

GENERAL COLLECTIONS

INTRODUCTION

This checklist is designed for use in Queen's Bench actions. Where proceedings are taken under *The Small Claims Act*, similar procedures may be used in the Provincial Court.

The checklist is designed for counsel representing a creditor. Nevertheless, the checklist may also assist counsel representing a debtor.

This checklist is not intended to cover all aspects of Debtor-Creditor law. In particular, it should be noted that this checklist is not intended to cover the topics of bankruptcy and realization on a secured debt; these topics will be covered in detail elsewhere. Even so, an attempt has been made to identify issues that may arise in the general debt collection process, so as to refer the user to the appropriate resources.

LIST OF AUTHORITIES

The difficulty with Debtor-Creditor law generally, is that there is little written on the subject, and the reported decisions are often contradictory. Even so, there are a number of useful sources of information.

General References:

Debtor-Creditor Law: Enforcement Saskatchewan Bar Admission Course.

These materials are more rudimentary than Dunlop, but are a good synopsis. This material is updated on a regular basis. It should be noted that these materials cover and cite most, if not all, of the leading cases in the topics covered in this checklist.

Dunlop, *Creditor-Debtor Law in Canada*, 2nd Ed., (Toronto: Carswell, 1995).

The most complete source. Material on most areas of the checklist may be found in Dunlop.

Holden & Morowetz, *The Annotated Bankruptcy and Insolvency Act*, (Toronto: Thomson/Carswell, 2006).

A good reference that is published annually for the *Bankruptcy and Insolvency Act*; it will provide useful reference on petitioning a debtor into bankruptcy, the unpaid supplier's remedy and issues of Crown priority.

McKeague & Vorony, *The Queen's Bench Rules of Saskatchewan: Annotated* (out of print), (Regina: Law Society of Saskatchewan, 1998).

An excellent reference where a remedy flows from the *Rules of Court*. Of particular note is Part 6, dealing with issues of pleading, and Part 32, dealing with property preservation and interim injunctions.

Cases and Articles:

As was noted above, the Bar Admission Course materials discuss most of the leading cases. However, some are significant enough to merit mention here.

Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2.

The leading Supreme Court of Canada case on Mareva injunctions. Judicial consideration of this should be researched if such an injunction is contemplated.

Leier v. Shumiatcher (1962), 32 D.L.R. (2d) 584.

Discusses the effect of delivering a Writ of Execution to the Sheriff)

Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077.

The leading Supreme Court of Canada authority on the enforcement of judgments. This case would appear to be good authority for the new procedure now employed under *The Enforcement of Canadian Judgments Act, 2002*.

Norfolk Trustco v. Hardy, [1984] 5 W.W.R. 86.

Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd., [1982] 1 S.C.R. 726.

The genesis of the concept of “reasonable notice.” The case has been considered a number of times. Judicial consideration of this case may guide you in determining an appropriate notice.

The Implications of Morguard Investments Ltd. v. De Savoye (1993) 22 C.B.L.J. 2.

A good discussion of some of the issues arising from *Morguard*.

Wanhella v. Agricultural Credit Corporation of Saskatchewan (1988), 68 Sask. R. 146.

All consider the issue as to whether the Provincial Crown is caught by the provisions of *The Exemptions Act*, and offer different views on the subject. The issue is unresolved.

Wilkenson v. Agricultural Credit Corporation of Saskatchewan, [1987] 4 W.W.R. 713

Legislation

Note that the proclamation of *The Enforcement of Canadian Judgments Act, 2002* results in a streamlined process for registering Canadian judgments, and likely renders *The Reciprocal Enforcement of Judgments Act, 1996* of little assistance. To date, the Court of Queen’s Bench has not issued any new rules dealing with registration under the new legislation; but this remains a possibility. Accordingly, before proceeding under the new *Act*, one should review the *Queen’s Bench Rules* to see if such rules have been issued.

As of December, 2005, *The Enforcement of Judgments Conventions Act*, S.S. 1998 has not been proclaimed, although it was assented to on June 11, 1998. Upon proclamation, the *Act* and the underlying convention will affect the enforcement of judgments from jurisdictions outside of Canada.

As of December, 2005, *The Cost of Credit Disclosure Act* has not been proclaimed. Upon proclamation, the *Act* may affect the enforcement of claims for interest.

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CHECKLIST

A. COLLECTION ACTION

1. Initial Contact.

- 1.1 Immediately discuss party names with potential client. Do not go further than this and ensure that there is no communication of confidential client information.
- 1.2 Ensure that there is no conflict of interest.
- 1.3 Arrange initial interview. This interview may be conducted in person, or by telephone.
- 1.4 Prior to interview ask that client bring or send originals of all documents which evidence or relate in any way to indebtedness. These documents should include credit applications, loan agreements, invoices, statements of account, promissory notes, security agreements, guarantees and other contracts. If there are other credit arrangements between parties, ask client bring those documents as well, since there may be documents on those files which will assist in collection process. Note in particular that other credit arrangements may contain documents which have cross-default or cross-security clauses. Obtain copies of all correspondence between creditor and debtor, in particular any letter or document which may contain acknowledgment of indebtedness. Obtain copy of all receipts for advances and payments, all demands for payment, settlement letters and copies of any cheques given by debtor in payment of account.
- 1.5 Set out ground rules of interview. If this is free consultation, or if payment is expected from client, advise client beforehand.

2. Consult With Clients and Obtain Instructions.

- 2.1 Review ground rules. If a limited free consultation, be sure to advise client of time at which charges will begin to accrue.
 - 2.1.1 Determine whether your client is a secured creditor and the debtor is a farmer so as to invoke the requirement of prior notice to sue pursuant to s. 21 of the *Farm Debt Mediation Act* (Canada)
- 2.2 Interview client and discuss facts in general terms.

Notes:

- 2.3 Determine client's objectives, and determine whether debt action is appropriate. If so, begin general discussion of client's options.
- 2.4 Advise client generally about obtaining a judgment in debt. Explain potential difficulties faced by unsecured creditor when enforcing judgment, such as debtor who hides assets and debtor who assigns or is petitioned into bankruptcy.
- 2.5 Advise of possible alternatives to debt action, such as:
- 2.5.1 Settlement. This will be discussed in detail below, but it may be worthwhile to spend some time canvassing possibilities such as payment schedule, acquiring security and other methods to avoid initiating court action.
 - 2.5.2 Claiming on performance bond. This remedy may be available where debtor is required to be licensed, or where debt arises in construction context.
 - 2.5.3 Enforcement of security. Enforcement of security is covered elsewhere. It should be a consideration at this stage. Impact of security realization upon obtaining judgment is covered in this checklist.
 - 2.5.4 Using a statutory remedy, such as:
 - a. Those available to persons supplying labour and materials, under *The Builders' Lien Act*, such as filing notice or claim of lien (note that this is covered in separate checklist).
 - b. Petitioning debtor into bankruptcy. This may be particularly effective if debtor has recently entered transaction which may be attacked as fraudulent conveyance or preference, or has made some other reallocation or disposition of assets. Note that this is a time sensitive remedy, since s. 95 of *The Bankruptcy and Insolvency Act* provides that if such transactions are made within three months of bankruptcy, they will be deemed fraudulent and can be readily set aside. Bankruptcy may also be useful tool in altering priorities of creditors and a timely petition may forestall the Crown from gaining status as a secured creditor. Bankruptcy issues are more fully dealt with in another checklist.

