

CHAPTER TEN: CREDITORS' REMEDIES AND DEBTORS' ASSISTANCE

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CHAPTER TEN: CREDITORS' REMEDIES AND DEBTORS' ASSISTANCE

I. CREDITORS' REMEDIES

A. *Governing Legislation*

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as am. by S.C. 1992, c.27 and S.C. 1997, c. 12.

Builder's Lien Act, S.B.C. 1997, c. 45.

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2.

Business Practices and Consumer Protection Authority Act, S.B.C. 2004, c. 2.

Court Order Enforcement Act, R.S.B.C. 1996, c. 78.

Creditor Assistance Act, R.S.B.C. 1996, c. 83.

Interest Act, R.S.C. 1985, c. I-18.

Personal Property Security Act, R.S.B.C. 1996, c. 359.

Pension Benefits Standards Act, R.S.B.C. 1996, c. 352.

Repairer's Lien Act, R.S.B.C. 1996, c. 404.

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1.

Winding Up and Restructuring Act, R.S. C. 1996, c. 6.

While matters involving bankruptcy or insolvency should almost always be referred to an insolvency practitioner, students offering advice in this area should ensure that the advice is up-to-date in accordance with the applicable insolvency legislation. Always refer to the legislation directly. Given the number of applicable statutes and regulations, the law in this area is frequently subject to change.

B. *Introduction to Creditors' Remedies*

There are legal remedies available to creditors to enforce a debt, but the related procedures are frequently time-consuming and potentially costly, and there is no guarantee that the creditor will actually receive all of the funds owed. The single most important reason for starting civil proceedings to collect a debt is to permit the creditor to execute on his or her judgment. Such execution proceedings may include:

1. examinations in aid of execution (to determine the debtor's ability to pay the debt);
2. subpoena to debtor hearing (to obtain a court order compelling the debtor to make payments on the judgment);
3. garnishment (to compel third parties to pay funds into court to the credit of the judgment rather than pay those funds to the debtor); and
4. collection by execution (to lodge a writ of execution with the bailiff who will then seize and sell the debtor's assets and pay proceeds to the credit of the judgment).

A judgment may also be filed on the title of real property owned by the debtor and will remain on the title of that property for two years unless it is discharged by the debt being paid or bankruptcy, or the creditor commences execution proceedings against the land.

Before giving advice to creditors, a student should ask a number of questions. The first is whether the good is a secured interest, and, if so, whether it is a consumer good. If the debt is unsecured, a charge cannot be registered against the property, unless the property is the subject matter of the dispute. However, after a judgment is obtained a charge can be registered against any property owned by the judgment debtor. Although LSLAP helps comparatively few creditors, this half of the chapter should answer most questions for matters that LSLAP **may** be able to help with.

C. *Creditors' Remedies Against Debtors*

Prior to taking action against a debtor, the creditor must provide a reasonable time for payment on a demand loan or term loan. That time begins to run from the date of the demand for payment and not the date of the loan. What constitutes a reasonable demand period depends upon the facts of each case: see *Redhawk Drilling Ltd. v T.D. Bank* (1986), 49 Alta LR (2d) 38; *Wbonnock Industries v National Bank of Canada* (1987), 16 BCLR (2d) 320, 42 DLR (4th) 163; *Lister v Dunlop (Ronald Ehnyn Lister Ltd v Dunlop Canada Ltd)*, [1982] 1 SCR 726. For a list of factors to be considered see *Mister Broadloom Corporation (1968) Ltd v Bank of Montreal* (1979), 25 OR (2d) 198. The limitation period for commencement of proceedings for the collection of a debt in B.C. is 6 years from the debtor's acknowledgement in writing of the cause of action or last payment on the debt.

1. Secured Creditors

a) *Definition*

A secured creditor holds a lien, mortgage, or charge against the debtor's assets or collateral as security for the repayment of the debt.

b) *General Introduction to the PPSA*

The Personal Property Security Act [PPSA] establishes a system for the registration, priority, and enforcement of secured loan and credit transactions involving personal property in B.C. Secured creditors holding agreements that create or provide for security interests (i.e. chattel mortgages and conditional sales agreements) must register these security agreements in order to "perfect" its interest and establish its priority vis-à-vis third parties.

For agreements that are subject to the PPSA, Part 5 of the PPSA outlines the creditor's remedies (ss. 56 - Rights and remedies, 57 - Collection of payments under intangibles or chattel paper, and 67 - Rights and remedies: consumer goods). For agreements that involve fixtures, crops or accessions, ss. 36 – 38 apply. In addition, Part 6 contains some sections (i.e. ss. 68(2) - Good faith and commercially reasonable, and 72 - Notice) that are of procedural importance.

NOTE: These are examples of issues that may be encountered by clinicians while dealing with the PPSA. Remember that PPSA issues, particularly those involving priority disputes or matters relating to the transitional provisions, are complex and may have to be referred to a lawyer.

c) *What Does the PPSA Govern?*

The scope of the PPSA is defined in s. 2 as including every transaction that in substance creates a "security interest" without regard to its form. Section 1 defines

“security interest” as an interest in goods, etc., which secures payment or performance of an obligation. As well, under s. 3, a transaction involving either a transfer of an account or chattel paper, a commercial consignment, or a lease for a term of more than one year that does not secure payment or performance of an obligation (i.e. does not create a security interest) is subject to the PPSA. Section 55 provides that Part 5 does not apply to transactions brought within the PPSA by s. 3. It is necessary to look to the terms and the common law.

NOTE: Section 4 lists types of transactions that are exempt from the PPSA. The PPSA does not apply to a “lien, charge or other interest given by a rule of law or an enactment unless the enactment contains an express provision that the PPSA applies”. Generally this excludes real property and natural resources.

d) Perfection

For a creditor’s interest in a good to be practically effective, s. 35(1)(b) of the PPSA states that the interest must be “perfected”, whereby the creditor becomes a “secured” party. By virtue of s. 19, a security interest must satisfy two conditions to be “perfected”:

- i) the security interest must have “attached” (see below); and
- ii) the secured party must ensure that “all steps required for perfection under this Act have been completed” (see below).

In general, attachment will ensure that the security interest is enforceable against the debtor, while perfection will protect the security interest against competing third party claims.

“Attachment”: Section 12 states that a security interest attaches to the good when:

- i) value is given;
- ii) the debtor has rights in the collateral; and
- iii) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable under s. 10 (unless the parties specifically agreed to postpone the time for attachment in which case the security interest will attach at the time specified in the agreement).

e) Methods of Perfection

- i) perfection by possession of collateral applies to all forms of security interests (s. 24);
- ii) perfection by registration. Subject to s. 19, registration of a financing statement perfects a security interest in collateral. (s. 25); and
- iii) temporary perfection (ss. 5(3), 7(3), 26, 28(3), 29(4) and 51).

f) Remedies

Where a debtor defaults on a security agreement, s. 56 provides that the secured party has against the debtor only the rights and remedies provided in the security

agreement (as long as they do not derogate those rights given to the debtor by the PPSA), as well as those specifically provided by the PPSA (s. 17 and ss. 36 – 38). Important sections of the PPSA for the creditor are ss. 58 and 59, which contain rules for seizing and disposing of collateral. These sections provide that, unless the security agreement states otherwise, where the debtor defaults on their payment, the creditor may elect to take possession of the collateral pursuant to the contract, dispose of the collateral **and** then sue for any amount still owing. Section 67, provides for a more limited set of remedies where the collateral takes the form of consumer goods – known as the “seize or sue” rule. Formerly, under legislation repealed by the PPSA, all creditors could only seize or sue but not both. The principle of “seize **or** sue” still applies to “consumer goods” (see **Section I.C.1.g: Seizure**, below); it no longer applies to commercial goods.

g) Seizure

Where the security interest does not involve fixtures, accessions, crops, or consumer goods, s. 58 provides the fundamental rule for realization upon non-possessory security interest in tangible personal property: the secured party has a right to seize (in the case of a secured loan transaction) or to repossess (in the case of a secured credit sales transaction) the collateral. Upon seizing the collateral, s. 17 defines the rights and obligations of secured parties in possession of collateral. The section imposes a standard of reasonable care on the secured party in possession of the collateral and the secured party must follow the notice provisions outlined in ss. 59(6) – (12) before he or she is entitled to carry through with disposal.

b) Disposal of Collateral

After seizing collateral, the secured party under s. 59(2) may dispose of it either in its present condition or after repairing it (though s. 68(2) protects the debtor from incurring unnecessary expenses because all rights, etc., under the PPSA must be discharged “in good faith”). Further, s. 59(3) provides that the secured party may dispose of the collateral by a private or public sale (either as a whole or in commercial units or parts) and, if the security agreement so provides, by lease. See also **Section I.C.1.k: Voluntary Foreclosure**.

Section 59(2) provides a priority scheme regarding application of the proceeds of sale: first, toward the reasonable expenses of seizing, repairing, etc.; second, toward the satisfaction of the obligations owed to the secured party; and last, if any surplus exists, to the satisfaction of obligations owed to persons holding a subordinate security interest, and then toward the debtor (s. 60).

A person who buys an item from a disposal sale takes the good free and clear of the debtor, the secured party, and any subordinate creditors whether or not the secured party complied with the requirements of the section. In the case of a prior secured creditor’s interest, if the goods are “consumer goods” of a value less than \$1,000 and the purchaser gave value for the goods, the purchaser takes them free of the prior secured creditor’s interest (see s. 59(14)).

i) Notice of Intention to Dispose of Collateral

NOTE: The forms of notices under the PPSA depend on a number of factors, including the nature of the security and the terms of the security agreement. Advice concerning the validity of notices should be referred to a lawyer.

