

Enforcing Judgments through the Sale of Real Property: Modern Solutions to Traditional Impediments

The Traditional Model: Enforcing Judgments through the Sheriff's Sale Process

So you've obtained a judgment against a debtor that owes you a significant amount of money but refuses to make payments. In traditional fashion, you obtain a writ of execution with the understanding that the sheriff will seize and sell the judgment debtor's house or any other real property owned by the debtor as a means of satisfying the judgment. Obviously, this situation represents a worst case scenario to an extent, but is often the only avenue available to a creditor when faced with an uncooperative debtor.

As part of the usual enforcement process in selling real property, as creditor, you first request a mortgage discharge statement from any relevant mortgagees with mortgages registered on title. This phase of the process is in fact necessary as it allows the sheriff to identify outstanding balances owed to various third parties – debts that will influence the distribution of the property pie. You assume this will not be a significant hurdle until the mortgagees are contacted and refuse to provide a discharge statement without the debtor's consent. The root of the mortgagee's reluctance is simple: according to federal privacy laws the statements contain "personal information" of the debtor such that their disclosure is prohibited, absent consent. Not surprisingly, the debtor has little incentive to grant such permission, as they are likely in no hurry to assist or push the process along. The practical implication is that you are now forced to engage in examinations in aid of execution of the debtor to obtain the information you need, which can be protracted, inefficient and expensive, with no assurance of a positive end result.

A Novel Alternative: Enforcing Judgments through Judicially Supervised Sales

Such was the state of Ontario's judgment enforcement execution regime until late 2015. Enter the recent case of *Canaccede International Acquisitions Ltd v Abdullah*, delivered on September 9th, 2015, which has potentially redefined the model to be applied by judgment creditors in pursuing the enforcement of unsecured judgments through the sale of a debtor's real property. In *Canaccede*, the applicant was a judgment creditor of five named respondents, all of whom chose not to oppose the proceedings. Based on the applicant's submissions, the Court considered the viability of approving a judicially supervised sales process as a means of circumventing the pitfalls associated with the traditional sheriff's sale process. The Court conceded that such an approach

has never before been endorsed, but also made note that there is no provision in the Execution Act that imposes the sheriff's sale model as an exclusive and absolute prescription. Rather, based on the doctrine of equitable execution and the court's inherent jurisdiction to "make an appropriate order that will do justice between the parties," the Court ruled that a judicially supervised sales process may constitute the preferred approach in many cases.

In that regard, the Court held that:

- 1) as a prerequisite to seeking an order for sale from the court, an order must be obtained directing a reference hearing to delineate the issues and establish the proper procedure to be followed in conducting the sale of the property; and
- 2) assuming that the referee determines that the respondent(s) have an interest in the land that may be sold to satisfy the debt, an order for sale by private contract must follow.

The initial reference hearing would involve all interested parties, including any mortgagee(s), who must disclose mortgage discharge statements to the creditor(s) as a natural byproduct of the hearing in order to get paid. Thus, the process potentially sidesteps the privacy issues that tend to bog down the traditional model. This procedure also preserves the rights of the respondents and others with an interest in the land to show cause as to why it would be unjust or inequitable to require the sale. Therefore, practically speaking, fairness between the parties is not impinged, while access to justice for judgment creditors is heightened.

The Present Climate: Analyzing the Impact of *Canaccede*

It is noteworthy to point out that *Canaccede* was heard by the Ontario Superior Court of Justice and was not appealed by the respondents. Additionally, relatively recent case law has diverged from the ruling in *Canaccede*. For example, in the case of *Royal Bank of Canada v Trang*, the Ontario Court of Appeal affirmed that, absent consent, mortgage discharge statements constitute "personal information" and are therefore protected from disclosure and production by a third party mortgagee. The Court of Appeal promoted the traditional model, ruling that creditors can include consent terms within their loan agreements in an effort to pre-empt the possibility of consent issues arising following a default. Clearly, this method can only be harnessed if the creditor turned their mind to the issue during loan negotiations.

Although *Trang* was delivered 9 months prior to *Canaccede*, it has not been overturned such that it is arguably binding authority for lower courts such as that in *Cannaccede*. Perhaps more fundamentally, the Court in *Cannaccede* admitted that the process it endorsed is not rooted in established practice. Rather, its foundation rests upon the notion of using the common law as an evolutionary tool to meet and overcome legal and practical impediments that lack substantial utility. In the circumstances, it is difficult to determine which approach will gain popular support moving forward.

Future Developments: the Ultimate Authority of the Supreme Court of Canada

The answer as to which approach will govern will be delivered in definitive fashion by the Supreme Court of Canada (the “SCC”) in the coming months. This is because the applicants in *Trang*, unlike the respondents in *Canaccede*, sought leave to appeal their case, which was granted on July 16th, 2015. The appeal has been tentatively set for an April 27th, 2016 hearing date. At the time leave to appeal was granted, *Canaccede* had not yet burst onto the

legal scene. Now, it carries the potential to influence any decision reached by the SCC with respect to the proper approach to be endorsed and followed when enforcing unsecured judgments against a judgment debtor’s real property.

While there are no guarantees in the appellate process, it is clear that the traditional model employed by many creditors in enforcing judgments, at least with respect to third parties, has been fundamentally disturbed. Until the dust settles, judgment creditors should consider the position promoted by *Canaccede* in implementing the execution of their unsecured judgment(s), rather than passively acquiescing to the costly and inherently unpredictable sheriff’s sale process.

Stay tuned...

¹ 2015 ONSC 5553 (*Canaccede*).

² 2014 ONCA 883 (*Trang*).

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