# Part I. The Judgment

## A. Introduction – The Regulation of the Debt Collection System

|  |
| --- |
| **BPCPA** |
| **“Consumer Transaction”** | * Means (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a),
 |
| **Deceptive Act or Practice** | * An oral, written, visual, descriptive or other representation by a supplier, or (b) any conduct by a supplier that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor – **s.4**
* Prohibited / BOP on supplier – **s.5**
 |
| **Unconscionable Act or Practice** | * Court considers all circumstances 🡪 undue pressure to enter consumer transaction / supplier took advantage of inability or incapacity / total price grossly exceeded other similar transactions / no reasonable probability of full payment of total price by consumer / terms or conditions so harsh or adverse as to be inequitable **– s.8**
* Prohibited **– s.9**
 |
| **Transaction Unenforceable**  | * If an unconscionable act or practice occurred in respect of a consumer transaction, that consumer transaction is not binding on the consumer or guarantor **– s.10**
 |
| **Part 11 – Administration** | * Provides for a Director and Inspectors and the Act bestows on them the authority and obligation to administer and enforce the provisions of the Act.
 |
| **Harassment****Prohibited**s.114 | 1. A collector must not communicate or attempt to communicate with a debtor, a member of the debtor's family or household, a relative, neighbour, friend or acquaintance of the debtor, or the debtor's employer in a manner or with a frequency as to constitute harassment.
2. Without limiting subsection (1), one or more of the following constitutes harassment:
	1. using threatening, profane, intimidating or coercive language;
	2. exerting undue, excessive or unreasonable pressure;
	3. publishing or threatening to publish a debtor's failure to pay
 |
| **Removal, Seizure Stuff That Isn’t Allowed**s.122 | * remove from inside the debtor's private dwelling any personal property claimed under seizure, distress or repossession, in the absence of the debtor, the debtor's spouse, the debtor's agent or an adult resident in the debtor's dwelling;
* seize, repossess or levy distress against personal property that is not specifically charged or mortgaged, or to which legal claim may not be made under a statute, court judgment or court order
 |
| **Collector Cannot Misrepresent** | * In collecting or attempting to collect payment of a debt, a collector must not supply false or misleading info, misrepresent purpose of communication or misrepresent identity of collector – **s.123**
 |

|  |
| --- |
| **Criminal Code** |
| **Extortion**s.346 | * (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.
* (2) A threat to institute civil proceedings is not a threat for the purposes of this section.
 |
| **False Information****/****Indecent or****Harassing Communications** s.372 | * Everyone commits an offence who:
	+ with intent to injure or alarm a person, conveys information that they know is false, or causes such information to be conveyed by letter or any means of telecommunication.
	+ with intent to alarm or annoy a person, makes an indecent communication to that person or to any other person by a means of telecommunication
	+ without lawful excuse and with intent to harass a person, repeatedly communicates, or causes repeated communications to be made, with them by a means of telecommunication.
 |

## B. Laws Relating to the Judgment

|  |
| --- |
| **Default Judgments** |
| **Getting Default Judgment**(Civil Rules 3-3) | * A debtor who cannot pay and ignores process of the court 🡪 default judgment may then be entered for the sum plus pre-judgment interest under 3-3(3)
 |
| **Remedies** | * Confers all the rights and remedies of a regularly obtained judgment
 |
| **Setting Aside** | * Two grounds:
	1. As of right
	2. Discretion of the court
 |
| **As of Right** | * Debtor is entitled for judgment to be set aside if:
	1. Procedural defects (improper service / lack of notice etc.)
	2. Where there has been a breach of natural justice (***Bache***)
* D must prove 🡪 that there was a flaw or failure in the procedure which amounts to a denial of natural justice (***Bache***)
* Result 🡪 it’s a nullity, everyone put back in the position had there not been judgment
 |
| **If No Defect In Procedure 🡪****Discretion of the Court** | * D must show: (***Miracle Feeds***)
	1. That he did not willfully or deliberately fail to enter an appearance or file a defense
	2. That he made application to set aside the default judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or give an explanation for the delay in bringing the application
	3. That he has a meritorious defense or a defense worthy of investigation, and
	4. The foregoing requirements are established through affidavit material filed by or on behalf of the D
* The above items are relevant factors, not conditions that must be satisfied (***HMTQ***)
 |

|  |
| --- |
| **Interest (*Court Order Interest Act*)** |
| **Pre-Judgment Interest**Part 1 | * Arises from day cause of action arose (money was due; accident happened, etc.) to the date of judgment
* At a rate the court considers appropriate
 |
| **Post-Judgment Interest**Part 2 | * Interest from date you obtained judgment up to the date you are paid in full.
* Rate is annual simple interest rate = to prime lending rate of banker to the government.
* Court may vary rate of interest.
 |

|  |
| --- |
| **Limitation Periods (*Limitation Act*)** |
| **Limitation Period to Enforce Judgment**s.7 | * If judgment is local (BC) 🡪 10 years after the day on which it became enforceable
* If judgment extra-provincial 🡪 the earlier of the following:
	1. The expiry of the time for enforcement in the jurisdiction where judgment was made
	2. 10 years after date judgment became enforceable
* \*So you never have more than 10 years in BC
 |
| **Completion of Enforcement Process**s.23 | * (a) If limitation period has expired but enforcement process is outstanding, JC may:
	+ Continue proceedings with unexpired writ of execution but cannot renew writ
	+ Commence or continue proceedings against land under COEA but cannot renew unless already commenced
	+ Continue proceedings in which a charging order is claimed
* (b) If court orders a stay on execution of a judgment, limitation period is postponed/suspended as long as stay is in force
 |

|  |
| --- |
| **Judgments on Judgments: Domestic** |
| **What is it?** | * A JC can bring a local action on BC judgment in order to extend the limitation period up to another 10 years – seen in ***Young***
* Useful if JD is evading process / trying to hide etc.
 |
| **JD’s Defences** | * Abuse of process 🡪 JD must establish that the second action is an abuse of process 🡪 JC will not be permitted to proceed if so – ***Young***
* JC does not need to adduce evidence of reasonable or good faith efforts to collect – ***Young***
 |

|  |
| --- |
| **Judgments on Judgments: Foreign** |
| **Enforcing Foreign Judgments in BC****Using CL** | * Must show:
1. The foreign judgment is *final and conclusive*; and
2. The foreign court had *jurisdiction*:
	* 1. D was *present* in the foreign jurisdiction when the action was started, OR
		2. D voluntarily *submitted* to the jurisdiction of the international court, OR
		3. There is a *real and substantial connection* between the action and the foreign jurisdiction (***Morguard***)
 |
| **ECJDA** | * Use for 🡪 Canadian judgments from outside BC
* Gives blind, full faith credit to judgments from outside BC, both pecuniary (final) or non-pecuniary
* Effect of registration 🡪 Canadian judgment will be of the same effect as if it had been a judgment of the Supreme Court (s.4)
* JC has 10 years or until the expiration period of the other province/territory, whichever is less (s.5)
 |
| **COEA**  | * Use for 🡪 foreign judgments in reciprocating jurisdictions
	+ Australia, all Canadian except Quebec, Washington (state), Alaska, California, Colorado, Idaho, Oregon, Austria, UK, Germany
 |

|  |
| --- |
| **Stays of Execution** |
| **What Are They?** | * At CL, judgments are payable immediately – but sometimes inequitable for D to pay right away
* Can try to get stay of execution 🡪 temporary stop on right of enforcing a J
* A matter of discretion for the court, equitable – can be lifted later by the court that issued the order
 |
| **Test for Stay***Morguard Real Estate* | * Ask:
	1. Serious question to be tried? 🡪 low threshold
	2. Would applicant suffer irreparable harm if application refused?
		+ E.g. bankruptcy perhaps?
	3. Balance of convenience 🡪 which party would suffer greater harm; balance harm of denying stay v JC’s right to enforce judgment. Consider:
		+ Necessity of preserving the subject matter of the litigation
		+ Prevention of irreparably damage
		+ Existing special circumstances
		+ \*C doesn’t need to show in need of $, onus on D
 |
| **Stays on Appeal** **/** **Voth Order***Voth* | * Why use? 🡪 P wins, D doesn’t want to pay, then appeal, and upon being successful, P now cannot repay
 |
| * What is it 🡪 When there is an appeal, and where the amount involved is significant, a stay of execution on payment of the amount of the judgment by the defendant may be ordered
 |
| * Process 🡪 D pays the money into court and the P has access to it on terms
	+ If D is successful on appeal, P must repay with interest
	+ P must provide sufficient security for the amount paid out, plus interest, plus costs
 |
| **Stays Not On Appeal** | * The sum is payable immediately unless the court orders otherwise – **COEA s.48**
* Court may order a stay of execution – **Civil Rules 13-2(31)**
 |

|  |  |
| --- | --- |
| **Considerations for Stays Not on Appeal***Lau* | 1. Are there special circumstances?
2. The balance of convenience
3. Where required by “justice between the parties” and in order to avoid unnecessary proceedings and expense.
4. Weigh the relative prejudice to the parties (for example, will one party lose everything if the stay is granted or not?)
5. To enable the Court to protect either litigant.
6. Where there is no outstanding appeal
7. To allow a judgment debtor sufficient time to prosecute a counterclaim against the judgment creditor.
 |
| **Foreign Stay on Appeal** | * Foreign judgment is enforceable as long as final and conclusive… BUT
* When the foreign judgment is under appeal and the P wants to enforce it in BC, the D can apply for a stay of execution – ***Litecubes***
* **Civil Rules 19-3(9)** 🡪 D can apply for an order staying the proceeding until the determination of the appeal. The court has *discretion* to grant the stay of execution, which can be made subject to terms
	+ D is not *entitled* to a stay if appealing
 |

## C. Information Acquisition – Civil Rules 13-3 and 13-4

|  |  |  |
| --- | --- | --- |
|  | **Subpoena to Debtor 13-3** | **Examination in Aid of Execution 13-4** |
| **Judgments Used For** | * Judgments for payment of money only
 | * Any kind
 |
| **Used If** | * JC wants binding order for payment at conclusion of hearing
* If JD is able but unwilling to pay
* JC is aware of JD’s financial position
 | * Useful first step
* Finding out maximum information about the judgment debtor
* Can also examine people other than JD including spouse
* Required to produce non-privileged documents
 |
| **Writ of Execution** | * Can’t have writ of execution in process
 | * Allowed to have writ of execution outstanding
 |
| **# Times Allowed** | * Unlimited
 | * Once per year
 |
| **Binding Order?** | * Can get examiner to make order to pay whole debt/instalments 🡪 the order replaces the J, force of court order, can be found in contempt if fail to pay
* Even if sent to prison, doesn’t stop debt
 | * Does not lead to a binding order for payment and does not have built-in contempt provisions for failure to attend (although general contempt provisions are available).
 |
| **Enforcement** | * Contempt orders can be made based on conduct of JD – 40 days jail
* JD can be committed to jail if:
	+ Refuses to attend
	+ Refuses to be sworn, doesn’t produce documents, gives unsatisfactory answers
	+ Examiner concludes that debtor has dealt with property with an intent to defraud JC or has unreasonably neglected or refused to pay debt
* There will usually be an order to pay in installments
 | * Must attend or risk being in contempt of court
 |
| **Cases** | * ***Blaxland***🡪 need something close to BARD for civil contempt when imprisonment is the penalty
* *Here the JD tried to say he couldn’t pay as a defence to not paying his installments but the court found he was able to pay*
* Non-compliance with orders to pay by installments can lead to imprisonment
 | * ***Doobay*** 🡪 *JD was found in contempt, jailed for 42 days and ordered to pay a fine of $40k for repeatedly failing to answer questions sufficiently and continued disobedience.*
* *Answers demonstrated “evasiveness and unwillingness to comply with the Court Orders”*
 |

