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Ontario Paves Road to Improved Judgment-Creditor Recovery - New Developments Could Expedite Enforcement

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Judgment-creditors who have experienced the uncertainty of Ontario's civil enforcement regime have recently been given two reasons to be cautiously optimistic about the future of enforcement.

This past fall, the Ontario Superior Court in *Canaccede International Acquisitions Ltd v. Abdullah*, 2015 ONSC 5553 recognized a new judicially supervised process for the sale of a judgment-debtor's property, which represents an important alternative to the traditional Sheriff's sale under the *Execution Act*. This was the first time a judicial sales process was applied in Ontario outside of mortgage enforcement, family law and other litigation with respect to specific property.

Further changes await if Ontario ultimately decides to privatize its civil enforcement service - an option that the Ministry of the Attorney General ("MAG") recently announced is officially on the table. The government is currently exploring two privatization models: (1) delegating to a not-for-profit administrative authority; or (2) contracting out to private agencies, similar to the model used in British Columbia and Alberta. Enforcement services would be regulated under both models. According to MAG, switching from the current model to a private service should result in judgment-creditors having access to more civil enforcement officers in more locations, thereby speeding up the enforcement process across the province.

From a judgment-creditor's perspective, the impact of both developments could be significant, and may result in faster and more cost-effective enforcement of judgments.

Practical Impediments to Enforcing Money Judgments Prior to *Canaccede*

There are a number of challenges for judgment-creditors looking to enforce monetary judgments, particularly through a traditional Sherriff's sale of property belonging to the judgment-debtor.

Firstly, Sheriff's sales take a notoriously long time and often do not even result in a sale. This can leave judgment-creditors without an effective remedy after having already expended considerable resources to obtain judgment and then fund a Sheriff's sale.

Additionally, the Court in *Canaccede* was particularly concerned with the practical implications of a recent Court of Appeal decision which held that the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*") prohibits a mortgagee from providing a mortgage statement to a third-party judgment-creditor looking to enforce its judgment. Given that Sheriffs require discharge statements before they can sell a property, that decision made Sheriff's sales even more protracted and costly, as it forced judgment-creditors to undertake examinations of judgment-debtors under oath to try to determine the amounts owing under registered mortgages, as well as other lengthy and costly enforcement procedures, all with uncertain outcomes. This was a key reason why the Court in *Canaccede* exercised its equitable jurisdiction to recognize a judicially supervised sale process, which can result in faster and more cost-effective enforcement.

***Canaccede*: The Two-Step Procedure for a Judicially Supervised Sale**

In *Canaccede*, the Applicant obtained judgments against the Respondents in five separate Small Claims Court proceedings, and sought to enforce the judgments against land owned by the Respondents. The Applicant relied on Rule 20 of the *Small Claims Court Rules*, which provides that Small Claims Court judgments may be enforced by any method permitted by law, and applied to the Superior Court for equitable relief in the form of a judicial sale.

The Court found that it had inherent jurisdiction to grant the relief sought. The Court held that nothing in the *Execution Act* required the enforcement of a judgment against land to proceed exclusively by way of a Sheriff's sale. Relying on its inherent jurisdiction "to do justice between the parties", the Court approved a two-step process for the judicially supervised sale of a judgment-debtor's property.

a. The first step in the process is for the judgment-creditor to seek an order for a reference under Rule 54.02 of the *Rules of Civil Procedure*. The reference hearing would inquire into and determine all issues relating to the conduct of the sale of the property, including the following issues: What property or interest in the lands is liable to be sold under the judgment.

b. The parties with interests in the lands.

c. The nature and priority of interests in the lands.

d. How the proceeds of a sale should be distributed.

e. If it is unjust to require the sale of the property.

Once the reference hearing is completed, and if the referee determines that the judgment-creditor has an interest in the land that may be sold to satisfy the judgment, the judgment-creditor can apply to the Court for an order for sale by private contract under Rule 55.06.

Private Enforcement in Other Jurisdictions

British Columbia and Alberta are currently the only provinces that delegate civil enforcement to private agencies. This is accomplished by awarding contracts to local agencies through a public tender process.

