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LAW 514: Judgment Enforcement Law

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# Ch. 1: Debt and Its Enforcement

## Overview of Debt Enforcement Systems

* The judgment enforcement system provides a set of remedies to which a judgment creditor may resort in the event that the debtor fails to satisfy a money judgment.

### *Civil Enforcement Act*: Introduction

* In Alberta, the primary judgment enforcement system is found in the *Civil Enforcement Act* ("*CEA*").
  + The *CEA*, which took effect on January 1, 1996, replaced an enforcement system which was described as a "patchwork of English and Canadian legislation and judge-made ruled that do not fit together in a comprehensible or workable pattern" (Dunlop).
    - The *CEA* redesigned the procedures to create a simpler and more efficient judgment enforcement system that minimizes the occasions when an application to the court is required while allowing interested parties to seek judicial intervention on issues that arise in the course of enforcement.
  + The CEA relies on the initiative of an instructing creditor to choose an appropriate enforcement strategy (Wood), which include:
    1. Writ proceedings against personal property,
       - In proceedings against personal property, an enforcement creditor hires a civil enforcement agency who seizes property, sells the property, and distributes the proceeds to creditors.
    2. Writ proceedings against land,
       - In proceedings against land, the enforcement creditor hires a civil enforcement agency, which gives notice of intention to sell to the debtor, sells the house, and distributes the money to creditors.
    3. Garnishment, and
       - In garnishment proceedings, an enforcement creditor provides notice to someone who owes money to the debtor (e.g., employers, banks, tenants, accounts receivable), the payor pays that money to the clerk of the court (rather than the debtor), and the clerk distributes it.
    4. Receivership
       - A receiver is a person appointed to realize value from the debtor's assets (e.g., by collecting rents or accounts receivable), and may be empowered to run the debtor's business.

### Other Enforcement Systems

* While the *CEA* is the primary source of remedies to which a creditor may resort to enforce a money judgment, it is not the only system available; some of the other systems include (Wood & Buckwold):
  1. Secured transactions law
     + If a creditor takes a security interest in the debtor's property (the collateral) to secure an obligation, the secured creditor gets special enforcement remedies against the collateral.
       - In addition, a secured creditor is afforded a higher priority than unsecured creditors; i.e., a secured party can apply the proceeds of the collateral against the obligation secured and is not required to share these proceeds with other creditors.
       - Property given as collateral may be real property (often in the form of a mortgage) or personal property (in which case the *Personal Property Security Act* will usually govern).
       - A security interest arises consensually out of an agreement between the debtor and creditor.
  2. Liens and other non-consensual security interests
     + There are several common law and statutory devices which give certain classes of creditors an interest (somewhat like a security interest) by operation of law.
       - e.g., the common law possessory lien conferred upon repairers.
       - e.g., the landlord’s right of distress for unpaid rent.
  3. Other Proprietary Claims
     + e.g., if A wrongfully takes B's automobile, A may sue B for conversion. If successful, the judgment may be enforced in the usual way, or A may exercise self-help remedies in relation to the goods (recaption of chattels) or may seek the assistance of the court through an order of replevin.
  4. Enforcement of Maintenance Orders
     + Under the *Maintenance Enforcement Act* ("*MEA*"), support orders are automatically filed with the Director of Maintenance Enforcement, though the creditor may withdraw from the program.
     + The *MEA* creates a number of additional remedies unavailable to other unsecured creditors.
       - It gives the creditor priority over other unsecured enforcement creditors.
       - In the event of default, the Director may file an order with the Registrar of Motor Vehicles to prevent a renewal of the debtor's licence or registration.
       - The remedy of imprisonment of the debtor is available for default in payment of maintenance.
  5. Enforcement of Claims for Unpaid Wages
     + Under the *Employment Standards Code*, an employee can file a complaint to an employment standards officer to recover unpaid wages; if the officer determines that wages are owing, an order may be filed and is enforceable as a judgment.
       - Provides an employee with a low-cost, simplified method of claiming unpaid wages.

## Guarantees & Secured Lending

* Several risks are involved when loaning money or property to individuals solely on their promise to repay.
  + First, there is the risk that the debtor defaults on their obligation.
  + Second, if the debtor fails to repay, the creditor may have to start an action to recover their money.
    - Even if they win, they will not be fully indemnified for all the costs of litigation; if they lose, they will have to pay a portion of the debtor's costs.
  + Third, if they win their lawsuit, the debtor may have no exigible property to seize.
  + Fourth, if the debtor does have exigible property, and they refuse to pay up, the creditor will incur costs enforcing the judgment.
    - Further, if there are other creditors, some might have priority over the lender; if not, the presence of other creditors will at least shrink the share of the debtor's assets to which the lender is entitled.
* That said, there are a few things that a lender can do to increase their chances of recovering, including: (1) guarantees and (2) secured lending.

### Guarantees

* **Guarantee**: a promise by one party to be liable for the debt of another party.
  + A party may guarantee a debt up to a set amount, or they may guarantee the entire debt.
  + A guarantee may be set up such that the creditor has to seek recovery from the debtor before coming after the guarantor; in most cases, though, the creditor may go after the guarantor first.
  + There is a distinction to be made between personal guarantees and corporate guarantees.
    - *Personal guarantee*: e.g., if A is lending money to B, and they think B may have trouble repaying the loan, A may require that B get someone to agree to be liable for their default as a condition of the loan.
    - *Corporate guarantee*: e.g., if A is lending money to X Ltd, and they think X Ltd may have trouble repaying the loan, A may require that the shareholders of X Ltd agree to be liable for any default by X Ltd as a condition of the loan.
* The *Guarantee Acknowledgement Act* ("GAA") is legislation unique to Alberta that is meant to ensure that guarantors know the consequences of signing a guarantee and the fact that they cannot otherwise be held liable for a debtor's obligations.
  + Per the *GAA*, no guarantee has any effect unless the person entering into the obligation [s. 3]:
    1. appears before a lawyer,
    2. acknowledges to the lawyer that the person executed the guarantee, and
    3. in the presence of the lawyer, signs a certificate in the prescribed form.
       - The lawyer must only issue the certificate form after being satisfied that the person entering into the obligation is aware of the contents of the guarantee and understands it [s. 4(1)].
  + For the purposes of the Act, a guarantee is a written agreement whereby a person, *not a corporation*, enters into an obligation to answer for an act or default or omission of another [s. 1(a)].
    - Therefore, if the person giving the guarantee is a parent company guaranteeing the debts of a subsidiary, they do not need to execute the guarantee before a lawyer; the Act is meant to protect *individuals*.
    - It does not include (i) a bill of exchange, cheque, or promissory note, (ii) a partnership agreement, (iii) a bond or recognizance given to the Crown or a court or pursuant to a statute, or (iv) a guarantee given on the sale of an interest in land or an interest in goods or chattels [s. 1(a)].

### Secured Lending

#### Secured vs. Unsecured Lending

* An *unsecured* creditor has a claim against the debtor for the amount of the debt (i.e., the debtor has a personal obligation to pay but the creditor has no right in the debtor's property as a source of payment).
  + If the debtor does not satisfy this claim, the unsecured creditor sues the debtor on the claim, obtains a judgment and then enforces it using the judgment enforcement mechanisms discussed in this course.
* With *secured* lending, a debtor gives her creditor a proprietary interest in one or more of her assets on the understanding that, if she defaults, the creditor can look to the value of those assets to satisfy the debt without having to sue on that debt.
  + A debtor can grant a security interest in specific item(s) of property or a category of property (e.g., "all present and after-acquired accounts").
  + Examples of secured transactions include:
    - *Pledges*, whereby a debtor gives the creditor a piece of property as collateral that will be returned only if the debtor satisfies the debt.
    - *Home loans* (i.e., mortgages), which are secured against a house; if the individual defaults under the mortgage (e.g., by failing to make monthly payments, insure the house, etc.) the bank can sell the house to satisfy the amounts outstanding on the loan (i.e., foreclosure).
      * The priority of the security interest as against competing interests in the land is determined primarily by registration of the mortgage in the Land Titles registry.
    - *Operating lines of credit*, which are secured against the inventory and equipment of a business; if the business defaults on the operating line of credit, the creditor can look to the value of those assets to satisfy the debt.
  + If a borrower defaults, the remedies available to the secured creditor will be determined by the security agreement and by legislation.
    - Security agreements with respect to real property are governed by the *Law of Property Act* and the various unwritten rules that govern foreclosure proceedings.
    - Security interests in personal property are governed by the *Personal Property Security Act*.
  + Typically, a secured creditor's right to apply proceeds from collateral in satisfaction of a debt exists in preference to the claims of the debtor's unsecured creditors and the claims of third parties who acquire proprietary rights in the collateral from the debtor.
    - Registration is generally the determining factor in establishing the priority of a security interest.
      * Creditors with a security interest in personal property protect the priority of their interest by registering a financing statement in the PPR.
      * Creditors with a security interest in real property protect the priority of their interest by registering an instrument against the certificate of title in the Land Titles office.
    - Registration puts parties on notice about who has a claim against personal or real property.
  + As among secured creditors, they are entitled to a *priority distribution*, wherein the creditor with first priority is paid in full before any other creditor gets to collect; if there is property remaining, the creditor with second priority gets paid in full before any of the other creditors get to collect, and so on.
    - While the rules about priority are quite complicated, generally, the creditor who registers their security interest first gets priority.
    - e.g., imagine that four creditors have a security interest in collateral worth $50,000:

Secured 
Creditors 
creditor A 
Creditor B 
Creditor C 
Creditor D 
Total 
Amount 
Owing 
$15,000 
$20,000 
565.000 
$10000 
$200,000 
Amount 
Owing to 
creditor/ 
Total Debt 
7.5% 
10% 
32.5% 
100% 
Rank 
4 
3 
Pro Rata 
Distribution 
53750 
$16,250 
$25,000 
Priority 
Distributi-m 
$0 
$20,000 
SO 
$30,000 

#### Oversecured vs. Undersecured

* A debt is *oversecured* when the value of the collateral securing the loan exceeds the amount of the debt.
  + e.g., you loan your friend $500 and take a security interest in his bike, which is worth $750.
* A debt is *undersecured* when the amount of the debt exceeds the value of the collateral securing the loan.
  + e.g., you loan your friend $500 and take a security interest in his bike. His bike is worth $750, but there is a secured creditor with priority to you and she is owed $400.

## Bankruptcy Proceedings

* + The provincial judgment enforcement system may be stayed for a period of time or entirely displaced under the federal *Bankruptcy and Insolvency Act* if the debtor goes into bankruptcy (Wood & Buckwold).
    - A bankruptcy stays proceedings on the enforcement measures of unsecured creditors under provincial judgment enforcement law.
      * The assets of the bankrupt are vested in a trustee who then liquidates them and distributes the proceeds to the creditors.
    - There are two methods by which bankruptcy proceedings can be initiated.
      * The debtor can voluntarily make an assignment in bankruptcy.
      * The creditors of the debtor may seek to put a debtor into bankruptcy by filing in court an application for a receiving order.
    - The bankruptcy system applies to both corporate bodies and to individuals.
      * In the case of a corporate bankruptcy, an insolvent corporation faces a choice between liquidation in bankruptcy and re-organization.
        + Under a re-organization, the existing managers maintain control of the corporation, and the claims of creditors are scaled back to give the firm a new and viable capital structure.

Re-organization proposals are voted upon by the various classes of creditors.

If it is accepted, it binds all creditors.

If it is rejected, the corporation is placed in bankruptcy.

* + - * + The end result of a liquidation in bankruptcy is that the corporation ceases to function.
      * In the case of a bankruptcy of an individual, the individual will usually be discharged from the claims of the creditors.
        + However, the *Bankruptcy and Insolvency Act* contains provisions governing consumer proposals, wherein a consumer debtor proposes a compromise or extension of payments with the creditors (which is binding only if it is not rejected by the creditors).
        + There are two major limitations on the granting of discharges:

The court has a wide discretion in making the order.

It may grant an absolute discharge, suspend the operation of the order, require as a condition of the order that the bankrupt pay money or perform such other acts as the court may direct, or refuse the discharge.

A discharge does not release the bankrupt from certain classes of debts.

e.g., fines, alimony, or maintenance claims, debts arising out of fraud while acting in a fiduciary capacity, and obtaining property by false pretences or fraudulent misrepresentation.

## Imprisonment for Debt

* + For much of English history, the primary process for judgment enforcement was imprisonment; however, Canadian law has for over 100 years moved away from imprisonment and towards proprietary remedies.
    - Under s. 2(e) of the *CEA*, except as provided in any other enactment, a person may not be arrested or imprisoned for default in payment of a money judgment.
      * Plus, r. 10.52(3) of the *Rules of Court* specifies that a judge may declare a person in civil contempt (the sanctions for which include imprisonment) if they do not comply with an order, *other than an order to pay money*, without reasonable excuse.
    - Despite this, there remain 4 situations in Alberta where imprisonment can occur in enforcing a money judgment:
      1. Imprisonment of maintenance defaulters can and does take place under the *Maintenance Enforcement Act* [s. 30].
      2. Where a judgment debtor fails to attend on an examination in aid or refuses to make satisfactory answers on the examination, he or she may be held in civil contempt and imprisoned.
      3. It is not clear that the legislation abolishing imprisonment for debt extends to the equitable writ of *ne exeat regno*, which orders a debtor not to leave the jurisdiction on threat of imprisonment.
      4. While r. 10.52(3) says that a failure to obey a court order for the payment of money is not civil contempt, there is a Nova Scotia case which creates an exception where the debtor, in addition to refusing to pay, *actively conceals assets* to frustrate the judgment creditor (*MacNeil v MacNeil*).

## Ethical Issues in Collection

* + When engaging in debt collection, a lawyer should keep in mind the following rules in the Law Society’s Code of Conduct.
    - Rule 3.2-11 states that a lawyer must not, in an attempt to gain a benefit for a client, threaten to (1) to initiate or proceed with a criminal or quasi-criminal charge or (2) make a complaint to a regulatory authority.
      * The impropriety stems from using criminal or quasi-criminal proceedings to gain a civil advantage, even if the client has a legitimate entitlement to be paid money.
      * It is not improper for a lawyer to request that another lawyer comply with an undertaking or trust condition or other professional obligation or face being reported to the Society.
    - Rule 2.1-1 specifies that 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.
    - Rule 5.1-2 holds that a lawyer must not knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable.
    - Rule 7.2-1 obligates lawyers to act in good faith with all persons with whom you have dealings.

### Demand Letters

* When someone owes your client money, usually the first step will be to send a demand letter.
  + A demand letter can be a cheap and effective way to resolve a dispute without going to court.
    - If a debtor receives a letter on letterhead from a lawyer demanding payment, they may be obliged to comply.
    - Sometimes you will *have* to send a demand letter to commence an action, as when a debt is only payable "on demand."
  + A demand letter will usually demand payment, offer details about how payment can be made, and set out what the creditor's next steps will be if payment is not made by a specified date.
    - The letter may indicate that the creditor will initiate civil proceedings if payment is not made.
    - It may suggest that the creditor will seek costs if they have to file a civil claim.
    - It may point out that pre-judgment interest will continue to accrue if the debtor holds off.
* In a demand letter, lawyers have an ethical and legal obligation to refrain from:
  + Making materially inaccurate or misleading statements of law,
  + Making unfounded demands for compensation,
  + Suggesting that litigation is possible if they know that there is little or no chance litigation will in fact be commenced,
  + Threatening criminal or quasi-criminal proceedings.
* In addition to the LSA's Code of Conduct, consequences for improper demands in a demand letter can be found in:
  + The *Criminal Code*:
    - *Section 346*: every one commits extortion who, without reasonable justification and with intent to obtain anything, by threats, accusations, menaces, or violence attempts to induce any person to do anything or cause anything to be done.
      * A threat to institute civil proceedings is not a threat for the purposes of this section [*Code*, s. 346(2)].
    - *Section 141*: every person commits an offence who asks for or obtains or agrees to receive or obtain any valuable consideration by agreeing to compound or conceal an indictable offence.
    - *Section 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.
  + The *Judicature Act*:
    - *Section 55*: any person using a court form in a manner likely or intended to deceive another is guilty of an offence and liable to a fine of not less than $100 and not more than $500 or to a term of imprisonment not exceeding 6 months, or both.
  + The *Alberta Rules of Court*.
    - *Rule 10.50*: if a lawyer engages in serious misconduct, the court may order them to pay a costs award.
    - e.g., in *Cybulski v Bertrand*, counsel for a creditor wrote to the debtor stating that steps in execution of the judgment including seizure and sale would be taken in the event of any delay relating to payment of the judgment. Two days later, counsel for the plaintiff instructed a bailiff to seize vehicles owned by the defendant, resulting in three subsequent applications to have the seizure set aside. The court ordered that the plaintiff's counsel pay anything owing to the bailiff with respect to the seizure, and required the plaintiff to pay the defendant's party and party costs with respect to the three applications.

#### *Wilson v Law Society of British Columbia* (1986), 33 DLR (4th) 572 (BCCA)

Facts:

* The appellant was found guilty of professional misconduct by the Law Society of BC for writing a letter to a member of the public, Mr. Northrop in which he demanded that Mr. Northrop return his client's personal belongings and warned: "Your failure to comply with this request could … result in theft charges proceeded with against you." The appellant argued that this statement was not a threat, but merely a forewarning to Northrop that if he acted in a certain way it could lead to a charge of theft.

Issue and holding:

* Did the Law Society err in finding that the appellant's conduct constituted professional misconduct? **NO**

Analysis:

* Under the *Professional Conduct Handbook*, no lawyer shall demand on behalf of a client, a payment of money or any other thing from any person to avoid a prosecution being launched against them.
  + The purpose of this rule is to prevent the criminal law from being used as a lever to enforce the payment of a civil claim, thereby protecting the standing of the legal profession in public estimation.

Rationale: (MacFarlane JA)

* The court must be careful not to interfere with the decision of the Benchers, for their decision is based on a professional standard which only they, being members of the profession, can properly apply.
* That said, the letter is open to the interpretation that the appellant was either agreeing to compound the offence of theft if he obtained a benefit for his client or was threatening criminal proceedings with intent to gain a benefit for his client.

Notes:

* "Shoplifting civil recovery letters" ("SCRLs") are letters written by lawyers and directed either to people accused of shoplifting or parents of children accused of shoplifting demanding payment of a specified amount and threatening civil action if the payment is not made.
  + While the logic of SCRLs is to try to recoup the costs of shoplifting from those who cause them, there are significant ethical concerns about this practice in Canada.
    - For one, even if the fact of shoplifting is established, there is usually no legal basis for a claim against the parents of a shoplifter.
      * Plus, the suggestion that legal proceedings will be taken to recover a claim is generally untrue.
    - Lawyers who send SCRLs are likely aware that their clients do not have a legal basis for their demands or have no intention of proceeding to court, but they still send them anyway.
      * They do so, presumably, because sometimes the recipient will pay because of fear, ignorance, and the absence of legal advice.
    - The sending of SCRLs may violate the Law Society's Code of Conduct, Rule 2.1-1 of which provides that a lawyer has a duty to carry on the practice of law honourably and with integrity.
      * Further, Rule 7.2-1 states that 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.
* Another practice used by some lawyers to collect debts is that of sending a draft statement of claim filled out with the names of the creditor and alleged debtor as plaintiff and defendant along with the lawyer’s letter demanding payment.
  + The use of draft statements of claim has also been criticized on ethical grounds, though the nature of the claim pursued by these means may give rise to different considerations than SCRLs.
    - The claim is usually a claim for repayment of a voluntarily incurred debt, and the document presented as the statement of claim is usually marked as a draft.

### Civil Liability

* If a party engages in improper conduct in the process of judgment enforcement, they could be found liable in trespass, assault, defamation, fraudulent misrepresentation, conspiracy to harm (see *Mraiche*), etc.

#### *Mraiche Investment Corp v McLennan Ross LLP*, 2012 ABCA 95

Facts:

* In November 2007, Mraiche Investment Corp ("Mraiche") sued Premier City Investments Ltd ("Premier") along with G.S. Paul, the sole director of Premier, in Action No. 14578. In April 2008, Fialkov, a solicitor with McLennan Ross LLP, incorporated 1396619 Alberta Ltd ("1396619") on the instructions of G.S. Paul. In May 2008, four parcels of land owned by Premier were transferred to 1396619 for nominal consideration. In August 2008, on the instruction of G.S. Paul, Fialkov facilitated the sale of the parcels from 1396619 to Newcastle Construction (1994) Inc ("Newcastle"). In October 2008, Action No. 14578 was settled for $2,500,000 plus costs against Premier, G.S. Paul, and two other companies. However, Mraiche was unable to capture any of the proceeds of sale of the four properties to satisfy its judgment against Premier.
* Mraiche commenced this action against, *inter alia*, McLennan Ross. It alleged a conspiracy to harm Mraiche by participating in the transfer of properties to avoid Mraiche's claim to them. While it did not point to evidence of an actual agreement including Fialkov to injure Mraiche, Mraiche claimed that the facts known to Fialkov would have informed him as to the questionable nature of the transfers. McLennan Ross applied for summary judgment dismissing the action.

Procedural history:

* The chambers judge struck the appellant's suit, concluding that the claim of fraud against McLennan Ross was speculative and had no chance of success.

Issue and holding:

* Did the chambers judge err in concluding that Mraiche's claim of fraud against McLennan Ross had no chance of success? **NO**

Analysis:

* For the tort of civil conspiracy, the following elements must be proven:
  1. An agreement between two or more persons;
     + The plaintiff must adduce at least some evidence from which it may be inferred that there was an intentional participation by the parties with a view to the furtherance of a common design.
  2. Concerted action taken pursuant to the agreement;
  3. *If the action is lawful*, there must be evidence that the conspirators intended to cause damage to the plaintiff;
  4. *If the action is unlawful*, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
  5. Actual damage suffered by the plaintiff.

Rationale: (The Court)

* Mraiche effectively suggests that the tort can be made out *without* reference to a specific agreement to harm, so long as Fialkov should have known that some creditors of the client were pressing them for money.
* The artificial imposition of a deemed agreement arising from a constructively determined 'ought to know' state of mind would make the tort of civil conspiracy so elastic as to make it mere negligence without proximity, privity, or fiduciary duty.

Notes:

* A litigant who makes unsubstantiated allegations that the opposing party has engaged in a fraudulent conveyance or concealment of assets may be penalized through the imposition of a substantially increased award of costs.

### *Consumer Protection Act*

#### Unfair Practices

* It is an unfair practice for a supplier, in a consumer transaction or a proposed consumer transaction [*CPA*, s. 6(2)]:
  1. to exert undue pressure or influence on the consumer to enter into the consumer transaction;
  2. to take advantage of the consumer as a result of the consumer’s inability to understand the character, nature, language or effect of the consumer transaction or any matter related to the transaction;
  3. to use exaggeration, innuendo or ambiguity as to a material fact with respect to the consumer transaction;
  4. to charge a price for goods or services that grossly exceeds the price at which similar goods or services are readily available without informing the consumer of the difference in price and the reason for the difference;
  5. to charge a price for goods or services that is more than 10%, to a maximum of $100, higher than the estimate given for those goods or services unless
     1. the consumer has expressly consented to the higher price before the goods or services are supplied, or
     2. if the consumer requires additional or different goods and services, the consumer and the supplier agree to amend the estimate in a consumer agreement;
  6. to charge a fee for an estimate for goods or services unless the consumer
     1. is informed in advance that a fee will be charged and informed of the amount of the fee, and
     2. has expressly consented to be charged the fee.
* It is an unfair practice for a supplier [*CPA*, s. 6(3)]:
  1. to enter into a consumer transaction if the supplier knows or ought to know that the consumer is unable to receive any reasonable benefit from the goods or services;
  2. to enter into a consumer transaction if the supplier knows or ought to know that there is no reasonable probability that the consumer is able to pay the full price for the goods or services;
  3. to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one‑sided;
  4. to make a representation that a consumer transaction involves or does not involve rights, remedies or obligations that is different from the fact.
* The following are unfair practices if they are directed at one or more consumers or potential consumers [*CPA*, s. 6(4)]:
  1. a supplier’s doing or saying anything that might reasonably deceive or mislead a consumer;
  2. a supplier’s misleading statement of opinion if the consumer is likely to rely on that opinion to the consumer’s disadvantage;
  3. a supplier’s representation that goods or services have sponsorship, approval, performance, characteristics, accessories, ingredients, quantities, components, uses, benefits or other attributes that they do not have;
  4. a supplier’s representation that the supplier has a sponsorship, approval, status, qualification, affiliation or connection that the supplier does not have;
  5. a supplier’s representation that goods or services are of a particular standard, quality, grade, style or model if they are not;
  6. a supplier’s representation that goods have or have not been used to an extent that is different from the fact;
  7. a supplier’s representation that goods are new if they are used, deteriorated, altered or reconditioned;
  8. a supplier’s representation that goods have or do not have a particular prior history or usage if that is different from the fact;
  9. a supplier’s representation that goods or services are available for a reason that is different from the fact;
  10. a supplier’s representation that goods or services have been made available in accordance with a previous representation if they have not;
  11. a supplier’s representation that the supplier can supply goods or services if the supplier cannot;
  12. a supplier’s representation involving a voucher that another supplier will provide goods or a service or will provide goods or a service at a discounted or reduced price if the first‑mentioned supplier knows or ought to know that the second‑mentioned supplier will not;
  13. a supplier’s representation that goods are available in a particular quantity if they are not;
  14. a supplier’s representation that goods or services will be supplied within a stated period if the supplier knows or ought to know that they will not;
  15. a supplier’s representation that a specific price benefit or advantage exists if it does not;
  16. a supplier’s representation that a part, replacement, repair or adjustment is needed or desirable if it is not;
  17. a supplier’s representation that the supplier is requesting information, conducting a survey or making a solicitation for a particular purpose if that is not the case;
  18. a supplier’s representation that a person does or does not have the authority to negotiate the terms of a consumer transaction if the representation is different from the fact;
  19. when the price of any part of goods or services is given in any representation by a supplier,
      1. failure to give the total price of the goods or services, or
      2. giving less prominence to the total price of the goods or services than to the price of the part;
  20. when the amount of any instalment to be paid in respect of goods or services is given in any representation by a supplier,
      1. failure to give the total price of the goods or services, or
      2. giving less prominence to the total price of the goods and services than to the amount of the instalment;

t.1)    a supplier’s representation regarding an agreement for continuing provision of services if the supplier fails to provide prominent and full disclosure of the details of the agreement…;

1. a supplier’s giving an estimate of the price of goods or services if the goods or services cannot be provided for that price;
2. a supplier’s representation of the price of goods or services in such a way that a consumer might reasonably believe that the price refers to a larger package of goods or services than is the case;
3. a supplier’s representation that a consumer will obtain a benefit for helping the supplier to find other potential customers if it is unlikely that the consumer will obtain such a benefit;
4. a supplier’s representation about the performance, capability or length of life of goods or services unless
   1. the representation is based on adequate and proper independent testing that was done before the representation is made,
   2. the testing substantiates the claim, and
   3. the representation accurately and fairly reflects the results of the testing;
5. a supplier’s representation that goods or services are available at an advantageous price if reasonable quantities of them are not available at such a price, unless it is made clear that quantities are limited;
6. a supplier’s representation that appears in an objective form such as an editorial, documentary or scientific report when the representation is primarily made to sell goods or services, unless the representation states that it is an advertisement or promotion;

#### Terminology

* "Material fact” means any information that would reasonably be expected to affect the decision of a consumer to enter into a consumer transaction [*CPA*, s. 6(1)].
* "Consumer' means an individual who [*CPA*, s. 1(1)(b)]:
  1. receives or has the right to receive goods or services from a supplier as a result of a purchase, lease, gift, contest, or other arrangement, but does not include an individual who intends to sell the goods after receiving them,
  2. has a legal obligation to compensate a supplier for goods that have been or are to be supplied to another individual and the other individual does not intend to sell the goods after receiving them, or
  3. has a legal obligation to compensate a supplier for services that have been or are to be supplied to another individual;
* "Consumer transaction" means [*CPA*, s. 1(1)(c)]:
  1. the supply of goods or services by a supplier to a consumer as a result of a purchase, lease, gift, contest or other arrangement, or
  2. an agreement between a supplier and a consumer, as a result of a purchase, lease, gift, contest or other arrangement, in which the supplier is to supply goods or services to the consumer or to another consumer specified in the agreement;
* "Goods" means (i) any personal property that is used or ordinarily used primarily for personal, family, or household purposes, (ii) a voucher, or (iii) a new residential dwelling whether or not the dwelling is affixed to land [*CPA*, s. 1(1)(e)].
* "Services" means any service offered or provided primarily for personal, family, or household purposes, including [*CPA*, s. 1(1)(k)]:
  1. a service offered or provided that involves the addition to or maintenance, repair or alteration of goods or any residential dwelling,
  2. a membership in any club or organization if the club or organization is a business formed to make a profit for its owners,
  3. the right to use property under a time share contract, and
  4. any credit agreement;
* "Supplier" means a person who, in the course of the person’s business (i) provides goods or services to consumers, (ii) manufactures, assembles, or produces goods, (iii) promotes the use or purchase of goods or services, or (iv) receives or is entitled to receive money or other consideration as a result of the provision of goods or services to consumers, and includes any salesperson, employee, representative or agent of the person [*CPA*, s. 1(1)(l)].
* "Voucher” means any document that purports to give the holder the right to obtain goods or a service or the right to obtain goods or a service at a discounted or reduced price [*CPA*, s. 1(1)(n)].

#### Remedies

* Any waiver or release by a person of the person’s rights under the *CPA* is void [*CPA*, s. 2(1)], though this does not apply to a release made in the settlement of a dispute [*CPA*, s. 2(2)].

##### Cancelling an Agreement

* Where a supplier engaged in an unfair practice, any consumer who entered into a consumer transaction that was subject to the unfair practice may cancel the consumer transaction at no cost or penalty [*CPA*, s. 7(2)].
  + A consumer must give notice within one year of the supplier having been found to have engaged in an unfair practice related to a consumer transaction if they wish to cancel the transaction [*CPA*, s. 7.1(1)(a)].
* A consumer is entitled to recover the amount by which their payment exceeds the value of the goods or services to them and/or to recover damages if cancellation of the transaction is not possible because [*CPA*, s. 7(3)]:
  + the return or restitution of the goods or cancellation of the services is no longer possible, or
  + cancellation would deprive a third party of a right in the subject‑matter of the transaction that the third party has acquired in good faith and for value.
  + A consumer must give notice within one year of the supplier having been found to have engaged in an unfair practice related to a consumer transaction if they seek recovery under s. 7(3) [*CPA*, s. 7.1(1)(b)].
* If a consumer has delivered notice and has not received a satisfactory response within the prescribed period, they may commence an action [*CPA*, s. 7.1(5)].

##### Court Actions

* When a consumer has suffered damage or loss due to an unfair practice, they may commence an action in the ABQB for relief against any supplier or any principal, director, manager, employee or agent of a supplier who engaged in or acquiesced that unfair practice [*CPA*, s. 13(1)].
  + In an action under this section, the court may [*CPA*, s. 13(2)]:
    1. declare that the practice is an unfair practice;
    2. award damages for damage or loss suffered;
    3. award punitive or exemplary damages;
    4. make an order for
       1. specific performance of the consumer transaction,
       2. restitution of property or funds, or
       3. rescission of the consumer transaction;
    5. grant an order in the nature of an injunction restraining the supplier from engaging in the unfair practice;
    6. make any directions and grant any other relief the court considers proper.
  + The court must consider whether the consumer made a reasonable effort to minimize any damage resulting from the unfair practice and to resolve the dispute with the supplier before commencing the action [*CPA*, s. 13(3)].

# Ch. 2: Set-Off

* Assume that Ann owes Bob $50,000. At the same time, Bob owes Ann $40,000. If Bob were to sue Ann for the $50,000, Ann could pay $10,000 and raise set-off as a defence to the $40,000 balance of the claim. Similarly, Bob can recover $40,000 of the total $50,000 by setting off the $40,000 owed to Ann and suing to recover the balance of $10,000 if Ann refuses to pay.
* Set-off does several things:
  1. It operates as a debt collection device.
     + Assume that Ann owes Bob $50,000. At the same time, Bob owes Ann $40,000. Ann can recover the $40,000 owed to her by paying Bob $10,000 and asserting set-off (i.e., she does not have to sue him for $40,000).
       - Similarly, Bob can recover $40,000 of the $50,000 owed to him by Ann through asserting set-off. He will only have to recover the balance of $10,000.
  2. It may be raised as a defence to an action for the 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.
     + If Ann sues Bob to recover the $40,000 he owes her, he may defend the action by raising his right of set-off.
  3. It allows the party asserting set-off to gain priority over other creditors (see *Citibank Canada*).
  4. May affect enforcement of a writ through garnishment of a debt
     + Under s. 78(i) of the *CEA*, a garnishee is entitled to a set‑off to which they would have been entitled in the absence of garnishment proceedings if:
       1. the right to the set‑off already existed when the garnishee summons was served on the garnishee,
       2. 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
       3. it would be inequitable not to allow the set‑off;
  5. It 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 (*Re Palmer and Southwood*).

## *Holt v Telford*, [1987] 2 SCR 193

Facts:

* The Telfords and Canadian Stanley Development entered into an agreement to trade parcels of land. Each party agreed to make a down payment towards the purchase of the other's land and each gave the other a mortgage on the purchased land securing payment of the balance of the price.
  + The Telfords' purchase of Canadian Stanley land involved a $265,000 purchase price and a $115,000 down payment. A mortgage was given to Canadian Stanley securing payment of the balance of $150,000, payable by way of three instalments of $50,000 plus interest on each of January 31, 1981, July 31, 1981, and January 31, 1982.
  + Canadian Stanley's purchase of Telford land involved a $265,000 purchase price and a $165,000 down payment. A mortgage was given to the Telfords securing payment of the balance of $100,000, payable by way of two installments of $50,000 plus interest on each of July 31, 1981 and January 31, 1982.

On September 26, 1980, Canadian Stanley assigned the Telford mortgage to the Holts without notifying the Telfords. The Telfords' lawyer subsequently tendered payment of the sum due on January 31, 1981 to Canadian Stanley. Canadian Stanley indicated that the mortgage had been assigned to the Holts and returned the cheque. On February 2, 1981, the Holts demanded payment of the $50,000 plus interest due on January 31. A few weeks later, they commenced action against the Telfords for the entire amount of $150,000 plus interest, relying on a term of the mortgage providing that upon default of any payment, the whole principal would become payable. The Telfords paid the $50,000 due on January 31, 1981 and claimed that they were entitled to have the mortgage against the property purchased by them discharged by way of set-off.

Issue and holding:

* Do the Telfords have a right to set off the debt owed to them against the Holts' claim? **YES**

Analysis:

* Agreement, express or implied, can create a right of set-off.
  + *Note*: set-off by agreement can expand or restrict the rights of set-off otherwise available.
* Absent such an agreement, a litigant may demonstrate that they have a right to set-off at law or in equity.
  + *Set-off at law* requires the fulfilment of two conditions: (1) both obligations must be debts (i.e., liquidated sums), and (2) both debts must be mutual cross obligations (i.e., the parties must owe debts to one another which can be ascertained with certainty at the time of pleading).
    - Under this definition, any assignment would destroy mutuality at law, because the debt would be owed to a third party.
  + *Equitable set-off* is available where there is a claim for a money sum, liquidated or unliquidated (i.e., it applies even where the cross-obligations are not debts), and *there is no requirement of mutuality*.
    - Equitable set-off allows an individual to:
      1. Set-off against the assignee a money sum which accrued and became due *prior* to the notice of assignment, and
         * If the *assignment* occurs before the existence of debts to be set off, the assignment prevents the mutuality of debts (unless the second situation applies).
      2. Set-off against the assignee a money sum which arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with that contract or series of events.
         * In these cases, a debt arising out of the contract or closely interrelated contracts may be set-off against the assignee *even if the debt accrues due after the notice of the assignment*.
* Under s. 150 of the *Land Titles Act* (now s. 154), assignment of a mortgage is not effective unless notice in writing of the assignment is given to the original vendor or owner.

Rationale: (Wilson J)

* As the trial judge found, there was no agreement creating a right of set-off in this case.
* Set-off at law is not available because the debts are not mutual (i.e., the assignment to the Holts destroyed mutuality at law, which is a prerequisite of legal set-off).
* However, the Telford *are* entitled to equitable set-off.
  + The debts which the Telfords are seeking to set off against each other (i.e., those amounts payable by each party on July 31, 1981 and January 31, 1982) did not accrue due before the date of the notice of assignment.
    - The Telfords did not receive any notice of assignment in compliance with the provisions of the *Land Titles Act* until the Holts filed their notice of statement of claim on March 13, 1981.
    - Under the original schedule of payments, the only debt which accrued due prior to March 13, 1981 was the January 31, 1981 payment of $50,000 from the Telfords to Canadian Stanley.
  + However, *the debts which the Telfords are seeking to set off arose out of the same contract or closely interrelated contracts*.
    - The Telford mortgage and the Canadian Stanley mortgage are part of the land exchange deal, being part of the consideration for the reciprocal transfers.
      * The mortgages were entered into on the same date.
      * The purchase price for both parcels was the same ($265,000).
      * Except for the January 31, 1981 payment, the payments under the two mortgages were on the same dates and for the same amounts.

## *Chubak v Corner Brook Farms Ltd*, 2015 ABQB 806

Facts:

* The plaintiffs (the "Chubaks") sold the shares of Carnwood Contracting Ltd ("Carnwood") to Corner Brook Farms Ltd ("Corner Brook"). The defendants Jerry Hodge and Audrey Hodge (the "Hodges") guaranteed payment of the amount owing by Corner Brook to the Chubaks. At the same time, the Chubaks, who were formerly shareholders and principals of Carnwood, concluded an agreement with Carnwood containing non-solicitation and non-competition provisions. Corner Brook did not pay what it owed for the shares of Carnwood, and the Chubaks sought summary judgment against Corner Brook and the Hodges as guarantors. However, the defendants claimed that the Chubaks violated the restrictive covenants in their agreement with Carnwood, thereby affecting its value. As such, the defendants argued that they should be able to set-off the amount they owed to the Chubaks against Carnwood's damage claim against the Chubaks.

Issues and holding:

* Is legal set-off available to set off the amount the defendants owe to the Chubaks against Carnwood's damage claim against the Chubaks? **NO**
* Is equitable set-off available to set off the amount they owed to the Chubaks against Carnwood's damage claim against the Chubaks? **NO**

Analysis:

* In equity, cross-claims by the same parties may be set off if they are either debts or a debt and a damage claim that arises out of closely connected contracts.
  + After an assignment, equity may allow set-off notwithstanding the fact that different parties are then involved, but *somewhere along the chain there must have been mutuality of parties*.

Rationale: (Master Robertson)

* Since set-off at law arises only where the cross-obligations are debts (see *Holt v Telford*), it is not available in this case, because one claim is a damage claim.
* Equitable set-off is not available because the claims in question were at no point mutual; the debt claim, which is the subject of this lawsuit, is owed by Corner Brook to the Chubaks, while the obligations under the separate agreement are owed by the Chubaks to Carnwood.

## *Citibank Canada v Confederation Life Insurance Co*, [1996] OJ No 3409 (SC)

Facts:

* In winding up proceedings, the assets of an insolvent company are sold and its unsecured creditors are paid out to the extent of their proportionate share of the proceeds remaining after satisfaction of secured creditors' claims.
* In August 1994, Confederation Life Insurance Co ("CLIC") was placed in liquidation. At the time, Citibank owed CLIC $4,028,825 under a Term Deposit. But, Citibank claimed that CLIC owed it $3,209,768 under "bond option" and "swap" agreements which, as a result of its insolvency, it would not be in a position to honour when they later fell due. As such, Citibank claimed that it had a right of set-off.
  + If Citibank *does* have a right of set-off, it will remain a net debtor of CLIC to the extent of $819,057, but will recover 100% of the amounts which it says CLIC owes to it ($3,209,768), providing it with an advantage over other creditors of CLIC, who will likely recover little, if anything.
  + If Citibank *does not* have a right of set-off, it will be required to pay the liquidator 100% of what it owes CLIC ($4,028,825), and will very likely recover nothing on account of CLIC's outstanding obligations.

Issue and holding:

* Is Citibank entitled to set-off CLIC's liability so calculated against its funds held on deposit by Citibank? **NO**

Analysis:

* In insolvency situations, set-off provides a creditor with an advantage which other creditors don't have.
  + It puts the advantaged creditor in what is tantamount to a secured position, something which was not a part of the bargain with the insolvent company in the first place.
  + At the same time, set-off helps address the unfairness that arises where a debtor/creditor is required to pay the liquidator everything that is legitimately owed to the insolvent company but is only able to collect a fraction of what is equally legitimately owing by the insolvent company, if anything.
* Set-off may arise contractually, at law, or in equity.
  + For set-off at law to occur, the following circumstances must arise:
    1. The obligations existing between the two parties must be debts, and *they must be debts which are for liquidated sums which can be ascertained with certainty*, and
       - When the amount to be recovered depends on the circumstances and is fixed by opinion or by assessment or by what might be judged reasonable, the claim is generally *unliquidated*.
    2. Both debts must be mutual cross-obligations (i.e., cross-claims between the same parties and in the same right).
  + For set-off to occur in equity, there is no necessity for mutuality, and the cross-obligations need not be debts, but may be for a sum of money whether liquidated or unliquidated.
    1. However, the cross-claims must be connected in some way that would make it unjust to permit one party to enforce payment without accounting for the existence of the other claim.

Rationale: (Blair J)

* No question of contractual set-off exists here, and Citibank is not entitled in law or in equity to set off the bond option and swap agreement claims against the amount owing by it to CLIC on the Term Deposit.
  + There is no right to set-off in equity because there is not a sufficiently close connection between the obligation of Citibank under the Term Deposit and the obligations of CLIC relation to the bond option and swap agreements.
    - The Term Deposit transaction was entered into between Citibank and CLIC on May 23, 1984, at a different time and for entirely different purposes than the bond option agreement and swap agreement transactions later and separately agreed to between the parties.
  + There is no right to set-off at law because:
    - Citibank’s claims against CLIC are not "debts," but rather give rise to a claim in damages.
      * CLIC is being held to task for anticipatory breach (i.e., for not being in a position to honour its obligations under the bond option and swap agreements when they would later fall due); this gives rise not to a debt, but to a claim in damages.
    - Alternatively, even if Citibank's claims are "debts," they are not for liquidated sums because they cannot be ascertained with certainty.
      * Since the agreements did not define the sum that would be owed by CLIC in the event that they defaulted on their payment obligations, Citibank calculated the value of its claim by obtaining five quotes for the replacement cost of the agreements, dropping the highest and the lowest, and averaging the remaining three.
        + This method depends on the underlying opinion of the experts, which is based on their assessment of the diverse factors at play in the bond option or swap agreement markets.
      * Where the ingredients of the formula depend upon the circumstances of the case and are fixed by opinion or assessment the characteristics of a liquidated amount are not present.
        + It is not enough that at the end of the exercise a sum has been arrived at.

Notes:

* As this case shows, set-off can have the effect of altering priorities among creditors; an unsecured creditor who can assert set-off may effectively recover the full amount of the debt owed to them while leaving little or no property available to other unsecured creditors of the debtor.

# Ch. 3: Pre-Judgment Relief

## Attachment Orders

* The *CEA* creates a single category of pre-judgment remedy called an *attachment order*.
  + According to Dana Nowak, attachment orders are more common in cases involving fraud, misappropriation, misrepresentation, shareholder disputes, purchase/sale transactions, and competition breaches.
  + Courts tend not to like attachment orders because they are very restrictive.

### Applying for an Order

* **A claimant may apply to the Court for an attachment order where they have commenced or is about to commence proceedings** in Alberta [*CEA*, s. 17(1)(a)].
  + The applicant can apply for an attachment order after filing a statement of claim but before serving it on the defendant.
* **The application may be made *ex parte*** for a temporary attachment order not exceeding 21 days, which will expire unless it is extended on an application on notice to the defendant [*CEA*, ss. 18(1)–(2)].
  + If it would be inappropriate for an *ex parte* attachment order to expire automatically after 21 days, it may specify a later expiry date or specify that it remains in effect until it terminates [*CEA*, s. 18(3)].
  + If an application to extend the period cannot reasonably be heard and determined before the expiry of the attachment order, the Court may, on an *ex parte* application, extend the period pending the determination of the application [*CEA*, s. 18(5)].
  + When an application is made to extend the attachment order on notice to the defendant [CEA, s. 18(6)]:
    1. the onus is on the claimant to establish that the attachment order should be continued;
    2. the order shall not be extended unless the circumstances that exist at the time of hearing the application justify the continued existence of the order;
    3. the Court may terminate the order if the claimant failed to make full and fair disclosure of the material information that existed at the time they made the *ex parte* application.
       - The duty to provide full and fair disclosure includes an obligation to take reasonable steps to investigate the relevant facts before an application is made (*Five Star Motor*).
       - It is not sufficient that no inaccurate representations are made (*Five Star Motor*).

#### *Tiger Calcium Services Inc v Sazwan*, 2017 ABCA 316

Analysis: (Strekaf JA)

* *Ex parte* applications (i.e., those without notice to or argument by any adverse party) are extraordinary, since it is a fundamental principle that parties have a right to be heard before their rights are negatively affected.
  + They are limited to those situations in which the delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given (e.g., they will shield their assets before an order can be obtained).
  + An applicant proceeding without notice is required to act with the utmost good faith and make full disclosure of the facts, *including facts which would militate against the application*.
  + Without notice, orders should not be approached on the basis that unreasonable terms can always be modified after the fact on a review application.

### Conditions for an Order

* **On hearing an application, the Court *may* grant an attachment order if:**
  1. **It is satisfied that [s. 17(2)]:**
     1. **there is a reasonable likelihood that the claimant’s claim will be established, and**
        + This standard is lower than the "strong *prima facie* case" standard (*Haney Farms*).
     2. **there are *reasonable grounds* for believing that the defendant is dealing with the defendant’s exigible property, or is likely to deal with that property,**
        1. **otherwise than for the purpose of meeting their *reasonable and ordinary* business or living expenses, and**
           + Whether a sale is in the ordinary course of business depends on what is the usual or regular type of transaction that is engaged in by people in the business (*Haney Farms*).
        2. **in a manner that would be *likely to seriously hinder the claimant* in enforcing a judgment against the defendant, and**
           + In determining whether this test has been met, a deponent’s belief is not sufficient; there must be a sufficient evidentiary foundation to support the belief (*Haney Farms*).

The court can look the timing of creation of debts, whether debts were created out of the ordinary course of business, whether assets have disappeared, whether assets have been sold to non-arm’s length parties for less than market value, whether the value of the defendant’s assets greatly exceeds the sum of the plaintiff’s claims, etc. (*Haney Farms*).

* + - * + It is not necessary to prove that actual dissipation of assets has occurred or that the respondent intended to defeat creditors (*Haney Farms*).
  1. **The claimant undertakes to pay any damages or indemnity that the Court may subsequently decide should be paid to the defendant or a third person by reason of the attachment order [*CEA*, s. 17(4)].**
     1. Where the Court grants an attachment order, it may require the claimant (a) to give any additional undertaking and (b) to provide security in respect of it [*CEA*, s. 17(4)].
     2. Given the risk of damages, a plaintiff should only apply for an attachment order if they are sure they are going to win.
* Even where the test is satisfied, the court retains a discretion to not grant it if there is some compelling reason not to.

#### *1482221 Alberta Ltd v Haney Farms (1985) Ltd*, 2009 ABQB 760

Facts:

* In 1985, Leonard Haney incorporated his farm operation, which became Haney Farms (1985) Ltd. He held the majority of the shares while the remaining shares were divided among his wife and four children: Dick, Harry, Tom, and Barb. In 2003, Dick took over the shares of Haney Farms. To pay for his siblings' interests in Haney Farms, he gave them promissory notes of about $1 million each. There was also a general security agreement ("GSA") giving the siblings a security interests over Dick's shares in Haney Farms. It contained provisions permitting the acceleration of the outstanding balance should there be a failure to comply with some of the terms of the GSA or if Dick disposed of all or a substantial part of its assets.
* Starting in late 2008, to make Haney Farms a "more efficient unit," Dick phased out its cattle operations, sold most of its farm land, ended its feedlot business, and closed its gravel pit. Tom and Harry claim that the GSA has been breached and that they are entitled to accelerate the balance outstanding. They also seek to attach $1.6 million of the proceeds from the sale of part of the farm.

Issues and holding:

1. Is there a reasonable likelihood that Harry and Tom's claims against Haney Farms will be established? **YES**
2. Are there reasonable grounds for believing that Haney Farms is dealing (or is likely to deal) with its exigible property other than for the purpose of meeting reasonable and ordinary business or living expenses? **YES**
3. Are there reasonable grounds for believing that Haney Farms is dealing (or is likely to deal) with its exigible property in a manner that would likely seriously hinder the claimant in enforcing a judgment against it? **NO**

Analysis:

* An attachment order is an extraordinary remedy; the Court should only grant it when it is just and equitable to do so, taking into account the interests of the claimant, the defendant and affected third parties.
  + A plaintiff cannot prevent the defendant from disposing of assets merely because he fears that, by the time he obtains judgment, the defendant will have no assets against which to enforce it.
  + The Court should be aware of the fact that an eager and aggressive litigant may seek the remedy to secure a prejudgment lever in negotiation.
  + In its assessment of what is fair and reasonable, the Court is entitled to consider the fact that an attachment order is stigmatizing in the business community.
* Under s. 17(2) of the *CEA*, the Court *may* grant an attachment order if it is satisfied that:
  1. there is a reasonable likelihood that the claimant’s claim will be established, and
  2. there are *reasonable grounds* for believing that the defendant is dealing with the defendant’s exigible property, or is likely to deal with that property,
     1. otherwise than for the purpose of meeting their *reasonable and ordinary* business or living expenses, and
     2. in a manner that would be *likely to seriously hinder the claimant* in enforcing a judgment against the defendant, and

Rationale: (Master Hanebury)

1. The GSA provides that the disposal of a substantial part of the debtor’s assets is an event of default entitling the creditors to accelerate the balance due, and Haney Farms has not denied the sale of much of its assets.
2. This disposal of land and assets and the change in the focus of Haney Farms' business provide reasonable grounds for believing that it is dealing with its assets for a purpose other than meeting *ordinary* business expenses.
   * In times of economic difficulty many businesses adjust their asset portfolios; while such an action may be eminently reasonable, it cannot be described as the meeting of "ordinary expenses."
3. The applicants have not established that Honey Farms is or is likely to deal with its property in a manner that would likely seriously hinder their enforcement of a judgment against it.
   * There are presently assets more than sufficient to satisfy the claims of the creditors, even utilizing the calculation done by the creditors' own accountant.
   * The sale of assets supports the claim that Haney Farms is prudently and legitimately scaling back its operation and rearranging its financial affairs to deal with its liabilities, including those to the plaintiffs.
   * Haney Farms' decision to scale back its operation and rearrange its financial affairs is not due solely to Dick's mismanagement.
     + While better economic decisions could likely have been made, the farm has had to deal with economic forces that were outside of its control, including the BSE crisis and the 2008 recession.
     + While Dick and his family could have scale back or eliminated some of the perks taken by them, they are likely insufficient to have made a significant difference to the economic state of the company.

Notes:

* In *Osman Auction v Belland*, the ABQB held that where the cause of action is in fraud and the plaintiff has shown a reasonable likelihood that the cause of action will be established, the circumstances may give rise to an inference that there are reasonable grounds for believing that the defendant is likely to deal with his exigible property to the plaintiff’s prejudice.
* Under s. 9 of the *Court of Queen's Bench Act*, a Master in chambers cannot issue an injunction.
  + However, in *Proprietary Industries Inc v Workum*, the ABCA held that a Master *can* grant an attachment order in "injunction-like" terms under the jurisdiction conferred by s. 17 of the *CEA*.
* A lawyer who advises a plaintiff to seek an attachment order or *Mareva* injunction should take into account the potential costs of a failed application.
  + In *Tiger Calcium Services Inc v Sazwan*, one of the defendants and two members of his family were awarded damages in trespass for the actions associated with execution of the *Anton Pillar* and *Mareva* injunction/attachment orders set aside by the ABCA.
* An attachment order or *Mareva* injunction may attach property in another jurisdiction based if the court has *in personam* jurisdiction over the parties.
  + In *Alberta (Treasury Branches) v Pocklington*, the ABQB granted an order prohibiting the defendant from dealing with property, including an aircraft, then located in Colorado.
    - The *CEA* does not expressly require that all property owned by a potential debtor be located in Alberta before an attachment order can be granted, nor that any such order is effective only in regard to property located in Alberta at the time the order is granted.
    - Immediate unenforceability does not preclude an order that is otherwise appropriate.
  + In *Mooney v Orr*, the BCSC concluded that the court had jurisdiction to issue an injunction against a defendant *in personam* affecting assets located outside the province.
    - Similarly, in *Google Inc v Equustek Solutions Inc*, the SCC held that when a court has *in personam* jurisdiction, and where it is necessary to ensure an injunction’s effectiveness, it can grant an injunction enjoining that person’s conduct anywhere in the world.
  + In *Talisman Energy Inc v Flo-Dynamics Systems Inc*, a former employee of Talisman Energy moved $4 million USD from his Canadian bank account to an account in Austria after being served with a statement of claim alleging breach of fiduciary duty and other causes of action. Talisman applied for an order directing that the funds be transferred back to Canada and held in a solicitor’s trust account to preserve the funds and prevent dissipation.
    - The ABQB concluded that a *Mareva*-type injunction could extend beyond merely freezing assets to ordering the return of assets from foreign jurisdictions. Ultimately, Tilleman J refused such an order, and ordered that the funds be placed in a solicitor's trust account in Austria.

### Terms of the Order

* In granting an attachment order, the Court may:
  + Prohibit any dealing with *exigible* property of the defendant, or impose restrictions on such dealing; [*CEA*, s. 17(3)(b)–(c)]
    - "Exigible property" means property that would be exigible (i.e., non-exempt) if the defendant were an enforcement debtor [*CEA*, s. 16(e)].
    - "Dealing" includes transferring, mortgaging, charging, using, disposing of, creating an interest in or doing anything to the property [*CEA*, s. 16(c)].
    - An injunction has purely *in personam* effect; it does not confer an interest in or rights in relation to property subject to the terms of the order.
  + Require the defendant or a person who has possession of their *exigible* property to deliver up the property to a person identified in the order; [*CEA*, s. 17(3)(d)].
    - There is an argument that, by virtue of this provision, an attachment order may be issued against non-parties, at least as a supplement to an order against the defendant.
  + Issue a garnishee summons in accordance with Part 8; [*CEA*, ss. 17(3)(e), (7)(a)]
  + Appoint a receiver in accordance with Part 9; [*CEA*, ss. 17(3)(f), (7)(b)]
  + Include in the order any term or condition it considers necessary or desirable [*CEA*, s. 17(3)(g)].
  + On application, authorize the sale or disposition of the property without the consent of the owner if [*CEA*, s. 21]:
    1. the property (i) will depreciate substantially in value or (ii) will be unduly expensive to keep under attachment, or
    2. it is necessary or prudent to sell or dispose of the property for any other reason.
* When an attachment order is granted, it should cause as little inconvenience to the defendant as is consistent with achieving the purposes for which the order is granted [*CEA*, s. 17(5)].
  + An attachment order shall not attach property that exceeds a value necessary to meet the claimant’s claim and any related writs, unless such a limitation would make the order unworkable or ineffective [*CEA*, s. 17(6)].
    - "Related writ" means a writ that would be disclosed if a distribution seizure search was conducted of the PPR [*CEA*, s. 1(1)(mm)].
    - An unlimited injunction or attachment order without any financial cap will be granted only if justified by compelling evidence (*Tiger Calcium*).

### Registration and Priority of an Order

* An attachment order may be (a) registered in the PPR and, (b) in the case of land under the *Land Titles Act*, registered against the certificate of title to the land [*CEA*, s. 22].
* **Once an attachment order is registered, priority between it and the interest of a third person in property to which the attachment order applies is determined as if the attachment order were a writ** [*CEA*, s. 23(1)].
  + Where prior to the expiration of an attachment order (a) a writ has been issued in the same proceedings, (b) the writ is registered in the PPR, and (c) in the case of land, the writ is registered under the *Land Titles Act*, *that writ has the same priority as the attachment order* [*CEA*, s. 23(3)].
    - i.e., the writ is given priority status that pre-dates the judgment.
  + e.g., Julie obtained an attachment order directing Zeke not to sell a piece of expensive equipment until the order expires or is terminated. She registered the attachment order in the PPR. Zeke then sells the equipment to Bill (who has not searched the registry). Zeke is not in the business of selling this kind of equipment, so the sale is not “in the ordinary course of business.” Julie eventually obtains judgment against Zeke, issues a writ of enforcement against him, and registers it in the PPR.
    - In this example, the attachment order has the same priority with respect to Bill as would a writ [s. 23(1)]. Section 34(1) provides that an interest acquired in property after the property is bound by a writ is subordinate to the writ. The attachment order therefore has priority over Bill. Once the writ is issued and registered, it has the same priority as the attachment order [s. 23(3)]. Therefore, Jill can seize the equipment to enforce the writ.
* **Unless the Court orders otherwise, writ proceedings may be brought against property that is subject to an attachment order** without regard to the attaching claimant's claim [*CEA*, s. 24(1)].
  + However, on application, the Court may order one or more of the following where it considers that it would be just and equitable to do so [*CEA*, s. 24(2)]:
    1. that no writ proceedings be commenced or continued against property that is the subject of an attachment order until the attachment order terminates;
       - This would allow the party who sought the attachment order to share in the distribution.
    2. that money realized through writ proceedings against property that is the subject of an attachment order not be distributed until the attachment order terminates;
    3. that the attachment creditor have the status of an instructing creditor for the purposes of the distribution of the proceeds.

