

# CREDITORS' REMEDIES

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## Chapter 1

# Collections<sup>1</sup>

### [§1.01] Introduction

#### 1. Scope of Materials

In this chapter we provide a brief outline of the practice of collections law in British Columbia. The emphasis is on the remedies of the unsecured creditor after judgment; civil procedure before judgment is detailed in the *Practice Material: Civil Litigation*. The rights of secured creditors are considered only in the context of priority rights between secured and unsecured creditors; other information on secured creditors appears in Chapter 3 of the *Practice Material: Commercial Law*. In addition, special collection remedies in family law are dealt with in the *Practice Material: Family Law*, and builders' liens are covered in Chapter 2 of the *Practice Material: Creditors' Remedies*. Bankruptcy law is beyond the scope of the *Practice Material*.

#### 2. Overview of the Law

The current body of collections law is a patchwork of inherited British law, Canadian federal and provincial statute law, and many borrowed common law and equitable principles.

Reform of collections law and practice has been slow, and less than comprehensive. The judgment enforcement process continues to be a mix of old and new law, requiring the practitioner to consider carefully the most appropriate remedy approach to reach debtor assets.

#### 3. Supreme Court Civil Rules

Effective July 1, 2010, practice in the Supreme Court of BC, including collections, will be governed by new Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "SCCR"). The SCCR introduce a number of significant changes to civil practice in Supreme Court, including substantive changes to service rules and the initiation of claims, as well as new forms. To the extent that collections practice is affected by the SCCR, this chapter will use the terminology and procedure mandated by the SCCR as of July 1, 2010.

### [§1.02] Source Material

#### 1. References

A basic text for Canadian collections law is Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed. (Toronto: Carswell, 1994). For British Columbia practitioners there is a provincial collections text: Lyman R. Robinson, Q.C., *British Columbia Debtor-Creditor Law and Precedents* (Toronto: Carswell, looseleaf). Also very useful is William D. Holder and John C. Fiddick, *Annotated British Columbia Court Order Enforcement Act* (Aurora: Canada Law Book).

The Continuing Legal Education Society of British Columbia publishes the *British Columbia Creditors' Remedies—An Annotated Guide*, which is a comprehensive looseleaf guide to collections. Consult the CLE website at <http://www.cle.bc.ca> to find other recent publications.

Over the years, the British Columbia Law Institute (formerly the Law Reform Commission of British Columbia) has produced several working papers and reports on debtor-creditor law; a list of all reports can be obtained from the Institute or through their website at [www.bcli.org](http://www.bcli.org).

#### 2. Statutes

There are a number of provincial and federal statutes that are important in collections law. These statutes will be considered throughout this chapter. Some of the more important British Columbia statutes are:

- a. *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28—provides for enforcement of foreign judgments and arbitral awards.
- b. *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78—provides substantive and procedural law for garnishment, foreign judgment registration, and post-judgment execution against real and personal property.

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<sup>1</sup> **Robert A. Finlay**, of Hamilton Duncan Armstrong & Stewart, kindly updated and revised this chapter in January 2010. John C. Fiddick of Clark Wilson LLP revised this chapter annually from August 2004 to July 2008. This chapter was reviewed in January 1997, February 1998, December 1998, February 2000, January 2002 and May 2003 by Stella D. Frame, Boughton Peterson Yang Anderson Law Corporation, Vancouver. Cynthia Callison of Callison Hanna, Vancouver, reviewed the chapter in January 2002 and included commentary on the impact of the *Indian Act*. Revised in January 2001 by Kenneth M. Duke, then of Boughton Peterson Yang Anderson. Prepared for PLTC by Allan A. Parker in 1988 and revised annually to February 1996; also reviewed in March 1996 by Peter J. Reardon, Lang Michener Lawrence & Shaw, Vancouver.

- c. *Court Order Interest Act*, R.S.B.C. 1996, c. 79—provides for prejudgment and post-judgment interest to be added to most creditor claims.
- d. *Creditor Assistance Act*, R.S.B.C. 1996, c. 83—modifies the common law to provide for equal sharing of execution proceeds among some judgment creditors.
- e. *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2—provides for licensing of collection agents and bailiffs; contains substantive limitations on debt collection tactics by all creditors.
- f. *Enforcement of Canadian Judgments and Decrees Act*, S.B.C. 2003, c. 29, brought into force on May 4, 2006 (BC Reg. 121/2006)—allows most judgments that have been made by a court or tribunal of a Canadian province or territory to be registered simply by paying a fee, filing a certified copy of the judgment, and providing whatever additional material the Supreme Court Civil Rules require. The scope of the Act is not limited to monetary judgments. (See § 1.06 for more information.)
- g. *Foreign Money Claims Act*, R.S.B.C. 1996, c. 155—provides for conversion dates of claims in foreign money amounts.
- h. *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163—provides a remedy for creditors of a debtor who has disposed of property in order to frustrate judgment execution.
- i. *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164—among other provisions, gives a remedy to creditors of an insolvent debtor who has preferred one creditor by transfer of property.
- j. *Indian Act*, R.S.C. 1985, c. I-5— Under s. 89(1), provides that the on-reserve property (real or personal) of an Indian or Indian Band is not subject to charges, pledges, mortgages, attachments, levies, seizures, distress or execution when the creditor is not an Indian or Indian Band.
- k. *Law and Equity Act*, R.S.B.C. 1996, c. 253—makes as law in British Columbia (except where modified by the legislature) all English law in effect before November 19, 1858 (s. 2); establishes that rules of equity prevail over the common law (s. 44); contains several substantive rules relevant to collections law, including relief from forfeiture (s. 24), relief from acceleration (s. 25), conditions under which writs of execution do not attach property (s. 35),

assignment of debts and *choses in action* (s. 36), authority for appointment of receivers and issuing of injunctions on interlocutory application (s. 39), proceedings against jointly and severally liable parties (s. 53), recovery of property other than land (s. 57), and contracts which must be in writing to be enforceable (s. 59).

### [§1.03] Opening a New File

#### 1. File Management

The many principles for client relations covered in the *Practice Material: Practice Management* and *Practice Material: Professional Responsibility* are applicable to collections clients, whether creditors or debtors. It is important at the outset to clarify client objectives, conflicts, fees, and any retainer conditions. Limitation dates must be identified and acted upon. Instructions should be confirmed in writing, a file should be organized, and a bring forward and client reporting schedule should be recorded; see "Collections Procedure" in the Law Society of BC *Checklists Manual* found on the website at <http://www.lawsociety.bc.ca>, following the *Practice Support* link.

Lawyer and legal assistant roles should be clarified, taking into consideration Chapter 12, Rules 4 to 9 of the Law Society's *Professional Conduct Handbook* about the limitations on legal assistants in litigation files.

Creditor clients have three basic goals: (1) collect as much of their debt as possible; (2) limit legal costs; and (3) collect quickly. The reality of collections is that these goals may not be achieved easily: the debtor may be evasive, judgment-proof, or unreasonably litigious; competing creditors, whether secured or unsecured, may affect the client's ability to collect. The costs of litigation are also often not fully recoverable.

When acting for a debtor, it is important to obtain a retainer (so as not to become the next creditor) and to communicate with the debtor regarding the merits (or lack of merits) of any defence, as soon as possible.

It is vital that clients understand the process and that they be given a realistic assessment of their situation. Clients who face paying an unexpected legal bill for unsuccessful collection efforts will be unsatisfied. Cost-effectiveness and practicality are the hallmarks of a successful collections practice.

## 2. Information Required

The lawyer needs to obtain complete information about the creditor-client, the other side, and the cause of action, as soon as possible. The lawyer needs to question the client thoroughly for details and to obtain copies of all relevant client documents (for example, credit applications, debt instruments, account ledgers, and correspondence). The lawyer should be satisfied that credit agreement documentation is consistent with account records. For example, has interest on a fixed rate promissory note inadvertently been calculated on a prime plus basis?

Sophisticated clients may be given information about how to carry out some or all of these preliminary investigations in order to minimize costs. With certain high-volume clients, standardized instruction forms may be devised to ensure that all relevant information is provided in written form.

The lawyer should consider, and carry out if necessary, searches for additional information. Places to search include:

- the Registrar of Companies (to confirm individual or corporate status and standing of defendant);
- the Personal Property Registry (to confirm asset ownership and encumbrances); and
- the Land Title Office.

Corporate, Personal Property Registry and Land Title searches can be done on the internet via BC Online. Credit bureau records may also be accessed on the debtor. Following judgment, a creditor may obtain motor vehicle registration information on a debtor from the Insurance Corporation of British Columbia. Skip-tracing services may be used to locate debtors whose whereabouts are unknown.

In cases where a creditor has reason to suspect that the debtor is insolvent or has declared bankruptcy, a fee-based search may be conducted of the Bankruptcy and Insolvency online database maintained by the Office of the Superintendent of Bankruptcy.

## 3. Assessment of the Action

When assessing the action, the lawyer must review carefully all the information he or she has gathered and consider the applicable law. The applicable law may go far beyond routine collections procedures. Many principles may be relevant, from the common law of contract to consumer-oriented statute law, to priority disputes.

A review of all potential issues that may arise in a collection action is beyond the scope of this chapter. A few of the many important subjects not covered in any detail here are:

- applicability of seize or sue laws when dealing with consumer goods;
- joint and several liability of defendants and merger;
- indemnifiers or insurers;
- status of guarantors;
- common law and equitable defences;
- statutory or common law counterclaims;
- applicability of the *Infants Act*;
- applicability of the *Indian Act*.

## 4. Demanding Payment

It is standard practice for a lawyer acting for a creditor to issue a demand letter for payment before commencing legal action. Under section 115 of the *Business Practices and Consumer Protection Act*, a “collector” (defined broadly under the Act) cannot bring legal proceedings for recovery of the debt unless the debtor has been given notice of the assignment or until the collector has given notice to the debtor that the collector intends to commence an action. This letter should set out: the essence of the client’s claim; the nature of the default; the terms for resolution (for example, payment in full, or otherwise); directions for reply (usually to the lawyer); and a specific deadline for reply.

Note that while the Act defines collector broadly, the *Debt Collection Industry Regulation* clarifies that the disclosure required under s. 115, and the preconditions to taking legal action under s. 121, do not apply to a creditor collecting or attempting to collect a debt owed to the creditor (B.C. Reg. 295/2004, s. 2). If the collection has not been assigned to an agency for collection and the creditor simply wants to collect, these provisions do not apply. Nevertheless, when you act for a creditor, there can be both practical and legal reasons for issuing a demand letter.

A demand letter puts the other side on notice that a lawyer is involved, and demonstrates that the client “means business”. At the same time, it may maintain some goodwill between the parties, which is likely to be lost once litigation is started.

Although not a common result, a settlement may be reached and litigation avoided. Outside of settlement, there may be some form of response that provides useful information, such as a confirmation of the address of the debtor. The response may also reveal what may be expected in

the way of any defence. An inappropriate response or no response will at least confirm the need for legal action.

When there is a contract, the lawyer should read it to determine whether a demand is contractually required. If there is any doubt about the need for a demand, it is prudent to issue one so that you remove a potential ground for defence.

A demand may be a legal precondition for a cause of action, such as against some guarantors or in some actions on promissory notes: see *Waldron v. Royal Bank* (1991), 53 B.C.L.R. (2d) 294 (C.A.), which states that a debtor is generally entitled to reasonable notice before the collateral is seized.

In cases in which a demand is a legal precondition, take care to ensure that both proof of receipt of the demand by an independent source is available, and that the demand conforms in all respects with any governing contractual provisions. It is preferable that the demand letter not refer to any privileged matters or offers to settle to be made without prejudice; any settlement offers should be set out in separate correspondence.

There are a few exceptional instances in which a demand might best be avoided. If it is decided that an attempt at prejudgment execution (for example, garnishment, *Mareva* injunction) is appropriate, then a demand may prompt asset removal. If it is clear that the other side is about to leave the jurisdiction, it may be important to file and serve a notice of civil claim quickly. It may also not be appropriate to issue your own demand when a sophisticated client has done so adequately already.

There are many limits on the conduct of a person demanding payment. Tort law prohibits intentional infliction of nervous shock. Part 7 of the *Business Practices and Consumer Protection Act* prohibits a number of listed unreasonable collection practices (see sections 114-116). Section 114 of the *Business Practices and Consumer Protection Act* prohibits a collector from harassing a debtor. Harassment includes: (a) using threatening, profane, intimidating or coercive language; (b) exerting undue, excessive or unreasonable pressure; or (c) publishing or threatening to publish a debtor's failure to pay. Beyond this Act, the *Criminal Code* prohibits conduct such as direct threats of harm to persons or property (s. 264.1), extortion (s. 346), and conveying false messages with intent to alarm (s. 372).

Section 116(4) of the *Business Practices and Consumer Protection Act* prohibits collectors from continuing to communicate with a debtor directly once the debtor has notified the collector to communicate with the debtor's lawyer and has

provided an address for a lawyer.

Particularly important to lawyers are the *Professional Conduct Handbook* Rules against communicating directly with opposing parties, or potential witnesses, represented by counsel (Chapter 8, Rule 12.1), and demanding payment from a person while threatening either a prosecution or a complaint to a regulatory authority (see Chapter 4, Rule 2 and Chapter 13, Rule 4), which includes threatening to bring about a bankruptcy if payment is not made.

### [§1.03.1] Contingency Fees for Collections

Given that the client often has made some unsuccessful attempts to collect by the time he or she sees a lawyer, the client may be extremely sensitive to legal fees. Consequently, the client may want you to consider a contingency fee arrangement.

While contingency fee arrangements (no fees if no recovery) may be most beneficial to the client, many law firms maintain fairly conservative credit-granting policies, so be alert to those policies.

Before entering into a contingency fee agreement for a collection matter, you should consider:

- (a) the tenure and quality of the relationship between the law firm and the client;
- (b) the history with the client i.e., whether collections have been done for the client previously;
- (c) the credit-worthiness of the client;
- (d) the exigible assets of the debtor;
- (e) the claims from competing creditors and priorities;
- (f) the likelihood of a bankruptcy of the debtor;
- (g) the length of time to obtain a recovery; and
- (h) the risk of non-recovery.

Once the investigation is done, an economic analysis can be completed on the risk/reward associated with a contingency fee arrangement. In British Columbia, the vast majority of contingency fee arrangements are entered into in respect of plaintiffs' motor vehicle accident claims. In such cases counsel are generally assured that a successful claim will result in the Insurance Corporation of British Columbia paying the judgment in full, thereby mitigating the financial risk to lawyers of such contingent fee structures. The same cannot be said of unsecured debt collection files.

## [§1.04] Initiating Proceedings

All aspects of commencing a legal action and proceeding through to trial are covered in detail in the *Practice Material: Civil Litigation*. A limited number of topics relevant to collections law are canvassed briefly here.

### 1. Limitations

The *Limitation Act* extinguishes causes of action for recovery of debts, damages, or other money, upon the expiration of a limitation period fixed by the Act (s. 9(1)).

To determine the relevant limitation date for a claim, it is necessary to ascertain the governing section in the *Limitation Act* and the date on which the cause of action arose. It is necessary also to consider if the cause of action has been confirmed because this may extend the limitation period.

#### a. Specific Limitations

Most creditor claims will come under s. 3(5) of the *Limitation Act*, which provides a six-year limitation on bringing actions, calculated from the date on which the right to bring the action arose.

Subparagraph 3(3)(f) governs limitations for judgments. “On a judgment for the payment of money or the return of personal property” there is a ten-year limitation on bringing actions. Time runs from the date on which the right to bring the action arose. Courts have interpreted this to mean that judgment creditors can bring a further action, based on their existing judgment (that is, sue on the unpaid judgment as a separate cause of action), in order to extend the life of their judgment, for a further ten years (*Sign-O-Lite Plastics Ltd. v. Kennedy* (1983), 48 B.C.L.R. 130 (S.C.)). Execution proceedings are also to be considered “actions on a judgment” governed by s. 3(3)(f); hence, garnishing orders issued in October 1988 on a judgment entered on September 15, 1978 were set aside in *C.I.B.C. v. Williams* (1988), 34 B.C.L.R. (2d) 75 (S.C.). See also *Deol v. Shipowick* 2008 BCSC 108 in which the court held that a judgment creditor may register a judgment against title to a debtor’s property, and renew the registration, so long as the limitation period applicable to the judgment itself has not expired and the renewal takes place within two years of the date of the original registration or any renewal.

