SASKATCHEWAN
LAW REVIEW

From Sherwood Forest to Saskatchewan: The Role of the Sheriff in a Redesigned Judgment Enforcement System

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The sheriff plays a central role in the judgment enforcement system of Saskatchewan and other provinces. The modern sheriff's office is the product of more than a thousand years of English and Canadian history and a century of unsystematic statutory tinkering with the enforcement writs. This article identifies the issues to be addressed in redesigning that office as the administrative core of a new system of judgment enforcement law, and considers alternative approaches to their resolution. By way of context, the author outlines the sheriff's present role in the enforcement of money judgments and surveys the history of the office.

I. INTRODUCTION

The word "sheriff" conjures visions of imaginary masculine personages possessing varying degrees of ruggedly romantic flair.[1] The usual standards are the stockinged and jerkined villain of the forests of Nottingham and the star-emblazoned, ten-gallon-hat-wearing law enforcer of the Western movie. A survey of Canadians would likely reveal that, in the considerable majority, they are ignorant of the fact that the sheriff is a real life denizen of the Canadian law enforcement scene, most likely located at a desk in the offices of a court house and armed, not with long bow or six shooter, but rather, with pen,

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1 The male-gendered popular image accords very closely, but not entirely, with historic reality. Although married women were largely incapacitated in legal terms by the supposed merger of their legal personalities with those of their husbands, women were not otherwise precluded from holding public office as a matter of general principle. Historic records confirm the existence of at least one female sheriff, namely the Countess of Salisbury, who was sheriff of Whiltshire in the time of Henry III. See John H. Baker, *An Introduction to English Legal History*, 3d ed. (London: Butterworths, 1990) at 530. Nevertheless, the masculine pronoun is used in this article in deference to the fact that it reflects most readers' justifiably gendered associations with the word "sheriff."

computer and the keys to a government issue automobile. And he might be a she.

One hopes that most law students emerge from law school knowing that the modern Canadian sheriff is a government employee charged with the enforcement of civil judgments through the seizure and sale of the exigible property[2] of judgment debtors on the directive of the Court, issued by way of a writ of execution.[3] Regrettably, many will carry into legal practice a clear understanding of little else having to do with the law surrounding the current incarnation of this ancient office. However, lawyers' incomplete fluency in this area of law is not entirely surprising, given its tortuous history, *ad hoc* conceptual framework, and general complexity.

The sheriff is the linchpin of the Canadian judgment enforcement system, and the story of the system's evolution is in large part the story of the sheriff.[4] Accordingly, any reform of judgment enforcement law requires a reexamination of the office of sheriff. This article addresses the question of how that office, assuming it is to be retained, might function in a modern system.

Consideration of the future of the sheriff must be based on an understanding of his present role, which in turn, requires at least a cursory review of his past. This is particularly true given that fundamental aspects of the sheriff's judgment enforcement functions and the law associated with them manifest the functions of, and principles governing, his historic predecessors. This article, therefore, proceeds from a brief examination of the modern role of the sheriff in judgment enforcement, through a contextual overview of his historical legal antecedents and certain legal principles associated with them, to a discussion of recent developments in the administration

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2 "Exigible property" is simply property of a judgment debtor that can, under the relevant legal principles, be seized and disposed of or received (as in the case of money payable on a debt) to generate funds to satisfy a judgment debt.

3 The discussion in this article of Canadian judgment enforcement law and institutions is limited to that of the common law jurisdictions; *i.e.*, the provinces and territories other than Quebec. In most of these jurisdictions, the sheriff is also responsible for empanelling juries, and may be responsible for escorting prisoners and other aspects of courthouse security. However, aside from passing references to these functions, the current topic is the sheriff's role in judgment enforcement.

4 In fact, the modern Canadian sheriff has a more pivotal role in judgment enforcement than does his modern English counterpart. Though the English sheriff originally played a central role in that process, the fragmented court system that eventually developed in England led to the diffusion of judgment enforcement activities among the various officers of various courts. In its comprehensive 1969 review of the judgment enforcement process in England, the Payne Committee, *infra* note 30 at 84, observed that while sheriffs were responsible to levy execution under writs of *fieri facias* issued by the High Court, judgment enforcement in other courts was assigned variously to the court bailiff, the constabulary, or other government appointed officials.

of judgment enforcement systems. The discussion concludes with an assessment of alternative approaches to reform.

II. CURRENT JUDGMENT ENFORCEMENT DEVICES: THE SHERIFF'S ROLE IN THE ENFORCEMENT OF CIVIL JUDGMENTS

The role of the Saskatchewan sheriff as an enforcer of judgments is loosely representative of his role in most of the other common law provinces. He is charged with the seizure and sale of property belonging to recalcitrant judgment debtors, to the end of satisfying the monetary claims of their judgment creditors. The source of his authority is the judicial writ now most commonly called the "writ of execution," though sometimes still designated by the Latin name of its primary predecessor, the writ of *fieri facias* or *fi fa*.[5] However, much to the frustration and astonishment of the uninitiated judgment holder, the sheriff can seize only limited kinds of property under a writ: namely goods,[6] documentary payment obligations falling within stipulated categories,[7] interests in land,[8] corporate shares,[9] and accounts.[10] The kind and quantity of assets of these types available for seizure with respect to a given judgment debtor is further limited by provincial exemptions law, which is designed to ensure that judgment debtors and their families are not so denuded of essential possessions as to cast them upon the welfare rolls of the state.

In Saskatchewan, a judgment debtor's personal residence cannot be reached through a writ of execution, no matter how grand and without regard to the extent of the debtor's equity,[11] nor can any land held by him or her in joint tenancy with another person.[12] The seizure of corporate shares may be obstructed by procedural and

5 The expression "writ of execution" is used with a regrettable degree of imprecision. It is sometimes used as a direct substitute for the narrower "writ of *fieri facias*," but is also often a summary form of expression encompassing several of the old enforcement writs, including *fieri facias*, *elegit*, sequestration and attachment. See *e.g.* Saskatchewan, *Court of Queen's Bench Rules*, r. 353. For further elaboration, see Charles R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1995) at 249-51.

6 *The Executions Act*, R.S.S. 1978, c. E-12, ss. 2.1, 2.2.

7 *Ibid.*, s. 5(1).

8 *Ibid.*, s. 2.3.

9 *Ibid.*, s. 17.

10 The jurisdiction to seize accounts under a writ of execution was created by the addition of s. 5(2) of *The Executions Act*, *ibid.* Ontario is the only other province that permits seizure of accounts under writ proceedings. See *Execution Act*, R.S.O. 1990, c. E.24, s. 19(2).

11 *The Exemptions Act*, R.S.S. 1978, c. E-14, s. 2(1).

12 *The Land Titles Act, 2000*, S.S. 2000, c. L-5.1, s. 156. The new s. 156(b), as enacted by S.S. 2002, c. 51, s. 19, precludes transfer of the interest in land of a joint tenant, except with the consent of all joint tenants, or on order of the court made on

logistical difficulties arising from such factors as their extra-provincial *situs*,[13] their dematerialized form,[14] or the existence of transfer and other restrictions,[15] any of which may make them unavailable to the sheriff. Although interests in land other than a personal residence or homestead are theoretically available to the sheriff, the statutorily prescribed procedures associated with seizure and sale are lengthy and daunting.[16] Other types of assets having significant value can only be reached, if at all, through an enforcement device not involving the sheriff.

The limited scope of the writ of execution is a product of its incremental historic development. For present purposes, it is sufficient to note that the only types of property available for seizure using this enforcement device are those that were either exigible at common law under the writ of *fieri facias*, or have been specifically included by statutory enactment over the last century and a half.

The writ of execution by its terms constitutes an order of the Court directing the sheriff to seize and sell the property of the named judgment debtor to satisfy the judgment upon which the writ is issued. However, the reality is that such action will only be taken on the instruction of the judgment creditor, who is responsible for the sheriff's fees and costs regardless of his success in levying execution. Rare is the creditors' solicitor who has not bemoaned the unwillingness of the sheriff to so much as investigate the availability of assets without prior benefit of the posting of substantial security for costs, inviting a potentially "good money after bad" course of action that their clients are understandably reluctant to take, given the limitations on seizure outlined above.

Should a judgment debtor or third party object to a seizure, the sheriff continues with the levy at his own peril, for he may be liable in damages for the seizure and sale of property against which he is not entitled to proceed.[17] He will be sheltered from potential liability

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application of a joint tenant. The effect of the provision is to prevent sale of such an interest by the sheriff under a writ of execution. To similar effect, see *The Land Titles Act*, R.S.S. 1978, c. L-5, as rep. by S.S. 2000, c. L-5.1, s. 240(2).

13 In Saskatchewan, *The Executions Act*, *supra* note 6, s. 17(2) stipulates that the sheriff may seize corporate shares by seizing the share certificates and serving a notice of seizure on the company. Since no Canadian sheriff has jurisdiction to act outside his or her province or territory, this constitutes an obstacle to seizure of shares where the physical share certificates are located elsewhere.

14 Subsection 17(2), *ibid.*, does not appear to accommodate the seizure of shares that are not represented by a share certificate.

15 But see *Associates Finance Co. Ltd. v. Webber* (1972), 28 D.L.R. (3d) 673, [1972] 4 W.W.R. 131 (B.C.S.C.).

16 *The Executions Act*, *supra* note 6, ss. 22-25.

17 For a discussion of the potential liabilities of a sheriff in connection with seizure under a writ, see Dunlop, *supra* note 5 at 288-310.

only by procuring directions of the Court through interpleader, which in practice must be supported by security for costs posted by a judgment creditor or creditors.[18]

If the sheriff is successful in generating funds through the seizure and disposition of assets of the judgment debtor, he is statutorily obliged to distribute those funds ratably to all creditors who have, by a stipulated date, delivered writs of execution or notices of claim to him, as prescribed by *The Creditors' Relief Act*.[19] In Saskatchewan, debts owed to maintenance claimants[20] and a portion of unpaid employment earnings owed to employees of a judgment debtor are exceptions to the *pari passu* scheme of sharing contemplated by the Act.[21] In addition, a seller who is awarded judgment for the purchase price of goods is exclusively entitled to the proceeds of execution against those goods if they are of a kind that would be exempt as against other creditors.[22] Finally, creditors who have paid the costs associated with interpleader proceedings are entitled to any fruits of those proceedings resulting from an order in favour of the sheriff.[23]

Aside from the writ of execution, the judgment enforcement devices available in Saskatchewan involve direct action by judgment creditors. The most commonly used of these is the garnishee summons. Once issued by the registrar or the Court and served by the judgment creditor or her agent on a person owing money to the judgment debtor, the recipient or "garnishee" is obliged to pay any sum presently owed into Court for distribution to the garnishing creditor.[24] Money paid into Court through this device is paid out exclusively to the garnishing creditor, unless it is claimed by the sheriff on behalf of execution creditors under the authority of *The Creditors' Relief Act*—in which case it falls subject to the *pari passu* distribution scheme described above.[25] Given that accounts owed the judgment debtor may also be

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18 Under s. 37 of *The Executions Act*, *supra* note 6, a sheriff may withdraw from possession of property claimed by a third party and apply to the Court for "an order protecting him from any action in respect of the seizure and possession of the property," but only if the execution creditor has given notice to the sheriff that he admits the claim.