### Enforcing an Order

* A person who violates an order of the court directing that certain things should or should not be done may be found in contempt of court [*ARC*, r. 10.52].
* **A person who knowingly assists or participates in dealing with attached property in a manner inconsistent with the terms of an attachment order may be ordered to compensate a creditor for resulting loss** [*CEA*, s. 25(1)].
  + An individual is deemed to have knowledge of information if a reasonable person in their position would take cognizance of it [*CEA*, s. 1(2)(a)].
  + The Court shall not make such an order by reason only of the person having done something that was necessary to meet a legal duty that (a) arose before the person acquired knowledge of the attachment order and (b) was owed to someone other than the defendant [*CEA*, s. 25(2)].

### Discovery of Information for Obtaining or Enforcing an Order

* To collect information for obtaining or enforcing an order, an applicant may apply for an order and wait until the respondent files a reply affidavit.
  + If the respondent decides to file a reply affidavit, then the applicant may question the respondent on that affidavit [*ARC*, r. 6.7] to collect information for the attachment order.
  + If the defendant does not file a reply affidavit, there is no explicit provision for pre-judgment examination of a defendant.
    - In *Dean v Bryan*, the plaintiff sought an order directing the defendant to answer questions regarding the whereabouts of her assets to help establish the conditions for an order under s. 17(2) of the *CEA*.
      * Kenny J held that *people do not need to account for their assets during the course of litigation*; the onus is on the applicant for an attachment order to provide evidence that someone is dealing with their assets in a certain manner as set out in s. 17(2).
    - But, in *Qualex-Landmark Investments Inc v Soroya*, a defendant refused to answer questions about his assets, his intentions with respect to certain sale proceeds, and details of his income and expenses.
      * The ABQB granted an attachment order. While Strekaf J did not order the defendants to answer questions regarding their assets, she concluded that *adverse inferences could be drawn against them on the basis of their refusal to answer*. In this case, those inferences supported the conclusion that the requirements of s. 17(2)(b) were met.
    - Plus, s. 17(3)(g) of the *CEA* provides that in granting an attachment order, the court may include "any term, condition or ancillary provision that it considers necessary or desirable," which presumably accommodates an order for production of documents.
      * This may be appropriate to establish the whereabouts of property when grounds for an attachment order are already established.
      * *Lindsey Estate v Strategic Metals Corp* involved an application for an order directing the defendant to answer questions after an attachment order was granted.
        + The ABQB held that it is a proper exercise of jurisdiction to compel answers to such questions and undertakings as are necessary to breathe life into the order.
* An applicant for an attachment order may apply to appoint an inspector to investigate a corporation where the court is satisfied that there are sufficient grounds to suspect wrongdoing [*Business Corporations Act*, ss. 231, 232].

### Termination of an Order

* **An attachment order will terminate on the earlier of (a) the dismissal or discontinuance of the claimant’s proceedings and (b) the 60th day from the entry of a judgment in favour of the claimant** [*CEA*, s. 19(1)].
  + The Court may extend the operation of an attachment order beyond these times if it appears just and equitable to do so [*CEA*, s. 19(2)].
  + The Court may also shorten the duration of an attachment order beyond what would otherwise be the case under this rule.
* Any interested person may apply to the Court to vary or terminate an attachment order [*CEA*, s. 17(8)].
  + *Calmusky v Hodgins* dealt with an application to terminate an attachment order on the grounds of that the plaintiff who had obtained it was dilatory in moving the proceedings forward to trial. It had been about 2.5 years since anything was done to move the action forward.
    - The ABQB concluded that *inordinate delay without reasonable excuse is a basis on which to vacate an attachment order*.
* If the application for an attachment order was made *ex parte*, the order will expire in 21 days or on such earlier date as may be specified in the order unless the Court is satisfied that it would be inappropriate for the order to so terminate and specifies a longer duration [*CEA*, s. 18(3)].
  + In *Cameron v Aecometric Corp*, the plaintiff obtained an *ex parte* attachment order on February 13, which authorized a garnishee summons against a person who owed money to the defendant. The summons was served on the garnishee on February 14. The attachment order expired on February 28 and money was paid into court by the garnishee on March 3 and April 1.
    - On application, the judge held that the garnishee summons had expired on February 28 and ordered that the money in court be paid to the defendant. The plaintiff appealed.
    - On appeal, the ABCA suggested that the summons continued in effect for 1 year per s. 79 of the *CEA*, regardless of whether the attachment order under which it was issued remained in effect.
* Property may be released from attachment if (a) the defendant, (b) any person claiming an interest in the attached property, and or (c) the person in whose possession the property was at the time of the attachment provide sufficient alternative security [*CEA*, s. 20].
  + The amount will be determined by the court, having regard to all the circumstances, including the apparent value of the defendant’s interest in the attached property, or by agreement between all interested persons [*CEA*, s. 20].

## *Mareva* Injunctions

* The *Mareva* injunction was the primary remedy used to preserve assets pending judgment before the *CEA*.
  + The court is empowered to order an interlocutory injunction under s. 13(2) of the *Judicature Act*, which specifies that it may grant an order in the nature of an injunction if it appears to be just and convenient.
    - The order may be made either unconditionally or on any terms and conditions the court thinks just [*Judicature Act*, s. 13(2)].
* **In Alberta, the *CEA* provisions relating to attachment orders have not supplanted the court's jurisdiction to grant an injunction.**
  + But, in granting an injunction, a court should be guided by the principles in the *CEA* (*Tiger Calcium*).
    - e.g., in *Tiger Calcium*, the ABCA suggested that *ex parte Mareva* injunctions should be time-limited, just as attachment orders are, and that 21 days is a good rule of thumb.
  + The implication that a common law remedy can supplant the requirements of statutory law may be viewed as objectionable, but the problem is likely to arise rarely.
    - In practice, there will be few cases in which a *Mareva* injunction could be granted while an attachment order could not.
  + In any case where an attachment order and/or *Mareva* injunction is sought, you should be clear about what you are claiming.

### *Cho v Twin Cities Power-Canada*, 2011 ABQB 707 & 2012 ABCA 47

Facts:

* The plaintiff seeks damages for dismissal from employment and payment of bonuses owing. On February 2, 2011, the defendant companies obtained an *ex parte Mareva* injunction. In it, Macleod J directed that $1.8 million which Allan Cho withdrew from Twin Cities Power-Canada's ("Twin Cities") bank accounts be deposited into the trust account of his counsel. Macleod J's order was vacated by consent, and the defendants now seek to have the $1.8 million released to them. Mr. Cho seeks to have a new *Mareva* injunction issued, or in the alternative, an attachment order.

Issue and holding:

1. Should Mr. Cho be granted a new *Mareva* injunction? **NO**
2. If no, should Mr. Cho be granted an attachment order? **NO**

Analysis:

* To obtain a *Mareva* injunction (which is an extraordinary, discretionary remedy which does not go as of right), the plaintiff must:
  1. Establish a strong *prima facie* case for potential success at trial.
  2. Satisfy the court that there is a real risk that the respondent will remove assets from the jurisdiction, or dissipate them, in order to avoid enforcement under a judgment.
     + Requires proof that the respondent is acting out of the ordinary course of honest business, and that *they have an intent to evade legitimate execution enforcement*.
       - Courts are reluctant to grant, in effect, enforcement before a judgment has been obtained where there is no evidence of any improper purpose.
     + If there is clear evidence of dishonesty in the cause of action sued over, this makes it easier to find that assets will be removed or hidden.
  3. Satisfy the latter two elements of the tripartite test for an interlocutory injunction, namely:
     1. Irreparable harm should the injunction not be granted, and
     2. The balance of convenience favours the moving party.
  4. Meet procedural requirements by providing: (a) full and frank disclosure, (b) particulars of the claim, (c) assets within the jurisdiction, and (d) an undertaking as to damages.
* The test for obtaining an attachment order under s. 17 of the *CEA* is somewhat different than that for obtaining a *Mareva* injunction; it requires the plaintiff to:
  1. Establish a reasonable likelihood that the plaintiff will establish their claim; suspicion is not enough.
  2. Establish that the respondent is dealing with (or likely intent to deal with) their property in two ways:
     1. Other than meeting reasonable business or living expenses, and
        + i.e., an attachment order will not be appropriate where the respondent is dissipating property in a manner that conforms to the usual course of business.
        + "Expenses" must be read broadly, not technically; legitimate investments, dividends, deposits, security, or loans are not strictly "expenses," but are typically useful and even necessary in most business.
     2. In a manner likely to seriously hinder the plaintiff in enforcing a judgment against them.
        + While any spending of money potentially creates some hindrance to later enforcement, s. 17 requires *serious* hindrance.

Rationale: (Hawco J)

1. There is no basis upon which to grant an extraordinary *Mareva* injunction.
   * The plaintiff has not established a real risk that a judgment he might receive might ultimately be unsatisfied because of the actions and intent of the defendants.
     + Fears that he may not recover a judgment is not a ground for such an extraordinary remedy.
     + The plaintiff's claims are for damages for dismissal and payment for accrued bonuses; those claims are claims in damages for debt, not proprietary claims to any specific fund.
     + There is evidence that the defendants do not keep large sums unnecessarily sitting idle in Canada, and that it often pays profits out to its parent company, but there is nothing wrong with that.
       - It is a comparatively common business practice, and it is the right of shareholders to have dividends paid regularly, so long as ordinary creditors are paid in the ordinary course.
     + The defendant business is active and continuing; this suggests that hiding assets and not paying a Canadian judgment would make little sense in the long run.
   * Plus, the plaintiff has not made out a strong *prima facie* case for wrongful dismissal; the contract at issue allows either party to end the employment at any time, and while the plaintiff alleges an oral replacement contract, he has not provided a *prima facie* case of that.
2. An attachment order is a discretionary remedy, and it should not be granted in the absence of evidence (1) that the defendants are dealing with property other than for the purpose of meeting its reasonable and ordinary business expenses or (2) that such dealings are likely to seriously hinder enforcement proceedings.
   * Plus, s. 17(6) expressly forbids attaching more property than is necessary; that shows that the attachment is not to go beyond what is needed.

Notes:

* From *Athabasca Minerals Inc v Syncrude Canada Ltd*, the grounds for obtaining a *Mareva* injunction differ from those for obtaining an attachment order in three ways:
  1. The strength of the applicant’s claim required for a *Mareva* injunction is higher than that required for an attachment order.
     + An applicant for an injunction must show a strong *prima facie* case, whereas an applicant for an attachment order must show only that there is a reasonable likelihood he will establish his claim.
  2. Alberta courts require evidence that the respondent intends to remove, hide, or dissipate assets *in order to avoid judgment*; s. 17(2)(b) of the *CEA* does not require intent to defeat judgment.
  3. Unlike applicants for a *Mareva* injunction, an applicant for an attachment order need not satisfy the elements of the common law tripartite test for the award of an injunction.
  + **As these differences indicate, the test for a *Mareva* injunction is more difficult to satisfy than the test for an attachment order.**
* **Further, unlike an attachment order, a *Mareva* injunction cannot be registered at the PPR and in the Land Titles office and has no priority implications.**
  + Thus, there is no legislative basis for a subsequent writ being backdated to the date the injunction is granted.
  + This is a big reason to seek an attachment order rather than a *Mareva* injunction.
* **Plus, under s. 9 of the *Court of Queen's Bench Act*, a master in chambers cannot issue a *Mareva* injunction.**
  + However, in *Proprietary Industries Inc v Workum*, the ABCA held that a master may grant an attachment order in "injunction-like" terms under the jurisdiction conferred by s. 17 of the *CEA*.
* *Mareva* injunctions are ordinarily on notice to the defendant; however, an injunction can be granted *ex parte* if serving notice of the application might cause undue prejudice to the applicant [*ARC*, r. 6.4(b)].
  + e.g., the order is urgently required, or there are legitimate grounds to fear that a respondent may, on receiving notice of the application, act to shield assets before an order can be obtained.
  + A party against whom an order without notice has been granted can bring an application to set aside or vary the order prior to its expiry pursuant to r. 9.15(1)(a) of the *ARCs* (*Tiger Calcium*).
* A court may grant a *Mareva* injunction against a non-party to litigation.
  + In *Google Inc v Equustek Solutions Inc*, the defendant was selling products online which the plaintiff alleged were developed in breach of the plaintiff's intellectual property rights. The Court issued a number of injunctions, but the defendant left Canada and did not comply with them. The Court then issued an injunction requiring Google to delist the defendant’s websites from its search engines. Google contested the order, arguing that the Court could not enjoin a stranger to the litigation.
    - The SCC decided that the court could impose an injunction on a third party if it is just and equitable and their assistance is required to ensure that the defendant does not dissipate assets.

## *Anton Piller* Orders

* + An application for an *Anton Piller* order under r. 6.26 of the *ARC* is occasionally made in conjunction with an application for an attachment order.
    - They are used to authorize a search for and seizure of documents at the defendant’s residence or business to preserve evidence in support of the applicant’s case or to prevent the defendant from misusing information in his or her possession before a judgment is obtained.
      * i.e., they are used to discover, detain, and retain documents and property which are the subject of the action or evidence relevant to the issues arising in the action.
      * They should not be granted as a device to secure information required to establish grounds for a *Mareva* injunction or attachment order.
    - From *Calenese Canada Inc v Murray Demolition Corp*, 2006 SCC 36, the test for an *Anton Piller* order is:
      1. The applicant must have a strong *prima facie* case,
      2. The alleged damage to the plaintiff by the defendant’s alleged misconduct must be very serious,
      3. There must be convincing evidence that the defendant has in its possession incriminating documents or things, and
      4. There must be a *real* possibility that the defendant may destroy such material before the discovery process can work.
    - *Anton Piller* orders are an exceptional remedy and, given how intrusive they can be, they should be granted sparingly and only on clear and convincing evidence.

## *Norwich* Orders

* + A *Norwich* order is an equitable remedy that allows an applicant to obtain information from *non-parties* to (1) identify wrongdoers, (2) find and preserve evidence, and (3) trace and preserve assets.
    - e.g., if you are suing a defendant and want to find out about funds moving into and out of their bank accounts, you may use a *Norwich* order to get that information from the bank.
    - e.g., you may use a *Norwich* order to require an internet service provider to disclose who an IP address belongs to.
    - From *Rogers Communications Inc v Voltage Pictures, LLC*, 2018 SCC 38, the test for a *Norwich* order is:
      1. There must be evidence of a valid, *bona fide*, or reasonable claim against the alleged wrongdoer;
      2. The person from whom discovery is sought must be in some way involved in the matter under dispute (i.e., he must be more than an innocent bystander);
         * This does not necessarily mean that they have to have done anything wrong; e.g., a bank holding a wrongdoer's money is sufficient to consider them involved.
      3. The person from whom discovery is sought must be the only practical source of information available to the applicants;
      4. The person from whom discovery is sought must be reasonably compensated for his expenses arising out of compliance with the discovery order in addition to his legal costs; and
      5. The public interests in favour of disclosure must outweigh the legitimate privacy concerns.
    - Given how intrusive they can be, *Norwich* orders should be used sparingly.
  + *Norwich* orders overlap with r. 5.13 of the *ARC*, which provides that, on application, and after notice is served on the person affected by it, the court may order a non-party to produce a record if [r. 5.13(1)]:
    1. the record is under the control of that person,
    2. there is reason to believe that the record is relevant and material, and
    3. the person who has control of the record might be required to produce it at trial.
    - The one requesting the record must pay the non-party an amount determined by the court [r. 5.13(2)].

## Preservation Orders

* + Rule 6.25(1)(a) of the *ARC* provides that the court may make an order for the preservation of property which is in dispute (i.e., "preservation orders" or "proprietary injunctions").
    - In *Gemba Fund One LLC v Tolosa Development Corp*, the ABCA explained that the purpose of a preservation order is to *preserve the disputed property until trial so that the property will be available to be returned to the plaintiff* if successful at trial.
      * e.g., a bank initiating foreclosure proceedings may seek a preservation order to ensure that the house is not damaged.
      * By contrast, *Mareva* injunctions and attachment orders not involve a claim to ownership to the asset sought to be the subject of the injunction (i.e., they are not proprietary in nature); they typically restrict a defendant from dealing with assets which he or she clearly owns.
    - The line between an attachment order (or *Mareva* injunction) and a preservation order may be unclear.
      * An attachment order might operate both to prevent the defendant from dealing with the property claimed *and* to prevent the defendant from dealing with other property that is not in dispute but that may provide a source of recovery in the event that damages are awarded.
        + While the order sought may be cast as an attachment order, it is in effect both an attachment order and a preservation order, and in such a case, the statutory rules that govern attachment orders will presumably govern.
    - There is some disagreement over the test a party must satisfy when seeking a preservation order.
      * In *Athabasca Minerals Inc v Syncrude Canada Ltd*, the ABQB held that the test for getting a preservation order was the tripartite test for getting an injunction:
        1. There is a serious issue to be tried;
        2. The applicant will suffer irreparable harm in the absence of relief;
        3. The balance of convenience favours granting relief.
      * But, in *Gilks v Green Clean Squad Inc*, Veit J held that an applicant for a preservation order must satisfy the requirements of s. 17 of the *CEA*.
  + A preservation order can be distinguished from an order for *replevin* under Part 6, Division 8 of the *ARC*, which can be used to recover possession of personal property wrongfully held by someone else.

## Staying Payment of Money Out of Court

* + If money has been paid into court that a client feels they have a claim to, they may apply to stay payment of that money out of court pending the applicant proving their claim.
    - e.g., in *Olympia Trust Co v Totten*, 2012 ABQB 488, the bank foreclosed on the house of estranged spouses and paid the surplus proceeds into court. The wife applied for half of those proceeds as a joint owner. However, the husband's father claimed that, since he loaned the couple money to purchase the house, he had a beneficial interest in it. He thus applied to stay the payment of money out of court pending him proving his claim.
    - The authority for granting a stay of payment of money out of court can be found in the *ARC* and the *Judicature Act*.
      * Under r. 6.27(1) of the *ARC*, on application, the court may direct that money or other property held by the court not be paid out or disposed of without notice being served on the applicant.
        + The applicant must be a person who (a) is interested in the money or other property held by the court or (b) is seeking to have it applied to satisfy a judgment, order, or a writ of enforcement against the person on whose behalf the money or property is held [*ARC*, r. 6.27(2)].
      * Under s. 17(1)(a) of the *Judicature Act*, in a proceeding for the recovery of a debt or liquidated demand, the court may grant a stay of proceedings on any terms that it may prescribe, including an extension of the time for payment of a judgment debt.
    - The test for staying payment of money out of court is the tri-partite test for an interlocutory injunction:
      1. There is a serious issue to be tried;
      2. The applicant will suffer irreparable harm in the absence of relief;
      3. The balance of convenience favours granting relief.

## Writ Saving

* + If a defendant does not defend a claim, and the plaintiff gets default judgment and starts enforcement proceedings, the defendant may then apply to set aside the default judgment under r. 9.15(3) of the *ARC*. If the court decides to set aside the default judgment under r. 9.15(3), re-starting the litigation process, the court may impose "any terms [it] considers just."
    - That said, the court may decide to set aside default judgment *on the condition that the writ remains in place*, with the plaintiff merely being prohibited from taking steps on it
      * This allows the plaintiff to maintain their priority among the defendant's other creditors, which is what they will want if they emerge victorious in the litigation.
      * Then, if the defendant is successful, then then the writ ceases to have any effect.

## Staying Judgment

* *Example*: defendant loses at trial and is ordered to pay $200,000. They appeal the decision on the grounds that the trial judge made a serious error of law. However, they are worried that if they pay the $200,000 to the plaintiff right away, they will not get that money back if they are successful on appeal (e.g., perhaps the plaintiff is a gambler). In this case, the defendant could apply to stay the judgment.

### By Agreement

* A creditor and debtor may enter into an agreement that provides that proceedings under a writ of enforcement are to be stayed or suspended.
  + If they do, the creditor must, within 15 days, register in the PPR a status report that discloses the fact that the proceedings are stayed or suspended, as the case may be [*CER*, s. 42].
  + A creditor and debtor may enter into an agreement to enable the debtor to pay down the judgment over time.

### Bankruptcy

* Under the *Bankruptcy and Insolvency Act* ("BIA"), when a debtor initiates insolvency proceedings, no creditor can commence or continue enforcement proceedings against them [s. 69.3(1)] until they are discharged [s. 69.3(1.1)], though there are some exceptions for secured creditors [s. 69.3(2)].
* Enforcement proceedings are stayed by the debtor filing a notice of intention to make a proposal [*BIA*, s. 69(1)(a)], filing a Division I proposal [*BIA*, s. 69.1(1)(a)], or filing a consumer proposal [*BIA*, s. 69.2(1)(a)].
* On the making of a consolidation order, no process shall be issued against the debtor at the instance of a creditor in respect of certain types of debt [*BIA*, s. 229].

### Provincial Court Judgments

* Under s. 49 of the *Provincial Court Act*, an appeal *does* operate as a stay of proceedings under the judgment being appealed, subject to an order from the ABQB.
* Even if an enforcement debtor does not appeal the decision, they may still apply to stay the judgment under s. 44.1 of the *Provincial Court Act* "subject to any terms and conditions that the ABPC considers appropriate."
  + For example, the court may, under s. 44.2 of the *Provincial Court Act*, stay enforcement proceedings and establish a schedule pursuant to which the debtor must pay down the judgment over time.

### Court of Queen's Bench Judgments

* Under r. 14.58 of the *ARC*, the filing of an appeal of an ABQB order does *not* stay proceedings or enforcement of the decision under appeal *unless otherwise ordered*.
  + But, an appellant may apply to the court to stay enforcement proceedings [*CEA*, s. 5(2)(d); *ARC*, r. 1.4(2)(h); *Judicature Act*, s. 17].
    - Where the court stays enforcement under s. 5(2)(d) of the *CEA*, the order must be registered at the PPR or it does not affect any person who does not have actual knowledge of it [*CEA*, s. 5(3)].
    - An enforcement creditor may even apply to stay enforcement proceedings under these sections if they are *not* appealing the decision.
      * e.g., if they cannot afford to pay the judgment all at once, the court may stay enforcement proceedings on the condition that the creditor pay the debtor $2,000 each month.
  + Under r. 14.48 of the *ARC*, an appellant may apply for an order staying enforcement proceedings to (a) the judge who made the decision, or (b) a single appeal judge.
    - If the ABQB justice who made the decision is hostile towards the appellant, it is likely best to seek relief from a single ABCA justice.
  + The court may grant judgment for the plaintiff but stay enforcement proceedings until the plaintiff fulfills some condition (e.g., returns the defendant's property to them).
    - If a judgment is made subject to conditions, the party to whom the conditions apply may not enforce the judgment until (a) they have filed an affidavit confirming that the conditions have been met or (b) the court so permits [*ARC*, r. 9.18].

#### *Vysek v Nova Gas International Ltd*, 2001 ABCA 300

Facts:

* The appellants brought an action against the respondents in May 1997. They alleged that the respondents breached contractual, fiduciary, and tortious duties owed to Peter Vysek while he was employed by Nova Gas International Ltd ("Nova Gas") as part of a student exchange program funded in part by the W.G. (Bill) Howard Memorial Foundation ("the Foundation"). The appellants alleged that as a result of the breaches, Vysek became infected with a tropical disease and suffered brain damage. Rawlins J dismissed all the appellants' claims and awarded Nova Gas $641,602 and the Foundation $199,106 in costs. The appellants appealed Rawlins J's decision. In September 2001, Kenny J heard and dismissed an application for a stay of judgment pending appeal. The appellants now apply to stay the costs judgment for one year or until such time as the appeal is heard.

Issue and holding:

* Should the appellants be granted a stay of the costs judgment pending appeal? **NO**

Analysis:

* Under r. 508(1) of the old *Rules of Court*, an appeal does not automatically stay enforcement unless a judge so orders.
  + Litigants are generally entitled to enjoy the benefits of their successful litigation, even if the matter is being appealed.
* The applicant bears the onus of establishing that a stay is justified, and must establish the following:
  1. There is a *prima facie* or serious triable issue;
     + Accordingly, a frivolous appeal would not support a stay.
  2. The applicant will suffer irreparable harm if the stay is not granted; and
     + Irreparable harm, in the context of staying the enforcement of money judgments, *involves an assessment of the likelihood that the respondent will repay the appellant in the event the appeal is successful*.
       - Courts generally deal with this issue by examining the respondent’s financial position, and ordering appropriate terms to ensure repayment.
  3. The balance of convenience favours a stay.
     + Accordingly, an appeal against an impecunious respondent may not support a stay.

Rationale: (Fruman JA)

* The appellants' application for a stay of judgment pending appeal is dismissed.
  + The appellants have not established a serious triable issue.
    - The trial judge decided that Vysek's brain damage was not caused by an infectious disease, based on a careful analysis of expert evidence and findings of credibility; the standard for overturning findings of fact and credibility is high (palpable and overriding error), making this appeal very difficult to bring.
  + The appellants have failed to establish that irreparable harm will occur if the stay is not granted; i.e., they have not shown that they will be unable to recover the costs judgment if their appeal is successful.
    - TransCanada PipeLines Ltd ("TCPL"), as successor in interest to Nova Gas, has billions in assets.
      * Plus, as a condition of Kenny J's order denying the stay, TCPL and its insurer were required to provide undertakings to repay the appellants, in the event their appeal is successful.
    - The Foundation is willing to deposit its portion of the costs award in an interest-bearing account to ensure repayment to the appellants in the event their appeal is successful.
  + The balance of convenience favours the Respondents.
    - There is no evidence showing that the respondents would be unable to repay the appellants if the appeal is allowed.
      * Further, while the appellants submit that they will be unable to meet their personal expenses if a stay is not granted, this is addressed by the exemptions under the *CEA*.
    - But, there *is* evidence that the appellants would be unable to pay the costs award if the appeal is unsuccessful.
      * The appellants' assets represent approximately 1/2 of the costs award, and there are competing claims for this money.
      * The appellants have not provided a reasonable proposal to ensure that the costs award will be paid in the future, should their appeal fail.

Notes:

* In *Amik Oilfield Equipment & Rentals Ltd v Beaumont Energy Inc*, Strekaf JA held that a stay of enforcement was not justified on the balance of convenience even though the judgment debtor showed a real risk that they might be unable to recover the amount of the judgment from the creditor if the appeal were allowed.
  + However, the court gave the debtor the option of putting the amount of the judgment in an interest-bearing trust account pending determination of the appeal rather than submitting to immediate enforcement measures.
    - This mitigates any risk that the respondent would be unable to repay the judgment amount if the applicants were successful on appeal.
* The courts have not been entirely consistent in their formulation of the elements of the tripartite test.
  + In *Siksika Health Services v Health Sciences Association of Alberta*, Fruman JA held that the first element of the tripartite test requires proof of *an arguable issue to be determined* on appeal, which is a lower standard than that offered in *Vysek*.

## Security for Judgment/Costs

### Security for Judgment

* Example: a plaintiff is granted judgment in the amount of $50,000. The defendant wants to appeal the decision, and has therefore not satisfied the judgment. The plaintiff may apply to the court for the defendant to pay $50,000 into court before being allowed to appeal. Then, if the appeal if unsuccessful, the money can be paid out to the plaintiff.
* The authority for granting a security for judgment order can be found in r. 1.4(2)(e) of the *Rules of Court*, which allows a court to impose terms, conditions, and time limits.
  + Further, s. 8 of the *Judicature Act* states that the Court may grant, *either absolutely or on any reasonable terms and conditions*, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled.

#### *Vaillancourt v Carter*, 2017 ABCA 282

Facts:

* In 2003, Anne Vaillancourt commenced an action against Kenneth Carter for breach of contract. In October 2016, Ms. Vaillancourt was awarded over $1 million against Mr. Carter, and Mr. Carter filed a Notice of Appeal of the judgment. Ms. Vaillancourt commenced enforcement proceedings and demanded a financial report under s. 35.10 of the *CER*. In February 2017, Ms. Carter executed a Financial Statement of Debtor, through which he swore that he had no assets other than $44,081 in a personal bank account. However, the report was grossly inaccurate, and subsequent evidence indicated that Mr. Carter had substantial assets in his control. He had transferred many of his personal assets, valued at millions of dollars, to a holding company to deliberately make himself judgment-proof. Ms. Vaillancourt filed an application for security for judgment.

Issue and holding:

* Is Ms. Vaillancourt entitled to security for judgment? **YES**

Analysis:

* Security for judgment is an exceptional remedy that requires an appellant to post the required security before continuing with his or her appeal; if it is not posted, the appeal is dismissed.
  + It restrains the appellant from dissipating a portion of his assets so that they are available to satisfy the judgment should it be upheld.
  + *As a general rule, a security for judgment will not be granted*; recovery of judgment is more appropriately dealt with through enforcement proceedings than applications for security for judgment.
    - Ordering security for judgment may preclude low-income appellants from pursuing their appeals.
    - Ordering security for judgment may enable a single enforcement creditor to receive preference over other creditors, which is not what enforcement proceedings under the *CEA* contemplate.
    - To allow litigants to regularly use the court as an agency for the collection of trial costs or as a way to circumvent the ordinary enforcement process would be an abuse of process.
  + However, *in exceptional circumstances*, a security judgment order may be made, as when:
    1. There are no assets in the jurisdiction against which to enforce a judgment and the appeal has little merit.
    2. It is needed to preserve assets that would otherwise be destroyed, disposed of, or dissipated prior to the resolution of the dispute.
    3. It is needed to encourage respect for the judicial process and avoid abuse of process.

Rationale: (O'Ferrall JA)

* Mr. Carter cannot advance his appeal while simultaneously abusing the court's processes and providing misleading evidence.
  + By attempting to rely on the inaccuracies in his financial report to defeat Ms. Vaillancourt's application for security for judgment, Mr. Carter has clearly misled the court with regards to his financial position.
* An order of security for judgment will not prevent Mr. Carter from continuing his appeal.
  + Mr. Carter lives in an expensive home in an exclusive inner-city neighbourhood, has a recreational property in Vernon, BC, drives luxury cars, and recently sold a number of franchises for over $5.75 million; he is also closely connected to a half dozen closely-held corporations, and a family trust he set up pays all of his personal expenses.
* Mr. Carter's appeal has some obstacles to overcome, given the numerous findings of fact that would need to be overturned on appeal and the high standard of review associated with such findings.

Notes:

* O'Ferrall JA ordered that $1,000,000 be posted as security for judgment and $25,000 be posted as security for costs. The total security of $1,025,000 could be posted in the form of an irrevocable letter of credit. O'Ferrall JA gave Mr. Carter 60 days to post the security, failing which his appeal would be dismissed.
  + He also ordered that the funds not be paid out of court without a further order of the court. Recognizing that Mr. Carter might have other creditors, O'Ferrall JA wanted to avoid conferring on Ms. Vaillancourt an improper priority over other creditors.

### Security for Costs

* A security for costs order is an order requiring a party to pay money into court or make money or property available to ensure that a costs award will be satisfied if the other property is successful in litigation.
  + While either party can apply for security for costs, it is usually done by the defendant.
    - e.g., the plaintiff sues the defendant for breach of contract. The estimated cost of defending the lawsuit is $60,000. If the defendant thinks they have a good case, but that the plaintiff would not be able to satisfy a costs award if their action is dismissed, the defendant may request that the plaintiff be ordered to pay $60,000 into court as security for costs.
    - It is less common for a plaintiff to seek security for costs because it is pretty aggressive for a plaintiff to file a claim *and* demand that the defendant put up money to defend against it.
  + Under the *ARC*, the Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account [r. 4.22]:
    1. whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
    2. the ability of the respondent to the application to pay the costs award;
    3. the merits of the action in which the application is filed;
    4. whether an order to give security for payment of a costs award would unduly prejudice the respondent’s ability to continue the action;
    5. any other matter the Court considers appropriate.
  + An order to provide security for payment of a costs award must, unless the Court otherwise orders [*ARC*, s. 4.23(1)]:
    1. specify the nature of the security to be provided, which may include payment into Court,
    2. require a party to whom the order is directed to provide the security no later than 2 months after the date of the order or any other time specified in the order,
    3. stay some or all applications and other proceedings in the action until the security is provided, and
    4. state that if the security is not provided in accordance with the order, as the case requires,
       1. all or part of an action is dismissed without further order, or
       2. a claim or defence is struck out.

# Ch. 4: Enforcement Agencies and Bailiffs

## Contracting with Enforcement Agencies

* + The Office of the Sheriff has legislative authority to enter into contracts with a civil enforcement agency under which the agency is authorized to conduct seizures, carry out evictions, sell property that has been seized, and distribute the proceeds to those who are lawfully entitled to them [*CEA*, s. 9(1)].
    - A bailiff can only carry out their duties if they are employed by one of these agencies or are otherwise under contract to an agency to provide bailiff services on behalf of the agency [*CEA*, s. 12(a)].
      * The Court does not have the power to appoint a private bailiff [*CEA*, s. 9(5)].
      * The privatization of enforcement activities was a change ushered in by the *CEA* to ensure that the interests of the agencies are more closely aligned with the interests of instructing creditors (Wood).
        + That said, there was a danger that these agencies may become too responsive and engage in abusive enforcement tactics.
    - Where an agency has written instructions to carry out a function that is permitted by the CEA or another enactment, the agency has a statutory obligation to carry out that function if [*CEA*, s. 12(c)]:
      1. the fees that are prescribed or agreed to for carrying out that function have been paid or arrangements that are satisfactory to the agency for payment have been made, and
      2. subject to the regulations, all reasonable security or indemnification requested by the agency for carrying out of the function has been provided;
    - On application by an agency or interested person, the Court may give directions regarding the exercise of any of the agency's powers or duties under the *CEA* or any other enactment [*CEA*, s. 12(d)].
    - Civil enforcement agencies are not agents of the Crown, and the Crown is not liable for their acts or omissions [*CEA*, s. 11].

## Complaints and Investigations

* + Under the *CEA*, the Office of the Sheriff is responsible for maintaining the integrity of the enforcement system by screening civil enforcement agencies to ensure that they meet the necessary requirements.
    - Under the *Civil Enforcement Regulation* ("*CER*"), a person cannot be appointed as a bailiff unless they have [s. 22(3)]:
      1. to the satisfaction of the sheriff, completed training, and passed an exam approved by the sheriff,
      2. entered into any agreement, undertaking, or other arrangement required by the sheriff,
      3. provided to the sheriff a current criminal record check, and
      4. provided to the sheriff either a fingerprint check in respect of that person.
    - As a condition of a person maintaining their appointment as a bailiff, the sheriff may require that person to take ongoing training [*CER*, s. 25].
    - The sheriff has wide investigative powers where a complaint concerning an agency or bailiff is received or the sheriff has reasonable grounds for believing that the agency or bailiff is acting unlawfully or not in accordance with their agreement [*CEA*, s. 14].
      * At the discretion of the sheriff, the sheriff may suspend or cancel an appointment of a bailiff at their discretion if they:
        + Are convicted of a crime or of an offence under any law concerning fraud, breach of trust, or intentional bodily injury; [*CER*, s. 26(a)–(b)].
        + Fail, in the opinion of the sheriff, to comply with any provision of the Code of Conduct for Civil Enforcement Bailiffs; [*CER*, s. 26(c)].
        + Fails to pay a judgment for damages sustained by reason of an act or omission arising from the duties, functions or responsibilities of the bailiff; [*CER*, s. 26(d)].
        + Made an untrue statement in the application for appointment as a bailiff; [*CER*, s. 26(e)].
        + Fails to take ongoing training as required by the sheriff or otherwise fail to comply with a written direction of the sheriff; [*CER*, s. 26(f), (h)]
        + Are not, in the opinion of the sheriff, a fit and proper person to hold an appointment as a bailiff; [*CER*, s. 26(g)].
      * Agreements entered into with civil enforcement agencies may contain provisions governing the suspension or cancellation of the agreement [*CEA*, s. 9(2)(b)].

## Codes of Conduct

### Code of Conduct for Civil Enforcement Agencies

* A civil enforcement agency must [*CER*, Schedule 1, s. 2]:
  1. discharge the agency’s responsibilities with integrity;
  2. treat all persons fairly, courteously and with respect;
  3. provide equal and impartial services to all persons for whom the agency provides services;
  4. comply with the provisions of (i) the *CEA*, (ii) the *CER*, and (iii) any other law that governs the conduct of a civil enforcement agency in the discharge of its responsibilities;
  5. make full disclosure to the client;
  6. report all activities to the client;
  7. provide the client with detailed and accurate accounts of fees and disbursements;
  8. report all unlawful activities of which it becomes aware in the course of providing services.
* A civil enforcement agency must not [*CER*, Schedule 1, s. 3]:
  1. conduct any seizure relating to a debt in which the agency has a financial interest other than in the form of fees paid to the agency;
  2. disclose any information of a confidential nature that comes to the knowledge of the agency except as required to perform the services of an agency;
  3. charge a fee other than the amount set out in the tariff of fees provided to the sheriff;
  4. carry on or have an interest in any business engaged in the sale of seized property;
  5. carry on business as a private investigator or operate as a collection agency;
  6. directly or indirectly, purchase any property that has been the subject of a seizure by an agency unless the agency has the consent of the debtor and all affected creditors.
* A civil enforcement agency must ensure that a civil enforcement bailiff who is acting on behalf of that agency complies with the Code of Conduct for Civil Enforcement Bailiffs [*CER*, Schedule 1, s. 4].
* A civil enforcement agency must notify every creditor for whom the agency is acting of any potential conflict of interest that may arise between that agency and that creditor [*CER*, Schedule 1, s. 5].

### Code of Conduct for Bailiffs

* A bailiff must [*CER*, Schedule 2, s. 1]:
  1. discharge all their responsibilities with integrity;
  2. treat all persons fairly, courteously, and with respect;
  3. provide equal and impartial services to all persons to whom they provide services;
  4. comply with the provisions of the *CEA*, *CER*, and other applicable laws;

d.1) report unlawful activities discovered during the course of their duties;

1. when discharging the duties of a civil enforcement bailiff, (i) carry their badge and ID card and (ii) where requested, produce for them for inspection.

* A bailiff must *not* [*CER*, Schedule 2, s. 2]:
  1. carry on any collection agency business, private investigation business, or business engaged in the sale of seized property;
  2. directly or indirectly, purchase property that they have seized unless they have the consent to do so of the debtor and all affected creditors;
  3. perform any services while under the influence of alcohol or illicit drugs;
  4. mislead or attempt to mislead anyone in the discharge of their bailiff duties;
  5. directly or indirectly, demand or receive any fee or gratuity for performing or not performing any services other than those charged by the civil enforcement agency under whose authority the bailiff is providing services;
  6. except as authorized under the Act, use, or allow the use of, their position or title to advance or benefit the private interests of the bailiff or another person;
  7. disclose any confidential information that comes to their knowledge except as required to perform the services of the bailiff;
  8. represent that the bailiff is a civil enforcement bailiff or use their badge or ID card, except when acting under the authority of a civil enforcement agency.

# Ch 5: Collecting Information

## Searches and Credit Reports

* A creditor should inquire about a debtor's property *before* commencing litigation, in case the debtor is judgment-proof; if they are, that should militate against commencing the action.

### Types of Searches

* Information about a debtor can be collected through:
  + Searching the PPR, which will show security agreements registered against the debtor, whether there are any other enforcement creditors, etc.
    - A person is authorized to conduct a PPR search under s. 48 of the *PPSA*.
  + A name search at Land Titles, which will reveal all of the real property owned by the debtor in Alberta.
    - Section 2(c) of the *Name Search Regulation* (made pursuant to the *Land Titles Act*), a person may conduct a name search if they have a registerable instrument and is searching the name of the person (i) who is specified in the instrument and (ii) whose interests in land the instrument is intended to be registered.
      * "Instrument" is defined in the *Land Titles Act* as including a judgment or order of a court [s. 1(k)(ii)].
  + A court search, which will show what other legal proceedings a debtor is involved it, whether a receiver has been appointed, etc.
  + A credit report search, which can provide information about addresses, employment history, etc.
    - The *Consumer Protection Act* ("*CPA*") and *Credit and Personal Reports Regulation* ("*CPRR*") govern the creation, maintenance, and disclosure of credit reports; they:
      * Specify that disclosure of a credit report may occur only in limited circumstances, including where there are reasonable grounds to believe that the person requesting it will use it "in connection with the collection of a debt from the individual to whom the report pertains" [*CPA*, s. 44(1)].
      * Limit the types of information that can be included in a credit report [*CPRR*, s. 4].
      * Provide individuals with procedures to dispute the accuracy of the information in the report [*CPRR*, s 3.3] or add additional, explanatory information [*CPA*, s 47; *CPRR*, s. 3.2].
      * Prohibit anyone from giving "false or misleading information to a reporting agency" [*CPA*, s. 49] and impose an obligation on credit reporting agencies to "adopt all reasonable procedures to ensure the fairness and accuracy of their reports" (*CPA*, s. 45).
        + A person has a cause of action if they experience "loss, damage of inconvenience" as a result of another party’s contravention of the *CPA* or *CPRR* (*CPA*, s. 50).
  + A search of the Motor Vehicle Registry.
    - Under the *Access to Motor Vehicle Information Regulation*, the Registrar of Motor Vehicle Services release information to a person for use in or for the purposes of, a proceeding before a court or quasi‑judicial body [s. 2(m)].
  + A bankruptcy search, which will indicate whether the debtor has initiated insolvency proceedings.

#### *Parmar v Royal Bank of Canada*, 2016 ABQB 439

Facts:

* In 2009, Mr. Parmar sued the Royal Bank of Canada ("RBC") claiming that the mortgage in issue was fraudulently obtained. RBC started foreclosure proceedings in 2010. The land in foreclosure was sold leaving a deficiency in excess of $200k. Mr. Parmar and RBC subsequently settled their dispute. They signed mutual released and Mr. Parmar paid RBC $10k. After the settlement was finalized, RBC failed to accurately update its internal records. They continued to show funds outstanding by Mr. Parmar under the mortgage. This information was duly reported to Equifax and TransUnion, which are credit reporting agencies. While Mr. Parmar was able to get his credit reports updated by November 2014, he points to two incidents where he says he was unable to obtain credit as a result of the misreporting.

Issues and holding:

* Is Mr. Parmar entitled to damages for any inaccurate reporting? **YES**

Analysis:

* Section 49 of the *Fair Trading Act* (now the *Consumer Protection Act*) provides that no person may give false or misleading information to a reporting agency.
  + Section 50 provides that if an individual has suffered loss, damage, or inconvenience as a result of a contravention of the Act, the aggrieved individual has a cause of action.

Rationale: (Master Hanebury)

* Mr. Parmar is *not* entitled to damages for the two incidents where he was unable to obtain credit.
  + On the first occasion, in January 2015, Mr. Parmar provided a copy of the mutual release to the lender, but the mortgage was still denied.
    - Given that it was aware of the circumstances, it is difficult to award damages on the basis of the lender's refusal.
  + On the second occasion, in January 2016, Mr. Parmar was approved for a mortgage but, since it was a high ratio loan, it required insurance financing; the insurer was unwilling to insure the loan.
    - In January 2016, the credit reporting was accurate; it is therefore difficult to see how damages should be awarded on this basis.
* While Mr. Parmar has claimed mental distress as a result of the inaccurate reporting, there are no doctor's reports or other evidence to support this claim; so, he is also not entitled to damages for mental distress.
* However, Mr. Parmar is entitled to an award of nominal damages against RBC in the sum of $5000 for the inconvenience caused to him by its failure to fairly and promptly report to the credit reporting agencies.

## Financial Statement of Debtor

* + A creditor may, on written notice to a debtor, require the debtor to provide to the creditor a financial report (in Form 13) verified by statutory declaration [*CER*, s. 35.10(1)].
    - The information disclosed in the report includes the debtor's salary, business income, real and personal property, bank accounts, shares and securities, and any transfer of property in the past year.
      * From *Vaillancourt v Carter*, the purpose of this disclosure is twofold:
        1. It can satisfy the judgment creditor that the judgment debtor is impecunious, or
        2. It can help the judgment creditor find the judgment debtor's assets in circumstances where the judgment is not paid forthwith.
    - The debtor must provide their financial report to the creditor within 15 days from the day on which they are served with notice under subs. (1) [*CER*, s. 35.10(2)].
      * Once a debtor has provided a financial report, no creditor may, without a court order, require them to provide another one until 1 year has expired from the day they provided the first one [*CER*, s. 35.10(3)].
      * Where a creditor has been provided with a financial report, they creditor must, within 15 days, register in the PPR a status report for the writ indicating that the debtor has provided the report [*CER*, s. 35.10(4)].
      * A creditor provided with a financial report must, on a written request by any other creditor of that debtor and the tendering of a fee of $25, provide to that other creditor a copy of the report [*CER*, s. 35.10(5)].
    - As O'Ferrall JA notes in *Vaillancourt v Carter*, it is incumbent on lawyers to ensure that their clients understand their obligations to truthfully disclose the information sworn in a statutory declaration.
      * Indeed, under s. 2(b) of the *Commissioners for Oaths Regulation*, a commissioner for oaths must not "participate in the preparation or delivery of any document that is false, incomplete, misleading, deceptive or fraudulent."

## Questioning

### Debtor

* On service of a written notice, a creditor may require the debtor to attend for questioning under oath [*CER*, s. 35.11(1)].
  + i.e., questioning is mandatory on service of the notice.
  + The notice must be served on the debtor at least 5 days before they are required to attend for questioning [*CER*, s. 35.11(2)].
* An enforcement debtor may be questioned on matters in respect of the following [*CER*, s. 35.12(1)]:
  1. the property and financial means that the debtor had when the liability to which the judgment relates was incurred or, if the judgment is for costs only, when the proceedings were commenced;
  2. the property and financial means that the debtor presently has;
  3. any disposal of property made by the debtor since incurring the liability or, if the judgment is for costs only, since the proceedings were commenced;
  4. any matter relating to exemptions;
  5. where the debtor is a corporation, the name and address of, and any other pertinent information relating to, any director or officer or any former director or officer of the corporation.
  + Where a debtor has provided a financial report, the creditor may also question them about it [*CER*, s. 35.12(2)].
* Once a creditor has questioned a debtor, that creditor may not, without a court order, question that debtor again until 1 year has elapsed from the day of that previous questioning [*CER*, s. 35.11(3)].

#### *Beaver Hills Holdings Ltd v Greenstreet Development Corp*, 2013 ABQB 203

Facts:

* In August 2012, the plaintiff was granted summary judgment against the defendants. On November 2, 2012, written notice of questioning on November 28, 2011 was served on counsel for defendant Richard Melchin. On November 19, Melchin's lawyer responded that he would not attend for questioning on that day, as he was seeking to stay the plaintiff's judgment. On December 11, an order was granted requiring Melchin to attend for questioning no later than January 15, 2013. The plaintiff issued an appointment for questioning on January 11, 2013 and served it on Melchin's lawyer on January 8. On January 9, counsel for Melchin advised that he would be unavailable on January 11 on account of his mother's 90th birthday, and requested that the appointment be postponed to January 15. Melchin then failed to attend on January 11. The court directed that Melchin attend for questioning on January 15, 2013, but Melchin again failed to show up. He claimed that he was sick on this day, as evidenced by a doctor's note and the affidavit of his lawyer's legal assistant, which claims that she overheard the lawyer say that Melchin was sick. The plaintiff applied to hold Melchin in civil contempt for failing to attend for questioning. At the hearing of the application, arrangements were made to have Melchin attend for questioning on March 21, 2013. Therefore, the only remedy sought is an order for solicitor and client costs for the enforcement proceedings.

Issue and holding:

1. Did Melchin have a reasonable excuse for his failure to attend questioning on November 28, 2012? **YES**
2. Did Melchin have a reasonable excuse for his failure to attend questioning on January 11, 2013? **YES**
3. Did Melchin have a reasonable excuse for his failure to attend questioning on January 15, 2013? **NO**
4. What is the appropriate penalty for contempt in the circumstances of this case? *(see below)*

Analysis:

* Under s. 35.17 of the *CER*, 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.
  + Since r. 10.52 of the *Rules of Court* includes reasonable excuse as a defence to civil contempt, it is assumed that reasonable exclude constitutes a defence to civil contempt under s. 35.17 by analogy.
* The penalty for a finding of contempt should always be proportionate to the personal responsibility of the person in contempt and to the seriousness of the contempt.

Rationale: (Ross J)

1. The application to stay enforcement proceedings constituted a reasonable excuse for Melchin's failure to attend for questioning on November 28, 2012.
   * The December 11, 2012 order, which provided for questioning to take place "no later than" January 15, *did not* preclude a finding of civil contempt for failure to attend questioning on November 28.
     + It did not indicate that any decision was made regarding civil contempt in relation to Melchin's failure to attend questioning on November 28.
   * While Melchin submits that his failures to attend on November 28 was due to delays associated with his lawyer opening a new office, this does not excuse Melchin.
     + Too much work for counsel is not an excuse for failure to be timely in litigation; the answer is to get more help or have other counsel appointed.
2. The 90th birthday of Melchin's mother, combined with the request to postpone questioning, constitutes a reasonable excuse for Melchin's failure to attend on January 11, 2013; further, service of the appointment on January 9, 2013 did not provide the required 5 days' notice stipulated in s. 35.11(2) of the *CER*.
   * The December 11, 2012 order, which provided for questioning to take place "no later than" January 15, *did not* preclude a finding of civil contempt for failure to attend questioning on January 11.
     + There is nothing in the order that indicates that an appointment served in accordance with the *CER* for a date earlier than January 15, 2013 would not be effective.
   * While Melchin submits that his failures to attend on January 11 was due to delays associated with his lawyer opening a new office, this does not excuse Melchin.
     + Too much work for counsel is not an excuse for failure to be timely in litigation; the answer is to get more help or have other counsel appointed.
3. Melchin has not established a reasonable excuse for his failure to attend on January 15, 2013.
   * The affidavit of the legal assistance, which claims that she overheard Melchin's lawyer say he was sick, constitutes hearsay evidence that lacks any semblance of necessity or reliability.
     + The deponent had no involvement with or knowledge of the facts deposed to.
     + There is an obvious and readily available source of better evidence: Melchin himself.
4. An appropriate penalty is not solicitor and client costs, but a heightened costs award; Melchin is thus ordered to pay double taxable costs for enforcement steps up to and including this application.
   * While Melchin is in civil contempt, that finding is tempered by a number of considerations, including that: (1) the finding of contempt is not related to Melchin's failures to appear before January 15, 2013 and (2) counsel has accepted some responsibility for delays in this matter.

Notes:

* A finding of civil contempt requires proof beyond a reasonable doubt of an intentional act or omission that is in fact a breach of a clear order of which the alleged contemnor has notice (*Envacon*).
  + The requirement of intention does not require wilful or deliberate disobedience of the order.
  + A person who makes good faith and reasonable efforts but is unable to comply with the order may avoid a finding of contempt.

### Employees

* Where the debtor is not a corporation, an creditor may, *on court order*, question under oath any employee of the debtor with respect to any matter about which the creditor may question the debtor [*CER*, s. 35.13].

### Directors, Officers, and Employees of a Corporation

* Where the debtor is a corporation, a creditor may, for the purposes of questioning the debtor, question under oath any director or officer of the corporation [*CER*, s. 35.14(1)].
* *On court order*, the creditor may question under oath (a) an employee of the corporation or (b) a former director, officer, or employee of the corporation with respect to any matter about which the creditor may question a director or officer of the corporation [*CER*, s. 35.14(2)].

### Transferees

* Where a debtor has transferred exigible property to another person after the date when the liability or debt that was the subject of the action was incurred, the court may direct that other person to attend before a person named in the order and be questioned under oath [*CER*, s. 35.15(1)].
  + If the transferee is a corporation, the creditor may, on a court order, question any present or former director, officer, or employee of the corporation [*CER*, s. 35.15(2)].
* The transferee may be questioned in respect of the following matters [*CER*, s. 35.15(3)]:
  1. the property transferred;
  2. the disposal of any property by the debtor after the date referred to in subs. (1);
  3. any debts owing by the transferee to the debtor;
  4. any other matter specified in the order.

### Persons in Possession of Exigible Property

* Where there are reasonable grounds for believing that another person is in possession of exigible property of a debtor, the Court may direct that other person to attend before a person named in the order and be questioned under oath [*CER*, s. 35.16(1)].
  + If this person is a corporation, the creditor may, on a court order, question any present or former director, officer, or employee of the corporation [*CER*, s. 35.16(2)].
* A person questioned under this section may be questioned in respect of the following [*CER*, s. 35.16(3)]:
  1. the exigible property that is in the possession of the person;
  2. the means by which the exigible property came into the possession of the person;
  3. any other matter specified in the order.

### Third Parties

* To enforce a judgment or order, the court, on application, may order a person to attend before a person named by the court to be questioned under oath about a matter in the judgment or order [*ARC*, r. 9.29(1)].

## Disclosure by Third Parties

### Disclosure by Creditors

* **All creditors**: A requesting creditor may, by a written demand served on another enforcement creditor ("replying creditor"), inquire as to one or both of the following (a) whether the replying creditor has a writ against the requesting creditor's debtor (b) the amount owing under the replying creditor’s writ [*CER*, s. 35.08(2)].
  + In a written demand, the requesting creditor must set out [*CER*, s. 35.08(3)]:
    1. an address to which the reply to the written demand may be made,
    2. the nature of the inquiry being made under subsection (2), and
    3. if an inquiry is being made pursuant to subsection (2)(a),
       1. the name of the requesting creditor’s debtor, and
       2. the occupation, address and date of birth of the requesting creditor’s debtor, where that information is known to the requesting creditor.
  + A replying creditor must provide to the requesting creditor a written reply within 15 days from the day of being served with a written demand [*CER*, s. 35.08(5)].
    - If a replying creditor fails to comply with a written demand without reasonable excuse, the requesting creditor may apply for an order requiring the replying creditor to comply [*CER*, s. 35.08(7)].
* **Secured creditors**: Under s. 18(1) of the *PPSA*, a creditor may, by a demand in writing, require a secured creditor to send or make available to any person at an address specified by the debtor, one or more of the following:
  1. a copy of any security agreement providing for a security interest held by the secured party in the personal property of the debtor;
  2. a statement of the amount of the indebtedness and of the terms of payment of the indebtedness;
  3. an itemized list of personal property attached to the demand indicating which items are collateral as of the date specified in the demand;
  4. the amount of the indebtedness and of the terms of payment of the indebtedness as of the date specified in the demand;
  5. 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.
  + The secured party must comply with a demand not later than 10 days after the secured party receives it, in the case of any other secured party [*PPSA*, s. 18(5)(b)].
    1. If they do not, the person making the demand may apply to the court for an order requiring the secured party to comply with the demand [*PPSA*, s. 18(6)], though the court may also exempt the secured party from complying with the demand or extend the time for compliance [*PPSA*, s. 18(9)].

### Disclosure by Others

* When disclosure of personal information is sought from a third party, privacy legislation governs when that disclosure can take place.

#### *Aecon Industrial Western v International Brotherhood of Boilermakers, Iron Ship Builder, Blacksmiths, Forgers and Helpers, Local Lodge No. 146*, 2013 ABQB 122

Facts:

* In August 2012, the applicant was given judgment against a member of the respondent union. The union was not a party to the underlying action. The judgment debtor did not pay and the applicant sought to enforce its judgment under the *CEA*. It then applied to have the union disclose employment information about the debtor. The union resisted, citing the *Personal Information Protection Act* ("*PIPA*").

Issue and holding:

* Is the union required to disclose the debtor's employment information? **YES**

Analysis:

* *PIPA* includes a positive duty for unions 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 in s. 20 applying.
  + Under s. 20, an organization *may* disclose personal information about an individual without consent if:
    1. a reasonable person would consider disclosure to be clearly in the interests of the individual and consent cannot be obtained in a timely way or the individual would not reasonably be expected to withhold consent;

…

1. disclosure is for the purpose of complying with a subpoena, warrant, or order issued 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;

…

1. disclosure is reasonable for the purposes of an investigation or a legal proceeding

Rationale: (Master Schlosser)

* Under s. 20(a) of *PIPA*, the union is required to disclose the employment information of the debtor; 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, since this individual is not able to do so themselves.
  + Part 1.3 of the *CER* permits a creditor to require a debtor to provide information, including employment information; s. 35.17 provides a means for enforcing compliance, if necessary.
  + Unlawful behaviour is not consistent with the use or meaning of the word "reasonable" in s. 20(a); the purpose of the *PIPA* is to protect reasonable and legitimate expectations, not illegitimate ones.

