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Consumer Law and Credit / Debt Law

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This manual explains the law in general. It is not intended to give you legal advice on your particular problem. Because each person's case is different, you may need to get legal help. The information in this manual was up to date as of November 2012.

Consumer Law and Credit/Debt Law is only available in PDF format at **www.legalaid.bc.ca**.

Dedication

This edition of *Consumer Law and Credit/Debt Law* is dedicated to our legal reviewer Allan Parker, QC.

Allan was a respected lawyer, teacher, mentor, and friend to poverty lawyers, paralegals, and community advocates who worked tirelessly to improve access to justice for the disadvantaged.

Allan's interest in helping people with debt problems began in 1973, when he co-wrote the first publication on this subject. At that time he worked with the Consumer Protection League in Vancouver. He later became a lawyer at the Legal Services Society.

As Allan progressed in his career, he became recognized as an expert in collections and foreclosure law. He taught this subject at many conferences and workshops and wrote extensively about it. He was working on the current edition of this publication when he passed away unexpectedly. Allan's many contributions to legal aid and pro bono work in BC will always be appreciated.

Contents

Part I:

Before You Begin

Format of this manual

This manual is divided into three parts:

- **Part I: Before you begin.** Read this first to understand how to find information about your client's problems in this manual.
- **Part II: Consumer and credit/debt problems and laws.** Chapters on common problems in consumer and debt law are arranged alphabetically to help you work through your client's problems. They contain cross-references to other chapters that may also help you. Each cross-reference ("see page __") is linked, so you can click on it to go directly to the page it refers to.
- **Part III: Other helpful resources.** Additional resources that may be helpful to manual users.

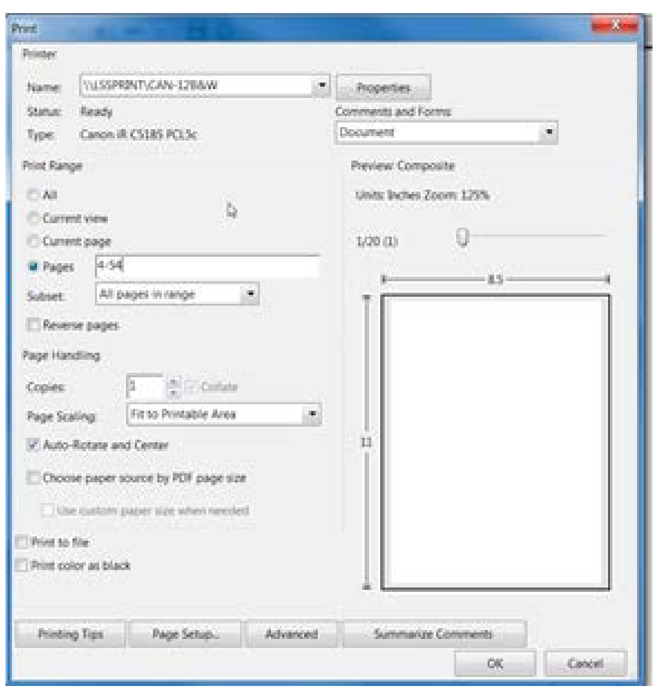
Tips on searching this PDF

1. Use the bookmarks on the left side of the screen to identify chapters that look appropriate for your client's problem.

   You can also do a keyword search by clicking Control F (Ctrl F) (if you are using a PC) or Command F (if you are using a Mac) and typing in a keyword that relates to your client's problem. For example, if the problem involves a foreclosure, type "foreclosure" (without the quotation marks) in the search box and press Enter.

   - You will be taken to the first instance of the word "foreclosure" in the document. It probably will not be what you are looking for (it will probably show the word on the Contents page).
   - Continue pressing Enter to work through the document until you find the word in the context of your client's problem.
   - Scroll to the header or footer of the page you land on to see where you are in the document. Another option is to use the page numbers that appear at the top of the screen to see where you are in the document. You will also find cross-references to other parts of the manual in most chapters to help you find other relevant information.

2. Once you find the chapter that discusses your client's problem, you may want to print it out to review it with the client. When printing from a PDF, you can choose to print only the pages that your client needs by using the print properties to specify the pages you want to print.



Scope of this manual

Purpose

This manual is designed to be a problem-solving resource for legal information advocates, paralegals, and lawyers whose clients are having problems with consumer goods and services contracts, or consumer credit contracts.

Format

Each topic has been set out in this problem-solving format:

- A list of common questions clients ask
- An outline of the relevant law
- Suggestions for specific information gathering to solve the problem
- Suggestions for solving the problem

Some topics also have a list of resources for further information.

Content

The criteria for deciding on the content of this manual included:

- whether the information would provide entry-level advocates with realistic solutions for clients with consumer or debt problems, and
- whether alternative resources (including lawyers and government agencies, as well as other manuals and publications) were available. If so, we refer readers to those resources, listed in Appendix 3.

In general, topics involving consumer contracts or credit are covered in the most detail (e.g., judgment enforcement processes, bankruptcy). Other relevant topics (e.g., court procedures) are covered in less detail because many other resources are available for both advocates and clients to find out more about these.

Some relevant topics that fall outside the scope of this manual include builders' liens, residential tenancies, and family maintenance enforcement (see Appendix 3).

Appendix 1 contains a list of the federal and provincial statutes and regulations referred to in this manual. These statutes and regulations are all available online.

Federal statutes and regulations are posted at www.laws.justice.gc.ca. This website is generally updated weekly. BC legislation is posted at www.bclaws.ca, which is updated continually.

Both federal and BC legislation are also available on the CanLII website at www.canlii.org. Another Internet resource is Westlaw eCarswell's LawSource, a computer database service available for free at courthouse libraries. To find a courthouse library near you, go to the website of the Courthouse Libraries BC at www.courthouselibrary.ca.

You may want to obtain hard copies of the more important statutes and keep them in a statute binder. However, remember that it is important to keep up to date on statutory changes. Your primary reference should be the First Reading Bills for the BC Legislature. Also, the following print resources summarize legislative changes:

- *BC Legislative Digest*
- *BarTalk* (a monthly publication for lawyers from the BC Branch of the Canadian Bar Association, which contains updates on legislative changes)

This manual contains limited references to case law (the collection of previous written legal decisions in a particular jurisdiction such as a province or a country; over time, case law develops and establishes principles that are used in understanding the law and deciding future cases). In many instances where common law (a body of legal principles that are developed from decisions made by judges, rather than from statutes or constitutions; e.g., principles of contract law) is outlined, referring to case law would add unduly to the length of the manual. We give case citations only if they help to explain a legal principle, or if they provide a helpful precedent to resolve a client's problem either in negotiations or in a court proceeding.

Appendix 2 lists the citations for a case or a reference to where it can be found. As you come to use or refer to certain cases, it may be useful to develop a personal or office file of cases, organized according to the topics in this manual.

In this manual, we describe basic legal principles and how those principles can be applied to solve client problems. In most instances, detailed case law is unnecessary. If additional case law appears to be necessary, consult a lawyer or refer to the resources listed in Appendix 3.

This manual does not contain a glossary of legal terms. We avoid legal terms wherever possible and, when necessary, explain the terms in the context of the topic. You may find a legal dictionary useful for general reference (see Appendix 3 for some suggestions).

How to use this manual to help your clients

Perspective

While this manual is about identifying and solving problems, it is important to keep client problems in perspective. The law outlined in this manual governs millions of consumer and credit transactions made in the province every year. The vast majority of those transactions are carried out without any problems. Overwhelmingly, society accepts the rules that govern these transactions, and follows them.

Being realistic about solving clients' problems is also important. Often, solving a problem means making the best of a bleak situation. It means, in many instances, that you may not be able to assist clients to make the kind of fundamental changes in their circumstances that will help them avoid similar or other problems, particularly financial problems, in the future. It also means appreciating that the facts provided by clients cannot be changed.

How to find answers to client questions

Every chapter is divided into sections to help you understand and work through your client's problem.

Client problem: This will help you decide if the chapter is about a law that will affect your client.

Summary of the law: This will give you a basic understanding of the law so that you can use it to help your client.

Information gathering: This will help you to understand what information you need from your client to help solve the problem.

Solving the problem: This gives some suggestions for solving your client's problem.

Related topics and materials: Some chapters contain suggestions for further reading on a problem, and some also contain cross-references to other chapters that may help or that may give you more information on a topic. Any cross-references in the main text of a chapter are also listed by their chapter title in the **Related topics and materials** section at the end of the chapter.

Understanding the law

This manual attempts to provide an outline of the basic legal principles that advocates need to understand to assist clients who have consumer or debt problems.

Gathering relevant facts from the client and other sources

The most important initial step in fact gathering is the client interview. Good interviewing skills come from a combination of experience and realizing that, as with any other skill, proper training, practice, and reflection on the skill can make you a more effective interviewer.

Identifying the client's problem or problems

A client's problem will not always fit neatly into the topics outlined in this manual. It is up to you to understand the facts presented by the client and to apply the law to solve the problem. In some instances, a client's problem can be quickly identified. In other instances, it may take considerable fact gathering, investigation, and research to identify the issues.

Applying the law to the problem

Applying the law to a client's problem involves explaining to the client the basic principles of the law and how the law governs his or her circumstances.

Outlining client options

In most instances, there is more than one approach to solving a client's problem. You will serve your clients best if you present a range of options to them. In this way, clients can make informed decisions rather than having solutions imposed on them by you.

Carrying out the client's option

In carrying out the client's option, you and the client should draft an initial plan of action. This plan should include agreement on who is to carry out the initial steps, how to carry out those steps, and the time frame in which to carry out the steps.

Client options: Range and reality

Here are some ways to categorize the client's options:

- **Do nothing:** In applying the law to a client's problem, it may be that the client does not have to do anything right away (the "wait-and-see" approach), or that letting the matter go is the most realistic alternative.

  A wait-and-see approach may be the most practical option in cases where a client is still hopeful that the matter will be resolved without taking further steps; for example, when the likelihood of success in seeking a remedy (either in court or another forum) is in doubt. The client may find the cost of seeking a remedy too high. Many clients will say the emotional strain of pursuing a remedy is not worth what might be recovered.

- **Negotiate directly with the other side (client alone or with assistance):** Often, a matter can be resolved by negotiation. It may involve a phone call, a letter, or a face-to-face meeting. Your assistance may be important if a client is unable or reluctant to negotiate alone.
- **Use other individuals or agencies:** There are many people other than advocates or lawyers who may be able to help resolve the problem. These include MPs, MLAs, government agencies (such as Consumer Protection BC, also known as the Business Practices and Consumer Protection Authority), the Better Business Bureau, the media, professional or trade associations, and consumer groups.
- **Take non-legal, self-help steps:** Sometimes a more creative approach can help solve a problem. Picketing the business in question may, at the very least, have a nuisance effect that puts pressure on the other side to settle. This option costs little in dollar terms, but if the results are not relatively quick, it may be difficult for the client to sustain the action.

  Boycotts, in limited circumstances, may also be effective. Usually, boycotts involve several people who are aggrieved or who are at least willing to support one individual or cause.

- **Use legal action:** A client may be able to seek a remedy in the court system. The advantages of going to court include using the court system to force a resolution. The disadvantages include the time it may take to resolve the matter; the uncertainty of success; and the likelihood that if the client uses a lawyer, some or all of the legal costs will not be recovered.

Often, problem solving involves a combination of these alternatives at various stages. A client's best plan is to start with an attempt to negotiate a resolution. If that fails, the client may want to take legal action. The client can still keep the negotiation option open during the legal process. Most legal cases settle before they go to trial.

The key aspect of efficient problem solving is choosing the most appropriate remedy. Realism is the key. Advocates need to be realistic about a client's chances of success, about the amount that might be recovered, about the ability of any other service to resolve the problem, and about the client's ability to carry out his or her role in the remedy (particularly if it is a self-help remedy).

Ethical and professional considerations

Under the *Legal Profession Act* (LPA), only lawyers and articled students licensed by the Law Society of British Columbia may practise law in BC. However, the LPA defines "practice of law" as excluding the work of advocates, provided that the work is not performed for (or in the expectation of) a fee, gain, or reward (direct or indirect) from the client.

Nonetheless, advocates (and, of course, lawyers) should consider themselves bound by the ethical rules of conduct set by the Law Society of BC. These rules of conduct are explained in a manual called the *Professional Conduct Handbook* (PCH).

Chapter 1 of the PCH contains historic principles of lawyers' ethics called the "Canons of Legal Ethics." These are general principles, but they set an important tone for an advocate's professional duties. Duties are owed to the state, the courts and tribunals, the client, other advocates, and oneself. In virtually any ethical situation, the canons provide relevant guidance for personal conduct.

The Law Society stresses that many complaints about lawyers can be avoided by good lawyer-client communications. The primary responsibility for communication rests with the lawyer, who should ensure that:

- clients are kept informed of the progress of their file,
- clients are adequately briefed on the various options available to resolve a problem, and
- clients' inquiries are handled promptly and efficiently.

There are a range of techniques to ensure proper communication with clients, including returning phone calls promptly, sending copies of correspondence to clients, explaining legal concepts in simple terms, and giving realistic advice to clients.

Under the *Legal Services Society Act* (LSSA), s. 12, people who are not lawyers but are employed by the Legal Services Society (LSS) or a funded agency may provide services (e.g., give legal advice) that would ordinarily be provided by lawyers, so long as the individual is supervised by a lawyer. However, s. 12 also notes that such employees (like non-LSS advocates) may not appear in court on someone's behalf unless the court grants permission.

Under s. 23(1) of the LSSA, information disclosed by a legal aid client or applicant is privileged. This means that it must be kept confidential in the same manner and to the same extent as if it had been disclosed to a lawyer in a lawyer-client relationship.

See also chapter 26, Fraudulent conveyances and fraudulent preferences.

Professional conduct rules

The following is a list of some of the more important rules that should be followed by everyone in the conduct of client files (all chapter references are to the PCH):

- **Appearances before tribunals:** Advocates are not permitted to represent clients in the superior courts of the province, but there may be limited instances when they can assist in the presentation of cases in the three divisions of the Provincial Court of British Columbia. The rules for appearances in other tribunals vary considerably.
- **Confidentiality:** The PCH contains an entire section (chapter 5) on confidentiality. The rules expand on the general confidentiality requirement set out in the LSSA.
- **Conflicts of interest:** Clients must be given undivided loyalty (chapter 6). There are two main situations in which this rule applies:
    - It applies most obviously where parties are directly opposed to each other in a matter. An advocate or different advocates within the same organization cannot act for opposing parties. In practice, it is important for advocates and their organizations to develop and to follow internal procedures that detect conflicts early on, and to follow procedures to refer one or more of the clients in conflict situations to outside representation.
    - The rule may also apply where an advocate is asked to act for more than one party, even where it appears initially that the parties have all interests in common. For example, an advocate may be approached by a husband and wife being sued by a creditor. In general, it may be safe to act for both. However, be alert to the

possibility of conflicts if there appear to be matrimonial problems between a husband and wife, or if one of the parties appears to be unreasonably influenced by the other. If conflicts do arise after an advocate agrees to act for two or more people, it generally means that the advocate must stop acting for any of the parties.

- **Contacting other parties or witnesses:** Chapters 4 and 8 of the PCH prohibit lawyers from being in direct contact with opposing parties or with witnesses represented by another lawyer, unless there is explicit permission to do so.

  The PCH requires lawyers who contact any unrepresented person to make it clear to both the client and the unrepresented person that the lawyer is not acting in any way in the interests of the unrepresented person.

  In general, lawyers can contact unrepresented witnesses. However, it is important to be clear about who you are representing.

- **Threatening:** There is a range of prohibitions against communicating in a threatening way. The PCH has a number of general rules that call on lawyers to conduct themselves in a professional manner. Behaviour such as swearing at an opposing party or at that party's lawyer is considered unprofessional. Threatening to report a lawyer to the Law Society, for some advantage, is also unprofessional.

  Threatening to report the criminal conduct of an opposing party for purposes of achieving some gain is improper. A classic example of this is threatening to report someone to the police if that person does not make good on an NSF cheque.

The dishonest client

A dishonest client presents advocates with another ethical dilemma. You are entitled to begin by presuming that what a client tells you is truthful, though you may need to reconfirm those facts as other facts emerge.

If a client tells a lawyer that he or she intends to lie at a proceeding (such as a court or tribunal hearing), the lawyer must advise the client that he or she will withdraw from acting for the client if the client insists on not telling the truth (PCH, chapter 8). If the lawyer does withdraw, he or she is not allowed to explain why to the court or tribunal. The reasons lawyers withdraw, and the process for withdrawing from acting for a client, are set out in the PCH, chapter 10.

In recent years, the Law Society has repeatedly warned lawyers against acting for clients when it appears that the client's motives are fraudulent, such as wanting to have assets transferred to another party (it may be a fraudulent conveyance) or giving one creditor (such as a relative) a proportionally larger payment on a debt compared with other creditors (it may be a fraudulent preference).

Getting help with ethical issues

Aside from knowing and applying the basic rules of ethical conduct, a very important aspect of professionalism is knowing where and when to ask for help with an ethical issue. The Law Society has recognized this problem and provides a considerable number of resources, including written materials and and staff, to answer ethical questions from lawyers.

It is particularly important for advocates, when faced with an ethical issue, to contact a lawyer for advice if there is any doubt about how the matter should be handled.

Part II:

Consumer and credit/debt problems and laws

1 Aboriginal law and consumer/credit law

The Aboriginal section of the Legal Services Society's website has useful information and resources for Aboriginal people, including information on wills and estates, and the special harvesting rights that Aboriginal people have under the *Indian Act*. The content of the website continues to expand, and will include information on benefits and services for Aboriginal people later in 2013.

See also *Aboriginal People and the Law in BC*. This manual is for legal advocates and other professionals who work with Aboriginal people and contains information on bankruptcy and creditor/debtor law from an Aboriginal perspective.

2 Bailiffs, court bailiffs, and sheriffs

Client problems

- A creditor with a lien over a client's car has threatened to repossess the car because the client missed a payment.
- A bailiff came with a warrant to repossess a client's rented furniture because the client missed a payment.
- A sheriff came with a writ (a written court order) to take a client's household goods because he or she has not paid on a court judgment that a creditor took against the client some months ago.
- Client asks what rights he or she has to refuse to let a "repo man" into the client's residence or onto the client's property.

Summary of the law

The rights of creditors and debtors in cases of repossession are the rough edge of debtor-creditor law. There is the potential for great upset to clients, and for one side or the other to use force. Those helping the debtor must act very quickly to resolve the problem. The civil law relationship between a creditor and debtor may be governed by criminal laws in these situations. Criminal law is distinct from civil law. Criminal law sets out the nature of offences, and is used for charging and trying people accused of a crime, and sentencing those found guilty. In civil law, the emphasis is not on punishing a person who has done wrong, but on fixing problems that his or her actions have caused so that the other party is compensated in some way, or at least does not suffer a loss. Some examples of civil law are debt law, personal injury, malpractice, and claims for breach of contract.

Repossessions occur in two main instances:

1. When there is default under a security agreement (see chapter 36) or lease agreement (see chapter 32) between a debtor and creditor.
2. When an unsecured judgment creditor wants the asset of the debtor seized and sold to satisfy the judgment.

It is important to distinguish between these two situations, because the rights and remedies of all the players (including the debtor, creditor, and party doing the repossessing) are different for each one.

There is a fundamental difference in the authority and the laws under which each action is taken:

- A bailiff carrying out a repossession under a security agreement or a lease agreement is repossessing on the basis of contractual rights governed by the *Personal Property Security Act* (PPSA) (see chapter 36) or related legislation such as the *Repairers Lien Act* (RLA) (see chapter 39).
- A court bailiff carrying out a seizure for a judgment creditor does so under a court order governed by the *Court Order Enforcement Act* (COEA) and the *Supreme Court Civil Rules* (or the *Small Claims Act* (SCA) and Rules).

As explained below, a debtor can deal with a repossession problem in various ways.

The players

Under British Columbia law, the roles of bailiff, court bailiff, and sheriff are different. In some instances, the legal principles governing the actions of these parties are the same; in other instances, the parties have different rights. Their roles also have historic meaning, particularly that of the sheriff.

Basically, bailiffs, court bailiffs, and sheriffs carry out the directions of creditors (see chapter 18), or the court orders creditors have obtained. Usually this means the bailiff, court bailiff, or sheriff can take chattels (a legal term that means personal, moveable possessions; see chapter 21) from a debtor. In some instances, where a creditor has a security interest in the chattels of a debtor, an employee of the creditor could carry out the repossession directly. However, creditors usually prefer to hire bailiffs to do this for them.

Bailiffs

Under the *Business Practices and Consumer Protection Act* (BPCPA), part 7, bailiffs are persons who act on behalf of another party (e.g., a creditor) to carry out tasks such as repossessing chattels. Bailiffs must be licensed under the BPCPA and must go through the same licensing processes as collection agents (see chapter 6) do. Bailiffs can be refused licences or have their licences suspended by Consumer Protection BC, also known as the Business Practices and Consumer Protection Authority.

In general, bailiffs carry out contractual repossessions — that is, repossessions on behalf of creditors who have a security interest over the goods of the debtor when the debtor defaults on payment on the security agreement.

The BPCPA regulates bailiffs' conduct:

- Section 114 prohibits bailiffs from exerting "undue, excessive or unreasonable pressure on a debtor" in repossessing chattels.
- Section 122 prohibits bailiffs from removing chattels from the home of a debtor in the debtor's absence or when another adult is not in the home unless the bailiff has a specific court order saying he or she can do so.

Bailiffs are prohibited from repossessing chattels that are not, for example, part of the security agreement under which the creditor is claiming the right of repossession. Sometimes it is a difficult legal issue to determine whether a security agreement covers a particular chattel. Some security agreements may cover a single item, such as a car. Other security agreements say that it covers not only all property that the debtor owns at the time the agreement is made, but also all property that the debtor acquires after the agreement is made.

Bailiffs are in the business of repossessing. The law does not give bailiffs any special rights, and they must operate their business within the requirements of the BPCPA.

Court bailiffs

The term "court bailiff" is relatively new to British Columbia. The designation arose from a government decision some years ago to privatize judgment enforcement processes. Prior to privatization, judgment enforcement processes (including seizing chattels on behalf of judgment creditors under writs of seizure and sale) were carried out by sheriffs. Now, most judgment enforcement processes are carried out by court bailiffs. The government contracts with some bailiff businesses to provide court bailiff services in each region of the province.

Bailiffs receive court bailiff designation from the Attorney General under the authority of the *Sheriff Act* (SA):

- Under s. 3(2), a court bailiff "is deemed to be a sheriff" for a number of purposes, including almost all aspects of judgment enforcement.
- Court bailiffs cannot carry out orders for the arrest of debtors; this must still be done by sheriffs.
- Court bailiffs are not governed by the provisions of the BPCPA (see Debt Collection Industry Regulation, s. 2(1)).

Sheriffs

The role of the sheriff goes back many centuries in English law. Sheriffs play two important roles in British Columbia today:

- They are employees of the provincial government, appointed under the SA, s. 2.
- They are officers of the court according to the SA, s. 6.

While their significance in debtor-creditor matters has been reduced because the judgment enforcement process has been privatized, there are some instances when sheriffs may become involved. For example, sheriffs carry out arrest orders under civil proceedings (where the plaintiff — in this case, the creditor — seeks a remedy against the defendant — in this case, the debtor — and the defendant is unlikely to face imprisonment). They are not governed by the provisions of the BPCPA except when issuing a warrant under the RLA (see Debt Collection Industry Regulation, s. 2(1)).

Debtors' rights in repossessions

From the debtor's perspective, the rights of the parties in repossessions revolve around two basic issues:

1. What right does either side have to use force?
2. What legal alternatives are available to the debtor to avoid repossession?

Validity of authority to repossess

Determining the validity of the authority under which the repossession is being attempted (i.e., the right to make the repossession) is important when considering the use of force. In most instances, the right to repossess is clear, particularly in judgment enforcement situations.

In contractual repossessions (including under PPSA security agreements, leases, and repairers' liens [see chapter 39]), the validity usually arises from a breach of the contract by the debtor, such as failing to make a payment. Failing to make a payment usually means creditors can:

- invoke an acceleration clause (which means the debtor no longer has the right to pay in instalments) in the credit agreement and declare the whole balance of the credit agreement due; and
- take steps to repossess their security.

In most instances, the breach will be clear. However, note that the client might claim that he or she and the creditor made a *subsequent agreement* that the creditor would not repossess. In this case, the creditor may have temporarily given up the right of repossession, so long as the debtor abides by the new agreement (e.g., to make up missed payments by a certain date).

Extent of force allowed

Assuming the authority is valid, the next issue is how much force can be used. A few basic principles are important to consider here:

- A bailiff or court bailiff cannot forcibly enter the debtor's residence if it is clear that the debtor is refusing entry.
- If entry is allowed, a bailiff or court bailiff is generally allowed to take authorized chattels.
- A bailiff or court bailiff can generally take the chattels of a debtor if the goods are outside a dwelling house (e.g., a car in a driveway).
- A bailiff or court bailiff cannot usually use force to take something in the direct possession of the debtor (that the debtor is physically holding) that the debtor is refusing to release.
- If either party wrongly uses force, they may be liable for criminal charges. In *R. v. Doucette*, for example, three bailiffs were convicted of assault when a struggle developed as they were trying to repossess a television from the debtor's apartment.

  (See also chapter 38 and chapter 42.)

Information gathering

Gather and confirm all information on the financial circumstances of the client, including income and expenses, assets and debts, and future prospects for changes in income.

Obtain copies of all the relevant documents, including documents that relate to the creditor as well as the bailiff or court bailiff carrying out the repossession. In the case of repossessions by bailiffs, obtain the security or lease agreement. In the case of repossessions by a court bailiff, obtain copies of all court documents, including the judgment upon which the writ for seizure was based.

If the client does not have the legal documents, you can obtain copies from the court registry. There may be some urgency to the matter. Ensure that the client has not missed a deadline such as:

- making up arrears payments negotiated between the client and the creditor, or
- filing a claim for exemption where a court bailiff has already made a seizure.

Solving the problem

Clients facing repossession come to advocates at different stages of the repossession process. This will often affect what advice is appropriate and which approach to use to solve the problem.

Contractual repossessions

Clients may come before repossession, telling you that they think the creditor will repossess, or that the creditor has threatened to repossess. Assure clients of their basic right not to have their residence entered forcibly. At the same time, stress the importance of taking the initiative to resolve the problem and avoid a repossession confrontation.

If a client has the financial resources to make up the arrears payment(s), the first approach is usually to offer the creditor the arrears. If the client's ability to pay is limited because of illness, job loss, or another valid cause, a variation on this approach might be to ask the creditor to take a lower monthly payment for a fixed period of time.

For security agreements covered by the PPSA, the debtor has a number of special statutory rights when the goods are "consumer goods" as defined under that law. These include:

- the right to reinstate a contract (i.e., go back to making regular monthly payments instead of paying the whole balance) if the client pays the arrears (s. 62), and
- the right not to have the goods repossessed when two-thirds of the purchase price has been paid.

In some instances, it may be to the advantage of the client to allow repossession, or even to offer to return the secured goods to the secured creditor (this is called "surrender" of the goods). Under the consumer goods provisions of the PPSA, the debtor's financial obligations to the creditor may be cancelled upon repossession.