# Part II. Collection Remedies

## A. Personal Property

### 1. Attachment of Debts (Garnishment): *Court Order Enforcement Act,* Part 1

|  |
| --- |
| **Garnishment** |
| **Basics** | * Created by COAE, Part 1
* Debt collection remedy that allows a creditor to serve a 3rd party (garnishee) with an order directing the garnishee not to pay a debt due to the debtor 🡪 must pay it into the court for the benefit of the creditor OR dispute liability
* If garnishee doesn’t comply they become personally liable for the debt
* No continuing garnishing orders 🡪 must keep getting new ones
 |
| **4 Steps** | 1. Issuance of garnishing order (*ex parte* application at the court registry);
2. Service of garnishing order on garnishee;
3. Garnishee pays funds into Court;
4. Funds are paid out of court to the judgment creditor.
 |
| **Requirements** | 1. Debt must be due or accruing due at the time of issuance – **s.3 and *Dabrowski***
2. Property must be attachable – **see below**
3. Must have jurisdiction (garnishee must be in Province) – **s.3(2)(e) and *Mitchell***
 |
| **1) Issuance** |
| **Issuance**s.3 | * Authorizes the issuance of a garnishing order generally
 |
| **Timing of Order** | * There must be a debt in existence at the time that the garnishing order is issued – ***Dabrowski***
	+ Issuance, not service, is the critical time
	+ Can’t be cured by debt subsequently coming into existence
	+ *Here, Canadian Bank of Commerce got order against auctioneer (garnishee) before auction had taken place and debt existed* 🡪invalid
* If there is no debt at time of issuance 🡪 then the garnishing order will be set aside by the Court
 |
| **“Debt due”**s.3(1) | * Includes debts, obligations and liabilities owing, payable or accruing due
* Includes wages that would in the ordinary course of employment become owing within 7 days after date affidavit is sworn
 |
| **“Debts, obligations and liabilities”**s.3(1) | * Includes debts NOT arising out of trust or contract IF a judgment has been recovered on it
* Includes claims arising out of trust or K that are subject to equitable execution
 |
| **Conditional Debt** | * Must be *unconditional* debt owed to JD at issuance – ***Vater***
	+ *Here, JC sought to garnish disability insurance benefits 🡪 insurance company only has to pay this amount if JD is alive and disabled at time payment due though 🡪 conditional*
	+ *Should have got order on date that payment was due*
* However, If terms/conditions are “mere matters of procedure and administration” / do not affect the existence of the debt 🡪 then it is garnishable – ***Bel-Fran***
	+ *Here, D could withdraw term deposit before maturity if he gave 7 days’ notice and fulfilled minor conditions*
 |
| **Attachable Property** | * See section below
 |
| **2) Service of Garnishing Order**  |
| **When**s.9 | * A copy of the garnishing order must be served on the defendant/judgment debtor at once or within a time allowed by the Court before the debt is paid out
 |
| **Failure to Serve** | * Failure to serve the garnishing order within a reasonable period of time is a ground to set aside the garnishing order
* Seen in ***Pybus*** where the garnishing orders were not served for 6 months, after the defendant had requested that they be served 🡪 PJGO set aside
 |
| **3) Payment into Court by Garnishee** |
| **Garnishee’s Options** | 1. Pay the money into court, which extinguishes his debt – **s.21**
2. Pay money into court, then dispute that he owes a debt to JD – **s.16**
3. Dispute validity of garnishing order, without paying it – **s.16**
* Garnishee need to do one of these or will be in contempt of court and could become personally liable for the debt and costs
 |
| **Garnishee Must Not** | 1. Simply do nothing
	* Garnishee leaves himself open to a “**s.11 order**” which authorizes JC to bring action against garnishee who fails to pay, then get a judgment (he’s liable for amount garnished)
	* JC can execute against garnishee – **s.14**
	* Remember, if garnishing order conflicts with something 🡪 pay money into court and file a dispute note – seen in ***Ahaus*** below
2. Pay the garnishor directly
3. Pay twice (once to JD, once to court)
 |
| **Garnishee Personal Liability** |
| **Payment by Garnishee**s.11 | * If the garnishee does nothing (doesn’t pay into court, doesn’t dispute) then a judge may order the garnishee to:
	+ If prejudgment 🡪 Pay the amount + costs into court
	+ If judgment recovered 🡪 Pay the amount + costs to the JC
* S.11 order is discretionary 🡪 “judge *may* order the garnishee…” – seen in ***Evans***
* S.11 order can give JC priority over garnishee’s assets but need full and frank disclosure of material facts – ***Evans***
 |
| **Full and Frank Disclosure** **/** **Trickery** | * Garnishing orders are made *ex parte* and counsel requesting a garnishing order must provide full and frank disclosure of material facts which might influence the exercise of discretion – ***Evans***
* Failure to do so can allows the court to set the order aside without regard to the merits of the application – ***Evans***
	+ *Here, the plaintiff knew that the garnishee was under a freezing order from BC SecCom but asked for a garnishing order anyway without disclosing the existence of the freezing order to the court. The garnishee should not be held liable for its inability to pay the garnished funds into court. You have to tell the court if there are other parties that might have claims (relates to priority).*
 |

|  |
| --- |
| **Attachable Property** |
| **Term Deposits** | * Are attachable provided that terms are complied with – ***Bel-Fran***
 |
| **Deposit Account** | * Bank isn’t in a continual state of owing to the JD and only becomes so when the JD makes a demand BUT…
* Service of the garnishing order is equivalent of a demand on the bank and so, it is a valid garnishing order – discussed in ***Bel-Fran***
* Remember, for jurisdictional purposes, the account is located at branch were it is held – see ***Mitchell***
 |
| **Joint Account** | * If both joint owners are JD’s then JC can garnish the debt
* If only one is though 🡪 nemo dat applies, and bank would be in breach of K duty 🡪 cannot garnish – ***Field***
* Cannot garnish even if one joint owner renounces their claim (as they still maintain a right to sue for the funds) – ***Field***
* Court cannot make inquiry into “true ownership” of account to determine if it is a sham account – ***Field***
 |
| **Rent** | * Rent that is due in the future is not “payable or accruing due” within the meaning of the *COEA*🡪 Must be payable beyond question – ***Access Mortgage***
* You cannot issue and serve a garnishing order before the rent due date, although overdue rent is attachable – ***Access Mortgage***
	+ *Here, tenants (garnishees) paid rent money into court a week before rent was due 🡪 not allowed*
 |
| **Wages and Salaries** | * Garnishable if due within 7 days
* PJGO is not possible for wages – **s.3(4)**
* 7-day rule 🡪 JC can issue GO a week before salary is due and GO will be valid
	+ Applies to Crown employees, Fed employees may be complicated by *Garnishment and Pension Diversion Act*
* 70% or at least $100 ($200 w/ dependents) exempt – **s.3(5)**
* No continuing GO – have to do it every two weeks
* Prohibition on firing the debtor because of garnishing order – **s.27**
 |
| **Undertakings** | * Purchase moneys held in a conveyancing transaction (undertakings) by a lawyer or notary are attachable – ***Ahaus***
	+ *Here, D sold house, money paid into notary’s trust (undertaking), JC gets garnishing order for this trust fund. The conveyance of title was complete and the undertaking requirements were met 🡪 debt accruing due for balance of purchase money*
* Remember, if garnishing order conflicts with undertaking 🡪 pay money into court and file a dispute note
	+ Never do nothing! 🡪 Results in personal liability for the debt
 |
| **RRSP** | * S.73.1 of the COEA extends immunity to RRSPs from execution in BC
* Likely would extend to retirement funds as well
 |
| **Builder’s Liens Funds** | * *Builders Liens Act* has provisions that make it not garnishable
	+ S.13(1) – expressly makes the garnishor’s interest subordinate to the garnishee if the money is paid into Court
 |
| **Retainers** | * True retainers (retainers which may never be repaid to the client) are not debts due or accruing due to the client 🡪 exempt from garnishment – ***Gervais***
	+ The money could potentially be earned by the lawyers and therefore they have an interest 🡪 not sole property of client
* A hearing with affidavit evidence may be necessary to determine whether a retainer is a true retainer
 |
| **Priority** | * Builder’s lien claimants have priority over garnishing creditors – **s.13** **BLA**
 |

|  |
| --- |
| **Jurisdiction** |
| **Jurisdiction Requirements** | * *Garnishee* must be in the jurisdiction of the court (located in the province) – **s.3(2)(e)**
* The Debt 🡪 does *not* need to be located in the province according to COEA (as seen in ***Mitchell***) 🡪 can be located wherever the debtor can be found and sued
 |
| ***Bank Act***s.462 | * For garnishing wages 🡪 the Bank Act is silent / does not apply 🡪 don’t need to serve branch where account is – ***Mitchell***
	+ *Distinction between being garnished as employer and as an account holder*
	+ *JD worked for bank, it was his wages being garnished, not the account, so the Bank Act did not apply. Wife could serve branch in Victoria even though accounts were in West Indies and Toronto.*
* For garnishing accounts 🡪 Bank Act applies 🡪 A writ only applies at the branch where the notice is served so you must serve branch where the account is kept / Cannot serve on head office
* Exception for garnishing accounts 🡪 However, ***Univar*** says that if the bank has *a branch* in BC, then you can garnish the account, even if the account is not physically located in BC, so long as the extra-provincial branch is served *ex juris*. Even though bank act locates debt in at certain branch, BCSC dismisses this as merely procedural
	+ \*EE thinks this is wrong because it allows seizure of property *outside BC*. But it has not been challenged yet so you can still argue this if you are a JC
 |

|  |
| --- |
| **Priorities** |
| **Debts Bound From Time of Service** s.9(1) | * Service of garnishing order binds the debt at time of service to the garnishee:
* “Bind” 🡪 Creates an equitable charge / lien / property interest / personal right in favour of JC in the debt – ***Overhead Door***
* Interpreted differently for GO and PJGO – ***Overhead Door***
	1. GO 🡪 creates an equitable charge on funds garnished from the time of service
	2. PJGO 🡪 doesn’t create an equitable charge until judgment is obtained / merely obtains right to have money paid into court and prevents garnishee from disposing of the money
 |
| **Secured Creditors** | * General rule is that they have priority over JCs
 |
| **Determining Priority** | * First in time, first in line 🡪 The general principle is that charges take priority in the order in which they become a charge – ***Overhead Door***
	+ *Here, C1 and C2 commence separate actions on same day, C2 issues PJGO, C1 gets default judgment* *and applies for equitable order over money paid into court. C2 then gets default judgment 3 days later. C1 has priority. PJGO doesn’t create priority for C2.*
* GO 🡪 creates priority as soon as it is served
* PJGO 🡪 simply an order for garnishee to pay into court. Doesn’t create priority at service, only once judgment is given.
 |
| **Trickery** | * S.11 is a discretionary order and it is up the courts to enforce 🡪 JC can’t jump priority through trickery – ***Evans***
	+ *Here, JC didn’t inform court that he was trying to position himself ahead of other creditors or that the account being garnished had been frozen by the securities commission, making compliance with the order impossible.*
 |
| **Super Priority Claim**s.17 | * Court may order appearance of 3rd party if suggested by garnishee that the debt belongs to or is claimed by a 3rd person, or that a 3rd person has a lien or charge on it.
* Other statutes may create super priority:
	+ E.g. Employment Standards Act 🡪 gives super priority to ESA director over funds held in court because s.15 of ESA expressly provides for the priority of wage claims of employees over assignments 🡪 creates statutory lien – ***Twin Stag***
 |

