SASKATCHEWAN LAW REVIEW

The Reform of Judgment Enforcement Law in Canada: An Overview and Comparison of Models for Reform

*Tamara M. Buckwold**

I. INTRODUCTION: THE RECENT HISTORY OF JUDGMENT ENFORCEMENT LAW REFORM

The law governing enforcement of judgments falls within the constitutional jurisdiction of the provinces and territories, subject to the overriding effect of federal legislation governing the enforcement of government revenue claims and judgments of the Federal Court.[1] Until quite recently, judgment enforcement law in the common law jurisdictions was accurately described as "a patchwork of English and Canadian legislation and judge-made rules which do not fit together into a comprehensible or workable pattern."[2] While that pronouncement remains largely true in many provinces, some have enacted legislation that comprehensively reforms the law governing enforcement of judgments. This paper canvasses the central features of the two primary models of reformed law, represented by the *Civil Enforcement Act*[3] of Alberta (the "*CEA*" or "Alberta model") and *The Enforcement of Money Judgments Act*[4] of Saskatchewan (the "*EMJA*" or "Saskatchewan model"). A brief review of the history of reform will explain the choice of these statutes as representative models.

Alberta was the first to implement a reformed system of law through the enactment in 1994 of the *CEA*.[5] The Act was a product of the Alberta Law Reform Institute report on *Enforcement of Money Judgments* and adopted most of the recommendations advanced by

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* Professor, Faculty of Law, University of Alberta.

1 Hereafter, a reference to the law of the provinces is generally intended to include the law of the territories.

2 CRB Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed (Toronto: Carswell, 1995) at 9.

3 RSA 2000, c C-15 [*CEA*].

4 SS 2010, c E-9.22 [*EMJA*].

5 SA 1994, c C-10.5.

the Institute.[6] The new law came into effect in 1996, along with a partially privatized administrative enforcement system. The Alberta Act was followed closely both in time and format by the Newfoundland and Labrador *Judgment Enforcement Act*,[7] which may be regarded as a variant of the Alberta model.

The road to reform in Saskatchewan began with the publication in 2001 of an "Interim Report on the Modernization of Saskatchewan Money Judgment Enforcement Law."[8] The reform initiative was inspired and led by Professor Ronald Cuming, who co-wrote the report with this author, then Professor Cuming's colleague at the University of Saskatchewan, College of Law. The report reflected many of the central themes embodied in the *CEA* but the recommendations advanced departed from the Alberta model in several important respects. Soon after the Saskatchewan Interim Report was published, the Uniform Law Conference of Canada ("ULCC") launched a project to modernize and harmonize judgment enforcement law across the country. Professors Cuming and Buckwold were members of the working group that developed the recommendations ultimately published with commentary in 2004 as the *Uniform Civil Enforcement of Money Judgments Act*.[9] The group was chaired by Professor Emeritus Lyman Robinson, Q.C., of the University of Victoria Faculty of Law, and included representatives from Alberta and other provinces. Although the ULCC Uniform Act draws from both the Alberta model and the model then proposed for Saskatchewan, it adopts the principal features of the Saskatchewan model. The intervention of the ULCC project delayed development of the final recommendations for

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6 Alberta Law Reform Institute, *Enforcement of Money Judgments*, Report No 61, vol 1 & 2 (Edmonton: ALRI, 1991) [Alberta Report]. Prejudgment remedies were addressed in a previous report of the Institute's progenitor, the Institute of Law Research and Reform. See Institute of Law Research and Reform, *Prejudgment Remedies for Unsecured Claimants*, Report No 50 (Edmonton: ILRR, 1988) [Alberta Prejudgment Report]. The recommendations advanced in the Alberta Prejudgment Report were appended to volume 2 of the Alberta Report and incorporated in the proposed draft *Judgment Enforcement Act*.

7 SNL 1996, c J-1.1.

8 Tamara M Buckwold & Ronald CC Cuming, *Interim Report on Modernization of Saskatchewan Money Judgment Enforcement Law* (Saskatoon: Saskatchewan Queen's Printer, 2001) [Saskatchewan Interim Report], online: Saskatchewan Queen's Printer <http://www.qp.gov.sk.ca/orphan/reporta.pdf>, archived: <https://perma.cc/7W2Z-ZWE7>.

9 Uniform Law Conference of Canada, *Uniform Civil Enforcement of Money Judgments Act* (Regina: ULCC, 2004) [ULCC Uniform Act], online: ULCC <http://www.ulcc.ca/en/uniform-acts-en-gb-1/84-civil-enforcement-of-money-judgments-act/1110-civil-enforcement-of-money-judgments-act>, archived: <https://perma.cc/ZJ7F-56HU>.

reform in Saskatchewan, which were published early in 2005.[10] The recommendations in the final report and included draft legislation were largely consistent with those in the interim report, with refinements on several points of detail. The final report came to fruition with the enactment in 2010 of the *EMJA*, which substantially follows its recommendations. In the result, the Alberta statute can be seen as the first model of reform while the Saskatchewan Act is the second. The ULCC Uniform Act falls somewhere in between, though considerably closer to Saskatchewan's model than to Alberta's.

The impetus for reform has produced projects in other provinces, one of which has been realized in legislation. The New Brunswick *Enforcement of Money Judgments Act*[11] was enacted in 2013 but remains unproclaimed. The New Brunswick Act draws elements from both the Alberta and Saskatchewan models but incorporates its own distinctive features so is not truly representative of either, nor of the ULCC Uniform Act. In addition, law reform bodies in Nova Scotia[12] and British Columbia[13] have issued reports recommending adoption of the ULCC Uniform Act with some amendments. The variations proposed would result in legislation that combines elements of the Alberta and Saskatchewan models. In the result, the most fruitful comparison remains one between what might be considered the first-generation Alberta model and the second-generation Saskatchewan model.

The Alberta and Saskatchewan models differ in many points of detail and, where they converge in principle, corresponding provisions or features may be framed in different terms. It is impossible in the space of a law review paper to fully canvas the elements that are similar or different. The discussion that follows offers an overview of

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10 Tamara M Buckwold & Ronald CC Cuming, *Final Report: Modernization of Saskatchewan Money Judgment Enforcement Law* (Saskatoon: Saskatchewan Queen's Printer, 2005) [Saskatchewan Report], online: Saskatchewan Queen's Printer <http://www.qp.gov.sk.ca/orphan/je_final_report.pdf>, archived: <https://perma.cc/GYP9-DJMD>. The Introduction to the report notes that the authors considered the ULCC Model Act and the Alberta *Civil Enforcement Act* in the development of their recommendations but that features of the system proposed differ from both the ULCC and the Alberta legislation (Saskatchewan Report, *ibid* at 1).

11 Bill 56, *Enforcement of Money Judgments Act*, 57th Leg, New Brunswick, 2013 (assented to 21 June 2013) [New Brunswick Act].

12 Law Reform Commission of Nova Scotia, *Enforcement of Civil Judgments*, Final Report (Halifax: LRCNS, 2014), online: LRCNS Law Reform Commission of Nova Scotia <http://www.lawreform.ns.ca/Downloads/Enforcement_of_Civil_Judgments-Final_Report.pdf>, archived: <https://perma.cc/T7NR-ABXJ>.

13 British Columbia Law Institute, *Report on the Uniform Civil Enforcement of Money Judgments Act*, Report No 37 (Vancouver: BCLI, 2005) [BC Report], online: BCLI <http://www.bcli.org/publication/37-report-uniform-civil-enforcement-money-judgments-act>, archived: <https://perma.cc/UKZ9-Y694>.

the main similarities between them and identifies their significant differences.[14]

II. AN OVERVIEW OF THE STATUTORY MODELS

Both the *EMJA* and the *CEA* create a single statutory regime that encompasses all types of judgment enforcement proceedings against all forms of property.[15] The array of disparate measures that previously comprised the enforcement system is swept away and replaced by a system based on a single functional concept. The *EMJA* provides for the enforcement of a registered judgment while the *CEA* provides for the enforcement of a registered writ, issued on a judgment. The specific measures that may be used to enforce the judgment or the writ, respectively, are simply procedural variants on the unitary basis for enforcement. In both cases, the procedural rules applied to different types of property are integrated in a single system that includes a single set of priority rules and feeds into a distribution scheme that applies to all methods of enforcement.

The registered "writ of enforcement" is the basis for proceedings under the *CEA*.[16] The writ is issued by the clerk of the court once judgment is obtained, and must be registered in the Personal Property Registry before enforcement proceedings can be undertaken.[17] Registration also plays a central role in determining the priority of the writ as against competing claims to the debtor's property, a subject explored later on. A judgment may be enforced against any type of property under the umbrella device of "writ proceedings," which are "any action, step or measure authorized by this Act to be taken for the purposes of enforcing a money judgment."[18] Under this system it is the writ that is enforced rather than the judgment itself: the writ is the conduit through which enforcement is accomplished. Four distinct procedures fall under the umbrella of writ proceedings: (i) seizure and sale of personal property,[19] (ii) sale of land,[20] (iii) garnishment of

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14 For comprehensive commentaries on the *CEA* and the *EMJA* respectively, see CRB Dunlop & Tamara M Buckwold, *Debt Recovery in Alberta* (Toronto: Carswell, 2012); Ronald CC Cuming & Donald H Layh, *The Saskatchewan Enforcement of Money Judgments Act: Commentary and Analysis* (Regina: Queen's Printer, 2012).

15 The statutes are supplemented in both provinces by regulations and rules of court. See *Enforcement of Money Judgments Regulations*, RRS c E-9.22, Reg 1; *Civil Enforcement Regulation*, Alta Reg 276/1995 [*CER*].

16 *Supra* note 3, s 1(1)(tt).

17 *Ibid*, s 26.

18 *Ibid*, s 1(1)(uu).

19 *Ibid*, Part 5. In addition, Part 6 provides "Special Seizure Mechanisms" for specified types of personal property.

20 *Ibid*, Part 7. There is no seizure step in the process that applies to enforcement against land but the judgment debtor is given a series of notices of sale.

obligations owed to the judgment debtor,[21] and (iv) the appointment of a receiver or other special remedy granted by order of the court.[22]

The procedures for enforcement against personal property and land are, roughly speaking, the analog of execution by the sheriff under the old law. Proceedings are initiated by instructions given to a civil enforcement agency by an "instructing creditor."[23] The civil enforcement agency is a private enterprise operating under contract with the Sheriff Civil-Enforcement, a government official who exercises licensing and supervisory control over the system.[24] Garnishment under the CEA also reflects the pre-reform remedy but has a substantially expanded scope. As under the old law, the garnishee summons is served by the judgment creditor or agent on the garnishee, who is obliged to remit payment of obligations owed to the debtor to the clerk of the court. The creditor who initiates garnishment is the instructing creditor. Substantively, garnishment is a much stronger remedy under the reformed system than under the old law. A garnishee summons remains in effect for two years and captures future obligations as well as obligations due and payable when the summons is served. If neither garnishment nor the standard remedies administered by an agency offer effective means of enforcement, the court may appoint a receiver or grant a special order tailored to the circumstances.[25] Funds generated by writ proceedings are distributed by the agency, clerk, or receiver as the case may be according to a single set of rules.

The *EMJA* represents a more radical change in the structure of the enforcement system. All enforcement measures are conducted through the office of the sheriff except in the few cases in which a receiver is appointed by the court and, even then, the sheriff plays an administrative role in the process. Registration of a judgment creates an "enforcement charge"[26] and is *de facto* a condition of enforcement action, since a judgment creditor must provide the sheriff with a registry search indicating that the judgment has been registered before the sheriff will act on the creditor's instructions.[27] The charge establishes a priority position for creditors' rights of enforcement but it is the judgment itself that is enforced, without the intercession of

21 *Ibid*, Part 8.
22 *Ibid*, Part 9.
23 *Ibid*, s 1(1)(x).
24 An agency may also collect payments due to the judgment debtor under a security agreement (*ibid*, s 51) and enforce payment under an instrument (*ibid*, s 50). Regarding the role and authority of the civil enforcement agency, see generally Dunlop & Buckwold, *supra* note 14 at Part 2.
25 A receiver must be a licensed trustee in bankruptcy or other person deemed qualified by the court. See *CER*, *supra* note 15, s 32.
26 *EMJA*, *supra* note 4, s 22.
27 *Ibid*, s 31(1)(c).

a writ or comparable device. The *EMJA* departs more significantly from the pre-reform system than does the *CEA* through adoption of "seizure" as a single device for enforcement against all forms of property, administered by the office of the sheriff. The sheriff initiates seizure when he or she has received an "enforcement instruction" from a judgment creditor.[28] The concept of "seizure" as a unitary enforcement device is extended to receivership under a provision declaring that property collected by or taken into the control of a receiver is deemed to be property seized by the sheriff.[29] The procedure for seizure of accounts bears some resemblance to the old practice of garnishment but the idea and terminology of garnishment as a separate process has been abandoned and the clerk of the court no longer plays a role. Accounts are seized by the sheriff through service of notice on the account debtor, who is required to remit payment to the sheriff's office.[30] The sheriff is a public official (that is, a government employee) whose responsibilities and authority greatly exceed that of his or her pre-reform counterpart. Notable differences between the partly privatized administrative system of the *CEA* and the public administrative structure of the *EMJA* are discussed further below.

III. COMMON FEATURES OF THE STATUTORY MODELS

A. UNIVERSAL EXIGIBILITY

Under pre-reform law, enforcement of a judgment depended on the availability of an enforcement mechanism that allowed the judgment creditor to reach the type of property against which enforcement was sought. The incremental and uncoordinated development of the various enforcement devices meant that there were classes of property for which no adequate process was offered.[31] Both models of reformed law implement the principle of "universal exigibility," overcoming the old procedural obstacles to enforcement. All property of a judgment debtor may be reached under a unitary statute, with the exception of property deliberately excluded from enforcement through the declaration of a statutory exemption. The principle is expressly stated in both Acts[32] and is realized in both systems through the adoption of a single conceptual and functional basis for enforcement. As noted above, all forms of property may be reached under the *EMJA* through

28 *Ibid*, s 31(1)(a).

29 *Ibid*, s 72(7)(a). Unless otherwise ordered by the court, an order appointing a receiver requires the receiver to deliver possession or control of property to the sheriff, and to remit to the sheriff sums collected by the receiver (see *ibid*, s 72(3)).

30 *Ibid*, s 58.

31 Alberta Report, vol 1, *supra* note 6 at 24. For a summary of the pre-reform enforcement devices and their respective scopes of application, see Cuming & Layh, *supra* note 14 at 5-11. For a comprehensive text on pre-reform law generally, see Dunlop, *supra* note 2.

32 *EMJA*, *supra* note 4, s 37(1); *CEA*, *supra* note 3, s 2(b).

"seizure" and under the *CEA* through "writ proceedings". In both cases, the "property" subject to enforcement includes transferrable rights with commercial value that are not generally viewed as property at common law or in equity.[33]

B. PRE-JUDGMENT ASSET PRESERVATION

The logistics of litigation and the constraints of available court time often produce an extended delay between the time an action is launched and the time judgment is rendered. That hiatus may allow a defendant who is so inclined to obstruct or defeat the enforcement of a judgment eventually obtained by transferring away, encumbering, or dissipating his or her exigible assets so that little or nothing remains for a judgment creditor. Before the enactment of reformed legislation, plaintiff litigants in both jurisdictions relied primarily on a "Mareva" injunction[34] granted by the court to effectively "freeze" some portion of the defendant's property, ensuring that assets would remain available when judgment enforcement measures could be pursued. Pre-judgment garnishment was also used in the limited circumstances defined by legislation.[35]

Though a set of judicial principles developed around the availability and use of the Mareva injunction, the reports that prompted reform in Saskatchewan and Alberta point to the absence of a coherent asset preservation device resting on a well-defined policy.[36] Such a device

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33 The *EMJA* definition of personal property includes an interest in a license, which is generally not regarded as property (*EMJA*, *ibid*, s 2(1)(hh)). See also Cuming & Layh, *supra* note 14 at 34-36. The *CEA* extends the concept of property to "any right or interest that can be transferred for value from one person to another" (*CEA*, *ibid*, s 1(1)(ll)(iii)). See also Dunlop & Buckwold, *supra* note 14 at 36-42.

