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# PART I. THE JUDGMENT

## INTRODUCTION & REGULATION OF THE DEBT COLLECTION SYSTEM

4 policy concerns:

1. Just debts should be paid. Once a judgment given, the debt is deemed to be just. \*Common Law
2. *Nemo dat* – creditor can realize judgment debt only from an asset(s) that are actually owned by the judgment debtor. Sometimes difficult to determine debtor’s interest in an asset. \*Common Law
3. Should be some protection for the debtor and the debtor’s family. \*Achievable only by statute
4. Should be some form of equitable distribution of debtor’s assets among and between the judgment creditors. \*Achievable only by statute.

Two methods for becoming a judgment creditor, without rigging an action:

1. Appearing where someone has been charged with a criminal offence (covered by *Criminal Code*)
2. Certificate under the *Creditor Assistance Act* (implements ‘equitable distribution’ policy concern)
   1. Provides a process for becoming the equivalent of a judgment creditor without actually commencing a civil action.

1970’s: Legislature took a two-pronged approach to the regulation of debt collection:

1. *Debt Collection Act* (now essentially *BPCPA*)– primarily self-help regulating
2. *Debtor Assistance Act* (still in existence): counselling, debt pooling & debt consolidation (now *BIA*).

Commission found that the regulatory approach is preferable to the prohibition approach. **Regulatory approach is not limited to debt collection agencies, applies to everyone collecting debts (everyone has to comply with Pt. 7).**

If you are a harassed debtor (or know someone who is), there are options available:

1. If a collection agency is harassing, complain to a director of the *BPCPA*. Director has ability to suspend licenses, can but collection agency out of business.
2. Complain to the ombudsperson.
3. Bring an action for damages under the *BPCPA*.
4. Call the media.

***Business Practices and Consumer Protection Act* (BPCPA)**

**s. 113:** Debt collector is a person in BC who is collecting or attempting to collect a debt.

**s. 114** (**lead provision)**

(1) A collector must not communicate or attempt to communicate with a debtor, a member of the debtor’s family or household, a relative, friend or acquaintance of the debtor or their employer in a manner or frequency that constitutes harassment. (2) Specific examples of harassment: (a) coarse language, (b) exerting undue pressure, (c) publishing or threatening to publish a debtor’s failure to pay

**s. 116:** Debt collector must not contact or attempt to contact a debtor at their place of employment

**s. 117:** Debt collector must not communicate with debtor, (& list in 114), *unless the person has given a guarantee*.

**s. 118**: Collector must not communicate in any way with the debtor (& list in 114) on a statutory holiday, Sunday (except between 1-5pm), and on any other day except between the hours of 7 am to 9 pm.

**s.120:** Must not collect or attempt to collect money more than the amount owing, or from someone who is not liable (c) if the person has informed the collector that they are not that person and they continue to contact that person after confirming they are not the debtor.

**Division II of Part 7** - **Debt Pooling:** a process engaged in by debt collection agencies. Debt pooling system an arrangement or procedure under which a debtor pays money to a debt pooler to be distributed or paid by a debt pooler to three or more creditors of the debtor. Not the same as a consolidation order under the *BIA*, not binding on any creditor, doesn’t give the debtor any extra time to pay. Problems with debt pooling:

* Debtor may fail to inform the debt pooler about all the creditors (some creditors may be omitted)
* Debt poolers may charge double fees (to creditor and debtor) – prohibited in s. 126
* Even if debtor lists all creditors to begin with, creditors may pull out as they are not bound.

**Criminal Code**

**s.346:** extortion – anyone who uses threatens, accusations, or violence or attempts to induce any person to do something with intent to obtain anything (doesn’t include threat to institute civil proceedings).

**s.372:** Intent to alarm/injure sends false information is guilty of indictable offence <2 years imprisonment.

## LAWS RELATING TO THE JUDGMENT

### Default Judgments

Where claim s for debt or liquidated damages and debtor ignores court process, default judgment may be entered.

**Creditor’s Perspective:** (1) Preserves creditors rights (limitation periods) (2) access garnishment &seizure/sale & registration against property (3) get judgment interest.

**Debtor’s Perspective:** Judgment debtor can apply to have the default judgment set aside: (1) discretionary – did not wilfully fail to defend, made application to set aside as soon as possible after knowing about default judgment (2) *ex debito justitae/*as of right if procedural defect/failure to comply with rules.

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| ***Bache Halsey Staurt Shields v Charles et al; Dobell, Third Party* (1982) BCSC** |
| D not properly notified by P that they were going to ask for judgment. Judgment set aside – no notice first having been given to D = breach of rules also a judgment without notice. **Under circumstances where he was deprived of his right to be heard** (contrary to rules of natural justice). |

### Limitation Period

**Domestic Judgments:**

**s.7 *Limitation Act*:** In BC,10 years to enforce judgment after becomes enforceable. Four ways in which the 10-year limitation period can be extended:

* **s. 23:** If upon expiration of limitation period, an enforcement process is outstanding the judgment creditor may: (a) continue on unexpired writ of execution **1 year** (b) commence/continue proceedings against land 2 years (c) continue proceedings in which charging order – **equitable remedy no finite time limit.**
* **s. 23(2)** *If a court makes an order staying execution on a judgment, the running of the limitation periods established by this Act for proceedings on that judgment is postponed or suspended for so long as the order staying execution is in force.*
* **s. 24** Confirmation of liability acknowledged.
* Bring an action on the original judgment. Enforcing **judgment debt** created by the court. Very common for actions to be brought on foreign judgments in BC because if creditor wants to enforce foreign judgment, need to convert it to a BC

judgment.

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| ***Young v Verigin* [2007] BCCA –** action on an action (BC judgments) |
| Also permissible to bring an action in BC on a BC judgment. Qualified by possibility of abuse of process by JC – if possible, action will not succeed. Evidentiary burden on defendant. 10 years to enforce original judgment, judgment creditor realizes the life of the judgment is running out – can bring an action on the original judgment. **If successful, judgment creditor gets another ten years.**  \*\*\*In second action, pleading cause of action consisting of judgment debt (debt created by original judgment). |

**Foreign Judgments: s.7(b) *Limitation Act*:** *if the judgment is an extra-provincial judgment, after the earlier of the following: 1. The expiry of time in foreign jurisdiction or 2. The date that is 10 years after the judgment became enforceable in the foreign jurisdiction*. \*\*\*Foreign judgment is every judgment from outside of BC\*\*\*

### Judgments on Judgments

Mostly blanket sovereignty shield - JC must persuade BC courts to recognize and enforce judgment. Three methods for the foreign judgment creditor to get the BC courts to recognize and enforce foreign judgment so they can use BC methods of enforcement **\*\*\*both statutory regimes replace common law with registration, however both regimes are only available for a limited section of judgments\*\*\*:**

1. **Common law - Not Canadian, Non-reciprocating:**.

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| ***De Savoye v Morguard Investments* [1990]- originated in BC –** COMMON LAW TEST |
| **Facts:**  De Savoye’s lived in Alberta, guaranteed mortgage. Everything happened in Alberta, BUT the De Savoye’s moved with all their assets to BC. Mortgage wasn’t getting paid, called on their guarantee – Alberta judgment against the De Savoye’s, took legal advice in BC telling them to not do anything/not participate in Alberta action. Lawyer told them to stay in BC and the Alberta judgment wouldn’t be recognized against them. Morguard Investments tried to get it enforced in BC, BC court said reciprocity – and that they would recognize Alberta judgment. Gets to SCC – decides that it is time to modernize the conflict of laws.  **Analysis:**  Justice LaForest (unanimous): [39] *There should be greater recognition in a Federal system. Provinces ought to recognize each other’s judgments more freely than judgments from outside of Canada*.  **Takeaway:**   1. **Presence: Was the defendant served in Alberta (question of fact)?** 2. **Submission: If the defendant wasn’t served in Alberta, did the defendant in the Alberta action subsequently submit in some way (factual based)?** 3. **Did the cause of action have a real and substantial connection with the Province of Alberta (extremely flexible)? Substantial means ‘non-trivial’.**   In practice, very few foreign judgments that will not be recognized and enforced by a Canadian court. SCC says can use this for judgments outside Canada too.   * Used to assume judgment is pecuniary – but sometimes remedy is injunction and this can now be done in Canada. * Must be on a final decision |

**Defences at Common Law:** these defences are also available under the *Court Order Enforcement Act* BUT NOT under the *Enforcement of Canadian Judgment & Decrees Act.* (1) fraud (2) natural justice (3) public policy

1. ***Court Order Enforcement Act,* Part II: HERE LIMITED TO PECUNIARY -** Limited to presence & submission as the only basis of jurisdiction of the foreign court. Operates by way of reciprocity. If the foreign judgment the foreign creditor is looking to have enforced originates in a reciprocating state, can be registered under this statute. **States in reciprocal agreements:** (1) Canada except QB (2) Australia (3) Washington, Alaska, Oregon, California, Colorado & Idaho (4) UK (5) Austria (6) Germany
2. ***Enforcement of Canadian Judgment & Decrees Act:* NOT LIMITED TO PECUNIARY** If a Canadian judgment, go to this *Act* and register. This statute is not enforced in every province, but in BC you can take full advantage of it – only have to register judgment. Only possible argument the judgment debtor could make is that the other province law is inconsistent with BC’s public policy (difficult to persuade court).

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| ***Gharavi v Khouzani* 2017 BCSC** – Currency conversion |
| **Facts:** Plaintiff wants BCSC to recognize an Iranian judgment for 6 billion Iranian currency units plus interest. Common law.  **Issue:** Because of s.12 of *Currency Act*, Canadian courts generally give judgments in Canadian currency. Can cause windfalls and losses when currency is converted. Common law had fixed conversion date BUT have since abandoned this. In BC, enacted *Foreign Money Conversion Act* –judgment CAN be given in foreign currency (i.e. injunction).  **Court:**  Despite section 12 of the Currency Act saying that a Canadian court needs to give its judgments in Canadian dollars we can, under the Foreign Money Conversion Act, give an order of specific performance in a foreign currency. |

Can use any of these options at any time, assuming the judgment is eligible. In any of these processes – have to persuade BC court (or use legislation) that the judgment obtained elsewhere is one that is really to be recognized. BC prefers to select which judgments it recognizes. Always local rules for selecting which judgments to enforce.

### Stays of Execution

Defendant oriented - Court can set terms – no limits on terms when the court grants a stay/injunction

Stays On Appeal: **S.48(1) *COEA***: *if court orders money be paid, it is to be paid immediately unless court orders otherwise.* **S.48(2)** *court might allow installments or suspend execution for the time it considers proper*.

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| ***Morguard Real Estate Investment Trust v Davidson* [2001] BCCA** |
| **Facts:** Co-defendants want to appeal; tried to get default judgment from trial set aside (didn’t attend or raise a defence). Application to set aside default judgment as discretion and also as of right. Decision to not set aside on appeal. Original judgment was a default judgment from 1999 for $300,000. One defendant in BC and the judgment creditor tried to execute to enforce the judgment against that defendant but that defendant declared bankruptcy. The co-defendant was in Manitoba, the BC judgment creditor registered his judgment against the Manitoba judgment creditor in Manitoba but that judgment/registration was set aside. Co-defendant comes to BC. BCCA has to decide whether or not to stay execution against the judgment debtors pending appeal.  **Court:** relative applicable principle is that set out in *RJR Macdonald v Canada (SCC)* for stay application pending appeal:   1. Is there a serious matter to be tried/is there an arguable case? **Low threshold** 2. Will irreparable harm result from the failure to grant a stay? Look at plaintiff & defendant 3. Balance of convenience: compare what will happen to each party if they do or do not grant a stay.   BCCA declined to order a stay of execution, Mr. Davidson ought to have paid the $300,000 judgment + interest to Morguard Real Estate Investments.  **\*\*\* might apply when defendant appealing is asking for a stay of execution \*\*\*** |

#### General Stay of Execution

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| ***Attorney General v Lau & Lau* [2002] BCSC** |
| **Facts:** application by the Lau’s for a stay of execution (Civil Rules - 13.2 Section 31, authorizes court to stay execution in circumstances in which there is no appeal pending. Rents went up – fought bitterly by residents (including Lau’s), lost in the end but in this case they had to pay back-rent. Lau’s owed around $20,000 in back-rent. If they didn’t pay the back-rent owing they would forfeit their lease. They had no income and no way to pay the back-rent and avoid forfeiture.  **Rule/Reasoning:** Grants the stay of execution; but says no one knows the exact test to determine when a stay of execution should be ordered. Factors: Crown (JC) at no risk, defendants at considerable risk & special circumstances. Crown gets judgment but not entitled to enforce it except that the Crown is entitled to register its judgment against the title/interest that the Lau’s have in the land. Crown essentially getting a secured interest. |
| ***Voth Bros Construction v National Bank of Canada* (1987) BCCA*:*** VOTH ORDER  Plaintiff making an offer to pay money into the court. Compromise between the principle that a defendant ought to pay (***s.48***) and the fact that the defendant won’t want to pay etc. Reiterates the practice and principle decided in 1980. Bank (judgment debtor) is appealing the trial decision and asked for a stay of execution pending appeal. The bank wants to put off paying the two big sums of money unless and until the appellate court has said they really do owe that money. **Voth Bros proposes a *Robitaille/Voth Order* under which the bank would be required to pay the full amount of the judgment into court.** The successful plaintiff/judgment creditor can use that money as needed (can avoid bankruptcy etc) provided that the use is supported by a letter of credit as security. If debtor wins on appeal, successful plaintiff will have to pay the money back (guaranteed with security) with interest. ***Robitaille:*** purports to give protection to everyone. He can use the money to maintain himself, give a letter of security and will pay back if the Canucks win on appeal (they didn’t). Note: the terms and conditions of the payment in and out are very carefully specified by the court (para 12) |

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| ***Litecubes v Northern Light Products Inc* [2007] BCSC -**  *When the foreign judgment for which recognition is being sought is on appeal in the foreign jurisdiction.* |
| **Facts:** Missouri action – complaint about infringement of patent. Defendant is appealing the Missouri judgment in Missouri. This judgment is immediately enforceable (is final) but there is provision in the Civil Rules 19-9 for the court to grant a stay of execution, can issue writ but can’t proceed. Justice faced with problem of interpreting and applying Rule. Looks at history of Rule and its various incarnations – used to be mandatory, BC courts were directed to stay local BC proceedings until foreign determined, now given discretion.  **Ruling:** BC should always stay proceedings until **foreign appeal** is determined. |

## Information Acquisition

**First Contact:** best opportunity to ask client questions about an issue that might later arise, including questions about what they do. Explore what their assets are, if drafting a mortgage for example can ask opposing party many questions.

**Searches:** Figure out what their means/abilities to pay are. Important to advise client about the collectivity of a judgment before taking them on. At each stage, collectability is professional responsibility of lawyer to advise. Have to tell risk.

* BC Online – access for lawyers, look for what they have been sued for – e.g. fraud, failure to pay debts. Criminal searches can be conducted too.
* *Land Title Registry*.
* BC Assessment – search assessed value of someone’s home. Based on this information, obtain parcel identification number and can see mortgages and their interest rates.
* *PPSA* registry – applied for credit card, financed a car etc. These searches give current address information.
* Google – find newspaper clippings etc.
* Industry Canada bankruptcy searches

Note: in all manners of debt collection - courts are less eager to impose harsh remedies on desperate people as opposed to the innocent party ripped off by a con artist.

**EXAMINATIONS:**

**Pre-Judgment:**

* Discovery Process:Before a judgment is given, can already set up to execute & enforce. Client will often have some information, or know someone who does. The discovery process – entitled to examine and document people for discovery (*see* Civil Rules 13-4). In pre-judgment context, discovery is limited to what has been pleaded. Allowed to ask background questions. Might be able to get production of bank records – can get garnishment. Just need to know bank location and serve garnishing order on the bank. Need to know specific branch address of a bank (bank=debtor to JD)

**Post-Judgment:** Mechanisms to compel disclosure of financial information. Non-payment of a judgment cannot result in imprisonment. Examinations are no longer limited by pleadings; anything related to lack of payment. The breadth of discovery is basically unlimited.

* Process that allows you to apply, as of right, for full disclosure of financial statements.
* Disclosure: all of their assets including all tax returns from date of order to date when judgment arose (Can be a very long time). If a fraud was alleged, might want to go back even further to look for trusts etc.
* Debtor examinations: Every vehicle registration, life insurance policies, tax source documents, financial statements. Extremely burdensome order that you get as a matter of right.
* An examination in aid of execution of *any order of the court*. E.g. if you get something pre-judgment, as simple as document production – usually not just filing proceedings, can examine people in aid of interlocutory.
* Important practice point: the implied undertaking of confidentiality. In the course of a lawsuit – extends to after issuance of a judgment – if someone has to disclose information by compulsion of the courts process (e.g. discovery) or by way of an order of the court to produce documents, implied undertaking if breached/or allow client to breach, can be disciplined by the law society. Can even be held in contempt of court for it.

***Supreme Court Civil Rules***

**13-4:** Examinations in aid of execution

* (2) If JC entitled to issue execution on or otherwise enforce order of court, JC may examine JD for discovery as to (a) any matter pertinent to enforcement of order (b) reason for non-payment/non-performance (c)income & property of JD (d) debts owed to and by JD (e) JD’s disposal of property either before or after order (f) means JD has had or may have of satisfying the order (g) Whether JD intends to obey order.
* (5) Court may find that other person has knowledge of (2) and order them to be examined.

**SUBPOENA TO DEBTOR:**

Orders are very burdensome (have to produce within 14 days); all you need for order is to have a debtor examination at some point down the road. It is almost impossible sometimes to fulfill these orders. Subpoena to debtor has the same scope, however it is conducted in front of a judge or registrar. Do these if you have difficult debtors/debtor counsel. Some counsel do not understand creditor’s remedies.

