KOSKIE MINSKY

JUSTICE MATTERS

Civil Litigation

This newsletter is intended to provide insight for our clients on relevant litigation issues.

Judgment: Not always the end of the road to recovery

Many litigants are under the impression that once a judgment is obtained, payment of the debt owed will follow shortly thereafter. However, that is not necessarily the case. As such, we will examine what it means to obtain default judgment and what steps may need to be taken in order to recover the debt owed to the Plaintiff/Creditor.

Once your claim is served on a Defendant, the Defendant has a prescribed time under the *Rules of Civil Procedure* in which to serve and file their Statement of Defence. If a Defendant fails to serve and file a Defence pursuant to the *Rules*, a Plaintiff may note the Defendant in default. The consequences of noting a Defendant in default, is that the Defendant is deemed to have admitted the truth of the allegations made in the Statement of Claim. Thereafter, the Defendant is prohibited from delivering a Statement of Defence or taking any other step in the proceeding without leave of the Court, which step would usually be a motion to set aside the noting in default.

After noting a Defendant in default, the Plaintiff can move to have the Registrar sign a Default Judgment against the Defendant in respect of certain claims; for example, claims in respect of a monetary debt including interest. However, while the Defendant is required to pay the amount owed pursuant to the Default Judgment/Order, it is not always so easy to actually obtain payment from the Defendant.

Accordingly, if payment is not forthcoming from the Defendant, it may be necessary to arrange an Examination in Aid of Execution, also known as a Judgment Debtor Examination. Pursuant to the *Rules*, a creditor is entitled to examine a judgment debtor in relation to: the reason for his/her nonpayment or nonperformance under the Order; the debtor's income and property; any disposal of assets either before or after the Order; and, the debtor's means by which to satisfy the Order. The purpose of a Judgment Debtor Examination is to obtain enough information about the assets of a creditor in order to take other enforcement steps to recover the debt owed to him/her including, but not limited to, filing a Writ against the debtor to prevent the disposal of property without first satisfying the Order, or to seize property of

the debtor and/or garnish the debtor's bank accounts or wages.

While a Default Judgment means that as a creditor you are entitled to payment of a debt, it does not mean the debtor is prepared to cooperate in providing payment of your judgment, and as such, the above steps are often required to enforce the Judgment/Order.

Execution After Judgment-Garnishment

Once a creditor obtains judgment for the payment of money, and the judgment debtor does not remit payment within a reasonable time, one of the options available to enforce the judgment is to proceed with a notice of garnishment.

The *Rules of Civil Procedure* outline the procedure for issuance of a garnishment. By notice of garnishment, the garnishment entitles the creditor to seek payment for the recovery of monies, which a third party, the garnishee, owes to the debtor or holds on behalf of the debtor. The most common examples include wages remitted by an employer to the debtor, or the debtor's funds being held in a bank account at a financial institution.

To issue a notice of garnishment with the Court in Ontario, the creditor is obliged to file a requisition for garnishment with the registrar, a copy of the order or judgment, an affidavit outlining certain prescribed information, and any other evidence necessary to establish the amount awarded in support of the creditor's entitlement to garnish.

The notice of garnishment is in force for six years from the date of the Order, and must be renewed within six years. It is important to diarize these dates to ensure the garnishment does not expire.

If the creditor has no knowledge regarding the judgment debtor's employment or bank accounts, the *Rules of Civil Procedure* entitle the creditor to conduct an examination in aid of execution, commonly referred to as a judgment debtor examination. An examination in aid of execution can be helpful because it provides the creditor with an opportunity to obtain information, under oath, regarding the judgment debtor's property, sources of income, expenses, and dispositions or transfer of assets which may be attacked in Court as a fraudulent conveyance or unjust preference. If a judgment debtor fails to attend an examination in aid of execution, the creditor can bring a motion before the Court to compel an attendance. If the judgment debtor fails to attend the examination in the face of a Court Order, a judge of the Superior Court has jurisdiction to hold the judgment debtor in contempt, and in more egregious circumstances, order that the debtor be imprisoned.

If a garnishee does not make payment or respond to the notice of garnishment, the garnishee can be exposed for the full amount of the judgment. If the garnishment is disputed, the garnishee must serve and file a garnishee statement within 10 days of service of the notice of garnishment detailing why the

garnishment is disputed. Should such a dispute arise, a creditor, debtor, or garnishee may request a garnishment hearing with the Court under Rule 60. A judge has broad discretion on a garnishment hearing to determine the rights and obligations arising from the garnishment.

It should be noted there are limitations to enforcement by garnishment. Garnishment of wages is limited pursuant to the *Wages Act*. Employment insurance, social assistance, and dependent payments cannot be garnished, even if the funds are deposited into the debtor's account at a financial institution.

