

THE REFORM OF JUDGMENT ENFORCEMENT LAW IN ALBERTA

Roderick J. Wood*

I. INTRODUCTION

Alberta is set to become the first Canadian common law jurisdiction to comprehensively reform its judgment enforcement law. Although it was not the first province to study reform of this area of law,¹ it was the first to act. The Civil Enforcement Act² (CEA) was passed on November 10, 1994 and is expected to come into force during the fall of 1995.

There were two forces behind the reforms. The first was the work of the Alberta Law Reform Institute.³ The imprint of its reform proposals is clearly visible throughout the CEA. The second was the government's decision to permit the private sector to carry out the enforcement activities of the sheriff. Although the former has been more influential in shaping the substantive legislative content of the CEA, the latter has ensured its swift passage and implementation. New Brunswick and Newfoundland are currently studying similar legislation based upon the Alberta model, but without the privatization element.⁴

* Associate Professor, Faculty of Law, University of Alberta. I am grateful to Rick Bowes and Geoff Ho for their helpful input and useful discussions over the course of a long reform process.

¹ The British Columbia Law Reform Commission published the following reports: *The Attachment of Debts Act*, Report No. 39 (1978); *Execution Against Land*, Report No. 40 (1978); *The Creditors' Relief Legislation: A New Approach*, Report No. 42 (1979); *Execution Against Shares*, Report No. 116 (1991). The Ontario Law Reform Commission in 1981 published its *Report on the Enforcement of Judgment Debts and Related Matters*, Report No. 46, Vols. I-III. New Brunswick in 1976 and 1985 published the following reform proposals: *Legal Remedies of the Unsecured Creditor After Judgment*, Third Report of the Consumer Protection Project, Vol. II, Consumer Protection Project Law Reform Division, New Brunswick Justice Dept. (1976); *Proposals for a System of Enforcement of Judgment Debts*, Law Reform Branch, New Brunswick Attorney General (1985).

² S.A. 1994, c. C-10.5.

³ *Prejudgment Remedies for Unsecured Claimants*, Report No. 50 (February, 1988); *Enforcement of Money Judgments*, Report No. 61 (March, 1991).

⁴ *Proposed Judgment Enforcement Act with Commentary*, New Brunswick Office of the

The existing enforcement system has been described as “a patchwork of English and Canadian legislation and judge-made rules which do not fit together in a comprehensible or workable pattern”.⁵ The CEA replaces it with a single statute that adopts a coherent and internally consistent approach.⁶ Although the CEA reshapes virtually every aspect of judgment enforcement law, it would be wrong to regard it as representing a radical break with the past. The basic concepts and procedures have not changed. The enforcement system continues to rely upon the initiative of the instructing creditor, who must choose an appropriate enforcement strategy. The three primary remedies continue to be writ proceedings against personal property, writ proceedings against land and garnishment, with equitable receivership available as a residual remedy. The concepts of the binding effect of the writ, exemptions and pro rata distribution have all been retained. It is at the operational level that the real bite of the reforms is felt. The existing procedures are criticized for being complex, cumbersome and inefficient. The fundamental objective of the CEA is to redesign these procedures so as to create a simpler and more efficient system.

The privatization of the enforcement activities is also not as radical as it might at first appear. Most of the sheriff's seizures in Alberta are presently conducted by bailiffs under contract.⁷ The CEA takes this one step further, and uses as its model the privatization of the sheriff's functions in British Columbia, which occurred without a major legislative amendment.⁸

Attorney General (May, 1994); *Proposal for a Newfoundland Judgment Enforcement Act*, Department of Justice, Province of Newfoundland and Labrador (August, 1994). Both of these proposals were prepared by Professor John R. Williamson.

⁵ C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, (Toronto, Carswell, 1981), p. 13.

⁶ The CEA replaces the Executions Creditor Act, R.S.A. 1980, c. E-14; the Exemptions Act, R.S.A. 1980, c. E-15; and the Seizures Act, R.S.A. 1980, c. S-11. Procedural rules governing the enforcement of court orders and garnishment continue to be located in the Rules of Court.

⁷ See *Proposed Civil Enforcement Act: Discussion Draft*, Alberta Justice, (July, 1994), at p. 2.

