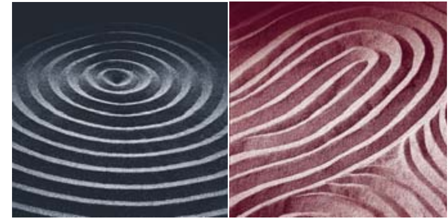
MILLER THOMSON LLP
Barristers & Solicitors
Patent & Trade-Mark Agents

Scotia Plaza
40 King St. West, Suite 5800
P.O. Box 1011
Toronto, ON Canada
M5H 3S1
Tel. 416.595.8500
Fax.416.595.8695
www.millerthomson.com



TORONTO VANCOUVER WHITEHORSE CALGARY EDMONTON KITCHENER-WATERLOO GUELPH MARKHAM MONTRÉAL

Recovering the Debt: Litigation Strategies Against Deadbeat Debtors

Craig Mills
and
Arthi Sambasivan

This article is provided as an information service only and is not meant as legal advise. Readers are cautioned not to act on the information provided without seeking specific legal advise with respect to their unique circumstances.
© Miller Thomson LLP 1998-2006

Recovering the Debt:
Litigation Strategies Against Deadbeat Debtors

by

Craig Mills & Arthi Sambasivan[1]
(Miller Thomson LLP)

While many clients immediately consider bringing litigation in order to right a perceived wrong, litigation for the recovery of a debt usually boils down to an economic decision. In this context, the decision to litigate must take into account many factors including: the amount of the debt, the time and cost associated with the litigation process, the likelihood of success and, most importantly, the likelihood of recovery from the debtor.

This paper is designed to serve as a helpful, though not exhaustive, guide for creditors engaged in the debt recovery process in Ontario. It will discuss the various means by which creditors can arm themselves with the necessary information to make the decision to litigate. It will also explore that various steps in making demands upon the debt, commencing a collection action and effective strategies against debtors who are later found to have insufficient assets due to a change in circumstances or have taken active steps to hide their assets.

1. Warning signs of a deadbeat debtor

Clearly, litigation is not the most effective method to recovering a debt. For this reason, a wise creditor should take steps to protect itself to the extent possible before the debtor goes into default. This includes conducting credit reviews and asset searches, requiring upfront deposits, requesting supporting guarantees and taking and properly registering security interests where possible. While taking these steps can never completely eliminate the possibility that the debtor will go into default, they will certainly ease the creditor's ability to maximize its recovery.

---

[1] Special thanks to Luxmen Aloysius, our articling student, for his diligent assistance in preparing this article. His hard work on the foundations of this paper is greatly appreciated.

There are usually typical warning signs that the debtor is having financial difficulty and is about to default on the debt. These include: late payments; evading collection calls; complaints about the financed or leased equipment soon after delivery to the debtor; cancellation or failure to maintain insurance on personal and real property; resistance to inspections by the creditor; changes in equipment location; business name changes; personal issues such as a divorce situation and/or partnership disputes.

When these signs begin to appear, a creditor should take proactive steps to ensure that, if the account does go into default, there are no unexpected issues that may restrict its enforcement remedies. As an example, has the contract or agreement with the debtor been signed and dated by both the creditor and debtor? Does the creditor have director's resolutions on file authorizing the debtor to enter the contract with the creditor? Has the creditor property registered its security interest under the *Personal Property Security Act*?[2] These are some of the questions that should be considered in the early stages. These precautionary steps are essential and less costly to remedy when considered in the early stages.

Creditors should also take this time to gather as much current information as they can about the debtor, the debtor's business and the extent of the debtor's assets. While the debtor may be one source of this information, a creditor may be able to obtain more reliable information from searches conducted on third party databases (as discussed below).

It is important that any communications with the debtor should be documented. Telephone conversations should be confirmed by a letter and detailed notes from conversations about the status of accounts should be kept. Carefully maintained business records will always enhance a creditor's position in a possible action against the debtor.

2. Considerations before commencing proceedings

Having satisfied itself that it is in a position to enforce the debt, a creditor considering commencement of proceedings should also give some thought to some preliminary issues. The

---

[2] R.S.O. 1990, c. P.10.

primary consideration is whether proceedings are warranted in light of the debtor's current financial position. As noted above, a creditor would be well served by conducting various searches to determine the relevant information about the debtor and the extent of its assets.

Another important consideration is the applicable limitation period and whether the date by which an action must be commenced has expired. A looming limitation period may impact on a creditor's decision to begin with an initial demand letter or simply proceed with an action.