19 R.S.S. 1978, c. C-46. The equivalent legislation of other Canadian jurisdictions is discussed by Dunlop, *supra* note 5 at 547-56.

20 *The Enforcement of Maintenance Orders Act, 1997*, S.S. 1997, c. E-9.21, s. 44(15).

21 *The Creditors' Relief Act*, *supra* note 19, s. 15.

22 *Ibid.*, s. 16.

23 *Ibid.*, s. 12.

24 *The Attachment of Debts Act*, R.S.S. 1978, c. A-32. Subsection 5(1) provides that service of the garnishee summons on the garnishee "shall bind any debt due or accruing due from the garnishee to the defendant or judgment debtor." An exception is made in connection with wages and salary, in that the summons binds "all wages or salary that become due or payable at any time within five days after service of the summons."

25 *The Creditors' Relief Act*, *supra* note 19, s. 31.

seized by the sheriff pursuant to the quite different rules associated with seizure under a writ, the potential for disharmonious overlap between these remedies is readily apparent.

Though corporate shares are, to a limited extent, exigible under a writ, they can be reached more effectively under s. 12 of *The Executions Act* through a charging order issued by a Court on application of a judgment creditor.[26] Oddly, it seems that such orders are rarely pursued by judgment creditors, in spite of the fact that proceeds generated by the sale of shares subject to a charging order are payable exclusively to the creditor on whose behalf the order is issued. Again, there is patent overlap between the remedy of seizure and sale of shares by the sheriff under a writ and that of a sale consequent upon a charging order issued in favour of a judgment creditor.

Finally, judgment creditors in Saskatchewan may apply to the Court for the appointment of a receiver of identified property of their judgment debtors by way of equitable execution.[27] The remedy was, as its name implies, devised by the English Courts of Equity as an adjunct to the common law writs. It was designed to enable the judgment creditor to access property that could not otherwise be reached to satisfy a judgment due to some obstacle of a technical nature preventing its seizure under a writ. A receiver appointed in such proceedings is empowered to take possession of and sell the assets stipulated in the order of appointment in order to generate funds to satisfy the applicant creditor's judgment. Though the efficacy and scope of this enforcement device appears superficially to be enormous, the constraints that have been imposed by the courts on its use have rendered it of virtually no practical consequence.[28]

In sum, in Saskatchewan, as in most other provinces and territories, judgments may be enforced against the property of judgment debtors through a variety of enforcement vehicles, the writ of execution being the broadest in scope and the only one invoking the centralized administrative action of the office of sheriff. The writ is also differentiated from other enforcement devices by the fact that the Court is not routinely involved in the enforcement activities pursued under it, except in connection with its issuance. The fact that devices other than the writ are implemented without the involvement of the sheriff makes for confusion and conflict in the administration of provincial judgment enforcement systems, and complicates realization of the legislated policy of equitable distribution among judgment creditors. In addition, the diverse conceptual bases and historic origins

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26 *Supra* note 6.

27 See *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01, s. 65; and Saskatchewan, *Court of Queen's Bench Rules*, rr. 387, 397-405.

28 See generally Dunlop, *supra* note 5 at 428-39.

of these devices prevents any sort of systematic integration of the legal rules and principles associated with them, and creates the unfairness inherent in the disparate results of their respective utilization. This unlovely picture is further blemished by the fact that some assets of defaulting judgment debtors are simply not available to their unsecured creditors through any proceeding short of bankruptcy—a last resort notorious for its trifling return.

III. SHERWOOD FOREST REVISITED—THE HISTORY OF THE ENGLISH SHERIFF

The foregoing outlines the role of the sheriff in current Canadian judgment enforcement systems, but does not explain why or how he has come to this position. Besides offering an intrinsically intriguing account of the historic roots of a significant aspect of the Canadian legal system, a review of the history of the English sheriff may provide a better understanding of how the current state of affairs has come to be so unsatisfactory, and offer some assistance in determining how the task of effecting change would be best approached.

The modern lawyer may be surprised by three truths about the infamous Sheriff of Nottingham. First, if he did not exist in precisely the folkloric guise in which we have become acquainted with him, he was quite probably a very real character bearing a very real resemblance in important peculiars to the fictional tyrant of Sherwood Forest. Secondly, the historic *cum* mythical Sheriff of Nottingham employed many of the powers still held by the modern Canadian sheriff, and to very much the same end. Third, the convention of complaining about the role and function of the sheriff is hardly a new one.

To address the last point first, the authors of a comprehensive study on the office of the sheriff in British Columbia have said the following;

> Little need be said to explain the choice of the sheriff as a subject of study, if only because the office has always been under review. Scrutiny began, it seems, in 1076 when William the Conqueror ordered "the very first commission of inquiry" into sheriffs. Later, in 1170, Henry II held an Inquest of Sheriffs. In 1215, *Magna Carta* called for an "enquiry" into the "evil customs" of "sheriffs and their servants" and later the same century much of the work of the Rag[e]man's Quest was concerned with what sheriffs did.[29]

29 Gordon Turriff and Elizabeth Edinger, Law Reform Commission of British Columbia, *The Office of The Sheriff* Study Paper (Vancouver: 1983) at 1 [footnotes omitted]. The passage quoted demonstrates the antiquity of the office of sheriff.

On a more local note, the authors also point out that the Legislative Assembly of British Columbia, like the House of Lords, embarked on an investigation into the office of sheriff in 1888. The mechanics of judgment enforcement, including the role of the sheriff, have been repeatedly scrutinized more recently in Canada and other common law countries, not only in the 1983 Study Paper from which the foregoing quote was taken, but also in the exhaustive 1969 Payne Committee report on the *Enforcement of Judgment Debts* in the United Kingdom,[30] the 1981 Report of the Ontario Law Reform Commission on *The Enforcement of Judgments Debts and Related Matters*,[31] and the 1991 Report of the Alberta Law Reform Institute on *Enforcement of Money Judgments*,[32] among others.[33] It is currently being examined by a working group of the Uniform Law Conference of Canada, charged with the preparation of a draft uniform Act on the enforcement of money judgments,[34] as well as by this author, in a collaborative project pursuant to which an interim report including recommendations and draft legislation has been issued.[35]

Recent studies have generally addressed the question of how the sheriff's office might be made more effective. In notable contrast, the concern motivating commissions of several centuries ago was frequently that the sheriff was all too effective in the exercise of his authority.

Sheriffs were in existence in all the counties of England by at least 992 A.D. See Steve Gullion, "Sheriffs in Search of a Role" (1992) 142 New L.J. 1156.

30 Presented to Parliament by the Lord High Chancellor, *Report of the Committee on the Enforcement of Judgment Debts* (London: Her Majesty's Stationery Office, 1969) [Payne Committee].

31 (Toronto: Ministry of the Attorney General).

32 Report No. 61, vol. 1 & 2 (Edmonton: The Institute).

33 See also Northern Ireland Office of Law Reform, Report of the Joint Working Party, *The Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland* (Belfast: 1965) [Anderson Committee]; New South Wales Law Reform Commission, *Draft Proposal Relating to the Enforcement of Money Judgments* (Sydney: 1975); New Brunswick Department of Justice, Law Reform Division, *Third Report of the Consumer Protection Project*, vol. II, *Legal Remedies of the Unsecured Creditor After Judgment* (Fredericton: 1976); Australian Law Reform Commission, Research Paper, *Enforcement of Judgments* (Sydney: 1984); Ireland Law Reform Commission, Report, *Debt Collection: (1) The Law relating to Sheriffs* (Dublin: 1988); South African Law Commission, Working Paper, *Debt Collecting* (Pretoria: 1993).

34 The working group began in 2001 under the chairmanship of Professor Emeritus Lyman Robinson. The report of the working group is to be delivered at the annual meeting of the Uniform Law Conference in the summer of 2003. Further information regarding this project, along with other initiatives associated with the Commercial Law Strategy of the Uniform Law Conference of Canada, can be obtained through the Conference's website at <http://www.ulcc.ca>.

35 Tamara M. Buckwold & Ronald C.C. Cuming, *Interim Report on Modernization of Saskatchewan Money Judgment Enforcement Law* (2001) [unpublished], online: Queen's Printer for Saskatchewan <http://www.qp.gov.sk.ca/orphan/reporta.pdf> [*Buckwold-Cuming Report*].

The genealogy of the sheriff evidences both the antiquity[36] and the importance of the office—a point that returns us to the first "truth" asserted above. The popularly notorious Sheriff of Nottingham is almost certainly a fictionalized representation of, if not an identifiable person, a composite of real historic figures who held the office. Though accounts vary,[37] it would seem that Robin Hood, his legendary foil, was borne of the historic era spanning the twelfth and thirteenth centuries, after the Norman Conquest of England. At about that time, the Sheriff reached the pinnacle of his power, which stemmed from his status as the foremost officer of the King within the shire that constituted his territorial jurisdiction.[38] The extent of his duties and authority in this capacity were enormous, including the preservation of the King's peace, the proclamation and execution of the commands of the King received by royal writ, and most notably for our purposes, the collection of judicial fines, taxes and levies.[39]

In fact, the sheriff's power was so great, and its abuse so rampant, as to inspire the earlier noted reference in the *Magna Carta* to the need for an "enquiry" into his "evil customs."[40] In the centuries following the *Magna Carta*, the power and role of the sheriff were limited by successive statutory enactments and by the loss of aspects of his jurisdiction to such other emerging public officials as itinerant justices, coroners and justices of the peace.[41] However, he remained charged with the duty of serving judicial process and executing judgments, and, until at least the seventeenth century, was England's primary police official.[42]

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36 Sheriffs were in existence in all the counties of England by at least 992 A.D. See Gullion, *supra* note 29.

37 A useful list of authoritative discussions of the origins and historical context of Robin Hood may be found under the title *Search for a Real Robin Hood*, online: <http://www.geocities.com/Athens/Acropolis/4198/rh/realrob.html>.

38 The word "sheriff," or "shire-reve" is derived from the words "shire" and "reeve": Irene Gladwin, *The Sheriff: The Man and his Office* (1974) at 29, cited in Turriff & Edinger, *supra* note 29 at 4. To quote Begbie C.J. in *Malott v. The Queen* (1886), 1 B.C.R. (Pt. II) 212 (S.C. *en banc*) at 215: "In fact, 'shire' is a portion 'shorn' out of the whole kingdom and placed under the administration (*ad haec*) of a 'reeve,' the Sheriff."

