

APPENDIX H

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CIVIL ENFORCEMENT

Peter J. M. Lown

Alberta

REQUEST

I have been asked by the Steering Committee of the Uniform Law Conference of Canada, Civil Section, to prepare a brief proposal for the consideration of the Conference. The proposal relates to the Conference undertaking the preparation of model Civil Enforcement legislation for all the Canadian provinces. It is consistent with the philosophy of the Agreement on Internal Trade and the philosophy of the Conference's approach to Commercial Law.

While the Steering Committee has approved the project, it is important that the section understand the nature and extent of the work.

This document asks the section to endorse the decision of the Steering Committee, and to approve some structure for the project. At the annual meeting, I will present more detail on the principles for reform, and ask the section to set out those principles to guide the project.

In particular, section members should consider the subject matter priorities, and the time frame within which the project should be completed. I have not provided a comprehensive picture of the common law agreement legislation. However, the snapshot and the exemptions examples referred to in the section, "Carrying Out the ULC Plan" on page 4 should provide some food for thought.

BACKGROUND

The background to this request is the work of the Institute, which ultimately lead to the passing of the *Civil Enforcement Act* in Alberta. This legislation, to a large extent, is based on our Report No. 50 on Prejudgment Remedies, and our Report No. 61 on the Enforcement of Money Judgments. Much of the *Civil Enforcement Act* follows the Institute's recommendations, although there is much more in the regulations than was initially proposed by the Institute. The Institute work has been subsequently adopted in Newfoundland, which now has a new Judgment Enforcement Act ready to go into operation.

Report No. 61 describes an enforcement system which:

1. has grown like Topsy
2. is unpredictable
3. is not particularly efficient

These criticisms are shared in other provinces. Both Newfoundland and Ontario reports have commented on the "fragmented, ambiguous, incomplete, and archaic" state of the enforcement system. Several commentators have referred to the lack of simplicity, efficiency, and balance in the current system. It is clear that the operational maintenance of the enforcement system has been seriously neglected in most provinces. The development of different rules and processes for different types of property has lead to a plurality of remedies, lacking in consistency and rationale. In some cases, this plurality has lead to an emphasis of form over substance, an emphasis which ultimately erodes the confidence of debtors and creditors in the usefulness of the system as a whole.

These criticisms are exacerbated when businesses or creditors are involved in multi-province business operations. For example, different exemption rules and different processes necessitate different record keeping for activities in different provinces. These inconsistencies generate greater activity, greater likelihood of error and have significant

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cost implications for any business involved in interprovincial activity. The differing rules also impact our mobile population. A move from one province to another may change the existence and amount of exemptions or even the exigibility of property altogether.

In other areas where reform is contemplated, the inconsistencies of the enforcement system can also skew the nature of the reform. For example, in considering the question of exigibility of registered savings plans, the principle of exigibility of proceeds of those plans may be affected by the disparate exemption rules which exist across the country. Should the principle of exigibility of proceeds be compromised depending on the different exemption systems?

Principles for Reform

Both Alberta and Newfoundland have accepted the need for a statement of principles which would guide the approach to reforming the civil enforcement system. These general principles include the following:

- a) **Universal Exigibility:** All of a debtor's property should be subject to enforcement, excepting only such property as is deliberately excepted.
- b) **Just Exemptions:** Such property as the debtor reasonably requires for the maintenance of his family should be deliberately exempt.
- c) **Sharing among Creditors:** The proceeds of enforcement processes should be shared among enforcement creditors.
- d) **Creditor Initiative:** The enforcement system should continue to be creditor driven.
- e) **One Statute:** The entire enforcement system should be governed by one consistent, coherent, and logically ordered statute.

- f) **Judicial Supervision:** The enforcement system should operate with a minimum of judicial supervision, but there should be ready access to the court when directions are required.