Subject to the circumstances where notice is not required as per s. 59(17) (e.g. for perishable collateral, collateral requiring disproportionately high storage costs relative

to its value, etc.), the requirements for notice are outlined in ss. 59(6) and (10). These sections require that the secured party, or receiver, as the case may be, must provide at least **20 days** notice of his or her intention to dispose of the collateral to parties including the debtor and any other creditor.

When a secured party is considering methods of disposal, he or she must give notice to the following parties (see s. 59(6)):

- i) the debtor;
- ii) any other person who is known by the secured party as the owner of the collateral (where that is not the debtor);
- iii) any creditor or person with a security interest in the collateral whose interest is subordinate to the secured party, who registered a financing statement, or whose security interest is perfected by possession at the time of seizure or repossession of the collateral; and
- iv) any other person with an interest in the collateral who has given notice to the secured party of his or her interest in the collateral before the notice of disposition is given to the debtor.

The secured party is required to include specific information in the notice (see s. 59(7)):

- i) a description of the collateral;
- ii) the amount required to satisfy the obligation secured by the security interest;
- iii) the arrears owing (exclusive of the operation of an acceleration clause);
- iv) the expenses associated with seizure and repossession; and
- v) the date, time and place of disposition.

In the case of a receiver attending to the disposition of the collateral, the receiver must give notice to (see s. 59(10)):

- i) the debtor;
- ii) any other person known by the secured party to be an owner of the collateral;
- iii) any creditor with a security interest subordinate to that other secured party, who has either registered the financing statement, or who has perfected its security interest by possession at the time of the seizure or repossession of the collateral; and
- iv) any other person with an interest in the collateral who has notified the receiver of that interest in the collateral before the notice of disposition is given to the debtor.

The notice that the receiver must provide need contain only (see s. 59(11)):

- i) a description of the collateral;
- ii) a statement that unless the collateral is redeemed it will be disposed of; and

- iii) the particulars relating to the place of disposition or where tenders may be delivered.

j) Surplus or Deficiency

When a secured party is left with a surplus after disposal of the collateral, it must be accounted for and paid to the parties in the order specified in s. 60(2). If a dispute regarding entitlement arises, s. 60(4) provides for the secured party to pay the secured funds into court, which gives those claiming entitlement the opportunity to make an application under s. 70 for payment.

Under s. 60(5), the debtor is responsible for any deficiency balance unless the secured party and the debtor have agreed otherwise and made provisions as such in the security agreement.

NOTE: This section does not apply to consumer goods.

k) Voluntary Foreclosure

After default, a secured party may make a proposal to the debtor and other interested parties to take the collateral to satisfy obligations secured by it (s. 61). This provision will likely be used in situations where there is a substantial shortfall and there is no practical means of collecting the security.

The debtor and other interested parties have 15 days to object to the secured party's proposal. Failure to object is deemed to be an irrevocable election to forfeit all rights and interests in the good and entitles the secured party to retain the good.

If the debtor or other secured party provides notice of objection to the secured party within 15 days after the notice is given, the secured party must dispose of the collateral in accordance with the provisions of s. 59. In such circumstances, the secured party may make an application to the court for an order that an objection to the secured party's proposal is ineffective because:

- i) the objection was made for a purpose other than protecting an interest in the collateral or the proceeds of the disposition of the collateral; or
- ii) the market value of the collateral is less than the total amount owing to the secured party plus the costs of disposition.

l) Restrictions on Realization

(1) Subordination of Unperfected Security Interests

Under s. 20(a), an unperfected security interest is subordinate to the interest of:

- a person who causes the collateral to be seized under legal process to enforce a judgment (including execution, garnishment or attachment), or who has obtained a charging order or equitable execution affecting or relating to the collateral;
- a representative of a creditor enforcing the rights of a person referred to above; and

- a sheriff acting under the Creditor Assistance Act and any judgment creditor entitled to participate in the distribution of property under the Creditor Assistance Act.

Also, if an interest is unperfected at the date of the bankruptcy or winding-up, then that interest is not effective against a trustee in bankruptcy or a liquidator (Winding-Up Act, R.S.C. 1985, c. 27).

In addition, ss. 20(c), 30(3) and 31 confirm the subordination of the interest of a secured party to a *bona fide* purchaser for value under various circumstances.

(2) Restriction on the Right to Accelerate a Term Debt

The security agreement may contain an “acceleration clause” that provides that the total amount owing becomes due upon default in payments or whenever the secured party has “commercially reasonable grounds” to believe that he or she may not be repaid or that the collateral is “in jeopardy”. If there is an acceleration clause in the security agreement, it may not be invoked unless this objective test of “commercially reasonable grounds” has been satisfied.

(3) Limitation of the Right of Seizure for Consumer Goods

For collateral that is a “consumer good”, where the debtor has paid at least two-thirds of the total amount secured, the creditor may not seize the good without first obtaining a court order (see **Section I.C.1.m: Consumer Goods**).

(4) Obligation While in Possession of Collateral

Section 17 of the PPSA imposes a standard of reasonable care on any secured party in possession of the collateral.

(5) Rights of a Debtor

The PPSA preserves the debtor’s (but not the secured party’s) rights and remedies under other statutes that are not inconsistent with the PPSA as well as the specific rights and remedies provided in the security agreement, Part 5 and s. 17 (s. 56(2)(b)).

(6) Rights of Redemption and Reinstatement

Under s. 62, a debtor has redemption rights. Any person entitled to notice of a pending disposition of collateral may “redeem” the collateral by tendering to the secured party fulfilment of the obligations secured by the collateral plus the reasonable expenses incurred by the secured party associated in seizing the collateral or otherwise preparing it for disposition. The aforementioned obligations may simply be the amount in arrears; however, it is more often the case that an acceleration clause applies, and that the obligations will be the total amount of the debt. Where the security agreement contains an acceleration clause, the debtor may apply to court for relief from the consequences of default or for an ordering staying enforcement of the security agreement’s acceleration provision.

Where the collateral is a “consumer good”, the calculation of the obligation secured and the obligation that must be tendered is varied. The debtor may “reinstate” the security agreement by paying only the monies actually in arrears – negating the operation of any acceleration clause. The debtor may waive this right but any such agreement must be in writing after default. Note that the number of times the debtor may reinstate the security agreement is limited depending on the period of time for repayment set out in the security agreement; however, the frequency of reinstatement may be varied by agreement between the parties.

m) Consumer Goods

(1) Definition

Section 1 of the PPSA defines consumer goods as “goods that are used or acquired for use primarily for personal, family or household purposes”.

(2) Secured Party’s Remedies

Section 67(1) lists the options available to a secured party. The secured party may elect to pursue one of the following remedies:

- seize or repossess the goods (s. 58);
- enact the voluntary foreclosure remedy (s. 61) (discussed above);
- accept the surrender of the goods by the debtor; or
- start an action to recover a judgment against the debtor for the amount of the unpaid debt or unperformed obligations under the security agreement.

This is sometimes called the “seize or sue” rule.

If the debtor has paid at least two-thirds of the total amount of the secured obligation, the secured party may not seize the consumer good used as collateral (s. 58(3)). However, the secured party may apply to court for an order that the “two-thirds rule” should not apply and the court will make a decision based on (s. 58(4), (5)):

- the value of the collateral;
- the amount of the obligation that has been discharged;
- the reasons for default; and
- the current and future financial circumstances of the parties.

(3) Disqualification from “Seize or Sue” and Leases

A secured party with a security interest in “consumer goods” may escape the seize or sue provisions when:

- the debtor has engaged in wilful or reckless acts or neglect that has caused substantial damage or deterioration to the goods; the secured party may seek a court order pursuant to s. 67(8) disqualifying the

debtor from the rights and remedies ordinarily available under s. 67(1)-(5) (s. 67(8)); or

- the secured party discovers after seizure that an accession that was collateral has been removed and not replaced by other goods of equivalent value and free from prior security interests, a claim may be advanced against the debtor for the value of the accession (s. 67(8)).

NOTE: The “seize or sue” rule does not apply to “true leases”. The “seize or sue” rule does apply to “security leases” or “conditional sales agreements”. BC courts have been developing tests to distinguish between true leases and security leases. Disputes often arise over car leases. Clients should consult with a lawyer who is familiar with this area of law when trying to figure out whether their contract is a true lease or a security lease. If the lease is a true lease the creditor has the option to seize **and** sue; see *DaimlerChrysler Services Canada Inc v Cameron* 2007 BCCA 144.

(4) Consequences of Electing to Proceed Against Collateral

Under s. 67(2), an election to proceed against the collateral results in the extinguishment of the debtor’s obligations under the security agreement or any related agreement (with the exception of land mortgages executed before July 1, 1973), thereby automatically releasing any guarantor or indemnitor of the obligations contained in the security agreement. However, ss. 67(3) and 67(4) contain exceptions.

Since proceeding against the collateral precludes the creditor from recovering the deficiency of the debt, the creditor is well advised to collect as much of the debt as possible, from other sources prior to seizing the goods. Remember, however, that if the creditor collects 2/3 or more of the debt they lose the right to seize the goods.

