

Second Progress Report on the Civil Enforcement of Judgments Project 2002



2002 Yellowknife NT

SECOND PROGRESS REPORT ON THE CIVIL ENFORCEMENT OF JUDGMENTS PROJECT

CIVIL SECTION

Lyman R. Robinson, Q.C., Project Leader, British Columbia

INTRODUCTION

[1] The law governing the enforcement of money judgments in many Canadian provinces relies on antiquated legal concepts and serves neither debtors nor creditors particularly well. The Civil Section recognized the need to modernize this area of the law and implemented a project to develop a Uniform *Civil Enforcement Act*.

[2] The Working Group would like to acknowledge the benefits it has derived from the work that has been done with respect to the enforcement of civil judgments in Alberta, Newfoundland, New Brunswick, Nova Scotia and Saskatchewan.

THE WORKING GROUP

[3] The membership of the Working Group has grown over the last year with the addition of representatives from the Federal government and the government of Ontario. The current members are:

Lyman Robinson, Q.C., Project Leader

Arthur L. Close, Q.C.

Geoff Ho, Q.C.

Darcy McGovern

Prof. Ronald C.C. Cuming, Q.C.

Prof. Tamara Buckwold

Marie José Longtin

Tim Rattenbury

Prof. John Williamson

Christopher P. Curran

Mounia Allouch

Hélène Fortin

John Twohig

Keith Pritchard

Caroline Carter of the British Columbia Law Institute is the Reporter to the Working Group.

AUGUST 2002 REPORT

[4] This Report is divided into four parts:

I - OBJECTIVES OF THE PROJECT

II - SUMMARY OF THE WORK UNDERTAKEN TO DATE

A. Registry of Money Judgments

B. The Registration Process

C. Effect of Registering a Judgment

D. Priorities Among Registered Judgments and the Distribution of Enforcement Proceeds

E. Enforcement Proceedings

F. Land - The Common Law Nemo Dat Rule

G. Property Exempt from Execution

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I. Distribution of Proceeds of Enforcement

III - TOPICS FOR FUTURE CONSIDERATION

IV - CONCLUSION

I - OBJECTIVES OF THE PROJECT

[5] The objectives of the project are to develop a Uniform Act for the enforcement of monetary civil judgments that will:

(a) make the enforcement of judgments more efficient and effective by streamlining judgment enforcement procedures and eliminating unnecessary procedural steps;

(b) provide a comprehensive code of monetary judgment enforcement procedures that are available to a judgment creditor and clearly establish the rights of judgment debtors (Where possible the Uniform Act should use language that is understandable by lay persons who may use the Act);

(c) provide for the registration of judgments in a prescribed registry in each province and territory with the objective of creating a searchable public registry of monetary judgments; and

(d) facilitate the integration of the charges against property arising from the enforcement of monetary judgments with security interests, liens and other charges against both personal and real property.

II - A SUMMARY OF THE WORK UNDERTAKEN TO DATE

[6] This summary sets out the main elements of the Uniform Act that the Working Group has considered up to May, 2002. The Working Group has noted that there is considerable diversity among the provinces and territories with regard to some aspects of property law that serves as the background upon which judgment enforcement measures against such property must operate. This diversity has led the Working Group to postpone, until its work is complete, the decision on whether to recommend the adoption of a Uniform Act or a Model Act. A Model Act may be better suited to accommodate some of the diverse aspects of provincial property law. In the meantime, references in this Progress Report will be to a Uniform Act on the Enforcement of Monetary Civil Judgments (the "Uniform Act").

A - Registry of Money Judgments

[7] A principal recommendation of the Working Group will be the establishment in each province or territory of a prescribed registry where all enforceable judgments may be registered. Each province and territory will prescribe the registry that is appropriate for that province or territory. It is contemplated that most provinces and territories will prescribe their existing Personal Property Registry established under their *Personal Property Security Act* ("PPSA"). Where a province or territory decides to retain or establish a separate judgment enforcement registry, it will be necessary to consider how priorities in a judgment enforcement registry will be integrated with priorities under the PPSA. In this Progress Report, the registry will be referred to as either the "prescribed registry" or simply the "registry".

[8] Registration of a judgment in the prescribed registry will not be a mandatory requirement; however, registration will be a prerequisite to

- (a) obtaining the benefit of the priorities established by the Uniform Act,
- (b) utilizing the enforcement measures provided by the Uniform Act, and
- (c) being eligible to participate in the distribution of proceeds arising from enforcement proceedings.

[9] Due to the characteristics of the Civil Code in Quebec, the registration requirements referred to in the preceding paragraph will not apply in the Province of Quebec.

[10] Upon registration of a judgment in the prescribed registry using the name of the judgment debtor, it will become an enforcement charge in favour of the judgment creditor against the judgment debtor's interest in all of her or his present and after acquired personal property. The initial registration may also include serial numbers of equipment as "serial numbered goods" that are owned by the judgment debtor. If this information is not available at the time of the initial registration, an amended registration may be filed if the serial numbers are subsequently learned. Registration of a judgment using serial numbers of equipment will give a judgment creditor priority over a subsequent buyer who acquires the equipment in a sale out of the ordinary course of the judgment debtor's business.

[11] With regard to land, in some provinces and territories, registration of the judgment in the prescribed registry will also have the effect of charging the judgment debtor's interest in all present and after acquired property including real property. In other provinces and territories, it will be necessary to register the judgment in accordance with the land title or land registry system of the province or territory before the judgment becomes a charge against an interest in real property.

