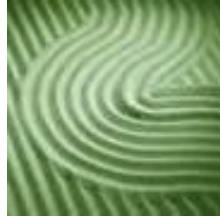


2500, 20 Queen St. West
Toronto, ON
Canada
M5H 3S1
Tel. 416.595.8500
Fax 416.595.8695
www.millerthomson.com



MILLER THOMSON LLP

Barristers & Solicitors, Patent & Trade-Mark Agents

TORONTO VANCOUVER CALGARY EDMONTON WATERLOO-WELLINGTON MARKHAM WHITEHORSE WASHINGTON, D.C.

Enforcement of Judgment

Craig Mills and
Arthi Sambasivan
2003

This article is provided as an information service only and is not meant as legal advice. Readers are cautioned not to act on the information provided without seeking specific legal advice with respect to their unique circumstances.

8 Miller Thomson LLP 1998-2003

ENFORCEMENT OF JUDGMENT

Craig Mills

Arthi Sambasivan

June 20, 2003

ENFORCEMENT OF JUDGMENTS

TABLE OF CONTENTS

I. PRE-JUDGMENT CONSIDERATIONS

- A. Searches/Collecting Information From Your Client**
- B. Demand Payment**
- C. Limitation Periods**
- D. Pre Claim Options**
- E. PPSA Recovery**
- F. Interim Preservation of Property**
- G. Interim Recovery of Personal Property**
- H. Certificate of Pending Litigation**
- I. Power of Sale**
- J. Anton Piller/Mareva Injunctions (Rule 40)**
- K. Interim Receiver (Rule 41)**
- L. Urgent Case (Rule 37.17)**

II. PRE AND POST JUDGMENT REMEDIES

- M. Piercing the Corporate Veil**
 - (I) Fraudulent Conveyance Act (“FCA”)**
 - (II) Assignment and Preferences Act**

(III) Bulk Sales Act

(IV) Remedies Under the BIA

(V) Oppression Remedy

N. Issued the Claim and the Debtor Becomes A Bankrupt?

- **How do Creditors Get Paid?**

III. POST JUDGMENT CONSIDERATIONS

O. Default Judgments

P. Examination in Aid of Execution

Q. Writs

- **Writ of Seizure and Sale**

- **Writ of Delivery**

- **Writ of Possession**

R. Garnishment Proceedings

- **Bank Account Garnishment**

- **Employment Wages Garnishment**

S. Investigators

T. Partition Act

Email to: yourname@millerthomson.ca
Email from: jturner@millerthomson.ca
Date: June 19, 2003
Status: URGENT!

Dear (Insert your name here):

*I'd like you to help me with my client, **Big Industry Ltd.** The Vice President of B.I.L. will be coming in today at 9:30 a.m. to talk about a debt owed to them by **Small Fry Inc.** The debt owed to B.I.L. comes to \$300,000 for consulting services provided by B.I.L. to Small Fry. B.I.L. wants to discuss it options in collecting this sum.*