If the value of the goods to be repossessed is relatively low compared to the total amount owed to the creditor, the debtor may be able to have the entire debt discharged in exchange for giving up the goods.

If a security agreement states that all current and after-acquired property of the debtor is covered by the agreement, there may be an argument (in fairly extreme situations) that the agreement is an unfair trade practice (see chapter 44), or unconscionable (not right or reasonable).

Judgment enforcement repossessions

See chapter 21, Enforcing judgments against chattels.

Complaints against bailiffs and court bailiffs

Aside from seeking a negotiated or court-imposed resolution to a repossession problem, you may wish to help clients complain to Consumer Protection BC. If a bailiff's conduct seriously breaches a BPCPA provision, Consumer Protection BC may take action against the bailiff's licence. The BPCPA also provides for prosecuting breaches of the PPSA.

You may also wish to consider helping clients complain about the conduct of court bailiffs to the Ministry of Justice.

Litigation against bailiffs and court bailiffs

In general, if a bailiff or a court bailiff has wrongfully taken property from a debtor, the debtor has a cause of action to have the property returned and a cause of action for general damages. Determining if the property was wrongfully taken usually requires a lawyer's opinion.

Raising the possibility of legal action, or actually starting an action, can give the debtor a particularly effective bargaining advantage. For example, the debtor's claim may be set off against some or all of the creditor's claim.

Related topics and materials

See Collection agents; Creditors (types of); Enforcing judgments against chattels; Harassment; Leases; *Personal Property Security Act*: Security agreements; Recovery of goods; Repairers' liens; Torts: Assault and trespass; Unfair or deceptive practices: Trade practices legislation.

See also the Canadian Bar Association's Collection of Debts and Harassment by Debt Collectors information pages.

3 *Bankruptcy Act:* Assignments in bankruptcy

Client problems

- Client feels so far in debt that he or she has to “go bankrupt” but does not know anything about the process.
- Client has several creditors trying to collect and feels that the debts owed are unmanageable.
- Client thinks he or she needs to go bankrupt but has a number of questions for you, such as:
  - How long will it take?
  - Do I have to go to court?
  - What will I be left with?
  - How much does it cost?
  - Will I ever get credit afterwards?
  - Will I have to pay any debts even after bankruptcy?
  - Will I lose my house?
  - What will happen to my job?
  - Are there any alternatives?
- Client has heard about a law that allows the client to get rid of debts by paying off a part of each debt to each creditor.

Summary of the law

Bankruptcy (i.e., giving up what you own to get rid of your debts) in Canada is governed by the federal *Bankruptcy and Insolvency Act* (BIA). There are actually three debtor remedies under the BIA:

1. Assignment in bankruptcy
2. Proposals
3. Orderly payment of debts (this remedy is not available in BC at this time) (see chapter 4).

This section discusses assignments in bankruptcy (usually this involves a client working with a trustee in bankruptcy and volunteering to declare bankruptcy). See chapter 5 for information on proposals, and chapter 19 for orderly payment of debts (consolidation).

While remedies (legal ways of enforcing a right or approaching a problem) under the BIA are very important for debtors, advocate involvement is limited because assignments, proposals, and consolidations must all be handled by people authorized under the BIA. There is no "do-it-yourself bankruptcy" in Canada, and lawyers and advocates cannot perform the functions prescribed under the BIA. However, your role in these remedies is still important, and you must understand them so you can advise clients of all possible options for resolving a financial problem.

An assignment in bankruptcy is a serious step; once the assignment is made, there is usually no way to reverse the process. Advocates may continue to provide assistance and support for debtors who are going through assignments or proposals.

Going into bankruptcy

Debtors can go into bankruptcy in two ways:

- They may make a voluntary assignment in bankruptcy. This process is started by the debtor.
- They are forced into bankruptcy. A creditor can sometimes force a debtor into bankruptcy by filing a court action called a petition, and asking the court to declare the debtor bankrupt.

The majority of consumer bankruptcies are started by voluntary assignments in bankruptcy. Creditors will only try to force debtors into bankruptcy when there are considerable assets available to be sold to pay creditors, and when creditors think they are not going to get any more money from the debtor through any other means. Petitions in bankruptcy are used much more frequently against businesses than individual debtors.

Debtors legally qualify to make assignments in bankruptcy if they:

- owe more than $1,000 to their creditors,
- are generally unable to pay their credit obligations as the obligations become due, and
- are unable to file a viable proposal.

It is possible to go bankrupt by owing money to only one creditor, but most people who go bankrupt have several creditors (see chapter 18).

What has to be given up in a bankruptcy

Basically, the bankruptcy process involves debtors giving up most of their assets in exchange for having their debts eliminated by law. However, some assets are exempt and so can be kept by the debtor.

RRSPs, RRIFs, and DPSPs (deferred profit sharing plans), with the exception of contributions made in the last 12 months before the debtor went into bankruptcy, are designated exempt property under the *Income Tax Act* (ITA).

Also, debtors in British Columbia who go bankrupt may keep assets that are exempt from seizure under the *Court Order Enforcement Act* (COEA). The Court Order Enforcement Regulation allows an exemption value of $4,000 for household furnishings and appliances, $5,000 for one motor vehicle if the debtor is not a debtor under family maintenance provisions, $2,000 for one motor vehicle if the debtor is a maintenance debtor, and $10,000 for tools and other personal property used by the debtor to earn income from his or her occupation (see Appendix 3).

All essential clothing and medical and dental aids are exempt. A bankrupt may also keep equity in his or her principal residence of $12,000 if the residence is located within the Capital Regional District (Victoria area) or Metro Vancouver, and $9,000 if the residence is located elsewhere in BC. If two spouses own a principal residence together and both declare bankruptcy, they may each be able to claim a $9,000 or $12,000 (depending on the location) exemption on the equity in that principal residence (see *Re Halverson*).

In cases where creditors have security claims over a debtor's assets, bankruptcy can be a particular hardship because the creditor is usually entitled to repossess the asset as soon as a bankruptcy is started. It does not matter if the asset is normally exempt from being sold off for the creditors. If an asset is subject to a security agreement (i.e., extra assurance for the creditor in case the borrower cannot repay a loan; see chapter 36), even down to basic household furnishings, the secured creditor is legally allowed to take it and sell it. Debtors may be forced to make arrangements to repay at least the actual value of the assets, during or after the bankruptcy, to avoid having the assets repossessed.

What may still be owed after bankruptcy

To many debtors, the prospect of losing assets does not mean much because they have nothing, or nothing that can be taken in the bankruptcy process. However, debtors must understand that not all debts are eliminated through bankruptcy. Under s. 178 of the BIA, a discharge from bankruptcy will not release the bankrupt from certain debts, including:

- fines, penalties, or restitution orders imposed by a court;
- awards of damages by a court for intentionally inflicted bodily harm or sexual assault;
- spousal or child support arrears;
- debt or liabilities arising from certain types of fraudulent conduct on the part of the debtor; and
- student loans if the debtor files for bankruptcy before ceasing to be a student or within seven years of ceasing to be a student. (However, a former student can make a special application to be discharged from his or her student loan after five years on the grounds of hardship. For more information on student loans see chapter 18.)

In some instances, a debtor will have to pay back some money to the estate creditors as a condition of his or her discharge. Note that courts are more likely to order partial repayment when the bankrupt has an income tax debt.

Starting the process

The process begins when a debtor files an application for bankruptcy (called "the assignment") through a trustee. The application outlines all assets and debts, income and expenses, and other information about the debtor.

The trustee handles the affairs of the debtor and completes his or her bankruptcy process. A government employee called an official receiver supervises the process and makes sure the law is followed.

In most instances, a debtor goes to a trustee before making an assignment. The debtor may be referred to the trustee by a credit counselling service, a lawyer, or the official receiver. The trustee helps the debtor prepare the assignment papers. The trustee is usually then confirmed by the official receiver to handle the bankruptcy for that debtor.

The most important effect of an assignment is that all legal actions by creditors against the bankrupt are stopped. Unless creditors get court permission, they cannot sue a bankrupt or take judgment enforcement proceedings (see chapter 21 and chapter 22). Most insolvent individuals and families file for bankruptcy under the Summary Administration provisions because the value of their eligible assets is less than $15,000.

Bankruptcy trustees

Bankruptcy trustees are licensed by the federal government to handle a debtor's bankruptcy process; only trustees who have a licence can do this job. Under the BIA, a trustee's primary obligation is to the creditors of the debtor, not to the debtor. Trustees are usually accountants because lawyers are not given licences to administer bankruptcies. This reflects a long-standing legal view that the trusteeship obligation to creditors conflicts with a lawyer's fundamental duty to his or her client, the bankrupt.

However, lawyers do have a significant role in the bankruptcy process. If any matter in the administration of the bankruptcy is disputed, the matter will likely have to go to court. When bankruptcy matters go to court, all the parties are entitled to be separately represented: trustees, each creditor, and the bankrupt.

The cost of bankruptcy

Sometimes the cost of the bankruptcy can be a problem for a debtor. The starting fee allowed under the BIA for handling a Summary Administration bankruptcy is around $1,500 plus tax (HST until March 31, 2013; GST from April 1, 2013) and counselling fees (BIA, rule 128). A trustee's fee for administering the bankruptcy must be paid by the debtor.

Technically, a debtor does not pay a fee straight to the trustee for a bankruptcy. The BIA says that a trustee is to be paid out of whatever funds are obtained during the administration of a bankruptcy. The total fund that the trustee holds is called a debtor's estate. This estate can be made up of money obtained from selling off the debtor's assets, as well as from some of his or her income, which may have to be paid every month to the trustee.

When there is little prospect for any assets to be sold off, and if the debtor has a very low income, there may not be an estate from which to take a fee. For this reason, a trustee may demand that a debtor get some money first to put into the estate to start the bankruptcy process. When the bankruptcy is finished, the trustee can then take that money. Usually, a trustee will want the debtor to pay most or all of the fee before starting the bankruptcy, because once a trustee agrees to take on a bankruptcy, it is essentially impossible for him or her to refuse to complete its administration.

Some financing arrangements are possible. A trustee may do a bankruptcy with a down payment and a commitment for monthly payments to be paid into the estate. Trustees may demand that someone else guarantee those payments by putting up the money until the trustee gets all the bankrupt's payments. Another option is to have the bankrupt sign over a post-bankruptcy tax refund or child tax credit to the trustee. However, such assignments have been found to be of "no force and effect" against the bankrupt (see *Marzetti v. Marzetti*).

If the debtor may have trouble either paying the fee up front or making a payment plan, it may be wise for him or her to approach the federal government bankruptcy office first to inquire about the Bankruptcy Assistance Program. Under this program, the office may be able to connect the debtor with a trustee who is willing to take the case on easier terms than those usually required.

The client must understand that trustees are not obligated by law to administer anyone's bankruptcy. And even when they take on a debtor at the request of the government, it does not mean that the debtor will not have to pay anything for the process. A trustee usually requires the debtor to pay court filing fees. The trustee applies the normal bankruptcy rules to sell off any assets that are not exempt from the bankruptcy process, and may also demand that the bankrupt, if working, pay some wages into the estate.

Bankruptcy counselling

The BIA specifically requires debtors to obtain financial counselling during the bankruptcy process. The debtor is obliged to attend two counselling sessions following the assignment.

Summary administration of the estate

Following the assignment in bankruptcy of the debtor and the appointment of the trustee, the trustee begins administering the bankruptcy. From the time of the assignment, the non-exempt assets of the bankrupt technically belong to the trustee, on behalf of the creditors. The trustee owns those assets for the benefit of the creditors. All those assets comprise the estate. The main work of the trustee is to determine what assets are in the estate, identify all creditors and how much they are owed, and divide up the available estate among the creditors.

The trustee begins by locating the creditors. If they want to share in the estate, they must file a claim and have that claim accepted by the trustee. The trustee also works with the bankrupt to determine the assets in the estate. Sometimes assets must be sold and the sale proceeds are then paid into the estate.

Creditors who hold at least 25 percent of the dollar value of the total claims filed may request a meeting of creditors. They must do so within 30 days of the assignment.

The BIA treats secured creditors differently from other creditors. A bankrupt cannot claim exemption of assets covered by a *Personal Property Security Act* (PPSA) security agreement (see chapter 36). The result can be harsh for the bankrupt since it is possible in some cases for secured creditors to take almost everything a bankrupt possesses. For example, if a properly registered security agreement specifically covers a bankrupt's present household furnishings, they could be taken. Creditors can take and sell the assets covered by the security agreement and may also be able to make a claim to the trustee for the balance. In practice, the creditor and the bankrupt may agree to avoid the seizure by having the bankrupt enter into a new credit contract to pay the creditor for the actual value of the assets covered by the security agreement.

If a bankrupt owns a house, it may have to be sold, even if the bankrupt owns the house with a non-bankrupt person (including a spouse). The bankrupt is only entitled to a half-share of the net sale value of a jointly owned house. If half of the equity exceeds the exemption limit for a principal residence prescribed by the COEA, it must go into the estate for the creditors.

An employed bankrupt who earns more than the amount set by the superintendent of bankruptcy will have to make monthly payments to the trustee for the benefit of the creditors from any income above what is reasonable to support the number of people in the bankrupt's family and the bankrupt's personal situation (called "surplus income").

When the trustee has completed the estate administration, the creditors are paid a share of the estate proportionate to the amount they are owed. The final steps for the trustee are to obtain a discharge from his or her duties and a discharge from bankruptcy for the bankrupt.

Discharge from bankruptcy

In most cases, a bankrupt will receive an automatic absolute discharge from bankruptcy after a specific period of time. As the discharge date approaches, the trustee must notify the government and the person's creditors of the bankrupt's right to an absolute discharge from bankruptcy. The creditors, the superintendent, and the trustee all have a right to object to this absolute discharge. If no objections are received, then the bankrupt is discharged at the end of the applicable time period.

The applicable period of time depends on whether or not the person has been bankrupt before and whether or not he or she has had surplus income during the bankruptcy. In the case of a first-time bankrupt, the period is 9 months if there has been no surplus income, and 21 months if there has. In the case of a second-time bankrupt, the period is 24 months if there has been no surplus income, and 36 months if there has.

Automatic discharges do not always apply. Situations in which they do not apply include:

- The bankrupt has been bankrupt more than once before.
- The bankrupt refused or neglected to take financial counselling.
- One or more of the creditors objects to the automatic discharge.
- The trustee or the superintendent objects to the discharge.

- The bankrupt has over $200,000 in income tax debt that comprises 75 percent or more of his or her debt.

If there is an objection to the discharge, the matter goes to mediation or before a court official for hearing. If the bankrupt has been bankrupt before, the discharge must be heard by the court. When discharge hearings are required, bankrupt persons must make the applications themselves. All creditors who filed claims are given notice of the hearing.

The various grounds on which creditors and trustees can object to a discharge are set out in the BIA. The grounds are broad enough that it is possible to object to any bankrupt's discharge. The real reason that creditors object is that they hope the court will make an order that the bankrupt has to pay back a percentage of the money owed to all the creditors. This is called a conditional order. The condition could be that 25 percent to 50 percent must be paid to every creditor, through the trustee, before the bankrupt is finally discharged. If the judge decides to ignore the objections of the creditors, then the bankrupt is granted an absolute (unconditional) discharge and the bankruptcy process is over.

In recent years, an increasing number of discharge cases have come up for discharge hearings. In part, this is simply because the number of bankruptcies has increased over the years. However, it is also because creditors appear to be objecting to discharges in more cases. Also, the superintendent has been objecting in situations where the bankrupt appears to have been abusing the bankruptcy process. Persons who have gone through bankruptcy before may attract special attention.

It is difficult to say with any certainty if a court will give an absolute discharge or impose conditions. Many factors are considered. One main factor is the behaviour of the debtor both before the assignment and during the course of the bankruptcy. For example, if the bankrupt has not cooperated with the trustee (e.g., has refused to pay a certain amount of wages every month), a judge may decide to give a discharge on condition that a portion of the wages be paid to the trustee for the following year or two.

Another important factor is the kind of debts the bankrupt had. While there are very technical rules governing which creditors a person is ordered to pay as a condition for bankruptcy discharge, the courts feel some kinds of debts are more important to repay, at least in part, as a condition of discharge from bankruptcy. These include debts to the government for past income taxes, and debts arising from court judgments in motor vehicle injury cases.

The debtor's income situation is probably the most important factor in a court's decision to impose repayment conditions for discharge. If there is little discretionary income after the debtor meets modest monthly expenses, there is little point in making an order for a large repayment.

However, for people making a reasonable salary, the court is likely to make a conditional discharge order, even if the bankrupt's behaviour before and during the bankruptcy was not criticized. The court may also impose conditions if the debtor emerges from bankruptcy with a large amount of exempt assets, such as RRSPs.

In a very few cases, courts may make one of two other kinds of orders when a bankrupt is asking for a discharge. The court may suspend the discharge for a few months to a year to show the debtor that his or her behaviour in the bankruptcy was not proper in the view of the court. In extreme cases, a court may refuse outright to give a discharge. Note that this does not mean that a bankrupt will stay in bankruptcy forever, but that he or she must make another court application after a reasonable waiting period.

The effect of a bankruptcy discharge

After discharge, a bankrupt is legally released from paying debts incurred prior to the assignment in bankruptcy, except those debts described in the BIA, s. 178 (as discussed above). In addition, debts owed to creditors who were not notified of the bankruptcy may not be completely released. A debtor may choose to pay debts from which he or she has been released, but has no obligation to do so.

Information gathering

The advocate's role with most debtors is to provide guidance for the most appropriate remedy to resolve the debt problem. This requires the advocate to obtain full details of the debtor's income and expenses, and assets and liabilities. The financial situation of a spouse may also be relevant. It is important to review the debtor's financial circumstances over both the short term and long term. An assignment in bankruptcy is not appropriate if the debtor is only temporarily unable to repay debts.

Solving the problem

Bankruptcy is a final solution after all other alternatives have been considered or tried. It is not a short-term solution for someone who is temporarily unemployed, for example. If there is any prospect of future income that will allow a debtor to repay debts over a reasonable period of time, then bankruptcy should be avoided.

To assess whether bankruptcy is appropriate, compare the level of debt to the level of income. It is not possible to set an arbitrary level and say, for example, that everyone who owes $5,000 should not go bankrupt, or that everyone who owes $50,000 should go bankrupt. For a welfare recipient, $5,000 in debts may well be enough to justify bankruptcy. For a doctor, $50,000 in debts may not justify bankruptcy.

One question that often bothers debtors is whether they will be able to get credit after going through bankruptcy. It is difficult to give a general answer since each case is different but getting credit after bankruptcy may be a problem for a time. A person who is facing bankruptcy is probably not a good prospect for any, or increased, credit.

According to all the creditors' warnings, no bankrupt will ever get credit again. This is an exaggeration. There is no law that says that people who have gone through bankruptcy should not have credit. It is up to each borrower and creditor to decide after the bankruptcy.

It is probably true, however, that if creditors are aware of a person's recent bankruptcy, consumer or mortgage credit may be refused, particularly if the creditor is a bank. It may be somewhat easier to obtain credit from a creditor who is also a seller financing a sale and getting a security agreement for the item sold. Thus, for example, it may not be too difficult to buy an inexpensive car on credit (assuming a debtor decides he or she absolutely needs to buy on credit after a bankruptcy experience).

If some time has passed since a bankruptcy, the likelihood of getting credit is greater, particularly when a pattern of stability of income and residence has been established. For example, a person who has had a steady job for a couple of years and who has lived at the same address for that time may meet credit-granting terms, even those of a bank.

The advocate's role in advising on bankruptcy will usually be to give general advice on the appropriateness of the remedy and to generally explain the process to the debtor. If bankruptcy appears to be appropriate, refer the debtor to a trustee in bankruptcy or the federal bankruptcy office.

Related topics and materials

See *Bankruptcy Act:* Orderly payment of debts; *Bankruptcy Act:* Proposals; Creditors (types of); Debtors remedies: Financial remedies; Enforcing judgments against chattels; Enforcing judgments against land; Foreclosure and mortgages; Garnishment and set-off; Payday loans.

See also Discharge from Bankruptcy, Justice Education Society of BC; Personal Bankruptcy Guide, Bankruptcy Canada; You Owe Money, Office of the Superintendent of Bankruptcy Canada; and When You Can't Pay Your Debts, The Canadian Bar Association BC Branch.

4 *Bankruptcy Act*: Orderly payment of debts

Part X of the federal *Bankruptcy and Insolvency Act* (BIA) contains the Orderly Payment of Debts (OPD) provision under which a debtor can consolidate most debts and have those debts paid off through one monthly payment to the court. Before 2002, part X of the BIA was administered by the Debtors Assistance Branch of the BC Ministry of Attorney General. Since the government closed the Debtors Assistance Branch in April 2002, however, BC has not provided consolidation services under part X for debtors, despite the fact that part X remains in force in the province.

Related topics and materials

See *Bankruptcy Act*: Assignments in bankruptcy; *Bankruptcy Act*: Proposals; Debtors remedies: Financial remedies; Foreclosure and mortgages; Garnishment and set-off.

See also Discharge from Bankruptcy, Justice Education Society of BC; Personal Bankruptcy Guide, Bankruptcy Canada; You Owe Money, Office of the Superintendent of Bankruptcy Canada; and When You Can't Pay Your Debts, The Canadian Bar Association BC Branch.

5 | *Bankruptcy Act:* Proposals

Client problem

- Client wants advice on repaying debts and has the financial ability to pay something toward all of them, but needs a lower overall monthly payment and additional time to pay.

Summary of the law

Part III, divisions I and II, of the federal *Bankruptcy and Insolvency Act* (BIA) contains the provisions under which a debtor can make a proposal to all or a class of creditors (e.g., only unsecured creditors) (see chapter 18) to pay off a percentage of the debts, after which the debtor will be discharged at law from owing the balance of the debts to those creditors.

The proposal provisions are not the same as an assignment in bankruptcy (see chapter 3). They are designed to provide an alternative to bankruptcy (i.e., giving up what you own to eliminate your debts) for debtors who have some ability to pay on their debts, but who cannot be reasonably expected to pay off all their debts over a reasonable time because of the overall amount due relative to the monthly income available to make payments.

The process

The BIA provides for two types of proposals: consumer proposals and ordinary proposals.

Consumer proposals

Consumer proposals:

- can be made by individuals who have total debts of $250,000 or less (excluding money owed on a mortgage for the debtor's house), and
- generally take a maximum of five years to complete.

As with assignments in bankruptcy, the debtor must undergo counselling as part of the proposal process. Proposals are administered by proposal administrators (trustees licensed under the BIA).

A proposal administrator first makes a full inventory of the debtor's income and expenses, assets and liabilities, and creditors, and sets that information out in a proposal with the debtor's offer of partial payment. The proposal is filed with the local official receiver's office, which supervises proposals (and assignments in bankruptcy) for the federal government. Then that form, along with additional information, is immediately sent to all the creditors of the debtor.

Basically, the proposal to the creditors is that the debtor will pay them a percentage of the amount of money owed to them. For example, if the debtor owes all creditors $25,000, and the debtor and administrator feel that the debtor can pay $12,500 over five years to those creditors, each creditor would receive 50 percent of the amount owed to them during the five years that the payments are made.

Creditors have up to 45 days to accept or reject a proposal. Creditors who do not respond are deemed to have accepted the proposal. If no creditor objects to the proposal within 45 days, the proposal is considered to have been approved by the creditors.

If any creditor objects, or more than 25 percent are against the proposal, the trustee must hold a meeting of creditors at which they vote on the proposal. For a proposal to succeed, a majority of the creditors (based on the amount owed) must approve. (The votes are based on the amount of money owed, so each creditor has as many votes as he or she is owed in dollars.)

If the proposal is accepted (either because there is no objection or because it is approved at a meeting of the creditors), the debtor begins making payments to the administrator, and the administrator then forwards payments to the creditors.

Debtors who have had their proposals accepted are protected from legal action or judgment enforcement action by all creditors covered by the proposal. Under the BIA, creditors covered by the proposal cannot start or continue legal actions against the debtor as long as the proposal is in force.

Within two months of a proposal being approved, the debtor will meet with the administrator for the first of two counselling sessions. The second counselling session is held within seven months.

The cost of a consumer proposal is approximately $1,600, plus tax (HST until March 31, 2013; GST from April 1, 2013) and counselling fees. In addition, the debtor must pay a fee to the administrator equal to 20 percent of the counselling fees moneys distributed to creditors, and a levy to the superintendent equal to 5 percent of all the funds disbursed.

Ordinary proposals

Ordinary proposals are available to insolvent individuals, families, and businesses whose debts exceed $250,000. The process for obtaining approval of an ordinary proposal is similar to the process for obtaining approval of a consumer proposal, with some significant differences as follows:

- There is always a meeting of the creditors.
- A rejection of an ordinary proposal by creditors results in immediate bankruptcy as of the date of the creditors' meeting.
- The proposal must be approved by a majority of the creditors, who represent at least two-thirds of the total dollar amount owed. If the proposal is accepted by the creditors, it must then be approved by the court.
- The fees for each case are decided individually and voted on by the creditors.
- There are no mandatory counselling sessions.

Information gathering

The advocate's role with most debtors is to provide guidance for the most appropriate remedy to resolve the debt problem. This requires that the advocate obtain full details of the debtor's income and expenses, and assets and liabilities. The financial situation of a spouse may also be relevant. It is important to review the debtor's financial circumstances over both the short term and long term to assess whether bankruptcy really is the best option for the client.

Related topics and materials

See *Bankruptcy Act*: Assignments in bankruptcy; *Bankruptcy Act*: Orderly payment of debts; Creditors (types of); Debtors remedies: Financial remedies.

See also Discharge from Bankruptcy, Justice Education Society of BC; Personal Bankruptcy Guide, Bankruptcy Canada; You Owe Money, Office of the Superintendent of Bankruptcy Canada; and When You Can't Pay Your Debts, the Canadian Bar Association BC Branch.

6 Collection agents

Client problems

- A collection agent is trying to collect on a bill that the client says is not owed.
- A collection agent is harassing the client by making repeated telephone calls to him or her at home and work.
- A collection agent is threatening legal action against the client.

Summary of the law

Collection agents are individuals or businesses that collect debts for other parties. They have no special legal powers to collect from a debtor; they are like any other creditor (see chapter 18). Collection agents have a reputation for being the most aggressive people in the credit industry. This reputation comes from their tactics.

In general, creditors use collection agents:

- when the amount due does not justify the cost of using lawyers to collect,
- when the creditor has exhausted its own collection efforts, or
- when maintaining goodwill with the client is not a factor.

Collection agents usually take over a creditor's claim by way of assignment. This means the creditor "sells" the claim to the agent. The claim is usually assigned in exchange for a promise that the agent will pay the creditor a certain percentage of any amount collected.

Collection agents will try to collect through direct contact with a debtor (often by phone), but rarely through the court process. Section 121 of the *Business Practices and Consumer Protection Act* (BPCPA) prohibits a collection agent from bringing a legal proceeding as a plaintiff against a debtor without giving the debtor notice of the assignment of the debt by the creditor to the collection agent, or without giving notice that the collection agent intends to bring the proceeding.

Collection agents must be licensed under the BPCPA. Consumer Protection BC, also known as the Business Practices and Consumer Protection Authority, is responsible for issuing, cancelling, and suspending licences. A collection agent has a right to appeal such a decision to the courts.