39 Gladwin, *supra* note 38.

40 Turriff & Edinger, *supra* note 29 at 1. The authors cite additional sources to the effect that the sheriff, and particularly his under sheriffs, were justly hated. However, this view is qualified by one author's suggestion that the *Magna Carta* included provisions designed to limit the powers of the sheriff, not because of general dissatisfaction with their conduct, but because the earls and barons were displeased at the local feudal courts' loss of "business" (from which they derived revenue) to the increasingly popular sheriffs' courts. See Gullion, *supra* note 29 at 1156.

41 Turriff & Edinger, *supra* note 29 at 5.

42 *Ibid.*

The modern version of the legend implies that Robin Hood was at odds with the Sheriff of Nottingham for reasons having to do with misconduct of a formally criminal character, such as stealing from the rich. No doubt fortified by the vision of sheriff as United States lawman, the common assumption is that the designation of Robin Hood as "outlaw" is referable to these felonious activities.[43] Interestingly, it may well be that the real Robin Hood was outlawed not for heroic misdeeds of this kind, but rather for failure to pay his debts.

To the contemporary reader, the connection between debt and outlawry is rather obscure. An understanding of that connection requires brief consideration of the complex picture of the medieval courts and their processes. During the period in history hereunder discussion, the primary English courts were the courts of Common Pleas, King's Bench and Chancery. The manner in which proceedings in these courts could be initiated was critically important to the availability of a remedy, and the sheriff was an essential functionary in that regard.

Originally, the Court of King's Bench was an itinerant court that followed the King, who personally presided over the proceedings. The sheriff, as the King's officer, was personally attendant at the sittings of the itinerant court. As such, there was no need for complainants to acquire a writ or issue formal process calling him to action in the initiation of proceedings. However, a plaintiff who wished to sue in Common Pleas, or in King's Bench when that court was sitting in another county, was obliged to purchase a royal writ from the King's Chancery to authorize the commencement of proceedings. The writs were addressed to the sheriff, who was directed to convey a command to the defendant, in effect ordering him to appear before the court.[44] Though the directives communicated through the writs could take

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43 It seems that, while the law enforcement aspect of the sheriff's role was largely eliminated in England by the nineteenth century and was taken up in Canada to a very limited extent, it came to constitute the sheriff's dominant role in the United States. In their original law enforcement role, Anglo-Saxon sheriffs could call upon the local freemen to form a *posse comitatus* to hunt for persons in violation of the law. When the office of sheriff was transplanted to the American colonies, sheriffs, who could exercise the extensive, if by then increasingly disused, law enforcement powers of the English sheriff, took on an active role in catching accused persons and delivering them for trial. As one author notes, "Many of the traditional powers of sheriffs proved to be well-suited to frontier conditions and the mediaeval power of calling on the *posse comitatus* was the legal basis on which the famous Wild West posse was organized": see Gullion, *supra* note 29 at 1157. These powers, along with the fact that American sheriffs were directly elected as officials of county government, meant that by the end of the nineteenth century the sheriff was firmly established as the official responsible for law enforcement in the county: *ibid.*

44 Baker, *supra* note 1 at 64.

various forms, they invariably spoke to the sheriff, as officer of the Crown, on whose authority they issued.

Once initiated, proceedings were moved along by *mesne* writs, perhaps the most important of which were those designed to secure the defendant's appearance before the Court. The importance of these writs stems from the fact that under the early common law, the Court could not assume jurisdiction over personal actions unless the defendant made a personal appearance before it.[45] Though these writs were issued by and under the authority of the courts, rather than directly by the King, they were similarly addressed to the sheriff.[46] As a result, judicial process in the common law courts (*i.e.*, Common Pleas and King's Bench) was heavily dependent upon action by the sheriff[47] who, in this connection, might be characterized as officer of the King, acting under the direction of the King's courts.

Perhaps the most punitive consequence of failure on the part of a defendant to appear in court in response to a *mesne* writ was a declaration of outlawry—a remedy that apparently resonated loudly through the trees of Sherwood Forest. It has been described as follows:

> Outlawry is the process of putting a man outside the protection of the law for his contempt in wilfully avoiding the execution of the process of the King's Court, and is resorted to when the ordinary process of the law has failed to effect his apprehension. A person outlawed is *civiliter mortuus*. All his property is forfeited to the Crown and he is incapable of bringing any action for redress of injuries.[48]

In the result, the outlaw not only lost all his property, but was subject to arrest and imprisonment by the sheriff—incarceration in itself being a common device to coerce a defendant to appear, thereby "voluntarily" submitting to the jurisdiction of the Court in civil actions.[49] Until 1879, a person could be outlawed in England (albeit only after the completion of an involved formal process)[50] for failure

45 Dunlop, *supra* note 5 at 71.

46 Baker, *supra* note 1 at 51.

47 *Ibid.* at 118.

48 Philip E. Mather, *A Compendium of Sheriff and Execution Law*, 2d ed. (London: Stevens & Sons, 1903) at 265.

49 By the eighteenth century, the arrest of a defendant-debtor was the usual mode of commencing suit in the courts of Common Pleas, King's Bench and Exchequer. See Dunlop, *supra* note 5 at 71-72. As to arrest in civil proceedings in England, see generally Dunlop, *ibid.* at 70-76; and in Canada, Dunlop, *ibid.* at 96-100.

50 The process was so complex and cumbersome that a nineteenth-century parliamentary commission described outlawry as an "abuse" prejudicial to the plaintiff, as well as to the defendant, in that the former was subject to "the evils of delay and expense": Dunlop, *ibid.* at 78. As to the forms and processes involved in procuring a declaration of outlawry, see Mather, *supra* note 48 at 265-71.

to appear in civil proceedings,[51] as well as for failure to appear upon an indictment or criminal information.[52] Notably, by the end of the sixteenth century, the courts had acceded to the argument that the confiscated property of an outlaw could be paid directly to the creditor pressing suit rather than to the Crown, even though the defendant had not appeared and judgment had not been granted.[53] It has been observed that this procedure, though originally intended to coerce an absent defendant to appear in court, was converted in effect into a prejudgment collection remedy.

In addition to having the duty and authority to enforce the *mesne* writs of the courts, the sheriff of Robin Hood's day enforced final judgments issued by the common law courts under a series of additional judicial writs authorizing either the seizure of property of the judgment debtor or his arrest. The generically named "writ of execution" currently used as a primary device in judgment enforcement is a direct descendent of these.[54]

As to the question of whether Robin Hood and his Merry Men were outlawed for failure to answer to an action for civil debt, or for conduct constituting criminal misbehaviour, the evidence is apparently mixed. However, it seems as likely that they were pursued by the Sheriff under the authority conferred upon him by the civil writs as under his police powers. Regardless of the reality behind the legend, the story of Robin Hood not only offers a colourful illustration of the function and authority of the medieval sheriff, but casts light on our understanding of the function and authority of his modern counterpart.

This brings us back to the second "truth" stated at the beginning of this section, namely, that the historic *cum* mythical Sheriff of Nottingham employed many of the powers still held by the modern sheriff, and to very much the same end. Although the *mesne* writs have become a legal artifact, the sheriff of today in most common law jurisdictions still acts, as he did for purposes of the enforcement of civil process in centuries past, under the authority of the judicial writs, except to the limited extent that additional powers have been conferred by statute. Though the scope of what were formerly the

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51 *Civil Procedure Acts Repeal Act, 1879* (U.K.), 42 & 43 Vict., c. 59, s. 3 abolished outlawry in civil proceedings.

52 Mather, *supra* note 48 at 265.

53 Dunlop, *supra* note 5 at 77. Dunlop also notes at 78 that this remedy was particularly attractive to creditors as it could be used to catch assets that were not otherwise exigible at common law.

54 The writs of *fieri facias*, directing seizure of certain forms of personal property, and *elegit*, permitting seizure of land, were of foremost importance in connection with enforcement against a judgment debtor's property. For a general description of the use of these writs, see Dunlop, *ibid.* at 80-84.

writs of *fieri facias* and *elegit* have been marginally expanded by provincial legislation, the previously described limitations inherent in their modern incarnation are the residue of their history.[55]

IV. SERVANT OF CROWN, COURT OR CREDITOR?

The aggressive personal avarice of the legendary Sheriff of Nottingham is very likely a fairly accurate reflection of the attitude of many of the common law sheriffs, and an unsurprising product of their position. Though he was an officer of the Crown, the sheriff was not "employed" by either King or Court. The nature of his role in England was described in an early Alberta case as follows:

> [T]he connection between the State and the sheriff after his appointment or election is of a very casual character. He is practically placed in the sole and undisturbed discharge of the duties of the shrievalty. He takes to his own use the emoluments of the office and out of them meets the expenditures of it. He employs under sheriffs or deputy sheriffs and bailiffs of his own selection. He assigns to them the work that they are to do, pays them their salaries and dismisses them at his pleasure. His office is in its management entirely free from outside dictatorship or control. He runs it as an institution for which he and he alone is responsible to those whose business passes through it. And so in these jurisdictions he is held liable for the misconduct of those whom he employs in his office.[56]

In today's terms, the English sheriff would probably be best described as an independent contractor, liable for his own misfeasance and, under the doctrine of *respondeat superior*, for that of his underlings, over whom he had complete control.[57] The office of sheriff as transplanted to British North America was similar in character to its English counterpart, in that the sheriff remained an independent functionary. The early Canadian sheriff was called a "fee sheriff," by virtue of the fact that he was compensated "in whole or in part by fees and disbursements paid by execution creditors or collected from the proceeds of seizure and sale."[58] This continued into the twentieth

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55 In Saskatchewan, the writ of *elegit* appears not to have survived the statutory extension of the writ of execution to land, which now falls subject to *The Executions Act*, *supra* note 6, ss. 22-30. See *Weidman v. McClary Manufacturing* (1917), 33 D.L.R. 672, 2 W.W.R. 210 (Sask. C.A.).

56 *Great Northern Insurance Co. v. Young* (1916), 32 D.L.R. 238, 1 W.W.R. 886 at 889 (Alta. S.C.), *per* Walsh J.

57 Turriff & Edinger, *supra* note 29 at 20-21.

58 Dunlop, *supra* note 5 at 289.

century until the sheriff became an employee of the government and a member of the civil service.