⁸ In British Columbia, the privatization of the sheriff's enforcement activities was accomplished through a very short amendment to the Attorney General Statutes Amendment Act, S.B.C. 1992, c. 31, s. 19. This amended s. 2.1(1) of the Sheriff Act, R.S.B.C. 1979, c. 386 by providing that the minister may appoint a person as court bailiff to exercise the powers of a sheriff for the purpose of enforcing writs. The following year the Miscellaneous Statutes Amendment Act (No. 2), 1993, S.B.C. 1993, c. 55, s. 25 added s. 2.1(1.1) to the Sheriff Act. This provided that a court bailiff is deemed to be a sheriff for the purposes of any amendment that confers any powers, rights or duties in respect of any civil

II. TERMINOLOGY AND GENERAL PRINCIPLES

The CEA contains an extensive set of definitions. The term "execution" has been dropped. The terms "writ of enforcement", "enforcement creditor" and "enforcement debtor" replace "writ of execution", "execution creditor" and "execution debtor".⁹ The term "writ proceedings" is used to describe any measures taken to enforce a money judgment.¹⁰

A notable feature of the definitions is the extent to which the terminology of the Personal Property Security Act¹¹ (PPSA) is adopted as the basic language of the Act.¹² This integration with the PPSA goes even deeper. The CEA adopts many of the approaches of the PPSA. For example, the CEA borrows the concept of an overarching judicial supervisory power over the remedial system,¹³ and imposes an obligation to act in good faith and in a commercially reasonable manner.¹⁴

A number of fundamental principles are enshrined near the beginning of the CEA. These include the concepts of universal exigibility of property,¹⁵ province-wide enforcement,¹⁶ and non-waivability of the debtor's rights, including the right to claim exemptions.¹⁷ The Act binds the Crown in exercising any rights as a creditor, but does not affect its collection of a debt through proceedings available under its prerogative or any other enactment.¹⁸ A person who suffers loss or damage as a result of

execution proceedings. The right to supervise these private sector agencies is presumably contained in the franchise agreements between the government and the agencies.

⁹ CEA, ss. 1(1)(ss), 1(1)(o), 1(1)(q).

¹⁰ CEA, s. 1(1)(tt).

¹¹ S.A. 1988, c. P-4.05.

¹² The CEA adopts the following PPSA definitions: "accessions", "building materials", "chattel paper", "crops", "document of title", "fixture", "goods" and "instrument". In addition, it uses PPSA terminology such as the concept of perfection and the category of "serial number goods".

¹³ CEA, s. 5. This corresponds to PPSA, s. 64.

¹⁴ CEA, s. 2(g). This corresponds to PPSA, s. 66(1).

¹⁵ CEA, s. 2(b). The statutory authority for the proposition that all non-exempt property was exigible under Alberta law was of long standing, but was never applied until recently. See R.J. Wood, "Universal Exigibility Under a Writ of Execution" (1991), 79 *Alta. L.R.* (2d) 55.

¹⁶ CEA, s. 2(c). Under existing law, the sheriff's enforcement activity is restricted to the judicial district in which the property is located. The execution creditor must use an alias writ and give separate instructions if property is located in more than one judicial district.

¹⁷ CEA, ss. 2(h), 2(i).

¹⁸ CEA, s. 3. This means that the Crown cannot assert its prerogative of immunity from statute or its prerogative of prior payment over creditors of equal degree when recov-

another person's failure to comply with the Act is given a right to recover damages.¹⁹

III. CIVIL ENFORCEMENT AGENCIES

The CEA privatizes most of the operational enforcement activities of the Office of the Sheriff. It gives the Sheriff's Office the legislative authority to enter into contracts with a civil enforcement agency under which the agency is authorized to conduct seizures, to sell property that has been seized and to distribute the proceeds of sale.²⁰ The court will no longer have the power to appoint a private bailiff.²¹ Civil enforcement agencies and the bailiffs employed by them are not agents of the Crown, and the Crown is not liable for their acts or omissions.²² An agency is under a statutory obligation to carry out a seizure upon receiving written instructions, provided that the appropriate fees and expenses have been paid and reasonable security or indemnification has been given.²³

Under the CEA, the Sheriff's Office carries out a supervisory function. It is responsible for maintaining the integrity of the enforcement system by screening the civil enforcement agencies to ensure that they meet the necessary insurance, bonding and training requirements. The bailiffs employed by agencies must also satisfy the training and other requirements necessary to be appointed.²⁴ The sheriff is given wide investigative powers where a complaint concerning an agency or bailiff is received or if the sheriff has reasonable grounds for believing that there has been a violation.²⁵ The sheriff is given the power to revoke the appointment of a bailiff who acts unethically,²⁶ and the agree-

ering a debt under the CEA. However, it does not prevent the Crown from proceeding by way of the prerogative remedy of the writ of extent or under proceedings governed by some other statute. The position is therefore similar to that reached in *Royal Bank v. Black & White Developments Ltd.* (1988), 60 Alta. L.R. (2d) 31 (C.A.).

¹⁹ CEA, s. 4.