Consumer Protection BC regulates the collection notices used by collection agents. The BPCPA defines collectors as employees of a collection agent, and makes the collection agent liable for any damage done by any collector (see chapter 42). By regulation, the licensing provisions do not apply to lawyers, employees of banks, trust companies or credit unions, or sheriffs and court bailiffs (see chapter 2).

Information gathering

When assisting a debtor with a claim by a collection agent, gather and confirm all information on the financial circumstances of the client, including income and expenses, assets and debts, and future prospects for changes in income. For a specific debt, confirm the details of the collection agency and the creditor who assigned the debt to the agency.

Information gathering should include obtaining sufficient details to make an assessment of the debtor's liability and the amount owed. Consider, for example, if the debtor might have a defence to the claim if the matter were brought to court by the collection agent.

It may be useful to have the debtor prepare a written account of the number and content of the contacts the collection agent has made. Advise the debtor to keep a record of future unwanted contacts by the collection agent, though reasonably quick action to solve the problem may ensure an end to such contacts.

In general, carefully review the entire financial circumstances of the debtor — the fact that the client is having problems with a collection agent may well mean that he or she is facing financial difficulties with other creditors as well.

Solving the problem

There are several aspects to resolving a debtor's problem with a collection agent. The immediate concern will probably be putting a stop to unwanted contacts by the agent. Even where a debtor is clearly liable on a debt, the law does not allow any creditor, including collection agents, to pressure a debtor unreasonably (see chapter 28).

It may be difficult for the debtor to act on his or her own under these circumstances. Intervention by an advocate or lawyer may be more effective. Consider hand delivering a letter or sending a registered letter to the collection agent outlining the debtor's circumstances along with a proposal for resolving the claim. Make it clear if the claim is being denied (in whole or in part). It is unlawful for a collection agent to continue to try to collect a debt if the debtor has notified the collection agent and the creditor that the debt is disputed and the debtor wants the creditor to take the matter to court (see BPCPA, s. 116(4)(c)). You must make it clear that the debtor does not want further direct contact.

In the past, the government directed that collection agents must not try to collect from debtors who are currently on social assistance. A quick and effective way of stopping agencies from repeatedly contacting such clients is to contact the collector in writing and inform them of the client's status (perhaps enclosing a copy of a cheque stub), asserting that the client has the right under BPCPA, s. 116, not to be contacted, except in writing, and advising the collector that a complaint will be made to Consumer Protection BC if there are further unnecessary contacts. The advocate should propose that the client will update the collector about his or her financial circumstances at reasonable intervals (e.g., every three months).

Alternatively, the debtor might contact Consumer Protection BC for help, letting the collection agent know that such a complaint has been made. This is usually enough to stop the pressure. It may also be in the public interest to make such a complaint, as Consumer Protection BC may take steps to revoke the licence of a collection agent if there are a number of complaints.

A broader concern in these cases is the overall financial picture of the debtor. Consider if there are other creditors who ought to be dealt with at the same time. Consider the short-term and long-term financial circumstances of the debtor and what remedies are most appropriate.

If the collection agent has been particularly persistent, the debtor may wish to take legal action. There are a range of causes of action that might be brought. Such actions usually require legal advice. Regardless of the degree of persistence, consider carefully with the debtor if he or she wishes to undertake such litigation. Often, debtors are relieved just to resolve the financial problems and have little desire to seek further redress.

Related topics and materials

See Bailiffs, court bailiffs, and sheriffs; Creditors (types of); Harassment; Torts: Assault and trespass.

See also the Canadian Bar Association's useful information on Collection of Debts and Harassment by Debt Collectors. The association's website also has links to information on other credit, debt, and consumer topics.

7 Contempt of court

Client problems

- Client is going to refuse to attend a trial, even though he or she has received a summons to appear.
- Creditor is threatening to put client in jail unless a debt is paid.
- Judge has told client that he or she could be jailed if a payment order is not obeyed.
- Client was served with a notice to appear in court, and the bailiff said the client could be arrested and jailed if he or she does not appear at the hearing.
- Client asks what will happen if he or she fails to appear for a court hearing for which the client has been given a notice saying that he or she must appear.
- Client asks what will happen if he or she refuses to make payments on a judgment, even though there is an ability to pay and an order to make instalment payments.

Summary of the law

Imprisonment for debt was abolished in British Columbia well over a hundred years ago. The principle that a person cannot be imprisoned for debt is specifically stated in s. 51 of the *Court Order Enforcement Act* (COEA).

However, a person can be arrested and at least temporarily imprisoned for behaviour that is considered to be in contempt of the legal process. There are provisions in the Small Claims Rules and the Supreme Court Civil Rules that govern contempt in collection matters.

In both levels of court, contempt usually arises in one of two situations:

- Failure to obey an order to appear for a court hearing when there has been proper notice of the hearing.
- Failure to make a payment on a judgment when the debtor is clearly able to make payment.

Small Claims Court

Under the Small Claims Rules, there are various provisions for arresting someone who has not obeyed a court order or who has not appeared at court as required in a summons. Basically, failure to obey the order or to appear is considered contempt for the court process, and the rules allow for the person in contempt to be arrested, brought before the court, and, in some instances, imprisoned. The following discussion of the provisions in the Small Claims Rules focuses on the contempt and arrest process, not the purpose of the various hearings described.

Payment hearings

Payment hearings assess a debtor's ability to pay and consider whether there should be a payment schedule. A debtor can be ordered to attend such a hearing (if, for example, he or she attended a trial and a payment hearing was ordered for a later date), or served with a summons to attend the hearing. Under Small Claims Rule 12(15), a creditor can request that the court issue an arrest warrant if the debtor did not attend a payment hearing he or she was ordered to attend or was served with a summons to attend.

Default hearings

Default hearings are held when a judgment debtor has not obeyed a judgment repayment schedule previously ordered by the court (such as at trial or a payment hearing). Under Small Claims Rule 13(9), creditors can ask the court to issue an arrest warrant for people who do not attend default hearings that they were ordered to attend or were served with a summons to attend.

There is a second contempt-related process possible at default hearings: imprisonment for failure to obey the judgment repayment schedule. This can apply if the court decides that the debtor's explanation, or lack of explanation, of why the payment schedule has not been obeyed is not satisfactory and amounts to contempt of court.

The arrest process

Under Small Claims Rule 14, a person who is ordered to be arrested for contempt is initially notified with an arrest order, and not actually arrested. The person has seven days to arrange with a court registrar to attend court voluntarily. If the person fails to do this, a sheriff (see chapter 2) or peace officer can arrest the person after that time. If the person is arrested, he or she must be brought to court right away. The person may be released immediately, with the court making an order that he or she attend on another date to deal with the matter while the creditor is present.

The imprisonment process

If a warrant for imprisonment is issued at a default hearing for a debtor's unreasonable failure to pay on a judgment, the person can be arrested within a 12-month period after the order is made. When the debtor is arrested, he or she can avoid imprisonment by paying the amount shown owing under the order. Rule 15(7) specifically provides that imprisonment under the Small Claims Rules does not cancel either the debt or any right of the creditor to take steps to collect it.

Contempt rule

A Small Claims Court judge is given additional powers to deal with contempt under Small Claims Rule 19. This rule should be read carefully, as there are considerable consequences for people who are in breach of it. Under Rule 19(1), a judge can order a person to be imprisoned for up to three days for specific contemptuous conduct, including:

- refusing to be sworn (to affirm) at a hearing or refusing to answer a question at a hearing,
- refusing to produce a record or other evidence,
- failing to obey a direction of a judge, or
- repeatedly failing without a reasonable excuse to attend court when summoned or ordered.

In addition to this remedy, the judge can make an order on the merits of the case (e.g., dismissing the claim of a contemptuous plaintiff, or dismissing the reply of a contemptuous defendant).

Supreme Court

Under the Supreme Court Civil Rules, there are various provisions for arresting someone who, among other things, has not obeyed a court order or who has not appeared at court as required in a summons. Basically, failing to obey the order or failing to appear are considered contempt for the court process, and the rules allow for the party in contempt to be arrested, brought before the court, and, in some instances, imprisoned. The following discussion of the provisions in the Rules focuses on the contempt and arrest process, not the purpose of the various hearings described.

Rule 22-8 governs the contempt process. Being in contempt of a Supreme Court order can be punished by imprisonment or a fine or both. In addition, the judge can make an order on the merits of the case when there is contempt (e.g., dismissing the claim of a contemptuous plaintiff, or dismissing the reply of a contemptuous defendant).

Rule 22-8 states that certain acts are in contempt of court, including any act or omission described in Rule 22-7(5) or Rule 12-5(25). The actions listed in these two rules are similar to some of the contemptuous acts outlined under the discussion of contempt for Small Claims Court. They include:

- neglect of a subpoena (official order to attend court) to go to court,
- neglect of a subpoena to attend an examination in aid of execution (a post-judgment examination process, governed by Rule 13-4), and
- refusal to be sworn (to affirm) or answer questions at trial.

The subpoena-to-debtor process (an inquiry into the income, expenses, and assets of a judgment debtor) under Rule 13-3 is similar to the payment and default hearing process under the Small Claims Rules. The subpoena-to-debtor process has specific (and very detailed) rules for arrest for failing to attend a hearing as required, and for unreasonably refusing to pay on an instalment order that may have been made by the court. These are set out in some detail in Rules 13-3(12) to 13-3(26).

Information gathering

Gather and confirm all information on the financial circumstances of the client, including income and expenses, assets and debts, and future prospects for changes in income.

Obtain copies of all documents relevant to the creditor's claim, including correspondence and legal documents. If the client does not have the legal documents, you can obtain copies from the court registry.

You must appreciate that there may be some urgency to the matter. Ensure that the client has not, for example, missed a required court hearing date, or missed a payment under a Small Claims Court payment order or under a Supreme Court subpoena to debtor.

Solving the problem

While many clients may be unhappy with the court process, relatively few act in contempt of it. You may need to explain the contempt process to clients who ask "what if" questions or to clients who openly admit that they are going to act in contempt of the court process.

Only rarely will you be faced with an act of contempt for which the client is facing arrest or imprisonment. In those instances, it is probably more likely that the client has been in contempt out of ignorance, fear, or frustration, rather than open defiance of the process. You may be able to facilitate a quick resolution by explaining the client's responsibility to him or her and helping him or her comply with the requirements of the court process. However, if there is an actual defiance of the process, you may only be able to explain the repercussions to the client. If the client continues to act in a contemptuous manner, you may be limited in what you can do, or you could consider involving a lawyer in the matter.

Related topics and materials

See Bailiffs, court bailiffs, and sheriffs.

8 Contracts: An overview

Client problems

- Client comes to you with questions about wanting to “get out of” a credit agreement or a consumer contract.
- Client asks if he or she can get compensation for a consumer contract that the client says was unfair.
- Client is being sued on a credit contract or a consumer sale contract and wants to know what a court might decide about it.

Summary of the law

The common law of contracts

A contract is a legally recognized agreement made between two or more people. The agreement details each party’s obligations and can be enforced in court. If one of the parties fails to observe these obligations, he or she may be liable to pay compensation in the form of damages or other remedies ordered by a court.

Under common law, the following fundamental elements must be present before the courts will enforce an agreement:

- **Intention to make a contract:** Contracts are enforceable promises, but not all promises are enforceable. For enforceability, there must be an intention to be bound by the promise. This intention can be found in what a person says or does, and in the circumstances under which the promise is made.
- **Capacity:** Each party to the contract must have legally recognized ability, intelligence, and maturity to appreciate the significance of what an adult would understand as being a legally enforceable promise. One area where the qualification of capacity is especially important is for contracts concerning people under the age of 19. These are known as “infants’ contracts.” (See chapter 12.)

- **Agreement:** There must be an *offer* to contract on *certain terms*, and *an acceptance* of the offer on those terms. A response to an offer that makes any material change in the terms or conditions of the content of the offer is not an acceptance; it is a counter-offer.

  The parties must agree on the essential terms to make the contract binding. If there is no agreement, or if one or both of the parties misunderstands an essential term, there may be no contract. An agreement that leaves one of the essential terms to be decided at a future time is usually unenforceable.

  Terms can be express (i.e., specifically stated or written, or both, by the parties) or implied (i.e., not specifically stated or written, but reasonably taken from the actions or understanding of the parties to the agreement, or from the law imposing the terms even where the parties did not specifically agree to the terms). Sometimes terms are implied in a contract by statute law. For example, where a contract is for the sale or lease of goods, the *Sale of Goods Act* (SGA) may imply a number of terms as part of the agreement.

- **Consideration:** A promise must be supported by consideration before the law will enforce it. Basically, a promise is only enforceable if the person making the promise receives something of benefit from the person to whom the promise is made and who is seeking to enforce the promise. In most cases, this benefit is something of tangible economic value. However, it can also be an act or some other behaviour requested by the person who made the promise.

  A promise to give someone a car, if that person was giving nothing in return, would probably not be considered an enforceable promise; it would probably be considered a gift. A promise to pay someone else's debt when that person is obtaining credit, should there be a default on the debtor's promise to pay, is usually considered an enforceable promise, which the law would probably consider a guarantee.

  Almost all consumer and credit contracts have the necessary intention, capacity, agreement, and consideration.

Statutory rights in contracts

While some aspects of modern consumer and credit contracts are governed directly or indirectly by statute law passed by the provincial and federal governments, most promises need only meet the basic requirements of common law to be enforceable.

Some basic rights often given to consumers by statute law include the following:

- **Contracts in writing:** While the absence of a written document can make proof of an agreement more difficult, there is no general principle that all contracts must be in writing to be enforceable. Some types of contracts must be in writing, under requirements in the statute law. These include the *Law and Equity Act* (LEA) (see chapter 24 and chapter 38), the *Business Practices and Consumer Protection Act* (BPCPA) (mentioned frequently throughout this manual), the *Bills of Exchange Act* (BEA) (see also chapter 9), and the *Personal Property Security Act* (PPSA) (see chapter 36).

  Even where the statute law requires a written agreement, with certain terms specified in the agreement, a person seeking to enforce his or her rights may be able to get some compensation even if the requirements of the law were not met.

- **Cut-off clauses:** Contracts that a consumer makes with one business, such as a merchant or a lender, are sometimes sold to other parties. For example, an appliance store may sell a consumer finance contract to a bank or finance company. The sale of the contract is called "assigning the contract." In general, the party who buys the contract has all the rights to collect on it that the original party had.

  In the past, the party buying the contract wanted to limit the responsibility it had for any problems arising from the performance of the contract (e.g., if the merchandise financed was defective). One way to do this was to have the consumer agree to a clause in the contract that he or she would not raise certain defences against the party who bought the contract (called the "assignee"). It was called a "cut-off" clause because it tried to cut off rights the consumer may have had before the contract was assigned.

  Consumers are now protected against cut-off clauses in certain types of consumer contracts. For contracts governed by BC's BPCPA, the law specifically says that consumers have the same rights against an assignee as against the original party who assigned the contract (called the "assignor"). The same protections apply for promissory notes (enforceable promises to repay a debt or loan) governed by the federal BEA.

- **Implied terms:** A number of terms are implied in various consumer and credit contracts by statute. For example, certain warranties and conditions are implied in consumer sales of goods and leases under the *Sale of Goods Act* (SGA).
- **Non-waiver of statutory rights:** A number of statutes say that the additional implied terms or protections given to consumers by that law cannot be given up by a consumer, even if there is a term in the agreement that says the consumer waives the right to have that protection. That is, the consumer is protected from contracting out

of certain rights. These statutes include the BPCPA, the *Interest Act* (Canada) (IA), and the SGA.

- **Prepayment rights:** In common law, a borrower did not always have a right to pay off a debt obligation earlier than the date stated in the contract. If there were no terms that said the borrower could do so, the borrower was obliged to continue to make the payments of principal and interest called for in the agreement. For a discussion of where consumers now have a statutory right to prepay credit obligations, see chapter 37.

Specific types of contracts and contract terms

Many consumer and credit contracts can be categorized by the types of terms or rights forming part of those contracts. In addition, there are various categories of terms that may arise in a wide range of consumer credit transactions. These contract categories, as well as the contract terms, arise both in common law and in statute law. Some of the more important categories and terms are listed here. Many are described in more detail under separate topics.

Acceleration clause: Acceleration clauses are standard in most written credit contracts. The clause means that if a borrower misses making a payment on a credit contract, the creditor has the right to claim the whole remaining balance due from the borrower.

Assignment clause: An assignment clause is a common contract term that allows (or prohibits) one or more of the parties to sell their rights under the contract to another party. A common example of a contract assignment is when a furniture store sells its credit contracts to a bank or finance company. (See also cut-off clauses, explained above.)

Consumer transactions: The BPCPA defines consumer transactions as supplying goods, services, or real property to an individual for primarily personal, family, or household use. The definition of "goods" includes personal property, fixtures, and credit. "Services" include a membership in a club or organization. The BPCPA regulates these kinds of consumer transactions.

Contract conditions: The word "condition" has several legal meanings. One of the most important meanings is found in contract law. Condition is a broad label given to the essential terms of the contract. Sometimes the parties specifically define which terms are contract conditions, and sometimes the law (e.g., the SGA) implies which terms are contract conditions. More likely, the contract is silent on categorizing terms in this manner.

As will be discussed elsewhere, this broad categorization can be important when there is a breach of a contract, since there are different remedies for breaches of contract conditions than for other types of contract terms (such as contract warranties, discussed below) (see chapter 11).

Contract warranties: The word "warranty" has at least two very different meanings in law. To consumers, it usually means a contractual promise that a seller makes about the quality of the goods or services sold. Under the law, a warranty is a broad label given to terms of a contract that are the non-essential terms of the contract. Sometimes the parties specifically define which terms are contract warranties, and sometimes the law (e.g., the SGA) implies which terms are contract warranties. More likely, the contract is silent on categorizing terms in this manner.

As will be discussed elsewhere, this broad categorization can be important when there is a breach of the contract, since there are different remedies for breaches of contract warranties, as distinguished from other types of contract terms (such as contract conditions, discussed above) (see chapter 11).

Estimates: Estimates are a difficult area of the law. The case law suggests that whether estimates are binding depends on the intention of the parties to the agreement. The interpretation of an estimate can be complicated when the estimate is not for a specific figure, but is given as a range or in descriptive terms such as "standard price." For a case that considers the principles of law governing estimates, see *ABCO Diesel Ltd. v. Dolphin Delivery Ltd*. Note also that estimates are addressed in the BPCPA, s. 4(3)(c)(iii).

Future performance contracts: The BPCPA and the Consumer Contracts Regulation define a future performance contract as a contract for the supply of goods or services costing more than $50, where the delivery of the goods or performance of the services (by the supplier), or payment for either (by the consumer), is not made when the contract is signed. "Supply" is defined to include a sale, lease, assignment, etc. Future performance contracts do not include contracts for the supply of goods or services under a credit agreement if the goods or services have been supplied, and do not cover time-share contracts. The BPCPA regulates future performance contracts.

Guarantees: The word "guarantee" has at least two very different meanings in law. To consumers, it usually means a seller's contractual promise about the quality of the goods or services sold. In law, there is a very different meaning, related to a type of credit contract. A contract of guarantee is a promise by a third party to honour a credit contract of a debtor if the debtor defaults on payment. The third party is called a "guarantor" and is as responsible for the debt as the debtor once there is default. Commonly, consumers call guarantors "co-signers." (See chapter 13.)

Promissory notes: The federal *Bills of Exchange Act* (BEA) defines promissory notes as an unconditional promise made in writing by one person to another, agreeing to pay on demand, or at a fixed or determinable time, a certain sum to a specified person or to the bearer. Promissory notes are a basic form of credit contract. The BEA regulates promissory notes and gives special protections to consumers who sign them. It requires that promissory notes given in consumer transactions be marked "consumer purchase." This means that consumers cannot waive their contractual rights under the note if it is assigned to a third party.

Sale of goods contracts: Under the SGA, the sale of goods is defined as between a buyer and a seller and includes all types of chattels (personal, moveable possessions; see chapter 21). The SGA provides a number of rights and remedies in sale of goods transactions.

Waiver clauses: In many standard form contracts, there are clauses in which consumers are asked to give up certain legal rights, particularly statutory rights, which may give them some protections if the contract is broken. As noted above, many consumer protection statutes have specific provisions that prohibit waiving of these rights.

Even if a waiver clause is not specifically prohibited, consumers may still be able to obtain a remedy for breach of contract if a fundamental aspect of the contract is breached. This issue can arise, for example, in sale of goods transactions governed by the SGA. While consumers cannot waive their rights under the SGA in the purchase of new goods, the rights can be waived in the purchase of used goods when those goods are purchased from retail businesses.

The issue most often arises in the sale of used cars. Invariably, a car dealer's sale contract has a waiver clause. The courts have said in a number of decisions that if the problem with the car is fundamental, the waiver of rights term in the contract will be interpreted very strictly against the seller. Often, the courts ignore the waiver clause and give the consumer a remedy. (See also chapter 11.) One of the leading cases applying this principle is *Findlay et al. v. Couldwell and Beywood Motors* (for more detail on this case, see chapter 44).

Defences to contract claims

Common-law defences

Even if the fundamental elements for enforceability of a contract are present, a court may refuse to enforce the contract against one party. Historically, the common law has recognized a number of situations where defences (see chapter 9) are allowed, and where the party seeking to enforce the agreement will not be given a remedy or will only be given a limited remedy. Such reasons are called defences.

Statutory defences

Many consumer and credit contracts are governed not only by the basic common-law principles of contract, but also by many additional rules set out in statute law passed by the provincial and federal governments. (See chapter 9.)

Information gathering

See chapter 9 and chapter 11 for guidelines on what information you need to collect from the client.

Solving the problem

See chapter 9 and chapter 11 for guidelines on solving the client's problem.

Related topics and materials

See Contracts: Defences; Contracts: Opting out and cooling-off periods; Contracts: Remedies; Contracts, infants': Contracts made by minors; Co-signing: Guarantors and joint debtors; Creditors (types of); Debtors remedies: Financial remedies; Deposits in consumer transactions; Enforcing judgments against chattels; Misleading advertising: The *Competition Act*; Prepayment rights; Sale of goods law; Unfair or deceptive practices: Trade practices legislation.

See also the Canadian Bar Association's Buying Defective Goods and Door-to-Door Sales, Time-Shares and Contracts You Can Cancel, and the British Columbia Law Institute's Defective Contracts Relief and Unfair Contract Terms.

9 Contracts: Defences

Client problems

- Client did not understand the contract he or she was signing.
- Client was “forced” into signing a contract.
- Client signed a contract, but says he or she was misled about the extent of his or her liability.
- Client misunderstood a contract.

Summary of the law

Even with the basic elements of a contract present (see chapter 8), common law and statute law provide a number of grounds for a party to avoid having a contract enforced against him or her. These defences to contract actions give the defending party a legal excuse to get out of the contract. Without such defences, the contract would be legally enforceable. Remedies to enforce contracts are discussed in chapter 11. (See also chapter 6, chapter 10, and chapter 44.)

This section defines some of the basic grounds in common law and statute law that can help a party get out of a contract. This information is only a summary. If you intend to provide assistance to someone defending a legal action, review the law further, possibly with a lawyer.

Defences versus causes of action

This section covers defences only. Defences are the grounds upon which a consumer can defend a legal action by someone seeking to enforce a contract. This is different from a “cause of action,” which is a consumer’s right to bring a legal action him- or herself. In some instances, some legal principles can be both defences and causes of action, depending on who is bringing the action. For example, if a consumer refuses to make payments called for in a contract, he or she may be able to make a defence on the grounds of unconscionability (see below). If the consumer has already paid for the goods or services, he or she could also use the grounds of unconscionability to bring a legal action (or "cause of action").

Defences to liability and quantum

It is important to note the distinction between defences to liability and defences to amount, or quantum. Liability refers to the court finding someone responsible for an action or debt. If a consumer can assert no defence in an action by a creditor, the consumer is liable (or responsible) for that debt. If a consumer has paid for a defective product and gets his or her money back through legal action, the seller is liable for damages (the amount of money to be refunded).

If the court decides that one party should pay something to the other, the court must also decide how much should be paid. The legal term for the amount to be paid is "quantum." Often, the amount is obvious. For example, if the consumer is liable, the creditor can usually prove the amount of the debt. If the court decides that the consumer is entitled to a refund, the amount also ought to be obvious.

In some instances, however, the issue is less clear. For example, in the case of debt, there may be disagreement over:

- whether the debtor has been properly credited for all payments made, or
- whether the amount of interest claimed by the creditor is correct (see chapter 30). This is a particularly complicated area where courts often have to decide whether a full or only partial refund should be awarded.

The defence of making the other side prove its case

In general, the plaintiff (the party seeking a remedy) must prove his or her case by presenting evidence to persuade a judge that he or she is entitled to the remedy. If the plaintiff is a creditor (see chapter 18), the creditor must prove that the debtor owes the debt; if the plaintiff is a consumer, he or she must prove that the product he or she bought was defective.

The obligation on plaintiffs to prove their case means defendants need only indicate that they do not admit to the plaintiff's claim. Defendants can do this by filing a Reply in the case of Small Claims Court actions, or by filing an Appearance and a Statement of Defence in Supreme Court actions.

Plaintiffs may fail to prove their case in a number of ways:

- They may not bother to show up at court, thinking that it is not worth their time or that they may lose.
- They may not have the proper evidence, such as witnesses or documents.

- They may not be credible and so lose by not proving their case on the balance of probabilities (the likelihood that one party's evidence is more likely to be accurate than the other's).
- They may run afoul of some rule of evidence that does not allow them to admit evidence crucial to proving the case.

Common-law defences

Illegality

Courts generally do not enforce contracts that are for an illegal purpose or that contravene a statute. An obvious example of an unenforceable contract is one made with the intent of harming someone. Some interesting exceptions to the general rule include the following:

- **Gambling debts:** Historically considered uncollectable and illegal, court decisions suggest they are now collectable.
- **Illegally paid interest:** Although it is illegal under the *Criminal Code* to lend or collect interest at an annual rate above 60 percent (except as authorized under payday loan legislation, chapter 35), in at least some instances the courts have allowed the recovery of the illegally paid interest.

Misrepresentation

If a person makes a false statement to induce someone to enter a contract, the deceived party may be entitled to a remedy in court. Historically, the courts have awarded different types of remedies, depending on the nature of the misrepresentation. For example, they may let the deceived party out of a contract completely or give the person partial compensation through a damages award. To some extent, common-law principles of misrepresentation have been overtaken by related defences for deceptive acts or practices that apply to a wide range of consumer and credit transactions under the provisions of the *Business Practices and Consumer Protection Act* (BPCPA).

Mistake

"Mistake" refers to a basic, or fundamental, misapprehension or misunderstanding between the parties to a contract. For example, the parties might be mistaken about who the contracting parties are, the subject matter of the contract, or the nature of the contract itself.

In common law, a contract based on a fundamental mistake is void — that is, ineffective for all purposes and at all times. Neither side can enforce the agreement. This has often resulted in hardship for one or both sides. Recent findings tend to favour the concept of a contract being "voidable" as opposed to a contract being void. Voidability allows a court to terminate the contract, but gives partial compensation to one party.

In most standard modern credit and consumer contracts, this concept of fundamental mistake seldom arises. Although clients may complain that they did not understand the papers they were signing, a perfect understanding of all the terms of a contract is not necessary to make it binding, as long as clients grasp the basic terms of the contract.

