**Class 1**

Extra-Judicial Debt Collection

* Collecting a debt without getting a judgment first.
* Policy concern is protection for debtor and his family – self-help in debt collection is good but the methods of collection should be reasonable.
* If being harassed by a collection agency, this’ll be extra-judicial, so won’t think to get a lawyer. The debtor can go to the media, complain to the ombudsperson, or complain to the director of the Business Practice and Consumer Protection Authority, or bring an action for damages under the Business Practice and Consumer Protection Act.

Business Practice and Consumer Protection Act – Regulating Debt Collection

* Part 7 of the BPCPA: s.113 – collector means a person whether in BC or not who is collecting or attempting to collect a debt. Means these prohibitions applies to anyone collecting a debt, including lawyers and collection agencies. Sheriffs are excepted.
* S.114: general standard of conduct. A collector must not communicate or attempt to communicate with the debtor, a relative, a neighbour, a member of the household, friend, acquaintance, or employer of the debtor in a manner or with a frequency as to constitute harassment. If it amounts to harassment, debtor has a cause of action.
* Threatening, profane, intimidating, or coercive language, undue, excessive, or unreasonable pressure, or publishing or threatening to publish a failure to pay are all deemed harassment.
* s.116: a collector must not communicate or attempt to communicate with debtor at his place of employment unless collector doesn’t have their home address or phone number and the contact is solely for that purpose, the collector has attempted to contact the debtor at home but hasn’t been able to, or the debtor authorizes contact at the workplace.
* S.117: except for the purpose of obtaining home address or phone number, debtor may not attempt to communicate with member of debtor’s household, relative, friend, or acquaintance unless they are a guarantor of the debt or debtor authorized it.
* Can’t contact the debtor outside of writing or through debtor’s lawyer if debtor has so stipulated or not at all if debtor has said they’re disputing the debt/taking it to court.
* S.118(2): collector cannot communicate with the debtor or his circle on a statutory holiday or on Sundays outside of 1-5pm or on any other day outside of 7am-9pm. Also can’t make collect calls or send faxes to the debtor (s.119)
* S.120: collector must not collect or attempt to collect an amount that exceeds what’s owing or attempt to collect from a person not liable for the debt.

Remedies for Contravention (Part 10)

* s.171: cause of action for damages
* s.173: the plaintiff debtor suing for damages is supposed to notify the director of the authority, the administrator. Director can then intervene, take over the action, and thus take over the costs. Director may also intervene to regulate the agency in question, like taking their license. That said, if director doesn’t intervene, you can still proceed with your action for damages.

Limitations Act

* s.9(1) of the old Limitation Act was clear in the consequence of expiration of the limitation period on a cause of action to recover vanishes. In the new act, s.6 just says an action must not be commenced after period expires – have to read this up to mean that the cause of action is gone, since it doesn’t explicitly say so. Idea is that the cause of action is gone, so need to bring an action with the time period to preserve your rights.
* If you obtain a judgment, it has a life of 10 years, even if it’s a default judgment. So if debtor can’t pay in first two years, he may have a windfall within the period that enables payment.

Benefits of Getting a Judgment

* Can go beyond self-help and can seize property and use various judicially supervised execution processes, though these are of more help for unwilling as opposed to destitute debtors.
* Process of getting the judgment causes the debt to grow: you get pre-judgment interest fromd ate of cause of action to date of judgment and then you get post-judgment interest on that judgment. Can be particularly huge if it starts going through levels of appeal.
* Makes the creditor feel better, giving him day in court with judge validating the debt.

Setting Aside Default Judgments

* If it was an unconscionable or deceptive transaction, it’s out under the BPCPA.
* Civil rules also say court is empowered to set aside default and summary judgments as a matter of discretion, and can attach terms and conditions (majority of default judgments go this way)
* Can also be set aside as of right, in which case it is a nullity, as though it never existed. This is significant since often a debtor doesn’t even realize there’s an action and the judgment creditor starts seizing property, getting injunctions, garnishing wages – execution processes are already commenced. If the default judgment is set aside as of right, the enforcement processes are too.
* Charles, Dobell: Default judgments are set aside as of right where there’s been a breach of natural justice. Here, it was a judgment given without notice to the defendant and the defendant was deprived of his right to be heard. This is a nullity and not a mere irregularity. He did not know that the plaintiff’s application could mean a default judgment.
* Defendant, particularly self-represented, shouldn’t be left to guess at the relief plaintiff is seeking and should have his attention drawn specifically to what judge will be asked to do. Otherwise, breach of natural justice - judgment is nullity with enforcement measures set aside.

**Class 2**

Importance of Information

* Judgment is a declaration of liability with a judgment order, but no one makes the judgment debtor do anything. No automatic enforcement. Judgment creditor has to do proceedings.
* JC can proceed with basic info the JC has about the JD regarding the assets that were acquired before the judgment or the JC can take proceedings to acquire more info. Getting this new information is crucial – ensures JC isn’t going after property that doesn’t exist or isn’t worth anything. Info will also tell JC whether the JD is unable or just unwilling to pay – if it’s just unwillingness, you know he’s worth going after.

Limitation Period

* When the limitation period expires, the cause of action disappears. You must bring your action in time to preserve your rights.
* Judgments in BC are good for 10 years from the day the judgment becomes enforceable. (s.7 of Limitations Act).
* S.7(b): if the judgment is from another jurisdiction, it’s the earlier of the expiry of the time for enforcement in the originating jurisdiction or 10 years after the day it became enforceable in the originating jurisdiction.
* As long as it’s within that 10 year window, the JC can use any of the available enforcement proceedings. None of them require leave if a certain period of time passes within that window.

Extending the s.7 Limitation Period: Outstanding Writ

* S.23: if on expiration of those 10 years, an enforcement process is outstanding. Basically, if you have an unexpired writ of execution: ie the day before the judgment dies you can quickly issue a writ of seizure and sale which will give you one more year – a writ of execution is good for one year. You’re limited to just the property subject to that writ/method of execution.
* s.23(b): against land – if you registered your judgment against land the day before the judgment dies, you get two more years to realize on that land.
* Charging order: equitable order that takes as long as it takes - if you commence any of these proceedings before 10 years is up, you get as much time as it needs to complete

Method of Extension #2 and #3: Staying Execution Stops the Clock and Confirmation

* s.23(2): JDs can’t cause the limitation period to expire by getting stays of execution: stays of execution suspend the life of the judgment, stopping the clock.
* s.24: confirmation of the cause of action. If the defendant in an action confirms a cause of action then the limitation period is extended. This must be in writing. This is where there’s the use of an enforcement process or a payment by the JD on account of the judgment that looks like a confirmation of the cause of action, in which case, the limitation period is extended and starts running again at that point.

Method of Extension #4: An Action on the Judgment

* getting a judgment on the judgment: you can bring an action in BC on a BC judgment and get a new judgment on it as well as having action on foreign judgment in BC in order to convert it.
* Young: Confirms it is permissible to bring a BC action on a BC judgment in order to get another 10 years. Typically, when you get a judgment, original cause of action merges with it and is gone but the judgment debt constitutes a new cause of action in itself. So you can bring an action on that judgment debt.
* Young does say that you can only bring such action if it doesn’t constitute an abuse of process. The onus is on the defendant to plead facts to show that it does. An example might be where the JD had money to pay at least part of the debt but JC did absolutely nothing for 10 years, no effort to collect, and now brings this action.
* Here there was no abuse of process: defendant had been completely unable to pay but had an ailing mother, so might be able to pay in the future due to inheritance.

Converting Foreign Judgments

* Must convert a foreign judgment into a BC judgment in order to enforce it in BC/use BC enforcement processes. This will typically be desirable when the JD has assets in BC. JC can always just try and talk JD into paying, but using enforcement processes requires conversion.
* Foreign judgment can only be converted if it is still within its limitation period. After conversion, the now BC judgment is good for 10 years.
* If the judgment is from another Canadian jurisdiction, JC should turn to the Enforcement of Canadian Judgment and Decrees Act, which gives blind full faith and credit to the out of province judgment, it’s instantly converted.
* If you get a non-Canadian judgment, first step is to look at the Court Order Enforcement Act if the originating jurisdiction has a reciprocal agreement with BC. So far, this is just other Canadian provinces, Alaska, California, Washington, Idaho, Colorado, Oregon, Australia, Germany, Austria, and the United Kingdom. If it’s one of these states, you can register the judgment under the Act’s simplified process. That said, the Act requires presence and submission between jurisdiction and action or defendant – R&S connection isn’t good enough.
* A judgment from anywhere else requires use of the common law process.

Common Law Process for Recognizing/Enforcing Foreign Judgments

* R&E of foreign judgment requires that the foreign judgment be final and conclusive and that the foreign court have had jurisdiction in the international sense.
* Final and conclusive = JD can’t go back to the same court in the originating jurisdiction and get the judgment altered (like family law judgments).
* Jurisdiction in the int’l sense is satisfied by presence (defendant was served in the foreign jurisdiction/was physically present in the jurisdiction when the action was commenced) or submission (defendant defended against the action in the foreign jurisdiction and lost or otherwise did something that amounted to participation in the action).
* Morguard creates third way of finding jurisdiction: a real and substantial connection between the originating jurisdiction and the action or the originating action and the defendant.
* Unclear what R&S connection is, but we’ve since established it as giving a very low threshold: it’s just a connection that is not tenuous or hypothetical.
* Biels established that the R&S connection applies to non-Canadian judgments AND Canadian judgments. Still must be final and conclusive.
* Pro-Swing made it clear that foreign non-pecuniary judgments can also be recognized provided it meets the usual requirements (final and conclusive and jurisdiction in the int’l sense via presence, submission, or R&S connection) plus consideration of additional factors: how much court supervision and court time the equitable order would require and how clear it is.

**Class 3**

First Step to Finding Information on Debtor: Searches

* information is key to a successful debt claim, first thing to do: need to find out if the debtor is just unwilling to pay or unable to, in which case going after him is a waste of time.
* Search LTO to find if they own or joint-own any land and if there are mortgages on that land. Pull a property tax assessment to find how much the government has valuated those lands, bearing in mind that the government typically undervalues property.
* Search Personal Property Registry: not every piece of property is registered, but if there are security interests in personal property, like a car loan, it’ll be there and will give you an idea of what the debtor owns.
* Court Services Online: has the debtor been a defendant or plaintiff in an action. You’ll find out if the debtor is owed money or was awarded money or if they’ve been sued and lost big sums.
* Corporate Registry: if the target is a company, tells you who the directors are and if they started taking money out of the company or taking corporate opportunities, which will help you chase the money down. Also tells you who the shareholders are.
* Use Linkedin, Facebook, Google to find evidence of an extravagant lifestyle contradicting their claims of being impecunious.

Subpoena to Debtor (post-judgment procedure via Supreme Court Civil Rules)

* must personally serve this on the judgment debtor and this is conducted in a courtroom with the Master present. After service, if they don’t show up, bench warrant may be issued for their arrest provided you can prove proper service and compliance with rules.
* It’s a cross-examination and if judgment debtor has incriminating documents, bring them.
* After the payment hearing and all evidence comes out, you can make submissions to the court. Court will then make an order by default that the debtor pay on certain terms. These terms are whatever the court deems appropriate with those terms based on the evidence If debtor brings evidence showing they’re poor, the Master/registrar won’t make a burdensome order: just a very small amount due per month.
* Meanwhile, creditor will bring evidence to make them look rich to get a heavier order. Will also give a heavier order if the debtor is evasive on cross-examination.
* Based on all this info, the court issues the order and it’s binding on the debtor, who must pay according to its terms. If they do not comply with the terms of the order, don’t make the payments when they’re supposed to, they can go to jail or be fined for contempt.
* Subpoena to debtor can’t be used concurrently with other remedies. Can’t even issue the subpoena if there’s any outstanding writ of execution and, as part of getting subpoena, you must file affidavit saying there isn’t one. And once the order is made, you can’t take any other steps of execution. You’re stuck solely with whatever order the court makes.
* Subpoena is best when you discover, say through examination, that they really are broke: at least you’ll get an order that’ll get you something and since there’s very little to get, it doesn’t matter that you aren’t able to pursue any other steps of execution.

Examination in Aid of Execution

* An examination under oath and that debtor must show up to. Scope of what you can discover these people on is very broad. This is conducted in court reporter’s office.
* Process is initiated by way of an appointment, a court form, not filed in the registry. Serve it on the debtor or their lawyer, unlike the subpoena, you don’t have to personally serve it.
* For both this and the subpoena, you have to send the debtor conduct money to pay for their travel costs to these proceedings and if you don’t, they can not show up.
* Unlike subpoena, h ere the debtor is obligated to bring all documents related to their finances. In the subpoena, you such obligation, but you can demand those documents and if debtor didn’t bring them, the matter can be adjourned and an order issued for him to do so. This order can also be issued ahead of the examination if there’s something you want to see first.
* Breadth of discovery in examination is so broad that you can even ask them how much money they have in their wallet or how much their car is worth. Can ask them about anything that relates to the payment or non-payment of the judgment debt. Can ask them any question from now up to when you got the judgment, it’s up to when the judgment debt arose, though if you have evidence that they were judgment-proofing themselves before that (you’d been threatening to sue for some time), you may be able to examine stuff from before the judgment.
* can also examine other people who may have information, like the debtor’s spouse. Just have to establish a link by way of asking pointed questions of the debtyr and sifting through documents to figure out where the money went.
* After the examination, you can immediately use the info you got to start collecting using any collection procedures, like garnishing accounts you discovered in the examination.

**Class 4**

Conversion of Judgments and Limitation Periods

* First Boston Financial: In 2002, First Boston commences action in Nevada against the Grants. In 2004, the Grants move completely to BC, selling everything in Nevada, and create a family trust in BC out of the proceeds. In 2005, First Boston gets a judgment against them. Nevada judgments are good for 6 years. By the time the Grants find out, time for appeal is over.
* First Boston starts an action in BC for conversion of the Nevada judgment. Grants declare bankruptcy before conversion occurs. When you declare bankruptcy, all actions against you are stayed – First Boston can’t proceed with action for conversion.
* The trustee in bankruptcy assigns any claims against the Grants to First Boston. Basically, when you transfer your property to a third party when you have tons of creditors, there’s a suspicion that it’s a fraudulent conveyance. Trustee in Bankruptcy never pursued this, but assigned that cause of action/claim to first Boston.
* Can this claim proceed? Grants are saying First Boston has no cause of action against them: the limitation period of their judgment has expired – limitation period is the shorter of the limitation period from originating jurisdiction or 10 years and 6 years has passed.
* Court says First Boston has a claim: they’re no longer relying on the Nevada judgment, they’re relying on the assignment.

Stays of Execution

* Stays on appeal: defendant debtor is appealing the decision and wishes not to have anything happen until the appeal is decided.
* Stays not on appeal: even if you’re not appealing, you can use s.48 of the Court Order Enforcement Act of R.13-2 in the civil rules.
* S.48: if an order has been obtained for a sum of money, the sum is payable immediately unless the court orders otherwise. The court may provide that the order is payable in installments or may suspend execution for the time it considers proper. This means that unless the court issues a stay, a judgment debtor has to pay the judgment creditor immediately. Even if the defendant wants to appeal or doesn’t want to pay, the creditor is entitled to start enforcing.

Voth Orders (Stays on Appeal: a Compromise on S.48’s Immediacy)

* Robitaille: Robitaille was injured and Canucks didn’t care and told him to go play. After he was done playing, his body was wrecked and he sued the Canucks and won a large sum. Canucks said they shouldn’t have to pay because they’re going to appeal. CA said they can have a stay of execution due to being on appeal and there are statutory provisions for that, but it’s not automatic whenever there’s an appeal and is within court’s discretion.
* Stay is granted on terms and conditions: condition that the Canucks should pay the full amount of the judgment into court immediately into an interest-bearing account. Robitaille was given use of that money provided he put up a letter of credit as security for anything he withdrew. So he got the money, but would have to pay back whatever he withdrew if appeal succeeded.
* Voth: confirms Robitaille. Voth brothers won judgment against bank, who appealed and asked for stay of execution. Voth proposed the order Robitaille got: bank pays money into court and Voth issues a letter of credit as security for what they withdraw. Court agrees and gives order.

Stays on Appeal Without Voth Order Compromise

* Morguard: Morguard gets judgments against a BC defendant and Manitoba defendant. BC guy is bankrupt so they’re forced to go after the Manitoba guy. They try to convert the judgment into Manitoba judgment through registration. Registration gets set aside.
* Judge gives the test for a stay of execution and says it’s the same as the test for an injunction as per RJR Macdonald: Is there a serious matter to be tried/an arguable case? Will irreparable harm result from a refusal to stay? Then consider the balance of convenience – what’s fair (this what a Voth order focuses on).
* A Voth order is offered but not accepted and since there was no evidence of irreparable harm, the stay of execution on appeal is refused.
* Case shows that if you don’t go for a Voth order, it’s possible for the court to refuse a stay and force the debtor to pay up regardless of the appeal and then, if the appeal is successful, try and get and repayment from the creditor.

Absolute Stays of Execution (no appeal)

* Lau: requesting a stay pursuant to R.13-2 or s.48 without any appeal: no difference between the two, free choice. Lau is a resident with long-term lease on Musqueam lands and claimed they couldn’t afford the rent increases – he requests stay of execution of order to pay the rent.
* court says it looks at what’s just, looking at balance of convenience, looking at relative position of the parties. The Crown is at no irreparable risk and neither is the band: they don’t really need this money, which is a tiny part of its overall budget, so no real damage to the plaintiffs but it’s clearly a huge problem for the Laus. As a result, execution is stayed.
* Because it’s discretionary, court can impose terms and conditions on the stay. Here, the te term is that while the stay is granted, the Crown does have a judgment and is entitled to register it on Lau’s land – they’ll get the security of the land even though the Laus don’t have to pay immediately.