²⁰ CEA, s. 9(1).

²¹ CEA, s. 9(5). The court previously had the power to appoint private bailiffs under the Seizures Act, *supra*, footnote 6, s. 18.

²² CEA, s. 11.

²³ CEA, s. 12(c).

²⁴ Draft Civil Enforcement Regulation, s. 20(3). At the time of writing, a draft of the regulations had been circulated for comment but had not yet been promulgated.

²⁵ CEA, s. 14.

²⁶ Draft Civil Enforcement Regulation, s. 23.

ments entered into with the agencies may contain provisions governing the suspension or cancellation of the agreement.²⁷ The Regulations provide a Code of Conduct for both agencies and bailiffs which proscribe a number of abusive, misleading or unethical practices.²⁸

The CEA is primarily concerned with the remedies of unsecured creditors. However, it covers the enforcement remedies of other classes of creditors as well. Alberta is unique among the common law provinces in its approach to the self-help remedies of creditors. The exercise of self-help remedies by secured creditors, landlords and other claimants was prohibited from an early date.²⁹ Except for receiverships, every distress or seizure by a creditor had to be undertaken by a sheriff or bailiff.³⁰ This policy has been retained in the CEA so that secured creditors, landlords and other claimants will be required to conduct their seizures or evictions through civil enforcement agencies.³¹

IV. PREJUDGMENT REMEDIES

The CEA adopts a unified approach to prejudgment remedies. In place of the writ of attachment, prejudgment garnishment and the Mareva injunction, the Act creates a single category of prejudgment remedy called an attachment order. The remedy most closely resembles the Mareva injunction in procedure, but makes available a wider range of protective orders to the successful applicant. An application for an attachment order may be made *ex parte* for a temporary order not exceeding 21 days in duration. This order will expire unless it is extended on an application on notice to the defendant.³² The applicant must establish that there is a reasonable likelihood that the claim against the defendant will be established and that there are reasonable grounds for believing that the defendant will deal with exigible property in a manner that would be likely to seriously hinder the claimant's enforcement remedies.³³

²⁷ CEA, s. 9(2)(b).

²⁸ Civil Enforcement Regulation, s. 8 and Schedules 1 and 2.

²⁹ The prohibition of self-help remedies was first introduced 1914 by the Extra-Judicial Seizures Act, S.A. 1914, c. 4.

³⁰ See s. 18 of the Seizures Act, R.S.A. 1980, c. S-11, and s. 58(2) of the PPSA.

³¹ CEA, ss. 9(1), 9(3) and 9(8). In addition, the CEA contains two miscellaneous sections pertaining to distress. See CEA, ss. 104 and 105.

³² CEA, s. 18.

³³ CEA, s. 17(2).

The court has at its disposal a wider array of orders to protect the property. It may prohibit or restrict any dealing with the property, order the delivery of the property to another person, authorize the issuance of a garnishee summons or appoint a receiver.³⁴ The defendant may have the property released by providing sufficient alternative security.³⁵ Although the order is usually designed to preserve the property, the court may authorize its sale if the property will depreciate substantially in value or if it is otherwise prudent to dispose of the property.³⁶

V. REGISTRATION AND PRIORITY OF WRITS

As in the past, a writ must be founded upon an unexpired, unsatisfied money judgment.³⁷ But in addition to this, the CEA sets out further registration requirements that must be undertaken before the writ is in force. In the case of personal property, the writ must be registered in the Personal Property Registry (PPR). In the case of land, the writ must be registered in both the PPR and under the Land Titles Act against the certificate of title to the land.³⁸

Registration of the writ is not merely a matter of protecting the enforcement creditor's claim against the claims of other third parties; it is a pre-condition that must be satisfied before any enforcement measure can be taken. The reason for this becomes clear once it is understood that registration of a writ has a co-ordination function as well as a notification function. Registration of a writ, like registration of a security interest, provides notice to third parties that a creditor has a potential claim to the property. However, registration of a writ is also used to co-ordinate the activities of enforcement creditors. It provides the primary means by which an agency can determine if there are other enforcement creditors with writs against the debtor. This information is needed so that the agency can ascertain the extent to which other enforcement creditors are entitled to share in a distribution. This directly affects the amount of property that will be seized and the manner in which the proceeds will be distributed. The PPR regis-

³⁴ CEA, s. 17(3).

³⁵ CEA, s. 20.

³⁶ CEA, s. 21.

³⁷ CEA, s. 27.