|  |
| --- |
| **Pre-Judgment Garnishment** |
| **Available For** | * Available once creditor has commenced or is about to commence an action
* “Debts or liquidated demands” 🡪 Amount is already ascertained or can be ascertained by simple arithmetic – ***Busnex***
* If amount requires investigation beyond mere calculation 🡪 then it constitutes ‘damages’ – ***Busnex***
* *Here, the claim for loss of commission was based on figures that used estimates. The share purchase agreement was not completed and determination at trial would involve knowing what the figures would have been if it were completed*
 |
| **Not Used For** | * For unliquidated claims 🡪 the judgment creditor should seek a *Mareva* injunction instead of a pre-judgment garnishing order
* Cannot garnish wages pre-judgment – **s.3(4)**
 |
| **Process** | * Application can be made under **s.3(2)(a)**
* Affidavit requirements of **s.3(2)(d)** must be followed
 |
| **Affidavit Requirements**s.3(2)(d) | * Action must be pending
* Must state time of commencement
* Must state nature of cause of action
* Must state actual amount of the debt, claim or demand
* The amount of the debt must be “justly due and owing, after making all just discounts”
 |
| **Observance of Requirements**  | * Garnishing order is an extraordinary process and requires meticulous observance of statutory requirements or else it could be set aside (***Knowles***) 🡪 however, this was subsequently qualified by ***Myron Balango***
	+ *Knowles 🡪 cause of action not stated sufficiently so set aside. Just stated “debt on chattel mortgage”.*
* Qualification 🡪 meticulous observance does not require technical perfection or ridiculous compliance – ***Myron Balango***
	1. Must be written so that no one is misled by it, even if they may be momentarily puzzled.
	2. The document as a whole must clearly inform the reader of its true message
	3. There must be no confusion or uncertainty of what is meant
* Imperfect affidavits are voidable, not void, so court still has discretion to uphold – ***Pybus***
 |
| **Defense Stuff** | * Ignoring a PJGO is contempt
* PJGOs are ex parte applications – so D only gets notice once it is served
 |

|  |  |
| --- | --- |
| **Judicial Discretion**s.5 | * The Court has the discretion to release all or part of the garnishment where doing so is “just in all the circumstances”
 |
| **Determining ‘Just in all the Circumstances’** | * The Court must consider various factors in determining what is “just in all the circumstances.” – ***Redekopp***
* The onus is on the defendant to make these factors out: – ***Redekopp***
	+ The strength of the plaintiff’s case 🡪 D wants to make out that case is weak
	+ Hardship to the defendant 🡪 does the attachment cause hardship?
	+ Necessity 🡪 is attachment necessary to ensure that the plaintiff can recover if his or her claim is successful? Does D have lots of assets to pay out if loses
	+ Other circumstances 🡪 would it be unreasonable to deprive D of the assets / operating capital?
* *Here, D argued that if it did not have access to the money, its business will be destroyed and other creditors will be prejudiced. Court exercises discretion under s. 5 to release some of the garnished funds back to the defendant as it would not be just to deprive D of operating capital*
 |
| **Setting Aside****PJGO** | * Imperfect affidavits are voidable, not void, so court still has discretion to uphold – ***Pybus***
* ***Pybus*** 🡪 1) improper service; 2) claim against D was not for a liquidated amount; 3) failure to make all just discounts 🡪 set aside PJGO
* Failure to serve the garnishing order within a reasonable period of time is a ground to set aside the garnishing order – ***Pybus***
	+ Garnishing orders were not served for 6 months, after the defendant had requested that they be served 🡪 PJGO voidable, set aside
 |

### 2. Writ of Seizure and Sale: COEA, Part 5

|  |
| --- |
| **Procedure for Writ of Seizure and Sale** |
| **What is it?** | * Post-judgment remedy for a JC for choses in action and choses in possession
* Order that someone must collect the judgment (including interest) out of the JD’s goods and chattel
 |
| **Time Valid** | * Writ is good for 1 year
 |
| **Steps** | 1. Issuance
2. Delivery
3. Entry and search
4. Seizure
5. Sale
6. Payment
 |
| **1) Issuance** |
| **What is it?** | * Administrative writ issued by registrar
* Writ includes amount of judgment, plus interest, plus costs that you want the sheriff to levy (seize)
 |
| **2) Delivery of Writ to Sheriff** |
| **Order of Execution** | * Sheriff (court bailiff) has obligation to execute writs in the order they are received
 |
| **Providing Sheriff Info and Directions** | * JC is advised to provide sheriff with info about JD’s assets that are subject to the writ or seizure and sale, and the whereabouts of those assets
* JC may direct sheriff to seize specific property, as long as the property is exigible (can be seized). But…
* Liability 🡪 Directing the sheriff to seize certain assets could make the sheriff your agent and you could be liable if assets are not exigible or are immune due to Crown property (***Cybulski***) 🡪 Give the sheriff as much info as you can instead
	+ *Here, Canada Post trucks owned by credit company and leased to CP were seized. P had to bear costs for unnecessary proceedings and expenses related to seizure because payment was forthcoming and Crown immunity*
 |
| **3) Entry and Search** |
| **What Sheriff Cannot Do** | * Sheriff cannot search JD’s person but can ask him to hand over his stuff
* Using force 🡪 Court bailiff cannot enter the dwelling house of a JD or 3rd party where the judgment debtor’s property is stored by force against the will of that person – ***Boyce***
	+ Open/unlocked doors 🡪 can enter
	+ Locked door / pushing JD away when trying to close the door 🡪 trespass
* Curtilage: living space outside of home 🡪 Cannot take that property. Includes cars on driveway
 |
| **What Sheriff Can Do** | * Residential 🡪 can enter if permitted / door is open/unlocked – ***Boyce***
* Once inside house 🡪 Once the court bailiff is inside, he or she may break open doors and chests within the house – ***Boyce***
* Commercial buildings / non-dwelling house 🡪 Writ of S&S is sufficient authority if property is located in a commercial building. Don’t need a court order to enter – ***Boyce***
* 3rd Parties 🡪 In general, sheriff can seize JD’s property/assets held by 3rd party. If property is in possession of third party, can avoid fraudulence conveyance action by advising the sheriff to seize – ***Boyce***
* Safety deposit boxes 🡪 A writ of seizure and sale is sufficient to get at the contents of a safety deposit box. The court bailiff does not need to obtain a drilling order in addition to the writ. It is not trespassing even if the box is empty – ***Boyce***
 |

|  |
| --- |
| **4) Seizure** |
| **Types of Seizure** | * Can be actual seizure (continuous possession) or walking possession
* Walking possession orders are a valid form of seizure by the sheriff 🡪 Signature will help prove there was a walking possession – ***Modern Car***
 |
| **When are Goods Bound?**s.35(2) LAEA | * Seizure subject to the writ binds the property.
* Goods not bound until seizure has taken place
 |
| **Valid Seizure = Question of Fact** | * Some act must be done by the sheriff to indicate that he intends to seize the property – ***Modern Car***
	+ *Here, S gave card saying S held execution against JD. JD refused to sign walking agreement for caravan.*
* JD’s lack of consent to sign walking possession agreement is not determinative (doesn’t necessarily indicate abandonment) – ***Modern Car***
	+ *Here, the sheriff made frequent visits to the check up on the property (a caravan which could not be moved) indicating that he did not intend to abandon seizure*
 |
| **Physical Possession not Required** | * Sheriff need not take physical possession or have continual presence on premises to seize the property 🡪 he can leave it in JD’s possession – ***Modern Car***
* Won’t be considered abandonment 🡪 abandonment determined by looking at intentions of sheriff based on evidence as a whole
 |
| **Walking Possession Agreement** | * What is it? 🡪 K indicating that JD acknowledges that the sheriff showed up to seize the property, but if sheriff leaves, he hasn’t abandoned the asset, he’s coming back for it later
* Walking possession orders are a valid form of seizure by the sheriff – ***Modern Cars***
* Signature will help prove there was a walking possession but failure to sign is not fatal – ***Modern Cars***
* Sheriff often makes a “bargain” with JD to enter into an installment plan 🡪 I won’t seize if you promise to pay certain amounts by certain dates.
 |
| **Crown Immunity** | * Crown property (includes leased property) is immune from seizure and sale. If counsel tries to get a writ of seizure and sale for Crown property, they may end up being personally liable for costs – ***Cybulski***
	+ *Here, counsel of JC got writ of S&S for Canada Post trucks*
 |
| **If Seized Property is Transferred** | * At the moment of seizure, sheriff has “special property” in the goods seized 🡪 can seize the goods if they are transferred to a 3rd party – ***Modern Cars***
* Sheriff can seize from 3rd party 🡪 The JD can validly transfer the property to a BFPV, but the transfer of title from JD to BFPV is subject to the sheriff’s right to seize the property (he has priority over BFPV) – ***Modern Cars***
 |
| **5) Sale** |
| **How?** | * Sheriff must sell by public auction or tender (private sale)
* In BC, practice is public auction. Needs to be within a reasonable time and for a reasonable price
* Public auction tends to depreciate the price, but more likely to stand up to challenge that sheriff failed to get an “adequate price”
* If the property has an expiry date, there are exigencies
 |
| **If Sheriff Can’t Sell** | * He can withdraw the item from sale
* Writ of Venditioni exponas: directed to sell at any price he can get
* R. 42(26) ask court for direction
 |
| **6) Payment** |
| **Order of Payment** | * *Creditor Assistance Act* 🡪 payment is pro rata between JCs
* CL 🡪 Pay creditors in order that writs were delivered
 |