***Civil Rules:***

**13-3:** Subpoena to debtor

* (4) Examination of debtor – (a) income/property (b) debts owed to and by debtor (c) disposal the debtor has made of any property (d) means debtor has or may have to satisfy the order.
* (5) Must be in front of examiner – court, master, or registrar.
* (6) Both parties can call witnesses for cross-examination

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| ***Doobay v Diamond*, 2012 ONCA** – Contempt of Court |
| **Facts:** Diamond refused to answer substantial number of questions asked on two separate in-person examination proceedings and provided inadequate written responses to a request. Also failed to attend an examination for follow-up questions to written answers. Found in contempt of court – sentence 20 days in jail + fine. Diamond served sentence, then continued to disobey court orders so Doobay brought another contempt motion. Again, Diamond provided inadequate answers. Diamond brought cross motion for an order staying contempt motion as an abuse of process or for an adjournment to give him opportunity to call evidence. Motions judge reject arguments, sentence to new sentence = 42 days in jail and fine of $40k b/c avoiding compliance with order.  **Analysis:** Appealed on three grounds:   * In dismissing cross-motion, motion judge erred in refusing to grant requested adjournment: only issue Diamond raised as being material and contentious was whether parties had settled differences. No air to reality to allegations. No error. * Motions judge erred by failing to specify which answers were inadequate and by penalizing same conduct that founded previous finding of contempt and accompanying penalty. If contempt is ongoing, the court must be able to impose measured but incremental sanctions to obtain compliance. * The sentence imposed was unreasonable – no. |
| ***Blaxland v Fuller,* 2004 BCSC –** Application to vary registrar’s order/application for commital |
| **Facts:** Plaintiff applies for an order for committal of defendant alleging fraudulent misrepresentation inducing them to invest $100k each in a company operated by D, and obtained judgment against D. Registrar ordered D to pay $2k/month to P, application for committal adjourned by judge to permit D to bring application to vary registrar’s order. Registrar refuses to vary order.  **Court:**   * More than one year elapsed from time stay issued to date matter brought back for removal of stay and continuaion of Justice’s order. Violated rule that no order of committal shall be enforced after expiration of 1 year after date of order made. * But matter recommenced and fresh application of committal. Order of register not been obeyed, D knew of order. Question: has D shown good cause why an order for committal should not be made against him? * Income ≠ ability to pay. D hasn’t shown can’t pay $2k/month as ordered. * Defendant shall be committed for 40 days. |
| ***Laroche Capital v Signalchem,* 2015 BCSC** |
| **Facts:** Multiple actions in process between plaintiffs and defendants. JDs applied for finding of contempt for defendant willfully disobeying judgment. D filed response to contempt indicating did not have sufficient cash to pay but intended to pay it in the short term once in receipt of scientific research grants which D had applied for. At subpoena to debtor hearings, D expressed concern that examination not be used to gather evidence for the other ongoing actions between the parties. Ps advised D they intended to rely on transcript at the contempt hearing. JD seeks special costs or compensation (Rule 13-3(9)).  **Court:** D’s application for compensation dismissed   * Not unnecessary or vexatious for Ps to proceed with subpoena to debtor as a step towards executing on judgment * Ps shifting position wrt intention to proceed to subpoena to debtor and other steps did not demonstrate above. * Ps relying on partial transcript in contempt hearings and as fresh evidence does not demonstrate ulterior motive for commencement of subpoena process. * Ps conduct does not reach level or reprehensibility requiring a special cost sanction. |
| ***Carey v Laiken,* 2015 SCC** |
| **Facts:** Carey was a lawyer who was the subject of contempt proceedings for allegedly breaching terms of Mareva injunction issued against his client by returning to the client $50k which he held in trust. Found to be in contempt but judge revisited and reversed when it came back for consideration of appropriate penalty. Court of Appeal found Carey in contempt. Issue on appeal: to have committed contempt, did Carey have to intend to interfere with the administration of justice?  **Court:** Contempt of court rests on power of court to uphold its dignity and process. Two forms of contempt:   * Criminal: requires element of public defiance. * Civil: primarily coercive rather than punitive. Three elements must be established BARD on intentional act or omission:   (1) Order alleged to have been breached must state clearly and unequivocally what should and should not have been done  (2) Party alleged to have breached order must have had actual knowledge of it. Note – may be possible to infer knowledge or wilful blindness *may* apply.  (3) Party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. |
| ***Bea v Owners Strata Plan,* 2015 BCCA** |
| **Facts:** Strata passed parking bylaw, Beas objected. Filed multiple petitions challenging the bylaw, which were dismissed and Beas found to be engaging in abuse of litigation process while pursuing vexatious claims against owners. Mrs Bea found to be in contempt of court, and was ordered to deliver up vacant possession of Strata Lot 1 to owners of strata units and that it be immediately sold.  **Court:**   * Was the order selling strata unit as a remedy for contempt of court available to chambers judge?   + Rule 22-8(1) of *Civil Rules*: power of court to punish contempt of court must be exercised by an order of committal or by imposition of a fine or both. From *Constitution Act*, Rules cannot limit courts ability to punish for contempt, Rule 22-8 is not exhaustive.   + Court historically had inherent jurisdiction to seize property as a remedy for contempt (see orders of sequestration – Form 51).   + Only in more recent history this aspect of contempt remedy has essentially disappeared.   + Order of sequestration or equivalent power to seize and sell property protected by core of BCSC inherent jurisdiction, therefore order made by chambers judge was within court’s jurisdiction * Even if the judge did have inherent jurisdiction to make such an order, was it appropriate in the circumstances?   + Focus of contempt power is both coercive and punitive power meant to be used as a means to address the conduct in breach of a court order. Not meant to be used as a means of providing a civil remedy to underlying dispute.   + Bea has shown a contemptuous disregard for court orders, she is unlikely to obey orders restraining future vexatious filings   + Primary effect of sale removes Beas connection to the owners/strata council against which they have developed such a destructive animus which would end these vexatious proceedings.   + Chamber judge’s discretionary decision to grant order deserves deference in the circumstances. |

\*\* Contempt is a remedy for failure to pay an installment payment and failure to pay an order after a subpoena to debtor proceeding. They have dates attached (normally judgments just say ‘pay at once’), unless an order to pay a certain amount of money has a date attached, you cannot be in contempt for not paying. **If there is a date attached and there is a failure to pay on that date, there is a contempt.**

# PART II – COLLECTION REMEDIES

## Personal Property

Remedy the utilization of which a judgment creditor can obtain at least some satisfaction of the judgment when the judgment debtor fails to voluntarily pay. Have to accept that some assets may not be exigible. This will change if BC adopts the Model Act proposed by the **Uniform Law Conference of Canada**. Even then, will not be a single process, but will eliminate the pocket of assets that you cannot get at (statement at beginning that says *all property is exigible*).

### Attachment of Debts (Garnishment)

Court Order Enforcement Act Part I.

A consolidation in 1979 of other statutes. Procedure of attachment of debts/garnishment (interchangeable terms) invented in England in mid-19th century in *Common Law Procedure Act.* All of this legislation has been repealed, but BC has not modernized its definitions (not repealed in BC, out on limb). Merits of Attachment of Debts**: (1) JC –** $for$, seldom have to share with other creditors **(2) JD** – interrupt cash flow BUT full value goes to reducing debt.

* **Example**: JD owes money to JC. Third party (bank, other person, corporation) owes money to the JD. The debt owed by the TP to the JD is a *chose in action* does not need evidence by paper. Part II *COEA* allows bailiff to seize the paper and seize the *chose in action* but a debt is not normally evidenced by paper. Pure *chose in action*. JC wants to seize the debt owed by TP to JD to satisfy the debt owed by JD to JC. JC is the ‘garnishor’. and issues the garnishing order – order of the court that authorizes the garnishor/JC to seize the debt owed to the JD in order to satisfy the debt the JD owes to the garnishor/JC. The TP that owes money to the JD is referred to as the ‘garnishee’.

**\*\*\* no relationship between garnishor (JC) and garnishee (TP) except the knowledge that they owe JD a debt (through information acquisition) – often TP is a bank (once you figure out where bank is located can issue a garnishing order and attach the debt owed by the bank to the JD\*\*\***

#### Procedure:

1. **Judgment creditor issues the garnishment order.**

* There must be a debt in existence at the time the garnishment order is issued (cannot be in the future) and if there is no debt in existence at that moment (can even be particular hour of the day), the garnishing order is invalid. However, the garnishor can try again. Judgment creditor cannot cure an invalid garnishing order. See Canadian Bank of Commerce v Dabrowski.

1. **Judgment creditor/garnishor services the garnishing order to the garnishee.**

* Again, timing is critical. The JC wants the debt still to be in existence, service binds the debt (s.9)
* In BC, can garnish debts before you have a judgment, but in the post-judgment context if the garnishor is a JC and issues a garnishing order (debt is in existence) and has it served on the garnishee, that service creates some kind of property interest (at the very least that debt is frozen in the hands of the garnishee).
* Amount can increase or decrease and the garnishor is only binding whatever amount is owed by the garnishee to the JD at the moment at service.
* No payment into court until the garnishment order has been properly served upon the JD and the garnishee. Most JC’s serve the garnishee immediately and ultimately later serve the JD.

1. **Payment into court.**

Paid into court. The garnishee should never do nothing: court order to pay into court. If you fail to comply with the court order, you will be in contempt. The COEAhas a built in remedy, but you will be in contempt. Garnishee should also never pay the JC directly.

* What if the JD says they don’t owe the JC anymore? Garnishee has some options: 1. Comply and pay into court 2. Garnishee can pay the money into court and dispute it 3. File a dispute note in the court; don’t pay money in but file a notice.
* As soon as paid into court, the garnishee is cleared of the debt.
* If garnishee is disputing the order, can rely on procedure grounds, substantive grounds (e.g. no debt in existence) and discretion (the court has discretion to release the garnishing order).
* If the garnishee does nothing, cases turn on s.11 of the COEA– the built in contempt remedy for garnishors.

1. **Payment out of court to the judgment creditor.**

* s.12,13,15– four different ways of getting payment out – no legal issues just fulfilling statutory steps.
  + S.12: Before order for payment out of court, must give JD notice unless judge dispenses with notice
  + S.13: Payment out of court without order if :
    - (1) Under garnishing proceedings, 10 days notice of intended payout given to JD and JD has not filed notice of intention to dispute or if default judgment and 3 months expiers from day on which money paid into court
    - (4) from garnishing proceedings, if the consent in writing of the JD to the payment is filed with registrar or judge setting the exact amount to be paid out.
  + S.15: If claim or demand is not due at the time of attachment, order may be made for payment of it at maturity and execution may issue for it when it matures.

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| Canadian Bank of Commerce v Dabrowski [1954] BCSC - *Debt must exist at time of issuance of garnishing order.* |
| **Facts:**  CIBC issued a garnishing order on March 3rd at 10 am. G.O Directed at an auctioneer and the auction was to be held later in that day (11:30), and the JD had consigned livestock and machinery to be auctioned. If it is sold, the auctioneer is going to owe money (the proceeds) to the JD. Auctioneer pays money into court later, but BMO objects to the money being paid to CIBC.  **Issue:** Was the garnishing order issued by CIBC valid?  **Conclusion:** No, at the time (10am) when the garnishing order was issued, the debt didn’t exist. The debt arose around 11:30 once the livestock/machinery had been sold and at that point the garnishing order could have been issued. |

#### Substance

COEA PART I – a number of attempts made in Part I to define the asset that can be garnished. Repetition in the definitions.

* S.3(1):
  + (1) ‘Debt(s) due(s)’ include debts owed or liabilities AND wages that would in the ordinary course of employment owing, payable or due in the 7 days after an affidavit has been sworn
  + (1) Debts, obligations and liabilities subject to this *Act* does not include an obligation or liability not arising out of trust or contract **but does include** all claims and demands of JD against garnishee arising out of trust or contract if they could be made under equitable execution.
  + Authorizes against 3 classes of debts for 3(1):
    - Claims arising out of trust of contract
    - Judgment debts – if judgment debtor has brought an action against the garnishee, the cause of action is irrelevant because it is a judgment debt.
    - Claims arising out of trust or contract that are subject to equitable execution.
  + Problem with this definition, exigible is often defined in terms of Common Law remedies. Here, we have a circular definition. Not many cases concerning garnishment and the validity of the garnishing order.

BC Court interpretation of these definitions (“*debts, obligations, liabilities*”) has been inconsistent. Cases over the decades have provided shifting inconsistent definitions. Started narrow and have gradually broadened out, have become accustomed to garnishment (it was early in 19th century a new remedy), new remedies are always treated with kid gloves, courts were going to interpret narrowly. Have become more flexible, however if you are representing the judgment debtor you are always going to bring out the narrowest definition because there has never been a statement in one of the broader cases that this definition/approach is replacing the old narrower approach. All seem to be available all of the time. If representing a JC want broad, if representing JD want to stick to the narrowest.

**Progression:**

1. Vater v Styles: narrowest – at the time that the garnishing order is issued, the judgment debtor must have been able to commence an action against the third party. **COMPLETELY UNCONDITIONAL**.
2. Certain conditions could be disregarded. E.g. Fluction of Time - if promissory note isn’t due for another year, it is still a garnishable debt (only condition attached is a fluction of time).
3. Bel Fran Investments v Pantuity – broadest – the court can look at the conditions that attach to the payment of debts and can characterize them: ***if they are mere matters of administration and convenience they can also be ignored.***

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| Vater v Styles & Metropolitan Life Ins (1930) BCCA - *Case in which the narrowest definition is employed by the courts. Not surprising, relatively early on in the lifetime of attachment of debts as a remedy, and in the depression era.* |
| **Facts:** Judgment obtained by Vater against Mr. Styles for $189. Not a large judgment, but Mr. Styles was completely unable to pay it. Mr. Styles is getting a disability pension a few times a year (he is totally disabled). The garnishing order is issued by Vader in late August, haven’t been paid and they know he is going to be getting the pension payment November 3rd. Garnishing order is served on Metropolitan Life Insurance Company (pension payer), they wait until November 3rd and pay the money into court (complying with the garnishing order). There is an objection, court in BC overturns order on the grounds that when the garnishing order was issued there was no debt in existence (means no garnishable debt in existence, Met Life was going to have to pay in November).  **Conclusion:** under the terms of the Policy, Mr. Styles had to be alive on November 3rd and he had to still be disabled. ***Conditional debt according to BCCA.***. At the time in August, these were important conditions therefore no garnishable debt in existence. |
| Bel Fran Investments v Pantuity [1975] BC – broadest approach. |
| **Facts:** Garnishing order issued on Feb 19th 1975 directed to BMO as garnishee. JD deposited $725k in BMO subject to terms of a “term deposit receipt” dated January 10th, 1975 maturing on April 9th, 1975. JD submits that deposit was not a “debt or obligation due or accruing due” from BMO to JD at date of affidavit in support of garnishing order was sworn.  **Analysis:** Looks to an English case – *Bagley v Winsome* where C.A. held that a particular term deposit in a particular garnishee bank in England was garnishable. In England, statute had been enacted subsequently to make that the law. In BC, Justice Anderson takes the similar approach of examining the terms and conditions attached to the term deposit and decides in this particular case that the terms and conditions attaching to this term deposit are (para 16) “*mere matters of procedure and administration and all are satisfied by the service of the garnishing order*”. Makes the point – judgment debtor couldn’t transfer ownership of deposit by delivery – no one could be prejudiced just a question between JD and bank. **Important to look to every term deposit’s terms and conditions.**  **Takeaway:  *if conditions are mere matters of administration and convenience they can also be ignored.*** |

**Bank Accounts:** Can assume that JCs like to garnish bank accounts of all kinds. Often a large pool of money that JC’s want to get their hands on. Can only do this when a condition has been satisfied – make a demand on the bank “*I want to withdraw x amount of dollars from my account”.* Until JD makes this demand on the bank, in strict legal principle (*Vader v Styles*) there is nothing garnishable there. English courts held that current accounts were garnishable and that garnishing orders was sufficient to be a demand to constitute a garnishable debt. BUT there is no debt when issued because there is no demand, but courts wanted to find a way to let it happen.

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| Access Mortgage Group v Stuart (1984) BCCA – is rent garnishable? |
| **Facts:** JC wants to garnish rent from the JD who owns an apartment complex and collects rent. For each of the renters, the rent is due on the first of the month. JC for five successive months had issued garnishing orders in BC under the COEA(note – one shot operations, if you want to garnish continuing debts have to issue valid garnishing orders each time it is due).  **Court:** At the time of the issuance of each of the garnishing orders (23rd for rent due on the 1st) there was no debt in existence. Debt didn’t arise until the 1st, at that point the debt was due and presumably paid.   * What if the tenant leaves, what action would the JD have? Damages – may not get full amount of the rent that was being garnished. Without regard to authority, BCCA said there couldn’t be an equitable receiver – rent is not available under equitable execution. How can JC issue and serve on the day the rent is due on the first (assuming most tenants pay on time)? Only solution (no statutory) is a practical one – call on the tenants, somehow tell them not to pay their rent on the day it is due and hope for the best. |
| Ahaus Developments Ltd v Savage [1994] BCCA - conveyance |
| **Facts:** pre-judgment garnishing order. Ms. Savage (defendant) sells her house and uses a notary public to do the paperwork. A sale of her home/house under an agreement for sale, subject to mortgages. Notary public gives the owner of the house an undertaking to discharge the mortgages on title before paying anything to the owner of the house. Plaintiff issues a pre-judgment garnishing order (no debt in existence yet). The plaintiff (Ahaus) serves the garnishing order on the notary public (garnishee). Notary has a judicial order (equivalent) and a solemn undertaking – comply with order or undertaking? Solemn undertaking wins out – pays off the mortgagees and pay the balance to the defendant (Ms. Savage). Now in contempt of the court order. JC brings an action against the garnishee (s.11 order). Doesn’t persist against Savage, gets judgment against garnishee. Notary public appeals. Three defences – 1. Conditional debt, if conditional debt (not mere reflection of time) then not garnishable.  **Majority:** BCCA says rights had crystalized at time of service of the garnishing order despite the argument that it was conditional. Can’t do nothing – could have filed a dispute note, or have paid the undertaking and paid the proceeds due to the defendant into court with a dispute note. Don’t ever do nothing – respond to the court order.  **CJ Dissent (**policy grounds): conveyancing is a difficult area with lots of problems that occur. Notary/garnishee might not have been in a position of knowing what her options were (policy argument not particularly geared to the circumstance of this particular case). |

**Note 1:** Nova Scotia – not immune, allow joint bank account to be garnished to the proportion that the judgment debtor contributed themselves. In BC, nothing has been acted on, however a committee is currently working on enacting a uniform Act. So, how will joint bank accounts be handled when only one of the holders is indebted. At the end of the model uniform Act, there is a sections titled ‘Third Party Claims’ – third party will have to make a claim to the money.

**Note 2:** RRSP, other funds have been given some protection (s.71.3 COEA) – protects RRSPs almost completely.

**Note 3**:7-day rule - In BC, despite the fact that wages and salary are garnishable, they really were not available under garnishment because they were due and payable on the same day so virtually impossible to issue and serve a garnishing order on the employer before they paid the employee. In 1941, BC put in the 4-day rule (subsequently expanded to the ***7 day rule***): **Even though wages and salaries may not be fully earned, so there might not be a debt in existence sufficient to satisfy the statute, it is permissible (not mandatory) for a JC to garnish wages and salary by issuing a garnishing order up to 7 days in advance of payment day EVEN THOUGH THERE IS NO DEBT IN EXISTENCE AT THAT POINT.**

**Note 4:** **Process for garnishing MUST FIRST Determine whether garnishment is available**

* 1. Is there a third party that owes a debt to the JD that the JC can garnish?
     1. Does the claim arise from one of the following?
        1. Contract
        2. Trust
        3. Judgment
        4. Can it be recovered by equitable execution?
  2. Is the debt subject to any conditions/contingencies/concerns? If the condition attached to payment of the debt by the third party to the JD is the passage of time, can be ignored.
     1. Are the terms and conditions mere matters of administration and convenience? Most flexible category
  3. The debt must exist both at the time the garnishing order is issued and at the time of service.

