ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Enforcement of Judgments and Orders

Consultation Memorandum No. 12.11
August 2004

Deadline for Comments: October 31, 2004

ALBERTA RULES OF COURT PROJECT

The Alberta Rules of Court Project is a 3-year project which has undertaken a major review of the *Alberta Rules of Court* [The Rules] with a view to producing recommendations for a new set of rules by 2004. The Project is funded by the Alberta Law Reform Institute (ALRI), the Alberta Department of Justice, the Law Society of Alberta and the Alberta Law Foundation, and is managed by ALRI.

This consultation memorandum is issued as part of the Project. It has been prepared with the assistance of the members of the Rules Project Committee, who were generous in the donation of their time and expert knowledge to this project. Committee members prepared papers, parts of which have been incorporated in this consultation memorandum. The members of the committee are:

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This consultation memorandum was written by Dick Dunlop with the exception of Chapter 4, which was written by Debra Hathaway.

Mr. Dunlop also relied on the assistance of Alberta Law Reform Institute Counsel Cynthia Martens and Debra Hathaway as well as research assistants Lisa Statt, Orrice Harron, Darryl Douglas, Kristen Lewicki, and Raisa MacLeod.

A reader who wishes to have more information about the Alberta Rules of Court Project may consult the background material included in each of the Consultation Memoranda 12.1 to 12.9. More complete information, including reports about the Project and particulars of previous Consultation Memoranda, may also be found at, and downloaded from, the ALRI website: **<http://www.law.ualberta.ca/alri>**

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THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	Expert Evidence and "Independent" Medical Examinations	February 2003	May 16, 2003
12.4	Parties	February 2003	June 2, 2003
12.5	Management of Litigation	March 2003	June 30, 2003
12.6	Promoting Early Resolution of Disputes by Settlement	July 2003	November 14, 2003
12.7	Discovery and Evidence Issues: Commission Evidence, Admissions, Pierrringer Agreements and Innovative Procedures	July 2003	November 14, 2003
12.8	Pleadings	October 2003	January 31, 2004
12.9	Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions	February 2004	April 30, 2004
12.10	Motions and Orders	July 2004	September 30, 2004
12.11	Enforcement of Judgments and Orders	August 2004	October 31, 2004

Available to view or download at the ALRI website: *http://www.law.ualberta.ca/alri/*

ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The members of the Institute's Board are A. de Villars, Q.C.; A.D. Fielding, Q.C.; The Hon. Judge N.A. Flatters; P.M. Hartman, Q.C.; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C.; P.J.M. Lown, Q.C. (Director); A.D. Macleod, Q.C.; The Hon. Madam Justice B.L. Rawlins; W.N. Renke; D.R. Stollery, Q.C.; The Hon. Mr. Justice N.C. Wittmann (Chairman) and K.D. Yamauchi.

The Institute's legal staff consists of P.J.M. Lown, Q.C. (Director); D.W. Hathaway; C.L. Martens; S. Pearson; S. Petersson; M.A. Shone, Q.C. and H.L. Stout. C.R.B. Dunlop; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C. and D.I. Wilson, Q.C. are consultants to the Institute.

PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute by October 31, 2004

This consultation memorandum addresses a group of rules and forms concerned with enforcement of judgments or orders of a court. The committee is primarily concerned with Parts 28 (*Enforcement of Judgments and Orders*), 36 (*Extraordinary Remedies*) and 57 (*Rules and Orders Promulgated under the Winding-Up Act*). In addition, the committee will comment on Rules 82-83, 151, 155, 331, 333, and Part 37 as well as some general issues.

Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the Committee has identified a number of issues arising from these procedures and has made preliminary proposals. These proposals are not final recommendations, but proposals which are being put to the legal community for further comment. These proposals will be reviewed once comments on the issues raised in the consultation memorandum are received, and may be revised accordingly. While this consultation memorandum attempts to include a comprehensive list of issues in the areas covered, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other issues which should be addressed.

We encourage your comments on the issues and the proposals contained herein. You may respond to one, a few or many of the issues addressed. You can reach us with your comments or with questions about this consultation memorandum or the Rules Project on our website, by fax, mail or e-mail to:

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Website: http://www.law.ualberta.ca./alri/

The process of law reform is essentially public. Even so, you may provide anonymous written comments, if you prefer. Or you may identify yourself, but request that your comments be treated confidentially (i.e., your name will not be publicly linked to your comments). Unless you choose anonymity, or request confidentiality by indicating this in your response, ALRI assumes that all ***written comments are not confidential***. ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although usually we will discuss comments generally and without specific attributions.

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EXECUTIVE SUMMARY

1. MANDATE OF COMMITTEE

The mandate of the Committee on the Enforcement of Judgments and Orders [the committee] is to look at a group of rules concerned with enforcement of judgments or orders of a court. The committee is primarily concerned with Parts 28 (*Enforcement of Judgments and Orders*), 36 (*Extraordinary Remedies*) and 57 (*Rules and Orders Promulgated under the Winding-Up Act*). In addition, the committee will comment on Rules 82-83, 151, 155, 331, 333, and Part 37 as well as some general issues.

This report discusses 160 rules and 7 forms, and makes proposals on 67 issues. In this summary, we outline the principles which guided our work and the highlights of the report. For a table of the disposition of every rule we examined, see Appendix A.

2. PRINCIPLES

1. Remedies are important – A legal system may go to great lengths to reach a just solution to a dispute, but that effort will be worthless if there is no effective, efficient and credible system of remedies to enforce the court's decision.

2. A remedial system must be fair, appropriate and reasonable for all parties – While remedies must give successful litigants confidence in the process and a reasonable hope of recovery, they must also protect the legitimate rights of the unsuccessful party to fair and reasonable enforcement. Remedies must conform to "the principle of proportionality", that is, drastic remedies should be used only "when less intrusive forms of enforcement ... have not worked or are not available."[1]

3. The present enforcement rules are in need of reform – Rules of court should be clear, useful, effective and just. The rules within our mandate do not come close to meeting this standard. They are archaic, repetitive, unclear, unnecessarily technical,

[1] J. Beatson, Q.C., *Independent Review of Bailiff Law: Report* (Cambridge: University of Cambridge Centre for Public Law, 2000) at 10 [Beatson].

procedurally clumsy, excessively complex and sometimes unjust. Given the importance of a fair and effective system of remedies, reform is an urgent need.

4. Obsolete rules and processes should be repealed – Antique processes which are no longer used or needed should be deleted from the new rules. On the other hand, a remedy which appears useless to us may have a use that we have not yet discovered. Caution is the right approach.

5. Chronological organization of the rules – The new rules should roughly follow the chronology of a lawsuit. The Rules presently make some attempt to follow this plan, but the organization breaks down in the rules under consideration in this consultation memorandum.

6. The rules should avoid repetition – Some of the present rules duplicate each other or deal with the same problem, often in different ways. The new Alberta rules should merge duplicates into one rule which contains the best elements of the old.

7. The rules should where possible aim for general propositions rather than a series of specific but similar situations

8. Remedies should as a general rule be immediately available – Once a litigant has obtained a judgment, the remedies necessary to enforce that judgment should be immediately available. The rights of the parties have been settled. There should be no requirement that the successful litigant must go to court again to seek leave to issue remedies. This principle should not apply where the judgment itself says otherwise or where it is dangerous to permit enforcement without prior judicial scrutiny, for example, where immediate deployment of remedies will do a serious and irreparable injury to the unsuccessful litigant.

9. Rules dealing with a subject governed by a statute should where appropriate be moved into the statute or regulation thereunder – Under this heading, we are thinking particularly of the *Civil Enforcement Act* but there are other examples. Many rules are confined to issues governed and regulated by a statute. In all such cases, we

should consider moving the rule into the statute or into regulations created under the statute.

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

2. The present system of civil enforcement involves the researcher in a lengthy voyage from the *Act* to The Rules and back. Putting the law in one place makes the job of the researcher easier and therefore less expensive and uncertain. However, a rule which applies to more than one remedy or statute likely has to remain in the rules.

3. In most cases, rules will be moved into the *Civil Enforcement Regulation* rather than the *Act*. At present The Rules are largely, although not entirely, procedural rather than substantive. Procedural rules require frequent amendment which is easier for regulations rather than statutes. Still, the regulations pursuant to an act are more likely to be drafted in harmony with their parent legislation.

3. HIGHLIGHTS

1. Rules which deal only with issues governed by the *Civil Enforcement Act* should be amended and moved to that *Act* or to the *Civil Enforcement Regulation* – We discussed above the fundamental policy underlying the movement of these rules to the relevant statute or, more likely, the regulation. The rules and forms which would be moved are Rules 340.1, 341(2), 348, 349.1, 350, 351, 353-355, 357-358, 360, 368-375, 377-379, 381-383.1 and 470-481.1, and Forms F, F.1, I, I.1, L and M. We propose some amendments to these rules aimed at making the process operate more smoothly and efficiently. Some unnecessary rules should be repealed. In our view, conduct money should no longer be a requirement for examinations in aid. Rules 353, 354 and 355 should be amended to permit service by ordinary mail except in matters

relating to contempt, attachment orders, the seizure and sale of a residence or where the court orders otherwise.

2. Rules 74(2), 151 and 155(b), which require leave of the court before enforcement can be commenced, should be repealed – We earlier argued that, once a litigant has obtained a judgment, the remedies necessary to enforce that judgment should be immediately available without leave. Rules 74(2), 151 and 155(b) violate this principle for no good reason and should be repealed. The unsuccessful litigant can still ask the court to stay enforcement in the judgment or later in a stay of enforcement order. In our view, this is sufficient protection without a blanket prohibition of enforcement.

3. The present rules regarding enforcement against a partnership and its partners should be amended to follow Rules 8.01 to 8.06 of the Ontario, *Rules of Civil Procedure* [Ontario Rules].

4. The time limits on the enforcement of money and non-money judgments should be clarified, and Rules 331, 347 and 357 should be amended – The *Limitations Act* or the new Alberta rules should create a period of 10 years from the date of issue of any money or non-money judgment or order for any enforcement process to be initiated. After the elapse of the 10 year period, an enforcement process cannot be launched at all unless the applicant has obtained a new judgment by action or under Rule 331. Rules 347 and 357 will need to be reconsidered in the light of this proposal. Rule 331, which permits people with judgments or orders to extend the time for enforcement, should be rewritten to make it clear that (1) the rule applies to money and non-money judgments and orders and to all enforcement processes, not just writs of enforcement and (2) a master as well as a judge has jurisdiction to hear and decide the application. Wherever possible, the Rule 331 process should be made less technical and difficult.

5. The rules regarding replevin (Rules 427-436), interpleader (Rules 442-460), receivers (Rules 463-464), preservation orders in part (Rules 467-469) and stop orders (Rule 494) should be moved to a new part of the Alberta rules entitled "Preservation of Rights in Pending Litigation" and located before the rules on

trial and judgment – At present The Rules include Part 36, entitled "Extraordinary Remedies," which follows the rules on trial, judgment and enforcement and contains the rules on replevin, interpleader, receivers, preservation orders and stop orders. All of these processes are entirely or mostly used before trial. The Ontario Rules have a separate part entitled "Preservation of Rights in Pending Litigation," which includes rules on interlocutory injunctions and mandatory orders, receivers, certificates of pending litigation, interpleader, interim recovery of personal property (that is, replevin) and interim preservation of property. In our view, the new Alberta rules should follow the Ontario model.

6. Replevin (Rules 427-436), interpleader (Rules 442-460), receivership (Rules 463-464) and the stop order (Rule 494) are useful processes which should remain in the Alberta rules, although amendments are needed – The proposals for amendment are intended to simplify the present rules and clarify the jurisdiction and discretion of the court while preserving processes which play a useful part in Alberta practice.

7. Preservation of property orders, currently governed by Rules 467, 468 and 469, should be amended but should remain in the Alberta rules – One purpose of the preservation order is to ensure that the property in dispute or its worth in money is safeguarded until judgment has been rendered. The process is remedial because it guarantees that the party seeking title or an interest in the property will enjoy the fruits of a favourable judgment. The remedy serves a second process which has nothing to do with remedies or enforcement. It can be used as a device to gather and preserve evidence before trial to support the applicant's side and undermine that of the opponent. Both purposes are useful and should be retained. In our view, the discovery-like elements should be cut out of the present rules and put into the discovery part of the new rules. The remedial aspects should be retained in the new part entitled "Preservation of Rights in Pending Litigation." We propose several amendments to the remedial aspects of Rules 467, 468 and 469 to expand their scope and increase their efficiency and clarity.

8. Rules 361 to 363 governing recovery of possession of land should be retained and amended – The committee proposes several amendments to simplify and

modernize these essential rules. We would eliminate the writ of possession on the ground that a well-drafted judgment or order will do the same job. The problem of goods left in a property subject of a possession order is now dealt with by the cumbersome Rule 363. We propose that the rule be amended to bring it into line with the more flexible scheme set out in the *Residential Tenancies Act*.

9. Rules 494.1-498 governing sale of land should be retained with minor amendments.

10. The new Alberta rules should provide a range of penalties which a court may give against someone who acts contrary to or who disobeys a court order other than an order for the payment of money – One of the most common complaints of respondents to the Rules Project is that the courts will not enforce their own orders, often because they will not imprison the violator for contempt. In our view, the solution is the creation of a rule listing a variety of possible penalties for disobedience to an order. The list would include but would not be limited to contempt; it would include penalties ranging from a warning to a fine to a monetary award. Other remedies may include modification or elimination of exemptions from enforcement, suspension of the driver's licence of the delinquent under the motor vehicle legislation and remedies aimed at directors and officers of corporate offenders. The substance of the present Rules 364 to 367 should be amended and included in the list. Another possible remedy is to follow the example of the present Rule 367 and section 8 of the *Civil Enforcement Act*. These provisions empower the court to get someone else to perform the act which the disobedient person should have performed. The choice of the appropriate penalty or remedy will lie with the court. While contempt may well be appropriate in serious cases, the capacity to choose a less severe penalty may result in the rules being enforced more often and more firmly than is now the case.

11. The Winding-up and Restructuring Act Rules [*WURA* Rules] (Rules 754-812) should be repealed – The *Winding-up Act* was passed in 1882 to deal with the liquidation of "Insolvent Banks, Insurance Companies, Loan Companies, Building Societies, and Trading Corporations." The *Act*, now re-entitled the *Winding-up and Restructuring Act* [*WURA*], is still in force and continues to be the basis for a relatively small but significant type of liquidation. Some western provinces, including

Alberta, promulgated Winding-up Act rules early in the twentieth century. Most provinces have repealed their rules, but Alberta retains them. In our view, they should be repealed. Alberta courts will still be able to make procedural rulings by resort to the general rules or to the *WURA* itself.

12. Masters should be permitted to hear and decide applications for civil contempt – Section 9 of the *Court of Queen's Bench Act* excludes from the master's jurisdiction matters related to criminal proceedings or the liberty of the subject and applications relating to civil contempt except in maintenance enforcement situations. The exclusion of civil contempt from masters' jurisdiction creates difficulties. The committee strongly believes that masters should be empowered to hear and decide civil contempt applications at least within the areas surveyed in this consultation memorandum.

LIST OF ISSUES

BASIC PRINCIPLES

ENFORCEMENT OF MONEY JUDGMENTS

RULES RELEVANT TO THE ENFORCEMENT OF MONEY AND NON-MONEY JUDGMENTS

ENFORCEMENT AGAINST A PARTNERSHIP AND ITS PARTNERS: RULE 82

LIMITATIONS AND ENFORCEMENT: RULES 331, 347, AND 357

REPLEVIN: RULES 427 TO 436

INTERPLEADER: RULES 442 TO 460

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MISCELLANEOUS ISSUES

CHAPTER 1. BASIC PRINCIPLES

ISSUE No. 1
What basic principles should guide reform of the rules regarding remedies?

[1] The mandate of the Committee on the Enforcement of Judgments and Orders [the committee] is to look at a group of rules concerned with enforcement of judgments or orders of a court. The committee is primarily concerned with Parts 28 (*Enforcement of Judgments and Orders*), 36 (*Extraordinary Remedies*) and 57 (*Rules and Orders Promulgated under the Winding-Up Act*).[2] In addition, the committee will comment on Rules 82-83, 151, 155, 331, 333, and Part 37[3] as well as some general issues.

[2] The committee held several meetings to discuss the rules under our jurisdiction. Committee members contributed written and oral comments on specific remedies. As we worked through the enforcement rules, we reached some general conclusions which form the basis for the specific proposals in succeeding parts.

POSITION OF THE COMMITTEE

A. Remedies are Important

[3] In 1991, the Institute published *Enforcement of Money Judgments*[4] which proposed far-reaching changes in the Alberta judgment enforcement system. The report begins with the uncontroversial proposition that just and efficient processes for the enforcement of judgment debts are essential.

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[2] The committee did not consider r. 344 in Part 28 or the rules on mandamus and prohibition in Part 36.

[3] Part 37 (*Sales of Real Estate*) was also considered by Francis Price, Q.C. who was responsible for foreclosure.

[4] Alberta Law Reform Institute, *Enforcement of Money Judgments*, 2 vols. (Report No. 61) (Edmonton: The Institute, 1991) [ALRI, *Enforcement of Money Judgments*].

> What use is a judicial system that purports to resolve a dispute if the resolution it determines cannot be implemented effectively? Moreover, a just and efficient enforcement system is necessary if credit is to continue to play its fundamentally important role in the operation of our commercial system.[5]

While the Institute was talking about money judgments, the proposition applies equally to non-money judgments or orders. A legal system may go to great lengths to reach a just solution to a dispute, but that effort will be worthless if there is no effective, efficient and credible system of remedies to enforce the court's decision. One practitioner astutely observed that these problems are very important because they involve "bread and butter issues" for parties and counsel alike.

B. A Remedial System Must be Fair, Appropriate and Reasonable for All Parties

[4] While remedies must give successful litigants confidence in the process and a reasonable hope of recovery, they must also protect the legitimate rights of the unsuccessful party to fair and reasonable enforcement. Jack Beatson, in a recent paper on English creditors' remedies law, argues that remedies must conform to "the principle of proportionality", that is, drastic remedies should be used only "when less intrusive forms of enforcement ... have not worked or are not available."[6] Beatson goes on to summarize four principles which the Scottish Law Commission applied to the remedy of distress.

> The first of these is the rule of law requirement that where the law confers a right on any person, it must also supply an effective mechanism to make the right genuine and real in its practical effect. Secondly, there is what the Commission terms the principle of least coercion, broadly the equivalent of proportionality as described above. Thirdly, there is what the Commission terms the principle of appropriateness. This means that legal procedures should be designed to achieve their objectives in as direct a manner as possible. Finally, there is the principle of effective enforcement.[7]

We agree.

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[5] *Ibid.*, vol. 1 at 21.

[6] Beatson, *supra* note 1.

[7] *Ibid.* at 11.

C. The Present Enforcement Rules are in Need of Reform

[5] Rules of court should be clear, useful, effective and just. The rules within our mandate do not come close to meeting this standard. They are archaic, repetitive, unclear, unnecessarily technical, procedurally clumsy, excessively complex and sometimes unjust. Some rules in Part 36 lay down pretrial processes; they have nothing to do with enforcement and should be moved much earlier in the rules. Given the importance of a fair and effective system of remedies, reform is an urgent need.

D. Obsolete Rules and Processes Should be Repealed

[6] Antique processes which are no longer used or needed should be deleted from the new rules. On the other hand, a remedy which appears useless to us may have a use that we have not yet discovered. Caution is the right approach.

E. Chronological Organization of the Rules

[7] The new rules should follow roughly the chronology of a lawsuit. At present The Rules make some attempt to follow this plan, but the organization breaks down in the rules under consideration here. For example, The Rules contain Part 36, entitled "Extraordinary Remedies," which follows the rules on trial, judgment and enforcement. This section includes rules on replevin, interpleader, receivers, preservation orders and stop orders, all of which are entirely or mostly used before trial.

[8] Other provinces have adopted a different approach. For example, the Ontario Rules have a separate part entitled "Preservation of Rights in Pending Litigation." It includes rules on interlocutory injunctions and mandatory orders, receivers, certificates of pending litigation, interpleader, interim recovery of personal property (that is, replevin) and interim preservation of property. We will later propose that we follow the Ontario organization.

F. The Rules Should Avoid Repetition

[9] Some of the present rules duplicate each other or deal with the same problem, often in different ways. Rules 467, 468 and 469 are an example. The new Alberta rules should merge duplicates into one rule which contains the best elements of the old.

G. The Rules Should Where Possible Aim for General Propositions Rather than a Series of Specific but Similar Situations

[10] Some enforcement rules amount to examples or illustrations of a broader principle. There are two examples.

1. There are numerous rules about getting possession, control or delivery of personal property. These separate rules should be brought together and rationalized. The aim is to express the broad principle directly and clearly.

2. The new rules should include a list of possible remedial orders which a court may give against someone who acts contrary to or who disobeys a court order other than an order for the payment of money. The list would include but would not be limited to contempt. This idea is developed further in Chapter 13.

H. Remedies Should as a General Rule be Immediately Available

[11] Once a litigant has obtained a judgment, the remedies necessary to enforce that judgment should be immediately available. The rights of the parties have been settled. There should be no requirement that the successful litigant must go to court again to seek leave to issue remedies. This principle should not apply where the judgment itself says otherwise or where it is dangerous to permit enforcement without prior judicial scrutiny, for example, where immediate deployment of remedies will do a serious and irreparable injury to the unsuccessful litigant.

I. Rules Dealing with a Subject Governed by a Statute Should Where Appropriate be Moved into the Statute or Regulation Thereunder

[12] Under this heading, we are thinking particularly of the *Civil Enforcement Act*[8] but there are other examples. Many rules are confined to issues governed and regulated by a statute. In all such cases, we should consider moving the rule into the statute or into regulations created under the statute.

1. If the law is concentrated in one place, it is more likely to be coherent and integrated. Dividing the law of creditors' remedies between the *Civil*

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[8] R.S.A. 2000, c. C-15.

Enforcement Act and The Rules leads to repetition, confusion and direct conflict. These flaws can be largely eliminated if rules which are part of the scheme of enforcement of money judgments are moved into the *Act* or the *Civil Enforcement Regulation*.[9]

2. The present system of civil enforcement involves the researcher in a lengthy voyage from the *Act* to The Rules and back. Putting the law in one place makes the job of the researcher easier and therefore less expensive and uncertain. However, a rule which applies to more than one remedy or statute likely has to remain in the rules.

3. In most cases, rules will be moved into the *Civil Enforcement Regulation* rather than the *Act*. The Rules at present are largely, although not entirely, procedural rather than substantive.[10] Procedural rules require frequent amendment which is easier for regulations rather than statutes. Still, the regulations pursuant to an act are more likely to be drafted in harmony with their parent legislation.

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[9] Alta. Reg. 276/95.

[10] Some of the present rules are substantive and should be placed in the *Civil Enforcement Act*, *supra* note 8.

CHAPTER 2. ENFORCEMENT OF MONEY JUDGMENTS

A. Preliminary and General Issues

ISSUE No. 2
Should rules relevant only to the subject matter of the *Civil Enforcement Act*[11] be moved to that *Act* or to the *Civil Enforcement Regulation*[12]?

[13] The Alberta Law Reform Institute, in its 1991 report *Enforcement of Money Judgments* proposed as a basic principle of reform that the new law of creditors' remedies should, as far as possible, be concentrated in one statute.

> RECOMMENDATION 4:
>
> ONE STATUTE
>
> The enforcement of money judgments should be governed by one statute that describes the system of enforcement and the various processes, and the procedures that are a part of it, in consistent, coherent and logically ordered terms.[13]

[14] The government acted on the Institute Report and passed the *Civil Enforcement Act*. The *Act* did not, however, fully implement the one statute recommendation. Part of the processes and procedures were relegated to the *Civil Enforcement Regulation* while others found a home in The Rules. There is some suggestion that this division of legislative material may have been a logistical rather than a principled decision; the enforcement rules were drafted prior to the *Civil Enforcement Regulation* and were able to be brought into force sooner than the *Regulation*. No one has moved to change them since.

[15] The result has been confusion and conflicts among the various legislative instruments. The *Act* and the *Regulation* are relatively coherent, but The Rules are less integrated with the statutory scheme. Françoise Belzil, a member of this committee,

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[11] *Civil Enforcement Act*, *supra* note 8.

[12] *Civil Enforcement Regulation*, *supra* note 9.

[13] ALRI, *Enforcement of Money Judgments*, *supra* note 4, vol. 1 at 27.

described some of these conflicts in an early LESA lecture;[14] others are detailed below.

POSITION OF THE COMMITTEE

[16] We think that rules which are relevant only to the subject matter of the *Civil Enforcement Act* should be moved to that *Act* or to the *Civil Enforcement Regulation*. We advanced two reasons for this conclusion in Chapter 1 of this memorandum.

1. If the law is concentrated in one place, it is more likely to be coherent and integrated. Dividing the law of creditors' remedies between the *Civil Enforcement Act* and The Rules has led to repetition, confusion and direct conflict. These flaws can be largely eliminated if rules which are part of the scheme of enforcement of money judgments are moved into the *Act* or the *Civil Enforcement Regulation*.

2. The present system of civil enforcement involves the researcher in a lengthy voyage from the *Act* to The Rules and back. Putting the law in one place makes the job of the researcher easier and therefore less expensive and uncertain. The committee's experience was that practitioners and lay people encountered problems in working with two separate pieces of legislation.