|  |
| --- |
| **Goods, Chattels and Effects** |
| **What is Exigible**s.55 | * All goods, chattels, and effects of a judgment debtor are exigible under a writ of seizure and sale subject to exemptions in sections 70 through 79.
* “Goods, chattels, and effects” are not defined in the statue 🡪 Looks to the case law below
* Does not include land – **s.56**
 |
| **Non-Tangible Property?** | * Goods, chattels and effects are limited to tangible property – ***Bank of BC***
	+ *Here, JC attempted to execute against RRSP.*
 |
| **Shares?** | * Narrow view (generally accepted) 🡪 Not tangible so they don’t fall within s.55 – ***Bank of BC***
	+ Exigible under s.58 though! See below!
	+ Overrules *A&W*.
* Broad view (anomaly) 🡪 Exigible. S.55 reaches all JD property – ***A&W***
	+ *Here, court held that RRSP could be garnished. RRSPs now exempt though under s.71.3*
 |
| **Intellectual Property?** | * Intellectual property (TM, patents etc.) cannot be seized under s. 55 of the COEA (incorporeal/intangible property cannot be seized) – ***Mortil***
* Physical property holding the IP can be seized though but may be subject to safeguards/terms – ***Mortil***
	+ *Here, sheriff seized JDs software (copy of computer program) under writ. The physical computer software could be seized but safeguards were put in place to safeguard the IP of the software 🡪 software’s sale was subject to requirement that purchaser enter into a trust agreement with the D concerning non-disclosure and prohibition of unauthorized use (similar to terms of licensing agreement)*
 |
| **Resource Interests**s.57 | * The following interests can be seized and sold 🡪 mineral title / license, permit, lease as defined in Coal Act, Petroleum and Gas Act or Geothermal Resource Act / any property/machinery/equipment/material placed on the location of the above
 |
| **Equitable Interest**s.62 | * Sheriff may seize and sell the interest or equity of redemption in any goods or chattels of the execution debtor
 |
| **Money and Securities for Money** |
| **Exigible?** **+** **Process** | * Money / bank notes /any cheques / bills of exchange / promissory notes / bonds / specialties or other securities for money can be seized by a sheriff – **s.58**
	+ \*EE: could possibly extend to gift cards and pre-paid cards. Broad interpretation maybe even licenses etc.
	+ Doesn’t include debts 🡪 use garnishment instead
* For cheques and promissory notes, once time of payment arrives, sheriff can sue in his name for recovery of the sums – **s.58**
* Payment to sheriff by party that is liable is a valid discharge – **s.59**
* Sheriff must pay money recovered to execution creditor and surplus goes to execution debtor – **s.60**
 |
| **Life Insurance** | * A *paid up* life insurance policy is ‘other’ security for money 🡪 exigible – ***Nisbet***
	+ *Canadian Mutual Loan Investment company was assigned a paid up life insurance policy as collateral AND was a JC. Would have been exigible if held by the JD*
 |
| **Bearer Shares** **/** **‘Street Certificates’** | * It does not matter where the corporation that issued the bearer shares is located, as long as bearer share is located in BC, and not held in court 🡪 treated as money – ***Patmore***
	+ *Here, shares were given to bank as collateral security for his indebtedness 🡪 treated the paper as the asset*
* ‘Bearer shares’ can be seized and sold *under s.58* as if they are the equivalent of money so long as they are found in the owner’s home/office/bank/elsewhere [just cannot be in the possession of the court] – ***Patmore***
 |
| **RRSP** | * RRSPs fall within s.58 and are exigible – ***Bank of BC***
* Doesn’t matter now because RRSPs have statutory immunity under s.71.3 🡪 Use if you want to interpret liberally
 |
| **Cheques** | * Cannot be seized until they are the property of the JD 🡪 what constitutes actual delivery is less certain. Mailbox? Physical receipt?
* Can’t intercept postman though and inspect mail
* Some cheques may have immunity such as some social welfare cheques, pension etc.
 |
| **Shares** |
| **Share Statutes** | * Shares with transfer restrictions 🡪 ***COEA***
* Publicly traded shares 🡪 ***Securities Transfer Act***
* Must be BC Corporation to use the COEA / exception for bearer shares though (see ***Patmore***)
 |
| **Share Location** | * Has to be a BC Corporation to use COEA provisions relating to transfer restrictions
 |
| **Share Seizure** | * JD’s interest in securities may be seized by the sheriff in accordance with sections 47 to 51 of the Securities Transfer Act. – **COEA s.63.1(2)**
* Certificated security seizure 🡪 Seizure of interest in security certificate requires actual seizure of the security certificate – **Securities Transfer Act s.48(1)**
* If the issuer is in possession 🡪 then sheriff can seize by serving notice on issuer’s chief executive office – **STA s.48(2)**
* Uncertificated security seizure 🡪 must be seized by serving notice on issuer at chief executive office – **STA s.49**
* Security Entitlement 🡪 interest of JD can be seized by serving notice on securities intermediary where JD’s account is maintained – **STA s.50**
 |
| **Share Sale** | * Sheriff can sell seized shares – **COEA s.64.1**
* Transfer restrictions 🡪 Sheriff is bound by transfer restrictions but may be able to redeem the seized security for a predetermined price / formula if entitled **– COEA s.65.1**
* Transfer restriction intended to defeat… 🡪 If court finds that transfer restriction was intended to defeat,hinder, delay or defraud creditors or others, the court may make any order that the court considers appropriate regarding the seized security including sale **– COEA s.65.1**
 |
| **Secured Parties**s.51 STA | * Sheriff can seize the interest of a judgment debtor in:
	1. An uncertificated security registered in the name of a secured party
	2. A certificated security that is in the possession of a secured party
* But must serve a notice of seizure on the secured party
 |

### 3. Judgments Acts, 1838 and 1840, Charging Order

|  |
| --- |
| **Judgments Acts, 1838 and 1840** |
| **What is it?** | * Where JD owns/has equitable interest in "any government stock, funds, or annuities, or any stock or shares of or in any public company in England [probably includes BC] in his name or in trust", JC can apply to court to order assets stand *charged* with payment of the JC
* Not seized, they are charged
 |
| **Process** | * Application is ex parte
* If court exercises discretion a charging order *nisi* issued 🡪 Six month waiting period and JD can show cause as to why bonds/shares should not be sold to satisfy the judgment debt (e.g. big inheritance coming soon etc.)
* If no cause is shown then move on to new application and order absolute can be issued
* Court can then make an order for sale 🡪 JC entitled to full proceeds
* If no order absolute then discharge
* \*EE: much more cumbersome method than Securities Transfer Act (see page above)
 |
| **Available?** | * When? 🡪 Only available post-judgment / must be JC
* Which Companies? 🡪 Judgments Acts charging orders are available for BC companies as well as non-BC companies with a sufficient presence in BC and where the shares can be dealt with effectively (including a federally incorporated company that has a head office and share office in BC) – ***Consumer Imaginet***
 |
| **Why Use?** | * Makes JC a secured creditor once assets are charged
* JC gets full proceeds 🡪 Don’t have to share with other creditors like under the *Creditor Assistance Act*
* Need not seize the actual share certificates
* Can seize government bonds
 |

## B. Real Property: Court Order Enforcement Act, Part 5

|  |
| --- |
| **Real Property** |
| **“Land”**s.81 | * Includes:
	+ Every estate, right, title and interest in land,
	+ All real property, both legal and equitable, and any contingent or future interest in it
	+ Includes interests of mortgagor and mortgagee, vendor and purchaser, joint tenants
* Exemption 🡪 unsurveyed or unregistered Crown land – **s.86(8)**
 |
| **Beneficial Interests Registrable** | * If a JC has knowledge that the JD is the beneficial owner of an estate or interest in land that is not registered, the JC can apply to register the judgment against the beneficial estate or interest in the land affected – **s.86(9)**
 |
| **No Writ**s.80 | * A writ of elegit or writ of fieri facias de terris must not be issued in British Columbia
* Reason 🡪 we have a land title system with LTO + registration
 |
| **3 Steps** | 1. Registration
2. Enforcement
3. Sale
 |
| **No Preconditions****To Use This** | * There are no preconditions or requirements that state that judgment debtors have to register against other properties or use other remedies before registering against land – ***Schiava***
* If the JD objects to the selling of his lands he should sell personal assets to pay the judgment and stop the sale – ***Schiava***
 |
| **Procedure****For Registration** | * Starting point 🡪 JC may register judgment immediately in any BC LTO against any and all land in which JD has title and the judgment forms a lien and charge on the land of the JD from the time of registration – **s.86**
 |
| * Subject to rights of BPFV prior to registration of judgment **s.86(3)**
	+ Register ASAP to get priority (as in ***Fulthorp***)
	+ *Here, (1) BMO gets judgment (2) JD enters into K to sell to Fullthorp (interest created) (3) BMO registers (4) title transfers to Fulthorp who didn’t check registry 🡪 Fulthorp took interest prior to J; BMO is SOL*
 |
| * If beneficial interest 🡪 get to the extent of the beneficial interest – **s.86(3)**
* If beneficial interest enlarges 🡪 If JC has registered against a particular interest and the JD’s interest enlarges, JC’s registered interest automatically enlarges with it – **s.86(5)**
* If JD has unregistered beneficial interest 🡪 If JC has knowledge of unregistered BI, can submit proof to registrar and apply to register against it – **s.86(9)**
 |
| * Application to register judgment 🡪 Deliver certificate of judgment to registrar, sealed and signed by the court in which the judgment was obtained – **s.88**
* Notice 🡪 Registrar then sends notice to owner/JD – **s.89**
 |
| * Registered judgment survives sale of land to 3rd parties – ***Jacques***
	+ JD can’t just sell property without regard to registered judgment and deprive JC of remedy.
	+ Purchaser must take property subject to the judgment (purchaser here had full notice anyways because it was registered – deemed knowledge!)
	+ Purchaser may have action against JD though if promised free and clear title
	+ *Here, BMO held mortgage + next registered charge (judgment in favour of bank). JD sold interest to 3rd party, BMO receives money as a result, clears the mortgage, but not the J. Registrar made order cancelling the J interest of BMO thinking there was no interest left but this was incorrect.*
* Joint tenancy 🡪 Registration of judgment does not sever joint tenancy. Only a sale does. – ***Muntain***
	+ *Here, J registered against Mr. M’s (JD) home (shared with Mrs. M) // JD dies // land transfers to wife through right of survivorship 🡪 registered judgment does not apply, JD’s interest is now gone. If property were sold then CIBC would have been entitled to recover.*
 |
| **Expiry**s.91 | * Registration of judgment expires after 2 years unless an application is made to renew (gives 2 more years)
* You must renew the charge every 2 years or lose priority 🡪 it doesn’t matter if you start sale proceedings; they will not perpetuate the charge – ***Butler Lafarge***
* If you re-register after expiry, your priority does not revive – ***Butler Lafarge***
 |
| **Procedure for Enforcement** | * Show cause hearing 🡪 JC makes motion in SC Chambers calling on JD (or other person with interest) to show cause. JD can then show cause why the land should not be sold to realize the judgment debt – **s.92**
	+ E.g. debt is paid, judgment has expired, sell different property (maybe), value has gone down, matrimonial home etc.
	+ If JD is dead 🡪 must call on those with interest / trustee / other person with legal estate in it
* Inquiry 🡪 If JD fails to show cause why his land shouldn’t be sold, the court *must* order an inquiry. – **s.94**
	+ District registrar must inquire into the following matters:
		- Find out what land is liable to be sold
		- Find out JD’s interest in land
		- What judgments for charge/lien against land and priorities
		- Determine how proceeds are to be distributed
		- Report all findings back to the court
	+ If multiple creditors, the one first taking proceedings is entitled to his costs in priority whether before or after his own 🡪 act fast!
 |
| * Order for sale 🡪 If after s.94 inquiry land is found liable to be sold an order must be made declaring what land or interest is liable to be sold and directing sale of it by the sheriff – **s.96(1)**
* Confirmation hearing 🡪 court may have advertisements published in order to hear from potentially interested persons unknown to the JC. If no one comes forward, land is sold – **s.97**
 |
| * Act is not a complete code 🡪 court retains jurisdiction over conduct of the sale, including orders that sale is subject to judicial approval – ***Wardle***
	+ JD can use this to ensure there is a reserve price or a particular type of sale / prevents sheriff collusion as well
* Court has general discretion to defer 🡪 Not limited to s.96(2) – ***Wardle***
* Deferral of sale of JD’s home 🡪 Court has discretion to defer sale if the land is the JD’s home, subject to terms and conditions of payment **s.96(2)**
	+ Limited to natural persons; won’t apply to corps
	+ Deferral of sale may be more likely if property is *matrimonial home* (seen in ***Muntain***)
	+ Court may *compare the prejudice* to both parties to see if discretion should be exercised (*seen in* ***Pegg*** *where 45yo rancher did not have to sell ranch property to satisfy. He would have to start whole new operation. Prejudice to him outweighs*)
* Conditions 🡪 The Court may impose conditions on the sale of property, including the deferral of its sale (if the property is likely to increase in value) or ordering the sale to be conducted by a real estate agent instead of a court bailiff – ***Topouzis***
	+ *Here, JD wanted to develop the property so that it would be worth more, would be able to fully pay everyone off 🡪 court exercised discretion and allowed sale to be deferred for 4 months so that development permit could be sought*
 |
| **Procedure for Sale** | * Time of sale 🡪 sheriff cannot offer the land for sale until a month from the date of the order – **s.100**
* Notice of sale 🡪 sheriff must give notice of sale before land is offered in the Gazette and advertise in a local newspaper for 7 days preceding sale. Must specify the particular property / names / charges on land / time and place of sale / amount of judgment – **s.101**
* Plaintiff or mortgagee can purchase 🡪 acquires same interest as any other purchaser – **s.103**
* Sheriff can adjourn sale 🡪 if no good offers / no bidders – **s.104**
* Conveyance 🡪 the interest that vests in the purchaser at sale is the same interest the JD had at the registration of the 1st J – doesn’t matter if it’s a later JC conducting the sale – **s.105(2)**
	+ \*EE doesn’t know what this means!
* Proceeds 🡪 are paid to the court registrar less fees/expenses (**s.106**) and then paid into court as if money levied under execution under CAA (**s.110**)
* Distribution 🡪 money received by registrar is distributed to the persons to whom the sheriff would distribute under the *Creditor Assistance Act* (pro rata) – **s.111**
	+ Does not apply to foreclosure proceedings (***Roadburg***) 🡪 if foreclosure, then CAA doesn’t apply and payment is made on the basis of the order of registration on title
 |
| * Purchaser not affected by irregularities even with notice 🡪 as long as not a party to the irregularity, sale is valid – **s.107**
* Proceeding not abated by marriage/death/bankruptcy 🡪 sale of land is not affected for those reasons / purchaser gets absolute title to estate and interest of execution debtor – **s.108**
 |
| **Matrimonial Home** | * Deferral of sale under s.96(2) may be more likely if property is matrimonial home (seen in ***Muntain***)
* COAE is not a complete code 🡪 Court has jurisdiction to supervise sale even though this is not provided for in the statute, including making order that sale is subject to judicial approval. This type of order is most appropriate when a matrimonial home is subject to a sale – ***Wardle***
	+ JD can use this to ensure there is a reserve price or a particular type of sale
 |
| **Foreclosure** | * If foreclosure proceedings instituted, then CAA pro rata distribution doesn’t apply 🡪 payment is made on the basis of the order of registration on title – ***Roadburg***
* So make sure to register your judgment early to have priority!
 |

