, the current dysfunctional self-help creditor-driven system will remain in place.

A completely new approach is required and therefore recommended. With the *NBJEA*, the province can design an enforcement office to coordinate and supervise all enforcement activities in the province with broad discretionary quasi-judicial and administrative powers specifically designed to tailor enforcement measures to meet the requirements of each individual situation and every enforcement situation.¹⁸⁷ Under the *NBJEA*, the enforcement officer’s role and authority should be described as follows: “[u]nless otherwise provided in another enactment, an enforcement officer has the power and authority to undertake enforcement proceedings [... upon the filing of a Notice of

¹⁸⁰ *Saskatchewan Act*, *supra* note 3, s 31. See also *Newfoundland Act*, *supra* note 1, s 72.

¹⁸¹ *Uniform Act*, *supra* note 4, s 40; *Saskatchewan Act*, *supra* note 3, s 30(2); *Newfoundland Act*, *supra* note 1, s 72.

¹⁸² *Saskatchewan Act*, *supra* note 3, s 34(4) ; *Uniform Act*, *supra* note 4, s 40(4).

¹⁸³ *Ibid*, s 10 and ULCC comment on s 40 at 47.

¹⁸⁴ *Saskatchewan Act*, *supra* note 3, ss 34(1)-(2), 115.

¹⁸⁵ *Saskatchewan 2010 Report*, *supra* note 26 at 70.

¹⁸⁶ *Ibid*; *Saskatchewan 2005 Report*, *supra* note 23 at 66.

¹⁸⁷ *New Brunswick 1985 Report*, *supra* note 30 at 23.

Enforcement] with respect to property located anywhere in the province/territory without the need for further authority from the court”.¹⁸⁸

Similar to the enforcement instruction under the *Uniform Act*, the Notice of Enforcement required under the *NBJEA* should contain information fields that will call upon the judgment creditor to provide the following types of information to the extent that they are known to the judgment creditor:

- a) The name and address of the judgment creditor;
- b) The name and address of the law firm, if any, that is acting for the judgment creditor in giving the enforcement instruction to the enforcement officer;
- c) If the name of the judgment creditor that appears on the judgment is different than the name of the judgment creditor delivering the enforcement instruction, there should be a reference to documentation that explains the change in the name of the judgment creditor;
- d) The name of the judgment debtor as it appears on the judgment;
- e) Any alias or alternative name used by the judgment debtor or by which the judgment debtor may be known;
- f) The current address of the judgment debtor if it is known to the judgment creditor;
- g) The existence and amount recoverable on the judgment and the desire of the judgment creditor to have the judgment enforced;
- h) A description and location of exigible property of the judgment debtor that is known to the judgment creditor.¹⁸⁹

Notwithstanding this wide discretionary power yet respecting the optional creditor control principle, the Notice of Enforcement would also enable the initiating judgment creditor to recommend a specific enforcement strategy. Nevertheless, even when specific enforcement instructions have been given by the judgment creditor, the *NBJEA* should provide the enforcement officer with the authority to analyse the judgment debtor's individual situation, the expected enforcement costs and determine the most appropriate and efficient enforcement measure for all parties involved especially in the case of a cooperative judgment debtor. In other words, an instructing judgment creditor will never be able to dictate the proceeding undertaken by the enforcement officer without a court order but only recommend an appropriate course of action.

Considering the enforcement officer's expertise, experience and resources, it is believed that in most cases the enforcement officer will have determined the best enforcement strategy to satisfy the amount recoverable. In addition, as is currently the case with the Support Enforcement Office, the enforcement officer may have a better and more accurate portrait of the judgment debtor's financial situation than a judgment creditor. It is also expected that most unsophisticated creditors or creditors with limited resources and therefore unable to seek legal advice, will rely on the expertise and experience of the enforcement office.

The proposed discretion given to the enforcement officer under the *NBJEA* is also recognized by the ULCC's comment that “a judgment creditor may give an enforcement instruction that instructs the enforcement officer to utilize whatever enforcement proceedings are necessary to satisfy the amount recoverable”.¹⁹⁰ A review of the actual wording of the *Uniform Act*, which uses mandatory terminology, seems to negate, however, this possibility. It is therefore recommended that the *NBJEA* expressly provide for the option that the enforcement officer proceed with any enforcement measure that he or she determines to be the most efficient in the circumstances

¹⁸⁸ *Uniform Act*, *supra* note 4, s 41.

¹⁸⁹ *Ibid*, ULCC comment on s 40 at 46.

¹⁹⁰ *Ibid*.

unless the judgment creditor provides commercially reasonable and practicable enforcement instructions pursuant to the judgment creditor's optional participation. The enforcement officer would, however, be required by the Act to inform the judgment creditor of the intended enforcement measure and, if a judgment creditor's appropriate and valid enforcement instructions were declined by the enforcement officer, the judgment creditor could then apply to the court for an order directing the enforcement officer to undertake a specific enforcement proceeding.¹⁹¹

Given the expertise developed within a central co-ordinated office, the accuracy and accessibility of updated information on judgment debtors and the enforcement officer's wide discretion to implement the most efficient and effective enforcement strategy, it is recommended that the current requirement to provide an undertaking or security for costs prior to enforcement be eliminated. The *NBJEA* would follow the current practice in Newfoundland and Labrador where there is no obligation to provide security prior to enforcement. The *NBJEA* should nevertheless authorize the enforcement officer to request security for costs in the event the only enforcement strategy possible represents elevated risks that proceeds may not cover enforcement costs. The enforcement officer must evaluate the financial risks as well as the interests of the judgment creditors, the judgment debtor and affected third parties. However, in order to protect the judgment debtor, enforcement costs and fees should be prescribed by regulation and judgment creditors could only recover from the judgment debtor the prescribed amount unless ordered otherwise.

The remaining elements as proposed in the *Uniform Act* such as the reporting by the enforcement office to the judgment creditor, the protection of the judgment creditor from any liability arising from the enforcement proceedings, as well as the required renewal of the enforcement instructions after 24 months and the continued obligation of the judgment creditor to provide the enforcement office with any new information or developments affecting the parties should be incorporated in the *NBJEA*.¹⁹²

¹⁹¹ *Ibid*, s 6, ULCC comment on s 40; *Saskatchewan Act*, *supra* note 3, s 30(2)(b).

¹⁹² *Saskatchewan Act*, *ibid*, ss 32, 35; *Uniform Act*, *supra* note 4, s 42.

7. Registration and creation of an enforcement charge

7.1 The current law in New Brunswick

The requirement of a registry system for judgments was first recognized in the *New Brunswick 1976 Report* and subsequently commented on in the New Brunswick 1985 and 1994 Reports. These reports recognized the benefits of a centralized registry system for the purposes of coordinating collection enforcement on a province-wide basis.¹⁹³ Given the legislative amendments to New Brunswick's judgment enforcement law enacted with the *PPSA* and the creation of the *PPSA* Registry¹⁹⁴ in 1995, the "new approach" enabling both secured and unsecured creditors to bind personal property via the *PPSA* Registry recommended in the *New Brunswick 1994 Report* have already been implemented in New Brunswick. As a result, registration of judgments in New Brunswick against real and personal property is not a novel concept for judgment creditors.

Currently, a Notice of Judgment may be registered in the *PPSA* Registry pursuant to section 2.2(1) of the *Creditors Relief Act*. The debtor's present and after-acquired personal property is then bound in the amount of the judgment. The Notice of Judgment will be effective for the period of years specified in the registration, but for no more than 20 years after the date of judgment.¹⁹⁵ The *PPSA* Registry is province-wide and only one registration is required to cover all counties of the province. A registered judgment has priority over an unperfected security interest regardless of whether the security interest attaches before or after the judgment is registered.¹⁹⁶ In addition, by operation of subsection 2.3(9) of the *Creditors Relief Act*, an enforcement proceeding for the purpose of enforcing a money judgment shall not be commenced until a Notice of Judgment has been registered in the *PPSA* Registry.

Another important aspect of registration is the absence of any priority and the *pro rata* sharing among registered judgment creditors in the proceeds of a levy by a sheriff against the property of a judgment debtor.¹⁹⁷ It is currently possible under the *Creditors Relief Act* for non-registered creditors at the time of enforcement to share in the distribution of proceeds if they deliver a registered Notice of Judgment within one month from the date the sheriff enters a public notice of the enforcement proceeds.¹⁹⁸

Creditors are also well-advised to register their judgment in one or both real property registries established in the province if they wish to "bind" or charge land, either to exert pressure on the judgment debtor by rendering the land practically unsellable, or enforcing against the land to satisfy the judgment. Registration of a memorial of judgment in the appropriate land registry office remains a requirement to bind land not yet registered under the new Land Titles Registry. Pursuant to the *Memorials and Executions Act*, a memorial of judgment providing for the payment of money may be registered in the registry office of the county in which the debtor's lands are situated and will therefore bind the debtor's lands for a period of 5 years.¹⁹⁹ If the debtor has lands in more than one county, registration of such memorial of judgment is necessary in each and every county in which his or her lands are located.

The new *Land Titles Act* also provides for the registration of memorials of judgment at sections 40 to 46 of this Act. Subsection 40(4) provides that an application to register a memorial of judgment

¹⁹³ See *New Brunswick 1994 Report*, vol 2, *supra* note 78 at Sum Rpt-5.

¹⁹⁴ *PPSA*, *supra* note 22, s 42(1).

¹⁹⁵ *Creditors Relief Act*, *supra* note 24, s 2.2(2). The *NBJEA* will have to be harmonised with section 8 of the new *Limitations of Actions Act*, SNB 2009, c L-8.5, which provides for a 15 year limitation period and allows a fresh action on a judgment obtain to obtain a "renewed judgment".

¹⁹⁶ *Creditors Relief Act*, *supra* note 24, s 2.3(7); *PPSA*, *supra* note 22, s 19 (perfection and attachment are required for a security interest to be perfected. Without completing the procedural perfecting steps, a security interest is still unperfected even though it may have attached.); *ibid*, s 20(1)(a) (a security interest may be registered before the judgment, but still could remain unattached; until the security interest attaches, registered judgments will have priority over it).

¹⁹⁷ *Creditors Relief Act*, *supra* note 24, ss 2.3(12)-(13).

¹⁹⁸ *Ibid*, ss 4(1), 2.3(14).

¹⁹⁹ *Memorials and Executions Act*, *supra* note 25, ss 5-6 (a memorial of judgment is obtained from the Clerk of Court of Queen's Bench or the Registrar of the Court of Appeal).

may be made in respect of more than one parcel of land registered under the Act. Section 46 further provides that where there is a conflict with the provisions of the *Memorials and Executions Act*, sections 40 to 45 of the *Land Titles Act*, which provide that registration is parcel specific, apply.

Having registered his or her judgment, the judgment creditor obtains priority over any subsequently registered interests. The efficiency of this registration is revealed when the judgment debtor comes to deal with his or her property. As the property is bound on registration, neither future purchasers nor secured parties will want to deal with the property without the judgment debtor paying off the judgment to free the property of the encumbrance.

7.2 The case for reform and recommendations

7.2.1 Creation of an enforcement charge

Since 1995, the issuance and delivery of an Order of Seizure and Sale to the Sheriff has been unnecessary for the purpose of binding or affecting an “enforcement charge” on the property of the debtor. Registration of a Notice of Judgment in the *PPSA* Registry and the respective land registries is sufficient to protect the judgment creditor’s interests. Considering that the current state of the law in the province is precisely what is recommended by the ULCC, it is recommended that the *NBJEA* maintain the status quo but expressly provide for the creation of an enforcement charge upon the registration of a judgment in the *PPSA* Registry.²⁰⁰ In addition, the current administrative and procedural structure applicable to the registration of judgments remains applicable and can simply be fine-tuned for the purposes of the *NBJEA*.

