

**FACULTY OF LAW
FINAL EXAMINATION – DECEMBER 2006**

LAW 514:A2 Judgment Enforcement – Prof. Tamara M. Buckwold

Time Allotted: TWO & ONE HALF (2 ½) hours.

THIS EXAMINATION WILL BE GRADED ANONYMOUSLY. DO NOT ENTER ANY INFORMATION ON YOUR EXAMINATION BOOKLETS OR YOUR ELECTRONIC ANSWER FILE THAT MAY IDENTIFY YOU.

Students writing by computer: Once you have closed your examination file you will complete the exam up-load process. A member of the faculty IT staff is available to provide assistance should you encounter any difficulty. When you leave the examination please check with the IT person outside the examination room to ensure that your examination file has properly uploaded. (Note: Successful uploads are automatically recorded online by the ExamSoft system. The IT staff can determine whether your upload is complete by performing an online check. You may close and stow your laptop after completing the upload process before you leave the examination room.)

Students who are not writing by computer: DO NOT ENTER YOUR NAME ON ANY ANSWER BOOKLETS. A list will be circulated and your name is to be entered opposite a number on that sheet. That number will be your code number FOR THIS EXAMINATION ONLY and should be entered on the examination booklets in the space provided for your surname.

Special Instructions:

1. This examination question paper contains 5 questions on 4 pages. Check to ensure it is complete before starting.
2. The marks allocated to each question are indicated in the left margin. Apportion your time intelligently.
3. Questions should be answered in order and your answers recorded accordingly. Students writing by computer should enter their answer to each question in the correspondingly numbered document window. Disregard any answer windows provided in excess of the number required to complete the examination.
4. This is an OPEN BOOK examination. Therefore marks will not be awarded for general statements of law.
5. If you feel that you do not have sufficient information to answer a question, state any assumptions of fact you must make, but do NOT substitute different facts for those contained in a question.

6. Cell phones, unauthorized laptops and related equipment must be turned off and stowed.
 7. Adhere to the time limitation imposed on this examination strictly. Failure to stop writing at the end of the examination may lead to a deduction of grades or a failure to accept the examination.
 8. Limit your use of abbreviations to common terms (e.g. enforcement debtor) and indicate at the beginning of your answer the meaning of any abbreviations used.
 9. In order to avoid disturbing other students, you may NOT leave the examination room during the last **15 MINUTES** of the examination period.
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Part A

Edwin Daniels lives in a basement suite in Edmonton, having rented out the house in which he was living with his wife, Ella, when she left him and moved to Calgary in April of this year. Although he has a strong emotional attachment to the house, Edwin recognized that he could not afford to live in it until his financial position improved. In the meantime, the rent paid by tenants would be sufficient to make the mortgage payments.

Before their separation, Edwin and Ella worked together as real estate agents. Their real estate business was operated through a private company called Edell Realty Ltd., of which Edwin and Ella are the sole shareholders and directors. Income generated by the agency allowed them to make the down payment on the house as well as the mortgage payments due to the Bank of Nova Scotia, who loaned the money to finance its purchase six years ago. The Bank of Nova Scotia's mortgage is registered against title to the house, which is in Edwin's name.

In spite of the booming Edmonton real estate market, the real estate agency had been in serious decline for some time before Edwin and Ella's separation, due primarily to Edwin's increasingly unreliable work habits. In May of 2006, lacking a meaningful income from the business, Edwin borrowed a substantial sum of money from the Bank of Montreal on the basis of falsified financial statements. When he defaulted on the July 1st payment the Bank investigated and, learning the truth, immediately sued to recover what he owed them.

When he was served with the BMO statement of claim in mid-July Edwin was in such a depressed state that he was incapable of seeking legal advice or otherwise acting to deal with the situation. As a result of Edwin's inaction, BMO obtained a default judgment against him and issued a writ of enforcement on September 5, 2006. The writ was registered in the Personal Property Registry against Edwin's name on September 5 and in the Land Titles Office against title to Edwin's house on September 6.

