If We Did It: The Possibility of Seizure and Sale of Intellectual Property Rights in British Columbia

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Introduction

When their debtor refuses to pay, judgment creditors often have to get creative in order to obtain what a court of law has deemed to be rightfully theirs. This was certainly the case with Mr. and Mrs. Goldman and their judgment debtor, Mr. Orenthal James Simpson. Following O.J. Simpson's infamous acquittal of double homicide, the parents of one of the murder victims, Ron Goldman, filed a civil suit against Simpson for wrongful death. A $33.5 million judgment was rendered against Simpson on March 10, 1997. Mr. Simpson became the world's most famous judgment-debtor and remained so for ten more years, until the Goldmans sought to renew the judgment pursuant to California's *Enforcement of Judgments Act*. Though the Goldmans initially broached the idea of acquiring a proprietary interest in Simpson's "right of publicity" to pay off the judgment debt — whereby the creditors would acquire a direct cause of action against those who used Simpson's name and likeness[1] — the publishing rights to Simpson's book, *If I Did It*, were finally awarded to the Goldmans to satisfy the judgment debt. The book is currently in publication by the Goldmans under the title *If I Did It: Confessions of the Killer*.

Although a traditional post-judgment remedy did not technically bring about the result in *Goldman v. Simpson*,[2] the case serves as an example of how intellectual property rights may be seized in order to satisfy a pre-existing judgment debt. As 51% of Canada's economy is now represented by knowledge-based industries,[3] it is easy to imagine that many judgment creditors in the future will engage with debtors whose most valuable assets are categorized as intellectual property. Unlike the provinces of Ontario and Saskatchewan, however, British Columbia's *Court Order Enforcement Act* (BCCOEA) is silent on the exigibility of intellectual property, and in the absence of statutory provisions permitting the contrary, courts in this province have refused to include intellectual property in the ambit of assets that may be seized by a bailiff acting pursuant to a writ of execution. The importance of intellectual property rights, as reflected in the increase in value of those rights and the prevalence of the number of companies having sole or primarily intellectual property rights in their assets, is incongruous with a judgment creditor's inability to seize and sell such assets pursuant to a writ of execution for satisfaction of a judgment.

Writs of Execution in British Columbia, Ontario, and Saskatchewan

[1] Hastings H. Beard, "Squeezing the Juice: Can the Right of Publicity Be Used to Satisfy a Civil Judgment?" (2007) 15 Journal of Intellectual Property Law 143 at 146.

[2] The rights were instead allotted to the Goldmans by a bankruptcy court, although counsel for the Goldmans had previously sought to garnish the rights to the book from HarperCollins via the Sacramento County Sheriff in November 2006: David J. Cook, "Post-Judgment Remedies in Reaching Patents, Copyrights and Trademarks in the Enforcement of a Money Judgment" (2010) 9 Northwestern Journal of Technology and Intellectual Property 128 at 170.

[3] Christopher Heer et al, "Statistics on the Value and Importance of Intellectual Property" *Heer Law*, November 18, 2020, online: https://www.heerlaw.com/value-intellectual-property.

Judgments are, to the disappointment of weary litigants, not self-executing. Following a lawsuit, the victorious party often emerges from the courtroom "only to learn from her lawyer that collecting the judgment will cost more than the judgment is worth."[4]

A preferred method of obtaining a judgment debt is a writ of execution (also known as a writ of seizure and sale or a writ of *fieri facias*). This writ, which can be obtained by a judgment creditor in British Columbia and most other jurisdictions, permits a court bailiff to seize and sell the assets of the debtor in order to satisfy the amount owing on the judgment, as well as the interest on the debt and additional costs. What makes a writ of execution so desirable is that the assets of the debtor are seized on an *ex parte* basis and sold expediently, thus narrowing the timeframe during which the judgment debtor may destroy or diminish the assets. Furthermore, notwithstanding the process of obtaining the writ, the seizure and sale occur outside of court and therefore do not incur any additional costs associated with litigation.

Section 55 of the BCCOEA provides that all goods, chattels, and effects of a judgment debtor are liable to seizure and sale under a writ of execution, except as exempted under the Act. Included in the definition of goods, chattels, and effects are money or bank notes, cheques, bills of exchange, promissory notes, stocks, shares, dividends, and a debtor's equity of redemption in goods and chattels.[5] The sections of the BCCOEA pertaining to writs of execution have been interpreted in line with the general principle of common law that intangible assets, including intellectual property rights, are immune from seizure in order to satisfy a judgment debt.