34 See Dunlop & Buckwold, *ibid* at 150-51, for a brief account of the development of the injunction in England and its emigration to Canada. See also Cuming & Layh, *ibid* at 60.

35 Cuming & Layh, *ibid* at 10. The authors note that relief might also be obtained in very limited circumstances under *The Absconding Debtors Act* (RSS 1978, c A-2, as repealed by *Civil Enforcement Act*, SA 1994, c C-10.5, s 171(c)), repealed with the enactment of the *EMJA*. In Alberta, additional remedies included writs of attachment under the Rules of Court (AR 124/2010), appointment of a receiver of an auction sale under the Rules of Court, and the judge-made "writ-saving" order. See Dunlop & Buckwold, *ibid* at 149.

36 Saskatchewan Report, *supra* note 10 at 19. Alberta Prejudgment Report, *supra* note 6 at 158:

> The best way to obtain a coherent, consistent system of prejudgment remedies for unsecured claimants is to replace the various existing prejudgment relief mechanisms with a single, well thought-out procedure for obtaining provisional relief.

The recommendations advanced in the Alberta Prejudgment Report were appended to volume 2 of the Alberta Report and call for elimination of identified pre-judgment remedies including Mareva injunctions or similar relief and the "methods of providing security for a claimant whose default judgment is set aside

has been included in both systems, in the form of the "attachment order" under the *CEA*[37] and the "preservation order" under the *EMJA*.[38] In both cases the order is based on clearly defined rules designed to balance competing interests: on one side, the need to prevent strategic action on the part of a defendant calculated to undermine the enforcement of a future judgment and, on the other, the need to ensure that a plaintiff cannot unfairly coerce a defendant into settlement through the pressure exerted by an asset-freezing remedy. An order may be granted only if the grounds for relief are established and, even if they are, the court has the discretion to refuse the order—a discretion that is likely to be exercised only in rare cases.

The Saskatchewan and Alberta models both require as grounds for an order proof that the defendant is dealing with or likely to deal with his or her property in a way that will materially hinder enforcement of a future judgment.[39] They differ in the extent to which the applicant plaintiff must establish that the action is based on a valid claim, as well as in the priority implications of an order. The second point is addressed below in the discussion of priorities generally.

A plaintiff who seeks a Mareva injunction must satisfy the court that he or she is pursuing a legitimate action. However, the standard defining the likelihood of success that justifies an order is not entirely clear. It is stated variously as a "good arguable case," a "prima facie case," or a "strong prima facie case."[40] Both the *EMJA* and the *CEA* respond to that uncertainty by defining the extent to which success in the action must be proven.

The grounds for an order under the *CEA* include the requirement that "there is a reasonable likelihood that the claimant's claim against the defendant will be established."[41] This seems like a fair approach in principle but its implementation in practice is problematic because it requires the court to assess the degree of likelihood that a plaintiff will succeed at trial on the basis of the very partial evidentiary record advanced in a chambers application, usually without *vive voce*

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pursuant to [the rules of court]" (Alberta Report, *supra* note 6, vol 2 at 207). The latter reference is to the practice known as writ-saving.

37 *Supra* note 3, Part 3.

38 *Supra* note 4, Part II.

39 See *ibid*, s 5(5); CEA, *supra* note 3, s 17(2).

40 Saskatchewan Report, *supra* note 10 at 23. The cases adopting varying formulations are too numerous to list. See e.g. *Cho v Twin Cities Power-Canada*, 2012 ABCA 47, 522 AR 154 (suggesting that the test is (likely) "strong prima facie case" rather than merely "good arguable case" at para 5); *Chipewayan Prairie First Nation No. 470 v Kent*, 2008 ABQB 157, 443 AR 56 [*Kent*] (in favour of "serious issue to be tried" at para 65).

41 *Supra* note 3, s 17(2)(a).

testimony.[42] It is difficult for the applicant to satisfy the onus of proving a measurable likelihood of success in the action when the affidavits filed by the parties contain conflicting evidence regarding the facts on which the cause of action is based.[43]

The Saskatchewan Report recognized the practical difficulties involved in requiring the court to make a prospective assessment of the merits of the case, noting that "it is not the role of the court to try the matter" in an application for pre-judgment relief.[44] Under the *EMJA*, the plaintiff must satisfy the court that the action would, if successful, result in a judgment in the plaintiff's favour.[45] The plaintiff's claim must disclose a legitimate cause of action, but proof of the likelihood of success is not required, though the court may exercise its discretion to refuse an order where the claim is clearly spurious.[46] The potential for procurement of a preservation order on the basis of groundless allegations of fact is minimized by both the general requirement that rights conferred by the Act be exercised in good faith,[47] and the requirement that the plaintiff provide security to compensate the defendant for loss that may be caused as a result of the order.[48]

The Alberta Report expresses the unqualified view that the proposed attachment order would replace all existing prejudgment remedies, including the Mareva injunction and the judicial practice of writ-saving.[49] The assumption that the *CEA* would govern all proceedings relating to enforcement of judgments is given statutory effect through s. 2, providing that "a money judgment may only be enforced in accordance with this Act."[50] The *EMJA* includes a similar provision.[51] Cuming and Layh describe the effect of the *EMJA*

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42 The authorities generally suggest that examination on the defendant's affidavit cannot be used as a "fishing expedition" to uncover the facts required to establish grounds for an order (see *Dean v Bryan*, 2007 ABQB 394; *Security Home Mortgage Investment Corp., in liquidation v Atlantic Leasing Limited*, 2001 NFCA 15, 198 Nfld & PEIR 172). But for a case in which the Court drew adverse inferences from the defendant's refusal to disclose details of her financial affairs in questioning on her affidavit before the order was granted, see *Qualex-Landmark Investments Inc. v Soroya*, 2009 ABQB 689, 486 AR 307.

43 See *1498587 Alberta Inc. v Devani*, 2012 ABQB 324, 540 AR 335.

44 Saskatchewan Report, *supra* note 10 at 23.

45 *Supra* note 4, s 5(5).

46 For a comprehensive discussion and explanation of the statutory standard, see *Arslan v Şekerbank T.A.Ş.*, 2016 SKCA 77, 400 DLR (4th) 193, leave to appeal to SCC refused, 37196 (9 February 2017) [*Arslan*].

47 *EMJA*, *supra* note 4, s 115. To similar effect, see also *CEA*, *supra* note 3, s 2(g).

48 *EMJA*, *ibid*, s 5(7). To similar effect, see also *CEA*, *ibid*, s 17(4).

49 Writ-saving is described in the text accompanying note 191.

50 *Supra* note 3, s 2(a).

51 *Supra* note 4, s 3.

preservation order in terms that reflect the intended effect of the attachment order as expressed in the Alberta Report:

> Undoubtedly, the use of Mareva Injunctions in the context of money judgment enforcement has been completely pre-empted by the integrated and balanced system of Part II [governing preservations orders].[52]

That view has received clear judicial endorsement in Saskatchewan.[53] One would expect this result under both systems, but the expectation has not been fulfilled in Alberta. Courts regularly grant orders designated variously as Mareva or interlocutory injunctions under the judge-made guidelines associated with those remedies, often without reference to the *CEA* attachment order.[54] In some cases, the order granted is described as *either* a Mareva injunction or an attachment order. The potential for confusion and uncertainty is obvious. Retention of the judicial injunction alongside the statutory attachment order raises a number of questions relating to the differently defined grounds for relief and the overlap between them. Some judges have suggested that an injunction should not be granted in circumstances in which an attachment order would be refused,[55] but the relationship between the alternative remedies and grounds for relief remains unclear.[56] The continued use of the injunction for the purpose the attachment order was designed to fulfill appears to be more a matter of oversight than intention: lawyers and judges have simply continued to use familiar remedies without consciously considering whether they have survived the Act. The possibility remains that an Alberta court presented with argument on the point will declare that the Mareva injunction is no longer available.

C. ACCESS TO INFORMATION IN AID OF ENFORCEMENT

Both models offer a range of methods by which a judgment creditor or the enforcement official may obtain information from a judgment

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52 Cuming & Layh, *supra* note 14 at 61.

53 *Arslan*, *supra* note 46.

54 The *Judicature Act* (RSA 2000, c J-2) provides that the Court may by interlocutory order grant an injunction or appoint a receiver "in all cases in which it appears to the Court to be just or convenient that the order should be made" (*ibid*, s 13). In contrast with their practice in relation to pre-judgment injunctions, Alberta courts have held that the *CEA* provisions allowing the Court to appoint a receiver have supplanted the court's jurisdiction to appoint a receiver under the *Judicature Act*. See *A. (K.L.) v S. (R.C.)* (1997), [1998] 4 WWR 451, 55 Alta LR (3d) 24 (QB); *Frueh v Mair*, 1998 ABQB 738, 68 Alta LR (3d) 305.

55 *Gaastra v Tri-Link Consultants Inc.*, 2012 ABQB 350; *Kent*, *supra* note 40.

56 See e.g. *Olympia Trust Co. v Totten*, 2012 ABQB 488.

debtor regarding the assets and income that might be available to satisfy a judgment. The debtor must deliver prescribed information through a form or questionnaire and must submit to questioning as required.[57] Both regimes provide for procurement of information from third parties, but the *EMJA* contemplates a broader range of sources than does the *CEA*. Judgment creditors are clearly entitled to extract from judgment debtors personal financial information that is not available to the public generally but the extent to which modern privacy legislation precludes others from disclosing information without a debtor's express consent is not as clear. The Supreme Court of Canada's decision in *Royal Bank of Canada v. Trang*[58] settles the issue in one context and offers guidance for other cases.

The *Trang* decision addresses a commonplace situation. A creditor seeks to have property sold to satisfy a judgment but the property is subject to a security interest that has priority over the rights of enforcement arising from the judgment or writ. Judgment enforcement measures will be fruitless if the amount owed to the secured creditor is equal to or greater than the exigible value of the property in question. If reliable information regarding the amount of the debt is not available from the debtor, a judgment creditor or enforcement official will need to obtain it from the secured creditor. The question addressed in *Trang* was whether a financial institution that holds that information is precluded by privacy legislation from disclosing it. The case dealt with enforcement efforts against land subject to a mortgage that had priority over a writ, but the same issue may arise in connection with a security interest in personal property.

The specific question before the court in *Trang* was whether a mortgagee bank was precluded by the *Personal Information Protection and Electronic Documents Act*[59] from providing a mortgage discharge statement to an Ontario sheriff seeking to sell the mortgaged land to enforce a judgment under a writ of seizure and sale. Writing for a unanimous court, Justice Côté reversed the Ontario Court of Appeal which, in a split decision, had held that *PIPEDA* precluded an order for disclosure in the circumstances.[60] A full review of the case is

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57 *EMJA*, *supra* note 4, Part III; *CER*, *supra* note 15, ss 35.09-35.12, 35.17.

58 2016 SCC 50, 403 DLR (4th) 193 [*Trang*].

59 SC 2000, c 5 [*PIPEDA*]. The case fell within the federal statute because it involved a federally regulated bank. The same issue could arise under provincial privacy statutes. The exceptions to the prohibition of disclosure defined by provincial legislation roughly parallel those provided in the federal Act and the decision in *Trang* is clearly authoritative with respect to the provincial statutes. See *Personal Information Protection Act*, SA 2003, c P-6.5; *The Privacy Act*, RSS 1978, c P-24.

60 *Royal Bank of Canada v Trang*, 2014 ONCA 883, 379 DLR (4th) 601. The Court affirmed the position taken in the earlier case of *Citi Cards Canada Inc. v Pleasance* (2011 ONCA 3, 103 OR (3d) 241).

beyond the scope of this article, but the decision and the reasons behind it are authoritative in Saskatchewan and Alberta, as well as in Ontario. Thus, a brief discussion is necessary.

The statutory prohibition against disclosure under both the federal Act and its provincial counterparts is subject to a number of exceptions. The Supreme Court based its decision in *Trang* on two of them. First, disclosure of information is permitted without the knowledge or consent of an individual if the disclosure is required to comply with an order made by a court, person, or body with jurisdiction to compel the production of information.[61] According to the court, the intention behind the exception "is to ensure that legally required disclosures are not affected by *PIPEDA*."[62] That exception is engaged when a court orders a creditor to disclose the amount required to discharge a secured debt. The order might be made under a jurisdiction conferred by statute or, as suggested by Côté J., under the inherent jurisdiction of the court.[63]

With respect to an order to disclose mortgage information, Côté J. said the following:

> I conclude that an order requiring disclosure can be made by a court in this context if either the debtor fails to respond to a written request that he or she sign a form consenting to the provision of the mortgage discharge statement to the creditor, or fails to attend a single judgment debtor examination. A creditor who has already obtained a judgment, filed a writ of seizure and sale, and completed one of the two above-mentioned steps has proven its claim and provided notice. Provided the judgment creditor serves the debtor with the motion to obtain disclosure, the creditor should be entitled to an order for disclosure. A judgment creditor in such a situation should not be required to undergo a cumbersome and costly procedure to realize its debt.[64]

While its decision on that point was enough to grant the appeal, the Court held that a second exception to the statutory prohibition against disclosure applied; namely, that the mortgagor-judgment debtor must be taken to have impliedly consented to disclosure for purposes of judgment enforcement proceedings: "Disclosure to a

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61 *PIPEDA*, *supra* note 59, s 7(3)(c). To similar effect, see *Personal Information Protection Act*, *supra* note 59, s 20(e); *The Privacy Act*, *supra* note 59, s 4(1)(c).

62 *Trang*, *supra* note 58 at para 25.

63 *Ibid* at para 29.

64 *Ibid* at para 32.

person who requires the information to exercise an established legal right is clearly different from disclosure to a person who is merely curious or seeks the information for nefarious purposes."[65] The decision is significant both as it relates to the disclosure of information by a creditor who holds a security interest in property of a judgment debtor, and more broadly, as it relates to disclosure by a third party for purposes of judgment enforcement measures generally.

The *EMJA* includes two provisions that engage the first exception to the prohibition against disclosure considered in *Trang*. Paragraph 15(1)(d) provides that the court may "order a specified person to disclose to the enforcing judgment creditor, or the sheriff, information contained in the specified person's records respecting the judgment debtor and any property in which the judgment debtor has an interest."[66] The provision is not limited to an order for disclosure by a secured creditor: it encompasses an order against anyone whose records contain information about the judgment debtor and the debtor's property. In addition, the Act gives the sheriff authority to serve notice on any person believed to have records relating to property of the judgment debtor requiring that person to provide specified information, including the outstanding balance of a mortgage, lien or other encumbrance against property of the debtor. Presumably, a mortgagee or other person who receives such a notice is obligated to provide the information requested even without a court order. Under *PIPEDA*, the notice constitutes "an order made by a…person….with jurisdiction to compel the production of information."[67] Under *The Privacy Act*[68] of Saskatchewan, provision of the information would be "authorized or required by or under a law in force in the province."[69]

In Alberta, the statutory basis for third party disclosure of information personal to a debtor is not as clear. The *Civil Enforcement Regulation*[70] provides for a court order requiring identified third parties to provide information, but the list is limited to employees of the debtor, directors, and officers of an incorporated debtor and those to whom a debtor has transferred exigible property: creditors of the debtor and third parties generally are not among those named.[71] If the property involved is personal property, s. 18 of the *Personal*

65 *Ibid* at para 46.
66 *EMJA*, *supra* note 4, s 15(1)(d).
67 *Supra* note 59, s 7(3)(c).
68 *Supra* note 59.
69 *Ibid*, s 4(1)(c).
70 *Supra* note 15.
71 *Ibid*, ss 35.13-35.17.