Though the modern sheriff is employed and paid as an ordinary civil servant, he is clearly still regarded in legal terms as officer of the Court and possibly also to some extent, officer of the Crown.[59] As was discussed earlier, the sheriff was originally the personal officer and agent of the King and as such, could be called upon to perform virtually any function, including enforcement of the process of the King's courts. It has been argued that, insofar as the common law relating to sheriffs as Crown officers has been received into the law of the Canadian provinces, the sheriff may remain subject to some extent to the Crown's direction.[60] Whether or not the issuance of specific directives to the sheriff as Crown agent remains technically possible, for practical purposes the modern sheriff is subject to executive control only by way of legislative enactment pertinent to his office.[61]

More importantly, the sheriff remains an officer of the Court. His position has been described as follows:

> The sheriff does some things because a court orders him to do so or could order him to do so if it was necessary. He does other things because a statute says that he is the one to execute court orders for which the statute makes provision. Because in each of these cases a court order is made in one way or another, the sheriff has special responsibilities.[62]

In Saskatchewan, the sheriff is legislatively designated an officer of the Court,[63] and his duty to act in the enforcement of a judgment

59 Under s. 3(2) of *The Court Officials Act, 1984*, S.S. 1984-85-86, c. C-43.1, the Minister being the member of the Executive Council to whom the administration of the Act is assigned, may appoint a person to hold the office and perform the duties of sheriff.

60 Turriff & Edinger, *supra* note 29 at 63. Though it appears to have caused little practical difficulty, the modern sheriff's position as employee of the Crown nevertheless sits rather uncomfortably with his role as officer of the Court. These authors express considerable dismay at the potential for bureaucratic interference in the functioning of the sheriff's office associated with the sheriff's appointment as civil servant. They take the view at 232-36 that this potential threatens the independence of the courts, in that it may constrain the court's ability to control its process.

61 *The Court Officials Act, 1984*, *supra* note 59, s. 7(1) provides that "[e]very court official shall perform the duties assigned to him by this Act, the regulations, any other Act or law and any rule of court."

62 Turriff & Edinger, *supra* note 29 at 63.

63 Section 6 of *The Court Officials Act, 1984*, *supra* note 59, provides that "[e]very court official is an officer of the court in respect of which he is appointed or in respect of which he serves and he shall obey the orders of that court and of the judge of that court." The sheriff is, on application of ss. 2(b) and 3(2)(f), a court official.

still formally stems from the Court's directive. Although the wording of the writ of execution used in Saskatchewan reads as a direct command of the Queen, the import of that wording is qualified by the fact that the writ is issued by the Court, which is formally designated the Court of the reigning monarch (*i.e.*, "Queen's Bench" or "King's Bench").[64] There is no statute comprehensively regulating the conduct of the sheriff or prescribing his duties and functions. In the result, the law defining the authority, duties and personal liability of the sheriff remains firmly rooted in the rules applicable to his historic predecessor, the independent sheriff, insofar as he was charged with execution of the Court's process and judgments.[65]

The fact that that the sheriff is regarded as an officer of the Court means that, in matters of judgment enforcement, he acts as principal, not as agent of the creditor whose judgment he may take action to enforce at any given time.[66] This has several important legal consequences.

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64 The heading of the form of writ prescribed in the Rules of Court indicates that it is issued under the authority of "Elizabeth the Second by the Grace of God of the United Kingdom, Canada and Her Other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith": Saskatchewan, *The Queen's Bench Rules*, form 38. The sheriff is, under the writ:

> commanded that of the goods (*or* lands *or* goods and lands) of [judgment debtor] in the Province of Saskatchewan you cause to be made $ [amount of judgment]...[by the judgment of the court] recovered against him.
>
> And that you have the said money and in what manner you shall have executed this writ make appear to the said court at [judicial centre] immediately after the execution thereof...

Ibid. [emphasis in original].

65 Turriff & Edinger point out that in British Columbia, the sheriff is subject to almost no legislated direction in the fulfillment of his role in execution of civil process. In the result, they conclude that

> the sheriff is to be guided in the execution of civil process chiefly by common law rules largely formulated before the commencement of the twentieth century with little judicial indication of how those rules and standards are to be adapted to the present circumstances.

Supra note 29 at 133. The same is largely true of the Saskatchewan sheriff. The regulations issued under *The Court Officials Act, 1984*, *supra* note 59, affect the sheriff only in that they prescribe the appearance of his seal of office, the oath to be taken by him, and the hours during which his office must be open. See *The Court Officials Regulations*, R.R.S. 1985, c. C-43.1, Reg. 1, ss. 4, 5, 7. *The Executions Act*, *supra* note 6, is directed primarily to the question of what property of a judgment debtor is subject to seizure in execution, though some instruction is provided the sheriff with respect to the manner in which certain types of assets may be seized and sold. The *Queen's Bench Rules* also address in *ad hoc* fashion such matters as the sheriff's entitlement to fees and costs and his role in interpleader proceedings where title to property is in issue.

66 *Corsbie v. J.I. Case Threshing Machine Co.* (1913), 14 D.L.R. 55, 5 W.W.R. 153 (Sask. S.C.). This principle is subject to the qualification that the sheriff may become the *de facto* agent of a judgment creditor who interferes with the execution process by

The sheriff is obliged to act fairly and with due respect for all persons affected by his work.[67] In other words, he must not sacrifice the rights of the judgment debtor to the interests of the judgment creditor for the sake of the expedient satisfaction of the judgment. Conversely, he may not permit his sympathy for the judgment debtor to affect the entitlement of the judgment creditor to payment. He must also take care to avoid prejudicing the rights of third parties—particularly through wrongfully seizing or damaging their property in the process of executing against the judgment debtor.

The sheriff may incur personal liability for conduct that infringes the rights of others, whether or not intentionally so. Summarily put, the sheriff is liable to the judgment creditor for failure to act properly in the course of satisfing the judgment through seizure and sale of the judgment debtor's exigible assets. He is liable to the judgment debtor for damaging the debtor's property or for illegal seizure—most often on the grounds of trespass where he has overstepped his authority to enter the debtor's premises. And he is liable in conversion to third persons whose assets have been wrongfully seized or in trespass for wrongful entry on their property.[68] While the modern sheriff is servant of both Crown and Court, his official capacity does not shield him from personal liability for misfeasance—no doubt a product of the independence he historically enjoyed in the conduct of his office.[69]

The sheriff is clearly not servant or agent of the judgment creditor. Though in practice he will take action to enforce a writ only at the

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giving the sheriff specific instructions as to how that process should be conducted. However, this "agency" operates only to make the creditor liable for misconduct on the sheriff's part. It does not impose on the sheriff the usual obligations and duties of an agent to his principal. See *Wilson v. Tumman* (1843), 6 Man. & G. 236, 134 E.R. 879 (C.P.), *Overn v. Strand*, [1931] S.C.R. 720, [1932] 1 D.L.R. 490.

67 The sheriff's duty of impartiality as between judgment creditor and judgment debtor has been metaphorically described as placing him "between two fires." See *Humphrys v. Pratt* (1831), 5 E.R. 269 at 273 (H.L.). See Dunlop, *supra* note 5 at 297.

68 See Turriff & Edinger, *supra* note 29 at 179-80. The potential financial repercussions of the sheriff's personal liability have been apparent for several centuries. In England, *The Statute of Sheriffs*, 9 Edw. II. St. 2 (1315) provided that each sheriff must "have sufficient land within the same shire where he shall be sheriff to answer the King and his People," a requirement imposed, according to a seventeenth century author, "in case any man shall complain against him": see M. Balton, *Officium Vicecomitum or The Office and Authorities of Sherifs* (1623) at 2, quoted in Richard Clarke Sewell, *A Treatise on the Law of the Sheriff* (London: Butterworths, 1842) at 17, and quoted in Turriff & Edinger at 29. Note that *The Public Officers' Protection Act*, R.S.S. 1978, c. P-40 offers limited "protection" to a sheriff acting under a writ of execution or other process by deeming him a person acting in the discharge of a public duty or authority within the meaning of this Act, thereby entitling the sheriff to the Act's restrictive limitation of actions provision.

69 For a general discussion of the duties and corresponding liability of the Canadian sheriff, see Dunlop, *supra* note 5 at 288-310.

instruction of the judgment creditor who has had it issued, he is not subject to his or her direction. At common law the sheriff is obliged to carry out the execution process as soon as possible once the writ has been delivered by the judgment creditor with instructions to seize.[70] However, the reality is that he will not undertake action unless confident that his fees and disbursements will be recovered, either through the assured existence of exigible and available assets owned by the judgment debtor or, more commonly, through an indemnity against costs provided by the instructing creditor. Accordingly, judgment creditors and their solicitors in Saskatchewan and elsewhere frequently complain that the sheriff cannot be made to act and in consequence frequently fails to do so in a manner that they find satisfactory.[71]

Theoretically, the sheriff may be disciplined by the Court for improperly conducting himself as its officer, through means as severe as committal for contempt.[72] However, the practical likelihood of the Court taking direct supervisory action over today's civil service sheriff is remote, regardless of its technical authority to do so. Similarly, no modern government official is likely to advocate an activist attitude on the part of the sheriff that might motivate him to expend government resources in aid of private judgment enforcement without the assurance of recompense.

V. ALTERNATIVE VIEWS OF THE OFFICE OF SHERIFF: RECENT DEVELOPMENTS AND PROPOSALS FOR REFORM

A. THE HAZARDS OF ANACHRONISM

In the days of Robin Hood and for several centuries thereafter, the sheriff had both the power and the incentive to enforce civil judgments with great efficiency. The enforcement writs under which he was empowered to act gave him access to all of the property of a judgment debtor that was likely to have any real value, namely, tangible assets capable of physical seizure. The inducement of generating personal

70 Dunlop, *supra* note 5 at 294-95. On the other hand, the force of that principle is considerably weakened by the corollary rule that a judgment creditor suing a sheriff for breach of his duty to act under the writ must establish that he or she has suffered actual pecuniary damages as a result of the sheriff's default. See *Massey Manufacturing Co. v. Clement* (1893), 9 Man. R. 359 at 369-70 (C.A.).

71 Concerns of this kind were repeatedly expressed by Saskatchewan lawyers in the course of the consultations undertaken by me and my colleague, Professor Ronald C.C. Cuming, in connection with the *Buckwold-Cuming Report*, *supra* note 35. With reference to British Columbia, Turriff & Edinger state, "Many lawyers in the Province are dissatisfied with the way in which the sheriff goes about his work and many of them have simply ceased to use the sheriff when it is lawful for them on their clients' behalf to use someone else": *supra* note 29 at 238. A note early in their report implies that the difficulty stems at least in part from the unwillingness of government to devote sufficient resources to the sheriff's office: *ibid.* at 2.

72 *Ibid.* at 108-110.

income by dint of seizure no doubt operated as a significant motivation to do so with the greatest possible frequency and to the fullest extent. Further, the fact that he recruited (and paid) his own deputies and bailiffs meant that the sheriff was not likely to be handicapped in his efforts by a shortage of personnel.

