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Practice Resource

Garnishment of Lawyers' Trust Accounts

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Garnishment of Lawyers' Trust Accounts

If you are served with a garnishing order and you hold funds in trust in which the named defendant or judgment debtor has an interest, what is your duty to pay the money into court? How, when, and by whom can a garnishing order be used to attach funds that you hold pursuant to an undertaking or condition? How is your retainer affected by a garnishing order? This resource aims to answer these questions and clarify your responsibilities should you receive a garnishing order that relates to funds held in your trust account.

A. Attachment of debts generally

Garnishment, or attachment of debts, is a statutory remedy arising from the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 ("COEA"). A plaintiff or judgment creditor in an action may apply under section 3 of the COEA, without notice, for an order that debts due from a garnishee (a third party, which may include a lawyer) to a defendant or judgment debtor (which may include a lawyer's client) be "attached" and paid into court. Generally in this article, the term "garnishee" refers to the lawyer, the term "creditor" refers to the plaintiff or judgment creditor, and the term "debtor" refers to the defendant or judgment debtor.

Garnishing orders may be granted in both Small Claims Court and Supreme Court actions, either before or after judgment. A garnishing order under the COEA may be set aside by the court for non-compliance with the statutory requirements of the legislation. The courts hold creditors to a stricter standard of "meticulous observance" where pre-judgment garnishment is involved, because it is considered to be an extraordinary remedy that deprives the debtor of the use of its funds prior to a determination on the merits.[1] If a garnishing order is granted despite what appears to be non-compliance with the statutory requirements, that matter is typically determined between the creditor and the debtor; the garnishee is entitled to rely on the order and may pay any funds properly attached into court. However, in the case of a lawyer's trust account, the question of whether the funds are properly attached is a matter for the garnishee to determine; the issues around this question are the primary focus of this article.

Before turning to the specifics of the garnishment of lawyers' trust accounts, it should be noted that funds may be attached under statutes other than the COEA. Generally, garnishees are required to comply with these attachments in the same manner and following the same principles as garnishing orders under the COEA[2]. Some examples of attachments under other statutes follow. Section 18 of the *Family Maintenance Enforcement Act*, R.S.B.C. 1996, c. 127 ("FMEA") provides for the making of a garnishing order by a court, which is deemed to be an order under the COEA. In addition, section 15 of the FMEA provides for the issuance of "notices of attachment", which are not court orders, but which require compliance under section 15(6) which is similar to compliance with a garnishment order. Canada Revenue Agency has the authority to garnish under section 224 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), and

under sections 84 and 317 of the *Excise Tax Act*, R.S.C. 1985, c. E-15. Section 224 of the *Income Tax Act* permits the Minister of National Revenue to issue a requirement to pay to a person for funds that are payable or will become payable to a debtor.

B. Lawyers as garnishees

The effect of section 3(2)(e) of the COEA is that upon the creditor fulfilling the criteria in section 3(2)(c) or (d), the indebtedness or liability of the debtor may be owed by "any other person" who is indebted to the debtor and that such other person is called the garnishee. On the face of that, there is no reason why lawyers might be exempted as garnishees. To date the case law in British Columbia takes it as a given that lawyers are potential garnishees. Similarly, in *San Diego Catering Ltd. (Re)*,[3] it was held that a lawyer falls within the scope of a "particular person" under section 317(1) of the *Excise Tax Act* and is thus liable to pay funds "otherwise receivable by the tax debtor" to Canada Revenue Agency.

Although there has been no authority on the issue to date in British Columbia, solicitor-client privilege is likely not infringed by the payment of garnished debts into court and probably does not provide a defense to garnishment. In *Kirkpatrick v. Reimer*, [4] the Alberta District Court held that "[t]here does not seem to be a problem of confidentiality, because the solicitor is not required to disclose privileged communication between solicitor and client" in the course of meeting the demands of the garnishing order and paying the funds into court.

Law Society Rule 3-64(1)(a) permits a lawyer to withdraw funds from a trust account in order to satisfy a court order.

