

# **JUDGMENT ENFORCEMENT AND THE PPSA THE NEWFOUNDLAND EXPERIENCE**

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## 1. INTRODUCTION

On June 1, 1997 the *Judgment Enforcement Act*<sup>1</sup> (JEA) came into force. The process leading to the enactment of this legislation is set out in the Executive Summary that accompanied the Bill to the Legislature. (A copy of the Executive Summary is attached to this Material as Appendix A.)

The JEA is patterned on the Alberta *Civil Enforcement Act*<sup>2</sup> (CEA) which in turn was based on the Alberta Law Reform Institute's Model Judgment Enforcement Act<sup>3</sup> (Model JEA). The Alberta Model JEA dealt only with the enforcement of money judgments and continued a central role for the sheriff in the proposed enforcement system. However, the Alberta CEA covers civil enforcement activities by judgment creditors, secured creditors, and landlords. Further, the Alberta CEA in effect privatized the enforcement of money judgments through civil enforcement agencies. As will be noted in this presentation, the Newfoundland JEA in many respects is closer to the Alberta Model JEA than the Alberta CEA.

From the beginning the JEA contemplated the adoption of a PPSA. In the Discussion Paper prepared prior to the drafting of the JEA, it was recommended that the JEA integrate PPSA concepts<sup>4</sup>. Even further, Part A(3) of the Executive Summary stated that:

The JEA represents the first phase of integration of the enforcement system with a new personal property security regime for the province. Integration of the system for enforcement of money judgments and a PPSA regime will facilitate commercial activity in the province and be a benefit to lenders, other creditors and borrowers alike.

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<sup>1</sup> *Judgment Enforcement Act*, S. N. 1996, c. J-1.1; as amended S. N. 1997 c. 3 (hereinafter the JEA).

<sup>2</sup> *Civil Enforcement Act*, S. A. 1994, c. C-10.5 (hereinafter the CEA).

<sup>3</sup> Alberta Law Reform Institute, *Enforcement of Money Judgments*, Report No. 61, Volumes 1 and 2, (March, 1991) (hereinafter Model JEA).

<sup>4</sup> Discussion Paper, *Proposals for a Newfoundland Judgment Enforcement Act*, prepared by John R. Williamson for the Department of Justice, Province of Newfoundland and Labrador (August 1994; St. John's)

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The second phase of this reform initiative is a Draft PPSA which will soon be available for public review and comment.

The Draft PPSA is patterned on the Western Model Acts currently in force in New Brunswick<sup>5</sup> (NB PPSA) and Nova Scotia<sup>6</sup>. It should be noted that the approach to the Newfoundland PPSA has been harmonization with the New Brunswick and Nova Scotia legislation rather than uniformity. This is particularly evident with respect to judgment enforcement since the other two provinces still have what might be referred to as traditional judgment enforcement systems when compared to the Newfoundland JEA.

Since the JEA follows the Alberta CEA so closely, the Alberta approach is proposed for purposes of integration of the PPSA and JEA. The Alberta PPSA is a Western Model statute and the result is harmonization if not uniformity with the legislation in New Brunswick and Nova Scotia. However, as will be discussed below, the Newfoundland JEA does use the New Brunswick "notice of judgment" rather than the Alberta CEA "writ of execution".

### 2. FOCUS OF PRESENTATION

The focus of this presentation will be to describe the approach taken in the adoption of PPSA concepts under the JEA and their integration with the Draft PPSA. Unfortunately, time is not sufficient in this forum to describe the system of enforcement created by the JEA. The Executive Summary attached (Appendix A) provides general information in this regard. For the purposes of this presentation, we will first discuss binding of the debtor's personal property upon registration of a notice of judgment on the Judgment Enforcement Registry<sup>7</sup> (JER). We will then outline the interface proposed for the Personal Property Registry (PPR) with the Judgment Enforcement Registry (JER)<sup>8</sup>.

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<sup>5</sup> *Personal Property Security Act*, S. N. B. 1993, c. P-7.1 (as amended) (hereinafter NB PPSA).

<sup>6</sup> *Personal Property Security Act*, S. N. S. 1996, c. 13.

<sup>7</sup> See below Part 9(b).

<sup>8</sup> See below Part 9(e).

In this presentation discussion will be limited to the Alberta CEA and PPSA and the New Brunswick *Creditors Relief Act*<sup>9</sup> (CRA) and NB PPSA.

However, in order to appreciate these issues, certain general aspects of the JEA must be reviewed.

### 3. PRE JEA ENFORCEMENT SYSTEM

The primary objective of the JEA is to create an efficient system for the collective enforcement of money judgments. In order to accomplish this objective, the system must be unified, coordinated, and province wide.

