Manitoba Court of Queen's Bench Rule 20A: History of the Law regarding Civil Money Judgment and Mortgage Enforcement

by

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Dedication

To my wife Johanna, and my children John and Margot for their love and support during the research and writing of this thesis.

To my father, Barry, for always encouraging me to do my best.

To my late mother, Margaret, who missed seeing me graduate but shared with me her love of reading and learning.

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The Great Library of the Law Society of Manitoba staff were very kind to me; access after normal hours, access to the closed rare book room and loans of historical materials.

Christine Stewart, Librarian of the Attorney-General's Library went out of her way to send materials she thought might be of use to me. She was invariably right.

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Abstract

This Master of Laws thesis provides an analysis of Manitoba Court of Queen's Bench civil money judgment cases, sampled quantitatively for 1995 and 2004, to examine the length of time from the filing of a claim to judgment being issued, before and after the implementation of Manitoba Queen's Bench Rule 20A. The historical roots of Manitoba court procedure and certain enforcement processes are examined to explain historically: if you get the judgment, how do you get the money? The procedural law is rooted in the English medieval common law system of judicial writs, most recently made more efficient by Manitoba Queen's Bench Rule 20A. This remains basic to issues of law reform for all common law jurisdictions, including Saskatchewan's *Enforcement of Money Judgments Act,* and this thesis concludes with a set of qualitative recommendations.

Manitoba Court of Queen's Bench Rule 20A: History of the Law regarding Civil Money Judgment and Mortgage Enforcement[1]

> A judgment at common law in an action for money, irrespective of any statute, is nothing more than a sentence of a Court of law, declaring the opinion of the Court that the plaintiff is entitled to recover a sum of money. That is the nature of a judgment, and execution upon it is merely the process of the Court causing the money to be raised out of the defendant's property.
>
> Lord Redesdale in (1821), *East India Co.* v. *Kynaston*, 3 Bli. (O.S.) 153.

Introduction:

This Master of Laws thesis explores civil money judgments in Manitoba, from commencing a court proceeding through to enforcement of the judgment obtained. It examines the historical roots of Manitoba law, courts and civil money judgment enforcement processes. The overall objective is: (a) to assess the effectiveness of Manitoba's civil money judgment processes and enforcement schemes, (b) to identify whether there is need for reform and (c) to propose recommendations for change. Specifically, this thesis will identify constructive improvements to Manitoba law regarding court processes, in the context of Manitoba's Court of Queen's Bench Rule 20A (expedited actions), as well as refining court judgment enforcement methods.

Accordingly, this thesis responds to the following research questions:

1. Is Court of Queen's Bench Rule 20A effective?
2. Should Rule 20A be amended as proposed in the May 2009 proposal for reform from the Court?

[1] The opinions expressed in this thesis are those of the author and not those of the Government of Manitoba. The author was appointed acting Registrar-General of Manitoba and Chief Operating Officer of The Property Registry Special Operating Agency on 2 January 2009 and previously served from 1996 to 2008 as Deputy Registrar-General of Manitoba and District Registrar of the Winnipeg Land Titles Office.

3. What additional insights with respect to improving (i) enforcement processes for collection of civil money judgments, and (ii) efficiency of court processes for the conduct of cases can be gained from research conducted in response to the first two (2) research questions.

The law regarding enforcement of civil money judgments in Manitoba has evolved from its time of reception from England until the procedural law used currently. The historical roots and evolution of those procedures to the current state of the law and of law reform in this area are examined in this thesis.

Manitoba court procedural law has rooted itself in the medieval system of writs. Judicial writs were and still are commands from a court to a Sheriff or other court officer to do certain actions. Accordingly, the discussion begins with an examination of what is a writ and what they were used for in England prior to 1870. The names and general powers of a writ's enforcement processes are evolutionary and continue now in 2011. By way of example, current processes such as garnishment and seizure and sale of assets of a debtor would be recognizable to any medieval lawyer, notwithstanding adjustments to the processes used and the modernization from Latin to English wording.

The historical discussion continues with a review of the roots of Manitoba's Court System.[2] In particular, Chapter II explores the Court of Queen's Bench in its historical context, with particular focus on how it developed both the court structure and the processes for enforcement of civil money judgments. From 1870 to 1900, Manitoba

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[2] For a recent general history of the Court of Queen's Bench, read Dale Brawn, *The Court of Queen's Bench of Manitoba 1870 – 1950: A Biographical History* (Toronto: University of Toronto Press, for The Osgoode Society For Canadian Legal History, 2006).

was eastern Canada's western most frontier, with the sprawling North West Territories between it and British Columbia's Rocky Mountains. The development of law specific to frontier life made by the Manitoba Legislature was made in the context of English law at that time. Indeed, it was a live issue in the 1870s to determine the date of incorporation of law from England because that date would determine which Imperial statutes applied as law in Manitoba. To add to this technicality, during that time, England itself was undergoing significant reform of its law applicable to the formation and powers of its various courts, with its medieval law of procedure also having undergone significant reform in 1852 and 1854. If there was no specific legislation, two Imperial statutes would apply: *The Common Law Procedure Act, 1852*[3] and *The Common Law Procedure Act, 1854.*[4]

Furthermore, the Imperial government was passing new statutes governing imprisonment for civil debt in 1869[5] and then in 1870.[6] Determining if these statutes were also the law in Manitoba was vitally important. As late as 1889, court cases were still trying to ascertain which Imperial statutes were indeed in force in Manitoba.[7]

The date of 15 July 1870 was finally declared for incorporation of Manitoba law. This in turn determined the structure of courts and their powers in Manitoba. Not long after 1870, however, the Imperial government had instituted major reform to its own courts and their powers, through a group of statutes that are known as the *Judicature*

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[3] *The Common Law Procedure Act, 1852,* 15 & 16 Vict. c. 76, Royal Assent 30 June 1852 [hereinafter *The Common Law Procedure Act, 1852*].
[4] *The Common Law Procedure Act, 1854,* 17 & 18 Vict. c. 125, Royal Assent 12 August 1854 [hereinafter *The Common Law Procedure Act, 1854*].
[5] *The Debtors Act, 1869,* 32 & 33 Victoria, c. 62 (Imp.).
[6] *The Absconding Debtors Act,* 33 & 34 Vict., cap. 76, (Imp.), Royal Assent 9 August 1870 did not form part of the law of Manitoba as it became law after 15 July 1870.
[7] *Re Bremner,* (1889), 6 Man. L.R. 73 regarding *The Debtors Act, 1869,* 32 & 33 Victoria, c. 62 (Imp.).

Acts.[8] Given Manitoba's date of incorporation, these major court reforms at Westminster did not form part of Manitoba law. Accordingly, Manitoba court structure remained that of England pre-1870 and court processes remained based in the *Common Law Procedure Acts* of 1852 and 1854, with any amendments that existed as of 15 July 1870.

Chapter II therefore sets out in fuller detail, the unique manner in which Manitoba evolved its initial law, courts and the processes that governed its courts, particularly through the lens of creditor remedies. Chapter III then looks specifically at the historical origins of certain creditor remedies against the person as well as against the tangible personal assets of the judgment debtor. Gaining an understanding of the origins of particular procedural processes and remedies is key to gaining insight into some of the limits and information asymmetries at play in the current regime today.

Chapter IV continues with a review of the historical roots of enforcement of judgments against land of a debtor, to establish a foundation from which to elicit points of comparison to modern concerns and criticisms. This includes discussion of the historic problems with *The Real Property Act* foreclosure process in relation to modern concerns about methods that can be used to circumvent the currently used mortgage sale and foreclosure processes. This will illuminate at least one recommendation for reform of the current law regarding security against land given for a loan, which will be made.

Current reform recommendations are considered in Chapters V and VI, including those related to increasing administrative and cost efficiencies. . Reform of civil justice processes may continue in an evolutionary fashion, as in Manitoba and in the historical roots discussed in Chapters II and III. Changes are generally incremental and occur over

[8] *The Judicature Act*, *1873*, 36 & 37 Vict., c. 66 (Imp.) is the first. Others were in 1874, 1875, 1877, 1879, 1881, 1884, 1890, 1891, 1894, 1899, 1902, 1909, and 1910 according to E. Jenks, *A Short History of English Law*, 2nd ed., (London: Methuen & Co., 1920), p. 373.

time as statutes are amended to address particular issues. But this model for reform-by-accretion has an alternative in more comprehensive root-and-branch reform. Incremental change, therefore, may not always be the most effective way for civil justice reform.

Chapter V describes the process of incremental change to court process through revision of civil court rules of procedure. The need for civil justice reform and particular examples of amendments to court rules in British Columbia and Manitoba are examined. These amendments aim at reducing the time needed for cases to go from the filing of the claim to the judgment being issued. The primary goal of such amendments is to reduce the cost of litigation to the parties through expanded use of case conferences and reduction in the use of pre-trial discovery procedures. One very significant, yet still incremental, initiative in Manitoba has been the introduction of Manitoba Court of Queen's Bench Rule 20A (expedited actions), which came into force in 1996. Rule 20A imposes mandatory case conferences within specific time-frames after a case has been commenced. The intended effect of imposing such a case conference was to shorten the time from commencement of a case through to the disposition of the case by way of settlement or trial judgment. There have been doubts whether Rule 20A has been achieving its objective. Thus, Chapter VI discusses a proposal for reform of Rule 20A circulated by the Court of Queen's Bench of Manitoba in 2009. As of 2011, this proposal has not been brought into force. To establish an accurate empirical base, the overall efficiency of Rule 20A will be explored through an examination of court records from 1995 and 2004, the subject of Chapter VII.

The alternative to evolutionary or incremental change, reform-by-accretion, is comprehensive change. Saskatchewan, Alberta and Newfoundland have made sweeping

root-and-branch reform to revise their civil justice processes, modernizing legislation that is comprehensive and drafted to rationalize their laws of civil justice enforcement. The most recent reform is the Saskatchewan *Enforcement of Money Judgments Act*.[9] This statute will be examined in Chapter VI as an example of root-and-branch reform and as a potential model for future reform of civil money judgment law in Manitoba.

Chapter VII shifts attention to the modern realities of executory judgments by conducting a qualitative examination of Manitoba Court of Queen's Bench cases in the years 1995 and 2004. Given that one major anecdotal criticism of previous reports on civil justice reform, noted in Chapter V, was that court cases took too long and were too costly for parties to the litigation, these cases will be examined to determine the length of time from commencement of an action (filing of a statement of claim) to the date of judgment. Data regarding the amounts of judgments awarded and the time to judgment were also collected, as was the method of enforcement used by a judgment creditor. The purpose of this exercise has been to ascertain an overall estimate of the life times of all such actions. If Manitoba Court of Queen's Bench Rule 20A is indeed contributing to reducing this length of time, a comparison of 2004 cases and 1994 cases should reveal, from start to finish, the time for cases before and after 1996 when Rule 20A came in place: is that case disposal time in 2004 was shorter than it was in 1995? The data do in fact support the conclusion that Rule 20A is contributing to the shortening of the time it takes for a court case to reach judgment.

Other data collected with respect to amounts of judgments and the time to judgment for particular claims have been collected to allow examination of whether the

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[9] *Enforcement of Money Judgments Act*, S. S. 2010, c. E-9.22 Royal Assent 20 May 2010, to be in force on proclamation.

proposed new Rule 20A is useful in reducing costs of litigation to the parties and if there should be any further revisions to the proposed Rule 20A.

Additional data on the filing in court of documents such as Notices of Discontinuance and Satisfaction has been collected and examined with the goal of possible recommendations to other court rules regarding further improvement of administrative and cost efficiencies. Finally, information collected on the use of civil enforcement processes after judgment to collect on the judgment debt is examined to support possible incremental reform of the particular processes looked at.

The thesis concludes in Chapter VIII with a set of qualitative recommendations to improve efficiencies and equities in Manitoba's civil money judgment processes and enforcement mechanisms and calls for a comprehensive review of the civil money judgment enforcement process in Manitoba.

Chapter I: Historical Roots of Executory Civil Judgments

> The system of courts in later medieval England reflected English society and to a considerable extent gave that society its structure and tone. The "adversary system" of the common law, whereby every case, civil or criminal, was a combat originally physical and then verbal between opposing parties, diffused the spirit of the game through English life. In the ordeal, the wager of law or of battle, there was an element of the gamble congenial, perhaps, to a military aristocracy. By 1500, however, the game of law was much more a competition of skills, more suited to a commercial society.[10]

From the 1400s to the early 1800s the Kings of England provided courts like the Court of King's Bench with judges acting in their name, who in turn used administrative officers like the Sheriff in each county, to execute judicial orders and acts. A glimpse into this world and, in particular, certain of its legal aspects can be seen through the definitions written by Giles Jacob, a prominent legal writer in the 1700s, in numerous editions of his law dictionary published from 1729 to the present, in forty-five editions, with expansions and updates by others.[11] [12]

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[10] A. Harding, *The Law Courts of Medieval England*, (London: George Irwin & Unwin Ltd., 1973), p. 115. For a history of the development of English law after the 1300s to the 1800s, see E. Jenks*, A Short History of English Law*, 2nd ed., (London: Methuen & Co., 1920), on-line: http://openlibrary.org/books/OL7177765M/A_short_history_of_English_law_from_the_earliest_times_to_the_end_of_the_year_1919.(accessed August 16, 2011). For a description of trial by battle based on a writ of right or upon an appeal of felony, see W. S. Holdsworth, *A history of English Law*, 2nd ed., Vol. 1, (London: Methuen & Co., 1903), p. 451.

[11] Giles Jacob, *A new law-dictionary: containing the definition of Words and Terms, also the whole Law, and Practice thereof, & c. Carefully Abridged.* Numerous editions and publishers.
A list of editions is on-line: http://openlibrary.org/books/OL6727744M/A_new_law-dictionary (accessed: 29 June 2011). For clarity, quotes from this book will be modified from the original to change the "f" to modern "s"or "c" where appropriate. I am grateful to Dr. DeLloyd J. Guth for the opportunity to read his personal copy of the seventh edition, 1756.

[12] To modern eyes, customs of the land in medieval times appear difficult and harsh. Example from Giles Jacob, 1743: **Free-Bench**, signifies that Estate in Copyhold Lands, which the wife, being espoused a virgin, has after the decease of her husband, for her dower, according to the Custom of the Manor. *Kitch. 102.* As to this *Free-Bench* ... there is a Custom that when a Copyhold Tenant dies, the Widow shall have her *Free-Bench,* in all the deceased Husband`s Lands, *dum sola & castan suerit,* whilst she lives single and chaste; but if she commits *Incontinence*, she shall forfeit her Estate: Nevertheless upon her coming into the Court of the Manor, riding backwards on a *Black Ram,* and having his Tail in her Hand, and at the same time saying the words following, the Steward is obliged by the custom to re-admit her to her *Free Bench:* The words mentioned are these, *viz*:

Here I am,

Accordingly, as described by Jacob, a Sheriff was defined as:

> **Sheriff** or Shire=rebe, (from the Saxon) signifies the Chief Officer under the King, in every County or Shire, and is so called from the first Division of this Kingdom into Counties. Sheriffs, though anciently elected in the County- Court by the People, are now appointed by the King…. A Sheriff is invested with a judicial and ministerial Power: His judicial Authority consists in Hearing and Determining Causes, in his Town and County Court ;… The ministerial Authority of the Sheriff concerns the Execution of Writs and Processes out of the King's Courts; and no Process is to be served but by the Sheriff, wherein he ought not to dispute the Validity of any Writ, but is to execute the same….[13]

And what was a Writ?

> **Writ**, signifies in general the King's Precept in Writing under Seal, issuing out of some Court, directed to the Sheriff or other Officer, and commanding something to be done in relation to a Suit or Action, or giving Commission to have the same done.… Writs in Civil Actions are either Original or Judicial: Original, are such as are issued out of the Court of Chancery, for the summoning of a Defendant to appear, and are granted before the Suit is commenced, in order to begin the fame; and Judicial Writs issue out of the Court where the Original is returned, after the Suit is begun. [14]

There was a writ for almost every purpose and action that the sheriff was called on to conduct. A fixed fee schedule existed for each type of writ, for drafting it by a scrivener in Chancery, the royal secretariat, and for executing it in the county venue.

Riding upon a Black Ram,
Like a Whore as I am;
And for my Crincum Crancum,
Have lost my Binkum Bankum;
And for my Tail's Game,
Have done this worldly shame,
Therefore I pray you Mr. Steward,
Let me have my Land again.

Clauses that require a spouse to live chaste are now inoperative. *The Family Maintenance Act*, C.C.S.M., c. F20, ss. 9 (4) *Dum casta* clauses inoperative.

9(4) Where an agreement provides that support for a spouse or common-law partner shall only continue while the spouse or common-law partner is chaste that provision is invalid and unenforceable and all other provisions of the agreement shall be enforced without regard to that provision.

[13] Giles Jacob, *A new law-dictionary*, no edition number given (In the Savoy: Henry Lintot, 1743). On-line but link no longer accessible. [hereafter Giles Jacob, 1743, unless otherwise specified]. No page numbering is available; words are in alphabetic order in the dictionary.

[14] *Ibid.*

Writs were drafted and issued with exacting specificity. An example of this specificity can be seen in the writ required for taking action against a person when there may be confusion as to the name of the person and the need for a writ to deal with it:

> **Identitate Dominis**, is a writ or process that issues where a person is taken and arrested in any personal action and committed to prison, instead of another of the same name; in which case he may have this writ directed to the Sheriff, who is thereby appointed to make inquiry whether the prisoner be the same person against whom the action was brought or not; and if not, the Sheriff is empowered to discharge him.

When a creditor wanted to collect money from a debtor, the creditor would seek the correct writ ordering the sheriff to require attendance of the debtor in court; and further writs could require the sheriff to seize assets or imprison the debtor. A writ of *venire facias,* for example, compelled the sheriff to collect a jury of twelve men to hear the case.[15]

A writ of *Capias ad respondendum* was a judicial writ used to commence an action, although there were other ways to commence actions. The *Capias ad respondendum* required the sheriff to ensure the debtor defendant to attend court on the specified date and required the sheriff to arrest the debtor and hold him until security for the plaintiff creditor's claim was given.[16]

> ***Capias*** is a Writ of two Sorts; one before Judgment in an Action and the other after: That before Judgment is called *Capias ad respondendum*, where an Original is sued out, &c. to take the Defendant, and make him answer the Plaintiff…. Where the Defendant is not taken on a first Writ, an *Alias* and a *Pluries Capias* shall be issued….[17]

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[15] H. Black, Black's Law Dictionary, 5th ed., (St. Paul: West Publishing Co., 1979), p. 1395. [hereafter "Black"]. Note that this offers definitions appropriate to the U.S. legal context.
[16] Black, p. 188.
[17] Giles Jacob, 1743 *Capias*.

Where the defendant was not to be found ("*non est inventus*" being the Sheriff's routine return endorsement), he would be called upon to appear in five county court sittings and, if not found, would be outlawed by the issuing of a writ of *exigi facias* or *exigent.*

> **Exigent** is a Writ that lies where the Defendant in a personal Action cannot be found, nor any Effects of his, within the County, by which he may be attach-'ed or distrained : This Writ is directed to the Sheriff, to proclaim and call the Defendant five County- Court Days, one after another, and charging him to appear under the Pain of Outlawry. It seems to take it's Name from exacting the Party, whose Appearance is required, to answer the Law; and if he comes not at the last Day's Proclamation, he is said to be *Quinquies Exactus*, five 'Times exacted, and then is outlawed.[18]

Following failure of the *exigent,* the judgment creditor could request issuance of a writ of *capias utlagatum*:

> **Capias Utlagatum**, is a Writ which lies against one that is outlawed in any Action, by virtue of which the Sheriff apprehends the Party outlawed, for not appearing upon the *Exigent*, and keeps him in safe Custody until the Day of Return, and then presents him to the Court, to be there farther ordered for his Contempt. This Writ is either general against the Body ; or special, against the Body, Lands and Goods….[19]

If the defendant appeared at the court to face the action, the outlawry could be reversed.[20]

If the plaintiff was successful in obtaining judgment against the defendant debtor, the plaintiff sought to collect the amount of the judgment by the process of execution.

> **Execution**, is the completing or finishing of some act, as of a judgment, or deed, etc. and usually signifies the obtaining possession of anything recovered by Judgment of Law. … In a Personal Action, the Execution may be three ways, viz. by the writ of *Capias ad Satisfaciendum* against the Body of the Defendant; *Fieri facias* against his goods; or *Elegit* against the Lands, etc. In a real and mixed action, the execution is by writ of *Habere facias Seisinam,* to put the party in possession of freehold lands recovered; and *Habere Possessionem* to put him in to possession of his term, etc... Writs of Execution bind the Property of

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[18] Giles Jacob, 1743 *Exigent*.
[19] *Ibid*., *capias utlagatum.*
[20] *Ibid.*

> Goods, only from the time of delivery of the writ to the Sheriff; but the land is bound from the Day of the judgment obtained: And here the sale of any goods for valuable consideration, after a judgment, and before the execution awarded, will be good : It is otherwise as to lands, of which execution may be made even on a purchase after the judgment, tho' the Defendant sell such land before execution: Likewise Sheriffs may deliver in execution all the lands whereof others shall be seized in truth for him against whom execution is had, on a judgment.[21]

Note that this writ of execution bound the goods of a defendant from the date of its delivery to the sheriff (which is still the case in 2011).

The three major writs of execution were *Capias ad Satisfaciendum, Elegit* and *Fieri facias* and they continued to be the major executory writs when Manitoba became a province in 1870.

Capias ad Satisfaciendum was the writ that caused a person to be imprisoned for debt until the debt was satisfied or security for the debt given. This will be discussed in Chapter III, below.

> ***Capias ad Satisfaciendum*** is a Writ of Execution that issues on a judgment obtained, and lies where any Person recovers in a personal Action ; as for Debt, Damages, … in any of the King's Courts, and the Defendant has not Lands or Goods, of which the same may be levied : In this Case, he that recovers shall have this Writ directed to the Sheriff, commanding him that he take the Defendant's Body, to satisfy the Plaintiff; and **he shall be imprisoned till Satisfaction be made for the Debt,** …recovered against him[22] [emphasis added].

