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practical tools to improve interprovincial enforcement of maintenance orders after divorce

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Canada

PRACTICAL TOOLS TO IMPROVE INTERPROVINCIAL ENFORCEMENT OF MAINTENANCE ORDERS AFTER DIVORCE

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PRACTICAL TOOLS TO IMPROVE INTERPROVINCIAL ENFORCEMENT OF MAINTENANCE ORDERS AFTER DIVORCE

A Study Paper

Prepared for the

Law Reform Commission

by

C. Myrna Bowman

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Foreword

In August, 1980, at Montréal, The Canadian Bar Association, during its Sixty-Second Annual Meeting, passed the following two resolutions among others:

RESOLUTION NO. 2

WHEREAS there is a need to improve the methods for enforcing payment of maintenance ordered pursuant to the *Divorce Act* (Canada), where the debtor spouse resides in a different province from the creditor spouse;

AND WHEREAS the use of continuing Garnishing Orders has been a very effective means of enforcing maintenance payments;

AND WHEREAS the *Divorce Act* provides that a decree *nisi* may be registered in any superior court in Canada and thereafter may be enforced as a judgment of that court;

AND WHEREAS the Federal Court of Canada is a superior court having jurisdiction throughout Canada;

THEREFORE BE IT RESOLVED that the Canadian Bar Association endorse the proposal now being considered by the Law Reform Commission to make available the continuing Garnishing Order in cases where the debtor and creditor spouses live in different provinces, by appropriate amendment to the *Divorce Act* to provide that the court which made the maintenance order, or any court in which the order is registered under Section 15 of the Act, may enforce that order by a continuing Garnishing Order and that such Garnishing Order will be binding upon an employer anywhere in Canada, subject to the exemptions from seizure or attachment applying in the province in which the debtor spouse is employed.

– and –

RESOLUTION NO. 3

WHEREAS there is a need to improve the methods for enforcing payment of maintenance ordered pursuant to the *Divorce Act* (Canada);

AND WHEREAS many taxpayers are entitled to receive a refund of tax payments upon filing their annual Income Tax Returns;

THEREFORE BE IT RESOLVED that the Canadian Bar Association endorses the proposal now being considered by the Law Reform Commission that the *Income Tax Act* be amended to provide that the

Minister of National Revenue be bound by a Garnishing Order or a Receiving Order granted by the court of any province to enforce the payment of maintenance ordered to be paid by the taxpayer.

Both resolutions refer to "the proposal now being considered by the Law Reform Commission". This study paper expresses the proposals to which reference is made in the resolutions of The Canadian Bar Association.

This study was undertaken for the Commission in 1979 by Mrs. C. Myrna Bowman, a barrister of Winnipeg. Conscious of obstables — both constitutional and procedural — impeding the enforcement of maintenance ordered pursuant to the *Divorce Act*, where the debtor spouse resides in a different province from the creditor spouse, the Commission perceived a growing social problem which is generated by those very obstacles. It seemed that the social problem could, in some measure at least, be alleviated by legislative reform directed to obviating the legal difficulties. To that end, this study was commissioned. The three proposals expressed herein are surely no cure-all to the social problem, but if implemented, would go some distance towards reducing its impact on those who require maintenance after a divorce has put asunder the adult principals of a family.

The basic notion on which Proposal I proceeds is as follows:

1. Divorce being within the legislative powers of Parliament pursuant to section 91(26) of *The B.N.A. Act*, the *Divorce Act* is clearly one of "the laws of Canada" as that expression is interpreted in section 101 of *The B.N.A. Act*.

2. The *Divorce Act* provides, by section 14, that an order made under section 10 or 11 (corollary relief) has legal effect throughout Canada, and by section 15, that such order may be registered in any other superior court in Canada and may be enforced in like manner as an order of that superior court.

3. The Federal Court of Canada is a court created by Parliament pursuant to section 101 of *The B.N.A. Act* for the better administration of the laws of Canada and the *Federal Court Act* provides, by section 3, that the Federal Court is a superior court of record having civil jurisdiction.

4. By appropriate legislation and rules of court, maintenance orders made under the *Divorce Act* could be enforced transprovincially by garnishment process issued in the Federal Court, just as expeditiously and inexpensively as such orders

can now be enforced entirely within the province whose superior court made the orders.

There are two salient reasons for developing the above-mentioned sequence of legal reasoning leading to the proposal for enforcement by garnishment process of the Federal Court.

First, there are the difficulties encountered in enforcing and collecting maintenance when the maintenance debtor moves out of the province in which the Decree *nisi* was granted. Those difficulties comprehend the undue technicality of procedures, expense and delay. They frequently impose intolerable frustration upon the spouse and the children for whose benefit the maintenance was awarded and, almost as frequently, these people unwillingly become a charge upon the welfare program of the province. The end result, all too often, is that the person adjudged to have both the means and the responsibility to pay maintenance escapes entirely, and the burden is shifted to the taxpayers of the province who, after all, provide the revenue for provincial welfare.

Second, the increasing mobility of the population makes the above described scenario occur with increasing frequence. Analytical studies entitled "The Frequency of Geographic Mobility in the Population of Canada", 1978, prepared at the request of and published by Statistics Canada amply support the above contention. These studies indicate not only that the mobility rate of Canadians (especially those whose mother tongue is English) is higher even than that of our neighbours in the U.S.A., but also that "among the ages where most geographic mobility takes place, persons who were once married but were no longer living with their spouses at the time of the 1971 Census had consistently higher than average mobility rates" (p. 31). Again, "changes in marital status often entail or are otherwise associated with geographic mobility" (p. 32).

The present obstacles to enforcement of maintenance under the *Divorce Act* evince no paramount virtue in and of themselves: they thwart social values expressed by Parliament in the *Divorce Act*; and they result all too frequently in both individual and collective injustice by permitting evasion of individual responsibility which must then be borne by others.

There are two other proposals which also merit consideration. Proposal II envisages amendment of the *Divorce Act* to give direct trans-provincial reach to the garnishment process of the provincial

superior courts. Proposal III would permit garnishment of any unpaid income tax refunds in the hands of the Minister of National Revenue, but without violating any confidentiality owed to the taxpayer/judgment debtor.

There may be some people, perhaps more enamoured of complex legal procedures than of social justice, who will protest that the proposals expressed here are draconian. However, it should be borne in mind that these proposals are directed toward the realization of greater efficacy in the trans-provincial enforcement of maintenance orders. Maintenance orders, quite unlike judgments awarding damages for tort, are predicated upon the debtor's ability to pay in the first instance and, if the debtor's or the creditor's circumstances subsequently change, the maintenance order may be judicially varied upon tendering proper evidence of the changed circumstances. Augmenting the efficacy of trans-provincial enforcement by lawful means, then, can hardly be objectionable.

It is true that this study has been effected at the very time at which the transfer of jurisdiction over marriage and divorce, by constitutional amendment, has been mooted in meetings of federal and provincial first ministers and their officials. That historical fact is a pure coincidence. However, surely no apology is needed for this consideration of proposals for reform of the law in the legal and constitutional situation which actually exists in Canada.