The province wide aspect and some elements of coordination were already in place prior to the JEA. The bailiwick of the High Sheriff of Newfoundland (the Sheriff) is the Province. The office of the High Sheriff is located in St. John's which has provided centralized administration. Therefore, the important elements of centralization on a province wide basis have existed in Newfoundland for centuries.

Prior to the adoption of the JEA, certain enforcement procedures could be conducted from the Sheriff's Office in St. John's regardless of where the debtor or property was located. Garnishment or attachment of a debt is an example of such a procedure. On the other hand, other enforcement procedures had to be conducted outside the office. An obvious example of this would be the seizure of tangible personal property. Activity such as seizure might be referred to as "field work".

Where field work was required, the Sheriff would generally have the work carried out by staff employed by the Department of Justice. However, outside St. John's, this work would be carried out by fee for service deputy sheriffs appointed by the Sheriff. Through this means, the Sheriff had access to sub-sheriffs, deputy sheriffs, and sheriff's bailiffs located throughout the Province.

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<sup>9</sup> *Creditors Relief Act*, R. S. N. B. 1973, c. C-33, ss. 2.1-2.6 (hereinafter CRA).

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However, all enforcement activity, including distribution of the proceeds of enforcement, was controlled through the Sheriff's Office in St. John's resulting in a significant degree of coordination on a province wide basis.

To assist in the coordination of judgment enforcement prior to the JEA, the Sheriff's Office developed a computerized data base. While certain information on this data base was available to the public, it did not constitute a public registry for the purposes of binding property.

Thus, the basics for a centralized, coordinated, province wide enforcement system were already in place in Newfoundland. However, significant pieces were missing. For example: a clear statutory base did not exist for the enforcement system created primarily under the *Rules of the Supreme Court, 1986*; an effective and efficient method of binding the debtor's property, both land and personal, did not exist; more importantly, collective enforcement did not exist since priority among judgment creditors was based on the common law principles of first come first paid.

### **4. OVERVIEW OF JEA**

#### **a. General**

The basic functional elements of the enforcement system created by the JEA are quite simple: provide the judgment creditor with effective binding of all of the debtor's non-exempt property by registering a notice of judgment; authorize the judgment creditor to instruct the Sheriff to carry out enforcement proceedings to realize upon that property; provide for the distribution of the proceeds by the Sheriff to judgment creditors with illigible claims in accordance with the priorities established under the JEA.

**b. Universal Exigibility**

With respect to property of the debtor available to satisfy a money judgment, the JEA clearly adopts the principle of universal exigibility; ie. that all valuable rights of the debtor (subject to reasonable exemptions) should be subject to appropriate enforcement proceedings<sup>10</sup>.

**c. Binding**

Binding relates to the priority of the interest of the judgment creditor over persons who subsequently acquire an interest in that property. Binding has traditionally occurred at some stage of an enforcement procedure such as the delivery of a writ to the sheriff or the seizure of property by the sheriff. The JEA clearly separates the binding of property from the enforcement procedure for the realization of that property. Binding under the JEA is accomplished by the registration of a notice of judgment on a province wide computer database referred to as the Judgment Enforcement Registry (JER). The JER will be discussed in more detail below in Part 9. The registration of a notice of judgment and binding must occur before an enforcement procedure to realize on the debtor's property can be initiated by a judgment creditor<sup>11</sup>.

**d. Enforcement Procedures**

Once binding has occurred, the judgment creditor may initiate an enforcement procedure that is appropriate for the property in question. The judgment creditor who initiates the enforcement procedure is referred to as the "instructing creditor". The instructing creditor generally has control over enforcement procedures with respect to that property of the debtor. Only one enforcement procedure may be in effect with respect to the same property of the debtor at any time.

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<sup>10</sup> JEA, s. 2(1)(rr) ("property").

<sup>11</sup> JEA, s. 38(4)(b).

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The instructing creditor initiates an enforcement procedure by giving the Sheriff written instructions in accordance with the JEA. With the exception of special cases under Part IX, the judgment creditor is not required to return to court for a further order to authorize or direct enforcement procedures against the debtor's property.

While many procedures may be conducted from the Sheriffs Office in St. John's, field work is still carried out by members of the Sheriff's Office, sheriff's bailiffs, or fee for service deputy sheriffs located throughout the Province. In addition, the JEA authorizes the Sheriff to retain other agents and advisors such as real estate agents and securities brokers to carry out the enforcement procedure.

As noted, all enforcement proceedings and the distribution of the proceeds of enforcement proceedings, are directed and coordinated from the Sheriff's Office. To ensure that this is done in an efficient manner, an Enforcement Officer and a Small Claims Coordinator have been appointed to facilitate administration of the enforcement procedures under the JEA.