C. When can funds held in trust be garnished?

Funds held in a trust may be subject to garnishment if:

1. a debt exists due or accruing due from the garnishee to the debtor;
2. the debt due or accruing due is owed at the time of the garnishing order's issuance; and
3. no exemption or law prohibits the attachment of the funds.

1. A debt exists

The court in *Bank of Montreal v. Chantry*,[5] reasoned that a "trustee becomes an equitable debtor to the *cestui que trust* [i.e. the beneficiary] when there is money in the trustee's hands which he ought to pay to the *cestui que trust*." In such an event, the funds are attachable. This may be so even if the exact amount due from the garnishee to the debtor is undefined. Thus, in *Bank of*

Montreal v. Chantry, the court held that an attachable debt could be found despite the exact amount being unascertained as long as it was "an undoubted debt."[6] The same reasoning was applied in *Bank of Nova Scotia v. Lockwood*, in which the lack of certainty as to the exact amount of the debt was determined not to "ultimately [make] any difference."[7]

In *Bank of Montreal v. Chantry*, the court provided two possible tests for determining if there was a debt due to the debtor:

- Could the debtor maintain an action for the debt against the garnishee?
- Would the debt vest in the debtor's trustee in bankruptcy if he or she became insolvent?

If these questions are answered in the affirmative, then the funds are likely debts due or accruing due from the garnishee to the debtor and therefore are eligible to be attached, unless there is some other circumstance that removes them from eligibility. The case law has established that before funds held in a trust by a lawyer garnishee may be attached:

a. there must be no unfulfilled conditions or undertakings in respect of the funds; and

b. the person to whom the funds are allegedly owed must have the sole beneficial interest in the funds.

a. Unfulfilled Conditions or Undertakings

Funds that have unperformed conditions or unfulfilled lawyers' undertakings on them, or that are subject to a contingency, generally cannot be garnished. As stated in *Bank of Montreal v. Chantry*, "if the existence of a debt depends on the performance of a condition there is no debt until the condition has been performed." If the funds are subject to a condition other than the passage of time and that condition has not been fulfilled at the time the garnishing order is issued, the funds are not subject to garnishment because they do not constitute debts due or accruing due.[8]

According to *Bank of Montreal v. Chantry* and *Bank of Nova Scotia v. Lockwood*, a condition must be "substantial" in order to render the funds ineligible for attachment. Conditions that only amount to "some tag ends" will not be sufficient to set aside a garnishing order. No definition or clear examples are given for the exact meaning of a "tag end" or for how to distinguish a minor from a substantial condition, but the usage of the words appears to render anything more than mere procedural requirements to be a condition.

Funds that were previously subject to a condition, contingency, or undertaking that has since been fulfilled or otherwise settled may be attached as long as the condition, contingency or undertaking was already completed at the time the garnishing order was issued.[9]

Likewise, if a condition applies to only some of the funds, the balance may be subject to garnishment. For instance, in *Ahaus Development v. Savage*, the majority of the Court of Appeal found that the portion of the sale proceeds received by a notary public in trust in respect of a sale of real property that was not required to discharge a mortgage was subject to garnishment since the conveyance of title was completed, the purchase price was in the notary's hands, and the amount required to discharge the mortgage was determined.[10]

b. Sole Beneficial Interest in the Funds

Before funds held by a garnishee may be attached, the debtor must have a beneficial interest in the funds because "a trust account in which the judgment debtor has no beneficial interest cannot be so attached": *Bank of Montreal v. Chantry*. Furthermore, the debtor must have the *sole* beneficial interest in the funds. An example of the latter principle is found in the facts of *Royal Bank of Can. v. Tompkins*,[11] (which case is referred to by the court in *Bank of Montreal v. Chantry*). In *Royal Bank of Can. v. Tompkins* a garnishing order was set aside because the funds were owed to joint tenants and thus could not properly be construed as a debt to one party.[12]

Before a garnishing order will be set aside on the basis that another person (such as the garnishee) has an interest in the funds, it must be established that the claimed interest is *bona fide*. This requirement is of particular relevance to garnishment of funds held by a lawyer as a retainer, a subject discussed in a later section of this article.