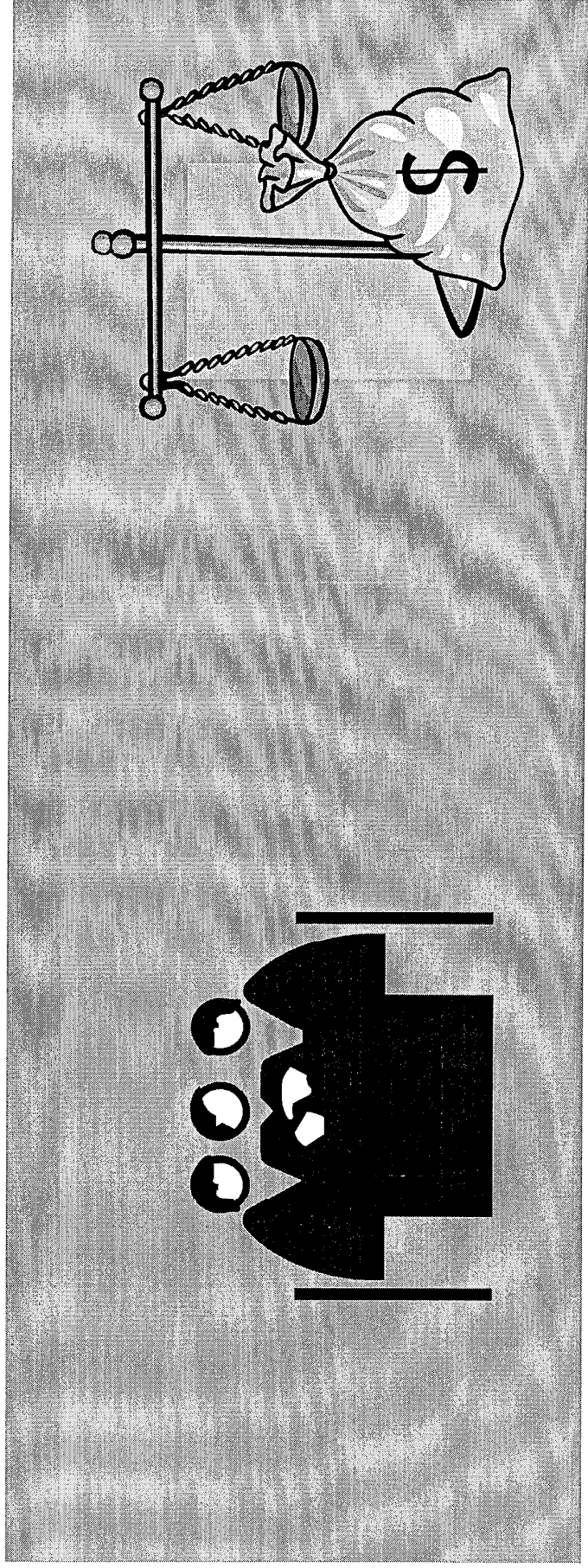
I cannot attend the meeting and I would like you to take the meeting. I have told the client of your wealth of experience in collection matters. He is looking forward to speaking to you.

Please look after this matter in my absence.

Regards

J.T.

Pre-Judgment Considerations



A. Searches/Collecting Information From Your Client

- **2 Kinds of Searches: Locate or Asset Search**
 - **Information for your investigator:**
 - **Name, address and telephone number**
 - **Previous addresses**
 - **Driver's licence**
 - **Information on the business of the debtor (names and addresses of business partners/officers/directors)**
 - **Banking information, motor vehicle details, inventory, property or other assets**
 - **Information on the clients of the debtor**
 - **Information on the debtor's guarantors, demand dates and assets**
 - **"No-find-no-fee"**

Searches (cont'd)

- **Corporate/business names (reveals address of head office and addresses of directors and officers)**
- **Credit bureau**
- **PPSA (reveals names and addresses of any secured creditors and type of collateral put up as security)**
- **Execution (reveals writs of execution registered against debtor)**
- **Land registry office (subsearch will reveal whether debtor owns or has substantial interest in real property)**
- **Bank Act (similar to a PPSA search)**
- **Bulk Sales Act (reveals transfer of assets from debtor to a bona fide purchaser)**
- **Bankruptcy (reveals bankruptcy, proposal, private and court appointed receiverships)**
- **Motor vehicle**
- **Internet (Canada411.ca or Infospace.ca)**

B. Demand Payment

- **Identify lease/loan/mortgage/guarantee by date, account number and names of parties**
- **Identify event of default**
- **Amount of debt plus interest and costs**
 - **interest should be based on the contractual terms of interest, failing which demand interest in accordance with CJA.**
- **Reasonable costs incurred include:**
 - **Repossession, recovery, disposition, initiating default proceedings, administrative costs.**

C. Limitation Periods

- **Current Act:**
- **6 years from date cause of action arose - action of account, debt collections/ action upon the case**
- **20 years to enforce the judgment**
- **Consider other limitation periods in relevant legislation: i.e. *Proceedings Against the Crown, Municipal Act, BIA.***

Limitation Periods [cont'd]