(5) Consequences of Electing to Sue

An election to sue results in the following consequences for the creditor:

- Under s. 67(6), if the creditor gets a judgment against the debtor and seizes the collateral pursuant to a writ of seizure and sale, the right of recovery is limited to the gross amount realized from the sale of the collateral;
- Under s. 67(10), commencement of proceedings against the debtor extinguishes the security interest of the creditor in the goods.

Therefore, the goods become subject to a bankruptcy stay; and the creditor may have to share proceeds of the seizure and sale with other creditors as he or she will no longer have priority based on secured creditor status.

Exceptions include cases of fraud or cases where the stay is unjust.

2. Unsecured Creditors

A creditor initiates legal proceedings for one obvious and specific purpose: to permit that creditor to obtain a judgment and collect the debt owed. There may be cases where such action is not taken, for example, if the debtor has no assets and is not likely to ever have assets. There

are also instances where a creditor may be legally prevented from initiating proceedings against a debtor, for example, if the debtor files an assignment in bankruptcy. These issues will be discovered when the debtor's assets, if any, are identified at Payment Hearing in Small Claims Court, or in the Examination in Aid of Execution or Subpoena to Debtor Hearing in Supreme Court (see **Appendix B: Checklist for Examination in Aid of Execution**). However, when a debtor has or may have assets, the creditor may wish to obtain a judgment on the debt to execute against assets of the debtor.

a) ***The Creditor Assistance Act***

Before this Act, the common law position was that priorities among execution creditors were determined in relation to the time the writs were filed. The creditor who filed the first writ would be paid in full, and then the next, and so on.

The principles of the Creditor Assistance Act allow creditors to give debtors time to pay, and not prejudice the patient creditor over another who files as soon as the debt is due. Section 3 provides that on execution, all creditors who have filed a writ will receive their share on a *pro rata* (or "rateable") basis. *Pro rata* means that each creditor will receive a share of the funds available for distribution that is proportionate to their share of the debtor's total debt.

Exceptions to this principle of *pro rata* distribution allow preference to sheriff's costs, costs to the creditor at whose instance the seizure and levy was made, and wage claims that do not exceed three month's wages, or salary. Further, the Family Maintenance Enforcement Act, RSBC 1996, c 127 provides that proceeds realized on execution under that Act are not subject to distribution under the Creditor Assistance Act. In addition, some statutory liens and charges may take priority over the rateable distribution under the Act.

NOTE: Payments made pursuant to a foreclosure sale of land will be made in the order that judgments are registered at the Land Title Office, and not on a *pro rata* basis.

(1) Money to be Levied by Execution

Under s. 3, once the sheriff collects money, an event called a levy, the persons who qualify under the Act distribute it. These persons must have filed a writ of execution prior to the levy or must file a writ within one month of the date the levy was entered. Where the creditor does not have a judgment against the debtor at the time of levy, and the claim is for debt, the creditor may obtain a certificate of claim under the Creditor Assistance Act. If this certificate is delivered to the sheriff within one month of the levy, the creditor may participate in the rateable distribution. The procedure for the certificate of claim is in ss. 6 – 21 of the Act.

(2) Contest of the Creditor's Claim

Under s. 14, on receiving an affidavit of claim the execution debtor may file and serve an affidavit of good defense to the claim within 10 days of the original service. The court may vary this length of time upon application. The distribution is halted pending verification of the validity of the claim.

Besides the debtor, another creditor may contest the claim (s. 15). Grounds for filing include an allegation that there is no debt due in good faith from the debtor to the claimant, or an allegation that the claim is not

one of debt as required by s. 6 of the Creditor Assistance Act. A claimant whose claim is contested must make an application to Supreme Court within eight days of being notified; otherwise, the claim will be deemed to have been abandoned.

Students should further note that under s. 12, if the amount levied does not satisfy all of the writs of execution and certificates of claim, the sheriff is authorized to make a further seizure of the execution debtor's personal property to satisfy all writs and certificates of claim. In addition, the certificate, if issued, remains in force for three years and may be renewed similarly to a writ of execution.

b) Execution

Under s. 55 of the Court Order Enforcement Act [COEA], any judgment creditor (a creditor who has obtained judgment against the debtor) may have property of the judgment debtor seized and sold by the sheriff to satisfy the amount owing under the judgment. Section 60 of the COEA directs that any surplus after payment of the judgment, interest, and reasonable costs of seizure and sale be paid to the debtor. Section 71(1) of the COEA creates categories of exemptions for the personal property of debtors with the specific amounts set by regulation. Debtors are allowed:

1. Necessary clothing, medical and dental aids that are required by the debtor and his or her dependants;
2. \$4,000 for household furnishings and appliances (calculated using approximately 10% of the original purchase price);
3. \$5,000 for one motor vehicle if the debtor is not a maintenance debtor (calculated using net equity and current value);
4. \$2,000 for one motor vehicle if the debtor is a maintenance debtor (calculated using net equity and current value); and
5. \$10,000 for tools and other personal property that the debtor uses in his or her occupation. (calculated using approximately 10% of the original purchase price).

A "maintenance debtor" has the same meaning as a "debtor" in s. 1(1) of the Family Maintenance Enforcement Act. In addition, s. 71.1(1) of the COEA exempts the principal residence of the debtor; \$12,000 is the prescribed amount of equity exemption if the debtor's principal residence is located within the boundaries of the Capital Regional District or the Greater Vancouver Regional District. If the debtor's principal residence is located outside of these boundaries, \$9,000 is the prescribed amount of equity exemption. These values are calculated using the net equity.

NOTE: Refer to B.C. Reg. 28/98 (Court Order Enforcement Exemption Regulations) for further details regarding exemptions under the COEA. Where there are competing priority interests between judgment creditors and secured parties, each party should seek the assistance of counsel.

NOTE: The execution remedy is available to an unsecured creditor only after he or she has obtained judgment against the debtor.

NOTE: The B.C. Supreme Court recently held in *Thow (Re)* 2010 BCSC 1561 and *Atwal (Re)* 2011 BCSC 687 that a debtor whose property is sold by a trustee under the Bankruptcy and Insolvency Act [BIA] is not entitled to the above exemptions if the value of their property exceeds that which is prescribed in

the legislation. Thus, at the moment, exemptions under the COEA operate differently from exemptions under the BIA, which currently does not allow the debtor to retain any equity in property whose value exceeds the prescribed exemption. **However, the law relating to personal exemptions in a bankruptcy is currently being challenged, as *Atwal (Re)* has been appealed to the B.C. Court of Appeal by the applicant.** Students should verify the state of the law before giving any advice in this area.

(1) Seizure Under Execution

Any goods, chattels and effects of the judgment debtor (COEA, s. 55), money, bank notes, cheques, or other securities for money, such as shares of an incorporated company in British Columbia (s. 64; *Peligrin et al. Ajac's Equip. (1982) Inc et al* (1984), 56 BCLR 17, [1984] 5 WWR 563 (SC)), and any legal or equitable present, future, executory or contingent interest in land (s. 81) may be seized after the exemptions from s. 71(1) of the COEA are applied.

Where the debtor is a conditional buyer or a chattel mortgagor, a sheriff or bailiff may seize secured goods. Sheriffs, however, are usually reluctant to seize collateral unless there is clearly equity in it. In such cases, the secured creditor cannot seize a greater interest than the debtor has. The secured creditor takes the secured goods subject to the security interest of the conditional seller or chattel mortgagee.

Sections 71(2) and (3) set out three exceptions to the personal property exemptions provided in s. 71(1) of the COEA:

- a) the debtor cannot exempt goods identical to the goods that were the subject of the contract in question; and
- b) a trader cannot claim any goods that are part of his or her stock-in-trades.
- c) Corporate debtors cannot avail themselves of the personal property exemption.

In addition, s. 54 of the Insurance Act, RSBC 1996, c 226 allows for the exemption of certain insurance policies. Section 54(1) states that if insurance money has already been payable then it is exempt; essentially creditors cannot attach once money has been transferred. Section 54(2) states that insurance money and the rights and interests of the insured in a life insurance contract are exempt from execution or seizure, as long as there is a designation in favour of a preferred beneficiary (immediate family as defined by the act) of the person whose life is insured.

In a recent trilogy of cases, B.C.'s Court of Appeal held that Registered Retirement Savings Plans (RRSPs) in the form of delayed annuities could satisfy the requirements of s. 54(2) of the Insurance Act, and are therefore shielded from execution and seizure: see *Smythe McMahon Inc. v Sykes* (1998), Vancouver CA016762 (B.C.C.A.); *Robson v Robson* (1995), Vancouver CA020118 (BCCA); and *Thomson v Stock* (1997), Vancouver CA020458 (BCCA).

The Bankruptcy and Insolvency Act, 1985, s. 67(1)(b.3) now shields all RRSP contributions from seizure in a bankruptcy, except those made in the 12 months prior to bankruptcy.

Certain interests have been held to fall outside s. 71 and therefore are not exempt from seizure. Partial interest and equitable interests do not fall within s. 71 and thus, for example, a purchaser under a conditional sales agreement cannot prevent seizure of the goods sold under the agreement. Similarly, the section does not apply to a charging order or a garnishing order since the section only refers to “forced seizure and sale”. Thus, monies in court and debts or wages being garnished cannot form part of the judgment debtor’s exemption under the COEA.

(2) Execution Procedure: Chattels, Money, Shares, Etc.