[12] The establishment of a registry of judgments within each province and territory will also benefit third parties who may be interested in dealing with a property and want to know whether that property is subject to any charges or may be subject to an enforcement proceeding. It will no longer be necessary for third parties to spend the time and incur the cost of searching the records of each court registry in the province or territory to determine whether there are any money judgments that may be enforced against the property in question. A search of the prescribed registry will reveal whether there are any money judgments against the person whose name has been searched.

With regard to personal property, if a search of the prescribed registry reveals a judgment, the judgment will be a charge against the present and after acquired property of the person whose name has been searched.

With regard to real property, if a search of the prescribed registry reveals a judgment, the consequences will vary depending on the province or territory. Provinces and territories will have the option of electing whether registration in the prescribed registry has the effect of charging the judgment debtor's interest in real property. In the provinces and territories that do not make the election, it will be necessary to conduct a search of the Land Title office to determine whether the judgment charging the judgment debtor's interest in real property has been registered. In the latter provinces and territories, the Working Group proposes to recommend that a judgment must be registered in the prescribed registry before it can be registered against an interest in real property. Therefore, a search of the prescribed registry will reveal whether there are any money judgments against a person that may be registered against an interest in real or personal property of the person whose name is searched.

[13] In those provinces and territories that prescribe the Personal Property Registry established under the PPSA, a single search of that registry will reveal the existence of both consensual security interests and registered judgments that constitute a charge against the personal property of the person whose name is searched.

B - The Registration Process

[14] The Working Group has developed tentative recommendations that will govern the registration process and the effect of renewals of a registration, if any. These tentative recommendations will be reviewed again at the conclusion of the Working Group's project. The tentative recommendations are reproduced below for the information of the Civil Section. The Working Group is not seeking guidance regarding these recommendations; however, if the Civil Section wishes to make any comments on these tentative recommendations, such comments will be taken into account when these recommendations are reviewed again by the Working Group.

(1) *When Registration is Permitted*

- (a) Where a money judgment is in force, the judgment creditor may register a Notice of Judgment in the registry.
- (b) A money judgment is not in force if:
 - ▶ (i) the judgment has been satisfied;
 - ▶ (ii) the 10 year period for the enforcement of a judgment has expired; or
 - ▶ (iii) there is an order of the court staying proceedings of enforcement.

(2) *Duration of Registration*

- (a) The period during which the registration of a Notice of Judgment constitutes an effective charge shall be determined by individual provinces.
- (b) A registration of the Notice of Judgment terminates:
 - ▶ (i) upon the expiry or discharge of the registration, or
 - ▶ (ii) when the judgment to which the registration relates has been satisfied, withdrawn or becomes otherwise unenforceable,

whichever first occurs.

(3) *Renewal of Registration and Priority of a Renewal*

Where provincial legislation permits for the renewal of the registration of a Notice of Judgment, and the judgment creditor did not register for an infinite period, a renewal of the registration of a Notice of Judgment retains the same priority in relation to other interests in the judgment debtor's property as the original registration of the Notice

of Judgment. This will be the case so long as the renewal is registered prior to the expiration of the most recent registration of the Notice of Judgment.

Note: In some provinces and territories there will not be a need for a renewal provision. In Newfoundland, registration of a Notice of Judgment is valid for the period that the judgment remains in force. In Saskatchewan, if the recommendations of Professors R. Cuming and T. Buckwold in the *Interim Report on Modernization of Saskatchewan Money Judgment Enforcement Law* are adopted, there will not be a need for a renewal provision because the registration continues until it is discharged or expires.

(4) Registration of a New Judgment based on an Action on the Judgment Debt

The Uniform Act will contain provisions permitting registration of a new judgment based on an action of the judgment debt. In specified circumstances, such a registration will be treated as a renewal for the purpose of determining the priority of the registration.

Note: In Newfoundland, the judgment debt is extinguished at the end of the limitation period for enforcing a judgment. Therefore, no action can be maintained on the judgment debt. Since registration of the Notice of Judgment continues for the period that the judgment is in force, there is no need to provide for renewals in Newfoundland.

(5) Defects, Errors and Misleading Registrations

The effectiveness of the registration of a Notice of Judgment is not affected by a defect, irregularity, omission or error in the Notice of Judgment unless the defect, irregularity, omission or error is seriously misleading.

(6) Discharge of Registrations

Where a Notice of Judgment has been registered and:

- (a) the judgment to which the registration relates has been satisfied, released or is otherwise no longer enforceable; or
- (b) the person named in the registration of the Notice of Judgment as a judgment debtor is not a judgment debtor of the judgment creditor under the judgment to which the Notice of Judgment relates;

the judgment creditor shall discharge the registration of the Notice of Judgment.

Note: The Uniform Act will include provisions whereby a judgment debtor or any person with an interest in the property affected by the registration of a Notice of Judgment may deliver a written demand to the judgment creditor requiring a discharge of the registration.

C - Effect of Registering a Judgment

[15] A distinction has been made between personal property and real property with regard to the effect of registering a judgment.

[16] **PERSONAL PROPERTY** - Under the current law in many provinces, the personal property of the judgment debtor is not attached or bound by a judgment until the property has been seized or otherwise made the subject of an enforcement proceeding. The Working Group recommends that upon the registration of a judgment in the prescribed registry, the judgment will create an enforcement charge in favour of the judgment creditor against the judgment debtor's interest in all present and after acquired personal property. An enforcement charge is a charge against the judgment debtor's personal property that will have the same priority as a consensual non-purchase money security interest in non-inventory collateral that has been perfected by registration under PPSA statutes.