Property Security Act[72] in both provinces provides grounds for an order requiring a secured creditor to disclose information regarding the amount of the secured debt,[73] but there is no equivalent statutory provision for security interests in land. However, the court may be able to order disclosure from anyone who has information material to the proceedings under the broad jurisdiction conferred by s. 5(1) of the *CEA* to "give directions in respect of …any matter or issue that arises out of any civil enforcement proceedings."[74] The list of orders contemplated in s. 5(2) includes "any other order or direction in respect of matters coming under this Act that the Court considers appropriate in the circumstances."[75] In addition, the decision in *Trang* suggests that the court may have inherent jurisdiction to order a third party to disclose information that is required for enforcement of a judgment.[76]

The Supreme Court's view of the implied consent exception to the prohibition against disclosure is of particular consequence in connection with the procurement of mortgage information, since the decision indicates that a mortgagee must disclose the balance secured by a mortgage over a judgment debtor's interest in land even without a court order or a specific statutory provision mandating disclosure. The question this presents is when the debtor's consent is engaged such that the mortgagee may and should disclose the information. The Court provides an answer in the context of Ontario's judgment enforcement system:

> In the case at bar, a reasonable person would consider it appropriate for a mortgagee to provide a mortgage discharge statement to a judgment creditor who has obtained a writ of seizure and sale of the mortgaged asset from the court and filed it with the sheriff…In this case, RBC also sought the mortgage discharge statement through the examination process, but this additional step is not necessary. Obtaining a writ of seizure and sale, and filing it with the sheriff, makes operational the consent to disclosure given by the Trangs concurrent with their giving a mortgage to Scotiabank.[77]

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72 *Personal Property Security Act*, RSA 2000, c P-7 [Alta *PPSA*]; *The Personal Property Security Act, 1993*, SS 1993, c P-6.2 [Sask *PPSA*]. The Acts are the same in all respects material to this paper unless indicated otherwise. A reference hereafter to the "*PPSA*" or "*PPSAs*" without differentiation applies to both Acts.

73 *Ibid*, s 18.

74 *Supra* note 3, s 5(1).

75 *Ibid*, s 5(2)(i).

76 *Supra* note 58 at para 29.

77 *Ibid* at para 49.

In Ontario, the filing of a writ with the sheriff is a mandatory precursor to enforcement action and has the effect of binding the debtor's property, thereby giving the writ a priority status relative to other *in rem* claims.[78] The writ by its terms directs the sheriff to seize and sell the real and personal property of the judgment debtor but the sheriff is not in fact required to take active measures until the judgment creditor directs enforcement.[79] In Saskatchewan, the closest analog to filing a writ with the sheriff is registration of the judgment. In Alberta, it is registration of the writ of enforcement. Like the Ontario act of filing with the sheriff, registration serves both to formally signal the judgment creditor's rights of enforcement and to give those rights priority as against other claimants. Under the reformed systems, one might conclude that the principle of implied consent established in *Trang* is activated by registration.

The implied consent theory might be argued in contexts other than mortgage disclosure. However, if legislation provides for a disclosure order, the implied consent argument will be of only supplemental value. The decision in *Trang* suggests that an exception to privacy law is engaged by an order granted under the court's statutory or inherent jurisdiction to compel disclosure of information reasonably required to effectuate judgment enforcement measures, regardless of whether the judgment debtor has expressly or impliedly consented to disclosure of the information in question. A debtor cannot frustrate the legal rights of judgment creditors by refusing to provide information required by judgment enforcement law, safe in the expectation that privacy legislation will preclude third parties from providing that information in his or her stead.

The implied consent theory as a separate argument will be important where, as in *Trang*, it is relied upon as grounds for disclosure of information without an order of the court. There will rarely be an obvious answer to the question of whether a debtor has impliedly consented to disclosure in a specific context other than that addressed by *Trang*, so it seems likely that those who are legally precluded from disclosing private information without consent will in most cases require a court order before doing so. However, once a court has found implied consent in a specific context, institutions in possession of private information may be willing to release that information without a court order in subsequent instances that fall within the scope of the ruling. There may therefore be a precedential value in

78 Frank Bennett, *Bennett on Creditors' and Debtors' Rights and Remedies*, 5th ed (Toronto: Thomson Carswell, 2006) at 35-36. The writ binds goods and land upon delivery to the sheriff, though it will only bind the debtor's lands under the land titles system once the sheriff gives a copy of the writ to the land registrar (*ibid* at 36).

79 *Ibid* at 35.

requesting a court to make a finding of implied consent where the essential facts of the situation considered are likely to recur in other instances. For example, in *Aecon Industrial Western v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146*,[80] an Alberta court relied on an implied consent analysis as grounds for an order requiring a union to disclose employment information about a union member, apparently to facilitate garnishment proceedings against his employer.[81] Whether other organizations will feel safe in releasing employment information to facilitate judgment enforcement proceedings without the protection of a court order remains to be seen. The difficulty will be to know whether a given factual situation does or does not fall within a previous court ruling. An order of the court will no doubt be required in most cases to resolve any doubt.

D. ADOPTION OF *PERSONAL PROPERTY SECURITY ACT* POLICIES AND CONCEPTS

The *PPSA*s of Saskatchewan and Alberta, nearly identical in most respects, represent comprehensively reformed systems of law governing the rights of creditors whose claims are secured by an interest in personal property. The *PPSA*s have proven extremely successful and were an obvious model for the reform of judgment enforcement law. The *EMJA* and the *CEA* adopt key features of the *PPSA*s, implementing a comprehensive and integrated statutory structure that rationalizes and simplifies the process of judgment enforcement and creating an interface between the systems of law governing recovery of secured and unsecured debt.

The influence of *PPSA* concepts and rules is felt most strongly under the new judgment enforcement regimes in the approach taken to priority, especially with respect to competing claims to personal property. Under the *PPSA*, the priority of a security interest in personal property as against competing interests in the collateral is determined primarily by whether and when the security interest is registered in the Personal Property Registry.[82] Under the reformed judgment

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80 2013 ABQB 122, 558 AR 108 [*Aecon*].

81 The issue was whether disclosure was prevented by the Alberta *Personal Information Protection Act* (*supra* note 59). The union was appropriately cautious in refusing to disclose the information sought in the absence of judicial direction, for fear of violating the Act. The implied consent theory was used to justify the court's order (*Aecon*, *ibid* at para 17) but the court did not identify a statutory provision, rule of court, or other jurisdictional basis for the order.

82 Registration is the primary though not sole means by which a security interest may be "perfected," and the date of registration is the primary factor in determining priority. For a full account of the *PPSA* priority regime, see generally Ronald CC Cuming, Catherine Walsh & Roderick J Wood, *Personal Property Security Law*, 2nd ed (Toronto: Irwin Law, 2012).

enforcement law, the priority of a judgment creditor's claim to the debtor's personal property is likewise based on registration. In both cases registrations are made in the Personal Property Registry, which functions in Saskatchewan as the Judgment Registry. Registrations under the *PPSA* and the judgment enforcement legislation are governed by essentially the same rules and search results under both systems depend on the capability of the registry logarithm. Priorities with respect to land are determined by registration under the *Land Titles Act*[83] of each province. The similarities and differences in the specific priority rules relating to personal property and land under the two models are discussed further below.

The *PPSA* concepts that appear in the judgment enforcement statutes are not limited to issues of priority. Like the *PPSA*s, the *EMJA* and the *CEA* require all parties exercising rights or performing duties under the Act to act "in good faith and in a commercially reasonable manner."[84] A person whose interests are prejudiced by the exercise of bad faith or commercially indefensible judgment on the part of another may be compensated for harm caused by violation of the statutory standard.[85] This is particularly significant in Alberta where enforcement action may be conducted by a private agency rather than an officer of government or the court. A Saskatchewan sheriff is exempt from liability for failure to act in a commercially reasonable manner or for otherwise deviating from the Act if he or she acted in good faith.[86]

The standard of commercial reasonableness applies to the manner in which property is sold by the enforcement official. Both statutes adopt a flexible approach: a civil enforcement agency or sheriff is not obliged to sell by auction or otherwise constrained in the method of sale chosen, but is expected to sell the debtor's property in the manner that is likely to produce the highest price. The governing rules are both permissive, in that they give the enforcement official a range of options in selling the property, and directive, in that they require him or her to choose the option that will yield the highest recovery for judgment creditors and, potentially, a surplus for the debtor. The language of the *EMJA* is more explicit than that of the *CEA*, providing that property shall be disposed of "in a manner that is likely to realize the maximum proceeds reasonably recoverable under the circumstances."[87] The *CEA* mandates the same result by providing

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83 *Land Titles Act*, RSA 2000, c L-4 [Alta *LTA*]; *The Land Titles Act, 2000*, SS 2000, c L-5.1 [Sask *LTA*].

84 *EMJA*, *supra* note 4, s 115; *CEA*, *supra* note 3, s 2(g). Compare Sask *PPSA*, *supra* note 72, s 65(3); Alta *PPSA*, *supra* note 72, s 66(1).

85 *EMJA*, *ibid*, s 117; *CEA*, *ibid*, s 4.

86 *EMJA*, *ibid*, s 124(1).

87 *Ibid*, s 98(1)(a).

that a civil enforcement agency may sell both personal property and land by any method that is commercially reasonable.[88] *PPSA* case law interpreting the standard of commercial reasonableness may be applied by analogy to the equivalent provisions of the judgment enforcement statutes, both in connection with sale and more broadly. The cases establish that a commercially reasonable sale is one in which the person conducting the sale has used "best efforts to see that the highest possible price is obtained for the collateral."[89]

E. DISTRIBUTION OF FUNDS AND THE CREDITOR SHARING PRINCIPLE

Both the *EMJA* and *CEA* provide a comprehensive set of rules governing the creation, amount, and disbursement of a fund created by enforcement proceedings. While the distribution schemes differ on points of detail, they are similar in conception and effect. Both systems expressly recognize the rights of secured creditors and others who have an interest in the property sold in enforcement proceedings, and both address the exemptions entitlement of the judgment debtor. The funds in the hands of the enforcement official are distributed to judgment creditors after any payments to third parties and the debtor are extracted, according to a prescribed ranking of claims.[90]

The principle of *pro rata* sharing among judgment creditors has been embedded in the law of Saskatchewan and Alberta since the late nineteenth-century.[91] Under pre-reform law, a judgment creditor who initiated successful enforcement measures was obliged to share the proceeds *pro rata* with other writ holders and with creditors who

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88 *CEA* s. 48(d) applies to personal property and s. 69 to land (*supra* note 3). With respect to personal property, s. 48(c) excuses the agency from the requirement to sell as soon after instructed to do so as is practicable if it is commercially reasonable to delay the sale. The Alberta Report describes the manner in which property was sold under pre-reform law (*supra* note 6 at 104-106, 170-72). The *Seizures Act* (RSA 1980, c S-11, repealed) required that personal property be sold by public auction or tender unless the court ordered otherwise. While these rules did not apply to land, the accepted practice was to sell by auction or by tender—neither of which were likely to realize the best possible price for property of either kind.

89 Cuming, Walsh & Wood, *supra* note 82 at 648, quoting Grant Gilmore, *Security Interests in Personal Property* (Boston: Little, Brown, 1965) vol 2 at 1234.

90 In Saskatchewan, distributions are made by the sheriff (see *EMJA*, *supra* note 4, Part XII). In Alberta, a distributing authority is either a civil enforcement agency or, in the case of garnishment, the clerk of the court (*CEA*, *supra* note 3, s 94). A receiver appointed by the court is treated as a distributing authority for purposes of the distribution rules (*CER*, *supra* note 15, s 35).

91 For a historical account and critical analysis of the creditor sharing principle, see Lyman R Robinson, *Distribution of Proceeds of Execution: An Examination of the Common Law, Creditors' Relief Legislation, Modern Judgment Enforcement Statutes and Proposals for Reform* (2003) 66:1 Sask L Rev 309. See also Dunlop & Buckwold, *supra* note 14 at 709-710; Cuming & Layh, *supra* note 14 at 329-30.

were qualified to obtain a "certificate" of their claims.[92] The new statutes retain the sharing principle in modified form. In Alberta, the distributable fund created by writ proceedings is shared among creditors who have registered a writ of enforcement or who have claims that are deemed by other legislation to have the status of a registered writ.[93] A judgment creditor need only register to share in the proceeds of enforcement measures taken by another. In Saskatchewan, the class of sharing creditors is considerably more restricted. Only those who have taken active steps to enforce their judgment by delivering an enforcement instruction to the sheriff are entitled to participate:[94] registration of a judgment is not, in itself, enough.[95] The *EMJA* approach to enforcement requires creditors who have a genuine interest in enforcing their judgment to actively participate in the enforcement system. A judgment creditor cannot simply register a judgment and await payment in the hope that funds will be forthcoming when the debtor's property is liquidated in proceedings taken by another creditor, or when the debtor is forced to pay out the judgment in order to mortgage or sell property free of the enforcement charge.

Both the *EMJA* and *CEA* depart from the strictly *pro rata* approach of pre-reform law by rewarding the creditor who has initiated the enforcement measures producing the fund with a bonus.[96] Creditors are more likely to undertake enforcement measures if their recovery is not undercut by the claims of others who are free-riding on their efforts. Similarly, both systems compensate creditors who have participated in an interpleader proceeding that defeats a third party claim to the debtor's property. Subject to the recovery of costs and the satisfaction of judgments that have priority under other statutes, interpleading creditors in Saskatchewan are entitled to recover fully from the remaining fund to the extent that their action secured the property that produced the fund. Their Alberta counterparts enjoy slightly more favourable treatment, in that their claims rank below

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92 The sharing rules operated somewhat differently in Saskatchewan and Alberta. For a full explanation, see Dunlop, *supra* note 2 at 545-72.

93 "Eligible claims" are defined in the *CEA* (*supra* note 3, ss 99(1)-(2)).

94 *EMJA*, *supra* note 4, s 110(3).

95 There is an exception where the sheriff receives funds generated by the sale of property in enforcement action by a secured creditor, or where a creditor who has issued an enforcement instruction receives payment directly from the judgment debtor. In either case a fund is constituted regardless of whether the sheriff holds a subsisting enforcement instruction from any creditor and the sheriff is obliged to distribute the fund as prescribed. For further explanation, see Saskatchewan Report, *supra* note 10 at 177-78; Cuming & Layh, *supra* note 14 at 330-32.

96 *EMJA*, *supra* note 4, s 110(3)(f); *CEA*, *supra* note 3, s 99(3)(f).

claims for costs but above claims entitled to priority under other legislation.[97]

The sharing rules of the two models differ in their treatment of money paid by a judgment debtor directly to the judgment creditor. The *EMJA* provides that a judgment creditor who receives payment after delivering an enforcement instruction must remit the payment to the sheriff for distribution according to the rules of the Act, regardless of whether the enforcement instruction remains in effect as a "subsisting enforcement instruction."[98] The rationale for this approach is as follows:

> A judgment creditor who has elected to invoke the judgment enforcement system by delivering an enforcement instruction cannot circumvent the system by retaining money paid directly by the judgment debtor or someone else. However, a judgment creditor who has not invoked the system (*i.e.*, has not delivered an enforcement instruction to the sheriff), other than to register the judgment, is entitled to deal directly with the judgment debtor in seeking satisfaction of the judgment without surrendering to the sheriff money received from the judgment debtor or someone else on behalf of the judgment debtor. However, any receipt of payment in these circumstances is vulnerable to [attack] under *The Fraudulent Preferences Act*, R.S.S. 1978, c. F-21.[99]

Under the *CEA*, a payment made by a debtor to an agency to pay out or reduce the judgment debt is subject to distribution, but a payment made directly to the judgment creditor is not.[100] This difference between the two systems seems relatively minor but may have significant consequences. Judgment creditors in Alberta can "have their cake and eat it too," taking advantage of a distribution made under enforcement action by another creditor while avoiding the requirement to share by accepting payment directly from the debtor.[101]

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97 *EMJA*, *ibid*, s 110(3)(e); *CEA*, *ibid*, s 99(3)(e). Unlike the *EMJA*, the *CEA* provides two sets of distribution rules. Subsection 99(3) applies where the amount of the distributable fund is less than the total amount of eligible claims to the fund, which is almost always the case. Section 100 applies when the amount of the fund exceeds the total amount of claims. There is no priority among eligible claims and no instructing creditor's bonus under that section, since everyone will be paid in full.