[17] Putting all the enforcement rules into either the *Act* or the *Regulation* would make more sense and be more user friendly. The committee thinks that most of the present rules might be better placed in the *Regulation* than in the *Act*, but it can see no reason for a third legislative vehicle. If the problem is the need for speedy amendment, that need can be met by putting a particular rule in the *Regulation*. A number of remedies, such as pre-judgment remedies, were moved to the *Act* when it was first drafted; the committee sees no reason why the rest of the rules specific to enforcement of money judgments should not be moved as well. However, there are many rules which apply to more than one remedy or statute. These will have to stay in the new rules.

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[14] Françoise H. Belzil, "Seizure of Personal Property" in Legal Education Society of Alberta, *Civil Enforcement Act. Continuing Professional Competence Seminar Held April 17, 1996* (Edmonton: Legal Education Society of Alberta, 1996).

ISSUE No. 3
Should applications under the *Civil Enforcement Act* be made by originating notice? Should notice be required? Should Rule 340.1 be moved to the *Civil Enforcement Act*?

[18] Rule 340.1 provides that an application under the *Civil Enforcement Act* (a) shall be made by way of an originating notice unless the application is part of proceedings already commenced and (b) shall not be made *ex parte* unless expressly authorized under the *Civil Enforcement Act* or Rule 387. The rule applies only to applications under the *Civil Enforcement Act*. The committee examined two primary questions raised by this rule.

1. Should applications be required to be made by originating notice?
2. Should notice be required?

[19] As to the originating notice requirement, it was noted that many applications under the *Act* are one-shot deals, where only a single order is needed and it is unlikely that there will be any protracted litigation. In these situations, a pleading type of document is unnecessary and expensive. Other applications under the *Act* are more likely to lead to further proceedings; in these cases, an originating notice is appropriate. The practice in Edmonton is that the masters permit simple, one time matters to be brought by way of an *ex parte* order, but the practice in Calgary is different.

[20] *Ex parte* applications are useful in one shot situations, especially where the applicant does not want to give the debtor notice because such an action would prejudice the creditor. The committee was divided on the appropriateness of *ex parte* applications. Rule 387.1 already provides for *ex parte* applications.

POSITION OF THE COMMITTEE

The Committee decided the following:

1. Rule 340.1 should be moved to the *Civil Enforcement Act* or to the *Civil Enforcement Regulation*.
2. No originating notice should be necessary in respect of proceedings which have been commenced. In other cases, it would be preferable that only those motions

which will result in ongoing proceedings should be started by originating notice. Those motions which are likely to involve only a single application may be started by either a notice of motion or an *ex parte* application.

3. The general rule should be that all applications are on notice unless the new rules or the *Civil Enforcement Act* otherwise provides. This position is consistent with The Rules as a whole. Rule 387.1 should be retained whether or not Rule 340.1 is moved to the *Act*.

B. Getting Information about the Debtor

ISSUE No. 4
Should the rules which enable the creditor to obtain information about the debtor (Rules 360 and 368 to 379, and Forms I and I.1) be moved to the *Civil Enforcement Act* or to the *Civil Enforcement Regulation*? Should any changes be made?

[21] Creditors seeking to enforce money claims against debtors are well advised to ask before the lawsuit begins whether the debtor has any exigible or garnishable property worth the cost and aggravation of litigation. Much of the burden of acquiring this information properly rests on the creditor. When credit is extended, and from that point on, the creditor should be preparing for the possibility of nonpayment by building a record about the debtor's employment, bank account, and other funds and assets. Once nonpayment happens, the creditor is still responsible to get as much information as possible about the debtor's property. It is not the job of the bailiff, the lawyer, or the judge to provide detective services.

[22] Some debtors manage to hide their funds and assets with great skill. For them, some method offered by the law may be needed to collect information otherwise difficult or impossible to discover. The Rules presently offer three processes to acquire information about the judgment debtor. They are, the inquiry served on another creditor (Rule 360), the debtor's financial report (Rule 370) and the examination in aid (Rules 371-379). The committee's experience was that these rules work well, except for the problem of conduct money which will be discussed below and the issue of enforcement which will be addressed in a later part.

[23] Rule 379 provides that the rules relating to an examination for discovery apply to examinations in aid. One of those rules is the requirement that service of an appointment for examination is to be accompanied by the payment of conduct money.[15] An earlier consultation memorandum on document discovery and examination for discovery[16] considered abolishing the need for conduct money entirely but rejected the idea. That committee thought that examination is an intrusion and abolition might result in inconvenience. The Institute has received a request from a lawyer that conduct money be abolished, at least for examinations in aid. In the committee's experience, conduct money cheques are often not cashed.

POSITION OF THE COMMITTEE

[24] The committee concluded that these rules are used as part of the enforcement of money judgments and are an integral part of the scheme of the *Civil Enforcement Act*. They and the accompanying forms should be moved out of The Rules into the *Act* or the *Civil Enforcement Regulation*. One exception is Rule 376 which provides:

> **376** Where a difficulty arises in the enforcement of a judgment, the Court may by order direct any person to attend before a person named in the order and be examined under oath regarding any matter specified in the order.

Rule 376 is a necessary and useful section. As it applies to both monetary and non-monetary judgments, it should be retained in the new rules. It should be included with the other enforcement of judgment rules which follow the rules on judgment.

[25] On the whole, these rules work well and should be part of the system of enforcement of money judgments. The rules place the initiative on the judgment creditor to decide whether and how to enforce the judgment. The creditor, not the state, decides how to gather information about the debtor. We favour the continuation of creditor control of the creditors' remedies process generally.[17]

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[15] R. 204.

[16] Alberta Law Reform Institute, *Document Discovery and Examination for Discovery* (Rules of Court Project, Consultation Memorandum No. 12.2) (Edmonton: Alberta Law Reform Institute, 2002) at 64-65.

[17] The Institute took this position earlier in ALRI, *Enforcement of Money Judgments*, *supra* note 4, vol. 1 at 26. For a different view, see Tamara M. Buckwold & Ronald C.C. Cuming, *Interim Report on Modernization of Saskatchewan Money Judgment Enforcement Law* (Regina, Saskatchewan: Queen's Printer, 2001) at 16-21, 39-40 [Buckwold and Cuming].

[26] The committee thought that Rule 360 is necessary to ensure that the Personal Property Registry [PPR] is updated. There was some discussion whether the service requirements could not be simplified. Ordinary mail should suffice. The committee agreed that Rule 360(7) should permit applications under that subrule to be made *ex parte* unless the court orders otherwise. The order granted under Rule 360(8) will still have to be served.

[27] Rule 378 provides that the costs of any examination or application made under Division 5 (financial report of debtor and examination in aid) are in the discretion of the court. There are different practices in Calgary and Edmonton. A fiat is required in Calgary to get costs of an examination in aid, but not in Edmonton. The general view of the committee was that there should be no need for a fiat; creditors should be entitled to their costs of these steps according to Schedule C. There was some discussion about the need for Rule 378, but it was noted that removal of the rule might not solve the problem of the requirement of a fiat in Calgary. The committee ultimately concluded that the rule should be moved to the *Civil Enforcement Act* or the *Civil Enforcement Regulation*. It should be made clear that leave of the court is not required to get costs of examinations in aid and applications relating to obtaining financial information from the debtor.

[28] The committee was sympathetic to the lawyer who complained about the requirement of conduct money for examinations in aid. The difference between examinations for discovery and examinations in aid is that the latter occur after judgment when the rights of the parties have been settled. The defendant has been served and has had an opportunity to defend the action. Judgment has been rendered but has not been paid. The judgment debtor has the right to appeal and to apply for a stay of enforcement. The situation is different from the examination for discovery where the claim has not been established. The judgment creditor may be understandably unhappy about being required to pay more money to the judgment debtor to find out why the latter has not paid the judgment debt. In our view, conduct money should no longer be a requirement for examinations in aid.

[29] Much of the committee's discussion turned on two issues: remedies for noncompliance with the rules and the jurisdiction of the Master to order contempt. Both issues are discussed and proposals made below.

ISSUE No. 5
Should Rule 460.1 on the examination of a debtor be moved to the *Personal Property Security Act*?[18] Should any changes be made?

[30] Rule 460.1(1) provides:

> **460.1(1)** A person who is a secured party under the *Personal Property Security Act*, on service of a written notice on the debtor, may require the debtor to attend an examination and be examined under oath by the secured party with respect to the location of the collateral that is the subject of the security interest.

Subsections 2 and 3 provide for seven days notice of the examination on the debtor and that the rules for examination for discovery apply with any necessary modifications and unless otherwise provided in Rule 460.1.

[31] There was a similar provision in the *Seizures Act*[19] which was repealed when the *Civil Enforcement Act* came into force in January 1, 1996. Suggestions were made that the section was useful, and it was brought back as Rule 460.1 in 2001. The rule was placed in the division on interpleader instead of its more natural home with the other rules on debtor questionnaires or examinations in aid of the debtor.

POSITION OF THE COMMITTEE

[32] The committee concluded that the rule works well in its present form. However, it has to do with the enforcement of personal property security and should be moved to the *Personal Property Security Act* or the *Personal Property Security Regulation*.

C. The Writ of Enforcement

ISSUE No. 6
Should the rules include Rule 341 permitting judgments to be stayed?

[33] Rule 341(1) empowers the court, at or after the grant of a judgment, to stay its enforcement and to remove or extend such stay. Rule 341(2), restricted to proceedings

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[18] R.S.A. 2000, c. P-7.

[19] R.S.A. 1980, c. S-11.

under the *Civil Enforcement Act*, provides for the filing of a stay order in the PPR and the effect of such an order before filing.

[34] Rule 341(1) is part of a much larger pattern of law. The courts originally could stay proceedings as part of their inherent discretion to control court proceedings, an inherent power which a majority of cases hold continues today.[20] Stay pending appeal is the subject of specific legislation for judgments in Queen's Bench[21] and Provincial Court.[22]

[35] The courts also have powers, found in several places, to stay proceedings generally. The principal source of authority is section 17 of the *Judicature Act*[23] which provides as follows:

> Stay of proceedings
>
> 17(1) In a proceeding
>
> (a) for the recovery of a debt or liquidated demand,
>
> (b) for the enforcement of a security or charge on land,
>
> (c) for the determination or specific performance of an agreement for the sale of land, or
>
> (d) for the possession of land,
>
> the Court in its discretion may at any stage of the proceeding grant a stay of proceedings on any terms that the Court may prescribe, and in like manner the Court in its discretion may with or without imposing terms, after final judgment in any proceeding whatsoever, grant a stay of execution of an order for sale or of other similar process, including a stay of an order for possession of land, and may by an order granting the stay extend the time for payment of a judgment debt or the time for doing any act or making any payment prescribed by a previous order of the Court.
>
> (2) In a proceeding
>
> (a) for the enforcement of a security or charge on farm land,
>
> (b) for the determination or specific performance of an agreement for the sale of farm land, or

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[20] C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d ed. (Scarborough, Ontario: Carswell, 1995) at 210-212 [Dunlop book].

[21] *Court of Appeal Rules*, r. 508 (no automatic stay unless judge so orders).

[22] *Provincial Court Act*, R.S.A. 2000, c. P-31, s. 49 (automatic stay unless Q.B. judge otherwise orders). See also s. 44.1 (general power in Provincial Court to stay judgment).

[23] *Judicature Act*, R.S.A. 2000, c. J-2.

> (c) for the possession of farm land, the Court, notwithstanding the terms of an order or judgment previously made, shall grant a stay of proceedings when it appears that the default of the mortgagor, purchaser or other person is in whole or in part caused by the inability of the mortgagor, purchaser or other person to market grain by reason of lack of elevator space or by reason of the restrictions as to delivery of grain imposed under the Canadian Wheat Board Act (Canada) and the regulations under that Act.
>
> (3) A stay granted under subsection (2) remains in force until set aside by the Court, but shall be set aside only on application after notice and on the Court being satisfied that the conditions existing at the time of the granting of the stay and by reason of which it was granted no longer exist.

[36] The *Civil Enforcement Act* also speaks to the issue. Section 5(1) says that the Court may on application give directions as to a civil enforcement proceeding. Section 5(2)(d) provides that the Court considering an application under this *Act* may "stay enforcement of rights provided in this Act."[24]

POSITION OF THE COMMITTEE

[37] It is trite law that the court has inherent jurisdiction, confirmed by section 17 of the *Judicature Act*, to stay proceedings. If there is any doubt that judgments are proceedings, section 17 could be amended to say so. It is confusing and repetitive to say the same thing again in The Rules. We would suggest repeal of Rule 341(1).

[38] Rule 341(2) is restricted to proceedings under the *Civil Enforcement Act* and should be moved to the *Act* or the *Civil Enforcement Regulation*. The rule is necessary to prevent creditors from ordering a civil enforcement agency to enforce judgments when there is a stay order in place.

ISSUE No. 7
Should Rule 348, which establishes the amount owing at any time on a writ, be moved to the *Civil Enforcement Act*?

[39] The rule provides that the amount owing at any time on a writ is the total of the amount of the judgment, taxable costs and interest, less amounts paid.

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[24] See also *Provincial Court Act*, *supra* note 22, s. 44.1.

POSITION OF THE COMMITTEE

[40] The rule seems to state the obvious. However, the committee noted that the rule includes "taxable" costs rather than "taxed" costs. If the rule is repealed an enforcement debtor may refuse to acknowledge liability for costs unless and until they are taxed. The judgment creditor may receive payments directly from the debtor which do not go through a distributing authority, and an unscrupulous creditor may try to exclude these payments from the amount owing on a writ absent a section like this. The committee concluded that Rule 348 should be retained but moved to the *Civil Enforcement Act* or the *Civil Enforcement Regulation*.

ISSUE No. 8
Should Rules 349, 349.1 and 351 on the power of the clerk and the court to make changes in writs of enforcement be retained and moved to the *Civil Enforcement Act*?

[41] These rules empower the clerk (in Rules 349 and 349.1) and the court (in Rule 351) to make major and minor changes to writs of enforcement. None of the rules empower changes to judgments.

[42] The present Rule 349 provides that, where the name (apparently of the creditor only) shown on a judgment or writ is incorrect or has changed, the clerk may alter the writ. Rule 349.1 empowers the clerk to correct clerical errors on a writ without limit. Rule 349.1 was added to The Rules in 1996. Stevenson and Côté comment: "Before this Rule, it was doubtful whether any one could correct a writ of enforcement, yet minor errors in names often hamper effective enforcement."[25]

[43] Rule 351 empowers the court (not the clerk) to do several things:

1. Issue a writ showing the debtor's (but not the creditor's?) proper name where the debtor's name is misstated in the judgment. This power would appear not to extend to the case where the judgment got the debtor's name right but the writ got it wrong.

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[25] The Honourable W.A. Stevenson & The Honourable J.E. Côté, *Alberta Civil Procedure Handbook 2004* (Edmonton, Alberta: Juriliber, 2004) at 305 [*Civil Procedure Handbook*].

2. Order "a change" (apparently any change) to a writ.
3. Order a new writ to be issued.
4. Direct an issue.

One may wonder if the last three sweeping powers enable the judge to do what they cannot do under the first power?

[44] Edmonton and Calgary practice differs as to the clerks' willingness to make changes without a fiat. Clerks are often reluctant to make any change of their own accord, no matter how minor. The Clerks' Manual limits clerks to correcting very basic typos, while referring all others to a master for action.

POSITION OF THE COMMITTEE

[45] The central issue is what changes should the clerk be empowered to make to the writ and what changes should be reserved to the court. In our view, the court should have a plenary jurisdiction to make changes in the writ.

[46] As to the clerk's power to amend writs, we agree that there is a need for a mechanism to fix quickly small errors in writs. In our view, the clerk's power to make changes should be restricted to situations where the writ spells a word differently from the judgment. In this narrow area, the clerk should be able to correct the writ to make it follow the judgment. Otherwise, the applicant should be required to go to the court.

[47] We suggest that Rule 349 be repealed. Rule 349.1, as amended above, should be retained and moved to the *Civil Enforcement Act* or the *Civil Enforcement Regulation*. The drafter of the new Rule 349.1 should avoid the ambiguous expression "clerical error." The intention is to make the clerk's jurisdiction simple, clear and narrow. Rule 351 should be retained with the addition that the motion may be made *ex parte* unless the court orders otherwise. The new Rule 351 should be stripped of the restrictive language in the present rule. The new rule should be moved to the *Civil Enforcement Act* or the *Regulation*.

ISSUE No. 9
Should Rule 350 on assignment and resulting amendments of writs be retained?

[48] Rule 350 provides that a person entitled to enforce a writ may without court order make a total or partial assignment of the writ to another person.[26] The clerk, on being satisfied of the assignment, may without court order amend the writ to show the name of the assignee.[27] Where a writ is partially assigned, the clerk may without court order issue two replacement writs, one to the judgment creditor and one to the assignee, showing the amounts owing to each.[28] Such replacement writ stands in the place of the writ being replaced and shall be dated with the same date as the writ being replaced.[29] The committee's information is that writs are occasionally assigned.

POSITION OF THE COMMITTEE

[49] The committee's view was that Rule 350 serves a necessary purpose and should be retained. In later parts of this consultation memorandum, we will propose the abolition of all writs used as enforcement or remedial processes except for the writ of enforcement. As Rule 350 will then be relevant only to the enforcement of money judgments, it should be moved to the *Civil Enforcement Act* or the *Civil Enforcement Regulation*.

ISSUE No. 10
Should Rule 352 be repealed?

[50] Rule 352 presently deals with a judgment granted for the recovery of both land and money, whether for costs or otherwise. It provides that, where a writ is to be issued, a writ of possession may be used for recovery of the land, and a writ of enforcement may be used for recovery of the money.

POSITION OF THE COMMITTEE

[51] Later in this consultation memorandum, we will propose that the writ of possession be eliminated and that people applying for possession of land can rely on

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[26] R. 350(1).

[27] R. 350(2).

[28] R. 350(3).

[29] R. 350(4).

the judgment or order. In light of this decision, we see no function for this rule. We suggest that Rule 352 be repealed.

ISSUE No. 11
Should Rules 353, 354 and 355 regarding service of documents under the *Civil Enforcement Act* be moved to the *Act* or to the *Civil Enforcement Regulation*? Should the rules be made less restrictive?

[52] The Rules presently address questions of service generally in Part 3 (Rules 13 to 29). These rules were considered and some changes proposed in the Institute's Consultation Memorandum 12.1 in the Rules Project.[30] The direction of the proposals in Consultation Memorandum 12.1 is to make the service rules less rigid and onerous.

[53] The rules under consideration in this consultation memorandum are Rules 353, 354 and 355 which address service of documents for the purposes of the *Civil Enforcement Act*. They are apparently intended to fill a gap in the *Act* and in the *Civil Enforcement Regulation*. Section 6 of the *Act* provides that "a document that is to be served, given or provided to a person under this Act, may be served, given or provided to that person in accordance with the regulations." "Service" is not defined in the *Act*, although the *Act* requires service in numerous sections.[31] Section 1(2) determines when individuals, corporations, partnerships, associations and the Crown are deemed to know of a matter. Section 107 empowers the Lieutenant Governor in Council to make regulations regarding service. However, the *Civil Enforcement Regulation* is silent about service. Perhaps the word "regulation" in section 6 is intended to refer to The Rules.

[54] Rule 353 provides separate rules for service on individuals, members of a partnership, corporations, municipalities and associations. A common thread is that service on all of these entities may be by registered mail. Rule 353(3) provides that a document sent by registered mail is deemed to be served or delivered when the

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[30] Alberta Law Reform Institute, *Commencement of Proceedings in Queen's Bench* (Rules of Court Project, Consultation Memorandum No. 12.1) (Edmonton: Alberta Law Reform Institute, 2002) [ALRI CM 12.1].

[31] E.g., sections related to seizure and sale of personalty (ss. 44, 45, 46, 48), seizure of special types of personalty (ss. 50, 51, 53, 58, 62), sale of land (ss. 73, 74), garnishment (s. 82) and distribution (s. 101).

addressee actually gets it or on the expiry of 7 days from mailing. Where the addressee would be prejudiced, the court is empowered in some situations to make any appropriate order. The rest of Rules 353, 354 and 355 provide for (1) service by a distributing authority, (2) service on the holder of a related writ, a person with a registered interest in the PPR and a civil enforcement agency and (3) agreements to accept service by alternative means.

[55] Some elements of these rules are borrowed in an amended form from Part 3, which has been criticized in Consultation Memorandum 12.1. The consultation memorandum would permit service on an individual by (1) leaving the document with an adult person residing at the individual's place of residence and (2) mailing the document to the individual at that address. A similar requirement is one alternative form of seizure in section 45 of the *Civil Enforcement Act*.

POSITION OF THE COMMITTEE

[56] The committee thought that the requirements for service of documents under the *Act* should be broader than they currently are. Personal service can be difficult as many debtors are evasive and several attempts may be necessary. The experience of members of the committee is that documents served by registered mail are often returned unserved.

[57] The present Rules 353, 354 and 355 permit as an alternative the service of documents by **registered mail**. In our view, the requirement should be changed to **ordinary mail** as the general requirement. The judgment debtor has been served in accordance with the Part 3 service rules at the commencement of the process, and a judgment has been entered against them. In many cases there is a better chance of the document being received by ordinary mail than by registered mail. The committee thinks it is sufficient to address the letter to the debtor at their last known address.

[58] The committee considered whether, in addition to ordinary mail, documents should also be served on an adult living in the residence of the debtor. This additional requirement was rejected on the ground that it would add unnecessarily to the costs.

[59] There are no doubt exceptions where personal service, at least by registered mail, should be required. Examples are (1) matters relating to contempt, (2) service of

documents related to attachment orders under Part 3 of the *Civil Enforcement Act* and (3) the seizure and sale of a residence. If seizure is attempted, the more stringent rules of the *Civil Enforcement Act* will apply. There may be other legislation which requires personal service. For most cases, however, service by ordinary mail is adequate and may be more likely to reach the intended recipient. The rules should make it clear that a court may impose a different service rule in the particular circumstances of the case.

[60] Two final observations:

1. The drafter of the new Part 3 rules might well consider the clearer and more direct drafting of Rules 353, 354 and 355 as a model.
2. As Rules 353, 354 and 355 relate solely to matters under the *Act*, they should be moved to the *Act* or the *Regulation*.

ISSUE No. 12
Should Rules 356, 357 and 358 be moved to the *Civil Enforcement Act* or to the *Civil Enforcement Regulation*?

[61] Rules 357 (issue of writ of enforcement) and 358 (endorsement where money is payable into court) are essential and important parts of the enforcement process. Rule 356 provides that terms used in Division 2 and defined in the *Civil Enforcement Act* have the meanings given to them by the *Act*. Rule 357 provides that a writ of enforcement shall be in Form F of Schedule A and may include an Addendum in Form F.1 of Schedule A.

POSITION OF THE COMMITTEE

[62] Rules 357 and 358, as well as Forms F and F.1, should be retained and moved to the *Civil Enforcement Act* or the *Civil Enforcement Regulation*.[32] Rule 356 will then be unnecessary as to Rules 357 and 358. Division 2 also includes Rule 359 on fraudulent preferences and conveyances and Rule 360 on the inquiry served on another creditor. We discussed Rule 360 above and proposed that it be moved to the *Act* or the *Regulation*. We discuss Rule 359 below, including the issue of definition. Rule 356 is unnecessary and should be repealed.

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[32] R. 357 is also discussed and amendments are proposed in Chapter 5.

ISSUE No. 13
Should Rules 381, 382, 383 and 383.1 be moved to the *Civil Enforcement Act* or to the *Civil Enforcement Regulation*? Should Rule 380 be repealed?

[63] As the title to Part 28, Division 6 suggests, these rules are concerned with seizure and sale of personal property under the *Civil Enforcement Act*. Rule 380 incorporates the definitions of the *Act*. Rule 381 provides that where an application is made under the *Act* for authority to sell or dispose of any personalty of an enforcement debtor, the application must be initiated by a notice of motion and must, unless otherwise directed, be made on 7 days notice to the enforcement debtor. Rules 382, 383 and 383.1 flesh out the process for seizure and sale of securities set out in Part 6 of the *Act*.

POSITION OF THE COMMITTEE

[64] Rules 381-383.1 only concern matters arising under the *Act* and should be moved to the *Act* or the *Civil Enforcement Regulation*. Some of the rules under consideration are clearly substantive. If they are moved to the *Act*, Rule 380 can be repealed.

[65] Rule 381 apparently assumes that an action is already in existence. However, there are matters arising under the *Act*, such as landlord's distress, where there is probably no action. In our discussion of Rule 340.1, we expressed our views about whether an originating notice of motion is necessary to initiate an action. The committee also feels that the 7 days notice period in Rule 381 is too long; it should be the same as for any other application.

D. Garnishment

ISSUE No. 14
Should the garnishee rules and forms (Rules 470 to 481.1; Forms L and M) be moved to the *Civil Enforcement Act* or to the *Civil Enforcement Regulation*? Should the rules be changed?

[66] We noted earlier the recommendation of the Alberta Law Reform Institute that the new law of enforcement of money judgments should be concentrated in one statute. The garnishment process is a good example of the failure to achieve that goal. The law is currently scattered throughout the *Civil Enforcement Act*, the *Civil Enforcement Regulation* and The Rules. If a lawyer or layperson wants a clear and chronological account of the garnishment process, they have to take a tortuous and confusing path which dodges from The Rules to the *Act* to the *Regulation* and back to The Rules. More significant are the discontinuities created by scattering the law among various pieces of legislation.[33] Even if The Rules are valid despite their differences from the CEA, it is not good policy to make decisions in the statute, only to amend or undo them in The Rules.[34]

POSITION OF THE COMMITTEE

[67] The committee agrees with the recommendation of the Alberta Law Reform Institute in 1991 that the law of judgment creditors' remedies should be concentrated in the *Civil Enforcement Act* and the *Civil Enforcement Regulation*. If this proposal is carried out today and the present rules are integrated into the *Act* and the *Regulation*, the result should be to eliminate the discontinuities and conflicts which have been created by the artificial hiving off of part of the process of garnishment into The Rules. The only argument for continuing the status quo is that it is easier to amend The Rules than the *Act* or the *Regulation.* In our view, the confusion created by splitting one subject among several pieces of legislation outweighs any argument based on the ease of amendment. The garnishment process should be established by one piece of legislation that is logically arranged and describes each step in a manner that can be understood by people who are affected by it and not just by their lawyers.