The Commission consulted with members from every province of the Family Law Section of The Canadian Bar Association on May 30, 1980, in Ottawa. That consultation group could not of course speak for The Canadian Bar Association as its plenary session did, for example, in August, 1980. Cognizant, however, of the constitutional discussions concerning jurisdiction over marriage and divorce, that group of family law practitioners requested the Commission to transmit to the federal Minister of Justice its unanimous opinion that:

> whatever disposition be made of legislative jurisdiction over marriage and divorce, there ought to remain some federal umbrella enforcement provisions in Canada's Constitution so that Parliament could make laws for effective transprovincial enforcement of maintenance throughout Canada.

The Commission duly transmitted that expression of opinion to the minister a few days after the meeting.

The family law consultative group was concerned that something more than a mere "full-faith-and-credit" clause ought to be implanted

in an amended constitution. It wanted specific legislative jurisdiction over trans-provincial enforcement to remain in and with Parliament. The consultative group considered the legal and constitutional system which *might* come into being. The proposals expressed in this paper are formulated as practical reforms in the legal and constitutional system which is *actually* in being.

These proposals merit at least consideration and discussion because of the unjustifiable frustrations of maintenance enforcement which our legal system now countenances. It is high time to address these problems and to redress the injustice which they perpetrate.

Francis C. Muldoon, Q.C.,
Chairman,
Law Reform Commission of Canada.

Ottawa
December, 1980

Introduction

The enforcement of maintenance orders must, in legal circles, rival the weather as a subject for endless discussing having little or no effective result. The problems of enforcement are legion and complex; and the proposed solutions are many. The purpose of this paper is to discuss three limited and practical proposals for changes to existing law to improve enforcement of maintenance orders made under the *Divorce Act* where the debtor resides in a province other than that where the maintenance order was made.

The *Divorce Act*[1] provides, in sections 10 and 11, for the making of orders, *inter alia*, for the maintenance of a former spouse and/or the children of the marriage. Section 14 of the same Act provides:

> **14.** A decree of divorce granted under this Act or an order made under section 10 or 11 has legal effect throughout Canada.

This fine statement of principle, however, is not easy to put into practice. Since, traditionally, the Courts of one province regard those of any other as "foreign Courts" in the same way as those of some other country, something more is necessary to give meaning to the statement of section 14.

The drafters of the *Divorce Act* did make some further attempts in the desired direction, chiefly in section 15:

> **15.** An order made under section 10 or 11 by any court may be registered in any other superior court in Canada and may be enforced in like manner as an order of that superior court or in such other manner as is provided for by any rules of court or regulations made under section 19.

and paragraph 19(1)(*d*):

> **19.** (1) A court or court of appeal may make rules of court applicable to any proceedings under this Act within the jurisdiction of that court, including, without restricting the generality of the foregoing, rules of court
>
> . . .

(*d*) providing for the registration and enforcement of orders made under this Act including their enforcement after death; . . .

Experience has demonstrated to the practising lawyer and disenchanted former spouse that the existing provisions are not adequate in themselves to make it practically feasible for an ex-wife in, say New Brunswick, to collect maintenance from her former husband in Alberta, unless she is possessed of such an embarrassment of riches with which to pay legal costs as would seem to obviate the need for maintenance.

The other principal means of enforcement is through the provincial statutes whereby reciprocal arrangements are in place to enforce maintenance orders granted elsewhere under the *Divorce Act* or under the provincial maintenance laws. Experience has demonstrated that this legislation operates slowly and ineffectively, often taking years before the defaulting spouse pays anything. In many provinces such proceedings appear to enjoy a low priority in the Attorney General's Office and a resourceful and imaginative defaulter can prolong proceedings for years without paying a penny.

Any practising lawyer knows that the most simple, inexpensive and effective means of collecting maintenance (or any other debt) is through a garnishing order on the wages of the debtor. Where the debtor is employed in the same province where the decree *nisi* was granted, this method is readily available. However, in many provinces, no special provisions are made for enforcement of maintenance orders, and the only garnishment provisions are for the traditional "one shot" garnishing order, which when applied to wages, attaches only the wages due or accruing due within a limited period, usually seven days, after service upon the employer. It is thus necessary to repeat the process for each month's maintenance payment, which can result in prohibitive cost to the judgment creditor.

In a few provinces, such as Manitoba, garnishment rules applying to enforcement of maintenance orders are treated somewhat differently. Since 1974, in Manitoba, maintenance orders are enforceable by an "everlasting" garnishing order,[2] which attaches not only wages due or accruing due within seven days after service, but continues in force so that the employer continues to deduct the monthly payments from the debtor's wages so long as he remains in that employment. The payments are forwarded directly to the judgment creditor, or at her option to the Provincial Judges Court (Family Division). This

procedure is simple, cheap and effective, and in the five years since it was enacted, has given rise to no serious problems.

Where the defaulter resides in another province, the problem is compounded. The judgment creditor wishing to attach wages must register her order in that province, as provided in section 15, and then proceed in accordance with the law, rules and practice of the court of that province. This almost certainly requires that a lawyer in that province be retained to carry out the necessary procedures, as well as the original lawyer who must continue to be involved in the original jurisdiction in order to supply information, prepare and have executed the necessary affidavits, etc. Should the judgment debtor wish, in many provinces he would have the right to apply in his own province to have the terms of the garnishing order varied or suspended. In such case, the judgment creditor must oppose those proceedings, possibly necessitating personal attendance in the other province and certainly incurring hundreds, if not thousands of dollars of legal cost.

Is it any wonder that many persons entitled to receive maintenance simply give up, and either resign themselves to dependence on welfare, or accept a standard of living for themselves and their children far below that which fairness and justice (to say nothing of the law) entitles them?

Is there any way around this impenetrable legal thicket, created in large part by the fact that we have a federal, rather than a unitary state?

Proposal I

The first pathway suggested to circumvent the problems described, *supra*, lies through the Federal Court of Canada. It is acknowledged that at present some critics are suggesting that the jurisdiction of the Federal Court be greatly restricted or even abolished. Without commenting on these suggestions, the writer is of the view that we who have the mixed blessing of a federal state must perforce be sufficiently ingenious to utilize whatever institutions and methods currently exist to deal effectively with problems which necessarily arise from divided jurisdiction.

The *Federal Court Act*,[3] by the provisions of section 3, constitutes the Federal Court of Canada in the following terms:

> **3.** The court of law, equity and admiralty in and for Canada now existing under the name of the Exchequer Court of Canada is hereby continued under the name of the Federal Court of Canada as an additional court for the better administration of the laws of Canada and shall continue to be a superior court of record having civil and criminal jurisdiction.

It is clearly a superior court as contemplated in section 15 of the *Divorce Act*, wherein maintenance orders granted under section 10 and section 11 of the Act may be registered. After registration, the order may be enforced "in like manner as an order of that superior court or in such other manner as is provided for by any rules of court or regulations made under section 19".

The discussion earlier in this paper advocates garnishment of wages, and especially continuous garnishment, as an effective means of enforcement of maintenance orders. The next logical question is why should not the Federal Court enforce maintenance orders by this means, with a procedure expressly designed for maintenance orders as distinct from other civil judgments.

There appears to be no reason why such a procedure cannot be devised and implemented by the addition of new Rules of the Federal

Court. A brief inspection of the present Rules (Rules 2300-2302) annexed, and Reasons for Order in *Patricia Joan Supeene, formerly Patricia Joan Beech, and Edward John Beech*, annexed, illustrate the difficulties encountered by a creditor under the traditional approach to garnishment.