In general, courts look at the reasonableness of the mistake and the behaviour of the parties when deciding whether to enforce a contract. If one party clearly did not bother to read some of the "fine print" of a contract when they had the opportunity to do so, a court may not be sympathetic to an argument based on a mistake.

However, if one of the parties knows about the mistake and does not reveal that knowledge, the courts may let the mistaken party out of the contract.

In recent years, courts have decided that consumers may be relieved from the strictness of some written contract terms if they find it is the duty of the business to draw a specific term to the consumer's attention. In *Tilden Rent-A-Car v. Clendenning*, for example, it was not that the consumer was mistaken about the terms of the contract, but that the consumer was unaware of a "fine print" term that had an unfair effect on the relationship between the parties.

Unfairness of bargain

Several common-law grounds deal with contracts that are fundamentally unfair. In many instances, these principles overlap:

Unconscionability: A contract is said to be unconscionable if a stronger party uses power to gain an unfair advantage over a weaker one. Inequality between the parties created by one party's ignorance, need, or distress can result in substantial unfairness in the overall bargain; for example, with one party setting an inordinately high or low price. An early BC case on unconscionability was *Morrison v. Coast Finance Ltd.* in 1965. The Supreme Court of British Columbia also applied the principles set out in *Morrison v. Coast Finance Ltd.* in a 1994 case called *Waters v. Sun Route Tours Inc.*

Under duress: External coercion or compulsion exerted by one party against another can result in a contract being made under duress or force. Compulsion may be physical, psychological, or economic. The most obvious example of duress is if one party is threatened with physical harm unless he or she enters into an agreement.

Undue influence: Undue influence is when one party uses the other party's confidence in him or her to gain an advantage. The confidence may arise from the nature of the relationship, such as between members of a family, or between professionals and their clients.

Statutory defences

Statute law provides an additional range of defences in consumer and credit contract transactions. In some instances, these statutory defences are extensions of common-law principles; in other instances, the defences are specific to the statute. Some of the more important statutes containing consumer or debtor defences are listed below. These statutes are discussed in more detail under a number of topics in this manual. Federal statutes are followed by "(Canada)"; all others are BC statutes:

Bills of Exchange Act (Canada)

Business Practices and Consumer Protection Act

Criminal Code (Canada)

Infants Act

Interest Act (Canada)

Law and Equity Act

Limitation Act

Personal Property Security Act

Solving the problem

This section provides only a brief overview of some of the more important defences available in consumer and debtor transactions. Take care when raising a defence during negotiations with a seller or creditor. While there is a considerable range of possible defences, they are rarely successful in court. In general, you should consult a lawyer if the issue of a defence arises.

Related topics and materials

See Collection agents; Contracts: Defences; Contracts: Opting out and cooling-off periods; Contracts: Remedies; Contracts,infants': Contracts made by minors; Co-signing: Guarantors and joint debtors; Creditors (types of); Debtors remedies: Financial remedies; Deposits in consumer transactions; Interest and the cost of borrowing money; Misleading advertising: The *Competition Act*; Payday loans; Prepayment rights; Sale of goods law; Unfair or deceptive practices: Trade practices legislation.

See also the Canadian Bar Association's Buying Defective Goods and Door-to-Door Sales, Time-Shares and Contracts You Can Cancel and the British Columbia Law Institute's Defective Contracts Relief and Unfair Contract Terms.

10 Contracts: Opting out and cooling-off periods

Client problems

- Client entered into a contract for goods or services and now wants out of the contract, even though there is nothing wrong with what the client bought.
- Client heard that he or she had 10 days to take goods back to a store, but the store will not accept the goods.

Summary of the law

If there is no fault in a contract between a seller and a buyer, consumers generally do not have the right to change their mind and get out of the contract. There either must be a reason to get out of the contract, such as the goods being unsatisfactory, or one of the exceptions explained below must apply.

If there is no reason, the only way to get out of the contract is if the seller agrees. If this is the case, the consumer and the seller are actually making a new agreement — to let the consumer out of the old agreement.

Common-law exceptions

The consumer may be able to get out of a contract if the contract originally specified that the consumer could choose to do so. For example, some department stores advertise that they allow consumers to return any product purchased at the store. In law, the promise in the advertisement would probably be considered a term of every sale contract the store makes (see chapter 8). Or, a seller may promise a particular consumer that he or she could return a product or the contract could be cancelled.

Promises stated clearly in a contract are called "explicit terms." The parties specifically discuss and agree to such explicit terms. Other promises that allow a contract to be cancelled might be "implied" terms. For example, if a store displays a sign reading "No Refunds — Only Exchanges," it could be argued that this gives the buyer an additional contractual right of exchange, regardless of the quality of the product, since the consumer already has the legal right to return goods that are fundamentally defective.

There may be either explicit or implicit limits, or both, on the contractual right of exchange. There may also be time limits. For example, some stores advertise that the consumer has a limited number of days to bring any goods back for a refund. If there is no time limit specified, the law would probably say that the consumer has a reasonable time to ask for the refund. The law does not have a set definition for "reasonable time." It varies depending on, for example, what was bought, where it was bought, and what the implied terms of the contract were.

There may also be limits arising from the consumer's use of the product. For example, a store may advertise that it accepts returns as long as the product is, essentially, unused. If there is no explicit term regarding use, the law would probably say that the product has to be resalable as new or near-new before the consumer could ask for a refund.

Statutory exceptions

The *Business Practices and Consumer Protection Act* (BPCPA) gives consumers some rights to cancel certain contracts, beyond the general rights in common law.

Refer to sections 17 to 56 of the BPCPA and the Consumer Contracts Regulation for specifics. Here are some general guidelines:

Door-to-door sales: Many consumers believe they can only cancel door-to-door sales contracts. However, the terms of the BPCPA actually apply to a wider range of transactions. BPCPA cancellation provisions apply to "direct sales contracts" — contracts for goods and services entered into in person at a place other than the supplier's permanent place of business. This covers door-to-door sales and other situations.

If a direct seller makes a sale somewhere other than a permanent place of business, s. 21(1) says a consumer has 10 days after the date that the consumer receives the contract to cancel the contract (longer in some instances). This means that if a consumer receives a copy of a direct sales contract on February 1, for example, the consumer has up to and including February 11 to cancel.

A consumer may cancel a direct sales contract not later than one year after the date the consumer receives a copy of the contract if:

- the contract does not meet the content requirements set out in the BPCPA,
- the supplier was under a direct sales prohibition order at the time the contract was made, or

- the goods or services were not supplied within 30 days of the supply date.

Distance sales contracts: The BPCPA defines distance sales contracts as contracts for the supply of goods and services that are not entered into in person, and, in the case of goods, where the consumer does not have an opportunity to inspect the goods at the time the contract is entered into (e.g., Internet or catalogue sales).

A consumer has the right to cancel a distance sales contract no later than 7 days after receiving a copy of it if the contract does not comply with the requirements for contracts in electronic form or otherwise comply with the content requirements of the BPCPA. A consumer has up to 30 days to cancel a distance sales contract if the supplier does not supply the consumer with a copy of the contract within 15 days of the contract being made.

Furthermore, if a supplier fails to deliver the goods or services within 30 days of the supply date in the contract, the consumer may cancel the contract. If no supply date was specified in the contract and the supplier does not deliver the goods or services within 30 days, the consumer has the right to cancel 30 days from the date the contract was entered into.

Future performance contracts and continuing service contracts: Future performance contracts are defined in the BPCPA as contracts for the supply of goods or services for which the supply or payment in full is not made at the time the contract is executed. Continuing service contracts are future performance contracts that provide for the performance of services on a continuing basis. Examples of continuing service contracts are gym memberships and dance lesson contracts.

A consumer has the right to cancel a future performance contract no later than one year after the date the consumer receives a copy of the contract if the contract does not contain the information required by the BPCPA, such as the supply date, the amount of each periodic payment, etc.

A consumer may cancel a continuing service contract no later than 10 days after receiving a copy of the contract, or at any time if there has been a material change in the circumstances of the consumer or the supplier. Examples of material changes in the circumstances of the consumer provided in s. 25(3) of the BPCPA are the death, disability, or relocation of the consumer. Examples of material changes in the circumstances of the supplier provided in s. 25(4) are failure to complete the services within the time specified in the contract, unavailability of the services due to discontinuance or substantial change in operation of the supplier, and relocation of the supplier by more than 30 kilometres.

Notice of cancellation: Under s. 54 of the BPCPA, a consumer (or supplier) may give a notice of cancellation by any means that permits a person to prove that he or she cancelled the contract on a specific date, including delivering the notice in person, or by registered mail, email, or fax to the appropriate address or number in the contract.

If the notice of cancellation is given other than by personal delivery, it is deemed to have been given at the time it was sent.

Information gathering

Obtain all the facts surrounding the contract, including details from the client and copies of all the documents. Specifically, find out:

- the date the agreement was made,
- the value of the contract, and
- whether any oral representations were made by the seller aside from the written contract.

Solving the problem

Before focusing specifically on the common-law or statutory rights of cancellation, consider if there are any other applicable remedies that would support negotiation for cancellation. For example, if there was unfairness in the making of the contract, there may be additional rights under the common law or the statute law, such as in the BPCPA.

If the consumer's right to cancel falls under the common law, either you or the consumer should approach the seller as soon as possible. Discuss with the consumer in advance what kind of cancellation arrangement he or she wishes to make (e.g., full refund of payment; exchange for another product; credit note for future purchases).

If the consumer's right to cancel falls under one of the statutory provisions of the BPCPA, then proper written notice should be given within the time limits. Since this right of cancellation is given by statute beyond rights in common law, a court probably cannot extend the time for giving notice of cancellation.

After a consumer gives notice of cancellation, the BPCPA sets out detailed rights and responsibilities for:

- returning the goods to the seller,
- the amount of time for refunding money paid by the consumer under the contract,

- returning items traded in as part of the contract, and
- cancelling any related credit agreement.

Related topics and materials

See Contracts: An overview; Contracts: Defences; Contracts: Remedies; Contracts, infants': Contracts made by minors; Misleading advertising: The *Competition Act*.

See also the Canadian Bar Association's Buying Defective Goods and Door-to-Door Sales, Time-Shares and Contracts You Can Cancel and the British Columbia Law Institute's Defective Contracts Relief and Unfair Contract Terms.

11 Contracts: Remedies

Client problem

- Client wants to know what type of award a judge might make if a consumer or credit problem goes to court.

Summary of the law

When a matter goes to court, the party bringing the action must set out his or her grounds for asking for a remedy (called the "cause of action") and the type of remedy he or she wants (this can be called the "relief" for which the party is asking).

This section outlines the various forms of relief someone can ask for. You should also consult chapter 8 and chapter 9, including their **Related topics and materials** sections.

Actions by creditors and sellers against consumers

In the majority of Small Claims or Supreme Court cases brought *against consumers*, creditors or sellers ask for a judgment ordering the consumer to pay money. The seller or creditor is usually seeking to recover the balance owed by the consumer. For example, a creditor who is suing on a defaulted credit agreement asks for a money judgment in the amount outstanding, along with interest and legal costs. Similarly, a supplier of goods or services who has not been paid asks for a judgment for the amount outstanding.

To successfully defend the action, the consumer must raise a defence that the court accepts, or show that the creditor or seller has failed to prove its case. Consumers may also ask for other kinds of remedies if they are sued. For example, a consumer being sued for a debt may ask the court to make an instalment payment order (see chapter 29) for the judgment (rather than ordering that the whole amount is due), or, in very exceptional circumstances, the court might order a stay of enforcement (that is, the plaintiff gets the judgment and is acknowledged to be in the right, but is not allowed to try to collect on it).

Actions by consumers against creditors or sellers

In most (but not all) cases brought by consumers against sellers and creditors, the consumer also asks for a judgment ordering the other side to pay money. The consumer is usually seeking compensation for some breach of the credit or sale agreement. For example, a consumer who has paid for goods that turn out to be defective may sue for compensation to make up for the value of the defect in the goods. Or, the consumer may base a case on a separate cause of action. For example, a debtor harassed by a collection agent may bring an action for damages under the *Business Practices and Consumer Protection Act* (BPCPA) (see also chapter 28).

A money judgment is the most common remedy available to consumers, but it is not the only one. In cases where there has been a fundamental breach of the contract by a creditor or seller, the court may order "rescission." This is a legal term for undoing the contract and restoring the parties to their original situation. For example, the court may order the return of both the consumer's money and the seller's property.

A court may also order that property seized from a debtor be returned to the debtor. This might be ordered if:

- a debtor is in default of a security agreement (see chapter 36) but has the ability to reinstate the terms of the contract; or
- the property of a debtor has been wrongfully seized; that is, a bailiff repossesses property not covered by the creditor's security agreement (see chapter 2).

Other remedies are available in statute and common law under principles known as equity and unjust enrichment. It is usually necessary to get a lawyer's advice because some of these remedies include declarations (court orders that make a party do something) and injunctions (court orders that prohibit a party from doing something).

Related topics and materials

See Bailiffs, court bailiffs, and sheriffs; Contracts: Defences; Contracts: Opting out and cooling-off periods; Contracts: Remedies; Contracts, infants': Contracts made by minors; Creditors (types of); Debtors remedies: Financial remedies; Harassment; Instalment payment orders; Misleading advertising: The *Competition Act*; Prepayment rights; Sale of goods law; Unfair or deceptive practices: Trade practices legislation.

See also the Canadian Bar Association's Buying Defective Goods and Door-to-Door Sales, Time-Shares and Contracts You Can Cancel and the British Columbia Law Institute's Defective Contracts Relief and Unfair Contract Terms.

12 Contracts, infants': Contracts made by minors

Client problems

- Client under 19 years of age wants advice about getting credit.
- Client wants to know what rights there are for suing a person under 19 years of age.
- Client wants to know if he or she will be responsible, as a guarantor, for the credit contracts of a person under 19 years of age.
- Client or client's parents want to know about suing or defending a court case where client is under the age of 19.

Summary of the law

BC's *Age of Majority Act* (AMA) defines anyone under the age of 19 as an "infant." There are a number of differences, both in common law and statute law, between the rights and responsibilities of infants and those of adults. These differences reflect the notion that children (minors) need greater legal protection than adults in diverse matters, ranging from consenting to medical treatment to entering into credit contracts. In some instances, the differences involve complex principles of law. This section of the manual focuses specifically on infants' contracts (contracts made with people under the age of 19) and, briefly, on the rules for infants using the court system.

Infants' contracts

In 1985, the BC legislature amended the sections of the *Infants Act* (IA) dealing with infants' contracts. Prior to the amendments, the IA made most sales and credit contracts involving infants "void." The old BC legislation was based on long-standing British law. However, the old legislation was fairly inflexible and was often as much a hardship for the adult dealing with the infant as it was protection for the child.

Current BC law presumes that contracts made by an infant are unenforceable against (but not by) the infant with the following exceptions:

- Where enforceability is specifically allowed by other statutes
- Where the infant affirms (confirms), performs or partially performs (e.g., makes payments under the contract), or does not repudiate (cancel in writing) the contract within one year after turning 19

Even if the contract is unenforceable against the infant because the exceptions do not apply, there may still be a remedy for either side, depending on the circumstances. Under s. 20 of the IA, either side can apply to the court for a remedy, including payment of compensation, return of property, or discharge of the contract (see chapter 11). When making such an order, the court considers all the circumstances surrounding the making of the contract.

According to s. 23, a guarantor to an infant's contract is liable on (responsible for) the guarantee regardless of whether the contract is enforceable against the infant.

Infants and court procedure

The Supreme Court Civil Rules and Small Claims Rules impose special restrictions on how a court case can be brought against or by an infant.

In general, the infant must bring or defend an action through an adult (usually a parent) appointed as a litigation guardian. (That person is called the "guardian *ad litem*" for court purposes.) According to Supreme Court Rule 20-2(2), the infant cannot bring the action alone. Small Claims Rule 17(18) makes Supreme Court Rule 20-2(2) applicable to proceedings in Small Claims Court. When someone brings an action against an infant in either court, the court papers are served on a parent or guardian, rather than the infant.

Information gathering

In addition to gathering and confirming all information on the financial circumstances of the client, including income and expenses, assets and debts, and future prospects for changes in income, check for guarantors in credit contracts made by infant clients. It may be that the creditor has obtained a guarantee from a parent or other responsible individual as part of extending credit to the infant. (See chapter 13.)

Solving the problem

Clients under 19 who have consumer or credit questions will probably want to know:

- what the procedures are in either Small Claims Court or Supreme Court, and
- what their rights and responsibilities are under credit contracts.

Related topics and materials

See Contracts: An overview; Contracts: Defences; Contracts: Opting out and cooling-off periods; Contracts: Remedies; Co-signing: Guarantors and joint debtors; Court jurisdiction and procedures; Credit cards.

13 Co-signing: Guarantors and joint debtors

Client problems

- Client has been asked to be a "co-signer" for a debt and wants to know what legal responsibilities are involved.
- Client co-signed a loan and wants to know his or her rights because the other party defaulted and the creditor is demanding payment from the client.
- Client and spouse have separated, and the client wants to know what to do about joint debts, such as credit cards.
- Client wants you to explain to someone else what it will mean to co-sign a bank loan for the client.

Summary of the law

This area of the law is complex. The extent of client responsibility can turn on fine distinctions of law, as can the availability of legal defences. A considerable body of statute law and case law governs the creditor and debtor relationship when there is more than one debtor in a credit obligation.

The following is only a very brief outline of the basic principles. Consult a lawyer for an opinion in specific cases.

Co-signing: Guarantors versus joint debtors

"Co-signing" is the popular term for someone agreeing to be liable (responsible) for the debt of another person. In law, there is an important division in the responsibilities of people who co-sign. In general, when two or more borrowers contract to receive and take the benefit of credit, they are known as joint debtors. They are each fully and independently responsible for the debt.

Technically, creditors usually ask joint debtors to be "jointly and severally" liable (each person is responsible for the entire debt). This gives the creditor certain advantages if the debtors default and the creditor attempts to collect the whole judgment by making separate settlement arrangements to collect part of the judgment from each debtor.

There are many situations in which people are asked to be joint debtors, such as when a husband and wife take a mortgage (see chapter 24) to buy a house, or they obtain a line of credit to buy a car, or they request credit cards from a bank (see chapter 15).

If a borrower applies for credit and the lender demands that someone else promise to be responsible for the debt if the borrower defaults, the borrower is called the "principal debtor" and the other person is called a "guarantor."

Most commonly, relatives or friends are asked to be a guarantor for a borrower who cannot obtain credit on the strength of his or her own financial record. The borrower may have a limited income or assets, or may have a poor credit history (see chapter 17). In business, individuals who are principals in a company are often asked to be guarantors for the debts of the company.

In most instances, creditors specify which type of contract they want the parties to sign and there may be relatively little to negotiate. The law will usually, but not always, follow the express intention of the parties when considering the liability of joint debtors or guarantors.

Default obligations of guarantors and joint debtors

The law distinguishes between credit contracts with jointly responsible debtors and credit contracts with a guarantor, but if there is a default in either case, the creditor has a right to claim against anyone who contracted for the debt.

Joint debtors: There is little joint debtors can do to avoid a debt completely or to legally shift liability to the other debtor. The law does not care, for example, if one party's income is higher than the other's or if the debtors have agreed between themselves who will pay off the debt. Debtors cannot bind a creditor to a contract to which the creditor has not been a party. This is especially a problem when spouses separate and one spouse promises to pay off certain debts as part of a separation agreement. If that spouse defaults on paying the debt, the creditor can still sue both spouses.

There are particular problems for joint debtors with credit cards (see chapter 15). Usually, the credit agreement between the parties and the creditor calls for each debtor to be fully responsible for all credit obtained through the card.

Guarantors: A guarantor's responsibility for a debt only comes into effect if the principal debtor defaults on an obligation. The law allows certain defences (chapter 9) and remedies (chapter 11) for guarantors that are not open to joint debtors.

The most significant defence principle says that if the creditor and principal debtor make significant changes to the detriment of the guarantor in the credit contract (before or after the principal debtor's default), then the guarantor may be able to get out of paying off the debt. For example, if a creditor lowers the monthly payments for a principal debtor having trouble making the full payments called for under the loan agreement, the creditor may wait a long period after default to start legal action against the guarantor. The courts may find this prejudicial enough to the guarantor to disallow the claim against the guarantor.

Defences for guarantors and joint debtors

In some instances, a guarantor or joint debtor may be able to argue that common-law defences, such as unconscionability (explained in chapter 9), should apply to their circumstances. In *Bank of Montreal v. Koszil*, the court found that a guarantor (a common-law wife) who had not received independent legal advice, and who was not fully aware of her common-law partner's financial predicament before signing a promissory note (an enforceable promise to repay a debt or loan) and mortgage, was the victim of unconscionability; the action against her was dismissed. In *Toronto-Dominion Bank v. Wong and Lim*, however, the court found that a mother, as joint debtor, was responsible for her son's debt even though it was clear that the benefit of the loan went to the son, and that the mother had not received independent legal advice. The court found that agreeing to sign the loan showed imprudence, but not unconscionability.

A common client concern about becoming a guarantor is the apparent unfairness of being responsible for someone else's debt when little or no benefit has gone to the client. The client may complain, "My friend got all the money." Unfortunately, this does not often translate into a defence or remedy for the client.

Even though the guarantor gains no monetary benefit from guaranteeing a loan, the law usually still finds legal consideration in this relationship. The benefit to the creditor is the guarantor's promise to pay, while the benefit to the guarantor is the satisfaction that the principal debtor got the loan from the creditor.

Information gathering

The most important aspect of fact gathering for co-signing situations is to get copies of all the parties' credit agreements. A lawyer must review the agreements to determine the client's legal obligation. You must also get full details of the circumstances surrounding the credit contract, including discussions between debtors (e.g., spouses) and discussions between the client and the creditor.

Solving the problem

Situations involving joint debtors (or a principal debtor and a guarantor) often include potential for a conflict of interest. Be careful about advising more than one debtor in any multiple debtor obligation. It may be wise to deal with only one of the debtors, particularly if one or more of the parties did not receive a direct benefit from the loan. Consider seeking advice from a lawyer about the potential for conflicts, even if the joint debtors are spouses. There may be defences against the creditor for some or all of the amount due, or there may be remedies against the other debtor.

When liability and the amount due have been confirmed, review the full financial circumstances of the client. Consider comprehensive remedies if there is more than one creditor.

In joint debtor situations, creditors may be more willing to accept a settlement proposal. Usually a creditor can accept partial payment from one debtor in full satisfaction of that debtor's liability, and still claim the balance from the other debtor. There are some other possibilities for settlement arrangements:

- Immediate lump-sum payment (e.g., 25 percent to 50 percent of the full amount owed) in full satisfaction of the debt
- Immediate part-payment (e.g., 5 percent to 10 percent of the full amount owed), coupled with instalment payments to make up the balance to somewhere between 25 percent and 50 percent of the full amount owed
- Creditor promises to release the client from liability on the debt when instalment payments totalling an agreed percentage of the full amount owed are reached (e.g., if regular instalment payments are continued until 50 percent is repaid)

Related topics and materials

See Contracts: An overview; Contracts: Defences; Contracts: Opting out and cooling-off periods; Contracts: Remedies; Contracts, infants': Contracts made by minors; Credit cards; Credit reporting and credit ratings; Foreclosure and mortgages.

14 Court jurisdiction and procedures

Client problems

- Client asks for help in starting a court action, or, having advised the client that he or she should take a matter to court, you want to explain the court procedures.
- Client comes to you with court documents indicating that a legal action has been started against the client. Aside from dealing with the merits of the case, you want to explain the court procedures.
- Client explains that he or she cannot afford a lawyer and wants you to help in court or at least give some advice about court procedures.
- Client wants to know how much a legal action is going to cost.

Summary of the law

It is beyond the scope of this manual to go into detail about court jurisdiction and procedure. There is a large body of statute law, court rules, and case law on this subject. This section gives an overview of the court process, relevant to advising clients. A number of sources of information on court procedures are listed at the end of this section. Consult a lawyer for help on how to advise on Supreme Court procedures.

There are two basic aspects to any court case:

- **Substance:** Refers to the merits of the case — whether the client has a claim against someone else, or, if the client is a defendant, whether there is a defence to a claim made against him or her.
- **Procedure:** Refers to the court processes necessary to resolve the merits of a case.

Almost all legal actions in British Columbia will be started in either Small Claims Court or Supreme Court. In a very few instances, not covered here, an action may be started in the Federal Court of Canada. Small Claims Court and Supreme Court are commonly called trial courts, because that is where trials of claims are heard. The key resources for understanding the processes in these two courts are the rules prescribed for each: the Small Claims Rules and the Supreme Court Civil Rules.

Jurisdiction

When starting a legal action, the first consideration is which court it will be launched in — in other words, which court has "jurisdiction" (the legal right to act in or judge a case) over the matter. Rules often dictate this, but sometimes it is a matter of choice. In most consumer and debt actions, the main factor governing jurisdiction is the dollar amount of the claim.

Here are the main factors to consider for each court:

Small Claims Court

- Has monetary jurisdiction over actions up to $25,000.
- Deals with most types of consumer and debt cases (s. 3(1) of the *Small Claims Act* (SCA)). Some causes of action (e.g., libel, slander, and malicious prosecution) cannot be brought in this court (s. 3(2) of the SCA).
- Some statutes specify that an action can be brought in this court. For example, s. 171(3) of the *Business Practices and Consumer Protection Act* (BPCPA) states that certain actions under the BPCPA can be brought in Small Claims Court.
- Procedures are easier to follow than in the Supreme Court, so the plaintiff (the person making the claim) may not need a lawyer.
- The plaintiff cannot start another action for the difference between the upper limit of the court and the amount owed.

If the amount the client wants to claim is over the limit, it may be to his or her advantage to consider reducing the claim to the maximum allowed to start the action in Small Claims Court, where he or she may not need a lawyer.

Supreme Court

- Has monetary jurisdiction over any amount of money being claimed.
- Claims within the monetary jurisdiction of the Small Claims Court may be started here, though there are disadvantages.
- Procedures are more complicated than in Small Claims Court, so the plaintiff will probably need a lawyer.
- If the plaintiff uses a lawyer for claims that could have been brought before the Small Claims Court, the plaintiff is almost always barred from claiming compensation for legal fees.

Legal costs

A client's immediate concern is usually what chance he or she has of successfully commencing or defending a legal action. This is an assessment of the merits of the case and includes explaining how much clients will get if they win or how much they will have to pay if they lose a legal action.

Legal costs are the procedural costs of having a matter resolved in the court system. For the purpose of this section, legal costs mean all monetary costs encountered in the legal process, including lawyer fees.

Assessing what the court costs will be is probably as important as advising clients on the merits of the case. First, clients often have no idea about legal fees or court filing fees and are often misinformed. Second, court costs often prove to be a major factor in a client's decision on how a matter is to be handled.

Clients should understand the range of costs that can be encountered in the legal process, including:

- court fees,
- disbursements, and
- lawyer fees.

Court fees: Court fees are what the government charges for people to use the court system. For example, in Small Claims Court, it costs a claimant $100 to file a Notice of Claim where the claim does not exceed $3,000.

Disbursements: Disbursements are the costs associated with carrying out the legal process and include having legal documents served, photocopying costs, and fees for expert witnesses to testify at trial.

Lawyer fees: Clients should be clear on what a lawyer is going to charge for taking a case. Most lawyers charge an hourly rate for taking a case to court. They may quote a fee that includes going to trial. (See chapter 31.)

