THE NEW BRUNSWICK JUDGMENT ENFORCEMENT ACT: HAS ITS TIME FINALLY COME?

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1. 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, thus forcing the plaintiff to undertake additional proceedings to overcome additional obstacles on the path to debt recovery. According to the British Columbia Law Institute, these legal impediments "can be as time-consuming, elaborate, and expensive as the steps required to establish liability".[2] 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.[3]

Although the mandate of the New Brunswick Department of Justice and Consumer Affairs is to promote the impartial administration of justice and to ensure

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[2] British Columbia Law Institute, *Report on the Uniform Civil Enforcement of Money Judgments Act*, BCLI Report no 37, (Vancouver: British Columbia Law Institute, 2005), online: BCLI <http://www.bcli.org/bclrg/projects/uniform-civil-enforcement-money-judgments-act > at 1 [*British Columbia 2005 Report*].

[3] Ontario Ministry of the Attorney General, *Ontario Civil Justice Review* (Supplemental and Final Report), (Toronto: Ontario Civil Justice Review, 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> [*Ontario 1996 Report*].

protection of the public interest,[4] 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.[5] 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, their confidence in the system is damaged, and thus becomes a matter of public interest.[6]

The Law Reform Commission of Nova Scotia recently emphasized the vital role of judgment enforcement law within our justice system, and its impact on the public's confidence in the civil justice system:

> An enforcement system that is unduly complicated or costly, or that simply fails to deliver results, is certain to undermine the confidence of the public and foster cynicism about the administration of justice. Put simply, it is the responsibility of the state - part and parcel of the duty to maintain and promote the rule of law - to uphold its courts' judgments with strong and effective enforcement action.[7]

This declaration reflects a growing consensus in Canada on the types of reform necessary to create a "modern, efficient and balanced enforcement system".[8] This is in addition to three New Brunswick 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 via the enactment of modern judgment enforcement legislation. Kerr observed, in 1976, 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

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[4] New Brunswick Justice and Consumer Affairs, *Mandates*, online: New Brunswick Government <http://www2.gnb.ca/content/gnb/en/contacts/dept_renderer.146.1418.html#mandates>.

[5] *British Columbia 2005 Report*, *supra* note 2 at 1.

[6] *Ontario 1996 Report*, *supra* note 3.

[7] Nova Scotia Law Reform Commission, *Enforcement of Civil Judgments* (Discussion Paper), (Halifax: Law Reform Commission of Nova Scotia, 2011) at 7, online: Law Reform Commission of Nova Scotia <http://www.lawreform.ns.ca/Downloads/Enforcement%20of%20Civil%20Judgments%20-%20Discussion%20Paper.pdf> [*Nova Scotia 2011 Report*].

[8] New Brunswick Office of the Attorney General, *The Proposed New Brunswick Enforcement Act* (Executive Summary and Proposed Act), (Fredericton: Law Reform Branch, 1994), vol 1 at 6 [*New Brunswick 1994 Report*].

recognized debts from recalcitrant judgment debtors while, on the other hand, protects cooperative debtors who simply do not have the means to pay.[9]

To this end, three other provinces - Newfoundland and Labrador,[10] Alberta[11] and Saskatchewan -[12] 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*[13] in 2004, which was endorsed, albeit with reservations, by the British Columbia Law Institute in 2005 and the Law Reform Commission of Nova Scotia in 2011.[14]

Although a complete historical and legal analysis of judgment enforcement law is outside the scope of this study, this article aims to examine various issues within New Brunswick's current legal and administrative framework by reviewing current legislation in other provinces as well as the *Uniform Act* and the judgment enforcement act proposed in the province's 1994 report. The authors conclude that a new approach is fundamental to a fair, just, efficient, effective, impartial and accessible system of justice in our province and therefore recommend the enactment of the *New Brunswick Judgment Enforcement Act* ("*NBJEA*").[15]

1.1 The current judgment enforcement system in New Brunswick

Since the province's last report on this issue in 1994, 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 a new legal regime governing security interests pursuant to the *Personal Property Security Act*[16]

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[9] New Brunswick Ministry of Justice, *Legal Remedies of the Unsecured Creditor after Judgment* by Karl J Dore & Robert W Kerr (Fredericton: Government of New Brunswick, 1976) vol II at 240-241 [*New Brunswick 1976 Report*].

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

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

[12] *The Enforcement of Money Judgments Act*, SS 2010, c E-9.22 [*Saskatchewan Act*]. Although the Act was assented to May 20, 2010 is had not been proclaimed as of March 28, 2012.

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

[14] *British Columbia 2005 Report*, *supra* note 2 and *Nova Scotia 2011 Report*, *supra* note 7.

[15] See: Alberta Law Reform Institute, *Enforcement of Money Judgments* (Report), (Edmonton: ALRI, 1991), vol 1 at 3 [*Alberta 1991 Report*]; *British Columbia 2005 Report*, *supra* note 2 at 1.

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

("*PPSA*"), such as the creation of a central computerized personal property registry ("*PPSA* Registry") as well as the registration of judgments and elimination of the need to pursue judgment enforcement proceedings in order to assert priority as against a secured party.

Given that a debtor often has both secured and unsecured debts, it is anomalous that legislative reform has up to now privileged one set of creditors.[17] Although complementary provisions were added to the *Creditors Relief Act*[18] as an interim step pending the introduction of a new judgment enforcement system, unsecured creditors must rely to this day on an assortment of new and old legislation, which dates back to the 19th century. In fact, the necessity and importance of 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:

> 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 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.[19]

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* ("*Rules of Court*") in order to determine their rights and obligations.[20] The current collection of statutes on this issue is not only numerous, but also comprised mostly of antiquated, fragmented,

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[17] Tamara M Buckwold & Ronald CC Cuming, *Modernization of Saskatchewan Money Judgment Enforcement Law* (Final Report) (University of Saskatchewan, 2005) at 1, online: Government of Saskatchewan <http://www.qp.gov.sk.ca/orphan/JE_Final_Report.pdf> [*Saskatchewan 2005 Report*].

[18] *Creditors Relief Act*, RSNB 1973, c C-33 .

[19] *New Brunswick 1976 Report*, *supra* note 9 at 233. See also: Dunlop, a leading academic in the field, corroborating this conclusion: Charles RB Dunlop, *Creditor-Debtor Law in* Canada, 2d ed (Toronto: Carswell, 1995) at 9 [Dunlop], which is also cited in *British Columbia 2005 Report*, *supra* note 2 at 9.

[20] See: *Creditors Relief Act*, *supra* note 18; *Garnishee Act*, RSNB 1973, c G-2; *Arrest and Examinations Act*, RSNB 1973, c A-12; *PPSA*, *supra* note 16; *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*].

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.[21]

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".[22] 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.[23] Survey research in Nova Scotia evaluating the Small Claims Court revealed that the most significant element in need of reform was the "complexity and expense of collection efforts following judgments".[24] It would be most surprising if the majority of judgment creditors in the province of New Brunswick would not express a similar complaint.

1.2 Basic principles

Given the objective to institute a modern, uniform, coordinated, efficient, and flexible judgment enforcement system, which will balance the interests of both creditors and debtors in a manner that is just and equitable, it is recommended that several overriding principles be endorsed and embraced by the *NBJEA*.[25] These principles permeate the authors' analysis as well as the resulting recommendations and judgment enforcement system proposed herein.

1.2.1 An effective enforcement system

Remedies are important to enable judgment creditors to overcome the repudiation of the debt by judgment debtors.[26] As postulated by the British Columbia Law Institute, a just and effective judgment enforcement system must strive to provide legal tools

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[21] Ronald CC Cuming, *The Enforcement of Money Judgments Act SS 2010, c E-9.22* (Analysis and Commentary, Version 1(c)) (University of Saskatchewan, 2010) at 4, online: Government of Saskatchewan <http://www.qp.gov.sk.ca/documents/misc-publications/emjabook-v1c.pdf> [*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*.

[22] *British Columbia 2005 Report*, *supra* note 2 at 11.

[23] *New Brunswick 1994 Report*, *supra* note 8, vol 1 at 3-4.

[24] *Nova Scotia 2011 Report*, *supra* note 7 at 8.

[25] New Brunswick Office of the Attorney General, *Proposal for a System of Enforcement of Judgment Debts* (Executive Summary) by John R Williamson (Fredericton: Office of the Attorney General of New Brunswick, 1985) at 5 [*New Brunswick 1985 Report*]. See also: *Saskatchewan 2005 Report*, *supra* note 17 at 3; *Nova Scotia 2011 Report*, *supra* note 7 at 6.

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

for judgment creditors to overcome the obstinacy of judgment debtors.[27] In order to promote fairness among creditors, universal exigibility should also be prioritized such that all a debtor's property should be subject to enforcement measures except property that is expressly exempted in the statute.[28]

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

In 2004, the Alberta Law Reform Institute reviewed the consolidation of the judgment enforcement system enacted in 1994 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."[29] 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"[30] and recommended the integration of all enforcement-related matters under one legislation. Their rationale was that if the law is concentrated in one place it is more likely to be coherent and integrated, and that such consolidation would make the job of the researcher easier and therefore less expensive and uncertain.[31]

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 judgments statute. By consolidating all rules and legal principles related 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.[32]

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[27] *British Columbia 2005 Report*, *supra* note 2 at 1.

[28] *Alberta 1991 Report*, *supra* note 15 at 24-25; *Nova Scotia 2011 Report*, *supra* note 7 at 6; *Saskatchewan 2005 Report*, *supra* note 17 at 3; *British Columbia 2005 Report*, *supra* note 2 at 16; Manitoba Law Reform Commission, *Review of the Garnishment Act* (Report), (Winnipeg: Manitoba Law Reform Commission, 2005) at 10.

