Collection Law in British Columbia Getting Paid on a Collection File — From Start to Finish

By

Michael B. Morgan

October 27, 2005
This paper was presented at a conference put on by Lorman Education Services

This is a general overview of the subject matter and should not be relied upon as legal advice or opinion.
For specific legal advice on the information provided and related topics,
please contact the author or any member of the Banking and Insolvency Group.

Copyright © 2005, Lawson Lundell LLP
All Rights Reserved

GETTING PAID ON A COLLECTION FILE – FROM START TO FINISH

I. INTRODUCTION

This paper is intended to be an overview of various issues and potential pitfalls that inevitably will arise in the course of attempting to collect on a debt claim from the time the debt becomes due all the way through to the enforcement of a court judgment based on the debt claim. Given the broad nature of the topic, this paper is, of necessity, a basic overview and identification of certain issues and items one may have to consider and resolve during the course of a collection file. Furthermore, given the scope of other topics being presented at the seminar, certain issues will only briefly be touched upon.

The first section of the paper will focus on identifying matters that ought to be covered and addressed at the outset by way of due diligence to ascertain and ensure further action is warranted. The second section of the paper addresses the stages of a collection file from an initial demand for payment all the way to a judgment from a court of competent jurisdiction. Lastly, the final section of the paper will identify ways in which a judgment of the court can be executed upon in order for a recovery of actual cash to be made.

II. DUE DILIGENCE

Often the most overlooked yet essential stages of a collection file is the due diligence phase. Practical avenues of collection ought to be canvassed in this stage, which often can lead to saving time and money in the long run.

Three specific areas will be canvassed in this section:

1. Gathering information;
2. Limitation Periods; and
3. Security.

1. Gathering Information

It is vitally important at the outset to gather as much information as possible on the debt claim so as to avoid potential difficulties in, among other things, proving the claim in court or executing on any judgment that may ultimately be obtained.

(a) Relevant Documents

The first step in gathering information is to ensure you have at your disposal all relevant documents such as contracts, credit applications, invoices, bills of lading, purchase orders, any acknowledgments of debt or guarantees and indemnities. These documents ought to be reviewed to determine matters such as the amount of the claim that is due and outstanding, any credits that may be due and owing to the debtor as a setoff or otherwise, the amount of interest claimed and that is recoverable, the appropriate parties

from which recovery can be sought, and particulars of any banking information or accounts receivable of the debtor which may be able to be used for prejudgment execution purposes such as prejudgment garnishment.

(b) **Mandatory Arbitration Provisions**

Furthermore, all such documents should be reviewed to determine whether there are any mandatory arbitration or mediation clauses in the relevant contract that must be utilized prior to commencing any court action. Many mandatory arbitration provisions in commercial contracts call for specific courses of action to be taken before the matter can be referred to the courts.

(c) **Searches**

During the initial due diligence phase, searches should also be undertaken to determine what assets of the debtor are available for execution in the future. In particular, searches of the Personal Property Registry ("PPR"), the relevant Land Title Office ("LTO") and Corporate Searches should routinely be performed at the commencement of a collection file. The PPR search will give you an indication of what the debtor owns in terms of personal property that may be encumbered by a security interest. Furthermore, it will also give you an indication of what other creditors may be out there of which you ought to be aware. The LTO searches will indicate if the debtor owns or has any interest in any real property in the Province and what charges (including mortgages) are registered against any such property. Finally, assuming you are dealing with a corporate debtor,

the corporate registry search will provide you with the precise name of the debtor in addition to the corporation's address for service of documents including the initial demand letter[1] and any subsequent court documents.

A review of the relevant documents will also indicate who is the proper party to be named in any subsequent court action. In particular, you may wish to name various individuals who may be liable for the debt including guarantors or indemnitors. In that regard, it is also important to ascertain all known aliases of any individual debtors.

The corporate searches may indicate that the debtor whom you assumed was a corporation may, in fact, be an individual carrying on business as an unincorporated entity (e.g., Joe Bloggs, carrying on business as Blogg's Plumbing). If the debtor does not exist as a separate corporate entity, the individual will have to be named personally in any subsequent court actions and therefore the LTO search, in particular, will become increasingly important as registration of any subsequent judgment will be more readily facilitated if all correct names and addresses are used.

(d) Guarantors or Indemnitors

With respect to guarantors and indemnitors, often these individuals become the best avenue of recourse on a debt claim particularly if the debtor is a corporate entity that

---

[1] Please note that demand letters may also have to be sent to specific addresses for notices in any relevant commercial contracts.

may not have any assets. Often credit agreements or other commercial documents have guarantee or indemnity language in the finer details of the contract that should be reviewed and taken advantage of wherever possible. In pursuing a guarantor or an indemnitor, careful attention ought to be paid to the terms of the guarantee or indemnity to ensure all proper steps, including providing the appropriate notices, are taken or else there is a risk those parties may be released from any obligations they may have had.