The judgment creditor obtains a warrant of execution (Small Claims Court) or a writ of seizure and sale (Supreme Court) directing the sheriff or bailiff to seize and sell sufficient goods or securities to satisfy the debt plus expenses (COEA, ss. 58 and 60). The seizure of shares involves particular problems: see ss. 64 and 65; see also *Peligren et al. v. Ajac's Equipment (1982) Inc. et al.* (1984), 56 B.C.L.R. 17, [1984] 5 W.W.R. 563 (B.C.S.C.).

Where the sheriff seizes goods, the sheriff’s officers are entitled to assume that all the goods and chattels on the premises are the property of the judgment debtor at the time of the seizure. The judgment debtor has a duty to claim that some of the property is personal property or the personal property of others: see *Supreme Auto Body v. B.C.* (1987), 21 B.C.L.R. (2d) 101 (C.A.).

(3) Execution Procedure: Land

NOTE: **LSLAP students cannot help with issues relating to land. These cases must be referred to the Lawyer Referral Service.**

If the judgment creditor registers a judgment in any Land Title Office, a lien is created against the interest in the real property of the judgment debtor that is registered in the land registration district in which the judgment is registered (s. 82). Once a lien is formed, the judgment creditor may seek a court order to have the sheriff sell the land (ss. 92 and 96), unless the land is held in joint ownership and the debt is in one party’s name only. In that case, an application must be brought for partition and sale of the property. The execution procedure, however, is slow and potentially expensive. **The judgment creditor must renew the judgment after two years or it is extinguished**, unless it is a non-expiring judgment (i.e. a judgment registered under the Family Maintenance Enforcement Act).

NOTE: Where there is a conflict between the PPSA and the Land Title Act, the Land Title Act prevails (PPSA, s. 74).

(4) Legal Advice on Execution Orders

Once the execution process has begun, the debtor usually has one final opportunity to pay. In the case of land, the sheriff may not sell until one month after receiving the order for sale (s. 100). The debtor should be advised to pay if possible because the amount recovered on a forced sale may not be as high as otherwise obtained on a normal sale of property.

c) *Garnishment of Bank Accounts and other Accounts Receivable*

(1) Garnishment Before or After Judgment

Garnishment is a judicial proceeding in which a creditor asks the court to order a third party who is indebted to the debtor to turn over to the creditor any of the debtor's property. The creditor is the garnishor. The third party is the garnishee. The COEA provides that a garnishing order may be obtained before or after judgement.

A pre-judgment garnishing order is paid into court pending the outcome of the proceedings, and may be used in circumstances where the debtors ability to pay may be compromised before judgement. A pre-judgment garnishing order is not available against wages. The creditor's action against the debtor must be for a liquidated (i.e. explicitly specified) or ascertained sum. E.g. damages for a breach of contract must be quantified as a term of that contract (see *Gibbons v Specialty Cars* (27 January 1989), F.5885590 (BC County Ct.)). A definition of liquidated sum is found in *Hydro Fuels v Wilder*, [1968] 1 OR 169 at 276 (HCJ). The accompanying affidavit must disclose the nature of the cause of action and the specified amount claimed. Note that recourse to a pre-judgment garnishing order is extraordinary and therefore the provisions of the COEA must be strictly complied with or it may be overturned. **Never swear an affidavit in support of a pre-judgment garnishing order for a client.** Have the client swear the affidavit him or herself.

A creditor who begins an action for a liquidated sum may seek to garnish a debt owed to the debtor to have the money paid into court to "ensure" payment if the creditor is successful in court. However, remember other judgment creditors may also be trying to ensure payment.

If the order has not yet been made and the debt is valid, it may be in the debtor's best interest to pay the creditor if possible, since the debtor is liable for payment of the costs of the garnishing proceedings.

If the order has already been made, the creditor should examine the possibility of having the garnishment released and an order for payment by instalments substituted under s. 5, or in the case of garnishment of wages, having the exemption increased under s. 4. **The creditor should be advised that hardship may be used as a defence.**

If the client is a garnishee who wishes to dispute indebtedness to the defendant or judgment debtor, he or she should file a dispute notice as soon as possible with the court. If he or she does not dispute it, a second order, called an order absolute may be issued (see **Appendix A: List of Relevant Documents: Affidavit in Support of Garnishing Order After Judgment**). This order operates as a judgment and execution may be taken against him or her. **Inactivity could render a garnishee liable even if he or she never owed the money to the defendant/judgment debtor.**

(2) What Debts Can be Garnished?

Any debt that is "due or accruing due" to a judgment debtor may be garnished by a judgment creditor. This requires that the debt be an existing or perfected debt even though payment is not yet due. Bank accounts can be garnished as long as it is not a joint bank account, except

where the creditor is exercising its right of offset. For example, a creditor bank may garnish a debtor's personal account, including a joint account, to offset the debtor's debts to that bank. **A client in this situation should be advised that they have a right to open a bank account elsewhere, so long as they have the proper identification documents.** Term deposits may be garnished as long as any conditions on withdrawal are mere matters of procedure and administration, though there may be complications where the account is transferable.

RRSPs are now exempt from enforcement processes under section 71.3 of the COEA. However, the debtor may lose any contributions made within the previous 12 months. Also, many pension plan payments are exempt pursuant to s. 63 of the Pension Benefits Standards Act. Section 15 of the COEA provides that a creditor may seek a garnishing order that will attach a debt maturing in the future. This form of garnishing order may be useful in attaching monthly payments, since all future monthly payments can be attached by one order rather than issuing a garnishing order for each payment.

NOTE: The Financial Consumer Agency of Canada ("FCAC") publishes a great deal of useful information on consumer's rights as they relate to financial institutions, including information on opening personal banking accounts and guidelines for garnishing joint accounts: see www.fcac-acfc.gc.ca. See also the website of the Canadian Bankers Association, www.cba.ca, for further information. Clients should be advised that credit unions in B.C. are governed by the provincial Financial Institutions Commission ("FICOM"). See www.fic.gov.bc.ca for further details.

(3) Procedure for Pre-Judgment Garnishing Order

The creditor must swear in an affidavit that an action is pending, provide the date of its commencement, the nature of the cause of action, and the actual amount (i.e. liquidated or ascertained sum) of the debt, claim or demand, and that the same is justly due and owing. The affidavit may be sworn before or after the action is commenced (although the form of the affidavit will differ). The affidavit must also state that another person, the garnishee, is indebted to the debtor, and provide the garnishee's residential address (COEA, ss. 3(2)(e) and (f)).

The garnishing order may be set aside if the procedural requirements are not strictly complied with because it is considered an extraordinary remedy. For example, a pre-judgment garnishing order will be set aside where the affidavit in support sets out an amount including interest and the affidavit does not allege the existence of an agreement on the part of the debtor to pay interest: see *Nevin Sadler-Brown Goodbrand Ltd. v Adola Mining Corp. and Prophecy Developments Ltd.* (1988), 24 BCLR (2d) 341. **Never** claim court ordered interest in the affidavit.

The court has discretion to set aside a pre-judgment garnishing order, but the applicant must submit a meritorious set-off claim or show extraordinary hardship arising out of the garnishment. While there is some conflicting law regarding whether the plaintiff's solicitor may swear in an affidavit as to what is the amount owing (see *Caribou Construction v Cementation Co. (Canada)* (1987), 11 BCLR (2d) 122 (SC); *Trade Fortune Inc. v Amalgamated Mill Supplies* (1994), 89 BCLR (2d) 132 (SC)), most practitioners prefer never to swear an

affidavit to support a pre-judgment garnishing order. Whenever possible, the client should swear the affidavit: see *Samuel and Sons Travel v Right on Travel* (1987), 19 BCLR (2d) 199. The remaining procedure is the same as for post-judgment garnishing orders (below) except that the court retains the money pending the action's outcome.

(4) Procedure for Post-Judgment Garnishing Order

A judgment creditor or his or her solicitor must swear an affidavit stating:

- a) that a judgment has been recovered;
- b) the amount that is unsatisfied;
- c) that another person, the garnishee, is indebted to the judgment debtor;
and
- d) the address of the garnishee's residence in the jurisdiction (s. 3(2)).

The affidavit is filed in the court registry along with the form of order requested. Barring any technical problem resulting in the registry declining to issue the order, the garnishing order will usually be issued on the same day. The garnishee is then served with a copy of the order, which commands him or her to pay the money into court. A copy of the order is then served on the debtor as soon as possible after service on the garnishee. The garnishee may dispute indebtedness to the judgment debtor (see **Section II.B: Legal Advice for Debtors Who are Garnished**, below). Where the garnishee pays money, the court keeps the money until it is paid out to the judgment creditor under ss. 11, 12, and 13.

Funds held jointly to the credit of the defendant and another person, who is not a party to the action, cannot be garnished, except where a creditor bank exercises its right of offset: see *238344 BC Ltd. v Patriquin et al* (1984), 57 BCLR 224.

(5) Payment by Installments

A debtor against whom a garnishing order has been made may apply for a release of the garnishing order, and for an order for the payment of the debt by instalments on the basis of hardship (see *Bank of Montreal v Monsell* (1994), 58 BCLR 11 (SC)). This order, if granted (it is rare), will bind the debtor's creditors, but will only continue for as long as the debtor is not in default on any payment for more than five days, and so long as no other garnishing order is issued against him or her for any other debt (s. 5). The creditor may apply to have the order varied if new evidence of the debtor's finances comes to light.

d) Garnishment of Wages

(1) Judgment Required

Garnishment of wages can only occur after a judgment (s. 3(4)).