[29] *Alberta 2004 Report*, *supra* note 26 at 7.

[30] *Ibid* at 23.

[31] *Ibid* at xv and 8.

[32] See: *Alberta 1991 Report*, *supra* note 15; *Nova Scotia 2011 Report*, *supra* note 7 at 6, 28; *Saskatchewan 2005 Report*, *supra* note 17 at 2-3; *British Columbia 2005 Report*, *supra* note 2 at 16, 18.

1.2.3 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.[33] Several underlying reasons for this principle 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.[34]

1.2.4 Limited judicial supervision

Once judgment is granted, an effective and efficient judgment enforcement system should strive to minimize judicial involvement and ensure that remedies are immediately available, thus enabling a judgment creditor "to immediately realize upon it, through the appropriate remedies, without returning to court for an additional order".[35] 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.[36]

1.2.5 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.[37] To attain this objective from both a creditor's and a debtor's point of view, the judgment enforcement

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[33] *Alberta 1991 Report*, *supra* note 15; *Nova Scotia 2011 Report*, *supra* note 7 at 6.

[34] *Saskatchewan 2005 Report*, *supra* note 17 at 4-5.

[35] *Nova Scotia 2011 Report*, *supra* note 7 at 6, citing *Alberta 2004 Report*, *supra* note 26 at xiv.

[36] *Saskatchewan 2005 Report*, *supra* note 17 at 8; *Alberta 1991 Report*, *supra* note 15 at 3, 27-28; *Nova Scotia 2011 Report*, *supra* note 7 at 6; *British Columbia 2005 Report*, *supra* note 2 at 16. See also: *Alberta Act*, *supra* note 11, s 5; *Newfoundland Act*, *supra* note 10, s 11; *Saskatchewan Act*, *supra* note 12, s 114; *Uniform Act*, *supra* note 13, s 7.

[37] *New Brunswick 1976 Report*, *supra* note 9 at 240.

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".[38]

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."[39] 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.[40]

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".[41] It is therefore recommended that the *NBJEA* provide mechanisms to resolve disputes arising during the enforcement process.[42] 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 a prescribed period 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 the enforcement officer's determination would be final unless a court order is obtained.

1.2.6 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

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[38] *Ibid* at 240-41.

[39] *Saskatchewan 2005 Report*, *supra* note 17 at 2.

[40] *Alberta 1991 Report*, *supra* note 15, vol 1 at 254; *Nova Scotia 2011 Report*, *supra* note 7 at 26-27; and *British Columbia 2005 Report*, *supra* note 2 at 1.

[41] *Saskatchewan 2005 Report*, *supra* note 17 at 8.

[42] Notwithstanding its 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.

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 prorate basis.[43]

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 among all judgment creditors entitled by the statute to share.[44] 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 once again included 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.[45]

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 subject[46] further confirms that this principle should continue to guide the *NBJEA* and its provisions.

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[43] *New Brunswick 1985 Report*, *supra* note 25 at 308.

[44] Dunlop, *supra* note 19 at 415-17. See also: Saskatchewan 2010 Report, *supra* note 21 at 141. See also 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 [*Robinson*]. A review of the history and objectives of the *Creditors Relief Act* was also undertaken by Williamson in the *New Brunswick 1985 Report*, *supra* note 25 at 308-313.

[45] *Saskatchewan 2010 Report*, *supra* note 21 at 141. See also *Robinson*, *supra* note 44.

[46] *Saskatchewan 2005 Report*, *supra* note 17 at 3; *British Columbia 2005 Report*, *supra* note 2 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 25 at 310, was Law Reform Commission of British Columbia, *Report on Attachment of Debts Act* (Victoria: Law Reform Commission of British Columbia, 1976).

1.2.7 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 single, multifaceted and integrated approach replaces the plethora of current remedies with a single enforcement remedy: seizure of assets. Seizure may be accomplished either by the sheriff directly or by a receiver appointed by the court in appropriate circumstances for that purpose.[47] In either case, the type of asset no longer determines the remedy available to the judgment creditor. Rather, a judgment can be enforced either by actual physical seizure of the property or by Notice of Seizure on a person in possession or control of the asset, which can have the same legal impact as an actual seizure.

In addition, a unitary approach to enforcement and the principle of proportionate sharing among judgment creditors naturally leads 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 who have filed a Notice of Enforcement. The prerequisite to provide detailed enforcement instructions to the Sheriff 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*.

1.2.8 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

[47] *Saskatchewan 2005 Report, supra* note 17 at 8. See also *British Columbia 2005 Report, supra* note 2 at 16, describing the *Uniform Act*. The *Newfoundland Act, supra* note 10 and the *Alberta Act, supra* note 11 also make great strides in this direction even though both statutes preserve garnishment as a distinct remedy, operating alongside seizure of assets.

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."[48]

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 judgment creditors, unsophisticated or otherwise, must resort to enforcement services, they should not be compelled to dictate every detail of the enforcement proceedings. A choice should therefore 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*. It is expected, however, that most creditors will rely on the expertise and experience of the enforcement office.

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 and exempt property before embarking on a review of the proposed structure, administration and procedures contemplated for the *NBJEA*.

2. PRESERVING JUDGMENT CREDITOR INTERESTS

2.1 The current law in New Brunswick

Prejudgment remedies are pre-emptive legal devices designed to assist a creditor in protecting the debtor's assets from illegitimate disposition or removal from jurisdiction pending the adjudication of the claim for damages so that the debtor's exigible 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).

The Mareva injunction (sometimes also referred to as a "freezing order") takes its name 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,

[48] *New Brunswick 1976 Report, supra* note 9 at 253.

the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets".[49]

In its leading decision on the subject, *Aetna Financial Services Ltd v Feigelman*,[50] 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"[51] and that there must be assets of the defendant susceptible to execution, and 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".[52] The overriding consideration is whether the defendant has 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".[53]

In New Brunswick, this equitable remedy is also governed 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".[54]

The New Brunswick Court of Appeal held, 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

[49] *Mareva Campania Naviera SA v International Bulk Carriers SA*, [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.

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

[51] *Ibid* at para 30.

[52] *Ibid* at para 25.

[53] *Ibid.*

[54] *Rules of Court, supra* note 20, r 40.03(1).

> 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.[55]

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.[56]

Rule 40.03, however, does not address relief ancillary to these injunctions, leaving some doubt as to the court's jurisdiction to make any such orders, even though circumstances may be such that a creditor cannot fully ascertain which specific assets should be covered by the order without obtaining this information from third parties or directly from the debtor.[57]

In New Brunswick, garnishment of debts owed to judgment debtors is not available before judgment, except as provided by the *Absconding Debtors Act*.[58] 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. However, it is a relatively unused statute.[59]

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[55] *Canadian Imperial Bank of Commerce v Price* (1987), 81 NBR (2d) 181 (CA) at 187-88 [*Price*].

[56] In *Aetna Financial Services, supra* note 50 at paras 41-43, the Supreme Court of Canada ultimately found that a Mareva 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.

[57] *A J Bekhor & Co Ltd v Bilton*, [1981] 2 All ER 565, at 576.

[58] *Absconding Debtors Act, supra* note 20, s 2.

[59] There appear to be less than 10 reported decisions dealing with the *Absconding Debtors Act*.

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.[60] However, the remedy is limited to claims for a "debt or liquidated demand". To prevent abuse, courts require strict observance of the statutory requirements set down to govern such orders. In some jurisdictions, a plaintiff will need to satisfy the court that he will likely suffer prejudice if the prejudgment attaching order is not granted.[61] The property subject to a prejudgment attaching order is generally the same as that caught by a post judgment garnishing order.

2.2 The case for reform and recommendation

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. Since one of the objectives of the NBEJA is to create a coherent, comprehensive and consolidated system of judgment enforcement, it is only fitting that prejudgment remedies be included, allowing all available avenues in one single piece of legislation governing the requirements 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 a "preservation order"[62], replacing Mareva injunctions and including the possibility of attaching debts before judgment.

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 or give the applicant a security interest in the assets.[63] 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.

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

[61] See: e.g. *Osman Auction v Belland*, 1998 ABQB 1095.

[62] See also: *Saskatchewan Act*, *supra* note 12 at Part II; *Newfoundland Act*, *supra* note 10, s 27, which refers to an "attachment order".

[63] *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.

Four general principles should govern preservations orders: 1) the relative strength of the applicant's action for a judgment; 2) the risk that removal or disposition of property will hinder or frustrate the enforcement of an eventual judgment; 3) whether it is just, in the circumstances, to issue a preservation order; and 4) the preservation order should cause no more inconvenience to the defendant than is necessary.

Given that all prejudgment remedies are interlocutory in nature, the *NBJEA* should, first of all, 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. A very high threshold limits the availability of preservation orders to those cases where there is little to no doubt as to the outcome of the case, while a less stringent threshold makes preservation orders more accessible, 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" [64] and a "strong *prima facie* case" [65] is not helpful and difficult to apply on limited affidavit evidence. As such, strong consideration should be given to making the relative strength of the applicant 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.[66] While the *Uniform Act* provides, *inter alia*, that the court may grant a preservation

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[64] *Price, supra* note 55 at 187-88 and *Montreal Trust Co of Canada v Occo Developments Ltd,* (1998) 197 NBR (2d) 347 (QB), at 3.

[65] Suggested, at least, by the Supreme Court of Canada in *Aetna Financial Services, supra* note 50, at para 7.

[66] *Alberta Act, supra* note 11, s 17(2). See also *New Brunswick 1994 Report, supra* note 8, vol 1, proposed NBEJA, s 17(2)(a) [*NBEJA 1994*].