### **e. Collective Enforcement**

Perhaps the most significant change to the enforcement system in Newfoundland was the adoption of the principle of collective enforcement. Pro rata sharing is certainly the most obvious aspect of collective enforcement. Under the JEA, a "distributable fund" is constituted when monies are received by the Sheriff as a result of the registration of a notice of judgment<sup>12</sup>. Most often this will occur as a result of enforcement proceedings conducted by the Sheriff. Creditors with a notice of judgment at the time the distributable fund is constituted are "eligible creditors" and entitled to share in accordance with the distribution provisions of the JEA<sup>13</sup>.

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<sup>12</sup> JEA, ss. 150; 151(1).

<sup>13</sup> JEA, s. 153.



However, collective enforcement has much broader implications for the system and the Sheriff. The binding of the debtor's property does not create exclusive individual rights for the judgment creditor. Other judgment creditors of the debtor may also exercise enforcement procedures with respect to the interest in the debtor's property bound by another (prior) judgment creditor. In other words, JC 2 may instruct the Sheriff to sell the interest of the debtor bound by JC 1. The sale will be conducted by the Sheriff for the collective benefit of JC 1 and JC 2 who will be entitled to share in the distributable fund created. To the extent possible, the Sheriff will therefore attempt to realize an amount sufficient to satisfy the claims of both JC 1 and JC 2.

**f. Enforcement Debt**

At this point, a distinction should be drawn between various amounts relevant to enforcement proceedings. Of course there is the original amount of the judgment. In many respects, it is of little relevance to the actual enforcement procedures. The actual amount outstanding on the judgment (the judgment debt) is the most relevant amount. It is relevant not only to the Sheriff in conducting enforcement proceedings, but is of obvious interest to other judgment creditors and third parties dealing with the debtor's property.

Theoretically, the Sheriff should base all enforcement proceedings on the judgment debt.

The problem is that this is not always feasible. Yet a failure to act on the basis of the judgment debt may prejudice not only other creditors but the debtor as well. Potential problems include "excessive enforcement"<sup>14</sup> and excessive distributions to a judgment creditor.

The Sheriff must have current information on the judgment debt of each judgment creditor of a debtor. Therefore, the JEA provides for the calculation of an amount

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<sup>14</sup> Only property of the debtor sufficient to satisfy the claims of creditors should be subject to enforcement procedures at any time.

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referred to as the "enforcement debt"<sup>15</sup> with respect to a notice of judgment. The details of the calculation of the enforcement debt will be discussed below in Part 9 in the context of the database created for the purposes of the JEA.

### **g. Conclusion**

This thumbnail sketch is intended to provide sufficient background to discuss the adoption of PPSA concepts in the JEA, integration of the JEA and the Draft PPSA, and the functions of the judgment enforcement database created to perform the public registry and administrative functions for the enforcement system.

## **5. INTEGRATION OF PPSA CONCEPTS**

### **a. General**

First, we will consider the binding of the debtor's property upon registration of a "notice of judgment" on the JER. While adoption of PPSA concepts is clearly evident in the binding of the debtor's personal property, it is also reflected in the specific enforcement procedures under the JEA. Many enforcement procedures were developed to be appropriate for specific types of personal property as created and defined in PPSA terminology. Unfortunately, the scope of this presentation does not allow for a discussion of this aspect of the use of PPSA concepts under the JEA. Therefore, the focus will be limited to PPSA concepts in the context of binding the debtor's personal property.

### **b. Notice of Judgment**

Under the JEA, the money judgment entitles the judgment creditor to register a notice of judgment on the (JER)<sup>16</sup>. As will be discussed below in Part 9, the JER is a computerized

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<sup>15</sup> JEA, s. 22.

<sup>16</sup> JEA, s. 38(1).

database patterned on the personal property registries in operation in Canada. It constitutes a public registry for the purposes of binding the debtor's present and after acquired land and personal property. Newfoundland would appear to be unique in that a single registration by a judgment creditor is effective for purposes of binding all valuable rights of the debtor, both real and personal.

The concept of a "notice of judgment"<sup>17</sup> follows the New Brunswick approach<sup>18</sup>. A "notice of judgment" does not exist other than as the data registered on the JER. There is no such thing as a "notice of judgment" in the form of a document or certificate that the judgment creditor obtains from the court. In fact, the judgment creditor is not required to obtain an execution or enforcement order before being entitled to register the notice of judgment or initiate enforcement procedures. This differs from the Alberta CEA approach where a writ of execution is to be obtained before registration on the PPR. Under the JEA, the money judgment entitles the judgment creditor to register the data that constitutes the "notice of judgment" in the same manner as a security interest entitles a secured party to register a financing statement.

