**Judgment Enforcement Law CAN**

**Fall 2018**

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# 1. DEBT AND ITS ENFORCEMENT

## A. Debt and Debt Enforcement Systems/Overview

**Judgement Enforcement Before Reform**

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| 4 pre-Civil Enforcement Act judgment enforcement remedies   * (1) Writ of execution   + Procedure of seizure, sale and distribution of proceeds conducted by the sheriff of the judicial district * (2) Garnishment (garnishee summons)   + Process for reaching intangible property in the form of obligations “due or accruing due” to the judgment debtor * (3) Equitable execution (through the appointment of a receiver)   + Designed to permit enforcement against assets of judgment debtor where there is an obstacle to the utilization of ordinary measures, but only available in limited (and uncertain) circumstances * (4) Charging order   + against shares or money in court; order on application to the court * Plus, Mareva Injunction   + Pre-judgment asset preservation remedy   + Survives the CEA as an alternative to an attachment order |

**Overview of Civil Enforcement Act (in effect since 1996)**

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| * Now a single enforcement device: the writ of enforcement * New terminology:   + Judgement debtor 🡪 enforcement debtor   + Judgment creditor 🡪 enforcement creditor * Universal exigibility: Writ binds all exibigle property on registration, subject to statutory exemptions * The system is largely privatized   + Sheriff replaced by civil enforcement agencies and private bailiffs * A writ “binds” on registration; registration is required as a basis of enforcement and priority * Garnishment is maintained in a modified form and is based on a writ * Receivership is maintained in a modified form as an exceptional remedy (is statutory, rather than equitable) * Provision made for pre-judgment asset preservation– the “attachment order”.   + Mareva injunction remains in effect |

**Steps in Enforcing a Judgment**

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| * Where pre-judgment asset preservation is a concern, an attachment order may be issued on application to Court (and consider Mareva injunction as alternative). * Judgment is obtained * Judgment creditor (or lawyer) requests Clerk of the Court to issue writ of enforcement. (Judgment creditor is now an “enforcement creditor”) * Enforcement creditor (or lawyer) registers writ of enforcement   + In PPR   + Against title to judgment/enforcement debtor’s land in Land Titles registry, if land is involved * Enforcement creditor (or lawyer) initiates “writ proceedings” (enforcement measures); 3 options:   + (1) Seizure and/or sale (Civil Enforcement Agency/Bailiff)   + (2) Garnishment (Clerk of Court)   + (3) Special remedy (receiver or other order) * Funds generated by writ proceedings are distributed by the distributing authority (in parentheses above) * To enforce a judgment, can the ED be imprisoned?   + No, BUT   + Rule10.52: A person may be found in civil contempt for failure to comply with any other type of Court order. In civil enforcement proceedings, such orders may include e.g. an “attachment order”, i.e., order to preserve property pending judgment in an action or other order contemplated by the CEA or CER.   + CER s 35.17: Where a person required to provide information in relation to writ proceedings by order of the court or under a statutory provision fails to do so, the Court may hold the person in civil contempt. |

## B. The Ethical Obligations of Lawyers in Collection Practices & Judgment Enforcement

**Constraints imposed by law on debt collection and credit reporting practices (7 constraints)**

**(1) Statutory regulation of offensive or misleading conduct**

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| 1. *Fair Trading Act* and regulation 2. Primary source of law is provincial 3. Lawyers are generally exempt from this legislation |

**(2) *Criminal Code* offences**

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| * Extortion: Intentional procurement of something by threats without reasonable justification, but threat of civil proceedings is not a threat for that purpose   + 346 (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done. * Compounding an offence: i.e. I won’t tell if you pay up   + 141 (1) Everyone who asks for or obtains or agrees to receive or obtain any valuable consideration for himself or any other person by agreeing to compound or conceal an indictable offence is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. * Communication of false information with intent to injure or alarm, telephone harassment   + 372 (1) Everyone commits an offence who, with intent to injure or alarm a person, conveys information that they know is false, or causes such information to be conveyed by letter or any means of telecommunication |

**(3) *Judicature Act***

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| * Offence for misuse of court process or forms (including writ of enforcement, garnishee summons, related documents)   + 55 Any person using any court process or form or any process or form similar to it in any manner likely or intended to deceive any other person is guilty of an offence and liable to a fine of not less than $1000 and not more than $500 or to a term of imprisonment not exceeding 6 months, or to both. |

**(4) Lawyers subject to sanction by Law Society for professional misconduct**

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| * Threat of criminal proceedings (see *Wilson*)   + The purpose of the rule is to prevent the criminal law from being used a as lever to enforce the payment of a civil claim   + Law Society of Alberta Code of Conduct:   2.02 (8)A lawyer must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:  (a) to initiate or proceed with a criminal or quasi-criminal charge; or  (b) to make a complaint to a regulatory authority   * Threat of civil proceedings   + Law Society of Alberta Code of Conduct:   Integrity  1.01 (1) A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.  Encouraging Respect for the Administration of Justice  4.06 (1) A lawyer must encourage public respect for and try to improve the administration of justice.  Courtesy and Good Faith  6.02 (1) A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.   * + Shoplifting civil recovery letters (see *Zealous Advocacy*)   + Demand for payment accompanied by draft statement of claim |

*Wilson v Law Society of British Columbia*

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| Ratio | A lawyer cannot threaten criminal prosecution on behalf of a client or advise a client to do so in order to gain a benefit for the client (Code of Conduct s. 2.02(8)) |
| Facts | * The appellant lawyer wrote a letter to the public for which he was charged with professional misconduct * The letter outlined that if the addressee did not comply, theft charges or forcible removal of the items would result |
| Issues | Whether the lawyer’s letter amounted to professional misconduct |
| Judicial History | * The appellant was found guilty of professional misconduct |
| Decision | Appeal dismissed – lawyer guilty of professional misconduct |
| Reasoning | * Criminal law should not be used as a lever to enforce a civil claim |
| Notes | * As a lawyer, can never threaten with criminal proceedings (lawyers are not exempt from the *CC*) |

*Zealous Advocacy or Exploitative Shakedown?*

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| * SCRLs do not reflect a valid legal claim * Zealous advocacy has limits, these letters could be seen as taking advantage of those who are youthful, unexperienced, or unsophisticated * Solutions:   + Pass new rules of professional conduct regarding SCRLs, but should not blanket prohibit demand letters   + Issue advisories on the proper manner in which to send an SCRL   + Publish practice directive |

*Lawyers regulating Lawyers?*

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| * (1) In some circumstances, demand letters sent by lawyers on behalf of retailers seeking recovery of losses associated with shoplifting either may not rest on a legitimate cause of action, or may claim losses that courts do not recognize. * (2) When lawyers send demand letters that they have a reasonable basis to know are not based on a cause of action, that seek losses that are not legally recoverable, and which the lawyers have a reasonable basis for knowing that their clients will not pursue in court, they act unethically. * (3) Law societies do not discipline lawyers for sending demand letters that are not based on a cause of action, or that seek losses that are not legally recoverable. The negative consequences for such letters are likely to be judicial, or informal regulatory control by other lawyers through mechanisms of “shaming” or “shunning”. * (4) Unless the law societies are going to exert regulatory control themselves, they should not discipline lawyers who engage in shaming and shunning of other lawyers who have at least arguably acted unethically, even if the shaming and shunning is not polite. * (5) Any other approach undermines the legitimacy of self-regulation, reinforcing the perception that law societies want to suppress criticism rather than engaging with their only justifiable mandate: protecting clients and the legal system from the harms that can be done by unethical lawyers. |

**(5) Lawyers subject to sanction under an order for costs in relation to improper judgment enforcement measures**

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| * Rules of Court   10.50 If a lawyer for a party engages in serious misconduct, the Court may order the lawyer to pay a costs award with respect to a person named in the order. |

**(6) Client potentially liable for costs of court applications prompted by improper judgment enforcement measures**

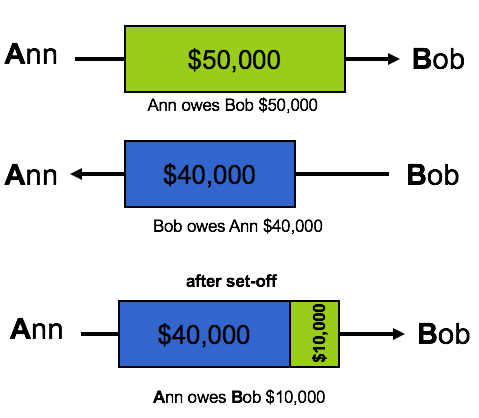
**(7) Tort**

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| * Trespass, assault, defamation * Conspiracy to harm (*Mraiche*) |

*Mraiche Investment Corp v McLennan Ross LLP*

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| Ratio | As the solicitor was not aware of the judgment against the client, s/he cannot be found liable for conspiracy to commit a tort |
| Facts | * November 2007, Mraiche sued Mr. Paul and his company Premier, Rossall, a solicitor in the defendant firm, represented Paul in this action * August 2008, Fialkov, another solicitor at the defendant firm, on behalf of Mr. and Mrs. Paul sold land owned by Premier to a numbered company he incorporated that had Mrs. Paul as the sole shareholder and director * October 2008, Fialkov prepared backdated trust documents indicating the land was held in trust by Premier for the numbered company * Mraiche was unable to capture any of the proceeds of the sale of land from Premier to the numbered company * Fialkov swore an affidavit stating that he was unaware of the Mraiche litigation and that he was contacted by Mrs. Paul to set up the trust document |
| Issues | Should the law firm, in carrying out instructions from a client, be found liable for the tort of conspiracy to defraud a creditor? |
| Decision | Appeal dismissed – the lawyer was not guilty of the tort |
| Reasoning | * There was no evidence that Fialkov was aware of the particulars of the Mraiche claim, and no evidence that he was aware of the law suit at all |
| Notes | * Consider liability of the lawyer on the assumption that the transaction was a fraudulent conveyance, was the lawyer guilty of conspiracy to commit harm:   + The defendant’s predominant purpose was to cause injury to the plaintiff; or   + Where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result. |

# 2. SET-OFF

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**Set-off and Post-judgment Writ Proceedings**

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| * **(1) May affect enforcement of a writ through garnishment or seizure of a debt.**   + In above example, assume that Chris obtains a judgment against Ann, issues and registers a writ and serves a garnishee summons on Bob to attach the $40,000 payable by Bob to Ann.   + Bob is permitted to raise his right of set-off against Ann in response to the garnishee summons served by Chris * **(2)** **May affect enforcement of a writ where rights of set-off affect the extent of the enforcement debtor’s interest in property that may be subject to sale in writ proceedings.**   + See *Re Palmer and Southwood* |

**Set-off and Pre-judgment Debt Recovery**

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| * **(1) Operates as a debt collection device**   + In above example, Ann recovers the $40,000 owed to her by Bob by paying him $10,000 and asserting set-off   + Often used by banks * **(2) May be raised as a defence (via counterclaim) to an action for recovery of a debt**   + If Bob sues Ann for $50,000, Ann may pay $10,000 and assert set-off by way of defence against his claim for the balance.   + Conversely, if Ann sues Bob to recover the $40,000 he owes her he may defend the action by raising his right of set-off |

**Set-off and Priority of a Claim**

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| * **(1) Allows the party asserting set-off to gain priority over other creditors**   + Assume Bob owes money under judgments obtained against him by Chris and Del. Assume that Bob’s exigible property is worth $40,000   + If Ann were to sue Bob for the $40,000 he owes her and enforce a writ issued on the judgment by seizure of Bob’s property, she would have to share the proceeds with Chris and Del. Set-off allows Ann to recover the entire $40,000 by cancelling her debt to Bob.   + See *Citibank Canada v. Canadian Life Insurance Co* |

**Set-off in Law**

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| * Both obligations must be debts (ie. liquidated sums, not an unliquidated claim)   + Liquidated debt means quantifiable with certainty * Obligations must be mutual (assignment destroys mutuality) |

**Set-off in Equity**

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| * Available where claim is for a liquidated or unliquidated money sum * May be asserted against an assignee (i.e., where mutuality is lost) if:   + The sum to be set off accrued and became due prior to the notice of assignment, (whether or not it is payable before that date - see *Business Computers Ltd v Anglo-African Leasing Ltd*) or   + The sum to be set off arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with the contract or series of events, even if it accrues after the notice of assignment |

*Telford v Holt*

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| Ratio | Definition of legal and equitable set-off |
| Facts | * **Canadian Stanley purchases Telford land for $265,000** * Down payment $165,000 * Balance of $100,000 payable pursuant to mortgage on land purchased * **Telford purchases Canadian Stanley land for $265,000** * Down payment $115,000 * Balance of $150,000 payable pursuant to mortgage on land purchased * Canadian Stanley assigned the Telford mortgage to the Holts without notifying the Telfords * The Telford's lawyer tendered payment towards the mortgage to Canadian Stanley of $50,000 plus interest stating that the balance owing was offset by the amount owed by Canadian Stanley to the Telfords   + Canadian Stanley returned the cheque and stated that the mortgage had been assigned to the Holts * The Holts then commenced an action against the Telfords for the full $150,000 * The Telfords paid the $50,000 due and claimed they were entitled to have the mortgage discharged |
| Issues | Whether the Telfords are able to set off the remainder of the debt on the mortgage despite the mortgage assignment |
| Judicial History | * ABCA confirmed the trial decision to the Telfords claim for set-off |
| Decision | Appeal allowed – the Telfords were entitled to equitable set-off of the remaining debts |
| Reasoning | * The Telfords did not receive notice of assignment until the Holts filed their notice of SoC on March 13, 1981 * The only debt which has accrued was the January payment of $50,000 (Buckwold disagrees, but outcome the same) * The contracts were sufficiently inter-related |
| Notes | * Set-off at law:   + Both obligations must be debts (ie. liquidated sums, not an unliquidated claim)   + Obligations must be mutual (assignment destroys mutuality) * Set-off in equity:   + Available where claim is for a liquidated or unliquidated money sum   + May be asserted against an assignee (i.e., where mutuality is lost) if:     - The sum to be set off accrued and became due prior to the notice of assignment, (whether or not it is payable before that date - see *Business Computers Ltd v Anglo-African Leasing Ltd*) or     - The sum to be set off arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with the contract or series of events, even if it accrues after the notice of assignment |

*Citibank Canada v Confederation Life Insurance Co*

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| Ratio | Failing to meet the legal or equitable requirements for set-off |
| Facts | * Citibank was an unsecured creditor of Confederation and sought to set-off certain payment obligations owed by Confederation to Citibank against funds * If set-off were to occur, Citibank would be a net-debtor of Confederation, giving it an advantage over other creditors * If set-off did not occur, then Citibank would likely recover none of its debts |
| Issues | Whether Citibank is entitled to set off the amount owed by Confederation with the amount deposited with them in dealing with the liquidators |
| Decision | Verdict for the defendant – Citibank was not entitled to a right of set-off |
| Reasoning | * Citibank does not meet the test for legal set-off because in the context in which they are put forward they are not “debts”, nor are they “liquidated” debts (calculable).   + The fact that the parties have provided a formula for quantification of a claim therefore does not render the claim a “liquidated” claim if the formula depends on market or other fluctuating factors. * They do not meet the tests for equitable set-off because the transactions involved are not sufficiently connected to bring the equitable principles into play   + “so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without consideration of the cross-claim.” |
| Notes |  |

# 3. PRELIMINARY MATTERS

## A. Pre-Judgment Remedies

### i. The Mareva Injunction, the Attachment Order & the Preservation Order

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| * Concern borne from the defendant moving, disposing or hiding their assets prior to judgment being rendered * Two possibilities:   + Attachment order– CEA   + Mareva injunction – *Judicature Act*   + Preservation order – *Rules of Court* (must meet section 17 of the CEA) |

**Attachment Order**

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| * An order preventing disposition of assets by the defendant until judgment in an action * Governed by Part 3 of the CEA * **How do you get an attachment order? (process)**   + By applying to the Court (s. 17(1))     - The Court is the Court of Queen’s Bench (s. 1(1)(j))     - This includes Judges and Masters in Chambers * **When can an application be made?**   + The claimant may apply where the proceedings have commenced in AB to establish the claimants claim or are about to commence (s. 17(1)(a))     - Claim means that the claim will result in a money judgment (not property/trust, etc.) (s. 16(a)) * **Terms of the order (what you can get)**   + Orders only apply to exigible property (s. 17(3)(a)(i),(ii))     - Exigible means property that is not exempt from writ or distress proceedings (s. 1(1)(u))   + The Court may prohibit any dealings with exigible property of the defendant (s. 17(3)(b))   + The Court may impose conditions or restrictions on any dealings with exigible property of the defendant (s. 17(3)(c))   + The Court may require the defendant or a person who has possession or control of exigible property to the defendant to deliver up the property to a person identified by the order (s. 17(3)(d))   + The Court may authorize the clerk to issue a garnishee summons (s. 17(3)(e))   + The Court may appoint a receiver (s. 17(3)(f))   + The Court may include in the order any term, condition or ancillary provision that the Court considers necessary or desirable (s. 17(3)(g)) * **Grounds for an order (what must be established)** (s. 17(2))   + The Court *may* grant the order if it is satisfied that:     - There is reasonable likelihood that the claimant’s claim against the defendant will be established, **and**     - There are reasonable grounds for believing that the defendant is dealing with their exigible property, or is likely to,       * Otherwise for the purpose of meeting reasonable and ordinary business expenses, **and**       * In a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant   + See *14881 Alberta Ltd v Haney Farms (1985) Ltd* * **Limitations on the award of an order**   + Limitations only apply if the grounds for an order can be established   + Undertaking and security (s. 17(4)) – practical consideration     - Mandatory to the applicant to undertake to pay any damages or indemnity that the Court may award to the defendant should the action fail (and the defendant suffers a loss)     - The claimant may be required to provide security in respect to the undertaking     - Prevents using the application as an inducement to settle   + The application should be no more onerous that it needs to be to achieve its purpose (s. 17(5), (6))     - Say attach to a bank account, rather than operating equipment     - Should attach to property that is equivalent in value to the plaintiff’s claim |

*1482221 Alta Ltd v Haney Farms (1985) Ltd*

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| Ratio | Application of the test for an attachment order |
| Facts | * A SoC was filed by a numbers company of two brothers who have familial ties to a large family farm * An attachment order was sought to attach $1.6 million - the proceeds of the sale of the farm * The brothers alleged that Haney farms had become a shell after the expenditure of $2.2 million in 2008 on land and equipment, $500,000 from the company to Dick and family for salaries, etc., they pointed to airplanes, airstrips and hangars as evidence * Dick gave a different explanation of the expenditures, plus outside forces that affected the position of the farm |
| Issues | Are the brothers entitled to an attachment order for the proceeds of the sale of the farm |
| Decision | Application dismissed – no attachment order for the plaintiff |
| Reasoning | * Reasonable likelihood that the claim will be established? – the claim is based on the general security agreement, with the sale of most assets there is a reasonable likelihood that the plaintiffs will establish their claim * Dealing with property other than for meeting ordinary business expenses? – Requirement is met as selling may assets and paying down large amounts of debt is not in the farm’s ordinary business (even if reasonable for the governing economic times) * Dealing with property in a way that would seriously hinder the claimant’s enforcement of a judgment? – not met, there are more than enough assets to satisfy the judgment; some of the perks could have been scaled back, but it is unlikely to affect the company to a large degree; the failure of the farm was affected by some outside forces |
| Notes | * An attachment order is an extraordinary remedy; cannot get the remedy just because they fear that the assets will be gone * The remedy is discretionary even if the statutory requirements have been met   + Should only make an order if just and equitable to do so taking into consideration the interest of those involved and third parties * **Is there a reasonable likelihood that the claim will be established?**   + Standard is lower than a strong prima facie case   + Standard is higher than just determining if on the evidence there is a genuine issue to be tried – must show a reasonable likelihood that it will succeed * **Are there reasonable grounds for believing that the defendant is dealing with its exigible property or is likely to deal with that property otherwise than for the purpose of meeting its reasonable and ordinary business or living expenses?**   + A rigorous specific requirement   + What is the usual or regular type of transaction that is engaged in by people in the defendant’s business * **Are there reasonable grounds for believing that the defendant is dealing with its exigible property or is likely to deal with that property in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against it?**   + There must be substance to an allegation founded in evidentiary support   + Look at: (1) timing of creation of the debts, (2) whether debt was created out of the ordinary course of business, (3) whether assets have disappeared, (4) whether assets have been sold to non-arm’s length parties for less than market value, (5) whether the value of the defendant’s exigible assets greatly exceeds the plaintiff’s claim   + **NOTE:** Where allegations of fraud as determined to have a reasonable foundation, it is not necessary to prove that actual dissipation of assets has occurred to meet this test (grounds for an inference) |

**Mareva Injunction**

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| * Injunction preventing the defendant from disposing of asset pending a judgment   + Same objective as an attachment order – asset-freezing order * Governed by the *Judicature Act* s. 13(2) * **How do you get a Mareva Injunction?**   + Implicit in s. 13(2), by application to the Court     - Court of Queen’s Bench (s. 1)     - Or on appeal Court of Appeal (s. 1)     - DOES NOT include Master in Chambers – their power does not include injunctions (*Court of Queen’s Bench Act* s. 9(3)(d)) * **When can application be made?**   + After an action has been commenced, and before judgement (injunction granted by an interlocutory order s. 13(2))   + Cannot be granted before a SoC or Originating App has been file with the Court (unlike attachment order) * **Terms of the injunction**    + In practice will be similar to the terms of an attachment order, but the statute   leaves the terms entirely open ended (so see CEA s. 17(3))   * + - Will be an order directing the defendant to do or not do something with their property * **Grounds for a Mareva injunction (what must be established)**   + Open-ended language – in all cases in which it appears to the Court to be just or convenient (s. 13(2))   + But reality is it is constrained by the common law – see *Cho v Twin Cities Power-Canada*   + Onus on applicant to establish the grounds * **Limitations on the award for an order**    + No limitation in the *Judicature Act*   + In practice will likely require an undertaking/security – but in the case of a Mareva injunction it is at the discretion of the Court   + And the Court is likely to limit the scope (counsel for the defendant should ensure that the scope is limited if an order is granted) |

*Cho v Twin Cities Power-Canada*

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| Ratio | Application of the test for a Mareva injunction |
| Facts | * Cho obtained an *ex parte* Mareva injunction in February 2011 against the defendant * Mid-February, the parties consented to an order vacating the previous order   + The Parties agreed that the money would not be disturbed without the consent of counsel or further orders from the court * Defendant is seeking to have the $1.8 million released to them * Plaintiff is seeking another Mareva injunction or, in the alternative, an attachment order |
| Issues | Whether the plaintiff is entitled to a Mareva injunction or an attachment order |
| Judicial History | Mareva injunction and attachment order denied in ABQB |
| Decision | Appeal dismissed – neither Mareva injunction not attachment order are granted |
| Reasoning | * The claimant failed to prove that it had a strong prima facie case on the affidavit evidence * Regardless, the evidence does not show that the respondents are removing, hiding or dissipating assets to avoid execution, nor do they have plans to do so |
| Notes | * **Test for Mareva injunction**    + The plaintiff must show a strong prima facie case for his suit     - The applicant has shown that there is a “serious issue to be tried”   + The plaintiff must show that there is a real risk that the respondent will remove assets from the jurisdiction, or dissipate them, to avoid execution (enforcement) under a judgment     - Acting out of the ordinary court of honest business?     - Intent to evade legitimate execution (enforcement)? * A Mareva injunction is subject to the **tripartite test** for injunctions   + Serious issue to be tried   + Irreparable harm if injunction is not granted   + Balance of convenience – what are the implications of granting the injunction? |

**Property Outside the Jurisdiction**

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| * Immediate unenforceability (the CEA does not affect property outside the jurisdiction) does not mean that an order should not be granted if otherwise * The CEA does not explicitly require the property to be in AB for an Attachment order to apply * *Alberta (Treasury Branches) v Pocklington*   + An airplane can be subject to an order when it returns to the Province * *Awad v Dover Investments Ltd* (Ont. SCJ)   + Plaintiff sued defendant in AB, defendant was owed money under a judgment in ON, property of the defendant in AB   + A Master in Chambers made an order directing that the money payable under the ON judgment be paid into Court   + The ON Court said that the AB court had jurisdiction because it was an in personam order (cannot make an order that would affect the rights in the property, but could make an in personam order) * *Mooney v Orr*   + A Mareva injunction can and will be ordered on property located outside of the jurisdiction, but should not be done readily * *Google Inc v Equustek Solutions Inc* (SCC) **NEW**   + SCC affirmed that Mareva injunctions can follow you, no matter what jurisdiction you’re in   + When a court has *in personam* jurisdiction, and where it is necessary to ensure the injunction’s effectiveness, it can grant an injunction enjoining that person’s conduct anywhere in the world. * *Talisman Energy Inc v Flo-Dynamics Systems Inc*   + Plaintiff sought an order to direct the defendant to bring funds back into the jurisdiction   + The Court said that they had no authority on this - reluctance of the Court to issue this   + Did not grant the order, but did direct that the funds be held in a solicitor trust account in Austria (but this likely wouldn’t be followed in Austria) |

**Mareva Injunctions Against Non-Parties**

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| * Mareva injunctions *can* be granted and enforced against third parties (*Google Inc v Equustek Solutions Inc*) * This could be supplementary to an injunction against a defendant   + This means that you need to first get an attachment order against the defendant, *then* get one against the third party   + This is supported by S 18(3) and s 17(3)(d) |

### ii. Duration of an Attachment Order

**Termination of Attachment Order** (s. 19)

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| * Terminates on whichever occurs first (subject to an order of the Court and s. 18):   + On the dismissal or discontinuance of the claimant’s proceedings   + On the 60th day from the day of the entry of a judgment in favour of the claimant * Can extend the if it appears just and equitable to do so * Section 18 governs *ex parte* orders |

**Termination of an *Ex Parte* Order** (s. 18)

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| * Terminates on expiry of initial term – not longer than 21 days unless “the Court is satisfied it would be inappropriate” for the order to so terminate * Initial term may be extended by application on notice to defendant * Court may extend initial term ex parte to accommodate hearing of notice application for further extension |

**Termination of garnishee summons ordered under an attachment order**

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| * This results from:   + An ex parte attachment order authorizes a garnishee summons to be served on a person who owes money to the defendant   + The summons is served while the order remains in effect (within 21 days from date of the order) but funds are paid into court after the order has terminated (21 days have expired) * s 79(1) provides that a garnishee summons expires 2 years after the day on which it was issued. Does the garnishee summons remain in effect for 2 years or does its effectiveness terminate when the attachment order expires (in 21 days or at such other time specified in the order)? * *Cameron v Aecometric*   + Ex parte attachment order was granted and authorized a garnishee summons to be served (to a person who owes money to the defendant)   + The money was not paid into court until after the order had expired   + In obiter, The Court suggested that the garnishee summons should remain in effect for 2 years (but this seems wrong, like a go-around)   + Buckwold disagrees with this outcome: once the attachment order collapses, the garnishee summons should collapse because it is merely a way of enforcing the attachment order |

**Application to Terminate (ex parte order or order granted on notice)**

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| * 17 (8) Any interested person may apply to the Court to vary or terminate an attachment order. * Relevant factors on application to terminate:   + *Calmusky v Hodgins* (delay, inciting settlement)   + *Welcome Ford Sales Ltd v Hellec* (onus on original applicant to justify continuation, failure to make full disclosure to court on application is grounds for terminating) |

*Tiger Calcium Services Inc v Sazwan* (2017 ABCA) **NEW CASE**

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| Ratio | Applicants making *ex parte* orders are required to act with utmost good faith and make a full, fair, and candid disclosure of the facts. This disclosure must include all facts material to the motion. |
| Facts | * Plaintiffs commenced an action against Tiger based on misrepresentation and non-disclosure * Counsel for the plaintiffs applied for *ex parte* Mareva and Anton Piller orders, which were granted   + Anton Piller authorize search and seizure of documents and compromising evidence material to the plaintiff’s claim * The original chambers judge granted a conflated Mareva/attachment order * This case concerns Tiger’s appeal of these orders |
| Issues | Whether these orders should be set aside |
| Decision | All but two should be set aside |
| Reasoning | * The court determined that the original applications failed to meet the duty of full disclosure * The orders were criticized for having no expiry date and an unreasonably low limit for spending (in the context of this action)   + i.e., there were overreaching terms and an overreaching nature * There was a delay in the proceedings, yet the order was still granted *ex parte* despite the general requirement for urgency to grant those orders   + i.e., Failure to proceed in a timely fashion * The chambers judge determined that all the tests were met for all the defendants when they were not   + i.e., the defendants were not differentiated enough * None of the above necessitates setting aside an order, but that may be the appropriate remedy in some cases having regard to the overall circumstances |
| Notes | * Injunctions granted without notice are typically made for a strictly limited amount of time and should never be made for an unlimited duration   + In fact, they should only be granted for the least onerous amount of time * Additional question of whether the original applicants can introduce new evidence on appeal?   + Any new evidence should be treated with caution — ultimately it should have been part of the original application |

*Calmusky v Hodgins*

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| Ratio | Excessive/inordinate delay is grounds for vacating an attachment order |
| Facts | * Plaintiff was granted an attachment order for $80,000 * The plaintiff did not advance the action further than the SoC, claiming that they could not proceed with litigation because they could not afford it (and it was the defendant’s fault) * Defendants argued that they breached their undertaking that they would advance the action without delay |
| Issues | Whether excessive delay constitutes a reason for terminating an attachment order |
| Decision | Attachment order vacated |
| Reasoning | * Financial constraints on the plaintiff was not a reasonable excuse for the plaintiff |
| Notes | * Factors to consider for vacating an attachment order:   + Delay   + Hopes that the disruption will incite the defendant to settle |

*Vaillancourt v Carter* **NEW**

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| Ratio | Security for judgment is generally avoided except:   * Where there are no assets in the jurisdiction against which to enforce a judgment and the appeal has little merit * To preserve assets that would otherwise be destroyed, disposed of, or dissipated prior to the resolution of the dispute * To encourage respect for the judicial process and avoid abuse of process |
| Facts | * V and C were business partners whose relationship deteriorated * V sued C for her share in the company. * It took so long for the matter to go to trial (12 years) that C was able to try to judgment proof himself by selling assets, dissolving the defendant company, and moving his assets to shell corporations * There was a judgment ordered against C and V tried to enforce it under the CEA * She ordered a Form 13 from C which requires him (by statute) to disclose all his assets, but C was extremely vague and misleading * C is appealing the judgment against him * V is applying for security for judgment — an order saying that the appellant can only appeal if they provide security for the last judgment |
| Issues | Whether V’s application is valid |
| Decision | It was valid. |
| Reasoning | * C was vague and misleading in his Form 13, which he swore to be an accurate disclosure   + He claimed he had almost no money, but the evidence showed otherwise * Enforcement proceedings are much preferred to security for judgment (an extraordinary remedy), but there are certain exceptions to the rule against it:   + Where there are no assets in the jurisdiction against which to enforce a judgment and the appeal has little merit   + To preserve assets that would otherwise be destroyed, disposed of, or dissipated prior to the resolution of the dispute   + To encourage respect for the judicial process and avoid abuse of process * The Court in this case is mostly concerned with encourage respect for the judicial process — Carter was being a huge douche * C argued that V’s application should be struck for delay, but it was only “delayed” because she was trying to use actual enforcement to get her judgment — once she got the Form 13 she hastily applied for the security   Conclusion: C was obviously trying to abuse the system and therefore he is ordered to pay $1,000,000 as a security for judgment on his appeal |
| Notes | * There are two more exceptions, per *Westjet v ELC Marketing Inc*:   + A plaintiff requests a defendant provide security as a condition of mounting a defence (Buckwold says this is what an attachment order is for)   + A judgment debtor has a counterclaim against the judgment creditor that remains to be decided and the judgment creditor requests that the judgment debtor provide security for judgment as a condition of pursuing the counterclaim * Litigants can request security for costs to ensure that the litigate will be paid of successful |

### iii. Enforcement of an Attachment Order

**Rules of Court**

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| * If a person violates an order of the court they can be found in civil contempt (ss. 10.52(3)) * Possible sanctions include imprisonment, fines, judgment made/claim dismissed (s. 10.53(1))   + This does not provide a remedy for the plaintiff |

