

# DEBTOR CREDITOR RELATIONS SPRING 2014 FREYA KODAR

## CREDIT REPORTING AND CREDIT CARD REGULATION

### Credit Reporting

**Credit Rating Agencies:** private, lucrative industry (Trans Union, Equifax) that collect info about credit history, payment loans, then make a report to sell to businesses

**Credit information:** created every time an individual applies for credit or borrows money

**Credit Score:** complex algorithm that predicts how you're going to handle credit in the future – credit risk

**Credit Rating/Report:** more detailed about past practice with credit - gives SIN, DOB, ER, current and former address, name of spouse, employer, outstanding litigation or judgments (w/some restrictions), credit relationships, credit history or trade lines, info available from public records, any involvement with a third party collection agency, consumer comment (person can explain in 100 words in less why their credit is the way it is)

#### Business Practices and Consumer Protection Act [Part 6, ss. 106-112, 171]

<p><b>106</b> - definitions</p>	<p><b>“credit information”</b> means information about an individual’s credit, including the individual’s name, age, place of residence, previous place of residence, marital status, spouse’s name and age, number of dependents, particulars of education or professional qualifications, place of employment, previous place of employment, estimated income, paying habits, outstanding debt obligations, cost of living, or obligations and assets;</p> <p><b>“report”</b> means a written, oral or other communication respecting credit information of an individual;</p> <p><b>“reporting agency”</b> means a person, whether in British Columbia or not, who</p> <ul style="list-style-type: none"> <li>(a) provides reports for gain or profit,</li> <li>(b) provides reports on a routine, non-profit bases as an ancillary part of a business carried on for gain or profit, or</li> <li>(c) is designated by regulation</li> </ul>
<p><b>107</b> – Requirements of Consent for Report</p> <p>- <i>Person (supplier) must not obtain report respecting an individual without their consent</i></p> <p>- <i>Consent can be obtained through application for credit, insurance, employment, or tenancy</i></p>	<p><b>(1)</b> A person must not obtain from a reporting agency a report respecting an individual for a purpose referred to in section <b>108(1)(a)</b> without the <b>consent</b> of the individual.</p> <p><b>(2)</b> A person may obtain the consent of the individual by any method that permits the person to produce evidence that the individual consented, including by prominently displaying information respecting consent in clear and comprehensible manner in an <b>application</b> for credit, insurance, employment, or tenancy.</p>
<p><b>108</b> – To whom reports may be given (exhaustive list)</p> <p>- <i>Reporting agency must not provide credit information except to this list of persons</i></p> <p>- <i>Can also provide report to other persons with written consent of the individual</i></p> <p><b>107 &amp; 108 work together</b></p>	<p><b>(1)</b> A reporting agency must not <b>knowingly</b> provide credit information about an individual in a report, except in a report given</p> <p><b>(a)</b> to a person who, it has reason to believe</p> <ul style="list-style-type: none"> <li>(i) intends to use the report in connection with <u>extending credit</u> to, or <u>collecting the debt</u> of an individual,</li> <li>(ii) intends to use the report in connection with the individual entering into or renewing a <u>tenancy agreement</u>,</li> <li>(iii) intends to use the report for the purpose of evaluating the individual for <u>employment, promotion, reassignment or retention</u> as an employee,</li> <li>(iv) intends to use the report in connection with <u>underwriting insurance</u> involving the individual,</li> <li>(v) intends to use the report to determine the <u>eligibility of an individual under an enactment</u>, if the information is relevant to a lawful requirement, or</li> </ul>

	<p>(vi) otherwise has a <u>direct business requirement</u> for the report in connection with a <u>transaction</u></p> <p>(b) to the government of Canada, the government of a province or municipality in Canada or to an <u>agent</u> of any of these [C, P, M]</p> <p>(c) To a law enforcement agency in Canada, concerning an offence under the laws of Canada or a province.</p> <p>(d) in response to a court order</p> <p>(e) to the director, to assist in inspection under this Act, or</p> <p>(f) under the <b>written</b> consent of the individual to whom the information relates</p> <p>(2) A person must not obtain from a reporting agency a report about an individual <u>except</u> in the circumstances referred to in (1). (<b>exhaustive list</b>)</p>
<p><b>109 – Contents of the Report</b></p> <p><i>- Reporting Agency must not include the following information in their report</i></p>	<p>(1) A reporting agency must not include in a report given under s. <b>108(1)(a)</b> any of the following:</p> <p>(a) information, unless the <u>name and address of the source of the information</u> is recorded in its files or can be readily ascertained by the individual;</p> <p>(b) information not based on the <u>most reliable evidence</u> reasonably available;</p> <p>(c) <u>unfavorable information</u>, other than unfavorable credit information, unless the reporting agency has</p> <p>(i) <u>corroborated</u> the information, or</p> <p>(ii) made <u>reasonable efforts to corroborate</u> the evidence on which the information is based, and the lack of corroboration is noted with and accompanies the information;</p> <p>(d) information about a <u>legal proceeding</u> in which the individual is a nominal defendant or in which the cause of action is primarily other than for a liquidated amount;</p> <p>(f) information about a <b>judgment 6 years</b> after the judgment was given, unless the creditor or the creditor’s agent confirms that all or part of the judgment remains <u>unpaid</u> and the confirmation appears in the reporting agency’s file;</p> <p>(g) information about <u>the bankruptcy of an individual 6 years</u> after the date the individual was <b>discharged</b> from bankruptcy, unless that individual has been bankrupt <u>more than once</u>;</p> <p>(h) information about <u>criminal or summary conviction charges</u> against the individual unless the charged have <u>resulted in a conviction</u>;</p> <p>(i) information about a <b>conviction of the individual under the laws of Canada or a province 6 years</b> after the date of the conviction, or, if the conviction resulted in <u>imprisonment</u>, after the date of the individual’s <u>release or parole</u>, but information about a conviction must not be reported if:</p> <p>(i) the individual has been granted an <u>absolute or conditional discharge</u>, or</p> <p>(ii) after the conviction, the individual has been granted a <u>free pardon</u>;</p> <p>(j) information given <u>orally</u>, unless the content of the oral report is recorded in the reporting agency’s file;</p> <p>(k) information about the <u>race, belief, color, sexual orientation, ancestry, ethnic origin or political affiliation of an individual</u>;</p> <p>(l) information concerning any member of the individual’s family other than the spouse as provided for in this Part;</p>

	<p>(m) information about the payment or non-payment of <u>lawfully imposed fines 6 years after the fine was imposed</u>;</p> <p>(n) information about a <u>legal proceeding 12 months after the date the proceeding began, unless the current status of the proceeding has been ascertained and is included in the report</u>;</p> <p><b>(o)</b> any other information <b>adverse to the individual's interest</b> 6 years after the event that gave rise to the information <b>(CATCH ALL)</b></p> <p>(p) any other prescribed information.</p> <p>(2) for the purposes of (1)(a), a person who provides information to a reporting agency for <u>remuneration or other benefit except salary is not a source of information</u>.</p> <p>(3) In a report given under <b>108(1)(b)</b> [government], a reporting agency must not provide information about an individual except the following information:</p> <p>(a) name;</p> <p>(b) current and former addresses;</p> <p>(c) current place of employment and former places of employment.</p>
<p><b>110 – Notice of Denial of Benefit or Increase in Cost of Benefit</b></p> <p><i>- If a person (supplier) uses information in a credit report they receive to deny credit or increase the cost of credit, they must give notice to the individual</i></p> <p><i>- If the individual requests, must also inform them of the name and address of the reporting agency</i></p>	<p><b>(1)</b> If a person who receives a report given under <b>108(1)(a)</b> uses information contained in the report to</p> <p>(a) <u>deny all or part of a benefit</u> to an individual, or</p> <p>(b) <u>increase the cost of a benefit</u> to an individual, either wholly or <u>partly</u> because of information contained in the report, the person must <b>give written notice of the denial or increase to the individual</b> and, if the report was about another individual, that <u>other individual</u>.</p> <p>(2) The person must give the <b>notice</b></p> <p>(a) not later than <b>30 days</b> after the decision was made, and</p> <p>(b) in <u>person</u> or by <u>mail</u> to the last known address of each individual.</p> <p>(3) For the purposes of this section, a notice that is sent by mail is deemed to have been given at the time it is <u>sent</u>.</p> <p>(4) On the <u>written request</u> of the individual made within <b>60</b> days after receipt of the <u>notice</u>, the person must inform the individual of the name and address of the reporting agency.</p> <p>(5) The <u>notice</u> must contain a statement of the individual's right to request the information referred to in (4).</p>
<p><b>111 – Explanation by individual</b></p> <p>[See PIPA s. 24 and 27 which allows individual to correct information and sets out a procedure for doing so]</p> <p><i>- Individual may give explanation relating to credit information</i></p> <p><i>- Reporting agency must retain the information and include it in the credit report</i></p>	<p><b>(1)</b> An individual may give to a reporting agency, in writing of not more than <b>100 words</b>, an <u>explanation or additional information</u> that relates to the information kept by the reporting agency about the individual.</p> <p>(2) The reporting agency must <u>retain</u> the explanation or additional information with the other information the reporting agency keeps about the individual, and must <u>include</u> the explanation or additional information in <u>any report given about the individual</u> if the explanation or additional information <u>relates</u> to any information in the report.</p>
<p><b>112 – False or Misleading Information</b></p> <p><i>- A person must not supply false or misleading information to credit reporting agency</i></p>	<p><b>(1)</b> A person must not supply <u>false or misleading information</u> to a reporting agency</p> <p>(2) A person does not contravene subsection (1), if, at the time the information was supplied, the person <u>did not know</u> that it was false or misleading and, with the exercise of <u>reasonable diligence</u>, could not have known that it was false or misleading.</p>

<p><b>171 – Damages Recoverable</b></p> <p>- <i>If person (individual subject to credit report – not anyone in this section) suffers damage, they may bring action against the supplier, reporting agency, collector, bailiff, or collection agency.</i></p> <p>- <i>NO punitive damages</i></p>	<p><b>(1)</b> subject to <b>(2)</b>, if a person, other than a person referred to in paragraphs <b>(a)</b> to <b>(e)</b>, has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a</p> <p><b>(a)</b> supplier,</p> <p><b>(b)</b> reporting agency, as defined in s. 106 [definitions]</p> <p><b>(c)</b> collector, as defined in s. 113</p> <p><b>(d)</b> bailiff, collection agent or debt pooler, as defined in section 125, or</p> <p><b>(e)</b> a person required to hold a license under Part 9 who <b>engaged in</b> or <b>acquiesced</b> in the contravention that caused damage or loss.</p> <p><b>(3)</b> The Provincial Court has jurisdiction for the purposes of this section, even though a contravention of this Act or the regulations may constitute a libel or slander.</p>
<p><b>172 – Court Actions Respecting Consumer Transactions</b></p>	<p>Individual can make a complaint to a regulator, who can then investigate and levy a fine</p>

**Personal Information Protection Act [ss. 12, 13, 23(1) – 23(3.1), 24, 27]**

<p><b>12 – Collection of Personal Information Without Consent</b></p> <p>- <i>the credit grantor may collect information as long as the individual consented at some point</i></p>	<p><b>(1)</b> An organization may collect personal information about an individual <u>without consent</u> or from a source other than the individual if:</p> <p><b>(g)</b> the organization is a <b>credit reporting agency</b> that collects the personal information to <b>create a credit report</b> and the individual consents at the <b>time the original collection takes place to the disclosure</b> for this purpose,</p> <p><b>(j)</b> the personal information is necessary to facilitate</p> <p>(i) the collection of a debt owed to the organization, or</p> <p>(ii) the payment of a debt owed by the organization</p>
<p><b>13 – Collection of employee personal information</b></p>	<p><b>(1)</b> Subject to <b>(2)</b>, an organization may collect employee personal information without the consent of the individual.</p> <p><b>(2)</b> An organization may <u>not</u> collect employee personal information without the consent of the individual <u>unless</u></p> <p><b>(a)</b> section 12 allows the collection of the employee personal information without consent, or</p> <p><b>(b)</b> the collection is <u>reasonable</u> for the purposes of <u>establishing, managing or terminating</u> an employment relationship between the organization and the individual.</p> <p><b>(3)</b> An organization must <u>notify</u> an individual that it will be collecting employee personal information about the individual and the purposes for the collection before the organization collects the employee personal information without the consent of the individual.</p> <p><b>(4)</b> subsection <b>(3)</b> does not apply to employee personal information if section <b>12</b> allows it to be collected without the consent of the individual.</p>
<p><b>15 – Use of personal information without consent</b></p> <p>- <i>A credit report can be created without consent</i></p>	<p><b>(1)</b> An organization may use personal information about an individual without the consent of the individual if: [same as s. 12 above]</p>
<p><b>23 – Access to personal information</b></p> <p>- <i>Individual can request their own credit report</i></p>	<p><b>(1)</b> subject to <b>(2)</b> to <b>(5)</b>, on request of an individual, an organization must provide the individual with the following:</p> <p><b>(a)</b> the individual’s <u>personal information</u> under the control of the</p>

<p><i>and it must be provided free of charge</i>  - <i>Must also disclose source of the information, unless it is reasonable to assume the individual can determine the source on its own</i></p>	<p>organization;  <b>(b)</b> information about the <u>ways</u> in which the personal information has been and is being used by the organization;  <b>(c)</b> <u>the names of the individuals and organizations</u> to whom the personal information has been <u>disclosed</u> by the organization.  <b>(2)</b> An organization that  <b>(a)</b> is a credit reporting agency, and  <b>(b)</b> receives a request under <b>(1)</b>,  must also provide the individual with the <u>names or he sources</u> for which it received the personal information <u>unless it is reasonable to assume the individual can ascertain those sources.</u>  <b>(3)</b> An organization is not required to disclose personal information and other information under <b>(1)</b> or <b>(2)</b> in the following circumstances:  <b>(a)</b> information is protected by solicitor-client privilege  <b>(b)</b> disclosure of the information would reveal confidential commercial information that, if disclosed, could reasonably <u>harm</u> the <u>competitive position of the organization</u>;  <b>(c)</b> the information was collected or disclosed <u>without consent</u>, as allowed under s. <b>12</b> or <b>18</b>, for the purposes of an investigation and the investigation and associated proceedings and appeals have not been completed;  <b>(3.1)</b> A credit reporting agency is not required to disclose the <u>names of the individuals and organizations to whom the personal information was last disclosed</u> by the agency in a credit report more than <b>12 months</b> before the request under <b>(1)</b> was made.</p>
<p><b>24 – Right to Request Correction of Personal Information</b>  - <i>An individual may request correction of personal information</i>  - <i>The organization must correct the information as soon as possible and send it to each organization to which it was disclosed for the last year</i></p>	<p><b>(1)</b> An individual may request an organization to correct an <u>error</u> or <u>omission</u> in the personal information that is  <b>(a)</b> about the individual, and  <b>(b)</b> under the control of the organization.  <b>(2)</b> If an organization is satisfied on reasonable grounds a request under <b>(1)</b> should be implemented, the organization must  <b>(a)</b> correct the personal information as soon as reasonably possible, and  <b>(b)</b> send the corrected personal information to each organization to which the personal information was disclosed by the organization during the <u>year</u> before the date the correction was made.</p>
<p><b>27 – How to Make a Request</b></p>	<p>For an individual to obtain access to his/her personal information or to request a correction of his/her personal information, the individual must make a <b>written request</b> that provides sufficient detail to enable the organization, with a reasonable effort, to <u>identify</u> the individual and the personal information or correction being sought.</p>

### **Haskett v. Equifax et al.**

#### **Take-Aways:**

- 1.** There is a common law remedy in tort available: A credit reporting agency has a **duty to the person about whom they are creating the report to ensure its accuracy.**
- 2.** “Credit is an **integral part of everyday life in today’s society.**”
  - Not only people seeking *loans*, mortgages, insurance, or car leases, but also those who wish to *rent an apartment* or even *obtain employment* may be the subject of a credit report - the contents of the report may affect whether they are able to obtain the loan, job, or accommodation.
  - Credit cards are a basic form of payment, but their availability is limited by one’s creditworthiness. Without credit, one cannot conduct financial transactions via phone/internet.

- Due to the **universality of credit**, it is expected that consumer rely heavily on credit reporters to carry out their function not only **honestly**, but **accurately**, with **skill and diligence** and in accordance with **statutory obligations**.

**Facts:** P alleges he was denied credit from credit grantors b/c the D credit reporting agency negligently and illegally provided inaccurate information about his creditworthiness by including statute-barred debts and interests on those debts in their credit reports about him to credit grantors (reporting statute-barred debt and prohibited information in credit reports violates Ont. Consumer Reporting Act)

**Issue:** Whether a customer who has been denied credit as a result of information negligently provided to a lender by a credit rating agency can sue the credit agency for their losses.

## Credit Cards & Lines of Credit

### Business Practices and Consumer Protection Act [Part 5, s. 57, 58, 91, 94-99]

<p><b>57 – Definitions</b></p>	<p>“<b>credit agreement</b>” means an agreement under which credit is extended and includes</p> <ul style="list-style-type: none"> <li>(a) an agreement in relation to               <ul style="list-style-type: none"> <li>(i) a loan of money,</li> <li>(ii) a credit sale,</li> <li>(iii) a line of credit, or</li> <li>(iv) a credit card, and</li> </ul> </li> <li>(b) a renewal of an agreement referred to in this definition</li> </ul> <p>“<b>credit card</b>” means a card or other device that can be used to obtain advances under a credit agreement for open credit</p> <p>“<b>APR</b>” means the annual percentage rate calculated in accordance w/regulations</p>
<p><b>58 – Application</b>          - Applies to individuals for personal use (not businesses b/c sophisticated, bargaining power, no need to make basic needs)          - Does not apply to payday loans</p>	<p><b>(2)</b> Subject to <b>(3)</b> and <b>(4)</b>, this Part applies to a credit agreement if</p> <ul style="list-style-type: none"> <li><b>(a)</b> the borrower is an <u>individual</u>,</li> <li><b>(b)</b> the borrower enters into the credit agreement primarily for <u>personal, family or household purposes</u>, and</li> <li><b>(c)</b> the credit agreement           <ul style="list-style-type: none"> <li>(i) is entered into by the credit grantor in the <u>ordinary course of carrying on a business</u>,</li> <li>(ii) is arranged by a loan broker, or</li> <li>(iii) is a prescribed credit agreement</li> </ul> </li> </ul> <p><b>(3)</b> This part does not apply to:</p> <ul style="list-style-type: none"> <li><b>(b)</b> a credit agreement if           <ul style="list-style-type: none"> <li><b>(i)</b> the credit grantor is provided with a statement, in the credit agreement or other document, to the effect that the borrower has entered into the credit agreement for <u>primarily business purposes</u>,</li> <li>(ii) the statement is signed by the borrower, and</li> <li>(iii) the credit grantor believes in good faith the statement is true</li> </ul> </li> </ul> <p><b>(4)</b> Does not apply to payday loans</p>
<p><b>91 – Initial disclosure statements for open credit</b></p>	<p><b>(1)</b> A credit grantor who has entered into a credit agreement must ensure the initial disclosure statement includes the following:</p> <ul style="list-style-type: none"> <li><b>(a)</b> the effective date of the statement;</li> <li><b>(b)</b> the credit limit;</li> <li><b>(c)</b> the minimum periodic payment or method of determining the minimum periodic payment;</li> <li><b>(d)</b> the initial annual interest rate and compounding period;</li> <li><b>(k)</b> the nature of any default charges provided for by the credit agreement;</li> </ul>

	<p>(l) how often the borrower will receive statements of account;</p> <p>(m) a telephone number in accordance with section 92 (3)</p> <p>(2) Despite (1),</p> <p>(a) the credit limit referred to in (1)(b) may be disclosed</p> <p>(i) in the first statement of account given to the borrower</p> <p>(ii) in a separate statement given to the borrower on or before the date on which the borrower received the first statement of account</p>
94 – Definitions	<p>“<b>cardholder</b>” means an individual who is a borrower in relation to a credit card;</p> <p>“<b>credit card issuer</b>” means a person who is a credit grantor in relation to a credit card</p>
96 – Credit Cards May be Issued Only on Application	<p>(1) a credit card issuer <u>must not issue</u> a credit card to an individual who has <b>not applied</b> for the card.</p> <p>(2) subsection (1) does not apply to a credit card that is issued to an individual to replace or renew a card that was applied for and issued to that individual</p>
97 – Application for Credit Cards	<p>(1) A credit card issuer who has entered into a credit agreement for a credit card must ensure that the application for discloses the following information or complies with (2):</p> <p>(a) if the interest rate payable under the credit agreement is a <u>fixed</u> rate of interest, that interest rate expressed as an <u>annual interest rate</u>;</p> <p>(b) if the interest rate payable under the credit agreement is a <u>floating</u> rate, the <u>index rate</u> and the <u>manner</u> by which that rate is to be modified to obtain the interest rate payable under the credit agreement;</p> <p>(c) the <b>grace period</b>, if any;</p> <p>(d) the nature and amount of any <u>non-interest finance charges</u> that are payable or may become payable by the cardholder;</p> <p>(e) the <u>date</u> as of which the information referred to in paragraphs (a) to (d) is in effect.</p> <p>(2) when person actually applies, they still have to use it</p>
98 – Additional Disclosure for Credit Cards	<p>(1) In addition to the information required by 91, a credit card issuer must disclose, in initial disclosure statement, the cardholder’s maximum liability for unauthorized use of the credit card if lost or stolen.</p> <p>(2) The credit card issuer must notify the cardholder of any change in the information disclosed in a disclosure statement</p>
99 – Limitation of Cardholder’s Liability	<p>(1) A cardholder who has <u>reported</u>, orally or in writing, a lost or stolen credit card, or the unauthorized use of the credit card or credit card number, to the credit card issuer is <u>not liable for any debt incurred</u> through the use of that card <b>after</b> the credit card issuer receives the report.</p> <p>(2) The maximum total liability of a cardholder arising from unauthorized use of a lost or stolen credit card <b>before</b> the issuer received notice under (1) is the <u>lesser</u> of</p> <p>(a) <b>\$50</b>, and</p> <p>(b) the <u>maximum amount set by the credit agreement</u> in relation to the credit card</p> <p>(3) subsection (2) does not apply to the use of a credit card in conjunction with a <b>personal identification number</b> at an <b>automated teller machine</b>.</p>

<b>Credit Business Practices Regulations [ss. 1,3-6]</b>	
<p><b>3 – Minimum Grace Period for New Purchases</b></p>	<p>(1) a statement of account in respect of a <u>billing cycle</u> for a credit card must be sent by an institution to the borrower without delay after the last day of that <u>billing cycle</u>.</p> <p>(2) An institution may <u>not</u> require a <u>minimum payment</u> in respect of the outstanding balance owing on a credit card account for a particular billing cycle to be made by the borrower on a day earlier than <b>21 days</b> after the last day of that billing cycle. <b>[21 day grace period]</b></p> <p>(4) An institution may <b>not charge interest</b> on purchases of goods or services made on a credit card during a particular billing cycle if the borrower <u>pays the outstanding balance owing on the credit card account in full on or before the due date.</u></p>
<p><b>4 – Allocation of Payments</b>  <i>- Creditors must start with the highest interest rate and move to the lowest, or match proportion that each bears to the total cost – cannot move lowest to highest</i></p>	<p>(1) If different interest rates apply to different amounts owing for a particular billing cycle on a credit card account, the institution must allocate any payment made by the borrower that is great than the required minimum payment for that billing cycle among those amounts using one of the following methods:</p> <p>(a) by allocating that payment first to the amount with the <u>highest interest rate</u> and then allocating any remaining portion of the payment to the other amounts in descending order, based on their applicable interest rates <b>[highest to lowest]</b>; or</p> <p>(b) by allocating that payment among those amounts in the same proportion as each amount bears to the outstanding balance owing on the credit card account <b>[proportionately]</b></p>
<p><b>5 - Over-the-limit Fee Due to Holds</b></p>	<p>(1) subject to (2), an institution <u>may not</u> charge a borrower an amount for <u>surpassing their credit limit</u> as a result of a <b>hold</b> on their credit card.</p> <p>(2) subsection (1) does not apply if the borrower would, in any case, have surpassed the credit limit during the period in which the hold was in effect.</p>
<p><b>6 – Consent for Increases in Credit Limits</b></p>	<p>(1) An institution <u>may not</u> increase the <b>credit limit</b> on a borrower’s credit card account without first obtaining the borrower’s <u>express consent</u> to do so.</p> <p>(2) If the borrower’s consent to the increase is given <u>orally</u>, the institution must, not later than the date of the first statement of account after the date of consent, provide <u>confirmation</u> of that consent to the borrower in <u>writing</u>, in paper or electronic form.</p> <p>(3) The <u>use of any service related to the credit card account</u> by the borrower, including the simple use of the credit card, does <u>not</u> constitute <u>express consent</u> for the purpose of subsection (1).</p>

## PAYDAY LOANS

**Payday Loans:** relatively small loans given in exchange for post-dated cheques or other pre-authorized withdrawal from a bank account in the form of a loan + interest and other fees.