Notes:

- c. Unpaid suppliers' remedy set out in ss. 81.1 and 81.2 of *The Bankruptcy and Insolvency Act*. This remedy allows a supplier to repossess goods not paid for, which have been supplied to debtor who is in bankruptcy and receivership. Note that this remedy only pertains to goods for which payment has not been received. Note also that this is a time sensitive remedy which requires that creditor demand repossession from trustee or receiver within 30 days of delivery of goods to debtor. It may afford a reason for petitioning debtor into bankruptcy. Bankruptcy issues are more fully discussed in another checklist.
- 2.5.5 Selling debt to collection agency.
- 2.6 If client generally wishes to proceed, begin to solidify your understanding of case.
- 2.7 Collect necessary information from client:
 - 2.7.1 Complete name of client. If trade name is used, ensure that you have *proper* name of legal entity, and proper business name.
 - 2.7.2 Client's address, telephone numbers, occupation, age and, where applicable, contact person.
 - 2.7.3 For each debtor:
 - a. Name, address, telephone numbers and name of lawyer, if any. Get as much information as possible, to ensure that service of process is effected efficiently. Age, marital status and spouse's name.
 - b. Occupation, employer, pay dates (if known) and financial institutions.
 - c. Land owned (mortgages, tax certificates).
 - d. Car: serial number and plate.
 - e. Other assets which may exist.
- 2.8 Discuss with client the potential need to conduct searches to ensure that names and details are correct.
- 2.9 Obtain details of transaction or events which give rise to debt or claim including:
 - 2.9.1 Nature of transaction (promissory note, cheque, credit card, contract, goods sold and delivered, work and materials).

Notes:

- 2.9.2 All parties involved such as guarantors. Is this a debt where directors of corporate defendant may be held personally liable?
- 2.9.3 Where and when events occurred.
- 2.9.4 When debt, or part thereof, became due and details regarding default. Does default give rise to right to accelerate payment of remainder of debt?
- 2.9.5 Exact amount of principal debt outstanding.
- 2.9.6 Whether there was agreement to pay interest. If so, whether it was in writing, and whether a rate was agreed upon. Was there agreement as to dates for calculating and compounding interest?
- 2.9.7 Amount of interest presently outstanding.
- 2.9.8 Account history including dates of advances or supply, date of payments and so on.
- 2.9.9 Whether demand has been made, if so, when and in what manner. Whether there has been any response to demand.
- 2.9.10 Whether there have been any agreements to postpone payment, not enforce security or not pursue guarantees.
- 2.9.11 Any security for debt obtained (vendors' lien, security interest, guarantee, mortgage and so on).
- 2.10 Get originals of all relevant documents, such as contracts, promissory notes, invoices, guarantees, security documents, demand letters and correspondence.
- 2.11 Briefly review documents, checking facts against these documents, and looking for details, such as:
 - 2.11.1 That debtor is properly named and described, and corporate debtors are described by appropriate designation such as Ltd., Inc., etc.
 - 2.11.2 Whether contract is signed. Is it signed under seal?
 - 2.11.3 Whether contract is signed by infant, and if so, whether contract is enforceable. The common law largely governs, but may be modified by statutory provisions such as s. 4 of *The Sale of Goods Act*, and s. 164 of *The Saskatchewan Insurance Act*. If contract is not enforceable, is there a guarantor?

Notes:

- 2.12 Make preliminary determination as to when debt became due and payable. This is important to ensure that your client does not take action prematurely.
- 2.13 Determine whether there are limitation problems, and advise client in this regard. In particular, consider:
 - 2.13.1 Two year limitation period set out in s.5 of *The Limitation Act*
 - 2.13.2 The provisions of s.10 of *The Limitations Act* trigger into a cause of action upon default.
 - 2.13.3 The provisions of s.14 of *The Limitations Act* if the claim is for contribution or indemnity.
 - 2.13.4 If the transitional provisions of *The Limitations Act* applies:
 - a. General six year limitation set out in s. 3(1)(f) of *The Limitation of Actions Act*.
 - b. Ten year limitation for action based on judgment set out in s. 3(1)(i).
 - c. Ten year limitation for action brought to recover rent charge or money secured by land set out in s. 12(1).
 - d. Ten year limitation for action brought to recover money payable under agreement for sale of land set out in s. 13.
 - e. Six year limitation for action brought to recover rent arrears, interest and damages relating thereto set out in s. 14(1).
- 2.14 Consider whether there has been acknowledgment or part payment which extends limitation date as set out in *The Limitations of Actions Act*, s.11.
- 2.15 Determine whether your client is a secured creditor and the debtor is a farmer so as to invoke the requirement of prior notice to sue pursuant to s. 21 of *the Farm Debt Mediation Act (Canada)*.
- 2.16 Make preliminary determination as to whether there are any statutory bars on suing, for example, ss. 2, 6 and 18 of *The Limitation of Civil Rights Act*, ss. 25, 26 and 46 of *The Saskatchewan Farm Security Act* and ss. 69(1) and 69.1 of *The Bankruptcy and Insolvency Act*.
- 2.17 Determine whether there is bar to enforcement, pursuant to *The Statute of Frauds*.

