



# The Law Society of Manitoba

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## CIVIL PROCEDURE

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### **Chapter 5** Collections

March 2023

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# A. INTRODUCTION

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## 1. Scope of Materials

There are few lawyers at any stage of practice who are not called upon on a regular basis to advise or take steps in the realm of debt collection. Most lawyers will, at some time, be involved in actions to recover money judgments, and may be advising clients who seek to collect debts which are overdue.

The purpose of these materials is to outline the usual steps, procedures and considerations for counsel and clients in the collection of unsecured debts. The laws that govern or touch upon collection matters are wide and varied. More than 25 statutes are referred to in the materials which follow. Not all are central to collection concerns, but an able practitioner in this area of the law must be well equipped with knowledge drawn from diverse sources.

Procedural guides to remedies and relief are stressed in the following materials. Cases are cited for your future reference in practice, and by then may not be the most current authority, so beware.

Precedents are provided as a starting point. The character of every case should be reflected in the materials you draft as proceedings advance from the demand letter through to terms of settlement.

## 2. Sources

### a) Texts and Other Materials

- C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed. (Scarborough: Carswell, 1995) - As Canada's basic text in collections law, this source addresses every topic dealt with in these materials and is an obvious starting point for research in this area.
- J. Woolley and K. Busby, *Manitoba King's Bench Rules Annotated*.
- M. Foulds and D. MacKay, *Watson and McGowan's Ontario Civil Practice, 2023* (Toronto: Carswell, 2022).
- V. DiCatri, Q.C., *Registration of Title to Land* (Toronto: Carswell, 1988 - Looseleaf), see "Judgments and Writs of Execution." This work was last updated with Release No. 5, May 2022.
- Shin Imai *Annotated Aboriginal Law: The Constitution, Legislation, Treaties and Supreme Court of Canada Case Summaries* (2019 ed.).
- [Code of Professional Conduct](#), Law Society of Manitoba.
- [OMG, They're Insolvent! What Do We Do Now?](#) - October 22, 2015. Available on CPDOnline.
- [Show Me the Money: Receivership and Bankruptcy Basics](#) - April 22, 2021. Available on CPDOnline.

## **b) Statutes**

### **i. *The Court of King's Bench Act***

The *Act*, rules and prescribed forms are the tools of a practitioner's trade in the realm of collections.

### **ii. *The Court of King's Bench Small Claims Practices Act***

These materials contain a detailed discussion of the provisions of this *Act* and King's Bench Rule 76 which may be used in actions commenced in Small Claims Court to recover sums of \$15,000.00 or less, or a higher amount prescribed by regulation.

### **iii. *The Garnishment Act***

The statutory right to garnish is created by this *Act*, and in section 2, the Government of Manitoba submits to being garnished as an ordinary person.

The application of the remedy is later discussed in detail under the headings Prejudgment and Post-judgment Execution.

Note that many provinces (notably Ontario, Quebec and most of the Maritime Provinces) do not permit prejudgment garnishment. Provisions vary in each of the other jurisdictions. Be cautious when citing non-Manitoba authority.

Manitoba's prejudgment garnishment requires an appearance before a Master.

Due to the fact that the motion is brought without notice, the full disclosure requirements applicable to without notice motions must be followed.

### **iv. *Garnishment, Attachment and Pension Diversion Act***

His Majesty in Right of Canada, as garnishee, submits in this *Act* to provincial garnishment law for certain specified debtors. The statute provides for and refers to related provisions under other federal statutes, such as the *National Defence Act* which deals with garnishment of members of the Canadian Armed Forces.

The Federal Department of Justice maintains a Garnishment Registry, and publishes detailed instructions outlining procedures for garnishing the federal government. Notices of intention to garnish must be served in accordance with prescribed procedures as a precondition to provincial garnishment proceedings being effective against the federal Crown.

As later discussed in these materials, judgments obtained in Canada may not require registration under reciprocal enforcement of judgment legislation where the federal government is garnishee, and collection proceedings are taken in a province other than the one where judgment was obtained.

**v. *The Reciprocal Enforcement of Judgments Act***

To simplify the enforcement of judgments from most other provinces and certain other jurisdictions, the Legislature has adopted the uniform scheme set out in this *Act*. Its provisions and the common law principles which operate where the *Act* is not applicable are discussed in the materials which follow.

**vi. *The Enforcement of Canadian Judgments Act***

This *Act* came into effect on March 22, 2006. It provides for recognition of civil judgments from other Canadian provinces and territories on a full faith and credit basis as well as recognition of Canadian civil protection orders.

**vii. *The Executions Act***

This *Act* provides for execution against personal property of the debtor, and is discussed in detail under the Post-Judgment Execution heading, “Writ of Seizure and Sale.”

**viii. *The Judgments Act***

Manitoba’s procedures for execution against land are provided in this *Act*. See Post-Judgment Execution against Real Property.

**ix. *The Fraudulent Conveyances Act***

Where a debtor has conveyed property, otherwise exigible, to a third person with the intention of defeating or delaying creditors, an action can be brought under *The Fraudulent Conveyances Act* for a declaration that the transfer is void as against judgment creditors.

If the action is brought by a creditor before a claim has been reduced to a judgment, the established practice is for such creditor to bring the action in its own name and on behalf of all other creditors of the debtor as a class action.

*Traders Bank v. Wright*, 1908 CanLII 333 (MB CA)

Failure to so proceed can result in the Statement of Claim being struck.

*Bank of Montreal v. Freed*, 1990 CanLII 11162 (MB CA)

Post-judgment, a single judgment creditor has standing to bring an action under the *Act* in its own name and on its own behalf.

*The Western Canada L. & S. Co. v. Snow*, 1890 CanLII 120 (MB QB)

The result of a successful action under this *Act* is to remove an obstacle to creditors by restoring the property to the hands of the transferor and making it available for the usual execution procedures.



**x. Bankruptcy and Insolvency Act, as amended**

Where a debtor is insolvent, has generally ceased to meet liabilities as they come due and is attempting to abscond or defraud creditors, or has committed some other act of bankruptcy (defined in s. 42 of the *Act*) an unsecured creditor owed more than \$1,000.00 may petition the debtor into bankruptcy.

Bankruptcy circumvents the need for debt actions and automatically stays all civil proceedings against the bankrupt. Creditors merely file a proof of claim (there is usually no need for a judgment to prove claims for liquidated amounts) and the trustee ultimately distributes proceeds from the unsecured portion of the debtor's estate among preferred and unsecured creditors according to priorities set out in section 136 of the *Act*.

Where the value of the estate at the date of petition is not sufficient to satisfy costs of the bankruptcy and claims of creditors of the estate, the claims are extinguished upon discharge of the bankrupt.

Corporate debtors are not discharged unless all liabilities are satisfied.

Note that certain liabilities of a debtor survive discharge from bankruptcy i.e., claims based on fraud, breach of trust, payment for spousal or child support etc. (See s. 178.)

By amendments to the *Act* which took effect September 18, 2009, rights permitting debtors to make Commercial and Consumer Proposals to creditors have been extended. Under these provisions, civil proceedings against the debtor are stayed pending and on approval of the terms of the Proposal. Debtors and creditors may agree, under these provisions, to a compromise of the indebtedness and to various terms for payment or part payment of the indebtedness over time.

**xi. Indian Act**

Execution proceedings of all types against treaty Indians or bands are severely restricted by the following provisions:

*Section 89(1)...the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.*

*Section 90(1)*

*For purposes of sections 87 and 89, personal property that was*

*a) purchased by His Majesty with Indian moneys or moneys appropriated by Parliament for the use or benefit of Indians or bands, or*

*b) given to Indians or to a band under a treaty or agreement between a band and his Majesty,*

*shall be deemed always to be situated on a reserve.*

Judicial interpretations of these provisions have tended to be expansive, not restrictive.

See the Annotated *Indian Act*, supra.

**xii. *The Registered Retirement Savings Protection Act***

This *Act* provides, subject to certain exceptions contained in the *Act*, that all rights, property and interests of a planholder in a registered plan are exempt from any enforcement process.

An “enforcement process” is defined to include garnishment, execution, seizure or attachment or any other remedy or legal process to enforce payment of an amount payable by a planholder. See the *Act* for specific definitions of “planholder” and “registered plan.”

## B. PRELIMINARY MATTERS

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### 1. Client Expectations

Collection matters are among the most straightforward of civil litigation proceedings, at least on the question of liability. Interesting defences may arise; however, creditors are usually certain that a fixed sum is overdue and owing to them and simply want prompt and inexpensive enforcement of their right to collect.

Being entitled to a money judgment and actually collecting on one can be two very different things. Debtors often cannot meet their financial obligations, or are prepared to resist legal proceedings in order to delay or frustrate a creditor's collection efforts.

Absent sound advice from counsel, creditors may pursue their legal rights to no avail - throwing good money after bad.

In order to meet and satisfy client expectations in the realm of collections, counsel should keep the following in mind:

- be candid with your client about costs at every stage of the proceedings;
- ensure that your client has realistically assessed the debtor's capacity to pay;
- never close the door on settlement; and
- get to know the remedies and procedures available - be creative and timely in their application.

### 2. Information Required

At the very outset obtain from the client:

- full particulars of the claim;
- the course of dealings in which it arose;
- the creditor's assessment of the debtor's capacity to pay; and
- particulars respecting efforts made to date to collect on the account.

An interview checklist is provided in the Checklists and Precedents section as a guide for initial interviews of creditors. Do not use the guide as an outline for the interview. Let the client tell you the story. Use the checklist at the end of the interview to confirm that you have the information essential to proceed.

Obtain all relevant documents from the creditor including:

- credit applications;
- invoices;
- statements;
- demands;
- particulars of payments received; and
- copies of correspondence.

Conduct corporate searches to confirm:

- proper names of the parties;
- the address for service respecting corporate defendants; and
- proof of your client's extra-provincial registration in Manitoba, if applicable.

An Equifax search can also be a useful tool in determining a debtor's last place of employment or address as well as providing a list of other potential debts owing by the same debtor and whether those debts are in collection, have been paid or have been written off. A date of birth or social insurance number is required to conduct an Equifax search on the debtor.

Consider whether searches at the Land Titles Office and the Personal Property Registry are likely to produce information useful to the intended proceedings (i.e., to determine how the debtor's name appears on certificates of title to facilitate judgment registrations against land, to obtain particulars for prejudgment garnishment of bank accounts, mortgage or rent payments accruing to the debtor, etc.).