## C. Equitable Relief

|  |
| --- |
| **1. *Mareva* Injunctions** |
| **Basics** | * Provided for in s.39 of the LAEA, existence in Canada affirmed by SCC in ***Aetna Financial***
* Basically a freezing order 🡪 Defendant’s assets are frozen to prevent them from being removed from the jurisdiction or sold in an attempt to frustrate a potential judgment
* In personam order 🡪 restrains D under threat of contempt of court
* Not a security interest 🡪 D is still owner, secured parties can get the assets
* Can apply to any type of asset
* Can operate anywhere in the world
* P can get a list of assets (ancillary order) worldwide as well
* Terms 🡪 still need to be able to carry on operations, have money to pay lawyer etc.
* If D wants assets unfrozen 🡪 post security
 |
| **When?** | * Can be made anytime 🡪 pre/during/post judgment
 |
| **Specificity**  | * Mareva orders should be precise/specific and not open-ended for amounts/time etc. – ***Tracy***
 |
| **Full and Frank** | * Need full and frank disclosure to get mareva injunction – ***Tracy***
 |
| **Requirements** | 1. The Court (any Canadian common law court) must have jurisdiction. Without jurisdiction, you cannot issue an injunction.
2. The plaintiff must establish a good arguable case (not required for post-judgment)
3. The Court must be persuaded that there is a real risk of a dry judgment (assets disappear)
4. It must be just and convenient 🡪 big one
 |
| 1. **Jurisdiction**
 | * BC courts have the jurisdiction to order worldwide *Mareva* injunctions against defendants within the province because it is an in personam order – ***Mooney 1***
* The less the value of the assets within the jurisdiction, the more likely the court is to grant relief with extra-territorial effect – ***Mooney 1***
 |
| 1. **Good Arguable Case**
 | * Plaintiff needs to establish a good arguable case 🡪 action cannot be frivolous, vexatious, tenuous and not credible – ***Mooney 2***
* Can use either good arguable or prima facie. The difference in words is likely without consequence **–** ***Tracy***
 |
| 1. **Real Risk of Dry Judgment**
 | * A “real risk” must be substantiated, not simply an apprehension arising out of suspicion – ***Mooney 1***
* Can be a risk based on character and present behavior rather than any reason tied to assets – ***Mooney 1***
* No requirement of fraudulent intent – ***Silver Standard***
 |
| 1. **Just and Convenient**
 | * May be granted in all cases in which it appears to the court to be just or convenient – **LAEA s.39**
* The ultimate question is 🡪 whether it is fair and just that the plaintiff should have the right to monitor the movement or expenditure of capital assets by the defendant during the course of proceedings – ***Mooney 2***
 |
| **Factors** | * Third parties 🡪 No rule that mareva injunction cannot be ordered where it would materially and adversely affect an innocent third party – ***Silver Standard***
* If the injunction will result in the defendant being unable to pay a debt incurred to a third party in the ordinary course of business, then the *Mareva* injunction will likely not be in the interests of justice and convenience – ***Silver Standard***
* Courts will be reluctant to interfere with the parties' normal business arrangements, and affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed – ***Silver Standard***
* If mareva injunction would have the effect of putting D out of business then it is likely unfair – ***Aetna***
* Other factors: - ***Davila*** (case where mine was the asset)
	+ Would order put people out of work?
	+ Does asset in question still need to be paid for?
	+ Are there creditors that need to be paid?
	+ Would the asset deteriorate?
	+ Would company become insolvent
* Variations must be just and convenient as well – ***Davila***
 |
| **Worldwide *Mareva* Injunction** | * BC courts have the jurisdiction to order worldwide *Mareva* injunctions against defendants within the province because it is an in personam order – ***Mooney 1***
* Must demonstrate that there are assets located outside of BC which, if dissipated or concealed, would frustrate any judgment obtained against the defendant – ***Mooney 1***
	+ The fewer assets that the defendant has in BC 🡪 the more likely the Court will be to grant the injunction
	+ *Here, Mooney had few assets in BC and there was a real risk he would conceal ex juris assets (he had a history of doing this) – M justified*
* “Exceptional circumstances” must be present to justify a worldwide *Mareva* injunction – ***Mooney 2***
	+ This may be satisfied by the defendant having a foreign residence and having a history of complicated international business dealings
* *Seen in* ***Davila*** *where court ordered worldwide freeze due to real risk that Ps would suffer irreparable harm since the mining operations would have further reduced the value of the mine which was already insufficient to satisfy a potential judgment*
* Court may consider relevant factors such as 🡪 the nature of the transaction giving rise to the cause of action (whether it is local, national, or international) / the risks inherent in that transaction / the residency of the defendant / enforcement rights for judgment creditors in the jurisdiction where the defendant’s assets are located / the amount of the claim / and the history of the defendant’s conduct – ***Mooney 2***
 |
| **Varying an Order** | * Variation itself must be just and convenient – ***Davila***
* The applicant must establish that a significant change in circumstances has occurred since the injunction was granted – ***Davila***
	+ *Here, further evidence emerged after initial mareva injunction as to the value of the mine being frozen and the detrimental effect that mining operations were having on the value of it. Global mareva injunction was issued to account for this.*
* Has the D’s actions significantly diminished the value of the asset? – ***Davila***
	+ *Here, D was allowed to operate mine at de minimis level in ordinary course of business but P alleges that they had increased production. Question is not whether ‘de minimis’ or ‘ordinary course of busienss’, just whether value has been significantly diminished. Here value was being diminished but order not granted to shut down operations entirely based on balance of convenience*
* Variation itself must be just and convenient – ***Davila***
* Can also apply to dissolve order
 |
| **3rd Parties** | * Are bound by the injunction the minute it is made and can be found in contempt of court as well
* Can’t be in contempt of it until notified of existence
* No rule that mareva injunction cannot be ordered where it would materially and adversely affect an innocent third party but harm to third party’s interests will still be considered – ***Silver Standard***
 |
| **Differences Between *Mareva* Order and PJGO** (*Silver Standard)* |
| **Mareva Injunction** | **Both** | **Pre-judgment Garnishing Order** |
| * Broad but vague
* Assets frozen / no proprietary claim (relying on D to comply with order / not very secure)
* Equitable remedy 🡪 no statutory authority (mentioned in *Law and Equity Act* but, comes from equity).
* *In personem*: available for property anywhere in the world
* Available for any claim (debt, damages, etc.)
* Does require P to establish something about D’s state of mind
* Allows you to apply for an ancillary order for both local and world-wide assets.
* Rare that it will be unconditional (will have a time limit)
 | * *Ex parte* first step
* Required to be a local action
 | * Narrower but surer
* Money gets paid into court 🡪 very secure
* CL remedy 🡪 statute *COEA*
* *In rem*: the debt itself is seized
* Limited to debts
* Limited to Ps with liquidated claims
* D’s state of mind / intentions are not a concern
 |

|  |
| --- |
| **2. Equitable Receivers** |
| **Basics** | * S.39 of LAEA provides for equitable receivers, Civil Rules 42(5) and 47 also relevant
* Is available post-judgment and pre-judgment, usually post.
* Anyone can be appointed an equitable receiver 🡪 could be sheriff or accountant for more complex
 |
| **Steps / questions** | 1. The asset must be exigible at CL
2. There must be an impediment to CL execution or there are special circumstances
3. It must be just and convenient in all the circumstances
 |
| **1) Asset Must be Exigible** | * Ask (don’t know which one court will use):
	+ Is this class of asset exigible 🡪 Broadest (favourable to JC)
		- *Seen in* ***A&W*** *where court asked if shares, as a class, were exigible, rather than these particular shares in the RRSP which were not limited to BC companies*
	+ Is this particular asset exigible? 🡪 Middle ground
	+ Is this particular asset exigible right now? 🡪 Narrowest (favourable to JD)
		- *Seen in* ***Fox*** *where funds that were “payable from time to time” (mining rights payments) and thus not “due or accruing due” were not subject to exigible execution.*
* Particulars needed 🡪 Applicant must identify the particulars of assets, cannot just have receiver take in JD’s assets generally – ***Interclaim***
 |
| **2) Impediment to CL Execution** **OR** **Special Circumstances** | * Legal Impediment 🡪 refers to JD’s interest in the property. Useful for joint interests.
	+ *E.g. Beneficial interest in property, S&S hard to do, joint bank account, joint tenancy*
* Practical Impediment 🡪 Could use a legal method but it would be difficult or impractical
	+ *E.g. If JD owes lots of small debts, really impractical to issue numerous GOs, easier to get ER to collect total sum owing to JC*
	+ *In* ***Fox*** *above where timing was an issue, could argue that timing is a practical impediment for garnishment*
 |
| * Special Circumstances 🡪 Even if there is no impediment to legal execution you can show special circumstances exist that should override the impediment requirement and allow appointment of an ER
	+ ***NEC*** – *evidence of fraud, dishonesty, concealing assets, attempts to make oneself judgment proof 🡪 special circumstance was trying to prevent JD from getting away with his property*
 |
| **3) Just and Convenient** | * Convenience factors: 🡪 ***Interclaim***
	1. The amount of the judgment
	2. Cost the receiver vs. the likely return to the JC
	3. The capacity of the JD to hinder legal execution.
 |
| **Statute Barred?** | * Statutes can prohibit equitable receivers from being appointed even if JD is fraudulent – ***Klyne***
	+ *Here, P gets J but JD leaves country and disposed of assets. P tries to get JD’s pension payments going to JD’s wife. Held: statute barred, not just and convenient for wife.*
	+ *\**EE disagrees because (1) ER comes from equity and (2) is this not a legal impediment?
 |
| **Worldwide Allowed?** | * While it’s not impossible to appoint receiver with power to collect property in another jurisdiction, it won’t happen often b/c receiver must be recognized in that jurisdiction as properly appointed. Not likely to get receiver appointed here for worldwide collection of property – ***Interclaim***
 |
| **The Future***Masri* | * Not adopted in Canada 🡪 \*EE: thinks there is no reason why this could not apply in BC
1. Says you *can* get a world-wide equitable receiver, though not in every situation
	* 3 factors must be met 🡪 prejudice to innocent 3rd parties
2. Equitable receivers operate in personam (like mareva), not in rem like garnishing 🡪 therefore there is jurisdiction to appoint an equitable receiver to collect an asset ex juris (same as BC)
3. Equitable receivers may collect *future debts/profits* 🡪 don’t need to be exigible at time! (unlike BC)
* *Mr. Masri brought an action in contract stating that he was entitled to a share of oilfield profits. Action brought in England but Masri not English and oil field not in England. Defendants had the ability to pay but unwilling and avoided. Even though these were not debts due or accruing due, the court allowed the world-wide equitable receiver.*
 |

|  |
| --- |
| **3. Equitable Charging Orders** |
| **Basics** | * Modeled on the *Judgment Acts* charging order (sale of government or public company stock/bond etc.)
* Created as a substitute to appointing an equitable receiver
* Allows JCs to get access to property sitting in court
* Usually post-judgment but *can* still be applied for pre-judgment
 |
| **Requirements** | * Property must be in the possession of the court, court bailiff or an officer of the court
* JD must apply to the court where the assets are actually located
* JD must be presently entitled to property
* Must come with clean hands – ***Millar***
 |
| **Procedure** | 1. If only claimant or JC 🡪 claimant gets paid immediately from funds in court – ***Chima***
	* Satisfy the court that there are no other claims/creditors
2. If other creditors or claims 🡪 follow procedure in the *Judgment Act –* ***Rennison***
	1. Hold the money in court for 6 months
	2. In those 6 months creditors may come forward to establish a claim
	3. After 6 months, the court can make an order for payment
	4. If there are others then you get paid out pro rata
	* *Here, D had evidence of other creditors and wanted to pay his lawyer as well.*
 |
| **Funds with Trustee?** | * Equitable charging orders may be made against funds held in the hands of a trustee where legal execution would be otherwise available (because funds held by trustee cannot be garnished) – ***Accredit***
	+ *Here, funds held by a trustee in bankruptcy*
 |