(a) Searches

There are a variety of searches that can assist the client in determining whether there are sufficient assets to warrant attempting to obtain judgement. The following table outlines some of the searches that are available to determine the existence and breadth of the debtor assets against which a judgment could be enforced:[3]

Type of Search	Description
Corporate search (Provincial or Federal)	Corporate searches are available for all provincially and federally incorporated corporations and are helpful in confirming the jurisdiction and corporate status of a corporation. Corporate searches also reveal information about the corporation that is available in the public files. This includes information regarding the corporation's current corporation name, any existing and former registered business names, information on the directors and officers of the corporation (including home addresses), the registered office address of the corporation and information regarding any former amalgamations of the corporation.
Personal Property and Security Act **(PPSA) search**	In Ontario, PPSA searches show registrations made against a corporation or persons under the former *Corporation Securities Registration Act* (Ontario) and under the PPSA recorded in Ontario's Personal Property Security Registry System. Ontario's Personal Property Security Registry System is the central computer-based registry system maintained by the Ministry of Governmental Services.

[3] Table modified from Elizabeth Gillis, Advanced Corporate Business Transactions (Emond Montgomer: Toronto, 2006), Table 2.4 Corporate/Commercial Searches to be Conducted Against SearchCo. at 38.

Type of Search	Description
	PPSA searches will indicate whether the personal property of the corporation or person is subject to any security interests of secured creditors. A creditor should consider conducting PPSA searches (or the jurisdictional equivalent) in each jurisdiction in Canada (and, when applicable, the United States) where the person or corporation has assets.
***Bank Act* (Canada) s.427 search**	A *Bank Act* search will indicate whether any banks have taken a security interest in the assets of the corporation or the individual pursuant to section 427 of the *Bank Act*.
***Bankruptcy and Insolvency Act* (Canada) search**	A bankruptcy search determines whether there is any record of any bankruptcy or insolvency proceedings involving the corporation or individual registered with the Office of the Superintendent of Bankruptcy in Ottawa (for all of Canada) under the *Bankruptcy and Insolvency Act* (Canada).
***Bulk Sales Act* (Ontario) search**	A *Bulk Sales Act* search will indicate whether a corporation has made a sale of its stock in bulk out of the usual course of business. This search is conducted by examining the court file in the jurisdiction where the corporation carries on business.
***Execution Act* (Ontario) search**	Execution searches will indicate whether a judgement creditor has filed an execution or writ against a corporation or individual for an unpaid judgement in the Sheriff's Office in the place where the corporation or individual carries on business. Province wide searches are also available (such as through www.bar-ex.com's "Ontario Writs Locator").
Real property searches	Where it is determined that the debtor has an interest in real property, real property searches (or sub-searches) can be conducted to determine whether the status and nature of the debtor's title to real property and whether there are any encumbrances, mortgages, or other charges registered against such real property.
Motor vehicles search	Provides information on an individual or corporation's ownership of motor vehicles in the jurisdiction in which the search is conducted.
Miscellaneous searches	General internet searches (i.e. 411.ca., Industry Canada searches Google, company websites, etc.) can also bring up

Type of Search	Description
	contact/employment information about an individual or corporation.

The above searches are helpful in obtaining information about the debtor, the extent of its assets and whether there are prior encumbrances against the debtor's assets, such as a security interest or mortgage.

(b) Limitation periods

In Ontario, claims arising after January 1, 2004 will generally be subject to the *Limitations Act, 2002*[4]. The *Limitations Act, 2002* provides a basic two year limitation period from the point of discovery of the claim. Please note that there are transition rules under the *Act* for claims (or debts) that arose *before* January 1, 2004 (when the *Act* came into force), and where no proceeding has been commenced. If the claim was not discovered before January 1, 2004, the limitation period under the *Act* may apply. If the claim was discovered before January 1, 2004, then the creditor should investigate the applicable limitation periods arising under the Act's predecessor, the *Limitations Act*[5] or from other legislation.

It is important to note that the limitation period is dependent on the particular facts of the case and you should give careful consideration in determining the applicable limitation period.

3. Demanding payment

One important action that should always be taken during the pre-litigation phase is the issuance of a demand letter by the creditor to the debtor. Not only does a demand letter create an opportunity for the payment of the debt, but it also documents efforts made by the creditor to enforce the debt. This can be helpful at later stages of an action.

[4] S.O. 2002, c. 24, Sch. B. (the "Act").

[5] R.S.O. 1990, c. L.15

Not all demand letters are created equally. A demand letter should address and include the following information:

- identify the document under which the debt arises (i.e. the contract, invoice, lease agreement, promissory note, loan, mortgage, guarantee) including the date, account number and names of the parties to the contract;
- copies of the contract and supporting documents;
- identify the event of default which triggered the creditor's right to enforce;
- details of the amount due (arrears and accelerated payments), accrued interest, penalties and costs. This information can be set out in a detailed statement of account. Interest should be based on the terms of the contract. A *per diem* amount is also helpful; and
- the date by which payment must be received.