The writ of *elegit* caused the sheriff to put the judgment creditor into possession of the debtor's land and goods, except for beasts of the plow. The creditor became a tenant by *elegit* and would account to the sheriff from time to time by inquisition or

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[21] Giles Jacob, 1743 *Execution*.
[22] *Ibid.*, *Capias ad Satisfaciendum.*

report to the sheriff as to the income derived from the tenancy, which was to be applied to the outstanding debt.

> **Elegit**, is a writ of execution which lies for a person who has recovered debt or damages, or upon a recognizance in any court, against a defendant that is not able to satisfy the same in his goods; and is directed to the Sheriff, commanding him to make Delivery of a Moiety of the Party's Lands and all his Goods, Beasts of the Plough excepted; which is done by a Jury Summoned to inquire what Land the Defendant had at the Time of the Judgment obtained: And the Creditor by Virtue thereof shall hold the said Moiety of the Lands so delivered to him, until his whole Debt and Damages are paid and satisfied ; and during that Time he is *Tenant by Elegit. Reg. Orig. 299. F. N. B. 267.* This writ is given by the Statute of *Westminster 2. 13 Ed I.* And has its Name from the old *Latin* Words in it, *Elegit sibi Liberari*, etc. But it ought to be sued out within a year and a day after the Judgment. All other Writs of Execution may be good, tho' not returned, except it be an *Elegit;* but that must be returned when executed, because an Inquisition is taken upon it, and that the Court may judge of the sufficiency thereof. *4 Rep 65.* Where lands are once taken in execution on a writ of *Elegit,* and the Writ is returned and filed, in such case the Plaintiff shall have no other execution….
>
> A person having lands by *Elegit,* is not punishable for committing Waste; but the defendant may bring against such Tenant a Writ of *Venire facias ad computandum, etc.* by which it shall be inquired, whether he has levied all the Money, or only Part thereof; and if he has not levied the Money, then it must be inquired how much the Waste does amount to: and where the Waste amount only to Parcel, then as much of the Money, as the Waste comes to shall be deducted from the Sum that was to be levied: And if he has committed more Waste than the Amount of the Money to be levied, the Defendant shall be discharged of the said Money, and recover the Land, with Damages for the Superfluity of the Waste made above that Money.[23]

The judgment creditor had to choose between becoming a tenant by *elegit* to collect income from the land and goods to satisfy the debt or to have a writ of *fieri facias* issued to have the sheriff seize and sell the goods of the debtor. The judgment creditor could not have both writs at one time.

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[23] Giles Jacob, 1754 *Elegit*.

Fieri facias remains alive and well in 2011 in Manitoba, as the instrument available from the Court of Queen's Bench, operating as the writ of seizure and sale, available to a creditor awarded judgment against a debtor.

> ***Fieri facias,*** is a Writ that lies where a Person has recovered Judgment for Debt or Damages in the King's Courts against any one, by which the Sheriff is commanded to levy the Debt and Damages on the Defendant's Goods and Chattels. Old Nat. B. R. 152. This Writ must be sued out within a Year and Day after the judgment obtained….[24]

The status of writs in use in 2011 is discussed, *supra*, in Chapter IV, (b) Status of Writs in 2011.

[24] *Ibid., Fieri facias.*

Chapter II: Historical Roots of Manitoba's Court System[25]

When Manitoba became a province in 1870, the issue of what procedural law applied needed to be addressed. As well, the new legislature had to make law more relevant to the unique social conditions of an Anglo-French frontier.[26] Statutes were quickly passed only to be repealed in the later 1870s. This chapter examines the development of statute law in Manitoba generally and then looks closely at early Manitoba procedural law regarding enforcement of judgments. It will become clear that the development of this procedural law was enacted with no comprehensive theme or goal. Instead, there is incremental steps being taken as issues are identified and reacted to by the Manitoba Legislature. This will later be contrasted to the comprehensive proposal for civil justice reform enacted in Saskatchewan in 2011, discussed in Chapter VI.

(a) Hudson's Bay Company Charter

The Charter of the Hudson's Bay Company provided that the laws of England applicable on 2 May 1670 would apply to the lands it claimed, which included those governed later as Assiniboia and then as the Province of Manitoba.[27] The Charter

[25] Portions of this chapter were first drafted as part of a paper presented in a Canadian Legal History course instructed by Dr. DeLloyd J. Guth.
[26] For a discussion on the development of law in Rupert's Land prior to Manitoba being created, see H. Robert Baker, "Creating Order in the Wilderness: Transplanting the English Law to Rupert's Land, 1835-51," *Law and History Review*, Volume 17 Number 2 Summer 1999 <http://www.historycooperative.org/journals/lhr/17.2/baker.html> (accessed: 26 Jun. 2011).
[27] Dale and Lee Gibson, *Substantial Justice* (Winnipeg: Peguis Publishers, 1972), p. 41.

specified that the laws applicable in the county of Kent, in England, would apply.[28] Until Manitoba became a Province, this English law applied in the lands which would become Manitoba. It was a question to be determined as to what English law and as of what date, applied in Manitoba once it became a province.

(b) Creation of a Supreme Court and First Attempt to Establish Law for Manitoba.

The second statute passed by the first session of the first parliament of Manitoba was *An Act to establish a Supreme Court in the Province of Manitoba, and for other purposes,* given Royal Assent on 3 May 1871.[29] This court was given wide jurisdiction:

> … over all matters of Law and Equity, all matters of wills and intestacy, and shall possess such powers and authorities in relation to matters of Local or Provincial jurisdiction as in England are distributed among the Superior Courts of Law and Equity, and of Probate.[30]

This same act addressed the law of evidence which would apply:

> 38. As far as possible consistently with the circumstances of the country, the laws of evidence and the principles which govern the administration of justice in England, shall obtain in the Supreme Court of Manitoba.[31]

The Supreme Court so created was renamed the Court of Queen's Bench (or King's, as applicable) on 21 February 1872.[32]

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[28] *Re Tait*, (1890) Man. Q.B. cited in *The Western Law Times*, Vol. 1, p. 76.
[29] 34 Vict., c. II (Man.), [hereinafter *The Supreme Court Act*]. For the curious, the first statute was *The Interpretation Act,* 34 Vict., c. I (Man.).
[30] *The Supreme Court Act*, s. 1.
[31] *Ibid.,* s. 38.
[32] *An Act to amend an Act to establish a Supreme Court in the Province of Manitoba*, 35 Vict., c. III (Man.), s. 1.

The laws of the Governor and Council of Assiniboia were made applicable for all of Manitoba:

> 51. So much of the laws of the Governor and Council of Assiniboia, as may be inconsistent with this Act, is hereby repealed.
>
> 52. So much of the laws of the Governor and Council of Assiniboia as are not repealed by the preceding section, or are not inconsistent with this Act, or with any other Act to be passed during this session, shall be extended to the whole of the Province of Manitoba.[33]

This was important because the Laws of Assiniboia set out in the Code of 11 April 1862[34] contained express provisions in Part S, Article LIII, as clarified in Part T amended 7 January 1864, regarding the law that would apply.

> LIII. In place of the laws of England of the date of the Hudson's Bay Company's charter [2 May 1670], the laws of England of her Majesty's accession [20 June 1837], so far as they may be applicable to the condition of the colony, shall regulate the proceedings of the general court, till some higher authority or this council itself shall have expressly provided, either in whole or in part, to the contrary.
>
> T. To remove all doubt as to the true construction of the 53rd Article of the code of 11th April, 1862, the proceedings of the General court shall be regulated by the laws of England, not only of the date of her present Majesty's accession so far as they may be applicable to the conditions of the Colony, but also by all such laws of England of subsequent date as may be applicable to the same; in other words, the proceedings of the General court **shall be regulated by the existing laws of England for the time being, in so far as the same are known to the court,** and are applicable [35] [Emphasis added].

The net effect of reading Section 52 of *The Supreme Court Act* with Article LIII of the Laws of Assiniboia was to establish the current laws of England "in so far as they were known to the court" in Manitoba as applying to all of Manitoba. Article LIII initially established the law to be that as of 20 June 1837, when Queen Victoria ascended

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[33] *Ibid.,* ss. 51, 52.

[34] *Laws of Assiniboia passed by the Governor and Council of Assiniboia, April 11, 1862* set out in C.S.M. 1880, p. liv.

[35] *Ibid.*

the throne. The amendment in Part T made that date a moving one, to be whatever was the then existing law of England. The difficulty created by this moving date was how a court in Manitoba could decide what the law to be applied to a given situation should be. Information moved to a frontier like Manitoba in a haphazard manner as travelers brought information with them. The travel of legal information in a reliable manner from England took time and the Manitoba court had to do its best to determine the laws of England as of when? Then current law could not be known, only as when the hopefully reliable source material about English law came to Manitoba.

On 22 July 1874, the above issue was clarified by *An Act respecting the Court of Queen's Bench in Manitoba* which provided:

> 1. The Court of Queen's Bench in Manitoba shall decide and determine all matters of controversy relative to property and civil rights, according to the laws existing, or established and being in England, as such were, existed and stood, on the fifteenth day of July, one thousand eight hundred and seventy, so far as same can be made applicable to property and civil rights in this Province….[36]

Sections 25 through 52 of *The Supreme Court Act* were subsequently repealed on 14 May 1875 [37] when a more comprehensive statute dealing with the administration of justice, including matters of civil judgments, in Manitoba was passed.[38]

(c) Date of Incorporation of English Law

The issue of the date for incorporation of English law was soon considered by the Court of Queen's Bench on a number of occasions. This was directly relevant to any

[36] 38 Vict., c. XII (Man.), s.1.
[37] 38 Vict., c. V, s. LXX (Man.)
[38] *An Act respecting the Administration of Justice*, 38 Vict., c. V (Man.).

transplanting of the English procedural law, rooted in the medieval writ system, for execution of civil judgments.

In *The Canadian Bank of Commerce* v. *Adamson*,[39] Dubuc, J. on 8 October 1883 succinctly set out the Imperial and Dominion statutes establishing law in Manitoba and found that the laws in force in England on 15 July 1870 were applicable to the Province of Manitoba:

> DUBUC, J. – We find that the laws of England were introduced in this country by the Council of Assiniboia, by its ordinance or enactment on the 7th January 1864, amending the ordinance on administrations of justice of the 11th April 1962. This was over six years before the country became the Province of Manitoba.
>
> By the Imperial Act, 31 and 32 Vic., c. 105, s. 5, known as the "Rupert's Land Act, 1868," it is provided that, until otherwise enacted by the Parliament of Canada, all powers, authorities and jurisdiction of the several courts of justice then established in Rupert's Land, shall continue in full force and effect therein.
>
> By the Dominion Act, 32 and 33 Vic., c. 3, s. 5, it is enacted that all the laws in force in Rupert's Land and the Northwestern Territories at the time of their admission into the Dominion of Canada shall remain in force until altered by the Parliament of Canada.
>
> By the Dominion Act, 33 Vic., c. 3, s. 36, the next above mentioned Act 32 and 33 Vic, c. 3, is continued in force until the end of the next session of Parliament. This Act is known as the Manitoba Act.
>
> The Act 34 Vic., c. 13, s. 7, continues in force permanently, the next above mentioned Act.
>
> So the laws which were in force in England in 1864 were introduced in this country by the Council of Assiniboia, and afterwards the Provincial Legislature enacted that the laws in force in England on the 15th July 1870, shall be applicable to this Province, and particularly the practice and procedure which existed and stood in England on the above date, shall be the practice and procedure of the Court of Queen's Bench of Manitoba.[40]

[39] *The Canadian Bank of Commerce* v. *Adamson*, (1883), 1 Man. L.R. 3 (Q.B.).
[40] *Ibid.*, p. 4.

Taylor, J. (as he then was) on 16 October 1883 in *Keating* v. *Moises*[41] went further to set out the time frames for incorporation of the laws of England in Manitoba:

> Up to 11th April 1862, the law in force here was the law of England at the date of the Hudson Bay Company's charter. Then on the 11th April 1862, the law of England at the date of Her Majesty's accession was introduced. This continued to the 7th January 1864, when the law of England, as it stood at that date, was declared to be the law of Assinboia.[42]

These decisions represented the then current Court's interpretation of the effects of the Hudson's Bay Charter, the provisions of the Council of Assiniboia, and the relevant Manitoba, Dominion and Imperial statutes. They offered an appearance of certainty as to the dates of incorporation of English laws in Manitoba. At this point, a Manitoba lawyer would be able to determine the appropriate English law governing civil court procedure and judgment enforcement processes. However, all of this disappeared when the Queen's Bench heard *Sinclair* v. *Mulligan*[43] in 1886.

Killam, J. heard this factually complex case involving an 1856 land transaction where part of the transaction was made orally. The Imperial *Statute of Frauds*[44] had required a transaction involving land to be in writing. Killam, J. held that this 1677 Imperial *Statute of Frauds* did not exist in 1670 when the Hudson's Bay Company's Charter was granted; and accordingly, commonly made oral land transactions in the 1850s to 1870 were valid. He further held that the Council of Assiniboia provisions regarding the laws of England were to be interpreted as only dealing with procedure in

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[41] *Keating* v. *Moises*, (1883), 2 Man. L.R. 47 (Q.B.).
[42] *Ibid.*, p. 47.
[43] *Sinclair* v. *Mulligan*, (1886), 3 Man. L.R. 481 (Q.B.).
[44] *Statute of Frauds,* 29 Car. II, c. 3 (Imp.). Note that the *Statute of Frauds* was repealed in Manitoba as of 1 October 1983 by *An Act to repeal the Statute of Frauds*, C.C.S.M. c. F158.

the General Court that then existed and did not affect the general laws of property in force. This decision was appealed.

In *Sinclair* v. *Mulligan,* (1888),[45] the Queen's Bench sitting in appeal upheld the trial decision**:**

> I foresee the grave difficulties which must arise from holding that until 1870, the law of England of the date of the Hudson's Bay Company's charter 1670, was the law in force here, and that indeed, except as to matters which have been dealt with by the Dominion Parliament, or which are within the jurisdiction of the Provincial Legislature, and have been dealt with by it, that is the law of this Province at the present day, yet I do not see how I can, in the face of the decision of the House of Lords, in *Whicker* v. *Hume*,[7 H.L. 124] hold otherwise than that the ordinances of 1862 and 1864, were limited to regulating the proceedings of the court, and did not introduce the general Laws of England. The remedy for the results which may follow from the law being in this state, must I presume be sought in legislation by the Dominion Parliament[46] [Case citation added].

Dubuc, J. concurred in the result of this case but expressed doubt that the Council of Assiniboia had only dealt with procedural issues and had not attempted to update the general law applicable to Assiniboia:

> [The trial judge, Killam, J.] . . . is of opinion that this brings into operation here only the procedure of the English courts and not the general law of England. The ordinance is no doubt susceptible of that construction, and its wording does certainly favor it. But I am inclined to think that this is not what was meant and intended by Council of Assiniboia. The procedure in the General Court of the colony of Assiniboia, though of the simplest and most primitive kind, appeared to be adapted to the requirements of the country, where litigation and the conflicting rights of parties were determined by the court without the assistance of lawyers. It was so before, and was continued after 1862, until the transfer in 1870 without an iota of change. There was no need for a change, and we can hardly conceive that the legislators of the time, the members of the Council of Assiniboia, would have even thought of introducing the bulk of the English procedure in the General Court which had

[45] *Sinclair* v. *Mulligan,* (1888), 5 Man. L.R. 17. The Queen's Bench heard appeals of its own decisions until the Manitoba Court of Appeal came into existence with *The Court of Appeal Act*, 5-6 Edw. VII, c. 18: Royal Assent 16 March 1906.

[46] *Ibid.,* p. 23.

> not the officials and the machinery required to have said procedure put in operation. But it is only natural to suppose that they desired to be governed and have their rights determined under modern laws existing in England at the time of Her Majesty's accession rather than according to the laws in operation two hundred years ago. However, if, as I think, this was their intention, I must confess that the wording of the ordinance is defective, and leads to the construction put upon it by my brother Killam.[47]

The Dominion Parliament responded on 22 May 1888 and over-ruled the interpretation established by *Sinclair* v. *Mulligan*:

> 1. Subject to the provisions of the next following section, the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the fifteenth day of July, one thousand eight hundred and seventy, were from the said day and are in force in the Province of Manitoba, in so far as the same are applicable to the said Province, and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of Parliament of the United Kingdom applicable to the said Province, or the Parliament of Canada.
>
> 3. Nothing in the first section of this Act contained shall affect any action, suit, judgment, process or proceeding pending, existing or in force at the time of the passing of this Act. [48]

In *Walker* v. *Walker*,[49] the Judicial Committee of the Privy Council in 1919 confirmed that *An Act respecting the application of certain laws therein mentioned to the Province of Manitoba,* 51 Victoria, c. 33 (Dom.):

> . . . provided by s. 1 that, with an exception that is not material, the laws of England relating to matters within the jurisdiction of the Parliament of Canada, so far as same existed on July 15, 1870, had been, as from that date, and were in force in Manitoba, in so as far applicable to the province and unrepealed by Imperial or Dominion legislation.[50]

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[47] *Ibid.,* p. 24.
[48] *An Act respecting the application of certain laws therein mentioned to the Province of Manitoba,* 51 Vict., c. 33 (Dom.), ss. 1, 3.
[49] *Walker* v. *Walker*, [1919] A.C. 947 (P.C.).
[50] *Ibid*., p. 953.

This decision ended any uncertainty as to the date of incorporation of English law into Manitoba and established certainty as to the applicable English statutes which would govern Manitoba court process and civil money judgment enforcement.

(d) Jurisdiction of the Court of Queen's Bench

The jurisdiction of the Court of Queen's Bench was made explicit by *An Act respecting the Court of Queen's Bench in Manitoba* of 22 July 1874:

> II. The said Court of Queen's Bench, being a Court of Record and possessing original and appellate jurisdiction, shall possess and exercise all such powers and authorities as by the laws of England are incident to a Superior Court of Record of Civil and Criminal jurisdiction, in all matters, Civil and Criminal, whatsoever, and shall have, use, enjoy and exercise all the rights, incidents and privileges as fully to all intents and purposes as the same were on the day and in the year aforesaid possessed, used and enjoyed, by any of Her Majesty's Superior Courts of Common law, at Westminster or by the Court of Chancery, at Lincoln's Inn, in England.
> . . .
>
> VII. The said Court of Queen's Bench shall possess the same powers, authorities and jurisdiction as the Court of Chancery in England possessed on the fifteenth day of July, one thousand eight hundred and seventy.[51]

The date referenced in *The Queen's Bench Act, 1874,* section VII above, 15 July 1870, set out a jurisdiction that did not actually change or increase what the very first statute *The Supreme Court Act (*Royal Assent on 3 May 1871) provided in the general language quoted above.[52] What it did do was change the date of reference for the powers of the courts in England being adopted for Manitoba from the 3 May 1871 date of *The Supreme Court Act* to 15 July 1870.

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[51] *An Act respecting the Court of Queen's Bench in Manitoba,* 38 Vict., c. XII (Man.), s. II. and s. VII, [hereafter "*The Queen's Bench Act, 1874*"].
[52] *Ibid*., see note 1 and section 1 of the Act quoted there.

The Western Law Times in 1890 complained of difficulties caused by using a fixed date in the past, namely 15 July 1870, for incorporation of English law:

> With slight modifications, the people of Manitoba have to rely on the law of England, as it existed, almost forty years ago. In other words, our civil procedure is mainly that of The Common Law Procedure Act 1852, and only so far as same is applicable….[footnote omitted] Truly it is a sad sarcasm, to ask a lawyer in every case that comes before him to calmly review all the intricacies of such a general rule and apply it.[53]

A number of court cases occurred as a result of disputes over whether particular Imperial statutes were in force in Manitoba, for example:

- *Re Bremner,* (1889), 6 Man. L.R. 73 regarding *The Debtors Act, 1869,* 32 & 33 Victoria, c. 62 (Imp.).
- *Cockerill* v. *Harrison,* (1903), 14 Man. L.R. 366 regarding *Imperial Act*, 32 & 33 Victoria, c. 68 (Imp.).
- *Walker* v. *Walker*, [1919] A.C. 947 (P.C.) regarding *Matrimonial Causes Act, 1857,* 20 & 21 Victoria, c. 85 (Imp.).

The application of the laws of England as they existed on 15 July 1870 is still the law in 2011:[54]

> **Application of laws of England**
>
> 33(1) The court shall decide all matters relative to property and civil rights according to the laws of England as they existed on July 15, 1870, insofar as they can be made applicable to matters relating to property and civil rights in the Province, except as they may have been changed or altered by
>
> > (a) an Act of the Legislature or of the Parliament of Canada;
> >
> > (b) an Act of the Parliament of the United Kingdom affecting the province and enacted before the coming into force of the Statute of Westminster, 1931; or

[53] *The Western Law Times*, Vol. I, no. 6, p. 115 (Sept. 15, 1880).
[54] *The Court of Queen's Bench Act,* C.C.S.M. c. C280, s. 33(1).

(c) a rule or order of the court.

It is the gradual evolution of this transplanted English civil procedural law by the Manitoba Legislature that is the subject of Chapter III and IV, and will be contrasted with an alternate method of civil justice reform in Chapter VI.

(e) Creation of the County Court

Debt is always a personal and local matter, so creditors would normally seek remedy in the most local jurisdiction. Historically, in England and Canada this meant the county court.

An early example of reform of transplanted English law and court civil process, *An Act to amend an Act to establish a Supreme Court in the Province of Manitoba,*[55] on 21 February 1872 did more than just change the name of its Supreme Court to the Court of Queen's Bench. It also abolished the court of Petty Sessions that had previously existed in Assiniboia, under the Hudson's Bay Company, and created a County Court in and for each county in the Province.[56] The County Court would have "jurisdiction over all debts not exceeding one hundred dollars, Canadian currency."[57] The only reference to court practice and procedure was "The Jurisdiction shall be exercised in a summary manner without jury."[58]

An appeal to the Court of Queen's Bench was available for:

> . . . all judgments of the County Court, where the judgment amounts to forty dollars or upwards.[59]

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[55] *Supra* note 6.
[56] *Ibid*., s. 6.
[57] *Ibid*., s. 9.
[58] *Ibid*., s. 11.
[59] *Ibid*., s. 13.