## D. Federal Court Judgments

|  |
| --- |
| **Federal Court Judgments** |
| **CAA** | * Is not applicable to federal court judgments 🡪 the federal system is not bound by the CAA – ***BC Deputy Sheriff***
	+ *Goods seized and sold under writ from Revenue Canada. Later Royal Bank does the same thing but the goods have already been seized for Revenue Canada. Both want access to proceeds. If the Creditors Assistance Act were applicable to Crown, CB would have retained the proceeds for 30 days.*
* Federal Court judgments governed by CL 🡪 first in time, first in right – ***BC Deputy Sheriff***
	+ Therefore, they do not have to share
* Exception 🡪 where the Crown claims the benefit of a BC statute it is subject to the burdens of the statute – ***Hong Kong Bank of Canada***
	+ *Here, although the Crown did not claim the benefit of the CAA, it used the COEA and has tied its judgment to land so it is subject to the burdens.*
 |
| **Execution Against Goods** | * If JC is executing against goods, timing is very important to compete against federal court creditors (FCs)
* Federal Court does not share with regular creditors – ***BC Deputy Sheriff***
 |
| **Execution Against Land** | * If the Crown or any federal court JC registers the judgment against title to land in BC, then that JC is subject to *pro rata* distribution pursuant to the *CAA* – ***Hong Kong Bank of Canada***
* If the federal court judgment creditor wants to avoid *pro rata* distribution, they can get a federal court writ against land – ***Hong Kong Bank of Canada***
 |

# Part III. Reviewable Transactions

|  |
| --- |
| **The Fraudulent Conveyance Act** |
| **Basics**s.1 | * The act prohibits dispositions of property with intent to *delay, hinder,* OR *defraud* creditors and others of their just and lawful remedies 🡪 these dispositions will be void and of no effect
	+ Actus reus 🡪 disposition of property that is currently exigible in the province (assign, give, charge, etc.)
	+ Mens rea 🡪 intent to delay, hinder or defraud creditors
* Look for defendant anticipating a judgment against them and taking action
 |
| **Exception**s.2 | * Bona fide purchaser for value without notice 🡪 This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud
* Value ≠ fair market value. Only need good consideration – ***Stanwood***
* If transfer to family member, can consider natural love and affection – ***Stanwood***
 |
| **Legitimate Transaction +** **Delay / Hindered** | * A legitimate transaction can still delay/hinder 🡪 Where the transfer leaves the asset technically exigible, but very difficult to execute against, the transfer may still be set aside – ***Stanwood***
	+ *Chans have judgment against Standwoods. Stanwoods consult lawyer who wrote about family holding companies and advises them that unsecured creditors cannot insist that the debtors preserve assets in a particular form. Stanwoods transfer all assets to two private holding companies and place transfer restrictions on shares, making it more difficult for Chans to execute against them (delayed and hindered) and realize on value (case is pre-Securities Transfer Act)*
 |
| **Proving Intent** | * Plaintiff must show 🡪 The only intent necessary to void a transaction under the FCA is the intent to put one’s assets out of reach of one’s creditors (***First Boston***). *Mala fides* need not be established on the part of the transferor (***Abakhan***)
* Intent cannot be inferred from the effect of the transfer – ***Maudsley***
	+ *Here, deceased GF transferred everything to children and BF tries to attack the transfer and will. Although the conveyance had the effect of making bf unable to get at property, intent was not that – intent was to gift to her children and also keep it out of reach of kids’ spouses (in case of divorce)*
* How/When? 🡪 Intent must be established at the time of disposition on BOP
* If near relative then collusion is assumed 🡪 Burden shifts when there is a transfer to a near relative – ***Solomon***
* May have to go to trial to determine intent if conflicting evidence / may require witnesses 🡪 summary trial on affidavit evidence not always possible – ***First Boston***
* If intent established 🡪 gives rise to a rebuttable presumption – ***Maudsley***
 |
| **Intent of Other Party Required?****/****Double Intent** | 1. Where a conveyance is made upon valuable consideration 🡪 it is necessary to show the fraudulent intent of both parties (double intent) ***– Stanwood***
	* Valuable consideration 🡪 does not include nominal or inadequate consideration – ***Stanwood***
2. Where conveyance is voluntary or consideration is nominal/inadequate 🡪 it is only necessary to show the fraudulent intent of the maker of it – ***Stanwood***
 |
| * Double intent 🡪 There must be some level of knowledge or collusion on the part of the transferee – ***Solomon***
	+ *Here, Mr. S conveyed all assets to Mrs. C (BPFV) to get around spousal support payments to wife. Admits to fraudulent intent but wife couldn’t show intent by Mrs. C, nor could she prove relationship went beyond landlord tenant 🡪 insufficient circumstantial evidence*
 |
| **Badges of Fraud***Solomon* | * Look for circumstantial evidence of intent:
	+ Transaction was secret
	+ Generality of conveyances (all or substantially all of the transferor’s assets have been conveyed)
	+ Continuance in possession by transferor after conveyance
	+ Some benefit retained under the settlement to the settlor
	+ Gross excess of value of property over price paid
	+ Cash instead of cheque payment
	+ Deed contained a self-serving and unusual provision
	+ Deed gave power to revoke the conveyance
	+ Close relationship between the parties to the conveyance
	+ Deed contains false statements as to the consideration
 |
| **Indications of Fraud for Double Intent***Solomon* | * Knowledge of the likelihood of a successful action by the plaintiff against the transferor.
* Unusual haste in closing.
* No immediate or early change of possession following conveyance.
* Joint possession by transferor and transferee.
* Relationship between parties to the conveyance.
 |
| **“and others”***Maudsley* | * Generally 🡪 creditors who come into existence after disposition of the property
* Persons who do not have debts owing to them but who do have just claims that have not yet been brought to fruition in the legal process
	+ May include anyone who has a legal or equitable claim at the time of the transfer
	+ Creditors who can establish that the conveyance was intended to defeat an anticipated but not yet extant debt / a judgment debt arising from a yet‐to‐be litigated claim
* Debatable 🡪 Creditors whose claims arise from a speculative venture embarked upon by the debtor immediately before or after having executed the transfer under challenge
* IS NOT 🡪 *any* person other than creditors
* Moral claims do not give rise to an action
 |
| **“creditors and others”** | * Includes future creditors (those who were not creditors at time of disposition) – ***Boukalis***
* Includes unsecured creditors – ***Boukalis***
 |
| **Corporate Veil**  | * Can be pierced for FCA actions – ***Stanwood***
	+ *Stanwoods’ intent was that of the corporation*
 |

# Part IV. Exemptions, Immunities and Priorities

|  |
| --- |
| **The Partial Abolition of Priority: *The* *CAA*** |
| **Basics** | * Common law rule was first in time, first in right 🡪 CAA modifies by partially abolishing priorities among unsecured creditors
* The *CAA* applies where 🡪 the sheriff seizes personal property and sells it and if land is sold pursuant to the act
* No rehabilitation / forgiveness of debt
 |
| **No Priority** | * There is no priority among execution creditors in the Supreme Court or the Provincial Court – **s.46**
 |
| **Operation** | 1. JC gets a writ and delivers it to the sheriff. Sheriff seizes.
2. After seizure, other creditors can come forward up until 2 days before sale by sheriff 🡪 Get certificate
3. Debtor can make payment before sale.
	* If JC paid in full then no s.2.
	* If partial payment then that amount is applied to the execution and s.2 does not apply to that amount
4. Sheriff sells seized items if debt is not satisfied and makes entry in his book 🡪 Levy
5. Once the sheriff has made an entry in his book he holds that amount for 30 days.
6. Within this 30 day period more writs/certificates can be delivered and sheriff can continue to seize and sell property
7. At the end of the 30 days he distributes the entire amount pro rata to the JCs who have delivered writs or certificates.
 |
| **Sheriff + The Levy** |
| **Entry Into Book**s.2 | * When a sheriff levies money on an execution against the property of a debtor, the sheriff must enter promptly in a book a notice stating that the levy has been made, its amount and the date of the entry
 |
| **Distribution + Times**s.3 | * The money collected by the sheriff must be distributed rateably among all execution creditors (S&S writs) and other creditors (s.6 “others”) whose writs or certificates were in the sheriff's hands at the time of the levy, or within one month from the entry of notice
	+ ***Benjamin Moore*** 🡪 *In January, sheriff seizes a debt (can’t do this in BC). March and April, other writs are delivered to the sheriff. In May, receives money that has been garnished. As a result, the Sheriff did not complete the levy until May. All creditors who had executions filed in his hands within 1 month after May 7 are entitled to receive their pro rata share on distribution.*
 |
| **If Sheriff Receives More Claims** | * On receiving certificate, S must make a further seizure of D’s goods and chattels, if any, to cover amount certified + S’s fees – **s.12**
 |
| **“Levy”** | * Levy = to collect or obtain moneys as a result of seizure – ***Benjamin Moore***
* There is no levy until the sheriff actually has the money in hand from the seizure 🡪 it is not when the summons is served or seizure is made – ***Benjamin Moore***
	+ *See facts above*
* Voluntary payment after seizure qualifies as well
 |
| **Distribution if Amount Levied Insufficient**  | * If the money is insufficient to pay all claims in full, the sheriff may – **s.38**
	1. Distribute promptly, OR
	2. Prepare a plan for distribution 🡪 creditors/debtor can examine
* Objections to be made within 8 days of sheriff delivering his plan to creditors/debtors. **– s.39**
	1. If no objection 🡪 Distribute promptly
	2. If objection made 🡪 sheriff can distribute to creditors in as much as it doesn’t interfere with the objection
	3. Sheriff may disregard frivolous objections / objections clearly insufficient to interfere with distribution
 |
| **Who Can Use?** |
| **Claimants**s.6 + s.37 | * To be entitled to distribution, creditor must be
	1. JC’s 🡪 An execution creditor (S&S writs) or
	2. Certificate holders 🡪 Have established a claim under the CAA
 |
| **“Other Creditors”** | * Those who are not yet JC’s 🡪 can get a certificate under **s.11**
* If debt remains unsatisfied after seizure, other creditors may make a claim up until 2 days before the time set for sale by the sheriff – **s.6**
 |
| **Certificate Holders** | * Certificate holder may have a writ of execution issued in same manner as an ordinary judgment – **s.18**
* On receiving certificate, S must make a further seizure of D’s goods and chattels, if any, to cover amount certified + S’s fees – **s.12**
 |
| **Miscellaneous** |
| **Certificate Time Limits** | * A certificate remains in force for 3 years 🡪 can also be renewed – **s.13**
 |
| **Additional Time for Debtor** | * Court may allow further time to pay upon application and if court believes it will not result in injustice to the creditor – **s.22**
* No claim can be delayed for more than 3 months though this does not apply to JC’s
 |
| **Debtor/Creditor Can Contest** | * The claim may be contested by the debtor or by a creditor interested in contesting it – **s.14**
 |
| **Attaching Orders****/****Garnishment**s.34 | * A sheriff may garnish if:
	1. there are several executions and claims AND
	2. there do not appear to be sufficient goods to pay them all and the sheriff's own fees
* Shared 🡪 Any creditor who attaches a debt does so for the creditor and all creditors entitled under this Act
 |
| * The CAA does not apply to PJGO because CAA requires levy 🡪 garnishing proceeds will be shared though if other creditors have given writs to the sheriff at time garnishing order is served – ***Tan***
	+ *Tan has a prejudgment garnishing order. Gets judgment and there are no other JCs (at the time the summons was served, though there were when the money was paid into court). Tan applies under part 1 of the COEA for payment out of that money. D objects and says it should go to the sheriff or other creditors. Held: Nope*
* Practically 🡪 get GO before writs delivered to sheriff and execution
 |
| **Employee Wages** | * Director of employment standards have priority for first 3 months wages then share pro rata for the rest of the amount – ***MacMillan Bloedel***
* Director of employment standards has priority even if doesn’t issue writ within 30 days as required 🡪 ESA creates lien that has priority under s.87(3) – ***MacMillan Bloedel***
 |
| **Equitable Execution** | * CAA does not capture money by way of equitable execution
 |
| **Foreclosure Proceedings** | * If foreclosure proceedings instituted, then CAA pro rata distribution doesn’t apply 🡪 payment is made on the basis of the order of registration on title – ***Roadburg***
* So make sure to register your judgment early to have priority!
 |