Some judgment enforcement processes *initiated* before the ten-year limitation can be continued afterwards (s. 11(1)).

#### b. Commencement Dates

After ascertaining the governing *Limitation Act* section, the date on which the cause of action arose must be considered, since this is the starting date for the limitation period. In the case of demand promissory notes, the limitation period runs from the date of the making of the note (*Ponti v. Marathon Motors Limited* (1978), 9 B.C.L.R. 46 (Co. Ct.)). When a loan is considered contingent on a future event, the cause of action arises at the time specified or upon the happening of the contingency. However, there may be circumstances in which the lender does not have to wait for the contingency once there is a default but only need wait a reasonable time before making demand and commencing action (*Berry v. Page* (1989), 38 B.C.L.R. (2d) 244 (C.A.)).

In a claim against a guarantor where the guarantee document called for a demand to be made, courts have held that the cause of action arose on the date of the demand and not on the date of the last advance (*CIBC v. Sayani* (1994), 100 B.C.L.R. (2d) 294).

In promissory notes and other credit contracts that call for periodic payments, the limitation period will probably begin to run from the earliest time at which a legal action could be brought (*Reeves v. Butcher* (1891), 2 Q.B. 509 (C.A.) and *Norman Estate v. Norman* (1990), 43 B.C.L.R. (2d) 193 (S.C.)).

In *Associates Financial Services Limited v. Scott*, [1984] B.C.D. Civ. 2480-03 (Co. Ct.), the court held that the date on which the last payment was made was the commencement date. A later date (when the balance was to become due and payable) was specifically rejected as a commencement date, on the authority of *Reeves*. However, in *Bank of Montreal v. Wickland*, [1984] B.C.D. Civ. 599-02 (Co. Ct.), the court held on the facts of the case that the date of last payment specified in the contract should be the commencement date. In *Canada (Attorney General) v. Strickland* (1995), 9 B.C.L.R. (3d) 12 (S.C.), the court held that default on a Canada student loan ran from the date of default in payments to the bank, and not a later date when the Government of Canada subsequently paid out the bank.

In practice, it is safest to work from the earliest possible commencement date and, where there is any doubt, file a notice of civil claim (SCCR 3-1) as a precaution.

c. Confirmation of Cause of Action

Section 5(1) of the *Limitation Act* provides that the running period for a cause of action will, in effect, start again once the cause of action has been confirmed; see *Norman Estate v. Norman*, *supra* for an illustration of a confirmation deemed ineffective because it came after the limitation period expired. Confirmation can come from the making of a payment, or from a written, signed acknowledgment from the party against whom there is a cause of action.

Confirmation by way of payment is usually clear, though in *Black v. Betts*, [1982] B.C.D. Civ. 2480-01 (S.C.), the court extended the language of s. 5(2)(a)(ii) to cover payments made on behalf of and with the apparent knowledge of, a debtor businessperson. See also *Bank of Montreal v. Sheppard* (1989), 39 C.P.C. (2d) 67 (B.C.S.C.). In *Desrosiers v. Wharton*, [1986] B.C.D. Civ. 3388-03 (S.C.), the court held a partial payment accompanied by a disclaimer of liability still had the effect of confirming the cause of action. See also *Lee v. Burdeny* (2 November 1988), Vancouver No. CA008374 (B.C.C.A.), [1988] B.C.J. No. 2449, (leave to appeal dismissed, S.C.C., May 4, 1989).

Section 8 of the Act provides a 30-year ultimate limitation period that governs causes of action under s. 3(5), among others. The effect is that, notwithstanding successive confirmations, an action cannot be commenced beyond 30 years from the original date on which the right to do so arose.

2. Choice of Registry<sup>2</sup>

There are two levels of trial court under provincial jurisdiction in which debt actions may be brought: the Provincial Court–Civil (Small Claims), and the Supreme Court.

Court-related statutes deal with monetary jurisdiction, venue and restrictions on causes of action that may be heard in a court. In addition, there are some matters that come within the exercise of the court's discretion (such as the award

of costs and disbursements), which may also dictate the court in which an action should be commenced.

a. Monetary Jurisdiction

The monetary jurisdiction of the Small Claims Court is limited to a maximum of \$25,000, exclusive of interest and costs (*Small Claims Act*, s. 3).

A creditor may choose to abandon claims over the statutory limit, but in doing so abandons the right to collect the balance (Small Claims Rules 1(4) and (6)). Also, a creditor may not “split the claim”, bringing one action for \$25,000 and another for the balance.

There are no monetary limits on the value of a claim that can be brought in the Supreme Court. However, SCCR 14-1(10) provides that a plaintiff who recovers \$25,000 or less (the limit of the Small Claims Court monetary jurisdiction) in an action is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the action in the Supreme Court. Delay in the Small Claims Court system is not sufficient reason to justify Supreme Court costs being awarded (*Rassak v. Addante*, [1992] B.C.W.L.D. No. 2226 (S.C.)).

On appeals from Small Claims Court decisions, the Supreme Court does have discretion to award costs for the appeal (*Small Claims Act*, s. 13). Appeal costs on Scale 1 were awarded in *Sign-O-Lite Plastics Ltd. v. Watts & Co.*, [1992] B.C.W.L.D. No. 2548 (S.C.): appeal costs were refused in *Lochhead v. B.C.A.A. Insurance Corporation*, [1992] B.C.W.L.D. No. 1686 (S.C.).

b. Venue

Small claims actions must be filed at the registry nearest to where the defendant lives or carries on business, or where the transaction or event that resulted in the claim took place (Small Claims Rule 1(2)). In a case decided under s. 7 of the old *Small Claims Act*, a court held that when more than one venue is open to the plaintiff on the facts of the case, the plaintiff controls the choice (*Simpson-Sears Ltd. v. Marshall* (1979), 12 B.C.L.R. 244 (S.C.)). The plaintiff's place of residence alone did not entitle it to select a venue outside the provisions of s. 7 (*Binder v. Mercedes-Benz Canada Inc.* (1984), 52 B.C.L.R. 271 (Prov. Ct.)).

<sup>2</sup> Be cautious when attempting to apply jurisdictional case law that was decided before 1990, given changes to the *Small Claims Act*.

In credit contracts that call for payments to be made to the creditor at a specific location (for example, a creditor's place of business or its main credit office), a default in payment gives rise to a cause of action at that payment location (*Simpson-Sears Ltd. v. Marshall, Sign-O-Lite Plastics Ltd. v. Szabo*, [1979] B.C.D. Civ. 3652-04 (S.C.)).

Because the Supreme Court is a court of general jurisdiction throughout the province, a plaintiff is entitled to commence an action in a registry of its choice, and to have the trial heard at the place named in the notice of civil claim (SCCR 12-1(5)), subject to a judge's discretion to order a change of venue. In addition, there are provisions in SCCR 8-2(1) for hearing applications in different locations by consent of the parties, order of the court or the normal location of the court's sitting in the applicable judicial district. Note that in foreclosure proceedings there are specific "local venue" rules (*Law and Equity Act*, s. 21). The same applies to builder's lien actions and some other actions. When dealing with claims against land, generally, the venue is where the land is located.

For all actions, the safest practice is to check the governing statute.

c. Causes of Action

While monetary limits and venue are the two main jurisdictional considerations in collections law, statutory provisions governing causes of action may also come into play. The causes of action over which a court has jurisdiction are governed both by the court statutes themselves, and by specific provisions in many other statutes, which create or regulate causes of action.

The *Small Claims Act*, s. 3(1), sets out a non-exhaustive list of actions over which the court has jurisdiction. This includes actions for debt or damages, recovery of personal property, and specific performance of an agreement relating to personal property. Section 3(2) prohibits actions for libel, slander or malicious prosecution. Certain actions, such as builder's lien actions, may not be brought in Small Claims Court either.

The Supreme Court of British Columbia is a court of inherent jurisdiction. It has general jurisdiction over actions unless authority is specifically removed.

3. Supreme Court Civil Rule 15-1—Fast Track Litigation

The fast track litigation procedures apply when the only claims in an action are for money and the total amount claimed is \$100,000 or less, exclusive of interest and costs (SCCR15-1(1)). If SCCR 15-1 applies, any party may file a notice of fast track action in Form 61 and the words "Subject to Rule 15-1" must be added to the style of proceedings (SCCR 15-1(2)).

Supreme Court Civil Rule 15-1 is designed to reduce oral discovery, allow the expedited setting of trial dates, and limit the cost of the proceedings generally. Once a party to an action applies for a trial date, the registrar must set the date for the trial for sometime within the next four months (SCCR 15-1(13)).

Supreme Court Civil Rule 15-1 includes procedures that are different from those applicable to regular actions and, therefore, it is important to read the rule carefully. Examinations for discovery are limited to two hours, unless the party being examined consents or the court orders a longer examination (SCCR 15-1(11)). A trial must be heard without a jury (SCCR 15-1(10)). If, as a result of a trial management conference, a judge is of the view that the trial will likely require more than three days, the judge may adjourn the trial to a date to be set (SCCR 15-1(14)).

Costs are fixed in accordance with SCCR 15-1(15) and the court may consider a settlement offer delivered under SCCR 9-1.

4. Initiating the Action

In Small Claims Court a debt action is begun by filing a notice of claim pursuant to Small Claims Rule 1.

Under the former Supreme Court Rules, a plaintiff was entitled to initiate proceedings using a simplified endorsement of the claim on a writ of summons. If the defendant failed to respond to the writ of summons, judgment could be entered on the basis of the simplified endorsement without the need to file a full statement of claim. This process is no longer possible under the SCCR. In Supreme Court the initiating process is the same regardless of the application of SCCR 15-1. That is, the plaintiff must file a notice of civil claim pursuant to SCCR 3-1.

## 5. Service of Process

Service of process is a fundamental procedural step in all litigation. Generally, jurisdiction over the subject matter of the litigation arises from the initiation of the action, while jurisdiction over the defendant arises from service of process. After a proceeding is commenced, notice to the other side continues to be an important precondition to virtually every step in the action.

A party usually has a choice of who may serve process. The general practice is to employ a private process server. Under s. 7 of the *Sheriff Act*, only a sheriff may “serve or execute a judgment summons, an order of committal or writ or warrant of execution”. Sheriff services are contracted out to specific bailiff companies.

Service procedures (including substituted service and service outside British Columbia) are governed mainly by Small Claims Rules 2 and 18, and SCCR 4-2, 4-3, 4-4, and 4-5. There are service procedures in other statutes, such as the *Business Corporations Act*. Service procedures are sometimes more liberal under the Small Claims Rules. For example, Rule 2(2) allows service on an individual defendant by mailing a copy of the notice of claim by registered mail (with proof by photocopy of the signature obtained at time of delivery or online confirmation of delivery). Finally, the debt instrument or the contract documents may provide for the method of service and stipulate the persons to be served.

### [§1.05] Proceeding to Judgment

#### 1. Default Judgment

Understanding default proceedings is important in collections matters. It often is important to move quickly for default if defence documents are not filed. In practice, many collections matters will be resolved by default, because a defendant does not respond to the action.

When a party, properly served, fails to file the required defence documents, within the times prescribed by the rules (of whichever court), then, assuming payment has not been received, default judgment can be entered. Where the claim has been for a liquidated amount (this will be the case in most collections-related actions), the plaintiff can enter a final judgment and then proceed to enforce the judgment.

In a small claims action, the only defence document that need be filed is a dispute form (Form 2) called a “reply” (Small Claims Rule 3(2)). A defendant can also use a reply form to admit the claim and ask a judge to set a payment schedule or to make a counterclaim (Small Claims Rule 3(2)).

A defendant must file a reply within 14 days after service, if served within the province (Small Claims Rule 3(4)). If it is not filed, default judgment can be entered (Small Claims Rule 6(4)). In debt actions, a plaintiff can obtain final judgment by submitting an application for default order (Form 5) and a certificate of service (Small Claims Rule 6(3)).

Under the former Supreme Court Rules, defendants in Supreme Court actions were required to file an appearance within seven days and a statement of defence within 14 days of filing an appearance or default judgment could be entered. Now, the defendant need only file a response to civil claim pursuant to SCCR 3-3 within the time limits set out in SCCR 3-3(3) (for example, within Canada, within 21 days after the person is served with a notice of civil claim).

As with small claims actions, if the claim is for a “liquidated” amount, final judgment can be entered in default of the defendant filing a response (SCCR 3-8). As part of the documentation for obtaining default judgment from the court registry, a plaintiff may submit a bill of costs (SCCR 3-8(3)).

Certain professional courtesies are expected of lawyers who are in a position to file default judgment, particularly when the other side is represented by counsel. Generally, it is unprofessional conduct for a lawyer to file default judgment knowing the other side is represented by counsel, unless a timely warning is or has been given of an intention to do so. See Chapter 11, Rule 12 in the *Professional Conduct Handbook*, requiring express client instructions to be communicated at the outset of the matter before a lawyer may proceed by default against a represented party without further inquiry or warning; see also *Henry v. Zurich Life Insurance Company* (20 September 1996), Victoria Registry, V02596 (B.C.C.A.), [1996] B.C.J. No. 3070. Note also *Foreman v. Gerling*, [1991] B.C.W.L.D. No. 1703 (C.A.), where the court set aside a default judgment which plaintiff’s counsel had kept secret from the defendant’s counsel for several months; the court set aside the judgment as a “debt of justice” given the conduct of plaintiff’s counsel.

#### 2. Applications for Summary Judgment

As with default proceedings, applications for summary judgment are often an important part of the collections process. Most collections matters, even when defended, need not go to a conventional trial. There are a number of alternatives open to the plaintiff.

In a small claims action when the defendant has filed a Form 2 reply defending an action, the parties must follow the procedures for a settlement conference and then trial, as set out in Small Claims Rules 7 and 10 respectively. Alternatively, when liability is admitted, the defendant can use the Form 2 reply to ask for a payment hearing under Small Claims Rule 12. There is no authority under the Small Claims Rules to use procedures to obtain judgment under the SCCR.

Under the SCCR, there are several options available to plaintiffs to obtain judgments before trial when it is not open to file default judgment (that is, when a response has been filed). These are detailed in the *Practice Material: Civil Litigation*. Note that the Notice to Mediate (General) Regulation (BC Reg. 4/2001) applies to a proceeding for a debt claim. The Regulation outlines the procedure to be followed. Similarly, the mediation pilot projects in Provincial Small Claims apply to debt claims.

For collections matters in the Supreme Court, note the following SCCR and practice points.

a. Consent Judgment

As an alternative to a judgment being entered, there has been a past practice of the parties negotiating an instalment payment arrangement, with the plaintiff taking, but not entering, a consent-type order to hold as security. If an instalment was missed, the order was entered and judgment taken. Supreme Court Civil Rule 8-3 authorizes such consent arrangements.

*Trans Atlantic Resources Inc. v. IMT Multilingual Systems* (1992), 65 B.C.L.R. (2d) 45 (S.C.) called these consent arrangements into question, in light of the *Law and Equity Act*, s. 58. Section 58 provides ‘No Cognovit Actionem or Warrant of Attorney to confess judgment has any force or effect’. The court held that consents to judgment given under (now repealed) Rule 57(24) were rendered void by s. 53 (now s. 58).