The term "non-inventory" collateral describes a type of security interest in relation to the special PPSA rules that apply to inventory collateral. For example, if collateral falls within the definition of inventory, a subsequent purchase money security interest ("PMSI") must give notice to prior security interests. By using the term "non-inventory" collateral, it makes it clear that a subsequent PMSI need not give notice to a prior registered judgment holder. When a judgment is registered in the prescribed registry it will charge the present and after acquired inventory of a judgment debtor.

Under the Working Group's proposal, a judgment debtor's property will be charged with satisfaction of a judgment from the moment of registration of the judgment in the prescribed registry. It will be unnecessary for the judgment creditor to take any enforcement proceedings in order to attach or bind the judgment debtor's personal property. The priority of an enforcement charge and distribution of proceeds of enforcement proceedings among judgment creditors are discussed later in this Report.

[17] **REAL PROPERTY** - There are significant differences in the land title and land registration systems among the provinces and territories and with regard to the reliance placed on the record of the Land Title office as being a complete record of all encumbrances against the title. These differences will likely make it necessary for the Working Group to recommend that the Uniform Act provide for at least two alternative approaches with regard to how and when a judgment attaches a judgment debtor's interest in land. In some provinces, the registration of a Notice of Judgment in the prescribed registry will have the effect of charging the judgment debtor's present and after acquired interests in both personal property and real property. In other provinces, a judgment debtor's interest in land will only be charged by the judgment if the judgment is registered in accordance with the land title or land registration system of the province.

D - Priorities Among Registered Judgments and the Distribution of Enforcement Proceeds

1 - Overview

[18] The Working Group has agreed in principle that a Notice of Judgment which is registered in the prescribed registry should be accorded the same priority, in relation to other interests, as a consensual non-purchase money security interest in non-inventory collateral* that has been perfected by registration under the PPSA.

* See paragraph [16] for a discussion of the meaning of this term.

[19] With regard to priorities between registered judgments and consensual security interests, liens and other charges, the Working Group has agreed that the priority rules of the PPSA will apply. Generally, this will mean that priorities will be determined on the basis of the date and time of registration. The PPSA exceptions to this general rule, such as the priority accorded to a PMSI, will apply to registered judgments in the same manner as they apply to consensual security interests.

[20] The priority between a registered judgment and subsequent security interests, liens and other charges should be determined based on the priority rules of the PPSA.

[21] With regard to priorities among registered judgments, the members of the Working Group are divided and seek guidance from the Civil Section.

[22] To the extent that the priority accorded to registered judgments determines the distribution among judgment creditors of the proceeds of an enforcement proceeding, priorities are linked to the issue of distribution of proceeds of execution.

2 - Request for Guidance from the Civil Section

[23] The question upon which guidance is sought is how the proceeds of an enforcement proceeding should be distributed among registered judgment holders.

[24] Should the distribution of proceeds follow:

- (a) the principle of *pro rata* distribution among judgment creditors who have registered their judgment in the prescribed registry, regardless of the date and time of registration; or
- (b) the date and time of registration of a judgment in the prescribed registry in accordance with the rules of a first-to-register priority regime.

3 - Advantages and Disadvantages of Each Option

[25] The advantages and disadvantages of each option are set forth below.

Pro Rata Distribution Model

[26] The prevalent view among the members of the Working Group is that proceeds of an enforcement proceeding should be distributed on a *pro rata* basis among judgments that are registered in the prescribed registry. (There is a subsidiary issue with regard to whether distribution should be limited to those registered judgment creditors who have given enforcement instructions to an Enforcement Officer).

[27] Among the arguments that have been made in favour of adopting the *Pro Rata* Distribution Model are the following:

- (a) It may encourage creditors to extend further time to debtors to pay a debt before initiating enforcement proceedings because such delay will not prejudice the priority of a claim in any subsequent distribution, provided that a creditor registers a judgment in the prescribed registry prior to the distribution of proceeds of an enforcement proceeding. This may reduce the likelihood of the debtor being forced into bankruptcy.
- (b) It produces greater equity among registered judgment creditors in relation to recovery on their respective judgments.
- (c) Seeking *pro rata* sharing among creditors by petitioning a debtor into bankruptcy is so costly that this is not a viable alternative for many creditors and particularly those with relatively small claims.
- (d) It has been adopted by Alberta and Newfoundland in their new judgment enforcement legislation.
- (e) Historically, creditors relief legislation (in those provinces and territories that have not adopted new judgment enforcement legislation) provides for *pro rata* sharing in the distribution of proceeds of execution.

[28] Among the arguments that have been made against adopting the *Pro Rata* Distribution Model are the following:

- (a) Where one or more security interests, which are perfected by registration, intervene among two or more registered judgments, the calculation of the distributable fund which is available for distribution among judgment creditors is an extra step in the distribution process.
- (b) There will be one rule for determining priorities between registered Notices of Judgment and perfected consensual security interests and another rule for determining priority among registered Notices of Judgment.
- (c) Creditors are more likely to commence an action against a debtor at the first opportunity because the longer a creditor waits, the more likely it will be that there will be other judgment creditors with whom the proceeds of an enforcement proceeding must be shared on a *pro rata* basis.
- (d) *Pro rata* distribution is a distribution scheme associated with bankruptcy. The principle of *pro rata* distribution was imported into creditors relief legislation after the federal Parliament repealed the *Insolvent Act* in 1880 and abandoned that legislative field of bankruptcy and insolvency until 1919 when Parliament enacted the *Bankruptcy Act*. If a creditor wishes to have a debtor's assets distributed on a *pro rata* basis, the creditor should petition the debtor into bankruptcy under the *Bankruptcy and Insolvency Act*.