- **New Act (comes in to force Jan. 1/04)**
- **2 years - basic limitation from point of discovery of claim (s.4)**
- **no limitation period to enforce a court order (s. 16)**

D. Pre Claim Options

- **Pre Claim examinations:**
 - **not contemplated by the rules;**
 - **can be undertaken on consent of the parties;**



Pre Claim Options (cont'd)

- **Self-Help and Collections without Judgment:**
 - **secured creditor seizes an asset used as collateral for securing a debt under the *PPSA*;**
 - **mortgagee exercising a power of sale under the *Mortgages Act*;**
 - **landlord taking possession of leased premises or distraining property for arrears under the *Commercial Tenancies Act*.**

E. PPSA Recovery

- **Secured creditor -**
- **section 59(7) no merger of security agreement if secured creditor has a judgment**
- **can proceed to sue on the covenant in the agreement, obtain judgment and levy an execution against the collateral that is pledged under the security agreement.**

F. Interim Preservation of Property (Rule 45)

- **Interim order for custody or preservation of property (i.e. real evidence)**
- **Authorize entry upon any property in possession of party or non-party**
- **If perishable, court have item photographed (under R. 32.01) and then order its sale on terms that are just: R. 45.01**
- **If issue concerns right to funds, court can order that funds be paid into court: 45.02**
 - **If no dispute over title (i.e. item held as security such as a repair lien), court can order party claiming recovery to pay value of item into court: R. 45.03**
- **Affidavit in support must disclose all people with claim to possession: 45.03(2)**

G. Interim Recovery of Personal Property

- **Rule: s. 104 of the CJA; r. 44 of the RCP**
- **List recovery of the personal property in the claim- immediately bring a rule 44 motion**
- **Entitles creditor to seize the equipment with the assistance of the sheriff – reasonable force**
- **Affidavit - description of the property, fmv, entitled to repossess; unlawfully taken/detained**

Interim Recovery of Personal Property (cont'd)

- **plaintiff or defendant will post security**
- **without notice, Sheriff must hold the property for 10 days**
- **high degree of probability that the plaintiff will be successful at trial;**
- **equities of the situation**

H. Certificate of Pending Litigation

(S. 103 of the CJA; Rule 42)

- **believe real property may be dissipated**
 - **included statement of claim interest in land and description of the interest**
- **Affidavit evidence –plaintiff has a reasonable claim to an interest in the land - need not show direct interest**
- **Without notice - serve all parties with interest in the land**
- **CPL registered on title under the *Land Titles Act* or the *Registry Act***

Certificate of Pending Litigation (cont'd)

- **CPL's can be struck out on the following grounds:**
- **claimed damages as an alternative to the interest in land;**
- **no reasonable claim for interest in the land; or**
- **interests can be protected by another form of security**
- **(s. 103(5) CJA).**

Power of Sale

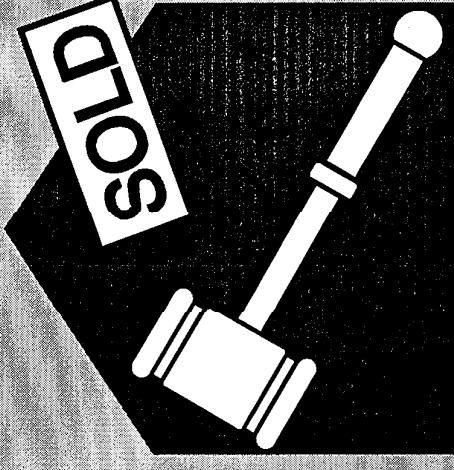
- **Default on the payments due under the mortgage, the Mortgagee may decide to initiate Power of Sale proceedings by serving a Notice of Sale**
- **Consider prior encumbrance(s) on the property (i.e. mortgage) - execution creditors do not rank in priority to mortgagees**

Power of Sale (cont'd)

- **In representing an execution creditor, contact the Mortgagee to determine:**
 - **The current value of the Mortgage**
 - **Sale price/appraisals on the property**
 - **Details of other secured/execution creditors and amounts claimed by each**