A Court of King's Bench Registry search can also be conducted to determine whether anyone else has commenced an action against the debtor and whether any collection efforts have been made and/or been successful as a result.

Check, where appropriate, whether the debtor is bankrupt or subject to a court ordered receivership, and therefore subject to a stay of all proceedings which prevent valid actions from commencing.

### **3. Assessment of the Action**

Having received the particulars provided by the creditor, consider whether any specialty remedies are available before you proceed with collection on the basis of an unsecured debt.

For example, be alert to:

- lien and trust claim remedies available to suppliers, subcontractors and employees under *The Builders' Liens Act*;
- landlord rights of distress against commercial tenants under *The Landlord and Tenant Act*;
- rights to recover possession of personal property under section 59(1) of *The Court of King's Bench Act* and King's Bench Rule 44; and
- any secured creditor rights arising under *The Personal Property Security Act*, *The Mortgage Act*, *The Garage Keepers Act*, etc.

Before you commence proceedings to collect money owing to an extra-provincial corporation under a contract made in whole or in part in Manitoba, ensure that the foreign creditor has registered in Manitoba as this affects the required status to sue in Manitoba. See section 197(1) of *The Corporations Act*. This requirement for registration does not apply to federal corporations.

A proceeding commenced without such registration in place has been found not to be a nullity, but was deemed to be stayed until the registration was complete.

*Amco Engineering Co. v. Custom Steel Products Inc.*, 1981 CanLII 2734 (MB CA)

Ensure that the correct parties have been identified.

Where there is doubt about the proper identity of the debtor, sue sole proprietors or partners in their personal capacities, name the firm as a defendant as well as any corporation which seems implicated in the course of dealings. With clubs, associations and Indian bands, check the relevant case law to ensure the proper party is sued having regard to King's Bench Rule 8.

Whether suing on a personal guarantee, promissory note, sale of goods account, or other simple contract debt, consider relevant statutes and defences which might arise. Take the appropriate law into account when you advise your client on available courses of action, the likelihood of obtaining a judgment and the complexity of defences likely to arise. Consider the applicable limitation period and diarize the limitation date accordingly.

Advise your client as well on the likelihood of executing on a judgment if the action succeeds.

Consider whether:

- the debtor has known means or assets to satisfy a judgment;
- there are other creditors currently pursuing the debtor;
- secured creditors have interests registered against “all the assets and undertakings” of the debtor;
- bankruptcy is likely to intervene to stay the creditor’s proceeding; and
- the debtor is a treaty Indian whose assets may be protected by limits on execution under the *Indian Act*.

## 4. Demanding Payment

Some promissory notes and guarantees expressly require demand to issue before the obligation to pay or the right to claim interest may arise. In such cases, comply strictly with the conditions for demand before commencing an action.

In most cases, however, a letter of demand from a law firm signals to the debtor that legal proceedings and attendant liability for costs are imminent. Payment without substantial cost may thus be provoked.

In other circumstances issuance of a demand may not be the first communication with the debtor. Sometimes the creditor has already demanded and threatened legal proceedings in writing, so that further demand is not warranted. In other cases where a creditor has cause for concern about the debtor absconding or disposing of exigible assets, the element of surprise may be required, in which case it is not advisable to issue a demand prior to proceedings commencing.

When required, demand letters should be simple and to the point. The parties, the basis for the claim, particulars of the interest rate payable and a clear statement of the current amount owing should be included. A copy of any promissory note or personal guarantee may be attached. Where demand is made on behalf of a bank or credit union, identify each loan or account for which payment is demanded. Limit the time for response, and make clear where reply is to be directed. Leave no doubt about the action which will follow upon the debtor’s failure to respond.

A sample form of demand letter is included in the precedents.

## C. INITIATING PROCEEDINGS

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Where a debtor fails to respond to a demand issued, or you are instructed to immediately commence a court action for recovery of a debt, the following preliminary matters require consideration.

### 1. Limitation Periods

Obtain from the client particulars necessary to determine the precise nature of the cause of action and when it arose. If the time limit for bringing an action has expired, make inquiries to determine whether the debtor has confirmed or acknowledged liability in such a way as to extend the time for commencing an action.

#### a) Specific Limitations

*The Limitation of Actions Act* has been repealed and replaced by *The Limitations Act*, which came into effect on September 30, 2022. The new *Act* applies to all claims commenced after that date.

Most collection matters now come within section 6 of *The Limitations Act*, which provides:

*Unless this Act provides otherwise, a proceeding respecting a claim must not be commenced more than two years after the day the claim is discovered.*

Pursuant to section 7:

*A claim is discovered under this Act on the day the claimant first knew or ought to have known all of the following:*

- (a) that injury, loss or damage has occurred;*
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;*
- (c) that the act or omission was that of a person against whom the claim is or may be made;*
- (d) that, given the nature and circumstances of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.*

With respect to a debt, section 8 sets out that the day the injury, loss or damage occurs is as follows:

- (b) in the case of a series of acts or omissions respecting the same obligation, the day the last act or omission in the series occurs;*
- (e) in the case of a default in performing a demand obligation, the day the default occurs, once a demand for performance is made;*

## b) Commencement Dates

With the particulars of the case before you, consult *The Limitations Act* or any other statute that may apply. Also note that it may be possible to extend the time to bring an action, with consent (see s. 24).

The limitation period does not run during any time a stay of proceedings is in effect under the *Bankruptcy and Insolvency Act* (Canada), the *Companies' Creditors Arrangement Act* (Canada) or the *Farm Debt Mediation Act* (Canada) (s. 25), or while the claimant is a minor or under a disability (ss. 13 and 14).

Work from the earliest possible commencement date and promptly issue a statement of claim if there is any danger that the cause of action is expiring.

## c) Confirmation of Cause of Action

Where, before the limitation period expires, the debtor acknowledges a debt or judgment in writing, makes a written promise to pay or makes a part payment on the debt, section 20 of *The Limitations Act* provides that the operation of the limitation period begins to run afresh from the time of the acknowledgment.

## 2. Currency Considerations

The [Currency Act](#) section 12 requires that "...any reference to money or monetary value in any indictment or other legal proceeding shall be stated in the currency of Canada."

Manitoba courts will not issue judgments in funds other than Canadian. The proper rate and date for conversion of a claim into Canadian funds may generate strong arguments at trial, particularly where substantial fluctuation has occurred in the exchange rate.

To preserve the optimal position for a creditor with a foreign currency claim, it is appropriate to plead the claim in the foreign currency amount, and in the prayer for relief, claim judgment in the Canadian dollar equivalent to the foreign currency claim amount, without specifying a date for conversion.



### 3. Prejudgment Interest

Where there is evidence to support a claim for prejudgment interest at a rate in excess of the statutory rate provided by regulations under *The Court of King's Bench Act*, plead the particulars supporting such a claim.

An interest rate claimed in invoices for overdue accounts may indicate an “implied” term of the parties’ dealings. If the debtor has ever paid interest under an invoice or statement from the creditor, such conduct may support allegations of an express agreement to pay the creditor’s rate.

Check credit applications, etc. for an express agreement to pay interest on overdue accounts at a prescribed rate.

Where there is no express or implied agreement, it may be appropriate to claim prejudgment interest at the creditor’s bank borrowing rate, particularly where the account is a large one.

### 4. Post-judgment Interest

Judgments rendered before July 1, 1994 bear interest post-judgment at the Federal [Interest Act](#) rate of 5% per annum, unless the court otherwise ordered.

Provisions in section 84(1) of *The Court of King's Bench Act*, read together with amendments in S.M. 1993, c.19, provide that the post-judgment interest rate published quarterly in the Manitoba Gazette shall apply to money owing under an order, including costs, from date of pronouncement, unless otherwise ordered by the court, notwithstanding any stay or appeal of the order.

Where a creditor has a basis in an agreement, under statutory authority such as by order of the Public Utilities Board, or otherwise, for claiming post-judgment interest at a rate different from that provided under *The Court of King's Bench Act*, pertinent facts should be pled.

Under section 79(1) of *The Court of King's Bench Act*, pre- and post-judgment interest rates are determined by the registrar quarterly. The Table showing the pre- and post-judgment interest rates is found [here](#).

### 5. Choice of Courts

Where the principal sum claimed does not exceed \$15,000.00, the possibility of proceeding under *The Court of King's Bench Small Claims Practices Act* should be reviewed with your client.

Where small claim procedures are not appropriate, actions for the recovery of money judgments proceed in the Court of King’s Bench. (For limited exceptions to this general rule, see the Administrative Advocacy materials respecting matters heard in the Federal Court.)

## D. SMALL CLAIMS COURT

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### 1. Selecting Small Claims Court

Not every eligible small claim is appropriate for summary determination in Small Claims Court. Keep in mind that some of the court officers who hear these matters in the first instance are not legally trained, and the proceedings are very informal. No interlocutory proceedings or rights of pretrial discovery are available. Notice of the claim is filed and served, and the hearing date is fixed by the court. The parties must appear and each give such evidence, under oath, as the court may permit.

Many creditors attend to their own filing, service and appearances on small claims matters, and this option should be presented to clients where it is available and cost considerations are paramount. If the claimant fails to appear, the hearing officer may either dismiss the claim or adjourn the hearing subject to such terms and conditions as the judge or court officer may direct.

It may not be appropriate to initiate proceedings in Small Claims Court where the matter at issue is complex, where the creditor is seeking a judicial precedent, or where a foreign creditor does not have a local representative readily available to attend and give evidence on its behalf at the hearing.

On the other hand, low costs and expeditious determination of the dispute weigh in favour of small claims proceedings. If a creditor has a claim which exceeds \$15,000.00 but not by an amount sufficient to warrant the expense of a King's Bench claim, the creditor can waive the amount over \$15,000.00 and still proceed in Small Claims Court. This may be a more cost-effective and expeditious recovery for the creditor even if it means walking away from a portion of what the creditor believes it is owed.

Frequently, defendants do not appear, in which case the judge or court officer must allow the claimant to prove service of the claim on the defendant. If proper service is proven, the judge or court officer must then hear and decide the claim and determine whether to dismiss any counterclaim made by the defendant. Even if a defendant does not appear, the hearing officer may still require the claimant to prove their case by the provision of documentary and sometimes oral evidence. It is therefore good practice to come prepared with your evidence and witnesses even if you do not think the defendant will attend and the matter may proceed by default.