This appeared to be a poorly defined appeal right. A claim for ninety dollars that was dismissed could not be appealed under this provision because there was no judgment in excess of forty dollars. A losing defendant could appeal a judgment given for over forty dollars but an unsuccessful plaintiff had no appeal because there was no enforcement for a judgment amount over forty dollars.

The Legislature came back to the issue of a County Court in 1873 with *An Act to Establish a County Court in the Province of Manitoba, and for other purposes.*[60] This statute specifically created County Courts for each of the then existing four counties in Manitoba, namely Selkirk, Lisgar, Provencher and Marquette.[61]

The jurisdiction of the County Court was clarified and expanded:

> IV. All suits or actions in the County Courts shall be heard, tried and determined in a summary manner and according to equity and good conscience, and no appeal shall be allowed from any judgment of the County Court, except by special leave of the Judge, on special grounds.
>
> The said County Courts shall not have cognizance of any action:
>
> (1) Where the title to land is brought in question; or
>
> (2) In which the validity of any devise, bequest or limitation under any rule or settlement is disputed; or
>
> (3) For any libel or slander; or
>
> (4) For criminal conversation or seduction; or
>
> (5) Of any action against a Justice of the Peace for anything done by him in the execution of his office, if he objects thereto.
>
> V. Subject to the exceptions contained in the last preceding section, the County Courts shall have jurisdiction:

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[60] *An Act to Establish a County Court in the Province of Manitoba, and for other purposes,* 36 Vict., c. VI (Man.): Royal Assent 8 March 1873.
[61] *Ibid.,* s. 1.

> (1) In all personal actions when the debt or damages claimed do not exceed the sum of one hundred dollars;
>
> (2) In all causes and suits relating to debt, covenant and contract, to two hundred and fifty dollars, when the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant, and in all cases under an Act respecting Lessors and Lessees;
>
> (3) To any amount on bail-bonds given to the Sheriff in any case in a County Court, whatever may be the penalty; and
>
> (4) On recognizances of bail in a County Court, whatever may be the amount recovered or for which the bail thereon may be liable.

All Acts that dealt with the County Court were consolidated in 1879 by the *County Courts Act.*[62] In marked contrast to the first statute creating the County Courts, *An Act to amend an Act to establish a Supreme Court in the Province of Manitoba* of 1872 offered thirty sections in three pages to create the court and briefly set out court procedure; the *County Courts Act* was 146 pages long, including detailed blank forms for use in court judgment enforcement processes.[63]

[62] *County Courts Act*, 42-43 Vict., c. I, Royal Assent 25 June 1879.
[63] For a discussion of the development of the equity side of the Court of Queen's Bench, read Sharon G. McCulloch, *Manitoba Court of Queen's Bench in Equity, 1872 – 1895, a study in legal administration and records*, M.A. Thesis (Winnipeg: University of Manitoba, October, 2000), on-line: http://hdl.handle.net/1993/2635.

Chapter III: Actions against the Person and Tangible Personal Assets of the Judgment Debtor, as Creditor Remedies

For the purposes of this discussion, enforcement processes to collect on civil money judgments are categorised as:

- Actions against the person and tangible personal assets of the judgment debtor, in creditor remedies; and,
- Actions against real estate owned by the judgment debtor.

(a) General Historical Overview

In the 1870s and thereafter, all procedural remedies for a judgment creditor were governed by specific Manitoba legislation, insofar as it existed. Where there was no specific legislation, two Imperial statutes would apply. They were *The Common Law Procedure Act, 1852*[64] and *The Common Law Procedure Act, 1854.*[65]

In addition to the foregoing, *An Act respecting the Administration of Justice*[66] came into force on 14 May 1875. This Act dealt with the many procedural issues regarding enforcement of judgments. It repealed *An Act respecting Arrest and Imprisonment for Debt*[67] and replaced it with new provisions.[68]

The Administration of Justice Act of 1875 was given second reading and went to committee for review on 21 April 1875. It was reported:

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[64] *The Common Law Procedure Act, 1852,* 15 & 16 Vict. c. 76, Royal Assent 30 June 1852 [hereinafter *The Common Law Procedure Act, 1852*].
[65] *The Common Law Procedure Act, 1854,* 17 & 18 Vict. c. 125, Royal Assent 12 August 1854 [hereinafter *The Common Law Procedure Act, 1854*].
[66] *The Administration of Justice Act* of 1875.
[67] *Ibid.,* s. LXX. *An Act respecting Arrest and Imprisonment for Debt,* 36 Vict., c. 19, Royal Assent 8 March 1873.
[68] *Ibid.,* ss. XLIII to LIII.

> Hon Mr Royal said by the enactments of this House the common law of England was made the law of procedure in this Province, but it had been found in some instances it was not speedy enough in its application. The object therefore, of this Bill was to make it applicable to this Province in the matters of Replevin, Garnishee and Attachment in the Queen's Bench. There were also provisions respecting imprisonment for debt, fraudulent preferences and County Courts.[69]

The provisions in Section 9 (limitations on the power to imprison for debt) of *An Act respecting Arrest and Imprisonment for Debt* were changed and single women became subject to arrest, and the age restriction of not arresting anyone over seventy years of age was dropped:

> XLIII: No writ of capias to arrest and hold to bail shall be issued for a **cause of action less than one hundred dollars**, but such writ may be issued when the cause of action equals or exceeds that sum; but no person shall be subject to arrest under any such writ, who, by reason of any privilege, usage or otherwise, is by law exempt therefrom; nor shall any person be liable to arrest for non-payment of costs; and **no married woman** shall be liable to arrest on mesne or final process[70] [emphasis added].

A writ of *capias ad satifaciendum,* which was a writ to arrest a debtor, to hold in custody until payment of the judgment debt or a posting of a bond or security for the debt, became available again with repeal of *An Act respecting Arrest and Imprisonment for Debt*[71]:

> XLVIII. After final judgment has been obtained against any debtor as foresaid, a *capias ad satifaciendum* may issue upon a judge's order, which may be made on its being made to appear either that thereby the judgment creditor will be likely to realize and make his debt, or that the judgment debtor hath parted with his property, or made some secret or fraudulent conveyance or disposition thereof in order to prevent its being taken in execution or hath otherwise acted fraudulently in or about the premises.[72]

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[69] *Manitoba Daily Free Press*, "Manitoba Parliament Wednesday, April 21, 1875," 22 April 1875 issue.
[70] *Ibid.,* s. XLIII.
[71] *Ibid.,* s. LXX.
[72] *Ibid.,* s. XLVIII.

(b) The Debtor's Act, 1869 (Imp.)

All Manitoba statutes that dealt with imprisonment to enforce payment of debts were made in the context of *The Debtor's Act*, *1869*, 32 & 33 Victoria, c. 62 (Imp.) which banned imprisonment for debt except in prescribed circumstances. The general rule was set out in section 4:

> 4. With the exceptions herein-after mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money.
>
> There shall be excepted from the operation of the above enactment:
>
> (1) Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract:
>
> (2) Default in payment of any sum recoverable summarily before a justice or justices of the peace:
>
> (3) Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control:
>
> (4) Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order:
>
> (5) Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order:
>
> (6) Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made:
>
> Provided, first, that **no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year**; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money[73] [Emphasis added].

[73] *The Debtors Act*, 1869, 32 & 33 Victoria, c. 62 (Imp.), s. 4. [hereafter "*The Debtors Act, 1869*"].

Re an Attorney[74], *Monkman* v. *Sinnot*[75] and *Re Bremner* [76] were three Manitoba court decisions that held that *The Debtors Act, 1869* was in force in Manitoba.

Imprisonment for debt in certain circumstances was allowed pursuant to section 5 of *The Debtors Act, 1869*. It permitted any court to commit to prison for a term not exceeding six weeks or until payment of the sum due had been made, any person who was in default for payment of debt due pursuant to any order or judgment of any court. Further, being imprisoned did not satisfy or extinguish the debt.

There was one important restriction on imprisonment for debt in this section. The creditor had to prove that the debtor had the means to pay the debt, either at or after the date of the order of judgment, and the debtor must be proved to have refused or neglected to pay the debt.

Then in 1890, *An Act to Amend Certain Acts*, 53 Victoria, c. 2, s. 39 made all portions of *The Debtors Act, 1869* after section 4 no longer in force in Manitoba:

> 39. Subsection 6 of Section 4 and all sections subsequent to Section 4 of Chapter 62 of 32 and 33 Victoria of the Statutes of the Imperial Parliament are hereby declared not to be in force in Manitoba.[77]

This provision remains in force in Manitoba in 2011 and so does section 4 of *The Debtors Act, 1869*.[78] The 1890 change eliminated imprisonment of up to six weeks for failing to pay a judgment set out in section 5 and the absconding debtor provisions set out in section 6 of *The Debtors Act, 1869*.

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[74] *Re an Attorney,*(1886), 3 Man. L.R. 316.
[75] *Monkman* v. *Sinnot,*(1886), 3 Man. L.R. 170 (Q.B.).
[76] *Re Bremner,* (1889), 6 Man. L.R. 73.
[77] *An Act to Amend Certain Acts*, 53 Vict., c. 2, s. 39 Royal Assent 31 March 1890.
[78] *The Debtor's Arrest Act,* R.S.M. 1990, c. 237, which replaced R.S.M. 1892, c. 43, s. 3.

While *An Act to Amend Certain Acts*, 53 Victoria, c. 2, s. 39 repealed from the law of Manitoba the provisions of *The Debtors Act, 1869* that set out how and in what circumstances a person could be imprisoned for debt, the legislature of Manitoba provided for arrest for debt in *An Act respecting Arrest and Imprisonment for Debt*[79] of 1873, *The Administration of Justice Act* [80] of 1875, *The Administration of Justice Act, 1885*[81] and later consolidated most of the related provisions into *The Debtors' Arrest Act*[82] in 1892.

Arrest for debt in Manitoba ended on 28 June 1895 with the coming into force of *The Queen's Bench Act, 1895*, rule 808:

> 808. No person shall be arrested or held to bail for debt or for the non-payment of money upon, under or by virtue of any writ, rule, order or process issued out of the Court of Queen's Bench.[83]

(c) Writ of Arrest

The Administration of Justice Act of 1875 provided that a writ of arrest was only allowed in actions for alimony:

> XLV. In Equity, the writ *Ne exeat Provincia* shall be called **a writ of arrest** and no order shall be granted for such a writ except upon complying with the conditions mentioned in the next preceding section.
>
> XLVI. In any **suit for alimony instituted after this Act takes effect**, any Judge may, in proper case, order a writ of arrest to issue at any time after the bill is filed, and **shall in the order fix the amount of bail** to be given by the defendant in order to procure his discharge, but such amount shall not exceed what may be considered sufficient to cover the amount of

[79] *An Act respecting Arrest and Imprisonment for Debt,* 36 Vict., c.XIX, Royal Assent 8 March 1873.
[80] *An Act respecting the Administration of Justice,* 38 Vict., c. V [hereinafter *The Administration of Justice Act* of 1875].
[81] *The Administration of Justice Act, 1885,* 48 Vict., c. 17, Royal Assent 2 May 1885 [hereinafter *The Administration of Justice Act,1885*] .
[82] *The Debtors' Arrest Act,* R.S.M. 1892, c. 43. [hereafter The Debtors' Arrest Act, 1892].
[83] *The Court of Queen's Bench Act, 1895*, 58 and 59 Vict., cap. 6, rule 808.

> **future alimony for two years besides arrears and costs**, but may be for less at the discretion of the judge[84] [Emphasis added].

These provisions continued in Manitoba law and were incorporated in *The Debtors' Arrest Act, 1892.*

(d) Exemptions from Execution of Judgment

The first statute in Manitoba providing for exemptions from execution of a judgment was *An Act relating to Homesteads*,[85] enacted by the first session of the first parliament of Manitoba and given Royal Assent on 3 May 1871. Execution was allowed first against personal property of the debtor; but only if a sale of that personal property did not satisfy the judgment could there be a sale of real property owned by the debtor.[86] The exemptions from execution appeared generous, especially for mechanics, farmers or a professional:

> *6th*. The tools and necessaries used by the debtor in the practice of his trade or profession to the value of one hundred dollars in the supposition that the debtor is a mechanic, but to the value of two hundred dollars if the debtor is a farmer or a professional man.[87]

In addition to exemptions regarding food, clothing and bedding for the debtor and his family, one hundred and sixty acres of land cultivated by a debtor was exempted from execution.[88]

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[84] *The Administration of Justice Act* of 1875, ss. XLV and XLVI.
[85] *An Act relating to Homesteads,* 34 Vict., c. XVI (Man.).
[86] *Ibid.,* s. 1.
[87] *Ibid.,* s. 2, ss. 6.
[88] *Ibid.,* s. 2, ss. 8.

There was a fascinating restriction on enforcement of judgments for debts originating outside of Manitoba:

> 8. No judgment or action for debts contracted outside of this Province shall be enforced against any settler coming to this Province within seven years from the date of his arrival, provided always that nothing herein shall prevent the collection of debts contracted outside of this Province for goods purchased to be brought to this Province.[89]

This statute clearly had a policy of seeking to encourage people to come to Manitoba and to homestead land by protecting them, as lawful escapees, from earlier acquired debts outside of Manitoba. The statute did not apply to debts contracted before the statute's passage on 3 May 1871.[90] Thus, Section 8 clearly targeted future homesteaders and offered protection from their debt collectors in their previous domiciles.

Exemptions from execution in 2011 are set out in *The Executions Act.*[91] The exemptions do not apply where a debtor is about to or has left the province or has absconded.[92]

(e) Absconding Debtors

In England as of 15 July 1870, where creditors had good reason to believe their debtors were about to abscond from the country, the creditor could cause the debtor to be arrested and required to give bail. The provisions of *An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain cases; for extending the Remedies of creditors against the Property of Debtors; and for amending the laws for the relief of*

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[89] *Ibid.,* s. 8.
[90] *Ibid.,* s. 7.
[91] *The Executions Act*, C.C.S.M., c. E160, s. 23.
[92] *Ibid.,* s. 29.

Insolvent Debtors in England[93] (better known as the *Judgments Act, 1838*) in section 3 allowed for arrest and bail where the creditor had brought an action for an amount of twenty pounds or more. The *Common Law Procedure Act, 1852* allowed for a creditor to seek a warrant for the arrest of a debtor prior to the bringing of an action as long as the creditor commenced an action and obtained a writ of *capias* within seven days.

Section 6 of *The Debtors Act, 1869* replaced *The Common Law Procedure Act, 1852* process with a new rule allowing a creditor who had brought an action for greater than fifty pounds, had probable cause to believe the debtor was about to leave England and where the absence would materially prejudice the ability of the creditor to prosecute the action, to apply for an order of the court to arrest and imprison the debtor for up to six months, unless the debtor gave the court required security and agreed to not leave the country without leave of the court. This greatly restricted the ability of a creditor to have a potentially absconding debtor arrested. In fact, as absence of a debtor might not be prejudicial to the action, the absence of a debtor interfered with the ability of a creditor to have the debtor made a bankrupt. The Imperial government dealt with this situation by enacting *The Absconding Debtors Act*[94] in 1870. The amendments provided in this statute would not form any part of the law of Manitoba because the statute only came in force on 9 August 1870, after the 15 July 1870 date for possible incorporation in Manitoba law.

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[93] *An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain cases; for extending the Remedies of creditors against the Property of Debtors; and for amending the laws for the relief of Insolvent Debtors in England,* 1 & 2 Vict., c. 110 (Imp.) (better known as the Judgments Act, 1838).
[94] *The Absconding Debtors Act,* 33 & 34 Vict., cap. 76, (Imp.), Royal Assent 9 August 1870. The history of the development of the law about absconding debtors up to 1870 is described in the Introduction to this statute in W. Paterson (Ed.), *The Practical Statutes of the session 1870*, (London: Horace Cox, 1870).

In marked contrast to both the law of England described above and protections given to debtors who came to Manitoba, *An Act respecting Absconding Debtors*[95] was given Royal Assent on 21 February 1872 providing for seizure and sale of personal and real property in Manitoba of any debtor who

> . . . has absconded from this Province, and has taken up his abode in any country outside of the Dominion…. [96]

A creditor could obtain *ex parte* judgment and execution after giving one month's notice in any public newspaper, calling on the debtor to appear and defend the action.[97]

The Legislature then moved to deal with debtors who were preparing to abscond or hide assets from creditors. On 8 March 1873, *An Act respecting Arrest and Imprisonment for Debt*[98] was given Royal Assent. A plaintiff before or after judgment could file an affidavit confirming that the defendant was:

> . . . **personally indebted to the plaintiff** in a sum amounting to, or exceeding Forty Dollars, and also that such plaintiff… hath reason to believe, … upon grounds to specially set forth in such affidavit, that **the defendant is immediately about to leave this Province with intent to defraud his creditors generally**, or the plaintiff in particular, and that the **departure would deprive the plaintiff of his remedy** against the defendant, **or** that the **defendant hath secreted**, or secretly disposed of, or is about to secrete… **his property, real or personal, with such intent**. . . [99] [emphasis added].

Upon such an affidavit being filed, the court:

> . . . may grant a [Writ of] *capias ad respondendum*, or attachment against the body of such defendant….[100]

[95] *An Act respecting Absconding Debtors*, 35 Vict., c. XVIII.
[96] *Ibid.*, s. 1.
[97] *Ibid.*, s. 1.
[98] *An Act respecting Arrest and Imprisonment for Debt,* 36 Vict., c. XIX.
[99] *Ibid.,* s. I.
[100] *Ibid.*

The Sheriff could then arrest the debtor and hold him incarcerated until payment into court of the amount claimed or bail made or a bond set by the defendant.[101] Some limitations on the power to imprison for debt were put in place:

> And whereas it is desirable to soften the rigor of the laws affecting the relation between Debtor and Creditor;
>
> IX. Subject always to the provisions made in section ten, (X.) no person of the **age of seventy years or upwards**, **and no female shall be arrested or held to bail by reason of any debt**, or by reason of any other cause of civil action or suit whatsoever:
>
> (2.) No person shall be arrested or held to bail or detained in custody upon any cause of civil action which has arisen in any place outside of this Province, or in any civil suit where the cause of action does not amount to **forty dollars of lawful money** in Canada;
>
> (3.) No writ of *capias ad satisfaciendum* or other execution against the person, shall issue or be allowed[102] [emphasis added].

In 2011, arrest of an absconding debtor does not occur. A creditor's remedy instead is to attach the realty and personalty of the debtor by obtaining an order for the attachment before judgment. This remedy is available under several circumstances.[103]

(f) Attachment before Judgment

> 60(1) Where, in an action in which the payment of money is claimed, it is alleged that the defendant,
>
> (a) resides outside Manitoba, or is a corporation that is not registered under *The Corporations Act*;
>
> (b) hides or absconds within Manitoba with the intent to avoid service of a document;
>
> (c) is about to leave or has left Manitoba with the intent to
>
> (i) change residence,

[101] *Ibid.,* ss. II, III.
[102] *Ibid.,* s. IX.
[103] *The Court of Queen's Bench Act,* C.C.S.M. c. C280, s. 60(1).

(ii) defraud a creditor, or

(iii) avoid service of a document;

(d) is about to permanently remove or has permanently removed property out of Manitoba; or

(e) has concealed, removed, assigned, transferred, conveyed, converted or otherwise disposed of property with an intent to delay, defeat or defraud a creditor or is about to do so;

the court may, on motion, make an order for the attachment before judgment of real or personal property in which the defendant has an interest.

The order of attachment must be registered at a land titles office in order to attach real property "…and upon registration constitutes a lien and charge on the real property against which it is registered."[104] For personal property, the order of attachment binds all goods and chattels of the debtor within the province from the time of delivery of the order to the Sheriff.[105] The order of attachment before judgment and a writ of execution after judgment both become binding at the time of delivery to the Sheriff. This time of delivery, and even the existence of the attaching order or writ of execution, is difficult for any third party to determine.[106] In Manitoba, attaching orders or writs of execution could be registered in the Manitoba Personal Property Registry. The benefit is to make the attaching orders or writ of execution available easily to anyone interested by an online search of the Personal Property Registry along with any security interests registered against the same debtor's goods and chattels.

[104] *Ibid.,*s. 60(3).
[105] *Ibid.,*s. 60(3) and *The Executions Act*, C.C.S.M., c. E160, s. 5(1).
[106] A sheriff's certificate may be obtained from the Civil Enforcement Unit of the Manitoba Sheriff's office by writing to the Sheriff and ordering the certificate.

(g) Oral Examination of the Debtor

The Common Law Procedure Act, 1854 had given authority to a Judge to examine a judgment debtor either orally or by affidavit as to any and all debts owing to him.[107]

The first Manitoba provision requiring a debtor to attend for an examination as to his ability to pay the claimed debt, location of assets, and what assets or debts were accruing as due to the debtor that could be seized by the creditor, was section XLI:

> XLI. In both the Queen's and the County Court any creditor whose claim is in judgment or in course of being put in judgment by an action then pending, may, upon a proper case being made for that purpose apply to the court or a judge for a rule or order that **the debtor shall be orally examined before the court or judge, or before the clerk of the court, or such other examiner as shall be named in the rule or order** as to the circumstances of his contracting the debt or liability and whether any and what other persons are jointly or severally liable with him and as to **any and what debts, obligations or liabilities are due, owing, payable, or are accruing and will be due or payable to him,** and on such examination upon notice so to do, the debtor shall produce all his books, papers and documents to the end that a full and complete discovery shall be made in respect of **his means and ability to satisfy the creditor**, and such examination shall be conducted in the usual manner of oral examinations, and shall be by person taking such examination reduced to writing and signed by the debtor[108] [emphasis added].

Not much has changed in this process from 1875 to 2011. A creditor may examine a debtor in aid of execution as set out in Rule 60.17(2):

> Examination of debtor
>
> 60.17(2) A creditor may examine the debtor in relation to,
>
> (a) the reason for nonpayment or nonperformance of the order;
>
> (b) the debtor's income and property;

[107] *The Common Law Procedure Act, 1854,* s. LX [Imp.].
[108] *The Administration of Justice Act, 1875,* s. XLI [Manitoba].