First-to-Register Priority Regime

[29] Under a first-to-register priority regime priorities and distribution of proceeds of an enforcement proceeding would be determined by reference to the date and time of registration of a judgment in the prescribed registry subject to some exceptions, such as in the case of PMSIs, that apply to consensual security interests under the PPSA.

[30] Among the arguments that have been made in favour of adopting a *First-to-Register Priority Regime* are the following:

- (a) Where the prescribed registry is the Personal Property Registry under the PPSA, the rules for determining priorities among all registered charges will, subject to some exceptions, largely be the same. Whereas, if a *pro rata* distribution model is adopted, there will still need to be priority rules that determine priorities between registered judgments and perfected consensual security interests.
- (b) The priority rules of the PPSA are already in place and they are well-known and understood by many lawyers and judges.
- (c) Any future changes in PPSA rules will automatically apply to registered judgments.
- (d) Creditors are less likely to petition a debtor into bankruptcy because it will mean that they will be subject to *pro rata* sharing in bankruptcy with other unsecured creditors.
- (e) This regime is consistent with the priority system in some provinces with regard to the distribution of the proceeds of sale of land among registered judgment creditors where foreclosure proceedings are taken by a consensual secured creditor.
- (f) The adoption of this approach does not preclude granting a super priority in favour of certain classes of creditors such as for those who are creditors under a family maintenance order or wage claim.
- (g) This regime is consistent with the Convention on International Interests in Mobile Equipment, Article 38. (*Note: Canada has elected not to have judgments treated as interests under Article 38*).

[31] Among the arguments that have been made against adopting a *First-to-Register Priority Regime* are the following:

- (a) This regime will encourage creditors to proceed to judgment as quickly as possible in order to enhance their priority over other creditors to the detriment of creditors who were willing to extend the time for payment of their claims.
- (b) A debtor could favour one creditor over another by stoutly defending some claims while acquiescing to default judgment with regard to a favoured creditor.
- (c) Creditors who must delay bringing an action until all of the elements of their cause of action have occurred will be prejudiced in relation to those who can bring an action immediately.
- (d) Some creditors may be more inclined to petition a debtor into bankruptcy in order to obtain a *pro rata* distribution of assets among creditors.
- (e) Special priority rules, which are different from those that apply to security interests, will be needed with regard to wage creditors and family maintenance creditors.
- (f) This regime will be a significant change from the current state of the law.

[32] The Working Group requests guidance from the Civil Section with regard to the choice between the *pro rata* distribution model and the first-to-register priority regime where priorities would be determined on the basis of the date and time of registration of judgments.

E - Enforcement Proceedings

1 - Generally

[33] The Working Group's recommendations with regard to enforcement proceedings have been guided by the following principles:

- (a) The Uniform Act should be a comprehensive code of judgment enforcement procedures. A lay person who reads the Uniform Act and the regulations promulgated under the Act should be able to ascertain all of the enforcement procedures that are available to a judgment creditor and all of the rights of judgment debtors. References to other statutes should be kept to a minimum.
- (b) The responsibility for initiating an enforcement proceeding should rest with the judgment creditor. This will require the judgment creditor to provide proper instructions to an Enforcement Officer as well as information with regard to the nature and location of the judgment debtor's property that will be the subject of an enforcement

proceeding.

(c) Enforcement Officers should be given exclusive powers and responsibilities with regard to specified types of enforcement proceedings. In some provinces, enforcement proceedings are currently carried out by sheriffs who are appointed under provincial legislation. Sheriffs are employees of the provincial or territorial government and they are officers of the court. In other provinces, the enforcement of civil judgments has been privatized. In such provinces, private bailiffs operate under contract with the province and are subject to the supervision of a government official. The Working Group has been using the generic term "Enforcement Officer" to include both sheriffs and bailiffs. Under the Uniform Act, a province or territory may define the term "Enforcement Officer" to reflect the current practice in the province or territory or it can substitute the term "sheriff", for example, in place of the term "Enforcement Officer".

Seizure and sale of tangible personal property is one type of enforcement proceeding that should only be carried out by an Enforcement Officer. Enforcement Officers should have powers similar to those of a receiver that will enable them to deal with seized property in a more effective manner as long as these powers are exercised in a commercially reasonable manner. The policy reasons for placing the carriage of the seizure and sale of tangible personal property in the hands of Enforcement Officers are to:

- ▶ (i) minimize the risk of physical conflict that may arise if judgment creditors are permitted to engage in this type of enforcement;
- ▶ (ii) increase the likelihood that judgment debtors will be better informed with regard to their right to claim some property as exempt from execution; and
- ▶ (iii) ensure that the distribution of the proceeds is handled by a person who does not have any self-interest in the distribution other than the collection of the Enforcement Officer's fees and disbursements.