*Trans Atlantic* was applied at the trial level in *Toronto-Dominion Bank v. Shnier*, [1992] B.C.W.L.D. No. 2542 (S.C.), though the consent to judgment in the latter case was entered under Rule 41(16). On appeal, the Court found that a consent to judgment order is a judge’s order, and not a cognovit actionem ((1994), 93 B.C.L.R. (2d) 310 (C.A.)).

b. Striking Out Pleadings

Under SCCR 9-5 the court may order that a pleading be struck on various grounds, including that it discloses no reasonable claim or defence. This rule can be useful when non-lawyers have drafted and filed spurious pleadings, although other summary judgment applications may be more appropriate depending on the nature of the pleadings and the allegations contained in them.

c. Defendant Non-compliance

Under SCCR 22-7(5), the court may order proceedings to continue as if no response had been filed, if there has been a failure to comply with certain rules. A single failure will generally not attract this sanction; the rule is most useful when there have been repeated breaches.

d. Withdrawal of Defence

Sometimes a response may be filed simply to preserve a defendant’s position. When subsequent developments dictate that a defendant allow default judgment to be signed, the defendant may file a notice of withdrawal in Form 37. Once Form 37 has been filed, the plaintiff may file a judgment in default of defence (SCCR 9-8(7)).

e. Summary Judgment

Supreme Court Civil Rule 9-6 gives the court authority to grant judgment on application (with supporting affidavit) in chambers, on the ground that there is no “genuine issue for trial”. There is extensive case law on the application of the predecessor to SCCR 9-6, the former Rule 18. Essentially, the plaintiff must show that a judgment is clearly and obviously justified, while the defendant, to successfully defend, need only show there is a triable issue. Debt actions are one of the more likely causes of action to be successful under this rule, but there is a very low threshold for the defendant.

The powers of the court under SCCR 9-6 appear to be broader than under former Rule 18. It is unclear at this point whether the court will grant judgment more liberally under SCCR 9-6 given this apparently greater discretion.

A master has jurisdiction to hear these applications.

f. Summary Trial

Another summary method for proceeding is to apply for judgment by summary trial. Supreme Court Civil Rule 9-7 gives the court two broad powers on a summary trial application: to grant judgment on the whole of the affidavit evidence which has been presented; or, when the court cannot give judgment on the evidence, to make several directions to expedite the proceeding. Only a judge has jurisdiction to hear these applications. The predecessor to SCCR 9-7 is Rule 18A. As with Rule 18, there is extensive judicial interpretation regarding Rule 18A. See *Practice Material: Civil Litigation*, Chapter 4 for a review of some of this case law.

At Robson Square Small Claims registry in Vancouver, Rule 9.2 provides for a summary trial process to claimants who are commercial lenders. The claimant must be “in the business of lending money or extending credit” and the debt must arise from a loan or extension of credit in the course of that business. Common examples are credit card and loan debts. This procedure applies to claims up to \$25,000. If Rule 9.2 applies, a half-hour streamlined trial before a judge is scheduled. At the end of the trial, the judge will make a payment order, dismiss the claim or order that the claim be set for mediation or a trial conference.

At the Richmond Small Claims registry, all claims up to \$5,000 are scheduled for a one-hour simplified trial before an experienced lawyer. At Robson Square, all claims up to \$5,000, with the exception of financial debt claims under Rule 9.2 and personal injury claims, will be set for simplified trial during the evening. See Rule 9.1 for details.

3. Canadian Currency

The *Currency Act* (Canada), s. 12, provides in part that “any reference to money or monetary value in any indictment or other legal proceedings shall be stated in the currency of Canada”.

The *Foreign Money Claims Act* R.S.B.C. 1996, c. 155, s. 1(1) provides:

If, before making an order for the payment of money arising out of a claim or loss, the court considers that the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a

currency other than the currency of Canada, the court must order that the money payable under the order will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in British Columbia at the close of business on the conversion date.

The “conversion date” is tied to the date that payments are actually made on the judgment. The bank refers to the currency values on the last day before the day on which the judgment debtor makes a payment to the judgment creditor under the order.

In practice, it is still common to see foreign-money claims converted to Canadian currency at the date judgment is granted. Having a judgment expressed in Canadian currency can simplify the use of execution proceedings such as post-judgment garnishment.

4. Judgment Interest

a. Interest before Judgment

While a creditor’s right to prejudgment interest is usually not in doubt, arriving at the appropriate rate can become complicated. Determination of the rate in British Columbia is governed by federal statute law (the *Interest Act*) and provincial statute law (the *Court Order Interest Act*).

Under the *Interest Act* (Canada), parties are generally at liberty to contract for a stipulated rate of interest (s. 2). If by agreement of the parties, or by law, interest is payable but no rate is stipulated, the rate is fixed at 5% per annum under s. 3. This section will rarely be applicable given judicial interpretation of when there is an agreement and when a rate applies by operation of law.

In the great majority of credit contracts, the parties will explicitly agree on a set rate. In addition, it has been held that an agreement can be implied (*Makin Mailey Advertising Ltd. v. Budget Brake & Muffler Distributors Ltd.*, [1987] B.C.D. Civ 2061-01 (C.A)).

If no agreement is found, then s. 1 of the *Court Order Interest Act* applies. Under s. 1, a judge may award interest “on the amount ordered to be paid at a rate the court considers appropriate in the circumstances”: see, for example, *Cedargrove Sound Co. Ltd. v. G C Custom Sound Ltd.*, [1982] B.C.D. Civ. 2062-01 (Co. Ct.). Generally, the rate will be approximately the rate set for 30-day commercial paper. The courts have rejected arguments that the rate of prejudgment

interest should be set with reference to non-economic criteria, such as delay or the manner in which the litigation is conducted.

Section 4 of the *Interest Act* requires written contracts (other than those involving real property mortgages), where interest is stated to be payable at a rate less than a year (for example, monthly), to contain an express statement of an equivalent yearly rate. Failing the statement of that equivalent, only 5% per annum is chargeable. The threshold issue in invoking this section appears to be how the rate is expressed, not when the interest itself is actually payable (*Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.* (1991), 83 Alta. L.R. (2d) 289 (C.A.)). Hence, for example, the disclosure requirements of the Act are met if an annual rate is stated, even though interest is calculated, and payable, monthly.

b. Interest after Judgment

The *Court Order Interest Act* ("COIA") is divided into two parts: Part I governing pre-judgment interest, and Part II governing post-judgment interest.

In Part II, under s. 7 of the Act, pecuniary judgments bear interest at a rate equal to the prime lending rate of the banker to the government. The rate is fixed on a half-yearly basis: a rate is set on January 1 and July 1 each year.

Under s. 8, the court has authority to vary the rate or fix a different date from which interest is to be calculated. Under s. 9, post-judgment interest is deemed to be included in the judgment for enforcement purposes, and a partial payment on a judgment is to be applied first to outstanding interest.

c. Criminal Interest Rates

The *Criminal Code*, s. 347, prohibits agreements for interest at an effective annual rate of over 60%. Most reported decisions under this section involve litigation over financing arrangements for large property development projects.

In *Kebet Holdings Ltd. v. 351173 B.C. Ltd.*, [1992] B.C.W.L.D. No. 2069 (S.C.) [appeal dismissed (1993), 74 B.C.L.R. (2d) 198 (C.A.)], the trial court summarized the relevant factors to be applied when deciding enforceability as including: (1) the object and policy of s. 347; (2) the intention of either party to break the law; (3) the equality of bargaining position, and professional advice

given to the parties; and (4) whether one party would be unjustly enriched if the contract were not enforced.

When calculating the actual rate of interest to determine if it exceeds the criminal rate, courts have broadly interpreted the definition of "interest" in s. 347 of the *Criminal Code*. For example, "interest" may include, penalties or charges for late payment of an account or bill (*Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112).

In practice, the determination of whether interest is actually being charged at the criminal rate can be a complex accounting exercise requiring expert evidence.

The courts have addressed the issue of whether a borrower can recover interest paid that subsequently is found to have been paid at a criminal rate. The courts have acknowledged the general principle that money paid under an illegal contract is not normally recoverable. That general principle was applied, to deny recovery, in *Bon Street Developments Ltd. v. Terracan Capital Corp.* (1993), 76 B.C.L.R. (2d) 90 (S.C.); see also *Vandekerkhove v. Litchfield* (1995), 1 B.C.L.R. (3d) 70 (C.A.). Such a result is not automatic given recent caselaw, however.

In *Transport North American Express Inc. v. New Solutions Financial Group*, 2004 SCC 7, [2004], 1 S.C.R. 249, the majority of the Supreme Court of Canada held that (para. 32): "If the case is an appropriate one for the court to sever only those provisions of the loan agreement that put the effective interest rate over 60 percent, and if it is conceded, as it must be, that such a rewording alters the agreement of the parties, the question becomes only a choice of the appropriate technique of severance." Notional severance is a remedy available as a matter of law in cases involving s. 347 of the *Criminal Code* (para. 5). Notional severance calls for the reduction of the pure interest component (as opposed to various fees, which for the purposes of s. 347 are considered "interest") to make the overall interest rate 60%. This approach is different from the traditional severance (or the "blue-pencil approach") where the pure interest component is completely removed from the agreement.

## **[§1.06] Registration and Actions on Foreign Judgments**

A “foreign judgment” is a judgment from any jurisdiction outside British Columbia. Hence, judgments from other provinces, U.S. courts, and elsewhere are all considered foreign.

In general, a foreign money judgment can be enforced in British Columbia either at common law (with the foreign judgment being the cause of action in a new court action in British Columbia), by complying with the simplified registration and filing system for Canadian judgments under the *Enforcement of Canadian Judgments and Decrees Act* or through the registration procedures set out in sections 28 to 39 (and Schedules) of the *Court Order Enforcement Act*, and SCCR 19-3.

The *Enforcement of Canadian Judgments and Decrees Act* provides that the British Columbia Supreme Court will not entertain as grounds for staying or limiting the enforcement of a judgment from another Canadian province or territory an argument that the originating court lacked jurisdiction over the defendant or the dispute or that the British Columbia court might have come to a different view of the merits of the decision. The proper course for a party wishing to raise those sorts of matters is to seek relief in the province or territory where the judgment was originally made, either through appeal or further application to the court that made the judgment.

The *Enforcement of Canadian Judgments and Decrees Act* is a uniform statute designed for each province and territory to adopt in order to achieve a goal of uniformity in the enforcement of judgments from Canadian provinces and territories. One of the effects of the *Enforcement of Canadian Judgments and Decrees Act* was to repeal s. 29(1) of the *Court Order Enforcement Act* and substitute a simplified procedure for registration of Canadian judgments in the Supreme Court (see s. 3). Further, s. 1 of the *Limitation Act* is amended such that the limitation period for the enforcement of any judgment from a Canadian province or territory is extended to 10 years. The definition of “Canadian judgment” is broad enough to also include judgments from the province of Quebec, which traditionally have been excluded from enforcement in British Columbia by way of registration. Further, the *Enforcement of Canadian Judgments and Decrees Act* applies not only to money judgments but also to declarations of rights, status and obligations of individuals.

The *Enforcement of Canadian Judgments and Decrees Act* contemplates the registration and enforcement of interim orders as well as final orders; however, if the order sought to be enforced is a money judgment, this may only be done after that judgment becomes final. Registration is made by filing a certified true copy of the foreign judgment along with a requisition pursuant to

SCCR 17-1(1)(b). The requisition in this case constitutes the “originating pleading” (under the former Rules of Court, the “originating application”) and is sufficient to initiate the proceedings in British Columbia. Once the Canadian judgment is registered in British Columbia, the judgment may be enforced as if it were a judgment of the British Columbia Supreme Court (s. 4).

The *Enforcement of Canadian Judgments and Decrees Act* also contemplates an application for directions relating to the enforcement of the order. At that application, the court may limit enforcement of the order if there is evidence that a party affected by the order plans to make an application to set it aside, a stay is in effect in the province or territory where the order was made or enforcement of the judgment would be contrary to public policy in British Columbia. If the foreign judgment was obtained by default, an application for directions must be made prior to any attempts to enforce the order after registration in British Columbia. Finally, there is express authority for a party to recover interest and costs relating to the registration and enforcement of the foreign judgment.

Registration under the *Court Order Enforcement Act* is available only if the foreign judgment was granted in a reciprocating jurisdiction. Several jurisdictions are declared to be reciprocating states for the purposes of the *Court Order Enforcement Act*. These jurisdictions include the United Kingdom, several states in Australia, the Federal Republic of Germany, Austria and the following U.S. states: Washington, California, Oregon, Colorado, Idaho and Alaska. Judgments from those jurisdictions may be registered pursuant to a simplified process under the *Court Order Enforcement Act*, and become enforceable in the same way as a local judgment would be enforceable.

The application for registration of a reciprocally-enforceable judgment under the *Court Order Enforcement Act* must be supported by an affidavit which attaches: a certified copy of the judgment under seal of the original court; a certified translation, where applicable; and a statement similar to that included in Schedule 2 of the *Court Order Enforcement Act*, which sets out the date upon which the action was commenced, whether a defence was entered, when judgment was allowed, the time for appeal has expired and either no appeal is pending or an appeal was made and was dismissed and any other details necessary for the court to make an order enforcing the judgment. The affidavit must also state that the judgment creditor is entitled to enforce the judgment; the amount presently owing on the judgment; the full name, occupation and last known residence of both the judgment creditor and the judgment debtor; whether the judgment debtor was personally served or through some other process or participated in the proceeding or otherwise submitted to the jurisdiction. Finally, the affidavit must state that the

judgment is not one that is disqualified from registration under s. 29(6) of the *Court Order Enforcement Act*.

Section 29(6) provides:

29(6) An order for registration must not be made if the court to which the application for registration is made is satisfied that

- (a) the original court acted either
  - (i) without jurisdiction under the conflict of laws rules of the court to which application is made, or
  - (ii) without authority, under the law in force in the state where the judgment was made, to adjudicate concerning the cause of action or subject matter that resulted in the judgment or concerning the person of the judgment debtor,
- (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident in the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court,
- (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, even though he or she was ordinarily resident or was carrying on business in the state of that court or had agreed to submit to the jurisdiction of that court,
- (d) the judgment was obtained by fraud,
- (e) an appeal is pending or the time in which an appeal may be taken has not expired,
- (f) the judgment was for a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the registering court, or
- (g) the judgment debtor would have a good defence if an action were brought on the judgment.

On the test to be applied when challenging a non-Canadian foreign judgment, note *Moses v. Shore Boat Builders Ltd.* (1992), 68 B.C.L.R. (2d) 394 (S.C.), aff'd (1993), 83 B.C.L.R. (2d) 177 (C.A.), leave to appeal to the Supreme Court of Canada refused, [1994] B.C.W.L.D. No. 793 (S.C.C.). In *Moses*, the trial court held: (1) the real and substantial connection test is the only question to be asked if the judgment is from a Canadian court; (2) if the judgment is not from a Canadian court, the fairness of the process of the foreign court can be challenged only on grounds of manifest error on the face of the judgment, or of breach of natural justice or public policy; and (3) it may be open to parties

to restrict the forum for an action arising out of contract, by agreement.

Judgments from non-reciprocating jurisdictions can be pursued in British Columbia, but it is necessary to commence an action on the foreign judgment and obtain judgment in British Columbia prior to enforcement. In an early decision, the British Columbia Supreme court appeared to have held that it is acceptable to register a judgment from a non-reciprocating jurisdiction in a reciprocating jurisdiction, and then apply to register that judgment in British Columbia (*Hickman v. Kaiser* (1996), B.C.L.R. (3d) 195). However, given the more recent decision of the Court of Appeal in *Owen v. Rocketinfo Inc.* 2008 BCCA 502, it is clear that this practice is no longer sound. Accordingly, enforcement of non-reciprocating foreign judgments may now be pursued solely by initiating a new action on the judgment in British Columbia.

### [§1.07] Prejudgment Execution

Generally, a creditor must start a debt action and obtain a judgment before the creditor can proceed against the assets of a debtor. In British Columbia, there is authority for two significant exceptions to this rule: *Mareva* injunctions (available only in Supreme Court actions and exceptional as a remedy) and *prejudgment* garnishment (available in both Supreme Court and Small Claims Court). Garnishment law and procedure will be dealt with under the postjudgment remedy heading.

#### 1. *Mareva* Injunctions

*Mareva* injunctions are a form of interlocutory injunction. In most cases the application is made without notice. This type of injunction prohibits a defendant from disposing of assets pending the outcome of the action between the parties. The name arises from a leading British decision—*Mareva Compania Naviera S.A. v. Int. Bulkcarriers S.A.*, [1980] 1 All E.R. 213 (C.A.), as applied in *Sekisui House Kabushiki Kaisha (Sekisui House Co.) v. Nagashima* (1982), 42 B.C.L.R. 1 (C.A.).