- Payday loans are part of the AFS, services are usually targeted towards lower-income individuals or those with poor credit history
- Those who use payday loans tend to be more vulnerable consumers in terms of their ability to access credit in the mainstream financial system or to cover basic living costs without incurring or increasing debt.
- Must have **ID, a personal chequing account with a financial institution**, and (usually) proof of regular income

**Reasons for Payday Loans:** (1) unable to get cheaper forms of credit such as lines of credit or credit card, (2) live in a community not served by mainstream banks, and/or (3) like the borrowing process, location, and hours.

### Current Regulation

- There is both provincial (property and civil rights) and federal jurisdiction in this area (trade and commerce, criminal, interest and banking)
- In 2007, the federal government enacted Bill C-26 an Act to amend the Criminal Code and added s. 347.1, which **exempts lenders from prosecution** under s. 347 for payday loans of \$1500 or less for a period of less than 62 days if the vendor is licensed under the provincial regulatory scheme - **in effect it exempts them from prosecution**
  - Keeps the same definition of interest
  - Defines payday loans (which the provincial regulations follow)
- s. 347.1(3) The **federal government designates a province as being exempt** from s. 347 and have s. 347.1 apply **so long as the province has a scheme in place that:**
  - Protects recipients and limits the overall cost of loans
- After bill passed, most provinces put in legislation – but not Quebec or NF
  - Quebec has a cap on interest of 35%
- Designates an agency to license lenders, give them an investigation and enforcement mechanism, penalties to apply if lender exceeds the rates
- A **payday loan in one province can cost more** than in another because they have **set different rates**
- In BC, provincial cabinet sets the rates after a consultation paper in 2007
  - Our rate is \$23/\$100 > this is the rate the Payday Loan Association wanted
- Came into force in November, added Part 6.1 to the BPCPA, Pay Day loans Regulation

<b>Criminal Code [ss. 347 &amp; 347.1]</b>	
<b>347(2)</b> - Definitions	<p><b>“criminal rate”</b> means an <u>effective annual rate of interest</u> calculated in accordance with <u>generally accepted actuarial practices and principles</u> _____ that exceeds <b>60%</b> on the credit advanced under an agreement or arrangement.</p> <p><b>“interest”</b> means the aggregate of <b>all charges and expenses</b>, whether in the form of a fee, fine, penalty, commission or other similar charge or expenses or in any other form <u>paid or payable</u> for the advancing of credit under an agreement or arrangement ...”</p>
<b>347(1)</b> – Criminal Interest Rate	<p><b>(1)</b> ...every one who enters into an agreement or <u>arrangement to receive interest at a criminal rate</u>, or <b>receives</b> a payment or partial payment of interest at a criminal rate, is</p> <p style="margin-left: 20px;"><b>(a)</b> guilty of an <u>indictable offence</u>...; or</p> <p style="margin-left: 20px;"><b>(b)</b> guilty of an offence <u>punishable on summary conviction</u></p>

347.1(1) - Definitions	“ <b>payday loan</b> ” means an advancement of money in exchange for a post-dated cheque, a preauthorized debit or a future payment of a similar nature but not for any guarantee, suretyship, overdraft protection or security on property and not through a margin loan, pawnbroking, a line of credit or a credit card.
347.1(2) – <b>Non – Application for Payday Loans</b>	Section 347 do[es] not apply in respect of a payday loan agreement if (a) the amount advanced is <b>\$1,500</b> or less and the term is <b>62 days</b> or less (b) the person is <b>licensed</b> under the laws of a province to enter into the agreement; and (c) the province is <b>designated</b> under ss. (3).
347.1(3) – <b>Designation of Province</b>	<b>(3)</b> The Governor in Council shall, by order and at the request of the lieutenant governor in council of a province, designate the province for the purposes of this section <b>if the province has legislative measures that protect recipients of payday loans and that provide for limits on the total cost of borrowing</b> under the agreements.

**Business Practices and Consumer Protection Act [Part s.1 ss. 112.01, 112.02-112.06, 112.08, 112.10, 197.1]**

112.01 - Definitions	“ <b>payday loan</b> ” means a credit agreement, as defined in section 57, that is a loan of money, with a principal of <b>\$1 500 or less</b> and for a term of <b>62 days or less</b> , made in exchange for a post-dated cheque, a pre-authorized debit or a future payment of a similar nature but not for any guarantee, suretyship, overdraft protection or security on property and not through a margin loan, pawnbroking, a line of credit or a credit card;  “ <b>rollover</b> ” means any of the following: (a) the <u>extension</u> or <u>renewal</u> of a payday loan that <u>imposes additional fees</u> or charges on the borrower, other than interest; (b) the advancement of a <u>new</u> payday loan to <u>pay out</u> an <u>existing</u> payday loan; “ <b>APR</b> ” has the same meaning as in Part 5 Part 5 – “APR” means the annual percentage rate calculated in accordance with the regulations [ <b>See Below</b> ].
>>> <b>6(1) of Disclosure of the Cost of Consumer Credit Regulation – Calculating the APR</b> <ul style="list-style-type: none"> <li>• Example APR for \$100 loan for 14 days at 23% = 599.98%</li> <li>• <math>APR = (100 \times 23) / (0.03856 \times \\$100)</math> <ul style="list-style-type: none"> <li>○ <math>T = 14/365 = 0.38356</math></li> </ul> </li> </ul>	<b>(1)</b> The APR for a credit agreement: <b>APR = <math>(100 \times C) / (T \times P)</math></b> <b>C</b> = total cost of credit (interest rate, not expressed as decimal); <b>T</b> = length of the term expressed in years (X/365); <b>P</b> = the average outstanding principal over the term as calculated under <b>(2)</b>
<b>112.02(1) – Limited on Total Cost of Borrowing –</b>	<b>(1)</b> The Lieutenant Governor in Council may, by regulation,

Payday Loans	<p><u>set the maximum amount</u>, or establish a rate, formula, tariff or method of determining the maximum amount, that may be <u>charged, required or accepted by a payday lender</u> in respect of</p> <ul style="list-style-type: none"> <li>(a) the total cost of credit for a payday loan,</li> <li>(b) any interest, and</li> <li>(c) any permissible charge.</li> </ul> <p>(2) A payday lender must not charge, require or accept from the borrower or consumer any amount that exceeds a maximum set or determined under subsection (1).</p>
112.03(2) – Prohibitions Respecting Interest Charges	<p>(2) Despite subsection (1) (b) (i), if the borrower <u>fails to make the last payment</u> required under the loan agreement, the payday lender must not charge, require or accept any interest in respect of the payday loan for any period of time that exceeds the maximum number of days prescribed under section 197.1 (1) (c).</p>
<p><b>112.04(1) – Fees, Penalties, and Charges Prohibited Unless Allowed by Regulation</b>  <i>- Cannot charge a fee for a cash card (CSFS Compliance Order &amp; Administrative Penalty)</i></p>	<p>(1) A payday lender must not charge, require or accept</p> <ul style="list-style-type: none"> <li>(a) any fee, penalty, rate, commission, consideration, charge or other amount unless it is a permissible charge,</li> <li>(b) any amount ...not disclosed in the loan agreement,</li> <li>(c) any amount that exceeds the amount disclosed ...,</li> <li>(d) any amount for cancellation of a payday loan ...,</li> <li>(e) any amount for making a payment b/f it is due ... or for repayment of [the] loan before the end of the term ...</li> <li>(f) any amount for or in relation to a cash card</li> </ul>
112.05 – Payday Loan Cancellation Rights	<p>(1) A borrower may <b>cancel</b> a payday loan at any time before the <u>end of the next day</u> that the payday lender is open for business following the date on which the borrower receives the first advance, or before the end of any longer period that may be <u>prescribed in the regulations</u>.</p> <p>(3) A borrower may cancel a payday loan at any time if the payday lender</p> <ul style="list-style-type: none"> <li>(a) does not <u>advise the borrower of the borrower's cancellation right</u> under subsection (1),</li> <li>(b) fails to satisfy any of the <u>requirements of section 112.06 (2), (4) (a) and (5)</u> [payday loan agreements], or</li> <li>(c) <u>contravenes</u> a prescribed provision of this Act or the regulations.</li> </ul>
112.06 – Payday Loan Agreements: Required Terms and Disclosure Statements	<p>(2) A payday lender must ensure that the loan agreement includes all of the following terms, information and statements:</p> <ul style="list-style-type: none"> <li>(k) the total cost of credit and the <b>APR</b> for the loan;</li> <li>(p) a statement that the loan is a "high cost loan";</li> <li>(q) a statement of the cancellation [rights], setting out how those rights can be exercised and identifying the time by which the borrower can exercise them;</li> <li>(r) a statement of the remedies available to the borrower under section 112.10 [remedies];</li> </ul>
112.08 – Other Prohibited Payday Lender Practices	<p>(1) A payday lender must not do any of the following:</p> <ul style="list-style-type: none"> <li>(a) <b>grant rollovers</b>;</li> </ul>

	<p>(b) issue a new payday loan to a borrower who already has a payday loan issued by the lender;</p> <p>(c) issue a payday loan in excess of a prescribed portion of a borrower's net pay or other net income to be received during the payday loan term;</p> <p>(j) require, request or accept an assignment of wages</p> <p>(k) require, request or accept as security for a payday loan, any <u>personal property or real property</u>;</p> <p>(m) engage in any other practice prohibited by regulations under section <b>197.1. [CATCH ALL]</b></p>
112.10 - Remedies	<p>(1) The borrower is <u>not liable</u> to pay the payday lender any amount that</p> <p>(a) exceeds the maximum set by regulation under section 112.02 (1), or</p> <p>(b) a lender is prohibited from charging, requiring or accepting under section 112.03 ...</p> <p>(2) If the borrower has paid an amount referred to in subsection (1), the borrower is entitled to a <b>refund of all monies paid</b> in excess of the principal of the payday loan.</p> <p>(11) The remedies under this section are <u>in addition</u> to any other remedy available to the borrower and are additional to any other penalty that the payday lender may be subject to under this Act or the regulations.</p>
165	<p>(1) An <u>individual</u> on whom an administrative penalty is imposed is liable to a penalty of not more than <b>\$5 000</b>.</p> <p>(2) A <u>corporation</u> on which an administrative penalty is imposed is liable to a penalty of not more than <b>\$50 000</b>.</p>
197.1	<p>(1) The Lieutenant Governor in Council may make regulations as follows:</p> <p>(a) specifying fees, penalties, rates, commissions or charges allowed to be charged by payday lenders under Part 6.1 or in relation to</p> <p>(i) a payday loan, or</p> <p>(ii) any good or service supplied by the payday lender to a borrower or consumer</p>

<b>Payday Loan Regulations [ss. 5,6,9,13,17-24]</b>	
5 – License for Each Location	A payday lender must have a <b>separate license</b> for each location from which the payday lender conducts business in British Columbia
6 – Terms of License	The director may issue a license for a term not exceeding <b>3</b> years
9 – License Application Fees	Subject to any applicable fees set by the administrative authority, a person must pay the following license application fees and submit the fees with the person's application for a license: <p>(a) <b>\$1500</b> per year for the head office or primary location;</p> <p>(b) <b>\$750</b> per year for each additional location from which the license conducts business</p>
13 – Signs and Notices	(1) A payday lender must display at each of the lender's place of business

	<p>(a) a sign visible to borrowers immediately on entering the place of business, and</p> <p>(b) a sign visible to borrowers at each place where the payday loan is negotiated</p> <p>(2)-(3) sets out the requirements for signs</p> <p>(4) sets out information required on the signs</p>
<p><b>17 – Permissible Charges</b> - <i>This includes all fees</i></p>	<p>(1) The maximum amount that may be charged, required or accepted by a payday lender for a loan is <b>23% of the principal</b>.</p> <p>(2) if the repayment amount specified in the agreement is not paid, a payday lender may charge an amount up to the following <u>maximum</u> amounts as default fees:</p> <p>(a) interest at a rate of <b>30% per annum</b> on the outstanding principal; <b>[annual interest rate &lt; criminal rate]</b></p> <p>(b) a one time fee of <b>\$20</b> for a dishonoured cheque or a dishonoured pre-authorized debit</p>
<p><b>18 Prohibited Practices – Amount of Loan</b></p>	<p>A payday lender must not issue a payday loan in excess of <b>50%</b> of the borrower's <u>net pay or other net income</u> to be received during the term of a payday loan.</p>
<p><b>19 Prohibited Practices – Tied Selling</b></p>	<p>(1) A payday lender must not make a payday loan contingent on the supply of other goods or services.</p> <p>(2) A payday loan agreement must not include a term or condition relating to the supply of other goods or services</p> <p>(3) A payday loan agreement must include a statement that the supply of other goods or services is separate and optional.</p>
<p><b>20 – Prohibited Practices – Collection from Employer</b></p>	<p>A payday loan agreement must not contain a provision giving the lender permission to collect on a delinquent loan from the borrower's employer.</p>
<p><b>21 – Prohibited Practices - Miscellaneous</b></p>	<p>(1) Payday lender can't require that a payday loan be due before the first day on which the borrower will receive his/her pay or other income following the date of the loan.</p> <p>(2) Payday lender must not state or imply that a payday loan will <u>improve the borrower's credit rating</u> if it will not do so.</p> <p>(3) A payday lender must not require, request or accept information that would give the payday lender <u>direct access to a borrower's bank account</u>, other than pre-authorization for repayment of a specific payday loan.</p> <p>(4) A payday lender must not include an <u>enticement to enter into a payday loan for a prize or reward in a <b>representation or advertisement</b></u>.</p> <p>(5) A payday lender must not enter into a payday loan agreement that does not comply with this regulation.</p>
<p><b>22 Prohibited Practices - Repayment</b></p>	<p>A payday lender must not accept a cheque from the borrower unless it is payable to the <u>lender</u>.</p>
<p><b>23 Prohibited Practices – Maximum Repayment</b></p>	<p>(2) A lender who enters into a third or subsequent agreement in a <b>62-day period</b> must,</p> <p>(a) if the borrower is paid or otherwise receives income on a <u>bi-weekly, semi-monthly or more frequent</u> basis, provide in the loan agreement that repayment is to be spread over at least <b>3 pay periods</b>, or</p> <p>(b) if the borrower is paid or otherwise receives income</p>

	<p>on a <u>less frequent</u> basis than that referred to in paragraph (a), provide in the loan agreement that repayment is to be spread over at least <b>2 pay periods</b>.</p> <p><b>(3)</b> A payday lender must not require a repayment under a loan agreement referred to in subsection <b>(2)</b> that is more than,</p> <p><b>(a)</b> for a borrower referred to in paragraph (a) of that subsection, <b>35% of the sum</b> of the principal and the cost of borrowing in relation to the loan, or</p> <p><b>(b)</b> for a borrower referred to in paragraph (b) of that subsection, <b>50% of the sum</b> of the principal and the cost of borrowing in relation to the loan.</p>
<p><b>24</b> – Consequences of Failure to Comply With S.23</p>	<p>Despite s. <b>17</b>, if a payday lender contravenes s. <b>23</b>,</p> <p><b>(a)</b> all amounts in relation to the payday loan other than the principal cease to be permissible charges and</p> <p><b>(b)</b> the borrower is not liable to pay the lender any amount that exceeds the principal of the payday loan.</p>

## DEBT COLLECTION PRACTICES

### Debt Collection Practices

It is standard practice for a creditor seeking to recover repayment of a debt to make a demand for repayment first (before commencing legal action)

- Often done through demand letter sent from creditor’s counsel to debtor
- May be required by K between D and C
- Also creates goodwill in the event litigation ultimately ensues
- However, **such a demand letter will not be made** if the C is concerned that the **D will attempt to hide assets** once put on notice

<b>Business Practices and Consumer Protection Act [ss. 113-124, 171-72]</b>	
<p><b>113 – Definition</b>  <i>-Broad definition of collector to cover those with head offices outside of BC</i></p>	<p>“<b>collector</b>” means a person, <u>whether in BC or not</u>, who is collecting or attempting to collect a debt (Broad)</p>
<p><b>114 – Harassment</b></p>	<p><b>(1)</b> A collector must not communicate or attempt to communicate with a <u>debtor</u>, a <u>member of the debtor’s family or household</u>, a <u>relative, neighbor, friend, or acquaintance of the debtor</u>, or the <b>debtor’s employer</b> in a manner or with a frequency as to constitute <b>harassment</b>.  <b>(2)</b> Without limiting (1), one or more of the following constitutes <b>harassment</b>:                      (a) using <u>threatening, profane, intimidating or coercive language</u>;                      (b) exerting <u>undue, excessive, or unreasonable pressure</u>;  <b>[See Roach]</b>                      (c) <u>publishing or threatening to publish</u> a debtor’s failure to pay. <b>[Non-exhaustive]</b></p>
<p><b>115 – Disclosure to Debtor</b>  <i>- This section creates a pre-condition – creditor’s don’t like it because it increases administrative costs</i>  <i>- The <b>original creditor</b> is <b>exempt</b> from this requirement of sending notice by the Debt Collection Industry Regulation</i></p>	<p><b>(1)</b> A collector must not attempt to collect payment of a debt from a debtor until the collector has <u>notified the debtor in writing</u> or the collector has <u>made a reasonable attempt to notify the debtor in writing</u> of                      (a) the <u>name of the creditor</u> with whom the debt was incurred,                      (b) the <u>amount of the debt</u>, and                      (c) the <u>identity and authority of the collector</u> to collect the debt from the debtor  <b>(2)</b> A collector must not initiate <u>verbal communication with a debtor</u> with respect to the collection of a debt <u>until 5 days after</u> the collector has sent to the debtor the written notice referred to in (1).  <b>[(1) and (2) do not apply to creditor collecting/attempting to collect a debt owed to the creditor – SEE BELOW]</b></p>
<p><b>&gt;&gt;&gt;&gt; s. 2 Debt Collection Industry Regulation</b></p>	<p><b>(2)</b> S. 115 [disclosure to debtor] and 121 (1) and (2) [legal proceedings] of the Act do not apply to a creditor collecting or attempting to collect a debt owed to the creditor.</p>
<p><b>116 – Communication With Debtor</b></p>	<p><b>(1)</b> A collector must not <u>communicate or attempt to</u></p>

-Note: the collector may not want to contact the debtor at work anyway, for fear he will lose his job and lose ability to pay  
 -There is some ambiguity about what “contact” means – ie./ leaving a message

communicate with a debtor at the debtor’s **place of employment unless**

- (a) the collector does not have the home address or telephone number for the debtor and the collector contracts the debtor solely for the purpose of requesting the debtor’s home address or telephone number or both,
- (b) the collector has attempted to contact the debtor at the debtor’s home address or telephone number, but the collector has not contacted the debtor in any of those attempts [see (2)], or
- (c) the collector has been **authorized by the debtor** to communicate with the debtor at the debtor’s place of employment

**(2)** The collector must not make more than one verbal attempt under **(1)(b)**, to **contact** the debtor at the **debtor’s place of employment.**

**(3)** At the time a collector communicates with a debtor, the collector must first indicate to the debtor

- (a) the name of the creditor with whom the debt was incurred,
- (b) the amount of the debt, and
- (c) the identity and authority of the collector to collect the debt from the debtor.

**(4)** a collector must not continue to communicate with a debtor

- (a) except in writing **[SEE ROACH]**, if the debtor
  - (i) has notified the collector to communicate in writing only, and
  - (ii) has provided a mailing address at which the debtor may be contract
- (b) except through the debtor’s lawyer, if the debtor
  - (i) has notified the collector to communicate only with the debtor’s lawyer, and
  - (ii) has provided an address for the lawyer, or
- (c) If the debtor has notified the collector and the creditor that the debt is in dispute and that the debtor would like the creditor to take the matter to court. **[Does not apply in respect to debt due to government, SEE BELOW]**

**>>>> s. 2 Debt Collection Industry Regulation**

**(4)** Section 116(4)(c) of the Act does not apply in respect of a debt due to **government.**

**117 – Communication With Persons Other Than Debtor**

**(1)** Except for the purpose of obtaining the debtor’s home address or telephone number, a collector must not communicate or attempt to communicate with a **member of the debtor’s family or household, or a relative, neighbor, friend or acquaintance** of the debtor **unless**

- (a) the person contacted has agreed to pay the debt and is being contacted in respect of the guarantee, or
- (b) the debtor has authorized the collector to discuss the debt with the person contacted.