Likewise, the *NBJEA* should also adopt the current requirement for registration as a qualifier for initiating enforcement proceedings as well as participating in the distribution of the proceeds of enforcement.²⁰¹ Registration of a Notice of Judgment against the property of the debtor goes beyond simple issues of convenience and public notice. Registration of a Notice of Judgment becomes the prescribed precursor to enforcement, informing all parties involved of their respective interests in the property of the judgment debtor and enabling each creditor to determine his or her next course of action, which ultimately creates a simplified protocol for judgment creditors.

There are, however, two areas in need of reform, which relate to the distribution of proceeds of an enforcement proceeding and to the registration of judgments against real property. Although registration of a Notice of Judgment would remain a prerequisite to being eligible to share in the distributable fund, the determination of the time period within which a judgment creditor can register or provide enforcement instructions can create uncertainty since the total number of enforcing creditors and thus total judgment debt amount may be unknown at the time of enforcement.²⁰²

As further explained in section 10.2.2, the desire to determine the total amount of eligible claims to be enforced prior to enforcement could be achieved by requiring the enforcement officer to advise all registered judgment creditors of the impending enforcement in order to permit them to deliver a Notice of Enforcement within a prescribed period and thus become entitled to share in the distributable fund in accordance with the *NBJEA* priority and distribution scheme.

7.2.2 Registration against real property

Given that the manner in which judgments are registered and enforced against land varies significantly among provinces and territories, the *Uniform Act* suggests two possible options for future legislative reform of judgment enforcement law.

²⁰⁰ *Uniform Act*, *supra* note 4, ULCC introductory comment on part 5 at 29.

²⁰¹ *Creditors Relief Act*, *supra* note 24, ss 2.3(9), 2.3(13) (“[a] judgment creditor is not entitled to share in the proceeds of a levy by the sheriff against the personal property of the judgment debtor under this Act unless the creditor has registered a notice of judgment under s 2.2(1)”).

²⁰² *Uniform Act*, *supra* note 4, ULCC introductory comment on part 5 at 29; *British Columbia 2005 Report*, *supra* note 5 at 75.

Option 1 of the *Uniform Act* reflects the practices that have been adopted by Newfoundland and Labrador and recommended in the Saskatchewan 2001 Report.²⁰³ It allows for the creation of the enforcement charge against all property of the debtor, including real property, without registration of a Notice of Judgment in the land registry system or land titles registry. Cumming and Buckwold initially proposed that “a single registration in the Registry would create an enforcement charge on both the personal property and land owned by the judgment debtor at the date of the registration or acquired any time thereafter while the judgment remains registered”.²⁰⁴ An interested purchaser of real property would therefore have to obtain a search result in both the Land Titles Registry as well as the *PPSA* Registry to determine whether the land is subject to an enforcement charge.

In comparison, Option 2 of the *Uniform Act* relating to registration against real property reflects the practices adopted in Alberta and proposed in the 1994 *NBJEA* to create an enforcement charge on land and provides generally that registration under a province’s *Land Titles Act* is necessary prior to charging the property of the debtor. In 1994, Williamson endorsed abolition of the registration required in the registry office of the county where the debtor’s lands are situated in order to bind unregistered land. The *New Brunswick 1994 Report* recommended as follows:

In the case of land subject to the land registry system, a notice of judgment registered on the *PPSA* Registry will bind the debtor’s land by creating a general lien on all present and after-acquired land anywhere in the Province. The legal effect of registration will be unchanged from that of the current registration of a “memorial of judgment” except that a single registration will bind the land anywhere in the Province.

Land subject to the *Land Titles Act* (registered land) will be dealt with slightly differently than land subject to the *Registry Act*. In the case of registered land, registration of the notice of judgment on the title will also be required and only a specific lien will be created.

There will be no exceptions to the obligations placed on third parties to search the PPR [*PPSA* Registry] or the Land Titles Office for notices of judgment affecting the debtor’s land.²⁰⁵

As recommended in 2001, Saskatchewan did, in the end, adopt legislation that creates a Judgment Registry for all judgments regardless of the nature of the property of the judgment debtor against which a judgment is ultimately enforced.²⁰⁶ However,

registration of the judgment in the Judgment Registry, although a mandatory step, does not give rise to an enforcement charge affecting an extant interest in land of the judgment debtor. The charge arises with respect to a specific interest in land of the judgment debtor, [...] only when the judgment is registered in the land titles registry against the interest. There is, however, a parallel between the effect of a registered judgment on personal property and land. A judgment registered in the Judgment Registry automatically results in an enforcement charge affecting land acquired by the judgment debtor and registered in the land title registry after the registration has been effected.²⁰⁷

In Saskatchewan, subsection 172(1) the *Land Titles Act, 2000* provides for an automatic registration in the Land Titles Registry of a registered judgment creditor’s interest against the judgment debtor’s after-acquired title or interest in land: “On and after the registration of a writ in the writ registry against the name of a debtor, any title subsequently issued, or interest subsequently registered in the land titles registry, in the exact name of the debtor must include and be subject to

²⁰³ *Saskatchewan 2001 Report*, *supra* note 83 at 167-170.

²⁰⁴ *Ibid* at 169.

²⁰⁵ *New Brunswick 1994 Report*, vol 1, *supra* note 15 at 9-10.

²⁰⁶ *Saskatchewan Act*, *supra* note 3, ss 18-21.

²⁰⁷ *Saskatchewan 2010 Report*, *supra* note 26 at 61 [citations omitted]. See also *Land Titles Act, 2000*, SS 2000, c L-5.1, ss 172-173.

the registration of an interest based on the writ.” Any interest registered is therefore subject to any interest based on a registered judgment where there is an exact match between the name of the debtor on the judgment and the name of the interest holder on the interest registered.²⁰⁸

Since New Brunswick has also adopted a land titles registry system, option 1 of the *Uniform Act* is not recommended. As observed by the British Columbia Law Institute, the older practice of registering judgments in a general registry could “compromise the integrity of the land title system”.²⁰⁹

Considering the guiding principle of universal exigibility of a judgment debtor’s property as well as the objective of the *NBJEA* to provide a coordinated and flexible system of enforcement of judgments enabling judgment creditors to successfully satisfy their judgments, it is recommended that these objectives should prevail over the additional burden of intended purchasers of real property to search two registries and the judgment debtor’s after-acquired title or interest in land. Given the foregoing, the authors recommend that the *NBJEA* adopt the Saskatchewan approach. As a result, a judgment debtor’s existing interest in registered land can only be charged by a judgment registered in both the *PPSA* Registry and the land titles registry. Furthermore, if the judgment debtor thereafter acquires a registered interest in land, a judgment registered in the *PPSA* Registry would create an enforcement charge as soon as that interest is registered in the land titles registry.

²⁰⁸ *Land Titles Act*, 2000, *ibid*, s 53(2).

²⁰⁹ *British Columbia 2005 Report*, *supra* note 5 at 180.

8. Priority of an enforcement charge

While registration of a judgment is useful for its role with respect to public notice and as a catalyst event to qualify judgment creditors to initiate enforcement proceedings and to share in a distributable fund, the order of registration need not be the determining factor as to priority among judgment creditors. A further analysis on priorities is therefore not only appropriate but also essential.

8.1 The current law in New Brunswick

Priorities with respect to encumbrance holders are currently governed by the provisions of the *Creditors Relief Act* as well as the *PPSA* for personal property and the *Registry Act* and *Land Titles Act* with respect to real property. With the introduction of personal property securities legislation and the creation of a coordinated and centralized registry for judgments, New Brunswick had abandoned the link between the enforcement process and the crystallization of priority positioning for a judgment creditor. As previously explained, by registering a Notice of Judgment in New Brunswick, judgment creditors are creating charges on property which mark a fundamental departure from pre-*PPSA* legislation and its requirement of having to commence enforcement procedures in order to charge property. This more streamlined and modern approach automatically binds the debtor's present and subsequently-acquired property and renders the registration of interests the ultimate statutory source for the establishment of priorities.

This legislative reform and the subordination of subsequent interests were explained by Walsh in the following comments judicially approved in *CIBC v CTV Television*:

S. 20(1)(a) [of the *PPSA*] abandons the traditional linkage between the priority rights of judgment creditors and the judgment enforcement process. Judgment creditors are not required to even initiate enforcement proceedings, let alone take that process to the point of seizure, in order to assert priority over an unperfected security interest. All they need do is register notice of their judgment in the Personal Property Registry, something which amendments to the *Creditors Relief Act*, proclaimed in force at the same time as the *PPSA*, permits them to do as soon as judgment is obtained. Once notice of the judgment is registered, the debtor's present and after-acquired personal property is bound in the amount of the judgment. Registration binds the property for the amount of the judgment, costs and accrued interest, less any amounts paid to satisfy the judgment. Provided the notice of judgment is registered before the security interest is perfected, s. 20(1)(a) of the *PPSA* gives priority to the interest of the judgment creditor.

A registered judgment has priority over an unperfected security interest regardless of whether the security interest attaches before or after the judgment is registered. In cases where the security interest attaches *before* the judgment is registered, but is not yet perfected in the procedural sense of registration or taking possession, the *Creditors Relief Act* expressly provides that the registered judgment has priority. In cases where the security interest does not attach until *after* the judgment is registered, the security interest is postponed by *PPSA* s. 20(1)(a) even if the security interest was registered before the judgment was registered. This is because, under s. 19, a security interest is perfected only when it has attached *and* all procedural perfecting steps have been completed. Since s. 20(1)(a) subordinates an *unperfected* and not merely an *unregistered* security interest to a registered judgment, both attachment and registration of the security interest must precede the registration of the judgment in order for the security interest to have priority. This result is justified because it is attachment and not registration that gives the secured party its proprietary interest in the debtor's property. In contrast,

the judgment creditor has done everything possible to “perfect” his or her interest – sued the debtor to judgment and then registered that judgment.²¹⁰

Pursuant to the priority scheme under the *PPSA*, a properly registered judgment will therefore have priority over unperfected security, subsequently registered security or any other encumbrance provided that the aforementioned encumbrance does not benefit from a statutory preference in the *PPSA* or any other statute. Examples of encumbrances holding statutory preferences within the *PPSA* include repairer’s liens²¹¹ and purchase money security interests (“PMSI”s)²¹², which can be generally defined as security taken on collateral where it secures the purchase price.

In comparison, the *Land Titles Act* simply provides at section 19 that “[i]nstruments and interests or claims thereunder in respect of or affecting the same land shall be entitled to priority, the one over the other, according to the order of the registration numbers, dates and times assigned to the instruments by the registrar and not according to the date of their execution”.

8.2 The case for reform and recommendations

Contrary to other provinces, there is no need for a substantive reform of the law governing priorities in New Brunswick since “when New Brunswick adopted its *PPSA*, reform of judgment enforcement law was in the air, enabling it to take the next logical step in the evolution of the law governing priority between judgment creditors and secured parties”.²¹³ Although a review of the current law on security interests and their interaction with other interests or encumbrances on the debtor’s property may be appropriate given that the *PPSA* already dates back to 1995, an in-depth analysis of the priority schemes contemplated by the *PPSA* and the *Land Titles Act* is beyond the scope of this research project and the authors are not aware of any major issues in need of reform.

As previously explained, the law in New Brunswick currently provides that an enforcement charge created by the registration of a judgment has the same priority in relation to both prior and subsequent interests in the judgment debtor’s property charged as a perfected security interest, other than a PMSI, as defined by the *PPSA*.²¹⁴ This rule, which is present in all legislative reforms on judgment enforcement law in the country, should continue to guide the *NBJEA*’s priority scheme.