[68] As to the substance of the rules, however, the committee is satisfied that, when they are integrated into the legislation, they will operate efficiently and fairly. The committee discussed the garnishee's duties, the administration fee payable to the garnishee, and the grace period for garnishees to respond, as well as other aspects of the process. Our overall conclusion was that the rules were fair and appropriate.

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[33] R. 476 defines the duties of the garnishee where an attachment is against employment earnings. It does not fit smoothly and may conflict with the *Civil Enforcement Act*, *supra* note 8, s. 81.

[34] For example, r. 479(6) is said to be "notwithstanding s. 78(d) of the *Civil Enforcement Act*."

[69] The committee looked at Rule 472(5) which provides that a garnishee summons shall not be set aside for an irregularity unless it prejudices the debtor or garnishee. This kind of slip rule is important in garnishee proceedings where the creditor may not get a second chance to attach the money. The cases on prejudgment garnishment are very harsh and technical; the slightest typo may invalidate the garnishee summons.[35] In our view, the slip rule is so important that it should be retained in the *Act* or the *Regulation* as a separate provision even though there is a general slip rule (Rule 558) in The Rules and a general power in section 5 of the *Act* to correct slips.

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[35] Dunlop book, *supra* note 20 at 141-144.

CHAPTER 3. RULES RELEVANT TO THE ENFORCEMENT OF MONEY AND NON-MONEY JUDGMENTS

[70] The rules discussed in this section can be relevant to both money and non-money claims. Unless otherwise noted, these rules should stay in the rules.[36]

A. Rules Requiring Leave of the Court Before Enforcement Can be Commenced

ISSUE No. 15
Should a party to litigation who obtains judgment in an action involving a counterclaim be required to seek leave to enforce the judgment?

[71] Rules 151 and 155(b) are short enough to be quoted in full.

> **Execution or garnishee after counter-claim**
>
> **151** When a defendant sets up a counterclaim in any action to which this part applies, the plaintiff may not issue a writ or a garnishee summons without leave.
>
> **Application to counterclaim**
>
> **155** This Part applies to a counterclaim to the same extent as if a counterclaim were a separate action except that
>
> (a) where the plaintiff in the original action has not filed a statement of defence or demand of notice to a counterclaim, a judgment on the counterclaim may be obtained against the plaintiff only on motion with notice to the plaintiff, and
>
> (b) neither a garnishee summons nor a writ shall issue against the plaintiff in the original action without leave.[37]

[72] Both rules are located in Part 10. Headed "Procedure on Default," Part 10 deals with a defendant who fails to file a statement of defence or demand of notice. The plaintiff may, depending on the nature of the claim, obtain a default judgment against

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[36] In Chapter 2, in our discussion of examination in aid, we noted that r. 376 should remain in the rules as it can affect both monetary and non-monetary judgments.

[37] The variations in capitalization and spelling are directly quoted from The Rules. One general piece of advice is that the editors of the new rules should hire a good copy-editor.

the defendant or note the defendant in default. Similar groups of rules exist in most Canadian provinces, although Rules 151 and 155(b) are not common. Some rules of court are silent on the issue of remedies; others leave it to the defendant to apply for a stay of execution. Where other provincial rules of court include provisions similar to Rules 151 and 155(b), they are usually located early in the rules in a section on default judgment instead of being placed with the other enforcement rules, such as our Part 28.

[73] Rule 151 imposes an automatic stay of enforcement[38] without leave where two conditions are met: (1) the plaintiff has obtained a default judgment or a judgment after a noting in default,[39] and (2) the defendant has set up a counterclaim in the same action which counterclaim has not gone to judgment.[40] The rule does not apply to all default judgments (including judgments obtained after a noting in default); it applies only to those judgments where the defendant has set up a counterclaim. Nor does the rule apply to a judgment where the defendant has defended the action or demanded notice. The evil struck at involves the presence of both a default judgment and a counterclaim.

[74] Rule 155(b) was intended to deal with the reverse of the above scenario.[41] An automatic stay of enforcement without leave is created where (1) the plaintiff commences an action against the defendant which has not gone to judgment,[42] (2) the defendant launches a counterclaim in the same action against the plaintiff, (3) the plaintiff/defendant by counterclaim has not filed a statement of defence or demand of notice to the counterclaim, and (4) the defendant has gone to judgment against the

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[38] At least, there is an automatic stay as to writs and garnishee summonses. Nothing is said about equitable execution.

[39] What if the plaintiff is in a position to obtain a default judgment but has not done so? But why would the rule apply to this case, especially as it speaks of "a writ," a postjudgment remedy?

[40] Literally the rule applies whether the defendant/plaintiff by counterclaim has gone to judgment on the counterclaim or not. But why prevent the plaintiff from enforcing their judgment when the plaintiff by counterclaim with a judgment apparently can do so (subject to r. 155)?

[41] Allan A. Fradsham, *Alberta Rules of Court Annotated 2002* (Scarborough, Ontario: Carswell, 2001) at 234 [Fradsham 2002].

[42] *Supra* note 40.

plaintiff on the counterclaim.[43] The judgment is a default judgment or a judgment following a noting in default.

[75] There are relatively few cases on Rules 151 and 155(b), perhaps because there are not many cases which fit within them. Allan Fradsham says, without citing authority, that an application for leave under Rule 151 "must be obtained on *notice* in the usual manner."[44]

POSITION OF THE COMMITTEE

[76] In Chapter 1 of this consultation memorandum, we argued that, once a litigant has obtained a judgment, the remedies necessary to enforce that judgment should be immediately available. The rights of the parties have been settled. There should be no requirement that the successful litigant must go to court again to seek leave to issue remedies. We noted that this principle should not apply where the judgment itself says otherwise or where it is dangerous to permit enforcement without prior judicial scrutiny. The issue here is whether the counterclaim situation falls within our general policy of immediate recourse to remedies or within the "danger" exception.

[77] As a general rule, judgments in Alberta practice can be enforced immediately and without leave, unless the judgment itself provides otherwise. Once the court issues a judgment (including an order), even on default, that judgment or order is the decision of the court on the issues in the lawsuit and should be immediately enforceable. There are two limits to this principle: (1) the judgment may stay enforcement or otherwise limit it; (2) a defendant can always apply to the court before or after judgment for a stay of proceedings or a stay of enforcement of the judgment. The rules may however prohibit immediate enforcement where necessary to prevent a danger to the defendant.

[78] It is unclear to us what danger these rules are addressing.

1. The rules do not apply to all default judgments, only to those where there has been a counterclaim. If the evil is the potential unfairness of default judgments,

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[43] *Supra* note 39.

[44] Fradsham 2002, *supra* note 41 at 233 [emphasis in original].

one would expect the ban to extend to all default judgments. A defendant can apply under Rule 158 to set aside or vary a default judgment.

2. Nor do the rules extend to all situations where there are claims from both plaintiff and defendant against each other. The rules apply only to counterclaims. They say nothing about separate lawsuits, third party situations, and other complex litigation patterns in which there may be the danger that one party will enforce a judgment although, when all the litigation is over, that party will owe more money than they are entitled to collect.

3. One might think that the drafters had in mind the unrepresented litigant who might not realize what was happening. But if the rules flow from a solicitude for the party without counsel, the ban on enforcement should apply to all default judgments and perhaps all judgments, defended or not. The problem of the unrepresented litigant is serious but can hardly be solved by rules like Rules 151 and 155(b) which apply to represented and unrepresented parties.

4. It is unclear why the combination of the default judgment and the counterclaim is so dangerous that a ban on enforcement is needed.

5. If the evil which occasioned the rules is that claims and counterclaims should be considered together and not be allowed to be considered at different times and out of order, that may be better done by staying proceedings on the counterclaim until the main claim is dealt with.

[79] It was also unclear to the committee how often these rules would ever be used because most defendants who issue a counterclaim will also file a defence. The rules almost seem designed to catch the rare slip where someone forgets to file a statement of defence with the counterclaim. The committee thought that the onus should be on the defendant to apply to stay enforcement.

[80] The root problem is which of the litigants should have to apply to court: the plaintiff for permission to enforce or the defendant seeking a stay of enforcement. Our conclusion is that it is for the defendant to apply for a stay. The defendant has a

judgment against them. Without more, the defendant should do what the court has ordered unless they can convince a court that enforcement would be unjust.

[81] As a result, we propose that Rules 151 and 155(b) be repealed.

ISSUE No. 16
Where (1) a third party fails to defend, (2) the plaintiff obtains judgment other than by default, and (3) the defendant obtains judgment against the third party, should the defendant be required to obtain leave before enforcement?

[82] Part 7 of The Rules creates the third party procedure. These rules have been considered and proposals for substantial change made in an earlier consultation memorandum.[45] The job of this section is to consider one of the current third party rules in the light of our policy set out in Chapter 1 and Consultation Memorandum No. 12.9.

[83] The rule relevant to enforcement is Rule 74(2) which needs to be set out in full:

> **74(1)** If a third party fails to defend and the plaintiff obtains a judgment other than by default, the Court may at or after the trial of the action or if the action is decided other than by trial at any time after judgment give such judgment as the nature of the case requires for the defendant against the third party.
>
> **(2)** A writ shall not issue on a judgment given under this Rule without leave until the judgment against the defendant has been satisfied.

Rule 74(2) raises problems similar to Rules 151 and 155, discussed above.

[84] For Rule 74(2) to apply, three conditions must be met: (1) the third party must have failed to defend the claim by the defendant, (2) the plaintiff must have obtained a judgment against the defendant other than by default, and (3) the defendant must have obtained judgment against the third party. If the conditions are satisfied, the defendant is prohibited from enforcing their judgment against the third party without leave of the court until the plaintiff's judgment against the defendant is satisfied. After satisfaction, the defendant apparently no longer needs leave.

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[45] Alberta Law Reform Institute, *Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions* (Rules of Court Project, Consultation Memorandum No. 12.9) (Edmonton: Alberta Law Reform Institute, 2004) at 43-64 [ALRI CM 12.9].

[85] In all other situations, judgments which arise in the third party process can apparently be immediately enforced. There is no prohibition on the plaintiff enforcing the judgment against the defendant. The defendant can enforce their judgment against the third party (1) where the plaintiff obtained a default judgment against the defendant, or (2) where the defendant's judgment against the third party was not by default. The issue is whether immediate enforcement should be prohibited in this or any situation.[46]

[86] The problem must be considered in light of the conclusions reached in Consultation Memorandum No. 12.9. That memorandum divides third party claim rules into three categories: (1) restrictive processes limited to claims for contribution or indemnity, (2) processes limited to third party claims for relief from the defendant's liability to the plaintiff, and (3) third party claims which can include independent although factually related damage claims. The present Alberta third party process falls into category 2. Most other provinces' rules fall within category 3. Consultation Memorandum No. 12.9 wishes to move Alberta to a category 3 process which will permit third party notices to include independent claims provided they are sufficiently related to the main action. The change is significant, transforming third party claims into a "general joinder device by which a defendant may engraft on to the main action any 'related claim' they may have against non-parties, subject to the severance power given to the court."[47]

POSITION OF THE COMMITTEE

[87] If third party procedure in Alberta is to become a "general joinder device," then it is difficult to impose on the defendant a prohibition on enforcement when other joinder processes do not have such a limitation and when we already proposed that the current limitation on claim/counterclaim litigation should be repealed. Our general approach is that, once a judgment is rendered, it should be immediately enforceable. We have difficulty in seeing why that reasoning should not apply to third party

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[46] Most other Canadian jurisdictions do not have anything like r. 74(2) but see *Saskatchewan Queen's Bench Rules*, r. 107G.

[47] ALRI CM 12.9, *supra* note 45 at 48, quoting Professor Garry D. Watson & Mr. Justice Craig Perkins, *Holmested and Watson Ontario Civil Procedure*, looseleaf (Toronto: Carswell, 1984), vol. 3 at 29-7 [Holmested & Watson].

proceedings. The present Rule 74(2) prohibits enforcement in a very limited situation while other similar judgments are unencumbered by a requirement to obtain leave. It is not obvious why the defendant must satisfy the plaintiff's claim before having an unfettered right to enforce its judgment against the third party. Why cannot the defendant realize the claim against the third party in order to pay the plaintiff?

[88] If Rule 74(2) is repealed, the third party will retain the right to ask the judge deciding the third party claim to include a term in the judgment prohibiting enforcement, as well as the general right to apply at any time for stay of enforcement. In our view, this is sufficient protection. Our conclusion is that Rule 74(2) should be repealed.

B. Fraudulent Conveyances and Preferences

ISSUE No. 17
Should Rule 359 remain in the rules as is?

[89] Rule 359(1) provides that, where a judgment creditor claims relief under the *Fraudulent Preferences Act*[48] or the Imperial *Fraudulent Conveyances Act*,[49] the court may order that part or all of the property be sold to realize the amount to be levied under a writ of enforcement. Rule 359(2) says that the judgment creditor applying under subrule (1) need not have been a judgment creditor at the time of the impugned transfer or conveyance.

POSITION OF THE COMMITTEE

[90] Rule 359 reads like a section of one of the cited statutes which is where it probably belongs. There are two difficulties in proposing that it be moved to legislation. One is that the *Statute of Elizabeth* is a bit difficult to amend as an Imperial statute repealed in the United Kingdom in 1925 and never enacted in Alberta. The more fundamental problem is that the law of fraudulent conveyances and

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[48] R.S.A. 2000, c. F-24.

[49] *Fraudulent Conveyances Act*, 1571 (13 Eliz. 1), c. 5, usually referred to as the *Statute of Elizabeth*. For the history, see Dunlop book, *supra* note 20 at 593-595.

preferences is archaic, confused, excessively complicated and in clear need of reform. The Institute has included the subject in its list of possible future projects. Rule 359 raises substantive issues, including (1) remedies for fraudulent conveyances and preferences and (2) who is entitled to use the legislation. These questions are better dealt with in a comprehensive study of this complex field of law. In the interim, the committee sees Rule 359 as a useful rule which should be retained in the rules as it may involve both monetary and non-monetary judgments. It should be included with the other enforcement of judgment rules which follow the rules on judgments.

C. Other Rules Relevant to Enforcement

ISSUE No. 18
Should Rule 333 regarding memoranda of satisfaction of judgment remain in the rules in its present form?

[91] Rule 333 provides for the memorandum of satisfaction of judgment, often called a satisfaction piece. It provides that a memorandum shall be entered by the clerk in the procedure book (1) on a consent to the satisfaction signed by the person entitled to the benefit of the judgment or their solicitor, or (2) on court order which shall be obtained on notice and proof of satisfaction.

[92] The rule has a long history but relatively little judicial interpretation. Some cases say that a satisfaction piece is nothing more than a specialized form of receipt[50] and does not amount to a release,[51] absent evidence that it was intended to bring to an end any right to enforce the judgment or the underlying claim. There are cases in which the satisfaction piece has been given substantial weight, and others where it was explained away by other evidence.[52] The impact of the satisfaction piece turns on the

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[50] *Heitman Financial Services Ltd. v. Towncliff Properties Ltd.* (1982), 35 O.R. (2d) 189 (H.C.); followed in *Bank of Nova Scotia v. Kostuchuk*, [2003] 8 W.W.R. 589, 2003 MBCA 66.

[51] *Rainbird Sprinkler Mfg. Co. (Canada) v. Elpat Holdings Ltd.* (1996), 187 A.R. 222 (C.A.) and cases cited *ibid*.

[52] See also *McClelland v. McClelland*, [1972] 1 O.R. 236, (1971), 22 D.L.R. (3d) 624 (H.C.).

evidence in the same way that an assertion by a debtor that a claim is paid in full will be scrutinized by the court in light of all the facts.[53]

[93] Several members of the committee said that the satisfaction piece is used a lot and is given serious weight. It is treated as more significant than the cases cited above would suggest. In foreclosures, the satisfaction piece is an important document and it can cause real problems if it is used by mistake. In Alberta practice, satisfaction pieces are treated as more than mere receipts.

[94] A memorandum of satisfaction placed on the court file is a public document showing that the litigation is at an end. The satisfaction piece is needed for a discharge of a writ of enforcement at the Land Titles Office and the PPR. The satisfaction piece will also affect a person's credit rating which would otherwise show outstanding litigation.

POSITION OF THE COMMITTEE

[95] The memorandum of satisfaction is an important part of litigation practice in Alberta. The view of the committee is that Rule 333 should be retained in its present form. Because it applies to money and non-money judgments, it should be included with the other enforcement of judgment rules which follow the rules on judgments.

ISSUE No. 19
Should Rule 343 on enforcement of a judgment for payment into court be retained in its present form in the rules?

[96] Rule 343 provides that any judgment for the payment of money into Court may be enforced in any manner in which a judgment for the payment of money to a person may be enforced.

POSITION OF THE COMMITTEE

[97] Rule 343 should be retained in the postjudgment rules as its application is broader than money judgments. It is useful as it gives to the court the ability to enforce a judgment for money paid into court.

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[53] *Judicature Act*, *supra* note 23, s. 13(1); Dunlop book, *supra* note 20 at 37-40.

ISSUE No. 20
Should Rule 345, which deals with judgments ordering relief subject to a condition or contingency, be retained in its present form in the rules?

[98] Rule 345 provides that, where under a judgment a party is entitled to relief subject to, or on the fulfilment of, a condition or contingency, that party may, on the fulfilment of the condition or contingency, apply to the court for leave to issue a writ. The rule deals with what are called "Cinderella orders." It is primarily used in money judgment situations although it literally extends to non-money judgments such as orders for possession. At present, the practice is that an affidavit will be filed showing that the conditions for enforcement of the order have been met.

POSITION OF THE COMMITTEE

[99] Rule 345 is useful and should be retained. The committee debated whether it should be restricted to money judgment situations. We concluded that it might be useful in some non-money cases and should be retained in the postjudgment Rules. The committee discussed whether leave of the court was necessary, whether proof of satisfaction of the condition could be made *ex parte*, or whether it could be done through the clerk. One concern is that self represented litigants might abuse the procedure if the requirement of leave of the court was dispensed with. Eliminating the need for court applications on notice in every case would reduce both the time and cost of enforcement. The committee concluded that Rule 345 should be amended to provide that the application to file a writ because the condition was met may be made *ex parte* unless the court orders otherwise.

[100] Rule 345 presently empowers the party to apply to the court for leave "to issue a writ." We will later propose the elimination of all writs except the writ of enforcement which is created by the *Civil Enforcement Act*. The committee thought that the rule might be relevant to other situations like orders of possession. We therefore suggest that the words "to issue a writ" be replaced by "to take further steps."

ISSUE No. 21
Should Rule 346 on enforcement of judgments and orders by or against non-parties be retained in its present form in the rules?

[101] Rule 346 provides that (1) where a person is not a party to a cause but obtains an order or (2) where such a person is subject to an order or judgment, that order or judgment may be enforced by or against the person as if they were a party. Such orders or judgments are issued. For example, people who are not actual parties may be entitled to conduct money for examinations or production of documents, or they may be subject to costs orders for failing to comply with discovery orders.

POSITION OF THE COMMITTEE

[102] The committee thought that the rule in its present form was useful. As it applies to money and non-money judgments and orders, it should remain in the postjudgment Alberta rules. Rule 346(a) talks about a person obtaining an order. Rules 346(b) deals with the person being subject to an order or judgment. Why the difference? The committee thought that a non-party might obtain an order but could never obtain a judgment. However a non-party could be subject to both orders and judgments. The rule is correct as is.

CHAPTER 4. ENFORCEMENT AGAINST A PARTNERSHIP AND ITS PARTNERS: RULE 82

ISSUE No. 22
Should there be any changes to the rules regarding enforcement against a partnership and its partners?

[103] The General Rewrite Committee of the Rules Project has already made proposals concerning the procedural rules for commencing litigation against partnerships and individual partners. The committee has proposed that, with some minor differences, the Alberta rules should basically use the Ontario model of procedure[54] when suing a partnership and individual partners.[55] The General Rewrite Committee referred to the Enforcement of Judgments and Orders Committee the issues around enforcement of judgments or orders against a partnership and its partners, procedure which is currently found in Rule 82.

[104] When a judgment or order has been obtained against a partnership, Rule 82 provides that a writ to enforce it can be issued against the partnership's property and also against the property of certain individual partners. A partner's property is subject to enforcement if the partner has participated or failed to participate in the litigation in certain ways or has been adjudged by the court to be a partner. There is an exception for partners outside the jurisdiction who did not participate in the litigation. A partner who was not previously involved in the litigation can also be brought in for enforcement purposes once that partner's liability has been admitted or adjudicated.

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[54] Ontario, *Rules of Civil Procedure*, rr. 8.01-8.05 [Ontario Rules].

[55] Alberta Law Reform Institute, *Parties* (Rules of Court Project, Consultation Memorandum No. 12.4) (Edmonton: Alberta Law Reform Institute, 2003) at 8-15 [ALRI CM 12.4]. The General Rewrite Committee proposed that, like Ontario, our rules should be silent about the material date for determining which partners should benefit from, or be liable for, the litigation. The plaintiff may seek disclosure of partners' identities as of any material date specified in the notice, although a partnership may show cause why the information should not be provided if it disputes the relevance of the requested date. An individual partner (or former partner) can be sued by being served with the originating process and a notice alleging partnership at the material time. However, unlike in Ontario, an individually-sued partner will be able to defend separately in all circumstances, without leave, unless otherwise ordered by the court, and that defence will not be treated as a firm defence.

POSITION OF THE COMMITTEE

[105] Because enforcement against partners is tied to the conduct of the original litigation, it is important to maintain consistency with the procedural model used for that purpose. Therefore, the committee has also used the Ontario model[56] as the basis for our enforcement proposals.

[106] The committee proposes that Rule 82 be moved to where the other postjudgment rules are located, rather than staying in its present location among the rules concerning the early stages of litigation. The committee would also prefer to see the term "partnership" used in these rules rather than "firm," although it recognizes that "firm" is the defined term used by the *Partnership Act*[57] and its use in the rules promotes consistency with the governing statute in this area.

[107] It is not necessary for Rule 82(1) to refer to enforcement against property "within the jurisdiction" – that legal effect is produced anyway by the law of territoriality. Rule 82(1) should be reworded along the lines of Ontario Rule 8.06(1) which provides, "An order against a partnership using the firm name may be enforced against the property of the partnership."

[108] Rule 82(2), which governs when a judgment against a partnership can be enforced against individual partners, should be reworded to match Ontario Rule 8.06(2), which provides as follows:

> (2) An order against a partnership using the firm name may also be enforced, where the order or a subsequent order so provides, against any person who was served as provided in Rule 8.03 and who,
>
> (a) under that rule, is deemed to have been a partner;
>
> (b) has admitted having been a partner; or
>
> (c) has been adjudged to have been a partner,
>
> at the material time.

[109] The three circumstances in which a partner is subject to enforcement are not dissimilar to the current Alberta situation, and are tied to the Ontario Rules for

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[56] Ontario Rules, r. 8.06.

[57] *Partnership Act*, R.S.A. 2000, c. P-3, s. 2.

bringing individual partners into the litigation, which our rules will be following. Under (a), someone is "deemed" to be a partner when they are served with the statement of claim but do not defend.

[110] The Ontario rule, unlike our current Alberta rule, requires a court to order that the firm judgment can be enforced against an individual partner. In Ontario,[58] as in Alberta,[59] there are three types of partnerships: ordinary partnerships, limited partnerships and limited liability partnerships (LLPs). The last two types contain partners who have limited liability and who are not generally proper parties to litigation against the partnership, except in certain circumstances.[60] Having to seek a specific court order to enforce against a partner would prevent unwarranted or inadvertent enforcement against partners with limited liability. Because the order will specifically state against whom the judgment is enforceable, it also "facilitate[s] enforcement by… removing any difficulty in convincing the registrar as to against whom writs of execution may issue pursuant to the judgment."[61]

[111] The Ontario model sees no need to have a counterpart to our Rule 82(3), which prevents enforcement against property in Alberta of partners who were out of the jurisdiction when the statement of claim was issued, unless the partner was legally served or filed a defence. The committee also proposes deletion of this rule.

[112] Rule 82(4) and (5) concerns the situation where, following judgment, the plaintiff wants to enforce against a partner or former partner who has not been previously involved in the litigation. If that person admits liability, the court can grant leave for enforcement, but if the person denies liability, the court will order the matter to be tried. Ontario Rule 8.06(3) is to the same effect but is more concisely worded, and the committee proposes its use in our rules in place of our current provision.

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[58] *Partnerships Act*, R.S.O. 1990, c. P-5; *Limited Partnerships Act*, R.S.O. 1990, c. L-16.

[59] *Partnership Act*, *supra* note 57.

[60] *Ibid.*, ss. 12(1) - (3) and 77.

[61] *Holmested & Watson*, *supra* note 47, vol. 2 at 8-19.

[113] Since a court order will be required in our revised rules to enforce any firm judgment against a partner, Rule 82(6) can also be deleted.[62] Rule 82(7), which allows a court to direct the taking of accounts and the making of inquiries, is really just a superfluous restatement of a court's inherent powers and can be deleted as well.

[62] R. 82(6) implicitly assumes the abrogation of the common law prohibition against using firm names in suits between a partnership and its partners or between partnerships with partners in common. The General Rewrite Committee has proposed that this implicit assumption be replaced by an explicit rule allowing the use of firm names in such circumstances: ALRI CM 12.4, *supra* note 55 at 14-15.