Today's sheriff is in a very different position. Execution, which is the sole enforcement device available to him, is a technical, awkward and limited process. As was earlier mentioned, it provides incomplete access to the assets of judgment debtors, and is constrained by principles and procedures developed in an *ad hoc* fashion by courts and legislatures through literally centuries of evolution. In addition, it overlaps with the more effective seizure devices available to judgment creditors acting directly, particularly garnishment,[73] and the charging order against shares.[74] To complicate matters further, the sheriff is under a legal duty to fulfill the Court's directive to seize property to satisfy the writ, but is simultaneously subject to the administrative direction of civil service superiors, and is faced with the reality of personnel and resources limited by government fiscal allotment. Finally, while the sheriff is variously public servant and officer of the Court but clearly not the agent of the judgment creditor, it is widely felt that he should more effectively serve the latter's interest in judgment enforcement.

To sum up, the modern sheriff is equipped with an antiquated set of legal tools designed to be used by a powerful Crown official unconstrained by externally imposed fiscal limitations in a socio-economic setting in which tangible property constituted the primary form of personal wealth, and in which judgment enforcement fell primarily within his domain.[75] It is therefore unsurprising that judgment enforcement has become one of the most frequently frustrating and frustrated aspects of the civil justice system.

B. REFORM IN ALBERTA AND NEWFOUNDLAND

The need to create a new legal structure to facilitate effective and efficient judgment enforcement underlies legislation recently adopted

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73 Garnishment is governed by *The Attachment of Debts Act*, *supra* note 24.

74 *The Executions Act*, *supra* note 6, ss. 12-14.

75 Decrees of the Courts of Equity directing the payment of money were originally enforceable only *in personam*, through imprisonment of a non-paying defendant for contempt. Equity eventually developed remedies designed to reach the defendant's property rather than his or her person; namely the writ of sequestration, the appointment of a receiver and the issuance of a charging order, none of which required the involvement of the sheriff. However, these remedies not only came later in time than the common law writs, but also were, and those that remain in use (receivership and the charging order) still are, subject to significant practical limitations. For an overview of the history of these remedies, see Dunlop, *supra* note 5 at 91-96.

in two Canadian provinces.[76] In 1994, Alberta replaced a system of judgment enforcement law that was similar to the current law of Saskatchewan with the *Civil Enforcement Act*,[77] followed in 1996 by Newfoundland with the *Judgment Enforcement Act*.[78]

These systems exemplify many of the recommendations made by the commissions and working groups referred to earlier in this paper.[79] They closely resemble each other, except in certain aspects of their administrative approach to the role of the sheriff in the enforcement process. The primary features of the systems represented by this legislation are similar to those recommended in the earlier noted interim report on reform of Saskatchewan judgment enforcement law,[80] though those recommendations would further simplify and rationalize the conceptual basis and process of enforcement.[81] In the Saskatchewan report, the structure of the enforcement regime proposed is defined in terms that would accommodate a range of approaches to the administrative role of the sheriff. The question is which administrative approach is to be preferred.

As history proves, the functional nature of the sheriff's role depends upon the design of the legal mechanism or mechanisms to be used in the seizure and disposition of the property of judgment debtors, and the distribution of its proceeds. Accordingly, a redefinition of the conceptual basis of judgment enforcement remedies will necessarily be reflected in the administrative structure of the enforcement system. In Alberta and Newfoundland, two primary legal mechanisms for seizure and disposition are prescribed.[82] They are the writ of enforcement and the garnishee summons—the former

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76 I wish to acknowledge, with thanks, my indebtedness to the following individuals for having generously devoted their time and considerable experience and expertise to providing invaluable information regarding the operation of the Alberta judgment enforcement system during personal interviews conducted by me and my colleague, Professor Ronald C.C. Cuming, on December 5th and 6th, 2002: Geoff Ho, Court Services Division, Alberta Department of Justice; Duane C. Weatherall, Sheriff, Alberta Justice, Civil Enforcement; Francoise H. Belzil, Sharek Reay LLP; Lyle Stewart and Garry Kalyn, Stewart, Belland & Associates Inc., Civil Enforcement Agency; Norman H. Gagnon, Rockingham & Shortridge Consolidated Civil Enforcement Inc.; Brian Firkin, Western Civil Enforcement Agency Inc.

77 S.A. 1994, c. C-10.5.

78 S.N.L. 1996, c. J-1.1.

79 *Supra* notes 29-35.

80 *Buckwold-Cuming Report, supra* note 35.

81 As at the time of this writing, the working draft of the Uniform Law Conference of Canada working group on judgment enforcement, *supra* note 34, adopts features of all three systems, though in areas of difference it relies preponderantly on those proposed in the *Buckwold-Cuming Report, supra* note 35.

82 The Alberta legislation will be used as the model for discussion. Significant differences between the Alberta and Newfoundland statutes will be noted as may be appropriate.

being a unitary device replacing all previous enforcement writs, the latter an updated and more expansive version of the traditional garnishment process. In addition, the Court may, on application of a judgment creditor, appoint a receiver to take possession of and realize property of the judgment debtor in order to satisfy a writ.[83]

The broadest by far of these devices is the writ of enforcement, which, upon registration in the Personal Property Security Registry, binds all of the judgment debtor's exigible personal property and, upon registration under *The Land Titles Act*,[84] binds all land described in the certificate of title against which it is registered.[85] In Alberta, seizure and sale of property bound by a writ is carried out by a civil enforcement agency, which may act for purposes of seizure either directly or through a bailiff.[86] In effect, all non-exempt property of a judgment debtor in Alberta is exigible by way of seizure and sale under a writ, the conduct of which is assigned to a civil enforcement agency; *i.e.*, a single administrative authority is empowered to utilize a single legal device for purposes of judgment enforcement.

The modern Alberta garnishee summons remains distinct from the writ of enforcement, both conceptually and administratively. Like its predecessor,[87] though with a considerably expanded scope, the garnishee summons permits a judgment creditor to take action against monetary obligations owed the judgment debtor through the administrative medium of the Court. The garnishee summons "attaches" the garnished monetary obligation when served upon the person who owes that obligation to the account debtor (the garnishee).[88] The summons is issued by the clerk of the Court, who also distributes the funds paid into Court under its terms. A civil enforcement agency

83 The Alberta Law Reform Institute, *supra* note 32, vol. 1 at 237-38, rejected the possibility of appointment of a receiver without court involvement, on the view that the special circumstances warranting such a remedy should be assessed by a court. However, the Ontario Law Reform Commission, *supra* note 31, Part II at 235 recommended that receivership be available on application to the enforcement office. The Saskatchewan proposals represent a compromise position. They recommend that receivers be appointed on application to the Court: see *Buckwold-Cuming Report*, *supra* note 35, s. 50 and accompanying explanatory notes. However, under s. 51, property seized by a receiver so appointed would be deemed to be seized by the sheriff, and property (including money) in the possession of a receiver would be delivered to the sheriff for distribution. Further, under s. 53 the sheriff would have initial supervisory jurisdiction over receivers, subject to application to the Court.

84 R.S.A. 2000, c. L-4.

85 *Civil Enforcement Act*, R.S.A. 2000, c. C-15, s. 33(2). Enforcement activity in Newfoundland is conducted by the office of the sheriff. See *Judgment Enforcement Act*, *supra* note 78, s. 5. However, many mechanical functions are delegated to private bailiffs.

86 *Civil Enforcement Act*, *ibid.*, s. 9.

87 See *Alberta Rules of Court*, Alta. Reg. 390/68, ss. 470-484.

88 *Civil Enforcement Act*, *supra* note 85, s. 78.

is not involved in the garnishment process, though obligations subject to garnishment may also be seized by an agency acting under a writ of enforcement.

The process of enforcement is completed, as it was under the previous law, by *pro rata* distribution of the proceeds realized to all qualifying judgment creditors of the debtor, after the claims of prior interest holders have been satisfied.[89] Funds realized under writ of enforcement proceedings are divided among qualifying judgment creditors by the civil enforcement agency, while those paid into Court under a garnishee summons are distributed by the clerk.[90]

Alberta's enforcement system is distinguished from that of Newfoundland, not by the conceptual structure of the legislation, but by the fact that the civil enforcement agency charged with the authority and the duty to act on a writ of enforcement is not an arm of government. In other words, judgment enforcement has been "privatized" in Alberta.[91] Though a single official "sheriff" employed by the provincial government remains at the apex of the enforcement structure, his role is purely bureaucratic. He is responsible for the appointment of qualified civil enforcement agencies and bailiffs, and has a formal role in their supervision.[92] However, the actual process of enforcement under a writ is fully executed by civil enforcement agencies and their bailiffs.[93]

Like Alberta, Newfoundland has adopted a streamlined enforcement system utilizing a single writ procedure, along with garnishment and receivership. However, that procedure is carried out by a sheriff's office staffed by employees of government, operating in traditional fashion as the enforcement arm of the Court.

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89 See the *Civil Enforcment Act, ibid.*, ss. 94-103. Qualifying judgment creditors are those who hold a "related writ," defined as a writ that would be disclosed on a search of the Personal Property Registry using the name of the debtor as shown on the instructing creditor's writ. Claimants who will have priority over writ holders in the distribution are typically secured creditors. Other identified fees and claims are also given priority in the distribution scheme defined by s. 99.

90 *Civil Enforcement Act, ibid.*, s. 94.

91 This choice of administrative structure is not consistent with the report of the Alberta Law Institute, on which most of the reform of Alberta enforcement law was based. Having examined the suggestion that "privatization" be adopted, the report's authors concluded that private bailiffs should not be used for enforcement seizures. See *Buckwold-Cuming Report, supra* note 35 at 71.

92 See generally *Civil Enforcement Act, supra* note 85, s. 9. Civil enforcement agencies are required to file with the sheriff monthly reports of their seizure activities, along with regular financial reports. The sheriff is also responsible for responding to complaints regarding the conduct of civil enforcement agencies and bailiffs.

93 The sheriff is formally authorized to carry out the duties and functions and exercise the powers of an agency. See *Civil Enforcement Act, ibid.*, s. 9(7). However, Alberta Sheriff Duane Weatherall has, by his own account, *supra* note 76, never acted under that provision.