As a result, unlike other provinces, the *NBJEA* and the rules for determining priority between an enforcement charge and other interests in the judgment debtor’s property can be modeled on the province’s current objectives of the *Creditors’ Relief Act* and the legislative provisions of the *PPSA* and the *Land Titles Act*, thereby easing the implementation of the *NBJEA* in the province. It is the opinion of the authors that these enactments provide for effective methods of determining priority among encumbrance holders.

Given the ease with which New Brunswick can streamline all three legislative regimes dealing with security interests and their enforcement, it is recommended that the *NBJEA* make the priority rules of the *PPSA* and the *Land Titles Act*, which are applicable in determining the priority of a perfected security interest, applicable to determining the priority of an enforcement charge created in relation to other security interests except as otherwise provided in the *NBJEA*.²¹⁵

Notwithstanding the guiding principle to consolidate and simplify the province’s judgment enforcement process, it is still necessary to have a set of clearly established rules within the *NBJEA* itself to govern priorities of enforcement charges in a judgment debtor’s property.²¹⁶ In addition, reference to applicable legislation should be clearly established in the *NBJEA*. For example, the *Saskatchewan Act* specifically provides that “[e]xcept as otherwise provided in this Act or the

²¹⁰ 2005 NBQB 429 (CanLII) at paras 24-25 citing Walsh, *supra* note 130 at 110 -11.

²¹¹ See *PPSA*, *supra* note 22, s 32; *Re Giffen* [1998] 1 SCR 91.

²¹² *PPSA*, *supra* note 22, s 34.

²¹³ Walsh, *supra* note 130 at 110-111.

²¹⁴ *PPSA*, *supra* note 22, s 20(1). See also *Alberta Act*, *supra* note 2, ss 34, 42(1); *Newfoundland Act*, *supra* note 1, ss 48-49; *Saskatchewan Act*, *supra* note 3, s 23.

²¹⁵ *Uniform Act*, *supra* note 4, ULCC comment on s 35(1).

²¹⁶ *British Columbia 2005 Report*, *supra* note 5 at 90.

regulations, the following provisions of *The Personal Property Security Act, 1993* apply, with any necessary modification, to the registration of a judgment pursuant to this Part”.²¹⁷

The importance of this consolidation of rules is further apparent when one considers that the rights of secured and non-secured creditors are subject to the statutory priorities of preferred creditors originating in several legislative enactments.²¹⁸ As a result, the determination of priority ranking for judgment creditors in New Brunswick remains an endeavour requiring the reconciliation of several pieces of legislation all enacted for varying purposes.

The authors therefore advance once again the 1976 recommendation that “any statutory priorities which do exist, like the existing priorities of employees and landlord, be incorporated [... in the judgment enforcement legislation] to show clearly their relationship to the distribution of moneys under the Act”.²¹⁹ Such an approach is found, for example, in the *Saskatchewan Act* which specifically provides that an enforcement charge is subordinate to a landlord’s right of distress exercised before the enforcement charge comes into existence.²²⁰

Although the *PPSA* also establishes the priority of liens²²¹, of PSMIs²²² and of buyers and lessees of the judgment debtor’s property in the ordinary course of business²²³, these should be fine-tuned in the *NBJEA* to provide for enforcement charges. In addition, several interests will need further examination to be adapted to the *NBJEA* such as futures advances²²⁴, fixtures and growing crops²²⁵ as well as negotiable instruments and chattel paper.²²⁶

There remains, however, one question which must be addressed: the determination of priorities among enforcement charges and the common law rule of “first in time, first in right” to the judgment debtor’s property. As previously stated in Part 2, it is the authors’ recommendation that the *NBJEA* follow, albeit with a few modifications regarding the qualifications to share and the creation of preferred payments for judgment creditors upon distribution, the guiding principle of collective enforcement leading to the proportional sharing among judgment creditors and its impact on the distribution of seized property.

This principle is expressed by the statutory rule that nothing in the relevant part of the *NBJEA* dealing with priorities creates a priority between or among enforcement charges. The rule is to avoid any possible interpretation that a priority can be created among enforcement charges based on the time of registration.²²⁷ A lack of priority between judgment creditors is, the authors argue, a just and equitable approach to distribution given the economic and physical realities faced by judgment creditors in completing the judgment enforcement process. Departure from a sharing system does not appear to be warranted and the sharing system offers many benefits:

²¹⁷ *Saskatchewan Act*, *supra* note 3, s 29.

²¹⁸ See e.g. *Employment Standards Act*, SNB 82, c E-7.2; *Mechanics’ Lien Act*, RSNB 1973, c M-6; *Wage Earners Protection Act*, RSNB 2011, c 235; *Real Property Tax Act*, RSNB 1973, c R-2; *Revenue Administration Act*, SNB 1983, c R-10.22.

²¹⁹ *New Brunswick 1976 Report*, *supra* note 16 at 29.

²²⁰ *Saskatchewan Act*, *supra* note 3, s 27(3).

²²¹ *PPSA*, *supra* note 22, s 32. See also *Alberta Act*, *supra* note 2, s 40; *Newfoundland Act*, *supra* note 1, s 57; *Saskatchewan Act*, *supra* note 3, s 23; *The Personal Property Security Act, 1993*, S.S. 1993, c P-6.2, s 32 [*Saskatchewan PPSA*].

²²² *PPSA*, *supra* note 22, s 34. See also *Alberta Act*, *supra* note 2, s 35(3); *Newfoundland Act*, *supra* note 1, s 50(3); *Saskatchewan Act*, *supra* note 3, s 23; *Saskatchewan PPSA*, *supra* note 221, s 34.

²²³ *PPSA*, *supra* note 22, s 30. See also *Alberta Act*, *supra* note 2, s 36; *Newfoundland Act*, *supra* note 1, s 52; *Saskatchewan Act*, *supra* note 3, s 25.

²²⁴ *PPSA*, *supra* note 22, s 14. See also *Saskatchewan Act*, *supra* note 3, ss 23(4)-(5).

²²⁵ *PPSA*, *supra* note 22, ss 36-37. See also *Alberta Act*, *supra* note 2, s 37; *Newfoundland Act*, *supra* note 1, s 53; *Saskatchewan Act*, *supra* note 3, s 24.

²²⁶ *PPSA*, *supra* note 22, s 41. See also *Alberta Act*, *supra* note 2, s 38; *Newfoundland Act*, *supra* note 1, s 54; *Saskatchewan Act*, *supra* note 3, s 25.

²²⁷ See *Alberta Act*, *supra* note 2, s 42(2); *Saskatchewan Act*, *supra* note 3, s 27(1); *Uniform Act*, *supra* note 4, s 38(4).

Other arguments, which may be tendered to support the retention of the principle of pro rata distribution of proceeds of judgment enforcement proceedings among all judgment creditors, include the following:

(a) Utilization of the principle of pro rata distribution may encourage creditors to extend additional time to debtors for the payment of their debts before creditors initiate debt enforcement proceedings because a delay in initiating enforcement proceedings is less likely to prejudice the priority of creditors' claims in any subsequent distribution of proceeds of an execution proceeding. Of course, a creditor must obtain and register its judgment prior to the relevant date for the determination of an entitlement to participate in a distribution of proceeds of an execution.

(b) Utilization of the principle of pro rata distribution may reduce the incentive of creditors to petition a debtor into bankruptcy as a means of attaining a pro rata sharing of a debtor's assets.

(c) Because of the high up-front costs that a creditor must incur if the creditor wishes to obtain the principle of pro rata distribution by petitioning a debtor into bankruptcy, bankruptcy is not an economically viable alternative for creditors who have relatively small claims to attain pro rata distribution.

(d) The principle of pro rata distribution has been a hallmark of creditors' relief legislation in Canada for one hundred years and this principle has been reaffirmed in the enactment of modern judgment enforcement legislation.²²⁸

While it may be appropriate to reward secured creditors for their initiative of registering a security, this concept of reward does not correspond with the varying realities faced by judgment creditors in completing the judgment enforcement process. Some judgment creditors may face years of litigation to obtain a minimal award while other judgment creditors may easily obtain a default judgment on issues of complex law simply due to the fact that the defendant did not have the material and physical resources to defend the claim. It is thus arguably inappropriate to allow priorities between these two sets of encumbrance holders based on time alone. As a result, subject to certain allowed costs and preferences, as explained in Section 10.2.2, the balance of a distributable fund is distributed among all eligible claims on a pro rata basis.

Given the above recommendation to preserve the equal status of all judgment creditors, the *NBJEA* will need to address the relationships among interests in seized property, in particular the priority between enforcement charges and security interests.

Under current judgment enforcement law as well as the recommended rule for the *NBJEA*, the priority of intervening secured creditors is preserved notwithstanding the absence of priority among enforcement charges. As explained by the ULCC, "if a security interest in property is registered after the creation of an enforcement charge and a subsequent enforcement charge is created after the registration of the security interest, the security interest is not subordinate to the second enforcement charge merely because it is subordinate to the first enforcement charge".²²⁹ In addition, an interest in property that is subordinate to an enforcement charge would be subordinate only to the extent of the amount recoverable under the judgment to which the enforcement charge relates at the time the enforcement proceedings are taken against the property.²³⁰

The interplay between enforcement charges and intervening secured creditors as well as the resulting distribution of a distributable fund is further discussed in Part 10 on distribution.

²²⁸ Robinson, *supra* note 50 at para 30.

²²⁹ *Uniform Act*, *supra* note 4, ULCC comment on section 38(1). See also *Alberta Act*, *supra* note 2, s 42(1).

²³⁰ *Uniform Act*, *supra* note 4, s 38(3).

9. Enforcement procedures and remedies

As with the *Uniform Act* and the *Saskatchewan Act*, the objective of the *NBJEA* is to provide a modern, comprehensive system of powers and responsibilities for the enforcement officer, spelling out the enforcement officer's authority to deal with a variety of complex assets that are not explicitly covered by our existing judgment enforcement legislation. Although creditors' right to successfully and efficiently enforce a judgment is a core objective of the reform, it must not be attained at the expense of debtors' rights.

9.1 The current law in New Brunswick

9.1.1 Seizure and sale of property (including land)

Seizure and sale of property is largely governed by the *Memorials and Executions Act*. The Act allows the seizure of money and securities for money²³¹, the seizure of land²³² and various interests in land, such as a beneficiary interest through a trust²³³ or a mortgagee's interest²³⁴, as well as tangible and intangible personal property²³⁵. The *Memorials and Executions Act* also provides that some personal property is exempt from seizure and sale.

While the *Memorials and Executions Act* provides for seizure and sale of various types of property, the availability of the ancient writ of *fiery facias*, now called Order for Seizure and Sale, is found at Rule 61 of the *Rules of Court*.²³⁶ The enforcement of the Order for Seizure and Sale and other enforcement orders is the responsibility of the sheriff²³⁷, although creditors can and often must play an important role in gathering information for the sheriff regarding the judgment debtor's exigible assets and providing detailed enforcement instructions.

If the judgment debtor is believed to have exigible property, an Order for Seizure and Sale can be obtained from the clerk of the court pursuant to Rule 61. The Order is then delivered to the Sheriff and has the effect of directing the sheriff to seize a sufficient amount of the judgment debtor's exigible assets as is necessary to satisfy the judgment and ancillary costs.