A *Mareva* injunction is a draconian remedy, and is therefore not granted readily. Exceptional circumstances must exist to warrant granting the injunction, such as a wrongful act of a defendant in disposing of his or her assets, or a real risk that such action may be taken imminently.

The injunction does not give the plaintiff a proprietary interest over the defendant's assets, and the principles for granting *Mareva* injunctions do not properly extend to situations where proprietary interests are in dispute. In the latter case, there is authority for a form of preservation order under SCCR 10-1, and possibly under the *Law and Equity Act*, s. 57. Usually, the injunction will be tailored to allow the debtor to meet legitimate debt payments

accruing in the ordinary course of business; for example, see *Imperial Oil v. Gibson* (1992), 72 B.C.L.R. (2d) 195 (C.A. in chambers) and *Mooney v. Orr* (1994), 98 B.C.L.R. (2d) 318 (S.C.).

The authority for granting *Mareva* injunctions is rooted in the equitable jurisdiction of courts, though there is specific statutory authority in the *Law and Equity Act*, s. 39. However, that section simply grants authority when “it appears to the court to be just or convenient that the order should be made”. It continues to fall to established equitable principles for the court to decide when an injunction will be granted. Remember that a *Mareva* injunction is an **extraordinary remedy**. Historically, it has been granted only when the applicant has met several stringent tests demonstrating, among other things, that:

1. the object of the relief is not simply to provide the applicant with security for the amount of its claim before judgment;
2. there is a *real* risk (factually substantiated) of assets being disposed of or dissipated; and
3. the applicant will suffer irreparable harm unless the court grants this relief.

Supreme Court Civil Rule 10-4 governs the procedure for pre-trial injunctions. While the test appears to be a simple one, the court will demand a high standard of proof and will scrutinize the evidence. The court will also expect full and frank disclosure from counsel seeking the order given that the application is typically brought without notice. Many orders without notice have been set aside for failure to disclose all relevant evidence. On occasion, the courts impose significant costs penalties against parties who obtain such orders and are subsequently found to have failed to provide full and frank disclosure to the court of all material fact. Given the cost and effort involved, such applications are rare for most collections matters.

The leading case on *Mareva* injunctions in Canada is *Aetna Financial Services Limited v. Feigelman*, [1985] 2 W.W.R. 97 (S.C.C.). The court reviewed and generally agreed with the principles for granting the injunction as they had evolved in Britain and Canada. The threshold issues are whether the plaintiff has a strong *prima facie* case (*Traff v. Evancic* (1995), 15 B.C.L.R. (3d) 85 (C.A.)), and whether the balance of convenience favours the plaintiff. The test for granting an injunction generally has undergone much judicial review: see *RJR Macdonald Inc. v. Canada (AG)*, [1994] 1 S.C.R. 311; *The Mark Anthony Group, Inc. v. Vincor International Inc.* (1998), 58 B.C.L.R. (3d) 124 (C.A.); and *Silver Standard*

*Resources Inc. v. Joint Stock Company Geolog* (1998), 59 B.C.L.R. (3d) 196 (C.A.).

The 1994 decision of *Mooney v. Orr* (1994), 98 B.C.L.R. (2d) 318 (S.C.), represented a significant development in the law of *Mareva* injunctions in British Columbia. During the course of a lengthy trial in a breach of contract and fraud action, one party made an application without notice before a different judge for a *Mareva* injunction against another party. The fundamental challenge to the applicant's counsel was to persuade the court to extend the effect of its order outside British Columbia—this being a departure from the law as enunciated in *Zellers Inc. v. Doobay* (1989), 34 B.C.L.R. (2d) 187 (S.C.). The court granted the order.

The respondent subsequently applied to the trial judge to set aside the injunction ((1994), 100 B.C.L.R. (2d) 335 (S.C.)). The trial judge re-cast the principle in *Aetna*, which had held that an applicant ought to show that there was a genuine risk of disappearance of assets from the jurisdiction. The court held this was only a factor in the exercise of the court's discretion to balance the interests of the parties. Moreover, the general approach taken by the trial judge may be seen as a slackening of the very rigid tests applied in previous decisions and more akin to the test applied when granting interim injunctions; that is, once an applicant has shown a strong *prima facie* case, the issue is whether in all of the circumstances it would be just and equitable to grant the injunction. The trial judge refused to set aside the injunction until the mandatory compliance aspects of the order were complied with. When this was done, the injunction was later dissolved ((1994), 1 B.C.L.R. (3d) 150 (S.C.)). See, (1995) 53 *The Advocate* 435 for a thorough discussion of *Mooney v. Orr*.

The applicant for an interlocutory injunction must give an undertaking to pay damages for any loss suffered by the defendant as a result of the granting of the injunction if, at trial, it appears that the injunction was wrongly granted: SCCR 10-4(5).

For a more complete discussion of *Mareva* injunctions, see the *British Columbia Creditors' Remedies—An Annotated Guide* (Vancouver: CLE), Chapter 5.

## 2. Prejudgment Garnishment

### a. The Process

A plaintiff in an action may apply, without notice, for an order that debts due from the garnishee (a third party) to the defendant be attached (*Court Order Enforcement Act*, s. 3). Garnishing orders before judgment are available in both Small Claims Court and

Supreme Court actions. The requirements for the contents of the affidavit that supports the application are set out in s. 3(2) of the *Court Order Enforcement Act*. Also, Schedule 1 to the Act contains forms to follow (Form A or Form C, depending on the circumstances). An applicant for a pre or postjudgment garnishing order must also file a requisition in Form 2.

A creditor-plaintiff cannot garnishee itself, (for example, a bank that has a cause of action against one of its customers) (*Bank of Montreal v. Big White Land Development Ltd.* (1982), 17 B.L.R. 257 (B.C.S.C.)). However, such a creditor may have other remedies, such as set-off rights at common law, or if a bank or financial institution has multiple current accounts, a right to “consolidate” the current accounts and regard them as a single obligation.

An garnishing order can be obtained from a registrar at a court registry. The usual practice in Supreme Court is to file a notice of civil claim and simultaneously seek a garnishing order. There is no hearing before a judge or master. The registrar decides whether the formalities have been met. The order is directed at any person within the province who owes the defendant money. The order is then served on the garnishee immediately. After funds have been paid into court, the order is served on the defendant. The garnishee is obligated to pay into court any amounts owing to the defendant, up to the value of the claim.

Banks are frequently the target of garnishing orders. Accordingly, the specific rules governing the attachment of bank accounts is important. The primary rule, as set out in the Federal *Bank Act*, is that the specific branch where the bank account is located must be served with the garnishing order (ss.462(1)(d)). However, as long as the bank has a business presence in British Columbia, the branch of the bank need not be located in B.C. to be subject to a prejudgment garnishing order. See *Univar Canada v. PCL Packaging Corp.* 2007 BCSC 1737.

Prejudgment garnishment does not give the creditor a proprietary interest over the funds paid into court. The funds must remain in court pending judgment or settlement by the parties. Nonetheless, it can be strategically advantageous for the creditor. It provides security against asset removal, and it can provide a very strong bargaining tool.

Notably, wages cannot be garnisheed before judgment (s. 3(4)). Wages include commission salary.

#### b. Setting Aside Prejudgment Garnishing Orders

Because garnishing orders are obtained without notice, the defendant is entitled to apply for a rehearing to argue that the order should be set aside. Regardless of the merits of any defence, a defendant may decide to make such an application as a matter of tactics. The application is made by notice of motion in the proceeding, and the court hears it.

British Columbia courts have consistently held the view that the exceptional nature of prejudgment garnishment demands meticulous (but not “ridiculous” as indicated by one judge) adherence to the requirements of the *Court Order Enforcement Act*. Where the creditor (plaintiff) fails to do so, the order will be set aside and the funds in court will be returned to the defendant. A plaintiff cannot rectify a defective first order by unilaterally attempting to withdraw it and obtaining a second order—both will be set aside (*Richardson Greenshields of Canada Ltd. v. McKim and Bank of B.C.* (1987), 14 B.C.L.R. (2d) 101 (S.C.)).

Applications to set aside prejudgment garnishing orders usually involve an attack on the formalities and substance of the affidavit sworn in support of the order. The applicant in *Coast Tractor & Equipment Ltd. v. Halliday* (1987), 13 B.C.L.R. (2d) 66 (S.C.) was unsuccessful in arguing that s. 8 of the *Canadian Charter of Rights and Freedoms* was a ground to set aside an order.

Evidence allowed at the hearing is limited. When the affidavit in support is found insufficient (for example, in stating the nature of the cause of action without particularity), the difficulty generally cannot be cured by reference to other (unsworn) material (*Brent Koop Yachts Inc. v. Fraser Valley Bus Service Ltd.*, [1982] B.C.D. Civ. 1722-03 (S.C.)), nor can it be corrected by a supplementary affidavit by the plaintiff (*Vitek v. Poh*, [1984] B.C.D. Civ. 1720-02 (S.C.)). A defendant's mere denial of liability will not be sufficient to set aside an order (*Findlay v. Boyd*, [1983] B.C.D. Civ. 1723-01 (S.C.); and *Weber v. D5 Enterprises Ltd.* (1983), 51 B.C.L.R. 172 (S.C.)). For a discussion of the test for leave to appeal pretrial orders such as garnishing orders, see *Lenec v. Mallinson*, [1995] B.C.W.L.D. No. 2190 (C.A. in

chambers).

There is extensive case law on attempts to set aside a garnishing order; see Allan A. Parker, "Garnishment before Judgment in British Columbia: Fifty Ways to Lose Your Order" (1990), 48 *The Advocate* 407 and yearly updates in the *Annual Review of Law and Practice* (Vancouver: CLE). A sampling of cases follows.

i. Cause of action not succinctly stated

Under s. 3(2)(d)(iii) the claimant must set out in the affidavit "the nature of the cause of action". This is a threshold issue. The benchmark case on inadequacy of a statement of the nature of the cause of action as set out in the affidavit is *Knowles v. Peter* (1954), 12 W.W.R. (N.S.) 560 (B.C.S.C.). In that case the court held as defective a cause of action described as "for debt on a chattel mortgage". In some instances, the courts appear to merge this ground with the requirement that the claim be for a liquidated amount; in *United States of America v. Annesley* (1957), 21 W.W.R. 520 (B.C.S.C.), the court held that a claim for "monies due to the plaintiff from the defendant under the terms of two contracts in writing" did not adequately disclose a liquidated demand. See also *Tarnowski v. Sobolewski Anfield*, [1987] B.C.W.L.D. 1317 where a similar problem arose.

It is difficult to extract general principles on this ground since most cases turn on the specific language of the particular affidavit. One example of satisfactory language is contained in *Pro-Conic Electronics Limited v. Pro Quality International Limited* (1985), 63 B.C.L.R. 279 (C.A.), where the claim was described as for "electronic products sold by the plaintiff to the defendant [between particular dates] pursuant to contracts made in British Columbia whereby the sum of \$598,900.85 (U.S. \$453,129.19) was due on December 4, 1984 and remains unpaid". In *Co-operators Gen. Ins. Co. v. Billett* (1988), 27 B.C.L.R. (2d) 367 (C.A.), the Court of Appeal held as sufficient a cause of action described in the supporting affidavit as for "monies of the Plaintiffs had and received by the Defendants". See also *First Avenue Research Corp. v. Donar Chemicals*

*Ltd.* (1987), 11 B.C.L.R. (2d) 136 (S.C.).

The criteria set out in *Hastings v. O'Neill Hotels and Resorts Management Ltd.* (1999), 86 A.C.W.S. (3d) 546 (B.C.S.C.), [1999] B.C.J. No. 432 (Q.L.) provide some guidance in preparing an affidavit in support of a prejudgment garnishing order generally where the claim is not a clearly "liquidated claim". The concept of a liquidated claim is dealt with in detail below.

The cases are divided on the practice of appending the statement of claim to the affidavit as an exhibit (now the notice of claim), as a substitute for or in addition to a statement of the nature of the claim in the affidavit itself. It is clear that the statement of claim must be appended as an exhibit, and not merely referenced, for example, by way of later argument in chambers as supporting the affidavit (*Grant Atkinson and Blair Ltd. v. Far-Met Importers*, [1989] B.C.W.L.D. No. 027 (Co. Ct.)).

The practice of appending the statement of claim to the affidavit appears satisfactory in view of the Court of Appeal decision in *Skybound Developments Ltd. v. Hughes Properties Ltd.* (1985), 65 B.C.L.R. 79 (C.A.). However, there are still dangers in this practice. For example, in a case where the affidavit in support alleged more than one cause of action, the court set aside the garnishing order on the basis that not all the causes of action were liquidated and the court would not speculate on which cause of action the plaintiff intended to rely (*Knowland v. C.E.L. Industries Ltd.* (1988), 32 B.C.L.R. (2d) 381 (S.C.), but see also *Andersen v. Pacific Coast Systems Ltd.* [1994] B.C.J. No. 587 (Q.L.) (S.C.)).

ii. Cause of action not for a liquidated sum

It is implied that the cause of action must be for a liquidated sum (*Pe Ben Industries Company Ltd. v. Chinook Construction & Engineering Ltd.*, [1977] 3 W.W.R. 481 (B.C.C.A.)).

A "liquidated sum" is defined as "a liquidated demand in the nature of a debt, i.e. a specific sum of money due and payable under or by virtue of a

contract. The amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic." See *Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp.* 1999 BCCA 0078.

Many cases have considered which causes of action are considered liquidated claims: for example, see *Hodgson, King & Marble Ltd. v. Braemair Rest Home Ltd.*, [1971] 1 W.W.R. 442 (B.C. Co. Ct.).

The decision in *Hastings v. O'Neill* has often been interpreted to apply regardless of whether the claim is clearly a "liquidated claim" or not. As the court confirms in *Paul Esposito Holdings Ltd. v. Beta Enterprises Ltd. et. al.* 2005 BCSC 648, however, the criteria set out in *Hastings v. O'Neill* for affidavits in support of prejudgment garnishing orders applies only where the claim does not clearly fall into the category of a liquidated claim. Where the claim is clearly a liquidated claim, the *Hastings v. O'Neill* criteria are of limited or no application.

Generally speaking, a cause of action seeking damages rather than a fixed amount is not a liquidated claim. Further, where an unliquidated claim forms part of the overall cause of action stated in the affidavit, the order will be set aside (*K.M. Simon Enterprises Ltd v. Canadian Pacific Airlines Limited* (1983), 48 B.C.L.R. 250 (S.C.)).

Essentially, when the basis for the amounts claimed cannot be ascertained with any precision, a court may find the claim unliquidated. Hence, in a construction contract where extra work performed was to be paid for at a rate to be agreed upon, the court found the claim unliquidated (*Total Water Treatment Inc. v. Miller Contr. Ltd.*, [1988] B.C.W.L.D. No. 3872 (C.A.)). Where the extras have been approved and invoiced, the claim may be liquidated (*Alpine Electric Ltd. v. 398717 British Columbia Ltd.*, [1993] B.C.J. No. 183 (S.C.)).

If the price is calculable, then a claim for professional services may be liquidated. The claim must be sufficiently clear to put the defendant on notice that the plaintiff seeks a

liquidated amount, or the garnishing order will be set aside (*Bazargan v. Milinx Business Services Inc.*, 2001 BCSC 907).

Generally, a claim for prejudgment interest in addition to the principal debt is defective since there is no entitlement to such interest until there is a judgment (*Brown Farris & Jefferson Ltd. v. Diligenti* (1979), 17 B.C.L.R. 220 (S.C.)). However, a plaintiff can make a claim for interest as part of an otherwise liquidated claim if the interest was provided by contract (*Daleco Resources v. Loredi Resources Ltd.* ([1983] B.C.J. No. 108 (S.C.)), and if the interest portion of the claim is clearly set out in the affidavit (*Nevin Sadlier-Brown Goodbrand Ltd. v. Adola Mining Corp* (1988), 24 B.C.L.R. (2d) 341 (Co. Ct.)). See also *Design Sportswear Ltd. v. Goodmark Apparel Inc.*, (1994), 20 C.P.C. (3d) 279. An assertion on an invoice is not sufficient if the defendant has not agreed to it (*Kalicum Drilling Ltd. v. Orca Estates Ltd.*, 1997 CanLII 4113 (B.C.C.A.)).