Notes:

* Disclosure may also be justified under ss. 20(e) and (m) of the *PIPA*, though it was not necessary for Master Schlosser to decide this.
* Notably, Master Schlosser did not indicate the jurisdictional basis for directing the union to disclose employment information.
  + There is nothing in the *CEA* or *CER* that explicitly provides for disclosure of information by persons other than those identified in ss. 35.09 to 35.16 of the *CER*.
  + Rule 9.29 of the *Rules of Court* may be relevant; it provides that, to enforce a judgment or order, the court, on application, may order a person to be questioned about a matter in the judgment or order.
  + Section 5(2)(i) of the *CEA* may also apply; it allows the court to make any order or direction in respect of matters coming under the Act that it considers appropriate in the circumstances.
  + Further, s. 8 of the *Judicature Act* states that the Court may grant, either absolutely or on any reasonable terms and conditions, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled.
* In an agreement with a third party (e.g., bank, union, etc.), a debtor may consent to the disclosure of personal information to certain persons.
  + Therefore, if there is an agreement in place, that should be the first place to look to determine whether disclosure is permitted.

#### *Royal Bank of Canada v Trang*, 2016 SCC 50

Facts:

* Royal Bank of Canada ("RBC") sought to enforce a writ against land subject to a mortgage held by Scotiabank. The sheriff refused to sell the land without knowing how much was outstanding on the mortgage. RBC made two unsuccessful attempts to obtain this information from the debtors. Scotiabank refused to disclose the amount outstanding on the mortgage on the basis it was information protected under the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"). RBC applied for an order compelling Scotiabank to produce the mortgage discharge statement.

Issues and holding:

1. Could the Court order Scotiabank to produce the information? **YES**
2. Could Scotiabank produce the information without being ordered to do so by the Court? **YES**

Analysis:

* Schedule 1, cl. 4.3 of *PIPEDA* prohibits disclosure of personal information without the knowledge and consent of the affected individual.
  + Section 7(3) provides that an organization may disclose personal information without the knowledge or consent of the affected individual if disclosure is required to comply with an order made by a court, person, or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records.
  + Schedule 1, cl. 4.3.6 of *PIPEDA* acknowledges that consent for the purposes of the statutecan be implied consent when the information is "less sensitive."
    - Clause 4.3.5 signals that, in assessing whether consent is required for disclosure, the reasonable expectations of the individual are relevant.

Rationale: (Côté J)

1. The order sought by RBC constitutes an "order made by a court" under s. 7(3)(c) of *PIPEDA*; thus, Scotiabank must disclose the mortgage discharge statement to RBC notwithstanding any absence of consent.
   * Under the inherent jurisdiction of the court *and* r. 60.18(6)(a) if Ontario's *Rules of Civil Procedure*, the court can order the examination of any person who may have knowledge of matters pertinent to the enforcement of a judgment.
   * RBC should not have to make motion after motion to discern how much remains outstanding on the debtors' mortgage and enforce its judgment.
     + A legal system which is unnecessarily complex and rule-focused is antithetical to access to justice.
2. At the time the mortgage was given, the debtors impliedly consented to disclosure for the purpose of assisting a sheriff in executing a writ of seizure.
   * The information at issue is less sensitive than other financial information.
     + While financial information is generally extremely sensitive, sensitivity must be assessed in light of the related financial information in the public domain and the purpose served by making it public.
     + That said, in Ontario, when mortgages are registered on title, the principal amount of the mortgage, the rate of interest, the payment periods, and the due date are made publicly available under the *Land Registration Reform Act*.
       - This allows creditors with a current or future interest in land to make informed decisions by giving certainty to the rough calculations made from publicly available information.
       - The broad scope of the publicly available information about a mortgage is makes the current balance of that mortgage less sensitive.
   * A reasonable person would consider it appropriate for Scotiabank to provide a mortgage discharge statement to RBC, who has obtained a writ of seizure and sale of the mortgaged asset.
     + When determining reasonable expectations, the whole context is important.
       - The legitimate business interests of other creditors are a relevant part of that context.
         * A mortgage discharge statement concerns more than just mortgagor and mortgagee; the rights of others depend on it, and it is thus something they have a right to know.
       - Another part of the context is the identity and motive of the party seeking disclosure.
         * Disclosure to a person exercising an established legal right is different from disclosure to a person who is merely curious or has a nefarious motive.
     + Given the context, a reasonable person borrowing money knows that, if he defaults on a loan, his creditor will be entitled to recover the debt against his assets. It follows that they expects that a creditor will be able to obtain the information necessary to realize on its legal rights.
       - It would be unreasonable for a borrower to expect that as long as he refused to comply with his obligation to provide information, his creditor would never be able to recover the debt.
       - This does not mean that a bank may disclose a mortgage discharge statement to anyone who requests it; it is reasonable to expect that a bank will not disclose such information to a person with no legal interest in the property.

Notes:

* *PIPEDA* applies to federal works, undertakings, and businesses within Alberta, including banks.

## Enforcement of Duties

* + If a person who is required to provide a financial report or submit to questioning fails to do so or fails to answer a question that may properly be asked of them, the Court may, on application [*CER*, s. 35.17]:
    1. direct that the person comply with the requirements under Part 1.3 or answer the question,
    2. hold the person in civil contempt, and/or
       - Contempt has 3 elements which must be established beyond a reasonable doubt (*Carey v Laiken*):
         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 *actual*, personal knowledge of it.
         3. The party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.
       - The court retains a discretion to not find contempt, even when all the elements are met, if a finding of contempt would work an injustice (*Carey v Laiken*).
       - Recall, under s. 9(3)(d) of the *Court of Queen's Bench Act*, Masters in chambers do not have jurisdiction to hear contempt hearings.
    3. make any other order that the Court considers appropriate in the circumstances.
  + A person who fails to accurately disclose the information required by a financial report risks prosecution for perjury (*Vaillancourt v Carter*) and an award of costs.

# Ch. 6: Writs of Enforcement & Priorities

* + A secured party can upset the priority rules enumerated below by applying for a bankruptcy order against the debtor.
    - Courts have granted bankruptcy orders where the only motivation of the secured party was to invert priorities (see e.g., *Bank of Montreal v Scott Road Enterprises Ltd*).

## Registration of Writs

Judgment* 
File Writ of 
Enforcement at 
Courthouse 
Register Writ at 
& Land 
Titles 
& Sell 
Personal 
Property 
Sell Real 
Property 
Garnish 
Obligations 
Appoint a 
Receiver 

\*If you receive a judgment in Provincial Court, you must register it in the ABQB before you can start enforcement proceedings [*Provincial Court Act*, s. 9.71(5)].

### Issuing of Writs

* A judgment creditor may require the court clerk of the judicial centre where the judgment has been entered to issue, at any time that the judgment is in force, a *writ of enforcement* [*CEA*, s. 25.1(1)].
  + The form for the writ of enforcement is prescribed by the *Alberta Rules of Court*; the creditor must fill it out themselves and file it at the courthouse, at which point the writ is said to be "issued."
  + The issuance of a writ of enforcement is required to initiate enforcement proceedings.
  + The writ of enforcement serves to communicate to the sheriff the particulars of the judgment and authorizes the sheriff to accept lawful enforcement instructions from the creditor.

#### Amounts Owing on the Writ

* In addition to the amount recovered by the judgment (i.e., amount the creditor was owed, plus pre-judgment costs, plus court-awarded costs), there may be levied under a writ of enforcement (a) the fees and expenses incurred in enforcing the writ of enforcement and (b) interest on the amount recovered [*CEA*, s. 13.1].
  + The amount owing on a writ is the total of (a) the amount of the judgment, (b) the costs assessed as payable that are *not* included in the judgment, and (c) interest owing in respect of the amount in clauses (a) and (b), LESS any amounts paid to the creditor on account of the judgment [*CER*, s. 40.01].

### Duration of the Writ

* A writ is only in force if the judgment in respect of which it has been issued is in force [*CEA*, s. 27(1); *ARC*, r. 9.20]; that said, a judgment is no longer in force [*CEA*, s. 27(2)]:
  1. if it has been satisfied, or
  2. 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.
     + The judgment takes effect on (a) the date of pronouncement or, (b) if the Court orders the judgment to come into effect before or after the date of pronouncement, the date so ordered [*ARC*, r. 9.6].
     + On application, the Court may grant a judgment creditor a new judgment [*ARC*, r. 9.21(1)].
       - Notice of the application must (a) be filed before the expiry of the 10-year period and (b) be served on the debtor in the same method as a commencement document [*ARC*, r. 9.21(3)].
       - If the debtor does not appear at the hearing of the application *and* show why a new judgment should be denied, the Court may grant a new judgment for the amount due and a costs award if it is satisfied that (a) notice of the application was served on the debtor and (b) the amount has not been paid under the original judgment [*ARC*, r. 9.21(5)].

### Registration of Writs

* A judgment creditor *cannot* initiate any writ proceedings in respect of a money judgment [*CEA*, s. 26]:
  1. *against any personal property* unless the writ issued in respect of that judgment is **registered in the Personal Property Registry** ("PPR"), or
     + The registration of a writ in PPR is in effect for 2 years, but can be renewed [*CEA*, s. 28].
       - Registration may be renewed for further periods of 2 years through registration of a report updating the information relating to the writ [*PPSR*, s. 6].
  2. *against land* unless the writ issued in respect of that judgment is **registered in the PPR *and* registered under the *Land Titles Act*** ("*LTA*") against the certificate of title.
     + The registration of a writ under the *LTA* is in effect for the duration of the judgment [*CEA*, s. 29].
* Registration of a writ provides notice to third parties that a creditor has a potential claim to property and helps coordinate the activities of enforcement creditors (Wood).
  + It provides the primary means by which an agency determines if there are other creditors with writs against the debtor.
    - This is needed so that other agencies can ascertain if other enforcement creditors are entitled to share in a distribution, which affects the amount of property that will be seized and the manner in which the proceeds will be distributed.
  + It also records the details of all enforcement activity carried out by a civil enforcement agency, which is required to register information concerning any seizure, sale, or distribution associated with a writ [*CER*, s. 13].
    - This provides an enforcement creditor with an easy means to discover if other enforcement measures have been initiated or completed.

### Fixing Errors or Omissions

* *Without* a court order:
  + **Changes of name**: Where the name of a judgment creditor shown on a writ is incorrect or has changed, the clerk may, without a court order, issue or amend a writ that has already been issued so the person is properly named [*CER*, s. 35.01].
  + **Clerical errors**: Where there is a clerical error on a writ, the clerk may, without an order of the Court, correct the error on the face of the writ [*CER*, s. 35.02].
* *With* a court order:
  + **Court order**: A party claiming to be entitled to enforce a judgment may apply to the Court for an order directing one or more of the following [*CER*, s. 35.03(1)]:
    1. that a writ be issued showing the proper name of the judgment debtor where their name as shown on the judgment is not the judgment debtor’s proper name;
    2. that a change be made to a writ;
    3. that a new writ be issued;
    4. that any issue or question necessary to determine the rights of the parties be decided in any way in which a question in an action may be decided.
  + **Validation**: 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 PPR, the Court may, on application, validate any writ proceedings that have taken place, subject to any interests that may have arisen in the period between the issuance of the writ or its registration in the PPR, as the case may be, and the correction of the error or omission.

### Assignment

* A judgment creditor may, without a court order, make a (1) total or (2) partial assignment of the writ to another person [*CEA*, s. 25.2(1)].
  1. **Total**: Where *all* of the judgment creditor's rights under a writ have been assigned, the court clerk may amend the writ to show the name of the assignee [*CEA*, s. 25.2(2)].
  2. **Partial**: Where *a portion* of the judgment creditor's rights under a writ have been assigned, the court clerk may divide the writ and issue [*CEA*, s. 25.2(3)]:
     1. a replacement writ to the judgment creditor indicating the amount that remains owing to them under the writ, and
     2. a replacement writ to the assignee indicating the amount that is owing to them under the writ.

## Personal Property

### Binding Effect of Writs

* A writ binds *all* of the enforcement debtor's *exigible* personal property in Alberta upon registration in the Personal Property Registry ("PPR") [*CEA*, s. 33(2)(a)].
  + "Exigible" property means property *not exempt from writ proceedings* under Part 10 [*CEA*, s. 1(1)(u)].
    - If an enforcement debtor has no exigible property, they are described as "judgment proof."
  + Creditors cannot enforce against property that belongs to someone other than the debtor (e.g., the debtor's wife, the debtor's company, etc.).
  + The binding effect of the writ does not involve any change in the ownership of the bound property, but it *does* give the sheriff the right to seize the property in the hands of the debtor (ALRI).
  + The binding effect applies to after-acquired personal property from the time the debtor acquires it [*CEA*, s. 33(3)].
    - "After‑acquired personal property" means personal property acquired by an enforcement debtor after the relevant writ is registered in the PPR [*CEA*, s. 31(a)].
  + Under the *CEA*, *all* the debtor’s personal property in Alberta is bound, regardless of where it was located, upon registration of the writ in the PPR [s. 2(c)].
    - Previously, the binding effect of the writ was confined to the judicial district of the sheriff to whom it was delivered (ALRI).
  + Previously, the binding effect of the writ extended only to the "goods" of the judgment debtor, which were understood as tangible property physically capable of seizure.
    - Under current law, there is no distinction between tangible and intangible property in the context of the binding effect of the writ.
* *"*Personal property" means property other than land [s. 1(1)(jj)].
  + Under the current *CEA*, "property" includes [s. 1(1)(ll)]:
    1. things, as well as rights or interests in things,
    2. anything regarded in law or equity as property or as an interest in property,
    3. any right or interest that can be transferred for value from one person to another,
    4. any right, including a contingent or future right, to be paid money or receive any other kind of property (e.g., debts, including garnishable debts), and
    5. any cause of action;

#### *Saulnier v Royal Bank of Canada*, 2008 SCC 58

Facts:

* Saulnier holds four fishing licenses (lobster, herring, swordfish, and mackerel) under s. 7(1) of the *Fisheries Act*, which enable him to engage in a regulated industry where participation is otherwise prohibited. In 2004, Saulnier's fishing business faltered, and he made an assignment in bankruptcy. At this point, he owed about $400,000, $250,000 of which he owed to RBC. In March 2005, the receiver and the trustee in bankruptcy signed an agreement to sell Saulnier's fishing licenses (which had a market value in excess of $600,000), but Saulnier refused to sign the necessary documents. The trustee in bankruptcy and RBC brought this application for declaratory relief.

Issue and holding:

* Does a s. 7(1) fishing license constitute "property" available to a trustee under the *Bankruptcy and Insolvency Act* ("*BIA*") or a secured creditor under the *PPSA*? **YES**

Rationale: (Binnie J)

* A s. 7(1) fishing license is "property" within the meaning of the *BIA* and "personal property" within the meaning of the *PPSA*.
  + While it is extremely doubtful that a simple license could itself be considered property at common law, a s. 7(1) license obtains more than merely permission to do that which would otherwise be unlawful; it is a major commercial asset in the fisheries industry.
    - While the Minister of Fisheries and Oceans has "absolute discretion" to issue fishing licences under s. 7(1), in reality the commercial market operates on the assumption that licences can be transferred on application to the Minister and with the consent of the existing license holder.
    - To ignore this commercial reality would be to deny creditors access to something of significant value in the hands of the bankrupt, undermining the purposes of the *BIA* and *PPSA*.
  + This, coupled with a proprietary interest in the fish caught pursuant to it, bears a reasonable analogy to a *profit à prendre*, which is undeniably a property right.
    - While the proprietary interest in the fish is contingent on the fish being caught, that contingency is no more fatal to the license's proprietary status than is the case with an equivalent contingency arising under a *profit à prendre*.

#### *Stout & Company LLP v Chez Outdoors Ltd*, 2009 ABQB 444

Facts:

* Under s. 59 of the *Wildlife Regulation* ("the Regulation"), an outfitter-guide needs a Class T Outfitter-Guide to provide guiding services to non-resident hunters who, under ss. 95 and 112 of the Regulation, cannot hunt big game unless guided. To legally contract with non-residents, the outfitter-guide also needs an allocation issued pursuant to ss. 53(3) and 54 of the Regulation. The allocation is unique as to the kind of big game the guide is allowed to guide hunters to hunt and as to the area in which they can be guided. An outfitter-hunter needs an allocation to apply on behalf of non-resident hunters for "allocated licenses," which in turn permit those hunters to hunt certain big game. Unlike the Class T permit, an allocation is transferable to another eligible outfitter-guide under s. 55 of the Regulation with the approval of the Minister, and there is no provision prohibiting the transfer of allocations for value. The Alberta Professional Outfitters Society ("APOS") is an authority permitted to issue Class T permits and allocations under Schedule 3, s. 2(2) of the Regulation.
* On April 1, 2008, APOS issued a Class T permit to the defendant that was valid until March 31, 2009. The plaintiff obtained a small claims judgment against the defendant in the amount of $9,410 in March 2008. In September 2008, a bailiff effected seizure of all allocations and permits issues by APOS under the *Wildlife Act*. At the time, the defendant held several allocations. APOS and the Crown served notice objecting to the seizure. The plaintiff filed a motion seeking a declaration that the allocations are exigible property. They did not seek a declaration with respect to the Class T permits, as they are not transferrable under the *Wildlife Act* and the Regulations.

Issue and holding:

* Are the allocations held by the enforcement debtor under the *Wildlife Act* property within the meaning of the *CEA* and therefore subject to seizure in writ proceedings? **YES**

Analysis:

* The principles of universal exigibility and just exemptions exemplified in the *CEA* signify that all the property of a judgment debtor should be subject to enforcement regardless of its form or character, excepting only property that has been excluded deliberately from enforcement that is sufficient to permit debtors to maintain themselves and their dependents at a reasonable standard.
* In *Saulnier*, Binnie J concluded that the fishing licences held by Mr. Saulnier were property within the meaning of the *BIA* and *PPSA* because the license coupled with a property interest in the fish harvested bore a resemblance to the *profit à prendre*, a type of property interest recognized at common-law.

Rationale: (Moreau J)

* The reward or gain obtained by the defendant through his allocations under the *Wildlife Act* fall within the broad definition of "property" in the CEA, read purposefully and harmoniously with the scheme of the Act.
  + The Regulation authorizes the transfer of an allocation to another outfitter-guide (if approved by the Minister) and does not expressly prohibit transfers for value.
    - The allocations are therefore capable of being transferred for value and thus fall within the definition of property contained in s. 1(1)(ll)(iii) of the *CEA*.
  + Unlike in *Saulnier*, a Class T permit does not authorize outfitter-guides to hunt or harvest any animal; however, the Regulations provide a clear link between the outfitter-guide and the product of the hunt.
    - Namely, the allocations held by the defendant entitle it to apply on behalf of its hunter-clients for allocated licenses, which in turn permit them to hunt and to acquire a property interest recognized at common law in the fruits of the hunt (i.e., a *profit à prendre*).
      * i.e., while the allocations do not entitle their holder to obtain something that is itself property, they do entitle the holder to legally enable their clients to obtain something that is itself property – the game hunted as permitted by the allocations.
  + The allocations held by the defendant are something more than a mere permission to do something which is otherwise illegal.
    - The payment of money to the outfitter-guide (by the hunter-client) is contingent on the granting of allocated licences to the defendant’s hunter-clients on application by the defendant, with the allocated licences being akin to the *profit à prendre* discussed in *Saulnier*.
  + Unlike in *Saulnier*, there is no evidence regarding the potential marketability or value of the allocations held by the defendant; however, the *capability* of being sold, pledged, or leased is sufficient to allow the allocations to be categorized as personal property.

Notes:

* While a license is not property at common law, Moreau J concluded that it can be classified as property for the purposes of enforcing a judgment.

### Priorities

#### Starting Point

* *Except as provided in ss. 35 to 40* of the *CEA*, an interest in property acquired *after* the property is bound by a writ is subordinate to the writ [s. 34(1)].
  + Where an interest in property is subordinate to a writ [*CEA*, s. 34(2)]:
    1. the property is subject to writ proceedings as if the subordinate interest did not exist, and
    2. a person who acquires the property as a result of writ proceedings acquires it free of the subordinate interest.
  + Where an interest in property has priority to a writ, a person who acquires the property as a result of writ proceedings acquires it subject to that prior interest, unless the person with the prior interest consents to the sale or disposition of the property [*CEA*, s. 48(j)].
    - i.e., the purchaser acquires title free of the writ and subordinate interest holders, but *the sale cannot affect the rights of any party who have priority to the writ holder* (*Telalert*).

#### Security Interests

##### Terminology

* **Security interest**: Under the *PPSA*, "security interest" can mean one of two things [s. 1(1)(tt)]:
  1. *an interest in property that secures payment or performance of an obligation*; under s. 3(1), this includes every transaction, *in substance*, creates a security interest, without regard to its form and without regard to the person who has title to the collateral (the "substance test").
     + e.g., A loans $750 to B. B grants A a security interest in B’s bike. If B defaults in repaying $750 to A, A can seize & sell bicycle.
     + e.g., A sells bike to B for $750. B pays $150 & agrees to pay $100/month for 6 months. Title of bike remains with A until payment is made in full. (conditional sales contract)
       - In this example, A's interest in the property secures payment of the sale price.
     + e.g., A leases bike to B. Bike is worth $750. B pays $100/month. After 6 months, B has option to purchase bike for $150. (a security lease)
       - It is sometimes difficult to determine whether a contractual arrangement is a security lease designed to sell property or a true lease in which the intention is that the property is going to be transferred to the lessor; some relevant questions include:
         * At the end of the lease, does the property automatically vest in the lessee?
         * Is there an option or obligation for the lessee to purchase the property at the end of the lease?
         * Is the lessee leasing the property for its entire useful life?
         * What is the amount being paid on the lease versus the value of the property?
         * Are lease payments credited towards the purchase of the property?
  2. *a "deemed" security interest* (which are not technically security interests, but are treated as such for the purposes of the *PPSA*), *whether or not the interest secures payment or performance of the obligation*, including,
     1. a transferee arising from the transfer of an account or a transfer of chattel paper,
        + An "account" is a monetary obligation not evidenced by a chattel paper [*PPSA*, s. 1(1)(b)].
          - e.g., Jaheem delivers dog houses to four clients and gives them invoices saying that they have to pay within 30 days. If those clients fail to pay then, instead of taking steps to enforce the debts, he may sell those outstanding accounts to a collection company at a discounted price, and allow them to seek collection. In this example, the collection company is treated as having a security interest in these accounts and must file a financing statement in the PPR.
        + A "chattel paper" is a writing that evidences both a monetary obligation and a security interest in or lease of specific goods [*PPSA*, s. 1(1)(f)].
     2. a person who delivers goods to another person under a commercial consignment, and
        + "Commercial consignment" means a consignment under which goods are delivered for sale or disposition to a consignee who is in the business of dealing in goods of that kind by a consignor who is in the business of dealing in goods of that kind and reserves an interest in the goods after they have been delivered [*PPSA*, s. 1(1)(h)].
          - But, a consignment to an auctioneer or person who is known to sell or lease goods belonging to others is not a commercial consignment [*PPSA*, s. 1(1)(h)].
        + e.g., Bev is an artist who delivers paintings to DealCo, who is an art dealer, for sale to customers. If they are sold, Bev gets a share of the proceeds. If they are not sold, DealCo has to return to paintings to Bev. This is treated as a security interest under the *PPSA*. Bev has a deemed security interest, and would need to file a financing statement in the PPR.
          - This way, if DealCo's landlord seeks to seize some of DealCo's paintings to cover rental arrears, it can search the property to see if another person has priority.
          - However, if DealCo is known to sell or lease goods that belong to others, then this would not fall under the definition of a security interest.
     3. a lessor under a (true) lease for a term of more than one year,
        + "Lease for a term of more than one year" includes [*PPSA*, s. 1(1)(z)]:
          1. a lease for an indefinite term even though the lease is determinable by one or both parties within one year,
          2. a lease wherein the lessee, with the consent of the lessor, retains possession of the leased goods for a period in excess of one year after the date they acquired possession, and
          3. a lease that is renewable automatically, at the option of one of the parties, or by agreement, for one or more terms, the total of which, including the original term, may exceed one year.
        + "Lease for a term of more than one year" *does not* include [*PPSA*, s. 1(1)(z)]:
          1. a lease involving a lessor not regularly engaged in the business of leasing goods,
          2. a lease of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land, or
          3. a lease of any prescribed goods, regardless of the length of the term of the lease;
        + A lease for a term of more than one year is treated as a security interest under the *PPSA* because the borrower is in possession of the leased goods for a long enough time that we want to put other creditors on notice that it is not their property.
          - If a lessor does not file a financing statement in the PPR, their interest in the leased good could be lost in a priority battle with other creditors.
* **Purchase-money security interest**: a "purchase-money security interest" ("PMSI") means [*PPSA*, s. 1(1)(ll)]:
  1. a security interest taken or reserved in collateral to secure payment of all or part of its purchase price (vendor financing),
     + e.g., vendor sells equipment to Corp. for $300k. Corp. pays $100k, with the balance to be paid in monthly payments of $5k. The vendor takes a security interest in the equipment to secure payment of the balance.
  2. 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 (third party financing),
     + e.g., vendor sells equipment to Corp. for $300k. Corp. borrows $300k from bank. Bank takes a security interest in the equipment to secure repayment of the loan.
  3. the interest of a lessor of goods under a lease for a term of more than one year, or
     + A "lease for a term of more than one year" is deemed to be both a security interest and a PMSI.
  4. the interest of a person who delivers goods to another person under a commercial consignment.
     + Thus, a "commercial consignment" is deemed to be both a security interest and a PMSI.

but does not include a transaction of sale by and lease back to the seller.

* Under s. 34 of the *PPSA*, a party with a PMSI has priority over other secured parties if registration occurs within 15 days of the debtor (or a party on the debtor's behalf) taking possession of collateral.
  + PMSIs have priority because the secured party is providing value to the debtor to increase their assets.
  + e.g., DB grants a security interest in all present and after-acquired property to SP1, worth $100K. SP1 registers a financing statement at the PPR. The next day, DB purchases a digger from SP2 worth $40K. DB will pay the purchase price in installments over 1 year. DB takes possession of the digger and SP2 registers a financing statement at PPR. Because of the special priority rules in s. 34 of the *PPSA*, SP2 has priority over SP1 vis-a-vis the digger as long as it registers its financing statement at the PPR within 15 days of DB taking possession of the digger.

##### General Rule

* A security interest in personal property is subordinate to a writ that binds that property, regardless of whether it attached before or after the property became bound by the writ [*CEA*, s. 35(1)].
  + However, a security interest in personal property has priority over a writ that binds that property if, at the time the writ if registered in the PPR [*CEA*, s. 35(2)]:
    1. The secured party has perfected or registered their interest in the PPR, or
       - In this course, we do not focus on the various other ways an interest is "perfected."
    2. The secured party, or a person acting on their behalf, has possession of the property.
       - Possession only perfects a security interest while the property is actually held as collateral and not while it is held as a result of seizure or repossession [*PPSA*, s. 24(1)].

###### *Stoke Resources & Consulting Inc v Auto Body Services Red Deer Ltd*, 2009 ABQB 569

Facts:

* **Tank SS-1812**: In 2001, Stoke Resources & Consulting Inc ("Stoke Resources") purchased tank SS-1812. The principal of Stoke Resources, Ed Asuchak, met Doug Plastow in 2004. Asuchak was convinced to join personally with Plastow and Craig Berg to start a well testing company. For this purpose, the parties used Rockies Edge Inc ("Rockies"), which had been incorporated earlier, and which Asuchak became a director of. While the plan was to transfer the tank from Stoke Resources to Rockies, no agreement was executed and tank SS-1812 remained the property of Stoke Resources. Nevertheless, Asuchak delivered the tank to Rockies' premises. When those involved in the business venture had a falling out, Asuchak resigned as director of Rockies in December 2006. Asuchak pleaded for the return of the tank, but was convinced to allow Rockies to rent the trailer from January 2007 for four months at $8,000 per month. Thereafter, the tank sat on Rockies' yard until June 2007 when Stoke Resources arranged to rent the tank to a third party. In February 2008, the tank was returned to Rockies' yard on the understanding that Rockies could use at a rental rate of $200 for every day of use. The tank was seized in June 2008 by the defendant, a judgment creditor of Rockies.
* **Tank V102**: In September 2007, Rockies approached Asuchak to advise him that Rockies was in financial trouble with the CRA for $106,000 in unpaid taxes. Stoke Resources agreed to buy tank V102 from Rockies and pay the proceeds to the CRA. Rockies agreed to buy the tank back from Stoke Resources at $2,000 per month. On the strength of that arrangement, Stoke Resources left tank V102 with Rockies to use as it saw fit. The tank was seized in June 2008, also by the defendant.

Issues and holding:

1. Is the defendant's writ entitled to priority over the Stoke Resources' interest in tank SS-1812? **YES**
   1. Is Stoke Resources' interest in tank SS-1812 a security interest? **YES** *(reversed on appeal)*
   2. If yes, did that security interest take priority over the defendant's writ? **NO**
2. Is the defendant's writ entitled to priority over the Stoke Resources' interest in tank V102? **YES**
   1. Is Stoke Resources' interest in tank V102 a security interest? **YES**
   2. If yes, did that security interest take priority over the defendant's writ? **NO**

Analysis:

* Section 35 of the *CEA* provides that the *defendant’s writ has priority over a security interest* in the subject property unless that security interest is perfected or registered in the PPR or that property is in possession of the secured party or its agent under s. 24 of the *PPSA*.
  + In the *PPSA*, a security interest means an interest in goods that secures performance of an obligation, and *includes the interest of a lessor under a lease for a term of more than one year*.
    - Section 1(1)(z)(i) of the *PPSA* defines a lease for a term of more than one year as including a lease of indefinite term even if determinable unilaterally within one year.
  + Section 24 of the *PPSA* provides that, where a secured party or someone on the secured party’s behalf possesses the collateral, that possession perfects the interest in the goods or instrument.
    - However, a secured party is not in possession if the collateral is in the actual or apparent possession of the debtor.

Rationale: (Clackson J)

1. The interest of Stoke Resources in tank SS-1812 was a security interest which was not perfected or registered under the *PPSA*.
   1. The transaction involving tank SS-1812 was a lease for a term of more than one year within the meaning of the *PPSA*, since Rockies was obliged to pay rent in exchange for its use of the tank.
      * While tank SS-1812 was only on Rockies' property from February 2008 until it was seized about four months later, the lease was for an indefinite term, not a specific term; that said, s. 1(1)(z)(i) of the *PPSA* makes it clear that all indefinite leases are deemed to be leases in excess of one year *even if either party to the lease can terminate it at any time*.
        + Seizure does not terminate the lease; nothing in the *PPSA* provides for termination of a lease upon seizure and none of the terms of the lease make that provision.
      * *Note*: this finding was reversed on appeal (see Notes, below).
   2. Since Stoke Resources did not register its lease of tank SS-1812 to Rockies, its interest is subordinate to the defendant's writ under s. 35 of the *PPSA*.
2. The interest of Stoke Resources in tank V102 was a security interest which was not perfected or registered under the *PPSA*.
   1. The transaction involving tank V102 created a security interest in favour of Stoke Resources.
      * Tank V102 was transferred to the Stoke Resources on the understanding that it was to be security for repayment of a debt owed to it by Rockies.
   2. None of the various ways that Stoke Resources' security interest could obtain priority over the defendant’s writ are present here.
      * Tank V102 was not in possession by Stoke Resources or its agent, which would have perfected Stoke Resources' interest under s. 24 of the *PPSA*.
      * Stoke Resources' interest is not protected by s. 27 of the *PPSA* (perfection where goods in possession of bailee) because, while Rockies' possession might be as a bailee which has issued title to Stoke Resources, the Stoke Resources did not perfect the interest as is required by s. 27.

Notes:

* *On appeal, the ABCA reversed Clackson J's decision with respect to SS-1812* on the basis that the arrangement regarding that tank did not constitute a lease and, as a result, its seizure was unlawful.
  + The court found that, given how Stoke Resources leased the tank to a third party from June 2007 to February 2008, it retained the right to lease the tank to third parties while it was on Rockies' property. Thus, Rockies did not have exclusive possession of the tank and was instead granted a license to use it.

###### Advances

* The priority that a security interest has applies to all advances, including future ones [*PPSA*, s. 35(5)].
  + "Advance" means the payment of money, provision of credit, or giving of value [*PPSA*, s. 1(1)(c)].
  + HOWEVER, a perfected security interest that would otherwise have priority over a writ of enforcement issued under the *CEA* has that priority only to the extent of [*PPSA*, s. 35(6)]:
    1. advances made *before the secured party acquires knowledge of the writ*,
       - i.e., once a secured party has knowledge of a writ, further advances do *not* have priority.
       - 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 [*CEA*, s. 32].
         * An individual is deemed to have knowledge of a matter when information in respect of that matter is acquired by them in circumstances in which a reasonable person would take cognizance of the information [*CEA*, s. 1(2)(a)].
         * A corporation is deemed to have knowledge of a matter when information in respect of that matter has come to the attention of [*CEA*, s. 1(2)(d)]:

an officer of the corporation, or

a senior employee of the corporation with responsibility for matters to which the information relates,

under circumstances in which a reasonable person would take cognizance of the information or when the information in writing has been delivered to the registered office of the corporation or attorney for service for the corporation.

* Under s. 47 of the *PPSA*, registration of a financing statement in the PPR is not deemed to be constructive notice or knowledge of its existence or contents.
  + While this does not appear in the *CEA*, the same likely applies in writ proceedings.

1. advances made pursuant to an obligation owing to a person *other than the debtor* entered into by the secured party before acquiring the knowledge of the writ, and
2. reasonable costs incurred and expenditures made by the secured party for the protection, preservation, or repair of the collateral.

* An obligation owing to a debtor to make future advances is not binding on a secured party if the security interest does not have priority over a writ with respect to those advances [*PPSA*, s. 14(2)].
* e.g., Parties A and B enter into a security agreement in which Party A agrees to lend Party B money, up to a max of $40,000. Party B gives Party A a security interest to secure any amount that may be owed to Party A from time to time. Party A registers the security agreement at the PPR. The next day (Day 2), Party A makes the first advance of $20,000 to Party B. On Day 3, an enforcement creditor registers a writ at the PPR. On Day 4, Party A makes a further advance of $10,000 to Party B.
  + In this case, under the general rule, all of Party A's advances have the same priority, dating from the time the security agreement was registered. Hence, Party A would have priority to the advance on Day 4, even though it was made after the writ was registered.
  + However, if Party A knew of the writ registered in the PPR, and they made the advance on Day 4 anyway, that advance would not have priority over the writ.

###### Purchase-Money Security Interests

* A PMSI in personal property has priority over a writ that bound the personal property *before* the PMSI was registered or perfected if the security interest was registered or perfected not later than 15 days from the day that [*CEA*, s. 35(3)]:
  1. the debtor, or another person at the request of the debtor, obtained possession of the collateral, or
  2. the security interest attached, in the case of personal property other than goods, chattel paper, a security certificate, a document of title, an instrument or money.
  + e.g., CR obtains judgment for $200k and registers it in the PPR. The DB purchase equipment worth $100k, with the price to be paid in monthly installments of $2.5k. The vendor takes a security interest to secure payment. The vendor then registers a financing statement in the PPR.

###### Lapse

* Where
  1. 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
  2. the writ is re‑registered not later than 30 days after the lapse or discharge,

the lapse or discharge does not affect the priority status of the writ in relation to a competing security interest that, prior to the lapse or discharge of the writ, had a subordinate priority position [*CEA*, s. 35(4)].

* However, this does not apply where the competing security interest secures advances made or contracted for *after the lapse or discharge and prior to the re‑registration of the writ* [*CEA*, s. 35(4)].
* This provision provides protection to writ creditors whose writs accidentally lapse, and it also provides some protection to third parties who make advances based on information in the PPR.

#### Disposition of Goods

* The exceptions relating to the disposition of goods exist to promote commercial activity.

##### Terminology

* "Goods" includes *consumer goods*, *equipment*, and *inventory*.
  + "Consumer goods" means goods that are used or acquired for use primarily for personal, family, or household purposes [*PPSA*, s. 1(1)(i)].
  + "Equipment" means goods that are held by a debtor other than as inventory or consumer goods [*PPSA*, s. 1(1)(p)].
  + "Inventory" means goods that are (i) held by a person for sale or lease, or that have been leased by that person, (ii) to be furnished by a person or have been furnished under a contract of service, (iii) raw materials or work in progress, or (iv) materials used or consumed in a business [*PPSA*, s. 1(1)(y)].
    - Unlike equipment and consumer goods, inventory tends to turn over with relative frequency.
  + e.g., a minivan could be a consumer good, inventory, or equipment.
    - *Consumer goods*: Jesse has a van that he uses to drive to/from work, to the store, and on trips.
    - *Inventory*: Jesse is used a used car salesman. The minivan is sitting on his lot, ready to be sold.
    - *Equipment*: Jesse is a taxi driver and uses the minivan to transport passengers.
* "Serial number goods" mean a motor vehicle, trailer, mobile home, manufactured home, aircraft, boat, and outboard motor for a boat [*PPSR*, s. 1(1)(y)(i)].
  + Serial number goods are all high-value goods that are often bought and sold on the secondary market.
  + "Motor vehicle" means a mobile device propelled primarily by any power other than muscular power
    1. 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
    2. that is used in the construction or maintenance of roads,

and includes a pedal bike with a motor, 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 [*PPSR*, s. 1(1)(p)].

* "Trailer" means a device in, on, or by which a person or thing may be transported or drawn that is not self-propelled and that is designed to be drawn on a road by a motor vehicle [*PPSR*, s. 1(1)(cc)].
* "Mobile home” means a structure, whether equipped with wheels or not, that is not self-propelled and is designed [*PPSR*, s. 1(1)(o)]:
  1. to be moved from one place to another by being towed or carried, and
  2. to be used as (A) a dwelling house or premises, (B) a business office or premises, or (C) accommodation for a purpose other than one described in paragraph (A) or (B);
* "Boat" means a vessel that is designed for transporting persons or things on water and that is propelled primarily by any power other than muscular power [*PPSR*, s. 1(1)(e)].
* "Aircraft" means any machine capable of deriving support in the atmosphere from the reactions of the air [*PPSR*, s. 1(1)(b)].

##### Course of Business Exception

* 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 [*CEA*, s. 36(1)], whether or not the buyer or lessee has knowledge of the writ.
  + In *Wandering Creek Farms Ltd v Sphenical Capital Inc*, the ABQB laid out some considerations for determining whether a sale falls in the "ordinary course of business":
    - *Transaction type*; i.e., is the transaction part of the normal part of their business?
    - *Place of sale*; i.e., did the sale take place at the seller's usual place of business?
    - *Parties to the transaction*; i.e., is the purchaser an ordinary customer?
    - *Quantity of the goods sold*; i.e., was the amount of goods sold abnormal?
    - Price charged; i.e., did the purchaser pay fair market value?
    - *Advertising*; i.e., what sort of trade does the seller purport to engage in?
    - *Percentage of overall volume of sales*; i.e., do the type of goods sold constitute a large proportion of the seller's overall sales?
* The reason for this exception is that the consequences for commerce, if every transaction was liable to be upset by creditors who had registered writs against the vendor, would be unacceptable (ALRI).
  + Plus, removal of goods fit for sale in the ordinary course of business might be undesirable since such sale is likely to yield a greater return than sale by other means (ALRI).

##### "Garage Sale" Exception

* A buyer or lessee of goods acquired as *consumer goods* takes free from a writ that binds the goods if [*CEA*, s. 36(2)]:
  1. they gave value for the interest acquired,
  2. they bought or leased the goods without knowledge that the goods are bound by the writ, and
  3. 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.
* Ensures that people who buys goods from someone whose ordinary business is not to sell such items in innocent and casual transactions (e.g., the sale of a bicycle between two neighbours) will not have to search the PPR for writs that might bind those goods (ALRI).
  + Such an obligation would deter casual private transactions without significant benefit to anyone (ALRI).

##### Serial Number Goods Exception

* Where serial number goods that are bound by a writ are *not* described by serial number in the registration of that writ in the PPR [*CEA*, s. 36(3)]:
  1. 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
  2. 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.
* *There is no serial number goods exception for inventory* because inventory turns over with great frequency, and it would be too onerous on a writ holder to have to constantly update their writ to include the serial numbers of inventory as it comes in.
  + e.g., a debtor buys old Ford Thunderbirds, fixes them up, and sells them through Kijiji. A creditor gets judgment against the debtor and registers it at the PPR, but does not include the serial number of the debtor's Thunderbirds. Then, the debtor sells the Thunderbird to a purchaser for $50,000. In this case, the serial number goods exception would not protect the purchaser (though the course of business exception may apply).

enforcement 
creditor 
enforcement 
debtor 
buyer 1 
c 
buyer/lessee/SP 

* This exception protects parties dealing with buyers of a serial number good by requiring an enforcement creditor to include the serial number of the goods in registration of the writ in order to assert priority.
  + e.g., in the above diagram, A's writ binds B's personal property. B sells the car to C. Since C knows B's name, she can search the personal property registry to see if there are any writs that bind A's personal property. However, if C buys the car and sells it to D later on, D will have no way of finding out about A's writ, since they have no dealings with the debtor (i.e., B). However, if A is required to describe the car's serial number in the registration of their writ, D is able to search that number in the PPR and determine the existence of A's writ.

CEA 
section 
36(1) 
3 6(2) 
Party 
Acquiringan 
Interest 
Buyer or 
lessee 
Buyer or 
lessee 
Buyer, lessee 
or secured 
party 
Buyer, lessee 
or secured 
party 
In what is 
Interest 
Ac uired 
Goods 
Goods that are 
acquired as 
consumer goods 
Serial number 
goods that are 
consumer goods 
Serial number 
goods that are 
equipment 
Requirements for Exception to Apply 
Sold or leased "the ordinary course of business of 
the seller" 
(1) 
(2) 
(3) 
(1) 
(2) 
(1) 
(2) 
(3) 
Buyer or lessee gives value 
Buyer or lessee did not have kn owledge the 
goods bound by mit 
Value of goods sold, or lease SSI 000 
Writ not registered against serial number 
Buyer lessee or secured palty gives value for 
interest 
Writ not registered against serial number 
Buyer, lessee or secured palty gives value for 
interest 
Buyer, lessee or secured palty does not have 
kn owledge of the mit. 

#### Priority of Liens

* A lien is an interest in property, similar to a security interest, which enables a creditor to retain (usually) or seize (occasionally) property belonging to a debtor; they can be established by statute, agreement, or the common law.
  + e.g., under the *Possessory Liens Act*, a person has a lien for the payment of the person’s debt on a chattel on which the person has expended money, labour, or skill at the request of its owner and enhanced its value [s. 2].
  + e.g., under the *Garage Keepers' Lien Act*, a garage keeper who is entitled to payment of a sum for the storage, repair, or maintenance or the price of accessories or parts furnished, has a lien on the motor vehicle for the sum to which the garage keeper is entitled [s. 2(1)].
    - "Garage keeper" means a person who keeps a place of business for the housing, storage, or repair of a motor vehicle or farm vehicle and who receives compensation for that housing, storage, or repair [s. 1(d)].
  + e.g., under the *Rules of Court*, on application by a lawyer, the court may declare property specified in its order to be subject to a charge as security for payment of the lawyer's charges [r. 10.4(1)].
* When a person in the ordinary course of business furnishes materials or services with respect to goods 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 [*CEA*, s. 40].

##### *Sharma v 643454 Alberta Ltd*, 2006 ABQB 119

Facts:

* In 1996, the plaintiff obtained a judgment against Wayne Goebel, who has several other judgment creditors. The judgment was subsequently assigned to the Alberta Lawyers' Insurance Association ("ALIA"). In 2002, Goebel was convicted in Provincial Court of several offences under the *Public Health Act* and received a substantial fine. He launched an appeal to the ABQB, but in the interim was unable to pay the fines and was arrested in January 2003. He served six days in jail before being released upon paying the balance outstanding. The money used to pay the fines, in the amount of $42,026, was provided by Goebel's long-time friend Cheryl Semenchuk. She obtained the money from her lines of credit and credit cards and advanced the sum to the Holder Law Office, which used those funds to get Goebel released. Goebel agreed to repay Semenchuk at $600 per month, and on January 23, 2003, he signed an assignment in favour of Semenchuk. It indicated that, if Goebel's pending appeal was successful, any refund of the fines would be returned to Semenchuk. On May 9, 2003, Goebel's appeal was allowed in part, thanks to the services of the Holder Law Office. On October 29, 2003, Semenchuk and Holder Law Office signed a further assignment indicating that the Holder Law Office was entitled to retain $10,000 out of the fine refund, in recognition of its efforts to recover them. Through several payments, fine refunds totalling $24,840 were paid to the Holder Law Office on Goebel's behalf by March 9, 2004. ALIA tried unsuccessfully to garnishee these funds. When issues arose over who was entitled to the money, it was paid back into court.
* There are now competing claims to the funds. Semenchuk claims an entitlement to the funds, as she originally advanced them to Goebel. The Holder Law Office claims $10,000 by virtue of the Irrevocable Assignment of October 29, 2003, and also claims a charging order. ALIA claims preferential costs under s. 99(3)(c) of the *CEA*, in priority to Goebel's other creditors, because it took the initiative in pursuing the funds.

Issues and holding:

1. Is Semenchuk entitled to a proprietary remedy? **NO**
2. Are Semenchuk and the Holder Law Office secured creditors under the assignments? **NO**
3. Is the Holder Law Office entitled to a charging order under r. 625 of the *ARC*? **YES**
4. Is ALIA entitled to preferential costs in preference to Goebel's other creditors? **YES**

Analysis:

* Under r. 625 (now r. 10.4) of the *ARC*, the court may declare a lawyer to be entitled to a charge upon property recovered through their efforts for his proper fees and disbursements in the proceedings; there are four requirements for granting a charging order under r. 625:
  1. The lawyer must have conducted litigation on behalf of the client;
  2. The lawyer’s efforts in the litigation must have recovered or preserved for the client the net property sought to be charged;
  3. The charge is limited to fees and disbursements incurred in the same litigation which recovered or preserved the property;
  4. Even if the foregoing conditions are met, the court may refuse to grant the charge if to do so would be unfair.
* Charging orders can defeat the interest of an unsecured creditor, and possibly even a secured creditor, even if the charging order is not registered.
  + There is no reason why a secured or unsecured creditor should be allowed to benefit from the labours of the lawyer without seeing that the lawyer is paid a fair amount.
* Under s. 99(3)(c) of the *CEA*, where the total amount claimed by enforcement creditors exceeds the amount of a distributable fund, the distributing authority must apply the fund in the following order of priority:

…

1. first, to other fees and expenses of a distributing authority that were incurred in connection with the enforcement measures that have produced the fund;
2. second, *to other costs that may be claimed against the enforcement debtor that were incurred by the instructing creditor in connection with the enforcement measures that have produced the fund*;

…

Rationale: (Slatter J)

1. Semenchuk is left with remedies in debt; she has no proprietary interest in the funds.
   * The true nature of the arrangement is that she lent the funds to Goebel on the condition that they were to pay his fine.
   * Semenchuk herself refers to the transaction as a loan in a letter she wrote to the Holder Law Office and in her answers to undertakings dated October 16, 2005.
2. Semenchuk is an unsecured creditor, and the Holder Law Office is also an unsecured creditor, subject to any claim for a charging order.
   * The two assignments are security interests, as their primary purpose was to secure payment or performance of an obligation; they were not absolute assignments.
     + If Goebels had paid down the loan at all, and all of the fines were refunded, *Semenchuk would only have been entitled to the unpaid portion of the loan, not the whole thing*.
   * However, neither assignment was registered at the PPR, and s. 35 of the *CEA* provides that a security interest is subordinate to any writ that is registered prior to the registration of the security interest.
3. The Holder Law Office is entitled to a charging order estimated at $6,000, subject to assessment.
   * The Holder Law Office prosecuted the successful appeal on behalf of Goebel.
   * It was its successful prosecution of the appeal that resulted in the refund of the fines.
   * $6,000 represents the amount approximately incurred by the Holder Law Office between January 2003 (when the funds were advanced) and May 9, 2003 (when the appeal was decided).
   * In the circumstances, there would be no unfairness in a charging order.
     + While the Holder Law Office did previously acknowledge Semenchuk's assignment, the subsequent acknowledgement by Semenchuk on October 29, 2003 negates any unfairness.
     + At the end of the day, it was the Holder Law Office that effected recovery of the fines.
       - The whole purpose of the charging order is to ensure that third parties do not benefit from the work of solicitors, unless the solicitors are paid first.
4. ALIA is entitled to preferential costs under s. 99(3)(c) of the *CEA*, and submissions may be made on quantum; the balance of the funds should be distributed among the writ holders in accordance with the *CEA*.
   * ALIA is the only writ holder that has pursued the garnisheed funds, and that but for its efforts nothing would have been recovered for any creditor.

Notes:

* Even though Holder Law Office did not register their interest, they still obtained priority over $6,000 of the fine refunds, representing the value of the work that they put into the appeal.

#### Interaction Between Writs

* An interest in property is not subordinate to a writ by reason only of the fact that the interest is subordinate to another writ [*CEA*, s. 42(1)], but this does not create any priority as between writs [*CEA*, s. 42(2)].
  + e.g., On Day 1, Creditor 1 (owed $20k), registers their writ at the PPR. On Day 2, Secured Party (owed $30k) registers their security interest at the PPR. On Day 3, Creditor 2 (owed $80k) registers their writ at the PPR. Writ proceedings then recover $40k. The first $20k is allocated to Creditor 1. The remaining $20k is allocated to Secured Party, since they are next in priority. Under s. 42(1), the Secured Party is not subordinate to Creditor 2 just because it is subordinate to Creditor 1. Then, while nothing remains to be allocated to Creditor 2, Creditor 2 is entitled to share in the $20k allocated to Creditor 1 (under Part 11). Under s. 42(2), Creditor 1 is not entitled to priority over Creditor 2. Even if Creditor 1 has priority vis-à-vis a secured creditor, they still have to share *pro rata* with Creditor 2.

## Real Property

### Binding Effect of Writs

* A writ, on being registered under the *Land Titles Act* ("*LTA*"), binds all of the enforcement debtor’s *exigible* land *described in the certificate of title against which the writ is registered* [*CEA*, s. 33(2)(b)].
  + "Exigible" land means land *not exempt from writ proceedings* under Part 10 [*CEA*, s. 1(1)(u)].
  + "Land" includes any interest in land, but does not include growing crops [*CEA*, s. 1(1)(bb)].
    - Under the *LTA*, a writ of enforcement binds "all legal and equitable interests of the debtor in the land included in the certificate of title are bound by the writ" [s. 122(7)(a)].
  + Therefore, before a writ creditor can enforce against a debtor's land, they must determine what parcels of land the debtor has an interest in.
    - This can be done with a financial statement of debtor [*CER*, s. 35.10], questioning [*CER*, ss. 35.11–35.16], and a name search at the Land Titles Office [*Name Search Regulation*].
* **Lapse**: A writ registered under the *LTA* will lapse on application to the Registrar of Land Titles 60 days after notice to take proceedings in court has been served on the creditor or send by registered mail to the creditor at the address on the writ UNLESS the creditor takes proceedings in court to substantiate their interest and a certificate of lis pendens has been filed with the Registrar [*LTA*, s. 123(2)].
  + A certificate of lis pendens puts everyone who searches the Land Titles registry on notice that the parcel of land is subject to litigation.
* **Discharge**: The Registrar of Land Titles must discharge a writ against land bound by it on production of [*LTA*, s. 125]:
  1. a judge’s order directing the discharge of the writ against the land,
  2. evidence from the clerk of the court showing the expiration, satisfaction, or withdrawal of the writ, or
  3. a discharge executed by the enforcement creditor.

#### *Royal Bank of Canada v Malfair*, 2002 ABQB 39

Facts:

* Alfred Malfair and Carrie Zelent are father and daughter. Zelent wanted a house but could not afford one. Malfair, wanting to help his daughter, agreed to be a half owner of a house as a joint tenant. They obtained mortgage financing to buy the house from a mortgagee. In August 1998, the Royal Bank of Canada ("RBC") got a money judgment against Zelent in the amount of $4,556 and registered a writ of enforcement against the title the same month. In June 2001, Zelent transferred her half-interest in the house to Malfair for $1. Malfair listed the house, and received an offer equal to the amount owing on the mortgage, but he could not close on the sale because RBC refused to discharge its writ.

Issue and holding:

* Should RBC's writ be enforced against the property, or should it be discharged from title? **Discharged**

Analysis:

* Section 122(7) of the *Land Titles Act* says that a writ of enforcement binds the legal and equitable interests of the debtor in land; if a debtor's equity in the property is zero, there will be nothing for the writ to attach to.
* If there is no reasonable prospect of realizing a return for the creditor, the court may refuse to order a sale of the land.
  + It is not a function of the law to teach judgment debtors a lesson by ordering a sale that will not result in gains for the creditor.

Rationale: (Master Funduk)

* The writ of enforcement could bind only Zelent's half-interest under s. 122(7), for what it was worth.
* That said, RBC has not shown that, when Zelent transferred her half-interest to Malfair, the house's value was more than what was owing on the mortgage; *thus, there was no equity for the writ to attach to*.
  + If house could be sold for a price leaving a "net," 1/2 of the net would have been available for RBC as the equity to which the writ of enforcement attached.
* Since there was no equity for the writ to attach to, it should be discharged.
  + Simply leaving it in place is not an appropriate resolution; there must be finality.

### Priorities

* Recall that, except as otherwise provided in any other enactment, an interest acquired in real property after the property is bound by a writ is subordinate to the writ [*CEA*, s. 34(1)].
  + Interests registered in respect of the same land have priority *based on order of registration* under the *LTA* [*LTA*, ss. 14, 56].
* There are two key competitions in the civil enforcement context when dealing with real property:
  1. Writs vs registered interests
  2. Writs vs unregistered interests

#### Registered Interests

* If land is sold in writ proceedings, the buyer will acquire title subject to security interests registered before the writ but free of security interests registered after the writ [*CEA*, s. 34(2)(b)].
  + A court order is required to direct the Registrar of Land Titles to transfer title to the buyer free of any subordinate registered interests in the land [*CEA*, s. 75(1)].
  + A prior security interest in land follows the land; i.e., the buyer will acquire the land subject to the security interest (i.e., if the debtor defaults, the secured party may foreclose).
  + When an enforcement creditor initiates writ proceedings against real property, the civil enforcement agency is *not obliged to pay a prior secured party from the proceeds of sale*.
    - In contrast, when dealing with personal property, priority gives a secured party a right to be paid out from the proceeds of sale.
  + In practice, though, land will rarely be saleable unless the party with the prior security interest consents to sale after being paid out; nobody wants to buy land with a mortgage on it.
    - If a mortgagee with a prior registered security interest consents to the sale of land in exchange for a share of the sale proceeds, title will issue in buyer’s name free of the mortgagee's interest.
      * However, either the mortgagee must discharge its registration against the title or the enforcement creditor must obtain a court order directing the Registrar of Land Titles to transfer title to the buyer free of the mortgagee's interest [*CEA*, s. 75(1)].
    - In this case, a subordinate security interest will take a share of the sale proceeds only if a surplus remains after the writ is satisfied.
      * If nothing remains, the secured party is left with an unsecured claim against enforcement debtor.

#### Unregistered Interests

* When a writ is registered under the *LTA*, it binds only the debtor's legal and equitable interests in the land included in the certificate of title [*CEA*, s. 33(2)(b); *LTA*, s. 122(7)(a)]; if that interest is subject to a prior interest, the writ attaches to the debtor's interest subject to the prior interest, *even if it is unregistered*.
  + e.g., the debtor borrows money and grants a security interest in his real property (a mortgage) to a secured party (SP). SP fails to register the mortgage against the certificate of title in the Land Titles registry. An enforcement creditor then registered a writ against the title to the land. In this case, SP has priority over the creditor with respect to the land, even though its interest is unregistered.
    - In contrast, if the debtor grants a mortgage in his real property to SP (but the mortgage is not registered) and then grants a second mortgage to another mortgagee (who does register their mortgage) over the same land, the registered mortgagee has priority over the unregistered one.
    - The practice of treating writ creditors differently than registered mortgagees has been justified by arguing that writ creditors do not rely on the certificate of title in the same way as a mortgagee.
  + In contrast, registration of a writ against personal property *does* give it priority over a prior unregistered interest.
    - e.g., a debtor grants a security interest in personal property to a secured party (SP). SP fails to register the security interest in the PPR. An enforcement creditor then registers a writ in the PPR against the debtor. In this case, the creditor has priority over SP with respect to personal property under s. 35(1) of the *CEA*.
* However, when land subject to a prior unregistered security interest and a registered writ of enforcement is sold by the debtor, *the buyer takes free of the prior security interest* but subject to the writ.
  + Unregistered interests are enforceable against a writ but NOT enforceable against a person who becomes a registered owner of the land, because *they are entitled to rely on the certificate of title*.
  + That said, a writ creditor may discharge their writ in exchange for being paid out of the sale proceeds.
* When land subject to a prior unregistered interest is sold *in writ proceedings*, the buyer acquires title free of the prior interest, BUT the holder of the prior security interest has priority to the proceeds generated by the sale [*CEA*, s. 96(3)].