Power of Sale (cont'd)

- **Will there be any surplus from the sale proceeds?**
 - **Surplus shared on a *pro-rata* basis**
 - **Mortgagee must account for the sale proceeds**



Anton Piller/Mareva Injunctions (Rule 40)

- **Anton Piller order permits plaintiff to search defendant's premises**
- **Very intrusive; rarely ordered; requires high evidentiary threshold**
- **To obtain an Anton Piller order, the following conditions must be met:**
 1. **strong prima facie case**
 2. **damage (potential or actual) must be serious for plaintiff**
 3. **clear evidence that defendant has incriminating documents/items in possession**
 4. **establish real possibility that defendant may destroy**

Anton Piller/Mareva Injunctions (Rule 40) - cont'd

- **Mareva Injunction prevents debtor from dissipating assets prior to trial. The plaintiff must:**
 - **Make full and frank disclosure of all matters which are material to case;**
 - **Provide particulars of claim against the defendant, including the amount, the grounds for the claim and points against it by the defendant;**
 - **Establish grounds for believing that the defendant has assets in the jurisdiction;**

Anton Piller/Mareva Injunctions (Rule 40) - cont'd

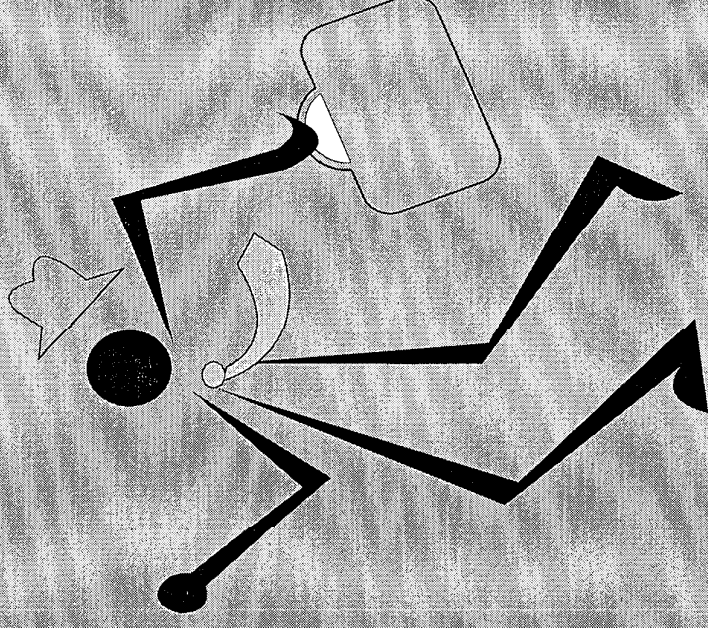
- Give grounds for believing that there is a risk that the assets will be removed before a judgment is granted; and
- Give an undertaking as to damages: *Chitel v Rothbart* (Ont. C.A.)
- Mareva injunctions can be worldwide: *Babnaft Int'l v. Bassatne* (Eng C.A.)
- Must show insufficient assets within jurisdiction; assets in foreign jurisdiction; high risk of disposal

Interim Receiver (Rule 41)

