

Private bailiffs would help fix system

BY JENNIFER McPHEE
Law Times

Appointing private bailiffs to enforce court-ordered personal property seizures or executions of property judgments would help fix the current system, which is ineffective and problem-plagued, say some Ontario lawyers.

"When it comes to seizing physical assets or having someone try to take cash, the whole system completely breaks down," says lawyer Kevin Fisher, an executive-member-at-large of the Ontario Bar Association's civil litigation section. "The problem is, you get these habitual offenders who know this, and they just thumb their noses at the system, and basically you have no enforcement."

Part of the difficulty is the length of time it takes to get orders enforced, which is caused by a lack of resources in sheriff's offices throughout Ontario.

The solution: the Ministry of the Attorney General should assign private bailiffs to enforce court-ordered personal property seizures or executions of judgments involving personal property, he says.

The sheriff's officers in Ontario's enforcement units are bogged down by one of their other functions — enforcing tribunal-ordered rental evictions for landlords, says commercial litigator Paul Voorn, an executive member of the OBA's civil litigation section, who along with Fisher has lobbied the Ministry of the Attorney General to fix the problem.

Voorn says he waits one or two weeks for sheriff's offices in Ontario to enforce judgments. And Fisher, whose practice includes enforcing federal judgments across the country, says he has waited six months or longer after giving a requisition to enforce to sheriff's offices in Ontario.

"My experience is that I've been getting very effective enforcement across the country, but not in Ontario," he says.

Provinces including British Columbia, Alberta, and Quebec have very effective systems because these provinces allow private bailiffs to enforce judgments against debtors for the repossession and seizure of personal property, say Fisher and Voorn.

But in Ontario, only sheriff's officers authorized by the ministry can carry out this job, they say.

When sheriff's officers in Ontario do go to a business to enforce a judgment, they often don't get the job done, says Fisher.

Fisher often asks a sheriff's office to seize cash from the register of a bar, restaurant, or nightclub in order to make a point because the business has been illegally airing live sporting events, and has not responded to litigation or has ignored an injunction.

"They'll go in and they won't really do anything," he says. "They'll say, 'Do you have anything?' They'll spend 30 seconds in that particular bar."

And, despite asking them to go to the business at a time when the cash register is likely to be full, the officers will often show

up in the middle of the afternoon when it's empty, he says.

"[Creditors] pay for this," says Fisher. "We are kind of a client in a way. If I was paying a bailiff to do it, we'd get results. We are paying significant fees."

Another problem stems from the fact that sheriff's offices in Ontario require creditors to give the office an address for the goods or assets to be seized several days in advance of a seizure, says Voorn.

But because these goods are frequently mobile or in transit, they have often been sold, hidden, or moved by the time the sheriff's officer arrives, says Voorn.

"You can imagine the trouble a creditor, who has leased 20 vehicles to a debtor, would have in trying to get these vehicles repossessed through the sheriff's office if they need to let them know days in advance where the vehicles are," says Voorn. "They could be anywhere."

Sheriff's officers also work during business hours, and creditors often need someone to collect



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assets at odd hours, says Voorn. It takes a long time for sheriff's officers to get approval to work overtime, and once they do get approval, the creditor covers the cost of the overtime, says Voorn.

But private bailiffs work

around the clock and can act extremely quickly, says Voorn.

"You call up a private bailiff, and you can say, 'I found the vehicle, it's at this location.' They'll say, 'I've got the tow truck, I'll be there in half an hour.'"

"They just have so many more tools available to them to assist a creditor in conducting a seizure, whereas the sheriff just simply says, 'You provide me with the address and I'll go there,'" says Voorn.

Fisher says bureaucratic red tape also plagues the enforcement system in Ontario, although some changes have been made because of his complaints.

In one situation, he asked a sheriff's office to enforce a judgment against a bar with a name that ended in "Ltd." He received a report that stated the office would not enforce the judgment because the name of the bar on the judgment was different. The difference was that the judgment spelled out the word "Limited," says Fisher.