Notes:

- 2.18 Determine whether interest rates comply with rate disclosure laws such as *Criminal Code*, *The Cost of Credit Disclosure Act* and *Interest Act*.
- 2.19 Consider possible applicability of law of another jurisdiction. For instance, was credit advanced to debtor while he or she was in another jurisdiction?
- 2.19.1 If debtor is resident outside Saskatchewan, discuss possibility that action is better brought in debtor's home jurisdiction. In this regard, consider if debtor has exigible assets in Saskatchewan. Consider if judgment of Saskatchewan Court is enforceable in debtor's home jurisdiction. There is further discussion below on enforcement issues, under heading of "Foreign Judgments."
- 2.20 Consider other defences such as:
- 2.20.1 No consideration.
- 2.20.2 Misrepresentation.
- 2.20.3 *Non est factum*.
- 2.20.4 Unconscionability.
- 2.20.5 Penalty clauses.
- 2.20.6 Mistake.
- 2.20.7 Acceptance of part performance and satisfaction of obligation: *The Queen's Bench Act, 1998*, s.64.
- 2.21 Give client a preliminary opinion as to whether there is cause of action and whether there are any realistic defences.
- 2.22 Discuss prospects of collecting on judgment.
- 2.23 Discuss proposed collection process and steps that will be taken, overall length of time, estimated costs and any alternatives. Discuss settlement and risks of litigation.
- 2.24 Where there is security in place, discuss possible enforcement of security. (Further information on this alternative is outside scope of this checklist).
- 2.25 Obtain agreement and instructions defining extent of your authority. In case of new corporate client, consider obtaining Director's Resolution confirming conditions of retainer and setting out who will give instructions, and to whom you will report.

Notes:

- 2.26 Ask your client to review their records and to provide you with any other documentary evidence that is relevant. Advise client as to what constitutes documentary evidence within meaning of *The Rules of Court*. Impress upon client the obligation to make full discovery of documents and obligation upon you to certify full disclosure.
 - 2.27 Discuss terms of retainer. Advise how your account will be determined. Advise respecting method and timing of payment, and any conditions upon which you undertake to act.
 - 2.28 If retainer is required before you will act, ensure that client understands this, and that they understand that failure to fulfill your retainer requirements (and other conditions) will mean that you cannot safeguard their interests. Remind client of any imminent limitation period in such circumstances.
3. Acting for Debtor.
- 3.1 If approached to act for debtor consider whether it is possible to act for reduced fee, on payment schedule, or on pro bono basis. Explain any limits to retainer, and if unable to go beyond giving summary advice, consider referring debtor to other agencies, or to trustee in bankruptcy.
 - 3.2 If fee arrangement is contemplated, consider inherent difficulties in collecting from recalcitrant debtor and take any steps you deem necessary, such as taking retainer fee in trust, or otherwise securing your fees. Note that secured creditor may claim interest in funds paid as retainer and that payment of such funds may also be challenged as preference. In such circumstances, you may wish to require that retainer be paid to you, not by debtor, but by third party which does not face such challenges.
 - 3.3 Consider whether there are other creditors who will be making claims against debtor, and in particular, whether client's assets are subject to security. Assess debtor's complete financial circumstances.
 - 3.4 Consider whether there are common law, equitable or statutory defences to creditors' claim, or whether there are common law, equitable or statutory counterclaims which may be asserted against creditor.

Notes:

- 3.5 Determine whether amount claimed by creditor is correct. Review all records and demand full account documentation from creditor if necessary. Note requirement for full particulars under Rule 150.
 - 3.6 If default proceedings have been taken, canvass possibility of having these opened by consent or by court order.
 - 3.7 Consider *Bankruptcy and Insolvency Act* remedies, including assignment, proposal, or orderly payment of debts consolidation.
 - 3.8 Consider possibility of making a “bird in the hand” offer to creditor.
 - 3.9 Consider *Queen’s Bench Act, 1998* application for payment over time.
 - 3.10 Act with extreme caution if debtor is requesting advice or assistance which may contravene settlement or preference provisions of *Bankruptcy and Insolvency Act* or which may contravene *Statute of Elizabeth* or *The Fraudulent Preference Act*.
4. Follow-Up from Initial Interview.
- 4.1 Send letter to client confirming retainer, setting out manner in which you will determine your fee, stating conditions upon which you have agreed to act and summarizing points discussed. Confirm in letter client’s obligation to provide you with all relevant documentary evidence, for purposes of proceeding.
 - 4.2 Open file, and:
 - 4.2.1 Diarize limitation dates, demand deadlines and default dates.
 - 4.2.2 Place checklist in file.
 - 4.2.3 Conduct searches and obtain copies of documents as required. This may include: company searches for all corporate parties and business name searches, checking back to time when events giving rise to action occurred, including:
 - a. Name, prior names, names of amalgamated corporations and registered office.
 - b. Identity and addresses of directors, officers and powers of attorney.
 - c. Good standing.

Notes:

- d. Tax search in any municipality in which debtor may have property, to determine legal description thereof, and status of taxes. Note that often, with small municipalities, all that is required is telephone call to clerk or administrator.
 - e. Land Registry search on debtor's addresses and any other property in which debtor is thought to have an interest. Land Registry search on the name of the debtor and similar names. Writ Registry search.
 - f. Credit Bureau Search. (Note that if you do not have prior written authorization from the debtor, you must give notice pursuant to s.19 of *The Credit Reporting Act*).
 - g. Court Registry, to determine if other actions are outstanding.
 - h. Bankruptcy Registrar (if debtor shows as bankrupt, consider whether you require leave to bring action, or whether your client can simply file proof of claim).
 - i. Personal Property Registry.
 - j. Bank of Canada.
 - k. Motor Vehicle Registry.
- 4.3 If recourse to a bond is available, obtain details.
- 4.4 If there are registrations in PPR which affect viability of pursuing this debtor consider making written demand for details pursuant to s. 18 of *The Personal Property Security Act, 1993*. Consider appropriate timing of demand.
- 4.5 Determine what documents may be in client's files which may assist you. For example, has debtor provided your client with any statements of net worth or financial projections which may be of assistance?
- 4.6 Collect and verify facts.
- 4.7 Determine whether there are any conditions precedent to actions such as:
- 4.7.1 Contractual conditions precedent.
 - 4.7.2 Need for consent to sue.

Notes:

- 4.7.3 Assignment of cause of action.
- 4.7.4 Giving of notice.
- 4.7.5 Demand in writing, and expiry of reasonable time to pay. Given all of the facts in your possession, has adequate demand, with reasonable notice, been made? (consider rule in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726). Consider issues such as history of relationship between debtor and creditor, amount of security held, and previous history of indebtedness. Discuss issue with client.
- 4.7.6 Notice of intention pursuant to s. 21 of the *Farm Debt Mediation Act* (Canada).
- 4.7.7 Leave pursuant to *The Land Contracts (Actions) Act* or *The Saskatchewan Farm Security Act*.
- 4.7.8 Extraprovincial registration as required by s. 275 of *The Business Corporations Act*, where action is based on contract made in whole or in part in Saskatchewan.
- 4.8 If information sources reveal pessimistic picture as to collection, immediately raise this with client. For example if there are no unencumbered assets, advise client of difficulty of collecting. Where there are debts owed to Crown, advise client of implications of Crown priority, and determine whether there is any value in using *Bankruptcy and Insolvency Act* to remove Crown priority.
- 4.9 Address issue of demand. If agreed that no adequate demand or notice has been provided, send demand letters to debtor. Diarize expiry date. Consider taking immediate legal action without demand, if circumstances justify. If you make demand, consider whether you are ethically bound to communicate with debtor's lawyer, by *Code of Professional Conduct*. Also ensure that no improper action is taken, such as criminal offense of compounding.
- 4.10 If necessary, discuss with client the desirability of hiring a skip tracer or investigator.
- 4.11 Determine client's preliminary position on settlement. Confirm such instructions in writing before making a proposal or agreeing to any settlement.