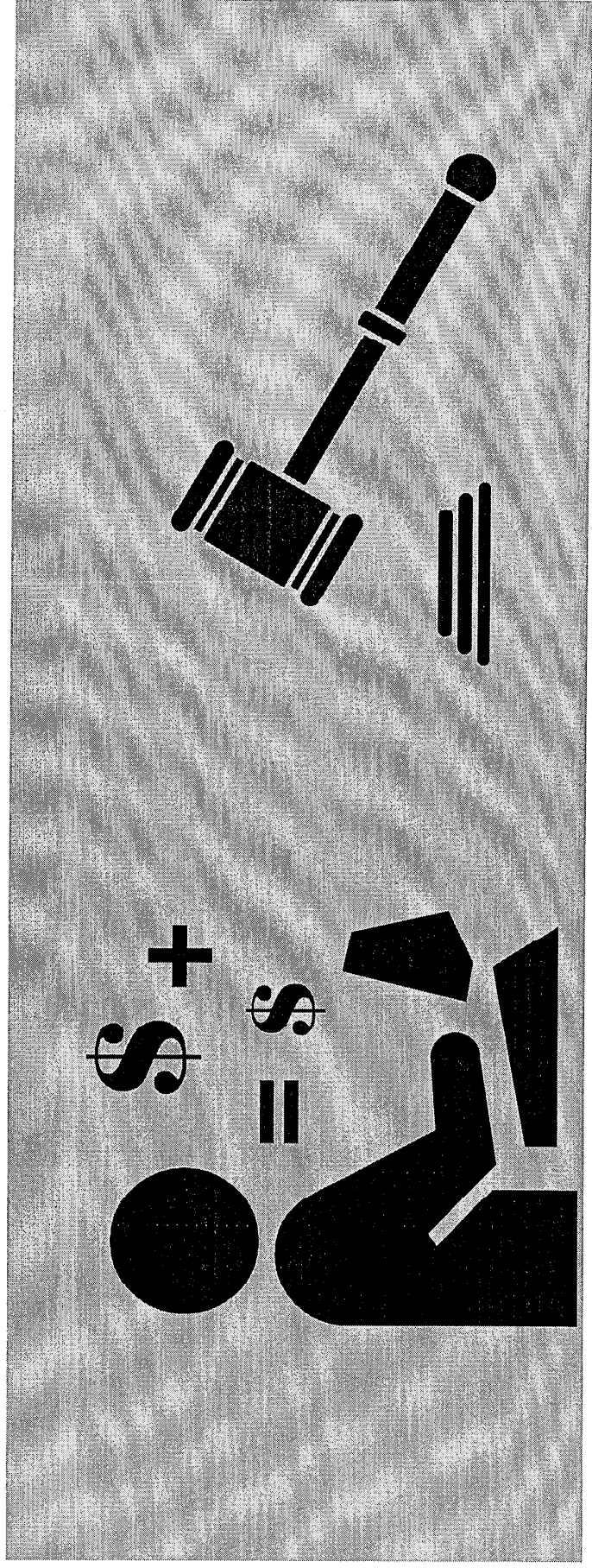
- **S. 103 of CJA and Rule 41 permit judge to appoint receiver**
- **Test: “appointment is just and convenient having regard to nature of property and rights of parties”**
- **Extraordinary relief; high threshold to be met**
- **Need strong evidence that creditor’s right to recovery is in jeopardy (i.e. debtor disposing of assets, fraud)**
- **Receiver must act in best interests of ALL parties (no duty owed to creditor)**
- **Creditor bears costs of receivership if appointment not warranted or of there is a shortfall in assets**

Urgent Case (Rule 37.17)

- **On an urgent case a motion may be made before commencement of a proceeding**
- **moving party's undertaking to commence an proceeding forthwith**



Pre and Post Judgment Remedies



Piercing the Corporate Veil

- **When it appears that an individual taken steps to organize their affairs to avoid payment**
- **legal battle may be a battle separate and apart from the debt collection process**
- **“alter ego theory”**
- **Pierced when directors have acted in a high handed and fraudulent manner.**

Piercing the Corporate Veil (cont'd)

- **Legislative provisions which can be used to attack creditor proofing schemes:**
 - **Fraudulent Conveyance Act;**
 - **Assignment and Preferences Act;**
 - **Bulk Sales Act**
 - **Remedies under the BIA**
 - **section 248 of the OBCA - the Oppression remedy**

(I) Fraudulent Conveyance Act ("FCA")

- **available inside and outside a bankruptcy;**
- **available to "creditors or others"**
- **No judgment - representative action**
- **Judgment - name plaintiff in its own name**

FCA (cont'd)

- **disposition of property is void if one can prove elements in the Act.**
- **transferred property available for the execution or seizure from the transferee at the instance of the creditors.**
- **No limitation period set out in the FCA**