³⁸ CEA, s. 26.

tration has a two-year life, but may be renewed for further periods of two years through registration of a status report which updates the information in relation to the writ.³⁹

The PPR is also used to record the details of all enforcement activity carried out by a civil enforcement agency. An agency is required to register information concerning any seizure, sale or distribution associated with a writ.⁴⁰ This information will permit a further co-ordination of enforcement activities by providing an enforcement creditor with an easy means to discover if other enforcement measures have been initiated or completed.

Under prior law, a writ of execution bound the goods upon its delivery to the sheriff.⁴¹ This gave the writ priority over subsequently created interests. However, this binding effect only pertained to goods (and not other forms of personal property) located in the judicial district of the sheriff. Furthermore, it did not give the enforcement creditor priority over a prior unregistered interest. The CEA extends the binding effect of the writ to all of the enforcement debtor's exigible personal property in the province upon registration of the writ in the PPR.⁴² It also provides that the binding effect will defeat a prior unperfected security interest in personal property.⁴³ The writ's priority over subsequent interests is qualified by several important exceptions which subordinate the writ to ordinary course sales, sales of consumer goods, purchase-money security interests and transfers of negotiable property.⁴⁴ These provisions closely track the comparable provisions of the PPSA,⁴⁵ and as a consequence, the priority status of the writ is substantially similar to that of a non-possessory security interest in the property.

³⁹ Draft Personal Property Security Amendment Regulation, Alta. Reg. 302/92, ss. 5, 6 [amending Personal Property Security Regulation, Alta. Reg. 234/90, s. 4]. The enforcement creditor must also register a status report when the creditor receives a payment from the debtor. This ensures that the registration of the writ accurately reflects the current amount owing under each writ, and allows an agency to use a registry search to establish the amounts to be distributed to the various enforcement creditors.

⁴⁰ Draft Civil Enforcement Regulations, s. 10(1).

⁴¹ Seizures Act, *supra*, footnote 6, s. 4 [amended S.A. 1988, c. P-4.05, s. 97].

⁴² CEA, s. 33(2).

⁴³ CEA, s. 35(1). This represents a change in Alberta law. Under existing law, registration of a writ did not defeat a prior unperfected interest, but merely protected the binding effect of the writ against subsequent interests. See generally R.C.C. Cuming and R.J. Wood, *Alberta Personal Property Security Act Handbook*, 2nd ed., (Toronto, Carswell, 1993), pp. 154-57.

⁴⁴ CEA, ss. 35-40.

⁴⁵ PPSA, ss. 30-32 and 34.

The general registry system for writs against land is to be abolished.⁴⁶ The statutory machinery associated with this change is contained in a 1988 amendment to the Land Titles Act, which has yet to be proclaimed into force.⁴⁷ The amended legislation requires registration of the writ against each certificate of title. The CEA has little to add to this new scheme.⁴⁸ Unlike registration against personal property, registration of the writ against land does not give it priority over a prior unregistered interest.⁴⁹

VI. SEIZURE AND SALE

The CEA sets out a general seizure and sale procedure in relation to personal property. The rules governing the seizure of property have not been substantially changed. The notice of objection system, unique to Alberta, has been retained.⁵⁰ The seizure documents that are served on the enforcement debtor include a notice of objection to seizure of personal property. If the enforcement debtor completes this document and serves it on the agency within 15 days, the agency is prohibited from selling the property without first obtaining a court order permitting sale.⁵¹

The rules governing the conduct of the sale undergo a more significant change. Under existing law, sale by public auction or tender is the norm, and a court order is needed in order to sell the property by some other method.⁵² The CEA gives an agency greater latitude by permitting it to sell the property by any commercially reasonable method.⁵³ The agency must give the

⁴⁶ The general registry system did not involve registration of the writ against each parcel of land. The writ was filed in a separate registry, which was checked whenever there was a registration of an interest against a certificate of title. This meant that a single registration could cover several parcels of land. It also meant that there were often delays caused by the appearance of writs filed against other persons having identical or similar names.

⁴⁷ Land Titles Amendment Act, 1988, S.A. 1988, c. 27.

⁴⁸ Section 33(2)(b) of the CEA merely provides that the writ obtains its binding effect against land when it is registered against the certificate of title.

⁴⁹ In this respect, the position is the same as under existing law. See *Price v. Materials Testing Laboratories Ltd.*, (1976), 68 D.L.R. (3d) 444, [1976] 5 W.W.R. 280 (Alta. S.C.T.D.).

⁵⁰ This feature is presently set out in the Seizures Act, *supra*, footnote 6, ss. 27 to 29.

⁵¹ CEA, s. 46. There is a widespread practice for the sheriff to leave the goods with the debtor pursuant to a bailee's undertaking until the notice period has expired or a court order is obtained will continue under the CEA. It is not clear whether civil enforcement agencies will adopt this practice to the same degree.