In New Brunswick, the sheriff may require the creditor to pay the required fees and reasonably anticipated expenses of carrying out the enforcement in advance.²³⁸ Furthermore, if there are reasonable grounds to believe that property of the debtor is in the possession or control of a third party, that person may be directed to deliver over the property.²³⁹ Where property is claimed by a third party, the sheriff may refuse to proceed with a seizure until the creditor provides sufficient security to cover any damages that the sheriff might sustain because of the seizure or sale.²⁴⁰

9.1.2 Garnishment

In addition to the seizure and sale of the judgment debtor's exigible assets, a judgment creditor can also attach debts owed to the judgment debtor by a third party and compel the third party to pay the money owed towards the satisfaction of the judgment pursuant to the *Garnishee Act*. The *Creditors Relief Act* also provides that the sheriff may garnish sums owed to the judgment debtor. However, it appears that the sheriff will only do so where there are "several executions and claims" in his hands and that there does not appear to be sufficient exigible assets to cover all claims as well as enforcement costs.²⁴¹ Furthermore, the *Creditors Relief Act* provides that a judgment creditor who

²³¹ *Supra* note 25, s 26(1) (securities for money include cheques, bills of exchange, promissory notes, bonds and specialties).

²³² *Ibid*, s 11.

²³³ *Ibid*, s 12.

²³⁴ *Ibid*, s 24(1).

²³⁵ *Ibid*, ss 23(1) (tangible property, i.e., goods and chattels), 23.1-23.7 (securities and security entitlements).

²³⁶ See *supra* note 25, r 61.02(1)(a), 61.07. See generally *ibid*, r 61.

²³⁷ See generally *ibid*; *Memorials and Executions Act*, *Garnishee Act*.

²³⁸ *Sheriffs Act*, *supra* note 141, s 13.

²³⁹ *Rules of Court*, *supra* note 25, r 61.08(4).

²⁴⁰ *Ibid*, r 61.08(3).

²⁴¹ *Creditors Relief Act*, *supra* note 24, s 35.

attaches a debt is deemed to have done so for the benefit of all creditors entitled to the *pro rata* sharing under that Act.²⁴²

Although the “seizure” of money is technically possible under the *Memorials and Executions Act* as funds could conceivably be in the debtor’s possession, the seizure of income is mostly achieved through garnishment as previously explained. Garnishment is a process by which the judgment creditor can compel a third party to remit money which that third party is legally required to pay to the judgment debtor. Although the effect of the attaching order is ultimately felt by the judgment debtor, the order itself is against the third party, compelling the latter to pay the judgment creditor any money owed by the third party to the judgment debtor.

Pursuant to an attaching order, debts and sums of money owing from the third party to the judgment debtor are attached and bound in his or her hands.²⁴³ However, not all debts can be attached, but only those debts which are “due absolutely and without depending on any contingency”.²⁴⁴ If the garnishee makes any payment to anyone other than the judgment creditor or into court once served with an attaching order, the payment is void and the garnishee is liable to pay the same to the extent of the judgment creditor’s claim or to the extent of the debt or sum of money owing by the garnishee to the judgment debtor.²⁴⁵

In order to obtain an Order for Garnishment, an application (which can be made *ex parte*) must be filed with the court. The application has to be supported by an affidavit and has to state the following:

- that the judgment was recovered and when,
- that the whole, or some part, and how much thereof, remains unpaid and unsatisfied,
- that the deponent has reason to believe and does believe that some one or more parties, naming them, or stating that he is unable to name them, is or are within the Province, [...] and is or are indebted to or liable to pay a sum of money to the judgment debtor, and
- that it is necessary in the interest of justice that an attaching order should be issued, [...] which order said judge may make, if satisfied that it is necessary in the interest of justice that the same should be issued.²⁴⁶

9.1.3 Payment Order

Another enforcement proceeding currently available to judgment creditors is the payment order.

Pursuant to the *Arrest and Examinations Act*, a judgment creditor may serve on the judgment debtor a Notice of Judgment in the form prescribed by regulation.²⁴⁷ The judgment debtor may then either satisfy the judgment in whole by paying the amount in the notice received or pay the judgment in equal monthly instalments in accordance with the payment schedule prescribed by regulation.²⁴⁸ Under the *Recovery of Judgment Regulation - Arrest and Examinations Act*, the debtor is directed to pay the creditor in 12, 24, 36 or 48 equal monthly instalments depending on the amount of the judgment.²⁴⁹ If the judgment debtor is unable to comply with the prescribed instalments, he may apply to the clerk of the court for a payment order to vary the prescribed

²⁴² *Ibid*, s 35(3).

²⁴³ *Garnishee Act*, *supra* note 25, s 5.

²⁴⁴ *Ibid*, s 32(b).

²⁴⁵ *Ibid*, s 6.

²⁴⁶ *Ibid*, s 3.

²⁴⁷ *Supra* note 25, s 29.1(2).

²⁴⁸ *Ibid*, 29.1(4).

²⁴⁹ NB Reg 84-23, s 4, Schedule A.

schedule.²⁵⁰ The judgment creditor also has the ability to ask the clerk to vary the prescribed schedule²⁵¹.

If the judgment debtor fails to pay the judgment or the instalments stated in the notice he has received, the judgment creditor may apply to the clerk to obtain an order directing the judgment debtor to pay.²⁵² If the judgment debtor is unable to comply with the payment order, he may apply to the clerk of the court for an order to vary the payment order.²⁵³ Failure to comply with any of the clerk's payment orders may be punished by a finding of contempt of court.²⁵⁴

In practice, however, this enforcement measure is rarely, if ever, utilized by creditors. The complexity of the legislation governing the enforcement measure for creditors and debtors alike, the frequent and casual disregard of these orders by judgment debtors, the lack of consequences on the recalcitrant judgment debtor and the refusal of the justice system to uphold these types of payment orders may explain this avoidance.

As stated earlier, the *Arrest and Examinations Act* also allows a judgment creditor to obtain an order compelling the judgment debtor to be examined under oath before a judge or the clerk of the court. If such an examination has shown that the judgment debtor has the ability to pay, the judgment creditor can request an order that the debtor pay the amount of the judgment debt together with any enforcement costs forthwith or by instalments.²⁵⁵ Such orders can also be varied on application by the judgment debtor.²⁵⁶ Failure to comply with any order to pay issued under subsection 45(1) is also punishable by a finding of contempt of court.²⁵⁷

9.2 The case for reform and recommendations

With regards to enforcement remedies, the authors recommend that the *NBJEA* follow the same general principles of the *Saskatchewan Act* and the *Uniform Act*. Both Acts clarify the role of the enforcement officer, his or her powers and responsibilities and provide once again wide discretionary powers to realize the objectives of the *NBJEA* to efficiently recover outstanding amounts owing to judgment creditors while at the same time protecting judgment debtor interests.

For the most part, these Acts contain 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 also contain various provisions for the seizure and disposition of specific types of assets, such as licenses, corporate securities and property subject to family court exclusive possession orders. As noted by Cuming, the *Saskatchewan Act* has a fundamental policy goal: "except as otherwise specifically provided, all exigible property is subject to seizure and, when appropriate, to disposition in order to enforce a money judgment. Implementation of this policy entails giving to the sheriff a range of measures to effect seizure that vary according to the type of property being seized."²⁵⁸

9.2.1 Power of enforcement officer

Unlike the sheriff's current role within the judgment enforcement system, the *NBJEA* should clarify the enforcement officer's wide discretionary power and expressly provide a non-exhaustive list of such powers. Except as otherwise provided in the *NBJEA*, an enforcement officer who has seized exigible property would be able to, subject to any exemption,

²⁵⁰ *Arrest and Examinations Act*, *supra* note 25, s 29.1(5).

²⁵¹ *Ibid*, s 29.2(1).

²⁵² *Ibid*, s 29.4(1).

²⁵³ *Ibid*, s 29.4(4).

²⁵⁴ *Ibid*, s 29.5.

²⁵⁵ *Ibid*, s 45(1).

²⁵⁶ *Ibid*, s 45(6).

²⁵⁷ *Ibid*, s 45(9).

²⁵⁸ *Saskatchewan 2010 Report*, *supra* note 26 at 73.

exercise any power or right necessarily incidental to enforcement of a judgment with respect to the property or its disposition that the judgment debtor had at the date of seizure or acquires after the seizure until the property has been disposed of or the seizure terminated, including, but not limited to:

- (a) the power to assign or transfer an interest in property;
- (b) the power of election;
- (c) the powers of a beneficiary under a trust;
- (d) the power to give a release or discharge;
- (e) the power to collect an account;
- (f) the power to present an instrument or security for payment and receive payment;
- (g) the power to sue any person liable on an account, instrument or security in the name of the judgment debtor;
- (h) the power to negotiate an instrument or security; and
- (i) the power to take protective or conservatory measures, including effecting a registration relating to the judgment debtor's interest in the registry, the land titles registry or any other public registry.²⁵⁹

The power to seize and realize upon the judgment debtor's property as well as the above ancillary powers are subject, however, to the exigibility of the property and the amount of recovery required to satisfy the judgment. Hence, an enforcement officer may only seize exigible property sufficient to satisfy the amount owing with respect to any or all Notices of Enforcement as well as any amount payable to a person whose interest in or claim to exigible property or its proceeds has priority over an enforcement charge relating to a Notice of Enforcement.²⁶⁰

In addition, when the enforcement officer serves a Notice of Seizure, he or she may also serve directions, which may be amended or revoked, respecting the manner in which the person served shall or shall not deal with the property while it remains in their possession or control, or requiring the person served to deliver possession or control of the property to the enforcement officer. As a result, when property has been seized by the enforcement officer, the judgment debtor or other person affected can only deal with the property to the extent permitted by the enforcement officer. Statutory obligations may therefore be imposed on the person in possession of the judgment debtor's property, "including the obligation to hold or to surrender to the sheriff property of the debtor or property to which the debtor is entitled immediately or at some future time".²⁶¹

A person who fails to comply with the enforcement officer's directions, and any other person who assists that person, is liable to the judgment creditor for any loss this causes as well as any penalties contemplated by the Act.

9.2.2 Seizure of property

For the purpose of enforcing a judgment, an enforcement officer may seize any property of the judgment debtor that is subject to an enforcement charge. According to the principle of universal exigibility of the judgment debtor's property, the enforcement officer should be authorized to seize all types of property in order to sell it or, conceivably, realize its value in some other way. "Property" should therefore be defined in broad terms as (a) land, (b) personal property as defined in the *PPSA* and (c) any other right, claim, interest or thing that has realizable value.

²⁵⁹ *Saskatchewan Act*, *supra* note 3, s 38(1). See also *Saskatchewan 2010 Report*, *supra* note 26 at 73.

²⁶⁰ *Saskatchewan Act*, *supra* note 3, s 39.

²⁶¹ *Saskatchewan 2010 Report*, *supra* note 26 at 73.

In accordance with the general principles guiding this reform, in particular the objective to consolidate, streamline and clarify not only rights and obligations but procedures, the authors propose that the *NBJEA* adopt the *Uniform Act* and the *Saskatchewan Act*'s notion of "seizure"²⁶², a term used to encompass all judgment enforcement remedies provided by prior law. Pursuant to this legal innovation, "seizure" can be done in two ways, either (a) by taking physical possession of the property, or (b) by serving a Notice of Seizure on whoever has control of the property.

Except as otherwise specifically provided in the *NBJEA*²⁶³, an enforcement officer may seize exigible tangible property by taking physical possession of the property, by serving a notice, as prescribed, on the person in possession of the property or the land on which the property is situated or by posting the Notice of Seizure on the property or in a conspicuous place in close proximity to the property.²⁶⁴ In the case of intangible property, such as goods, chattel paper, a document of title, an instrument, money, a security, a futures contract, a licence or an account, the seizure would be accomplished by serving notice on the judgment debtor or by serving notice on the person whose obligation consists of the property or a portion of the property.²⁶⁵ In addition, the *Saskatchewan Act* permits steps other than those described in the Act as may be appropriate to the nature of the property.²⁶⁶ As a result, intangible property will always have to be seized by Notice of Seizure, but a Notice of Seizure can also be used for physical property if the enforcement officer wants to seize the property but leave it in the physical possession of the judgment debtor or another person.