**CEA**

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| * Potential for compensation, but only if person knew they were dealing with attached property in a manner that is inconsistent with the attachment order (s. 25) * They may be ordered to compensate the claimant or enforcement creditor for loss resulting from that dealing * “knowing”: information is required under circumstances where a reasonable person would be cognizant of the attachment order * Registration of the attachment order is not sufficient for knowledge * 25(1) Where a person knowingly assists or participates in dealing with attached property in a manner that is inconsistent with the terms of the attachment order, the Court may order that person to compensate any claimant or enforcement creditor who suffers actual loss as a result of that dealing   + The Court shall not make an order if the person was doing something necessary to meet a legal duty that arose before acquiring knowledge of the attachment order, or a legal duty that was owed to someone other than the defendant (s. 25(2)) |

### iv. Obtaining Information

**Discovery of Information for the Purpose of Obtaining or Enforcing an Attachment Order**

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| * No statutory provision, regulation or rule of court provides for pre-judgment disclosure of assets * *Dean v Bryan* (AB) – one line of reasoning   + a defendant does not need to account for what they do with their assets pre-judgment   + the onus is on the applicant for an attachment order to provide evidence that they are dealing with their assets in a certain manners set out in s. 17(2) of the CEA * *Qalex-Landmark Investments Inc v Soroya* (AB) – second line of reasoning   + Less restrictive approach: reverse inferences could be drawn against the defendant on the basis of their refusal to answer questions regarding their assets   + The onus is on the claimant, but often the knowledge is in the exclusive possession of the defendant   + As attachment orders are time sensitive, the defendant cannot take advantage of delay through non-disclosure   + Hopefully the decision depends of other facts in an affidavit, not just the bare refusal to answer questions   Information to *Enforce* An Attachment Order   * *Lindsey Estate v Strategic Metals Corp* (AB)   + Application for an order directing the defendant to answer questions after an attachment order was granted   + The Court has discretion to make ancillary orders necessary to give effect to its remedy * *Security Home Mortgage Investment Corp v Atlantic Leasing Inc* (NFLD)   + Refusal of the plaintiff's application for an order directing the defendant to answer questions designed to determine the existence and location of funds payable pursuant to a settlement of the defendant's action against a third party.   + If plaintiffs were supposed to be able to do this, it would be in the Act |

**Seizing Evidence Relating to a Defendant’s Dealings with His/Her Property**

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| * Anton Pillar Order (common law)   + An order authorizing the search for and seizure of documents at the defendant’s business or residence   + May be sought as an adjunct to an attachment order * Rules of Court, r. 6.26   + Court can make an order to inspect property, and to enter land under the rule * CEA, s. 17(3)   + In granting an attachment order may include any terms that it considers necessary or desirable |

### v. Writ Proceedings against Property Subject to an Attachment Order

**CEA s. 24(1)**

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| * Writ proceedings may be commenced against property that is subject to an attachment order and any money realized through those proceedings may be distributed under Part 11 without regard to the attaching claimant’s claim. * BUT * The Court can order (s. 28(2))   + That no writ proceedings be commenced against property subject to an attachment order without leave of the Court, or termination   + that money realized through writ proceedings against property that is the subject of an attachment order not be distributed until the attachment order terminates   + that the attachment creditor have the status of an instructing creditor for the purposes of the distribution of the proceeds |

### vi. Priorities and Writ Saving

**Registration of an Attachment Order**

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| * Plaintiff can establish priority by registering the attachment order in the PPR or under the *Land Titles Act* (s. 22) * Once registered, it has the same status as a writ of enforcement (conferred a right in rem) * A Mareva injunction cannot be registered |

**Priority of Attachment Order – Section 23**

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| * Upon judgment, the writ can be registered on the date of the registry of the attachment order * **The writ is given priority status that pre-dates the judgment** * This is extremely effective in preventing the defendant from using the property as collateral * E.g., A registers an attachment order against B, B sells his property to C before the judgment is obtained. Under this rule, A can seize the property from C because the writ (resulting from the judgment in A’s favour) is given the same priority as the registered attachment order. This means that A has a prior interest in the property relative to C.   Mareva Injunctions in Comparison   * Have no basis for registration * Purely *in personam* * No priority implications * Another reason to prefer attachment orders over mareva injunctions (and another reason why the courts *must* distinguish between the two when they are granted) * Note: Preservation orders (Sask equivalent of attachment orders) cannot be registered * So why do we have it in AB? Could be the legislature’s way of trying to replicate the old practice of writ saving. |

**Writ Saving**

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| * Rules of Court: 3.36 – 3.39   + Entering judgment in default of defence, especially 3.39 regarding failure to defend a claim for debt or liquidated demand * Rules of Court 9.15 (3) The Court may set aside, vary or discharge a judgment in default of defence on any terms the Court considers just * *Bank of Montreal v Pawluk*   + If the court grants an order setting aside a default judgment on condition that the writ issued on the judgment be maintained, the result is to preserve the priority established by registration of the writ if a judgment is ultimately obtained at trial * This is even stronger than the retroactive nature of registering an attachment order   + If you have only registered an attachment order and the court sets aside a default judgment, you may lose priority depending on if someone registered an interest before you   + If you register a writ saving order *instead* of an attachment order, then you maintain your priority in the event that the court sets aside a default judgment * It is not entirely clear whether the practice of writ-saving has survived enactment of the CEA provisions dealing with registration and priority of an attachment order. It has been used in at least one case since the Act came into effect, though without any discussion of the substantive question of whether it continues to be justified. |

## B. Stay of Proceedings

**Overview**

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| * Enforcement of a judgment may be stayed * Provincial Court judgment   + Automatically by appeal to Q.B., subject to an order of Q.B. on application [Provincial Court Act s. 49]   + By order of the Provincial Court on application [Provincial Court Act s. 44.1]   + Provincial Court may order payment over time [Provincial Court Act s. 44.2] * Queen’s Bench judgment   + By order of Court of Q.B on application. [CEA s. 5(2)(d), Judicature Act s 17, Rule 1.4(2)(h)].   + Where judgment is appealed, by order of C.A. on application [Rule 14.1 – incorporates old Rule 508]   + Where judgment is subject to fulfilment of a condition, until the condition is fulfiled, unless the court makes an order permitting enforcement [Rule 9.18]   + Are there grounds for an order directing payment over time? Consider CEA s 5(2) (broad discretion for court to make orders) and see *Judicature Act* s 17 (discretion of the court to grant a stay at any stage of proceedings * In all cases:   + Where enforcement creditor has entered into an agreement that proceedings under a writ are to be stayed [CER s. 42]   + Where judgment debtor has become bankrupt, restructuring proceedings have been initiated (notice of proposal or proposal) or a consolidation order has been made under the Bankruptcy & Insolvency Act. See ss. 69(1), 69.1(1), 69.2(1), 69.3(1), 229 |

**Stay by application under the Civil Enforcement Act**

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| **5(1)** The Court may, on application by an interested party or an agency, give directions in respect of or determine any matter or issue that arises out of any civil enforcement proceedings.  **(2)**  On considering an application under this Act, the Court may do any one or more of the following:  (d) **stay enforcement of rights** provided in this Act;  (h) make an order granted under this Act **subject to any terms or conditions** that the Court considers appropriate in the circumstances;  **(3)**  Where the Court stays the enforcement of rights by order under subsection (2)(d),  (a) the order may be registered in the Personal Property Registry, and  (b) until the order is registered in the Personal Property Registry, the order does not affect any person who does not have actual knowledge of the order. |

**Stay by application under the Judicature Act**

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| **17(1)** ……..the Court in its discretion may with or without imposing terms, after final judgment in any proceeding whatsoever, grant a stay of execution of an order for sale or of other similar process, including a stay of an order for possession of land, and may by an order granting the stay extend the time for payment of a judgment debt or the time for doing any act or making any payment prescribed by a previous order of the Court. |

*Vysek v. Nova Gas International*

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| Ratio | A stay is not automatic, must satisfy the tripartite test |
| Facts | * The Appellants brought an action against the respondents in May 1997 alleging that the Respondents breached contractual, fiduciary and tortious duties owed to Peter Vysek while he was employed by Nova Gas International Ltd. in Malaysia, in 1995, as part of a student exchange program * As a result of the breaches Peter became infected by a tropical disease and suffered brain damage |
| Issues | Whether the applicants were entitled to a stay of enforcement pending appeal |
| Decision | Application for stay of judgment pending appeal dismissed |
| Reasoning | * The applicant failed to establish a *prima facie* serious triable issue, here the applicant was asking the CA to make a new finding of fact * The application failed to establish irreparable harm, here Nova had billions in assets and was willing to put money aside to satisfy judgment * The applicant failed to make out that the respondents would not be able to pay if the appeal was successful |
| Notes | * Presumption: “Successful litigants are entitled to enjoy the benefits of their successful litigation, even though the matter is being appealed….The Applicant bears the onus of establishing that a stay is justified and must provide good evidence.” * **Tripartite test:**   + (1) There is a *prima facie* or serious triable issue   + (2) The applicant will suffer irreparable harm if the stay is not granted   “Irreparable harm, in the context of staying the execution of money judgments, usually involves an assessment of the likelihood that the respondent will repay the appellant in the event the appeal is successful.”   * + (3) The balance of convenience favours a stay. |

## C. Limitation of Actions

**Overview**

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| * A judgment may only be enforced through “writ proceedings,” which are based on the existence and registration of a writ of enforcement * **CEA 27(1)** A writ is in force only while the judgment in respect of which the writ is issued is in force * **(2)**  For the purposes of subsection (1), a **judgment is not in force**   + (a) if it has been satisfied, or   + (b) **on the expiration of 10 years from the day that the judgment takes effect** **unless** the judgment is **renewed** **or** an **action is brought on that judgment** within the 10-year period. * No reason to not renew, but if miss renewal, then can start an action – if new judgment is issued then the registration in the PPR is back-dated to the registration of the initial writ * **Rules of Court** **9.20**   Unless an enactment otherwise provides, and except for the purpose of the enactment, a writ remains in force as long as the judgment or order under which the writ was issued is in force. * **See also the *Limitations Act*: If judgment is not renewed the defendant is immune from liability on the claim** |

**When does a judgment come into effect for purposes of the 10-year rule?**

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| * Rules of Court * **9.6**   Every judgment and every order, whether or not it has been entered, comes into effect on   + (a) the date of pronouncement, or   + (b) if the Court orders the judgment or order to come into effect before or after the date of pronouncement, the date so ordered. |

**How is a judgment renewed?**

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| * Rules of Court * (1) **9.21(1)** **On application**, the Court may grant a judgment creditor a new judgment or order on a former judgment or any part of it that has not been paid *[(2) onus is on judgment debtor to show cause why new judgment or order should not be granted]….* * (2) **By suing on the judgment** under the ordinary rules |

**What is the priority of a new writ?**

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| * Where a writ has already been registered, it maintains its priority |

# 4. ENFORCEMENT AGENCIES AND BAILIFFS

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**Officials who play a role in writ proceedings under the CEA**

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| * Seizure & sale of personal property (Parts 5 & 6) 🡪 civil enforcement agency (bailiff employed to perform seizure function) * Sale of land (Part 7 - no seizure step) 🡪 civil enforcement agency * Garnishment of “obligations” (Part 8) 🡪 clerk of the court * Seizure and/or sale by receiver appointed by the court (Part 9) 🡪 may or may not be a civil enforcement agency |

**Authority/Functions of a Civil Enforcement Agency**

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| * **9(1)** The sheriff, on behalf of the Crown, may enter into an **agreement** with a person under which that person is authorized to operate a civil enforcement agency for the purpose of performing the following functions:   + (a) **the carrying out of seizures of property pursuant to writ proceedings [see defn. below]** or **the right of distress [see defn. next slide]**;   + (b) the carrying out of evictions;   + (c) the **selling of property that has been seized pursuant to writ proceedings** or the right of distress;   + (d) the **distribution of the proceeds of sales** referred to in clause (c) to persons who are lawfully entitled to those proceeds;   + (e) the carrying out of any other functions or duties provided for or permitted under this or any other enactment or an order of the Court * **1(1)(uu)** **“writ proceedings”** means any action, step or measure authorized by this Act to be taken for the purpose of enforcing a money judgment * See 1(1)(m) for definition of **“distress”** * **Only an agency may (s. 9(3)):**   + conduct seizure, sale and distribution in writ proceedings and evictions under any statutory authority.   + conduct seizures in relation to repossession of leased goods or enforcement of a security interest in personal property. (Once seized, goods may be delivered to the lessor or secured party for further proceedings. See Personal Property Security Act s. 58(5). Or the agency may be retained to sell.) * **Mandatory use of civil enforcement bailiffs to seize and deal with property (ss. 9(4), 10(1))** * **Section 13:** defines the authority of a bailiff to enter premises for purposes of carrying out civil enforcement proceedings. * Civil Enforcement Agencies have a duty to act in good faith (s. 2(g)) * Liability for non-compliance with Act and Regulations (s. 4) * **If acting outside the scope of their authority, potential civil liability of agencies and bailiffs also includes:**   + Trespass   + Conversion   + Negligence * But irregularity in seizure does not invalidate seizure itself:   + **13(f)** A seizure is valid notwithstanding any irregularity in the procedure by which it was carried out. * Act imposes a positive obligation on an agency to act when instructed to do so   + When the fees or expenses have been paid for carrying out the duty/function   + AND subject to the regulations, **all reasonable security or indemnification** that is requested by the agency for the carrying out of the duty or function has been provided * NOTE: the agency is not the agent of the instructing creditor, the agency is given authority under the statute   + BUT s 12(c)(ii) requires an instructing creditor to agree to indemnify an agency as a condition of requiring them to act * **Limit of indemnification**: do not have to indemnify if the bailiff’s action amounted to negligence or wilful misconduct even if the agreement between the instructing creditor and agency says this (CER s. 10) * Agency has a duty to record steps taken in the PPR (CER s. 13(1)) * Section 5 allows an agency or other interested party to seek the direction of the court with respect to matters in doubt. * Criminal offence to interfere with writ proceedings (CC ss. 2, 129), also prohibited under CEA s. 45(5) |

**Liability of the Instructing Creditor**

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| * NOTE: the agency is not the agent of the instructing creditor, the agency is given authority under the statute   + BUT s 12(c)(ii) requires an instructing creditor to agree to indemnify an agency as a condition of requiring them to act * No vicarious liability for wrongful actions of the agency or bailiff. The agency is acting under authority of statute, not acting in law as agent of the instructing creditor * Instructing creditor might be liable at common law for procurement of a tort if they specifically instruct the agent to seize property that is in fact not property of the enforcement debtor (*Overn v Strand*) * **Limit of indemnification**: do not have to indemnify if the bailiff’s action amounted to negligence or wilful misconduct even if the agreement between the instructing creditor and agency says this (CER s. 10) * Agency has a duty to record steps taken in the PPR (CER s. 13(1)) * Section 5 allows an agency or other interested party to seek the direction of the court with respect to matters in doubt. * It is a criminal offence to interfere with writ proceedings (CC ss. 2, 129), also prohibited under CEA s. 45(5) |

# 5. THE WRIT OF ENFORCEMENT

## A. The Concept and Operation of the Writ of Enforcement: Overview

**Terminology**

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| **1(1)(tt)** “**writ**” means a writ of enforcement and includes any writ issued by the Court of Appeal, the Federal Court of Canada or the Supreme Court of Canada that is similar in nature to a writ of enforcement;  **1(1)(uu)** “**writ proceedings**” means any action, step or measure authorized by this Act to be taken for the purpose of enforcing a money judgment.  **1(1)(g)** “**civil enforcement proceedings**” includes  (i) **writ proceedings**;  (ii) distress proceedings authorized under this Act or any other law that is in force in Alberta;  (iii) evictions authorized pursuant to a law in force in Alberta or an order of a Court;  **1(1)((r) “enforcement debtor”** means a person against whom a writ is in force;  **1(1)(p) “enforcement creditor”** means a person in whose favour a writ is in force;  **Form 10** – form of the writ  **A money judgment may only be enforced under the CEA –** through writ proceedings (s. 2) |

## B. Scope of the Writ

**All property of the ED is subject to writ proceedings, except as provided (s. 2(b))**

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| * Section 33(2) – writ binds to all exigible property upon registry (non-exempt property)   + Personal property in PPR   + Land under the *Land Titles Act* * What is property? * **1(1)(ll)** **“property”** includes   + (i) things, as well as rights or interests in things,   + (ii) anything regarded in law or equity as property or as an interest in property,   + **(iii) any right or interest that can be transferred for value from one person to another,**   + (iv) any right, including a contingent or future right, to be paid money or receive any other kind of property, and   + (v) any cause of action; * Also see *Stout* |

*Stout & Co. LLP v. Chez Outdoors Ltd*.

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| Ratio | Defining property under the CEA (broad definition)   * The *CEA* definition of "property" also includes any right or interest that can be transferred for value from one person to another (s. 1(1)(ll)(iii)) |
| Facts | * The plaintiff Stout obtained a judgment against the defendant Chez and issued a writ of enforcement * The defendants held a Class T outfitter-guide permit issued under the Alberta *Wildlife Act* – allowed Chez to provide guide services for hunting big game * Chez Outdoors also held “allocations” issued pursuant to the Wildlife Act regulation entitling it to legally contract with non-resident hunters for the provision of these services in relation to big game hunting * Although Class T permits are not transferrable, allocations may be transferred to another eligible outfitter-guide with the approval of the Minister * On the instruction of the enforcement creditor, “the bailiff effected seizure of ‘[a]ll Allocations, permits and entitlements issued by Alberta Professional Outfitters Society under the Alberta Wildlife Act’ held by the Defendant |
| Issues | Whether the allocations, permits and entitlements issued to the defendants under the *Wildlife Act* are exigible property under the CEA |
| Decision | Verdict for the Plaintiff – The allocations held by the defendant are exigible assets under the CEA |
| Reasoning | * Extends the reasoning in *Saulnier v. Royal Bank of Canada*   + Established that a fishing license falls within the PPSA and the BIA definitions of “property” on the basis that the permission to do something that would otherwise be illegal is coupled with a proprietary interest in the fish harvested * Note that here, the judgment debtor does not obtain a proprietary interest in the animal harvested from the hunt. * The allocations are capable of being transferred to other outfitters for value and thus fall under the definition of property in the CEA   + The *CEA* definition of "property" also includes any right or interest that can be transferred for value from one person to another (s. 1(1)(ll)(iii)) |
| Notes | * Illustration of the breadth of the definition of property under the CEA |

**Judgement Enforcement Law and the *Dower Act***

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| * The Act was a response to the economic vulnerability of married farm women flowing from the fact that their husbands were typically the sole owners of the land on which the family’s livelihood depended * The “dower rights” created by the Act are a rights given to the spouse of a married person in respect of their “homestead”, which is a parcel of land, either urban or rural, on which the owner’s dwelling is situated * What are dower rights?   + Right to prevent disposition of homestead by withholding consent.   + Right of damages against owner spouse who transfers title to homestead without consent.   + Right of surviving spouse to a life estate in the homestead and in exempt personal property of the deceased person. * Two issues:   + (1) Can writ proceedings be taken against land of an enforcement debtor that is a homestead, where the debtor’s spouse has a dower right in relation to the land?     - A creditor can attach an interest of the owner spouse, and the sheriff can sell the interest, but only subject to the dower rights (the spouse would be ejected from the house, but then could return upon the death of their spouse)   + (2) Can writ proceedings be taken against dower rights?     - Dower rights are not property as defined by the CEA so are not subject to writ proceedings     - Practical result is that an enforcement creditor cannot register or enforce a writ against land owned solely by the spouse of the dower rights holder while the spouse is living (*Phan v Lee*) |

*Phan v. Lee*

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| * Dower rights are not property * The practical result is that an enforcement creditor cannot register or enforce a writ against land owned solely by the spouse of the dower rights holder while the spouse is living. The court expressly left open the question of whether the life interest that vests in a surviving spouse upon the death of the other is “property” that may be subject to writ proceedings. * *Martin v. McNeill* (mentioned in *Phan v. Lee*)   + a creditor can attach the interest of the owner spouse and the sheriff can sell the property, but the owner’s interest can only be sold subject to the dower rights   + the owner spouse/debtor’s interest could be bound by a writ at the land titles office, but sale under the writ would be in abeyance (being without) until extinguishment of the dower rights |

**Are contingent interests and powers under a trust property?**

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| * *Quest Capital Corp v Longpre*   + A judgment debtor was the Protector of a discretionary trust of property established by his brother, under which the debtor and his children were the beneficiaries   + The judgment debtor’s contingent interest in the property subject to the trust was property but his powers in relation to the trust were not.   + A receiver could therefore be appointed under British Columbia law over the debtor’s contingent interest as beneficiary but not over powers held by the debtor under the terms of the trust |

## C. Issuance of the Writ and the Amount Recoverable

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| * (1) A writ of enforcement may be issued “in respect of the judgment” (s. 25.1(1)) * (2) The amount recoverable on the writ is the amount of the judgment plus costs not included in the amount of the judgment and interest owing in respect of the judgment and costs (CER s 40.01)   + See the *Judgment Interest Ac*t and *Judgment Interest Regulation* * (3) In addition to the amount of the judgment, the amount levied may include the fees and expenses incurred in enforcing the writ – fees and expenses of a Civil Enforcement Agency (CEA s 13.1) |

## D. Registration of the Writ

**Importance of Registration**

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| * Registration of a writ is:   + A prerequisite of enforcement action (s. 26)   + The basis of determining priorities (s. 33 plus priority rules)   + The basis for sharing in distribution of the proceeds of writ proceedings (Part 11 and definition of “related writ” s. 1(1)(mm)) |

**Registration as prerequisite of enforcement action: the initiation of proceedings**

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| **26**A judgment creditor may not initiate any writ proceedings in respect of a money judgment   * against any **personal property** unless a writ issued in respect of that judgment is registered in the Personal Property Registry, or * (b) against **land** unless a writ issued in respect of that judgment is registered in the Personal Property Registry **and**   + in the case of land under the *Land Titles Act*, is registered under the *Land Titles Act*, and   + (ii) in the case of land that is not under the *Land Titles Act*, is registered, filed or otherwise recorded in accordance with the regulations. |

**Registration as the basis for priority: the binding effect**

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| **33(2)** A writ,   * (a) in the case of **personal property**, on being registered in the Personal Property Registry binds all of the enforcement debtor’s exigible personal property; * (b) in the case of **land** **under the *Land Titles Act***, on being registered under the *Land Titles Act* binds all of the enforcement debtor’s exigible land described in the certificate of title against which the writ is registered; * **Note: The binding effect for land requires registration ONLY against title to the land. Registration in the PPR is not a prerequisite. Compare s. 26 where registration needs to be in the PPR and in title to initiate writ proceedings** * The binding effect does not give a property interest, but can be enforced against third parties * While not an interest in property, it functions like an interest in property |

**The mechanics of registration**

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| * *Personal Property Security Act* Part 4 (Registration) and *Personal Property Security Regulation* apply to registrations in the Personal Property Registry * **PPSA 44(2) Where any enactment permits or requires a registration to be made in the Registry, unless the regulations otherwise provide,**   + **(a) the registration shall be in accordance with the regulations, and**   + **(b) this Part applies to the registration.** * Registration in PPR is by name of the enforcement debtor * **22(1) The name of the debtor on a financing statement submitted for registration in respect of a writ of enforcement must be the name of the debtor as it appears on the judgment.** * Can add other names that the debtor is known by, but not necessary * Registration can be amended where the name on the judgment is not the proper name of the, but this is not a requirement (CER s. 35.03) * **Result:** Registration is valid if made against the judgment name even if that is not the legal or “proper” name of the judgment debtor**.** * **Note:** No property description is required for registration against personal property. Per s. 33(2), registration binds ALL of the enforcement debtor’s exigible personal property. * **Registration under *Land Titles Act* is against the certificate of title** |

**Errors in Registration**

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| * PPSA: A registration that contains a “seriously misleading error” is not valid. (s. 43(6))   + Does not require anyone to actually be misled (s. 43(8))   + Test is if you were to search for the name, it would not come up   + Low chance that a registration of a writ would have a seriously misleading error, as jut copying the name of the debtor from the judgment * But see CEA: * 30 Where writ proceedings have been carried out and there is an error or omission   + (a) on the writ, or   + (b) in respect of its registration in the Personal Property Registry, * the Court may, on application, make an order validating any writ proceedings that may have taken place, subject to any interests that may have arisen in the period of time between the issuance of the writ or its registration in the Personal Property Registry, as the case may be, and the correction of the error or omission. |

**Duration of Registration**

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| * Duration of registration is for 2 years for personal property (s. 28) * The registration of land under the *Land Titles Act* is for the duration of the judgment (s. 29) * **Note:** Distinguish duration of registration from duration of writ. Recall that the writ is in force only while the judgment in respect of which it is issued is in force (CEA s. 27). A judgment is not in force after 10 years from date it takes effect unless renewed (CEA s. 27 and Limitations Act s. 11). |

## E. Registration Obligations of Enforcement Creditors

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| * An EC needs to update the registration to reflect the amount owing within 15 days of receiving money under the judgment (CER 41) * **41** If an enforcement creditor   + (a) receives any money on account of the amount owing under a writ of enforcement, or   + (b) receives anything by way of satisfaction, either wholly or in part, of the amount owing under a writ of enforcement, * the enforcement creditor must, within 15 days from the day that the enforcement creditor received that money or that satisfaction, register in the Registry a status report to amend the amount owing under the writ of enforcement * If there is a stay of enforcement, EC needs to update in PPR within 15 days * **42** If an enforcement creditor enters into an agreement that provides that proceedings under a writ of enforcement are to be stayed or suspended, the enforcement creditor must, within 15 days from the day of entering into that agreement, register in the Registry a status report that discloses the fact that the proceedings are stayed or suspended, as the case may be.. * Failing to update under section 41 or 42 does not invalidate the writ (CER s. 43) |

## F. Discovering the Debtor’s Assets for Purpose of Enforcing Judgment

**Identify and locate the enforcement debtor's exigible property for purposes of enforcing judgment**

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| * **Financial report to be provided by enforcement debtor: CER s. 35.10**   + is mandatory on service of notice   + may be required annually   + status report indicating receipt of financial report to be registered by enforcement creditor in PPR and made available to other enforcement creditors upon request + payment of a fee * **Questioning of enforcement debtor under oath: CER ss. 35.11 - 35.12**   + is mandatory on service of notice   + may be required annually (or more often by order of the court)   + may address subjects indicated, including the financial report submitted by the debtor, financial means, dealings with property, potential exemption rights * **And see provisions for questioning of others: CER ss. 35.13 – 35.16**   + employees, corporate officials, transferees of property from the enforcement debtor and persons in possession of property of the enforcement debtor * **Disclosure of financial information by a person who holds a security interest in property of the enforcement debtor: PPSA s. 18** * **PPSA 18(1)** The debtor, a creditor, a civil enforcement agency, or a person with an interest in personal property of the debtor, or an authorized representative of any of them, may, by a demand in writing containing an address for reply and delivered to the secured party at the secured party’s most recent address in a registered financing statement relating to the property, or a more recent address if known by the person making the demand, require the secured party to send or make available to the person making the demand or, if the demand is made by the debtor, to any person at an address specified by the debtor, one or more of the following:   + (a) a copy of any security agreement providing for a security interest held by the secured party in the personal property of the debtor;   + (b) a statement in writing of the amount of the indebtedness and of the terms of payment of the indebtedness as of the date specified in the demand;   + (c) a written approval or correction of an itemized list of personal property attached to the demand indicating which items are collateral as of the date specified in the demand;   + (d) a written approval or correction of the amount of the indebtedness and of the terms of payment of the indebtedness as of the date specified in the demand;   + (e) sufficient information as to the location of the security agreement or a copy of it to enable a person entitled to receive a copy of the security agreement to inspect it. |

**Enforcement of Disclosure Obligation**

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| * CER s. 35.17 and Rules of Court 10.52 * by issuance of directions by the court and by civil contempt |

*Beaver Hills Holdings Ltd v Greenstreet Development Corp.*

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| Ratio | One can be held in civil contempt for failing to attend a questioning re judgment if he or she does not have a reasonable excuse (reasonable excuse needs direct evidence) |
| Facts | * The plaintiffs apply to have the respondent Richard Melchin and the defendants held in civil contempt for failing to obey a Court Order and Appointments requiring his attendance to be questioned in aid of the plaintiff's judgment and for failing to provide financial reports verified by Statutory Declaration * December 11, 2012, Order requiring the questioning to be conducted no later than January 15, 2013 * Counsel for the plaintiff then served an appointment for January 11, 2013 * The Defendant responded saying that Melchin was not available due to his mother’s 90th birthday and requested that the appointment be changed to January 15 or 16 * The Plaintiffs obtained a certificate of non-attendance when Mr. Melchin failed to appear on January 11, 2013. |
| Issues | Whether the defendant/respondent can be held in contempt of court for failing to attend questioning in aid of the plaintiff's judgment |
| Decision | Finding that Mr. Melchin was in civil contempt for not attending the questioning on January 15, 2013 - heightened order of costs |
| Reasoning | * Under Rule 10.52 of the Alberta Rules of Court a person who fails, without reasonable excuse, to comply with an order of the court to attend questioning, may be declared to be in civil contempt. * Under s 35.17 of the Civil Enforcement Regulation, if a person who is required to provide a financial report or submit to questioning fails to do so, he may be held to be in civil contempt * Failure to appear on January 11, 2016, does not constitute contempt – the mother’s birthday combined with an agreement to attend at a later date was a reasonable excuse * Failure to attend on January 15, does constitute contempt – the paralegals affidavit was not sufficient   + Had no knowledge of the facts deposed to, and had not spoken directly to the source of the hearsay |
| Notes | * Lawyer being disorganized is not a reasonable excuse * Court imports the requirement of reasonable excuse for the RoC into the CER |

*Greenberg v Nowak* (ONCA 2016)

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| **The test for civil contempt:**   1. The order alleged to have been breached must state clearly and unequivocally what should and should not be done; 2. The party alleged to have breached the order must have had actual knowledge of it; and 3. \*\*The party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act the order compels.    1. The act or omission must be intentional but *it is not necessary that there be an intention* to disobey the order in the sense of desiring or knowingly choosing to disobey.    2. The standard is beyond a reasonable doubt  * Note: this test says that an order must be disobeyed, but the CER (s 35.17) suggests that a person can be found in civil contempt for disobeying a statutory obligation   + Buckwold: It stands to reason that the same test would apply — you only need an intention to perform the act, not an intention to disobey   + Realistically, it would be difficult to have a court find someone in contempt of court if they have not disobeyed a court order. |

**Is disclosure of information by third parties precluded by federal or provincial privacy legislation?**

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| * **Personal Information Protection Act (PIPA – Alberta)** – per *Aecon Industrial Western v International Brotherhood of Boilermakers etc*   + **20** *An organization may disclose personal information about an individual with-out the consent of the individual but only if one or more of the following are applicable:*     - *(a) a reasonable person would consider that the disclosure of the information is clearly in the interests of the individual and consent of the individual cannot be obtained in a timely way or the individual would not reasonably be expected to withhold consent;*     - *(e) the disclosure of the information is for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body having jurisdiction to compel the production of information or with a rule of court that relates to the production of information;*     - *(m) the disclosure of the information is reasonable for the purposes of an investigation or a legal proceeding* * **Personal Information Protection and Electronic Documents Act (PIPEDA – Canada)** per *Citi Cards Canada Inc v Pleasance, Royal Bank v Trang* – compare   + **5(3)** an organization may disclose personal information only for purposes that a reasonable person would consider appropriate in the circumstances.   + **7** For the purposes of clause 4.3 of Schedule 1, personal information may be disclosed without consent in the listed circumstances, which include:     - **(c)** to comply with an order made by a court with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of documents.   + **Clause 4.3 Principle 3 of Schedule 1** sets out the requirement of consent to disclosure of personal information, the manner in which consent may be obtained and the circumstances in which it may be implied   + **Clause 4.3.6** states that an organization should generally seek express consent when the information is likely to be sensitive. Implied consent would generally be appropriate when the information is less sensitive. |

*Aecon Industrial Western v International Brotherhood of Boilermakers Etc*

[PIPA Application]

