

**ENFORCING JUDGEMENTS**

**OR**

**“IT AIN’T OVER ‘TIL THE CHEQUE CLEARS THE BANK”**

Nova Scotia Barristers’ Society

Lunch ‘n’ Learn Seminars

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Begin with this thought

How much of your time – and more importantly, your client's money – have you spent to get to this point?

Have you really gone through all of that – and are only now discovering that you may have trouble collecting on the Order that the Court granted in your client's favour?

I hope you have it in writing that your client knew that- and that you have been paid for your work – because if you don't, you probably won't. Even if you do, you may not...

As is true about most aspects of the legal system, lay people have very little understanding of the limits on the enforcement of Court Orders. Indeed, one might think that they are under the impression that if they win their case the losing party will provide them with a certified cheque for the full amount of the Order on the spot, before they leave the court room – or at the very least because of some anticipated sense of civic duty will run to the nearest bank and get the cheque they forgot - certainly an understandable oversight since maybe they did not expect to lose – bit of course now that they have and the judge has ordered them to pay, they will certainly do so - won't they???

**SURPRISE, SURPRISE, SURPRISE!!!!!!**

Fact is, as we know, the losing party often does not pay – because they are angry about losing, or they do not actually have any money, or they have ordered their affairs in such away that the limited means available to enforce an Order against them are ineffective.

So, if you take nothing else away from this presentation today, remember this – a lesson which every good chess player knows – **think about the end game first!**

Before you start any legal action – in fact in the first meeting you have with a client who is considering legal action - make sure that you have considered whether or not your client will in fact be able to enforce whatever Order the Court might give them if they succeed.

It is very difficult to tell a client that they have an excellent case, and will likely win in court, but are unlikely to ever get paid anything – but that is a much easier discussion to have before they have paid you thousands of dollars in legal fees and have only now discovered that all they got for it was a piece of paper – and whatever personal satisfaction comes from being declared right.

My advice is – have this discussion early, and update your information during the course of the proceedings – because the person or company that has assets today may not have them tomorrow.... BUT – for today, we are assuming that - somehow, despite your best efforts – or those of the client's previous lawyer – or perhaps by way of a default judgment that did not cost a lot of time and money – you are trying to collect on an Order that the debtor is not paying voluntarily.

So, what do you do?????

Well, this presentation was called “Enforcing Judgments” – but in reality there is no process of enforcing a “judgment” – in Nova Scotia a “judgment” is only a record of a Court Order that gets filed under one of the registration systems.

So, this should really be called “Enforcing Orders” – and since we get to the point of having an Order by following the Civil Procedure Rules, surely they will tell us how to enforce one. And they do...

Rule 52 says

***Enforcement of order for the payment or recovery of money***

***52.01.*** (1) *An order for the payment of money, other than the payment of money into court, may be enforced by one or more of the following orders,*

*(a) an execution order as provided in Rule 53;*

*(b) a receivership order as provided in Rule 54;*

*(c) a contempt order as provided in Rule 55. [E. 45/1(1)]*

(3) *An order for the recovery of money may be enforced by one or more of the following orders,*

*(a) an execution order as provided in Rule 53;*

*(b) a receivership order as provided in Rule 54. [E. 45/13(1)]*

***Enforcement of order for possession of real or personal property***

***52.02.*** (1) *An order for the giving of possession of real property or the delivery of any personal property may be enforced by any one or more of the following orders:*

*(a) a recovery order as provided by rule 48.13;*

*(b) a contempt order as provided by Rule 55. [E. 45/3/4]*

(2) *An order for the recovery of possession of real property, or for the return of any personal property, or in lieu thereof the recovery of the assessed value thereof, may be enforced by a recovery order as provided by rule 48.13. [E. 45/13(2)(3)]*

SO –there you have it. According to the Civil Procedure Rules, you have 4 options – Execution Order, Receivership Order, Recovery Order, or Contempt Order.

## **DISCUSSION**

### **A. Contempt Order (Rule 55)**

- don't bother!!!!

Is **never** issued to enforce a payment of money because last recourse is imprisonment – and Court will not jail anyone for failure to pay a civil debt – debtors' prison was abolished long ago!! Is reserved for punishing those who willfully act contrary to the Court's order - by doing or refraining to do some act – but the “refraining” does not apply to refraining to pay a monetary award .

One Exception!!