An effective demand letter provides the debtor with all the required information for the debt and clearly provides the debtor with a "last chance" opportunity to pay the debt at a specified time.

4. Secured Creditors: Notice of Intention to Enforce Security

In the case of a secured creditor, it is also important to include with the demand letter a "Notice of Intention to Enforce Security" under section 244(1) of the *Bankruptcy and Insolvency Act*.[6] Section 244 of the *BIA* provides that a secured party cannot enforce its security without providing a debtor with a minimum of the ten days' written notice of its intention to do so. Failure to deliver a s.244 notice can result in the secured creditor being liable for damages for improper seizure of the secured collateral.

---

[6] R.S.C., 1985, c.B-3 [hereinafter the *BIA*].

5. Pre claim options

There are several options available to a creditor before commencing litigation as means to enhance or facilitate recovery. These include pre-claim examinations and self-help remedies, the details of which are discussed below.

In addition, if a creditor is concerned that a sizeable asset could disappear before the creditor is able to obtain judgment, some consideration can be given to a court application for interim preservation or recovery orders, a certificate of pending litigation (with respect to real estate), an "Anton Pillar" order or Mareva injunction of the appointment of an interim receiver.

An overview of all these pre-claim options are discussed as follows.

(a) Pre-claim examinations

The concept of a pre-claim examination of a debtor is not part of the *Rules of Civil Procedure*[7] (Ontario). If a debtor is prepared to be helpful and consent to the examination, then this presents a great opportunity to gain access to a remedy usually only available after judgment is obtained. It allows the creditor with a cost effective means to determine and evaluate the extent of the debtor's assets prior to initiating proceedings to collect the debt.

In some cases a debtor may even agree to provide a statutory declaration setting out assets, liabilities, income and expenses to establish the debtor's poor financial circumstances. This may go a long way to determining whether initiating proceedings is warranted.

(b) Self-help remedies

Self help remedies are used by creditors to collect a debt without commencing legal proceeding against the debtor. For example, a secured creditor can seize assets upon default of a debt to the debtor under section 62 of the PPSA. Similar rights are provided to a mortgagee under the power of sale provisions under the *Mortgages Act*[8] and to commercial landlords under the

---

[7] R.R.O. 1990, Reg. 194 (the "*Rules of Civil Procedure*").
[8] R.S.O. 1990, c. M.40.

Commercial Tenancies Act[9] such as the right to take possession of leased premises and the right of distraint. Similar "self-help" remedies may be provided for in equipment or vehicle lease agreements or other types of contracts. A quick review of the creditor's rights under the contract may yield an effective debt recovery option.

(c) Interim preservation of property

Rule 45 of the *Rules of Civil Procedure* provides a procedure for preserving rights in pending litigation. Rule 45 provides that the court can make an order for preservation with respect to property which is relevant to an issue in the proceeding. If the property in question is perishable, the court can also order its sale and the proceeds be paid into court[10].

(d) Interim recovery of personal property

Section 104 of the *Courts of Justice Act* allows for the interim recovery of personal property. This rule goes one step further beyond simply preserving the property as it allows a party to actually recover it from the other party. For instance, an equipment lessor can seek an interim recovery order rather than awaiting a final judgment to recover its leased (and likely depreciating) asset.

The motion may be brought with or without notice to the debtor depending upon the circumstances (i.e. will the debtor hide the asset if given notice of the motion?)[11]. We would recommend that "short" notice be given to the debtor as opposed to no notice at all, as this may reduce concerns raised by a Master or Judge hearing such a motion.

On an interim recovery motion, the plaintiff must establish that the plaintiff is either the owner of the property or is entitled to possession of it and that the property was unlawfully taken or detained by the defendant.[12] The creditor should also be prepared to post a bond or letter of credit or other form of security with the court as this may be ordered by the court, particularly

---

[9] R.S.O. 1990, c. L.7.

[10] *Supra* note 7 at Rule 45.01(2).

[11] *Supra* note 7.

[12] Garry D. Watson and Michael McGowan, Ontario Civil Practice 2006 (Thomson Carswell: Toronto, 2005) at 924.

where the motion was brought without notice. In some cases, a court may order the security be twice the value of the property in question.

Should the creditor prevail and the interim recovery order is granted, the creditor may consider seeking an order permitting it to sell the property where it is a depreciable asset.[13]

Interim recovery orders can be a very effective means of bringing a quick end to the litigation as it removes the asset from the hands of the debtor.

(e) Certificate of pending litigation

Where the creditor has an interest in land, section 103 of the *Courts of Justice Act* provides the framework for obtaining a certificate evidencing one's interest in land which can then be registered upon title. If obtained, this is an effective way of impeding the debtor's ability to transfer the land to third parties.