CHAPTER 5. LIMITATIONS AND ENFORCEMENT: RULES 331, 347 AND 357

ISSUE No. 23
Should the time limits on enforcement of money and non-money judgments be clarified? Should Rules 331, 347 and 357 be amended?

A. Limitations and Enforcement: Rules 331, 347 and 357

[114] Rules 331, 347 and 357 are part of the confusing law governing limitations on the enforcement of judgments and orders (not the commencement of lawsuits). The law is confusing because it is partly common law and partly statutory rules and because the rules may be different for (1) different enforcement processes and (2) money and non-money judgments and orders. A summary of Alberta law is necessary before the rules can be assessed. Several issues need to be disentangled.[63]

B. Money Judgments and Orders

1. How long after the date of a money judgment or order can the judgment creditor issue a writ of enforcement?

[115] The relevant legislation is as follows:

> **Limitations Act**[64]
>
> s. 1 (a) "claim" means a matter giving rise to a civil proceeding in which a claimant seeks a remedial order;
>
> (i) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, but excludes
>
> (ii) the enforcement of a remedial order.
>
> s. 3 [This is the general limitation period. It applies to a claimant seeking "a remedial order."]
>
> s. 11 If, within 10 years after the claim arose, a claimant does not seek a remedial order in respect of a claim based on a judgment

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[63] The following discussion is partly based on C.R.B. Dunlop, *Cases and Materials for Credit Transactions 1* (Edmonton, Alberta: Faculty of Law, University of Alberta, 2000) at 107-109; Dunlop book, *supra* note 20 at 535-543.

[64] R.S.A. 2000, c. L-12.

or order for the payment of money, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

Civil Enforcement Act

s. 27 (1) A writ is in force only while the judgment in respect of which the writ is issued is in force.

(2) For the purposes of subsection (1), a judgment is not in force

(a) if it has been satisfied, or

(b) on the expiration of 10 years from the day that the judgment takes effect unless the judgment is renewed or an action is brought on that judgment within the 10-year period.

Alberta Rules

Rule 347 Unless otherwise provided for by an enactment, and except for the purposes of that enactment, a writ remains in force so long as the judgment in respect of which the writ was issued remains in force.

Rule 357 (1) A judgment creditor may require the clerk in whose office the judgment has been entered to issue a writ of enforcement in respect of the judgment at any time that the judgment is in force.

[116] A judgment creditor can without leave[65] issue a writ of enforcement before 10 years have elapsed since the date of the judgment or order. After the elapse of 10 years, the rule is probably that a writ of enforcement cannot be issued. The reason is section 27 of the *Civil Enforcement Act*, taken together with Rule 357.[66]

[117] Most Canadian cases assume that the basis for the ban on execution after 10 years is the limitations legislation; indeed, Alberta Rule 331 expressly proceeds on this assumption. However a careful reading of the *Limitations Act* suggests that it does not have anything to do with enforcement.[67] Section 3 of the *Act* imposes a time limit on the issue of a "remedial order." The intention of section 11 is to create a limitation

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[65] There are exceptions, e.g., rr. 74(2), 151, 155. They are discussed earlier.

[66] The intention of the Institute in its report on enforcement of money judgments was to put the limitation period of 10 years in their model statute on which the *Civil Enforcement Act*, *supra* note 8, is based. See ALRI, *Enforcement of Money Judgments*, *supra* note 4, vol. 1 at 56-57; vol. 2 at 40-47.

[67] A similar argument was (less clearly) available under the predecessor *Limitation of Actions Act*, R.S.A. 1980, c. L-15.

period against the action on a judgment, not against enforcement processes;[68] section 11 turns on the issue of a "remedial order." However the term "remedial order" is defined to exclude "the enforcement of a remedial order." Because of the definition, it is arguable that sections 3 and 11 do not apply to the issue of enforcement of an order, only to the old action on the judgment.[69] The English cases have vacillated over the issue[70] and are of doubtful assistance to Canadian courts.

2. How long after the date of a money judgment or order can the judgment creditor issue a garnishee summons or an application for equitable execution?

[118] Section 27(1) of the *Civil Enforcement Act* and Rules 347 and 357 are expressly directed only to writs. They do not mention garnishee summonses or receivership orders.

[119] As to garnishment, the position may still be the same because of Rule 472(1) which empowers a "creditor" to issue a garnishee summons. "Creditor" is defined in Rule 470(b) to mean "an enforcement creditor or a prejudgment claimant." Rule 470(2) says that terms used in the garnishment rules which are defined in the *Civil Enforcement Act* have the same meaning in the rules. An "enforcement creditor" is defined in section 1(1)(p) of the *Act* as meaning "a person in whose favour a writ is in force." The definition clearly relates to section 27. The result is that, unless a creditor is a prejudgment claimant, they cannot obtain a garnishee summons unless there is in force a judgment and a writ of enforcement.

[120] Receivership under section 85 of the *Civil Enforcement Act* is available only to an "enforcement creditor." The argument outlined above for garnishment applies here with the result that, unless a creditor obtains an attachment order, they cannot obtain a receivership order under section 85 unless there is in force a judgment and a writ of

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[68] This is the proposal of the Institute in its report on the subject. See Alberta Law Reform Institute, *Limitations* (Edmonton: Alberta Law Reform Institute, 1989) at 42-43, 97 [ALRI, *Limitations* Report].

[69] This was the intention of the Institute in its reports on limitations: Institute of Law Research and Reform, *Limitations* (Report for Discussion No. 4) (Edmonton: Alberta Law Reform Institute, 1986) at 20-21, 181-199 [ALRI *Limitations* RFD]; *ibid.* at 42-43, 97.

[70] Compare *Lougher v. Donovan*, [1948] 2 All E.R. 11 (C.A.); *W.T. Lamb & Sons v. Rider*, [1948] 2 K.B. 331 (C.A.); *National Westminster Bank PLC v. Powney*, [1991] Ch. 339 (C.A.); *Lowsley v. Forbes*, [1999] 1 A.C. 329, [1998] 3 All E.R. 897 (H.L.).

enforcement. Whether the same reasoning applies to a receivership order granted under section 13(2) of the *Judicature Act*[71] is more doubtful.

3. Can the 10 year period be extended?

[121] There appear to be two methods in Alberta to extend the 10 year limit as far as a money judgment is concerned. These methods have not been affected by the new *Limitations Act* or by the *Civil Enforcement Act*. Whether these methods are available for a money order is debatable.

1. The judgment creditor can, before the elapse of the 10 year period, commence a new action on the original judgment, plead nonpayment and obtain a new judgment which sets a new 10 year period running. The action on a judgment is a survival of English common law and has not apparently been abolished.[72]

2. Rule 331 permits a judgment creditor by notice of motion in the original action to obtain a new judgment, which sets a new 10 year period running.

The effect of issue of a new judgment and writ of enforcement is dealt with in section 27.1 of the *Civil Enforcement Act*.

[122] The experience of several committee members is that suing on the judgment is an easier method to employ than the application under Rule 331. It may be difficult to find the debtor in time to give the proper notice. Rule 331 has on occasion been interpreted strictly and technically, lessening its usefulness.[73]

4. What is the duration (or life span) of an enforcement process, once issued?

[123] There are several provisions which govern specific aspects of Issue (d).

1. Section 27 of the *Civil Enforcement Act* provides that the life of the writ of enforcement is determined by the life of the judgment. Rule 347 is almost word for word a copy of section 27(1) of the *Civil Enforcement Act* but not section 27(2).

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[71] *Supra* note 23.

[72] See Dunlop book, *supra* note 20 at 539; Fradsham 2002, *supra* note 41 at 697-701.

[73] Allan A. Fradsham, *Alberta Rules of Court Annotated 2004* (Scarborough, Ontario: Carswell, 2003) at 777-78; *Sanders v. Nousek*, [1975] 3 W.W.R. 125 (Alta. Master).

2. A similar provision applies to the filing of a writ of enforcement in the Land Title Registry. See section 29 of the *Civil Enforcement Act*.

3. The registration of the writ in the PPR lasts for 2 years, although there is a renewal procedure. *Civil Enforcement Act*, section 28.

4. The life of an issued garnishee summons is governed by section 79 of the *Civil Enforcement Act*.

5. Receiverships under section 85 of the *Civil Enforcement Act* are available only to an "enforcement creditor." We noted above that, because of the definition of "enforcement creditor," there must be a judgment and a writ of enforcement in force. Section 85 does not go on to say that a receivership order lapses when the judgment and writ of enforcement cease to be in force. This result may be implicit in the section; to hold otherwise may be seen as an end run around the policy underlying section 27.

C. Non-money Judgments and Orders

[124] Compared to the large body of common law and statutory rules on money judgments and orders, there is relatively little on the same issues in the context of non-money judgments and orders. The reason may be that it is relatively rare that the issue of a writ of possession, for example, is delayed 10 years. However, the problem can arise. The *Powney* case concerned the issue of a warrant of possession after the expiry of the 6 year limitation period in the English statute. The Court of Appeal held that the warrant could issue after the limitation period, subject however to a discretionary right in the court to refuse permission as required by the English rule. Whether there is any limit in Alberta on the issue of process enforcing a non-money judgment or order turns on the proper interpretation to be placed on the *Limitations Act*.

POSITION OF THE COMMITTEE

[125] The root problem is that Alberta law does not clearly provide a limitation period for the issue of remedies to enforce a money or non-money judgment or order. In our view, the law should create a time limit after which enforcement processes cannot be commenced unless, before that date, the party who benefits from the judgment has obtained a new judgment by action or under Rule 331.

[126] Limitation statutes are based on the policy that, after a period of time, actions cannot be commenced and judges have no discretion to change that result. Various reasons are advanced: there must be an end to the threat of litigation, it is increasingly unfair to start legal process because papers and witnesses are lost and memories fade.

[127] The reasons for limitation periods on the commencement of actions apply to the enforcement of judgments or orders. There should be a time when a person can assume that they are safe from enforcement. A judgment debtor may have a defence, such as payment or compromise, which becomes more difficult to assert as time passes, documents are lost and witnesses forget.

[128] The best solution would be to include a limitation period on enforcement in the *Limitations Act*. The definition of "remedial order" could be amended to include enforcement, rather than excluding enforcement as it now stands. However, the Institute took the position 15 years ago that time limits on enforcement do not belong in the limitations legislation.[74] Perhaps, then, such a limit should be created in the new rules to apply to both money and non-money judgments and orders.

[129] Whether in the *Limitations Act* or in the new rules, the law should create a period of 10 years from the date of issue of any money or non-money judgment or order for any enforcement process to be initiated. After the elapse of the 10 year period, enforcement process cannot be launched at all unless the applicant has obtained a new judgment by action or under Rule 331. For this purpose, enforcement process includes any process or remedy used to realize on a judgment or order.[75]

[130] Rules 347 and 357 should be reconsidered in the light of this proposal.[76] They both assume that the life span of the judgment is clear, which it is not. It is better to say directly in the *Limitations Act* or the new rules that enforcement process cannot be issued more than 10 years after the issue of the judgment or order unless the applicant

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[74] ALRI, *Limitations* Report, *supra* note 68 and ALRI *Limitations* RFD, *supra* note 69.

[75] The section should be sufficiently broad to apply to enforcement under the rules, the *Civil Enforcement Act*, *supra* note 8 and other legislation such as the *Judicature Act*, *supra* note 23.

[76] See also Chapter 2 for proposals on r. 357.

has obtained a new judgment by action or under Rule 331. Consequential amendments to sections 27 and 29 of the *Civil Enforcement Act* may be needed.

[131] If there is a cutoff date for enforcement, then it is important that people with judgments and orders should be able to extend the time for enforcement. The old action on the judgment should continue as part of Alberta law. In addition, Rule 331 should be retained in the postjudgment rules. Rule 331 should be rewritten to make it clear that it applies to money and non-money judgments and orders and to all enforcement processes, not just writs of enforcement. It should apply to garnishment, receivership and all other remedial orders and enforcement mechanisms. The rule should eliminate the reference to the *Limitation of Actions Act* because (1) that *Act* has been repealed, and (2) the *Limitations Act* does not say what the drafter thought that the old *Limitation of Actions Act* said. The redrafted Rule 331 should make it clear that a master as well as a judge has jurisdiction to hear and decide the application. Wherever possible, the Rule 331 process should be made less technical and difficult.

CHAPTER 6. REPLEVIN: RULES 427 TO 436

ISSUE No. 24
Is replevin still a useful remedy or should it be replaced by something else?

[132] Replevin is a pre-trial remedy to preserve items of personal property and the plaintiff's rights in the items. "To replevy" means to recover personal property. The order of replevin is always obtained prior to the trial of the action. The replevin rules may be included in Part 36 as an "extraordinary" remedy because a replevin order for the recovery of property is granted before rights are finally determined, that is, before the action is tried. It is a remedy employed for an exceptional purpose or on a special occasion, as opposed to an ordinary remedy by action. An action for replevin is commenced by statement of claim and alleges the wrongful taking or detention of personal property. It is not an action for a money judgment *per se* although it usually seeks damages in addition to the recovery of the item. Calls have been made elsewhere for the abolition of replevin and its replacement with clear rules setting out a system of remedies for illegal and irregular retention of personalty.[77]

POSITION OF THE COMMITTEE

[133] Replevin remains a useful remedy in Alberta and should be retained, with the relevant forms, in the rules. The remedy is not limited to situations within the ambit of the *Civil Enforcement Act*. However the present replevin rules are in need of amendment and reorganization.

ISSUE No. 25
Should the replevin rules be moved to a new part of the rules called "Preservation of Rights in Pending Litigation" and located before the rules on trial and judgment?

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[77] Lord Chancellor's Department, *Effective Enforcement: Improved Methods of Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (A White Paper issued by the Lord Chancellor's Department) (London: Lord Chancellor's Department, 2003) at 43, online: <http://lcd.gov.uk/enforcement/wp>.

Replevin is a pre-trial remedy to preserve personal property or rights in personal property. At present, the replevin rules are included in the section on extraordinary remedies which follows the rules on trial, judgment and enforcement. This placement is misleading as replevin orders are always sought before trial. Other provinces have adopted a different approach. For example, the Ontario Rules include a separate part entitled "Preservation of Rights in Pending Litigation." It includes rules on interlocutory injunctions and mandatory orders, receivers, certificates of pending litigation, interpleader, interim recovery of personal property (that is, replevin) and interim preservation of property.

POSITION OF THE COMMITTEE

[134] In Chapter 1, the committee argued that the new Alberta rules should follow roughly the chronology of a lawsuit. In our view, the new rules should contain a part, entitled "Preservation of Rights in Pending Litigation," which should follow the similarly titled part of the Ontario Rules. This new part will contain the rules regarding replevin, interpleader, receivers, preservation orders and stop orders because these processes are used primarily or exclusively before trial and judgment. In some cases, like interpleader, the rules may be used before or after judgment. This difference should be flagged in the relevant rules.

[135] The replevin rules should be moved to this new part. The remedy is always sought before trial, and the reader might reasonably expect to find these rules before trial, not after judgment. Most Canadian jurisdictions put their replevin rules before the rules on trial. We should follow suit. Because this kind of reorganization can confuse practitioners and lay people who use them, we would suggest that the new Alberta rules have a good table of contents and index.

ISSUE No. 26
Should Rule 428(a) be repealed? Should Rules 428(b) and 430 be retained and combined into one rule?

[136] An order of replevin may be obtained in two ways. Rule 428(a) provides that the order may be obtained from the clerk on praecipe if the plaintiff makes an affidavit giving the description and value of the property claimed, and stating that the plaintiff is the owner or lawfully entitled to possession of the property, and that the property

was wrongfully taken or fraudulently gotten out of their possession within the two months preceding the affidavit. Rule 428(b) provides that the order may be obtained from the court on application. Rule 430 adds that the court may grant the order *ex parte* or may direct notice to be served on the defendant. Most Canadian rules permit replevin orders to be granted *ex parte*.

[137] In the experience of the committee, replevin orders are usually obtained from the court, and a clerk asked to make such an order might send the applicant to a master. Rule 428(a) may date back to the time when clerks were often lawyers who exercised some discretionary jurisdiction. Its purpose may have been speed and cost. It was noted that, if the reason for the rule was speed in obtaining the order, telephone applications to a master or judge are now available. Most Canadian jurisdictions limit the power to grant replevin orders to the court.

POSITION OF THE COMMITTEE

[138] The committee was troubled by Rule 428(a) and concluded that it should be repealed. Replevin orders should be granted by the court.

[139] The rule should follow the majority Canadian practice and continue to permit replevin orders to be granted *ex parte* or on notice where the court directs. Replevin orders resemble attachment orders[78] and Mareva injunctions[79] in that they may have to be granted without the knowledge of the defendant to ensure that the property is not disposed of. We will later consider what special rules and limits should apply to replevin orders granted *ex parte*.

[140] The elements of Rules 428(b) and 430 regarding the court's power to grant the order and whether notice is required should be combined in one rule.

ISSUE No. 27

Should the replevin order be required to contain certain terms or should the contents of the order be left to the discretion of the court? Specifically,

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[78] *Civil Enforcement Act*, *supra* note 8, Part 3.

[79] Named after *Mareva Campania Naviera S.A. v. International Bulk Carriers S.A.*, [1980] 1 All E.R. 213 (C.A.).

should the order be required to include terms regarding (1) the description and value of the property, (2) the indemnity, and (3) the bond?

A. Required Terms or Discretion

[141] The replevin rules restrict the court's discretion by mandating terms to be included in a replevin order or the replevin bond. Most Canadian rules and statutes are similarly detailed and restrictive.

B. Description and Value of the Property

[142] Rule 429 currently provides that the order shall state the description and value of the property to be replevied. The word "value" creates problems. Does it mean replacement value, fair market value or forced sale value? Rule 428(b) requires an applicant for a replevin order to provide an affidavit stating the value and description of the property. While the clear identification in the order of the precise property will be helpful to the bailiff, it is less clear what role is played by a statement in the order of the property's value.

C. Undertaking

[143] The replevin rules at present do not require that the replevin order include or mandate undertakings by anyone. However Rules 432 and 433 require the plaintiff to provide a bond, which includes certain undertakings by the plaintiff. Rules 432 and 433 are discussed below.

D. Bond, Security, Detention of Property

[144] Rule 430(1)[80] provides that a court granting a replevin order may include certain conditions which are summarized below:

- Rule 430(a) – the court may direct the plaintiff to post with the clerk a bond or other security in a form and amount that the court considers appropriate.
- Rule 430(b) – the court may direct a civil enforcement agency in addition to or instead of a bond to take and detain the property instead of restoring it to the plaintiff.

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[80] The subrule is not numbered but there is a subrule 2 immediately following.

- Rule 430(c) – instead of a bond, the court may order that the plaintiff be free to pay into court a sum named in the order to stand as security to the defendant. The sum is intended to replace a bond which would otherwise have to be provided to a civil enforcement agency. Rule 430(2) adds that money paid into court shall remain in court as security subject to further order.
- Rule 430(d) – The court may impose any terms or conditions.

[145] Rules 432 and 433 also deal with the bond.

- Rule 432(1) and (2) provide that, with some exceptions, a civil enforcement agency shall not act on the replevin order until the plaintiff provides a bond or other security satisfactory to the court, in favour of the defendant and, unless the court otherwise provides, in an amount double the value of the property as stated in the order of replevin. The bond or security is to be held by the clerk and shall follow Form J. The bond may be assigned by leave of the court.
- Rule 432(3) permits a civil enforcement agency to act on a replevin order on receipt of the clerk's certificate that money has been paid into court in place of a bond or other security.
- Rule 433(1) says that the condition of the replevin bond shall be that the plaintiff shall (1) prosecute the action to a conclusion without delay, (2) return the property to the defendant if ordered to do so and (3) pay damages, costs and expenses sustained by the defendant because of the issue of the order if the plaintiff fails to recover judgment.
- Rule 433(2) requires the bond and its assignment to follow Forms I and J. There is confusion here. Form I is the financial statement of an individual debtor required under Rule 370(1). Form J is the replevin bond. There is no form of assignment.

POSITION OF THE COMMITTEE

A. Required terms or Discretion

[146] The committee discussed what, if any, elements of a replevin order or bond should be dictated in The Rules. While the court should be free to tailor the order or the bond to fit the circumstances, it may be helpful to give the court some guidance as to possible issues and terms. Our conclusion was that these rules should be made simpler and less detailed. They should say clearly that the court can include in the order such terms and conditions as to a bond, security, or payment of money into court

as the court considers appropriate in the circumstances. However the rule should set out a shopping list of types of terms and conditions that the court may include in a replevin order. The shopping list should say clearly that it is open-ended, not conclusive.

B. Description and Value of the Property

[147] It is essential that a replevin order include a clear and specific description of the property to be replevied. The applicant is asserting some kind of property right in the property. It is not too much to ask that the applicant describe the property and that the description be included in the order. The civil enforcement agency will need the description, especially if the respondent has several items of the general type claimed.

[148] However, we do not think that the replevin order must state the value of the property unless the court wishes in the circumstances to include it. It may be useful for the applicant to include a rough estimate of the property's value to enable the court to decide on the amount of security which the applicant must provide. Requiring that the value be set out in the order seems unnecessary.

C. Undertaking

[149] Rule 433(1) imposes three duties on the plaintiff who obtains a replevin order: the plaintiff shall (1) prosecute the action to a conclusion without delay, (2) return the property to the defendant if ordered to do so and (3) pay damages, costs and expenses sustained by the defendant because of the issue of the order if the plaintiff fails to recover judgment. The committee concluded that these duties are appropriate. Duty number 1 is essential: otherwise the plaintiff will just quit doing anything once they get the property back.

[150] A more awkward question is how to impose these duties on the applicant. The present rules make the duties part of the replevin bond. This seems a clumsy and indirect mechanism. The duties will not apply if the court orders some other form of security unless the court also includes the three duties in the order.

[151] In its search for a better process, the committee was directed to section 17(4) of the *Civil Enforcement Act*. The section provides:

> **17(4)** The Court shall not grant an attachment order unless the claimant undertakes to pay any damages or indemnity that the Court may subsequently decide should be paid to the defendant or a third person and where the Court grants an attachment order, the Court may require the claimant
>
> (a) to give any additional undertaking that the Court considers appropriate, and
>
> (b) to provide security in respect of any undertaking.

What interested us in the subsection is that it (1) requires the claimant to make an undertaking as part of the application and (2) requires the court to include the substance of the undertaking in the order. The advantage of including the duty in the order is that it alerts anyone who examines the order to the obligations imposed on the claimant.

[152] We think that the double-barrelled approach of section 17(4) is helpful as a model for the imposition on the applicant of the three duties outlined above. We propose that the drafter of the new Alberta rules should follow the structure of section 17(4) of the *Civil Enforcement Act*. The rule should require that (1) the applicant for a replevin order must undertake to perform the three duties noted above, and (2) the replevin order itself should impose the duties on the applicant. We would not include the three duties in the replevin bond unless the court otherwise orders.

D. Bond, Security, Detention of Property

[153] The committee found Rules 430 and 432 to be unnecessarily complex and confusing. Their purpose is to empower the court to require that the applicant provide security in a variety of forms, including payment into court and other forms of security. However the rules appear to emphasize the bond[81] and underestimate more useful ways in which the applicant can back up their undertakings. The complexity and the excessive emphasis on the bond may be evidence that the rules have not been reviewed recently. Complex regulation may have been more appropriate when the clerk granted and administered replevin orders. Committee members doubted that the requirements of Rule 432 are actually followed, especially the rule that the bond be double the value of the replevied property.

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[81] R. 432 is entitled "Bond" even though it deals with other securities and money paid into court.

[154] The committee proposes that the rules be rewritten to emphasize their real purpose which is to give the court power to order the applicant to provide security in whatever form seems appropriate, including a letter of undertaking or payment into court. The replevin order should require that the applicant provide security and should direct what form it should take. If subsequently the security appears inappropriate, the court should have power to modify its order on application. The security or letter of undertaking should be filed with the clerk but copies should be given to the defendant (who is the beneficiary of the security) and the civil enforcement agency. Rules 430 and 432 should be simplified. For example, Rule 432(a) would be more useful if everything after the words "satisfactory to the court" was deleted.

[155] The forms should be revisited in light of our proposals. The present form of replevin bond is rudimentary as a bond and more closely represents a type of undertaking. The drafter might ask if any forms are needed for these rules, given the plenary discretion we propose to vest in the court and the abolition of the clerk's power to grant replevin orders. If forms are seen as necessary, they should be rewritten and correctly numbered.

ISSUE No. 28
Should the new replevin rules expressly say that replevin orders can be executed only by civil enforcement agencies?

[156] Most of the replevin rules predate the *Civil Enforcement Act* which created the civil enforcement agency as the replacement for sheriffs' officers employed by or contracting with the provincial Crown. The replevin rules were amended after the enactment of the *Act* to create special provisions for civil enforcement agencies, but the rules have never said expressly that only civil enforcement agencies can enforce replevin orders. The agencies have a monopoly over the execution of writs of enforcement under the *Act*.

POSITION OF THE COMMITTEE

[157] The committee thinks that only civil enforcement agencies should be empowered to execute a replevin order. Such a rule fits with the policy of the *Civil Enforcement Act* and the frequent references to civil enforcement agencies in the replevin rules. It

avoids the possibility of self-help which should not be encouraged in the civil enforcement process.

ISSUE No. 29
Should the defendant be able to apply to the court to discharge, vary or modify the replevin order as presently established by Rule 431?

[158] Rule 431 presently provides that the defendant may apply to the court to discharge, vary or modify the order, or stay proceedings thereunder, or for "any other relief with respect to the return, safety or sale of the property or any part thereof or otherwise." The rule appears to apply whether the initial order of replevin was granted *ex parte* or on notice. The words "or otherwise" at the end of the rule may have been designed to prevent the rule's list of circumstances from being exhaustive.