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",[67] this language is best suited for *ex parte* applications. 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".[68]

As a result, the *NBJEA* should not 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 contend 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 requires an examination of the relative strength of the creditor's claim based on the record before the court.

Secondly, prejudgment remedies have often been predicated on the requirement to show an intention on the part of the defendant to dispose of his property, or otherwise make it unavailable in an effort to thwart the enforcement of an eventual judgment. However, since intent is always difficult to establish and must, in virtually all cases, be inferred from the circumstances, it should not be a factor governing the issuance of preservation orders. 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, without regard to motive *per se*.

Thirdly, 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.

Lastly, the *NBJEA* should adopt the principle of minimum disruption as a governing factor for preservation orders.[69] Preservation orders should only go so far as 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 and should not affect more property than is

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[67] *Uniform Act*, *supra* note 13, s 16(2).

[68] *Alberta Act*, *supra* note 11, s 17(2)(a).

[69] *NBEJA 1994*, *supra* note 66, s 18.

reasonably necessary to satisfy an eventual judgment in light of the applicant's claim.

The *NBJEA* would further establish the procedure to seek preservation orders and 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 come 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.

Preservation orders, by their nature, restrict the defendant's freedom to use or deal with his property before the plaintiff has fully proved his claim. Especially worrisome is the potential to deprive the defendant of the use of income-earning assets or goods sold in the context of a business undertaking:

> 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.[70]

As such, appropriate safeguards must tightly control preservation orders, preventing their use for improper purposes or sheer tactical advantage in litigation. *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,[71] which can be later 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

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[70] *Aetna Financial Services*, *supra* note 50 at para 43.

[71] Under the *Uniform Act*, the applicant is, by default, is required to post security. By contrast, the *1994 NBEJA*, *supra* note 66, s 23(3) gives discretion to the Court to require security.

40.04.[72] The *NBJEA* should also provide the defendant a right to vacate the order by providing adequate substitute security.

3. PROTECTING JUDGMENT DEBTOR INTERESTS

3.1 The current law in New Brunswick

The judgment debtor's counterpart to the judgment creditor's preservation order is the protection of exempted property. 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. 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*. Exceptions for the seizure of personal property are governed by the *Memorials and Executions Act* at subsection 33(1), which provides protection for furniture and furnishings, ordinary apparel, limited food and fuel, certain trade tools, seeds and grain, domestic animals and medical equipment.[73]

In addition, the *PPSA* provides a different list of personal property exempt from seizure by a secured party, which includes limited furniture, a limited value motor vehicle, medical equipment, and some consumer goods if they pass a hardship test.[74]

New Brunswick has also exempted from seizure life insurance money or rights that have been designated in favour of certain beneficiaries.[75]As such, an RRSP, a Registered Retirement Income Fund ("RRIF") or a Deferred Profit Sharing Plan ("DPSP") (all as defined in the federal *Income Tax Act*[76]) held with a life insurer and designated as payable to the insured's "spouse, child, grandchild or parent" is exempt from seizure.[77] Likewise, money transferred in certain circumstances from a pension fund to a prescribed retirement savings arrangement or

[72] See also *NBEJA 1994*, *supra* note 66, s 23(1).

[73] *Memorials and Executions Act*, *supra* note 20, s 33(1).

[74] *PPSA*, *supra* note 16, s 58(3).

[75] *Insurance Act*, RSNB 1973, c I-12, s 157(2).

[76] *Income Tax Act*, RSC 1985, c 1 (5th Supp.).

[77] *Insurance Act*, *supra* note 75, s 1 "life insurance" (g).

utilized to purchase a life annuity under the *Pension Benefits Act* is exempt from execution, seizure or attachment or other process of law.[78]

As a result, 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. Arguably, these rules also apply to RRIFs and DPSPs. The complete protection of pension plans contrasted against the relative exigibility of RRSPs creates a striking unfairness.

Notwithstanding these statutory exemptions, current jurisprudence suggests that, while a trust-based RRSP cannot be subject to an Order for Seizure and Sale, it could be subject to other post-judgment enforcement remedies, such as equitable execution via the appointment of a receiver.[79] In comparison, if the RRSP is not trust-based, it may be subject to an Order for Seizure and Sale.[80]

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, as most debtor income comes from third party sources. The *Garnishee Act*,[81] however, provides a statutory exemption for wages due to the judgment debtor for his or her personal labour and services on a hiring.[82] Quite arbitrarily it would seem, professional income, income from self-employment or from a business are not necessarily considered "wages" and would not be protected fully, if at all.[83] Additionally, as discussed above, some income or money derived from a Registered Retirement Savings Plan ("RRSP") may also be exempted.

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[78] *Pension Benefits Act*, SNB 1987, c P-5.1, ss 36(1), 57; *General Regulation*, NB Reg 91-195, s 20. No reference is made in the General Regulation to a DPSP as a prescribed "retirement savings arrangement". However, subsection 57(6) of the *Pension Benefits Act* enables creditors under orders for support or maintenance to seize or attach up to 50% of refunds of contributions with interest and other exempted property under the Act, unless ordered by a court of competent jurisdiction.

[79] *Watt v Trail*, 2001 NBCA 58, aff'd [2000] NBJ No 515 (QB).

[80] *Belliveau v Royal Bank of Canada*,(2000) 224 NBR (2d) 354 (CA). Although not considered by New Brunswick courts, the same reasoning may also apply to RRIFs.

[81] *Garnishee Act*, *supra* note 20.

[82] *Ibid* s 31. Wages can, however, be garnished in the case of a failure to pay spousal or child support or to pay federal taxes.

[83] In *National Sea Products Ltd. v Caissie*, (1987) 85 NBR (2d) 72 (QB), Miller J. 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".

The current judgment enforcement process in New Brunswick also allows for the seizure and sale of land without distinction as to its use. Enforcement proceedings may be taken 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, land may be seized and sold under execution as personal estate only if the sheriff has exhausted the debtor's personal estate, if any is found.[84] 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.

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 or a co-owner. 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, land may also be subject to unregistered interests pursuant to the *Marital Property Act*[85] or 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.

3.2 The case for reform and recommendations

Given that judgment enforcement is currently governed by an uncoordinated set of rules found in several statutes, regulations and common law principles without consistency or cohesiveness, the case for reform is strong. 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*[86] is required where a judgment creditor wishes to seize securities or security entitlements, such as shares in a business corporation.

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[84] *Memorials and Executions Act*, *supra* note 20, s 11.

[85] *Marital Property Act*, SNB 1980, c M-1.1.

[86] *Securities Transfer Act*, SNB 2008, c S-5.8.

The list of exempted property in the *Memorials and Executions Act* 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. Since there is no justifiable reason to distinguish between exigible property for secured and unsecured creditors, it is recommended that New Brunswick follow in the footsteps of Alberta, Newfoundland 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 *NBJEA* should 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 basic needs, as well as those of their dependants.[87] A guiding principle in deciding between total or partial exemptions 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, debtors and their families cannot be rendered destitute or financially dysfunctional by enforcement measures undertaken by creditors.

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.[88] 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.

The Alberta Law Reform Institute pointed out differences between registered pension plans and RRSPs, 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

[87] *Saskatchewan Act, supra* note 12, 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.

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

> 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.[89]

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, RIFFs and DPSPs, as concluded by the Alberta Law Reform Institute:

> 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 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.[90]

A total exemption for RRSPs, RIFFs and DPSPs as defined in the *Income Tax Act* (Canada) should therefore be included in the *NBJEA* to protect these sources of future income from seizure.[91] 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.

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

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

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

[91] *New Brunswick 1994 Report*, *supra* note 8 at 19.

"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 provided without undue regard to the type of income.

Strict adoption of the *Uniform Act* in this regard is not recommended, however, because the definition of "income" found in its section 164 appears to be too restrictive to capture some forms of income (income from self-employment, for example). Rather, the *NBJEA* should adopt 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".[92]

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. 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*[93], which has clear guidelines[94] 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.

The sale of land represents another important judgment enforcement remedy, which will be further discussed in section 5.2.5. In regards to exempt property, however, the *NBJEA* should also contain an exemption for accumulated equity in a principle residence in order to protect judgment debtor interests. The *NBJEA* should also contain an exemption for accumulated equity in a principle

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[92] *Saskatchewan Act, supra* note 12, s 96(1). Similarly, the *NBEJA 1994, supra* note 66, defined income 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."

[93] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

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

residence.[95] In keeping with the principle of universal exigibility, it is recommended that the prescribed amount for a principal residence be modest. 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, allowing the debtor to pay the reasonable expenses of securing and moving to a new shelter should the principal residence be seized and sold.[96]

The *NBJEA* should therefore include specific exemptions for property and income to be excluded from seizure. The exemptions currently found in the *Memorials and Executions Act* and the *PPSA* 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* (Canada).

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[95] Such an exemption is proposed in the *Uniform Act*, supra note 13, s 159(1)(e) and has been adopted by the legislation: *Newfoundland Act, supra* note 10, s 131(1)(h), *Saskatchewan Act, supra* note 12, s 93(2) and *Alberta Act, supra* note 11, s 88(g).

[96] *New Brunswick 1994 Report, supra* note 8, vol 1 at 18.

Maximum values for some exempted property should 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.