It is a precondition under Rule 42 of the *Rules of Civil Procedure* that the moving party has made a claim for a certificate in the action. It is important to note that a certificate of pending litigation ("CPL") does not necessarily require that the interest in the land be claimed by the plaintiff for itself as it is sufficient that an interest in land is otherwise in question.[14]

For instance, a creditor may discover that the debtor has fraudulently transferred his interest in land to a relative as a way to evade the creditor's claim on a debt. Even though the creditor is not yet a judgment creditor (and the creditor's claim is solely for an unpaid debt), the creditor can consider amending its claim against the debtor (and add the transferee) to allege the fraudulent conveyance under the *Fraudulent Conveyances Act.*[15] The claim would also include an order for a CPL.

(e) Anton Piller order

---

[13] R.R.O. 1990, Reg. 194 at Rule 45.01(2).
[14] Supra note 12 at pg. 915.
[15] R.S.O. 1990, c.F.29 [hereinafter *Fraudulent Conveyances Act*].

An "Anton Piller" order is a very intrusive order as it is the equivalent to a civil search warrant. If granted, the plaintiff would be permitted to search the defendant's premises for incriminating documents and property. Considering the intrusiveness of this type of order, courts will require that the plaintiff meet a high evidentiary threshold before granting such an order. The plaintiff will have to satisfy the following conditions: (i) a strong *prima facie* case, (ii) damage must be serious for plaintiff, (iii) clear evidence that the defendant has incriminating documents/items in its possession, and (iv) there is a real possibility that defendant may destroy the evidence or property.[16]

It is important to make full and frank disclosure of the relevant facts in the supporting materials filed on such motion. Otherwise, the creditor court risk that a court will set aside the order and order substantial damages in favour of the defendant.

(f) Mareva injunctions

A Mareva injunction prevents the debtor from dissipating assets prior to trial. In order to successfully obtain a Mareva injunction, the plaintiff must: (i) make full and frank disclosure of all matters which are material to the case, (ii) provide particulars of the claim against the defendant (including the amount and the grounds for the claim), (iii) establish that the defendant has assets in the jurisdiction and (iv) provide grounds for the belief that the defendant will dispose of the assets before judgement is granted.[17]

(g) Interim Receiver

Section 103 of the *Courts of Justice Act* and Rule 41 of the *Rules of Civil Procedure* allow a judge to appoint a receiver over the debtor's assets and property. Depending on the circumstances, creditors may seek the appointment of an interim receiver under sections 46, 47 or 47.1 of the BIA and section 60(1)(b) of the PPSA. A receiver is an impartial individual or firm who takes control of the debtor's assets and, depending on the terms of its appointment, will either preserve, manage or realize upon the debtor's assets for the benefit of all creditors, not just the creditor seeking the appointment.

---

[16] *Anton Piller K.G. v. Manufacturing Process Ltd.* [1976] 1 All E.R. 779 (C.A.).

[17] Ibid, see Bardeau Ltd. v. Crown Food Service Equipment (1982), 38 O.R. (2d) 411.

The test employed in determining whether an interim receiver is required is whether the appointment is "just and convenient" [18] (under the *Courts of Justice Act*) or that it is necessary for the protection of the debtor's estate or the interests of the creditor (under the BIA) in regards to the nature of the property and the rights of the parties.

The threshold is also very high and requires strong evidence that the creditor's rights are in jeopardy. As with the Anton Pillar order, if it is subsequently determined after the appointment of the receiver that the receivership was not warranted and/or there was no shortfall of assets, the creditor who applied for the appointment will be responsible for the costs of the receivership.