Whether legal fees, accountants' fees, and other fees based on hourly rates or subject to bonus contingencies are liquidated claims is a matter of some dispute. See *Nathanson, Schacter & Thompson v. Sarcee Band of Indians and Others* (1992), 70 B.C.L.R. (2d) 253, reviewed on other grounds at (1994), 90 B.C.L.R. (2d) 13; but, also see *Eades v. Kootnikoff* (1995), 13 B.C.L.R. (3d) 182 (S.C.). The statement of claim should sufficiently describe how the amount of claim is calculated. For example, it should describe information such as the contractual hourly rate, the number of hours worked, taxes, disbursements, costs of supplies, and any other amounts that are included in the claim (see *Eades*; and also see *Hayes, Debeck Stewart v. Nikka Developers Ltd.*, [1996] B.C.J. No. 2466 (Q.L) (B.C.S.C.), in which the court held that if the price of professional services is calculable, it is liquidated and can be attached by prejudgment garnishing order). Master Horn further concluded that the *Court Order Enforcement Act* "does not require a deponent to set out the basis upon which a fee for services was calculated."

## iii. All just discounts not made

Section 3(2)(d)(v) of the *Court Order Enforcement Act* requires the plaintiff to affirm that an amount is “justly due and owing, after making all just discounts”. This means that the party seeking a prejudgment garnishing order must reduce the amount claimed by the amount of the valid and liquidated claims of the other party.

In *First Ave Research Corp. v. Donar Chem. Ltd.* (1987), 11 B.C.L.R. (2d) 136 (S.C.), the court stated “all just discounts do not refer to the allegations in the counterclaim of the defendants” but only to reductions that should have been made to a liquidated sum. A counterclaim in damages cannot be the subject of a just discount claim by a defendant (*United Metal Fabricators Ltd. v. Voth Bros Construction* (1974), (1987), 20 B.C.L.R. (2d) 274 (S.C.) and see also *Alpine Electric, supra*). A court may consider evidence from the defendant that genuine claims and counterclaims exist between the parties to the proceeding, which would negate the assertion that the plaintiff has given effect to all just discounts (*Ridgeway-Pacific Construction Limited v. United Contractors Ltd.*, [1976] 1 W.W.R. 285 (B.C.C.A.)).

In *Design Sportswear Ltd. v. Goodmark Apparel Inc.* (1994), 26 C.P.C. (3d) 279 (B.C.S.C.), the Court held that a just discount could only be made for an ascertained or liquidated amount. The Court later clarified this concept in *Eagle Crest Explorations Ltd. v. Consolidated Madison Holdings Ltd.* (1995), 14 B.C.L.R. (3d) 336 (S.C.). In that case, the court confirmed (page 344) that courts have held that a valid, liquidated claim means evidence of a claim, which, “if ultimately accepted at trial, will establish that the sum, or at least some part of it is due to the defendant”.

A secured creditor, such as a mortgagee, is entitled to obtain a prejudgment garnishing order despite holding security for its debt: *Intrawest Corp. v. Gottschalk*, 2004 BCSC 1317.

## iv. Failure to follow formalities

Counsel attacking garnishing orders have been most creative in arguing that the procedural formalities for an order have not been complied with. The cases are sometimes difficult to reconcile.

It is important to distinguish between using Form A (used when an action has not been commenced) and Form C (used after an action has been commenced, but before judgment). When it is clear that a Form C affidavit was sworn before the action was filed, the order will be set aside (*Cardinal Insurance Co. v. Maple Underwriters Ltd.* (1983), 46 B.C.L.R. 137 (S.C.) and *Collum v. Sonic Barrier Sound Prod. Ltd.*, [1988] B.C.W.L.D. No. 1696 (C.A.)).

Failure of the official swearing the affidavit to indicate capacity (for example, notary or commissioner) was fatal in *Vitek v. Poh, supra*. A failure to have alterations and deletions initialled by the person before whom the affidavit was sworn was fatal in *Langley Stainless Prod. Ltd. v. 2051 Investments Ltd.*, [1987] B.C.D. Civ. 1720-02 (S.C.). However, additions and filling in spaces need not be initialled (*Bel Fran Investments Ltd.*, [1975] 6 W.W.R. 374 (B.C.S.C.)).

There is divided authority on the sufficiency of a solicitor, as opposed to the plaintiff, being the deponent for the affidavit. Such a practice was held insufficient in *Caribou Construction Ltd. v. Cementation Co. (Can.)* (1987), 11 B.C.L.R. (2d) 122 (S.C.). However, later cases have doubted this decision: see *Samuel and Sons Travel Ltd. v. Right On Travel (1984) Inc.* (1987), 19 B.C.L.R. (2d) 199 (Co. Ct.), and *Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd.* (1994), 89 B.C.L.R. (2d) 132 (S.C.). Furthermore, s. 3(2)(b) of the *Court Order Enforcement Act* specifically contemplates that the supporting affidavit may be sworn by the solicitor for the plaintiff. Nevertheless, the risk is that the solicitor may be cross-examined on the affidavit, so the preferred practice is to have the client swear the affidavit in support of any prejudgment garnishing order.

## v. Timing of the order

The times at which a garnishing order is issued and subsequently served are important for the validity of attachment attempts both before and after judgment. The cases on this issue are not easily reconciled. The strictest interpretation is that there must be “obligations and liabilities owing, payable or accruing” (excepting wages) at the time the order is issued and when the order is served (*Vater v. Styles* (1930), 42 B.C.L.R. 463 (C.A.), *Canadian Bank of Commerce v. Dabrowski* (1954), 13 W.W.R. (N.S.) 442 (B.C.S.C.), *B.C. Land and Insurance Agency (CR) Ltd. v. MacDonald*, [1987] B.C.D. Civ. 1723-02, (Co. Ct. Master), and *Ahaus Developments Ltd. v. Savage* (1994), 92 B.C.L.R. (2d) 307 (C.A.)).

In cases in which a debt will accrue and is due in the future, and where attempting to intercept funds involves difficult questions of timing, it is best to apply under s. 15 of the *Court Order Enforcement Act* for payment of a claim or demand into court at maturity. The application is made after a garnishing order is issued and should detail why serving the garnishing order in the ordinary course is impractical.

## vi. Section 5 applications

There is an additional ground for applying to set aside a prejudgment garnishing order, beyond alleging defects in the affidavit. The *Court Order Enforcement Act*, s. 5, provides the defendant with a right to apply to have the order set aside where the court considers it “just in all the circumstances”. The leading case on the exercise of discretion under this section is *Webster v. Webster* (1979), 12 B.C.L.R. 172 (C.A.). Where a judge has exercised discretion to set aside an order under s. 5, the Court of Appeal will not lightly vary that decision (*Bartle & Gibson Co. Ltd. v. Deakin Equipment Ltd.*, [1985] B.C.D. Civ. 1720-02 (C.A.)). A master cannot hear a section 5 application (*Saxe v. Kayne* (1991), 59 B.C.L.R. (2d) 108 (S.C. Master) and further at [1992] B.C.W.L.D. No. 2122 (S.C.)) although this stricture is not always observed (see *Intrawest Corp. v. Gottschalk*, *supra*).

There have been several decisions on s. 5 applications since *Webster*. Essentially, each case will be decided on its own merits, but generally it will be up to the defendant to show that the order is unnecessary, an abuse of process, or that it creates an undue hardship.

Cases where the order was set aside based on s. 5 include: *Fricke v. Mitchell* (1985), 67 B.C.L.R. 227 (S.C.); *K.M. Simon Enterprises Ltd. v. Canadian Pacific Airlines Limited*; *Min-En Laboratories Ltd. v. Westley Mines Ltd.* (1983), 57 B.C.L.R. 259 (C.A.); *Pennilane Development Corp. v. Fisher*, [1989] B.C.W.L.D. No. 1826 (Co. Ct.); and *Stovicek v. Napier International Technologies Inc.*, [1996] B.C.J. No. 687 (B.C.S.C. Master).

Cases where the court refused to apply s. 5 include: *Atkinson v. Canso Diesel Parts Ltd.* (1982), 32 B.C.L.R. 137 (S.C.); *First Ave Research Corp. v. Donar Chem. Ltd.*; *First Heritage Savings Credit Union v. A. B. Holt Holdings Inc.*, [1989] B.C.W.L.D. No. 1144 (Co. Ct.), and *GT Communications*.

**[§1.08] Acting for Debtors Before Judgment**

Some substantive and procedural law and professional responsibility matters are especially important to lawyers acting for debtors. These matters are in addition to the general comments made in the discussion in §1.03.

We noted earlier that plaintiff creditors want full payment with as little expense as possible and as quickly as possible. For defendant debtors, the converse of these propositions may not be in their best interests. The lawyer should be wary when debtor clients want to litigate regardless of the merits of the case. Other debtor clients may take a defeatist attitude to all recommendations. In general, debtors are likely to be under a variety of pressures and it may be important for the lawyer to work towards a quick but fair resolution of the matter.

Lawyers' fees are an obvious problem for many debtor clients. If a satisfactory arrangement cannot be worked out, then the lawyer should consider what services can be given pro bono, or the lawyer should refer the debtor to a not-for-profit debt counselling service.

It is important that lawyers fully review with debtors not only the specifics of the claim by the other side, but all details of the parties' dealings. For example, while there may not be a defence to the claim, there may be a counterclaim that can be raised.

A discussion of common law, equitable and statutory defences and causes of action for debtors is beyond the scope of this chapter. Some of the more important defence principles to consider at law and equity are mistake, failure of consideration, and “unconscionability” (inequality of bargaining power and unfairness of the bargain). In the statute law, there are important provisions in the *Personal Property Security Act*, *Business Practices and Consumer Protection Act*, and the *Bills of Exchange Act* (Canada). Debtor causes of action arise in tort law (for example, trespass to chattels) and in statute law (*Privacy Act*). See, generally, the “Collections Procedure” checklist in the Law Society’s *Checklists Manual*, and “Debtor Remedies” in the CLE course publications. For procedural and other strategies for defending a claim, see Chapter 14, “Acting for a Debtor” in *British Columbia Creditors’ Remedies—An Annotated Guide* (Vancouver: CLE).

It is important that the lawyer review a debtor’s entire financial picture. Besides the immediate problem that brings the client to the lawyer, there may be other unsecured (or secured) creditors pressing for payment as well. While it is beyond the scope of this chapter to discuss the federal *Bankruptcy and Insolvency Act*, lawyers should remember that a debtor might have remedies under that statute, including assignment in bankruptcy, consumer proposals (Part III, Division 2), commercial proposals (Part III, Division 1), and orderly payment of debts (Part X). In some cases it may be prudent to refer the debtor to someone who is experienced in assisting people who are in financial trouble, such as a trustee in bankruptcy.

There are many settlement alternatives to litigating a collections matter. A creditor may be satisfied with reinstatement of instalment payments, perhaps in a smaller amount. A debtor may have security to give, either over property or from a guarantor. Where a creditor insists on having judgment, it may be possible to negotiate an instalment payment clause as part of the judgment order. It may be open to the parties to agree to allow the debtor to liquidate some assets voluntarily to pay the creditor, as an alternative to potential loss of value to both sides through forced seizure and sale.

If liability and quantum of the debt are not in issue, but repayment terms cannot be settled, there are still remedies open to the debtor. Supreme Court Civil Rule 13-2(31) gives the court authority to make instalment payment orders on judgments. That rule also empowers the court to make orders suspending execution. There is authority in Small Claims Rules 11 and 12 for the Small Claims Court to order judgments payable by instalments.

There are special ethical concerns for lawyers when acting for debtors. In general, lawyers should always keep the Canons of Legal Ethics in mind when defending in litigation. In collection matters, of special concern to the Law Society is the potential for counsel to

become involved in fraudulent preferences and fraudulent conveyances (see Chapter 4, Rule 6 of the *Professional Conduct Handbook*). There may be risks both for the client and for the lawyer. Before acting in situations where there is any possibility of these allegations being raised against a client, the lawyer should thoroughly review the Law Society commentaries, and possibly seek the opinion of a Bencher. The CBA *Code of Professional Conduct*, Chapter III, Commentary 7 describes some of the limits on the advice a lawyer can give:

When advising the client the lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client how to violate the law and avoid punishment. The lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client.

The August 1987 *Discipline Digest* warns lawyers to resist temptations that can arise in debtor situations:

It is the lawyer's duty to protect his or her client within the bounds of the law. The temptation to push beyond those bounds is never more intense than when the client is a harried debtor in search of relief. Yet assisting in any attempt to remove assets from the reach of lawful creditors, whether for the benefit of the lawyer or the client, exposes the lawyer to serious criminal and civil liability, and professional discipline risks.

The following warnings from the February 1985 *Discipline Digest* address fraudulent conveyances specifically:

[M]embers who are asked to advise client in this type of situation should thoroughly review the case law on fraudulent conveyances.

[M]embers should vigorously search out the intent underlying the client's interest in making the conveyance, since an intent to "delay, hinder or defraud creditors and others" is essential to a claim under the *Fraudulent Conveyance Act*.

[M]embers should exercise extreme caution in accepting instructions to effect a transfer in circumstances which *may* constitute a fraudulent conveyance.

Determining the validity of a debtor-client's proposed course of conduct can be difficult. The difference between valid and invalid transactions may eventually turn on fairly narrow legal principles.

For a thorough review of the distinctions between fraudulent conveyance and fraudulent preferences, and of those transfers that are within the scope of the relevant Acts, see *British Columbia Creditors’ Remedies—An Annotated Guide* (Vancouver: CLE); and

Robinson's *British Columbia Debtor-Creditor Law & Precedents* (Toronto: Carswell).

### [§1.09] Postjudgment Execution

Once a creditor obtains a judgment the creditor is able to use a variety of payment enforcement methods. There is no practice requirement that the creditor make a further demand for payment. Under the *Bankruptcy and Insolvency Act* a judgment is considered continuing demand for payment.

As a practical matter, while a collection agent must not charge his or her fees and disbursements to a debtor except as authorized by legislation, a bailiff's reasonable fees and disbursements are deemed to be part of the amount owing by the debtor. Therefore, it may, in some circumstances, be prudent to use the services of a bailiff rather than a collection agent.

#### 1. Debtor Examinations

In situations where the judgment creditor has insufficient information with which to attempt judgment execution, there are two procedures under the SCCR that can be used to compel judgment debtors to appear personally and answer questions, under oath, about their ability to pay. Aside from providing the creditor an opportunity for questioning, the debtor and creditor may be able to use the occasion to come to an agreement on repayment, thus avoiding the unnecessary expense and delay associated with asset execution procedures.

##### a. Examination in Aid of Execution

Supreme Court Civil Rule 13-4 allows a judgment creditor to examine a debtor in aid of execution. The process is similar to examinations for discovery. The process is initiated by serving an appointment and sufficient conduct money on the debtor. Service on counsel for an officer of a company to be examined was held sufficient in *Bank of Montreal v. Quality Feeds Alberta Ltd.* 1995 CanLII 3189 (B.C.S.C.), aff'd (1996), 49 C.P.C. (3d) 8 (C.A.).

No court order for attendance is required. The debtor, the creditor and counsel are the only parties to the hearing, though a reporter may be brought in to record the proceedings. Supreme Court Civil Rule 13-4 lists the range of subjects on which the debtor can be examined; see the checklist beginning at E-5-1 of the Law Society's *Checklists Manual* for a suggested list of questions. This should be modified to suit the circumstances.

The examination in aid of execution process can be used concurrently with judgment execution attempts (unlike the subpoena to debtor process, discussed later). The existence of an outstanding writ of execution is not a valid ground for refusing to appear at the examination (*Kendall and Dolphin Ventures Ltd. v. Hunt* (1978), 9 B.C.L.R. 332 (S.C.)).