⁵² Seizures Act, *supra*, footnote 6, s. 14.

⁵³ CEA, s. 48(d).

enforcement debtor notice of the method of sale at least 15 days before the day of the sale.⁵⁴ If the agency proposes to sell the property to an enforcement creditor, the agency must notify the enforcement debtor and all other enforcement creditors with related writs. If any of these parties objects, a court order permitting the sale is required to complete the sale.⁵⁵ This approach attempts to ensure that the enforcement sale will produce as high a recovery as possible, while providing the debtor or other interested party with the opportunity to monitor the sale and to object to improvident terms or procedures.

VII. SPECIAL SEIZURE MECHANISMS

The CEA sets out a number of special seizure mechanisms that are needed because of the peculiar characteristics of some forms of property. Unless there is a conflict, these simply supplement the ordinary seizure procedure.⁵⁶

The CEA clarifies the procedure that is to be followed in seizing an instrument.⁵⁷ The system for seizing security interests is also improved. Existing law permits the seizure of a registered security interest by registering a notice of seizure in the PPR or land titles system and notifying the person obligated to pay.⁵⁸ Thereafter, the person so notified is required to pay the money to the sheriff. The CEA continues this general policy,⁵⁹ but enhances it by providing that an agency can register the security interest if the enforcement debtor has not already done so.⁶⁰ The agency is also given the right to sell the security interest and the right to enforce it in the event that it is in default.⁶¹ Other special rules are provided in relation to agricultural products,⁶² fixtures,⁶³ serial number goods⁶⁴ and mobile homes.⁶⁵

⁵⁴ CEA, s. 48(e).

⁵⁵ CEA, s. 48(f). This procedure is similar to the strict foreclosure remedy provided in s. 62 of the PPSA under which the secured party can propose to take the collateral in satisfaction of the obligation secured.

⁵⁶ CEA, s. 49.

⁵⁷ CEA, s. 50.

⁵⁸ Seizures Act, *supra*, footnote 6, s. 8.

⁵⁹ CEA, s. 51(a) and (c).

⁶⁰ CEA, s. 51(b).

⁶¹ CEA, s. 51(d). Under existing law, the security can only be sold if a court order is obtained. See Seizures Act, *supra*, footnote 6, s. 9. There is no mechanism under existing law which would permit a sheriff to collect by enforcing the security interest in the event that the security agreement is in default.

⁶² CEA, s. 52.

⁶³ CEA, s. 53.

The most notable innovation concerns the treatment of market securities. The CEA creates a seizure mechanism that takes into account the commercial realities of modern securities markets where securities are held by intermediaries or are reflected by book entries in a securities depository. Three alternative methods of seizing a security are available: seizure of a security certificate; service of a notice of seizure on the issuer if the enforcement debtor is the registered holder; or service of a notice of seizure on an intermediary who holds the security.⁶⁶ The CEA sets out a detailed set of rules governing the obligations of issuers and intermediaries upon whom a notice of seizure is served. Following the seizure, the agency is given the right to be paid dividends and receive information.⁶⁷ The security may be liquidated by any means that the nature of the security permits.⁶⁸

The CEA also clears up any remaining uncertainty concerning the procedure to be used in relation to non-publicly traded shares. The agency must give notice of the intended method of sale to interested parties and cannot take further steps to liquidate it until 15 days have elapsed. The agency is required to follow as closely as possible any procedure that the enforcement debtor would be required to follow, but is not required to do so to the extent that it would prevent the shares from being sold within a reasonable time or for a reasonable price.⁶⁹

VIII. ENFORCEMENT AGAINST LAND

The CEA makes it clear that all interests in land are exigible.⁷⁰ It

⁶⁴ CEA, s. 54. This allows the enforcement creditor to seize serial number goods simply by registering the serial number in the PPR and serving the seizure documents on the enforcement debtor. It is not clear what benefit this produces, since the agency will presumably wish to conduct an actual physical seizure so as to be in the position to deliver the goods to a buyer at the enforcement sale.

⁶⁵ CEA, s. 55. This provides that a court order is required if it is occupied.

⁶⁶ CEA, s. 57.

⁶⁷ CEA, ss. 58 to 60.

⁶⁸ CEA, s. 61. For example, an agency may simply instruct a broker to sell shares in a publicly traded company or may instruct a mutual fund to redeem in the case of an open-end mutual fund.

⁶⁹ CEA, s. 62.