|  |
| --- |
| **Debtors With Special Rights** |
| **Exemptions Under the COEA** |
| **Purpose** | * Provides certain protections to D and D’s family
 |
| **Valid Against** | * Both legal writs and equitable execution 🡪 law or equity
 |
| **Salary and Wages** | * Immune against PJGO
* 70% of any wages due by an employer to an employee is exempt from seizure or attachment under a garnishing order but the exempt amount must not be less than: – **s.3(5)**
	1. If no dependents 🡪 $100
	2. If dependents 🡪 $200
* 5(a) and (b) don’t apply if debt is for board and lodging – **s.3(6)**
* If wages seized under alimony, support, maintenance, separation agreement etc. 🡪 the exemption allowed to that person is 50% of any wages due if the wages due do not exceed $600 per month and 33 1/3% for wages in excess of  $600 per month but the amount of the exemption allowed under this subsection must not be less than $100 per month – **s.3(7)**
* A debtor or creditor who has used s.3 can apply to the court for an increase or reduction of the amount of exemption allowed under s.3 **– s.4**
 |
| **Limitation Period** | * Exemptions aren’t absolute 🡪 Must follow COEA and claim exemptions within 2 days of seizure or notice of seizure – ***Re Lee and Rathsburg***
* A debtor whose personal property has been seized may 🡪 within 2 days after the seizure or notice of it, whichever is later, select goods and chattels from the personal property seized, not exceeding in value the exemption under section 71(1) – **s.73(2)**
 |
| **“Debtor”**s.70 | * Includes any member of the debtor’s household if debtor is absent (not limited to family) + personal representative if debtor is dead
 |
| **Personal Property Exemption**s.71 | * The following goods and chattels of a debtor, at the option of the debtor, are exempt from forced seizure or sale by any process at law or in equity:
1. necessary clothing of the debtor and the debtor's dependents;
2. household furnishings and appliances that are of a value not exceeding a prescribed amount; 🡪 $4,000
3. one motor vehicle that is of a value not exceeding a prescribed amount; 🡪 $5,000 for non-FMA debtor, $2,000 if FMA debtor
4. tools and other personal property of the debtor that are used by the debtor to earn income from the debtor's occupation; 🡪 $10,000
5. medical and dental aids that are required by the debtor and the debtor's dependents;
6. any personal property prescribed by the regulations that is of a value not exceeding a prescribed amount.
* Exception 🡪 Does not apply to corporate debtor
 |
| **Principal Residence** s.71.1 | * The principal residence of a debtor is exempt from *forced* seizure or sale by any process at law or in equity if the value of the debtor's equity in the principal residence does not exceed a prescribed amount. 🡪 $12,000 for Vancouver, $9,000 for outside Vancouver
	+ Exception 🡪 does not apply to corporate debtor or for mortgage matter
	+ Remember! 🡪 s.96(2) may still apply, court can exercise discretion to defer the sale
* Broad interpretation of s.71.1 and the meaning of “forced” 🡪 JD can claim this exemption even if not involuntary sale within meaning of COEA (JD conducts their own sale (voluntary*ish*) rather than have bank/sheriff sell it (forced/involuntary)) – ***Nguyen***
	+ *RBC commences foreclosure proceedings and register judgment against title to the Nguyen’s property / Nguyen’s figure that they can get a better price than the foreclosure // sell the property with the bank’s approval // They deduct $24 000 from the proceeds of the sale pursuant to section 71.1. RB says, voluntary sale OR foreclosure sale and they get all. Nguyen’s say sale under COEA. Held: JD can still claim the exemption. Not a true voluntary sale.*
 |
| **Property Exceeding Exempted Values**s.71.2 | * If the value of the property referred to in section 71 or 71.1 exceeds the prescribed amount of the exemption for the property, that property is subject to seizure and sale under this Act.
* If the above property is sold then proceeds are distributed:
	+ First 🡪 to secured creditor the amount owed
	+ Second 🡪 to the debtor an amount not exceeding the prescribed amount of the exemption
* However, courts will give broad interpretation of value of exemption as these provisions are designed to protect debtors – ***Atwal***
	+ *Here, value of car was $5,800 but exemption only for $5,000. Court lets it slide.*
 |
| **Registered Plans** **(like RRSPs)**s.71.3 | * Registered plans are *prima facie* exempt from any enforcement process.
* Exceptions:
	+ Property contributed to a registered plan after or within 12 months before the date on which the debt being enforced came due,
	+ Property that has been or is being paid out of a registered plan,
	+ An enforcement process that is being effected in support of the enforcement of a maintenance order as defined in the *Family Maintenance Enforcement Act*, or
	+ An enforcement process initiated against a registered plan before November 1, 2008.
 |
| **Art**s.72 | * Works of art or other objects of cultural or historical significance brought into British Columbia for temporary public exhibit are exempt from seizure or sale under any process at law or in equity.
* Exceptions:
	+ Execution on a judgment respecting a contract for the transportation or warehousing or exhibition in British Columbia of the work or object, or
	+ A work or object that is offered for sale.
 |
| **Procedure** | * Sheriff must allow debtor to select goods and chattels from personal property seized, not exceeding in value the exemption under s.71 – **s.73(1)**
* A debtor whose personal property has been seized may 🡪 within 2 days after the seizure or notice of it, whichever is later, select goods and chattels from the personal property seized, not exceeding in value the exemption under section 71(1) – **s.73(2)**
* If sheriff thinks value of goods exceeds max exemption allowable 🡪 then must give written notice within 1 day and call an appraiser to sort it out if parties cannot agree on exempt items – **s.74**
* If goods exceed in value the exempt amount 🡪 then appraiser appraises as much of the claimed goods as will not exceed the exemption and those are the exempt goods **– s.75**
* Debtor may appeal decision of the appraiser or an act of the sheriff **– s.78**
 |
| **Misc. Exceptions** |
| **Insurance Act** | * Life insurance (and only life insurance) does not form part of estate of the insured 🡪 protected from claims of creditors – **s.65(1)**
* While a designation in favour of a spouse, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the insurance money and the rights and interests of the insured in it and in the contract are exempt from execution or seizure. – **s.65(2)**
* \*If beneficiary is receiving insurance money, that is exigible by the creditors of the beneficiary
 |
| **Workers Compensation Act** | * Sum payable as compensation is immune – **s.15**
* Let’s the government claim the money but no one else.
 |
| **Crown Proceeding Act** | * Court cannot issue execution or attachment enforcing payment by the government of money or costs – **s.13(6)**
 |
| **Canada Pension Plan** | * Benefits cannot be charged, attached etc. – **s.65**
* Benefit is exempt from seizure and execution, either in law or equity **– s.65**
 |
| **Old Age Security Act** | * Benefits cannot be charged, attached etc. – **s.36**
* Benefit is exempt from seizure and execution, either in law or equity **– s.36**
 |
| **Indian Act** | * The real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band – **s.89(1)**
* 2 step analysis for determining location: **- *Bastian***
	1. Identify all the potentially relevant factors
	2. Determine what weight they should be given considering:
		+ Purpose of exemption from taxation
		+ Type of property
		+ Nature of taxation of property
 |
| **Crown Liability and Proceedings Act** | * No execution shall issue on a judgment against the Crown (for Crown property) – **s.29**
* BC has similar provision
 |

|  |
| --- |
| **Creditors With Special Rights** |
| **Artisans** | * *Woodworkers Lien Act, Repairers Lien Act, Builders Lien Act* etc.
* The method for protecting artisans is to create a statutory lien with a power to sell
	+ E.g. Repairer would get lien over what they are repairing
* At CL a lien would arise automatically but there wasn’t necessarily a power to sell.
 |
| **Family Creditors** | * Support and maintenance (pecuniary awards)
* In the *Family Maintenance Enforcement Act* we have procedures that the court won’t implement in the *COEA* for other creditors. Also have federal statutes dealing with family creditors
 |
| * **S.8 Searchable information**: authorizes access to records and databanks (ex. Revenue Canada). Can use this to find out where your debtor is.
* **S.14.1 A corporation with only one debtor as shareholder:** renders a corporation liable for the family debtors debts if the family debtor is the sole shareholder (pierces the corporate veil).
* **S. 15 Notice of attachment:** Available only to the director of maintenance enforcement, not to the creditor directly. Provides for continuing attachment orders. Debts that will become due (not just those which are due and accruing due). Authorizes a continuing garnishing order and attachment of joint bank accounts.
* **S. 17 Notice of attachment from outside BC:** Don’t have to get garnishment from outside of the province recognized, can go straight to enforcement and garnish. 🡪 recognition of extra-provincial orders
* **S. 18 Garnishment:** Equivalent of a section 15 continuing garnishing order for the creditor for up to 12 months.
* **S. 25 Can Garnish the Crown:** the Crown waives its immunity from garnishment for a family creditor.
* **S.25.1 Lottery Winnings:** If debtor wins a prize over prescribed amount, lottery corp must deduct the amount owing under the family maintenance order and give it to the director
* **S. 26 Registration in land title office:** non-expiring.
* **S.26.1** **Priority with respect to personal property:** Priority for the total amount over any other claim registered and perfected SI *after the lien is created* even though part of that is for arrears due after perfection/registration
	+ Does not have priority over wages due to workers by their employers
* **S. 28 Priority over other judgment debts:** Gives priority to family judgments. Takes priority over any other unsecured judgment debt regardless of when an enforcement process is issued or served. Limited to arrears of maintenance owing for up to one year. They are given priority over all other JCs for up to one year’s arrears; for all the other years they share pro rata. Rank equally with other family creditors but before all others.
* **S. 29 Appointment of receiver:** Perhaps as broad as *Masri*. May appoint a receiver for *any* property of the debtor (regardless of whether it was exigible at law or not).
* **S. 29.1 Debtor’s licenses and number plates:** ICBC can refuse to license you. Can lose all federal licenses as well.
* **S. 31 Arrest of absconding debtor:** Authorizes the arrest of an absconding debtor (threatens to leave province)
 |
| **Employees***Employment Standards Act*s.87 | * Creates lien 🡪 (1) Unpaid wages constitute a lien, charge and secured debt in favour of the director, dating from the time the wages were earned, against all the real and personal property of the employer including money due or accruing due to the employer or other person from any source
* Lien has priority 🡪 (3) The amount of a lien, charge and secured debt referred to in subsections (1) is payable and enforceable in priority over all liens, judgments, charges and security interests or any other claims or rights, including the claims by the government, claims from contract, accounts, insurance or sale of goods, and PPSA SI
 |