In *Haywood Securities Inc. v. Inter-Tech Resource Group* (1985), 68 B.C.L.R. 145 (C.A.), affirming (1985), 62 B.C.L.R. 183 (S.C.), the Court of Appeal, with dissent, held that the *Canadian Charter of Rights and Freedoms*, s.13 could not be used as a defence for refusing to answer questions in examinations in aid of execution. Solicitor-client privilege is not a ground for refusing such production, unless it is shown that the effect of disclosure would be to reveal subject matter that would otherwise be privileged (*Douglas v. Small* (1989), 38 B.C.L.R. (2d) 351 (S.C.)). In *Douglas*, the court ordered a judgment debtor who was a lawyer to produce documents for an examination in aid of execution, including names and addresses of clients.

The court has discretion under SCCR 13-4(5)(formerly Rule 42A(4)) to order attendance and examination of any other person who may have knowledge of the debtor's circumstances. This provision was used to compel a spouse to attend (*Dezcam Industries Ltd. v. Kwak* (1983), 38 B.C.L.R. 121 (S.C.) and *Advance Magazine Publishers Inc. v. Fleming* 2002 BCSC 995), and the manager of a financial institution (*Hrabcak v. Hrabcak* (1982), 44 B.C.L.R. 22 (S.C.)) to attend. In *Royal Bank of Canada v. Scheinberg*, [1995] B.C.J. No. 2013 (B.C.S.C. Master), the court refused to order an examination of a defendant's counsel on the basis that the plaintiff had not reasonably exhausted alternatives for obtaining financial information about the defendant. In *Edelweiss Credit Union v. Waschke* (1986), 8 B.C.L.R. (2d) 392 (Co. Ct.), the court disapproved of a judgment creditor applying under the former Rule 26(11) (discovery of documents) as a method of obtaining a judgment debtor's address from a person who was not a party to the action.

Because judgment debtors often fail to appear at the examination, counsel should always remember to obtain an affidavit of service from the process server who served the appointment. Counsel will also require the appointment to be endorsed for non-appearance. The reporter attending will provide this after a 30-minute grace period to the debtor. Note that the examination must be held at the registry nearest to where the debtor resides.

Although the failure to attend at an examination in aid of execution is punishable by contempt, the courts have held that the "usual practice" requires the creditor to obtain an order requiring the debtor to attend which makes clear that the failure to attend may constitute contempt: *Sears, Roebuck & Co. v. Eadie* 1984 CanLII 308 (B.C.C.A.), (1984), 57 B.C.L.R. 262, 46 C.P.C. 122 (C.A.). This is despite the fact that this provision is typically included on the appointment previously served upon the debtor.

b. Subpoena to Debtor

Supreme Court Civil Rule 13-3 sets out the procedure for subpoenas to debtors. The process begins with the debtor being served with the subpoena, which contains a hearing date (substituted service is possible per *Margetish v. Gildemeester*, [1985] B.C.D. Civ. 3717-01 (Co. Ct.)), and sufficient conduct money.

There are a number of distinctions between an examination in aid of execution and a subpoena to debtor: in the latter, the hearing is held before an examiner (usually a registrar or a master), and the examiner has the authority to make an order for repayment of the judgment, on terms. The range of subjects on which the debtor can be questioned is narrower for a subpoena to debtor hearing (SCCR 13-3(4), formerly Rule 42(26)) and see *Kareena (B.C.) Services v. Superstar Holding Inc.* (1983), 44 B.C.L.R. 96 (Co. Ct. Registrar)).

A subpoena to debtor cannot be issued while a writ of execution is outstanding against the debtor (SCCR 13-3(1), formerly Rule 42(23)). Also, a subpoena to debtor hearing (but not an examination in aid of execution) should be dismissed when a monthly repayment order (in lieu of garnishment) under s. 5(2) of the *Court Order Enforcement Act* exists (*Bank of B.C. v. Joulie* (1982), 29 C.P.C. 273 (B.C. Co. Ct.)). However, the

parties may seek a variation of the order (SCCR 13-3(11), formerly Rule 42(33)) and see *Armstrong Spallumcheen Savings & Credit Union v. McKinlay*, [1992] B.C.W.L.D. No. 1338 (S.C. Master)).

The subpoena to debtor process generally is more advantageous to the debtor than the creditor. For the creditor, it is a method by which a debtor can be forced to disclose financial information but the likely result will be small periodic payments, with committal as a penalty for failure to either disclose or pay.

Debtors can expect that an examiner's repayment order will be reasonable and tailored to the debtor's financial circumstances. Debtors are protected against writs of execution and garnishment from that creditor so long as the payment order is not in default. Even if there is default, but an order has not been rescinded, execution can only issue for the amount in default (*Bank of Montreal v. Monsell* (1985), 58 B.C.L.R. 11 (S.C.)). Rule 42(21)(b), which provided for acceleration when there is default on instalment orders made under that Rule, was held not to govern instalment orders made under Rule 42(33) (*McKay v. McKay*, [1992] B.C.W.L.D. No. 2497 (S.C. Master)). These rules have been replaced by SCCR 13-2(32) and 13-3(11), respectively.

For more information on subpoenas to debtors, see Chapter 5 of *Practice Before the Registrar* (Vancouver: CLE).

c. Committal for Contempt

Section 51 of the *Court Order Enforcement Act* states: "a person must not be taken in execution on a judgment". However, imprisonment for contempt of orders arising from SCCR 13-2, 13-3, and 13-4 is still a remedy that a creditor may choose to invoke (*Microwave Cablevision Ltd. v. Harvard House Capital Ltd.* (1982), 37 B.C.L.R. 101 (C.A.) decided under former Rules 42 and 42A), although the practical value of the remedy is questionable.

In examinations in aid of execution, a debtor may risk contempt proceedings, for example, by failing to attend at all, or by attending but failing to bring relevant documents or answer relevant questions. Such actions are subject to a contempt application and punishment by fine or committal under SCCR 22-8, formerly Rule 56 (*Sears, Roebuck & Company v. Eadie* (1985), 57 B.C.L.R. 262 (C.A.)).

However, as noted above, in *Sears*, the Court of Appeal held that a precondition to such a contempt application was an application for an order of the court specifically directing the debtor to attend or answer as required. If the debtor failed to obey that order, then contempt proceedings could be brought.

On subpoenas to debtors, the authority for committal is specifically set out in SCCR 13-3. Under SCCR 13-3(8) a failure to attend, to be sworn, or to give satisfactory answers, among other actions, can lead to a committal order. Under SCCR 13-3(10), an unreasonable failure to pay on an instalment order, among other actions, can also lead to committal. The SCCR require a specific court hearing for committal if, as is usually the case, the original subpoena hearing was before a registrar.

When a client wants counsel to proceed with any form of contempt application, it is vital that the SCCR (which have only been summarized here) be strictly followed. Failure to do so will lead to dismissal of the application. The absence of contempt warning language in the hearing notice and an affidavit of service of the application sworn on information and belief, have each been considered to be fatal defects (*Winch v. Western Cedar Products Ltd.* (1977), 3 B.C.L.R. 198 (Co. Ct.)). Failure of strict proof of personal service of the application is fatal also (*Dow Chemical v. Coast Plastics*, [1986] B.C.D. Civ. 906-02 (S.C.)).

#### d. Small Claims Court

Small Claims Rules 12 to 15 set out an examination and payment order process for judgments made in Small Claims Court. A first step that is open to either debtor or creditor is to apply for a payment hearing under Small Claims Rule 12. At that hearing, the court has authority to order repayment by instalments, or it can confirm a date for full payment.

If a debtor does not make payments ordered under a payment hearing, or if payments are not made as can be ordered at a settlement conference or trial, the creditor can apply for a default hearing under Small Claims Rule 13. At that hearing, the court may confirm or change payment terms. Failure by the debtor to make payments or reasonably explain that failure, or failure by the debtor to attend the hearing, can eventually lead to committal.

## 2. Garnishment

Garnishment, or attachment of debts, is a statutory remedy. The provisions for garnishing debts, both before and after judgment, are set out in the *Court Order Enforcement Act*, Part I. Garnishment is usually directed against bank accounts or wages, though many other funds are subject to garnishment.

### a. The Process

A judgment creditor can obtain a garnishing order after judgment on application without notice, at the court registry. An affidavit in Form B of Schedule 1 is submitted. An applicant for a pre or postjudgment garnishing order must also file a requisition in Form 2. The applicant files a draft garnishing order along with the affidavit and requisition. The order binds the obligations due to the debtor from the garnishee, from the time of service of the order on the garnishee (s. 9(1)).

Garnishment is available in both Small Claims Court and Supreme Court actions. Note that most Small Claims Court forms are printed and where such forms are available, they must be used unless the firm precedents have been approved.

In British Columbia, garnishing orders do not continue to attach subsequent funds (except in some maintenance enforcement situations). The order attaches to wages that become owing, payable, or due within seven days from the date the affidavit in support was sworn. The order must be timed to coincide with the debtor's pay period and a new order obtained for a subsequent pay period. For this reason, wage garnishment for a relatively large judgment will be a cumbersome process.

When the garnishee is obligated to the judgment debtor, the garnishee must pay into court the lesser of the amount stated in the order, or the amount of the garnishee's obligation to the judgment debtor (s. 11). The Act sets out a process for resolving disputes over garnishee liability or amount due; see ss. 11 and 16 to 20.

As a matter of discretionary practice, garnishees who deny any debt, obligation, or liability to the defendant often address a letter to the court registry (with a copy to plaintiff's counsel) advising of that position. This often prevents follow-up phone calls and possible court applications.

The garnishing order is to be served on the judgment debtor "at once, or within a time as allowed by the judge or registrar" (s. 9(2)). However, service after two months was held not to invalidate the order where the defendants were not prejudiced by the late service (*Skybound Developments Ltd. v. Hughes Properties Ltd, supra*). In a British Columbia Court of Appeal decision, the court held that an order is not bad merely for late service, but that money paid in cannot be paid out until service has been made and proven (*Fraser Gifford v. Cooper*, [1987] B.C.W.L.D. No. 3812 (C.A.)).

In practice, a lawyer may delay serving the judgment debtor until the lawyer finds out if any money has been paid into court. A notice is sent from the registry to the creditor or the creditor's lawyer if money is paid in. Alternatively, the lawyer can simply contact the garnishee immediately after service to confirm if there will be payment in or not, or if there will be a dispute. If money is not to be paid in, then the lawyer can dispense with serving the order on the judgment debtor. The affidavit in support need not be served on the debtor, though it sometimes is. The garnishing order can be served substitutionally, upon order of the court (s. 9(5)).

Payment of money out of court is governed by ss. 12 and 13. The creditor has a number of options. An application can be made to court for an order for payment out, but the debtor must be notified of the application, unless an order is also obtained dispensing with service (or ordering substituted service). If a written consent is obtained from the debtor for payment out (for example, where the parties have come to a settlement), then no court order is necessary and the money can be paid out upon a requisition to the registry. In this instance, proof of service of the original garnishing order is not required (*Sears Canada Inc. v. Naswell* (1987), 20 C.P.C. (2d) 97 (B.C. Co. Ct.)).

The creditor can also have the money paid out by requisition if the debtor is served with a notice of an intention to apply for payment out, and if the debtor does not file a notice within ten days disputing the payment out. In order to save service costs and time, a lawyer may serve the debtor with the garnishing order and the notice of intention to apply for payment out simultaneously.

#### b. Funds Subject to Garnishment

The essential issue in garnishment after judgment is whether a garnishee's obligation to the debtor is subject to attachment under the Act. Section 3 provides that the "debt, obligations, and liabilities" must arise from a trust or contract obligation (unless it is itself a judgment due to the debtor). Wages and salaries are included (s. 1).

A great deal of case law exists around what assets can be garnished, and under what conditions. In addition, timing of the service of the order is often crucial.

Wages and salaries are subject to garnishment only **after** judgment. This includes wages payable to the debtor within seven days after the day on which the affidavit in support of the order is sworn (s. 1). Section 3 of the Act provides a limit on the amount of wages that can be garnished; usually, it is a maximum of 30% of the net income after statutory deductions.

Wages of provincial government employees are subject to garnishment (s. 6). Federal public servants are subject to garnishment through a separate federal statute—the *Garnishment, Attachment and Pension Diversion Act*, R.S.C. 1985, C. G-2. Under the previous *Canada Shipping Act*, R.S.C. 1985, C. S-9, wages due to seamen were exempt from garnishment. This exemption has been omitted from its successor, the *Canada Shipping Act 2001*, S.C. 2001, c. 26. Payments due to doctors from the Medical Services Commission have been held not garnishable because the obligation to pay is statutory, and does not arise from contract or trust (*First Western Capital Ltd. v. Hancock* (1984), 55 B.C.L.R. 273 (S.C.)). Garnishment of real estate commissions is possible, but very problematic because the "seven day rule does not apply" (*Crown Trust Company v. McNabb*, [1985] B.C.D. Civ. 1724-02 (S.C.)).

Wages and salaries received by Indians on reserve cannot be garnished (s. 89(1) of the *Indian Act*) unless all of the proceeds of the garnishment are in favour of a creditor who is an Indian. A non-Indian can only commence garnishment proceedings against an Indian or Indian Band's personal property if it is situated off reserve.

Funds held by financial institutions, such as chequing or savings accounts, are usually subject to garnishment so long as they are not held jointly with someone who is not indebted to the creditor. Term deposits can be garnished (*Bel Fran Investments Ltd. v. Pantuity Holdings*, [1975] 6 W.W.R. 374 (B.C.S.C.)). As of November 27, 2008, DPSPs, RRIFs and RRSPs are protected against garnishment (s. 71.3 of the *Court Order Enforcement Act*). A bank line of credit was held not garnishable in *Yakir v. March Films B.C. Ltd.* (1980), 19 B.C.L.R. 211 (S.C.). A debtor's funds put aside by a bank into a "suspense" account to cover possible dishonoured cheques was held garnishable in *Bank of Montreal v. Redlack supra*; see also *Garon Realty & Insurance Ltd. v. James and Royal Bank of Canada*, [1978] 6 W.W.R. 694 (B.C.S.C.). Bankers' acceptances were held to be attachable in *Knowland v. C.E.L. Industries Ltd, supra*.

Garnishing orders against banks (as garnishees) only attach assets in judgment debtor accounts at the branch served (*Bank Act* (Canada), s.462(1)). There is case authority that this section does not apply to bank employees whose wages are being garnished (*Bank of Nova Scotia v. Mitchell and Mitchell*, [1981] 5 W.W.R. 149 (B.C.C.A.)).

If the financial institution's branch that is served is on a reserve, then a garnishing order cannot attach to an Indian's account. Funds held on deposit (on or off reserve) for Indians or Indian Bands are not exigible if they are deemed to be situated on a reserve (s. 90 of the *Indian Act*). Personal property that was purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or Indian Bands or given to Indians or Indian Bands under a treaty or agreement between the Band and Her Majesty is non-exigible also (*Fricke v. Michell* (1985), 67 B.C.L.R. 227 (S.C.)). While the general principle of non-exigibility pursuant to the *Indian Act* remains in force, the Supreme Court of Canada in *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] 2 S.C.R. 846 significantly qualified the application of such exemption by narrowly construing the word "agreement" in ss. 90(1)(b) of the *Indian Act*.

The impact of *McDiarmid* can be seen in recent decisions granting more liberal execution against funds not physically located on reserve property: see for example

*Joyes v. Louis Bull Tribe #439*, (2009) 52 C.B.R. (5th) 26; 2009 ABCA 49 (CanLII).

For a further discussion of the *Indian Act* exemptions, see §1.12.4 below.

This exemption may not apply to incorporated companies such as Tribal Councils or aboriginal organizations (*R. v. National Indian Brotherhood*, [1979] 1 F.C. 103 (Fed. T.D.); *Johnson v. West Region Tribal Council*, [1994] 1 C.N.L.R. 94 (Fed. T.D.)). Also, an Indian development corporation is not an Indian and cannot garnish the wages owed by a band to an Indian (*Tsilhqot'in Economic Development Corp. v. Johnny*, [1995] B.C.J. NO. 2896 (QL) (Prov. Ct.)).

