

COVID-19 RESOURCE CENTER

Creditors' Rights and Remedies in the Time of COVID-19

March 27, 2020

The COVID-19 pandemic is causing cash flow problems (or, in other cases, exacerbating existing cash flow problems) for businesses worldwide and in British Columbia. This unprecedented situation has created a unique situation for creditors who are trying to collect on unpaid debts and enforce their remedies. Both secured and unsecured creditors will likely face challenges although the issues encountered by the two groups might be very different.

Unsecured creditors can commence lawsuits to recover their outstanding debts, but they may not be able to prosecute them as quickly as they might like. For instance, it may be difficult to serve claim on a debtor as social distancing may provide a reasonable excuse for a house-bound debtor to avoid service. However, and even if a creditor is able to overcome this issue, British Columbia has temporarily closed its courts to all non-urgent matters, meaning that, as long as the debtor files a defense, the creditor is not likely to obtain a court judgment until after the courts re-open to non-urgent matters. Further, it is likely that, once courts do resume, there will be a backlog of claims and matters to be heard that arose during this shutdown and will take some time to work through. We expect that unsecured debt claims will have to wait until late spring or early summer before they can be heard although unsecured creditors may use this time to prepare and advance matters as much as possible so that they are well positioned when the courts reopen.

Secured creditors can still avail themselves of out-of-court remedies, such as seizures by a bailiff under the Personal Property Security Act. Bailiff and auction houses are still open for business, but there are various logistical hurdles that might increase cost and adversely impact recovery. For instance, the current climate may make it difficult to attract bidders and auction houses might be reluctant (or refuse) to provide guarantees to secured lenders. Auctions are also being done remotely only; it remains to be seen what impact that will have on sale values, but it appears unlikely to increase sale values. In other words, a debt that may have seemed fully secured last month may seem less secured today.

Secured creditors may also have recourse to the courts for court-supervised proceedings, such as receivership applications or other insolvency proceedings and there is a further bulletin in Farris' COVID 19 Resource Centre on this topic.

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In order to provide some certainty and clarity when we emerge from this situation, both secured and unsecured creditors may wish to consider entering into a forbearance agreement whereby lenders agree not to enforce their claims for a period of time in exchange for some concessions from the borrower. Those concessions might include additional security or guarantees, changes to agreement terms or existing security, up-front payment provisions, an acknowledgement of liability, and a release in favour of the creditor. Further, parties engaged in forbearance while waiting for the local effects to subside may wish to consider specific terms or deadlines, such as courts returning to normal operations, or the termination of specific regulatory conditions, so all parties are clear about when the forbearance terminates.



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