2. Debt due or accruing due

To determine whether trust funds that constitute a debt are due or accruing due and are therefore attached by a garnishing order, two separate events must be identified:

a. the time at which the garnishing order was issued by the court; and

b. the time at which the garnishing order was served on the garnishee.

a. Issuance of Garnishing Order

A garnishing order under section 3 of the COEA cannot be prospective; that is, it only attaches debts, obligations, and liabilities that are "owing, payable or accruing due" at the time that the order was issued. Funds that might become a debt due at some time in the future are not captured. In other words, the funds must already be payable or inevitably become owing when the creditor obtains the order. As stated in *Canadian Bank of Commerce v. Dabrowski*, in

determining the applicability of the order, "the essential time is the time when the garnishee order was issued, not the time it was served."[13]

For example, in *B.C. Land and Insurance Agency (CR) Ltd. v. MacDonald*,[14] a garnishing order was set aside because the order targeted a cheque that had been issued to the garnishee but which was not in the possession of the garnishee at the time the garnishing order was issued. Because notice of the order and the cheque were delivered simultaneously to the garnishee, and since the funds would not vest in the garnishee until the cheque was accepted and deposited into the garnishee's account, which deposit was not an inevitability, it was not possible to say that there were funds vested in the garnishee owed to the debtor at the time of the order. Instead, the cheque was determined to be a conditional debt only. In determining whether the specified moneys were debts at the time, the Court held that "the essential time is the time when the Garnishing Order was issued and not the time it was served." At a minimum, the debt could not be said to be accruing due until the cheque had been given to the garnishee.

In *Bank of Nova Scotia v. Lockwood*, the lawyer was charged with an undertaking to sell a house and then use the proceeds from the sale to discharge a mortgage and to purchase a new house. Although the case was decided on a separate issue, the court considered in *obiter* whether the funds vested in the lawyer after the first sale could be considered funds "accruing due", if the order had been issued after the sale but before the purchase proceeds were delivered and title was transferred to the purchaser. The court reasoned that if the garnishing order was issued before title was registered to the purchaser, there was no obligation on the purchaser to pay the lawyer and thus there was no money accruing due. Consequently, there would be no obligation on the garnishee lawyer to pay the designated funds into court because the order could not attach funds that were not in the lawyer's possession and, until title was registered, were not guaranteed to vest in the lawyer.

b. Service or Notice of Garnishing Order

This question is more straightforward. Section 9(1) of the COEA provides that a garnishing order binds the garnishee (lawyer) and the debtor (client) with regard to the debts due from the garnishee to the debtor from the time of service or notice of the order. Once the client or the lawyer has been served or been given notice of the garnishing order, the lawyer and the debtor no longer have discretionary control over the designated funds and the lawyer must pay the money into court.

Since section 9(1) of the COEA only attaches funds as of service or notice, if at that time the funds have been fully paid out, there would be no debt due or accruing due from the lawyer to the client. Thus, if a valid garnishing order is issued but the lawyer pays out the targeted funds to the client in between the time of issuance and the time of service or notice, the lawyer is likely

not afoul of the order as long as the payment is honest and not an attempt to frustrate the creditor's remedies.

3. Exemptions by law

Some kinds of funds that might be paid to or held by lawyers in trust may well be exempt from attachment regardless of whether they amount to debts due or accruing due at the time a garnishing order is issued. For instance, holdback funds pursuant to section 5 of the *Builders Lien Act*, S.B.C. 1997, c. 45 are exempt from attachment by virtue of section 13(4) of that statute. Also compensation under the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 may not be liable to attachment by virtue of section 15 of that statute. There are other exemptions too numerous to detail. Accordingly, lawyers served with garnishing orders must give consideration to the nature of the trust funds they hold to determine whether those funds – even if otherwise payable to the named debtor – are exempt from attachment.

