

## Collecting bad debts

Whether to pursue a bad debt or not is a delicate commercial balancing act. As commercial debt grows in Western Canada, so should business owners' awareness about bad debt preventive measures, as well as an understanding of effective collection processes.

### Preventive measures

Keeping extensive, accurate documentation of transactions is a critical commercial practice. These documents not only provide clear initial notice of non-payment, but also strengthen any subsequent claims made against a debtor whether as evidence in court proceedings or just as supporting documentation to a letter of demand.

### Early warnings

The following actions of the customer are often warning signs to a business that a bad debt is looming:

- Failure to return phone calls and correspondence;
- delaying tactics such as breaking promises to pay;
- disputing specifications only well after the invoice becomes due; and
- claiming financial difficulties without specifics.

### Collection agencies

Once a creditor has exhausted their lines of communication with a debtor, a collection agency may be engaged on their behalf who will generally work to collect the debt on contingent fee basis for a percentage (often 50 per cent) of monies recovered. However, a large number of debtors will not respond to a collection agency.

### The legal route

When a collections agency cannot persuade a debtor to pay, it may be time to consult a lawyer to analyze the pros and cons of filing a writ in Supreme Court (for claims over \$25,000 in British Columbia) or a notice of claim in provincial (small claims) court (for claims under \$25,000 in B.C.) excluding interest and court costs.

The small claims court system in B.C. has settlement opportunities, including mediation and a mandatory Settlement Conference before trial. These can be used to resolve claims much more quickly than Supreme Court procedures.

A creditor with a claim resting on the \$25,000 threshold may want to consider waiving (or giving up) its incremental amount over \$25,000 in order to file in provincial court and take advantage of the more cost-effective and efficient procedures.

### Pre-judgment

In both levels of court, there are pre-judgment remedies that may leverage a debtor into paying before reaching the lengthy and costly trial procedure. These include:

1. Pre-judgment garnishing order: A garnishing order from the court allows a creditor to collect money owing to

the debtor directly from a person (the 'garnishee') who owes money to the debtor.

2. Preservation of property: A creditor's lawyer may apply for the detention, custody or preservation of property. Aside from securing the amount in dispute, this tactic may force a debtor into settlement discussions. The Rules of Court also allow for the appointment of a receiver to recover payment of debts from the debtor's assets in certain circumstances.

3. Default and summary judgments: Once a claim is filed and served on the debtor, the debtor has a finite amount of time within which they must file a response. If there is no response by this deadline, the creditor may apply for default judgment against the debtor.

4. Other pre-judgment securities: If there is concern about the debtor having significant assets that may be disposed of, or taken out of the jurisdiction prior to judgment, interim orders can be obtained upon application to the court to prevent this. These options should be explored at the initial stages of deciding whether to file suit.

### Going to trial

While the judgment of a court is a weapon against a debtor, it can often be a blunt weapon. There are a number of reasons that a creditor may wish to resolve its collection matter before reaching trial, including the following:

- Diversion of time and resources of the creditor towards a court proceeding rather than the creditor's daily business affairs;
- lengthy delays before the matter is resolved;
- no guarantee of outcome;
- further delays before the debt is recovered after judgment;
- delays caused by debtor relying on bankruptcy provisions to avoid payment; and
- limited recoverability of the judgment debts.

Mindful of these potential difficulties, the best measures are preventive, but when collectors fail, it is time to call in legal team. Lower Mainland creditor's lawyer will assess whether going to trial is the most appropriate course of action.

The good news is that a court judgment will permit a creditor to enforce both pre- and post-judgment interest on the outstanding debt.

### Getting paid

While obtaining a judgment does not guarantee payment of a debt, the advantage of receiving a court order is that the following enforcement options become available to the creditor once judgment is rendered:

- Debtor examinations;
- Debtor subpoenas;
- Committal for contempt;
- Execution against personal property;
- Execution against real property; and
- Post-judgment garnishment on any monies owed to the judgment debtor, e.g. wages.

Again, these procedures do not guarantee payment, but can exert significant pressures on the judgment debtor.

### Statutory limits

A creditor must be aware that it only has six years from the date of the debt in which to bring an action in court against the debtor in B.C. In determining the date of the debt, it is safest to assume that the limitation period commences from the date that the payment became due as stipulated on the creditor's invoice.

The unfortunate reality is that rarely will the creditor recover all of the expenses they incur in collecting a debt.

### Conclusion

The bottom line is that it is always preferable to manage the accounts receivable to avoid or limit bad debts rather than allowing them to accumulate.

The burden is always on the creditor to prove the agreement and the debt, so there is nothing stronger than an organized system and proper documentation. ♦

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