98 *EMJA*, *ibid*, s 107(3).

99 Cuming & Layh, *supra* note 14 at 331-32.

100 *CEA*, *supra* note 3, s 96(1)(b). See also Dunlop & Buckwold, *supra* note 14 at 718.

101 Note that the Alberta *Fraudulent Preferences Act* (RSA 2000, c F-24) does not apply to payments made in the form of money (*ibid*, s 2). Therefore, a payment of money to a judgment creditor cannot be attacked on grounds that it has preferential effect.

IV. SIGNIFICANT DIFFERENCES BETWEEN THE STATUTORY MODELS

A. CONCEPTUAL FOUNDATIONS AND TERMINOLOGY: THE EFFECT OF REGISTRATION

Under pre-reform law in both Saskatchewan and Alberta, the conceptual foundation of the several judgment enforcement devices varied. Delivery of a writ of execution to the sheriff "bound" the debtor's goods while registration in the land titles registry "bound" the debtor's land. The binding effect of the writ as it affected personal property did not extend beyond goods but the sheriff was empowered by statute to sell other kinds of property.[102] Alberta's pre-reform rules of court governing garnishment provided both that service of a garnishee summons would "bind" a debt due or accruing due to the judgment debtor, and that a debt was "attached" by the summons.[103] A court appointed receiver simply took possession of the debtor's property with power to sell. Registration of a writ had important priority implications with respect to land and, when the *PPSA* came into effect in each of the two provinces, ancillary amendments to the legislation governing execution made registration of the writ a factor in determining priority with respect to goods.[104] Overall, there was no conceptual consistency in the structure of judgment enforcement law and registration played only a partial role in the determination of priorities.

Under the *CEA* and *EMJA*, registration is central both to the conceptual structure that underpins the enforcement of a judgment and to the priority of a judgment creditor's claim to the debtor's property.[105] The adoption of registration as a central feature of judgment enforcement law was consciously patterned after the *PPSA*, except that in this context registration plays a role in enforcement as well as in the determination of priorities.[106] The priority rules of the respective Acts are considered later on.

Under the *CEA*, registration of a writ of enforcement in the Personal Property Registry "binds" all of the debtor's exigible personal property,

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102 See e.g. *Seizures Act*, *supra* note 88, s 5; *Executions Act*, RSS 1978, c E-12, ss 5(1), 10(1), 11.1(1), repealed. Both Acts are now repealed.

103 See Alberta Report, *supra* note 6, vol 2 Appendix B: Existing Legislation, Selected Rules of Court, r 471(1), 471(4), 473(1), 481(1).

104 *Seizures Act*, *supra* note 88, s 4; *Executions Act*, *supra* note 102, ss 2.1, 2.2.

105 For further discussion of the conceptual basis of both pre-reform and reformed judgment enforcement law, see Ronald CC Cuming, "When an Unsecured Creditor is a Secured Creditor" (2003) 66:1 Sask LR 255.

106 Under the *PPSA*, registration is the primary method by which a security interest is perfected and the date of registration is the central factor in determining the priority of a security interest as against competing third party claims to the collateral. However, a security interest need not be registered to be enforced against the debtor.

including after-acquired property.[107] The writ binds the debtor's interest in land on registration under the Alta *LTA* against the certificate of title that embodies the debtor's interest.[108] The writ must be registered in the Personal Property Registry as a condition of writ proceedings (that is, enforcement action) against both personal property and land.[109] Registration in the Personal Property Registry plays a role in enforcement against land because the registry also functions as a source of information about writ proceedings that have been initiated by judgment creditors.[110]

The *CEA* concept of the "binding effect" of the writ is drawn from pre-reform law,[111] but it extends to all of the debtor's property and the action that precipitates binding is registration rather than delivery of the writ to an enforcement official. The idea of "binding" is somewhat difficult to define but may be described as follows:

> Under English law, a writ of execution bound the judgment debtor's goods upon its delivery to the sheriff. The binding effect gave the sheriff the right to seize the affected property, not only in the hands of the judgment debtor but also in the hands of transferees, other than those protected by an over-riding common law or statutory rule. The power stemming from the writ was held by the sheriff, rather than the judgment creditor. The binding effect created rights of enforcement that could be exercised against third parties but it did not confer a property interest on the writ-holder and did not equate to a lien or charge. This concept was given statutory effect [by provincial legislation].[112]

The language of the *CEA* confirms that the binding effect does not give the judgment creditor an interest in the debtor's property. The Act speaks consistently to the enforcement and priority of the writ, never to the enforcement or priority of the judgment or rights held by the judgment creditor. Nevertheless, the *function* of a registered writ is closely analogous to the function of a security interest in that it embodies the right to sell or collect the debtor's property to satisfy

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107 *CEA*, *supra* note 3, ss 33(2)(a), 33(3).

108 *CEA*, *ibid*, s 33(2)(b). In the case of land that is not under the Alta *LTA*, the writ binds or otherwise affects the debtor's interest to the extent permitted by the enactments that govern the land. See Dunlop & Buckwold, *supra* note 14 at 532-33.

109 *CEA*, *ibid*, s 26.

110 The civil enforcement agency conducting proceedings is required to register reports of the various steps taken in the proceedings, from seizure through distribution. See *CER*, *supra* note 15, s 13.

111 Alberta Report, *supra* note 6 at 31ff.

112 Dunlop & Buckwold, *supra* note 14 at 276 [footnotes omitted]. See also Cuming, *supra* note 105 at 267ff.

the judgment debt and has a priority status relative to competing claimants to the property. In other words, it has both *in personam* and *in rem* effect.[113] However, the registered writ differs from a security interest functionally and conceptually in that it embodies the collective rights of judgment creditors who have registered. The Act requires that seizure and sale of property, as well as attachment of debts under a garnishee summons, be undertaken to the extent of the amount or value of property necessary to satisfy all registered writs. Subject to the instructing creditor's bonus and the priority for interpleading creditors described in the previous section, the fund produced by writ proceedings is shared among creditors who have registered a writ.

The Judgment Registry is the venue for registration of judgments under the *EMJA* but, operationally, the Personal Property Registry serves as the Judgment Registry.[114] The *EMJA* eschews the ancient language of "binding" in favour of a concept that may be more readily grasped by a modern lawyer. Registration in the Judgment Registry creates an "enforcement charge securing the amount recoverable in connection with the judgment."[115] The charge attaches to all of the debtor's present and after-acquired exigible personal property unless the registration includes a more limited description of the property charged.[116] The *EMJA* differs from the *CEA* in that, while the *CEA* speaks to enforcement of the binding writ rather than the underlying judgment, the *EMJA* speaks to enforcement of the judgment. It explicitly provides that the judgment confers on the sheriff authority to implement enforcement measures.[117] The charge created by registration serves only to establish the priority of judgment creditors' rights in relation to the debtor's property. However, a judgment creditor who wishes to initiate enforcement measures is required to give the sheriff a registry search result indicating that the judgment has been registered in relation to personal property and land.[118] In practice, registration is therefore a condition of enforcement under both models as well as a factor in determining priority.

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113 The term "*in rem*" is used in this paper to identify rights in relation to property that are enforceable not only against the owner of the property but against third parties. It is intended to include rights that are not interests in property but recognized in law as having a priority status relative to other rights, including property interests.

114 *EMJA*, *supra* note 4, s 18. This means that a search of the Personal Property Registry will disclose registered judgments as well as security interests in personal property and other registrable interests, though it is possible to conduct a search of the Judgment Registry alone, in which case the search result will only disclose registrations made under the *EMJA*. See Cuming & Layh, *supra* note 14 at 89ff.

115 *EMJA*, *ibid*, s 22(1).

116 *Ibid*.

117 *Ibid*, s 30(1).

118 *Ibid*, s 31(1).

The Land Titles Act, 2000[119] supplements the *EMJA* with respect to the requirement and effect of registration against interests in land. Registration of a judgment in the Judgment Registry (that is, the Personal Property Registry) is procedurally a condition of registration against the debtor's interests in land but does not create a charge on land owned by the debtor at the time of registration. The judgment creditor must apply under the Sask *LTA* to have an "interest based on that judgment" registered against the debtor's interest.[120] Once registered, the judgment creates an enforcement charge on the land.[121] Unlike the Alberta model, the Saskatchewan model allows an enforcement charge to attach automatically with respect to land acquired by the debtor in the future.[122] Once a judgment is registered in the Judgment Registry, any title subsequently issued or interest subsequently registered in the land titles registry in the name of the debtor as it appears on the judgment is subject to an enforcement charge. In effect, an enforcement charge attaches automatically to after-acquired land much as a charge attaches to after-acquired personal property.[123]

The idea of the "charge" may be intuitively meaningful to a modern lawyer but the precise proprietary character of the enforcement charge is less obvious than the term might suggest. The term "charge" suggests the concept of the charge in equity, which is in itself a complex idea. The equitable charge represents "the right to have the property (charged) applied to the satisfaction of the debt in preference to all subsequent claimants except, of course, the bona fide purchaser for value of the legal title without notice."[124] So understood, the equitable charge is functionally comparable to the statutory enforcement charge. The enforcement charge embodies rights of enforcement against the debtor's property to satisfy the debts owed judgment creditors, and those rights are enforceable against third parties according to the priority status ascribed by the Act. Like the equitable charge, the enforcement charge is an encumbrance on the debtor's property. However, the enforcement charge differs from its

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119 *Supra* note 83. "*LTA*" may be used in the text to refer to the *Land Titles Act* of Saskatchewan or Alberta as indicated by the context.

120 *Ibid*, s 171.

121 *Ibid*, s 173.

122 This approach reflects the land titles rules that governed before the *EMJA* was enacted. If a writ of execution against land was registered in the General Registry, the writ would bind an interest in land subsequently issued in the name of the judgment debtor and would be registered against the debtor's interest. The same system was once in place in Alberta but has since been abandoned.

123 See Cuming & Layh (*supra* note 14 at 139-45) for further detail regarding the rules that apply to land.

124 DW McLauchlan, "The Concept of 'Charge' in the Law of Chattel Securities" (1975-78) 8:3 VUWLR 283 at 289.

equitable counterpart in that it arises by law, rather than by agreement of the parties, and does not represent rights of enforcement specific to a single creditor. It represents the collective rights of judgment creditors who have taken the steps prescribed by the *EMJA* to share in the fruits of enforcement measures.[125] While the equitable charge may be a proprietary interest held by the chargee,[126] the enforcement charge is not a proprietary interest held by the creditor whose act of registration elicits its creation. It represents rights in relation to property rather than rights in property. So understood, the enforcement charge is conceptually aligned with the "binding effect" of the writ. Both represent the collective rights of judgment creditors and both have *in rem* effect in that those rights are enforceable against third parties to the extent provided in the legislation under which they arise.[127] Cuming and Layh suggest that the charge can be seen as having "an institutional existence and status similar to that of a writ of execution."[128]

This view of the conceptual character of the enforcement charge may be cast in doubt by language that appears in some provisions of the legislation, those of the Sask *LTA* being the most obvious. As noted above, a creditor must apply to have an "interest based on a judgment" registered in the Land Titles registry. However, the word "interest" as it appears here does not indicate that registration confers a property interest on the registering creditor. Rather, it is used to bring the enforcement charge within the conceptual structure and terminology of the *LTA*, which is framed in terms of categories and rankings of "interests" in land.

The language of subsection 26(1) of the *EMJA* is less easily explained. It provides:

> The trustee in bankruptcy of a judgment debtor succeeds *to the interest of a judgment creditor* under an enforcement charge affecting the property of the judgment debtor that

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125 *EMJA* s. 39(1) directs the sheriff to seize property sufficient to satisfy the amount recoverable with respect to any or all enforcement instructions he or she has received (*supra* note 4).

126 Hugh Beale et al, *The Law of Personal Property Security* (Oxford: Oxford University Press, 2007) at 104. The conception of property associated with the equitable charge is very subtle. The explanation advanced by McLauchlan makes the point: "The chargee gets nothing entitling him in any sense to call the property his own—he has no 'actual *enjoyment* rights'. Certain proprietary rights are *created*, but these rights 'are potential only and are not available for exercise until there has been default'" (*supra* note 124 at 291).

127 Cuming & Layh suggest that the priority regime of the *EMJA* gives the enforcement charge a proprietary *effect* but that the charge is not the equivalent of a security interest (*supra* note 14 at 100 [emphasis added]).

128 *Ibid* at 101.

> came into existence pursuant to section 21 before the date of bankruptcy.[129]

Subsection 173.3(9) of the Sask *LTA* defines the rights of the trustee in relation to an enforcement charge on land in parallel terms.

On their face, these provisions imply that an enforcement charge is a property interest held by a person: the trustee succeeds *to the interest of a judgment creditor*. However, this language departs from the otherwise consistent terminology of the *EMJA* and must be understood in light of its function. The Act speaks to the enforcement of the judgment or the "amount recoverable" in relation to the judgment, not to enforcement of the charge or to the realization of a property interest held by the judgment debtor. These provisions are not intended to suggest otherwise: they are designed to prevent the priority inversion that could otherwise occur when the judgment debtor becomes bankrupt.[130]

As a general rule, a security interest registered after a judgment is registered will be subordinate to the enforcement charge. However, the enforcement rights of judgment creditors under provincial law are suspended if the debtor becomes bankrupt.[131] Without a countervailing rule, an enforcement charge that has priority over a security interest under the *EMJA* or the *LTA* may therefore be subordinated to the security interest if bankruptcy intervenes and provincial judgment enforcement law ceases to operate. A perfected security interest is enforceable against the debtor's property notwithstanding bankruptcy and will accordingly have priority over the rights of unsecured creditors exercised through the trustee in bankruptcy. The *EMJA* and *LTA* provisions prevent this from occurring. The result is explained by Cuming and Layh:

> Subsection 26(1) and subsection 173.3(9) of the LTA reverse pre-existing law in this respect by allowing the trustee in bankruptcy to assert the priority status a judgment creditor could have asserted before the bankruptcy as against the holder of the security interest, a result consistent with the role of the trustee as the representative of unsecured creditors. As a result the trustee can claim the property subject to the enforcement charge for the benefit of the

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129 *EMJA*, *supra* note 4, s 26(1) [emphasis added].

130 The Newfoundland and Labrador *Judgment Enforcement Act* provides a rule with similar effect (*supra* note 7, s 48(2)).

131 This follows from the combined effect of ss. 69.3 and 70(1) of the *Bankruptcy and Insolvency Act* (RSC 1985, c B-3 [*BIA*]). For a general explanation of the effect of bankruptcy on the rights of judgment creditors, see Roderick J Wood, *Bankruptcy & Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015) at 169-70.