POSITION OF THE COMMITTEE

[159] The committee thought that Rule 431 should continue in the new rules. The committee asks the drafter to write the rule so that the list of circumstances in the present rule is not exhaustive.

ISSUE No. 30
Should special limits and safeguards apply to replevin orders obtained *ex parte*?

[160] The rules do not presently set out specific limits or safeguards where a replevin order is obtained *ex parte*. In contrast, section 18 of the *Civil Enforcement Act* provides that an attachment order granted *ex parte* must specify a date, not more than 21 days from the grant of the order, on which the order will expire unless it is extended in an application on notice to the defendant. The court has discretion to extend the 21 day time limit. To our knowledge, no other province has specified an expiry date for *ex parte* replevin orders, although several provinces limit the kind of replevin order which can be issued *ex parte*.

POSITION OF THE COMMITTEE

[161] The committee's view is that there should be expiry limits to *ex parte* replevin orders similar to the limits in section 18 of the *Civil Enforcement Act*. Such orders have the same potential for abuse, and similar expiry limits should apply.

ISSUE No. 31
Should all replevin orders other than those granted *ex parte* have an automatic expiry date?

[162] The Alberta replevin rules do not impose an outside expiry limit on all replevin orders. We follow the majority of Canadian jurisdictions here. However, the Newfoundland, *Rules of the Supreme Court, 1986* [Newfoundland Rules] provide in Rule 27.04(3) that, unless the court otherwise orders, property cannot be recovered under the order after the expiration of 90 days from its issue. Nothing in the rule limits the validity of the order regarding anything done earlier, nor does it limit the right of the court to issue a further order.

[163] A model closer to home is section 19 of the *Civil Enforcement Act* which provides:

> **19(1)** Subject to section 18 [dealing with *ex parte* attachment orders] and except as otherwise ordered by the Court, an attachment order terminates on whichever of the following occurs first:
>
> (a) on the dismissal or discontinuance of the claimant's proceedings;
>
> (b) on the 60th day from the day of the entry of a judgment in favour of the claimant.
>
> **19(2)** The Court may extend the operation of an attachment order beyond the times set out in subsection (1) if it appears just and equitable to do so.

POSITION OF THE COMMITTEE

[164] A replevin order is a prejudgment remedy and has all the dangers of such remedies. The plaintiff has not proven the case against the defendant and may not do so. On the other hand, an automatic time limit like that imposed by the Newfoundland rule may be a trap for the unwary, creating problems worse than the evil sought to be controlled. In the view of the committee, section 19 of the *Act* is a good compromise

for orders not granted *ex parte*. It recognizes the hazards of prejudgment remedies while imposing reasonable time limits.

ISSUE No. 32
Should Rule 434 be repealed?

[165] Rule 434 applies only to a replevin order issued by the clerk. It says that, when the order is issued, a civil enforcement agency shall take the property and not deliver it to the plaintiff without a court order but shall redeliver it to the defendant unless in the meantime the plaintiff obtains and serves a court order to the contrary. Some masters will never turn property over to the plaintiff, but others do.

POSITION OF THE COMMITTEE

[166] In light of our proposal to eliminate the clerk's power to issue a replevin order, Rule 434, as presently written, has nothing to apply to. However, the underlying problem continues. In our view, in all replevin order cases, the civil enforcement agency should take the property pursuant to the replevin order and should not deliver it to the plaintiff without a court order. The agency should redeliver the property to the defendant within 30 days of the original replevying unless the court otherwise provides in the original replevin order or in a subsequent order. The reason for the redelivery requirement is that replevin, like attachment under the *Civil Enforcement Act*, is an extraordinary remedy and must be kept within reasonably strict limits to prevent abuse.

ISSUE No. 33
Should Rule 435 be retained?

[167] Rule 435 provides that the civil enforcement agency shall return the order to the clerk within 10 days after service, and include a statement specifying the names, residential addresses and occupations of the sureties, the amount of the replevin bond, the names of the witnesses, the assets taken into possession and the reason why any assets (specifying them) are not taken into possession.

POSITION OF THE COMMITTEE

[168] The committee thinks that this rule should be repealed as it serves no useful purpose, especially where the replevin order specifies a form of security other than a bond. The court may of course order that such information be filed, but we do not think the requirement should be imposed on everyone. The plaintiff who obtains a replevin bond might be better advised to file it in the PPR. The civil enforcement agency should file supplementary information in the PPR as the replevin process proceeds.

ISSUE No. 34
Should Rule 436 be retained?

[169] Rule 436 says that, where the plaintiff is entitled to sign judgment by default in a replevin action, they may do so for $10 and costs for any damage claim, but is not entitled to recover a larger sum as damages except on a court assessment or by consent. The rule permits a plaintiff who simply wants to recover their property and has a nominal claim for damages to move to a default judgment.

POSITION OF THE COMMITTEE

[170] The committee's view is that Rule 436 serves a useful purpose and should be retained without change.

CHAPTER 7. INTERPLEADER: RULES 442 TO 460

ISSUE No. 35
Should interpleader remain a part of Alberta law?

[171] The Rutman edition of *Creditors' Remedies in Alberta*[82] describes interpleader in terms which emphasize its usefulness:

> At times a person may find himself or herself in possession of goods or money in which he or she has no interest, save in respect of costs or a lien, but in relation to which two or more parties are suing him or her or are about to sue. Interpleader is a mechanism that allows the person to apply to the court for relief to avoid being entangled in an action in which he or she has no direct interest, and to avoid a competing claimant suing him or her for delivery of the goods or money to the wrong claimant. An interpleader is therefore, merely a procedure to determine a right of property; it is not a claim, dispute or demand for which an amount can be awarded.

Stevenson and Côté agree.[83]

> Interpleader is a very useful method for avoiding multiple suits and unnecessary fights. It gives relief to a person who has property and admits that others have a better claim to it, but wishes to avoid the danger of giving the property up to the wrong claimant.

The Rules provide for interpleader applications generally in Rules 442 to 447. There are "additional interpleader rules for civil enforcement agencies and others" in Rules 455 to 460.[84]

POSITION OF THE COMMITTEE

[172] Interpleader is a useful, fair and essential method of resolving the problem of the person in possession of property and subject to adverse claims to that property. The remedy is also useful for civil enforcement agencies and bailiffs who may find themselves in a similar position with seized property. The interpleader process should remain part of Alberta law.

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[82] Ray C. Rutman, Brian W. Summers, John T. Prowse and Jeremy H.H. Hockin, *Creditors' Remedies in Alberta*, 2d ed., looseleaf (Scarborough, Ontario: Carswell, 1996) at 14-1 [Rutman].

[83] *Civil Procedure Handbook*, *supra* note 25 at 368.

[84] R. 460.1 is discussed in Chapter 2.

ISSUE No. 36
Should interpleader remain in the rules?

[173] The interpleader rules are divided into two parts. Rules 442 to 447 have no subheading but appear to be aimed at all interpleader applications whether under the *Civil Enforcement Act* or not. There are several references to the *Act* in Rules 442 to 447. The second group of rules (Rules 455-460.1) are entitled "Additional Interpleader Rules for Civil Enforcement Agencies and Others." They are "additional" to Rules 442-447 which therefore may apply to *Civil Enforcement Act* cases. They apply to "others." The drafter seems to have seen them as an extension of Rules 442-447, not as a separate process. The Institute report on *Enforcement of Money Judgments*[85] does not propose changes to the interpleader process. Changes were made after the enactment of the *Civil Enforcement Act*.

POSITION OF THE COMMITTEE

[174] The committee earlier expressed its view that, where a rule deals only with proceedings under the *Civil Enforcement Act*, it should be transferred to the *Act* or the *Civil Enforcement Regulation*, but that where it applies to other processes, it should stay in the rules. At first, we hoped that the money judgment aspects of the interpleader rules could be pulled out and sent to the *Act*, but we have now concluded that these rules are so intertwined that it would be difficult and risky to try to separate them out into separate parts. Our proposal is to leave all the interpleader rules, including those which refer to the *Civil Enforcement Act*, in the rules.

ISSUE No. 37
Should the interpleader rules be moved to a new part of the rules called "Preservation of Rights in Pending Litigation" and located before the rules on trial and judgment?

[175] Interpleader applications often occur before trial or judgment, but an interpleader application by a civil enforcement agency will usually be postjudgment.

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[85] ALRI, *Enforcement of Money Judgments*, *supra* note 4.

POSITION OF THE COMMITTEE

[176] In Chapter 6, Issue 25, we proposed that the new Alberta rules should contain a part, entitled "Preservation of Rights in Pending Litigation," which should follow the similarly titled part of the Ontario Rules. This new part should contain processes which are used primarily or exclusively before trial and judgment. While interpleader may be used before trial or after judgment, it is often included in a division like the Ontario "Preservation of Rights" part. We agree and would put the interpleader rules into the new pre-trial part along with replevin, receivers and preservation orders as long as the rules themselves make it clear that interpleader is available before or after judgment.

ISSUE No. 38
Should the grounds for applying for interpleader be expanded?

[177] Rule 443(1) sets out the threshold requirements for applying for interpleader.

> **443(1)** Where a person is under liability for any property in respect of which that person is or expects to be sued by 2 or more persons making adverse claims to that property, that person may apply by a notice of motion to the Court for relief by way of interpleader.

[178] The requirements imposed by Rule 443(1) are restrictive and puzzling. The applicant must show that they are a person who "is under liability for any property in respect of which that person is or expects to be sued by 2 or more persons making adverse claims to that property." Must the applicant prove that they will be liable, or is it enough to show that the applicant may be liable? Is liability used as a synonym for "under risk of being sued"? Suppose the applicant's argument is that they do not possess the property in question and have no relationship to it. Is the applicant debarred from applying for an interpleader order? If yes, is that an appropriate limit to interpleader?

[179] Other Canadian rules are clearer and wider. For example, the Ontario Rules provides as follows:

> **43.02 Where Available** - Where two or more persons make adverse claims in respect of property against a person who,

> (a) claims no beneficial interest in the property, other than a lien for costs, fees or expenses; and
>
> (b) is willing to deposit the property with the court or dispose of it as the court directs,
>
> that person may seek an interpleader order (Form 43A).

The advantage of the Ontario rule is that it does not require the applicant to show what is their relationship to the property or that they are or may be liable for the property. All that is required is adverse claimants, and the applicant's neutrality and willingness to follow the court's orders regarding disposition of the property. Ontario Rule 43.01 defines property to mean personal property, including a debt.

POSITION OF THE COMMITTEE

[180] The committee concluded that the grounds upon which interpleader may be sought should be expanded. Requiring that a party has been or expects to be sued is too limiting. The process should be available when any party who is not interested in property which others are contesting wishes to divest itself of that property. We propose that the present Rule 443(1) be replaced with Ontario Rule 43.02.

[181] The term "property" as used in Rule 443(1) currently means property as defined in section 1(1)(ll) of the *Civil Enforcement Act*. We note that the Ontario Rules define the term more narrowly. We prefer the definition of property in the *Civil Enforcement Act* because it is more expansive and because we think that definitions used in the *Act* should be carried forward into the rules unless there is a clear reason to depart from them.

ISSUE No. 39
Should an application for an interpleader be by notice of motion? Should an affidavit be required?

[182] Rule 443(1) requires interpleader applications to be commenced by notice of motion. Some of the other Canadian rules require such applications to be made by petition or originating notice of motion.

[183] Unlike some other jurisdictions, The Rules do not presently require an affidavit in support of an interpleader application. Rule 446(1)(a) empowers the court to

"summarily determine any issue on the basis of oral or affidavit evidence." It is likely that most such applications are accompanied by an affidavit.

POSITION OF THE COMMITTEE

[184] The committee is concerned that the rules governing interpleader and other applications be clear whether such applications must be commenced by notice of motion or originating notice of motion. The originating notice of motion must be served 10 days prior to the application while a standard notice of motion needs to be served only 2 days before. It would also be helpful if the filing fees for the two kinds of notices be clarified.

[185] The committee's view is that an interpleader application should be made by regular notice of motion, not by originating notice or statement of claim. The applicant should be required to file an affidavit, as with any other notice of motion.

ISSUE No. 40
Should the list of powers of the court in Rules 446 and 447 be modified?

[186] Rule 446(1) sets out a long list of powers which the court may exercise on an application for interpleader. They include summarily determining issues, directing trial, declaring a party to be the owner of the property, directing payment of liens and charges and ordering costs. In addition to these specific provisions, Rule 446(1)(f) empowers the court to "give any directions or make any order that the court considers appropriate in the circumstances." Rules 446 and 447 make it clear that the remedy is discretionary, and that courts may take into account the conduct of the parties among other factors.

[187] Rule 447 deals with the situation in which a claimant does not appear on the motion or, having appeared, neglects or refuses to comply with an order. In such cases, the court may order that the claimant and persons claiming under the claimant are barred as against the applicant and other persons claiming under the applicant. Such an order does not affect the rights of the claimants as between themselves.[86]

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[86] R. 447(2).

[188] Other Canadian rules have similar provisions with some additional powers that Alberta does not have. For example, they empower the court to (1) add parties, (2) stay proceedings, (3) declare that the liability of the applicant is extinguished, and (4) where interpleader application are pending in several proceedings, to make the interpleader order binding upon all the parties to the various proceedings.

[189] The applicant's goal in seeking an interpleader order is to get protection from the claimants. Certainly this was the goal of the sheriff and is for the civil enforcement agency. English and some Canadian rules expressly permit a court to grant a protection order giving the sheriff protection against the claimants. It may be that the large discretion in the present Rule 446(1) empowers the court to make such an order.

POSITION OF THE COMMITTEE

[190] The committee's view is that Rule 446 can be streamlined. Currently it does little more than reiterate powers which are in the inherent jurisdiction of the court. Therefore Rule 446 should be amended to provide that the court may make any order it deems just including a declaration that the liability of someone, including the applicant, be released or extinguished. Civil enforcement agencies are in the same difficult position that sheriffs were in, liable to be sued by the debtor, the instructing creditor, other creditors entitled to share, and third person claimants of property or funds seized. We propose that the courts be able in an appropriate case to protect civil enforcement agencies by declaring that their liability is extinguished.

ISSUE No. 41
Should Rule 446(2) be amended or repealed?

[191] Rule 446(2) provides:

> **(2)** Before making an order under subrule (1) [an interpleader order], the Court must be satisfied that the applicant
>
> (a) is not claiming any interest in the subject-matter of the dispute, other than in respect of a lien or for charges or costs, and
>
> (b) has not colluded with any of the claimants in respect of any matters for which the application is being made.

POSITION OF THE COMMITTEE

[192] The committee has difficulty seeing any necessity for either arm of Rule 446(2). Rule 446(2)(a) will be covered in the grounds upon which interpleader can be sought. See our proposals under Issue 38 above. The court in determining who has the better right to the property will have to consider any liens, claims for charges and cost made by anyone, including the applicant. Subrule (b) is also unnecessary as the property is going to be either transferred into court or protected as the court sees fit until title is decided. We propose that Rule 446(2) be repealed.

ISSUE No. 42
Apart from the above proposals, are there other changes which should be made to the interpleader rules?

POSITION OF THE COMMITTEE

[193] Apart from the above proposals, our general comment is that the interpleader rules are not new (except for the *Civil Enforcement Act* additions) and have been the subject of much interpretive energy by the courts. They have a fairly well settled meaning. Our inclination is to leave the substance of these rules alone unless we see some clearly unfair, illogical or poorly worded rule which can be changed without pulling the structure apart.

CHAPTER 8. RECEIVER: RULES 463 TO 464

ISSUE No. 43
Should Rules 463 and 464 on receivers be retained in the rules and amended?

[194] There are two rules on receivers which can be summarized as follows:

- Rule 463(1) requires the receiver appointed by court order to give security to be approved by the court unless the court otherwise orders. (Curiously, the tag word in the margin of this rule is "bond." The rule isn't literally restricted in the type of security to be given.)
- Rule 463(2) permits a receiver to be allowed compensation unless the court otherwise orders.
- Rule 464(1) requires the receiver to file accounts with and pass them before the clerk annually or at another period set by the court. Rule 464(2) says that thereafter the balance due on the accounts shall be paid.
- Rule 464(3) deals with the situation where the receiver does not file or pass accounts or take other proper proceedings. The court may (1) ask the receiver to show cause, (2) order the receiver to pay interest, or (3) deprive the receiver of part or all of their salary.

[195] The Alberta practice texts discuss receivership generally but have little on these rules. Stevenson and Côté[87] note that the receiver is used in three ways: (1) equitable execution to enforce a money claim or judgment, (2) under an express power to appoint given to a mortgagee in a debenture, and (3) as a kind of preservation order during litigation to hold the status quo and prevent the disappearance of property before trial. While the Stevenson and Côté discussion is limited to type 3, there is a large literature on types 1 and 2. Most other Canadian rules of court have rules on receivers, some more elaborate than ours.

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[87] *Civil Procedure Handbook*, *supra* note 25 at 372.

POSITION OF THE COMMITTEE

[196] Rules 463 and 464 apply to money and non-money claims and judgments and should remain in the new Alberta rules.

[197] In Chapter 6, Issue 25, we proposed that the new Alberta rules should contain a part, entitled "Preservation of Rights in Pending Litigation," which should follow the similarly titled part of the Ontario Rules. As Stevenson and Côté observe, receivers are often used before trial to preserve property.[88] They may also be used after judgment. We would follow the example of jurisdictions like Ontario and Manitoba and include these rules in the new pre-trial part along with replevin, interpleader and preservation orders as long as the rules themselves make it clear that receivership is available before or after judgment.

[198] Receivers are appointed under several statutes which may conflict with Rules 363 and 364. For example, the *Civil Enforcement Act* and the *Civil Enforcement Regulation* permit a court to appoint a receiver as a prejudgment or postjudgment remedy. Sections 32 to 35 of the *Regulation* create rules on accounting, filing with the clerk financial statements and accounts, the rights of others to inspect records of the receiver, and the distribution of proceeds of a liquidation. Some of these rules conflict with Rules 463 and 464. The *Regulation* requires financial statements to be filed every 180 days, unless otherwise ordered, rather than the year set out in Rule 464. In our view, the best way to solve these conflicts is to say in the new version of Rules 463 and 464 that they do not apply to receivers appointed under the *Civil Enforcement Act*.

[199] Receivers may be appointed under other statutes such as the *Personal Property Security Act* and the *Judicature Act*. Again the statutory regimes can conflict with Rules 463 and 464. We propose that these rules should not apply to receivers appointed under any statute.

[200] Rules 463 and 464 impose duties on the receiver such as giving security and filing accounts. The court may otherwise order. In our view, this is the reverse of the proper way to regulate receivers, nor do these rules reflect what is actually happening. We would prefer Rules 463 and 464 to provide that there is no requirement to do the

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[88] *Ibid*.

acts mentioned unless the court orders otherwise. In either case the policy remains that the court has the final say to be determined on the facts of the particular case.

CHAPTER 9. PRESERVATION ORDERS: RULES 467 TO 469

ISSUE No. 44
Should preservation of property orders continue to be part of the rules?

[201] Rules 467, 468 and 469 provide for various types of orders regarding property which is the subject of or involved in litigation. They are primarily orders issued before trial and judgment, although they are included in the present Part 36, entitled "Extraordinary Remedies." It may be useful to set out the relevant rules and to analyze what orders they permit.

[202] Rule 467 provides:

> **467** Where there is a dispute respecting the title to any property, the court may make an order for the preservation or interim custody of the property or may order the amount in dispute be brought into court or otherwise secured or may order the sale of the property and the payment of the proceeds into court.

[203] Rule 467 is comparatively simple. Where there is a dispute respecting the title to any property, the court may make one of three types of order. The three orders are apparently alternatives; the court cannot make more than one order in one application. The court may:

1. make an order for the preservation or interim custody of the property,
2. order the amount in dispute be brought into court or otherwise secured,
3. order the sale of the property and the payment of the proceeds into court.

The orders are available only in a dispute respecting the title to the property subject to the orders.

[204] Rule 468 provides:

> **468** The court may, upon the application of any party and on notice to any person to be affected, whether a party to the proceedings or not, upon such terms as seem just,
>
> (a) make any order for the detention or preservation of any property being the subject of the action or which may be evidence on any issue arising therein, and

> (b) make any order for the inspection of any property, the inspection of which is necessary for the proper determination of the question in dispute,
>
> and for all or any of these purposes,
>
> (c) authorize any person or persons to enter upon or into any land or building, and
>
> (d) authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence,
>
> but no order shall be made unless the person who is to be affected is protected for any loss or damage which may be occasioned to that person.

[205] Rule 468 is more complex and obscure. The court may again make one of three orders, although it is not clear if these orders are alternatives or if more than one may be made in one application. The court may:

1. make any order for the detention or preservation of any property being the subject of the action.[89]
2. make any order for the detention or preservation of any property which may be evidence on any issue arising therein.[90]
3. make any order for the inspection of any property, the inspection of which is necessary for the proper determination of the question in dispute.[91]

[206] Rule 468 is not finished. It goes on to say that, "for all or any of these purposes," the court may make more orders. These orders appear not to be alternatives. "These purposes" probably refers to orders 1 to 3 above. That is, when the court finds it

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[89] This alternative looks like the first possible order under r. 467, except for the use of "detention" instead of "interim custody." Is an action, the subject of which is property, the same as an action respecting the title to property?

[90] What does "therein" refer to? It might refer back to "property" or "order." A more likely suggestion is that it refers to an "action." The only action the rule has talked about is the action where property is the subject. The detention order (no. 2 above) can go against any property other than the property which is the subject of the action which is dealt with by detention order no. 1. It is not clear why one would want order 2 if "therein" refers back to an action where property is the subject. The rule is obscure.

[91] Here the property which can be inspected is any property, not just the property which is the subject of the action. Indeed, the action may not have property as its subject; it may, for example, be a tort action where it is the automobile which one party wishes to inspect. The cause of action has nothing to do with the title to the automobile, but the automobile, on a literal reading, may be the subject of an inspection order. If this reading is right, it is confusing to include alternative 3 in a rule otherwise concerned with property litigation.

appropriate to issue one of orders 1, 2 or 3, it can tack on one or both of orders 4 and 5. The court may:

> 4. authorize any person or persons to enter upon or into any land or building,
> 5. authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.[92]

A further condition to the grant of orders 4 and 5 is some sort of indemnity for the person to be affected.

[207] Rule 469 provides:

> **469** Where any personal property is sought to be retained or attached by virtue only of a lien or otherwise as security for money, the court may, upon motion, order that the person otherwise entitled to possession of the property be given possession upon payment into court, to abide the event of action or proceedings commenced or to be commenced, of the amount of the lien or security claimed, plus such further sum, if any, for interest and costs as may be just.

[208] It is an anticlimax to parse Rule 469 which seems quite comprehensible. It says that, where any personal property is sought to be retained or attached by virtue only of a lien or otherwise as security for money, the court may order that "the person otherwise entitled to possession of the property" be given possession upon payment into court of the amount of the lien or security claimed, plus a further "just" sum for interest and costs. The Rule 469 order resembles Order 2 under Rule 467 except that the payment into court includes a just sum for interest and costs.

[209] Rules 467, 468 and 469 serve a number of functions. The most important to this committee is that they enable the applicant to gain some assurance that the property or its worth in money is safeguarded until judgment has been rendered. They are remedial because they guarantee that the party seeking title or an interest in the property will enjoy the fruits of a favourable judgment. Judging by the number of reported cases, these orders are often sought, and a substantial and somewhat diverse jurisprudence has built up around them.

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[92] Judging by the way the rule is printed, the "necessary or expedient" condition applies only to order 5. There is a policy argument that the condition should apply to both types of order.

[210] The courts are well aware of the conflicting policies at play in any application for a preservation order. The applicant wants to be sure that, if their lawsuit succeeds, the prize is still there by the time that judgment is rendered. The courts are anxious that judgments are effective and not futile. On the other hand, preservation orders involve a serious invasion of the rights of the respondent to do what they want with the property. The diverse results in these cases reflect judicial uneasiness about these orders. The courts have sought guidance from the *Judicature Act*[93] and the *Civil Enforcement Act*[94] in striking the proper balance between applicant and respondent.

POSITION OF THE COMMITTEE

[211] The preservation order process should remain in the Alberta rules. We noted earlier that the process seeks to ensure that the property or its worth in money is safeguarded until judgment has been rendered. It is remedial because it guarantees that the party seeking title or an interest in the property will enjoy the fruits of a favourable judgment. These rules are a useful and much used part of the legal system. The variant of the process in Rule 469 has a similar function and should also be preserved.

ISSUE No. 45

Should those parts of Rule 468 which relate to detention or preservation of property which may be evidence, and inspection, sampling, observing and experimenting with property be deleted from the new preservation rule and moved to the part of the rules dealing with discovery?

[212] Rule 468 empowers the court to grant several orders, some of which are remedial and others are more in the nature of discovery. The court may order the detention or preservation of property which is the subject of the action. This is clearly remedial. However other elements of Rule 468 have nothing to do with enforcement or remedies but are devices to gather and preserve evidence before trial to support the applicant's side and undermine that of the opponent.

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[93] *McAllister v. McAllister*, 1998 ABQB 843; *688560 Alberta Ltd. v. Genesis Land Developers Ltd,* (2000), 82 Alta. L.R. (3d) 236 (Q.B.).

[94] *Interclaim Holdings Ltd. v. Down* (1999), 250 A.R. 94, 1999 ABCA 329.