Notes:

- 4.12 Take any steps necessary to claim on any bond (note that in some cases, bond may require a judgment).
- 4.13 Take any necessary steps to avail your client of statutory remedies referred to above, such as those found under *The Builders' Lien Act* and *Bankruptcy and Insolvency Act*.
- 4.14 Take steps to realize on any security. If realizing on a mortgage debt, remember provisions of s. 6 of *The Limitation of Civil Rights Act* and s. 26 of *The Saskatchewan Farm Security Act*, which extinguish debt upon Final Order for Foreclosure.
- 4.15 If debtor is already subject to judgment enforcement under Writ of Execution, consider making claim under *The Creditors Relief Act*, ss. 17 and 18.
5. Commence Proceedings.
 - 5.1 Determine all possible causes of action and whether evidence is available to support them. Determine who will be defendants and identify them clearly.
 - 5.2 Identify whether defendants are jointly, or jointly and severally liable. Ensure that this is clear when drafting claim.
 - 5.3 If suing partnership, determine whether to bring action in name of partnership, or in name of individual partners: Rule 52.
 - 5.4 If suing corporation, determine whether there is directors' liability and if so, name appropriate directors in proceeding.
 - 5.5 Decide in which court to bring action. If judgment sought is below \$5,000.00, consider Small Claims Court, considering fact that tariff of costs does not award any fees for default judgment under \$5,000.00.
 - 5.6 Consider possible actions under *Statute of Elizabeth* or *The Fraudulent Preferences Act*.
 - 5.7 Consider possible interim measures including: *The Absconding Debtors Act*, pre-judgment garnishment (checklist below), Mareva Injunction or proceedings pursuant to Part 32 of *Rules of Court*. (see Saskatchewan Bar Admission Course materials on *Judgment Enforcement*, Part II).
 - 5.8 If international debt is involved, consider provisions of *Currency Act* (Canada).

Notes:

- 5.9 Ensure all conditions precedent satisfied before bringing action.
- 5.10 Draft statement of claim. In so doing:
 - 5.10.1 Bear in mind *Rules of Court* which cover pleading; in particular, Rule 150 which requires full particulars of indebtedness.
 - 5.10.2 If claiming for interest, set out basis upon which interest is claimed. If interest is to be paid by agreement, then set out basis of agreement. If to be claimed as damages, set out necessary references to *The Prejudgment Interest Act*.
- 5.11 Send claim to client for review and comments.
- 5.12 Once in final form, issue claim.
- 5.13 Serve claim:
 - 5.13.1 Comply with general requirements of service.
 - 5.13.2 Consider special requirements, such as are set out in Rule 22, and in s. 269 of *The Business Corporations Act*.
- 5.14 If defendant is avoiding service, bring application for substituted service under Rule 23.
- 5.15 If service *ex juris* is required, determine whether leave of court is required under Part 4 of *Rules of Court*, and if so, make necessary application.
- 5.16 Upon determining service date, file proof of service and diarize file for noting in default of defence.
- 5.17 Upon expiry of time frame, note defendants in default. However, if party is represented by counsel ensure that counsel has been reasonably warned of intention to take such steps.
- 5.18 Once defendants are noted in default, proceed to judgment.
- 5.19 If statement of defence is entered, examine and consider:
 - 5.19.1 Whether defence is sound in law. If not, consider application to strike: Rule 173.
 - 5.19.2 Whether there are scandalous, vexatious or embarrassing allegations. If so, consider motion to strike: Rule 173.

Notes:

- 5.19.3 What evidence will be needed to support debtor's allegations and whether it is available. If there is defence on the face, but facts to support it do not exist, consider application for summary judgment pursuant to Part 9 of *Rules of Court*.
- 5.19.4 Any admissions made by debtor.
- 5.20 Discuss merits of defence with client and cost of proceeding to judgment compared to anticipated recovery of judgment. Discuss possible summary disposition and costs and risks.
- 5.21 Note time limits for filing Reply and Defence to Counterclaim.
- 5.22 If statement of defence raises new facts which call for response, consider filing a reply: Rule 108.
- 5.23 If counterclaim is filed, seek instructions regarding defence to counterclaim: Rule 105C-G.
- 6. Proceed to Judgment.
 - 6.1 Default Judgment.
 - 6.1.1 If defendants are noted in default, apply for default judgment. Note that you need not wait until all defendants have been noted in default or defences have been overcome: Rule 116. Note, however, that in case of joint debtors, the common law holds that judgment against one may extinguish debt of others. Proceed carefully when seeking to enter judgment against only one of several debtors.
 - 6.2 No Defence in Law or Other Grounds to Strike.
 - 6.2.1 If pleadings disclose no defence on their face, or the requisite material is available, apply to strike defence as noted above.
 - 6.3 Summary Judgment.
 - 6.3.1 If there is defence on the face, but facts to support it do not exist, apply for summary judgment as noted above.
 - 6.4 Prima Facie Defence.
 - 6.4.1 Disclose your documents and obtain document disclosure from other side. Proceed to examinations for discovery.

Notes:

- 6.4.2 Subsequent to discoveries, comply with your undertakings and obtain compliance from opposing counsel.
- 6.4.3 If undertakings are not provided or full document disclosure is not provided, consider application to compel, failing which defence shall be struck.
- 6.5 Judgment on Admissions.
 - 6.5.1 It may be that between the claim, documents provided and answers given at discovery, defendant will admit your claim. If so, make application for judgment on admissions, pursuant to Rule 247.
 - 6.5.2 If required, admission of requisite documents may be obtained by way of Notice to Admit Documents, Rule 243 (Form 18).
- 6.6 Settlement.
 - 6.6.1 In event that settlement is an option, discuss this possibility with debtor.
 - 6.6.2 If settling for less than full debt, consider what should happen if there is default in meeting terms of settlement (e.g. will full debt still be owing?).
 - 6.6.3 Confirm instructions in writing before agreeing to settlement and consider getting one or more of:
 - a. Post-dated cheques.
 - b. Consent Judgment (remember that debtor may attempt to withdraw consent if held unfiled).
 - c. Interest.
 - d. Mutual release.
 - 6.6.4 If settlement is unlikely, still consider making formal offer to settle pursuant to Part 14A of *Rules of Court*.
- 6.7 Trial.
 - 6.7.1 If summary disposition is not available, move matter on to trial and through any appeals.