Compensation for legal costs

Generally, people using the legal system are responsible for their own legal costs. Both plaintiffs and defendants have legal costs. Legal costs are often a significant factor in the decision to begin or defend a legal action. In some instances, the legal costs will be too high to justify taking an action, particularly if a lawyer is needed.

However, the law usually allows a successful litigant (a person involved in a legal action) some compensation for legal costs from the other side. For example, if a party is successful in making or defending a Small Claims

Court action, the SCA and Small Claims Rules permit a judge to add to the judgment the court fees and charges or expenses that he or she considers are directly related to the conduct of the lawsuit.

The Small Claims Court can order a party or witness whose behaviour causes unnecessary expenses for another party to pay all or part of those expenses. The Small Claims Rules also allow the court to impose a penalty of up to 20 percent of an offer to settle against a party who refuses a settlement where the judgment of the court is ultimately equal to or less than the amount offered by a defendant, or equal to or more than the amount offered by a plaintiff.

The SCA does not allow any recovery of lawyer fees in Small Claims Court actions, regardless of the outcome.

Successful parties in Supreme Court are generally awarded some compensation for lawyer fees as well as court costs and disbursements. The amount of compensation, however, is a complicated issue. Very roughly, a successful litigant can expect to be compensated for one-third to one-half of their overall legal costs, including lawyer fees.

Procedural considerations

The following are some of the basic procedural considerations in a legal action, up to the time of trial.

Resolution of the problem

In the majority of cases, the merits of a legal action are resolved before trial. This may happen because:

- the parties negotiate a settlement at some stage,
- the plaintiff gives up on the case,
- the plaintiff uses certain procedures to get a judgment without going to trial, or
- the defendant seeks a remedy (e.g., bankruptcy, see chapter 3, chapter 4, and chapter 5) to stop the legal proceeding.

Time limits and defaults

Time limits are crucial in court procedures. There are a range of consequences for exceeding a time limit for doing something. For example, a judgment may be entered against the defendant.

The most important time limits involve filing pleadings, including defence documents. In Small Claims Court, a defendant must file a Reply in the court registry within 14 days after the plaintiff's Notice of Claim is served on the defendant.

Under the Supreme Court Civil Rules, a plaintiff files a single document called a Notice of Civil Claim and a defendant must file a Response to Civil Claim. A defendant must file and serve the Response to Civil Claim within 21 days of being served with the Notice.

Pre-trial procedures

There is a significant difference between the number of steps involved in the legal process in Small Claims Court before a trial is held and the number involved in Supreme Court.

In Small Claims Court, the pre-trial processes are minimal. The main step is a settlement conference. This is an informal hearing held before the trial where both parties meet with a judge to see if some or all of the substantive and procedural issues can be resolved by agreement instead of going to trial. In many cases, there may also be a formal mediation presided over by a mediator (note that a mediator is not a judge and cannot make a judgment on a case). Such sessions are generally held before the settlement conference. In some cases, a trial conference must be held before the trial. Consult the Small Claims Rules 7 to 7.5 for details.

In Supreme Court, several pre-trial processes are possible. Here are two of the most important:

Discovery of documents: A requirement that each side produce relevant documents for inspection by the other party.

Examination for discovery: Pre-trial questioning of opposing parties by lawyers.

Rules of evidence

Perhaps the most difficult aspect of court procedures for clients to understand is how evidence is presented at court. Some rules of evidence (guidelines on what type of evidence is allowed) arise in common law, others in statute law, and still others under Small Claims Rules and Supreme Court Civil Rules.

Small Claims Rules give the widest latitude (they are more flexible) in presenting evidence and even specify that a judge may conduct a trial without complying with the formal rules of procedure and evidence (Rule 10(1)).

Burden of proof

The party bringing the action (the plaintiff) is responsible for proving all elements of his or her case to the judge on a balance of probabilities (which version of the case is more likely).

Information gathering

Gather and confirm all information on the financial circumstances of the client, including income and expenses, assets and debts, and future prospects for changes in income.

Solving the problem

To advise clients on court processes, you should have current copies of the rules for the Small Claims Court and the Supreme Court.

Related topics and materials

See *Bankruptcy Act:* Assignments in bankruptcy; *Bankruptcy Act*: Orderly payment of debts; *Bankruptcy Act*: Proposals; Lawyers' fees.

15 Credit cards

Client problems

- Client has lost a credit card and wants to know about liability if the card is used fraudulently.
- Client has bought defective merchandise with a credit card and wants to know if he or she can refuse to pay the credit card bill.
- Client has recently separated from a spouse and wants to know about liability for past and future bills on a joint credit card.
- Client wants to know how much interest is being charged, and how it is charged, on his or her credit card.

Summary of the law

Liability (responsibility) for charges made on credit cards follows the basic rules of contract law (see chapter 8). In most instances, the agreement is made between the consumer applying for the credit card and the creditor accepting the application. The creditor issues the credit card subject to the consumer accepting the terms set out in a cardholder agreement.

There are two main types of credit card agreements:

- Between merchants and consumers
- Between financial institutions and consumers

In merchant agreements, the merchant issues its own card to the consumer. Use of the card is usually restricted to purchases from that merchant. For example, most major department stores issue their own cards.

In agreements with financial institutions (e.g., banks), the creditor issues the card to the consumer for credit purchases at any business accepting the card. MasterCard and Visa are examples of financial institution cards. This type of agreement is really two agreements: one between the consumer-cardholder and the financial institution, and one between the merchant and the financial institution.

Typical cardholder agreements cover:

- the consumer's liability for charges on the card;
- how charges can arise (i.e., from the consumer making purchases with the card, and, for cards issued by financial institutions, from the consumer obtaining cash advances with the card);
- interest rates and how they are calculated;
- monthly payment requirements;
- responsibility when a card is lost or stolen;
- the consumer's credit limit; and
- termination of the agreement.

The consumer is usually held responsible for charges made through both direct use (e.g., when the card is presented to a merchant and signed for by the cardholder) and indirect use (e.g., the consumer gives the card number and expiry date over the phone).

Special credit card provisions

Some special legal issues arise with credit cards, both in common law and under statute law. Section 57 of the *Business Practices and Consumer Protection Act* (BPCPA) defines a credit card as being "a card or other device that can be used to obtain advances under a credit agreement for open credit …" A "credit agreement" is defined as an agreement under which credit is extended and includes loans, credit sales, lines of credit, and credit cards, or a replacement or renewal of any of these.

Disclosing the cost of borrowing on credit cards

Under the BPCPA, credit cards are a form of "open credit" (the borrower is not borrowing a fixed or agreed amount of money). The BPCPA requires lenders who extend open credit to make a statement available to the consumer in advance that explains the cost of borrowing on the credit card (see chapter 29). Once credit is extended, the lender must issue periodic statements showing details such as the total amount credited and the outstanding balance. In most cases, consumers get this information as part of their usual monthly statement.

Liability for lost or stolen credit cards

Section 99 of the BPCPA limits a consumer's liability for unauthorized use of a credit card. Given the growing problem with credit card fraud, this is an important protection. Once a consumer properly notifies the issuer, the consumer is not liable for any unauthorized use. Before giving proper notice, the consumer is liable for a maximum of $50 in unauthorized charges. The maximum liability set out in the credit agreement may be less than $50, but it cannot be more.

However, this protection does not apply to debit cards or when a credit card is used with a confidential personal identification number (PIN) to withdraw money from a cash machine. In such cases, the common law of contract applies. In *Plater v. Bank of Montreal*, the cardholder agreement stated that the cardholder was responsible for losses up to $500 if the PIN and credit card were not kept separately. Because it was found that the two were not kept in separate places, the cardholder was held liable for $500 rather than the $50 limit specified under the BPCPA.

Liability for jointly held credit cards

An important concern for consumers is their liability or responsibility when cards are issued to co-applicants or when cardholders agree to add other users to their existing credit card (see chapter 13). Liability for jointly held credit cards is not dealt with in the BPCPA — it is a matter of contract law, based on the cardholder agreement.

In general, cardholder agreements stipulate that each authorized user of a card is jointly and severally liable for the debts incurred on the card. This means the creditor can claim the full balance on the account from any of the holders, regardless of how little or how much each individual actually charged on the card. That liability continues at least until one of the parties to the agreement terminates the agreement. Responsibility for the debts of another cardholder may well continue until that cardholder's card is physically recovered and returned to the financial institution.

There may be instances where a unilateral action (such as raising the credit limit and then borrowing to that new limit) by one of two parties responsible for a credit card may not affect the other where notice was not given to the other cardholder.

The cardholder agreement may also be written to make the cardholder liable for anyone using the card with the cardholder's authority. For example, a cardholder might disclose a PIN to a friend to make a withdrawal at a cash machine. Under the terms of the cardholder agreement, the cardholder is responsible for any amount withdrawn, even if it was more than the cardholder had authorized the person to take.

Problems with products or services purchased with credit cards

The distinction between merchant credit cards and financial institution credit cards becomes important when the consumer has a problem with products or services purchased with the credit card. Usually, the consumer's reaction is to refuse to pay the credit card bill, or at least the amount on the bill relating to the problem product or service.

Disputes between a consumer and a merchant over a purchase on a merchant's own credit card are usually resolved according to general principles of contract law (see chapter 8). The parties can negotiate or they can go to court. If the matter goes to court, the court's decision on the merits of the case governs the liability on the credit card, or at least the credit card purchase.

Disputes between a consumer and a merchant over a purchase on a financial institution's card are more complicated. Usually, the consumer has little right to refuse to pay the bill from the financial institution. Cardholder agreements generally contain terms that mean that the consumer must pay for charges on the card regardless of product or service quality, and that the bank is not in any way responsible for consumer-merchant disputes. However, some cardholder agreements do contain special terms that are essentially warranties or insurance for the purchases made using the card.

Information gathering

The type of information you need to obtain is governed by the kind of credit card problem the client has. Generally, you need to obtain a copy of the cardholder agreement, a copy of the latest monthly statement the consumer received from the creditor, and copies of any correspondence between the consumer and the creditor.

Solving the problem

If the consumer's problem arises from an inability to pay the credit card bill, refer to chapter 3, chapter 4, chapter 5, and chapter 19.

If the problem involves potential liability for a lost or stolen credit card, ensure as soon as possible that the consumer has notified the creditor. Most credit card issuers, including MasterCard and Visa, have special phone numbers that you can call at no charge for reporting lost or stolen cards.

It may be difficult to assess the extent of a consumer's liability on a joint credit card. In the absence of any other defence, the consumer will probably at least be responsible for any debts incurred up to the time that the consumer cancelled the credit card agreement.

Related topics and materials

See *Bankruptcy Act:* Assignments in bankruptcy; *Bankruptcy Act*: Orderly payment of debts; *Bankruptcy Act*: Proposals; Contracts: An overview; Co-signing: Guarantors and joint debtors; Debtors remedies: Financial remedies; Interest and the cost of borrowing money.

See also Buying Goods on Credit, Credit Cards and Credit Bureaus, the Canadian Bar Association BC Branch. The People's Law School has a series of videos about credits cards available on YouTube: Consumer Credit and Debt: Ask for Help, Consumer Credit and Debt: Call the Company.

16 Credit insurance

Client problems

- Client is being offered, or asked to buy, some form of insurance as part of a credit transaction.
- Client thinks he or she has a claim on an insurance policy with a creditor, but the creditor is refusing to pay.

Summary of the law

The principles of insurance law are beyond the scope of this manual. However, there are a few instances where advocates may encounter insurance issues related to consumer transactions, particularly insurance for consumer loans or mortgages.

The first instance is when a consumer asks for advice about an offer for insurance as part of a credit transaction. For example, a consumer may be offered life and disability insurance when he or she takes out a mortgage (see chapter 24). The insurance coverage will usually be for an amount up to the value of the amount borrowed, and is designed to provide extra assurance that the obligation will be paid in the event of the borrower's inability to pay.

While credit insurance may be a prudent thing to have, consumers should be careful to compare the rates and coverage offered through the creditor. The premiums that the consumer is asked to pay by a creditor are often higher than the premiums he or she could get from the consumer's existing insurer, or from a new insurer who is not associated with the credit transaction. The consumer may find a better premium elsewhere for the same coverage, or better coverage for the same premium.

The second instance is when the consumer is attempting to make a claim on the credit insurance, and the insurer is resisting payment. While claims on insurance policies involving the death of an insured person are usually straightforward once proof of the death has been shown, claims on insurance policies because of alleged disabilities or, for example, unemployment, may be more problematic. Often, the terms of the contract are written relatively restrictively. If advocates encounter such a problem, it will probably be necessary to involve a lawyer.

Related topics and materials

See Foreclosure and mortgages.

17 | Credit reporting and credit ratings

Client problems

- Client wants to know how a bad credit rating affects his or her ability to get credit.
- Client asks about the effect of using a remedy under the *Bankruptcy and Insolvency Act* (BIA), including going bankrupt, making a proposal, or getting a consolidation order on one's credit rating.
- Client has been turned down for credit and says the credit report is unfair or incorrect.
- Client asks how to get access to his or her credit file at the local credit bureau.

Summary of the law

Each institution that a consumer obtains credit from (see chapter 18) has its own details of the consumer's history with that institution. A person's credit record is basically the accumulation of his or her entire credit history. Historically, that information was kept at a local credit reporting agency, called a credit bureau. Credit bureaus and other reporting agencies provided credit report information to creditors for a fee. More recently, credit reporting services have been consolidated into national reporting services, including Equifax and TransUnion Canada. These are not government agencies.

Credit reporting is regulated by the *Business Practices and Consumer Protection Act* (BPCPA) and the *Personal Information Protection Act* (PIPA). The BPCPA and PIPA have a number of provisions that are important for the protection of consumers.

Limited disclosure of a consumer's file: Section 108 of the BPCPA restricts disclosure of a consumer's file to people or businesses that have a legitimate reason for seeking the information, such as prospective creditors, landlords, employers, and insurers.

Contents of a credit report: Under s. 109 of the BPCPA, agencies must have reasonable procedures for ensuring accurate and fair reports. It contains a number of restrictions and prohibitions about what information can be reported. For example, debts barred from collection because the limitations date has passed cannot be reported. Criminal record information can only be reported if there has been a conviction, and then only for a limited period of time. In general, information more than six years old cannot be reported. Information about a consumer's race, creed, colour, ancestry, ethnic origin, or political affiliation cannot be reported.

Notification when a report is obtained: Sections 107 and 108(1)(f) of the BPCPA state that in most circumstances a report cannot be obtained unless the consumer signs a written consent. The BPCPA allows creditors to obtain the consent on credit application forms.

Notice of denial or increased cost: According to s. 110 of the BPCPA, if a consumer is denied credit or the cost of the credit is increased because of an unfavourable report, the creditor must give the consumer written notice of the denial or the increase.

Consumer access to credit files: Section 23 of the PIPA gives consumers the right to access their credit file.

Solving the problem

There are often misconceptions about a person's credit record. A client may be misled or intimidated by what a creditor, such as a collection agent (see chapter 6), says about his or her credit record. In some instances, a client's problem may be resolved simply by informing the client of his or her rights under the BPCPA and the PIPA.

If there is an issue about a client's credit record, the client should first seek disclosure of his or her record. Access is available online for a fee from Equifax and TransUnion Canada.

A consumer may also obtain his or her credit report without charge by mailing a request containing the following information:

- Full name
- Present address
- Previous addresses within the last five years
- Date of birth
- Copies of both sides of two pieces of identification, one of which has the consumer's signature, and one of which indicates the consumer's current address

The mailing address for Equifax Canada is:

Consumer Relations Department
Box 190, Station Jean-Talon
Montreal, Quebec
H1S 2Z2

The mailing address for TransUnion Canada is:

TransUnion
PO Box 338, LCD1
Hamilton, Ontario
L8L 7W2

Section 24 of the PIPA gives consumers the right to have any inaccuracies in the record corrected according to the procedures outlined in s. 27 of the PIPA. To dispute or correct a credit report, the consumer may email or write to Equifax or TransUnion. Equifax will also accept dispute information by phone.

Consumers may also file an explanatory note with the agency about any information in the file (BPCPA, s. 111).

If the client's problem cannot be resolved at this level, he or she can complain to the Privacy Commissioner. The Privacy Commissioner has the power to investigate and to order a reporting agency to amend a consumer's file (PIPA, s. 52(3)(d)).

Related topics and materials

See Collection agents; Credit insurance; Creditors (types of).

18 Creditors (types of)

Client problems

- Client has a complaint against a creditor and wants to know if there is someone or an agency that can help.
- Client wants to know if there are special laws governing the type of creditor he or she is dealing with.
- Client wants to know if a loan from a friend is as "legal" as a loan from a bank or credit union.
- Client is looking for guidance on which lending institution he or she should deal with.
- Client has a government debt (e.g., a student loan) and wants to know what special rules may apply.
- Client wants to know if there are laws governing "loan sharks."

Summary of the law

This section gives a brief overview of the regulatory laws governing financial institutions and contains links to other useful sections of this manual. See also the **Related topics and materials** section at the end of this chapter.

Regulation of creditors

All creditors, both lenders and retailers, are subject to a range of municipal, provincial, and federal laws. All institutional lenders are incorporated under and regulated by specific statutes; for example, the federal *Bank Act* (BA) governs banks and the provincial *Credit Union Act* (CUA) governs credit unions.

For each of these statutes there is usually a government regulatory agency. These agencies protect the public interest by ensuring that businesses are run in an appropriate manner, but they do not usually resolve individual complaints or problems between a borrower and lender.

Interest rates

Surprisingly, there is relatively little direct regulation of the interest rates creditors can charge (see chapter 30). The most important provision is in s. 347 of the *Criminal Code of Canada*, which sets an interest rate ceiling for all creditors at 60 percent per year, except as authorized under payday loan legislation (see chapter 35). Up to that limit, creditors can generally set credit rates as they see fit. Most lenders such as banks, trust companies, and credit unions have relatively competitive rates. The interest charges for finance companies are generally higher, as are the interest rates charged by department stores and other merchants who grant credit on their own credit card systems (see chapter 15).

However, a variety of federal and provincial laws require lenders and retailers to disclose both how much interest they are charging and how those charges are calculated. These laws include the federal *Interest Act* (IA), and part 5 of the provincial *Business Practices and Consumer Protection Act* (BPCPA).

Credit contracts

Most creditors, including lending institutions and retailers, have fairly sophisticated credit agreements that consumers must accept as part of a credit transaction. These contracts, including promissory notes (enforceable promises to repay a debt or loan) and security agreements (see chapter 36), are governed by both the common law of contracts (see chapter 8) and a range of federal and provincial statutes. It is important to understand, however, that a written agreement is not a requirement for all credit transactions. Credit arrangements with friends, for example, are usually as “legal” as those arranged with credit institutions, as long as there was a general intention that the agreement would be binding on the parties.

Special types of creditors

Government

Governments and government agencies can be creditors, just like any individual or corporation. However, they often have special powers that they can use to collect debts owed to them. While in most cases government agencies will not reduce the amount claimed from a debtor, they will in most cases be open to negotiating with a person who is ready, willing, and able to propose a payment plan. Here are a few examples of some of the special methods and rules that apply to governments.

Government of British Columbia

One common method is to deny the debtor certain privileges unless or until he or she makes satisfactory arrangements to pay the debt. Under the *Motor Vehicle Act* (MVA), ICBC may take away or refuse to renew a driver's licence if the person owes fines for motor vehicle-related offences, or money that ICBC has paid on his or her behalf in certain situations where the person has breached the terms of his or her insurance in some way, such as driving while impaired. This power is discretionary, and ICBC will generally be open to negotiating a payment plan. However, if ICBC denies or revokes a licence due to "motor vehicle indebtedness," the debtor can appeal ICBC's action to the Superintendent of Motor Vehicles within 30 business days.

Under s. 83 of the *Financial Administration Act* (FAA), if a person owes money to the provincial government and is also owed money by a third party, the government can serve a notice to require the third party to pay the amount owed directly to the government. This is similar to garnishment (see chapter 27), but is much harsher on the debtor because the courts are not involved, there is no exemption for wages, and the debtor cannot make an application to the court under the *Court Order Enforcement Act* (COEA) to request that the garnishment be set aside or to vary the amount taken. Although the debtor may still be able to challenge the government's action, this would be far more difficult, and a lawyer should be consulted.

The Family Maintenance Enforcement Program (FMEP) is one BC government agency that has special powers to collect debts under the *Family Maintenance Enforcement Act* and Regulations. A person who has a court order or filed separation agreement that requires a payor to pay them spousal or child support can register that order or agreement with FMEP, without charge, if the case has enough of a connection to BC. FMEP then enforces that order or agreement and forwards any payments collected to the person entitled to spousal or child support.

FMEP's powers include the ability to attach (take) wages and some government benefits such as Canada Pension Plan, WCB, and EI benefits. FMEP can also suspend a payor's driver's licence or passport in certain circumstances if payments are not up to date. The FMEP legislation sets out what rights debtors have to challenge actions taken by FMEP. For example, a debtor can apply to vary the amount of wages attached by FMEP if the payor can show what is needed to enable the payor to meet basic expenses, such as for housing and food.

FMEP's website has a guide that lawyers and advocates may find helpful.

Note that FMEP does not have the power to change the amount of child or spousal support that someone owes. If a payor wants to change the amount of child or spousal support that he or she is legally required to pay, the payor must apply to vary the court order or agreement that FMEP is enforcing. (See also Appendix 3.)

Government of Canada student loans

Millions of dollars are lent for educational purposes under federal and provincial student loan programs. Although a student in BC who applies for both a Canada and BC student loan uses only one application form, the loans are repaid separately.

Prior to 1995, Canada Student Loans, which were obtained through banks and credit unions, were 100 percent guaranteed by Human Resources and Skills Development Canada (HRSDC). In 1995, HRSDC negotiated a risk-shared agreement that resulted in the lending institutions sharing the risk should the student default. It meant that, in some cases, part of a debtor's student loan could be sent for collection by Canada Student Loans and part by the lending institution, meaning that the debtor could be dealing with two collection agencies on the same loan.

On July 31, 2000, the risk-shared arrangement between the federal government and participating financial institutions came to an end. The government now directly finances all new loans that were issued on or after August 1, 2000. The administration of Canada Student Loans has become the responsibility of the National Student Loans Service Centre (NSLSC). There are two divisions of the NSLSC, one to manage loans for students attending public institutions and the other to administer loans for students attending private institutions.

Both the Canada and BC student loan programs have various interest relief, debt reduction, principal deferment, and loan revision provisions available to students who are finding it difficult to repay their loans.

It should be noted that a student loan will not be erased by a discharge from bankruptcy (see chapter 3, chapter 4, and chapter 5), which is granted within seven years of a bankrupt's completion of studies. However, a former student can make a special application to be discharged from his or her student loan after five years on the grounds of hardship.

The HRSDC website has information on both student loans (which need to be paid back) and student grants (which do not need to be paid back), and advice on repaying loans.

Loan sharks

"Loan shark" is the slang term for individuals or businesses that lend money at a very high rate of interest. This kind of lender usually sets harsh repayment terms and may resort to threats or actual harm to the borrower if payments are missed (see chapter 28). Even if payments are made as called for, the borrower may end up owing more than was borrowed because of the high interest charges, which are calculated on a monthly or even weekly basis. Police and media reports indicate that there is a considerable underground credit market from loan sharks. Section 347 of the *Criminal Code* makes it an offence to lend money at an interest rate exceeding 60 percent per year (see chapter 30), except for payday lenders licensed under the BPCPA (see chapter 35).

Mortgage brokers

Mortgage brokers negotiate mortgages (see chapter 24) with lenders on behalf of borrowers and, in some cases, extend credit on the strength of mortgages on land that they then "sell" to a third party who receives the monthly payments from the borrower.

Mortgage brokers must be licensed under the BC *Mortgage Brokers Act* (MBA), which is aimed specifically at brokering businesses. Most other financial institutions and individuals who might come within the scope of the MBA are exempt from its licensing provisions, including all savings institutions, lawyers, government lending services, and court-appointed receivers and trustees.

Aside from setting out licensing requirements, the MBA requires the disclosure of borrowing costs in cases where the broker-lender is charging a bonus or other brokering fee (see chapter 30).

Clients should be cautious of obtaining credit through a brokering business. They should know that the cost of borrowing may be higher than from other credit sources.

If a client already has a mortgage from a broker and is now having trouble meeting his or her obligation, the client should consult a lawyer on the various remedies available (see chapter 19).

Pawnbrokers

Until April 2002, pawnbrokers were regulated by the province under the *Pawnbrokers Act* (PA). Some aspects of the *Personal Property Security Act* (PPSA) (see chapter 36) also apply to pawn transactions. Currently, however, the most significant regulation of pawnbrokers is found in municipal by-laws, such as Vancouver's Secondhand Dealers and Pawnbrokers By-law No. 2807.

A typical client problem with pawnbrokers is when the client cannot repay the amount of the loan, the interest, and the pawn fees to redeem his or her possession. In some cases, the effective rate of interest — because it includes pawn fees — exceeds the maximum rate of interest of 60 percent per year set by s. 347 of the *Criminal Code*. Pawnbroking does not fall within the legal exemptions created by payday loan legislation.

"Payday loan" businesses

Certain finance companies make small, short-term, high-interest loans that go by a variety of names: payday loans, cash advance loans, post-dated cheque loans, etc.

As of November 1, 2009, the BPCPA was amended to add a new part specifically to lay out the legislative framework dealing with payday loans. The details of this framework are discussed in chapter 35.

Tax-refund buyers

Some businesses lend people money if the borrower assigns his or her income-tax refund to the lender. The lender calculates the refund and pays the borrower part of the expected refund in cash. The lender then collects the entire refund at a later date.

Because of some abuses by these businesses, the federal government passed a law regulating loans given in exchange for tax refunds.

Under the federal *Tax Rebate Discounting Act* (TRDA), tax-refund buyers must disclose certain lending information to the borrower, including the actual interest rate being charged. The buyers must also keep accurate business records of the borrowers. Most importantly, the buyer must pay the borrower at least 85 percent of the first $300 of a refund, and if the refund is more than $300, the buyer must pay the borrower $250 plus 95 percent of the balance over $300, when the loan is made. A separate fee cannot be charged for completing the tax return.

If the buyer receives more than the expected refund, the difference between the refund and what was calculated must be paid to the borrower. The buyer must send the client a copy of the notice of assessment that Revenue Canada sends with the refund.

Related topics and materials

See *Bankruptcy Act*: Assignments in bankruptcy; *Bankruptcy Act*: Orderly payment of debts; *Bankruptcy Act*: Proposals; Contracts: An overview; Credit cards; Credit insurance; Debtors remedies: Financial remedies; Foreclosure and mortgages; Garnishment and set-off; Harassment; Interest and the cost of borrowing money; Payday loans.

See also How to Communicate with Creditors & Collection Agencies, Credit Counselling Society, and the LSLAP Manual: Creditors' Remedies and Debtors' Assistance, UBC Law Students' Legal Advice Program.

19 Debtors remedies: Financial remedies

Client problem

- Client wants to know how to resolve problems with one or more creditors.

Solving the problem

This section briefly outlines the range of financial remedies a debtor may use to resolve debt problems. Most debt problems are primarily financial problems, not legal problems. Accordingly, a debtor can take several steps that do not involve the legal process. In many instances, a debtor can resolve a problem directly with the creditor, possibly with the assistance of an advocate.