## **6. BINDING**

### **a. General**

As previously noted, the registration of a notice of judgment binds all property of the debtor, both real and personal. For this presentation, the focus will be on the treatment of the debtor's personal property.

As is the case in Alberta<sup>19</sup> and New Brunswick<sup>20</sup>, "personal property" for the purposes of binding is defined in PPSA terminology<sup>21</sup>. Binding of the debtor's property is treated as if a security interest were both created and perfected in favour of the judgment creditor

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<sup>17</sup> JEA, s. 2(1)(jj).

<sup>18</sup> CRA, s. 2.1 ("notice of judgment").

<sup>19</sup> CEA, s. 31(b).

<sup>20</sup> CRA, s. 2.1 ("personal property").

<sup>21</sup> JEA, s. 37(k).

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upon registration of a notice of judgment. In other words, a judgment creditor is generally accorded the same priority as a secured party with a security interest perfected by registration of a financing statement. The scope of the "deemed" security interest in favour of the judgment creditor is equivalent to a general and continuing security over all present and after acquired personal property of the debtor.

The basic priority rules for the notice of judgment can be divided on the basis of whether the competition is between a judgment creditor and either a person with a prior interest or a person with a subsequent interest. A prior interest will have priority over the notice of judgment unless otherwise provided since basic common law principles still apply<sup>22</sup>. A subsequent interest will be subordinate to the notice of judgment unless otherwise provided<sup>23</sup>.

### **b. Prior Security Interests**

While there are other issues related to prior third party interests, the concern at this time is the priority of a prior security interest in collateral (personal property) of the debtor. Consistent with the treatment of the notice of judgment as a perfected security interest, priority as against secured parties will be based on a first to register rule. A notice of judgment will have priority over an unperfected security interest other than a PMSI which is perfected within the grace period<sup>24</sup>. This priority rule will be found in the JEA rather than in the PPSA as is the case under Alberta provisions<sup>25</sup>. The subordination of unperfected security interests in New Brunswick continues to be found in s. 20(1) of the PPSA. The difference does not change the priority rule but simply reflects a difference in drafting styles.

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<sup>22</sup> *Jellett v. Wilkie*, (1896), 26 S. C. R. 282, "... an execution debtor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor." (at pp. 288-289); see also *Mills v. Duggan*, (1892), 21 S. C. R. 33, at pp. 46-47.

<sup>23</sup> JEA, s. 49.

<sup>24</sup> JEA, s. 50 to be amended to adopt s. 35. of the CEA.

<sup>25</sup> CEA, s. 35. The pre CEA priority rule subordinating unperfected security interests found in s.

This priority rule certainly enhances the position of judgment creditors when compared to the situation in jurisdictions which require that the judgment creditor seize or otherwise take control of the collateral in order to gain priority over prior unperfected security interests<sup>26</sup>. It might also be suggested that it improves the position of debtors since judgment creditors should be less likely to seize the debtor's property in order to establish priority and protect their position.

Special note should be made of the priority of a notice of judgment over a perfected security interest with respect to future advances. In this respect, the judgment creditor may be in a better position than a secured party with a subordinate security interest. Unlike the subordinate secured party, the judgment creditor can give notice of the registration of the notice of judgment and obtain priority over any future advances. This is the same result as reached in Alberta<sup>27</sup> and New Brunswick<sup>28</sup>. The Draft PPSA has adopted the Alberta PPSA provision consistent with the approach previously explained.

**c. Subsequent Third Parties**

The general rule is that interests in personal property acquired after the registration of the notice of judgment are subordinate to the notice of judgment<sup>29</sup>. The intent is that the subsequent third party will generally have the same priority as against a notice of judgment as they would have as against a security interest perfected by registration of a financing statement. Therefore, a person acquiring an interest in personal property is generally expected to search for notices of judgment in the same circumstances as they would search for financing statements.

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20(1)(a) of the Alberta PPSA has been repealed.

<sup>26</sup> See for example Saskatchewan *Personal Property Security Act*, S. S. 1993, c. P-6.2, s. 20(1); and, Ontario *Personal Property Security Act*, R. S. O. 1990, c. P.10 (as am.), s. 20(1).

<sup>27</sup> Alberta PPSA, s. 35(5).

<sup>28</sup> NB PPSA, s. 35(6).

<sup>29</sup> JEA, s. 49.