A corporate defendant which clearly has assets and is refusing to pay, because

*55.06. Where a body corporate is guilty of a contempt of court,*

*(a) it may be fined by the court, and the fine may be imposed in addition to any other punishment that may be imposed for contempt;*

*(b) a contempt order may also be made against any officer, director, employee or agent of the body corporate who directed, authorized, assented to, acquiesced or participated in the contempt.*

### **Drawbacks!!**

- expensive – requires 2 court applications, one for leave, one for the actual application.
- have to be able to serve notice on debtor
- not very useful to enforce payment of money

### **B. Receivership Order (Rule 46)**

- usually not financially feasible, especially for small amounts
- requires posting of bond in form and amount satisfactory to the Court (Rule 46.02)
- fees for receiver are significant

### C. Recovery Order (Rule 48)

- Unless you are after real or personal property, is of little use. Rule indicates is only for recovery of real or personal property which has been ordered delivered to the creditor. Does not usually apply to recovery of money – in any event, if it is not there, or cannot be found, then sending the Sheriff with a Recovery Order to get it, is not likely to bring much success.
- See Rule 48.13 – if the property to be recovered is not found, all the Sheriff does is file a report to that effect.

### D. Execution Order

- The “multi-tool” of the enforcement process. (see copy attached)
  - Permits many modes of recovery, including
    - garnishee of wages
    - seizure of bank accounts
    - 3<sup>rd</sup> party demands
    - seizure of shares
    - seizure and sale of personal property [*Creditors Relief Act (“CRA”)* and *Personal Property Security Act (“PPSA”)*]
    - seizure and sale of real property (*Sale of Land Under Execution Act*)
  - Is available as of right – granted by Prothonotary.
- BUT
- requires filing of a Judgment Certificate under the PPSA (see s. 2B(9) CRA
  - must be maintained for duration of Execution Order. (\$22.75 plus \$7.96 p.a.)
  - is only available for 6 years after date of Court Order (can be extended by Court - Rule 52.04(1)(a)
  - only valid for 6 years from date of Court Order, can be renewed, but only for 12 months at a time (Rule 52.05(3))
  - not enforceable outside provincial limits

### GARNISHEE OF WAGES

- if the debtor is working, can garnishee their wages
- applies as well to both federal and provincial government employees – but need to follow specific process for this
- applies also to Armed Forces – but cumbersome process to get there.

## LIMITATIONS

- can only take 15% of gross wages
- cannot reduce net income to less than \$415/wk (w/ dependants) or \$275/wk (w/o dependants)
- commission payments are considered wages

## SEIZURE OF BANK ACCOUNTS

- if you can find the debtor's bank, you can seize funds in their bank account
- subject to comments below, you can seize the entire bank account
- **can** seize funds in a joint bank account – see *Smith v. Schaffner*, (2007), 257 N.S.R. (2d) 58 (S.C.)  
Account holder that is not the debtor must demonstrate entitlement to funds. Exact details of how the Courts will do this remains to be seen.

## LIMITATIONS

- you have to find the bank account
- cannot seize funds in a joint account
- cannot seize funds if they are from an exempt source (e.g. disability pension)
- you cannot seize funds from a line of credit or overdraft account
- account can be closed and moved

## THIRD PARTY DEMANDS

- can seize amounts owed to debtor by a 3<sup>rd</sup> party
- useful in construction industry
- applies to any amounts payable by 3<sup>rd</sup> party to debtor, unless otherwise exempted,  
e.g. rents owed to landlords, proceeds of sale, funds in trust accounts, funds payable on expense accounts,

## LIMITATIONS

- you have to find the 3<sup>rd</sup> party
- does not take priority over secured party, e.g. holder of registered assignment of rents or book debts

### SEIZURE OF SHARES

- allows seizure of shares, but not actual taking of possession. Company is precluded from allowing them to be sold, until the court orders, and

*Rule 53.04(3) - The court may order any seized share, bond, debenture or other interest of a judgment debtor in a body corporate to be held, released, transferred or otherwise disposed of upon such terms and conditions as it may order, and any such holding, release, transfer or disposal pursuant to the terms of the order shall relieve the body corporate and transfer agent from any liability to any person claiming an interest in any such share, bond, debenture or other interest.*

### LIMITATIONS

- *Securities Act* will not permit these to be advertised for sale to general public – so could only be sold to an arranged party or to creditor
- will they be of any value? are they only a minority interest? Will they enable you to control the company? Is there a shareholder agreement that interferes?

### SEIZURE AND SALE OF PERSONAL PROPERTY

- Execution Order requires registration of judgment certificate under PPSA
- registration also constitutes security against personal property - Section 2B of CRA

*(2) Registration of a notice of judgment binds all of the judgment debtor's non-exempt exigible personal property on registration and all non-exempt exigible personal property acquired by the judgment debtor after registration from the time of its acquisition.*

*(3) Registration of a notice of judgment binds all non-exempt attachable debts owing to the judgment debtor on or after registration from the time the debt becomes an attachable debt except as against the person who owes the debt to the judgment debtor.*

### LIMITATIONS

- certain personal property exempted (s. 2E CRA incorporates s. 59 PPSA)

*3) Subject to subsection (7), a debtor may claim the following items of collateral to be exempt from seizure by a secured party:*