(c) the debts owed to and by the debtor;

(d) the disposal the debtor has made of any property either before or after the making of the order;

(e) the debtor's present, past and future means to satisfy the order;

(f) whether the debtor intends to obey the order or has any reason for not doing so; and

(g) any other matter pertinent to the enforcement of the order.[109]

If an examination determines that "… a debtor has concealed or made away with property to defeat or defraud creditors, a judge may make a contempt order against the debtor." [110]

(h) Garnishment

The remedy of attachment of debts owed to a judgment debtor was established by *The Common Law Procedure Act, 1854* in section LXI and the procedure to follow was set out in sections LXII through LXVII:

> LXI. It shall be lawful for a Judge, upon the *ex-parte* Application of such Judgment Creditor, either before or after such oral Examination, and upon Affidavit by himself or his Attorney stating that Judgment has been recovered, and that it is still unsatisfied, and to what Amount, and that any other Person is indebted to the Judgment Debtor, and is within the Jurisdiction, **to order that all Debts owing or accruing from such Third Person (herein-after called the Garnishee) to the Judgment Debtor shall be attached to answer the Judgment Debt**; and by the same or any subsequent Order it may be ordered that the Garnishee shall appear before the Judge or a Master of the Court, as such Judge shall appoint, to show Cause why he should not pay the Judgment Creditor the Debt due from him to the Judgment Debtor, or so much thereof as may be sufficient to satisfy the Judgment Debt [emphasis added].
>
> LXII. **Service of an Order that Debts due or accruing to the Judgment Debtor** shall be attached, or Notice thereof to the Garnishee,

[109] *Court of Queen's Bench Rules*, M.R. 553/88, r. 60.17(2).
[110] *Ibid.,* r. 60.17(5).

in such Manner as the Judge shall direct, **shall bind such Debt** in his Hands.

LXIII. If the Garnishee does not forthwith pay into Court the Amount due from him to the judgment Debtor or an Amount equal to the Judgment Debt, and does not dispute the Debt due or claimed to be due from him to the Judgment Debtor, or if he does not appear upon Summons, then the Judgment may order Execution to issue, and it may be sued forth accordingly, without any previous Writ of Process, to levy the Amount due from such Garnishee towards Satisfaction of the Judgment Debt.

LXIV. If the Garnishee disputes his Liability, the Judge, instead of making an Order that Execution shall issue, may order that the Judgment Creditor shall be at liberty to proceed against the Garnishee by Writ, calling upon him to show Cause why there should not be Execution against him for the alleged Debt, or for the Amount due to the Judgment Debtor, if less than the Judgment Debt, and for Costs of Suit; and the Proceedings upon such Suit shall be the same, as nearly as may be, as upon a Writ of Revivor issued under "The Common Law Procedure Act, 1852".

LXV. **Payment made** by or Execution levied upon the **Garnishee under any such Proceeding** as aforesaid **shall be a valid Discharge to him as against the Judgment Debtor to the Amount paid** or levied, although such Proceeding may be set aside or the Judgment reversed.

LXVI. In each of the Superior Courts there shall be kept at the Master's Office a Debt Attachment Book, and in such Book Entries shall be made of the Attachment and Proceedings thereon, with Names, Dates, and Statements of the Amount recovered, and otherwise; and the Mode of keeping such Books shall be the same in all the Courts; and Copies of any Entries made therein may be taken by any Person, upon Application to any Master.

LXVII.The Costs of any Application for an Attachment of Debt under this Act, and of any Proceedings arising from or incidental to such Application, shall be in the Discretion of the Court or a Judge[111] [emphasis added].

In Manitoba, the procedure for garnishing monies from a third party indebted to the debtor was set out in section XLII of *The Administration of Justice Act, 1875*:

[111] *The Common Law Procedure Act, 1854,* ss. LXI to LXVII [Imp.].

> XLII. Upon the ***ex parte* application** of any such creditor, either before or after such oral examination, and upon the affidavit of himself, his servant, attorney or agent, stating either that judgment has been recovered and that it is still unsatisfied and to what amount or extent **or that an action is pending,** the time of its commencement, and when judgment will likely be recovered, the nature of the cause of action and the **actual probable amount which will be recovered**, and that **the debt, claim or demand is justly due and owing to the plaintiff by the defendant**, after making all just discounts, and **that some third person or corporation is indebted to the defendant** and is **within the jurisdiction of the court**, according to the provisions of this Act or otherwise, any **judge may order that all the said debts, obligations and liabilities mentioned in the next preceding or in this section of the defendant shall be attached** to answer the judgment recovered or to be recovered of the plaintiff, and the garnishee in any such case may forthwith pay any such demand into the court to the credit of the cause which if in full shall to him be a full discharge of the demand, and in such cases where judgment has not been recovered, and until judgment has been recovered the money made from any garnishee **shall be paid into the court to the credit of the cause** subject to the application to the order of any judge, subject to the provisions herein contained, **all provisions of the English Common Law Procedure Act** and any subsequent enactments to the fifteenth of July, 1870, and the practice and procedure of the superior courts of common law and of the county court in England in respect of "garnisheeing" shall be applicable to garnishee proceedings in the Court of Queen's Bench and the County Court of this Province, except as the same may in matters of practice and the forms of procedure be from time to time altered or varied by any general rules of order of court in that behalf duly made[112] [emphasis added].

The procedures for garnishment contained in *The Administration of Justice Act*, as amended from time to time[113], were consolidated into one statute in 1891, entitled *The Garnishment Act.* [114] This remains the name of the statute to the present time in 2011. In discussing the remedy of garnishment in the first *Garnishment Act* in 1891, the Manitoba Law Reform Commission stated:

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[112] *Ibid.,* s. XLII.

[113] *The Administration of Justice Act*, R.S.M. 1891, c. 1. The processes for garnishment were removed in this version.

[114] *An Act Respecting the Attachment of Debts and other Liabilities*, R.S.M. 1891, c. 64. Section 1 states the Act may be cited as *The Garnishment Act*.

> The remedy has continued, relatively unchanged since that time with the exception of enhanced collection powers for maintenance orders and criminal penalties.[115]

In 1875, garnishment of debts owed to the debtor could occur both before and after judgment and this is still the law in 2011. Garnishment process is set out in *The Garnishment Act*[116] and in Queen's Bench Rule 60.13.[117] Garnishment continues to be a major tool in the collection of debts, both before and after judgment. Garnishment of wages before a judgment has been obtained by a creditor is prohibited.[118]

A garnishment order binds:

> (a) any debt due or accruing due at the time of service from the garnishee to the defendant or judgment debtor, other than wages; and
>
> (b) all wages that become due and payable from the garnishee to the judgment debtor within one year from the date the garnishment order takes effect.[119]

Manitoba Justice reported in 2006-2007 that $4.2 million was collected and disbursed through the suitor`s trust fund for garnishment of wages.[120] Such data were not available for 2004-2005. In 2004-2005 Manitoba`s Maintenance Enforcement program issued 2,688 federal garnishment orders and 5,597 regular garnishment orders and 191 pension garnishment orders.[121] These numbers do not count garnishment orders obtained by any other creditors.

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[115] Manitoba Law Reform Commission, *Review of The Garnishment Act*, Report No. 112, Dec. 2005, (Winnipeg: Manitoba Justice, 2005), p. 5.
[116] *The Garnishment Act,* C.C.S.M., c. G20.
[117] *Court of Queen's Bench Rules*, M.R. 553/88, r. 60.08.
[118] *The Garnishment Act,* C.C.S.M., c. G20, s. 11.
[119] *The Garnishment Act,* C.C.S.M., c. G20, s. 4 (1). The change to allow wages to be bound for one year from the date of service on the garnished employer was enacted in 2001 *The Enhanced Debt Collection (Various Acts Amended) Act*, S.M. 2001, c. 32, ss. 6 (2).
[120] Manitoba Justice, *Annual Report 2006-2007*, (Winnipeg: Manitoba Justice, 2007), p. 37.
[121] Manitoba Justice, *Annual Report 2004-2005*, (Winnipeg: Manitoba Justice, 2005), p. 35.

The Manitoba Law Reform Commission in December, 2005 issued a report outlining the history of garnishment in Manitoba and proposals for reform.[122] Among its recommendations was one to maintain the use of garnishment of debts before judgment.[123]

[122] Manitoba Law Reform Commission, *Review of The Garnishment Act*, Report No. 112, Dec. 2005, (Winnipeg: Manitoba Justice, 2005).
[123] *Ibid.,* p. 49. Garnishment of debts before judgment is authorised by *The Court of Queen's Bench Act*, C.C.S.M., c. C280, s. 61.

Chapter IV: Actions against Real Estate Owned by the Judgment Debtor

An Act relating to the Sale of Real Estate under Execution,[124] of 3 May 1871 was the first Manitoba statute to provide for sale of a debtor's land to satisfy the debt. A sale could only occur after one year after a judgment was registered.[125] Sale was to be by public auction after at least sixty days advertising in a newspaper in the Province.[126] This statute was repealed and replaced by the *Administration of Justice Act* in 1875.[127]

Registration of judgments referred to in *An Act relating to the Sale of Real Estate under Execution* occurred in the office of the Registrar of Deeds:

> 5. Judgments of the Supreme Court shall bind Real Estate, but only from time to time when a copy of the docket of judgment, certified by the Prothonotary, shall be registered in the office of the Registrar of Deeds.[128]

More detail was given in the *Administration of Justice Act* in 1875 in particular section LIV. Registration of a judgment in a Registry Office bound the lands of the judgment debtor within the jurisdiction of that registry Office. The same section sets out how a judgment sale of land was to be done:

> LIV. **No land shall be sold on any writ of execution against lands until one year after the said writ has been issued** and placed in the hands of the sheriff, and until the lands to be sold under it are once **advertised** in the Official Gazette of Manitoba **at least three months prior to such sale**, and in the weekly issue in some newspaper published in Winnipeg for three issues next preceding such sale, besides being posted up in the office of the sheriff. The foregoing conditions being

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[124] *An Act relating to the Sale of Real Estate under Execution* , 34 Vict., c. V (Man.), Royal Assent 3 May 1871.
[125] *Ibid*., s. 1.
[126] *Ibid*., ss. 2, 3.
[127] *Administration of Justice Act,* s. LXX.
[128] *An Act relating to the Registration of Deeds*, 34 Vict. C. VII, Royal Assent 3 May 1871, s. 5.

> complied with, the sheriff may at and after the expiration of one year from the time he shall so receive any writ of execution against the lands of any judgment debtor, **sell the same by public auction to the highest bidder**, and when sold convey the same to the purchaser thereof who shall thereby acquire all the estate and interest, right and title whatsoever, both at law and in equity or otherwise howsoever, whether in possession in reversion, remainder or expectancy, of the judgment debtor in the lands so sold and conveyed as aforesaid, any law, statute usage or custom to the contrary notwithstanding: Provided always that no such sale of lands shall take place unless the **actual debt in judgment is one hundred dollars or upwards**; Provided further and it is hereby declared and enacted that no such writ shall require to be renewed, nor shall it expire until the execution and return thereof; and under it immediately upon its receipt by the sheriff shall be bound, and after the expiration of the time aforesaid, may be sold and conveyed, all or any lands, tenements and heriditaments of the judgment debtor, both equitable and legal, and all his estate, right, title and interest therein, of what nature or kind soever, including a contingent, an executory, and a future interest, and a possibility, coupled with an interest in any lands, whether the object of the gift or limitation of such interest or possibility, be or be not ascertained; also a right of entry, whether immediately or future, and whether vested or contingent into or upon any land, and immediately upon any judgment being entered in the Queen's Bench, a certificate or certificates of such judgment in such form as the Prothonotary shall prescribe, and signed by him under the seal of the Court, may be recorded in any and all the Registry office or offices for the counties of this Province, and **from the time of the recording** of the same **the said judgment shall bind and form a lien on all the estate and interest aforesaid in the lands of the judgment debtor in the several counties in the Registrar offices of which such certificate is recorded;** and after recording of such certificate the judgment creditor may, if he shall elect to do so, forthwith proceed in equity upon the lien thereby created [129] [emphasis added].

The key elements of the foregoing section for a judicially authorised sale of a debtor's land in 1875 therefore were:

1. Judgment must be for one hundred dollars or greater;

2. Judgment must be registered at the appropriate Registry Office;

3. On registration the Judgment forms a lien against the land;

[129] *Administration of Justice Act,* s. LIV.

4. Lands must be advertised for sale at least three months prior to the sale in the Manitoba Gazette;

5. Lands must be advertised for sale in at least three weekly issues of a Winnipeg newspaper;

6. Lands must be advertised for sale by being posted in the Sheriff's office;

7. Sale will be by public auction to the highest bidder; and

8. One year must have passed after the writ of execution was delivered to the Sheriff.

These requirements were continued unchanged when *The Administration of Justice Act, 1885* was given Royal Assent on 2 May 1885.[130]

(a) *The Real Property Act of 1885*

The Real Property of Act of 1885 was given Royal Assent on 2 May 1885 and commenced and took effect from 1st July 1885.[131] With the coming into force of this statute, Manitoba became the second jurisdiction in Canada to adopt the system of land recording known as the Title or Torrens System.[132]

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[130] *The Administration of Justice Act, 1885,* 48 Vict., cap. 17, s. 110.
[131] *An Act Respecting Real Property in the Province of Manitoba,* 48 Vict., cap. 28, s. 1 "This act may be cited as "*The Real Property Act of 1885*". s. 2: "This act shall commence and take effect from and after the 1st day of July, A.D.1885." [hereafter cited as *The Real Property Act of 1885*].
[132] For a detailed history of the evolution of the development of the Torrens System for land holding and recording, read G. Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto: University of Toronto Press, 2008).

The process of execution of writs against land which had been titled under *The Real Property Act* became subject to a requirement that the writ must be registered at a Land Titles Office in order to attach the land for a judgment debt in question.[133] The writ once registered "shall operate as a caveat against the transfer by the execution debtor of the land ... and no transfer shall be made by him of such land and interest therein, except subject to the writ of the execution creditor under such writ." [134]

Note that the registration of a writ only operated as a caveat and was not treated as an interest in land. As discussed later, modern judgment acts in Manitoba now provide that the registration of a judgment creates an interest in the land. The effect of the registration of a judgment acting to prohibit any further dealings on the land, without being subject to the registration, continues to this day.

A sale by a Sheriff under execution of any land registered under *The Real Property Act of 1885* would have no effect on the land until confirmed by the Court of Queen's Bench. The order of confirmation of the sale, along with the transfer of land by the Sheriff, was sufficient for the purchaser to become registered as the owner of the land. [135]

The Real Property Act of 1885 had no provisions dealing with mortgage foreclosure procedures. It did specifically allow for a mortgagee to bring an action for ejectment against the mortgagor who was in default. [136]

Section 102 of *The Real Property Act of 1885* was repealed and replaced in 1887. The amended section 102 maintained the requirements for registration discussed above

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[133] *The Real Property Act of 1885*, s. 102.
[134] *Ibid.,* s. 102.
[135] *Ibid.*, s. 104.
[136] *Ibid.*, s. 116 (1). *The Ejectment Act,* 44 Vict., cap. 5 [Royal Assent: 25 May 1881] would then apply.

and added that, once a writ of execution had been registered, then the land in question could not be titled under *The Real Property Act of 1885* as long as the writ of execution was in effect. [137] In addition, the amendments of 1887 dealt with the issue of priority between two or more executions or other writs that were registered against the same person in land titles. The priority of registration in the Land Titles Office would prevail in settling the priorities as between the competing writs. [138]

In 1887, the rights of a mortgagee registered under the old system of land holding, where there had been default in the mortgage, were recognised; and specifically that mortgagee was authorised to bring an application to move the land secured from the old system of land holding into being titled under *The Real Property Act,* with the title being issued to the mortgagee as a person entitled to the equity of redemption.[139]

These 1887 amendments also eliminated a provision in the mortgage sale rules of the 1885 act that might have put a mortgagor at risk of losing the land to a mortgagee. The rules for mortgage sale provided in Section 80 of *The Real Property Act of 1885* permitted a mortgagee to sell the land by public auction or by private contract and also allowed a mortgagee "to buy in and re-sell the same, without being liable for any losses occasioned to their buying". Effectively, this would allow a mortgagee to enter into a private contract to sell the land to one's self and then re-sell the property to a third party. Effectively, a mortgagor would continue to be liable for the shortfall under a mortgage

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[137] *An Act to further amend "The Real Property of 1885" and the Act amending the same*, 50 Victoria, cap. 11 [Royal Assent 10 June 1887], s. 33.
[138] *Ibid.,* s. 34.
[139] *Ibid.,* s. 41.

and this would permit the mortgagee to sell the land at whatever value he or she saw fit, effectively leaving the mortgagor still owing a substantial portion of the debt. [140]

The Manitoba Legislature took two attempts at dealing with problems occasioned by its language in Section 80 of *The Real Property Act of 1885*. In 1886, the words were somewhat revised to make clear that the mortgagee had the power to hold the land for one's own use after the buy-in. Language then became:

> ...empower to sell the lands some mortgage to the encumbered... by public auction or by private contract, or both such modes of sale, and subject to such conditions as he may think, and to buy-in and re-sell the same, **and until such re-sale to hold, use or lease the same,** without being liable for any loss occasioned thereby; ... [emphasis added].[141]

This amendment made clear that the mortgagee would have the right to hold the land but it did nothing to protect a mortgagor.

It should be noted that the mortgage sale process provided for in section 80 set out a scheme for application of any monies obtained on the mortgage sale. Sale proceeds would be applied:

> firstly, in payment of the expenses occasioned by the sale; secondly, in payment of the monies which may then be due or owing to the mortgagee…; thirdly, in payment of subsequent mortgages or encumbrances, if any, in the order of their priority; and the surplus, if any, would be paid to the mortgagor…. [142]

This right of the mortgagor to receive any sale proceeds over and above those required for payment of all mortgages registered against the property was important. A small mortgage might be enforced by a mortgagee for lack of payment or breach of

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[140] *The Real Property Act of 1885*, s. 80.
[141] *An Act to amend "The Real Property Act of 1885," and for other purposes,* 49 Vic., cap. 28, s. 13.
[142] *The Real Property Act of 1885, s. 80.*

another covenant in the mortgage. However, the assumption built into this sale process was that the mortgage sale at auction would be at something approaching market value. This would allow the mortgagor to receive the benefit of any equity available after the costs of the mortgage sale and after all just debts against the land had been paid. The ability of the mortgagee to short cut this process by acquiring the land directly was a problem, although it was lawful. Even if the mortgagee gave full credit for the amount of the mortgage debt to the mortgagor, there was a risk that the mortgagee would be able to take the benefit of any equity in the property.

An example makes this clearer. The value of the land is $2,000 and the mortgage is for $500. With the language of section 80, the mortgagee can sell the property by direct private sale to himself or herself essentially at any valuation. Without analyzing the specifics of whether the mortgagor may have some kind of action in equity or in fraud against the mortgagee who sells the property at much less than the mortgage debt to himself or herself, the prudent mortgagee in this circumstance will simply give credit for the actual $500 mortgage debt. By taking ownership of the land into his or her own name, the mortgagee now has acquired the property for the valuation of $500 and can re-sell the same at its market value of $2,000. The additional equity over and above the mortgage debt will now belong to the mortgagee.

The 1886 amendments appear to have been intended to make clear that the mortgagee could make use of the property but in the end would be expected to sell the property either at auction sale or private sale. The underlying assumption appeared to be that this would happen and that the mortgagor would receive the benefit of the equity being realised. However, nothing in the actual section of the Act required this to happen

and a strict reading made clear that there was no such requirement. This major loophole was fixed in amendments made in 1887. The words "and to buy in and re-sell the same" were struck out of section 80. [143] In the 1887 amendments, the Registrar-General was given the power to make an order for foreclosure. A foreclosure order authorised a mortgagee to take ownership of land in his or her own name. [144] This power has continued from 1887 to the present day in 2011.

The foreclosure process provided for in the 1887 amendments was limited only to default in principal money or interest monies secured by a mortgage. A default in any other covenant would not support an action for foreclosure. The mortgagee would still have the right to bring the mortgage sale by auction or private sale under section 80 of *The Real Property Act of 1885;* but he or she would not be allowed to use the foreclosure process being established in these 1887 amendments. Section 44 of the 1887 amendments set out the following requirements for the Registrar-General to issue an order for foreclosure:

1. Default for payment of principal or interest money secured by a mortgage.
2. The mortgage must have been registered under *The Real Property Act.*
3. Default must be continued for 6 months after the time for payment was due.
4. The mortgagee must apply in writing to the Registrar-General for the order of foreclosure and in the application confirm the default has continued to the date of the application.
5. The land had been offered for sale at public auction after proper notice of sale had been given.
6. That the amount of the highest bid at such sale was not sufficient to satisfy the money secured by the mortgage together with the expenses occasioned by the sale.

[143] *An Act to amend "The Real Property Act of 1885," and for other purposes* 50 Vic., cap. 11, s. 25.
[144] *Ibid*., s. 45.

7. The notice in writing was given by the mortgagee to the mortgagor and every other person who the Registrar-General had directed to be served as may having an interest in the mortgaged land that was subsequent to the mortgaged that was being foreclosed upon.
8. The application must be accompanied by a statutory declaration or affidavit of the auctioneer as proof that the land had been offered for sale.

As discussed later, most of these provisions continue to the present day and are part of the rules for an order for foreclosure to be issued by the Registrar-General.

The Registrar-General after receiving an application for foreclosure would direct publication in each of three successive weeks in such newspaper or newspapers as the Registrar-General directed, and each such advertisement would offer the land for private sale. After expiration of at least one month from the date of publication of the first of the three successive newspaper advertisements, the Registrar-General could issue to the applicant the order for foreclosure. This would only occur if a private sale had not occurred that provided a sufficient amount to satisfy principal and interest money secured and all expenses occasioned by the sale and the foreclosure proceedings. [145]

These 1887 amendments established important limitations on the ability of the mortgagee to obtain title to the land. The key limitations were that the foreclosure right could only be obtained for default in payment of principal and interests, not in breaches of any other covenants. Further, the Registrar-General, would require proof that the property had failed to sell at public auction. Then the Registrar-General would attempt to have the land sold at private sale through the use of three consecutive newspaper advertisements offering the land for sale. All of these limitations were intended to seek to obtain the best possible price from the sale of the land. This would balance the right of the mortgagee to receive back the principal, interest and cost of the foreclosure

[145] *Ibid.,* s. 44.

proceedings, against the right of the mortgagor to receive any proceeds of sale over and above those required to satisfy the mortgage debt and cost of sale.