[34] The Working Group has developed tentative recommendations on a comprehensive set of procedures that will govern the seizure and sale of personal property. These tentative recommendations will be reviewed again at the conclusion of the Working Group's project. The Working Group's tentative recommendations or a precis thereof are reproduced for the information of the Civil Section. The Working Group is not seeking guidance regarding these recommendations; however, if the Civil Section wishes to make any comments on these tentative recommendations, such comments will be taken into account when these recommendations are reviewed again by the Working Group.

(1) Definition of "Enforcement Officer"

The term "Enforcement Officer" will be defined by each Province.

(2) Roles of Enforcement Officer and Instructing Enforcement Creditor

Seizure and sale of personal property must be carried out under the authority of an Enforcement Officer.

(3) Requirement of Enforcement Instructions

Enforcement Proceedings shall not be undertaken by an Enforcement Officer until he or she receives written enforcement instructions from an instructing Enforcement Creditor.

(4) Content of Enforcement Instructions

The content of the enforcement instructions will be discussed by the Working Group.

(5) Delivery of Supplementary Instructions and Withdrawal of Instructions

A judgment creditor may deliver supplementary instructions to an Enforcement Officer if the judgment creditor learns of new information concerning property of the judgment debtor that may be exigible.

(6) Circumstances Requiring Delivery of Supplementary Instructions

In specified circumstances, such as when a stay of execution has been ordered, a judgment creditor will be required to deliver supplementary instructions to the Enforcement Officer.

(7) Authority of Enforcement Officer to Undertake Enforcement Proceedings

After receiving an enforcement instruction, the judgment of the court requiring the payment of money confers the necessary authority on the Enforcement Officer to undertake judgment enforcement proceedings.

Note: Under this Proposal, it will no longer be necessary for the Enforcement Creditor to arrange to have a writ of seizure and sale or other form of writ of execution issued by the court.

(8) Quantity of Property to be Seized

The Enforcement Officer shall seek to seize enough of the Enforcement Debtor's personal property to satisfy:

- (a) the instructing Enforcement Creditor's Notice of Judgment and all related Notices of Judgment; and
- (b) the enforcement fees and expenses.

(9) Methods of Seizure

An Enforcement Officer may seize the personal property of the Enforcement Debtor:

- (a) By taking physical possession of it except where this interferes with the possession or a right to possession of a person that was acquired prior to the seizure;
- (b) While at the place where the property is located, by serving the prescribed enforcement documents on:
 - ▶ (i) the Enforcement Debtor or an adult member of the Enforcement Debtor's household,
 - ▶ (ii) an adult person occupying or working at the location at which the property is located, or
 - ▶ (iii) any person who has possession or control of the property.
- (c) By attaching the prescribed enforcement documents to a conspicuous place on the property or in a prominent place in close proximity to the property; or
- (d) By such method as is ordered by the court.

(10) Seizure Powers of an Enforcement Officer

The Uniform Act will specify the powers of an Enforcement Officer including, for example, the power to enter a location or premises including the prerequisites that must be satisfied before entering a residence.

(11) Powers of the Court

Upon application, the court may make an order

- (a) enjoining any person from interfering with the Enforcement Officer when carrying out the seizure of property or otherwise taking measures to enforce a judgment;

(b) directing the relevant police authority to provide protection to the Enforcement Officer while carrying out seizure of property or otherwise taking measures to enforce a judgment;

(c) in such other terms as may be necessary to enable the Enforcement Officer to effect enforcement measures;

(d) regarding the payment of the costs of the application to the court.

(12) Property in the Possession or Control of a Third Party

Where a third party has possession or control of property in which the Enforcement Debtor has an interest, the Enforcement Officer may demand that the third party deliver such property to the Enforcement Officer.

(13) Property held in Joint Tenancy

An Enforcement Officer may seize property of the Enforcement Debtor that is in the possession or subject to the right of possession of a joint owner of the property.

(14) Property of a Partnership

Notwithstanding subsection (13) property of a partnership may not be seized except on a judgment in the name of the partnership.

(15) Assertion of Third Party Rights

Where the third party has a right against the Enforcement Debtor to retain the property or does not have possession or control of the property, the third party shall so advise the Enforcement Officer.

(16) Seized Property held as Bailee of the Enforcement Officer

Property that has been seized by an Enforcement Officer in a manner other than taking physical possession of it shall be held by the person in possession as a bailee of the Enforcement Officer subject to such obligations with regard to the property as are specified by the Enforcement Officer.

(17) Obligations of a Bailee of the Enforcement Officer

A person who becomes the bailee of an Enforcement Officer under the preceding subsection, is subject to the obligations of a bailee of property for value at common law. Unless the bailee is relieved in writing of such obligations by an Enforcement Officer, the bailee is obliged to preserve the property and use the care that a careful and vigilant reasonable person would use in the custody of his or her own property of a similar nature. The bailee may not transfer or encumber the property in any manner and must deliver up the property upon the demand of the Enforcement Officer.

(18) Bailee's Entitlement to Costs

Bailees of an Enforcement Officer will be entitled to receive payment for their costs.

(19) Seizure of Property Subject to Statutory Right of Distress

When an Enforcement Officer seizes personal property that is subject to the statutory right of distress of a lessor of land by virtue of the tenant's default in payment of rent, the Enforcement Officer shall maintain the seizure and sell the property only if the Enforcement Officer has reasonable grounds to believe that the price recoverable in the sale will be more than sufficient to pay the amount of rent owing at the date of seizure, to a maximum of one year's rent, and the costs of seizure and sale.