**(2)** A collector must not communicate with a **debtor’s employer** except

- (a) for the purpose of confirming the debtor’s employment, business title, and business address, or

	(b) for other purposes authorized in writing by the debtor
118 – Time of Communication	<p>(1) “<b>statutory holiday</b>” means a holiday, except Sunday, unless the holiday falls on a Sunday</p> <p>(2) Except on the request of the person contacted, a collector must not communicate, either by telephone or in person, with the debtor, a member of the debtor’s family or household, or a relative, neighbor, friend or acquaintance of the debtor, or the debtor’s employer or guarantor <b>[everyone]</b></p> <p>(a) on a <u>statutory holiday</u></p> <p>(b) subject to (a), on a Sunday, except <u>between the hours if 1 p.m. and 5 p.m. local time</u> for the person contacted, or</p> <p>(c) on any other day, except <u>between the hours of 7 a.m. and 9 p.m. local time</u> for the person contacted.</p>
119 – Cost of Communication	A collector must not communicate or attempt to communicate with a person for the purpose of collecting, negotiating or demanding payment of a debt by a means that results in the costs of the communication being payable to the person.
120 – Collection from Person not Liable for Debt or in Excess of Amount of Debt	<p>A collector must not</p> <p>(a) collect or attempt to collect money that exceeds the amount of the debt owing, <b>[Roach]</b></p> <p>(b) collect or attempt to collect money from a person who is not liable for the debt, or</p> <p>(c) if a person has informed the collector that the person is not the debtor, continue to communicate with that person unless the collector first makes all reasonable efforts to ensure that the person is in fact the debtor</p>
121 – Legal Proceedings - The <b>original creditor</b> is <b>exempt</b> from this requirement of sending notice by the Debt Collection Industry Regulation	<p>(1) If a debt has been assigned to a collector, the collector must not</p> <p>(a) bring or continue a legal proceeding for the recovery of a debt as plaintiff unless the debtor has been given notice of the assignment, or</p> <p>(b) bring a legal proceeding unless the collector first gives notice to the debtor that the collector intends to bring the proceeding</p> <p>(2) A collector must not recommend to a creditor that a legal proceeding be brought, unless the collector first gives <u>notice</u> to the debtor that the collector intends to recommend that a proceeding be brought.</p> <p>(3) Nothing in subsection (2) affects solicitor-client privilege.</p> <p>(4) A collector must not directly or indirectly <u>threaten</u>, or state an intention, to bring or continue a <u>legal proceeding</u> for the recovery of a debt</p> <p>(a) for which the collector does not have the written authority of the creditor, or</p> <p>(b) for which there is no lawful authority.</p> <p><b>[(1) and (2) do not apply to creditor collecting/attempting to collect debt owed to the creditor – SEE BELOW]</b></p>
>>>> s. 2 Debt Collection Industry Regulation	(2) S. 115 [disclosure to debtor] and 121 (1) and (2) [legal proceedings] of the Act do not apply to a creditor collecting or attempting to collect a debt owed to the creditor.
122 – Removal, Seizure, Repossession and Distress	<b>122</b> A collector must not do any of the following, whether

	<p>on the collector's own behalf or on behalf of another person, directly or indirectly:</p> <p>(a) unless there is a court order to the contrary, <u>remove</u> from inside the debtor's private dwelling any personal property claimed under seizure, distress or repossession, in the absence of the debtor, the debtor's spouse, the debtor's agent or an adult resident in the debtor's dwelling;</p> <p>(b) <u>seize, repossess or levy distress</u> against personal property that is not specifically charged or mortgaged, or to which legal claim may not be made under a statute, court judgment or court order;</p> <p>(c) <u>remove, seize, repossess or levy distress</u> against personal property during a day or during the hours of a day when removal, seizure, repossession or distress is prohibited by the regulations.</p>
<b>123</b> – False or Misleading Information and Misrepresentations	<p>In collecting or attempting to collect payment of a debt, a collector must not</p> <p>(a) supply any false or misleading information,</p> <p>(b) misrepresent the purpose of a communication,</p> <p>(c) misrepresent the identity of the collector, or, if different, the creditor, or</p> <p>(d) use, without lawful authority, a summons, notice, or demand, or other document that suggest or implies a connection with a any court inside or outside Canada.</p>
<b>124</b> – Additional Prohibited Practices	<p>A collector must not commit or engage in a prescribed act or practice <b>[See Debt Collection Industry regulations BELOW]</b></p>
<b>171</b> – Damages Recoverable	<p>(1) subject to (2), if a person, other than a person referred to in (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a:</p> <p>(c) collector, as defined in <b>113</b>,</p> <p>(d) bailiff, collection agent or debt pooler, as defined in <b>125</b>,</p> <p>Who engaged in or acquiesced in the contravention that caused the damage or loss</p> <p>(3) The <b>Provincial Court</b> has jurisdiction for the purposes of this section, even though a contravention of this Act or the regulations may also constitute a libel or slander.</p> <p><b>[Also See Roach]</b></p>
<b>Remedy</b>	<p>Can also complain to Consumer Protection BC w/possibility of damages</p>

<b>Law Society of BC, Code of Professional Conduct for British Columbia [C 7: 7.2-6 &amp; 7.2-7]</b>	
Sets out certain conduct that is prohibited for lawyers making a demand for repayment of a loan	
<b>7.2-6</b> Sets out certain conduct that is prohibited for lawyers making a demand for repayment of a loan	<p>Subject to rule <b>7.2-7</b>, if a person is represented by a lawyer in respect of a manner, another lawyer must not, except through or with the consent of the person's lawyer;</p> <p>(a) approach, communicate or deal with the person on the matter,</p> <p>(b) attempt to negotiate or compromise the matter directly with the person.</p>

7.2-7	A lawyer who is not otherwise interested in a matter may give a <u>second opinion</u> to a person who is represented by a lawyer with respect to that matter.
7.2-6 and 7.2-7 <i>Commentary</i>	<p>[1] Rule 7.26 applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by a lawyer concerning the matter to which the communication relates.</p> <p>[2] The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances.</p> <p>[3] Rule 7.27 deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services required that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first lawyer involved.</p>
3.2-5	<p>A lawyer must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:</p> <ul style="list-style-type: none"> <li>(a) to initiate or proceed with a criminal or quasi-criminal charge (<i>bankruptcy</i>); or</li> <li>(b) to make a complaint to a regulatory authority.</li> </ul>

<b>Credit Business Practices (Banks, Authorized Foreign Banks, Trust and Loan Companies, Retail Associations, Canadian Insurance Companies and Foreign Insurance Companies Regulations [ s.7]</b>	
<p>7 – Debt Collection Practices  <i>-Very similar to the provisions in the COEA</i></p>	<p>(1) An institution that <u>communicates</u> with a debtor in order to <u>collect payment of a debt</u> from the debtor must inform them of the following <u>information</u>:</p> <ul style="list-style-type: none"> <li>(a) the details of the debt, such as the amount owed and the type of debt; and</li> <li>(b) the identity of, or unique identifier for, any person who is attempting to collect the payment on behalf of the institution and their relationship with the institution</li> </ul> <p>(2) An institution may not communicate or attempt to communicate with a debtor, any member of the debtor’s family or household, any relative, neighbor, friend, or acquaintance of the debtor or the debtor’s employer by any means, or in a manner or with a frequency that constitutes harassment [<b>everyone</b>], including</p> <ul style="list-style-type: none"> <li>(a) the <u>use of threatening, profane, intimidating or coercive language</u>;</li> <li>(b) the <u>use of undue, excessive or unreasonable pressure</u>; or</li> <li>(c) <u>making public, or threatening to make public, a debtor’s failure to pay.</u></li> </ul> <p>(3) Except for the sole purpose of obtaining a debtor’s address or telephone number, an institution may not contact or attempt to contact any member of the debtor’s family or household or any relative, neighbor, friend or acquaintance</p>

of the debtor unless

(a) that person has guaranteed to pay the debt and is being contacted in relation to that guarantee; or

(b) the debtor has given their express consent.

(4) If the consent referred to in paragraph (3)(b) is given orally by the debtor, the institution must, without delay, provide confirmation of that consent to the debtor in writing, in paper or electronic form.

(5) Unless otherwise authorized in writing by the debtor, an institution may contact a debtor's employer solely for the purpose of confirming that the debtor is employed, the nature of their employment and their business title and business address.

(6) An institution may not contact a debtor at the debtor's place of employment unless

(a) the institution does not have the home address or home telephone number of the debtor;

(b) attempts by the institution to contact the debtor at their home telephone number have failed; or

(c) the institution obtains written authorization from the debtor to do so.

(7) Except with the written consent of the debtor, an institution may not contact a debtor, any member of the debtor's family or household, any relative, neighbour, friend or acquaintance of the debtor or the debtor's employer or guarantor

(a) on a Sunday, except between the hours of 1:00 p.m. and 5:00 p.m. local time for the person being contacted;

(b) on any other holiday; or

(c) on any other day, except between the hours of 7:00 a.m. and 9:00 p.m. local time for the person being contacted.

(8) Except if the debtor or any other person referred to in subsection (7) has provided a cellular telephone number as a contact number, an institution may not knowingly communicate or attempt to communicate with the debtor or that person for the purpose of collecting, negotiating or demanding payment of a debt by a means that renders the charges or costs incurred for the communication payable by the debtor or that person, as the case may be.

(9) An institution that has communicated with a debtor in respect of the collection of a debt may not communicate with the debtor again in the course of that collection

(a) by a means other than in writing, if the debtor makes a written request by registered mail to the institution to communicate with the debtor only in writing in that regard and provides an address at which they may be contacted;

(b) by a means other than through the debtor's legal advisor, if the debtor makes a written request to the institution to communicate with the debtor in that regard only through the debtor's legal advisor and provides a telephone number and an address for the legal advisor; or

(c) without the debtor's consent, if the debtor notifies

the institution by registered mail that the debt is in dispute and that they intend to take the matter before a dispute resolution body or that they are prepared for the institution to take the matter to court.

**(10)** An institution may not misrepresent the purpose of a communication in respect of the collection of a debt with any person or give, directly or indirectly, by implication or otherwise, any false or misleading information in the course of that communication.

**(11)** Despite any agreement to the contrary between a debtor and an institution, any charges made or incurred by the institution in collecting a debt, other than charges referred to in section **18** of any of the following regulations, are not considered to be a part of the amount owing by the debtor and may not be recovered from the debtor by the institution:

**(a)** Cost of Borrowing (Banks) Regulations;

**(b)** Cost of Borrowing (Authorized Foreign Banks) Regulations;

**(c)** Cost of Borrowing (Trust and Loan Companies) Regulations;

**(d)** Cost of Borrowing (Retail Associations) Regulations;

**(e)** Cost of Borrowing (Canadian Insurance Companies) Regulations; and

**(f)** Cost of Borrowing (Foreign Insurance Companies) Regulations.

**(12)** An institution may not collect or attempt to collect payment in respect of a debt from any person who is not liable for the debt.

**(13)** An institution may not directly or indirectly threaten or state an intention to proceed with any legal action if it does not actually intend to do so.

**(14)** An institution may not, for the purpose of attempting to collect a debt, use any document that unlawfully purports to originate from any court within or outside Canada.

### **Total Credit Recovery v. Roach**

#### **Take Away**

There is no common law tort of harassment independent of the BPCPA. However, there is a statutory tort of harassment available for breach of ss. 114 [*Harassment*] and related provisions of the BPCPA. The debtor may have a cause of action for compensatory damages against the collection agency under s. **171**. The debtor may also complain to Consumer Protection BC for the possibility of recovering damages.

- Debt collection agency used excessive and/or unreasonable pressure – agency, as a result of information obtained in earlier call, knew that debtor was employed at the place they phoned; again, when they were clearly told not to call her at work, they did call, not to confirm her place of employment, which they already knew (violation of **114(2)(b)**)
- Calls leaving “urgent” messages when there was no “urgency.” The caller treated debtor with contempt – her unwillingness to engage in discussion was communicated by her refusal to return phone calls and engage in conversation, the agency refused to accept this (violation of **114(1)**).

- The amount the agency tried to collect was far in excess of the amounts said to be “due”, provided by statements sent to the debtor by Canadian Tire during the time of attempted collection (violation of **120(a)**)
- No notice given that the card was terminated, in breach of the agreement between D and C.

## Licensing

### Business Practices and Consumer Protection Act [ss. 125, 142, 143]

<p><b>125</b></p>	<p><b>“collection agent”</b> means a person, whether in BC or not, who</p> <p>(a) <u>in the course of business collects or attempts to collect payment of a debt for another person, or</u></p> <p>(b) <u>in the course of business takes an assignment of a debt due to another person for the purpose of collecting or attempting to collect payment of the debt, and includes a bailiff</u> <b>[Collection Agent – Canacede]</b></p> <p><b>“debt pooler”</b> means a person, whether in CB or not, who in the course of business arranged or operates a debt pooling system</p> <p><b>“debt pooling system”</b> means an arrangement or procedure under which a debtor pays to a debt pooler money to be distributed or paid, according to a system, by that debt pooler to <b>3</b> or more creditors of the debtor.</p>
<p><b>142</b></p>	<p><b>“designated activity”</b> in this Part means a business, industry, trade, profession, occupation or employment designated by regulation under s. <b>142.1</b> of the regulations <b>[See Below]</b></p>
<p><b>143</b> - Person must not engage in designated activity unless licensed or exempt</p>	<p>A person must not engage in a “designated activity” unless the person is</p> <p>(a) <b>licensed</b> to engage in the designated activity, or</p> <p>(b) <b>exempt</b> by regulation from the requirement to be licensed</p>

### Debt Collection Industry Regulation [s. 1.1(b), 3]

<p><b>1.1(b)</b></p>	<p>For the purposes of “designated activity” in s. 142 <i>[Licenses]</i> of the Act, the following are designated:</p> <p>(b) the business and occupations described in the definition of “collection agent” in s. <b>125</b> of the Act <b>[SEE ABOVE]</b></p>
<p><b>3</b></p>	<p>The following persons or classes of persons are <b>exempt from the requirement to have a license:</b></p> <p>(a) <u>lawyers</u> in the regular practice of their profession;</p> <p>(b) persons acting as <u>officers</u> of or under the process or authority of any <u>court</u>;</p> <p>(c) <u>trust companies and trustees</u> acting under the terms of any will, marriage settlement or deed of trust;</p> <p>(d) <u>chartered banks</u>;</p> <p>(e) <u>credit unions</u>, in respect of services provided by the credit union to its members;</p>

<p>(f) insurance agents licensed under the <i>Financial Institutions Act</i>, in respect of the collection of insurance premiums;</p> <p>(g) brokerages licensed under the <i>Real Estate Services Act</i>, their related licensees within the meaning of that Act and their employees, in respect of collections incidental to the business of the applicable brokerage;</p> <p>(h) persons collecting debts in the course of their employment with the government;</p> <p>(i) sheriffs;</p> <p>(j) discounters, as defined in section 2 of the <i>Tax Rebate Discounting Act</i> (Canada), exercising rights to refunds of tax acquired from taxpayers;</p> <p>(k) trustees licensed or appointed under the <i>Bankruptcy and Insolvency Act</i> (Canada);</p> <p>(l) corporations, in respect of the collection of debts for other corporations that are their affiliate, as defined in section 1 of the <i>Business Corporations Act</i>.</p>
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### Canaccede International Management Ltd v. Suttles

#### Take Aways

1. A collection agency, as defined in s. 125 of the Act, engages in a “designated activity”, as defined in s. 1.1 of the regulations, and therefore, must be registered pursuant to s. 125 of the Act.
2. **No double-recovery:** According to 192(2), compensation is not available under s. 192 (permits a court to order a defendant to pay compensation to a consumer for pecuniary loss suffered by them as a result of the commission of the offence) where the consumer has commenced an action against the defendant under s. 171 for the same transaction.
3. Even when damages are awarded, the debtor will almost always still be liable to repay their debt through a set-off against the amount.

#### Licensing Requirement

S. 1.1 of Regulations defines “designated activities” by reference to businesses and occupations defined in s. 125 BPCPA. S. 125 defines a “collection agent.” Collection activities **require licensing unless the person is exempt.**

- C took “an assignment of a debt due to another person for the purpose of collection or attempting to collect payment of the debt” – they were engaged in a designated activity and should have obtained a license.
- C was actively involved in trying to collect the debt from S – correspondence from C to S asking to satisfy debt – on this second basis, they were required to be licensed but failed to do so

#### Compliance With the Act

- Before attempting to collect the debt, they were required, pursuant to s. 115 to notify S of: (a) the name of the creditor with whom the debt was incurred, (b) the amount of the debt, and (c) the identity and authority of the collector to collect the debt from the debtor.
- Also required to give S notice of the assignment of the MBNA debt – C failed to provide details about the debt and a copy of the assignment to S in accordance with timelines in the legislation

#### Damages

S. 192 permits a court to order a defendant to pay compensation to a consumer for pecuniary loss suffered by them as a result of the commission of the offence. However, s. 192(2) makes clear that compensation is not available under s. 192 where the consumer has commenced an action against the defendant under s. 171 for the same transaction.

- S chose not to pursue any administrative options by reporting the offending behavior to the director. Instead, from the time he filed his counterclaim, he made clear he sought a set-off against the debt by way of

compensation or relief. It is appropriate to consider any damages S may recover under s. 171 despite lack of notice to the director.

## Privacy

<b>Personal Information Protection Act [ss. 12(1)(i) &amp; 15(1)(j)]</b>	
PIPA creates prohibitions on collections, use and disclosure of personal information and applies to all organizations engaged in commercial activity.	
<b>12(1)(i)</b> – Collection of Personal Information Without Consent <i>- 12 &amp; 15 - Organization can pass information along for debt collection activities without consent.</i>	<b>(1)</b> An organization <u>may collect</u> personal information about an individual <u>without consent</u> or from a <u>source other than the individual</u> , if... <b>(j)</b> the personal information is necessary to facilitate (i) the collection of a debt owed to the organization, or (ii) the payment of a debt owed by the organization
<b>15(1)(j)</b> – Use of Personal Information Without Consent	<b>(1)</b> An organization <u>may use</u> personal information about an individual <u>without the consent</u> of the individual, if... <b>(j)</b> the personal information is needed to facilitate (i) the collection of a debt owed to the organization, or (ii) the payment of a debt owed by the organization

## OBTAINING JUDGMENT I

### Limitation Periods

<b>Limitation Act [ss. 1, 6, 7, 8, 21(1), 23, 24(1), (2), (6), (7), &amp; (10)]</b>	
<p><b>1</b> – Definitions</p>	<p>“<b>claim</b>” means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission  “<b>extraprovincial judgment</b>” means a judgment, order or award other than a local judgment  “<b>judgment</b>” means an extraprovincial judgment or a local judgment</p>
<p><b>6</b> – Basic Limitation Period</p>	<p><b>(1)</b> Subject to this Act, a court proceeding in respect of a claim must not be commenced more than <b>2</b> years after the day on which the claim is <u>discovered</u>.  <b>(2)</b> The <b>2</b> year limitation period established under <b>(1)</b> does not apply to a court proceeding referred to in s. 7.</p>
<p><b>7</b> – Basic Limitation Period for Court Proceeding to Enforce or Sue on a Judgment</p> <p><i>- A judgment becomes enforceable when judgment is issued, when damages are awarded</i></p>	<p>Subject to this Act, a court proceeding must not be commenced to enforce or sue on a judgment for the payment of money or the return of personal property,</p> <p><b>(a)</b> if the judgment is a local judgment, more than <b>10</b> years after the day on which the judgment becomes enforceable, or</p> <p><b>(b)</b> if the judgment is an extraprovincial judgment, after the earlier of the following:</p> <p style="margin-left: 20px;">(i) the expiry of the time for enforcement in the jurisdiction where the extraprovincial judgment was made;</p> <p style="margin-left: 20px;">(ii) the date that is <b>10</b> years after the judgment became enforceable in the jurisdiction where the extraprovincial judgment was made.</p>
<p><b>8</b> – General Discovery Rules</p>	<p>A claim is discovered by a person on the <u>first day on which the person knew or reasonably ought to have known all of the following</u>:</p> <p style="margin-left: 20px;"><b>(a)</b> that injury, loss or damage had occurred;</p> <p style="margin-left: 20px;"><b>(b)</b> that the injury, loss or damage was caused by or contributed to by an act or omission;</p> <p style="margin-left: 20px;"><b>(c)</b> that the act or omission was that of the person against whom the claim is or may be made;</p> <p style="margin-left: 20px;"><b>(d)</b> that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss, or damage.</p>
<p><b>21</b> – Ultimate Limitation Period</p> <p><i>-acknowledgment reset’s the clock for both basic and limitation.</i></p>	<p><b>(1)</b> Even if the limitation period established by any other section of this Act in respect of a claim has not expired, a court proceeding must not be commenced with respect to the claim more than <b>15</b> years after the day on which the act or</p>

<p><b>23</b> – Completion of Enforcement Process</p>	<p>omission on which the claim is based took place.</p> <p><b>(1)</b> Despite any other provision of this Act, if, on the expiry of the limitation period established by s. 7 with respect to proceedings on a judgment, an enforcement process is outstanding, the judgment creditor or the judgment creditor’s successors may do any of the following:</p> <ul style="list-style-type: none"> <li>(a) continue proceedings on an unexpired writ of execution, but the writ may not be renewed,</li> <li>(b) commence or continue proceedings against land on a judgment registered under Part 5 of the COEA, but the registration may not be renewed unless those proceedings have been commenced;</li> <li>(c) continue proceedings in which a charging order is claimed.</li> </ul> <p><b>(2)</b> If a court makes an order <u>staying execution on a judgment</u>, the running of limitation period established by this Act for proceedings on that judgment is <u>postponed or suspended for as long as the order staying execution is in force</u>.</p>
<p><b>24</b> – Limitation Periods Extended if Liability Acknowledged  <i>-acknowledgment reset’s the clock for both basic and limitation.</i></p>	<p><b>(1)</b> If, <u>before the expiry</u> of either of the limitation periods that, under this Act, apply to a claim, a person <b>acknowledges liability</b> in respect of the claim,</p> <ul style="list-style-type: none"> <li>(a) the claim must not be considered to have been discovered on any day earlier than the day on which the acknowledgment is made, and</li> <li>(b) the act or omission on which the claim is based is <u>deemed to have taken place on the day on which the acknowledgment is made</u>.</li> </ul> <p><b>(2)</b> An acknowledgement of liability in respect of a claim for <b>interest</b> is also an acknowledgement of liability in respect of a claim for</p> <ul style="list-style-type: none"> <li>(a) the outstanding principal, if any, and</li> <li>(b) interest falling due after the acknowledgement is made.</li> </ul> <p><b>(6)</b> Subsection (1) does <b>not apply</b> to an acknowledgement, other than an acknowledgement referred to in (7), (8), or (9), unless the acknowledgement is</p> <ul style="list-style-type: none"> <li>(a) <b>in writing</b>,</li> <li>(b) <b>signed</b> by hand or by electronic signature within the meaning of the Electronic Transactions Act,</li> <li>(c) made by the person making the acknowledgement or the person’s <u>agent</u>, and</li> <li>(d) made to the person with the claim, the person’s <u>agent</u> or an official <u>receiver</u> or <u>trustee</u> acting under the BIA (Canada).</li> </ul> <p><b>(7)</b> In the case of a claim for payment of a liquidated sum, <b>part payment of the sum</b> by the person against whom the claim is or may be made or by the person’s agent is an <u>acknowledgement</u> by the person against whom the claim is or may be made of liability in respect of the claim.</p> <p><b>(10)</b> This section applies to an acknowledgement of liability in respect of a claim for payment of a liquidated sum <u>even though the person making the acknowledgement refuses or</u></p>

