

# Bumps in the Road to Recovery - Part II

Katherine Henshell

In my previous article, I explained the procedure for issuing a notice of garnishment as a tool for enforcing outstanding judgments. In this article I will explain a few of the more common limitations, delays, and temporary setbacks in the garnishment process.

## 1. Limitations

Section 7(2) of the *Wages Act*, RSO 1990, c. W1 allows an eighty per cent exemption of the debtor's wages from garnishment. Typically, the payroll department will remit to the sher-

iff twenty per cent of the defendant's gross wages less statutory deductions (E.I., C.P.P.). Sections 7(4) and (5) of the *Wages Act* allow for this exemption to be increased or decreased, respectively, on motion to the court by either the creditor or the debtor.

If the defendant is straight commission, the defendant can benefit from the eighty per cent exemption. In *S.R. Kertzer & Co. v. Ross* (1976), 20 N.B.R. (2d) 85 (N.B. Co. Ct.) the court expanded the definition of wages in holding that commissions constituting sole source of income

can be exempt as "wages". However, should the debtor be paid salary plus commission then twenty per cent of the defendant's gross pay less statutory exemptions plus one hundred per cent of his commission must be remitted to the sheriff.

Secondly, the notice of garnishment expires six years from the date that it is served on the garnishee (Rule 60.08(12)(a)).

Thirdly, leave of the court is required to issue a notice of garnishment if six years have elapsed since the date of the order or if the enforcement of the order is subject to a condition (Rule 60.08(2)). When leave of the court to issue a notice of garnishment is obtained, the notice of garnishment must be issued within one year after the date of the order granting leave which can be granted again on a subsequent motion (Rule 60.08(3)).



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## 2. Delays

Delays in receiving money from the sheriff can occur due to multiple creditors or priority creditors.

A situation of multiple creditors arises when more than one creditor has issued a notice of garnishment or filed a writ of seizure and sale with the sheriff against the debtor. You will recognize that this is the case when you receive a distribution proposal in the mail from the sheriff's office. The distribution proposal will set out the total amount of money to be distributed, the total priority amount being distributed and the amount that each creditor will be receiving. Distribution to creditors is done on a pro rata basis (*Creditors' Relief Act, RSO 1990, c. C.45 s. 5(2)*). Money will be distributed to creditors in accordance with the distribution proposal. Should you think that there is an error on the distribution proposal you must contact the sheriff's office to notify them, failing which you are deemed to accept the terms of the distribution proposal.

A situation of priority creditors arises when one creditor issues a notice of garnishment or writ of seizure and sale against the debtor and legislation exists to deem that creditor to be paid first all amounts owed before any other creditor is paid. Common priority creditors are Family Responsibility Office and Canada Customs and Revenue Agency. Sometimes a priority creditor is owed a large sum of money and chances are that your client will never see any money; however, at times, the priority creditor is only owed, for example, \$3,000.00 to \$5,000.00 and your client may only have to wait four to six months before she receives sheriff's remittances again.

## 3. Temporary Setbacks

In my experience I find that temporary setbacks occur on two occasions: i) When the garnishee fails to remit to the sheriff and ii) When the defendant "does not exist" according to garnishee's records.

### i) *The garnishee fails to remit*

The garnishee is liable to pay or reply to the sheriff within ten days after service on the garnishee or ten days after the debt becomes payable, whichever is later (Rule 60.06(11)). Garnishees fail to remit for a number of reasons:

1. The appropriate department does not have the garnishment documents;
2. The garnishee does not know how to process the documents; or
3. The garnishee is trying to protect the debtor. The first and second situations are easy to fix; however, the third requires a little more work.

When dealing with a large garnishee company it is important that the notice of garnishment is directed to the correct department. For an employer this is the payroll department and for a bank it is normally a

third party legal department. After service, it is important to make a follow-up telephone call to the garnishment processing department to ensure that they received the garnishment paperwork and are going to be remitting to the sheriff's office in the ordinary course. This simple procedure ensures there is no delay with the remittance.

The second reason usually occurs at a smaller company. From my experience, I find that on approximately one out of every seven garnishments, I receive a telephone call from the garnishee asking for the proper procedure to process the garnishment. I cite to them the appropriate legislation and make sure that they have the correct sheriff's office address to make remittances. I always give them the sheriff's office telephone number and tell them to follow up with their company lawyer or the sheriff's office as I act in the best interests of the creditor.

The third reason occurs more frequently than I would like it to. From my experience, on about one out of every 35, a garnishee fails to remit with intent. Garnishees failing to remit have advantages and disadvantages. Advantages are that the garnishee who does not pay to the sheriff

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the amount set out in the notice of garnishment, and who does not serve and file a garnishee's statement, on motion the creditor is entitled to an order against the garnishee for payment of the amount set out in the notice of garnishment (Rule 16.08(17)). Typically, garnishee companies have a larger amount of assets to enforce the judgment against. The disadvantages are finding those assets in an expeditious manner.

**ii) Defendants that "do not exist"**

Commonly this problem occurs because not enough prep work was done on the file prior to commencing the litigation. Proper prep work includes:

1. Pulling at least one credit bureau on the defendant. (My office policy is to pull both an Equifax bureau and a Transunion bureau.) A credit bureau leads to an incredible amount of information including current address, current place of employment, debtor's date of birth, aliases,

and some spousal information. Knowing how to use this information effectively will assist you in minimizing the time between claim and payment. Effective litigation can have the first garnishment payment in your office within two and one-half months from the date you issue the statement of claim.

2. Calling the defendant's payroll department and confirming the name the defendant uses to get paid. (My standard question is "What name do you write on the defendant's paycheque? Followed by the question "How do you spell that?")

3. Confirming the defendant's name as it appears on his bank account.

Confirming the name the defendant uses to receive his income or benefit from his assets is vital to ensuring the quickest and most efficient recovery of your client's money.

My purpose in writing these two articles was to assist lawyers in learning the effective use of the process of garnishment to enforce outstanding

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