(e) **Joint Debt Claims**

Consideration should be given to whether or not the debt claim is joint, several or joint and several. In that regard, Section 53 of the *Law and Equity Act* R.S.B.C. 1996, c. 52 provides as follows:

> 53(1) If a party has a demand recoverable against 2 or more persons jointly liable, it is sufficient if any of those persons is served with process, and an order may be obtained and execution issued against the person served even if others jointly liable may not have been served or sued or may not be within the jurisdiction of the court.
>
> (2) The obtaining of an order against any one person jointly liable does not release any others jointly liable who have been sued in the proceeding, whether the others may have been served with process or not.
>
> (3) Every person against whom an order has been obtained who has satisfied the order is entitled to demand and recover in the court contribution from any other person jointly liable with the person.

This provision alters the common law and allows a creditor to pursue only one debtor even if that debtor is jointly liable with two or more persons. The B.C. Supreme Court in *Clayburn Industries Ltd. v. Recor Services Inc.*, 2000 BCSC 1069, held at paragraph 24 that this provision:

> "...was added to avoid problems which arose where the liability of individuals was joint rather than several. Where the liability was only joint, it was long established that the failure to commence an action against all those potentially liable would release those not joined as parties and that a judgment taken as against only one person eliminated the ability of the plaintiff to later apply for judgment against other defendants thought to be jointly liable. Section 53 was enacted to allow a plaintiff to commence an action against only one joint obligant without the other person being released if not sued or, if sued, not served, or if served, not having a judgment taken against them. Section 53 was also enacted to allow a person who was joint and liable and who had paid a creditor to recover from another person jointly liable even though that person had not been previously named as a party or had not had a judgment issued against them."

Notwithstanding the *Clayburn* decision and Section 53 of the *Law & Equity Act*, it is always prudent to name all potential debtors in order to avoid any argument that a debt may have been released and, in addition, to avoid having to add parties to an action at a later time.

(f) **Foreign Currency**

Often issues will arise as to the currency by which the debt is payable. For example, the debt may be expressed in U.S. funds. The *Foreign Money Claims Act*, R.S.B.C. 1996, c. 155 (the "FMCA") essentially provides that if the Court considers that the person in

whose favour an order is to be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a currency other than the currency of Canada, the court must order that the money payable under the order is that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency in a chartered bank located in British Columbia at the close of business on the conversion date. The conversion date is the last day before the day on which a payment under the order is made by the judgment debtor to the judgment creditor that the bank quotes a Canadian dollar equivalent to the other currency.

In *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 115 B.C.A.C. 262, the B.C. Court of Appeal interpreted the FMCA to the effect that at the end of a trial, the Court has the discretion to decide what conversion date should be applied so as to ensure the plaintiff's true and exact compensation.

(g) Non-Resident Debtors and Foreign Judgments

A final issue that ought to be determined prior to issuing a demand to the appropriate parties is where the claim ought to be commenced. If the debtor does not reside in British Columbia you may want to nevertheless consider commencing the action in British Columbia in order to take advantage of reciprocal enforcement of foreign judgments in other jurisdictions in Canada and elsewhere.

In *Beals v. Saldanha*, 2003 SCC 72, the Supreme Court of Canada enforced, in Ontario, a judgment that had been obtained in Florida against the appellants who resided in Ontario. The appellants had decided not to defend the Florida action in which damages against them were assessed including compensatory and punitive damages. The Supreme Court of Canada upheld the Court of Appeal decision in which the Florida judgment was enforced. In doing so, the Court stated that international comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. The court determined that the "real and substantial connection" test ought to apply not only to interprovincial judgments, but also to foreign judgments. The underlying cause of action that formed the basis of the Florida judgment in *Beals* had a real and substantial connection to Florida and therefore that judgment was recognized and could be enforced in Ontario.

As a result, as long as there is a "real substantial connection" to British Columbia with respect to a particular debt claim, a creditor may commence and obtain a judgment here even though the defendant does not reside or have assets here. The judgment creditor could then apply to enforce the B.C. judgment in the jurisdiction where the defendant has assets or resides. Strategically, a creditor may be better off pursuing this course of action rather than in pursuing the debtor in his/her "home" jurisdiction.

Likewise, a foreign judgment can be enforced here in B.C. by commencing an action on the foreign judgment and relying on *Beals* and other similar decisions.

