

The Litigator

OTLA Ontario Trial Lawyers Association

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CRIME & COMPENSATION

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Concurrent criminal and civil cases:

Making the most of evidence

It cannot hurt to have just one more, right?

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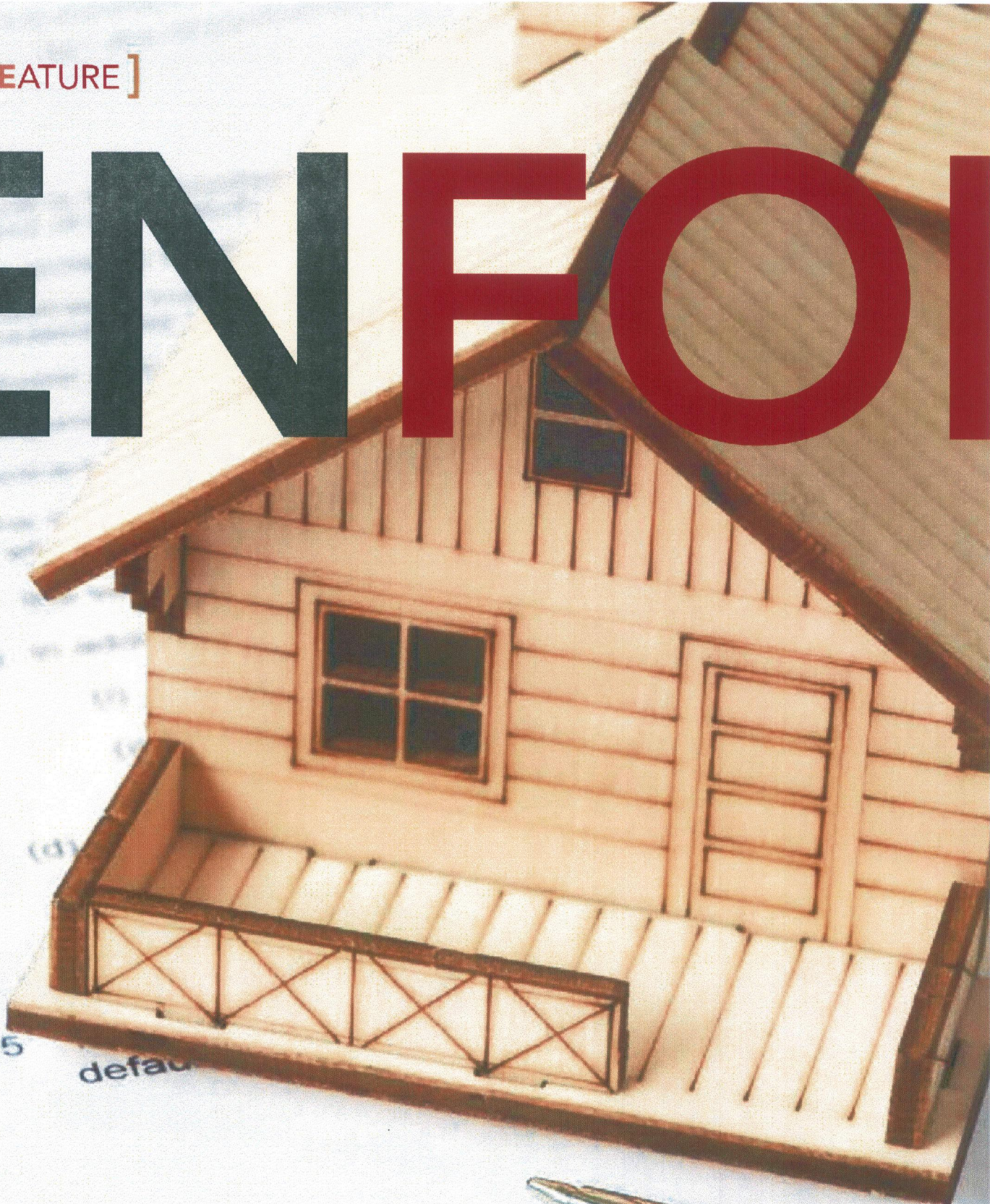
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ENFORCING YOUR CLIENT'S JUDGMENT

What are the various mechanisms for post-judgment enforcement contained in the *Rules of Civil Procedure*? This article summarizes three post-judgment enforcement procedures available to unsecured creditors in Ontario against either individuals or corporations.


Congratulations—you've drafted your client's claim, served it on the other party, and the court issued a judgment. Your client then asks you the foremost question on their mind: how do they start collecting their money?

Many unsecured judgment creditors ask this question and it is important for litigation lawyers to understand and utilize the various mechanisms for

post-judgment enforcement contained in the *Rules of Civil Procedure*. A happy client is one who collects their outstanding debts. An unhappy client is one who collects unenforceable judgments and legal bills. This article briefly summarizes three post-judgment enforcement procedures available to unsecured creditors in Ontario against either individuals or corporations, so that you as a lawyer can start collecting happy clients.