Information Acquisition

* Examination in aid of execution gives you a wider range of information.
* However, if you have info already and know the debtor is able to pay and just unwilling, go with the subpoena as it has contempt procedures built into it.
* Contempt proceedings require the creditor to pay a lot up front (costs of imprisonment, costs of execution), though it’s added onto the judgment in expectation that you’ll get it back in the end.
* It’s only where they’re unwilling to pay. If they can’t pay, they won’t generally be sent to jail.
* Examination in Aid of Execution is a broader investigation that is also enforceable by contempt, but it doesn’t have built-in contempt, just the general contempt provisions in the civil rule
* Subpoena has built-in con tempt, like not answering in satisfaction of the master. Or you can get an order for judgment by payment in installments where it’s not payable immediately, but payable on a certain date. When an order from a subpoena process stipulates a date and there’s non-payment on that date, it’s automatically contempt.
* If there’s no date, s.48(1) would say pay immediately, but that’s just ASAP. Subpoena allows date(s) for payment to be set and imprisonment when you don’t.
* Whole process imposes pressure: both examination and subpoena forces debtor to show up and commit hours to it.

Stays of Proceedings

* Light Cubes: Uses R. 19-3. Foreign judgment in Missouri against BC defendant, who is appealing it in Missouri. Judgment creditor isn’t waiting for the appeal to be determined and commences an action for conversion in BC. The defendant points out the appeal and asks for a stay of proceedings and the judge grants a stay of proceedings on the conversion action.
* Judge states that R.19-3(3) is interpreted such that if the foreign judgment is under appeal, the BC court will basically automatically grant a stay of proceedings on the conversion until the time for appeal has expired or the appeal is determined. Judge says this is in-line with the COEA, under which, you can’t register a judgment until the time for appeal is up or determined.
* Similarly, under the Enforcement of Canadian Judgments and Decrees Act, you can register the foreign judgment, but then the other side can immediately go to court for direction and get a stay on enforcement.
* The stay is not unconditional: it’s for a limited time. The judge assigns a date by which the appeal should be determined, though the debtor can apply for a renewal.
* Even if you’re hit with a stay, you count as having commenced an action in BC, so you are still entitled to apply for pre-judgment creditor’s remedies in BC like a garnishing order or a Mareva injunction to freeze assets and tie up property.

**Class 5**

Garnishment Process

* all collection processes must be initiated by the judgment creditor and garnishment is usually the first to be used. This is because there’s no discount of value. For instance, if you seize personal property and have court bailiff execute a sale, you’re not going to get the full value of that property. But if you garnish a debt, you get the full value of the debt and seldom have to share the proceeds with any other JC. And for the JD, while he’s still losing the asset, he also gets full value for it.
* Remember, always have to match the process to the appropriate property: no single process goes against all types of property. Here we’re looking at debts.
* First step: issuance of the garnishing order. An ex parte procedure where JC goes to the registry and just gets it with no objection procedure for JD. Don’t have to go before a judge.
* Second step: serve that garnishing order on the garnishee.
* Third step: the garnishee obediently and quickly pays the amount garnished into court.
* Fourth Step: payment out to the JC of the money that’s been paid into court.
* basically, JC gets a pecuniary award against JD – not just a debt, but a judgment. JC finds out that JD is owed money by a third party – a chose in action. JC can then seize that chose in action in full or partial satisfaction of the money owed on the judgment debt with JC as garnishor and the third party as garnishee. JC gets an ex parte garnishing order and serves it on the garnishee and then garnishes the money owed with garnishee hopefully paying it into court.

Garnishment as One-Shot Process

* no limit on the number of garnishing orders that the garnishor can issue, can be the same garnishee each time or multiple garnishees, but you have to do it one debt at a time.
* Continuing garnishing order: exception to the above: once issued, this order will catch any debts owed by the garnishee to the judgment debtor for a period of time. So if the debt garnished is wages, don’t need a new order every pay period.
* typically, it’s only one debt to be garnished and if it’s a small amount, it’s only for pressuring the JD and him knowing you can do this again and again. Also, if one garnishing order has a procedural error and gets set aside, you can just go back and do it again on the same debt. You can make multiple garnishing orders on the same debt.

Issuance of the garnishing order

* to get this, there must be a debt within the meaning of the statute in existence at the moment that you issue the garnishing order. If there is not a debt in existence at that moment of time, even if one will likely come about later, the order will be set aside as invalid/can’t issue.
* Dabrowski: JD gives auctioneer stuff to sell off. Auction would happen at 11:30 with the auctioneer then owing JD the proceeds: this would be a garnishable debt. JC gets a garnishing order issued at 10:00 and serves it later in the day on the auctioneer ordering him to pay the proceeds into court. Garnishing order was not validly issued and is set aside: he issued the garnishing order when the auction hadn’t happened yet and so the debt had not yet come into existence at time of issuance.
* CIBC a garnishing order on the same debt but did so after 11:30 and got the money before JC could issue a new order. Legal rule is that there must be a debt in existence at the time of issuance of the garnishing order – time of service isn’t good enough.
* Application for issuance is ex parte so you can take the JD by surprise so that he won’t know you’re coming (otherwise he could get the garnishee to speed up payment of the debt).

Service of the Garnishing Order

* If the garnishing order is successfully issued at a time there is an existing, identifiable debt, you have to notify the garnishee.
* After valid issuance, serve it. For the garnishing order to be effective, it has to be served while there is still an existing debt, before it gets paid out. It won’t be invalid if there isn’t one (unlike with issuance), it’s just that it’ll be pointless: no money there to be garnished.
* Central Trust: case where there’s a debt in existence at issuance but not at time of service. Happens with bank accounts: money in the account at time of issuance and then wait to serve until more deposits are made and it’s worth garnishing, but by the time they get there to serve it, the JD has withdrawn everything. Here, the garnishing order got passed to a bank teller before the withdrawal, but the teller didn’t give it to the manager until after. Court says to bad, tellers don’t count: there was a debt in existence at issuance so the order is valid but by the time of service there was nothing left and JC’s stuck with what’s left in the account at time of service.
* s.9 of the COEA: service of the order binds the debt in the garnishee’s hands from time of service. This means the amount of the debt can be played with until the moment of service, at which point the amount of the debt is bound. Unless it’s a continuing garnishing order, in which case you’d catch whatever came in for the enumerated time period after service.

Payment into Court by the Garnishee

* Form D, the garnishing order, notifies the garnishee that if it does not pay into court “at once” the amount of its indebtedness to the JD or the amount specified in the order and don’t dispute the debt, the garnishor can get a judgment against the garnishee for non-compliance – payment of the full amount with costs.
* Problem is the word “at once,” Form D has no specified time period and common law has never interpreted “at once” as meaning today – it’s just a reasonable time, which will depend on the circumstances of the debt. The garnishee just can’t ignore the garnishing order and do nothing and also can’t, after service, pay the garnishor directly or pay both the garnishor and into court. It must be paid into court alone. Must either pay into court, file a dispute note, or both.
* S.9(2): after paying it into court, the debt owed by the garnishee to the JD is gone, he’s free of it.
* If the garnishee disputes owing money to the JD or the amount of the judgment/specified on the order, he can either pay the money with a dispute note (in which case it’ll stay in court until the dispute is settled) or the garnishee can file a dispute note with the court and pay nothing.
* Dispute note = an objection by garnishee detailing its position.
* You can dispute the garnishing order on procedural grounds, substantive grounds (this is not a garnishable debt), or either the JD or garnishee can invoke court’s discretion to set it aside.
* After money is paid into court, final step is payment out, governed by s.12 and s.13 of COEA, where you just choose a method. Pre-requisite of payment out is that the garnishing order have been served on the judgment debtor (s.9(3))

What property can be hit with a garnishing order?

* s.3(1): authorizes issuance of garnishing orders generally on debts, obligations and liabilities, owing, payable, or accruing due and wages that would in the ordinary course of employment become owing, payable, or due within 7 days of affidavit being sworn as per s.3(2).
* Wages = salaries, commissions, fees, any money paid for services by employee for employer
* claims arising out of trust or contract: if there’s a trust or contract between JD and third party and JD has a claim arising out of it against the garnishee, that is subject to garnishment.
* Any judgment debts owed to the JD by a third party is garnishable.

Definition of the Garnishable Debt (broadening alternatives)

* first definition is from Vater: to be a garnishable debt, a debt, it must be immediately due. JD must have been able to bring an action against the third party to claim/enforce that debt without any conditions, it’s immediately due and owing.
* Second definition: doesn’t need to be absolutely unconditional to be garnishable; conditions of time can be overlooked – if it’s a debt that’s not payable for 2 months, it’s still garnishable. Basically, certain conditions, particularly time, which would prevent the debtor from bringing an action to enforce the debt right at this second can be ignored for purposes of garnishment.
* Third approach: any conditions attaching to this debt are examinable, with the court determining whether they’re significant or not, specifically whether they are mere matters of administration and convenience.
* Problem is that there is no case law declaring one of the three approaches as the definitive one and can’t predict which the court will use, though the second one is the most common. Still, JDs will argue for the narrowest, first approach while JCs will argue for the broadest, the third.
* The garnishee is considered an innocent party and the JC must be very careful to avoid inconveniencing him.

Vater: Narrowest Definition of Garnishable Debt

* Bader: JD is getting five payments per year from disability insurance. JC garnishes the insurance company– garnishing order issued in August and no payment is due to the JD until November, so that’s when it gets served. Question is whether there’s a valid garnishing order.
* Problem is this is disability insurance, which means payment is conditional on JD being alive and still being disabled by November, when payment is due. Because these are conditions attached to the November payment, it’s not a garnishable debt.
* There was no garnishable debt in existence when the garnishing order was issued in August for two reasons: time – the payment did not become owing until November, so nothing owing in August. More than that, there were conditions attached to that debt coming into existence. It’s not a case where payment would be made regardless. Under the narrow approach, conditions mean it was not a debt due or accruing due and so it was never garnishable.
* Order is invalid. If it had been issued in November, it would have been valid: debt was owing and conditions would’ve been met (we’d know he was alive and disabled). As it stands, the existence of conditions made it not garnishable, regardless of the nature of those conditions.

**Class 6**

Garnishing Current Debts

* Remember the three definitions: the narrow one in Vater, the broad one in Bel-Fran, and the middle position where as long as the debt is due, it’s garnishable (that is, if the only condition on it relates to the passage of time, it’s garnishable).
* Vater would say current accounts aren’t garnishable because the bank isn’t in a continuous state of owing money to the JD – it only owes upon the JD making a demand.
* English courts modified this: service of a garnishing order is equivalent to a demand by the JD on a bank, so it’s valid.
* An exception is made to the usual rule that a debt must be in existence at the time of issuance. In the case of current accounts, that’s okay: the debt comes into existence at time of service.

Garnishing Joint Accounts and RRSPs

* RRSPs are protected by statute from garnishment.
* Joint accounts: garnishee, bank, has a debt obligation owing to the JD and another person. This account is garnishable if both joint owners are indebted to the JC but it’s not garnishable if only one is indebted to the JC since that would lead to garnishor taking property that doesn’t belong to the JD. So if the account is joint-owned by an unindebted third party, it’s not garnishable.
* Commonly, the bank will pay the money into court anyway, at which point it’s up to the third party or JD to get the money back by filing an objection, at which point they should get the whole amount returned. Money would be paid directly to them, since the debt owed by the garnishee is extinguished upon its payment into court.

Garnishing Term Deposits (and the broadest interpretation for conditional debts)

* Bel-Fran: Pre-judgment garnishing order is issued. Attachable debt is the same pre or post-judgment. Money in term deposit is due to mature soon.
* English authority (Bagley) saw term deposits as a conditional debt, as they’re always subject to differing terms and conditions, and could inconvenience third parties, so not garnishable.
* Judge looks at the terms and conditions of this specific BC term deposit and says they are different from the ones in Bagley and so the term deposit is subject to attachment.
* Give the standard for evaluating conditions attached to debts: all conditions here were only “mere matters of procedure and administration.” They also were only conditions that affected the bank/garnishee, not a third party. The conditions attached to the term deposit are insignificant and don’t affect third parties, bank doesn’t need to insist on them, so this is a garnishable debt.
* Step up from only being able to ignore conditions that were passages of time. Now you can examine any condition and if it’s just a matter of procedure and administration, not significant, it’s garnishable.

Garnishing Future Depts?

* Bel-Fran is as far as we go in BC, but s.3(1) of the COEA refers to claims arising out of trust or contract if the claims can be made under equitable execution: a circular definition because equitable execution has always been limited by the CL forms of execution.
* Masri: wealthy JD refused to pay, leading to court granting a worldwide equitable receiver who could collect any debts owed to Masri.
* Key is that he grants this receiver the ability to collect future debts – debts not yet due and payable. S.3(1) of our Act says you can garnish any debts available by way of equitable execution, so if we adopt Masri, this means equitable execution may be an avenue through which to garnish future debts, debts which aren’t in existence unconditionally or are subject to conditions at time of issuance that go beyond insignificant administrative.

Garnishment of wages and salary

* Problem is that common law says you haven’t earned money until the contract is completed. This would make wages immune from garnishment since they’re always paid only when they’re fully earned.
* BC got around this by putting a 4-day, now a 7-day rule in the s.1 COEA definition of debt. This means you can get your garnishing order issued for wages/salary and served on the garnishee/employer up to 7 days before the employee/JD would be paid out.
* Deductions are available to the employee/JD, so you won’t get 100% of the wages. Also, you cannot get pre-judgment garnishment on wages/salary. It must be a judgment debt.
* An employer whose employee’s wages have been garnished is prohibited from firing or discharging that employee.
* Remember that barring a continuing garnishing order, you can only garnish one debt at a time, you can’t catch all the wages for a certain period. You have to garnish one pay period at a time. This means garnishing wages will generally only get small dollar value each time and is mostly for the pressure and nuisance value, especially since it messes with the JD’s employer’s system.

Garnishing rent

* Same problem as garnishing wages: it’s not really a debt owing until the date the rent is actually due, by which time it’s generally already paid to the JD by the garnishee.
* Stewart: there is no 4-day or 7-day rule for rent. But if the JD has multiple tenants paying him rent, you’ll want to garnish those tenants every month/pay period for the rent. The JC’s practice had been to issue a garnishing order late in the month for next month’s rent: had issued order on Sept 23rd for rent due in October, assuming 7-day rule for wages would be extended to rent.
* BCAA focuses on whether there was an attachable, existing debt when the order was issued in September. Decides rent due on Oct. 1 for month of October is not payable or accruing due in September. So you cannot issue and serve a valid garnishing order before the rent is actually due: the tenant could move out.

Garnishing Real Estate Conveyances

* Ahaus: Savage sells her house and the garnishee is the notary. The notary is handling the money and gives the vendor, Savage, an undertaking that he will discharge the mortgages on the property and then pay the balance over to Savage.
* May 1st, Ahaus, the creditor, issues a pre-judgment garnishing order and serves it on the notary,. May 2nd, the notary, the garnishee, receives a cheque for sale proceeds on the house. Not discussed, but there’s already a time problem: there was no cheque at time of order at time of issuance and hence no existing debt owed by notary to the debtor.
* The notary completely ignores the garnishing order and just fulfills her undertaking, paying off the mortgagors and giving the balance to the vendor/debtor. Did nothing on the garnishing order and filed no dispute note to the court. (She should have either paid all of the sale proceeds into court with a dispute note for the amount owing to the mortgagors, or paid the mortgagors and paid the rest into court with a note explaining the undertaking).
* Failure to respond in any way to a garnishing order is contempt entitling the garnishor to file an action for the garnishee for the amount garnished, which Ahaus does. Order directing garnishee to pay says “at once” with no date, but if there’s been complete non-compliance, it’s breached.
* Notary loses and has to pay. Concern with the case is that the judge keeps saying that service of the order is the critical time for determining validity of the order, which goes against the weight of authority that has it at the moment of issuance.
* Dissent: garnishment shouldn’t be permitted for any conveyancing transaction: too complex and things go wrong too often with cheques being late and parties backing out. No statute or case has acted on this dissent so, as it stands, you can garnish conveyancing moneys provided your timing is right.

**Class 7**

Applying for a Pre-judgment Garnishing Order

* at common law, you couldn’t touch defendant’s assets until plaintiff became a JC (Lister).
* we now have the statutory remedy allowing plaintiffs to apply for garnishing orders before having received a judgment. Mareva injunctions can also be gotten pre-juddgment.
* Pre-judgment garnishing orders are limited in that the only property they attach to are debts, but allows for greater security since it’s paid into court, ensuring defendant can’t disappear it.
* It’s only available for attachable debts within the COEA’s definition: a debt owing from the garnishee to the defendant.
* s.3(2): any plaintiff to an action can apply for one. It’s not uncommon to file a notice of civil claim and application for pre-judgment garnishing order at the same time. As soon as you’re a plaintiff, you’re eligible to apply.
* Applicant must set out that an action is pending (can’t apply before issuing the notice of civil claim), the time of its commencement, the nature of the cause of action, the actual amount of the debt, that it is justly due and owing after making all just discounts, and that the garnishee is indebted and in the jurisdiction of the court.

Grounds for Setting Aside a Pre-Judgment Garnishing Order (s.3(2)(d))

* defendant can argue that the procedure has been imperfect (a badly filled out form)
* defendant can argue that the plaintiff’s claim is not for a debt or liquidated damages
* defendant can argue that the plaintiff has failed to make all just discounts.
* As in regular garnishing order, defendant can argue that it’s not a garnishable debt
* defendant can invoke judicial discretion relying on s.5 of the COEA.