##### *Drebert v Coates*, 2008 ABQB 684

Facts:

* In 2000, Helen Drebert, as the beneficiary, entered into a trust deed with her son, Ryan Drebert. She transferred property into their joint names, with Ryan acknowledging that he was holding the lands for Helen's benefit. In July 2007, Violet Coates obtained a judgment of $18,321 against Ryan. She searched the title to the subject property and, seeing it was in joint names, registered her writ of enforcement against the certificate of title. Ryan applied to have the writ removed from the title to the property, but the application was dismissed. In December 2007, Helen and Ryan transferred ownership of the property into Helen's name alone. Helen now brings an application to have the writ discharged from the certificate of the property.

Issue and holding:

* Did the writ bind the title to the property so that when Helen became the sole owner, it could properly remain on title? **NO**

Analysis:

* Despite the best intentions of the Torrens system, it appears that courts have been willing to recognize unregistered equitable interests in land.
  + The intention of the Torrens system was to establish only one estate in land, to have this estate registered in a public register, and to provide that any person who *bona fide* acquired that registered estate should obtain an indefeasible title representing the totality of ownership.
  + However, in *Jellett v Wilkie* (1896), the SCC held that a writ could only attach to the actual interest of the debtor after consideration of the equities affecting that interest; as that interest had been transferred (albeit unregistered), there was no actual interest for the creditor to attach.
    - The principle here is that unregistered equitable interests in land may be created and will be recognized and protected at common law.
* That said, there has been no relevant change to Alberta's *Land Titles Act* ("*LTA*") that would negative the principles established in *Jellett v Wilkie*.
  + In *Price v Materials Testing Laboratories Ltd* (1976), Laycraft J held that s. 77 of the *LTA* expressly contemplated the existence of equitable interests in land.
    - Section 77, which is similar in wording to s. 122(7)(a) of the current *LTA*, provided that, where a writ of enforcement is endorsed on a certificate of title, *all legal and equitable interests of the debtor in the land are bound by the writ* during the time it is in force.
  + Further, Laycraft J concluded that there was nothing in the *LTA* to justify the conclusion that *Jellett v Wilkie* was no longer the law in Alberta, and there has been no further amendments to the *LTA* that would justify a departure from that conclusion.

Rationale: (Master Hanebury)

* Ms. Coates' writ could only attach to Ryan's exigible land, being land not exempt from writ proceedings; as Ryan's title was subject to a prior equitable interest (i.e., the trust agreement with his mother), and this interest is recognized by the courts, there was no exigible property to which the writ could attach.
  + As such, Ryan could transfer the title back to Helen, free of Ms. Coates’ writ.

Notes:

* Preservation of the rule in *Jellett v Wilkie* in the context of judgment enforcement contradicts the Torrens principle of indefeasibility of title and creates problems of proof, since it requires the court to go behind the title to determine whether the registered owner is in fact the true owner of the land in question.
  + The rule in *Jellett v Wilkie* has been legislatively overruled in Saskatchewan, where an enforcement charge on land created by registration of a judgment is *not* subject to unregistered interests.
* In *Re Palmer and Southwood* (1976), 67 DLR (3d) 327 (ABCA), a wife had an agreement with her husband that the family home would be transferred to her once certain conditions had been met. A writ was subsequently registered on title. Pursuant to the agreement, the transfer was released to the wife who registered title in her name. She then sought to have the writ removed from the title.
  + The court noted that enforcement will only bind the debtor's legal and equitable interest in the land and it will not bind more than what the debtor was entitled to at the time the writ was registered.
    - i.e., a writ, on registration, is subject to prior equities and charges existing in respect of the land.
  + The court found that at the time the writ was registered, the husband had a legal and equitable interest in the land. Thus, the filing of writ bound that interest as of that date.

#### Summary

* A writ binds a 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*; *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, but takes *free* of an unregistered interest in the land, whether or not the interest has priority over the writ [*CEA*, 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 [*CEA*, s. 96(3)], because they have priority over the writ creditor.
* **Interests that are subordinate to a writ**: Interests acquired after property is bound are subordinate to the writ [*CEA*, s. 34(1)].
  + A buyer in writ proceedings takes free of subordinate interests [*CEA*, s. 34(2)], though a court order is required to direct the Registrar of Land Titles to transfer title free of subordinate interests [*CEA*, s. 75(1)].

# Ch. 7: Enforcement Against Personal Property

Creditor instructs civil enforcement agency to 
seize exigible personal property of DB 
Bailiff effects seizure - s 44, 45 
If no notice of 
objection served 
by DB, creditor 
instructs sale of 
property 
If notice of objection is 
served by DB, agency 
sells only on order of 
Court or property is 
released — s 46 
3rd party claim procedure: 
property is released or 
process continues 
to sale — Rules of Court or 
CEAs 5 
Property is sold by agency [must provide notice of method] — s 48 
OR agency releases property if instruction to sell not given — 
s 47) 
Agency distributes proceeds under Part Il 

## Seizure Rules

* Except as otherwise provided in another enactment, (i) a money judgment may only be enforced and (ii) a seizure may only be carried out in accordance with the *CEA* [*CEA*, s. 2(a)].
* The *CEA* prohibits self-help remedies; secured creditors, landlords and other claimants are required to conduct their seizures through civil enforcement agencies [*CEA*, s. 9(3)].

### Default Seizure Rules

* As a prerequisite to seizure, the instructing creditor must provide a civil enforcement agency with a warrant and a letter of instruction to help them with the seizure.
  + Information in a letter of instruction may include:
    - Any urgency associated with the file (e.g., is the property about to be moved or hidden?).
    - Any unusual circumstances which might be anticipated (e.g., is there a risk of violence?).
    - Whether removal of the seized property is required (as opposed to leaving it on a bailee's undertaking).
    - Forms of indemnification as requested by the agency.
    - Whether the creditor is aware of any legal impediments to seizure such as stays or third party claims as applicable to the specific property.

#### Initiating Seizure (s. 45)

* Unless the seizure process in respect of certain classes of property is described in another enactment [*CEA*, s. 45(2)], personal property that is described in a notice of seizure is seized when a bailiff [*CEA*, s. 45(1)]:
  1. while at the place at which the property is located, serves the seizure documents on (i) the debtor or an adult member of their 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
     + "Seizure documents" means (a) the *warrant* under which seizure is carried out (Forms 1 to 4.1), (b) a *Notice of Seizure of Personal Property* (Form 5), (c) a *Notice of Objection* (Form 6), and (d) an *Information for Debtor* (Form 7) [*CER*, s. 2].
  2. 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.
* Where at the time of the seizure a bailiff did not serve the seizure documents on the debtor or an adult member of their household, they must serve them on the debtor as soon as practicable [*CEA*, s. 45(3)].
  + IF an agency is unable to serve the seizure documents on the debtor or an adult member of their household, the instructing creditor may proceed as if the debtor had been served with the seizure documents *and had filed a notice of objection in respect of the seizure* [*CEA*, s. 45(4)].
* A person is guilty of an offence if they, without lawful authority, remove, damage, or otherwise interfere with seizure documents or identifying documents that are attached to seized property [*CEA*, s. 45(5)(a)].

##### *Fort McMurray Housing v Royal Bank of Canada* (1999), 243 AR 174 (QB)

Facts:

* Mr. Stolte owned a mobile home situated on the land of Fort McMurray Housing ("FMH") pursuant to a lease agreement. In June 1998, Mr. Stolte decided to move to Edmonton and put his mobile home up for sale. Apparently, Stolte and FMH agreed that, instead of making his lease payments, Stolte would pay all rent owing when he sold the home. By the end of the fall of 1998, FMH grew concerned about the amount of rent owing and had the home seized on September 10, 1998. However, because Stolte was no longer living in the home, he was not personally served with the notice of the seizure. Instead, the seizure documents were attached to the door of his mobile home. While the bailiff attempted to serve the documents via registered mail, the acknowledgement of receipt was returned unsigned. Stolte learned about the seizure in a phone call with an employee of FMH on October 14, 1998. On October 22, 1998, FMH took steps to sell the mobile home by soliciting offers through newspaper advertisements. On November 3, 1998, Stolte obtained an offer on the home for $21,000. However, FMH did not allow him to sell the home because it had already begun the tender process. As a result of FMH's refusal, Mr. Stolte was unable to complete the sale.

Issue and holding:

1. Was FMH entitled to sell the mobile home under the *CEA*? **NO**
2. If no, what is the effect of FMH's lack of authorization to sell the mobile home? *(see below)*
3. Is Stolte entitled to sell the mobile home? **YES**
4. Should Stolte only be liable for rental arrears up to November 1998, given FMH's refusal to allow him to sell the property? **NO**

Analysis:

* Under ss. 45(4) and 46(2) of the *CEA*, where property is seized without service of the seizure documents on the debtor or an adult member of their family, the bailiff can only proceed as if the debtor filed a notice of objection (i.e., they must only dispose of the property with permission of the court).
  + *Note*: under s. 104 of the *CEA*, ss. 45 and 46 apply to a landlord's right of distress as if it were seizure pursuant to writ proceedings.
* If an enforcement debtor filed a notice of objection, and the creditor applies to the court for permission to dispose of the property, the debtor may seek relief under the *Judicature Act*.
  + Under s. 10 of the *Judicature Act*, courts have the power to relieve against all penalties and forfeitures and, in doing so, to impose any terms that it deems appropriate.

Rationale: (Lee J)

1. FMH was never entitled to sell the mobile home because service was never effected on Stolte or an adult member of his family, and permission of the court to proceed to sale was neither sought nor obtained.
   * FMH never effected personal service, there is no confirmation that he received the notice posted on the door of the mobile home, and he did not receive the documents sent via registered mail.
2. Any purchase through the sale by tender is void *ab initio* and cannot be enforced against Stolte; any dispute arising out of the sale by tender is between the respective bidders and FMH.
3. Stolte owes creditors $11,907 total, giving him thousands of dollars of equity in the home that he stands to lose; as a result, he should be allowed an opportunity to sell the property himself pursuant to s. 10.
4. Stolte is responsible to FMH for all rent owing up to the sale of the home; Stolte is in violation of the lease agreement, and evidence of wrongdoing by FMH is not strong enough to warrant a reduction in rent owing.

Notes:

* A mobile home is personal property; the tenant usually owns the mobile home and rents the plot of land.
  + Mobile home tenancies are governed by the *Mobile Home Sites Tenancies Act*.

#### Carrying Out Seizures (s. 13(2))

* All rights, duties, and functions of creditors, agencies, and bailiffs under the *CEA* must be exercised or discharged in good faith and in a commercially reasonable manner [*CEA*, s. 2(g)].
* Bailiffs have the right to effect seizure at some places and times without a court order, whereas other places and times require a court order.
  + **Debtor's premises**: A bailiff may enter the premises of a debtor to carry out seizure of the debtor's property [*CEA*, s. 13(2)(a)(i)].
    - HOWEVER, in the case of a *residence* of the debtor, a bailiff shall not (i) enter the residence except in the presence of a person whom the bailiff believes to be an adult who lives in the residence, (ii) enter the residence after entry has been refused, or (iii) use force for the purposes of gaining access to the residence, *unless authorized by the Court* [*CEA*, s. 13(2)(c)].
      * A bailiff *may* use reasonable force to gain access to premises, *other than a residence*, of a debtor [*CEA*, s. 13(2)(c.1)(i)].
    - A bailiff who has gained lawful entry to premises may gain entry by appropriate means to (i) any enclosure or container or (ii) any interior room of the premises [*CEA*, s. 13(2)(d)].
  + **Third party's premises**: Where a bailiff has reasonable grounds to believe that a debtor's personal property is located at the premises of someone other than the debtor, the bailiff may enter those premises to seize the debtor's personal property; [*CEA*, s. 13(2)(a.1)]
    - HOWEVER, the bailiff shall not (i) attempt to enter these premises after entry has been refused or (ii) use force to gain access to the premises *unless authorized by the court*; [*CEA*, s. 13(2)(b)].
      * A bailiff *may* use reasonable force to gain access to premises of a person other than a debtor or to a residence *where authorized by an order of the Court* [*CEA*, s. 13(2)(c.1)(ii)].
    - In the case of a *residence* of someone other than the debtor, a bailiff shall not (i) enter the residence except in the presence of a person whom the bailiff believes to be an adult who lives in the residence, (ii) enter the residence after entry has been refused, or (iii) use force for the purposes of gaining access to the residence, *unless authorized by the Court* [*CEA*, s. 13(2)(c)].
  + Unless otherwise ordered by the Court, an agency shall not attempt to carry out a seizure or eviction or at a residence between the hours of 10pm and the following 6am [*CER*, s. 8(1)].
* Where a bailiff has used force to gain entry to premises, they must make that location reasonably secure before leaving it [*CEA*, s. 13(2)(e)].
* A person is guilty of an offence who by means of threats of carrying out a seizure or sale obtains, takes, or receives any property except as authorized by law [*CEA*, s. 15(1)(a)].
  + Plus, a person who suffers loss or damage as a result of a failure to comply with the *CEA* has a right to recover damages [*CEA*, s. 4].

#### Maintaining Seizure (s. 13(2)(h)–(k))

* A bailiff may remove for safekeeping the personal property that is under seizure [s. 13(2)(h)] or may appoint someone as bailee of the property if they sign an undertaking (a "bailee's undertaking") to (i) hold the property for the bailiff and the agency and (ii) deliver up the property on demand [*CEA*, s. 13(2)(i)].
  + If a debtor has possession of personal property under seizure and has been served with the seizure documents in respect of it then they, whether or not they have signed an undertaking [*CEA*, s. 13(2)(j)]:
    1. hold that property as bailee for the bailiff and the agency, and
       - This may be desirable because it reduces the costs associated with storage seized goods.
       - This may also be desirable because it allows the debtor to continue to benefit from the seized goods pending the hearing of their objection.
         * This would be especially important where the debtor uses the seized goods to earn a living (e.g., a work truck).
       - This would be *inadvisable* when dealing with an untrustworthy debtor (e.g., Francis Mella).
    2. must deliver up that personal property to the bailiff or the agency (A) when required to do so by the bailiff or the agency (B) at a location specified by the bailiff or the agency.
* A bailee who fails to surrender seized goods when ordered to faces a number of possible sanctions:
  + The court may hold a person in civil contempt and award damages and costs against them if (i) they are under a duty to deliver to a bailiff or agency personal property under seizure and (ii) fail to do so within a reasonable time after being required to by the bailiff or agency [*CEA*, s. 13(2)(k)].
  + A person is guilty of an offence if they, without lawful authority, remove, damage, or otherwise interfere with any property that is under seizure [*CEA*, s. 45(5)(b)].
  + Every one who is a bailee of anything that is under lawful seizure, and who is obliged by law to deliver it to a person entitled thereto, *steals it* if he does not deliver it in accordance with his obligation [*Criminal Code*, s. 324].
    - However, the bailee does not steal it if his failure to produce and deliver it is not the result of a wilful act or omission by him [*Criminal Code*, s. 324].

#### Procedural Irregularities (s. 13(2)(f)–(g))

* A seizure is valid notwithstanding any irregularity in the procedure by which it was carried out [s. 13(2)(f)].
  + However, the Court *may* order a seizure to be discontinued where a person has been or is likely to be prejudiced by an irregularity in the procedure [s. 13(2)(g)].

#### Objections

* **Debtor**: Where a debtor wishes to object to a seizure of personal property, they must serve a Notice of Objection on the agency that carried out the seizure *within 15 days* from the day that the seizure documents are served [*CEA*, s. 46(1)].
  + On being served with a Notice of Objection, the agency shall not sell or otherwise dispose of the property unless permitted by the Court [*CEA*, s. 46(2)].
  + A notice of objection shall be disregarded if (a) it does not contain a reason for the objection or (b) it is not served on the agency within the 15‑day period provided under subs. (1) [*CEA*, s. 46(3)].
* **Third party**: If a third party makes a claim to personal property under seizure, they must serve on the civil enforcement agency a written notice setting out (a) their claim and (b) an address for service [*ARC*, r. 6.62].
  + On being served with notice, the agency must immediately serve written notice of the claim on the instructing creditor and all other holders of related writs [*ARC*, r. 6.63(1)].
    - If the instructing creditor or related writ holder wishes to (a) dispute the claim or (b) assert priority over the claim, they must serve a written notice to that effect on the agency within *20 days* after service of the notice [*ARC*, r. 6.63(2)].
    - If the instructing creditor and related writ holders do not dispute the claim within the applicable time, they are presumed to admit the claim [*ARC*, r. 6.63(4)].
  + If no one disputes the claim of the third party, the civil enforcement agency may release from seizure the personal property in respect of which the claim was made [*ARC*, r. 6.63(5)].
  + If the instructing creditor or a related writ holder disputes the claim of the third party, the agency may:
    - Ask the instructing creditor or related writ holder to apply to the court to determine the parties' respective rights.
      * Under the *CEA*, the court may, *on application by "an interested party,"* give directions in respect of any matter or issue that arises out of civil enforcement proceedings [s. 5].
    - Apply to the court for an interpleader order under Part 6, Division 9 of the *ARC* to allow the court to declare a party to be the owner of the personal property.

##### *Riczu v Indigion Holdings Ltd* (1997), 207 AR 318 (QB)

Facts:

* Harvey Riczu, the son of Jim Riczu, operated Jim's Motor Repairs (Calgary) Ltd. The business owed rental arrears to Indigion Holdings Ltd, so Indigion distrained a Bobcat located on the rental premises. Jim Riczu swears that the Bobcat is his property. He says that he previously operated Jim's Motor Repairs, but when he sold it to Harvey in 1987, he retained ownership of the Bobcat. He produces no documentation to support his ownership besides letters from neighbours stating that they had seen the Bobcat on Jim's farm at one time.

Issues and holding:

1. Who bears the onus of proving ownership of the bobcat? **Jim Riczu**
2. Has Jim Riczu proved ownership of the Bobcat? **NO**

Analysis:

* Generally, the onus lies with the judgment creditor to prove that goods seized are the debtor's, but:
  + Where goods are in the debtor's possession, there is a presumption they are the debtor's, and the onus shifts to the claimant to establish their title thereto.
    - The claimant must show a *bona fide* sale accompanied by immediate delivery and a continued change of possession.
    - The claimant must adduce some evidence beyond a bare statement of ownership.
  + Similarly, where the goods belonged to the debtor before the seizure and were conveyed to a near relative under suspicious circumstances, the onus shifts to the claimant to prove ownership.
    - In such cases, corroboration of the claimant's claim to ownership is desirable.
* Under s. 104(b) of the *CEA*, a landlord shall not distrain for rent against personal property that belongs to any person other than the tenant.
  + However, under s. 104(c)(ii), this does not apply in favour of a person whose title is derived by gift.

Rationale: (Master Waller)

1. Given the family relationship that exists here and the fact that the debtor had possession of the goods at the time of the distraint, a strong onus lies with the applicant father to show his ownership of the goods.
2. Jim Riczu has failed to discharge his burden of establishing title to the Bobcat.
   * Even if the court is wrong about this, Indigion Holdings' seizure of the Bobcat is proper under s. 104(c)(ii) of the *CEA*.

Notes:

* *E Dehr Delivery Ltd v Debr*, 2016 ABQB 714, involved an action between a secured creditor and a debtor, who wrongfully sold the truck subject to the creditor's security interest. The person to whom the truck was sold, though not a party to the action, brought an application seeking a declaration that it took the trucks free of the creditor's security interest. The creditor argued that, as a non-party, the applicant was not entitled to bring an application.
  + Master Breitkreuz held that the Court had jurisdiction to entertain the application before it. Under s. 5 of the *CEA*, the court may, on application by a person claiming an interest in property, make a binding declaration to ensure the protection of the interests of non-parties in property that is subject to civil enforcement proceedings.

#### Termination of Seizure (s. 47)

* Once personal property is seized, that property remains under seizure until the agency (a) sells or otherwise disposes of the property under this Act or (b) releases the property from seizure [*CEA*, s. 47(1)].
* **Release**: If personal property has been under seizure for 45 days or more, the agency may give 15 days' notice of its intention to release the property from seizure to every enforcement creditor [*CEA*, s. 47(2)].
  + Unless the agency has been directed by a creditor to continue the seizure, the agency may release from seizure the property in respect of which the notice was given [*CEA*, s. 47(3)].
  + e.g., if an instructing creditor directs a civil enforcement agency to seize property, and the debtor objects, the property may be released if the instructing creditor fails to take any additional steps.

### Special Seizure Rules

* These special seizure mechanisms that are needed because of the peculiar characteristics of some forms of property (Wood); absent a conflict, these simply supplement the ordinary seizure procedure [*CEA*, s. 49].
  + There are other special seizure rules for cash and instruments [s. 50], security interests [s. 52], agricultural products [s. 52], fixtures [s. 53], and securities [ss. 56–65].
* Compared to prior law, the *CEA* makes it easier for a creditor to proceed against certain marketable forms of property, such as publicly traded securities (Wood).

#### Demand on Third Party (s. 44)

* Where there are reasonable grounds for believing that a debtor's property is in the possession of a third party, the agency must, if instructed by the instructing creditor, serve a demand on the third party requiring them to deliver the property to the agency or make it available for seizure within 15 days [*CEA*, s. 44(1)].
  + A third party on whom a demand is served under this section must forthwith [*CEA*, s. 44(2)]:
    1. deliver the property to the agency,
    2. 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
    3. where they have a right to retain the debtor's property or do not have possession of it, advise the agency that they are not required to comply with clauses (a) and (b) for those reasons.
  + Where the third party complies with such a demand, the agency must compensate them for any expenses reasonably incurred in complying with that demand [*CEA*, s. 44(3)].
  + Where the third party fails to comply with such a demand without reasonable excuse, they must compensate the creditors with a related writ for any pecuniary loss suffered by them as a result of the non‑compliance [*CEA*, s. 44(4)].

#### Serial Number Goods (s. 54)

* Serial number goods may be seized [*CEA*, s. 54]:
  1. in accordance with Part 5 of the *CEA* (i.e., the default seizure rules), or
  2. subject to the regulations, by (i) registering in the PPR a notice of the seizure that identifies the goods by serial number and (ii) serving the seizure documents on the enforcement debtor.
     + Seizure shall not be conducted in this way unless [*CER*, s. 8(3)]:
       1. a bailiff has tried to effect seizure under the default seizure rules and has failed to do so
          1. because the property to be seized is not reasonably accessible due to weather conditions or the location of the property, or
          2. because of concerns respecting the safety of the property or of the bailiff, or
       2. an agency has reasonable grounds for believing that
          1. an attempt to seize the property under the default seizure rules would likely be unsuccessful due to a reason referred to in clause (a), or
          2. seizing the property under s. 54(b) rather than the default seizure rules would likely result in a substantial saving in the overall cost of the seizure proceedings.
     + Where a seizure is conducted in this way, the civil enforcement agency must attach to the seizure documents a statement [*CER*, s. 8(4)]:
       1. stating that the seizure was not effected under the default seizure rules, and
       2. setting out the reasons or circumstances referred to in subsection (3) as to why the seizure was not effected under the default seizure rules.

#### Mobile Homes (s. 55)

* For the purpose of acquiring possession of a seized mobile home, the following applies [CEA, s. 55]:
  1. where
     1. the mobile home is occupied by the enforcement debtor or some other person, and
     2. the occupant fails, on demand, to deliver up possession of the mobile home,

the instructing creditor, on notice to the occupant, may apply to the Court for an order directing the occupant to deliver up possession of the mobile home;

1. an agency may obtain possession of the mobile home as authorized by the order referred to in clause (a) if
   1. the occupant has been served with the order, and
   2. the occupant has failed to deliver up possession of the mobile home as directed by the order.

## Sale of Property

* The rules surrounding the sale of seized personal property attempts to ensure that they will produce as high a recovery as possible, while providing the debtor and other interested parties with the opportunity to monitor the sale and to object to improvident terms or procedures (Wood).
  + The agency must, at least 15 days before the sale, give notice to the instructing creditor and the debtor of the method of sale being used [*CEA*, s. 48(e)], *unless* an expeditious sale is permitted (see below).
    - This gives the instructing creditor and the debtor the opportunity to object to the method of sale.
  + **Time of sale**: 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 (i.e., 15 days) [*CEA*, s. 48(a)].
    - Thereafter, an agency must sell the property as soon after being instructed as is practicable [*CEA*, s. 48(b)], though they may delay the sale if the delay is commercially reasonable [*CEA*, s. 48(c)].
    - *On application*, the Court may permit the agency to effect an expeditious sale where, in the circumstances, it is appropriate to sell the property in an expeditious manner [*CEA*, s. 48(h)].
    - *Without a court order*, the agency may effect an expeditious sale of property that is perishable or is rapidly declining in value or an instrument or a security, and the proceeds arising from that sale [*CEA*, s. 48(i)]:
      1. stand in the place of the instrument, security, or property that was sold, and
      2. must not be distributed until the period for the debtor to serve a Notice of Objection under s. 46 has expired;
  + **Method of sale**: The agency may, without an order of the Court, sell the property by *any commercially reasonable method* [*CEA*, s. 48(d)].
    - Under the prior law, sale by public auction or tender was the norm; this rule offers greater flexibility (Wood).
    - The agency may sell the property to an enforcement creditor by private sale if [*CEA*, s. 48(f)]:
      1. at least 15 days before the sale, the agency gives notice of its terms to (A) the debtor and (B) all of the other creditors having related writs at the time that the notice is given, and
      2. within the 15‑day period neither the debtor nor any of the creditors having related writs serves on the agency a Notice of Objection to the sale;
         * If an objection is served on the agency, the matter shall be dealt with in the same manner as a Notice of Objection is dealt with under s. 46 [*CEA*, s. 48(g)].
    - An agency or bailiff may buy property that is the subject of seizure only if it has the consent of the debtor and all affected creditors to do so [*CER*, Schedule 1, s. 3(f); *CER*, Schedule 2, s. 2(b)].
      1. This is meant to prevent civil enforcement agencies and bailiffs from getting a "deal" on seized goods because they have more information than other parties.
* Subject to s. 34(2), when property is sold [CEA, s. 48(j)]:
  1. the buyer obtains only the interest in the property (A) of the 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
     + e.g., if A has priority to a writ holder, but consents to the sale of the property in question (likely for a price), the ultimate buyer will take the property free of A's interest.
  2. the sale of the property does not adversely affect the interests of any other person in the property.
     + i.e., the purchaser acquires title free of the writ and subordinate interest holders, but *the sale cannot affect the rights of any party who have priority to the writ holder* (*Telalert*).

### *Alligator Group v Telalert Inc*, 1999 ABQB 784

Facts:

* On January 4th, 1999 the plaintiffs obtained a consent judgment against the defendant in the amount of $130,717. On January 8, 1999, a civil enforcement agency, seized all of the defendant's assets located in its office. Although the defendant did not file a Notice of Objection, two of its secured creditors objected on the grounds that the property seized was necessary for the defendant to carry on their business and generate income for future repayment. The combined debt to the two secured creditors totalled $600,000. According to an officer of one of them, the secured claims are substantially in excess of the value of the assets of the judgment debtor.

Issues and holding:

1. Are the Notices of Objection valid? **NO**
2. Can the instructing creditor proceed with a removal and sale of the goods? **YES**
3. Can the secured creditors stay the sale of the seized goods? **YES**

Analysis:

* Section 46 of the *CEA* allows an enforcement debtor to file a Notice of Objection within 15 days from the date seizure documents are served.
  + If they do, s. 46(2) prohibits the civil enforcement agency from selling the property unless they are permitted to do so by the court.
* Under ss. 34(2) and 48(i) of the *CEA*, the civil enforcement agency may sell the interest of an enforcement debtor in property free and clear of claims of the owner and all subsequent subordinate interest holders; however, the sale however *cannot* affect the rights of any party who have priority to the writ holder.
  + Therefore, the purchaser acquires title to the seized goods free of the writ and subordinate interest holders but subject to all prior secured creditor claims.
* Section 5(1) of the *CEA* allows an interested party (e.g., a secured creditor) to apply to the court for the determination of any matter arising out of a civil enforcement proceeding.
  + Section 5(2)(d) provides that, on considering such an application, the court may stay enforcement of rights provided in the *CEA*.
    - A stay may be appropriate where an order for sale would be detrimental to a debtor or its secured creditor without a corresponding benefit to the execution creditor.

Rationale: (Master Laycock)

1. Section 46 does not permit any person other than the enforcement debtor to file a Notice of Objection.
   * Instead, the secured creditors may apply under s. 5 of the *CEA* for the determination of any matter arising out of a civil enforcement proceeding.
2. There is no provision in the *PPSA* or *CEA* which stops the enforcement creditor or the civil enforcement agency from selling seized personal property.
3. Since there is no equity in the seized assets for the enforcement creditor, sale will be detrimental to the debtor and the secured creditors without any benefit to the enforcement creditor.
   * Thus, the enforcement creditor’s right to proceed with the sale of the seized goods is stayed until there is evidence that the sale of the seized goods would result in proceeds being paid to the creditor.

Notes:

* In this case, the instructing creditor moved to sell the debtor's personal property even though the debtor's secured creditors would receive the entirety of the sale proceeds. While the instructing creditor's motivation was not discussed in the judgment, Prof. Lund says that the instructing creditor was likely trying to get leverage against the debtor to get repaid.
* Under r. 6.64(a) of the *ARC*, if a person claims to have a security interest in personal property that has been seized in writ proceedings, the court may order that the property be sold and the proceeds applied to discharge the amount due to the claimant if the sale and application of the proceeds are not disputed.

## Personal Property Exemptions

* The purpose of exemptions is to permit debtors to maintain themselves and their dependents at a reasonable standard and to have reasonable security that they will be able to continue to do so in the future (*Stout & Co*).
* A foundational principle cited in many cases is that these exemptions provisions should be interpreted liberally in favour of the debtor.
  + That said, where courts have considered whether language in legislation other than the *CEA* created an exemption, they have concluded that they ought not to ascribe a legislative intention to create an exemption without clear language to that effect (*Re Laughlin*).
* Any waiver by a debtor of any exemption given by the *CEA* is void [*CEA*, s. 2(i)].

### Exempt Property (s. 88)

* The interest of a debtor in the following personal property is exempt from *writ proceedings* (i.e., not proceedings against secured parties) [*CEA*, s. 88]:
  1. the food required by the debtor and their dependants during the next 12 months; (no limit)
  2. the necessary clothing of the debtor and their dependants up to the value prescribed by the regulations;
     + The maximum exemption for clothing is $4,000 [*CER*, s. 37(1)(a)].
  3. household furnishings and appliances up to the value prescribed by the regulations;
     + The maximum exemption for household furnishings and appliances is $4,000 [*CER*, s. 37(1)(b)].
  4. one motor vehicle up to the value prescribed by the regulations;
     + The maximum exemption for the motor vehicle is $5,000 [*CER*, s. 37(1)(c)].
     + In *Re Heitman & Heck (Bankrupt)*, a bankruptcy registrar concluded that each of two joint owners of a car could claim the exemption provided by s. 88(d). Since each debtor was entitled to a $5,000 exemption, the tandem exemption meant that the car was exempt to the extent of $10,000.
     + e.g., the Debtor has an old Camaro worth $15k. It is his only vehicle. He uses it to buy groceries, to take his girlfriend to the movies and to commute to his job. The priority ranking of his creditors is: Secured Party 1 (owed $4k), Writ Creditor (owed $16k), Secured Party 2 (owed $2k).
       - In this case, $4k is allocated to Secured Party 1, leaving $11K remaining, because exemptions cannot be claimed against secured parties.
       - The next $5k is allocated to an exemption for the Debtor, leaving $6k remaining.
         * However, of this $5k, $2k goes to Secured Party 2 (because exemptions cannot be claimed against secured parties), while the remaining $3k stays with the Debtor.
       - The remaining $6k is allocated to the writ creditor.
  5. medical and dental aids that are required by the debtor and their dependants; (no limit)

…

1. in the case of a debtor whose primary occupation is not farming, personal property up to the value prescribed by the regulations that is used by the debtor to earn income from their occupation;
   * The maximum exemption for this personal property is $10,000 [*CER*, s. 37(1)(d)].
   * There is older case law suggesting that, if a debtor uses a vehicle merely to commute to and from work, they cannot claim an exemption under s. 88(h).
   * In *Mcweld Maintenance Ltd v MacNutt*, the ABQB held that a debtor could claim a motor vehicle used to earn income from their occupation *in addition* to a motor vehicle claimed under s. 88(d).
     + The debtor was a gravel hauler and could claim an exemption for a gravel truck worth $5,500 under s. 88(h) and a pick-up truck worth $1,000 under s. 88(d).
   * In *Re Miller*, the ABQB concluded that a vehicle used by the debtor to earn income from her occupation could be claimed under s. 88(h) rather than 88(d), allowing the debtor to claim an exemption for the higher value permitted under s. 88(h).
     + The court rejected the view that a cosmetician who provided in-home services used her car only for the purpose of travelling *to* her employment rather than for the purposes of earning income from her occupation within the meaning of clause (h).
   * If a debtor's vehicle is used for non-profit work, there is case law indicating that it is not exempt.
2. in the case of a debtor whose primary occupation is farming, the personal property necessary for the proper and efficient conduct of their farming operations for the next 12 months; (no limit)
3. any property as prescribed by the regulations.
   * Where a 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 prescribed value, as the case may be, are exempt for 60 days from the day of the sale *if those proceeds are not intermingled with any other funds of the debtor* [*CER*, s. s. 37(2)(a)].
     + e.g., the debtor has a minivan worth $8k that they use to transport family. They claim the vehicle as exempt, but only up to $5k. The debtor sells minivan for $8k and deposits the money into a bank account. In this case, $5k of that money would be exempt, but *only* for 60 days from receipt of the funds and *only if* the funds are not intermingled with any other funds of the debtor.
   * Property is exempt from writ proceedings if another enactment says so [*CER*, s. 37(2)(b)].

* By locating the monetary limits for the exemptions described in s. 88 in the *CER*, the *CEA* facilitates a more regular updating of these limits and thus prevents them from being eroded by inflation (Wood).
  + However, the numbers in the *CER* have not been updated from 2003, which means that the value of exempt property has been considerably eroded by inflation.

#### *Re Thorne (Bankrupt)*, 2004 ABQB 83

Facts:

* Prior to bankruptcy, Ms. Thorne entered into a vehicle lease with GMAC. After an accident in 2003, the vehicle was written off. Accordingly, Ms. Thorne signed an automobile proof of loss and transferred her interest in the vehicle to the insurer on October 17, 2003. She received insurance settlement money in the amount of $5,946 on December 1, 2003. The trustee seeks advice on whether these funds are exempt.

Issue and holding:

* Are the insurance proceeds an exempt asset? **YES**

Analysis:

* Under s. 37(2) of the *CER*, where a debtor sells exempt property or property that is exempt up to a prescribed value, the proceeds from that sale, or the proceeds up to the prescribed value, as the case may be, are exempt for 60 days from the day of the sale if they are not intermingled with any other funds of the debtor.
  + The Oxford Dictionary defines "sell" to mean disposal in exchange for money.

Rationale: (Registrar Laycock)

* Pursuant to s. 37(2) of the *CER*, the insurance proceeds up to the prescribed value ($5,000) are exempt from seizure for 60 days from the day of the sale of her leasehold interest.
  + If Ms. Thorne's vehicle had not been in an accident, she would be entitled to claim it as exempt property under s. 88(d) of the *CEA* up to the value prescribed by the regulations ($5,000).
  + The effect of the insurer’s decision to declare the vehicle a write-off was to cause a sale of the vehicle to the insurers (i.e., a disposal of Ms. Thorne's leasehold interest in exchange for money).
  + There is no evidence in the copies of Ms. Thorne's account statements of any commingling of funds.
* That said, the "day of the sale" of Ms. Thorne's leasehold interest for the purposes of calculating the period during which the insurance funds are exempt is December 1, 2003 (i.e., the day on which Ms. Thorne received the funds).
  + To fix an earlier date would effectively make it impossible for Ms. Thorne to claim an exemption with respect to the sale proceeds; this would frustrate the legislature's intention to enable debtors to reinvest sale proceeds from exempt property in other exempt assets.

Notes:

* In this case, Registrar Laycock interpreted "day of sale" in s. 37(2) to mean "day of receipt of the sale proceeds" in order to best carry out the legislature's intent.
  + Similarly, in *Re Knight*, the ABQB concluded that, in the context of s. 37(2), the day of sale occurs when the funds are available and the bankrupt (or, in our case, debtor) knows that they are available.
* The purpose of s. 37(2) of the CER is to give an enforcement debtor some time from the receipt of the sale proceeds of exempt property to decide what to do with the funds and purchase a replacement exempt asset.
  + Without s. 37(2), money from the sale of exempt property would not be exempt and could be lost in enforcement proceedings before the debtor is able to reinvest the funds in an exempt asset.

### Seizure and Sale of Exempt Property (s. 89)

* A bailiff may not seize personal property where they know or should reasonably know that the property could not be sold for more than the exempted amounts [*CEA*, s. 89(3)].
  + Exemptions are a *right*, not a privilege; they exist even if not claimed (*Norkus v Direct Rentals*).
    - Hence, exemptions can be claimed by third parties on behalf of a debtor (e.g., secured parties).
  + If a debtor wants to object to a seizure of exempt property, they have 15 days from their receipt of the seizure documents to serve a Notice of Objection on the agency carrying out the seizure [*CEA*, s. 46(1)].
    - An agency whose bailiff has seized exempt property must release the property without delay on acquiring knowledge that it cannot be sold for more than the exempt amounts [*CEA*, s. 89(4)].
    - Even if the debtor fails to serve a Notice of Objection within the applicable time, they may still apply under s. 5(1) of the *CEA* to claim the exempted amount out of the sale proceeds.
* Property in which the debtor's interest is exempt from writ proceedings up to a prescribed value may be sold in writ proceedings *only if* the proceeds of the sale exceed the amount of the exemption plus any amount owed to a secured creditor with priority to the property at issue [*CEA*, s. 89(2)].
  + e.g., the debtor has a minivan worth $8k used to transport their family. A party with a security interest registered in the PPR prior to the writ is owed $4k. The debtor can claim an exemption, but only up to $5k. The enforcement creditor is barred from seizing and selling the minivan, because the sale proceeds of the van would not be enough to cover the exemption plus the value of the security interest.
    - However, in a like situation where the property at issue is *not* partially exempt from writ proceedings, this rule will not apply (see *Alligator Group*, above).
* An agency that sells property in which the debtor's interest is exempt from writ proceedings up to a prescribed value must deal with the proceeds in accordance with Part 11 [*CEA*, s. 89(5)].
  + In short, if the enforcement debtor’s equity in the exempt property exceeds the monetary limit, the property may be sold with the exempt portion being paid to the debtor (Wood).

### Selection of Property

* If [*CEA*, s. 90(1)]:
  1. an enforcement debtor owns more than one item of a type of property for which there is an exemption under s. 88, and
  2. 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.

* i.e., the debtor is given the right of selection where a choice between items must be made (Wood).
* If the enforcement debtor does not make a selection in a timely manner, the bailiff may select the items that are exempt [*CEA*, s. 90(2)]

### Determination of Exemption

* In the case of personal property that has been seized, 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 *at the time of the seizure* [*CEA*, s. 91(a)].
  + e.g., the debtor works as a carpenter, and has $24k worth of tools. All of his tools are seized in writ proceedings. The debtor then starts working as a bookkeeper. The debtor claims that $10k of his tools are exempt. The creditor argues that the tools are not being used to earn an income from the debtor's occupation (i.e., bookkeeping). In this case, the debtor would be entitled to the exemption, because the court must make its determination on the basis of the circumstances that existed at the time the tools were seized.

### Estate Assets

* Where a debtor is deceased, the property of that debtor that would be exempt if the debtor were alive remains exempt from writ proceedings against the debtor’s estate for the period of time that the property is required for the maintenance and support of the deceased debtor’s dependants [*CEA*, s. 92(1)].
  + "Dependant" means one or more of the following [*CER*, s. 36(a)]:
    1. the spouse or AIP of the debtor;
    2. any child of an enforcement debtor who is under the age of 18 years and lives with the debtor;
    3. any relative of an debtor or of the debtor’s spouse or AIP who, by reason of mental or physical infirmity, is financially dependent on the debtor;
       - "Relative" means (i) a spouse or AIP, (ii) a parent or grandparent, (iii) a child, (iv) a brother or sister, (v) a brother‑in‑law, sister‑in‑law, father‑in‑law or mother‑in‑law, (vi) an aunt or uncle, and (vii) a first or second cousin [*CER*, s. 36(b)].
    4. any other person who the court determines is financially dependent on the debtor;
* If a debtor has died, the personal representative of the debtor’s estate may make a selection of the property to be exempt [*CEA*, s. 92(2)].

### Non‑Applicability of Part 10 (s. 93)

* The exemptions set out in Part 10 do not apply to the following [*CEA*, s. 93]:
  1. to an enforcement debtor that is not an individual (e.g., a corporation);
  2. to partnership property;
  3. to writ proceedings on a judgment for the payment of support, maintenance, or alimony;
  4. to property that the enforcement debtor has abandoned;
  5. to writ proceedings on a money judgment arising out of an act for which the debtor has been convicted of an offence under the *Criminal Code*.

#### *Ms R v Mr W*, 2006 ABQB 819

Facts:

* Mr. W was charged and convicted for sexual assault against his stepdaughters, including the plaintiff Ms. R. Ms. R subsequently commenced a civil action gains Mr. W. The Statement of Claim contained some allegations for which Mr. W was neither charged nor convicted. He did not defend the action, and Ms. R obtained default judgment against him. That judgment did not specify whether Ms. R's damages arose out of an act for which Mr. W was previously convicted. As a former teacher, Mr. W had a pension to which he had made contributions. Ms. R tried to garnishee the pension, but this attempt was resisted by the Alberta Teachers’ Retirement Fund Board ("the Board"), which administered Mr. W's pension under the *Teachers' Pension Plans Act* ("*TPPA*").

Issues and holding:

1. Does s. 93 of the CEA override the non-exigibility of pensions provided for in s. 19 of the *TPPA*? **NO**
2. Alternatively, does Ms. R have a money judgment arising out of an act for which the enforcement debtor has been convicted of an offence under the *Criminal Code* within the meaning of s. 93 of the CEA? **NO**

Analysis:

* Under s. 2 of the *CEA*, all property of an enforcement debtor is subject to writ proceedings under the Act, "except as otherwise provided for in this or any other enactment."
  + *With respect to "any other enactment,"* s. 19 of the *Teachers' Pension Plans (Legislative Provisions) Regulations* ("TPPA Regulations") specifies that a teacher's pension is not subject to "garnishee proceedings, attachment, seizure or any legal process."
  + *With respect to "this … enactment,"* Part 10 of the *CEA* outlines the property which is exempt under the CEA from writ proceedings.
    - However, under s. 93(e), the exemptions in Part 10 do not apply to writ proceedings on a money judgment arising out of an act for which the debtor has been convicted of an offence under the *Criminal Code*.

Rationale: (Thomas J)

1. Section 93(e) of the *CEA* expressly and unequivocally states that it applies only to the exemptions described in Part 10 of the *CEA*; as such, it does not override the clear, unambiguous provisions in the *TPPA* Regulations.
   * The plain and ordinary meaning of s. 19 of the *TPPA* Regulations is that the procedures under the *CEA* do not apply to pensions under *TPPA*.
     + This is consistent with the policy objectives and legislative purpose in establishing pensions to provide a secure and stable level of income for individuals in their retirement.
   * Similarly, the clear and unambiguous intent of the legislature in enacting s. 93 was to limit its application to those exemptions listed in Part 10.
     + The Legislature did not intend to make the *TPPA* subject to any part of the *CEA*, including s. 93.
2. Even if s. 93(e) does override the exemption found in s. 19 of the *TPPA* Regulations, Ms. R is still unable to garnishee Mr. W's pension since she does not have a judgment that comes within the meaning of s. 93(e).
   * The judgment in the civil action does not reflect that it arises out of Mr. W's criminal convictions.
     + Maybe Mr. W did not defend the action because, from his perspective, whether the court awarded damages was irrelevant because he assumed that his only asset, his teachers' pension, was judgment-proof.

#### *Alberta Motor Association v Gladden*, 2017 ABQB 174

Background:

* In response to the decision in *Ms R v Mr W*, the CEA was amended to exempt RRSP contributions from attachment by a judgment creditor. Section 92.1 now provides that property in a registered plan is exempt from any enforcement process. The exemption for RRSP contributions is contained in Part 10 of the *CEA*, and is therefore subject to the limits set out in s. 93.

Facts:

* The Alberta Motor Association ("AMA") received a consent judgment against Mr. Gladden for damages arising from a fraud he perpetuated while an AMA employee. AMA applied for approval of an order transferring the commuted value of Gladden's pension to the AMA in partial satisfaction of the judgment. Gladden consented to this order.

Issue and holding:

1. Can Gladden assign his pension to the AMA, notwithstanding s. 72 of Alberta's *Employment Pension Plans Act* (*"EPPA*")? **YES**
2. Alternatively, does the consent judgment together with the consent order constitute an abandonment of the pension in law? **YES**

Analysis:

* Section 72 of the *EPPA* provides that pension benefits cannot be alienated and are exempt from seizure, preventing a party from contracting out of their statutory benefits.
* Under s. 93(e) of the *CEA*, the exemptions *in Part 10* do not apply to writ proceedings on a money judgment arising out of an act for which the debtor has been convicted of an offence under the *Criminal Code*.

Rationale: (Veit J)

1. Notwithstanding s. 72 of the *EPPA*, Gladden may assign his pension to the AMA.
   * The Alberta Legislature's enactment of s. 92.1 of the *CEA* reflects an attempt to balance two competing policy objectives: ensuring retirees have a means of sustenance while also ensuring that perpetrators of criminal offences do not receive benefits from their wrongdoing to the prejudice of their victims.
     + This legislative policy must be harmonized throughout existing legislation by ensuring that pensions are not exempt from seizure in writ proceedings.
   * There is no material difference between RRSPs (which are not exempt from seizure) and pensions; thus, if the Court interprets s. 72 to exempt pensions from seizure in writ proceedings arising out of criminal conduct, this would create an arbitrary distinction between pensions and RRSPs.
   * While Gladden has not been convicted of a crime, he has knowingly consented to a judgment based on fraud, which comes within the definition of the crime of fraud under the *Criminal Code*; as such, under s. 95 of the *CEA*, the exemptions in Part 10 of the *CEA* do not apply to these proceedings.
     + There is no principled reason to hinge AMA's civil recovery on an actual conviction.
2. Where there is a consent judgment and a consent order, there is ample evidence of specific intent of desertion and relinquishment.

Notes:

* While funds in an RRSP are exempt under Part 10 of the *CEA*, payments out of an RRSP are exempt under s. 81.1, which falls under Part 8 and is thus not subject to s. 93(e)'s removal of the exemption.
  + Does it make sense that the funds in an RRSP plan could be depleted because they are not exempt from writ proceedings to enforce a judgment based on a criminal offence, while payments out of an RRSP plan are exempt and, because the exemption is not in Part 10, they are not subject to s. 93(e)?
* There was an alternative route to reach the conclusion that the criminal conviction exception applies to in s. 93 applies to pension benefits notwithstanding s. 72 of the *EPPA*.
  + Section 88 of the *CEA* sets out what property is exempt from writ proceedings, which includes "any property as prescribed by the regulations."
  + Section 37(2)(c) of the *CER* provides that in addition to property set out in s. 88 of the *CEA*, "any property that is exempt from writ proceedings under another enactment in force in Alberta" is exempt from writ proceedings.
    - This incorporates exemptions from other legislation (including the *EPPA*) into the *CEA*, making those provisions from the other legislation subject to the criminal conviction exception in s. 93.

## Distress

### Right of Distress

* A landlord's right of "distress" is a remedy available to both commercial and residential landlords to seize the personal property of a lessee located on the rental premises to recover unpaid rent without having to go to court [see *CEA*, s. 1(1)(m)(i)].
  + In practice, this remedy is rarely used in residential tenancies, because residential tenants often do not have enough personal property to make seizure and sale worthwhile.
  + The procedure that applies to the seizure and sale of personal property in writ proceedings largely applies to seizure and sale of goods by a landlord [*CEA*, s. 104(a)–(a.1)].
  + A landlord cannot distrain against personal property that belongs to any person other than the tenant liable for the rent [CEA, s. 104(b)], BUT this does not apply in favour of [*CEA*, s. 104(c)]:
    1. a person claiming title under or by virtue of writ proceedings against the tenant,
    2. a person whose title is derived by purchase, gift, transfer or assignment, or otherwise, from the tenant, whether absolute or in trust,
    3. *a person who has a security interest in personal property on the premises* OTHER THAN a person who has a PMSI in the personal property,
       - i.e., a landlord who has distrained has priority over a security party with a security interest in personal property unless the secured party is a PMSI holder.
    4. any person involved in a transaction involving the disposition of the tenant’s property for the purpose of defeating the claim of the landlord, or
    5. a relative of the tenant who lives on the premises as a member of the tenant’s family;
  + Except where the tenant has absconded from Alberta without leaving a spouse, AIP, or any children under 18, the following is exempt from seizure [*CEA*, s. 104(d)]:
    1. in the case of a residential tenancy, the property set out in s. 88(a), (b), (c), (e), (h) and (i), and
    2. in the case of a non‑residential tenancy, the property set out in s. 88(a), (b), (c), (e) and (i).
    - As applicable to distress proceedings, in s. 88(c), the phrase "household furnishings and appliances" means [*CER*, s. 38(1)]:
      1. one washing machine and dryer,
      2. one kitchen suite,
      3. bedroom suites and bedding,
      4. kitchen appliances, including one each of a stove, a microwave, a refrigerator and a freezer,
      5. kitchen utensils, and
      6. carriages, strollers, cradles and cribs necessary for the use of the debtor's children;
    - Where a distress is carried out under the *CEA*, the following are the maximum amounts allowed for exempt property under s. 88:
      1. the maximum exemption for clothing referred to in s. 88(b) is $4000;
      2. the maximum exemption for household furnishings and appliances referred to in s. 88(c) is $1000;
      3. the maximum exemption for personal property referred to in s. 88(h) $10,000, in the case of a distress carried out in respect of residential premises.
  + Where an interest in property is subordinate to a landlord's right of distress:
    - The property is subject to distress to the same extent that the property would have been if the subordinate interest did not exist, and [*CEA*, ss. 34(2)(a), 104(a)]
    - A person who acquires the property as a result of distress proceedings acquires the property free of the subordinate interest [*CEA*, ss. 34(2)(b), 104(a)].

### Property Already Under Seizure

* At common law, the doctrine of *in custodia legis* applied to resolve disputes between an unpaid landlord and an enforcement creditor claiming the goods of a tenant-debtor.
  + It provides that *property in the custody of the law is not subject to seizure to satisfy another claim*; i.e., the first to *seize* property, as between a writ creditor and a landlord with a right of distress, has priority.
  + Hence, a landlord who had goods seized by the sheriff in the exercise of a right of distress had priority over the claim of an enforcement creditor.
    - e.g., On Day 1, a writ is registered against the debtor, who is a tenant. The debtor is in arrears in rent due to their landlord. On Day 2, the landlord distrains goods owned by the tenant for unpaid rent. According to *in custodia legis*, the landlord has priority to the goods seized.
  + Conversely, the seizure of goods by a sheriff acting to enforce a writ of execution had priority over a landlord’s right of distress against the goods.
    - HOWEVER, the writ's priority is qualified by the *Statute of Anne*, 1907 (see *Circa 1880*, below).
    - e.g., On Day 1, a writ is registered against the debtor, who is a tenant. The debtor is in arrears in rent due to their landlord. On Day 2, the writ holder instructs seizure of goods in writ proceedings. According to *in custodia legis*, the writ holder has priority to the goods seized SUBJECT TO the landlord's rights under the *Statute of Anne, 1709* (see *Circa 1880*, below).
  + In 2006, the *CEA* was amended to enshrine *in custodia legis* in s. 48.2.
* However, in 2011, s. 48.2 of the *CEA* was amended to remove the language enshrining *in custodia legis*.
  + i.e., a person who has a right of distress against personal property already under seizure may nonetheless distrain against the seized property [*CEA*, s. 48.2(1)(a)]; conversely, an enforcement creditor who wishes to seize personal property that is already under distress may seize that property notwithstanding that it is already under seizure [*CEA*, s. 48.2(2)(a)].
  + However, the legislature did not replace the priority rule in *in custodia legis* with another priority rule.
    - Thus, it is an open question as to whether *in custodia legis* still applies, or whether it was eliminated; if it was eliminated, it is uncertain what, if anything, it was replaced with.
    - In Professor Lund's opinion, the safest approach is to assume that *in custodia legis* still applies.

#### *Circa 1880 Imports Ltd v Antique Photo Parlour Ltd* (1983), 55 AR 19 (QB)

Facts:

* Circa 1880 Imports Ltd ("Circa") obtained a judgment against the Antique Photo Parlour Ltd ("Antique") for $20,651. At all material times, Antique rented a retail premise in Kingsway Mall from Westgreen Developments (North) Ltd ("Westgreen"). In April 1982, Circa instructed the sheriff to attend at Antique's premises and seize under the judgment. A bailee's undertaking was signed and the seized articles remained on the premises. In May 1982, Westgreen seized the same items for arrears of rent in the amount of $5,073. The goods were sold at public auction by the sheriff in November 1982, netting $6,644. The sheriff proposes to pay out Westgreen's claim in full and remit the balance to Circa. Circa objects to this proposal, arguing that when it made its seizure, the goods no longer belonged to Antique so that Westgreen’s subsequent seizure for rent could not attach to the same goods.

Issue and holding:

* Is Westgreen's entitled to have its claim paid in full out of the sale proceeds? **YES**

Analysis:

* Under the *Landlord and Tenant Act (Statute of Anne), 1709*, goods on leased lands are not liable to seizure unless the enforcement creditor pays to the landlord such sums of money as are due for rent at the time, provided the arrears of rent do not amount to more than one year's rent.

Rationale: (Miller J)

* The distribution of the fund as proposed by the sheriff is the proper and legal way to disburse it.
  + The *Statute of Anne* is in force and is still the law in Alberta, and Circa has not shown that Westgreen seized for anything other than arrears of rent on a subsisting tenancy for less than one year's rent.

# Ch. 8: Enforcement Against Land

* Compared to prior law, the *CEA* makes it easier for a creditor to proceed against certain marketable forms of property, including land (Wood).
* For the purposes of enforcing a writ [*CEA*, s. 67]:
  1. all land of the enforcement debtor that is under the *LTA* is liable to sale, and
  2. all land of the enforcement debtor that is not under the *LTA* is, subject to the enactments governing that land, liable (i) to sale or (ii) to be otherwise dealt with, in accordance with the regulations.
* "Land" includes *any* interest in land [*CEA*, s. 1(1)(bb)], including fee simple estates, life estates, leasehold interests, *profits à prendre*, etc.

## Initiating Enforcement Proceedings

* To initiate enforcement proceedings to sell land, a creditor must provide an agency instructions to sell the land and any relevant documents or information that are required by the agency [*CEA*, s. 68].