1. The court may make any order for the detention or preservation of any property which may be evidence on any issue arising therein. This is not remedial but is intended to make sure that evidence is kept safe for the trial.
2. The court may make any order for the inspection of any property, the inspection of which is necessary for the proper determination of the question in dispute. This is clearly a kind of discovery procedure.
3. "For all or any of these purposes," the court may also (1) authorize anyone to enter land or a building, and (2) take samples, make observations or try experiments "which may seem necessary or expedient for the purpose of obtaining full information or evidence."

[213] These orders are similar to examination of documents or oral examination for discovery and are deployed in efforts to learn more about the opponent's case, always before trial. They have nothing to do with enforcement. These discovery-like orders are often sought and granted in Alberta. The Alberta courts are trying to work out sensible limits to the wholesale grant of inspection orders, and counsel are experimenting with the process. In some recent Alberta cases, counsel have asked for and obtained preservation or inspection orders under Rule 468 and *Anton Piller*[95] orders under the English and Canadian jurisprudence which allows pretrial inspection of material on the other party's premises.[96]

[214] The practice in other provinces is diverse. Manitoba, Ontario, New Brunswick and Prince Edward Island put the preservation of property rules together with other prejudgment processes before the trial rules. British Columbia and Saskatchewan follow the Alberta pattern of putting these rules after trial and judgment and with other postjudgment enforcement remedies.

POSITION OF THE COMMITTEE

[215] This committee is concerned with remedial and enforcement rules. As a result, it has no comment on the discovery-like elements of Rule 468. However, we suggest

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[95] *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] Ch. 55 (C.A.).

[96] Susan Robinson Burns, "Pre-trial Strategies to Preserve Rights, Assets and Evidence: Injunctions, Attachment, *Mareva* and *Anton Piller*." (Paper presented to the Forensic Accounting: Dealing with Fraud, Forgery and Defalcation Seminar, Edmonton: Delta Edmonton Centre Suite Hotel, March 4, 1998) (Edmonton: Legal Education Society of Alberta, 1998).

that the discovery and preservation of evidence aspects of Rule 468 be taken out of the rule and moved to the examination for discovery part of the rules. These orders are almost always sought before trial, and the relevant rules are more naturally located with the other discovery rules. We comment on the strictly remedial aspects of Rule 468 below.

ISSUE No. 46
Should those parts of Rules 467, 468 and 469 which relate to remedies be moved to a new part of the rules called "Preservation of Rights in Pending Litigation" and located before the rules on trial and judgment?

[216] At present, the preservation order rules are included in the section on extraordinary remedies which follows the rules on trial, judgment and enforcement. This placement is misleading as preservation orders are usually although not always sought before trial. Their purpose is to preserve property until judgment is obtained. Other provinces take a different approach. The Ontario Rules include a separate part entitled "Preservation of Rights in Pending Litigation." It includes rules on interlocutory injunctions and mandatory orders, receivers, certificates of pending litigation, interpleader, interim recovery of personal property (a.k.a. replevin) and interim preservation of property.

POSITION OF THE COMMITTEE

[217] In Chapter 6, Issue 25, we proposed that the new rules should contain a part, entitled "Preservation of Rights in Pending Litigation," which should follow the similarly titled part of the Ontario Rules. This new part should contain processes which are used primarily or exclusively before trial and judgment. Preservation order rules are usually included in a division like the Ontario "Preservation of Rights" part. We agree and would put the remedial elements of Rules 467, 468 and 469 into the new pre-trial part along with replevin, receivers and interpleader.

ISSUE No. 47
Should Rules 467 and 468(a) be combined into one rule?

[218] Rules 467 and 468(a) appear to cover the same ground and provide the same remedy, although there are some differences of detail.

POSITION OF THE COMMITTEE

[219] These rules should be combined into one rule. We noted earlier that there are differences in the drafting of Rules 467 and 468(a). We urge the drafter to choose those elements of both rules which give the court the more extensive jurisdiction. The intention is to retain all court powers in the present rules while eliminating repetition.

ISSUE No. 48
Should Rule 469 be retained as a separate subrule?

[220] Rule 469 deals with a somewhat different situation from the two rules discussed above. The rule applies to personal property subject to a lien or "otherwise as security for money." Where the claimant of a lien or a security of money seeks to retain or attach such personal property, the person otherwise entitled to possession of the property (the debtor) may on court order be given possession of the property upon payment into court of the amount of the lien or security claimed plus interest and costs.

[221] The committee wondered if Rule 469 could be discarded because of the enactment of the *Personal Property Security Act*[97] (*PPSA*). Stevenson and Côté trace Rule 469 back to the 1914 Alberta Rules and to the Northwest Territories Judicature Ordinance of 1883,[98] over 100 years before the enactment of the *PPSA* in Alberta. Rule 469 applies to matters inside and outside the scope of the *PPSA*, especially liens which are expressly excluded from the *PPSA* by section 4(a).

[222] The *PPSA* does not include the precise remedy available under Rule 469. Part 5, entitled "Rights and Remedies on Default," has some significant elements. Section 56(1)(b) provides that where the debtor is in default under a security agreement, the debtor has against the secured party the rights and remedies provided by any other Act

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[97] *Supra* note 18.

[98] *Civil Procedure Handbook*, *supra* note 25 at 375.

or rule of law "not inconsistent with this Act." Section 62 deals with the retention of the collateral by the secured party. Section 63 enables the debtor to reinstate the security agreement by paying the arrears (apparently to the secured party) and curing other defaults. Section 64 gives the court jurisdiction to make orders regarding enforcement. Arguably something like the order contemplated by Rule 469 could be made under section 64. Such an order could also be made under Rule 469 unless the rule is inconsistent with the *Act*.[99]

[223] Liens are dealt with in several Alberta statutes.[100] They are fairly skeletal and do not usually contain detailed remedial provisions. Section 4 of the *Innkeepers Act*[101] does enable the lodger or guest to pay into the office of the clerk of the court the amount of the claim with a further sum for security for costs, after which the lodger or guest may recover the property detained by the innkeeper.

POSITION OF THE COMMITTEE

[224] In our view, Rule 469 continues to serve a real purpose, despite the passage of the *PPSA* and various lien statutes. We think that the rule should continue as a subsection of the new preservation order rule. It should incorporate the same range of powers in the court as Rules 467 and 468(a).

[225] Rule 469 includes matters other than those governed by the *PPSA*. It creates a specific discretionary remedy which may be sensible and useful in a few cases. As a fallback process, it is useful and should be kept, subject to the issues raised elsewhere in the consultation memorandum. We think that the Minister of Justice should consider whether the new version of Rule 469 needs to be amended so that it better meshes with the *PPSA* and the lien statutes.

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[99] On these sections, see Ronald C.C. Cuming & Roderick J. Wood, *Alberta Personal Property Security Act Handbook*, 2d ed. (Scarborough, Ontario: Carswell, 1993) at 365-429; Roderick J. Wood, "Enforcement Remedies of Creditors" (1996) 34 Alta. L. Rev. 783.

[100] E.g., *Garage Keepers' Lien Act*, R.S.A. 2000, c. G-2; *Possessory Liens Act*, R.S.A. 2000, c. P-19.

[101] R.S.A. 2000, c. I-2.

ISSUE No. 49
Should Rules 467, 468 and 469 apply to personal and real property, or just to personalty?

[226] At present, Rules 467 and 468 appear to apply to personal and real property while Rule 469 applies only to personalty. Members of the committee reported that they had used Rule 467 against realty. There was some doubt whether these rules are used in foreclosure proceedings as there are specific rules. The question was raised whether they have a use against leasehold property.

POSITION OF THE COMMITTEE

[227] The committee's view was that there was no reason to limit the application of any of these rules. They should apply to personal and real property.

ISSUE No. 50
Should specific funds be subject to preservation orders?

[228] There is considerable doubt whether a fund of money is property which can be the subject of a preservation order under Alberta and similar rules.[102] As a result, most Canadian rules[103] expressly extend the remedy to funds. An example is Ontario Rule 45.02 which provides:

> 45.02 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

There has been substantial litigation about the scope of rules like 45.02. Fraser and Horn summarize the British Columbia jurisprudence as follows:

> Where the right to a specific fund (such as estate monies) is in dispute, the court may order the funds to be paid into court, or otherwise secured (Rule 46(2)). The monies must, however, constitute a "fund" and the

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[102] The Honourable W.A. Stevenson & The Honourable J.E. Côté, *Civil Procedure Guide, 1996*, looseleaf (Edmonton, Alberta: Juriliber, 1996) at 1522 [*Civil Procedure Guide*]; The Honourable W.A. Stevenson & The Honourable J.E. Côté, *Civil Procedure Encyclopedia,* looseleaf (Edmonton, Alberta: Juriliber, 2003) at 55-38 [*Civil Procedure Encyclopedia*].

[103] E.g., British Columbia, *Supreme Court Rules*; Manitoba, *Court of Queen's Bench Rules*; Ontario Rules; *Rules of Court of New Brunswick* and Prince Edward Island, *Rules of Civil Procedure*.

> subrule is not available to someone claiming generally for payment of monies."[104]

POSITION OF THE COMMITTEE

[229] In our view, the new Alberta rules should provide that a preservation order can be given against specific funds along the lines of Rule 45.02 of the Ontario Rules.

ISSUE No. 51
Should the court be empowered to order immediate sale in appropriate cases?

[230] The Alberta preservation order rules do not expressly create a power in a court to order immediate sale of perishable property which is depreciating in value. Courts have sometimes used the preservation rules to accomplish this result.[105]

[231] The *Civil Enforcement Act* in its provisions governing sale of personalty provides for expeditious sale. Section 48(i) provides in part:

> **48(i)** ...the agency may ...effect an expeditious sale of property that is perishable or is rapidly declining in value or an instrument or a market security [*and the proceeds of sale stand in place of the property*].

The civil enforcement agency may sell without court order in the enforcement context, a result not contemplated here. But the extended list of situations in which expeditious sale could be ordered by a court is a possible model for our new preservation order rule.

[232] Other provinces expressly empower courts to sell in such circumstances. Rule 45.01(2) of the Ontario Rules, which deals with preservation orders, is a good example.

> 45.01(2) Where the property is of a perishable nature or likely to deteriorate or for any other reason ought to be sold, the court may order its sale in such manner and on such terms as are just.

The Ontario rule has the advantage of being broader than section 48(i) of the *Civil Enforcement Act*.

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[104] The Honourable Mr. Justice G. Peter Fraser & John W. Horn, Q.C., *The Conduct of Civil Litigation in British Columbia*, looseleaf (Markham, Ontario: Butterworths, 1978) vol. 2 at 1682. [Citations omitted.]

[105] *Khan v. Hazemi*, [1991] A.J. No. 305 (Master).

POSITION OF THE COMMITTEE

[233] In our view, the power to order expeditious sale is useful and should be expressly provided for. The new Alberta rules should empower the court to order immediate sale of property held on a preservation order and in appropriate cases. The rule should follow Ontario Rule 45.01(2) because of its broad drafting. The committee does not want to propose a rule with technical limitations because it will usually be exercised in a crisis situation when the court should be free to find and order the appropriate solution.

ISSUE No. 52
How much should the person in possession of the property be required to pay into court so that they can remain in possession? Should the payment in include an amount for interest and costs?

[234] Rule 467 provides that the court may "order the amount in dispute be brought into court or otherwise secured." Rule 469 enables the person in possession to remain in possession "upon payment into court ... of the amount of the lien or security claimed [plus interest and costs]." Stevenson and Côté, citing an English case, say: "the whole amount claimed must be paid into court, even if it is more than the property is worth."[106]

[235] The present rules are also inconsistent on payment of interest and costs. Rule 467 permits the court to order the amount in dispute to be brought into court or otherwise secured. Nothing is said about bringing into court something for interest or costs. Rule 469 empowers the court to order that the person in possession of property remain in possession upon payment into court of the amount of the claim, plus a further "just" sum for interest and costs.

POSITION OF THE COMMITTEE

[236] The committee discussed whether the amount required to be paid into court was appropriate. There may be cases where it is unfair to require the person in possession

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[106] *Civil Procedure Encyclopedia, supra* note 102 at 55-42, citing *Gebruder Naf v. Ploton* (1890), 25 Q.B.D. 13 (C.A.). The learned authors make the observation under the title "Personalty Subject to Lien or Charge" but they were not directly considering any specific rules.

to pay in the amount of the lien or security, and that the actual value of the property would be a better standard. On the other hand, the courts may have considerable difficulty in assessing value which may explain why courts today order the whole amount claimed to be paid into court, even if it is more than the property is worth. The committee also noted the inconsistent treatment of interest and costs.

[237] The committee concluded that, rather than specifying a value-based test, it would be better to give the court discretion about how much should be paid into court. The court should also be able to order payment in of an additional reasonable amount for storage charges,[107] interest and costs.

ISSUE No. 53
Should the new preservation order rule preserve the court's power to authorize any person to enter land or buildings? Are any modifications needed?

[238] Rule 468 presently empowers the court in a preservation order to authorize any person or persons to enter upon or into any land or building. The right of entry is often part of an order for the inspection of property, but it may be relevant to pre-trial remedial orders as well; for example, it can be used to facilitate the sale of land.

POSITION OF THE COMMITTEE

[239] The committee proposes that the court power to authorize persons to enter land or buildings serves a useful purpose and should continue in the new version of Rules 467, 468 and 469. It should be modified in two ways:

1. The entry must seem to the court to be necessary or expedient for the purpose, and
2. The applicant should be required to provide an indemnity for the affected person.

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[107] *Civil Procedure Encyclopedia*, *ibid.* at 55-42, say that storage charges are not required to be paid into court in Ontario. The learned authors are considering personalty subject to a lien or charge, i.e., rules like r. 469.

CHAPTER 10. MONEY AND PROPERTY IN COURT: RULE 494

[240] Rule 494, the stop order rule, seems innocuous, but it raises some interesting and complex issues of law, history and policy. The rule provides:

> **494(1)** Any person claiming to be interested in any money, stock or securities in court, or claiming to have them applied towards the satisfaction of any judgment or writ of enforcement against the person to whose credit the money, stock or securities stand, may, upon an affidavit verifying his claim, apply *ex parte* for an order directing that the money, stock or securities shall not be paid out or dealt with except upon notice to him.
>
> **(2)** The person obtaining the order may be ordered to pay any costs, charges and expenses occasioned thereby to any person interested in the money, stock or securities to which the order relates.

[241] The rule deals with two different cases:

Case 1 – the person "claiming to be interested" in any money, stock or securities in court, and

Case 2 – the person claiming to have the money, stock or securities in court applied towards the satisfaction of any judgment or writ of enforcement.

In both cases, the remedy sought is "an order directing that the money, stock or securities shall not be paid out or dealt with except upon notice to him." The idea is to freeze the money or asset so that it will remain in court until the applicant has a chance to make their claim against it.

ISSUE No. 54
Should Rule 494 be retained in its present form as a remedy for an applicant interested in money, stock or securities in court?

[242] The first case to which Rule 494 applies is that of the person who claims to be interested in money, stock or securities in court. It works as a kind of preservation order.

POSITION OF THE COMMITTEE

[243] This aspect of Rule 494 seems sensible. Courts ought to be able on application to freeze property or funds in court where a third person makes out a case for such an order. The applicant is not asking that the property in court be given to them immediately; the goal is to ensure that the applicant gets notice before the money or securities are dispersed so that the applicant can establish a claim to them. Because this aspect of Rule 494 deals with matters outside the scope of the *Civil Enforcement Act* and because it provides a significant and useful process, it should remain in the rules.

[244] The effect of Rule 494 is limited. Assume that Tom and Dick are engaged in litigation about who has the better claim to the securities in court. Harry applies under Rule 494 for a stop order, alleging that he has a better claim than either Tom or Dick. If Harry succeeds, all he gets is a right to notice if the securities are to be "dealt with." If Harry wants to establish his claim, he must, one assumes, commence an action to do so. The stop order does not do that job.

[245] The remedy will primarily be used before judgment. Rule 494 should therefore be moved earlier in the rules to our new part entitled "Preservation of Rights in Pending Litigation." The rule should say clearly that it applies before and after judgment.

[246] At present, the rule applies only to money, stock or securities in court.[108] In our view, there is no particular magic in these assets. Why are securities protected but not the Vermeer painting or the antique automobile? The process ought to apply to all funds and personal property.

[247] If the existing language is retained, the drafter might consider dropping the word "stock" and using the more expansive term "securities." We also wonder about the words "interested in any money." A person can have a property interest in securities but can they have any ownership interest or charge on money (assuming the money is

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[108] The restriction of the rule to money or securities probably flows from the nineteenth century law on charging orders which were often accompanied by stop orders and which were restricted to the same kinds of property.

not rare coins)? If the drafter is talking about a person with an assignment of book debts or a charge against a fund, is there a clearer way to express this claim? The drafter should try to find more appropriate language than "interested in money."

ISSUE No. 55
Should Rule 494 be retained in its present form as a remedy for a person claiming to have the money, stock or securities in court applied towards the satisfaction of any judgment or writ of enforcement?

[248] This part of the rule gets us into complexities. A little history is necessary. English and Canadian law has experienced considerable difficulty in devising effective creditors' remedies against funds or assets of the debtor held by the court.[109] Execution has been generally held to be useless against such property, absent legislation changing this result. Garnishment is equally unavailable because of section 78(j) of the *Civil Enforcement Act* which says that "money held in a court is not subject to garnishment." Nineteenth century law invented or developed three devices to get at money or property in court.

1. The Court of Chancery invented a charging order against funds in court[110] on analogy to the charging order created by section 14 of the *Judgments Act, 1838*[111] against stock or shares. The charging order was seen as a type of equitable execution. The remedy has been granted in Canada.[112]

2. The English courts also invented the stop order to prevent drawing out a fund in court to the prejudice of an assignee, lienholder or unsecured creditor.[113] The English stop order was later codified in the *Rules of the Supreme Court* and has been copied exactly or with modifications in many Canadian jurisdictions,

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[109] The following account is based on Dunlop book, *supra* note 20. See also *Civil Procedure Encyclopedia*, *supra* note 102 at 57-43 – 57-44.

[110] Dunlop book, *supra* note 20 at 85-88, 94-96.

[111] *Judgments Act*, 1838 (1 & 2 Vict.), c. 110.

[112] Dunlop book, *supra* note 20 at 109-110, 425-428, 441.

[113] Dunlop book, *ibid.* at 441-443; *Civil Procedure Encyclopedia*, *supra* note 102.

including Alberta. The remedy is often used to freeze funds in court until the creditor can obtain a charging order against the funds. Stop orders have been granted in Canada, including Alberta.

3. A receivership order could also be used to receive property or money which might be paid or transferred out of court to the debtor.

[249] The Institute 1991 report *Enforcement of Money Judgments*[114] traced the above history. It argued that the charging order against funds in court had been replaced by two pieces of Alberta legislation.

1. Section 7 of the *Execution Creditors Act*[115] permitted the sheriff or any interested party to apply for an order that a fund in court belonging to an execution debtor be paid to the sheriff for distribution as proceeds of execution.
2. The second "replacing" provision was Rule 494 (the stop order rule).[116]

[250] The Institute *Enforcement of Money Judgments* report[117] proposed that garnishment be extended to include funds in court "to which the enforcement debtor is, or might become, entitled." Both section 7 of the *Execution Creditors Act* and Rule 494 (the stop order rule) would be "replaced" by garnishment.[118] The garnishee summons would be served on the clerk of the court who would respond like any garnishee. "Of course, the clerk would pay nothing to the sheriff until it was clear that the fund in court (or some part of it) was payable to the debtor."[119]

[251] The government's response was interesting.

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[114] ALRI, *Enforcement of Money Judgments*, *supra* note 4, vol. 1 at 228-229.

[115] R.S.A. 1980, c. E-14.

[116] It is doubtful if s. 7 of the *Execution Creditors Act* abolished the charging order. The Institute may have meant that, as a practical matter, lawyers used s. 7 or r. 494 instead of the antiquated charging order process.

[117] *Supra* note 4.

[118] The Institute also called for the abolition of the charging order against stock or shares under the Imperial *Judgments Act*, 1838, *supra* note 111. See ALRI, *Enforcement of Money Judgments*, *supra* note 4, vol. 1 at 249-252.

[119] ALRI, *Enforcement of Money Judgments*, *ibid.*, vol. 1 at 228.

1. It expressly rejected in section 78(j) of the *Civil Enforcement Act* the idea that garnishment be used to catch funds in court.

2. It repealed the *Execution Creditors Act*, including section 7.[120] There does not appear to be anything like section 7 in the *Civil Enforcement Act*.

3. It preserved Rule 494.

4. Section 2(b) of the *Civil Enforcement Act* lays down the general principle that "all property of an enforcement debtor is subject to writ proceedings under this Act." One assumes that funds or property in court are included. The result may be that money or property in court can be seized, although the conclusion is surprising.

5. As to the charging order against funds in court, nothing overt is said. However, section 2(a) of the *Civil Enforcement Act* may be relevant. It provides:

> 2. The following applies with respect to the carrying out of civil enforcement proceedings:
>
> (a) except as otherwise provided for in another enactment,
>
> (i) a money judgment may only be enforced, and
>
> (ii) a seizure or eviction may only be carried out,
>
> in accordance with this Act.

It has been suggested that the charging order is no longer available in Alberta.[121]

[252] The upshot is that creditors are arguably in a worse position to pursue funds or assets in court than they were before the *Civil Enforcement Act*. It is possible, although contrary to most case law, that execution is available against funds or property in court. Garnishment against "money held in a court" is prohibited. A receiver order under section 85 of the *Civil Enforcement Act* is available only against exigible, that is, not exempt,[122] property. The result is that receivership under the *Civil Enforcement Act* and, more likely, the *Judicature Act* may be available, although at

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[120] The repeal of s. 7 would not revive the charging order if the latter had been abolished by s. 7. See *Interpretation Act*, R.S.A. 2000, c. I-8, s. 35(1)(a).

[121] Rutman, *supra* note 82 at 10-26.

[122] See definition of "exigible" in the *Civil Enforcement Act*, *supra* note 8, s. 1(1)(u).

some expense. One conclusion is clear. A judgment creditor has no effective and simple remedy against property in court with the possible exception of receivership and a charging order. A stop order, taken alone, does nothing except to temporarily freeze the asset.[123]

POSITION OF THE COMMITTEE

[253] The committee thinks that the law should include a simple process by which a creditor can seize or attach whatever rights the debtor has to take funds or property out of court. The *Civil Enforcement Act* lays down the general principle that all property is exigible unless declared to be exempt by the *Act* or another statute. What is missing is a simple twenty-first century process to achieve that goal in the case of funds or property of the debtor in court. We do not propose the revival of the charging order. A stop order under Rule 494 does not do the job. All it does is to freeze the property or money in court in the sense that the debtor cannot receive it without notice to the creditor.

[254] The Institute *Enforcement of Money Judgments* report[124] proposed that garnishment be extended to include funds in court "to which the enforcement debtor is, or might become, entitled." This result would be achieved by including funds in court in the definition of "future obligation" in section 77(1)(c) of the *Civil Enforcement Act*. (The obligation could also be included in the definition of "current obligation" where the court has decided the disposition of the funds.) This recommendation was expressly negatived in section 78(j) of the *Civil Enforcement Act*.

[255] The Institute proposal is a possible model for reform. It does not interfere with the working of the litigation process concerning the funds in court. The court may hold that the funds belong, not to the debtor, but to another party to the litigation. In that event, both the debtor and the creditor are losers. This is no different from other near-debts included in the present definition of future obligation. All that the Institute proposal means is that, if the court decides that the funds should become payable to

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[123] Other possibilities include applying for directions under s. 5 or for an attachment order under s. 17 of the *Civil Enforcement Act*, *ibid*.

[124] *Supra* note 4, vol. 1 at 229.

the debtor, a current obligation will arise and the money will be paid into court pursuant to the garnishee summons. Of course, the Institute proposal does not solve the problem of property in court other than money.

[256] We have found relatively few models of an appropriate section. The Newfoundland Rules create an incomplete remedy in Rule 51.01:

> 51.01. Where money is standing to the credit of a judgment debtor in Court, the Court may, on application of the judgment creditor or sheriff and on notice, make such order with respect to the money in Court as it thinks just.

The Newfoundland rule is helpful but limited. It applies only to judgment debtors and to situations where "money is standing to the credit" of the debtor. In our view, the remedy should also be available before judgment as part of an attachment order under Part 3 of the *Civil Enforcement Act*. It should not be limited to money which stands to the credit of the debtor, that is, money the right to which has been settled. It should extend to money which is claimed by the debtor although the money cannot be taken until the claim is settled in the debtor's favour. An *ex parte* application should be available unless the court orders otherwise.

[257] If what is sought is a flexible court-controlled remedy over claims against funds or property in court, then receivership, somewhat modified, may be the best solution. The downside of receiver orders is that they can be complex, time-consuming and expensive.

[258] Our bottom line is that the law should include a simple process by which a creditor can seize or attach whatever rights the respondent has or will have later to take funds or property out of court. If the court has decided that the money or property is that of the debtor, then the remedy should be executed forthwith. If not, then the remedy should be available immediately although its execution must await the court's determination. The remedy may be located in the new Alberta rules or it may be legislated as an amendment to the *Judicature Act* or the *Court of Queen's Bench Act*. Until this new process is designed, Rule 494 should be continued in force. It may find a place in the new process, but it certainly is needed in the interim.

[259] In Chapter 6, Issue 25, we proposed that the new Alberta rules should contain a part, entitled "Preservation of Rights in Pending Litigation," which should follow the

similarly titled part of the Ontario Rules. This new part should contain processes which are used primarily or exclusively before trial and judgment. Both Rule 494 and the new process will primarily be used before judgment. If Rule 494 is retained or if the new process is put in the new rules, they should be included in our new part entitled “Preservation of Rights in Pending Litigation.” The rules should say clearly that both apply before and after judgment.