Even where attachment is not strictly prohibited by statute, funds may not be liable to attachment if they are the subject of a trust created by statute. For example, *British Columbia Buildings Corp. v. Arbour Contracting Ltd.*, dealt with funds that were subject to a trust under section 10 of the *Builders Lien Act*, S.B.C. 1997, c. 45. Although such funds are not immune from attachment by operation of that legislation, the existence of the statutory trust resulted in a finding that the beneficiaries' interests took priority over all other interests.[15] Although that case dealt with the interests of a secured party, rather than a creditor who had obtained a garnishing order, the result should be no different where garnishment is involved.

D. Specific situations

The following are some common situations in which lawyers hold funds in trust and where there may be some debate about whether those funds are liable to be paid into court pursuant to a garnishing order.

1. Retainers

The general rule is that if a lawyer is in possession of funds advanced by a client as a retainer for legal services, a third party will generally not be able to attach the retainer under a garnishing order unless the funds were advanced to the lawyer with an intent to frustrate the creditor's remedy. The rationale for the foregoing is that a lawyer holds an interest in a *bona fide* retainer and the funds therefore cannot be garnished. That is, once funds are provided as a retainer, they are not the sole property of the client, and as discussed above, funds in which persons other than the debtor have an interest cannot be attached by a garnishing order.

This principle also extends to include the portion of the retainer that has yet to be earned by the lawyer: the lawyer has an interest in both the earned and unearned portions of the retainer.

However, if the relationship between the lawyer and the client dissolves prior to full use of the retainer, then the remaining amount may be considered accruing due to the client from the lawyer and therefore be subject to attachment.[16]

As stated in *Capozzi Enterprises Ltd. v. Tower Enterprises Inc.*,[17] the question of the retainer's *bona fide* nature is of critical importance in determining whether the retainer is subject to garnishment. In determining whether the retainer is *bona fide*, the court may consider a number of different factors, such as the time the retainer was established in relation to issuance of the garnishing order, the amount of the retainer in proportion to the expected services to be rendered, evidence of the retainer agreement, any evidence to the contrary, objections or the agreement of the opposing counsel, and any other factors that the court deems relevant.[18] For unclear or contentious situations, a hearing with evidence given by affidavit may be necessary.

Furthermore, it was affirmed in the *Capozzi Enterprises Ltd. v. Tower Enterprises Inc.* decision that payment of a retainer in anticipation of a possible future need for legal services is not a bar to a finding of a *bona fide* retainer, although a court may assess whether a payment of funds to the garnishee is "a device to shelter these funds from attachment" by looking at the circumstances as a whole. This position is strongly based on the policy consideration that "a defendant might find the balance of his or her solicitor's retainer attached, thereby preventing a defence or an appeal from being presented." A client may anticipate the need for the lawyer to conduct immediate follow-up proceedings at the close of the current business, and funds provided in anticipation of their use as a retainer for this possibility should not be attached. The absence of this understanding may lead a creditor to attempt to garnish repeatedly funds that the debtor pays to the garnishee lawyer in order to assert legal rights or launch an appeal in order to prevent the debtor from accessing legal services.

The court in *Capozzi Enterprises Ltd. v. Tower Enterprises Inc.* also expressly rejected the argument that the unearned portion of the retainer is analogous to a term deposit. While term deposits are attachable for the reasons set out in *Bel-Fran Investments Ltd. v. Pantuity Holdings Limited and Bank of Montreal*,[19] unearned portions of a retainer are subject to a contingency (the possibility of being taken up as lawyer's fees) and can therefore be distinguished from term deposits, which are payable subject only to the passage of time and some procedural requirements of the holding financial institution.

2. Judgment or settlement proceeds

At first blush, one might think that judgment or settlement proceeds paid to a lawyer in trust for a client would constitute an unquestioned debt due from the lawyer to the client. However, the lawyer may well have an interest in those funds if the lawyer has not been paid in full for the lawyer's services in relation to the court proceeding that gave rise to the recovery of those funds. At common law, for many years, it has been the case that a lawyer has a solicitor's lien on the