*(a) furniture, household furnishings and appliances used by the debtor or a dependent to a realizable value of five thousand dollars or to any greater amount that may be prescribed;*

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

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

*(d) consumer goods in the possession and use of the debtor or a dependent if, on application, the Court determines that*

*(i) the loss of the consumer goods would cause serious hardship to the debtor or dependent, or*

*(ii) the costs of seizing and selling the goods would be disproportionate to the value that would be realized.*

- Sheriff will not seize personal property that is encumbered without consent of encumbrancer – if consent obtained encumbrancer gets paid first

*Rule 53.09 - (2) Where a person, who possesses an interest senior to that of the judgment debtor in any personal property to be sold under an execution order, advises the sheriff in writing that he consents to the sale of the property including his interest therein, the sheriff shall proceed to sell the interest of that person and the judgment debtor in the property.*

*(3) When a sale is completed under paragraph (2), the net proceeds shall, unless the court otherwise orders, be applied in satisfaction of the senior interest in full and the balance applied on the judgment debt.*

- process to seize and sell is cumbersome and costly – especially the advertising

**53.09.** *(1) A sheriff who seizes personal property under an execution order shall, before he proceeds to sell the interest of the judgment debtor therein at public sale to the highest bidder, cause public notice of the time and place of the sale to be given for at least ten (10) days before the day of sale by,*

*(a) an advertisement published at least twice in a newspaper printed or circulating in the county in which the sale is to take place, the last advertisement to be inserted within three (3) days of the date of the sale;*



*(b) posting an advertisement in at least five (5) public places and on the notice board established for the posting of public notices in the court house; and*

*(c) causing a copy of the advertisement to be mailed, postage prepaid by ordinary mail, to the judgment debtor and person in possession of the property at the time it was seized under the execution order.*

#### **SALE OF REAL PROPERTY**

- must proceed under *Sale of Land Under Execution Act*
- judgment certificate must be registered for at least one year in the registration district in which land is located
- very powerful option - is available as of right – often threat of proceeding is sufficient
- enables creditor to “jump ahead” by giving notice ( s. 8 and 9 of the *Act*)

#### **LIMITATIONS**

- can be costly – requires 5 advertisements in the newspaper
- prior secured creditors still have priority
- debtor can ask Court for relief (see Rule 53.13)

**\*\*NOTE\*\* - all of the above require that the creditor have a valid Execution Order and a judgment certificate with an unexpired registration under the PPSA**

#### **OTHER ISSUES REGARDING EXECUTION ORDERS**

##### **Sheriff's Fees and Commission**

- Admin/service fee of \$87.06 (payable up front) plus commission of 23.18% of any amount up to \$1000, and 11.59% of any amount over \$1000, plus HST on commission
- Fees are paid by debtor if funds are collected – if none collected, admin/service fee is paid by person who lodged execution order
- Once execution order is lodged with Sheriff, fees are due even if settled directly with debtor – and are due on full amount collected from the debtor– so be careful when settling to include these fees, and do not give the debtor a Release until you know the Sheriff's fees are paid.
- Also be careful when settling directly if you have an execution order lodged with the Sheriff – if another is lodged that requires the Sheriff to pro rate, you could have to remit some of what you recover to the Sheriff.
- Sheriff will usually collect their fees first – if they do not, and debtor goes bankrupt, person who lodged execution order with Sheriff has to pay Sheriff's fees – but gets none of the money collected, because all goes to trustee

## **NO Priority of Claims**

- No priority among execution creditors - Sheriff must pro rate all funds collected by them amongst all execution orders held by them when money collected, or received by them within 30 days
- Some claims have priority over execution creditors, e.g. WCB, Canada Revenue Agency –and those must be paid **in full** before any funds are advanced to execution creditors – even if they are lodged with the Sheriff after the execution order.

## **Lack of Investigation or Monitoring**

- any information to be acted on by the Sheriff must be provided by the creditor – the Sheriff's department will not carry out any investigation.
- Sheriff will generally accept at face value any information given by debtor, i.e. if the debtor says they have no money, or 3<sup>rd</sup> party says they owe nothing to debtor, Sheriff will not inquire further.
- when execution order requires return of info, and none is forthcoming, Sheriff is often delayed in following up, e.g. bank to report back within 10 days when account seized – left to creditor to follow up, but privacy legislation restricts ability to do so
- after 6 months Sheriff will return execution order – and if you want to act on it again must send it back and pay the \$75 fee up front again

## **BOTTOM LINE**

### **Your best bet for collecting on an execution order is if**

- **yours is the only one,**
- **you don't expect any others, especially any that will take priority**
- **you know where the assets are that you are seizing (bank accounts, wages, personal property) and they are not encumbered**
- **they are sufficient to satisfy most of your claim and the Sheriff's fees – because you will likely get only one opportunity at them (e.g. a bank account)**

- AN APPLICATION FOR A CONTEMPT ORDER IS AVAILABLE AGAINST ANYONE WHO FAILS TO REMIT FUNDS OR PROVIDE INFORMATION AS REQUIRED BY AN EXECUTION ORDER – BUT SEE COMMENTS ABOVE RE CONTEMPT ORDERS!!