	<b>does not promise to pay</b> the sum or balance of the sum still owing.
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<b>Interpretation Act s. 25</b>	
<b>25</b> – Calculation of time or age	<p>(2) If the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday.</p> <p>(4) In the calculation of time expressed as clear days, weeks, months or years, or as “at least” or “not less than” a number of days, weeks, months or years, the first and last days must be excluded.</p> <p>(5) In the calculation of time not referred to in (4), the first day must be excluded and the last day included.</p> <p>(7) A specified time of day is a reference to Pacific Standard Time, or 8 hours behind Greenwich mean time, unless Daylight Saving time is being used or observed on that day.</p>

<b>Court Order Enforcement Act s. 29(1)</b>	
<b>29</b> – Application for Registration of Judgment	<p>(1) If a judgment has been given in a court in a <b>reciprocating state</b>, the judgment creditor may apply to have the judgment registered in the Supreme Court unless</p> <p>(a) the time for enforcement has expired in the reciprocating state, or</p> <p>(b) 10 years have expired after the date the judgment became enforceable in the reciprocating state.</p>
<b>Jurisdictions Declared to be Reciprocating</b>	<p><i>Under Part 2 (section 37) of the Act</i></p> <p><i>In Canada:</i></p> <p>Alberta, Province of  Manitoba, Province of  New Brunswick, Province of  Newfoundland, Province of  Nova Scotia, Province of  Ontario, Province of  Prince Edward Island, Province of  Saskatchewan, Province of  Northwest Territories  Nunavut Territory  Yukon Territory</p> <p><i>In Australia:</i></p> <p>New South Wales  Queensland, State of  South Australia  Tasmania  Victoria, State of  Australian Capital Territory  Australian Antarctic Territory  Coral Sea Islands Territory  Heard and McDonald Islands Territory  Northern Territory of Australia  Territory of Ashmore and Cartier Islands</p> <p><i>In the United States of America:</i></p> <p>Washington, State of</p>

	Alaska, State of California, State of Oregon, State of Colorado, State of Idaho, State of <i>In Europe:</i> Federal Republic of Germany including Land Berlin Austria, Republic of <i>Under Part 4 of the Act:</i> United Kingdom
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<b>Enforcement of Canadian Judgments and Decrees Act [s. 5(1)]</b>	
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<b>5</b> – Time Limit for Registration and Enforcement	<p><b>(1)</b> A Canadian judgment that requires a person to pay money must <u>not be registered or enforced</u> under this Act</p> <p><b>(a)</b> <u>after the time for enforcement has expired in the province or territory where the judgment was made, or</u></p> <p><b>(b)</b> <u>later than 10 years after the date on which the judgment became enforceable in the province or territory where it was made.</u></p>
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<b>Financial Administration Act, s 86.1(1), (2), (3)</b>	
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<b>86.1</b> – Limitation period for government claims	<p><b>“claim”</b> has the same meaning as in the <i>Limitation Act</i></p> <p><b>“government claim”</b> means a claim in debt, or any other claim for payment or recovery of money in a specific or ascertainable amount, by</p> <p><b>(a)</b> the government</p> <p><b>(b)</b> a corporation or other organization within the taxpayer-supported government reporting entity</p> <p><b>(c)</b> a corporation or other organization that is not within the taxpayer-supported government reporting entity but was within the taxpayer-supported government reporting entity <u>on or after the date</u> on which the act or omission on which the claim is based took place and <u>before the expiry of the limitation period</u> created by this section applicable to the claim,</p> <p>and includes a claim by <u>ICBC</u> for vehicle indebtedness</p> <p><b>“limitation period”</b> has the same meaning as in the <i>Limitation Act</i></p> <p><b>(2)</b> Subject to <b>(3)</b>, the Limitation Act applies to government claims, and for that purpose,</p> <p><b>(a)</b> a reference to a claim in that Act is deemed to be a reference to a government claim, and</p> <p><b>(b)</b> the references in s. 6 of that Act to 2 years and a 2 year limitation period are, when applied to the government claim, <b>deemed to be references to 6 years and a 6 year limitation period respectively.</b></p> <p><b>(3)</b> Subsection <b>(2)</b> does not apply to a government claim for which a limitation period has been established under an enactment other than the <i>Limitation Act</i>.</p>
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## Methods to Obtain Judgment

### Determine the Proper Court for the action

- Monetary limit in Small Claims is \$25,000
- Supreme Court has no monetary limit, but there is a rule that if a settlement in SC is reached that is less than \$25,000, can only recover disbursements not costs.

## Default Judgment

The rules for obtaining a default judgment are set out in **Small Claims Rules Rule 6**, and **Supreme Court Civil Rules Rule 3-8**. A default judgment may be obtained in supreme or provincial court. It must be a claim for a debt or liquidated damages (amount of money is easily ascertainable) and the defendant has failed to enter an appearance or reply. The only way a default judgment can be obtained is if the defendant fails to respond by the time limit (21 days supreme court; 14 days provincial court). Proof of service is critical.

According to the **Law Society of BC**, if acting as counsel and in a position to file for default, it is bad conduct to do so without warning opposing counsel of your intention to do so, unless the client has specifically instructed you not to do so.

### Setting Aside a Default Judgment

The court may set aside a default judgment under **Rule 3-8(11)** on two grounds:

1. No service
2. Procedural Defect:
  - a. Claim is not for a liquidated amount
  - b. Claim exceeds court's jurisdiction

The Court may also exercise its discretion in setting aside a default order, even if the defendant was put on notice and there are no procedural defects present. However, the D must satisfy heavy requirements based on affidavit evidence - **Miracle Feeds**

1. That he did not willfully or deliberately fail to enter an appearance or file a defence to the P's claim
2. That he made application to set aside the judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or gave an explanation for any delay
3. That he has a meritorious defence or at least a defence worthy of investigation.

### Small Claims Rules – Rule 6 – If a Defendant Does Not Reply to a Claim

<b>6 (1)</b> – Claimant May Ask for Default Order	If a defendant does not file a reply within the time limit (14 days - see Rule 3 (4)), the claimant may ask the registrar for a default order.
<b>6 (2)</b> – Judge's Permission Needed in Certain Cases	No default order will be made on a counterclaim or 3 <sup>rd</sup> party notice
<b>6 (4)</b> – If a Claim is for Debt	If a claim is for debt and the claimant completes the required steps in <b>(3)</b> , the registrar must make a default order requiring the defendant to pay immediately the amount claimed plus expenses and any interest the claimant is entitled to.

6 (12) – How Payment May be Collected	The creditor may collect payment under a default order by taking any of the steps listed in Rule 11(11)
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**Supreme Court Civil Rules – Rule 3-8**

3-8 (1) – Default in Filing and Serving a Response to Civil Claim	A plaintiff may proceed against a defendant under this rule if <ul style="list-style-type: none"> <li>(a) that defendant has not filed and served a response to civil claim, and</li> <li>(b) the period for filing and serving the response to civil claim has expired.</li> </ul>
3-8 (2) – Filings Required	A plaintiff who wishes to proceed against a defendant under this rule must file <ul style="list-style-type: none"> <li>(a) <b>proof of service</b> of the notice of civil claim on that defendant,</li> <li>(b) proof that the defendant has <b>failed to serve a response</b> to civil claim,</li> <li>(c) a requisition endorsed by a registrar with a notation that no response to civil claim has been filed by that defendant, and</li> <li>(d) a draft default judgment order in Form 8.</li> </ul>
3-8 (3) – Claim for Specified or Ascertainable Amount	If the plaintiff's action against a defendant includes a claim for recovery of money in a <b>specified or ascertainable amount</b> , the plaintiff may <ul style="list-style-type: none"> <li>(a) on that claim, obtain judgment in Form 8 against that defendant for an amount not exceeding the total of <ul style="list-style-type: none"> <li>(i) the <u>amount</u> claimed,</li> <li>(ii) the <u>interest</u>, if any, to which the plaintiff is entitled, and</li> <li>(iii) <u>costs</u>, and</li> </ul> </li> <li>(b) proceed against one or more of the defendants, including the defendant against whom judgment was obtained, on any other claims brought in the action that are not barred as a result of the judgment referred to in paragraph (a).</li> </ul>
3-8 (11) – Court May Set Aside or Vary Default Judgment	The court may set aside or vary any judgment granted under this rule. <b>[Miracle Feeds]</b>

**Miracle Feeds v. D & H**

*Improper advice from lawyer, D actually did have a valid defense, new lawyer proceeded to have default set aside. Held: D met all criteria to set aside a default order. The court must be satisfied that it is fair to the D to set aside the judgment. There must be some kind of blameworthiness that attaches to the D to not set it aside.*

**Summary Judgment and Summary Trial**

**Summary Judgment** is available only at the Supreme Court level, under **Rule 9-6**. It permits the court to grant a judgment without a trial, so long as there is **no genuine triable issue** or **genuine defence**. The plaintiff must show the judgment is obviously in its favour. To rebut, the D must show there is a triable issue. Debt actions are most likely to

be successful in a summary judgment proceeding. If there are triable issues that make it inappropriate to order a summary judgment, then the P may apply for a summary trial.

**Summary Trial** is available only at the Supreme Court level, under **Rule 9-7**. It gives the court the power to grant judgment based on affidavit evidence (**9-7(5)**). The crucial question is whether the court can achieve a just and fair result proceeding by summary trial.

**Both** of these applications may be heard by a Master in Chambers.

<b>Supreme Court Civil Rules Rule 9-6 &amp; 9-7</b>	
<b>9-6 (5) – Power of Court</b>	On hearing an application under subrule (2) or (4), the court, <ul style="list-style-type: none"> <li><b>(a)</b> if satisfied that there is <u>no genuine issue for trial</u> with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,</li> <li><b>(b)</b> if satisfied that the <u>only genuine issue is the amount</u> to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,</li> <li><b>(c)</b> if satisfied that the <u>only genuine issue is a question of law</u>, may determine the question and pronounce judgment accordingly, and</li> <li><b>(d)</b> may make any other order it considers will further the object of these Supreme Court Civil Rules.</li> </ul>
<b>9-7 (5) – Evidence on Application</b>	Unless the court otherwise orders, on a summary trial application, the applicant and each other party of record may tender evidence by any or all of the following: <ul style="list-style-type: none"> <li><b>(a)</b> affidavit;</li> </ul>

### Fast Track Litigation

**Supreme Court Civil Rules Rule 15-1**, sets out a fast track litigation process for claims of **\$100,000** or less to allow for expedited setting of dates and limiting the cost of proceedings generally. Examinations for discovery are limited to 2 hours.

**Small Claims Rules, Rule 9.1** is a **Pilot Project for Robson Square and Richmond Small Claims Registry for Simplified Trials for Claims up to \$5,000**.

**Small Claims Rules, Rule 9.2** is a **Pilot Project for the Robson Square Small Claims Registry for Summary Trials for Financial Debt**. It applies to a debt claim filed at Robson Square Registry (**9.2(1)**). It provides a streamlined process for a trial. A judge may conduct a trial without complying with the formal rules of procedure and evidence (**9.2(9)**).

## Registration and Action on Foreign Judgments

### 3 Ways to Enforce a Judgment Obtained From a Jurisdiction Outside BC

1. **Enforcement of Canadian Judgments and Decrees Act** (Can judgment only -simplest)
2. **Court Order Enforcement Act Registration Proceedings** (in or outside Can – only reciprocal jurisdictions)
3. **Common Law**
  - If there is a real and substantial connection between the foreign jurisdiction and the subject matter that gave rise to the claim in the case, the foreign judgment is enforceable.

<b>Enforcement of Canadian Judgments and Decrees Act [ss. 1, 2-5, 6(3), 7-10]</b>	
<b>1 – Definitions</b> <i>- A Canadian judgment is a judgment made in Canada</i>	<b>“Canadian Judgment”</b> means a judgment, decree or order made in a civil proceeding by a court of a province or territory of Canada other than BC.
<b>2 – Right to register Canadian Judgment</b> <i>- To register a judgment requiring a person to pay money, it must be a final judgment</i>	<b>(1)</b> Subject to <b>(2)</b> , a Canadian judgment, whether or not the judgment is final, may be registered under this Act for the purpose of enforcement. <b>(2)</b> A Canadian judgment that required a person to pay money <u>may not be registered under this Act for the purpose of enforcement unless it is a <b>final judgment.</b></u>
<b>3 – Procedure for registering Canadian Judgment</b>	<b>(1)</b> A Canadian judgment is registered under this Act by paying the fee prescribed by regulation and by <b>filing in the registry of the Supreme Court</b> <b>(a)</b> a <u>copy of the judgment, certified as true</u> by a judge, registrar, clerk or other proper officer of the court that made the judgment, and <b>(b)</b> the <u>additional information or material required</u> by the applicable Rules of Court.
<b>4 – Effect of Registration</b>	Subject to <b>5</b> and <b>6</b> , a registered Canadian judgment <b>(a)</b> may be <b>enforced in BC as if it were an order or judgment of, and entered in, the Supreme Court,</b>
<b>5 – Time Limit for Registration and Enforcement</b>	<b>(1)</b> A Canadian judgment that required a person to pay money must not be registered or enforced under this Act <b>(a)</b> after the <u>time for enforcement has expired in the province or territory</u> where the judgment was made, or <b>(b)</b> later than <b>10 years</b> after the date on which the judgment became enforceable in the province or territory where it was made.
<b>6(3) – Application for Directions</b> <i>-This act recognizes orders from other provinces as valid and the BC court will not look behind the judgments</i>	<b>(3)</b> The Supreme Court must not make an order staying or limiting the enforcement of a registered Canadian judgment solely on the grounds that <b>(a)</b> court <u>lacked jurisdiction</u> over the subject matter of the proceeding that led to the judgment, or over the

	<p>party against whom enforcement is sought</p> <p><b>(b)</b> the Supreme Court would have come to a <u>different decision</u> on a finding of fact or law or on an exercise of discretion from the decision of court</p> <p><b>(c)</b> a <u>defect existed</u> in the process or proceeding leading to the judgment</p>
<b>7 – Interest on Registered Judgment</b>	<p><b>(1)</b> To the extent that a registered Canadian judgment required a person to pay money, interest is payable as if it were an order or judgment of the Supreme Court</p> <p><b>(2)</b> For the purposes of calculating the interest payable under <b>(1)</b>, the amount owing on the registered Canadian judgment is the total of</p> <p><b>(a)</b> the amount owing on that judgment on the date it is registered under this Act, and</p> <p><b>(b)</b> interest that has accrued to that date under the laws applicable to the calculation of interest on that judgment in the province or territory where it was made.</p>
<b>8 – Recovery of Registration Costs</b> <i>-Creditor may recover all costs incurred in registration of the foreign judgment</i>	<p>An enforcing party is entitled to recover all costs, charges and disbursements</p> <p><b>(a)</b> reasonably incurred in the registration of a Canadian judgment under this Act, and</p> <p><b>(b)</b> assessed or allowed by a registrar of the Supreme Court.</p>
<b>9 – Enforcing Parties’ Other Rights Not Affected by Registration</b>	<p>Registering a Canadian judgment does not affect an enforcing party’s rights to bring an action on the <u>Canadian judgment</u> or on the <u>original cause of action</u>.</p>

<b>Court Order Enforcement Act [ss. 28, 29, 33, 34, 38]</b>	
<b>29 – Application for Registration of Judgment</b>	<p><b>(1)</b> If a judgment has been given in a court in a <b>reciprocating state</b>, the judgment creditor may apply to have the judgment registered in the Supreme Court, unless</p> <p><b>(a)</b> the time for enforcement has <b>expired</b> in the reciprocating state, or</p> <p><b>(b)</b> <u>10 years have expired</u> after the date the judgment became enforceable in the reciprocating state</p> <p><b>(2)</b> An order for registration under this Part may be made <b>without notice to any person in any case</b> in which</p> <p><b>(a)</b> the judgment debtor</p> <p>(i) was personally served with process in the original action, or</p> <p>(ii) although not personally served, appeared or defended, or attorned or otherwise submitted to the jurisdiction of the original court, and</p> <p><b>(b)</b> under the law in force in the state where the judgment was made,</p> <p>(i) the time in which an appeal may be made against the judgment is expired and no appeal is pending, or</p> <p>(ii) an appeal has been made and disposed of.</p> <p><b>(5)</b> In a case to which <b>(2)</b> does not apply, <b>notice of application</b> for the order as is required by the rules or as the judge considers sufficient <u>must be given to the judgment debtor</u>.</p> <p><b>(6)</b> An order for registration must not be made if the court to</p>

	<p>which the application for registration is made is satisfied that</p> <p>(a) the original court acted either</p> <p>(i) without jurisdiction under conflict of law rules, or</p> <p>(ii) without authority under the law in force in the state where the judgment was made</p> <p>(b) the judgment debtor, being a person who was neither <u>carrying on business nor ordinarily resident</u> in the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court</p> <p>(c) the judgment debtor was not duly <b>served</b> with the process of the original court and did not appear, even though he or she was ordinarily resident or carrying on business in the state of that court or had agreed to submit to jurisdiction.</p> <p>(d) the judgment was obtained by fraud</p> <p>(e) an appeal is pending or the time in which an appeal may be taken has not expired</p>
<p><b>33 – Effect of Registration</b>  <i>-Same effect as local judgment registration</i>  <i>Except, if you register without notice to the debtor under 29(2), you cannot act on it until a month after the judgment debtor has notice of the registration</i></p>	<p>If a judgment is registered under this Part,</p> <p>(a) the judgment, from the date of registration, is of <b>the same effect as if it had been a judgment given originally in the registering court on the date of registration</b>, and proceedings may be taken on it accordingly, <b>except</b> that if the registration is made under an order made <u>without notice to any person</u>, a sale or other disposition of any property of the judgment debtor must not be made under the judgment before the expiration of <b>one month</b> after the judgment debtor has had notice of the registration or a further period as the registering court may order.</p>
<p><b>Jurisdictions Declared to Be Reciprocating</b></p>	<p><i>Under Part 2 (section 37) of the Act</i></p> <p><i>In Canada:</i></p> <p>Alberta, Province of  Manitoba, Province of  New Brunswick, Province of  Newfoundland, Province of  Nova Scotia, Province of  Ontario, Province of  Prince Edward Island, Province of  Saskatchewan, Province of  Northwest Territories  Nunavut Territory  Yukon Territory</p> <p><i>In Australia:</i></p> <p>New South Wales  Queensland, State of  South Australia  Tasmania  Victoria, State of  Australian Capital Territory  Australian Antarctic Territory  Coral Sea Islands Territory  Heard and McDonald Islands Territory  Northern Territory of Australia</p>

	Territory of Ashmore and Cartier Islands <i>In the United States of America:</i> Washington, State of Alaska, State of California, State of Oregon, State of Colorado, State of Idaho, State of <i>In Europe:</i> Federal Republic of Germany including Land Berlin Austria, Republic of <i>Under Part 4 of the Act:</i> United Kingdom
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## PRE-JUDGMENT EXECUTION

The **general rule** is that you cannot move against someone's assets without a judgment (*Lister & Stubbs*).

**Pre-judgment execution** remedies are **extraordinary** remedies used to affect the judgment debtor's property in **advance** of a judgment.

### Exceptions

1. Property or funds at issue in the dispute
2. Court can make pre-judgment orders with respect to D's property where failure to do so would undermine the integrity of the court process
3. To prevent fraud
4. Quia timet injunctions – where there is a real or impending threat that assets will be removed from the jurisdiction, or to dissipate or convert them (Mareva injunctions)

### Supreme Court Civil Rules, Rule 10-4 – Interlocutory Injunctions

(1) an application for a pre-trial injunction may be made by a party whether or not a claim for an injunction is included in the relief claimed

(2) an application for a pre-trial injunction may be made before the start of a proceeding and the injunction may be granted on terms providing for the start of the proceeding

(5) Unless the court otherwise orders, an order for a pre-trial or interim injunction must contain the applicant's undertaking to abide by any order that the court may make as to damages.

### Law & Equity Act, s. 39 – Injunction Granted by Interlocutory Order

(1) an injunction may be granted by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

(2) An order made under (1) may be made unconditionally or on terms and conditions the court thinks just.  
– [Mareva Injunction]

**Mareva injunctions** are equitable interlocutory injunctions that prohibit anyone named in the order from selling, encumbering, or otherwise dealing with D's property except as permitted by the injunction. They are an extraordinary remedy b/c they affect the D's property before the trial.

- Only available in Supreme Court
- May be used to effectively force a settlement
- Generally, do not require notice

A Mareva injunction can extend to assets outside the jurisdiction of the court issuing the injunction if the concealment or disposition of those assets would frustrate the judgment (*Mooney v. Orr*)

To obtaining a Mareva injunction, the party seeking must: – *Tracy v. Instalogs*

1. Establish a strong prima facie case or good arguable case

2. Prove the Balance of Convenience favors granting the order - balance the interests of both parties to reach a just and convenient result
  - a. Evidence that establishes existence of assets in BC (domestic injunction) or outside (national/international injunction)
  - b. Real risk of their disposal or dissipation
  - c. Irreparable harm
  - d. Past conduct

### **Tracy v. Instalogs**

*Held: Mareva injunction upheld against the company, set aside against individual officers, directors, shareholders b/c they did not meet good arguable case threshold and balance of convenience did not favour them.*

### **Judgments Against Lawyers**

#### **Law Society Rules - Standards of Financial Responsibility**

**3-43.1** Instances in which a lawyer has failed to meet a minimum standard of financial responsibility include, but are not limited to, the following:

(a) a **lawyer** against whom a monetary judgment is entered and who does not satisfy the judgment within **7 days after the date of entry**;

**3-44 (1)** A lawyer against whom a monetary judgment is entered and who does not satisfy the judgment within 7 days after the date of entry must immediately **notify** the Executive Director in writing of

(a) the circumstances of the judgment, including whether the judgment creditor is a client or former client of the lawyer, and

(b) his or her proposal for satisfying the judgment

**3-43** This Division applies to the following as it does to a lawyer, with the necessary changes and so far as it is applicable:

(a) a non-practising member;

(b) a retired member;

(c) an articled student;

(d) a practitioner of foreign law;

(e) a visiting lawyer permitted to practise law in British Columbia

(f) a law corporation.

## DEBTOR EXAMINATIONS

### Examination in Aid of Execution

May be used concurrently w/other execution processes.