Alternatively, if the foreign judgment was obtained in a reciprocating jurisdiction, pursuant to the provisions of the *Court Order Enforcement Act* R.S.B.C. 1996 c. 78 (the "COEA") a proceeding can be commenced under the COEA to have the B.C. courts recognize and enforce that judgment in a summary fashion depending on how the foreign judgment was obtained in the foreign jurisdiction and whether or not the foreign judgment is final. Accordingly, if the debt claim is based on a foreign judgment, then part of the information gathering process will include determining how the originating process was served in the foreign jurisdiction, determining whether or not the foreign judgment is final and binding, and determining whether any appeal period with respect to the foreign judgment has expired or, if any appeal was taken, whether any such appeals have been finally determined.

2. **Limitation Periods**

As part of the due diligence process special care must be taken to ensure the claim is not statute barred. The typical debt claim is based on a contract under which money is due and owing from the debtor. These claims have a six-year limitation period - see section 3(5) *Limitation Act*, R.S.B.C. 1996, c. 266. This provision provides that an action

cannot be brought after the expiration of six years after the date on which the right to do so arose.

Furthermore, once a judgment is obtained, proceedings on that judgment for the payment of money cannot be brought after the expiration of ten years after the date when the right to do so arose, subject to the judgment being renewed prior to the expiration of this ten year limitation period (section 3(3)(f) of the *Limitation Act*).

However, notwithstanding the above limitation periods, if a debtor confirms a cause of action with the creditor, the limitation period prior to the date of confirmation does not count in determining the limitation period for the action by the creditor having the benefit of the confirmation (section 5(1) of the *Limitation Act*). In that regard, the making of a payment in respect of a cause of action, right or title of the plaintiff or judgment creditor, constitutes a confirmation of the cause of action (section 5(2) of the *Limitation Act*).

With respect to foreign judgments, where a reciprocally enforceable judgment is capable of registration in B.C. under the COEA, the application to register the judgment in B.C. can be made within six years of the date of judgment (section 29 of the COEA).

In addition to contractual claims that may be governed by the six-year limitation period, special care must be taken if it is proposed that additional causes of action are to be alleged against an intended defendant. Claims in negligence or other tort claims

including breach of trust have a two-year limitation period. Furthermore, other statutory lien or secured claims typically have strict time periods by which a creditor can institute proceedings and/or commence an action to enforce any such rights. For example, claims under the *Builders' Lien Act*, S.B.C. 1997, c. 45 have strict timelines that must be adhered to for both the filing of the claim of builders' lien in the relevant Land Title Office (45 days after certain defined events), as well as the commencement of an action to enforce the claim of lien against the land (one year or 21 days depending on relevant triggering events), or a lien against the holdback (anytime prior to the release of the holdback), or a breach of trust claim under the BLA (one year from the breach of trust). Similarly, the *Repairers Lien Act*, R.S.B.C., c. 404, the *Warehouse Lien Act*, R.S.B.C. 1996, c. 480, and the *Woodworker Lien Act*, R.S.B.C. 1996, c. 491, each of which provide for a procedure that allows for a secured status to be asserted for those who fall within their provisions, have strict limitation periods that ought to be reviewed prior to asserting any such rights.

3. **Security**

In the course of gathering information during the due diligence process, attention should be given to whether or not a security interest can be alleged or pursued. For example, a credit agreement may provide for the granting of some form of security by the debtor to the creditor to secure the repayment of an obligation. If so, as long as the

security agreement is signed by the debtor, the security must then be perfected pursuant to the provisions of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 (the "PPSA") by registration of a financing statement. Steps then can be taken to enforce the security to possibly obtain payment on the secured obligation. Where a decision is made to enforce any security that may exist, be careful to ensure "seize or sue" provisions of the PPSA, which may prevent a creditor from realizing on any deficiency claim, are considered.

Additionally, other forms of statutory liens are granted to various creditors depending on the nature of the services provided to the debtor. These statutory liens are found in the provisions of the *Builders Lien Act*, the *Repairers Lien Act*, the *Warehouse Lien Act*, and the *Woodworkers Lien Act*. It is beyond the scope of this paper to outline the various procedures and proceedings that usually must be strictly complied with in order to claim and enforce a lien in connection with these statutes.

III FROM DEMAND LETTER TO JUDGMENT

Once your due diligence is complete, you are now ready to issue a demand letter and thereafter proceed with the commencement of an action. However, prior to issuing a demand you ought to determine whether or not the debt has actually become due which is an obvious prerequisite to not only the commencement of an action but also the issuance of a demand for payment.