Note – better to garnish bank account than wages (get 100%), and will get the total that is in there and not have to garnish every pay period. Two ways of protecting your money:

* 1. Account exclusively devoted to wages and salary (no mixing) – might be able to preserve the percentage immunity/exemption if nothing but wages and salary went into that account.

#### Joint Debts/Debtors

E.g. Joint Bank Account – an asset in which the judgment debtor has only an interest & doesn’t own the whole thing.

**Courts have consistently held that debt’s owned by a third party to the JD & AN UN-INDEBTED PERSON ARE NOT GARNISHABLE.**

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| Field v Pacific Coast Savings Credit Union, BCSC – joint bank accounts not garnishable in BC. |
| **Facts:** Plaintiffs open a joint bank account with PCSC (financial institution). One of the plaintiffs owes money to Revenue Canada, the other doesn’t owe anything. Revenue Canada garnishes the joint bank account (issues requirement to pay directed to PCSCU), credit union pays Revenue Canada out of the joint bank account. Joint owners sue the credit union for erroneously paying Revenue Canada from a joint bank account when only one of them was indebted.  **Court:** credit union is liable, joint bank accounts are not garnishable in BC. Field’s get a judgment against credit union for the full amount + interest. |

#### Pre-Judgment Attachment of Debts

Not the only pre-judgment remedy available for plaintiffs in BC. Also possible to get a Mareva injunction. This is statutory pre-judgment. Historically, at common law, a plaintiff could do nothing/not touch property of defendant until plaintiff obtained judgment. Common law position is the case of Lister v Stubbs. Most provinces Mareva injunctions are allowed – not all provinces allow pre-judgment garnishment. When uniform act enacted, there will be no more pre-judgment garnishment but rather preservation orders. The focus of litigation (both third party and JD have standing to object to garnishing orders)

A garnishing order is issued on an *ex-parte* application – the plaintiff or JC goes to the registry and gets the garnishing order registered (no notice given to garnishee or defendant in the action). This is because debts are so mobile and it is so easy for the debtor to preserve their property before issuing of the garnishing order. APPLIES TO BOTH PRE and POST judgment garnishing orders.

**When can you issue a pre-judgment garnishing order?**

S.3 COEA. It is permissible for a plaintiff in an action to issue a pre-judgment garnishing order the minute that plaintiff commences the action. If a judgment has not been recovered, have to swear that an action is pending, the nature of the cause of action, the actual amount of the debt, claim, or demand & that it is justly due and owing after making all just discount & stating in either case that any other person (garnishee) is indebted or liable to the JD & is in the jurisdiction of the court. Also have to swear that the person is someone in BC (jurisdiction of the court).

Very frequently issued – also very frequently objected to. Garnishee is supposed to pay the money into court (gives the plaintiff security) waiting for the plaintiff to get a judgment – will be able to be satisfied right away.

**Grounds most commonly invoked by the defendant in the action:**

1. The plaintiff hasn’t made full and frank disclosure
2. Imperfect procedure
3. The plaintiff’s claim against the defendant is not for a debt or liquidated damages.
4. The plaintiff hasn’t made all just discounts
5. The plaintiff has garnished wages and salary (immune from pre-judgment garnishment)
6. The debt garnished is not a garnishable debt.
7. Judicial discretion.

#### Objections to Pre-Judgment Garnishing Orders

Garnishing orders are considered judicial orders (not writ of seizure & sale) – *COEA* gives the court control over the garnishing order – objections made to the court, the control is limited by the relevant legislation. Come in two places:

* **Original control**: s.3 Authorization for Garnishment– does not direct a garnishing order, *a judge or registrar may issue a garnishing order*. Registrars rarely exercise this discretion whether to issue a garnishing order, but they do have it. Originally, when attachment of debts was first invented in England, English courts exercised their discretion to protect the third party garnishee. Wish was not to inconvenience the third party – might have time until the debt it payable.
* **Guidelines for exercising discretion:** S.5 COEA– specifically directed to protection of and concern for the defendant JD. JD may apply for release of the garnishment, or if payment of judgment by installments. If it is a judgment debtor and a valid garnishing order, if JD says it isn’t fair, then the garnishing order has to be replaced by order for payment by installments. But for pre-judgment garnishing order, judge/registrar has full discretion to release completely for fairness. S.5(2) – guidelines for exercising discretion. If under (1) registrar considers it just in all circumstances, may make order releasing part or all, must set amounts of installments. **Note – installments replace the judgment.**

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| Gray Project Management v Disruptive Media, BCSC (2015) |
| **Facts:** Gray = plaintiff, in contract for renovations for defendant. Gray doesn’t get fully paid, claiming $140k. issues notice of civil claim and pre-judgment garnishing order. Garnishee pays the money into court. The defendant in the action is unhappy and objects. Objections: **(1)** Says nature of cause of action not stated specifically in action, **(2)** claim against Disruptive is not a liquidated amount, **(3)** plaintiff failed to make all just discounts, **(4)** should have exercised discretion differently.  **Law:** *Knowles v Peter*, 1954: always considered the leading case, cited in Gray “Pre-judgment garnishment is an extraordinary process/unique in law (pre-Mareva injunctions), **There must be meticulous observance of the requirements of the attachments of debts act.” If a defendant objects to the pre-judgment garnishing order, the court must look very carefully at any defect in the pre-judgment garnishing order and will bend over backwards in favour of the defendant.**  **Court:**  **(1)** **Nature of Cause of Action: Plaintiff must meticulously observe *COEA*, but not completely – still require a very careful compliance with requirement of COEA PART I, if neither the defendant nor garnishee is mislead in anyway, the court will overlook or ignore certain failures to comply. In this case, notice of civil claim wasn’t attached to order, in the pre-judgment garnishing order don’t have to state everything and set it out, can attach civil claim and that will set out many of the details of the case.** BUT both had been filed and served, even though not strictly speaking attached, it was possible for both the defendant and registrar to have looked at them and examined them. This particular objection doesn’t work as often as it used to.  **(2) Claim is not liquidated amount:** Gray is claiming that Disruptive Media owes Gray money. Nothing in *COEA* suggests that pre-judgment garnishing orders must be in liquidated terms. Courts have interpreted *COEA* to require a liquidated claim. This limitation on plaintiffs was discussed at length by BC Law Reform Commission, decided it would recommend to continue limiting pre-judgment garnishment to plaintiffs who have liquidated claims against defendants (damage claim NOT count). Very common objection, frequently succeeds. **Amount must have already been ascertained or could be ascertained as a mere matter of arithmetic.**  **(3) Plaintiff failed to make all just discounts:** Disruptive media says it has counter-claims and the defendant was aware of them but didn’t account for them. Courts have limited the obligation to make just discounts to liquidated claims that the defendant has against the plaintiff. |
| ***Pybus v National Credit Counsellors of Canada* (2006) BCSC** |
| **Facts:** Former employee (Mr. Pybus) worked for National Credit Counsellors and was let go, his action is based on the fact that he hasn’t been fully paid for the work that he had done (not claiming wrongful dismissal). Mr. Pybus issues a series of pre-judgment garnishing orders, issued to a compliant third party garnishee who pays the money into court.  **Arguments/Court:**  (1) Weren’t served with copies of the pre-judgment garnishing orders:Case is determined on this objection. Relies on s.9(2) *COEA*. - *a copy of the garnishing order must be served at once or within a time allowed by judge/registrar on the defendant, judgment debtor or person liable to satisfy the judgment or order*. Ex-parte order, garnishee owing money to JD is always served first. Normal & usual/customary to serve the defendant/JD shortly thereafter. In this case, National Credit Counsellors of Canada had been asking for copies of various documents including garnishing orders for some time. Judge says 6 ½ months in the face of demands is too long to delay. Objections to the garnishing orders succeed.  (2) Requires meticulous observance of s.9(2).  **NOTE: \*\*\* Refers to BCSC decision (**Nyugyen): success in raising an objection to a pre-judgment garnishing order didn’t automatically render the pre-judgment garnishing order void, it makes it voidable, giving the court discretion to set it aside in whole or in part. Considering this decision and holding himself bound, Justice Caldwell set the whole garnishing order aside. |
| Politeknik Metal v AAE Holdings Ltd (2015) BCCA - meticulous compliance |
| **Facts:** AAE holdings is a BC company, plaintiff – Politeknik is a Turkish company. AAE Holdings has a subsidiary (Apex) that does all the work/manufactures aluminum excrusions. AAE’s practice is to purchase equipment and lease them to Apex. AAE makes a contract with Politeknick. Politeknik & AAE Holdings make a contract with no mention of Apex in it. AAE refuses to make all payments on contract of sale, AAE says there are deficiencies in the equipment. Politeknick starts an action in BC against AAE & Apex, issues pre-judgment garnishing orders with notice of civil claim attached in support claiming breach of contract & unjust enrichment. Also claiming that AAE & Apex are operated as a single entity. Issues a pre-judgment garnishing order directed at the bank where both AAE & Apex have accounts, bank pays money into court and pays in about $560k from Apex account, and $18k from AAE’s account.  **Court:** pre-judgment garnishing orders are set aside in their entirety, emphasizing that *meticulous compliance* is still required even if not perfection.   * **Failure of the plaintiff to make full and frank disclosure of all the material facts.** BCCA held that the affidavit in support of the pre-judgment garnishing order was misleading because it failed to disclose that the contract (basis for the cause of action) was only with the parent company & there was absolutely no pleading in the civil cause of action that AAE & Apex were alter-egos. Suggests that there are some cases where there has been some variation but has been some confusion between exercising discretion under a particular section (s.5) and the legal objections to pre-judgment garnishing orders. If properly issued – discretion, if failure to comply meticulously – set aside in entirety. Judge can sever part of the judgment and keep the rest. |
| ***Redekopp Mills Ltd v Canadian Timber Management* (1998) BCSC –** *test for whether to grant pre-judgment garnishment* |
| **Facts:** Defendant is a small company that has no other exigible assets in BC. Defendant has no interest in anything else in BC, if plaintiff is successful and becomes JC, they will have to apply to get the BC judgment recognized and enforced in another Province (where the assets are located).  **Issue:** What is just in all the circumstances? What factors should be considered by a court in exercising its discretion?   1. **Strength of the plaintiff’s case:** is it weak or strong? In this case, plaintiff has a strong case. 2. **Hardship to the defendant:** If the defendant is deprived of the use of the money. In this case, the hardship is ok but when start attaching adjectives “undue” “some”, gets more difficult. There would be some hardship. 3. **Necessity for the pre-judgment garnishment:** Does the defendant really need some security before judgment? Onus on defendant to show it wouldn’t be just. In this case, no exigible assets, Justice Wilson releases part of the pre-judgment garnishing order (splits the difference)   Defendant is arguing for exercise of discretion – the defendant can argue any circumstances that may be relevant (not limited to the three circumstances above that are always taken into account). Discretion is a big factor. Plaintiff isn’t limited to one attempt.  **(3) Plaintiff failed to make all just discounts:** Disruptive media says it has counter-claims and the defendant was aware of them but didn’t account for them. Courts have limited the obligation to make just discounts to liquidated claims that the defendant has against the plaintiff. |

#### Jurisdiction to Garnish

Constitutional issue. S.3(2)(e) COEA – *requires garnishee them to be in the jurisdiction of the court.* This is because the legislature acknowledges the limitations on Provincial jurisdiction & recognized that assets outside of the Province cannot be seized. Important – a garnishing order is an *in rem* order – territorially limited no province: in BC can issue a mandatory order to someone outside of the boundaries of the Province. These rules for locating a *chose in action* is necessarily arbitrary – is possible to have different rules for different purposes. Rule locating a debt for purposes of garnishment – utilized by the BC courts – not too clear on the concept but 2 possible rules:

1. **Broad:** *situs* of debt is wherever a debtor can be found and sued. If garnishee is in the Province
2. **Narrower**: Other provinces (not BC) – wherever the debtor (3rd party garnishee) can be found AND the debt is ordinarily payable.

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| ***Bank of Nova Scotia v Mitchell* [1981] BC –** *garnishee is Bank not branch when wages* |
| **Facts:** Mr. Mitchell ordered to pay Mrs. Mitchel $600/month under the *Divorce Act* in BC*.* Considering garnishing of wages and salary, JD was an employee of the bank. At time of Mrs. Mitchell petitioning for divorce, Mr. Mitchell lived in Langley, BC. Mr Mitchell did not make payments, by June 1980 arrears of $4000. Mr. Mitchell had moved to St. Lucia where he was still employed by Bank of Nova Scotia. Salary paid in St. Lucia and at the Caribbean Regional Head Office in Toronto – depositing sum to the credit of Mr. Mitchell at a branch in Toronto. Mrs. Mitchell obtained garnishing order and served them at the main Victoria BC branch for wages.  **Arguments:**   * Are the amounts owing, payable, or accruing due by the bank to Mr. Mitchell payable outside of BC for work/services performed wholly outside of BC debts or money accruing due under the COEA?   + BC Court has jurisdiction over Mr. Mitchell. Divorce proceedings were in BC & the Bank is in BC. * Can a garnishing order served at a branch in BC bind property in the possession of the bank’s branches in Toronto and St Lucia? Should it only apply to the money in the Victoria branch?   + Based on *Bank Act* Ch. B-1 (now see s.462): writ or process binds only property in the possession of the bank belonging to a person at the branch where such writ is served.   + Argues that wages are not in that category   + In terms of wages, garnishee is Bank of Nova Scotia, not the particular branch served. |

**Bank Act**

s. 462 (1): Effect of writ etc – only binding if served at the branch of the bank that has possession of the property or that is the branch of account in respect of the deposit account.

(3) Does not apply in respect of an enforcement notice in respect of a support order or provision.

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| Univar Canada v PCL Packaging Corp (2007) BCSC |
| Facts: Plaintiff supplied goods to defendant. Sought pre-judgment garnishing order on defendant’s bank account, at a branch of TD located in Toronto and an order to serve the garnishing order ex juris. Master dismissed application on basis that garnishee was the Ontario branch of the bank and not in jurisdiction of the court as required by s.(3)(2)(e) of COEA.  Court: Application of s.462. If garnishee is a bank and the bank has a branch in BC, then you can garnish the account even if the account isn’t physically located in BC. It does not matter where the account is located. Extra-provincial branch must be served ex juris.  Note: This interpretation is probably wrong, allows seizure of debt not in BC but hasn’t been overruled and is available (differs from Bank of Nova Scotia – that was wages not bank account). |

#### Priorities

COEA, s. 9(1): service of garnishing order binds the debt at time of service. Interpreted differently in pre- and post-judgment cases.

COEA, (s. 11): order absolute results in garnishee being personally liable if fails to pay.

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| BC Millwork Products v Overhead Door Sales Ltd [1961] BC |
| Facts: Overhead Door Co issued specially endorsed writ on December 9th, 1960 against Overhead Door Sales claiming sum of $18k. BC Millwork issued specially endorsed writ against Overhead Door Sales on December 9th, 1960 claiming sum of $6k and on same day issued garnishee order in which Bank of Nova Scotia was garnishee. Bank paid $3k into court. On December 19th, 1960 Overhead Door Co obtained default judgment against Overhead Door Sales for $18k. On December 22nd, BC Millwork obtained default judgment.  **Court:** Who gets the money? Only a JC is entitled to an equitable charging order. Charges take priority in the order that they become charges. |
| Evans v Silicon Valley IPO Network (2004) BCCA – Material disclosure and trickery |
| **Facts:** The plaintiff obtained a default judgment against the JD, Durante, in California. Durante had deposited money with Exchange Bank & Trust (EBT), who held his money in deposits with BMP in Vancouver. California is a reciprocating state, so the plaintiff registered his judgment in BC. He then obtained a series of post-judgment garnishing orders absolute against EBT/BMO. The plaintiff’s purpose for obtaining the garnishing order was to place himself in a better priority vis a vis other creditors   * EBT did not pay the fund into court, nor did it file a dispute notice. The garnishing order absolute made EBT liable for the full amount of the judgment debt, notwithstanding that the monies on deposit are less. * The money had already been frozen by the BC Securities Commission, and there was an agreement between counsel for the plaintiff and the defendant that neither would move against the funds without notice to the othes. The plaintiff’s lawyer did not tell this to the judge who issued the garnishing orders * EBT applied to have the garnishing order set aside, and the Court granted the application. The plaintiff then appealed   **Court:**  The appeal should be dismissed   * It was unfair to saddle EBT with an obligation massively larger than EBT’s debt to Durante when the freezing order prevented EBT from making any payment into court on the garnishing orders after judgment * It was unfair to the other claimants for the appellant to establish priority over them by means of an order made in ignorance of their interests. The surrounding circumstances coupled with the non-disclosure of the appellant’s counsel militate against an exercise of discretion in favour of the appellant * An *ex parte* application must make full and frank disclosure of all material facts to the court and failure to do so allows the court to set the order aside without regard to the merits of the application |
| Pacific Forest Industries v Twin Stag Timber (1985) BC |
| Facts: On May 19th, 1983 Twin Stag Timber gave a general assignment of its receivables both present and future to its banker, RBC. Registered with Registrar of Companies on June 6th, 1983. November 7th, 1983 Twin Stag had receivable from Crown Forest in the amount of $7k. In October 1983 Twin Stag received logs from Pacific Forest in respect of which Twin Stag owed Pacific about $21k. Pacific sought to garnish the receivable of Twin Stag from Crown. Crown paid fund into court. January 17th, 1984 order was made pursuant to s.12 of Employment Standards Act holding Twin Stag employees entitled to wages about $14k.  Court: Director of Employment Standards has super-priority over funds held in court under the Employment Standards Act. The priority takes the form of a statutory lien that attaches to the funds in court and will outrank other creditors. |

### 2. Execution by writ of seizure and sale.

#### INtroduction:

Part V *Court Order Enforcement Act*

At one time in the common law, all judgments were enforced by writs. Some of the writs are eliminated by statute. Example - *s.51* eliminates *capeus writs,* do not imprison for debts anymore only imprison for contempt (different because only failing to comply with a court order).

* Eliminated because BC has already adapted the writ system to the land title system. Left the writ of seizure and sale – if you involved in the small claims division Act called “*Warrant of execution” –* essentially the same.
* Federal equivalents – Federal Court of Canada issues judgments that have to be enforced. These judgments have their own processes. For a long time in the Federal act, the Latin terminology remained. Currently, the Latin terminology has been eliminated.

#### Procedure:

Six stages or steps under the *COEA* Part V if the judgment creditor decides to use/enforce the writ of seizure and sale. Writ of seizure and sale is easy for the judgment creditor, but it is somewhat of a faint hope.