Mortil v International Phasor Telecom[6] is emblematic of this approach. In that case, the judgment debtor, who owed slightly less than $7,000 to the creditor, had developed a computer software system called the Phasor Code 1000 that could encode and decode classified information. The debtor owned the copyright protecting the form in which the software was expressed and was the registered owner of the trademark "Phasor Code." The bailiff, acting pursuant to a writ of execution, seized a copy of the debtor's software system and the instruction manual. The debtor argued that the rights in the software system and the instruction manual were not liable to seizure and sale as they constituted intellectual property. The court concluded that the computer program and instruction manual, as tangible property, were indeed exigible under what is now section 55 of the BCCOEA, but qualified that the sale by the bailiff had to be subject to a trust agreement that would protect against disclosure of Phasor Code 1000's software. It seems safe to assume that the tangibility of the software system here was fundamental to the judgment rendered; if the debtor had simply registered a patent or trademark that had value, or simply owned a copyright that had value, but did not possess anything tangible that could be seized, the court likely would have afforded such intellectual property rights more protection, as they did with the software of the Phasor product.

Interestingly, intellectual property rights are exigible pursuant to a writ of execution under creditor-debtor regimes in some other provinces. Under section 17 of the *Execution Act* of Ontario, "all rights under letters patent of invention and any equitable or other right, property, interest or

[4] Doreen Gridley, "The Immunity of Intangible Assets from a Writ of Execution: Must We Forgive Our Debtors?" (1994) 28 Indiana Law Review 755 at 756.
[5] See sections 62 and 63.1 to 65.1.
[6] 1988 CarswellBC 69, [1988] B.C.W.L.D. 1126.

equity of redemption therein shall be deemed to be personal property and may be seized and sold under execution in like manner as other personal property", so long as notice of seizure is served on the Patent Office in Ottawa. In Saskatchewan, section 47 of *The Enforcement of Money Judgments Act* permits the bailiff to "seize intellectual property by serving notice of seizure on the judgment debtor and, if appropriate, on the office in which the right or interest is registered; and on the licensor of the right or interest." "Intellectual property" is defined in section 2(z) of that statute as including copyrights, letters patent for an invention, trademarks, industrial designs, "integrated circuit topography," and "plant breeder's rights," whether or not the property right or interest in question "arose or was recognized under the law of Canada or the law of any other country." Although these provisions do not appear to be widely utilized, they clearly remove the bright line of immunity that the common law has traditionally drawn around certain forms of intellectual property.

Extending the Writ of Execution to Intellectual Property in British Columbia

The legislative regimes in Ontario and Saskatchewan serve as precedent for the inclusion of intellectual property in the list of assets that may be seized by a bailiff pursuant to a writ of execution in British Columbia. Although a writ of execution may be unsuitable for certain forms of intellectual property — for example, a trade secret that is sold at public auction would lose all monetary value — there seems to be little reason not to override the common law with legislative amendments permitting seizure of intellectual property. The increasing reliance on intellectual property in countless market sectors may soon render the writ of execution, and the current prohibition on seizing intangible assets, irrelevant. As a result, some academic groups, including the British Columbia Law Institute, have advocated for the inclusion of intellectual property in the list of assets that may be seized by a bailiff pursuant to a writ of execution.[7]

What is it about intellectual property that renders this category of property immune from seizure in British Columbia — something courts historically refused to extend to any of the debtor's possessions besides "his wearing clothes"?[8] There is no principled reason why intellectual property should be, *prima facie*, distinct from other forms of property that can be seized by a bailiff, especially when other intangible forms of property like securities are exigible. This state of the law may be evidence that we continue to ascribe highly romantic and individualistic notions of "creativity" to intellectual property. Although this "personal creation mythology" serves an obvious purpose in protecting the rights of creators, it must be weighed against the needs of judgment creditors operating in an increasingly knowledge-based economy.

[7] British Columbia Law Institute, *Report on the Uniform Civil Enforcement of Money Judgments Act*, BCLI Report No. 37, March 2005. See, for example, sections 50 (Application of this Division) and 52 (Methods of Seizure by an Enforcement Officer).

[8] Although more generous exemptions exist today under section 71 of the COEA, the common law was historically very harsh; in the 1689 case of *Hardistey v Barney*, the English court held that "upon a fieri facias the sheriff may take anything but wearing clothes; nay, if the party hath two gowns, he may take one of them" (quoted at footnote 31 of the *Report on the Uniform Civil Enforcement of Money Judgments Act*, *supra* note 7.