In considering what procedure would be appropriate, the essential fact to be borne in mind is that a maintenance order differs from other civil judgments in three ways:

(a) it is an ongoing liability, accruing usually on a monthly basis;

(b) it is an order made after a consideration, as required in sections 10 and 11 of the *Divorce Act*, "of the condition, means and other circumstances" of the judgment debtor — in other words, a court has already considered his financial circumstances and determined that the payment required is, in fact, within his means. Such is not the case in other civil judgments;

(c) the continuation and quantum of the obligation are subject to variation by the court that made it, if the circumstances of the parties change.

An additional point to remember in discussing this subject is that although registrable and enforceable throughout Canada, a decree or order under the *Divorce Act* may only be varied or rescinded "by the Court that made the order" (sec. 11). A number of cases, most recently the Ontario Court of Appeal in *Re: Blane v. Blane*[4] and *Ramsay v. Ramsay et al.*,[5] have established that the section is to be taken literally, and that the courts of other provinces have no jurisdiction to vary or rescind a decree *nisi* made in one province.

Against this background, new Rules are proposed for the Federal Court to provide a procedure for continuing garnishing orders. The proposed new Rules are contained in Appendix C together with sample forms of Affidavit, Order and Memorandum.

The salient features of this proposal should be assessed on a consideration of:

1. effectiveness in collection;
2. minimization of cost and effort for the creditor;
3. avoidance of any injustice to the debtor.

These features are:

(a) The order is obtained *ex parte*, and personal service of the order upon the debtor is not required.

The *ex parte* nature of the order is common to most garnishment rules, including the present Rules of the Federal Court. To require notice by personal service upon the debtor in maintenance matters frequently places an onerous and expensive burden upon a creditor. Some such debtors deliberately evade service and conceal their whereabouts, others move frequently. The expense and time spent on personal service might well render the whole process fruitless for a parent who desperately needs the maintenance payments to help put food on the table. Where the debtor's wages are garnished, one can rest assured that he will notice it immediately, and will be readily able to learn the reason from his employer. It is suggested that the employer is in a far better position than anyone else to ensure prompt delivery to the debtor of a copy of the Order and Memorandum, and that no injustice will result to the debtor.

(b) The Order will attach wages due within one calendar month of the date of service. This provision obviates the problem of discovering when "pay day" is in any given business. Few, if any, employees are paid less often than once per month.

(c) There is no attachment of arrears beyond two months. The purpose of this proposal is to establish and maintain continuity of payments for the future, rather than to collect accumulated arrears.

Where payments have ceased after a debtor moves to another province, two months seems a reasonable period within which a diligent creditor might attempt to locate him and his employment and undertake the proposed garnishment. The arrears, if collectible, would enable the creditor to catch up on missed mortgage payments, etc. To enforce greater arrears by this method would, it is suggested, pose two risks:

(i) the debtor would be more likely to leave his employment in order to escape a long period when his work would earn him only the $200.00 exemption per month; and

(ii) the enforcement of lengthy arrears could result in injustice to a debtor, where the creditor had slept on her rights. The law generally tends to limit enforcement of arrears in

such circumstances, and it is therefore suggested that the continuing garnishing order is an inappropriate method of dealing with accumulated arrears.

(d) Payment is made directly to the creditor. This is an important feature of the proposed Rules, since it avoids the usual cumbersome and expensive process of payment into court, then notice of motion for payment out, Affidavit in support, to be served upon the debtor and a court appearance and a subsequent order for payment out. In many cases a "one shot" garnishing order utilizing such process, costs more in legal fees (even where the debtor is living in the same province and readily locatable) than the payment realized. In addition to the expense, that process causes weeks and sometimes months of delay before vitally needed maintenance moneys reach the creditor and her children. Does the new procedure prejudice the debtor? It is difficult to see how it would. The maintenance order which is the foundation of the garnishing order is current and ongoing, and made after determining it is within the debtor's means to pay. The suggested Affidavit eliminates the most obvious potential injustice of ongoing garnishment — a spouse who has remarried or children no longer dependent or no longer in the care and control of the creditor. If any injustice results from a change in circumstances of the debtor, surely the onus lies upon him to apply to the appropriate Court to vary that order, and until he does so, the order should continue to be enforceable at the lowest cost to the creditor.

(e) The exemption provided to the debtor will be $200.00 per month or the amount provided under the law of the province where the debtor resides, whichever is greater.

The present Rule 2300 (6) provides:

RULE 2300. ATTACHMENT OF MONEY

. . . .

(6) Where the debt due or accruing due to the judgment debtor is in respect of wages or salaries, no portion thereof that is exempt from seizure or attachment under the law of the particular province is attached by virtue of any order made under this Rule.

The suggested $200.00 per month minimum exemption is an additional protection for a debtor in the event that any province has an inordinately low exemption (for example, in Manitoba the present

exemption in maintenance matters is $100.00 per month, although a bill is presently before the Manitoba Legislature to increase this to $250.00). It should be remembered that the debtor would ordinarily be reduced to this level of income only until the two months' arrears are paid up, after which his income would be reduced only by the amount of the ongoing monthly maintenance.

(f) Payments will continue to be deducted and forwarded to the creditor so long as the order remains in effect and the employment continues.

This, of course, is the central advantage of the Proposal — that it operates to enforce future payments, at no additional cost. It is clearly an effective and low-cost procedure. No injustice to the debtor is foreseen since his ability to pay and his ongoing legal obligation to pay are already determined. Where circumstances have changed so as to render variation equitable, he has the right and opportunity, and the Memorandum so informs him, to go back to the court which imposed the obligation and seek that variation. Until he does so, however, the law should operate on the assumption that the entitlement of the creditor to maintenance and the ability of the debtor to provide it, continue.

There may be some who consider such monthly deductions to be an undue hardship on the employer. In Manitoba no such complaints have been made by employers, perhaps because the existing federal and provincial laws already require so much administrative effort by employers that one additional drop in the bucket goes unnoticed. In any case, it is suggested that the burden is not so onerous, since such garnishment will be relatively rare in any one business, and any cost factor is more than offset by the saving to the community at large where effective enforcement enables a family to be independent of public assistance.

Would amendment of the Federal Court Rules as proposed be constitutionally offensive? In the opinion of R. D. Gibson, Appendix D, some question is raised, but it is submitted that the concern expressed is unfounded.

Parliament has created the Federal Court by virtue of Section 101 of *The British North America Act* "for the better administration of the laws of Canada",[6] and the Supreme Court of Canada has declared that the court's jurisdiction is limited to matters concerning which there is a distinctive body of federal law.[7] The court is, by the

terms of its statute, a superior court of law and equity "for the better administration of the laws of Canada".

The Proposal here described relates directly to a substantive body of federal law — divorce law.

Garnishment is a method of enforcement, a matter of practice and procedure, rather than substantive law. Garnishment never exists in a vacuum, as a right *per se*, but is merely a method of enforcing an established substantive right. The power of attachment is one which is enjoyed by a superior court of record as part of its control[8] over its own process. It goes with the territory. That it was contemplated that the Federal Court should have such powers should be clear from the wording of section 3, *supra*, but is made even clearer by the specific reference in subsection 56(3) to "writs of execution or other proceedings against property". The garnishment powers of the Federal Court have been exercised in various cases, and no successful challenge to this jurisdiction is reported.