#### Supreme Court Civil Rules, Rule 13-4

<p><b>(2)</b> – Examination of Judgment Debtor  <i>-SCOPE of questions</i>  <i>Wider scope than Subpoena to Debtor</i>  <i>- JC need not attempt to satisfy the judgment by way of execution before conduction examination, need only be <u>entitled</u> to commence enforcement proceedings</i></p>	<p>If a judgment creditor is <b>entitled</b> to issue execution on or otherwise enforce an order of the court, the judgment creditor may <b>examine</b> the judgment debtor for discovery as to</p> <ul style="list-style-type: none"> <li><b>(a)</b> any matter pertinent to the enforcement of the order,</li> <li><b>(b)</b> the reason for non-payment or non-performance of the order,</li> <li><b>(c)</b> the income and property of the judgment debtor,</li> <li><b>(d)</b> the debts owed to and by the judgment debtor,</li> <li><b>(e)</b> the disposal the judgment debtor has made of any property either before or after the making of the order,</li> <li><b>(f)</b> the means the judgment debtor has, had or may have of satisfying the order, and</li> <li><b>(g)</b> whether the judgment debtor intends to obey the order or has any reason for not doing so.</li> </ul>
<p><b>(3)</b> – Examination of Corporate, Partnership or Firm Judgment Debtor</p>	<p>An <u>officer or director of a corporate judgment debtor</u>, or a person liable to execution on the order in the case of a <u>partnership or firm judgment debtor</u>, may, <b>without an order</b>, be examined for discovery on the matters set out in subrule <b>(2)</b>.</p>
<p><b>(4)</b> - Limitation</p>	<p>Unless the court otherwise orders, a person examined under subrule <b>(2)</b> or <b>(3)</b> must not be further examined in the <u>same proceeding for a year</u>.</p>
<p><b>(5)</b> – Examination of Person Other than Judgment Debtor</p>	<p>On being satisfied that any <u>other person</u> may have knowledge of the matters set out in subrule <b>(2)</b>, the court may <b>order</b> that <b>other person to be examined for discovery</b> concerning the person's knowledge.</p>
<p><b>(8)</b> – Use of Examination  <i>-How JC can use information gained from examination to help its enforcement proceedings</i></p>	<p>Any part of an examination for discovery under this rule may be <u>given in evidence</u> in the same or any subsequent proceeding between the parties to the proceeding or between the judgment creditor and the person examined for discovery.</p>

(10) – Service of Notice	Before conducting an examination for discover under this rule, the party wishing to conduct the examination must: <b>(a)</b> if the person to be examined is a party of record to, and has a <b>lawyer</b> in, the action, ensure that, at least <b>7 days</b> before the examination, (i) appointment served on lawyer, and (ii) witness fees tendered to lawyer <b>(b)</b> in any other case, at least <b>7 days before examination</b> (i) appointment served on person, and (ii) witness fees tendered to person
(11) – Production of Documents	Unless court otherwise orders, person to be examined must produce for inspection on examination all documents in his/her possession or control, not privileged, relating to the matters in <b>(2)</b> .

**Subpoena to Debtor**

This avenue should be taken when creditor has exhausted all attempts to enforce an order and wants a specific order relating to the way debt should be repaid. The matters that can be discussed are narrower in scope than an examination in aid of execution **(13-3 (4))**. Cannot be used w/other execution proceedings.

A **debtor** prefers this method b/c it leads to reasonable payment schedules, minimal information provided to the creditor, and so long as payment are being made the creditor may not initiate other enforcement proceedings.

<b>Supreme Court Civil Rules, Rule 13-3</b>	
<b>(1)</b> - Subpoena to Debtor <i>-cannot issue subpoena if writ of execution outstanding</i>	A creditor who has obtained an order of the court for recovery or payment or money or costs or both may issue a subpoena on filing an affidavit showing that the order is not satisfied and that <b>no writ of execution</b> issued by the creditor <b>is outstanding</b> against the debtor.
<b>(2)</b> – To Whom Subpoena Must be Directed	<b>(a)</b> if debtor is an individual, to the debtor <b>(b)</b> if debtor is corporation, to officer or director of the debtor
<b>(3)</b> – Service of subpoena	Subpoena must be served at least <b>7 days before the date of the examination under (4)</b> , and with the subpoena must be tendered any expenses the person served would be entitled to were he or she required to attend court as witness.
<b>(4)</b> – Examination of Debtor <i>-SCOPE of questions</i>	The examination referred to in a subpoena issued under <b>(1)</b> must take place before an examiner and must be on oath as to the following matters: <b>(a)</b> the <u>income and property</u> of the debtor; <b>(b)</b> the <u>debts owed to and by</u> the debtor <b>(c)</b> the <u>disposal</u> the debtor has made of any property <b>(d)</b> the <u>means</u> the debtor has, or has had, or in future may have, of <u>satisfying the order</u>
<b>(8)</b> – Debtor Refusing to Attend or Respond <i>- If D refuses to attend or respond, examiner can order committal or apprehension</i> <i>- Not a great option to compel payment</i>	If person subpoenaed <b>(a)</b> does not <u>attend</u> as required at the examination under subrule (4) or an adjournment of it, <b>(b)</b> <u>refuses to be sworn</u> or to affirm, or to answer one or more of the questions put to the person, <b>(c)</b> after an order to that effect, refuses or neglects to produce or permit to be inspected any document or property, or

	<p>(d) does not give answers that are to the satisfaction of the examiner, then</p> <p>(e) if the examiner is a master or registrar, (i) examiner must make a report and fix a time and place at which the creditor/person may attend and without notice, order <b>committal</b> or <b>apprehension</b>.</p> <p>(f) if the examiner is the court, the examiner may order committal.</p>
<p><b>(11) – Order for payment</b> -At examination, examiner may make a payment order</p>	<p>The examiner may make one or more of the following orders:</p> <p>(a) for the payment of the debt by instalments; (b) for the payment of the debt on or before a fixed date; (c) varying or rescinding any previous order; (d) for payment to be made to a registrar, to the creditor or to the creditor's lawyer; (e) fixing the costs payable by the debtor without assessment,</p>

### Small Claims Payment Hearing & Default Hearing

A **payment hearing** under **Rule 12** must occur before a party can ask for a **default hearing** under **Rule 13**. The purpose of the default hearing is to determine why the debtor has not complied with the payment schedule. The emphasis is on coming to a payment arrangement.

Small Claims Rules, Rule 12, 13	
<b>12(1) – Purpose of a Payment Hearing</b>	The purpose of a payment hearing is to allow a judge or justice of the peace to (a) assess the debtor's ability to pay, and (b) consider whether a payment schedule should be ordered.
<b>(2) – Parties May Request Payment Hearing</b>	A payment hearing will be held if it is (a) requested by the creditor under <b>(3)</b> (b) requested by debtor under <b>(10)</b> , or (c) ordered by judge under Rule 11 (5)(a)
<b>(4) – When Creditor is Not Allowed to Ask for a Payment Hearing</b>	A creditor who has an <b>order for seizure and sale outstanding</b> against the debtor may not ask for a payment hearing without the permission of a judge
<b>(5) – If the Debtor is a Company</b>	If the debtor is a company, an officer, director or employee of the company may be summoned to the payment hearing.
<b>(6) – If the Debtor is a Partnership</b>	If the debtor is a partnership, a partner may be summoned to the payment hearing.
<b>(7) – Service of the Summons</b>	A person named in a summons to a payment hearing must be served by leaving the summons with the person at least <b>7 days before the date of the payment hearing</b> .
<b>(10) – If Debtor Asks for a Payment Hearing</b>	To ask for a payment hearing, a debtor must complete a notice (Form 13), following the instructions on the form, and file it at the registry.
<b>(11) – Service of Notice on Creditor</b>	The debtor must serve the notice on the creditor at least <b>7 days before the date of the payment hearing</b> .

<p><b>(12) – What Happens at a Payment Hearing?</b> -SCOPE of questions</p>	<p>At any payment hearing under these rules, evidence may be heard about any of the following:</p> <ul style="list-style-type: none"> <li>(a) the income and assets of the debtor;</li> <li>(b) the debts owed to and by the debtor;</li> <li>(c) any assets that the debtor has disposed of since the claim arose;</li> <li>(d) the means that the debtor has, or may have in the future, of paying the amount owed.</li> </ul>
<p><b>(13) – A Payment Schedule May be Ordered</b></p>	<p>After hearing the evidence and submissions by the parties, the judge or justice of the peace may order a payment schedule specifying</p> <ul style="list-style-type: none"> <li>(a) the date by which the debt must be paid, or</li> <li>(b) the amounts and dates of the instalments.</li> </ul>
<p><b>(14) – If a Creditor Does Not Attend</b></p>	<p>If a creditor does not attend a payment hearing, the judge or justice of the peace may hold the hearing, cancel it or postpone it</p>

## GARNISHMENT

Garnishment can be used both pre and post judgment to intercept debts due from the garnishee to the defendant (**pre-judgment**) or the judgment debtor (**post-judgment**).

The Court Order Enforcement Act applies to **Small Claims** and **Supreme Court (s. 1 “judge” and “registrar”)**

### **Debt Due – COEA s. 3(1)**

**S. 3(1) “debt or money accruing due”**, wages or salary to be garnished must become due or payable within **7 days** after the day on which an affidavit has been sworn under **3(2)**. Therefore, garnishing of wages must be done within 7 days after swearing the affidavit.

- **S. 9(1) service** of a copy of the garnishment order binds the debts in the garnishee’s hands from the time of service or notice.
- The debt obligations must be owing at the time the garnishment order is **issued** and when it is served (*CIBC v. Dabrowski*).

### **Affidavit Requirements – COEA s. 3(2)**

With **pre-judgment garnishment**, the plaintiff (**s. 3(2)(a)**) must fulfill the affidavit requirements in (**s. 3(2)(d)**) for debts due from the garnishee to be attached.

- (i) that an action is pending,
- (ii) the time of its commencement,
- (iii) the nature of the cause of action,
- (iv) the actual amount of the debt, claim or demand, and
- (v) that it is justly due and owing, after making all just discounts

With **post-judgment garnishment**, the judgment creditor or person entitled to enforce a judgment (**s. 3(2)(b)**) must fulfill the affidavit requirements in (**s. 3(2)(c)**) for debts due from the garnishee to be attached.

- (i) that it has been recovered or made, and
- (ii) the amount unsatisfied

With **both**, the affidavit must state that the garnishee is indebted or liable to the defendant/judgment debtor/person entitled to enforce the judgment and is in the jurisdiction of the court (**s. 3(2)(e)**) and must state, with reasonable certainty, the place of residence of the garnishee (**3(2)(f)**).

Then, the judge/registrar may order that all debts due from garnishee to defendant/judgment debtor/person liable/ are **attached** to the extent necessary to answer the judgment recovered or to be recovered, or the order made.

<b>Debts Subject to Garnishment - COEA</b>	
<b>Wages</b>	<p>A pre-judgment garnishment order must not be made for attachment of salary or wages (s. 3(4)).</p> <p><b>Exemptions</b>  <b>70%</b> of wages are <b>exempt (3(5))</b>.            Also, the amount of the exemption <u>cannot be less than</u>, in the case of a person <u>without dependents</u>, <b>\$100/month (3(5)(a))</b>, or in the case of a person <u>with dependents</u>, <b>\$200/month (3(5)(b))</b>, or proportionately for a shorter period.</p> <p>If the wages are attached under a court order for alimony/maintenance <b>(3(7)(a))</b>, a duly executed separation agreement <b>3(7)(b))</b>, or an order under s. 18(2) of the <i>Family Maintenance and Enforcement Act 3(7)(c)</i>, the exemption is only: <b>50%</b> of wages due if the wages are less than <b>\$600/month</b> and <b>33 1/3%</b> for wages in excess of <b>\$600/month</b>.            But, the amount of the exemption must not be less than <b>\$100/month</b>, or proportionately for a shorted period <b>(3(7))</b>.</p> <p>One may apply to vary the order <b>(4(1))</b>. But, order may not have the effect of increasing the exemption to more than <b>90%</b> of wages due, or reduce wages, in the case of a person <u>without dependents</u>, to less than <b>\$100/month (4(4)(a))</b>, and in the case of a person <u>with dependents</u>, to less than <b>\$200/month (4(4)(b))</b>, or proportionately for a shorted period.</p> <p>Wages of <b>BC government employees</b> may be garnished <b>(6(2))</b>. Wages of <b>federal government employees</b> may be garnished (s. 5 <i>Garnishment, Attachment and Pension Diversion Act</i>)</p> <p>An employer must not <b>dismiss</b> or <b>demote</b> or terminate a contract of employment of an employee <u>merely because of the service of a garnishing order on the employer (27(1))</u>.</p>
<b>Employment deductions</b>	Cannot be garnished b/c not “debts due and owing” to the employee
<b>Rent</b>	Cannot be garnished b/c conditional debt; Overdue rent can be garnished
<b>Lawyer’s Trust Accounts</b>	<p>Lawyer’s trust accounts are bare trusts and can be garnished – BUT if the money is in the lawyer’s retainer (work has been done), it is not a debt due to the JD so cannot be garnished. Funds held for a client transaction may be garnished.</p> <p>The rights and obligations must have crystalized and the debt owed must be discernable, otherwise it will be a conditional debt and can not be garnished (<i>Ahaus</i>).</p>
<b>Joint Bank Accounts</b>	Cannot be garnished ( <i>Neidemayer v. Neidemayer</i> )
<b>Bank accounts/ Term Deposits</b>	<p>Bank accounts can be garnished. Cannot garnish a line of credit b/c not due to the judgment debtor – so long as the debtor can withdraw funds or write cheques on the account, they are a debt due from a financial institution.</p> <p>Term deposits can be garnished unless there is something conditional about them.</p> <p>Term deposits with a future date that have not yet matured (ie./ defined term deposits) can be garnished and the order will be paid when they mature (s. 15 <i>COEA</i>).</p>
<b>RRSPs</b>	All property in a registered plan is <b>exempt</b> from garnishment <b>(71.3(2))</b> <b>“Registered plan”</b> includes a DPDP, RRIF, RRSP <b>(71.3(2))</b> .

	<p>Property contributed to a registered plan after or within 12 months before the date on which the debt being enforced came due can be garnished (<b>71.3(3)</b>). <b>71.3(2)</b> does not apply to (b) property that has been or is being paid out of a registered plan (<b>71.3(3)</b>). For the purposes of (<b>3(b)</b>), if an enforcement process is pursued against property being paid out... that property is deemed, for the purposes of this Act, to be a debt due to the planholder for or with respect to the salary or wages (<b>71.3(4)</b>) – treats money withdrawn from RRSP as <i>wages</i> – can garnish 30%</p>
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### Setting Aside Post-judgment Garnishment Order

- If a garnishing order is made against a judgment debtor, he/she may apply to the registrar or the court for a payment of the judgment by installments (**5(1)**)
- If, under (**1**), the registrar/judge considers it “just in all the circumstances”, he/she must set the amounts and terms of payment of the judgment by installments (**5(2)** – See **Webster BELOW**)

### Setting Aside a Pre-judgment Garnishment Order

Pre-judgment garnishment is an “extraordinary remedy” and *ex parte* action, meaning it can be easily set aside, especially if the claimant has not meticulously followed the requirements of the Act. Two ways to set aside:

1. Attack the content of the affidavits by alleging they do not meet the requirements in s. **3(2)(d)**, **(e)**, and **(f)** (*Sims and Sons*).
  - a. The cause of action was not a claim for debt (**(3(2)(d)(iii))**)
    - i. No need to specify “debt” (*Sims and Sons*)
  - b. The actual amount of the debt, claim or demand cannot be ascertained (**(3(2)(d)(iv))**)
    - i. Can claim for the liquidated amount when the claim includes both liquidated and unliquidated amounts, so long as they are clearly separated in the statement of claim and the affidavit (*Sims and Sons*).
  - c. The amount is justly due and owing, after making all just discounts (**3(2)(d)(v)**)
2. Apply to the court to have the pre-judgment garnishment order set aside in whole or in part as “**just in all the circumstances**” under s. **5(2)**
  - a. In the **post-judgment context**: order is not released but judge/registrar must set the amounts and terms of payment of the judgment by installments (**5(2)**).
  - b. Each decision is decided on its merits
  - c. The leading test is from *Webster v. Webster* – The applicant must show, when relying on **5(2)**, that the garnishment order is **unnecessary**, OR **an abusive process took place**, OR **the order creates undue hardship**.

### Accessing Garnished Funds

- Money may be paid out by court order if notice is given to the defendant/judgment debtor/person liable on the judgment, unless the judge dispenses with the notice (**s. 12(1)**).
- Money may be paid out without a court order to JC or solicitor if **10 days notice** of the intended payment out is given to the judgment debtor and the judgment debtor has not, on or before the day on which the 10 days expire, filed notice of his/her intention to dispute the payment (**13(1)(a)**) OR the judgment was obtained by default and 3 months have expired from the day on which the money was paid into court (**13(1)(b)**).
- Money may be paid out without a court order to a P or solicitor if **consent in writing** of defendant to payment out is filed with the registrar or judge, setting out the exact amount to be paid out.

### Downfalls

- Costly, must be renewed every pay period
- Exemptions, may not get much
- Preferred method is to obtain a payment order or subpoena to debtor
- Time consuming, expensive, rare to get a continuing order

- Appeals under s. 5 (undue hardship) has become “cottage industry”

## Pre-judgment Garnishment

### Court Order Enforcement Act [ss. 3(1), (2), (4), 5, 9]

<b>3(2) – Affidavit Requirements</b>	<p>A judge or registrar may, on application made without notice to any person by</p> <p style="margin-left: 20px;"><b>(a)</b> a <b>plaintiff</b> in an action on affidavit by himself or herself or his or her solicitor or some other person aware of the facts, stating</p> <p style="margin-left: 20px;"><b>(d) if a judgment has not been recovered,</b></p> <p style="margin-left: 40px;">(i) that an action is pending,</p> <p style="margin-left: 40px;">(ii) the time of its commencement,</p> <p style="margin-left: 40px;">(iii) the nature of the cause of action,</p> <p style="margin-left: 40px;">(iv) the actual amount of the debt, claim or demand, and</p> <p style="margin-left: 40px;">(v) that it is justly due and owing, after making all just discounts</p> <p>and stating in either case</p> <p style="margin-left: 20px;"><b>(e)</b> that <b>any other person</b>, hereafter called the garnishee, is indebted or liable to the defendant, judgment debtor, or person liable to satisfy the judgment or order, and is in the jurisdiction of the court, and</p> <p style="margin-left: 20px;"><b>(f)</b> with reasonable certainty, the place of residence of the garnishee</p> <p><b>order</b> that all debts due from garnishee to defendant/judgment debtor/person liable/ is <b>attached</b> to the extent necessary to answer the judgment recovered or to be recovered, or the order made.</p>
<b>3(4) – No Pre-judgment Garnishment Order for Salary or Wages</b>	<p>An order <b>must not be made</b> under this Part for the attachment of a debt due to an employee for the employee's salary or wages before a judgment or order for the payment of money has been obtained against the employee in the proceeding.</p>
<b>5 – Payments by Installments</b>	<p><b>(1)</b> If a <u>garnishing order</u> is made against a defendant or judgment debtor, he/she may apply to the registrar or to the court in which the order is made for a <b>release of the garnishment</b>, and <u>if a judgment has been entered against him or her, for payment of the judgment by installments.</u></p> <p><b>(2)</b> If, under (1), the registrar/judge considers it <b>just in all the circumstances</b>, he/she may make an order releasing all or part of the garnishment and if he/she does and <u>a judgment has been entered</u>, he or she must <u>set the amounts and terms of payment of the judgment by installments.</u></p>
<b>3(1) – Definitions - Debt or Money Accruing Due</b>	<p><b>“debt or money accruing due”</b>, and any expression of similar import, includes wages or salary that would in the ordinary course of employment become due or payable within <b>7 days</b> after the day on which an affidavit has been sworn under <b>3(2)</b>.</p>
<b>9(1) - Service</b>	<p><b>Service</b> of a copy of an order that states that debts, obligations or liabilities owing, payable or accruing due to the defendant, ... are attached <b>or notice</b> of it to the garnishee in a manner the judge or registrar directs, <b>binds</b></p>

	<b>the debts, obligations or liabilities in the garnishee's hands <u>from the time of service or notice.</u></b>
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**A.L. Sims and Son Ltd. v. Sable Resources Ltd.**

*Facts: Pre-judgment garnishment order set aside b/c not clear cause of action was a debt claim and actual amount owed was not clearly set out.*

**Webster v. Webster**

*Facts: Husband, plaintiff, garnishes wife's bank accounts, seeking to enforce 4 promissory notes. H commenced action 7 days after divorce went through – abusive process; once divorce proceedings were settled, there would be amply money to fulfill the debt - unnecessary; the wife needed the money to pay maintenance for the children and was in financial difficulty – undue hardship.*

**Post-judgment Garnishment**

<b>Court Order Enforcement Act [ss. 1, 3, 4, 6, 9, 10-20, 27, 71.3]</b>	
<b>3 (2) – Attachment Procedures and Exemptions</b>	<p>(2) A judge or registrar may, on application made without notice to any person by</p> <p style="padding-left: 20px;"><b>(b) a judgment creditor</b> or person entitled to enforce a <u>judgment or order</u> for the payment of money, on affidavit by himself/herself or his/her solicitor or some other person aware of the facts, stating,</p> <p style="padding-left: 20px;"><b>(c) if a judgment has been recovered or an order made,</b></p> <p style="padding-left: 40px;">(i) that it has been recovered or made, and</p> <p style="padding-left: 40px;">(ii) the amount unsatisfied</p> <p>and stating in either case</p> <p style="padding-left: 20px;"><b>(e) that any other person,</b> hereafter called the garnishee, is indebted or liable to the defendant, judgment debtor, or person liable to satisfy the judgment or order, and is in the jurisdiction of the court, and</p> <p style="padding-left: 20px;"><b>(f) with reasonable certainty, the place of residence of the garnishee</b></p> <p><b>order</b> that all debts due from garnishee to defendant/judgment debtor/person liable/ is <b>attached</b> to the extent necessary to answer the judgment recovered or to be recovered, or the order made.</p>
<b>3 (5) – 70% of Wages Exempt</b>	<p>Except as otherwise provided in this Part, <b>70%</b> of any wages due by an employer to an employee is <b>exempt</b> from seizure or attachment under a garnishing order.</p> <p>But the amount of the exemption allowed under this subsection must not be less than</p> <p style="padding-left: 20px;"><b>(a) in the case of a person without dependants, \$100 per month,</b> or proportionately for a shorter period, and</p> <p style="padding-left: 20px;"><b>(b) in the case of a person with one or more dependants, \$200 per month,</b> or proportionately for a shorter period.</p>
<b>3 (7) – Exception for Wages</b>	Despite any other provision of this Part, if the wages of a

	<p>person are seized or attached under</p> <p>(a) a court order for alimony or maintenance,</p> <p>(b) a duly executed separation agreement, or</p> <p>(c) an order under section <b>18 (2)</b> of the <i><b>Family Maintenance Enforcement Act</b></i>,</p> <p>the exemption allowed to that person is <b>50%</b> of any wages due if the wages due do not exceed <b>\$600</b> per month and <b>33 1/3%</b> for wages in excess of <b>\$600</b> per month but the amount of the exemption allowed under this subsection must not be less than <b>\$100 per month</b>, or proportionately for a shorter period.</p>
<b>6(2)</b> – Public Servant Salary Attachable	<p>Money owing, payable or accruing due from the <b>government</b>, or from an <u>agent of the government</u>, or from any <u>board or commission appointed by or acting under the government</u> as <b>salary or wages to any public servant</b> may be attached under this Part the same as money owing, payable or accruing due from any other person, and for that purpose this Part applies, subject to subsection (3), to the government or an agent of the government.</p>
<b>4</b> – Variation	<p>(1) A creditor who has proceeded by way of attachment of wages or a debtor affected by the proceedings, may apply in writing for an <b>increase or reduction</b> of the amount of exemption allowed under section 3.</p> <p>(4) An order must not be made if the order</p> <p>(a) has the effect of increasing the exemption allowed to <b>more than 90% of the wages due</b>, or</p> <p>(b) reduces the wages of an employee,</p> <p>(i) in the case of a person without dependents or in the case of an order under s. 3(7), to an amount <b>less than \$100 per month</b>, or proportionately for a shorter period, and</p> <p>(ii) in the case of a person with one or more dependents, to an amount less than <b>\$200 per month</b>, or proportionately for a shorter period</p>
<b>&gt;&gt;&gt;&gt; Garnishment, Attachment and Pension Diversion Act</b> – Wages of Federal Government Employee	<p><b>5</b> Her majesty is bound by provincial garnishment law in respect of</p> <p>(a) salaries, and</p> <p>(b) remuneration</p> <p>payable to judges to whom the <i>Judges Act</i> applies, or payable to any other person, excluding corporations, on behalf of a department or by a Crown corporation.</p>
<b>27(1)</b> – Employee Can Not Be Terminated	<p>An employer must not <b>dismiss</b> or <b>demote</b> an employee or terminate a contract of employment of an employee <u>merely because of the service of a garnishing order</u> on the employer issued under this Part for that employee.</p>
<b>&gt;&gt;&gt;&gt; Family Maintenance and Enforcement Act s. 18(3)</b>	<p>Can have a continuing garnishment order</p>
<b>12</b> – Payment Out of Court	<p>(1) an order must not be made for payment out of court of money paid in by the garnishee or for payment by garnishee to person entitled, without notice to defendant, debtor, or persons liable unless a judge dispenses with the notice.</p>
<b>13</b> – Payment Out of Court Without Order	<p>(1) Money paid into court under garnishing proceedings may</p>

be **paid out** to a judgment creditor or his or her solicitor without any order of the court if

(a) **10 days' notice** of the intended payment out is given to the judgment debtor and the judgment debtor has not, on or before the day on which the 10 days expire, filed notice of his or her intention to dispute the payment out, or

(b) the **judgment was obtained by default and 3 months** have expired from the day on which the money was paid into court.