Note that *The Real Property Act of 1885* as amended by these two amending statutes still did not limit the right of a mortgagee who had foreclosed upon the land to seek payment from the mortgagor of any of the principal interest that might still be left owing after the order for foreclosure was issued.

The Real Property Act of 1885 continued to be a work in progress, with amendments needed again in 1888. The validity of registrations against land under the old system that were made in land registry offices were confirmed as being in force and being valid as changes against land when the Province moved into the Torrens System. [146] Further in 1888, the legislature saw fit to make all titles to land subject to:

> (h) any judgement, decrees or orders for the payment of money against the registered owner of such land, and any mechanics liens affecting the said land which may be respectively registered and maintained in force... and priority of registration in the Land Titles Office shall prevail in settling the priorities between them. [147]

This important change affected the indefeasibility of titled land. It made clear that a court judgment or other orders for the payment of money had priority over the title itself. This new subsection (h) established that it was the priority of registration at land titles that would determine who merited priority between competing judgments and orders for the payment of money from a registered owner of land.

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[146] *An act to further amend "The Real Property Act of 1885", and for the other purposes*, 51 Vict., cap. 21, s. 2. [Royal Assent 18 May 1888].
[147] *An act to amend The Real Property Act of 1885 and amending acts*. 51 Vict., cap. 22, s. 11. [Royal Assent 18 May 1888].

The placement of a judgment or orders for the payment of money in section 61 of *The Real Property Act of 1885* meant that, at that time, those orders for payment became an exception to the indefeasibility rules of the title. In the current *Real Property Act*, these provisions are established in subsection 58 (1) and the priority of a builders' lien affecting the land are still maintained as part of clause 58 (1) (e). Builders' liens have replaced mechanic's liens.[148] Note that judgment, decrees or orders for payment of the money are not now part of the exceptions to the indefeasibility provided for in the modern subsection 58 (1).

In the current *Real Property Act*, a registration against land will be entitled to priority according to serial number; and priority takes effect from the day the instrument is assigned a serial number.[149]

Another major change to the law of Manitoba occurred in 1888 with amendments to *The Real Property Act of 1885* to create a general register in which to enter all writs of execution and certificates of judgment.[150] Any registrations of land had to be subject to a review in the general register to ensure that there were no writs or judgments endorsed against the name of the owner of the land. This general register created in 1888 remained in force until 20 August 1989. [151]

The concept of a general register or registry of writs was only replaced in 1989 with requirements that any judgment must be registered against the specific land owned by the judgment debtor and not filed and search by way of the name of the debtor. This is in contrast to the model that will be discussed later for the Province of Saskatchewan,

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[148] *The Builders' Liens Act*, C.C.S.M., c. B91.
[149] *The Real Property Act*, C.C.S.M., c. R 30, s. 64 and ss. 63 (2).
[150] *An act to amend The Real Property Act of 1885 and amending acts*, s. 20.
[151] *The Real Property Act*, C.C.S.M., c. R 30, s. 75.

which has maintained a writ registry and is in the process of moving to a Judgment Registry.

(b) Status of Writs in 2011

The enforcement of money judgment process in Manitoba is still based on the use of several medieval writs described in Chapter I. The forms of several writs have survived to 2011, although the names have been modernised. The term "Writs of execution" commonly referred to writs of *fieri facias* and writs of *elegit.*

The writ of seizure and sale is the same writ formerly known under the name of *fieri facias.*[152] The writ of possession[153] and the writ of delivery are both still available under *The Court of Queen's Bench Act.* Replevin orders are now called interim orders for recovery of personal property.[154]

The orders of attachment discussed in the 1870s are still called orders of attachment today in 2011.[155] The attachment of debt process is still known as garnishment and the garnishment order is now called a notice of garnishment.[156]

The sale of land by the Sheriff pursuant to a writ of *fieri facias de terris* ended on 5 March 1889.[157] The writ of *elegit* was abolished in Manitoba on 31 March 1890. [158]

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[152] *The Court of Queen's Bench Act*, C.C.S.M., c. C280, s. 101.
[153] *Ibid*., s. 39 for order of possession of land and s. 59 for order of possession of personal property.
[154] *Ibid*., s. 101.
[155] *Ibid*., s. 60.
[156] *Ibid*., s. 101.
[157] *An Act to further Amend Chapter 17 of 48 Victoria, being an Act respecting the Administration of Justice,* 52 Vict., c. 36, s. 13.
[158] *An Act to Amend Chapter 17 of 48 Victoria, being the "Administration of Justice Act, 1885," and Amendments thereto*, 53 Vict., c. 3, s. 1.

The Judgments Act of Manitoba in section 19 provides: "the writ commonly called the writ of *elegit* and the writ of *fieri facias de terris* shall not be issued in the province."[159]

(c) Current Processes for the Sale of Land

(i) Sale of Land of a Debtor Secured by a Mortgage

The current processes for sale of land of a debtor when a debt is secured by a mortgage against real property are:

1. Sale authorised by a judge of the Court of Queen's Bench; or
2. Sale authorised by a District Registrar pursuant to *The Real Property Act*[160].

The Court of Queen's Bench is a court of record of original jurisdiction and is the court that administers and authorises all execution proceedings, including the seizure and sale of a judgment debtor's lands.

> 32. The court is and continues to be a court of record of original jurisdiction and possesses and may exercise all such powers and authorities as by the laws of England are incident to a superior court of record of civil and criminal jurisdiction in all civil and criminal matters and possesses and may exercise all the rights, incidents and privileges of those courts as fully to all intents and purposes as they were on July 15, 1870 possessed and exercised by any of the superior courts of common law at Westminster, the Court of Chancery at Lincoln's Inn, the Court of Probate or by any other court in England having cognizance of property and civil rights and of crimes and offences.[161]

The court procedures to be followed to enforce a mortgage are set out in Rule 64 of the *Queen's Bench Rules*.[162] Rule 64.02 sets out what a mortgagee may claim:

> 64.02 A mortgagee may, in an action, claim,

[159] *The Judgments Act*, C.C.S.M., c. J10, s. 19.
[160] *The Real Property Act,* C.C.S.M., c. R30.
[161] *The Court of Queen's Bench Act,* C.C.S.M. c. C280, s. 32.
[162] *Court of Queen's Bench Rules,* M.R. 553/88, Rule 64.

(a) foreclosure or a sale of the mortgaged premises;

(b) payment of the mortgage debt by any party personally liable therefor; and

(c) possession of the mortgaged premises.[163]

A mortgage may also be enforced by proceedings authorised by a District Registrar of a Land Titles district if the mortgage was registered against land that has been titled pursuant to *The Real Property Act.*[164] The procedure to be followed is set out in *The Registrar-General's Rules for Mortgage Sale and Foreclosure Proceedings under The Real Property Act.*[165] Only sale of the land or foreclosure are available in proceedings under *The Real Property Act*.

A mortgagee has a choice between selling the land of the mortgagor to a third party or taking ownership of that land by the mortgagee. Foreclosure is when a mortgagee takes ownership of the land of the mortgagor. If the mortgagee takes ownership of the mortgaged land by foreclosure, section 16 of *The Mortgage Act*[166] ends any rights of the mortgagee to collect on the debt secured by the mortgage. A mortgagee needs an order from the court to force a mortgagor to give up physical possession of mortgaged land. Once the order is obtained, the Sheriff can then require the mortgagor to leave the land.

To obtain possession of the land or a judgment for the amount outstanding under a mortgage, a mortgagee must go to the Court of Queen's Bench and obtain an order of

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[163] *Ibid.,* Rule 64.02.
[164] *The Real Property Act,* C.C.S.M., c. R30, s. 96.
[165] *The Registrar-General's Rules for Mortgage Sale and Foreclosure Proceedings under The Real Property Act,* The Property Registry: Winnipeg, 1 February 1997.
[166] *The Mortgage Act*, C.C.S.M., c. M200.

possession. In proceedings in court or in a Land Titles Office, there is specific relief provided to a mortgagor to ease the potential hardship caused by mortgage provisions that may shorten the time otherwise allowed for repayment of the debt or to require the payment of additional amounts of money. This is known as relief against acceleration and is provided for in *The Court of Queen's Bench Act*, s. 39 and *The Real Property Act*, s. 115.

(ii) Relief against Acceleration

39 (1) Where

(a) a failure to pay money due and payable on a date prescribed in a mortgage or an agreement relating to the sale of land causes an additional [sic] amount that is payable at a later date to become immediately due and payable;

(b) a proceeding claiming the full amount payable under the mortgage or agreement under clause (a) is initiated;

(c) the defendant pays into court

(i) the amount originally due and payable under the mortgage or agreement under clause (a),

(ii) the costs of the proceeding under clause (b), and

(iii) an amount which the court deems sufficient to cover damages resulting from the failure to make payment on the prescribed date and to perform other acts required under the mortgage or agreement under clause (a); and

(d) the defendant performs all other acts required under the mortgage or agreement under clause (a);

the court may, on motion,

(e) before judgment, dismiss the proceeding under clause (b); or

(f) after judgment but before sale or recovery of possession of land or final foreclosure of the equity of redemption or final determination of the mortgage or the agreement, stay the proceeding under clause (b).

> Subsection (1) overrides agreement
>
> 39 (2) A motion under subsection (1) may be made notwithstanding a provision to the contrary contained in a mortgage or an agreement relating to the sale of land. [167]

> When acceleration clause not binding
>
> 115 Where default occurs in making a payment due under a mortgage or in the observance of a covenant contained therein, and, under the terms of the mortgage, by reason of such a default, the whole principal and interest secured thereby has become due and payable**, the mortgagor may, notwithstanding a provision in the mortgage to the contrary**, and **at any time prior to sale or foreclosure**, perform the covenant or **pay the arrears**, together with costs to be taxed by the district registrar; and **he is thereupon relieved from the consequences of non-payment** of so much of the mortgage money as has not become payable by reason of lapse of time[168] [emphasis added].

The Court of Queen's Bench also has a general power to relieve against penalties and forfeitures on such terms as are considered just.[169] A mortgagee may still require a mortgagor to execute a transfer of land in favour of the mortgagee to be held by the mortgagee as additional security for the loan. The terms governing the use of the transfer of land may be onerous and allow the mortgagee to register the transfer on any default in making a payment when due under the mortgage. This allows a mortgagee to avoid the rules governing foreclosure, mortgage sale and also the relief against forfeiture provisions. It is recommended that this be prohibited.

[167] *The Court of Queen's Bench Act,* C.C.S.M. c. C280, s. 39.
[168] *The Real Property Act,* C.C.S.M., c. R30, s. 115.
[169] *The Court of Queen's Bench Act,* C.C.S.M. c. C280, s. 35.

(iii) Sale of Land of a Debtor When There is No Mortgage

A judgment for a sum of money may be enforced against a judgment debtor's land in Manitoba pursuant to procedures set out in *The Judgments Act.*[170] In order to do so a certificate of judgment from the Court of Queen's Bench of Manitoba or the Federal Court of Canada must be registered in the appropriate Land Titles Office against land owned by the judgment debtor, as provided in section 2:

> 2 Immediately upon a judgment for payment of money being entered or recovered in the Court of Queen's Bench or in the Federal Court of Canada for a sum exceeding $40., a certificate of judgment …under the seal of the court and signed by the registrar or a deputy registrar of the court may **be registered in any Land Titles Office** in the province; and from the time of the registration thereof, the judgment, except as hereinafter mentioned, **binds and forms a lien and charge on all lands of the judgment debtor** against which the certificate of judgment is registered by instrument charging specific land …and the certificate when so registered has the same effect as if the judgment debtor had under its hand and seal executed a lien charging the lands in favour of the judgment creditor[171] [emphasis added].

Section 2 further provides that, upon registration of the certificate of judgment against land, the specific land is bound with a lien and charge against the land having the same effect as if the debtor had created the lien. This concept, that a statute creates a lien against land in Manitoba owned by a debtor once there has been a registration of some type of certificate, exists in several other Manitoba statutes. *The Builders' Liens Act* creates a lien against land in section 16 in favour of a worker or material supplier; and section 37 provides for registration of the claim for a lien against land where the work

[170] *The Judgments Act,* C.C.S.M., c. J10.
[171] *Ibid.*, s. 2.

was performed or materials supplied.[172] The lien is enforceable by an action in the Court of Queen's Bench and the resulting judgment, if obtained in favour of the lien claimant, becomes a judgment enforced in the same way as any other judgment of the court.

[172] *The Builders' Liens Act*, C.C.S.M. c. B91, s. 16 and 37.

Chapter V: Reform of Civil Court Processes

(a) The Case for Civil Court Reform

The enforcement of a money judgment presupposes the existence of a judgment against the debtor. However, a creditor prior to ever initiating an action in court must look at several factors prior to making the decision whether to seek to enforce and collect upon a debt. These factors include:

A. The law applicable for the enforcement of a debt and whether there any special requirements that will need to be met prior to enforcement of the debt;[173]
B. The cost of the litigation;
C. The prospects for actual collection of the debt as contrasted with merely obtaining a judgment that cannot be collected upon.

The general law applicable for enforcement of a money judgment has been discussed earlier. Other relevant elements are the processes involved in the court action and the

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[173] An example of a restriction would be enforcement of a debt against a farmer that may require compliance with appropriate farm debt legislation. *The Family Farm Protection Act*, C.C.S.M. c. 15, s. 8(1):

Actions or proceedings requiring leave

8(1) No person shall commence or continue any action or proceeding to realize upon or otherwise enforce

(a) a mortgage, an encumbrance, a security agreement or an agreement for sale of farmland, or any provision contained therein; or

(b) a judgment or an attachment obtained on the basis of a mortgage, an encumbrance, a security agreement or an agreement for sale of farmland, or any provision contained therein;

whereby a farmer could be deprived of the ownership or the possession of farmland of which the farmer is the registered owner or of which the farmer is the purchaser under an agreement for sale, without first obtaining leave of the court under this Part.

length of time it will take for those court processes to run from commencement of the action to an award of a judgment. In Manitoba, an action in the Court of Queen`s Bench is governed by the provisions of *The Court of Queen`s Bench Act*[174] and the *Court of Queen`s Bench Rules (Civil).* [175]

The Canadian Bar Association, Task Force on Systems of Civil Justice (CBA Task Force) issued a report in 1996 that looked at issues regarding civil justice in Canada.[176] The work of the committee members involved and the interest generated from the report led to a number of reviews of court rules and processes in various provinces. Among the reforms was the introduction of Rule 20A to the Court of Queen`s Bench Rules in Manitoba in 1996. This rule will be discussed in greater detail later.

Court rules that govern how law suits will be controlled by the court, including the use of time limits on various steps in a litigation process, as well as the use of both document and oral discovery, case management and formal notification of case termination, are all undergoing reform. This reform can be looked at as things that may determine the speed with which disputes are resolved in the civil courts. The CBA Task Force has conducted surveys and identified that the highest priority rating for reform given by members of the public was "the speed with which disputes are resolved in the civil courts."[177] Another key issue behind reform was identified as:

> The fact that the majority of Canadians cannot afford to seek justice in the current system is a problem which far outstrips in magnitude concerns about maximizing procedural and due process protection for those litigants who are presently able to access the system. [178]

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[174] *The Court of Queen's Bench Act,* C.C.S.M. c. C280.
[175] *Court of Queen's Bench Rules (Civil),* Man. R. 553/88. For an annotation of these rules, see Karen Busby, *Manitoba Queen's Bench Rules Annotated*, (Toronto: Carswell, 1992).
[176] Canadian Bar Association, Task Force on Systems of Civil Justice, *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*, (Ottawa: Canadian Bar Association, 1996).
[177] CBA Task Force Report, Table 1, p. 12.
[178] *Ibid.*, p. 12.

The CBA Task Force also identified concerns with delay:

> Specific, comparable data about the time required to process civil cases in Canadian courts are not available at present. This lack of data... emerged as one of the most fundamental challenges facing those who manage the current system and those who would shape and improve the system for the future.[179]

Pre-trial processes such as filing of pleadings and document and oral discovery processes take time. The CBA Task Force report indicated that "lawyers estimated that a typical case takes more than two years from commencement to trial, but they suggested that such cases should take only slightly more than a year from commencement to trial." [180]

An Ontario civil justice review in 1995 issued a first report that estimated the legal fees for each litigant in a case that completed a three-day trial were approximately $38,000.00, with about 191 lawyer hours billed at approximately $200.00 per hour. Document preparation and oral discovery costs within that total were approximately $7,000.00. No costs for motions related to discovery were listed within the breakdowns. The report noted that Toronto area masters estimated that a quarter of all motions brought before them involved discovery issues. This meant that at least in a quarter of the cases discussed, litigation costs would have been higher than the estimated $38,000. [181]

Lord Woolf, a leader in civil justice reform in England, described the five main issues with civil justice as follows:

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[179] *Ibid.*

[180] *Ibid.*, p. 14.

[181] Ontario Civil Justice Review, *First Report,* ch. 11.4, s. 2 (Toronto: Ontario Ministry of Attorney-General, 1985). http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/firstreport/cost.asp (accessed: 28 June 2011).

1. too long,
2. cost too much,
3. undue complexity,
4. too much uncertainty, and
5. unfavourably weighted in favour of the financially stronger party. [182]

The need is for civil justice reform and for reviews of court rules and methods to reduce cost, as a result of a number of studies. The Canadian Centre for Justice Statistics, Statistics Canada conducted its review of civil case management in 1999.[183] In particular, they examined the use of a time of two case management tools used in Canadian civil courts, namely time limits and formal notification requirements. The report defined this as:

> Time limits refer to the established time periods outlined for the conclusion of critical steps in the litigation process. This addressed individual case movement in the court system. Formal notification requirements relate to an obligation by the parties to notify the court when an action has terminated. These requirements served to inform overall case disposition irrespective of any target disposition dates that may be in effect.[184]

The report concluded:

> ... the notion of enforcing time limits that addressed the overall disposition of cases is beginning to take hold. Less frequently used is a requirement for formal notification when a non-trial case has been settled or abandoned. [185]

This report noted that only British Columbia in 1998 had a formal notification requirement and that there was no strict enforcement around that requirement and

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[182] Lord Woolf, Master of the Rules, England described in E. Todres, *Development of Performance Standards in Civil Justice: A Discussion Paper*, (Association of Canadian Court Administrators, " Into the Future Conference," 2006, p. 6.) http://cfcj-fcjc.org/docs/2006/acca-en.pdf (accessed: 28 June 2011).
[183] Canadian Centre for Justice Statistics, Statistics Canada, *The Use of Time Limits and Formal Notification in Civil Case Management* (Ottawa: Minister of Industry, Canada, 1999).
[184] *Ibid.*, p. 4.
[185] *Ibid.*, p. 19.

therefore it was difficult to produce reliable information on civil case attrition, pending case inventory and backlog.[186]

Ontario was the first province to conduct significant civil justice review, with a first report in March 1995 and a supplemental and final report in November 1996. [187]

(b) British Columbia Reform of Civil Court Rules

British Columbia "created a Justice Review Task Force in March, 2002 to identify wide range of potential reform that can make the justice system more responsible, accessible and efficient." [188] A working group from its Joint Review Task Force produced a report in November 2006 entitled "Effective and Affordable Civil Justice." [189] Its third recommendation was that British Columbia should create new civil court rules and that no oral discovery be allowed for all cases valued at under $100,000.00, except by order of the court or with consent of the parties. [190] British Columbia has implemented such new civil court rules on 1 July 2010. [191]

The British Columbia *Supreme Court Civil Rules* in Part 15 – "Fast Track Litigation" proceedings now applies the rule:

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[186] *Ibid.*, p. 17.
[187] First report of the Civil Justice Review (Toronto: Ontario Civil Justice Review, March, 1995). Supplemental and final report of the Civil Justice Review (Toronto: Ontario Civil Justice Review, November, 1996). Both reports available at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/default.asp (accessed: June 28, 2011).
[188] Ministry of Attorney General of British Columbia, How the new civil rules where developed, http://www.ag.gov.bc.ca/new-rules/civil/index.htm. (accessed: 28 June 2011).
[189] British Columbia Justice Review Task Force, "Effective and Affordable Civil Justice", (Victoria: November, 2006) http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf (accessed: 28 June 2011).
[190] *Ibid.*, p. 28.
[191] Ministry of Attorney General of British Columbia, "How the new civil rules where developed," http://www.ag.gov.bc.ca/new-rules/civil/index.htm. (accessed: 28 June 2011). *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

(1) Subject to subrule (4) and unless the court otherwise orders, this rule applies to an action if

(a) the only claims in the action are for one or more of money, real property, a builder's lien and personal property and the total of the following amounts is $100,000 or less, exclusive of interest and costs:

(i) the amount of any money claimed in the action by the plaintiff for pecuniary loss;

(ii) the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss;

(iii) the fair market value, as at the date the action is commenced, of

(A) all real property and all interests in real property, and

(B) all personal property and all interests in personal property

claimed in the action by the plaintiff,

(b) the trial of the action can be completed within 3 days,

(c) the parties to the action consent, or

(d) the court, on its own motion or on the application of any party, so orders. [192]

Note that this rule does not automatically apply. If the rule applies in subrule (1), then any party may file a Notice of Fast Track Action. This will apparently bring the action under the rules of the fast track litigation rule 15-1.[193] It is not entirely clear from a reading of sub-rules (1) and (2) whether the fast track litigation rules apply if no one files a Notice of Fast Track Action. A significant consequence of a matter being a fast track action is to limit examinations for discovery of a party by other parties who are adverse in interest to not more than two hours, unless the person examined consents. [194]

The other significant change under these fast track litigation rules is that costs are fixed at an amount, exclusive of disbursements, as:

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[192] *Ibid.*, r. 15-1 (1).
[193] *Ibid.*, r. 15-1 (2).
[194] *Ibid.*, r. 15-1(11).

a. one day trial or less, $8,000.00;
b. two day trial or less, $9,500.00; or,
c. more than two days of trial, $11,000.00.[195]

(c) Manitoba Reform of Civil Court Rules – Rule 20A

In light of such foregoing reforms, where is Manitoba? Manitoba Regulation 229/96 amended the *Court of Queen's Bench Rules* to add Rule 20A Expedited Actions.[196] It does not apply to family proceedings.[197] Its procedures apply "… to an action where the relief claimed is a liquidated or unliquidated amount[198] not exceeding $50,000.00 exclusive of interest and cost." [199] In addition, a judge may order the Rule 20A Expedited Actions procedures to apply to matters greater than $50,000.00 and may also order that the rule not apply.[200]

The key aspect of Rule 20A is the requirement for a first case conference must be within sixty days after the close of pleadings in the action.[201] This first case conference may be adjourned by consent of the parties to a fixed date that must be within 120 days after the close of the pleadings.[202] The balance of the rule deals with case conference issues and memoranda requirements. The rule provides that costs will be based on class 2 of tariff A, regardless of whether the judgment exceeds the sum of $50,000.00.[203]

This Expedited Actions process is still in force in 2011.