4. *NBJEA* ADMINISTRATION AND ENFORCEMENT INITIATION

4.1 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*.[97]

With the introduction of personal property securities legislation and the creation of a centralized registry for judgments in 1995, New Brunswick abandoned the link between the enforcement process and the crystallization of priority positioning for a judgment creditor. Marking a fundamental departure from pre-*PPSA* legislation and its requirement that enforcement procedures be commenced in order to charge property, registration of a Notice of Judgment by a judgment creditor now creates at once a charge on the judgment debtor's present and after-acquired personal property and the ability to enforce the judgment.[98] The *PPSA* Registry is province-wide, so that only one registration is required to cover all counties of the province. Similarly, 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.

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.[99] Pursuant to the *Memorials and Executions Act*, a memorial of judgment providing for the payment

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[97] The number of different legislative sources governing enforcement is well illustrated in the definition of "enforcement proceedings" found in the *Creditors Relief Act, supra* note 18, at s2.1:"'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".

[98] *Ibid*, s 2.2(1).

[99] *Registry Act, supra* note 20.

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.[100] If the debtor has lands in more than one county, registration of a memorial of judgment is necessary in each and every county in which his or her lands are located.

The newer *Land Titles Act*[101] also provides for the registration of memorials of judgment at sections 40 to 46 of the Act. Subsection 40(4) provides that an application to register a memorial of judgment 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.

This more streamlined and modern approach automatically binds the debtor's present and subsequently-acquired property, making the registration of interests the ultimate statutory source for the establishment of priorities. 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.

Pursuant to the priority scheme under the *PPSA*, a registered judgment has priority over an unperfected security interest regardless of whether the security interest attaches before or after the judgment is registered.[102] As a result, a properly registered judgment will 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 liens[103] and purchase money security interests ("PMSI"s)[104], which

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[100] *Memorials and Executions Act*, *supra* note 20, 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.

[101] *Land Titles Act*, *supra* note 20.

[102] *PPSA*, *supra* note 16, ss 19, 20(1)(a). See also Catherine Walsh, *An Introduction to the New Brunswick Personal Property Security Act*, (Fredericton: New Brunswick Geographic Information Corporation, 1995) at 110 -11[*Walsh*], *CIBC v CTV Television*, 2005 NBQB 429 at paras 24-25.

[103] *PPSA*, *supra* note 16, s 32 as well as *Re Giffen* [1998] 1 SCR 91.

[104] *PPSA*, *supra* note 16, s 34.

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.[105]

Once a judgment is registered, enforcement measures must be initiated and driven by the creditor. Before being able to enforce a judgment, however, it is imperative to discover all the necessary information with respect to the debtor's property and financial affairs.[106] Currently, the law in New Brunswick offers a judgment creditor two options for gathering necessary information with respect to the debtor. A judgment creditor can use the *Arrest and Examinations Act* to examine a judgment debtor under oath before a judge or a clerk of the court as to any property and any debts owing to or by him.[107] After such an examination, a judgment debtor may be ordered to pay the judgment amount in one sum or make instalments.[108] A judgment creditor can also use Rule 61.14, entitled *Examination in Aid of Enforcement*, not only to discover the debtor's assets, income, debts and any means to satisfy the judgment, but also to enquire about the disposal of any property since the cause of action began.[109] The advantage of using the *Rules of Court* is that the examination is recorded and a transcript can be produced to be used as evidence should the need arise, as in proceedings to have a transfer or an assignment declared fraudulent.[110]

Under the current system, a creditor can therefore demand disclosure of the judgment debtors' assets and 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 to enforce a judgment, given the current absence of any public assistance from the government.

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[105] *Land Titles Act*, SNB 1981, c L-1.1 s 19(1).

[106] *New Brunswick 1985 Report*, *supra* note 25 at 84.

[107] *Arrest and Examinations Act*, *supra* note 20, s 30. In practice, most of these examinations are conducted before the clerk of the court.

[108] *Ibid*, s 45(1).

[109] *Rules of Court*, *supra* note 20, r 61.14.

[110] *Ibid*, r 33.13, 33.14.

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 60 of the *Rules of Court* or request an 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 made. 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.

However, when a debtor fails or refuses to provide complete disclosure, the entire process can be frustrated. Although such behaviour is punishable by a contempt order, courts are reluctant to grant this remedy 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". This remedy is not readily granted because it calls for the court to issue a warrant for the debtor's arrest.[111] Although frustration with such reluctance may be warranted, imprisonment is seen as an excessively harsh consequence of "enforcing" a court order. As a result, the court will more often merely threaten rather than imprison the debtor.[112] Ultimately, the existing procedure is "frustrating, expensive and ineffective".[113]

In addition to the complexity and additional cost -- not only for legal services, but also collection costs such as security deposits to the sheriff and service fees -- judgment creditors are 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. 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".[114]

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[111] *Alberta 2004 Report*, *supra* note 26 at para 282.

[112] *Ibid* at para 283.

[113] *Ibid* at para 284. The authors reiterate this observation based on their personal experience in New Brunswick.

[114] NB Government, online: <http://www2.gnb.ca/content/gnb/en/contacts/dept_renderer.146.1418.html#mandates>.

At present, sheriffs play a limited role in the enforcement of judgments in New Brunswick.[115] With security deposits generally ranging from $2000 to $3000 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".[116] 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",[117] which it is hereby suggested are equally applicable to New Brunswick. The unwillingness of sheriffs to proceed without appropriate security for costs posted by the instructing judgment creditor and the lack of required personnel and resources may inevitably be a product of a user-pay system. A third reality which may explain in part the first two 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.[118]

4.2 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 structure, administration and underlying rules and principles for the proposed judgment enforcement system. As with most governmental policies, potential answers to these questions should be

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

[116] *Saskatchewan 2005 Report*, *supra* note 17 at 6.

[117] *Ibid.*

[118] *Ibid* at 6-7.

examined against the standards of effectiveness, efficiency, systemic cost and fairness, always guided by the basic principles previously outlined.

4.2.1 A central, provincial co-ordinated enforcement office

Pursuant to the authors' review of legal discourse on this issue and, in particular, the possible privatisation of enforcement services, the resulting recommendation favours a provincial public administration with a unitary and integrated approach to enforcement given its many advantages, among which are the following:

- Complete and accurate information about a debtor is more likely to be available to government 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.[119]

In accordance with the above endorsement of a public enforcement office, 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.[120] As Williamson advocated in 1994: "exclusive authority must be vested in one enforcement office to co-ordinate all enforcement proceedings against a debtor".[121] 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 system[122], the

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[119] *New Brunswick 1976 Report*, *supra* note 9 at 249-50.

[120] *Ibid* at 275-276; *New Brunswick 1985 Report*, *supra* note 25 at 6-13; *New Brunswick 1994 Report*, *supra* note 8, vol 2 at Sum Rpt 2-4.

[121] *New Brunswick 1994 Report*, *Ibid* at Sum Rpt 4.

[122] *Ibid* at Sum Rpt 8.

creation of a government office to control and implement judgment enforcement measures is once again recommended. 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 the sheriff's 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.[123]

The authors' recommendation is further corroborated by a recently successful legislative reform in the province on enforcement proceedings. Interestingly, New Brunswick enacted and proclaimed the *Support Enforcement Act*[124] in 2008, which created a new Office of Support Enforcement. A Director of Support Enforcement with the Family Support Orders Service ("FSOS") located in each judicial district is responsible for the administration of this Act. Federal and provincial laws give FSOS the authority to use various enforcement measures to collect overdue support payments. For example, the FSOS may initiate a payment order either directly to the payer or to a third party (often an employer); 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; or bring an enforcement hearing before the Court.[125] 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

[123] *Ibid* at Sum Rpt 9 and *Saskatchewan 2005 Report*, *supra* note 17 at 5.

[124] *Support Enforcement Act*, SNB 2005, c S-15.5.

[125] The Family Support Orders Service (FSOS), online: New Brunswick Government <http://www.gnb.ca/0062/fsos/newsite/fsos-page2-e.asp#8>.

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.[126] In fact, FSOS collects more than $43 million in support every year in New Brunswick.[127]

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. The mandate of this crown corporation is to make government services more accessible through one-stop service centres, as well as through the Internet and over the phone. The SNB Online website leverages technology to maximise customer satisfaction and represents a significant transformation in the way citizens access government information, services and products.[128] The potential of a central source to facilitate the enforcement of judgments 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 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".[129]

With these resounding successes and templates, a new public judgment enforcement system 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."[130] 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.[131]

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[126] *CBA Conference*, *supra* note 114.

[127] New Brunswick Justice and Consumer Affairs, online: New Brunswick Government <http://www.gnb.ca/0062/fsos/newsite/fsos-whowhat-e.asp>.

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

[129] *Nova Scotia 2011 Report*, *supra* note 7 at 20-21.

[130] *New Brunswick 1976 Report*, *supra* note 9 at 245.

[131] *Saskatchewan 2005 Report*, *supra* note 17 at 6-7.

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".[132]

4.2.2 Creation of 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* adopt the status quo, but expressly provide for the creation of an enforcement charge upon the registration of a judgment in the *PPSA* Registry.[133] 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.[134] 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.

In addition to the enforcement charge created on the judgment debtor's present and after-acquired personal property upon registration of the Notice of Judgment in the *PPSA* Registry, the *NBJEA* must address the appropriate procedure to create an enforcement charge on land. Given that the manner in which judgments are registered and enforced against land varies significantly among provinces and

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[132] *New Brunswick 1976 Report*, *supra* note 9 at 242.

[133] *Uniform Act*, *supra* note 13, s 29.

[134] *Creditors Relief Act*, *supra* note 18, ss 2.3(9), 2.3(13). The latter section provides that "[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 subsection 2.2(1)."

territories, the *Uniform Act* suggests two possible options for future legislative reform of judgment enforcement law.

