

PROPOSAL FOR
A SYSTEM OF ENFORCEMENT OF
JUDGMENT DEBTS

EXECUTIVE SUMMARY

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**SUMMARY: PROPOSAL FOR A SYSTEM
OF ENFORCEMENT OF JUDGMENT DEBTS**

A. NEED FOR REFORM

It is not necessary to detail the manifest deficiencies in the process of enforcement of judgments in New Brunswick. Although one normally thinks of these as problems faced by judgment creditors, debtors also have legitimate concerns under the present system¹. One need only read the introduction to Volume II of the Third Report of the Consumer Protection Project (1976)² prepared by Professor R.W. Kerr in order to appreciate the scope of the problems which are evident within the present system. As noted by Professor Kerr:

From the description of the existing scheme of creditors' remedies, it is apparent that the system is a complex and poorly interrelated collection of procedures. Many of these procedures originated in the complex legal system that existed before the major legal reforms of the last century and a half. These old procedures have been substantially modified by legislation during the last century and most are now substantially regulated by statute. The reforms have proceeded on a rather haphazard basis, however, unlike the reforms in the remainder of the legal system which have endeavoured with considerable consistency to simplify and rationalize the system³.

Similar sentiments were expressed by the Ontario Law Reform Commission in their Report on the Enforcement of Judgment Debts and

Related Matters.⁴ After reviewing various aspects of the present system of execution in Ontario, the following comments were made:

The existence of the separate enforcement offices and personnel, noted in the preceding paragraph, contrives at the very outset to promote a substantial degree of confusion and inefficiency in the enforcement of judgment debts... To one degree or another, each of these topics illustrate the fragmented, ambiguous, incomplete and archaic nature of existing debtor-creditor law⁵.

and later:

In Chapter I of this Part of our Report, the Commission emphasized the uncertainty, complexity and archaic nature of a significant portion of the law relating to the enforcement of judgment debts. Developing in a generally ad hoc and unsystematic fashion, the law often has left debtors, their advisors and enforcement personnel in some confusion concerning the administration of the enforcement system as a whole and concerning the existence and effectiveness of statutory rights⁶.

These comments are equally applicable to the law and system for execution of judgments in New Brunswick today. As noted in the very first paragraph of the Ontario Report, as a result of this state of the law, the obtaining of a judgment by no means ensures satisfaction of that judgment. In a great many cases "... rather than marking the successful completion of their efforts to gain monetary relief, the judgment often represents only the beginning of a more difficult and frustrating experience - enforcing the judgment to obtain payment."⁷ The need for reform is unquestioned. The extent and the nature of the reform are areas more open for discussion.

In Part I of the Kerr Report, certain specific and largely mechanical problems with the present system were identified and changes recommended to improve its operation. In Part 2 the broader and more fundamental problems with the present system were identified.⁸ These may be briefly enumerated as follows:

- 1) Gaps in Exigibility of Property
- 2) Complexity of the System
- 3) Inefficiencies in Enforcement
- 4) Inadequacy of Exemptions
- 5) Potential Harassment of the Debtor
- 6) Lack of a Hearing for the Debtor on the Issue of Enforcement.

In Part 4 recommendations were made for "The Proposed Enforcement System:"

"... to reduce as far as realistically possible the fundamental problems previously discussed..."⁹

In attempting this, some major fundamental and innovative changes were recommended. The mechanical changes recommended for the present system and this new system were presented basically as alternative proposals.

The approach taken in this Report for the reform of the system of enforcement of judgments is to go beyond tinkering with mechanical details while stopping short of a completely new and fundamentally different system. In recommending reform, the warning expressed in the Ontario Report has been kept in mind:

In our view, the case has not been made for a total, fundamental reorganization of the enfor-

cement of judgment debts system. We believe that many of the critical issues raised by solicitors and laymen knowledgeable in the field are amenable to a less sweeping solution than that proposed in several other jurisdictions. To those who decry this approach - to those who view it as yet further "piecemeal" change - it may be said that a system in need of reform is not necessarily a system completely lacking in virtue. The basic tenets may be, as here, essentially sound and worth preserving¹⁰.