CHAPTER 11. RECOVERY OF POSSESSION OF LAND: RULES 361 TO 363

[260] Rule 361(1) provides that a judgment or order for the recovery or for the delivery of the possession of land may be enforced by a writ of possession. Rule 361(2) says that, where a judgment or order directs delivery of possession on a specified date or time, the person entitled to get possession may without further order direct the clerk to issue the writ of possession on filing an affidavit showing service of the judgment and noncompliance. Otherwise, writs of possession can only be issued by court order.[125] For the history-minded, Rule 362 informs us that a writ of possession has the effect of a writ of assistance. Rule 363, dealing with goods left on the premises which are subject to the writ of possession, will be dealt with below.

ISSUE No. 56
Here and elsewhere, should the term "writ" be replaced by judgment or order?

[261] In this context, the writ is a formal written command of a court or the Crown to a sheriff or other official authorizing certain acts in respect of a person or a person's property. An example is the writ of *fieri facias* or writ of execution and, now, the writ of enforcement. A writ of *fieri facias* was a command to the sheriff to satisfy a judgment from the debtor's property.

[262] Two terms used in these rules are "writ of possession" and "writ of assistance." The 6th edition of *Black's Law Dictionary* defines a writ of possession as a "writ of execution employed to enforce a judgment to recover the possession of land. It commands the sheriff to enter land and give possession of it to the person entitled under the judgment."[126] The same dictionary defines a writ of assistance as existing "to enforce judgment of the court directing specific act....an equitable remedy normally used to transfer real property, the title of which has been previously adjudicated, as a means of enforcing the court's own decree....essentially a mandatory

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[125] R. 361(3).

[126] *Black's Law Dictionary*, 6th ed., *s.v.* "writ of possession" at 1611.

injunction, the effect of which is to bring about a change in the possession of realty."[127]

POSITION OF THE COMMITTEE

[263] Apart from the attraction of archaic technical terms, the committee had trouble finding a reason for the continued use of "writ." It may be difficult to look behind a writ to question the authority of the civil enforcement agency, but well-drafted judgments and orders of the court granting the same relief carry at least as much weight. There may be legal problems in masters giving possession orders, as against writs, although the committee's experience was that masters grant possession orders in foreclosure actions and landlord-tenant disputes all the time. We were driven to the conclusion that, in light of the Steering Committee's goal to maximize the rules' clarity, the term writ should be replaced by order or judgment here and elsewhere in the enforcement rules. The term "writ of enforcement" in the *Civil Enforcement Act* might also be reconsidered although it lies beyond the mandate of the Rules Project.

ISSUE No. 57
Can the writ of possession be eliminated as a step in the process of recovery of the possession of land?

[264] Writs of possession are currently used in two circumstances: landlord-tenant disputes and foreclosures. Rule 361(1) requires that a plaintiff seeking the recovery or the delivery of possession of land must jump two hurdles: the plaintiff must obtain (1) a judgment or order for recovery or delivery of possession of the land, and (2) a writ of possession.

POSITION OF THE COMMITTEE

[265] The committee was not aware of any practical advantage in the requirement of a writ of possession. It did not see why a properly drafted order would not have the same result. In the interests of simplicity, the writ step should be eliminated. We therefore propose that Rule 361(1) be repealed.

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[127] *Ibid.*, s.v. "writ of assistance" at 1609.

ISSUE No. 58
What documents should be served on the person in possession of land before the possession order is executed?

[266] Rule 361(2)(c) requires that a judgment or order for possession be served on the person in possession of the land. The committee understands that the clerks of the court are very conscientious about ensuring that possession orders have been complied with before issuing writs.

POSITION OF THE COMMITTEE

[267] Even if the writ of possession is abolished, a concern remains that the judgment or order for possession be served on the person in possession. Service should be effected before a bailiff carries out the terms of the order. If the writ of possession step is eliminated, the committee sees no reason why the manner of service should not be specified in the order. The committee was concerned with self-represented applicants for a possession order failing to ensure that orders are served properly.

[268] The committee concluded that the new Alberta rules should continue Rule 361(2)(a) and (b) but remove any reference to the writ of possession. The rule should say that the successful applicant may obtain possession when the civil enforcement agency has served the order on the person in possession pursuant to the terms of the order. The court may order otherwise. An affidavit showing that service has been properly effected should then be filed. The rest of Rule 361(2) and the whole of Rule 361(3) should be repealed. The rules that are retained are usually used after judgment and should continue to be placed after the judgment rules in the new rules.

[269] The effect of these changes is to put control over the possession of land process into the hands of the court which can tailor the terms of the order to fit the circumstances. The possession order should say that, once the civil enforcement agency serves the person in possession, the agency has the authority to move out the person in possession. The agency finds its authority to move people out in the court order. If the civil enforcement agency fails to comply with the terms of the order, either the agency or the creditor on whose behalf the agency is working will be liable. Requiring the civil enforcement agency to serve the order for possession eliminates the need to have a separate process server do the job.

[270] The committee also discussed Cinderella orders, that is, orders that are stayed while certain payments are made but which may be enforced if there is a default. Some masters granting possession orders of this type include a term that notice of the default be served on the person in possession prior to the order being enforced. The committee agrees with this practice. We would include in the rule a requirement that, in the Cinderella order situation, notice of default must be served on the person in possession prior to enforcement of the order, unless the court orders otherwise.

[271] The committee also concluded that Rule 362 can be repealed. We do not see what the rule adds to the remedy.

ISSUE No. 59
Should Rule 363 be retained in the new rules? Should Rule 363(5) be rewritten?

[272] Rule 363 deals with the problem of goods left in a property which is the subject of a possession order. In order to enforce a writ of possession, it is not necessary to remove goods.[128] Where a civil enforcement agency does so, the owner of the goods may recover them by paying certain sums.[129] If the owner does not, Rule 363(3) provides that the person on whose behalf the possession order was enforced may apply to a court for an order authorizing the goods to be sold and the manner of sale. The distribution of the proceeds is set out in subrule (4). Subrule (5) provides that, where the goods were not removed at the time that the writ of possession was enforced and the owner of the goods does not remove them within 30 days, the person on whose behalf the writ was enforced may apply to court for directions as to the disposition of the goods remaining on the premises.

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[128] R. 363(1).

[129] R. 363(2).

[273] The problem dealt with by Rule 363(5) is also regulated in the *Residential Tenancies Act*[130] which sets different rules for three situations of "abandoned goods."[131]

1. **Goods worth less than $1,000.** Under section 28(2), a landlord who believes on reasonable grounds that abandoned goods have a total market value of less than $1,000[132] "may dispose of the goods." The goods may be sold or just hauled to the dump.

2. **Goods worth $1,000 or more, but less than the cost of removal, storage and sale.** Where the landlord believes that the goods are worth $1,000 or more, but less than the cost of removing, storing and selling them, they may sell the goods by a means and for a price that the landlord believes is reasonable.[133]

3. **Goods worth $1,000 or more, and equal to or more than the cost of removal, storage and sale.** The landlord must store the abandoned goods for 30 days.[134] After that period, they may dispose of the goods by public auction or, with a court order, by private sale. If no bid is received at a public auction, the landlord is free to dispose of the goods.

POSITION OF THE COMMITTEE

[274] The committee thought that Rule 363 as a whole is sensible and should be retained although the term "writ of possession" should be replaced by "order of possession" to fit our earlier proposal. We would prefer the rule to refer to "personal property' rather than "goods" because the latter term is usually limited to tangible

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[130] R.S.A. 2000, c. R-17.

[131] The term is defined in *ibid.*, s. 28(1) of the to mean goods left on residential premises by a tenant who has (1) abandoned the premises or (2) vacated the premises and whose tenancy has expired or been terminated.

[132] The subsection speaks of "the prescribed amount" which is set in the *Residential Tenancies Ministerial Regulation*, Alta. Reg. 229/1992, s. 5(1).

[133] *Residential Tenancies Act*, *supra* note 130, s. 28(3).

[134] The subsection speaks of the prescribed period which is set in the *Residential Tenancies Ministerial Regulation*, *supra* note 132, s. 5(2).

personalty. Rule 363 is usually used after judgment and should continue to be placed after the judgment rules in the new rules.

[275] The committee was troubled by an apparent conflict in approach to personalty left or abandoned by the tenant. Rule 363(3) provides that, where a civil enforcement agency has removed goods and the owner of the goods has not recovered them, the person on whose behalf the possession order was enforced may apply to a court for an order authorizing the goods to be sold and the manner of sale. Rule 363(5) requires the person on whose behalf the writ was enforced to apply to court for directions as to the disposition of the goods remaining on the premises. In contrast, the *Residential Tenancies Act* offers three alternatives, all of which are easier for the landlord or mortgagee. They turn on the value of the abandoned goods, established by the reasonable belief of the landlord. A court order is generally not needed.

[276] We prefer the approach of the *Residential Tenancies Act*. If the tenant or owner is not prepared to pick up their belongings, why should the landlord or the mortgagee exercising rights under a possession order be held to a higher standard than the one set out in the *Act*? We suggest that Rule 363(3) and (5) be combined into one rule which incorporates the approach to abandoned personalty set out in section 28 of the *Act*. The committee discussed whether $1,000 was the appropriate threshold. We concluded that it is. It is not very high, so creditors will be forced to follow a more stringent process in many cases. The threshold will minimize the possibility of debtors claiming that there was valuable personalty left on the premises. As to the whole of the above, the court should be able to order otherwise.

CHAPTER 12. SALES OF LAND: RULES 494.1 TO 498[135]

[277] Part 37 is entitled "Sales of Real Estate," but the rules speak about sales, mortgages, partitions and exchanges of land, whether as part of a foreclosure proceeding or otherwise. The rules give the court substantial powers over the sale or other transfer of land as part of a court proceeding. Rule 495 empowers the court to order sale and to compel anyone who is (1) bound by the order and (2) in possession of the property or in receipt of rents and profits to deliver possession and receipts to the purchaser or such other person as the court directs. Rule 496 says that, in addition to powers already existing where a sale, mortgage, partition or exchange of real estate is ordered, the court "may make directions as to how it is to be carried out." Where all parties are before the court, it may order a sale, mortgage, partition or exchange of land "to be carried out by proceedings altogether out of court" but money produced thereby shall be paid into court or to trustees or otherwise as the court may order.[136] Where a judgment or order directs a sale, it shall not be made until approved by the court "and all proper parties shall join in the sale and conveyance as the court directs."[137] Rule 494.1 says that Part 37 "is subject to the *Civil Enforcement Act* and the regulations under that *Act*."

[278] Similar rules are common elsewhere in Canada. Some jurisdictions, like Ontario and Manitoba, appear to have only mortgage and partition rules regarding sale. Others have rules applying to sale generally. Some are complex, setting out details as to the kinds of directions a court can give, the distribution of proceeds and costs. A couple of provinces have special rules about debenture holders' proceedings where property is to be sold, providing that the court may order sale before or after judgment, whether or not all interested persons are ascertained or served.

[279] The sale of land rules have been the subject of some judicial interpretation. Stevenson and Côté are cautious: "This is a complex topic, with a puzzling but

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[135] This report does not discuss the sale of real estate in mortgage litigation.

[136] R. 497.

[137] R. 498.

different set of statutes and rules in each province. How the legislation in a given province interacts is sometimes difficult to understand."[138] Our rules are even more complex, as some deal only with sales while others include mortgages, partitions and exchanges of land. One member of the committee noted that Part 37 is not used in foreclosure proceedings because there are separate foreclosure rules. Another said that Rule 495 is the real estate equivalent of Rule 467, the first of the three preservation order rules discussed above.

POSITION OF THE COMMITTEE

[280] The committee's conclusion was that the Part 37 rules are useful for situations not dealt with elsewhere. They reserve plenty of discretion to the court. In our view, they should be retained. As they normally come into play after judgment, they should remain where they are.

[281] The drafter should redraft the rules as a list of terms or elements which the court may include in its order. The court should have ample discretion. The drafter should review the interplay of these rules with the foreclosure rules.

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[138] *Civil Procedure Encyclopedia*, *supra* note 102 at 59-1.

CHAPTER 13. REMEDIES TO ENFORCE COURT ORDERS

ISSUE No. 60
Should the new rules include a list of remedies for breach of a court order to do or refrain from doing something?

[282] One of the most common complaints of respondents to the Rules Project is that the courts will not enforce their orders. Here are some examples:

1. "Justices are not willing to enforce the Rules. [The respondent goes on to discuss the failure to provide a financial statement under Rule 370.] Our clients have to pay the costs of the court application and we can't even get a contempt finding."
2. "Judges give extensions to debtors who do not show up in court. [The debtor fails to provide a financial statement or attend an examination in aid.] [The debtors] are in contempt according to Rule 377, but judges won't enforce the contempt rules."
3. "When costs are awarded, they should be payable forthwith.... It doesn't have to be a large penalty, but there must be enforcement of the Rules."
4. "No one obeys the Rules and the courts will not enforce them anyway."
5. "Another example is that the costs sanctions for not complying with the Affidavit of Records are not enforced by the Masters."
6. "Enforcement of the Rules remains a problem. It is hard to push a trial along when deadlines aren't meant and orders aren't enforced...."
7. "Chambers judges often do not enforce the Rules."
8. "There is too much lenience in enforcing the Rules, particularly when you are required to prove that there has been prejudice...." [The writer goes on to argue that the prejudice requirement should be eliminated.]
9. "Several counsel noted that the Rules are currently not enforced in a meaningful way...."
10. "There are unrepresented litigants in foreclosure matters all the time.... There are essentially two sets of Rules. For example, an unrepresented litigant who doesn't file an Affidavit will be forgiven three times.... [Y]ou can't have two sets of Rules, or the whole system will be affected."

[283] While the expressions may be extreme, the frustration is understandable. In many cases, however, "enforcement" means a finding of contempt which will result in committal to prison until the contempt is purged by compliance. While disobedience to court rules and orders undermines the legal process, imprisonment of the violators is in most cases excessively harsh. The result is that a court confronted with a disobedient litigant or witness is likely to threaten dire consequences rather than actually commit the violator.

[284] A good example of the failure of the present enforcement machinery is the group of processes for obtaining information about the debtor's assets. The financial report and the examination in aid are essential for the creditor to decide whether to launch enforcement processes and how to conduct them. They can be frustrated by the debtor simply not filling in the report or showing up at the examination. In actual practice creditors are required to make several attempts and applications before the court will grant a contempt order against a debtor, as the only real remedy is to issue a warrant for the debtor's arrest. It is a frustrating, expensive and ineffective procedure.

POSITION OF THE COMMITTEE

[285] The basic problem appears to be that, in many cases, the penalty for enforcing the rules is so harsh that courts would rather not use it. We noted earlier Jack Beatson's comment that remedies must conform to "the principle of proportionality", that is, drastic remedies should be used only "when less intrusive forms of enforcement ... have not worked or are not available."[139] The same principle applies to the enforcement of court rules and processes.

[286] Surely it is possible to design a range of penalties which a court may give against someone who acts contrary to or who disobeys a court order other than an order for the payment of money. The list would include but would not be limited to contempt; it would include penalties ranging from a warning to a fine[140] to a monetary award. Monetary awards against the violator should be enforceable by all the remedies available to the creditor under the *Civil Enforcement Act*. In some cases, the

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[139] Beatson, *supra* note 1 at 10.

[140] If the fine is a genuine criminal fine and not a civil judgment under another name, it might survive the discharge of the bankrupt under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 178(1)(a).

exemptions available under the *Civil Enforcement Act* and other legislation might be modified or set aside. A failure to pay some judgments under the motor vehicle legislation can result in the suspension of the driver's licence of the delinquent;[141] the new enforcement rules might follow suit. A review of Alberta and other legislation will suggest other possibilities, particularly for corporate offenders.[142] There may be situations where officers and directors of the delinquent corporation should be personally liable.

[287] An entirely different approach is suggested by Rule 367 and section 8 of the *Civil Enforcement Act*. Rule 367 provides that if (1) a mandamus, mandatory order, injunction or judgment for the specific performance of a contract is not complied with, or (2) a judgment requires a person to do any act other than the payment of money and that person fails to do that act, the court, in addition to or instead of finding the disobedient party in civil contempt, may direct that the act required to be done be done by the successful party or some other person appointed by the court. The expenses in carrying out the act may be ascertained by a method directed by the court, and a writ of enforcement may be issued for that amount and costs.

[288] Section 8 of the *Civil Enforcement Act* accomplishes the same result in somewhat different terms.

> **8** For the purposes of dealing with or disposing of property pursuant to this Act, an agency, a bailiff or a receiver appointed under this Act may
>
> (a) do any act or thing that would otherwise have to be done by
>
> (i) an enforcement debtor, or
>
> (ii) a person who is subject to distress proceedings,
>
> and
>
> (b) execute or endorse any document that would otherwise have to be executed or endorsed by
>
> (i) an enforcement debtor, or
>
> (ii) a person who is subject to distress proceedings.

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[141] *Traffic Safety Act*, R.S.A. 2000, c. T-6, ss. 101-105.

[142] The Lord Chancellor's Office is considering a variety of penalties against corporate offenders in creditors' remedies law, including sanctions against directors, disqualification of directors and winding up the company for persistent non-compliance. See Lord Chancellor's Department, *Enforcement Review: Report of the First Phase of the Enforcement Review* (A review issued by the Department for Constitutional Affairs (London: Lord Chancellor's Department, 2000) at 50, online: <http://www.dca.gov.uk/enforcement/firstphasefr.htm>.

[289] Instead of having a confrontation with the person who disobeys a court order, these provisions empower the court to get someone else to perform the act which the disobedient person should have performed. The approach of Rule 367 and section 8 of the *Civil Enforcement Act* is not to say, here is your penalty, but rather to say, we will get around your refusal and find another way to do the job. The gist of these provisions should be included in the list of proposed remedies available to the court. In some cases, it will solve the problem; in others, a more confrontational remedy will be needed. Both should be available to be used as the court decides.[143]

[290] The committee has little sympathy for scofflaws who ignore court processes and orders. In serious cases, contempt may well be the best penalty and should be used. Most situations do not justify the use of contempt but should result in some other penalty. As in criminal process and in labour arbitration, the capacity to choose from a variety of penalties and remedies gives the court or arbitrator discretion to choose the most appropriate solution with the result that rules will be enforced more often and more firmly than is now the case. A range of possible penalties may make it easier for courts to deal with self-represented litigants, noted in comment 10 above.

[291] Three additional points need to be made:

- Any list of enforcement penalties should make it clear that the inherent jurisdiction of the court to award any other remedy is preserved.
- The list will need modification in respect of masters who have limits on their jurisdiction under the *Court of Queen's Bench Act*.[144] If the applicant is seeking any penalty short of contempt, the rule should make it clear that the master has jurisdiction to hear and decide the matter.[145]
- This remedial rule will be used after judgment and should be located with the other postjudgment rules.

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[143] A similar problem can arise under r. 498, discussed in Chapter 12.

[144] R.S.A. 2000, c. C-31, s. 9(3). Masters cannot deal with questions of criminal or civil contempt.

[145] In Chapter 15, Issue 60, we will propose that masters be empowered to hear and decide civil contempt applications in enforcement matters.

ISSUE No. 61
Should Rules 364 to 367 be part of the new rules?

[292] Rule 364 deals with the situation where a judgment directs the recovery of specific property other than land or money. In such a case, the clerk may issue a writ of delivery directing a civil enforcement agency to cause the property to be delivered in accordance with the judgment.[146] Where the specific property is not delivered, the court may order that the civil enforcement agency take possession of different personal property of the judgment debtor valued to an amount not in excess of double the value of the property subject to the judgment. The property is to be kept until further court order.[147]

[293] The 6th edition of *Black's Law Dictionary* defines a writ of delivery as

> a writ of execution employed to enforce a judgment for the delivery of chattels. It commands the sheriff to cause the chattels mentioned in the writ to be returned to the person who has obtained the judgment; and, if the chattels cannot be found, to distrain the person against whom the judgment was given until he returns them.[148]

The writ is usually a postjudgment remedy.

[294] Rules 365 and 366 continue in Alberta practice, the curious writ of sequestration. A writ of sequestration is used to enforce obedience with a court order. It orders the taking of possession of a person's assets until the act ordered to be done by that person has been done. The 6th edition of *Black's Law Dictionary* describes a writ of sequestration as "a writ authorizing the taking into the custody of the law of the real and personal estate (or rents, issues and profits) of a defendant who is in contempt, and holding the same until he shall comply."[149] Sequestration can be used in addition to or instead of a finding of civil contempt. It is an extraordinary remedy and is penal in nature.

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[146] R. 364(1).

[147] R. 364(2). This curious rule finds its origins in the English writ of capias in withernam. See Percy George Osborn, *A Concise Law Dictionary*, 4th ed. (London: Sweet & Maxwell, 1954) *s.v.* "writ of capias in withernam" at 64.

[148] *Black's Law Dictionary*, *supra* note 126, *s.v.* "writ of delivery" at 1610.

[149] *Ibid.*, *s.v.* "sequestration" at 1366.

[295] Rule 365 provides that, in addition to or in lieu of holding in contempt "a party to a judgment referred to in Rule 364," the court may give leave that the judgment be enforced by a writ of sequestration which is to be directed to a civil enforcement agency.

[296] Rule 366 deals with the different situation of a judgment against a corporation which is "wilfully disobeyed." Such a judgment can be enforced, with leave of the court, by one or more of three remedies: (1) a writ of sequestration against the corporation's property, (2) a court order holding one, some or all of the directors or officers of the corporation in civil contempt, and (3) a writ of sequestration against the property of one, some or all of the directors or officers of the corporation.

[297] Rule 367 is discussed above in Issue 60.

POSITION OF THE COMMITTEE

[298] Rules 364 to 367 create a group of remedies which the court can deploy against the party or person who refuses to obey a court order. They are clothed in antiquated language and rely on ancient processes, but their purpose is in line with our proposal to extend the range of remedies available to the court. In our view, the rules should be rewritten in modern language and placed in the list of proposals suggested in Issue 60 above. The remedies will mostly be exercised after judgment and the relevant provisions should be placed with the other post-judgment rules.

[299] We would propose several changes to the existing Rule 364.

- All orders of delivery should be given by the court, not the clerk.

- The present rule empowers the civil enforcement agency to take possession of different personal property valued to an amount not in excess of double the value of the property subject to the judgment. The provision uses the ambiguous term "value" and is unnecessarily rigid. There will be situations where much more than double the value of the property will be needed. We would leave to the court the question how much property the civil enforcement agency should take.

- Whether or not the substitute property taken by the agency should continue in its possession should be determined by the court in its discretion.

[300] Some other specific comments may be made.

- The term writ should be deleted and replaced with "order."

- Rule 365 is incomprehensible unless you read it with a copy of *Black's Law Dictionary* at your elbow. The rule should delete all reference to the writ of sequestration and say directly the remedy which the court can grant.

CHAPTER 14. WINDING-UP AND RESTRUCTURING ACT RULES: RULES 754 TO 812

ISSUE No. 62
Should the Winding-up and Restructuring Act Rules (Rules 754-812) be repealed?

[301] The *Winding-up Act* was passed in 1882 to deal with the liquidation of "Insolvent Banks, Insurance Companies, Loan Companies, Building Societies, and Trading Corporations."[150] The *Act*, now re-entitled the *Winding-up and Restructuring Act*,[151] [*WURA*] is still in force and continues to be the basis for a relatively small but significant type of liquidation.

[302] Carfagnini identifies the objects of such legislation:

> The objects of winding-up legislation are to: (1) provide for the equitable and rateable distribution of a company's assets among its creditors without preference; (2) protect the debtor from harassment by its creditors; and (3) prevent the piecemeal realization of the debtor's assets and an unequal distribution of those assets among creditors.[152]

The *Act* empowers the court to stay proceedings and to order a pari passu distribution of dividends. There are significant differences between the *WURA*, the *Bankruptcy and Insolvency Act*[153] and the *Companies' Creditors Arrangement Act*[154] even though the statutes have roughly similar goals.

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[150] The words are drawn from the title of the 1882 statute. It was renamed the *Winding-up Act* in the consolidation of statutes of Canada completed in 1886. See generally Jay A. Carfagnini, "Proceedings under the *Winding-up Act*" (1988), 66 C.B.R. (N.S.) 77 [Carfagnini]. See also Bradley Crawford, "Restructuring Financial Institutions under the *Winding-up Act*" (1994), 10 B.F.L.R. 87; Lazar Sarna, "Definitions" (1994) 11:3 & 4 Nat'l Insolv. Rev. 33, 49.

[151] R.S.C. 1985, c. W-11 [*WURA*].

[152] Carfagnini, *supra* note 150 at 79.

[153] *Supra* note 140.

[154] R.S.C. 1985, c. C-36.

[303] Despite the federal statute, provinces have intervened in the field of winding up corporations. Two provinces today have their own winding-up acts.[155] The *WURA* itself contemplates provincial involvement in the legislative process. Section 109 of the present *Act* provides that proceedings under a winding-up order "shall be carried on as nearly as may be in the same manner as an ordinary suit, action or proceeding within the jurisdiction of the court."

[304] A more specific invitation to provincial lawmakers is section 136 which says that "a majority of the judges of a court, of which the chief justice shall be one" may settle forms and make rules to be followed in proceedings in this act. Section 137 provides that, until such local rules and forms are settled, the procedure shall "be the same as nearly possible as those of the court in other cases." Some western provinces accepted the invitation in section 136. British Columbia and Saskatchewan promulgated Winding-up Act rules early in the twentieth century[156] but repealed them in the 1970s or 1980s. Other provinces appear never to have created their own rules.