As Cuming observed, these new provisions give a much greater significance to seizure by simple notice than was recognized by prior law since "[s]eizure by notice is the functional equivalent of seizure by taking possession or control in that it gives rise to obligations on the part of the person to whom the Notice of Seizure is given to recognize the control of the sheriff with respect to the property".²⁶⁷ Cuming further commented on "a very important innovation" in the *Saskatchewan Act*, which he described as:

the possibility of enforcement through seizure of a judgment debtor's interest [in] tangible personal property even though the judgment debtor does not have a right to possession of the property. Under prior law, a sheriff could not seize property owned by the judgment debtor under a writ of execution if to do so was to interfere with the possessory rights of a third party. This rule precluded execution against valuable property interests since the only method of effecting execution was for the sheriff to take possession or control of the property. Under the EMJA, seizure can be effected by a notice without physical seizure. Consequently, it need not involve interference with the rights of the person in possession of the property. This feature is particularly significant where the judgment debtor has title to property subject to the possessory rights of a lessee or buyer or where the property is a security interest in property of a person who is not the judgment debtor.²⁶⁸

9.2.3 Seizure of accounts owing to judgment debtor

As the FSOS of New Brunswick can most likely attest to, the best source of funds to satisfy a debt is the debtor's flow of future income. As a result, and given our recommendation that wages and income receive only limited protection against civil enforcement measures under the *NBJEA*, a key element of the proposed enforcement system is an expanded and streamlined procedure for seizure of surplus employment and other income or any other type of existing or future accounts owed to the judgment debtor.

²⁶² *Saskatchewan Act*, *supra* note 3, s 2(1)(ww).

²⁶³ See e.g. *ibid*, Part V; *Uniform Act*, *supra* note 4, Part 9. These legislative provisions provide specific rules applicable to the various forms of and interests in personal property such as goods, fixtures, crops, leases and contracts, securities and security entitlements, intellectual property and accounts. In addition, the enforcement officer would possess the discretion to take any steps as may be appropriate having regard to the nature of the property.

²⁶⁴ *Saskatchewan Act*, *supra* note 3, s 41; *Uniform Act*, *supra* note 4, s 52.

²⁶⁵ *Saskatchewan Act*, *supra* note 3, s 41; *Uniform Act*, *supra* note 4, s 52.

²⁶⁶ *Saskatchewan Act*, *supra* note 3, s 41(2)(g).

²⁶⁷ *Saskatchewan 2010 Report*, *supra* note 26 at 79.

²⁶⁸ *Ibid* at 85 [citation and footnote omitted]. See e.g. *Kinnear v Kinnear* (1924), 26 OWR 111 (Ont SC).

To attain this objective, the *Uniform Act* eliminates “garnishment” from judgment enforcement terminology, as does the *Saskatchewan Act*, replacing this enforcement remedy by the seizure of “accounts owing to the judgment debtor”²⁶⁹ or seizure of “existing and future accounts”.²⁷⁰ The *Newfoundland Act* and the *Alberta Act* both retain the term garnishment, as does the proposed 1994 *NBJEA*.

As with all types of property, the notion of “seizure” should apply to all types of accounts owing to a judgment debtor. It is therefore recommended that the *NBJEA* follow the *Saskatchewan Act*, which provides, as the title of Part VII clarifies, that seizure can be effectuated on present and future accounts and encompasses any monetary obligation due to the judgment debtor. As explained by Wickett,

[t]his includes insurance contracts, letters of credit, guarantee contracts, and indemnity contracts. It also includes accounts which are not in existence when the notice of seizure is served, but which come into existence within one year of delivery. This “all encompassing” feature of the seizure of present and future accounts provides clarity and flexibility that are significantly lacking under the current system.²⁷¹

With respect to the seizure of income, the authors recommend that the *NBJEA* adopt an approach similar to that found in the proposed 1994 *NBJEA*. This approach allows the enforcement officer to determine the exempt assets and income and to issue to the debtor an order to pay any surplus income over the assessed amount of exempted income. The instalment order would therefore create a personal duty on the debtor to pay the enforcement officer a portion of the income received. Consultation with the judgment debtor on the specific amount payable should be envisioned thereby ensuring the ultimate order reflects not only the debtor’s individual situation but the debtor’s possible wish to increase the proposed payment in order to satisfy the judgment earlier. Failure by the judgment debtor to respect the payment order would allow the enforcement officer to seize the income directly from the source without having to apply for a court order.²⁷²

FSOS’s success in garnishing employment income should provide a starting point in determining the infrastructure required to seize this type of property and the *Support Enforcement Act* and its regulations templates to be adapted for the *NBJEA*. As under the *Support Enforcement Act*, protection for the judgment debtor and the garnishee are recommended.²⁷³ Judgment debtors should be protected from dismissal or any other disciplinary action taken by the employer if the reason is related to the issuing of the payment order.²⁷⁴

In fact, it is recommended that the legislative provisions of the *Support Enforcement Act* and the *NBJEA* should comprise similar terminology and procedures. Although certain differences are expected given the nature of support orders and agreements, the administrative structure, procedures and documentation should be comparable from a judgment debtor’s and a garnishee’s perspective.

9.2.4 Disposition of seized property

Consistent with the guiding principle that judgment creditor involvement should be an option not a requirement, the enforcement officer’s wide discretionary powers should naturally be extended to the method of sale of seized property. The authors therefore recommend that the *NBJEA* afford enforcement officers the necessary discretion to dispose of seized property in the manner that the enforcement officer, acting reasonably, considers offers the best opportunity to maximize the

²⁶⁹ *Uniform Act*, *supra* note 4, Part 9 – Enforcement Proceedings Against Personal Property, Division 4.

²⁷⁰ *Saskatchewan Act*, *supra* note 3, Part VII.

²⁷¹ Amanda CC Wickett, “Goodbye Garnishment: A Legislative Note on Saskatchewan’s Proposed Approach to the Seizure of Present and Future Accounts” (2007) 70 Sask L Rev 183 at para 23; *Saskatchewan 2005 Report*, *supra* note 23 at 112-13; *Saskatchewan Act*, *supra* note 3, Part VII.

²⁷² *New Brunswick 1994 Report*, vol 1, *supra* note 15, 1994 *NBJEA*, ss 136, 166.3-166.4.

²⁷³ *Supra* note 7, s 17.

²⁷⁴ *Ibid*, s 21.

proceeds that may be anticipated from disposition. The enforcement officer should, however, be required to inform judgment creditors who stand to share the proceeds of the sale as to the method of sale chosen prior to the sale proceeding.²⁷⁵ A judgment creditor disagreeing with the enforcement officer's intended course of conduct could then take steps to obtain a court order directing the officer to proceed otherwise.²⁷⁶

The preferred approach to implement the above recommendation is found in the *Saskatchewan Act*. Although particular manners of disposition for various types of property or circumstances may be prescribed, subsection 98(1) provides that seized property shall be disposed of by the enforcement officer in a manner that is likely to realize the maximum proceeds reasonably recoverable under the circumstances, including by sale or lease. Cuming advanced the following arguments in favour of granting the discretion and resulting flexibility to the enforcement officer:

It reflects the conclusion that detailed requirements imposed on the sheriff are more likely to be counterproductive since they may preclude the sheriff from taking advantage of market conditions. For example, the sheriff may conclude that a sale of real property by a real estate agent or a sale of personal property without incurring the costs and delay of advertising is the manner of disposition most likely to bring the maximum proceeds reasonably recoverable in the circumstances. While this approach removes the "safe harbour" provided by statutory rules detailing the steps to be taken when disposing of collateral, in the great bulk of cases it is likely to be the most efficient way to obtain the maximum realizable value of the property.²⁷⁷

This discretionary power is restricted, however, by the Notice of Disposition requirement to all interested parties and the enforcement officer's statutory standard of conduct "to perform a function or duty or exercise a right or power [...] in good faith and in a commercially reasonable manner".²⁷⁸ The enforcement officer is further guided by the court's authority to order that property be disposed of for any price obtainable if the sheriff is unable to dispose of the property for an amount that the sheriff believes is a reasonable price or, even prohibit disposition if:

- i) it is unlikely that a disposition will produce sufficient proceeds to discharge the costs of obtaining the judgment and the costs of enforcement;
- ii) the property produces income or is likely to produce income that can be applied to satisfy the amount recoverable; or
- iii) for any other reason the court concludes that the disposition should not occur.²⁷⁹

The *Saskatchewan Act* further provides that a purchaser of the property would receive the same title as the judgment debtor possesses. In particular, a person who acquires an interest in property in good faith pursuant to a disposition by the enforcement officer takes the property free from the following interests:

- a) the interest of the judgment debtor;
- b) an interest subordinate to that of the judgment debtor;
- c) any enforcement charge affecting the property;

²⁷⁵ Effectively a blend of the *Uniform Act*, *supra* note 4, s 64(1) and the *New Brunswick 1994 Report*, vol 1, *supra* note 15, 1994 NBJEA, s 83(2).

²⁷⁶ See especially *Uniform Act*, *supra* note 4, s 64 (which provides judgment creditors such a right).

²⁷⁷ *Saskatchewan 2010 Report*, *supra* note 26 at 134.

²⁷⁸ *Saskatchewan Act*, *supra* note 3, s 115.

²⁷⁹ *Ibid*, s 98(2).

- d) an interest in personal property subordinate to an enforcement charge as provided in this Act;
- e) an interest in land subordinate to an enforcement charge as provided in *The Land Titles Act, 2000*.²⁸⁰

The advantages of the aforementioned statutory provisions are summarized by Williamson:

Thus, there will be no requirement that the Enforcement Officer disclose that the property is being sold as a result of enforcement proceedings. This approach treats the sale as if it were the debtor doing indirectly what he or she should have done directly; sell the property to satisfy the judgments. This approach should increase the amount realized from the debtor's property.²⁸¹

9.2.5 Sale of land

The *NBJEA* should specifically address the sale of land as a means of judgment enforcement. The present requirement that all exigible personal property be sold before enforcement against land can take place should be removed. Notwithstanding the removal of this limitation, the sale of land will remain, in most cases, a method of enforcement not taken lightly by a judgment creditor, for the costs associated will inevitably remain, as will the competing interest of mortgage lenders and co-owners which operate to reduce the actual potential of the land to satisfy the judgment debt. In addition, the sale of land would nonetheless be subject to the exemption for equity in a principle residence as previously recommended in Section 5.2.3 of this report.

It is further recommended that all joint tenancies be automatically severed by operation of the enforcement proceedings under of the *NBJEA* and that the joint owners be deemed to own equal shares in the land. The *NBJEA* should also provide an innocent co-owner the right to apply to court and rebut the presumption of equal ownership. The co-owner would have the right to purchase the judgment debtor's share at fair market value before a sale is made by the enforcement officer, as is provided for in the *Uniform Act*.²⁸²

In order to protect judgment debtor and third party interests in land, the authors recommend that the *NBJEA* provide for a waiting period before land can be sold to satisfy a judgment debt. The waiting period would allow a judgment debtor the opportunity to satisfy the judgment or come to an agreement with the enforcement officer or the judgment creditor to avoid the sale of land. Waiting periods of different lengths have been adopted in those provinces that have reformed their judgment enforcement laws. The *Saskatchewan Act* provides that interest in land cannot be sold before 12 months after the date of seizure²⁸³ whereas the *Alberta Act* provides seized land cannot be offered for sale until 180 days have elapsed since the judgment debtor has been served with documents advising of the intention to sell land to satisfy a judgment.²⁸⁴ In comparison, the *Newfoundland Act* provides that the sheriff cannot offer land for sale until 30 days have elapsed from the date on which the judgment debtor was served with notice that land would be sold and cannot actually sell land until 90 days have elapsed since the date of service.²⁸⁵

It is believed that a waiting period of six months should be sufficient for a judgment debtor to attempt to rearrange his or her affairs and satisfy the judgment or come to an agreement with the enforcement officer or his creditors so as to avoid the sale of land.²⁸⁶ Finally, the *NBJEA* should enable the court to shorten or extend the waiting period on application of an interested party.