The attachment of money to enforce a valid judgment is available with respect to other civil judgments in the Federal Court; it is therefore available with respect to enforcement of decrees and orders made in the exercise of original jurisdiction by the court under the *Divorce Act*, and with respect to any order there registered under section 15 of the Act.

It is hard to imagine anything more clearly designed "for the better administration of the laws of Canada" than rules which make effective a judgment pronounced under the *Divorce Act*. This Proposal is to make the procedure already in place more effective.

The Proposal is a procedural one, to combine the best features of garnishment and receivership, both powers possessed by the court as a superior court of record of law and equity. Indeed, the present rules would conceivably allow the appointment of a receiver to collect ongoing maintenance, but the existing rules and practice would make this unnecessarily cumbersome and expensive for maintenance collection.

It is submitted that the Proposal simply alters the procedure so that the attachment of wages presently possible can be accomplished more effectively and inexpensively. Nothing substantive is altered, since a creditor achieves nothing that could not be achieved with a

continuing series of garnishing orders obtained monthly at great expense.

The Proposal, if accepted, would make available on an interprovincial level, a simple, inexpensive and effective tool for enforcement, which has operated for some years with great success in a number of provinces.

Proposal II

Should Proposal I be rejected by reason of qualms over any expansion in the operation of the Federal Court or otherwise, there is another potential route to the same end, by amendment of the *Divorce Act* itself.

It is therefore proposed that the *Divorce Act* be amended by numbering the text of the present section 12 as subsection (1) and by adding the following provisions:

12. (1) Where a court makes an order pursuant to section 10 or 11, it may

. . .

(*c*) at the time of making the order, or thereafter, make an order attaching the wages, salary, fees, commission or other money payable from time to time from an employer to the person ordered to make payments, and in such case the said employer shall deduct from the payment due to that person, in each pay period, such sum, or *pro rata* portion thereof, as shall be necessary to satisfy the order for alimony or maintenance and shall pay the said sums in accordance with the order served upon the employer.

(2) an order made pursuant to paragraph (1)(*c*) shall be binding upon an employer anywhere in Canada from the date of service upon him, and the employer shall continue to make such deductions and pay the money in accordance with the said order, so long as that person remains in his employ or as the order remains in effect and so long as that person is entitled to receive wages, salary, fees, commission or other money from the employer.

(3) an order made pursuant to paragraph (1)(*c*) does not attach any portion of the wages, salary, fees, commission or other money that is exempt from seizure or attachment under the law of the particular province where the debtor resides.

12.1 Where an order has been made pursuant to section 10 or 11 and is registered in any other superior court as provided in section 15, a court where such order has been registered may, upon application, grant an order of attachment as set out in paragraph 12(1)(*c*).

12.2 An order made pursuant to paragraph 12(1)(*c*) or section 12.1 may be varied, suspended or terminated by the court that made the order, if that court considers it fit and just to do so.

With the addition of the above subsection, the courts of each province could then make rules governing the procedural requirements to obtain such a continuing garnishing order.

By means of consultation and co-operation among the judges of the courts of the various provinces, a highly satisfactory degree of uniformity has thus far been maintained in the Rules made in each province under the *Divorce Act*. Should this Proposal be adopted, there appears to be no reason why a uniform set of rules relating to continuous garnishing orders should not also be adopted. The rules and forms annexed in relation to Proposal I could readily be adapted for such purpose.

The advantages of this Proposal over Proposal I are:

1. The court making the garnishing order would usually be the same one which granted the maintenance order, which would minimize the paper work, and give the judge or prothonotary granting the order the benefit of such additional information as might be found in the court pocket.

2. The amendment would be equally effective and useful where the debtor resides in the same province as the creditor, and would thus give to those provinces now lacking such statutory provision the benefits of continuing garnishment, at least in respect of orders under the *Divorce Act*.

The disadvantage of this Proposal, as against Proposal I, is that it would require two stages of enactment:

1. Parliament would have to amend the *Divorce Act*; and

2. The judges of the various courts would have to devise (and hopefully agree upon) sets of rules which would give effect to the amendment, as provided in paragraph 19(1)(*d*).

It is submitted that the disadvantage above described is a serious one. Neither the Parliament of Canada nor the courts are notorious for acting with undue haste, and if the courts are to consult and co-operate with respect to rules, then even greater delay in implementation may be expected.

A further problem may be encountered with this Proposal, and that is the possibility that there may be resentment and resistance in the legal system of one province at the concept of the court of another province reaching into their jurisdiction even for such a

desirable purpose as this. Historically, the courts of each province regard those of other provinces as "foreign", and each tends to guard its jurisdiction somewhat jealously.

The considerations of speed of implementation and jurisdictional jealousy would seem to favour the concept of proceeding through the Federal Court Rules as set out in Proposal I.

Nevertheless, if that route be closed, the tool of continuing garnishment is sufficiently useful, and the goal of better enforcement sufficiently important, to justify the time and effort required to proceed by amendment to the *Divorce Act*.

But let us not ignore that plaintive and echoing cry that is the inevitable concomitant of any proposal for law reform in Canada — "Is it constitutional?"

A line of authorities over the past ten years has clearly established that granting of custody and maintenance orders under the *Divorce Act* is *intra vires*, as being ancillary to a valid exercise of federal jurisdiction over divorce. The last words on the subject were uttered in the unanimous judgment of the Supreme Court of Canada in *Zacks v. Zacks*.[9]

This Proposal however, poses a slightly different question:

> Can the superior court of one province make an order which relates to property, even though ancillary to divorce, which is effective beyond the border of that province?

The *Divorce Act* already provides, in section 14:

> **14.** A decree of divorce granted under this Act or an order made under section 10 or 11 has legal effect throughout Canada.

If the jurisdiction to make maintenance orders is properly within the jurisdiction of Parliament as ancillary to divorce, it would appear only reasonable that Parliament would also have jurisdiction to make such orders enforceable.

Although the question cannot be answered with certainty, it would appear that this Proposal would be constitutionally valid, analagous to other existing federal legislation, such as the *Winding-up Act*,[10] where the courts of one province may make an order to

take effect in another province. For a fuller exploration of the constitutional aspect, see the opinion of R. D. Gibson, Appendix D.

If this Proposal is accepted, an additional and useful amendment, in view of *Blane v. Blane* and *Ramsay v. Ramsay*, would be to provide, by an alteration to subsection 11(2), that an order may be varied or rescinded by a court other than that which made the order if:

(a) both parties consent in writing to the application being heard and determined in that court; or

(b) both parties are resident within the jurisdiction of that court when the application is made.

This amendment is only peripherally relevant to the Proposal, but is worthwhile as mitigating the effect of the Blane and Ramsay cases, without any apparent prejudice to anyone.

Proposal III

Any serious consideration of enforcement procedures must lead one eventually to ask: Who always gets his money first? Who is the most effective collector of moneys due and owing? The Minister of National Revenue — that's who.

Without a doubt, the most effective method of collecting maintenance would be to employ the machinery of the tax collector. In addition to possible jurisdictional problems, however, there are powerful arguments against the overall utilization of the tax collector as an enforcer of maintenance. Confidentiality of information relating to income tax returns is strictly protected by statute, and it is argued that any infringement of such confidentiality and the use of information for any purpose other than enforcement of tax obligations would undermine the effectiveness of the income tax laws and lead to widespread evasions and concealment of income.

Without debating the relative merits of the sanctity of the income tax return, as opposed to the social and human importance of enforcing maintenance orders, it must be recognized that, for the present at least, political realities negative any such Draconian measures of enforcement.