Although not every debt requires that a demand be issued, it is often prudent to issue a demand for payment, in accordance with the relevant contract, and allow for a reasonable time for repayment. Depending on the circumstances, seven to ten days is typically a reasonable amount of time in this regard. If demand is not made in accordance with the contract, or if a reasonable amount of time to satisfy the demand is not provided, a defence to the claim may thereafter be alleged by the debtor.

If the demand is issued and no payment is received within the time limited in accordance with the demand, an action can then be commenced based on the information that was gathered during the due diligence period.

(a) Small Claims Court (Provincial Court of British Columbia)

As of September 1, 2005, the monetary jurisdiction of the Small Claims Court in B.C. was raised from $10,000 to $25,000. Therefore, assuming there are no jurisdictional restrictions (of which there are several in the Small Claims Court), if the amount claimed against an intended defendant is less than $25,000, an action can be commenced in the Small Claims Court.

In drafting the Notice of Claim, the document used in commencing an action in the Small Claims Court, be sure to correctly identify the parties to the action, including any aliases for individual defendants. This will ensure execution on any judgment that may be obtained will not be hindered or delayed.

Under Rule 2 of the Small Claims Rules, a Claimant must file a Notice of Claim and pay the required fee at the Small Claims Registry nearest to where:

(i) the Defendant lives or carries on business; or

(ii) the transaction or event that resulted in the claim took place.

Accordingly, the question that often arises is where the claim ought to be brought. For most collection files, the claim can likely be commenced where the payment was to be made, as the default in payment - at the place of payment - actually gives rise to the cause of action. This was the result in *Pace Personnel Ltd. v. Brighton* [1993], B.C.J. No. 2685 (B.C.P.C.). Therefore, although a debtor may reside anywhere in the Province, it may be possible to commence a Small Claims action to recover a debt claim in the Small Claims Registry closest to where the creditor resides or carries on business. Strategically, this case is beneficial to creditors seeking to pursue a collection claim through the Small Claims Court.

A. *Prejudgment Remedies*

In Small Claims Court practice, the main prejudgment execution remedy available to a Claimant is garnishment proceedings. Extensive case law has been established with respect to what funds are subject to garnishment on a prejudgment basis and under what conditions. Essentially, any debt claim can be the subject of a prejudgment garnishing

order if the garnished obligation is located in British Columbia. The two main exceptions to this general rule are:

(a) wages cannot be garnished before judgment (*Court Order Enforcement Act*, section 3(4)); and

(b) interest, other than contractual interest, cannot be garnished before judgment. Also, it is not recommended to garnish, on a prejudgment basis, contractual interest because of the risk in having the Garnishing Order either not being granted at all, or, if granted, later set aside.

Furthermore, a garnishing order cannot be issued if the garnishee is not within British Columbia. Therefore, the affidavit in support must include a statement that the garnishee is in the jurisdiction of the Court.

Typical garnishees include banks and accounts receivable owing to the defendant debtor. In order to obtain a garnishing order on a prejudgment basis, the claim must be for a liquidated amount and for a sum certain that is capable of arithmetic calculation. As a result, in Small Claims Court, an issue that is often overlooked is that the Notice of Claim must clearly outline how the debt claim was calculated in order to entitle a Claimant to a prejudgment garnishing order. Furthermore, if possible, it is important to allege the defendant agreed to pay the amount claimed in the action or there is a risk the garnishing order may not be granted.

B. *Default Judgment*

Once the Notice of Claim is filed it must then be served on the defendant. A Certificate of Service then ought to be obtained. This will allow for a default order for judgment to be sought if the defendant does not file a Reply within the time limited under the Small Claims Rules (14 days if the Defendant was served in B.C.; 30 days if served outside B.C.).

C. *Pre-Trial*

If a Reply is filed, the Small Claims Rules provide for mandatory settlement conferences to be held prior to any trial of the dispute. At the settlement conference, a judge will hear from both sides and will attempt to have the parties settle the claim on acceptable terms to all parties. If the matter does not settle at the settlement conference, it will be set down for trial.

Moreover, certain Small Claims Registries have a mediation process in addition to the settlement conference. Pursuant to this process, which in some cases is a mandatory step in the action, a mediation is held prior to a settlement conference with the assistance of a qualified mediator at which the parties attempt to resolve their differences short of proceeding to the settlement conference or trial.

D. *Trial*

If the action does not settle prior to trial, the Registry will set a trial date. Evidence heard at a Small Claims trial does not follow the same stringent rules of evidence as with a trial in the Supreme Court of British Columbia. The Small Claims Court is much more informal and more of a "lay person's" court in this regard.