"That drove me almost insane," he says.

In another situation, Fisher asked one of the enforcement units to enforce a judgment by seizing the assets of a business that was a partnership.

"Under the rules of civil procedure, you can seize the assets of the partnership, but they wouldn't do it unless I went back and got a judgment against all the individuals in the partnership," he says.

"I actually photocopied the page from the rules and sent it to them, but it didn't make any difference," he says. "There are lots of these kinds of things."

Both Fisher and Voorn are quick to point out that none of these problems are the fault of the sheriff's officers.

The ministry's policies tie the officer's hands in various ways, they say.

For instance, the government requires the officers to remain "neutral" and not take the side of the creditor, and because of that, the debtor will often leave if a debtor disputes a seizure, says Voorn.

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Officers frustrated by system

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But there is already a process whereby the debtor can oppose a seizure if something was done incorrectly, says Fisher.

Fisher says that many officers have told him they are equally frustrated by the system.

Until about one year ago, Voorn and those lawyers that deal with the Personal Properties Security Act could circumvent these problems by asking a judge to grant them an order authorizing a private bailiff to go onto a property and repossess goods.

The Courts of Justice Act states that a sheriff will enforce a repossession order unless another act provides otherwise, says Voorn, but the Personal Properties Security Act states that a creditor can repossess by any means available at law.

So when a secured creditor had a security agreement with a debtor and the debtor defaulted under the agreement, Voorn would often get such an order from a judge.

But then the registrar of bailiffs — who licenses private bailiffs in Ontario — put a stop to this by stating that bailiffs will lose their licences if they seize goods under a court order because they are not allowed to do so under the Courts of Justice Act.

"That's fair," he says. "But of course what the creditors and their lawyers lost was a very effective tool to get a judge to make an order that a private bailiff could go in and seize," says Voorn.

Voorn and Fisher have met with ministry staff twice about their concerns.

They asked the ministry to

appoint qualified bailiffs as sheriff's officers. These officers could work on a contract basis for the government to fill in gaps in staffing, says Voorn.

They also suggested that the government test the waters through a pilot project by appointing private bailiffs to enforce Small Claims Court judgments in one of the judicial districts in Ontario.

The meetings with the government were productive, and ministry staff promised to look into whether to solve the problem by hiring more officers or whether to appoint private bailiffs, says Voorn.

If the government hires private bailiffs on a contract basis, the union will need to be consulted, points out Voorn.

Another change that Fisher would like to see involves allowing what's known as "constructive seizure."

When some other provinces seize assets, they give the debtor notice that everything will be sold unless the debtor settles the judgment or deals with the creditor in some other way, he says.

But in Ontario, the assets are immediately taken to an auction and sold, says Fisher.

Constructive seizure gets the debtors' attention, which is what creditors — those that aren't trying to repossess specific goods — want, he says.

The creditor doesn't really want to sell the goods, because they are worth more to the debtor than they are on the open market, he says.

And not only does constructive seizure motivate the debtor to resolve the issue in the vast majority of situations, but it also has a domino effect, because other local businesses hear about it, says Fisher.

"It usually stops the problem locally," he says. "You end up spending fewer resources by clients, and within the court system it's just more effective. You don't have to keep sending someone back and back and back."

Right now, many debtors in Ontario know they can operate "just below the radar," says Fisher.

"It's almost like fraud because they can get away with it," he says.

"They can run up a big credit card debt and never have to worry about anybody really getting them because, even if there's a judgment against them, there's no way anyone can ever collect or get the goods — not without a tremendous amount of expense and bureaucratic problems."

Both Fisher and Voorn stress that the sheriff's offices throughout Ontario are fairly effective when it comes to their other roles — garnishing wages or the bank accounts of debtors, and handling writs of sale and seizure binding real estate owned by debtors. It's only the enforcement of personal property that's causing all these problems, they say.

A ministry spokesperson did not return phone calls. **L17**

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