### Notice of Intention to Sell

* Before selling land under the *CEA*, an agency must give Notice of Intention to Sell the land [*CEA*, s. 70(1)] and file a caveat against the certificate of title setting out the Notice of Intention [*CER*, s. 46(2)].
  + **Information**: The notice of intention to sell land must contain [*CER*, s. 46(1)]:
    1. all of the "standard information," which includes the following [*CER*, s. 45(c)]:
       1. the name of the debtor whose land is the subject of sale proceedings;
       2. the name and address for service of the agency that is carrying out the sale proceedings;
       3. the name and address for service of the instructing creditor;
       4. the judicial district and action number in which the instructing creditor’s writ of enforcement was issued;
       5. the legal description of the land that is the subject of the sale proceedings;
       6. the nature of the debtor’s interest in the land, insofar as it is known to the instructing creditor;
    2. a statement that the agency has been instructed by the instructing creditor to sell the debtor’s interest in the land described in the notice,
    3. a statement that, unless the Court otherwise orders, the agency cannot offer the land for sale until the expiration of a 180‑day waiting period after the notice has been served on the persons who are required to be served with the notice,
    4. a statement that if the debtor’s principal residence is located on the land, the land may be exempt, in whole or in part, from sale under writ proceedings, and
    5. a statement that if the enforcement debtor claims that the land is exempt in whole or in part from sale under writ proceedings, the enforcement debtor must serve a written claim on the agency before the expiration of the waiting period,
  + **Service**: The notice must be served on (i) the enforcement debtor, (ii) every registered owner, and (iii) every subordinate claimant whose claim is recorded on the certificate of title [*CER*, s. 46(1)(b)].
    - "Registered owner" means a person who is shown on a certificate of title as an owner, including a co‑owner, of a freehold or leasehold estate in land [*CER*, s. 45(a)].
    - "Subordinate claimant" means, in respect of land that is the subject of sale proceedings, a person who has or claims to have an interest in the land that is subordinate to a writ of enforcement [*CER*, s. 45(d)].
  + If an agency has given notice of intention, no other agency may give notice of intention to sell the same land while the original notice is still in effect [*CEA*, s. 70(2)].
    - A notice of intention remains in effect until (a) the notice is withdrawn by the agency that gave it or (b) the Court, on application by any interested person, declares that is no longer in effect [*CEA*, s. 70(3)].

### Service

* Subject to s. 48.1(4), a Notice of Intention may be served by [*CER*, s. 48.1(1)]:
  1. personal service on the person to be served,
  2. recorded mail addressed to the person to be served, or
  3. leaving the document containing the notice with, or sending it by recorded mail addressed to, the person to be served.
* A Notice of Intention may only be served on an *enforcement debtor* and a every *registered owner* by means of personal service or recorded mail [*CER*, s. 48.1(4)].
  + For the rules of serving a Notice of Intention on subordinate claimants, and the rules that apply to the service of other notices, see "Service," below.

### Waiting Period

* An agency shall not offer land for sale until 180 days from the day the notice of intention was served on the relevant parties [*CEA*, s. 72(1)].
  + This provides the debtor with an opportunity to pay off the writ and avoid sale OR sell the land themselves to achieve a better return.
    - A debtor may wish to sell their property themselves because potential buyers, cognizant of the risks of purchasing property through enforcement proceedings, may make lower offers if the property is sold by a civil enforcement agency.
  + A court may extend or shorten this waiting period [*CEA*, s. 72(2)], but may only shorten the waiting period if it is satisfied that the land is not exempt [*CEA*, s. 72(3)].

### Claiming an Exemption

* Before the expiration of the 180-day waiting period, a debtor who is an individual may serve on the agency a written claim claiming an exemption [*CEA*, s. 73(1)].
  + Unless the court orders otherwise, a debtor who serves a written claim is presumed to be entitled to the applicable exemption [*CEA*, s. 73(2)].
  + Where a debtor *does not* serve a written claim on the agency within the waiting period, they may not, without the permission of the Court, subsequently claim that the land is exempt [*CEA*, s. 73(3)].
* On the expiration of the 180-day waiting period, the agency may offer the land for sale in accordance with the Notice of Intention to Sell [*CEA*, s. 73(4)].

## Sale of Land

* An agency may sell land by any method of sale that is commercially reasonable [*CEA*, s. 69].
  + An agency may list property with a real estate agent, by tender, by auction, etc.
  + Under prior law, a sale of land had to proceed through a public auction or by tender, which was criticised for producing sub‑optimal re­coveries (Wood).
* At least *30 days before offering land for sale*, the agency must serve notice of the method of sale on the debtor and any other person specified by the regulations [*CEA*, s. 74(1)].
  + The Notice of the Method of Sale must be served on (a) the debtor, (b) every registered owner, and (c) every subordinate claimant whose claim is recorded on the certificate of title [*CER*, s. 47(2)].
    - "Registered owner" means a person who is shown on a certificate of title as an owner, including a co‑owner, of a freehold or leasehold estate in land [*CER*, s. 45(a)].
    - "Subordinate claimant" means, in respect of land that is the subject of sale proceedings, a person who has or claims to have an interest in the land that is subordinate to a writ of enforcement [*CER*, s. 45(d)].
      * They are entitled to object to the method of sale because they may be entitled to a share of the proceeds and thus have an interest in ensuring that the property is sold for enough.
  + If the notice sets out the minimum price for which the agency proposes to sell the land, the following applies [*CEA*, s. 74(3)]:
    1. 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;
    2. if any person serves a notice of objection on the agency within the 30-day period, the agency must not sell the land *except on terms that are approved of by the court*;
    3. if a notice of objection is not served on the agency within the 30-day period, the agency may, without a court order, complete the sale for a price that equals or exceeds the proposed minimum price.
  + If the notice does not set out the minimum price for which the agency proposes to sell the land, the following applies [*CEA*, s. 74(4)]:
    1. on entering into an agreement to sell the land, the agency must serve Notice of Terms of Sale on
       1. every person who was served with notice of the method of sale, and
       2. if the instructing creditor is the buyer, every other creditor with a related writ at the time that the notice is given;
    2. the notice of the terms of sale must state that any person who objects to the terms must serve a notice of objection on the agency within 15 days;
    3. if a person serves a notice of objection on the agency within the 15-day period, the agency shall not complete the sale unless authorized to do so by the court;
    4. if a notice of objection is *not* served on the agency within the 15-day period, the agency may, without a court order, complete the sale.

### Service

* Subject to s. 48.1(4), a Notice of Method of Sale may be served by (a) personal service on the person to be served, (b) recorded mail addressed to the person to be served, or (c) leaving the document containing the notice with, or sending it by recorded mail addressed to, the person to be served [*CER*, s. 48.1(1)].

### *Alex Cole Ltd v Wannet*, 2009 ABQB 642

Facts:

* Consolidated Civil Enforcement Inc ("Consolidated") effected the sale of McCutcheon's interest in her house.
* **First Notice**: Consolidated issued a Notice of Method of Sale on March 6, 2008, indicating that the proposed listing price for the land was $175,000 with a minimum price of $160,000. McCutcheon received it, and sent a letter to Consolidated which she purported to be a Notice of Objection on April 14, 2008. It claimed that the house was exempt, that her co-debtor had been making monthly payments on the judgment, and that the amount of the judgment was erroneous. Notwithstanding this Notice, Consolidated proceeded to solicit offers on the land. Since, it was unable to generate any offers, it abandoned its efforts to sell the house.
* **Second Notice**: On June 11, 2008, and again on June 30, 2008, Consolidated sent a second Notice of Method of Sale to McCutcheon. It lowered the minimum price at which the land could be sold from $160,000 to $120,000. McCutcheon failed to object to either Notice within 30 days. On August 22, 2008, Consolidated listed the house for sale, and on August 29, it accepted an offer from Alex Cole Ltd. McCutcheon was advised of the sale by mail on September 2, 2008. On September 8, she mailed Consolidated a Notice of Objection. But, Consolidated proceeded to close the sale to Cole. It provided the Registrar of Land Titles with a certificate under s. 75(b) of the *CEA*. Consolidated obtained Alex Cole's purchase funds and distributed them to McCutcheon's creditors.

Issue and holding:

* Did Consolidated comply with s. 74 of the *CEA* and was entitled to sell the land without court order? **YES**
* If no, is Alex Cole entitled to keep the land? **YES**
  + i.e., McCutcheon’s remedy lies in an action against Consolidated and/or its instructing creditor.

Rationale: (Master Prowse)

* Consolidated sold the land in accordance with s. 74 of the *CEA*.
  + Consolidated was entitled to proceed with sale without a court application after serving the first Notice of Method of Sale, because McCutcheon did not serve a Notice of Objection as contemplated by s. 74(3)(a) of the *CEA*.
    - Section 74(3)(a) indicates that a valid Notice of Objection occurs when the judgment debtor objects to the proposed minimum price; since McCutcheon's letter of April 14, 2008 indicated no objection to the proposed minimum price, it was not a valid Notice of Objection.
  + Since there was no valid Notice of Objection to the first Notice of Method of Sale, it was permissible for Consolidated to issue a new Notice of Method of Sale with a lower minimum sale price.
  + The Notice of Objection that McCutcheon sent on September 8, 2008, in response to the second Notice of Method of Sale, was out of time and Consolidated was entitled to disregard it.
* Even if Consolidated did not sell the land in accordance with the *CEA*, McCutcheon is not entitled to have the land transferred back to her.
  + Alex Cole was a *bona fide* purchaser for value who had no knowledge that Consolidated may not have complied with s. 74 of the *CEA*.
    - It relied on Consolidated’s implicit assertion that it had complied with s. 74 and was therefore legally authorized to convey McCutcheon’s land to Cole.
  + Consequently, Alex Cole should be allowed to rely on s. 183 of the *LTA*, which provides (subject to certain exceptions which do not apply in this case) that no action lies for recovery of land against an owner to whom a certificate of title has been issued.
    - This is consistent with both the *LTA* and with public policy; *bidders should be assured that the title they derive, absent lack of* bona fides *on their part, will be secure*.
      * If purchasers of land from civil enforcement agencies cannot be sure that they have received good title, notwithstanding reliance on statements that all proper steps have been taken, then those purchasers will likely respond to this negative contingency by submitting lower bids; this is just as bad for enforcement debtors as it is for enforcement creditors.

Notes:

* As Master Prowse noted, s. 74(3) is a trap for unsophisticated enforcement debtors, who could easily fall under the misapprehension that complaints about aspects of the sale process other than the proposed minimum sale price constitute a valid 'Notice of Objection'.
* In *Sandhu v Meg Place LP Investment Corporation*, 2016 ABQB 503, the notice of intention to sell land served on the enforcement debtor named the wrong party as the instructing creditor. The ABQB held that, because no prejudice was suffered because of the error, imperfect compliance with the statutory procedures in the *CEA* should not nullify the steps taken.

Agency serves Notice of Intention to Sell, CEA s 70 
Agency serves Notice of Method of 
Sale, CEA S 74(3) — includes minimum 
Agency serves Notice of Method of 
Sale, CEA S 74(4) — does not include 
minimum price 
Agreement for Sale of Land 
Agency serves Notice of Terms of 
sale, CEA s 74(4) 
15D 
180D 
price 
Objection? Must 
apply to Court, 
CEA s 
30D 
No Objection? 
Sell land, CEA s 
Objection? Must apply to 
Court, CEA s 
No objection? Sell pursuant 
to agmlt, CEA s 74(4)(d) 

## Transfer of Land

* 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 the *CEA* and that
  1. a notice of objection to the sale was not served on the agency within the prescribed period, or
  2. a notice of objection to the sale was served on the agency and that the Court has authorized the sale,

the Registrar shall transfer the debtor’s interest in the land to the transferee free of all writs but, unless otherwise ordered by the Court, subject to any other encumbrances or interests that were registered against the debtor's interest in the land [*CEA*, s. 75(1)].

* Where an interest in land is sold pursuant to a Court order, the Registrar shall not transfer the interest until it has been satisfied by the agency [*CEA*, s. 75(2)]:
  1. that all persons who have a right to appeal that order have given written undertakings not to appeal the order, or
  2. in the case of undertakings not being given, (i) that the order is no longer subject to an appeal or (ii) if the order has been appealed, that the appeal has been concluded.
* While a court order is required to remove subordinate instruments from the certificate of title, you can get the holders of those instruments to voluntarily discharge them.
  + The holders of subordinate instruments will likely be amenable to discharging them if you remind them that they have no entitlement, that you will take them to court to remove their instruments from the certificate of title, and that you will seek costs if a court application is necessary.
* Where an agency sells land, it must within 10 days from the day of the sale of the land register a report in the PPR setting out the details of the sale [*CER*, s. 47(3)(a)].

## Real Property Exemptions

### Exempt Real Property (s. 88)

* + Subject to s. 89, the interest of an enforcement debtor in the following real property is exempt *from writ proceedings* (i.e., not proceedings against a secured party) [*CEA*, s. 88]:

…

1. in the case of a debtor whose primary occupation is farming, up to 160 acres of land if the debtor's principal residence is located on that land and that land is part of their farm;
   * + This exemption only applies when farming is the debtor's "primary occupation"; e.g., it does not apply where a debtor has a garden or a chicken coop in her backyard.
2. the principal residence of a debtor (including mobile homes), up to the prescribed value.
   * + The maximum exemption for a principal residence is $40,000 [*CER*, s. 37(1)(e)].
     + However, *if the debtor is a co‑owner, the amount of the exemption is reduced to an amount that is proportionate to the debtor’s ownership interest* in the residence [*CEA*, s. 88(g)].
       - i.e., if a debtor jointly owns property with someone else, they can each claim an exemption for $20,000 in equity.
     + e.g., a debtor who is a dentist has a principal residence worth $450,000. There is a writ registered against the property for $45,000, and a prior registered mortgage for $380,000.
       - The secured party gets paid out in full, since exemptions are not enforceable against secured creditors. Next, the debtor gets to claim a $40k exemption. This leaves $30k for the writ creditor.
     + e.g., a debtor who is a dentist has a principal residence worth $450,000.There is a writ registered against the property for $45,000, a prior registered mortgage for $380,000, and a subsequent registered mortgage for $30,000.
       - In this case, $380,000 goes to prior secured party, leaving $70K.
       - The debtor then gets to claim their $40k exemption, leaving $30K.
       - The remaining $30k goes to the writ creditor, since they have priority with respect to the subsequent mortgagee.

…

1. any property as prescribed by the regulations.
   * + Under s. 37(2) of the *CER*, the following property is exempt from writ proceedings:
       1. where a 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 prescribed value, as the case may be, are exempt for 60 days from the day of the sale if those proceeds are not intermingled with any other funds of the debtor;
       2. any property that is exempt from writ proceedings under another enactment.

#### *Re Fuller*, 2003 ABQB 416

Facts:

* 1. Mr. Fuller and his wife jointly own 5 quarter sections of land. Mr. Fuller has had a cereal grain farming operation on the land since 1974. In 2002, driven by a lack of moisture and an abundance of grasshoppers, Mr. Fuller decided to temporarily suspend his farming operation to work full-time at the Casalta Oil Field so that he and his wife can pay their bank loans, mortgages, and other debts. He continued farming at a substantially reduced basis, and expects to increase his farming activity in spring 2004.
  2. In April 2003, Mr. Fuller made an assignment in bankruptcy. The trustee applies for the determination of whether Mr. Fuller is entitled to have his home quarter exempted pursuant to s. 88(f) of the *CEA*.

Issue and holding:

* 1. Is Mr. Fuller's home quarter exempt from seizure? **YES**

Analysis:

* 1. The intention of the exemption in s. 88(f) is to maintain a home quarter and sufficient farming equipment to allow continued farming operations.
  2. When one's primary occupation was once farming, factors to consider to determine whether that occupation continues include: selling off land or equipment, expressing an intention to terminate farming, time spent in off-farm employment, and whether off-farm employment is meant to be temporary or permanent.

Rationale: (Registrar Laycock)

* 1. On the basis of his past performance and future intention, on the date of bankruptcy, Mr. Fuller's primary occupation was farming; he is therefore entitled to the exemption provided in s. 88(f).
     + Mr. Fuller has throughout the majority of his lifetime been a farmer and he wishes to continue farming.
     + Mr. Fuller's break from full-time farming has been occasioned by drought conditions which require a substantial shift in his on-going farming endeavours.
       - His work off the farm has in fact been for the primary purpose of preserving the farm.

Notes:

* 1. At the time the *CEA* was enacted, s. 88(f) exempted 160 acres from writ proceedings for debtors (i) who are *bona fide* farmers and (ii) whose principal source of livelihood is farming. In other words, the emphasis has shifted from the debtor's primary source of income, to their primary "occupation."
     + In *Re Clark*, Registrar Laycock noted that legitimate farmers may have series of years where they operate at a loss during which their principal source of livelihood is not farming. In this instance, these farmers may still be able to receive an exemption under the current s. 88(f).
  2. In *Kallenberger v Beck (Trustee Of)*, Lovecchio J held that the intention to have farming as a principal occupation coupled with a history of doing so may qualify one for an exemption, but intention alone cannot.

#### *Knight (Re)*, 2012 ABQB 759

Facts:

* 1. The enforcement debtor, Mr. Knight, separated from his wife in July 2006. The wife left the couple's Canmore home and it was listed for sale in August 2006. An offer to purchase the house was accepted in September 2006 and the sale closed in December 2006. Mr. Knight and his son occupied furnished temporary accommodation in Sylvan Lake from early September 2006 until after the sale closed. Mr. Knight deposed that he moved to Sylvan Lake to "attempt to seek new career employment with no guarantee of success." He and his son returned to Canmore whenever they could on the weekends and all of his belongings and furnishings remained in the Canmore residence until two days prior to the closing of the sale. Mr. Knight's daughter and a friend were occupying the residence from September until the closing of the sale. The proceeds from the sale of the house were held in a lawyer's trust account pending settlement of Mr. Knight's matrimonial property dispute. The dispute was settled in November 2011 and the proceeds were paid out to Mr. Knight. At that time, he claimed to be entitled to $20,000 of the proceeds on the basis of the exemptions provided in ss. 88(g) and (j) of the *CEA* and ss. 37(1)(e) and (2)(a) of the *CER*.

Issue and holding:

* 1. Is Mr. Knight entitled to an exemption of $20,000 of the sale proceeds from the Canmore house? **YES**
     1. Was the Canmore home Mr. Knight's principal residence? **YES**
     2. Were the proceeds from the sale of Mr. Knight's home intermingled with his other funds? **NO**
     3. Has the exemption expired due to the passage of time? **NO**
     4. Was the house sold by the enforcement debtor? **YES** *(discussion omitted)*

Analysis:

* 1. The purpose of exemptions for principal residences and their proceeds is to preserve a debtor's ability to survive and earn a living, thereby contributing to their rehabilitation.
  2. For proceeds from the sale of a house to be exempt, the house must be the debtor's principal residence, the funds must not have been intermingled with the debtor's other funds, and the debtor must have sold the property; if these requirements are satisfied, the exemption continues for 60 days from the day of sale.
     + The onus is on the party claiming an exemption to show that he had a realistic expectation of returning to the residence, that his absence was only of a temporary nature, that he had not abandoned the residence as his principal residence, or that the residence remained his ‘home base'.
       - Physical presence, while a good indicator of principal residence, is not the sole indicator; one need not be present at the residence every day for it to be their principal residence.
       - In the absence of actual occupation, intention and context must govern a determination of principal residence; when someone no longer has a realistic expectation of returning to the residence at some time, it is unlikely to be their principal residence.
     + The 60-day exemption period starts to run not when the transaction closes, but when the proceeds are made available to the debtor and the debtor knows they are available (*Re Thorne*).
       - The debtor has 60 days from the receipt of the sale proceeds to decide what to do with the funds and initiate the purchase of a replacement asset that would not be available to the creditors.

Rationale: (Registrar Hanebury)

* 1. Mr. Knight is entitled to an exemption of $20,000 of the sale proceeds from the Canmore house.
     1. While Mr. Knight had no intention to return to his Canmore home permanently when he and his son went to Sylvan Lake (as it was being sold), it continued to be his home base during that period.
        + In August 2006, Mr. Knight and his wife had moved out permanently, and neither the utilities nor the mortgages were being paid.
          - The failure to pay utilities does not necessarily mean a house is vacant or abandoned.
        + However, his personal effects and furnishings remained in the house, he and his son returned to it on weekends two or three times a month, and his daughter lived there in the fall.
     2. It has not been suggested that the funds from the Canmore sale were intermingled with other funds.
     3. The sale proceeds only became available to Mr. Knight when they were released from trust, as his entitlement to them was in dispute; Mr. Knight then claimed his exemption within 60 days thereafter.

Notes:

* 1. In *Re Snow*, 2014 ABQB 592, to save money, the bankrupt and his wife moved into the basement of the bankrupt's mother's house, rented out their own home, and intended to return to it once the wife returned to work. While the bankrupt was still living in the basement when he made an assignment in bankruptcy, the court allowed his claim for an exemption.
     + The main question was whether the debtor had moved out temporarily with a long-term intention to return to live in the premises, with some relevant indicia including:
       - The reasons for moving out,
       - Whether furniture or other personal items were left in the premises,
       - 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, and
       - If the person has not returned, why he or she has not done so.
  2. In *Re Hillmer* (2004), 264 AR 173 (QB), Registrar Alberstat held that a mere assertion that a debtor intends at some point in the future to reside at a residence is not sufficient to make that their principal residence. To establish a place as a residence, a party must show that they have actually lived there, that any absence is temporary because of special circumstances, and that they intend to return there in the future.
  3. In *Re Currie*, 2000 ABQB 71, Bielby J cited authority for the principle that an exemption continues where the debtor is forced to leave his or her home as a result of legal process, which may include mortgage foreclosure or similar sale proceedings mandated by law, or an order for exclusive possession in favour of a spouse.
  4. In *Re Dunbar* (1998), 222 AR 102 (QB), a debtor’s principal residence was sold generating net proceeds of $39,150. The money was deposited in an account holding $201.14. $3,000 in withdrawals were made followed by a deposit of $4,880. Registrar Funduk held that the debtor was not entitled to claim an exemption for the sale proceeds under CER s. 37(1) because they were intermingled with other funds.

#### *Bank of Montreal v Hobbs*, 2014 ABQB 545

Facts:

* 1. The defendants in these actions (Lily Okeny in one, Frank Hobbs and Carla Mastrofrancesco in the other) lost their principal residences by foreclosure and court ordered sale. In both cases, after the payout of the mortgage and all associated costs, excess proceeds were paid into Court.

Issue and holding:

* 1. Is s. 37(2)(a) of the *CER* applicable to forced sales? **NO**

Analysis:

* 1. Under s. 37(2)(a) of the CER, where an enforcement debtor sells exempt property, the proceeds from that sale (up to the stated value) are exempt for 60 days from the day of the sale if those proceeds are not intermingled with any other funds of the enforcement debtor.

Rationale: (Sullivan J)

* 1. Section 37(2)(a) applies "where an enforcement debtor sells" property; by its plain text, the provision does not apply where the sale is conducted by some person or entity other than the enforcement debtor.
     + Reading in a limitation in the case of forced sales would require ignoring the text's ordinary meaning.
     + In a voluntary sale, the debtor is in control of the process and can determine how their exempt property is to be dealt with; in the case of a forced sale, the debtor has no control over the process.
     + This reading of the plain text and purpose of the *CER* is supported by commentary on its drafting.
       - In May 1995, Susan Robinson Burns, writing for LESA, commented that the 1995 draft legislation and regulations did not address proceeds "realized from a voluntary sale of an exempt asset," but in 1996, observed that the revised s. 37(2)(a) of the *CER* did explicitly address "voluntary sale[s]."

### Property Exempt up to Prescribed Value

* 1. Property in which the debtor's interest is exempt from writ proceedings up to a prescribed value may be sold in writ proceedings *only if* the proceeds of the sale exceed the amount of the exemption plus any amount owed to a secured creditor with priority to the property at issue [*CEA*, s. 89(2)].
  2. An agency that sells property in which the debtor's interest is exempt from writ proceedings up to a prescribed value must deal with the proceeds in accordance with Part 11 [*CEA*, s. 89(5)].
     + In short, if the enforcement debtor’s equity in the exempt property exceeds the monetary limit, the property may be sold with the exempt portion being paid to the debtor (Wood).
  3. There is a "positive duty on the court to consider [the debtor's] exemption in the absence of any claim from her as to entitlement to the exemption" (*Wells Fargo Financial Corporation Canada/Society Financiere Wells Fargo Canada v Taylor*).
     + That said, the debtor must provide some evidence in support of the claimed exemption (*Resmor Trust Company v Wood*).

### Selection of Property

* 1. If [*CEA*, s. 90(1)]:
     1. an enforcement debtor owns more than one item of a type of property for which there is an exemption under s. 88, and
     2. 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.

* 1. i.e., the debtor is given the right of selection where a choice between items must be made (Wood).
  2. If the enforcement debtor does not make a selection in a timely manner, the bailiff may select the items that are exempt [*CEA*, s. 90(2)].

### Determination of Exemption

* 1. In the case of enforcement against land, 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 at the time that the notice of intention to sell is given [*CEA*, s. 91(b)].

### Non-Applicability of Part 10 (s. 93)

* 1. The exemptions set out in Part 10 do not apply to the following [CEA, s. 93]:
     1. to an enforcement debtor that is not an individual (e.g., a corporation);
     2. to partnership property;
     3. to writ proceedings on a judgment for the payment of support, maintenance, or alimony;
     4. to property that the enforcement debtor has abandoned;
     5. to writ proceedings on a money judgment arising out of an act for which the debtor has been convicted of an offence under the *Criminal Code*.

# Ch. 9: Garnishment

* In garnishment proceedings, a creditor provides notice to someone who owes money to the debtor (e.g., employers, banks, tenants, accounts receivable), the payor pays that money to the clerk of the court (rather than the debtor), and the clerk distributes it in accordance with the *CEA*.
  + Compared to prior law, the *CEA* expanded the garnishment remedy and reduced the cost of exercising it; it reflected a deliberate policy decision to promote the use of garnishment wherever feasible (Wood).
  + Garnishment is a preferred method of enforcing a judgment because of its simplicity, effectiveness, and efficiency.
    - The procedure for garnishment is less onerous (and therefore less costly) than the seizure process (Wood).
    - Further, garnishment involves a diversion of money rather than the sale of the debtor's property, there is not the "lost value" value problem that is associated with enforcement sales (Wood).
      * The lost value problem is that personal property often sells for (significantly) less than its purchase price and for less than the value the debtor places on it.

## General Procedure

* After a writ is issued by the court clerk and registered in the PPR, the creditor may request that the court clerk issue a *garnishee summons*.
  + A creditor may require the clerk to issue a garnishee summons by filing an affidavit in support of the garnishee summons [*CER*, s. 35.21(1)(a)] and preparing five copies of the garnishee summons in Form 11 for the amount owing on the instructing creditor's writ plus all related writs.
    - Five copies are required because the court keeps one, the instructing creditor keeps one, and three are provided to the garnishee.
  + When the creditor has provided the necessary information, the clerk must "issue" the garnishee summons for the amount of all relevant claims [*CER*, s. 35.21(2)].
* For a garnishee summons to "attach" to an obligation owed to the debtor, the garnishee summons must [*CER*, s. 35.22(1)]:
  1. be served in triplicate on the person who owes an obligation to the debtor (i.e., the garnishee) in accordance with s. 35.05, and
  2. be accompanied by a garnishee’s compensation fee in the amount of $25.
* Except as otherwise provided by the *CEA* or any other enactment, *any current or future obligation is attachable by garnishment* [*CEA*, s. 78(a)].
  + "Current obligation" means an obligation, or any portion of one, 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 out of a deposit account on satisfaction of a condition under s. 83(1) [*CEA*, s. 77(1)(a)].
    - A condition under s. 83(1) of the *CEA* refers to a condition of a deposit account agreement that the account holder must apply in person, give notice, or present some document to the garnishee before making a withdrawal.
  + "Future obligation" means an obligation, or any portion of one, that [*CEA*, s. 77(1)(c)]:
    1. 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,
    2. will arise or become payable in the ordinary course of events from an existing employment relationship,
    3. is a statutory obligation that is likely to arise or become payable as a result of an event that has occurred, or
    4. may arise or become payable in respect of an existing cause of action;
  + “Obligation” means a legal or equitable duty to pay money [*CEA*, s. 77(1)(i)].
  + Money held in a court is not subject to garnishment [s. 78(j)].
    - If a creditor wants to get paid out of money held in court, they must apply to the court to do so.
* Once, the garnishee summons attaches the garnished obligation, the garnishee, within 15 days of being served with a garnishee summons [*CER*, s. 35.23(2)]:
  1. if able, serve a copy of the garnishee summons on the debtor;
     + However, instead of relying on a garnishee, a creditor may opt to serve the garnishee summons on the debtor [*CER*, s. 35.26(1)].
  2. deliver to the clerk the "garnishee's response," which must include the following as applicable [*CER*, s. 35.23(5)]:
     1. either
        1. a certificate stating that the garnishee has delivered a copy of the summons to the debtor, or
        2. a statement setting out the reason why the garnishee has been unable to deliver the summons to the debtor;
     2. the amount of any current obligation attached by the summons;
     3. the amount that is being paid by the garnishee to the clerk on account of the summons;
     4. where the garnishee summons has attached a future obligation, the following, if known:
        1. the date or dates on which the future obligation, or any portion of it, is expected to become payable;
        2. the amount that is expected to be payable on each date;
        3. the nature of any contingencies that must be satisfied before the future obligation will become payable;
     5. where the garnishee summons has attached a joint entitlement, the name and address of each joint obligee other than the debtor.
        + If disclosure of a joint obligee's address would be unlawful or a breach of a legal duty owed by the garnishee to the obligee, the garnishee, must instead [*CEA*, s. 82(c)].
          1. serve the garnishee summons on the obligee, and
          2. certify in the garnishee’s response that the garnishee has done so;
     6. if the garnishee disputes the existence of an attachable obligation, the grounds for the dispute;
     7. if the garnishee believes that an obligation against which the summons has been issued is or may be owed to a person other than the debtor,
        1. the reasons for that belief, and
        2. the name and address of that other person;
     8. if another garnishee summons regarding the same obligation has previously been served on the garnishee and is still in effect,
        1. a statement stating that another summons regarding the same obligation is in effect, and
        2. the expiry date of that other summons.
  3. pay to the clerk the lesser of
     1. the amount outstanding on the garnishee summons, and
     2. the amount currently owing to the debtor,

less the garnishee’s compensation in the amount of $10.

* Money that is attached by a garnishee summons must, subject to this Act, be paid into court by the garnishee [*CEA*, s. 78(k)], not to a civil enforcement agency.
* Once the money is paid into court, the clerk distributes it in accordance with the distribution scheme in the *CEA*.

## Why Does a Garnishee Comply?

* A payment made by a garnishee discharges them, to the extent of the payment, as against the debtor [*CEA*, s. 78(h)].
  + e.g., A owes the debtor $100. A's debt to the debtor is garnished, and A pays $100 into court. The debtor can no longer demand payment from A.
* A garnishee can claim set-off as against the amount owing to the debtor if [*CEA*, s. 78(i)]:
  1. the right to the set‑off already existed when the garnishee summons was served on the garnishee,
  2. 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
  3. it would be inequitable not to allow the set‑off;
  + e.g., at the date of service, the garnishee owes $10,000 to the debtor, and the debtor owes $5,000 to the garnishee. The garnishee can set-off the $5,000 owed by the debtor and pay the balance of the $5,000 into court.
* Where a garnishee [*CEA*, s. 84(1)]:
  1. does not comply with any requirement of the *CEA*, the court may grant appropriate relief on the application of a creditor, or
  2. has failed to pay money into court in accordance with the *CEA*, *the court may grant judgment against the garnishee for the amount of the summons* or a lesser amount as the court considers appropriate.
     + e.g., A owes the debtor $100. A is served with a garnishee summons. The amount of all relevant claims is $2,000. A ignores the garnishee summons and pays $100 to the debtor. The creditor can sue A for up to $2000, but they would have a hard time convincing the court that it was appropriate to require A to pay more than $100.
  + HOWEVER, a garnishee who makes a payment to the debtor after being served with a garnishee summons will not be liable under s. 84 if:
    - The payment is made during the "grace period" [*CER*, s. 35.24], which begins when the summons is served on the garnishee and ends [*CER*, s. 35.24(2)]:
      1. at midnight on the day that the summons is served, if the summons is served on the office, branch, or agent of the garnishee responsible for paying the attached obligation, or
      2. at midnight on the 7th day following the day that the summons is served on the garnishee, if service of the summons is effected otherwise than as stated under clause (a);
         * This longer grace period is justified on the grounds that it may take time to transmit notice of a garnishee summons to the people responsible for paying the debtor.
         * As a result, it is advisable to serve a garnishee at the location where the payment is going to be paid from (e.g., head office).
    - The garnishee attempted in good faith to identify the obligation attached by the summons and prevent it from being paid to the debtor [*CER*, s. 35.24(1)(a)]; and
    - Either [*CER*, s. 35.24(1)(b)]:
      1. the payment was not authorized, permitted, or effected by an officer, employee, or agent of the garnishee who had actual knowledge of the garnishment before the payment was made, or
      2. it was not reasonably possible in the circumstances to prevent the payment from being made to the debtor.

## When a Garnishee Summons is in Effect

* A garnishee summons remains in effect until the earliest of the following occurs [CEA, s. 79(3)]:
  1. the garnishee summons expires;
     + A garnishee summons expires 2 years from the day on which it was issued [*CEA*, s. 79(1)].
       - However, where a garnishee summons is issued in respect of a deposit account, it expires 60 days from the day on which it was issued [*CEA*, s. 79(2)].
     + An instructing creditor may renew a garnishee summons for another 2 years by filing a renewal statement in Form 12 and serving it on the garnishee at any time within 60 days before the expiry date [*CER*, s. 35.28(2)].
       - This does not apply to garnishee summons issued against a deposit account [*CER*, s. 35.28(1)].
       - There is no limit on the number of times that a garnishee summons may be renewed [*CER*, s. 35.28(5)].
  2. the garnishee pays the garnishee summons amounts to the clerk who issued the garnishee summons;
     + Does not apply to a garnishee summons issued against employment earnings [*CEA*, s. 81(2)] or registered plan payments [*CEA*, s. 81.1(3)].
  3. the enforcement creditor notifies the garnishee that the garnishee summons is no longer in effect;
  4. the garnishment proceedings are terminated by order of the court.
* A garnishee summons *shall not* be set aside for an irregularity unless in the opinion of the Court the irregularity has prejudiced the debtor or garnishee [*CEA*, s. 77.1].

## Future Obligations

* If a future obligation that has been attached by a garnishee summons becomes payable, the garnishee must immediately [*CER*, s. 35.23(3)]:
  1. deliver to the clerk the garnishee’s response setting out
     1. the amount of the future obligation that is now payable, and
     2. the amount that is being paid by the garnishee to the clerk on account of the garnishee summons, and
  2. pay to the clerk the lesser of
     1. the amount outstanding on the garnishee summons, and
     2. the amount of the future obligation that has become payable to the debtor,

less the garnishee’s compensation in the amount of $10.

* Where the source of a garnished future obligation:
  1. is property of the debtor, or
  2. is an agreement between the debtor and the garnishee,

the court may exempt from attachment as much of the obligation as is required by the debtor to keep or maintain the property or to perform the agreement, as the case may be [*CEA*, s. 80].

* e.g., a corporate debtor and garnishee have a contract for the debtor to built a garage, requiring installment payments. The garnishee is set to pay the first installment of $30k on March 15. $25k will be used to pay for labour and materials and $5k will be profit. In this case, the court has discretion to exempt from attachment the $25k for labour and materials to ensure that the obligation is performed.
* Does not apply to a garnishee summons issued against employment earnings [*CEA*, s. 81(2)] or registered plan payments [*CEA*, s. 81.1(3)].

## Deposit Accounts

* A deposit account is treated as an obligation that is attachable by garnishment.
  + e.g., the debtor has a savings account at Scotiabank worth $5,000. This means that Scotiabank owes the debtor a debt of $5,000. A creditor can garnish the debt owed by Scotiabank to the debtor.
  + "Deposit account" means a chequing, savings, demand, or similar account at a bank, treasury branch, trust corporation, loan corporation, credit union, or other deposit‑taking financial institution [*CEA*, s. 1(1)(l)].
    - It 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 [*CEA*, s. 1(1)(l)].
* Garnishee summons against a deposit account last only 60 days [*CEA*, s. 79(2)] and cannot be renewed [*CER*, s. 35.28(1)].
  + A garnishee summons attaches to all monies paid into the account within that 60-day period.
  + That said, an instructing creditor can still issue another garnishee summons against the same bank account after a previous one expires.
* A garnishee summons only binds a financial institution if served on a branch where the account is located [*Bank Act*, s. 462; *Trust and Loan Companies Act*, s. 448].
  + A creditor can locate the branch where the account is located by requiring the debtor to fill out a financial report.
    - If they are questioning the debtor, they will serve the conduct money on the debtor using a cheque and then follow up to see where that cheque was deposited.
* Where the employment earnings of a debtor are paid directly into a deposit account, the debtor may apply to the Court for an order directing that they be entitled to an exemption similar to that which they would have been entitled to if the employment earnings had been garnished from the employer [*CEA*, s. 83(3)].
  + In other words, an employer cannot get around the employment earnings exemptions by garnishing employment income from a bank account.
  + The downside of this for the debtor is that they need an application to take advantage of the employment earnings exemptions.

### *Re Sunstar Mfg Inc (Bankrupt)*, 2001 ABQB 1113

Facts:

* Weatherford Canada Ltd ("Weatherford") obtained a judgment against Sunstar Mfg Inc ("Sunstar") for over $39,000. In April 2000, Weatherford served a garnishee summons at a CIBC branch in respect of Sunstar's deposit accounts. On or about May 1, 2000, CIBC received a cheque for $25,000 payable to Sunstar from Alberta Treasury Branches ("ATB"). CIBC credited Sunstar's account, and deducted overdraft fees, leaving $24,573. On May 2, 2000, ATB sent CIBC a stop payment, which removed the bank's authority to pay out the cheque. Notwithstanding the stop payment, CIBC paid the $24,573 into court to satisfy the garnishee summons on May 8, 2000. CIBC held that it accidentally overlooked the stop payment before paying out the cheque, mistakenly believing that it had authority to pay out on the cheque when it did not. Weatherford argues that the garnishee summons attached to the money as soon as it was deposited into the account.

Issues and holding:

1. Is the money recoverable under the law of mistake of fact? **YES**
2. When did the garnishee summons attach? **Never**

Analysis:

* The court is a trustee of money paid into it; payment into court is not payment to the creditor.
* Money that is paid under a mistake of fact is recoverable provided (1) the payor did not intend the payee to have the money in any event, (2) the money was not paid for good consideration, and (3) the payee (i.e., creditor) has not changed its position in good faith (i.e., discharged the debt).
  + The payor's carelessness in making the payment is irrelevant.
* A garnishee summons attaches to any current or future obligation of the garnishee to the debtor.
  + An obligation is defined in s. 77(1)(i) of the *CEA* as a legal or equitable duty to pay money.

Rationale: (Registrar Breitkreuz)

1. CIBC's made a mistake in believing that the cheque had cleared and the money was in the account, and this mistaken caused it to make the payment; thus, the money is *prima facie* recoverable.
   * That said, Weatherford does not have a defence to recovery by CIBC on these facts; Weatherford has not changed its position, and the payment into court was not for valuable consideration.
2. Absent an agreement, a bank is under no legal or equitable duty to pay money out to a customer who trying to draw funds against an uncleared cheque; thus, there is no obligation to attach on a provisional credit.
   * If there *were* an agreement that a customer can draw against uncleared funds, the garnishee summons would attach immediately upon the cheque being deposited, regardless of the fact it had not cleared.

## Joint Entitlements

* Where a joint entitlement is owed to a debtor and any other person, a garnishee summons may be issued against that joint entitlement [*CEA*, s. 78(g)].
  + Joint entitlement" means an obligation that is or will be owed to 2 or more persons jointly [*CEA*, s. 77(1)(g)].
  + This represents a departure from the prior law, under which the garnishment of a bank account could be frustrated if a joint obligation were involved (Wood).
* Where a joint entitlement is owed to a debtor and any other person, an equal portion of the joint entitlement is *prima facie* owed to each joint owner [*CEA*, s. 82(d)].
  + This presumption is rebuttable; if it appears that the debtor may be beneficially entitled to a larger portion of the joint entitlement, the court may, on application, require the garnishee to pay the larger portion to the clerk [*CEA*, s. 82(e)].
    - e.g., the debtor and their spouse have a jointly-held deposit account with $7,600 in funds.
      * The debtor *is prima facie* entitled to garnish 50% of the funds.
      * However, the creditor may bring an application to attach more than 50% of the account if, say, the debtor has been the only one depositing funds into it.
  + A garnishee summons that attaches a *joint deposit account* only attaches the portion of the joint entitlement that is a current obligation [*CEA*, s. 83(2)].
    - e.g., the debtor and their spouse have a joint bank account worth $5,000 at the time a garnishee summons is served. Two days later, $1,000 is deposited into the account. In this case, the garnishee summons only attaches the debtor's portion of $5,000 (that is, $2,500 under the presumption of equal sharing).
* To garnish a joint entitlement then, after the garnishee responds to a garnishee summons, the instructing creditor must serve a copy of the garnishee summons and a notice of the garnishee's response on each joint obligee [*CEA*, s. 82(b)].
  + When money is received by the clerk in respect of a joint entitlement, that money shall not be distributed until 30 days have expired from the day that the notice is served on all the joint obligees [*CEA*, s. 82(h)].

### *Wayfarer Holidays Ltd v Hoteles Barcelo* (1993), 12 OR (3d) 208 (Ont Ct (Gen Div))

Facts:

* Sunquest Vacations Ltd ("Sunquest") and Canadian Holidays Ltd ("Canadian") carry on business as tour operators selling package vacation tours. Their vacation tours include accommodations at the Bavaro Beach Resort in the Dominican Republic. The resort is operated by Hoteles Barcelo, which runs hotels in various countries. Accommodations at the Bavaro Beach Resort are obtained through contracts with International Tourist Activities ("ITA"), which is a representative of the hotel. Funds received by Sunquest and Canadian from travellers for hotel reservations are held in a separate trust account and then paid to ITA. Disputes arising out of the contracts are dealt with exclusively by the courts of Santo Domingo.
* The creditor obtained a judgment in December 1992 against Hoteles Barcelo in the amount of $283,990. Garnishment proceedings were commenced, and the creditor served a notice of garnishment on Sunquest and Canadian. It alleged that each garnishee owes or will owe a debt to Hoteles Barcelo as a provider of hotel accommodations. However, the Bavaro Beach Resort advised Sunquest and Canadian that, if the funds are paid into court and are not forwarded to ITA, the hotel will not honour reservations of Sunquest and Canadian travellers upon their arrival in the Dominican Republic. This will result in inconvenience to travellers and in negative publicity. As such, the garnishees claim to be in a position of double jeopardy, unable to pay the disputed monies into court while still protecting their clients' interests.

Issue and holding:

* Should the court enforce the notice of garnishment issued by the creditor against the garnishees? **NO**

Analysis:

* The court has a discretionary power not to make the order for payment by the garnishees where it would be inequitable.
* That said, 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.

Rationale: (Corbett J)

* There is a real and substantial risk of double payment by the garnishees, which would make it inequitable to require payment into court.
  + The garnishees would make the required payments to ITA, notwithstanding payment into court, because of the risk of inconvenience and hardship to their customers.
    - The hotel's threat does not appear to be a bluff, and it should not be put to the test at great risk to the travelling public who have prepaid for this accommodation.
  + A court ought not to order a garnishee to pay money to a creditor where the payment would leave the garnishee liable to an action to recover the same debt brought in the foreign court to whose jurisdiction the garnishee is subject.
* The creditor submits that the garnishees are indebted to Hoteles Barcelo, not the ITA, and that any payment made to ITA by the garnishees is simply a payment to Hoteles Barcelo; in doing so, the creditor relies on the principle that payment to a agent (the ITASA) is payment to the principal (Hoteles Barcelo).
  + However, the court has no evidence respecting the nature of the relationship between the purported principal and agent nor the applicable law governing that relationship.

## Employment Earnings & Exemptions

### Employment Earnings

* An instructing creditor can garnish the debtor's employment earnings from their employer.
  + "Employment earnings" means wages, salary, commissions, or renumeration for work *by an individual* (i.e., not a corporation) however computed [*CEA*, s. 77(1)(b)].
* A garnishee summons does not attach a debtor’s employment earnings that are ordinarily payable at the end of the pay period unless the summons is served on the garnishee [*CER*, s. 35.25(1)]:
  1. at least 5 days before the end of the pay period, in the case of a pay period that is 10 days or less, and
  2. at least 10 days before the end of the pay period, in the case of a pay period that is more than 10 days.
* Within 15 days from the day of service of the garnishee summons on a garnishee, the garnishee must [*CER*, s. 35.25(3)]:
  1. if able, serve a copy of the garnishee summons on the debtor, and
  2. deliver to the clerk a written response containing as much of the following as is applicable:
     1. a statement acknowledging or denying that the debtor is employed by the garnishee;
     2. a statement indicating the frequency with which the debtor’s employment earnings are paid to the debtor;
     3. either
        1. a certificate stating that the garnishee has delivered a copy of the garnishee summons to the debtor, or
        2. a statement setting out the reasons why the garnishee has been unable to deliver the summons to the debtor;
     4. if another garnishee summons against the debtor’s employment earnings has previously been served on the garnishee and is still in effect,
        1. a statement stating that another garnishee summons against the debtor’s employment earnings is in effect, and
        2. the expiry date of that other garnishee summons.
* Within 5 days after the end of the debtor’s last pay period in any month during which a garnishee summons is in effect, the garnishee must [*CER*, s. 35.35(4)]:
  1. pay to the clerk the amount of the debtor’s employment earnings for the month that are attached by the garnishee summons, less the garnishee’s compensation in the amount of $10, and
     1. A garnishee’s compensation but may be deducted from the debtor’s employment earnings only where the debtor’s net pay exceeds the debtor’s actual exemption [*CEA*, s. 81(1)(i)].
  2. deliver to the clerk a statement setting out [*CEA*, s. 81(1)(c)]:
     1. the debtor’s total employment earnings for the pay periods that ended during the month,
     2. the number of the debtor’s dependants, and
     3. the particulars of any amounts deducted in calculating the enforcement debtor’s net pay for the month;

#### *Trans Canada Credit Corp v Jarvis* (1997), 211 AR 156 (QB)

Facts:

* Trans Canada got a judgment against the defendant in Provincial Court in January 1997. It then had a writ of enforcement issued and garnisheed the defendant's employer, Cobra Maintenance Ltd ("Cobra"). Cobra responded in March 1997 saying that it was unable to garnishee any of the defendant's wages. He had apparently been laid off in February 1997 and already received his last paycheque. Avco then got a judgment against the defendant in Provincial Court and garnisheed Cobra in April 1997. In August and September 1997, Cobra paid $868 into court in three separate transfers because the defendant was rehired in August 1997. Trans Canada objected to any further dividends to Avco on the grounds that, since its garnishee came first, the payments should go to it.
  + *Note*: under s. 78(d) of the *CEA*, 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.

Issue and holding:

* Did Trans Canada's garnishee attach to the employment earnings paid into court by Cobra, such that Cobra's garnishee summons was of no effect under s. 78(d)? **NO**

Analysis:

* Under ss. 62 and 63(1) of the *Employment Standards Code*, an employer may temporarily lay off an employee for up to 60 consecutive days without terminating the employment relationship.
  + *Note*: plus, an interruption of less than 60 days in an debtor’s employment is not to be taken into account in determining the effect of a garnishee summons issued against their employment earnings [*CEA*, s. 81(1)(k)]*.*
* Section 78(a) of the *CEA* provides that any "current obligation or future obligation" is attachable by garnishment.

Rationale: (Master Funduk)

* The defendant did not work for Cobra under one, continuous employment contract; as such, when he was rehired in August 1997, he was operating under a new employment contract.
* When Trans Canada garnisheed Cobra, garnishment did not attach to the defendant's August 1997 employment contract because it had not yet crystallized, and *such a future contract of employment is neither a "current obligation" nor a "future obligation" within the meaning of s. 78(a)* of the *CEA*.

Notes:

* If a third party owes money to a debtor under a contract, a garnishment can attach to that obligation, but if the third party later comes to owe money to the debtor under a separate contract, the garnishment will not automatically attach to that latter obligation solely by virtue of the contracting parties being the same.
* The *Trans Canada* decision tells us what to do as a garnishee when served with a summons for a debtor who is currently not employed.
  + The garnishee summons must be kept on record, as it may attach wages owed to the debtor if the debtor is rehired (or returns to work).
  + If the debtor is rehired (or returns to work) *within* 60 days of the day he left work, the employment is treated as ongoing and wages must be paid into court (until the end of 2 years after the date of issue of the summons, or such longer period as required if served with notice of renewal of the summons).
  + If a debtor is rehired (or returns to work) *more* than 60 days after the last pay period, the garnishee summons ceases to have effect.
  + If an employer is served with a garnishee summons by another creditor after the debtor returns to work from a temporary layoff, that summons is ineffective if the debtor's employment was ongoing.
    - The employer should pay into court under the first garnishee summons and, with respect to the second, submit a response indicating that another garnishee summons has been served and is still in effect pursuant to s. 35.25(3)(b) of the *CER*.

### Exigible Earnings

* In any month during which a garnishee summons is in effect with respect to employment earnings, it will attach the amount, if any, by which the debtor's net pay for the month exceeds the debtor’s *actual employment earnings exemption* (see below) for the month [*CEA*, s. 81(1)(a)].
  + i.e., a garnishee summons attaches the amount remaining after a debtor's employment earning exemption is deducted from his or her net pay (Wood).
    - "Net pay" means, in respect of any month, the total employment earnings payable by an employer to a person in that month minus any deductions prescribed by regulation [*CEA*, s. 77(1)(h)].
      * The deductions to be made from a person's total employment earnings to determine net pay are: (a) income tax, (b) CPP contributions, and (c) EI contributions [*CER*, s. 39(1)].
    - To illustrate, the debtor's exigible earnings are calculated using the following formula:
      * TOTAL PAY 
        Minus DEDUCTIONS (z NET PAY) 
        Minus EXEMPTIONS 
        EXIGIBLE EARNINGS 
  + Under prior law, the instructing creditor had to serve the employer with a fresh garnishee summons before every pay period (Wood).
    - Thus, the *CEA* significantly reduced the expense of garnishment.

#### Employment Earnings Exemption

* A debtor's actual employment earnings exemption for any month is the sum of (i) the debtor's minimum exemption and (ii) 1/2 of any amount by which the debtor's net pay exceeds their minimum exemption [*CEA*, s. 81(1)(d)].
  + In other words, the *CEA* allows for an escalation of garnishee exemptions with an increase in income levels (*Fruh v Mair*).
    - Essentially, for every $100 of earnings over the minimum exemption, only $50 is available for garnishee of the debtors (*Fruh v Mair*).
    - This provides debtors with an added incentive to earn more than the bare minimum exemption.
* However, a debtor's actual employment earnings exemption for any month *shall not exceed their* *maximum exemption* [*CEA*, s. 81(1)(e)].

Not Exempt 
Maximum Exemption 
50% Exempt 
Minimum Exemption 
Exempt 
Net Pay 

* A debtor's minimum and maximum employment earnings exemption for any month must be determined in accordance with the regulations [*CEA*, s. 81(1)(f)].
  + Under the *CER*, the minimum exemption is $800 plus $200 per dependant [s. 39(2)(a)], while the maximum exemption is $2,400 plus $200 per dependent [s. 39(2)(b)].
    - "Dependent" means one or more of the following [*CER*, s. 36(a)]:
      1. the debtor's spouse or AIP;
      2. any child of a debtor who is under the age of 18 years and lives with them;
      3. any relative of a debtor or of the debtor's spouse or AIPs who, by reason of mental or physical infirmity, is financially dependent on the debtor;
         * "Relative" means (i) a spouse or AIP, (ii) a parent or grandparent, (iii) a child, (iv) a brother or sister, (v)a brother‑in‑law, sister‑in‑law, father‑in‑law or mother‑in‑law, (vi) an aunt or uncle, (vii) a first or second cousin [*CER*, s. 36(b)].
      4. any other person who the Court determines is financially dependent on the debtor;
    - A garnishee may assume that a debtor does not have any dependants other than those persons that the debtor has, in a written statement given to the garnishee, identified as their dependants [*CER*, s. 40(1)].
      * The garnishee, if acting in good faith, is entitled to rely on the written statement [*CER*, s. 40(2)].
  + By specifying the rate of exemption in the *CER* rather than the *CEA*, the legislature intended to make it easier for the government to vary the level of exemptions based on such things as fluctuations in inflation (*Fruh v Mair*).
    - However, the exemptions have not been updated in a long time, and have thus been considerably eroded by inflation.
* e.g., if a debtor has three dependents, their minimum exemption will be $1,400 ($800 + (3 x $200)) and their maximum exemption will be $3,000 ($2,400 + (3 x $200)). Thus, their actual exemption can be calculated as follows:

Debtor's 
Net Pay 
$1200 
$1600 
$3000 
$5000 
Amount 
Exempt 
$1200 
$1500 
$2200 
$3000 
Why? 
< $1400, so entirely exempt 
$1400 + (50% of $1600-$1400) = $1500 
$1400+ (50% of $3000-$1400) = $2200 
$1400+ (50% of $5000-$1400) = $3200> $3000 

* The court may, on application, modify the minimum or maximum employment earnings exemption to which an enforcement debtor is entitled [*CER*, s. 39(3)].
  + In considering such an application, the Court should consider at least [*CER*, s. 39(4)]:
    1. the family responsibilities of the debtor;
    2. the personal circumstances of the debtor;
    3. the conduct of the debtor in the carrying out of their financial affairs;
    4. the earnings of the debtor’s dependents.
* *If a debtor earns employment income from more than one source*, the court on application may reduce or eliminate their exemption that is applicable to any source of employment income [*CEA*, s. 81(1)(g)].
  + e.g., a debtor earns $800 per month from three different employers. These amounts fall below the minimum employment earnings exemption, which would frustrate the creditors attempts to garnish the debtor's earnings. Thus, the creditor could apply to reduce the exemptions allowed for each source of income to enable them to garnish the debtor's income.
* If a debtor's employment earnings from a source vary substantially between months by reason that the debtor is paid
  1. at intervals in excess of one month,
  2. at irregular intervals, or
  3. in irregular amounts,

the court, on application, may increase the minimum or maximum exemption for any particular month, so that the debtor's total exemptions over the course of the garnishment proceedings will approximate what they would have been if the debtor's earnings had been uniformly distributed over the relevant months [*CEA*, s. 81(1)(h)].

* An employer cannot suspend, lay off, or terminate an employee for the sole reason that garnishment proceedings are being taken against them [*Employment Standards Code*, s. 124].

##### *Fruh v Mair* (1996), 42 Alta LR (3d) 146 (QB)

Facts:

* Margaret Fruh alleged that Judith and William Mair converted trust funds for their own personal use. A consent judgment was granted in June 1991 in favour of Ms. Fruh and a writ of enforcement was filed in October 1991. In November 1991, the Mairs filed for bankruptcy. They were both discharged from bankruptcy (Ms. Mair in September 1993 and Mr. Mair in March 1994) but, under s. 178(1)(d) of the *Bankruptcy and Insolvency Act*, the discharge did not release them from their debt to Ms. Fruh. In October 1994, Ms. Fruh issued garnishee summons against Mr. Mair at Air Canada and Ms. Mair at the Alberta Children's Hospital. Under the prior law, they each received exemptions of $700 per month plus $140 for each of their four dependent children, giving them each an exemption of $1,260 per month. Per this arrangement, Ms. Fruh was garnishing nothing from the Alberta Children’s Hospital and was receiving an average of $442 per month from Air Canada. Effective January 1, 1996, s. 81(1)(d) of the *CEA* gave each debtor a *minimum* exemption of $1,600 per month [*CER*, s. 39(2)] plus 1/2 of the amount by which their net pay exceeded $1,600. Ms. Fruh argues that the court should reduce these exemptions.
* They have a net take home income on the average just over $3,500 per month. Mr. Mair's average monthly gross income is $3,100, which yields net pay of $2,268, while Mrs. Mair's gross income on average is $1,580, which yields net pay of $1,236.

Issue and holding:

* Should the amount of the minimum exemption available to Wilhelm and Judith Mair be reduced? **YES**

Analysis:

* Under the *CER*, a debtor's minimum exemption is $800 plus $200 per dependent and their maximum exemption is $2,400 plus $200 per dependent [s. 39(2)].
* Section 39(3) of the *CER* holds that the court, on application, may modify the minimum or maximum employment earnings exemption to which an enforcement debtor is entitled.
  + In considering such an application, the Court should consider at least [*CER*, s. 39(4)]:
    1. the family responsibilities of the debtor;
    2. the personal circumstances of the debtor;
    3. the conduct of the debtor in the carrying out of their financial affairs;
    4. the earnings of the debtor’s dependents.
  + Other matters the court may consider on such an application include:
    - Whether there are other exigible assets available to the judgment creditor to realize on in addition to or in place of garnishment.
    - How the debt arose.
    - Whether the debtor has made any reasonable proposal for the repayment of the debt.
    - Any extraordinary expenses required for the maintenance, education, and well-being of children including: medical, dental, orthodontic and optometric expenses.
    - Special expenses required to maintain dependents.