⁷⁰ CEA, s. 67. Under existing law, there was no explicit statement that land was exigible and there was some uncertainty whether certain types of interests in land were exigible. See *Enforcement of Money Judgments*, *supra*, footnote 3, at pp. 159-64.

also eliminates two procedural rules which tended to discourage enforcement against land. There is no longer any need to obtain a return *nulla bona*,⁷¹ and the one year waiting period has been reduced to 180 days.⁷² Under prior law, a sale of land had to proceed through a public auction or by tender. This was criticized as producing sub-optimal recoveries.⁷³ The CEA permits an agency to sell land by any commercially reasonable method.⁷⁴

The agency must give notice of the method of sale at least 30 days before offering the land for sale. If the notice sets out a minimum price, an objection may be served within the 30-day period. If a minimum price is not set out, a further notice of the terms of the sale must be given and an opportunity to object to the sale is provided.⁷⁵ A court order is not needed to complete the sale unless the enforcement debtor claims that the land is exempt⁷⁶ or if the enforcement debtor or another interested person objects to the sale. However, a court order is needed in order to transfer the land free of any encumbrance or interest registered against the enforcement debtor's interest in the land.⁷⁷

Under existing law, the right of survivorship of the other joint owner defeated the binding effect of the writ in the event of the execution debtor's death.⁷⁸ The CEA reverses this outcome. If the enforcement debtor dies before severance occurs, the writ continues to bind the land to the extent of the enforcement debtor's interest.⁷⁹

IX. GARNISHMENT

Perhaps the most significant reform is the expansion of the garnishment remedy. The Act makes a deliberate policy decision to promote the use of garnishment whenever feasible. Garnishment is preferred because of its simplicity, effectiveness

⁷¹ This occurs when the sheriff, having received instruction to seize personalty, replies that there is none against which to levy execution.

⁷² CEA, s. 72. This period can be extended or shortened by the court.

⁷³ See *Enforcement of Money Judgments, supra*, footnote 3, at pp. 170-73.

⁷⁴ CEA, s. 69.

⁷⁵ CEA, s. 74.

⁷⁶ CEA, s. 73. This is accomplished by serving a written claim of exemption to the agency at any time before the expiration of the 180-day waiting period.

⁷⁷ CEA, s. 75.

⁷⁸ *Young (Re)* (1968), 70 D.L.R. (2d) 594, 66 W.W.R. 193 (B.C.C.A.).

⁷⁹ CEA, s. 76.

and efficiency. The procedure is less onerous (and therefore less costly) than the seizure process. Because the remedy involves a diversion of money rather than the sale of the debtor's property, there is not the "lost value" problem that is associated with enforcement sales.⁸⁰ The strategy of the CEA is therefore to further reduce the procedural costs of garnishment (by permitting continuing garnishment), while at the same time expanding the classes of obligations that are subject to attachment.

The garnishee summons operates for a period of one year from the date of issuance.⁸¹ It is a continuing garnishment in that it attaches any current obligation and also any future obligation that arises under an existing agreement or relationship.⁸² If the obligation is a deposit account, the garnishee summons expires 60 days after its issuance.⁸³ In either case, the garnishee summons may be renewed.

Under existing law, garnishment of a bank account or other debt could be frustrated if a joint obligation were involved or if there were conditions requiring the production of a pass book or other document.⁸⁴ The CEA provides that the garnishee summons is also made effective against joint entitlements,⁸⁵ but it attaches only a current obligation if it is a joint deposit account that is being attached.⁸⁶ The garnishee summons must be served on each joint obligee.⁸⁷ There is a presumption that an equal portion of the joint entitlement is owed to each joint owner, but this may be rebutted on application of any interested party to a court for a determination of the actual beneficial interest of each joint obligee.⁸⁸ The

⁸⁰ See W.C. Whitford, "A Critique of the Consumer Credit Collection System", [1979] Wis. L. Rev. 1047, at pp. 1129-35.

⁸¹ CEA, s. 79(1).

⁸² CEA, s. 78(a).

⁸³ CEA, s. 79(2).

⁸⁴ In *Banff Park Savings & Credit Union Ltd. v. Rose* (1982), 139 D.L.R. (3d) 764, 22 Alta. L.R. (2d) 81 (C.A.), it was held that a bank account was not garnishable if it was owed to the judgment debtor and another person jointly. In *Provincial Treasurer of Alberta v. Huterian Brethren Church of Smoky Lake* (1980), 12 Alta. L.R. (2d) 368, 80 D.T.C. 6228 (C.A.) it was held that a term requiring the production of a document prevented the garnishment of a term deposit.

⁸⁵ CEA, s. 78(g).

⁸⁶ CEA, s. 83(2). In other words, any future deposits into the account would not be caught by the garnishee summons.