E. *Judgment*

Following a trial, the Small Claims Court Judge will either pronounce judgment in favour of the Claimant or will dismiss the claim. If judgment is granted in favour of the Claimant, a Payment Order will be prepared which the Claimant can rely upon in executing on the judgment.

(b) **Supreme Court of British Columbia ("SCBC")**

The originating process in the SCBC is a Writ of Summons that can be filed with either a simple endorsement (a brief summary of the nature of the relief claimed) or with a Statement of Claim (which may have to eventually be filed if the Defendant enters and Appearance). As with a Notice of Claim in the Small Claims Court, a Writ and Statement of Claim ought to succinctly describe the defendants being sued on the outstanding debt.

Unlike in Small Claims Court, an action commenced in the SCBC can be commenced out of any registry in the Province regardless of where the transaction that gave rise to

the dispute took place and regardless of where the defendant resides or carries on business. Furthermore, there is no monetary limit in the SCBC, however, if judgment is ultimately obtained for an amount that falls within the monetary jurisdiction of the Small Claims Court, the successful plaintiff may nevertheless be disentitled to its costs in pursuing the claim in the SCBC as opposed to Small Claims Court.

A. *Prejudgment Remedies*

In the SCBC there are a variety of prejudgment executions available to a plaintiff:

(i) Garnishment

There are three types of garnishment in the SCBC:

(i) Garnishment pre-action;

(ii) Garnishment prejudgment; and

(iii) Garnishment after judgment (to be discussed in the next section).

In order for a plaintiff to avail itself of this extraordinary remedy, the plaintiff must comply meticulously with the requirements of the *Court Order Enforcement Act*. The application for the garnishing order is made without notice to the defendant supported by an Affidavit by the plaintiff or some other person who is aware of the facts. Any errors with respect to the form and/or content of the Affidavit that is filed in support of the application for a garnishing order may result in either the garnishing order not being granted in the first place or, if granted, subject to later being set aside by the defendant. The advantage of garnishing before action (as opposed to simply before judgment) is

that often creditors are concerned that immediately upon learning that an action has been commenced, a defendant may then arrange its financial affairs in a manner to make garnishment more difficult.

In B.C., garnishing orders are effective only at the time of service of the garnishing order on the garnishee and do not continue to attach any debts that may become due to the defendant after that time. A prejudgment garnishing order that is served on a garnishee attaches all debts, obligations and liabilities owing, payable or accruing due from the garnishee to the defendant (except wages) to the extent necessary to satisfy the amount of the plaintiff's claim and the costs of the garnishment proceedings.

(ii) Preservation of Property – Rule 46

Rule 46 of the Rules of Court provides another form of prejudgment execution. This Rule allows for an application to be made to the Court for the detention, custody or preservation of any property that is the subject matter of a proceeding. Furthermore, the rule also provides that where the right of a party to a specific fund is in dispute in a proceeding, the Court may order the fund to be paid into Court or otherwise secured. Essentially, this Rule authorizes the Court to grant an injunction to preserve certain assets pending trial.

Once again, as prejudgment execution is an extraordinary remedy, an order will only be made under this Rule if the property in dispute is the very subject matter of the

proceeding and if, but for the order being made, the property would be destroyed or lost before the resolution of the dispute (see *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 at 12).

In order to obtain an order with respect to the payment of a specific fund into Court, the plaintiff must file evidence that the right to a specific fund is in dispute in the action and that the fund is endangered by the conduct of the defendant.

(iii) Other Forms of Prejudgment Execution

In addition to the above noted common forms of prejudgment execution, a plaintiff may wish to consider seeking the appointment of a receiver or the obtaining of an injunction pursuant to s. 39 of the *Law and Equity Act* R.S.B.C. 1996 c. 253 which provides as follows:

> (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.
>
> (2) An order made under subsection (1) may be made either unconditionally or on terms and conditions the court thinks just.
>
> (3) If an injunction is requested either before, at or after the hearing of a cause or matter, to prevent any threatened or apprehended waste or trespass, the injunction may be granted if the court thinks fit, whether the person against whom the injunction is sought is or is not in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

Alternatively, relief can be sought pursuant to Rule 45 (Injunctions) or Rule 47 (Receivers) of the Rules of Court.

Generally, the test for the appointment of a receiver is whether it is just and convenient to preserve the status quo for the applicant rather than for his opponent (*Royal Bank of Canada v. Cal Glass Ltd.* 1997 8 B.C.L.R. 345 at pp. 350, 351).

Similarly, the test for an injunction is whether there is a fair question to be tried and, if so, assessing where the balance of convenience lies (see *Attorney General of British Columbia v. Wale* (1986) 9 B.C.L.R. (2nd) 333 (CA)).