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| Ratio | PIPA does not prevent a union from disclosing employment information about an enforcement debtor |
| Facts | * Application by an enforcement creditor to have the Union respondent disclose employment information about a Union member for the enforcement of a judgment * The Union has not provided any employment information citing PIPA – it has a positive duty not to disclose information protected by the Act without the consent of the person furnishing the information (s. 7), or without one of the exceptions applying (s. 20) |
| Issues | Is the Union required to disclose the employment information of a Union member, despite falling under PIPA? |
| Decision | Union required to provide the information |
| Reasoning | * It is difficult to see how an individual could 'reasonably be expected to withhold consent' to having the Union disclose this information in these circumstances, when this individual is not able to do so themselves (the ED cannot refuse to give the EC this information) |
| Notes | * The Master did not indicate the jurisdictional basis for the order directing the union to disclose that information * Seems to base the order on PIPA, but PIPA doesn’t give the jurisdiction * Could have grounded decision in following authorities:   + **Rule 9.29** “to enforce or assist in the enforcement of a judgment or order”, the Court may order a person to be questioned under oath about “a matter in the judgment or order”.   + **CEA s 5(2)(i)** authorizes the court to “make any other order or direction in respect of matters coming under this Act that the Court considers appropriate in the circumstances.” * **COMPARE:** *Citi Cards Canada Inc v Pleasance, Royal Bank v Trang*   + PIPEDA was never intended to be used as a shield by an individual to prevent third parties from disclosing personal information that the individual is required by law to produce.   + If Parliament had intended to create exemptions where the person was required to provide the information otherwise, it could have done so   + Allowing for disclosure would effectively negate the protection afforded under PIPEDA |

*Royal Bank of Canada v Trang* **NEW**

[PIPEDA Application]

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| Ratio | Disclosure of the mortgage balance for purposes of judgment enforcement was not precluded by PIPEDA. |
| Facts | * Scotiabank wants to enforce a judgment against Trang, finds out that RBC has a mortgage on the land * Whether to sell the land depends on how much is on the mortgage * Sheriff requests a mortgage payout statement — how much is owed? * RBC says that they can’t give that based on PIPEDA * Scotiabank then goes to the courts to get an order to disclose — goes to the ONCA which upholds their earlier decision (see below) |
| ONCA | * Majority of the ONCA affirmed the court’s prior decision in *Citi Cards Canada v Pleasance* – namely, that a Bank that holds a mortgage on a judgment debtor’s land is precluded by PIPEDA from disclosing the balance outstanding on the mortgage to a sheriff who has been instructed to sell the land in judgment enforcement proceedings – there, under a writ of execution, corresponding roughly to the Alberta writ of enforcement. * PIPEDA applies to federal works, business, and undertakings, including banks. It therefore applies to the federally regulated banks operating in Alberta. * One of the arguments advanced on the appeal was that the mortgagor debtor had impliedly consented to release of that information in that context within the meaning of Schedule 1 of PIPEDA.   + Since the debtor could themselves be compelled to disclose that information for purposes of judgment enforcement measures, they could be treated as having impliedly consented to disclosure of that information by the bank.   + In effect, this is the argument on which the decision in *Aecon Industrial Western* is based. * The majority of the court (3 of 5) rejected the argument. The minority of 2 would have accepted the implied consent argument.   + They point out that the principal amount of the mortgage loan and interest are disclosed when the mortgage is registered. The current balance can be roughly calculated and in any even is no more sensitive than the initial and publicly disclosed amount. * They also held that a reasonable mortgagor would expect that a mortgage discharge statement would be disclosed to a judgment creditor. It would be unreasonable for a mortgage to think that privacy rights as to the current state of the mortgage could stand in the way of creditors rights. * Further, the mortgagor is himself or herself required to provide that information in aid of execution. “To conclude otherwise would accept that a reasonable mortgagor in a society governed by the rule of law intends to frustrate his or her creditors and to flout his or her obligations under the Rules of Civil Procedure”. |
| SCC | * On appeal to the SCC, the court held that disclosure of the mortgage balance for purposes of judgment enforcement was not precluded by PIPEDA. * The court based its decision on two lines of reasoning: * Implied consent:   + PIPEDA Schedule 1 cl 4.3.6 acknowledges that consent can be implied with information is “less sensitive”. Cl 4.3.5 states that in obtaining consent, the reasonable expectations of individuals are relevant.   + Mortgage information is made available to the public through registration, including the principal amount, the rate of interest, payment periods and due date. This is in part to enable creditors to make informed decisions. The degree of sensitivity must be assessed in the context of the information in the public domain and the need for public disclosure. Taking those matters into account, the current mortgage balance is “less sensitive” information. * Further, the reasonable expectations of individuals must be considered in the whole context.   + A mortgage statement is something on which the rights of others depends – i.e. the legitimate business interests of creditors is part of the context. The identity of the party seeking disclosure is also part of the context.   + Here, it is to a person who requires the information to exercise a legal right. A reasonable mortgagor would know that the outstanding mortgage balance would be provided to a sheriff in enforcing a judgment and that a judgment creditor would have a legal right to disclosure through examination of the mortgagor or by bringing a motion.   + A reasonable person borrowing money knows that if he defaults on a loan his creditor will be entitled to recover his debt against his assets – will reasonable expect the creditor to be able to obtain information. * Concludes a reasonable person would consider it appropriate for a mortgagee to provide a mortgage discharge statement for a judgment creditor who is taking enforcement action.   + NOTE the observation that the judgment creditor had also attempted to use the examination process but “this additional step is not necessary”.   + Obtaining and filing the writ of seizure and sale makes the mortgagor’s consent operational (presumably equivalent to issuing and registering a writ in AB)     - This means that you shouldn’t have to get an order for disclosure from the mortgagee since the mortgagor’s consent is operational (assumed) once the writ is registered on the title to land   + Consent for the purpose of assisting a sheriff in executing a writ was implicitly given at the time the mortgage was given. |

*Parmar v Royal Bank of Canada* **NEW**

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| * Royal Bank had failed to provide updated information to credit reporting agencies regarding settlement of their claim against Mr Parmar under a mortgage (Parmar paid the bank $10,000 although he alleged that the mortgage had been fraudulently obtained by a bank employee). * As a result they were issuing negative credit reports * Parmar sued for damages. He could not prove causation with respect to the refusal of a new mortgage by another financier or with respect to the refusal of insurance by a mortgage insurer. Nor could he provide medical information in support of a claim for mental distress. * Nevertheless the Court awarded him $5000 in damages. Why? * The Act permits an award of damages for inconvenience. (*Fair Trading Act* now *Consumer Protection Act* s 50). The objective is to prevent individuals from having to take action to enforce their right to an accurate credit report. * Parmar “had to deal with a lender who, to a large extent, controlled what was reported by Equifax and TransUnion, and who continued to see him as liable, despite the release it does not deny it properly signed. He had to hire a lawyer to enforce his rights. * In the result he was awarded nominal damages of $5000 for the inconvenience caused to him by the bank’s failure to fairly and promptly report to the credit reporting agencies. |

## G. Priority of the Writ

**Considerations**

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| * Priority and the decision to litigate   + While there is a limitation on suing, this decision must be weighed against the likelihood that the client will be able to enforce the judgment   + Consider whether the other party has any assets   + Consider if they have assets whether there are other interests that may have priority * Priority post-judgement   + What would be the best way for the client to enforce the judgement (writ proceedings, garnishment, receivership, etc.)   + What about the transfer of assets? * Registration of a writ in the PPR functions as notice of the writ to the world * Start with the default rule, but if a more specific rule applies, it displaces the default rule * REMEMBER: a writ needs to be properly registered in order for priority rules to apply |

**Approaching a priority problem**

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| * Is the writ registered in the PPR? On what date? * The general rules in s. 33(2) and 34(1) apply to all forms of property   + An interest that exists before a writ is registered has priority over the writ – s. 33(2)   + An interest that arises after a writ is registered is subordinate to the writ – s. 34(1) * If the property is personal property, consider the specific priority rules in Part 4 Division 2 * In a priority competition between a writ and a security interest in personal property, consider the rules in s. 35 * The starting point is s. 35(1) – writ has priority over any security interest “except as otherwise provided” * Exceptions to s. 35(1):   + Security interest registered or perfected by possession before the writ is registered – s. 35(2)   + If the security interest is a PMSI – s. 35(3) * Rules apply in reverse order of specificity – the more specific rule supplants the more general. If a more specific rule does not apply, move up to the next level of generality * Consequences of priority   + Where an interest in property is subordinate to a writ, the property is subject to writ proceedings as if the interest did not exist and a buyer in writ proceedings takes free of the interest – s. 34(2)   + Where an interest in personal property has priority over a writ, a buyer in writ proceedings acquires the property subject to that interest – s. 48(j) |

### i. Personal Property

#### a. The Binding Effect and Consequences of Priority

**The Binding Effect and the Default Priority Rule**

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| * **Interests that arise before the writ is registered (First default rule)** * 33(2) A writ,   + (a) in the case of personal property, on being registered in the Personal Property Registry **binds** all of the enforcement debtor’s exigible property; * (3) Subsection (2)(a) applies to after-acquired personal property of the enforcement debtor from the time that the enforcement debtor acquires that property * The writ can only bind the what the debtor has, and if the debtor’s property was subject to an interest that already exists, then it has priority over the writ * This means that an interest does not have to be registered to have priority over the writ, but there are several statutory exceptions * **Interests that arise after the writ is registered (Second default rule)** * 34(1) Except as otherwise provided in sections 35 to 40 or in any other enactment, an interest acquired after the property is bound by a writ is subordinate to the writ * An interest acquired in property after a writ is registered is subordinate to the writ unless a more specific priority rules leads to a different result |

**The Implications of Priority: Interest Subordinate to a Writ (sale of property in writ proceedings)**

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| * **34(2)** Where an interest in property is subordinate to a writ,   + (a) the property is subject to writ proceedings to the same extent that the property would have been if the subordinate interest did not exist, and   + (b) a person who acquires the property as a result of writ proceedings acquires the property free of the subordinate interest * (a) means that a subordinate interest is not an obstacle to writ proceedings * (b) means that a sale of the property in writ proceedings eliminates the subordinate interest |

**The Implications of Priority: Interest that have Priority over a Writ (sale of property in writ proceedings)**

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| * **48(j)** subject to section 34(2), when property is sold,   + (i) the buyer obtains only the interest in the property     - (A) of the enforcement debtor, and     - (B) of any other person with an interest in the property who has consented to the sale or disposition of the interest   + and   + (ii) the sale of the property does not adversely affect the rights or interest of any other person in the property * Means sale of property in writ proceedings does not eliminate an interest that has priority unless the holder of the interest consents to the sale |

#### b. Priority between a Writ and a Security Interest

**Definitions**

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| * **PPSA 1(1)(tt)** “security interest means   + (i) an interest in [personal property] that secures payment or performance of an obligation (the “substance” test) * “Attachment” of a security interest   + a security interest has “attached” when it is recognized as existing under the PPSA rules   + for this course can assume it has attached * “Perfection” of a security interest   + when attached and a perfection step has occurred (most common is registration in the PPR)   + Possession of the collateral also perfects if it is a tangible good |

**Scope of the Priority Competition**

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| * A writ binds all property at the time the writ is registered, and all property acquired after the writ is registered (s. 33(2), (3)) * A security interest might be only in certain identified collateral, but can also be an “all present and after-acquired personal property” * So the scope of the priority competition will be based on the security interest   + What they register the s/i as is irrelevant (just matters what the security interest is actually for) |

**Default Rule**

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| * **35(1)** Except as otherwise provided in this Division, a security interest in personal property is subordinate to a writ that binds the property regardless of whether the security interest attached before or after the personal property became bound by registration of the writ in the Personal Property Registry * **Means:** a registered writ has priority over any security interest in the debtor’s property, unless a more specific priority rule in this Division applies (so, subject to exceptions) |

**Exception: Security interest has priority if registered (or perfected) before the writ is registered**

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| * **35(2)** Subject to section 35(5) and (6) of the PPSA, a security interest in personal property has priority over a writ that binds the property if at the time the writ is registered in the Personal Property Registry   + (a) the security interest is perfected or registered in the Personal Property Registry * **Means**: If a security interest is perfected by registration, priority between the security interest and the writ will go to the first to register (first to register rule) * **Implicitly:**  If the security interest is not registered or is registered after the writ is registered, the default rule in s. 35(1) applies (writ has priority) – supplants 33(2) default rule. |

**Exception: Security interest has priority if perfected by possession before the writ is registered**

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| * **35(2)** Subject to section 35(5) and (6) of the PPSA, a security interest in personal property has priority over a writ that binds the property if at the time the writ is registered in the Personal Property Registry   + (b) the secured party or a person action on behalf of the secured party has possession of the personal property under section 24 of the PPSA (perfection by possession of the collateral) * **Means:**  If the security interest is perfected by possession, the security interest has priority if the secured party was in possession before the writ was registered * **Implicitly:** If possession does not precede registration of the writ, the default rule in s. 35(1) applies – writ has priority |

**Exception: The purchase-money security interest super-priority for goods and tangibles CEA s. 35(3)**

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| * **Definition:** * **PPSA 1(1)(ll) “**purchase-money security interest” means   + (i) a security interest taken or reserved in collateral to secure payment of all or part of its purchase price   + **Example vendor PMSI:**  Debtor purchases a car from Seller under an installment payment plan. Seller takes a security interest in the car to secure payment of the unpaid purchase price.   + (ii) a security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights   + **Example lender PMSI:**  Bank loans Debtor money to purchase a car and takes a security interest in the car purchased to secure payment of the loan. Debtor actually uses the funds to purchase the car. * **35(3)** A purchase money security interest in personal property has priority over a writ that bound the personal property before the purchase money security interest was registered or perfected if the security interest was registered or perfected not later than 15 days from the day that   + (a) the debtor, or another person at the request of the debtor, obtained possession of the collateral, or * **Means:** PMSI has priority of a writ even though the writ was registered first, if the PMSI is registered or perfected within the 15-day period after the debtor obtained possession of the collateral * **Implicitly:**  If the PMSI is not registered or perfected within the 15-day period, priority is determined by the ordinary priority rules. Apply s. 35(2). If s. 35(2) does not apply, the writ has priority under s. 35(1). |

**Deemed Security Interests**

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| * **1(1)(tt)** “security interest” means   + (ii) the interest of     - (A) a transferee arising from the transfer of an account or a transfer of chattel paper,     - (B) a person who delivers goods to another person under a commercial consignment, and     - (C) a lessor under a lease for a term of more than one year,   + whether or not the interest secures payment or performance of the obligation * **(1) Transfer of an account means:** The interest of the transferee/assignee of an account is treated as a security interest (not ownership) for purposes of applying the priority rules of the PPSA and the CEA. * **Example:** ED is a plumber. ED is owed money by her customers (“accounts”). ED sells her accounts to FinanceCo for cash and assigns the accounts to FinanceCo (who now owns the accounts and is entitled to collect them from the customers). FinancoCo has a “deemed” security interest in the accounts. ED is deemed to be the owner. * **(2) Commercial consignment means (PMSI):** The interest of the consignor is treated as a security interest (not ownership) for purposes of applying the priority rules of the PPSA and the CEA * **PPSA s. 1(1)(h) “commercial consignment”**   + Goods are delivered by a consignor to consignee for sale or disposition   + Both consignor & consignee are in the business of dealing in goods of that kind   + But a consignment to an auctioneer or person who is known to sell or lease goods belonging to others is not a commercial consignment * **Example:** Barb is an artist. She delivers paintings to ED, who is an art dealer, for sale to customers. The consignment agreement is a “commercial consignment” within the PPSA definition. Barb’s interest in the paintings is a “deemed” security interest. ED is deemed to be the owner * **(3) Lease for a term of more than one year means (PMSI):** The interest of the lessor is treated as a security interest (not ownership) for purposes of applying the priority rules of the PPSA and the CEA * **PPSA s. 1(1)(z) “lease for a term of more than one year**   + A lease of goods for a term of more than one year or for a term that **may** extend beyond one year (e.g. under a renewal clause or where the term is indefinite)   + The lessor is regularly engaged in the business of leasing goods * **Example:** ED leases a car from Dealership under a three year lease. The lease is a “lease for a term of more than one year” within the PPSA definition. Dealership has a “deemed” security interest in the car. ED is deemed to be the owner. |

*Sharma v 643454 Alberta Ltd*

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| Ratio | Application of deemed security interest rules |
| Facts | * 1996 Plaintiff receives $120,000 judgment against ED Goebel. * Plaintiff assigns judgment to ALIA (Alta Lawyers’ Insurance Assoc.). * ALIA - EC registers writ. * Other creditors obtain judgments and register writs ($225,000). * ED is fined in Provincial Court for violation of the Public Health Act, and appeals to QB. Obligation to pay fines is not stayed pending appeal decision. * Semenchuk loans ED $42,000 to pay fines (thereby avoiding further jail time for non-payment). * ED assigns potential fine refund resulting from appeal to Semenchuk. * QB Court allows appeal in part, orders partial fine refund – via ED’s lawyer, Holder. * ALIA-EC serves garnishee summonses on Holder (seeking funds payable by Holder to ED). * Semenchuk assigns $10,000 of fine refund to lawyer Holder. Any balance is payable to Semenchuk. * Court pays out $24,840 fine refund to ED via Holder. * ALIA-EC renews garnishee summons * ALIA-EC applies for interpleader order * Lawyer asserts rights under assignment & solicitor’s lien for legal fees |
| Issues | EC/writ v. Semenchuk as assignee of ED’s right to fine refund  EC/writ v. Lawyer as assignee of ED’s right to fine refund  EC/writ v. Lawyer under claim to a charging order (see Rules of Court 625, now 10.4) |
| Decision | In conclusion  (a) Ms. Semenchuk is an ordinary creditor with no secured or proprietary claim.  (b) The two Assignments are unenforceable against the writ holders for non-registration.  (c) The Holder Law Office is entitled (subject to taxation) to a charging order estimated at $6,000.00.  (d) The A.L.I.A. is entitled to some priority over the other writ holders for its efforts in pursuing this matter. It may speak to quantum.  (e) The balance of the funds should be distributed among the writ holders in accordance with the Civil Enforcement Act. |
| Reasoning | * In substances, Semenchuk’s interest was a security interest (asserting claim under an assignment) * In substance, Holder’s interest was also a security interests (asserting claim under an assignment) * Neither Holder nor Semenchuk registered, so default to s. 35(1) – the writ has priority |
| Notes | * Priority of a writ v. a solicitor’s charge for fees   + Holder had priority over the writ to the extent of the charge granted for unpaid fees (r. 10.4(1)) |

*Stoke Resources & Consulting Inc. v. Auto Body Services Red Deer Ltd*

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| Ratio | Illustrates the substance test, and deemed security interest (lease of more than one year) |
| Facts | * Plaintiff is the owner of (holds title to) pressure tanks SS-1812 and V102. * Plaintiff is in the business of oilfield consulting and equipment rental. * Rockies owes Plaintiff substantial sums of money. Rockies is in possession of the tanks. * Defendant has a writ registered against Rockies. |
| Issues | * Is Defendant entitled to enforce the writ through seizure of the tanks? * What is the nature of Plaintiff’s interest in the tanks? Is Plaintiff the owner or does Plaintiff have a security interest? * If the latter, what is the priority of Plaintiffs security interest as against Defendant's writ? |
| Decision | * The writ wins because the plaintiff did not register |
| Reasoning | * **Plaintiff’s interest in Tank V102: The substance test**    + Rockies agrees to “sell” the tank to Plaintiff on the understanding that the purchase money would be used to pay Rockies’ obligation to CRA. The tank is left in Rockies’ possession but the Plaintiff becomes owner.   + “V102 was transferred to the Plaintiff on the understanding that it was to be security for repayment of a debt owed by Rockies to the Plaintiff.”….” The transaction in substance creates a security interest in favour of the Plaintiff.” * **Plaintiff’s interest in Tank SS-1812: Deemed security interest – lease for a term of more than one year**   + The tank was the subject of a lease (not simply property of Plaintiff left in possession of Rockies) – i.e. Rockies was obliged to pay Plaintiff for use of the tank. The lease was for an indefinite term so was a ‘lease for a term of more than one year” within the PPSA definition. Plaintiff’s interest is a security interest. |
| Notes | * If a writ is registered against LESSEE, the CEA by definition treats OWNER’s interest as a security interest and implicitly treats LESSEE as owner for purposes of a priority competition between the writ and OWNER. * If the writ has priority, the tank can be seized and sold in writ proceedings without regard to OWNER’s title. * If the security interest has priority, the interest of OWNER is dominant and cannot be defeated in writ proceedings * **At CA:** Regarding Tank SS-1812: The arrangement was a license to use, not a lease, so could not be a “lease for a term of more than one year” |

**Addition PMSI definitions**

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| * **PPSA 1(1)(ll)** “purchase-money security interest” means   + (iii) the interest of a lessor of goods under a lease for a term of more than one year, or   + (iv) the interest of a person who delivers goods to another person under a commercial consignment, * but does not include a transaction of sale by and lease back to the seller, and, for the purposes of this definition, “purchase price” and “value” include credit charges or interest payable in respect of the purchase or loan; * **This taken with the CEA s. 35(3);** **result:** PMSI has priority over a writ even though the writ was registered first, provided that PMSI is registered or perfected within 15 day period. |

**Special rule for future advances by the Secured Party**

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| * A future advance is where the secured party agrees to advance the debtor money where the money is advanced to the debtor at different times. Under the security agreement, D gives SP a security interest to secure any amount that may be owed to SP from time to time. * **CEA 35(2)**Subject to section 35(5) and (6) of the *Personal Property Security Act*, a security interest in personal property has priority over a writ …(if the security interest is registered or perfected when the writ is registered) * **PPSA 35(5)**Subject to subsection (6), the priority that a security interest has under subsection (1) [i.e. based on registration or perfection] applies to all advances, including future advances * **PPSA 35(6)**A perfected security interest that would otherwise have priority over a writ of enforcement issued under the *Civil Enforcement Act* has that priority only to the extent of   + (a) advances made before the secured party acquires knowledge of the writ within the meaning of section 32 of the *Civil Enforcement Act,*   + (b) advances made pursuant to an obligation owing to a person other than the debtor entered into by the secured party before acquiring the knowledge referred to in clause (a), and   + (c) reasonable costs incurred and expenditures made by the secured party for the protection, preservation or repair of the collateral * **CEA s. 32**For the purpose of this Division, a person is considered to have knowledge of a writ if that person has knowledge that the relevant property is subject to a writ *or* is under seizure (i.e. registration alone ≠ knowledge) * **Means:** when advances are made, whether the Secured Party will recover the advances made after a writ was registered depends on whether s/he had knowledge of the writ (registration is not sufficient for knowledge), and whether there is left over money after seizure and sale in writ proceedings. |

#### c. Priority between a Writ and a Buyer

**Writ v. buyers & lessees of goods**

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| * Default rule (s. 34(1)) - An interest acquired in property after a writ is registered is subordinate to the writ unless a more specific priority rules leads to a different result) applies to all property including goods UNLESS a buyer or lessee is protected by a special priority rule * If no such rule applies, the writ holder may instruct an agency to seize the goods from the buyer or lessee and sell them - A person who buys the goods in the writ proceedings will acquire them free of the buyer’s or lessee’s interest |

**The “Ordinary Course of Business” Priority Rule**

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| * **36(1)**A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any writ that binds the goods * **(4**)  A sale or lease under this section may be for cash, by exchange for other property or on credit, and includes delivering goods or a document of title to goods under a pre-existing contract for sale, but does not include a transfer as security for, or in total or partial satisfaction of, a money debt or past liability. * “Ordinary course of business” – a sale by someone who is in the business who is selling the goods as part of the business enterprise * **NOTE:** Whether the buyer or lessee has knowledge of the writ is irrelevant |

**The “Garage Sale” Priority Rule**

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| * **36(2)**A buyer or lessee of goods, other than fixtures, that are acquired as consumer goods takes free from a writ that binds the goods   + (a) if the buyer or lessee gave value for the interest acquired,   + (b) if the buyer or lessee bought or leased the goods without knowledge that the goods are bound by the writ, and   + (c) if the purchase price of the goods does not exceed $1000 or, in the case of a lease, the market value of which does not exceed $1000. * **PPSA s, 1(1)(i)** “consumer goods” means goods that are used or acquired for use primarily for personal, family or household purposes; * **CEA s. 32** “Knowledge” = knowledge that property is “subject to a writ or is under seizure” * What the buyer buys it for matters in terms of consumer goods |

#### d. Serial Number Goods: Priority of Security Interests and Buyers

**What are Serial Numbered Goods?**

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| * **PPSA 1(1)(y)** “serial number goods” means,   + (i) except in respect of a garage keeper’s lien, a motor vehicle, a trailer, a mobile home, a designated manufactured home, an aircraft, a boat or an outboard motor for a boat, and * **(p)** “motor vehicle” means   + (i) except in respect of a garage keeper’s lien, a mobile device that is propelled primarily by any power other than muscular power     - (A) in, on or by which a person or thing may be transported or drawn, and that is designed for use on a road or natural terrain, or     - (B) that is used in the construction or maintenance of roads, and includes a pedal bicycle with a motor attached, a combine or tractor,   + but does not include a device that runs on rails or machinery designed only for use in farming, other than a combine or tractor, and * **NOTE:** definitions also provided for each of “trailer, mobile home, designated manufactured home, aircraft, boat” |

**Writ binding serial number goods v. buyer, lessee or subsequent secured party: the priority rule**

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| * **CEA 36(3)** Where serial number goods that are bound by a writ are not described by serial number in the registration of that writ in the Personal Property Registry,   + (a) in the case of consumer goods, a buyer, lessee or secured party who gives value for an interest in the goods acquires the interest free of the writ, and   + (b) in the case of equipment, a buyer, lessee or secured party who gives value for an interest in the goods without **knowledge** of the writ acquires the interest free of the writ. * s. 32   For the purpose of this Division, a person is considered to have knowledge of a writ if that person has knowledge that the relevant property is subject to a writ *or* is under seizure (i.e. registration alone ≠ knowledge) * s. 36(3) priority rules apply only to consumer goods or equipment * **CEA s. 31(b) adopts PPSA :** * **1(1)(i) “**consumer goods” means goods that are used or acquired for use primarily for personal, family or household purposes; * **(y)** “inventory” means goods   + (i) that are held by a person for sale or lease, or that have been leased by that person,   + (ii) that are to be furnished by a person or have been furnished by that person under a contract of service,   + (iii) that are raw materials or work in progress, or   + (iv) that are materials used or consumed in a business; * **(p)** “equipment” means goods that are held by a debtor other than as inventory or consumer goods; * Say an ED sells a car to a buyer (writ v buyer of serial numbered goods)   + **Result:** Writ “binds” the property of ED including the car – Buyer is subordinate to the writ under s. 34(1)   + **BUT**   + Is the car serial # goods?   + If yes, is it consumer goods or equipment?   + If it is equipment, does Buyer have knowledge of the writ? * Say secured party takes a security interest in ED’s car and registers in the PPR   + **Result:** Writ has priority over the security interest under s. 35(1)   + **BUT**   + Is the security interest registered before the writ was registered – s. 35(2)? No, so…   + Is the car serial number goods? Yes, so…   + Is the car consumer goods or equipment?   + If the car is equipment, does SP have knowledge of the writ? * If a serial number search does not disclose the registration, the error is “seriously misleading” for purposes of s. 36(3). * An error in debtor name is not cured by a correct serial number |

**Getting Serial Numbers for Registry**

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| * Use Form 10 – demand that the debtor provides a financial statement * Can amend a registration to include serial numbers after the fact |

#### e. Other Rules

**Lapse in Registration of the Writ and Priority**

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| * **In a priority competition between a writ and a perfected security interest – s. 35(4)** * **35(4)**Where   + (a) the registration of a writ     - (i) lapses as a result of a failure to renew the registration of the writ, or     - (ii)has been discharged in error or without authorization,   + and   + (b) the writ is re-registered not later than 30 days after the lapse or discharge, * the lapse or discharge of the writ does not affect the priority status of the writ in relation to a competing perfected security interest that immediately prior to the lapse or discharge of the writ had a subordinate priority position, except to the extent that the competing security interest secures advances made or contracted for after the lapse or discharge and prior to the re-registration of the writ. writ). * **Means:** there is a 30-day grace period where priority will priority will be maintained upon lapse of registration of a writ. But note, if an interest is registered in the PPR while the writ is not registered, it has priority over the writ |

**Writ v Lienholder**

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| * Lien: In this context, an *in* *rem* right to retain goods and sometimes to sell them to satisfy a debt arising from the provision of material or services in relation to the goods (e.g. woodsman’s lien, hotel keeper’s lien, warehouseman’s lien, garage keeper’s or repairer’s lien…). * **40**   When a person in the ordinary course of business furnishes materials or services with respect to **goods** that are bound by a writ, any **lien** that the person has with respect to the materials or services has priority over the writ unless the lien is given under an enactment that provides that the lien does not have that priority. * Ask: * Did the person claiming the goods furnish materials or services with respect to the goods in the ordinary course of their business? * Does the person have a lien on the goods under a common law or statutory rule? * If yes to both of the above, the lien has priority over a writ binding the goods unless a statutory priority rule applicable to the lien dictates a contrary result (e.g. the *Garagekeeper’s Lien Act* where the lien falls within the scope of the Act and is not registered as required by the Act when the writ is registered). |

**Writ v Holder or Buyer of Money and Negotiable or Quasi-negotiable Documents**

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| * (Instruments, Security Certificates, Negotiable Documents of Title & Chattel Paper) – s. 38 * Cash is the typical example — we think of cash as being negotiable (can transfer title simply by giving it away) * **38** Confers priority on a holder or purchaser under circumstances described. * Definitions:   + **Money** (PPSA s. 1(1)(cc)) = physical currency   + An **instrument** (PPSA s. 1(1)(y)): includes rights to the payment of money that are represented by a document such as a cheque or promissory note.   + A **document of title** (PPSA s. 1(1)(o)): is a receipt issued by a warehouse keeper or a carrier which acknowledges that the bailee will deliver the underlying goods to whoever is in possession of a duly endorsed document of title.   + **Chattel paper** (PPSA s. 1(1)(f)): is created when a retail or wholesale supplier sells goods under a secured financing agreement or leases them to a customer. The secured instalment purchase agreement or the lease agreement represents the right to the future stream of payments together with a proprietary right in the goods (i.e., the interest of the secured party or the lessor). This chattel paper can be transferred to another by transferring these documents. * Effects of s 38:   + **Money:** holder takes gratuitously without knowledge of writ **or** gives value regardless of knowledge   + **Instrument or security certificate:** purchaser gave value, acquired without knowledge of writ, took possession   + **Negotiable document of title:** holder gave value, acquired without knowledge of writ   + **Chattel paper:** purchaser gave new value, took possession in ordinary course of business, without knowledge of the writ |

**Errors in registration of the writ**

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| * **PPSA s 42(2)**  Where any enactment permits or requires a registration to be made in the Registry, unless the regulations otherwise provide,   + the registration shall be in accordance with the regulations, and   + this Part applies to the registration (subject to exceptions indicated in the Personal Property Security Regulation s. 67). * **The “seriously misleading” test** * **PPSA** **s 43(6)** The **validity of the registration** of a financing statement is not affected by a defect, irregularity, omission or error in the financing statement or in the registration of it unless the defect, irregularity, omission or error is seriously misleading. * **Test is objective: the question is whether someone COULD be misled** * **PPSA** **s 43(8)** Nothing in subsections (6) and (7) shall require, as a condition to a finding that a defect, irregularity, omission or error is seriously misleading, proof that anyone was actually misled by it. * Application of the test will be guided by PPSA caselaw. |

**The consequence of errors in registration – the process of analysis**

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| * The priority of a writ based on the date it is registered in the Personal Property Registry assumes that the registration is **valid**. * A valid registration requires that the financing statement submitted for registration is the name of the debtor as it appears on the judgment (PPSR s 22(1)). * If the name used is not the name that appears on the judgment, the registration is nevertheless valid unless the error is “seriously misleading” (PPSA s 43(6), 43(8) apply). * **Basic test under PPSA case law:** A registration is seriously misleading if a search of the registry using the correct name (i.e. the debtor name that appears on the judgment) does not disclose registration of the writ either as an exact match or a similar match. If a similar match, it must be evident to the searching party that the registration relates to the debtor named in the judgment. * CEA s. 30 provides that where writ proceedings have been carried out and there is an error or omission on the writ or in respect of its registration, the court may on application make an order validating writ proceedings “subject to any interests that may have arisen in the period of time between the issuance of the writ or its registration in the PPR and the correction of the error or omission” – i.e. cannot affect established priorities through an order validating the proceedings. |