Option 1 of the *Uniform Act* reflects the practices that have been adopted by Newfoundland and recommended in the Saskatchewan 2001 Report.[135] 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 registry system or land titles. Cuming 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".[136] 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. 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".[137] Since New Brunswick has also adopted a land titles registry system, Option 1 of the *Uniform Act* is not recommended.

In comparison, Option 2 of the *Uniform Act* reflects the practices adopted in Alberta and proposed in the 1994 *NBJEA*. It 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 requirement that registration occur 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" exception 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.

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[135] Tamara M Buckwold and Ronald CC Cuming, *Modernization of Saskatchewan Money Judgment Enforcement Law* (Interim Report) (University of Saskatchewan, 2001) at 167-170, online: <http://www.qp.gov.sk.ca/orphan/reporta.pdf>.

[136] *Ibid*, at 169.

[137] *British Columbia 2005 Report*, *supra* note 2 at 180.

> There will be no exceptions to the obligations placed on third parties to search the *PPSA* Registry or the Land Titles Office for notices of judgment affecting the debtor's land.[138]

As recommended in 2001, Saskatchewan did eventually adopt legislation that creates a Judgment Registry for all judgments regardless of the nature of the property against which a judgment is ultimately enforced.[139] 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 affected.[140]

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. 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.[141]

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 could only be charged by a judgment registered in both the *PPSA* Registry and the land titles registry. Furthermore, a judgment registered in the *PPSA* Registry would create an enforcement charge if the judgment debtor thereafter acquires a registered interest in land as soon as that interest is registered in the land titles registry.

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[138] *New Brunswick 1994 Report, supra* note 8, vol 1, at 9-10.

[139] *Saskatchewan Act, supra* note 12, ss 18-21.

[140] *Saskatchewan 2010 Report, supra* note 21 at 61. See also *Land Titles Act, 2000*, SS 2000, c L-5.1, s 172-173.

[141] *Land Titles, ibid*, s 53(2).

4.2.3 Priority of an enforcement charge

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".[142] 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.

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*.[143] 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 provisions of 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*.[144]

Notwithstanding the goal of consolidation and simplification, a new judgment enforcement process should have a set of clearly established rules to

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[142] *Walsh*, *supra* note 102 at 111.

[143] *PPSA*, *supra* note 16, s 20(1). See also: *Alberta Act*, *supra* note 11, ss 34, 42(1); *Newfoundland Act*, *supra* note 10, ss 48, 49; *Saskatchewan Act*, *supra* note 12, s 23.

[144] *Uniform Act*, *supra* note 13, ULCC comment on s 35(1).

govern priorities of enforcement charges in a judgment debtor's property.[145] Reference to applicable legislation, such as the *PPSA*, should be clearly established in the *NBJEA*, as has been done in the *Saskatchewan Act*.[146] 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.[147] 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, and that the provision be made to ensure that such priorities are not affected by the person entitled to priority delivering [of a Notice of Enforcement.][148]

Such an approach is found 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 came into existence.[149]

Although the *PPSA* also establishes the priority of liens[150], of PSMIs[151] and of buyers and lessees of the judgment debtor's property in the ordinary course of business[152], 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

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[145] *British Columbia 2005 Report*, *supra* note 2 at 90.

[146] *Saskatchewan Act*, *supra* note 12, s 29.

[147] See e.g.: *Employment Standards Act*, SNB 1982, 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.

[148] *New Brunswick 1976 Report*, *supra* note 9 at 29-30.

[149] *Saskatchewan Act*, *supra* note 12, s 27(3).

[150] *PPSA*, *supra* note 16, s 32. See also: *Alberta Act*, *supra* note 11, s 40; *Newfoundland Act*, *supra* note 10, s 57; *Saskatchewan Act*, *supra* note 12, s 23; *Personal Property Security Act, 1993*, SS 1993, c P-6.2, s 32 [*Saskatchewan PPSA*].

[151] *PPSA*, *supra* note 16, s 34. See also: *Alberta Act*, *supra* note 11, s 35(3); *Newfoundland Act*, *supra* note 10, s 50(3); *Saskatchewan Act*, *supra* note 12, s 23; *Saskatchewan PPSA*, *supra* note 149, s 34.

[152] *PPSA*, *supra* note 16, s 30. See also *Alberta Act*, *supra* note 11, s 36; *Newfoundland Act*, *supra* note 10, s 52; *Saskatchewan Act*, *supra* note 12, s 25.

the *NBJEA*, such as future advances[153], fixtures and growing crops[154] as well as negotiable instruments and chattel paper.[155]

It is further recommended that the *NBJEA* follow -- albeit with a few modifications[156] -- the guiding principle of collective enforcement, leading to the proportional sharing among judgment creditors. 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.[157] As a result, subject to certain allowed costs and preferences, the balance of a distributable fund is distributed among all eligible claims on a pro rata basis. A lack of priority between judgment creditors is 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:[158]

a) Because delay in initiating enforcement proceedings is less likely to prejudice the priority of creditors' claims under a system of pro rata distribution, creditors may be encouraged to extend additional time to debtors for the payment of their debts.
b) 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. Because of the high up-front costs that creditors must incur to petition a debtor into bankruptcy, this is not an economically viable option for creditors with relatively small claims to attain pro rata distribution.
c) Having been a hallmark of creditors' relief legislation in Canada for one hundred years, pro rata distribution has been reaffirmed in the enactment of modern judgment enforcement legislation.

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[153] *PPSA*, *supra* note 16, s 14. See also: *Saskatchewan Act*, *supra* note 12, ss 23(4)-(5).

[154] *PPSA*, *supra* note 16, ss 36 and 37. See also: *Alberta Act*, *supra* note 11, s 37; *Newfoundland Act*, *supra* note 10, s 53; *Saskatchewan Act*, *supra* note 12, s 24.

[155] *PPSA*, *supra* note 16, s 41. See also *Alberta Act*, *supra* note 11, s 38; the *Newfoundland Act*, *supra* note 10, s 54; *Saskatchewan Act*, *supra* note 12, s 25.

[156] The *NBJEA* proposed by the authors would not adopt the same qualifications to share the distributable fund and thus does not recommend the creation of preferred payments for judgment creditors upon distribution.

[157] See: *Alberta Act*, *supra* note 11, s 42(2); *Saskatchewan Act*, *supra* note 12, s 27(1); the *Uniform Act*, *supra* note 13, s 38(4).

[158] Robinson, *supra* note 44 at para 30.

While it may be appropriate to reward secured creditors for their initiative in 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 inappropriate to assign priorities between these two sets of encumbrance holders based on time alone.

The *NBJEA* will therefore need to address the priority relationships among interests in seized property, in particular 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".[159] Nonetheless, an interest in property that is subordinate to an enforcement charge is subordinate only to the extent of the amount recoverable under the judgment to which the enforcement charge relates at the time enforcement proceedings are taken against the property.[160]

4.2.4 Initiation of the enforcement process – Notice of Enforcement

Although the current scheme 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. In fact, there is an overwhelming consensus that the initiation of an enforcement procedure should require some positive step by judgment creditors. 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". 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.[161] Under these enforcement systems, the enforcement officer is not required to implement any enforcement measures unless the sheriff has

[159] *Uniform Act, supra* note 13, ULCC comment on section 38(1). See also: *Alberta Act, supra* note 11, s 42(1).

[160] *Uniform Act, supra* note 13, s 38(3).

[161] *Saskatchewan Act, supra* note 12, s 31. See also: *Newfoundland Act, supra* note 10, s 72.

received proper enforcement instruction according to these acts.[162] 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.[163]

Notwithstanding the creditor-driven approach of the *Uniform Act*, an enforcement officer may decline to undertake an enforcement proceeding should the enforcement instruction be contrary to the Act or a court order, or if it cannot be undertaken in good faith and in a commercially reasonable manner.[164] 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 if all of the requirements of the Act have not been met.[165] As commented by Cuming: "[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".[166]

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.[167] 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* and the *Uniform Act* limit the enforcement officer's discretion. 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 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 the judgment debtor's situation and current assets at their own expense in order to

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[162] *Saskatchewan Act, ibid*, s 30(2); *Uniform Act, supra* note 13, s 40.

[163] *Uniform Act, ibid*, s 40(4); *Saskatchewan Act, supra* note 12, s 34(4).

[164] *Uniform Act, ibid*, s 10, ULCC comment on s 40.

[165] *Saskatchewan Act, supra* note 12, ss 34(1), (2), 115.

[166] *Saskatchewan 2010 Report, supra* note 21 at 70.

[167] *Ibid* at 70 and *Saskatchewan 2005 Report, supra* note 17 at 66.

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 *Uniform Act* or the *Saskatchewan Act* are enacted in New Brunswick, the current dysfunctional creditor-driven system will remain in place. A completely new approach is therefore recommended. Although all reformed judgment enforcement systems, as well as the *Uniform Act*, provide that the judgment creditor not only initiate but control, contribute to and remain involved in the process, it has been previously recommended that, with the exception of initiating the enforcement proceeding, the creditor's detailed involvement should be optional. To fill this void, the *NBJEA* should institute an enforcement office to coordinate and supervise all enforcement activities in the province. This office should be given broad discretionary powers in order to tailor enforcement measures that meet the requirements of individual situations.[168]

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 Enforcement] with respect to property located anywhere in the province/territory without the need for further authority from the court.[169]

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: the name and address of the judgment creditor, the current address and name as it appears on the judgment of the judgment debtor, the existence and amount recoverable on the judgment and the desire of the judgment creditor to have the judgment enforced as well as a description and location of exigible property of the judgment debtor.[170]

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[168] *New Brunswick 1985 Report*, *supra* note 25 at 23.

[169] *Uniform Act*, *supra* note 13, s 41.