C. PROPOSALS FOR REFORM IN SASKATCHEWAN

The proposals that have been advanced for the reform of Saskatchewan judgment enforcement law advocate a conceptual and functional structure that is simpler than those of Alberta and Newfoundland. Rather than retaining diverse and overlapping enforcement remedies, as those provinces have done, the proposals recommend a single enforcement device; namely, seizure of and realization on the property of a judgment debtor subject to an enforcement charge. Registration of a judgment in the Personal Property Security Registry would create a charge on *all* of the judgment debtor's real and personal property, rendering it available to satisfy the judgment supporting the charge, subject to defined exemptions. Enforcement of the charge would in all cases involve simple "seizure" of assets, using the procedure or procedures prescribed as appropriate to various kinds of property.[94]

In their current form,[95] the Saskatchewan proposals contemplate the administration of the enforcement system by a public sheriff, who would be responsible for the seizure and disposition of assets of a judgment debtor on the receipt of an enforcement instruction[96] from a judgment creditor who holds an enforcement charge against those assets.[97] In addition, the sheriff would be responsible for administration of the preliminary asset discovery processes, which would include a demand for written disclosure and a demand for production of records and documents, as well as full-scale examination of the debtor and of third parties possessed of relevant information.[98] In exceptional circumstances a receiver could, as in Alberta and Newfoundland, be appointed by the Court on application of a judgment creditor to seize and dispose of assets. However, under the

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94 *Buckwold-Cuming Report, supra* note 35. Subsection 23(1) of the draft Act provides that "[a] sheriff may seize exigible property sufficient to satisfy the amount recoverable." As to the methods of seizure contemplated, see generally Part VI—Effecting Seizure, Part VII—Seizure of Existing and Future Accounts, and Part VIII—Special Orders and Receivership. Competing claims arising from interests held by third parties would be resolved under a set of priority rules that, with respect to personal property, essentially mirror the priority structure of *The Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2. The priority of claims against land is determined under a separate set of priority rules revolving around registration in the Land Titles registry.

95 The proposals are presently published in the form of an interim report. A final report will be published upon the conclusion of the consultation process which is, as at the date of this writing, nearing completion.

96 *Buckwold-Cuming Report, supra* note 35, s. 17.

97 *Ibid.*, s. 20.

98 *Ibid.*, ss. 6-8. The Alberta and Newfoundland systems include a similar demand for written disclosure by the debtor, but leave the administration of examinations for discovery essentially unchanged.

Saskatchewan proposals, proceeds realized by a receiver would be paid to the sheriff for distribution.[99]

Accordingly, virtually every step in the process as proposed is referable by its terms to action by the sheriff, whose authority would derive from the judgment of the Court itself.[100] The sheriff could demand and pursue disclosure of assets by the judgment debtor and third parties.[101] The sheriff could seize the exigible property of the judgment debtor of every description,[102] including accounts.[103] The sheriff would sell property seized "in the manner that is likely to realize the maximum proceeds reasonably recoverable,"[104] receive payment of accounts seized,[105] and would take possession and control of property seized by a receiver appointed by order of the Court.[106] The sheriff would distribute money received or realized by him pursuant to an enforcement instruction.[107]

Throughout the process of enforcement, the sheriff would be charged with such mechanical tasks as the delivery of documents and notices. He would also be charged with much more sophisticated tasks requiring informed and thoughtful decision, such as the preliminary assessment of a judgment debtor's claim to an exemption,[108] the assessment of the method of sale most appropriate to the assets and circumstances involved, the seizure and disposition of such complex forms of property as dematerialized shares and shares in closely held corporations, and the formulation of a plan of distribution in accordance with the stipulated scheme of priorities.[109]

In sum, the system proposed for Saskatchewan would differ from that in place in Alberta and Newfoundland in that it would embody a single enforcement device administered by a single official body—the office of the sheriff. Superficially, the assignment of the entire enforcement process to one office might appear to require the creation of a bureaucratic monolith, whose employees would perform each and every step. In fact, that outcome would be avoided by proposed

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99 See *ibid.*, s. 51.
100 *Ibid.*, s. 16.
101 *Ibid.*, s. 6.
102 *Ibid.*, s. 23.
103 *Ibid.*, ss. 33-47.
104 *Ibid.*, s. 66.
105 *Ibid.*, s. 37(1).
106 *Ibid.*, s. 51.
107 *Ibid.*, s. 74 *et seq.*
108 *Ibid.*, s. 61.
109 Any decision of the sheriff could be challenged by interested persons by way of summary application to the Court. In addition to a variety of specific provisions for appeal, the Court would be given broad general jurisdiction to make orders and give such directions as may be required to ensure proper implementation of the Act: *ibid.*, s. 83.

provisions accommodating very extensive delegation of the powers and duties of the sheriff to others. Of particular practical importance would be the specific authorization of the delivery of a wide range of notices, including notice of seizure, by the judgment creditor who has instructed enforcement. In effect, the sheriff could appoint the creditor (or, implicitly, his or her solicitor or representative) as the sheriff's agent for purposes of seizure of any type of asset, as well as in connection with certain other steps in the enforcement process.[110]

D. THE JUDGMENT CREDITOR'S ROLE IN ENFORCEMENT

The nature of the judgment creditor's involvement in the proposed enforcement process may be illustrated by way of comparison with the current garnishment process. Under the present system, a garnishee summons is issued by the registrar of the Court, then served by the issuing judgment creditor on the garnishee (often using the services of a private bailiff). The account thereby attached is payable into Court. Once paid into Court, the funds may be paid out to the garnishing creditor on application. Although there is no *pro rata* distribution among judgment creditors directly associated with garnishment, funds paid into Court under a garnishee summons can be brought within the *pro rata* system of *The Creditors' Relief Act* by application of the sheriff or an execution creditor.[111]

The Saskatchewan proposals for reform of judgment enforcement law accommodate essentially the same process, but in connection with seizure of the full range of a judgment debtor's assets, not only accounts. All assets may be seized by delivery of the prescribed form of notice, and all such notices, once issued by the sheriff, may be delivered by the instructing judgment creditor. Once seized, the sheriff is required to complete the enforcement process through realization against those assets and distribution of the proceeds. In connection with accounts, that process would involve payment out of the funds paid to the sheriff under the notice of seizure, much as is currently the case with respect to funds paid into Court under a garnishee summons. Where the sale of assets is required, the sheriff would be responsible for the conduct of that sale, as he currently is when proceeding under a writ of execution, but under a very significantly streamlined process. Again, the proceeds would be distributed in accordance with the statutorily prescribed scheme.

The Saskatchewan proposals share with the new enforcement regimes of Alberta and Newfoundland an emphasis on creditor involvement in the process. Under all of them, the enforcement officer, whether public sheriff or private agency, is directed to act upon

110 *Ibid.*, s. 81.

111 *The Creditor's Relief Act*, *supra* note 19, s. 31.

the instruction of the enforcing creditor. The Saskatchewan proposals call for commencement of the process by delivery to the sheriff of an "enforcement instruction," which is to include prescribed information about the judgment debtor, the amount to be recovered through enforcement measures and the type of measures the judgment creditor requests be employed to enforce the judgment.[112] Upon receipt of an enforcement instruction, the proposed legislation would provide that the sheriff "shall" take the enforcement measures requested, so long as they are practicable and the interests of the judgment debtor and affected third persons are protected, and provided that a suitable undertaking for payment of his fees and costs has been given. A judgment creditor may evince his or her continuing interest in enforcement by ensuring that the enforcement instruction remains in effect until such time as he or she is either satisfied with the result of the process, or decides not to pursue it further.[113]

The regime proposed for Saskatchewan may be viewed as a middle ground between the Alberta system and the very centralized public enforcement systems that have been recommended in some reports, and in fact implemented elsewhere. In Northern Ireland, judgment enforcement is administered entirely by the Enforcement of Judgments Office,[114] which can implement a wide range of enforcement measures, including the standard devices of seizure of property and attachment of debts, as well as several measures requiring the exercise of significant quasi-judicial discretion.[115] The Enforcement Office may, for example, order payment by instalments, appoint receivers, and even determine that a given judgment cannot be enforced.[116]

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112 *Buckwold-Cuming Report, supra* note 35, s. 17.

113 *Ibid.*, s. 18 provides for supplementary enforcement instructions, the delivery of which would both provide new information or directions to the sheriff and ensure that the enforcement process continues by preventing the original instruction from lapsing, *per* s. 19.

114 The office operates under the statutory regime of the *Judgments Enforcement (Northern Ireland) Order 1981*, S.I. 1981/226 (N.I. 6). That Order supplanted the *Judgments (Enforcement) Act (Northern Ireland) 1969*, R.S.N.I. 1969, c. 30, which originally established the current regime. Section 8 of the Order provides that the functions of the Office shall be exercisable by the Master (Enforcement of Judgments), a Judicial Officer (Enforcement of Judgments), the Chief Enforcement Officer, or any other member of the Northern Ireland Court Service.

115 *The Judgments Enforcement (Northern Ireland) Order 1981, supra* note 114, s. 13 provides that the enforcement office may make enforcement orders, issue custody warrants, issue processes for attendance and examination of debtors and others, conduct those examinations, receive money in respect of judgments, stay enforcement of judgments, set aside, discharge or vary enforcement orders and other orders, issue notices of unenforceability, and dismiss applications for enforcement. Under s. 15, an order of the enforcement office has the effect of an order of the High Court.

116 *The Judgments Enforcement (Northern Ireland) Order 1981, ibid.*, s. 16 enumerates an array of enforcement devices and powers, including those indicated in the text.

E. SUMMING UP

All of the systems described constitute an attempt to re-equip the modern sheriff, or equivalent thereto, in a manner suited to today's socio-economic and legal landscape. In general, they offer a conceptually simple enforcement device that can be utilized to enforce judgments effectively and efficiently through the seizure and disposition of assets for the benefit of the judgment creditor, but with due regard for the rights of debtors and third parties. The question is which variant best serves that purpose in the Saskatchewan context.

VI. ISSUES IN THE DESIGN OF THE SHERIFF'S OFFICE: WHERE DO WE GO FROM HERE?

As the foregoing discussion illustrates, a few fundamental issues in the choice of administrative structures for judgment enforcement present themselves. Should all enforcement measures be implemented under the authority of a single public office, or should the enforcement system encompass direct enforcement action by way of garnishment or a comparable process? Should all enforcement functions falling under the jurisdiction of the public enforcement office or sheriff be performed by the sheriff or another public officer? If not, to what extent should those functions be delegated to persons who do not operate as part of a public office, whether designated as an office of government or of the Court? Potential answers to these questions should be examined against the standards of effectiveness, efficiency, systemic cost and fairness.

Historically, the logical consequence of the fact that a judgment is by definition a creation of the Court has been that it is enforceable on the Court's authority and under its ultimate supervision; hence the abiding characterization of the sheriff as officer of the Court, albeit subject additionally to the authority of the Crown or legislature. No study or report has recommended, and no jurisdiction has implemented, an enforcement system that permits direct creditor enforcement. Even in Alberta, where enforcement falls to be performed by private civil enforcement agencies, those agencies and the bailiffs they employ must be properly accredited and formally appointed by the sheriff under the authority of the *Civil Enforcement Act*. Moreover, the sheriff is responsible to ensure that no unauthorized persons engage in enforcement activity, on pain of conviction of an offence under the Act.[117]

As indicated earlier, Alberta and Newfoundland have maintained garnishment as a creditor-initiated alternative distinct from seizure of

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117 *Civil Enforcement Act, supra* note 85, s. 14 confers upon the sheriff jurisdiction to investigate and respond to complaints of unauthorized enforcement activity. Section 15 makes it an offence to engage in such activity.

accounts by an enforcement officer. However, that enforcement device retains the traditional involvement of the Court via its registrar. The enforcement document must be issued by the Court and the funds paid into and out of Court. They cannot be seized directly by the garnishing creditor. Both systems additionally provide for seizure of accounts by the enforcement officer.