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For the purposes of clarification, following the Alberta CEA provisions<sup>30</sup>, a perfected security interest (other than for future advances after notice is given) will have priority over the notice of judgment. Under this provision the first to register rule clearly applies and issues of when attachment occurs and the time of binding do not arise. It avoids any argument that a security interest in after acquired property is a subsequent and therefore subordinate interest as against the notice of judgment.

The provisions whereby a subsequent interest will take free of or in priority to a notice of judgment are for the most part found in the JEA. Again, this follows the Alberta CEA drafting style rather than the New Brunswick style.

More importantly, the provisions differ in a more substantive way. The New Brunswick provision states:

(6) A person to whom personal property bound by a notice of judgment is transferred has priority as against the persons referred to in subsection (5) in the same circumstances that a transferee of personal property subject to a security interest perfected by registration has priority as against the secured party under subsections 30(1) to 30(4), subsections 30(6) and 30(8) and section 31 of the *Personal Property Security Act*, and those provisions apply with the necessary modifications.<sup>31</sup>

On the other hand, the Alberta approach does not equate the judgment creditor with the secured party for all purposes. As a result, in some cases the judgment creditor is not accorded the same priority as a secured party.

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<sup>30</sup> Section 35(2) of the CEA provides:

Subject to section 35(5) of the Personal Property Security Act, a security interest in personal property has priority over a writ if the security interest was registered or perfected before the property became bound by the writ.

<sup>31</sup> CRA, s. 2.3(6).

The Alberta provisions reflect a policy which recognizes the difference between the interests held by each. A security interest is a right in property acquired by the secured party while the interest created upon the binding of property is merely by way of a remedy made available to the judgment creditor<sup>32</sup>. While some differences will exist between the JEA and the New Brunswick provisions, it should be emphasized that the differences do not reflect fundamental differences in principle as to the priority of subsequent third parties acquiring an interest in property bound by a notice of judgment.

A detailed review of all the relevant provisions of the JEA is not possible in this forum. As noted, the priority results are generally the same as for security interests. However, the following situations deserve some further comment; buyer of goods in the ordinary course of business, serial numbered goods, and fixtures.

## 7. GOODS

### a. Ordinary Course of Business

Under the JEA<sup>33</sup>, a buyers in the ordinary course of business may claim a slightly better priority as against a prior judgment creditor compared to a prior secured party. Following the Alberta CEA provision<sup>34</sup>, the priority of the buyer in the ordinary course of business is not limited to notices of judgment registered against the seller but applies to any notice of judgment that binds the goods. This avoids potential ABC problems where the notice of

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<sup>32</sup> See for example the explanation by the Supreme Court in *Mills V. Duggan*, ((1892), 21 S. C. R. 33) where it is stated:

The foundation of the principle on which the rule of law established by these cases . . . is one which must commend itself to any one who reflects a little on the different positions of a purchaser or encumbrancer for valuable consideration and a judgment creditor. The first has contracted for a particular interest in the land: a judgment creditor originally placed his reliance on the personal credit and solvency of his debtor and his right against the land is not founded on any contract but is only part of his remedy. (at pp. 46-47).

<sup>33</sup> JEA, s. 52(1).

<sup>34</sup> CEA, s. 36(1).

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judgment is registered against A but C is buying from B. Further, the priority of the buyer is unaffected by knowledge of the notice of judgment<sup>35</sup>

The difference in priority of a judgment creditor compared to that accorded a secured party reflects the policy decision to recognize the different status of judgment creditors as compared to secured parties. As noted, the New Brunswick provisions does not reflect the same policy and a notice of judgment would appear to have the same priority as a secured party.

### **b. Serial Numbered Goods**

Currently the JEA does not permit registration or searching by serial number<sup>36</sup>. This was a transitional decision reflecting the fact that the existing personal property registration statutes required registration by name. However, the policy reasons for the treatment of serial numbered goods in a PPSA system were recognized in the context of binding those goods under the JEA. The concern related to the ABC problem and the difficulty of a person acquiring a "big ticket item" to ensure that the title was not encumbered<sup>37</sup>. As a result, a *bona fide* purchaser protection was added to the JEA<sup>38</sup>. In terms of the ABC situation, under this provision a *bona fide* buyer of serial numbered goods (C) will be protected from a notice of judgment registered against a previous owner (A) but must search for notices of judgment that may be registered in the name of the current owner (B). The protection is available to secured parties as well and the provision does not differentiate between consumer goods and equipment.

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<sup>35</sup> Of course, the impeachable transaction provisions of the JEA are always available to the judgment creditor in appropriate cases. There is also the issue of the extent to which a sale can be in the ordinary course of business where such knowledge exists.

<sup>36</sup> JEA, s. 14.