[170] *Ibid*, ULCC comment on s 40.

Notwithstanding this wide discretionary power yet respecting the optional creditor control principle, the Notice of Enforcement would enable the initiating judgment creditor to recommend a specific enforcement strategy. Nevertheless, even when specific enforcement instructions have been received by the judgment creditor, the *NBJEA* should provide the enforcement officer with the authority to analyse the judgment debtor's individual situation, as well as 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, without a court order an instructing judgment creditor will only be able to recommend an appropriate course of action to the enforcement officer, rather than dictate the proceeding.

Considering the enforcement officer's expertise, experience and resources, it is believed that in most cases the enforcement officer will determine 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 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".[171] However, the mandatory terminology used in the *Uniform Act* seems to negate this possibility. It is therefore recommended that the *NBJEA* expressly provide that the enforcement officer may proceed with any enforcement measure that he or she determines to be the most efficient and equitable for all parties involved in the circumstances unless the judgment creditor provides another commercially reasonable and practicable enforcement alternative 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.[172]

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[171] *Ibid.*

[172] *Ibid*, s 6, ULCC comment on section 40; *Saskatchewan Act, supra* note 12, s 30(2)(b).

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 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 that 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 of enforcement initiation proposed in the *Uniform Act* should be incorporated into the *NBJEA*. These elements include: reporting by the enforcement office to the judgment creditor; protection of the judgment creditor from any liability arising from the enforcement proceedings; 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.[173]

4.2.4 Obtaining disclosure

Sadly, debtors often refuse to disclose their financial situation and their assets.[174] As a result, enforcement measures to obtain disclosure are essential tools for the judgment creditor and the enforcement officer in deciding whether to undertake further enforcement measures. 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.[175]

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[173] *Saskatchewan Act, supra* note 12, ss 32, 35 and 35; *Uniform Act, supra* note 13, s 42.

[174] *Alberta 2004 Report, supra* note 26 at para 284.

[175] *Saskatchewan 2010 Report, supra* note 21 at 18. See: *Assignments and Preferences Act, supra* note 20.

Measures compelling disclosure must be incorporated in the *NBJEA*, whether in the Act itself or in the form of a regulation. This recommendation is supported by the Alberta Law Reform Institute, which examined in 2004 the province's rules of procedure and determined that the debtor examination rules should be included either in the judgment enforcement legislation or in its regulations.[176] As a result, several regulations of the *Alberta Act* deal specifically with debtor disclosure.[177]

Nevertheless, how to obtain this information remains a challenge. Judgment creditors have essentially four sources of information available to them in order to gather information on the debtor.[178] First, the judgment creditor may have personal knowledge of the debtor's financial affairs. Second, a search could be performed in the public registries. The remaining two options involve the examination of the judgment debtor or a third party. Although the first option is outside the formal structure of a system of enforcement, the last three sources of information are essential to an effective judgment enforcement system and must be included in the *NBJEA*.

Without the judgment debtor's cooperation, public registries form one of the best sources of information. It is therefore recommended that the *NBJEA* provide the enforcement officer the same authority given to the Director pursuant to the *Support Enforcement Act*[179]. Pursuant to this Act, the Director can demand information from anyone about a payer's location, contact information, salary, employment, assets, or any other information that is considered necessary to enforce the order.

Furthermore, it is recommended that the *NBJEA* adopt an approach similar to that found in the *Newfoundland Act*, which allows the judgment creditor to choose the disclosure remedy more suited to the circumstances rather than compelling the 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 creditor. The proposed system would thus have the flexibility required to promote efficiency and limit enforcement costs for the benefit of all parties involved.

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[176] *Alberta 2004 Report*, *supra* note 26, at xiv-xv.

[177] *Civil Enforcement Regulation*, Alta Reg 276/1995 [*Civil Enforcement Regulation*].

[178] *New Brunswick 1985 Report*, *supra* note 25 at 87-88.

[179] *Support Enforcement Act*, *supra* note 124, s 12(3).

Even though an examination might be necessary in certain circumstances, this method entails added costs and time for all parties involved. As such, a questionnaire has been suggested as an intermediate step. Although it has been embraced in other jurisdictions, there is no 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 1985[180] and rejected again in 1994 when a voluntary written questionnaire was proposed instead.[181]

According to the Alberta 1991 Report, the proposed questionnaire raises several problems, including the likelihood that debtors would ignore such a questionnaire or that the information provided by the debtor would be incomplete. Creating a standardised questionnaire that covers every situation is either impossible or is likely to be too complicated for a great number of debtors. In sum, the questionnaire could be just as frustrating as the present system of forcing a debtor to attend an examination. Nevertheless, the benefits of questionnaires are recognized: they would eliminate the need for oral examination in the majority of cases; information would be acquired more quickly; and information obtained by questionnaire would be easier to share with creditors than examination transcripts, which are expensive, voluminous and may be difficult to acquire.[182]

Given these important advantages, governments in Saskatchewan, Newfoundland 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.[183] Moreover, New Brunswick has also adopted the use of a financial statement in the *Support Enforcement Act* as prescribed by regulation.[184]

A questionnaire represents the opportunity for the judgment debtor to cooperate and to offer up full disclosure in order to avoid an oral examination.[185] 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.[186] If necessary, an

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[180] *New Brunswick 1985 Report, supra* note 25 at 89.

[181] *New Brunswick 1994 Report, supra* note 8, vol 2 at Sum Rpt 31.

[182] *Alberta 1991 Report, supra* note 15, vol 1 at 59.

[183] *Saskatchewan Act, supra,* note 12, Part III, starting at s 11; *Newfoundland Act, supra,* note 10, Part IV, s 64ff; *Civil Enforcement Regulation, supra* note 177, Part 1.3; *Uniform Act, supra* note 13, Part 8, s 45ff.

[184] *Support Enforcement Act, supra* note 124, s 30(1).

[185] *New Brunswick 1994 Report, supra* note 8, vol 2 at Sum Rpt 31.

[186] *Alberta 1991 Report, supra* note 15 at 60.

enforcement officer or a judgment creditor should be allowed to ask for further information or particulars from a person having completed a questionnaire.[187] 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.[188]

The Nova Scotia discussion paper acknowledges that, absent a mandatory mechanism, a judgment debtor may delay payment of the judgment without penalty other than interest, forcing the creditor to take some action at his or her expense.[189] The paper proposes some form of 'wakeup call,' at little or no cost to the creditor, which would trigger payment by the debtor, such as service of a questionnaire as proposed under paragraph 45(1)(a) of the *Uniform Act*. The debtor would then have ten (10) days to return the questionnaire, failing which the 'wakeup call' would be at minimum a visit from the enforcement officer, with possible enforcement action to follow.[190]

Given the increased role of the new enforcement office advocated as the foundation of the *NBJEA*, it is recommended that New Brunswick adopt this approach. 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. Respecting 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.

In simple and straightforward situations, all of the disclosure tools are not necessary and judgment creditors should be able to obtain sufficient information through the use of questionnaires. 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. Unless

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[187] *New Brunswick 1994 Report*, *supra* note 8, vol 2 at Sum Rpt 32.

[188] *Ibid.*

[189] *Nova Scotia 2011 Report*, *supra* note 7 at 32.

[190] *Ibid.*

requested and paid for by the judgment creditor, no transcript would be available following the examination.

Unlike the *Uniform Act*, which requires a judgment creditor to apply for an order compelling third parties to provide information known about the judgment debtor's financial affairs[191], the authors recommend that this authority devolve to the enforcement officer, as is the case in Newfoundland.[192] 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.[193]

Further enforcement measures must be contemplated and judgment debtors forewarned that penalties and other consequences are possible in the event a judgment debtor refuses to cooperate and honestly disclose the required information. Subsection 122(1) of the *Saskatchewan Act* provides that every person who contravenes certain statutory obligations (such as disclosure requirements) is guilty of a summary conviction offence and faces a maximum fine of $1,500 for a first offence and $10,000 for a second or subsequent offence. Corporations face a maximum fine of $10,000 for a first offence and $100,000 for a second or subsequent offence. Strong consideration should 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 disobedience of its provisions is an offence punishable under the *Provincial Offences Procedure Act*.[194] Finally, in the most difficult circumstances, the court could lend assistance by issuing any necessary order, including for contempt.

5. Enforcement procedures and remedies

5.1 The current law in New Brunswick

Seizure and sale of property is largely governed by the *Memorials and Executions Act*. The Act allows the seizure of money and securities for money, the seizure of

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[191] *Uniform Act, supra* note 13, ss 45(1)(c)-(d); *Saskatchewan Act, supra* note 12, s 15(1).

[192] *Newfoundland Act, supra* note 10, ss 65-66.

[193] *Civil Enforcement Regulation, supra* note 177, ss 35.09-35.18.

[194] *Support Enforcement Act, supra* note 124, ss 52(1), 56(3) and 56(5).

land and various interests in land, such as a beneficiary interest through a trust or a mortgagee's interest, as well as tangible and intangible personal property.[195] 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 enforce a judgment creditor's claim against the judgment debtor. According to subsection 4(1), 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.

The enforcement of the Order for Seizure and Sale and other enforcement orders is the responsibility of the sheriff,[196] 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. In addition, the sheriff may require the creditor to pay the required fees and reasonably anticipated expenses of carrying out the enforcement in advance.[197]

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.[198] However, 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.[199]

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.[200] 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

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[195] *Memorials and Executions Act*, *supra* note 20, ss 26(1) (securities for money include cheques, bills of exchange, promissory notes, bonds and specialties), 11, 12, 23(1), 24(1) (tangible property, i.e., goods and chattels), 23.1- 23.7 (securities and security entitlements).