1. **Judgment creditor issues the writ**. *Civil Rules form 50* – writ of seizure and sale is set out, good for **one year** after issued. Could just hold onto it, but if the judgment creditor wants it enforced it must be delivered for execution to the court bailiff (NOT sheriffs anymore).
   1. In BC, there is someone in each county called the court bailiff.
   2. It is necessary to deliver to court bailiff for execution NOT to hold onto.
2. **Delivering the writ to the court bailiff for execution.**
   1. Do not convert the court bailiff into the judgment creditor’s bailiff – the JC will then be responsible if the bailiff messes up. It is advisable for the JC when delivering the writ of seizure & sale (or federal version) to provide the court bailiff with some information about assets that the judgment debtor may own (remember, can only seize assets owned by the judgment debtor) at this point. Gives the court bailiff something to go on.
3. **Bailiff locates the judgment debtor’s premises**, searches, and in theory seizes exigible property – subject to seizure and sale & saleable. **Note - From this step onwards, the whole process is out of the hands of the judgment creditor (in bailiff’s control).**
   1. Normally the court bailiff will confine themselves to the premises in which the judgment debtor resides, but it is permissible and sometimes occurs that the court bailiff will enter and search the premises of an un-indebted third party (*Re Boyce*)
4. **Court bailiff seizes property.** Do not have to seize, but normally the court bailiff will.
5. **Court bailiff sells the property.**
6. **Court bailiff pays over something to the judgment creditor.**

From step 3 onwards, the judgment creditor is essentially at the mercy of the court bailiff.

**History of Court Bailiffs in BC.**

**England:** the High Sheriff was both a Crown Officer and a Court Officer.

* Ancient office – the Sheriff was legally trained and understood the law. Often the office of Sheriff ran in families for generations.
* All the execution was done by bailiffs
* One sheriff for each Bailiwick (area) – by law, each sheriff was deemed to know every person in their bailiwick. This means that the sheriff could be very efficient in the execution of the write – didn’t need to wait for the judgment creditor to issue information about the assets of the judgment debtor.

**BC:** imported the office of Sheriff, had “fees sheriffs”. BC was divided into Bailiwicks, the more writs they executed the higher the commission they got.

* Then given some police duties, and put on salaries.
* As of 1980, there was a single sheriff in BC, and many deputy sheriffs who did the work of execution. Under the Sheriff Act, even currently, the Bailiwick of the sheriff was deemed to be the whole province.
* Cannot know the whole property of everyone in the province.
* In the 1980’s, the BC Law Reform Commission got a grant to study the Office of the Sheriff. Note - Prof. Edinger did the last chapter on execution.
* In this report, Turriff recommended that BC should return to the old “fee sheriff” system. Should put the deputy sheriffs on commission (because they would work harder). Government does not enact this, went no further.
* In the late 1980’s, deputy sheriffs get replaced by court bailiffs who work on commission. Not sheriffs, but from the *Sheriff Act*, they can do all the execution processes that a sheriff could have done – but no police functions. All they can do is execute writs of seizure and sale.
* Approximately 1990 – present: Court bailiffs in BC, their jurisdiction is the entire province (even though it is divided into districts), they do everything that sheriffs used to do – including earning commission.

#### Common Law Duties of Court Bailiffs

To find, seize, and sell sufficient goods to satisfy the amount on the face of the writ and do so so forthwith.

* No statute about what the duties and obligations of a court bailiff are. ALL COMMON LAW.
* Case law virtually all created in the 19th century
  + Social and economic conditions in England in the 19th century are not the same as 21st century conditions in BC.
  + Difficult to be precise about the common law duties and obligations of the court bailiff.
  + Do not get the same volume of litigation
* Used to be ‘first in time first in right’, what if sheriff got many at a time? Told to figure it out.
* **Issuance:** Historically, at common law, the minute that the judgment creditor issued the writ the goods of the judgment debtor were bound. Whatever the judgment debtor did with the goods after issuance (even if they had no idea a writ had been issued), the sheriff could seize them whenever issued. Relevant to *Lloyds.*
* **Entry/Search & Seizure:** Sheriff was probably given some information from JC, then had to go find assets subject to writ. Rules about breaking & entering and how the sheriff could get in to the home & curtilage. Sheriff was prohibited from breaking down an outer door.
  + However, once permitted entry (still for court bailiffs today), then if the judgment debtor or their family refuses to open something, they can break anything. Only the outer door is prohibited.
    - Modern application: If in a condo, what is the outer door? Is it the lobby door or your units door.
* **Seizure**: Remember, all goods of judgment debtor bound by moment of issuance of writ. In BC (most likely all other provinces), in *Law and Equity Act* s.35(1*) –* postponed the binding effect of the writ until the sheriff actually seizes the goods – JD is free to dispose of them until actually seized.
  + If the asset in question is sold by JC, they should have some money which can be used to satisfy the judgment debt.
  + Issue – in fact today (*Lloyds*), the court bailiff will often enter into a **walking possession agreement**.
    - Bailiff comes to judgment debtor’s residence and sees property to seize. If judgment debtor is there, and claims they absolutely need the property for a particular reason (e.g. needing a car for work), it is common for the bailiff to let them continue using it even though it has been seized.
    - If the property is actually seized, then it can now be safely left in the possession of the JD because the bailiff can come back and take it away when it is time for the sale.
    - Remember – life of writ is only **one year**, often the walking possession agreement will be for longer than one year. Can the bailiff then seize the property even if the writ has died? What about installments – what happens if the writ expires before the payments are complete? NO ANSWERS, hardly any case law – no one sues the sheriff anymore.
* **Sale:** How does the sheriff/bailiff sell the asset(s) that have been seized?
  + Today – normally sells by public auction because the sheriff became convinced over the centuries that sale by public auction (as distinct from private sale) produced the best available price.
  + **Obligation of court bailiff to get the best available price for the asset(s) seized** bearing in mind the sheriff has simply seized them and cannot guarantee anything “*as is where is*” basis.
  + Bailiff is rarely able to obtain the actual value (replacement value) at a forced sale (garnishment is better).

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| ***Lloyds and Scottish Finance v Modern Cars and Caravans* (1966) *–*** *Intent to seize* |
| **Facts:** JC is an entity called Mercantile Credit, issue a writ of seizure and sale against a JD named Mr. Wood. Court bailiff comes to Mr. Wood’s residence and seizes the caravan in which Mr. Wood is living with his family. The caravan is worth considerably more than the debt owed to the judgment creditor making it the obvious asset to seize (also personal property, a chose in possession). Bailiff tries to get Mr. Wood to sign a walking possession agreement, who refuses and says the caravan belongs to his wife. Bailiff returns on a number of occasions, on the last time there is nothing there – the caravan has disappeared including the family. Mr. Wood sold the caravan to Modern Cars & Caravans, who in turn transferred it to Lloyds. Lloyds sells it on a hire-purchase agreement to another party. Three innocent third party transferees of the caravan. Bailiff finds the third innocent party and seizes the caravan.  **Issue:** Whether the bailiff originally seized the caravan (despite leaving the Wood family in possession), or whether he seized it but then abandoned it? If abandoned – nothing to prevent Mr. Wood from selling free and clear to Modern Cars and so on.  **Analysis/Discussion:** Lord Edmond Davies: turns on   * Whether the sheriff actually seized   + Seizure turns on intent, don’t have to actually physically seize the asset anymore. * Whether continuous possession required (in 1966) * Abandonment is on intention too. On the facts, the sheriff never intended to abandon the seizure.   **Rule:**   1. If the court bailiff in BC (sheriff in England) has actually seized an asset, then the asset is bound and even if it is conveyed by the judgment debtor to a third party and onwards, the bailiff/sheriff can seize it from the innocent third party. The word “bind” means the sheriff can seize it from anyone. Judgment debtor can give good title even after asset has been seized, but that good title is subject to the court bailiff coming and seizing the asset. 2. In order to seize an asset, it is not necessary for the court bailiff to maintain continuous personal possession. 3. Important for court bailiff to indicate to someone that they are seizing (need someone there). |

*Law and Equity Act*, s. 35(1): writ of execution binds goods at time of seizure, not at time of issuance as under the common law.

NOTE: partnership property is governed by *Partnership Act*.

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| Re Boyce [1992] Fed Ct |
| Facts: September 30th, 1991 certificate registered in Federal Court certifying payable by Boyce to Crown for $174k. February 13th, 1992 similar certificate registered in FC certifying Asselin indebted to Crown for $17k (income t& unemployment taxes). Same day writs issued by FC wrt to Boyce & Asselin and served on CIBC Winnipeg. Bank wont allow bailiff into safety deposit box, says it requires a “drilling order”. Bank says would be trespassing if safey deposit box empty  Court:   * Drilling order not required, fieri facias writ is sufficient. * Would not be trespassing. JDs have right to use safety deposit box, that right is an asset which is present at the branch in question. * Bank is an innocent third party – should be made whole for cost of repairing the drilled deposit box. * Hallsbury Laws: Court bailiff cannot enter dwelling house of JD or 3rd party where JD property stored by force against will of person. Does not apply to commercial buildings. * Once inside, may break open doors and chests within house. * Curtilage = living space outside of home e.g. cars in driveway. Cannot break into property. |
| Cybulski v Bertrand [2000] BCSC – crown property immune from seizure and sale. |
| Facts: Plaintiff injured in MCA January 1996, Bertrand was driver & Canada Post employer of Bertrand – was driving work vehicle at the time (insurance = CP’s?).  **Court:** Property of the Crown, including leased property, is exempt 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. CP owns vehicles leased to Canada Post. Plaintiff succeeds at trial, tries to execute writ against Canada Post trucks. |

#### Goods, Chattels & Effects

COEA s. 55 – Effect of writ of execution against goods

*Except as exempted by ss. 70-79, all goods, chattels and effects of a JD are liable to seizure and sale under a writ of execution against good and chattels”.*

* “Goods, chattels, and effects” are not defined in the statue. Looks to the case law below.
* Exemptions: *see* statutory appendix materials.

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| Vancouver A&W Drive-Ins v United Food Services (1981) BCSC – RRSP OVERTURNED BY NEXT CASE |
| **Facts:** JDs (AW drive-ins) tried unsuccessfully to execute upon JDs RRSP (JD beneficial owner, RRSP held in trust). Self-administered plan, JD could order trustee to change investments. JCs tried to garnish RRSP but trustee denied on basis that RRSP is not attachable.  **Court Analysis:**   1. What is the true relationship created by setting up of RRSP? Is it debtor-creditor, or a trust?    * RRSP relationship is exclusively a trust relationship.    * Not a debtor-creditor relationship, funds in hands of trustee not liable to be attached for garnishment, no debt owing by trustee to annuitant. 2. Does the annuitant have an interest in the fund and in investments and cash representing the fund that are subject to execution?    * RRSP is property, but in *COEA* no provision to extend execution to equitable interest (fund is equitable because beneficial interest), therefore the fund is immune.    * However, s.55 *COEA*: & effects. “effects” is sufficiently broad to cover the interest in RRSP.    * If the interest is fully vested in JD then it is exigible by writ of seizure and sale. 3. Is the interest of the annuitant in the fund and investments and cash representing the same, fully vested?    * In this case, yes because JD has the power to leave assets or terminate it by withdrawing the fund at any time. 4. Are there policy questions?    * Argued similar to pension plans (statutorily exempt from being subject to execution). BUT court disagrees. |
| Bank of BC v 225280 BC Ltd (1985) BCSC – OVERTURNS A&W |
| Facts: JD has RRSP in form of cash deposit with Bank of BC. JC applies for declaration that proceeds of RRSP are subject to seizure and sale.  Court:   * s.55 COEA: all goods, chattels and effects subject to seizure & sale. Also relies on Vancouver A&W. * “Effects” is sufficiently broad meaning to cover RRSPs – beneficial interest is personal property. * Goods, chattels, and effects are limited to tangible personal property. This excludes shares. Overturns approach in Vancouver A&W. * Shares in RRSP are not tangible personal property therefore are not subject to seizure and sale. |
| Mortil v International Phasor Telecom (1988) BC |
| **Facts:** sheriff seizes JDs software and Instruction manual under writ of seizure and sale. JD argues that software is intangible intellectual property and thus not subject to a writ of seizure and sale.  **Court:** intellectual property cannot be seized under *s. 55 of the COEA*. However, instruction manuals are tangible and may be seized. Court can order sale on terms to protect the intellectual property. S. 55 is limited to tangible personal property/chose in possession. |

#### Money & Securities for Money

COEA s.58-61 is almost a carbon copy of s.12. List of assets that are subject to seizure by the sheriff. Bank notes are not the equivalent of debts (species – bills, coins, etc). Few cases dealing with these assets. Few cases there are – interprets “other securities for money”. Allows for seizure and sale of intangibles evidence by paper. Including bank notes, money, cheques, bills of exchange, promissory notes, bonds, specialties, and other securities for money.

**Where can the bailiff find money to seize?**

* Can ask JD – but cannot search, has to be voluntary
* Commercial JD’s – always cash registers of its business… court bailiffs reluctant to take from cash registers, vendor collecting taxes therefore some of the money in the register doesn’t belong to the JD.
* Problems:
  + A cheque does not belong to the JD until it has been delivered
  + Certain cheques carry a certain immunity from execution (e.g. social welfare

**How does the sheriff/court bailiff seize?**

* Takes possession of the physical item
* If the person liable on the promissory note declines to pay on time, the court bailiff can sue.
* Whole execution is modified – unless creditor enters into agreement. JC has to determine if it is worth it. If a big bill of promissory note – probably worth it.

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| Canadian Mutual Loan v Nesbitt, 1900 ONT |
| **Facts:** JC trying to get dividends payable under a life insurance policy. Policy had already been pledged as security for a loan. Policy no longer available to be seized by JC, asks the court to appoint an equitable receiver to receive bonuses and dividends that would become payable under the life insurance policy (every five years).  **Issue:** Whether the receiver could be appointed (cannot be appointed with respect to assets that are exigible at common law), court had to consider whether the life insurance policy and dividends would be exigible at common law?  **Court:** Policy holder can turn it in and get some cash back (not face value – cash surrender value) at any time can ask what the cash surrender value is of the policy. It is a security for money & is exigible.  NOTE\*\*\*: Case can be factored into the BC statute – possible to say with confidence that life insurance policies are going to be exigible under s.58 BUT in case book list of statutes that create exemptions and immunities (IN BC – s.65 limited immunity from execution for life insurance policies). (1) If a beneficiary designated, insurance money from death onwards is not part of the estate of the insured.(2) Designation in favour of a spouse, child, grandchild, or parent of a person – insurance money and the rights and interests of the insured are exempt. |
| ***Re Trustee Act: Re Patmore,* 1962 –** *Shares endorsed as bearer share street certificates = essentially money* |
| **Facts:** Dr. Patmore, a dentist owns/invested in a lot of shares in a variety of corporations. Some of the corporations are not incorporated in BC (national & international). Dr. Patmore endorses the shares as bearer share street certificates (like money essentially). The bank knows there are many other creditors, considers it is a trustee within the meaning of the trustee act.  **Court:**  Exigible under execution act (now s.58 of COEA). Because these shares are endorsed as bearer shares/street certificates they are effectively money, irrelevant that they were shares in a non-BC corporation. Don’t need approval to transfer. |
| ***Bank of British Columbia v 225280* [1985] BCSC** |
| Repeat of case under goods, chattels, and effects. Remember: when attempt to seize an RRSP using s.55 of COEA the trial judge said no because an RRSP is not a tangible chose in possession, not a good in chattel or effect. JC tried again – on this occasion trial judge said it is a security for money and is subject to seizure by the sheriff. Modification of procedure with respect to court bailiff – he doesn’t sell the seized property. Justice Mackinnon erred??? |

Securities Transfer Act: IF CONFLICT, STA prevails.

s.48 - Certificated securities:

* (1): Court bailiff must seize the share certificate.
* (2) if certificate is been surrendered to issuer, then court bailiff can serve notice of seizure on issuer’s chief executive office (extraterritoriality problem if issuer is located outside of BC).

s.49 - Uncertificated securities: Seizure requires service of notice on chief executive office (extraterritoriality problem if outside BC).

s.50 - Security entitlements: Seizure requires service on broker where account is maintained.

s.51 - Securities and security entitlements pledged to a third party: Can be seized by serving notice on the secured third party.

*Court Order Enforcement Act*

s. 63.1: after seizing one of the above securities (aside from a certificated share in the possession of the judgment debtor), the seizure becomes effective once the issuer or securities intermediary has had a reasonable opportunity to act on the seizure. Seizure is not immediate. Sheriff can seize securities in accordance with *STA*.

s. 64.1: governs disposure of seized security. Court bailiff is deemed to be an appropriate person under the *STA* to deal with or dispose of the security. Judgment debtor ceases to be an appropriate person when security is seized. Court bailiff may execute, endorse, or do anything that the judgment debtor could have done with the security (including, presumably, sell it).

s. 65.1(5): shares are exigible but complicated with transfer restrictions. governs securities with transfer restrictions. Court bailiff must abide by restrictions in disposing of the security. However, the Court may order the restrictions void if they were fraudulently imposed on the security (so that the judgment debtor could frustrate execution).

NOTE: BC court must have jurisdiction over the person of the judgment debtor. Might fill in where the securities transfer actfails (if it does). Steps

1. JC knows JD owns some securities. Goes to court ex parte (no notice to JD), asks judge to charge the securities with the amount of the judgment debt. Order nisi (order unless). Charging order = order nisi.
2. Can’t be done for 6 months – can make 1st appearance and say those securities shouldn’t be charged for various reasons.
3. If JD fails to show cause why they shouldn’t be charged, the order is made absolute and then and only then can the JC do anything about selling the securities/shares.

Judgments Acts, 1838 and 1840:

* Created charging order for specific classes of property until 2007 s.69 COEA was repealed. Problematic in BC b/c confusing.
* Can be used to charge funds in court without engaging the *Creditor Assistance Act*.
* Only available post-judgment.
* Application is *ex parte*.
* *Order nisi* triggers show cause hearing. Judgment debtor or other interested party can show cause why the order should be discharged.
* New application is required for order absolute. Followed by six-month waiting period which starts when order nisi is made. Possibility for optional show cause hearing at this stage.
* Court makes order for sale (must convert order absolute into order for sale)
* Judgment creditor is entitled to full proceeds.

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| Consumer Imagenet Inc v Infinitron International Inc (2001) BCSC |
| Judgments Acts charging orders are available for BC companies as well as other companies with a substantial presence in BC (such as a federally incorporated company that has a head office and share office in BC). |

* If no order absolute, then discharge.

## B. Execution Against Real Property

Court Order Enforcement Act, Part 5

Execution against real property highly regulated by ss.80-116 of COEA.

**Procedure for execution against land.**

1. Registration judgment against title
2. JC calls on JD to show cause why their land should not be sold (s.92). Court orders an inquiry if no cause shown (s.94(1)).
3. Back to the court – order for sale (s.96)
4. Sale – sheriff may adjourn to get best price (s.104).
5. Distribution of the proceeds - monies realized from land are deemed be pursuant to *CAA* (s.110)

When can a judgment be registered? IMMEDIATELY. Also entitled as a JC to take the next steps and proceed to have the land sold.