Notes:

7. Entry of Judgment Roll and Issuance of Writs.
 - 7.1 Once it is appropriate to obtain judgment roll, enter it in appropriate form prescribed under *Rules* including:
 - 7.1.1 In event of default judgment, file “Judgment in Default of Defence in Case of Liquidated Demand and Certificate of Taxation of Costs” (Form 30) in duplicate. Include all taxable costs.
 - 7.1.2 If motion to strike, motion for judgment on admissions, or motion for summary judgment should succeed, file “Judgment in Pursuance of an Order” (Form 35).
 - 7.1.3 If trial has occurred, file “Judgment after Trial Without a Jury” (Form 32) or “Judgment after Trial With a Jury” (Form 33).
 - 7.2 If costs are to be taxed, file Bill of Costs in draft form. Upon taxation it becomes judgment of Court.
 - 7.3 If appeal has been taken, and costs have been awarded to your client, file certified copy of judgment above in Queen’s Bench. It then becomes enforceable as judgment of that court.
 - 7.4 Determine judicial centre(s) in which debtor resides or carries on business.
 - 7.5 Prepare Praecipe and Writ of Execution directed to Sheriff in judicial centre most conducive to undertaking enforcement proceedings.
 - 7.6 Issue Writ and direct Writ to appropriate Sheriff. Ask Sheriff to register Writ in their own office and in any other Sheriff’s Offices in which seizure proceedings might be required. Register Writ in the PPR and the Writ Registry by filing a Financing Statement.
 - 7.7 On your client’s behalf, register Writ in Personal Property Registry (and Saskatchewan Writ Registry).
 - 7.8 Conduct a name search of the Land Registry and attach your writ to all land and interests owned by the judgment debtor.

Note: If the client is prepared to spend the money to bring the matter to judgment, these steps would be a minimum effort towards enforcement. Further information about judgment enforcement is found below.

Notes:

B. ENFORCEMENT OF FOREIGN JUDGMENT

1. Initial Contact.
 - 1.1 In general terms follow the procedure set out in section A.1 above.
 - 1.2 Have client bring all documents relating to proceeding in foreign court, including pleadings and judgment. Have client arrange to bring all documentation relating to original cause of action.
2. Review State of Law.
 - 2.1 The following checklist is based principally upon provisions of statutes referred to below, and common law of conflicts. Note *The Enforcement of Canadian Judgments Act, 2002* will affect some of the case law in Saskatchewan dealing with the enforcement of foreign judgments, where that case law predates proclamation of the statute.
3. Consult with Clients and Obtain Instructions.
 - 3.1 Generally, proceed as set out in section A.2 above.
 - 3.2 Seek information specific to foreign judgment.
 - 3.3 Find out date and court in which foreign judgment was entered.
 - 3.4 Determine underlying facts, including:
 - 3.4.1 Whether judgment is one for money or for other relief. (If judgment is for other relief than payment of money, procedure falls outside scope of this checklist).
 - 3.4.2 Whether judgment is final.
 - 3.4.3 Underlying cause of action. For example:
 - a. If cause relates to action relating to title to, possession of or damage to, immovable property located in Saskatchewan, judgment of foreign court is of no consequence.
 - b. If cause of action is one which would not be entertained in Saskatchewan for reasons of public policy or otherwise, and whether there might be good defence to original cause of action.
 - c. If cause of action relates to enforcement of penal or taxation laws of another country, it may not be enforceable in Canada.
 - 3.4.4 Whether judgment is still subsisting in original jurisdiction.

Notes:

- 3.4.5 Whether defendant was ordinarily resident in jurisdiction in which judgment was granted, and if not, whether they voluntarily appeared in court proceedings or otherwise attorned to jurisdiction of foreign court.
- 3.4.6 If defendant was personally served with any of originating documents.
- 3.4.7 Whether appeal is pending or appeal period has expired.
- 3.5 Consider answers to foregoing questions, and make preliminary determination as to the following:
 - 3.5.1 If judgment is granted in a Canadian court, whether it may be registered pursuant to *The Enforcement of Canadian Judgments Act, 2002*: to determine if this may occur, refer to s. 3 of the *Act*, and the definition of “Canadian Judgment” set out in s. 2. Have regard to the time limits set out in s. 6.
 - 3.5.2 If judgment is granted in Canadian court, and there is a reason why it cannot be enforced pursuant to *The Enforcement of Canadian Judgments Act, 2002*, then examine whether it may be registered pursuant to *The Reciprocal Enforcement of Judgments Act, 1996*: to determine if this may occur, refer to s. 4 of that *Act*. If registrable, determine, pursuant to s. 3(4) whether registration may be done *ex parte* or whether notice must be given to debtor(s).
 - 3.5.3 If judgment issues from court outside of Canada, are requirements of ss. 3 and 6 of *The Foreign Judgments Act* met? If so, action may be brought on judgment. If not, action must be brought on original cause of action.
- 3.6 Having considered the foregoing, discuss matter with the client. Care should be taken to discuss particular statutory provisions which apply to foreign judgments. In particular, consideration should be given to conflicts of laws rules and principles and to any common law or statutory defences that might apply (e.g., as was noted above, foreign judgment may be rendered in taxation or penal statute, and may therefore not be enforceable in Saskatchewan – note however that these concepts may be limited in their interpretation. For example, an environmental clean-up order has been held to fall outside these categories: *United States of America v. Ivey* (1993), 26 O.R. (3d) 533 (C.A.)).

Notes:

- 3.7 Consider relevant facts and law and give client preliminary opinion as to whether they should proceed, and if so, whether they should proceed by way of registration, action on foreign judgment, or action on original cause of action.
- 3.8 Appropriate instructions should be obtained.
4. Acting for Debtor.
 - 4.1 In general terms, the considerations differ little from those set out in section A.3 above. However, consider carefully the many defences afforded by statutes and discuss advisability of these with debtor.
5. Follow-Up from Initial Interview.
 - 5.1 Generally, follow same procedures as set out in section A.4 above.
 - 5.2 Determine and diarize the following limitation periods:
 - 5.2.1 Ten year limitation period for action on judgment for payment of money: *The Limitations Act*, s.7(3).
 - 5.2.2 Expiry of original judgment or 10 year limitation period imposed by s. 6 of *The Enforcement of Canadian Judgments Act, 2002*;
 - 5.2.3 Six year limitation period for registering foreign judgment, set out in s. 3 of *The Reciprocal Enforcement of Judgments Act*.
 - 5.2.4 Limitation period for original cause of action.
 - 5.3 If able to proceed under *The Enforcement of Canadian Judgments Act, 2002*, *The Reciprocal Enforcement of Judgments Act, 1996*, or *The Foreign Judgments Act*, determine which of the following will be required and proceed to:
 - 5.3.1 Obtain details of foreign judgment, including style of cause, date, court, place and substance of judgment.
 - 5.3.2 Obtain Certified copy of Judgment from originating court.
 - 5.3.3 Order Certificate of Judgment from court of original jurisdiction.
 - 5.3.4 Ensure that judgment is final and conclusive.