(20) Seizure of Property Subject to an Exclusive Possession Order under Family Property Legislation

The Enforcement Officer may seize an interest in property subject to an order for exclusive possession under family property legislation only when an enforcement charge relating to the property has come into existence before the exclusive possession order was made.

Note: In conjunction with this subsection, the Working Group will recommend that when provinces and territories adopt the Uniform Act, they also amend their family property legislation to:

(a) permit the registration of exclusive possession orders in the Personal Property Registry or other prescribed registry, and

(b) provide that upon registration, subsequently registered interests are subordinated to a registered exclusive possession order.

(21) Irregularities in Seizure

A seizure is not invalidated by an irregularity in the procedures by which it is carried out, or in a Notice of Seizure, an enforcement instruction or registration of the Notice of Judgment.

(22) Enforcement Officer's Powers to Deal with Seized Property

An Enforcement Officer who has seized property may exercise any power or right necessarily incidental to enforcement of a judgment with respect to the property or its disposition that the Enforcement Debtor had at the date of seizure or acquires thereafter until the property has been disposed of or the seizure terminated, including, but not limited to:

(a) the power to assign or transfer an interest in property that has been seized;

(b) the power of election;

(c) all powers of a beneficiary under a trust;

(d) the power to give a release or discharge;

(e) the power to collect an account;

(f) the power to present an instrument or security for payment and receive payment;

(g) the power to sue any person liable on an account, instrument or security in the name of the debtor; or

(h) the power to negotiate an instrument or security without recourse to the Enforcement Officer.

(23) Application to Court for Directions

An Enforcement Officer, Enforcement Creditor, Enforcement Debtor or other interested party, may make application to the court for directions relating to the implementation of an enforcement measure provided by this Act and the court may make such order, including an order as to costs, as is appropriate.

(24) Sale of Seized Property to be Commercially Reasonable

An Enforcement Officer shall realize upon the value of the seized property by a method that the Enforcement Officer considers to be commercially reasonable.

(25) Notice of Sale Requirement

At least 15 days prior to a proposed sale, the Enforcement Officer shall give notice of a proposed sale by sending a notice to:

- (a) the Enforcement Debtor,
- (b) the instructing Enforcement Creditor and Enforcement Creditors having related Notices of Judgment, and
- (c) third persons who are known to the Enforcement Officer as having an interest in the property.

(26) Content of Notice of Sale

The notice of the proposed sale shall describe the method of sale proposed to be used. If the proposed method of sale is by private sale to an Enforcement Creditor, the notice of sale shall specify the terms of the proposed sale.

(27) Delay of Sale by Enforcement Officer

A sale may be delayed if, in the opinion of the Enforcement Officer, it is commercially reasonable to do so.

(28) Application to the Court re: Proposed Sale

At any time prior to the sale, the Enforcement Debtor, the instructing Enforcement Creditor, an Enforcement Creditor with a related Notice of Judgment or a third party with a proprietary interest in the property may make an application to the court regarding the proposed sale of seized property.

(29) Sale after Application to the Court

When an Enforcement Officer receives notice of an application to the court with regard to a proposed sale, the Enforcement Officer shall not sell seized property except in accordance with the order of the court.

(30) Expeditious Sales

Notwithstanding the above proposals, seized property may be sold in an expeditious manner,

- (a) under order of the court,
- (b) if the property is perishable, depreciating rapidly in value, dangerous, unsanitary or a hazard to health, upon giving every interested person as much notice as is practicable in the circumstances,
- (c) if the property is unique or designed for a special purpose, the Enforcement Officer has received an offer to purchase the property at a reasonable price, and it is not probable that another reasonable offer will be received, provided that interested persons have been given as much notice as is practicable in the circumstances, or
- (d) if the property is an instrument or a market security.

(31) Circumstances where Enforcement Officer Relieved of Liability

An Enforcement Officer is not liable for damages for the seizure and sale of property when at the time of seizure the Enforcement Officer has reasonable grounds to believe that the seized property:

- (a) is property of the Enforcement Debtor or is property in which the Enforcement Debtor has an interest; and
- (b) is exigible.

(32) Idem

The Uniform Act will specify circumstances when an Enforcement Officer will not be liable for damages for seizing property that turns out to be in excess of that which is required to satisfy the registered judgments.

2 - Specific Types of Personal Property

[35] During the summer of 2002, the Working Group will examine and consider whether there is a need for special provisions that will govern the seizure and/or sale of several categories of personal property that have unique characteristics. These categories of personal property will likely include:

(1) Market Securities

Market securities include shares and other corporate securities that are publically traded and include a right to acquire or sell such securities.

(2) Securities of Closely-Held Corporations

The seizure of the securities of a closely-held corporation and sale at their real value should not be limited by transfer restrictions imposed under the by-laws of the corporation or by a shareholders agreement.

(3) Interests under a Lease, Contract of Sale, or Security Agreement

Special provisions will be necessary to permit the seizure of:

- (a) the interest of a lessor, seller, or the secured party without disrupting the rightful possession of the lessee, purchaser or debtor. Seizure will include seizure of the payment obligation under the lease, contract of sale or security agreement.
- (b) the interest of a lessee, buyer or debtor pursuant to a security agreement notwithstanding any term in the lease, contract of sale or security agreement that purports to terminate the judgment debtor's interest or right to possession upon seizure of the property in an enforcement proceeding.

