MEMORANDUM TO FLOOR REGARDING WAGE GARNISHMENT ACT

2015 ANNUAL MEETING

A. Background

Wage garnishment is an involuntary deduction from wages that occurs pursuant to a legal process. A recent study by the ADP Research Institute revealed that 7.2% of all American employees had their wages garnished in 2013. About two-thirds of these were pursuant to child-support orders, tax levies, or bankruptcy orders, topics exempted from the Wage Garnishment Act, but literally millions of employees had their wages garnished for such obligations as consumer debt and student loans. These types of ordinary creditor garnishments are the subject of our act.

The wage garnishment procedures in effect in those states that permit the practice (and only a handful do not) are archaic, inefficient, and exceptionally complex. They vary widely from state to state, and sometimes from county to county within a state. This imposes significant costs on debtors, creditors, and garnished employers, particularly multi-state employers. In addition, very few current laws provide garnished debtors with useful information or with sufficient time to seek relief before a garnishment takes effect and wage withholding begins.

In addition, the amount that may be withheld from wages also varies widely from state to state. The federal Consumer Credit Protection Act, 15 U.S.C. § 1671-1677, provides a ceiling on the amount that may be withheld but does not preempt state laws to the extent that they are more protective of employees. There are wide disparities among the states in the level of protection provided to employees. The following paragraph from the project proposal submitted to the Committee on Scope and Program in 2011 provides a sense of the extent of nonuniformity:

> Whereas the CCPA limits withholding to the lesser of (1) 25% of disposable income or (2) the amount greater than 30 times the federal minimum wage, state laws may vary either or both of those factors, require that a percentage of gross income also be calculated, provide for a fixed exempt amount, or apply separate withholding limits to specific counties within the state. States may also, but do not necessarily, apply the state minimum wage to the calculation, if that amount is greater than the federal minimum wage.

B. A Brief Overview of the Wage Garnishment Act

One goal of the Drafting Committee is to create a procedure that, once initiated, will occur entirely outside of court unless a creditor, employee, or employer requests a hearing (which any party may do at any time). Under Section 5, after being served with a summons an employer will answer to the creditor, not the court, and will remit withheld amounts to the creditor, not the court. In addition to streamlining the process, this approach will permit

employers to avoid, except in unusual circumstances, the expense of hiring an attorney. If a creditor (or an employee) is unsure whether an employer is withholding the proper amount, Section 5(g) permits it to request a calculation worksheet that satisfies Section 7, meaning that it will show how the employer arrived at the amount to withhold.

Another goal of the Drafting Committee is to provide an employee, at the outset of the process, with sufficient information to permit the employee to take full advantage of all available legal protections, and to preclude withholding until the employee has had an opportunity to assess the situation, seek counsel if desired, and decide how best to proceed. Section 5(a)(4) requires a creditor to include with the summons a completed notice form that satisfies Section 6, and Section 5(c)(2) requires the employer to send to the employee a copy of the notice form within 15 business days after being served. Section 5(d) precludes any withholding of wages until the first regular payday that occurs at least 30 days after the notice is sent to the employee.

A third goal of the Drafting Committee is to provide states with a uniform set of definitions and with uniform guidelines for calculating the amount exempt from withholding. It may well be that states, as they do today, will vary with regard to the extent to which wages are exempt, but we will have accomplished a great deal if the exempt amount is calculated based on a uniform definition of what constitutes wages subject to withholding. The definitions are, of course, set forth in Section 2, and the exemptions are set forth in Section 8. Some states have special exemptions in addition to the basic exemptions in their wage garnishment laws (*e.g.*, additional protection for a head of household), and under Section 3(d) such exemptions continue to be available to employees. Section 4(c) is a choice-of-law provision under which an employee is entitled to the exemptions available in the employee's principal state of employment.

The Act contains a number of additional noteworthy features. Under Section 5(h)(1)(a), a wage garnishment remains in effect until the amount specified by the creditor in the complaint or motion is paid or the debtor is no longer an employee, and under Section 9(c) multiple wage garnishments are treated equally. These provisions promote the principles of simplification and fairness. Section 3(b) excludes from the scope of the act a number of types of involuntary wage withholdings and Section 9(a) recognizes that certain of these withholdings (*e.g.*, pursuant to a support order) will have priority over a withholding authorized by the act (similarly, some withholdings will rank lower than a withholding under the act). Section 9 adopts the principle that higher ranking withholding must be fully satisfied before any amounts become available for lower ranking withholdings. Law other than the act determines the relative priorities of the various types of involuntary withholdings.

C. Issues of Particular Concern at the Annual Meeting

The Drafting Committee of course welcomes comments on every aspect of the act but in particular seeks the Floor's guidance on the following issues:

1. The definition of "employee" (Section 2(5)). The current definition is limited to individuals treated by their employers as employees for federal income tax purposes. Some have urged the committee to expand the definition to include independent contractors (and perhaps even partners and LLC members to the extent their distributions constitute compensation for services).

It appears that businesses are expanding their use of independent contractors. For example, the drivers that deliver packages and letters for one major shipping and mailing service company are routinely treated as independent contractors. By expanding the definition we could provide protection for a class of individuals whom most people would think of as the rough equivalent of employees.

There are problems with expanding the definition. One problem is technical: experience under many different statutes and the recent Restatement of Employment Law indicates that there is no clear line that differentiates between individuals like the delivery-truck driver and other individuals who are classified as independent contractors (*e.g.*, attorneys, accountants). Another problem is that a broader definition will make it more difficult for employers to comply with the act. Employees are typically paid by the payroll office and independent contractors by the accounts-payable office. The current definition relies on the classification decision that the employer must make for other reasons and this permits the act to be implemented by just one office; expanding the definition will complicate matters internally in addition to creating the problem, no matter how tightly the language is drafted, of requiring the accounts-payable office at its peril to distinguish between individuals entitled to the protection of the act and other service providers.

2. The definition of "wages" (Section 2(19)). The draft provides two alternatives, and the rationale for each alternative is provided in the Reporter's Notes following Section 2.

3. Should the act require that employers receive an administrative fee for processing a garnishment and, if so, what is the best way to structure the fee. Section 5(a) contains a bracketed requirement for an upfront administrative fee but there is currently no provision permitting an employer to deduct an amount from each payment remitted to a creditor. The Reporter's Notes following Section 5 set out the arguments for and against administrative fees.

4. Does the notice form (Section 6) provide employees with the appropriate information to permit them to protect their interests? We request that the debate focus on the contents of the notice and not on the precise wording or formatting.[1]

[1] With excellent help from Garrett Heilman, ULC Legislative Counsel, we have issued a Request for Proposals from a consultant with expertise in the use of plain language. Our goals are to 1) organize the information in the form logically; 2) clearly, directly, and accurately convey the information; 3) allow the employee to easily navigate the document; and 4) format the information in a way that draws the employee's attention to what s/he needs to know and helps the employee move through the content efficiently.