(2) Deductions and Exempt Wages

70 percent of any wages due by an employer to an employee is exempt from seizure or attachment under a garnishing order. Therefore, only 30 percent of wages after statutory deductions (i.e. Employment Insurance premiums, Canada Pension Plan, Income Tax, etc.) can be garnished. However, a single person cannot be left with less than \$100 per month (or calculated *pro rata* for a shorter period), and a person with dependants cannot be left with less than \$200 per month (or calculated *pro rata* for a shorter period) (s. 5). However, where wages are garnished to pay maintenance or support for the debtor's family, the exemptions allowed to that person is 50 percent of wages not exceeding \$600 per month or 33 and 1/3 percent of wages exceeding \$600 per month (COEA s.3(7)). These exemptions must not be less than \$100 per month (s. 4(6)).

Garnishment by the Family Maintenance Enforcement Program is called a Notice of Attachment. The Family Maintenance Enforcement Act Regulation, B.C. Reg. 346/88 contains rules about exemptions from attachment. These rules are different than those found in the COEA.

(3) Variation of Exemption

A debtor whose wages are garnished may apply under s. 4 to have the exemption varied. The registrar or judge shall, within three days after receiving the application, notify persons affected by it and a hearing will be held within seven days.

With respect to maintenance orders, under s. 18(2) of the Family Maintenance Enforcement Act, upon application by a creditor, the court can issue a garnishing order against the debtor without giving notice.

A separate garnishing order must be sworn and issued for each payment of wages to the debtor, since one garnishing order is good for only one debt that is owed to the debtor.

(4) Employer's Liability for Firing Employee

No employer may fire or demote an employee because that employee has his or her wages garnished. An employer who does is liable on summary conviction to a fine of up to \$500 or up to three months in jail or both, and an employee can be reinstated with back pay if he or she is fired for garnishment of wages (s. 27). One should consider the fact that the garnishment may have been the final reason among others for termination, and may be difficult to prove.

e) ***Garnishment of Statutory Benefits***

Benefits including Employment Insurance, Canada Pension Plan, Old Age Security, workers compensation, social assistance and provincial disability benefits are usually exempt from garnishment, seizure or attachment. The exemptions are found in the statutes that govern these respective benefit programs.

However, this exemption from garnishment might not apply to offsets or to debts to the government. For example debts to the federal crown may be collected from Canada Pension Plan benefits. Social assistance (welfare) is the only statutory

benefit that is truly exempt from garnishment. **The client should also be advised that this protection against garnishment may not extend to a bank account into which the exempt income is deposited.**

f) Enforcing a Judgment Outside of B.C.

It is possible to register a B.C. judgment in many foreign jurisdictions, including other Canadian provinces. The requirements for registration may differ from jurisdiction to jurisdiction, so the judgment creditor should consult with counsel in the destination jurisdiction to determine the specific requirements.

It is also possible, and sometimes more efficient, to sue on the judgment in the province or country where the judgment debtor's assets are located. Normally the foreign court requires a certificate.

3. Unsecured Creditors: Remedies and Options Before Judgment (Liens)

A lien is a claim, encumbrance, or charge on property (real or personal) for payment of a debt, obligation, or duty. In many cases, a creditor is entitled to place a hold or lien over specific property that has benefitted from the individual's material or labour. It acts as security from the individual's material or labour and as security for the payment to the creditor. **Property liens are complicated and potentially serious. Please refer clients to a lawyer.** The most common liens are listed below.

a) Liens on Land (Builder's Liens)

NOTE: Builder's lien issues involve limitation periods and real property registrations and filings. The **time limitations are extremely strict**; solicitors have been known to lose suits because they filed a day late. **All cases should be referred to a lawyer.** Also, it is important to note that a new Builder's Lien Act, SBC 1997, c 45 came into force on February 1, 1998. This new Act repealed the Builder's Lien Act, RSBC 1996, c 41.

Under the current Builder's Lien Act, a worker, material supplier, contractor, or sub-contractor who does or causes to be done any work upon, or supplies material, or both, for an improvement, has a lien for the price of the work and material, upon the interest of the owner in the improvement, upon the improvement itself, upon the material delivered to the land, and upon the land itself (s. 2). "Price" does not include interest on outstanding accounts: see *Horseman Bros. Holdings Ltd. et al v Lee et al* (1985), 12 CLR 145 (BCCA).

After a claim of lien is filed against land, the lien-holder may enforce his or her claim by obtaining a court order for the land to be sold (s. 31). When a writ is issued, the lien holder must register a certificate of pending litigation against the land (s. 33(1)), which prevents any dealings with the title to the land until after the court determines the validity of the claim. No claim of lien can be filed if the claim is for less than \$200 (s. 17).

(1) Procedure

A claim of lien on land is filed in the Land Title Office (s. 33(1)). A claim of lien must be in the prescribed form or it is extinguished (s. 22). It takes effect from the time when work began, or when the first material was supplied for which the lien is claimed. A claim of lien has priority over all

judgments, executions, attachments, and receiving orders recovered, issued, or made after that date (s. 22).

(2) Limitation Period

The time for filing a claim of lien is governed by s. 20 and the time limitations are strict. If a certificate of completion has been issued for a contract or subcontract, the claims of lien of the contractor, subcontractor, or any person engaged by or under the contractor or subcontractor must be filed no later than **45 days** after the date on which the certificate of completion was issued. If there is no certificate of completion, a claim of lien may be filed no later than 45 days after the head contract or improvement has been completed, abandoned, or terminated.

If a person agrees to have repairs done, he or she must withhold 10 percent of the value of the work or material as they are actually provided under the contract or subcontract, **or** the amount of any payment made on account of the contract or subcontract price, whichever is greater, from the contractor for a period of 55 days after the certificate of completion is issued. This covers the possibility of having to pay workers, subcontractors, and suppliers who were not paid for their services by the contractor. This holdback must not be retained from a worker, material supplier, architect, or engineer (s. 4(6)).

In addition, all improvements done with the knowledge, but not at the request, of the owner will be held to be done at the request of the owner (s. 3(1)). This rule does not apply to improvements made after the owner files a notice of interest in the Land Title Office. A notice of interest is a prescribed form warning other persons that the owner's interest in the land is not bound by a lien claimed under the Act for an improvement on the land unless that improvement is undertaken at the express request of the owner (s. 1).

Unless an action to enforce a claim of lien is started and a certificate of pending litigation is registered in a Land Title Office within one year, the lien is extinguished (s. 33(5)). Note that the owner may require the lienholder to commence an action within 21 days, by sending the holder of a claim of lien notice in writing (s. 33(2)).

NOTE: Students should be aware that builder's liens may be filed in Supreme Court only, and only in the same jurisdiction as the land on which the lien is to be placed. As already mentioned, time limits are extremely strict here, so clients should take action without delay.

b) Liens on Chattels (Repairer's Liens)

(1) Possessory Lien and Right to Sell

Under the Repairer's Lien Act [RLA] every mechanic or other person who has bestowed money, skill or materials upon any chattel for its improvement, has a common law possessory lien on the chattel while it remains in his or her possession. These people are called garage keepers in the RLA. The lien holder may keep the chattel until paid. Where the person

holds the chattel for 90 days, he or she may sell it upon compliance with statutory provisions (s. 2). If the lien holder gives up possession prior to filing a lien, he or she loses the lien (except with liens on automobiles and aircraft, etc.) and is restricted to ordinary remedies in court.

(2) Lien on Automobile, Aircraft, Boats and Outboard Motors

If a mechanic relinquishes possession of an automobile, aircraft, boat or outboard motor, he or she does not lose the lien, provided that the debtor, before giving up possession, signed an acknowledgement of indebtedness (e.g. invoice, statement of account, etc.).

The garage keeper has, pursuant to s. 3 of the RLA, **21 days** to register a lien once he or she has given up possession of an automobile, aircraft, inboard or outboard motor; the registration is made at the Personal Property Registry.

(3) Procedure

Where a garage keeper gives up possession of an automobile, etc., and afterwards files an affidavit with the registrar, the garage keeper may enforce the lien by issuing a warrant for seizure to a licensed bailiff or the sheriff (s. 11). The automobile or aircraft may then be sold by following the procedures for the sale of chattels set out in s. 2 (s. 12). A warrant may only be issued within 180 days of filing the lien (s. 11).

(4) Limitation Period

As stated above, the garage keeper has, pursuant to s. 3 of the RLA, **21 days** to register a lien once he or she has given up possession.

When an affidavit of lien is filed, the lien will expire after **180 days**, unless the automobile, etc., has been seized within that period (s. 4).

A copy of the acknowledgement of indebtedness must be included in the affidavit. If the acknowledgement has not been obtained or is not included, the affidavit is invalid.