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[195] *Ibid.*, r. 15-1(15).
[196] *Court of Queen's Bench Rules*, Man. R. 553/88.
[197] *Ibid.*, r. 20A (23).
[198] Black at p. 839 defines: "Liquidated claim. Claim, the amount of which is has been agreed on by the parties to action or is fixed by operation of law"; and at p. 1378: "Unliquidated. ...the amount thereof can not be ascertained at the trial by a mere computation, based on the terms of the of the obligation or on some other accepted standard."
[199] *Ibid.*, r. 20A (2).
[200] *Ibid.*, r. 20A (3).
[201] *Ibid.*, r. 20A (6).
[202] *Ibid.*, r. 20A (8).
[203] *Ibid.*, r. 20A (22).

(d) Future Reform of Manitoba Civil Court Rules – May 2009 Proposed Draft Rule 20A

In May 2006, the Manitoba Court of Queen's Bench initiated a review of Rule 20A:

> Queen's Bench Rule 20A, the Expedited Action rule has been in effect for approximately ten years. It introduced a system of case management for civil actions where the relief claimed was in an amount not exceeding $50,000.00. It was a significant change in the pre-trial proceedings of the court respecting civil claims. After ten years of experience with Rule 20A, a review of its effectiveness would be of benefit to the court in determining whether it should be retained in its current form or be amended to resolve any problems that have arisen out of its application.[204]

In 2009, then Chief Justice Marc M. Monnin circulated to the legal profession of Manitoba a proposed new Rule 20A. [205]

Chief Justice Monnin's introductory remarks to the proposed draft of a new Rule 20A commented:

> In recent years, there have been very few civil trials in Manitoba where the amount at issue has been less than $100,000.00. Comments from counsel and litigants during pre-trials and mediations suggest certain claims or defences are not proceeding to trial because parties cannot afford the cost of the trial. They often point to the pre-trial process as being lengthy and cumbersome with the result that they are driven to settle their cases regardless of merit, the cost of the pre-trial process being a major factor.
> ... The proposed revisions to Queen's Bench Rule 20A are intended to address the problems raised above. They are based on the concept of proportionality, with the object being to institute a process that will facilitate the "expeditious and less expensive determinations of actions." It is proposed to adopt pre-trial procedures that are proportional in cost to the amount at issue in the action. The changes are intended to make it possible for litigants to have their modest claims adjudicated by the Court quickly and at reasonable cost. The existing rule contemplates that matters would be set down for trial within 180 days of the date of the first case

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[204] Notice, Court of Queen's Bench Re: Rule 20A Review, May 2006.
http://www.manitobacourts.mb.ca/pdf/rule_20a_review_e.pdf (accessed: June 28, 2011)

[205] He is now Mr. Justice Marc M. Monnin, appointed a judge of the Court of Appeal of Manitoba on 3 February 2011.

> conference. While this is not occurring under the current rules, the hope is to move closer to that goal with these new rules.[206]

The proposed draft Rule 20A expands application of the rule for Expedited Actions to those actions where the relief claimed is in an unliquidated amount not exceeding $100,000.00, exclusive of interest and costs.[207]

That sum of $100,000.00 is probably now too low. As discussed later, parties will have the opportunity to make a motion to have the rule not apply and they can make their case at that time for why the rule should not apply. In 2011 the buying power of $100,000.00 is not significantly greater than $50,000.00 was in 1996. The benefits of the Expedited Action process in shortening the time for cases to reach trial and reducing costs should apply to most actions filed in the court. This rule should be expanded to at least the sum of $200,000.00 and apply to cases for unspecified damages. This would effectively make the Expedited Action process the normal process for most cases; and the document and oral discovery process in the current *Court of Queen's Bench Rules* would then be used only where the party either successfully persuaded a judge to order the Expedited Action rule not apply or where the amount in question is more significant.

The proposed Rules 20A (4) through (7) set out guiding principles for a case management judge in determining when he or she should direct a particular action to be included within the Expedited Action rule. The amount of the action and the complexity of the issues involved, as well as the expenses of the action to the parties, are all matters that would be set out for consideration by the case conference judge.

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[206] M. M. Monnin, C.J.Q.B., Introductory remarks to proposed draft of Court of Queen's Bench Rule 20A, May, 2009. http://www.manitobacourts.mb.ca/pdf/introductory_remarks_monnin_rule20a.pdf (accessed: June 28, 2011)

[207] Manitoba Court of Queen's Bench, "Proposed draft Court of Queen's Bench Rule 20A", May 2009, r. 20A (2) http://www.manitobacourts.mb.ca/pdf/proposed_draft_qbrule20a.pdf (accessed: 28 June 2011).

In proposed Rule 20A (9) the current rule that a case conference must be scheduled within sixty days after the close of pleading is amended to be within ninety days of the close of pleadings. While this is later than the date of the first case conference compared to current rules, it is offset by elimination of the current Rule 20A (8) that allows the parties to adjourn the first case conference by their own consent. The proposed Rule 20A (13) requires that a case conference can only be adjourned in exceptional circumstances and then only to a fixed date.

An important amendment to the order making power of the case conference judge in proposed Rule 20A (20) (f) allows the case conference judge to limit the number and types of experts who will testify at trial. The current Expedited Action Rule 20A does not have any restrictions on document disclosure. Proposed Rule 20A (22) sets out new requirements for document disclosure.

Oral examination for discovery of a party is now significantly limited in proposed Rule 20A (31), compared to previous rules on oral examination. Proposed Rule 20A (31) (a) provides that there will be no oral examination for discovery for matters that are less than $50,000.00 being in dispute, without leave of the case conference judge. That leave will only be provided for under exceptional circumstances. Where the value in the Expedited Action exceeds $50,000.00, proposed Rule 20A (31) (d) provides that oral examination for discovery shall not exceed three hours in duration unless otherwise ordered by the case conference judge. Interrogatories are not to be used without leave of the case conference judge. An additional important change to the existing rules is set out in proposed Rule 20A (31) (f) which limits a party's obligations to give undertakings to provide information during oral examination for discovery.

These proposed changes to the Expedited Action rules are important improvements to the civil litigation process in Manitoba and they should be put in force. As discussed in Chapter VIII Conclusions and Recommendations for Change, *infra,* claims for unspecified damages would also benefit from being dealt with under the proposed Rule 20A.

Chapter VI: Law Reform Proposals Regarding Enforcement of Money Judgments

The most recent work on comprehensive law reform in the area of enforcement of money judgments is occurring in Saskatchewan.

In a final report to the Saskatchewan Law Reform Commission,[208] Professors T. Buchwold and R. Cuming tackled the thorny problem of how to enforce money judgments in the Province of Saskatchewan. This Final Report was based upon an interim report by them in November 2001,[209] released to allow interested persons to comment on the "large number of policy choices and changes in both substance and procedure."[210] These authors were part of the working group that prepared the 2004 report of "The Uniform Law Conference of Canada," entitled *Uniform Civil Enforcement of Money Judgments Act*[211] (the "*Uniform Act*")[212] and "… the Saskatchewan Interim Report provided the conceptual underpinnings of the *Uniform Act*."[213] Effectively, the Final Report is a Saskatchewan specific version of the *Uniform Act,* with specific policy decisions made by its authors following their experience in working on the *Uniform Act* and after receiving commentary on their Interim Report. British Columbia Law Institute has made its own analysis of the *Uniform Act,* intending to do for British Columbia what

[208] T. Buchwold and R. Cuming, "Final Report on Modernization of Saskatchewan Money Judgment Enforcement Law", January 2005, (Saskatoon: University of Saskatchewan, Faculty of Law, 2001), (Hereafter "Final Report").
[209] T. Buchwold and R. Cuming, "Interim Report on Modernization of Saskatchewan Money Judgment Enforcement Law", November 2001, (Saskatoon: University of Saskatchewan, Faculty of Law, 2001), (Hereafter "Interim Report").
[210] Interim Report, p. xxi.
[211] Uniform Law Conference of Canada online: http://www.ulcc.ca/en/us/Uniform_Civil_Enf_Money_Judgments_Act_En.pdf (accessed: 29 June 2011) (Hereafter "Uniform Act").
[212] British Columbia Law Institute, "Report on the Uniform Civil Enforcement of Money Judgments Act", Report no. 37, (Victoria: British Columbia Law Institute, March 2005), p. 14 (Hereafter "B.C. Report").
[213] B.C. Report, p. 15.

the Final Report offers to Saskatchewan, namely a comprehensive review of the *Uniform Act* to create a particular proposed statute for that province.[214]

In this Final Report, the authors set out a detailed proposal for reform of all processes in Saskatchewan related to the enforcement of money judgments. [215] They propose to sweep away all existing processes individually based upon the type of asset being seized, replacing them with a single uniform method for the seizure and sale of assets of a judgment debtor who has assets within the Province of Saskatchewan.

The authors have provided a brief eight page summary outlining the themes behind their proposed statute. The balance of the 209 page article consists of a draft statute entitled *The Enforcement of Money Judgments Act* (DRAFT EMJA, 2005) along with detailed commentaries accompanying most sections of the proposed statute. At the end is a section dealing with provisions regarding land intended to be incorporated in *The Land Titles Act, 2000 (Saskatchewan).* [216]

In the introduction to this report the authors discuss the themes embodied in their proposed statute and set them out as follows:

1. Modernization and codification of general judgment enforcement law in a single statute;
2. Reformulation of judgment enforcement devices so as to make them more consistent, efficient, complementary, effective and fair;
3. Universal exigibility of debtors' property (other than assets specifically exempted;

[214] B. C. Report.
[215] Money judgment is defined differently in the Interim Report than in the Final Report. Interim Report at p. 2 defines "“judgment” as an order of the court requiring the payment of money. . . ." The DRAFT EMJA, 2005 in the Final Report at p. 12 is materially different and does not restrict judgment to an order requiring the payment of money:

> *"judgment" means: (a) a subsisting judgment of the court, the Court of Appeal or the Supreme Court of Canada; (b) a subsisting order, decree, certificate or right that may be enforced as or in the same manner as a judgment of the court; and. . . .*

[216] Final Report, p. 201.

4. Reformulation of the sheriff's role in judgment enforcement without diminution of judgment creditors' involvement in the enforcement process;
5. Functional integration of judgment enforcement and judgment registration in the Personal Property Registry and under *The Land Titles Act, 2000 (Saskatchewan)*;
6. Retention of the principles of creditors' proportionate sharing in the property of a judgment debtor currently embodied in *The Creditors' Relief Act (Saskatchewan).*[217]

Among these major changes:

1. The office of sheriff is materially changed to become one that is primarily responsible for the enforcement of money judgments through the seizure and sale of assets and the distribution of proceeds to judgment creditors. [218]

2. The proposed DRAFT EMJA, 2005 would create a comprehensive system for the registration of judgments in the Personal Property Registry and these "enforcement charges" would be given priority status over personal property and with respect to interests in land, would be the equivalent of registered mortgages against the land. [219]

3. The proposal calls for sweeping change and simplification of the processes for selling assets of a judgment debtor. As set out in Part XI - Sale of Seized Property in the proposed DRAFT EMJA, 2005, property can be quickly and simply sold by the sheriff.

4. The proposed changes include several changes in methods for the distribution of proceeds of seized property. These are provided for in Part XII of the proposed DRAFT EMJA, 2005 - Distribution of Proceeds of Seized Property. One key change is in the determination of the type of exemptions of property that are allowed. Section 74 of the DRAFT EMJA, 2005 provides that a judgment debtor is entitled to an exemption for property or of a money amount allowing them to re-acquire a "functionally equivalent item of property". Similarly in the same section, the proposed statute will allow for voluntary sales by a judgment debtor of property that is subject to a seizure by a judgment creditor. This is a substantial change from the existing law of Saskatchewan in which a voluntary sale of assets results in there being no claim of exemption allowed to the judgment debtor. [220]

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[217] Final Report, p. 2.
[218] Final Report, p. 3.
[219] Final Report, p. 8.
[220] Final Report, p. 156, Explanatory Notes No. 1.

5. A further change that is subtle but could have far reaching implications is provided for in Section 4 of the proposed changes to *The Land Titles Act, 2000* set out at page 205 of the report. This change in Subsection 4(3) provides that the enforcement charge of a judgment creditor that has been registered against the interest held by a joint tenant in real property will survive the death of the judgment debtor. The existing law in Saskatchewan [221] and Manitoba provides the opposite result, that upon the death of a joint tenant who was a judgment debtor, the respective interest in the land moves to the surviving joint tenant free and clear of any enforcement charge or judgment that affected only the interest of the deceased joint tenant.

An example of the complexities that the Final Report has dealt with is in the use of the Personal Property Registry as the place for registering judgments. Practical experience in Manitoba has shown concerns with a register for debts based on names. This registration in the Personal Property Registry will provide a single point of searching for anyone interested in finding out if a particular person has judgment debts. Difficulties will arise from the need to have accurate names of debtors. When entering into a voluntary debt, such as a loan, it is normally easy to obtain identification from a debtor and information such as birth date and birth certificate. These allow for registration of a form of debtor name that will hopefully be consistent over time. When suing someone to judgment, the form of name used by a debtor can vary even without any intent to mislead. Determining if the name registered in court as a judgment debtor, *e.g.,* John A. Smith is the same person as Jim Allan Smith on a certificate of title can be of great concern to anyone who wishes to grant a mortgage on that land. Manitoba has operated a general registration of debts by name at its Land Titles Offices and used sworn affidavits from land owners who listed many similar forms of name to those recorded in the General Register. This proved cumbersome and inconvenient for land owners. To find a better balance between the needs of judgment creditors and land

[221] Final Report, p. 206, Explanatory Notes No. 2.

owners, the General Register was replaced in 1989 with a system that required registration of a judgment against a particular title.[222] The creditor can now sign a statement stating that the person named in their judgment is the same person as the one who owns the land, even where the names are not exact matches.[223] DRAFT EMJA, 2005 requires registration of a judgment against a specific title for land owned at the time of the registration of the judgment at the Personal Property Registry.[224] Land acquired after such registration is charged by that registration if the names of the debtor are shown to be the same in the Personal Property Registry and on the title to the land.[225] This can create the same difficulty that caused Manitoba to close down its General Register, namely dealing with name conflicts between a name register and a land title. Saskatchewan has maintained its General Register of writs indexed by name of debtor to current times, while Manitoba did not. [226]

The Final Report is a persuasive document setting out the need for comprehensive reform of the law relating to debtor and creditor relations, registration of judgments and the processes for enforcement of judgment by seizure and sale of assets of the debtor. The Saskatchewan legislature clearly agreed with the Final Report and on 20 May 2010, Royal Assent was given to The *Enforcement of Money Judgments Act*.[227] It

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[222] *The Real Property Act* C.C.S.M. cap. R30, s. 75. The General Register was closed for use as of 19 August 1989.
[223] *Ibid.,* ss. 75 (7).
[224] Final Report, p. 202, ss. 2(1).
[225] Final Report, p. 202, ss. 2(2).
[226] Final Report, p. 202, Explanatory Notes No. 3.
[227] *The Enforcement of Money Judgments Act*, S. S. 2010, c. E-9.22.

is not yet in force, awaiting proclamation,[228] which will likely happen in 2012 once necessary regulations have been prepared.[229]

Professor Cuming has prepared a detailed analysis and commentary regarding this new *Enforcement of Money Judgments Act*.[230]

Chapter 1 of the Commentary gives the historical background regarding execution processes against personal property and land in Saskatchewan. While the information and examples provided are applicable only to Saskatchewan there is little difference from the situation in Manitoba. The names of statutes are slightly different but the general approaches to execution against personal property and land are similar. Both provinces evolved their execution processes based upon early English law which then evolved by provincial statutes into more modern processes. In each case the execution processes varied as each process evolved and there was no attempt to codify the law regarding debtor and creditor remedies. The new *Enforcement of Money Judgments Act* (hereafter *EMJA*) changes that for Saskatchewan:

> *The Enforcement of Money Judgments Act* (hereafter EMJA) embodies a radical departure from the approach to development of money judgment enforcement law employed during the past 100 years. Prior to its enactment, this area was an uncoordinated amalgam of law drawn from disparate sources, much of which pre-dated Saskatchewan as a political entity. The *Act* is the outcome of the only undertaking in Saskatchewan's history to systematically examine this area of the law with a view to its rationalization and modernization.
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> The *Act* is as much of a "code" as is permissible under the common law approach to lawmaking.[231]

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[228] *Ibid*., s. 254.
[229] Personal conversation with Kimberly Lemieux, Senior Marketing Analyst and Deputy Registrar, Saskatchewan Personal Property Registry, 21 June 2011.
[230] R. C. C. Cuming, *The Enforcement of Money Judgment Act,* S.S. 2010, c. E-9.22: Analysis and Commentary, version 1 (c) (Saskatoon: Law Foundation of Saskatchewan), 2010 [hereafter Commentary].
[231] *Ibid.,* p. 1.

Manitoba in 2011 and Saskatchewan, prior to the proclaiming into force of *EMJA,* have had a system where the enforcement of a money judgment against a personal property of the debtor is based upon the judgment creditor obtaining a Writ of Execution. The Writ of Execution must then be delivered to the sheriff who is to take action based upon the Writ. Every English lawyer practicing since medieval times would be familiar with this process. One minor change in Manitoba was that the writ of execution ceased to have force two years from its date of issue. Pre-1870 this would have been the normal year-and-a-day requirements for a writ of *Fieri Facias*. [232] The sheriff on receiving that writ of execution would make note of its date and time of receipt.[233]

In Manitoba, "every writ of execution against goods and chattels, at and from the time of delivery to the sheriff binds all the goods and chattels … of the judgment debtor within the province."[234] This rule was clear. Difficulty arose for other creditors or persons who might wish to do business with the debtor. There is no fast, easy way in Manitoba for a person to determine if a writ of execution had been delivered to the sheriff. Contrast this with a situation of a creditor who wished to determine if a debtor had given a security interest in personal property. The creditor would simply go online and conduct a search of the Personal Property Registry, an online registry maintained by The Property Registry of the Province of Manitoba pursuant to provisions of *The Personal Property Security Act*.[235] A creditor might search by the name of the debtor or by the serial number for a certain type of goods such as automobiles.

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[232] *The Executions Acts*, C.C.S.M., c. E160, s. 2.1.
[233] *Ibid.,* s. 2.
[234] *Ibid.,* s. 5(1).
[235] *The Personal Property Security Act, C.C.S.M., c. P35.*

In Saskatchewan, *EMJA* will soon have a judgment registry. This registry will be electronic and online and will be housed as part of its Personal Property Registry. A search may be done directly of the judgment registry or a search may be made for the debtor's name in the Personal Property Registry; and that search will then return all registered security interests as well as all registered enforcement charges.[236] Note that in Saskatchewan *EMJA,* writs are abolished and what is registered in the judgment registry is the judgment. Section 23 of *EMJA* provides that the registered judgment will have the same priority as security interest created pursuant to the Saskatchewan *Personal Property Security Act*.

The public may determine if a particular judgment debtor is subject to registered security interests and registered enforcement charges simply by making an easily obtained online search of a public database. This online search will be of great benefit to both creditors and debtors. Debtors who wish to obtain credit can obtain such credit easier when the potential creditors are able to determine that the debtor is free and clear of any security interests and enforcement charges. If any such charges do exist, the creditor will be in a position to determine if these will affect the credit worthiness of the particular debtor.

Where the debtor in Manitoba is giving a security interest under *The Personal Property Security Act* to a creditor, it is important to the creditor to know if there are any pre-existing writs of enforcement registered with the sheriff. Any such writs of

[236] Kim Lemieux, Deputy Registrar, Saskatchewan Personal Property Registry, Oral presentation to the Canadian Conference of Personal Property Security Law, Toronto, 21 June 21 2011.

execution will have priority over any security interests granted by a debtor, subsequent to the date of registration of the writ with the sheriff.[237]

As discussed earlier, any writ or judgment registry has at its heart a potential problem in the use of the debtor's name as the main indexing key.[238] The fundamental issue is that a judgment creditor is not normally able to have access at the time of judgment to documentation such as a birth certificate of the debtor in order to ensure that the judgment is recorded in the exact name of the debtor. A partial remedy is to have a simple method for a judgment creditor to require a judgment debtor to provide his or her full true and current name as well as the serial number of any goods such as an automobile that the debtor owns; the judgment creditor may amend their registration to show the correct information. Currently, in Manitoba, the creditor would have to examine the judgment debtor using the process for examination in aid of execution described above.

EMJA sets out a process whereby the sheriff may send a written demand to debtors to provide further information on their name and assets. Manitoba will need a simpler method than oral examination in aid of execution if it is to adopt an enforcement charge process like that set out in *EMJA*. If Manitoba adopts the process set out in *EMJA* for expansion of the role of the sheriff, that could work. Another alternative would be for Manitoba to empower a creditor to send a written demand for information to a debtor and provide for sanctions on the debtor if he or she does not comply.

Manitoba and Saskatchewan both require a judgment creditor to register their judgment against the land of the debtor. Such registration will give the creditor an

[237] *The Executions Act,* ss. 5 (1).
[238] Commentary, p. 58. Professor Cuming describes in some depth the difficulties in the use of individual debtor names for both registration and subsequent searching in a writ registry.

interest in the land. With that interest the creditor may in due course sell the land to satisfy the debt.