As a result of this approach, most of the fundamental principles of the present system have been retained under the recommendations made. Much of the machinery for realizing on a judgment has been left basically intact under the proposals herein contained. However, there are some major changes proposed particularly with respect to the administrative structure. Significant changes also exist with respect to existing procedures. These changes combined, constitute a specific proposal for what can be fairly labelled a new system of enforcement for New Brunswick. The objective of this proposed new system of enforcement is a modern, uniform, coordinated, efficient and flexible system of enforcement of judgments which will balance the interests of both creditors and debtors in a manner that is just and equitable. Although it is contemplated that the recommendations form a complete package, implementation may be made in stages. A summary and overview of the proposed system follows.

B. SUMMARY OF PROPOSED ENFORCEMENT SYSTEM

I. Introduction

This chapter is not intended as a review of the problems of the present system, or the need for reform. It is intended to provide a summary of the system of enforcement of judgment debts proposed in this Report. The reasons for and the details of the recommendations have been deleted for the most part. This chapter should enable the reader to quickly appreciate the overall system and its operation. This will put the details of the system in perspective. A preliminary outline of the basic principles of the system is given in the following paragraph.

The objective is to provide an integrated, co-ordinated, unified, efficient system of collective execution on a province-wide basis. Execution will be based on the principle of universal exigibility. Therefore, all valuable rights of the judgment debtor anywhere in the province will be available to judgment creditors. This concept of universal exigibility will be tempered by reasonable exemption provisions to be outlined shortly. Realization of exigible property will be through specific enforcement procedures such as seizure and sale or collection. The basic approach in realization is to treat the procedure as if the judgment debtor were selling or collecting himself for the purpose of paying his creditors. In this way the law is merely doing indirectly what the judgment debtor should

be doing directly. Subject to limited priorities for certain types of creditors, all judgment creditors in the province will share in the judgment debtor's property on a pro rata basis.

II. Administrative Structure and Basic Procedures

The enforcement of all monetary judgments must follow the procedures contained in a new statute which will replace all existing legislation. This statute may be labelled the "Executions Act" and will provide for and contain a coherent statement of the system for the enforcement of judgment debts. The key to the system will be a new enforcement office which will control and co-ordinate the enforcement of judgments against a judgment debtor on a province-wide basis. It is proposed that there be four such enforcement offices within the Sheriff's Department. They will be located in each of the four Sheriffs' Districts under the immediate control of the District Sheriffs. Overall supervision will be through the Chief Sheriff. The functions of this office will be carried out by a new official to be called a "District Enforcement Officer" who will be given the status of a deputy sheriff. In view of the duties conferred, it is hoped that the four District Enforcement Officers will have legal training. Each of these District Enforcement Offices will have two-way communication with a computerized Central Registry of Enforcement to be located in Fredericton within the office of the Chief Sheriff.

Enforcement of a judgment must be initiated by the judgment creditor. This will be done by obtaining a Notice of Enforcement from the court. This Notice will in fact be an order of the court similar in principle to the present Order of Seizure and Sale. However, it will be a general execution order. It will be broad enough to encompass and authorize all of what are referred to as specific enforcement procedures. As will be explained later, these include collecting debts, seizing and selling property and making installment orders. The Notice will order the District Enforcement Officer to whom it is delivered, to carry out the specific enforcement procedures that are subsequently directed or requested by the judgment creditor.

This Notice of Enforcement must be delivered to the proper District Enforcement Office. Only one office will have control of enforcement against the debtor including distribution of the proceeds from the judgment debtor's property. All Notices must go to or be transferred to that Office. Upon delivery, the District Enforcement Officer shall place the Notice of Enforcement together with additional prescribed information on the Central Registry.

The immediate and significant effect of filing the Notice on the Central Registry is to bind the judgment debtor's exigible property, both real and personal. The binding and realization of real estate will be discussed in detail shortly.

In the case of personal property, it will be bound by the Notice subject to a protection for persons dealing bona fide

with the judgment debtor for valuable consideration after the filing of the Notice. This protection will terminate on seizure of the property in the course of the enforcement process.