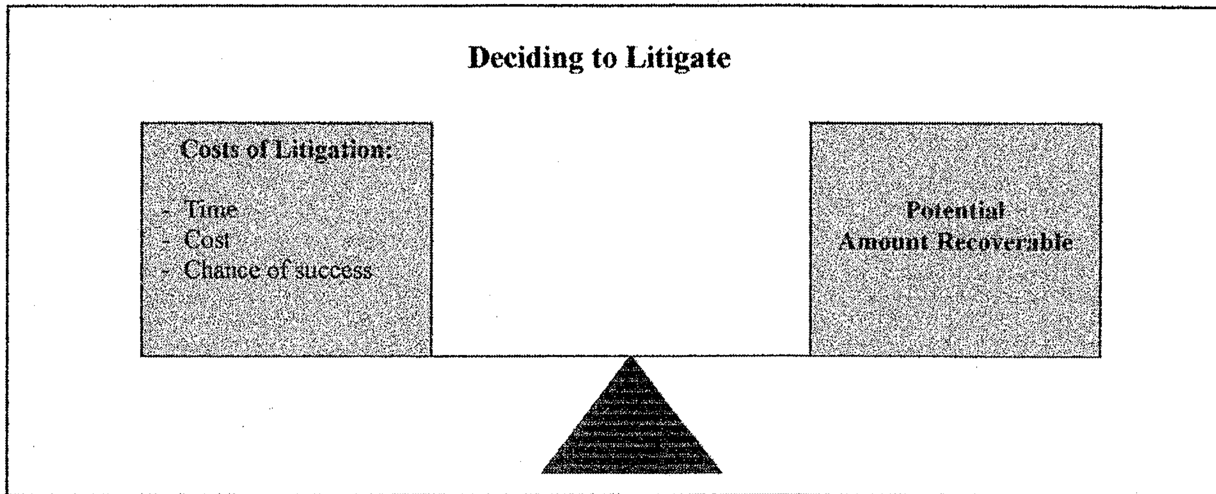
6. **Deciding to litigate**

Once all the outlined steps above have been conducted and information regarding the assets of the debtor has been collected, a decision must be made whether to commence an action against the debtor.

Two sets of factors should be weighed in making this decision. On one side is the time, cost and chances of success in litigation. On the other is the maximum and minimum amount recoverable from the debtor:

---

[18] Supra note 12 at 910-911. See *Third Generation Realty Ltd. v. Twiggs Holdings Ltd.* (1991), 6 C.P.C. (3d) 366 (Ont. Gen. Div.)



In making this determination, one must assess and analyze all the information collected and take into consideration the needs of the client and the objective of litigation.

7. Commencing Proceedings

Once a decision has been made to proceed with an action, there are various options open as to the type of proceedings that may be used to recover the debt. Below you will find an overview of some of the options available.

(a) Small claims court

The Small Claims Court is a simplified method of proceedings to enforce a debt. The *Rules of Small Claims Court*[19] provides that proceedings may be commenced in small claims court where the monetary or proprietary value being claimed does not exceed $10,000.00.

(b) Simplified procedure (Rule 76 – *Rules of Civil Procedure* (Ontario)

Under Rule 76 of the *Rules of Civil Procedure* (Ontario), there is a simplified procedure for claims between $10,000.00 and $50,000.00 (or more in some cases). "Simplified Rules" actions

[19] O.Reg. 258/98.

are a very cost effective route for debt collection actions. Creditors may also utilize the simplified procedure in cases where the debt in question exceeds $50,000.00. If the defendant objects to the use of simplified procedure and the creditor ultimately prevails, the objecting debtor may be faced with additional cost penalties.[20]

The major feature of the simplified procedure is that there are no examinations for discovery or cross-examinations on affidavits filed on motions.[21] Further, there are timelines set out in the *Rules of Civil Procedure* for setting the action down for trial which help to move the action along. However, the simplified procedure is not applicable to actions under the *Class Proceedings Act*, the *Construction Lien Act*, to divorce actions, family law proceedings or to cases governed by Rule 77 (Case Management) of the *Ontario Rules of Civil Procedure.*

(c) Case management (Rule 77)

Case management under Rule 77 of the *Rules of Civil Procedure* applies to all actions in Toronto and the Ottawa/Carleton area where an action has been commenced after July 3, 2001. Note however that there are exceptions to cases which may be case managed. The purpose of case management is to deal with cases expeditiously, reduce costs and to obtain fair settlements. For a detailed discussion of Case Management please refer to Rule 77 and Rule 78 in the *Rules of Civil Procedure.*[22]

8. Collecting on the Judgment and Recovering Collateral

Once judgement has been received there are several options for the recovery of the collateral by the creditor. These include self help remedies (such as garnishment proceedings and judgment debtor examinations), court processes and alternative methods of enforcement such as oppression remedies, restitution orders and fraudulent conveyance claims.

(a) Enforcement Remedies - Writs

---

[20] *Supra* note 7 at r.76.13(7).
[21] Supra note 12 at 1321.
[22] Supra note 12 at 1343.

Once a creditor has a judgment in hand, the first step (and sometimes only step) that creditors usually take is to issue a writ of execution. There are three forms of writs that are available: (i) writ of seizure and sale; (ii) writ of sequestration; and (iii) writ of possession. A writ of seizure and sale is generally issued and then filed with the sheriff in the jurisdiction in which the debtor resides or owns real or personal property. In addition, the creditor can direct the sheriff will seize the debtor's personal property, remarket and sell the property to satisfy the debt.[23] Creditors may need to provide the sheriff with details of the known assets of the debtor (to avoid the seizure of property owned by third parties).