## **SOME (occasionally) EFFECTIVE OPTIONS:**

### **Sale of Land Under Execution:**

- effective because there are few options available to debtor (would have to plead extreme hardship (Rule 53.13)).

- can be used even if judgment is only against one joint owner. Unlikely that anyone will buy an undivided joint interest – which means the creditor may end up buying it – could be the very worst thing for the debtor (e.g. creditor is now joint owner of property with debtor's spouse).
- purchaser can apply for property to be partitioned under the *Partition Act*. If the property does not lend itself to being partitioned it can be sold and the proceeds divided.
- just the threat of proceeding with Sale of Land Under Execution will often result in settlement – may also work if directed at mortgagee.
- remember if you settle when you have an execution order lodged with the Sheriff you have to recover their fees as well.
- can recover taxed costs and disbursements but will be paid from the proceeds – so if there is a prior encumbrance make sure there is enough equity to cover the Sheriff's fees, plus taxed costs and disbursements, plus a significant amount of your client's claim.
- enables creditor to “jump ahead” of other execution creditors (but not other secured creditors) by giving notice ( s. 8 and 9 of the *Act*)

### **Examination in Aid of Execution - Rule 53.15**

*The court may, at any time after the issue of an execution order, order any judgment debtor or other person by oral discovery or otherwise to disclose any information he possesses, regarding any property in which the judgment debtor has an interest or which he disposed of since contracting the debt or incurring the liability in respect of which an order was obtained.*

- application is *ex parte* and can require debtor to bring all relevant documents, including tax returns, bank statements, investment statements, etc.
- same latitude for questioning as on any other discovery, e.g. anything relevant to current assets or assets since claim arose
- if assets sold for less than FMV might be able to use provisions of *Statute of Elizabeth* or *Assignment and Preferences Act* to recover them.

### **Builders Lien Act (Trust Provisions - s. 44A to s. 44G)**

- arise under most recent revisions to Act
- failure to file lien in time does not preclude claim for breach of trust provisions
- amounts to breach of fiduciary duty for which there is no limitation
- directors could be personally liable (cannot direct company to commit breach of duty or fiduciary duty)
- right to information and to apply to court for disclosure of information (s. 32)

### **Register Judgment Under Land Registration Act**

- should consider doing this as a matter of course because it binds any property currently owned, or acquired after the judgment is recorded
- must register in each registration district where land is located – check carefully!!!
- affords priority over subsequent conveyances (s. 65 through 67) so should get paid if there is a subsequent sale or mortgage

- \*\*NOTE\*\***
- registration under the PPSA is not registration under the LRA – must do both
  - make sure the information on the judgment certificate distinguishes the debtor – so they cannot deny it is them
  - if there is a later conveyance and creditor is not paid only recourse is Sale of Land Under Execution - or claim against Crown if judgment missed on migration
  - migration does not require judgment to be paid out – only to be recorded in the parcel register

### **Seizure of Cash Register Receipts**

- execution order allows Sheriff to seize money in the cash register of a business named in the execution order. Effective it timed to be done on day of high retail volume (sometimes hard to co-ordinate).
- Sheriff will require indemnity before doing this

### **Sell Judgment Rights to 3<sup>rd</sup> Party**

- judgment is chose in action capable of assignment
- rights under execution order can be assigned (Rule 53.14)
- will likely be sold at a discount, but may be in creditor's interest. Assignee might have particular reason to acquire judgment, e.g.
  - personal interest
  - competitive business interest
  - defendant in separate law suit (allowing right of set-off)
  - guarantor of liability to creditor

### **Application under Assignment & Preferences Act (R.S.N.S. 1989, c.25) (“APA”) and/or Statute of Elizabeth (13 Eliz., c.5) (“SE”)**

[for the wording of the SE see *Geophysical Service Inc. v. Sable Mary Seismic Inc.*, , (2007) 260 N.S.R. (2d) 337 (C.A.) at para. 36]

- Allows creditor to make application to have declared void a transfer that is done with the intent to delay or hinder a creditor.