(II) Assignment and Preferences Act

- **attack both fraudulent conveyances and unjust preferences;**
- **debtor must be insolvent**
- **available to creditors having liquidated claims at the time of the conveyance;**
- **saving provisions – section 4(1) - a sale or payment used in good faith in the ordinary course of trade to an innocent purchaser**

Bulk Sales Act

- **Protects trade creditors of vendor who want to sell all or most of his business**
- **Risk - proceeds will not pay off the creditors**
- **Vendor must comply with provisions of Act or creditor can move to have sale set aside**
- **should bring action on behalf of all the trade creditors of the seller**
- **Buyer can be personally liable to account to creditors for value of stock received.**

(IV) Remedies under the BIA

- **Section 38 of the BIA**
- **section 38 allows creditor to step into the shoes of the trustee**
- **pursue remedies - unjust preference, fraudulent conveyance, settlements, reviewable transactions**
- **only participating creditors obtain benefit of the spoils of the proceeding**

(V) Oppression Remedy

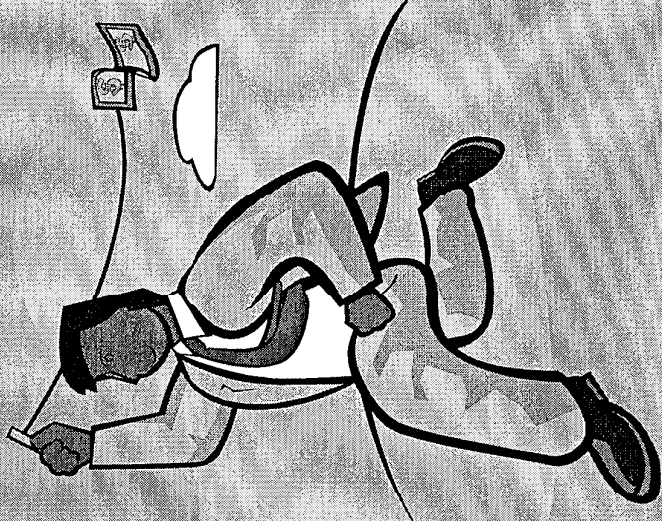
- **section 248 of the OBCA / corresponding sections under the CBCA.**
- **“complainant” may apply for relief by an Application to the court;**
- **secured or unsecured;**

Oppression Remedy (cont'd)

- **“oppressive or unfairly prejudicial or unfairly disregards” the interests creditor**
- **Remedy:**
 - **restraining the conduct;**
 - **appointing a receiver manager,**
 - **varying or setting aside the transaction**
 - **compensating the complainant (s. 248(3)).**

Issued the Claim and the Debtor Becomes a Bankrupt?