> bankrupt's estate to the extent of the amount secured by the charge in priority to the claim of the secured creditor.[132]

The constitutional validity of the *EMJA* approach rests on provincial jurisdiction over property and civil rights. The Supreme Court of Canada has confirmed that provincial legislatures may define rights of property, and the rights so defined prevail both outside of and within bankruptcy, provided provincial law does not conflict with or subvert bankruptcy law. Further, the trustee in bankruptcy may assert the proprietary rights of unsecured creditors conferred by provincial law.[133] Cuming and Layh put it this way:

> Subsection 26(1) does not change the priority structure of the *Bankruptcy and Insolvency Act*. It simply brings property into the bankrupt estate that would otherwise be taken by a secured party who, prior to bankruptcy, would have lost it as a result of the subordinate priority status of the security interest.[134]

The argument is compelling, though the constitutional validity of these provisions remains untested. Courts have traditionally refused to recognize that a proprietary claim conferred on judgment creditors under provincial law survives bankruptcy. However, the cases do not squarely address provisions comparable to those of the *EMJA*. While it is clear that a bankruptcy order or assignment "takes precedence" over rights of judgment creditors under provincial law,[135] that principle does not preclude the trustee from asserting the rights of judgment creditors for the collective benefit of unsecured creditors generally when provincial law expressly so provides. As Cuming and Layh suggest, provincial law is enhancing the bankruptcy estate rather than diminishing it.

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132 *Supra* note 14 at 129. See also Saskatchewan Report, *supra* note 10 at 53-55.

133 *Re Giffen*, [1998] 1 SCR 91, 155 DLR (4th) 442. The trustee in bankruptcy may defeat a property interest that is a security interest as defined by the *PPSA* if it is not perfected at the date of bankruptcy. The Court expressly recognized that the trustee may assume the rights unsecured creditors could otherwise assert under provincial judgment enforcement law (*ibid* at paras 38-41).

134 Cuming & Layh, *supra* note 14 at 130. For a fuller analysis of the constitutional issue, see Cuming, *supra* note 105 at 267-71.

135 *Royal Bank of Canada v Larue*, [1928] 1 DLR 945, [1928] AC 187 (PC). In *Bank of Montreal v Titan Landco Inc.* ((1990), 70 DLR (4th) 1, [1990] 5 WWR 304 (BCCA) [cited to DLR]), the Court held that a lien created by provincial law to secure the recovery of a Crown claim did not survive bankruptcy (*ibid* at 11). The case is distinguishable because the provincial legislation in question did not expressly authorize the trustee to exercise the rights associated with the lien, and recognition of the lien would have conflicted with the ranking of preferred claims under the *BIA* (*supra* note 131).

Whether or not they are constitutionally valid, ss. 26(1) of the *EMJA* and 173.3(8) of the Sask *LTA* should not be taken to indicate that an enforcement charge comprises a property interest held by a judgment creditor. The charge represents a claim that may be asserted by the judgment debtor's trustee in bankruptcy, but that claim is not a property interest held by the registering creditor.

The *CEA* does not include provisions to similar effect. The priority inversion that the Saskatchewan model prevents may therefore occur in Alberta.[136] The holder of a security interest that is subordinate to a writ binding property of a judgment debtor may assert priority over the rights of judgment creditors by putting the debtor into bankruptcy.[137]

To summarize, the idea of the "enforcement charge" under the *EMJA* fits more comfortably within generally understood conceptions of rights in and against property than does the "binding effect" of the writ under the *CEA*, but the two concepts function in essentially the same way. Both the enforcement charge and the binding writ constitute the conceptual device through which the rights of enforcement associated with a judgment are given a priority status relative to security interests and other *in rem* claims to the judgment debtor's property. Both arise from registration of the judgment claim in a publicly searchable registry. Functionally, both concepts entail rights in relation to a judgment debtor's property comparable to those associated with a security interest, though they represent the rights of creditors collectively rather than individually. The two models differ conceptually but not functionally with respect to the requirement of registration as a condition of enforcement. In the Alberta model, it is the registered writ that is enforced as against the judgment debtor, not the judgment itself. Registration therefore serves simultaneously as the basis for enforcement and priority. In the Saskatchewan model, it is the judgment that is enforced, but the enforcement charge created by registration gives the rights of enforcement embodied in the Act a priority status relative to third party claims against the property of the debtor.

B. APPROACH TO PRIORITIES

1. Introduction

Judgment debtors often grant security interests in their property, transfer it to others, and engage in activities that result in the creation

136 See Dunlop & Buckwold, *supra* note 14 at 284-85.

137 The strategic invocation of federal bankruptcy law as a device by which to produce priority inversions is not precluded as an abuse of process. See e.g. *Re Bank of Montreal and Scott Road Enterprises Ltd.* (1989), 57 DLR (4th) 623, [1989] 4 WWR 566 (BCCA). See also Wood, *supra* note 131 at 141-43.

of liens and other *in rem* claims.[138] The rights embodied in the binding writ and the enforcement charge, respectively, may affect third parties who acquire an interest in property of the debtor under transactions of this kind. The potential for competing claims to the same property requires legal rules that determine their priority ranking. The Saskatchewan and Alberta models of reformed law both include rules that govern the priority of judgment creditors' rights embodied in the enforcement charge or binding writ relative to the claims of others who may have an interest in the judgment debtor's property. As already noted, both models are patterned on the *PPSA* in that the fact and date of registration determines the priority of a judgment creditor's rights of enforcement in relation to competing interests. However, registration plays a considerably greater role in determining priority under the *EMJA* than it does under the *CEA*.

2. Priorities with Respect to Land

The priority system that pertains to land under the *CEA* is comprised of two basic rules, one implicit and one explicit. The implicit rule derives from the provision declaring that registration of a writ against land under the *LTA* "binds all of the enforcement debtor's exigible land described in the certificate of title against which the writ is registered."[139] The *CEA* rule reflects the *LTA* provision that applied to writs of execution under pre-reform law. The *LTA* provision has been reformulated to refer to a writ of enforcement but has otherwise been retained, perhaps redundantly in light of the parallel *CEA* rule.[140] The Supreme Court of Canada considered the effect of this language over a century ago, establishing the priority rule generally referred to as "the rule in *Wilkie v. Jellett*."[141] It concluded that the writ binds only the interest the debtor has so an interest in the debtor's land that exists before the writ is registered is unaffected and has priority over the writ, whether or not the interest is itself registered.

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138 For example, a landlord's right of distress against a tenant's goods is not a property interest in the goods but is a right enforceable against third parties. For further discussion of the conceptual nature of a landlord's right of distress, see Dunlop & Buckwold, *supra* note 14 at 783-88.

139 *CEA*, *supra* note 3, s 33(2)(b).

140 Alta *LTA*, *supra* note 83, s 122(7). There is a troublesome inconsistency between the *CEA* and *LTA* formulations of the rule. The *LTA* provides that the writ binds "all legal and equitable interests of the debtor in the land included in the certificate of title" (Alta *LTA*, *ibid*), while the rule in *CEA* s. 33(2)(b) provides that the writ binds only "exigible land" described in the certificate of title (*supra* note 3). The *LTA* provision should be read in light of the pre-*CEA* case law in which the courts held that a writ registered against land did not constitute a lien or charge on an exempt homestead (Dunlop & Buckwold, *supra* note 14 at 302-303, n 189).

141 *Jellett v Wilkie* (1896), 26 SCR 282, 16 CLT 260. And see *Davidson v Davidson*, [1946] SCR 115, [1946] 2 DLR 289.

The rule has been applied in Alberta cases decided both before[142] and after[143] the *CEA* came into effect. The *CEA* provides an express priority rule for interests acquired in property *after* the property is bound by a writ: a subsequently acquired interest is subordinate to the writ.[144] The resulting priority scheme is based on the binding effect of the writ produced by registration but does not depend on registration of interests that compete with the writ. Interests that arise before the writ is registered have priority over the writ and those that arise after the writ is registered are subordinate.

The rules that determine priority with respect to land in Saskatchewan are more straightforward and more transparent than those that apply in Alberta. The Saskatchewan model simply brings the enforcement charge within the priority regime of the *LTA*. Registration of a judgment against a debtor's interest in land creates an enforcement charge that is treated as an interest in land for purposes of priority: the first-in-time to register rule of the *LTA* applies except as otherwise provided.[145] The *LTA* includes a provision that expressly reverses the rule in *Wilkie v. Jellett*.[146]

The *CEA* follows the recommendations of the Alberta Report with respect to a writ binding land. The report endorses the pre-reform approach to the binding effect[147] but provides no articulated justification for preserving it, nor does it acknowledge that this approach is inconsistent with the principle of indefeasibility of title that informs a Torrens land registry system. The result is that a judgment creditor in Alberta may have land sold in writ proceedings only to encounter a belated claim to the proceeds by a person who asserts priority on the basis of an unregistered interest that arose before the creditor's writ or any other writ was registered. The buyer of the land will acquire title free of the unregistered interest by virtue of the *LTA*, but the holder of that interest will be entitled to the money generated by writ proceedings to the extent of his or her claim, at least until such time as the fund has been disbursed under the *CEA* distribution rules.[148]

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142 *Price v Materials Testing Laboratories Ltd.* (1976), 68 DLR (3d) 444, [1976] 5 WWR 280 (Alta QB).

143 *Drebert v Coates*, 2008 ABQB 684, [2009] 3 WWR 115.

144 *Supra* note 3, s 34(1).

145 Sask *LTA*, *supra* note 83, s 173.2. For an explanation, see Cuming & Layh, *supra* note 14 at 144-45. A mortgage on land has priority over a subsequently created enforcement charge with respect to advances made both before and after registration of the judgment.

146 Sask *LTA*, *ibid*, s 173.2(1)(a).

147 Alberta Report, vol 1, *supra* note 6 at 44.

148 *Supra* note 3, s 96(4).

3. Priorities with Respect to Personal Property

The rules of the *PPSA* that establish the priority of a security interest in personal property are designed to facilitate accurate risk assessment. This is accomplished primarily by using a publicly searchable registry as the basis for priority. Registration of a creditor's claim to a security interest in the Personal Property Registry enables those who might consider acquiring a competing interest in the collateral described in the registration to ascertain the existence and extent of the claim before electing to deal with the debtor: a search of the registry using the debtor's name will disclose it.[149] Further, a clear set of priority rules structured around "perfection" of the security interest through registration[150] allows the searching party to determine the priority of any interest he or she might acquire relative to the security interest disclosed by a registry search.[151]

The drafters of the *CEA* recognized that a binding writ is the functional equivalent of a security interest in personal property.[152] As we have seen, the registered writ secures recovery of a judgment debt in roughly the same way that a security interest secures recovery of a secured debt. Both represent an *in rem* claim to the debtor's property that may affect third parties who acquire a competing interest. Accordingly, the priority rules recommended in the Alberta Report and incorporated in the *CEA* parallel the central rules of the *PPSA* governing security interests.[153] Like a security interest, the priority of a writ depends on whether it is registered in the Personal Property Registry and discoverable through a registry search. The apparent intention of the statutory drafters was to give a registered writ a priority status equivalent to that of a security interest perfected by

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149 This assumes that the name used to register the security interest and the name used to search are the same, or sufficiently similar that the search will disclose the registration (Cuming, Walsh & Wood, *supra* note 82 at 364-66). It also assumes that the security interest was given by the person whose name is searched rather than by a previous owner of the property in question (*ibid* at 356).

150 A security interest may be perfected by other means but registration is by far the most common method of perfection and constitutes a direct parallel with registration of a writ. For more on perfection, see *ibid* at 296-317.

151 The idea that registration should play a role in the priority of a judgment creditor's claim to personal property of the debtor appeared in both Saskatchewan and Alberta legislation before the new models of judgment enforcement law were implemented. See Cuming & Layh, *supra* note 14 at 11 (describing Saskatchewan law). And see Alberta Report, vol 1, *supra* note 6 at 34-35 (regarding the legislation in Alberta).

152 For a fuller discussion of the theory of priority implemented by the *PPSA* and its adoption in the *CEA*, see Dunlop & Buckwold, *supra* note 14 at 279ff.

153 *CEA*, *supra* note 3, ss 21-42.

registration, and that intention is substantially if not entirely achieved by the priority rules of the *CEA*.[154]

The *CEA* priority scheme is most closely integrated with that of the *PPSA* in the context of a priority competition between a writ and a security interest. *PPSA* terms and concepts incorporated in the *CEA* by reference include the definitions of security interest and purchase money security interest as well as the notions of attachment and perfection, and the *CEA* priority rules parallel the *PPSA* rules that govern a competition between security interests. A security interest will have priority over a writ if it is registered or perfected before the writ is registered.[155] The writ will have priority if it is registered first,[156] unless the security interest is a purchase money security interest and is registered or perfected within fifteen days after the debtor obtained possession of the collateral or, in the case of intangible collateral, within fifteen days of the date of attachment.[157]

A significant but easily overlooked feature of the *CEA* priority rules is their application to interests that are "deemed" to be security interests under the *PPSA*. A person who leases goods to a judgment debtor under a lease for a term of more than one year,[158] or who consigns goods to the debtor under a commercial consignment,[159] is not treated as owner of the goods but rather has a security interest in the goods for purposes of a priority competition that falls within either the *PPSA* or the *CEA*.[160] Similarly, the interest of a person who takes an outright assignment of an account from a judgment debtor is a security interest, even if the assignment is not merely by way of security.[161] If a writ has priority over the unperfected interest of the lessor or consignor, the goods may be seized and sold in writ proceedings as if the lessor's or consignor's interest did not exist.[162] A writ that has priority over the assignee of an account owed to a judgment debtor may be enforced against the account without regard to the assignment.

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154 The limits of space preclude a full review of the *CEA* and *EMJA* priority rules. Only the most significant rules are considered.

155 *CEA*, *supra* note 3, s 35(2).

156 If the security interest is not registered or perfected before the writ, the residual priority rule in *CEA* s. 34(1) applies: a security interest is subordinate to a registered writ (*ibid*).

157 *Ibid*, s 35(3).

158 Alta *PPSA*, *supra* note 72, s 1(1)(z); Sask *PPSA*, *supra* note 72, s 2(1)(y).

159 Alta *PPSA*, *ibid*, s 1(1)(h); Sask *PPSA*, *ibid*, s 2(1)(h).

160 Alta *PPSA*, *ibid*, ss 1(1)(tt)(ii)(B)-(C); Sask *PPSA*, *ibid*, ss 2(1)(qq)(ii)(B)-(C). For a case demonstrating the operation of the *PPSA* definition of "security interest" in the application of the *CEA* priority rules, see *Stoke Resources & Consulting Inc. v Auto Body Services Red Deer Ltd.*, 2009 ABQB 569, 59 CBR (5th) 290, aff'd in material part 2011 ABCA 370, 85 CBR (5th) 255.

161 Alta *PPSA*, *ibid*, s 1(1)(tt)(ii)(A); Sask *PPSA*, *ibid*, s 2(1)(qq)(ii)(A).

162 *CEA*, *supra* note 3, s 34(2).

The operation of the *CEA* priority rules in these cases creates an implicit exception to the principle that a writ may only be enforced against property of the judgment debtor.[163]

The influence of the *PPSA* is also felt in the *CEA* buyer protection rules. The "ordinary course of business" and "garage sale" protection rules of the *CEA* parallel the corresponding *PPSA* rules.[164] Like the *PPSA*, the *CEA* provides specialized rules to determine the priority of a buyer or lessee of serial number goods,[165] though the *CEA* rules are not entirely consistent with the *PPSA* model.

Notwithstanding the general similarity of the *CEA* and *PPSA* priority regimes, some *CEA* rules depart from the *PPSA* approach in ways that are hard to understand or justify, and, in some cases, rules are ambiguous or lacking. For example, the *CEA* rules that apply to serial number goods give priority to a buyer of consumer goods if the registration of the writ does not include the serial number of the goods, even if the buyer has knowledge of the writ, while a buyer of goods held as equipment has priority only if he or she takes without knowledge.[166] Under the *PPSA* priority rules, a buyer of either serial number consumer goods or equipment can only take priority over a security interest that is not registered by serial number if he or she takes without knowledge of the security interest. Whether this and other differences in approach are deliberate or accidental is not clear, but the nature of the discrepancies suggests that the drafters of the *CEA* provisions may not have fully appreciated the operation of the corresponding *PPSA* rules.