**Does registration of a writ using the debtor’s name as it appears on the judgment protect those who may subsequently acquire an interest in debtor’s property?**

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| * **PROBLEM:** Registration of a writ using the debtor’s name as it appears on the judgment is valid regardless of whether that name is the debtor’s legal name. In contrast, a security interest is only perfected by a registration using the debtor’s legal name. A searching party may search using the legal name but not discover the writ. The writ is nevertheless valid and may have priority over an interest taken by the searching party.   + EC obtains a judgment against D and registers a writ against D’s name as indicated on the judgment. This is the name by which D is commonly known but is not D’s legal name.   + D approaches Bank and applies for a loan. Bank searches the registry using D’s legal name. The search result does not disclose EC’s writ as an exact or inexact match.   + Bank agrees to lend money to D secured by a security interest in D’s personal property. Bank perfects its security interest by registering a financing statement against D’s legal name, as required by the regulations that apply to registration of a security interest.   + D defaults in repaying the loan to Bank and Bank seizes property of D. EC learns of the seizure and demands that the writ be paid out before any proceeds generated by sale of the property are applied to the loan. Does the writ have priority over the security interest?   + Yes, the writ still has priority since this is not “seriously misleading”   SOLUTION (sort of): Potential creditors or buyers should search by a person’s legal name to discover security interests and by common names (if known) to discover writs. |

**The seriously misleading test as applied to serial number registration**

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| * Registration of the writ is valid if the debtor name is correct, but… * If serial number is required to establish priority of the writ over buyers and secured parties (s. 36(3)), an error in serial number may mean that the serial number registration is not “valid” for purposes of that rule. * If a serial number search does not disclose the registration, the error is “seriously misleading” for purposes of s. 36(3). * What is the result where a serial number registration is accurate but there is an error in debtor name that results in non-disclosure of the registration if the registry is searched by name alone? See PPSA case law for potential resolution.   A valid serial number registration does not save it from being seriously misleading |

**Seizure of property in writ proceedings does not affect the determination of priorities**

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| * **41**  Subject to section 35(6) of the *Personal Property Security Act* [advances], the position of a person who acquires an interest in personal property that is bound by a writ is determined by this Division regardless of whether the personal property has been seized   + EC registers a writ against ED’s name in the PPR.   + EC instructs a civil enforcement agency to seize ED’s car.   + ED sells her car to Buyer, who purchases it for personal use (title in specific goods passes when the contract of sale is made).   + Assuming Buyer has given value, she has priority over the writ under s. 36(3) (even if she knows that the car has been seized). The car is serial number goods acquired as consumer goods and the registration of the writ did not include the serial number of the car. The fact that the car has been seized does not affect Buyer’s priority.   + **Seizure of goods does not affect the debtor’s title or interests in property**   + Even if the ED was not in possession (even if the agency had taken the car), the ED could still sell the car. |

**Intervening interests: An interest that is subordinate to one writ is not thereby subordinate to all writs**

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| * **42(1)** An interest in property is not subordinate to a writ by reason only of the fact that the interest is subordinate to another writ. * Intervening interests: An interest that is subordinate to one writ is not thereby subordinate to all writs. * EC1 registers Writ 1 against ED in the PPR. The amount owing on Writ 1 is $20,000. * SP registers a security interest in PPR against equipment owned by ED. The amount secured is $30,000. * EC2 registers Writ 2 against ED in the personal property registry. The amount owing on Writ 2 is $40,000. * EC1 instructs a civil enforcement agency to seize property of ED. The agency seizes and sells a piece of equipment, generating proceeds (after deduction of enforcement costs) of $40,000. * Writ 1 has priority over SP’s security interest, which has priority over Writ 2. The first $20,000 is allocated to Writ 1. The remaining $20,000 is allocated to SP, since SP is next in priority. Nothing remains to be allocated to Writ 2. SP’s interest is not subordinate to Writ 2 by reason of the fact that it is subordinate to Writ 1. |

**There is no priority as between writs**

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| * **42(2)** Nothing in this section is to be construed so as to create any priority as between writs.   + EC1 registers Writ 1 against ED in the PPR. The amount owing on Writ 1 is $20,000.   + SP registers a security interest in PPR against equipment owned by ED. The amount secured is $30,000.   + EC2 registers Writ 2 against ED in the personal property registry. The amount owing on Writ 2 is $40,000.   + EC1 instructs a civil enforcement agency to seize property of ED. The agency seizes and sells a piece of equipment, generating proceeds (after deduction of enforcement costs) of $40,000.   + Writ 1 has priority over SP’s security interest, which has priority over Writ 2. The first $20,000 is allocated to Writ 1. The remaining $20,000 is allocated to SP, since SP is next in priority. Nothing remains to be allocated to Writ 2. **However,** Writ 2 is entitled to share in the $20,000 allocated to Writ 1 (under Part 11). There is no priority as between Writ 1 and Writ 2. (If there were priority between writs Writ 1 would be paid in full and Writ 2 would get nothing.)   + This is unique to Canada but is universal across all jurisdictions. |

### ii. Land

**Summary of Priority of Interests in Land**

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| * Writ binds enforcement debtor’s interest on registration against title [CEA s.33(2), LTA s.122(7)] * **Interests that have priority over a writ:** A writ binds only the interest of the enforcement debtor, so third party interests existing when the writ binds have priority over the writ, whether those interests are registered or unregistered – *Jellett v. Wilkie,* cited and applied in post-CEA cases including *Drebert v. Coates.*   + A buyer of land in writ proceedings takes subject to a registered interest in the land that has priority over a writ – s. 75(1).   + A buyer of land in writ proceedings takes free of an unregistered interest in the land, whether or not the interest has priority over the writ – s. 75(1) * But the holder of an unregistered interest that has priority over the writ is entitled to be paid first from the proceeds of sale – s. 96(3) * **Interests that are subordinate to a writ**: Interests acquired after property is bound are subordinate to the writ [CEA s.34(1)]   + A buyer of land in writ proceedings takes free of subordinate interests [s.34(2)]   + But if the interest is registered, a Court order will be required to discharge the interest [s. 75(1)]. * And see *Re Palmer and Southwood* re: a writ binding a seller’s interest in land**.** |

**Identifying Interests in Land held by Enforcement Debtor**

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| * **Land Titles Act 16**The Registrar shall maintain a record that will enable the Registrar to provide a list of land owned by persons who have the same name as a person specified in a request made to the Registrar for a search under section 17 * **Also, CER 35.10** – provide financial report to the ED * **Also, Form 13** |

**Registration as the Basis for Enforcement**

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| * **26**A judgment creditor may not initiate any writ proceedings in respect of a money judgment   + (b) against land unless a writ issued in respect of that judgment is registered in the Personal Property Registry and     - (i) in the case of land under the *Land Titles Act*, is registered under the *Land Titles Act*, and     - (ii) in the case of land that is not under the *Land Titles Act*, is registered, filed or otherwise recorded in accordance with the regulations. * **Means:**  a writ needs to be registered before it (the judgment) can be enforced against land |

**The binding effect as the foundation of priorities**

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| * **CEA 33(1)**A writ does not bind or otherwise affect an enforcement debtor’s interest   + (b) in any land under the *Land Titles Act*, other than while the writ is in force and registered under the *Land Titles Act* against the applicable certificate of title, * **(2)**  A writ,   + (b) in the case of land under the *Land Titles Act*, on being registered under the *Land Titles Act* **binds all of the enforcement debtor’s exigible land described in the certificate of title** against which the writ is registered; * **Land Titles Act 122(1**) In this section, “instrument” means   + (a) a writ of enforcement * **(2)**  Notwithstanding this or any other Act, no instrument that is presented to the Registrar shall charge or have any binding effect on any land in which the debtor has an interest unless a memorandum of the instrument has been endorsed on the certificate of title for that land. * **(7)**  Where a memorandum of an instrument or a caveat protecting the instrument is endorsed on a certificate of title,   + (a) in the case of an instrument that is a writ of enforcement, **all legal and equitable interests of the debtor in the land included in the certificate of title are bound by the writ** of enforcement during the period of time that the instrument is in force, * “Land” includes any interest in land, but not growing crops (which are treated as personal property) [see s. 1(1)(bb)] * **Example:**  a mortgage is an interest in land, a writ can bind a mortgage (would bind the mortgagee, not the owner of the land); the mortgage can be sold in writ proceedings |

**Duration of Registration**

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| * **CEA 29** The registration of a writ under the *Land Titles Act* is in effect for the duration of the judgment. * **Means:** registration under the LTA lasts for 10 years (unless judgment is renewed) * But recall that registration in the Personal Property Registry must be maintained as a pre-requisite of writ proceedings under s. 26. * **Means:** in order to start writ proceedings need to register in PPR, under which registration only lasts for 2 years |

### iii. The implications of Priority and Discharging the Writ

**Summary**

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| * Where an interest that has priority is full beneficial ownership, the writ must be discharged. See *Drebert v. Coates*, *Re Palmer and Southwood.* * Where the interest that has priority is a partial interest (i.e. a mortgage or a buyer’s interest under a partly executed agreement for sale), the enforcement debtor’s interest may be sold in writ proceedings but the proceedings do not affect the prior interest (assuming it is registered). See *Re Palmer & Southwood.* * Where the interest that has priority is a mortgage or other partial interest, the court *may* order discharge of the writ if the value of the enforcement debtor’s interest in the property (i.e. “equity”) is insufficient to produce proceeds that may be applied to the writ in writ proceedings. See *Royal Bank of Canada v. Malfair.*   + **Ask:** Is there any prospect that the value of the enforcement debtor’s interest (i.e. “equity”) may increase over time (e.g. through payment of the mortgage debt)?   + If there is no reasonable prospect that the value of the enforcement debtor’s interest will increase, the writ may be discharged to facilitate a voluntary sale. See *Royal Bank of Canada v. Malfair.*   + If the value of the enforcement debtor’s interest is likely to increase, the writ should remain on title but no writ proceedings should be taken until there is value in the property that can be applied to satisfaction of the writ. |

**The Priority Rules**

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| * **Priority of the writ as against interests that exist at the time the writ is registered (prior interests)** * s 33(2)(b) registration against title binds the enforcement debtor’s land. * See *Drebert v Coates.* * **Priority of the writ as against interests that arise after the writ is registered (subsequent interests)** * 34(1) Except as otherwise provided in sections 35 to 40 or in any other enactment, an interest acquired in property after the property is bound by a writ is subordinate to the writ. |

***Drebert v Coates***

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| Ratio | With land, pre-existing interests have priority over a writ, regardless of whether the prior interest is registered against title – a writ can only bind what a person has  *Drebert v Coates* confirms that a writ registered against title to land owned by the enforcement debtor binds only the interest held by the debtor at the date the writ is registered |
| Facts | * Title to land is transferred to enforcement debtor Derbert/son in trust for transferor – Drebert/mother. * Enforcement creditor holds writ against Derbert/son, registers writ against title. * Title transferred back to Drebert/mother subject to the writ. * Drebert/mother is now seeking to discharge the writ from title |
| Issues | * Is Drebert/mother entitled to have the writ discharged from the title? What is the priority of the writ as against Drebert/mother? |
| Decision | * Drebert/mother was entitled to a discharge of the writ. |
| Reasoning | * The “rule in *Jellett v. Wilkie*” applied. The writ may only bind the property of the enforcement debtor. “The rights of prior parties remain as they were before the execution was registered..” * And see CEA s. 33(2) and Land Titles Act s. 122(7) * The writ could only bind the ED’s interest, which was subject to Drebert/mother’s unregistered equitable interest under the trust. |
| Notes | * This result seems at odds with the Torrens system where the intention is to establish one estate in land only – to be registered publicly   + Undermines the principle of indefeasibility * The LTA says that beneficial interests *cannot* be registered on title — so if you were going to have a judgment against you, you could put your land in trust and then you’re somewhat shielded from having your land taken as a result of this prior beneficial interest |

**The implications of priority: Title of the buyer in writ proceedings**

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| * **CEA 34(2)**Where an interest in property is subordinate to a writ,   + (a) the property is subject to writ proceedings to the same extent that the property would have been if the subordinate interest did not exist, **[subordinate interest is not an obstacle to writ proceedings]** and   + (b) a person who acquires the property as a result of writ proceedings acquires the property free of the subordinate interest **[sale of the property in writ proceedings eliminates the subordinate interest].** * **Means:** the buyer in writ proceedings takes title clear of any subordinate interest * **CEA 75(1)**On presentation to the Registrar of Land Titles of   + (a)  a transfer of land that is executed by the agency, and   + (b)  a certificate certifying that the agency has complied with the requirements of this Part …. * the Registrar shall, subject to subsection (2), transfer the enforcement debtor’s interest in the land to the transferee free of all writs that were registered against the enforcement debtor’s interest in the land, but unless otherwise ordered by the Court, subject to any other encumbrances or interests that were registered against the enforcement debtor’s interest in the land. * **Result:**    + Buyer acquires title subject to all registered interests, including interests with priority over and subordinate to the writ unless the Court orders otherwise.     - **BUT** the Court will order discharge of subordinate interests pursuant to s 34(2).   + Buyer acquires title free of unregistered interests, including interests with priority over the writ.     - **BUT** the holder of the unregistered interest may be entitled to the proceeds of sale generated by the proceedings – see s 96(3) * **96(3)** Nothing in this Part other than section 102 shall be construed so as to prejudice any right to money that is based on an interest, including a security interest or an encumbrance,   + (a) in the money, or   + (b) in the property from which the money is derived, * where that interest has priority over the relevant writs. |

**Example**

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| **Assume the following priority ranking:**   * (1) Security interest #1 (mortgage) held by Secured Party 1 (SP1) registered against title * (2) Writ registered against title * (3) Security interest #2 (mortgage) held by Secured Party 2 (SP2) registered against title * If the land is sold by a civil enforcement agency in writ proceedings. the buyer will acquire title subject to security interest #1 but free of security interest #2 [see s. 34(2)(b)]. Nevertheless, a court order is required directing the Registrar of titles to transfer title to the buyer free of any registered interest in the land other than a writ [see s. 75(1)]. * In practice, land will rarely be saleable unless SP1 consents to sale, even if the land is worth more than the amount owing to SP1. * If SP1 consents to the sale, title will issue in Buyer’s name free of SP1’s interest only if SP1 discharges its registration against the title or a court order is obtained directing the Registrar of titles to transfer title to Buyer free of SP1’s interest [see s. 75(1)]. SP1 will be entitled to be paid first from the proceeds of sale. * SP2 will take a share of the proceeds of sale received by the civil enforcement agency only if a surplus remains after the writ is satisfied (Part 11). If nothing remains, secured party is left with an unsecured claim against enforcement debtor. |

**Implications of priority with respect to land that is exempt**

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| * **CEA 33(2)** A writ, * (b) in the case of land under the *Land Titles Act*, on being registered under the *Land Titles Act* binds all of the enforcement debtor’s exigible land described in the certificate of title against which the writ is registered * **CEA 34(1)**Except as otherwise provided in sections 35 to 40 or in any other enactment, an interest acquired in property after the property is bound by a writ is subordinate to the writ. * **Land Titles Act 122(7)** Where a memorandum of an instrument or a caveat protecting the instrument is endorsed on a certificate of title   + (a) in the case of an instrument that is a writ of enforcement, **all legal and equitable interests of the debtor in the land included in the certificate of title are bound by the writ** of enforcement during the period of time that the instrument is in force, * **Land Titles Act 124(1)** A writ may be transferred in whole or in part or postponed by the enforcement creditor.   + Consider if representing a client who wants to take out a mortgage on land that is encumbered with a writ * Differences between s. 33(2) and s. 122(7)   + CEA says “exigible” land – meaning some of the land is exempt   + LTA says all legal and equitable interests – does not exempt out any land   + Rule of statutory interpretation: more specific rule governs (s. 33(2)) |

**Writ binding land subject to an agreement for sale*: Re Palmer and Southwood***

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| * Implications of *Drebert v Coates* where the debtor has entered into an agreement for sale of the land * The buyer under the agreement for sale acquires an equitable interest coextensive with the amount of the purchase price that has been paid, along with a right to specific performance of the contract through transfer of the registered title when the purchase price is paid in full * If a writ is registered against title to the land after the agreement for sale is made, the writ can only bind the vendor’s interest and, once the purchase price is paid in full, that interest is eliminated in favour of the buyer who is entitled to have title registered in her or his name free of the writ * If the enforcement debtor’s interest is sold in writ proceedings before the agreement for sale is paid out, the buyer in the writ proceedings acquires the vendor’s interest and is in a position to enforce payment of the unpaid purchase price but takes subject to any defences that the buyer under the agreement for sale may have against the vendor/debtor, including a right of set-off. |

**Procedure for Discharging the Writ from Land: Discharge by Notice to Lapse**

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| * **Land Titles Act 123(2)**Every instrument registered against any land shall be lapsed by the Registrar on application made to the Registrar after the expiration of 60 days after notice, in the prescribed form, to take proceedings in court has been either   + (a) served on the creditor as process is usually served, or   + (b) sent by registered mail to the creditor at or to the address stated in the instrument or, if a notice of change of address for service has been filed with the Registrar, then at or to the address stated in the last notice of change of address for service filed in the Land Titles Office, * unless the creditor takes proceedings in court by application, subject to the *Alberta Rules of Court*, to substantiate the interest claimed by the creditor and a certificate of lis pendens in the prescribed form has been filed with the Registrar. * **Note:** Onus is on the creditor to establish grounds for maintaining registration of the writ. See *Royal Bank of Canada v. Malfair* * LTA s. 125, providing for discharge of a writ by order of the court, discharge where the writ has expired or been satisfied, or a discharge is executed by the enforcement creditor * **SUM: Enforcement creditors have 60 days after expiry to apply to the court for an order to maintain the writ, if** **they don’t,** **the registrar will lapse the writ.** |

*Canada v Malfair*

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| Ratio | Application of when will the court order discharge of a writ under LTA 123(2) |
| Facts | * Father and daughter acquire house as joint tenants using funds secured by mortgage on the house. * Bank obtains judgment ($4,556.40) against daughter and registers a writ of enforcement against title. * Daughter transfers her interest to father. * Father enters into an agreement to sell the house, but cannot close because Bank refuses to discharge its writ. * Father serves notice to lapse under Land Titles Act, Bank makes application to Court. |
| Issues | * Is Bank entitled to maintain its writ, or should it be discharged? |
| Decision | * Discharge of the writ |
| Reasoning | * Writ binds only daughter’s interest as joint tenant. * Father acquires daughter’s interest subject to the writ. * But daughter’s interest is fully encumbered by the mortgage – i.e. she has no “equity.” * **Option 1**: Writ proceedings are taken against the house (i.e. house to be sold). Cases decided under the *Seizures Act* applied: “If there was not a reasonable prospect of realizing a return for the judgment creditor the Court would refuse to order a sale.” * Here, the mortgage has priority over the writ. Therefore, the land could only be sold subject to the mortgage, so it would be unsalable or all proceeds of sale would go to mortgagee. * **Option 2**: Father leaves mortgage in default and mortgagee takes foreclosure proceedings. * Result will be to discharge the writ with no proceeds to writ holder. |
| Notes | * There was no factual, practical possibility that there would be any money left for the writ   + It was worth nothing, but the writ holder was probably hoping they would get paid out despite this * If the debtor was going to continue to make mortgage payments, the equity would grow and the writ should not be discharged   + Could not use *Malfair* as the authority in this case |

### iv. Competition between a Writ and a Landlord’s Right of Distress

**Definitions**

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| * **1(1)(g)**“civil enforcement proceedings” includes   + (i) writ proceedings;   + (ii) distress proceedings authorized under this Act or any other law that is in force in Alberta * **(m)** “distress” means anything done to exercise   + (i) a right of a landlord to distrain for unpaid rent. * **(uu)** “writ proceedings” means any action, step or measure authorized by this Act to be taken for the purpose of enforcing a money judgment**.** |

**What is Distress for Rent**

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| * The landlord’s right to distrain for unpaid rent is the right to seize and sell the **goods** located on the rented premises to recover the rent arrears. * CEA s. 104 **makes the procedure that applies to seizure and sale of personal property in writ proceedings applicable to seizure and sale of goods by a landlord**. It also offers priority rules that determine whether the right of distress can be exercised against goods in which a person other than the tenant claims an interest. |

**Priority of a Writ v. Landlord’s Right of Distress**

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| * **Scenario 1:**   + Writ is registered against ED, who is tenant of Landlord.   + **Landlord instructs seizure of goods** owned by tenant under distress for arrears of rent. * **Scenario 2:**    + Writ is registered against ED, who is tenant of Landlord.   + **Enforcement Creditor (EC) instructs seizure of goods** in writ proceedings. ED is in arrears in rent due to Landlord when the goods are seized. * **The common law doctrine of *in custodia legis*** * Goods under seizure by the sheriff are “in the custody of the law” and cannot subsequently be seized by another claimant. * As between a writ holder and a landlord, the first to seize under the authority of the sheriff will have priority. * Unlikely that the default rule (s. 33(2)) will apply, as authority suggests that a right of distress is not an “interest” in the goods against which that right may be exercised * A registered writ “binds” goods of an enforcement debtor but does not affect the ownership of the goods. Section 104(b) does not apply   + Section 104(c) means that a landlord has priority over a buyer in writ proceedings * Looks like back to the common law “first to seize” |

*Circa 1880 Imports Ltd v Antique Photo Parlour Ltd*

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| Ratio | Priority goes to the first to seize, subject to the Statute of Anne (Pre- CEA decision) |
| Facts | * Prior to April 1982, Circa obtained a judgement against Antique for $20,650 * On April 16, 1982, Circa instructed the sheriff to attend at Antique’s premises and seize under the judgment * On May 12, 1982, Westgreen seized the same items for arrears of rent in the amount of $5,072.50 * The goods were sold at public auction by the sheriff on November 22, 1982, and netted $6,643.95. The sheriff proposes to pay out Westgreen’s claim in full and remit the balance to Circa. Circa disputes this method of distribution |
| Issues | * Determine priorities to a fund held by the sheriff as between the claims of an execution creditor and a landlord’s distress for rent. |
| Decision | * (Pre-CEA) |
| Reasoning | * The effect of these decisions and the applicability of the Statute of Anne would seem to clearly indicate that this Act alters the common law rule in Alberta and gives the landlord a priority in this case |
| Notes | * **Result:**    + If the landlord seizes first, then s/he has priority   + If the EC seizes first, then they have priority, except must pay out landlord the amount owed up to one-years’ worth of rent |

## H. Unsatisfied Judgement against an Insured Debtor for Damage to Person or Property

**Insurance Act s. 534(1)**

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| * If a writ is issued subject to an action where the defendant was insured * And If the writ is returned unsatisfied, then the EC can seek payment directly from the insurer   + But unclear what returned unsatisfied means (could mean there is nothing for the Agency to sell, or could mean that EC has exhausted all options) |

# 6. ENFORCEMENT AGAINST PERSONAL PROPERTY

**Overview**

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| * Enforcement Creditor instructs civil enforcement agency to take action to enforce against exigible (non-exempt) property of the enforcement debtor. Creditor is the “instructing creditor.” * Civil enforcement agencies & bailiffs are authorized by statute and operate privately but subject to government supervision via the Sheriff - Civil Enforcement (distinguish sheriffs with authority over traffic enforcement, court security, prisoner transport) * Personal property is seized then sold. Proceedings are administered by the civil enforcement agency. Seizure conducted by civil enforcement bailiff employed by civil enforcement agency. * Proceedings are subject to the rights of secured creditors who hold security interests that have priority over writ – priorities determined largely by CEA. * (note: agencies also levy distress and seize property for purposes of enforcement of security interests). * Proceeds of enforcement measures are distributed by the agency according to CEA rules. |

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## A. Seizure

**Default Seizure Rule**

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| * Seizure effected by service of seizure documents on debtor or indicated person, or posting of notice by bailiff (followed by service on debtor) (s. 45(1)) * 45(1)  Personal property that is described in a notice of seizure is seized when a bailiff, * while *at the place at which the property is located*, serves the seizure documents *(see CER s 2)* on   + (i) the enforcement debtor or an adult member of the enforcement debtor’s household,   + (ii) an adult occupying or working at the location at which the property is located, or   + (iii) a person who has possession of or control over the property, * or * subject to the regulations, attaches to the property documents indicating that the property is seized or posts the notice of seizure in a conspicuous place *at the location at which the property is located*. * “**Seizure documents**” prescribed by **CER s 2**: seizure warrant, notice of seizure, notice of objection and information for debtor. And see forms prescribed in CER. * **Amount of property to be seized:** Seizure warrant instructs the agency to seize property to realize the sum owing to the creditor “and the total amount of all related writs plus costs.” * **Time of seizure and access to premises**: limited by rules provided in CEA s 13 and CER s 8. |

**Notice of Seizure**

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| * **Notice of seizure must be given to debtor (or adult member of debtor’s household)** * **45(3)** Where a bailiff effects seizure under subsection (1) or under section 57(1) but at the time of the seizure did not serve the seizure documents on the enforcement debtor or an adult member of the debtor’s household, an agency must serve the seizure documents on the debtor as soon after effecting seizure as is practicable**.** * **If notice of seizure not given to debtor or adult household member, debtor is deemed to have given notice of objection to seizure** * **(4)** Notwithstanding subsection (3), if an agency is unable to serve the seizure documents * (a) on the enforcement debtor, or * (b) on an adult member of the enforcement debtor’s household, * the instructing creditor may proceed in the same manner as if the enforcement debtor had been served with the seizure documents and had filed a notice of objection in respect of the seizure. |

**Maintaining Seizure**

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| * **Maintaining seizure: property may be removed or left with bailee: s. 13(2)** * (h) **a bailiff**, at the time of seizure or at any time after carrying out the seizure, **may remove** for safekeeping the personal property that is under seizure; * (i) **a bailiff may appoint the debtor or some other person as bailee** of the personal property that is under seizure if the debtor or other person signs an undertaking   + (i) to hold the property for the bailiff and the agency, and   + (ii) to deliver up the property to the bailiff or the agency on demand by the bailiff or agency; * (j) **a debtor who has possession of or control over personal property that is under seizure and has been served with the seizure documents** or the documents authorizing the carrying out of the distress in respect of that property   + (i) **holds that property as bailee** for the bailiff and the agency, and   + (ii) must deliver up that personal property to the bailiff or the agency     - (A) when required to do so by the bailiff or the agency, and     - (B) at a location specified by the bailiff or the agency, * whether or not the debtor has signed an undertaking referred to in clause (i); * **Failure of bailee to deliver goods is theft** (*CC.* s. 324)   + **Criminal Code s 324.** Every one who is a bailee of anything that is under lawful seizure by a peace officer or public officer in the execution of the duties of his office, and who is obliged by law or agreement to produce and deliver it to that officer or to another person entitled thereto at a certain time and place, or on demand, steals it if he does not produce and deliver it in accordance with his obligation, but he does not steal it if his failure to produce and deliver it is not the result of a wilful act or omission by him * **Interference with seizure is an offence** * **CEA 45(5)**  A person is guilty of an offence if that person without lawful authority removes, damages or otherwise interferes   + (a) with seizure documents or identifying documents that are attached to seized property or posted under subsection (1)(b), or   + (b) with any property that is under seizure. |

**Seizure of intangibles: How does an agency seize accounts payable and other intangibles?**

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| * **Default seizure rule**: where is intangible property located? * Does service of notice of seizure on the account debtor suffice?   + See *Stout & Co LLP* (re: big game hunting permits – bailiff effected seizure) * Likely would apply for receivership for accounts (garnishment would not be practical) |

## B. Proof of Ownership and Enforcement against Personal Property held by a Third Party

**Proof of Ownership**

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| * 43(1) Exigible property *of an enforcement debtor* is liable to seizure * See *Riczu v Indigeon Holdings Ltd* |

*Riczu v Indigeon Holdings Ltd*

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| Ratio | If what has been seized does not belong to the ED, it cannot be seized |
| Facts | * Jim’s Motor Repairs (Calgary) Ltd. owed rental arrears to the Applicant. The Applicant distrained a bobcat located on the premises. Harvey Riczu, the son of Jim Riczu, operated the business under the corporate name during the term of the lease * Jim Riczu claims the bobcat is his – evidenced by his statement and letters from neighbours who said they had seen it on Jim’s farm |
| Issues | * Whether the bobcat is property of Jim’s Motor Repairs and can be seized |
| Decision | * Applicant’s claim failed – given the family relationship, and that the debtor had possession of the goods, did not meet onus |
| Reasoning | * Who is the owner of the bobcat?   + Onus is on the EC to establish that ED is owner of property subject to seizure   + But where ED is in possession, ED is presumed to be the owner – onus shifts to claimant to establish ownership * Onus as between related persons   + Where goods are alleged to have been sold to a relative under suspicious circumstances, the onus is on the claimant (of ownership) to prove ownership * Evidence required to satisfy onus on 3P claimant   + Party claiming ownership must adduce some evidence beyond a sworn statement |
| Notes | Need to look at priority rules if established that it was a bona fide purchase of the property   * If the writ has priority, property may be seized in the hands of the buyer even though it is no longer the property of the enforcement debtor (s. 34(2)) |

**Alternative procedure where property of ED is in possession of a 3P**

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| * **44(1)**Where there are reasonable grounds for believing that exigible personal property of an enforcement debtor is in the possession or control of a third person, the agency may and, if so instructed by the instructing creditor, **must serve a demand on the third person requiring the third person to deliver the property to the agency or make it available for seizure** within 15 days from the day that the demand is served on the third person. * (2)  A third person on whom a demand is served under this section must forthwith   + (a) deliver the property to the agency,   + (b) advise the agency of the place at which seizure of the property may be effected and take reasonable steps to ensure that the property remains at that place until it is seized, or   + (c) where the third person has a right as against the enforcement debtor to retain the property or does not have possession or control of the property, advise the agency that the third person is not required to comply with clause (a) or (b) by reason that the third person     - (i) has a right as against the enforcement debtor to retain the property, or     - (ii) does not have possession or control of the property.   **Establishing possession of property by a 3P**   * **CER s 35.16:** The court may direct a person to attend and be questioned under oath where there are reasonable grounds to believe that the person is in possession of or has control over exigible property of an enforcement debtor. (See s 35.16 for further detail.) |

## C. Objections to Seizure and Assertion of Third Party Claims

**Objection to Seizure**

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| Debtor may object to seizure: sale precluded except by Court order   * 46(1) **Where an enforcement debtor wishes to object to a seizure** of personal property, the enforcement debtor must within 15 days from the day that   + (a) the seizure documents are served under section 45(1)(a)(i) on the enforcement debtor or an adult member of the enforcement debtor’s household, *(notice served at time of seizure)* or   + (b) the seizure documents are served under section 45(3) on the enforcement debtor *(notice served following seizure),* * **serve a notice of objection in the prescribed form on the agency** that carried out the seizure * (2) On being served with a notice of objection, the agency shall not sell or otherwise dispose of the property unless permitted to do so by the Court. * (3) A notice of objection is void and shall be disregarded if   + (a) a reason for the objection is not set out in the notice of objection, or   + (b) the notice of objection is not served on the agency within the15-day period provided for under subsection (1). * Section does not specify what is a reasonable objection, but suggests that a claim for an exemption is a valid reason to object |

**Deemed Objection to Seizure**

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| Where debtor is not served with seizure documents – deemed objection   * **Notice of seizure must be given to debtor (or adult member of debtor’s household)** * **45(3)** Where a bailiff effects seizure under subsection (1) or under section 57(1) but at the time of the seizure did not serve the seizure documents on the enforcement debtor or an adult member of the debtor’s household, an agency must serve the seizure documents on the debtor as soon after effecting seizure as is practicable. * **If notice of seizure not given to debtor or adult household member, debtor is deemed to have given notice of objection to seizure** * **(4)** Notwithstanding subsection (3), if an agency is unable to serve the seizure documents   + (a) on the enforcement debtor, or   + (b) on an adult member of the enforcement debtor’s household, * the instructing creditor may proceed in the same manner as if the enforcement debtor had been served with the seizure documents and had filed a notice of objection in respect of the seizure. |