Jointly owed obligations are not subject to garnishment unless all joint parties are defendants (*238344 B.C. Ltd. v. Petriquin* (1984), 57 B.C.L.R. 224 (C.A.) (bank account); and *Sladen v. Johanson and Long Lake Paving Ltd.*, [1989] B.C.W.L.D. No. 562 (C.A.) (funds in a law firm trust account)).

Rent payments are garnishable, but the order must apparently be served on the tenant on the day the rent is due and before payment has been forwarded: *Access Mortgage Group Ltd. v. Stuart* (1984), 49 B.C.L.R. 260 (C.A.). The "seven day rule" under ss. 3(1) of the *Court Order Enforcement Act* applies only to wages, and will not be of assistance against rent payments: *Cedric Steele & Associates Ltd. v. Johnston Terminals Limited*, [1988] B.C.D. Civ. 1724-03 (Co. Ct.).

Money paid into court is not garnishable (*Provincial Treasurer of Alberta v. Zen*, [1981] 5 W.W.R. 188 (B.C.S.C.)) but it may be subject to charging orders. Money payable by the federal Crown to third parties cannot be attached under the Act (*Selness v. Luk* ([1990] B.C.D. Civ. 1724-02 (B.C. Co. Ct.)). That portion of funds held by a garnishee on statutory trusts for GST, Employment Insurance, Canada Pension, and Income Tax cannot be garnished because they do not belong to the debtor (*Bhattacharjee v. Strong Western Holdings Ltd.*, [1993] B.C.J. No. 6 (S.C.)).

Pensions and annuities may be subject to garnishment, depending on their nature. A private annuity was subject to garnishment, and the *Insurance Act*, s. 54 was held not to be a defence, in *Bank of Montreal v. Freedman* (1984), 58 B.C.L.R. 289 (S.C.). A

similar argument under the *Insurance Act* was also rejected in *Crosson v. Crosson* (1985), 14 C.C.L.I. 246 (B.C.S.C.), where a disability pension was garnished. Welfare payments are not subject to garnishment for reasons of public policy (*Constantini and Company v. Fischer* (1982), 34 B.C.L.R. 363 (S.C.)).

Shareholder loans are subject to garnishment, so long as they are due and payable (*R. v. Big White Developments Ltd.*, [1984] B.C.D. Civ. 1724-05 (S.C.)). A demand loan between businesses was held garnishable, despite an allegation that there was a postponement understanding which would make the obligation conditional, in *Roe v. Mr. Build (Can.) Ltd.*, [1988] B.C.W.L.D. No. 845 (Co. Ct.).

Builders' lien trust funds may be subject to garnishment, but the funds remain subject to the claims of the trust beneficiaries (*A & M Painting v. Byers* (1981), 28 B.C.L.R. 43 (C.A.). See also *Aebig v. Miller Contracting Ltd.* (1993), 81 B.C.L.R. (2d) 221 (S.C. Master)).

Lawyers' trust accounts may be subject to garnishment. Funds held as a true retainer are probably not garnishable (*Johnson & Higgins v. Mayo Helicopters Ltd.*, [1978] 6 W.W.R. 206 (B.C.S.C.); and *Capozzi Enterprises Ltd. v. Tower Enterprises Inc.* (1983), 50 B.C.L.R. 100 (S.C.)). However, funds held in client transactions may or may not be garnishable, depending on conditionality or entitlement (*Ahaus Developments Ltd. v. Savage, supra*).

A constructive trustee of funds for a debtor can be the subject of garnishment (*Royal Bank of Canada v. Gustin and Weissner* (1981), 36 B.C.L.R. 227 (S.C.)). However, the funds held by a bankruptcy trustee as part of a bankrupt's estate, cannot be garnished by a creditor who alleges the funds do not belong to the estate; the creditor must seek a remedy under the *Bankruptcy and Insolvency Act* (*Bank of Montreal v. XED Services Ltd.*, [1992] B.C.W.L.D. No. 2340 (S.C.)).

Funds assigned as security are not subject to garnishment, so long as the security instrument is valid and in place before the garnishment. For a case on this point, see *Tyrer Enterprises Ltd. v. Lytton Lumber Ltd.*, [1992] B.C.W.L.D. No. 2452 (C.A. Chambers). However, a mere direction to pay will not constitute an assignment, and a garnishing order will succeed (*Weber v. D5*

*Enterprises Ltd.* (1983), 51 B.C.L.R. 172 (S.C.)). A receiver appointed under a debenture took priority in *Weldon Metal Products Ltd. v. First Food Corporation*, [1987] B.C.D. Civ. 1727-01 (S.C.).

### c. Release of Garnishment

As with prejudgment garnishing orders, there is authority in the *Court Order Enforcement Act* for garnishing orders after judgment to be released, on conditions (s. 5). This is a discretionary remedy. However, if there is a judgment, instalment repayment terms must be set if the order is released.

Setting the amount of the instalment can become problematic if the debtor has other creditors. In this situation, debtors should seek assistance with all their debts under the *Debtor Assistance Act* (see *Royal Bank of Canada v. Taylor* (1986), 8 B.C.L.R. (2d) 140 (Co. Ct.)).

## 3. Execution Against Real Property

If a creditor holds a mortgage registered against real property owned by a debtor, the creditor may execute against that property through foreclosure proceedings. Mortgage enforcement through foreclosure proceedings is governed by specific procedures set out in SCCR 21-7 and other applicable statutes such as the *Law and Equity Act*. A detailed discussion of foreclosure practice is beyond the scope of this chapter. For further information see the resource materials listed at §1.02 above.

An unsecured creditor who seeks to recover monies by execution against real property must generally do so under the enforcement mechanisms of the *Court Order Enforcement Act*. Sections 80 to 113 of the *Court Order Enforcement Act* set out the procedure. Lawyers and clients alike should recognize that this process is lengthy, cumbersome, and therefore costly. Accordingly, before initiating this form of execution a judgment creditor should consider all relevant factors carefully, particularly the potential for recovery if a sale of the property proceeds. In many instances, recovery by the creditor will be doubtful. There are many reasons for this.

The first step in the process is for the judgment creditor to register the judgment against the title interest of the debtor. A Small Claims Court Certificate of Judgment differs slightly from the Supreme Court in form. It is important to note that the registration of a judgment expires after two years unless it is renewed (s. 83).

Regardless of whether the judgment was obtained in Supreme or Small Claims Court, proceedings must be brought in the Supreme Court for sale of that interest. When the original judgment was obtained in the Supreme Court, the process is more easily initiated by notice of application under the judgment action (*Young v. Battiston* (1983), 50 B.C.L.R. 139 (S.C.)).

The Act sets out three hearings that must be held before the property is put up for sale. There is an initial show cause hearing before the court (s. 92). A registrar's hearing to determine details of the title follows (s. 94). Finally, there is a confirmation hearing before the court for a sale order (s. 94).

A court bailiff carries out any order for sale. A creditor cannot circumvent the sale process by bringing an offer directly to court (*Hunter v. Hunter*, [1976] B.C.D. Civ. (S.C.)) nor can a creditor avoid having sale proceeds paid into court as required under s. 110 (*Minister of National Revenue v. Bival Holdings Qualicum Ltd.* (1993), 79 B.C.L.R. (2d) 137 (S.C. Master)). However, in *Hongkong Bank of Canada v. R. in Right of Canada* (1989), 36 B.C.L.R. (2d) 373 (B.C.C.A.), the Court of Appeal excused the omission of several steps in a sale ordered under the authority of the Act.

Despite the apparently mandatory provisions in the *Court Order Enforcement Act* governing the sale of land, it has been held that the Act is not a "complete code" and that a chambers judge has discretion to incorporate the provisions of the former Rule 43 (now SCCR 13-5) in granting orders with respect to the sale of real property pursuant to execution proceedings: *Instafund Mortgage Management Corp. v. 379100 British Columbia Ltd.* 1998 CanLII 5841 (B.C.S.C.).

In *Lumley v. Lacasse*, [1992] B.C.W.L.D. No. 1204 (S.C.), the court held that it was open to a co-owner, who was not a judgment debtor, to seek a declaration concerning the interest, if any, which another co-owner had and against which a judgment had been registered. The court held that this right was consistent with the *Court Order Enforcement Act*, s. 86(2), and could be brought by petition under then Supreme Court Rule 10(1)(g) (now SCCR 2-1(2)).

In *Martin Commercial Fueling Inc. v. Virtanen*, [1994] 2 W.W.R. 348 (B.C.S.C.), the petitioner was a judgment creditor seeking to have the judgment debtor's interest in land sold. Shortly before the judgment had been registered, the debtor entered into an agreement to sell his interest; he held a one-third interest in common with two other people. The issue before the court was what interest in the land could be attached. On a lengthy review of the

authorities, the court held that the judgment attached only to the debtor's interest in the proceeds of sale of the land, and not to the land itself.

A debtor's title interest may prove illusory. In *Kish Equipment Ltd. v. A.W. Logging Ltd.* (1986), 2 B.C.L.R. (2d) 141 (S.C.), the court found a judgment debtor was not the beneficial owner of lands where a relative had transferred title to the judgment debtor without consideration in order to frustrate a third party's claim to the lands. However, a creditor may execute against land if it can prove that the debtor is the beneficial owner (*RGC Forex Service Corp. v. Chen* (2000), 72 B.C.L.R. (3d) 113 (C.A.)).

An evaluation of the charges registered against the property may show that the debtor has no significant equity in the property after claims of mortgagees and other priority charge holders are met. In proceedings under the Act where there is more than one judgment holder registered against the title, those judgment holders share equally, with no preference and not in priority of registration (*Rutherford, Bazett & Co. v. The Penticton Pub Ltd.* (1983), 50 B.C.L.R. 21 (S.C.)). A subsequent party with a judgment for a very large amount can diminish a first judgment holder's return considerably.

Where there are multiple judgments registered on property and the property is sold pursuant to foreclosure proceedings, however, judgments are paid in order of registration, not *pari passu*: *Hallmark Homes Ltd. v. Crown Trust Company* (1983), 49 B.C.L.R. 250 (S.C.).

The court has the discretion to dismiss the process at the show cause stage (*Jones v. Jones*, [1975] B.C.D. Civ. (S.C.)). At the time of the confirmation hearing, the court has the discretion to defer a sale order where the property is the home of the debtor (s. 96(2)).

The real property of an Indian or Indian Band will be exempt from execution (*Indian Act*, s. 89). Sections 29, 87, 89 and 90 of the *Indian Act* are part of a legislative package: the package acknowledges the Crown's duty to protect the property of Indians, which they hold as Indians, from dispossession by non-Indians (*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.)). However, off-reserve fee simple holdings of an Indian or Indian Band are not protected by s. 89 (*Canada (Attorney General) v. Giroux* (1916), 53 S.C.R. 172).

#### 4. Execution Against Personal Property

##### a. The Process

The *Court Order Enforcement Act*, s. 55, provides that all goods, chattels and effects of a judgment debtor are liable to seizure and sale under a writ of execution except as exempted under the Act. Section 58 covers, among other property, money or bank notes, cheques, bills of exchange and promissory notes; s. 62 covers a debtor's equity of redemption in goods and chattels (for example, property subject to chattel mortgages or conditional sales agreements); and s. 64.1 covers stocks, shares and dividends.

The procedure for obtaining a writ of execution is set out in SCCR 13-2. A writ can be obtained upon application to the court registry. It remains in force for one year, and can be renewed.

The writ is then placed with a court bailiff for execution. In practice, it is important that the judgment creditor provide as much information as possible in order to aid execution. For motor vehicles, searches should be obtained to confirm registered ownership (though this does not necessarily confirm beneficial ownership), and to confirm encumbrances. For shares, information should be provided on their nature and location.

A judgment debtor is liable for the taxable costs of the judgment creditor under SCCR 13-2(22)-(26), but only where assets are realized in execution (*Uram v. Uram* (1985), 66 B.C.L.R. 236 (S.C.)). However, if there is asset seizure but no sale (for example, where the parties come to a settlement), the court bailiff is entitled to costs (*Court Order Enforcement Act*, s. 113(3)).

Under Small Claims Rule 11(11), a judgment of the Small Claims Court can be enforced by an order for seizure and sale. By virtue of the *Court Order Enforcement Act*, s. 47, a writ of execution includes a Small Claims Court order of seizure and sale.

For an example of what damages can flow from a wrongful execution seizure, see *Hamilton v. British Columbia (Workers' Compensation Board)* (1992), 65 B.C.L.R. (2d) 96 (C.A.).

##### b. Specific Property Interests

Tangible personal property of the judgment debtor, such as motor vehicles and household furnishings, are clearly exigible under the *Court Order Enforcement Act*, s. 55. However, determining and executing upon the interest that the debtor has in the property may prove problematic. For example, a debtor may be the registered owner of a motor vehicle, but not the beneficial owner. It may fall to the court to decide ownership, and hence exigibility.

According to s. 71.3 of the *Court Order Enforcement Act*, DPSPs, RRIFs and RRSPs are exempt from any enforcement procedures commenced after November 1, 2008.

In 2007 the procedure for seizure and sale of company shares was modified and is now set out in sections 47-51 of the *Securities Transfer Act*, S.B.C. 2007, c. 10 and sections 63.1, 64.1 and 65.1 of the *Court Order Enforcement Act*. Under the new provisions, the method of seizure is determined by the kind of securities in question and whether those securities are held by another party as security (sections 47-61, *Securities Transfer Act*). While there is some question about the exigibility in British Columbia of shares in companies incorporated outside B.C., the argument *for* exigibility is probably more persuasive because they are assets regardless of the jurisdiction.

Exigibility of shares and actually realizing on their value may be difficult. There may be no market if the shares are insignificant in volume or are in a small non-reporting company. Nevertheless, in a family owned company other family members may offer to purchase the shares to keep the creditor out. Shares that were owned subject to an option to purchase by a third party are not exigible (*Guaranty Trust Company v. International Phasor Telecom Ltd.*, [1985] B.C.D. Civ. 764-01 (S.C.)).

A computer software program (incorporating a trade secret) was held to be tangible property, and exigible under s. 55; however, the court directed that any purchaser from the sheriff had to enter into a non-disclosure trust agreement similar to the terms of the defendant's original licence agreement (*Mortil v. International Phasor Telecom Ltd.* (1988), 23 B.C.L.R. (2d) 354 (Co. Ct.)). The vendor of the licence may not agree to such a transfer.

A judgment debtor's equitable interest in chattels subject to a security agreement is exigible (*Court Order Enforcement Act*, s. 62). However, as a practical matter, executing against that interest may not be worthwhile because the secured creditor must be paid in full first before the judgment creditor (*Re Ottaway* (1980), 20 B.C.L.R. 313 (C.A.)).

Prior to the Supreme Court of Canada's decision in *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] 2 S.C.R. 846, the exemptions from execution contained in the *Indian Act* were generally given a broad interpretation. The cases cited below provide a useful summary of the historical jurisprudence in this area, but should now be considered carefully in light of *McDiarmid Lumber*.

The personal property of an Indian or Band will be exempt from collection even though the Indian or Band is not located on a reserve (*Williams v. R.*, [1992] 1 S.C.R. 877 (S.C.C.)). Whether personal property is situated on reserve and whether a transaction relating to the personal property is deemed to have occurred on reserve depends on the specific circumstances of each case. It is normally appropriate to take a fair and liberal approach when determining if the paramount location of property is situated on reserve (*Metlakatla Ferry Service Ltd. v. British Columbia* (1987), 37 D.L.R. (4<sup>th</sup>) 322 (B.C.C.A.) and *Nowegijack v. The Queen*, [1983] 1 S.C.R. 29 (S.C.C.)). The paramount location of personal property requires an examination of the pattern of use and safekeeping of the property in question. If the paramount location is on reserve, the property is situated on reserve even with respect to off-reserve use and cannot be executed against (*Leighton v. B.C.*, [1989] 3 C.N.L.R. 136 (B.C.C.A.)).

#### c. Exemptions

Section 71 allows a debtor an exemption of goods and chattels to the value set by regulation. Current exemptions (BC Reg. 28/98) are as follows:

- (i) \$4,000 household items;
- (ii) \$10,000 work tools;
- (iii) \$5,000 car;
- (iv) \$12,000 equity for house in Greater Vancouver and Victoria, \$9,000 equity for a house elsewhere;

(v) essential clothing;

(vi) essential medical aids.