Like the *CEA*, the *EMJA* establishes a priority regime for personal property that is modelled on the *PPSA*. However, the *EMJA* goes much further than the *CEA* in promoting consistency between the judgment enforcement and personal property security priority rules. The priority

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163 The "deemed" security interests held by a lessor or consignor fall within the definition of "purchase money security interest" (Alta *PPSA*, *supra* note 72, ss 1(1)(ll)(iii)-(iv); Sask *PPSA*, *supra* note 72, ss 2(1)(jj)(iii)-(iv)) and will have priority over a writ only if registered before the writ is registered (*CEA*, *ibid*, s 35(2)), or registered after the writ is registered but within fifteen days of the date the debtor acquired possession of the goods (*CEA*, *ibid*, s 35(3)). The security interest of the assignee of an account is not a purchase money security interest, so the assignment must be registered before the writ is registered to have priority.

164 *CEA*, *ibid*, ss 36(1)-(2). Compare Alta *PPSA*, *ibid*, ss 30(2)-(3).

165 *CEA*, *ibid*, s 36(3).

166 *Ibid*. Further, an unperfected security interest in serial number consumer goods or equipment can have priority over a writ that is registered if registration of the writ does not include the serial number of the goods. This is inconsistent with the corresponding rules of the *PPSA*. See Dunlop & Buckwold, *supra* note 14 at 353-56. For other anomalies in the *CEA* rules, see Dunlop & Buckwold, *ibid* at 357ff (commenting on CEA s 37, governing fixtures). See also Dunlop & Buckwold, *ibid* at 377ff (on s 39, governing securities).

rules of the *PPSA* that govern a security interest in personal property are adopted by reference, subject to the relatively few qualifying rules set out in the *EMJA*. This is accomplished by s. 23(1):

> 23(1) Except as otherwise provided in this Act or the regulations, an enforcement charge has the same priority in relation to both prior and subsequent interests in property charged as a perfected security interest, other than a purchase money security interest, to which *The Personal Property Security Act, 1993* applies.[167]

In effect, the enforcement charge created by registration of a judgment in the Personal Property Registry cum Judgment Registry has essentially the same priority status as a security interest perfected by registration in the Personal Property Registry.[168] The date on which a judgment is registered and an enforcement charge on personal property thereby created is the critical date for determining the priority of the charge. The cumulative body of priority rules encompassed by s. 23(1) is qualified by express buyer protection rules that are substantially the same as the corresponding *PPSA* rules, but revised to accommodate the distinctive elements of the judgment enforcement system.[169]

The *EMJA* approach will produce the same result as the general priority rules of the *CEA* in a competition between a registered writ and a security interest. In effect, the default rule in both systems is that the first to register will have priority, except as provided by a more specific rule. The *EMJA* approach also parallels the *CEA* when a priority competition involves a purchase money security interest: the purchase money security interest will have priority over a previously created enforcement charge if it is perfected within the fifteen day period prescribed by s. 34(2) of the *PPSA*. Both systems adopt the *PPSA* definition of security interest so, as noted above, an enforcement charge may have priority over the "deemed" security interest held by

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167 *EMJA*, *supra* note 4. The *PPSA* priority rules that would otherwise apply to goods held by a judgment debtor as inventory do not apply to an enforcement charge (*EMJA*, *ibid*, s 23(2)). For example, a person who takes a purchase money security interest in inventory is not obliged to give notice to the holder of an enforcement charge in order to have priority over the charge under s. 34(3) of the Sask *PPSA* (*supra* note 72).

168 For a more complete explanation of the operation of s. 23(1), see Cuming & Layh, *supra* note 14 at 105-112.

169 *EMJA*, *supra* note 4, s 25. And see Cuming & Layh, *ibid* at 119-25. The *EMJA* also includes a separate set of rules governing the priority of an enforcement charge in fixtures or crops relative to an interest in land to which the fixtures are affixed or on which the crops are growing (see Cuming & Layh, *ibid* at 114-18). A priority competition between an enforcement charge and a security interest in the fixtures or crops as goods falls within the general rule of s. 23(1).

a lessor or consignor of goods or an assignee of an account falling within the relevant definition. However, while the general priority rules of the two models operate to similar effect in this context, the difference in approach produces discrepant outcomes in other cases. As we have seen, the *CEA* priority rules reflect but do not mirror those of the *PPSA* while, for the most part, the *EMJA* rules inherently do.

The differences between the *CEA* and the *EMJA* may result more from a difference in legislative philosophy than from a deliberate policy choice by Alberta legislators to depart from the *PPSA* rules. The *CEA* sets out the priority rules that govern a registered writ within the body of the Act.[170] The *EMJA* requires a person who wishes to ascertain the priority of an enforcement charge to refer to the priority rules of the *PPSA*. Which approach is to be preferred?[171]

On the surface, the *CEA* offers the advantages of simplicity and internal comprehensiveness: it does not require resort to the admittedly complex priority rules of the *PPSA* to determine the priority of a judgment creditor's claim. However, reference to, and an understanding of, *PPSA* rules and concepts is in practice required in order to understand and apply the *CEA* rules, especially as they relate to security interests. For example, a person reading the *CEA* alone will not be alerted to the fact that a security interest cannot be enforced against third parties, including the third party claims of judgment creditors embodied in a writ, unless the requirements of s. 10 of the *PPSA* are satisfied. Further, the application of the *CEA* rules is based on whether a security interest competing with a writ is "perfected or registered." "Perfected" is a status that can only be determined by resort to the *PPSA* rules governing attachment and perfection, and the reference to "registration" entails registration in accordance with the rules relating to registration of a financing statement under the *PPSA* as a means of achieving perfection. A person who attempts to apply the *CEA* priority rules without understanding the *PPSA* is likely to have difficulty, and may be mistaken in the conclusion he or she might reach. In other words, while the *CEA* rules may appear to be simple, they are deceptively so. In reality, the correct application of the CEA rules requires a good understanding of the *PPSA* priority structure, its detailed rules, and the concepts and policies they

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170 The *CEA* rules are supplemented by a *PPSA* priority rule under which a secured party who gains knowledge of a writ cannot claim priority with respect to advances made thereafter (Alta *PPSA*, *supra* note 72, s 35(6)).

171 My views on this point are informed by my experience working with and writing about both systems, but are no doubt weighted in favour of the Saskatchewan model by my involvement in the law reform process that led to the *EMJA* and in the ULCC civil enforcement project, as described in the Introduction. Some of the advantages of the Saskatchewan model are outlined in the Saskatchewan Report (*supra* note 10 at 44-45).

embody. On the other hand, a person who does understand the *PPSA* may be misled by the superficial similarities in the *PPSA* and *CEA* priority rules. Discrepancies between the *PPSA* and the *CEA* are not always obvious and may be overlooked. Under the Saskatchewan model, an understanding of *PPSA* priorities is directly transferrable to an understanding of *EMJA* priorities, subject to the handful of express supplementary rules in the *EMJA*.

The *EMJA* approach also avoids the problems of uncertainty resulting from the imperfect transplantation of a rule from the *PPSA* to the judgment enforcement statute,[172] or from the failure to provide a clear rule.[173] The comprehensive scope of the *PPSA* priority rules is such that virtually any potential priority issue that might arise in relation to an enforcement charge is addressed. The Saskatchewan model has the further advantage of substantially avoiding the need to amend priority rules in the judgment enforcement statute to coincide with future amendments to the *PPSA*. Under the *EMJA*, any amendment to a *PPSA* priority rule is automatically incorporated into the judgment enforcement priority structure, except in the relatively few cases in which the *EMJA* provides its own rule.

These points in favour of the Saskatchewan model should not be taken to suggest that the Alberta priority system is seriously deficient. On the contrary, the *CEA* provides a reasonably clear set of rules that provide a basis for the resolution of most priority disputes that are likely to arise in the context of judgment enforcement. However, the argument for the *EMJA* approach draws support from the fact that both the Saskatchewan and Alberta models were considered in the project that produced the ULCC Uniform Act[174] and the Saskatchewan approach was accepted. On the other hand, the British Columbia Law Institute recommendations for reform follow the ULCC Uniform Act in adopting the enforcement charge as a prerequisite to enforcement and the basis for determining priorities, but depart from the ULCC in endorsing a partial version of the *CEA* priority rules as a preferred

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172 For example, *CEA* s. 35(2)(a) (*supra* note 3) is ambiguous as to whether registration of a financing statement by a secured creditor who does not yet have an attached security interest confers priority over a writ, though a policy-based interpretation would suggest that the answer is yes. See Dunlop & Buckwold, *supra* note 14 at 327-37.

173 For example, the *CEA* gives no clear guidance as to the priority of a writ binding a security entitlement in relation to a security interest. See Dunlop & Buckwold, *ibid* at 389-95. Under the *EMJA*, the priority of an enforcement charge is governed by the *PPSA* priority rules that apply to this form of property. The concept of "control" as a factor in determining priority is addressed in the *EMJA* through provisions under which the sheriff may acquire control. See Cuming & Layh, *supra* note 14 at 125-27.

174 *Supra* note 9.

approach to the priority of the charge.[175] Oddly, the accompanying commentary bases the recommendation on the premise that "[i]t is desirable…to have a set of priority rules in the Uniform Act that correspond as closely as possible with the rules already existing in the *Personal Property Security Act*."[176] After suggesting that the ULCC Uniform Act departs in subtle ways from the *PPSA*, the Institute concludes that "[t]he proposed changes to the Uniform Act are meant to make this Part correspond more closely to the *Personal Property Security Act*, and thereby ease the implementation of the Uniform Act."[177] The recommended approach in fact contradicts the Institute's expressed goal.[178]

4. Priority of a Landlord's Right of Distress for Rent

The foregoing analysis of the priority rules of the respective statutory models addresses the strategy used in each to emulate the priority rules of the *PPSA* in the context of judgment enforcement. Before we leave the subject of priority, a comment on the scope of the respective priority regimes is warranted. The *EMJA* includes special rules to resolve a priority competition that often arises in practice, namely, the competition between a judgment creditor and a landlord entitled to levy distress on the goods of the judgment debtor-tenant for arrears of rent.[179] The *CEA* does not.

At common law, priority between a writ of execution and a landlord's right of distress was determined by the doctrine of *in custodia legis*.[180] Once goods were seized under legal process and thus "in the custody of the law," they could not be seized by a subsequent claimant without statutory authority to the contrary. This produced a "first to seize" approach to priority. A landlord who had goods seized under distress would have priority for arrears of rent over writs held by judgment creditors of the tenant. While the claims of judgment creditors who had goods seized under execution would similarly have priority over a landlord's claim for unpaid rent, that priority was

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175 BC Report, *supra* note 13 at 86-91.

176 *Ibid* at 90.

177 *Ibid*.

178 The New Brunswick Act (*supra* note 11) incorporates a priority system that differs significantly from both the Saskatchewan and Alberta models. This may be due in part to the fact that New Brunswick legislation already provides for the registration of judgments in the Personal Property Registry and the New Brunswick *Personal Property Security Act* (SNB 1993, c P-7.1) includes provisions governing priority as between a security interest and a judgment creditor who has registered a notice of judgment (*ibid*, s 20).

179 *Supra* note 4, ss 27(3)-(4).

180 *Jorgenson v Engelstad*, [1924] 2 DLR 635, 18 Sask LR 269 (CA). For a brief discussion of the case law, see Dunlop & Buckwold, *supra* note 14 at 779-80.

qualified by the 1709 *Statute of Anne*,[181] under which the landlord must be paid up to one year's arrears of rent before goods are removed and sold in execution proceedings.

The *EMJA* reflects the "first in time" approach of the common law as qualified by the *Statute of Anne*, but brings it within the conceptual and functional framework of the system by making the event that determines priority the date on which an enforcement charge is created by registration in the Judgment Registry, rather than the date goods are seized by the sheriff to enforce a judgment.[182] An enforcement charge is subordinate to a right of distress exercised by a landlord before it came into existence. A charge has priority over a right of distress exercised after it came into existence, but a sheriff who sells the tenant's goods to enforce the judgment must pay to the landlord the proceeds of sale for arrears of rent to a maximum of one year before distributing the fund to judgment creditors.[183]

Neither the *CEA* nor any other Alberta statute currently offers a rule that applies to a priority competition between a writ binding goods and a landlord claiming the goods under distress for rent. The statutory history on this point is puzzling. The *CEA* was amended in 2006 to add provisions that appeared on their face to implement a statutory form of the first-to-seize doctrine of *in custodia legis*.[184] The priority so determined was qualified by the *Statute of Anne*, which remains in effect in Alberta.[185] However, the 2006 provisions were eliminated by subsequent amendments providing explicitly that a person *may* have goods seized either in exercise of a right of distress or in writ proceedings notwithstanding that they are already under seizure pursuant to another claim.[186] The amended provision tells us, unhelpfully, that seizure in accordance with the new rules "does not affect priority to the seized property or its proceeds."[187] We can only wonder how priority is now to be determined. In the absence of anything else, the common law doctrine presumably applies in spite of the fact that the *CEA* authorizes successive seizures. The *CEA*

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181 (UK), 8 Ann, c 18.

182 *EMJA*, *supra* note 4, ss 27(3)-(5). See also Cuming & Layh, *supra* note 14 at 132-33.

183 *EMJA*, *ibid*, s 41(5).

184 *Justice Statutes Amendment Act, 2006*, SA 2006, c 4, s 1.

185 *Circa 1880 Imports Ltd. v Antique Photo Parlour Ltd.* (1983), 27 Alta LR (2d) 397 at 398-99, 55 AR 19 (QB).

186 *Justice and Court Statutes Amendment Act, 2011*, SA 2011, c 20, s 3(5). The new provision appears at s. 48.2 (*CEA*, *supra* note 3).

187 *CEA, ibid*, s 48.2(3). For an extended discussion of how the *CEA* might be applied to a priority competition between a writ and a landlord levying distress, see Dunlop & Buckwold, *supra* note 14 at 779-89. The analysis is based on the previous version of s. 48.2, which provided that property under seizure could not be subsequently seized by another claimant unless permitted by the court. That part of the analysis is redundant in light of the amendments described here.

provisions should be regarded as permissive procedural rules designed to save a person who has seized goods in ignorance of a previous seizure from liability for violation of the Act. Nevertheless, the legislation should be amended to clarify the result.

5. Priority of a Pre-judgment Asset Preservation Order

A pre-judgment preservation order granted under the *EMJA* resembles the pre-reform Mareva injunction in that it has purely *in personam* effect. It is an order directing the judgment debtor or another person to do or not do something with the debtor's property. An attachment order granted under the *CEA* has the same effect, but is given a further attribute. The order may be registered against both personal property and land[188] and, once registered, has the same priority as a registered writ.[189] Once a judgment is obtained in the action and a writ registered, the writ assumes the priority position of the attachment order. In other words, the priority of the writ is based on the date the attachment order was registered rather than the date the writ was registered. As I have written elsewhere:

> The remarkable result is that the priority status of the writ dates from a time when the attachment creditor's claim was just that: a claim yet to be proven and recognized by a judgment of the court. The necessary implication is that the attachment order itself has *in rem* effect, although the claim supporting the attachment order may never be reduced to judgment.[190]

This approach was not endorsed in the Alberta Report but may be explained as a statutory analog of the judicially invented practice known as writ-saving, which was familiar to the Alberta legal community before the law was reformed.[191] The practice was employed to prevent a writ issued on a default judgment and registered against the judgment debtor's land from losing the priority status so established if an order was granted setting aside the default judgment and directing trial. The court could set aside the judgment on condition that registration of the writ was maintained. A judgment eventually obtained in the action could then be enforced through the writ already registered.