²⁸⁰ *Ibid*, s 103(2).

²⁸¹ *New Brunswick 1994 Report*, vol 1, *supra* note 15 at 14.

²⁸² *Uniform Act*, *supra* note 4, s 144(1). See also *Saskatchewan Act*, *supra* note 3, s 49(5).

²⁸³ *Saskatchewan Act*, *ibid*, s 104.

²⁸⁴ *Alberta Act*, *supra* note 2, s 72(1).

²⁸⁵ *Newfoundland Act*, *supra* note 1, s 105(2).

²⁸⁶ *New Brunswick 1994 Report*, vol 1, *supra* note 15 at 13.

10. Distribution of proceeds of seized property

Once enforcement procedures have been completed, the issue then becomes how the proceeds of enforcement and the funds received by the enforcement officer directly from the judgment debtor or third parties are to be distributed. To this end, it has previously been recommended in Part 7 of this report on registration that only judgment creditors that have filed a Notice of Enforcement be eligible to participate in the distribution and share a distributable fund.

10.1 The current law in New Brunswick

Once priority is established between groups of encumbrance holders, funds are parceled out according to the principles of distribution expressed in the *Creditors Relief Act*. The judgment debtor's property is seized by the sheriff to such extent as is necessary and feasible to satisfy the orders of seizure and sale received from registered judgment creditors and, in some cases, the interest of other creditors such as preferred creditors or secured creditors if they possess a higher encumbrance on the property.²⁸⁷ All judgment creditors who have filed a Notice of Judgment under subsection 2.2(1) of the *Creditors Relief Act* are entitled to participate in the proceeds of distribution in addition to non-judgment creditors, who have obtained certificates under the Act.²⁸⁸

Distribution of proceeds among judgment creditors is contingent on the requirement that the sheriff "levy" money upon an execution against the property of a debtor.²⁸⁹ Dunlop explains that the notion of levy is dependent upon the actual seizure of property and any moneys received as a result whether by disposition or directly from the judgment debtor prior to the sale either by compulsion or negotiation.²⁹⁰ Accordingly, any money received from the debtor prior to seizure, even when resulting from the threat of an impending seizure, or by third parties on behalf of the debtor was not considered a levy and therefore not distributable among judgment creditors.²⁹¹

According to subsection 4(1), when the sheriff levies funds in excess of seven hundred and fifty dollars, he must proceed to make an entry into a journal for public inspection.²⁹² The sheriff must then hold the distributable fund for a period of one month during which additional creditors have an opportunity to file their Notice of Judgment or request a certificate under the Act in order to share in the proceeds.²⁹³ Section 19 of the *Creditors Relief Act* provides, however, that if any money is received from the judgment debtor prior to the sale of any seized property and no other creditor has filed a claim with the sheriff, the sheriff may pay the enforcing creditor without any public notice to other creditors.

In cases where there is sufficient property to satisfy all judgments, the issue of distribution and priorities becomes a moot point. However, as is often the case, the exigible property of a judgment debtor rarely allows for sufficient funds to pay all of the debts owed to judgment creditors and other encumbrance holders. In cases of insufficient amounts being realized by sheriffs, enforcement proceeds are applied first against the costs of execution and then shared, proportionally between judgment creditors.²⁹⁴

²⁸⁷ *Creditors Relief Act*, *supra* note 24, s 4(1).

²⁸⁸ See also *New Brunswick 1985 Report*, *supra* note 30 at 324. Under the present system, non judgment-creditors may obtain certificates through a summary procedure which allows for sharing of distribution proceeds or, alternatively, provides the certificate holder with the opportunity to take out his or her own writ against debtor property which is enforceable on its own terms. Williamson states, however, that the procedure is "rarely used, [and] that it is quite restricted under present legislation and that in some cases it does not save costs because it will result in full scale legal proceedings only in a different form".

²⁸⁹ *Creditors Relief Act*, *supra* note 24, s 4(1). The French version of the Act states: "Lorsqu'il perçoit une somme d'argent".

²⁹⁰ Dunlop, *supra* note 19 at 557-59.

²⁹¹ *Ibid* at 558.

²⁹² *Creditors Relief Act*, *supra* note 24, s 4(1).

²⁹³ *Ibid*, ss 4(1), 9(2).

²⁹⁴ *Ibid*, ss 3, 23.

Currently the regime in New Brunswick is most problematic in that the legislation on distribution excludes various assets of the debtor including payment orders, proceeds of equitable execution such as a receivership and, most notably, payments made by debtors to judgment creditors prior to seizure.²⁹⁵ In addition, the law remains uncertain whether all proceeds from garnishment obtained by a judgment creditor are for the benefit of the creditors entitled to *pro rata* sharing under the *Creditors Relief Act*, as suggested by subsection 35(3) of that Act, or whether such proceeds are only shared where the two statutory preconditions of the sheriff's right to apply for an attaching order are met.²⁹⁶

10.2 The case for reform and recommendations

In addition to the legal complexity not only of the mandated procedures but in the wording of the *Creditors Relief Act* itself, the adoption of personal property securities and land titles legislation further complicated the already disenfranchised legal roadmap to resolving priorities and distribution for judgment creditors. In response to these obstacles and guided by the principles of an efficient, effective and coherent enforcement system consolidated under one statute, modern judgment enforcement legislation invariably provides a complete code for distribution of a distributable fund to eligible claimants.²⁹⁷

Although these statutes are conceptually based on the repealed creditors' relief legislation, they provide a much more refined and effective judgment enforcement system.²⁹⁸ A centralized "distributable fund" administered and directed by an enforcement officer provides benefits for all judgment creditors regardless of the level of sophistication or experience. Moreover, it provides for a system where access to funding for legal representation does not provide a barrier or benefit to recovering funds. This will result in less expense as well as more timely and efficient access to judgment enforcement remedies leading to the satisfaction of judgments.²⁹⁹

10.2.1 Creation and composition of distributable fund

According to Williamson, one of the significant problems with the current legislative structure is its scope and the fact that "it is not broad enough from the standpoint of ensuring that the exigible property of a debtor is distributed *pro rata* among those creditors entitled to share".³⁰⁰ Of particular concern, as noted above, is the question of the exclusions of various types of property that are not currently seizable by the sheriff. The flaw of the current *Creditors Relief Act* is also well explained by Buckwold and Cuming:

One of the problems with *The Creditors' Relief Act* is the arbitrariness of its scope of application. It applies only if money has been levied by the sheriff against property of the judgment debtor. Since a levy occurs only when the sheriff receives money as a result of the seizure of a judgment debtor's property (whether or not there has been a sale), payments made to the sheriff before a seizure has occurred, payments made by the judgment debtor directly to the judgment creditor and payments made to the sheriff or judgment creditor by someone other than the judgment debtor are not distributable under the Act.³⁰¹

To address many of these problems, the time of creation of the distributable fund and its composition must first be examined.

²⁹⁵ *New Brunswick 1985 Report*, *supra* note 30 at 314.

²⁹⁶ See also *Creditors Relief Act*, *supra* note 24, s 35(1) (the sheriff may apply for an attaching order only where (1) there are in his hands "several executions and claims" and (2) "there are not, or do not appear to be, sufficient lands or goods to pay all and his own fees").

²⁹⁷ *Uniform Act*, *supra* note 4, s 184; *Saskatchewan Act*, *supra* note 4, s 110; *Alberta Act*, *supra* note 2, s 99; *Newfoundland Act*, *supra* note 1, s 154.

²⁹⁸ *Saskatchewan 2010 Report*, *supra* note 26 at 141. See also Robinson, *supra* note 50 at paras 8-14.

²⁹⁹ *Saskatchewan 2010 Report*, *supra* note 26 at 141.

³⁰⁰ *New Brunswick 1985 Report*, *supra* note 30 at 313.

³⁰¹ *Saskatchewan 2005 Report*, *supra* note 23 at 177-78.

A review of new judgment enforcement legislation establishes that the creation of a distributable fund is “constituted” when an enforcement officer actually receives money either in the form of a payment from the judgment debtor and third parties or proceeds from the disposition of seized property by the enforcement officer or a secured creditor.³⁰² For example, subsection 180(1) of the *Uniform Act* provides that a “distributable fund is constituted when an enforcement officer receives money toward satisfaction of a judgment in respect of which the enforcement officer has received a subsisting enforcement instruction”.

This finding then leads the analysis to the composition of the distributable fund which merits particular attention. Given the guiding principles of collective enforcement and universal exigibility of the judgment debtor’s property, the authors recommend that the *NBJEA* follow the New Brunswick 1976 and 1985 Reports which recommend that a distributable fund should include any receipt of money by the enforcement officer towards satisfaction of an enforcement, whether as a result of seizure, garnishment, voluntary payments or otherwise.³⁰³

These recommendations take shape in the form of clause 180(2)(a) of the *Uniform Act* which defines a distributable fund as comprising all money that is “received by an enforcement officer towards satisfaction of a judgment after the receipt of an enforcement instruction regardless of the source of the money [...] whether or not the money is received as a result of an enforcement proceeding in respect of a judgment debtor’s property”.³⁰⁴ Likewise, the *Saskatchewan Act* has cast a wide net in formulating its definition of a distributable fund which captures all “[m]oney received by the sheriff in relation to an enforcement charge, whether or not the money is received as a result of an enforcement measure, with respect to the judgment debtor’s property”.³⁰⁵

Both the *Uniform Act* and the *Saskatchewan Act* contain language surrounding the creation of a “distributable fund” which charts new territory as it relates to the collection, administration and distribution of funds. However, both Acts fall short in fully addressing the issue of money paid voluntarily by judgment debtors to judgment creditors and direct that only funds received “after giving an enforcement instruction” be included in the distributable fund. In particular, the *Saskatchewan Act* provides at subsection 170(3) that “a judgment creditor who receives any [...] payments after giving an enforcement instruction to the sheriff shall deliver any funds received to the sheriff, regardless of whether the enforcement instruction is a subsisting enforcement instruction at the time payment is received”. Cuming explains the policy reason behind the decision to authorize a judgment creditor to retain a payment from the judgment debtor before filing a Notice of Enforcement and yet require the same creditor to remit such payment once a notice is delivered to the enforcement officer as follows:

Clause 107(3)(a) is based on the policy conclusion that, once a judgment creditor has elected to invoke the judgment enforcement system by delivering an enforcement instruction, he or she cannot circumvent the system by retaining money paid directly to him or her by the judgment debtor or someone else. However, a judgment creditor who has not invoked the system, other than to register his or her judgment, is entitled to deal directly with the judgment debtor in seeking satisfaction of the judgment.³⁰⁶

The inapplicability of judgment enforcement legislation prior to the receipt of a Notice of Enforcement from each and every registered judgment creditor seems, however, to defeat not only the principles of collective enforcement and of pro rata distribution among eligible creditors but also of the universal exigibility of the judgment debtor’s property for all judgment creditors. Under those Acts, it would be “possible for a judgment creditor who has received payment of part of his or her judgment under circumstances in which the money need not be remitted to the sheriff [...] to

³⁰² *Saskatchewan Act*, *supra* note 3, s 107; *Alberta Act*, *supra* note 2, s 97; *Newfoundland Act*, *supra* note 1, s 151(1).

³⁰³ *New Brunswick 1976 Report*, *supra* note 16 at 32.