Grounds for Setting Aside: Procedural Defect

* Knowles: based in 1954 that pre-judgment procedure is extraordinary. As a result, courts will scrutinize the form to ensure it is filled out correctly and will require “meticulous observance” of the requirements of the Act.
* Current view is that meticulous observance does not mean ridiculous observance. Just have to do it correctly and not mislead the defendant. Still, a pre-judgment garnishing order is subject to heavier scrutiny than a post-judgment one. The nature of the cause of action must be stated clearly. This doesn’t mean a statement of claim (though that can be attached to the order), but it does call for a succinct and informative statement of what the action is.
* Here, “debt for a chattel mortgage” doesn’t describe a cause of action. You need to spell out the cause of action clearly, who owes what to whom, and who the parties are. Here, they didn’t say who the mortgagor was. Though the court can guess, and very likely be correct, for pre-judgment garnishing orders, the court will not do so and will not fill in blanks for the plaintiff.
* Other issues sufficient for setting aside: didn’t sign the order, erased something without initialling the correction, or name and address of garnishee aren’t laid out with sufficient particularity.

Setting Aside: Plaintiff’s Claim must be for a Debt or Liquidated Demand

* linked to the procedural requirement that the cause of action be spelled out with sufficient particularity and that the actual amount be set out.
* A debt is like an action for money received, it’s an implied promise to pay a certain amount.
* Liquidated demands are genuine pre-estimates of damages (not a penalty) that will be payable in event of the breach of a promissory obligation, agreed to in advance in event of breach.
* Busnex: Defendant tries to get it pre-judgment garnishing order set aside: argued that it’s not a liquidated demand and that the claim isn’t set out with sufficient particularity.
* Court must examine the contract and what obligations were to be done under it. The plaintiff agreed to help defendant in a deal but the deal wan’st completed so no commission was paid. This claim for commission is not a debt, but a claim for damages. Everything in calculating this claim for commission is based on estimates (of the sale, of the commission if it went through)
* Busnex makes clear that the claim must either be debt or liquidated demand. Liquidated demand is money due or payable under a contract, an amount pre-ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment requires investigation beyond mere calculation, that’s damages and not a liquidated demand.
* If the deal had gone through and there was an agreed upon rate of commission, that would work, but because there wasn’t a pre-agreed rate and the sale went through, it’s damages since the ultimate deal price and rate of commission are estimates, not just calculation.
* If some part of the claim is liquidated/debt and some part is not (damages), the court will hive it off and allow the liquidated sum to stay in court while the rest will get paid out to the defendant. It’s not an all-or-nothing proposition.
* Bottom-line: to get a pre-judgment garnishing order for the sum you’re claiming, that sum must be a fixed amount (eg a promissory note, liquidated damages) or an amount that can be ascertained as a mere matter of basic arithmetic.

All Just Discounts

* Even if the claim is set out with sufficient particularity and the sum is a debt/liquidated sum, the defendant can object that in setting out the amount, the plaintiff must make all just discounts.
* If this argument is successful, it doesn’t mean the whole pre-judgment garnishing order will be set aside, only that some of the garnished money will be paid out of court.
* Key example: there were liquidated set-offs that the plaintiff ignored in garnishing a large amount. The result is that the plaintiff garnished too much. This could result in the whole order being set aside or, more likely, that part of the money being paid out.

Pybus: Meticulous Observance and the Exercise of Discretion

* Defendant applies to set aside pre-judgment garnishing orders. First argued that they weren’t served “at once” as required. Second that it wasn’t a claim for a liquidated amount. Third that there was a failure to make all just discounts.
* Master sets it aside: Knowles’ requirement of meticulous observation is modified so that we don’t need technical perfection but we do need substantial compliance with the statute bearing in mind the spirit of practicality. Here, defendant was asking and asking but nothing was served for over six months. That’s just too long – shows there’s a point you can’t go beyond for service.
* Procedural failures like this would only render the order voidable and the court still has discretion in whether or not to release the funds. That said, once a procedural failure is found, it creates a presumption that the order will be set aside and the moneys paid out. The Master finds insufficient reason here to exercise his discretion in favour of the Plaintiff, so it’s set aside.
* Discretion is almost always exercised in favour of the defendant, with the money being paid out. It’s only where the plaintiff has special circumstances or explanations for the things it didn’t do, so there is this chance to keep the money in court even if the Plaintiff screwed up.

Garnishee’s Compliance

* when the garnishee complies with the garnishing order and pays the money into court, the garnishee is discharged of the debt and no longer owes the amount to the defendant or the court. The money always goes to the defendant, only going to the garnishee if it was stupid enough to pay money into court that wasn’t actually owed.
* Typically, the garnishor won’t know exactly how much the garnishee owes the defendant. All it needs to know is the amount of the claim, which it will put on the form. This results in the garnishee paying into court whatever it owes to the defendant and not the full amount of the plaintiff’s claim. Just pay in whatever they owe the defendant at time of service.

Judicial Discretion to Set Aside Pre-Judgment Garnishing Orders

* Traditional discretion: this is exercised to protect the garnishee, who is considered an innocent third party, whenever it would be subject to massive inconvenience due to the garnishing. This is now inherent in s.3 where it says a judge “may” issue a garnishing order, meaning court has discretion to refuse an application
* s.5 is the provision that expressly gives to the courts discretion that it can exercise on behalf of the defendant or JD. Basically to prevent JD and his family from losing all assets and starving.
* S.5 is invoked regularly by defendant JDs either to get the court to release the garnishment or, if a judgment has been entered, to be able to pay in instalments.
* For pre-judgment garnishing orders, s.5 allows the court to release the entire amount as matter of discretion. For post-judgment garnishing orders, the court can only replace the order for payment in full into court with an order for payment in instalments.
* S.5(2): discretion is only exercised where it’s “just in all circumstances.”

Discretion: Defining “Just in all Circumstances”

* Redekopp Mills: lists factors for when it’s “just in all circumstances” to release the money to the defendants. In this case, no other defences worked: it’s liquidated, etc.
* Defendant argues it needs the cash-flow or it’ll destroy his business and implicit in that is that his other creditors will be screwed as a result. Plaintiff argues that this debt it’s garnishing is the only property in BC it can pursue.
* Factors: the strength of the plaintiff’s case (easier for court to pay out to the defendant if it’s only tenuous), the hardship to the defendant in the action (is it undue?), and necessity (does the plaintiff really need it?). Burden is then on defendant to show what’s just in the circumstances.
* It is a balancing exercise and these factors are not exhaustive. Even if the court decides to exercise discretion, it’s not all-or-nothing: here, the court decided to release some, but not all, of the funds. The defendant can also still try to get it set aside through other methods (not liquidated, not a debut within meaning of the Act, etc) even if he fails here.

Jurisdiction

* execution is territorial, no court official can seize property that is not in BC. Physical objects have a physical location but choses in action and intangibles need rules to locate them.
* COEA rule for locating debt: it’s not where the JD is located, but where the garnishee is located. The garnishee owing money to the defendant/JD must be in BC. The alternative rule that BC hasn’t adopted is that the debt is located wherever the debtor (garnishee) can be found OR where the debt is ordinarily or expressly payable – ie, if there’s an agreement between garnishee and the JD that the debt will be paid in a certain jurisdiction.
* Bank Act states that a bank account is located at the branch where the account is held. Bank of Nova Scotia case and Univar cases had differing approaches to this provision.

**Class 8**

Bank of Nova Scotia – Distinguishing/Limiting the Bank Act’s Application

* The Bank Act locates accounts at the branch where the account is kept.
* Bank of Nova Scotia: When the Ms were married, Mr. M was employed by Bank of Nova Scotia in BC but after divorce, he was transferred to a different branch in the West Indies. At the time the partners lived together, Mr. M was employed by Bank of Nova Scotia in BC. When marriage dissolved, he got himself transferred out of BC to the West Indies. His salary is now paid partly in the West Indies and partly into an account in Toronto. Nothing is payable in BC.
* Mr. M falls into arrears on maintenance order so Mrs. M serves garnishing order on Bank of Nova Scotia’s main branch in BC and serves ex juris on her husband in West Indies.
* BCCA finds bank is in contempt for doing nothing: didn’t cooperate with order or file dispute.
* BCCA says that while the wages were payable outside BC, the COEA says nothing about there being a debt situated in BC – all that is necessary is that the garnishee is in the province. Basic jurisdiction is not a problem.
* Bank argues s.462 of Bank Act that locates the account at the branch – Mr. M has no account in any branch in BC. BCCA says this has no application here: it’s not the account that is being garnished, but his salary – the bank is being garnished in its capacity as employer, not account-holder. The Bank Act is about locating accounts and has nothing to do with wages. All that is required is garnishee’s presence in the province – Bank of Nova Scotia is in the province and since Bank Act doesn’t apply for wages/employer, it doesn’t matter that specific branch isn’t.
* Service ex juris on the JD was defective, but it’s only service on the garnishee that matters.
* Remedy: a s.13 order against the bank for failing to comply with the garnishing order. The Bank now has the judgment made against it for the full amount owing on the maintenance with no wage exemption (usually you don’t garnish 100% of wages).

Univar

* Application for pre-judgment garnishing order with a bank as garnishee and bank account of the debtor as the asset to be garnished. Validity of the order goes to the BCSC.
* Judge notes that the COEA requires the garnishee be in the province and the bank has brick-and-mortar business places in BC.
* Court considers s.462’s locating the debt in the branch but says this is “merely procedural.” It doesn’t matter that the branch is outside BC as long as you make sure that that branch is served, which can be done ex juris. So, here, the garnishing order is issued in BC, served on TD bank in BC, and then served ex juris on the bank in Toronto.
* Like in Mitchell, there’s no requirement that the debt be in the province, only that the garnishee be located here. Except it also doesn’t matter if the branch isn’t here either, provided there’s service ex juris.

Priorities

* Essentially the race to garnish the debt ahead of other creditors.
* Priorities turn on the interpretation of s.9 of the COEA, which says that service of a garnishing order on the garnishee “bind” the obligation/liability/etc in the garnishee’s hands from the time of service. Question is the meaning given to the word “binds.”
* First option: in Manitoba, binds means “transfers absolutely.”
* Second option: binds means “creating an equitable/proprietary charge over the debt” in favour of the garnishing creditor.
* Third option: binds means “simply creating a lien/personal right to have the debt paid into court
* BC Millwork: case makes the second option apply to pre-judgment garnishing orders and the third option apply to post-judgment garnishing orders.
* Also, if you issue a pre-judgment garnishing order and then obtain judgment after service, your personal right/lien ripens into an equitable charge/proprietary interest at that point. So the object becomes ensuring that no other creditors claim the money before this ripening occurs.

Personal Right vs. Equitable Charge (Priorities in BC Millwork)

* In this case, the debtor is sued by both Overhead Door and BC Millwork, on the same day. OD is claiming $18K while Millwork is claiming $6500. Millwork issues a pre-judgment garnishing order on the day it commences its action while OD does nothing. Garnishee is a bank, which pays an account into court ($3287). OD ends up getting judgment first and, based on that, applies for an equitable charging order. Millwork gets judgment 3 days later.
* BCSC finds OD has priority: when Millwork served its pre-judgment garnishing order, it only imposed a personal right against the bank to have it pay that money into court. It had no proprietary interest in the money itself. If they did, there’d be nothing left for other creditors to charge but, as it is, the pot of money is fair-game to other judgment creditors.
* Ultimately, OD and Millwork agreed to share the money, though OD could have claimed the whole amount due to having priority. An equitable charging order is a remedy available to any JC (must be a JC) whenever there’s been a payment into court due to a pre-judgment garnishing order. You may have to share the money with other creditors, but you’ll always get something.

Evans – s.11 Orders Absolute

* California judgment obtained against Durante for $38 million. Durante’s moneys were in EBT bank and EBT held that $19 million in a BMO account. By the time the judgment was converted into a BC judgment, it had grown to $65 million.
* Evans gets a garnishing order against BMO, and it counts as being served on EBT, who do nothing. EBT was subject to a freezing order so could not dispose assets but nonetheless did not file a dispute note.
* Evans applies for a s.11 order (“order absolute”). Where the garnishee fails to pay into court or dispute the debt, judge can make an order under this for garnishee to pay into court the amount appearing due from the garnishee or as much as may satisfy the judgment plus costs for the garnishing proceedings. S.11 also counts as producing a judgment against the garnishee so can be enforced pursuant to s.14 which states that execution or other proceedings may be taken to enforce the s.11 order. In that case, the garnishee would become the JD and its property is now at risk to satisfy the amount ordered to be satisfied under s.11.
* Getting a s.11 order meant that they were no longer limited to garnishing the amount in JD’s account ($19 million). Instead, they can go after the garnishee for the whole amount of the judgment ($65 million) with s.14 making any and all assets of EBT at risk to satisfy that judgment. It’s not how much JD could have paid, now it’s how much to satisfy the judgment.

Full and Frank Disclosure in Applying for Garnishing (Evans

* BCCA are not pleased with Evans’ lawyers because they knew about the freezing order in advance and knew EBT wouldn’t be able to pay the money into court and did not make full and frank disclosure on an ex parte application. As officers of the court, they must make full and frank disclosure of all material facts on an ex parte application.
* In applying for the garnishing order and in applying for the order absolute, they were in ex parte procedures and were obligated to disclose all material facts. It also doesn’t matter that the defendant/JD could have come in but didn’t – if they’re not there, it’s non-adversarial and full disclosure must be made by the applicant.
* S.11(b) gives the court discretion in making a s.11 order: the judge “may” order. This means when garnishee fails to comply with the garnishing order, judge has discretion on what to do. So in situations of lack of disclosure, this discretion may be used to not issue the s.11 order.

Sorting Priorities Between Multiple Claimants

* Pacific Forests: Twin Stag, the debtor, had assigned its receivables (any debts that had been owing to it) to the bank. It also owes Pacific Lumber money and hasn’t been paying employees.
* Crown Forest owes money to Twin Stag (receivable). Pacific Lumber sues Twin Stag for the money its owed and issues a pre-judgment garnishing order, garnishing Crown Forest for that money. Crown Forest pays the money into court, discharging them from their debt.
* Bank has priority over Pacific Lumber: even though PL garnished the money, they are not entitled to it: the bank had assignment of receivables so it was never Twin Stag’s money to give. Outside creditors can’t get any incoming receivables. They belong to the bank.
* Employees vs. Bank: Employees complained under Employment Standards Act. Under ESA, the Director of Employment Standards can issue a certificate (equivalent of a judgment) ordering the employer to pay the director who will pass on the money to the employees. Despite not being a garnishor or a party to priority claims, he shows up and claims the money. Despite being a third part, court gives broad reading to s.17 of COEA to give him standing.
* S.15(2) of the ESA gives the director super-priority. It doesn’t matter when the assignment was made or whether it pre-dated the non-payment of wages. Employees are special creditors and the director gets priority for the amount owing under the ESA. He gets the garnished money.
* This super-priority is limited to personal property; does not affect mortgages or interests in land.

**Class 9**

Writs of Seizure and Sale: The Procedural Steps

* First: issuance of the writ (Form 50 of the civil rules) by the JC. It is directed to the sheriff commanding him to seize and sell goods of the named person and then pay the person specified from the amount realized. This step is entirely within the JC’s control, who has simply chosen the writ of seizure and sale as the best method of execution. At common law, issuance is the point of time at which the goods of the JD are bound by the writ, though s.31 of the Law and Equity Act has moved this up to the time of seizure.
* Second: JC delivers this writ, the completed Form 50 which is sealed at the registry, to the sheriff. Usually, the sheriff will be able to act upon delivery, but JC can also tell the sheriff to hold off until further notice. The sheriff is obligated to execute the writs in the order in which they are delivered. So if he gets multiple writs, this means executing the first one first and if that means there’s no property left, the later writs will go unsatisfied.
* Third: sheriff finds the JD, enters his premises (or the premises of a third party where the JD’s stuff is located) and searches those premises. Often the JC or JC’s lawyer will be able to supply info like the address of the JD and where property the JD owns might be located, often attained through examination.
* Fourth: Sheriff seizes the property
* Fifth: property that has been seized is sold.
* Sixth: sheriff pays over the proceeds to the JC.
* Ultimately, it is the duty of the sheriff to find, seize, and sell sufficient goods to satisfy the amount on the face of the writ/Form 50 and to do so forthwith.
* The writ is good for one year.

Limitations on the Sheriff’s Ability to Search and Seize

* Cybulski: if the JC or JC’s lawyer is providing info to the court bailiff to make him more efficient in his searches, the JC/JC’s lawyer must be careful not to inadvertently convert the bailiff into their agent. Essentially, you want to provide the max amount of info possible without giving precise directions (eg “seize this, seize that”). Otherwise, if the sheriff screws up and seizes something they shouldn’t have or commits any flaw that is subject to an action, the JC will be liable for what the court bailiff has done.
* Sheriff can’t force his way into a family dwelling. Neither this nor the curtilage (the space close to the residence which might be fenced in or any buildings within the curtilage) can be broken and enetered by the sheriff. The homeowner has to allow the sheriff in either expressly or by leaving a door open and can revoke that permission at any time. Commercial buildings do not receive this protection, only residential.
* Once in the building, the sheriff can break in anything in the house: cupboards, chests, any locked doors. This means that in a boardinghouse, if he’s let in the main door, he can break into any of the occupants’ rooms without their permission.

Searching Third Party Premises

* Sheriff goes to a commercial building, a bank, and wants to open JD’s safety deposit box without knowing what was in it. Court says that no separate drilling order is needed. As a commercial building (a bank), the writ is sufficient authority to require the bank to the box. Once the sheriff is in the building, he can break in anything.
* Typically, if you go onto the premises of a third party searching for JD’s assets and find nothing, you are liable for trespass. On the facts, the judge finds that not to apply here. It is unclear whether this can be generalized, either to any entry onto third party premises or onto third party commercial premises. Regardless, unless the sheriff is a jerk and/or does damage in the search, he’s unlikely to be sued for trespass (damages would be merely nominal).
* However, since the third party, the bank, is an innocent third party, any damage done in the search or costs the bank incurs due to it will be covered up-front by the JC (who after paying can add the amount to the JD’s debt). Third party must be kept whole.