**Where property is claimed by the ED or a 3P**

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| * Civil enforcement agency or an “interested party” may apply for directions * **5(1)**The Court may, on application by an interested party or an agency, give directions in respect of or determine any matter or issue that arises out of any civil enforcement proceedings. * (2)  On considering an application under this Act, the Court may do any one or more of the following:   + (a) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure compliance with this Act or to ensure protection of the interests of any person in property that is subject to civil enforcement proceedings;   + (b) give directions to any person regarding the exercise of that person’s rights or performance of that person’s functions or duties under this Act;   + (d) stay enforcement of rights provided in this Act;   + (i) except where this Act provides otherwise, make any other order or direction in respect of matters coming under this Act that the Court considers appropriate in the circumstances; * **NOTE: If debtor fails to serve objection to seizure within 15 days, might still apply to court under s. 5 requesting release from seizure – e.g. to claim an exemption** * Procedure of 3P (non-debtor) claim under Rules of Court * **Rule 6.62:** A third party may assert a claim to personal property that is seized by a civil enforcement agency by delivering a written claim to the agency * **See Rules 6.59 and 6.63** for procedure when claim is or is not disputed * **RoC shifts the onus to the enforcing creditor, so for a 3P would likely be a better process to use than the s. 5 application** |

## D. Release from Seizure or Sale of Property

**Release from Seizure**

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| Agency may release seizure of property on notice to ECs   * **Section 47**:   + If property has been under seizure for 45 days, the agency may give 15 days’ notice of their intention to release the property from seizure to all ECs   + Unless they have been directed to continue seizure in the 15-day period, the agency will release seizure * **Section 7**    + Before any seizure pursuant to writ proceedings is released or any garnishment is discontinued, a notice of the release or of the discontinuance must, at least 30 days before the date on which the seizure is to be released or the garnishment is to be discontinued, be served on ECs |

**Sale of Personal Property**

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| * **48**For the purposes of selling seized personal property, the following applies:   + (a) subject to clauses (h) and (i), property must not be sold until the period of time for serving on the agency a notice of objection with respect to the seizure of the property has expired; [*15 days from notice*]   + (b) subject to clause (a), an agency must sell the property as soon after being instructed to do so as is practicable;   + (c) the agency may delay the sale if it is commercially reasonable to do so;   + subject to this Part, **the agency may without an order of the Court sell the property by any commercially reasonable method**;   + (e)(h)(i) **agency must give 15 days’ notice of intended method of sale**, unless property is perishable or rapidly declining in value, or Court orders expeditious sale. |

## E. Title of the Buyer and the Rights of Secured Creditors

**Title of Buyer in Writ Proceedings**

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| * Buyer in writ proceedings buys property subject to any interests that have priority (unless consented to the sale) * Buyer takes clear of any interest subordinate to the writ * **48(j)** subject to section 34(2), when property is sold,   + (i) the buyer obtains only the interest in the property     - (A) of the enforcement debtor, and     - (B) of any other person with an interest in the property who has consented to the sale or disposition of the interest, and   + (ii) the sale of the property does not adversely affect the rights or interest of any other person in the property. *(Interests that have priority over the writ follow into the hands of the buyer)* * **34(2)**Where an interest in property is subordinate to a writ,   + (a) the property is subject to writ proceedings to the same extent that the property would have been if the subordinate interest did not exist, and   + (b) a person who acquires the property as a result of writ proceedings acquires the property free of the subordinate interest. |

**Rights of Secured Creditors**

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| * See *Alligator Group v Telalert Inc* |

*Alligator Group v Telalert Inc*

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| Ratio | Where goods are seized by an EC, and where the sale will be detrimental to the debtor and the secured creditors without any benefit to the execution creditor, a stay of the sale of seized goods will be granted |
| Facts | * Who Cares and Telalert both have a security interest in EDs ALLPAAP – registered * EC registers a writ in the PPR following the secured interests * Goods under seizure were worth less than the combined value of debts owed to the security interest |
| Issues | * What is the effect of a Notice of Objection to Seizure filed by secured creditors? (What procedure is available to secured creditors to assert a claim to property subject to seizure?) * What is the effect of a sale of seized property on secured creditors? * Can secured creditors stop a sale in the writ proceedings – i.e. are secured creditors entitled to a stay? |
| Decision | * Stay of proceedings granted, until the EC can show that sale would result in proceeds to them (order made under s. 5(2)(d)) |
| Reasoning | * Filing a notice of objection under s. 46 is only available to the ED * A secured creditor or other interested party may apply under s. 5 to the court for a determination of an issue arising from civil enforcement proceedings (onus on interested party to make out relief) |
| Notes | * The Court does not mention the RoC procedure, the parties could hae served a claim on the agency |

**Court can order sale of property with proceeds to be applied to discharge the secured claim**

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| * **Rule 6.64**   If a person claims to have a security interest in personal property that has been seized under civil enforcement proceedings, the Court may   + (a) order that the personal property be sold and the proceeds of the sale be applied to discharge the amount due to the claimant **if the sale and application of the proceeds of the sale are not disputed**,   + (b) order that sufficient money to answer the claim be paid into Court pending disposition of the claim, or   + (c) make any other order that the Court considers appropriate. |

## F. Invalidation of Proceedings due to Non-Compliance with Procedural Requirements

**Non-compliance with Procedural Requirements: Irregularities in Seizure**

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| * **13(2)** * (f) a seizure is valid notwithstanding any irregularity in the procedure by which it was carried out; * (g) notwithstanding clause (f), the Court may order a seizure to be discontinued where the Court is satisfied that a person has been or is likely to be prejudiced by an irregularity in the procedure by which the seizure was carried out; * Section 13 governs the way in which a bailiff may physically enter property to seize * **Does this apply to pre and post seizure requirements?** |

*Fort McMurray Housing v Royal Bank of Canada*

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| Ratio | **Section 13 only protects from non-compliance during the physical seizure stage**  Failure to give the debtor the opportunity to object to seizure will invalidate the sale of the property in those proceedings |
| Facts | * RBC seized ED’s mobile home pursuant to a registered PMSI * ED moves to Edmonton and puts the mobile home up for sale * Landlord then seizes mobile home by way of distress for unpaid rent (ED not served seizure docs by landlord) * Landlord initiates sale by soliciting tenders * ED received an offer for $21,000 – landlord refuses to discontinue proceedings to enable this sale to close * Landlord accepts a bid of $12,756 for purchase of mobile home |
| Issues | * Was seizure by the Landlord invalidated by the prior seizure effected by the secured party Bank? * What is the result of non-compliance with the provisions of the Act regarding notice of objection? |
| Decision | * Because the seizure and sale was not execute in accordance with the CEA, the sale by tender was invalid and therefore void |
| Reasoning | * Was seizure by the Landlord invalidated by the prior seizure effected by RBC?   + Court declines to decides as to whether property under seizure is “in custodia legis”; options: second seizure is of no legal effect, or is valid, but first to seize has priority   + CEA though – permits second seizure, the person who seized first implicitly has “control” of the civil enforcement proceedings unless consents to subsequent seizure * What is the result of non-compliance with the provisions of the Act re: notice of objections?   + “The bailiff was only allowed to proceed with the seizure under the terms of s. 45(4)(b), and was obligated to proceed as though Mr. Stolte had filed a notice of objection. With a notice of objection filed, the bailiff had no legal authority to offer the mobile home up for sale without the permission of the Court....The bailiffs had no authority to offer the mobile home for sale and no authority to effect a sale of the mobile home to any person who submitted a bid.” |
| Notes | * Under CEA, s. 104, ss. 45 and 46 apply to distress as if it were a seizure pursuant to writ proceedings * Likely that non-compliance of the act **would not** invalidate the proceedings in all cases |

**Possible Provisions Not Mentioned in Case**

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| * **2** The following applies with respect to the carrying out of civil enforcement proceedings:   + (g) all rights, duties and functions of creditors, agencies and bailiffs under this Act must be exercised or discharged in good faith and in a commercially reasonable manner; * **4**  A person who has suffered loss or damage as a result of another person’s failure to comply with this Act   + (a)   has a cause of action against that other person with respect to that failure, and   + (b) is entitled, if the Court or the Provincial Court finds that the person has suffered loss or damage, to a judgment for the damages suffered or $200, whichever is greater. |

## G. Special Seizure Mechanisms

### i. Property other than Securities

**Special Rules Overview**

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| * **Cash and Instruments – s. 50** * No special rules for seizure. Rules are provided for dealing with cash and instruments seized in writ proceedings. An agency may deal with an instrument to the same extent as the debtor. * **Agricultural products (as defined) – s. 52** * Crops may be seized while growing but not sold until harvested. * Agency may exercise enforcement debtor’s quota rights, marketing license, etc. * Rules provided for cost of harvesting - first priority in distribution of proceeds. * **Fixtures – s. 53** * Permits seizure and sale of a fixture where the enforcement debtor owns the fixture but not the land to which it is attached, provided that the writ has priority over interests held in the fixture as part of the land. * **Mobile homes – s. 55** * An order of the court must be obtained before seizure of a mobile home that is occupied, whether by the enforcement debtor or another person, in the event that possession is not given up to the enforcement agency voluntarily. |

**Serial Number Goods**

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| * **Personal Property Security Regulation** * **1(1)(y)** “**serial number goods**” means, (i) except in respect of a garage keeper’s lien, a motor vehicle, a trailer, a mobile home, a designated manufactured home, an aircraft, a boat or an outboard motor for a boat… * NOTE: “motor vehicle” has a specific definition * **CEA 54**   Serial number goods may be seized   + (a) in accordance with Part 5 *[i.e. by service or posting of seizure documents under s. 45 or by demand on a third person in possession pursuant to s. 44],* **or**   + (b) subject to the regulations, by     - (i) **registering in the Personal Property Registry** a notice of the seizure that identifies the goods by serial number, **and**     - (ii) **serving the seizure documents** on the enforcement debtor. * **CER s 8.1** The Registrar under the *Traffic Safety Act* may release motor vehicle information to agencies and bailiffs for the purpose of carrying out seizures.   **Seizure by registration must be justified (property not accessible, safety concerns, substantial savings)**   * **CER 8(3)**  A seizure of property shall not be conducted under section 54(b)(i) of the Act unless   + (a) a **bailiff has attempted** to effect the seizure under section 45 of the Act **and has failed** to do so     - (i) because the property to be seized is **not reasonably accessible** due to weather conditions or the location of the property, or     - (ii) because of **concerns respecting the safety of the property or of the bailiff**, * **or**   + (b) an agency has **reasonable grounds for believing** that     - (i) an attempt to **seize the property under section 45 of the Act would likely be unsuccessful** due to a reason referred to in clause (a), or     - (ii) **seizing the property under section 54**(b)(i) of the Act rather than section 45 of the Act **would likely result in a substantial saving** in the overall cost of the seizure proceedings. |

### ii. Securities

**Securities (Direct Holding System)**

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| * A share in a corporate “issuer” is a “security”. The provisions of the Act relating to securities refer to securities held directly by holders. * The common case is a share in a private or closely held corporation (i.e. a corporation the shares of which are not traded on a public exchange). * “Security” may also include other types of investment vehicles issued by a corporation directly to holders (e.g. bonds) – see definition below * Certificated security – security certificate is issued and delivered to shareholder or a person holding on the shareholder’s behalf * Uncertificated security – share ownership recorded on a share registry maintained by the issuer or a transfer agent.   **Security Transfer Act s. 1(1) – adopted by CEA s. 1(1)(nn.1)**   * (ff) “**security**” means, except as otherwise provided in sections 10 to 16, an **obligation of an issuer** or **a share**, participation **or other interest in an issuer** or in property or an enterprise of an issuer,   + (i) that is **represented by a security certificate** in bearer form or registered form, **or** **the transfer of which may be registered on books** **maintained for that purpose by or on behalf of the issuer**,   + (ii) that is one of a class or series, or by its terms is divisible into a class or series, of shares, participations, interests or obligations, and   + (iii) that     - (A) **is, or is of a type, dealt in or traded** on securities exchanges or securities markets, or     - (B) is a medium for investment and by its terms expressly provides that it is a security for the purposes of this Act |

**Security Entitlement (Indirect Holding System)**

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| * Broker and Investor do not hold securities. They hold “security entitlements”. The security entitlement owned by Investor = the rights of the entitlement holder against the securities intermediary with respect to the financial assets held in the securities account, as defined by the *Securities Transfer Act* Part 6.   **Securities Transfer Act – adopted by CEA s. 56(2)**   * **1(1)(hh)** “**security entitlement**” means the rights and property interest of an entitlement holder with respect to a financial asset that are specified in Part 6; * **Note:**  “Financial asset” as defined by the STA includes securities and other types of investment property that may be held in a securities account. A security entitlement may relate to any financial asset held in a security account. * Part 6 of the STA defines the rights of an entitlement holder as against the securities intermediary with whom the entitlement holder maintains the securities account. A security entitlement is the bundle of rights recognized in Part 6. |

**Seizure of Securities & Security Entitlements**

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| * **Civil Enforcement Act** * **57(1)** An agency may seize the interest of an enforcement debtor in a security or a security entitlement in accordance with sections 47 to 51 of the *Securities Transfer Act*. * **Securities Transfer Act** * **47** Subject to any necessary modifications for the purposes of permitting the operation of sections 48 to 51, the laws governing the civil enforcement of judgments apply to seizures described in those sections.   **Seizure of Securities**   * **Certificated securities: seizure of certificate** * **STA 48(1)**  Except as otherwise provided in subsection (2) and in section 51, the interest of a judgment debtor in a **certificated security** may be seized only by **actual seizure of the security certificate** by a civil enforcement agency. [And see *Canada Business Corporations Act* s 74 requiring possession of a security governed by that Act.] * **Uncertificated securities: notice to issuer** * **STA 49**   Except as otherwise provided in section 51, the interest of a judgment debtor in an **uncertificated security** may be seized only by a civil enforcement agency serving a **notice of seizure on the issuer** at the issuer’s chief executive office. * **Securities issued by an Alberta private company – certificated or uncertificated: notice to issuer (or, for certificated – seizure of certificate under STA s. 48(1))** * **CEA 57(2)** Notwithstanding section 48 of the *Securities Transfer Act*, an agency may seize the interest of an enforcement debtor in a **security issued by an Alberta private company** by serving a **notice of seizure on the issuer** at the issuer’s chief executive office * **CEA 56(1)** In this Division, “Alberta private company” means a corporation other than a distributing corporation with the meaning of the *Business Corporations Act*.   **Seizure of Security Entitlements CEA s. 57(1) incorporating STA**   * **Notice to Securities Intermediary** * **STA 50**Except as otherwise provided in section 51, the interest of a judgment debtor in a security entitlement may be seized only by a civil enforcement agency serving a **notice of seizure on the securities intermediary with whom the judgment debtor’s securities account is maintained.**   **Power of Civil Enforcement Agency on Seizure of Security or Security Entitlement**   * Agency assumes enforcement debtor’s right to deal with or dispose of the property under seizure; i.e. becomes the “appropriate person” for purposes of dealing with or disposing of the seized property – s 57.1(1) * Agency is authorized to exercise the rights of ED – s 57.1(2)   **Provision of Information & Payment of Dividends or Distributions**   * **Securities - s 58** obliges an Alberta private company that has been served with a notice of seizure regarding a security to provide the agency with information and pay to the agency any payments with respect to the security that would be payable to the enforcement debtor. * **Security entitlements - s 59** imposes similar obligations on a securities intermediary with respect to information and the payment of dividends, distributions and other payments where a security entitlement has been seized by service of notice of seizure on an intermediary whose jurisdiction is Alberta.   **Effect of Restriction on Disposition of Securities**   * A privately held corporation may preclude the transfer of shares except for in specific circumstances * **CEA** **61(1)**  An **agency may liquidate a seized security by any means that the nature of the security permits**. * **(2)**  **No restriction on the transfer of a security issued by an Alberta private company applies to the transfer of the security by an agency under this Act**. * **CEA 62** sets out a procedure for liquidation of securities issued by an Alberta private company designed to ensure that, insofar as possible, the sale procedure is consistent with the procedure that the enforcement debtor would be required to follow in order to sell the shares and that permits the issuer or other shareholders to acquire the shares. * **CEA 65** makes a transferee of a security from a civil enforcement agency subject to any shareholders’ agreement regarding the management of the company and the voting of shares if the enforcement debtor is precluded from transferring the shares except to a person who agrees to be party to the shareholders’ agreement (provided the transferee has knowledge of the agreement). |

## H. Exemptions

**Sources of Exemptions**

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| * Personal property listed in s. 88 (Part 10) + Civil Enforcement Regulation + other legislation * Personal property exemptions that are likely to arise in relation to garnishment   + Government support payments – CER s. 37(2)(b) – likely to be relevant in garnishment rather than seizure   + RRSPs and RDSPS     - s. 92.1 (Part 10) re: seizure or garnishment of corpus of plan     - s. 81.1 (Part 9) re: garnishment of payments out   + Employment earnings – garnishment - s. 81 (Part 9) and CER s. 39 * \*\*\***Exemptions are interpreted liberally in favour of the debtor** |

**Exemptions for Personal and Household Goods**

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| * **88**  Subject to section 89, the interest of an enforcement debtor in the following is exempt from writ proceedings:   + (a) the **food** required by the enforcement debtor and the enforcement debtor’s dependants during the next 12 months;   + (b) the **necessary clothing** of the enforcement debtor and the enforcement debtor’s dependants up to the value prescribed by the regulations **($4,000**);   + (c) **household furnishings and appliances** up to the value prescribed by the regulations **($4,000);**   + (d) one **motor vehicle** up to the value prescribed by the regulations **($5,000);**   + (e) **medical and dental aids** that are required by the enforcement debtor and the enforcement debtor’s dependants; * See **CER s. 37(1)** for exemption amounts |

**Exemption of Personal Property Used to Generate Income**

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| * **88**   Subject to section 89, the interest of an enforcement debtor in the following is exempt from writ proceedings:   + (h) **[Non-farmers]** in the case of an enforcement debtor whose primary occupation is not farming, **personal property** up to the value prescribed by the regulations that is **used by the enforcement debtor to earn income** from the enforcement debtor’s occupation **($10,000);**   + (i) **[Farmers]** in the case of an enforcement debtor whose primary occupation is farming, the **personal property that is necessary for the proper and efficient conduct of the enforcement debtor’s farming operations** for the next 12 months; **(no value limit)** |

**Exemptions in Other Legislation – Incorporated by Reference**

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| * **88** Subject to section 89, the interest of an enforcement debtor in the following is exempt from writ proceedings:   + (j) any property as prescribed by the regulations. * **Civil Enforcement Regulation** * 37(2)  In addition to the property referred to in section 88 of the Act, the following property is exempt from writ proceedings:   + (c) any property that is exempt from writ proceedings under another enactment in force in Alberta. |

**Procedure for Claiming Personal Property Exemptions**

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| * Bailiff makes preliminary assessment: s 45(1) provides that “all **exigible** personal property of an enforcement debtor is liable to seizure.” Bailiff should not seize property that is obviously exempt. * Notice of objection to seizure by ED → application by EC: s 46 provides that if ED serves notice of objection to seizure within 15 days of being served with seizure documents, personal property under seizure may not be sold without order of the court. EC (or agency) must apply for an order. * Application by ED after seizure (including after the time for service of notice of objection has expired): s 5(1) provides that “The Court may, on application by an interested party or an agency, give directions in respect of or determine any matter or issue that arises out of any civil enforcement proceedings.” |

**Time for Determination of Exemptions**

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| * **91**  On application to the Court to determine whether property is exempt, the Court must make its determination on the basis of the circumstances that exist   + (a) at the time of the seizure, in the case of personal property that has been seized, and |

**Enforcement Debtor’s Right of Selection Among Exempt Assets**

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| * **90**(1)  If   + (a) an enforcement debtor owns more than one item of a type of property for which there is an exemption under section 88, and   + (b) the total value of the items exceeds the maximum prescribed value of the exemption for that type of property, * the enforcement debtor may select the items, up to the maximum prescribed value of the exemption, that will be exempt. * (2)  If the enforcement debtor does not in a timely manner make a selection under subsection (1), the bailiff may select the items that are exempt. * Note: the Bailiff must act in good faith and in a commercially reasonable manner (s. 2(g)) |

**The Operation of Exemption in Bankruptcy**

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| * **Bankruptcy & Insolvency Act** * 67(1) The property of a bankrupt divisible among his creditors shall not comprise   + (b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, |

**Motor Vehicle Exemptions**

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| * **88**  Subject to section 89, the interest of an enforcement debtor in the following is exempt from writ proceedings:   + (d) one motor vehicle up to the value prescribed …($5,000);   + (h) in the case of an enforcement debtor whose primary occupation is not farming, personal property up to the value prescribed by the regulations that is used by the enforcement debtor to earn income from the enforcement debtor’s occupation ($10,000); * ***McWeld Maintenance v. McNutt*:** could claim under both (d) and (h) * ***Re Millar*:** a vehicle used by debtor for purposes of earning income from occupation could be claimed under (h) rather than (d) (a vehicle used to go to and from work is not expressly exempt, but could be rethought) |

**Claiming Exemptions in Jointly Owned Property**

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| * ***Re Heitman***: exemptions can be combined to claim double the limit * Likely only able to seize if both owners are debtors (joint ownership) |

**Exemptions for Farmers**

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| * ***Re Laughlin***: the language of “not assignable” does not create an exemption for agricultural stabilizaton payments under the governing legislation |

**Can the Property Worth More that the Max Exempt Amount be Sold in Writ Proceedings?**

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| * **89**(1) This section applies to property in which the enforcement debtor’s interest is exempt from writ proceedings up to a prescribed value, but it does not apply to property where other property of the same description has been selected for exemption under section 90. * (2)  Property to which this section applies may be sold in writ proceedings only if the proceeds of the sale exceed the total of any amounts **that would be payable** out of the proceeds in respect of the following:   + (a) money payable under section 96(4) ***= money payable to the holder of an interest that has priority over the writ.***   + (b) money payable to the enforcement debtor or a subordinate secured creditor or encumbrancer under section 98(1) ***= the amount for which the enforcement debtor may claim an exemption*** * Pay out first interest with priority, then the exemption, if money still money left over then can proceed with sale in writ proceedings |

**Proceeds of a Voluntary Sale of Exempt Property**

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| * **Proceeds of a voluntary sale of exempt property by Enforcement Debtor** * **CER 37(2)**  **In addition to the property referred to in section 88 of the Act, the following property is exempt from writ proceedings:**   + (a) where an enforcement debtor sells     - (i) exempt property, or     - (ii)property that is exempt up to a prescribed value, * the proceeds from that sale, or the proceeds from that sale up to the stated value, as the case may be, are exempt for a period of *60 days* from the day of the sale *if those proceeds are not intermingled* *with any other funds* of the enforcement debtor; * **RESULT:** $5,000 of the $20,000 proceeds of sale remain exempt for 60 days from date of sale if not intermingled. The remaining $15,000 may be seized or garnisheed * See *Re Thorne* |

*Re Thorne*

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| Ratio | Insurance proceeds fall within the language of the exemption  The date of the sale is the date on which the 60 days starts running |
| Facts | * Thorne had a vehicle that was written off because of an accident * There was a residual surplus of $5,946.20 |
| Issues | * Does CER s. 37(2) apply where an exempt asset has been destroyed and the enforcement debtor has received insurance proceeds? * When does the 60 day period contemplated by s. 37(2) start running? |
| Decision | * The insurance proceeds were subject to an exemption |
| Reasoning | * The decision of the insurer to declare the vehicle a write-off was to cause a sale of the vehicle to the insurers |
| Notes | * Not clear what would happen if there was a partial payment for damages to a vehicle, but not a complete write-off |

**Proceeds of an Involuntary Sale of Exempt Property in the Hands of a Distributing Authority**

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| * Proceeds of exempt property may be in the hands of an agency because of either:   + (1) Sale of the property in writ proceedings, or   + (2) If exempt property is subject to a security interest, sale of the property in proceedings by the secured party on the debtor’s default where the sale yields a surplus after satisfaction of the secured debt. * Intermingling rule still applies (s. 98(3)) * See Distribution |

**Exemptions Not Available**

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| * **93**  The exemptions set out in this Part do not apply to the following:   + (a) to an enforcement debtor that is not an individual (e.g. a corporation);   + (b) to partnership property;   + (c) **to writ proceedings on a judgment for the payment of maintenance or alimony;**   + (d) to property that the enforcement debtor has abandoned;   + (e) to writ proceedings on a money **judgment arising out of an act for which the enforcement debtor has been convicted of an offence** under the *Criminal Code* (Canada). * Criminal Offence: *R v W*    + Section 93 does not apply to other acts (in this case the *Teacher’s Pension Plan Act*)   + Exemptions for teacher’s pension was still available even though the ED was convicted of sexual assault, and the EC in the civil action was attempting to enforce judgment   + Could have it been brought under the CEA through CER s. 37(2) and CEA s. 88(j)? |

**Exemptions under the Indian Act**

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| * **89**(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band. * Result is that property is exempt only if:   + property of an Indian or a band   + situated on a reserve, and   + creditor claiming the property is not an Indian or a band (see *Alberta Worker’s Compensation Board) v. Enoch Band* and *Ferguson Gifford v Lax Kw’Alaams Indian Band* chapter 8) * Most issues arise in relation to the question of where property is situated. |

### I. Liability for Wrongful Seizure or Violation of the Act

**Procedural Error may not invalidate proceedings**

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| * May not invalidate proceedings, but bailiff/agency may still be liable for violation of statutory requirements in tort * **13(2)**   + (f) a seizure is valid notwithstanding any irregularity in the procedure by which it was carried out;   + (g) notwithstanding clause (f), the Court may order a seizure to be discontinued where the Court is satisfied that a person has been or is likely to be prejudiced by an irregularity in the procedure by which the seizure was carried out; * *Fort McMurray Housing* though: proceedings void for non-compliance with provisions requiring court order for sale where judgment debtor has not been served with seizure documents. |

**Statutory cause of action for failure to comply with Act (or regulations)**

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| * **4**A person who has suffered loss or damage as a result of another person’s failure to comply with this Act   + (a) has a cause of action against that other person with respect to that failure, an   + (b) is entitled, if the Court or the Provincial Court finds that the person has suffered loss or damage, to a judgment for the damages suffered or $200, whichever is greater. * **1(3)** A reference in this Act to “this Act” or “this enactment” includes a reference to the regulations made under this Act. * **Note:** A claim based on a statutory cause of action must be pursued by commencement of an independent action rather than by application to the court under the action giving rise to the claim. |

**What may constitute failure to comply with the Act**

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| * (1) Failure to perform a statutory duty or obligation or observe a procedural rule   + e.g. Bailiff seizes goods that are not property of the enforcement debtor. CEA s. 43(1) makes only “exigible personal property of an enforcement debtor” liable to seizure. Therefore the bailiff and the agency by whom he/she is employed may be liable for violation of the Act if the person whose property was seized has suffered loss or damage.   + e.g. Agency fails to serve seizure documents on ED after seizing goods and sells them without an order of the court. The property was exempt. The agency may be liable to ED for loss of the property.   + e.g. Bailiff uses authorized force to gain entry to premises in order to effect seizure but fails to leave the premises reasonably secure as required by s 13(3). Bailiff and agency may be liable for loss suffered by the owner of the premises or property located in the premises. * (2) Breach of statutory duty includes failure to act in good faith and in a commercially reasonable manner.   + **2**  The following applies with respect to the carrying out of civil enforcement proceedings:     - (g) all rights, duties and functions of **creditors, agencies and bailiffs** under this Act must be exercised or discharged in good faith and in a commercially reasonable manner;   + **48**   For the purposes of selling seized personal property, the following applies:     - (d) subject to this Part, the agency may without an order of the Court sell the property by any commercially reasonable method;   + e.g. Agency sells property without taking reasonable steps to obtain the best price. Agency may be liable for loss suffered by ED (difference between price obtained and price that should have been obtained). |

**Defence to Action by an ED for Violation of Statute: Consent or Waiver by ED**

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| * **2**  The following applies with respect to the carrying out of civil enforcement proceedings:   + (f) subject to clauses (h) and (i) and Part 2, anything done by an agency or a bailiff with the written consent of all interested persons is deemed to have been done in accordance with this Act;   + (h) any waiver by a debtor of any right or duty under this Act is void if it was given before the right or duty arose;   + (i) a waiver by a debtor of any exemption given by this Act is void; * **Indemnification of agency for liability arising from action taken**: Recall that an enforcement creditor may be obliged to provide indemnification to an agency but an indemnification agreement must not purport to exclude or restrict the agency’s liability for or indemnify an agency against **negligence or wilful misconduct** by the agency. See “4 Enforcement Agencies & Bailiffs” |

**Avoiding Liability by Seeking Direction of the Court**

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| * **(1) CEA s. 5** * **5(1)** The Court may, on application by an interested party or an agency, give directions in respect of or determine any matter or issue that arises out of any civil enforcement proceedings. * **(2)** On considering an application under this Act, the Court may do any one or more of the following:   + (a) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure compliance with this Act or to ensure protection of the interests of any person in property that is subject to civil enforcement proceedings;   + (b) give directions to any person regarding the exercise of that person’s rights or performance of that person’s functions or duties under this Act;   + (c) give directions respecting the carrying out of civil enforcement proceedings; * **(2) Interpleader application to determine ownership of property (RoC)** |

# 7. ENFORCEMENT AGAINST LAND

**Overview**

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| * Enforcement Creditor instructs civil enforcement agency to take action to enforce against exigible (non-exempt) property of the enforcement debtor. Creditor is the “instructing creditor.” * Civil enforcement agencies & bailiffs are authorized by statute and operate privately but subject to government supervision via the Sheriff - Civil Enforcement (distinguish sheriffs with authority over traffic enforcement, court security, prisoner transport) * No seizure step for land. Sale procedure conducted by the civil enforcement agency. * Proceedings are subject to the rights of secured creditors who hold security interests that have priority over writ – priorities determined largely by CEA. * (note: agencies also levy distress and seize property for purposes of enforcement of security interests). * Proceeds of enforcement measures are distributed by the agency according to CEA rules. |

## A. Procedure for Sale

**Sale of Land in Writ Proceedings: CEA Part 7**

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| * **67**  For the purposes of enforcing a writ,   + (a) **all land of the enforcement debtor that is under the *Land Titles Act* is liable to sale under this Part**, and   + (b) all land of the enforcement debtor that is not under the *Land Titles Act* is, subject to the enactments governing that land, liable     - (i) to sale, or     - (ii) to be otherwise dealt with, in accordance with the regulations. |

**Procedure for Enforcement against Land**

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| * **Registration of the writ:** Writ is registered in PPR **and** against title to land – “binds” under s.33(2) and entitles judgment creditor to initiate writ proceedings per s.26(b) * **Instruction to sell:** Enforcement Creditor instructs an agency to sell and provides documents or information required by the agency [s.68] * **Notice of intention to sell:** Agency gives notice of intention to sell to ED and others prescribed [s.70] and files a caveat against the certificate of title [CER s.46]   + Notice must be served by personal service on ED and every other registered owner [CER s. 35.07] * **Waiting period before land is offered for sale:** 180 day waiting period before land is offered for sale unless otherwise ordered by the Court (gives ED opportunity to claim an exemption or redeem the land by paying out the writ). The period may be shortened only if the Court is satisfied that the land is not exempt [s.72] * **Assertion of an exemption claim:** ED may claim an exemption for the land during the 180 day period but thereafter may not assert the exemption except with leave of the Court [s.73]   + ED who serves a written claim to exemption is presumed to be entitled to the exemption unless the Court orders otherwise (EC must apply for an order to sell).   + The exemption for a farmer’s principal residence (“homestead”) is house and farm land up to 160 acres [s.88(f)] – no value limit.   + An exemption is granted for a non-farm principal residence to maximum of $40,000 [s.88(g) & Regulation s.37(1)(e)] – or a fraction of that amount proportionate to ED’s ownership interest. * **Offering for sale:** The agency may offer the land for sale once the 180 day period expires. If an exemption claim has been made and accepted, the agency may (implicitly) sell only if the land is worth more than the exempt amount. * **Notice of method of sale and objections to sale:** 30 days before offering land for sale, agency serves notice of method of sale [s. 74]   + Agency may sell by any method of sale that is commercially reasonable. [s. 69]   + Notice of method of sale may or may not set out minimum sale price. [s. 74]   + If minimum price stated in the notice of method of sale, objection to sale at that price may be served within 30 days.     - If objection is served, the terms of sale must be approved by the Court.     - If no objection, the agency may complete the sale.   + If no minimum price stated, notice of the terms of the actual proposed sale must be given. Objection to proposed terms of sale may be served within 15 days.     - If objection is served, terms of sale must be approved by Court.     - If no objection, agency may complete the sale. * **Effect of agreement to sell:** A joint tenancy of land is severed when the agency has entered into an agreement to sell ED’s interest as joint tenant. [s. 76] * **Transfer to a buyer in the writ proceedings:** Agency may execute a transfer of title and must certify compliance with the Act. [s. 75] * **Title of the buyer:** The Registrar shall transfer ED’s interest free of all registered writs but subject to other encumbrances unless otherwise ordered by Court (i.e. application for Court order must be made by Agency, EC or Buyer). [s. 75]   + Buyer acquires ED’s interest in the property free of interests subordinate to the writ [s. 34(2)] but subject to interests having priority over writ [writ binds only property of ED – s. 33(2)]. * **Distribution of proceeds by the agency:**   + Agency must follow rules in Part 11.   + The exempt amount of proceeds must be paid out as provided in s 98.   + Agency must register reports of the sale and of the distribution of proceeds in the PPR within the prescribed period. [CER s. 47(3)] |