The following solutions apply to debtors who accept liability (responsibility) for a claim by a creditor. If you believe there is a defence that makes the client not legally liable for the claim, see chapter 4, chapter 9, chapter 14, and chapter 23 for ways to resolve the problem, most likely through litigation.

First steps

Many debt problems can be resolved by direct, early communication with creditors. Many debtors make matters difficult by ignoring their problems. Carefully note the history of communication (or lack of communication) between the client and creditor as part of the initial fact gathering.

It is important that resolutions be realistic and that the client be committed to them. For example, a financial solution often involves the client having to cut back on spending. You should review the client's budget arrangements to ensure that a solution is feasible and that the client is likely to follow it.

Solutions

Budgeting out of debt

Most financial solutions involve carefully reviewing a client's household budget and, in some instances, educating him or her as well as acting as a legal advocate. You should be aware of basic budgeting techniques so that you can give clients basic budgeting advice, and supplement this with budgeting materials.

The recipe for budgeting out of debt is usually simple:

1. Clients carefully monitor their expenses.
2. Clients cut back on current expenses.
3. Creditors cooperate (they may be asked to accept a little less each month, for example).

Debt pooling

If a client has several creditors (chapter 18) and a limited amount to pay toward debts each month, debt pooling may be appropriate. Essentially, the client works out how much can go to debts each month after accounting for current living expenses. Each creditor is asked to accept a share from this amount (the pool) in proportion to the amount that is owed. Usually, creditors are asked to accept less per month than they are entitled to receive and to be paid off over a longer period.

Debt pools can be a considerable amount of work to set up and maintain, and they require the cooperation of the client's major creditors. The advantage of pooling is that it allows some flexibility from month to month: if a client has been consistent in his or her payments (or paid more some months), then creditors may be agreeable to taking less for a month or two when the need arises.

Debt pools can be run by the client alone or by the client with the assistance of an advocate (or other credit advisor). The Credit Counselling Society of BC is a reputable, non-profit agency that offers debt pooling and credit counselling services.

Be wary of commercial pooling services, which charge the debtor for their services.

Debt consolidation and debt refinancing

Debt consolidation usually refers to gathering all debts into one payment scheme or with one creditor. For example, a client may be able to get a debt consolidation loan from a credit union to pay off a number of smaller debts. The advantages of such loans are usually that the debtor gets a smaller monthly payment for the one debt, and the interest rate on that loan may be lower than at least some of the smaller credit obligations (e.g., department store charge accounts).

Debt refinancing means getting another credit contract for an existing debt obligation. Refinancing may be with the same creditor or a different creditor. The advantage that a debtor usually seeks in debt refinancing is a lower monthly payment or lower interest rate, or both. The disadvantage is that it could take the debtor more time to pay off the loan.

Settlement

In some instances, a creditor may be willing to accept less than the full amount owed on a debt. The debt may have been in arrears for some time, and the creditor may be willing to accept 50 percent or 75 percent of the amount owed if the debtor can come up with a lump sum to make the payment. The advantage to the debtor is that he or she can have the debt discharged for less than is owed. The disadvantage is that it may be difficult to get a source of credit to fund such a settlement. (Debtors may be able to ask relatives.)

A debtor may be able to use a combination of settlement and instalment payments. For example, if a debtor owes a creditor $10,000, the creditor may be willing to accept a lump sum payment of, for example, $3,500, and monthly payments of $300 for 12 months (for a total of $7,100). The creditor usually insists that the settlement agreement is only valid if the debtor makes the 12 monthly payments. If the debtor defaults on those payments, the creditor will claim the full balance owed.

Interim measures

There are a number of short-term remedies that creditors may agree to:

- Time extensions
- Moratoriums (where the repayment is suspended for a time)
- Suspension of interest charges

If a debtor is temporarily unable to make full payments on a debt obligation because of unemployment, illness, or other cause, the creditor may be willing to allow a few payments to be made up later. Or, the creditor may be willing to suspend (or lower) interest charges for a short period of time.

Related topics and materials

See *Bankruptcy Act*: Proposals; *Bankruptcy Act*: Orderly payment of debts; Contracts: Defences; Court jurisdiction and procedures; Creditors (types of); Examination of debtors; Instalment payment orders; Interest and the cost of borrowing money; Stays of enforcement.

See also Credit Card Debt, MOSAIC; Dealing with Debts: A Consumer's Guide, Office for the Superintendent of Bankruptcy Canada; and the LSLAP Manual: Creditors' Remedies and Debtors' Assistance, UBC Law Students' Legal Advice Program.

In addition, the People's Law School has a series of videos about credit and debt freely available: Consumer Law: An Animation Series on Credit and Debt, Consumer Credit and Debt: Someone Owes You Money, and Consumer Credit and Debt: You Owe Money.

20 Deposits in consumer transactions

Client problems

- Client paid a deposit in a consumer transaction and wants to know how to get it back after deciding not to complete the transaction.
- Client has paid a deposit and now wants out of a transaction, but the seller refuses to return the deposit.
- Client paid a deposit for goods, but the seller goes out of business without delivering the goods.

Summary of the law

This section provides a brief outline of the common law of deposits as it applies to consumer transactions. Deposits in other transactions, such as residential tenancies and purchases of land, are not included in this discussion.

Basically, a deposit is a payment made by a purchaser, usually at the seller's request, as confirmation of a contract. It is paid before the seller fulfills some or all of his or her part of the contract (see chapter 8). Consumers are asked for deposits in a variety of situations where the seller must take some action, such as ordering or manufacturing a product, or providing a service requiring some preparation.

In common law, deposits are forfeited to the seller if the consumer refuses to carry through with the transaction. For example, if the consumer agrees to buy a car and gives a deposit in exchange for the seller's promise of delivery within two weeks, the consumer cannot get out of the agreement simply because he or she changes his or her mind (see chapter 10). The law says, in general, that the seller can keep the deposit as compensation for the consumer breaching the contract (i.e., wanting out of the deal without a legal excuse). However, there are some exceptions to this general rule:

- The seller cannot keep a deposit disproportional to the value of the loss he or she will suffer if the consumer backs out of the transaction. For example, a court might find that a seller who keeps a deposit of 50 percent of the price of a new car is being unfair to the consumer. The dealer may have spent time and money to order the car, but it is likely the car could be sold to someone else to recoup that expense. If the consumer went to court over the matter, a judge would probably order that at least some of that 50 percent be paid back.

- The consumer is generally entitled to get his or her money back if the seller breaches the agreement. For example, if the seller cannot deliver a product, or cannot deliver it within a reasonable time as promised, the consumer is probably entitled to call off the deal and have the deposit returned. If the seller delivers an unsatisfactory product, the consumer is also entitled to have the deposit returned.
- The consumer may be entitled to a refund of the deposit if the deposit was given to a seller with an advertised policy of giving refunds, regardless of the reason.

Buyers' liens under the *Sale of Goods Act*

Under s. 75 of the *Sale of Goods Act* (SGA), consumers have certain lien rights (a lien allows a person's property to be kept until a debt is paid) for deposits paid to sellers. This is an important protection in cases where businesses take a deposit for some or all of the purchase price for goods and then go out of business before delivering the goods.

The lien rights arise in situations where the consumer enters a sales contract for a product that the seller usually sells in the course of its business. These rights give consumers a claim for the amount of the deposit against the assets of the business, including all the goods and the bank accounts of the business. Most importantly, consumer claims that comply with the terms of s. 75 rank ahead of claims of creditors with security interests under the *Personal Property Security Act* (PPSA) (see chapter 18 and chapter 36).

Information gathering

Gather information from the client and from any documents the client has. Be particularly careful about getting full details of the various promises made by the seller for the time of delivery and the quality of the product.

Solving the problem

Before approaching the seller, decide whether the consumer has grounds to ask for some or all of a deposit back. Was the amount paid unfair in relation to the losses of the seller? Has the seller breached the agreement? Are there any other grounds for justifying the consumer getting out of the agreement?

Besides buyer lien rights under the SGA, a consumer may be able to get a refund from his or her credit card issuer if the deposit was charged to the credit card and the goods or services were not delivered (see chapter 15).

If the consumer wants out of the transaction, and has no legal grounds to ask, it may be difficult to get the seller to agree to any kind of refund. In general, deposits are taken specifically to secure buyer performance.

Some alternatives to consider include:

- negotiating a return of part of the deposit, or
- having the consumer take some other good or service instead of the good or service in the initial contract.

Related topics and materials

See Contracts: An overview; Contracts: Defences; Contracts: Opting out and cooling-off periods; Contracts: Remedies; Credit cards; Creditors (types of).

See also the Canadian Bar Association BC Branch's Buying Defective Goods and Door-to-Door Sales, Time-Shares and Contracts You Can Cancel; and the British Columbia Law Institute's Defective Contracts Relief and Unfair Contract Terms.

21 Enforcing judgments against chattels

Client problems

- Creditor has threatened to take the client's car, foreclose against the client, or repossess the client's car.
- Client brings you court documents showing a bailiff has taken his or her chattels.

Summary of the law

Chattels is a legal term that generally refers to a person's moveable possessions. The term "chattels" generally does not include possessions that cannot be moved (like real property; i.e., houses or land). This section deals with the rights of an *unsecured* judgment creditor to have a debtor's chattels seized to satisfy the judgment debt. Secured creditors (creditors with a security interest in some or all of a debtor's chattels) have very different legal rights (see chapter 18).

Actions against chattels before judgment

In general, an unsecured creditor cannot take action against the chattels of a debtor until a judgment is obtained. Only after a judgment has been granted on a debt claim can a creditor look to the assets of the debtor to satisfy the judgment.

Aggressive creditors often threaten action against assets even before a judgment is obtained. (See chapter 28.) Such threats are usually baseless because seizure of chattels after judgment can usually be avoided.

However, two exceptions allow creditors to tie up the assets of a debtor while a legal action is pending (i.e., before a judgment):

- A pre-judgment garnishment (of a bank account, for example) (see chapter 27).
- A *Mareva* injunction (*Mareva* is the name of a leading British court decision that outlines when a court can order a debtor not to dispose

of assets while an unsecured creditor's claim is being processed in the courts. *Mareva* injunctions can only be made by Supreme Court judges — not Small Claims Court judges — under complex circumstances, so a client should consult a lawyer if such an injunction has been threatened or issued).

Actions against chattels after judgment

Once a judgment is obtained, a creditor is entitled to a further order for seizing a debtor's assets to satisfy the judgment. In Supreme Court, such an order is known as a Writ of Seizure and Sale; in Small Claims Court, it is called an Order for Seizure and Sale. The creditor can obtain these orders from court registry staff (a court hearing is not needed). The orders are then delivered to the local court bailiff (see chapter 2) to carry out.

Sections 47 to 78 of the *Court Order Enforcement Act* (COEA) set out the procedure that a court bailiff follows to enforce orders. Usually, the court bailiff requires information from the judgment creditor on which assets may be seized. The asset most likely to be seized after judgment is a car; household goods are not usually worth enough to justify seizure. The COEA also allows court bailiffs to seize other assets such as stocks, bonds, and promissory notes (enforceable promises to repay a debt or loan).

Property exempt from seizure and sale

Under s. 71 of the COEA and the Court Order Enforcement Regulation, a debtor may exempt certain goods and chattels from being seized and sold. The regulation exempts household furnishings and appliances to a value of $4,000; one motor vehicle worth $5,000 (if the debtor is not a maintenance debtor), or one motor vehicle worth $2,000 (if the debtor is a maintenance debtor) (see Appendix 3); and tools and other personal property of the debtor that are used by the debtor to earn income from the debtor's occupation.

When carrying out personal property seizures, the court bailiff must allow the debtor to select goods and chattels to this exemption level. Under COEA, s. 73(2), the judgment debtor must make a claim for exemption within two days after the seizure (or notice of the seizure). This exemption has been strictly interpreted by the courts — the exemption is lost if the claim is not made in time.

The COEA does not provide detailed procedures for claiming the exemption, however. The court bailiff is directed to make a list of the items claimed if the debtor does not deliver one, but as a precaution, it is a good idea to make a list, file it in the court registry, and then personally deliver a copy to the court bailiff — all within the time limit.

If there is a question about the value of assets or ownership of assets, the court bailiff will not actually take possession of the assets, but may seize them in name only. The bailiff does this by having the debtor sign a notice acknowledging the seizure and that the debtor is holding the assets for the court bailiff until the value or ownership is settled. This process is commonly known as a "walking seizure."

Sections 74 to 78 of the COEA provide a somewhat cumbersome process for valuing assets if the court bailiff and the debtor disagree over how much property can be claimed as exempt. Advocates rarely need to resort to this process.

The COEA allows an exemption to be claimed over a debtor's equity in secured goods. Say, for example, a debtor owns a car worth $10,500. Assume there is $5,000 outstanding on a security agreement with a creditor (other than the judgment creditor). The difference between the value of the car and the amount owed to the secured creditor is considered to be the judgment debtor's "equity" in the car. In practical terms, this is the amount of money that the debtor could get after paying off the secured creditor if he or she sold the car.

If the car were a judgment debtor's only asset, it probably would not be worth seizing under an order for seizure and sale, even though it is worth (and could be sold for) $10,500. This is because the secured creditor is entitled to be paid in full first (i.e., $5,000). Then the debtor could claim the $5,000 exemption (if he or she is not a maintenance debtor). Court bailiff costs would probably take up the rest of the $500 balance.

The matter becomes more complicated when the judgment creditor has a judgment against two debtors who own property jointly. The most common example is when spouses who are joint judgment debtors own household assets and a vehicle jointly. The law appears to allow the spouses to combine their exemption claims in this situation, so that, in total, they could claim $8,000 worth of goods as exempt between them.

Other exemptions under BC and federal law may provide additional exemptions for a judgment debtor against any form of judgment enforcement, including seizure by a court bailiff and garnishment:

- The *Insurance Act* (IA) exempts payments from insurance companies under certain annuity contracts.
- The *Credit Union Act* (CUA) exempts certain credit union shares.
- Under the *Indian Act* (Canada) (IA/C), real and personal property of a status Indian or a band situated on a reserve is not subject to seizure, except by other Indians.
- Provincial laws exempt the pensions of teachers and provincial and municipal employees.
- Provincial laws exempt welfare benefits.

- Federal laws exempt EI payments, veterans allowances, and OAP payments.
- The COEA exempts RRSPs, RRIFs, and DPSPs (deferred profit sharing plans).

  Consult a lawyer about how these laws might apply.

Information gathering

Gather and confirm all information on the financial circumstances of the client, including income and expenses, assets and debts, and future prospects for changes in income. Obtain copies of all court documents, particularly copies of the court judgment, the seizure and sale order, and any notice of possession signed by the judgment debtor.

Solving the problem

Assess two matters immediately:

- When the seizure, if any, was made
- Whether there are other creditors aside from the judgment creditor issuing the order for seizure and sale

You must determine the date of the seizure to ensure that the debtor's exemption claim is made within the two-day time limit. If there is any doubt, the debtor should make a claim immediately, after which you can determine the most appropriate remedy for the client.

Determining if there are other creditors is important when you are deciding what remedy to recommend. If there is only the judgment creditor, you may be able to focus on negotiated remedies such as a repayment agreement, or court remedies such as an instalment payment order (see chapter 29). If there are several creditors, you may need to consider more global remedies such as debt pooling (see chapter 19), or remedies under the *Bankruptcy and Insolvency Act* (BIA) (see chapter 3, chapter 4, and chapter 5).

Related topics and materials

See Bailiffs, court bailiffs, and sheriffs; *Bankruptcy Act*: Assignments in bankruptcy; *Bankruptcy Act*: Orderly payment of debts; *Bankruptcy Act*: Proposals; Creditors (types of); Debtors remedies: Financial remedies; Garnishment and set-off; Harassment; Instalment payment orders; Recovery of goods; Repairers' liens; *Personal Property Security Act*: Security agreements; Stays of enforcement.

22 Enforcing judgments against land

Client problems

- Creditor has threatened to take a client's house, or to foreclose or repossess the house.
- Client brings court documents showing the creditor has started one of two types of legal action:
  - a foreclosure
  - an action to have the client's house sold under the *Court Order Enforcement Act* (COEA)

Summary of the law

Foreclosures and enforcement actions are the two main legal proceedings that creditors may bring against a debtor's home. It is important to understand the differences between the proceedings.

Foreclosures

Foreclosures are proceedings brought by creditors who have mortgages against the property. Usually, a person who borrows money to buy a house has to give a mortgage over the house as security for the creditor. If the borrower defaults, the creditor can bring a legal action to take the property and, at the same time, get a judgment for the money owed (see chapter 24).

Enforcement actions against land

Enforcement actions against land are proceedings brought by unsecured creditors (see chapter 18) who have obtained judgments against a debtor. Unsecured creditors do not have mortgages as security. The creditor must first get a judgment, and then bring the enforcement action.

Under the Court Order Exemption Regulation, a judgment debtor whose principal residence is located within the Capital Regional District (Victoria) or Metro Vancouver may claim $12,000 equity that is exempt from seizure. Judgment debtors living outside these areas may claim an exemption of $9,000 equity in their principal residences.

Procedure

Enforcement actions for the sale of land must be brought in Supreme Court under sections 92 to 113 of the COEA. These sections provide a code for the procedure for having the property sold. The judgment creditor's first step is to register the judgment against the debtor's property in the Land Title Office.

If the judgment that the creditor is seeking to enforce by the sale of land was obtained in Small Claims Court, the creditor must begin a Supreme Court action under the COEA to force the sale of the property.

If the judgment that the creditor is trying to enforce by the sale of land was obtained in Supreme Court, the creditor need only file a Notice of Motion in the Supreme Court action between the creditor and debtor.

At the first hearing (called a "show cause" hearing), the debtor must show why the property should not be sold to satisfy the judgment. It is difficult, though not impossible, for debtors to convince the judge to dismiss the creditor's action. Under s. 96(2) of the COEA, if the home of the judgment debtor is on the land, the court may defer the sale depending on how the judgment debtor responds to the terms and conditions, usually instalment payments (see chapter 29), set by the court.

Most often, the judge makes an order for the next hearing in the process. This is a hearing before a registrar held in a more informal setting. The registrar hears evidence on matters such as the value of the property, what creditors have claims (and for how much) against the property, and the debtor's financial circumstances.

The registrar writes a brief report, files it in the court file, and sends a copy to both the creditor and the debtor. Then the creditor has to file a motion for the final court hearing before a judge. At that final hearing, the judge reviews the registrar's report and decides whether to make an order to have the property sold. If the order is made, the creditor can proceed with the sale by forwarding a copy of the sale order to the local court bailiff (see chapter 2). The court bailiff usually arranges for a real estate agent to sell the property.

If the debtor's interest in the land is a joint tenancy or tenancy in common, rather than the entire title, a creditor can still take enforcement action. Essentially, the process is the same, except that if one of the co-owners of the property is not a judgment debtor, then only the interest of the judgment debtor is subject to sale. The buyer/new owner may be the judgment creditor, the non-creditor owner, or a third party. If the new co-owners are not compatible, either one of them may apply for a sale of the entire ownership of the property under the *Partition of Property Act* (PPA).

Information gathering

Confirm which parties the creditor is making a claim against (e.g., is it against one of two spouses? both spouses? guarantors?).

Confirm whether any legal action against the debtor has begun. If a legal action has been started, confirm the nature of the proceedings and the stage the proceedings are at.

Obtain all the facts on the history of the dealings between the debtor and the creditor.

Obtain all the facts on the debtor's financial circumstances, including income and expenses, assets and debts, and future financial prospects.

If the creditor holds a mortgage and has started a foreclosure, the debtor will be served with a foreclosure petition. If the creditor does not have a mortgage, then a Small Claims Court or Supreme Court action for a judgment must be started first. The proceeding for enforcement against the land is taken after judgment.

Confirm with the debtor what legal documents have been served. If necessary, conduct a search at the court registry for legal documents.

Consider conducting a Land Title Office search of the debtor's property to confirm all the charges against the title.

The most significant issue in an enforcement action against land is the equity the debtor has in the land. For this reason, you must obtain a realistic appraisal of the property. The most recent statement from the BC Assessment Authority can help. Alternatively, you could use a real estate agent or qualified appraiser.

Enforcement actions against land are relatively rare because often there is little equity in the land for either the debtor or the creditor. Small amounts of equity ($12,000 in the Capital Regional and Metro Vancouver, and $9,000 elsewhere in the province) are exempt from execution under the Court Order Enforcement Regulation.

Often, other creditors' rights may have priority over an unsecured creditor with a judgment registered against the land. In general, if these creditors' claims were registered against the title to the land before the unsecured creditor's judgment was registered, the holders of these claims are entitled to be paid in full out of any enforcement action sale before any money is paid to the judgment creditor.

Many different types of creditors can have priority, including:

- creditors holding mortgages, and
- government authorities with claims for taxes (e.g., a municipality owed property taxes or the federal government owed income taxes).

Also, the costs of the sale (including lawyers' fees (see chapter 31), court bailiff sale fees, and any real estate agent fees) have to be paid before the judgment creditor is paid.

If there are other judgment creditors on title, a judgment creditor may get little out of an enforcement proceeding. By law, if one judgment creditor brings an enforcement action, all the judgment creditors who have registered their judgments against the land get a share of the sale proceeds based on the size of their claim. There is no priority of time among judgment holders, as there is with most other creditors. This means that if a creditor with a relatively large judgment registered against the land after a creditor with a small judgment, the former still gets a proportionally larger share of the sale proceeds available after the priority creditors (those who are judged to be entitled to be paid first) are paid in full.

Solving the problem

Review all of the debtor's financial circumstances. If there are other creditors, consider a remedy (see chapter 19) that includes all creditors.

Consider whether it is feasible for the debtor to sell the property and pay off all creditors.

If there is only one significant creditor, consider negotiating a financial solution that works for the debtor's circumstances. This might include:

- making a settlement,
- temporarily lowering instalment payments,
- temporarily suspending payments, or
- granting additional security to the creditor.

If no financial solution is possible because the debtor has no foreseeable ability to pay on the judgment, it may still be possible to convince the creditor to suspend the enforcement action if you can show the creditor that there will be little equity available for the judgment.

As a final alternative, the debtor can defend against the enforcement action. This might be possible if:

- there appears to be some equity in the property for the judgment creditor, and
- the debtor has no foreseeable ability to pay on the judgment.

Based on the case law, there are a number of possible outcomes. In extreme circumstances, the court might be persuaded to dismiss the action at the show cause stage if a sale would produce extreme hardship for one or more of the judgment debtors.

The court might be persuaded to order a deferral of the sale at the final hearing when the registrar's report is considered. Section 96 of the COEA provides in part: "where a premises situated on the land … of a judgment debtor is the home of the debtor, the court may defer the sale, subject to the performance by the judgment debtor of terms and conditions of payment or otherwise as the court imposes."

The court might be persuaded to defer the order for sale to allow the debtor to try to sell the property. The advantage of this approach is that the debtor may be able to get a better price for the property than if the property is sold by the court bailiff.

Related topics and materials

See Bailiffs, court bailiffs, and sheriffs; Court jurisdiction and procedures; Creditors (types of); Debtors remedies: Financial remedies; Enforcing judgments against chattels; Foreclosure and mortgages; Instalment payment orders; Lawyers' fees.

See also Dealing with Debt: A Consumer's Guide, Office of the Superintendent of Bankruptcy Canada.

23 Examination of debtors

Client problem

- Client has been served court papers requiring him or her to go to a hearing to answer questions about his or her ability to pay a court judgment.

Summary of the law

Once a judgment is taken against a debtor, the creditor has a number of legal methods to enforce the judgment. One method, available in both Small Claims Court and Supreme Court, is a kind of enforcement hearing (a hearing to gather information about the debtor's financial situation and have an order made). At this hearing:

- the debtor is questioned about his or her ability to pay,
- the creditor has an opportunity to find out the financial circumstances of the debtor, and
- the creditor can get a judgment payment order against the debtor.

The proceedings differ between Small Claims Court and Supreme Court.

Small Claims Rules

The emphasis in the Small Claims Rules is on the creditor and debtor coming to a payment arrangement, assuming the debtor is obliged to pay the debt. If a judgment is made against a debtor but a payment order was not made at trial, the judgment creditor can initiate a payment hearing under Small Claims Rule 12.

The judgment debtor is served with a summons for this hearing and must attend. Failure to attend can result in the debtor being declared in contempt of court. At the hearing, the judge considers the financial circumstances of the debtor and may order a payment schedule (see chapter 29).

Supreme Court Civil Rules

Under the Supreme Court Civil Rules, there are two examination processes. The Supreme Court process most similar to the Small Claims Court payment hearing is called the subpoena-to-debtor process. This is outlined in Rule 13-3 of the Supreme Court Civil Rules. Under this process, the judgment debtor (the person who owes money) is summoned to a hearing to look into the debtor's financial situation. If the debtor does not attend, he or she may be declared in contempt of court (see chapter 7). Under the subpoena-to-debtor process, the registrar (or master) who holds the hearing examines (or allows someone to examine) the debtor. The registrar can make a payment order.

The other examination process, under Rule 13-4, is an examination in aid of execution. At an examination in aid of execution hearing, the judgment creditor (the person or organization to whom money is owed), or its lawyer, asks the debtor questions about the debtor's income, assets, and other finances. Usually a court reporter is present to record the questions and answers. For this hearing, the judgment debtor is served with a notice, called an appointment, which sets out when and where the hearing will be held.

Information gathering

In some instances, clients may have ignored the legal proceedings taken against them. An examination hearing in either court may be the first hearing they attend. You must get a client's full financial picture, including a history of the court proceedings. Obtain copies of all relevant court documents, either from the client or from the court registry. Be careful to note the date of the hearing.

Solving the problem

If the client has ignored the legal process to date, advocates may need to explain the entire process. It may well be, for example, that a default judgment was taken against the debtor. (You may want to satisfy yourself that, even at this late date, there is no defence or cause of action for the client. There may still be a remote possibility of applying to set aside the default judgment or commencing a legal action against the judgment creditor.)

Explain to the debtor how important it is to attend the hearing. At the same time, review the debtor's circumstances to consider how best to resolve his or her financial difficulties. If the judgment creditor is the client's only creditor, consider negotiating some kind of financial solution on behalf of the debtor before the hearing. This might mean that the hearing need not be held. If there are other creditors, other types of financial or legal solutions may be necessary.

If an arrangement with the creditor cannot be made, you may be able to assist the debtor in obtaining an instalment payment order at the hearing. Small Claims Court judges can make instalment payment orders at payment hearings, and Supreme Court registrars can make instalment payment orders at subpoena-to-debtor hearings (an inquiry into the income, expenses, and assets of a judgment debtor). You may be able to use these hearings to your client's advantage. An instalment payment order protects the client: in both courts, the creditor cannot take the enforcement process any further so long as the judgment debtor is not in default of the instalment payment order.

Related topics and materials

See Contempt of court; Court jurisdiction and procedures; Debtors remedies: Financial remedies; Instalment payment orders.

24 Foreclosure and mortgages

Client problems

- Client has missed a mortgage payment and is worried about legal action by the mortgage lender.
- Client has received a foreclosure petition and wants to know his or her rights.

Summary of the law

The law of real property mortgages (i.e., mortgages of land) and of foreclosures is complicated. In most instances, a person who has a problem with a mortgage and faces foreclosure should get the advice of a lawyer. This section gives advocates an overview of some of the key principles of these areas of law.