Decisions of Small Claims Court, being judgments of the Court of King's Bench, are subject to enforcement on the same basis as any other judgment of the court.

An unsatisfactory result in Small Claims Court can only be appealed to a Court of King's Bench judge on a question of law or jurisdiction with leave of a judge. (See s. 12(1) of *The Court of King's Bench Small Claims Practices Act* ("the Act"). If leave is granted, the judge will determine whether the hearing will proceed by oral argument or by a new hearing of the evidence (see s. 12(8)). If counsel appear at the appeal, they are required to robe (Court of Queen's Bench of Manitoba re: Court Attire dated November 26, 2020 [Notice](#)).

Under the *Act*, costs not exceeding \$500.00 (except in exceptional circumstances) and reasonably incurred disbursements may be awarded to the successful party (s. 14(1)). This factor should be considered where a creditor seeks counsel's attendance at Small Claims Court hearings.

## 2. Monetary Jurisdiction

Small Claims Court has jurisdiction as follows:

- where the claimant's claim, exclusive of interest, is for an amount of money not exceeding \$15,000.00 which may include general damages not exceeding \$2,000.00; or
- an assessment of liability arising from a motor vehicle accident.

## 3. Substantive Jurisdiction

*The Court of King's Bench Small Claims Practices Act* does not apply where the proceeding involves or is likely to require determination of questions relating to:

- residential tenancy disputes (s. 3(2));
- ownership of, or an interest in, real property (s. 3(4)(a));
- interpretation or enforcement of a testamentary disposition (s. 3(4)(b));
- administration of a trust or an estate (s. 3(4)(c));
- family law matters as defined in section 41 of *The Court of King's Bench Act* (s. 3(4)(d));
- an allegation of wrongful dismissal from employment (s. 3(4)(d.1));
- allegations of malicious prosecution, false imprisonment or defamation (s. 3(4)(e)); or
- allegations of wrongdoing by a judge or justice (s. 3(4)(f)).

## 4. Form of Pleadings

King's Bench Rule 76 applies to proceedings under the *Act*. The prescribed Small Claims Form 76A has been pre-printed as a multi-part form to simplify the issuance of pleadings by persons not assisted by counsel. A claimant must serve a blank Defence ([Form 76D](#)) on each defendant along with a copy of the Small Claim ([Form 76A](#)) within 30 days after the small claim was filed (Rule 76.03(1)). A claimant must file a Declaration of Service ([Form 76B](#)) as proof of service on the defendant.

When completing the claim form, ensure that all essential particulars such as the date and place of transactions, or particulars of relevant invoices or statements are included. If necessary, the details of the claim may be set out in paragraph form on a separate page with copies attached to each part of the claim form.

If a defendant wishes to dispute the claim, they must file a Defence (Form 76D) or a Defence and Counterclaim (*Form 76E*) within 20 days of being served with a small claim (Rule 76.05(1)). The defendant must serve a copy of the defence or defence and counterclaim on the claimant within 30 days of filing (Rule 76.05(2)). The defendant must also file a Declaration of Service (Form 76B) as proof of service on the claimant (Rule 76.05(3)).

If a defendant fails to file a defence or defence and counterclaim within 20 days, a claimant may file a Request for Noting Default and Default Decision (*Form 76E.1*) if they have filed a declaration of service (Rule 76.06(1)). A defendant may file a defence or defence and counterclaim any time before being noted in default (Rule 76.06(2)).

Where a defendant raises a counterclaim for an amount in excess of \$15,000.00 or which is joined with a counterclaim for any other remedy, and the defendant does not abandon the excess or other remedy, section 5 of the *Act* applies. The judge or court officer shall adjourn the claim for 30 days and order the party making the counterclaim to commence an action in the Court of King's Bench to enforce the counterclaim.

At least five days prior to the date fixed by the judge or court officer for the hearing, the party making the counterclaim must provide the judge or court officer with a certified copy of the statement of claim or other initiating process commencing the action in the Court of King's Bench. The Small Claim that was adjourned will then be deemed to be discontinued.

Third parties may be named by order of the judge or court officer at the time of hearing (ss. 8.7(1) and (2) of the *Act*) where it appears that a party against whom a claim or counterclaim is made may be entitled to a contribution or indemnity from a person not a party to the claim.

## **5. Judicial Centre for Hearing**

A small claim may be filed in any judicial district, but will be scheduled for hearing and heard by the court in the administrative or judicial centre nearest to the place where the defendant resides or carries on business or where the cause of action arose, subject only to the parties and the court officer or judge hearing the matter agreeing to some other location (Rule 76.08).

## **6. Service**

### **a) General Principles**

The object and purpose of Small Claims Court is reflected in the permitted manner of service which is intended to be as expeditious, informal and as inexpensive as possible.

## **b) Specific Rules for Service on Parties**

Section 21(1) of the *Act* permits effective service to be made:

- (a) by actually delivering it to the person required to be served; or
- (b) by handing it to and leaving it with a person who appears to be at least 16 years old at the residence of the person required to be served; or
- (c) by mailing it by prepaid registered mail enclosed in a package addressed to the person required to be served at the last known or usual place of abode of the person.

Registered mail is generally the most common practice for service of a Small Claim as set out in section 21(1)(c). Registered mail is prepaid and the delivery status is tracked. A claimant can provide proof of service by printing a confirmation of delivery. For further details about registered mail and tracking information, please visit the Canada Post [website](#).

A Declaration of Service (Form 76B) indicating that this procedure has been followed should be filed prior to the hearing date. When serving via registered mail, the tracking number must be provided to comply with section 21(1)(c). A copy of the receipt confirmation from Canada Post, including a signature of receipt, should be attached to the Declaration of Service.

## **c) Order Extending Time**

A party may apply for an order to extend the time for service ([Form 76C](#)). Applications for such orders may be made informally by attending at the court office and making this request of the court clerk, or by request at the hearing. (See Rule 76.15.5).

## **d) Substituted Service**

Section 21(2) of the *Act* allows a judge or court officer to order substitutional service in such manner as a court officer may direct.

## **e) Proof of Service**

Section 22 of the *Act* permits proof of service to be made on oral evidence given under oath or by means of an Affidavit by a person having personal knowledge of the facts deposed to. Proof of service can also be made by way of a Declaration of Service in Form 76B. (See Rule 76.03(3) and Rule 76.05(3)).

## 7. Appeals

A party may appeal a decision made by a court officer to a judge of the Court of King's Bench on a question of law or jurisdiction only, with leave of a judge (s. 12(1) of the Act).

A party who seeks to appeal a decision of a court officer must file an Application for Leave to Appeal and Notice of Appeal (*Form 76K*) within 30 days after the certificate of decision is filed with the court, along with a copy of the transcript of proceedings or proof that the transcript has been ordered. (See s. 12(2) of the Act).

The party will thereafter obtain an Appointment from the King's Bench setting out the date and place of hearing. The party must serve the Application for Leave to Appeal, the Notice of Appeal, the transcript and the Appointment upon each party within 20 days from the date of filing, and thereafter file a Declaration of Service (*Form 76B*). (See ss. 12(4) and (5)).

If the judge grants leave to appeal, the judge will thereafter set the date and place for hearing of the appeal and direct whether the appeal will be heard by oral argument or by a new hearing of the evidence. The judge will also provide direction as to what written materials must be filed and served and the time periods for doing so. (See s. 12(8)).

A Small Claims Appeal is a King's Bench trial before a judge and, therefore, counsel is required to robe, even if they are appearing to request an adjournment or seeking leave.

Proceedings to enforce the decision are stayed as at the date the Application for Leave and Notice of Appeal are filed. (See ss. 12 (6) and (7)).

Where a defendant was noted on default (s. 8.0.3(1)), or did not appear at the original hearing (s. 9(2)), the defendant may file an Application to Set Aside Decision (s. 11(1), Rule 76.12(1) and *Form 76I*). At the time of filing, the defendant must pay \$150.00 into court for security for costs (Rule 76.12(2)). The defendant must serve the Application to Set Aside Decision on the other parties and file a Declaration of Service with the court.

In determining whether or not to set aside the decision, the hearing officer (or judge, if the original decision was made by a judge) will consider whether the defendant willfully or deliberately failed to appear at the hearing, if the application to set aside was filed as soon as reasonably possible after obtaining knowledge of it (or any delay in filing was explained), and whether it is fair and just in the circumstances. (See s. 11(6) of the Act). The decision of the judge or court officer in this regard is final and cannot be appealed. (See s. 11(10) of the Act).

If the decision is set aside, it is null and void from the date of the decision to set it aside (s. 11(8) of the *Act*). The hearing officer (or judge) will set a date for a new hearing (Rule 76.12(4) and s. 11(7) of the *Act*).

If the decision is not set aside, it remains in effect and can be enforced (s. 11(9) of the *Act*).

A decision of a judge on appeal from a decision of a court officer is final and there is no further appeal to the Court of Appeal (s. 13 of the *Act*).

A party may appeal a decision made by a judge to the Court of Appeal on a question of law or jurisdiction only, with leave of a judge of that court (s. 15(1) of the *Act*).

The party must file an application for leave to appeal and notice of appeal with The Court of Appeal within 30 days after the Certificate of Decision is filed in the Court of King's Bench (s. 15(2) of the *Act*).

## E. COURT OF KING'S BENCH PROCEEDINGS

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Money judgments for sums exceeding \$15,000.00 must proceed in the Court of King's Bench.

### 1. General Procedure

Matters related to selection of the administrative district, the form of pleadings and service are dealt with elsewhere in these materials. Nothing distinguishes collection proceedings on these topics.

Default judgments, motions for summary judgment, motions to strike embarrassing pleadings and other relevant proceedings prior to and including trial are also covered elsewhere in these materials.

### 2. Rule 20A - Expedited Actions

King's Bench Rule 20A introduced an expedited process to Manitoba law which was designed to reduce legal costs and facilitate access to the judicial process. Effective April 1, 2012, the rule was modified substantially both in terms of monetary limit and procedure. Rule 20A was modified again on January 1, 2018. It is therefore important that counsel refer to the most current rules before proceeding with an expedited action.

Rule 20A applies to actions where the relief claimed is a liquidated or unliquidated amount not exceeding \$100,000.00, exclusive of interest and costs. This rule applies even if the plaintiff claims related relief in the action.