In Manitoba a judgment creditor must periodically attempt to determine if the judgment debtor has acquired new land. The Manitoba Land Titles system allows for a name search in order for a search to be conducted against names of land holders in Manitoba. This name search was developed in part to address the needs of creditors searching for more recently acquired property of judgment debtors. This has become necessary with the abolition of the general register of writs in Manitoba.

Saskatchewan has dealt with the problem of after acquired property through a linkage between registry databases that maintain the writ register and the databases that maintain the land records under its *The Land Titles Act, 2000.*[239] A perfect match between a debtor's name and the new landowner's name will result in the enforcement charge automatically being carried forward and endorsed against the new title to the land in question. There are processes available for a potential new landowner to address the issue of an exact name match with a registration in the judgment registry.

The policy decision is whether or not to provide for automatic movement of a registration of an enforcement charge to the land records in order to apply it to a newly acquired piece of land. An alternative would be to maintain the existing Manitoba position, that it is that the obligation is with the judgment creditor to register against specific land when they become aware that a judgment debtor has acquired such land. This avoids the concern raised by requiring a land titles office to review affidavits stating whether or not a particular writ applies to a particular judgment debtor's name.

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[239] *The Land Titles Act 2000,* S.S. 2000, c. L-5.1.

The benefits of registering writs as enforcement charges for determination of both the existence of the writ as well as its relationship to security interests under *The Personal Property Security Act* are clear and significant. Manitoba should require the registration of writs of execution in its Personal Property Registry and establish that registration of a writ of execution binds the goods and chattels of a judgment debtor.

Chapter VII: Modern Realities of Executory Judgments: Court of Queen's Bench Case Statistics, 1995 and 2004

As outlined in the Introduction to this thesis, focus is on the following research questions:

1. Is Court of Queen's Bench Rule 20A effective?
2. Should Rule 20A be amended as proposed in the May 2009 proposal for reform from the Court?
3. What additional insights with respect to improving (i) enforcement processes for collection of civil money judgments, and (ii) efficiency of court processes for the conduct of cases can be gained from research conducted in response to the first two (2) research questions.

Rule 20A of the *Court of Queen's Bench Rules,*[240] deals with expedited actions for claims under $50,000.00 and was implemented in 1996. At the request of former Chief Justice Marc M. Monnin of the Court of Queen's Bench, this research looks at court records prior to and after the 1996 implementation by the Court of its Rule 20A. These rules are designed to streamline the administration and conduct of court cases in which the amount claimed is a money judgment for less than $50,000.00: what is the length of time from commencement of a claim to judgment issued by the Court and what amounts of judgments are awarded? The first question addressed is whether Rule 20A has actually streamlined the administration and conduct of court cases in which the amount claimed was a money judgment for less than $50,000.00. Then the data

[240] *Court of Queen's Bench Rules*, M.R. 553/88 was amended by M.R. 184/96 creating Rule 20A.

are examined to determine if proposed amendments to Rule 20A, discussed in Chapter V, *supra*, should be implemented.

The amounts of judgments awarded, and the enforcement process used to collect upon such judgments, are also examined to determine what processes are being used.

(a) Sampling Process Used

The method begins with examination of 417 consecutive Queen's Bench Civil Division files in each of the years of 1995 and 2004. The majority of files in 2004 will have reached conclusion and closure by the time of examination of the records in 2008. The 1995 records were selected as being prior to the 1996 implementation of Rule 20A.

Records were examined starting with consecutive files registered with the court starting on October 1st of each of the respective years. Fall is traditionally a busy period at the Court of Queen's Bench and 1 October is historically the start of the *Michaelmas* court term, after summer recess.

The review was done by examining the records maintained in electronic format by registrars of the Court of Queen's Bench. The individual hard-copy files were only reviewed where there was difficulty in clarifying what information was available through the electronic record. A sample size of 417 records placed limitation on the statistical reliability of their data when compared to the overall large size of the records in the Court of Queen's Bench. The 417 did not cover all files registered in the month of October for the year 1995. It did cover records of court cases registered between 1 October and 19 October 1995. In 2004, registration dates between 1 October and 27 October 2004 were included within the sample. There were variations in registration

dates because some occurred outside of this range but were within the consecutive file numbering used for this sample by the registry.

Records were only examined in the Winnipeg Centre of the Court of Queen's Bench, Civil Division. Accordingly, matrimonial cases were not included within the sample because they are processed within the Court of Queen's Bench, Family Division. Once an initial file had been arbitrarily selected as the initial starting date, all files were then examined in consecutive order from that date. In 1995, the opening file was CI95-01-92636 registered on Monday, 2 October 1995. In 2004, the initial opening file was CI04-01-39474 registered on Friday, 1 October 2004. Queen's Bench files were assigned a case file number that provided a certain amount of detail about the case. Cases marked with the letters CI were in the Civil Division of the Court of Queen's Bench. The next two digits, being 95 or 04, respectively, indicated the year the case was initiated. The next digits, being -01 in each case, meant that this was in the Court of Queen's Bench centre in Winnipeg. Finally, the next five digits were consecutive file numbers assigned by the court to each file.

The data examined were a statement of claim, a notice of application or some other process used to open a Queen's Bench file. Where the file commenced by a notice of application or other process, this survey merely noted those files and no other data were collected. Where the file was initiated by a statement of claim, the records were examined to determine the initial registration date of the claim, whether a statement of defence was filed, the date of the statement of defence and the date on which a judgment was obtained, if any. The judgment amount was noted as well as whether or not a notice of discontinuance or notice of satisfaction was filed. Where the records showed that

garnishment was used, then the date of first garnishment was noted. The number of days between the filing of the statement of claim and the obtaining of a judgment was calculated. If the judgment was made by default, this was recorded.

Judgments obtained by registration of a Certificate of Debt[241] or by similar process by the Province of Manitoba or other governmental authority were included with the statement of claim cases; and the same data were collected for those files as for statement of claim files. These showed as cases in which judgment was obtained on the same day as the claim was filed. These cases became relevant to an examination of debt collection processes because these judgments were obtained and enforcement processes, usually garnishment, were started simultaneously with the registration of the documents, such as a certificate of debt.

The 2004 sample data was collected twice, once as of 22 August 2008 and then updated to 24 July 2011. This is approximately 3.75 and 6.75 years after commencement of the 2004 case files. Length of time from commencement of a claim until judgment obtained was determined after 3.75 years of the commencement date in each of both sample years. The 1995 data was collected thirteen years after commencement date and the 2004 sample was collected 6.75 years. There may be some variation between samples if 2004 cases reached judgment after the sample collection date of 24 July 2011.

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[241] There are nine Manitoba statutes which authorise the filing of a certificate of debt. On filing of a certificate at the Court of Queen's Bench a judgment is automatically issued for the amount of the certificate: *The Biofuels Act,* C.C.S.M. c. B40, s. 10(3); *The Contaminated Sites Remediation Act,* C.C.S.M. c. C205, s. 34; *The Dangerous Goods Handling and Transportation Act,* C.C.S.M. c. D12, ss. 22 (4) and 30 (8); *The Fortified Buildings Act,* C.C.S.M. c. F153, s. 14 (3); *The Highway Traffic Act,* C.C.S.M. c. H60, s. 242.3 (34); *The Pari-Mutuel Levy Act,* C.C.S.M. c. P12, s. 29; *The Provincial Parks Act,* C.C.S.M. c. P20, s. 22; *The Property Tax and Insulation Assistance Act,* C.C.S.M. c. P143, s. 24; *The Safer Communities and Neighborhoods Act,* C.C.S.M. c. S5, s. 25 (3). A similar process is used for the filing of a certificate of default which, upon filing at the Court of Queen's Bench, also becomes a judgment: *The Workers Compensation Act,* C.C.S.M. c. W200, s. 85 (2).

Analysis of the data was done to determine the following field categories:

- Number of statements of claim filed
- Number of default judgments
- Number of defended judgments
- Number of dismissed claims
- Number of unresolved claims
- Number of judgments over $50,000
- Number of judgments under $50,000
- Number of Notices of Satisfaction filed
- Number of discontinuances filed
- Calculated days from claim filed to judgment delivery

Enforcement processes were examined in the 2004 data to determine usage of orders of garnishment, writs of seizure and sale, writs of possession and examination of a judgment debtor in aid of execution.

(b) Results and Analysis

(i) Summary of Findings

There has been a significant drop in the number of cases filed each year after 1995. Volume declined from 8,662 cases filed in 1995 to 4,617 in 2004, a drop of 53% compared to 1995. Material drop in case volume can be seen first in 1996 and progressed in a downward trend thereafter, in Table 1.

Table No. 1 Number of Cases Filed – Queen's Bench, Winnipeg Centre

Number of Cases Filed – Queen's Bench, Winnipeg Centre		
	Suit Numbers	**Total Filed**
1994	11087 – 85999	8912
1995	86000 – 94662	**8662**
1996	94663 – 00526	5863
1997	00527 – 05499	4972
1998	05500 – 11100	5600
1999	11101 – 16109	5008
2000	16110 – 21278	5168
2001	21279 – 26140	4861
2002	26141 – 31156	5015
2003	31157 – 36161	5004
2004	36162 – 40779	**4617**
2005	40780 – 45513	4733
2006	45514 – 50154	4640
2007	50155 – 54999	4844
2008	55000 – 59452	4492
2009	59493 – 64461	4968
2010	64462 – 69678	5216

Table 2A sets out in summary fashion the data collected from the sampling of records as of August 22, 2008. The sample shows a marked increase in cases commenced by Notices of Application and methods other than a statement of claim from 1995 (20%) to 2004 (31%) of the total sample. This is reflected in the decline in the number of cases commenced by statement of claim from 1995 (80%) to 2004 (69%) of the sample.

The percentage of cases in which a statement of defence was filed is essentially unchanged between sample years 1995 (22%) and 2004 (19%).

The number of judgments issued after trial doubled in absolute numbers from 1995 (23) to 2004 (48) even though the number of actual cases filed in the court was halved. The 2004 cases were under Rule 20A (Expedited Action) and it may be

surmised that case management contributed to these contested cases proceeding to judgment after trial. However, note that case conferences pursuant to Rule 20A occurred in 18 cases out of 287 statements of claim commenced in the 2004 sample cases. Thus only 6% of the statements of claim were actively managed under the Rule 20A procedures.

The number of Notices of Discontinuance registered dropped dramatically from 1995 (38%) to 2004 (1%). The number of Notices of Satisfaction registered doubled from 1995 (6%) to 2004 (13%). There is no clear explanation as to why this occurred. Anecdotal discussions with lawyers suggest that creditor legal counsel may be registering Notices of Satisfaction in the court after collecting on a judgment debt. When a debt is collected without judgment being obtained, it appears common practice to send the Notice of discontinuance by mail to the debtor.

Table No. 2A Summary of Case Data – Queen's Bench Records Reviewed as of August, 2008

Summary of Case data – Queen's Bench Records Reviewed as of August 22, 2008				
	1995		2004	
	No.	% of total sample	No.	% of total sample
Applications and other	82	19.7	130	31.2
Number of Statements of claim	335	80.3	287	68.8
Number of Defended Cases	90	21.6	79	18.9
Total Number of Judgments Given	111	26.6	163	39.1
Number of Default Judgments	88	21.1	115	27.6
Estimated number of trial judgments (Total Judgments – Default judgments)	23	5.5	48	11.5
Average days from claim to judgment	229		65	
Average days to judgment determined 3.75 years after sample month*	144		65	
Number of Dismissed Cases	19	4.6	4	1
Number of Discontinuances Registered	160	38.4	59	14.1
Number of Satisfactions Registered	26	6.2	52	12.5
Number of Cases When Garnishment Used	49	11.8	95	22.8
Number of Unsatisfied Judgments	85	20.4	111	26.6

Table No. 2B Summary of Case Data – Queen's Bench Records with 2004 Data Reviewed as of July 24, 2011

Summary of Case data – Queen's Bench Records Reviewed with 2004 Data Reviewed as of July 24, 2011				
	1995 as of August 22, 2008		2004 as of July 24, 2011	
	No.	% of total sample	No.	% of total sample
Applications and other	82	19.7	130	31.2
Number of Statements of claim	335	80.3	287	68.8
Number of Defended Cases	90	21.6	79	18.9
Total Number of Judgments Given	111	26.6	194	46.5
Number of Default Judgments	88	21.1	116	27.8
Estimated number of trial judgments (Total Judgments – Default judgments)	23	5.5	78	18.7
Average days from claim to judgment	229		93	
Average days to judgment determined 3.75 years after sample month*	144		65	
Number of Dismissed Cases	19	4.6	9	2.2
Number of Discontinuances Registered	160	38.4	63	15.1
Number of Satisfactions Registered	26	6.2	56	13.4
Number of Cases When Garnishment Used	49	11.8	98	23.5
Number of Unsatisfied Judgments	85	20.4	138	33.1

Table No. 3A 1995 - Actual Amounts of Judgments Awarded over $100,000

1995 - Actual Amounts of Judgments Awarded over $100,000				
	Days to Judgment	**Amount Claimed**	**Judgment Amount**	**Judgment**
Over $100,000.00 but under $200,000.00		$96,630.98	$114,309.91	Default
		$105,674.63	$106.866.58	Default
		$114,309.91	$117,790.94	Default
		$115,145.74	$102,061.85	Default
		$141,463.15	$143,957.53	Bankruptcy
	1301	Damages	$148,000.00	Trial
		$176,925.05	$179,461.99	Default
Over $200,000.00		Damages	$227,959.19	Default
		Damages	$548,516.45	Trial
	225	$1,124,031.31	$1,169,830.92	Default

Table No. 3B 2004 - Actual Amounts of Judgments Awarded over $100,000 as of July 24, 2011

2004 - Actual Amounts of Judgments Awarded over $100,000 as of July 24, 2011				
	Days to Judgment	**Amount Claimed**	**Judgment Amount**	**Judgment**
Over $100,000.00 but under $200,000.00		None	None	None
Over $200,000.00		$574,434.06	$721,319.75	Default
		$600,000.00	$646,553.42	Default
	1,335	264,348.11	$264,348.11	Trial
		$208,706.66	$216,150.66	Default
	877	Unspecified	186,879.44	Trial

Table No. 4A 1995 Cases Over One Year

1995 Cases Over One Year				
	No. of Days			
	Dismissed	Trial	Claim	Judgment
		875	Damages	$39,000
	510		Damages	
	866		Damages	
	724		Damages	
		1866	Damages	$2,760.
	511		Damages	
	598		Damages	
	2523		Damages	
	987		Damages	
	1788		$21,500.	
	2263		Damages	
	2520		Damages	
	1085		Damages	
		826	Damages	Undetermined
		1301	Damages	$148,000.
Average	1215	1167		

Table No. 4B 2004 Cases Over One Year

2004 Cases Over One Year				
No. of Days				
	Dismissed	**Trial**	**Claim**	**Judgment**
	1611		$450,000	
	1569		Damages	
		1335	$264,348.11	$264,348.11
	926		Damages	
		877	Damages	186,879.44
		704	16,753.65	18,180.31
	645		$11,400	
		579		$42,650.45
	571		Damages	
		432	$40,243.28	$27,819
Average	1,064	785		

The average length of time from commencement to judgment awarded shows the most dramatic change from 1995 (229 days) to 2004 (65 days). A more detailed look at 1995 data determined that fifteen cases took greater than one year to reach judgment (Table 4A). Of those, eleven were dismissals and those matters took an average of 1,215 days (over three years) to be finally determined and dismissed by the court. Only four cases went to trial in cases that took over one year. Those four cases averaged 1,167 days to reach judgment. Only two had judgments amounts awarded over $100,000.

Only one of the fifteen cases in 1995 that took more than one year to resolve would have been caught by Rule 20A, if it had been applicable then; the amount claimed in that case was $21,500 and it was dismissed 1,728 days after the claim. The other fourteen cases claimed unspecified damages.

Table 4B shows the average length of time for a tried case to reach judgment took 785 days. Cases that ultimately were dismissed took an average of 1,064 days to be dismissed by the Court.

Sample data for 2004 was examined as of 22 August 2008 and as of 24 July 2011. All 1995 data was as of 22 August 2008. The average length of time from commencement of an action to judgment awarded in 2004 was first determined as of 22 August 2008. This is approximately three years and eight months after the sample date of October 2004. If this same cut off had applied to the 1995 data, five cases would have been missed. These five cases ranged from 1,520 days to 2,523 days and averaged 1,922 days; and removing those five cases from the average calculation reduces the 1995 average from 229 days to 144 days.

Even with normalizing the data to be based on a 3.75 year sample period, average length of time from commencement of an action to judgment in 1995 (144 days) is more than twice as long as was the situation in 2004 (65 days).

Table2B updates the 2004 data updated to 24 July 2011 which is 6.75 years after the 2004 cases commenced. There are cases which may still resolve after this date.

Note in Table 5 that in 2004, only four cases exceeded one year from commencement of an action to judgment awarded. One case was a dismissal. The other three were trials and averaged 629 days to reach judgment.

Even with the longer time from commencement of an action to the date of sample collection, the number of still open unresolved court cases dropped markedly from 1995 (31%) to 2004 (23%). Still, having almost a quarter of all case files without a resolution on record causes problems for court administrators and defendants.[242]

The Rule 20A Expedited Actions rule appears to be working to reduce the time needed for cases from beginning to end, meaning judgment awarded. However, other factors likely also contributed to the reduction in time, namely the reduction in cases filed in 2004 compared to 1995 and the introduction of Judicially Assisted Dispute Resolution. This will be discussed in more depth in section (d) Summary of Research, *infra*.

Table No. 5 Case Analysis of Rule 20A - Amount Claimed

Case Analysis of Rule 20A Amount Claimed				
	1995		**2004**	
	No.	**% of total claim**	**No.**	**% of total claims**
Total Cases Sampled	417	-	417	-
Total number of claims	339		287	
$50,000.00 or less, or unspecified damages claimed	319	94.1	264	92.0
$100,000.00 or less	9	2.1	18	4.3
Over $100,000.00, Under $200,000.00	8	1.9	5	1.2
Over $200,000.00	3	0.7	0	0

[242] Canadian Centre for Justice Statistics, Statistics Canada, *The Use of Time Limits and Formal Notification in Civil Case Management* (Ottawa: Minister of Industry, Canada, 1999).

Table No. 6 Case Analysis of Rule 20A - Judgment Amounts

Case Analysis of Rule 20A Judgment Amounts				
	1995		2004	
	No.	% of total judgments	No.	% of total judgments
Total Cases Sampled	417	-	417	-
Total Number of judgments	112		194	
$1 to $9,999	82	73.2	110	56.7
$1 to 50,000.00	104	92.9	177	91.2
Over $50,000 to $100,000.00	3	2.7	12	6.2
Over $100,000.00, Under $200,000.00	7	6.25	1	0.5
Over $200,000.00	3	0.7	4	2.1

(ii) Analysis of Results

Tables 3, 5 and 6 were prepared to analyze whether the current Rule 20A should be revised.

Rule 20A in its current form appears to be working well. As described, one of the proposed recommendations is to increase the limit for application of Rule 20A to $200,000 from $100,000. However, in 2004, only five cases had judgments awarded in excess of $100,000 and of these four were in excess of $200,000. Even the proposed Rule 20A with its $100,000 liquidated or unliquidated amount limit would not have applied to these cases because they were all based on claims in excess of $200,000.

In terms of claims for lower sums, 56.7% of the judgments issued in 2004 were for an amount less than $10,000. A claim for an amount under $10,000 may be

processed in the Small Claims Division of the Court of Queen's Bench.[243] Fifty of 112 of those actions claimed a specified amount under $10,000 and three claimed amounts over the $10,000 threshold. It could not be determined if these claims met all of the criteria to be heard in the Small Claims Division, in particular the criteria requiring general damages to not exceed $2,000. The rest of the claims were made for unspecified damages. A portion of these under $10,000 judgments were from the registration to create a judgment by the filing of Certificates of Debt and Residential Tenancy Orders. These filings do not create any delay to court processing as upon registration, the judgment is issued and so they are one day from filing to issuing of a judgment.

It is the cases initiated by a statement of claim for either a liquidated or unliquidated amount under $10,000 that are possibly problematic. The Small Claims Division is intended to be the place for these cases, providing lower cost to the parties from simplified hearing processes and no discovery of documents or pre-trial discovery examination of parties. There may be benefits to parties in cost savings and time to resolution at judgment if a process is put into place to allow registrars of the court to have these cases referred to the Small Claims Division when appropriate. Anecdotal discussions with lawyers suggest that some of them may be filing claims under $10,000 in Queen's Bench instead of Small Claims because the added complexity and cost of preparing and registering a defence to the claim is significantly greater in Queen's Bench. More defendants may elect to not defend the case and therefore it proceeds to a

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[243] *The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M., c. C285, ss. 3(1): A person may file a claim under this Act
(a) for an amount of money not exceeding $10,000. which may include general damages in an amount not exceeding $2,000….

default judgment. A defendant may be more willing to attend and defend the claim at a Small Claim hearing with its simplified filing and hearing procedures.

(c) Enforcement Processes Used to Aid in Collection of Judgments

The sample data for 2004 as of 24 July 2011 were examined to determine the enforcement processes used by the judgment creditor to aid in collection of the judgment debt.

(i) Brief Summary of Results:

Garnishment: The use of garnishment almost doubled from 1995 (12%) to 2004 (23%), for all cases in which a judgment was issued. This may be partially explained from the volume of maintenance enforcement processes in 2004 which did not exist in 1995.[244] Garnishment after judgment is the most common enforcement method selected by judgment creditors to enforce their judgment. Garnishment before judgment was granted in one case. All other instances of garnishment within the sampled data were issued after judgment.

Writ of seizure and sale: A writ of seizure and sale was issued in only two cases. In both, garnishment after judgment was also obtained. One case involved a judgment amount of approximately $51,000 and the other was for approximately $17,000.

Writ of possession: Writs of possession were issued fourteen times in the 2004 sample. In eleven of these cases possession of a rental unit was sought pursuant to *The Residential Tenancies Act*[245] and an order of the director was registered in the Court of Queen's Bench seeking the issuance of a writ of possession. The other three cases

[244] See the discussion under garnishment, *supra*.
[245] *The Residential Tenancies Act,* C.C.S.M., c. R119, ss. 157 (2).

involved the obtaining of a writ of possession in disputes over land ownership or in mortgage sale proceedings.