Mortgages

There are two legal aspects to a mortgage of land:

- A contractual promise to pay the money being lent
- Giving security over the land to ensure payment

Historically, the security aspect of a land mortgage meant the borrower was actually transferring the land to the lender until the mortgage was paid off. This did not mean that the lender went on the land title as the owner — the borrower was still the registered owner — but the mortgage lender was shown as a charge against the title. The notion of transfer meant that the lender had certain rights to take the land if the debtor defaulted. The court process that the lender had to initiate was a foreclosure (where the lender can take back the property if mortgage payments are not kept up). Amendments to the *Land Title Act* (LTA) have abolished the concept of transfer, but the rights of the mortgage lender to foreclose remain.

The mortgage registration process has been greatly simplified in recent years because many mortgages have similar terms. Most lenders insist on using their own standard mortgage contract, with few variations. Under the LTA, mortgage lenders can file a copy of their standard mortgage terms at the Land Title Office, rather than filing a copy of the same terms for each mortgage. If the terms vary at all, the lender can file a document that shows only the changes. An important protection for borrowers is that the lender must still give the borrower a copy of the standard mortgage terms (and any modifications) when the mortgage is signed.

While most institutional lenders have their own standard terms, the LTA provides an alternative that lenders can adopt as their standard form of mortgage. While it is beyond the scope of this manual to go into detail about all the terms of a mortgage, the following are some of the more important aspects to understand.

Promises of the borrower

The fundamental promises of the borrower in any mortgage are to pay the amount borrowed on time and to give the property as security in case of default. In most mortgages, the borrower also promises to pay the property taxes, to keep the property in good repair, and to insure buildings on the property against fire and other risks.

Amount borrowed

The mortgage states the principal amount lent to the borrower, the interest rate at which the money is lent, and the periodic payments the borrower must make. The mortgage will also state the frequency of the payments, which can be weekly, bi-weekly, monthly, etc.

Length of the mortgage

There are two time periods relevant to most mortgages: the “term” of the mortgage and the “amortization” period of the mortgage. The amortization period refers to the length of time to pay off the whole mortgage. A typical amortization period for a new mortgage is 25 years.

The term of the mortgage refers to the length of time the borrower and lender agree that the borrower can have the money at an agreed rate of interest before, technically, the borrower has to pay back the remaining balance. Typically, lenders and borrowers agree on terms ranging from one to five years. While at the end of that time the borrower is technically required to pay back the remaining balance, it is almost always the case that the parties agree to extend the term for another period of time at a renegotiated rate of interest.

Prepayment rights

One of the most important aspects of consumer mortgages is the right to prepay the mortgage (see chapter 37). A "closed" mortgage is when the parties agree that the borrower has no right to pay out the mortgage earlier than the end of the mortgage term (e.g., one, two, or five years). An "open" mortgage is when the parties agree that the borrower can, if he or she wants to, pay out the mortgage during the term of the mortgage.

Because prepayment rights benefit the borrower, most lenders charge a higher rate of interest for open mortgages, particularly for ones with longer terms. Some lenders offer a compromise between open and closed mortgages: mortgages that give a partial right of prepayment. A lender may agree to accept additional payments during the term of the mortgage (for example, 15 percent of the balance owing, in any 12-month period without penalty).

Assumption rights

When an owner-borrower wants to sell property with a mortgage on it, there are two basic options:

- Pay out the mortgage (such as with the sale proceeds).
- Have the buyer assume the mortgage (i.e., take over responsibility for paying the mortgage).

The assumption of mortgages may be important when interest rates are rising, or when the prospective buyer has trouble qualifying for a new mortgage loan. Typically, mortgages say that an existing borrower-owner cannot contract to have a buyer assume the mortgage without the approval of the lender. Historically, lenders were reluctant to release owner-borrowers from their promise to pay when a mortgage was assumed. As a result, some borrowers remained liable long after the property was sold, and if the subsequent owner defaulted, the original owner-borrower could still be responsible for the mortgage.

There are some important provisions in the *Property Law Act* (PLA) that deal with the assumption of mortgages over residential property. The most important provisions give protection to owner-borrowers who want to sell their property, with their purchasers assuming the existing mortgage.

Under the PLA, there are two ways for the original owner-borrower to be released from a promise to pay:

- The owner-borrower can request a release at the time of the sale.
- Three months after the existing term of the mortgage has expired, the owner-borrower will be released anyway, unless the lender has made a specific demand for payment.

An important protection for owner-borrowers is that creditors cannot, by law, unreasonably refuse to grant release requests. As a result of these changes in the law, it is unlikely that advocates will encounter the problem of former owner-borrowers not being released from all their mortgage obligations when a house is sold.

Default in the mortgage

The most common way for a borrower to default in a mortgage is by failing to make the required periodic payments. However, most mortgages give lenders many other rights to declare the mortgage in default, including a failure to pay the property taxes, abandonment of the property, bankruptcy by the borrower (see chapter 3), and adding further mortgages to the land without the permission of the existing mortgage lender.

An important right of the creditor, triggered upon default, is the contractual right to accelerate the agreement, which allows the creditor to claim the full balance owing, not merely the arrears.

Remedies of the lender

A plain reading of most mortgages appears to give mortgage lenders a frightening list of remedies against the borrower when there is a default. Older mortgage clauses spoke of the right to take possession of the land, to sell the land by private auction, to appoint a receiver, or to "take whatever action is necessary to take, recover, and keep possession of the land." In fact, in most instances, mortgage lenders are restricted, for both practical and legal reasons, in taking foreclosure proceedings against the borrower.

Foreclosures

Foreclosure is the most common way for a mortgage lender to enforce its rights under a mortgage that is in default. Historically, foreclosure was the legal process by which the lender closed off the right of the borrower to get the title back, back when mortgaging meant there was an actual transfer of the property to the lender until the mortgage was completely paid. Under the present LTA, there is not an actual transfer of the property to the lender, but the remedy remains essentially the same process: the lender goes to court to get the property or to get the property sold in order to recover the money lent.

The process

Foreclosures are started by petition, under the Supreme Court Civil Rules. If there are no special circumstances to suggest a lender should delay starting a foreclosure, the process is usually started around the third month that the mortgage is in default. The law requires the borrower to be served with the petition.

In most mortgage default cases, there is no formal trial on the issue of default. Because the default is usually not seriously in doubt, and because in most instances debtors do not have a defence to the claim for the amount owed, the Supreme Court Civil Rules allow foreclosures to be heard in a fairly summary manner.

The first hearing is usually held in Supreme Court Chambers — a special, more informal setting of the Supreme Court, where the evidence is presented through affidavits, rather than oral testimony of witnesses. The first hearing is usually held within three weeks to a month of when the petition was served on the borrowers, and is likely to be over in a matter of minutes unless the foreclosure is contested.

At the first hearing, the lender asks for a number of court orders, including judgment against the borrowers, legal costs, and an order setting the length of time that the borrowers have to come up with enough money to at least pay the arrears. That period of time is called the "redemption period." Under very historic principles of equity law, as well as under the *Law and Equity Act* (LEA), s. 16(2), that redemption period must be six months unless a shorter or longer period is justified. Increasingly, lenders are applying for and courts are granting shortened redemption periods, particularly in cases where the debtor has little or no equity in the property.

The courts will almost always set a very short redemption period if the debtor has abandoned the property, or the debtor is "wasting" (i.e., destroying) the property.

At the end of the redemption period, the lender has a choice of remedies:

- Apply to the court to have the title to the property transferred to the lender's name (called obtaining a "Final Order of Foreclosure").
- Apply to the court to have the property sold (called obtaining "Conduct of Sale").

Sometimes, before the redemption period expires, a mortgagee or another creditor (e.g., second or subsequent mortgage lender, or creditor with a judgment registered against the title) will ask for a Conduct of Sale. In some instances, then, a borrower may find that he or she cannot stay on the property during the full length of the redemption period.

Information gathering

While foreclosure is a legal process, the real factors in any foreclosure are financial, including the value of the property, the amount owed on the mortgage(s) on the property, the presence of any other financial claims against the title (e.g., a judgment), and the financial circumstances (both short and long term) of the debtor. To help a borrower who faces foreclosure or has been served with a petition, you must collect and evaluate all of his or her financial information.

The value of the property can be estimated from the most recent assessment authority notice or civic property tax notice. Alternatively, a real estate agent may be willing to give an estimate, or the borrower can obtain an appraisal from a certified appraiser. The amount owed under the mortgage will be available from the foreclosure petition.

If a foreclosure has not been started, the information can be obtained from the lender.

You must have a full picture of the borrower's finances, particularly the charges that are registered against the title or are relevant to the title (e.g., other mortgages, judgments, liens, property taxes, tax levies from Revenue Canada). Again, at least some of this information can be extracted from the foreclosure petition. Alternatively, start by conducting a title search of the property at the Land Title Office.

Solving the problem

A borrower's rights and remedies in a foreclosure proceeding can be divided into two categories:

- Rights and remedies that relate to redeeming or reinstating the mortgage.
- Rights and remedies that relate to the foreclosure process itself.

Reinstating and redeeming

Reinstating a mortgage means bringing it back into good standing by paying all the arrears, as well as the creditor's legal costs. The arrears are usually calculated to the date of reinstatement, not to the end of the redemption period (LEA, s. 19). This means, for example, that the creditor cannot claim six months' interest (i.e., interest for the usual full length of the redemption period) if reinstatement is offered after the first month of the redemption period.

If a borrower's financial problems were temporary and are now resolved, reinstatement may be possible. If a debtor can come up with the full amount needed to reinstate, and it is realistic to expect the borrower to be able to maintain the required payments after reinstatement, a creditor will usually agree to reinstatement. If a creditor does not agree, and if the debtor does have the funds, an application can be made for a court to order reinstatement under s. 25 of the LEA.

Reinstatement is basically relief against the acceleration right that the lender will usually exercise in a foreclosure proceeding. Reinstatement is only available when the term of the mortgage has not expired. For example, if there is a three-year term and default and foreclosure occur in the first year, reinstatement is viable (possible); the reinstated mortgage, if kept up to date, would run for at least two years. If default occurred right at the end of the three-year term, reinstatement is not viable, because once the term of the mortgage has expired, the right to reinstate lapses.

Redeeming the mortgage means paying it out. The borrower has to pay the principal amount owed, interest, and legal costs; the borrower also has to pay all property taxes in arrears. In practical terms, the borrower has two sources of funds for redeeming:

- Another creditor willing to advance funds
- A buyer of the property, where the sale proceeds are used to redeem the mortgage

The option of redeeming a mortgage again depends on the borrower's financial circumstances. If the borrower has equity in the property, and if there is little likelihood of reinstatement because the debtor's long-term financial prospects are poor, it may be advantageous to try to sell. The borrower can try to sell the property during the redemption period, though the ability to sell may be hampered if a creditor has obtained an order for Conduct of Sale.

Foreclosure

Even if redemption or reinstatement is impractical, advocates should ensure that the borrower's full rights are safeguarded during the foreclosure process. Here are some points to watch for:

Legal costs: In general, creditors can only claim a fixed scale of legal costs, under Appendix B, rule 5, of the Supreme Court Civil Rules.

Venue: Under the LEA, s. 21, if a municipality has a Supreme Court registry, foreclosures should be started in the municipal jurisdiction of the property. Outside municipal boundaries, or where there is no Supreme Court registry in the municipality, foreclosures begin at a registry within the judicial district of the property. This provision attempts to ensure that borrowers have reasonable access to the court process, and ends the practice of lawyers in the Lower Mainland starting actions in Vancouver or New Westminster for properties located in the far reaches of the province.

Redemption period: If the lender is asking for a redemption period of less than six months, the lender is obliged to justify the shorter period. You may be able to help borrowers present evidence to court that opposes a creditor's request for a shortened redemption period.

Conduct of Sale: During the redemption period, the lender and/or other creditors may apply for a Conduct of Sale. Borrowers may be able to oppose an order by showing that there is equity in the property and that they are making reasonable efforts to sell the property themselves. Borrowers may be able to argue that their efforts to sell the property are preferable, since creditors may be inclined to want to sell the property faster, at a lower price, than the borrower would like.

Even where an order for Conduct of Sale is made, the borrower may be able to oppose the approval of the sale. Court approval must be obtained for any sale — the creditor with a Conduct of Sale presents a buyer's offer at a court hearing. The borrower may be able to argue that the offer is not enough, and that more time should be allowed to get a better price.

Extending the redemption period: When the lender is asking for a Final Order of Foreclosure, the borrower may be able to argue that the redemption period should be extended. The borrower needs to show that there is reasonable equity in the property to protect the lender for the full amount owed, and the borrower needs to show that there is a reasonable likelihood of sale or redemption within the additional time. In residential foreclosures, borrowers may be given between one and three months; in foreclosures of farm property, sometimes the courts have given longer extensions.

Facilitating the borrower in moving from the property: Where no other remedy is available, and where the borrower must finally leave the property because it has been sold under a Conduct of Sale order or because the lender has obtained a Final Order of Foreclosure, you may still be able to help the borrower move from the property.

Both orders stipulate a date when the debtor has to give vacant possession. With Final Orders of Foreclosure in particular, there is usually some small negotiability in the date when the borrowers must move. This is because the cost and upset factor in a forced removal can be high for both the lender and the borrower. For example, if a final order requires vacant possession during the middle of a month, a lender may agree to allow possession until the end of the month, while the borrower arranges other accommodation. In these circumstances, you must give the lender reasonable assurances that the borrower will move on the agreed date and that the property will not be allowed to deteriorate in the meantime.

Financial solutions after sale of the property: Where there has been a forced sale of the property, the borrower may come out of the foreclosure process still owing a considerable amount of money to the foreclosing creditor, as well as to other creditors with mortgages or judgments registered against the property. There may have been claims against the property in excess of the selling price of the property. If creditors' claims are not satisfied through the foreclosure, creditors can continue to claim any balance due. Clients may be under the impression that since they have lost their house, all the creditors' claims are extinguished — this is not the case.

Having seen the borrower through the foreclosure, it may be necessary to look to other remedies, including either a proposal or an assignment in bankruptcy under the *Bankruptcy and Insolvency Act* (BIA), or some form of negotiated settlement with the creditors.

Related topics and materials

See *Bankruptcy Act*: Assignments in bankruptcy; *Bankruptcy Act*: Proposals; Enforcing judgments against land; Interest and the cost of borrowing money; Prepayment rights.

See also *Can't Pay Your Mortgage?: What You Can Do If You're Facing Foreclosure* (Legal Services Society, 2012), and the Canadian Centre for Elder Law's Reverse Mortgages. The Canadian Bar Association BC Branch website offers some useful information on Buying a House, Foreclosure, and Mortgages and Financing a House Purchase.

25 Foreign claims and judgments

Client problems

- Client tells you that a creditor is trying to collect on a debt or judgment from another province or from the United States.
- Client has been served with legal documents from another province or the United States that show that a creditor is suing or threatening to sue the client in that jurisdiction.

Summary of the law

This section provides a very brief introduction to the law on claims and judgments that originate outside BC. In general, you should consult a lawyer about such claims. This section does not cover enforcement of maintenance claims under family law statutes (see Appendix 3).

A "foreign" claim or judgment means a claim or judgment by a creditor made in a jurisdiction outside the province of British Columbia. Thus, the province of Alberta is a foreign jurisdiction, as is the state of Washington. There are special rules in common law and in BC's statute law governing how foreign claims and judgments are handled in BC courts.

The law of foreign claims and judgments is complex. A claim or judgment may eventually be enforceable against the debtor in BC. Debts are not left behind if a debtor moves from Ontario to BC, for example.

If a debt was incurred in a foreign jurisdiction and the debtor is now in BC, the creditor usually has a choice of suing the debtor in the foreign jurisdiction or in BC. If the creditor sues on the debt in BC, the debtor can respond and consider appropriate BC court remedies in the usual way (see chapter 14).

If the creditor sues on the debt in the foreign jurisdiction, the debtor faces the obvious disadvantage of trying to defend or resolve the matter in that jurisdiction. Creditors almost always first sue in the foreign jurisdiction (i.e., foreign to the debtor) because it is usually more convenient for them. Just because the debtor does not live there does not mean that the courts there will not let the case go ahead. In general, as long as the creditor satisfies the court that the debt arose in that jurisdiction and that the debtor has been served with the necessary court paperwork for that jurisdiction, the court will give a judgment.

Once a creditor has a judgment in the foreign jurisdiction, he or she may then take enforcement steps in BC. The law says there are two main ways a creditor can begin enforcement:

- By starting a new legal action using the foreign judgment as a cause of action
- By registering the foreign judgment under provisions in the *Court Order Enforcement Act* (COEA)

Whichever process is used, the debtor faces a further problem: the statute law and case law on enforcing foreign judgments severely restrict the defences the debtor can raise. In general, defences are limited to procedural fairness in how the judgment was taken in the foreign jurisdiction. The trend in Canadian case law has been to restrict the interpretation of instances when those procedural defences are available.

Information gathering

Obtain full information on the client's financial situation, as well as the details of the foreign claim. Be particularly careful about checking the time limits for the debtor to respond to court proceedings in the foreign jurisdiction or in BC.

Solving the problem

If there is an issue of liability, whether the client is being sued in the foreign jurisdiction or has had a judgment made there and is now being sued in BC, you should get a lawyer to review the matter.

If the client admits the claim (or judgment), you may be able to help arrange a repayment scheme.

Alternatively, you may assist the debtor in seeking other financial remedies that include the foreign debt. For example, the debtor can usually include the foreign claim or judgment in an assignment in bankruptcy (see chapter 3).

Related topics and materials

See *Bankruptcy Act*: Assignments in bankruptcy; Contracts: Defences; Court jurisdiction and procedures.

26 Fraudulent conveyances and fraudulent preferences

Client problems

- Client asks if it is permissible to "hide" assets from creditors or a court bailiff.
- Client asks if it is permissible to pay off a relative who is a creditor, but not other creditors.
- Client asks if he or she can avoid creditors coming after the client's house by transferring it into the name of his or her spouse, who is not legally liable for the debts of the client.

Summary of the law

Many debtors actively try to avoid creditors' claims against them, either legally (by an assignment in bankruptcy, for example [see chapter 23]) or illegally. This section briefly outlines the basic legal and ethical issues to watch for when clients ask "what if" questions. (See also the comments on ethics at the beginning of this manual.)

Fraudulent conveyances

Under the *Fraudulent Conveyance Act* (FCA), disposing of property to delay, hinder, or defraud creditors is illegal. The law still sees it as the debtor's property and so allows creditors to continue to get at that property.

The most common disposal of property of interest to the FCA is the transfer of property to a relative, such as a spouse. If a husband and wife jointly own a house for many years and suddenly the husband transfers it to his wife just as a creditor begins a legal action against the husband, the transfer might be considered a fraudulent conveyance. Transferring chattels (personal, moveable possessions; see chapter 21) under the same circumstances might also be considered fraudulent.

If a creditor feels that a disposition was fraudulent within the meaning of the FCA, it can bring a court action against the debtor and attempt to get at the asset as part of its enforcement steps.

Fraudulent preferences

Under the *Fraudulent Preference Act* (FPA), if a debtor cannot pay his or her creditors and makes a transfer or payment favouring one particular creditor, that transfer or payment is considered a fraudulent preference and is void. The debtor is said to have "preferred" that one creditor over the others. This situation is probably more likely to arise in commercial situations than in consumer situations. However, it may arise, for example, in situations where the debtor borrows money from a relative and pays off the relative but does not pay any other creditor.

If a creditor feels that a transfer is fraudulent according to the FPA, it can bring a court action against the debtor and attempt to get at the money (or other asset) transferred as part of its enforcement steps.

Solving the problem

Fraudulent conveyances and fraudulent preferences are among the most troubling situations for lawyers who advise debtors. The Law Society has repeatedly expressed concern that lawyers be extremely careful when clients ask for legal advice in this area of law. A debtor may ask questions about ordering his or her financial affairs when a creditor or creditors are pressing the debtor, or ask the lawyer to carry out a transfer for the debtor (such as a conveyance of an interest in land) under similar circumstances.

If you encounter a client who has already made what appears to be a fraudulent conveyance or fraudulent preference, tell the client to seek the advice of a lawyer.

It is unlikely that a client will ask you to actually assist in a fraudulent conveyance or transfer. More likely are the "what if" questions from clients who want to know the legal limits of ordering their affairs to avoid creditors.

Since this area of the law is a difficult one from both a substantive and an ethical viewpoint, you should probably decline to answer a client's questions in this area and seek the assistance of a lawyer. At the same time, ensure that the client is aware of his or her options for practical, appropriate remedies.

Related topics and materials

See *Bankruptcy Act*: Assignments in bankruptcy; Court jurisdiction and procedures; Debtors remedies: Financial remedies.

27 Garnishment and set-off

Client problems

- Creditor has threatened to garnishee the client's wages or bank account.
- Creditor has garnisheed the client's wages or bank account.

Summary of the law

Garnishment is a statutory remedy governed by part 1 of the *Court Order Enforcement Act* (COEA). It allows a creditor access to money owed to a debtor by someone else (i.e., a third party). The most common assets garnisheed (redirected to a creditor) are wages and bank accounts. For example, suppose an employer (the third party) owes wages to an employee (the debtor). The creditor may be able to garnishee a portion of the wages for payment on the debt. When a debtor has money in a bank account, the money in the bank is considered a debt owed to the debtor. The creditor may be able to garnishee the bank account for payment on the debt. Joint debts cannot be garnisheed unless all the persons to whom the debt is owed are also judgment debtors (a person who has been found in a Court judgment to owe money to another party [called the judgment creditor]). For example, a joint bank account may be garnisheed only if all the account holders are also judgment debtors.

Set-off is a remedy that is similar to garnishment but does not require a court order. It is often used by banks when a client has savings on deposit with the bank while having an overdue loan with the same bank (but not necessarily the same branch). In such cases, the bank may be able to "set off" the amount of the overdue loan against the amount in the savings account. For example, if the client has an overdue credit card account of $7,000, but also has $5,000 in a savings account, the bank may apply the funds in the savings account toward the loan, thus reducing the savings account to zero, and reducing the loan to $2,000. Many credit card and loan contracts have terms allowing banks to use set-off.

Some private pension benefits and many types of government income benefits, such as welfare payments, are exempt from being seized by creditors. (For example, see s. 29 of the *Employment and Assistance Act* [EAA].) This means that a creditor cannot use a garnishing order to make the government or pension plan administrator pay the benefits, or any portion of them, to the creditor. Also, there is some case law indicating that such benefits may be exempt from garnishment or set-off even after they have been deposited in a bank account, especially if the purpose of the account is to receive the benefit. (See *Metropolitan Toronto [Municipality] v. O'Brien* and *McIntosh v. Laronde*.) However, this area of the law is not fully developed. Government can give itself a statutory right to set off payment of some government benefits against debts owed to the government — one example being that the Canada Revenue Agency can take at least a portion of a person's CPP benefits in payment of arrears of taxes.

Garnishing orders against bank accounts

To get a garnishing order against a bank account, a creditor must start a legal action in either Small Claims Court or Supreme Court (see chapter 14). The garnishing order can be obtained without a court hearing and without notice to the debtor. The creditor files an affidavit and a draft order with the court registry. A registry official processes the draft order and gives the completed order to the creditor to serve on the third party and the debtor. The affidavit and order must follow a format set out in the schedules at the end of the COEA.

Because creditors often start legal action and get the garnishing order simultaneously, garnishing orders against bank accounts can take debtors by surprise. The first notice debtors may get is when they are served the paperwork for the legal action and the garnishing order at the same time. Or, a debtor's first notice may even be the bank calling to say a cheque has bounced because the account was emptied by the garnishing order.

Garnishing orders against wages

To get a garnishing order against wages, a creditor must have a judgment. Unlike bank accounts, wages cannot be garnisheed before judgment. To get a garnishing order against wages, the judgment creditor follows the same procedures for garnishing a bank account.

When a garnishing order is served on a bank, the bank is obliged to take from the debtor's account as much as is needed to satisfy the order. A bank account can be emptied completely this way. When a garnishing order is served on an employer, the employer is obliged to send the court registry only a portion of the debtor's wages. That portion is usually 30 percent of the net wages due — that is, 30 percent of the amount payable, after statutory deductions for things such as income tax, CPP, and EI. The other 70 percent is exempt from garnishment. When garnishment is for maintenance, the exemption is only 50 percent (see Appendix 3).

Information gathering

If the debtor has only been threatened with garnishment, there is no order or affidavit to review. If the debtor has actually been garnisheed, you must get a copy of both the garnishing order and the supporting affidavit that must have been filed as part of the application for the order. In most instances, the debtor has been served with the order already. If the debtor does not have either the order or the affidavit, obtain copies from the court registry where the order was issued.

Solving the problem

Whether garnishment or set-off is threatened or an order has actually been issued, the matter must be resolved urgently. Review the entire financial circumstances of the debtor. Enforcement action by one creditor may indicate that the debtor has several creditors, and thus the solution should include all creditors.

When dealing with a specific creditor, satisfy yourself that the creditor's claim is valid, both as to the debtor's liability and as to the amount claimed by the creditor. If either issue is in doubt, you should probably refer the matter to a lawyer.

Where a set-off has occurred, there may be no practical solution, except the stop-gap measure of opening a new account with a different savings institution (not at another branch of the same institution), so that further set-offs will not occur in the future. However, if the funds have been taken from an account that is used to receive government income benefits, it may be possible to get the set-off cancelled. In some cases, the bank may voluntarily reverse the set-off if an advocate shows them a copy of the statute that grants the funds exempt status. If the bank does not reverse the set-off, then the only solutions may be to open a new account at a different institution, and/or make an application to court to have the funds refunded.

Where a garnishing order has been made and money has been paid to the court registry, there are two main remedies available:

- **If a garnishing order was made *before* judgment** (such as against a bank account), a debtor can make an application to set aside the garnishing order. The application would not deal with the merits of the creditor's claim; rather, it would deal with the validity of the garnishing process. For this reason, you and the client must consider carefully whether it is worthwhile to make such an application.

An application to set aside a garnishing order is heard by a judge of the court where the order was issued. The debtor either files the application in Small Claims Court or files a Notice of Motion in Supreme Court. In special circumstances, the application can be heard at a registry nearest to where the debtor resides, rather than a more distant court registry. Consult registry staff on how to make such an application.

The grounds for setting aside a garnishing order made before judgment can be found in the COEA. Under s. 3 of the COEA, the affidavit must contain certain information about the claim against the debtor. If the information is wrong, the order will probably be set aside. In general, judges require strict compliance with the COEA. Reviewing a garnishing order before judgment for these technical defects probably requires a lawyer because there is a great deal of case law on the requirements of s. 3.

Under s. 5 of the COEA, a judge has the discretion to set aside the garnishing order, even if the order and affidavit are technically sound (i.e., there are no defects under s. 3). The COEA says that the judge can do this when it is "just in all the circumstances" to do so. Cases decided under this section have usually been decided on the basis of the merits of the case itself, and also on the basis of how much hardship there would be to the debtor if the money were to remain in court.

Additionally, the creditor may be able to have the garnishing order set aside if it was made against an account used to receive government benefits on the grounds that, as noted above, such funds are exempt from seizure.