Notes:

- 5.3.5 Obtain details of method of service in foreign jurisdiction and whether defendant entered appearance.
- 6. Commence Proceedings.
 - 6.1 If suit is to be launched on original cause of action, proceed in accordance with above checklist.
 - 6.2 If suit is brought on foreign judgment, under *The Foreign Judgments Act*, pleadings should set forth details of judgment. Otherwise, action will proceed in accordance with above checklist.
 - 6.3 If intention is to proceed by registering under *The Reciprocal Enforcement of Judgments Act, 1996*, then the following procedures should be followed:
 - 6.3.1 Obtain and verify Certificate provided by foreign court.
 - 6.3.2 Prepare draft order for registration. Ensure that appropriate endorsement is contained on *ex parte* order, as required by Rule 467.
 - 6.3.3 If proceeding *ex parte*, prepare Memorandum to Judge and file with foregoing documents. If proceeding by way of notice, prepare Notice of Motion, and serve it and supporting material upon debtor(s). Then file with proof of service.
 - 6.4 If intention is to proceed with registration under *The Enforcement of Canadian Judgments Act, 2002*, then obtain the Certified Copy of Judgment and file with the requisite fee. Note that the Queen's Bench Rules may be amended to require additional information to be provided, but no such amendment has yet been made. Note also that there is no statutory requirement that an order for registration be made and that any order be served on the judgment debtor. Accordingly, until or unless the Queen's Bench Rules are amended to require any such action, it would appear that filing the judgment is sufficient to give rise to an ability to issue a writ or garnishee proceedings and to immediately enforce.
- 7. Proceed to Registration (*Reciprocal Enforcement Only*).
 - 7.1 When order is granted, have it issued in final form.
 - 7.2 Note that if order is granted *ex parte*, copy of order must be served upon debtor(s) within one month, or within such additional time as court may allow, and that sale under execution may not proceed during this time.

Notes:

- 7.3 Otherwise, enforce registered judgment in accordance with other enforcement proceedings set out in this checklist.

C. JUDGMENT ENFORCEMENT – WRITS OF EXECUTION**1. Initial Instructions.**

- 1.1 Consider options other than enforcement, such as:
- 1.1.1 If debtor is corporation, suspending enforcement in exchange for personal guarantee.
 - 1.1.2 Exchanging immediate enforcement under writ for payments, with some form of security being granted (consider possible difficulties in enforcing security, such as prior encumbrances, *Statute of Elizabeth*, *The Fraudulent Preferences Act* and *Bankruptcy and Insolvency Act*).
 - 1.1.3 Consider likelihood that debtor may bring application under *The Queen's Bench Act, 1998*, for payment over time, or may make proposal to creditors under *Bankruptcy and Insolvency Act*.
- 1.2 If amicable resolution is not in offing, prepare for enforcement:
- 1.2.1 Instruct Sheriff to send demand letter to judgment debtor, advising that execution proceedings will be taken if judgment is not satisfied by specified date. Consider asking Sheriff to include calculation of daily interest and costs, due to your client under *The Executions Act*.
 - 1.2.2 Requisition updated PPR search and Writ Registry search. Check these to ensure that your judgment has been properly registered. Check them, also, to determine merit of possible enforcement proceedings. Review them also to determine whether there may be assets available for seizure.
 - 1.2.3 Update all personal information gathered at commencement of law suit (see section A.4 above). Determine whether these indicate that there are other assets available as well.
 - 1.2.4 In addition to the foregoing, consider possibility of obtaining services of Sheriff, or of private investigator, to determine where assets may be located. Potential assets for seizure include all lands, goods, share certificates, bank accounts and so on.

Notes:

- 1.3 Review above mentioned information, and consider whether any of the following proceedings should be taken:
 - 1.3.1 Examination in aid of execution (another checklist).
 - 1.3.2 Attachment of debts (section E below).
 - 1.3.3 Execution against goods.
 - 1.3.4 Execution against intangibles.
 - 1.3.5 Execution against lands.
- 1.4 Evaluate situation and make your recommendations to client.
- 1.5 Explain costs and timelines involved. Explain to client that Sheriff must be indemnified and that your client must agree to stand good for Sheriff's costs. Obtain instructions from client that you may make these commitments on their behalf, and obtain written confirmation of those instructions.
- 1.6 Explain to client that, pursuant to *The Creditor's Relief Act*, other creditors, both judgment and nonjudgment, may share in proceeds of execution on *pro rata* basis.
- 1.7 Obtain instructions for enforcement from client, and confirm in writing.
2. Execution against Goods.
 - 2.1 Once all information has been received respecting possible goods for seizure, evaluate these against exemptions which may be available to debtor:
 - 2.1.1 In case of individual who does not farm, pursuant to *The Exemptions Act*. (Note that if acting for Crown, these exemptions *may not* be available. The case law is unsettled).
 - 2.1.2 Against individual who farms, pursuant to Part V of *The Saskatchewan Farm Security Act*.
 - 2.2 Determine whether remaining goods are encumbered, such as to render any seizure and sale of no benefit. If you have questions in this regard, you may consider making use of request for information provisions contained in s. 18 of *The Personal Property Security Act, 1993*.

Notes:

- 2.3 Once determination is complete, and goods have been identified, send full details, including copies of all search results, to appropriate Sheriff. Your letter will have to contain agreement to pay fees and costs, and indemnity for Sheriff. Ensure that this is provided on your client's behalf.
 - 2.4 Once seizure is effected, Sheriff will retain responsibility for selling goods and dealing with proceeds, including payment out to your client, if appropriate.
 - 2.5 If you are offered settlement, insure that it includes all enforcement costs, including Sheriff's fees. Confirm your instructions to settle in writing.
3. Attachment of Intangibles.
- 3.1 Intangibles such as debts, shares, investments and the like may be subject to attachment by a number of means.
 - 3.2 They may be subject to attachment by Garnishee Summons. If this is the preferred route, further information is set out below.
 - 3.3 Where judgment debtor owns investment with Province of Saskatchewan, or has shares in company (in his or her own name, which are not accessible by other means), a charging order may be sought pursuant to ss. 12 through 16 of *The Executions Act*. This procedure is rarely used.
 - 3.4 Otherwise, Sheriff is entitled to seize intangibles, simply by proceeding under Writ of Execution. For example:
 - 3.4.1 Sheriff may simply seize money, bank notes, surplus of former execution against judgment debtor, monies levied under execution payable to judgment debtor, cheques, bills of exchange, promissory notes, bonds and other securities: s. 5 of *The Executions Act*.
 - 3.4.2 Sheriff may seize debtor's interest under registered mortgage against real property: ss. 5 and 11 of *The Executions Act*.
 - 3.4.3 Sheriff may seize any security interest held by judgment debtor: s. 11 of *The Executions Act*. If share certificates are located within Province of Saskatchewan, Sheriff may seize shares: s. 7 of *The Executions Act*.
 - 3.4.4 Sheriff will have conduct of sale and realization proceedings with respect to intangibles.