Rationale: (Master Laycock)

* Mr. Mair's exemption should be reduced to $1,300 per month to yield a garnishee amount in the range of $1,000 per month and leave the Mairs with net disposable income in amount of about $2,500 per month.
  + Ms. Fruh is entitled to have her money repaid, and it is in the interests of the debtors, whether they realize it or not, to repay their debt rather than be constantly faced with the uncertainty of civil enforcement, legal costs, court appearances, etc.
  + The Mairs have learned little as a result of going through the bankruptcy on how to properly budget and care for their financial affairs.
    - While they have decreased their mortgage expenses, they have increased their other expenses, such that they are currently overspending their earnings and are facing high credit card balances.
  + From November 1991 to November 1992, the Mairs, while in bankruptcy, had approximately $1,800 to pay their household expenses after mortgage payments.
    - Plus, from December 1, 1994 to June 1995, they were able to pay $1,000 per month to the clerk of the ABCA.

Notes:

* Provisions that operate to exempt various types of property that would otherwise be subject to garnishment are found in the *CEA* and *CER* as well as in other legislation; that said, whether legislation creates an exemption from writ proceedings will depend on its wording.
  + In *Re Laughlin*, the registrar in bankruptcy considered legislation providing for farm income stabilization payments received by a bankrupt under Alberta’s *Agriculture Financial Services Act*. He concluded that a provision stating that "compensation payments are not assignable" *did not* create an exemption.
    - The result would likely have been different if the legislation provided that payment may not be "attached" (e.g., *Employment Insurance Act*, s. 42(1)].
* Money payable to an enforcement debtor by the government or a Crown agency is not subject to garnishment under the *CEA* due to the doctrine of Crown immunity from judicial process.
  + Thus, wages payable to government employees can only be reached under special legislation (see Chapter 14).

##### *Bank of Montreal v Tchir*, 2003 ABQB 684

Facts:

* The debtor Tchir was an employee of Telus. In August 1998, a garnishee summons naming Tchir was served on Telus. On the first page of the garnishee summons was the following section:

A screenshot of a computer

Description automatically generated with medium confidence

The plaintiff creditor had only checked off the box indicating "employment earnings." The garnishee summons was renewed from 1999 to 2002. In November 2002, Tchir accepted a severance package from Telus in the amount of $5,000 cash and a $63,278 payment into Tchir's RRSPs. Telus takes the position that the garnishee summons did not bind the severance pay because the "employment earnings" box was checked and not the "money owing from other sources" box.

Issue and holding:

* Was Telus bound to include the severance pay in the calculations of what was paid into court? **YES**

Analysis:

* Employment earnings, which can be subject to garnishment, are defined in s. 77(1)(b) as "wages, salary, commissions or remuneration for work by an individual however computed."

Rationale: (Master Wacowich)

* The words, "remuneration for work by an individual however computed" in s. 77(1)(b) include any payment by a party relating to work performed by a debtor.
  + In *Wallace v United Grain Growers Ltd*, the SCC noted that the phrase "salary, wages or other remuneration" in the *Bankruptcy and Insolvency Act* is interpreted broadly to include severance pay.
    - Indeed, the Court noted that "salary, wages or other remuneration" encompasses virtually all benefits accruing to employees.
  + Severance stands in the place of the salary that the employee would have earned had the employee worked during the period of notice to which he or she was entitled.
    - The fact that the severance payment was made in a lump sum at the end of Tchir's employment does not alter the fundamental character of the money.
    - Telus was of the position that termination pay is a voluntary payment which does not constitute earnings; however, this is not the case, as severance pay reflects an *obligation* of the employer to the employee arising from the employment relationship.

#### Other Exemptions

* Property in a *registered plan* (e.g., RRSP, RRIF) is exempt from any enforcement process [*CEA*, s. 92.1(2)], but payments out of registered plans can be garnished.
  + Exemptions apply to payments out of a registered plan, similar to the employment earnings exemption [*CER*, ss. 40.1–40.2].
* Property in a *registered disability savings plan* and any payments out of it are exempt from any enforcement process [*CEA*, s. 92.1(3)].
* Property in a *registered education savings plan* and any payments out of it to assist the beneficiary to further their education at a post‑secondary level are exempt from any enforcement process [*CEA*, s. 92.1(3.1)].
* Life insurance policies are exempt from civil enforcement proceedings [*Insurance Act*, s. 666(2)].
* Obligations owed to an "Indian or band" when located "on reserve" [*Indian Act*, ss. 89–90]; see "Ch. 10: Indian Act Exemptions," *below*.
* Pension legislation often makes pension benefits exempt:
  + *Canada Pension Plan*, s. 65.
  + *Old Age Security Act*, s. 36(1.1).
  + *Employment Pension Plans Act*, s. 72.
  + *Teachers' Pension Plans Act* and *Teachers' Pension Plans (Legislative Provisions) Regulation*, s. 19.
  + *Canadian Forces Superannuation Act*, s. 83.
* Benefits paid pursuant to government support program may be exempt:
  + Income support payments under the *Income and Employment Supports Act* are exempt if the proceeds from the payment are not intermingled with any other funds of the debtor [CER, s. 37(2)(b)(i)].
  + Benefits paid under the *Assured Income for the Severely Handicapped Act* are exempt if the proceeds from the payment are not intermingled with any other funds of the debtor [*CER*, s. 37(2)(b)(ii)].
  + Payments from the Workers' Compensation Board are exempt unless the Board approves enforcement against the payments [*Workers' Compensation Act*, s. 141].

# Ch. 10: *Indian Act* Exemptions (ss. 89 & 90)

* + Under s. 89(1) of the *Indian Act* ("*IA*") the real and personal property of *an Indian or a band* situated on a reserve is *not subject to attachment, seizure, distress, or execution in favour or at the instance of any person other than an Indian or a band*.
    - This provision is an acknowledgment by the Crown that it is "honour‑bound to shield Indians from any efforts by non‑natives to dispossess Indians of the property which they hold *qua* Indians, i.e., their land base and the chattels on that land base" (*Mitchell v Peguis Indian Band*).

## Who is an "Indian"?

* + "Indian" is defined in s. 2(1) of the *IA* as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian."
    - The *IA* therefore does not apply to Inuit, Métis, or non-status Indians.
    - A corporation is not considered an "Indian" under the *IA*, even if it has its registered office on a reserve and even if its shareholders are registered Indians.
  + "Indian" in this section is used only as a statutory term that determines the application of the *IA*.
    - In other contexts, the term is generally considered offensive as applied to Canada's Indigenous people.

## Who is Prohibited from Enforcing?

* + Section 89 provides that property on a reserve is not subject to seizure "*in favour or at the instance of any person other than an Indian or band*."
    - This section in italics applies to (1) the Crown and (2) non-Indigenous secured and unsecured creditors; i.e., property on reserve is not subject to seizure by the Crown or by creditors.
      * In *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, the Court held that the *IA* exemptions serve two purposes:
        1. They guard against the possibility that one branch of government, through the imposition of taxes, could erode the benefits given by another.
        2. They ensure that the enforcement of civil judgments by non‑Indigenous people will not hinder status Indians in the enjoyment of advantages retained pursuant to treaties.
      * In *Taylor’s Towing v Intact Insurance Company*, 2017 ONCA 992, Intact Insurance Company ("Intact") hired towing companies owned by members of the Six Nations of Grand River to tow and store vehicles owned by it. The vehicles were stored on the Six Nations reserve. When a dispute over fees arose, Intact applied for an order permitting it to retrieve the vehicles. The Court held that *the purpose of the exemptions in s. 89 was to ensure that First Nations' use of property on their reserve lands is not eroded by the ability of governments to tax, or creditors to seize*. Since Intact was neither a creditor of the towing companies nor the Crown, they were not prevented from seizing the vehicles.
    - In maintenance enforcement proceedings, a payor spouse who qualifies as an "Indian" cannot claim an exemption under s. 89 against the director of the maintenance enforcement program if the payee also qualifies as an "Indian."
      * The execution, though carried out by the director of maintenance enforcement, is "in favour of or at the instance of an Indian."
    - In *R v Hope*, 2016 ONCA 648, an individual accused of second degree murder applied for release pending trial. A number of people from his community offered to stand as sureties, which would be required to pay money into court if the individual breached the conditions of his release or failed to appear in court. The sureties were status Indians, and the Crown raised this as one reason not to grant the accused’s application for release.
      * The Court rejected the Crown's argument. It held that the protection afforded to Indigenous peoples should not interfere with their right to secure release from detention.

## Location of Property

### Tangible Goods

* Where property subject to seizure is mobile goods, the relevant test for purposes of s 89 of the Indian Act is whether the "paramount location" of the goods is on or off the reserve as determined by the overall pattern of safeguarding and use.
  + All relevant factors are examined with a view to determining whether the asset bears a closer connection to an on-reserve or off-reserve location.
  + In *Wahpeton Dakota First Nation v LaJeunesse*, 2001 SKQB 146, the court’s application of the “paramount location” approach led to the conclusion that a school bus owned by an Indian resident on a reserve that was used to transport Indian children between the reserve and an off-reserve school was property situated on a reserve falling within the protection of s 89(1).
    - Accordingly, a creditor of the bus owner was not entitled to seize the bus to enforce a lien arising from repairs performed on the bus at the creditor’s off-reserve premises.
  + A debtor cannot deliberately relocate what are evidently off-reserve assets to an on-reserve location so as to take advantage of the section 89 exemption and can be restrained by injunction from doing so (*Nathanson, Schachter & Thompson v Sarcee Indian Band*).
  + Property belonging to an Indian that is involuntarily removed from a reserve by virtue of an illegal police seizure does not lose the protection from seizure under s. 89 (*Vincent c Quebec*).

### Intangible Property

#### *Williams v Canada*, [1992] 1 SCR 877

Facts:

* The appellant is a member of the Penticton Indian Band ("the Band") and resides on the Penticton Indian Reserve ("the Reserve"). In 1984, he received regular EI benefits for which he qualified benefits because of his former employment with a logging company and his employment by the Band in a "NEED" project. In both cases, the work was performed on the reserve, the employer was located on the reserve, and the appellant was paid on the reserve. During his employment, contributions to the EI scheme were paid both by the appellant and his employers. The benefits were paid by the regional computer centre of the Canada Employment and Immigration Commission in Vancouver. The appellant received a notice of assessment which included in his taxable income for 1984 the EI benefits. The appellant contested the assessment.

Issue and holding:

* Are the EI benefits "located" on a reserve for the purposes of s. 87(1) of the *IA*, making them exempt from taxation? **YES**

Analysis:

* Section 87(1)(b) of the *IA* provides that the personal property of an Indian or a band situated *on a reserve* is exempt from taxation.
* The proper approach to determining the *situs* of intangible personal property is for a court to evaluate the various connecting factors which tie the property to one location or another.
  + In the context of the exemption from taxation in the *Indian Act*, the connecting factors which are potentially relevant should be weighed in light of three important considerations:
    1. The purpose of the exemption;
    2. The type of property in question; and
    3. The incidence of taxation upon that property.
  + There are a number of potentially relevant connecting factors in determining the location of the receipt of EI benefits, including:
    1. The residence of the debtor;
    2. The residence of the person receiving the benefits;
    3. The place the benefits are paid; and
    4. The location of the employment income which gave rise to the qualification for the benefits.

Rationale:

* All the potential connecting factors with respect to the qualifying employment of the appellant point to the reserve; because the qualifying employment was located on reserve, so too were the benefits he received.
  + The employer was located on the reserve, the work was performed on the reserve, the appellant resided on the reserve, and he was paid on the reserve.

#### *Verreault v The Queen*, 2012 TCC 293

Facts:

* Arlette Verreault is an Aboriginal person from the Mashteuiatsh Reserve in Quebec. In 1998 and 1999, she worked for the Training Centre of Centre d'amitié autochtone de La Tuque Inc ("the friendship centre"), as an employee of Native Leasing Services ("NLS"). The main goal of the Training Centre was to assist Aboriginal people in obtaining secondary 5 equivalency certification within a period of six months. The head office and premises of the friendship centre were located in La Tuque, which was not a reserve. Ms. Verreault's main clients were Aboriginal people living off-reserve.

Issue and holding:

* Is Ms. Verreault's employment income "personal property situated on a reserve," making it exempt from taxation by virtue of s. 87 of the *Indian Act*? **NO**

Analysis:

* Section 87(1)(b) of the *Indian Act* provides that the personal property of an Indian or a band situated *on a reserve* is exempt from taxation.
* The proper approach to determining the *situs* of intangible personal property is for a court to evaluate the various connecting factors which tie the property to one location or another.
  + In the context of the exemption from taxation in the *Indian Act*, the connecting factors which are potentially relevant should be weighed in light of three important considerations:
    1. The purpose of the exemption;
    2. The type of property in question; and
    3. The incidence of taxation upon that property.
  + With respect to employment income, the relevant connecting factors are accepted to be:
    1. Location of the employer;
    2. Residence of the employee;
    3. Location of the work; and
    4. Nature of the work.

Rationale: (Boyle J)

* An analysis of the relevant factors reveals an insufficient connection between Ms. Verreault's employment income and a reserve.
  + Ms. Verreault's employer, NLS, is operated by an Aboriginal person on the Six Nations Reserve; however, little weight should be given to this connecting factor.
    - NLS had no involvement with the affairs of the friendship centre, and appeared to have served solely as a vehicle through which payment was made to Ms. Verreault to increase her prospects of an exemption.
  + During the years in question, Ms. Verreault lived in the town of La Tuque, not on a reserve.
    - This is not necessarily fatal to her claim in and of itself; it is not a requirement of s. 87 that the owner of personal property reside on a reserve.
  + The place where Ms. Verreault worked was located in La Tuque, not on a reserve.
    - She spent only about one or two days per month at one of three reserves promoting the work of the La Tuque Training Project.
    - The primary focus of both the friendship centre was providing assistance to Aboriginal people living in urban centers.
  + The only connection between the nature of Ms. Verreault's work and any reserve is that the majority of her clients were Aboriginal people who came from reserves and who may have returned afterwards.
    - Given the driving distances, it is assumed that none of the clients resided on the reserves during their six months of training in La Tuque.
    - Merely because the nature of employment is to provide services to Indians does not connect that employment to a reserve as a physical place.
      * It is not the policy of s. 87 to provide a tax subsidy for services provided to and for the benefit of reserves.

#### *Alberta (Workers' Compensation Board) v Enoch Band* (1993), 141 AR 204 (CA)

Facts:

* The Workers' Compensation Board ("WCB") assessed the Enoch Band ("the Band") for unpaid dues and registered the assessment in the Court of Queen's Bench, whereupon the assessment became enforceable by statute as a judgment against the Band. In anticipation of the difficulty of enforcing a judgment against property of an Indian Band situated on a reserve, the WCB assigned its judgment to Mr. Barter, who was an Indian. The assignment agreement provided that 85% of any amount collected by Barter would be remitted to the WCB, while Mr. Barter would retain 15%. Mr. Barter issued and served a garnishee summons on the Edmonton branch of Peace Hills Trust, where the Band held an account. The deposit agreement between the Band and Peace Hills Trust contained this provision:

20. … it is understood and agreed that although the Account … may be serviced or dealt with off an Indian Reserve, the Account … shall be … deemed to be held at the head office of Peace Hills on the Samson Indian Reserve…

Issues and holding:

1. Was the assignment agreement effective to allow Mr. Barter to enforce the judgment as an Indian? **NO**
2. Was the deposit account held by an Indian Band at an Edmonton branch of Peace Hills Trust property situated on a reserve for purposes of the s. 89 exemption? **NO**

Analysis:

* A bank account is situated for legal purposes where it is payable, and it is payable where it would be paid and where the holder would seek payment in the ordinary course of business (*R v Lovitt*).

Rationale: (Côté JA)

1. Section 89 allows for enforcement proceedings against on-reserve property "in favour ... of" an Indian; while Mr. Barter is an Indian, the assignment to him did not change the fact that enforcement of the judgment was in favour of the WCB, since the vast majority of the money collected would be paid to it.
   * As a result, *if the account was situated on a reserve*, the s. 89 exemption will be triggered.
2. The site of the account was at the Edmonton branch of Peace Hills Trust and *not* on any Indian reserve; as a result, the s. 89 exemption does not apply and the WCB is entitled to enforce their judgment through garnishment of the Edmonton Peace Hills Trust account.
   * It is clear that the only place at which the Band could require payment out from its account was at the Edmonton branch; that was the only place the parties could deal with each other, and there is no evidence they ever dealt with each other anywhere else.
   * While there is a provision in the account agreement deeming that the account was located elsewhere, that provision is ineffective against the WCB as a third party.
     + An Indian or a Band cannot render all of his or its property exempt simply by signing a contract with someone else and deeming his or its property to be where it is not.

Notes:

* In *Joyes v Louis Bull Tribe #439*, 2009 ABCA 49, the Court confirmed that, instead of the "connecting factors" test, courts should use the concrete common law rule from *R v Lovitt* to determine the situs of bank accounts.
* Côté JA noted that if the WCB had made an ordinary assignment with no strings attached and a lump sum consideration already paid to a person who is an Indian within the meaning of the *Indian Act*, the assignee *might* have been able to enforce the judgment against assets located on reserve.
  + HOWEVER, in *Ferguson Gifford v Lax Kw’Alaams Indian Band*, 2000 BCSC 273, a law firm obtained a judgment against the Lax Kw’Alaams Indian Band for unpaid legal fees and assigned it absolutely to Mr. Helin, a status Indian. Mr. Helin then served a garnishee summons on the band’s account at a branch of the TD bank located on a reserve. The court held that *the assignment was not effective to avoid the s. 89 exemption*, relying on the general principle that the assignee of a debt takes subject to the equities that exist between the assignor and the debtor. What the law firm assigned to Mr. Helin was a judgment which had a limitation on the execution measures that could be taken to enforce it.
    - The court cited s. 36 of BC's *Law and Equities Act*, but Alberta has a similar provision in s. 20 of the *Judicature Act*.

## Section 90

* Personal property shall be deemed always to be situated on a reserve that was [*IA*, s. 90(1)]:
  1. purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or
  2. given to Indians or to a band under a treaty or agreement between a band and Her Majesty.
* "Her Majesty" in s. 90 refers only to the Crown in right of *Canada*.

### *McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58

Facts:

* The God's Lake Band is a 1909 adherent to Treaty No. 5. In it, the Crown agreed, *inter alia*, to protect traditional activities on the surrendered land, provide annual grants, and maintain schools. Since then, the God's Lake Band and the federal government have signed a Comprehensive Funding Arrangement ("CFAs"), pursuant to which funds are deposited in the Band's *off-reserve* account on a monthly basis. The respondent, a creditor of the band that has obtained a consent judgment and garnishment order, is seeking to seize the funds. The CFA funds are designed to be spent for certain designated purposes. One of these purposes — on-reserve education — appears to be closely related to the Crown’s obligations under Treaty No. 5. Others seem only indirectly related to such obligations. Still others seem to fall entirely outside the treaty obligations.

Issue and holding:

* Do the words "personal property … given to Indians or to a band under a treaty or agreement between a band and Her Majesty" in s. 90(1)(b) of the *IA* apply to the funds provided under the CFA? **NO**

Analysis:

* Precedent, principle, and policy all suggest that Parliament's intent was that the word "agreement" in s. 90(1)(b) should be confined to agreements that flesh out treaty commitments of the Crown to Indians.
  + In *Mitchell*, the SCC held that the purpose of the exemption provisions in the *IA* was to protect what the Indian band was "given" in return for the surrender of Indian lands (i.e., property that enures to Indians pursuant to treaties and their ancillary agreements).
  + The principle of associated meaning holds that, when two or more words linked by "and" or "or" serve an analogous function within a provision, ambiguity in one of them may be resolved by having regard to the other(s).
    - This principle can be applied to clarify the meaning of "agreement" in s. 90(1)(b); the terms 'treaty' and 'agreement' take colour from one another.
  + It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain.
    - That said, if "agreement" is interpreted broadly to cover all types of agreements between Indians and the government, the word "treaty" has no role to play (since a treaty is a type of agreement).
      * This supports the view taken that "agreement" in s. 90(1)(b) should be read more narrowly as supplementing "treaty."
  + Provincial credit regimes create important rights for debtors and creditors; in the absence of express language, it is not the place of courts to read the *IA* exceptions in such a way that would significantly interfere with these regimes.
  + A further reason that the word "agreement" in s. 90(1)(b) should be read narrowly is that the section limits the ability of Aboriginal peoples to access credit.
    - The *IA* exemptions serve as a significant deterrent to financing business activity on-reserve.
  + Section 90(2) of the *IA* specifies that every transaction purporting to pass title to property deemed to be situated on a reserve by s. 90(1) is void unless the transaction is entered into with the consent of the Minister.
    - If ministerial consent is required for *every transaction* that deals with property deemed to be situated on reserve by s. 90(1), a broad interpretation of "treaty or agreement" could result in significant delays in the delivery of needed programs and services to band members.
  + When Parliament enacted the current exemption provisions in 1951, self-determination had emerged as an aspiration, and bands were beginning to embark on projects to improve their economic situation.
    - As such, Parliament enacted provisions which allowed Indians to enter commercial arrangements for their own economic advantage, while maintaining some basic protection for property situated on reserves and funds flowing from treaty obligations.
    - By contrast, the predecessor of s. 90(1) was very broad, reflecting a paternalistic desire to protect Indians and their property from exploitation.
      * They protected from seizure "presents given to Indians," "annuities or interest on funds," and "moneys appropriated by Parliament, held for any band of Indians," as well as any property purchased with those funds.
    - Parliament's documented desire to move away from a purely paternalistic approach and encourage Indian entrepreneurship and self-government is consistent with an intention to confine protection from seizure to benefits flowing from treaties.
      * Exempting property broadly would be inconsistent with self-sufficiency because it would deprive Indian communities of a cornerstone of economic development.
  + While it may seem confusing that Parliament added the word "agreement" in s. 90(1)(b) instead of limiting itself to "treaty," it must be remembered that treaty promises are often couched in very general terms and that supplementary agreements are needed to flesh out the details of the commitments undertaken by the Crown.
    - On this view, the word "agreement" was added to ensure that personal property given pursuant to a treaty would be protected; creditors would not be able to argue that property conferred in fulfillment of the treaty was not protected because the obligation was not expressly spelled out in the original treaty.

Rationale: (McLachlin CJ)

* The record does not disclose the precise relationship between the funds in question and the treaty obligations of the Crown.
  + The fund created by the CFA is blended and is thus difficult to characterize for the purposes of applying s. 90(1)(b).
    - It includes funds provided by the federal government to enhance the self-sufficiency and living standards of the Band in a wide range of areas.
  + While the solution where blended funds are concerned is usually to require the party claiming protection to trace the protected portion of the fund from unprotected portions, *the record does not permit us to delineate the extent of the Crown's treaty obligations to determine whether, and to what extent, some of the funds may flow directly from those obligations*.
* The burden is on the Band to demonstrate that the CFA is an "agreement" that gives effect to the Crown's treaty obligations; since they have not done so, the Court cannot find that s. 90(1)(b) operates to protect the funds at issue.

Dissent: (Binnie J)

* The word "agreement" in s. 90(1)(b) should include agreements between the Crown and Indigenous to provide public services (i.e., education, housing, health, welfare, and other government-type essential services on reserve), regardless of whether these agreements are ancillary to treaties (i.e., the "public sector services funding approach").
  + The word "agreement" in s. 90(1)(b) forms part of a larger legislative initiative taken to protect and encourage the survival of reserves as liveable communities and to ensure that public monies "given" to an Indian band for essential public services on the reserve are used for the intended purposes.
    - Only a purposeful as opposed to restrictive reading of s. 90(1)(b) will accomplish that objective.
    - *Note*: McLachlin CJ criticizes this approach for engaging in political decision-making.
  + This approach would avoid tying the exemption to the historical anomalies created by the treaty-making process.
    - It would treat non-treaty bands the same as the bands who did sign treaties.
      * By contrast, if s. 90(1)(b) applies only to treaties and agreements that flesh out treaty commitments, then funding provided to treaty-less bands would not be protected.
        + Such a lack of equity ought not to be attributed to Parliament absent clear language.
      * If a primary purpose of the *IA* exemptions is to protect reserves and its members from dispossession, why should s. 90(1)(b) not be interpreted as applicable to all reserves?
    - No dramatic consequences would flow from the serendipitous differences in the wording of treaties across Canada.
      * By contrast, McLachlin CJ's approach would result in a checkerboard of exemptions across Canada determined by the vagaries of the treaty-making process.
        + e.g., it is difficult to identify any legislative purpose that would be served by protecting payments for on-reserve medical services to bands under Treaty No. 6 (which has a medicine chest clause) but not bands under Treaty No. 5 (which does not mention a medicine chest).
        + e.g., Treaty No. 6 happened to mention education, but most of the numbered treaties do not; that said, on what rational basis would Parliament intend scholarship monies to be garnisheed in the case of some Indian students but not others?
    - The definition of treaty (to which "agreements" must be found to be "ancillary") is elastic.
      * On what basis can it be said that the extensive modern treaty benefits should be free of tax and execution, whereas the CFA benefits do not enjoy such exemptions unless they can be said to be "ancillary" to some 19th century document?
  + This approach puts the focus on the location where the needs of the band are to be met (the reserve) rather than on where the federal funds voted by Parliament for that purpose happen to be on deposit (likely off-reserve).
  + This approach avoids differential treatment of CFA funds depending on whether the band is rich enough to attract to its reserve a branch of a deposit-taking financial institution
    - By contrast, under McLachlin CJ's approach, bands that are too poor and too remote to have an on-site bank branch in which to deposit their CFA funds must put them in off-reserve accounts that may be subject to taxation and seizure.
  + A more restrictive interpretation of "agreement" is more likely to *impede* Aboriginal self-government than foster it.
    - A band concerned about such matters as taxation seizure and garnishment would be better off letting the government provide services directly to the reserve rather than attempting to provide the public services themselves through CFA funding.
  + While there will be issues of interpretation as to whether to characterize agreements as falling within government-to-government transfers for public on-reserve services, these can be resolved on the basis of the "generous and liberal" principles of statutory interpretation favourable to Indigenous peoples.
  + The Attorney General expressed concern that if s. 90(1)(b) included CFA funds then s. 90(3) would require ministerial approval for their disbursement; however, the CFA itself is ministerial authority for disbursement.
  + Unlike McLachlin CJ's approach, this approach does not impose an onus on the band to prove which parts of CFA funding on deposit at any particular time "flesh out" treaty commitments of the Crown and which parts of CFA funding do not.
    - This is a burden which bands cannot discharge, given the deposit of blended monthly payments which are not segregated on a project-by-project basis.
  + The objective of predictability and certainty in economic relations between First Nations and non-Indigenous people is better served by a categorical denial of execution or garnishment of CFA funds.
    - Litigation in the general run of cases over what is or what is not sufficiently connected to a treaty to qualify for s. 90(1)(b) protection will drain First Nation finances.
  + McLachlin CJ's approach would permit creditors in certain instances to garnish CFA funding meant for essential public services, which could create situations where either (1) band members will be forced to live in third world conditions or (2) the federal government will step in to fund the delivery of the essential services it had already funded under the CFA; both of these are unacceptable outcomes.
  + While McLachlin CJ argues that reserves would benefit by greater access to credit, this ignores the fact that communities like God's Lake are too poor and too remote to have on-reserve banking facilities.
  + If a narrow interpretation of s. 90(1)(b) is adopted, only the more economically developed bands served by on-reserve banks will paradoxically receive their CFA funds free from the threat of enforcement.
    - *Note*: McLachlin CJ responds that, even if there is no deposit-taking financial institution on-reserve, it is open to the band to deposit its funding in financial institutions on other reserves.
* Because the CFA between the God's Lake Band and the federal Crown is an agreement to provide essential services on-reserve, it is a "treaty or agreement between a band and Her Majesty" within the meaning of s. 90(1)(b) of the *IA*, and it follows that funds flowing to the band from the Crown under the CFA should be exempt from garnishment.

Notes:

* The majority acknowledged that Indian bands may receive property in their capacity as partners in policy implementation, as representatives of local interests, or as administrators of public spending destined to improve conditions in Indian communities.
  + While all of this funding is important, the *IA* singles out treaty funding as representing a different kind of property that benefits from special protections.

## Work Arounds

* A *leasehold interest* situated on reserve *is* subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution in favour of or at the instance of persons other than an Indian or band [*IA*, s. 89(1.1)].
* The s. 89 exemption does not apply to conditional sales contracts, allowing Indians to buy personal property on credit.
  + A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property remains in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve [*IA*, s. 89(2)].
* If a debtor and creditor sign off on a contract that deems where property will be located for the purpose of s. 89, it is likely enforceable, *but only against the parties to the contract*.
* Incorporation can allow Aboriginal entrepreneurs to avoid the obstacle that s. 89 places on their ability to access financing.
  + This is because corporations do not enjoy the protection offered by s. 89, and can have their on-reserve assets seized by creditors.
* An Indian or band could get around the s. 89 exemption by borrowing money and having a third party guarantee payment.

# Ch. 11: Enforcement Against Partial or Limited Interests

* + The *CEA* ushered in a principle of universal exigibility; that is, all of the debtor's property, subject to any exemptions, are available to creditors to satisfy a judgment debt [*CEA*, s. 2(b)].

## Joint Tenancy

* Writ proceedings against a debtor's interest as a joint tenant *sever the joint tenancy* when an agency has entered into an agreement to sell the debtor’s interest [*CEA*, s. 76(1)].
  + e.g., a debtor and their spouse jointly own land worth $400,000. Writ proceedings sever the joint tenancy, and the debtor and spouse become tenants in common as soon as the agreement for sale is reached. The civil enforcement agency can then enforce against the debtor’s 50% interest of land (i.e., $200,000), subject to debtor’s $20,000 claim for an exemption.
    - It may be difficult to market a partial interest in property; thus, to maximize sale proceeds, the spouse may agree to sell the property entirely.
    - If, after sale of the debtor's 50% interest, the spouse co-owns the property with a buyer in equal shares, they could apply to terminate co-ownership under s. 15 of the *Law of Property Act*.

### Divisible Property

* A writ may be enforced against the interest of a tenant in common of money or a divisible asset.

#### *Glavine v Biletsky*, 2019 ABCA 291

Background:

* In *Royal Bank of Canada v Bisset*, 2005 ABQB 700, a house was voluntarily sold by joint owner spouses who had separated and agreed to share the proceeds of sale equally. The mortgage was paid out and the remaining proceeds were claimed by judgment creditors of the husband.
  + In his analysis, Master Alberstat relied on *Perry v Perry Estate*, 2001 ABQB 399, where the court held that a joint tenancy can be severed in one of three ways:
    1. By an act of one person acting on his or her 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.
  + Master Alberstat concluded that the joint tenancy was severed with respect to the proceeds by agreement of the parties and that the husband’s creditors were therefore not entitled to claim any part of the share belonging to the wife. In the course of his analysis, Master Alberstat asserted that "If there is no severance then the full amount of the proceeds may be attached. If there is a severance then only one half is available for distribution." *This first proposition is clearly overruled in Glavine v Biletsky*.

Facts:

* A husband and wife owned a home as joint tenants. The home was subject to a mortgage which they both executed. The couple defaulted and the home was foreclosed upon, but a $160,000 surplus remained after the mortgagee was paid out. The appellant, an enforcement creditor of the husband (but not the wife), had registered a writ against title to the home. He sought to enforce his judgment against the surplus proceeds of the house sale. Enforcement was permitted on just 1/2 of the funds paid into court on the basis that the wife's interest in the foreclosure surplus could not be seized to satisfy the husband's debts. The appellant brought an application before a Master to have the remaining 1/2 of the surplus funds paid to the enforcement creditors.

Procedural history:

* The Master denied the appellant's application and directed the remaining half of the surplus be paid to the wife. The appellant than appealed the Master's decision, but the appeal was dismissed by a chambers judge.

Issue and holding:

* Can the enforcement creditor enforce against the wife's interest in the surplus funds? **NO**

Rationale: (The Court)

* Under s. 33(2) of the *CEA*, writs filed by enforcement creditors against jointly-owned properties bind only the enforcement debtor's exigible interest in the land.
  + i.e., prior to any sale, while the land is held in joint tenancy, the enforcement creditor's writ attaches only to his or her debtor’s interest in the land, less the value of any exemptions.

Notes:

* Under s. 76(1) of the *CEA*, writ proceedings against jointly-owned property sever the joint tenancy when an agency has entered into an agreement to sell the debtor’s interest. Since the house in *Glavine* was not sold pursuant to writ proceedings, it was an open question as to whether the foreclosure sale severed the joint tenancy. However, *the court found it unnecessary to address this question*.
  + Severance is thus not as important now as it was before *Glavine v Biletsky*, because even if a joint tenancy is not severed, the court is going to treat it as if it was.

### Indivisible Personal Property

* In *Graham v Canadian Western Bank*, 1999 ABQB 647, the court offered some guidance on how writ proceedings may be executed against a joint interest in *goods*. In that case, a creditor who held a security interest in the debtor’s interest in a trailer sought to enforce the secured debt through seizure and sale of the trailer. The trailer was owned jointly by the debtor and his wife.
  + Master Laycock concluded that the secured creditor could not sell the trailer and then divide the sale proceeds because that would interfere with the rights of wife to the use and possession of the trailer. He noted that a joint owner may be estopped from asserting a right of possession if she allows the other joint owner to appear to be the sole owner, but there was no evidence of that in this case.
  + *Note*: although the enforcement debtor's interest may in principle be seized and sold, with the buyer acquiring title as tenant in common with the other owner, nobody is going to want to co-own a vehicle with a stranger.

### Death of the Debtor

* If a writ is registered against land in which a debtor holds an interest in joint tenancy and the debtor dies, the writ shall continue to bind the land in an amount equal to the lesser of [*CEA*, s. 76(2)]:
  1. the amount owing on the writ, and
  2. 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 (measured from the time the debtor dies).
  + Section 76(2) does away with survivorship rights of the surviving joint tenant where writ proceedings have been taken against that joint tenant's interest (*Glavine v Biletsky*).
    - e.g., a debtor and their spouse jointly own land worth $500,000. A writ is registered against the land for $45,000, but the sale process was not commenced before the debtor died.
      * Under prior law, the right of survivorship of the other joint owner defeated the binding effect of the writ in the event of the enforcement debtor's death (Wood).
      * However, under s. 76(2), the writ continues to bind the debtor's interest in land; namely, it binds the lesser of (1) the amount owing on the writ ($45,000) and (2) the value of the debtor's interest if the joint tenancy severed immediately before their death ($250,000).
* Where a debtor dies, the property that would be exempt if they were alive remains exempt from writ proceedings against the debtor's estate *for the period of time that the property is required for the maintenance and support of the deceased debtor’s dependents* [*CEA*, s. 92(1)].

## Matrimonial Property

### *Maroukis v Maroukis*, [1984] 2 SCR 137

Facts:

* Despina ("the wife") and Apostolos ("the husband") Maroukis married in 1965. They acquired a matrimonial home as joint tenants in 1975. The parties separated in October 1978, and in November 1978, the wife applied for a division of family assets under Ontario's *Family Law Reform Act* ("the Act"). In July 1979, the Bank of Nova Scotia ("the Bank") filed writs against the husband. In October 1979, Luchak J ordered that the matrimonial property vest in the wife. Hence, the Bank filed their writs after the separation and commencement of proceedings under the Act but before the making of the order in October 1979.

Issue and holding:

* Did the October 1979 order vest title to the home (1) subject to the Bank's claim or (2) free from the Bank's claim? **(1)**

Rationale: (McIntyre J)

* Title to the matrimonial home vested in the wife only on the making of the October 1979 order.
  + Each spouse has the right under the Act to apply for a division of family property, but until the order is made, the right is only a personal right to require the court to determine ownership of family assets.
    - The vesting in a spouse of the specific property making up his or her respective share takes place upon the date the court order is made.
  + There is no authority in the Act for an order retroactively vesting property in a spouse.

Notes:

* This principle has subsequently been applied in Alberta cases where neither party to matrimonial property legislation filed a CLP (see *Groot v Kotake*, 2014 ABQB 53).
  + In *Phillips v Phillips*, 2007 ABQB 131, the wife was 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 were registered against title to the house AFTER the order but BEFORE the house was transferred into the wife's name.
    - Lee J held that the court order extinguished the husband's beneficial interest in the property before the writ was registered. As such, the creditor could not enforce against the house, since a writ can only attach the interest of the enforcement debtor, which in this case was subject to the wife's prior unregistered interest (see *Jellett v Wilkie*).

### Markey v Revenue Canada Taxation, 1997 ABCA 288

Facts:

* Under s. 35(1) the *Family Property Act*, a spouse who commences matrimonial property proceedings may file a certificate of lis pendens ("CLP") against the certificate of title to land.
  + If a CLP has been registered, any instrument that (a) is registered after the registration of the CLP and (b) purports to affect land included in the certificate of title is subject to the claim of the spouse who filed the CLP [*FPA*, s. 35(3)].
* Mr. and Mrs. Markey separated in 1992, at which point they jointly owned a matrimonial home. In early December 1993, Mrs. Markey began an action under the *Matrimonial Property Act*, and on December 19, 1993, she filed a CLP against title to the property. On June 11, 1996, the CRA filed a writ of enforcement against Mr. Markey and registered it against title to the matrimonial home. On July 31, 1996, Mr. and Mrs. Markey resolved their matrimonial property dispute through an agreement in which Mr. Markey agreed to transfer the land to Mrs. Markey. The agreement was incorporated into a consent order. The order provided that Mr. Markey alone would be responsible for all his debts owing to Revenue Canada. The land was duly transferred to Mrs. Markey, who then applied for an order declaring the writ to be invalid and unenforceable and seeking its discharge from title.

Issue and holding:

* Does Mrs. Markey's interest in the matrimonial home have priority over the CRA's writ? **YES**

Rationale: (Hunt JA)

* Section 35 of the *Matrimonial Property Act* (now the *Family Property Act*) precludes the defeat of the CLP by a subsequently registered writ of enforcement.
  + Section 35 specifically states that any subsequently-registered instrument is "subject to the claim of the spouse who filed the [CLP]."

Notes:

* This case was distinguishable from *Maroukis* because there was not a section in Ontario's *Family Law Reform Act* akin to s. 35 of Alberta's *Matrimonial Property Act*.
* This case tells us that, if you are involved in family law litigation, you should file a CLP against title to the family home to protects your claim vis-a-vis creditors who register writs of enforcement against title to the home while litigation is ongoing.
  + This case also tells us that, if you are acting for a creditor, you are enforcing against land owned by a debtor, and you note that there was a CLP filed before your writ, you need to do further investigations.
* In *Nelson v Nelson*, 2001 ABQB 732, the court confirmed that s. 35 of the *Matrimonial Property Act* allows a spouse to register a CLP against the other spouse’s title and interest in real property, such that an interest registered subsequent to the certificate is deemed to be subordinate to any interest the registering spouse may have once the matrimonial property distribution has been made.
  + However, there is no mechanism set out in the *Matrimonial Property Act* for registering a potential matrimonial property interest against the *personal property* of the other spouse.

## Trust Property

* A trust involves the simultaneous existence of two property interests in the same asset: the trustee holds legal title but the beneficiary under the trust is the owner in equity (i.e., the beneficial owner).
  + A writ against the beneficiary of a trust can be enforced against trust property.
    - Section 2(b) of the *CEA* states that all property of a debtor is subject to writ proceedings except as otherwise provided, and "property" is defined in s. 1(1)(ll)(ii) as including "anything regarded in law or equity as … an interest in property."
    - A creditor can enforce a trust by garnishing as a "future obligation" [*CEA*, s. 77(1)(c)] or appointing a receiver to receive payment or take possession of the trust property once the beneficial interest vests [*CEA*, s. 85].
    - However, *the beneficial interest can only be taken or sold subject to any terms of the trust*.
      * If certain contingencies have to be satisfied before the beneficiary's interest vests, the creditor is going to be subject to those same contingencies.
        + If the trust is discretionary, the trustee can refuse to pay the creditors.
      * In *Southway Transport Ltd v Alberta Re-Tech (1995) Ltd*, 1999 ABQB 430, a garnishee summons was served on a lawyer, Laidlaw, who held funds in trust for his client, Alberta Re-Tech Ltd. The funds were subject to an undertaking made by Laidlaw to another lawyer that they were held to the credit of that lawyer’s client pending settlement or disposition of the client’s claim against Alberta Re-Tech.
        + Master Waller held that Laidlaw owed an "obligation," as defined by the *CEA*, to Alberta Re-Tech, making the funds in trust subject to garnishment. However, *they were held under the terms of the undertaking*, and were to be paid into court only if the person in whose favour the undertaking was given did not obtain judgment against Alberta Re-Tech or obtained judgment for less than the amount in trust, in which case the balance remaining after satisfaction of the judgment was to be paid into court under the garnishment.
  + A writ against a trustee cannot be enforced against trust property.
    - Writs bind the owner's title subject to the equitable interest of the beneficiary (*Drebert v Coates*).
      * Therefore, if a trust arises before a writ binds the property of the trustee (i.e., before the writ is registered), the writ cannot be enforced against that property.
      * However, *if the trust arises after the binding effect of the writ, the writ will have priority over the interest of the beneficiary* and can be enforced against the property.
        + i.e., whether a writ can be enforced against trust property depends on when the property became subject to a trust.
        + e.g., the debtor was unjustly enriched at expense of X. The next day, the creditor registers writ against the debtor at the PPR. The day after that, the court declares that X entitled to constructive trust in the debtor's property. If the court holds that the constructive trust "arose" at time of unjust enrichment, it will defeat the interest of the subsequent creditor, but if it holds that it arose at time of court order, it will take the debtor's property subject to the writ.

### *1003166 Alberta Ltd v 868609 Alberta Ltd*, 2005 ABQB 729

Facts:

* The plaintiffs commenced an action against Roy Chapman in November 2003, alleging that he breached his fiduciary duty to them by secretly taking profits. The plaintiffs sought a declaration that they were beneficiaries of a constructive trust in certain lands owned by Mr. Chapman and the Chapman companies ("the Beaumont lands"). On November 12, 2003, the plaintiffs registered a Certificate of Lis Pendens ("CLP") against the title to the Beaumont lands. Duncan & Craig LLP ("the Firm") began acting for Mr. Chapman and the Chapman companies in this lawsuit in 2003. The Firm ceased to act for them on December 1, 2004. On December 13, 2004, it obtained a Certificate of Taxation for its unpaid legal fees against Mr. Chapman and the Chapman companies. On January 7, 2005, it obtained an order allowing it to enforce its taxed accounts as a judgment. On January 25, 2005, it registered a writ of enforcement against the Beaumont lands at the Land Titles Office. On May 24, 2005, the court issued its decision in the action, holding that the plaintiffs were beneficiaries of a constructive trust in the Beaumont lands. The plaintiffs now ask the court to discharge the Firm's writ against the Beaumont lands on the basis that the plaintiffs have a proprietary interest in those lands which originated at the time of Mr. Chapman's wrongdoing (before the Firm registered its writ).

Issue and holding:

* Do the plaintiffs have a proprietary interest in the Beaumont lands that has priority over the Firm's writ of enforcement? **YES**

Analysis:

* While the court has discretion as to whether it should recognize a constructive trust and also on the effective date of such trust, the prevailing view is that the constructive trust arises when the unjust enrichment occurs.
  + When exercising its discretion, the court should examine the overall circumstances, including the competing equities, the dealings of the parties and their conduct, and the profits that will be available to the plaintiffs.

Rationale: (Veit J)

* On a principled analysis of the competing claims of the plaintiffs and the unpaid Firm, the plaintiffs are entitled to the benefit of a constructive trust that will defeat the claims of the law firm; in other words, the constructive trust arose *at the time of the wrongdoing*.
  + The plaintiffs formally advised all potential creditors who subsequently came to deal with Mr. Chapman and his companies (including the Firm) that Mr. Chapman may not be the owner of those lands and that they should therefore take care to protect their interests as creditors.
    - Therefore, reasonable investigation would have informed the Firm of their potential jeopardy as creditors.

### *Glover v Kumar*, 2012 ABQB 516

Facts:

* Sandra Lachance and Ken Glover bought a house in Calgary in 1999. The house was registered in their name as joint tenants. In 2004, Ms. Lachance and Mr. Glover faced financial difficulties. They met with Kevin Kumar for assistance in refinancing the mortgage on the house. They provided Mr. Kumar with a transfer of title to facilitate the acquisition of a new mortgage on the understanding that title would be transferred back to them once the mortgage was in place. They also sent money to Mr. Kumar so that he could make the new mortgage payments. Title to the house was transferred to Joe Ramlal, who obtained a mortgage from Scotia Mortgage Corp. Mr. Kumar undertook to have title transferred back to Ms. Lachance and Mr. Glover, but he fraudulently arranged to have title registered in their names along with his own. Ms. Lachance and Mr. Glover then discovered that Mr. Kumar disappeared after having failed to make the payments due on the new mortgage with funds given to him for that purpose. In 2007, writs against Mr. Kumar were registered against title to the land. In 2012, Mr. Glover applied for order declaring that Mr. Kumar has no interest in the land and an order directing the Registrar of Land Titles to reissue the title in the names of him and Ms. Lachance clear of the writs.

Issue and holding:

* Does Mr. Kumar have an actual interest in the lands to which the writs can attach? **NO**

Analysis:

* Based on the principle that equity presumes bargains and not gifts, a presumption of a resulting trust is the general rule that applies to gratuitous transfers.
  + When a gratuitous transfer is made, the onus is on the person receiving the transfer to demonstrate that a gift was intended; otherwise, the transferee holds that property in trust for the transferor.

Rationale: (Hawco J)

* Mr. Kumar held the property pursuant to a resulting trust, *which arose immediately upon transfer*.
  + When Mr. Glover and Ms. Lachance gratuitously transferred the land to Mr. Kumar, a presumption of resulting trust arose; that presumption has not been rebutted.
  + As such, Mr. Kumar had no interest in land to which writs of enforcement could bind, and the Registrar should reissue title to the house in the names of Mr. Glover and Ms. Lachance.

### Charitable Purpose Trusts

* A charitable purpose trust exists where property is held in trust by an enforcement debtor, not for the benefit of an identified beneficiary, but for the fulfilment of a charitable purpose defined by the settlor of the trust property.
* In *Re Christian Brothers of Ireland in Canada* (2000), 47 OR (3d) 674, the ONCA held that property held by a corporation as trustee under a charitable purpose trust was available to satisfy a judgment obtained against the corporation in connection with activities that were not related to the purpose of the trust.
  + However, in *Rowland v Vancouver College Ltd* (2001) 205 DLR (4th) 193, the BCCA agreed that property held subject to a charitable purpose trust is available to satisfy judgments arising from the trustee’s conduct in administering that trust, but concluded that such property is *not* available to satisfy judgments arising from the trustee’s conduct of charitable work unrelated to the trust.

## Other Interests

### Property Under the *Dower Act*

* The *Dower Act* was enacted as a response to the economic vulnerability of married farm women flowing from the fact that their husbands were typically the sole owners of their land.
  + Notably, the Act applies to a "married person" of either sex, but not to unmarried partners.
  + "Dower rights" are all rights given by the Act to a person in respect of the homestead of a married person, and includes [s. 1(c)]:
    1. the right to prevent disposition of the homestead by withholding consent,
    2. the right of action for damages against the married person if a disposition of the homestead is made without consent,
    3. the right to obtain payment from the General Revenue Fund of an unsatisfied judgment against the married person in respect of a disposition of the homestead that is made without consent,
    4. the right of a surviving spouse to a life estate in the homestead of the deceased spouse, and
    5. the right of a surviving spouse to a life estate in the personal property of the deceased married person that is exempt from seizure under writ proceedings;
    - i.e., in essence, it is designed to ensure that a married person is not ejected from her or his home either before or after the death or a spouse without her or his consent.
  + "Homestead" means a parcel of land [s. 1(d)]:
    1. on which the dwelling house occupied by the owner of the parcel as the owner’s residence is situated, and
    2. that consists of (A) not more than 4 adjoining lots in one block in a city, town or village or (B) not more than one quarter section of land other than land in a city, town or village.
* In *Martin v McNeill* (1982), 41 AR 473 (CA), the majority held that a creditor can enforce against property subject to dower rights, but it remains subject to the non-owning spouse's right to a life estate when the owner spouse dies.
  + The majority noted that, if the creditors of the owner spouse could not have the homestead sold without the non-owner spouse's consent, then the homestead of every married person, regardless of its value, would be exempt from seizure. Such an interpretation, in its view, was not in accordance with the *Dower Act* and the *Execution Act*.
  + In dissent, Belzil JA wrote that the majority decision lacked realism. It suggested that, upon seizure and sale of the property, the non-owner spouse would be ejected from the house to await the death of the owner spouse, at which point they would take a life interest in the property.
* In *Phan v Lee*, 2005 ABCA 142, the court held that a non-owner spouse’s *dower rights were not "property" within the meaning of the CEA* and are therefore not subject to writ proceedings.
  + i.e., 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 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.

### Partnership Property

* Under s. 26 of the *Partnership Act* ("*PA*"), a writ cannot bind partnership property except on a judgment against the firm.
  + "Partnership property" means property brought into the partnership stock or acquired on account of the firm, or for the purposes of and in the course of the partnership business [*PA*, s. 1(h)].
  + Thus, when a creditor obtains a judgment against one partner, they cannot enforce that judgment against the share of that partner in the firm (*Brown, Janson & Co v Hutchinson & Co*).
* However, under s. 27(1)(a) of the *PA*, the court may, on application by a creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest on the judgment debt.
  + The court may appoint a receiver of that partner’s share of profits and of any other money that might be coming to the partner in respect of the partnership [*PA*, s. 27(1)(b)(i)].
    - This operates as an injunction against the execution debtor receiving anything from his co-partners (*Brown, Janson & Co v Hutchinson & Co*).
  + The court may direct accounts and inquiries and give other orders and directions (A) that might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or (B) that the circumstances of the case require [*PA*, s. 27(1)(b)(ii)].
    - This means that an order may be made to take an account of what is due from the co-partners to the judgment debtor partner (*Brown, Janson & Co v Hutchinson & Co*).

### Secured Obligations

* When an enforcement debtor is also a secured creditor [*CEA*, s. 51]:
  1. seizure of a secured obligation by an enforcement creditor is effected by
     1. identifying the obligation and the security for it in the notice of seizure,
     2. registering the notice of seizure in the PPR,
     3. if the collateral for the secured obligation is land, registering under the *LTA* the notice of the seizure against the certificate of title to the land, and
     4. serving the seizure documents on the enforcement debtor;
  2. if the debtor’s security has not been registered in the PPR or under the *LTA* when the secured obligation is seized, an agency may register it in the PPR or under the *LTA*, as the case may be;
  3. 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;
     + e.g., 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. 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 payments due from A and/or sell the secured obligation. The buyer in writ proceedings will step into B's shoes.

# Ch. 12: Receivers and Special Remedies

## General Receivership Principles

* + A distinction can be made between a *receiver* and a *receiver-manager*.
    - A receiver has the power to collect payments/rent and to realize upon the security/judgment.
    - A receiver-manager has all the powers of a receiver, but they can *also* manage the debtor's business.
  + Receivers may be appointed either under:
    - A security agreement, or
      * A receivership is a very common remedy to a secured party under a security agreement; if the debtor defaults on the agreement, a receiver could be appointed.
        + Often, this will happen when the secured party no longer has faith in the people running the debtor's business.
    - Legislation
      * e.g., *Bankruptcy and Insolvency Act*, s. 243
        + A big benefit of appointing a receiver under the *BIA* is that, since it is federal legislation, the appointment has national effect.

If a receiver is appointed by order under provincial legislation, often they will have to get that order recognized in another province for it to be enforced there.

* + - * e.g., *Judicature Act*, s. 13(2)
      * e.g., *Personal Property Security Act*, s. 65
      * e.g., *Business Corporations Act*, ss. 99, 242(3)(b)
      * e.g., *Civil Enforcement Act*, ss. 17, 85-87
      * e.g., *Builders’ Lien Act*, s. 54
  + There is a distinction between *private receivers* and *court-appointed receivers*.
    - Private receivers are appointed pursuant to the default and remedy provisions of a security agreement without a court application.
      * What constitutes a "default" is defined under the security agreement.
      * The powers of a private receiver are set out in the security agreement.
        + A private receiver may only be appointed over the assets subject to the security agreement.
      * Since they do not require a court application, they tend to be less expensive.
    - A court-appointed receiver is appointed by a court order.
      * For this to occur, the test set out in the relevant legislation must be satisfied.
        + The *BIA* and the *Judicature Act* require that the appointment of a receiver be "just and convenient," which is a very broad test.
        + A receiver can be concurrently appointed under multiple pieces of legislation.

e.g., an applicant may wish to apply under the *BIA* so that the receiver has national scope, while also applying under the *PPSA* to make use of certain powers under that legislation as well.

* + - * A court-appointed receiver's powers are set out in the order appointing the receiver.
        + While the receivership might only cover some of the debtor's property, it generally covers all of the debtor's property.
      * There is a template on the Alberta Courts website for receivership orders, representing what a receivership order should generally look like.
        + To delete provisions from the template, you must **~~bold them and cross them out~~**; to add provisions, you must **bold and underline them**.

Allows the judge to focus on how the order that you're requesting differs from the template model, which is important because these orders are often granted on a very expedited basis.

* + - * + The general contents of a receivership order include:

A stay, which says that writ creditors cannot take any enforcement proceedings against property covered by the order.

Receivers' powers

Obligations of others to co-operate with receiver

Protection for receivers from certain liabilities (e.g., employment, environmental)

Payment and oversight of receiver's fees

The order will often say that the receivers gets paid first, but this is matched with an obligation for the receiver to submit all their fees.

Comeback provision

Allows anyone who disputes the receivership to appear before the court and asked to have the receivership changed.

* + Receiverships are a separate process from bankruptcy; as such, there can be both a receivership *and* a bankruptcy in place at the same time.
    - A receivership is usually a secured creditor's remedy, and a secured creditor usually has priority; bankruptcy is largely an unsecured creditors' remedy.
    - So, if there is a receivership and a bankruptcy in place at the same time, the receiver is going to step in, wind down the company or sell all of its assets, create a pool of money, pay out the secured creditor, and then pay the rest to the bankruptcy trustee to divide among unsecured creditors.
  + There are two scenarios that you may encounter when representing a creditor:
    1. A prior ranking secured creditor has applied to appoint a receiver over the debtor's property. If so, there are some things you should consider:
       - Are the receiver's fees reasonable?
         * This is important because they are usually paid out in priority to other interests.
         * If the receiver has claimed too much for compensation, you can challenge those fees in court, which has the authority to supervise a receiver.

However, if you successfully challenge a receiver's fees, but there is no money for unsecured creditors (i.e., the secured creditor's interest exceeds the value of the debtor's collateral), you will have wasted your money on the application.

* + - * What if there is a surplus after the secured creditor has been paid out?
        + If the receivership is existing alongside bankruptcy, the receiver will simply pay out the surplus funds to the trustee in bankruptcy, who distributes it to the unsecured creditors.
        + The receiver might be authorized to distribute surplus under the court order.

If they are appointed under the *CEA*, they would be a "distributing authority."

Even if they are not appointed under the *CEA*, the order could direct the receiver to distribute the surplus according to the *CEA* distribution scheme if all parties consent (*Resmor Trust v Wood*).

* + - * + The receiver might may surplus to a civil enforcement agency for distribution in accordance with the *CEA* distribution rules.
    1. You may wish to appoint a receiver yourself (see below).
       - e.g., a debtor owns a number of rental units, each one occupied by a different tenant paying rent. The creditor wants to enforce their judgments by obtaining those rent payments. They could garnish the payments, but this may be unwieldy due to the large number of tenants, and the potential of them changing their identity. In the alternative, they could appoint a receiver who is empowered to collect on all the obligations.

## Receivers under the Civil Enforcement Act

* Where certain exigible property of a debtor cannot otherwise be conveniently realized, the court, on application by an enforcement creditor, may do one or more of the following [*CEA*, s. 85(1)]:
  1. appoint a receiver of the property;
  2. order the 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;
  3. enjoin the debtor or any other person from disposing of or otherwise dealing with the property;
  4. make any other or additional order that the court considers necessary or appropriate to facilitate realization of the property.
  + While the discretion conferred by s. 85 is very broad, there are virtually no reported cases in which s. 85 has been used other than as grounds for the appointment of a receiver.
    - In *Alberta Treasury Branches v Tetz* (1998), 227 AR 334 (QB), ATB sought a special order to facilitate enforcement of a writ against money generated by the sale of land owned by the debtor. ATB discovered that the land had been sold when it attempted to register its writ against title but it did not know where the sale proceeds were deposited so could not use garnishment as an enforcement device. Lee J referenced s. 5(2) in granting an order directing the debtor to pay any funds from the sale into court, even though s. 85 would have clearly applied.
* The receivership remedy in s. 85(1)(a) is a residual remedy which should be used only if the conventional remedies are impractical or less effective (Wood).
  + In determining whether to appoint a receiver, the court must consider at least [*CEA*, s. 86]:
    1. whether it would be more practical to realize on the property through other proceedings authorized by the *CEA*;
    2. whether the appointment of a receiver would be an effective means of realizing on the property;
    3. the probable cost of the receivership in relation to the probable benefits to be derived by the appointment of a receiver;
    4. whether the appointment of a receiver would cause undue hardship or prejudice to the debtor or a third person;
    5. the likelihood of the writs against the debtor being satisfied without resorting to the property in question.
  1. A person may not be appointed as a receiver unless they [*CEA*, s. 87(a)]:
     1. has satisfied the qualifications, if any, set out in the regulations, and
        + Under the *CER*, only the following persons are eligible to be appointed as receivers [s. 32]:
          1. a licensed trustee in bankruptcy;
          2. a person, other than a licensed trustee in bankruptcy, who

is qualified to carry out the functions and duties of a receiver in the circumstances, and

provides such security as may be required by the court.