Sections 73 to 78 set out the procedure for asset seizure, exemption claims by the debtor, and valuation of the assets.

A debtor must make the exemption selection within two days of the seizure (s. 73(2)). Failure to do so will mean loss of the exemption right (*Lee v. Colonial Cabinets and Plastic Laminates Ltd.*, [1978] 5 W.W.R. 27 (B.C.C.A.)).

In practice, where there is any question about an exemption claim for property such as household furnishings, the court bailiff may leave the judgment debtor temporarily in possession of the property. In these instances, the judgment debtor may be required to sign a "notice of seizure and person in possession" to confirm that the seizure has not been abandoned.

A debtor may include in an exemption claim, any equity in secured goods. Where a debtor claims an exemption over an asset which is worth more than \$5,000, the asset is to be sold but the debtor receives the exemption amount in priority to the judgment creditor (*Yorkshire Guarantee & Securities Corporation v. Cooper* (1903), 10 B.C.R. 65 (C.A.); and *Pacific Produce Co. Ltd. v. Chow* (14 June 1990), Vancouver F894264 (B.C. Co. Ct.), [1990] B.C.J. No. 1376).

There are other specific exemptions in other statutes, but they rarely apply, or they provide little additional help to the judgment debtor.

#### 5. Equitable Execution

Execution remedies arose in equity where existing remedies at law were unavailable to reach certain judgment debtor assets. In addition, statute laws were enacted which gave additional authority for equitable-type execution orders. In British Columbia, at least two forms of equitable execution continue to be available to enforce Supreme Court judgments, though in relatively limited circumstances.

##### a. Charging Order

The authority for the court to make a charging order arose from British statute law, and the court's equitable jurisdiction (*C.I.B.C. v. Smith*, [1976] 5 W.W.R. 643 (B.C.S.C.)). Consequently, all equitable principles, including the "clean hands doctrine", apply (*Re Farkas* (1983), 50 B.C.L.R. 94 (S.C.)).

Modern execution laws that permit judgment creditors to execute against debtor interests, which previously could only be reached by a charging order, have largely eclipsed charging orders.

The main remaining circumstance for granting a charging order is to attach funds that are in court in another action in favour of the judgment debtor. The funds may be in court through garnishee proceedings in the other action, or through settlement payment. Generally, the charging order will be subject to existing legal or equitable claims on the funds.

It is beyond the scope of this section to detail the various competing claims and conditions of payment that can affect the granting of an order. Generally, if a charging order is granted to a judgment creditor before the garnishing creditor obtains a judgment, then the charging order will take priority (*B.C. Millwork Products Ltd. v. Overhead Door Sales (Vancouver) Ltd.* (1961), 26 D.L.R. (2d) 753 (B.C.S.C.)).

On occasion, a creditor can use a charging order to cure its own defective garnishing order (*Richardson Greenshields of Canada v. McKim and Bank of B.C.*, *supra*). This was done in *Pacific Centre Ltd. v. Geoff Hobbs & Associates Ltd.*, [1988] B.C.J. No. 90 (Co. Ct.); see also *Lin v. Leung* (1992), 64 B.C.L.R. (2d) 248 (S.C.).

There is some question about the procedure that the courts should follow in granting a charging order. Some earlier British Columbia decisions held that the procedure for charging orders under British statute law should apply. The essence of this procedure is that there must be a charging order *nisi* granted first, followed by an order absolute (and payment out of money in court) in six months.

The current British Columbia practice is that while it is within the authority of the court to make an immediate charging order absolute, an order *nisi* will be made, unless it is clear there are no competing interests for the funds (*Chima v. Hayduk*, [1976] 6 W.W.R. 546 (B.C.S.C.), *Rennison v. Sieg* (1979), 10 B.C.L.R. 30 (S.C.); and *Regner v. Dvorak* (1983), 51 B.C.L.R. 158 (S.C.)). An immediate order was granted in *Pacific Centre Ltd. v. Geoff Hobbs & Associates Ltd.*, *supra*.

## b. Equitable Receiver

The modern authority for judgment execution through the appointment of an equitable receiver arises from the *Law and Equity Act*, s. 39, and SCCR 13-2(5) and 10-2. As with the authority for granting *Mareva* injunctions, the authority for appointing equitable receivers is stated in general language. It falls to the court, applying equitable principles, to exercise its discretion in granting an order. The role of a receiver appointed in these circumstances is to stand in the place of the judgment debtor and obtain or receive assets for the benefit of the judgment creditor. Such an appointment is not a remedy that can be used before judgment (*Vancouver City Savings Credit Union v. Welsh*, [1988] B.C.D. Civ. 3874-01 (S.C.), but see *Grenzservice Speditions Ges. m.b.H. v. Jans*, (1995), 15 B.C.L.R. (3d) 370 (S.C.)).

Current British Columbia case law suggests equitable receivers will be appointed in two situations: where the judgment creditor seeks to execute against an equitable interest (that is, where execution by writ or other statutory methods is not available); or where the court deems there to be “special circumstances” which justify an order. Authority for these propositions is found in *NEC Corporation v. Steintron International* (1985), 67 B.C.L.R. 191 (S.C.).

An equitable receiver was appointed in the following “special circumstance” situations:

- i. to liquidate an RRSP in an orderly fashion so as to avoid devaluation and negative tax consequences (*National Trust Co. v. United Services Funds*, [1986] B.C.D. Civ. 3867-04 (S.C.) and *Robson v. Robson*, *supra*; but note *Yorkshire Trust Company v. 239745 B.C. Ltd. and Day* (1983), 45 B.C.L.R. 361 (S.C.), where an appointment to liquidate an RRSP was refused where the trial decision was under appeal);
- ii. when the conduct of the debtor, both before and after judgment, indicated efforts to make away with assets (*NEC Corporation v. Steintron International*);
- iii. when the debtor had put himself outside the reach of the usual remedies, the only assets were shares in a company and the debtor had demonstrated that he was likely to make away with any assets he could access. (*Warren v. Warren* 2008 BCSC 731).

- iv. to get at contributive shares of limited partners owing money to the judgment debtor (a corporate partnership) (*Bancorp Financial Ltd. v. 234509 B.C. Ltd.* (1986), 62 C.B.R. (N.S.) 311 (B.C.S.C.) and *Graybriar Industries Ltd. v. South West Marine Estates Ltd.* (1988), 21 B.C.L.R. (2d) 256 (S.C.)).

Appointment of an equitable receiver was refused in the following situations:

- i. when the judgment creditor had not demonstrated the difficulty or impossibility of enforcing the judgment by other means against the judgment debtor (a doctor) (*First Western Capital Ltd. v. Wardle* (1984), 54 C.B.R. (N.S.) 230 (B.C.S.C.));
- ii. when, among other factors, there was no evidence of hindrance, evasion, or attempt to leave the jurisdiction by the judgment debtor (a real estate agent); and when it was open to the judgment creditor to apply for an instalment payment order through a subpoena to debtor application (*First Pacific Credit Union v. Dewhurst* (1987), 16 B.C.L.R. (2d) 371 (S.C. Master));
- iii. when the inconvenience of legal execution (garnishment) was outweighed by the expense of a receivership appointment (*Sign-O-Lite Plastics v. MacDonald Drugs (Cranbrook) Ltd.* (1980), 24 B.C.L.R. 172 (S.C.));
- iv. when the judgment debtor was held not to have an interest in the asset (an annuity payment payable to a spouse) (*China Software Corp., supra*).

For an analysis of the principles of law on the appointment of equitable receivers in judgment enforcement cases in British Columbia, see Chapter 9, “Equitable Remedies” in *British Columbia Creditors’ Remedies—An Annotated Guide* (Vancouver: CLE).

## [§1.10] Execution Priorities

In many instances, there is more than one judgment creditor attempting to collect from the debtor. There are several principles which govern the priorities among, and share entitlement of, those competing creditors.

The *Creditor Assistance Act (CAA)* is the starting point for considering creditor priorities. Under this Act, the court bailiff recovers money for a judgment creditor under the writ of seizure and sale. Once collected, the bailiff must enter a notice, in a book, stating that a levy of money on a writ of seizure and sale against the property of a debtor has been made. The entry must be made promptly and must detail the amount that was collected and the date on which it was collected. The entry book must be open to the public and there must be no charge to look at it.

The money collected by a court bailiff must be distributed rateably among all execution creditors and other creditors whose writs or certificates under the *CAA* are in the court bailiff’s hands at the time of the levy, or within one month from when the notice was entered (s.3). If the time limit is missed, there is no share entitlement (*Totem Welding Supplies Ltd. v. Johnston, Wilkinson Company Limited* (1986), 8 B.C.L.R. (2d) 17 (S.C.)).

There are several limitations on the applicability of the Act. Historically, a very restrictive interpretation has been placed on s. 34 (dealing with attaching orders) such that the Act does not apply to most situations where one judgment creditor gets funds into court through garnishment. In addition, money brought into court through a garnishing order before judgment by one creditor, which is then attached by way of charging order granted to a second (judgment) creditor, is not subject to the Act and hence additional judgment creditors may not be able to share in those proceeds (*Bonnieman v. Rocky Mountain Society for Public Art*, [1985] B.C.D. Civ. 1727-01 (Co. Ct.)).

As noted above, a number of decisions have held that the Act does not apply, for a variety of reasons, to judgment creditors where funds have been paid into court in foreclosure proceedings. In such proceedings, judgment creditors share according to priority of title registration (*Roadburg v. R.* (1980), 21 B.C.L.R. 114 (C.A.) (money paid in under order for sale) and *Hallmark Homes Ltd. v. Crown Trust Company* (1983), 49 B.C.L.R. 250 (S.C.) (money paid in by a mortgagor to remove foreclosure judgments from title)).

While s. 46 of the *Creditor Assistance Act* provides that there is no priority among execution creditors, there are many exceptions that may give the Crown, or Crown agencies (among others) a priority over funds. Indeed, many priority-type cases involve issues of priority as between the federal and provincial Crowns. There have been several decisions involving Crown priorities; for

example, see the *Workers Compensation Act*, s. 52, and *W.C.B. v. Attorney General/Canada* (1984), 57 B.C.L.R. 338 (S.C.). In another decision in the same case, (1984), 57 B.C.L.R. 21 (S.C.), the court also held the federal Crown had a priority based on prerogative rights.

The case of *British Columbia (Deputy Sheriff, Victoria) v. Canada* (1992), 66 B.C.L.R. (2d) 371 (C.A.) was an important 1992 priorities-type decision. The facts were that the deputy sheriff seized and sold assets on the authority of a writ of *fiери facias* issued from the Federal Court of Canada, arising from Revenue Canada certificates. Before funds were paid over, a judgment creditor bank placed a Supreme Court of British Columbia writ of seizure and sale with the sheriff and made a claim to the funds. The Court of Appeal held that the bank had no entitlement to the funds, reasoning that under the *Federal Court Act*, s. 56(3), and under what the court called the “federal common law of executions”, the sale funds were the property of Revenue Canada as soon as the judgment debtor’s property was sold.

The court noted that the decision did not need to address two “difficult” questions: (1) the exact nature of the federal Crown prerogative when the claims of the Crown and others are of equal degree; and (2) the exact accommodation of federal Crown claims vis-a-vis the *Creditor Assistance Act* where the federal Crown did not commence and maintain its enforcement proceedings in the provincial system.

### [§1.11] Acting for Debtors After Judgment

In many instances a debtor will only seek a lawyer’s help after judgment, when a creditor is attempting to enforce. It is important to consider immediately if it is realistic to attack the judgment itself (such as where it was entered in default). If this is not possible, then consider remedies directed against the enforcement.

A debtor may be judgment-proof; that is, there are no exigible assets. It may be possible to have the enforcement steps ended simply by informing the creditor or the creditor’s counsel of the debtor’s circumstances.

When the creditor persists, and when there are extenuating circumstances, a court may order a stay of execution under authority of the *Court Order Enforcement Act*, s. 48. Two cases where the courts found special circumstances justifying a stay are *Bank of Montreal v. Price*, [1983] B.C.D. Civ. 591-01 (Co. Ct.), and *Bank of Nova Scotia v. Pilling*, [1984] B.C.D. Civ. 3423-02 (C.A.). The court refused an application for a stay in *Caisse Populaire Maillardville v. Frigon*, [1988] B.C.D. Civ. 3872-02 (S.C.). In that case, the court found no special circumstances where the defendant alleged that the eventual disposition of a related court action between the parties in his favour would allow him to sell property and pay the plaintiff’s judgment.

The parties may be able to negotiate a repayment by instalments as an alternative to execution. When the debtor does have some ability to pay, but the creditor is not willing to agree to such an arrangement, it may be possible for the debtor to apply to the courts, even after judgment, for an instalment payment order. However, as with stays of execution, instalment payment orders should be made only in special circumstances (*Royal Bank v. McLennan* (1918), 41 D.L.R. 27 (B.C.C.A.), *MacMillan v. Progressive Mill Supplies Ltd.*, [1986] B.C.J. No. 827 (S.C.), *Canadian Imperial Bank of Commerce v. Pegg*, [1994] B.C.J. No. 182 (S.C.), and *Solar v. Kovacs*, [1995] B.C.J. No. 1146 (S.C. Master)). Note also that instalment payment orders can be made under the *Court Order Enforcement Act*, s. 5 (setting aside garnishing orders after judgment) and s. 96 (deferring judgment execution against a debtor’s home), and under SCCR 13-3(11) and SCCR 13-2 (31) – 13-2 (33).

### [§1.12] Related Collection Remedies

A number of statutes give plaintiffs, including creditors, remedies beyond their cause of action for debt or damages. Often, there is a proprietary aspect to these additional remedies. The following is a sampling of these remedies relevant to collections.

#### 1. Recovery of Goods

Under the *Law and Equity Act*, s. 57, the court can order interim return of property in an action for recovery of specific property. Similar relief is also available under SCCR 10-1. Recovery orders may be helpful to secured creditors if the other side is wrongfully detaining goods, and recovery of the goods is preferable to a money judgment upon which execution is doubtful.

#### 2. Fraudulent Preferences and Conveyances

The *Fraudulent Conveyance Act* and the *Fraudulent Preference Act* were summarized briefly in §1.02. Essentially, they provide creditors with additional remedies in reaching assets that debtors have wrongfully transferred to other parties. Detailing these statutes is beyond the scope of this section. For a summary, see Chapter 11, “Fraudulent Transactions” in *British Columbia Creditors’ Remedies* (Vancouver: CLE).

#### 3. Repairers’ Liens

At common law, a repairer of chattels had a possessory lien right to hold the chattel until paid. The *Repairers Lien Act* supplements this right. First, it gives a right to sell the chattel for payment; second, it gives a right to retake possession under certain circumstances.

#### 4. *Indian Act*

Although an Indian or Indian Band's real and personal property situated on reserve are not exigible, the *Indian Act* does not preclude other remedies. Court orders may be obtained and may be enforced by creditors. For example, Indians can be required to attend debtor examinations and payment hearings so that a judgment creditor can establish the judgment debtor's off-reserve assets and ability to pay. However, if an Indian does not have property or interests off reserve, the on-reserve property will still be exempt from seizure by non-Indians.

Under s. 89(1), the real and personal property of an Indian or an Indian band situated on reserve is subject to charge, pledge, mortgage, attachment, levy, seizure, or execution in favour of an Indian or Indian Band. Consequently, an Indian Band can enforce a debt or seize the on-reserve property of an Indian, including the on-reserve property of its own members, and an Indian may enforce a debt, commence garnishment proceedings, obtain execution against assets, or seize the on-reserve property of another Indian. The Indian creditor must be a registered Indian or status Indian (entitled to be registered), but does not have to be a member of the same band or nation affiliation as the Indian debtor (*Campbell v. Sandy*, [1956] 4 D.L.R. (2d) 754 (Ont.Co.Crt.)).

A leasehold interest in "designated lands" is not protected from seizure, execution, or enforcement under s. 89(1) (s. 89(1.1)). "Designated lands" under the *Indian Act* are reserve lands to which an Indian Band has, for a limited time, released or surrendered its rights and interests.