Examination of a judgment debtor in aid of execution: Examination of a judgment debtor in aid of execution occurred in two cases and in both cases garnishment was also used. One case involved a judgment amount of approximately $92,000 and the other was for approximately $8,000.

Bankruptcy stay of proceedings: In seven cases a judgment debtor filed in bankruptcy and the enforcement proceedings were stayed.

Other: No other writs were issued in any of the 2004 cases sampled.

Certificate of Judgment: A certificate of judgment may be obtained from the Court and registered against land owned by a judgment debtor. How often this was done cannot be determined for these sample cases.

(d) Summary of Research

We return to the research questions outlined in the Introduction.

1. Is Court of Queen's Bench Rule 20A effective?

The data collected support the conclusion that Rule 20A has been realizing its stated goal of streamlining the court process for liquidated or unliquidated claims made under $50,000. Rule 20A is at its heart a requirement for a case conference to occur within 60 days of the commencement of a case. This then leaves the case management judge to work with the parties to keep the case on track towards settlement or trial. The reduction in average time from claim to judgment of 223 days in 1995 to 93 days in 2004

(see table 2B) supports the conclusion that Rule 20A has helped streamline case management for civil proceedings.

The reduction in the total number of cases from 1995 to 2004 should make more court resources available per case filed. The impact of the additional court resources per case on case processing times is not possible to be determined.

The Court of Queen's Bench also had Judicially Assisted Dispute Resolution, known as JADR available for parties in 2004. JADR commenced in Manitoba in 1997.[246] There are no published rules and the system is informal. Parties may request a judge of the Court to act as a mediator. The process is not mandatory. A 2009 report regarding Manitoba JADR stated:

> In reviewing Statements of Claim filed in comparison to the number of trials heard, only 2% to 3% of the claims filed actually proceed to trial. The remaining 97% to 98% of the Statements of Claim filed are settled, discontinued or abandoned. In regard to the Statements of Claim set down for trial, only 23% to 32% of the cases actually proceed to trial. For JADR cases set down, 81% to 84% of the cases proceed. The settlement rate is unknown, as the Court of Queen's Bench does not maintain any statistics in this area. Anecdotal information would indicate that the JADR settlement rate in Manitoba is in the range of 85% to 95%, depending on the information source. Even without verifiable data, it is evident that the JADR process has been an immense success. Presently, in Manitoba, more cases are set down for JADR than for trial. Civil litigation matters are three to four times more likely to proceed to JADR than to trial.[247]

The specific impact of JADR on case processing times is not determinable but appears to be significant in having contested court actions resolved without the need of a trial.

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[246] Canadian Forum on Civil Justice, "Manitoba Judicially Assisted Dispute Resolution (JADR)," on-line: http://cfcj-fcjc.org/inventory/reform.php?id=170) (accessed: 21 August 2011).

[247] Manitoba ADR Section, "Report to the National Alternative Dispute Resolution Section of the Canadian Bar Association, 2008-2009." On-line: http://www.cba.org/CBA/sections_Adr/pdf/ADR_BranchReport_(Manitoba).pdf (accessed: 21 August 2011).

The combined contributions to streamlining court processing times of Rule 20A, reduced number of cases filed and the growing use of JADR all are factors in the success of the Manitoba Court of Queen's Bench in improving its case processing times from 1995 to 2004.

2. Should Rule 20A be amended as proposed in the May 2009 proposal for reform from the Court?

Support for further reform to the proposed Rule 20A must be based on something other than simply shortening the length of time that cases take. The strongest argument for civil justice reform rests in methods for reducing the cost of litigation to the parties: shortening the time for a case to take is one such method. Indeed, the proposed Rule 20A directly addresses reducing cost to the parties by reducing discovery processes as described in Chapter V, *supra*. Reduction of costs to the parties is the reason that the proposed Rule 20A should be implemented.

The recommendation to increase the limit for application of proposed Rule 20A to $200,000 from $100,000, and to include claims for unspecified damages is based on the same goal of cost reduction. Table 3A shows that there was one trial judgment for claims between $100,000 and $200,000 in 1995 and none in 2004. The proposed Rule allows parties to opt in or out of the new Rule by making a court motion. Notwithstanding that, having almost all cases within the proposed Rule may reduce motions of this type. Including all claims made for unspecified amounts would also have the benefit of giving parties to those actions the cost reductions of proposed Rule 20A. Leaving only actions for specified amounts over $200,000 outside of the proposed Rule

20A would allow the use of more costly processes for cases where the amount in dispute is proportional to the possible costs of the action to the parties.

3. What additional insights with respect to improving (i) enforcement processes for collection of civil money judgments, and (ii) efficiency of court processes for the conduct of cases can be gained from research conducted in response to the first two (2) research questions.

(i) enforcement processes for collection of civil money judgments

A larger examination of Queen's Bench case files to review the use of enforcement processes would be useful as part of any review by Manitoba of its processes for enforcement of civil money judgments. Prior to reform of Alberta civil judgment enforcement methods, Alberta Institute of Law Research and Reform obtained a research paper in 1986 by Professor C. R. B. Dunlop[248]that examined Alberta court records. A larger examination of Manitoba Court and Sheriff's office records regarding enforcement processes would be invaluable in supporting civil justice procedural reform in Manitoba.

The Manitoba Law Reform Commission in 2005 stated:

> We echo the call for fundamental reform of the civil enforcement regime. Unfortunately, our current resources prevent us from undertaking such a comprehensive review.[249]

The data collected and described in section (c) *supra*, on judgment enforcement methods assists in supporting the more general call for further research, such as that conducted by Professor Dunlop in Alberta, to support fundamental reform of civil enforcement processes in Manitoba.

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[248] C. R. B. Dunlop, *The Operation of the Unsecured Creditors' Remedies System in Alberta*, Research Paper No. 16, (Edmonton: Alberta Institute of Law Research and Reform, March, 1986).
[249] Manitoba Law Reform Commission, *Review of The Garnishment Act*, Report No. 112, Dec. 2005, (Winnipeg: Manitoba Justice, 2005), p. 2.

The growth in the use of garnishment almost doubled from 1995 (12%) to 2004 (23%), in all cases in which a judgment was issued. This supports the need for analysis and further reform of this important judgment enforcement method, as called for by the Manitoba Law Reform Commission in 2005. This should be acted on even if there is no general reform of the law regarding enforcement remedies.

The use of a writ of seizure and sale in only two cases in the 2004 sample indicate that this writ is still being used by judgment creditors. Further evidence from the Office of the Sheriff in Manitoba could be sought to better understand the frequency of use of this historically important remedy and what barriers, if any, there are to its use by judgment creditors.

Note that no other remedies were used in the 2004 sample cases other than the writ of possession, used to obtain possession of land. In three cases in 2004, the remedy was used as part of the mortgage enforcement process. Obtaining possession of the land is an important step in either the mortgage sale or foreclosure process. In the other eleven times a writ of possession was sought, a landlord was acting to obtain possession of premises rented to a tenant.

The registration of a Certificate of Judgment against land owned by the Judgment Debtor may actually be the most common remedy used by Judgment Creditors. On an anecdotal basis, because no hard data can be discerned from this data sampling technique, Land Titles Office District Registrars and their staff commonly see registrations of Certificates of Judgment against land. For a patient Judgment Creditor, this is an inexpensive way to obtain a lien against land of the Judgment Debtor. At some future point, the lien will have to be dealt with by the Judgment Debtor. The lien will

then normally stop any sale of the land or future mortgaging or even any future advances of money against a mortgage previously registered. At that point, the judgment amount, including appropriate interest on the amount of the judgment, will have to be paid to the Judgment Creditor in order to have the lien removed by the Judgment Creditor. The only costs to the Judgment Creditor are the costs to obtain the Certificate of Judgment from the Court, the cost of a search of Land Titles Office records to locate land owned by the Judgment Debtor and the cost of registration of the Certificates of Judgment. At the present time, these costs would total less than $100 in disbursements.

Where the Judgment Debtor does not own land in Manitoba, garnishment would be the next easiest remedy if the Judgment Debtor is employed. If the Judgment Debtor owns no land and is either self-employed or unemployed, the Judgment Creditor may not be able to enforce payment. Seizure and sale of assets can be done if assets of the Judgment Debtor can be located. Locating such assets is often difficult. The remedy to find those assets is in examination of the Judgment Debtor in aid of execution. As the 2004 data showed, this particular remedy was only used twice and in both cases was used with garnishment. Seizure and sale was not used in those cases.

(ii) efficiency of court processes

Court processes could be improved by the timely filing of evidence that a case has been concluded. This may be by the Plaintiff filing a Notice of Discontinuance of the case before a trial. The Plaintiff may have reached a settlement of the case with the Defendant and this will normally result with a Notice of Discontinuance being provided to the Defendant. In 1995, 38.4% of the cases filed ended in with a Discontinuance and in 2004, this occurred in 15.1 % of the cases. It cannot be determined from the evidence

in this sample how many cases settled where a Notice of Discontinuance provided to the Defendant was never submitted by the Defendant to the Court. Personal experience and anecdotal comments from lawyers who handle significant numbers of debt collection matters suggest that it is common for debtors not represented by legal counsel to not realise the importance of registering the Notice of Discontinuance. Several counsel I have indicated to me they are contacted several times a year, often many years later, by Defendants wanting a new Notice of Discontinuance.

Post-judgment court records reflect the end of a case by the filing of a Notice of Satisfaction. This indicates that the Judgment Creditor has collected on the judgment and the Judgment Debtor no longer owes anything to the Judgment Creditor. Similar to comments *supra* about Notices of Discontinuance, the identical problem occurs with Notices of Satisfaction given to Judgment Debtors who were not represented by legal counsel. The data show that in 1995, 26.6 % of cases ended in a Judgment and Notices of Satisfaction were filed in only 6.2% of cases. In 2004, judgments occurred in 46.5% of cases and the rate of filing of Notices of Satisfaction improved to 13.4% of cases. The number of unsatisfied judgments were 20.4% in 1995 and 33.1% of cases sampled in 2004. Either the Judgment Creditor was unable to collect in full, or the court record has not been updated by the filing of a Notice of Satisfaction. A requirement to have the Judgment Creditor register the Notice of Satisfaction would help protect the credit rating of Judgment Debtors. It would also help future analysis of the effectiveness of enforcement remedies by allowing easier determination of how many times a Judgment Creditor gives up and abandons collection efforts.

Chapter VIII: Conclusions and Recommendations for change

1. Implement proposed May 2009 *Queen's Bench Rule* 20A

The specific details of the proposed Rule 20A have been discussed in Chapter V, section (d) *supra*. They are aimed at reducing costs of a court action to the parties through reducing or eliminating certain discovery processes and expanding the use of case conferences to manage case activity. The business case for this particular reform was made by then Chief Justice Marc Monnin:

> In recent years, there have been very few civil trials in Manitoba where the amount at issue has been less than $100,000.00. Comments from counsel and litigants during pre-trials and mediations suggest certain **claims or defences are not proceeding to trial because parties cannot afford the cost of the trial**. They often point to the pre-trial process as being lengthy and cumbersome with the result that they are driven to settle their cases regardless of merit, the cost of the pre-trial process being a major factor.
> ... The proposed revisions to Queen's Bench Rule 20A are intended to address the problems raised above. They are based on the concept of proportionality, with the object being to institute a process that will facilitate the "expeditious and less expensive determinations of actions." **It is proposed to adopt pre-trial procedures that are proportional in cost to the amount at issue in the action.** The changes are intended to make it possible for litigants to have their modest claims adjudicated by the Court quickly and at reasonable cost. **The existing rule contemplates that matters would be set down for trial within 180 days of the date of the first case conference.** While this is not occurring under the current rules, the hope is to move closer to that goal with these new rules.[250]
> [emphasis added]

[250] M. M. Monnin, C.J.Q.B., Introductory remarks to proposed draft of Court of Queen's Bench Rule 20A, May, 2009. http://www.manitobacourts.mb.ca/pdf/introductory_remarks_monnin_rule20a.pdf (accessed: June 28, 2011)

(a) revise the proposal to use a threshold of claims under $200,000 or unspecified damages for the rule to apply

Table 3B shows that in 2004 only two trial judgments issued for amounts over $100,000 and those cases took 877 days and 1,335 days respectively. As they were for an unspecified amount and an amount over a million dollars, neither case would have been dealt with under the proposed Rule 20A. The data in Tables 3B and 4B also shows that there were no cases for an amount between $100,000 and $200,000 that would be caught by a revision of the threshold for application of up to $200,000.

I also recommend that the Revised Rule 20A process apply to cases where there is no amount claimed. The data show that in 2004 all claims for an unspecified amount of damages ended in judgments under $200,000. Leaving only actions for specified amounts over $200,000 outside of the proposed Rule 20A would allow more costly processes to be available for cases where the amount in dispute is proportional to the possible costs of the action to the parties.

The simplest wording would be that the proposed Rule 20A apply to all actions except those filed claiming a liquidated or unliquidated amount in excess of $200,000, exclusive of interest and costs.

2. Amendment to the Court of Queen's Bench Rules Requiring:

(a) the plaintiff to register within a reasonable time a Notice of Discontinuance of an action if the action ends without a trial judgment or when appropriate, a Notice of Satisfaction of judgment.

The Real Property Amendment Act was given Royal Assent on 16 June 2011. Portions of this Bill came into force on Royal Assent and other portions will come into force on 5 December 2011. One amendment that comes into force on 5 December 2011 creates an obligation on the holder of an interest registered in the records of the Land Titles Office to register a discharge of that interest within sixty days after all of the obligations under the instrument on which the interest is based have been performed or the interest has ceased to exist by operation of a law, whichever is earlier. [251] In practical terms, this means that a mortgagee will have sixty days after receipt of payment in which to submit a discharge of the mortgage to the Land Titles Office. This obligation will also apply to any other type of registration made by any interest holder in the land.

This amendment is intended to ensure that the record of the Land Titles Office is accurate and not cluttered with registrations that are no longer required.

The current practice in Manitoba prior to this amendment has been for the interest holder to provide a discharge of that interest, either directly to the landowner or to a lawyer representing the landowner. Where that document has been submitted to the lawyer for the landowner, that lawyer will either submit the document to the Land Titles Office for registration or forward the document to their client, the landowner. In circumstances where the landowner receives the discharge of the interest either directly from the interest holder or from their respective lawyer, the discharged document may

[251] *The Real Property Amendment Act*, R.S.M., c. 33, s. 23.

not actually end up registered. This leaves the landowner or their successor to seek to have the registered interest removed from the title of the land at some later date, frequently at some expense to obtain either a court order or, in a case of mortgages, from the Registrar-General.[252]

The examination of the Court of Queen's Bench records conducted has shown that many cases are still outstanding after many years. In particular, the 2004 data showed that 23% of all cases filed were still outstanding in 2011. As no activity has occurred on some of these files for almost seven years, it is clear that the cases either have been abandoned or the plaintiff has been successful in either obtaining payment or has given up on seeking payment. In any case, on the court record the action remains open.

This author's personal experience representing clients' litigation matters is that, after successfully collecting from a judgment debtor, the provision of a Notice of Satisfaction to the judgment debtor has frequently resulted in the document never being registered by the judgment debtor. Equally common is when collection has occurred without the necessity of obtaining a court judgment; delivery of a Notice of Discontinuance to the judgment debtor also frequently results in the document not being registered with the court.

There are benefits to defendants in actions for the collection of damages to having the court records show that the action has ended. Credit reporting agencies are aware of outstanding law suits and may take those into account in credit scores. As discussed earlier, under Civil Justice Reform, there are benefits to the administration of justice for court administrators to know when a case is over.

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[252] *The Real Property Act,* C.C.S.M., c. R30, s. 107.

An amendment to Manitoba's *Court of Queen's Bench Rules* requiring the plaintiff to register within a reasonable time a Notice of Discontinuance of an action, if the action ends without a trial judgment or, when appropriate, a Notice of Satisfaction of judgment, should be enacted.

(b) the use of full and correct names in pleadings by all parties

There are no specific requirements in the Manitoba *Court of Queen's Bench Act* or its civil court rules that require a party to use their full and correct name and to acknowledge any alias.[253] Plaintiffs are often not described properly and the pleadings use whatever form of defendant's name that the plaintiff believes to be correct. When a Statement of Defence to a matter is filed, the pleadings are rarely revised to show correct names, even if the defendant acknowledges that the name shown is incomplete or incorrect.[254] The resulting judgments can then have debtor names on them that may not match debtor names on land records or in *Personal Property Security Act* registrations.

Personal Property Registry Regulation, M. R. 80/2000 contains name rules for use in financing registrations. A similar requirement, that each party to a lawsuit provide full disclosure of their own name in accordance with a set of rules, along with a simple process to amend names in pleadings, would allow resulting judgments to be more

[253] *Queen`s Bench Rule*, M.R. 553/88, r. 4.07 (1) (c) requires a deponent in an affidavit to state the full name of the deponent.
[254] This has been a problem for a long time. See reference to *Identitate Dominis* in Chapter 1, *supra*; also W.J. Bryne, *A Selection of Legal Maxims*, 9th ed. (London: Sweet & Maxwell, 1924), p. 201: ...``where a party was sued by the wrong name, and suffered judgment to go against him, without attempting to rectify the mistake, he could not afterwards, in an action against the sheriff for false imprisonment, complain of an act of execution issued against him by that name...."

accurate.[255] Future development of an online registry of resulting writs of execution would be enhanced.

Where a judgment is obtained on default, there is no opportunity to require a defendant to disclose the full and true name prior to the judgment issuing. A provision similar to those in the Saskatchewan *Enforcement of Money Judgments Act,* establishing a simple process for a judgment creditor to require the judgment debtor to disclose the full name as determined in accordance with rules for name disclosure in a law suit, would be valuable. Judgments and writs of execution could be revised to show the defendants name as disclosed. Disclosure of assets, including serial numbers of goods such as automobiles, would also allow for proper registrations by the judgment creditor against those goods.

3. Manitoba review of existing money judgment enforcement law to rationalize and codify the law in this area.

A review and re-drafting of a Manitoba codification of money judgment enforcement law would be a significant task. The benefits of a comprehensive new statute are also significant as seen in the discussion in Chapter VI, *supra*, about Saskatchewan's *Enforcement of Money Judgments Act.* Key benefits for Manitoba would be the same as those described in Chapter VI for the Saskatchewan *Enforcement of Money Judgments Act*:

1. Modernization and codification of general judgment enforcement law in a single statute;

[255] *Queen`s Bench Rule*, M.R. 553/88, r. 5.04 (2) allows the court to correct the name of a party on such terms as may be just.

2. Reformulation of judgment enforcement devices so as to make them more consistent, efficient, complementary, effective and fair;
3. Universal exigibility of debtors' property (other than assets specifically exempted.[256]

The call for general reform in the area of civil judgment enforcement was made by the Manitoba Law Reform Commission in 2005:

> … in our view, a comprehensive review of the entire enforcement system is long overdue.
>
> The civil enforcement scheme has been described as "fragmentary, uncoordinated and out of date," "inefficient, unpredictable and, in some cases, arbitrary and unjust." It is not so much a "system" as it is a collection of discrete procedures aimed at specific types of assets. Each procedure is subject to exemptions and inherent limitations and a creditor must resort to one or more of the remedies described above in order to reach all of the debtor's property. These procedures have not kept pace with the changing way in which wealth is held today and the operation of the system is seen as cumbersome as courts are involved in its supervision and administration. The system, as a whole, does not promote fairness because it does not result in an equitable distribution of the proceeds of execution.
>
> True modernization cannot be achieved by reforming individual remedies and, indeed, the piecemeal approach runs contrary to the recent trend in other Canadian jurisdictions[257] [footnotes omitted].

4. Require writs of execution to be registered in the Personal Property Registry and provide that registration is required for the writ to bind the goods and chattels of judgment debtor.

As discussed in Chapter VI, *supra*, the Saskatchewan *Enforcement of Money Judgments Act* requires judgments to be registered in a Judgment Registry. Such registration creates an enforcement charge that is treated similarly to a security interest in the goods and chattels of the judgment debtor. If codification of money judgment enforcement law does not occur, then Manitoba needs to borrow certain concepts from

[256] Final Report*,* p. 2.
[257] Manitoba Law Reform Commission, *Review of The Garnishment Act*, Report No. 112, Dec. 2005, (Winnipeg: Manitoba Justice, 2005), p. 2.

Saskatchewan. One relatively easily borrowed and valuable concept would be an amendment to *The Executions Act*, particularly section 5 (1) to require registration in the Personal Property Registry, rather than delivery of a writ of execution to the sheriff, to bind goods and chattels of a judgment debtor.

The benefit of this amendment is that public may determine if a particular judgment debtor is subject to registered security interests and registered enforcement charges simply by making an easily obtained online search of a public database. This online search will be of great benefit to both creditors and debtors. Debtors who wish to obtain credit can obtain such credit easier when the potential creditors are able to determine that the debtor is free and clear of any security interests and enforcement charges. If any such charges do exist, the creditor will be in a position to determine if these will affect the credit worthiness of the particular debtor.

5. **Prohibit the use of a Transfer of Land as security for a loan**

As discussed in Chapter IV, section (c) (ii) *supra*, a creditor may require the borrower to sign a transfer of land in favour of the creditor or with the name of the transferee blank, as security for a loan. A mortgage may or not be registered. The creditor then registers the transfer of land and takes ownership or provides ownership to a third party who has paid the creditor. The use of a Transfer of Land as security by-passes all of the rules and protections governing foreclosure and mortgage sale of land. The potential for wrongdoing is high and this procedure should be prohibited.

Epilogue

What is amazing in this mass of legal technicalities, in this legislator's and lawyer's labyrinth of procedural rules, is the overwhelming evidence that Manitobans continue their faith and confidence in peaceful, juridical resolution of their civil conflicts. They do not resort to violent self help or medieval trial by combat. They continue to initiate thousands of claims, whether in person or by hiring a lawyer, knowing that there are costs and risks that cannot be anticipated or measured, at least not when first registering their statements of claim. And still they sue, rather than become hunt-and-seize vigilantes. We cannot see how much of the iceberg of civil recovery activity occurs outside of the courts in Manitoba; but we can be grateful for the rule-of-law culture recorded for a study such as this.