Notes:

4. Execution against Lands.
 - 4.1 Search of any lands held by judgment debtor should be conducted. Registration of writ should be made against any such lands.
 - 4.2 Determine whether land in question is homestead within meaning of *The Exemptions Act* or *The Saskatchewan Farm Security Act*. If so, advise client that enforcement proceedings are unlikely to succeed. Obtain instructions as to whether to diarize your file for future, to determine whether status of homestead has changed, or whether you should simply close your file.
 - 4.3 Under s. 22(3) of *The Executions Act*, enforcement against land must await one year from date upon which writ is delivered to Sheriff.
 - 4.4 Diarize file for one year and so advise client.
 - 4.5 Upon expiry of one year period, obtain a Copy of Title for all affected land. Review encumbrances thereon.
 - 4.6 Note whether land is held by judgment debtor as joint tenant with another person not named in your judgment. If so, you will have to simply await disposition of land by joint tenants, unless encumbrancer takes action.
 - 4.7 If necessary, contact encumbrancers to determine their position.
 - 4.8 Consider whether best strategy is to simply await foreclosure proceedings by prior encumbrancers or to bring proceedings to realize on judgment under *The Executions Act*.
 - 4.9 If judgment debtor is individual farmer, you must obtain order pursuant to s. 11 of *The Saskatchewan Farm Security Act*, before sale may proceed. Procedures for this are set forth in foreclosures checklist.
 - 4.10 If judgment debtor is an individual, leave must be obtained pursuant to ss. 3 and 4 of *The Land Contracts (Actions) Act* (see s. 23 of *The Executions Act*). The procedures for obtaining leave are set forth in *Foreclosures* checklist.
 - 4.11 Once necessary court order has been obtained, sale may proceed.
 - 4.12 Sheriff must provide a return of *nulla bona* prior to sale, stating that there are no goods in their jurisdiction liable to seizure. If lands are located in more than one Sheriff's jurisdiction, such a Writ must be obtained from all affected Sheriffs.

Notes:

- 4.13 Copy of order should be sent to Sheriff, along with letter of direction, identifying properties to be sold. Deposit for costs may be required. The usual indemnity will be required. It should be given on behalf of client.
- 4.14 Thereafter, Sheriff will conduct sale pursuant to ss. 22 through 30 of *The Executions Act*.
- 4.15 In alternative, execution creditor may wish to use a private sector selling officer to conduct judicial sale. The Sheriff is required to charge for his or her services on tariff. A private sector selling officer may be able to charge a more competitive fee. If this is preferred approach, you must retain selling officer, agree upon fee, and bring application to have selling officer appointed. In most cases, court will be prepared to appoint private officer.
- 4.16 Upon completion of sale, pursuant to Rule 374, the selling officer will remit application for confirmation of sale to you as solicitor for instructing creditor. Bring that application in timely fashion.

D. ATTACHMENT OF DEBTS

1. Introduction.

Garnishment may take place both before and after judgment. Before judgment, a claim must be issued and affidavit must be filed deposing to truth of plaintiff's claim. After judgment, affidavit must depose to actual judgment obtained.

Pre-judgment garnishment is not available where intended garnishee is Federal Crown (see *Garnishment Attachment and Pension Diversion Act*).

Note also that secured creditor with perfected security interest in debts owed to debtor may claim priority to attached funds even after they are garnisheed.

2. Attaching Debts Owing by Crown.

2.1 If you seek to attach debt owing by Federal Crown:

2.1.1 Note that garnishment of Federal Crown is governed by specific legislation: *Garnishment, Attachment and Pension Diversion Act*.

2.1.2 Federal Crown may only be garnisheed post-judgment: see ss. 8 and 20 of *Act*.

Notes:

- 2.1.3 Note that generally only certain payments owing by Departments of Federal Government and certain prescribed Crown Corporations may be garnisheed: see s. 5 of *Act*. Note that similar restrictions apply to members and employees of Senate and House of Commons: see s. 17.
- 2.1.4 Note specific rules for prior notice and specified manner in which monies are attached, as set forth in Divisions I and IV of *Act*.
- 2.1.5 Note that other, non-specified Crown Corporations are simply governed by provincial law: Division II.
- 2.2 If you seek to attach debt owing by Provincial Crown, note restrictions and procedures set forth in ss. 6 and 7 of *The Attachment of Debts Act*.
- 3. Pre-judgment Procedure.

Note: Pre-judgment garnishment is a highly technical remedy. All rules must be observed. It is critical that you understand the creditor's cause of action, the amount owing and the manner in which it became due. If you do not, you may end up with problems in your material.

- 3.1 Before commencing pre-judgment garnishment proceedings, ensure that remedy has a reasonable chance of success. In particular:
 - 3.1.1 Ensure that client's claim is for debt or liquidated amount as pre-judgment garnishment is not available for unliquidated claim.
 - 3.1.2 If you intend to attach wages or salary, an *ex parte* application must be sought pursuant to s. 9 of *The Attachment of Debts Act*. Only rarely will such an application succeed (for example, a suit brought on a foreign judgment).
 - 3.1.3 Determine who may owe money to debtor, and review the law as to what kind of debt is attachable under garnishee summons. In particular, note recent decision of Saskatchewan Court of Appeal in *Bank of Montreal v. I.M. Krisp Foods Ltd.* (C.A. File No. 2200) (10 November 1995) (Unreported), providing that a debt due at a future date may still be subject to garnishee summons.