*Alex Cole Ltd v Wannet*

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| Ratio | Objection to price is the only objection recognized at this point (could not object based on an exemption)  Timelines important |
| Facts | * Agency serves Notice of Method of Sale with minimum price stated * ED gives notice of objection on grounds that:   + The land is her personal residence   + The land is exempt   + Payments are being made on the judgment   + The stated amount of the judgment is erroneous * Agency is unable to sell for the amount indicated on the first Notice so serves a second Notice of Method of Sale with lower minimum price stated (Notice served twice, to different addresses) * ED does not give notice of objection within 30 days * Agency enters an agreement to sell the land to Cole * Agency provides Registrar of Land Titles with a transfer of title and certificate of compliance with s. 74 of the Act as required by s. 75 |
| Issues | * Was ED’s notice of objection a valid notice of objection within s. 74? What grounds for objection are recognized? When may an ED assert a claim to an exemption? * If the agency violated the requirements of s. 74, was ED entitled to a reconveyance of the land from the purchaser? |
| Decision | * No recoveyance – Agency sold land in a manner authorized by the Act |
| Reasoning | * Objections to the first notice was not valid – the objection needed to be to the price * Second notice was validly served – Agency could process the sale |
| Notes |  |

**Objection to Sale**

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| * 74(1) At least 30 days before offering land for sale the agency must serve notice of the method of sale on the enforcement debtor and any other person specified by the regulations. * (2)  In addition to any information prescribed by the regulations, the notice of the method of sale **may** set out the minimum price for which the agency proposes to sell the land. * (3)  If the notice of the method of sale sets out the minimum price for which the agency proposes to sell the land, the following applies:   + (a) the notice must state that **any person who objects to the land being sold for the proposed minimum price must serve a notice of objection** on the agency within 30 days from the day of being served with notice of the method of sale;   + (b) if any person serves a notice of objection on the agency within the time mentioned in clause (a), the agency must not sell the land except on terms that are approved of by the Court;   + (c) if a notice of objection is not served on the agency within the time mentioned in clause (a), the agency may, without an order of the Court, complete the sale of the land for a price that equals or exceeds the proposed minimum price. |

## B. Title of the Buyer in Writ Proceedings

**Sections 34(2)(b) and 75(1)**

## C. Exemptions

**Principle Residence of the Enforcement Debtor**

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| * **88**   Subject to section 89, the interest of an enforcement debtor in the following is exempt from writ proceedings: * (f)in the case of an enforcement debtor whose primary occupation is farming, up to 160 acres of land if the enforcement debtor’s principal residence is located on that land and that land is part of that enforcement debtor’s farm; * (g) the principal residence of an enforcement debtor, including a residence that is a mobile home, up to the value prescribed by the regulations for that residence but if the enforcement debtor is a co-owner of the residence, the amount of the exemption allowed under this provision is reduced to an amount that is proportionate to the enforcement debtor’s ownership interest in the residence ($40,000); * **When is a person’s “primary occupation” farming for the purposes of the 160 acre exemption in s. 88(f)? – *Re Fuller, Kallenberger v Beck (Trustee of)***   + In *Fuller* his primary occupation was farming – so exempt (but under the older wording would not have been exempt: *bona fide* farmer whose “principal source of livelihood is farming”)   + In *Kallenberger* he intended to make farming his principle occupation, but this was never established – intention alone is not enough (need history and intention) * **When is a house a “principal residence” within the meaning of s. 88(g)?** * Actual residence at the date exemption is determined may not be required:   + ***Re Currie* (see *Re Knight*)**   + Actual occupation   + Temporary absence with realistic intention of resuming occupation   + Forced sale due to legal process (e.g. mortgage foreclosure, order for exclusive possession in favour of an alienated spouse)   + ***Re Knight***   + Residence has not been abandoned and is “home base” though debtor might not be in actual occupation and might have no realistic intention of resuming occupation. Consider reasons for the debtor’s absence.   + ***Re Hillmer***   + Where debtor has never resided in house as a principal residence, intention to assume occupation in the future is not grounds for the exemption.   + ***Re Snow***   + List of factors in determining whether an intention to return suffices to establish the exemption.   + The key question is whether the debtor had moved out temporarily with a long-term intention to return to live in the premises, and whether that intention has what might be described as a substantial "air of reality" by some corroborating factors.   + Factors:     - The reason for moving out     - Whether furniture or other personal items were left in the premises (suggesting intention to return)     - Whether the facts indicate that the person has abandoned the premises     - The length of time that the individual lived elsewhere     - Whether the individual did, in fact return to the premises     - If the person has not returned, why s/he has not done so * Onus is on the person claiming an exemption to establish grounds ***(Re Knight***)***.*** |

**Exemption for Proceeds of Voluntary Sale**

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| * **Civil Enforcement Regulation** * **37(2)**  In addition to the property referred to in section 88 of the Act, the following property is exempt from writ proceedings:   + (a) where an enforcement debtor sells     - (i) exempt property, or     - (ii) property that is exempt up to a prescribed value, * the proceeds from that sale, or the proceeds from that sale up to the stated value, as the case may be, are exempt for a period of 60 days from the day of the sale if those proceeds are not intermingled with any other funds of the enforcement debtor; * The “day of sale” for the purposes of this section: *Re Knight*   + The principle: “[I]n the context of s. 37(2) the day of sale occurs when the funds are available and the bankrupt (debtor) knows that they are available.”   + The purpose of the exemption is to allow the debtor to secure substitute exempt property * “Proceeds are not intermingled with any other funds of the enforcement debtor” within this section:   + *Re Dunbar*   + Proceeds from sale ($39,150) were intermingled with approximately $200   + RESULT: Proceeds of sale of the residence are not exempt. They were “intermingled with other funds of the enforcement debtor.” The bankrupts’ interest in the new home purchased using those funds was therefore available to the creditors in the bankruptcy. |

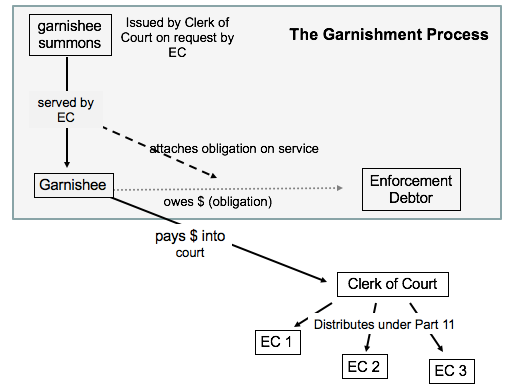
**Claiming the Principal Residence Exemption**

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| * **Where land is subject to writ proceedings, see:** * s 70 requires the agency to serve ED with notice of intention to sell. * s 72 provides that an agency shall not offer the land for sale until the expiry of 180 days from service of the notice of intention to sell (which may be extended by the court but not shortened unless the court is satisfied that the land is not exempt). * s 73(3) provides that if the ED does not claim the exemption within the 180 day period (or longer time as ordered by the court), the ED may not subsequently claim that the land is exempt without leave of the Court (may be obtained on application under s 5) * If an exemption claim is established but the property is worth more than the exempt amount, the agency may sell the property but must pay out the exempt portion of the proceeds of sale as provided in s 98   **The right to proceeds of exempt land sold in writ proceedings (Part 11)**   * **98(1)**  A distributing authority *[i.e. civil enforcement agency]* that receives money that is exempt or that represents the proceeds of exempt property must make the following payments from the money:   + (b) if there is no creditor to whom clause (a) applies,\* **pay the prescribed amount of the exemption to the enforcement debtor** * **(3)**  Except where money that is paid to an enforcement debtor under subsection (1) is intermingled with other funds of the enforcement debtor, any money that is paid to an enforcement debtor under subsection (1), including any deposit account into which it is paid, is exempt for a period of 60 days from the day that the money is paid to the enforcement debtor. * \*NOTE: clause (a) requires that the proceeds of exempt property be paid to the holder of a security interest that is subordinate to the writ (secured parties are not affected by exemptions law) or to an enforcement creditor against whom the exemption does not apply, if such an interest or enforcement creditor exists.   **where proceeds of exempt land bound by a writ are generated by mortgage foreclosure proceedings, see *Wells Fargo Financial Corp Canada v. Taylor***   * An enforcement debtor's right to a principal residence exemption would exist in foreclosure sales * The 60-day period starts when the funds are paid into Court * Where property is sold in distress proceedings, any amount in excess of security interest shall be paid to an agency (s. 96(2)) |

# 8. GARNISHMENT

**Overview**

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| * Garnishee summons issued by clerk of court on request of enforcement creditor. Creditor is the “instructing creditor”. * Summons operates only in relation to intangible property – i.e. current and future “obligations” owed to the enforcement debtor (monetary obligations in the form of e.g. bank accounts, wages, accounts receivable, other). * Summons served by enforcement creditor on “garnishee” (person who owes money to the enforcement debtor) – is required to pay money owed enforcement debtor into court. * Proceedings are subject to the rights of secured creditors who hold security interests in the intangible property attached by the garnishee summons if their security interests have priority over writ – priorities determined largely by CEA. * Funds in court distributed by clerk of court according to CEA rules. |



## A. Scope and Procedure

**CEA Part 8**

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| * **CEA 78**For the purpose of enforcing a writ by means of garnishment, the following applies:   + (e) a garnishee summons attaches the garnished obligation when the garnishee summons is served on the garnishee; * **CEA 77(1)(e)** “garnishee” means a person on whom a garnishee summons is served for the purposes of attaching an obligation that is owed or may become owing by that person to an enforcement debtor; |

**Pre-judgment Garnishment under Attachment Order**

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| * **17**(3)  In granting an attachment order, the Court may do one or more of the following:   + (e) authorize the clerk to issue a garnishee summons; * (7)  For the purposes of an order made under subsection (3), the following applies:   + (a) if the clerk is authorized to issue a garnishee summons, Part 8, with any necessary modification, applies to that garnishment; * NOTE: Recall *Cameron v Aecometric Corp* in Chapter 3, suggesting that an attachment order garnishee summons expires in accordance with the Part 8 rules, not at the date the attachment order expires. |

**What is the Garnishee Summons Issued For?**

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| * **Garnishee summons issued by clerk of the court (see CER s 35.21(1)) for the amount of all related writs + any amount specified in an attachment order** * **CER s 35.21(2)** When the creditor has complied with this section, the clerk shall issue a garnishee summons in Form 11 in Schedule 4 for the **amount of all relevant claims** * **CER s 35.19**   In this Part   + (a) “**amount of all relevant claims**” means the total of     - (i) the **amount outstanding on all related writs** that are in force against the debtor, **and**     - (ii) where a garnishee summons is authorized by an attachment order, the **amount authorized to be attached** in respect of the prejudgment claimant’s claim; * **CEA 1(1) (mm) “related writ”** means   + (i) in respect of a particular enforcement debtor, a writ that would be disclosed if a distribution seizure search was conducted of the Personal Property Registry using the **name of that debtor as shown on the instructing creditor’s writ**, and   + (ii) in respect of a defendant under Part 3, a writ that would be disclosed if a distribution seizure search was conducted of the Personal Property Registry using the **name of that defendant as shown on the attachment order**; |

**What can be attached?**

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| * Current and future obligations * **CEA 78**For the purpose of enforcing a writ by means of garnishment, the following applies:   + (a) except as otherwise provided by this or any other enactment, any **current obligation** or **future obligation** is attachable by garnishment; * **CEA s. 1(1)(i) “obligation”** means a legal or equitable duty to pay money; * **CER s 35.21(3)**  A garnishee summons is deemed to be issued against any current obligation or future obligation **of the type indicated in the garnishee summons** as being owed by the garnishee to the debtor. * **See Form 11** – The creditor intends to garnish the debtor’s (check one)   + employment earnings   + deposit accounts   + money owing from other sources * **CEA s. 77(1)(b) “employment earnings”** means wages, salary, commissions or remuneration for work by an individual however computed. * **1(1)(l) “deposit account”** means a chequing, savings, demand or similar account at a … deposit-taking financial institution in Alberta, but does not include an account or arrangement under which money is deposited for a fixed term whether or not the term may be abridged, extended or renewed. |

**Current Obligation**

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| * An obligation that is immediately payable on day of service * **77(1)(a) “current obligation”** means an obligation, or any portion of an obligation, that on the day of service of a garnishee summons on the garnishee   + (i) is payable,   + (ii) is payable on demand, or   + (iii) is payable on satisfaction of a condition to which section 83(1) applies; |

**Future Obligation**

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| * Obligation that will arise or become payable in the future by virtue of an existing fact or relationship * **77(1)(c) “future obligation”** means an obligation or any portion of an obligation that is not a current obligation and that   + (i) will **arise or become payable** in **certain** circumstances or at a **certain** time or times under     - (A) an **existing** agreement or trust,     - (B) an issued security, or     - (C) the will of a deceased person,   + (ii) will arise or become payable in the ordinary course of events from an **existing** employment relationship,   + (iii) is a statutory obligation that is likely to arise or become payable as a result of an **event that has occurred**, or   + (iv) may arise or become payable in respect of an existing cause of action; * Note expiry date of summons (s. 79) – 2 years from which the date of the summons was issued, or for “deposit accounts” 60 days * **“Existing” state of affairs or event determined at date of service of summons, but includes renewal or amendment of an existing agreement** * **77(2)** For the purposes of subsection (1)(c),   + (a) a reference to an existing state of affairs or to an event that has taken place refers to a state of affairs or event that is existing or that has taken place **when the relevant garnishee summons is served** on the garnishee,   + and   + (b) a **reference to an existing agreement includes an agreement that amends or replaces an agreement that was existing** when the relevant garnishee summons was served on the garnishee. * **When does a garnishee summons attach to a future obligation?** * **CEA 78**For the purpose of enforcing a writ by means of garnishment, the following applies:   + (e) a garnishee summons attaches the garnished obligation when the garnishee summons is served on the garnishee; |

**Garnishment of “Deposit Accounts” (banking accounts other than term deposits)**

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| * **1(1)(l) “deposit account”** means a chequing, savings, demand or similar account at a … deposit-taking financial institution in Alberta, but does not include an account or arrangement under which money is deposited for a fixed term whether or not the term may be abridged, extended or renewed. * THEREFORE, any provision that applies to a “deposit account” does not apply to a term deposit * A deposit account payable on demand or on presentation of a passbook or other formal mechanism is a “current obligation” * **77(1)(a) “current obligation”** *[includes an obligation that is payable on demand or one falling within s. 83(1)]* * **83(1)** For the purposes of determining whether a **deposit account obligation** has arisen or is payable, a condition of the account agreement   + (a) that the account holder must apply in person to make or give notice before making a withdrawal, or   + (b) that any person making a withdrawal must present a pass-book or other document to the garnishee, * is to be disregarded for the purposes of this Part. |

**Garnishment of Term Deposits**

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| * Is not a “deposit account” but is subject to garnishment as a “future obligation” * **77(1)(c) “future obligation”** means an obligation or any portion of an obligation that is not a current obligation and that   + (i) will **arise or become payable** in **certain** circumstances or at a **certain** time or times under     - (A) an **existing** agreement… * The garnishee summons is subject to general rules including rules that apply to a “joint entitlement”, but not subject to rules that apply to a “deposit account” or “joint deposit account”. * Check-off box on form of summons (Form 11) should indicate “money owing from other sources” rather than “deposit account”. |

**How long is summons in effect?**

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| * 2 years from issuance, or for “deposit account”, 60 days * **79(1)** Subject to subsection (2), a garnishee summons expires **two years** from the day on which it was issued. *[includes term deposits]* * **(2)** Subject to section 83(2), where a garnishee summons is issued in respect of a **deposit account**, the garnishee summons expires **60 days** from the day on which it was issued. * **(3)** A garnishee summons remains in effect until the earliest of the following occurs:   + (a) the garnishee summons expires;   + (b) the garnishee pays the garnishee summons amounts to the clerk who issued the garnishee summons;   + (c) the enforcement creditor notifies the garnishee that the garnishee summons is no longer in effect;   + (d) the garnishment proceedings are terminated by order of the Court.   **Garnishee Summons Can be Renewed**   * By issuance of renewal statement * **CER s 35.28** * (1) Does not apply to a summons issued against a deposit account *[but “deposit account” does not include a term deposit]* or joint account *[i.e. cannot be renewed – new summons must be issued and served]* * (2) Instructing creditor may require clerk to issue a renewal statement within 60 days before expiry of current summons * (3) If renewal statement is served on garnishee before expiry of current summons the summons is renewed for 2 years * (4) Renewal statement is void if not served before expiry of current summons * (5) No limit on number of renewals |

**Garnishment of Joint Entitlements (includes joint deposits and joint term deposits)**

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| * **77(1)(g) “joint entitlement”** means an obligation that is or will be owed to 2 or more persons jointly. * **78**For the purpose of enforcing a writ by means of garnishment, the following applies:   + (g) where a **joint entitlement** is owed to an enforcement debtor and any other person, a garnishee summons may be issued against that joint entitlement; * **82**   For the purposes of **garnishing a joint entitlement** in which an enforcement debtor has an interest, the following applies:   + (d) where a joint entitlement is owed to an enforcement debtor and any other person, it is **presumed** for the purposes of this Part that, subject to clauses (e), (f) and (g**), an equal portion of the joint entitlement is owed to each joint owner**;   + (e) if, on an **ex parte application** by an enforcement creditor, it appears to the Court that the **enforcement debtor may be beneficially entitled to a larger portion of the joint entitlement than is presumed** under clause (d), the Court may require the garnishee to pay the larger portion to the clerk;   + (g) on the application of any interested person, the **Court may determine the actual beneficial interest of each joint obligee**; * **BUT, summons attaching to a joint deposit account only attaches current obligations (i.e. not future amounts deposited after service of summons)** * **83(2)** A garnishee summons that attaches a joint deposit account only attaches the portion of the joint entitlement that is a current obligation |

**Obligations of Garnishee**

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| * **CEA 78**   For the purpose of enforcing a writ by means of garnishment, the following applies:   + (k) money that is attached by a garnishee summons must, subject to this Act, be paid into Court by the garnishee * **CER s 35.23 Except in relation to garnishment of employment earnings:** * **(2) Garnishee must, within 15 days of being served**   + (a) If able, serve a copy of the summons on the debtor   + (b) Deliver the garnishee’s response (as per subsection (5) – includes the amount of a current obligation attached by the summons and the amount paid into court, information regarding future obligations, grounds for disputing an obligation, other)   + (c) Pay to the clerk the lesser of the amount outstanding on the summons or the amount of any current obligation (less a $10 compensation fee) * **(3)** **Where a future obligation attached by a summons becomes payable garnishee must immediately**   + (a) Deliver the garnishee’s response indicating the amount payable and amount being paid to the clerk and   + (b) Pay to the clerk the lesser of the amount outstanding on the summons and the amount of the obligation that has become payable * If a future obligation falls outside of the 2 years (expiry) – then could apply for an order from the Court (s. 5)   **Obligation owed by garnishee is discharged by payment into court (ED cannot sue garnishee for payment)**   * **78**For the purpose of enforcing a writ by means of garnishment, the following applies:   + (h) a payment made by a garnishee in accordance with this Part or on a judgment granted under section 84 discharges the garnishee, to the extent of the payment, as against the enforcement debtor; |

**Special Rules for Garnishment of Employment Earnings**

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| * **CER s. 35.25** * (1) Garnishee summons only attaches amounts earned within a pay period if served   + where pay period is 10 days or less, at least 5 days before the end of the pay period   + where pay period is more than 10 days, at least 10 days before the end of the pay period   + (Once served, summons continues to attach earnings in future pay periods.) * (2) Garnishee must, within 15 days of being served, serve summons on debtor (if possible) and deliver a written response with information regarding the existence of the employment and manner of payment of earnings * (4) Garnishee must pay the amount of the debtor’s employment earnings for the month that are attached by the summons into court within 5 days of the end of the debtor’s last pay period in the month, less garnishee’s compensation of $10 * OR * (5) If the pay period is less than one month, garnishee *may* pay within 5 days of the end of each pay period * NOTE: The amount of employment earnings payable to the clerk must be calculated taking into account the employment earnings exemption * **Employment Standards Code: ED may not be fired due to garnishment of employment earnings** * **124**  No employer or other person may suspend, lay off or terminate an employee for the sole reason that garnishment proceedings are being or may be taken against the employee. |

**Garnishee may exercise right of set-off as provided**

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| * **78** For the purpose of enforcing a writ by means of garnishment, the following applies * (i) **a garnishee is entitled to a set-off** to which the garnishee would have been entitled in the absence of garnishment proceedings if   + (i) the right to the set-off already existed when the garnishee summons was served on the garnishee,   + (ii) the right to the set-off arose after the garnishee summons was served on the garnishee but the set-off arose in consequence of an obligation entered into by the garnishee prior to service of the garnishee summons, or   + (iii) it would be inequitable not to allow the set-off; (say liable in tort for undetermined amount) |

**If Garnishee Fails to Pay into Court**

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| * May be subject to judgment for the amount of the summons (or lesser amount) or may be liable for other non-compliance with statutory requirements * **84(1)**  Where a garnishee   + (a) does not comply with any requirement of this Part, the Court may grant appropriate relief on the application of an enforcement creditor,   + or   + (b) has failed to pay money to the clerk in accordance with this Part, **the Court may grant judgment against the garnishee** **for the amount of the garnishee summons or a lesser amount** as the Court considers appropriate in the circumstances. * **(2)**   A judgment granted under subsection (1)(b) may be in the name of the creditor making the application but the **judgment is for the benefit of all the enforcement creditors who would have shared** in the distribution if the money had been paid to the clerk in accordance with this Part. |

**Effect of Successive Garnishee Summons**

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| * **78** For the purpose of enforcing a writ by means of garnishment, the following applies:   + (d) subject to the regulations, if a garnishee summons is in effect and another garnishee summons is issued against the same obligation, that subsequent garnishee summons is of no effect; |

**Distribution by the Clerk**

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| * **Distribution pursuant to garnishment to enforce a writ - see Part 11 of Act:** * Any amount received by a “distributing authority” constitutes a distributable fund. The Clerk is a “distributing authority.” * **Distribution pursuant to prejudgment garnishment:** * **CER s 35.27** (1) The clerk shall pay out money that is paid into Court pursuant to a prejudgment garnishee summons only as directed by the Court or as provided by this section. * (2) Except as otherwise ordered by the Court, the money or the portion of the money referred to in subsection (1) necessary to satisfy any related writ that is in force against the debtor constitutes a distributable fund for the purpose of Part 11 of the Civil Enforcement Act when   + (a) the clerk is satisfied that there is a related writ in force against the debtor… * **CEA s 24(2)** On application the Court may…order…   + (b) that money realized through writ proceedings against property that is the subject of an attachment order not be distributed until the attachment order terminates. |

*Trans Canada Credit Corp v Jarvis*

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| Ratio | If layoff is for less than 60 days, then ongoing employment. If it is more than 60 days, look at the surrounding circumstances |
| Facts | * January 1997 - Trans Canada serves garnishee summons on Cobra re: ED (summons issued by clerk of QB in Grand Prairie) Cobra responds that **ED not employed at that time** * April 1997 - Avco serves garnishee summons on Cobra re: ED (summons issued by clerk of QB in Peace River) * May 1997 - Cobra pays $200 into Court in Peace River (under Avco garnishee) & clerk distributes the entire sum to Avco * August – September - Further payments are made into Court in Peace River (under Avco September garnishee) |
| Issues | * Is Trans Canada’s garnishee in effect in relation to the funds paid into court in August-September (s. 78)? Were the wages earned by ED after he was re-hired in August a “current or future obligation” attached by the Trans Canada summons? |
| Decision | * Avco was entitled to the garnishmen wages it received |
| Reasoning | * A temporary layoff without termination of employment contract is possible, but only in limited circumstances * In general, a layoff for more than 60 days terminates an employement and the employer must pay termination pay (Employment Standards Code) |
| Notes | * **78** For the purpose of enforcing a writ by means of garnishment, the following applies:   + (d) subject to the regulations, if a garnishee summons is in effect and another garnishee summons is issued against the same obligation, that subsequent garnishee summons is of no effect; |

*Bank of Montreal v Tchir*

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| Ratio | Liability of garnishee for failure to pay money into Court – definition of employment earnings is broad |
| Facts | * Telus did not remit severance pay as part of the garnishee summons * On Form 11 “employment earnings” was checked off * Telus contended that severance pay was “money owing from other sources” and not “employment earnings” |
| Issues | * Whether severance pay is included in the definition of “employment earnings” |
| Decision | * Severance pay was included in “employment earnings” |
| Reasoning | * Speaking generally, one should experience no difficulty including in the definition of salary, wages and other remuneration virtually all benefits accruing to employees * Severance pay reflects an obligation of the employer to the employee arising from the employment relationship - It was remuneration for work provided. |
| Notes | * **84(1)**  Where a garnishee   + has failed to pay money to the clerk in accordance with this Part, the Court may grant judgment against the garnishee for the amount of the garnishee summons or a lesser amount as the Court considers appropriate in the circumstances. * If any doubts that it is “employment earnings” should also check the “money owing from other sources” box |

*Wayfarer Holidays Ltd. v Barcelo*

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| Ratio | Courts have an equitable discretion to stay garnishee proceedings if there is risk of double payment |
| Facts | * Both Sunquest and Canadian have been advised by representatives of the Bavaro Beach Hotel, if the funds are paid pursuant to the notice of garnishment and are not forwarded to ITASA, the hotel will not honour reservations of Sunquest and Canadian travellers upon their arrival in the Dominican Republic. * Canadian deposed it cannot pay the disputed moneys into court or to the sheriff and at the same time protect the interests of its clients * Sunquest also deposed it must make the required payments to protect its vacationers |
| Issues | * Does the court have a discretion to stay garnishee proceedings on equitable grounds? * On what basis might the court exercise the discretion? |
| Decision | * No order for garnishment shall issue because of the real and substantial risk of double payment by the garnishees |
| Reasoning | * A garnishee ought not to be placed in double jeopardy so that the garnishee is at risk of having to pay the same debt twice * The risk of double payment must be a real risk and not a speculative or theoretical hazard * On the material before me, the risk of double payment is real and substantial. |
| Notes | * Double jeopardy for two reasons – one, would pay twice so clients could stay in the hotel, two, would potentially be subject to litigation in Dominican Republic * In AB – s. 5 |

*Re Sunstar Mfg Inc*

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| Ratio | Money paid under mistake of fact is recoverable |
| Facts | * April – EC Weatherford issues garnishee summons for bank accounts of ED with CIBC * April 25 – CIBC served with garnishee summons * May 1 - $25,000 cheque payable to ED credited to account; CIBC sets off $426.89 overdraft & debits account for balance of $24,573.11 to satisfy summons; Cheque returned to CIBC with “stop payment” notice * May 8 – CIBC pays $24,573.11 into court pursuant to summons |
| Issues | * Can money paid into court on the basis of a mistake in fact be recovered by the garnishee? * What are the obligations of a garnishee with respect to an account created by the deposit of a cheque? Does the deposit create a current or future obligation? |
| Decision | * Money directed to be returned to CIBC |
| Reasoning | * General principle: “Money that is paid under a mistake of fact is recoverable provided the payer did not intend the payee to have the money in any event, the money was not paid for good consideration and the payee has not in good faith changed his position.” |
| Notes | * Reality: CIBC never actually got paid the money |

## B. Exemptions and Other Obstacles to Garnishment

**Garnishment Proceedings involving the Crown**

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| * The doctrine of Crown Immunity from legal process * Judicial process may not be asserted against the Crown unless explicitly permitted by legislation. Therefore ,obligations owed by the Crown are not subject to garnishment. * There is special legislation that allows for garnishment of civil servant’s wages (*Civil Service Garnishee Act* and *Garnishment, Attachment and Pension Diversion Act*) – nothing that allows for garnishment of an MLA * Doctrine may be circumvented by a properly drafted order of the court appointing a receiver of payments due to an ED from the Crown.   + All the order does is to make valid any payment the Crown makes to the receiver and entitle the receiver to give a valid receipt on behalf of the (person to whom the payment is owed). (*Martin v Martin*)   + Language cannot be used that requires the Crown to deliver funds to the receiver (*Daniels v Daniels*) * Can likely get around using CEA s. 37(2)(b) **– Exemption for provincial government support payments** * **CER s. 37(2)**  In addition to the property referred to in section 88 of the Act, the following property is exempt from writ proceedings   + (b) any payment made to an enforcement debtor that is     - (i) an income support payment paid under the *Income and Employment Supports Act*,     - (ii) a handicap benefit paid under the *Assured Income for the Severely Handicapped Act*, or     - (iii)    a widow’s pension paid under the *Widows’ Pension Act*,   + **if the proceeds from the payment are not intermingled with any other funds of the enforcement debtor**;   *Quebec (AG) v Canada (Human Resources and Social Development)*   * Constitutional doctrine of paramountcy applied to an RTP issued under the *Employment Insurance Act* (i.e. not the doctrine of Crown immunity). Provincial exemptions do not operate. * But enforcement of federal claims as a judgment of the federal court is subject to provincial law including exemptions rule (*obiter*).   *Re Mutter*   * Relied on SCC decision in *Quebec v Canada* for the view that provincial exemptions do not bind the federal Crown unless they are specifically incorporated in federal legislation. Is the Supreme Court decision authority for that view? |

**Enforcement against funds held in Court to the credit of an ED**

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| *HSBC Canada v 410086 Alberta Ltd*   * The clerk does not owe a debt to the ED so is not subject to garnishment * Same reasoning applies to an RTP under federal legislation   Could you get money out of court some other way?   * Appoint a receiver to receive payment of funds * Get an order for the Clerk to distribute the funds under the CEA |

**Statutory Exemption from Garnishment**

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| * **Employment earnings** – CEA Part 8 ss. 81, 83(3), CER ss. 39, 40 * **Investments**   + Income Tax Act RRSPs, RRIPs, DPSPs – CEA Part 8 ss. 81.1, 83(3.1), Part 10 s. 92.1, CER ss. 40.1 – 40.2   + Life insurance policies and insured annuities – *Insurance Act* ss. 554, 555, 580 * **Pensions** – *Employment Pensions Plan Act* s. 85 and other legislation dealing with pensions for specific groups – e.g. *Teachers Pension Plan Act* * **Government support payments** – CEA Part 10 s. 88(j), CER s. 37(2)(b) * **Property (including obligations) located on reserve** – *Indian Act* s. 89 * **Expenses for maintenance of property and performance of contracts that produce a future payment subject to garnishment** – CEA Part 8 s. 80 * **\* Note** that most exemptions that are likely to be relevant to garnishment are in Part 8 (Garnishment) but some are in Part 10 (Exemptions) and some are in other legislation. |