As a matter of best practices, a creditor should canvass the likelihood of collecting a judgment before issuing and/or deciding to proceed with a claim.

Pursuing Claims in Bankruptcy

Just because a debtor is bankrupt (or in another insolvency proceeding), does not necessarily mean creditors will not recover amounts owing from the debtor. This is particularly true for employees (including Unions/Union Trust Funds) who may have super-priority claims in a bankruptcy for unpaid wages and pension contributions. Proving your claim and the ranking of your claim versus other creditors is the central focus for effectively pursuing claims in bankruptcy. Below is a brief overview of the bankruptcy process in Canada.

Bankruptcy

Generally, any insolvent person who has no other way to meet his or her financial obligations may file for bankruptcy. In a bankruptcy, a corporation or person (called the "debtor") who can no longer pay their debts, gives all of their non-exempt property to a Trustee in Bankruptcy who then sells the property and distributes the available funds to creditors. Bankruptcy can be voluntary, or forced by a creditor through the Courts. Once a debtor is declared bankrupt, all legal proceedings are stayed absent the Court's permission.

Proof of Claim Form

After a bankruptcy has been filed, the Trustee will send out to all the known creditors: a notice of bankruptcy, a list of creditors and the amounts of their claims (known by the Trustee at that time). To recover money owed, a creditor must complete and submit a Proof of Claim to the Trustee. In this form, a creditor must set out: their contact information; the amount owed; the basis of the claim; the ranking of the claim (e.g. unsecured, priority, secured etc.); and must attach any supporting documents proving the claim. The Trustee then determines if the claim is allowed in whole or in part. A creditor has 30 days to appeal a disallowed claim to the Court. If the Trustee approves the Proof of Claim, the creditor may share in any dividends/distributions and vote at the first meeting of creditors (if one is held).

Meeting of creditors

Within five days of appointment, the Trustee must send a notice of the bankruptcy and a notice of the First Meeting of Creditors (if one is held) to the bankrupt, and any known creditors. At the first meeting of creditors, there will be a vote to confirm (or replace) the Trustee, and to appoint inspectors [inspectors are appointed to provide the Trustee with direction and authority]. At this meeting, creditors may also ask the Trustee and bankrupt questions, review the Trustee's preliminary report and examine the bankrupt's affairs. Sometime, the Trustee may also have the creditors vote on other resolutions/issues.

It is important to file your Proof of Claim prior to the First Meeting of Creditors, as this allows the creditor to: vote on a resolution; examine the Proofs of Claim of the other creditors; or require the production of bankrupt's books or documents. The creditor may also vote by proxy by providing the Trustee with a completed proxy form.

Distribution

After the Trustee has sold all of the bankrupt's property, the Trustee prepares a final statement of receipts and disbursements along with a dividend sheet. The dividend sheet contains a list of creditors who will receive dividends and the amount to which they are entitled. Dividends are distributed pursuant to a complex set of rules under the caselaw and the *Bankruptcy and Insolvency Act.* The distribution can also vary depending on the nature of the assets sold and any security on those assets. Although the following list is an oversimplification, and not necessarily true in each case or for every asset, often times distribution of proceeds follows the following ranking:

a) CRA Trust Claims;

b) certain employee super-priority claims;

c) secured claims;

d) Trustees fees and legal costs; and

e) unsecured claims.

Unsecured creditors are paid on a pro-rata basis, and after all secured and preferred creditors have been paid in full. However, in some cases, there will be no distribution for unsecured creditors.

Employees/Unions

If the creditor is an employee of the bankrupt, they may be entitled to have up to approximately $3,700 of their claim paid out by the *Wage Earner Protection Program* (WEPP) – certain claims for unpaid wages, vacation, severance and termination pay. Eligible claims are paid out through a government fund, regardless if there are any funds for distribution in the bankruptcy. If a WEPP payment is made, then

Services Canada is subrogated to the employee's claim in the bankruptcy (up to the amount paid out by WEPP).

In a bankruptcy, the *Bankruptcy and Insolvency Act* provides for super priority claims regarding unpaid wages/compensation and unpaid pension contributions. Caselaw in Ontario confirms unpaid monthly Union remittances/benefits and pension contributions qualify for these super priorities. In many cases, it is also possible for employees and Unions/Union Trust Funds to sue directors of bankrupt corporations personally for any unpaid wages and monthly remittances/benefits. It is therefore strongly recommended that you consult a knowledgeable lawyer to assist you with preparing a Proof of Claim, particularly if the claim is for a Union/Union Trust Fund regarding unpaid monthly contributions/remittances and pension contributions.

David Silver, Partner Demetrios Yiokaris, Partner