(4) Money paid into court under garnishing proceedings may be paid out to a plaintiff or his or her solicitor without any order of the court if the **consent in writing of the defendant** to the payment out is filed with the registrar or judge, setting out the exact amount to be paid out.

### ***CIBC v. Dabrowski***

The essential time is when the garnishee order was **issued**, not the time it was served.

*Facts: Counsel for the Bank of Montreal ... submits that the plaintiff's garnishee order is invalid and should be set aside on the ground that at the time the said garnishee order was issued there were no debts, obligations or liabilities owing, payable or accruing due from the garnishee to the defendants.*

### ***Vater v. Styles***

**Conditional obligations**, in which circumstances may arise that would either prevent payment or vest the amount in another, are **not attachable**.

*Facts: Styles will only get the disability pension if he continues to be disabled within the meaning of the insurance policy, it is a condition debt and cannot be garnished before it is paid to him. There are outside factors affecting whether or not he will get the money.*

### ***Ahaus Developments v. Savage***

*Facts: Notary acts for vendor in sale of residence, after conveying title, he received \$119,000 from purchaser's solicitor (net proceeds of sale), obligation to pay out and procure discharge of 3 mortgages, she was served with garnishing order to pay debts due to vendor into court, The condition which was required to be filled in order for the debt to Mrs. S to be accruing due was fulfilled because the conveyance was complete, no longer a conditional debt. Dissent: There was still a condition on the amount due to Mrs. Savage as the mortgage hadn't been discharged yet, something could have happened to change things.*

## EXECUTION AGAINST LAND

### The Process

[*Court Order Enforcement Act* ss. 47, 81, 88, 89, 91, 92, 93, 94, 96, 100, 101, 104, 106]

The process occurs in Supreme Court and is governed by ss. **86-115** of the *COEA*.

#### Definitions

- **S. 81 “land”** includes every estate, right, title and interest in land, and all real property, both legal and equitable, and of every nature and kind.. and includes (c) the interest in land of a joint tenant, whether or not subject to a mortgage, and (d) the interests of a tenant in common.
- **S. 81 “judgment”** means a judgment, decree or order of the Federal Court of Canada, Court of Appeal, Supreme Court or Provincial Court, or a judge of any of those courts, or a claim established under the *Creditor Assistance Act*.

#### 1. Register Judgment (s.86, 88, 89, 90)

- From the time of registration the judgment forms a lien and charge on the land of the JD specified in the application referred to in s. 88 (**86(3)**).
- Judgment creditor applies under the *LTA* to register, against the title to a specified land, a judgment in the same manner as a charge is registered by delivering the registrar a certificate of judgment or, if permitted by enactment, a copy of an order (**88(1)**).
- Must be (a) sealed with the seal of the court in which the judgment was entered/recovered, and (b) signed by the court registrar (**88(2)**).
- The registrar, on completion of registration under **88**, give notice to the owner in prescribed form together with a copy of the certificate of judgment (**89(2)**).
- Damages may be awarded if the registrar cancels the registration of a judgment under s. 89 and the owner has sustained damage or incurred costs or expenses because judgment creditor registered judgment w/out reasonable cause (**90(1)**).

#### 2. “Show cause” hearing (s. 92, 93)

- Once judgment registered, JC makes motion may in Supreme Court Chambers calling on JD to show cause why any land that is registered or the JD’s interest in it, or a part of it should not be sold to realize the amount payable under the judgment (**92(1)**).
- On application under **92**, the proceedings are had summarily or by trial of issue or by inquiry before court officer as necessary of convenient for the purpose of ascertaining the truth of the matters and whether the interest in land is liable (**93**).

#### 3. Registrar’s Hearing (93, 94)

- As part of the order under s. 93, an order for a reference to a district registrar must also be made to determine (s. 94) what land is liable, what the priorities are against the judgment, how proceeds should be distributed, etc.

#### 4. Confirmation Hearing and Order for Sale (96) \*\*

- JC has to file a notice seeking the confirmation

- All buyers that will be affected by the order for sale must be given notice
- At this stage, a JD is going to raise issues to oppose the sale:
  - **Is the property the JD's home?** If a premises situated on the land or interest in it of a judgment debtor is the home of the debtor, the court may defer the sale, subject to the performance by the judgment debtor of terms and conditions of payment or otherwise as the court imposes (**96(2)**).
  - **Did the JD receive proper notice?** If substituted service has been ordered by the court on the JD, the land ordered to be sold must not be sold by the sheriff until it has been advertised as provided in s. 97 for **6 months** after the order for sale (**96(3)**). Despite (**3**), on application by the JC to the SC, the court may shorten the period of 6 months or make any other order it thinks fit (**96(4)**).
- If the land or interest of the judgment debtor in it is found liable to be sold, court confirms registrar's report and an order must be made declaring what land or what interest in it is liable to be sold, and directing the sale of it by the sheriff (**96(1)**).

#### 5. Sheriff Advertises and Sells (100, 101, 104)

- The sheriff must not offer the land for sale within a period less than **1 month** from the day on which the order for the sale of it is delivered to the sheriff (**100**).
- Before the land is offered for sale, the sheriff must advertise in the Gazette, specifying: **(a)** the particular property to be sold, **(b)** the name or names of the plaintiffs and defendants in every proceeding, **(c)** the charges, if any, appearing on the register against the land, **(d)** the date of the registration of encumbrances or charges, **(e)** the time and place of the intended sale, **(f)** the amount of the judgment (**101**).
- If, at the time set for the sale under an order, no bidder appears or the sheriff does not think biddings are sufficient to satisfy a sale, the sheriff may **adjourn** the sale (**104**).

#### 6. Distribution to Qualifying Creditors (106)

- All money made on the sale must immediately, after deducting sheriff's fees and incidental expenses, be delivered to the registrar of the court where the order for sale was made, or out of which the writ was issued, with a statement of the land sold and the money made (**106**).
- There is a new process by which the court can order sale by the JC, which makes the sale process more efficient. The court relies in **SC Rules 13-5** and **COEA s. 96** for this power.

## Problems for Creditor

### Principal Residence Exemption (71.1)

The "**principal residence**" of the debtor is exempt from forced seizure or sale by any process at law or in equity if the value of the debtor's equity in the principal residence does not exceed a prescribed amount (**71.1(1)**).

- Does not apply to **(a)** corporate debtor, **(b)** a debtor who is party to a proceeding in respect of a mortgage (**71.1(2)**).

If the value of the principal residence exceeds the "**prescribed amount**" of the exemption, that property is subject to seizure and sale (**71.2(1)**).

- Proceeds distributed, after secured creditors, to debtor an amount not exceeding the prescribed amount of the exemption (**71.2(1)(b)**). The sum received by the debtor is exempt from attachment (**71.2(3)**)
- This section does not affect priority of maintenance order under *Family Maintenance and Enforcement Act* (**71.2(4)**).

### Court Order Enforcement Exemption Regulation – Prescribed Amount

**3** The prescribed amount of equity is

**(a) \$12, 000** if the debtor is a person whose principal residence is located within the boundaries of the Capital Regional District or the Greater Vancouver Regional District.

**(b) \$9, 000** if the debtor is a person whose principal residence is located **outside** those boundaries

### Thow (Re) – Definition of "Principal Residence"

Principal residence is not defined in the COEA.

Occupancy is not necessary to find that a dwelling is the primary residence, but it is indicative.

The onus is on the debtor claiming the exemption to show that he had a realistic expectation of returning to the Residence, or that his absence was only of a temporary nature, or that he had not abandoned the Residence as his Principal Residence, or that the Residence remained his "home base" (*Thow (Re)*).

### Discretion to Defer

- **S. 96(2)** If a premises situated on the land or interest in it of a judgment debtor is the home of the debtor, the court may defer the sale, subject to the performance by the judgment debtor of terms and conditions of payment or otherwise as the court imposes (**96(2)**).

### Interest of Good Faith Purchaser

- S. 86(3) states that from registration the judgment forms a lien and charge on the land... **subject to the rights of a purchaser, who before the registration of a judgment, acquired an interest in the land for good faith and for valuable consideration.**

A judgment creditors registration is subject to the rights of BPFVWN who obtained the interest in the land *before* the judgment was registered (*Bank of Montreal v. Fulthorp*).

### Joint Tenancy & Tenancy in Common

- **Joint Tenancy:** Where JD does not have full interest, the JC can only obtain a judgment on that half. The registration of a judgment does not sever a joint tenancy. JC can register the judgment, but if the JD dies, the interest vanishes.
- **Tenancy in Common:** Can only sell the half interest owned by the JD. It is difficult to sell a ½ interest and will likely get less than 50% of the MV. Tenant dies, judgment continues as a charge.

### **Thow (Re)**

*Facts: swore in affidavit he left Canada for US “permanently, in bankruptcy petition he gave US address and stated he was domiciled or had residence in Washington. Was not his principal residence at the material time.*

### **Bank of Montreal v. Fulthorp**

*Facts: BMO has judgment against former half owner of F’s property – order dates Oct 21, 2003; Oct 24 there was agreement for purchase and sale for whole property by F; Nov 12 BMO registered judgment; Nov 27, transfer to F registered; F’s notary did not search title before/after and registered his title subject to this judgment; JC’s judgment is subject to F’s interest.*

## **EXECUTION AGAINST PERSONAL PROPERTY**

“Writ of execution” includes writ of seizure and sale coming out of Provincial and Supreme Court (**47 “writ of execution” COEA**).

- A writ of execution directs a sheriff to seize a portion of the JD’s property and sell that property such that when sold, it will satisfy the judgment.
- This is the most common way of recovering a judgment; merely issuing a writ can speed up payment and recovery, without actually having to seize
- Writ more appropriate for certain types of property, such as chattels - concern over low prices at auctions, seizing intangibles, and seizing shares

>>A person must not be taken in execution on a judgment (**51**)

### **Procedure for Obtaining a Writ - Supreme Court Civil Rules, Rule 13-2(11), (12), (15)-(22)**

- An order for payment may be enforced by writ of seizure or sale, using Form 50 (**SCCR 13-2(11)**).
- A writ of execution, if unexecuted, remains in force for **1 year** only, unless renewed (**SCCR 13-2(18)**)
- Once you have issued a writ, it is given to a sheriff/court bailiff who will seize enough goods to satisfy
  - The amount owing on the judgment
  - The interest on the judgment
  - The sheriff’s costs
  - The judgment creditor’s costs, and
  - The costs of execution
- Any goods seized are sold at public auction
- Unless the court orders otherwise, a party who is entitled to enforce an order is entitled to the costs, fees and expenses of enforcement including proceedings under *COEA*, Rule 13-2,3,4 (**SCCR 13-2(22)**)

### **Procedure for Obtaining an Order - Small Claims Rules, Rule 11(11)-(13)**

- A creditor can ask the registrar to issue an order for seizure and sale (**SCR, 11(a)**)
- The registrar may issue an order for seizure and sale if a creditor completes the form following the instructions and files it at the registry (**SCR 11(12)**)
- If the order has not been enforced within **12** months after issued, it expires but creditor may ask registrar to issue another (**SCR 11(13)**)

## Goods, Chattels, and Effects – s. 55

[COEA [55-57, 62, 70-79]; COEE Regulation [1-2] *Small Claims Rules*, Rule 11(11)-(13)]

### SPECIFIC PROPERTY

#### Tangible Property

- **Effect of Writ of Execution Against Goods:** Except as exempted by ss. 70-79 or otherwise provided by this Act, all **goods, chattels and effects** of a JD are liable to seizure and sale under a writ of execution against goods and chattels (**55**).
- **Land Cannot Be Seized:** Land must not be seized and sold under a writ of execution against goods and chattels (**56**).
- **Included Properties:** Any interest that a person has in any of the following may be seized and sold by the sheriff: **(a)** mineral title in *Mineral Tenure Act*, permit, license, lease in **(b)** *Coal Act*, **(c)** *Petroleum and Natural Gas Act*, **(d)** *Geothermal Resources Act*, or any plant, machinery, personal property or other material placed on location by holder/permittee/licensee/lessee (**57**).
- A **vehicle** is the most common goods seized

#### Intangible Property – Under s. 55

- S. **55** does not apply to intangible property – it cannot be seized under the BC COEA, which is outdated
- In *Mortil v. International Phasor Telecom*, trademark software could be seized, subject to a trust agreement with the D concerning nondisclosure and prohibition of unauthorized use.
- *Wira v. Jubilee Enterprises* 2010 confirms that IP cannot be seized under common law.
- In *Ontario*, intangible property can be seized. If you have a BC judgment and individual has IP in Ontario, can register judgment in Ontario.
- But see s. **58** – Money and securities for money

### EXEMPTIONS

#### Personal Property of the Debtor (71)(1)

Under s. **71(1)**, the following goods and chattels of a debtor, at the option of the debtor, are **exempt** from forced seizure or sale:

- necessary clothing of the debtor and the debtor's dependants;
- household furnishings and appliances that are of a value not exceeding a prescribed amount;
- one motor vehicle that is of a value not exceeding a prescribed amount;
- tools and other personal property of the debtor, not exceeding in value a prescribed amount, that are used by the debtor to earn income from the debtor's occupation;
- medical and dental aids that are required by the debtor and the debtor's dependants;
- any personal property prescribed by the regulations that is of a value not exceeding a prescribed amount.

#### Court Order Enforcement Exemption Regulation – Prescribed Amounts

**2** For the purposes of section **71 (1)** of the Act, the prescribed amounts of exemption are as follows:

- \$4 000** for household furnishings and appliances;
- \$5 000** for one motor vehicle if the debtor is not a maintenance debtor;
- \$2 000** for one motor vehicle if the debtor is a maintenance debtor;

(d) \$10 000 for tools and other personal property of the debtor that are used by the debtor to earn income from the debtor's occupation.

**NB:** If you are executing a judgment against two debtors, that judgment doubles (supported by case law)

#### Works of Art (72)

- Works of art or other objects of cultural/historical significant brought into BC for temporary public exhibit are exempt from seizure or sale (72(1)).
- Subsection (1) does not apply (a) to an execution on judgment respecting contract for transportation or warehousing or exhibition in BC of the work/object or (b) to a work or object offered for sale (72(2)).

#### RRSPs (71.3)

- Despite any other enactment, all property in a registered plan is exempt from any enforcement process (71.3(2)).
- “enforcement process” means (d) seizure (71.3)
- [See below for detailed provisions]

#### PROCESSES (73-78)

Ss. 73-78 set out the procedure for determining exempt goods

- Once assets are seized, the D can choose which they want to keep under the exemptions - must do so within 2 days of seizure or notice of it, whichever is later (73)
- An appraiser may be appointed if the JC thinks the JD is trying to cheat and keep more property than the exemption allows (74)
- If the goods are appraised at more than the amount of the exemption under 71(1), the remainder is exempt (75).
- The bailiff may not force entry, if permitted to enter can only seize permitted items. They can generally take things outside the home, such as on the driveway.

### Money & Securities for Money – s. 58

[COEA [58-61, 71.3]]

- **Sheriff Empowered to Seize Money/Securities for Money:** A sheriff/other officer to whom writ directed must seize and take any money, bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to debtor (58)
  - Money & bank notes - go directly to JC
  - Cheques, bills of exchange, etc. are subject to CAA – seized and held to maturity then sue for recovery
  - There has been litigation over what is included in “**other securities for money**” – includes insurance (*Nisbett*)
- **Payment to or Recovery by Sheriff is Valid Discharge:** payment to sheriff by party liable on [the list above, less money] with or without suit, or recovery and levying against party liable, discharges the liable party from liability to extent of the payment (59).
- **Sheriff to Satisfy Writ and Pay Surplus to Debtor:** sheriff must pay over to execution creditor money sufficient to discharge amount directed by writ (60(1)). If, after satisfaction, together with sheriff's fees, poundage and expenses, surplus remains, it is paid to debtor (60(2)).
- **Sheriff Not Bound to Sue Until Indemnified:** A sheriff does not have to commence an action on maturity of a security for money unless the execution creditor has agreed to indemnify the sheriff from and against all costs and expenses (61(1)).

#### RRSPs

- Despite any other enactment, all property in a registered plan is exempt from any enforcement process (71.3(2)).
- 71.3 (2) does not apply to (a) property contributed to registered plan after or within **12 months** before date on which debt being enforced came due, or (c) to enforcement process that is being effected in support of enforcement of **maintenance order under FMEA (71.3(3))**.

- **71.3(2)** does not apply to **(b)** property that has been or is being paid out of a registered plan (**71.3(3)**). For the purposes of **(3(b))**, if an enforcement process is pursued against property being paid out... that property is deemed, for the purposes of this Act, to be a debt due to the planholder for or with respect to the salary or wages (**71.3(4)**) – treats money withdrawn from RRSP as *wages* – can garnish 30%
- NOTE: Tax Free Savings Accounts do not fall under the protection of this provision, even though they are touted by the government as a retirement vehicle

## EXECUTION AGAINST SHARES

[COEA [61.1, 63.1-65.1]; *Securities Transfer Act* [1, 10-12, 44, 47-51]]

The *COEA* works in conjunction with the *Securities Transfer Act*.

- The terms relating to securities have the same meanings as in the *STA* (**63.1 COEA**)
- \*\*Securities may be seized by the sheriff in accordance with ss. 47-51 *STA* (**63.1(2) COEA**)\*\*

### **What is a “security”?**

A mutual fund security is a security (**11(1)**). In this section, “**mutual fund security**” means a share, unit or similar equity interest issued by an open-end mutual fund, but does not include an insurance policy, endowment policy or annuity contract issued by insurance company (**11(2) STA**).

“**open-ended mutual fund**” means an entity that makes a distribution to the public of its shares, units, or similar equity interests and that carries on biz of investing consideration it receives for the shares, units, etc. all/substantially all of which are redeemable on demand of holders/owners (**11(2) STA**).

A share or similar equity interest issued by a corporation, business trust or similar entity is a security (**10 STA**).

### Certificated Securities – (s. 48 STA)

“**certificated security**” means a security that is represented by a certificate (**1(1)**)

\*Securities may be seized by the sheriff in accordance with ss. 47-51 *STA* (**63.1(2) COEA**)\*

Seizure can occur:

- Subject to **48(2)** and **51**, only through **actual (physical) seizure** of the security certificate by a sheriff (**48(1)**),  
or

- **If** the certificate is surrendered to the issuer by the JD, by sheriff serving **notice of the seizure** on the issuer at the issuer's **chief executive office (48(2))** or
- **If** the certificate is held by a secured party, by sheriff serving **notice of the seizure** on the secured party (**51**)
- Seizure by notice takes effect once the issuer (or intermediary) has had a reasonable opportunity to act on the notice (**63.1(3) COEA**)

#### Uncertificated Securities – (s. 49 STA)

**“uncertificated security”** means a security that is not represented by a certificate (**1(1)**)

- Prior to enactment of this provision, could not be seized b/c nothing tangible – has to apply for equitable receiver who would then instruct broker to sell them

\*Securities may be seized by the sheriff in accordance with ss. 47-51 STA (**63.1(2) COEA**)\*

Seizure can occur:

- Subject to **51**, only through **notice of the seizure** by the sheriff to the issuer at their **chief executive office (49)**
  - **Exception: If** the uncertificated security is registered in the name of a secured party, by sheriff serving **notice of the seizure** on the secured party (**51**)
  - Seizure by notice takes effect once the issuer (or intermediary) has had a reasonable opportunity to act on the notice (**63.1(3)**)
  - **\*\*Issue:** since you must serve on issuer at issuer's chief executive officer, many offices will not be in BC and must register judgment in another province (ie./Ont.).

#### Securities Entitlements - (s. 50 STA)

- **“security entitlement”** means the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 6 (**1(1)**).
- **“entitlement holder”** means a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary and includes a person who acquired a security by virtue of s. 95(1)(b) or (c) (**1(1)**).
- \*Securities may be seized by the sheriff in accordance with ss. 47-51 STA (**63.1(2) COEA**)\*
- Judgment debtor's interest in security entitlement may be seized by sheriff serving notice of seizure on securities intermediary that maintains JD's securities account (**50**).