In mid-November Edwin disclosed his marital, emotional and financial disarray to his aunt, Mary Meyers. However, he did not inform her of the legal proceedings taken against him by BMO. Mary agreed to lend Edwin \$50,000 on condition that he obtain medical treatment for his depression and embark on a course of personal counseling. Although she made no inquiries as to his legal position, Mary had worked as a legal secretary for many years and was sufficiently savvy to obtain security for repayment of the loan. She obtained and registered a mortgage against the title to Edwin's house on November 20, 2006. In addition, Edwin gave her a security interest in his shares in Edell Realty Ltd. Although the company was generating little operating revenue, its capital assets are such that the shares do have some value. Although Mary did not register her security interest in the shares in the Personal Property Registry, she did take possession of Edwin's share certificates, on the understanding that she would hold them until such time as she was repaid in full. As a result of Mary's intervention, Edwin has pulled himself together and hired a lawyer.

Offer your opinion on the following questions, providing reasons for your answers.

Marks

- 20** 1. Edwin's lawyer has advised him to apply for an order of the court setting aside BMO's default judgment so he can enter a statement of defence in the action. Although BMO has a good claim, Edwin hopes that if the judgment is set aside the bank will be willing to negotiate a settlement in order to avoid the cost and delay of a trial. Would the priority of BMO's rights as against Mary Meyers or other creditors who might subsequently claim an interest in Edwin's house be affected by an order setting aside the default judgment? In your discussion, consider any types of judicial relief that BMO might seek to establish or preserve its priority and assess the likelihood that an application for such relief would succeed.

NOTE: for purposes of questions 2 and 3 you should assume that BMO's default judgment remains in place.

- 30** 2. How would sale of the house under writ proceedings affect the interests of the Bank of Nova Scotia and Mary Meyers? How would the proceeds of sale be distributed? Identify any factors that might be relevant.
- 10** 3. What is the priority of bank's claim to Edwin's Edell Realty Ltd. shares on the basis of its writ of enforcement relative to the security interest held by Mary Meyers?

Part B

Excel Equipment Inc. is an Alberta company. It sells and leases high-end construction equipment to companies operating in northern Alberta. A few months ago Excel's board of directors fired Ethel Crane, the company's chief financial officer, alleging that she had knowingly failed to accurately report the company's financial position. When it turned

out that the board's decision was based on misinformation, Ethel sued and obtained a substantial judgment against Excel for wrongful dismissal and libel. She issued a writ of enforcement and registered it against Excel in the Personal Property Registry on October 10, 2006.

Marks

- 20** 4. On October 18, 2006 Ethel served a garnishee summons on an Edmonton construction company, Construx Ltd., who was at the time leasing two cranes from Excel for use in its work on a new oil extraction facility in the tar sands region of Alberta. The monthly payments under the lease are \$9,000, due on the first of each month. Construx paid the \$9,000 due on November 1 into court as required by the summons. On November 17, Construx leased a third crane from Excel for use on another project, at a rental of \$5,000 per month. Two days after Construx took delivery of the third crane one of the cranes it was leasing under the first lease collapsed, destroying several pieces of very expensive equipment Construx had on the work site. Construx immediately suspended all payments due under its leases with Excel, and refused to pay any further amounts into court pursuant to the garnishee summons. The company also commenced an action against Excel claiming compensation for the value of the equipment destroyed by the collapsed crane.

Ethel has informed Construx that she intends to apply for an order under s. 84(1)(b) of the Civil Enforcement Act granting her a judgment against Construx for failing to pay the rental due under the two lease agreements into court pursuant to her garnishee summons. Identify any arguments that Construx might raise in defence to such an application, and assess their validity.

Marks

- 20** 5. On October 20 Ethel instructed Alta Civil Enforcement Agency to seize a 2005 Ford utility van parked in the yard of Excel's Edmonton offices. The van was painted with Excel's corporate logo, and was apparently used by the company as a delivery vehicle. On learning of the seizure, Bill Bilson, an Edmonton courier operator, informed Alta that the van belongs to him. Bill has produced a bill of sale for the van dated October 19, 2006, indicating payment of the purchase price in full by cheque. According to Bill, he was leaving the van in storage on Excel's premises until he was able to get the new registration and license plates for it. Bill happens to be the brother of Bertha Bilson, who is Excel's controlling shareholder and chair of the company's board of directors. Ethel takes the position that (a) the alleged sale is bogus and the van is in reality Excel's property and (b) even if the sale is legitimate, Bill can only acquire title subject to her writ, which was registered against Excel before the date of sale. Is Ethel likely to succeed on either argument?

- End of Examination -