Notes:

- 3.1.4 Ensure that there is reasonable possibility that proposed garnishee is indebted to defendant. In the event that you are not this confident, you may wish to avoid remedy, since your client may be attacked for swearing affidavit with insufficient belief, or for abusing process of court.
- 3.1.5 Ensure that debts you are seeking to attach are not owed jointly to your debtor and another person.
- 3.2 Advise client as to vagaries of pre-judgment garnishment law and possibilities that Garnishee Summons may be set aside. Advise client of potential costs arising from application to set aside summons. Advise client that funds in court may be subject to claims of other secured creditors, or intervening bankruptcy.
- 3.3 Obtain instructions.
- 3.4 Draft statement of claim and affidavit carefully:
 - 3.4.1 Ensure that claim and affidavit observe all essentials set out in s. 3 of *The Attachment of Debts Act*. Avoid using standard forms.
 - 3.4.2 Ensure that claim sets forth basis upon which debt became due and owing with sufficient clarity.
 - 3.4.3 Ensure that there are no internal inconsistencies in affidavit, or inconsistencies between affidavit and statement of claim. Do not depose to alternative claims in affidavit.
 - 3.4.4 If client is unable to have affidavit sworn on personal knowledge, obtain access to person with most personal knowledge, and clearly identify that person as such.
 - 3.4.5 Ensure that all information sworn on basis of business records, or information and belief, is identified in such fashion. Otherwise, scrupulously observe requirements for drafting affidavit.
 - 3.4.6 If claim contains claim for both liquidated and unliquidated amounts, include only liquidated claim in affidavit.

Notes:

- 3.5 Have affidavit sworn by client. Never swear a prejudgment affidavit yourself.
- 3.6 Swearing affidavit may occur before or after claim is issued.
- 3.7 Prepare garnishee summons, using appropriate form.
- 3.8 If *ex parte* application is required to attach wages or salary, prepare necessary material. Have affidavit prepared and sworn by client respecting need to attach before judgment.
- 3.9 File claim and affidavit, and application, if necessary.
- 3.10 Upon issuance of summons, retain original for proof of service. Ensure that copies of summons which are served have claim attached to them.
- 3.11 Provide explicit instructions as to service and arrange for service on garnishee. Service on defendant must be made within 20 days after service on garnishee.
- 3.12 Diarize for follow-up and prepare proof of service.
4. Post Judgment.
 - 4.1 Generally, the same procedure applies as respects pre-judgment garnishment, set forth above.
 - 4.2 If seeking to attach wages or salary, ensure that appropriate wording is used in affidavit, and appropriate form of summons is used.
 - 4.3 If seeking to attach wages and salary, recall that summons will attach these as are owing at date of service and for five days thereafter.
 - 4.4 Draft affidavit and summons.
 - 4.5 Have affidavit sworn and filed. Have summons issued.
 - 4.6 Provide explicit instructions as to service and arrange for service on garnishee. Service on defendant must be made within 20 days after service on garnishee.
 - 4.7 Diarize for follow-up and prepare proof of service.
5. Acting for Debtor.
 - 5.1 Where debtor is solvent and wishes to avoid embarrassment and disruption occasioned by pre-judgment process, consider entering agreement with plaintiff to avoid further proceedings. Where this will not succeed, consider having your client post security for judgment, and bring application to bar further pre-judgment proceedings.

Notes:

- 5.2 Where affidavit is false, but not obviously so on its face, consider traversing affidavit with contrary allegations, and then seeking order to cross-examine deponent. If cross-examination succeeds, summons should be set aside. However, if it does not, summons will stand, since court will not try merits of case on application to set aside.
- 5.3 Where there are technical difficulties with plaintiff's material, bring application to set aside solely on problematic material.
- 5.4 If debtor is entitled to exemption, seek cooperation of employer in withholding this amount, failing which an application should be made for payment of those funds to your client.
6. Follow-Up Service.
- 6.1 If you do not hear from garnishee or court, follow-up to see if funds were paid in.
- 6.2 If no return has been made, circumstances may dictate that informal inquiry be made of garnishee, to be followed by demand that return be made. If no return is made, you may take necessary enforcement steps against garnishee, under s. 18 of *The Attachment of Debts Act*.
- 6.3 If garnishee disputes liability of amount to be attached, make necessary application pursuant to s. 11 of *The Attachment of Debts Act* within 60 days of return.
- 6.4 In all cases, be prepared for application by debtor to set aside Garnishee Summons. Note that in case of pre-judgment proceeding, Garnishee Summons may not be set aside on basis that defendant disputes merits of plaintiff's claim. The Garnishee Summons can, however, be set aside on following bases:
- 6.4.1 Abuse of process. This usually occurs when plaintiff's affidavit is false. The defendant must demonstrate that affidavit was patently false or must get order to cross-examine plaintiff and show falsity during course of that cross-examination.
- 6.4.2 Non-compliance with *Act*. This will occur where court adjudges that claim is not for debt or liquidated demand, that there are inconsistencies in affidavit, that plaintiff has not sworn positively to indebtedness, and so on.

Notes:

7. Exemptions.
 - 7.1 Note that debtor is entitled to exemption, where their wages have been garnisheed. The employer may withhold exemption, or debtor may bring application to have it paid out of court. The exemption is \$500.00 per month for debtor, and \$100.00 per month for each dependant: s. 22 of *The Attachment of Debts Act*.
 - 7.2 Note that if amount garnisheed is for less than a full month, exemption is to be pro-rated.
8. Payment Out of Court.
 - 8.1 Pre-judgment garnishee may not be paid out of court until after judgment. Once judgment is obtained, you should consider bringing application for payment of monies out of court.
 - 8.2 Payment out may be sought, generally ten days after service of summons upon garnishee, or judgment: s. 13 of *The Attachment of Debts Act*. However, note that garnishee of wages may not be paid out of court until 60 days after money is paid in (or judgment, whichever is later): s. 22(10). Note that debtor may consent to earlier payment out of court.
 - 8.3 Payment out of court may be sought on *ex parte* basis.
 - 8.4 When monies may be paid out of court, prepare:
 - 8.4.1 Memorandum to Judge.
 - 8.4.2 Draft order, providing that funds plus any accrued interest are to be paid to your client by way of your office, and further providing that costs of garnishee and payment out are to be paid first out of proceeds, with remainder to be applied against judgment.
 - 8.4.3 Draft bill of costs.
 - 8.5 Note that once fiat is received, no order need be issued, even though draft order was filed. The cheque and taxed bill will be returned to you.
 - 8.6 Funds should be remitted immediately to client, to ensure that Court cheque clears at earliest possible moment, so as to avoid assignment in bankruptcy catching the funds.

Notes:

E. EXHAUSTION OF REMEDIES

There will come a point where the further enforcement of a judgment is futile, for a number of reasons, often that the debtor has no further assets. In such circumstances:

1. Inform client and obtain instructions to cease enforcement.
2. Confirm with client who has responsibility for ensuring that judgment is renewed at expiry of ten years.
3. Confirm arrangement in writing.