There is, however, a limited but useful reform which would take advantage of the Minister of National Revenue's great prowess as a collector of money, without violating any confidentiality.

The proposal is simple: Amend the *Income Tax Act*[11] to make the Minister of National Revenue subject to garnishment to collect arrears of maintenance, with respect to any refund payable to a taxpayer/judgment debtor.

While the Crown in the Right of Canada has not, by tradition, been subject to attachment, there is no reason at all why this cannot be altered, should Parliament so declare. The Crown in the Right of

some, if not all, of the provinces, has already forgone this ancient privilege, with no visible harm to Her Majesty's interests.

The above proposal does not breach any confidentiality provisions. The Minister of National Revenue who receives such an order merely pays the refund (to the extent of the debt) into court, and notifies the judgment debtor accordingly. Neither the whereabouts of the judgment debtor, his employment or other financial information is disclosed.

Although this paper is primarily directed to better enforcement of maintenance orders under the *Divorce Act*, there appears to be no reason why this proposal should not be equally useful and applicable with respect to maintenance orders made under provincial jurisdiction, and where the parties in fact reside in the same provine.

One difficulty would have to be overcome — the Minister of National Revenue would have to be given sufficient information with which to correctly identify the judgment debtor. Where the person's social insurance number is known this would be adequate. Even if it is unknown initially, a little diligent investigation will often reveal it. Where it is not known and cannot be determined fairly readily, the following particulars should be sufficient, all of which should be available to any divorced spouse:

(a) full name of debtor;

(b) date and place of birth;

(c) last known address and employer;

(d) address of debtor in a given taxation year; (For example: If John Jones, date of birth May 18, 1932, filed a tax return in 1975 giving his address at 210 Langside Street, Winnipeg, and showing his wife's name as Natasha, the Minister of National Revenue can thus identify his Social Insurance Number and trace his present location.)

In the majority of such cases, however, the party can be identified and if a refund were due him, it would be paid into court and concurrently, the Minister of National Revenue would advise him accordingly. It can be reasonably assumed that a taxpayer expecting a refund will have taken care to provide the Department with his correct address.

A debtor receiving such notice would have the opportunity to make such representations as he wished, if he disputed his liability to pay, when the motion was made to pay the money out of court.

It is necessary to recognize that in some cases refunds are assigned by a taxpayer, or "discounted", and in such cases the Minister of National Revenue would have to recognize the validity and priority of such an assignment if it were delivered to him prior to his receipt of a garnishing order. It would thus behoove the creditor to ensure that her garnishing order was issued and served as soon after January 1st as possible, to ensure that any refund was diverted to her.

While the foregoing Proposal is by no means an overall solution to maintenance enforcement, it would enable the creditor to have some prospect of collecting at least partial payment, even if the debtor is long gone and his whereabouts unknown. Indeed, if his anticipated refund was snaffled, she might well hear from him quite promptly, if only for purposes of denunciation. In view of the fact that income tax refunds frequently run into hundreds of dollars and even into the thousands, for people earning average incomes, it is submitted that this Proposal deserves serious consideration.

The expense to the creditor is not great, and in some jurisdictions no legal fees would be involved where, as in Manitoba, the Enforcement Section of the Provincial Judge's Court (Family Division) could undertake such a procedure without charge.

Even where legal fees are involved, if there is a probability that the debtor has been employed somewhere, many creditors would consider the expense a reasonable gamble. Even $200.00 or $300.00 recovered in this way can be a fortune to a divorced or separated mother trying to provide a decent living for her children.

Endnotes

1. The *Divorce Act*, R.S.C. 1970, c. D-8.
2. The *Garnishment Act*, RSM Cap. G20, Sec. 14.
3. The *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Suppl.).
4. *Blane v. Blane* (1977) 13 OR (2d) 466.
5. *Ramsay v. Ramsay et al.* (1977) 13 OR (2d) 85.
6. *The British North America Act*, 1867, Sec. 91(26).
7. *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.* (1977) 71 DLR (3rd) 111 (SCC).
8. Per *Martin J.*, quoting from the argument in *Peacock v. Bell,* 1 Wms. Saund. 73, 85 E.R. 84, which was approved in *Gosset v. Howard,* 10 Q.B. 411, 116 E.R. 158; (*The Canadian Abridgment (2d) 164, Item 985*):

   "The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court, but that which is so expressly alleged."

   and

   Per *O'Halloran J.A.*, in *Re Patterson and Nanaimo Dry Cleaning and Laundry Workers Union* (1947) 2 WWR 510, (1947) 4 DLR 159 (B.C. C.A.):

   "If no relevant rule of practice is found in the statutes or existing Rule of Court, then it is for the particular Court of competent jurisdiction to make a rule consonant with reason and justice, in order that the administration of justice may not be hindered or delayed."
9. *Zacks v. Zacks*, (1973) 35 DLR (3rd) 420.
10. *Winding-up Act*, R.S.C. 1970, c. W-10.
11. *Income Tax Act*, S.C. 1970-71-72, c. 63.

APPENDIX A

General Rules and Orders

Rule 2300

DIVISION F — GARNISHMENT PROCEEDINGS

Rule 2300. Attachment of Money

(1) The Court, upon the *ex parte* application of a judgment creditor, on affidavit showing that the judgment is unsatisfied and

(a) that there is a debt owing or accruing from some person in Canada to the judgment debtor, or

(b) that there is a debt owing or accruing from some person not in Canada to the judgment debtor and that such debt is one for which such person might be sued in Canada by the judgment debtor,

may order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt and that the garnishee do at a time and place named show cause why he should not pay to the judgment creditor the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the judgment. (Form 64).

(2) An order under paragraph (1) to show cause must, at least 7 days before the time appointed thereby for showing cause, be served

(a) on the garnishee personally; and

(b) unless the Court otherwise directs, on the judgment debtor.

(3) An order under paragraph (1) binds the debts attached from the time of service on the garnishee.

(4) If the garnishee admits his liability, he may, subject to paragraph (6), pay into Court the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy that judgment and give notice thereof to the judgment creditor.

(5) Where the garnishee has not made a payment into Court as authorized by paragraph (4), if he does not dispute the debt claimed to be due from him to the judgment debtor, or, if he does not appear pursuant to the show cause order, the Court may make an order for payment to the judgment creditor or payment into Court of the debt. (Forms 65 and 66). If the debt is not payable at the time of the attachment, an order may be made for payment thereof when it becomes payable.

(6) Where the debt due or accruing due to the judgment debtor is in respect of wages or salaries, no portion thereof that is exempt from seizure or attachment under the law of the particular province is attached by virtue of any order made under this Rule.

(7) An order under paragraph (5) may be enforced in the same manner as any other order for the payment of money.

(8) Where the garnishee disputes liability to pay the debt claimed to be due or accruing due from him to the judgment debtor, the Court may summarily determine the question at issue or order that any question necessary for determining the liability of the garnishee be tried in any manner in which any question or issue in an action may be tried.

(9) If in garnishee proceedings it is brought to the notice of the Court that some other person than the judgment debtor is or claims to be entitled to the debt sought to be attached or has or claims to have a charge or lien upon it, the Court may order that person to attend before the Court and state the nature of his claim with particulars thereof.