[305] Unlike most Canadian jurisdictions, Alberta retains its Winding-up Act Rules [*WURA* Rules]. Stevenson and Côté trace the Alberta rules back to the 1914 Rules of Court and ultimately to the English Companies (Winding-Up) Rules, 1890.[157] In their 1996 *Civil Procedure Guide*,[158] the authors speculate about their significance:

> These Rules are passed under the authority of the Federal Winding-Up Act, now RSC 1985, c. W-11, s. 136, but were applied to provincial companies by virtue of the Companies Act s. 269(2) RSA 1970 c. 60. As there does not seem to be any equivalent provision in the Alberta Business Corporations Act, it may be that these Rules no longer apply to any kind of provincially-incorporated company in Alberta. But they apply to banks and other federally-incorporated companies.

The Alberta *WURA* Rules appear not to have been substantially amended since 1968 when they were last revised and promulgated. They refer to the *Winding-up Act* even though the name of the Act has been the *Winding-up and Restructuring Act* since the 1980s.

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[155] *Winding-up Act*, R.S.N.B. 1973, c. W-10; *Winding-up Act*, R.S.P.E.I. 1988, c. W-5.

[156] British Columbia Rules date back at least to 1906.

[157] *Civil Procedure Handbook*, *supra* note 25 at 617-618.

[158] *Civil Procedure Guide*, *supra* note 102 at 2192.

[306] We noted above that the *WURA* is occasionally used in Alberta. The committee was curious whether there was any evidence that the Alberta *WURA* Rules were used. Our case research suggests that the *WURA* Rules are rarely referred to in the cases.[159] They may have been used to prepare court documents but were not sufficiently central to be mentioned in the judgments. What is more interesting is that, in cases under the *WURA*, counsel will often cite and the courts will apply rules from the non-*WURA* part of The Rules, including pleadings, discovery and costs. The Alberta courts are apparently prepared to fill gaps in the *Act* by having recourse to the non-WURA part of The Rules but are less ready to find a solution in the *WURA* Rules themselves.

[307] We contacted some counsel with experience in *WURA* litigation and received three major and some minor responses. The major comments can be summarized as follows:

1. The *WURA* Rules require some additional and perhaps unnecessary steps, but are not particularly onerous or time consuming. Windings-up in Alberta are relatively rare and extensive revision may not be justified. The rules can be lived with.

2. Repeal the *WURA* Rules. They are "entirely anachronistic and had virtually no application at all to the situation we faced in [a case counsel was involved in]." Despite involvement with a major lawsuit, "I don't believe I ever once encountered the need to consult this part of the Alberta *Rules of Court*." The balance of The Rules can apply appropriately to any proceedings that might be commenced under the *WURA*. See our Rule 811. Perhaps the rules should make it clear that the general rules of court apply to matters under the *WURA*. The parties should not be free to argue that the *Bankruptcy and Insolvency Act* rules apply. He also mentioned some problems with the *WURA* itself.

3. The *WURA* Rules are workable and repeal is not "possible or advisable." Most counsel involved in *WURA* litigation have used the *WURA* Rules, although one

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[159] The various Stevenson and Côté books cite numerous cases. However many of them are not from Alberta or arise under the *Bankruptcy and Insolvency Act*, *supra* note 140 or the *Companies' Creditors Arrangement Act*, *supra* note 154. Of cases which arise under *WURA supra* note 151, most do not mention the *WURA* Rules.

such lawyer indicated that he did not know that they existed. The rules could be improved on, but it is not a priority.

[308] The minor comments included the following:

1. The *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act* are more appropriate statutes, unless you are required to use the *WURA*.

2. The Rules should not apply to insolvency matters. The courts now are flexible and accommodating. There cannot be inflexible rules for insolvency because matters move quickly and are unpredictable.

3. There should be rules which codify procedures for insolvency. Currently there are a few specialized practitioners who seem to make up the rules as they go along. This is unfair to other counsel.

POSITION OF THE COMMITTEE

[309] The view of the committee is that the *WURA* Rules should be repealed. There are several reasons:

1. The *WURA* makes it clear that, where a jurisdiction has not created *WURA* rules, the general rules of the jurisdiction apply.

2. In the absence of rules dedicated to *WURA* matters, Alberta courts have ample jurisdiction to make procedural rulings. In Appendix B, we include a chart which shows the overlap between the present *WURA* Rules, the *WURA* and the present non-*WURA* rules. Our conclusion is that a court will be able to make procedural rulings likely to arise in *WURA* litigation by resort either to the general rules or to *WURA* itself.

3. This conclusion has apparently been reached by most Canadian jurisdictions. Even in provinces with their own winding-up acts, the legislation usually applies to provincially incorporated companies. The abandonment of the *WURA* rules in BC and Saskatchewan is telling.

4. The federal government has not created a separate set of rules for *WURA* proceedings. Why should this or any province fill the gap, especially in the absence of public concern?

5. *WURA* litigation is not a major problem in Alberta.

6. The Alberta courts are already showing a willingness to use the non-*WURA* Rules to solve problems in *WURA* disputes. Litigation does not appear to turn on the existing *WURA* Rules, judging by the cases.

7. The alternative to repeal is substantial surgery on the existing *WURA* Rules.

CHAPTER 15. MISCELLANEOUS ISSUES

ISSUE No. 63
Should masters be permitted to deal with applications for civil contempt?

[310] Section 9 of the *Court of Queen's Bench Act*[160] sets out the powers and jurisdiction of a master in chambers. Section 9(3) excludes from the master's jurisdiction matters related to criminal proceedings or the liberty of the subject[161] and applications relating to civil contempt.[162] Section 9(4) provides that, notwithstanding subsection (3), a master has the same power and jurisdiction as the court under sections 17 and 27 to 32 of the *Maintenance Enforcement Act*.[163] Those sections empower the court to imprison maintenance defaulters.

[311] The exclusion of civil contempt from masters' jurisdiction creates difficulties. Masters are more familiar with evasive debtors as the orders to attend examinations and provide financial information are usually made by the masters. Since they have a better appreciation of the frustration and cost caused by some debtors, they may be more willing to grant contempt orders. Masters have often heard the steps leading up to the contempt application and are in a better position to decide the issue. A common observation in feedback received by the Institute is that masters should have a broader jurisdiction.

POSITION OF THE COMMITTEE

[312] The committee strongly believes that masters should be empowered to hear and decide civil contempt applications at least within the areas surveyed in this consultation memorandum. The change would require an amendment to the *Court of Queen's Bench Act* and would necessitate consideration of the constitutionality of such an amendment. In policy, however, this committee urges the government to

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[160] *Supra* note 144.

[161] *Ibid.*, s. 9(3)(c).

[162] *Ibid.*, . 9(3)(d).

[163] R.S.A. 2000, c. M-1.

consider favourably an extension of masters' jurisdiction to include hearing and deciding civil contempt applications.

ISSUE No. 64
Should the new rules follow roughly the chronology of a lawsuit?

POSITION OF THE COMMITTEE

[313] In Chapter 1, we argued that the new Alberta rules should follow roughly the chronology of a lawsuit. At several points, we suggested the creation of a new part of the rules, entitled "Preservation of Rights in Pending Litigation," which would be located before the present rules on trial and judgment. Following the Ontario Rules, it would include processes usually deployed before trial and judgment such as interpleader, replevin and preservation orders. We also proposed that rules relevant to only one statute should be moved to that statute or the relevant regulation. Rules relevant to more than one statute or remedy should stay in the new Alberta rules.

[314] It follows that the present titles to the parts under consideration in this consultation memorandum should be rewritten or scrapped. There is nothing extraordinary about most of the remedies collected in Part 36 under the title "Extraordinary Remedies." In our view, all the remedial rules which are primarily used after judgment should be combined in one part entitled "Enforcement of Judgments and Orders."

ISSUE No. 65
Should the definitions of terms in the rules under review in this consultation memorandum be reviewed and rationalized?

[315] Definitions of key terms is a problem in the rules within our mandate. There are several definition rules which are inconsistent with each other and incomplete in their coverage. Here are the principal definition provisions.

Rule 5 – These definitions apply to all The Rules, unless there is a contradictory definition applicable to a specific part or division. Rule 5 does not define "judgment," "instructing creditor," "judgment creditor" or "judgment debtor." "Order" is defined in Rule 5(1)(j) as including a decree.

Rule 340 – The definitions in this rule apply to the whole of Part 28 but not elsewhere.

Rule 340(a) defines "judgment" to include "an order of the Court." Rule 5(1)(j) provides that an "order" includes a decree. So "judgment" as defined in Rule 340(a) must include a decree also.

Rule 340(b) provides that "'judgment creditor' means a person who is entitled to enforce a judgment."

Rule 340(c) says that a "'judgment debtor' means a person against whom a judgment may be enforced."

Rule 340(d) is the first reference to the *Civil Enforcement Act*. It says that "'related writ' means a related writ as defined in the *Civil Enforcement Act*."

Rule 342 is related to the definitions in Rule 340. It provides:

342 An order of the Court may be enforced against all persons bound by the order in the same manner as a judgment to the same effect may be enforced.

Rule 356 provides that any term used in Division 2 "that is defined in the *Civil Enforcement Act* has the meaning given to it by that *Act*." In Chapter 2 of this consultation memorandum, we proposed that Rules 357 and 358 be transferred to the *Civil Enforcement* Act or the *Civil Enforcement Regulation*, and that Rule 356 be repealed as unnecessary because the definitions in the *Act* would apply. We also proposed in Chapter 2 the repeal of Rule 380 for the same reason.

Rule 442 defines terms for the purpose of Rules 443 to 460:

442 In Rules 443 to 460,

(a) "claimant" means

  (i) a person referred to in Rule 443(1) who is making or is expected to make an adverse claim against property, or

  (ii) a person referred to in Rule 443(2) who makes a claim;

(b) "instructing creditor" means the instructing creditor as defined in section 1(1)(x) of the *Civil Enforcement Act*;

(c) "property" means property as defined in section 1(1)(ll) of the *Civil Enforcement Act*;

(d) "related writ" means a related writ as defined in section 1(1)(mm) of the *Civil Enforcement Act*.

[316] There is much case law attempting definitions of most of the above terms. There are also numerous statutory definitions, especially in the *Civil Enforcement Act*. The *Act* defines "judgment" to include "any order, decree, duty or right that may be enforced as or in the same manner as a judgment of the Court."[164] A "judgment creditor" means a person who has a money judgment.[165] "Related writ"[166] and "instructing creditor"[167] are defined but not "debt," "debtor," "judgment debtor"[168] or "order." Other definitions are scattered through the *Act* and the *Civil Enforcement Regulation*.

[317] The present rules under review in this committee use all the terms defined and discussed above. A substantial majority of the rules under consideration use either "judgment" or "order" or both. Some rules are addressed to "judgments and orders," "judgments or orders" or one or the other term. A smaller group of rules include terms like "judgment creditor," "judgment debtor," 'instructing creditor" or "related writ."[169]

POSITION OF THE COMMITTEE

[318] Definitions are significant in The Rules generally and in the area of enforcement. The present patchwork of definitions is unsatisfactory and confusing. In addition to reconsidering the definitions as a whole, it is necessary to decide whether we can use definitions in relevant legislation like the *Civil Enforcement Act*.

ISSUE No. 66

Should the terms "judgment" and "order" be defined in The Rules? If yes, what definitions are appropriate and where in the new rules should the definitions appear?

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[164] *Supra* note 8, s. 1(1)(z).

[165] *Ibid.*, s. 1(1)(aa).

[166] *Ibid.*, s. 1(1)(mm).

[167] *Ibid.*, s. 1(1)(x).

[168] "Enforcement creditor" and "enforcement debtor" are defined in *ibid.*, s. 1(1)(p) & (r), respectively.

[169] We do not include rules we propose should be transferred to the *Civil Enforcement Act*, *ibid.* or the *Personal Property Security Act*, *supra* note 18, or which should be repealed.

[319] The definition of "judgment" and "order" has a long and complex history. The common law is summarized by C.R.B. Dunlop:

> *Williston and Rolls* defines judgments as "Decisions which finally determine the question or questions at issue in an action *inter partes*", as contrasted with orders which only determine "preliminary or subsidiary questions relating to the procedure for the obtaining or enforcement of a judgment"...
>
> It should be noted that the term is not always used in such a narrow sense. Lawyers sometimes use "judgment" to describe any judicial decision, including interlocutory decisions... The term "judgment" appears in numerous statutes and is significant in a variety of contexts; it cannot be assumed that it bears the same meaning throughout the law.[170]

[320] A practical problem arising from the distinction is that some remedies historically could be obtained only after judgment. Courts have held that interim alimony orders reviewable by the court at a later date are not judgments and cannot be the basis of postjudgment remedies.[171] Most Canadian jurisdictions reverse this result by provisions like our Rule 342.

[321] Most Canadian rules, following Alberta, continue the distinction between judgments and orders while making it clear that orders will be treated like judgments for the purpose of enforcement. Rule 340, which defines judgments to include orders, is a common provision. Definitions of judgment and order usually say that the term "includes" something rather than "means" something. The intention is likely to modify the common law terms while leaving the courts free to develop rules to meet new situations.

[322] Ontario, British Columbia and Manitoba have adopted a radically different approach. They use the order as the central concept, defining it to include judgments. So the Ontario rules on trial are followed by Rule 59 on orders and Rule 60 on enforcement of orders. Ontario and Manitoba use more specific definitions. For example, Ontario Rule 1.03 says:

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[170] Dunlop book, *supra* note 20 at 190 [footnotes omitted].

[171] *Ibid.* at 193.

> "judgment" means a decision that finally disposes of an application or action on its merits and includes a judgment entered in consequence of the default of a party.

On the other hand, the same rule defines "order" simply as including a judgment.

POSITION OF THE COMMITTEE

[323] The committee's mandate was to examine enforcement rules, not The Rules as a whole. As a result, we have not considered whether any definitions of "judgment," "order" or the terms discussed in issue 67 below should be included in Rule 5 which applies to The Rules as a whole. The drafter might want to consider this issue.

[324] We did look at Rule 5(1)(j) which defines "order" to include a decree. We asked whether decrees remain useful and meaningful remedies in our system, or whether the term is obsolete. We were surprised to find several statutes and regulations in which decrees are still mentioned. Here are the references we found.

- *Alberta Evidence Act*, ss. 42, 44 - decrees from non-Alberta jurisdictions.
- *Civil Enforcement Act*, s. 1(1)(z) - definition of judgment.
- *Domestic Relations Act*, ss. 18 (decree for restitution of conjugal rights), 22 (decree of divorce), 23 (same), 50 (decree of nullity of marriage), 78 (same).
- *Foreign Cultural Property Immunity Act*, s. 2 ("judgment, decree or order").
- *Judicature Act*, ss. 5 (grant of jurisdiction to Alberta courts), 18 "judgment, decree, rule or order").
- *Land Titles Act*, s. 190 (decree or order to Registrar to cancel etc. title).
- *Legitimacy Act*, s. 2 (decree of nullity of voidable marriage).
- *Matrimonial Property Act*, ss. 6 (decree of divorce, decree nisi), 7 (same).
- *Mechanical Recording of Evidence Act*, s. 1(a) (hearing by clerk, sheriff, arbitator etc who makes order, decree, finding, etc.).
- *Parentage and Maintenance Act*, s. 12 (decree of nullity of marriage).
- *Marriage Act*, ss. 15 (decree of divorce, final decree, decree absolute, decree of annulment), 16 (same), 19 (decree of judicial separation), 21 (decree of presumption of death).
- *Proceedings against the Crown Act*, s. 1(a) - definition of "order."
- *Sale of Goods Act*, s. 51 (judgment or decree of damages, payment of price, etc.).
- *Vital Statistics Act*, ss. 9 (decree of adoption), 10 (decree).

- *Change of Name Regulation*, s. 3 (decree nisi, decree absolute). I could not retrieve a copy of the form.
- *Health Insurance Premiums Regulation*, s. 7 (decree absolute of divorce).

[325] What the list means is that Alberta statutes still speak of decrees and the courts clearly have the jurisdiction to grant decrees under this legislation, unless overridden by other legislation. It may be that the Alberta government should consider removing "decrees" from Alberta statutes at which time Rule 5(1)(j) can be repealed. Until then, Rule 5(1)(j) should remain as is.

[326] Even if definitions of "judgment" and "order" are not included in Rule 5, should they be included in the parts having to do with enforcement? As far as "order" is concerned, Rule 5(1)(j) will do the job. As to "judgment," we propose that the term be defined in two places: (1) the new part entitled "Preservation of Rights in Pending Litigation" which will precede the trial rules, and (2) the postjudgment enforcement rules part which we earlier suggested should be entitled "Enforcement of Judgments and Orders." We think that the definition of "judgment" in Rule 340(a), as supplemented by Rule 342, is suitable and should be retained. Rules 340(a) and 342 ensure that interim money orders will enjoy the same remedies as judgments. Most Canadian jurisdictions have rules like ours, and we are reluctant to experiment with the definition of a fundamental term in the enforcement system. We note that some rules speak of "judgments," and others of "judgments and orders." We urge the drafter to keep the definitions in mind in writing the new enforcement rules; the aim is to achieve a uniform use of the terms.

[327] We do not favour the adoption in Alberta of the Ontario use of "order" instead of "judgment" as the term to describe all judicial decisions, whether before or after judgment. There is a long common law history of the definition of these terms which is well understood. The Ontario approach is jarring and may have unexpected consequences. We prefer to adopt definitions which work with the common law rather than contradicting it without clear reason.

[328] We noted above the definition of judgment in the *Civil Enforcement Act* as including "any order, decree, duty or right that may be enforced as or in the same

manner as a judgment of the Court."[172] "Order" is not defined. We are not clear what is caught by the definition in the *Civil Enforcement Act* which is not already caught by Rules 340(a) and 342. We prefer the present rules to be retained as is.

ISSUE No. 67
Should the terms "judgment creditor," "judgment debtor," "related writ," "instructing creditor" and similar terms be defined in the new rules? Should the definitions follow those in the *Civil Enforcement Act*?

[329] We noted earlier that Rule 340 defines some terms for the whole of Part 28 but not elsewhere. "Judgment creditor" is defined to mean a person who is entitled to enforce a judgment, and "judgment debtor" means a person against whom a judgment may be enforced. "Related writ" means a related writ as defined in the *Civil Enforcement Act*. The full reach of Rule 340 is cut down in Rule 356 which says that any term used in Division 2 of Part 28 "that is defined in the *Civil Enforcement Act* has the meaning given to it by that Act." Finally, Rule 442, in Part 36, defines several terms for the purpose of Rules 443 to 460, the interpleader rules. "Claimant" has a stand alone definition, but "instructing creditor," "property" and "related writ" carry the definition of those terms in the *Civil Enforcement Act*.

[330] The definition of "judgment creditor" in Rule 340 needs to be quoted to compare it to the definition in the *Civil Enforcement Act*.[173]

> **340** (b) "judgment creditor" means a person who is entitled to enforce a judgment.

The *Civil Enforcement Act* is somewhat different.

> **1(1)(aa)** "judgment creditor" means a person who has a money judgment.

[331] The definition in Rule 340(b) is roughly similar to definitions in other rules. For example, Ontario contains the following definitions at the start of its part on enforcement of orders and applying only to that part:

> **60.01** In Rules 60.02 to 60.19,

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[172] *Supra* note 8, s. 1(1)(z).

[173] "Judgment debtor" is not defined in the *Act* except inferentially from the definition of "judgment creditor."

> "creditor" means a person who is entitled to enforce an order for the payment or recovery of money;
>
> "debtor" means a person against whom an order for the payment or recovery of money may be enforced.

POSITION OF THE COMMITTEE

[332] In our view, terms like "judgment creditor" and "judgment debtor" should be defined in The Rules. Canadian rules of court usually define these terms, and we should follow suit. The terms should be defined in two places: (1) the new part entitled "Preservation of Rights in Pending Litigation" which will precede the trial rules, and (2) the postjudgment enforcement rules part which we earlier suggested should be entitled "Enforcement of Judgments and Orders." The definitions of these terms should be the same in both Parts. There is no reason for basic and well-understood terms to be defined differently for different parts of the enforcement rules.

[333] We suggest that the definitions should be the same as the definitions in the *Civil Enforcement Act*. We are fortunate to have a code of creditors' remedies law in the *Act*. In the interests of uniformity, these definitions should be carried forward into the rules governing money judgments or orders.

[334] We prefer the definition of "judgment creditor" in the *Act* to the definition in the present Rule 340(b). In our view, a judgment creditor is, as the *Civil Enforcement Act* says, a creditor with a judgment or order.[174] The effect of the judgment or order may be stayed or delayed for some reason, but why should that deprive the judgment creditor of their status, as Rule 340(b) appears to say? If we wish to prevent a judgment creditor from issuing a writ of enforcement, we should do so expressly. See the discussion of Rules 341 and 345 in Chapter 2. The drafter might consider following the present Rule 356 by saying that any term used in this part that is defined in the *Civil Enforcement Act* has the meaning given to it by that *Act*.

[335] However, the committee is anxious to identify a problem which the drafter will need to solve. The *Civil Enforcement Act* applies to money claims and judgments only. However, many of the rules discussed above apply to both money and non-money

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[174] *Supra* note 8, s. 1(1)(aa) defines "judgment creditor" as "a person who has a money judgment." However s. 1(1)(z) defines "judgment" to include any order.

claims and judgments, or to non-money claims and judgments alone. The litigant who asserts a non-money claim or who obtains a non-money judgment cannot be described as a judgment creditor nor can the unsuccessful litigant be called a judgment debtor. The drafter will need to use different terminology to describe parties to non-money claims or judgments.

APPENDIX A

DISPOSITION OF RULES

Rule Numbers in Present Rules	Disposition	Placement in New Rules If They Stay in Rules
74(2)	repeal	n/a
82	amend and retain in rules	postjudgment
151	repeal	n/a
155(b)	repeal	n/a
331	amend and retain in rules	postjudgment
333	retain in rules	postjudgment
340(a)	retain in rules	prejudgment and postjudgment
340(b)-(d)	amend and retain in rules	prejudgment and postjudgment
340.1	*Civil Enforcement Act or Civil Enforcement Regulation* (hereafter CEA)	n/a
341(1)	repeal	n/a
341(2)	*CEA*	n/a
342	retain in rules	prejudgment and postjudgment
343	retain in rules	postjudgment
344	not considered	
345	amend and retain in rules	postjudgment
346	retain in rules	postjudgment
347	see Chapter 5	
348	*CEA*	n/a

Rule Numbers in Present Rules	Disposition	Placement in New Rules If They Stay in Rules
349	repeal	n/a
349.1	amend and move to *CEA*	n/a
350	*CEA*	n/a
351	amend and move to *CEA*	n/a
352	repeal	n/a
353-355	amend and move to *CEA*	n/a
356	repeal	n/a
357-358	*CEA* (As to 357, see Chapter 5)	n/a
359	retain in rules	postjudgment
360	amend and move to *CEA*	n/a
361-363	amend and retain in rules	postjudgment
364-367	amend and retain in rules	postjudgment
368-375	*CEA*	n/a
376	retain in the Rules	postjudgment
377-379	*CEA*	n/a
380	repeal	n/a
381-383.1	amend and move to *CEA*	n/a
427-436	amend and retain in rules	prejudgment
442-460	amend and retain in rules	prejudgment
460.1	*Personal Property Security Act*	n/a
463-464	amend and retain in rules	prejudgment
467-469	amend and retain in rules	prejudgment
470-481.1	*CEA*	n/a
494	amend and retain in rules in part	prejudgment
494.1-498	amend and retain in rules	postjudgment
754-812	repeal	n/a

Rule Numbers in Present Rules	Disposition	Placement in New Rules If They Stay in Rules
Form Numbers		
F and F.1	*CEA*	n/a
I and I.1	*CEA*	n/a
I and J	see Chapter 6	
L and M	*CEA*	n/a

APPENDIX B

Alberta Rule Nos.	Subject of Rules	*WURA*	Present Rules and Act
754 – 757	title of petition, filing, service, copies to creditors and contributories	ss. 11 - 16 appl. for order	The Rules, Part 2
758 – 762	advertisement, service, entry, notice of motion to proceed with winding-up, provisional liquidator, order	ss. 13 - 16, 110 – power of ct.	The Rules, Parts 3 and 4 (service), Parts 27, 29 (judgments and orders)
Nothing		ss. 17 - 22 stay, effect of order	
763 – 771	appointment liquidator, advertisement, notice, qualifications, security order, service, duties, accounts	ss. 23 - 49 – appointment of liquidator, notice, security, prov. liquidator, powers, duties, pay	
772 – 778	advertisement for debts, proof, investigation, report, power of court, service of notice, costs	ss. 71 - 92 claims, secured creditors, contestation	
Nothing		ss. 63 - 68 – meetings of creditors	
779 – 781	list of contributories	ss. 50 - 52 – list	
782 – 789	calls on contributories, order	ss. 53 - 62 – calls	

Alberta Rule Nos.	Subject of Rules	*WURA*	Present Rules and Act
Nothing		ss. 93 - 107 – distribution of assets, fraud, prefs, appeals	
790 – 802	application to chambers, compromises, advertisements register and file of proceedings, provincial liquidator, attendance and appearance of parties, service	s. 38 – compromises, and see general powers ss.	As to clerk's presence in hearings, see *Court of Queen's Bench Act*, ss. 17 - 19.
803 – 805	termination of winding-up	no express provision but general power	
806 – 812	solicitor of liquidator, forms (English forms!), delegation of court powers, costs, power of court, power to follow general practice of court	s. 36 – solicitor of liquidation s. 111 – power of court to delegate ss. 111 - 112 – power of court to follow general practice (also s. 132) ss. 113 - 135 – misc. powers of court re service, remedies, exams, notice, slip rule, evidence	Various Alberta rules