**Employment Earnings Exemption**

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| * **77(1)** In this Part,   + (b) “**employment earnings**” means wages, salary, commissions or remuneration for work by an individual however computed. * [See *Bank of Montreal v Tchir*] * **Garnishee summons attaches only the amount of employment earnings that is not exempt** * **81(1)**  For the purposes of garnishing an enforcement debtor’s **employment earnings** from the enforcement debtor’s employer, the following applies: * (a) in any month during which a garnishee summons is in effect, the garnishee summons attaches the amount, if any, by which an enforcement debtor’s **net pay** for the month **exceeds** the employment debtor’s **actual** **employment earnings exemption** for the month;   Formula: **ATTACHED AMOUNT = NET PAY minus ACTUAL EMPLOYMENT EARNINGS EXEMPTION**   * **77(1) (h) “net pay”** means earnings payable in a month minus any prescribed deductions. Deductions prescribed by CER s. 39(1) are income tax, Canada Pension Plan contributions and employment insurance contributions. * **81(1)** Provides a formula. Actual employment earnings exemption = the minimum amount prescribed by the regulations + half of net pay above the minimum up to the maximum prescribed by the regulations (half the difference between the net pay and the minimum exemption) * **CER 39(2)** provides that the minimum amount of exemption = $800 + $200 per dependent. The maximum amount of exemption = $2400 + $200 per dependent. * **CER 36(1)** “dependent” includes spouse, adult interdependent partner, child under 18, relatives of ED or spouse who are financially dependent due to mental or physical infirmity or any person deemed by court to be financially dependent on ED   **Where income varies in amount or is from multiple sources**   * **81(1)** For the purposes of garnishing an enforcement debtor’s employment earnings from the enforcement debtor’s employer, the following applies:   + (g) if the **enforcement debtor earns employment income from more than one source**, the Court on application may reduce or eliminate the enforcement debtor’s actual exemption that is applicable to any source of employment income;   + (h) if an enforcement debtor’s employment **earnings from a particular source vary substantially** **between months** by reason that the enforcement debtor is paid     - (i) at intervals in excess of one month,     - (ii) at irregular intervals, or     - (iii)in irregular amounts,     - the Court on application may increase the minimum or maximum exemption for any particular month, so that the enforcement debtor’s total exemptions over the course of the garnishment proceedings will approximate what they would have been if the enforcement debtor’s employment earnings had been uniformly distributed over the relevant months;   **Orders adjusting amount of minimum or maximum exemption**   * **CER 39(3)** The Court, on application, may modify the minimum or maximum employment earnings exemption to which an enforcement debtor is entitled. * **(4)**  In considering an application under subsection (3), the Court should take into consideration **at least** the following:   + (a) the family responsibilities of the enforcement debtor;   + (b) the personal circumstances of the enforcement debtor;   + (c) the conduct of the enforcement debtor in the carrying out of the enforcement debtor’s financial affairs;   + (d)the earnings of the enforcement debtor’s dependants. * See *Fruh v Mair*   **EE Exemption for garnishment of employment earnings deposited directly into an account**   * **83(3)** Where the employment earnings of an enforcement debtor are paid directly into a deposit account by or on behalf of the enforcement debtor’s employer, the enforcement debtor may apply to the Court for an order directing that the enforcement debtor be entitled to an employment earnings exemption similar to that which the enforcement debtor would have been entitled to if the employment earnings had been garnished from the employer * Entitled to exemption for accounts holding employment earnings (cannot just garnish bank account)   **Special provisions for enforcement of family support orders**   * **81(1)** For the purposes of garnishing an enforcement debtor’s employment earnings from the enforcement debtor’s employer, the following applies:   + (j) the portion of an enforcement debtor’s employment earnings that is exempt from garnishment and the portion that is attached by a garnishee summons issued in respect of a judgment for the payment of support, maintenance or alimony must be determined in accordance with the *Maintenance Enforcement Act*; |

*Fruh v Mair*

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| Ratio | The courts have discretion in calculating the employment earnings exemption |
| Facts | * The EC had an incredibly difficult time enforcing their judgment against the ED |
| Issues | * Whether the exemptions can be reduced so the EC will be paid in a more timely manner |
| Decision | * Exemption fixed at $1,300 per month |
| Reasoning | * Other matters the court may consider on an application under C.E.R. s. 39(3) and (4) include:   + (a) Whether there are other exigible assets available to the judgment creditor to realize on, in addition to, or in place of garnishment;   + (b) How the debt arose;   + (c) Whether the enforcement debtor has made any reasonable proposal for the repayment of the debt;   + (d) Any extraordinary expenses required for the maintenance, education and well-being of children including: medical, dental, orthodontic and optometric expenses;   + (e) Special expenses required to maintain “dependents”. |
| Notes | * Court seems to be considering how the debts arose, and the ED’s unwillingness to pay (not taking into consideration the purpose of the exemptions) |

**Garnishment of Investments**

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| **Exemption of investment in a “registered plan” (RRSP, RRIP, DPSP) or “registered disability savings plan” and payments out of “registered disability savings plan”** – CEA s. 92.1   * “registered plan” means plans as defined by *Income Tax Act*:   + RRSP = registered retirement savings plan   + RRIP = registered retirement investment plan   + DPSP = deferred profit sharing plan * And “registered disability savings plan” means plan as defined by *Income Tax Act* * **Exemption of investment in a registered plan (RRSP, RRIP, DPSP)** * **92.1(2)** Property in a registered plan, including any current obligation or future obligation under the plan, is exempt from any enforcement process, but a payment out of a registered plan to a plan holder is not exempt. (but see s. 81.1 in Part 8) * **Exemption of investment *and* payments out for registered disability savings plan** * **92.1(3)** Property in a registered disability savings plan, including any current obligation or future obligation under the plan and any payments out of a registered disability savings plan to a plan holder are exempt from any enforcement process.   **Registered Plan Payment Exemption**   * **CEA s. 81.1 - exemption for payments out of RRSPs, RRIFs and DPSPs – applies only to garnishment** * **81.1(2)**  The Lieutenant Governor in Council may make regulations respecting the garnishing of an enforcement debtor’s **registered plan payments**, including, without limitation, regulations respecting   + (a) the determination of the amount of a registered plan payment that is attached by a garnishee summons, including the determination of any registered plan payment exemptions; |

**Garnishment of Life Insurance Policies**

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| **Insurance Act Exemption (want to protect beneficiaries)**   * **Where ED’s life is insured under an insurance policy, money payable to a beneficiary is not subject to the claims of ED’s creditors.** * 666(1) If a beneficiary is designated, any insurance money payable to the beneficiary is not, from the time of the happening of the event on which the insurance money becomes payable, part of the estate of the insured and is not subject to the claims of the creditors of the insured. * **Where a beneficiary is a spouse, adult interdependent partner, child, grandchild or parent of ED, the policy and money payable under the policy are exempt** * 666(2) While there is in effect a designation in favour of any one or more of a spouse or adult interdependent partner, child, grandchild or parent of a person whose life is insured, the insurance money and the rights and interests of the insured in the insurance money and in the contract are exempt from civil enforcement proceedings under the Civil Enforcement Act or execution or seizure under any other law in force in Alberta. |

**Employment Pension Exemption**

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| **Employment Pensions Plans Act (a full exemption)**   * **85(1)**  Subject to subsections (1.1) and (2), **benefits**, money that has been transferred under section 30(5), 37(2), 38, 39(6) or 64(3) or the regulations made in respect of section 80 or pursuant to a similar transfer made before January 1, 1987 and money earned by such transferred money may not be assigned, charged, alienated or anticipated and **are exempt from execution, seizure or attachment** either at law or in equity, and any transaction purporting to assign, charge, alienate or anticipate benefits or any such money is void.   + 1(1)(e) **“benefit”** means ***a pension or any other benefit under a pension plan***, and includes a return of contributions to or in respect of a member or former member, any payment in a series of payments that constitutes a benefit and future entitlements to any such benefit, but does not include a refund of surplus assets;   + (gg) **“pension plan”** or “plan” means a ***plan, scheme or arrangement*** organized and administered to provide pensions for employees and former employees and ***under which***, except in the case of a supplemental pension plan, ***the employer is*** or, in the case of a terminated plan, was ***required to make contributions to the plan on behalf of the members***, and includes the pension fund of a plan but does not include a prescribed plan, scheme or arrangement; * Different treatment – even from RRSPs |

**Exemption for Provincial Government Support Payments**

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| * **CER s. 37(2)**  In addition to the property referred to in section 88 of the Act, the following property is exempt from writ proceedings   + (b) any payment made to an enforcement debtor that is     - (i) an income support payment paid under the *Income and Employment Supports Act*,     - (ii) a handicap benefit paid under the *Assured Income for the Severely Handicapped Act*, or     - (iii) a widow’s pension paid under the *Widows’ Pension Act*,     - if the proceeds from the payment are not intermingled with any other funds of the enforcement debtor; * Exempt if not intermingled * How can these payments be claimed? – no notice of objection   + Would need to apply under s. 5 declaring the money into court exempt, and pay it back out of court |

**Exemptions for Obligations Located on a Reserve**

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| **Indian Act**   * **89(1)** Subject to this Act, the real and personal **property of an Indian or a band** **situated on a reserve** is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution **in favour or at the instance of any person other than an Indian** or a band. * **90(1)** For the purposes of sections 87 and 89, personal property that was   + (a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or   + (b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,   + shall be deemed always to be situated on a reserve |

*Alberta (Worker’s Compensation Board) v Enoch Band*

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| Ratio | Application of Indiant Act garnishment (seizure) exemption rules |
| Facts | * Was the assignment effective to avoid the operation of the Indian Act exemption on the grounds of Barter’s status as an Indian? Was this an execution or attachment “in favour of...an Indian”? * Was the obligation owed to the Band by the Bank “situated on a reserve”? |
| Issues | * Was the assignment effective to avoid the operation of the Indian Act exemption on the grounds of Barter’s status as an Indian? Was this an execution or attachment “in favour of...an Indian”? * Was the obligation owed to the Band by the Bank “situated on a reserve”? |
| Decision | * Property not exempt from seizure – the Band’s bank account was not situation n the reserve |
| Reasoning | * Assignment was not a true assignment:   + Substantially, the money collected is going to be paid to the Board, and so s. 89(1)’s exemption would be triggered if the property is situation on the reserve * Property was not located on reserve   + A bank account is situated for legal purposes where it is payable. It is payable where in the ordinary course of business it would be paid and where the holder would seek payment, and that is the branch where he deals   + I cannot see that an Indian or a Band can render all his or its property exempt simply by signing a contract with someone else who is not a creditor or connected with a creditor, deeming his or its property to be where it is not. |
| Notes | * Left open idea that a judgment could be assigned to overcome exemption |

*Gifford v Lax Kw’Alaams Indian Band*

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| Ratio | An assignment is not sufficient to overcome the exception in s. 89 |
| Facts | * A judgment against the Band in favour of a law firm was assigned absolutely to an associate of the firm who was an Indian as defined by the Act. He served a garnishee summons on the Band’s TD Bank account, which was located on a reserve |
| Issues | * The effect of assignment to an Indian |
| Decision | * Assingment was not effective |
| Reasoning | * The assignee of a chose in action takes subject to “equities” – i.e. to defences that the debtor could have raised against the assignor. The Indian Act limitation on execution is an “equity” to which the assignee was subject. The judgment therefore could not be enforced by the assignee. * Permitting avoidance of the exemption through assignment of the judgment would violate the policy implemented by s. 89. |
| Notes | * An exemption is not strictly speaking a defence against enforcement of a particular judgment debt since it does not relate to the judgment. It is a right to claim property free of seizure in the circumstances defined by the exemption. It is therefore not an “equity” in the usual sense. |

*McDiarmid Lumber Ltd v God’s Lake First Nations*

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| Notes | * Where is the deposit located? * the location of a deposit account held by an Indian band should be determined under the ordinary common law and statutory situs rules that apply to an account – no connecting factors analysis * The funds in the band’s bank account did not fall within s. 90 of the Indian Act, which exempts “personal property…given to Indians or to a band under a treaty or agreement between a band and Her Majesty” from judgment enforcement measures |

**Expenses for Maintenance of Property and Performance of Contracts that Produce a Future Obligation Subject to Garnishment**

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| * **Discretionary exemption** * **80**  Where the source of a garnished future obligation   + (a) is property of the enforcement debtor, or   + (b) is an agreement between the enforcement debtor and the garnishee,   + the Court may exempt from attachment as much of the obligation as is required by the enforcement debtor to keep or maintain the property or to perform the agreement, as the case may be. * Designed to protect tenants – if did not exempt, the landlord would likely not keep up the property * (b) is progress payments to construction company – if attached, then the construction would stop |

NOTE

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| * There is no good way of claiming an exemption under garnishment * If aware of exemption, need to apply for an order under s. 5 * For tangible property there is a procedure |

# 9. ENFORCEMENT AGAINST PARTIAL OR LIMITED INTERESTS

## A. General

**“Property” Subject to Write Proceedings Includes Partial Interests**

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| * Starting point: writ proceedings can be taken against partial interests * Looking at the following, but also recall dower rights, enforcement against debtor as owner of land subject to an agreement for sale, garnishment of joint accounts |

## B. Jointly Owned Property

**Summary**

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| * The interest of an ED as tenant in common may (in principle) be subject to writ proceedings. CEA s 2   + In the case of divisible property (e.g. money), see *Royal Bank of Canada v Bissett*   + In the case of non-divisible property (e.g. goods) the buyer will acquire title as tenant in common with the non-debtor owner * A writ may (likely) not be enforced against the interest of a joint tenant unless the tenancy is severed or the law otherwise provides (query *Bissett*) * A writ may be enforced against the interest of and ED as joint tenant of land. Sale in writ proceedings severs the joint tenancy. CEA s 76 * Where property is held in joint tenancy and the ED dies, the non-debtor joint tenant acquires title by right of survivorship free of a writ binding the interest of the ED (*Power v Grace* confirmed in *Maroukis v Maroukis*)   + EXCEPT THAT a writ continues to bind jointly owned land after the death of the ED, to the extent of the value of the land at the date of death. CEA s 76(2). * A writ may be enforced through garnishment proceedings against a joint account (or obligation). CEA s 82 * Where a jointly owned asset is not divisible, the asset itself cannot be seized and sold. Although the enforcement debtor’s interest may in principle be seized and sold, the result would be severance of the joint tenancy – buyer acquires title as tenant in common with the other co-owner. But query whether the court would stay proceedings. |

**Joint Interest: Land**

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| * **76(1)** Writ proceedings against an enforcement debtor’s interest as a joint tenant of land sever the joint tenancy *when an agency has entered into an agreement to sell* the debtor’s interest * In practice would be difficult to find a buyer * CEA does not give first right of refusal to the joint owner * Partition order if land could be physically divided   **Exemption claim when land is held by co-owners**   * ***88***  *Subject to section 89, the interest of an enforcement debtor in the following is exempt from writ proceedings:*    + *(g)the principal residence of an enforcement debtor, including a residence that is a mobile home, up to the value prescribed by the regulations for that residence but if the enforcement debtor is a co-owner of the residence, the amount of the exemption allowed under this provision is reduced to an amount that is proportionate to the enforcement debtor’s ownership interest in the residence;* [The amount of the exemption under CER s. 37(1)(e) is $40,000.] * Exemption applies proportionally to the ED’s interest – so would be entitled to a $20,000 exemption   **Enforcement of the writ after death of the ED**   * **76(2)**  If a writ is registered against land in which an enforcement debtor holds an interest in joint tenancy and the enforcement debtor dies, the writ shall continue to bind the land in an amount equal to the lesser of   + (a) the amount owing on the writ, and   + (b) the value that the debtor’s interest in the land would have been if the joint tenancy had been severed immediately before the debtor’s death. * At common law, ED’s death would have eliminated the writ because his interest would be extinguished by right of survivorship * Practically, would have to wait until the survivors sells or mortgages the property to enforce |

**Joint Interests: Personal Property** (other than garnishment of joint account)

*Royal Bank of Canada v Bisset*

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| Ratio | Application of severance of title – Where a joint tenancy is severed, a writ may be enforced against the interest of the enforcement debtor as a tenant in common |
| Facts | * Writs against Brian Bisset registered against title to house owned jointly with wife, Carol. * Spouses voluntarily sell the house after having separated on the understanding that the proceeds would be divided equally. * Proceeds of sale after payment of mortgage, commission and taxes held by Bissets’ lawyer. |
| Issues | * Is the full amount of the sale **proceeds** subject to the claims of the writ holders? What is the enforcement debtor’s interest in the proceeds |
| Decision | * Title to proceeds severed |
| Reasoning | * “. . . joint tenancy can be severed in one of three ways: (1) by an act of one person acting on his or her own share; (2) by mutual agreement; or (3) by "any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common". Severance may occur by other means, such as a judicial sale or bankruptcy…” |
| Notes | * Bisset could have probably got an exemption under CER s. 37(2) |

## C. Property Rights under Spousal Property Legislation

*Maroukis v Maroukis* [*nemo dat*]

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| Ratio | Property vests according to option 1 |
| Facts | * October 1978 – parties separate. They own the matrimonial home as joint tenants. * November 1978 – proceedings for division of matrimonial property under the *Family Law Reform Act* (Ontario)commenced by the wife. * July 1979 – writs against husband filed with Sheriff. * October 1979 – Judge makes an order under *The Family Law Reform Act* (Ontario) vesting the matrimonial home in wife. |
| Issues | * Where proceedings are taken by a spouse under s. 4 of the Family Law Reform Act, R.S.O. 1980, c. 152, at what time does specific property vest in the spouse to whom it has been allocated? |
| Decision | * First in time is first in right, the wife takes subject to the writ |
| Reasoning | * The Act does not automatically confer a property interest in family assets * Court ordered that property vested the date of separation |
| Notes | * Option 1:   + Writ binds H’s undivided half interest.   + W acquires H’s interest under Court order so takes subject to the writ.   + Writ may be enforced against the house * Option 2:   + W’s has rights under FLRA in relation to H’s property that “crystallize” at date of separation or when proceedings for division of property are commenced. (Court order October 1979 is declaratory of existing rights.)   + Writ is registered - cannot bind W’s pre-existing interest in H’s property. W therefore takes free of writ. * The Act does not automatically confer a property interest in family assets * Court ordered that property vested upon the order of the court (after the writ) |

*Re Schreyer*

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| Notes | * The effect of provincial legislation governing division of family property * Equalization model: Property is valued and orders made for payment as between spouses to effect equal distribution. A spouse does not have a proprietary interest in the property of the other (unless and until a vesting order is made at the distribution stage, as in *Maroukis*) * Division of property model: Spouses acquire a beneficial half interest in all family property by virtue of the legislation. |

*Nelson v Nelson* (ABQB)

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| Notes | * Parties are separated and wife commences proceedings under Matrimonial Property Act but no order is made. * Writ proceedings are taken against property of husband. * Writ has priority over wife (i.e. attached before wife acquired any interest). * Implies equalization model in Alberta – *Maroukis* applied. |

*Phillips v Phillips* (ABQB)

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| Notes | * Wife is granted an order under matrimonial property legislation transferring title in a jointly owned house to her name as sole owner. * Writs issued against the Husband are registered against title to the house. * Is Wife entitled to have the writs discharged? * Held: The court order extinguished the husband’s beneficial interest in the property before the writ was registered. The writ can only attach the interest of the execution debtor, which was subject to the wife’s prior unregistered interest. See *Jellett v. Wilkie*. |

**Implications of registration of a *lis pendens* against land under the *Matrimonial Property Act***

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| ***Markey v. Canada (Revenue)***   * Husband and Wife separate, Wife commences action under the Matrimonial Property Act and files a *lis pendens* against title to the matrimonial home. * CRA issues a writ of enforcement against Husband and registers it against title to the house. * Court orders transfer of title to the home to Wife subject to identified encumbrances, not including the writ. * Is Wife entitled to have the writ discharged? Yes * **Held*:*** *Matrimonial Property Act* s. 35 states that where a certificate of *lis pendens* is filed in relation to proceedings under the Act any subsequently registered interest is “subject to the claim of the spouse who filed the certificate of *lis pendens*.” *Maroukis* distinguished – no equivalent provision in legislation under consideration. The wife is entitled to discharge of the writ. |

## D. Constructive Trusts and Other Trust Interest

**Trusts Generally**

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| * A trust may arise by:   + Express declaration   + Constructive trust – see *1003166 Alberta Ltd*   + Resulting trust – see *Glover v Kumar*   + Other rule of law * 1. Can writ proceedings be taken against property owned by the ED if the property is subject to a trust in favour of another person? (ED holds legal title but another person holds the beneficial interest)   + See s. 33 and the rule in *Jellett v. Wilkie*. A writ may only be enforced against property of the enforcement debtor – i.e. cannot be enforced against the beneficial owner.   + Recall *Drebert v. Coates*. A writ registered against the trustee may be discharged on application by the beneficial owner (i.e. where the trust arose before the writ was registered). * 2. Can writ proceedings be taken against an ED’s interest as beneficiary under a trust? |

**Constructive Trust and its Effect on Creditor’s Rights**

*1003166 Alberta Ltd. v. 868609 Alberta Ltd.*

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| Ratio | The Court has the discretion as to whether it should recognize a constructive trust and also on the effective date of such trust |
| Facts | * Duncan & Craig LLP is a creditor of Roy Chapman, and the Chapman companies, for unpaid legal fees * the law firm registered a Writ of Enforcement relating to those fees against certain lands, described as the Beaumont lands, owned by Mr. Chapman and the Chapman companies * The plaintiffs ask the court to discharge the law firm’s Writ against the Beaumont lands on the basis that the plaintiffs’ proprietary interest in those lands has priority over the law firm’s Writ. * November 2003 Action commenced against Chapman (remedy sought – declaration of constructive or resulting trust based on breach of fiduciary duty) * January 2005 Duncan & Craig LLP acting for Chapman withdraw before trial, issue judgment for costs against Chapman and register writ against Beaumont lands * May 2005 Judgment for plaintiff - constructive trust granted over Beaumont lands in favour of plaintiff. |
| Issues | * At what point in time did the trust arise? * Whether the plaintiffs are entitled to dicharge the writ attached to Chapman's land as the land was held in trust prior to the writ being registered? |
| Decision | * The application is allowed: Duncan & Craig LLP’s writ is discharged |
| Reasoning | * the unpaid creditor law firm extended credit to Mr. Chapman knowing that the plaintiffs were claiming a remedial constructive trust.” Therefore “allocation of risk” factors did not weigh against retroactive effect of the trust. * I observe that the situation here is one where a constructive trust is necessary to provide justice to the plaintiffs because a mere award of damages would not be adequate as a matter of fact. |
| Notes |  |

**Resulting Trust and Its Effect on Creditor’s Rights**

*Glover v Kumar*

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| Ratio | Resulting trust arose at the outset, and the writ is discharged |
| Facts | * Title was conveyed to Kumar on the understanding that he would reconvey it back to the plaintiffs * This does not happen and writs are registered against the land |
| Issues | * Whether Lachance and Glover are entitled to clear the writs off title of the house in which Kumar fraudulently added his name on title * Did Kumar hold the property as a resulting trust? |
| Decision | * Writ discharged, and Kumar’s name removed from title |
| Reasoning | * Mr. Kumar has no actual interest in the lands * Where there is no contribution and where there is no evidence that a gift was intended, the presumption of resulting trust will not be rebutted |
| Notes | * If the enforcement debtor holds title to property subject to a resulting trust, a writ against the enforcement debtor cannot be enforced against the property (and may be discharged from the title in the case of land). * In general, where property is transferred gratuitously, the transferee holds it subject to a resulting trust in favour of the transferor unless the transferee can prove that it was intended as a gift. The resulting trust arises at the time of the transfer |

**Enforcement where the ED is the Beneficiary**

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| * An existing or contingent beneficial interest is property of the enforcement debtor and may be subject to writ proceedings   + See *Quest Capital Corp v. Longpre* confirming that a debtor’s contingent beneficial interest under a discretionary trust was subject to judgment enforcement measures in B.C. * With respect to a contingent interest, consider:   + Garnishment of a “future obligation”   + 77(1)(c) “future obligation” means an obligation or any portion of an obligation that is not a current obligation and that     - (i) will arise or become payable in certain circumstances or at a certain time under       * (a) an existing agreement or trust….   + Appointment of a receiver to receive payment or take possession once the beneficial interest vests (*Quest Capital*, CEA s. 85) |

## E. Security Interests

**Enforcement of a writ against a secured obligation (security interest) held by an Enforcement Debtor in personal property or land**

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| * A owes $300,000 to B. * B holds a security interest in A’s land (a mortgage) or a security interest in A’s personal property to secure repayment. * A makes periodic payments to B under the security agreement. * If A defaults under the agreement, B can seize and sell the property to satisfy the debt. * B’s rights against A are a “secured obligation”: **1(1)(nn)** means an obligation secured by an interest in property * If a writ is registered against B, the “secured obligation” may be seized in writ proceedings under the special rules of s. 51. * This allows the agency to collect the payments due from A and/or sell the secured obligation. The buyer in writ proceedings will step into B’s shoes. * **Secured obligation = duty to pay money (debt or account) – *in personam***   **+**  **interest in land or personal property securing payment (mortgage/security interest) – *in rem***   * **secured obligation** = debt owed to security interest holder + property interest held by security interest owned securing repayment of the debt |

**Method of Seizure of Secured Obligations**

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| * **51**  For the purposes of seizing and dealing with a secured obligation, other than a market security or an obligation evidenced by an instrument, the following applies:   + (a) **seizure of a secured obligation is effected by**     - (i) identifying the obligation and the security for it in the notice of seizure,     - (ii) **registering the notice of seizure in the Personal Property Registry**,     - (iii) if the collateral for the secured obligation is **land**, **registering under the *Land Titles Act* the notice of the seizure** against the certificate of title to the land, and     - (iv) **serving the seizure documents** on the enforcement debtor; |

**Realization on Secured Obligation by Enforcement Agency**

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| * **51** For the purposes of seizing and dealing with a secured obligation, other than a market security or an obligation evidenced by an instrument, the following applies: * **Agency may take steps to establish priority of ED’s security interest**   + (b) if the enforcement debtor’s security has not been registered in the Personal Property Registry or under the *Land Titles Act* when the secured obligation is seized, an agency may register the security in the Personal Property Registry or under the *Land Titles Act*, as the case may be; * **Debtor on obligation must pay agency amounts due on debt to agency once notified of seizure**   + (c) after seizing a secured obligation, an **agency may serve the notice of seizure on the person liable to pay the obligation** and after being served with the notice that person must pay to the agency any amount that is or becomes payable in respect of the obligation; * **Agency may sell the secured obligation or collect on it to the same extent as enforcement debtor**   + (d) after serving the notice of seizure on the person liable to pay the obligation, **an agency, as an alternative to selling** the secured obligation under Part 5, **may collect the obligation** through any proceedings, including an action or enforcement of the security, that could otherwise have been taken by the enforcement debtor * Result: buyer of the s/i becomes the secured party |

# 10. RECEIVERS AND SPECIAL REMEDIES

**Appointment of a Receiver or Special Order: Overview**

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| * Application to Court for appointment of receiver to seize and liquidate assets, or for other special remedy. * Application is heard in chambers * Rights of enforcement creditor are subject to the rights of secured creditors who hold security interests that have priority over the writ - priorities determined by the CEA as above. * Funds generated by sale of assets distributed by the receiver according to CEA rules. |

**“Equitable Execution”: Appointment of a Receiver at Common Law**

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| * ***Judicature Act*** * **13(2)** An order in the nature of a mandamus or injunction may be granted or a **receiver appointed** by an interlocutory order of the Court **in all cases in which it appears to the Court to be just or convenient that the order should be made**, and the order may be made either unconditionally or on any terms and conditions the Court thinks just. * Common law limitations:   + (1) A receiver may only be appointed where the property against which enforcement is sought is exigible, but seizure is impossible due to some legal (i.e. not merely practical) impediment.   + (2) A receiver may not be appointed where the property against which enforcement is sought can be reached by ordinary means (e.g. under a writ of execution or through garnishment). * May a receiver be appointed under the Judicature Act to enforce a judgment? * Do the principles governing equitable execution apply under the CEA? * *Allen v Shaw*   + A receiver cannot be appointed to get at otherwise exempt property –undue hardship is a barrier (s. 85 factors), so cannot make someone destitute   + Think of the purpose of the exmeptions * *Fruh v Mair*   + Can the court appoint a receiver - goes through the factors in s. 86     - Garnishment is not a viable alternative     - This will be effective     - Not expensive - just receive and distribute funds     - Is the third party going to be hurt - no, even though Ac did argue     - Hardship for the debtor - not now, we'll see what happens (potential future hardship is not a consideration, the order can always be varied) |

**CEA: Appointment of a Receiver**

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| * **85(1)**  Notwithstanding any rule of law or equity to the contrary, **where certain exigible property of an enforcement debtor** **cannot otherwise be conveniently realized**, the Court on the application of an enforcement creditor may do one or more of the following:   + **(a) appoint a receiver of the property;**   + (b) order the enforcement debtor or any person in possession or control of the property to deliver up the property to an agency or to another person named in the order;   + (c) enjoin the enforcement debtor or any other person from disposing of or otherwise dealing with the property;   + (d) make any other or additional order that the Court considers necessary or appropriate to facilitate realization of the property. * **(2)** Where the Court appoints a receiver under subsection (1), the Court may in the order direct that the order apply to property acquired by the enforcement debtor after the order is granted. |

**Factors in the Appointment of a Receiver**

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| * **86**  In determining whether to appoint a **receiver** under section 85, the Court must consider **at least** the following:   + (a) whether it would be more **practical** to realize on the property through other proceedings authorized by this Act;   + (b) whether the appointment of a receiver would be an **effective** means of realizing on the property;   + (c) the **probable cost** of the receivership in relation to the probable benefits to be derived by the appointment of a receiver;   + (d) whether the appointment of a receiver would cause **undue hardship** or prejudice to the enforcement debtor or a third person;   + the **likelihood of the writs** against the enforcement debtor **being satisfied** without resorting to the property in question. * (c) is a major factor – likely more expensive to appoint a receiver, because hiring someone to do this * Receivership is a fall-back when other things don’t work |

**Receiver’s Qualifications**

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| * **87**  With respect to receivers, the following applies:   + (a) a person may not be appointed as a receiver unless that person     - (i) has satisfied the qualifications, if any, set out in the regulations, and     - (ii) has agreed in writing to act as a receiver in respect of the matter for which the appointment is to be made; * **CER 32**  Only the following persons are eligible to be appointed as receivers under the Act:   + (a) a licensed trustee in bankruptcy;   + (b)a person, other than a licensed trustee in bankruptcy, who     - (i) to the satisfaction of the Court, is qualified to carry out the functions and duties of a receiver in the circumstances for which the receiver is being appointed, and     - (ii) provides such security as may be required by the Court * Always accountants |

**Receiver’s Powers**

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| * **87**  With respect to receivers, the following applies:   + (b) **the Court may give a receiver those powers that the Court considers necessary or appropriate for the realization of the property, including**, without limiting the generality of the foregoing, the **power to manage or sell** the property or bring any proceedings in relation to the property;   + (c) unless otherwise ordered by the Court, a receiver may take into the receiver’s custody and control the property over which the receiver is being appointed. * ***Quest Capital Corp v Longpre*** (BCCA 2012). * The court may appoint a receiver of a judgment debtor’s contingent interest as beneficiary under a contingent trust. But if the debtor is the trustee or otherwise has powers with respect to the administration of the trust, can the court empower the receiver to exercise the debtor’s powers under the trust? * the JD property was a contingent interest as a beneficiary under a contingent trust – an interest that may or may not vest (so if the interest ever vests, there is someone waiting in the wings to receive the money) |

**Receiver’s Default Obligations**

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| * **CER 33(1)**  **Unless otherwise ordered** by the Court, a receiver must do the following:   + (a) **take custody and control** of the property that is subject to the receivership;   + (b) **hold in a trust account** all money coming under the receiver’s control through the receivership;   + (c) **keep detailed records**, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving the property that is subject to the receivership;   + (d) at least once in every 180-day period after the receiver’s appointment, **file** with the clerk of the Court **financial statements** of the receiver’s administration;   + (e) on completion of the receiver’s duties, file with the clerk of the Court a **final account** of the receiver’s administration. * **(2)** Where a receiver has filed a financial statement or a final account, as the case may be, with the clerk of the Court under subsection (1)(d) or (e), the receiver must, within 15 days from the day of that filing, **register in the Registry a notice** that the financial statement or the final account, as the case may be, has been filed with the clerk of the Court. |