(10) After hearing any person who attends before the Court in compliance with an order under paragraph (9), the Court may summarily determine the questions at issue between the claimants or

make such other order as it thinks just, including an order that any question or issue necessary for determining the validity of the claim of such person be tried in such manner as is mentioned in paragraph (8).

(11) Any payment made by a garnishee under paragraph (4) or in compliance with an order under this Rule, and any execution levied against him in pursuance of such an order, shall be a valid discharge of his liability to the judgment debtor to the extent of the amount paid or levied notwithstanding that the garnishee proceedings are subsequently set aside or the judgment or order from which they arose reversed.

Rule 2301. Attachment of Money in Court

(1) Where money is standing to the credit of a judgment debtor in court, the judgment creditor shall be entitled to take garnishee proceedings in respect of that money, but may apply to the Court for an order that the money or so much thereof as is sufficient to satisfy the judgment or order sought to be enforced, and the costs of the application, be paid to the judgment creditor.

(2) On making an application under this Rule the applicant must serve a notice of such application on the Administrator in the matter in respect of which the money is in Court, and the money to which the application relates shall not be paid out of Court until after the determination of the application.

(3) Unless the Court otherwise directs, the notice of a motion under this Rule must be served on the judgment debtor at least 7 days before the day named therein for the hearing of the application.

Rule 2302. Costs Retained

The costs of any application for an order under this Division and of any proceedings arising therefrom or incidental thereto shall, unless the Court otherwise directs, be retained by the judgment creditor out of the money recovered by him under the order and in priority to the judgment debt.

APPENDIX B

IN THE FEDERAL COURT OF CANADA

TRIAL DIVISION

Between:

PATRICIA JOAN SUPEENE,

formerly Patricia Joan Beech,

Judgment Creditor (*Petitioner*),

– and -

EDWARD JOHN BEECH,

Judgment Debtor (*Respondent*).

REASONS FOR ORDER

The Associate Chief Justice:

This is an application made under Rule 324 for a garnishee order *nisi* under Rule 2300(1). The rule requires that the application be supported by an affidavit showing that there is a debt owing or accruing from some person in Canada to the judgment debtor.

The affidavit upon which the order is sought was sworn in Winnipeg by the plaintiff whose address is apparently in Winnipeg. In it the only paragraph which refers to any debt owing to the defendant (judgment debtor) is paragraph 4. It reads:

4. THAT there is a debt due and owing to the (Respondent) Judgment Debtor, who resides in Vancouver, British Columbia, Canada by the employer of the (Respondent) Judgment Debtor, BELKIN PACKAGING (CORRUGATED DIVISION) at 330 Viking Way, Richmond, British Columbia, Canada.

In my opinion this is entirely insufficient to satisfy the requirements of the rule. There is no explanation as to how such a deponent could have personal knowledge of the fact asserted and it seems unlikely that she has personal knowledge of it. Moreover, it is a bald statement that a debt is due and owing. What the debt is for is not stated but, assuming that it is intended by the paragraph to imply that there is a debt due for wages, there is not a word as to how much is due and no explanation as to how it happens to be due and owing. Normally wages are paid when they are due and it is a comparatively rare situation in which an amount of wages becomes due and owing but is not paid until some later time. It is not possible under the rule to garnishee wages while they are being earned.

It would, I think, be quite wrong to summon a garnishee on such flimsy material and to put him to the expense of appearing before the Court to say perhaps that no debt is owing or that only some trifling amount, which would not warrant the expense, is due.

The application is accordingly refused.

"A. L. Thurlow"

A.C.J.

OTTAWA,

June 18, 1976.

APPENDIX C

PROPOSED NEW FEDERAL COURT RULES FOR ENFORCEMENT OF ORDERS UNDER THE *DIVORCE ACT*.

Rule 2300.1

(1) Where a decree or order has been made in this Court under the provisions of the *Divorce Act*, or filed in this Court pursuant to Rule 1087, in which decree or order there is judgment for payment of periodic maintenance or alimony, the following rules apply.

(2) The Court, upon the *ex parte* application of the creditor on Affidavit, in Form A, showing:

(a) that the judgment is unsatisfied in whole or in part;

(b) that the deponent verily believes that the debtor is employed by the garnishee, and that wages, salary, commission, fees or any other money is payable from time to time from the garnishee to the debtor in respect of work or services performed in the course of employment of the debtor;

(c) such particulars of the nature and place of occupation of the debtor as are known to the creditor and his address, if known;

(d) that no order has been made varying the order or orders registered under Rule 1087, and that the said order is still in full force and effect;

(e) setting forth the mailing address to which payments in satisfaction of the garnishing order should be directed;

may order that all debts owing or accruing due from the garnishee to the debtor and all wages, salary, commission, fees, and any other money payable by the garnishee to the debtor at any time within one calendar month after service of the said order, shall be attached.

(3) Where a garnishing order is served on the employer of a debtor, the garnishee shall deduct and continue to deduct from the salary, wages, commission, fees and any other money accruing due or payable or thereafter accruing due, from time to time by the

garnishee to the debtor, such amounts in accordance with the garnishing order, and remit the said moneys to the person named in the garnishing order for as long as and whenever the debtor is in his employ and the garnishing order remains in force.

(4) Where the wages of a person are seized or attached pursuant to these Rules, the exemption allowed to be paid to that person shall be the greater of

(a) $200.00 per month or *pro rata* for any part of a month; or

(b) the amount exempted from attachment by the law of the province where the debtor resides, where wages, salary, commission or fees are attached for payment of maintenance or alimony.

(5) That annexed to the garnishing order shall be:

(a) a true copy of the Order registered under Rule 1087;

(b) a memorandum setting out:

(i) the residence of the debtor;

(ii) the nature and place of the occupation of the debtor in the service of the garnishee at the time of the issue of the garnishing order, if known;

(iii) that the garnishing process was issued by virtue of a court order for alimony or maintenance;

(iv) that the garnishee notify the court by mail of payments made to the creditor pursuant to the order;

(v) that the garnishee notify the court and the creditor by mail forthwith upon the termination of the employment of the debtor and forthwith upon his subsequent re-employment;

(vi) the exemption of $200.00 per month or such greater sum as may be provided by the laws of the province where the debtor resides;

(vii) that the debtor may, if he so desires, make application to the Court which made the order registered, for a variation of the terms thereof, or that the debtor may, if he so desires, make application to the Court from which the garnishing order was issued, for a variation of the terms thereof.

(6) An order made pursuant to these Rules may be discontinued or suspended

(a) by notice in writing from the creditor to the garnishee, a copy of which shall be delivered or mailed to the debtor and the Court;

(b) by registration in the Court of an order from the Court which made the order registered, directing that the creditor shall discontinue or suspend garnishment proceedings;

(c) by an order of this Court, made on motion with notice to the creditor, to be heard and determined in the province where the creditor resides.

(7) A garnishing order granted pursuant to these Rules shall not apply to enforce payment of any arrears exceeding two months.

(8) Notwithstanding these Rules, a creditor may proceed as otherwise provided by law, to recover moneys due and payable under an order for maintenance in addition to or in lieu of proceeding under these Rules.

(9) Where subsequent to the service upon a garnishee of an order made pursuant to these Rules, an order is made varying the terms of the order registered under Rule 1087, a certified copy of the variation order shall forthwith be registered pursuant to these Rules, and a copy served upon the garnishee, who shall thereafter remit to the creditor in accordance with the variation order.