B. *Default Judgment*

Once a defendant(s) has been served with the originating process in a SCBC action, an Appearance must be filed or the plaintiff can obtain a default judgment. If an Appearance is filed, a Statement of Defence must then be filed or again the plaintiff can obtain a default judgment.

A default judgment (either as a result of the failure to enter an Appearance or a Statement of Defence) may be entered for a fixed amount if the claim is for a liquidated amount or for a debt (Rule 17(3) and 25(4) of the Rules of Court). As with garnishing orders before judgment, the pleadings must set out enough detail to show how the amount claimed has been calculated in order to obtain default judgment for a liquidated amount. If the Court is not satisfied that the claim is liquidated, judgment will only be

entered for damages to be assessed and a later application must be set down to determine the amount of damages that will be awarded.

If interest is claimed on the debt or liquidated amount, a schedule should be attached to the application for a default judgment showing how the interest was calculated. However, if there was no agreement between the parties for interest (or at least no alleged agreement) the Court will only add prejudgment interest to the amount of the default judgment and a schedule showing that interest should also be attached.

Pursuant to the *Interest Act*, if an agreement for the payment of interest is not plead at a per annum rate and the rate is more than 5% per annum, then interest will only be allowed at 5% per annum.

In addition to the amount of the default judgment and interest, the Court may also assess and grant the costs a plaintiff is entitled to under Schedule 1 of Appendix B of the Rules of Court.

C. *Discoveries*

If a Statement of Defence is filed, before proceeding to trial the parties are entitled to discoveries in the SCBC - both document and oral. All relevant documents are typically exchanged between the parties if one or either of the parties invokes the document discovery procedure found in Rule 26 of the Rules of Court. Furthermore, a

representative of the parties may be required to attend an oral examination under oath if required by an adverse party pursuant to Rule 27 of the Rules of Court.

The discovery process, both documentary and oral, allows each party to "discover" the other party's case prior to trial and also assists either party in obtaining valuable admissions from adverse parties to help support the claim or the defence as the case may be.

Following the discovery stage, the dispute can then proceed to trial.

D. *Summary Trial or Summary Judgment*

In B.C., it is possible to obtain a judgment against a defendant without proceeding to a conventional trial. A summary judgment application is available where there is no defence to the claim. Alternatively, on motion by one of the parties, the Court may be able to conduct a summary trial on the basis of Affidavit and certain evidence obtained in the discovery stage of the action without the need to proceed with live witnesses at a conventional trial. Most debt actions can proceed by either a summary judgment application or by a summary trial application, either of which often can greatly reduce the amount of time and expense required to obtain a judgment from the court.

E. *Conventional Trial*

If the debt action cannot proceed by way of a summary judgment or a summary trial application, the action will then proceed to a conventional trial. At trial, the plaintiff

must prove its case on a balance of probabilities with witnesses who testify and are then subjected to cross-examination by opposing counsel.

F. *Judgment*

Once the dispute is brought to the Court for resolution by way of a summary judgment application, a summary trial application, or a conventional trial, the Court may then grant judgment in favour of the plaintiff that can then be enforced.

IV ENFORCING THE JUDGMENT

Once a judgment is obtained, the judgment holder is at liberty to take steps to enforce the judgment in order to get paid. It may be that a simple demand letter asking for payment of the judgment will cause the judgment debtor to pay the amount outstanding. However, in most cases, getting paid on the judgment will not be so easy. Where the judgment is not paid, execution on the judgment can occur immediately after the judgment was granted, subject to any stay of execution the judgment debtor may obtain from the Court – usually pending an appeal of the judgment.

1. **Debtor Examinations**

Often a judgment creditor will not know what assets a debtor owns which can be used to satisfy the amount of the judgment despite the searches that were performed during the due diligence phase mentioned above. Both the Small Claims Rules and the Supreme Court Rules outline procedures whereby the individual judgment debtor or, in

the case of a corporate judgment debtor, representatives of the corporate judgment debtor, can be examined under oath and answer questions about the judgment debtor's ability to pay the judgment. These procedures not only allow the judgment creditor an opportunity for questioning, they also provide the parties with a means to arrive at an agreement with respect to repayment of the judgment thus avoiding further execution procedures and, ultimately, further costs.