⁸⁷ CEA, s. 82(b). The garnishee's response must include the names and addresses of any joint obligees. If disclosure of this information would be unlawful, the garnishee must instead serve the garnishee summons on the obligee and certify this fact. See CEA, s. 82(a) and (c).

⁸⁸ CEA, s. 82(g).

CEA also provides that conditions requiring the production of a pass-book or other document or the giving of notice do not prevent garnishment.⁸⁹

The introduction of continuing garnishment has a profound impact on wage garnishment. It significantly reduces the expense of garnishment, as it is unnecessary to serve the employer with a fresh garnishee summons before every pay period.⁹⁰ However, this advantage is counterbalanced by the creation of a more generous exemption policy in respect of wage garnishments.⁹¹ The garnishee summons attaches the amount remaining after the enforcement debtor's employment earning exemption is deducted from his or her net pay. A basic minimum exemption is prescribed, which increases as the size of the dependent family increases. This amount together with one half of any net pay in excess of the minimum exemption forms the employment earning exemption. However, this cannot exceed the prescribed maximum exemption.⁹²

X. RECEIVERS AND SPECIAL REMEDIES

The CEA retains the equitable receivership as an enforcement remedy. Its availability under existing Alberta law was restricted because of a requirement that the property be exigible at law.⁹³ This will no longer prove to be a stumbling block, since one of the foundational principles of the CEA is that all non-exempt property should be available under writ proceedings.⁹⁴ Nevertheless, the receivership remedy will continue to occupy the role of a residual remedy which should be used only if the conventional remedies are impractical or less effective.

⁸⁹ CEA, s. 83(1).

⁹⁰ The garnishee summons must, however, be served at least 10 days before the end of the pay period that is more than 10 days or 5 days before a pay period that is 10 days or less. See Draft Rules of Court, rule 478(1).

⁹¹ The employment earnings exemptions are set out in s. 30 of the Draft Civil Enforcement Regulations. Under existing law, a single person with two dependent children who had net earnings of \$2,500 per month would be entitled to an exemption of \$805. Under the exemption rates currently set out in the Draft Regulations, the debtor would be entitled to a monthly exemption of \$2,075.

⁹² CEA, s. 81(d)-(f).

⁹³ See *Fox v. Peterson Livestock Ltd.*, [1982] 2 W.W.R. 204 (Alta. C.A.).

⁹⁴ CEA, s. 2(b).

XI. EXEMPTIONS

The CEA does not radically alter the basic exemptions policy. The reforms are directed towards the creation of a robust exemptions scheme that is less prone to the problem of statutory obsolescence. The CEA continues the practice of attaching monetary limits to many categories of exempt property, but locates the monetary limits in the regulations.⁹⁵ This is done in order to facilitate a more regular updating of the monetary limits and thereby prevent them from being eroded by inflation.

The categories of exempt property are simplified and modernized. Some of the restrictions on the exemptions are removed. For example, one motor vehicle is exempt whether or not it is required in a trade or calling,⁹⁶ and the general livelihood exemption covers any property used by the enforcement debtor to earn an income.⁹⁷ In the case of the homestead exemption of 160 acres, the exemption is narrowed so that it applies only to *bona fide* farmers whose principal source of livelihood is farming.⁹⁸

The CEA retains the existing rule that if the enforcement debtor's equity in the exempt property exceeds the monetary limit, the property may be sold with the exempt portion being paid to the debtor.⁹⁹ However, the CEA goes on to provide that the exemption in relation to this fund persists for 60 days after it is paid to the enforcement debtor unless it is intermingled with other funds.¹⁰⁰ The debtor is given the right of selection where a choice between items must be made.¹⁰¹

The seizure documents that are served on the enforcement debtor must include a notice setting out the exemptions allowed under the Act.¹⁰² The notice of objection system provides an appropriate mechanism through which disputes concerning

⁹⁵ Draft Civil Enforcement Regulation, s. 29.

⁹⁶ CEA, s. 88(d).

⁹⁷ CEA, s. 88(h). Under existing law, the equipment was only exempt if it was used by a person engaged in a trade or profession. This included mechanics, artisans and persons having skills of a particular trade or craft, but did not cover other occupations. See *Rodi & Wienberger Aktiengesellschaft v. Kay* (1959), 30 W.W.R. 229 (Alta. Dist. Ct.).

⁹⁸ CEA, s. 88(f).

⁹⁹ CEA, s. 89(1).

¹⁰⁰ CEA, s. 89(2)(c).

¹⁰¹ CEA, s. 90(1).