- both statutes still in force [see *Koziol v. Smith*, (1997), 160 N.S.R. (2d) 227 at para. 7].
- APA applies only if debtor is insolvent; SE does not require insolvency [see *Kent Building Supplies v. Cumberland Builders Ltd.*, (1997), 163 N.S.R. (2d) 289 at para. 36]
- applicant “creditor” does not have to have a judgment [see *Geophysical Services, supra*] What will suffice is unclear – clear breach of contract may suffice – see *Koziol, supra*.
- both statutes require that conveyance be with intent to defeat creditors –but note presumed intent in Section 2(a) and 2 (b) in APA if application brought within 60 days of conveyance. Otherwise, although burden of proof is on applicant (see *Aliant Telecom Inc. v. 3007620 Nova Scotia Ltd.*, (2001), 199 N.S.R. (2d) 182, at para. 15) Courts will impute intent, especially if there is no consideration for the transfer (see *Koziol, supra*, at para. 8 ), if the debtor is insolvent at the time of transfer (see *Kent Building Supplies, supra* at para. 34) or there are other “badges of fraud (see *Kent Building Supplies, supra* at para. 39)
- application is for benefit of all creditors (see *Kent Building Supplies, supra* at para. 52)
- if pursuing an application consider sharing the costs with all other creditors

**FINAL POINT – get solid and reliable information about the debtor!! CHECK**

- Sheriff’s office - any execution orders or government demands lodged there? - any there recently? were they satisfied? from what source?
- Prothonotary’s office - was the debtor sued recently? with what result? defended?
  - defaulted? Collected – call the lawyer of creditor and ask them!

**PPSA - do a search for security registered against debtor – are assets encumbered?**  
- remember a GSA covers book debts (may defeat a 3<sup>rd</sup> party demand)

**LRA - do a search for real property owned in the province (can now search province wide by name**  
- do a judgment search - any ahead of you? any satisfied? how?

**Companies Office search - who are the officers/directors? are they aware of the judgment/execution order? are they as keen to avoid it as the person you are dealing with? will they react to the pressure of you possible avenues of proceeding? Look for recent changes in status, corporate names, or people – may indicate a sale of shares or assets**

**Bankruptcy search - are they bankrupt or under a consumer proposal?**

## **APPENDIX**

### **Civil Procedure Rule 46 - RECEIVERS**

#### **Appointment of receiver and injunction**

##### **46.01.**

(1) The court may appoint a receiver in any proceeding in which it appears to be just or convenient, and the appointment may be made either unconditionally or upon such terms and conditions as the court thinks just.

(2) When appointing a receiver, the court may grant an injunction restraining the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of the application for the appointment of the receiver. [E. 30/1(4)]

(3) Where an applicant wishes to apply for the immediate grant of such an injunction, he may do so ex parte. [E. 30/1(3)]

(4) Where on a hearing of an application for the appointment of a receiver, it appears that the matter in dispute should be dealt with by an early trial, the court may order accordingly and fix the place and mode of trial, and make such other order as is just. [E. 29/5]

#### **Giving of security by receiver**

##### **46.02.**

(1) Unless the court otherwise orders or an enactment otherwise provides, a receiver shall give security approved by the court to account for any property received by him as receiver, and he shall deal with the property as the court directs. [E. 30/2(1)(2)]

(2) The security shall be filed in the office of the prothonotary. [E. 30/2(4)]

#### **Remuneration of receiver**

##### **46.03.**

A receiver shall be allowed such proper remuneration, if any, as may be fixed by the court. [E. 30/3]

#### **Receiver's accounts**

##### **46.04.**

A receiver shall submit his accounts, verified by affidavit, to the court, annually or at such intervals as the court may order, for approval and when approved the accounts shall be filed and any balance disbursed in accordance with the order. [E. 30/4/5]

#### **Default by receiver**

##### **46.05.**

Where a receiver fails to attend on the passing of any account, submit an account, make an affidavit, or do any other thing that he is required to do, he and any party or person may be required to attend in chambers to show cause for the failure, and the court may make such order as is just, including ordering the discharge of the receiver and the appointment of another, the disallowance of any remuneration claimed by the receiver or any part thereof, and the payment of such interest and costs by the receiver or any party or person as is just. [E. 30/6]

## **Civil Procedure Rule 48.13**

### **Application for a final recovery order after judgment or order**

#### **48.13.**

(1) Where it is sought to enforce a final order for the recovery of possession of property, the prothonotary may, on an ex parte application supported by affidavit, grant an order in Form 48.13A for the sheriff to deliver possession of the property as provided in the order.

(2) The sheriff, upon receipt of an order in Form 48.13A, shall take immediate possession of the property described therein or such part thereof as is available, and the person in possession of the property shall not have the right to retain possession of it by filing a bond or otherwise.

(3) When the sheriff is unable to take possession of any property referred to in the order, he shall forthwith file the order with the prothonotary with his report endorsed thereon or attached thereto, and the court may grant such further order as is just.

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## **Creditors Relief Act**

### **Property bound**

**2B (1)** Personal property of a judgment debtor shall not be bound except by registration of a notice of judgment pursuant to subsection (1) of Section 2A.

(2) Registration of a notice of judgment binds all of the judgment debtor's non-exempt exigible personal property on registration and all non-exempt exigible personal property acquired by the judgment debtor after registration from the time of its acquisition.

