Recommended Changes to *Federal Courts Rules* regarding Enforcement
A Discussion Paper
July 17, 2013

Background

On May 11, 2012, a subcommittee was constituted at the Plenary Federal Courts Rules Committee meeting to: (1) identify in the enforcement provisions of the *Federal Courts Rules* which may be causing practical, procedural or legal difficulties; and (2) suggest any modifications to the Rules to resolve the problems with considerations of efficiency, consistency, access to justice and the sensible use of judicial resources in mind.

Issues and Recommended changes

The subcommittee convened several times to discuss a number of rules concerning enforcement (i.e., Rules 423-458) and issues of practical, procedural and legal concern. As a result of these discussions, the subcommittee recommends a number of changes to these rules as set out below.

For this discussion paper, the subcommittee identifies the following issues and rules for which it recommends changes:

(1) Should the process of writ renewal and the issuance of new writs be made an administrative procedure rather than a judicial one? (Rules 434-437)

(2) Should Rule 439(3) be amended by adding the words "any interested person" after the word "sheriff" so that both the creditor and the Sheriff are permitted to seek directions from the Court concerning enforcement issues? (Rule 439(3))

(3) Should garnishment procedures be administrative (e.g., requisition and issuance of a writ by the Registry upon certain conditions being fulfilled) rather than judicial (e.g. with the current show cause requirement)? (Rules 425, 449-457)

(4) Should Rule 426 be extended to allow the examination of third parties with leave of the Court ? (Rule 426)

(5) Should Rule 458 on Charging Orders be amended to allow charging orders against "moneys, currencies and other moveable assets", and should the words "any beneficial" be added before the word interest in paragraph 458(1)(a)(i)? (Rule 458)

(6) Should the Rules be amended to allow for the enforcement of domestic arbitral awards? (Rules 326-334)

(7) Should Rule 326(a) be amended to reflect the renumbering of sections of a statute? (Rule 326(a))

(1) Should the process of writ renewal and the issuance of new writs be made an administrative procedure rather than a judicial one? (Rules 434-437)

The subcommittee recommends that the process of writ renewal should be an administrative procedure, and the issuance of new writs should retain the requirement of leave of the Court. The current rule requires creditors to produce full motion records for leave to renew or to issue new writs, usually brought *ex parte*. There are rarely any objections to the renewal of writs, and the extra time and expense by the creditor in filing another motion record and the time required for judicial involvement in this renewal process appears to be unnecessary.

(2) Should Rule 439(3) be amended by adding the words "any interested person" after the word "sheriff" so that both the creditor and the sheriff are permitted to seek directions from the Court concerning enforcement issues? (Rule 439(3)**)**

The subcommittee recommends that this rule should be amended to allow the creditor also to seek directions from the Court. It was noted that in Ontario the sheriff is sometimes dilatory in taking certain steps on behalf of a creditor, including bringing a motion for directions. For instance, with the sale of property the sheriff is sometimes unsure as to how best to proceed and is reluctant to bring a motion.

It is less costly for a creditor to have its own counsel file a motion for directions than pay for the cost of the Sheriff's counsel to bring the motion. In addition, the creditor often has better background evidence on the debtor than the sheriff for a motion for directions.

(3) Should garnishment procedures be administrative (e.g., requisition and issuance of a writ by the Registry upon certain conditions being fulfilled) rather than judicial (e.g. with the current show cause requirement)? (Rules 425, 449-457)

The subcommittee recommends that the procedure should be made more administrative in nature: this includes doing away with the show cause hearing and making the writ requisition an administrative rather than a judicial procedure: see **Annex A** for the specific detailed recommendations.

(4) Should Rule 426 be extended to allow the examination of third parties with leave of the Court? (Rule 426)

The subcommittee recommends that this rule should be amended to allow the examinations of third parties with leave of the Court. Leave would have to be sought by way of a motion and the same requirements as are set out in Rule 238(3) should first be satisfied.

This change would provide a quicker method for obtaining relevant information on the debtor from third parties than issuing a Requirement For Information to third parties under the *Income Tax Act* and then resorting to a compliance motion under section 231.7 of that Act.

(5) Should Rule 458 on Charging Orders be amended to allow charging orders against "moneys, currencies and other moveable assets", and should the words "any beneficial" be added before the word interest in paragraph 458(1)(a)(i)? (Rule 458)

The subcommittee recommends that there should be no change to allow charging orders against "moneys, currencies and other moveable assets", but that there should be the change to add the words "any beneficial" before the word "interest" in Rule 458(1)(a)(i).

The language of rule 458 on charging orders has led to some confusion on its application: see *Canada v. Malachowski* 2011 FC 413. The word "beneficial" should be used in both rules 458(1)(a)(i) and 458(1)(a)(ii) so that the language clearly reflect a creditor's ability to charge a debtor's beneficial interest in all assets listed.

(6) Should Rules 326 to 334 be amended to allow for the enforcement of domestic arbitral awards? (Rules 326-334)

The subcommittee recommends that these rules should be amended to make clear that they apply to a domestic arbitral award covered by s. 5(2) of the *Commercial Arbitration Act*.

Rule 326 references the *Commercial Arbitration Act*. Article 35 of the Code, which is attached as a schedule to the *Commercial Arbitration Act,* appears to apply to an arbitral award made in Canada in either a maritime or admiralty matter or where Her Majesty in right of Canada, a departmental corporation or a Crown corporation is a party. The Code applies, for the most part, to arbitrations in Canada.

Rules 326 – 334 appear to be limited to a "foreign judgment" which includes an "arbitral award". While it may be arguable that the reference to Article 35 of the Code in the definition includes a domestic award, the language used throughout the Rules suggest otherwise. The *Commentary* of the Federal Courts Practice of 2011 suggests that: "There is no provision for registering and enforcing arbitral awards made in Canada."

It would be useful from a practitioner's perspective to be able to enforce a domestic maritime arbitration award through the Federal Court.

(7) Should Rule 326(a) be amended to reflect the renumbering of sections of a statute? (Rule 326(a))

The subcommittee recommends that the reference to "sections 63-71 of the *Maritime Liability Act*" in this paragraph be updated and amended to refer to "sections 80-89 of the *Marine Liability Act"*.

Under the definition of "foreign judgment" in Rule 326(a), there is reference to sections 63-71 of the *Marine Liability Act*. The *Marine Liability Act* was amended in 2009 and the former sections 63-71 are now found at sections 80-89. The Rule should be amended to identify this change as the current sections 63-71 have nothing to do with obtaining or enforcing of an award or judgment.

It will be useful to have further commentary and discussion of the above issues from counsel who make use of these rules so that all practical, procedural and legal issues can be taken into account before any changes are made.

Please send your comments by the end of September 2013 by mail or email to:

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