# Part V. Builder’s Liens

|  |
| --- |
| **The Lien and Holdback Provisions** |
| **Supplements CL** | * Builder will still be able to use CL / sue under contract
 |
| **Requirements** | * Must fall within definitions. Need:
	+ Owner
	+ Improvement
	+ Lien claimant
 |
| **The Owner** |
| **“Owner”**s.1 | * At the time the lien is filed at the LTO, anyone with
	1. A legal or equitable interest in the land on which the improvement is located at whose request AND
	2. On whose credit / on whose behalf / with whose knowledge or consent or / for whose direct benefit
	3. Work is done / material is supplied
* Does not include mortgagee unless mortgagee in possession
 |
| **Holdback** | * Owner must hold back 10% for each contractor for 55 days 🡪 See below
 |
| **Non-Contracting Owner** | * Deemed authorization 🡪 An improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner – **s.3**
* Exception 🡪 does not apply to an improvement made after the owner has filed a notice of interest in the LTO – **s.3**
* Practically 🡪 Non-contracting should file notice with LTO saying they are not involved!
* Used to have to post signs/notices saying you’re not going to be responsible, have them up all the time 🡪 now just make sure you have something at the Land Title Office, and you don’t need to worry if the contractor has kept the appropriate holdback amount – ***Westburne***
	+ *Here, VGH was responsible for lien as the owner even though leased to UBC who had done the improvements/hired contractor/subcontractors etc. because there were no notices posted. This now changed.*
 |
| **Strata Lots***Strata Property Act* | * Builders Lien Act applies to strata lots – **s.86**
* In a phased strata plan a claim of lien under the Builders Lien Act may be filed against only the strata lots in the phase in which the materials were supplied or the work was done – **s.87**
 |
| **Improvement** |
| **“Improvement”** | * Includes just about any work associated with construction site
* Anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it – **s.1**
	+ Also includes any clearing, excavating, digging, drilling, tunneling, filling, grading or ditching of, in, on or under land
 |
| **Improvement?** | * Moulds that were bolted/anchored to a construction shed and were very heavy were considered improvements (attached through bolts or by their own weight) even though potentially impermanent / removable – ***Deal***
* Even if measure of attachment not clear, may still be improvement in their own right – ***Deal***
* Planning an improvement is not an improvement 🡪 construction of the improvement must actually commence – ***Chaston***
	+ *Here, designing a brewpub but did not proceed with construction. No lien for architect/engineers merely for pre-construction planning.*
 |
| **“Material”** | * Movable property that is delivered to the land on which the improvement is located and is intended to become part of the improvement, either directly or in a transformed state, or is consumed or used in the making of the improvement, including equipment rented without an operator – **s.1**
 |
| **Off-Site Improvement** | * If work is being done on improvement off-site, can still file lien against the land – ***Deal***
 |

|  |
| --- |
| **Lien Claimants** |
| **Who?** **/** **What They Get** | * Who? 🡪 A contractor / sub-contractor / worker who in relation to an improvement performs or provides work / supplies materials **– s.2**
* Gets what? 🡪 has a lien for unpaid work and material on the interest of the owner in the improvement / the improvement itself / the land / the materials deliver to the land **– s.2**
* Exclusion 🡪 person who performs or provides work or supplies material to an architect, engineer or material supplier has no lien **– s.2**
* Architects and engineers covered 🡪 perform “services” which falls under “work” and can file a lien so long as improvement is actually commenced – ***BLA*** [see ***Chaston*** above for “commenced” requirement]
* Materials supplier 🡪 a contractor/subcontractor who supplies only material in relation to an improvement + further test: – ***Pacific West***
	1. Must supply material for an improvement
	2. The material delivered to the land on which improvement situated (enough that claimant knows where this is, doesn’t need to actually deliver) AND
	3. Claimant must know, at time of delivery, the project for which the material will be used for and communicate that knowledge to the defendant
* Service providers not included unless directly related to improvement – ***Northern Thunderbird***
	+ *Northern Thunderbird is like an airbus, bringing workers to a mine improvement far north. S.2 not broad enough to cover them*
 |
| **How Lien Arises** | * Through operation of the law 🡪 don’t have to do anything besides work or services
* Lien must be perfected by filing though
* Claimant has to make inquiries as to which project the payment is for, can’t just apply to oldest account – ***JW Price***
	+ *Claimant has multiple projects. Doesn’t ask which project to put payment on to, erroneously applies to the oldest account.*
 |
| **When to File** **/** **Time Limits** | * To file 🡪 Have 45 days to file a lien from: – **s.20**
	1. Date on which the certificate of completion was issued (if issued)
	2. The head contract/improvement has been completed/abandoned/terminated
* Extinguished if not filed within s.20 limits – **s.22**
 |
| * To commence action 🡪 Have 1 year from date of filing to commence action to enforce the lien and to file a certificate of pending litigation at LTO or the lien is extinguished – **s.33**
* Certificate of pending litigation 🡪 must be filed at LTO as well within 1 year of filing lien – **s.33**
* Can get around expiration of time limit using s.4(9) 🡪 which creates an independent lien on the holdback itself (rather than on the land) – ***Shimco*** *…*but the holdback must still exist – ***Wah Fai***
	+ *Wah Fai constricts Shimco to its facts. No holdback existed in the first place so there could be no lien.*
 |
| * Trust Claims 🡪 An action by a beneficiary or against a trustee of a trust created under section 10 must not be commenced later than one year after: – **s.14**
	1. the head contract is completed, abandoned or terminated, or
	2. if the owner did not engage a head contractor, the completion or abandonment of the improvement in respect of which the money over which a trust is claimed became available
 |
| **Takes Effect** **/** **Priority**s.21 | * Takes effect from 🡪 *the time work began* or *the time the first material was supplied* for which the lien is claimed (not date of filing!)🡪 it is retroactive to the date the work began!
	+ So if a was judgment filed *after* work began, lien would still get priority when filed
* It has priority over 🡪 all judgments, executions, attachments and receiving orders recovered, issued or made after that date
 |
| **The Holdback** |
| **How Much**s.4 | * The person primarily responsible *on each* contract / subcontract must retain a holdback equal to 10% of the greater of:
	1. The value of the work / material, and
	2. The amount of any payment made on account of the contract or subcontract price.
* Multiple holdbacks exist! 🡪 Each contract/sub-contract has its own 10% holdback
* S. 4(9) creates an independent lien on the holdback itself (broad interpretation in this case) 🡪 Can get around expiration of time limit using s.4(9) which creates an independent lien on the holdback itself but the holdback must still exist – ***Shimco***and ***Wah Fai***
	+ I.e. Have a separate claim against the holdback even when claims against the land have been extinguished by the effluxion of time.
 |
| **Holdback Account**s.5 | * Owner must establish a separate bank account for each contract 🡪 Cannot be mixed with other monies.
* Lien protects the holdback, cannot be garnished – protected by statute until payout is authorized
 |
| **Holdback Period**s.8 | * Holdback must be kept for 55 days after:
	+ completion certificate issued
	+ the head contract is completed, abandoned or terminated, if the owner engaged a head contractor
	+ the improvement is completed or abandoned but no head contract
 |

|  |
| --- |
| **Discharge of Liens** |
| **By Payment**s.23 | * Owner / contractor / subcontractor pays into court the lesser of (a) the total amount of the claim and (b) the amount of the required holdback
 |
| **By Giving Security**s.24 | * The court may, after considering all relevant circumstances, order the cancellation of the claim of lien on the giving of security satisfactory to the court.
* Security required can be less than the amount of the claim of lien
* Security stands in place of the land and the liens can be ordered to be removed immediately
 |
| **On Application**s.25 | * An owner / contractor / subcontractor / lien claimant may at any time apply to the court / registrar / commissioner and will be discharged if:
	1. Not filed properly or on time under s.22 OR s.33 time limit has expired
	2. Action to enforce has been dismissed + no appeal
	3. Action to enforce discontinued
	4. Claim of lien has been satisfied
 |
| **Sale of Land** | * Court may order sale of land to satisfy claims of lien – **s.31**
 |

|  |
| --- |
| **The Trust Provisions** |
| **Trust Fund**s.10 | * Money received by a contractor / subcontractor constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor / subcontractor
	+ The contractor or subcontractor is the trustee of the fund.
	+ No trust is created if the contract funds remain with the owner 🡪 must be received by contractor/subcontractor – ***Commercial Union Assurance***
 |
| * Contractor / subcontractor cannot use trust money for their own use until all beneficiaries are paid (has to be used only on project for which it was paid – can’t be used on other projects)
	+ However, a head contractor who has paid to a subcontractor the amount properly payable to that subcontractor has discharged his trust obligation 🡪 not responsible if sub-contractor doesn’t pay out their suppliers/subs etc. – ***Mackenzie Redi-Mix***
	+ The moneys received by each subcontractor from the head contractor continue to be, in the hands of the recipients, trust funds – ***Mackenzie Redi-Mix***
 |
| * Exception 🡪 this provision does not apply to architect, engineer or material supplier
 |
| **Principles** | * Only those funds due from the owner to the contractor may be claimed by subcontractors or materialmen below him – ***Commercial Union Assurance***
* Apart from mandatory hold back funds, an owner who completes the work after default is entitled to deduct the full cost of completion from any amount payable to a defaulting contractor or subcontractor even if this leaves subcontractors and materialmen further down the line unpaid – ***Commercial Union Assurance***
 |
| **Limitation Period**s.14 | * An action by a beneficiary must not be commenced later than one year after:
	+ the head contract is completed, abandoned or terminated, or
	+ if the owner did not engage a head contractor, the completion or abandonment of the improvement in respect of which the money over which a trust is claimed became available
 |
| **Priority** | * builder’s lien claimants have priority over garnishing creditors – **s.13**
 |
| **Breach** | * Can sue the corporate contractor and a knowledgeable director of the firm because they also become trustees.
* Spending money on a permit has been argued to be breach of trust
* Can be liable even if accidental/unintentional/innocent breach – ***Farwell***
	+ *Sub-contractor Farwell was paid and put money in general account. He intended to pay suppliers but bank used the money to apply to an outstanding debt. Held: liable as trustee. Even though entirely innocent in not knowing or intending bank action he could have foreseen this would happen. General account was at risk and he exposed the trust money to the risk.*
 |
| **Third Parties: Constructive Trusts** | * Banks usually know that their client is in the construction industry and that the monies flowing through the accounts are construction monies.
* Where the trust money for the improvement has been used for something else, a disappointed lien claimant who has become a trust claimant may sue the (1) contractor, (2) directing mind of the contractor (3) the bank into which the contractor deposited construction money.
* 3rd party liability more likely if 🡪 they act outside the normal course of business / are negligent / have knowledge of financial difficulties / use money for their own self-serving purposes / know there are unpaid builders / know the money being used is trust money – seen in ***Groves-Riffen***
	+ *Groves-Raffin given $234k, 139k of which for a school project. Director Groves deposits chq at BNS, tells them he depositing the money and changing banks. BNS pays outstanding loan, returns balance. Groves takes this to CIBC. Groves withdraws remainder $170k in 1000s, flees to Australia.*
	+ *BNS knew exactly where the money came from, knew it was trust money, was aware of the BLA (or should have been), knew Groves-Raffin was in financial difficulties*
 |