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| ***Schiava re Execution Act,* 1960 BC– LEADING CASE.** |
| Justice Wilson: provisions of Execution Act could be read literally. No pre-conditions in BC, no requirement for JC to exhaust remedies against personal property first, can go directly to the land. |

COEA:

s.81 – Definitions of what judgments can be registered

* “*a judgment, decree, or order of the Federal court of Canada, Court of Appeal, Supreme Court or a claim established under the Creditors Assistance Act. Includes an order made under any other Act that entitles a person to register a judgment against land”*
* Allow judgment creditors from Federal Court to register their judgment against title to land in BC. Also authorize registration against specific title to land – judgment by certificate that administrative tribunals give.

s.83 – Should register judgment against land immediately.

* (3) outlines effects of registration “*From the time of its registration the judgment forms a lien and charge on the land of the JD specified in application in the same manner as if charged in writing by JD under his or own signature and seal”.*
* Become the holder of a lien and charge against land
* Will entitle JC to be paid out if the land is sold in order of time of registration. Even if the JC does not proceed with execution against land and doesn’t get order for sale, if someone else does (mortgagee etc), the JC is protected.
* Registration must be renewed within two years.
* Exception: s.83 – **non expiring judgment**:
  + Family judgment, family creditors are protected – family maintenance order under *Family Maintenance Order Act*, if a maintenance creditor you can get judgment registered and don’t need to worry about the two-year limit.

s.86: HAVE TO REGISTER AGAINST EACH SPECIFIC PROPERTY NOW. Deliver copy of judgment signed and sealed by the registrar. The land title registrar then has to give notice to JD (to prevent mistaken identity errors from occurring).

* (3) effect of registration is to immediately create lien and charge on the land.
* (5) registration goes against any future interests held by debtor.

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| Butler-Lafarge v Lowe [1973] BCSC – consequences of failure to register in time. |
| **Facts:** JD (Ms. Low) mortgages her interest in land – mortgage (1972) – realized there was already a judgment registered on title, mortgagee recognized they were second in priority to judgment. In June 1972, JC commences proceedings to obtain an order for the sale of the land. In August, JC registers certificate of pending litigation. November 1972 JC renews registration of the judgment.  **Issue:** What are the priorities? Did the CPL registered in August preserve the lien and charge created by the registration of the judgment two years before.  **Court:** If registration is not renewed and expires, it ceases to form a lien or charge on the lands of the JD, priority of charge is lost. Can re-register, but then priority is lost. |
| ***Bank of Montreal v Jacques* [1988] BC** |
| **Facts:** May 4th, 1976 Mayes’ registered owners of leasehold interest in a property in North Van (leasehold = 99 yrs), registered owner = District of N Van. Dec 22nd, 1986 BMO Vancouver branch obtained judgment against Mayes’ leasehold interest. At that time, prior encumbrances against interest: (1) 1st mortgage by way of priority agreement (2) 2nd mortgage (3) third mortgage (4) 4th mortgage in favour of BMO N. Vancouver branch (5) Foreclosure proceedings commenced by BMO pursuant to 4th mortgage. June 1987, Mennells purchase leasehold property. BMO received cheque for $49k as result of sale. June 22nd 1987 release filed by Mayes’ to release “any right, title and interest” which they had in the property. Registrar orders judgment in favour of BMO be cancelled unless BMO took steps to prevent cancellation.  **Court:** Judgment debtor cannot get rid of lien and charge on land by selling land to third party. If the third party is aware of the judgment, it will run with the land. If in land title office, third party is deemed to have known. |
| ***Bank of Montreal v Fulthorp* 2006 BCCA** |
| **Facts:** BMO obtained judgment against Ms. Weckermann in October 2003, BMO registered November 12th, 2003. Transfer of property to Fulthorp registered in LTO November 27th, 2003 – notary did not search, title registered subject to bank’s judgment. Proceeds paid to Weckermann enough to pay judgment.  **Analysis:**   * COEA s.86: Judgments after October 30th, 1979 (3) from the time of its registration forms a lien and charge on the land of the judgment debtor (c) subject to the rights of a purchaser who, before the registration of the judgment, has acquired an interest in the land.   **Court:** If an interest in land acquired before the registration of a judgment, *even if the interest is not yet registered at LTO*, the JC cannot register judgment against title. Underlying principle = JC cannot seize property that doesn’t belong to JD. |
| ***CIBC v Muntain & Muntain* [1985] BCSC** |
| -You can register judgment against title, but *lis pendens* or judgment does not sever joint tenancy. Only a sale or death can sever joint tenancy. If the judgment debtor owner dies and the other owner is not a judgment debtor, you cannot realize against property and the *lis pendens* or judgment will be discharged.  -Court has discretion not to order sale under s. 96(2) or to impose terms and conditions. Courts tend to be reluctant to order the sale of matrimonial homes, especially those inhabited by pensioners where one is a judgment debtor and the other is not. |
| ***First Western Capital v Wardle*** |
| *COEA* 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. |
| ***Topouzis v Abboud*** |
| *COEA*, s. 110: money realized by sale of land is deemed to be money levied pursuant to the *Creditor Assistance Act*. 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. |
| ***Roadberg v British Columbia*** |
| In foreclosures, the lien and charge created by registration of judgment against title is transferred to the fund in court.  *CAA* does not apply to foreclosure proceedings. Payment is made out on the basis of the order of registration on title. |

## C. Equitable Relief

Originally, there were two systems of court in England (common law & equity)/ Equity originally enforced equitable orders by contempt (equity acts *in personam*). If you failed to comply with an order made by a court of equity, you were fined or imprisoned (classic remedies used for contempt). Equity then adopted other processes of enforcement of their own judgments (equitable judgments)

* Sequestration – still have a writ of sequestration in the civil rules but not a general remedy for enforcing judgments – really a contempt remedy
* Equitable receivers
* Equitable charging orders
* Injunctions & specific performance

The equitable orders were used in cases in which the common law writs, which were always limited (but even more so then) failed to provide relief to the plaintiff/JC. Common law & equity merged in 1873 (Judicature Act) The single merged court could then make equitable orders & common law orders. Many inconsistent cases/confusion. BC eventually followed common law.

Law and Equity Act

s.39

* (1) Injunction or order in the nature of *mandamus* may be granted, or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.
  + Not really a source of jurisdiction, but a recognition of the jurisdiction that had already existed in equity – now the common law courts can use as well
  + The only guidelines set out in the section are that the court must find that such appointment would be “just or convenient” – discretionary; courts have developed their own guidelines

### 1. Mareva Injunctions

Began as a custom of foreign attachment – permitted a plaintiff bringing an action against a foreign defendant to make an ex parte application for an order of seizure of the defendant’s assets within the jurisdiction. Designed to ensure that the foreign defendant would show up for the trial; if defendant failed to appear, plaintiff could realize upon sufficient assets to satisfy the debt. Used up until the mid-nineteenth century, then rejected by the merged courts – instead Lister v Stubbs principle: security for a debt will not be ordered before judgment even where success of the claim is highly probable.Reinvented by Lord Denning as the Mareva injunction in 1975 in *Nippon Yusen Kaisha v Karageorgis* and *Mareva Cornpania Naviera v International Bulk Carriers.*

* Denning first decided Nippon Yusen Kaisha v Karageorgis [1975] and then Mareva Cornpania Naviera v International Bulk Carriers SA [1975]:
  + The owner of a ship was a foreigner, and the ship could easily be removed from the port of England where it was currently located, meaning that there would then be no assets left in England from which a successful plaintiff could satisfy his judgment
  + The Mareva injunction froze the property so that the ship could not be used

**Rapidly expanded:**

* Initially, there was no available pre-judgment relief for plaintiffs (in Canada, we now have pre-judgment garnishment)
* The Mareva injunction was available pre-judgment
* At one point, applications were being made at the rate of 30/day
* Initially, only available to foreign (ex juris) defendants; now available to any defendants
* Initially only available re: local (in England) assets; now available to assets anywhere in the world
* Initially a pre-judgment remedy; now available pre and post judgment
* Ancillary orders (eg: for disclosure of assets) may now be made in addition to the Mareva injunction
* Available for any and all claims, regardless of cause of action
* Available with respect to any category of property
* Safeguards for 3rd parties in possession of property included (eg: banks)
* Required the plaintiff to put up security in case the defendant was successful and suffered damage as a result of the injunction

**Procedure:** (From ***Mooney v Orr***).

(1) Plaintiff makes an *ex parte* application (not all parties have to be present)

* Don’t want to let the defendant know what you are doing – would give them time to dispose of their assets

(2) Plaintiff must make full and frank disclosure

(3) The plaintiff must be prepared to post security for damage caused by Mareva injunction if plaintiff loses

**Plaintiff must establish:** *From* Aetna – confirming Mareva Injunctions available in Canada.

(1) The court has jurisdiction over the defendant in the action \*\*this point is a bit unclear\*\*

* A Mareva injunction is applied for early on, meaning that there may be a dispute re: jurisdiction
* Equitable remedies are in personam remedies, so the court must have jurisdiction (under our rules for jurisdiction)
  + Doesn’t have to be a local defendant, but court must be able to say that it has jurisdiction

(2) A “good, arguable case” or “a strong prima facie case”

(3). There is a real risk to the plaintiff of a dry judgment (where unable to collect/will be no assets)

* If Mareva injunction not issued, there will be no assets available from which the plaintiff can recover his debt

(5). The Mareva injunction must be just and convenient (a cost-benefit analysis)

**Options for Defendant:**

(1). Make an argument before a court to have the Mareva injunction dismissed, or varied

(2). Third parties can also dispute the issuance of a Mareva injunction, although there are no cases in BC on this point

**Effect of a Mareva injunction:**

* The property is frozen, meaning that the debtor cannot move or dispose of the property
* Ownership does not change hands
* The plaintiff does not receive any kind of a property interest

**Penalties for Breach of Injunction:**

* The only remedy available is contempt proceedings
* In England, the debtor can be thrown in jail for up to two years if the debtor is persistently in breach
* In Canada, you can still be thrown in jail but not for nearly as long
* If the debtor absconds the jurisdiction and does not have assets in the jurisdiction, there’s not much a court/plaintiff can do

Note: The court cannot jail someone who has breached a Mareva injunction in a foreign jurisdiction – the Mareva injunction must first be recognized and enforced in that jurisdiction.

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| Aetna Financial Services v Feigelman, SCC - *Confirms availability of Mareva injunctions in Canada.* |
| **Court:**  **(1).** There is legislative authority in every province for issuing injunctions (Law and Equity Act)  **(2)**. It is permissible for courts to continue to issue Mareva injunctions  **(3)**. The Mareva injunction is an *in personam* remedy  **(4)**. The Mareva injunction had to be “Canadianized” to fit within the federal system   1. The defendant was a CBCA company whose head office was located in Manitoba, but the defendant intended to move it to Quebec. If it did so, then there would no longer be any assets left in Manitoba   The defendant would be permitted to move its head office, but the Manitoba decision would be recognized, and could be realized upon in Quebec (or any other province) |
| Mooney v Orr (1) (1994) BCSC – Worldwide Mareva available but exceptional remedy |
| Facts: Defendants seek ex parte Mareva injunction against plaintiff and defendant by counterclaim (Mooney). Unusual application – middle of a complex trial & the injunction would restrain Mooney (resident of BC) from dealing with any of his assets, including ones outside of BC. No prior history of Cdn court granting Mareva that has such extra-territorial effect. Court grants worldwide Mareva.  **Court:**  Worldwide Mareva:   1. If UK courts can issue worldwide Mareva injunctions, as a *in personam* order then BC must also be able to order worldwide Mareva injunctions against people located in BC. 2. Worldwide Mareva injunction still an exceptional remedy – must be    1. “Strong *prima facie* case”    2. Real risk that defendant will remove assets from the jurisdiction or dissipate to ‘avoid possibility of judgment’       1. Must be substantiated – not just an apprehension based on suspicion. 3. For worldwide Mareva – “*there exist assets ex juris the disposition or concealment of which would be likely to frustrate any judgment obtained against the defendant*” (there are not sufficient funds within the jurisdiction to satisfy the judgment). The fewer assets in BC, the more likely the court will be to order worldwide Mareva.   Disclosure:   1. Within 14 days, Mooney must disclose the full value of his assets, their locations, and how they are held    1. Disclosure of the nature and location of the assets is a necessary adjunct of the restriction on disposition, and disclosure of value is required as a matter of course   **(2).** However, real hardship might result if Mooney is required to obtain appraisals of non-liquid assets such as real property or shares in private companies   * 1. The order will require Mooney to indicate the value only of those assets that are publicly traded shares, bank deposits or similar securities, or where the value can be ascertained without the necessity of expert appraisal evidence   2. The applicant must also include an undertaking not to make use of the information so disclosed in proceedings abroad without the leave of this Court   Equitable Receiver:The court should appoint an equitable receiver, and Mooney should transfer his assets that are located outside of the jurisdiction to the receiver   * The tax consequences of such a transfer could be disastrous * The prior approval of this Court or Mooney must be obtained before the receiver is empowered to move an asset from one jurisdiction to another * The applicant must also undertake to pay any damages that Mooney may sustain as a result of the granting of the injunction should he ultimately prevail at trial |
| Mooney v Orr (2) [1994[ BCSC |
| Facts: Application by Mooney to discharge/dissolve Mareva injunction from Mooney 1.  Court: Upholds issuance of Mareva. Three issues:   1. What should be the practice of the court when a plaintiff seeks Mareva injunction with ancillary mandatory orders (e.g. to list assets and transfer them to receiver)?   *The applicant for a Mareva injunction must make full and fair disclosure of all material facts known to him and make proper inquiries for any additional relevant facts before making the application (including those facts relevant to the defendant’s position)*   1. Should the test of the merits of the plaintiff’s case differ where the application is:    1. Made during trial to the trial judge: *should be inter-parte.*    2. To restrain the movement of assets situate outside of BC before commencement of proceedings?    3. To require that foreign assets be transferred to a receiver. 2. Should the test for determining whether grounds exist for believing that the defendant has assets, and that there is a real risk of their disposal/dissipation to avoid consequences of judgment, vary with the terms and conditions of the order sought?   *The fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case. The ultimate question is: is it fair and just that the applicant should have the right to monitor the movement or expenditure of capital assets by the respondent during the course of the proceedings between them?*  Note: *“Strong prima facie case” vs “good arguable case” – both mean the same thing in BC* |
| Tracy v Instaloans Financial Solutions Centre (2007) BCCA. – Mareva injunctions are available for class actions |
| **Facts:** Tracy obtained worldwide Mareva injunction, impound order requiring defendants to place all funds from sale of businesses in issue in a lawyer’s trust account and requiring them to file affidavits listing all their assets. Not required to give an undertaking as to damages.  **Court:** Doesn’t vary any aspect of general approach.   * In BC, plaintiff must prove either “good arguable case” and “strong *prima facie* case” (same thing), does not need to meet “bound to succeed” threshold. * Relationship between claim and assets being frozen, quantum is important   + Applicant must establish extent of viable claim bears some relation to value of assets sought to be frozen * Mareva injunction must be accompanied by commitment from applicant to expedite trial process * Mareva cannot exist open-ended, must be some limited duration. |

Note: Both plaintiffs and defendants can apply for variations in injunctions. Post-judgment injunctions are available in BC (but they are the exception, not the rule).

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| First Majestic v Davila, 2014 BCSC – Varying a Mareva injunction |
| **Facts:** A BC judgment for breach of fiduciary duty, plaintiffs were successful and had to enforce in Mexico. Under Mexican law, not permissible to enforce a foreign judgment until all appeals have been determined. Santos purchased mine in Mexico through his control in MMM, have no BC assets. D had previously negotiated to purchase mine for Ps, where he was President, CEO, and director. MMM purchased mine one year after Santos resigned from P company. Court found D breached fiduciary duty to Ps & engaged in misrepresentation, misconduct, and wrongful acts. Ps awarded $93.4 million. Remaining debt = $80 million. Within weeks of Ds filing appeal, Ps applied for post-judgment Mareva injunction to prevent Ds from disposing of or diminishing value of mine. Dickson J granted interim injunction and granted Mareva. Ds are increasing mines production, Ps say this increased mining is significantly dimishing the mine’s value and apply to vary existing Mareva to (a) remove Ds right to mine in ordinary course of business (b) Freeze Ds worldwide assets NOT just mine (c) Require Ds to provide Ps with documents/records (d) Require Santos to attend examination (e) Compel Ds to produce docs (f) Require Ds to swear an affidavit of assets worldwide.  **Court:**  For variation of Mareva Injunction:  **(1**) Applicant must establish that a significant change in circumstances has occurred since injunction was granted  **(2)** On post-judgment, real issue is where where the balance of convenience lies, and whether either side will suffer irreparable harm  Should Mareva injunction Prohibit all Mining? Yes.There is a real risk that the Ds actions are diminishing the mine’s value  Should the Mareva injunction extend to worldwide assets? Yes. Extends Mareva to include all assets of the JD in the world no matter where they are located. |

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| ***Silver Standard Resources v Joint Stock Geolog* [1998]***– Comparison between two pre-judgment remedies* (garnishment and Mareva). |
| **Facts:**  Silver Standard hasn’t repaid the money owed to Geolog. Wants to recover the money. Silver Standard (BC company) brings action in BC. Geolog points to arbitration clause in contract. Says they have no discretion – has to stay the action commenced by Silver Standard. BUT the International Arbitration Actauthorizes BC court to permit interim measures of protection. Geolog had no assets in BC.  **Court:** Considers conditions governing the granting of a Mareva injunction.   * Third parties are also bound by Mareva injunctions once they are informed of the injunction. Can be liable for contempt if they disregard the injunction too. * s.5 COEA discretion to set aside pre-judgment garnishing order. BUT wasn’t exercised here. Order allowed to stand. * For Mareva injunction, *in personam* remedy * Both require that you have commenced an action   + Pre-judgment garnishing: don’t need to establish defendant’s state of mind   + Mareva: Do need to address the defendant’s state of mind.     - Might be able to establish fraudulent intent     - Have to establish that defendant intended to induce a dry judgment. |

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| *Pre-Judgment Garnishment Order vs* | Mareva Injunction |
| Common law remedy codified in COEA. | Equitable remedy. |
| In rem: debt is seized. Garnishee must be in the province. | *In personam*: property may be located anywhere in the world |
| Limited to debts. | Not limited to debts. |
| No concern with defendant’s state of mind. | Plaintiff must establish defendant’s state of mind. |
| Debt is paid into court. | Assets are frozen. |
| Requires local action. | Also requires local action. |
| Requires a claim for debt or liquidated damages. | Can be for any claim. |
| No ancillary order for discovery. | Plaintiff can apply for ancillary order for discovery. |

### 2. Equitable Receivers

Now available both pre-and post-judgment. Open to the court to specify the powers the equitable receiver will have. No reason for the BC courts not to follow the lead of the English court of appeal.