(4) Growing Crops, Agricultural Products, and Products of the Seas, Lakes and Rivers

Growing crops which require harvesting before sale require special provisions with regard to the payment of harvesting expenses. The sale of these types of products is often subject to marketing legislation. In such cases, the Enforcement Officer should have the same rights and duties as the judgment debtor.

(5) Fixtures

Fixtures are personal property that are attached to real property. Seizure of a fixture may adversely affect the interest of persons, other than the judgment debtor, who have an interest in the real property to which a fixture is attached. Such persons should be given notice of a seizure and the right to retain the fixture upon fulfilling certain conditions. If a fixture is removed after seizure, the owner of the real property (other than the judgment debtor) should be reimbursed for such damage.

(6) Mobile Homes

Special provisions may be necessary where a judgment debtor refuses to deliver up a mobile home after a seizure by an Enforcement Officer.

(7) Cash

Where cash is seized, third parties may have valid claims to the cash that have priority over the judgment enforcement proceeding. Therefore, the distribution of cash as proceeds of an enforcement proceeding should be delayed for a reasonable period of time to permit a third party, who may have a claim on the fund, to assert its claim to the fund.

(8) Property held in Joint Tenancy or Tenancy in Common

Where a judgment debtor owns property in joint tenancy or tenancy in common with others, seizure of the judgment debtor's interest will affect the other owners who should be given notice of the seizure and the opportunity to purchase the judgment debtor's interest in the property at fair market value.

(9) Seizure of Licenses and Intellectual Property

Licenses held by a judgment debtor may be subject to terms and conditions. Disposition of a license after seizure should only take place in accordance with such terms and conditions. Transfers of patents, copyright and other forms of intellectual property which are subject to federal legislation should not be transferred until all statutory requirements for a valid transfer have been met.

[36] Seizure of Accounts

The Working Group has developed tentative recommendations with regard to the seizure of accounts that are owing to a judgment debtor or may become owing to a judgment debtor within the 12 month period following a Notice of Seizure.

[37] Currently, in most provinces and territories, debts which are owing or accruing due to the judgment debtor are attached by means of a garnishee summons or garnishing order. In some provinces, such as British Columbia, the garnishment process requires an application to the court supported by an affidavit, and an order of the court; however, the issuance of a garnishing order has become an administrative function assigned to court registry staff. Over the years, the garnishment process has become encrusted with many procedural and substantive technicalities that place unnecessary burdens on judgment creditors and garnishees and often increase costs that, in the final analysis, are borne by the judgment debtor.

[38] Under the Working Group's earlier proposals, the registration of a judgment in the prescribed registry will have the effect of becoming a charge against all of the judgment debtor's present and after acquired personal property. The Working Group recommends that debts and future debts (hereinafter referred to as "account debts") should be treated in much the same manner as other forms of personal property and that they should be subject to seizure by an Enforcement Officer acting upon the instructions of a judgment creditor.

[39] Registration of a Notice of Judgment in the prescribed registry will become a charge against present and after acquired account debts. Registration of the judgment in the prescribed registry will not place any obligations on the account debtor. Obligations of an account debtor under an enforcement proceeding against an account debt will only arise after the account debtor has been given Notice of Seizure by the Enforcement Officer or the account debtor receives notice of an assignment from an assignee of the Enforcement Officer following seizure by the Enforcement Officer and the subsequent assignment of the account debt by the Enforcement Officer. The delivery of a Notice of Seizure to an account debtor will have the effect of seizing any account debts that are owing at the time of the delivery of the Notice of Seizure and any account debts that become owing in the 12 months following the delivery of the Notice of Seizure. Delivery of a Notice of Seizure will replace the service of a garnishee summons or garnishing order.

[40] Seizure of an account debt occurs when a Notice of Seizure is given to:

- (a) the account debtor; and
- (b) the judgment debtor.

[41] After an account debt has been seized, an Enforcement Officer may assign account debts to a factor for collection. In such cases, delivery of a Notice of Seizure to the judgment debtor will inform the judgment debtor that the account debt has been seized and that payment of the account by the account debtor may only be made in accordance with the instructions of the Enforcement Officer or her/his assignee. Where an Enforcement Officer assigns seized accounts to a factor, the factor will have the responsibility of giving the account debtor notice by delivering copies of the notice of the seizure and the assignment from the Enforcement Officer to the factor.

[42] An account debtor is obliged to pay an account debt:

- (a) to the Enforcement Officer when given a Notice of Seizure; or
- (b) to an assignee when given a copy of a Notice of Seizure and a notice of assignment of the account debt from the Enforcement Officer to the assignee.

[43] Special provisions will apply to the seizure of deposit accounts, employment remuneration, and trust obligations. The effect of serving a Notice of Seizure on a deposit taking institution will be the subject of special provisions. Service of a Notice of Seizure will only affect obligations that are owing to the judgment debtor at the time of service of the Notice of Seizure. The Notice of Seizure will not affect future obligations that may become owing by the deposit taking institution to the judgment debtor within the 12 month period following service of the Notice of Seizure.

The seizure of employment remuneration will need to be read in conjunction with the exemption from seizure with regard to employment remuneration.

F - Land - The Common Law *Nemo Dat* Rule

[44] There is considerable diversity in the enforcement proceedings that are currently in use in the provinces and territories. This diversity reflects different systems of land tenure that exist in the different jurisdictions. It may be a significant challenge to achieve uniformity in this area. With the exception of the common law *nemo dat* rule which is discussed in the immediately following paragraphs, the Working Group has postponed its discussion of land until it has completed its review of enforcement of judgments against personal property.