A number of conceptual and policy reasons may be advanced for the argument that writ-saving has not survived enactment of the

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188 *CEA*, *ibid*, s 22.
189 *Ibid*, s 23.
190 Dunlop & Buckwold, *supra* note 14 at 232.
191 See *Pawluk v Bank of Montreal*, [1990] 4 WWR 566, 73 Alta LR (2d) 266 (CA).

CEA, but two are particularly persuasive.[192] As already noted, the *CEA* expressly states that, except as otherwise provided in another enactment, a money judgment may only be enforced in accordance with the Act.[193] Enforcement of a judgment through a writ preserved by judicial fiat offends that prohibition. Second, the provision of a statutory pre-judgment remedy that has a priority status must implicitly supplant a judicial remedy that operates to similar effect.

The practice of writ-saving was also employed in Saskatchewan before the *EMJA* was enacted,[194] but the potential that it might have survived the new legislation is even less there than in Alberta. Priority under the *EMJA* is based on the enforcement charge that arises on registration of a judgment: no writ is involved. The court cannot simultaneously order that the judgment is set aside and that it continues to exist for purposes of the registry.

The practical consequences of ascribing a priority status to an attachment order are significant.[195] Though an attachment order registered in the Personal Property Registry may affect only the property identified in the order, it is not clear that the retroactive effect of a writ subsequently registered is similarly limited. A writ on registration binds "all of the enforcement debtor's exigible personal property."[196] The rule governing attachment orders says that a writ issued in the proceedings "has the same priority as the attachment order"[197] but does not limit its scope of operation. If the retroactive priority of the writ is limited to the property affected by the attachment order, the writ may have a different priority status with respect to different items of property. The potential for confusion and uncertainty is likely to mean that a debtor will be unable to sell or encumber any personal property once an attachment order is registered in the Personal Property Registry, since a person who subsequently acquires an interest will risk subordination to a future writ. The consequences of registering an attachment order against title to land are somewhat less extreme since the future writ will bind only the land that falls within the certificate of title against which it is registered.[198]

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192 For further analysis, see Dunlop & Buckwold, *supra* note 14 at 233-38.

193 *Supra* note 3, s 2(a)(i). As we have seen, Alberta courts have continued to grant the non-statutory Mareva injunction without reference to this provision and notwithstanding the existence of a statutory asset preservation remedy (see the text accompanying notes 50-56).

194 *Willrun Payroll Services Inc. v Prairie Land & Investment Services Ltd.*, 2010 SKCA 42, 350 Sask R 126.

195 For an extended discussion of the problems of interpretation and application associated with the conferral of a priority status on an attachment order, see Dunlop & Buckwold, *supra* note 14 at 238-41.

196 *CEA*, *supra* note 3, s 33(2)(a).

197 *Ibid*, s 23(3).

198 *Ibid*, s 33(2)(b).

C. ADMINISTRATIVE STRUCTURE

The pre-reform administrative machinery of judgment enforcement in Saskatchewan and Alberta was essentially the same. The seizure and sale of tangible personal property and the sale of land under writs of execution were conducted by civil services sheriffs acting through sheriffs' bailiffs. Garnishment of accounts, most often wages and deposit accounts, was administered by the clerk of the court. In the rare cases in which a receiver was appointed on application to the court, the receiver acted under the court's supervision.

The authors of the Alberta Report considered and rejected the suggestion that some of the functions associated with the writ of execution be assigned to private bailiffs. They recommended that the then-existing system be retained with the qualification that each sheriff should have the authority to effect seizure anywhere in Alberta, overcoming the obstacles presented by the requirement that execution proceedings be conducted by the sheriff of the judicial district in which the property was located.[199] While garnishment would continue to be administered by the clerk of the court, it would become one of the modes of enforcing a writ, rather than a separate process, and would be subject to the same general rules as any other form of writ proceeding. The *CEA* embodies almost all of the central recommendations of the Alberta Report with the notable exception of the one directed to the role of sheriffs.[200]

Under the *CEA*, there is one sheriff in the province: the Sheriff-Civil Enforcement (referred to in the Act simply as the Sheriff). The Sheriff has no active role in enforcing judgments. The functions that were once performed by sheriffs, including seizures, sales, and distributions, are now performed by a private entity called a "civil enforcement agency," referred to throughout the Act simply as an agency.[201] The agency performs the physical activities associated with seizure and sale through private bailiffs. Although the Sheriff has the legal authority to perform the functions assigned to an agency,[202] he or she in fact does not do so. The Sheriff's role is to appoint authorized agencies and bailiffs to act as prescribed by the legislation, and to oversee their operations. The *CEA* greatly expands the scope of garnishment and clarifies the rules that govern its use, but the remedy continues to be administered procedurally by the clerk

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199 Alberta Report, vol 1, *supra* note 6 at 72-73.

200 For a full description of the administrative structure of the *CEA* and its implications, see Dunlop & Buckwold, *supra* note 14 at 99-146.

201 *CEA* s. 1(1)(b) defines "agency" as a person who is authorized under Part 2 to operate a civil enforcement agency, and includes a sheriff who performs the functions of an agency under the Act (*supra* note 3).

202 *Ibid*, s 9(7).

of the court. While all types of enforcement are "writ proceedings," proceedings conducted by an agency are administratively distinct from writ proceedings in the form of garnishment.

A civil enforcement agency acts under contract with the Sheriff and according to the authority and duties assigned by the *CEA*. The authority and duties of a bailiff are similarly prescribed in the Act, and the activities of both are further governed by extensive provisions in the *CER*,[203] including codes of conduct. An agency may in principle seize and sell all forms of personal property. However, the rules governing writ proceedings against personal property are not easily applied to enforcement against accounts and other forms of intangible property.[204] In practice, garnishment is used for enforcement against monetary obligations other than accounts in bulk, while a bulk sale of accounts likely requires the appointment of a receiver or some other special order on application to the court.[205]

In the result, the *CEA* adopts the unitary concept of "writ proceedings" as the basis for enforcement, but administration of the different forms of proceeding is conducted by different authorities, each of whom performs essentially the functions that they or their counterparts performed under the old system. The civil enforcement agency substitutes for the old civil service sheriff. The clerk of the court continues to administer garnishment. The court still supervises a receiver appointed by its order and, presumably, the implementation of any other special order.

The *EMJA* is based on an administrative structure that differs radically from both the system employed in Alberta and the system that operated in Saskatchewan under the old law. Enforcement against all forms of property is collapsed into the single mechanism of "seizure,"[206] which initiates "enforcement measures"[207] by way of

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203 *Ibid*, Part 2; *CER*, *supra* note 15, Part 1 and Schedule 2.

204 As a rule, seizure of personal property requires the presence of the enforcement officer "where the property is located" (*CEA*, *supra* note 3, s 45(1)). The rule clearly contemplates seizure of tangible property (see Dunlop & Buckwold, *supra* note 14 at 434-38). However, in *Stout & Company LLP v Chez Outdoors Ltd.* (2009 ABQB 444, 9 Alta LR (5th) 366), intangible property in the form of a licence was seized by notice of seizure given to the enforcement debtor, a process described anecdotally by counsel for the enforcing creditor as having been based on the theory that the licence was "located" throughout Alberta. Therefore, the licence could be seized by notice to the debtor wherever the debtor was in the province. There is nothing in the decision itself that describes or explicitly endorses seizure on that basis.

205 *CEA* s. 85 provides for the appointment of a receiver or "any other or additional order that the Court considers necessary or appropriate to facilitate realization of the property" (*CEA*, *ibid*).

206 *EMJA*, *supra* note 4, s 2(1)(ww).

207 *Ibid*, s 2(1)(p). "[E]nforcement measure" means essentially any step provided for by the Act to enforce a judgment, other than registration (*ibid*).

sale or collection of the property as may be appropriate. The process is governed by detailed rules defining the procedure through which seizure is effected and enforcement measures conducted in relation to different types of property.[208] It may be argued that the idea of seizure is not functionally required or conceptually apt in relation to land or accounts, since neither can be taken into the physical possession of the sheriff or other enforcement official.[209] However, the *EMJA* recognizes that the meaning and effect of the term "seizure" can be what the law prescribes, and incorporates the view that the adoption of a single conceptual and functional enforcement device will simplify the administration of the enforcement system and enhance its effectiveness. Seizure is merely the procedural step that initiates any enforcement action, other than appointment of a receiver by the court. The Act further advances the coherence and efficiency of the system by placing enforcement against all forms of property in the hands of the public sheriff, with the partial exception of enforcement through a court appointed receiver. The remedy of garnishment is abandoned and, along with it, the role of the clerk of the court as an enforcement official.

The Saskatchewan Report addresses the option of privatizing the judgment enforcement system along the lines of the Alberta approach. Aside from potential arguments of principle that would deny coercive authority to private actors in the legal system, investigation of the Alberta system made it clear to the authors of the report that a similar approach is not practically feasible in Saskatchewan.[210] Alberta law differs from that of Saskatchewan and the other provinces and territories in its approach to the enforcement of security interests in personal property. A secured creditor who wishes to realize on the collateral when the debtor defaults is required to employ an agency to effect seizure.[211] Once seizure is accomplished, the agency may surrender possession of the collateral to the secured creditor, who may complete the process of disposition independently[212] or choose to employ the agency or another person as the creditor's agent for those purposes. In addition, the seizure and disposition of a tenant's goods under a landlord's right of distress must be conducted by an agency.[213] The work generated by enforcement of security interests and the conduct of landlords' distress together produce by far the

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208 See Saskatchewan Report, *supra* note 10 at 8.

209 Dunlop discusses the conceptual and practical problems associated with seizure of land under the pre-reform law (*supra* note 2 at 358-62).

210 Saskatchewan Report, *supra* note 10 at 7.

211 *CEA*, *supra* note 3, s 9(3)(b). This requirement was originally imposed by the *Seizures Act* (*supra* note 88).

212 Alta *PPSA*, *supra* note 72, s 58(5).

213 *CEA*, *supra* note 3, s 104.

main part of an agency's revenue, the enforcement of security being an especially important component. The enforcement of judgments alone would not produce sufficient revenue to support a business, even in the considerably more populous province of Alberta. Saskatchewan law, in contrast, allows secured creditors to exercise "self-help" in enforcing against personal property collateral: neither the sheriff nor any other authorized official need be involved. Without a role in security enforcement, a private business in Saskatchewan could not survive on the revenue generated by enforcement of judgments.

While the Saskatchewan Report recommends that the sheriff be the sole enforcement official, it suggests that a judgment creditor be given a role in effecting seizure. The notice of seizure would be issued by the sheriff's office but could be delivered by the judgment creditor or his or her agent, much as a garnishee summons could be served by a creditor under the old system.[214] The recommendation was intended to reduce the costs of enforcement and relieve part of the administrative workload that would otherwise be borne by the sheriff. The *EMJA* goes much further, providing that the sheriff may authorize any person, including a judgment creditor, to perform *any* function that the sheriff is empowered or required to perform.[215] The breadth of this approach may in practice have restricted the role for creditors envisaged in the report, since it appears that the sheriff's power of delegation is exercised with caution, if at all. It may be necessary to amend the regulations to include a defined procedure for delegation of the notice-giving function to creditors if the intention of the report is to be fulfilled in this respect.

Whether prompted by economics or policy, the fact that a public official is in charge of all enforcement proceedings other than receivership allows him or her to be clothed with a degree of authority that would not be properly entrusted to a private agency. The powers of the Saskatchewan sheriff are too extensive to fully enumerate here, but perhaps the most notable aspect of the sheriff's role is his or her adjudicative authority.[216] The sheriff may accept or reject a claim to an exemption,[217] may make a non-appealable selection as among

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214 Saskatchewan Report, *supra* note 10 at 197.

215 *Supra* note 4, s 4(1).

216 The *EMJA* also gives the sheriff the all-encompassing power in dealing with the judgment debtor's property to exercise any rights of the debtor necessarily incidental to enforcement of the judgment (*ibid*, s 38(1)). Aside from the general power to sell and transfer title, the civil enforcement agency has a similar power only in relation to dealings with instruments (*CEA*, *supra* note 3, s 50), the sale of agricultural products (*CEA*, *ibid*, s 52) and enforcement against securities and security entitlements (*CEA*, *ibid*, s 57.1).

217 *EMJA*, *supra* note 4, s 90(4). The sheriff's decision is subject to review by the court under s. 90(5) (*ibid*).

vehicles that may be claimed as exempt when the debtor fails to exercise the right of selection,[218] and, where a debtor receives income other than through employment remuneration, may assess the amount of the income exemption available to the debtor in lieu of the amount to which the debtor would be entitled if all his or her income were employment remuneration.[219] In contrast, if an exemption is claimed under the *CEA*, the judgment creditor or agency must obtain an order of the court to validate or reject the claim and, in the latter case, proceed to sale.[220] The Saskatchewan sheriff also has an important role in the conduct of enforcement proceedings by a receiver. A receiver appointed by the court is required to report to the sheriff, who is empowered to instruct the receiver to sell property, examine and approve the receiver's reports, fix the receiver's remuneration, discharge the security provided by the receiver and terminate the receivership, or require the receiver to apply to court for completion of those functions.[221] In Alberta, a receiver is appointed and supervised by the court according to the directions given in the order of appointment.

A civil enforcement agency in Alberta has a much more limited scope of authority than a Saskatchewan sheriff. While an agency is not legally the agent of a judgment creditor who retains it, the agency is nevertheless employed by the creditor.[222] The appearance of bias in the performance of an adjudicative or discretionary power in an adversarial context would be highly problematic. The role of the sheriff as defined by the *EMJA* produces obvious efficiencies of time and cost that were not available under the old law and that could not be similarly achieved in a privatized system.

D. ENFORCEMENT AGAINST INTANGIBLE PROPERTY AND PARTIAL INTERESTS

The principle of universal exigibility implemented by both the *EMJA* and the *CEA* was discussed earlier: *all* property of a judgment debtor is subject to enforcement measures, including limited interests in property. While the principle is clear, the means by which it may be effected in practice can present difficulties.

The *CEA* provides rules for enforcement against some forms of intangible property: securities and security entitlements may be

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218 *Ibid*, s 93(6).
219 *Ibid*, s 96.
220 This is true with respect to personal property (*supra* note 3, s 46(2)) and with respect to land (*ibid*, s 73(2)).
221 *EMJA*, *supra* note 4, s 74.
222 For further discussion of the relationship between an agency and the instructing creditor, see Dunlop & Buckwold, *supra* note 14 at 113-20.

seized,[223] and current and future obligations (primarily accounts) are subject to garnishment.[224] There are no rules for enforcement against other forms of intangible property, such as licences and intellectual property, and the ordinary rules for enforcement against personal property are not easily applied because they require seizure where the property is located.[225] The *CEA* also provides rules for enforcement against some partial interests in property, but only a few. There are rules for enforcement against security interests (including mortgages) held by the debtor in another person's property[226] and for enforcement against jointly owned land[227] and joint obligations,[228] but not for other co-owned property.[229] If the ordinary rules that apply to seizure and sale of personal property, sale of land, or garnishment are not workable in practice, a creditor may apply to the court for the appointment of a receiver or another special order.