Pleadings are filed in the Court of King's Bench. Under the rules which came into effect on January 1, 2018 there is no longer a mandatory case conference requirement. Instead there are specific time frames for disclosure of documents (Rule 20A (7-15)), limits on examinations for discovery (Rule 20A (16-19)) and requirements for disclosure of witnesses (Rule 20A (20-29)).

This rule must be reviewed carefully prior to issuing a claim so that all time frames are met. More detailed information on Rule 20A is provided in the other Civil Procedure chapters.



## F. FOREIGN JUDGMENTS

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### 1. Common Law Recognition and Enforcement

Where a creditor has a judgment from a foreign court other than a state named in reciprocal enforcement of judgment legislation in the province, common law principles and conflict of laws rules determine the proper course of proceedings. In most cases the creditor's simplest course of action is to sue in Manitoba on the original cause of action, possibly referencing the existence of the foreign judgment in the pleadings. If no defence is filed, judgment by default will quickly produce an enforceable judgment in this jurisdiction.

To understand the nature of the defences which might be raised in such a proceeding, including the doctrine of merger and *res judicata*, consult references such as C. R. B. Dunlop, *Creditor - Debtor Law in Canada*, 2nd ed. (Scarborough: Carswell, 1995).

### 2. Reciprocal Registration and Enforcement

#### a) *The Enforcement of Canadian Judgments Act*

*The Enforcement of Canadian Judgments Act* ("the Act") came into effect on March 22, 2006. The Act applies to judgments made in a civil proceeding by a court in other Canadian provinces and territories. There are two key features to the Act.

##### i. Canadian Judgment

A "Canadian judgment" is defined in section 1 to include a judgment made in a civil proceeding by a court of a province or territory of Canada, other than Manitoba,

- that requires a person to pay money;
- under which a person is required to do or not do an act or thing; or
- that declares rights, obligations or status in relation to a person or thing;

but does not include a judgment that

- is for maintenance or support;
- is for the payment of money as a penalty or fine for committing an offence;
- relates to the care, control or welfare of a minor, other than a Canadian civil protection order;
- is made by a tribunal of a province or territory of Canada other than Manitoba whether or not it is enforceable as an order of the superior court of unlimited trial jurisdiction in that province or territory, to the extent that it provides for relief other than the payment of money; or

- relates to the granting of probate or letters of administration or the administration of the estate of a deceased person.

A Canadian judgment can be registered in Manitoba by paying the required fee and filing with the registrar of the Court of King's Bench a copy of the judgment, certified as true by an officer of the court that made the judgment and any additional information or material required by the regulations (s. 3). A registered Canadian judgment may then be enforced in Manitoba as if it were an order of the Court of King's Bench (s. 4).

A Canadian judgment that requires a person to pay money may not be registered under this *Act* for the purpose of enforcement unless it is a final judgment (s. 2(2)).

The provisions of a Canadian judgment that require a person to pay money must not be registered or enforced under this *Act* after

- the time for enforcement has expired in the province or territory where the judgment was made; or
- later than 10 years after the day on which the judgment became enforceable in the province or territory where it was made;

whichever occurs first (s. 5(1)).

A party to the proceeding in which a registered Canadian judgment was made may apply to the Court of King's Bench for directions respecting its enforcement and the *Act* sets out the types of orders the court may make (ss. 6(1), (2) and (3)). However, an application for directions before any measures are taken to enforce a registered Canadian judgment is mandatory if the enforceability of the judgment is, by its terms, subject to the satisfaction of a condition or the judgment (other than a Canadian civil protection order) was obtained without notice to the person bound by it (s. 6(4)).

This *Act* does not replace *The Reciprocal Enforcement of Judgments Act*, but is intended to permit civil judgments from other Canadian jurisdictions to be registered pursuant to a simpler process. Neither registering a Canadian judgment nor taking other proceedings under this *Act* affects an enforcing party's right to bring an action on the original cause of action or to register and enforce the Canadian judgment pursuant to *The Reciprocal Enforcement of Judgments Act* (s. 9).

## ii. Canadian Civil Protection Order

A “Canadian civil protection order” is defined in section 1 of the *Act* as a Canadian judgment or a portion of a Canadian judgment that prohibits a person from:

- being in physical proximity to a specified person or following a specified person from place to place;
- contacting or communicating with a specified person, either directly or indirectly;
- attending at or within a certain distance of a specified place or location; or
- engaging in molesting, annoying, harassing or threatening conduct directed at a specified person.

A Canadian civil protection order may be registered and enforced in Manitoba as a Canadian judgment (s. 12). Nonetheless, a Canadian civil protection order is deemed to be an order of the Court of King’s Bench and may be enforced in the same manner as an order of that court for all purposes, whether or not the order is registered (ss. 10 and 11). These provisions will be of particular importance to victims of domestic violence.

## b) *The Reciprocal Enforcement of Judgments Act*

On application made within six years of issuance, judgments from reciprocating states listed in regulations to this *Act*, may be registered in Manitoba for enforcement as judgments of the Manitoba Court of King’s Bench (s. 3(1)).

The Regulations under the *Act* list as reciprocating states all Canadian provinces (other than Quebec), the North West Territories, the Yukon, Nunavut, Idaho, Washington, and certain states and territories of Australia.

Nothing in this *Act* affects the right of a judgment creditor to register their judgment under *The Enforcement of Canadian Judgments Act* (s. 13(2)).

### i. Process

The originating process for registering a judgment under the *Act* is a Notice of Application to a judge in King’s Bench [Form 14B](#).

The application may be made without notice to the judgment debtor if the circumstances fall within the criteria set out in section 3(2) of the *Act*.

Section 9(1) of the *Act* authorizes *ex parte* garnishment proceedings to commence with the application. Such proceedings are deemed to be garnishment before judgment. Conventional practice therefore assumes that wages of the debtor cannot be attached on such an application.

An *ex parte* application can only be made, under section 3(2), where:

- the judgment debtor was personally served with the originating process in the original action; or
- the judgment debtor, though not personally served, appeared, defended, attorned or otherwise submitted to the jurisdiction of the original court; and
- time for appeal has expired, no appeal is pending, or all appeals have been disposed of.

*Ex parte* applications must be accompanied by a certificate in the form prescribed by the *Act* under the seal of the originating court, signed by a clerk or judge (s. 3(3)).

The judgment creditor's affidavit in support of the application should include:

- a true copy of the originating process;
- particulars of service or attornment by the judgment debtor to the jurisdiction of the original court;
- particulars of the judgment issued;
- particulars of any appeals taken;
- particulars of any payments received on the judgment and the balance outstanding;
- sealed copy of the certificate of the original court in the form prescribed; and where applicable:
- the name and address of each garnishee;
- that the judgment creditor believes that each garnishee is, or will become indebted to the judgment debtor;
- particulars of each debt to be garnished including that same are not for wages.

The precedents contain a sample Affidavit.

Where the application is heard and granted, the resulting order must be filed with the court together with an exemplification or certified copy of the original judgment, whereupon the original judgment is entered as a judgment of the Manitoba Court of King's Bench (s. 3(7)). These requirements coincide with section 38(1) of *The Manitoba Evidence Act*, which permits proof to be made of

foreign judgments from any part of the Commonwealth or in the United States, or any state, territory or possession thereof by an exemplification or certified copy of the judgment purporting to be under the seal of the court.

Taxed costs of the application may be added to the judgment amount (s. 7(c)).

If the application proceeded *ex parte*, notice of the registration of judgment must be served on the judgment debtor in the same manner as a Statement of Claim is required to be served, within one month of the date of registration. King's Bench Rule 16.01(1) requires such service to be personal or by one of the alternatives provided in Rule 16.03.

Section 8(1)(b) of the *Act* allows the judgment debtor one month from notice of registration to apply to set the registration aside. There is Alberta authority which states that the judgment debtor's application must be filed and served within one month of notice to be effective.

*Alcor Pacific Lumber Sales Ltd. v. Janet Lumber Trading Co.*, 1977 CanLII 638 (AB QB)

Defences which the judgment debtor can raise are set out in section 3(6) of the *Act*.

## ii. Effect of Registration

Once registered in the Manitoba Court of King's Bench, the judgment is of the same force and effect as if it had originally issued in the Manitoba court on the date of registration.

Execution proceedings can be taken on the judgment. The judgment can be registered against real property. Note, however, that no sale or other disposition of any property of the judgment debtor, nor payment out of funds garnished, may be effected where the registration was made on an *ex parte* order until expiry of one month from service of notice of the registration on the judgment debtor or such further period as the registering court may order (s. 7(a)).

## c) ***The Canada-United Kingdom Judgments Enforcement Act***

Part III of the Convention attached as a schedule to the above *Act* deals with the enforcement in Manitoba of money judgments from the United Kingdom of Great Britain (including England, Wales, Scotland) and Northern Ireland.

King's Bench Rule 65 sets out the process for effecting a registration under the *Act*. The specific form for a Notice of Application is prescribed in *Form 65A*.

**d) Reciprocity**

Keep in mind that a Manitoba judgment may be registered and enforced in reciprocating states referred to in the two statutes referenced above.

**e) *Garnishment, Attachment and Pension Diversion Act***

It may not be necessary to register a judgment in other provinces where enforcement is sought under the federal *Garnishment, Attachment and Pension Diversion Act*. For example, if the debtor is a member of Canada's Armed Forces, it may be possible to garnish the debtor's wages under a judgment obtained in Manitoba or elsewhere in Canada when the debtor has been posted outside the jurisdiction without the necessity of registering the judgment in the place where the debtor currently resides.

For particulars, consult the *Act* and its regulations, and obtain forms and procedural guides from the Garnishment Registry, Federal Department of Justice, Winnipeg Regional Office, 301 – 310 Broadway.

## G. PREJUDGMENT EXECUTION

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Manitoba has had absconding debtor legislation since the late 1800s which has permitted a creditor, prior to judgment, to attach a debtor's property. The attachment process is designed to hold the assets until judgment is obtained, after which the usual execution process must be completed. The general rule is that there can be no execution without first obtaining a judgment.

### 1. Mareva Injunctions

English courts created the Mareva injunction as an exception to their general rule against prejudgment execution. The remedy was also created to fill the gap in English law respecting absconding debtors.

Mareva injunctions are applied for without notice, usually after a Statement of Claim has issued, and seek to restrain a debtor from disposing of assets within the jurisdiction pending trial.