³⁰⁴ *Uniform Act*, *supra* note 4, s 180(2)(a).

³⁰⁵ *Saskatchewan Act*, *supra* note 3, s 107(2)(a).

³⁰⁶ *Saskatchewan 2010 Report*, *supra* note 26 at 143-44.

thereafter deliver an enforcement instruction and share with other judgment creditors in distribution of a fund".³⁰⁷

In the *New Brunswick 1985 Report*, Williamson notes that the underlying reason for allowing payments from debtors to judgment creditors outside of the scope of a distributable fund was to encourage negotiation between the parties and payments outside the enforcement system. He argues that this is inconsistent with the pro-rata sharing approach and that all voluntary payments should be remitted to the enforcement officer. He further explains that

[t]he desired result for the judgment debtor can be obtained just as easily in a manner that is consistent with both of these objectives. The binding of property by a judgment creditor is for the benefit of all the creditors entitled to share. [...] [B]inding and priority can be protected and continued by other creditors. The amount of the lien created is not limited just to the amount of the judgment for which that first Notice of Enforcement was issued. If the judgment debtor wishes to have his property released then he should negotiate with the Enforcement Officer.³⁰⁸

Allowing payments that are clearly outside of the scope of the distributable fund not only allows, subject to the *Assignment and Preferences Act*, but encourages unjust preferences.³⁰⁹ In agreement with these conclusions, it is therefore recommended that the *NBJEA* deviate from the limited application of the *Saskatchewan Act* and the *Uniform Act* and provide that any money received by registered judgment creditors must be reported to the enforcement officer and be considered as forfeited to the enforcement officer for inclusion in a distributable fund.

The *NBJEA* should therefore adopt the aforementioned all-encompassing definitions of "distributable fund" but enlarge its scope to include not only moneys received following the delivery of a Notice of Enforcement to the enforcement officer but rather following the filing of a Notice of Judgment in the *PPSA* Registry for the benefit of all judgement creditors.

10.2.2 Eligible claims, priority and distribution

Once the composition of the distributable fund is determined, the *NBJEA* must also prescribe which creditors can claim priority and which judgment creditors are eligible to share in the distributable fund.

According to the *Newfoundland Act*, only a registered judgment creditor "at the time the distributable fund is constituted and no other person has an eligible claim to that distributable fund".³¹⁰ As previously noted, a distributable fund in Newfoundland and Labrador is constituted when the enforcement officer receives the money, not when public notice of the receipt has posted.³¹¹

In comparison, sections 179 and 182 of the *Uniform Act* limit the access of a distributable fund to instructing judgment creditors, and all eligible claims are determined by the enforcement officer as of the time the distributable fund is constituted when an enforcement officer receives money after receipt of an enforcement instruction. However, as observed by the ULCC comment on this provision, "[b]etween the time of a seizure by an enforcement officer and the time that the enforcement officer receives proceeds from the sale or other disposition of the seized property, additional judgment creditors may deliver enforcement instructions to the enforcement officer and thereby become eligible claimants who are entitled to share in the distribution of the distributable fund under this Part".³¹²

³⁰⁷ *Ibid* at 144.

³⁰⁸ *New Brunswick 1985 Report*, *supra* note 30 at 318.

³⁰⁹ *Ibid* at 317-319.

³¹⁰ *Newfoundland Act*, *supra* note 1, s 153(1).

³¹¹ *Ibid*, s 151(1).

³¹² *British Columbia 2005 Report*, *supra* note 5 at 237-8.

Between these two options lies the *Saskatchewan Act*. Although that Act provides that only instructing judgment creditors are entitled to share in proceeds of enforcement proceedings, a sheriff must serve on any registered judgment creditor in the registry and who has not given an enforcement instruction to the sheriff a notice of the upcoming distribution of the fund in accordance with the period prescribed at section 108.³¹³ This notice affords registered judgment creditors the opportunity to provide the sheriff with enforcement instructions that will enable them to participate in the distribution. The 1994 *NBJEA* also provided a 30-day period to registered judgment creditors to declare their desire to share in the proceeds.³¹⁴

It would seem though that by limiting access to the distributable fund to judgment creditors whom have already given instructions to the enforcement officer, the priority given via registration to a judgment creditor above other subsequent charges on the judgment debtor's property would be in fact nullified. Accordingly, notice to all registered judgment creditors is recommended to enable all exigible claims to participate in the distribution. This does not resolve, however, the uncertainty mentioned above.

The desire to determine the total amount of eligible claims to be enforced prior to enforcement could nevertheless be achieved by requiring the enforcement officer to provide notice of the upcoming enforcement to all registered judgment creditors prior to enforcement proceedings. In reply to the enforcement officer's notice, registered judgment creditors would be permitted to file a Notice of Enforcement in accordance with the statutory requirements of the *NBJEA*, prior to the initiation of enforcement proceedings in order to share in the distributable fund. Any creditor omitting to reply to the enforcement officer's request or indicates a refusal to participate within the prescribed period would not be entitled to participate in the distribution.

If the distributable fund is constituted by the receipt of money that does not result from an enforcement proceeding such as a payment from the judgment debtor or the realization of a security interest, a similar notice to registered judgment creditors could be envisioned. In the event of the receipt of a regular stream of funds, such as the seizure of surplus income, additional registered judgment creditors would be able to share in the distributable fund and the enforcement officer, upon receipt of any additional Notices of Enforcement, would determine whether a new enforcement strategy is warranted. Should a revised strategy be recommended by the enforcement officer, notice must be given once again to all registered judgment creditors prior to the second enforcement proceeding. It is also recommended that the *NBJEA* adopt section 183 of the *Uniform Act* authorizing the enforcement officer to demand information about a claim from judgment creditors. This option still provides a sense of fairness to all registered judgment creditors like the *Saskatchewan Act* and the *Newfoundland Act* while enabling the enforcement officer to develop the most efficient and effective enforcement strategy for all enforcing judgment creditors prior to enforcement.

With regards to distribution, both the *British Columbia 2005 Report* and the Nova Scotia 2011 Report recommended substantial adoption of the distribution scheme and list of eligible claims provided by the *Uniform Act*. Language adopted by the *Saskatchewan Act* is substantially different although a careful reading would suggest that the order of distribution is very similar in nature.³¹⁵ Under the *Uniform Act*, all judgment creditors who have filed enforcement instructions are eligible to participate in the proceeds of the "distributable fund". According to subsection 184(1), eligible claims are identified and paid out as follows:

- 1) fees, taxable court costs and expenses of the enforcement officer earned or incurred in connection with the enforcement proceedings that relate to the money comprising the distributable fund, which amount must be paid to the enforcement officer or to the judgment creditor or other person to the extent that such fees, costs or expenses have been paid to the enforcement officer;

³¹³ *Saskatchewan Act*, *supra* note 3, s 109.

³¹⁴ *New Brunswick 1994 Report*, vol 1, *supra* note 15, 1994 *NBJEA*, ss 169-170.

³¹⁵ See also *Newfoundland Act*, *supra* note 1, s 154(1); *Alberta Act*, *supra* note 2, ss 99-100.

- 2) taxable court costs of a judgment creditor incurred in a proceeding to obtain a preservation order, a third person or interpleader proceeding, or any other application to the court attributed to money in the distributable fund;
- 3) exempt income or proceeds of disposition from the sale of property of exempt property of the judgment debtor to the judgment debtor;
- 4) the eligible claim of each instructing judgment creditor whose enforcement instruction led directly to the contribution of money to the distributable fund up to a prescribed amount;³¹⁶
- 5) eligible claims that by virtue of any other enactment or law in force are entitled to priority over the claims of judgment creditors generally;
- 6) eligible claims of judgment creditors paid on a *pro rata* basis who were parties to an interpleader proceeding to the extent that money in the distributable fund can be attributed to those proceedings;
- 7) taxable costs not falling within 1), 2) or 3), that are payable out of the distributable fund under a court order;
- 8) the remaining balance in the distributable fund is distributed on a *pro rata* basis among
 - i) judgment creditors to the extent of remaining balance of their eligible claims, and
 - ii) landlords, if at the time of seizure, they had a right of distress under landlord and tenant legislation;
- 9) any amount remaining must be paid to the judgment debtor or person entitled to it unless, prior to payment to the judgment debtor, the enforcement officer receives a new enforcement instruction

The aforementioned categories make up the list of eligible claims to the distributable fund under the *Uniform Act*. The functioning of the scheme is such that one category must be exhausted prior to distribution to the next category. Therefore all claims referenced in the first category must be paid out of the proceeds of the distributable fund prior to payment of eligible claims in the second category, and so forth.

Notwithstanding the procedural and substantive legal novelties proposed for the *NBJEA*, the authors opine that a similar scheme for the priority of exigible claims remains appropriate for the *NBJEA* with the omission of the third and fourth category. It is unclear why a judgment debtor's exempt income or proceeds of disposition from the sale of the judgment debtor's exempt property be included in the distributable fund if they are "exempt". In fact, none of the modern judgment enforcement legislation includes such a category.³¹⁷ In addition, the *NBJEA* does not require that any preference be given to judgment creditors whose enforcement instructions have led directly to the contribution of money to the distributable fund.

Guided by the principle of optional judgment creditor control and in the absence of any requirement to provide specific instructions or security for costs, the *NBJEA* does not task any judgment creditors with liability in terms of evaluating the enforcement options nor with making key decisions on enforcement measures. As a result, the "free rider problem" in other jurisdictions, where only some of the judgment creditors expend the effort and incur the risks associated with enforcement

³¹⁶ Section 184(1)d) provides that the instructing judgment creditor's claim cannot exceed the lesser of (i) the sum of \$2,000 plus 15% of the amount by which the remaining balance of the distributable fund exceeds \$15,000, or (ii) the amount of money in the distributable fund that is directly attributable to the enforcement proceeding of that instructing judgment creditor.

³¹⁷ See *Saskatchewan Act*, *supra* note 3, s 109; *Newfoundland Act*, *supra* note 1, s 154(1); *Alberta Act*, *supra* note 2, s 99.

proceedings, would not occur under the *NBJEA*.³¹⁸ The reward given to instructing judgment creditors under the other Acts is therefore neither required nor recommended under the *NBJEA*. Nevertheless, judgment creditors do have the option under the *NBJEA* to control the enforcement process and should not be penalized for their diligence and successful enforcement on behalf of all enforcement charges. As a result, their fees, costs and expenses should be prioritized to the same extent as those of the enforcement officer. These enforcement costs would be fixed and assessed by the enforcement officer, as is currently the case by the court or the clerk of the court.

As discussed in Part 8 on Priority of an enforcement charge, the interplay between categories 5 and 8 creates the possibility that security interests, which are perfected by registration, are interspersed by date and time of registration among enforcement charges. Lawyers and academics alike have taken issue with the percentage of distribution in the case of intervening secured creditors ranking among judgment creditors and must be examined under the auspices of equity and application of the *NBJEA*.

The fact that judgment creditors who register their judgments after a registered security interest are “allowed” to benefit from a priority created by the earlier registration by another judgment creditor does raise some form of unfairness. This is well illustrated in the following example offered by Walsh to explain priority among registered judgment creditors where there is an intervening registered security:

Suppose, for instance, that Judgment Creditor A registers a judgment against Debtor for \$10,000. Secured Party subsequently takes and registers a security interest against all Debtor’s present and after-acquired personal property to secure a \$20,000 loan. Judgment Creditors B and C then register their judgments. In this scenario, Creditor A has priority over Secured Party to the extent of \$10,000. But because the security interest is perfected by the time that Creditors B and C enter the picture, Secured Creditor has priority over them to the extent of the \$20,000 secured loan. Nonetheless, Creditors B and C, by virtue of their sharing rights under the *Creditors Relief Act* are entitled to share pro rata in Creditor A’s \$10,000 priority over Secured Party.³¹⁹

For Creditor A in Walsh’s example, having to share the \$10,000 priority he or she diligently secured with two other judgment creditors is disconcerting, especially if Creditors B and C have substantially higher judgment. Creditor A may indeed receive the lowest portion of the funds available to the class he created, while the intervening Secured Party retains priority for the next \$20,000 available from Debtor. This effectively creates a scenario where the first registered creditor may end up getting less money than all other creditors who have registered subsequently.