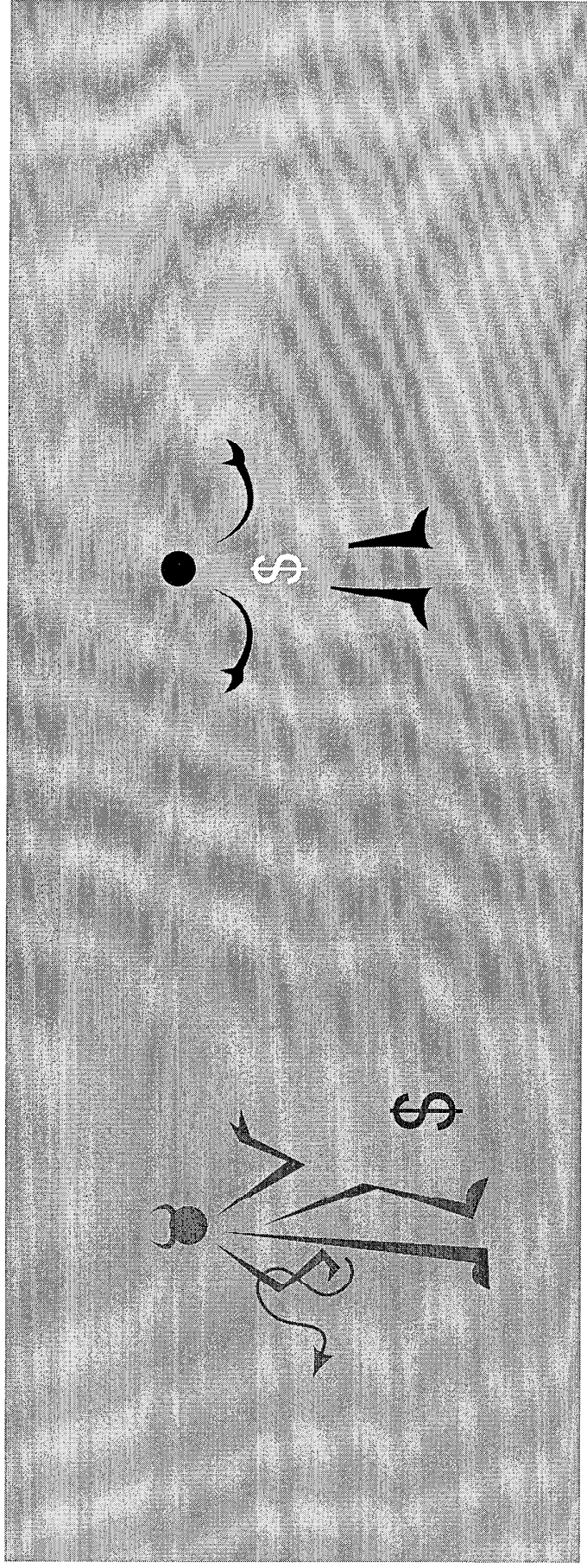
- All property of BK vests in trustee (except for property held in trust for others)
- Stay of proceedings



How Do Creditors Get Paid?

- **Submit proof of claim to the trustee;**
- **Trustee determines if claim is “provable”**
- **Without proof of claim cannot receive a dividend from the estate;**
- **No impact on the secured creditor;**
- **Trustee/Creditor (s. 38)**
- **to obtain a personal judgment leave of the bankruptcy court to lift the stay (69.4 of the BIA);**
- **30 goods rule (s. 81 of the BIA) – supplier of goods can repossess.**

Post-Judgment Considerations



Default Judgments

- **Liquidated Debt - Requisition**
- **If unliquidated, move for Judgment**
- **Can be set aside on motion**
 - **test for setting aside Judgment greater than test for setting aside noting in default (good defence on the merits)**

Examination in Aid of Execution

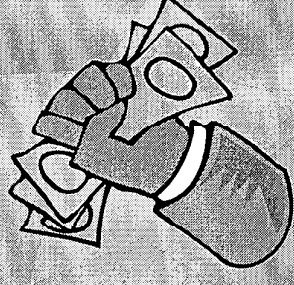
- **Debtor seldom attends notwithstanding personal service of notice;**
- **Can be conducted in writing (by mail), best when debtor represented by counsel**
- **Motion to Compel attendance**
 - **At least 2 or 3 certificate of Non-Attendance required**
- **Contempt motions costly**
- **Enforcement of contempt order costly**
- **Consider retaining investigator instead**

Writs

- **Writ of Seizure and Sale**
 - Attaches to real property;
 - No leave required;
 - Sheriff will seize property *and* remarket and sell
- **Writ of Delivery**
 - Leave to issue required
 - Sheriff seizes property, creditor remarkets and sells
- **Writ of Possession**
 - Leave to issue required

Garnishment Proceedings

- **Bank Account Garnishment vs. Bank Account Seizure**
 - **Garnishment in effect for 6 years**
 - **Seizure - one-time seizure**
- **Employment Wages Garnishment**
 - **Garnishment of Income/Partnership Draw/Other remuneration**
 - **RSP seizures, but not CPP**



Partition Act

- **For partition and sale of the property.**
- **Third parties are not interested in purchasing a one-half interest**
- **If co-owner is a spouse living on the property, reluctant to grant an Order**
- **Must have “immediate right to possession”**
- **To sell part interest in the property is through the sheriff who advertises the sale of the property.**