Injunctions are relief *in personam*, binding on the debtor, unlike attachment proceedings which direct the sheriff, garnishee, etc. to take steps for the preservation of specified assets.

A Mareva injunction may be the preferred remedy, even in Manitoba where:

- control of the debtor is the object;
- particulars of assets in the jurisdiction may not be known; or
- the statutory grounds for attachment are not in evidence.

### 2. Attachment of Personal Property and Land Before Judgment

Manitoba's longstanding provisions for attaching the property of absconding debtors are now found principally in section 60 of *The Court of King's Bench Act* and Rule 46.

#### a) Requirements

Attachment of personal property or land prior to judgment is permitted where:

- a Statement of Claim for payment of money has issued;

- the defendant resides outside of Manitoba, or is a corporation not registered in Manitoba;
- the defendant hides or absconds within Manitoba with the intent to avoid service of a document;
- the defendant is about to leave or has left Manitoba with the intent to:
  - change residence;
  - defraud a creditor; or
  - avoid service of a document;
- the defendant is about to permanently remove or has permanently removed property out of Manitoba; or
- the defendant has concealed, removed, assigned, transferred, conveyed, converted or otherwise disposed of property with an intent to delay, defeat or defraud a creditor, or is about to do so (s. 60(1) *The Court of King's Bench Act*).

Personal property exemptions from execution under *The Executions Act* are not available to absconding debtors (s. 29).

## **b) Procedure**

King's Bench Rules 46.01 through 46.13 set out the procedures for prejudgment attachment which commence with issuance of a Statement of Claim for the recovery of money.

A Motion without Notice (Rule 46.01(2)) is then made to the court with a supporting Affidavit containing evidence required by Rule 46.01(1).

As with all Affidavits on matters to be heard *ex parte*, there must be full disclosure of all facts material to the matter being heard. See [Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers](#), 1977 CanLII 1634 (MB CA).

Orders may issue in [Form 46A](#) directing the sheriff to seize personal property, or ordering attachment of land.

The plaintiff may be required to post security (Rule 46.02(1)(c)) and should be advised of that possibility prior to bringing the motion.

The sheriff is required to serve a copy of the order on the debtor when personal property is attached, and report on enforcement results to the creditor (Rule 46.03).

By further motion, the plaintiff can obtain orders directing the sheriff's enforcement activities, or ordering persons to disclose information necessary to the attachment (Rule 46.04).



Any dispute respecting ownership of personalty or proceeds seized by the sheriff may be resolved upon a notice of claim being given to the sheriff under Rule 60.12, adapted as required for prejudgment execution. If the dispute cannot be resolved, the sheriff may finally interplead.

The sheriff may attach personal property in the possession of third persons according to procedures set out in Rule 46.08.

The sheriff may sell perishable property, property resulting in unreasonable loss and expense, etc. under Rule 46.09. Otherwise, the attached personalty is held by the sheriff until judgment issues, and a writ of seizure and sale then authorizes disposition.

To attach land, a certified copy of the order for attachment is registered in the appropriate land titles office (Rule 46.12). Ensure that the motion, affidavit and order contain the proper legal description of lands to be attached.

### 3. Garnishment Before Judgment

Garnishment prior to judgment can be an effective means of pressing a debtor to deal expeditiously with a creditor's claim and, if successful, may provide some security for the creditor pending judgment.

Garnishment prior to judgment attaches "all debts due and accruing at the time of service other than wages ([Form 46E](#) and s. 4(1) of *The Garnishment Act*). Section 11 of the *Act* specifically provides that wages cannot be attached prejudgment.

The debtor is entitled to claim damages if a garnishing creditor's action fails or judgment issues for an amount less than the sum attached (s. 62(1)(c) of *The Court of King's Bench Act*). This also applies to prejudgment attachment of personal property and land.

Keep in mind that execution is not complete until sums attached have actually been paid out of court to the garnishing creditor after judgment. In the interim, other creditors may be able to advance equal or better claims to the funds attached.

Should the debtor become bankrupt prior to judgment, monies in court will fall into the bankrupt's estate for distribution among preferred and unsecured creditors, all in accordance with priorities set out in the [Bankruptcy and Insolvency Act](#). The garnishing creditor has no proprietary interest in the funds prior to judgment and completion of the execution process.

## **a) Requirements**

Prejudgment garnishment is available only in actions where judgment is claimed for a debt or a liquidated demand. Unliquidated damages claimed in actions for breach of contract or tort will not qualify. Garnishment on *quantum meruit* claims is sometimes allowed prejudgment if the payment amount can be readily determined.

## **b) Procedure**

In addition to a Statement of Claim and Notice of Motion, an Affidavit in Support of a Motion in compliance with Rule 46.14(1) must be prepared and sworn by the plaintiff. The affidavit must state:

- facts showing the plaintiff has a good cause of action against the defendant for payment of a debt or liquidated demand;
- the amount of the plaintiff's claim, with allowance for all just credits, set-offs and counterclaims known to the plaintiff;
- particulars of the debtor's defence, if known;
- the name and address of each person to whom a Notice of Garnishment is to be directed;
- that the plaintiff believes those persons are or will become indebted to the defendant, and the grounds for the belief; and
- such particulars of the debt as are known to the plaintiff.

More than one garnishee can be named in a single motion and supporting affidavit.

Rule 46.14(2) permits the motion to be made without notice. On any motion without notice, all material facts must be fully disclosed in the supporting affidavit or the resulting order may be set aside. For example, if counsel for the Defendant has sent correspondence setting out their client's position or their reasons for disputing the Plaintiff's claim then a copy of that letter should be attached to your client's Affidavit.

It is open to the court under Rule 46.14(3) to require the plaintiff to post security. It is now relatively common for the King's Bench Masters to order security for costs in these situations.

## **c) Filing Process**

The order, once granted, is filed for signing together with two copies of each of the Notice of Garnishment (Before Judgment) (*Form 46E*) and the related Garnishee's Statement (*Form 46F*). Security, if ordered, must be posted. The registrar then issues and returns the Notice(s) of Garnishment to plaintiff's counsel.

#### **d) Service of Notice of Garnishment**

Rule 60.08(6) applies, with necessary modifications, to prejudgment garnishment so that the creditor must serve

- the debtor, and
- the garnishee

with the Notice of Garnishment and attached blank Garnishee's Statement.

Service may be personal, by an alternative to personal service under Rule 16.03 or by mail under Rule 16.06.

Where the debtor's bank, trust company, credit union, etc. is the garnishee, Rule 60.08(8) requires service at the branch where the debt is payable.

#### **e) Garnishee Response**

The garnishee is liable to pay to the court within 7 days after the notice is served, all debts due and payable at the time of service by the garnishee to the defendant, other than wages.

If the garnishee disputes the garnishment, or pays less into court than the amount set out in the Notice of Garnishment, particulars of the garnishee's reasons for non-payment or underpayment must be filed with the court within seven days of the date of service in the form of the Garnishee's Statement (Rule 60.08(11)).

See Rule 60.08(11.1) in relation to garnishment to enforce a maintenance order.

#### **f) Enforcement Against Garnishee**

Rule 60.08(12) provides for motions and summary proceedings to determine questions or disputes arising from the garnishee's response or failure to respond. The effect of payments properly or improperly made by a garnishee is provided for in Rules 60.08(14) and (15).

#### **g) Termination**

Rule 60.08(16) requires a Notice of Termination of Garnishment (*Form 60H*) to be filed and served on the garnishee if the amount owing has been paid by a person other than the garnishee, or has otherwise been settled.

# H. ACTING FOR DEBTORS PRIOR TO JUDGMENT

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## 1. Judgment Proofing

Individuals embarking upon business ventures in sole proprietorships or partnerships are totally exposed to personal liability for the debts of the business. The following protective measures should be recommended:

- incorporate;
- the principals should take security back for monies lent to the business and duly register same;
- avoid giving personal guarantees;
- where a bank or other creditor requires a personal guarantee, offer general security over the assets and undertakings of the business to ensure that business assets provide the first layer of security, maximizing protection from personal liability for the principal;
- spread the risk of execution by registration of the family residence and other exigible assets in the name of the dependent or least financially exposed spouse;
- seek exemption from execution for insurance monies, RRSPs etc. by designation of a family member as beneficiary in accordance with provisions of sections 224-228 of *The Insurance Act*.

It is appropriate for lawyers to assist clients in setting up mechanisms for the conduct of business relationships to minimize personal liability for future business debts.

## 2. Advising Debtors

Where a debtor seeks advice after debts have accrued, or when creditors are already in pursuit, the permitted role of counsel changes.

***Rule 3.2-2 of the Manitoba Code of Professional Conduct states:***

When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

**Rule 3.2-7 states:**

A lawyer must never:

- (a) knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct;
- (b) do or omit to do anything that the lawyer ought to know assists in or encourages any dishonesty, fraud, crime, or illegal conduct by a client or others; or
- (c) instruct a client or others on how to violate the law and avoid punishment.

Commentary [1] under Rule 3.2-7 states that a lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

Accordingly, when acting for debtors, counsel's role may be limited to that of advocate. The time for protecting assets by transfer or other disposition has usually passed. Keep in mind *The Fraudulent Conveyances Act* and absconding debtor provisions referenced in section 60 of *The Court of King's Bench Act*.

As an advocate, obtain the facts. Get the particulars of dealings between the debtor and claiming creditor. Determine whether there is a defence on the merits, a right of counterclaim, set-off or indemnification, etc. Inquire about the debtor's general financial state, other debts owing and capacity to meet existing liabilities.

Consider obtaining a retainer to secure payment of your fees and disbursements.

Given the normal objective of creditors to obtain quick and inexpensive resolution of claims, terms for settlement should be explored. What is the debtor's exposure? What realistic proposals can be advanced at the outset of proceedings to compromise or reduce the claim amount and minimize the debtor's exposure to liability for the legal costs on both sides of the collection proceeding?

Where a claim has commenced in Small Claims Court, and the defendant has good reason to defend, counterclaim, etc. it may be cost effective for the debtor to appear without counsel. As the rules limit the scope of appeals, however, consideration should be given to appearing at the original small claim hearing aided by counsel.