¹⁰² Draft Civil Enforcement Regulations, s. 7(2).

exemptions can be resolved. A waiver of an exemption given by a debtor is void.¹⁰³

XII. DISTRIBUTION

The CEA maintains in a modified form the notion of pro rata sharing among enforcement creditors. The distribution will be undertaken by the clerk of the court in the case of a garnishment, and by an enforcement agency in the case of any other writ proceeding. The term "distributing authority" is used to encompass both.¹⁰⁴

A distributable fund is constituted when money is received by the distributing authority.¹⁰⁵ The distributing authority will then determine the eligible claims. The eligible claims are those amounts that are outstanding on all related writs as of the date the fund is constituted. The distributing authority will make this determination by conducting a search of the PPR. The search differs from an ordinary registry search in that it will reveal only those registrations that are identical or nearly identical to the formulation of name that appears on the writ of the enforcement creditor who directed the seizure. This means that there is a risk that an enforcement creditor with a registered writ against the same debtor will not share in the distribution because the name on that creditor's writ does not appear as a related writ.

If the total claims exceed the distributable fund, the money is applied first to cover the fees and other costs incurred in undertaking the enforcement measure, and then to other claims entitled to priority by any other law. The instructing creditor is then given a priority to the first \$2,000. This preference is increased if the amount to be distributed to the enforcement creditors exceeds \$15,000. The balance of the fund, if any, is subject to the pro rata sharing principle.¹⁰⁶

The instructing creditor preference is new. Under common law, the first creditor to deliver a writ to the sheriff was entitled to priority.¹⁰⁷ This rule was replaced with a statutory scheme which called for a pro rata sharing among creditors.¹⁰⁸ The instructing

¹⁰³ CEA, s. 2(i).

¹⁰⁴ CEA, s. 94.

¹⁰⁵ CEA, s. 97.

¹⁰⁶ This scheme of distribution is set out in CEA, s. 99(3).

¹⁰⁷ *Tate v. Corporation of Toronto* (1892), 3 P.R. 181.

¹⁰⁸ Execution Creditors Act, *supra*, footnote 6.

creditor preference therefore represents a hybrid rule. It attempts to retain the sharing principle while preserving a creditor's incentive to actively pursue enforcement measures.¹⁰⁹ A practical consequence of the rule is that sharing often will not be required where small judgments are enforced.¹¹⁰

Before making a pro rata distribution, the distributing authority must serve a statement setting out the proposed distribution to all creditors who have related writs. An enforcement creditor is given a 15 day period within which to object to this proposed distribution.¹¹¹

XIII. CONCLUSION

The CEA proceeds from the fundamental premise that all non-exempt property of the debtor should be available to satisfy the claims of judgment creditors. It then attempts to improve the efficiency of the enforcement system. A number of strategies are employed towards this end. First, there is a significant expansion in the types of property that are channelled through the major remedies of garnishment, writ proceedings against personal property and writ proceedings against land. These "off-the shelf" remedies are less costly because no court involvement is needed in the absence of an objection by the debtor or other interested party. Second, the efficiency of these enforcement remedies is improved by reducing enforcement costs and maximizing recoveries from enforcement sales. Finally, the introduction of an instructing creditor preference into the distribution scheme will provide creditors with an added incentive to pursue their enforcement remedies without abandoning the principle of pro rata sharing.

The CEA goes some distance in encouraging the exercise of enforcement remedies against property that retains its value. This

¹⁰⁹ The incentive problem is most pronounced under existing law where the active creditor's claim is small and the passive creditor's claim is large. For example, suppose that the active creditor has a judgment for \$1,000 and the passive creditor has a judgment for \$100,000. Under the existing system, the active creditor would be entitled to only 1% of any distributable fund.

¹¹⁰ An empirical study undertaken in Alberta indicated that 63.9% of judgments were for amounts not exceeding \$2,000. See *The Operation of the Unsecured Creditors' Remedies System in Alberta*, Institute of Law Research and Reform, Research Paper No. 16 (Edmonton, 1986) pp. 60-64.

¹¹¹ CEA, s. 101.

can be seen most clearly in its approach to garnishment. Garnishment avoids the "lost value" problem because it involves a diversion of money rather than the forced sale of property. For this reason, the CEA greatly expands the scope of the garnishment remedy and reduces the cost of exercising it. The CEA also makes it easier for an enforcement creditor to proceed against certain marketable forms of property, such as publicly traded securities and land.

The use of private sector agencies will also affect the dynamics of the enforcement system. A common complaint about the operation of the existing system concerns the unresponsiveness of many of its officials. Privatization will ensure that the interests of the agencies are more closely aligned with the interests of instructing creditors. Of course, the new danger is the agencies may become too responsive and engage in abusive enforcement tactics. It remains to be seen whether the insurance, bonding and training requirements as well as the monitoring by the Sheriff's Office will be effective in curbing abuses.