**Three rules about appointing equitable receivers:**

1. Property must be exigible at common law
   1. Conflicting case law.
   2. Question: Is this asset, at this moment exigible (Peterson Livestock and Fox)
   3. Three approaches:
      1. Is this class of assets exigible at common law? (broadest and most judgment creditor friendly)
      2. Is this asset exigible at common law? (narrower approach)
      3. Is this asset immediately exigible at common law? (narrowest and most judgment debtor friendly)
2. Must be an impediment to execution at law.
   1. Some reason JC can’t use the writ
   2. Or persuaded that would be preferable to using common law execution (NEC Corporation)
3. Is it just and convenient? S 39 of the Law and Equity Act is the authorizing statute for equitable receivers, and it holds that the appointment must be “just and equitable in all the circumstances”
   1. This requires a cost-benefit analysis

**Garnishing order is *in rem* order** – debt is seized, asset that is actually seized by virtue of the order made by the English court. All you need is jurisdiction over the JD not the asset, so can appoint equitable receiver on a worldwide basis.

* Have been appointing trustees in bankruptcy, why can’t appoint equitable receiver worldwide?
* Lord Justice Collins: Even if wrong about cases, why should a 2008 (read 2017) court be bound by 19th century rules (p. 141)? May seem curious that deciding now whether a court may exercise a power it is necessary to consider whether it is justified by pre-1873 practice?
* Holds: nothing that prevents the Court of Appeal in 2008 from appointing an equitable receiver to intercept the income from the oil concession (in Yemen – worldwide appointment).
* Appointment of equitable receiver in England is no different than a Mareva injunction in England. Not enforceable, receiver can’t take any actions to enforce their authority in a foreign jurisdiction until the foreign jurisdiction has recognized the appointment of the receiver.

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| Vancouver A&W Drive-Ins v United Food Services – widest approach/class of assets |
| **Facts:** JC wanted to get at shares held in JDs RRSP (case preceded amendments making RRSPs non-exigible). The shares in question were not exigible. Can’t use execution at law, because against shares of company not incorporated in BC.  **Court:** Takes broadest approach and asks:   * Is this **class of property** exigible at common law? * Shares as a class of asset were exigible, *even though these particular shares couldn’t be executed against at common law* |
| ***Re Peterson Livestock* & Fox (1982) BC** – *narrowest approach that can be used* |
| ***Re Peterson Livestock* & Fox (1982) BC** – *narrowest approach that can be used*  **Facts:** Fox = JD, Indigenous man living on a reserve. JC = his band. Mines and minerals were being developed on the reserve, JD was due to receive royalties from the Crown in exchange for having the mines on reserve land. Almost exclusively asked when the asset in question is a debt. Mines and minerals being developed. Can JC get equitable receiver?  **Court:** Takes narrowest approach and asks:   * Is this asset **immediately exigible** at common law? * Looks at relevant legislation – not garnishable because not due and accruing due. Because not exigible can’t get equitable receiver appointed. |
| NEC Corp v Steintron International Electronics Ltd [1985] BC – fraud/special circumstances |
| **Facts:** Steintron not voluntarily paying up, on evidence introduced is doing its best to dispose of and hide its assets. In effect, to render the judgment dry. “Unpleasing to determine the litigant is not honest … but in this case no other rational conclusion”. Evidence of dishonesty on the part of the judgment debtor. Amounts to special circumstances.  **Court:**   1. The Court may appoint an equitable receiver where the plaintiff seeks to have an equitable interest sold or where there are special circumstances that render it practically very difficult, if not impossible, for the judgment creditor to obtain the fruits of his or her judgment. 2. Equitable receiver over all assets permissible. 3. Fraud established of judgment debtor. Other cases exist in which there is no fraud (Goldschmid*t* – JC could have garnished multiple small debts owing to the JD, but JD not an English corporation – would be easy to say that all English debtors owing money to JD might pay).    1. JC free to argue that anything constitutes a special circumstance and if that is made out then the last rule – must be *just and convenient* becomes the paramount rule.    2. Court will do a cost-benefit analysis of appointing an equitable receiver. |
| ***Interclaim Holdings v Down*, 2002 BCSC** |
| **Facts:** Application for appointment of a worldwide equitable receiver. Mr. Down was in trouble with the authorities in the US, ended up settling claim that the US authorities had against him. Awarded 1.8 million dollars in costs when he won as a defendant. Interclaim had posted $400,000 but Mr. Down doesn’t think this is enough. Mr. Down now the judgment creditor wants an equitable receiver appointed on a worldwide basis because Interclaim Holdings has no assets in BC. Interclaim holdings had also asked for an interim receiver in bankruptcy to be appointed on a worldwide basis as Mr. Down owned assets worldwide.  **Court:**   * CJ Brenner refuses to order the appointment of a worldwide equitable receiver. No reason why JD couldn’t enforce his judgment in the jurisdictions in which Interclaim was located (Common law jurisdictions, CL rules for enforcement familiar to Brenner). * No equitable receiver on the facts of this case, but did not hold that a worldwide equitable receiver could never be appointed just that this case wasn’t appropriate.   + The fact in this case that JD entering bankruptcy in another jurisdiction and has limited assets in BC does not meet special circumstances threshold; no impediment to seek enforcement in another jurisdiction. |
| ***Klyne v Young* (1996) BCSC***– statutory immunity – egregious circumstances* |
| Lots of statutes create immunities for certain payments (eg. Social benefits, pensions). Treat as removal of impediment? Useful in a limited number of cases, wouldn’t want to always overrule the statutory immunity and appoint an equitable receiver. But in some egregious cases you might.  **Facts:** JC (Klyne) brought an action against Mr. Young for sexual assault. Mr. Young had been her teacher when she was a child and he had assaulted her. He fled, but he left behind in BC a wife and a daughter. The evidence provided by the defendant (Mr. Young’s wife) established that Mr. Young was receiving disability benefits that were about to expire, and after that he would receive a pension. Both disability benefits and pensions generally are protected by statutory prohibitions on executions and assignments. JC can’t find any other assets belonging to Mr. Young (JD). She seeks appointment of an equitable receiver to receive his pension.  **Court:** If an asset is immune to all forms of execution under statute (such as a pension), then you cannot get an equitable receiver appointed as a matter of statutory interpretation (“execution” used in pension legislation includes equitable receivers). Execution is not a term of art. |
| ***Masri v Consolidated Contractors International Company* –** *contempt/bad behavior of JDs* |
| **Facts:** Basis for claim originally was Masri entered contract with defendants. Entitled to 10% (partnership agreement) of their 10% share in an oil field in Yemen. Defendants fought action – say English court has no jurisdiction. House of Lords say they do have jurisdiction, thereafter all defendants participated in English court. In this particular case, English Court of Appeal (and lower) getting frustrated with JDs. JDs thumbing their nose at the English decisions. No doubt ever at any point that the JDs could have paid the judgment. No question of not being able to pay – did not want to pay. Contempt induced Court of Appeal to modify certain remedies including the appointment of equitable receiver.  **Court:** Equitable receivers operate *in personam,* not *in rem.* Equitable receivers may collect future profits.  Note: hasn’t yet been followed in BC. Still have to garnish each time you want to collect a judgment. |
| ***JSC VTB Bank v Skurikhin* (2015) EWHC –** *UK recognizing and enforcing Russian judgment* |
| **Facts:** Claimant (VTB) seeks appointment of equitable receiver over the LLP membership interests in 2nd defendant by way of equitable execution. Judgments were obtained by VTB by enforcement in UK of judgment in Russian courts. LLP interests in 2nd defendant are located in UK jurisdiction. Wants to get equitable receiver over shares in order to sell D’s valuable properties in Italy.  **Court:** The court found that the first defendant was the beneficial owner of certain LLP membership interests. As he had *de facto* control over those interests, they were property subject to trust and regarded in equity as his assets. Applying the principles set down in recent case law, the court held that it was just and convenient for equitable receivers to be appointed over those assets. The appointment was necessary to meet the demands of justice that prior judgments of the court be complied with and enforced in circumstances where the first defendant was in breach of a worldwide freezing order. |

### 3. Equitable Charging Orders

A charging order, in [English law](https://en.wikipedia.org/wiki/English_law), is an order obtained from a [court](https://en.wikipedia.org/wiki/Court) or [judge](https://en.wikipedia.org/wiki/Judge) by a judgment creditor, by which the property of the [judgment debtor](https://en.wikipedia.org/wiki/Judgment_debtor) in any [stocks](https://en.wikipedia.org/wiki/Stocks) or [funds](https://en.wikipedia.org/wiki/Funds) or land stands charged with the payment of the amount for which judgment shall have been recovered, with interest and costs. Applies to/is available for property based on the location of the property, and is property in court to which the judgment debtor is presently entitled (*in custodia legis*). JD must have some proprietary interest in the asset which is in court. Asset is usually a fund of money.

**Note:** If you use s.26 of the Creditor Assistance Act only have to wait 1 month to get a share (distributed by bailiff *pro rata*). If using Equitable Charging Order, have to wait 6 months if there are other creditors.

**Note:** Equitable receiver and Mareva injunctions are very flexible. Can seek both before and after judgment, can do both in an appropriate case. May apply for a Mareva and appointment of Equitable Receiver as separate remedies or in combination. Both are unlimited in the sense that the Mareva can freeze and the equitable receiver can be appointed to collect property in any part of the world because both are *in personam* orders.

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| Chima v Hayduk (1976) BC – no other creditors. |
| **Facts:** Money in court from pre-judgment garnishing order, surplus leftover belonging to Mr. Hayduck (JD of Chima). Chima applies for an equitable charging order – money in court to which JC is entitled to. JD has no other creditors.  **Court:**   * Equitable charging orders can be used to charge funds that have been paid into court, including those that have been paid into court as a result of a garnishment order in another action and where some of those garnished funds are left over. * Where there are no other creditors, the Court may order immediate payment of the funds charged (otherwise, you need to wait six months). |
| Rennison v Sieg (1979) BCSC |
| **Facts:** Sieg entitled to $17,500 had been paid into court for MVA. Mr. Rennison is a JC of Sieg. In this case, Sieg (not other creditors) says that he has to pay his lawyer in the MVA action and has other creditors that he would like to pay from the money.  **Court:** Since other creditors exist, if you apply for charging order, court will hold fund sitting in court belonging to Mr. Sieg and wait for 6 months. In that 6 months any creditors who want to share in the fund can put in a claim. Will be paid out *pro rata* to all creditors. |
| Canada Revenue v Miller (2006) BCSC |
| **Facts:** Miller has many creditors including revenue agency, Shaw, his brother. Driving at Cypress Bowl after park was closed, stopped by WV police and they seize $250,000 sitting in cash in a bag in Mr. Miller’s back seat. Judge finds money was illegally seized. Revenue Canada claiming money because he owes back taxes, file it by certificate in court becomes enforceable in court. WV police has various claims, so they pay money into court (interpleader) in order to sort it out.  **Argument:** Mr. Miller argues Revenue Canada doesn’t have clean hands (needed for seeking equitable remedies) because the $250,000 fund was illegally seized.  **Court:** Demonstrates that it might be an argument because equitable doctrines apply to Mareva injunctions and equitable receivers and equitable charging orders. Doesn’t win on this argument because Trial Judge says it would require him to consider there is no difference between WV Police and the Crowns, but they are separate. Crown did not seize money; WV police did. Revenue Canada gets all $250k. |

## D. Federal Court Judgments

If you get a judgment from the Federal Court it is enforceable in any Province in BC where assets are located, do not need to get judgment recognized.

1. If you are a JC from federal court, you have to use federal court process (Federal Court Rules, statute).
2. JC (often Crown in Canada) may pose special priority problems.
3. Integrating federal court judgments and enforcement of BC judgments.

**Note:** If the crown takes the benefit of a statute must take the burden of it too. Benefit from COEA.

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| BC (Deputy Sheriff) v Canada (1992) BCCA |
| **Facts:** JD in this case is International Electronics – owes back taxes to Revenue Canada. Revenue Canada doesn’t get paid the amount it claims to be owed by International Electronics so it issues certificates and files them in federal court. Those certificates become enforceable as if they were judgments of the federal court. Issues writ of seizure and sale. The writs are delivered to the sheriff because Federal Court JC under FC rules use the same people to enforce their judgments as BC JD’s use (court bailiff now). International Electronics then has an action issued against them by Royal Bank. IE doesn’t even defend, default judgment. Issues writ to the same court bailiff.  **Issue:** Court bailiff interpleaded. Does federal JC or provincial JC get the money?  **Court:** By the time the BC JC was claiming, the procedure under the writ had been completed. Property had passed to the execution purchaser so the court bailiff owed the money to the Crown/Revenue Canada.   * Creditor Assistance Act does not apply to federal court judgments or certificates. First in time, first in right is the rule for competing judgment creditors in the federal court system. * -Federal court certificates have the same force and effect as judgments.   -A writ of *fi fa* issued under certificate by the federal court is complete once the goods are seized. At that time, the first creditor to issue the writ is entitled to the proceeds of the sale. |
| Hong Kong Bank of Canada v Canada (1989) BCCA |
| If a federal court judgment creditor registers judgment against title to land in BC, the distribution of proceeds from the sale will be pursuant to the CAA and will be *pro rata*. If the federal court judgment creditor wants to avoid *pro rata* distribution, they can get a federal court writ against land. If you want benefit of statute – have to take the burden too. |

# Part III: Reviewable Transactions

## A. The Fraudulent Conveyance Act

Trustees in bankruptcy can use provisions in *BIA* and others – voluminous flow of cases invoking Fraudulent Conveyance Act and/or Fraudulent Preferences Act. Fine line between acting prudently and acting fraudulently. No concern with a debtor incorporating. You incorporate – gives separate personality etc.

The Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 and the *Fraudulent Preference Act* R.S.B.C. 1996, c. 164 are reproduced in the Statutory Materials. They are distinct but overlapping *Acts*. The *Fraudulent Conveyance Act* is a modernized version of a statute of Elizabeth I. Comparable legislation exists in many jurisdictions. The *Fraudulent Preference Act* is turn-of-the-century provincial legislation enacted to fill the void which then existed as a result of the repeal of the federal *Bankruptcy Act*. In some circumstances both *Acts* may be invoked by the creditor. Nevertheless, there are significant differences between the two *Acts*.

FCA is a statute from 1571. Was originally a criminal statute.

* Conveyance is different than a preference. Preference is favouring one creditor over another, conveyance is simply moving money out of a creditor’s reach.
* A conveyance can be any type of transfer.

FPA was not enacted until the turn of the 20th century. Is really more like bankruptcy legislation. Less useful. Key provisions for collections at sections 1-6 substantive and sections 7-12 procedure.

* Giant loophole – cash payments are exempt.

FCA - preamble gives you taste of old statute.

S.1 – Three elements:

*Actus reus* – disposition of property.

* + Anything now exigible, in which debtor has beneficial interest.
  + What does disposition mean? Basically everything – transfer, assign, give, sell, bequite, divise, divest, etc.
* *Mens rea* – intent to delay, hinder or defraud.
  + State of mind of the debtor/transferor is what poses the most problems in litigation.
  + S.2 – if disposition for value state of mind of the transferee is important.
  + Relevant time is the time of the disposition.
  + Can determine intention by: admission, looking at the effect of the disposition on the creditor, circumstantial evidence (“badges of fraud”).
  + What is not required is moral turpitude, malice, *male fides*, etc.
* Victims are creditors and others.
  + Creditor at time of disposition clearly has standing.
  + Who are others? Standing is not limited to creditors at time of disposition.

**Issues in the case law:**

* State of mind.
* Dispositions for value (Section 2 requires double intent – state of mind of the transferor and the purchaser for value. Section 2 creates an exception for bona fide purchaser for value).
  + Knowing that the defendant has creditors is not enough to give a transferee notice, there must be something more but this is not specifically defined.

**Start from the proposition that most dispositions for *bona* *fide* purchasers for value are usually ok.**

Creditor claims arising after a disposition of property, except after the death of the alleged debtor, have a pretty good chance of success if there is a disposition of property for less than market value / a gratuitous disposition they have a pretty good chance of success. However, your success attacking a disposition will always depend on the circumstances existing at the time of the disposition.

* Are they already involved in litigation?
* Do they have other creditors they cannot pay?

What precautions can be taken if you are counsel to a defendant debtor who wants to dispose of his or her property?

* Document the circumstances.
* Advise client to retain a reasonable reserve of assets or funds to pay of anticipated creditors.
* Consider getting consent of existing creditors prior to making the disposition.

Fraudulent Preferences Ac*t* is a useless statute according to Professor Edinger.

* Debtor must be in insolvent circumstances at the time of the transfer.
* The creditors must be existing at the time of the transfer, no “creditors or others”.
* Sections 7 – 12 are, however, useful because they can be used in conjunction with a *FCA* claim.
  + 7 – tracing provision.
  + 9 – useful if the asset is real property. Gives you a short cut, you can avoid bringing an action under the *FCA* and simply bring a show cause hearing.
  + 10 – entitle to register judgment against land regardless of conveyance if found to be fraudulent conveyance.