#### Disposition – (64.1-65.1 COEA)

- The **sheriff is deemed** to be the appropriate person under the STA to deal with or dispose of the seized property and the **JD is not** the appropriate person (**64.1 COEA**)
- On seizure of JD's interest in security/entitlement, sheriff may (**a**) do anything that would otherwise have to be done by JD, or (**b**) execute or endorse any document that would otherwise have to be executed or endorsed by the JD (**64.1(2) COEA**).
  - Sheriff must provide issuer/intermediary w/certificate of sheriff stating sheriff has authority under this Act (**64.1(3) COEA**)
- Sheriff has duty to the JD and JC to get best price.
- If on public exchange, easy – give instructions to brokerage to sell
- If privately held, issues with realizing value and may also be restrictions on share transfers (more onerous for private companies)
  - Most obvious market is other shareholders – often family members
- **Share Transfer Restrictions**
  - **Sheriff is bound to transfer restrictions** where transfer is restricted by terms of security, restriction imposed by issuer, or unanimous shareholder agreement governed by law of BC (ie./ companies incorporated in BC, or provincial government) (**65.1(3)**)
  - Sheriff can apply to court for declaration that the share transfer was put in place to defeat, hinder, delay or defraud creditors and court can make any order it considers appropriate regarding the seized security (**65.1(5)**) – **Q: was the STR put in place immediately after the judgment issued?**
    - (**a**) directing method or terms of sale of security or realizing the value other than through a sale;

- (b) directing issuer to pay dividends, distributions, or interest to sheriff
- (c) directing issuer to register transfer to a person despite a restriction on the transfer or entitlement of another person to acquire or redeem the security.
- (d) directing that all/part unanimous SH agreement does not apply to a person who acquires security
- (e) directing issuer be dissolved and proceeds disposed of

## EQUITABLE EXECUTION

An equitable remedy can be applied for in two cases:

1. Seeking to execute a judgment against **equitable interests** (ie./ trust)
2. Where the court deems there to be **special circumstances** (*Warren v. Warren*)
  - a. **Legal impediment** to accessing traditional methods of execution
  - b. **Inconvenience** - must be something **more** than mere inconvenience, a practical problem – [100 little orders needed]

Q: do the special circumstances outweigh the cost of appointing a receiver?

### EQUITABLE RECEIVERS

#### **Equitable Receiver**

- A receiver is a person who complies and sells the assets of a JD, giving the proceeds to the JC
- A receiver stands in the place of the JD and can therefore collect debts owing to the JD or commence legal actions on his/her behalf
- Once receiver is appointed, the JD can no longer receive assets, and is prohibited from interfering, lest the D be found in contempt of court
- Once JC has recovered money, receiver files application w/court to be discharged of their duties, and settles all payment for service

**Authority to appoint receiver** - *Law and Equity Act*, s. 39(1) and *Supreme Court Civil Rules*, Rule 10-2(1)

- A receiver may be appointed by interlocutory order of the court in all cases in which it appears just and convenient that the order should be made (**39(1) Law and Equity Act**)
- The court may appoint a receiver in any proceeding either unconditionally or on terms, whether or not included in relief claimed by the JD (**10-2(1) SCCR**)
- An order may be enforced by appointment of receiver under Rule 10-2 (**13-2(5) SCCR**)

## Post-judgment remedy only

- a JC may not apply to have receiver appointed until judgment has been entered against the D.

## Equitable receiver is not meant to be put over ALL the D's assets

- this is ultra vires the provinces b/c begins to resemble bankruptcy receivership

*Warren v. Warren*

- Special Circumstances justifying equitable receivership
  - Cannot find D
  - D is outside reach of usual legal remedies
  - D acted in contravention of original order not to dispose of property

## EQUITABLE CHARGING ORDERS

- A **charging order** is an order obtained by a JC placed on a JD's property for monies owed
- The main purpose is to attach funds that are already in court in favour of an existing JC.
  - Ex./ (1) JD is a JC in another action and there is money in court in relation to settlement, JC will apply for charging order; (2) JD is a JD in another case and money paid into court through pre-judgment garnishment, JC can apply for charging order to go after funds
- The *Creditors Assistance Act* does not apply to charging orders because they are an equitable remedy.

*Canada (MNR) v. Millar*

- Absolute charging order granted in favour of CRA b/c there is a legal hindrance on CRA getting the funds – they are in court due to interpleader proceedings and the court cannot be garnished.
- Clean hands argument b/c evidence (\$) obtained by police in Charter violation - dismissed as police and CRA are not the same entity, even though both branches of government

## EXEMPTIONS/ IMMUNITIES/ PRIORITIES

### Priorities

\*\*\* Generally speaking, a secured creditor will always rank ahead of an unsecured creditor

1. Certificate for unpaid wages issued under *Employment Standards Act*
2. Statutory lien under *Workers Compensation Act* (priority over everything excepting liens for wages due to workers by their employer)
3. Family Maintenance Order (priority over unsecured judgment debt only)

## RATABLE SHARING PROVISIONS

*Creditor's Assistance Act – (s. 2, 3) & Court Order Enforcement Act (s. 10,11)*

- **Distribution:** proceeds are distributed *ratably* among judgment creditors - % of the total based on the proportion of the claim- applies to real and personal property (**s. 3 CAA**)\*\*\*
- If a judgment creditor forces a sale, it must be paid into court and distributed in accordance with the CAA (**s. 110, 111 Court Order Enforcement Act**),
- **Sheriff's Notice of Levy:** When a sheriff levies money on an execution against the property of a debtor, the sheriff must enter promptly in a book of notice stating the levy has been made, its amount, and date of entry (**2(1) CAA**). Book must be kept in sheriff's office and open to public w/out charge (**2(2) CAA**).
- **Deficiency in Levy:** If the amount levied by the sheriff is not sufficient to pay the execution debts and other claims, money applied *ratably* to pay debts and costs of creditors, after paying sheriff's fees, taxed costs and costs of execution to creditor who instigated the levy (**27 CAA**).

- **Distribution to Established Claimants Only:** if debt claim, may get certificate of claim to share in distribution, even if no judgment (**37 CAA**)
- CAA does not apply to the federal government, but it applies to the BC Government (**Rutherford**)

*Rutherford v. Penticton Pub*

- Unless it specifically provides otherwise, an enactment is binding on the government (BC) (**14(1) Interpretation Act**)
- Priority: sheriff's costs > municipality for taxes > payment of petitioner's costs > Queen in right of Canada > balance to be paid out to other JCs in proportion to judgments.
- The province, by virtue of s. 47 CAA, and s. 14 Interpretation Act, has wiped out any prerogative right to priority which Queen in right of BC may have had. However, CAA has no binding effect on prerogative right to propriety of Queen in right of Canada.

## MORTGAGES AND JUDGMENTS

*Land Title Act – (s. 28)*

In *Hankin v. Gill*, the court held that s. 28 of the *Land Title Act* and s. 3 of the CAA are inconsistent and cannot be applied together. Even when a mortgage is registered before the judgments, judgment creditors will share ratably and the remainder is distributed to the mortgagor. This is so despite s. 28 of the LTA, which states that charges have priority according to the date of registration. This creates uncertainty for mortgagees, who will now rank below other judgment creditors.

*Hankin v. Gill*

- Order of registration: 3 judgments > mortgagor > 8 judgments
- Order of payment: costs, 3 judgments, 8 judgments share ratably, anything left over goes to mortgagor

## FAMILY SUPPORT ORDERS

*Family Maintenance Enforcement Act and Priorities – (s. 28(1))*

- Despite any other Act, a maintenance order (FMO) has priority over unsecured judgment (**28(1) FMEA**)
- Priority does not apply to arrears of maintenance owing more than **a year** before the date the creditor (maintenance creditor) initiated proceedings to enforce the maintenance order (**28(2) FMEA**).
- A maintenance order ranks equally with another maintenance order (**28(3)**)
- Where property (real or personal) has been seized and sold pursuant to the COEA, maintenance orders will be paid out from the funds ahead of ordinary creditors. Any funds remaining will be distributed ratably (if more than one creditor, entitled to share under CAA).
- Payments received on behalf of a creditor are not garnishable by another creditor or maintenance debtor (**28(4) FMEA**)
- Sharing under COEA does not apply to a maintenance order (**26(5)**).

*BC (Director of Maintenance Enforcement) v. Leontowicz*

- Ss. in COEA and CAA that mandate *sharing* also do not apply to maintenance orders registered against title to land (**26(5) FMEA**). When the FMEA applies, by virtue of **28(4)**, FMOs rank ahead, and also share *ratably* (**28(3)**).
- Taxes > 3FMOs share ratably > other creditors get remainder

## WAGES

*Court Order Enforcement Act – (s. 52)*

- **Court may order preference claim to extent of 3 months wages:** Where there has been a seizure of goods under a writ of execution or an order for the sale of land (or a sale of these forms of property by a receiver), an employee of the execution debtor may apply to the court for an order that the sheriff (or receiver) keep up to **3 months of wages** owing at time of seizure/order/sale. This sum will have priority over execution creditor's claim (after the costs of the execution proceedings) (**52(2) COEA**). This is a *discretionary remedy*. - Under **52(2) COEA**, employees of execution debtor may apply for order with propriety for 3 months arrears.

*Creditor Assistance Act – (s. 36)*

- **Priority for Wages and Salary:** This section provides that claims for wages and salaries of employees who were **employed by the debtor at the time of the levy or within one month before the levy** have a priority over other claimants to the extent of three months wages or salary **(36(1) CAA)**.
- The portion of their claim, if any, that is in excess of 3 months shares ratably with other creditors.
- To participate, employees must file writ of execution or a certificate of claim in accordance with the CAA procedures that other creditors follow.
- In practice, most employees use remedies in ESA to pursue unpaid wage claim.

*Employment Standards Act – (s. 87(1))*

- The Director of Employment Standards can make a determination that an employer pay wages owing for up to **6 months (80 ESA)**.
- Unpaid wages are a lien, charge and secured debt in favour of director for up to 6 months unpaid wages or salary **(87(1) ESA)**.
- The lien/charge has priority over all other claims except money advanced under a mortgage or debenture registered against land **(87(3) ESA)**

*Director of Employment Standards v. MacMillan Bloedel*

- You may pursue an action through **36(1) CAA**, **52(2) COEA**, or **87(1) ESA**, and will have priority in either case (ESA strongest).

*Workers Compensation Act - (s. 52(1))*

- Priority is given to amounts due to Workers Compensation Board **(52(1) WCA)**
- *Worker's Compensation Board v. Canada (AG) #1:* WCA applies to both property and proceeds of property
- *Worker's Compensation Board v. Canada (AG) #2:* Federal Crown prerogative not extinguished, but BC has extinguished theirs. WCB statutory lien > AG Canada > remaining creditors share ratably (including BC government)

## Exemptions

Employment and Assistance Act, s 29:

Income assistance, hardship assistance, and supplements exempt **(29(1))**

Except does not prevent income assistance being retained by way of a deduction or set off under the Act **(29(2))**

Workers Compensation Act, s 15:

Workers compensation payments exempt; except for money advanced by way of financial or other social welfare assistance owing to the Province or to a municipality **(15)**

Canada Pension Plan Act, s 65:

CPP payments exempt **(65(1.1))**

Except if person applying for CPP has been given “any advance or assistance or welfare payment” **(65(2))**

Old Age Security Act, s 36(1.1):

Benefits exempt from seizure and execution **(36(1.1))**

Pension Benefit Standards Act, s 63:

Pension benefits exempt **(63(1))**

Except does not apply to additional voluntary contributions **(63(3)(a))** or pension entitlements that relate to a family law proceeding **(63(3)(b))**;

Despite 3(3), additional voluntary contributions made before, on or after November 1, 2008 are exempt **(63(3.2))**

[mirrors COEA section introduced in 2008 re: RRSP exemptions]

Pension Benefits Standards Act, 1985, s 31 [Federal]:

If federally regulated, the exemptions in the province will apply **(31)**

*Insurance Act, s 65:*

“life insurance” includes insurance under which the insurer (g) undertakes to provide an annuity for a term dependent solely or partly on a human life.

If beneficiary is designated, from the date of the event, insurance money is exempt (65(1)).

Before the event, as long as there is a “designation in favour of any one or more of a spouse, child, grandchild or parent of a person whose life is insured”, the insurance money and rights or interests in it is exempt (65(2))

## Immunities

*Crown Proceeding Act, s. 13(6):*

Courts may not issue execution or attachment on a judgment against the provincial Crown (13(6)).

*Crown Liability and Proceedings Act, s. 29 & 30 [Federal]:*

Courts may not issue execution or attachment on a judgment against the federal Crown (29)

Minister shall authorize payment out of the Consolidated Revenue Fund of any money awarded to any person against the Crown (30(1)).

## FIRST NATIONS LAND/ DEBT TO GOVERNMENTS

### First Nations Land

**S. 89** of the **Indian Act** provides that **real and personal property** of a status Indian or band **situation “on reserve”** is not subject to any kind of execution proceedings by anyone other than an Indian or a band (**89(1) Indian Act**).

- “**Indian**” is someone who is registered or entitled to be registered under the IA
- This provision causes problems for creditors by making it **more difficult for a creditor to recover a judgment**
- It also creates a problem for First Nations – hard to raise money/access credit if they cannot give their property as security
  - Also creates problems internally – no one ever really owns their own homes
  - Indian or band can’t get loans, or will only get them at higher rate
  - Limited to government or band financing

**S. 90** of the **Indian Act** provides that personal property is **deemed** to be **situated on reserve** if (1) purchased by the Crown with Indian money, (2) purchased with money appropriated by the Crown for Indian use, or (3) if given to status Indian or band **pursuant to a treaty or agreement** (**90(1) Indian Act**).

- Ex./ Indian band given money under treaty, placed on off-reserve bank account, creditor cannot access it.

Royal Commission identified these provisions as problem for accessing credit

- In BC, there are a number of cases where bands do not have treaties
- Money given to bands to provide services, and they deposit in banks off reserve
- Many remote reserves don’t have bank account on reserve

### *God’s Lake First Nation*

For *deeming* provision in s. **90** to apply, the agreements must be related to a treaty agreement -ancillary to a treaty agreement.

- ss. **88, 89** must be interpreted narrowly

Held: Money situated in off-reserve bank account pursuant to comprehensive funding agreement w/federal government does *not* fall under the deeming provision and is *not* exempt from seizure.

- “On reserve” in s. **89(1)** must be given its plain and ordinary meaning, and the connecting factors test does not apply here
- Deeming provision does not apply – agreement must be ancillary to or flesh out the treaty – they are not two separate things
- Protects economic self-sufficiency and self-government with respect to access and credit

Dissent: Deeming provision should be construed broadly, agreement should mean something different than treaty. A social welfare exception should be created – if the agreement relates to essential public services, use funds for the purpose for which they were given.

Outcome: While more assets are open for security, if you are a creditor, you must do a case-by-case analysis of anything offered as collateral to determine if protected by these ss. or not - unpredictability. Depending on the content of a treaty in a particular area, funds for the same purpose of a Band in Ont and MB may be protected in one but not the other, depending on what the treaty holds.

## Debt to Governments

### Financial Administration Act – (s. 86.1(2), 83(1))

- The limitation periods in s. 6 of the *Limitation Act*, when applied to a government claim, are **deemed** to be **6 years (86.1(2)(b) Financial Administration Act)**.
- “**government claim**” means a debt claim by (a) the government, (b) a corporation or other organization within the taxpayer-supported government reporting entity, or (c) corporation or other organization not within the TSGRE, but was within it on or after the date the act/omission took place and before the limitation period expired, and includes a claim by ICBC for vehicle indebtedness (**86.1(1) FAA**).
  - “**taxpayer-supported government reporting entity**” means the government reporting entity excluding self-supported government enterprises (s. 1(1) *Budget Transparency and Accountability Act*)
  - “**government reporting entity**” means (a) the government as reported through consolidated revenue fund, (b) government corporations other than those that are government corporations solely by reason of being under Act agents of the government, and (c) **education and health sector organizations** (s. 1(1) *Budget Transparency and Accountability Act*)
  - “**education and health sector organization**” means (a) the following as defined in s. 1 of the *College and Institute Act*: (a) a **university**; (i) an institution, (b) the following as defined in s. 1 of the *School Act*: (i) a board; (ii) a francophone education authority, (c) a board as defined in s. 1 of the *Health Authorities Act*, (d) a **hospital** as defined in s. 1 of the *Hospital Act*.
- **Demand on 3<sup>rd</sup> Party**: If the debtor owes money to the government, and the Minister of Finance receives information that a 3<sup>rd</sup> party is/ is about to become indebted to the debtor, the MF may demand 3<sup>rd</sup> party to pay that money to MF on account of debtor’s liability to government (**83(1) Financial Administration Act**).
  - The 3<sup>rd</sup> party must pay to MF promptly after (a) receipt of the demand, or (b) the due date of the liability to debtor, and the receipt of the MF for money paid discharges the liability of 3<sup>rd</sup> party to debtor to extent of the amount (83(2) FAA).

### Motor Vehicle Act – (s. 26(1)(b))

- ICBC may refuse to issue a drivers license to a person who:
  - Is indebted to ICBC (**26(1)(b) Motor Vehicle Act**)
  - Is indebted to government b/c of failure to pay fine imposed due to conviction under: (**26(1)(b) Motor Vehicle Act**)
    - (i) a motor vehicle related *Criminal Code* offence,
    - (ii) the *Motor Vehicle Act*,
    - (iii) the *Commercial Transport Act*,
    - (iv) the *Motor Fuel Tax Act*,
    - (v) the *Highway Act* or the *Transportation Act*,
    - (v.1) the *Liquor Control and Licensing Act*, whether the indebtedness arose before or after this subparagraph comes into force,

- (vi) the *Motor Carrier Act* or the *Passenger Transportation Act*, or
  - (vii) the *Motor Vehicle (All Terrain) Act*,
  - (viii) the *South Coast British Columbia Transportation Authority Act*, whether the indebtedness arose before or after this subparagraph comes into force, or
  - (ix) the *British Columbia Transit Act*, whether the indebtedness arose before or after this subparagraph comes into force.
- Is indebted to a concessionaire/billing organization for excessive toll debt, as defined in *Transportation Investment Act (26(1)(e) Motor Vehicle Act)*
  - Is indebted to authority/subsidiary/billing organization for excessive toll debt, as defined in *South Coast BC Transportation Act (26(1)(f) Motor Vehicle Act)*
  - Is indebted to authority, as defined in *South Coast BC Transportation Act*, under s. 250 **(26(1)(f.1) Motor Vehicle Act)**

*Family Maintenance Enforcement Act – (s. 18)*

- **Garnishment:** Court may make an order that is deemed to be an order under s. 3 of the COEA **(18(2))**.
- Order remains in force for 12 months unless discharged by the court **(18(3)) –extraordinary garnishment order**
- If garnishee admits a debt, they must promptly pay it to the court and amount forwarded to director **(18(4))**.

*Employment Standards Act – (s. 89)*

- **Demand on 3<sup>rd</sup> Party:** If director has reason to believe a person is likely to become indebted to another who owes money, director may demand in writing that person pay all or part of the money otherwise payable to that person on account of the other's liability **(89(1))**.
- A demand continues in effect until satisfied or cancelled by director **(89(5)) - extraordinary garnishment order – parallel to 18(3) FMEA**

*Income Tax Act –(s. 224, 225)*

- **Garnishment:** where minister has knowledge or suspects person is, or will be within one year, liable to make payment to another person who is liable, Minister may in writing require person to pay money otherwise payable to the tax debtor to the Receiver General on account of the tax debtor's liability **(224(1))**.
- **Collection Restrictions:** If TP liable for amount assessed, Minister shall not do any of the following to collect the amount **(225.1(1))**:
  - (a) commence legal proceedings in a court,
  - (b) certify the amount under section 223,
  - (c) require a person to make a payment under subsection 224(1),
  - (d) require an institution or a person to make a payment under subsection 224(1.1),
  - (e) [Repealed, 2006, c. 4, s. 166]
  - (f) require a person to turn over moneys under subsection 224.3(1), or
  - (g) give a notice, issue a certificate or make a direction under subsection 225(1).
- **Collection Commencement:** Collection commencement day is: **(225.1(1.1))**
  - (a) in the case of an amount assessed under subsection 188(1.1) in respect of a notice of intention to revoke given under subsection 168(1) or any of subsections 149.1(2) to (4.1), one year after the day on which the notice was mailed;
  - (b) in the case of an amount assessed under section 188.1, one year after the day on which the notice of assessment was sent; and
  - (c) in any other case, 90 days after the day on which the notice of assessment was sent.

## FRAUDULENT CONVEYANCES / PREFERENCES

### Fraudulent Conveyances

[*Fraudulent Conveyance Act*, ss. 1-2; *Interpretation Act* ss. 28(4) & 29 “dispose”; *Law Society of BC Code Rules* 3.2-7 and 3.2-8]

A **disposition of property** is **void and of no effect** if made to *delay, defraud, or hinder* creditors **and others** of their just and lawful remedies (s. 1 *Fraudulent Conveyance Act*).

- **Burden** on **P** to prove “disposition” and “intent”
- **Also (b)** bond, **(c)** proceeding; **(d)** order - *mostly historical*

Does not apply to a disposition of property for **goods consideration and in good faith**, lawfully transferred to a person who, at the time of transfer, has **no notice/knowledge** of collusion/fraud (s. 2)

- **Burden** on **D** to prove goods consideration, good faith

#### 1. “Disposition of Property”

- “Property” is any beneficial interest in real or personal property - property that is exempt from execution proceedings is not within the scope of the Act.
- “Disposition” – so long as property is transferred, there is a disposition
  - “Dispose” means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, divest, release, and agree to do any of those things (s. 29 *Interpretation Act*)
    - other forms of the word have the same meaning (24(1) *Interpretation Act*).
- “Others” includes future creditors who are foreseeable (those who extend credit to debtor after FC takes place) (*Abakhan*)
  - Commentary post-*Abakhan* indicates courts should recognize a future creditor as someone the debtor has some sense of at the time of the transaction, a speculative future creditor should not be caught. This is similar to foreseeability in tort. (ie./ business who regularly borrows money)

#### 2. “Intent”

- There is no need to prove dishonest intent for a fraudulent conveyance, only intent to move property out of the reach of creditors (*Abakhan*).

- The transaction may be fraudulent even if it was carried out with other intentions, so long as one of the intentions was to move property out of reach (*Abakhan*)
- The legislation is remedial, but must be given a broad, fair, liberal construction that best meets the aims of creditors (*Royal Bank of Canada, cited in Abakhan at para 62*)
- If there is no consideration, only worry about the intent of the debtor
- If there is good consideration, to take the transaction outside of s. 2, must show an intent to delay, hinder, defraud creditors – collusion/fraud on both transferee and transferor

### **3. Badges of Fraud**

Intent may be proven with circumstantial evidence, known as “badges of fraud”

- Transferring for little or no consideration
- Failure to register the transaction or delay in registration
- Transferee’s relationship with transferor – does the transferor continue to use/benefit from the property?
- Is the exchange one of real and personal property (easy to execute) for preferred shares of the same value (very difficult to execute against)?
- Was it transferred on the day a writ of execution was received?
- Did the person convey most/all of assets?
- Transferred interest in JT, which would have transferred to his wife on death anyways (*CIBC v. Ash*)
- When interest conveyed, debtor did not have substantial assets other than what was transferred (*CIBC v. Ash*)

### **PROFFESIONAL OBLIGATIONS**

*Law Society of BC Code of Professional Conduct, Rules 3.2-7 & 8*

- It is important for lawyers to ensure they are not assisting their client with a fraudulent transaction.
- Facts that should put the lawyer on notice:
  - Client promising unrealistic investment return to 3<sup>rd</sup> parties
  - Client wants to put money in lawyer’s trust account when no services provided

**3.2-7** A lawyer must not engage in any activity that the lawyer knows or *ought to know* assists in or encourages any dishonesty, crime or fraud.