[196] See *Rules of Court*, *supra* note 20, r 61 generally, but also the *Memorials and Executions Act* and the *Garnishee Act*, *supra* note 20.

[197] *Sheriffs Act*, RSNB 1973, c S-8, s 13.

[198] *Rules of Court*, *supra* note 20, r 61.08(4)

[199] *Ibid*, r 61.08(3).

[200] The *Garnishee Act*, *supra* note 20, does not apply to all debts, but only to those debts which are "due absolutely and without depending on any contingency". See especially s 32(b).

garnishment, 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.[201] However, not all debts can be attached, but only those debts which are "due absolutely and without depending on any contingency".[202] 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.[203]

In addition, the *Creditors Relief Act* provides that the sheriff may garnish sums owed to the judgment debtor.[204] 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. Furthermore, the *Creditors Relief Act* provides that a judgment creditor who attaches a debt is deemed to have done so for the benefit of all creditors entitled to the pro rata sharing under that Act.[205]

Another enforcement proceeding currently available to judgment creditors is the payment order. Pursuant to section 29.1 of the *Arrest and Examinations Act*, a judgment creditor may serve on the judgment debtor a Notice of Judgment in the form prescribed by regulation. 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. Under the regulation, the debtor is directed to pay the creditor in 12, 24, 36 or 48 equal monthly instalments depending on the amount of the judgment.[206] If the judgment debtor is unable to comply with the prescribed instalments, an application may be made to the clerk of the court to vary the prescribed schedule.

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[201] *Ibid*, s 5.

[202] *Ibid*, s 32(b).

[203] *Ibid*, s 6.

[204] *Creditors Relief Act*, *supra* note 18, s 35.

[205] *Ibid*, s 35(3).

[206] *Recovery of Judgment Regulation*, NB Reg 84-23, s 4, Schedule A.

Pursuant to sections 29.2 and 29.4, the judgment creditor also has the ability to ask the clerk to vary the prescribed schedule and 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. Again, if the judgment debtor cannot comply, he may apply to the clerk of the court to vary that payment order. Although failure to comply with any of the clerk's payment orders may be punished by a finding of contempt of court, this enforcement measure is rarely, if ever, utilized by creditors.[207] The complexity of the legislation governing 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, section 45 of the *Arrest and Examinations Act* also allows a judgment creditor to obtain an order compelling the judgment debtor to be examined under oath. If such an examination has shown that the judgment debtor has the ability to pay, an order that the debtor pay the amount of the judgment debt together with any costs of examination forthwith or by instalments may also be made. Such orders can also be varied on application by the judgment debtor and disobedience is punishable by a finding of contempt of court.

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 equitable relief is governed by Rule 41.02(1)b) of the *Rules of Court* and entails the appointment of a receiver over specific property. 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, but the moving party must demonstrate that is it "just or convenient to do so". Accordingly, a receiver will not be appointed where it is wholly unnecessary and unless there is clear evidence 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. Although this remedy can be very effective, it is rarely utilized -- no doubt in light of the additional cost that it entails -- but arguably because the remedy appears

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[207] *Arrest and Examinations Act, supra* note 20, s 29.5.

to be available only when ordinary enforcement measures have failed or would clearly be ineffective.[208]

Upon completion of enforcement procedures and disposition of assets, the issue then becomes how to distribute both the proceeds of enforcement and the funds received by the enforcement officer directly from the judgment debtor or third parties. 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.*

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,[209] a notion 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.[210] 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, is not considered a levy and therefore is not distributable among judgment creditors.[211] 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.

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. 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.[212] Finally, all judgment creditors who have filed a Notice of Judgment under subsection 2.2(1) are entitled to participate in the proceeds of distribution in addition to non-judgment creditors, who have obtained certificates under the *Creditors Relief Act.*[213]

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[208] There is little case law in New Brunswick on the appointment of receivers.

[209] *Creditors Relief Act, supra* note 18, s 4(1). The French version of the Act states: "Lorsqu'il perçoit une somme d'argent".

[210] Dunlop, *supra* note 19 at 557-59.

[211] *Ibid* at 558.

[212] *Creditors Relief Act, supra* note 18, ss 4(1), 9(2).

[213] 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

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 eligible 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.[214]

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 a receivership and, most notably, payments made by debtors to judgment creditors prior to seizure.[215] 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 preconditions of the sheriff's right to apply for an attaching order.[216]

5.2 The case for reform and recommendations

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 promotion of creditors' rights 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.

With regards to enforcement remedies, the authors recommend that the *NBJEA* follow the same general principles of the *Saskatchewan Act* and the *Uniform*

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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". See *New Brunswick 1985 Report*, *supra* note 25 at 324

[214] *Creditors Relief Act*, *supra* note 18, ss 3, 23.

[215] *New Brunswick 1985 Report*, *supra* note 25 at 314.

[216] See also *Creditors Relief Act*, *supra* note 18, 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".

Act. Both Acts clarify the role of the enforcement officer, his or her powers and responsibilities and provide wide discretionary powers to realize the objectives of the *NBJEA* and 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.

5.2.1 Power of enforcement officer

In contrast with the current creditor-control enforcement remedies, the central role of the sheriffs in the proposed judgment enforcement system must be further clarified. Unlike the sheriff's current role within the judgment enforcement system, the *NBJEA* should expressly provide a non-exhaustive list of such powers, including the powers of election and of a beneficiary under a trust as well as the power to assign or transfer an interest in property; to give a release or discharge; to collect an account; to present an instrument or security for payment and receive payment; to sue any person liable on an account, instrument or security in the name of the judgment debtor; to negotiate an instrument or security; and to take protective or conservatory measures such as effecting a registration relating to the judgment debtor's interest in the registry, the land titles registry or any other public registry.[217]

The power to seize and realize upon the judgment debtor's property, as well as the above ancillary powers, are subject to the exigibility of the property and the amount of recovery required to satisfy the eligible claims. 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.[218]

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

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[217] *Saskatchewan Act*, *supra* note 12, s 38(1). See also *Saskatchewan 2010 Report*, *supra* note 21 at 73.

[218] *Saskatchewan Act*, *supra* note 12, s 39.

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

5.2.2 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.

With respect to seizure of property, the *NBJEA* should adopt the *Uniform Act* and the *Saskatchewan Act*'s notion of "seizure",[220] a term 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*,[221] an enforcement officer may therefore seize exigible tangible property either by taking physical possession of the property or by serving a notice, as prescribed, on the person in possession of the property or the land on which the property is situated and posting the Notice of Seizure on the property or in a conspicuous place in close proximity to the property.[222]

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[219] *Saskatchewan 2010 Report*, *supra* note 21 at 73.

[220] *Saskatchewan Act*, *supra* note 12, s 2(1)(ww).

[221] See e.g. *ibid*, Part VI; *Uniform Act*, *supra* note 13, 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 other steps as may be appropriate having regard to the nature of the property.

[222] *Uniform Act*, *supra* note 13, s 52; *Saskatchewan Act*, *supra* note 12, s 41.

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.[223] In addition, the *Saskatchewan Act* permits steps other than those described in the Act as may be appropriate to the nature of the property.[224] 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.[225]

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.[226]

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[223] *Uniform Act, supra* note 13, s 52; *Saskatchewan Act, supra* note 12, s 41.

[224] *Saskatchewan Act, Ibid*, s 41(2)(g).

[225] *Saskatchewan 2010 Report, supra* note 21 at 79.

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

5.2.3 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 the previous 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. 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"[227] or seizure of "existing and future accounts"[228]. 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 affected 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.[229]

With respect to the seizure of income, it is recommended 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.

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[227] *Uniform Act*, *supra* note 13 at Part 9 – Enforcement Proceedings Against Personal Property, Division 4.

[228] *Saskatchewan Act*, *supra* note 12 at Part VII.

[229] 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 17 at 112-13; *Saskatchewan Act*, *supra* note 12 at Part VII.

Consultation with the judgment debtor on the specific amount payable should be envisioned, thereby ensuring the ultimate order reflect not only the debtor's individual situation but the debtor's 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.[230]

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.[231] Moreover, it is also 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.

5.2.4 Disposition of seized property

Consistent with the guiding principle that judgment creditor involvement should be an option, but 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 proceeds that may be anticipated from disposition. The enforcement officer should, however, be required to inform judgment creditors who stand to share in the proceeds of the sale as to the method of sale chosen prior to the sale proceeding.[232] A judgment creditor disagreeing with the enforcement officer's indented course of conduct could then take steps to obtain a court order directing the officer to proceed otherwise.[233]

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

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[230] *NBJEA 1994*, *supra* note 66, ss 136, 166.3-166.4.

[231] *Support Enforcement Act*, *supra* note 124, s 17.

[232] Effectively a blend of *NBJEA 1994*, *supra* note 66, s 83(2) and *Uniform Act*, *supra* note 13, s 64(1).

[233] See especially *Uniform* Act, *ibid*, s 64(which provides judgment creditors such a right).

seized property shall be disposed of by the sheriff 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.[234]

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".[235]

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.[236]

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

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[234] *Saskatchewan 2010 Report*, *supra* note 21 at 134.

[235] *Saskatchewan Act*, *supra* note 12, s 115.

[236] *Ibid*, s 98(2).

sheriff takes the property free from the interest of the judgment debtor, an interest subordinate to that of the judgment debtor, any enforcement charge affecting the property as well as an interest in personal property or in land subordinate to an enforcement charge as provided in the *Saskatchewan Act* or in *The Land Titles Act, 2000*.[237] The advantages of the aforementioned statutory provisions are summarized by Williamson:

> 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.[238]

5.2.5 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 to be taken lightly, as the associated enforcement costs and likelihood of competing interests will inevitably remain and reduce the actual potential of the land to satisfy the judgment debt. In addition, the sale of land would be subject to the exemption for equity in a principle residence as previously recommended by the authors.