If a client's car has been seized, check with the Registrar-General to determine whether the acknowledgement of indebtedness was properly included, and whether the automobile, etc. was seized before the end of the limitation period: see *Rudd's Heavy Equip. Repairs Ltd. v Blackstone Paving Ltd. et al* (1985), 34 ACWS (2d).

c) Buyer's Lien

When a buyer has made a partial or full payment to a seller - and the goods are unascertained or future consumer goods, the buyer can place a lien against all goods that are in, or will come into, the possession of the seller that correspond with the description or sample of goods agreed upon (See Part 9 of the Sale of Goods Act). This holds as long as the goods were not sold to someone else. The buyer also has a lien against any bank account where the seller normally deposits the proceeds of sales. This lien has priority over all other security interests, but generally is not valid in bankruptcy. However, if the seller has maintained records or documents that clearly identify the goods for which a deposit was paid, the buyer may be entitled to the

lien. Where the seller maintains a separate trust account, the buyer can file a property claim for the trust funds which is in priority to other security interests. See *In the Bankruptcy of Ian Gregory Thom*, 2006 BCSC, 1414 and *In the Matter of the Bankruptcy of Anderson's Engineering Ltd.* 2001 BCSC 1476

The seller can discharge the lien by handing over the good or returning the buyer's deposit, but the latter will not relieve the seller from the possibility of suit for breach of contract. The buyer's lien permits the buyer, upon application to court, to have goods seized and sold and have the proceeds delivered, or just have the goods delivered. Note that this section does not apply to goods bought under s. 79 of the Sale of Goods Act. Please read the Sale of Goods Act for details of proceedings and application.

d) Liens for Storage

The Warehouse Lien Act provides that every warehouse owner or operator has a lien on goods deposited with him or her for storage, whether deposited by the owner of goods or by his or her authority, or by any person entrusted with possession of the goods by the owner, or by his or her authority (s. 2(1)). This right does not apply to unpaid charges for goods previously stored: see *Re Dutton Pacific Forest Products Ltd.* (1980), 117 DLR (3d) 507 (S.C.), sub nom *Squamish Terminals Ltd. v Price-Waterhouse Limited*. After the warehouse gives the appropriate notices, the goods may be sold to collect the charges (ss. 3 and 4).

e) Legal Advice on Liens

If the lien is valid and the client wishes to discharge the lien, but disputes the amount of the claim, the client may wish to make the payment to the lien-holder. The client should send an accompanying letter stating an intention to dispute the claim, and if he or she is required to sign documents acknowledging indebtedness before the chattels will be released, he or she should write the words "Without Prejudice" above the signature. In every case, the client should always ensure that the proper steps have been taken to discharge the lien upon payment.

II. INTRODUCTION TO DEBTORS' OPTIONS

NOTE: The provincial Debtor Assistance Program has been closed since April 30th, 2002.

Being in debt is obviously stressful for debtors. Debtors should be made aware that measures can be taken against overeager creditors.

A debtor should not assume that he or she can ignore his or her responsibilities because it is unlikely the creditor will initiate legal action. The debtor should normally try to communicate with the creditor(s) in hopes of reaching an agreement about repayment, and to avoid potentially costly legal battles. If such communication occurs, both the debtor and the creditor must be realistic about the situation. Both parties must assess the costs and delay involved in any litigation. In such negotiations, the latter factors may work in favour of the debtor. All of this is, of course, assuming that the debtor indeed owes the money to the creditor in the first place. The debtor should seek legal advice **before** discussing a debt with a collector.

A debtor should also seek legal advice where he or she disputes the amount owing. Where a creditor is pressuring a debtor for payment, a student may write a "without prejudice" letter to the creditor explaining your client's position and offering a settlement. See **Section III.F: Settlements**, below for further information.

A debtor cannot seek to avoid defending an action in court where that action takes place in another province on the grounds that the court lacks jurisdiction. An action under s. 29 of the COEA to enforce an extra-provincial

default judgment may proceed where the debtor was served but chose not to offer any defence to the original statement of claim. The creditor simply registers a judgment from another province in B.C., and it becomes a B.C. judgment. Furthermore, as a result of the decisions in *Morguard Investments v De Savoye*, [1990] 3 SCR 1077 and *Beals v Saldanha*, [2003] 3 SCR 416, 2003 SCC 72, American and other international default judgments can be easily enforced in B.C. A creditor seeking to register a judgment in B.C. should be aware that only judgments from a reciprocating state can be registered. To determine if a reciprocating agreement exists go to the schedule in the COEA. If there is no reciprocating agreement in place, a creditor can bring an action on the judgment or on the original cause of action.

A. Legal Advice for Debtors Under Secured Transactions

The information in this section is specific to the defendant's point of view, but is most usefully read in conjunction with **Section I: Creditors' Remedies**. If a student needs more information, that section may help to complete the picture.

Where the debtor is in default under a security agreement, s. 56 of the PPSA provides that the secured party has against the debtor the rights and remedies provided in the security agreement (provided such do not derogate those rights given to the debtor by the PPSA) as well as those specifically provided by the Act.

Sections 58 and 59, contain rules for seizing and disposing of collateral. These sections provide that, unless the security agreement states otherwise, where the debtor defaults on their payment, the creditor may elect to take possession of the collateral pursuant to the contract, dispose of the collateral **and** then sue for any amount still owing. Section 67, provides for a more limited set of remedies where the collateral takes the form of consumer goods – known as the “seize or sue” rule. Formerly, under legislation repealed by the PPSA, all creditors could only seize or sue but not both. The principle of “seize **or** sue” still applies to “consumer goods” (see **Section I.C.1.g: Seizure**, above); it no longer applies to commercial goods.

1. Notice

NOTE: The forms of notices under the PPSA depend on a number of variables, including the nature of the security and the terms of the security agreement. Clients seeking advice concerning the validity of notices should be referred to a lawyer.

Subject to the circumstances where notice is not required as per s. 59 (17) (i.e. for perishable collateral, collateral requiring disproportionately high storage costs relative to its value, etc.), the requirements for notice are outlined in ss. 59(6) and (10): the secured party or receiver, as the case may be, must provide at least 20 days notice of an intention to dispose of the collateral to parties including the debtor and any other creditor. The clinician should check to make sure that the debtor received notice in time and in the correct form.

2. Limitation of the Right of Seizure

With respect to collateral which is a “consumer good,” where the debtor has paid at least two-thirds of the total amount secured, the creditor may not seize the good without first obtaining a court order.

3. Rights of a Debtor on Realization

The PPSA preserves the debtor's (but not the secured party's) rights and remedies under other statutes that are not inconsistent with the PPSA, as well as the specific rights and remedies provided in the security agreement, Part 5 and s. 17 (s. 56(2)(b)).

4. Rights of Redemption and Reinstatement

Under s. 62, a debtor has redemption rights. Any person entitled to notice of a pending disposition of collateral may “redeem” the collateral by tendering to the secured party fulfilment of the obligations secured by the collateral plus the reasonable expenses incurred by the secured party associated in seizing the collateral or otherwise preparing it for disposition. The aforementioned obligations may simply be the amount in arrears; however, it is more often the case that an acceleration clause applies, and that the obligations will be the total amount of the debt. Where the security agreement contains an acceleration clause, the debtor may apply to court for relief from the consequences of default or for an ordering staying enforcement of the security agreement’s acceleration provision.

Where the collateral is a “consumer good”, the calculation of the obligation secured and the obligation that must be tendered is varied. The debtor may “reinstate” the security agreement by paying only the monies actually in arrears – negating the operation of any acceleration clause. The debtor may waive this right but any such agreement must be in writing after default. Note that the number of times the debtor may reinstate the security agreement is limited depending on the period of time for repayment set out in the security agreement; however, the frequency of reinstatement may be varied by agreement between the parties.

5. Execution

See **Section I.C.2.b: Execution.**

B. Legal Advice for Debtors Who are Garnished

The details of how an order for garnishment is obtained are found in the creditor’s remedy portion of the chapter, but debtors should be reminded that **hardship** may be a defence to garnishment. Therefore, a pre or post-judgment garnishment order may be varied where it would be unfair to the judgment debtor; it is generally easier to have a pre-judgment order varied.

Under ss. 3 or 4 of the COEA, a judge has the discretion to set aside a garnishing order once the debtor has made an application. A judge will consider:

For pre-judgment orders only:

1. the strengths and weaknesses of the defendant’s defence to the claim.

For both pre and post-judgment orders:

1. whether the judgment leaves the debtor with an inordinately low cash flow;
2. whether there is a risk that the grant or continuance of the order will cause an injustice to the debtor;
3. whether there is a possibility of abuse of process by the creditor; and
4. whether the garnishment of certain payments, such as social assistance benefits, run counter to public policy.

Furthermore, s. 4(4) of the COEA describes the limits to which a debtor’s wages may be garnished. Thus, if a debtor has a low income or has savings he or she depends on for the necessities of life, he or she can have the amount that is being garnished (or proposed to be garnished) reduced, the terms of the order varied, or the garnishment ended. A person who is subject to a Notice of Attachment under the Family Maintenance Enforcement Program can also try to have the amount that is being ‘garnished’

reduced. Additionally, a garnishing order from a civil action has to be renewed monthly, while a garnishing order for maintenance does not.

If the debtor receives income from a statutory benefit that is exempt from garnishment (see **Section I.c.2.e**) they should be advised as to how to protect their money after it is paid. Their income should be safe if it is paid by direct deposit into an account at an institution to which they do not owe any money. No other deposits should ever be made into this account. It is also helpful to speak to a branch manager so that they understand the purpose of the account. **A debtor should be advised that they have a right to open a personal bank account at a chartered bank, even if they do not have a job or do not have money to put in the account right away.** However, the applicant can be refused if the bank employee suspects fraud or experiences harassment from the applicant. For further information, see: www.fcac-acfc.gc.ca.

NOTE: This right does not extend to credit unions, which have wider powers to deny applicants. For further information, visit www.fic.gov.bc.ca.

