LAW REFORM COMMISSION OF BRITISH COLUMBIA

Minor Report on The Jurisdiction of Local Judges: Stays of Execution and Instalment Orders

LRC72

February 1984

February 20, 1984

The Honourable Brian R.D. Smith, Q.C.
Attorney General of the Province of British Columbia
Parliament Buildings
Victoria, B.C. V8V 1X4

Dear Mr. Attorney:

Re: *Minor Report on The Jurisdiction of Local Judges: Stays of Execution and Instalment Orders*

A. Introduction

The administration of civil justice presents particular problems in a jurisdiction as large and geographically diverse as British Columbia. While there are a number of judicial centres in the Province, the *Supreme Court Act* requires continuous sittings in two locations only: Victoria and Vancouver (section 35). In other places (referred to for convenience as "interior" communities) sittings are governed by section 34:

> 34. Subject to section 35 sittings of the court for the trial of civil proceedings shall be held at least once a year at each assize town, and at other times as the Chief Justice considers necessary, for the transaction of the court's business.

Thus, in many interior communities a Justice of the Supreme Court is available only when visiting on assize.

In these communities, there is an obvious need for machinery to deal with routine matters and permit Supreme Court litigants to get on with their actions with dispatch and at minimal cost. This need is met in section 11 of the *Supreme Court Act* which clothes County Court Judges with the capacity to exercise certain functions that would otherwise be reserved to a Justice of the Supreme Court. County Court Judges are either resident in most interior communities or are readily available. Section 11 provides:

> 11. (1) For the purposes of this section, a County Court Judge is a judge of the court and while exercising the jurisdiction of a judge, a County Court Judge shall be called a Local Judge of the Supreme Court of British Columbia.
>
> (2) A local judge has the jurisdiction of the court or a judge
>
> (a) notwithstanding paragraph (c), in a proceeding in the court that could have been commenced in a County Court;
> (b) under the *Bankruptcy Act* (Canada) and the *Divorce Act* (Canada); and
> (c) under all enactments except this Act, the *County Court Act* and
>
> (i) proceedings under the [statutes listed]
> (ii) trials under the [statutes listed]

Two features of the jurisdiction of a Local Judge of the Supreme Court might be noted. First, the reference in subsection (2)(c) is to jurisdiction under "enactments." That term, as defined in the *Interpretation Act*, is broad enough to encompass the Rules of Court. Thus, virtually any matter that might be heard by a Supreme Court Justice sitting in chambers may also be dealt with by a Local Judge of the Supreme Court.

A second feature to note is that jurisdiction under the *Supreme Court Act* itself is excluded by excepting "this Act" under subsection (2)(c) from the jurisdiction of a Local Judge. The effect of this is that, apart from section 11, a Local Judge has no jurisdiction under the Supreme Court Act itself. He cannot exercise jurisdiction vested in a Justice of the Supreme Court by any other section.

Our attention has been drawn to section 42 of the *Supreme Court Act*. It provides:

> 42. When an order has been obtained for a sum of money, the sum shall be payable immediately unless the court orders otherwise. The court may provide that an order is payable by instalments or may suspend execution for the time it considers proper.

A Local Judge of the Supreme Court, therefore, has no jurisdiction to order a stay of execution or that a judgment be paid by instalments under section 42 (*see Canada Trustco* v. *Internorth*, (1983) 43 B.C.L.R. 388). Such jurisdiction as he has in that regard must, therefore, arise under the Rules of Court.

B. Stay of Execution: Rule 42(25)

The authority, in the Rules of Court, for a stay of execution is found in Rule 42(25). It provides:

> (25) (a) The court, at the time of making an order, may stay execution thereon until such time as it thinks fit.
> (b) A party against whom an order has been made may apply to the court for a stay of execution or other relief on the ground of facts which have arisen too late to be pleaded, and the court may give relief on such terms as it thinks just.

The effect of this rule is that, except in the narrow circumstances contemplated by paragraph (b), a Local Judge of the Supreme Court may order a stay of execution only at the time an order is made. He appears to have no power, after the order has been made, to entertain an application to stay execution. Section 42 of the *Supreme Court Act*, in contrast to Rule 42(25), contains no temporal restriction. It might also be noted that the corresponding provision of the former Rules of Court was similarly flexible. Paragraph (b) of Marginal Rule 595 provided:

> 595 (b) The Court or a Judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit.

This restriction on the powers of a Local Judge is, therefore, of recent origin.