Effecting and Maintaining a Seizure

* At common law, taking physical possession of the goods is not required to legally seize it, you merely have to indicate that you are seizing it. However, at common law, in order to maintain a seizure, you had to maintain physical presence: the bailiff would just stay with the property until someone came to take it away.
* To get around this, sheriffs started entering into “walking possession agreements”: written documents they got the JD to sign acknowledging that the sheriff had seized the property and was not going to remain in continuous physical possession but would nonetheless maintain the seizure: he’s going to leave and he’s going to come back, but he won’t be re-seizing the property on his return.
* It is no longer necessary for sheriff to maintain continuous physical presence on the premises. It’s possible to indicate seizure and leave.
* Problem with walking possession agreements is that it leaves the JD in possession of the seized property, free to dispose it to unsuspecting purchasers.
* Sheriff is entitled to take assistants with him when going to seize: the “posse comitatus.”

The Judgment Debtor Sells the Seized Asset and Walking Possession Agreements (Lloyd’s)

* 1966 English case. Mercantile (JC) issues a writ of seizure and sale, delivers it to the sheriff, who finds Wood (JD) living in a caravan with his family. He is allowed in and after some argument about who owns the caravan, the sheriff seizes it. But he can’t take it right away since the family is still living in it. Wood refuses to sign a walking possession agreement. Sheriff indicates that he has seized the caravan and tells them not to move it. He comes back on nine separate occasions to check that it’s still there. Eventually it disappears.
* Wood had sold it to Modern Cars, who sold it to Lloyd’s, who let it to Worsfeld in a purchase agreement. Sheriff seizes it from Worsfeld even though he was a bona fide purchaser who paid good consideration for it.
* S.31 Law and Equity Act: moves the critical point of time for binding from issuance to seizure. This means that between the issuance of the writ and actual seizure, the JD is free to dispose of goods to bona fide purchasers for value. Typically, you have issuance, then delivery, and then seizure: a purchaser can acquire good title as that property has not yet been bound to the JD, as long as they had no knowledge of the delivery of the writ of execution.
* If, after seizure, the JD transfers/conveys goods that have been seized, by virtue of the binding effect of the writ, the sheriff has special property in those goods and can seize that property from any bona fide purchaser for value who acquired title after seizure. This means that any transferees of a JD’s property, particularly where that JD was left in walking possession of those goods, are at risk. The JD can still pass good title after seizure, but the transferee is at risk of the sheriff showing up and seizing it even if transferee has good title until then.
* Court finds this was a valid seizure and the JD’s refusal to sign the walking order didn’t kill it: a JD can’t defeat a seizure just by refusing to sign.
* That said, particularly without a signed agreement, it’s possible for the sheriff to abandon the seizure. This is a factual determination based on evidence of the state of mind of the sheriff. Here, the sheriff had not abandoned the seizure due to the evidence of his continually coming back to check on the caravan’s still being there.

**Class 10**

Sheriff’s Sale of the Seized Goods.

* Second stage of executing a writ of seizure and sale: after validly seizing the stuff, the sheriff is supposed to sell it. It is also possible for the sheriff to hold onto the property and receive “hostage payments’ from the JD until the stuff is returned.
* At common law, the sheriff is to sell it “forthwith” and can be sued by either the JD or the JC for failing to get a good price for the seized property.
* As a pre-emptive defence, the sheriff commonly will sell via public auction, since theoretically an auction means best available price (though stuff is always discounted for being as is, where is). The sheriff is not obligated to take the highest bid – he can decide to refuse all bids and have another auction. Also, if it’s a public auction, the sheriff has to advertise it.
* writ says “public auction or by tender” so sheriff can have a private sale, but it can leave him open to “best price” arguments. Thus, private sales are usually only held for stuff with transfer restrictions, like share certificates in a closely-held corporation.
* Sheriff generally conducts auction himself, though can hire an auctioneer to do it. Once the goods are sold, the sheriff is entitled to commission on the sale called “poundage.”
* After delivery of the goods after sale, the sheriff’s next obligation is payment. He must pay the JCs in the order in which their writs were delivered to him, though this may be modified by the Creditor Assistance Act when it applies.

Cybulski – Reasonable Pressure; Directing the Sheriff

* Ration is to put pressure on the JD only when it’s reasonable.
* MVA between postal truck and the plaintiff, who gets judgment from Canada post and then sends letter to defendants demanding money on that day. Defendant says it’ll take a week: takes time to get payment out of the Crown, who have deep pockets. Plaintiff won’t wait and gives bailiff instructions to seize vehicles a week after judgment.
* Remember agency law: give the bailiff info, not instructions, otherwise they are converted into the JC’s agent and any liability he incurs in executing the writ is your liability.
* Court finds that it doesn’t matter that the trucks were not owned by Canada Post and only leased by them: Crown immunity from execution extends to property leased to or in possession of the Crown and it doesn’t matter if they don’t own it. Execution here is thus invalid.
* Bailiff wants his poundage and JD argues he should not be responsible for the costs and disbursements for the execution proceedings since the execution was totally unnecessary: the money was on its way and the vehicles were immune. As a result, the expenses payable to the bailiff (costs, fees, poundage) were ordered payable personally by JC’s counsel.
* Bottom-line: don’t give bailiff specific directions, be reasonable in your pressure, and don’t direct bailiff to seize immune property or you’ll be at risk personally.

Interests Subject to Writ of Seizure and Sale

* s.55: all goods, chattels, and effects of a JD are liable to seizure and sale under the writ against good and chattels. Refers to tangible personal property. (Morton)
* s.56: interests in land can’t be seized/sold under a writ of seizure and sale.
* s.57: intangible interests subject to seizure and sale: a mineral title, a permit, license, or lease under the Coal Act, or a permit, license or lease under the Petroleum and Natural Gas Act, and a permit, license, or lease as defined under the Geothermal Resources Act.
* S.62: under the writ, sheriff can seize and sell the interest or equitable redemption in any goods or chattels belonging to the JD. This conveys any interest in the goods the JD had at time of seizure. This means that both legal AND equitable interests in goods are subject to seizure.

Vancouver A&W – broad interpretation of what falls under s.55

* law has since been modified by statute in that RRSPs are now exempt from seizure.
* JC serves garnishing order on Yorkshire Trust, who hold the JD’s RRSP. Yorkshire ignore the order. JC then tries to deliver a writ of execution to sheriff who says he can’t seize an RRSP. Forces JC to go to court for directions on how to execute against this RRSP.
* Judge says the relationship between Yorkshire and the RRSP is one of beneficiary/trustee and not debtor/creditor, end of story. Garnishing order won’t work. Never considers that the definition of attachable debt in the COEA also includes claims arising out of contract or trust.
* Considers the writ: is the interest of the JD in the trust “property”? The assets the fund is invested in are shares are clearly property.
* COEA says all good, chattels, and “effects” are liable to seizure/sale. Judge holds that “effects” is sufficiently broad to cover the interest here. So both the shares and the interest in shares are property under the COEA and subject to seizure and sale.
* Judge never considers the RRSP itself, only the assets it is invested in. s.55 is broad enough to include it.
* Judge (wrongly) finds that you can’t seize shares in a foreign corporation and appoints an equitable receiver – receivers can collect assets which you can’t seize at common law via writ of execution due to some impediment, usually the nature of the interest the JD has in the assets. Here, the impediment was the shares being of a foreign corporation. Receiver will recover the RRSP through the assets it’s invested in, cash it in, pay the JC.
* Point of the case is the very large, liberal, purposive interpretation given to s.55’s “goods, chattels, and effects.” While still good law, this case is unlikely to be followed today.

Bank of BC – Narrower take on s.55’s scope

* JC wants a declaration that the JD’s RRSP is subject to a writ of seizure and sale, relying on s.55.
* Judge rejects and says “goods, chattels and effects” are limited to TANGIBLE personal property. S.55 is a codification of the common law, which was limited to legal interests in tangible personal property. His logic is that if we went with A&W’s interpretation, the other layers of the COEA would be redundant. Since the JC argued s.55 exclusively, he was out of luck.

Morton – s.55 and IP rights?

* sheriff seizes one copy of the JD’s phasercode software system and one instruction manual. JD argues this is not subject to a writ of seizure and sale within s.55, since what’s at stake is not just the hardcopy manual, but the software system itself and the trade-mark, which he licenses out to parties after they sign confidentiality agreements.
* Judge says s.55 has been restrictively interpreted and is limited to what the common law allows the JC to seize: tangible property. Intellectual property is not tangible personal property. You cannot seize and sell industrial designs, rights, trade-marks under s.55 or any part of COEA.
* But the manual and software itself were tangible but because the associated IP rights were not, the manual and software can’t be sold unencumbered: sale must be subject to terms equivalent to the licensing agreements the JD imposed on its licensees.

s.62 – seizing interests in equity

* refers to the interests in equity of redemption of the JD in goods, chattels, effects. At common law, JC can only seize the interest of the JD (nemo dat) and only the legal interest. S.62 supplements this by also authorizing seizure and sale of the JD’s equitable interests in the tangible, personal property. How to effect seizure of an equitable interest is another matter.
* Unclear whether s.62 authorizes seizure of jointly owned tangible personal property. We know it is not permissible to garnish jointly owned debts unless both owners are indebted to the JC, though it is permissible to seize an interest in real property that is jointly owned.

**Class 11**

Summary of Seizing Goods

* Limited by judicial interpretation to seizing and selling tangible goods, including both legal and equitable interests in tangible goods but NOT joint interests.

Seizing Money and Securities for Money

* Based off of Judgments Act 1838, s.58 made these assets available for execution by sheriff via writ of seizure and sale. All of the stuff in s.58 were intangibles, but they were intangibles evidenced by something tangible (paper) that the sheriff could seize.
* s.58: money or banknotes, cheques, bills of exchange, promissory notes, bonds, specialties, and a residual clause “other securities for money.”
* Sheriffs are hesitant to use s.58: uncertain on what they can do under it and these forms of property are hard to find.
* All the s.58 property have a tangible aspect. Money means notes and coins, not debts (use garnishment for that).

Limits to S.58

* Under s.58, the sheriff can’t actually search the JD (eg, ask them to open t heir wallets). The debtor must voluntarily open t heir wallet and hand over the bank note, it can’t be involuntary.
* If the JD is a business, the bailiff will be hesitant to empty the cash register due to concerns about wrongfully seizing property (money) belonging to a third party. This is because customers pay taxes on all purchases, which amasses in an undifferentiated form in the register such that if the bailiff scoops everything, some of it would be government property.
* Seizing cheques also have difficulties: the bailiff can’t head off the mailman and intercept the cheque to be delivered – until the cheque is actually delivered to theh recipient (the JD), it’s not the recipient’s property, it still belongs to the payor. Also, government payments such as social service payments, pension cheques, and welfare cheques are immune via legislation. Finally, once the cheque is deposited by the JD into a general bank account and mixed with other funds, you can garnish the account, but you can no longer seize the cheque.

“Other securities for money”

* Two possible interpretation: a broad interpretation that includes everything, like licenses and permits, or narrowly such that “other securities for money” only adds to the s.58 list forms of property analogous to the stuff already listed, like money/bank-notes.
* Canadian Mutual Loan: insurance policies are immune by statute but JC was instead going after the dividends. Garnishment might work as dividends may be debts to be paid (though you’d have to wait until they were due and then serve the order before they were paid out).
* Instead of garnishing, JC asks for appointment of an equitable receiver, which required that the assets be exigible at law but for some impediment. Court finds that the fully paid-up policy and its dividends are exigible as other securities for money: usually life insurance policies aren’t paid up until the holder’s death so JD’s interest is only contingent and thus can’t be seized. However, because this policy’s 10 required payments were fully paid-up, the policy didn’t require any further payment and thus could be included under “other securities for money.”
* Patmore: Bank pays Patmore’s shares in bearer form (they had paper certificates) into court so they wouldn’t be liable. JC goes for an equitable charging order. The shares were in a foreign corporation but the judge says this does not stop the charging order: the shares would have been exigible were they found anywhere but the court. It’s just the location that immunizes.
* Court extends s.58 to include shares in bearer form. Doesn’t matter where the corporation in which the shares are apportioned was incorporated. Bearer shares are equivalent to money and, in fact, are their own part of s.58 as a result, not “other securities.”
* Bank of BC: it’s only at the point that the bailiff actually seizes or refuses to seize something that the JC wants seized that they must pick a provision under the COEA. After picking the wrong one last time, they try for s.58. RRPS have since been made immune, but at the time of this case, s.58’s wording was found wide enough to include an RRSP.

Seizure and Sale Procedure for s.58 Intangibles.

* Provision says the sheriff MUST seize, despite the fact that upon delivery of the writ, the sheriff has the discretion to go out and look for things. Also, bailiff can’t discharge obligation to seize stuff like money and cheques without info from the JC since that stuff is not readily visible.
* In 1838 Judgments Act, it’s still a physical seizure: sheriff must find the tangible evidence of these assets and actually seize the paper.
* Ss.58-61 don’t actually authorize the sheriff to sell: he can either give the intangibles directly over to the JC or he can hold the stuff as security for the amount to be levied. This “holding” means that if he physically seizes a promissory note with a due date that hasn’t come up yet, he can hold the note and wait for payment and then, under s.58, if the person doesn’t pay, the sheriff can sue.
* It’s unknown as to whether these s.58 options are exclusive or if there’s still a right to sell these things. As it stands, the options are to transfer to the JC, receive payment, hold for payment, or sue for payment (and only has to sue if JC agrees to indemnify the sheriff for all costs).

Securities Transfers Act – Seizing Securities/Shares

* While old acts make shares physical exigible, that only works where they have certificates.
* Judgments Act 1838: JC can apply to the court for a charging order against shares and incomes. This is not a physical seizure. Ontario then amends its Execution Act to say that shares could be seized physically or seized just by giving notice to the appropriate entity. BC adopts everything: the Judgments Act is still in force while the Execution Act is transferred to the COEA. These COEA provisions are then repealed and we get the Securities Transfer Act.
* STA has it so that if you can trade it and it’s regulated, it’s exigible. This includes securities, which can be sub-divided into certificated securities, uncertificated securities, and securities with transfer restrictions. Then you’ve got security entitlements.
* Bailiff still is obligated to execute against securities by seizure, regardless of how the process is conducted, and is authorized by the JC upon delivery of a writ of seizure and sale.
* s.48: seizure of interest in certificated security requires the sheriff actually seize the paper certificate. Of the certificate has been surrendered to the issuer (the company), then s.48(2) says the sheriff can provide notice of seizure on the issuer’s chief, executive office.
* S.49: for uncertificated securities, JD’s interest in those shares may be seized only by sheriff serving notice of seizure on issuer’s chief, executive office.
* If the head office is outside BC, this may trigger extra-territoriality problems since the sheriff is only authorized by BC legislation.
* S.50: sheriff seizes security entitlements in financial assets by serving notice of the seizure to the JD’s broker (JD’s “securities intermediary”).
* S.51: if the security entitlements have been pledged to a third party as security for something else, seizure may be effected by serving notice to that third party.
* S.63.1(3): if a seizure under the STA is via notice to an issuer or broker, the seizure becomes effective when the issuer or broker has had a reasonable opportunity to act on the seizure having regard to the time and manner of receipt of notice. No interpretation of this.
* Sheriff has the power to do anything the JD could do with the securities: sell them, etc.

Transfer restrictions

* Major problem is how to valuate shares that are not publicly traded and hence have no clear market-rpce. Courts basically just have the sheriff take their best guess, which endangers him to arguments by the JD and/or JC that he didn’t get the best price.
* s.65.1: limited to shares in BC companies and sheriff is bound by any transfer restrictions.
* S.65.1(5): it’s not a fraudulent conveyance in itself to incorporate, but potential JDs may see a judgment incoming, incorporate, and then hide their money in shares with transfer restrictions, making themselves judgment-proof. This provision addresses that: on an application by sheriff or any interested person, if the BCSC considers a restriction on the seized security was made with intent to defeat, hinder, delay, or defraud creditors or others, court will make an order it considers appropriate.
* Wide range of power here: court can even direct that the issuer be dissolved and its proceeds distributed according to law (freeing up the money invested in the shares for seizure).

**Class 12**

Judgments Act: Does it Apply?

* The COEA (for transfer restricted securities) and the STA are probably not exclusive, though neither statute is clear. STA s.6 does say that except where inconsistent, the principles of law and equity supplement the Act, which would suggest it’s non-exclusive.
* Also, s.63 of the COEA used to say no charging orders but has been repealed.
* Be aware of any possible judicial confusion between Judgments Act charging orders and equitable charging orders.

Judgments Act 1838 Charging Orders

* Made government stocks, funds, and annuities (ie Canada Savings Bonds) as well as stocks/shares in “any public company in England” exigible. “In England” has been interpreted as “BC companies” for our purposes. The Sheriff wasn’t authorized to seize these things under the Act; instead, the Act creates a charging order – the JC can charge the shares.
* Judgments Act 1840: clarifies that any form of interest in these classes of property are subject to a charging order.
* Consumer Imagenet: BCSC applies the Judgments Act, grants a charging order and makes it absolute. The court describes the Judgments Act as received English law and the shares in this particular case are chargeable.
* Problem was that Infinitron was not a BC company, but a federal incorporated one. But its head office and share transfer office were in BC.
* Charging orders can always apply to shares in BC companies and, based on Consumer Imagenet, to shares in a federally incorporated company with clear connections to BC.

Effects of a charging order

* It is as if the JD had voluntarily charged the shares with the amount owing.
* Based Consumer Imagenet, this is likely an in personam remedy. This could raise another argument for shares of non-BC corporations being charged: if BC has jurisdiction over the person, that is all that’s required for an in personam remedy to be issued, doesn’t matter if the property being charged is foreign. This argument ie especially useful since someone may try to argue that a seizure under the STA is ultra vires as extra-territorial legislation.
* The shares stand charged with the payment of the judgment debt. Once issued, the order prohibits transfer of the shares to a third party. The JC effectively becomes a secured creditor with a security interest in the shares.
* Other big advantage: the JC is entitled to the entire proceeds of the sale of these charged shares and don’t have to share the proceeds with any other creditors.