Your client can enforce against real property

After your client receives their judgment, if the judgment debtor owns real property, a lawyer should immediately file and issue a writ of seizure and sale in the jurisdiction of the property's location. Your client may want to file this writ even without confirmed property ownership, as the writ would register against any future property owned by named the debtor in that jurisdiction



As per the Wages Act, if the debtor is considered an employee of another, a creditor can usually garnish twenty per cent of the debtor's net wages. If the debtor qualifies as an independent contractor of the garnishee (such as a real estate agent), a creditor could typically garnish one hundred per cent of the debtor's commissions or other amounts owed from the garnishee to the debtor.

during the six year period after filing and precludes the debtor from disposing of or refinancing their property unless the judgment creditor withdraws his writ. The writ can be renewed before the expiry of the six-year term without requesting leave from the court.

A lawyer must be careful to file her client's writ with the exact name displayed on the title of the debtor's property. If the debtor's name on title is different from the name on the writ, the writ may not appear on a search of executions registered against the debtor in that jurisdiction, and therefore may not effectively bind their property. Since the names on the writ follow the names stated on the judgment, it is prudent for a lawyer to conduct a property search before issuing her client's claim. This would ensure that the spelling of a defendant's name as disclosed on title is properly included as an "also known as" within the title of proceedings.

Your client's writ should act as security for a situation where the debtor attempts to sell or refinance the mortgages on his property, but if your client prefers a more aggressive approach, an unsecured creditor may

consider directing a Sheriff's sale of the debtor's equity of redemption in his property. Where warranted, this is a very effective enforcement tool for an unsecured creditor. Typically, individuals anticipate that a secured creditor can realize upon his debts by seizure and sale, such as a mortgagee conducting a power of sale of real property. However, many individuals do not think that an unsecured creditor can also coordinate steps which produce similar results, that being the sale of a debtor's real property.

First and foremost, a Sheriff's sale can only be directed when there is sufficient equity in the debtor's real property to satisfy the encumbrances on title. In order to determine the equity in a property, a lawyer should update the property's parcel abstract (to learn of any new charges or encumbrances) and conduct an executions search in the name of the debtor as stated on title (to learn of any other judgment creditors who would share pro rata in the equity after the sale). The executions search should also reveal your client's judgment, thereby confirming that you correctly filed the writ.

Although one can approximate the value of the property to assess the viability of a Sheriff's sale, in order to proceed with the sale, the Sheriff requires a formal up to date appraisal of the property and an up to date statement showing the balances remaining on any mortgages encumbering the property. As per the 2011 *Citi Cards Canada Inc. v. Pleasance*, 2011 ONCA 3 decision, *PIPEDA* prohibits financial institutions from providing a mortgage statement to a creditor for the purpose of enforcing a judgment. Therefore, in order to obtain this document, a creditor could require an examination in aid of execution of the debtor. The Sheriff also requires a tax certificate from the city or municipality to ensure that any tax arrears do not compromise the potential equity in the property.

In addition to the above documents, the Sheriff typically requires a deposit of \$5,000.00 (which could vary based upon jurisdiction) to conduct the sale. The deposit is used for the Sheriff's costs including advertising expenses, auctioneer costs, and the costs of retaining counsel to review. It is important to remember that once the Sheriff commences the sale process, the Sheriff, not the creditor, controls the process and it is the Sheriff (often with no input whatsoever from the creditor) that determines what, if any, price is reasonable for a sale to proceed. Therefore, the risk can be fairly high that your client's deposit money (and of course, any legal fees incurred), become a non-refundable cost.

Your client can enforce by garnishment

As described above, directing a Sheriff's sale is a long and possibly expensive process. If your client seeks a more

immediate enforcement route, and has information that the debtor has money owed to him, a creditor could garnish these funds. For instance, if an individual debtor is employed, your client could garnish his wages. Before proceeding to issue and serve a notice of garnishment on the debtor and the potential employer (the “garnishee”), a lawyer should confirm the debtor’s employment with the payroll department of the garnishee.

As per the *Wages Act*, if the debtor is considered an employee of another, a creditor can usually garnish twenty per cent of the debtor’s net wages. If the debtor qualifies as an independent contractor of the garnishee (such as a real estate agent), a creditor could typically garnish one hundred per cent of the debtor’s commissions or other amounts owed from the garnishee to the debtor.

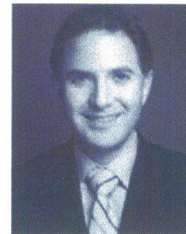
The consequences for a garnishee not complying with the notice of garnishment could be a judgment issued against the garnishee. In this respect,

a lawyer must be careful to determine the proper name of the garnishee via a corporate name search. If the garnishee is misnamed on the garnishment documents, a creditor may have no recourse against the actual misnamed garnishee if the garnishee refuses to remit the debtor’s wages or commissions pursuant to the garnishment. As well, garnishing an individual debtor who is self-employed in a small corporation is often difficult as the debtor is typically in control of the garnishee’s payroll.

Garnishment does not just apply to wages and/or salary. If an individual has any funds owed to him such as rent payments, or even payments from another party, those funds can be garnished. In addition, if you are aware of any bank accounts held by either an individual or corporate debtor, so long as you can properly identify the accounts, a creditor can attempt to garnish the funds held in the account (up to the judgment amount) at the time the bank receives the notice of garnishment.

Your client can conduct an examination

Last, if you are unable to find information on the debtor to facilitate collection, a creditor may conduct an examination in aid of execution of the judgment. This type of examination is under oath, and the *Rules* state that the debtor may be examined in relation to his income, property, debts, and past, present, and future means to satisfy the judgment. Information accumulated during the course of the examination can be used to obtain knowledge of assets and any other possible source of enforcement, including the methods note above.



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