The *EMJA* provides a much more comprehensive set of procedures for enforcement against intangibles and a range of partial interests. It offers rules for enforcement against intangibles[230] in the form of accounts,[231] securities and security entitlements,[232] licences,[233] and intellectual property.[234] There are rules for enforcement against partial interests including a judgment debtor's interest as co-owner of all forms of property,[235] a beneficiary's interest under a trust,[236] and interests under a lease, contract of sale, or security agreement.[237] The

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223 *Supra* note 3, ss 57-65.
224 *Ibid*, s 78(a).
225 See discussion in note 204, *supra*.
226 The *CEA* uses the term "secured obligation" rather than "security interest." A secured obligation is defined in s. 1(1)(nn) as "an obligation secured by an interest in property" (*supra* note 3). The concept is apparently intended to be equivalent to a security interest but the terminology and definition create problems. For further analysis, see Dunlop & Buckwold, *supra* note 14 at 477-80.
227 The *CEA* provides that a joint tenancy is severed upon sale by an agency (*supra* note 3, s 76) but, unlike the *EMJA*, the *CEA* does not provide rules giving the other joint owner a first right of purchase. Compare *EMJA*, *supra* note 4, ss 49(5)-(7).
228 *CEA*, *ibid*, ss 78(g), 82, 83(2).
229 In practice, it may be impossible to enforce against co-owned personal property that is not physically divisible. See Dunlop & Buckwold, *supra* note 14 at 420-25.
230 Section 41(2)(b) of the *EMJA* applies to seizure of intangibles generally (*supra* note 4) and is supplemented by rules that apply to specific types of intangible. For further detail on this subsection and the provisions referred to in notes 231-40, see generally Cuming & Layh, *supra* note 14.
231 *EMJA*, *ibid*, ss 57-70.
232 *Ibid*, ss 51-56.
233 *Ibid*, ss 41(2)(c), 43.
234 *Ibid*, s 47.
235 *Ibid*, s 49. And see *ibid*, s 50 (partnership property).
236 *Ibid*, ss 41(2)(e), 41(3), 59.
237 *Ibid*, ss 45-46.

EMJA also provides a fall-back seizure rule authorizing the sheriff to seize by taking "any other steps as may be appropriate having regard to the nature of the property."[238] Like the *CEA*, the *EMJA* provides for seizure in any manner ordered by the court[239] and for enforcement through the appointment of a receiver.[240]

E. EXEMPTIONS

The *EMJA* and the *CEA* include provisions that exempt identified property of a judgment debtor from seizure to satisfy a judgment. The policy supporting statutory exemptions has evolved over time and the scope of exemptions law differs significantly across jurisdictions.[241] The Alberta Report includes an extended discussion of the approach that should be taken to exemptions under the proposed legislation, prefacing its recommendations with this statement of the currently accepted rationale:

> The enforcement processes should not destroy the debtor as a viable economic and social entity. The law, in the interests of all participants, must protect debtors from forfeiting so much of their property and potential as would render it impossible or unreasonably difficult for them to maintain themselves and their dependants at a reasonable standard and with reasonable security that they can continue to do so. There is also considerable social interest in preserving the viability of debtors. If creditors were allowed to destroy debtors' economic viability, their continued maintenance would fall to society. The result would be a net asset transfer from the public purse to creditors.[242]

A full review and comparison of the exemptions provisions of the two statutes is beyond the scope of this paper, but major points of similarity and difference deserve mention.

The *CEA* follows the recommendations of the Alberta Report in offering exemptions for identified general categories of property,

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238 *Ibid*, s 41(2)(g).
239 *Ibid*, s 41(2)(f).
240 *Ibid*, Part VIII.
241 See generally Dunlop, *supra* note 2 at 449-506. Historically, exemptions legislation has varied widely in policy and approach. See Thomas GW Telfer, *Ruin and Redemption* (Toronto: University of Toronto Press, 2014) at 152-53. See also Thomas GW Telfer, "The Evolution of Bankruptcy Exemption Law in Canada 1867-1919: The Triumph of the Provincial Model" in Janis P Sarra, ed, *Annual Review of Insolvency Law, 2007* (Toronto: Thomson Carswell, 2008) 577 at 585-94.
242 Alberta Report, vol 1, *supra* note 6 at 254-55. To similar effect, see the Saskatchewan Report, *supra* note 10 at 143.

with monetary value limits imposed by regulation in relation to most categories. The report acknowledges the risk of obsolescence associated with value limitations but encourages the legislature to address that concern by regularly reviewing and updating the legislated amounts.[243] Unfortunately, that has not occurred. The employment earnings exemption is calculated on the basis of minimum and maximum exempt amounts that remain unchanged from those recommended in the 1991 report, which were derived from poverty level incomes reported by governmental and non-governmental organizations. The minimum and maximum exemptions established in the Alberta Report use 1990 as a base year.[244] The exempt amounts for several other categories, including the principal residence, have remained unchanged since they were revised in 1984, before the *CEA* was enacted.[245] The problem is avoided by defining the exemption for medical and dental aids required by a debtor and his or her dependants on the basis of type alone without a value limitation,[246] and that approach is also applied to the equipment[247] and principal residence[248] exemptions given to farmers. In contrast, the exemptions for income-earning equipment and the principal residence of a debtor who is not a farmer are restricted to $10,000 and $40,000, respectively. In the case of the principal residence, a debtor who is a co-owner may claim only the proportion of the $40,000 that corresponds with the extent of his or her interest in the home. The exemption for the capital value of registered savings and investment plans is not capped, but payments out are subject to the exemptions calculation that applies to employment earnings.

The Saskatchewan Report included recommendations that were designed to largely eliminate the problems of obsolescence inherent in value-limited categories. The exemptions provisions recommended would identify the type of property subject to the exemption without a monetary limit, but would allow a judgment creditor to apply for an order of the court allowing the sheriff to seize and sell the property if its value significantly exceeded the value of a reasonable functional equivalent available on the market that would adequately meet the needs of the debtor and his or her dependants. The debtor would be paid the amount of the proceeds required to purchase substitute

243 Alberta Report, vol 1, *ibid* at 315.
244 *Ibid* at 290-91.
245 *Ibid* at 260, n 431.
246 *CEA*, *supra* note 3, s 88(e).
247 *Ibid*, s 88(i). A debtor whose primary occupation is farming may claim an exemption for "the personal property that is necessary for the proper and efficient conduct of the enforcement debtor's farming operations for the next 12 months."
248 *Ibid*, s 88(f). A farmer may claim an exemption for up to 160 acres of land if his or her principal residence is located on the land and it is part of his or her farm.

property that would minimally fulfil the function of the property for which the exemption was claimed.[249] This approach would not only avoid the problems of outdated monetary limits, but would recognize differences in the real needs of debtors based on family size, place of residence, and other relevant factors.

The functional approach as framed in the report was not fully adopted in the *EMJA*, but it appears to have influenced the provisions that apply to some categories of property. The *EMJA* provides a list of categories of exempt property, many of which correspond with the categories established in the *CEA*, and several of which are subject to a value limit prescribed by regulation.[250] Unlike its *CEA* counterpart, the *EMJA* exemption for income-earning property required by a non-farm debtor to support himself or herself and his or her dependants is not value-limited, nor is the household furnishings exemption. However, the court may order seizure and sale of an item falling within those categories "if the value of the item is significantly in excess of the value of an equivalent item of property."[251] The debtor is paid the amount of the proceeds sufficient to replace the property sold with an equivalent item of more modest value. The "functional equivalence" approach is also recognized in a provision under which the court may permit the debtor to retain a vehicle worth more than the prescribed amount if it is necessary to meet the reasonable educational and health needs of the debtor and his or her dependants.[252]

Both models exempt a farm homestead regardless of value. The Saskatchewan exemption is not located in the *EMJA*, but in *The Saskatchewan Farm Security Act*,[253] along with the other exemptions available to farmers. The non-farm principal residence exemption under the *EMJA* is value limited, but the Act retains the longstanding and uniquely Saskatchewan policy of precluding seizure and sale for so long as the home is the debtor's "active residence."[254] The Sask *PPSA* preserves the established provincial policy of extending exemptions to enforcement action by secured creditors who hold a security interest in personal property, other than a purchase money security interest.[255]

The *EMJA* expressly precludes the seizure and sale of property of such low value that the proceeds of sale are not likely to materially

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249 Saskatchewan Report, *supra* note 10 at 152-53 (proposed s 73 and explanatory notes).
250 The exemptions are listed in *EMJA* s. 93 (*supra* note 4).
251 *Ibid*, s 94(2).
252 *Ibid*, s 93(7).
253 SS 1988-89, c S-17.1, s 66; *EMJA*, *supra* note 4, s 93(8).
254 *EMJA*, *ibid*, ss 93(1)(l), 93(2).
255 *Supra* note 72, ss 55(8), 55(14).

exceed the costs of enforcement.[256] While there is no corresponding provision in the *CEA*, it may be "commercially unreasonable" and therefore a violation of the Act for an agency to act on a creditor's instructions to implement writ proceedings against such property.[257]

Both the *EMJA* and the *CEA* extend exemptions to the proceeds of sales of exempt property, whether those sales are voluntary or occur in judgment enforcement or other judicial proceedings.[258] For example, if a motor vehicle worth more than the exempt amount is seized and sold, money equivalent to the amount of the exemption is paid to the debtor and remains exempt for a specified period so it may be used to acquire another motor vehicle.[259] Although the amount of the exemption may not be enough to pay the full purchase price of a new automobile, the debtor can use the exempt amount for a down payment and finance the balance by granting a purchase money security interest to a seller or lender. Since a purchase money security interest that is registered in timely fashion has priority over a prior enforcement charge or binding writ, the car will not be seized to enforce a judgment so long as the debtor's equity is less than the amount of the exemption.[260] The same result may be achieved when the exempt proceeds of a personal residence are used to purchase a new home, but by a more circuitous route.

In Alberta, a writ binds land only upon registration against title to the land.[261] If a judgment creditor finances the purchase of land through a mortgage loan, title to the land is likely to issue with the mortgage as the first registered encumbrance. The mortgage will have priority over a subsequently registered writ, so the land will in practice be unavailable to judgment creditors as long as the value of the debtor's equity is no greater than the amount of the exemption. A Saskatchewan debtor who wishes to use the exempt proceeds of a house to purchase a new one is faced with the fact that an enforcement

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256 *Supra* note 4, s 93(j).

257 *Supra* note 3, s 2(g).

258 *EMJA*, *supra* note 4, s 94; *CEA*, *supra* note 3, s 98; *CER*, *supra* note 15, s 37(2). With respect to the *CEA*, see Dunlop & Buckwold, *supra* note 14 at 657-65. Section 94(5) of the *EMJA* also provides an exemption for insurance money payable in compensation for loss of or damage to exempt property (*ibid*). Case authority in Alberta supports a similar result with respect to insurance proceeds payable on the total destruction of exempt property (*Re Thorne*, 2004 ABQB 83, 1 CBR (5th) 101). The result where property is damaged but not a total loss is unclear.

259 The exempt period under *EMJA* s. 94(12) is six months (*ibid*). Under the *CEA* provision and regulation it is sixty days (*CEA*, *ibid*; *CER*, *ibid*).

260 The *CEA* s. 89 expressly prohibits sale in this situation (*ibid*). The same approach will in practice be taken under the *EMJA*, since sale of the car would not yield proceeds to satisfy the judgment. A court order may be obtained under s. 98(2) to prevent a sale if necessary (*EMJA*, *ibid*).

261 *CEA*, *ibid*, s 33(2)(b).

charge can attach automatically to after-acquired land: title will issue subject to the charge, which would presumably take precedence over a mortgage. However, the enforcement charge will attach only if title to the new house issues in exactly the same name as the name of the debtor as it appears on the registered judgment.[262] If the house is purchased in a slightly different name, an enforcement charge will not arise until the judgment is registered directly against title.[263] Since the charge will be subordinate to the mortgage, the result would be the same as in Alberta.

Both the *EMJA* and the *CEA* limit the exemption for proceeds of exempt property to funds that are not intermingled with other funds. The harsh consequences of this restriction are demonstrated by an Alberta case in which $39,150 in exempt proceeds generated by sale of a principal residence was deposited in an account that contained a few hundred dollars, to which $4,880 in non-exempt funds was subsequently added by a further deposit. The Court held that the exemption was extinguished by the intermingling, with the result that the debtors' interest in a house purchased using $40,500 drawn from the account and comprised substantially of the exempt funds was lost to the trustee in bankruptcy.[264] The Court refused to take a *de minimis* approach to the prohibition against intermingling. The application of tracing rules to determine the amount of proceeds that remains in a mixed fund would produce a fairer result, but the courts are not likely to accept that approach in light of the unambiguous language of the legislation.

V. CONCLUSION

In the twenty years since it came into effect, the *CEA* has generated a very modest body of case law. The vast majority of the reported cases that do exist are decisions on applications for attachment orders, and many of those involve disputed facts rather than debates over the meaning and application of the Act. The *EMJA* has had a shorter but otherwise similar history. The lack of significant litigation suggests that the new systems are functioning well with little need for judicial interpretation or gap filling, though the relatively good economic conditions that have prevailed until recently may also be a factor. Coercive legal measures are less frequently required to recover debt when times are good than when well-paid jobs are scarce and incomes are depressed. Nevertheless, while a definitive assessment may be premature, indications to date are that the new law is generally a success.

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262 Sask *LTA*, *supra* note 83, s 172(1). And see Cuming & Layh, *supra* note 14 at 140-42.
263 Sask *LTA*, *ibid*, s 173(1).
264 *Re Dunbar*, 1998 ABQB 413, 5 CBR (4th) 48. Provincial exemptions operate in bankruptcy under the *BIA* (*supra* note 131, s 67(1)(b)).

The *CEA* has raised few concerns, though some omissions and ambiguities remain to be resolved through statutory amendment and judicial decision. The Act consolidated the judgment enforcement devices of garnishment, sale under execution, and receivership in a single statute and in so doing substantially rationalized and improved the law. It extended the scope of the judgment enforcement system, simplified the procedures involved, and resolved a number of significant problems that previously existed. The adoption of a registry-based approach to priority with respect to all forms of personal property was an important innovation. However, the model of reform embodied in the *CEA* is less far-reaching, both conceptually and administratively, than the model adopted in Saskatchewan. This approach may have allowed lawyers to make a relatively comfortable transition from the old law to the new, but has produced a somewhat less comprehensive and more fragmented system than the one implemented by the *EMJA*.

The *CEA* and the *EMJA* share important features, but the *EMJA* represents a more radical approach to reform. It embodies a comprehensive enforcement regime based on a consistent foundational concept and a unitary procedural device. Judgments are enforced (not writs), priority with respect to both real and personal property is based on a statutory charge rather than the antiquated idea of "binding," priority rankings are determined by registration, and enforcement in all contexts is implemented simply by seizure. The system is highly integrated with the law governing enforcement of secured debt. The fact that one enforcement official administers all forms of proceeding, with the minor and partial exception of enforcement through a receiver, concentrates expertise as well as the clerical functions required to operate the system in one office. A creditor who wishes to enforce against various forms of property can do so in one venue.

The Saskatchewan approach has notable parallels with the reform of personal property security law through enactment of the *PPSA*. The *PPSA* did more than aggregate the existing security devices of conditional sale, chattel mortgage, and floating charge within one statutory system. It assimilated all forms of secured transaction into a unitary concept (the security interest), created a priority scheme based largely on registration, and provided a relatively simple set of rules governing enforcement. The *PPSA* model and Alberta's already-functioning model of reformed judgment enforcement law were available as foundations on which to build the reform of judgment enforcement law in Saskatchewan.

The increasing degree of interest in judgment enforcement law reform across Canadian jurisdictions is cause for optimism. The work done in Alberta, Saskatchewan, and at the ULCC has produced models that can be adapted to local practices and policies. We may

hope to see much better systems of judgment enforcement in place across the country in the not-too-distant future. On a less positive note, the history of reform to date indicates that we are not likely to see in judgment enforcement law the degree of interjurisdictional harmonization achieved in the reform of personal property security law. Nevertheless, we can expect that many of the features of the Saskatchewan and Alberta models will become part of the law elsewhere, facilitating cross-border legal practice and generally making judgment enforcement a more efficient and accessible legal regime than it has historically been.