Judgment Acts Charging Order Procedure

* First step: ex parte application by JC, don’t have to notify anybody, for a charging of the shares.
* Second step: within 6 months, this is followed by a “show cause hearing.” This is where the JD, or any interested person, can apply to the court for a discharge of the order since nothing’s been sold or happened to the shares yet. A discharge can be pursued on either legal or discretionary grounds. After this show cause hearing, the court will either order that the charging order be discharged or made absolute.
* Third: even if it’s made an order absolute, the JC still has to apply for an order for sale.
* Procedure is complex and lengthy and JC must assess whether the expense is worthwhile.

Executing Against Real Property

* At common law, \ couldn’t realize or seize/sell land. There was an old writ that authorized \ sheriff to harvest, seize, and sell crops, but that’s now encompassed by writ of seizure and sale.
* s.81: defines land as including every estate, right, title, and interest in land and real property, future, executory, or contingent interests, legal or equitable interests.
* Expressly includes interests of mortgagors, interests of vendor and purchaser, interests of joint tenants, interests of tenants in common, but excludes rights of a lien claimant under BLA.
* Procedure: registration, then show cause hearing/inquiry, then order for sale, then the sale, the distribution of proceeds.

Registration of Judgment Against Land

* S.86: the minute you get judgment, you can register it on the land immediately.
* Re Schiava: JD argued JC had to execute against his personal property first and couldn’t go directly to the land. Court said no – there are no pre-conditions to registering a judgment against land and no requirement that the JC first exhaust its remedies against personal property before going against the land.
* After this registration, there’s nothing to prevent JD from selling off his personal property, getting a better price than sheriff would’ve, and paying off the judgment to save the land, since registration itself isn’t a conclusive or final step.
* Mion Estate: approved Schiava’s reasoning. JD argued JC had to proceed against JD’s shares before going against property, but BCSC said you ran register judgment immediately.

Registration Procedural Matters

* s.86(2): you have to register your judgment against title to “specified land.” Prior to 1979, you just registered in the judgments register, which automatically put it on any land in the province owned by the JD. Now, you must ascertain what land or interest in land belongs to your JD and register the judgment against that interest.
* S.86(5): if the nature of the interest changes in that real property, a registered judgment can capture those after acquired interests, but only insofar as that expanded interest relates to the same land. The captured after-acquired interests are further interests acquired in the same land
* S.88: to register, deliver a copy of the judgment signed & sealed by registrar of the court to LTO.
* S.89: registrar has to send out notices to the owner of that property that a judgment has been registered against his estate or interest. If owner doesn’t respond, fine, but if he disputes being the JD or the existence of a debt/judgment, the registrar must do an inquiry to, for instance, determines who owns the estate/interest.
* S.84: definition of “judgment” for these purposes encompasses all judgments by certificates (administrative judgments), federal court judgments, and s.96 BC court judgments. This means any foreign judgment would first have to be converted into a BC judgment.

The Effect of Registration

* s.86(3): registration immediately creates a lien and charge on the land of the judgment debtor specified in the application in the same manner as if charged in writing by the JD under his or her signature/seal.
* A lien/charge won’t be any good if the JD goes bankrupt, but you’re otherwise in a very good position with respect to priority against other claims against the JD.
* Bank of Montreal: JD had a 99 year lease and BMO, instead of foreclosing, got a judgment and registered against the title on which it also had a mortgage registered (there were also two other mortgages on it). The JD, with the mortgages and judgment on title, decide to sell the leasehold interest for no profit and the registrar cancels the judgment.
* Court says the judgment isn’t canceled: JD must deal with the JC when the JD is voluntarily selling the land/the interest in the land to a third party. If he fails to do so and the third party is aware of the status of the title, including judgments, then the third party purchaser takes subject to the judgments. Judgment runs with the land.
* Court says the value of the JD’s equity in the property might fluctuate: can’t guarantee that it’ll rise or stay the same after registration of judgment. Nonetheless, the registered JC must be dealt with, even if this means the JC won’t be paid in full. You cannot get rid of a judgment by selling to a third party.
* As well as being entitled to be dealt with in a voluntary sale, registration also entitles the JD to be paid out in order of priority of registration under the LTA should, for instance, any of the mortgages foreclose on the property.

Renewal and Limitations of the Registered Judgment.

* S.83(1) and (2): must renew registration of your judgment every two years unless it’s a non-expiring judgment (a maintenance/support judgment under s.26(5) of the Family Maintenance Enforcement Act).
* Butler Lafarge: Nov. 17, 1970, judgment is registered against the interest of the purchaser, Lowe in, an agreement for sale. Lowe then mortgages his interest and the mortgage expressly recognizes the judgment’s having higher priority. June 1972, JC commences proceedings for sale of the land to get money out and registers a certificate of pending litigation in August for its application for an order of sale. Mortgagor starts foreclosure proceedings in October.
* JC renews registration of its judgment on Nov. 27, 10 days too late. Court holds that the lien and charge created by law arising on registration of the judgment had evaporated two days to the day of registration. The CPL did not preserve it. Even if commencing proceedings for sale, you have to keep the judgment registered at all times.
* JC can still re-register, but has lost his place. Re-registering would put date of registration at Nov. 27, 1972, so he’d be ahead of future creditors but in second place to the mortgagee.
* Shipowick: life of the judgment must also be considered. $10K judgment in 1991 that’s registered in Nov. 1992, re-registered every two years up until there being an action for order for sale in September 2001. But when they try to re-register in 2004, the court says the charge has vanished because the 10 year life of the judgment has expired. You cannot re-register past the life of a judgment, though you can extend it by two years by re-registering on the last day of the judgment’s 10 year life.

Unregistered interests in land

* Nemo dat applies: if the land was already transferred by the JD, you can’t register your judgment against that land, even if that transfer wasn’t registered.
* There can be registration of judgments against unregistered beneficial interests.
* Bank of Montreal and Fulthorp: W owned a half-interest in property and a few months after BMO got judgment against her, she enters into a contract to sell the land to Fulthrop. One month later, BMO registers against her interest in land since she’s still the registered owner and Fulthorp hadn’t registered yet.
* BMO tries to get the land sold but the registrar’s inquiry said its claim had evaporated: never properly registered against W’s land because she owned no land at time of registration – it had been transferred - and a JC is prohibited from seizing property not owned by the JD regardless of whether the transfer was unregistered, leaving JD as registered owner.

Jointly-owned land

* Despite not being able to garnish jointly owned debts or seize jointly owned property, jointly owned land is expressly made subject to registration of a judgment. That said, if one of the joint tenants dies, you’ll either get nothing if the JD dies or a windfall if the other joint tenant dies.
* CIBC and Muntain:. CIBC got judgment against Muntain Jr. and when Muntain Jr. can’t pay the debt, CIBC goes against the guarantor, his dad, and applies to have guarantor’s property sold. Property is registered by Mr. and Mrs. Muntain in joint tenancy. Since they’re pensioners and this is their matrimonial property, twice BCSC refuses the application on discretionary grounds.
* CIBC files a CPL on the property and a week later, the guarantor dies.
* Court rules that a CPL does not affect a joint tenancy. A joint tenancy is not severed until there’s an actual sale. As a result, on the guarantor’s death, the whole property went to Mrs. Muntain who was neither debtor nor guarantor and can take it all free of the judgment.
* Case shows the danger or registering against a joint interest in land: you either will get the full value if the JD ends up owning it all or you may get nothing due to the JD dying.

**Class 13**

Procedure for Getting Sale of Land

* Can register immediately upon judgment and renew it for the life of the judgment: you have max 12 years to enforce your judgment against land.
* Simple registration alone gives security: runs with the land and requires the owner to negotiate with you on a voluntary sale.
* Getting a sale requires following COEA procedure.
* S.92: First step is a show-cause hearing. After deciding to sell, the JD is called to show why it should not be sold in a Chambers application. COEA does not list reasons: JD can invoke law and discretion. These same arguments may be repeated later in the process.
* Possible causes: may argue that the debt’s been paid, the judgment has expired, that there’s other exigible property (Schiava), that there’s no equity in the land worth selling; may ask for payment by installments or invoke discretion of the court in some other way for some cause peculiar to the JD and/or the property. Bias is always in favour of the JD.
* S.94(1): if JD fails to show cause, the judge MUST order an inquiry by referring it to the district registrar, who must define what land is liable to be sold, what interest in that land the JD has, what judgments/liens/charges are on it and in what priority, and how proceeds of the sale would have to be distributed. Registrar must then report all of this to the court and notify every interested party.
* S.94(5): third step: this report must be confirmed by the court in another hearing, or varied or sent back to the registrar.
* S.96: final step: at the above hearing, after confirming or varyingthe report, court can issue an order for sale. This is effectively another show-cause hearing much like s.92.
* S.96(2): the court is given general discretion to impose terms and conditions on the order for sale. Court has an even more generous discretion with respect to the home of the JD.
* S.96(1): after confirmation, an order must be made by the court and the order must declare what land and what interest in it is liable to be sold, directing sale of it by the sheriff. This was usually done by public auction after advertising in particular places for a certain length of time.
* S.100: provides a redemption period – sheriff must not offer the land for sale until one month has elapsed since his getting the order. JD can still save the land then by paying the judgment.

Orders for Sale on Terms and Conditions

* Topouzis: orders for sale are often attached with conditions: typical one is having the land be sold by a real estate agent instead of the sheriff.
* Here, as he is entitled to do, JD objects to the order for sale, arguing that the judgment is under appeal and that as it stands, there isn’t enough equity in the property to satisfy the judgment but that it is going to be developed and, once it is, it’ll be worth much more and will satisfy.
* Arguments are insufficient for overturning the order for sale due to deficiencies in the evidence on JD’s equity and what land is worth, but it’s enough to attach terms and conditions: the order for sale is deferred for another 4 months so that the development project can mature and JD can get a development permit, so that the property will be worth more when sold so that the creditors can be paid.
* Thus, the argument that the land will be worth more shortly can be enough to defer the sale.
* This objection is basically another opportunity for JD to show why the land shouldn’t be sold, making any arguments relevant to his circumstances to justify a refusal to order sale.

Sheriff’s Conducting of the Sale and Distribution of Proceeds

* Common law requires him to get the best available price.
* s.104 authorizes sheriff to adjourn the sale, preventingthe sheriff from HAVING to sell to the highest bidder (eg: if it’s too low). After adjournment, the sheriff can ask the court for direction or follow the Wardel procedure to make the sale subject to judicial supervision.
* S.106: before distribution, the Sheriff’s expenses are deducted. The proceeds must then be delivered to the registrar of the court where the order was made.
* S.110: money realized by the sale of land in an execution sale is money levied under execution within meaning of the Creditor’s Assistance Act. The CAA purports to abolish priority among judgment creditors. This means that a JC will be paid out pursuant to the CAA and NOT in order of registration on title.

Judicial Supervision of the Sale

* Wardel: After JC got an order for sale, JD tried and failed to claim the court’s discretion to be exercised on basis that it was his matrimonial home so then asked for sale to be subject to court approval. COEA doesn’t say court has jurisdiction to supervise sale of land.
* BCCA says that the COEA is not a complete code – there being no reference to judicial oversight of the sale doesn’t mean the court lacks jurisdiction to do so.
* Court also says that you can’t use the rules of court for the sale of real property.
* Court does have jurisdiction to make an order that the sale is subject to judicial approval. This is especially appropriate where, as here, the JC is selling JD’s matrimonial home. While that won’t be enough to kill the order for sale, it is enough to get the sale supervised to ensure it’s done fairly. This is part of the court’s general supervisory jurisdiction so you don’t even technically have to show special circumstances (eg: it’s the JD’s home), but it helps.
* This can also be requested in advance at the time the JC applies for the order for sale.

Mortgage Advances

* Property Law Act: if a mortgage is on the title, followed by a judgment, but then further advances are made on the mortgage, those advances tack onto the mortgage’s priority.
* This mean’s equity is diminishing for the JC as advances are made.

Roadberg – Priorities After Sale of Land

* 5 mortgages, 11 judgments registered on title, 3 of which are in favour of the Crown as JC. Mortgagee #5 forecloses. Issue is distribution of proceeds: typically paid out according to priority, leading to people attempting to climb to the top.
* Crown’s super-priority does not extend to prior registered mortgage-holders. They’re also low in priority amongst the judgments (they’re #7, #9, and #11).
* Crown argued once land is sold, proceeds paid into court, the lien and charge created via COEA and registration of judgment evaporates.
* Court rejected this: even in a foreclosure action not governed by the COEA, a charge created by registration of judgment against title to land simply transfers to the fund in court and does not evaporate upon sale of the land.
* If it’s a foreclosure sale and not an execution sale, CAA does not apply – this means there is no abolition of priority among JCs, who are paid out in order of registration on title.

Equitable Relief

* Law and Equity Act s.39: an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in appears to the court to be just or convenient for the order to be made. Essentially gives court right to issue equitable relief for legal orders.

Mareva Injunctions (Equitable Relief #1)

* Original position (Lister/Stubbs): until you get judgment, can’t interfere with defendant’s assets. Denning distinguished this to create injunction prohibiting defendant from taking their property out of England.
* Mareva injunction prevents defendant from disposing of its assets for a particular length of time, either until judgment or shorter. It is an in personam equitable order that does not create any kind of property interest, lien, or charge in the assets. Just an order not to dispose of them.
* Mareva: original case had foreign defendant with easily moved assets who knew he was going to be sued so was going to move the assets out before judgment. What was issued was a local order (only affects property in England), pre-judgment against foreigners. Since mareva injunctions are in personam, this has since been expanded worldwide to prevent disposal of assets anywhere in the world.
* Ancillary order for disclosure of assets: typically accompanies an application for mareva injunction: an order for the defendant to list his assets and their locations.
* Marevas are not limited to any category of property and captures tangibles, intangibles, persona, or real. Also not limited to unliquidated claims against the defendant.

Requirements to Get a Mareva Injunction

* the court must have jurisdiction over the defendant in the action
* the plaintiff must have a good, arguable case
* the court must be persuaded that there’s a real risk of a dry judgment – that somehow the defendant in the action is going to deal with assets such that by the time the court pronounces judgment, JC will never be able to enforce that judgment
* must be just and convenient.
* Application is ex parte by the plaintiff with full and frank disclosure, occasionally with plaintiff having to guarantee security in the event of damages in implementation of the freezing order
* Aetna Financial: defendant is a federally incorporated company. It was closing down Manitob operations and only had a bit of money left. Plaintiff gets a mareva from Manitoba court.
* SCC has jurisdiction to issue pre-judgment marevas in all common law provinces.
* Federally incorporated companies can do business anywhere in Canada so there’s nothing underhanded about Aetna moving its assets out of Manitoba and into Ontario, especially since a Manitoba judgment would easily be converted there.
* Aetna is thus not attempting to dispose of or remove assets to render the Manitoba judgment dry. Without this intent, and given the federal nature of Aetna’s business, it was not just or convenient to issue the injunction.

**Class 14**

Mooney – Mareva Principles in BC

* Mid-Trial (so still a pre-judgment remedy), Orr applies ex parte for a mareva injunction against Mooney, requesting he be restrained from dealing with or disposing his assets, wherever situate, whether he holds them directly or indirectly. Also asks for ancillary order for disclosure with both locations and amounts and the appointment of an equitable receiver.
* First step: you can’t get a Mareva if your action is frivolous, vexatious, or tenuous. Some cases say a strong, prima facie case is necessary, but judge says a good, arguable case is sufficient.
* Historically, marevas were only awarded where there was a risk of removal of assets from the jurisdiction, and then if there was a risk of disposal within the jurisdiction. There was no evidence of that here, he had stable assets in BC.
* Despite his not actually having done anything with the assets, the judge decided that enough risk could be shown based on his character and general behaviour (he was already being charged in a fraudulent conveyance action and there were two other big, English judgments against him that he hadn’t bothered to satisfy).
* Ancillary order: judge orders he list the assets and their locations but need only give values if he knows them – he’s not going to be ordered to get them valued.

Mooney No. 2 – Arguments to Set Aside the Mareva Injunction

* Mooney’s objection brings it to an adversarial hearing before a different judge from the ex parte
* Argues that applicant failed to make full and frank disclosure: the applicant must make full and fair disclosure of all material facts known to him as well as make proper inquiries for any additional relevant facts before making the application, including facts relevant to the defendant’s position. Failure to do so will lead to the mareva being set aside. Fails on facts.
* Argues wrong standard of proof: must be the strong, prima facie case. Judge disagrees; application is an exercise of discretion without a fixed formula. Discretion, motivated by the interests in justice and fairness of the order, can allow for judge to go with good, arguable case.
* Judge decides mooney’s character and recent conduct was enough to show sufficient risk of disposal/removal of assets even if he hadn’t touched them yet.
* While discretionary, the ultimate question is whether it’s just and convenient that this injunction be issued. Flexible formula that can rely on defendant’s character to establish risk.

Hickman – Post-Judgment Mareva Injunctions, Typical Limits on Mareva Injunctions

* Giant Texas judgment against Hickman. JC takes the Texas judgment to Idaho and registers it there, and since Idaho is a reciprocating state with BC, can then register it her (can no longer chain judgments like this). Now he wants a mareva based on this judgment.
* This would technically be a post-judgment mareva: court just relies on Orwell Steel, English case in which post-judgment marevas were okay. Thus, post-judgment marevas are accepted in BC.
* Court decides not to freeze everything: Marevas are typically limited in value or to particular assets – not all the defendant’s assets are froze, at the very least he needs to have sufficient assets to feed/house himself, continue living and/or continue carrying on business.
* The term is going to be limited: if it’s pre-judgment, it can run up until judgment or lesser term and in post-judgment, a limited term will be stipulated. At some point, the plaintiff/creditor is expected to start using COEA execution processes to get satisfaction. Defendant and Plaintiff will argue as to what term should be and what the exemptions are, all of which is discretionary.