C. Harassment by Debt Collectors

The Business Practices and Consumer Protection Act, [BPCPA] provides for the licensing and regulation of debt collectors, which is carried out by Consumer Protection BC. The statute provides that jurisdiction is determined by the location of the debtor. Under the statute, Consumer Protection BC has wide powers of investigation. .

1. Unreasonable Collection Practices

A collector must not communicate with a debtor, a member of the debtor's family, a relative, a neighbour or the debtor's employer in a manner or with a frequency as to constitute harassment. The following constitutes harassment:

- a) using threatening, profane, intimidating or coercive language;
- b) exerting undue, excessive or unreasonable pressure; and/or
- c) publishing or threatening to publish a debtor's failure to pay (BPCPA, s.114).

A collector cannot communicate with a debtor at the debtor's place of employment unless one of the following conditions are met:

- a) the collector does not have the home address or telephone number for the debtor and the collector contacts 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 these attempts (the collector is limited to one verbal attempt at the debtor's place of employment (s.116(2)), meaning one call even if the debtor doesn't answer or hangs up); or
- c) the collector has been authorized by the debtor to communicate with the debtor at the debtor's place of employment (s.116 (1)).

When the collector is contacting the debtor, they must indicate the name of the creditor with whom the debt was incurred, the amount of the debt, and the identity and authority of the collector to collect the debt from the debtor (s.116 (3)).

The collector must only contact a debtor through writing if the debtor provides a mailing address and notifies the collector in writing that they wish to be contacted only by writing. (s.116 (4)). If the debtor does not respond or make an effort to respond to the collector's written correspondence, the collector can contact the debtor in other ways.

In collecting or attempting to collect payment of debt, a collector must not supply any false or misleading information; misrepresent the purpose of communication; misrepresent the identity of the collector or, if different, the creditor; or use, without lawful authority, a summons, notice, demand, or other document that suggest or implies a connection with any court inside Canada (s.123).

If a creditor does not obey the BPCPA, the debtor may report the creditor to Consumer Protection BC (see www.consumerprotectionbc.ca).

2. Limits on Right of Seizure

Under s. 122, no collector, whether on his or her own behalf or on behalf of another, directly, indirectly, or through others, shall:

- a) unless there is a court order to the contrary, remove from 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;
- b) seize, repossess or levy distress against any chattel not specifically charged or mortgaged, or to which legal claim may not be made under a statute, court judgment, or court order; or
- c) remove, seize, repossess, or levy distress against any chattel during a day or during the hours of a day when such removal, seizure, repossession or distress is prohibited by regulations under this Act.

3. Consequences of Contravention of the Business Practices and Consumer Protection Act

Where there is evidence of misconduct by the debt collector, the Director may suspend, cancel, or refuse to issue his or her license (s.146(1)). Such conduct includes (s.146(2)):

- a) contravening this Act or regulations;
- b) failing to meet the minimum requirements for a license;
- c) conduct by the debt collector that shows that he or she is unfit to have a license; or
- d) being convicted of an offence under Canadian law.

4. Legal Advice for a Harassed Debtor

If there may be a violation of the Business Practices and Consumer Protection Act, the debtor should do the following:

- a) find out the name of the collector and/or agency;
- b) record the exact words or practice followed by the debt collector or the agency; and

- c) detail the time and dates of the calls or visits.

With the above information the debtor should contact Consumer Protection BC for the name of the complaints manager for the collection agency the debtor is dealing with. This complaints manager will work with the debtor to resolve the complaint, including disciplinary action, if appropriate. See the following web site for more information: www.consumerprotectionbc.ca.

Finally, if the debtor suffered damages or inconvenience as a result of the agency's collection practices, a Small Claims action may be commenced.

D. Credit Reporting Agencies

Businesses offering goods or services on credit often rely on credit bureaus for financial and prior debt information on their customers.

The Business Practices and Consumer Protection Act regulates the activities of these agencies in order to minimize unfair treatment of the party seeking credit. Federal legislation, such as the Personal Information Protection and Electronic Documents Act [PIPEDA] and the Privacy Act, also outline the requirements for organizations in their use, collection, and disclosure of personal information in their business practices. Credit information that these bureaus can disclose is the most common type of personal information, and includes one's:

- a) name, date of birth and address;
- b) current and former marital status;
- c) current and former place of work;
- d) payment habits; and
- e) debts owing.

A credit reporting agency **cannot** give out an individual's personal credit report without that individual's consent. When one seeks credit, he or she will be asked to consent to the lender obtaining a credit report or a credit check. After consent is given, the lender can obtain a "soft check" periodically meaning they can view the report relating to their loans).

Certain information cannot be included in a credit report, e.g., criminal charges (unless the individual was convicted), convictions more than six years old, and information about race, religion or political affiliation.

Credit reporting agencies' records are not always accurate and up to date. The quality and accuracy of the credit information depends on the credit information provided by the credit granting companies who sign up with the credit reporting agencies. If an individual finds incorrect information on his or her file, he or she can report the error to the agency that provided the information to have it corrected. If an individual has proof that their credit report contains an error and they are unable to resolve it with the creditor directly, the individual should contact the credit reporting agencies who are reporting the incorrect information. The agencies will assist them with finding a resolution. The BPCPA allows individuals to provide a 100 word explanation to the reporting agency, which is to be kept and reported with their file (s.111); this may be a useful provision if a business has reported a disputed claim regarding the client. It is an offence (punishable by a fine of up to \$10,000 or to imprisonment for up to 12 months) to knowingly supply false or misleading information to a reporting agency (s. 112).

Consumers may obtain their own credit report for free at least once a year. There are currently two main credit reporting agencies in Canada, listed below.

Equifax

Toll-free: 1-800-465-7166

Website: www.equifax.ca**TransUnion**

Toll-free: 1-800-663-9980 (English); 1-877-713-3393 (French)

Website: www.transunion.ca

NOTE: Individuals should check their credit history regularly. Industry specialists suggest once per year. Credit reporting agencies will send a person a copy of their credit history by regular mail for free.

III. GETTING OUT OF DEBT

A. *Introduction*

NOTE: The following applies to individuals only.

Before advising a client about getting out of debt, the student should **ensure that the client, in fact, is liable for the alleged debts.**

Most clients do not seek advice until long after they have become overburdened with debts. Financial counselling may be of assistance.

B. *Debtors' Assistance Referrals and Resources*

The Credit Counselling Society is a non-profit organization that assists people who are experiencing difficulties with debts. They provide free and confidential counselling with highly trained counsellors. They can answer questions over the phone or by online chat. Exercise caution in hiring a for-profit Credit Counsellor, as they are not regulated and thus may vary greatly in quality.

Credit Counselling Society330 - 435 Columbia Street
New Westminster, B.C. V3L 5N8Telephone: 1-888-527-8999
Website: www.nomoredebts.org

The Public Legal Education and Information Network's "Clicklaw" web site has a helpful section titled "Debt". Articles and information on various topics relating to consumer protection, debt and Small Claims Court in British Columbia can be found online at www.clicklaw.bc.ca.

Information on how to deal with debt collectors and collection agencies and harassment can be found on the Clicklaw website or through consumer protection BC online at: www.consumerprotectionbc.ca.

The Office of the Superintendent of Bankruptcy in Canada, an agency of Industry Canada, assists debtors by providing them with many useful online resources such as "Dealing with Debt: A Consumer's Guide" and "Debtor's Frequently Asked Questions". A full directory of licensed trustees in bankruptcy is available on their website: www.ic.gc.ca/eic/site/bsf-osb.nsf/intro.

For further information the Office of the Superintendent of Bankruptcy can be contacted at:

Office of the Superintendent of Bankruptcy2000 - 300 West Georgia Street
Vancouver, B.C. V6B 6E1Telephone: (604) 666-5007
Fax: (604) 666-4610

Other useful websites that provide general information on bankruptcy in B.C. are:

Personal Bankruptcy Canada

Website: www.bankruptcy-canada.ca

Bankruptcy Canada

Website: www.bankruptcycanada.com

NOTE: The client should be advised that these websites, while useful sources of information, are revenue-driven. The client should therefore be advised that the list of trustees found on both websites is not exhaustive.

C. *Communicating with Creditors when Unable to Make Contractual Payments*

Depending on a consumer's circumstances, they may need to contact their creditors to ask for assistance in getting through financially difficult times. Most people truly want to honour their commitments; however, they may not be able to do so at this time. If someone needs help with determining what their budget is and if they have surplus income to offer their creditors a reduced payment, the Credit Counselling Society is able to help consumers at no cost: 1-888-527-8999.

If the client has enough surplus income in their budget to repay their debt, they may wish to contact their creditors in writing and offer reduced payments until they are in a position to make contractual payments again. This is **not** a legal arrangement.

The steps involved in this reduced payment are:

1. determine the amount(s) owed and to whom (verify with the creditors rather than relying on the client);
2. determine how much money is available to pay to creditors, keeping the basic standard of living in mind;
3. consider if the client has assets, bank accounts or investments at risk;
4. consider the nature of the debt and if someone else would be impacted if the client is unable to make full payment, e.g. a joint credit card;
5. work out a payment plan for the creditors on a pro rata basis;
6. write the creditor a short letter outlining your situation and providing proof of reduced financial capacity, e.g. EI stub;
7. send or fax the above letter with supporting documentation and retain proof of the creditor receiving said letter (e.g. fax transmission report), retain a copy for your file;
8. update creditor periodically, e.g. if client's situation stays the same or improves and if they're able to resume contractual payments.