Direct creditor enforcement as an aspect of a judgment enforcement system would not only be markedly anomalous in terms of historical development but would also be likely to fail on all four measures suggested above. The concern of the government of Alberta over unauthorized enforcement activity exemplifies the view that direct enforcement is likely to compromise fairness by enabling persons motivated by self-interest, however justified, to divest others of their property on an involuntary basis. The possibilities of excessive or inappropriate forcible seizure and infringement on exemption and third party rights are apparent, particularly given the antipathy that may in many cases accompany the litigation leading to the judgment. In addition, completely unwarranted seizure based on substantively unfounded default judgments would not only be possible, but virtually inevitable in at least some cases.

Direct action in the context of judgment enforcement is distinguishable in both principle and practice from direct action in the context of the enforcement of security interests, on the ground that the latter involves the debtor's consensual surrender of his or her interest in identified property in the event of inability to repay debt in accordance with agreed terms.[118] On a different note, direct action would necessitate abandonment of the *pro rata* sharing among judgment creditors that has characterized the law of Saskatchewan and other jurisdictions for many decades.[119]

The failure of direct creditor action on the fairness scale in itself justifies rejection of that approach. However, it is worth noting that the appearance of effectiveness, efficiency, and economy suggested by direct creditor action is in any event likely superficial. The heightened potential for debtor evasion of seizure under such a regime presents a

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118 Notably, the government of Alberta has for many years proscribed direct creditor action, even in the context of the enforcement of security interests, doubtless due to concerns about unjustified, over-enthusiastic, or inopportune seizure and sale of collateral. Enforcement of security interests, like judgment enforcement, is regulated by the *Civil Enforcement Act*, *ibid.*

119 At the August 2002 annual meeting of the Uniform Law Conference of Canada Civil Section in Yellowknife, the working group on the enforcement of money judgments, *supra* note 34, put to the delegates for their vote the question of whether *pro rata* sharing should be abandoned in favour of a first-registered-first-satisfied distribution regime. On the formal vote taken of delegates representing all Canadian provinces and territories, the retention of *pro rata* sharing was endorsed by a majority of 21 to 8.

considerable obstacle to the achievement of any of those objectives. Further, the possibility of seizure and sale on a more or less incidental basis by persons inexperienced in both the relevant law and practice is likely to cost more, rather than less, than enforcement on a large scale by those whose business it is to perform such activities. Considerable efficiencies of scale and expertise are offered by the latter, as is a reduced likelihood of the court involvement that would be required to redress problems arising from the process.

These considerations commend the view that seizure of property for purposes of judgment enforcement must be administered by an official person or agency appropriately qualified and authorized to perform not only that function but also such related tasks as sale and distribution. However, this constitutes only a partial response to the first question posed above. Although direct creditor action may not be desirable as the sole or primary enforcement device, the question remains whether the optimal system would involve a single enforcement office, or would accommodate creditor-initiated devices operating outside the jurisdiction of the enforcement office.

The bifurcated approach under which Alberta and Newfoundland have married a version of the familiar garnishment process with that of seizure of property under the new writ of enforcement preserves, albeit to a much more limited extent, the historic incongruity of a system embracing conceptually divergent and functionally overlapping enforcement devices. Though the rationale behind this legislative choice is unclear, it may have been made in deference to lawyers' manifest fondness for the familiar garnishment process. The 1991 report of the Alberta Law Institute on *Enforcement of Money Judgments*, which led to enactment of the new Alberta statute, notes that the popularity of garnishment was evident in its survey of enforcement activity.[120] However, while the authors of the report endorsed retention of garnishment as a form of enforcement against monetary obligations, they recommended that the process be removed from the clerk of the court's office and brought within the administrative authority of the office of the sheriff. The primary reasoning behind this recommendation is articulated in this passage from the report:

> We recommended previously that no enforcement activity be permitted unless the creditor has delivered a writ of enforcement to the sheriff. We consider this requirement to be important for the rationalization of existing remedies, the co-ordination of all enforcement activity, and the efficient implementation of the sharing principle for the distribution of enforcement proceeds. Accordingly, a

120 *Supra* note 32, vol. 1 at 185.

> creditor will be obliged to file a writ of enforcement with the sheriff before a garnishee summons can be issued.
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> We think that the logical implication of this requirement is that the garnishee summons should be issued from the sheriff's office and not the clerk's office.[121]

The point is persuasive. One would reasonably expect that a coordinated, consistent, and efficient system of judgment enforcement is most likely to be achieved through a single administrative structure. Such a system can achieve the functional and cost efficiencies of scale and expertise. In addition, the system costs created by the duplication and overlap endemic to a bifurcated administrated process can be minimized, and consistency in outcomes promoted by standard practice. This, in turn, yields fairness of the kind created by consistent and predictable treatment of comparable claimants.[122]

This approach is consistent with the recommendations of others who have studied the matter intensively. In its report on judgment enforcement, the Ontario Law Reform Commission was strongly of the view that the entire judgment enforcement system should be brought under a unified administration, constituted by the office of the sheriff.[123] Similarly, the Payne Report in England stressed the "complexity, the confusion, the expense and the unevenness of justice which are involved in the existence of parallel and collateral systems for the recovery of debts."[124] The Committee advocated the creation of a single Enforcement Office based upon the existing staff and offices of the county courts, which office would assume responsibility for the enforcement of virtually all money judgments.[125] The Payne Committee endorsed the earlier recommendations of the Anderson Committee in Northern Ireland,[126] which were there embodied in new legislation creating the Enforcement of Judgments Office.[127] Studies undertaken in other jurisdictions have yielded the same conclusion.[128] The enforcement systems in most of the jurisdictions under study in these reports suffered not only the historic anomalies

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121 *Ibid.* at 186.

122 Equality in treatment of judgment debts was noted as a factor to be considered by the Payne Committee, *supra* note 30 at 93, and inferentially by the Ontario Law Reform Commission, *supra* note 31 at 96 *et seq.* in its discussion of other proposals for reform.

123 *Ibid.* at 78-83.

124 *Supra* note 30 at 81.

125 *Ibid.* at 94-95.

126 *Supra* note 33, sometimes called the "Anderson Report."

127 *Judgments (Enforcement) Act (Northern Ireland) 1969*, *supra* note 114.

128 See the New South Wales Law Reform Commission and the New Brunswick Department of Justice, Law Reform Division, *supra* note 33.

created by our shared legal heritage, but the additional complexity of a diversity of enforcement officials and devices associated with various courts. However, they are in uniform agreement as to the general undesirably of disparate offices and enforcement mechanisms of whatever stripe, and in their conclusions regarding the preferred administrative approach.

The answer to the first question posed at the outset of this section would accordingly seem to be a resounding "Yes." All enforcement measures should be implemented under the authority of a single public office.

What, then, of the question of delegation of function? Assuming that a single administrative structure is likely to promote efficiency and fairness, and reduce systemic costs, it is reasonable to expect that those advantages may be further maximized by basing the enforcement system on a single enforcement device. Accordingly, the Saskatchewan proposals endorse a unitary mechanism (seizure and sale or disposition of all types of property), based on a unitary legal concept (the enforcement charge), administered through a single official structure (the office of the sheriff).[129] Nevertheless, they would, as noted earlier, accommodate direct creditor involvement through the sheriff's delegation of enforcement functions, in a manner comparable to, but broader in scope than, their involvement in the existing process of garnishment. In practice, the result would be consistent with the Alberta Law Institute Report's recommendation that garnishment be brought under the jurisdiction of the enforcement office, but would be more far reaching in that it would encompass the seizure of forms of property in addition to debts.

The delegation of certain enforcement functions to judgment creditors is likely to both enhance the effectiveness of the system and minimize its costs. However, the extent to which delegation is appropriate depends upon the extent to which the action in question requires a balancing of rights or the exercise of informed judgment. Considerations of fairness as among judgment creditors, judgment debtors, and affected third parties are of dominant importance in this regard.

In Alberta, civil enforcement agencies are authorized to delegate to accredited bailiffs the actual seizure and removal of property.[130] However, all other steps in the enforcement process must be performed by the agency's own personnel, and no part of the process may be undertaken by the judgment creditor or his or her designate. The Saskatchewan proposals are, in this regard, somewhat more

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129 This is subject to the qualification that a receiver may be appointed by the Court, as noted earlier, *supra* note 83.

130 *Civil Enforcement Act*, *supra* note 85, s. 10.

favourable to judgment creditors, though fundamentally comparable in effect. While they countenance the delivery of notices of seizure and other formal notices by judgment creditors or their personal agents, they would leave matters calling for the exercise of expertise and discretion to the sheriff's office. Delegation with respect to other functions of a mechanical nature may be addressed as needed by regulation.[131] In the result, while the enforcement process need not be executed exclusively by government or court officials, no study or report has suggested delegation of tasks other than those of a routine nature, nor has direct creditor involvement in connection with physical seizure and removal of property been recommended or adopted.

The final question to be addressed may also be regarded as one of delegation, but on a grand scale. Is privatization of the judgment enforcement system under an administrative model of the sort adopted in Alberta preferable to the retention of a publicly staffed and funded sheriff's office?

In Alberta, all of the functions of the sheriff in connection with judgment enforcement have in effect been delegated to civil enforcement agencies, including the distribution of funds generated by seizure and sale of assets.[132] Agencies provide these services to judgment creditors on a fee for service basis, at rates established at their own discretion. This is subject to the requirement that all fees charged must fall within a fee scale filed periodically with the provincial sheriff, who is the governing public official. The objective is to provide enforcement services at competitive user-pay rates, while ensuring that large clients such as financial institutions and retail businesses are not excessively advantaged over small judgment creditors by rates discounted heavily for volume. Although the governing legislation permits seizure of accounts or payment obligations by enforcement agencies, it appears that in practice enforcement against assets of that kind is still mainly pursued through the garnishment system, which is administered by the clerk of the court.

An alert reader may at this point hear an historic echo. The authors of the 1983 British Columbia Law Reform Commission study on *The Office of the Sheriff* described the sheriffs of our collective common law past as "entrepreneurial" sheriffs, for obvious reason.[133] Moreover, they recommended that reversion to an entrepreneurial

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131 *Buckwold-Cuming Report, supra* note 35, s. 90.