Tracey – Marevas and Class Actions

* application over all Insta-Loans’ property around the world – enormous value of assets claimed leads to reconsideration.
* Confirms Mooney. Neither the strong, prima facie case nor good, arguable case standards must be tightly adhered to. Good, arguable case is generally enough. Flexibility is still a focus.
* The value of the assets that would be subject to the mareva is important. This must be examined relative to the value of the claim. For reasons of justice and convenience, this may lead to court reducing the value of the assets subject to the mareval.
* Reiterates that you can’t have open-ended marevas. This leads to an order that the applicants/plaintiff give an undertaking to expedite the trial and not drag it out.
* It is usually required that the applicant give an undertaking to compensate the defendant or any third parties in possession of the assets in damages for any losses they suffer. In class actions, this doesn’t happen: can’t get the representative plaintiff to personally indemnify for losses.

Enforcement of Mareva Injunctions

* Remedies for where defendant disobeys the injunction and moves or disposes of assets subject to it or does not produce list of assets required by the ancillary order, the only remedy for the creditor is contempt. This can mean a fine, imprisonment, or, if pre-judgment, pleadings being struck, resulting in the defendant being found liable in the cause of action.
* Third party liability: if the third party in possession of the assets (eg.: bank) disobeys the injunction, it will also be liable in contempt, provided it had been informed of the injunction. As a result, as soon as the ex parte application succeeds, creditor should notify the defendant AND any third parties in possession or control of defendant’s assets such that they too will be liable if they dispose of or transfer defendant’s assets upon his instructions.

Enforcement of Worldwide Marevas

* can’t hold third parties in a foreign jurisdiction in contempt unless and until you have got the foreign court in that jurisdiction to recognize the mareva.
* JSCBTA Bank: Ablyozov stole a bunch of money from Kazakhstani bank, then flees to England. Bank commences action in England and applies for worldwide mareva on all his assets, wherever they might be, largely because he’d hidden the misappropriated funds in 1200 holding companies all around the world. Gets the freezing order plus disclosure order.
* Ablyosov doesn’t comply with the disclosure order satisfactorially and is thus foundin contempt. Term of contempt can’t be unlimited – 2 year max, so he only gets 22 months imprisonment plus his pleadings are struck. As this was England, no criminal/civil contempt distinction.
* In Canada, civil contempt is limited to 30 days in jail and is decided on balance of probabilities. Criminal contempt requires proof beyond a reasonable doubt that you thumbed your nose at the order.
* Contempt does not award the plaintiff/creditor any proprietary interest in the asssets/property.

**Class 15**

Distinction Between Pre-Judgment Garnishing Orders and Pre-Judgment Mareva Injunctions.

* Silver Standard: Silver, BC company, sues Geolog, Russian company. Geolog is owed loans by Cominco and Geolog wants that money. Silver gets a Mareva injunction directed at Cominco making any payments to Geolog, freezing it. Also gets a garnishing order directed at Cominco.
* There is an arbitration clause in their contract and under the International Commercial Arbitration Act, courts are required to stay actions when faced with such an agreement. That said, s.9 allows for interim measures of protection such that even if the action must be stayed, it can issue marevas and garnishing orders even if the matter is going to arbitration.
* Court confirms the flexible Mooney approach and rejects any strict requirement of fraudulent intent and zero impact on third parties. The ultimate rule is a balancing of justice and convenience: here, there’d be serious, adverse effects to a third party if the mareva was not listed, as the payment Cominco owed to Geolog was money Geolog owed Dukat. In weighing justice and convenience, marevas are concerned not just about rights between plaintiff and defendant but VERY concerned with rights and negative effects on third parties.
* While this gets the mareva tossed, the garnishing order stays. This is because under COEA s.5, judge does not have discretion, it’s a statutory remedy with no requirement for the plaintiff to establish fraudulent intent on part of defendant. Also, it mandates far less concern about effects on third parties.
* Pre-judgment garnishing orders are statutory, in rem, and are limited to debts and liquidated claims. The money is paid into court and there is no concern over defendant’s state of mind. Both it and the mareva start with an ex parte application and require a local action.
* Marevas are equitable, not statutory, and are in personam (available for property all over the world, not just in BC) and are available for any claim brought by the plaintiff, not just debts. It requires plaintiff to establish something about the defendant’s state of mind, either through showing something done or threatened to be done to make a dry judgment or something in the defendant’s past or character. Comes with order for disclosure and results in frozen assets.

Equitable Receivers

* While the L&E Act and Civil Rules mention it, it is an equitable remedy where a receiver is appointed pre-judgment or post-judgment (the latter is more common – a form of execution)
* anyone is eligible to be appointed as an equitable receiver, need not be a trustee or sheriff and can even be the JC himself. Who’s appointed will depend upon the complexity of the business over which they’re appointed.
* The court specifies and tailors the power and authority of the equitable receiver in each case – there is no exhaustive, finite list of powers for all equitable receivers.

Requirements to Get the Appointment of an Equitable Receiver

* First: the property must be exigible at common law. There are three different questions the court may ask to establish this: is this CLASS of assets exigible at common law? Is THIS asset in particular exigible at common law? Or is this asset right now, immediately exigible at CL.
* Second: Is there an impediment to execution at common law? This can be either a legal or practical impediment? If there is none, are there any special circumstances?
* Third: is it just and convenient in the circumstances to appoint an equitable receiver? Defendant or applicant can argue anything here including cost/benefit analysis and exhaustion of other remedies.
* The wider the class of assets, the more assets that would be subject to the receivership, the less scope there is for an appointment. Trend has been to expand the classes of assets exigible in common law, promoting common law remedies and leaving less room for equitable receivers. And yet even in Alberta, where ALL property has been made exigible, the remedy continues.
* An equitable receiver has never been made available for all assets generally of the JD/defendant. Can’t be done if following the three steps. The first step alone requires consideration of particular assets or class of assets - normally court will only appoint a receiver for specified assets.

Exigible Assets for Purposes of Equitable Receivership

* Vancouver A&W Drive-Ins: Since judge decided that the COEA did not extend to shares in non-BC companies, this RRSP could not be affected by a writ of seizure in sale. As a result, he appoints an equitable receiver over the shares.
* Judge asked the widest possible question: is this class of assets (shares) exigible? He’d already decided that “these shares” in particular wouldn’t be, so widens the question to get a “yes.”
* Re Peterson Livestock: asset in issue was an alleged debt to be paid from the government to the defendant, a per-capita payment to the Indians on the reserve based on sale of minerals on Indian Land. JC has no other process it could use against debtor’s assets due to his living on the Reserve and hence being immune to execution under the Indian Act.
* Court denies the appointment through its use of the narrow question: the property is not NOW exigible or garnishible at common law: it’s not yet a debt that’s due or accruing due, it hasn’t been earned yet and there’s no claim to be made. It wouldn’t be garnishable yet. This means that if the asset is a debt, and it’s not currently garnishable, it’d fail the narrow approach to the first requirement everytime, which kind of defeats the point of equitable receivers (which are meant to be available where other execution methods aren’t.)

Requirement of Impediment to Legal Execution

* 19th century, the typical impediment to execution at common law was if the JD’s interest in the property was equitable/beneficial and not legal – CL writs only applied to legal interests. So the court would appoint an equitable receiver to collect JD’s beneficial interests in assets. This is extremely uncommon today where if an asset is exigible, whether the interest in it is legal o r beneficial is irrelevant.
* Practical impediments are more common: eg: JD is owed a multitude of small debts and issuing tons and tons of garnishing orders is a practical difficulty.

“Special Circumstances”

* Can be raised as an alternative to the requirement of a legal or practical impediment.
* NEC Corporation: court appoints a receiver over all the defendant’s property and assets based on “special circumstances.” Fraud by the JD were the special circumstances. Fraud isn’t required to show such circumstances, but it’s a reliable one. Typically, demonstrating some difficulty in using common law execution is sufficient.
* The all-encompassing scope was due to the judge using the model receivership order in the BCSC practice directions. Can argue this case, but it’s likely that this model order was intended for receivers under the Bankruptcy & Insolvency Act, not equitable receivers.
* Relies on an English case to show that fraud amounts to special circumstances. Fraud could mean the JD doing its best to hide or remove assets to defeat judgment.

Worldwide Equitable Receivers and Special Circumstances

* Interclaim Holdings: Down applies for an equitable receiver for all Interclaim’s assets and property, a worldwide receiver, since they only have $400,000 in BC and he’s owed $1.8 million. This fails the second step: equitable receivers can’t be appointed where legal execution is possible, barring special circumstances.
* Here, even if the assets were located outside the jurisdiction, they were in common law jurisdiction with recognition and enforcement rules that would recognize other common law judgments, at which point Down could’ve used their common law enforcement processes against those exigible assets.
* Special circumstances: Down argues that he wasn’t allowed to claim in Interclaim’s bankruptcy proceedings in Ireland, there were no other assets in BC, Interclaim’s representatives didn’t appear for examination in aid of execution. Nonetheless, these special circumstances were found insufficient and with no legal impediment either, no equitable receiver appointed.
* The case, however, does not reject the idea of a worldwide equitable receiver.

Equitable Receivers for Assets Immunized by Legislation

* Klyne: JC has a $90K judgment against JD for sexual assault and wants an equitable receiver to collect his future pension benefits. JD has since left the country. Question is whether pension benefits are exigible or statutorially immune from any form of execution.
* It’s an exercise of statutory interpretation. Language of immunity provisions has grown broader as courts have found loop-holes. This clause just says no “execution” and this can be read up to include a prohibition of execution via appointment of equitable receivers. If this asset is completely immune to any form of execution, there can be no appointment of a receiver.
* What the court doesn’t consider is whether these immunity provisions could be seen as an impediment – it’s a debt, which is exigible at common law, and there’s a statutory provision that acts as an impediment. Some cases have recognized this situation as grounds for a receiver. This would usually be done where the defendant pensioner had engaged in something particularly egregious such that the court doesn’t think he deserved his pension. It gives the court flexibility for where the JC deserves satisfaction and JD doesn’t deserve protection.

**Class 16**

Equitable Receivers for Joint Interests

* most common impediment to execution at common law use to be the nature of the debtor’s interest insofar as if it was an equitable interest, it couldn’t be executed against. Now, this is no longer a concern.
* The nature of the legal interest is still an impediment in one sense: joint interests in debts (like joint bank accounts) which are not exigible/garnishable. That could mean a receiver.
* Receiver couldn’t get the whole joint account and would have to figure out what proportion of the funds belonged to the JD.
* Outside of joint acconts, nowadays, most applications for receivers skip the legal impediment branch and head straight to the special circumstances branch.

Masri – Equitable Receivers for Future Profits?

* English case not yet confirmed or rejected in Canada.
* Masri gets a giant judgment based off of profits from a Yemen oilfield that his partners owed him a cut of. The defendants were able to pay the judgment debt but refused.
* With their having no assets in England, Masri applies for and gets an equitable receiver for the purpose of collecting future revenues from the oilfield. Note that these are future debts – at the time of applying for the receiver, these payments/yields from the oilfield were not yet due or accruing due and hence not garnishable.
* Court notes that this is an in personam action with no proprietary interest vesting in the receiver. The defendant is within the jurisdiction of the court and, as such, this is equivalent to an injunction prohibiting the defendant from receiving assets. The defendant is simply enjoined from receiving these yields from the oilfield with the receiver stepping into their shoes instead.
* Problem that goes unaddressed: the receiver has no authority in any other jurisdiction unless he is recognized by the judicial system in that country. Judge just figures that since foreign courts so readily recognize worldwide marevas and foreign trustees in bankruptcy, this should be no different.
* What about the first test for getting an equitable receiver? Future profits are NOT exigible at common law (Peterson Livestock) due to being subject to conditions. Judge says in the name of progress, equitable receivers can be appointed to collect future profits from this asset.

Justice and Convenience – The Possible New Rule on Appointment of Equitable Receivers

* Fonu: confirmed Masri. Essentially, Masri moved requirement #3 (justice and convenience) as the #1 concern, with the demands of justice being the overriding consideration. This allows the court to grant injunctions and appoint receivers in ways that would not have happened in 1873, regardless of whether the asset is presently amenable to execution at law.
* As such, Masri is a release from the three hard conditions for appointment of an equitable receiver in favour of a focus on the demands of justice and convenience.
* If Masri is applied, this means you could get a receiver appointed to receive any forms of property in BC. Being able to do this for future debts is the big bonus: get an equitable receiver appointed to collect debts as they become payable, since the judge is no longer bound by current rules of exigibility, and thus avoid having to repeatedly garnish each debt separately as it becomes due. Best of all, there’s no law stipulating who can be a receiver – can even be the JC.
* JC’s best path to getting a receiver: argue Masri then, failing that, go for the broadest version of rule #1: is this class of assets exigible at law.

Equitable Charging Orders

* first question: identify the property and where it’s located. Equitable charging orders only apply for property in custodia legis, which means most commonly in court, though also possibly with the court bailiff, an officer of the court, or a trustee in bankruptcy.
* Without an equitable charging order, a creditor can’t take property from the court without being in contempt. Must first get the court to charge the asset in yoru favour.
* Second requirement: if the money/assets are in custodya legis, it must be shown that the JD is presently entitled to it. This might mean waiting for an action to be determined in his favour.
* Third question: is the JC the only claimant and the only creditor of the owner of the fund?

Equitable Charging Order – When Does Pay-Out Occur?

* Cheema: money is in court due to a pre-judgment garnishing order. There’s then a trial resulting in a judgment that is satisfied by the money in court. The leftover surplus now belongs to Hayda but is still in-court. Cheema is Hayda’s JC and is thus entitled to this fund and wants it to satisfy his judgment against Hayda and applies for equitable charging order.
* The money is in court and it belongs to the JD so JC can get the order.
* In this case, pay-out to the JC/applicant for the order is immediate due to the JD having absolutely no other creditors. Cheema was the only person in position to claim the fund.
* Rennison: Sieg sues a third party and gets a settlement that results in $17,500 being paid into court. Sieg’s JC, Rennison, is owed $13,000. Test is met: the money is paid into court and the JC, Sieg, is entitled to it having won his lawsuit. Rennison asks for an equitable charging order so that he can satisfy his judgment and is looking for immediate payout.
* JD objects to immediate payout: he’s got other creditors and doesn’t want to give all the money to one JC.
* If the JD can show the existence of other creditors or JCs, the JC applying for the equitable charging order cannot get immediate payment out. Where this is shown, the court will hold onto the money for another 6 months during which other creditors can come forward to claim a share. At the end of 6 months, the court will determine allocation.
* The JD is not frozen in these six months from moving other assets around, nor is the JC forbidden from using other execution methods in that period.

S.26 of the Creditor’s Assistance Act: Alternative to the Equitable Charging order.

* s.26 is an option worth considering for the JC where you know the JD has multiple creditors.
* Under this section, JC gets his judgment, gets a writ of seizure and sale, delivers it to the sheriff, and tells the sheriff about the fund in court that the JD is, or is going to be, entitled to.
* Problem with s.26 is that the JC will be forced to share the fund with any other creditors who delivered writs to the sheriff or put in claims in with respect to that asset.
* The benefit, however, is that the sheriff will only hold onto the collected assets for one month before allocating it to the creditors who delivered writs to him. So creditors effectively only have one month to come forward rather than six.

Miller – Clean Hands Doctrine?

* West Van police recover $250,000 cash out of Miller’s car during an illegal search. The police pay it into court and Miller wants it back, the CRA (one of his JCs) also applies for an equitable charging order on it. Along with the CRA, Miller also had multiple other JCs: Shaw, Rogers, his brother. Eventually, they all disappear leaving only Miller and the CRA.
* Miller argues that the CRA can’t get an equitable charging order on account of the clean hands doctrione: the Crown came in the possession of this asset, the bag of money, by means of an illegal search. This is rejected on account of the BCSC being unwilling to lump all Crown agents and entities in together as one entity. The municipal police are far from the federal govn’t CRA.
* What is notable is that the court never says that the clean-hands doctrine is inapplicable to equitable charging orders. It likely applies to any form of equitable relief.

**Clean 17**

Federal Court Judgments

* BC Deputy Sheriff: CRA gets a judgment by certificate, gets writs of seizure and sale out of the Federal court, and delivers them to sheriff in BC. Sheriff seizes JD’s stuff and sells it off.
* RBC gets a judgment against the JD and delivers its own writ of seizure and sale to the same sheriff, but by this point, he’d already seized and sold it all on behalf of the CRA. Now everyone wants the proceeds of this sale which the sheriff pays into court.
* Court finds that a CRA certificate, when filed, is effective as a judgment.
* BC statutes do not apply to the Federal Court system. FC judgments are governed by federal common law and under common law, priorities are based on first in time, first in right. If you deliver the writ and the sheriff executes it, the first JC to deliver the writ gets paid first. Since there was nothing left to be seized/sold by the time RBC’s writ came in, the CRA takes the whole amount and does not have to share.
* The Creditor’s Assistance Act is not applicable to the Crown in Right of Canada (aka the Crown using the Federal Court system to enforce its federal court judgment). If the Crown is using the federal court system, it’s not bound by the CAA and so won’t have to share with other creditors. If the Crown used the provincial system, they would be stuck with the CAA.
* Other judge, Taylor, takes the chance to cast doubt on walking possession agreements since at common law, sheriffs are obliged to execute the writ immediately, meaning sale ASAP, not holding. Walking possession agreements don’t follow that and they aren’t explicitly authorized by statute, so their status is put in some question.