"fruits of the litigation" and that "all persons dealing with a fund obtained by litigation must be assumed to be aware that the fund is to be considered as subject to the deduction of the costs to be paid to the solicitor who has conducted the litigation which is successful".[20] That is so whether or not there has been a charging order pronounced under section 79 of the *Legal Profession Act*, S.B.C. 1998, c. 9; the Court of Appeal has described the lawyer's "inchoate" right as arising immediately upon recovery of property as a result of the lawyer's efforts.[21] Accordingly, it has been held by the Supreme Court of Canada that "no creditor can touch that money until the solicitor's lien is first satisfied" because both the debtor and the lawyer are entitled to such funds "conjointly".[22]

3. Transaction proceeds

Where a lawyer receives the proceeds of a sale or other transaction in trust, one must determine whether the funds are payable unconditionally to the client before it can be determined whether they are subject to attachment. Thus, where a property is sold, but the lawyer is required to discharge mortgages or make other payments from the funds, or is on other undertakings that result in the funds not being payable to the debtor, the funds may be free from attachment unless the amount unquestionably due to the debtor can be ascertained. Some of the cases referred to above – namely *Ahaus Development v. Savage* and *Bank of Nova Scotia v. Lockwood* – address this subject. Likewise, a security agreements that gives the secured party an interest in funds received by a lawyer in trust from a client's sale of assets such that it cannot be said that the client has the sole beneficial interest in those funds may be free attachment (and even where the security agreement does not so provide, a security interest in collateral that gives rise to proceeds extends to those proceeds by virtue of section 28(1) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359).

4. Funds Held as Security for Claims or Pending Resolution of Claims

It is clear that where funds are being held by a lawyer in trust as security for claims (including costs) or pending resolution of claims, on terms that require the funds be held pending some further agreement or future court order, those funds are not subject to attachment because multiple persons have an interest in the funds and because such conditions require more than the mere effluxion of time before the lawyer is obligated to the debtor. That is so even where the only persons who might ultimately become entitled to the funds are all judgment debtors of the judgment creditor seeking to attach the funds.

For instance, in *Royal Bank v. Williamson*, the proceeds of the sale of the family home were being held in trust by a lawyer pursuant to an agreement between the spouses that they would be so held pending an agreement between them or an order of the court as to their distribution. Even though the creditor bank was owed money by *both* spouses such that the funds would be entirely owed to one or the other of the named debtors, the court held that the lawyer was not

then obligated to pay the funds because of the undertaking, which required more than simple passage of time.[23] Obviously, in a case where funds held in trust as security for claims or pending the resolution of claims and the persons that might ultimately receive the funds are not both debtors named in the order, the case against attachment is even stronger because the debtor would not have the sole beneficial interest in the funds (see above).

E. Don't ignore the order!

Even where trust funds are not caught by a garnishing order, a dispute note should be filed before it is too late to set the garnishing order aside. When you receive the order: (1) determine whether payment into court is required (or get legal advice about it); and (2) either pay into court or file a dispute note promptly.

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1 *Knowles v. Peter*, [1954] B.C.J. No. 34 (S.C.), 12 W.W.R. (N.S.) 560.

2 See *Ellis v. Ellis*, 2000 BCSC 1576, [2000] B.C.J. No. 2255 for a case that distinguishes between garnishment under the COEA and attachment under the *Family Maintenance Enforcement Act*, R.S.B.C. 1996, c. 127. Although these orders are separate and distinct processes, the court states that "[i]t would seem […] that cases decided under the COEA may be applied to interpret the FMEA if it serves to provide fairness to the parties and promote the social purposes of the statute."

3 *San Diego Catering Ltd. (Re)*, [1996] B.C.J. No. 2070 (C.A.), 82 B.C.A.C. 91.

4 *Kirkpatrick v. Reimer*, [1979] A.J. No. 843 (D.C.), 96 D.L.R. (3d) 378 at para 7.

5 *Bank of Montreal v. Chantry and Chantry*, [1979] S.J. No. 593 (D.C.), [1979] 5 W.W.R. 470.

6 *Bank of Montreal v. Chantry and Chantry*, [1979] S.J. No. 593 (D.C.), [1979] 5 W.W.R. 470 at paras 14-15.