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 sheriff, as is provided for in the *Uniform Act*.[239]

In order to protect judgment debtor and third party interests in land, a waiting period before land can be sold to satisfy a judgment debt should be prescribed by the *NBJEA*. The waiting period would allow a judgment debtor the opportunity to satisfy the judgment or come to an agreement with the enforcement

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[237] *Ibid*, s 103(2).

[238] *New Brunswick 1994 Report, supra* note 8, vol 1 at 14.

[239] *Uniform Act, supra* note 13, s 144(1). See also *Saskatchewan Act, supra* note 12, s 49(5).

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 seizure[240] 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.[241] 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.[242]

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 his creditors so as to avoid the sale of land.[243] Finally, the *NBJEA* should enable the court to shorten or extend the waiting period on application of an interested party.

5.2.6 Appointment of receivers

Although Rule 41.02 allows receivership 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 is diminished under a modern judgment enforcement statute, which adopts the principle of universal exigibility, but can still play a vital role in judgment enforcement, because circumstances may make enforcement more efficient through receivership than through ordinary enforcement measures. It is therefore recommended that the *NBJEA* adopt in substance Part 13 of the *Uniform Act*, making receivership an efficient and effective enforcement tool where the circumstances warrant it. It provides that the court may appoint a receiver over all or specified property of the judgment debtor. Courts ought to be allowed ample 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

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[240] *Saskatchewan Act, ibid*, s 104.

[241] *Alberta Act, supra* note 11, s 72(1).

[242] *Newfoundland Act, supra* note 10, s 105(2).

[243] *New Brunswick 1994 Report, supra* note 8, vol 1 at 13.

circumstances to be assessed by the courts in deciding whether a receiver should be appointed. Under the *Uniform Act*, these considerations include whether receivership is an effective means of realizing on the property, the practicability of other enforcement proceedings, whether the money that a receiver may reasonably be expected to realize is likely to be sufficient to pay the costs related to the receivership, whether actual money is expected to remain for distribution among judgment creditors and whether the receivership may cause 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.[244]

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 previously enumerated 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 41.05(d) of the *Rules of Court*.

5.2.7 Distribution of proceeds of seized property

The current complexity of the distribution scheme is the resulting legacy of the *Creditors Relief Act,* due not only to the mandated procedures but in the wording of the 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 and coherent enforcement system consolidated under one statute, modern judgment enforcement legislation provides a complete code for distribution of a distributable fund to eligible claimants.[245]

Although these statutes are conceptually based on the repealed Creditors Relief legislation, they provide a much more refined and effective judgment enforcement system.[246] 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

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[244] *Uniform Act, supra* note 13, s 172.

[245] *Ibid*, s 184; *Saskatchewan Act, supra* note 12, s 110; *Alberta Act, supra* note 11, s 99; *Newfoundland Act, supra* note 10, s 154.

[246] *Saskatchewan 2010 Report, supra* note 21 at 141. See also: *Robinson, supra* note 44 at paras 8-14.

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.[247]

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."[248] Of particular concern is the question of the exclusions of various types of property that are not currently seizable by the sheriff. This flaw of the current *Creditors Relief Act* is 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.[249]

To address many of these problems, the time of creation of the distributable fund and its composition must first be examined. 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 or third parties or in the form of proceeds from the disposition of seized property by the enforcement officer or a secured creditor.[250] 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

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[247] *Saskatchewan 2010 Report*, *supra* note 21 at 141.

[248] *New Brunswick 1985 Report*, *supra* note 25 at 313.

[249] *Saskatchewan 2005 Report*, *supra* note 17 at 177-78.

[250] *Saskatchewan Act*, *supra* note 12, s 107; *Alberta Act*, *supra* note 11, s 97; *Newfoundland Act*, *supra* note 10, s 151(1).

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.[251]

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".[252] 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".[253]

Both the *Uniform Act* and the *Saskatchewan Act* contain language surrounding the creation of a "distribution 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.[254]

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:

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[251] *New Brunswick 1976 Report, supra* note 9 at 32.

[252] *Uniform Act, supra* note 13, s 180(2)(a).

[253] *Saskatchewan Act, supra* note 12, s 107(2)(a).

[254] *Ibid*, s 170(3).

> 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.[255]

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 thereafter deliver an enforcement instruction and share with other judgment creditors in distribution of a fund".[256]

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.[257] Allowing payments that are clearly outside of the scope of the distributable fund not only allows, subject to the *Assignment and Preferences Act*[258], but encourages unjust preferences.[259] 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.

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[255] *Saskatchewan 2010 Report, supra* note 21 at 143-44.

[256] *Ibid.*

[257] *New Brunswick 1985 Report, supra* note 25 at 317-319.

[258] *Assignments and Preferences Act, supra* note 20.

[259] *New Brunswick 1985 Report, supra* note 25 at 317-319

Once the composition of the distributable fund is determined, the *NBJEA* must 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".[260] 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.[261]

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.[262] 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.[263]

It would seem, however, that by limiting access to the distributable fund to judgment creditors whom have already given instructions to the enforcement officer, as is proposed by the *Uniform Act*, 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. In order to determine de 'exigibility' of claims, it is further recommended that the *NBJEA*

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[260] *Newfoundland Act*, *supra* note 10, s 153(1).

[261] *British Columbia 2005 Report*, *supra* note 2 at 237-8.

[262] *Saskatchewan Act*, *supra* note 12, s 109.

[263] *NBJEA 1994*, *supra* note 66, ss 169-170.

adopt section 183 of the *Uniform Act* authorizing the enforcement officer to demand information about a claim from judgment creditors.

These recommendations do not resolve, however, the uncertainty regarding the total amount of eligible claims to be enforced prior to enforcement. With this objective in mind, an effective enforcement strategy based on the actual amount of eligible claims could 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 indicating a refusal to participate within the prescribed period would not be entitled to participate in the distribution. As a result, only judgment creditors that have filed a Notice of Enforcement would be eligible to participate in the distribution and share a distributable fund.

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. In the event a revised strategy is recommended by the enforcement officer, notice must be given once again to all registered judgment creditors prior to the actual enforcement. 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 and the conceptual charges are very similar in nature.[264] Under the *Uniform Act*, all judgment creditors who have filed enforcement instructions are eligible to participate in the proceeds of the "distributable fund".

[264] See also the *Newfoundland Act*, *supra* note 10, s 154(1); *Alberta Act*, *supra* note 11, ss 99-100.

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;

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;[265]

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,
   ii) landlords, if at the time of seizure, they had a right of distress under landlord and tenant legislation; and

[265] *Uniform Act, supra* note 13, s 184(1)(d). Section 184(1)(d) provides that the instructing judgment creditor's claim cannot exceed the lesser of (i) the sum of $2000 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;

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 novelties proposed for the *NBJEA*, 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 there are "exempt". In fact, none of the modern judgment enforcement legislation includes such a category.[266]

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.[267] 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, or 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 proceedings, would not occur under the *NBJEA*.[268] 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,

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[266] See *Saskatchewan Act*, *supra* note 12, s 109; *Newfoundland Act*, *supra* note 10, s 154(1); *Alberta Act*, *supra* note 11, s 99.

[267] For e.g.: *Uniform Act*, *supra* note 13, s 184(1)(d) : preference to judgment creditors is limited to $2,000 plus 15% of the remainder of the fund exceeding $15,000 or such other sum as set by Regulation.

[268] *Saskatchewan 2010 Report*, *supra* note 21 at 149.

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.

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 under the auspices of equity and application of the *NBJEA*. The fact that judgment creditors who register their judgments after a secured 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.[269]

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 judgments. 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

[269] Walsh, *supra* note 102 at 112.

not able to obtain a quick judgment, either because Debtor defended those claim 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.[270] 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.

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 un-adjudicated, 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 creating 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, including the judgment debtor, judgment creditors with eligible claims, secured parties, lien holders and other persons with a security or registered interest in property affected by enforcement proceedings which led directly to the contribution of the distributable fund.[271]

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[270] *Rules of Court*, *supra* note 20, r 21.04, 21.05, 21.06.

[271] *Uniform Act*, *supra* note 13, s 187. See also: *Alberta Act*, *supra* note 11, s 99; *Newfoundland Act*, *supra* note 10, s 154; *Saskatchewan Act*, *supra* note 12, s 110.

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.[272] 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.[273] Objections can then be dealt with according to the *NBJEA*.

6. 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.[274]

The *NBJEA* contemplates a grant of wide discretionary powers to a new enforcement office and its 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 onset of this article, the objective was to analyse specific issues within New Brunswick's current legal judgment enforcement regime in comparison to other proposed or enacted legislation in Canada in order to determine the best solution for the province. It is believed that this article has also provided

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[272] *Uniform Act, supra* note 13, s 188; *Alberta Act, supra* note 11, s 101; *Newfoundland Act, supra* note 10, ss 156, 159; *Saskatchewan Act, supra* note 12, s 111.

[273] *Uniform Act, supra* note 13, s 185; *Alberta Act, supra* note 11, s 101; *Newfoundland Act, supra* note 10, s 154; *Saskatchewan Act, supra* note 12, 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.

[274] *New Brunswick 1976 Report, supra* note 9 at 239.

additional elements to incite the debate which should take place in the wake of the modernization of our provincial judgment enforcement system.

In conclusion, the authors hope that the current government maintains its goal to enact a modern *NBJEA* and that the issues identified in this article and the recommendations contained herein will entice and help the province achieve this objective.