<sup>37</sup> The situation would arise where a notice of judgment is registered against A which binds a car now owned by B which is to be purchased by C. C would only be able to search in the name of B and would not find the notice of judgment registered in the name of A.

<sup>38</sup> JEA, s. 52(3)-(5).



With the adoption of the PPSA, registration and searching by serial number will be added to the JER. However, the approach to the requirement to register a notice of judgment by serial number will differ from that under the New Brunswick provisions and will follow the Alberta CEA.

The New Brunswick approach is to treat the registration of a notice of judgment the same as the registration of a financing statement<sup>39</sup>. Therefore, with respect to serial numbered consumer goods, registration by name of the debtor will not be an effective registration. Buyers and secured parties will take free of a notice of judgment which does not include the serial number. This creates a difficult hurdle for judgment creditors which is not faced by secured parties who are in a much better position to obtain the serial number prior to advancing funds. In addition to priority issues under the New Brunswick provisions, there is concern that consumer goods can not be subject to enforcement proceedings unless the notice of judgment reflects the serial number<sup>40</sup>.

The JEA will permit the judgment creditor to bind serial numbered goods and initiate enforcement procedures even though the notice of judgment does not contain the serial number. Following the Alberta CEA provision<sup>41</sup>, buyers, lessees and secured parties are protected if they acquire an interest in serial numbered goods before the notice of judgment is registered by serial number. Serial numbered equipment is treated similarly except the person acquiring the interest must not have knowledge of the notice of judgment in order to claim priority. This approach is thought to be a better balance and reflect the different status of a secured party and judgment creditor. While there is clearly an incentive to register by serial number, failure to do so is not fatal to the enforcement rights of the judgment creditor.

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<sup>39</sup> See NB PPSA, s. 43(8) which declares a registration to be invalid in the case of serial numbered consumer goods if the serial number is not registered; see also Reg. 95-97, s. 45 which requires registration by serial number for serial numbered consumer goods.

<sup>40</sup> Section 2.3(9) provides:

An enforcement proceeding for the purpose of enforcing a money judgment shall not be commenced until a notice of judgment has been registered in the Registry in relation to the judgment.

## 8. FIXTURES

### a. Bound as Land

One of the more interesting challenges has been to integrate the judgment enforcement system with the PPSA priority rules for fixtures.

In the case of land interests, in order to maintain the priority of a security interest in a fixture over subsequently acquired land interests, a secured party is generally required to register a "fixture notice"<sup>42</sup> in the appropriate land registry office.

The PPSA priority rules for determining priority as between secured parties and judgment creditors are usually based on the premise that a judgment creditor may only bind a fixture as land. For the purpose of this discussion, we will refer to a "judgment lien" as the interest of a judgment creditor who has bound the debtor's land in accordance with the procedures in a particular jurisdiction. Influenced by the 1962 Text of UCC Article 9, the tendency has been to protect judgment creditors in a manner similar to other land interests. Under this approach, the judgment creditor who binds the land is treated as having a reliance interest equivalent to that of a purchaser of an ownership interest in the land.

An example of this approach is found in the NB PPSA. Subsection 36(9) states:

A security interest in goods that attaches before, when or after the goods become fixtures is subordinate to the interest of a creditor of the debtor who causes a memorial of judgment affecting the land to be registered in the records of the appropriate land registry office

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<sup>41</sup> CEA, s. 36(3).

<sup>42</sup> The term "fixture notice" is used here to refer to a notice that may be registered by a secured party in the appropriate land registry office with respect to land to which a fixture is affixed. See NB PPSA, s. 49; and, Alberta PPSA, s. 49.

or the title register of the appropriate land titles office under the Memorials and Executions Act before notice of the security interest in the fixtures is registered in accordance with section 49.

Priority is determined on the basis of a race to the land registry office.

The Draft PPSA does not determine priority on the basis of a race to the land registry. For reasons discussed below, the proposed provision follows the 1972 UCC Text (see Part (b) below) and reflects the principles for binding personal property under the JEA (see (c) below).

**b. 1972 UCC Text**

Under the 1972 UCC Text the general priority rule is that a land interest, including a judgment lien, will have priority over a security interest in a fixture unless the secured party can rely on one of the exceptions provided<sup>43</sup>. The exception applicable to judgment creditors provides that the secured party will have priority if the conflicting land interest is:

... a lien on the real estate obtained by legal or equitable proceedings after the security interest is perfected by any method permitted by this article<sup>44</sup>

Filing is generally required in order to perfect a security interest<sup>45</sup>. A proper filing with respect to fixtures is either the filing of a financing statement on a personal property registry or a fixture notice in the land registry<sup>46</sup>.