(10)(a) Where the garnishee disputes his liability to pay, he shall forthwith notify the court and the creditor in writing of the reasons for such dispute;

(b) Where notice is received pursuant to the above, the court may summarily determine the liability of the garnishee be tried in any manner in which any question or issue in an action may be tried.

AFFIDAVIT OF CREDITOR

(*Style of Cause*)

I, A.B., of the City of , in the Province of , make oath and say:

1. THAT I am A.B., the named in the Decree *Nisi* of divorce annexed hereto and marked Exhibit "A" to this my Affidavit, which Decree was registered in this Honourable Court on the day of , 19 , as No. .

2. THAT the said Decree was made absolute on [or:] has not yet been made absolute.

3. THAT the terms of the said Decree *Nisi* as to payment of maintenance have not been varied and remain in full force and effect. [or:]

4. THAT the terms of the said Decree *Nisi* have been varied as follows: (set out dates of variation orders and annex true copies of each), and the order dated (most recent) remains in full force and effect and was registered in this Honourable Court on the day of 19 , as No. .

5. THAT C.D. (debtor) has refused or neglected to make the payments required under the said order and is in default in the amount of $_____ for the period (set out particulars of default).

6. THAT I am the person lawfully entitled to receive the said money and I wish payment to be directed to me at (mailing address or bank, etc.)

7. (Where maintenance payments are for children only or where a specific amount is payable for maintenance of children only, state that the children named are still in the care and control of the deponent and are still dependent)

8. (Where maintenance payments are for creditor only, or where a specific amount is payable for maintenance of the creditor only, state whether or not the creditor has remarried)

9. THAT there has been no agreement in writing between me and C.D. whereby I agreed to forgo any or all of the payments due to me pursuant to the order(s) annexed hereto (or as the case may be).

10. THAT I verily believe that C.D. is employed by E.F., and that there are, from time to time, moneys due or accruing due to C.D. from E.F. (garnishee) with respect to wages, salary, fees or commission payable to the said C.D. from E.F. (if nature and place of employment are known, specify).

11. THAT the most recent address which I have for C.D. as of (date) is:

(*also give Social Insurance Number and date of birth of debtor, if known*).

SWORN BEFORE ME etc.

GARNISHING ORDER
(MAINTENANCE OR ALIMONY)

(COURT)

IN CHAMBERS
THE HONOURABLE
MR. JUSTICE

THE PROTHONOTARY.

day, the day

of , 19 .

BETWEEN:

PETITIONER, APPLICANT
(*Creditor*),

– and -

RESPONDENT, (*Debtor*),

TO: GARNISHEE.

GARNISHING ORDER

Federal Court Rule No. 2300.1

Upon the application of and on hearing
read the affidavit of , filed, and on hearing
counsel for the creditor

1. IT IS ORDERED that the garnishee deduct from the salary, wages, fees or commission of the debtor now due or hereafter accruing due from time to time, the following amounts, namely:

(a) the sum of $———— (being arrears in maintenance or alimony not exceeding 2 months); and

(b) the sum of $———— (weekly, bi-weekly, semi-monthly or monthly) in as nearly equal deductions as possible in order to yield the sum of $———— per as provided in the

order for maintenance or alimony for as long as the debtor remains in the employ of the garnishee.

2. IT IS FURTHER ORDERED that the garnishee within seven days after each deduction remit the amount deducted to:

NAME

ADDRESS

SIGNED the day of , A.D. 19 .

Judge
Prothonotary.

N O T E:

AN ADDITIONAL COPY OF THIS ORDER AND MEMORANDUM IS SUPPLIED, TO BE DELIVERED OR MAILED BY THE GARNISHEE TO THE DEBTOR AS SOON AS POSSIBLE.

MEMORANDUM TO GARNISHEE AND DEBTOR

(COURT)

No.

BETWEEN:

PETITIONER

(*Creditor*)

and

RESPONDENT

(*Debtor*)

and

GARNISHEE

TO THE ABOVE NAMED GARNISHEE AND TO THE DEBTOR:

The Debtor (*name*) resides at and is employed by the Garnishee at in the capacity of .

Cheques should be mailed to the Creditor at the address set out in the Garnishing Order.

_____

Creditor's Attorney.

The Garnishing Order annexed hereto is made by the Federal Court at to enforce payment of maintenance ordered

under the *Divorce Act*. Any communications should be directed to the Court at the above address.

Service of a Garnishing Order under Rule 2300.1 binds any debt due or accruing due from the Garnishee to the Debtor and all wages, salary, fees or commission or other money that becomes due or payable within 1 calendar month from the date of service of the Garnishing Order upon the Garnishee.

Payments shall continue under this Order until further order of this Court, or until notice in writing is received from the Creditor.

If the Garnishee disputes his liability to pay, he shall forthwith notify the court and the Creditor in writing of the reasons for such dispute. Where notice is so received, the Court may summarily determine the liability of the Garnishee be tried in any manner in which any question or issue in an action may be tried.

If the circumstances justify, the Debtor may make application to the said Court to vary the terms of the Garnishing Order, and such application will be heard and determined by the Court at the above location.

The Debtor also has the right to make an application to the Court that granted the maintenance order, for a variation of that order, if the circumstances of the parties have changed substantially since the order was made.

A Debtor who wishes to make either such application is advised to seek the assistance of a lawyer.

N O T E: The amount exempted from attachment by this order, to be paid to the Debtor, is

(a) $200.00 per month (or *pro rata* for any lesser pay period); or

(b) the amount exempt from attachment for maintenance payments in the province where the Debtor resides;

whichever is the greater.

APPENDIX D

CONSTITUTIONALITY OF PROPOSED CONTINUING GARNISHING ORDERS UNDER *DIVORCE ACT*.

A. *Could Parliament enact a continuing garnishment procedure to enforce maintenance orders anywhere in Canada?*

Although attachment, execution, and garnishment procedures are normally regarded as falling within provincial jurisdiction,[1] there are already federal statutes in existence which provide for garnishment and similar measures to enforce rights governed by federal law. The *Winding-up Act*,[2] for example, authorizes the garnishment of debts owed to wound-up companies, such right to be exercised in accordance with the laws and procedures of the province concerned. The *Income Tax Act*[3] provides for garnishment of debts owed to a defaulting taxpayer, and stipulates that in the case of wages the garnishing demand shall have a continuing effect. The existence of such provisions does not establish their constitutional validity, of course (although the apparent lack of any challenge to their validity may be significant). Before a confident opinion can be expressed about the constitutionality of the proposed garnishment procedure under the *Divorce Act* it will be necessary to examine the competing arguments.

The Parliament of Canada has constitutional responsibility for "marriage and divorce".[4] Although there was some initial doubt about Parliament's right to include such corollary matters as support and child custody in the *Divorce Act*,[5] it has now been established that such matters are to be regarded as "necessarily incidental" to divorce.[6] It is probable that a procedure like garnishment, designed to enforce obligations arising under these corollary provisions, would be similarly treated. The question has not yet been ruled on, however, and there is at least one plausible contrary argument.

Two heads of provincial jurisdiction could be said to be involved: "property and civil rights in the province",[7] and "administration of justice in the province, including the constitution . . . of provincial courts . . . and including procedure in civil matters in those courts".[8]

The first of these is not likely to cause any problem, because the contemplated procedure could be said to have as substantial a "divorce" aspect as a "property and civil rights" aspect; and in such "dual aspect" situations federal legislation prevails. It might, however, be possible to contend that the question relates much more closely to "civil procedure" than to "divorce", in which case it would be found to belong in "pith and substance" to the provincial domain.

