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PROGRESS REPORT ON THE CIVIL ENFORCEMENT OF JUDGMENTS PROJECT

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INTRODUCTION

[1] In many Canadian provinces the legislation regarding the enforcement of judgments has remained relatively unchanged for many years, particularly those provisions respecting execution against personal property. The legislation that does exist often relies on antiquated legal concepts and serves neither debtors nor creditors particularly well.

[2] The resulting need to modernize and update the laws respecting the enforcement of civil judgments has been recognized by the Conference. The topic of civil enforcement came before the Civil Law Section at the 1998 Meeting in Halifax. Discussions at that time culminated in a resolution by the Section that it should carry out a project to develop a Uniform or Model Civil Enforcement Act.

THE WORKING GROUP

[3] A Working Group has been created to proceed with this project. The Group became active early in 2001 when financial support for the project was assured. The members of the Working Group are as follows:

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

Philippe Lortie

Hélène Fortin

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

[4] A representative from the federal government will also be approached to either join or assist the Working Group as some issues may arise that interact with bankruptcy law.

MAY 11, 2001 MEETING

[5] Since the establishment of the Working Group two meetings have been held. The first meeting, on May 11, 2001, focussed on setting out the scope and the general approach of the project. The discussions in this regard were based on the Workplan Document prepared by Lyman Robinson. (This document was presented to the Civil Law Section last year.)

[6] The Working Group agreed that the scope of the project will be to address two core issues. The first issue is to set out a legal framework within which enforcement will take place. The legal framework chosen will integrate the enforcement of civil judgments with the registration-based schemes of the provinces. This will enable civil judgments to be registered in the personal property registries.

[7] The integration of the enforcement of civil judgments and registration-based schemes was favoured as it will create a rational legal framework for judgment enforcement in each province which will serve creditors and debtors better than the current system. The registration of civil judgments will enable creditors to ascertain whether a judgment exists against a debtor and provide creditors with more comprehensive information when determining whether to take a security interest or commence enforcement proceedings.

[8] Under the legal framework issue the Working Group will also address how to assimilate a new civil judgment enforcement scheme with real property issues. One option that has been proposed in this regard is to incorporate the procedure with respect to mortgage foreclosures into the new enforcement scheme.

[9] Once the legal framework is dealt with, the second core issue that the Working Group will address is the actual procedures that will be used to enforce debts due under civil judgments.

[10] The Working Group has agreed that reviewable transactions (fraudulent preferences and fraudulent conveyances) will be excluded from the project.

[11] The Group acknowledged that the project should build on the work that has already been done or is ongoing with respect to the enforcement of civil judgments. Alberta, Newfoundland, New Brunswick, Nova Scotia and Saskatchewan are considering or have enacted legislation that permits the registration of monetary judgments in public registries that provide for the

registration of charges against personal property. The developments that have occurred in these provinces will be considered as the project moves forward.

JUNE 21, 2001 MEETING

[12] A second meeting was held on June 21, 2001. The objective of that meeting was to discuss the details of the legal framework which integrates the enforcement of civil judgments with the registration-based schemes.

[13] It is envisaged that the adoption of the registration-based schemes will enable a Judgment Creditor to create an interest that will attach to the property of a Judgment Debtor upon registration of the judgment. This would be analogous to a security interest in favour of the Judgment Creditor in the property of the Judgment Debtor. (The Working Group will address the exemptions from civil judgment enforcement proceedings.)

[14] The scheme will be adopted in such a way that the priority results for the Judgment Creditor will generally be the same as for security interests under the registration-based schemes. Thus, registration would enable a Judgment Creditor to have priority over a subsequently acquired interest. This would be subject to the same exceptions that would limit the priority of a consensual security interest.

[15] Exceptions to the registration-based scheme generally, which are necessitated by policy and practical considerations, will also be addressed. It will also be necessary to consider the special position of Quebec since the provisions of the Civil Code limit the ability of a creditor to take security in the non-enterprise assets of an individual.

NEXT STEP OF THE PROJECT

[16] Once the details of the legal framework have been determined, the Working Group will consider the legal procedures that will be made available for the enforcement of payment with regard to debts due under civil judgments. In this respect, the differences between security interests and interests arising out of registered judgments will need to be considered in order to determine the appropriate mechanism for enforcement.

[17] Under a security interest the creditor acquires a right in the property of the debtor for value. The nature of this interest is consensual and, therefore, works well with a self-help enforcement process. In contrast, the nature of a Judgment Creditor's interest will be non-consensual as it will create an interest in the Judgment Debtor's property as a remedy to enforce the judgment. As the interest created by a registered judgment will be non-consensual, the enforcement process may need to be governed by a system that requires the creditor to act through an intermediary, such as a sheriff or bailiff. This will avoid potential abuses arising and direct confrontation between the creditor and the debtor.

2002 REPORT

[18] It is the Working Group's expectation that a report on the project will be put before the

Conference at the 2002 Annual Meeting. There will undoubtedly be a number of issues on which the Working Group will seek guidance from the Civil Law Section. This arises out of the fact that in some cases the registration-based scheme will conflict with other principles and policies that are currently part of the general law of executions.

[19] One example in this respect is that the registration-based scheme with regard to the priority between perfected security interests conflicts with the principles embodied in the creditors' relief legislation of most provinces. Most creditors' relief legislation in Canada allows for pro rata sharing in the distribution of proceeds among execution creditors. In contrast, the Personal Property Security Act ("PPSA") determines the priority between perfected security interests according to the date and time of perfection. These two approaches are contradictory and a choice will need to be made as to which one should be adopted.

[20] Another example where the registration-based scheme conflicts with the principles under executions law is in the case of prior unregistered interests in the property of the debtor. According to the common law rule of *nemo dat* a debtor can give another no better title than the debtor has. If this is applied to the civil enforcement of judgments then the Judgment Creditor's interest would only be able to attach to the interest of the Judgment Debtor that remains at the time of registration. This would allow a prior unregistered interest to take priority over the registered interest of a Judgment Creditor. In contrast, the PPSA holds that in determining priorities a prior unperfected interest is subordinate to a registered security interest. These two examples represent the type of issues that will come before the Conference next year for guidance.

[21] The Civil Enforcement of Judgments Working Group will continue to meet regularly in order to proceed with this project.