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| Abakhan & Associates v. Braydon Investments, 2009 BCCA 521 - FCA |
| **Facts:** Abakhan & Associates is the trustee in bankruptcy. BHL becomes partner in JW auto and almost contemporaneously transfers all its assets in Braydon. JW auto becomes bankrupt and the trustee in bankruptcy wants to recoup the assets transferred from BHL to Braydon. On Summary trial the judge held that one purpose of the transfer of assets from BHL to Braydon was to put BHL’s assets out of reach of its creditors, and the transfer was therefore a fraudulent conveyance within the meaning of the *Fraudulent Conveyance Act*, 1996, R.S.B.C. c.163. The trial judge held this to be so, despite the fact that BHL’s and Braydon’s principal, William Botham, had no dishonest intent, or *mala fides*, and acted on professional advice to effect legitimate business purposes (was advised that he could both protect BHL’s assets from creditors’ claims and qualify for the tax benefits of capital cost allowance claims with the transfer).  **Issue**: Is a transfer of property made with a view to protecting assets from creditors, present or future, if made honestly, without moral blameworthiness, and for other legitimate business purposes, is prohibited by the Fraudulent Conveyance Act? Is the mere intent to delay or hinder creditors is sufficient or must *mala fides* be established under s. 1 of the Act?  **Court:**   * There had been a substantial body of authority holding it unnecessary to establish *mala fides* on the part of the transferor to commit fraud. * Purposive approach: The focus in the case law has been on the provision of a civil remedy for creditors disadvantaged by the conduct of their debtors.   + To achieve this purpose, we pay attention to the intent “to delay, hinder or defraud” and ignore the wording of “collusion, guile, malice or fraud”. * Proof of intent:Intent is a state of mind and a question of fact.   + Where a disposition had the effect of hindering or delaying or defeating creditors, the Court presumes the intention and will attribute it to the settlor.   + Where you foresaw that potential creditors might be defeated by the impugned conveyance.   + Where you exchange exigible assets for non-exigible assets.   + Proof of intent to defeat or delay creditors typically requires drawing inferences from the circumstances surrounding the transaction.   **Takeaway:** The only intent now necessary is the intent to put one’s assets out of the reach of ones creditors, no further dishonest or morally blameworthy intent is required. NO *mala fides* necessary, only if they foresaw potential creditors who might be defeated. |
| McGuire v. Ottawa Wine Vaults Co., (1913) 48 SCR 44 - FCA |
| **Facts:** McGuire got into pub business, transferred property to his wife (gratuitous/voluntary).   * Restaurants, pubs, and shipping are usually risky businesses. * McGuire’s pub gets into trouble. * Creditors who accumulated subsequent to the transfer qualified as others to claim against that disposition. * Disposition set aside and assets restored to the transferor.   **Court:** Entering into a risky business, if you make a disposition it is susceptible. |
| Maudsley v Meshen, 2012 BCCA 91- FCA |
| **Facts**: Ms. Meshen’s settled an *alter ego* trust prior to her death on which her children and their issue and her late-husband’s brother were the beneficiaries; her common law spouse (Mr. Mawdsley) was not. The same is true of the last will, which Ms. Meshen also signed on May 12. Ms. Meshen was confident that Mr. Maudsley would make no claims on her property. Ms. Meshen dies, Mr. Maudsley brings WVA and FCA claim.  **Court:**   * Plaintiff must prove that defendant’s intent. Intent cannot be inferred from the effect of the transfer. * Creditor means someone to whom a debt or obligation is owed or someone who is entitled to the fulfillment of an obligation. “And others” refers to 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. Moral claims do not give rise to an action. People who have no claim at the time of the transfer cannot use the *FCA*.   **Professor’s note:** disagrees that cases are consistent in limiting others to those that have a claim, thinks there is no consistency in interpretation of “creditors and others” in the *FCA*. |
| Canadian Imperial Bank of Commerce v. Boukalis, [1987] B.C.J. No. 86, 11 B.C.L.R. (2d) 190 (B.C.C.A.) FCA |
| **Facts**: CIBC wanted to set aside a second mortgage by the defendant Vasilios Boukalis, to his brother, the defendant John Boukalis, for the sum of $550,000. When the mortgage was granted Vasilios Boukalis was indebted to the Bank but the indebtedness was secured and the Bank has not shown that the security was inadequate at that time. At the time of trial however, the security had proved to be inadequate and the bank had several outstanding judgments against Vasilios Boukalis.  **Issue:** Does one who is not an unsecured creditor at the time of a conveyance have status to challenge a conveyance under the *FCA*? Put otherwise, is a creditor who was fully secured at the time of an impugned transaction not permitted to take the benefit of the *FCA*?  **Court:**   * The different language in the *FCA* and the *FPA* indicates that there is a different group to be protected, and that is consistent with the fact that the Acts have different purposes.   + This part of the *Fraudulent Preference Act* [section 3] deals with preferences in favour of certain creditors. A plaintiff cannot be a prejudiced creditor if he was not a creditor at the time the preference was given. The thrust of these sections is to ban the preference of one creditor over another or others. Thus, the Act refers to "creditors or some of them".   + The *Fraudulent Conveyance Act* has a different thrust. It is designed to ban the disposing of property to hinder or delay creditors and those who might become creditors. Thus, the Act refers to "creditors and others".   **Takeaway:** A secured creditor who becomes unsecured might have a claim under the *FCA*. If persons who were not creditors at the time the transfer was made may claim as others why would a secured creditor who becomes unsecured be disentitled? |
| Banton v. Westcoast Landfill Diversion Corp., 2004 BCCA 293 - FCA |
| **Facts:** The appellant challenges under the *FPA* and the *FCA* a mortgage granted by the respondent Westcoast to the respondent HUWS Corp. The trial judge found that HUWS Corp. had the contractual right to call for the mortgage security on its legitimate past debt granted before the appellant had obtained its judgment. It occurred before the second obligation arose.  **Issue**: How does not go about determining intention where there is no admission that they intended to delay, hinder or defraud?  **Analysis:** Six “Badges of fraud” - Indicia of fraudulent intention include the following:   1. The state of the debtor’s financial affairs at the time of the transaction, including his income, assets and debts; 2. The relationship between the parties to transfer; 3. The effect of the disposition on the assets of the debtor, i.e. whether the transfer effectively divests the debtor of a substantial portion or all of his assets; 4. Evidence of haste in making the disposition; 5. The timing of the transfer relative to notice of debts or claims against the debtor; 6. Whether the transferee gave valuable consideration of the transfer.    * Others: secrecy of the transaction, grantor has power to revoke the conveyance, giveaway phrase proclaiming the transfer to be bona fide for consideration, transferor retains benefit under the settlement, etc.   **Court:** The intent here was not to defraud another creditor but to fulfil a prior obligation. Appeal dismissed. |
| Chan v. Stanwood, [2002] B.C.J. No. 1942, 2002 BCCA 474 - FCA |
| **Facts:** The defendants were facing the prospect of bankruptcy and the plaintiffs had just obtained a judgment against them, and other creditors, were owed additional sums. The defendants got information about family holding companies as an estate planning and asset protection vehicle for the living. Incorporate, obtain valuation of assets, transfer them to the corporation, get fair market value in the way of Preferred shares. Any creditor who sought to execute against their shares in the companies would encounter major obstacles. Trial judge found the conveyance to be fraudulent. Defendant appealed arguing that the judge had erred (1) in finding the conveyance of the assets to be fraudulent notwithstanding the fact that the companies gave "valuable consideration" for the assets; and (2) in finding fraudulent intent on the part of the Stanwoods notwithstanding that the transfers were not a "sham".  **Analysis**:   * Where valuable consideration has passed the focus is not on the sufficiency of that consideration but on the intentions of both parties to the transaction. * Found that it had been clear on the evidence that the Stanwoods had intended to delay and defeat their creditors by exchanging their exigible assets for shares which were "not effectively exigible". The shares were specifically designed to let the defendants stay in their home for at least 5 years. The exchange of exigible assets for the Preferred shares delayed, hindered or defrauded the Chans – and did so by design. * Intent to delay or hinder is just as attackable as an intent to defraud.   + The *Fraudulent Conveyance Act*, like its sister statute, the *Fraudulent Preference Act*, must be applied in a manner consistent with modern commerce and common sense. * Court can pierce corporate veil in *FCA* actions. Where the transfer leaves the asset technically exigible, but very difficult to execute against, the transfer may still be set aside. * Double intent was established as it was the same operating mind, so section 2 exception wasn’t applicable.   **Decision**: Found there to be no error in the trial judge's conclusions that the transfers offended the Act. Dismissed the Stanwoods' appeal from the order of the court below declaring the transfers void and of no force and effect insofar as they affected the rights of the Chans.  **Professor’s notes:** Under *COEA* court is empowered to dispose a corporation if restrictions on a share were put on with the intent to delay creditors. Perhaps the Chan’s could have gone against the shares directly under the *COEA* for less of a cost.  **Second issue, the bad lawyer:**   * + His evidence was tantamount to an admission that the transactions he was counselling would delay and hinder the Stanwoods' creditors at a time when his clients were insolvent, and that that was the purpose of the transactions.   + Can a lawyer who has counselled clients to commit what turns out to be an illegal act be found liable for the consequences of that act?   + The *Handbook of Professional Conduct* issued by the Law Society of British Columbia states at Rule 1(1) of Chapter 1 that a lawyer should not aid, counsel or assist any person to act in any way contrary to the law, and at Rule 6 of Chapter 4 that "A lawyer shall not knowingly assist a client to make, receive or participate in a fraudulent conveyance, preference or settlement."   + But did the plaintiff’s pleadings reasonably disclose a cause of action? No and it is too late to clarify at this point, given the moral stain of the things they allege.   + The court concludes that in the absence of a pleading of fraud or conspiracy, the trial judge did not err in dismissing the action against Mr. Davis on the evidence before her. It dismisses the plaintiffs' appeal against the dismissal of their action against Mr. Davis. |
| First Boston Financial LLC v Grant, 2014 BCSC 2 |
| **Facts**: Grants had a company carrying on business in Nevada. They had sold assets to FBF and weren’t paid when they expected to be paid so they repossessed the assets and sold them to a third party. FBF thought the repossession was not legally permissible – commenced an action in Nevada in 2002. Got judgment in Nevada but it took so long the Grants had sold up all of their assets in Nevada and had retired to British Columbia. Grants had created a trust for the benefit of their children and grand-children. FBF took their time with trying to get their judgment recognized in BC. Grants declare bankruptcy. FBF filed as creditors in the bankruptcy but clearly weren’t going to get their judgment satisfied. The trustee in bankruptcy does nothing about the family trust. FBF takes an assignment of the trustee’s claims and goes after the creation of the family trust under the *FCA*. FBF wants summary trial but Grants argue (1) Nevada 2005 judgment has expired and (2) they didn’t intend to delay or defraud anybody.   * Trial court decides it can decide the limiations issue on summary trial and finds in favour of FBF because they are not pursuing their judgment but are pursuing in name of the trustee. * What was the state of mind of the Grants when they created the family trust?   Repeats the key premise from Mawdsley v Meschen – actual state of mind is never completely irrelevant, we don’t rely exclusively on the effect of the transaction. |

# Part IV. Exemptions, Immunities and Priorities

**Three types of exemptions:**

* Exemptions from process,
* Exemptions for particular assets, and
* General exemptions.

Where there is an exemption for an asset, you can assume that asset is exigible.

BC doesn’t have an “*Exemptions* *Act*” you must look to exemption provisions in other statutes. We have categories of exemptions with maximum amounts sets out in the Regulations. If the judgment creditor is a family creditor some of the limits are different that ordinarily. The *Bankruptcy and Insolvency* *Act* incorporates by reference the exemptions provisions from each province. The bankrupt can claim the exemptions against the trustee in bankruptcy.

Court bailiffs have a contractual duty to inform a judgment debtor of the statutory exemptions.

## A. Debtors with Special Rights

Court Order Enforcement Act, R.S.B.C. 1996, c. 78 (see Statutory Materials)

**s.3 - Attachment procedures and exemptions:**

* (5) Except as otherwise provided in this Part, 70% of any wages due by an employer to an employee is exempt from seizure or attachment under a garnishing order issued by a judge or registrar, but the amount of the exemption allowed under this subsection must not be less than
  + (a) in the case of a person without dependants, $100 per month, or proportionately for a shorter period, and
  + (b) in the case of a person with one or more dependants, $200 per month, or proportionately for a shorter period.

**s.4 - Variation of exemptions:**

* (1) A creditor who has proceeded by way of seizure or attachment of wages of a person under section 3, or under any other Act, or a debtor affected by the proceedings, may apply in writing verified under oath to the registrar or, if the proceedings are in the Provincial Court, to a judge of that court, for an increase or reduction, as the case may be, of the amount of exemption allowed under section 3.

**s.70 - Definitions for sections 71 to 78:** In sections 71 to 78, unless the context otherwise requires,

* + "debtor" includes the personal representative of the debtor if the debtor is dead, and in case of the absence of the debtor, includes any member of the debtor's household;
  + "value" means the net amount that the goods and chattels may be reasonably expected to realize at a sale of goods and chattels conducted in the manner in which such sales are usually conducted by a sheriff or other officer.

**s. 71 - Personal property of debtor:** allows debtor to keep essential items, such as necessary clothing of debtor and dependents, household furnishings not exceeding $400, one motor vehicle not exceeding $5000 ($2000 for family debtor), tools related to occupation and for the purpose of earning income not exceeding $10,000, and medical and dental aids. (note: pets are exigible. Bismarck could technically be seized and sold by a court bailiff.)

**s.71.1 - Principal residence of debtor:** principal residence is exempt from forced seizure and sale by any process at law or in equity if the value is less than $12,000.

**s.71.2 - Property exceeding exempted values:** for real estate, if value is over $12,000, then property is exigible and can be sold, but judgment debtor gets to keep $12,000 from proceeds.

**s. 71.3 - Registered plans exempt from seizure:** RRSPs and RRIFs are immune from execution subject to exceptions for payments made in last 12 months and payments made out of plan.

**s.72(1) - Art exempt from seizure:** Art and objects of cultural significance that are in BC for temporary exhibition are exempt from seizure and sale.

Also see ss. (73-79, 96(2)).

Judgment Debtors may be able to take advantage of a variety of statutory regimes in addition to the general exemptions. Because these are statutory immunities have to interpret the statute. Ask questions:

1. What asset is protected? How specific is the statute?
2. From what enforcement processes is this asset protected?
3. For whose benefit does the statute specify for (JD or anybody else)?

Note: In addition to previous exemptions garnishment (s.4,5,6 *COEA*) – no garnishment of wages in the pre-judgment context, even in post-judgment context there is an exemption % so that debtor can retain a certain percentage of wages in order to live. Chattels (s.71.3 *COEA*): Almost completely protects RRSPs and similar plans from seizure or any other form of enforcement. Art brought into Province for exhibit (s.42)

Included in these *representative statutes,* casebook does not purport to be exhaustive. These are the most commonly encountered exemptions, might be others.

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| Re Lee and Rathsburg et al., (1978) BC: |
| **Facts:** In 1977, Derek Tahmasebi obtained a judgment against the judgment debtor in the sum of $4,010 and on November 14, 1977, his solicitor obtained a writ of seizure and sale. On November 16, 1977, the Sheriff, acting on the authority of the writ, seized an automobile registered in the name of the judgment debtor On November 23rd, the Sheriff received notice in writing from the judgment debtor stating that he claimed the automobile as exempt from seizure pursuant to s. 25 of the Execution Act, because it had a value of only "approximately $500". (under the former $2000 global exemption) On November 28th, the other two judgment creditors obtained a warrant of execution with regard to a judgment which they had obtained against the judgment debtor.  **Court:** A careful reading of the judgments in that case does not justify the conclusion that there is a distinction between "exemption" and "selection".   * If a Sheriff seizes the goods and chattels of a judgment debtor pursuant to a writ of execution the judgment debtor may claim exemption from seizure of goods and chattels to the value of $2,000 providing he makes his claim within two days of the seizure, or notice of the seizure, regardless of whether the value of the goods seized is less, or more, than $2,000, otherwise the Sheriff would be unable to "execute his writ without uncertainty". * Exemptions are NOT absolute. The judgment debtor must claim the exemptions. * Time in which to claim the exemption: 2 days. Courts will not extend it. |
| Royal Bank of Canada v. Nguyen, [2004] BCSC – principal residence exemption |
| **Facts:** Claim against trustee in bankruptcy. RBC gives credit to corporation for personal guarantees of the Nguyens. Company defaults. Registers judgment against title to land of the Nguyens. Facing involuntary sale, foreclosure proceedings. Nguyens do personal sale to get a better price. Want to claim exemptions from the proceeds of the sale. Liberal interpretation of the application of the exemption for the principal residence.The parties agree that the respondents' equity in the Property exceeds the "prescribed amount" in s. 71.1.The exemption amount of $24,000 as set out in the Court Order Enforcement Exemption Regulation  **Court:** gives a large and liberal interpretation to s. 71.1. Includes situations where debtors sell property because a forced sale is impending. Exemption also applies to forced sales in foreclosure proceedings.   * The scheme established by s. 71.2(2) requires that the proceeds of sale should be distributed in the following order: first, to the Bank the amounts secured by its three mortgages ($281,000); second, to the respondents the principal residence exemption ($24,000); and third, to the Bank the amounts owing pursuant to the judgments against the respondents. |
| Re Atwal, 2012 BCCA – vehicles. |
| Claim against trustee in bankruptcy. Affirms *Nguyen* and gives another generous interpretation, this time for vehicles. Is a bankrupt person who owns a vehicle of a value in excess of $5,000 is entitled to an exemption of $5,000 under the BIA for that vehicle? Unlike *Nguyen*, this case involves a bankruptcy as a result of which all of the appellant’s assets, subject to the applicable exemptions, vested in his bankruptcy trustee at the moment of the bankruptcy. There is no principled basis upon which to distinguish a bankruptcy from an impending foreclosure for the purposes of the application of the statutory exemptions to the benefit of a debtor.  **Court:** The exemption for a vehicle found in s. 71(1)(c) of the Act, when considered in the statutory scheme that includes ss. 37 and 67(1)(b) of the BIA, is available to a bankrupt regardless of whether there is a sale of the vehicle.   * appellant is entitled to a personal exemption of $5,000 for his 2005 Chevrolet Uplander motor vehicle. * Determined interpretation of application of exemption provisions so now BC courts are likely to accord the exemptions to the debtor even if it is not a seizure and sale by a court bailiff. |

BC Crown Proceeding Act & Crown Liability and Proceedings Act (Federal)

Exempt the Crown from execution processes. If the judgment debtor is the Crown in BC or Canada (or other Province) you don’t garnish or seize Crown owned assets, instead present judgment (procedure for getting payment from the Crown). All that is protected is Crown assets from ordinary enforcement processes. Hopefully Crown will pay the judgment. IMMUNITY FROM ENFORCEMENT NOT LIABILITY/PAYMENT.

**Other Statutes:** Most of these statutes protect welfare benefits, statutes that authorizes payments also protects against enforcement. Cheques probably retain their immunity from seizure until actually cashed & used by the recipient. Immunity is likely lost whenever the amount of the benefit is mixed with other funds. E.g. Once direct deposit, have *probably* lost immunity for the benefit at that point. Can take precautionary measures – such as setting up a joint account (not garnishable). Family members may get more exemptions than ordinary. Workers Compensation and others are not exhaustive of other benefits.

* Insurance Act (BC): s.65(1) & (2) deals with life insurance (limited to life insurance policies) protects life insurance monies and the policy itself.
  + (1):protects money. “*If a beneficiary is designated the insurance money from the time of the death is not part of the estate of the insured and is not subject to the claims of the creditors of the insured*”
    - However, the beneficiary’s creditors are free to go after the amount received by the beneficiary.
  + (2):protects money and contract of insurance. Speaks of a beneficiary who is a spouse, child, grandchild, or parent of the person whose life is insured. Unsure of whether beneficiary in (1) is limited to these people. The life insurance contract might be considered to be another security for money under whatever the relevant provision is in the *COEA.*
* Life insurance policies always have a cash surrender value (if still living, can turn policy back in to the insurance company and get some value for it). Creditor could do the same besides s.65(2).
* Indian Act (Federal): gives immunity from taxation and all creditors to all property located on a reserve.
  + S.89: real or personal property situated on a reserve is not subject to charge, pledge, mortgage, tax or levy by any person other than an Indian or a Band.
  + Locating property on reserve – tangible that can be moved, and intangible.
    - Tangible: cars, equipment, items. Can you seize as soon as the property leaves the reserve? Not automatically just because it has been moved.
    - Intangible: debts, income

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| Bastien Estate (2011 SCC) |
| Approach adopted by SCC for taxation and determining the location of income is the same approach we use to locate any other personal property for purposes of enforcement of a judgment. Cromwell J: *one determines the location of intangible personal property such as interest income by conducting a two-step analysis: 1. One identifies potentially relevant factors tending to connect the property to a location 2. Determine what weight they should be given in identifying the location of the property.*   * Mr. Bastian found to have the interest income located on the reserve:   + Status Indian born on a reserve in Ontario and died there   + Operated a business on the reserve   + Took the income from the business and invested it in term deposits in a bank located on a reserve   + Interest he earned on those investments was paid into his account also in the bank on the reserve |

## B. Creditors with Special Rights

Can’t negotiate anything on their own. Various categories of statute in BC & legislatures throughout Canada have also decided that certain classes of creditors deserve assistance in their collection of debts. Statutes are not uniform in the assistance. There are statutes that give the Crown liens where nothing has to be registered.