The Official Comment to the 1972 Text states:

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<sup>43</sup> R 9-313(7).

<sup>44</sup> R 9-313(4)(d).

<sup>45</sup> R 9-302(1).

<sup>46</sup> R 9-401(1).

. . . there is no requirement that as against a judgment lienor of the real estate, that prior filing of the fixture security interest must be in the real estate records. The fixture security interest if perfected first should prevail even though not filed or recorded in real estate records, because generally a judgment creditor is not a reliance creditor who would have searched records. Thus, even a prior filing in the chattel records protects the priority of a fixture security interest against a subsequent judgment lien.<sup>47</sup>

The Official Comment indicates that the provision recognizes the difference in reliance interests between a purchaser or encumbrancer and a judgment creditor noted above<sup>48</sup>. Under the UCC approach, priority with respect to "fixture" goods is basically the same as for any other goods. A perfected security interest will prevail over the interest of a judgment creditor who has bound the goods as a result of binding the land to which the goods are affixed.

Based on the assumption that fixtures are bound as land, one might conclude that it is appropriate in the Canadian context to apply a first to perfect (financing statement or fixture notice) rule.

**c. Bound as Goods**

Priority under the 1972 UCC Text is premised on the judgment creditor binding the fixture as land. Under the JEA, the notice of judgment binds "personal property" in the same manner as if a security interest were created. "Personal property" is defined to include "goods" which are further defined to include "fixtures"<sup>49</sup>. As a consequence, the judgment creditor is in the same position as a secured party with respect to pre and post affixation security interests in fixtures. The judgment creditor can, in other words, bind the fixture as goods.

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<sup>47</sup> Official Comment to R 9-313, Comment 3(c).

<sup>48</sup> *Supra note 32.*

<sup>49</sup> JEA, ss. 37(k) ("personal property"); 2(1)(y) ("goods"); 2(1)(x) ("fixtures").

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A competition between security interests in fixtures is determined on the basis of the general priority rules under the PPSA. The first to register rule will normally apply and a fixture notice is irrelevant for this purpose. If a judgment creditor is considered to be a secured party for the purposes of the PPSA priority rules for goods generally, why should there be an exception in the case of fixture goods?

There does not appear to be any reason why there should be a difference in treatment. In fact, applying a first to perfect rule is consistent with the current UCC approach as discussed above. Therefore, the Draft PPSA provides that priority between a secured party and a judgment creditor will be determined on the basis of the first to perfect or register.

It may be that this is an approach that should be considered in all jurisdictions. However, it seems the logical approach for Newfoundland, since to adopt the Western Model approach would lead to anomalous results under the Newfoundland system. The potential problem is highlighted by the fact that under the JEA the notice of judgment binds both land and personal property simultaneously.

The concern can be illustrated by an example using the NB PPSA provision quoted above. Assume that SP registers a financing statement with respect to fixtures before JC registers a notice of judgment that binds the fixtures. Subsequently, SP registers a fixture notice with respect to the fixtures. Following the New Brunswick provision, JC would have priority on the basis that the notice of judgment was registered on the JER before the fixture notice was registered in the land registry. Yet if we consider the fixture to be "goods", SP should prevail.

Under the Draft PPSA provision, SP would prevail on the basis of timely registration on the PPR. JC did not search or rely on the land registry and was not prejudiced by the fact that SP did not register a fixture notice before the notice of judgment was registered.

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The same approach is proposed for growing crops which can also be bound as goods.

### **d. Conclusion**

With respect to fixtures and growing crops, certain provisions of the JEA differ from the Alberta CEA. These differences are intended to clarify the binding of fixtures as "goods". As well, the proposed priority rule for fixtures in the Draft PPSA differs from that found in the Alberta PPSA<sup>50</sup>. For reasons noted above, the proposed PPSA provision will differ from that found in the New Brunswick legislation.

The proposed treatment of fixtures and growing crops is still under consideration. A paper exploring the issue of integration and the appropriate priority rule may be forthcoming for further comment.

## **9. JER AND PPSA**

### **a. General**

The JEA requires that the Sheriff maintain public records as well as administrative records necessary for the efficient operation of the system of judgment enforcement. An integrated database has been created which performs in various modules the functions which the Sheriff is responsible to perform. We will discuss briefly the JER and then the other administrative aspects of the database which has been created for the Sheriff's Office.

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<sup>50</sup> Alberta PPSA, s. 36(5). This provision is based on the Western Model approach and determines priority on the basis of a race to the land titles office.

**b. Judgment Enforcement Registry**

The Judgment Enforcement Registry<sup>51</sup> (JER) is a computerized registry patterned on a modern PPSA registry. The JER is notionally separate from the administrative records which are also contained in the judgment enforcement database. These administrative records, which the Sheriff is also required to maintain, are discussed in more detail below.