C. Instalment Orders

Surprisingly, the Rules of Court appear to contain no explicit provision which clothes the court with jurisdiction to order that the judgment be payable by instalments. There is, however, a procedure provided under the rules whereby a judgment creditor may issue a subpoena to the judgment debtor calling for his appearance before an examiner. The examiner is authorized under Rule 42(37)(a) to make an order "for the payment of the debt by instalments."

This procedure suffers from two obvious limitations. First, it can be invoked only by the judgment creditor. There is no procedure under the rules whereby the judgment debtor might put the wheels in motion which would result in an instalment order, however much he may be able to justify it. Second, it involves a
rather complicated procedure which may not always be appropriate. Many cases might be quickly dealt with through a simple application to the court, either at the time judgment is pronounced or thereafter.

It would appear that only through a highly "creative" interpretation of the power to issue a stay of execution under Rule 42(25) could a Local Judge make what would be, in effect, an instalment order at the time of judgment. He would have no jurisdiction to entertain an application at a later date.

D. Analysis

It has been represented to us that the limitations on the jurisdiction of Local Judges of the Supreme Court with respect to stays of execution, and, to a lesser extent, instalment orders are creating real difficulties for litigants in interior communities where a Supreme Court Justice is not readily available. Urgent cases can only be dealt with by transferring the file to Vancouver or Victoria and bringing the application before a Supreme Court Justice available at one of those locations. This adds considerably to the expense of the application and may result in a delay which, at best, is inconvenient and, at worse, in a critical case could cause genuine hardship.

We are also told that the inability to entertain an application for a stay of execution is particularly critical in the context of mortgage foreclosure proceedings. While the time at which judgment on the personal covenant or guarantee may be taken is not free of doubt, the judgment will commonly be taken at the time the order *nisi* is pronounced (*see* the Honourable Chief Justice of the Supreme Court of British Columbia, "Foreclosure Practice," (1983) 41 Advocate 583). Moreover, in residential foreclosures, the judgment will frequently be pronounced in the absence of the mortgagor. Where a sale of the mortgaged property is, or may be pending, the facts of a particular case may justify a stay of execution until the existence and amount of the deficiency are known. The recent decline in real estate values has led to a situation where the judgment on the covenant is of much greater significance to mortgage lenders than previously.

We believe a good case exists for enlarging the jurisdiction of Local Judges of the Supreme Court with respect to stays of execution and instalment orders. It seems anomalous that, under the Rules, a Local Judge should be given the jurisdiction to pronounce judgment for an unlimited amount (e.g. under Rule 18), but be denied the power to stay execution on such a judgment unless the stay is made contemporaneously with the order. As pointed out above, Local Judges did possess such power until 1976 when the new rules came into force. We are not aware that this jurisdiction led to any difficulties or provided grounds for complaint. The balance of convenience seems clearly to favour the previous rule and we believe the present, more limited, jurisdiction should be enlarged. This conclusion applies with equal force to instalment orders.

If Local Judges were to be given the jurisdiction to stay execution on an application brought forward after the making of the order, a question arises as to the status of paragraph (b) of Rule 42(25). Strictly speaking, it would become largely redundant. It does, however, provide useful guidance as to particular circumstances in which a stay of execution may be appropriate. Moreover, as it provides for "other relief," it may have a role that goes beyond stays of execution. On the whole, we believe it is worth preserving.

E. Conclusion

We believe that the concerns raised in this Report can best be met through an amendment to the Rules of Court. We believe the best approach is to repeal Rule 42(25)(a) and replace it with a modified version which embodies the powers provided by section 42 of the *Supreme Court Act*. A complimentary amendment could then be made to Rule 42(25)(b).

The Commission recommends:

Rule 42(25) of the Rules of Court be repealed and replaced with a rule comparable to the following:

(25) (a) The court may, at or after the time of making an order,

(i) stay execution thereon until such time as it thinks fit, or
(ii) provide that the order, if for the payment of money, shall be payable by instalments;

(b) Without limiting the generality of paragraph (a), a party against whom an order has been made may apply to the court for a stay of execution or other relief on the ground of facts which have arisen too late to be pleaded and the court may give relief on such terms as it thinks just.

This letter is to be taken as Report No. 72 of the Law Reform Commission recommending changes in the Rules as herein set out. These recommendations were approved by the Commission at a meeting on January 26, 1984. The issue addressed is relatively narrow and uncontroversial and it was the Commission's conclusion that an informal Report by letter was the appropriate way of bringing these recommendations before you.

Yours sincerely,

Arthur L. Close
ViceChairman

ALC/ss