(3) Registration of a notice of judgment binds all non-exempt attachable debts owing to the judgment debtor on or after registration from the time the debt becomes an attachable debt except as against the person who owes the debt to the judgment debtor.

(4) Registration of a notice of judgment binds the personal property of the judgment debtor only while the judgment is a subsisting judgment.

(5) Subject to this Section, an interest acquired in personal property that is bound by a registration of a notice of judgment is subordinate to the interest of

(a) the judgment creditor;

(b) all persons entitled by this Act or otherwise to participate in a distribution of personal property subject to the interest of a creditor referred to in clause (a); and

(c) a sheriff and a representative of creditors for the purpose of enforcing the rights of a creditor referred to in clause (a).

- (6) A person to whom personal property bound by a notice of judgment is transferred has priority as against the persons referred to in subsection (5) in the same circumstances that a transferee of personal property subject to a security interest perfected by registration has priority as against the secured party under subsections (1) to (4), (6) and (8) of Section 31 and Section 32 of the *Personal Property Security Act*, and those provisions apply *mutatis mutandis*.
- (7) For the purpose of subsection (1) of Section 21 of the *Personal Property Security Act* and subject to Section 23 of that Act, the non-exempt exigible personal property of a judgment debtor and the non-exempt attachable debts of a judgment debtor are bound by registration of a notice of judgment notwithstanding that the security interest referred to in subsection (1) of Section 21 of the *Personal Property Security Act* attached before the notice of judgment was registered.
- (8) A lien on goods bound by registration of a notice of judgment that arises as a result of the provision in the ordinary course of business of materials or services in respect of the goods has priority over the interest of the judgment creditor in the goods.
- (9) An enforcement proceeding for the purpose of enforcing a money judgment shall not be commenced until a notice of judgment relating to the judgment has been registered pursuant to subsection (1) of Section 2A.
- (10) Where an interest acquired in personal property that is bound by registration of a notice of judgment is subordinate to the interest of a judgment creditor,
- (a) the property is subject to enforcement proceedings to the same extent as if the subordinate interest did not exist; and
  - (b) a person who acquires the property as a result of enforcement proceedings obtains title free of the subordinate interest.
- (11) Personal property of a judgment debtor that is bound by the registration of a notice of judgment is bound for the amount of the judgment, costs and accrued interest less any amounts received by the judgment creditor.
- (12) An interest in personal property is not subordinate to the interest of a judgment creditor who has registered a notice of judgment by reason only that the interest is subordinate to the interest of another judgment creditor who has registered a notice of judgment but nothing in this Section creates any priority as between judgment creditors who have registered notices of judgment.
- (13) A judgment creditor is not entitled to share in the proceeds of a levy by the sheriff against the personal property of the judgment debtor pursuant to this Act unless the creditor has registered a notice of judgment pursuant to subsection (1) of Section 2A.
- (14) In applying the provisions of this Act for the purpose of determining the entitlement of creditors to share in the proceeds of a levy by the sheriff, a reference to an execution or certificate or the delivery of an execution or certificate to the sheriff shall be construed as a reference to a registered notice of judgment or the registration of a notice of judgment, unless the context otherwise requires.
- (15) Where a notice of judgment has been registered, the judgment creditor, the judgment debtor or any other person with an interest in personal property of the judgment debtor may apply to the Supreme Court for an order determining whether or not any item or kind of personal property is exempt, exigible or an attachable debt.
- (16) A person referred to in subsection (15) may amend the registration of the notice of judgment to disclose the particulars of the order made pursuant to that subsection. 1995-96, c. 13, s. 78.



## Conflict

**2E** Where there is a conflict between Sections 2A to 2D and any other provision of this Act or of the *Assignments and Preferences Act*, the *Judicature Act* or the *Civil Procedure Rules*, Sections 2A to 2D prevail. 1995-96, c. 13, s. 78.

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## Personal Property Security Act

59(3) Subject to subsection (7), a debtor may claim the following items of collateral to be exempt from seizure by a secured party:

- (a) furniture, household furnishings and appliances used by the debtor or a dependent to a realizable value of five thousand dollars or to any greater amount that may be prescribed;
  - (b) one motor vehicle having a realizable value of not more than six thousand five hundred dollars at the time the claim for exemption is made, or not more than any greater amount that may be prescribed, if the motor vehicle is required by the debtor in the course of or to retain employment or in the course of and necessary to the debtor's trade, profession or occupation or for transportation to a place of employment where public transportation facilities are not reasonably available;
  - (c) medical or health aids necessary to enable the debtor or a dependent to work or to sustain health;
  - (d) consumer goods in the possession and use of the debtor or a dependent if, on application, the Court determines that
    - (i) the loss of the consumer goods would cause serious hardship to the debtor or dependent, or
    - (ii) the costs of seizing and selling the goods would be disproportionate to the value that would be realized.
- (4) A dependant may claim an item of collateral within clause (3)(a), (c) or (d) to be exempt from seizure but a claim may not be made by both a debtor and a dependant with respect to an item of the same kind.
- (5) Where a claim for exemption is made pursuant to clause (3)(a) or (b) and the realizable value of the collateral for which the claim is made exceeds the maximum amount of the exemption specified in those clauses, the secured party may seize the collateral.
- (6) A secured party who seizes collateral in the circumstances referred to in subsection (5) shall dispose of it in accordance with Section 60 and shall pay to the debtor an amount equivalent to the maximum amount of the exemption, whether or not the proceeds of the disposition exceed that maximum amount.
- (7) Clauses (3)(a) to (c) and subsections (4), (5) and (6) do not apply in relation to goods that are subject to a purchase money security interest held by the secured party against whom the claim to exemption is made. 1995-96, c. 13, s. 59.
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## **Sale of Land Under Execution**

### **PRIORITY LOST BY LACHES**

#### **Notice to prior judgment creditor to sell**

**8** Where several judgments against the same person have been registered in the same registry or land registration office for one year and any judgment creditor whose judgment was so registered before the judgment of another judgment creditor does not take effective steps to sell the land bound by the judgments, the subsequent judgment creditor may give written notice to the prior judgment creditor requiring the prior judgment creditor to sell such land within three months after the service of such notice upon the prior judgment creditor. R.S., c. 409, s. 8; 2001, c. 6, s. 125.

#### **Priority acquired by subsequent judgment creditor**

**9** Where such prior judgment creditor does not, in the opinion of the court or a judge, take effective steps to sell the land within three months from the service of such notice, the subsequent judgment creditor giving the notice shall acquire priority for his judgment over the judgment of the judgment creditor upon whom such notice is served, and may, upon notice of the application to such judgment creditor, obtain from the court in which his judgment was obtained, or a judge thereof, an order in the action for leave to sell the said land, free from the lien or encumbrance of the prior judgment. R.S., c. 409, s. 9.

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## **Builders Lien Act - TRUST PROVISIONS**

### **Owner trustee of trust fund for contractor**

44A (1) All amounts received by an owner that are to be used in the financing of any of the purposes enumerated in Section 6, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor.

(2) Where amounts become payable under a contract to a contractor by the owner, an amount that is equal to an amount that is in the owner's hands or received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor.

(3) Where the substantial performance of a contract has been deemed, or has been declared by the court, an amount that is equal to the unpaid price of the substantially performed portion of the contract that is in the owner's hands or is received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor.

(4) The owner is the trustee of the trust fund created by subsection (1), (2) or (3), and the owner shall not appropriate or convert any part of a fund to the owner's own use or to any use inconsistent with the trust until the contractor is paid all amounts related to any of the purposes enumerated in Section 6 owed to the contractor by the owner. 2004, c. 14, s. 20.

### **Contractor trustee of trust fund**

44B (1) All amounts

(a) owing to a contractor or subcontractor, whether or not due or payable; or

(b) received by a contractor or subcontractor,

on account of the contract or subcontract price of any of the purposes enumerated in Section 6 constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to any of the purposes enumerated in Section 6 who are owed amounts by the contractor or subcontractor.

(2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to any of the purposes enumerated in Section 6 are paid all amounts related to any of the purposes enumerated in Section 6 owed to them by the contractor or subcontractor. *2004, c. 14, s. 20.*

### **Where owner's interest in premises sold**

44C (1) Where the owner's interest in a premises is sold by the owner, an amount equal to

(a) the value of the consideration received by the owner as a result of the sale,

less

(b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises,

constitutes a trust fund for the benefit of the contractor.

(2) The former owner is the trustee of the trust created by subsection (1), and shall not appropriate or convert any part of the trust property to the former owner's own use or to any use inconsistent with the trust until the contractor is paid all amounts owed to the contractor that relate to any of the purposes enumerated in Section 6. *2004, c. 14, s. 20.*

### **Payment by trustee**

44D Subject to Section 13, every payment by a trustee to a person the trustee is liable to pay for services or materials supplied to any of the purposes enumerated in Section 6 discharges the trust of the trustee making the payment and the trustee's obligations and liability as trustee to all beneficiaries of the trust to the extent of the payment made by the trustee. *2004, c. 14, s. 20.*

### **Retention or application of trust funds upon payment**

44E (1) A trustee who pays in whole or in part for the supply of services or materials to any of the purposes enumerated in Section 6 out of money that is not subject to a trust under this Act may retain from trust funds an amount equal to that paid by the trustee without being in breach of the trust.