* + 1. has agreed in writing to act as a receiver in respect of the matter for which the appointment is to be made;
  1. The court may give a receiver the powers that it considers appropriate to realize on the property [*CEA*, s. 87(b)].
     + This includes the power to manage or sell the property or bring any proceedings in relation to the property [*CEA*, s. 87(b)].
     + Unless otherwise ordered, a receiver may take into their custody and control the property over which the receiver is being appointed [*CEA*, s. 87(c)].
  2. Unless otherwise ordered, a receiver must do the following [*CER*, s. 33(1)]:
     1. take custody and control of the property that is subject to the receivership;
        + Where the court appoints a receiver, it may in the order direct that the order apply to property acquired by the debtor after the order is granted [*CEA*, s. 85(2)].
     2. hold in a trust account all money coming under the receiver’s control through the receivership;
     3. keep detailed records of all receipts, expenditures, and transactions involving the property that is subject to the receivership;
        + A debtor, a creditor, or an agency may, by a request in writing served on a receiver, require the receiver to make these records available for inspection [*CER*, s. 34(1)(a)].
     4. at least once in every 180‑day period after the receiver’s appointment, file with the court clerk financial statements of their administration;
     5. on completion of the receiver’s duties, file with the court clerk a final account of their administration.
  3. Where a receiver liquidates property subject to a receivership, they shall, unless otherwise ordered, distribute the proceeds in the same manner as if it were a distributing authority under Part 11 of the *CEA* [*CEA*, s. 35].

### *Allen v Shaw et al* (1997), 211 AR 61 (QB)

Facts:

* K.A. obtained a consent judgment for money damages against her parents R.S. and S.S. for assault, battery, and breach of trust that arose from the actions of the defendant R.S. consistently sexually abusing K.A. over a 17-year period. It is clear that R.S. and S.S. have little in the way of assets. However, R.S. is a retired member of the Calgary Fire Department and is drawing a pension of about $1000 a month pursuant to the legislation governing public sector pension plans.

Issue and holding:

1. Can a receiver be appointed to receive R.S.'s pension payment pursuant to the *CEA*? **NO**
2. Does the *Public Sector Pension Plans (Legislative Provisions) Regulation* ("the Regulation") prevent K.A. from receiving R.S.'s pension? **YES**
3. If yes, does the gravity of the wrongdoing at issue constitute a special circumstance to justify ignoring the statutory protections afforded to public sector pensions? **NO**

Rationale: (Perras J)

1. With respect to s. 86(d) of the *CEA* (i.e., the causing of undue hardship or prejudice to the debtor or a third party), it appears that the debtor and his wife would be left destitute if the pension were seized.
   * For this reason, the remedy of equitable receivership is not available under the *CEA*.
   * *Note*: Perras J believed that ss. 86(a), (b), and (e) were satisfied, but that s. 86(c) would not be satisfied because there was no material indicating the costs of the receivership in relation to the benefits.
2. In any event, s. 14 of the Regulation provides that a person’s interest in a pension benefit is not subject to garnishee proceedings, attachment, seizure, *or any legal process*.
   * The phrase "any legal process" must be given its ordinary meaning, which means any process that requires the assistance of the court (including the process sought by K.A.).
3. When considering equitable receivership, the focus must be on the circumstances that prevent the enforcement of the money judgment and whether those circumstances are special; in this case, no such "special circumstances" would justify appointing a receiver.
   * The facts leading to a judgment, no matter how horrific, ought not to play a role in whether or not a receiver can be appointed.

### *Freuh v Mair* (1998), 229 AR 375 (QB)

Facts:

* Margaret Frueh alleged that Judith and William Mair converted trust funds for their own personal use. A consent judgment was granted in June 1991 in favour of Ms. Frueh and a writ of enforcement was filed in October 1991. In October 1994, Ms. Frueh issued garnishee summons against Mr. Mair at Air Canada and Ms. Mair at the Alberta Children's Hospital. Garnishment proceedings were unsuccessful against the Alberta Children's Hospital because of Ms. Mair's exemptions and unsuccessful against Air Canada because Mr. Mair took a voluntary leave of absence. In April 1996, Ms. Frueh conducted questioning in aid of enforcement and concluded that the Mairs did not have exigible assets. Ms. Frueh accordingly sought an order appointing a receiver to receive the pension benefits due to Mr. Mair under his Air Canada pension plan upon his future retirement. However, s. 16.3 of the Air Canada Pension Plan rules states that: "*no benefit provided under the plan shall be subject to* the claims of, or to the *execution*, attachment, garnishment or other legal or *equitable process by any creditor* of an employee or any other person."

Issues and holding:

1. Is the appointment of a receiver precluded by the *Pension Benefits Standards Act* ("*PBSA*")? **NO**
2. Can the court appoint a receiver under s. 85 of the *CEA*?
3. Does s. 16.3 of the Air Canada Pension Plan rules preclude the appointment of a receiver? **NO**

Rationale: (Master Laycock)

1. Section 18 of the *PBSA* provides that no benefit provided under a plan "is capable of being assigned, charged, anticipated or given as security"; this does not prohibit the appointment of a receiver to enforce a judgment.
2. It would appear that the five considerations in s. 86 of the *CEA* would justify the appointment of a receiver.
   1. With respect to s. 86(a), there appears to be no better way to realize on the pension through the *CEA* than by appointing a receiver.
      * To obtain a garnishee summons, it would have to be determined that the pension constitutes a "future obligation" as per s. 78(a) of the *CEA*; however, no money is currently being paid to Mr. Mair from his pension, and the pension will not be payable until 2002 at the earliest.
      * Furthermore, the payments from the pension plan are governed by the terms of the Air Canada Pension Plan rules which are from time to time amended, making it difficult for Ms. Frueh to gain information on amendments to the plan.
   2. With respect to s. 86(b), the appointment of a receiver appears to be an effective means of realizing on the pension.
      * There is some concern that Mr. Mair will terminate his employment and access his pension such as to defeat any hope that Ms. Frueh has of collecting on her judgment.
        + Therefore, although the appointment of a receiver may initially appear premature (since nothing can be done until the debtor retires or otherwise terminates his employment), it may be an effective means to ensure that the debtor cannot thwart the creditor’s entitlement to the pension benefits to satisfy the judgment.
   3. With respect to s. 86(c), the probable cost of the receivership outweighs the probable benefits to be derived by the appointment of a receiver.
      * The cost of appointing a receiver will initially be minimal, since they will take no action until the debtor retires or otherwise terminates his employment.
      * If the appointment of a receiver helps protect Ms. Frueh from losing the means to access the pension in the future, then it would appear that the benefits outweigh the costs.
        + When benefits become payable, the receiver will be in a passive role of receiving and disbursing funds at minimal cost.
   4. With respect to s. 86(d), the appointment of a receiver would not cause undue hardship or prejudice to Mr. Mair or a third person.
      * While Air Canada argues that appointing a receiver will cause undue hardship to the company through increased administrative costs, legislation already imposes obligations on employers to comply with such remedies as garnishee summons.
      * There would be no undue hardship on Mr. Mair at this time since he is not currently receiving any money from his pension (*note*: unlike in *Allan v Shaw et al*).
        + If at a later date the receivership causes undue hardship, he can apply to have it revised.
   5. With respect to s. 86(e), Ms. Frueh has no way of knowing if she will be able to obtain funds in the future.
      * Mr. Mair has taken a voluntary leave of absence from his employment with Air Canada, and there is no evidence as to how long the leave of absence will last.
3. Air Canada cannot, through an agreement with its employees, bar a creditor's rights of enforcement.
   1. The Air Canada rules are not an enactment and cannot prevent the property of Mr. Mair being subject to writ proceedings under the *CEA*.

Notes:

* In the result, Master Laycock appointed the law firm Major Caron as receiver of any benefits payable by Air Canada to Mr. Mair and directed that Air Canada shall make the payments to the receiver of any benefits otherwise payable to Mr. Mair, notwithstanding the Air Canada Pension Plan rule 16.3.

# Ch. 13: Distribution of Proceeds

* Nothing in Part 11 prejudices any right to money that is based on an interest in the property from which the money is derived where that interest has priority over the relevant writs [*CEA*, s. 96(3)].
  + Under this provision, the holder of an unregistered interest in land that has priority over a writ is entitled to be paid first from the proceeds of sale.

## Distributing Authority

* In Part 11 of the *CEA*, a *distributing authority* is an entity that is authorized to make a distribution to creditors.
  + "Distributing authority" means (a) in the case of writ proceedings other than garnishment, a civil enforcement agency and (b) in the case of garnishment, the clerk of the court [*CEA*, s. 94].
  + A receiver appointed under Part 9 of the *CEA* is not necessarily a distributing authority, but it must distribute funds "as if [it] were a distributing authority" unless otherwise ordered [*CER*, s. 35].

## Distributable Fund

* A "distributable fund" is the source of the payments to which enforcement creditors are entitled.
* A distributable fund includes money [*CEA*, ss. 97(a), 96(1)]:
  1. realized through writ proceedings under the *CEA* (i.e., sale of property, garnishment, receivership), or
  2. otherwise received by an agency other than through writ proceedings, which includes
     + Implicitly, money paid to an agency voluntarily by the debtor;
     + Surplus funds generated by a landlord's distress and received by an agency [*CEA*, s. 96(2)(a)(i)];
     + Surplus funds generated by the enforcement of a security interest (e.g., foreclosure) and received by an agency [*CEA*, s. 96(2)(a)(ii)].
       - e.g., the debtor owns a truck worth $40k. A secured party holds a security interest over the truck securing a debtor of $20k. A creditor has a $25k judgment against the debtor that is subordinate to the security interest. The debtor defaults on the secured debt. The secured party instructs the agency to seize the truck.
         * In this case, the secured party may instruct the agency to either: (1) sell the truck or (2) deliver the truck to them so that they can sell it.
         * After the truck is sold, it yields $40k. There is a $20k surplus after payment to the secured party.

If the truck was sold by the agency, the surplus funds in the agency's hands are a distributable fund.

If the truck was sold by the secured party or a person other than the agency, the surplus funds must be paid to the agency and will constitute a distributable fund.

* + - * e.g., the debtor owns land worth $400k. There is a mortgage registered against title that secured a debt of $200k to the mortgagee. A writ is subsequently registered against title to the land on a $250k judgment. The debtor defaults on the mortgage, and the land is sold in foreclosure proceedings.
        + In this case, the $200,000 surplus after satisfaction of the mortgage debt must be paid to an agency and constitutes a distributable fund, subject to the debtor's claim for an exemption.
* A distributable fund *does not* include:
  + Money in which a person has a security interest or other interest that has priority over the claims of enforcement creditors [*CEA*, ss. 97(c), 96(4)].
    - If a distributing authority receives such funds, they must pay to the secured party the money which they are entitled [*CEA*, s. 96(4)].
      * Where personal property subject to a security interest is sold in writ proceedings, a secured party’s priority extends to the proceeds [*PPSA*, ss. 28(1), 1(1)(g)].
      * The same does not apply with respect to mortgages; when a creditor initiates writ proceedings against land, the agency is *not obliged to pay a prior secured party from the proceeds of sale* (i.e., the mortgagee’s priority does not extend to the proceeds of sale).
    - e.g., a secured party loans money to the debtor, and registers their security interest at the PPR. A creditor subsequently gets judgment against the debtor, and registers their writ at the PPR. The creditor instructs the seizure and sale of property with consent of the secured party.
      * Since the secured party has consented to the sale, the buyer takes the goods free and clear of the prior security interest.
      * From the proceeds of the sale, the agency is going to pay the prior secured party and distribute the remaining funds to the writ creditor.
  + Money that is exempt or is the proceed of exempt property [*CEA*, s. 97(c), 98].
    - If a distributing authority receives such funds, they must make the following payments from the money [*CEA*, s. 98(1)]:
      1. if the money is subject to a subordinate security interest or there is an enforcement creditor to whom the exemption does not apply (under *CEA*, s. 93(e); *Indian Act*, s. 89),
         1. pay the prescribed amount of the exemption to the secured creditor or enforcement creditor, or
         2. if the amount owed to the secured creditor or enforcement creditor is less than the exemption, pay the secured creditor or enforcement creditor the amount owed and pay the balance of the exemption to the debtor;
      2. if there is no creditor to whom clause (a) applies, pay the prescribed amount of the exemption to the debtor.
    - After payment of the amounts required to be paid, any money remaining constitutes a distributable fund [*CEA*, s. 98(2)].
      * e.g., a creditor has a $20k judgment, and registers their writ in the PPR. A secured party then takes a subordinate security interest in the debtor's car, securing a $3k debt. The car is seized and sold in writ proceedings for $15k.
        + The debtor is entitled to an exemption of $5k, and the remaining $10k forms a distributable fund. From the $5k allocated to the exemption, the secured party can claim $3k, since debtors cannot raise exemptions against secured parties.
      * e.g., the creditor has a $20k judgment, which they register in the PPR. A maintenance order for $10k in support arrears is subsequently registered in the PPR against the debtor. The debtor's car is then sold in writ proceedings for $15,000.
        + Under the *Maintenance Enforcement Act*, a maintenance order registered in the PPR is deemed to be a writ of enforcement [s. 21(2)].
        + The debtor can claim an exemption of $5k, and the remaining $10k forms a distributable fund. However, the maintenance creditor can claim the entire $5k allocated to an exemption, because the exemptions in the *CEA* do not apply to writ proceedings on a judgment for the payment of maintenance [*CEA*, s. 93(c)].
      * e.g., a secured party ("SP1") registers a security interest at the PPR, securing a debt of $1k. A creditor with a judgment for $20k then registers their writ in the PPR. Then, a second secured party ("SP2") registers their security interest at the PPR, securing a debt of $3k. The debtor's car is seized in writ proceedings and sold for $15,000. The car is exempt to the extent of $5,000.
        + SP1 can claim the entire $1k owed to them, leaving a balance of $14k to be distributed. Of that amount, the writ creditor can claim $9k, with the other $5k being exempt. Of that exempt amount, $3k can be claimed by SP2 and $2k remains with the debtor.

### Foreclosure Proceedings

* Under s. 96(2)(b) of the *CEA*, if property bound by a writ subordinate to a security interest is sold pursuant to a judicial sale or by a person other than a distributing authority, any proceeds in excess of the amount necessary to discharge the security interest shall be paid to an agency (i.e., there is no provision that the funds be paid to the court clerk).
* However, the procedure dictated by s. 96(2)(b) for distributing surplus funds is not followed in practice; historically, money paid by a purchaser of foreclosed property is paid to the court clerk until an interested party applied to be paid out from the proceeds (*Canadian Western Trust Co v Eaton*, 2008 ABQB 481).
  + The problem created by simply paying the balance of proceeds into court without further direction is that an interested party must hire legal counsel, prepare a notice of motion and affidavit, file and serve the material on all other interested parties, and appear before a Master for a determination as to the priorities of payment of the funds out of court (*Canadian Western Trust*).
  + To avoid this result, the Master or judge who grants an order confirming sale in a foreclosure action may include terms that mirror the result that would follow if surplus proceeds were received by an agency and paid out under the rules of Part 11.
    - * The Master or judge may order the clerk of the court to act as a distributing authority and distribute the surplus in accordance with the *CEA*.
      * The Master or judge may also specify the distribution of the surplus funds in the order if they know who the eligible claimants are.
      * The Master or judge may also specify that the surplus is going to be paid over to a civil enforcement agency, if there a writ creditor involved in the proceedings willing to indemnify the agency.
* In *Resmor Trust Co v Wood*, 2006 ABQB 841, the Court dealt with an application for distribution of the surplus funds generated in a mortgage foreclosure sale of land.
  + The issue was whether the funds were to be distributed according to the *CEA* distribution rules, or according to a priority ranking based on the order in which the writs were registered against the title.
    - Before the *CEA* was implemented, those paid out from a fund remaining after a mortgage foreclosure were paid on the basis of when their writs were registered in the Land Titles Office.
  + Master Hanebury concluded that the CEA is designed to implement a single distribution scheme applicable to all proceedings; the writ holders were therefore to be paid in accordance with Part 11 of the *CEA*.

### Matrimonial Property Proceedings

* In *Crotty v Crotty*, 2012 ABQB 129, Mr. and Mrs. Crotty separated in September 2009. The matrimonial home was sold pursuant to a court order issued under the *Matrimonial Property Act*. The proceeds of sale were paid first towards satisfaction of the mortgages registered against the land. Mrs. Crotty was then granted 1/2 of the net proceeds of the sale. Mr. Crotty's share of the net proceeds was held in court pending an order determining the entitlement of the creditors who had registered writs against the husband.
  + Some creditors argued that the funds should be distributed pro rata under s. 99(3) of the *CEA*.
  + However, Master Hanebury concluded that the funds should be distributed according to the order in which the writs were registered against title, in accordance with ss. 14(3) and 56 of the *Land Titles Act*.
    - For one, the funds held in court were not realized through writ proceedings, as required by s. 96(1)(a) of the *CEA*.
    - Second, the funds held in court were not realized "in proceedings to enforce a security interest or encumbrance" as required by s. 96(2) of the *CEA*.
  + Prof. Lund suggests that this result could have been avoided if the writ holders applied under s. 85 for an order appointing a receiver of the funds in court.
    - In this case, an application under that provision is a "writ proceeding," so the funds would fall under Part 11 by virtue of s. 96(1)(a).

## Eligible Claims

* A distributable fund is payable only to those who hold "eligible claims" *at the time the fund is constituted* [*CEA*, s. 99(2)].
  + "Eligible claims" include the amounts outstanding on all *related writs* in force against the debtor [*CEA*, s. 99(1)(a)].
    - "Related writ" means a writ that would be disclosed if a distribution seizure search was conducted of the PPR using the name of the debtor [*CEA*, s. 1(1)(mm)(i)].
      * Include claims that are deemed in another enactment to be writs of enforcement and are registered in the PPR (e.g., maintenance enforcement claims under the *Maintenance Enforcement Act* [s. 21(2)]) [*CEA*, s. 95].
    - An attachment order is *not* an eligible claim, as the claimant does not have a writ of enforcement issued.
      * Therefore, writ proceedings can be taken against property and paid out without regard to the attachment order [*CEA*, s. 24(1); *CER*, s. 35.27].
      * However, on application, the court may order one or more of the following where it would be just and equitable to do so [*CEA*, s. 24(2)]:
        1. that no writ proceedings be commenced or continued against property that is the subject of an attachment order without the permission of the Court until the attachment order terminates;
        2. that money realized through writ proceedings against property that is the subject of an attachment order not be distributed until the attachment order terminates;

Where money cannot be distributed until the attachment order terminates, that money constitutes a distributable fund only when that occurs [*CEA*, s. 97(b)].

Recall, an attachment order terminates on the earlier of [*CEA*, s. 19(1)]:

on the dismissal or discontinuance of the claimant’s proceedings;

on the 60th day from the entry of judgment in favour of the claimant.

* + - * 1. that the attachment creditor have the status of an instructing creditor for the purposes of the distribution of the proceeds
  + Generally, *a fund is constituted when it is received by the distributing authority* [*CEA*, s. 97(a)].
    - But, where the *CEA* or a court order requires that money received by a distributing authority not be distributed before a certain period elapses or a certain event occurs, that money constitutes a distributable fund *only when the period elapses or the event occurs* [*CEA*, s. 97(b)].

### *Canadian Imperial Bank of Commerce v Mirage Builders Inc*, 2002 ABQB 356

Facts:

* The Canadian Imperial Bank of Commerce ("CIBC") commenced an action against Mirage Builders Inc ("Mirage") on July 24, 2001. CIBC was granted an attachment order on July 25, 2001, directing the court clerk to issue a garnishee summons in favour of CIBC in respect of monies owed by a third party to Mirage. On August 13, 2001, CIBC was granted judgment against Mirage, and a writ of enforcement was registered in the PPR in respect of that judgment on August 14, 2001. On September 7, 2001, Dennis and Theresa Andreasen ("the Andreasens") filed a statement of claim against Mirage. On September 14, 2001, the Andreasens were granted an attachment order on the assets of Mirage, which they registered in the PPR on September 24, 2001. On October 10, 2001, the garnishment funds from the attachment order in favour of CIBC, which consisted of the sum of $22,957, were paid to the court clerk. On October 30, 2001, judgment was granted in favour of the Andreasens against Mirage. A writ of enforcement in respect of that judgment was registered in the PPR on November 29, 2001. The Andreasens argue that their claim is an "eligible claim" within the meaning of s. 99 of the *CEA*, making them entitled to a proportionate share of the sum deposited into court pursuant to s. 99(3)(g).

Issues and holding:

1. *Preliminary issue*: On what date was the distributable fund constituted? **October 10 or November 1, 2001**
2. Can the court utilize s. 5(2)(i) of the *CEA* to enable the Andreasens to share in the distributable fund? **NO**
3. Does s. 23(3) of the *CEA* deem the registration date of the Andreasens' writ of enforcement to be the registration date of their attachment order (i.e., September 24, 2001) for the purposes of determining which claims are eligible against a distributable fund? **NO**
4. Should the court use its discretion under s. 24(2) of the *CEA* to extend the constitution date to November 30, 2001, with the effect that the Andreasens' claim would be an "eligible claim" under s. 99? **NO**

Analysis:

* Section 5(2)(i) of the *CEA* provides that "[o]n considering an application under this Act, the Court may … except where this Act provides otherwise, make any other order or direction ... that the Court considers appropriate in the circumstances."
  + Section 5 is only meant to be a minor adjunct to specific provisions of the *CEA* to deal with matters not otherwise specifically dealt with therein.
* Section 23(3) of the *CEA* provides that where, prior to the expiration of an attachment order, a writ has been issued to the claimant in respect of the same proceedings in which the attachment order was granted and the writ is registered in the PPR, that writ has the same priority as the attachment order.
* Under s. 24(2)(b) of the *CEA*, the court may, *where it would be just and equitable to do so*, order that money realized through writ proceedings against property that is the subject of an attachment order not be distributed until the attachment order terminates.

Rationale: (Master Breitkreuz)

1. The distributable funds was constituted on either October 10 or November 1, 2001.
   * Section 97(a) of the *CEA* provides that a fund is constituted the date the money is received by a distributing authority; in this case, the distributing authority received the money on October 10, 2001.
   * However, s. 97(b) of the *CEA* provides that, where money that is received by a distributing authority cannot be distributed before a certain period of time elapses or a certain event occurs, *that money constitutes a distributable fund only when the period elapses or the event occurs*.
     + Rule 481(1) of the *Alberta Rules of Court* (now s. 35.30 of the *CER*) provides that funds paid into Court pursuant to a garnishee summons shall not be distributed until 15 days from the date that the debtor is served with the garnishee summons.
     + Since Mirage was served with the garnishee summons on October 17, 2001, the distributable fund was constituted 15 days later on November 1, 2001 as per r. 481(1) and s. 97(b).
2. There are provisions in the *CEA* which give the court the discretion to order that funds should not be distributed until the termination of an attachment order (s. 24), and provisions which outline how to determine eligible claims (ss. 97 and 99).
   * The discretion given to the court pursuant to s. 5(2)(i) of the *CEA* should not be used to circumvent other provisions in the same Act.
   * *Note*: s. 5 is used to fill gaps in the legislation, but it should not be relied on where there is a more specific provision dealing with the subject matter.
3. Section 23 of the *CEA* provides that the date a writ is registered in the PPR "becomes" the date the attachment order was registered in the PPR *not for the purposes of determining whether it is eligible against a distributable fund*, but only for the purposes of determining priority once that claim has already been determined to be eligible.
   * If the court were to hold otherwise then, on the constitution date of any distributable fund, if there are any attachment orders registered in the PPR in regards to the same property, the funds could not be distributed until all of the attachment orders had been terminated.
     + This would yield an unjust result, as those claims that have been diligently pursued would be delayed until all attachment orders terminated.
   * Furthermore, anyone with an attachment order in respect to property held in a distributable fund can apply to delay the distribution of the funds under s. 24 of the *CEA*.
4. It would not be just and equitable to extend the constitution date to November 30, 2001, as required by s. 24 of the *CEA*.
   * While the Andreasens argue that CIBC knew of the existence of the attachment order and, if diligent, would have known that judgment had been granted, this does not disentitle CIBC to rely on the clear distribution arrangement in the *CEA*.
   * The Andreasens had ample time to file a writ of enforcement before November 1, 2001, and have not explained their failure to do so.
   * CIBC would be prejudiced financially (approximately $2,000) if the Court allows the application.
   * An order of the kind sought by the Andreasens could make the distribution process uncertain.

### *Lyons v Creason*, 2009 ABQB 394

Facts:

* Jason Hunt, 1205676 Alberta Ltd ("120"), and others have been sued by many people as a result of a ponzi scheme which was alleged to have been run by the defendants. In the "Lyons action," Mr. Hunt and 120 filed statements of defence. Thus, for that action to proceed, there needed to be an application for summary judgment. In July 2007, the plaintiffs in the Lyons action obtained an *ex parte* attachment order / *Mareva* injunction ("Order #1"), which attached certain funds in the name of 120. Sometime after the Lyons action was initiated, Mr. Hunt and 120 ran out of funds for a legal defence and let all their other actions go by way of default. This permitted some actions to proceed quicker to judgment than others. In one of those actions, commenced on May 14, 2008, Mr. Elke obtained a default judgment against 120 on June 10, 2008. Mr. Elke obtained a writ of enforcement on June 12, 2008 which was registered in the PPR on the same date. On February 9, 2009, Mr. Elke filed and served a garnishee summons on the TD Canada Trust location, which was holding $2 million attached by Order #1. Kent J ordered that the money be paid into court (Order #2) on the condition that such payment "shall not create or establish a distributable fund for the purposes of the [*CEA*]."

Issue and holding:

* Should the 120 funds be distributed to the judgment creditors without regard to Order #1? **NO**

Analysis:

* Under s. 99(2) of the *CEA*, eligible claims against a distributable fund shall be identified and the amount of each claim fixed as of the date that the fund is constituted.
  + In general, money constitutes a distributable fund when it is received by a distributing authority [*CEA*, s. 97(a)], but where an order requires that money received by a distributing authority not be distributed before a certain event occurs, *that money constitutes a distributable fund only when the event occurs* [*CEA*, s. 97(b)].
* Under s. 24(2) of the *CEA*, the court may, where it would be just and equitable to do so, order:
  1. that no writ proceedings be commenced or continued against property that is the subject of an attachment order without the leave of the court until the Attachment Order terminates;
  2. that money realized through writ proceedings against property that is the subject of an attachment order not be distributed until the attachment order terminates;

Rationale: (Kent J)

* The date of this judgment (June 26, 2009) is the date the fund is constituted, *subject to the ability of the plaintiffs in the Lyons action to obtain a judgment and file writs*.
  + It is just and equitable to order that the 120 money not be distributed pending dispute of the Lyons action because *it was the efforts of counsel in the Lyons action which resulted in the 120 money being preserved in the first place*, well before Mr. Elke commenced his action on May 14, 2008.
  + Further, Order #2 clearly stated that the money paid into court did not create a distributable fund, leaving it open to the court to determine when the distributable fund would be constituted.
    - That said, creating a distributable fund retroactively would be unfair to those parties whose actions moved through the court process more slowly.

Notes:

* It is fair and equitable to delay composition of the fund to enable an attachment creditor to obtain an eligible claim where:
  + The attachment creditor has preserved the property giving rise to the fund by means of the attachment order, and
  + The attachment creditor has been subject to procedural delays in obtaining judgment and registering a writ (unlike in *Mirage Builders*).

## Distribution Scheme

### Distributable Fund Exceeds Claims

* Where the amount of the distributable fund from which eligible claims are to be paid is equal to or greater than the amount of the eligible claims against the distributable fund, the distributing authority must, from the distributable fund [*CEA*, s. 100]:
  1. first, pay the eligible claims in full, and
  2. second, on paying the eligible claims, pay the remaining balance (i) to the enforcement debtor or (ii) to any other person who is entitled to the money.

### Claims Exceed Distributable Fund

* 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 [*CEA*, s. 99(3)]:

…

1. first, to other fees and expenses of a distributing authority that may be claimed against the debtor that were earned or incurred in connection with the enforcement measures that have produced the fund;
2. second, to costs incurred by the instructing creditor in connection with the enforcement measures that have produced the fund;
3. third, to the claims of a writ holder who participated in successful interpleader proceedings to the extent that those proceedings increased or preserved the value of the distributable fund [*CEA*, s. 103].
   * Interpleader proceedings involve two or more claimants making claims in respect of the same personal property [*ARC*, r. 6.56(1)].
   * This priority rule incentivizes writ holders participate in interpleader proceedings to increase the size of the distributable fund.
4. 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;
   * e.g., under the *Maintenance Enforcement Act*, a maintenance order takes priority over any unsecured judgment debt of the debtor, other than another maintenance order [s. 20(1)].
   * e.g., Crown claims, because of the Crown prerogative (see *Liberty Mortgage*, below).
5. fifth, to the balance of the instructing creditor’s claim up to an amount not exceeding (i) $2000, plus (ii) after the payments referred to in clauses (b) to (e) are made, 15% of the amount by which the balance of the fund remaining exceeds $15,000;
   * The instructing creditor preference provides creditors with an added incentive to pursue their enforcement remedies without abandoning the principle of *pro rata* sharing (Wood).
     + The incentive problem is most pronounced where the active creditor’s claim is small and the passive creditor’s claim is large (Wood).
       - e.g., suppose the active creditor has a judgment for $1,000 and the passive creditor has a judgment for $100,000. Without any priority for the active creditor, the active creditor would be entitled to only 1% of any fund distributed pro rata (Wood).
   * A practical consequence of the rule is that sharing often will not be required where small judgments are enforced (Wood).
     + That said, An empirical study in Alberta indicated that 63.9% of judgments were for amounts not exceeding $2,000 (Wood).
   * Where a garnishee summons or other enforcement proceedings result in the distributing authority receiving funds at different times, the total amount payable to the instructing creditor is determined as if the several funds had been a single distributable fund [*CEA*, s. 99(4)].
6. sixth, to all other eligible claims, including any unpaid balance of the instructing creditor’s claim, *pro rata*.
   * In other words, unsecured creditors are entitled to a percentage of the debtor's assets that is equal to their percentage of the total amount owing.
   * This includes the claim of the instructing creditor to the extent that it has not been paid through the instructing creditor's bonus.

Imagine that a civil enforcement agency recovered $50,000 
to be distributed amongst 4 writ creditors... 
Writ 
Creditors 
Creditor A 
Creditor B 
Creditor C 
Creditor D 
Total 
Amount 
Owing 
$15,000 
$20,000 
$65,000 
$100,000 
$200,000 
Amount 
Owing to 
Creditor/Tota 
I Debt 
7.5% 
10% 
32.5% 
50% 
100% 
Equal 
Distribution 
$12,500 
$12,500 
$12,500 
$12,500 
$50,000 
Pro-Rata 
Distribution 
$3,750 
$5,000 
$16,250 
$25,000 
$50,000 

#### *Fast Labour Solutions (Edmonton) Limited v Kramer*, 2016 ABCA 266

Facts:

* Fast Labour Solutions (Edmonton) Limited, the enforcement creditor, had seized a crane belonging to Kramer's Technical Services Inc, the enforcement debtor. The crane was located on land belonging to a third party who sought an order requiring its removal. A secured party, George Kramer, had registered a financing statement prior to the registration of the Fast Labour Solutions writ, so his security interest had priority over it. Fast Labour Solutions sought an order declaring that it could recover the cost of removing the crane from the proceeds of an enforcement sale ahead of Mr. Kramer.

Issue and holding:

* Can Fast Labour Solutions recover its costs ahead of Mr. Kramer (the secured party)? **YES**

Rationale: (The Court)

* Costs would be incurred to remove the crane, no matter which creditor had to remove it.
  + If it ultimately turns out that Mr. Kramer has the prior security interest, he would have had to remove the crane in order to realize on his security.
* Hence, if Mr. Kramer is now able to download the cost of removing the crane onto the writ holders, he would receive a windfall.

Notes:

* As Buckwold notes, the holding in this case runs counter to the principle found in s. 48(j)(ii) of the *CEA* that the sale of personal property does not adversely affect the interest of a party with priority over a writ holder, and the effect of ss. 94(4) and 99(3)(b) stipulating the manner in which proceeds of sale are distributed.
  + The application of this case should be restricted to situations where it is clear that the prior secured party would have been required to incur the costs if the enforcement creditor had not done so.

## Distribution Process

### Notification Process

* Where the distributable fund is less than the total amount of all eligible claims but greater than the total amount distributable under ss. 99(3)(b) to (f) (i.e., there are several eligible claimants under s. 99(3)(g) who will divide remaining funds on a prorated basis) the distributing authority must serve a statement setting out the proposed distribution on the debtor and each of the creditors holding related writs [*CEA*, s. 101(1)(a)].
  + If a person on whom a statement was served wishes to object to the distribution, they must within 15 days serve on the distributing authority a written notice of the objection [*CEA*, s. 101(1)(b)].
    - A person who has made an objection is deemed to have withdrawn it unless, within 15 days from the service of the objection, they (i) file with the court and (ii) serve on the distributing authority, an application for an order deciding the objection [*CEA*, s. 101(1)(d)].
    - Where an objection is made, the distributing authority must distribute in accordance with the proposed distribution as much of the fund as will not prejudice the objector if the objection is upheld [*CEA*, s. 101(1)(e)].
  + If an objection has not been made or any objection made is withdrawn, the distributing authority must distribute the fund in accordance with the statement of proposed distribution [*CEA*, s. 101(1)(c)(ii)].
* Where a distributing authority has any doubt regarding the validity or priority of a claim against money received by the distributing authority the distributing authority [*CEA*, s. 101(3)(a)]:
  1. must serve a notice to that effect on the person asserting the claim, and
     + The notice must set out how the distributing authority proposes to distribute the money [*CEA*, s. 101(3)(b)].
  2. may serve that notice on any other persons as the distributing authority considers appropriate;
  + Sections 101(1)(b) to (e) apply to a notice served under this subsection as if that notice were a statement served under subsection (1) [*CEA*, s. 101(3)(c)].

DA serves notice of proposed distribution on DB & 
CRS holding related writs 
Written objection is served on 
the DA within 15D 
15D from service of written 
objection, objecting party: 
-files application with Court to 
address objection, returnable 
w/i 30D & 
-serves DA with notice of 
application 
No objection served on DA within 
15D, OR objection withdrawn 
Objecting party fails to 
take steps to start court 
action, as required. 
Objection deemed 
withdrawn 
DA distributes according 
to statement of proposed 
distribution 

### Immediate Distribution

* The distributing authority must distribute the fund in accordance with s. 99(3) as soon as practicable where:
  + The distributable fund does not exceed the total amount distributable under ss. 99(3)(b) to (f) [*CEA*, s. 101(2)].
  + There is only one eligible claim to which s. 99(3)(g) would apply (i.e., there is only one eligible claim to be paid after the instructing creditor's bonus) [CEA, s. 101(1.1)].

# Ch. 14: Enforcement Involving the Crown

## The Crown as Creditor

* The Crown in right of both Canada and Alberta may invoke a range of special enforcement devices prescribed by statute to facilitate recovery of a debt owed to the Crown or a Crown agency.

### Crown Immunity

* The constitutional doctrine of Crown immunity means that the Crown is not bound by statutes *except for those that provide otherwise, expressly or impliedly*.
  + This is entrenched in the federal *Interpretation Act* (s. 17) and Alberta's *Interpretation Act* (s. 14).
    - However, British Columbia's *Interpretation Act* takes the opposite approach; it provides that, unless it specifically provides otherwise, an enactment is binding on the government [s. 14].
    - That said, even where provincial legislation claims to bind the federal Crown, it is generally not able to do so for constitutional reasons.
  + The Crown as creditor is therefore not subject to legislated restrictions that apply generally to the enforcement of a judgment or debt, unless the legislation makes it clear that it is.
* Section 3(1) of the *CEA* states that *the CEA binds the Crown in right of Alberta in exercising any rights or remedies as a creditor in civil enforcement proceedings*.
  + That said, s. 3(1) does not prevent the Crown from collecting a debt through proceedings otherwise available to the Crown under its prerogative or any other enactment [*CEA*, s. 3(2)].
  + Since the *CEA* is provincial legislation, it cannot affect the immunity of the federal Crown.

### Federal Crown Claims

* The Crown has special/enhanced collection powers:
  + Expedited process for judgment; *Income Tax Act*, s. 223
    - An amount payable by a debtor paid may be certified by the Minister; on production of the certificate, the Federal Court shall register it, and it is treated as a judgment for the purpose of enforcement proceedings without any need for litigation.
  + Security interest; *Income Tax Act*, s. 223(5)–(6)
    - A certificate of judgment may be registered for the purpose of creating a security interest in property held by the debtor.
  + Deemed trust; *Income Tax Act*, s. 227
    - Every person who withholds an amount under the Act is deemed, in the amount so withheld, to hold the amount in trust for the Crown, which has priority over essentially all competing interests.
  + Enhanced garnishment; *Income Tax Act*, s. 224
    - The Minister may give notice to a person who owes money to a tax debtor or a person liable to make payment to the Crown under the Act; the person receiving the notice must then remit to the Crown any amount payable to the debtor.
      * This power allows the Crown to jump ahead of any competing interests, and to acquire funds without having to share with other creditors.
    - The Crown can also garnish funds under the *CEA*, if it chooses.
  + Enhanced power of seizure and sale; e.g., *Income Tax Act*, s. 225
    - If a person has failed to pay an amount as required by the Act, the Minister may give notice that their goods and chattels be seized and sold and, if the person fails to pay within 30 days, the Minister may direct that the person’s goods and chattels be seized.

### Exemptions

* Depending on the proceeding used, provincial exemptions may noy apply as against the federal Crown.
  + Provincial exemptions do not apply when a requirement to pay is used to garnish funds, which could allow the Crown would garnish somebody's entire wages (*Quebec (AG) v Canada*).
    - The Crown generally refrains from taking *all* of a debtor's income, but they may do it if they think that the debtor is hiding some of their income.
  + Provincial exemptions *do* apply when the Crown uses seizure and sale power in federal legislation (e.g., *Income Tax Act*, s. 225(5)).

### Priority Distribution

* In proceedings under tax legislation, Crown may be able to claim priority over security interests (e.g., *Income Tax Act*, s. 224), and it does not need to share with unsecured creditors (e.g., *Income Tax Act*, ss. 224, 225)
* In judgment enforcement proceedings in Alberta, the federal Crown can claim distribution ahead of other, equally ranked claims because of the Crown prerogative (see *Liberty Mortgage*, below).

#### *Liberty Mortgage* *Services Ltd v Canada (Minister of National Revenue)*, 2012 ABCA 225

Facts:

* The defendant (not a party to the appeal) defaulted on his mortgage and the mortgaged lands were sold in a foreclosure action. After payment of the mortgage and costs, a balance of $63,537 was paid into court. Several writs had been registered against the certificate of title to the mortgaged lands, including those of the federal Crown to enforce a debt for unpaid taxes. The Crown relies on its prerogative to seek priority of payment among the various claims. The respondents argue that the federal Crown must share pro rata with the other writ holders.

Issue and holding:

* Is the federal Crown entitled under the *CEA* to priority of payment under its writ for unpaid taxes? **YES**

Analysis:

* At common law, the Crown holds a prerogative right to priority in payment against creditors of equal degree.
* Under s. 99(3)(e) of the *CEA* gives priority of distribution 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 … creditors generally."

Rationale: (Paperny JA)

* As part of the common law, the prerogative for priority of payment exists "by virtue of ... law in force in Alberta" under s. 99(3)(e); as such, s. 99(3)(e) preserves the Crown’s prerogative right to priority.

Notes:

* In the result, recognition of the prerogative meant that the judgment payable to the Crown had to be satisfied before the claims of other judgment creditors could be paid.
  + While s. 3(1) of the *CEA* provides that the Act binds the Crown in exercising any rights as a creditor in civil enforcement proceedings, the Court concluded that provincial legislation could not bind the federal Crown.
* The Court’s analysis of the statutory text in this case would seem to apply to the provincial Crown prerogative as well, but it may be argued that s. 3(1) is designed to bring the Crown within the rules that apply to writ proceedings generally.
  + Section 99(3)(e) should not be seen to supplant the general principle established by s 3(1).

## Crown as Debtor or Garnishee

* + A creditor cannot enforce a judgment against the federal or provincial Crown, as reflected in the federal *Crown Liability and Proceedings Act* [s. s 29] and Alberta's *Proceedings Against the Crown Act* [s. 25].
    - This is largely out of a desire to not interrupt the provision of public services by the Crown.
    - Further, the judicial branch relies on executive branch to enforce its orders, and so is very reticent to make orders requiring executive branch to do something because of the risk of non-enforcement and consequent undermining of judicial authority.
  + Because of Crown immunity, a creditor cannot usually garnish payments payable by the Crown to a debtor.
    - That said, some legislation specifically authorizes garnishing payments from Crown to a debtor:
      * *Garnishment, Attachment and Pension Diversion Act*, RSC 1985, c G-2
      * *Civil Service Garnishee Act*, RSA 2000, c C-16
    - A creditor may be able to appoint a receiver to "receive" payments from the Crown (see *Daniels v Daniels*, 2011 MBCA 94).

# Ch. 15: Enforcement of Foreign Judgments

* + The *CEA* provides for the enforcement of a writ issued on a judgment issued by an Alberta Court or by the Federal Court of Canada or the Supreme Court of Canada [see s. 1(1)(tt)].
  + A judgment issued by a court of another Canadian province or territory is regarded as a "foreign" judgment, as is a judgment issued by a court other than a Canadian court.
    - If your client sues and receives a foreign judgment, but the defendant has assets that are located primarily in Alberta, they have three options, which are not mutually exclusive:
      1. Suing again on the cause of action in Alberta
         * This is usually not a convenient way of proceeding; there are often jurisdictional and limitations issues, and it is not cheap to relitigate the merits of a case.
         * Plus, the prospect of conflicting judgments in two different jurisdictions (especially within Canada) may undermine confidence in the judicial system.
      2. Suing on the judgment in Alberta
      3. Applying to have the judgment recognized under the *Reciprocal Enforcement of Judgments Act*.

## Suing on the Judgment

* A person who holds a foreign judgment may enforce it by commencing an action on the judgment.
  + An action on a foreign judgment is initiated by statement of claim and proceeds in the usual way.
  + If judgment is granted by the Alberta court in the action on the foreign judgment, that new judgment is enforceable in the same way as any other Alberta judgment.
* To enforce a foreign judgment, the judgment creditor must establish:
  1. The foreign judgment was final and conclusive;
  2. The claim is for a fixed sum of money which the debtor has failed to satisfy; and
     + However, Canadian courts will sometimes enforce non-monetary foreign orders.
  3. The foreign court had jurisdiction over the underlying cause of action, which will be the case if:
     1. The defendant was present in the jurisdiction at the time the litigation was commenced (i.e., the defendant was served in the jurisdiction);
     2. The defendant submitted to the jurisdiction of the foreign court; or
        + A defendant will submit to the jurisdiction of the foreign court as soon as they contest the merits of the case in it.
     3. There is a real and substantial connection between the foreign court and the subject matter of the litigation (*Morguard Investments Ltd v De Savoye*).
        + There is no need to prove a connection between the enforcing jurisdiction and the action (see *Chevron Corp v Yaiguaje*, below).
* Even if the requirements for enforcing a foreign judgment are met, the defendant may prove that one of the defences to recognition and enforcement should apply (see *Beals v Saldanha*).

### *Chevron Corp v Yaiguaje*, 2015 SCC 42

Facts:

* The respondents seek to enforce in Canada a $9.5 billion USD judgment which had been won in Ecuador against Chevron Corporation ("Chevron") in 2011. The core of the judgment concerned a complaint by about 30,000 Indigenous peoples that oil exploration and extraction left their traditional lands heavily polluted. In 2014, the US District Court for the Southern District of New York refused an application for the judgment to be enforced in the US, finding that the judgment was secured by fraud. The respondents then commenced proceedings in Ontario to enforce their judgment against the assets of Chevron Canada, which is Chevron US's seventh-tier subsidiary. Chevron argues that, to enforce their judgment in Ontario, there must be a real and substantial connection between Chevron or the dispute and the enforcing court. This can be satisfied if the Chevron is present or has assets in Ontario. Chevron Canada further contends that jurisdiction cannot be established over it, as it was a stranger to the original foreign judgment.

Issue and holding:

1. In an action to recognize and enforce a foreign judgment, must there be a real and substantial connection between the defendant or the dispute and Ontario for jurisdiction to be established? **NO**
2. Do the Ontario courts have jurisdiction over Chevron Canada, a third party to the judgment for which recognition and enforcement is sought? **YES**

Analysis:

* Canadian courts, like many others, have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments.
  + Reflects the notion of *comity*, which refers to the deference and respect due by other states to the actions of a state legitimately taken within its territory (albeit with some limits).
* For a Canadian court to recognize and enforce a foreign judgment, the foreign court must have had jurisdiction over the underlying cause of action.
  + The foreign court will have jurisdiction where:
    1. The defendant was present in the foreign jurisdiction at the time of the action;
    2. The defendant consented to the foreign court's jurisdiction, whether by defending, attorning, or otherwise submitting to the jurisdiction of the foreign court; or
    3. There is a "real and substantial connection" between the foreign court and the litigants or the subject matter of the dispute.
  + Once this is established, jurisdiction in an action to enforce a foreign judgment is established when service *ex juris* is effected on a defendant against whom a foreign judgment debt is alleged to exist.
    - *Note*: see requirements for valid service *ex juris* under the *Alberta Rules of Court*, below.
  + Once service occurs, the defendant has an opportunity to prove that one of the defences to recognition and enforcement should apply.
    - The defendant may argue any or all of the following defences:
      * The proper use of judicial resources justifies a stay under the circumstances;
        + *Note*: perhaps the foreign judgment is being appealed, and recognition and enforcement proceedings should be stayed pending the appeal.
      * The court should decline to exercise jurisdiction on the basis of *forum non conveniens*;
      * Any one of the available defences to recognition and enforcement (i.e., fraud, denial of natural justice, or public policy) should be accepted in the circumstances.
    - No unfairness results to debtors from having to defend against recognition and enforcement.
      * Through their own non-compliance, they have made themselves the subject of outstanding obligations and may be called upon to answer for their debts in various jurisdictions.

Rationale: (Gascon J)

1. There is no requirement that the defendant have a real and substantial connection with the enforcing court.
   * At common law, the SCC has intimated no need to interrogate an enforcing court's jurisdiction as a prerequisite to recognition and enforcement (see *Morguard Investments Ltd v De Savoye*).
   * Principle supports the contention that there is no need to demonstrate a real and substantial connection between the dispute and the enforcing forum.
     + The purpose of an action for recognition and enforcement is not to evaluate the underlying claim or create a new obligation, but to assist in enforcing an already-adjudicated claim.
       - As such, in a recognition and enforcement case, the facts underlying the original judgment are largely irrelevant (except as they relate to potential defences).
     + To insist that the creditor under a foreign judgment await the arrival of the debtor’s assets in the jurisdiction before seeking enforcement could prejudice their ability to recover.
       - In an age of electronic international banking, funds once in the hands of a debtor can quickly leave a jurisdiction.
     + While the absence of assets may influence the appropriateness of the choice of a given forum for enforcement, these issues do not relate to the existence of jurisdiction, but to its exercise.
   * Ontario's *Rules of Civil Procedure* do not impose an obligation on the plaintiff to establish some conceivable connection between Ontario and the dispute in order to effect service *ex juris*.
     + *Note*: this is not the case in Alberta, where the *Rules of Court* require a real and substantial connection between Alberta and the facts on which a claim is based (see "Notes," below).
2. Chevron Canada operates a physical office from which it carries out a non-transitory business and its Ontario staff provides services to and solicits sales from its customers in Ontario; this is sufficient to establish presence-based jurisdiction over Chevron Canada.

Notes:

* As stated by Gascon J, to enforce a foreign judgment, *service must be effected on a defendant against whom a foreign judgment debt is alleged to exist*.
  + In Alberta, a commencement document may be served:
    1. *Outside Alberta and in Canada* only if a real and substantial connection exists between Alberta and the facts on which a claim in the action is based [*ARC*, r. 11.25(1)(a)].
    2. *Outside Canada* only if:
       1. a real and substantial connection exists between Alberta and the facts on which a claim in an action is based, and
       2. the Court, on application supported by an affidavit, permits service outside Canada [*ARC*, r. 11.25(2)].
    - In other words, while the SCC in *Chevron Corp v Yaiguaje* said there is no need for a real and substantial connection between the dispute and the enforcing court, the *ARC* says that there is.
  + A real and substantial connection between Alberta and the facts on which a claim is based is *presumed* (rebuttable) to exist in the following, *non-exhaustive* list of circumstances [*ARC*, r. 11.25(3)]:
    1. the claim relates to land in Alberta;
    2. the claim relates to a contract or alleged contract made, performed, or breached in Alberta;
    3. the claim is governed by the law of Alberta;
    4. the claim relates to a tort committed in Alberta;
    5. the claim relates to the enforcement of a security against property other than land by the sale, possession, or recovery of the property in Alberta;
    6. the claim relates to an injunction in which a person is to do or to refrain from doing something in Alberta;
    7. the defendant is resident in Alberta;
    8. the claim relates to the administration of an estate and the deceased died while ordinarily resident in Alberta;
    9. the defendant, although outside Alberta, is a necessary or proper party to the action brought against another person who was served in Alberta;
    10. the claim is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:
        1. the trust assets include immovable or movable property in Alberta and the relief claimed is only as to that property;
        2. the trustee is ordinarily resident in Alberta;
        3. the administration of the trust is principally carried on in Alberta;
        4. by the express terms of a trust document, the trust is governed by the law of Alberta;
    11. the action relates to a breach of an equitable duty in Alberta.
* A party seeking to enforce a foreign judgment in Alberta may be able to prove a real and substantial connection between Alberta and the cause of action on which the claim is based by showing that:
  + The defendant has property located in Alberta; or
  + There is a real likelihood of the defendant's property being moved to Alberta.

### *Beals v Saldanha*, 2003 SCC 72

Facts:

* The defendants were two Ontario couples who owned land in Florida. They sold the land to the plaintiffs for US$8,000. The plaintiffs misunderstood which lot they purchased and began building on a lot other than the one they had purchased. When they discovered their error, the plaintiffs sued the defendants in Florida. The commencing document served on the defendants indicated only that the plaintiffs were seeking "damages which exceed $5,000. One of the defendants filed a statement of defence. The plaintiffs then amended their commencing documents, but the defendants did not re-file a new statement of defence. Under Florida’s rules of civil procedure, the defendants were noted in default. Damages were assessed at US$210,000 in compensatory damages, US$50,000 in punitive damages, and post-judgment interest at a rate of 12% per annum. Having received incorrect legal advice that the judgment was not enforceable in Canada, the plaintiffs took no steps to appeal the judgment or have it set aside. The plaintiffs sued to have their judgment recognized in Ontario. By this time, the judgment was now worth about CDN$800,000.

Issues and holding:

1. Was there a real and substantial connection between the cause of action and Florida? **YES**
2. Do any defences bar the domestic enforcement of the Florida judgment? **NO**
   1. Are the defendants entitled to raise the defence of fraud as a bar to the recognition and enforcement of the Florida judgment? **NO**
   2. Are the defendants entitled to claim that they were denied natural justice as a bar to the recognition and enforcement of the Florida judgment? **NO**
   3. Should the court decline to enforce the Florida judgment on the grounds that the amount of the damage award would shock the conscience of a reasonable Canadian? **NO**

Procedural history:

* The ONCJ determined that the Florida judgment was unenforceable in Ontario on the basis of fraud (because the jury had not been made aware of some relevant information) and public policy (because the judgment did not pass the judicial “sniff test”).
* The ONCA disagreed, finding that there was no fraud and that it was inappropriate to incorporate a judicial "sniff test" as part of the analysis.

Analysis:

* Once the test for recognizing a foreign judgment is made out, the defendant has an opportunity to prove that one of the defences to recognition and enforcement should apply, which include:
  1. *Fraud*; foreign judgments will not be enforced if obtained by fraud.
     + Allegations of fraud that mislead the court into believing that it has jurisdiction over the cause of action can be relied upon to deny recognition of a foreign judgment.
       - *Note*: e.g., the foreign court took jurisdiction on the basis of false information that the defendant was carrying on business in the jurisdiction.
     + Allegations of fraud can be relied upon with proof of new and material facts (or newly discovered and material facts) which:
       1. Were not before the foreign court;
       2. Demonstrate that the foreign judgment was obtained by fraud; and
       3. Could not have been discovered and brought to the attention of the foreign court through the exercise of reasonable diligence before the judgment was entered.
          - A defendant has the burden of showing that the facts could not have been discovered by the exercise of due diligence prior to the obtaining of the foreign judgment.
     + This defence is construed narrowly to avoid the relitigation of issues previously tried.
       - If the court were to widen the scope of the fraud defence, domestic courts would be increasingly drawn into a re-examination of the merits of foreign judgments.
  2. *Natural justice*; foreign judgments will not be enforced if the defendant can prove, on a balance of probabilities, that the foreign proceedings were contrary to Canadian notions of fundamental justice.
     + Fair process is one that reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system.
       - It is viewed to include the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend.
     + This defence is restricted to the form of the foreign procedure, not the merits of the case.
  3. *Public policy*; foreign judgments that are contrary to the Canadian concept of justice will not be enforced.
     + Guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt.
     + This defence involves impeachment of a foreign judgment by condemning the foreign law on which the judgment is based; it is not a remedy to be used lightly.
* Unusual situations may arise that might require the creation of a new defence to the enforcement of a foreign judgment.
  + If so, the courts will need to ensure that any new defences continue to be narrow in scope, address specific facts, and raise issues not covered by the existing defences.

Rationale: (Major J)

1. The parties agreed that the cause of action had a real and substantial connection to Florida; even if they did not, the defendants purchased land in Florida, which represents a significant engagement with the foreign jurisdiction’s legal order.
2. None of the existing defences of fraud, natural justice or public policy have been supported by the evidence.
   1. The defendants have not claimed that there was evidence of fraud that they could not have discovered through the exercise of reasonable diligence had they defended the Florida action.
   2. The Florida proceedings were not contrary to the Canadian concept of natural justice.
      * The defendants claim to have been denied the opportunity to assess their legal jeopardy because the claim failed to specify the exact dollar amount they were seeking.
        + However, the Florida claims sought repayment of the purchase price and damages associated with preparing the wrong lot; in light of this, not being provided with a specific dollar value of the amount of damages sought cannot constitute a denial of natural justice.
      * Further, once they received notice of the amount of the judgment, the defendants obviously had precise notice of the extent of their financial exposure, but they failed to appeal the judgment.
   3. The damage award, although it has grown large, is not by itself a basis to refuse enforcement of the foreign judgment in Canada.

Notes:

* In Alberta, limitation periods apply to foreign judgments sought to be enforced in Alberta as if the cause of action arose on the date the foreign judgment was granted.
* In *SHN Grundstuecksverwaltungsgesellschaft MBH & Co v Hanne*, 2014 ABCA 168, the Court held that a domestic court could recognize a foreign judgment even if it arose in a civil law jurisdiction, so long as the process meets minimum standards of fairness.