Alternatively, if the debtor holds an RSP, depending on its wording, the creditor may be able to issue a direction to the sheriff to collapse the RSP.[24]

Another option is that the sheriff can be directed to sell the debtor's land. This may be particularly effective where the debtor has a partial interest in the land as it may force other owners of the property to deal with the judgment or else face the prospect of an unknown third party being able to purchase an interest in the land. You should consult subrule 60.07(17) through (23) for details of the procedure.

Under Rule 60.09, the creditor can seek a writ of sequestration in which the sheriff is directed to take possession of and hold the debtor's property and collect any income from the property until the debtor complies with the judgment. However, before such a writ can be issued, the creditor must seek leave of the court. Leave will only be granted where the court is satisfied that other enforcement remedies are or are likely to be ineffective.

Rule 60.10 provides that a creditor can obtain a writ of possession of the debtor's land only with leave of the court. Leave will only be granted where the court is satisfied that all persons in possession of the land have received notice of the judgment.

---

[23] See Subrules 60.07(13) to (16)

[24] There are some Ontario cases that have stated that RRSPs and the proceeds from the RRSPs are exigible. For instance, see *National Trust Corp. Ltd. v Lorenzetti* (1983), 148 D.L.R. (3d) 575 and *Minister of National Revenue-M.N.R. v Dellelce* (1985), O.J. No. 880.

(b) Enforcement Remedies – Judgment Debtor Examinations

Alternatively, a creditor may wish to schedule an "examination in aid of execution" pursuant to Rule 60.18. In an examination in aid of execution, the creditor serves notice of it intention to examine the debtor with respect to the reasons for non-payment of the judgment, the debtor's income and property, etc. The examination can be conducted in writing (by mail), but is most effective when conducted in person.

However, in practice, the debtor seldom attends notwithstanding personal service of notice. If this should occur, the creditor can bring a motion to compel the debtor's attendance. Before doing so, the creditor should obtain at least two or three certificates of non-attendance as a court will likely require evidence that the debtor is blatantly ignoring the notices before it will make an order for contempt. Note that contempt motions and enforcement of contempt orders are costly. Usually it is more cost effective to retain an investigator to gather information.

(c) Enforcement Remedies – Garnishment

Through a notice of garnishment under Rule 60.08, a creditor can attempt to collect from a debtor's bank account, employer or from the debtor's debtors. A notice of garnishment, once served upon the bank or third party debtor, is effective for six years.

Any amounts recovered by the sheriff will be shared on a *pro rata* basis among any execution creditors.

9. Bankruptcy Proceedings

While bankruptcy should not be used as a debt collection tool, judgment creditors may consider initiating bankruptcy proceedings against a judgment debtor. Although a judgment creditor would rank as an unsecured creditor in a bankruptcy, unsecured creditors will benefit from the powers afforded to a trustee in bankruptcy allowing it to pursue previously transferred property and conduct examinations of the bankrupt. In addition, the creditor may benefit from the fact that, in a bankruptcy, certain priorities afforded to Crown claims will be reversed.

10. Alternative enforcement options

Even if a creditor has carefully researched details of the debtor's financial situation, it may find on the day after judgment day that the debtor has shrewdly hidden its assets. As a "paper judgment" will likely be unacceptable, the creditor can consider additional proceedings against the crafty debtor. These include oppression remedies and fraudulent conveyance/preference clauses.

(i) Oppression Remedy

The purpose of the oppression remedy is to protect the legitimate interests of various stakeholders from the will of those who own and operate the corporation. Under the *Ontario Business Corporations Act*[25] and *Canadian Business Corporations Act*[26], both secured or unsecured creditors can apply for relief from oppressive or prejudicial conduct of the debtor which unfairly disregards the interests of the creditor.

Creditors do not necessarily have standing under the oppression provision as complainants as of right. Courts will analyze the facts of the case to determine whether the creditor has a legitimate interest in the company's affairs as the courts do not want to permit the oppression remedy to become a method for debt collection.

For example in *Waiser v. Deahy Medical Assessments Inc.*[27], the court found that plaintiff demonstrated that he was more than a mere creditor attempting to collect a debt. The court found that the plaintiff had a particular and reasonable expectation that the defendant's business affairs would be conducted with a view to protecting his interests. The plaintiff could not foresee that defendant would completely neglect its obligations. In finding that the plaintiff satisfied the requirements of s. 248 of the *Ontario Business Corporations Act*, the court found the actions of the debtor to be oppressive and awarded the sum of $76,158 to the plaintiff.

---

[25] R.S.O. 1990, c. B.16.
[26] R.S.C., 1985, c. C-44 .
[27] [2006] O.J. No. 224 (S.C.J.) (Q.L.)