Where a Statement of Claim has issued in the Court of King's Bench and has been served, determine the date of service and advise opposite counsel immediately that you are seeking instructions. In addition, if required, forestall the noting of default by receiving the written consent of plaintiff's counsel to a specified extension of time for the filing of any defence. Creditor's counsel will normally accommodate reasonable requests, particularly if a *bona fide* possibility of settlement will be explored in the interim.

### **3. Defending Prejudgment Attachment, Without Notice**

#### **a) Garnishment**

In the event that the debtor seeks counsel after a foreign judgment has been registered or a Statement of Claim has issued and prejudgment garnishment proceedings have commenced without notice, have immediate regard to the date of service, governing statutes, copies of all materials filed in court and the particulars which your client can provide.

Under *The Reciprocal Enforcement of Judgments Act*, have regard to the defences provided in section 3(6). Where appropriate grounds exist, apply to set aside the registration and serve supporting material within one month of the debtor's notice of the registration.

*Alcor Pacific Lumber Sales Ltd. v. Janet Lumber Trading Co.*, supra

In a Court of King's Bench prejudgment garnishment proceeding, debtor's counsel has two avenues to immediately explore. There is first the matter of filing a defence to prevent default judgment from being entered. Secondly, under Rule 46.14(6) consideration should be given to bringing a motion to set aside the garnishment proceedings if the defendant has a defence on the merits and garnishment before judgment can, in the circumstances, be shown to be unjust or to impose undue hardship on the defendant.

*Lechow v. A.E.I. Telecommunications (Canada) Ltd.*, 1991 CanLII 11773 (MB CA)

#### **b) Mareva Injunctions and Absconding Debtor Proceedings**

Where a debtor is wrongly accused of attempting to abscond or dispose of assets outside the jurisdiction, application may be made to set aside orders based on incomplete or inaccurate evidence. Overzealous creditors may be found liable for damage consequently suffered by the debtor.

## 4. Insolvency

A debtor who is insolvent and who can neither defend nor satisfy extensive claims outstanding may be best served by referral to a Licensed Insolvency Trustee for purposes of:

- referral to Orderly Payment of Debt Court (Part X of the *Bankruptcy and Insolvency Act*) for reorganization of the debtor's affairs and payment in full, over time, of all creditor claims; or
- formulation of a consumer proposal to be issued under Part III, Division II of the *Bankruptcy and Insolvency Act* whereby a compromise for satisfaction or part satisfaction of all creditor claims over a period of up to five years may be advanced; or
- filing an assignment in bankruptcy.

**Orderly payment of debt procedures** are often suitable where personal credit accounts have gotten out of control. Court ordered repayment terms usually cancel or substantially reduce the debtor's obligation to pay high rates of interest on such accounts, and stay execution proceedings by creditors.

**Consumer proposals** provide a summary procedure for an individual debtor who, with the assistance of a Licensed Insolvency Trustee under the *Bankruptcy and Insolvency Act*, may formally present a proposal to unsecured and possibly secured creditors offering to pay a reduced debt amount and/or extend the time for payment. Individual debtors may use this remedy where their liabilities, excluding debts secured on their principal residence, do not exceed \$250,000.00. Commercial proposals for business debts operate without monetary limit, and are subject to more extensive rules and procedures.

**Bankruptcy** may be the only way for a debtor to clean the slate and obtain an opportunity to start over, if they face liabilities so onerous (i.e., through a business failure, personal guarantees, etc.) that financial recovery through any paydown of the total indebtedness is not realistic.

Normally, legal counsel are not required to assist an individual debtor through any of the procedures referenced above.

# I. POST-JUDGMENT EXECUTION

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## 1. Examination in Aid of Execution

Where there is insufficient information about a judgment debtor's ability to satisfy a money judgment, an examination in aid of execution is often an appropriate starting point for the execution process.

Such examinations are possible post-judgment, whether or not a writ of possession or delivery has issued. Unless a court order is obtained under Rule 60.17(4), the debtor may not be examined more often than once per 12 month period.

### a) Procedure

A person to be examined in aid of execution must be served personally (not by any alternative means) with an Order for Examination in Aid of Execution (Rule 60.17(7), [Form 34A.1](#)).

An order is obtained from the registrar after filing a requisition and an Affidavit verifying that no examination has been held in the 12 month period before the date of the requisition.

By virtue of Rule 34.04(6), no attendance money need be paid or tendered to persons served with an Order for Examination in Aid of Execution.

Rule 34.05(1) requires that persons to be examined shall be given not less than 10 days notice of the time and place of examination, if they reside in Manitoba. *The Interprovincial Subpoena Act* provisions apply to non-residents.

Form 34A.1 should be adapted to the particular circumstances, specifying to the extent possible the documents and things which the judgment debtor is required to bring to the examination. An example is included in the precedent section. It is advisable, though not a requirement of the King's Bench Rules, that a copy of the judgment be appended to the order and coincidentally served on the judgment debtor.

### b) Scope and Conduct of the Examination

Examinations in aid of execution normally take less than one hour to complete, and permit inquiries to be made under oath respecting all matters pertinent to enforcement of a money judgment. Rule 60.17(2) specifically authorizes inquiry into:

- reasons for non-payment;
- debtor's income and property;



- debts owed to and by the debtor;
- dispositions of property prior and subsequent to judgment;
- debtor's past, present and future means to pay;
- debtor's intentions respecting payment of the judgment; and
- any other matter pertinent to the enforcement of the order.

Every examination should be planned with the specific judgment debtor in mind. All readily available information respecting the assets, means, and property of the judgment debtor should be obtained in preparation for the examination from the creditor, from public sources such as the Personal Property Registry, Land Titles Office, Court of King's Bench records and possibly from credit bureau inquiries.

Lists of questions are provided in the checklist section of this chapter to suggest usual areas for the examination. Do not follow such guides slavishly. Use the examination to make a thorough inquiry into the particular judgment debtor's past, present and prospective means to satisfy the judgment.

Conclude the examination with an invitation to the judgment debtor to propose terms for satisfaction of the judgment by payment over time, provision of security, assignment of debts owing, release of unencumbered personalty, release of cash on hand or any other means apparent from the examination.

Take notes throughout the examination. Although a court reporter will be present to transcribe the examination, only order a transcript of the examination if there is a specific need for it. Creditors seldom welcome the expense of an unnecessary disbursement.

### **c) Persons to be Examined**

Individual judgment debtors, sole proprietors and partners are examined in their personal capacities, with appropriate questioning on areas of personal as well as business assets, liabilities and dispositions.

An officer or director of a corporate debtor, or a partner or sole proprietor against whom the order may be enforced, may be examined on behalf of the debtor (Rule 60.17(3)).

Select the most knowledgeable officer or director for examination on behalf of a corporate judgment debtor.

Where difficulty arises in judgment enforcement, Rule 60.17(6) provides that the court may, on notice of motion with supporting affidavit, order the examination of any other person who the court is satisfied may have knowledge of matters appropriate to an examination in aid of execution or any other person “as is just.”

Where the transcript of a judgment debtor’s examination discloses conduct to defeat creditors, it may be appropriate under that provision to move for an order to examine an employer, a spouse, relatives, employees or transferees respecting the debtor’s income, assets or dispositions of property to determine whether a fraudulent conveyance can be proven. In cases where a judgment debtor’s whereabouts are unknown and family or friends are suspected of withholding such information, a court order under this rule may also be appropriate.

## **2. Contempt Orders**

### **a) Use in Enforcement Proceedings**

Rule 60.17(5) authorizes the court to make a contempt order against a judgment debtor where it appears from an examination of the debtor that they have concealed or made away with property to defeat or defraud creditors. Imprisonment of the judgment debtor to encourage “purging of the contempt” by reversing the wrongful conduct can result. Either few examiners are so skilled, or else few judgment debtors are so incautious as to bring this rule into frequent use, but it should be kept in mind.

More often, contempt proceedings are taken to compel the attendance of a judgment debtor at an examination in aid of execution, or to compel answers to proper questions, production of relevant documents, or responses to undertakings given in the course of the examination. These sanctions are imposed under Rule 60.17(8) and Rules 34.14(1) and (2). Procedures for contempt orders are set out at Rule 60.10.

### **b) Procedures**

If a judgment debtor fails to attend upon a duly served order for examination, you should request that the court reporter provide a certificate of non-attendance. A motion may then be brought before a judge seeking an order for contempt (Rule 60.17(8)). A contempt motion must be served personally upon the judgment debtor, and not by an alternative to personal service as set out in Rule 60.10(2).

Often the court will order one more attempt at examination, failing which a warrant may issue without further notice directing that the judgment debtor be brought before the court by the sheriff (Rule 60.10(4)). A brief period in detention normally precedes the judgment debtor’s resulting attendance before a judge.

Counsel attends to conduct the examination in court, or the judgment debtor is, in the case of other events of misconduct, ordered to purge the contempt by performing the defaulted task, failing which the court may order the imprisonment of the debtor or such other penalties as are set out in Rule 60.10(5).

Contempt proceedings are not treated lightly by the court and therefore can become quite protracted, requiring preparation of court documents for two or more motions and appearances, and necessitating repeated service on the judgment debtor. Properly informed judgment creditors do not often give instructions to pursue such a costly and time-consuming course unless there is some certainty that the debtor can or will thereby be pressed to satisfy the judgment.

### 3. Garnishment After Judgment

The simplest method of enforcing a money judgment is garnishment.

*The Garnishment Act* creates the statutory right and scope for attachment by garnishment. Rule 60.08 sets out detailed procedures. Effective May 1, 2002, the *Act* was amended to include statutory garnishment provisions for enforcement of fines, forfeited recognizance orders, and restitution orders (s. 14.4 to s. 14.7). The detailed procedures set out in Rule 60.08 have been amended accordingly.

Common targets for garnishment after judgment include wages and bank accounts. However “any debt due or accruing due” to the judgment debtor at the time of service may be attached.

#### a) Procedures

Post-judgment garnishment requires no initial motion or court appearance. The judgment creditor merely files with the deputy registrar, in accordance with Rule 60.08(3):

- (i) a Notice of Garnishment (*Forms 60E, 60E.1, 60E.2, 60F, or 60F.1*) for each garnishee, in duplicate;
- (ii) the creditor’s supporting Affidavit stating,
  - that an order for the payment of money has been made and the date of the order;
  - the date and amount of any payments received;
  - the amount payable, including interest;
  - the name and address of each garnishee;

- that the creditor believes the garnishee is, or will become, indebted to the debtor and the grounds for the belief;
- particulars of the debt including whether it is for wages; and
- where a person to whom a Notice of Garnishment is to be directed is not in Manitoba, that the debtor is entitled to sue that person in Manitoba to recover the debt, and the basis of the entitlement to sue in Manitoba (see Rule 17.02 for a list of possible bases for suit in Manitoba).