**Artisan Claims:**

* Woodworker Lien Act
* Repairer’s Lien Act
* Warehouse Lien Act
* Livestock Lien Act

Common technique of assistance given to artisans in all the statutes is the creation of a lien with power to sell. At common law liens arose when not paid but didn’t always have the power to sell. In addition, there are always procedural requirements. However, the lien ordered narrowly gives a power to sell (claim cost of storing too)

#### Family Maintenance Creditors

***Family Maintenance Enforcement Act* (BC)**

Amount owing to support orders (family creditors) increases every year despite the assistance legislatures have attempted to give (3.7 billion owed cumulatively across Canada to family creditors). Support orders are always variable even if a lump sum order. Family orders continue and are never final so they cannot be enforced as ordinary judgments. Also in BC – *Interjurisdictional Support Orders Act.*

Federal versions – *Garnishment Attachment and Pension Diversion Act* & *Family Orders and Agreements Enforcement Assistance Act*.

Family creditors have been given a range of enforcement opportunities/processes, if they can be improved why can’t ones for ordinary creditors also be improved? What it does for family creditors:

1. Government enforcement programs – instead of doing it alone, can give your judgment/support order to an office and the office does it for you.
2. Ordinary remedies (all the remedies that have been discussed to this date).
3. New and improved processes for the sole benefit of family creditors.
4. Family creditors are given priorities over ordinary judgment creditors.

* s. 8: *For the purpose of enforcing maintenance order using director, obtaining information for someone performing similar functions in another jurisdiction, may demand of anyone including government information that is in a record etc*. Entitles family creditor to access government databanks. This will help them locate the debtor and the debtor’s assets – access income tax returns.
* S.15: continuing garnishing orders.
* S.15(3.1): can garnish joint bank accounts.
* S.18: also garnishment.
* S.26: Maintenance
* S.28: important section even if not representing family creditor, even order from COEA is non-expiring. Family creditor can register on title to land the maintenance/support order and never has to think about it every two years – it stays there.ordinary creditor who applies for sale of real property. *Despite any other act, a maintenance order takes priority over any other unsecured judgment debt of the debtor regardless of when an enforcement process is issued or served. Does not apply to arrears of maintenance owing more than one year.* One year priority over anyone else.
  + (3) Ranks equally with other maintenance orders regardless of when issued or served. Each get 1 year priority but have to share with each other.

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| Ram v BC (Family Maintenance Enforcement Program) – 2015 BCSC |
| Facts: Applicant (Ram) seeks two orders (1) that respondent Director withdraw a notice of attachment that was served on ICBC and (2) that ICBC pay Ram $32k – portion of settlement funds from MVA. Ram owes child support from 1990 order, currently in arrears in excess of $32k. Director issued notices of attachment to ICBC to withhold settlement monies.  Court: Needs a more measured, flexible response. Loft, a relevant decision currently on appeal. Declines to decide case – adjourns, but states that there should be a balancing of various interests. |

#### Protections for Employees

* Three months worth of wages under *Creditor’s Assistance Act* – employees are given a preference without application under s.36(1) for 3 months worth of wages.
* *Builders Lien Act* – workers (employees) get 6 weeks worth of wages priority
* *CBCA* – Directors may be liable personally for 6 months worth of wages (s.119)
* *Employment Standards Act* – doesn’t kick in unless the employees seek the assistance of the Director of employment standards. If they do – those employees through the director get a priority that gets invoked on many occasions.
  + s.87(1): Despite any other act, unpaid wages are a lien, charge, and unsecured debt in favour of the Director.
    - Dated from time wages earned against all the real and personal property of the employer or the person named.
  + S.87(3): Subject to subsection 5, amount of a lien, charge or debt is payable and enforceable in priority over all liens, judgments, charges, and security interests or any other claims and rights including: any claim or right of government, contract, account receivable, any security interest, insurance.
  + This priority applies to mortgages of land or other equivalent under *PPSA*
    - Subsection 5: gives a small protection to mortgagees of land, their priority is preserved if they are registered first on title for monies actually advanced.

## C. Creditor Assistance Act – Partial Abolition of Priority

Will not be repealed out of existence if and when BC adopts uniform model act. Bankruptcy and Insolvency = federal, but there was a 40-year period in which there was no federal bankruptcy legislation. A number of provinces including BC enacted the best replacement they could (Creditor’s Relief Act)

* Abolishes common law priority of first in time first in right but is not even close in its effectiveness to Bankruptcy legislation.
* Provinces enacted other similar legislation at the same time.

THIS IS NOT THE EQUIVALENT – THREE MAJOR DIFFERENCES

1. *CAA* makes no provision for mandatory inclusion of all creditors, it is those that happen to qualify (few in number)
2. NO mandatory inclusion of all property, property that happens to be seized is distributed pro rata amongst the qualified creditors
3. No provision for rehabilitation, no forgiveness of debts.

Creditor Assistance Act: modifies first in time principle by partially abolishing priorities among unsecured creditors. S. 3: money collection under an execution sale must be distributed ratably among all creditors and other creditors whose writs and certificates were in the court bailiff’s hands at the time of execution or within 30 days following execution.

**s. 2**: court bailiff who has received funds under a writ of seizure and sale for a judgment creditor must enter the levy into a book, writing down the date of the levy and the amount. The book must be kept in the court bailiff’s office and must be open to inspection by the public without charge.

**Certificates:**

* if a creditor does not have a judgment but want to share in the proceeds pro rata, they can get a certificate of claim. Procedure involves serving an affidavit setting out claim on the debtor **(s. 7),** file it with the district registrar **(s.8),** and if the claim is not contested by the debtor within 10 days of service, apply to the district registrar for a certificate **(s. 11).** Once the creditor has the certificate, they become an execution creditor within the meaning of the *CAA* and are entitled to share in the proceeds pro rata **(s. 11(3))**. The certificate is good for three years and can be renewed **(s. 13).**
* Other benefits [s.20(4)] it is the equivalent to a judgment, good for 3 years – it is possible to renew it at least once (in theory at least 6 years). Authorizes the certificate holder to issue other writs of execution. Things can happen in the 6 years, might be worthwhile to get the cerficiate.

**s. 23: First exclusion -**  if there are no other writs (not certificates), and the judgment debtor pays the court bailiff instead of having his or her stuff sold, then the assets are not a levy pursuant to the *CAA*.

**s. 38:** court bailiff is authorized to prepare a plan for distribution after 30 days. If the levy is insufficient to meet all the claims, the court bailiff may either distribute the money promptly pro rata or prepare a list of creditors with the amount due to each and then let the creditors and the debtor examine the list.

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| ***Benjamin Moore v Finney,* (1954) Ontario–** *What is a levee?* |
| Sheriff in Ontario is collecting/seizing an asset which the court bailiff in BC currently cannot seize (a debt). DO NOT READ THIS AS IF IT REPRESENTS BC LAW WITH RESPECT TO ASSET, reflects interpretation in *CAA* to the meaning of a levee. Important – until there is a levee cannot be registered in the bailiff’s book. Procedure depends on the entry in the book.  **Facts:** Mid-January a creditor delivers a writ of execution. A week later, the Sheriff in Ontario seizes a debt. Procedure is to notify garnishee who owed money to JD. In March and April, ten other writs are delivered and each of those ten writs concerns money owed by the same judgment debtor. On May 7th, the money is actually received by the Sheriff, makes an entry in his book. Sheriff has less money than it will take to satisfy all the 11 claims. Sheriff prepares plan for distribution. JC #1 thought he should get it all, says other writs delivered are all too late.  **Court:** Until the 3rd party garnishee actually pays the money over to the bailiff, there is no levee. Levee = any forced payment of money (court bailiff must actually have received a certain dollar amount).  **Note:** Might be possible to get certificate in 30 days and get to share in the distribution. Even if you do not manage to get your certificate within the 30 day period, the statute directs the bailiff to retain a sufficient amount to give you your share when distributing the goods. |
| ***Tan Corporate Suites* [2001] BCSC -** *An attached debt must be paid to the Sheriff.* |
| Garnishment – does s.24(4) apply? *An attached debt must be paid to the Sheriff.* Reads literally as if all garnishments have to be paid to the court bailiff now and will be distributed pursuant to *CAA*.  **Holding:** ss.24(4)(5) have to be read in conjunction with ss.(1). Only in situations where the assets are insufficient to pay all the judgment creditors is garnishment. Garnishment escapes – can garnish but won’t be subject to the application of CAA unless ss.(1) kicks in.  **Note:** Probably escapes: money realized by way of equitable execution/equitable relief & Money collected by equitable receivers. By s.38 CAA the Sheriff may prepare a plan for distribution.  **Note:** payments made under Subpoena to Debtor proceedings or installment orders are not covered by the *CAA*. |
| Mcmillan Bloedel and Simpson (1984) BCCA |
| **Facts:** McMillan Bloedel gets a judgment against River Contracting. Gets writ of seizure and sale, pursuant to writ the Sheriff goes out and makes seizures against River. Employees complain to Director of employment standards, calls them– tells them not to bother. Many other creditors – between May & November (Sheriff still going out and seizing/selling assets), many other writs of seizure and sale are filed. Sheriff somehow manages not to include McMillan Bloedel.  **Court:** BCCA allows Director of Employment Standards to be joined at his option, even though argument was made that there were other remedies and shouldn’t share in this distribution. After priorities then McMillan Bloedel and others share *pro rata* the balance of the proceeds that remain.   * Judgment creditors who have delivered writs to the sheriff before the levy or within 30 days of the levy, and claimants who have priority (such as the Director of Employment Standards) but who have not complied with the timeline in the CAA, can object to the court bailiff’s distribution plan. |
| Hanken Furniture v Gill (1980) BCSC |
| Deals with distribution of the proceeds when the title to land has been sold pursuant to the *COEA.* Not relevant when there is a foreclosure sale. Registrar recommended distribution to the first 3 JC (paid in full, proceeds sufficient), then the next in order – RBC mortgage, then the registrar said the next 8 JC will be paid proportionately.  **Facts:** Mr. Gill owner of title to land, unfortunate debtor – has 11 judgments against him registered on title to land. Order of registration: JC 1,2,3 then mortgage for $35,000, then 8 more JC registered on title to land #4-11.  **Court:** Distribution – combines in an unhappy way distribution according to order of registration and the *CAA*. NOT SATISFACTORY. |

# Part V: BuilDers LienS

## A. THe LIen and Holdback Provisions

***Builders Liens Act***

Most important of the artisan’s liens statutes that are currently in force in BC. Builders liens originated in the US, NO English cases because they have never had the equivalent of this. BC has had some form of it since 1869. Much studied, frequently amended. BC Law Reform Commission studied it and recognizing all the problems created by the operation of the Act, seriously contemplated repealing it but said they cannot recommend unless they have been to a jurisdiction that once had a *Builders Lien Act* and then repealed it. Lack of budget – so *BLA* still stands. Again under study.

Why do we have it? Felt that people working on construction projects can’t protect themselves sufficiently by contract so they need other remedies (can’t make unjust enrichment claims). *BLA* SUPPLEMENTS ordinary remedies. Can still always sue on the contract – doesn’t take place of these.

***BLA* created remedies:**

* Lien;
* Trust;
* Holdback.

**Models of Construction Projects**

1. Pyramid – Owner – General contractor – subcontractors.
2. Private Homes – do own general contracting, multiple contracts directly with the owner.

Classification of an entity as a contractor or sub-contractor does not depend on the nature of the work that they are doing. Classification depends entirely on where in the pyramid the person fits. If the owner is doing their own general contracting, all the individuals/corporations may be contractors in this case.

s.1(1) An *improvement* is essential (a construction project) – includes anything *made, constructed, erected, altered, repaired or added to or under land* *includes excavation, ditching etc.*

Pretty complete definition. The general precept concerning the application of the *BLA* is that it is difficult to get in (courts are strict in interpretation) of the definition of contractor, sub-contractor, material supplier, and worker. Once one qualifies as participating in an improvement, then the courts are generous in interpreting the provisions of the *BLA*. Fairly common for persons or entities who contribute to an improvement to be unable to use the *BLA.* E.g. Materials suppliers (cement companies/lumber companies): if the lumber company has no idea which project it is supplying the lumber for, then it is not a material supplier within the means of the statute. One way to know – is to deliver materials to the site itself.

s.2 Contractors, sub-contractors, and workers have a *lien* for the price of the work and material if they are not paid. Have a lien on the following: (1) Interest of owner (2) On the improvement (3) on the land; and (4) the material onsite. Not unusual to be multiple owners – registered owner may sublease. Only one contracting owner (usually the person at the bottom of the chain), multiple owners (non-contracting) can protect themselves because they can file a notice of interest in the land title office disclaiming any responsibility.

BUT the lien claimant must perfect that statutory lien by filing the lien on the title to land & have to bring an action within a year.

s.20: sets the limitation period for filing/perfecting your lien by filing. Lien claimants have 45 days to file the claim of lien in the *LTO*. 45 days commences (two possible):

1. Date on which certification of completion was issued (usually an architect, issues for each stage of the process).

s.21: *A claim of lien filed under this act takes effect from the time work began or the time the first material was supplied for which the lien is claimed and has priority over all judgments, executions, etc made after that date.*

* Have to inquire when the work was first done *especially* when it is purely the order in which registration happened.

s.32: Gives some priority in addition to priority over ordinary JCs over mortgagees. Ss.(2) Builders liens will get priority over subsequent mortgage advancements.

s.33: Requires that lien claimant (person whom within 45 days has filed on title) to commence a lien action (action to enforce lien) within a year from the date of filing.

* Owners and mortgagees get nervous when there are lien claims to land.
* ss.(2) authorizes a “speedy trial” within 21 days. An owner or lien claimant can either serve the other personally OR the owner can use Canada Post mailed to the address in the claim of lien
* ss.(4) If service is by mail, notice is conclusively deemed to be served on the 8th day after deposit in the post box any place in Canada.

If the land is sold, there are provisions dealing with distribution and priorities. Provisions are incomprehensible.

**Holdback:** has the effect of making sales of land unlikely. If the owner and anyone else who is required to holdback moneys in compliance with the provisions of the *BLA* directing them to holdback money and holds back the amount directed then the lien claimants in terms of their lien claims are limited to payments from the holdback.

* Requires multiple holdbacks now – required/set out in s.4 – the person primarily liable on *each* contract and the person primarily liable on each sub-contract must retain a holdback. Must consist of 10% of the value or work or material or amount of any payment made.
* Lowered from 15% to 10% to reduce the likelihood of lien claims being filed on title.
* Any contracts > $100k, the person who must create a holdback must create a separate bank account.
* Holdback is subject to a lien. 🡨 problem in Shiemco.
* No equivalent to ss(9) before Shiemco – now makes it clear that there is a separate lien on the holdback.
* Holdback has to be retained for 55 days after the completion, abandonment, or termination of the contract.

How are liens removable under the *BLA?*

Having lien claims on title makes people nervous. General contractors can undertake to not have any lien claims filed. Have to get the claims off title. Assume owner – what happens if the owner wants the lien clams registered on title removed?

* Can pay holdback into court

The owner/contractor/subcontractor will only use s.23 if the total of lien claims filed is less than the total of the holdback. If the total value of the lien claims filed is greater than/exceeds the amount of the holdback then the owner can use s.24.

s.24: Make an application to court – court has discretion to require security to be posted. Security can vary – doesn’t have to be total value of the liens filed (might be lots filed).

Very easy to misuse trust monies.

Offences created by s.11 (fines, imprisonment) for breaches of trust.

If and when they have advanced their own monies to pay people below them in the construction pyramid and repay themselves from money received on account of the contract. Outside judgment creditor cannot garnish money in a holdback account. All case law consistently protected construction money.

* If the contract >100k, owner has to create separate bank account for holdback (ss(4)).
* If the owner has a single bank account with money for construction project, not trust and not holdback = outside JCs can garnish it.
* As soon as it hits the court it is trust money.

s.14 *BLA*: Limitation period for trust actions – an action by a beneficiary or against a trustee of a trust created under s.10 must not be commenced later than 1 year after (1) contract complete, abandoned or terminated etc.

Still possible for construction or worker to fail to file a claim of lien within 45 days. Missed filing lien claim? *Bring a trust action*. Don’t have to do anything to confirm or perfect trust claim in 45 days.

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| Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd., 2002 BCSC 238: |
| **Law:** s.4(9) – holdback required to be retained is subject to a lien and subject to payment of everyone involved with improvements. Implications finally realized – can make an argument based on this.  **Facts:** Owner = NV District, building a tennis facility, holdback = $64,000. General contractor with various sub-contractors who were not paid in full for the value of work and materials supplied because GC got into financial difficulties (7 subs not fully paid, including Shiemco). Filed liens within 45 days (only 3 subs managed to commence an action within the year). However, others – Shiemco included – did commence actions after the year had expired. NV commenced an action for a declaration that $64,000 was its maximum liability and that the lien (properly filed) was extinguished.  **Analysis:** *BCCA* recognizes that ss.(9) was brand new, and before it had not been the practice or law that there was a lien on the holdback – protected other ways (usually by the trust). NV retained future Justice Bob Jenkins as counsel, at this time he was the expert in Vancouver on builders liens.  **Conclusion:** Lien on the holdback, Shiemco gets to share with the other claimants who did everything by the book. No sub-contractor paid in full because the value of the liens claimed exceeded the holdback retained. |
| ***Wah Fai Plumbing and Heating*** |
| Private airline was transporting the workers to a remote mining site on a regular basis. Air transport held not to be entitled to claim the benefit/protection of the *BLA*.  **Facts:** Filed lien for the balance, 50k owed, like *Shiemco,* Waifai plumbing and heating fails to file within a year – clearly lien against land is extinguished. 8 years later argue Shiemco wanting lien against the holdback.  **Conclusion:** CA recognizes that Shiemco wasn’t warmly received and holds that it should be confined to its facts in the case (NV still retained holdback & hadn’t paid it out), court could confirm the existence of the lien against the holdback and allow Shiemco to share. In this case, two factors against Wai Fai succeeding (1) Owners in this case didn’t retain a holdback.  **Holding:** According to the terms of the *Builders Lien Act*, if the owners had retained a holdback could have authorized  (must holdback for 55 days after contract concluded) payment out – there would be no issues. Confine *Shiemco* to its facts. |