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METHODS FOR ENFORCING CIVIL JUDGMENTS IN ONTARIO

By: Pamela D. Pengelley

Cozen O'Connor
One Queen Street East, Suite 1920, Toronto ON M5C 2W5
Phone: (416) 361-3200 • Fax: (416) 361-1405
ppengelley@cozen.com

"If I owe you a pound, I have a problem but if I owe you a million, the problem is yours."
- John Maynard Keynes

INTRODUCTION

As subrogation professionals will know, obtaining a judgment against a defendant in a subrogated action may often be only the first step in a long process – obtaining a judgment is no guarantee of obtaining payment. When a court issues a judgment, it is not concerned with whether the unsuccessful party will ever actually pay the amount. It is up to the subrogating insurer, being the nominal plaintiff, to take this initiative. This situation is the same in cases where a criminal court orders that a defendant pay restitution, and the order is later converted to a civil judgment.

Nonetheless, our civil court system does provide the successful insurer (the "judgment creditor") with mechanisms to assist in collecting payment from the unsuccessful defendant (the "judgment debtor"). The two most common mechanisms for this purpose are (1) a writ of seizure and sale, and (2) a garnishment of debts, such as wages, owing to the debtor. In practice, however, these mechanisms can become quite complicated and are often inefficient. As a practical matter, it therefore bodes well for subrogation professionals to be aware of the advantages and limits of these enforcement mechanisms from the outset of contemplated litigation.

WRITS OF SEIZURE AND SALE

General Information

A writ of seizure and sale is the usual method of enforcing a judgment or court order in Ontario. Generally speaking, a writ is a document that is issued by a court to an Ontario sheriff.

Once filed with a sheriff's office, the writ allows a judgment creditor to direct a sheriff to seize and sell real estate and personal property owned by the debtor in order to satisfy the creditor's judgment. Any proceeds of a sale that exceed the sum of (a) monies owed to

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creditors, including interest, and (b) the costs of enforcing the writ, are returned to the debtor. This writ, however, is only effective to the extent that a debtor actually *has* assets that can be sold to satisfy this judgment. There is no minimum amount that a debtor must owe in order for a creditor to obtain a writ.

The lawyer for the judgment creditor obtains this writ by filing a "requisition" for the writ with the court's registrar, along with proof of the amount owing. A requisition is, essentially, a request to the court for a writ, addressed to a sheriff's office in a region where the debtor holds property. The writ tells the sheriff of the amount of money that is owed to the creditor, as well as any payments that have been received since the judgment was issued.

Ontario does not have a "province-wide" registry for filing writs. Instead, Ontario is divided into districts, each with a separate sheriff's office that can enforce writs only for property located in that particular district. The practical consequence is that a creditor will have to determine the location(s) in Ontario of debtor's property, and file a writ with the sheriff's office for each district where property is located. A creditor can file a writ of seizure and sale within six years of obtaining an order or judgment. A writ must be renewed every six years after the date of filing or it will expire.

Another important aspect of filing a writ is that a sheriff *will not* automatically enforce the writ or 'keep tabs' on the debtor's assets for the creditor. Even though a writ is filed with the sheriff's office, the sheriff *will not* take steps to enforce the writ until directed to do so by the creditor, and will require specific instructions and information from the creditor with respect to any property that is available for seizure. The sheriff also charges the creditor a fee for seizing the debtor's assets and selling them by way of a public sale and may require a "bond of indemnity" from the creditor which makes a creditor liable for any wrongful seizure of such property. Although the creditor can add the expenses of enforcing a judgment to the amounts owing by a debtor, it is up to a creditor to ensure that the debtor has assets that can properly be seized and sold so as to make the costs of enforcement worthwhile. Additionally, the proceeds of a sale do not go directly to the creditor who requested that the writ is enforced, but instead are held by the sheriff for 30 days and then distributed equally among the debtor's creditors.

Seizure and Sale of Personal Property

The definition of "property" that can be sold under a writ of seizure and sale is quite broad. In addition to seizing tangible land and goods, the sheriff can seize:

- Money, cheques, bills of exchange, promissory notes, bonds, mortgages or other securities, book debts and "choses in action";
- Money paid into court pending judgment;
- The mortgagee's interest under a mortgage;
- Rights under letters patent of invention;
- Equitable interests, including an equity of redemption;
- Shares in a private company; and,

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- Shares or dividends in a chartered bank or corporation having transferable shares.

Under Ontario's *Execution Act*, certain assets belonging to a debtor are sheltered from seizure and sale by creditors. Generally speaking, the following items are exempt from seizure:

- necessary and ordinary wearing apparel of the debtor and his or her family not exceeding $5,650 in value;
- the household furniture, utensils, equipment, food and fuel that are contained in and form part of the permanent home of the debtor, not exceeding $11,300 in value;
- tools and instruments and other chattels ordinarily used by the debtor in the debtor's business, profession or calling not exceeding $11,300 in value (unless the debtor is in the farming business, in which case different limits apply);
- a motor vehicle not exceeding $5,650 in value;
- welfare payments;
- insurance moneys;
- pension benefits;
- a portion of a worker's net wages; and
- benefits under the *Canada Pension Plan* and under the *Employment Insurance Act*.