(2) Where a trustee pays in whole or in part for the supply of services or materials to any of the purposes enumerated in Section 6 out of money that is loaned to the trustee, trust funds may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and the application of trust money does not constitute a breach of the trust. *2004, c. 14, s. 20.*

### **Retention of trust funds where outstanding debt or claim**

44F A trustee may, without being in breach of trust, retain from trust funds an amount that, as between the trustee and the person the trustee is liable to pay under a contract or subcontract related to any of the purposes enumerated in Section 6, is equal to the balance in the trustee's favour of all outstanding debts, claims or damages, whether or not related to any of the purposes enumerated in Section 6. *2004, c. 14, s. 20.*

### **Persons liable for breach of trust**

44G (1) In addition to the persons who are otherwise liable in an action for breach of trust under this Act,

(a) every director or officer of a corporation; and

(b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,

who assents to, or acquiesces in, conduct that the person knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.

(2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant.

(3) Where more than one person is found liable or has admitted liability for a particular breach of trust under this Act, those persons are jointly and severally liable.

(4) A person who is found liable, or who has admitted liability, for a particular breach of trust under this Act is entitled to recover contribution from any other person also liable for the breach in such amount as will result in equal contribution by all parties liable for the breach unless the court considers such apportionment would not be fair and, in that case, the court may direct such contribution or indemnity as the court considers appropriate in the circumstances. *2004, c. 14, s. 20.*

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### **Land Registration Act**

#### **Judgment roll**

65 (1) A registrar shall establish a judgment roll for the registration district.

(2) A judgment creditor may record a judgment for the recovery of money in the judgment roll for a registration district.

(3) A judgment shall be certified by the registrar, clerk or prothonotary of the court that issued it.

(4) A judgment recorded in a judgment roll binds and is a charge upon any registered interests of the judgment debtor within the registration district, whether acquired before or after the judgment is recorded, from the date the judgment is recorded until the judgment is removed from the roll.

(5) On the coming into force of this Act, a judgment recorded pursuant to the Registry Act before that date has the effect of a judgment recorded pursuant to this Act, has effect for twenty years subsequent to the date of the judgment, is subject to Sections 66, 67, 68 and 69 and may not be renewed.

(6) The recording of a judgment in the judgment roll has the same effect with respect to a parcel that has not been registered pursuant to this Act as it has with respect to a parcel registered pursuant to this Act, and no judgment shall be recorded pursuant to the Registry Act after this Act comes into force. *2001, c. 6, s. 65; 2002, c. 19, s. 27.*

### **Effect of judgment**

66 (1) A judgment is a charge as effectually and to the same extent as a recorded mortgage upon the interest of the judgment debtor in the amount of the judgment.

(2) A judgment against one joint tenant does not sever the joint tenancy.

(3) A judgment against one owner of an interest does not extend to or bind the interests of the other owners.

(4) A judgment shall be removed from the roll on the earliest of

(a) cancellation of the recording;

(b) the recording of a certificate of the registrar, prothonotary or clerk of the court that issued the judgment that the judgment was set aside;

(c) expiration of the time for which the judgment was recorded;

(d) the recording of a release of the judgment signed by the plaintiff, the solicitor for the plaintiff or the registrar, clerk or prothonotary of the court that issued the judgment; and

(e) the expiration of five years from the date of the recording of the judgment or the date of the last renewal of the recording of the judgment.

(5) The recording of a judgment may be renewed not more than three times by recording a certificate of renewal signed by the judgment creditor or the solicitor, agent or attorney of the judgment creditor at any time before the judgment is removed from the roll.

(6) A judgment that is removed from the roll ceases to bind or be a charge upon any parcel in the registration district.

(7) The validity of any title acquired by a sale under a judgment is not affected by the removal of the judgment from the roll.

(8) A judgment does not affect a person's interest in any parcel if the person's name is materially different from that of the judgment debtor.

(9) For the purpose of this Section, service shall be by registered mail or as prescribed. *2001, c. 6, s. 66; 2002, c. 19, s. 28.*

### **Contents of recording of judgment**

67 (1) The recording of a judgment shall contain the names and addresses of the parties to the action and, in the case of a judgment creditor, shall include an address at which the judgment creditor may be served and, in the case of a judgment debtor, shall include such information as tends to distinguish the judgment debtor from all other persons of the same or similar names.

- (2) A certificate of judgment shall contain the amount recovered and the names of the solicitors for the parties, if any.
- (3) A certificate of judgment shall be certified under the hand of the registrar, clerk or prothonotary of the Court that issued it, under the seal of the court, and, when so certified, shall be accepted by the registrar for recording without further proof.
- (4) The name of a judgment creditor shall be sufficiently detailed and accurate as to permit the name to be distinguished from all other like names, and shall comply with the prescribed standards.
- (5) The registrar shall not accept for recording a judgment that does not comply with the prescribed standards. *2001, c. 6, s. 67.*