However, standing has been extended to judgement creditors who seek to prevail upon the oppression remedies.[28]

The remedies usually granted in successful oppression remedy actions include an order restraining the oppressive conduct of the debtor, the appointment of a receiver manager, varying or setting aside the impugned transaction and/or compensating the complainant as provided in section 248 of the *Ontario Business Corporations Act* (and section 241 of the *Canadian Business Corporation Act*).

(ii) Fraudulent conveyances

As discussed in part above, where there is evidence that the debtor has transferred assets to another party for the sake of hindering, delaying or hiding the debtor's assets, the courts have employed federal and provincial legislation to strike down fraudulent conveyances. Provisions in the *BIA* and the *Fraudulent Conveyances Act*[29] (Ontario) can be used to 'undo' or to compensate for the fraudulent conveyance to the party that is entitled to the asset.

(A) *Bankruptcy and Insolvency Act*

Sections 95 and 96 of the *BIA* allow a trustee in bankruptcy to seek the court's assistance in reversing transfers where the bankrupt has, within the period prescribed, given an unjust preference to a creditor.

For a transaction to fit within sections 95 and 96 of the *Bankruptcy and Insolvency Act*, four elements must be met: (i) There must be a debtor-creditor relationship between the bankrupt and the alleged preferred creditor, (ii) the debtor must fit within the definition of 'insolvent person' as defined in the *Bankruptcy and Insolvency Act*; (iii) the transfer of the asset must be made with the intention to give the creditor a preference; and (iv) it occurred within three months before the date of the initial bankruptcy event. If the preferred creditor is a related person, the applicable time frame for the transfer of the asset is expanded to 12 months before the date of the initial bankruptcy event.

---

[28] See *Downtown Eatery v. Ontario* 54 O.R. (3d) 161 (Ont.C.A.) (Q.L.)
[29] *Supra* note 15.

If a trustee in bankruptcy can establish the above four elements, this activates a presumption that the transfer was entered into with the intention of giving a creditor a preference over other creditors. Where such a finding is made, the trustee in bankruptcy will be entitled to a judgement against the creditor in the amount received by the preferred creditor.

(B) *Fraudulent Conveyances Act*

Where a creditor does not have recourse to the *BIA*, the provincial *Fraudulent Conveyances Act* equips the creditor with similar powers. A creditor will be successful in bringing a claim against a debtor under the *Fraudulent Conveyances Act* where it can prove that there was: (i) a conveyance, (ii) a conveyance involving real or personal property; and (iii) a conveyance of the property made with the intention to defeat, delay, hinder or defraud a creditor or others[30].

The definitions of 'conveyance' and 'real or personal property' under the *Fraudulent Conveyances Act* have been broadly interpreted by the courts. The difficulty in bringing a claim under the *Fraudulent Conveyances Act* is to prove the debtor's intent to either defeat, hinder, delay or defraud creditors or others. However, courts have found the following factors (known as "badges of fraud") to be markers of a fraudulent conveyance:[31]

- The gift was general without cause or reason;
- The donor of the gift continued to be in possession and used the goods as his or her own;
- The transfer deed contained self serving and unusual provisions;
- The transfer deed gives the grantor a general power to revoke the conveyance;
- The transfer deed contains false statements as to consideration;
- The consideration is grossly inadequate; and/or
- A close relationship exists between the parties;

---

[30] *Supra* note 15 at s.2.
[31] See C.R.B. Dunlop, Creditor – Debtor Law in Canada (2nd ed.) (Carswell: Toronto, 1995) at 614.

Where the court finds the transfer to be a fraudulent conveyance under the *Fraudulent Conveyance Act*, the conveyance is deemed to be void as against the creditors or others and their assigns. The conveyed property becomes available to creditors for execution or seizure from the transferee.

11. Valuing and remarketing the collateral

Once the assets of the debtor have been seized and the creditor has decided to remarket the assets, the creditor must carefully approach the valuation, remarketing and sale of the debtor's assets. The general guideline is that the creditor's efforts to resell and remarket the collateral to satisfy the debt must be reasonable and appropriate in order to ensure that a commercially reasonable market value is obtained in the remarketing of the asset.

In valuing the asset, it is important that third party valuations or appraisals are taken and that the third party valuation is properly documented. While not provided in legislation, the general practice has been to obtain three appraisals on the collateral to determine the value of the assets.

When remarketing the collateral, appropriate prior notice must be given to the debtor that the collateral is to be remarketed. For instance, s.63 of the PPSA provides that the enforcing creditor must issue a notice of sale to the debtor and under s.63 of the PPSA, the requisite notice period is generally 15 days. However, no notice is required where the item is perishable[32].

The appropriate method of sale of the collateral is determined according to the nature of the collateral itself and which method would obtain the highest commercial value for the collateral. This is generally dictated by common sense and industry experience. To ensure that there is no issue with the method by which the collateral is remarketed, it is recommended that third party advice may be warranted. Again, this third party advice should be documented in the form of a report or letter.