Exception to Crown Priority – Getting the CAA to Apply to the Crown

* Hong Kong Bank of Canada: JD and his wife jointly own land subject to two creditors: the Crown and the bank. Owners reach an agreement to sell and the bank attempts to turn this into a sale pursuant to the COEA – they’re the last registered charge so want to ensure they get a share.
* After taxes and mortgages are sold off, the proceeds are divided into between Mrs. Whitson and the JD, with the latter being paid into court, as required by the COEA. This is deemed money levied pursuant to the CAA. Crown is arguing that where it and someone else are creditors of equal degree, it gets priority while bank argues the money is deemed levied under the CAA which means it must be shared. Bank wins.
* Unlike the prior case, the CAA applies to the Crown because even if it didn’t follow the proper procedures, this WAS a valid sale under the COEA. A failure to comply with COEA procedures does not make a sale a nullity. This distribution is thus pro-rata pursuant to the CAA.
* Falls under the “benefit/burden exception” to Crown priority: if the Crown claims the benefit of a statute, it will be subject to its burdens. While it had not taken any benefit from the CAA, it had taken advantage of the COEA’s facilitative provisions both in its definition of “federal judgment” and in registering its judgment against land, so it is subject to the COEA’s burdens, and since the COEA deems proceeds from a sale of land to be levied under the CAA, CAA applies
* Basically, if Crown or any federal plaintiff registers its judgment against land in BC, CAA applies.
* Crown could avoid the COEA by using federal court writs, including the old writ against land, instead of registration against title.

Fraudulent Conveyance Act

* S.1: As a former criminal statute, there are three components: actus reus (a disposition of property), mens rea (an intent to delay, hinder, or defraud), and a protected class (creditors and “others”).
* S.2: gives an exception to protected dispositions, which are disposition so property to bona fide purchasers for value provided that the purchaser has, at the time of the transfer, no notice or knowledge of collusion or fraud.
* Often coincides with marevas: use that to prevent disposition before it happens but if it does, and you didn’t get a mareva (so can’t get contempt), attack it under the FCA.

The Actus Reus Element – The Disposition

* Property protected under the FCA is all property currently exigible in the province.
* Interpretation Act: “disposition” means to transfer by any method, anything you could do with property including assignment.
* Any disposition of property by the JD or debtor is valid unless and until it’s actually attacked under the FCA. Until then, it’s a perfectly valid disposition.

The Mens Rea Element – Intent to Delay, Hinder, or Defraud

* Must establish the state of mind/intent of the transferor, the debtor/JD, as being to delay, hinder, or defraud.
* Double intent (also establishing the intent of the transferee) is required if the debtor argues the transfer was a s.2 bona fide disposition. If double intent is shown, it’ll still be set aside.
* Intent must be established as at the time of the disposition.
* Burden of proof in showing both elements is on the plaintiff invoking the FCA unless it’s a disposition to a near-relative. It’s the civil burden.
* State of mind can be proven by admission, whether the effect of the disposition was to delay/hinder/defraud, or through the badges of fraud (circumstances that commonly occur in fraudulent conveyances that may show transferor’s intention at time of the transfer).
* No form of moral turpitude must be shown.

Protected Classes: Creditors “and others”

* Anyone who is a creditor at the time of the disposition is protected by the FCA.
* “Others” has been held to include creditors who subsequently come into existence after the disposition of property. Not being a creditor of the transferor at the time of disposition does not necessarily prevent you from having FCA standing. There is no statutory limitation on “others” nor any time limit within which creditors must show up post-disposition.

Bona Fide Purchasers for Value s.2 Exception

* “For value” doesn’t have to mean market value, just good consideration
* if the disposition is to a family member/near-relative, “good consideration” can be further discounted to account for natural love and affection.

Result of a successful application under the FCA

* Court makes an order that the disposition be satisfied to the extent needed to satisfy the claimant. This can mean using tracing to get the proceeds or issuing a pecuniary judgment against the transferee.
* Will not result in the plaintiff getting the property. It will be returned to JD’s ownership such that the JC can use appropriate enforcement procedures against it.
* At CL, exception to this regaining ownership is that if the sheriff correctly believes that the property had been fraudulently conveyed, he can seize it. Unlikely just to do this purely on JD’s word, however, which means this is rarely done.

Is Effect Enough to Prove Intent? Having Standing as an “Other”

* BHL decision initially said that even without an intention to defraud on the part of transferor or transferee, if the effect of the transaction was to delay/hinder/defraud the creditors, that works
* Maudsley: Maudsley contests Meshin’s will and brings an FCA action against the trust it established – it didn’t give him anything.
* Assuming he had standing as a creditor/other, he has to prove intent. Badges of fraud and effect of the disposition only raise a rebuttable presumption.
* Goes against the BHL case: intent must be established. There is no rule of law that if the effect is to delay, hinder, or defraud then there is intent. Maudsley could not show an intent by the transferor, Meshin, to do him out of property.
* Historically, “others” refers to persons who do have debts owing to them by the transferor but who have just claims not yet brought to fruition in terms of legal process. This means that at the time of disposition, there has to be SOME relationship, even if not a debtor/creditor one, and some just claim. This limits the usual interpretation of its just being all future creditors.
* Alternatively, if future creditors are included, they could only attack dispositions that left the debtor with nothing with which to pay – no hinderance/delay unless you left nothing to pay.
* BCCA thus refuses to allow someone who had absolutely no claim at time of disposition to bring an action under the FCA. This is, however, inconsistent with other cases allowing creditors to come forward who had no cause at all at time of disposition, but it’s hoped Maudsley may limit.

**Class 18**

“Others”: Creditors Who Lost Secured Status

* CIBC and Boukalis: a creditor who at time of the disposition was fully secured creditor can bring an FCA claim even if it subsequently became an unsecured creditor. This must be the case since we even consider allowing claimants who were not even creditors at all at time of disposition.
* In this case, Boukalis had put his equity in his brother’s hands by granting him a second mortgage for no consideration. This was clearly a fraudulent conveyance: it had the necessary intent, it was to a near relative, and for no consideration. CIBC, despite becoming unsecured, was allowed to attack it under the FCA.
* This follows Maudsley: clearly, CIBC had a relationship with Boukalis at time of the disposition – they were a secured creditor owed money at that time.

Rebutting the s.2 Bona Fide Exception – Double Intent

* Solomon: Mr. S owes Mrs. S payments but has no wages (disabled) and transfers his house to K for good consideration while remaining there as a boarder. Since transfer was for good consideration, on its face, K was a bona fide purchaser for value protected by s.2 of the FCA.
* Mr. S admits that his intention was to make himself judgment proof in making the disposition. But since this was bona fide on its face, for the transaction to be set aside, there had to be intent on the part of the transferee as well. If it’s a disposition for good consideration to a bona fide purchaser who knew nothing about the circumstances, it’ll be protected.
* Mrs. S argued K was more than an arms-length landlady and had become a “near-relative” of Mr. S, which would put the burden of proof on K to show she lacked the intention. Trial judge says that while he may suspect this, there’s no evidence that she’s more than arms length. This leaves the burden of proof on Mrs. S to show K’s state of mind, which she can’t. As far as court is concerned then, K paid Mr. S in firm belief that he was paying his creditor (Mrs. S).
* Court doesn’t precisely explain what the state of mind of the transferee must be. Must establish that the transferee had some idea of the transferor’s fraudulent intent and/or some suspicion that the transferor wasn’t going to use the good consideration to pay its creditors. There may also have to be some form of collusion.

Badges of Fraud (Solomon)

* without an admission, as with K, you’re left to deduce the person’s state of mind through circumstantial evidence – “the badges of fraud” – circumstances you can infer from.
* the gift was general without exception of its apparel or anything of necessity - refers to “here’s all my property, here’s all my assets”
* the donor continued in possession and used the goods as his or her own including selling them,
* the transaction was secret or cash is taken in payment instead of a cheque (secrecy, no record)
* the transfer was made pending the writ (someone commences an action against me and I immediately start transferring assets) or the transfer amounted to a trust of the goods
* the deed contains a self-serving and unusual provision that “the gift was made honestly, truly, and bona fide” or itgives the grantor a general power to revoke the conveyance
* the deed contains false statements as to the consideration (nominal sale price is higher than the actual sale price) or the consideration is grossly inadequate (must be FMV or FMV reduced by natural love and affection)
* unusual haste to make the transaction
* some benefit is retained in the settlement by the settlor
* a close relationship exists between the parties to the conveyance.

Fraudulent Conveyances to Companies – Double Intention

* Chan: Stanwoods are advised by their lawyer that they can protect their assets by transferring them to private corporations in exchange for majority of the shares (which’ll have transfer restrictions). The Chans bring an FCA action to set aside this transfer.
* This falls into the s.2 exception since it’s a transfer for good consideration (they got shares in return for their assets). Chans are able to rebut this by showing double intention.
* this is because the JDs are also the corporation – court can pierce the corporate veil to see that its solely controlled by the JD meaning whatever the JD/transferor’s intent is is also the intent of the transferee companies. Since their intent was to judgment-proof, transfer is set aside.
* While the transfer of assets to companies in itself was a perfectly legitimate business transaction, it is caught by the FCA if there was the intent to delay/hinder/defraud.
* Successful attacks on corporate transactions like this will largely depend on the circumstances of the organization and the state of the debtor’s property before and after the incorporation.

Precautions a Debtor Can Take to Avoid an FCA Action

* document the debtor’s past history to show this is not an unusual transaction.
* Retain a reasonable reserve of assets to satisfy anticipated claims you may, for instance, incur over the course of business: evidence of your not intending to make yourself judgment-proof.
* notify or get the consent of existing creditors, making it clear you’re not trying to defraud them.

Fraudulent Preference Act

* s.7 to s.11 are procedural provisions that can be used in conjunction with the FCA. They allow for tracing under s.7 and if there’s an application in court to set aside a transaction involving real property, s.9 allows for JC simply to call for a show-cause hearing instead of commencing a new action demanding the JD to show cause why it should not be set aside.
* FPA actions are only allowed to be made by creditors in existence at the time of disposition and also only if the defendant was in insolvent circumstances at time of disposition.
* s.6 also makes FPA actions unavailable if the debtor paid in cash.
* s.5(2): another exception – the doctrine of pressure. If JD makes payment to one creditor aned another creditor complains of preference and can show double intent, debtor can argue that he didn’t mean to prefer and only did so because the creditor they paid pressured them and they couldn’t resist. Practically speaking, all these obstacles make an FPA action/the first six sections useless. However, under s.5, if you can attack the disposition within 60 days of it, you only have to prove the intent of the debtor.

Exemptions – Definitions and What it Applies To

* Bankruptcy and Insolvency Act defers to, or incorporates, provincial exemptions law – property that is exempt will depend upon where you go bankrupt – if BC, it’s COEA’s exemptions.
* “Debtor”: includes debtor’s personal representative if he’s dead or, in the absence of the debtor, any member of his household (ie, not just family, but any person present in the home at the time the sheriff shows up to affect seizure).
* “Value”: the net amount the goods and chattels can reasonably be foreseen as going for in a sheriff’s sale, NOT it’s replacement value or original value.
* s.71: these exemptions are limited to natural persons, corporate debtors don’t get them.

Personal Exemptions (s.71)

* necessary clothing of debtor and his dependents
* household furnishings and appliances that are of a value not exceeding $4000)
* one motor vehicle that is of a value not exceeding $5000 or $2000 for family debtors
* tools and other personal property of the debtor not exceeding $10K that are used by debtor to earn income from his occupation
* medical and dental aids that are required by debtor and his dependents

Exemptions for Real Property

* s.71.1: principle residence of the debtor is exempt from seizure and sale or any process in law or in equity (by sheriff or equitable receiver) as long as the value of his equity in the property doesn’t exceed $12K for Vancouver or Victoria (capital areas) or $9000 anywhere else.
* s.71.2: if the value of the property is greater than this amount, it’s exigible and can be seized and sold or sold by execution sale but the JD gets that $9000 or $12K back, not exigible.

Other Exemptions

* s.71.3: RRSPS are exempt, with the exception of any payments made by the debtor into the plan without 12 months of the debt coming due, property being paid out of a registered plan, or if the enforcement process was initiated before Nov. 2008.
* s.72: works of art or other objects of cultural or historical significance brought into BC for temporary public exhibit are exempt from seizure and sale.

**Class 19**

Application of COEA Personal Exemptions

* Art exemption is fairly absolute and the RRSP exemption is virtually absolute. But for the other exemptions, it is unwise to expect the sheriff to execute around them.
* s.73(1) suggests that an exemption’s being claimed requires a sheriff implementing an execution process, in which case the sheriff “must” allow the debtor to pick out assets among what was seized based on exemptions.
* While the exemptions are generally intended to capture every execution process but realistically, we’re considering the sheriff seizing property.
* Sheriff has no statutory obligation to inform the JD of his right to claim an exemption, though it used to be common practice and is now a contractual obligation on the sheriff’s part to do so.

Process for Claiming Exemptions and Resolving Disputes over Exemptions

* Lee: the JD or JD’s family must claim the exemption within 2 days of the seizure. In this case, the JC tried to claim the vehicle exemption 7 days after his car was seized, arguing that he was entitled to a “reasonable time” within which to claim the exemption. BCCA rejected this: the statute says 2 days and this is strictly interpreted as 2 days and no more.
* Sheriff will typically try to seize around things that’d be exempt (eg household stuff) but if there’s an exemption claim within the time period and a disagreement as to the value of the asset (particularly where exemption has a pecuniary cap), the COEA h as a complex procedure for deciding the issue through a valuation process involving appointment of appraisers.
* Before ordering the appraisal process, the COEA gives the parties 1 more day to consider the issue. This usually results in the parties agreeing on a value to avoid that complex process.

Scope of the exemptions: “Voluntary sales”

* Nguyen: RBC has mortgages against Nguyens’ home, Nguyens place another mortgage for RBC on their home as guarantors or their company’s debt. Company folds. RBC commences foreclosure proceedings and also register a judgment on title. Nguyens decide to sell the property “voluntarily” to get a better price than foreclosure sale, RBC agrees. After selling, they keep $24K of the proceeds pursuant to the s.71.1 exemption of $12K for the principal residence of each debtor (Mr and Mrs Nguyen).
* RBC argues they don’t get th is exemption as it was a voluntary sale by them or, failing that, a foreclosure sale. Either way, s.71.1 assumes a COEA execution sale and also excludes parties selling pursuant to a mortgage.
* Judge extends a large, liberal interpretation to s.71.1 that considers the policy and legislative intent behind the exemption. Finds the judgment debt is not in relation to a mortgage but more about guarantees, as evidenced by the judgment on title that could have made it a COEA sale.
* Rules that this was not a voluntary sale: it depended on the circumstances and here, on the facts, it was really a forced sale within the meaning of s.71.1
* With exemption applicable the order of payment: RBC gets all amounts secured by its mortgages, then the 24K to the debtors, then RBC gets the remainder to satisfy guarantees.

Application of Exemptions to Assets Over Pecuniary Caps

* Atwal: provincial exemptions also apply in bankruptcy context due to the BIA having no exemptions of its own.
* Atwal is ankrupt and owns a $5800 SUV. s.71.1(c) gives exemption for one motor vehicle ont exceeding $5000. Despite being over the limit, he sells the car and claims $5000. BCCA holds that this is correct: you’re entitled to the exemption for $5000 even if the actual car is over.

Other Miscellaneous Exemptions

* COEA is typically meant to apply to all processes in law or in equity, which means they can be claimed also against equitable receivers or any other process.
* Crown is completely immune to any execution process.
* Recall that wages are completely exempted from pre-judgment garnishment while only a percentage of wages can be subject to post-judgment garnishment with additional judicial discretion that can be invoked.
* Various statutes also immunize government paid benefits, protecting said payments from recipient’s attempts to assign them or from creditors trying to execute against them.
* The cheque/deposit of the benefit payment is immune but how long this immunity lasts depends on what the recipient does with the payment – uncertain whether it’s still immune if he mixes it with other funds or spends it on something.
* Insurance Act: only life insurance is immune from execution. S.65(1) says that if a beneficiary other than the insured himself is designated, the insurance money, upon the insured’s death, is not part of the estate of the insured and thus not subject to the claims of his creditors. These insurance payments are preserved for the beneficiaries’ benefit.
* s.65(2): fully paid-up policies also have a cash surrender value that the creditor may want to seize, but this can’t be done if the beneficiaries include spouse, child, grandchild, or parent.
* Worker’s Comp Act and Canada Pension also have exemptions.

Indian Act Exemptions

* s.87: real or personal property of an Indian or band situate on a reserve is exempt from execution at the instance of any person other than an Indian or Band.
* Difficulty becomes locating the real or personal property of an Indian or band. For instance, is a reserve resident’s truck exigible if it’s seized while he drives to work off-reserve? (Probably not)
* Difficulty is resolved either by resorting to arbitrary rules or, if there aren’t any, a weighing and listing of factors and connectors similar to conflicts’ real and substantial connection.
* Bastian Estate: Bastian invested income in a casse populaire with a branch on the reserve and got interest paid into his account in the reserve branch. CRA argued it was still taxable due to the casse generating its revenues in the economic mainstream which is not located on reserve.
* SCC gives two step test for locating intangible personal property: first identify the potentially relevant factors tending to connect the population to a location (ie: factors that connect it on or off the reserve). Second, determine the weight these factors should be given in light of the purpose of the exemption, the type of the property, and the nature of the taxation of that property (last isn’t relevant in execution context).

Creditors with Special Rights

* certain classes of creditors get special treatment in collection of debts they’re owed. These include artisans, family creditors, and employees.
* Artisan’s liens: examples include Repairer’s Lien Act, Woodworker’s Lien Act, Builder’s Lien Act. Artisans must follow their legislation’s regulations of lose its protection.

Family Creditors (ie: people owed support orders)

* Family Maintenance Enforcement Act gives assistance while the family creditor can also take the support order and file it with the director of Family Maintenance Enforcement and let him collect. This is voluntary and family creditor can also take it back.
* Family creditors have all the ordinary execution procedures plus improved processes in the FMEA while also being given priorities under the FMEA.
* Access to information: FMEA authorizes family creditors or the director to access records and databanks, including federal databanks like CRA, to locate your family debtor.
* s.14.1: corporations are liable if the family debtor has the sole beneficial interest in its shares.
* s.15: this section is only for the director, not the family creditor. It allows for director ti issue continuing attachment orders – continuing garnishing orders that attach not just to debts due or accruing due but also those that will become due, with the option to stipulate a time period.
* s.17:The director can also attach joint bank accounts.
* s.18: the continuing garnishing order can last for up to 12 months.
* s.25: Crown immunity is waived as against garnishing orders from family creditors.
* s.26: family judgments are non-expiring and need not be continually re-registered. Family claims can also be registered against personal property in s.26.1.
* s.28: maintenance order takes priority over any other unsecured judgment debt of debtor regardless of when an enforcement process is issued/served. This super-priority is limited to maintenance in arrears of up to one year. All additional arrears are pro-rata.