B.C. began privatizing its court bailiff services in 1990 through amendments to its *Sheriff Act*, which gave private companies appointed by the Minister the power to enforce civil processes and orders. Executions carried out by these private companies are governed by the *Court Order Enforcement Act*. Alberta followed suit in 1996 with the enactment of its *Civil Enforcement Act* (the "*CEA*").

Ontario will likely look to the experience in B.C. and Alberta with respect to privatizing its own civil enforcement services. Although these provinces have been operating under a private model since the 1990s, there are surprisingly few reports evaluating the delivery of these services.

According to a 2014 Report released by the Continuing Legal Education Society of British Columbia,[1] bailiffs in B.C. are reportedly successful in obtaining cash settlements from debtors - without having to seize a single asset - more than 50% of the time. One of the most significant benefits to a judgment-creditor of a cash settlement is that it does not have to be shared rateably with other creditors under British Columbia's *Creditors Assistance Act*.

In Ontario, the *Execution Act* does not provide for the Sheriff to negotiate with the judgment-debtor on behalf of a particular judgment-creditor. To the extent that any assets of the judgment-debtor are seized and sold, proceeds are shared rateably among all creditors who have filed writs of seizure and sale with the Sheriff's office pursuant to the *Creditors' Relief Act.*

Protections for the Judgment-Debtor

With respect to a judicial sales process, the Court in *Canaccede* held that this enforcement remedy preserves the rights of the judgment-debtor (and other parties with interests in the property) to show cause as to why the sale should not proceed. The Applicant in *Canaccede* personally served its application record on the Respondents, and also served each party shown on the parcel registers and execution searches conducted at the Sheriff's office in the counties where the properties were located. Despite personal service, none of the parties with an interest in the properties appeared to oppose the relief sought by the Applicant.

Protection of judgment-debtors from abusive enforcement efforts are a legitimate concern in considering whether to privatize civil enforcement services. For example, debtor advocacy groups have expressed concerns that private companies, motivated by profit and a competitive

marketplace, will ignore the needs and well-being of the judgment-debtor when enforcing a judgment.

Under both of MAG's proposed privatization models, it appears that the government would retain oversight by way of licencing and regulation. Such concerns with respect to accountability can be addressed directly in the regulatory regime. Turning to Alberta's legislation as an example, some key features include:

- a code of conduct for civil enforcement agencies and bailiffs (Schedules 1 and 2 of the regulation, respectively);
- with respect to the agency's own negligent acts or wilful misconduct, a provision that voids any contractual provision that purports to either limit the agency's liability or provide indemnification for such conduct (s. 10 of the regulation); and
- a complaint mechanism whereby the public can voice concerns to the Office of the Sheriff - Civil Enforcement, who is authorized to investigate for possible breaches of the *CEA*. If the Sheriff determines that a civil enforcement agency or bailiff, or an entity purporting to be one, contravenes the *CEA*, they are guilty of an offence, and liable to pay fines or to imprisonment (ss. 14 to 15 of the *CEA*).

Conclusion

As the Court held in *Canaccede*, the judicially supervised sales process "represents…an evolution and improvement in the common law." For judgment-creditors, this remedy presents a number of practical benefits compared to the traditional Sheriff's sale:

- A judicial sale will likely be a cheaper and faster way for judgment-creditors to enforce their judgments against a debtor's property.
- It will allow properties to be listed in the "realistic and active" marketplace, and result in a more robust sales process and possibly achieve higher sales prices.
- Finally, a judicially supervised sales procedure will restore predictability to a process where there were previously no assurances that a sale would actually proceed.

If Ontario ultimately decides to privatize its civil enforcement services, that will be a significant change to the civil justice system in Ontario. In the interim, a judicially supervised sale of property may prove to be useful new tool for judgment-creditors frustrated with traditional enforcement processes. It will be interesting to see whether judgment-creditors and their lawyer will begin to make use of this new tool.

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[1] https://www.cle.bc.ca/PracticePoints/CRED/14-ProcessSeizureSale.pdf