The JER is a public registry and printed search results may be obtained. As with a PPR, exact and inexact matches will be disclosed and the concept of seriously misleading errors in a registration have been incorporated into the creation of the JER.

The information disclosed on a search of the registry will be important for a number of purposes. In addition to those acquiring an interest in the debtor's property, the information disclosed on a search will be relevant to other judgment creditors since the JEA creates a system of collective enforcement. The Sheriff will be required to refer to the registry for the purpose of coordinating enforcement proceedings with respect to a debtor and in distributing a distributable fund.

**c. Administrative Records**

The Sheriff is required to maintain administrative records under the JEA<sup>52</sup>. These records are largely contained in the judgment enforcement database and are notionally separate from the JER. These records perform two basic functions. First, they allow the Sheriff to coordinate enforcement proceedings with respect to a debtor. Second, the records are generally available to the public<sup>53</sup> and can provide information to other creditors to assist in collective enforcement.

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<sup>51</sup> The term "registry" is defined (s. 2(1)(tt)) in the JEA to mean the registry created under s. 13.

<sup>52</sup> JEA, s. 18.

<sup>53</sup> JEA, s. 19.

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For the purpose of coordinated enforcement, the Sheriff must have information as to the amount outstanding with respect to a notice of judgment. Therefore, an amount for the "enforcement debt"<sup>54</sup> is calculated and maintained as part of the administrative records. In essence, the enforcement debt is a running balance account maintained by the Sheriff. The calculation starts with the registration of the notice of judgment. The creditor must indicate to the Sheriff at the time of registration not only the amount of the judgment (including the rate of post judgment interest) but also the amount actually owing. This may be less than the amount of the judgment if payments have been received. It may be more than the judgment if post judgment interest has accrued or if additional expenses have been incurred by the creditor.

Using information that is available to the Sheriff, the judgment enforcement database will maintain a running balance reflecting the enforcement debt. Information that is within the knowledge of the Sheriff for this purpose includes interest at the post judgment rate, cost of enforcement proceedings paid by the creditor to the Sheriff, and amounts distributed to the creditor by the Sheriff from monies realized as a result of enforcement proceedings.

The administrative records also benefit other creditors of the debtor. These records will include information with respect to enforcement proceedings that may have been initiated by other creditors. Information with respect to the debtor's property will also be available through the Sheriff. This will include information that has been acquired as a result of questionnaires completed by the debtor and the results of an examination of the debtor by a creditor<sup>55</sup>.

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<sup>54</sup> JEA, s. 22.

<sup>55</sup> JEA, s. 64-66. Certain information is not maintained in the judgment enforcement database but may be manually retrieved by reference to the files.



**d. Judgment Enforcement Database**

While notionally separate, the JER and administrative information have been integrated into a functional unit. For example, a search of the JER will disclose information that is part of the public administrative records.

The best way to appreciate this integration is to review sample screens attached to this Presentation Material and marked "Appendix B". These screens will be reviewed as part of the presentation.

**e. Proposed Interface With PPR**

It is proposed that the JER continue to function as a separate registry from the PPR. The public registry and administrative aspects of the judgment enforcement database will continue to be fully integrated. This is an issue of harmonization rather than uniformity with the other Atlantic Provinces.

It is proposed that from the standpoint of those searching title to personal property, a search of the PPR will also search the JER if requested to do so and will provide a standard JER printed search result. The registration requirements for name protocol and serial numbered goods will be the same for both. Therefore, a search appropriate for the PPR will also be appropriate for the JER. However, the searcher will receive more information from the JER search than would be provided with respect to a financing statement registered on a PPR. From the perspective of the user, the fact that one search request will result in the search of two databases will not be of concern.

Registration on the PPR will be available to authorized users through remote access. In the short term, registration on the JER will continue to be through the Sheriff's Office. The objective is to have the same remote access available to the same authorized users for

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the purposes of the JER and the PPR. The existence of two public registries should eventually be invisible to users registering notices of judgment.

### **f. Conclusion**

The proposed approach will allow the existing integrated judgment enforcement database to continue without affecting the ability of users to search for or register notices authorized to be registered on the JER. The interface between the registries will be invisible to users.

## **10. CONCLUSION**

This presentation has been an attempt to describe the experience with judgment enforcement and the proposed integration of the JEA and PPSA. As indicated, the Draft PPSA will soon be available. We invite comment on all aspects of the Draft legislation as well as integration of the *Judgment Enforcement Act*.

Anyone interested in obtaining copies of the Draft PPSA should contact:

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