NOTE: Contact the Credit Counselling Society for free help with this process if needed.

The creditors may feel the reduced payments are not acceptable, but would likely not pursue alternative legal action if this is all the client can afford at this time. Communication with the creditors is vital, especially if a consumer has no ability make payments at this time.

D. Debt Consolidation and Refinancing

Creditors will often offer refinancing or debt consolidation as the solution to the debtor's financial problem. The interest rate may be higher for the consolidation. Terms and conditions will determine total interest paid and the payment period. If making payments in the first place is the problem, consolidation loans may not be the solution.

E. Voluntary Debt Repayment Programs

When someone has some ability to repay their debts, but not quite as agreed, contact the Credit Counselling Society for help determining if the debt management program at the Society might be an option. This is an agreement between a client, to make set, reduced monthly payments, and their creditors, who in return agree to accept reduced payments and waive or reduce ongoing interest charges. A client agrees not to incur further debt while on the program. If a client defaults from the program, creditors may proceed with any and all remedies available to them. The client should contact the Credit Counselling Society for more information at 1-888-527-8999.

F. Settlements

Depending on the consumer's circumstances, their creditors may be willing to accept a settlement on a portion of what is owed. If a consumer has funds available, they can approach their creditors in writing to accept a onetime lump sum payment. In exchange, the creditors agree to report the debt as "settled" to all credit reporting agencies. It is essential that the consumer get this agreement in writing from the creditors before sending any money for the settlement.

Clients should be advised that some agencies that advertise "debt settlement" services may take advantage of debtors. Debtors should be aware of agencies that demand upfront fees before a settlement is negotiated. Contact the Credit Counselling Society for help with the settlement process if needed.

G. Services a Trustee Provides Under the Bankruptcy and Insolvency Act

The first appointment with a Bankruptcy Trustee in B.C. is always free. During this appointment, the trustee should outline the implications and information a consumer needs to consider before taking any action. This is the time to ask questions to understand the process and long term effect on your credit. A Trustee should be willing to take the time to explain everything thoroughly as there is no backing out once someone has signed the documents to assign themselves into bankruptcy.

1. Consumer Proposal

Depending on the nature and amount of the debt(s) and the consumer's ability to pay, a consumer proposal should be considered. A consumer proposal is a legal arrangement with creditors to repay a portion of the amounts owing. Assets are not usually jeopardized (as they may be in bankruptcy) and the interest stops accruing as long as payments are being made. Legal action and most garnishments are not effective while the consumer proposal arrangement is in place. Please consult a trustee for more detailed information.

2. Personal Bankruptcy

Personal Bankruptcy is governed by the BIA (including amendments), and is based on the premise that the client is completely unable to pay his or her debts, even at a reduced rate, and does not have assets to liquidate (client is insolvent). Bankruptcy is one option to deal with a heavy debt burden. The record of a bankruptcy stays on a person's credit record for a **minimum** of six years from the day the debts are discharged for a first-time bankrupt. This

increases to 14 years for a second-time bankrupt. This does not necessarily mean that credit will be denied, only that the bankruptcy will be a factor that a potential creditor will consider when deciding whether or not to extend credit to that person. Declaring bankruptcy may also effect one's professional designation and/or ability to gain or continue employment.

The debtor is required by law to engage a trustee to administer his or her bankruptcy. Personal bankruptcy using a trustee may cost the debtor approximately \$1,850 (including \$85 per counselling session, of which two are mandatory for a first time bankruptcy and HST). Usually the trustee will require a minimum payment to initiate the proceedings. The timelines for automatic discharge, in addition to being subject to fulfilment of the terms and conditions of the bankruptcy are dependent on both bankruptcy history and the individual's surplus income (as prescribed by the Superintendent of Bankruptcy standards – Directive 11):

- A first-time bankrupt with surplus income payable less than \$100 , is automatically discharged after nine months;
- For a first-time bankruptcy with surplus income greater than or equal to \$100 all debts are automatically discharged after 21 months;
- For a second-time bankruptcy with surplus income less than \$100 all debts are automatically discharged after 24 months;
- For a second-time bankruptcy with surplus income greater or equal to than \$100 all debts are automatically discharged after 36 months.

The period of the discharge may also be extended for certain prescribed reasons under BIA. Consult the Office of the Superintendent of Bankruptcy or trustee.

a) Debts That Bankruptcy Will Not Discharge

A client should know that filing for bankruptcy will not discharge his or her obligations for:

- an amount owing on a fine, penalty or restitution order imposed by a court in respect of an offence or debt arising out of a recognizance or bail;
- an award of damages by a court in civil proceedings in respect of bodily harm intentionally inflicted or sexual assault (including wrongful death resulting therefrom);
- a court order or a separation agreement regarding alimony or maintenance;
- an amount obtained under false pretences while acting in a fiduciary capacity
- a debt resulting from obtaining property or services by false pretences or by fraudulent misrepresentation (other than a debt arising from an equity claim) ;
- any debt or obligation for federal and provincial student loans where the date of bankruptcy occurs before the date on which the bankrupt ceased to be a full or part-time student or, as of June 18, 1998 through an amendment to the Act, within 7 years after the date on which the bankrupt ceased to be a full or part-time student (BIA, s. 178(1)(g)).

These exceptions may be found in section 178(1) of the BIA. Questions about bankruptcy, including specific questions regarding Canada Student Loans, may be directed to a licensed trustee or the Superintendent of Bankruptcy, Vancouver, B.C. at 1-877-376-9902

b) Assets That May be Retained by the Bankrupt in B.C.

The bankrupt may retain household furnishings and appliances valued at up to \$4,000 and any other goods or property exempt from execution under provincial and federal statutes (COEA, s. 71(1); Court Order Enforcement Exemption Regulation, B.C. Reg. 28/98, BIA, s. 67(1) and relevant amendments).

Also, s. 71(1) of the COEA allows a debtor to retain \$5,000 for one motor vehicle if he or she is not a maintenance debtor, and \$2,000 for one motor vehicle if he or she is a maintenance debtor. Section 71(1) also allows a bankrupt to retain \$10,000 for tools and other personal property used in his or her occupation. Also, s. 71.1(1) allows an equity exemption of \$12,000 if the debtor's principal residence is within the GVRD and Capital Regional District, or \$9,000 if outside the GVRD and Capital Regional District. The debtor can retain items related to his or her essential needs (or the needs of his or her dependants) such as clothing and medical equipment (s. 67(1)(b.1)).

All RRSPs are now exempt from seizure in a bankruptcy (except for contributions made in the year preceding bankruptcy). Any material transaction in the past 5 years is reviewable. Lastly, bankruptcy results in the loss of any tax refund due in the year of the bankruptcy. Any tax refund in the year of bankruptcy or prior goes to the trustee.

NOTE: If the debtor chooses a trustee and is rejected (due to a fee charge) that he or she is unable to pay, they should contact the Superintendent of Bankruptcy, Vancouver, B.C. to participate in their referral program. The debtor must obtain a written refusal from 2 trustees and, if they qualify for the program, - will then be assigned a trustee in the referral program for a reduced fee (not for free).

NOTE: A debtor who is on a fixed income with circumstances unlikely to change would therefore have no need to declare bankruptcy as he or she would be, in essence, judgment-proof. Refer to section C above, *Communicating with Creditors when Unable to Make Contractual Payments*.

IV. APPENDICES

APPENDIX A: RELEVANT FORMS LIST

The following are debt-related forms and documents. Small Claims forms may be found on at: www.ag.gov.bc.ca/courts/small_claims/info/forms.htm. Supreme Court forms may be found at: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/221_90_06a#pdfdocforms.

Pre-judgment Garnishment

- A. FORM A: GARNISHING ORDER BEFORE JUDGMENT (SUPREME COURT)
- B. FORM B: AFFIDAVIT IN SUPPORT OF GARNISHING ORDER BEFORE JUDGMENT
- C. FORM C: AFFIDAVIT IN SUPPORT OF GARNISHING ORDER BEFORE ACTION
- D. AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE GARNISHING ORDER
- E. ORDER TO SET ASIDE GARNISHING ORDER

Post-judgment Garnishment

- F. FORM A: GARNISHING ORDER AFTER JUDGMENT
- G. FORM B: AFFIDAVIT IN SUPPORT OF GARNISHING ORDER AFTER JUDGMENT
- H. FORM C: GARNISHING ORDER (ABSOLUTE)
- I. ENFORCING A BRITISH COLUMBIA JUDGMENT IN A RECIPROCATING FOREIGN JURISDICTION (CERTIFICATE: PURSUANT TO SCHEDULE 2, COEA)

APPENDIX B: CHECKLIST FOR EXAMINATION IN AID OF EXECUTION

Students should consult the B.C. Law Society web site for an extensive checklist for examination in aid of execution. Although this checklist is for the Supreme Court process, it is useful for Small Claims payment hearings as well.

The Law Society's website address is www.lawsociety.bc.ca.

1. Preliminary Matters
2. Employment
3. Real Property
4. Other Property (Legal or Equitable)
5. Dispositions of Property
6. Spouse
7. Family
8. Debts
9. Personal Budget
10. Litigation and Judgments
11. Satisfaction of the Judgment
12. Supplementary Questions for a Corporate Debtor