Elements of the Proposed Legislation

1. The Initiating Process

Part of the complexity of the old system is related to the fact that the rules developed differently for different types of property, and may have varied from district to district. The need to rationalize the initiating process for judgment enforcement should lead to:

- a) a single initiating document,
- b) covering defined property,
- c) having defined effects, e.g., whether or not there is an exception for a bona fide purchaser

2. The Recovery Process

Rationalizing the recovery process should involve simplification of the process of discovering the existence of assets, and the attachment of those assets for the benefit of the creditor. The issues raised under this general heading involve:

The debtor's involvement in the recovery process

- 1. should the debtor be required to disclose the existence of assets, or
- 2. should the creditor be responsible for discovering assets by an examination process or a combination of questionnaire and consequences for a failure to fill out the questionnaire

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Despite the complexity of the current recovery process, essentially the creditor is either attaching specific assets, or diverting benefits from a third party to the creditor which would otherwise have flowed to the debtor. Rationalization could reduce this to two existing processes which are:

- a) Process of Seizure, strictly based on Notice to the debtor. The subheadings under this process involve:
 1. the nature of instructions to be given by the creditor,
 2. the time during which seizure can take place,
 3. the type of property subject to seizure,
 4. the process of objecting to the seizure,
 5. handling special types of property.

- b) Process of Garnishment. If the enforcement is by way of diverting the benefit from the debtor to the creditor (garnishment), the issues are:
 1. what debts are covered by the garnishment process
 2. how is ongoing indebtedness dealt with
 3. can the same objection process be used in both seizure and garnishment

3. Exemptions

Are there general principles that can be adopted relating to exemptions that will serve to rationalize the exemption schemes across the country. Even though some local variations may exist, it may be helpful to discuss exemption policy in terms of:

- a) exemptions relating to the debtor carrying on a livelihood
- b) exemptions related to the basic living needs of the debtor
- c) minimum dollar values below which enforcement should not take place

4. Distribution among Creditors

Assuming there are some proceeds of the enforcement process which can be distributed among creditors, the major issues to be determined are:

- a) which creditors share
- b) on what basis
- c) is there any incentive for the active creditor
- d) how can the active creditor concept be applied in small claims actions

ULC Work Plan

Essentially there are four possibly severable areas involved in the overall revision process. Step 1 is the initiation process. Step 2 is the recovery process, and of particular importance is how to accommodate new types of property within that process. Step 3 is the question of exemptions, and Step 4 is the scheme for distribution of proceeds among creditors. There is possibly a Step 5, relating to fraudulent preferences, and that should not be forgotten.

Carrying Out the ULC Work Plan

Building on the experience of Alberta and Newfoundland, it is essential to create the right mix of membership on a working group. The group should balance those provinces which are desirous of moving a revised Civil Enforcement System, and those with the practical implementation experience of having done so. Secondly, it would be practical to use the ALRI Report and its recommendation as a starting point in discussion of each of these areas. Whether or not the ALRI recommendations are accepted, they would focus the discussion appropriately. Thirdly, the most important task for the working group is to establish a timetable and a work plan for the review of the civil enforcement system. Requests will have to be made to the executive for research assistance and those should be put in place as soon as possible.

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In order to assist with the question of determining whether or not the Conference should adopt this project, the following materials are attached:

1. A very brief literature survey indicating commentary on the need for review. The literature survey is not particularly large, partly because the need for rationalization and revision is so clear that it does not have to be addressed too often.
2. A picture of the enforcement legislation across the country, and its vintage. Even the different names of the legislation will indicate some of the lack of consistency.
3. A comparative picture of the exemptions regime in various jurisdiction across the country [it may reveal significant differences].

Questions for Civil Section to Determine

1. Assuming the section should undertake a Civil Enforcement Project, can the perceived problems and need for reform be confirmed?
2. If so, what should the elements of the project be, and in what order?
 - (a) The Initiating Process
 - (b) The Recovery Process
 - (c) Exemptions
 - (d) Distribution of Proceeds
 - (e) Fraudulent Preferences
3. Should the starting point, for discussion purposes, be the existing Alberta/Newfoundland position?
4. What should be the membership of the Working Group for purposes of?
 - (a) Overall Project Management
 - (b) Balance of Alberta/Newfoundland and other provinces