The deputy registrar then issues a Notice of Garnishment for each garnishee named and returns a copy of each notice to the creditor or its counsel for service (Rule 60.08(5)).

Both the judgment debtor and the garnishee(s) must be served personally or by a Rule 16.03 alternative to personal service, or by mail under Rule 16.06 with:

- the issued Notice of Garnishment;
- a Garnishee's Statement (*Form 60G*), in blank; and
- a memorandum as required by section 12 of *The Garnishment Act* where the debt is for wages.

The time for service on the judgment debtor is not specified. Usually, it is advisable to serve the garnishee first in order to minimize the chance of interference by the debtor.

The garnishee served must act either by:

- a) paying into court the full amount shown in the Notice of Garnishment within 7 days after service or 7 days after the debt becomes payable, whichever is later (Rule 60.08(9)); or
- b) paying into court any lesser amount or no amount and in either such case the garnishee is required to file with the court, within 7 days of service, a completed Garnishee's Statement setting out particulars disputing the garnishee's liability to pay the full amount (Rule 60.08(11)).

Provision is made in Rule 60.08(12) for a creditor, debtor, garnishee or any other interested person to bring a motion before a master for summary determination of rights and liabilities, to vary or suspend payments made, or to determine any other matter related to a notice of garnishment.

Rule 60.08(13) provides for an order to issue compelling a garnishee who fails to file a Garnishee's Statement, to make payment of the amount found payable by the garnishee to the judgment debtor.

Upon satisfaction or settlement of the judgment amount, the garnishing creditor is required to file and serve a Notice of Termination of Garnishment (*Form 60H*) on the garnishee.

## b) Funds Subject to Garnishment

Section 4(1) of *The Garnishment Act* states that service of a Garnishment Order on a garnishee binds:

- a) any debt due or accruing due at the time of service from the garnishee to the defendant or judgment debtor, other than wages; and
- b) all wages that become due and payable from the garnishee to the judgment debtor within one year from the date the garnishment order takes effect.

**“Debt due or accruing due”** is a phrase which has attracted much argument and various judicial interpretations. As a general rule, where the judgment debtor could sue the garnishee for a liquidated sum, unconditionally payable, the funds will be subject to attachment. Where timing or other contingencies make doubtful the debtor’s present interest or absolute right to receive the funds, uncertainties arise.

For a useful review of decisions on garnishment of insurance proceeds, unliquidated damage claims, legacies, beneficial interests in trusts, future rent payments, mortgage payments, payments under promissory notes, term bank deposits, registered retirement savings plans, welfare payments, etc. see C. R. B. Dunlop, *Creditor-Debtor Law in Canada*, 2d ed. (Scarborough: Carswell, 1995).

Monies owing jointly to a debtor and non-debtor are generally not attachable (i.e., joint bank accounts, partnership funds, etc.).

*J.R. Corneau Holdings Ltd. v. Pocket*, [1978] 5 W.W.R. 483 (Man. Co. Ct.)

However, the *Act* creates two exceptions; namely, a maintenance order (ss. 13.2(1)(2)) and a forfeited recognizance order or an order imposing a fine (s. 14.6(1)). In both instances the ability to issue a notice of garnishment is restricted to either a “designated officer” or a “collection officer.”

With respect to wages, a garnishment order remains in effect until the earliest of the following occurs:

- the garnishee pays the amount shown in the Garnishment Order into court;
- the garnisher discontinues the order or it is revoked by the court;
- the judgment debtor ceases to be employed by the garnishee;
- one year passes from the date the Garnishment Order takes effect (s. 4.1 of *The Garnishment Act*).

## c) Exemptions

*The Garnishment Act* provides in section 5 that 70% of wages are exempt from garnishment provided that a judgment debtor without dependents shall be allowed an exemption of not less than \$250.00 per month and a judgment debtor with dependents shall be allowed not less than \$350.00 per month.

Check sections 6 and 7 for special provisions which apply to debts related to the debtor's board and room account and to garnishment for family maintenance, etc.

Section 2 of *The Garnishment Act* expressly authorizes garnishment of funds payable by the provincial Crown. Keep in mind, however that the provincial Legislature cannot govern His Majesty the King in Right of Canada. Where it is intended to attach funds payable as wages or otherwise by the federal government, see provisions of the [Garnishment, Attachment and Pension Diversion Act](#) in which Parliament submits the federal Crown and certain of its agencies to provincial garnishment laws in the *Act*. Only those persons and payments specified by Parliament are subject to provincial garnishment laws.

Sections 89(1) and 90(1) of the [Indian Act](#) severely limits rights of garnishment against treaty Indians. As a general rule, monies appropriated for treaty Indians by either the federal or provincial governments are exempt from garnishment.

[Mitchell v. Peguis Indian Band](#), [1990] 2 S.C.R. 85.

Monies payable to treaty Indians from non-government sources should be subject to garnishment.

## 4. Payment Out

Monies garnished and paid into court form part of the judgment debtor's estate in the event of bankruptcy and may be subject to claims by other creditors. A trustee's right to withdraw such funds is provided for in Rule 73.09. Stop orders may issue under Rule 73.14 to preserve the funds pending resolution of competing claims.

It is therefore important that judgment creditors who have attached funds by garnishment proceed as promptly as possible to obtain payment out, thereby completing the execution process against such funds, and fixing their entitlement to same.

**a) Procedures Where Garnishment Proceeds do not Exceed \$15,000.00 per Garnishee**

Rules 73.04 and 73.07 provides for payment out by the registrar without need for an appearance if:

- no stop order has been filed under Rule 73.14;
- at least 10 days have elapsed since payment in; and
- at least 10 days have elapsed since the Notice of Garnishment was served on the debtor;

upon filing of:

- a Requisition (*Form 4E*) for cheque; and
- the creditor's Affidavit stating, *inter alia*;
  - the amount of the judgment outstanding;
  - that the time for appeal of the judgment has expired and no appeal is pending;
  - that Notice of Garnishment was served on the debtor in accordance with Rules 60.08(6), 60.08(6.2), 60.08(6.3), or 60.08(6.4), as the case may be.

The cheque may be requisitioned as payable to the creditor or lawyer of record for the creditor.

**b) Procedures Where Garnishment Proceeds Exceed \$15,000.00 per Garnishee**

Where the sum paid in by a garnishee exceeds \$15,000.00, Rule 73.04 procedures are not available. A motion must be made to a judge under Rule 73.03(1) for an order for payment of money out of court.

Notice of the motion must be served on all interested parties together with a supporting Affidavit. Although the rules do not so specify, it is advisable to include in the creditor's supporting Affidavit all of the matters required by Rule 73.07(2) on payout of \$15,000.00 or less.

In addition, some judges are of the view that the funds should not be paid out of court until the expiry of the appeal period relative to the order which granted payment out of court. Accordingly, there may be a further delay before you can request the Registry to pay out the funds. In order to avoid this situation, the motion requesting payment out should specifically request that the funds be paid out forthwith without the need for expiry of the appeal period.

If payment is to be made to the creditor's solicitor, the creditor should so consent or direct in the affidavit to satisfy Rule 73.12.

Upon filing the order for payment out, a requisition for cheque should also be filed.

## 5. Writ of Seizure and Sale

*The Executions Act* provides for writs of execution to issue to the sheriff, and empowers the sheriff to seize and take any goods, chattels, money and bank notes of the judgment debtor and any mortgages of real or personal estate, cheques, bills of exchange, bonds, promissory notes or other securities for money, including credit cards and receipts or similar instruments of the debtor or in which the debtor has an interest.

### a) Procedures

Rule 60.07(1) provides for issuance of writs of seizure and sale by the Court of King's Bench upon the filing of a Requisition (Form 4E) with the deputy registrar, stating particulars of the amount owing on the judgment, and filing two copies of the writ in Form 60A.

Section 16(1) of *The Executions Act* also requires that a Notice to Judgment Debtor in the form of Schedule B to the *Act* be delivered by the sheriff at the time of seizure to give the debtor notice of exemptions provided under section 23(1) of the *Act*. The Court of King's Bench requires this notice to be filed together with the requisition and writ.

The deputy registrar issues and seals the writ and returns a sealed copy to the judgment creditor. That sealed copy must be delivered to the sheriff together with the notice to judgment debtor. It is advisable to also provide such advice or instructions as may be available to the sheriff by letter or memorandum to guide the execution efforts.

Exigible assets seized may be sold by the sheriff. Upon the sale, the debtor's interest in the personalty sold is extinguished and title vests in the purchaser pursuant to section 7(4).

The sheriff is required to publish notice of execution proceeds in the Manitoba Gazette and to hold proceeds for 14 days before distribution (s. 20). On a motion, a creditor may, by order of a judge, apply to delay distribution until a judgment for a liquidated amount or debt action has been finalized (s. 22(1)).

Writs of seizure and sale expire two years from the date of issue, and may be renewed (s. 2.1).



## **b) Exemptions**

Individual judgment debtors (not corporations) are entitled to exemptions set out in section 23(1) of *The Executions Act* including:

- necessary household furnishings and appliances to a value of \$4,500.00;
- necessary and ordinary clothing of the judgment debtor and family;
- food and fuel for judgment debtor and family for six months, or equivalent cash value;
- farm animals necessary for judgment debtor's agricultural operations for next 12 months;
- necessary farm equipment and machinery for the next 12 month's operations and one motor vehicle, if the motor vehicle is required for agricultural purposes;
- necessary tools, books, necessaries of trade to the value of \$7,500.00, and where required for trade occupation, etc. one motor vehicle not exceeding \$3,000.00 in value;
- articles and furniture necessary to perform religious services;
- seed sufficient to seed all of judgment debtor's land under cultivation;
- health aids (i.e., wheelchair, air conditioner, eye glasses, etc.).

Chattel property of The City of Winnipeg, any municipality, local government district, school district, school division or school area in the province is exempt from seizure and sale (s. 23(1)(j)).

A partnership firm cannot claim several exemptions for each partner, but only one exemption for the firm out of the partnership property (s. 27).

