

Focus REAL PROPERTY

Better enforcement option for judgment creditors

Court paves the way for the alternative process of judicially supervised sales



Todd Christensen

In September 2015, Justice D.A. Broad of the Ontario Superior Court of Justice released his decision in *Canaccede International Acquisitions Ltd. v. Abdullah* [2015] ONSC 5553, creating what he called “an evolution and improvement in the common law” by approving an alternative enforcement avenue against real property to replace the ineffective sheriff’s sale process that was rendered inoperable by the Ontario Court of Appeal’s decisions in *Citi Cards Canada Inc. v. Pleasance* [2011] ONCA 3, and *Royal Bank of Canada v. Trang* [2014] ONCA 883.

In those decisions, the Ontario Court of Appeal held that federal privacy legislation (PIPEDA) prevented a mortgagee from providing a mortgage discharge statement to the enforcement office, colloquially known as “the sheriff,” without a court order requiring it. The Royal Bank of Canada (RBC) has appealed the *Trang* decision to the Supreme Court of Canada. That appeal is scheduled to be heard on April 27.

As the Privacy Commissioner points out in his factum in that appeal, RBC “twice ignor[ed] express instructions from the Court of Appeal concerning how to obtain an order for production of a Statement.”

Reviewing RBC’s appellant’s factum suggests it did so because



STONE18 / ISTOCKPHOTO.COM

“

[The] decision improves access to justice for all judgment creditors by providing a long-needed, more effective alternative to sheriff’s sales ...

Todd Christensen
Christensen Law Firm

the Court of Appeal’s interpretation of PIPEDA and recommended procedure creates a heavy procedural burden of up to six separate steps, “all of which take place after the creditor has already won its judgment—before the sheriff could even begin the process of seizing and selling the debtor’s real property.” (Emphasis in the original.)

While RBC chose to challenge the Ontario Court of Appeal’s interpretation of PIPEDA and procedural instructions with respect to sheriff’s sales, *Canaccede International Acquisitions Ltd.* (Canaccede) found and persuaded the Ontario Superior Court to adopt an alternative process to sheriff’s sales. This process provides a procedurally

efficient method for obtaining the required court order. It also corrects flaws that made sheriff’s sales ineffective even before PIPEDA came along.

In *Canaccede*, Justice Broad approved the use of the long-standing, judicially supervised sale process traditionally used in family, power-of-sale and property-specific proceedings to enforce money judgments against real property. The judgment creditor obtains an order for a reference for the conduct of a sale from a judge and then a judicial officer presides over a reference that carries out the sale in a two-step process. The first step is a show-cause hearing where interests in the property are determined and any party can show cause why it would be inequitable or unjust for the property to be sold. It is at this stage that the court orders production of the mortgage discharge statement. If the court officer determines the sale should proceed, the second step is for the sale to be carried out by private contract under court supervision. As Justice Broad indicates in his reasons in *Canaccede*, the solution is one that has been in use in British Columbia since 1998 and is more efficient and effective than sheriff’s sales:

“The applicant points to the British Columbia case of *Instafund Mortgage Management Corp. v. 379100 British Columbia Ltd.*, [1998] Carswell BC 2450 as providing support for the utilization of the process which it proposes. In that case, Burnyeat, J. noted the finding of the British Columbia Court of Appeal in *First Western Capital Ltd. v. Wardle* [1984], 59 B.C.L.R. 309 (B.C.C.A.) that the British Col-

umbia Court Order Enforcement Act, which only provided for enforcement of judgment debts against the interest of judgment debtors in land by way of sheriff’s auction, was not a complete code and that the court retained jurisdiction over the conduct of the sale. Justice Burnyeat ordered in *Instafund* that the sale of the judgment debtor’s property proceed under the supervision of the court rather than by sheriff’s auction, for the practical reasons that the process would allow a listing with a real estate agent in the realistic and active marketing of the property instead of the ineffective marketing of the property which results from an auction by the sheriff, and that the additional cost of a second auction which is created if the offers received are not in accordance with the sheriff’s view as to what the property is worth can be avoided.”

Justice Broad’s decision improves access to justice for all judgment creditors by providing a long-needed, more effective alternative to sheriff’s sales that also resolves the initially negative impact of PIPEDA as interpreted by the Court of Appeal.

Unless the Supreme Court obviates it in how it determines the *Trang* appeal, there’s a new sheriff’s sale in town in Ontario: an order for a reference for the conduct of a sale.

Todd Christensen is the principal of Christensen Law Firm, Cambridge, Ont. with a practice restricted to unsecured debt collection. He represented Canaccede both before Justice Broad and at the SCC in a motion for leave to intervene in the Trang appeal.

Flexibility: The fact that AAs are self financing is seen as a big plus

Continued from page 13

operation and management and may appoint up to 49 per cent of the board members, the real decision making authority for the AA lies exclusively with its board of directors. In this sense, they function similarly to Public Private Partnerships, though with a greater degree of government oversight.

One of the key benefits of utilizing AAs, from the government’s perspective, is that they are self-financed by fees collected from the businesses or professions which they regulate and are intended to operate on a cost-recovery basis. In an age of defi-

cits in our society, this makes them a particularly attractive regulatory system for governments. It is expected that the Condo Authority will be primarily financed from a monthly fee per condo unit (hoped to be in the range of \$1) collected by the corporation as part of its annual operating expenses. There will also be a user fee for those who wish to pursue disputes before the tribunal and access the condo registry data. The CMLA will be financed by licensing fees.

In addition to reducing expenditures, AAs have demonstrated that they can deliver services more efficiently, utiliz-

ing the industry-specific expertise of its board members. This board is more likely to be able to make appropriate risk-based assessments, unlike a government office where management decisions are made at a greater distance.

Though the first AAs were created in Ontario in 1976 (the Board of Funeral Services and Tarion Warranty Corporation), their use was limited until the passage of the *Safety and Consumer Statutes Administration Act* in 1996 allowing the Lieutenant Governor in Council to delegate its powers and duties to authorities in order to admin-

ister certain statutes. Since that time, a number of new AAs have been created, including the Electrical Safety Authority (ESA), the Technical Standards and Safety Authority (TSSA), TICO (tourism) and recently, the Ontario Film Authority. This growth in the use of the AA model reflects a broader government trend toward their use as specialized regulatory bodies for specific industries.

Given the financial benefits and governance flexibility that AAs provide, the government has signalled greater use of AAs is to be expected in the future. The two AAs being created in

response to the passage of Bill 106 reflect a newer approach to governing that is intended to be both cheaper and more efficient. Given the rapid change in the Ontario condominium industry over the past two decades and the continuing evolution of Ontario’s housing industry, the use of AAs to oversee this sector, and the flexibility this is intended to provide, is a welcome development.

Armand Conant is a partner and the head of the Condominium Law Group and Joel Berkovitz is an associate in the Condominium Law Group at Shibley Righton LLP.