(a) *SCBC Procedures*

In the SCBC, there are two procedures for the examination of a judgment debtor:

1. Rule 42A of the Rules of Court allows a judgment creditor to examine a judgment debtor "in aid of execution"; and

2. Rule 42(23) to (44) of the Rules of Court sets out the procedure for a "Subpoena to Debtor".

(i) Examination in Aid of Execution

This process is similar to Examinations for Discovery conducted before trial under Rule 27. At the examination, the judgment debtor, the judgment creditor and counsel are the only parties at the hearing (the Examination is not before a judge) together with a court reporter who records the proceedings. This examination is governed by Rule 42A which lists the range of subjects on which the judgment debtor can be examined. The examination is very broad in that the judgment debtor can be examined as to, for example, "any matter pertinent to the enforcement of the order" (Rule 42A(1)(a)).

As part of this process, the judgment debtor is required to bring relevant documents to the examination including, for example, bank statements, income tax returns and financial statements. The examination must be held at the Court Registry nearest to where the judgment debtor resides unless the parties agree or the Court orders otherwise.

(ii) Subpoena to Debtor

This process is commenced when a judgment debtor is served with a Subpoena to Debtor (together with sufficient expenses the person served would be entitled to as if they attend the court as a witness) requiring the judgment debtor to attend at the Court Registry on a hearing date. The difference between this procedure and an Examination in Aid of Execution is that with the Subpoena to Debtor, the hearing is held before an "examiner", which is usually a Registrar of a Master of the Court, who has the authority to make an Order for payment of the judgment on certain terms (e.g., instalment payments). Also, the range of questions on which the judgment debtor can be questioned is narrower than in an Examination in Aid of Execution.

Another important distinction between the two procedures is that pursuant to Rule 42(23), a Subpoena to Debtor cannot be issued while a Writ of Execution is outstanding against the judgment debtor whereas an Examination in Aid of Execution can be conducted while a Writ of Execution is outstanding. Also, if this process is used, the

judgment creditor ought to be aware that if a Payment Order is made by the examiner, further execution on the judgment may be limited so long as the Payment Order is not in default.

(b) *Small Claims Court Procedures*

In the Small Claims Court, the examination process a judgment creditor can take advantage of is called a Payment Hearing. This is similar to the Subpoena to Debtor process in the SCBC.

Under Rule 12 of the Small Claims Rules, a Payment Hearing can be held if requested by either the judgment creditor, the judgment debtor, or ordered by a judge. A judgment creditor may not, without the permission of a judge, ask for a Payment Hearing if an Order for Seizure and Sale remains outstanding against the judgment debtor.

A judgment debtor must bring to the Payment Hearing any records regarding the income and assets of the judgment debtor, the debts owed to and by the judgment debtor, any assets that the judgment debtor has disposed of since the claim arose and the means that the judgment debtor has or may have in future of paying the amount owed.

After a Payment Hearing has concluded, a judge or justice of the peace may order a payment schedule.

Also, a judge, in the course of making a Payment Order at the end of a small claims trial, may ask at that time if the judgment debtor requires time to pay and, if so, when the judgment debtor proposes to pay (Rule 11(1) and (2) of the Small Claims Rules). The judgment creditor would be consulted about the judgment debtor's proposal and if an agreement is reached regarding the judgment debtor's proposal, the judge may order a payment schedule requiring the judgment to be paid by a set date or by instalments. It is contemplated that this process occurs prior to any Payment Hearing having to be conducted.

If the judge orders a payment schedule, the judgment creditor may not take any steps to collect the judgment as long as the judgment debtor is making payments in accordance with the payment schedule (Rule 11(6) of the Small Claims Rules).

2. **Seizure of Personal Property**

Section 55 of the COEA provides that all goods, chattels and effects of a judgment debtor are liable to seizure and sale under a Writ of Execution except as exempt under the COEA. The Writ of Execution is obtained pursuant to Rule 42 of the Rules of Court.

After a judgment creditor receives a Writ of Execution, the Writ is given to a sheriff or court bailiff for execution. The Writ commands the sheriff to seize and sell sufficient goods and chattels of the debtor to satisfy the amount owing on the judgment together

with the judgment creditor's costs, interest on the judgment, costs of execution and the sheriff's costs. The judgment debtor's assets can then be sold at public auction and the net sale proceeds, if any, are remitted to the judgment creditor.

A similar procedure is provided for in the Small Claims Rules, which allows for an “Order for Seizure and Sale” to be made.

(i) *Exemptions*

There are several exemptions available to a judgment debtor under section 71 of the COEA and the relevant regulations under that Act. For example, the following amounts are exempt from execution:

(a) $4,000.00 for household furnishings and appliances;

(b) $5,000.00 for one motor vehicle; and

(c) $10,000.00 for tools and other personal property of the debtor used by the debtor to earn income from the debtor's occupation.

3. **Realizing on Real Property**

Under the provisions of the COEA, a judgment can be registered against title to any real property owned by the judgment debtor. The COEA also provides a procedure whereby the real property can be sold and the net sale proceeds paid to satisfy the judgment.