A similar problem, as yet unresolved, arises with respect to the federal *Evidence Act*. That Act states that it applies to "all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf."[9] A *dictum* of an Ontario judge in *Stafford v. Stafford*[10] in 1945 asserted that federal evidence legislation could not apply to a divorce proceeding in a provincial court, because evidence is primarily a question of procedure, and is therefore within exclusive provincial jurisdiction.[11] A federally-enacted garnishment procedure could, by similar reasoning, be found to be about civil procedure in pith and substance, and therefore to be beyond federal scope if it sought to employ provincial courts (superior or otherwise).

I doubt that this argument would prevail. In the first place, there is a conflicting decision, *Re Grande Textiles Ltd. and Drunker*,[12] in which a judge of the Quebec Superior Court held that the federal *Evidence Act* does apply to bankruptcy proceedings in a provincial court. Second, there are plentiful judicial *dicta* and scholarly comments suggesting that Parliament may enact procedures for the enforcement of federally created rights.[13] Even if the *Stafford dictum* were correct, it is possible that the right to a garnishing order might be regarded as more substantive (less "procedural") than questions of evidence. Finally, if there is concern about the constitutional problem, it may be possible to design the remedy in a way that does not employ the provincial courts. The garnishment procedure under the *Income Tax Act* avoids the courts altogether.

B. *Could Parliament impose responsibility for implementing the scheme on provincial superior courts?*

Yes. Apart from the possibility discussed about that the matter might be classified as "civil procedure" in provincial courts, there would be no obstacle to imposing new jurisdiction on provincial courts. The federal statute books are full of provisions that do just

that — including the corollary relief sections of the *Divorce Act* that were upheld in the *Zacks* case.[14]

C. *Could Parliament provide for the reciprocal enforcement of garnishment orders?*

A province may legislate for the reciprocal enforcement within its jurisdiction of judicial orders made in other provinces or countries.[15] This is not to deny federal competence to deal uniformly with the same topic, however. I am of the view that if such a provision were added to the *Divorce Act* it would be upheld as necessarily incidental to divorce.[16] In fact, although there is no clear-cut authority on the question, and some constitutionalists would probably disagree, I also believe that Parliament could, on the basis of its residual "peace, order and good government"[17] power, provide for the reciprocal enforcement of any provincial garnishing orders — even those made in regard to matters not otherwise under federal jurisdiction.

D. *Could Parliament empower a court to issue a continuing garnishing order which would be subject to the exemptions spelled out in the garnishment legislation of the province involved?*

Yes. Incorporation by reference of the legislation of another jurisdiction is constitutionally valid.[18] It is common for Parliament to adopt some features of provincial law on a subject, and to blend it with its own provisions.[19]

E. *Could the Federal Court of Canada be employed in the place of provincial superior courts?*

There could possibly be a problem here. Because the Federal Court is a product of section 101 of *The B.N.A. Act*, which authorizes the creation of courts at the federal level "for the better administration of the laws of Canada", it has been held that the Court's jurisdiction is constitutionally limited to matters concerning which there is some distinctive body of federal law.[20] If a dispute is governed by general principles of provincial law, it is not appropriate for Federal Court adjudication.

There is a distinctive body of "divorce law" which could be administered by the Federal Court, of course, but apart from a few

special statutory provisions there is no body of federal "garnishment law". If the proposed new remedy were to be fully codified in the federal statute the problem would be overcome. However, if the statute merely created the basic right, and left the details to be worked out by the Court on a "common law" basis, it would probably be invalid. The same problem would likely arise if the Federal Court were asked to administer the exemptions imposed by the various provincial Acts. An attempt to adopt as federal law by "incorporation by reference" all provincial garnishment law might possibly succeed, but it would probably be struck down as a "colourable device".

It would be wise, therefore, either to enact a thoroughly self-contained garnishment code, or else to make use of provincial superior courts for the administration of the new scheme.

Dale Gibson,
March 25, 1979.

Endnotes to Appendix D

1. *Paquin v. Warden* (1941) 71 Que. K.B. 425 (Que. C.A.).
2. R.S.C. 1970, c. W-10, s. 116.
3. S.C. 1970-72, c. 63, s. 224.
4. *The British North America Act*, 1867, s. 91(26).
5. R.S.C. 1970, c. D-8. The constitutional debate which preceded its passage is described in F. J. E. Jordan, "The Federal Divorce Act (1968) and the Constitutions", (1968) 14 McGill L.J. 209.
6. *Zacks v. Zacks* (1973) 35 D.L.R. (3d) 420 (S.C.C.). S. I. Bushnell, "Family Law and the Constitution", (1978) 1 Can.J.Fam.L. 202 contends that the "necessarily incidental" principle has been extended too far in *Zacks* and the cases following it, but inasmuch as the decision was a unanimous ruling of the Supreme Court of Canada, such criticism is of little practical significance.
7. *The B.N.A. Act*, s. 92(13).
8. *The B.N.A. Act*, s. 92(14).
9. R.S.C. 1970, c. E-10, s. 2.
10. [1945] 1 D.L.R. 263 (Ont. H.C.).
11. The present *Divorce Act* provides (s. 20) for the general application of provincial evidence law to divorce proceedings, but contains a special stipulation (s. 21) concerning the admissibility of admissions made during reconciliation discussions.
12. (1954) 34 C.B.R. 213 (Que. S.C.). The *Stafford* case was not considered.
13. For example, in *Bilsland v. Bilsland* [1922] 1 W.W.R. 718 (Man. C.A.), which held that the province may deal with divorce procedure, it was made clear that this would only be the case "until the Dominion takes further legislative action in

respect of the matter . . .'' (per Dennistoun J.A., at p. 730). A similar view was expressed (in regard to the allocation of jurisdiction to particular courts) in the Jordan article: (1968) 14 McGill L.J. 209, at 231. Even Bushnell, whose article was critical of extended federal jurisdiction in matters corollary to divorce, conceded that: ''It may be that provision could also be made for national enforcement of the orders made with the divorce decree'' (1978) 1 Can.J.Fam.L. 202, at 230.

14. Note 6.

15. *A.-G. Ontario v. Scott* (1956) 1 D.L.R. (2d) 433 (S.C.C.).

16. Sections 128 and 129 of the *Winding-up Act*, R.S.C. 1970, c. W-10 provide for reciprocal enforcement of provincial court orders.

17. *The B.N.A. Act*, s. 91.

18. *A.-G. Ontario v. Scott* (1956) 1 D.L.R. (2d) 433 (S.C.C.); *Coughlin v. Ontario Highway Transport Board* (1968) 68 D.L.R. (2d) 384 (S.C.C.).

19. E.g.: *Winding-up Act*, R.S.C. 1970, c. W-10, s. 106; *Indian Act*, R.S.C. 1970, c. 16, s. 88. The effect of the latter provision was considered in *Natural Parents v. Superintendent of Child Welfare* (1976) 60 D.L.R. (3d) 148 (S.C.C.).

20. *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.* (1977) 71 D.L.R. (3d) 111 (S.C.C.); *McNamara v. The Queen* (1977) 75 D.L.R. (3d) 273 (S.C.C.).