12. Debtor in receivership or bankruptcy

---

[32] *Supra* note 2 at s.63(7).

Where the debtor is already in receivership or bankruptcy, different considerations arise with respect to creditor's recovery.

(a) Receivership

Where the creditor learns that the debtor is the subject of a receivership, the creditor should attempt to determine whether the receivership is by way of a private appointment or court order. Where the receivership is court appointed, a creditor should obtain a copy of the receivership order. In addition, the creditor should be mindful that due to a stay of proceedings activated by the receivership order, no enforcement steps can be taken. In contrast, where the receiver is privately appointed, there is no stay of proceedings.

As a primary consideration, a receiver under either scenario will undertake a review of the creditors' security agreement and attempt to determine whether a particular creditor has priority over the debtor's assets. If there is a dispute as to priority, the creditor is entitled to review his or her security and the security of other lenders. If the creditor is dissatisfied with how the receivership is being conducted, the creditor can consider applying for a court order carving out its security from the stay of proceedings.

(b) Bankruptcy

Where the debtor is bankrupt, all property of the bankrupt vests in the trustee (except for property held in trust by the debtor). As in a court-appointed receivership, a stay of proceedings is automatically activated in a bankruptcy. However, secured creditors are not impacted by the stay. Secured creditors should carefully review their security agreements and ensure that their security has been properly registered. If a creditor's security interest is not perfected, the trustee of bankruptcy will have priority over the creditor. If the creditor's security interest is perfected, the creditor should deliver a proof of claim to the trustee in bankruptcy along with copies of the contract or security and a statement of account. This ensures that the trustee is aware of the details of the creditor's security.

In contrast to bankruptcy proceedings, a proposal under the *BIA* is a process in which a debtor formulates a plan of repayment to its creditors. The process is initiated by the debtor filing a

'Notice of Intention to Make a Proposal.' This automatically activates a stay of proceedings. Within 30 days of filing the notice of intention, the debtor must file a proposal or else be deemed to be bankrupt. The proposal can be made to unsecured creditors and secured creditors.

A proposal is approved by creditors if a majority in number and 2/3rds in value vote in favour of the proposal. If the plan is approved by the majority of creditors, the debtor would then seek court approval.

Upon receipt of a Notice of Intention or a proposal, the creditor should review its contract and/or security to ensure that it is in order and then, file a proof of claim attaching a copy of contract and/or security documents along with a statement of account.

Conclusion

The purpose of this paper was to guide the reader through the process of litigating against potential or "deadbeat" debtors. We have tried to canvass the wide range of options available to creditors to collect and enforce a judgment. We have not attempted to exhaustively cover all aspects, but give the reader capsules of information that hopefully will assist in a creditor in formulating an effective recovery strategy.

With careful investigation, planning and a consideration of the various enforcement remedies available, a creative creditor can (hopefully) maximize its ability to collect from a crafty debtor using the suggestions contained in this paper.

REFERENCE LIST

1. Legislation

Bankruptcy and Insolvency Act, R.S., 1985, c. B-3.

Canadian Business Corporations Act, R.S. 1985, c. C-44.

Commercial Tenancies Act, R.S.O. 1990, D.L.7.

Courts of Justice Act, R.S.O. 1990, c.43.

Limitation Act, 2002, S.O. 2002, chapter 24, Sch. B.

Mortgages Act, R.S.O. 1990, c.M.40.

Ontario Business Corporations Act, R.S.O. 1990, c. B.16.

Personal Property Security Act, R.S.O. 1990, c.P.10.

Rules of Civil Procedure, R.R.O. 1990, R. 194.

Rules of Small Claims Court, O.Reg. 258/98.

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29.

2. Case Law

Anton Piller K.G. v. Manufacturing Process, [1976] 1 All E.R. 779 (C.A.).

Bardeau Ltd. v. Crown Food Service Equipment (1982), 38 O.R. (2d) 411.

Downtown Eater v. Ontario 54 O.R. (3d) 161 (On.C.A.) (Q.L.).

Waiser v. Deahy Medical Assessments Inc., 25 T.L.W.D. 2540, [2006] O.J. No. 224 (Ont.Sup.Ct.J)(Q.L.).

3. Secondary Sources

Elizabeth Gillis, *Advanced Corporate Business Transactions* (Emond Montgomer: Toronto, 2006), Table 2.4 Corporate/Commercial Searches to be Conducted Against SearchCo.

C.R.B. Dunlop, Creditor – Debtor Law in Canada (2nd ed.) (Carswell: Toronto, 1995).

Garry D. Watson and Michael McGowan, *Ontario Civil Practice 2006* (Thomson Carswell: Toronto, 2005).