In order to register a judgment against the real property owned by the judgment debtor, the judgment creditor must first obtain a Certificate of Judgment from the Court where the judgment was obtained and then file same with the Land Title Office in the district in which the land is located.

Once the judgment is registered, one option is that the judgment creditor can simply wait until the property is sold or refinanced and obtain payment on the judgment in exchange for a release of same. However, this option involves some risk as in any subsequent bankruptcy of the judgment debtor, the judgment would not be effective as against the real property and would have to be removed from title. Furthermore, if a subsequent judgment holder registers a judgment against title to the real property and then commences proceedings to have the property sold, the first registered judgment holder would have to share *pari passu* in any sale proceeds. This would not be the situation if the property was sold out of a foreclosure proceeding or if the first judgment holder applied and completed a sale of the property prior to any other judgment holders registering a judgment against title.

If proceedings are not initiated under the COEA for the sale of the property before the expiry of two years after the date of registration of the judgment against title, the judgment must be renewed or else it will lose any priority status it may have had.

Once the judgment has been registered against title to the real property, that creditor can make an application to Court to have the property sold under ss. 92 to 112 of the COEA. There are three potential applications that need to be made in order effect the sale of the property:

(a) Application for a "show cause" hearing;

(b) Registrar's Hearing; and

(c) Confirmation Hearing and Order for Sale.

This is obviously a cumbersome, time-consuming and potentially costly enforcement procedure. However, judgment debtors involved in this process have been known to make payment of the judgment after the first court application. If the sale proceeds through the three stages of court applications, the sheriff will then advertise the property, sell the property, and thereafter make distribution to qualifying creditors.

Despite the above procedures, there is no assurance the funds will be recovered by a judgment creditor. For example, there may be a mortgage or two registered against the property ranking ahead of the judgment creditor. Therefore, the judgment creditor should ensure there will be sufficient equity in the property before proceeding with the sale under these provisions. Also, where the real property is the home of an individual judgment debtor, the Court may defer an Order for Sale especially where the judgment debtor's equity in its principal residence does not exceed $12,000 if the principal residence is in the Capital Regional District or the Greater Vancouver Regional District

or $9,000 otherwise. In those circumstances, s. 71.1 of the COEA provides that the principal residence is exempt from seizure and sale.

Problems also arise where the judgment debtor owns property as a tenant in common or in joint tenancy in which case the *Partition of Property Act*, R.S.B.C. 1996, c. 347 may have to be used in order to sell the judgment debtor's interest in the property.

4. Post-Judgment Garnishment

Garnishment after judgment is also permissible under the provisions of the COEA. Unlike prejudgment garnishment, post-judgment garnishment can attach wages that in the ordinary course of employment become owing, payable or due to the judgment debtor within seven days after the day on which an Affidavit has been sworn in support of the Garnishing Order.

Accordingly, post-judgment garnishment generally attempts to attach wages in addition to bank accounts or accounts receivable. However, s. 3(5) of the COEA provides that 70% of any wages due are exempt from attachment under a Garnishing Order. Furthermore, there is a minimum exemption of $100.00 per month for a person without dependents and $200.00 per month for a person with dependants. Finally, wages that are subject to garnishment are net of deductions from wages by an employer under federal and provincial legislation.

Once monies have been paid into Court under a garnishing order, the judgment creditor can apply for payment out under ss. 12 and 13 of the COEA on ten days notice to the judgment debtor and if no objection is made by the judgment debtor, or where judgment was obtained by default and three months have expired from the day on which the money was paid into Court, the funds can be paid out to the judgment creditor.

5. Other Jurisdictions

If the judgment debtor does not have assets in this Province, the judgment creditor may have to enforce the judgment in the jurisdiction where the debtor has assets. If the other jurisdiction has reciprocal enforcement of judgments legislation similar to the COEA, the judgment may be registered fairly readily or, alternatively, an action can be commenced to enforce the judgment in that other jurisdiction (see above analysis of the Supreme Court of Canada decision in *Beals, supra*).

Vancouver
1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
Telephone 604.685.3456
Facsimile 604.669.1620

Calgary
3700, 205-5th Avenue SW
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
Telephone 403.269.6900
Facsimile 403.269.9494

Yellowknife
P.O. Box 818
200, 4915 – 48 Street
YK Centre East
Yellowknife, Northwest Territories
Canada X1A 2N6
Telephone 867.669.5500
Toll Free 1.888.465.7608
Facsimile 867.920.2206

genmail@lawsonlundell.com
www.lawsonlundell.com