The sheriff can sell assets to recover excess value over exempt amounts (i.e., to recover \$5,000.00 from a \$8,000.00 motor vehicle) pursuant to section 23(2). The exemption amount is paid to the judgment debtor, then the judgment amount, plus costs, are paid to the judgment creditor. If there is any surplus remaining, it is paid to the judgment debtor.

Any agreement to waive or abandon exemptions is invalid (s. 35).

Mobile homes seized under a writ of seizure and sale which are used by the debtor as a permanent residence cannot be sold until one year after seizure (s. 36).

Certain insurance proceeds, government annuities, and chattels in use by surviving dependants of a debtor may also be exempt (ss. 24-26).

### c) Priorities

*The Executions Act* establishes the following priorities for distribution of proceeds of execution against personalty:

- security interests in any chattel or personalty duly registered in the PPR prior to delivery of the writ to the sheriff have priority (s. 5(1));
- employees of the judgment debtor have a first claim after secured creditors against exigible assets and proceeds for wage arrears up to 3 months (s. 3);
- costs of all execution creditors, including sheriff's fees take next;
- execution creditors share the balance, *pro rata* in proportion to their respective claims (s. 20(4)).

## 6. Execution Against Real Property

### a) Priorities

Under the Torrens system of land registration, judgment creditors recover in execution proceedings on land sales in accordance with the priority in time of their registrations and those of prior encumbrances (i.e., mortgagees, etc.)

In practice, judgment sale proceedings are not common. Other forms of execution such as garnishment and writs of seizure and sale are less costly and less time consuming. Debtors who have sufficient equity in exigible real property to satisfy large judgments can usually satisfy the judgment by other means (i.e., borrowing money on security of the land).

It is generally not economical to conduct judgment sale proceedings for small judgment amounts. Frequently the judgment debtor has mortgaged or otherwise charged the full value of the land so that net proceeds sufficient to satisfy the judgment and costs are unlikely to be realized. Most often, judgments are registered against title as an inexpensive means of securing the judgment amount pending the judgment debtor's disposition of the real property, and/or satisfaction of the judgment by other means.

For detailed discussion of judgment creditor priorities and related matters, see Di Castri, *Registration of Title to Land*, (1988 Looseleaf), "Judgments and Writs of Execution."

## **b) Procedures**

Manitoba, like British Columbia, does not follow a writ of fi fa or seizure process in respect of executions against land. Instead a separate process operates under *The Judgments Act*.

A certificate of the judgment creditor's money judgment may be filed in the appropriate land titles office to form a lien charging the title to lands registered in whole or in part in the name of the judgment debtor. The name of the debtor in the certificate of judgment is required by section 2 of *The Judgments Act* to be identical to that of the name on title. It is therefore advisable to conduct a search at the commencement of an action to get the debtor's name as it appears on registered land titles for use in the proceeding.

Certificates of judgment are no longer required to be renewed every two years, but instead remain on title until:

- judgment sale proceedings complete the execution process;
- prior registered mortgage foreclosure proceedings remove the judgment from title;
- a sale or transfer of the land is effected; or
- the judgment creditor consents (usually on terms requiring satisfaction or other disposition of the judgment debt).

No proceedings to realize on a registered judgment may be taken until after one year from the date of registering the judgment (s. 3(1)).

In accordance with *THE LIMITATIONS AMENDMENT AND PUBLIC OFFICERS AMENDMENT ACT* which received royal assent on May 30, 2023, orders of the court that were statute-barred prior to October 1, 2022, when the new legislation became effective remain statute-barred and are not revived. Orders of the court made on or after October 1, 2012 never expire.

Judgment sale proceedings are commenced by notice of application pursuant to provisions of *The Judgments Act*. Where partition is required, Rule 66.01 provides that the proceeding may begin by Notice of Application with reference to sections 19 and 20 of *The Law of Property Act*.

Rule 66.03 provides that money realized in a land sale proceeding shall be paid into court for distribution by order of a judge.

Title to the property sold issues in the name of the purchaser by vesting order after confirmation of the report on sale.

*R. v. Hamilton*, 1962 CanLII 543 (MB QB)

### **c) Exemptions**

Section 13 of *The Judgments Act* prohibits judgment execution proceedings against certain lands, namely:

- up to 160 acres of farm land (the home ¼ section) on which the judgment debtor resides and carries on farming or other purposes;
- the house, stables, barns and fences on the judgment debtor's exempt farm property;
- the actual residence or home of a non-farm judgment debtor, not held in joint tenancy or tenancy in common, to the value of \$2,500.00;
- the actual residence or home of a non-farm judgment debtor held in joint tenancy or tenancy in common where the judgment debtor's interest is valued up to \$1,500.00.

Corporate judgment debtors are entitled to the above exemptions.

Surplus lands or lands of surplus value may be sold and the proceeds exceeding exemptions distributed for the benefit of execution creditors.

Partnership property of partner debtors is subject to only one exemption (s. 14).

Absconding debtors are not entitled to the above exemptions (s. 15).

Agreements to waive or abandon exemptions under *The Judgments Act* are void (s. 18(1)).

## **7. Appointment of a Receiver**

The equitable jurisdiction of the court as expressed in section 55(1) of *The Court of King's Bench Act* permits the appointment of receivers where it is "just and convenient" to do so.

Rule 60.02(1)(c) contemplates enforcement of money judgments by appointment of a receiver.

Very special circumstances are required to invoke these enforcement provisions, and the circumstances should include exigible assets of substantial value to finance the costs of this unusual execution process.

Examples reported from other jurisdictions include: appointments of receivers to liquidate an RRSP in an orderly fashion and to avoid devaluation, to curb the activity of an absconding debtor, to get in contributive shares of limited partners in a corporate partnership, and so on.

## J. SETTLEMENT

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Creditor objectives of prompt and low-cost results can be and often are best served by settlement. Delay, risk, the cost of litigation and the cost of execution process can be avoided in whole or in part by the early negotiation of terms acceptable to the parties.

Regardless of the other terms, creditor's counsel should seek to obtain payment of an immediate lump sum as a pre-condition for every settlement.

The balance of payment terms, a compromise of the creditor's claim and consequences agreed to in the event of default are variables to be worked out to the parties' respective advantage in each case.

Documents appropriate to settlements also vary with the timing of the agreement and the stage of legal proceedings. See precedents.

### **1. Prior to Action Commencing**

The debtor may pay on demand. If payment is made in full, by cheque, the debtor may be content with a cancelled cheque or a receipt which simply proves payment of an account.

It is recommended that releases be executed and exchanged as a term of the settlement, particularly where more complicated matters including potential rights of set-off, counterclaim or other rights of action are intended to be extinguished.

In very complicated relationships (i.e., termination of a franchise agreement and settlement of all inter-party accounts and disputes), it may be appropriate to prepare formal minutes of settlement, executed by all parties.

### **2. Action Having Commenced**

A settlement reached at any time after a claim in Small Claims Court or a Statement of Claim in the Court of King's Bench has issued will require discontinuance of the court proceedings.

In Small Claims Court, discontinuance can be effected by an appearance, by letter to the court or by filing a notice in a form adapted from that used in the Court of King's Bench.

The proper form for a Notice of Discontinuance in the Court of King's Bench and requirements for service, at various stages of the proceedings, are set out in Rule 23.

Releases should be exchanged by the parties with specific reference to the matters in dispute. The proceedings should be identified in the release by court file number. If there will be a delay in concluding the settlement, the releases are usually held in trust by opposite counsel, subject to conditions requiring their return in the event of default.

It is common practice in such cases to secure the creditor's position with a consent to judgment for the full amount of the plaintiff's claim plus costs. The executed consent judgment is normally held in trust by the plaintiff's solicitor pending an event of default, whereupon it is agreed the consent may be filed and judgment obtained with execution proceedings to follow. Such terms of settlement conclude the collection proceedings with a minimum of further cost or delay to the creditor.

### **3. Settlement after Judgment**

When a judgment has been satisfied by the judgment debtor or upon the conclusion of successful execution proceedings, the action should be concluded by the filing of a Notice of Satisfaction (*Form 59C*).

In a simple debt action, the exchange of releases after a Notice of Satisfaction has been filed may be unnecessary. However, counsel usually do require releases as a condition for final settlement.

If garnishment proceedings were taken in the proceeding, they should be terminated upon the judgment being satisfied by filing and serving on each garnishee a Notice of Termination of Garnishment (see Rule 60.08(16) and *Form 60H*).

The sheriff's office should be provided with the Notice of Satisfaction where a writ of seizure and sale is outstanding.

Any certificates of judgment registered with land titles offices should be discharged using the standard land titles request form.

## K. ACTING FOR DEBTORS POST-JUDGMENT

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Once judgment has issued, the debtor is vulnerable to execution proceedings.

Where the insolvency remedies discussed earlier are not appropriate, counsel's advice may be required for the following.

### 1. Terms for Satisfaction

Creditors normally prefer consensual terms for payment of judgment debts over the alternative of incurring the costs, risk and delay of execution proceedings.

Determine with your client what can be offered to satisfy the creditor and advance terms which can control risks to the judgment debtor of the surprise and embarrassment of execution proceedings.

### 2. Post-Judgment Garnishment

Wages of the judgment debtor are subject to attachment. Standard exemptions were discussed earlier. However, *The Garnishment Act* also sets out a summary procedure in section 8 for the debtor (or creditor) to apply for increase (or decrease) in the amount of wage exemptions. There is a right of appeal to a judge from the resulting variation order within 14 days of its issuance. The judgment debtor may also apply for a release of the garnishment and for the payment of the judgment by installments (s. 9(1)).

Where, for any reason, a judgment debtor wishes to dispute payout of funds garnished, a stop order should be sought by a promptly filed motion under Rule 73.14(1). Grounds such as those set out in Rule 60.08(12), including prior assignment of the funds garnished, might then be argued.

### 3. Personal Property Exemptions

*The Executions Act* exemptions were previously discussed under the post-judgment execution heading, "Writs of Seizure and Sale."

Section 37 of the *Act* provides for summary disposition by a judge of disputes respecting a seizure or proposed seizure of property under a writ of seizure and sale. The appropriate procedure seems to be by a notice of motion in the original judgment creditor's action.

### 4. Real Property Exemptions

See the earlier discussion of exemptions pursuant to *The Judgments Act*, under Execution Against Real Property.

There may be opportunities to defend execution proceedings where partition is required, or in respect of unusual property interests.