132 The information recounted in these paragraphs regarding practical experience under the Alberta system is drawn from the series of personal interviews referred to at *supra* note 76.

133 Turriff & Edinger, *supra* note 29.

system from the public sheriff-as-employee-of-government model be seriously considered. Among the objectives they suggested in this regard were the anticipated profit-motivated provision of better service and the substantial elimination of the administrative cost and legal risk borne by government under a public system.[134] However, these suggestions were made in the context of a far-ranging general administrative reorganization of all of the functions of the sheriff's office, including, but not limited to, judgment enforcement. Their practical implications were not fully explored in the report. In other words, they were part of an answer offered to a question quite different in scope and emphasis than the question of how the law and administration of judgment enforcement might best be restructured. Nevertheless, they remind us that the lessons of history have something to contribute to our thinking on this issue.

Government officials in Alberta express satisfaction at the success of the privatized system in that province. Although twenty-three enforcement agencies were authorized to operate in one or more of the province's six judicial districts when the new system went into effect, only nine remain in business. In general, the remaining agencies are viewed as providing enforcement services in an effective and professional manner, at appropriate rates, and with suitable regard for the rights of judgment debtors and others. Few complaints regarding the conduct of agencies or bailiffs are received by the sheriff and, of those, fewer still require formal investigation and corrective action.[135]

Overall, the Alberta system appears generally to be meeting the goals of effectiveness, efficiency, optimal system cost, and fairness. However, on closer examination, it is clear that such a system would not do so in all jurisdictions.

There are several obstacles to the success of a fully privatized system in other jurisdictions, including Saskatchewan. First and perhaps foremost, the profit-driven enforcement system is viable in Alberta only because judgment enforcement is an adjunct to related, and much more lucrative, revenue generating services. Alberta has for several decades precluded creditor self-help in both the enforcement of security interests and the levy of distress for rent. That is, seizure and disposition of property consequent upon a debtor's default under a security agreement or lease must be conducted by an official agency—formerly the public sheriff's office, and currently the civil

134 *Ibid.* See the general discussion of administrative alternatives in c. IX at 232-42.

135 *Civil Enforcement Act, supra* note 85, s. 14 contains detailed provision for investigation of civil enforcement agencies and bailiffs by the sheriff, either on receipt of a complaint or of the sheriff's own motion, and authorizes the sheriff to take prescribed actions to ensure that civil enforcement proceedings are carried out properly and in accordance with the Act.

enforcement agencies. Similarly, the civil enforcement agencies have assumed the sheriff's former responsibility for seizure of property by way of distress for rent.[136] Civil enforcement agencies operating in Edmonton estimate that judgment enforcement constitutes no more than five to fifteen percent of the business of any agency. There appears to be unanimity of opinion that without PPSA security interest enforcement, civil enforcement agencies could not be financially viable.

It is important to recognize that the Alberta civil enforcement agencies provide a service very different from that provided by private bailiffs, whose business is fundamentally the routine service of process and seizure of physical assets. Significant expertise is required in the operation of a civil enforcement agency, given that it involves the administration of two relatively complex statutory schemes, including the determination of such difficult legal questions as the applicability of exemptions law, priority in the distribution of proceeds, and the technicalities of seizure and disposition of complex assets (*e.g.* corporate shares). Moreover, these agencies do much more than follow the direction of their clients. They are called upon to provide advice regarding the legalities and practicalities of enforcement activity, with the support of retained legal counsel as required.

The law of Saskatchewan, like that of most other provinces, enables secured creditors and landlords to take direct action against their debtors' personal property for purposes of recovery of secured debt obligations and unpaid rent. Though bailiffs are used for purposes of seizure, they do not provide services of the kind provided by the Alberta civil enforcement agency. Given that there is unlikely to be any interest among secured creditors and landlords in relinquishing their direct enforcement rights to an authorized agency, whether private or public, business realities would preclude the adoption in Saskatchewan of a fully privatized judgment enforcement system.

It is also worth noting that while the government of Alberta is sufficiently confident in the professional expertise of private agencies to entrust to them a judgment enforcement scheme that can raise difficult issues in connection with third party claims and priorities in the distribution of proceeds, the system of garnishment is publicly administered. Since garnishment continues to be the most widely used judgment enforcement device in that province, the distribution

136 All "civil enforcement proceedings" fall subject to the *Civil Enforcement Act*, *ibid.* Such proceedings, as defined by s. 1(1)(g), include judgment enforcement under writ proceedings, distress proceedings, and evictions. By virtue of s. 1(1)(m), distress proceedings include the right of a landlord to distrain for rent, the right of a lessor of personal property to repossess, the right of a secured party to enforce a security interest under the *Personal Property Security Act*, R.S.A. 2000, c. P-7, and generally any other legal right to take possession of personal property.

of large sums of money *de facto* falls largely to the clerk of the Court, where the risk of error can be more closely managed.

Similarly significant is the fact that the governing Alberta legislation is replete with detailed provisions regulating the process of seizure and sale in writ proceedings, significantly circumscribing room for the exercise of discretion on the part of enforcement agencies. One might justifiably speculate that this level of specificity was deemed necessary given the potential for interference with personal rights by agencies who represent neither government nor the courts in their administration of the judgment enforcement system. While such specificity may be appropriate in the context of a privatized system, a much greater degree of latitude may be conferred upon a public official, such as a sheriff. This, in turn, enables the enforcement system to be devised in a manner that minimizes procedural complexity and maximizes return.[137]

Finally, a privatized system intensifies the difficulty involved under any judgment enforcement system in providing service in thinly populated and remote areas of the province. Where profit is an essential consideration, the cost of service is likely to be so high as to make it either prohibitive or practically unavailable in some circumstances. Alberta has attempted to address this concern by subjecting civil enforcement agencies to an obligation to act when instructed to do so in writing by a judgment creditor. However, that obligation is, quite properly, conditioned on the payment of agreed fees and expenses and the provision of reasonable security or indemnification requested by the agency.[138] Understandably, civil enforcement agencies are in practice prone to discourage potential clients from attempting enforcement when the process of seizure and sale is likely to be unduly difficult or costly.

In principle, judgment enforcement is a system for the recovery of private debt, the cost of which should be borne by its creditor beneficiaries. In theory, a return to the "entrepreneurial" sheriff is consistent both with principle and with historic precedent. To the extent that that theory offers a practically workable solution, it

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137 One member of an Alberta civil enforcement agency interviewed by the author, see *supra* note 76, noted that the process of handling writs of enforcement is very cumbersome and relatively slow, largely due to notice requirements and waiting periods involved.

138 *Civil Enforcement Act*, *supra* note 85, s. 12(c), provides that

> where an agency has been given written instructions to carry out a duty or function...the agency has the responsibility to carry out that duty or function when
>
> (i) the fees and expenses that are prescribed or agreed to...have been paid or arrangements that are satisfactory to the agency for the payment of those fees and expenses have been made, and
>
> (ii) ...reasonable security or indemnification...has been provided.

should be observed. The question remaining, then, is to what extent *can* judgment enforcement functions in the province of Saskatchewan be properly performed by private actors and agencies?

Little is served by speculation on the details of the administrative structure that might be designed in response to that question. However, a few general points can be made. First, the conclusion that a publicly funded and administered sheriff's office must provide the core functional component of a streamlined enforcement system is inescapable. A system of private sheriffs is economically unfeasible in Saskatchewan. In addition, reliance on publicly trained and accountable officials for the performance of those elements of the process that involve significant expertise and informed decision making allows for a streamlined statutory scheme relatively uncluttered by the sort of detailed procedural rules that would otherwise be required to ensure that all aspects of the process are conducted properly and with due regard for the interests of those affected by it. Finally, retention of the sheriff as a public functionary acting under the authority and supervision of the Court accommodates the application of basic legal principles already developed regarding the duties of the sheriff, as modified by the new statutory provisions.

A second general conclusion is that certain functions of the public sheriff can, and likely should, be delegated to private individuals or properly qualified agencies. For example, regulations might allow the sheriff to authorize those who currently provide bailiff services or such services as insurance, real estate, or notarization to disseminate basic forms and information, deliver notices, perform physical seizure, and, perhaps in unchallenged cases, even sell assets. Though appropriate documentary authority would be issued by the sheriff's office (much as the registrar or clerk currently issues a garnishee summons or writ), these agencies could be paid on a fee-for-service basis by judgment creditors to perform permitted enforcement activities, and might also perform a useful role in connection with asset investigation. A system of this kind would accommodate the delivery of enforcement services in areas of the province distant from sheriffs' offices, minimize such administrative costs as mileage and office overhead, and facilitate a significant degree of creditor control over the critical components of the enforcement process. Such a system might be designed in a variety of ways in point of detail. However, as a matter of general principle and approach, it would accommodate performance of routine seizure and sale functions by authorized agencies, while reserving to the sheriff decisions and actions requiring unimpeachable impartiality or a developed understanding of the law.

Third, a restructured system of enforcement need not entail the imposition of a significantly increased financial burden on the

public purse. Enforcement services should be delivered on an overall cost recovery basis, and as many components of the process as possible should be assigned to privately paid service providers.[139] Admittedly, many of the fees associated with the duties performed by the sheriff would be established not by a competitive market, but by government regulation. While that is an unavoidable result of a publicly administered system, such fee structures are necessarily associated with a wide variety of publicly provided services and are not inevitably unfair or unrealistic.

Finally, a hybrid system of public and private enforcement can, with the advantages of a rationalized legal foundation, reasonably be expected to largely satisfy all the objectives of effectiveness, efficiency, reasonable systemic cost, and fairness.

VII. CONCLUSION

The need for change in our system of judgment enforcement is evident and has been noted repeatedly in relevant studies and reports delivered in Saskatchewan and in like jurisdictions over the past few decades. The potential for successful enforcement of judgments is currently frustrated not only by an unwieldy administrative infrastructure, as is commonly supposed, but also at least equally by a system of enforcement devices so complex and obscure that they are seriously underutilized by the legal profession.

Reform in judgment enforcement necessarily requires a redesign of both the legal and administrative structures involved. Ideally, each of those components will reflect and reinforce the other. A single, centralized enforcement structure complements a single enforcement device in respects involving more than aesthetic symmetry. Without administrative reorganization, a rationalized system of legal concept and principle is unlikely to achieve optimal success. Conversely, administrative reorganization without a rationalization of the foundational legal structures offers very limited benefits.

The momentum for change at this moment in history is significant. Other jurisdictions have made dramatic reforms, and there is clear interest in doing the same elsewhere. The rationalized and streamlined procedures that would be associated with a new law of judgment enforcement offer an opportunity to revitalize the office of the sheriff. Robin Hood, beware!

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139 It is worth noting that the requirement of registration of judgments as a precondition of enforcement would likely be a revenue generator for government.