- **Commentary:** the lawyer must be on their guard; the lawyer must make reasonable inquiries to get information about the client, subject matter, objects of the retainer, and make records of these inquiries [3]; if the lawyer thinks the transaction runs the risk of fraud, advise the client not to do it and refuse to do it; if you give them advice and they want to risk it, it is *foolish* of the lawyer to assist them.

### **Organizational Client – Progressive Chain**

**3.2-8** A lawyer who is employed or retained by an **organization** to act in a matter in which the lawyer knows or ought to know that the organization has acted, is acting or intends to act dishonestly, criminally or fraudulently, must do the following, in addition to his or her obligations under rule 3.2-7:

- advise ***the person from whom the lawyer takes instructions and the chief legal officer***, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, criminal or fraudulent and should be stopped;
- if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the ***board of directors, the board of trustees, or the appropriate committee of the board***, that the proposed conduct was, is or would be dishonest, criminal or fraudulent and should be stopped; and
- if the organization, despite the lawyer’s advice, continues with or intends to pursue the proposed wrongful conduct, ***withdraw*** from acting in the matter in accordance with section 3.7.

## **Fraudulent Preferences**

[*Fraudulent Preferences Act, ss 1 “creditors”, 3-7*]

A **fraudulent preference** occurs when debtor disposes of property and that disposition has the effect of preferring one creditor over another and allows the non-preferred creditor to attack the disposition.

- To bring FP action, must be a creditor and within 2 years (Limitation Act)

### Differences from FC

1. The legislation is only engaged when the debtor is in **insolvent circumstances**.
2. Must be disposition of property to a **creditor**.
  - “creditors” includes (a) surety and endorser of promissory note/bill of exchange who would, on payment by that person of the debt, become a creditor of the person giving the preference, and (b) beneficiary of a trust/other person to whom liability is equitable only (**1(1) Fraudulent Preferences Act**)

**S. 3A** disposition of property by a person at a time when the person is in **insolvent circumstances**, is unable to pay the person’s debts in full, or knows that he/she is on the eve of insolvency, is **void** if made:

- (a) with **intent** to defeat, hinder, delay or prejudice creditors/some of them, and
- (b) **to or for a creditor** with intent to give the creditor preference over other creditors or some of them.

### 1. Disposition of Property

- [Similar to Fraudulent Conveyance]
- ie./ debtor assigning A/R to creditor, assigning benefits under insurance policy, granting mortgage over land, naming beneficiaries

### 2. In favour of a creditor

#### 3. Intent

- Must prove both intent to defeat, hinder, delay or prejudice the creditors, AND intent to give the preference AND that the creditor intended to receive a preference.
- Intent may be shown through badges of fraud [See **Fraudulent Conveyances**]
- Must prove both **intent to give** and **intent to get**
  - **Intent to get:** show the preferred creditor knew of the debtor’s insolvent circumstances – to do so, P must prove (usually only in business context) the preferred creditor’s knowledge of the debtor’s circumstances was such that the ordinary business person would conclude the debtor was in insolvent circumstances

### 4. Insolvent Circumstances/ Unable to Pay Debts in Full/ On Eve of Insolvency

- Insolvent Circumstances: **Burden** on person alleging FP to show “insolvent circumstances” – two tests:
  - **1. Legal Test (“the book test”):** P must show debtor did not have enough exigible property to pay all of their debts – (NBV Assets – Liabilities)
  - **2. Business Test (“the commercial test”):** P must show debtor cannot pay debts in full as they become due in their ordinary course of affairs
  - To engage FPA, debtor must meet both tests
- Eve of Insolvency: **Burden** on person alleging FP to show disposition prevented debtor from becoming insolvent
  - Show that before the preferential disposition was made, they would have satisfied both tests, and
  - After the disposition, they knew the effect of the disposition was they would be insolvent in the immediate future.

### Deemed Preferences

- **Ss. 4-5** – create an exception where intent need not be proven
  - If the preference is made within 60 days of the D declaring bankruptcy OR if the creditor who is not preferred challenges the disposition within 60 days.
  - s. 5 **deems** the transaction preferential
- Doctrine of Pressure
  - The language of **s. 5** has been interpreted to mean that if the preferred creditor is pressuring the debtor, it operates to negate the preference
  - But if **s. 4** applies, the non-preferred C cannot rely on the doctrine of pressure and the transaction is **deemed** to be preferential.

### Defences – ss. 3, 4, 5 do not apply – Sales and Transfers in Good Faith

Protect transactions where a creditor may be preferred, but other creditors are not prejudiced

- Money paid, or property disposed of, bears fair and reasonable value to consideration, to a sale in good faith, payment made in ordinary course of business to innocent persons, to payment to creditor, or disposition in good faith (**6(1)**).
  - (a) in consideration of present actual payment in good faith and money
  - (b) by way of security for present actual advance of money in good faith;
  - (c) in consideration of present actual disposition in good faith of any property
- If valid sale of property, payment of consideration under circumstances that would render payment void, transfer is void (**6(2)**).
- If payment made that is void, and valuable security given in consideration, creditor may have security restored or value made good as a condition of return of payment (**6(3)**).
- The debtor can take back its security by paying the creditor under two conditions: creditor does not get security back, and also allows substitution of one security over the other in relation to the same debt as long as the value of the creditor's estate is not reduced (**6(4)**).
- Nothing in this section invalidates a security given to a creditor for an existing debt if, because of giving the security, an advance in money is made to the debtor by the creditor in the belief in good faith that the advance will enable the debtor to continue the debtor's business and pay his/her debt in full (**6(5)**).

## CONSUMER BANKRUPTCY & INSOLVENCY

### MAIN REQUIREMENT

Must be an “**insolvent person**” under the *Bankruptcy and Insolvency Act* s. 2: person who is not bankrupt, resides/carries on biz/property in Canada, liabilities provable amount to \$1,000, and (a) for any reason unable to meet obligations as they generally become due, (b) ceased paying current obligations in ordinary course of business as they generally become due, or (c) aggregate FMV of property not sufficient to enable payment of all obligations due and accruing.

### CONSUMER INSOLVENCY OPTIONS

#### 1. *Assignment in Bankruptcy*

- **BIA s. 49** – An insolvent person may, with leave of court, make assignment of all insolvent person's property for general benefit of their creditors.

#### 2. *Petitions into Bankruptcy*

- **43(1)** One or more creditors may file in court application for bankruptcy order against debtor if alleged in application that: (a) debts owing amount to **\$1,000**, and (b) debtor **has committed act of bankruptcy** within **6 months** preceding filing.
- **42(1)** Act of bankruptcy by debtor: (i) default in any proposal made under this Act, (j) ceases to meet obligations generally as they become due

#### 3. *Proposals*

- Corporate= “reorganization” – BIA if debts less than \$5M, BIA or CCAA if more than \$5M
- Consumers = “consumer proposal”
- **66.11** “consumer debtor” means an individual who is bankrupt or insolvent and whose aggregate debts, excluding any debts secured by principal residence, are not more than **\$250,000**
- **66.12 (5)** A consumer proposal must provide that its performance is to be completed within **5 years**
- Key advantage: keep surplus income earned & avoid stigma of bankruptcy
- Convince creditors it is more advantageous than bankruptcy, will involve paying debts off over longer time period, they will get more

## DUTIES OF BANKRUPT

- **158 (a)** make discovery of and **deliver all property** under his possession/control to trustee/authorized person
- **158 (a.1)** In circumstances specified in directives of Superintendent, deliver to trustee all **credit cards in possession/control to trustee for cancellation**
- **158 (b)** deliver to the trustee all books, records, documents, writings and papers including, title papers, insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs
- **158 (f)** make disclosure to the trustee of all property disposed of within one year before the date of the initial bankruptcy event and how and to whom and for what consideration any part thereof was disposed of
- **158 (g)** make disclosure to the trustee of all property disposed of by gift or settlement without adequate valuable consideration within the period beginning on the day that is five years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included
- **158 (n.1)** inform the trustee of any material change in the bankrupt's financial situation;

## INSOLVENT LAWYERS

Law Society Rules, Rule 1 "insolvent lawyer"; Division 6 – Financial Responsibility Rules, Rule 3-43, 43.1(b), 45, 46

**Rule 3-43** This division applies to the following as to a lawyer

- (a) a non-practising member;
- (b) a retired member;
- (c) an articled student;
- (d) a practitioner of foreign law;
- (e) a visiting lawyer permitted to practise law in British Columbia under Rules 2-10.2 to 2-12;
- (f) a law corporation.

**Rule 1 "insolvent lawyer"** means a lawyer who

- (a) is the respondent of a petition for a receiving order under s 43,
- (b) has made an assignment of all his or her property for the general benefit of the lawyer's creditors under s 49,
- (c) has made a proposal under ss 50 or 66.11,
- (d) has filed a notice of intention to make a proposal under s 50.4, **or**
- (e) has applied for a consolidation order under s 219 of the BIA

**3-43.1 (b)** Instances in which a lawyer has failed to meet a minimum standard of financial responsibility include an **insolvent lawyer**.

**3-45 (2(a))** A lawyer who becomes an insolvent lawyer must immediately notify the Executive Director in writing that he/she has become an insolvent lawyer.

**3-45(3)** An insolvent lawyer who becomes bankrupt has conducted himself or herself in a manner **unbecoming** a lawyer in either of the following circumstances:

- (a) the lawyer's wilful neglect of creditors, financial irresponsibility or personal extravagance contributed to the bankruptcy;
- (b) the lawyer fails or refuses to take reasonable steps to obtain a discharge from the bankruptcy within a reasonable time.

**3-45(4)** An insolvent lawyer must not operate a trust account except with

- (a) the permission of the Executive Director, **and**
- (b) a second signatory who is a practising lawyer, not an insolvent lawyer and approved by the Executive Director.

**3-45 (5)** Any lawyer who becomes an **undischarged** bankrupt must resign any directorships in corporations, including law corporations, in accordance with section 124 of the *Business Corporations Act*.

## PROPERTY & EXEMPTIONS

- All property of the bankrupt at the date of bankruptcy will become property available to be distributed to creditors (**s. 67 BIA**)

- **2 “property”** means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action (includes action for damages in contract/tort claim but does not include reputation/personal injury), land and every description of property, whether real or person, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent
- **67.1(1)** Excludes:
  - (a) property held in trust for another person
  - (b) **Exempt assets under COEA:** property that is exempt from execution or seizure under any laws applicable in the province where property situated/bankrupt resides
  - (c) goods and services tax credit payments
  - (d) **prescribed payments** relating to essential needs of individual
  - (b.3) without restricting generality of (b), property in RRSP or RRIF or any prescribed plan other than property contributed in the 12 months before date of bankruptcy
- **67(1)(c)** Includes:
  - all property at date of bankruptcy including refund owing under ITA for calendar year

## Surplus Income

**68(2) “total income” (a)** includes a bankrupt’s revenues earned/received by bankrupt between date of bankruptcy and date of discharge (incl. damages for wrongful dismissal that relates to workers’ compensation)

- **68(2)(b)** Does not include amounts received as a **gift**, a legacy or an **inheritance** or as any other **windfall**.

**68(1)** Superintendent, shall by directive establish standards for determining the surplus income of an individual bankrupt and the amount required to be paid to estate.

### \*\*\*\*Surplus Income Directive\*\*\*\*

The Superintendent’s Standards are derived from the Low Income Cut Off (LICO) released by Statistics Canada.

### Family Unit

**4** Includes, in addition to bankrupt, any persons who reside in same household and who benefit from either expenses incurred or income earned, or who contribute to expenses/earnings. Person who does not reside is a member if they benefit from or contribute to expenses/income.

### Calculation

**5(1)** The family unit’s total monthly income is determined by subtracting from the total of all of its members’ monthly incomes the following amounts as applicable:

- (a) in the case of a salaried employee, minimum statutory remittances (income tax, pension and employment insurance deductions) and other mandatory deductions
- (b) in the case of a person who is self-employed, business expenses and deductions as permitted by the *Income Tax Act* or similar provincial legislation, minimum statutory remittances and installment tax payments.

**(2)** The family unit's available monthly income is determined by subtracting from the family unit's total monthly income the monthly non-discretionary expenses applicable to the personal and family situations of both the bankrupt and the bankrupt's family unit:

- (a) child support payments;
- (b) spousal support payments;
- (c) child care expenses;
- (d) expenses associated with a medical condition;
- (e) court-imposed fines or penalties that are in the process of being paid;
- (f) expenses permitted by the *Income Tax Act* (or similar provincial legislation) that are a condition of employment;
- (g) any other debt where a stay of proceedings has been lifted by the court, and a recourse authorized; and
- (h) interest paid on debts that are not dischargeable in bankruptcy under paragraph 178(1)(g).

(3) Trustee shall verify accuracy of income and expense statement submitted by bankrupt by requiring bankrupt provide:

- (a) proof of income; and
- (b) proof of payments made pursuant to paras 5(2) and 5(3)

(5) For the purposes of **68(3) BIA**, trustee determines whether bankrupt has surplus income by subtracting from family unit's available monthly income the amount that, according to the Superintendent's standards (**Appendix A**), corresponds to the number of persons in the family unit.

**6** Where the bankrupt has monthly surplus income for **less than \$200**, the bankrupt is not required to pay any amount to the bankrupt's estate under this Directive.

**7** Subject to the family situation described in **6(1)** and an adjustment to surplus income calculation under **7** or **8**, where bankrupt has monthly surplus income **equal to or greater than \$200**, the bankrupt is required to pay **50%** of the monthly surplus income to the bankrupt's estate.

#### Family Situation Adjustment

**6(1)** The amount that the bankrupt is required to pay to the bankrupt's estate as determined in **5(6)** or **(7)** shall be adjusted to the **same % as the bankrupt's portion** of the family unit's available monthly income.

(2) Where non-bankrupt spouse refuses/neglects to divulge income/expenses, trustee shall, apply 50% of Superintendent's standards (**Appendix A**) corresponding to number of persons in family unit.

(3) Where person considered to be member of family unit as described in **4** (other than a spouse), who is not bankrupt, refuses or neglects to divulge his/her income and expenses, this person is deemed not to be a member of the family unit.

Single parent, one child \$2,800 monthly income after IT, CPP, EI	$2,800 - 2497 = 303$ Surplus Income payment = \$151.50
Single parent, one child \$2,800 monthly income after IT, CPP, EI \$750 child care expenses (5(2)(c))	$2,800 - 750 - 2497 = -447$ No Surplus Income
Two parents & child parent A – bankrupt parent B – not <u>Total family income (after deductions)</u> \$5,000: \$4,000 (Parent A), \$1,000 (Parent B) child care expenses = \$600/month	Bankrupt's monthly income \$4,000 Other family member: <u>\$1,000</u> Total family income \$5,000 Child care expenses \$600 Available income \$4,400 Appendix A standard <u>\$3,070</u> Total surplus: \$1,330  <u>Family Situation Adjustment</u> Bankrupt: $4,000 / 5,000 = .80$ $.80 \times 1,330 = 1,064$ Payment Required from bankrupt (5(7)) = \$532

## Provable Claims

**124(1)** Every creditor shall **prove his claim**, or is not entitled to share in distribution

**115** All questions at meetings of creditors decided by majority resolution at **one vote for each dollar** of every claim of the creditor – **votes proportionate to claim.**

**178(2)** An order for discharge **releases** bankrupt from all claims **provable** in bankruptcy.

**121 (1)** All debts and liabilities, present or future, to which bankrupt is subject to on date of bankruptcy/to which bankrupt may become subject to before discharge due to pre-existing obligation, shall be **deemed** to be **provable claims.**

**14.06(8)** Despite **121(1)**, claim/proposal for costs of remedying any environmental condition/damage affecting real property/immovable are a provable claim, whether condition arose/damage occurred before/after date of bankruptcy.

### Contingent and Unliquidated Claims

- **121(2)** Whether contingent or unliquidated is provable and how it should be valued is made in accordance w/ **s. 135.**
- **135 (1.1)** Trustee shall determine whether provable and, if provable, trustee shall value and the claim is thereafter **deemed** provable.

## Discharge

### 1. Never Been Bankrupt

**168.1(1)(a) bankrupt who has never before been bankrupt is automatically discharged**

- (i) after **9 months**, unless opposition to discharge filed within that 9 months or bankrupt required to make surplus income payments, or
  - (ii) on expiry of **21 months**...unless opposition has been filed before discharge takes effect
- **If you have SURPLUS INCOME payment, make a proposal!**

### 2. Bankrupt Once Before

**168.1(1) (b) bankrupt who has been bankrupt once is automatically discharged**

- (i) after **24 months**, unless opposition to discharge or surplus income payments required, **or**
- (ii) after **36 months**, unless opposition filed before discharge takes effect

**178(2)** An order for discharge **releases** bankrupt from all claims **provable** in bankruptcy.

**178(1)** An order does not release bankrupt from:

- Court imposed fines (**178(1)(a)**)
- Damage awards for intentionally inflicted bodily harm or sexual assault (**178(1)(a.1)**)
- Support obligations (**178(1) (b)&(c)**)
- Debts created through fraud (**178(1)(d) & (e)**)
- Student loan debt (under certain conditions) (**178(1)(g)**)

**172 (1)** On hearing court may (a) grant or refuse **absolute** order of discharge, (b) suspend operation of absolute order of discharge for **specified time**, or (c) grant **discharge subject to terms and conditions** w/respect to post-bankruptcy earnings/property.

**172(2)** On proof of the facts in **173**, court shall (a) refuse discharge, (b) suspend discharge for proper period, (c) require bankrupt as condition to perform acts, pay money, consent to judgments, or other conditions.

- **173(1) – If any of these facts are present, absolute discharge is NOT an option**
  - (a) assets of bankrupt are not of value = **50 cents on the dollar**, unless bankrupt proves this is due to circumstances for which the bankrupt cannot justly be held responsible.
    - *Wilkshire*
  - (b) bankrupt has **continued to trade** after becoming aware of being insolvent,
    - *Wilkshire*
  - (e) bankrupt has brought on/contributed to bankruptcy by **rash/hazardous speculations, unjustifiable extravagance in living, gambling or culpable neglect of bankrupt’s business affairs.**
  - (m) the bankrupt has failed to comply with a requirement to pay imposed under section 68
  - (n) the bankrupt, if the bankrupt **could have made a viable proposal**, chose bankruptcy rather than a proposal to creditors as the means to resolve the indebtedness;

The following general principles must guide determinations of whether to grant discharge (*Re Wilkshire*):

- The interests of the bankrupt and creditors, and interests of the public
- Legislature has recognized that citizen should not be so overwhelmed by his debts as to be incapable of performing the ordinary duties of citizenship
- Thus there is a state interest in debtor being released from the overwhelming pressure of debts
- One purpose of act is to allow honest but unfortunate debtor to be discharged and have a **fresh start**

On the other hand...

- Bankruptcy court should not be clearinghouse for all debts nor is it a charity
- Application of discharge provisions of Act important to regime’s success or failure
- Need to “guard against laxity in granting discharges”
- “Discharge is not a matter of right”

## Distribution

1. Secured Creditors
2. Preferred Creditors (136(1))
  - a. Funeral costs for deceased bankrupt (136(1)(a))
  - b. Trustee expenses and fees (136(1)(b))
  - c. Municipal taxes owing from previous 2 years (136(1)(e))
3. Ordinary Unsecured Creditors (141)
  - a. **141** all claims proved in bankruptcy shared rateably.
4. Postponed Creditors (137, 139, 140)
  - a. Eg./ 137(1) Not at arm’s length, not entitled to claim dividend until all other creditor claims satisfied
  - b. Eg./ 139 Where lender advances money engaged in business under contract w/borrower that lender shall receive interest varying w/profits and borrower then becomes bankrupt, lender not entitled to recover anything in respect of loan until claims of all other creditors of borrower satisfied.

## Special Claims

- Unpaid suppliers (81.1,81.2)
- Unpaid employees (81.3)
  - **81.3 (1)** for wages/salaries/commissions/compensation by bankrupt for services rendered during period of **6 months** before date of initial bankruptcy to date of bankruptcy – **secured, as of date of bankruptcy, to \$2,000** – less amount paid for receiver/trustee services – by security on bankrupt’s current assets.
- Unpaid pension contributions (81.5)
- Environmental claims (14.06(7))
  - **14.06(7)** Any claim by Queen in right of Canada or a province for costs of remedying environmental condition/damage is secured by security on real property or immovable property affected by the condition/damage and on contiguous property and related to activity causing damage.

## Student Loans

### *Discharge*

**178(1)(g)** An order of discharge does not release the bankrupt from a student loan where the date of bankruptcy occurred

- (i) before the date on which the bankrupt ceased to be a full or part time student under the legislation, or
- (ii) **within 7 years** after which the bankrupt ceased to be a full or part-time student – **discharge does not release from obligation of a student loan**

**178(1.1) Non-application by court order:** At any time **after 5 years** after bankrupt referred to in **1(g)** ceases to be full/part time student, court may order **(1)** does not apply if satisfied:

- (a) bankrupt has acted in **good faith** in connection with their liabilities under the debt, and
  - good faith evaluated on reasonable person standard (*Phillips*)
  - did applicant seek available relief and attempt to negotiate payments? (*Phillips*)
- (b) bankrupt **has and will continue to experience financial difficult** to such an extent that the bankrupt will be unable to pay the debt.
  - Hardship: if to deny the application would place bankrupt who is not emotionally robust in a position where her mental health could be undermined and progress towards financial rehabilitation halted (*Phillips*)

### *Proposal*

**66.28(2.1)** A consumer proposal does not release the consumer debtor from any particular debt referred to in **178(1)** unless the consumer proposal explicitly provides for the compromise of that debt and the creditor voted for the acceptance of the consumer proposal – **possible for it to be released under proposal**

### *Phillips Re*

Court applied **178(1.1)** because **undue hardship**:

- she has no equity to get a second mortgage on her home to pay debt
- she has poor health
- financial solvency will be a very slow process for her, will not be able to pay debt within a reasonable time

### *Abdo (Re) – quasi-student loan debt*

- Court allows discharge of the debt
  - No special status as student loan b/c not advanced for student loan purposes
  - No evidence of extravagance or trading w/knowledge
  - Could not have made viable proposal