Therefore, it is very important to ensure that the seizure of property is made in a manner that gives notice to third parties dealing with the judgment debtor's property that the property is now absolutely bound. These provisions should enable the judgment creditor to protect against possible fraudulent transactions without interfering with usual commercial activity. Thus, a person purchasing personal property will not be required to search the Central Registry as long as he is acting bona fide with valuable consideration.

The rights of third persons claiming an interest in the property at the time of filing the Notice of Enforcement must also be considered. These persons, who may be referred to as adverse claimants, will generally be entitled to prove their rights, if necessary, up to the time of sale. This will be necessary where the adverse claimant has rights which would be defeated by a voluntary conveyance by the judgment debtor. In cases where the rights claimed would survive a voluntary conveyance by the judgment debtor to a bona fide purchaser, there is no need to claim or prove those rights since the realization of the judgment debtors' property will be treated as if the judgment debtor had conveyed or exercised his rights voluntarily. In the case of the sale of property, this should greatly improve the title for purchasers at sheriffs' sales and this

fact should be reflected in higher prices. Higher prices will benefit all parties and add greatly to the efficiency of the system as a whole.

Where third parties claim to have acquired rights to the judgment debtor's property either before or after the filing of the Notice of Enforcement, the judgment creditor may dispute the claim. The dispute will be resolved through the dispute resolution procedures. These procedures will initially involve the District Enforcement Officer with an appeal to a judge. With some modifications, the procedures will be the present Interpleader provisions under Rule 43 of the Rules of Court. One potentially significant change is the increased control over impeachable transactions which will result in certain stated circumstances. A judgment creditor may ask for a determination of the validity of the third parties' claim. In certain cases there will be a rebuttable presumption which will entitle the District Enforcement Officer to review the transaction and set it aside in the appropriate cases. This should go a long way in reducing the frustration of creditors who see their debtor throw up road blocks to enforcement with virtual impunity. On the whole, these dispute resolution provisions are intended to encompass disputes in the enforcement of judgments regardless of the specific enforcement procedure being used.

III. Specific Enforcement Procedures

a) Introduction

The Notice of Enforcement will order the District Enforcement Officer to carry out the specific enforcement procedures as directed or requested by the judgment creditor. This does not mean that the Enforcement Officer will personally carry out all procedures. In some cases, such as the seizure and sale of personal property, the Enforcement Officer will direct that a sheriff carry out what might be termed the "field tasks". The sheriff will therefore continue his traditional functions. The Enforcement Officer will be entitled to direct a sheriff anywhere in the province to execute against the property of the judgment debtor. This is part of the concept of province-wide execution. Where monies are realized by a sheriff through the sale of property or otherwise, a report with the monies must be returned to the District Enforcement Officer for distribution by that Officer. The distribution of the proceeds from any enforcement procedure will be in accordance with the information on the Central Registry which will indicate all creditors in the province who have filed a Notice.

Before reviewing the details of the specific enforcement procedures, a brief note on the concept of universal exigibility is necessary. While exigibility has been a major source of problems under the present system, it will not be an issue under the proposed system. All valuable property and rights will be available to creditors subject to reasonable exemptions to pro-

protect the judgment debtor and his family. The issue will be the proper procedure to realize on non-exempt property or rights. The basic mechanics available will be voluntary payment, sale, involuntary collection or enforcement of rights. The processes available will be labelled the Installment Order, the Order of Seizure and Sale, Garnishment and Receiving Order. One or more of these procedures will generally be available for all rights of the judgment debtor. Where a right has been excluded from a procedure, it is based on a decision that the procedure was not appropriate in light of the nature of right or property. It is not a problem of exigibility and another procedure would therefore be available.

Where the rights of bona fide third parties dealing with the judgment debtor after seizure may be prejudiced, great emphasis is placed on the method for seizure. The proposed legislation will expressly state a general principle as to what would constitute a proper seizure so as to defeat the claims of such third parties. The general principle would be applied in individual cases according to the direction of the court. However, for the sake of certainty, simplicity and efficiency, there will also be specific provisions for the seizure of identifiable types of property.

