



# The Advocates' Society

PROMOTING EXCELLENCE IN ADVOCACY

## VIA E-MAIL

September 30, 2013

Ms. Marie-Claire Perrault  
Acting Secretary for the Rules Committee  
Federal Court of Appeal  
90 Sparks Street  
Ottawa, ON K1A 0H9

Dear Ms. Perrault:

**Re: Comments on the Discussion Paper dated July 17, 2013 of the Subcommittee on the *Federal Courts Rules Regarding Enforcement***

I write as chair of the Federal Courts Rules Task Force of The Advocates' Society ("TAS") to provide comments on the Discussion Paper dated July 17, 2013 of a Subcommittee of the Plenary Federal Courts Rules Committee which was constituted to (i) identify the enforcement provisions of the Federal Courts Rules that may be causing practical, procedural or legal difficulties; and (ii) suggest any modifications to the Rules to resolve such problems bearing in mind considerations of efficiency, consistency, access to justice and the sensible use of judicial resources.

TAS did not identify any enforcement provisions in need of amendment in addition to those identified by the Subcommittee in its Discussion Paper. With respect to the changes recommended by the Subcommittee, TAS agrees that the Subcommittee's recommended changes would result in sensible improvements to the enforcement rules. As discussed below, in two instances, TAS believes the Subcommittee's recommended change should be nuanced to achieve the purpose identified.

**Issue #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)**

TAS agrees with the Subcommittee's conclusion that issuance of a new writ should continue to require leave of the Court but that the Rules should be amended to provide an administrative procedure for renewal of writs. TAS believes that this recommendation if implemented will result in an appropriate degree of judicial supervision to obtain the original writ, while the administrative process for renewal would free up judicial resources and reduce the cost of obtaining a renewal.

---

**Issue #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))**

Rule 439(2) permits the sheriff to seek directions from the Court concerning any issue not addressed by the Rules that arises from enforcement of an order. The Subcommittee has recommended that the provision be amended to permit a judgment creditor to seek directions from the Court in the same circumstances as the sheriff.

TAS believes the Rule should be amended to permit any interested person to seek direction of the Court in such circumstances (rather than limiting this right to judgment creditors as suggested by the Subcommittee). This would permit the judgment debtor as well as the judgment creditor to move for direction from the Court. TAS agrees that the words “and any interested person” should be added after “sheriff” with the aim of achieving this goal.

**Issue #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 current garnishment proceedings call for a high degree of Court intervention in garnishment proceedings. The Subcommittee has recommended that garnishment procedures should be made more administrative and has set out in Annex A to the Discussion Paper the suggested scope and wording of the various Rules relating to garnishment.

TAS agrees that the current Rules relating to garnishment require an unnecessarily high degree of judicial intervention. TAS also agrees that the Rules dealing with garnishment as currently drafted are inadequate and resort must often be had to the “gap rule”, which is unsatisfactory. TAS agrees this should be remedied.

Therefore TAS agrees with the Subcommittee’s recommendation that the garnishment procedures be administrative rather than judicial and agrees with the approach set out in Annex A. The recommended changes would bring the garnishment proceedings closer in line with those under Rule 60.08 of the Ontario *Rules of Civil Procedure*. TAS has no suggestions for further or other changes than those the Subcommittee has identified in Annex A to the Discussion Paper.

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

Rule 426 as presently drafted permits a person who has obtained a judgment for the payment of money to conduct an examination of the judgment debtor. The Subcommittee has recommended that Rule 426 be amended to permit the examination of third parties with leave of the Court by way of motion, noting that this amendment would provide a quicker method for obtaining relevant information about the judgment debtor from third parties than issuing a Requirement for Information to third parties under the Income Tax Act and then bringing a compliance motion under s. 231.7 of that Act.

TAS does not disagree with the Subcommittee’s recommendation.

---

**Issue #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)**

Rules 458 to 465 establish the procedure for obtaining a charging order for the purpose of enforcing an order for the payment of an ascertained sum of money. As currently drafted, on an *ex parte* motion brought by the judgment creditor, the Court may make an interim charging order over real property (R. 458(1)(a)(i)) or securities (R. 458(1)(a)(ii)).

The Subcommittee decided not to recommend an amendment of Rule 458 to permit charging orders against “monies, currencies and other assets”, although the basis of this decision is not discussed. The Subcommittee recommended only that the Rule be amended to specify that the charging order should be with respect to “any beneficial interest” in real property and securities.

TAS agrees with the recommendation made by the Subcommittee with respect to amending the Rule to specify a charging order covers the judgment debtor’s beneficial interest in real property and securities. TAS wishes to understand more fully the rationale for the decision of the Subcommittee not to recommend an amendment to permit charging orders against “monies, currencies and other assets” of the judgment debtor. If there is a further round consultation, TAS would appreciate receiving clarification from the Subcommittee on this point.

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

Rules 326 to 334 govern registration and enforcement of foreign judgments and arbitral awards which may be registered in a Court in Canada under the listed statutes which include articles 35 and 36 of the *Commercial Arbitration Code* (“CAA”).

For the reasons outlined by the Subcommittee in the Discussion Paper, assuming there are no constitutional issues (ref. *McNamara Construction v The Queen*, [1977] 2 SCR 654 and *Rhine v The Queen*, [1980] 2 SCR 442), TAS supports an amendment that makes it clear that Rules 326 to 334 apply to a domestic arbitral award covered by s. 5(2) of the CAA.

TAS notes that the Subcommittee’s reference to domestic maritime awards in the final paragraph of this section of the Discussion Paper could appear to be a limit on the Subcommittee’s recommendation. TAS’s support of the recommendation is not limited to enforcement of a domestic maritime award.

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

TAS agrees the Rule should be amended to take care of this housekeeping matter.

\* \* \* \* \*

---

We would be pleased to answer any questions the Subcommittee may have about the above.

Yours very truly,



Nancy Brooks  
Chair, TAS Federal Courts Rules Task Force

**TAS Federal Courts Rules Task Force Members**

Nancy Brooks (Chair)  
Peter K. Doody  
Barbara Jackman  
Barbara McIsaac, Q.C.  
Arthur Renaud  
David Yazbeck