[45] Under the common law *nemo dat* rule, a debtor can give no better title to property to a third party than the debtor has. The Supreme Court of Canada in cases such as *Jellet v. Wilkie and Davidson v. Davidson* has consistently applied the *nemo dat* rule where a priority issue has arisen between a registered judgment and a prior unregistered interest in land. The effect of this rule is that a judgment registered against land only attaches the judgment debtor's interest in the land that remains at the time of registration of the judgment. Consequently, a prior unregistered interest in land takes priority over a registered judgment.

[46] The common law *nemo dat* rule conflicts with the principles of registration-based property regimes where priorities among various interests are determined based on the date and time of registration and unregistered interests are normally subordinated to registered interests.

[47] The *nemo dat* rule leaves judgment creditors vulnerable to being surprised by a prior unregistered interest in land after the judgment creditor has invested time and money pursuing an enforcement proceeding against the property. Generally, a judgment creditor should be able to rely on the records of the land title or land registry system as disclosing the state of the judgment debtor's interest before enforcement proceedings are pursued.

[48] The *nemo dat* rule may promote fraudulent conveyances by debtors who are engaging in risky financial activities and who fear future action by potential creditors. The debtor can make a secret unregistered transfer prior to any action by creditors. If the activity is financially successful, the transfer can be torn up. If the financial activity results in judgments, the debtor can rely on the *nemo dat* rule and leave creditors with the unenviable task of trying to prove a fraudulent conveyance.

[49] With regard to interests in land, the Working Group recommends:

- (a) The common law *nemo dat* rule be abolished and, subject to the provincial options referred to in the sub-paragraph (b), a new rule be enacted to provide that an unregistered voluntary disposition of land is subordinated to a judgment that is registered against a judgment debtor's interest in land.
- (b) Provinces and territories will have the option of enacting exceptions to the new rule stated in sub-paragraph (a) where

- ▶ (i) an instrument creating an interest is registered either before the judgment is registered or within three months of the date that the instrument was executed or the interest created (If it is not registered within this time, the instrument will be deemed fraudulent and void as against a judgment creditor who registers a judgment prior to the registration of the instrument); and
- ▶ (ii) the party claiming priority over a registered judgment can prove that the unregistered interest, other than a security interest, was acquired in good faith, as would be the case for a constructive trust claim.

- ▶ (iii) the party claiming priority over a registered judgment can prove that the judgment creditor had knowledge of the unregistered interest at the time when the claim upon which the money judgment is based arose.

G - Property Exempt from Execution

[50] The Working Group has begun a preliminary examination of property of a judgment debtor that should be exempt from execution. This topic is also under review by an independent task force established by the Superintendent in Bankruptcy. The task force, known as the Personal Insolvency Task Force ("PITF"), is reviewing several aspects of personal bankruptcy under the *Bankruptcy and Insolvency Act*, including property that may be claimed as exempt from bankruptcy. Among the proposals that are being considered by the PITF is a whether a bankrupt will be permitted to choose, in a bankruptcy proceeding, between federal and provincial legislation pertaining to exempt property.

Industry Canada has also released a discussion paper that looks at general exemptions and RRSP exemptions. The paper includes references to the PITF models as well as other models.

The recommendations of the PITF may impact upon the Working Group's review of property exemptions under the Uniform Act. Consequently, the Working Group has decided to postpone further examination of this topic until it has had an opportunity to review the PITF report.

H - Income Exemption

[51] The PITF report referred to under the previous heading will also consider exemptions of various types of income including retirement income. Consequently, the Working Group has decided to postpone further examination of this topic until it has had an opportunity to review the PITF report.

I - Distribution of Proceeds of Enforcement

[52] Monies recovered by the Enforcement Officer in an enforcement proceeding will constitute a distributable fund. In addition to the claims of judgment creditors, the Working Group plans to consider the priorities of other claims upon the distributable fund including:

- (a) Claims of the federal, provincial and territorial Crown;
- (b) Claims to priority arising under federal, provincial or territorial statutes;
- (c) Claims of a landlord for arrears of rent;
- (d) Lien claims (Eg. Repairers liens); and,
- (e) Fees and expenses of the Enforcement Officer.

III - TOPICS FOR FUTURE CONSIDERATION

[53] The Working Group's program over the next nine months includes an examination and development of recommendations on the following topics:

- (a) Enforcement Proceedings against Land;
- (b) Property Exempt from Execution;
- (c) Income Exempt from Execution;
- (d) Appointment of Receivers;
- (e) Charging Orders;
- (f) Prejudgment Remedies; and,
- (g) Third Party Procedures relating to Enforcement Proceedings.

IV - CONCLUSION

[54] The Working Group requests guidance from the Civil Section with regard to how the proceeds from an enforcement proceeding should be distributed among registered judgment holders.

Should the distribution of proceeds follow:

- (a) the principle of *pro rata* distribution among judgment creditors who have registered their judgment in the prescribed registry, regardless of the date and time of registration; or
- (b) the first-to-register regime where priorities would generally be determined in accordance with the date and time of registration of judgments in the prescribed registry?

[55] The Civil Enforcement of Judgments Working Group will take into account the comments received from the Civil Section as it continues with the Civil Enforcement of Judgments Project.

[56] Discussion Papers used as the point of departure for the Working Group's deliberations can be made available in English.