Finally, the District Enforcement Office may be faced with conflicting directions from different creditors as to how to realize on certain property of the judgment debtor. He will have a discretion to use the procedure that he believes will be

in the best interest of the creditors as a whole. Before reviewing the specific enforcement procedures for realization, we shall note briefly the enforcement procedure for determining what exigible property of the judgment debtor is available.

b) Information Concerning the Debtor's Property

Under the proposed system, the responsibility will fall on the judgment creditor to provide information to the District Enforcement Officer as to the debtor's exigible property. Both parties will be protected from liability so long as they are acting bona fide on reasonable grounds and belief. The system will provide sources of such information for the judgment creditor through specific enforcement procedures. There will be a written questionnaire under the proposed system. This written questionnaire, if properly used, should add to the efficiency of the system and reduce the costs for all parties. There will also be an oral examination before the District Enforcement Officer. This will be available at the request of a judgment creditor after a written questionnaire has been attempted.

c) Installment Orders

It is expected that the proposed Installment Order will play a significant role under the proposed system. It will permit creditors to satisfy their claim out of the debtor's future earnings. As well, it balances the creditor's rights with the right of the debtor to be able to maintain himself and his

family with the necessities of life in a manner that is not totally inconsistent with their condition in life. Further, the proposal recognizes the special needs of employees and gives them an opportunity to make the non-exempt portion of their income available to their creditors voluntarily.

The judgment creditor will request that the District Enforcement Officer make an Installment Order against the judgment debtor as one of the specific enforcement procedures available to him. This will be the only procedure available to reach what can be referred to as the judgment debtor's "income". "Income" here will be broad enough to include all remuneration for services as well as periodic payments that are otherwise exempt from execution, such as pension and disability payments. This "income" will generally be exempt up to 85%. The remaining 15% will be paid by the judgment debtor to the District Enforcement Officer pursuant to the Installment Order for distribution to the creditors. The 85% may be varied on application of the judgment creditor or judgment debtor depending on the circumstances. In light of the exemptions proposed to protect the other assets of the judgment debtor, there will not be a general stay of execution while the Installment Order is in force.

Wages will continue to be exempt from garnishment or other enforcement process so long as the judgment debtor continues to comply with the Installment Order. If there is a default in payment that is not due to circumstances beyond the control of the judgment debtor, this exemption will terminate. The Dis-

trict Enforcement Officer will take the steps necessary to ensure collection of the amount due under the Installment Order.

d) Order of Seizure and Sale

The judgment creditor may also request as a specific enforcement procedure that the District Enforcement Officer have non-exempt property seized and sold. This request, authorized by the Notice of Enforcement, will be made in a prescribed form to be called an Order of Seizure and Sale. When delivered, this Order will require the District Enforcement Officer to ensure that the available property is properly seized and sold. As previously noted, in most cases this will actually be effected by a sheriff. With a few minor exceptions, virtually all property can be realized on by sale including ordinary debts.

As previously noted, particular care was taken under this process with the requirements of seizure. Thus, in some cases a Notice of Seizure may have to be registered in an appropriate registry office. This requirement would be greatly simplified with a central computerized personal property security register integrated with the enforcement of judgments system.

e) Garnishment

In addition to the possibility of selling a debt as a method of realization as noted above, the proposed system has retained the usual method of collection through garnishment procedures. While the basic process is unchanged, there are some

changes in an effort to simplify the procedure and make it more efficient.

First, garnishment will be a specific enforcement procedure available from the District Enforcement Officer and not the court. The request to the Enforcement Officer will still have to be accompanied by an affidavit of the judgment creditor in support. The District Enforcement Officer will issue a Notice of Seizure to be served on the garnishee through the ordinary mail. While this may "bind" or "attach" the debt from the standpoint of the garnishee, further steps may be required to seize the debt and bind it as against third parties dealing with the judgment debtor.