## Reciprocal Enforcement of Judgments Act

* A creditor whose judgment is issued by the court of a "reciprocating jurisdiction" may also enforce it through the registration procedure offered by the *Reciprocal Enforcement of Judgments Act* ("*REJA*").
  + The *REJA* offers an expedited way to enforce foreign judgments in Alberta.
  + "Reciprocating jurisdictions" include [*Reciprocating Jurisdictions Regulation*, s. 1]:
    - 8 Canadian provinces: BC, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Newfoundland, and Prince Edward Island (not Quebec);
    - The Northwest Territories, the Yukon, and Nunavut;
    - The Commonwealth of Australia; and
    - 4 U.S. states: Washington, Idaho, Montana, and Arizona.
  + For the UK, there is a *Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*, which is implemented by Alberta's *International Conventions Implementation Act*.
* A judgment creditor must apply by originating notice (on the basis of affidavit evidence accompanied by a certified copy of the judgment) to enforce the foreign judgment within 6 years after the date of the judgment [*REJA*, s. 2(1)]; such applications may either be made on notice or *ex parte*.
  + **Applications on notice**: The judgment creditor must serve notice of the application on the judgment debtor in accordance with the *Alberta Rules of Court* [*REJA*, s. 2(5)].
    - An order granting the application will issue as a matter of course unless the judgment debtor proves that [*REJA*, s. 2(6)]:
      1. the original court acted either
         1. without jurisdiction under the conflict of laws rules of the ABQB, and/or
         2. without authority under the law of the original court to adjudicate concerning the cause of action or subject‑matter or concerning the person of the alleged debtor,
      2. the debtor, being a person who was neither carrying on business nor ordinarily resident in the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court,
      3. the debtor was not duly served with the process of the original court and did not appear, notwithstanding that they were ordinarily resident or were carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court,
      4. the judgment was obtained by fraud,
      5. an appeal is pending or the time within which an appeal may be taken has not expired,
      6. the judgment was in respect of a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the ABQB, or
      7. the debtor would have a good defence if an action were brought on the original judgment.
  + ***Ex parte* application**: an application may be made *ex parte* in a case in which the debtor [*REJA*, s. 2(2)]:
    1. was personally served with process in the original action, or
    2. though not personally served, appeared, defended, attorned (i.e., consented) or otherwise submitted to the jurisdiction of the original court,

and in which the time to launch an appeal has expired and no appeal is pending.

* When a judgment is registered pursuant to an *ex parte* order, notice must be served on the debtor within 1 month of the registration or any further period that the court orders [*REJA*, s. 6(1)(a)].
* Then, the debtor may apply to have the registration set aside on any of the grounds mentioned in s. 2(6) (above) within 1 month after they have had notice of the registration [*REJA*, s. 6(1)(b)].
* Once registered, the judgment is entered as a judgment of the Court of Queen's Bench and is enforceable in the usual way [*REJA*, s. 2(7)].
* One can apply for registration of a judgment under the *REJA* and commence a common law action on the judgment [*REJA*, s. 7].
  + This is advisable to ensure that a common law action on the judgment is not precluded by the operation of the *Limitations Act* should registration under *REJA* be unsuccessful (see *Laasch v Turenne*, below).
  + Only judgments for the payment of money may be enforced under the *REJA*, with the exception of maintenance orders [s. 1(1)(b)].

Start application for recognition by originating notice 
- ARC R 9.50 
Ex Parte Application, REJA, s 2(2) 
1 month 
Serve Notice of Registration on Debtor REJA, S 
6(1); ARC R 9.51 
1 month 
Application on Notice, 
REJA s 2(5) 
Debtor does not 
respond or does 
not respond in 
time 
Judgment remains 
registered 
Debtor applies to set 
aside, REA s 6(1) 
Debtor defends 
application 
Debtor 
does not 
defend 
Court considers defences to registration, REJA 
2(6) 
Application for registration 
denied/set aside 
Application for 
registration granted 

### *Laasch v Turenne*, 2012 ABCA 32

Facts:

* In July 2004, Nathan Laasch and his mother Sheri Bentley ("the Appellants") commenced a medical malpractice action in Montana against physician Annette Turenne ("the Respondent"). As the Respondent had since moved from Montana to Bonnyville, she was served with the initiating documents in Alberta in January 2005. She did not file a defence. On June 5, 2006, the Appellants obtained a default judgment of more than $5 million. In April 2008, the Appellants filed an application to have the Montana judgment registered in the ABQB pursuant to the *REJA*. Graesser J dismissed the application on the grounds that the Respondent raised a defence to registration under s. 2(6) of that Act. Namely, he found that the Respondent was neither carrying on business, nor ordinarily resident, in Montana at the relevant time and did not voluntarily appear, or otherwise submit during the proceedings to the jurisdiction of the Montana court. On July 25, 2008, before their registration application was heard but more than two years after the Montana judgment was granted, the Appellants commenced an action to enforce the judgment. The Respondent defended, pleading the *Limitations Act*. The Appellants argue that s. 3(1)(a)(iii) of that Act saves the action, because they could not have known that the injury warranted bringing a proceeding prior to the registration application being dismissed.

Issue and holding:

* Is the common law action statute-barred pursuant to s. 3(1)(a)(iii) of the *Limitations Act*? **YES**

Analysis:

* Section 3(1)(a) of the *Limitations Act* provides that a defendant is entitled to immunity from liability in respect of a claim if they do not seek a remedial order within 2 years after the date on which the claimant first knew, or in the circumstances ought to have known:
  1. that the injury for which the claimant seeks a remedial order had occurred,
  2. that the injury was attributable to the conduct of the defendant, and
  3. that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding.
     + The critical time is one at which a reasonable person would consider that someone in the plaintiff’s position, acting reasonably in light of his or her own circumstances and interests, could – not necessarily should – bring an action.
     + A plaintiff may not reasonably be able to bring an action given his or her own situation if:
       1. the costs and strains of litigation would be overwhelming to him or her,
       2. the possible damages recoverable would be minimal or speculative at best, or
       3. other personal circumstances combined to make it unfeasible to initiate an action.

Rationale: (The Court)

* There is no reason fact to find that the Appellants did not know, or ought not to have known, that the Montana judgment warranted bringing a proceeding on the date it was granted.
  + This is not a situation where a claimant, for psychological or economic reasons, erroneously believed proceedings were not warranted; it is a situation where an incorrect procedure was chosen.
    - In *Salna v Awad*, the ABCA held that discoverability in Alberta law generally refers to facts, not law; error, ignorance of the law, or uncertainty of law does not postpone a limitation period.
    - If accepted, the Appellants’ argument would result in the limitations scheme becoming optional; any party who believed it would be easier to first try an alternate route to suing, even if that route was not effective, would receive an indefinite postponement of the limitation period in s. 3(1)(a).
  + The Appellants led no evidence suggesting there was any point in time that they did not know they would have to pursue the Respondent in Alberta.
    - They had actual knowledge that proceedings in Alberta were warranted prior to the expiry of the 2-year limitation period, evidenced by the fact that they attempted to register the judgment in Alberta within the limitation period.
* The Appellants could have filed their statement of claim at the same time they filed their registration application, to protect themselves in the event their application was unsuccessful.
  + The *REJA* makes it clear that registration is merely an expedited, alternative way of enforcing a foreign judgment; it does not displace the original common law action on the foreign judgment.

Notes:

* The Appellants were later able to enforce their judgment by converting their originating notice into a statement of claim and adding a claim suing on the Montana judgment; because the originating notice had been filed within the limitation period, they were able to enforce their judgment.

# Ch. 16: Conduct that Defeats Creditors' Rights

## Resulting Trusts

### *Pecore v Pecore*, 2007 SCC 17

Analysis: (Rothstein J)

* Where someone makes a gratuitous transfer of property to someone else, either a presumption of resulting trust or a presumption of advancement, each of which are rebuttable, will apply.
  + The presumption of resulting trust is the general rule for gratuitous transfers.
    - Under the presumption of resulting trust, when property is gifted to someone gratuitously, the law presumes that they hold it in trust for the benefit of the original owner.
      * *Note*: this is because equity presumes bargains, not gifts.
    - To rebut the presumption of resulting trust, the recipient must prove that the transferor intended to gift a beneficial interest in the property on a balance of probabilities.
  + Alternatively, for certain types of transfers, a presumption of advancement will apply.
    - Under the presumption of advancement, when property is gifted to someone gratuitously, the law presumes that they intended to gift a beneficial interest in the property.
    - Advancement is presumed *in transfers from parents to their minor, dependent children*.
    - To rebut the presumption of advancement, the person challenging the transfer must prove that the transferor did not intend to gift a beneficial interest in the property to the transferee on a balance of probabilities.
* After the court determines the proper presumption to apply, it must weigh all the evidence relating to the actual intention of the transferor to determine whether the presumption has been rebutted.

Notes:

* Resulting trusts can arise with (1) the gratuitous transfer of property from one person to another or (2) the joint contribution by two people to the acquisition of property, title to which is in the name of only one of them (see e.g., *Glover v Kumar*, above).
* Traditional presumptions were that a gratuitous transfer from only a father to a child were presumed to be true gifts (i.e., these transfers were not presumed to create a resulting trust).
  + Today, this presumption is gender neutral, and advancement is only presumed in parent → minor child transfers.

### *Moody v Ashton*, 2004 SKQB 488

Facts:

* Brent Ashton was an NHL hockey player from 1979 to 1993. He married Susan Ashton in 1987. Before their marriage, they entered into a verbal agreement in which Susan agreed to give up her career opportunities in order to remain in the home and be there for Brent and their family. In exchange, Brent agreed to pay her roughly 1/2 of his disposable professional hockey income on the understanding that Susan would support him with the funds given to her once his professional hockey career ended. In October 1992 and July 1993, using $400,000 transferred to her by Brent, Susan acquired an investment portfolio of market securities that was registered in her name. In 1999, Thomas, Patrick, and Darrel Moody ("the Moodys") obtained judgment against Brent in the amount of $417,377 for advances made on Brent's behalf to two real estate development partnerships with which Brent and the Moodys were involved. The Moodys were only able to seize and sell a set of golf clubs and a bicycle. Now, they seek a declaration that Susan holds the investment portfolio in trust for Brent, making it exigible property against which they can enforce their judgment.

Issue and holding:

* Does Susan hold the investment portfolio in trust for Brent's benefit, such that the Moodys can enforce against it? **YES**

Analysis:

* At common law, if the gratuitous transferee of property is the wife of the transferor, it is presumed that the transferor is presumed to gift a beneficial interest in the property.
  + *Note*: traditionally, there has not been a presumption of advancement in gratuitous transfers from a wife to her husband.
  + This presumption can be rebutted with evidence that the transferor intended to create a resulting trust.
  + However, s. 50 of Saskatchewan's *The Family Property Act* abolishes the presumption of advancement in gratuitous transfers between spouses and replaces it with a presumption of resulting trust to be applied "in the same manner as if the spouses were not married."
* *A beneficiary’s property interest arising under a resulting trust is available to the creditors of the beneficiary*.
  + If the right to trust property in its original form is established, equity allows the property to be traced into a fund and through that fund into property purchased with monies from that fund.

Rationale: (Baynton J)

* Brent intended to retain a beneficial interest in the funds he transferred to Susan; he did not transfer them to her unconditionally or absolutely.
  + The evidence reveals that it was Brent and not Susan who exercised actual control over the portfolio even though it was in Susan's name; this is inconsistent with the portfolio being a gift.
  + The money was transferred to Susan on the understanding that she would support Brent with the funds once his professional hockey career ended.
* Therefore, since the funds transferred to Susan can be traced into the investment portfolio, the Moodys can enforce their judgment against it.

Notes:

* In this case, the court did not apply the presumption of advancement because *The Family Property Act* clearly abolished it in gratuitous transfers between spouses; however, in Alberta, the *Family Property Act* restricts the abolition of the presumption of advancement *to applications under matrimonial property legislation*.
  + Section 36(1) states that, *when the court is making a decision under the Act*, the presumption of advancement does not apply to transactions between spouses or AIPs.
    - When the creditors of a spouse or AIP are applying to enforce against their property, *they are not applying under the Family Property Act*; as a result, s. 36(1) does not do away with the presumption of advancement in interspousal gratuitous transfers in enforcement proceedings.
      * Hence, a debtor in Alberta may argue that the presumption of advancement still applies to gratuitous transfers from a husband to his wife.
      * Conversely, creditors could argue that the presumption of advancement should not apply in gratuitous transfers between spouses because it is based on outdated gender norms.
* e.g., Wife transferred funds to Husband, which he used to purchase investments. Wife's creditors claim that Husband holds the investments in trust for Wife and attempt to enforce against them.
  + In this case, Wife could argue that, while there is a presumption of advancement at common law in gratuitous transfers from a husband to his wife, that presumption should be extended to transfers from a wife to her husband so as to make the law of resulting trusts truly gender neutral.

## Reviewable Transactions

* + Fraudulent conveyances law and fraudulent preferences law allow creditors to challenge transactions that materially diminish the pool of assets against which creditors can seek satisfaction (ALRI).
    - *Fraudulent conveyances law* comes into play when a debtor transfers away property, diminishing his or her asset base and curtailing enforcement of existing or prospective judgments commensurately.
      * A concern in this area of the law is the need to promote certainty in the marketplace; uncertainty in the marketplace puts a chill on commercial activity.
      * The transferee is forced to disgorge the property received in favour of the transferor’s creditors.
    - *Fraudulent preferences law* deals with a transfer of property to pay one of a number of creditors, where the result of the transfer is to reduce the debtor’s asset base such that others cannot recover at all or to the same extent as the creditor who was paid.
      * The goal of fraudulent preferences law is to ensure that all creditors are treated fairly.
      * The "preferred" creditor is forced to share the property taken in payment according to a proportional satisfaction regime imposed by law.
  + Alberta is in need of modern legislation implementing coherent policies and clear principles designed to produce appropriate and predictable outcomes for both creditors and debtors (ALRI).
    - The current law is a patchwork of English and Canadian legislation and judge-made rules which do not fit together into a comprehensible or workable pattern.

### Fraudulent Conveyances

#### Legislative Grounds for Impeaching a Fraudulent Conveyance

* There are two legislative grounds for challenging fraudulent conveyances in Alberta:
  1. The *Fraudulent Conveyances Act, 1571* ("*FCA, 1571*"), or the "Statute of Elizabeth"; and
  2. The *Fraudulent Preferences Act* ("*FPA*").
* If you are seeking to set aside a fraudulent conveyance, it is prudent to plead both statutes.

##### *Fraudulent Conveyances Act, 1571*

* The *FCA, 1571* is an English statute that was received in Alberta and has not been replaced.
  + In the service of interpretation, the courts have engrafted on the wording of the statute requirements and presumptions that are not at all evident on their face; the result is a "common law gloss that comes close to erasing the Act itself" (ALRI).
* The test for impeaching a transfer of property under the *FCA, 1571* is four-fold:
  1. The debtor must intend to "delay, hinder or defraud" the claimant;
     + It is not settled whether the intent to delay, hinder, or defraud creditors must be the *dominant* intention of the debtor or just one intention (Dunlop).
     + Where the debtor is solvent, and the effect of the gift is to make him insolvent, it is presumed that the gift was made with the intent to defraud creditors (*Pigeon Lake*).
       - This presumption is probably rebuttable on proof that the debtor had some other reason for transferring the property (see *Paragon Capital Corp v Morgan*, 2014 ABCA 363).
         * However, Springman, Stewart, and MacNaughtan (cited in *Pigeon Lake*) suggest that a gift by an insolvent debtor is presumed *irrebuttably* to be intended to defeat creditors.
       - The presumption probably does not apply to a transfer for consideration (see *Krumm v McKay*).
  2. The effect of the transfer must be to delay, hinder defraud the claimant;
     + i.e., the transaction must make it harder for the creditor to enforce their judgment in fact.
     + e.g., if a debtor gives away a small piece of their exigible property, leaving plenty of property remaining for the creditor to enforce against, the *FCA, 1571* will not apply.
  3. If the transferee gives consideration that is more than "grossly inadequate," the claimant must show that the transferee had *knowledge* of the debtor's fraudulent intent; and
     + Therefore, if a transferee gives some consideration for the debtor's property, the bar for impeaching that transaction is higher.
     + The test is not whether the transferee gave fair market value.
       - e.g., in *Leighton v Muir and Windsor Supply Co*, the debtor transferred property with a $8.5k value to his sister, and his sister assumed a mortgage of $3.5k (the value of the consideration for the property). The court held that this was *not* grossly inadequate.
  4. The claimant was a "creditor or other."

##### *Fraudulent Preferences Act*

* This statute was enacted by the Alberta legislature in 1922 and has not been reformed since.
* The test for impeaching a transaction under s. 1 of the *FPA* has four steps:
  1. The debtor must intend to “delay, hinder or defraud” the claimant;
  2. The debtor must be insolvent, unable to pay their debts in full, or knowingly on the verge of insolvency at the time of the transaction;
     + There is no real difference between being insolvent and being unable to pay one's debts (Dunlop).
  3. The effect of the transfer must be to delay, hinder or defraud the claimant; and
     + i.e., the transaction must make it harder for the creditor to enforce their judgment in fact.
  4. The claimant must be a "creditor."
* It is usually harder to impeach a transaction under the *FPA* than under the *FCA, 1571* for 3 reasons:
  1. A narrower group of claimants can use the *FPA* (i.e., "creditors" rather than "creditors and others");
  2. The *FPA* requires the creditor to prove that the debtor was insolvent at the time of the conveyance; and
  3. Section 6 of the *FPA* contains some wide-ranging exceptions.

#### Establishing Fraudulent Intent

* **Direct evidence**: Occasionally, creditors will have direct evidence of fraudulent intent.
  + e.g., in *Botham Holdings Ltd (Trustee of) v Braydon Investments Ltd*, 2009 BCCA 521, the director of a debtor company admitted in questioning that an impugned transfer of the company's assets was intended to hinder its creditors.
* **Indirect evidence**: Absent direct evidence, a creditor may succeed in establishing fraudulent intent by pointing to certain "badges of fraud"; the more badges are proven, the stronger the *prima facie* case of fraudulent intent will be (*Moody v Ashton*).
  + Badges of fraud are simply a collection of suspicious circumstances; in *Frauds on Creditors: Fraudulent Conveyances and Preferences*, Springman lists the following:
    1. The gift was of everything owned by the debtor (*Hamm v Metz*, p. 243)
    2. The debtor continued in possession and used or benefited from the property (*Hamm v Metz*, p. 243);
       - However, this is not suspect if such continued possession, use, or benefit is consistent with the nature and purpose of the transaction, as in the case of a mortgage.
    3. The conveyance was secretly made;
    4. The conveyance was made while litigation was pending or anticipated (*Hamm v Metz*, p. 243);
    5. A trust was created;
       - Trusts are used so frequently to defeat creditors that the mere creation of one is suspect.
    6. A conveyance was expressly made "honestly, truly, and *bona fide*";
    7. The deed gives the grantor a general power to revoke the conveyance;
    8. The deed contains false statements as to consideration;
    9. The consideration is grossly inadequate;
    10. There is unusual haste to make the transfer (*Hamm v Metz*, p. 243);
    11. Cash is taken in payment instead of a cheque;
    12. A close relationship exists between the parties to the conveyance (*Hamm v Metz*, p. 243; *Pigeon Lake Park Maintenance Ltd v Foley*);
    13. Payment is made to a person not party to the disposition;
    14. There is a false statement as to down payments;
    15. There is a lack of security for promissory notes issued by a purchaser;
    16. The conveyance is absolute in form, but is effectively a security;
    17. The value of the mortgaged property greatly exceeds the debt secured by the mortgage;
    18. Sales on long periods of credit;
    19. Formality (informality);
    20. Failure to procure receipts;
    21. Sales of chattels without examination by the buyer;
    22. Employment of vendor by vendee after the sale;
    23. Transferring property to a grantee without his knowledge;
    24. Destruction or loss of relevant papers;
    25. Backdating an instrument;
    26. Transferor continues to represent property is his own after conveyance complete (*Hamm v Metz*, p. 243);
  + Further, where the debtor is solvent, and the transfer makes him insolvent, fraudulent intent is presumed (*Pigeon Lake Park Maintenance Ltd v Foley*).
* The need to establish fraudulent intent comes from the fact that reviewable transactions legislation used to be treated as criminal law.

#### Proving Insolvency

* Recall, insolvency *must* be proved under the *FPA* to set aside a transaction; under the *FCA, 1571*, proof of insolvency raises a presumption of fraudulent intent in the case of a gratuitous transfer.
* Insolvency could mean that (1) the sum of the debtor's assets are not adequate to pay off their liabilities or (2) the debtor does not have enough liquid assets to pay their bills as they come due.
  + It is uncertain whether the determination of insolvency should take into account future and contingent assets and liabilities (Dunlop).
  + There are several ways to prove insolvency:
    - Showing that the debtor has large liabilities, and the debtor is unable to prove that they had sufficient assets to cover them (*Moody v Ashton*);
    - Financial statements showing that the debtor's liabilities exceeded their assets (*Krum v McKay*).
    - Getting testimony from people involved in financial dealings with the debtor (*Hamm v Metz*).

#### Who are "Creditors and Others"?

* "Creditors and others" can apply under the *FCA, 1571*, but only "creditors" can apply under the *FPA*.
  + "Creditors" are those holding liquidated, certain claims at the time of the conveyance.
  + "Others" include those holding equitable or legal claims at the time of the conveyance, including unliquidated claims and (maybe) future creditors (i.e., those without claims at the time of the transfer).
    - In *Botham Holdings Ltd (Trustee of) v Braydon Investments Ltd*, 2009 BCCA 521, the Court said that the transfer of property to frustrate enforcement by potential *future* creditors is sufficient for impeaching a transaction.
    - However, in *Duca Financial Services Credit Union v Bozzo*, 2010 ONSC 3104, the Court said that future creditors could not set aside a transaction.

Standing? 
Value Given 
Insolvency 
Intent of Debtor to 
Delay, Hinder, 
Defraud Creditors 
Effect of 
Conveyance is to 
Delay, Hinder, 
Defraud Creditors 
Transferee 
Collusion 
Fraudulent Conveyances Act, 1571 
Current creditor w/ liquidated claim, 
creditor with unliquidated claim, future 
creditor (?) 
No consideration, or Something more 
grossly inadequate 
consideration 
Not required, but 
raises presumption 
of intent 
Yes 
Yes 
No 
than grossly 
inadequate 
consideration 
Not required, 
probably no 
recourse to the 
presumption 
Yes 
Yes 
Yes 
Fraudulent 
Preferences Act 
Current creditor w/ 
liquidated claim 
[See FPAs 6] 
Yes 
Yes 
Yes 
No 

##### *Pigeon Lake Park Maintenance Ltd v Foley* (1997), 205 AR 99 (QB)

Facts:

* The Pigeon Lake Park Maintenance Ltd ("the Plaintiff") initiated a lawsuit against Foley ("the Defendant") in Provincial Court. The Defendant counterclaimed. In March 1994, the Court gave judgment in favour of the Plaintiff. The Defendant appealed. In October 1994, a Queen's Bench justice allowed the appeal and ordered a new trial. On September 11, 1995, the Plaintiff transferred to David Chipchar title to a truck it owned. David is the son of Raymond Chipchar, who is the directing mind of the Plaintiff. On October 25, 1995, the Plaintiff transferred title to a second truck it owned to Raymond. The second Provincial Court trial concluded on November 9, 1995, and the Defendant got judgment against the Plaintiff for $4,000. The Defendant has been unable to collect on her judgment. She now seeks to set aside the transfers of the trucks.

Issues and holding:

* Does the Defendant have standing to impeach the transactions under the *FCA, 1571*? **YES**
* If yes, were the two transfers fraudulent conveyances, such that the Defendant can seize and sell both trucks to satisfy her claim? **YES**

Rationale: (Master Funduk)

1. Even if the Defendant was not a creditor at the time of the transfers, she can claim the benefit of the statute.
   * The *FCA, 1571* benefits all "creditors and others" who have been defrauded by the transfer of property by a debtor, *whether their debts were owing at the date of the transfer or were incurred after*.
   * The *FCA, 1571* was intended to prevent against debtors acting to intentionally place their property beyond the reach of their future creditors.
2. The logical inference to be drawn from the evidence is that Raymond intended the two transfers to protect the assets of the Plaintiff and to defeat the Defendant’s claim; since Raymond is the directing mind of the Plaintiff, his mind and the mind of the Plaintiff are one and the same.
   * The Plaintiff transferred the vehicles to David and Raymond while litigation was ongoing.
   * There is a close relationship between the debtor and the transferees.
   * The transactions left the Plaintiff insolvent (unable to pay its judgment debt).

##### *Hamm v Metz*, 2002 SKCA 11

Facts:

* In December 1990, Joyce Metz' house was destroyed by a fire. Two adjacent buildings, one owned by the Hamms and the other by Joan Carol Oraczewaka and Joan Carol’s Store Ltd (collectively, "the Respondents"), were also destroyed. In June 1991, Metz was charged with arson. While being investigated, and continuing after she was charged, Metz began to liquidate all her property. In September 1991, shortly after her accomplice plead guilty to arson, Metz sold three of her properties to Talaber and Hickmore:
  1. **Hickmore**: Metz transferred her residence at 2824-2836-13th Ave to Hickmore for $80,000 cash. Metz was in a romantic relationship with Hickmore, and continued to live in the house after the transfer.
  2. **Talaber**: Metz transferred 2440-14th Avenue and 2075 Retallack Street to Talaber for $29,000 and $15,000 respectively, both cash. He subsequently resold 2440-14th Avenue for $28,000. He is a nephew of Metz and spent some periods of his childhood with her.

Metz claimed to have lost the proceeds of the liquidation to a fraudster, though the trial judge rejected that explanation. Metz was convicted of arson in September 1992. The Hamms have outstanding tort claims for damages arising in the fire and now seek to set aside the sale of the properties to Talaber and Hickmore. Oraczewaka and Joan Carol's Store Ltd have already obtained default judgment against Metz, and were joined as plaintiffs to this action on the issue of the fraudulent conveyances.

Issues and holding:

1. Do the Respondents have standing to sue under (a) the *Fraudulent Conveyances Act, 1571* ("*FCA, 1571*") or (b) the *Fraudulent Preferences Act* ("*FPA*")? **YES**
2. Is the conveyance of Metz' residence, which is exempt property under Saskatchewan's *The Exemptions Act* to the extent of $32,000, impeachable as a fraudulent conveyance? *(see below)*
3. Were the conveyances impeachable under the *FCA, 1571* or the *FPA*? **YES**
4. Can Talaber be made to account for the proceeds of the sale of 2440-14th Avenue in the amount of $28,000, being the price for which Talaber resold the property? **YES**

Rationale: (Sherstobitoff JA)

1. While Oraczewaka and Joan Carol's Store Ltd have standing to impeach the transactions, the Hamms do not.
   * As parties with liquidated claims against Metz, Oraczewaka and Joan Carol's Store Ltd have standing under the *FPA* as "creditors" and under the *FCA, 1571* as "creditors and others."
   * Since the Hamms' tort claim is not yet proven, they have neither a liquidated nor an unliquidated claim against Metz and are thus neither "creditors" nor "creditors and others."
     + It is not enough for the Hamms to merely say that they have a claim without formal proof of it.
     + That said, if the Hamms prove their claim against her, it will still be open to them to share in whatever is realized from any property found to have been fraudulently conveyed.
2. Metz was entitled to convey an interest worth $32,000 under *The Exemptions Act*, making the transfer of that interest unimpeachable; therefore, the Hamms, assuming that they ultimately obtain judgment and enforce against the property, will only be entitled to whatever amount is realized in excess of $32,000.
   * If property is exempt from seizure, disposition of it cannot, by definition, defraud creditors within the meaning of the *FCA, 1571*.
3. The conveyances to Hickmore and Talaber are impeachable under both the *FCA, 1571* and the *FPA*.
   * The transactions had the effect of "delay[ing], hinder[ing] or defraud[ing]" the Respondents.
   * At the time of the impugned transactions, Metz knew that she was on the eve of insolvency; she knew that the value of the Respondents' claims exceeded the value of her assets.
     + Evidence of this comes from the bank and credit union personnel who were called to give detailed evidence of her financial dealings at the relevant times.
   * The circumstances present several "badges of fraud," suggesting that Metz, Hickmore, and Talaber *all* participated in a fraudulent scheme to defeat Metz' creditors.
     + By the fall of 1991, Metz no doubt knew that she was in a precarious legal and financial position, exacerbated by the guilty plea entered by her co-conspirator.
     + Between August 1991 and November 1991, Metz rapidly liquidated virtually all of her assets.
       - She has since made the preposterous suggestion that she was cheated out of this money without any scintilla of evidence supporting that assertion.
     + Metz had a very close relationship with Talaber (a nephew who she treated like a son) and Hickmore (her romantic partner for over three years).
     + Metz continued to reside in her residence after its sale to Hickmore.
     + After purchasing 2440-14th Avenue, Talaber kept up the "For Sale" signs which Metz had originally placed on the property and which were in her name.
     + Talaber granted Metz a power of attorney to sell the properties on his behalf.
       - This residual power and control retained by Metz is suspicious.
4. The *Fraudulent Preferences Act* states that fraudulent conveyances are in law "invalid against creditors"; this phrase is broad enough to encompass the transactions in this case.

Notes:

* In the result, the court declared that the transfer of all three properties were void as against the Respondents and all other proven creditors of Metz. It ordered the Registrar of Land Titles to issue a new certificate of title to the properties in Metz' name.
* In *Murdoch v Murdoch* (1976), 1 AR 378 (QB), the plaintiff wife sought an order setting aside a transfer of land that occurred after she had commenced an action for divorce and maintenance.
  + The Court concluded that the wife had standing under the *FCA, 1571*. While she was not a "creditor" within the meaning of the statute, she was included in the category of "others" as someone with a future claim against the husband.

### Fraudulent Preferences

* + Under the *Fraudulent Preferences Act* ("*FPA*"), you can impeach a fraudulent preference under ss. 2 and 3.
    - The choice of provision depends on how soon after a fraudulent preference an action is brought.

#### Sections 2 and 3

* + **Section 2**: For a claimant to successfully impeach a transfer of property under s. 2:
    1. The transferee must be a "creditor."
    2. The debtor must have been insolvent, unable to pay their debts in full, or knowingly on the eve of insolvency at the time of the transfer;
       - There is no real difference between being insolvent and being unable to pay one's debts (Dunlop).
    3. The transfer must have had the effect of giving that creditor preference;
    4. The transfer must have been made with the *dominant* intent of giving that creditor a preference; and
    5. The claimant must be a "creditor."
  + **Section 3**: For a claimant to successfully impeach a transfer of property under s. 3:
    1. The transferee must be a "creditor."
    2. The claim must be brought within 1 year after the impugned transaction;
    3. The debtor must have been insolvent, unable to pay their debts in full, or knowingly on the eve of insolvency at the time of the transfer;
    4. The transfer must have had the effect of giving that creditor a preference;
    5. The claimant must be a "creditor."
  + Section 3 of the *FPA* differs from s. 2 in two respects:
    1. Unlike an action brought under s. 2, a claimant proceeding under s. 3 does not need to prove that the debtor's dominant intent was to give a creditor a preference; and
    2. Unlike an action brought under s. 2, an action under s. 3 must be brough within 1 year after the impugned transaction.
       - It is harder to impeach a transaction after 1 year because of commercial certainty, which will suffer if applicants lack an incentive to pursue their actions expeditiously.

#### Who is a "Creditor"?

* + "Creditors" are those holding liquidated, certain claims at the time of the preference.
    - A person who holds a legal claim that has not been reduced to a liquidated amount does not qualify.
      * In *Van Duzen v Van Duzen*, 2001 BCSC 1805, a husband and wife were involved in matrimonial property litigation. The wife got a cost judgment in her favour, but the court did not assess the amount. The husband then transferred property to his lawyers (i.e., creditors) to pay their bills. The wife was not entitled to set aside the preference under BC's *Fraudulent Preference Act* because she was owed an unliquidated sum and was thus not a "creditor."
    - e.g., a debtor owes money to a creditor. The debtor transfers vacation property to her sister. There is no evidence that the debtor owed a debt to the sister. In this case, the creditor could not set aside the transaction as a fraudulent preference, but could possibly impeach it as a fraudulent conveyance.
  + Under s. 10(1) of the *FPA*, "one or more creditors may, for the benefit of creditors generally or for the benefit of those creditors who have been injured" by a fraudulent preference.
    - e.g., Party A sues the debtor sued for defamation. Party B advances $50k to the debtor, repayable on demand (thereby becoming a creditor). The debtor then transfers her cottage to her sister (a creditor) to satisfy a valid past loan. Party A wins at trial, and is awarded judgment in the amount of $30k (thereby becoming a creditor). Party B demands repayment of their loan and gets judgment of $50k when the debtor refuses. Under s. 10(1), Party A, though not a creditor at the time of the transaction, could sue for the benefit of Parties A & B (i.e., "creditors generally") to have the transfer of the cottage to the debtor's sister declared void.

#### Insolvency

* + To set aside a fraudulent preference under the *FPA*, the preference must have been made by a debtor who is "in insolvent circumstances or is unable to pay the person’s debts in full or knows that [they are] on the eve of insolvency."
    - Alberta courts have held that a person is in "insolvent circumstances" where they are experiencing BOTH *cash-flow/commercial insolvency* and *balance sheet/legal insolvency*.
      * Cash-flow/commercial insolvency occurs when the debtor lacks the liquid assets to pay debts.
        + e.g., the debtor has debts of $100k, liquid assets of $50k, and illiquid assets of $80k. Even though the debtor's total assets exceed their debts, they are cash-flow insolvent because they do not have enough cash on hand to pay debts as they come due.
      * Balance sheet/legal insolvency occurs when the debtor's debts exceed their assets.
        + e.g., the debtor has debts of $100k, liquid assets of $50k, and illiquid assets of $40k.
    - That said, Prof. Lund believes that someone could be in "insolvent circumstances" if they were *either* cash-flow insolvent or balance sheet insolvent; however, this is unsettled.

#### Preferential Effect

* + A creditor is "preferred" if the result of the transaction is that they are paid proportionately more than other creditors, such that those other creditors are made worse off by the transaction.
    - e.g., a debtor has assets of $45k. They owe $60k to Creditor A, $40k to Creditor B, and $30k to Creditor C. The debtor transfers $30k to Creditor C, while the remainder is distributed to Creditors A & B in writ proceedings. In this case, Creditors A and B were probably made worse off by the transfer to C, depending on the underlying priorities.

* + CRA 
    CRB 
    CRC 
    TOTAL 
    Amount 
    Owed 
    $60k 
    $40K 
    $30k 
    $130k 
    Pro Rata Distribution 
    of $45K 
    $45K 
    Amount Received 
    -15K pro rata to CRA& CRB 
    -30K transfer to CRC 
    $30k 
    S45K 

* + The situation would be different if C was the federal Crown, which can claim distribution ahead of other, equally ranked claims because of the Crown prerogative (see *Liberty Mortgage*, above).
  + A transfer of property to a secured creditor is not a preference if its effect is merely to reduce the extent of the recipient’s security.
    - e.g., a debtor is being sued for defamation by Party A. The debtor transfers her cottage to her sister to satisfy a valid past loan. Party A then wins at trial and is awarded a judgment of $30k. In this case, though the sister is a "creditor," her interest has priority to Party A's unsecured claim in any event.
    - However, conferring security on a creditor whose debt was previously unsecured may be a preference.

#### Fraudulent Intent

* + Recall, if you are bringing an application to set aside a transaction under s. 3 of the *FPA*, you do not have to show fraudulent intent; you only need to show intent if you are bringing an action under s. 2.
    - Fraudulent intent can be established through indirect, circumstantial evidence (badges of fraud) or direct evidence (see "Establishing Fraudulent Intent," above).
  + Under s. 2, the impugned transfer must be made with the *dominant* intent of preferring the recipient.
    - The case law has identified the following as transfers which are not made with the dominant intent of preferring the recipient:
      * A payment made in response to "pressure" exerted by the recipient creditor;
        + A mere demand by the creditor without even a threat of, much less a resort to, legal proceedings is sufficient to constitute "pressure."
        + e.g., in *Stephens v McArthur*, the recipient creditor threatened to take legal proceedings and cut off credit.
        + e.g., in *Van Duzen v Van Duzen*, the recipient creditor, who was the debtor's lawyer, threatened to stop working for the debtor.
      * A payment made to keep the debtor in business;
        + e.g., in *Megbiz v Osprey Energy*, a creditor challenged an assignment of property by the debtor to their auditors. The auditors were demanding payment before they were prepared to sign their audit. Master Hanebury held that the debtor's dominant intention was to stay in business rather than confer a preference, as the evidence indicated that the debtor would be delisted from the stock exchange if the auditors did not complete their audit.
      * A payment made in response to the dictates of conscience;
        + e.g., in *Re Carson*, a trustee returned funds misappropriated from a trust account in preference to their other creditors. The ONCA held that the trustee was acting to relieve their guilty conscience and not to prefer the beneficiaries.
      * A payment made pursuant to a previous agreement;
    - The case law is divided as to whether, under s. 2, the applicant needs to prove that the transferee had knowledge of the transferor's fraudulent intent.
      * In *Benallack v Bank of British North America* (1905), the SCC said that they do, but in *Re Titan* (below), the court said that they do not.
      * One approach is to *not* consider the transferee's intent under s. 2 and to instead consider it when analyzing transactions under s. 6.

### Section 6 Exceptions

* Section 6 of the *FPA* provides that a transaction cannot be impeached under s. 1 (fraudulent conveyances) and ss. 2 and 3 (fraudulent preferences) if:
  1. The transfer is:
     1. A *bona fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties;
        + Allows a debtor to pay bills and sell goods in the ordinary course without harming commercial certainty.
     2. A payment of money to a creditor; or
        + This is a HUGE exception to the reviewable transaction rules in ss. 1 to 3 of the *FPA*.
     3. A *bona fide* conveyance of property that is disposed in exchange for property (a swap), disposed in exchange for money (a sale), or encumbered with a security interest in exchange for money.
        + Since a debtor’s asset pool is not reduced by these transactions, we protect them.
  2. The money paid for the property sold bears a fair and reasonable relative value to the consideration received for it (i.e., the debtor cannot overpay).
     + e.g., in *Leighton v Muir and Windsor Supply Co*, the debtor transferred property with a $8.5k value to his sister, and his sister assumed a mortgage of $3.5k (the value of the consideration for the property). The court determined that the value of the mortgage was *not* a fair and reasonable value relative to the value of the land.

#### *Christensen v Christensen Estate* (1996), 184 AR 202 (CA)

Facts:

* Arthur, Norman, and Edward Christensen are brothers. Their father died in 1963, leaving a life interest to their mother and, upon her death, to the sons. Norman loaned Edward $30,000 in July 1988 and Arthur loaned Edward $10,000 in March 1990, to be repaid when they received their shares of their father's estate. Their mother died in January 1991. The estate lands were sold and Edward received a sum of $82,792 as his portion of the estate. In August 1991, Edward wrote two cheques, one to Norman for $36,472 and one to Arthur for $11,373. At the time, his liabilities totaled $265,863 and his assets (including his interest in the estate) totaled $132,549, making him insolvent. In late 1992, Edward was petitioned into bankruptcy by one of his creditors. The trustee in bankruptcy sought to set aside the payments to Norman and Arthur pursuant to the *Fraudulent Preferences Act* ("*FPA*").
* The brothers conceded that the payments came within s. 2 of the *FPA*, but argued that the payments are exempt from the operation of the *FPA* by s. 6, which creates an exemption for "any payment of money to a creditor…, if the money paid… bears a fair and reasonable relative value to the consideration therefor."

Issues and holding:

* Are the payments to Norman and Arthur exempt from the operation of the *FPA* by virtue of s. 6? **YES**

Analysis:

* Section 6(b) of the FPA provides that nothing in ss. 1 to 3 applies to "a payment of money to a creditor, or a *bona fide* [transaction], that is made in consideration of a present actual *bona fide* sale or delivery of goods or other property or of a present actual *bona fide* payment in money, or by way of security for a present actual *bona fide* advance of money."
  + The trial judge held that "present actual *bona fide*" modified "payment of money to a creditor," with the result being that payments to a creditor must be made in consideration of a present value.
    - *Note*: under this definition, *the payment of a past debt would not fit into the s. 6 exception*. Therefore, the trustee in bankruptcy was arguing that this was the correct interpretation.
  + Conversely, the brothers argued that "present actual *bona fide*" modified "[transaction]," not "payment of money to a creditor," with the result being that the payment of money can be for past consideration.

Rationale: (McFadyen JA)

* The language used in s. 6 does not lend itself to the interpretation adopted by the trial judge; as such, payments to creditors for past debts cannot be impeached by operated of s. 6 (provided that the money paid or property sold bear a fair and reasonable value relative to the consideration for it).
  + Counsel for the trustee did not cite any decision supporting the trial judge's interpretation of s. 6.
  + The courts have long recognized that the payment of money to a creditor is exempt from the operation of the *FPA*.

#### *Re Titan Investments Ltd Partnership*, 2005 ABQB 637

Facts:

* Titan Investments Limited Partnership ("Titan") was formed in 2003. It was presented as an investment vehicle whereby investor funds were pooled for the purposes of trading in the futures and equities markets. Titan's general partner was Titan Genpar Inc, whose sole shareholder was David Comte. Titan issued regular statements to investors indicating that Mr. Comte was achieving high returns for Titan through continuous trading in futures. On November 30, 2004, a notice was sent to investors advising that Titan would be wound up. Comte paid redemptions to 87 of Titan's investors (the "Overpaid Investors"), whose payouts ranged from an average of 242% of initial investment to a maximum of 5,500%. In December 2004, Mr. Comte committed suicide. He left a suicide note revealing that Titan was a Ponzi scheme and that he stole millions from investors. There are now more than 40 Titan investors who have not received redemptions to cover their initial investment (the "Underpaid Investors"). With the funds available to distribute to the Underpaid Investors, they will receive an average of 45% of their initial investment. If previous redemptions to the Overpaid Investors are repaid, and the funds are redistributed to all investors *pro rata*, the realization per partner will be between 75% and 93%.

Issues and holding:

1. Are the redemptions made to the Overpaid Investors impeachable as fraudulent preferences under the *Fraudulent Preferences Act* ("the *FPA*")? **YES**
   1. Can the payment to the Overpaid creditors be challenged under s. 2 of the *FPA*? **YES**
   2. Alternatively, can the payment to the Overpaid creditors be challenged under s. 3 of the *FPA*? **YES**
   3. Does s. 6 of the *FPA* affect the ability of the Underpaid Investors to recover? **NO**
2. In the event that the redemptions are found to be void on any of the above grounds, must the Overpaid Investors repay the *full* amount of the redemptions? **YES**
3. Does the defence of equitable change of position apply? **NO**

Analysis:

* To successfully impeach the payment to the Overpaid Investors under s. 2 of the *FPA*, an applicant must show (1) that there was a preferential transfer of property, (2) by an insolvent person or a person who is on the eve of insolvency, (3) to a creditor, (4) with the intent of giving that creditor a preference.
  + Section 2 *does not require a consideration of whether the recipient creditor intended to be preferred*.
  + In the case of an incorporated debtor, the intention of the individual or individuals who are the "governing mind" of the corporation will be imputed to the corporation.
* An applicant seeking to impeach a transaction under s. 3 of the *FPA* must bring the action to impeach the transaction within one year of the date that the transfer occurred, but need not prove an intent to prefer.
  + Rather, it is sufficient that the payment to the creditor had a preferential effect.
  + In other respects, the requirements under s. 3 are the same as the requirements under s. 2: there must have been (1) a preferential transfer of property, (2) by an insolvent person or a person who is on the eve of insolvency, (3) to a creditor.
* Section 6(b) of the *FPA* is interpreted such that a payment of money to a creditor is exempt from the *FPA* if it bore a fair and reasonable value to the consideration which gave rise to the obligation to pay.
  + The burden of demonstrating that the payment bears a fair and reasonable value relative to the consideration lies with the party seeking to uphold the transaction.
* Under the doctrine of equitable change, the right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.

Rationale: (Hawco J)

1. The redemptions made to the Overpaid Investors void as fraudulent preferences under the *FPA*.
   1. The payment to the Overpaid Investors can be challenged under s. 2 of the *FPA*.
      1. The payment of the investment funds by Comte to the Overpaid Investors qualifies as a transfer of property with preferential effect for the purposes of the s. 2.
         * The transfer reduced the pool of funds that would otherwise be distributable pro rata.
      2. Titan, which was run as a Ponzi scheme, was insolvent from its inception.
         * There were never sufficient funds to enable Titan to pay out its partners, and the scheme would have collapsed at any time a sufficient number of investors demanded redemptions.
      3. The Underpaid Investors are "creditors" under s. 2; they are persons to whom Titan was liable.
         * It is true that Titan's investors were warned that their investments were not loans, but were rather in the nature of an investment in equity.
           + Thus, if Mr. Comte's investments merely performed poorly, the Underpaid Investors would have likely had no remedy.
         * *However*, fraud vitiates the consent of a party to a transaction, rendering the transaction voidable; thus, since the Underpaid Investors were induced by fraud to invest, the contracts they entered into are voidable, and Titan is liable in equity to the Underpaid Investors to the extent of the investor’s investment of principle in the Titan.
      4. Mr. Comte made a deliberate decision to ignore the requests of certain investors for redemption and instead paid full redemptions to investors who had made no such requests; this is evidence of his decision to prefer the Overpaid Investors.
   2. If Mr. Comte *did not* intend to prefer the Overpaid Investors, then the redemptions to the Underpaid Investors made within one year of this action are void pursuant to s. 3 of the *FPA*.
      1. As stated in the s. 2 analysis, there has been a transfer of property from an insolvent person to a creditor; plus, the transfers clearly had a preferential effect.
   3. Section 6 does not exempt the redemptions made by Titan to the Overpaid Investors from the application of the *FPA*, since they do not bear a fair and reasonable value relative to the consideration.
      1. The Overpaid Investors achieved average realizations of 242% on their principle, and achieved realizations of as high as 5,500% on their principle
         * i.e., the amounts that the Overpaid Investors received far exceeded the amount of any equitable claim that the investors would have had against Comte.
2. Neither the FPA nor the case law supports a finding that the Overpaid Investors should be entitled to keep their initial investment.
   1. The *FPA* states that transactions that are found to be fraudulent preferences are void; it does not provide that the preference will only be void to the extent of the excess paid to the creditor.
3. The defence of equitable change is not available to the Overpaid Investors in these circumstances; they therefore cannot retain more than their equal share of the redemptions from Titan.
   1. The Overpaid Investors received the payments as a result of a fraud and, on the authority of *Principal Group Ltd (Trustee of) v Anderson*, it would be against public policy to allow the defence to apply.
   2. Any consideration of equity with respect to the Overpaid Investors would also have to include a consideration of equity with respect to the Underpaid Investors.

Notes:

* If proof of fraudulent intent on the part of a recipient creditor was required to set aside these transactions, they could not have been set aside.
  + The recipients did not know they were being preferred; they just thought they were getting a return on their investments.

### Ordering Property Sold

* + Rule 9.24(1) of the *Alberta Rules of Court* provides that, if a judgment creditor claims to be entitled to relief under the *Fraudulent Preferences Act*, on application by the creditor, the Court may order property or part of property to be sold to pay the amount owing under a writ of enforcement.
    - Notice of the application must be served on (a) the judgment debtor, and (b) the person to whom it is alleged the property was conveyed [r. 9.24(2)].
    - If a transfer is made to defeat, defraud, or hinder the rights of a judgment creditor, the creditor need not have obtained judgment at the time of the impugned transfer [r. 9.24(3)].
    - In *336239 Alberta Ltd (Dave’s Diesel Repair) v Mella*, 2016 ABQB 190, the court held that it could not grant judgment against a non-party transferee under r. 9.24 and order her to pay damages or compensation. It is limited to striking down an alleged fraudulent conveyance or ordering the sale of property wrongfully conveyed.

## The Oppression Remedy

* The oppression remedy is a flexible remedy used to ensure fairness between stakeholders in a corporation.
  + It was first designed to protect minority shareholders from being treated unfairly, but it has increasingly been used to address conveyances, preferences, and other unfair conduct.

### Standing

* A "complainant" may apply to the court for an oppression remedy [*BCA*, s. 242(1)].
  + In respect of an application for an oppression remedy, "complainant" includes a creditor only if, in the opinion of the court, the creditor is a "proper person" to make such an application [BCA, s. 239(b)].
    - To be a "proper person," creditors must establish at least a *prima facie* case of having been subjected to unfairly prejudicial actions or actions that unfairly disregarded its interests (*Builders’ Floor*, below).
    - Creditors have been given standing when those in control of a corporation have dissipated assets, rendering it immune from a judgment in favour of the creditor (*Builders’ Floor*, below).
    - Courts have held that "complainant" can include contingent claimants for an unliquidated demand (*Builders’ Floor*, below).
    - A creditor is more likely to be given standing when the debtor corporation is approaching insolvency (*Builders' Floor*, below).
      * This is because, as long as the debtor is solvent, a creditor can collect their claim using other judgment enforcement tools; as they approach insolvency, they have a bigger interest in how the debtor company manages its affairs.
  + The requirement for creditors to prove standing reflects a policy that oppression claims are not to be used as a method to collect debts (*PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16).
    - The mere fact that a corporation does not or cannot pay its debts as they come due does not amount to oppression.

### The Test

* If, on application by a complainant, the court is satisfied that in respect of a corporation or its affiliates [*BCA*, s. 242(2)]:
  1. any act or omission of the corporation or any of its affiliates effects a result,
  2. the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
  3. the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a creditor, the court may make an order to rectify the matters complained of.

#### *Builders’ Floor Centre Ltd v Thiessen*, 2013 ABQB 23

Facts:

* Builders’ Floor Centre ("Builders") provided and installed flooring in a new house owned by a house-builder, Autumn Ridge Homes Inc ("Autumn"). Before the work was completed, the property was transferred to John and Verna Thiessen as joint tenants for $1. The Thiessens were the sole shareholders and directors of one of the two corporations that held shares in Autumn, and John Thiessen was the President and Secretary- Treasurer of Autumn. Builders obtained a default judgment of approximately $43,500 against Autumn for its unpaid invoices, following which Autumn delivered a financial report indicating that its assets consisted of $10 in a bank account. Builders applied for the transfer of the house to be set aside.

Procedural history:

* Master Wacowich held, *inter alia*, that Autumn's conduct was oppressive within the terms of the *Business Corporations Act* ("*BCA*"). The Master thus directed that the transfer of the house be set aside and that the Registrar return registration of title to the land to the name and status as it existed prior to the transfer.

Issues and holding:

* Did the Master err in holding that Builders has an entitlement to an oppression remedy? **NO**

Analysis:

* The *BCA* permits a "complainant" to apply for an oppression remedy if the business or affairs of the corporation have been conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder or creditor.
* The test for oppression involves two related inquiries:
  1. Does the evidence support a *reasonable* expectation asserted by the claimant?
     + Useful factors in determining whether a reasonable expectation exists include:
       - General commercial practice;
       - The nature of the corporation;
       - The relationship between the parties;
       - Past practice;
       - Steps the claimant could have taken to protect itself;
       - Representations and agreements; and
       - The fair resolution of conflicts between corporate stakeholders.
     + That said, courts have found that a creditor reasonably expects the following:
       - That a corporation will not be used as a vehicle for fraud;
       - That the debtor will not convey away, for no consideration, exigible assets which will leave the creditor unable to realize upon assets to satisfy the debt;
       - That the directors of a corporation will manage the company in accordance with their legal obligations; and
         * i.e., to act honestly and in good faith in the best interests of the corporation and to exercise the diligence expected of a reasonably prudent person.
       - That the debtor will honour the understandings and expectations which the debtor has created and encouraged.
  2. Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression," "unfair prejudice," or "unfair disregard" of a relevant interest?

Rationale: (Neilsen J)

* Autumn unfairly disregarded Builders' reasonable expectations as a creditor.
  + Builders' reasonably entertained an expectation that, assuming fair dealing, its chances of repayment would not be frustrated by the transfer.
  + Removing Autumn's only asset, for next to no consideration, was oppressive, unfairly prejudicial, and unfairly disregarded the interests of Builders' as a creditor.
* While Builders' could have filed a builders' lien or taken some other form of security from Autumn so as to protect itself, this alone does not disentitle Builders’ from pursuing an oppression remedy.
  + At the time the work was completed, there was nothing to suggest that Builders' was at risk of not being paid, and therefore no reason for Builders’ to seek some form of security.

Note:

* In the result, Neilson J confirmed Master Wacowich's order that the transfer of the house be set aside and that the registration of title to the land be returned to the name and status as it existed prior to the transfer.
* The requirement that a complainant's expectations be "reasonable" imports a degree of objectivity.
  + It is not enough for the complainant to say that they had a subjective expectation of better treatment.

### Remedies

* On an oppression application, the court may make any *interim or final* order it thinks fit [*BCA*, s. 242(3)].
  + Courts may grant interim relief before the merits of the oppression claim have been decided.
    - To get interim relief, the complainant has to show a *strong prima facie* case.
  + The remedies that a court may grant include, w*ithout limiting the generality of the foregoing*, any or all of the following [*BCA*, s. 242(3)]:
    1. an order restraining the conduct complained of;
    2. an order appointing a receiver or receiver‑manager;
    3. an order to regulate a corporation’s affairs by amending the articles or bylaws;
    4. an order declaring that any amendment made to the articles or bylaws pursuant to clause (c) operates notwithstanding any USA made before or after the date of the order;
    5. an order directing an issue or exchange of securities;
    6. an order appointing directors in place of or in addition to all or any of the directors then in office;
    7. an order directing a corporation or any other person to purchase securities of a security holder;
    8. an order directing a corporation or any other person to pay to a security holder any part of the money paid by the security holder for securities;
    9. an order directing a corporation to pay a dividend to its shareholders or a class of its shareholders;
    10. an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
        - If property has been given at below fair market value, the court can undo this transaction.
    11. an order requiring a corporation to produce to the court or an interested person financial statements;
    12. an order compensating an aggrieved person;
        - Courts can even make people behind the corporation *personally* liable for compensating the complainant (*1007374 Alberta Ltd v Ruggieri*; *Vaillancourt v Carter*).
    13. an order directing rectification of the registers or other records of a corporation under section 244;
    14. an order for the liquidation and dissolution of the corporation;
    15. an order directing an investigation to be made;
        - This can be used as an interim remedy to gather evidence of wrongdoing as a basis for further relief.
    16. an order requiring the trial of any issue;
    17. an order granting permission to the applicant to
        1. bring an action in the name and on behalf of the corporation or any of its subsidiaries, or
        2. intervene in an action to which the corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing an action on behalf of the corporation or any of its subsidiaries.
  + While the oppression remedy is a broad remedy, courts will try to limit interference with the affairs of a corporation to what is necessary to protect the complainant.

#### *1007374 Alberta Ltd v Ruggieri*, 2015 ABCA 205

Facts:

* In 2003, the plaintiff entered into a consulting agreement with Ruggieri Engineering. In 2011, the plaintiff sued Ruggieri Engineering for breach of contract, and was awarded $337,130. After trial, but before the judgment was released, Antonio Ruggieri (the controlling mind of Ruggieri Engineering) took several steps which made it more difficult for the plaintiff to enforce a judgment. Ruggieri Engineering granted general security agreements of $500,000 in favour of Mr. Ruggieri and a related company, and also issued promissory notes to Mr. Ruggieri and the related company. Mr. Ruggieri then started a new company, Alberta Engineering, under whose name he carried out the same business for the same clients and with the same employees. The plaintiff sued Antonio Ruggieri, Ruggieri Engineering, Alberta Engineering, and another related company ("the Appellants"). The plaintiff advanced a number of claims, including oppression.

Procedural history:

* The trial judge found that the plaintiff succeeded on each of its claims and awarded damages of $476,499. Additionally, the trial judge awarded the plaintiff punitive damages of $100,000.

Issues and holding:

* Did the trial judge err in granting the plaintiff's oppression claim? **NO**
* Did the trial judge err in holding Mr. Ruggieri personally liable? **NO**
* Did the trial judge err in awarded the plaintiff $100,000 in punitive damages? **NO**

Analysis:

* In relation to creditors, the focus of the test for oppression is whether the effect of the corporation’s conduct is unfairly prejudicial or unfairly disregards the interest of the creditor.
  + The court must determine the reasonable expectations of the creditor, including expectations that the debtor will:
    1. Not convey away for no consideration exigible assets which will leave the creditor unpaid; and
    2. Honour the understanding and expectation that the debtor has created and encouraged.
  + Although the *BCA* focuses specifically on the acts and omissions of the corporation, in a small closely held corporation, it is the director who is the source of the conduct.
    - When a director exercises power in a manner that is unfairly prejudicial or unfairly disregards the interests of the complainant, liability may lie with the director.
* Punitive damages are the exception rather than the rule, and are imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.
  + When awarded, punitive damages should be proportionate to the harm caused, the degree of misconduct, the vulnerability of the plaintiff and any advantage or profit gained by the defendant.

Rationale: (Rowbotham JA)

* The Appellants affected a result that was unfairly prejudicial to the plaintiff and disregarded its interests.
  + They set out to strip Ruggieri Engineering of its exigible assets by encumbering it with general security notes and promissory notes and moving its business to Alberta Engineering.
  + While a debt action should not be routinely turned into an oppression action, the conduct of Ruggieri Engineering is considerably more than the mere failure to pay a judgment.
* Mr. Ruggieri personally benefitted from the oppressive conduct; he has continued in the same business without income, and has received over $800,000 in management fees from Alberta Engineering.
* There is no basis to interfere with the award of punitive damages in this case.
  + As the trial judge found, the Appellants' conduct was so oppressive, calculating, and unremitting, and has carried on for so many years, that nothing short of punitive damages will serve to properly condemn and punish this misconduct.