Enforcement of Maintenance Orders

* s.29.1: if you are owing $3000 or more in maintenance orders, ICBC can refuse to license you and you can lose federal licenses.
* s.29.1 also very broadly authorizes the appointment of an equitable receiver. For enforcement of a maintenance order, court can appoint a receiver for ANY property of the debtor, regardless of whether it’s exigible at law or if there are special circumstances or not.
* s.31: authorizes the arrest of an absconding debtor.

**Class 20**

Employment Standards Act

* employees are protected by multiple statutes. ESA s.87(3) allows them to complain to director to pursue wages in arrears for them with a priority for three months’ wages. (s.52 COEA)
* Builder’s Lien Act s.37(2) also may give them priority for 6 weeks’ wages while CBCA may make directors personally liable for several months of wages.

Creditor’s Assistance Act

* Only covers creditors that choose to collect and only covers certain classes of property. There is no rehabilitation or forgiveness of any unpaid balance.
* An attempt to abolish priorities among creditors, which CL had as first in time, first in right. The first JC to seize got it all and sheriff had to pay out creditors in property order. S.46 of CAA says there’s no priorities between execution creditors in BCSC or BCPC.
* S.2: when a sheriff levies money on an execution against the property of a debtor, sheriff must enter promptly in a book a notice stating that levy has been made, the amount, and date.
* S.3: amounts collected and entered under s.2 must be distributed rateably among all execution creditors and other creditors who had writs or certificates in sheriff’s hands at the time of the levy or within 1 month of the entry of the notice.
* Execution creditors are defined in COEA as those who have issued writs of seizure and sale or those who have gotten an order for sale of land pursuant to the COEA.

The CAA’s Application and Procedure – What’s a “Levy”

* Creditor gets judgment and decides to use a writ of seizure/sale, gets one issued and delivered to sheriff. While writ says “execute immediately, sheriff does it in reasonable time. After seizing JD’s asset(s), he has to sell it. Upon that sale, CAA kicks in.
* If there’s a sale of personal property, the sheriff must make an entry into his book (s.2). For s.2 to be triggered, there must be some sale or payment (Benjamin Moore).
* Benjamin Moore: Sheriff gets writ on Jan.13 and seizes a debt on Jan. 20 (sheriff can seize debts in ON, not BC). In March and April, 10 more writs are delivered to sheriff. May, Sheriff receives the money he garnished in January and it’s not enough to pay all JCs. The first in time JC, who delivered his writ first, objects to the distribution plan. Argues the other writs were delivered outside the 30 day limitation period which started ticking when the first writ was delivered.
* Court rejects this: the sheriff only makes the s.2 entry after he levies and NOT when he receives the writ. Levy means to collect or exact or obtain moneys as a result of seizure. That means the levy doesn’t occur until the sheriff got the dollars in his hands – May. The sale is the levy, not the seizure. Sale always = levy; leads to dollar amount that can be entered into the book.
* Levies do not have to be sales. If JD pays the sheriff to get the asset back, this is a forced payment and a forced payment of the whole or part of the amount counts as a levy. Sheriff just needs money in his hands with a definite dollar amount to enter into the book.

CAA Procedure – Holding Period

* After there’s been a levy and sheriff has made an entry in his book, he holds the amount/fund for 30 days. After that, he distributes entire amount to however many JCs and other creditors have delivered their writs and certificates up until that time.
* Thus, more JCs and creditors can come forward and deliver writs/certificates in those 30 days. Sheriff can also continue seizing and selling and levying in the period. At the end of the 30 days, all of this is added together into one fund that is distributed pro-rata.
* If execution creditors aren’t fully paid after this distribution, he can continue to seize/sell/levy.
* The Crown may also notice this levy and show up within the 30 days and claim statutory priority.

CAA – “Other Creditors” Certification

* JCs can issue writs of seizure and sale quickly but CAA’s “other creditors” cannot.
* These are creditors who may have a claim and may or may not have started an action yet but know JD owes them money. They can apply for certificate and deliver it within those 30 days.
* S.6: these other creditors are eligible to apply for a certificate either 20 days after the seizure of the asset or 2 days before the sale. Typically, “other creditors” won’t know when personal property of the JD has been seized other than watching for advertisements of sheriff sales.
* Creditor then applies to the district registrar for the certificate and the JD, the creditor’s debtor, has 10 days to object and, if he does, 10 more days are given for creditor to refute objection. That eats up 20 days of the 30 day period so that there’s still a 10 day grace period so that the other creditor can still get in on the fund when it’s distributed.
* Sheriff can be notified that you’re making a claim for a certificate if it looks like the objection will take longer than 10 days, and he can hold something back to give to the creditor as if it’d gotten the certificate in those 30 days. This is usually where it’ll be a sure thing, just taking time.
* Benefits of having a certificate: s.12 allows sheriff to make further seizures, s.13 has certificates remain in force for 3 years plus renewable and s.18 authorizes the certificate-holder to issue other writs of execution as if they h ad a judgment. They also get to share in the fund with other JCs under the CAA.

Omissions from the CAA

* s.23(1) and s.23(2): some levies do not have to be entered into the book. A s.2 notice must not be entered if there hasn’t been a sale by the sheriff, all executions/claims in sheriff’s hands are withdrawn or paid in full, and there’s no other claim for a certificate that’s been applied for.
* Essentially, this is where there’s been a forced payment by the JD to get the seized asset back and at that point in time (NOT after 30 days), no other writs or certificates have been delievered or, if they have, they’ve been fully paid or withdrawn and there are also no pending applications for certificates. Forced payments are technically levies but are NOT entered if at the time of the payment, there are no other creditors making claims.
* S.23(2): even if the forced payment with no other writs/certificates aroundis only a part payment of the amount owing on an execution or claim in sheriff’s hands, that’s enough to stop an entry into the book and a triggering of the 30 day period.

Sheriff’s Ability to Garnish under the CAA

* S.34: while sheriffs in BC don’t garnish, s.34 contemplates that he can do so in certain circumstances. Interpretation is that sheriff can attach debts owing by a debtor if there are several executions and claims against the debtor and insufficient goods to pay them all and the sheriff’s fees. This amount garnished would be added to the pot to be distributed after the 30 day period.
* Tan: Tan gets 250K paid into court via pre-judgment garnishing order, then gets a 600K judgment. No other garnishing orders or writs in sheriff’s hands, so he applies for payment out of that 250K. Defendant objects and says it should be shared with its other creditors.
* Court rejects this: the sheriff only garnishes, or the creditor only garnishes for other creditors, subject to the s.34(1) condition: insufficient funds to pay out outstanding writs.
* Thus, garnishing JCs rarely have to share the amount garnished and CAA rarely applies to it.

Other CAA Omissions: Equitable Execution and Rules of Court

* Old cases say JC trying to satisfy a judgment through equitable execution doesn’t have to share. Equitable charging order is the exception: if someone informs court of the existence of multiple creditors, they’ll share pro-rata (Rennison)
* S.26: sheriff can apply for payment out of a fund in court that belongs to the JD. This money would then go into the pot after being levied and entered under s.2.
* Sheriff can also add money gained through equitable execution into the levied fund where there’s been a successful application by a JC for appointing an equitable receiver and the receiver, who can be anyone, is the sheriff. That’s money coming into his hands: a levy
* Other omission is any payments made under rules of court, like under subpoena to debtor porceedings or instalment orders. These go straight to the JC without passing through the sheriff so will never be levied and entered into the book as per s.2.
* Thus, the only case where the JC will have to share under the CAA is if the sheriff seizes personal property and actually sells it.

Distribution

* For sales of land, registrar makes a recommendation requiring court approval. For personal property, distribution plan is entirely in sheriff’s jurisdiction. If it’s not enough to pay off all t he claiming creditors, it must be pro-rata.
* S.38: if money is insufficient to pay all claims in full, sheriff may either distribute promptly or prepare a plan for distribution.
* MacMillan Bloedel: MB gets judgment against C and is first JC and six months later, delivers writs to the sheriff; sheriff seizes C’s assets in July, Sept, Oct. C stops paying employees in July and Director issues a certificate and files it as a judgment for 3 months’ wages in November. Various other creditors also deliver writs from May to November. In October, assets are sold, leaving a pot of money to be held for 30 days after which it can be distributed (November).
* Sheriff must distribute pro-rata (not enough for all) and creates a distribution plan that fails to include Mac at all. Mac, as JC, is entitled to object to the plan and does, as does director. Court found that despite statutory priority for 3 months’ wages, ESA director is still sharing with the other creditors and is under no obligation to pursue the third party purchaser of the asset.

**Class 21**

Distribution After COEA Sale of Land

* Hankin Furniture: If it weren’t pursuant to the COEA, it’d be distribution in order of registration on title as per Roadburg, but under the COEA, CAA may kick in where there’s more claims against title than there are proceeds to pay the claims in full.
* Proceeds were insufficient in Hankin. Registered owner, Gill, had three judgments, then a mortgage, then 8 more judgments on title.
* JC #1 decides to proceed to an execution sale pursuant to the COEA. General process is followed: inquiry leading to registrar’s report on the title and a recommended distribution, followed by JC getting an order for sale from court based on that. Recommended plan was first 3 JCs are paid in full, then mortgage in full, then the 8 later JCs share what’s left. JC#7 objects, correctly arguing that all JCs should share.
* BCSC comes to strange result: all 11 JCs get paid first, sharing pro-rata, with the mortgagee getting paid out of what’s left, and any remnants after that going back to Gill.
* This is problematic: it disadvantages the mortgagee, a secured creditor who advanced money on expectation that the value of the land would cover them. The CAA was never intended to dispossess secured creditors of their securities by moving up priority of all JCs.
* It should have been decided that all sale proceeds go into that 30 day JC pot instead of going to the JCs directly, with mortgagee getting what it should’ve gotten from the sale while the JCs turn to the pot and share from it pro rata.

Hong Kong Bank Alternative to Hankin Distribution – Unregistered Judgments Against Land

* HKBC: the proceeds were a fund in court and were held for 30 days as per the CAA, at the end of which the registrar distributes pro-rata to the original JC whose writ was implemented and any other JCs or certificate-holders who delivered to the sheriff in those 30 days. Case said the fund in court had to be held for 30 days then distributed rateably to creditors with judgments registered against the land before the sale and any creditors who gave notice to the sheriff in that period. CAA gives no priority between creditors.
* Even if they failed to register on title before the sale of land or hadn’t yet reduced their claims to judgment, if they can get writs or certificates to the sheriff in those 30 days after the sale/levy, they get to share.
* Even if the 30 day pot is fixed in terms of dollar value, some JCs, like family creditors for one year’s arrears or ESA director pursuing wages, will get priority to it.

Builder’s Lien Act: The Owner

* Defined as a single owner who decides to improve his land by, say, building something on it. Whoever works on it is a claimant. May be multiple owners and purchasers may be caught.
* Pyramid model #1: single owner retains a head contractor who contracts with sub-contractors who may contract with sub-sub contractors. Each may have their own crew and material men.
* Pyramid model #2: Registered owner does its own contracting, having numerous contractors under it instead of a single head contractor, with each hiring subs. BLA catches both models.
* If there are multiple owners, only the “contracting owner” can discharge the obligations of the owner under the BLA but if he doesn’t, fails to hold back right amount for right number of days, all registered owners are at risk since claimants can pursue remedy of getting the land sold.
* Non-contracting owners can protect themselves either by leaning on the contracting owner to pay or registering a disclaimer in the LTA declaring non-responsibility.
* If a purchaser purchases land while the liens are still valid, they can be liable for up to 10% of the purchaser price.
* Improvement is defined broadly to include almost any work connected with a construction site. It just doesn’t include an improvement with work not yet started. There must be an actual improvement and not just planning.

Hold-Back

* Contracting owner must hold back 10% of the value of the head contractor’s contract at all times. If the registered owner is doing its own contracting without a head contractor, it must hold back 10% of the value of each of those contracts.
* Head contractor must then hold back 10% on each of his sub-contracts and each sub-contractor must do the same for each sub-sub.

Lien Claimants

* Contractors, sub-contractors, workers, anyone who works or supplies materials in relation to the improvement will get a lien for price of work and material to the extent it remains unpaid. Lien will attach to the land, the interest of the owners in the land, and the material delivered to and placed on the land. The lien arises by operation of law and the lien claimant need do nothing save provide the work or services.
* It’s arising doesn’t depend on the work you do but rather your position in the pyramid. Need not work on the site to be a claimant (can build stuff off-site). Not everyone connected to the site is a claimant though (Air Transport: the guy transporting workers to the site was not).

Perfecting a Lien Claim and Limitation Periods

* While it arises by law, that status must be perfected by filing on title to land.
* S.20: you have 45 days to file from the date at which certificate of completion is issued or, if there is none, from the date in which the head contract has been completed, abandoned, or terminated (maybe substantial completion?), or if no head contract, from date at which the improvement has been completed or abandoned.
* S.21: once perfected by filing, it is retroactive to the date the work began or the material was supplied and has priority over all judgments, executions, attachments, or receiving orders made thereafter. Leads to priority over stuff that came before it was filed, but after work started.
* If you don’t register within 45 days, the lien extinguishes and ceases to exist and can no longer be registered against title. Can still be used as basis of a trust or contract claim, but not lien. Shimco says you may still get a lien against the holdback amount, but not against the land.
* S.33: an action to enforce the lien against the land must be commenced within 1 year from date of filing. At any time within the year, owner can demand speedy trial by serving notice to owner personally or by mail. Within 21 days of notice, claimant must file a CPL, commence the action.
* S.33(4): if service is by mail, notice is deemed to have been served anywhere in Canada within 8 days of dropping off the notice at the mail office.
* S.19: can be liable for wrongful filing of liens if an abuse of process, and not just an innocent mistake, can be shown. Like filing when you knew there was no claim (eg blackmail).

**Class 22**

Holdback Obligations for Owners

* s.5: owners must actually establish a separate bank account for the holdback so that it doesn’t get mixed with other moneys. Contractors and subs don’t have this obligation.
* Outside creditors cannot garnish these funds or get a lien on it and if garnishee pays this money into court by accident, it’s deemed trust money not available to outside creditors.
* Owner can hold back more than 10%, but that’s the minimum. That 10% must be held back for at least 55 days, starting from when the liens were filed. A lien claimant has 45 days to file, the owner then keeps the holdback safe for 10 more days than that – if no lien claims have been filed after 55 days, the owner pays the holdback over to the contractor.
* It doesn’t matter how many lien claimants there are – if none of them file their claim within those 55 days, they’re out of luck.

Quicker Ways of Getting Liens off Title

* Frequently, banks will refuse to make any more advances until liens are removed or sub-contractors’ contracts will say “no liens” and won’t work until then. BLA thus provides for quicker ways to remove liens than completion or abandonment of the contract.
* S.23: if liens are filed, owner can pay the holdback into court if the value of the liens filed doesn’t exceed it. This removes the lien from the title.
* S.24: if the lien claims filed exceed the holdback, the court can order the lien claims cancelled upon the giving up of security. The value of the required security can be the total amount of the lien claims filed. While not a trial on the merits of the lien claimant, court can also take into account factors that would go into that trial and/or account for double-claims and set a lower amount as security. This security stands in place of the land and liens can then be removed.
* S.25: liens can be removed immediately where there are obvious bases rending it invalid.

Liens on the Holdback

* s.4(9): the liens that arise by operation of law are on the land and the materials but s.4(9) creates an independent lien on the holdback.
* Shimco: BCCA gives this a broad interpretation. Shimco had failed to perfect its lien and commence its action within the 1 year limitation period, but then commenced against the holdback. Even though being outside the period meant its lien claim had extinguished.
* BCCA finds that the BLA creates a separate lien claim against the holdback and this can be claimed even if your lien claim against the land has extinguished by passage of time. There is no time limit for bringing a claim against the holdback.
* Wah Fai Plumbing: confines Shimco application of the s.4(9) lien to cases where there is still a holdback in existence that hasn’t yet been paid out to anyone. Here, there never was a holdback and it’s not in existence at time of case, so no lien.

Sale of Land

* If lien claimants aren’t satisfied by any other techniques and claimants remain unpaid, s.31 authorizes court to order a sale of the land if it’s the only way to satisfy the lien claimants. Sales under the BLA are thus rare, with distribution being governed by ss.36, 37, and 38.

Construction Money as Trust Money

* s.10: money received becomes trust money. The trustees are the corporate construction firms acting as contractor or subcontractor or even directors of those firms.
* Any expenditure of that trust money on something that is not for the improvement is a breach of trust that can result in the director trustee with mens rea and corporate trustee being sued. This is to preserve the construction money to pay people in the pyramid.
* The beneficiaries who can complain are the lien claimants who pursue their claim vertically (claim through their sub-contractor and it gesso up the chain). Even if these lien claimants failed to file or bring an action and are thus not lien holders, they can still bring this trust claim.
* S.14: these trust claims still have a one year limitation period. So you can bring a trust action despite missing the 45 day filing limit, but won’t help if you miss the 1 year to commence action.
* S.11: sets out offences committed by contractors or subs who contravenes by using construction money for some other purpose, but is rarely used.
* It’s rarely successful, but the bank where the contractor deposited the construction money may be liable for breach of trust as a constructive trustee if the trust money is spent on something else. – can be sued by lien claimants making a trust claim against the contractor and its directing mind. This is where bank know their clients are in construction and that these are construction accounts but also knows exactly what’s going on (Bank of Nova Scotia).