The effect of services of the new Notice of Seizure on the garnishee is continuing in nature. No longer will garnishment be a one-shot remedy. It is also proposed to extend garnishment beyond existing debts so as to encompass contingent and conditional debts.

Together, these recommendations should greatly increase the utility and efficiency of the garnishment procedures.

f) Receiving Orders

The traditional equitable execution by way of appointment of a receiver will not exist under the proposed system. In its place there will be a new Receiving Order issued by the District Enforcement Officer as a specific enforcement procedure upon request from a judgment creditor. The new Receiving Order will

only be made where it is deemed the most practically convenient method of realization in light of the circumstances of the case. The nature of the property will be a very important consideration. With court approval, the power to manage the property may be conferred on the receiver. This procedure for realization may involve the sale, collection or enforcement of rights. It will be particularly appropriate where enforcement of rights involves the taking of legal actions on behalf of the judgment debtor with the fruits of such litigation to be made available to judgment creditors.

g) Other Procedures

The above specific enforcement procedures will be the only procedures available to realize on the judgment debtor's property. The use of post-judgment arrest of the debtor as a means of enforcing the judgment will continue. However, it will be outside the Enforcement Office and within the traditional jurisdiction of the court as provided under existing Rules of Court and other legislation.

IV. Execution Against Land

Due to the significance of land to most debtors and the special problems relating to the land registry system, care must be taken in realizing against this asset of the judgment debtor. The principle of universal exigibility will apply to land. The procedure to bind land will be the filing of the Notice of En-

forcement on the Central Registry. There will be no protection for bona fide purchasers and therefore the significance of seizure is minimized. A person dealing with the judgment debtor has been under an obligation to search title to land and that will continue. The scope of the binding will be to create a general lien against both present and after-acquired property of the judgment debtor.

The approach taken under the proposed system is an advantage to creditors because it also creates a general province-wide lien without requiring registration in each county land registry office. For potential purchasers of land, it is much easier to search this central list of names than searching the land registry books backwards and forwards for memorials of judgment today. Any inconvenience in searching another register to purchase land could be eliminated if the Central Registry of Enforcement were also used to obtain the necessary property tax certificate.

The actual sale of land under the enforcement system will be delayed for six months after the filing of the Notice. This should enable the judgment debtor to arrange financing to pay off his creditor if that is possible. Sale proceedings will be taken pursuant to a request sent to the District Enforcement Officer in prescribed form by the judgment creditor. The method of sale will be flexible with a discretion vested in the District Enforcement Officer to use the most appropriate method. This may include listing the property with a real estate agent.

There will be no exemptions for land except to provide for a two thousand dollar exemption to be retained from the proceeds of sale of a "residence". The purpose is to recognize the need for shelter and to ensure that this will be provided until more permanent suitable arrangements can be made. Continuing need for shelter will be met with the income exemption already discussed in the context of Installment Orders.

V. Exemptions from Enforcement

The first basic objective of the exemption provision is to ensure that property which is necessary in order for the debtor to maintain himself and his family is not taken in the enforcement process. In this regard, little change will be made from the present exemption provisions.

The second basic objective is to ensure that the debtor is left with sufficient income, broadly defined, to continue to provide the necessities for himself and his family. As explained earlier, there will be an exemption from all enforcement procedures for this income other than the Installment Order. Under this procedure, the judgment debtor will generally retain 85% of his income subject to variation by the District Enforcement Officer.

The third objective is to ensure, within reasonable limits, that the source of income for the debtor will be protected so as to ensure the continued flow of necessities. For example, the present "tools of the trade" exemption will continue slightly

expanded. So will the exemption for other funds intended to provide income when the debtor is unable to work. Therefore, pension funds, for example, will be exempt although payments from those funds will be treated as income when received.

Finally, it is recognized that the obligation to provide necessities to one's family does not terminate on death. Therefore, the present exemptions for life insurance policies and proceeds will continue. Also in this category will be pension funds transferred from the deceased to his surviving dependents.