7 *Bank of Nova Scotia v. Lockwood*, [1989] B.C.J. No. 608 (Co. Ct.).

8 For case law on this point, see *Bank of Nova Scotia v. Lockwood*, [1989] B.C.J. No. 608 (Co. Ct.); *Ahaus Development v. Savage*, [1994] B.C.J. No. 1455 (C.A.), 92 B.C.L.R. (2d) 307; *Vancouver A&W Drive Ins v. United Food Services* (1982), 38 B.C.L.R. 30 (S.C.); *Lampman & Laidlaw Ltd. v. Levine*, [1960] B.C.J. No. 87 (C.A.), 22 D.L.R. (2d) 605; and *Piscine Energetics v. Choi*, 2010 BCSC 874.

9 *Ahaus Development v. Savage*, [1994] B.C.J. No. 1455 (C.A.), 92 B.C.L.R. (2d) 307; *Taxsave Consultants Ltd. v. Pacific Lamp Corp.* (1990), 52 B.C.L.R. (2d) 128 (C.A.); and *Chudinsky v. Shaw*, [1988] B.C.J. No. 1734 (S.C.).

10 *Ahaus Development v. Savage*, [1994] B.C.J. No. 1455 (C.A.), 92 B.C.L.R. (2d) 307.

11 *Royal Bank of Can. v. Tompkins*, [1976] W.W.D. 174 (B.C.S.C.).

12 For more on this point, see also *238344 B.C. Ltd. v. Patriquin*, [1984] B.C.J. No. 1802 (C.A.); *Field v. Pacific Coast Savings Credit Union*, [1993] B.C.J. No. 1313 (S.C.); *Banff Park Savings and Credit Union Ltd. v. Rose*, [1982] A.J. No. 10 (C.A.), 139 D.L.R. (3d) 764; *Sladen v. Johanson*, [1988] B.C.J. No. 2567 (C.A.); and *Niedermayer v. Niedermayer*, 2009 BCSC 1703.

13 *Canadian Bank of Commerce v. Dabrowski*, [1954] B.C.J. No. 72 (S.C.), 13 W.W.R. (N.S.) 442.

14 *B.C. Land and Insurance Agency (CR) Ltd. v. MacDonald*, [1986] B.C.J. No. 2851 (Co. Ct.).

15 *British Columbia Buildings Corp. v. Arbour Contracting Ltd.*, [1996] B.C.J. No. 32 (S.C.), 17 B.C.L.R. (3d) 135.

16 See *Johnson & Higgins Willis Faber Ltd. v. Mayo Helicopters Ltd. and Russell & DuMoulin (Garnishee)*, [1978] B.C.J. No. 1182 (S.C.), [1978] 6 W.W.R. 206; *Gervais (Guardian ad litem of) v. Yewdale*, [1993] B.C.J. No. 2504 (S.C.), [1994] 3 W.W.R. 601.

17 *Capozzi Enterprises Ltd. v. Tower Enterprises Inc.*, [1983] B.C.J. No. 78 (S.C.), 3 D.L.R. (4th) 751.

18 See *Leaton Leather & Trading Co. v. Ngai*, [1997] B.C.J. No. 1660 (S.C.), 72 A.C.W.S. (3d) 484.

19 *Bel-Fran Investments Ltd. v. Pantuity Holdings Limited and Bank of Montreal*, [1975] B.C.J. No. 1150 (S.C.), 62 D.L.R. (3d) 140.

20 *Dallow v. Garrold* (1884), 13 Q.B.D. 543 at 546, affd. (1884) 14 Q.B.D. 543 (C.A.). See also *Ross v. Buxton* (1889), 42 Ch. D. 190; *Haymes v. Cooper* (1864), 55 E.R. 435; *Read v. Dupper* (1795), 101 E.R. 595; *Welsh v. Hole* (1779), 99 E.R. 155.

21 *FitzGibbon v. Piters*, 2012 BCCA 269.

22 *Bell v. Wright* (1895), 24 S.C.R. 656.

23 *Royal Bank v. Williamson* (1981), 30 B.C.L.R. 379 (Co. Ct.).