As such, some have advocated that the common law “first come, first serve” system that preceded creditors’ relief legislation was fairer. While such a system certainly would be “fairer” to Creditor A in Walsh’s scenario, the system can create other unfairness. For example, Creditor A may have easily obtained a default judgment because Debtor neglected or was unable to defend his claim. Meanwhile, Creditors B and C may have initiated legal action long before Creditor A, but were not able to obtain quick judgment, either because Debtor defended those claims or because their claims were not for liquidated damages, which denied them the ability to obtain a default judgment and forced them to conduct a trial on damages, all of which necessarily require more time.³²⁰ In such circumstances, Creditor A may be “first in time” only because of the particular circumstances that prevailed. It can also be argued that a first in time system inevitably favours creditors with greater financial means who can react more rapidly and secure the necessary legal services to obtain a judgment as quickly as feasible over those less fortunate creditors who, although diligent, may not be able to act with the same dispatch.

³¹⁸ *Saskatchewan 2010 Report*, *supra* note 26 at 149.

³¹⁹ Walsh, *supra* note 130 at 112.

³²⁰ *Rules of Court*, *supra* note 25, r 21.04-21.06.

Others argue that the relatively good position of Secured Party in Walsh's example is also unfair. Indeed, current law allows Secured Party to establish a second ranking to all future judgment creditors to the extent of the \$10,000 judgment value registered by Creditor A. While Secured Creditor afforded credit to Debtor with full knowledge of the outstanding judgment, he may have also acted with full knowledge of the pending, yet unadjudicated, claims of Creditor B and C, claims which may have been for substantial sums born of long existing obligations. However, the authors would argue that any system, which would create a priority for all undeclared judgment creditors without any cap, would thwart economic activity that is dependent on the accessibility of credit.

It would appear that the modern approach to dealing with two sets of interests on property is to provide for a reconciliation of both interests to the possible detriment of judgment creditors. While it may be argued that this treatment is an erosion of the rights of judgment creditors, it may also be argued that it is simply a strict application of the principle guiding the *NBJEA* that there shall be no priorities established between judgment creditors in enforcement legislation.

Finally, once enforcement proceedings are completed and the order of distribution determined, the enforcement officer should be required to prepare a Notice of Distribution indicating the total amount of the distributable fund and the amount received by each eligible claim under the *NBJEA*. The Notice of Distribution must be served on all interested parties. Section 187 of the *Uniform Act* enumerates the following parties:

- (a) the judgment debtor;
- (b) judgment creditors with eligible claims;
- (c) a secured party, lien holder or person with an interest referred to in section 181 (2);
- (d) a person with a security interest that was subordinate to the enforcement charge on personal property of the judgment debtor that was sold in an enforcement proceeding that led directly to the contribution of funds to the distributable fund; and
- (e) any person with a registered interest in the land of the judgment debtor that was extinguished by a sale of the land in an enforcement proceeding that led directly to the contribution of funds to the distributable fund.³²¹

Where the amount of the distributable fund is less than the total amount of all eligible claims, a statutory grace period for distribution of proceeds should also be contemplated to allow the above parties or any other person to object to the distribution scheme or aspects of it by giving a Notice of Objection to the enforcement officer within a prescribed period.³²² Once the period of grace allowed for any objections to the distribution scheme has expired and, where the amount of the distributable fund exceeds the amount required to make all payments, the funds can be distributed accordingly.³²³ Finally, objections can then be dealt with according to the *NBJEA*.

³²¹ See also *Alberta Act*, *supra* note 2, s 99; *Newfoundland Act*, *supra* note 1, s 154; *Saskatchewan Act*, *supra* note 3, s 110.

³²² *Uniform Act*, *supra* note 4, s 188; *Alberta Act*, *supra* note 2, s 101; *Newfoundland Act*, *supra* note 1, ss 156, 159; *Saskatchewan Act*, *supra* note 3, s 111.

³²³ *Uniform Act*, *supra* note 4, s 185; *Alberta Act*, *supra* note 2, s 101; *Newfoundland Act*, *supra* note 1, ss 154, 159; *Saskatchewan Act*, *supra* note 3, s 108. Exceptions are made pursuant to s 186 of the *Uniform Act* for funds in excess of \$2,000 or situations where two or more judgment creditors have claims in excess of the distribution fund.

11. Appointment of receivers

11.1 The current law in New Brunswick

On many occasions, ordinary enforcement measures and examinations in aid of execution yield nothing more than many undertakings that are never fulfilled or fulfilled without substance. Nonetheless, the creditor may be able to identify an asset while at the same time show the debtor's lack of co-operation. For example, the debtor may have an interest in a deceased's estate or the debtor may have set up a series of holding companies to shelter his or her assets and to pay his or her expenses.

Where the judgment creditor can show that enforcement remedies are unavailable or unduly complex as a result of impediments, he or she can apply for the appointment of a receiver. This remedy is also called equitable execution and is a form of equitable relief granted by the court in the situation where ordinary legal execution, although available, would be ineffective.

The relief granted by the court is the appointment of a receiver over specific property. It is an appointment by way of equitable execution initiated through a motion in the same action and after judgment has been obtained. In New Brunswick, the appointment of a receiver to facilitate the enforcement of a judgment is provided for under Rule 41.02(1)b) of the *Rules of Court*.

The appointment of a receiver by equitable execution is a means of reaching assets that are not otherwise exigible. There must be a legal right of the creditor to be paid out of the particular asset that the creditor cannot reach without aid of the equitable jurisdiction of the court. The appointment of a receiver is within the sole discretion of the court and the moving party must demonstrate that it is "just or convenient to do so". Accordingly, a receiver will not be appointed where it is wholly unnecessary; that is, where another remedy (i.e., ordinary enforcement methods, such as seizure and sale, garnishment or charging order) is available to the creditor or there are nominal assets to seize. A receiver will not be appointed unless there is clear evidence that there is some asset and that some benefit will be derived from the appointment of the receiver.

Generally, the court will appoint a receiver when garnishment is impractical, when the debtor has sheltered assets and when the debtor has arranged his or her affairs in such a way that ordinary means of execution are rendered useless. In these cases, the appointment can be very effective. However, it appears that the remedy is rarely utilized, no doubt in light of the additional cost that it entails, but arguably because the remedy appears to be available only when ordinary enforcement measures have failed or would clearly be ineffective.³²⁴

11.2 The case for reform and recommendations

Although Rule 41.02 allows creditors to obtain an order appointing a receiver in aid of judgment enforcement, there is merit in making this enforcement remedy a part of the *NBJEA* with codification and simplification of the principles governing the exercise of the court's discretion to grant this remedy. The need for the remedy of receivership is diminished under a modern judgment enforcement statute, which adopts the principle of universal exigibility. However, receivership can still play a vital role in judgment enforcement as circumstances may make enforcement more efficient through receivership than through ordinary enforcement measures.

The authors therefore recommend that the *NBJEA* adopt in substance Part 13 of the *Uniform Act*. This would make receivership for purposes of judgment enforcement an efficient and effective enforcement tool where the circumstances warrant it.

The *Uniform Act*, which provides that the court may appoint a receiver over all or specified property of the judgment debtor, is preferred over the *Saskatchewan Act*, which appears more restrictive by allowing the court only to appoint a receiver over specified property.³²⁵ The authors believe that

³²⁴ There is little case law in New Brunswick on the appointment of receivers.

³²⁵ *Uniform Act*, *supra* note 4, s 170(1); *Saskatchewan Act*, *supra* note 3, s 72(1)(a).

courts should be allowed more discretion as to the scope of any receivership order so as to prevent repeated appearances if problems are encountered.

The receiver could thus be appointed over all exigible property, subject only to property expressly exempted by the Act. The *NBJEA* would also provide those circumstances to be assessed by the courts in deciding whether a receiver should be appointed. Under the *Uniform Act*, those circumstances are:

- (a) whether an appointment of a receiver is an effective means of realizing on the property;
- (b) the practicability of enforcing the judgment through other enforcement proceedings under this Act;
- (c) whether the money that a receiver may reasonably be expected to realize from the property of the judgment debtor is likely to be sufficient to:
 - i) pay the costs relating to the appointment, supervision and discharge of the receiver,
 - ii) pay the expenses and remuneration of the receiver,
 - iii) pay the fees, taxable costs and expenses of the enforcement officer with regard to distribution of money realized by the receiver, and
 - iv) provide money for distribution among those judgment creditors who have an eligible claim [...];
- (d) the conduct of the judgment debtor or other person that has made enforcement of the judgment more difficult or costly; and
- (e) the extent to which the appointment of a receiver may result in undue hardship or prejudice to the judgment debtor, a dependant of the judgment debtor or to a person in possession or control of property of the judgment debtor.³²⁶

The adoption of the *Uniform Act* provisions also makes it clear that receivership is not available only when all other methods of enforcement have failed or are clearly impractical, but rather when it is just and convenient to order the receivership in light of the above quoted circumstances.

The *NBJEA* should also give the court discretion to grant the receiver those powers that are necessary to carry out his or her mandate, but would also provide a non-exhaustive list of powers that the court could grant, similar to what is currently found at Rule 41.05d) of the *Rules of Court*.

³²⁶ *Uniform Act*, *supra* note 4, s 172.

12. Conclusion

In light of political reality, any proposed system of creditor's remedies will have to strike a careful balance between the interest of the creditor and that of the debtor. It will have to offer the creditor a real possibility of collection while at the same time assuring the debtor that he will not be subjected to abuse.³²⁷

The *NBJEA* contemplates a grant of wide discretionary powers within the limits of the Act, subject to judicial review, to a new enforcement office and its enforcement officers with the objective and the hope that the new judgment enforcement system will create and maintain equilibrium between judgment creditor and debtor rights and interests.

Current law in New Brunswick dealing with judgment execution is in dire need of reform. Reports from this province as well as numerous others highlight the significant deficiencies and problems with the present system. To date, three provinces have taken steps to improve the situation for creditors, debtors and practitioners.

As stated at the outset of this report, our aim was to analyse specific issues within New Brunswick's current legal judgment enforcement regime in comparison to the *Uniform Act* and enacted legislation in Canada in order to determine the best solution for the province.

It is believed that this report has also provided additional elements to further the important debate that must take place in the wake of the modernization of our province's judgment enforcement system. Comments and discussions are encouraged on the issues addressed in this report as well as the proposals and recommendations contained therein. An invitation has already been issued by the Legislative Services Branch of the Office of the Attorney General for "any comments on the issues that a new *Enforcement of Money Judgments Act* should or should not address, or on the details of what it should or should not say".³²⁸

In conclusion, the authors hope that the current government maintains its current goal to enact a modern *NBJEA* and that this report will help the province achieve its objective.

³²⁷ *New Brunswick 1976 Report*, *supra* note 16 at 239.

³²⁸ New Brunswick, Office of the Attorney General, *Law Reform Notes* #30, (Fredericton, Office of the Attorney General, December 2011) at 2. Their contact information is as follows:

Legislative Services Branch, Office of the Attorney General
 Room 111, Centennial Building
 P.O. Box 6000, Fredericton, N.B., Canada E3B 5H1
 Tel.: (506) 453-6542; Fax: (506) 457-7342
 E-mail: lawreform-reformedudroit@gnb.ca

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