Seizure and Sale of Land

When a writ is filed with an Ontario sheriff, the sheriff will automatically forward the writ to the Land Titles Office in his particular district. The writ is said to "bind" any land or real estate owned by the debtor in the sheriff's district. That is, even if the debtor sells the property to a third party, then so long as the third party could have learned about the writ by contacting the sheriff's office and making the proper inquiries, the writ stays attached to the property so that the property can be sold by the creditor in satisfaction of the judgment.

Where a debtor owns a home jointly with a spouse or some other person, the property can still be sold under a writ of seizure and sale, but the creditor can only sell the debtor's joint interest in the property. Typically, the purchaser of the property would buy the debtor's joint interest and become a joint owner with the spouse. The purchaser would then bring partition proceedings which would force the spouse to purchase the creditor's joint interest or sell the property in its entirety and split the proceeds. Another option would be for the creditor to purchase the spouse's joint interest, and then re-sell the property.

A creditor is required to follow certain timelines before selling a debtor's land and real estate. Before a creditor can take any steps to sell a debtor's lands, the writ of seizure and sale must remain filed with the sheriff for at least four months. While the creditor can take steps to prepare for the sale after that time, the sheriff cannot sell the property for another two months, or six months from the date that the writ is issued. Before a sheriff conducts a sale of land, the sheriff requires specific instructions to sell the lands together with

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a deposit of $5,000 to cover the cost of advertising and $240 to cover the sheriff's fees for enforcement. The sheriff has discretion to adjourn the sale date, if necessary, in order to realize the best possible sale price.

GARNISHMENT OF INCOME AND OTHER DEBTS

A creditor may enforce an order for repayment or recovery of money by garnishing the debts payable to the debtor by other persons, referred to as "garnishees". Garnishment is a legal mechanism that permits a creditor to seize or intercept a portion of debts that are *owed* to the debtor by third parties, *before* payment is made. Notice of garnishment can be used with respect to a debtor's bank account, wages owing from an employer, or other monies owing to a debtor.

A Notice of Garnishment warns a third party garnishee that the debtor owes money to the creditor. The Notice explains to the garnishee that they must pay to the Sheriff the money (or property) in the garnishee's possession owing to the debtor up to the amount set out in the Notice of Garnishment. If the garnishee fails to do so, the court can award judgment against the garnishee. The garnishee must either pay the amount set out in the Notice or complete a "Garnishee's Statement" stating the reasons why the debt was not paid. Any debt payable to the debtor by the garnishee, as well as any future debt payable within six years, is subject to garnishment.

Just as with a Writ, a Notice of Garnishment is issued by the court and is filed with the Sheriff's Office in the garnishee's district. A separate Notice must be obtained for each Garnishee. Thus, each time a debtor changes employment, a new Notice of Garnishment must be obtained from the court.

Garnishment can be used to intercept:

- up to 20% of a debtor's wages;
- commissions and gratuities;
- pay equity to employees;
- moneys held in a debtor's bank account, or one-half of a debtor's joint bank account;
- moneys held in a R.R.S.P., including a locked-in R.R.S.P;
- the cash surrender value of a life insurance policy;
- moneys held as a retainer by a lawyer where no further services are contemplated;
- moneys owing to a medical doctor by OHIP; and,
- inheritance owed to a residual beneficiary.

The following debts are exempt from garnishment:

- 80% of a debtor's wages, unless the debt pertains to spousal support in which case the exemption is reduced to 50%;

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- R.R.S.Ps that contain an insurance element;
- investor-directed R.R.S.Ps;
- moneys payable on account of personal injury damages for pain and suffering;
- moneys held by a debtors lawyer as a retainer for an appeal or defence;
- moneys paid by a debtor to a landlord as a security deposit under a lease; and
- moneys deposited by a debtor as security for a bank in issuing a letter of credit.

CONCLUSION

When an insurer is successful in a subrogated action, but the defendant is unwilling or unable to pay the judgment, the two principal methods by which the insurer can enforce the judgment are (1) seizure and sale of the debtor's real and personal property; and (2) garnishment of debts owing to the debtor. In practice, however, these mechanisms can become quite inefficient. In Ontario, there is no centralized bureaucracy for the sheriff's offices with respect to enforcement of judgments. Additionally, these enforcement mechanisms are only as good as the assets and debts to which they attach. Initiating subrogated litigation may only worthwhile if, at the end of the day, there is money to recover. Obtaining a judgment for a debt is only the first part of the battle, since enforcement of that debt may be a very difficult and time-consuming process. It is important therefore, *before* embarking upon litigation, to discuss possible recovery options and other issues with an experienced lawyer.

Cozen O'Connor is internationally recognized for its ability to successfully evaluate and prosecute all types of subrogated property losses, both domestic and international. Our lawyers' expertise in dealing with all forms of property damage disputes, and issues surrounding their enforcement, can be deployed for the benefit of your company to assist in the recovery of subrogated claims.

For additional information concerning Cozen O'Connor's Subrogation and Recovery Program, please contact:

Chris Reain, Esquire
Subrogation and Recovery Department, Toronto
(416) 361-3200 • creain@cozen.com
www.cozen.com

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