**Distributions by a Receiver**

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| **CER 35**  Where a receiver liquidates property that is subject to the receivership, the **receiver shall**, unless otherwise ordered by the Court, **distribute the proceeds from the property in the same manner as if the receiver were a distributing authority** under Part 11 of the Act. |

**Other Special Remedies**

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| * **85(1)**  Notwithstanding any rule of law or equity to the contrary, where certain exigible property of an enforcement debtor **cannot otherwise be conveniently realized**, the Court on the application of an enforcement creditor may do one or more of the following:   + (a) appoint a receiver of the property;   + **(b) order the enforcement debtor or any person in possession or control of the property to deliver up the property to an agency or to another person named in the order;**   + **(c) enjoin the enforcement debtor or any other person from disposing of or otherwise dealing with the property;**   + **(d) make any other or additional order that the Court considers necessary or appropriate to facilitate realization of the property.** * *ATB v Tetz* * ATB went to register a writ against land, and Tetz had sold the land * ATB could have used the disclosure process, but by that time could be long gone * Applied to the court directing him to pay proceeds of the property into the clerk of the court * No factors guiding, but the factors in appointing a receiver would be relevant * In Tetz they applied under s. 5, but really should have applied under s. 85 – the section that gives the court clear jurisdiction |

# 11. DISTRIBUTION OF PROCEEDS

**Distribution: Overview**

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| * Conducted by the “distributing authority” – i.e. civil enforcement agency, clerk of the court or receiver appointed by court order. * Funds shared pro rata among enforcement creditors (i.e., creditors who have registered writs against the enforcement debtor), subject to a few recognized priorities (especially unpaid maintenance). * Bonus to instructing creditor prior to pro rata division. * Rights of secured creditors are recognized in the distribution scheme but secured creditors do not share in the pro rata payment scheme. |

**Elements of the System**

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| **1. Distributable fund:** Part 11 is organized around the concept of the “distributable fund,” which is the source of the payments to which enforcement creditors are entitled. It provides rules that determine what money does and does not fall within the distributable fund. See ss. 96, 97 and 98.    **2. Distributing authority:** The distributable fund is derived from money in the hands of a “distributing authority.” A civil enforcement agency or clerk of the Court is a distributing authority and a receiver appointed under the Act is treated as if he or she were a distributing authority. See s. 94 and s. 35 of the regulations.    **3. Eligible claims:** The distributable fund is payable to those who hold “eligible claims.” These are enforcement creditors and a few others whose claims are deemed by statute to be equivalent to a writ of enforcement. See ss. 99(1) and (2) and s. 95.  **4. Time fund is created:** The time at which the distributable fund is created determines the class of creditors who hold “eligible claims.” See s. 97(b).    **5. Distribution rules:** Part 11 lays out rules that determine how the distributable fund is to be disbursed to the holders of eligible claims. If the amount in the fund is equal to or more than the total of eligible claims it is distributed as prescribed by section 100. If the amount in the fund is insufficient to satisfy all eligible claims it is distributed according to section 99. Sections 96(4) and 98 contain provisions that determine how money that is not part of the distributable fund is to be paid.    **6. Procedure:** Section 101 establishes the procedure that is to be followed by a distributing authority in paying out funds. |

**End Game**

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| * Basic principle - Funds generated by writ proceedings are distributed pro rata to holders of related writs **after** taking into account amounts payable in relation to:   + security interests   + exemptions   + costs of enforcement   + priority entitlement of creditors participating in interpleader proceedings that generate the fund   + priority claims created by other law (notably, Crown claims and maintenance claims)   + the instructing creditor’s bonus |

**The Distributing Authority**

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| * **CEA s. 94:** “distributing authority” is   + an agency (i.e. civil enforcement agency)   + in the case of garnishment, the clerk (of the court * **and** * **CER s. 35:** a receiver appointed under Part 9 is to distribute “as if the receiver were a distributing authority”. |

**The Distributable Fund**

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| * If JD does not want property sold, they can pay into the court – falls under Part 11 * Section 96(2) applies where:   + **(a) An agency sells property** bound by the writ on behalf of a landlord levying distress or a secured party enforcing a security interest that has priority over a writ. Part 11 applies to surplus proceeds in the hands of the agency after payment of landlord’s claim or after discharge of the secured debt.   + **(b) A person other than an agency sells property** bound by the writ on behalf of a landlord levying distress or a secured party enforcing a security interest that has priority over a writ. Surplus proceeds after payment of the landlord’s claim or after discharge of the secured debt are to be paid to an agency and Part 11 applies to those funds. * Funds are supposed to be paid to the agency, but in reality, they get paid into court * Section 96(4) – recall for personal property s. 48(j), and for land s. 75(1) * Section 97(c): exemptions   + Exemptions do not affect secured creditors   + Exemptions do not affect judgment creditors against whom the exemption does not operate under CEA s. 93 (judgments for support – includes orders, judgment arising out of criminal act...) or other legislation. * **Application of s. 98(1):** If a distributing authority receives **money that is exempt or that represents the proceeds of exempt property,** it is payable as follows:   + (a) if the money is subject to a **subordinate security interest** or encumbrance **or** there is an **enforcement creditor against whom the exemption does not apply** the exempt amount is payable to that creditor and any balance of the exempt amount is payable to the ED.   + (b) if there is no creditor to whom clause (a) applies, the exempt amount is payable to the ED. * **98(2)**  Any money remaining constitutes a distributable fund. |

**Maintenance**

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| * **Maintenance Enforcement Act** * **21(1)**  The Director or a creditor may register a maintenance order in the Personal Property Registry. * **(2)**  If a maintenance order is registered under subsection (1), **the order is deemed to be a writ of enforcement for the amount that the payment ordered is in arrears** from time to time. * **(3)**  Notwithstanding any other Act, a maintenance order registered under this section takes priority over any other writ of enforcement. * **Civil Enforcement Act** * **1(1)** “judgment” includes an order… that may be enforced in the same manner as a judgment of the Court. * **93** The exemptions set out in this part do not apply …. * (c)  to writ proceedings on a judgment for the payment of support, maintenance or alimony; |

**Summary: What is the Distributable Fund?**

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| **1. Money to which Part 11 applies per s. 97(a) is a distributable fund subject to 2:**   * Money realized through writ proceedings – s.96(1)(a) * Money otherwise received by a civil enforcement agency as a result of an enforcement debt – s.96(1)(b)   + Includes voluntary payments made to procure release of seizure   + Money received as a result of distress proceedings or the enforcement of a security interest that has priority over a writ.     - Money received by a distributing authority where property is sold by the distributing authority (includes an agency and a receiver) – s.96(2)(a)     - Money paid to civil enforcement agency where property is sold under judicial sale or by person other than a distributing authority (e.g. land sold in mortgage foreclosure proceedings or personal property sold by secured party to enforce a security interest) – s.96(2)(b)  1. **Money explicitly not included in the fund as per s. 97(c):**  * s. 96(4) -money payable to a SP who has priority over a writ * s. 98 - money that is exempt or is proceeds of exempt property |

**The implications of *Fast Labour Solutions (Edmonton) Ltd v Kramers Technical Services Inc* (ABCA 2016)**

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| * **The ED who incurs costs gets to recover those first before the security interest that has priority** * Kramers Iowa leases a crane to Kramers Alberta. The lease is a lease for a term of more than one year as defined by the PPSA. Kramers Iowa is “regularly engaged in the business of leasing goods” for purposes of the definition. Kramers Iowa’s interest is a “security interest” and is not registered so is unperfected. * George Kramer registers a security interest securing $1.2 million US. The validity of the claim is not established. * Fast Labour Solutions registers a writ. * Fast Labour Solutions seizes a crane held by Kramers Alberta. Fast is directed by the Court to remove the crane from the premises on which it is located. * Is Kramers Iowa entitled to the crane as against Fast writ? Answer: No. Fast writ has priority under the CEA. * Can Fast claim priority over George Kramer for the costs of seizure and removal? * Answer: Yes. * Fast does not want to move the crane because it is costly and concerned about the priority s/I and recovering the amount paid to move the crane |

**Who is entitled to be paid from the fund? “Eligible Claims”**

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| * **99(1)**The eligible claims against a distributable fund are **the amounts outstanding on all related writs** that are in force against the enforcement debtor [and special provision for the costs of interpleader proceedings under s. 103(2)] * ***1(1)(mm) “related writ”*** *means* * *(i) in respect of a particular enforcement debtor, a writ that would be disclosed if a distribution seizure search was conducted of the Personal Property Registry using the name of that debtor as shown on the instructing creditor’s writ...*   **AND**   * **95** Claims treated as eligible claims include **claims treated as writs under another statute, if registered** in the PPR * **See especially Maintenance Enforcement Act re: a registered maintenance order** * **21** The Director or a creditor may register a maintenance order in the Personal Property Registry and if an order is registered it is deemed to be a writ of enforcement for the amount that the payment ordered is in arrears from time to time   **Note:** Amounts payable to secured creditors under Part 11 do not form part of the distributable fund and the claims of secured creditors are not “eligible claims” against the fund.  **On what date is the fund constituted?**   * **97**provides that:   + (a) Money constitutes a distributable fund when the money is received by a distributing authority.   + (b) Exception: Where the Act (including the regulations) or a Court order requires that money not be distributed before a certain period of time elapses or a certain event occurs, that money constitutes a distributable fund when the period elapses or the event occurs;     - **In the case of garnishment:** CER s. 35.30(1): provides that money paid into court under a garnishee summons shall not be distributed until 15 days from the day that the debtor is served with the garnishee summons, unless the court orders otherwise [formerly Rules of Court 481(1)]     - **And re: court orders delaying distribution of the fund:** see *Lyons v. Creason* (delay for attachment order) |

**How is the Fund Paid Out? The Scheme of Distribution**

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| * **Where the amount of eligible claims exceeds the amount of the distributable fund** * **99(3)** Where the total amount of the eligible claims exceeds the amount of a distributable fund, the distributing authority must apply the distributable fund toward the claims in the following order of priority:   + (a) repealed 2002 c17 s1(20);   + (b) fees and expenses of a distributing authority earned or incurred in connection with the enforcement measures that have produced the fund   + (c) other costs incurred by the instructing creditor in connection with the enforcement measures that have produced the fund   + (d) claims of writ holders who participated in successful interpleader proceedings in relation to any portion of the fund generated by those proceedings   + (e) eligible claims that are entitled to priority over the eligible claims of enforcement creditors generally by virtue of any other enactment or law in force in Alberta [*see especially Maintenance Enforcement Act and Crown prerogative to priority in payment – Liberty Mortgage Services Ltd v Canada*]   + (f) the instructing creditor’s bonus:   + (g) all other eligible claims, including any unpaid balance of the instructing creditor’s claim, pro rata. * Enforcement costs come out (b, c) * Interpleader- if invested time and money, then get paid out * (e) – maintenance claims, the Crown if has registered a writ – *Liberty Mortgage* * Provincial legislation cannot restrict federal Crown right * Buckwold argument: doesn’t apply to provincial Crown * Amount of bonus = $2,000 * **Plus**, if the fund remaining after payment of amounts (a) through (e) is more than $15,000, 15% of the balance of the fund exceeding $15,000. * Note special rule for calculating instructing creditor’s bonus in the case of garnishment, where more than one payment is made into court creating multiple distributable funds. Bonus is calculated as if the several funds were one fund. * Under s. 100 if there is more than enough money to go around – everyone gets paid (this never happens) |

**What are the rights of the holder of a registered attachment order in relation to a distributable fund?**

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| * s. 99: Eligible claims are amounts outstanding on related writs – i.e. writs registered against the ED – determined at the date the fund is constituted. The holder of an attachment order does not have judgment or a writ so does not have an “eligible claim” * s. 97: Money constitutes a distributable fund when it is received by a distributing authority, EXCEPT if a Court orders that money received by a distributing authority not be distributed before a certain period of time elapses or a certain event occurs. The fund is constituted when the time elapses or the event occurs. * s. 24(1): Writ proceedings may be taken against property subject to an attachment order and the distributable fund created by the proceedings may be paid out without regard to the attaching claimant’s claim UNLESS the court orders otherwise under s. 24(2) .   + And CER s. 35.27: Money paid to the Clerk pursuant to a garnishee summons issued under an attachment order is a distributable fund if there is a related writ(s) in force against the debtor [i.e. the money is paid to the holder of the related writ(s), who has an “eligible claim(s)”] UNLESS the court orders otherwise * s. 24(2) The Court may grant an order precluding writ proceedings against property subject to an attachment order or delaying distribution until the attachment order terminates. The court may direct that the attachment creditor has the status of instructing creditor for purposes of distribution of the proceeds of property that is the subject of an attachment order. * Might be able to delay the constitution of the fund to allow the attachment order holder to receive judgment and register their writ |

*Canadian Imperial Bank of Commerce v Mirage*

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| Ratio | Tardiness does not make it just and equitable to delay constitution (rules will operate unless there is some good reason for delaying constitution) |
| Facts | * Andreasens obtain an attachment order – order is registered September 24 * Funds are paid into court under CIBC garnishee summons (Against Mirage) October 10 * Judgment debtor Mirage is served with the garnishee summons October 17 * Andreasens become bankrupt October 24 * Andreasens obtain summary judgment October 30 * Andreasens trustee in bankruptcy registers writ November 29 |
| Issues | * Are Andreasens (trustee in bankruptcy) entitled to share in distribution of the fund created by CIBC garnishment? * Did Andreasens have an “eligible claim” when the distributable fund was constituted? * Should the Court grant an order delaying distribution of the fund until November 30 to give Andreasens an eligible claim? |
| Decision | * The Andreasens, through their trustee in bankruptcy, do not have an eligible claim |
| Reasoning | * Constitution of fund is ordinarily the date money is received by a distributing authority – i.e. October 10. * But when funds are paid into court pursuant to a garnishee summons, the distributable fund is constituted 15 days from the date that the debtor is served with the garnishee summons. See s. 97(b) and see Rules of Court 481(1), now CER s. 35.30(1) * Distributable fund constituted 15 days after October 17 = November 1. * An attachment creditor who has not registered a writ at the date of constitution of a distributable fund does not have an eligible claim against the fund. The date of registration of the attachment order affects the priority of the writ but not the date for determination of the eligible claim. Andreasens writ not registered November 1. * The court may grant an order directing that money realized through writ proceedings not be distributed until an attachment order terminates where the Court considers that it would be “just and equitable to do so”. See s. 24. (The order will delay constitution of the distributable fund, enabling the attachment creditor to obtain judgment and register a writ so as to acquire an eligible claim.) Section 5 does not apply. * The fact that CIBC was aware of Andreasens’ claim before constitution of the fund does not disentitle them from relying on the distribution rules of the CEA. The trustee could have registered a writ before the date the fund was constituted (15 days after service of the summons on the debtor) but has given no reasons for failure to do so. |
| Notes | NOTE when a distributable fund is constituted for ganishment |

*Lyons v Creason*

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| Ratio | Where the fund is the result of action by the attachment creditor, the court may direct that the attachment creditor is the instructing creditor and delay constitution of the fund. |
| Facts | * Lyons plaintiffs sue Hunt & 120 Co.– proceedings are defended * Lyons plaintiffs obtain “Attachment Order/Mareva Injunction” - $2 million deposit account * Lyons proceedings are subject to case management * Others sue Hunt & 120 Co. - default judgments issue to plaintiffs including Elke * Elke registers a writ and serves garnishee summons on bank account subject to Lyons attachment order * Court orders payment into court under the summons on condition that writ proceedings not be taken and that funds should not create a distributable fund * Lyons plaintiffs do not have “eligible claim” when funds are paid into court |
| Issues | * Whether delay of constitution of the distributable fund is equitable and just given the Lyons Plaintiffs situation |
| Decision | * Order constituting fund cast in terms that permit Lyons plaintiffs to obtain and register writs. Lyons plaintiffs are the instructing creditor. |
| Reasoning | * Plaintiffs in case managed actions could not proceed to judgment as quickly as other plaintiffs. No clear principles stated but cases is authority that it is “fair and equitable” to delay composition of the fund to enable an attachment creditor to obtain an eligible claim where:   + (1) the attachment creditor has preserved the property giving rise to the fund by means of the attachment order, and   + (2) the attachment creditor has been subject to procedural delays in obtaining judgment and registering a writ (distinguish *Mirage Builders*) |
| Notes |  |

**Distribution of the Surplus Proceeds of Mortgage Foreclosure**

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| **96(2)**  Where property that is bound by a writ is sold **in distress proceedings** under a landlord’s right of distraint or **in proceedings to enforce a security interest or encumbrance that has priority over the writ**,  (b) if the **property is sold** **pursuant to a judicial sale or by a person other than a distributing authority**, any portion of the proceeds in excess of the amount necessary to discharge the security interest or encumbrance shall be paid to an agency  \*\*This is not what happens in reality – it gets paid to the plaintiff’s solicitor (mortgagee/bank solicitor) |

*Canadian Western Trust v Eaton*

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| Notes | * **What process is actually followed with respect to the surplus proceeds of a mortgage foreclosure action?** * “Historically in Alberta the deposit and the balance of purchase money was paid to the clerk of the court who would be directed to make payments out of court to all interested parties. With the real estate crash and accompanying foreclosure boom in the early 1980s, the clerk of the court could no longer make timely payments and therefore the practice evolved to direct the plaintiff’s solicitor to receive all purchase funds and distribute monies to the plaintiff and all parties with a prior encumbrance. Surplus funds were directed to be paid to the clerk of the court to be held pending further order. This, by and large, remains the state of foreclosure practice in Alberta.” * **Practice directive:** Application for approval of sale in the foreclosure action must be served on registered owners to ensure that they are in a position to advance a claim for exemption with respect to surplus proceeds paid into court. See *Wells Fargo Financial Corp v. Taylor*. “The registered owners must make their exemption claim to the distributing authority.” But note lack of procedure for assertion of claim in these circumstances. * **Note:** A writ is a “related writ” if registered in the PPR even if not registered against title to the land subject to foreclosure. |

*Resmor Trust v Wood*

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| Notes | * **A different solution to the procedural conundrum: Order granted for distribution of surplus funds in court in mortgage foreclosure proceeding as follows:** * Clerk to pay funds representing principal residence exemption to ED. * ECs entitled to pro rata distribution of the balance. ECs to provide a consent order for signature of the court. Failing agreement among ECs, the clerk to forward funds to an agency for disbursement under the CEA. “If counsel cannot agree on the agency to handle these funds they may seek a further direction from the court.” |

*Bank of Montreal v Hobbs*

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| Ratio | Exemption is a right not a privilege – a right that exists despite failure to claim it  The 60 day limitation does not exist in the foreclosure context, only the voluntary sale context |
| Decision | * Section 37(2)(a) is not applicable to a forced sale |
| Reasoning | * The rationale underlying this distinction appears to be quite straightforward. In a voluntary sale, the debtor is in control of the process and has the opportunity to determine how, by what means, and when their designation of exempt property is to be dealt with. The legislature determined that the debtor must do so within 60 days. In the case of a forced sale, however, the enforcement debtor has no control over the process |
| Notes | * An enforcement debtor is entitled to claim an exemption with respect to surplus proceeds generated by sale of a personal residence in foreclosure proceedings. * CER s 37(2)(a) does not apply (60 days to apply for exemption for a voluntary sale) – i.e. time for claiming the exemption is not limited to 60 days after funds are paid into court. * BUT no reference to the procedure to be used to claim the exemption. * Section 98(1) specifies that a distributing authority that receives money that represents the proceeds of exempt property must pay the money to the enforcement debtor (or to the holder of a security interest that is subordinate to the writ or the holder of a claim that is not subject to exemptions). * How does the clerk determine the exempt status of the proceeds? * How would an agency determine the exempt status of the proceeds if they were paid to the agency as required by s 96(2) |

*Crotty v Crotty*

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| Issues | * Does the CEA apply where property bound by a writ is sold in proceedings that do not fall within s 96(2) – i.e. in proceedings other than mortgage foreclosure? |
| Decision | * Where the proceedings do not fall within section 96, the CEA does not apply. In the case of land, the Land Titles Act provides that registered instruments rank in priority of registration. Claims registered against title, including writs, should be paid out accordingly subject to a priority created by other law. |
| Notes | This was a matrimonial property division, not a mortgage foreclosure |

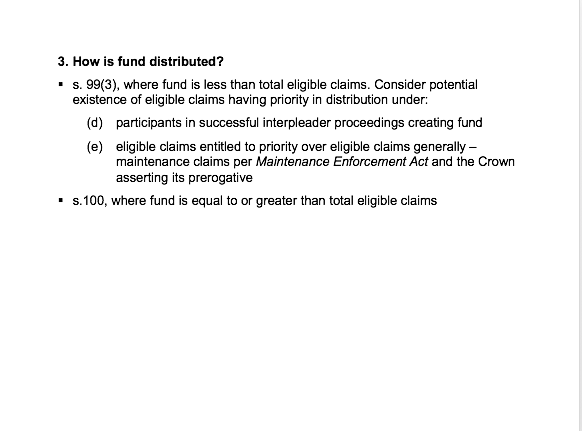
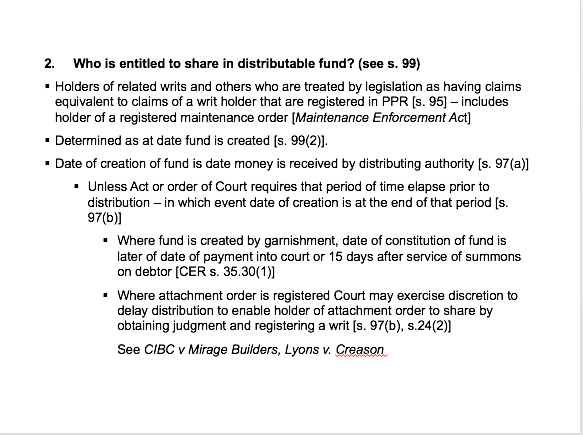
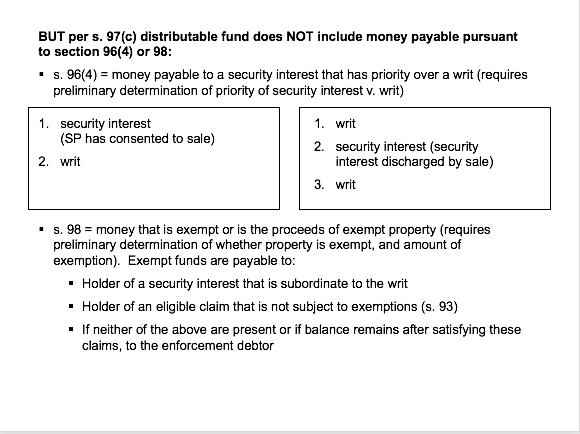
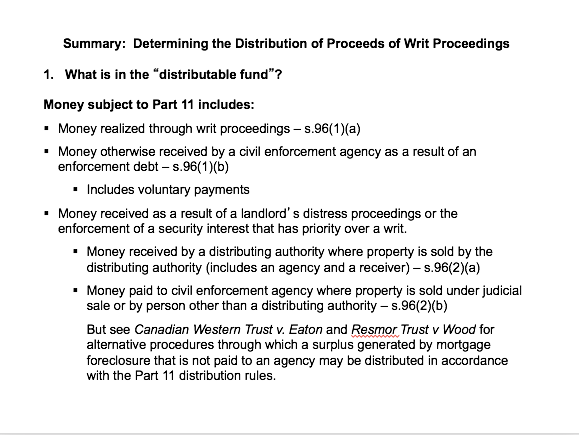
**Crown Prerogative**

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| * **Civil Enforcement Act**   + **1(1)(tt)** “writ” means a writ of enforcement and **includes any writ issued by the Court of Appeal, the Federal Court of Canada or the Supreme Court of Canada that is similar in nature to a writ of enforcement;** * **Federal Court Rules**   + **425** Orders for payment of money may be enforced by writs of seizure and sale, garnishment, charging orders, the appointment of a receiver, or writ of sequestration.   + All of these are recognized as equivalent to writs under the CEA.   + **56(1)** Federal Courts (appeal or not) may issue processes which are equal to provincial processes.   **Crown Enforcement Measures**   * **Certificates**   + Under the Income Tax, Excise Tax, Employment Insurance, and Canada Pension Plans Acts, the Federal Crown is authorized to recover unpaid amounts which fall under these Acts without getting a judgment.   + i.e., Crown becomes a creditor and can jump right to the enforcement stage. * **Requirement to Pay (RTP)**   + Operates similarly to a certificate; NOT subject to provincial exemptions. * **Seizure of Chattels**   + Authorized by the Income Tax Act and Excise Tax Act (GST)   + Not subject to provincial distribution rules   + IS subject to provincial exemptions named in the legislation * **Deemed Trusts**   + May allow the Crown to recover federal source deductions through funds generated by provincial judgment enforcement law.   + *Canada (Attorney General) v GlassCell Isofab Inc*: Funds paid into court under a provincial garnishment were subject to the federal deemed trust and must be paid to the federal Crown.   + The Crown has “super-priority” over all other creditors of the tax debtor”   + Note that the deemed trusts can also take priority over the interests of secured creditors. * **Bottom Line:** Federal Crown has many ways to enforce their debts and almost always has priority.   **Crown Immunity**   * The Crown is not bound by statutes except for those that expressly or implicitly specify otherwise. * Provincial exemptions do not affect a federal RTP but may apply to enforcement of a writ under provincial law (*Quebec (Attorney General) v Canada (Human Resources and Social Development)* SCC 2011) * At CL, both prov and fed Crown have a prerogative right to payment first as against other writs * i.e., when a Crown writ is up against an otherwise equal writ (one not falling within special legislation), the Crown writ will win   **Interpretation Act**   * No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty’s rights or prerogatives in any manner, unless the enactment expressly states that it binds Her Majesty.   **Civil Enforcement Act**   * **3(1)** This Act binds the Crown in exercising any rights or remedies as a creditor in civil enforcement proceedings. * (2) Notwithstanding subsection (1), nothing in this Act prevents the Crown from collecting a debt through proceedings otherwise available to the Crown under its prerogative or any other enactment. * **99(3)** [eligible claims to be paid in the following order of priority]   + (e) fourth, to eligible claims that by virtue of any other enactment or law in force in Alberta are entitled to priority over the eligible claims of enforcement creditors generally;   + (g) sixth, to all other eligible claims… * S 3(1) seems to be a statutory declaration of the benefit-burden doctrine * ABCA says that S 99(3)(e) recognizes the CL prerogative right (*Liberty Mortgage*) * But Tammy thinks that they read the statute backwards – 99(3) suggests that it would be subject to normal priority rules, and should overrule (e) * One ray of hope could be that the fed crown was the one involved in this case, therefore the argument could be made that a provincial level court cannot detract from federal crown’s powers * The outstanding question is whether it is the provincial crown? Do they get paid first? * Tammy thinks that s 3(1) strongly suggests that the CEA binds the Crown, but also that she would probably get shot down by the Courts * The way the case was reasoned would apply to the provincial crown too (unfortunately for Tammy)   **Enforcement against Money Payable by the Crown to an Enforcement Debtor**   * Garnishment is not possible due to Crown immunity from process, except as specifically provided in legislation.   + Legislation excepts government employees and officials (you must be able to garnishee their wages) * A receiver may be appointed with authority to receive funds payable by the Crown, but the Crown cannot be directed to pay to the receiver. See *Daniels v Daniels.*   + Basically provides a workaround. |

*Liberty Mortgage Services Ltd v Canada*

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| Ratio | CEA does not bind the Federal Crown – likely binds the provincial Crown (but they may have Crown prerogative) |
| Issues | * Can the federal Crown claim priority over other writ holders when it enforces a judgment or right to payment arising under federal law through registration of a writ of enforcement under the CEA? |
| Decision | * The Crown prerogative is preserved by CEA s. 99(3)(e) and 3(2). |
| Reasoning | * “…when the rights of the Crown come in conflict with the right of a subject in respect of the payment of debts of equal degree, the right of the Crown must prevail.” |

**Summary**

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# 12. ENFORCEMENT OF FOREIGN JUDGMENTS

***Reciprocal Enforcement of Judgment Act***

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| * Enforcement of judgments rendered in other Canadian jurisdictions. * Enforcement of judgments rendered by courts of reciprocating jurisdictions as listed in the *Reciprocating Jurisdictions Regulation*: Australia, the US states of Washington, Idaho and Montana. * Applies to money judgments other than judgments for spousal or child support. See s 1(1)(b) “judgment”   **Procedure:**   * Judgment creditor applies to QB for an order to register the judgment. Application may be *ex parte* if judgment debtor was served or appeared in the original action.   + Judgment creditor files a certificate of judgment from the originating court. * Court will order that judgment be registered unless one of the factors listed in s 2(6) is established. * Judgment debtor must be served with notice of registration and has one month within which to apply to have registration set aside. * Judgment once registered may be enforced as an Alberta QB judgment. * NOTE: Application does not preclude action to enforce the judgment at common law (s 7). |

**Action on the Judgment**

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| * Two steps for determining is judgment can be enforced: * (1) When should the domestic court accept jurisdiction to hear the action? * (2) When should the domestic court grant a judgment enforcing the foreign judgment? * NOTE: An action on the judgment is subject to ordinary limitation of actions rules. An action must be commenced in Alberta within 2 years of the date the foreign judgment was granted. |

*Chevron Corp v Yaiguaje*

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| Ratio | * Jurisdiction is established so long as they are properly served. * “In an action to enforce a foreign judgment, a domestic court can have jurisdiction as long as the defendant can be properly served under the Rules of Court.” |
| Facts | * The 47 respondents (the “plaintiffs”) represent approximately 30,000 indigenous Ecuadorian villagers * For over 20 years, they have been seeking legal accountability as well as financial and environmental reparation for harms they allegedly have suffered due to Texaco’s former operations in the region. * Texaco has since merged with Chevron * Since the initial judgment, Chevron has refused to acknowledge or pay the debt that the trial court said it owed, and it does not hold any Ecuadorian assets * Chevron Canada, a Canadian corporation governed by the CBCA, with its head office in Alberta, is a seventh-level indirect subsidiary of Chevron, which has 100 per cent ownership of every company in the chain between itself and Chevron Canada |
| Issues | * Does the Ontario court have jurisdiction over the action? * Must there be a real and substantial connection between the defendant or the dispute and the domestic court for jurisdiction to be established? |
| Decision | * The Ontario Court have jurisdiction |
| Reasoning | * Only need to properly serve to have jurisdiction (first step) * Real and substantial connection is considered in the second step – issue of enforcement, not jurisdiction. |
| Notes | * The court retains the ability to acknowledge jurisdiction but deny it nonetheless * The Rules of Court in Alberta bring the real and substantial connection step into their service rules (for *ex juris* claims) |

*Beals v Saldanha*

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| Ratio | * When a foreign judgment will be enforced (see reasoning) |
| Facts | * They think they are purchasing one lot, but actually purchase another – they start building, then find out they are building on someone else’s property * They sue the ON people * Jury awards damages of $210,000 and $50,000 in punitive * Defendants are notified that judgment is issued in Florida – they do nothing. |
| Issues | * When will a foreign judgment actually be enforced? |
| Decision | * Can enforce the judgment (but there was a dissent on the last two points – natural justice, public policy) |
| Reasoning | * (1) A foreign judgment will *prima facie* be recognized and enforced if the foreign court had jurisdiction over the action, based on:   + Defendant’s presence in the foreign jurisdiction when the action was commenced.   + Defendant’s attornment to the foreign court (i.e. by appearing in the proceedings).   + A real and substantial connection between the foreign court and the action or the parties. * (2) But enforcement may refused if the defendant can establish a defence in the action to enforce, based on:   + Fraud in procurement of the judgment – the only fraud that matters is fraud in the domestic jurisdiction   + Denial of natural justice in the foreign proceedings – minimum standards of procedural fairness (process in foreign court needs basic procedural fairness)   + Violation of the public policy of the domestic jurisdiction – is the foreign law contrary to our view to basic morality? |
| Notes | * The objective is to not re-try the substantive case, but to determine if the judgment was legitimate |

***International Commercial Arbitration Act***

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| * In business, most will resort to arbitration instead of litigation * This saves money and time * Most countries have adopted the *UNCITRAL Model Law on International Commercial Arbitration* (UN’s guidelines) * Not strictly examined – just need to know that this is an option. |