VI. Distribution of Proceeds of Enforcement

The policy of pro rata sharing among judgment creditors will continue under the proposed system but will be expanded to a province wide basis. This will avoid the "get in quick" attitude among creditors and is thought to be a more equitable approach than "first come first served". Provisions will ensure that the proceeds from all enforcement procedures go to and are distributed by the District Enforcement Officer having control over execution against the judgment debtor. Other provisions will attempt to catch or control voluntary payments made by a judgment debtor to his creditors. The present thirty day period after a levy in which to qualify for a share in any distribution will also continue.

The issue of those entitled to a priority on distribution was considered. Generally, priority for Crown claims would be abolished where based solely on the common law prerogative

rights of the Crown. The claims of maintenance creditors would be paid on a priority basis, There would be a limited priority extended to landlords for arrears of rent. The final general priority would be for wage-claims. These wage claims would be dealt with initially through the machinery of the new Employment Standards Act and would not require a judgment before being entitled to share in any distribution.

VII. Special Creditors

Although all monetary claims should be integrated into the system if possible, there is at least one exception. The enforcement of maintenance claims pursuant to a Support Order under the Family Relations Act should remain within the administration of the Family Court thus maintaining the present automatic enforcement procedure. It will also maintain the personal relationship that develops between the parties and court officers. This combination of more or less informal and formal procedures appears to be quite effective. The only time the Enforcement Office will become involved is where there has been a default and a Certificate has been issued out of the Family Court. That Certificate will have the force of a judgment. A Notice of Enforcement can then be delivered to the District Enforcement Officer in the usual manner for execution.

Finally, consideration was given to providing a special priority for small claim judgment creditors. The primary concern here is to avoid the frustration that may be encountered,

particularly when the creditor is not represented by legal counsel. A small claims judgment does not guarantee payment of the claim. It is recommended that more information be provided to inform such creditors of the need and potential costs of enforcing their judgment. However, there is no need to extend a priority over other judgment creditors.

More can be done in the enforcement system to further the objective of permitting creditors to represent themselves, however. It has been recommended that the District Enforcement Officer automatically undertake certain specific enforcement procedures such as the written questionnaire and an Order of Seizure and Sale when a Notice of Enforcement on a small claims judgment is delivered where the creditor does not have legal counsel. The small claims creditor must be informed that he will, however, be responsible for any costs incurred as a result of these enforcement procedures.

C. CONCLUSION

The changes recommended constitute a specific proposal for a system of enforcement of monetary judgments, that is modern, uniform, coordinated, efficient and flexible. It should balance the legitimate interests of the creditors, debtors and third parties involved in the enforcement process.

A major aspect to this system is its province-wide scope. This is accomplished through a computerized central registry of

enforcement notices. This central registry permits province-wide binding of a judgment debtor's real and personal property and distribution of the proceeds of enforcement to judgment creditors on a province-wide basis. The system as a whole would be enhanced if it were part of a personal property security system since notice to third parties and priorities could easily be determined. The system would be further enhanced if real property tax information and certificates could also be obtained. A combined central computerized system as outlined would certainly facilitate commercial and real estate transactions with resulting benefits for the public generally. The cost to the government should be covered by reasonable user fees similar to those that presently exist.

With existing technology and the study that has already been done on reforming the enforcement system, a system of enforcement as proposed could be implemented in a relatively short period of time.

- 1 The area of exemptions from executions is an obvious exam-
ple.
- 2 New Brunswick Department of Justice, Law Reform Division,
Third Report of the Consumer Protection, Vol. II, Legal
remedies of the Unsecured Creditor After Judgment, (1976)
(hereinafter referred to as the Kerr Report).
- 3 Kerr Report, at p. 233.
- 4 Ontario Law Reform Commission; Report on the Enforcement of
Judgment Debts and Related Matters (Parts I, II and III,
1981; Parts IV and V, 1983) (hereinafter referred to as the
Ontario Report).
- 5 Ontario Report, at p. 3, Part I.
- 6 Ontario Report, at p. 77, Part I.
- 7 Ontario Report, at p. 1, Part I.
- 8 Kerr Report, see generally pp. 215-231.
- 9 Kerr Report, at p. 258.
- 10 Ontario Report at p. 5, Part I.