- **If the garnishing order has been made *after* judgment** (such as against wages), s. 5 of the COEA is the only realistic ground you can use to have the order set aside (apart from the exempt government funds exemption noted above). The same test applies. However, when a judge sets aside an order made after judgment, an instalment payment order (see chapter 29) must form part of the order to set aside. The advantage of this requirement for the debtor is that so long as the instalment payment order is being made, s. 5 says the creditor cannot take other judgment enforcement steps against the debtor (such as having a court bailiff seize assets [see chapter 2]).

Clients may be concerned about being fired if their wages are garnisheed. You can point out COEA, s. 27, which states that employers cannot dismiss or demote employees solely because of the service of a garnishing order on the employer. If they do, employers can be prosecuted for breaches of s. 27.

Related topics and materials

See Bailiffs, court bailiffs, and sheriffs; Court jurisdiction and procedures; Enforcing judgments against chattels; Instalment payment orders.

See also the Canadian Bar Association BC Branch's information on Garnishment and the Law Centre's Small Claims Court Factsheets: Garnishing Orders.

28 Harassment

Client problems

- Client says a creditor is unfairly trying to collect when the client has no money to pay a claim.
- Client says a creditor is persisting in contacting him or her even though the client disputes the debt.

Summary of the law

When a debtor refuses, or is unwilling, to pay a creditor's claim, it is very likely that there will be friction between the two parties. Creditors are indignant that the debtor is not paying, while the debtor is indignant that the creditor is unfairly pressing for payment. Communication often breaks down, leading to pressure from the creditor, which the debtor feels is unreasonable.

There are various provisions in the common law, as well as federal and provincial legislation, limiting or providing remedies against harassment. Tort actions (brought by a private citizen) (see chapter 42) against creditors in common law are possible, but unlikely. There is no specific cause of action for "harassment" or "invasion of privacy" in Canada. A debtor might have a tort claim of nuisance against a creditor if a creditor's collection tactics are extreme (e.g., persistent, abusive phone calls). Some case law suggests that intentional mental harm may also be a tort. Naturally, if a creditor assaults a debtor during collection efforts, the debtor has a tort claim. Consult a lawyer if your client is considering bringing a common-law tort action against a creditor.

Legislation

Business Practices and Consumer Protection Act

Division 1 of Part 7, sections 113 through 124, of the *Business Practices and Consumer Protection Act* (BPCPA) deals with prohibited collection practices.

These prohibitions apply both to the original creditor and to any assignee, such as a collection agency (see chapter 6). The term “collector” in this section applies to both.

Section 114 prohibits communication or attempted communication with a debtor; a member of the debtor’s family or household; a relative, neighbour, friend, or acquaintance of the debtor; or the debtor’s employer in a manner or with a frequency that constitutes harassment. Situations that constitute harassment include:

- using threatening, profane, intimidating, or coercive language;
- exerting undue, excessive, or unreasonable pressure; and
- publishing or threatening to publish a debtor’s failure to pay.

The BPCPA restricts how, where, and when a collector may communicate with a debtor in attempting to collect a debt. A collector, other than a creditor attempting to collect its own debt, must give the debtor written notice of the name of the creditor, the amount of the debt, and the identity and authority of the collector at least five days before initiating verbal contact with the debtor.

A collector may only verbally contact a debtor at work once, and only in limited circumstances. A collector may only contact a debtor’s employer for the purpose of confirming a debtor’s employment or with the authorization of the debtor.

A collector may not continue to verbally contact a debtor if the debtor has requested that the creditor contact the debtor in writing only.

A collector may not continue to communicate directly with the debtor if the debtor has directed that all communication be with the debtor’s lawyer, or if the debtor has notified the collector and the creditor that he or she disputes the debt and wants the matter taken to court.

A collector must not communicate by phone or in person with the debtor, a relative, or a friend on a statutory holiday, on a Sunday except between 1:00 p.m. and 8:00 p.m., or any other day except between 7:00 a.m. and 9:00 p.m.

Section 120 expressly prohibits a collector from collecting more than the debtor owes or from someone who is not liable for the debt.

In addition to these rules specifically for debt collectors, s. 124 says that collectors cannot use practices that are prescribed in any part of the BPCPA or its regulations.

Consumer Protection BC, also known as the Business Practices and Consumer Protection Authority, publishes some guidelines for collection practices in the “Debt Collection” section of its website. Here are some of the guidelines:

- A collector should not mail a letter to a debtor's place of employment in an envelope that indicates the name of the collection agency and that is not clearly marked "personal and confidential."
- A collector should not use fax, voicemail, or email in a manner that is calculated to embarrass, humiliate, or alarm a debtor.
- A collector must not use profanity or other verbal abuse to locate a debtor or to collect a debt.

Section 171 of the BPCPA allows a person who has suffered damage to bring an action against a collector who has contravened the act or regulations. Actions under s. 171 can be brought to Small Claims Court. In *Total Credit Recovery v. Roach*, a debtor was awarded $2,000 compensation for harassing communications by a collection agency. Also of note is a case decided under earlier legislation, *Toban v. Total Credit Recovery*, in which a total of $10,000 in damages was awarded to the claimant for serious harassment, which included abusive calls to his landlord, employer, and family members from whom the collector demanded immediate payment.

In extreme situations, the *Criminal Code* may apply. Specific threats to harm a debtor, as well as repeated visits to a debtor's residence are prohibited under the *Criminal Code*.

Information gathering

When assisting a debtor with a harassment allegation, gather and confirm all information on the financial circumstances of the client, including income and expenses, assets and debts, and future prospects for changes in income. For the specific creditor involved, confirm basic details such as name and address.

Obtain sufficient detail to assess the debtor's liability and the amount the creditor claims is owed. Consider, for example, if the debtor has a defence to the claim if he or she were sued for the debt (see chapter 9 and chapter 19).

It may be useful to have the debtor prepare a written account (with details of the number of times and content) of any contact the creditor has made. You could advise the debtor to keep a record of future unwanted contact as well, though reasonably quick action to solve the problem may ensure an end to such contact.

Solving the problem

There are several aspects to resolving a debtor's allegation of harassment.

Stop the harassment

The immediate concern will probably be putting a stop to the harassment. Even where a debtor is clearly liable on a debt, the law does not allow any creditor to pressure a debtor unreasonably.

It may be difficult for the debtor to act on his or her own if the debtor has been harassed. Intervention by an advocate or lawyer may be more effective. Consider hand delivering or sending a registered letter to the creditor outlining the debtor's circumstances, along with a proposal for resolving the claim. Make it clear if the claim is being denied (in whole or in part), and make it clear, in any event, that the debtor does not want further direct contact. Consider advising the collection agent that if there is further direct contact, the debtor will consider taking legal action.

As an alternative, the debtor might contact Consumer Protection BC for help, letting the creditor know that such a complaint has been made. This contact is usually enough to stop the pressure. It may also be in the public interest to make such a complaint, as the authority may revoke the licence of a collection agent against whom there are a number of complaints.

Look for financial solutions

The broader concern may be the overall financial picture of the debtor. Consider, as always, if there are other creditors that ought to be dealt with at the same time. Consider the short-term and long-term financial circumstances of the debtor, and what remedies are most appropriate.

Consider legal action

If the conduct of the creditor has been particularly persistent, the debtor may wish to take legal action. There are a range of causes of action that can be brought, as described above. Such actions usually require legal advice. Regardless of the degree of persistence, consider carefully with the debtor if he or she wishes to undertake such litigation. Often, debtors are relieved that the financial problems are resolved and have little desire to seek further redress.

In extreme circumstances, the conduct of the creditor might be brought to the attention of the local Crown counsel for prosecution. Prosecutions under collection agent statutes are rare, but in the Saskatchewan case of

R. v. Ens, a debt collector was convicted of harassment after making six aggressive phone calls to a debtor over a two-day period.

Be careful not to violate the spirit of the *Law Society Professional Conduct Handbook*, rule 4(2). This rule prohibits making a threat to report criminal conduct in order to obtain a civil advantage. For example, it would be improper to demand damages (i.e., financial compensation) from the creditor in exchange for not reporting the creditor's conduct to Crown counsel.

Related topics and materials

See Collection agents; Contracts: Defences; Debtors remedies: Financial remedies; Torts: Assault and trespass.

See also the Canadian Bar Association BC Branch's Harassment by Debt Collectors.

29 Instalment payment orders

Client problems

- Creditor has threatened to sue or has sued the client in Small Claims Court or Supreme Court. Client does not deny the claim and says he or she can make reasonable monthly payments on the debt but cannot pay off the whole debt.
- Client has been sued and is concerned that his or her assets will be taken or wages will be garnisheed.

Summary of the law

Most credit agreements call for a debtor to make monthly payments to repay the total amount borrowed. So long as the debtor makes the payments, the creditor generally cannot demand any more. Except in the case of specific types of “demand” credit agreements (e.g., demand promissory notes, demand lines of credit), a creditor cannot suddenly simply decide to demand the full balance due.

However, the creditor is usually entitled to sue for the entire balance due if the debtor defaults on the credit contract (by missing a payment, for example). The creditor is entitled to do this because most contracts have an acceleration clause (a clause that allows the creditor to claim the full amount if the debtor does not meet the terms of the original contract).

If the creditor’s claim for the full amount is successful in court, the law generally says that the debtor is immediately obliged to pay the full amount, rather than just monthly payments. If the debtor has no legal remedies to pursue (see chapter 11 and chapter 19) or is unsuccessful in negotiating an agreement about payment with the creditor, the creditor can then take steps to enforce the judgment, such as by seizure of assets or garnishment (see chapter 27).

Authority for instalment payment orders

In both Small Claims Court and Supreme Court actions, judges have the authority to order that a judgment be paid in instalments, similar to how the debtor may have been making payments on the debt before the judgment. Historically, the courts have required special circumstances before making this kind of order (see *Royal Bank v. McLennan*).

The authority for instalment payment orders comes from various sources:

- ***Court Order Enforcement Act* (COEA)*:*** Under s. 48, where an order has been obtained for a sum of money, it is payable immediately unless the court makes a different order. The court can also:
    - make the order payable by instalments, or
    - suspend the execution of the order as long as it considers it proper.

    Section 48 was applied in the case of *Canadian Imperial Bank of Commerce v. Pegg*, where a rancher was allowed to pay off a judgment by a lump sum payment of about 40 percent of what was owed, plus monthly payments afterward. In making the order, the court decided:
    - the bank was well secured with the judgment, since the amount owed was about one-sixth of the value of the land owned,
    - that the prejudice to the debtor (losing a livelihood) was much greater than to the creditor (waiting a little longer for the money), and
    - that the debtor had been making every effort to resolve the matter with the bank.
- **Supreme Court Civil Rules:** At or after the time of giving a judgment, a judge can "provide that an order for the payment of money be payable by instalments" [Rule 13-2(31)]. The rules also state that if a debtor defaults on the instalment payment order, the full balance once again becomes due.
- **Small Claims Rules:** The current Small Claims Rules are more favourable toward allowing judgments of that court to be paid in instalments than in the past, particularly in Supreme Court. Small Claims Rule 7(14)(c) says instalment payment orders can be made at a settlement conference, by agreement of the parties.

    If a judge finds in favour of a creditor at trial, the judge can order a payment schedule at that time with the agreement of the creditor (Rule 11(4)). If the creditor does not agree, the judge can order a special "payment hearing" for later to determine how the judgment should be paid. Rule 12 covers the procedure for payment hearings and Rule 12(13) gives the court the authority to make an instalment payment order at that hearing.

If no payment order is made at trial, the debtor can still apply after the judgment for a payment hearing (Rule 12(10)). As with the Supreme Court Civil Rules, if a debtor defaults on a payment schedule, the full balance becomes due (Small Claims Rule 11(14)).

- **Other statutes:** Because of the broad provisions of the Supreme Court Civil Rules and the Small Claims Rules, additional authority may not be needed. However, the following provisions may give added weight to arguments in favour of instalment payment orders and may be more efficient to use:
  - **COEA:** Under s. 5, a judgment debtor who has been garnisheed can apply to have the garnishing order set aside and the judgment ordered payable in instalments. So long as the order is in good standing, the creditor cannot issue any further garnishing orders. Section 5 outlines the procedure for applying for an order, and for applying to vary the order if the debtor's circumstances change. Section 5 also says that if the judgment debtor is in default of the instalment payment order for more than five days, the order is terminated.
  - Under s. 96, a judgment debtor can ask the court to defer the sale of the "home of the debtor" if the creditor is applying to have the home sold to satisfy a judgment. Section 96 says the deferral can be made subject to terms and conditions (including instalment payments) that the court orders.
- **Supreme Court Civil Rules:** Under Rule 13-3(11) [before July 1, 2010, under old Rule 42(33)], a judgment debtor can ask the court to make an instalment payment order at a subpoena-to-debtor hearing.

Effect of instalment payment orders

As long as the debtor does not default on an instalment payment order, the debtor is protected from the creditor taking other steps to enforce the judgment. This is certainly clear in Small Claims Rule 11(6) for payment schedules ordered in Small Court actions.

Where instalment payment orders are made under another authority, such as Supreme Court Rule 42(21), the overall extent of the protection is less clear. However, from existing case law and provisions in the COEA and the Supreme Court Civil Rules, garnishment, writs of execution (a court order to enforce a judgment of possession), and applications for subpoena-to-debtor hearings are not allowed if a Supreme Court instalment payment order exists and the debtor is not in default.

Information gathering

There are two important aspects of fact gathering when a debtor applies for an instalment payment order:

- **The financial circumstances of the client**

  Obtain a complete financial picture of the client, including income and expenses, and assets and liabilities. It is particularly important to determine:

  - whether there are any other creditors,
  - the extent of the debtor's assets, and
  - the amount the debtor could pay each month on the judgment.

- **The court in which the creditor is making the claim**

  Information about the court involved will govern what procedures to follow when applying for the instalment payment order.

If the client has been sued, obtain all relevant court documents from the client or from the court registry. If the client has not been sued, determine the amount owing to anticipate in which court an action might be brought.

Solving the problem

Is the remedy viable?

Instalment payment orders are a useful remedy for debtors, but in limited circumstances, as described below:

- The court must generally be persuaded that there are special circumstances to justify such an order. It is the responsibility of the debtor to demonstrate the justification.
- Advocates should take the initiative to propose an instalment repayment agreement with the creditor, whether or not legal action has been started, rather than simply relying on the possibility that the court will make such an order. An application for any instalment payment order should probably be made only if the advocate cannot negotiate an arrangement directly with the creditor.
- The client should not be in default to, or unable to pay, more than one or two major creditors. Applying for orders for several creditors is cumbersome; other remedies such as proposals are probably more efficient.

- The client must have sufficient income to pay off the full amount owed, as well as other debts, within a reasonable time.
- Some case law suggests that courts are less sympathetic to making instalment payment orders if the debtor is cash poor but asset rich. That is, if the client has relatively little income but significant, non-necessity assets, the court may feel that the debtor should sell the assets and pay the creditor with the money earned from the sale.

The procedure

Instalment payment orders must be made in the course of a legal proceeding started by a creditor. For Small Claims actions, the debtor can ask for such an order at a settlement conference or at the end of a trial. Or, after the judgment, the debtor can apply for a hearing according to procedures set out in Small Claims Rule 12.

For Supreme Court actions, the best time to ask for an order is in response to a motion by the creditor for a summary judgment or summary trial. The debtor files and delivers a notice of motion and supporting affidavit in the creditor's court action, asking for the application to be heard when the creditor's application is heard.

Similarly, an application could be made in response to a garnishing order (COEA, s. 5), an application to sell the debtor's home (COEA, s. 96), or a subpoena-to-debtor notice. These orders are somewhat flexible. Small Claims Rule 17(3), COEA s. 5(3) (in place of garnishment), and Supreme Court Rule 42(33) (under a subpoena-to-debtor notice) provide authority for a debtor (and creditor) to apply to vary an instalment payment order once the order has been made, and where there is a change in the circumstances of the debtor.

Related topics and materials

See *Bankruptcy Act*: Assignments in bankruptcy; Contracts: Remedies; Debtors remedies: Financial remedies; Garnishment and set-off.

30 Interest and the cost of borrowing money

Client problems

- Client asks for information concerning interest rates and credit cost disclosure.
- Client wants to know if there is any limit on the interest he or she can be charged for a loan.

Summary of the law

A number of both federal and provincial laws deal with the cost of credit. Each level of government has some constitutional authority over different aspects of the cost of credit. The federal government has jurisdiction over interest, banking, and currency. The provinces generally have jurisdiction over property and financial institutions (other than banks) that operate wholly within the province.

Interest rate ceilings

There is little in either federal or provincial law regulating the maximum amount creditors can charge borrowers. Some years ago, the federal government repealed the interest rate ceilings set under its *Small Loans Act* (SMA). In its place, Parliament passed an amendment to s. 347 of the *Criminal Code*, setting a maximum interest rate of 60 percent per year for all lenders. The section applies to all consumer credit lenders except tax-refund buyers and licensed payday loan lenders (see chapter 18 and chapter 35). Anyone who lends at a higher rate can be prosecuted. And, according to an historic common-law principle that courts will not enforce an "illegal" contract, creditors generally cannot use the civil court system to collect on loans where the rate is above 60 percent per year.

Both the federal and provincial governments have laws setting a maximum rate for how much a borrower can be charged if someone buys the consumer's right to receive money from the government. The most common examples of such rights are for refunds under the federal *Income*

Tax Act (ITA), *Canada Pension Act* (CPA), and *Employment Insurance Act* (EIA). The federal law says the borrower must get at least 85 percent of the first $300 of a return, and $250 plus 95 percent of the balance over $300. (This rate relates to the amount of the refund, and is not a true annual rate of interest because the refund may be received within a matter of weeks. The real return to the lender is actually much higher. The actual rate of return depends on the amount of the refund and the length of time that the lender had to wait for the refund.)

The rate the tax buyer must disclose to the borrower is calculated according to a formula prescribed in regulations to the *Tax Rebate Discounting Act* (TRDA).

Many years ago, the federal government passed the *Interest Act* (IA). However, this relatively short law does not set interest rate ceilings. For consumer loans, the IA simply says that contracting parties are free to bargain for any interest rate they want in the agreement (subject only to other specified federal statutes, such as the TRDA and the interest ceiling in the *Criminal Code*).

The IA also says that if interest is to be calculated on less than an annual basis (daily, weekly, monthly, etc.), the borrower must also be given a yearly rate. If there is no agreed rate of interest (which rarely happens), the IA says a creditor can only charge 5 percent annual interest.

Cost of borrowing disclosure legislation

Credit cost disclosure legislation ensures that borrowers are accurately informed of the charges they must pay for credit. Because there are a variety of ways credit can be granted and charged for, and because there are a number of different methods for calculating those charges with a monthly or annual percentage rate, it is not surprising that many federal and provincial laws and regulations deal with credit cost disclosure.

The complexity of this subject is made more complex by the distinctions in legislative jurisdiction between the federal government and the provinces. Because these differences have not been fully reconciled either by federal-provincial agreement or by court decisions, it is sometimes difficult to explain where one law starts and another ends.

The federal government has legislation on credit cost disclosure through its jurisdiction over interest, income tax, criminal law, and banking. Through its jurisdiction over banks, the federal government has passed Cost of Borrowing (Banks) Regulations under the *Bank Act* (BA) that set out how banks must disclose the interest rate charged on consumer credit agreements, including loans, credit cards, and lines of credit. That rate must be stated as an annual percentage rate. For most consumer credit agreements, the bank must also disclose the cost of borrowing stated as an amount in dollars and cents at the time the credit agreement is made.

Provincially, credit cost disclosure is governed under the *Business Practices and Consumer Protection Act* (BPCPA), part 5. There are different disclosure requirements for fixed credit, such as loans, mortgages, and sales financing agreements; open credit, such as lines of credit and credit cards; and some leases. Fixed and open credit agreements require disclosure of the annual interest rate and the circumstances under which interest will be compounded. Leases and fixed and open credit agreements, which are not credit cards, must disclose the annual percentage rate calculated in accordance with the regulations.

If a fixed credit agreement has scheduled payments, the disclosure must include the total cost of credit. In the case of a lease covered by part 5 of the BPCPA, the statement must disclose the total lease cost. Part 5 of the BPCPA also sets out disclosure requirements for floating rate credit agreements, and amendments or renewals of credit agreements.

Related topics and materials

See Credit cards; Credit insurance; Creditors (types of); Foreclosure and mortgages; Leases; Payday loans.

31 Lawyers' fees

Client problems

- Client asks how much lawyers charge or how much a particular service costs.
- Client is unhappy with the fees charged by a lawyer and wants to know if there is anything that can be done.
- Client wants to know if there is a defence to a lawyer suing the client for fees.

Summary of the law

Lawyers have three main ways of charging for their services:

- **Hourly rate:** Rates vary considerably depending on factors such as level of lawyer experience and complexity of a case.
- **Flat rate:** Lawyers may quote a flat rate for a particular service, such as a will or conveyance.
- **Contingency fees:** This is when the lawyer's fee is based on a percentage of the money recovered in a legal action. Percentages vary, depending on several factors, but may range anywhere between 15 percent and 40 percent.

Fee payment arrangements vary, depending on factors such as the type of case. In many instances, a lawyer asks for a retainer — a sum of money up front to cover fees for services as they are performed. The lawyer must keep that money in a separate bank account, called a "trust account," until the services have been performed and a bill has been sent to the client.

In addition to fees, lawyers charge clients for any disbursements incurred. Disbursements are payments made on behalf of the client and can range from court filing fees to medical reports.

Solving the problem

The Law Society emphasizes that lawyers must communicate properly with clients about fees. Lawyers should be clear about fees when they agree to act for a client, and should keep the client informed of both file and fee developments.

Advocates can propose a number of alternatives to a client who is having fee problems with a lawyer. The first is simply to have the client contact the lawyer to discuss the fee. There may have been a misunderstanding between the parties that direct communication can clear up. The lawyer may be unaware that the client is unhappy with a fee. It is preferable for the client to discuss the fee directly with the lawyer after receiving advice from an advocate. However, advocates may wish to approach the lawyer directly, with the client's permission, to at least promote a direct discussion about the fee.

There are also more formal mechanisms to resolve fee disputes. Either the lawyer or the client can ask the Law Society to appoint a fee mediator. If both sides agree, the mediator will meet with the parties or may deal with the matter in writing. Note that a mediator's role is to help both parties come to an agreement — he or she has no power to make a decision.

The parties may also opt to resolve the matter in court. Usually the lawyer begins the action to collect an unpaid fee. If the fee is less than $25,000, the lawyer will probably sue in Small Claims Court. Larger amounts are handled in Supreme Court.

There is a special mechanism for resolving lawyers' bills under the *Legal Profession Act* (LPA). Under s. 70, both lawyer and client can apply to a Supreme Court registrar to have the bill (or a fee) "reviewed." The LPA sets out the procedure for bringing about a review, as well as the factors a registrar will consider when reviewing a bill, including:

- its complexity,
- the amount involved, and
- the amount of time reasonably spent on the file.

32 Leases

Client problems

- Client wants to know his or her rights regarding a leased car for which the dealer now wants payments, even though the car has been returned to the dealer.
- Client cannot make further payments on a car lease and wants to know his or her rights if the car is repossessed.

Summary of the law

Leasing agreements allow someone to use property temporarily. This arrangement is distinguished from sales agreements, where the intention is usually to allow the buyer to take permanent ownership of the property, or at least give the buyer a right to obtain ownership.

Leases are usually for a fixed period of time, after which the property is returned. Often, leases may be extended or there may be an option to buy the goods outright. Alternatively, goods can be rented on a monthly basis but for an indefinite period of time.

Leases are common in transactions involving housing, cars, and furniture. This section deals generally with such leasing rights. Leasing agreements, particularly car leases, can be complicated documents. Some of the more important provisions include responsibility for maintaining the vehicle and the condition of the vehicle upon its return.

A particularly important aspect of car leases is the consumer's financial responsibility when the contract is terminated. A lawyer should generally be consulted on car leases. This section contains only a brief overview of the law.

Lease rights

Several statutes touch upon the rights of consumers concerning leasing agreements.

Under the *Sale of Goods Act* (SGA) (see chapter 40), the protections for consumer purchases also apply to consumer leases. Under s. 18, for example, the implied condition as to the durability of goods applies to both sales and leases; under s. 20, the protection against waiver of rights applies to both sales and leases.

The *Motor Dealer Act* regulation requires a motor dealer to disclose certain information in writing to a consumer before the consumer enters into a lease agreement. Among other things, the consumer must be informed that the regulation allows consumers a one-day cooling-off period (see chapter 10) to cancel the contract provided the vehicle remains with the dealer. (This cooling-off period can be waived in writing.)

The trade practices requirements of the *Business Practices and Consumer Protection Act* (BPCPA) apply to consumer leases (see chapter 44).

The *Personal Property Security Act* (PPSA) (see chapter 36) applies to most consumer leases. It clearly applies to all leases in which the consumer has the option of buying the property. The PPSA (s. 1) also applies to most leases that do not have such a purchase option if the lease fits within the extended definition of "lease for a term of more than one year." A lease for a term of more than one year includes renewable shorter-term leases as well as leases with an indefinite term.

Of significance are the consumer goods remedies in part 5 of the PPSA, such as "seize or sue" and the "two-thirds rule," which apply to leases of consumer goods with a term of more than one year if the lease secures payment or performance of an obligation. Such leases are commonly called "security leases." Note that part 5 does not apply to what are commonly termed "true leases," which are strictly rental agreements and do not secure payment or performance of an obligation, even when they have a term of more than a year.

It is not always easy to determine whether a client has a security lease or a true lease. Some of the indications of "security leases" were noted in the leading case of *Accent Leasing & Sales Ltd. v. Babic and Bryant:*

- Clauses granting the consumer equity or an ownership interest in the property
- Options to purchase for a nominal sum
- Accelerated damages clauses or liquidated damages clauses
- Default provisions that heavily favour the supplier
- Consumer assumes the responsibilities of ownership, such as paying sales and other taxes, insurance, and licence fees
- Entire risk of loss placed on the consumer
- Supplier's business is to act as a financing agency

Typically, a client who has defaulted on a car lease will have received notice from the lessor threatening to both seize the vehicle and sue for any deficiency. While you should determine if the lease is a security lease or a true lease, an assertion by the debtor that the "seize or sue" provisions of part 5 of the PPSA apply is usually enough to discourage the lessor from pursuing both remedies, and a settlement can be negotiated.

Related topics and materials

See Contracts: Opting out and cooling-off periods; *Personal Property Security Act*: Security agreements; Sale of goods law; Unfair or deceptive practices: Trade practices legislation.

See also Breaking Your Lease Q&A: What You Need to Know, Tenant Resource Advisory Centre, and Tenant Info for Renters in British Columbia, British Columbia Law Institute (both resources relate to rental agreements).

33 Limitations

updated June 2013

Client problems

- Client has not paid on a debt for a number of years and wants to know if he or she is still liable for the debt.
- Client says there is an "old judgment" against him or her that a creditor is now trying to collect on again, and the client wants to know if the judgment is still valid.
- Client asks you how long he or she has to hide from creditors before the client does not have to pay anymore.

Summary of the law

A limitation period, or limitation date, refers to the legal deadline within, or by, which someone must start a lawsuit against someone else. If someone does not start a lawsuit within the applicable limitation period, then the other party may have a "limitation defence" against their claim. In other words, if someone starts a lawsuit against someone else after a limitation period or date has passed, the other person can ask the court to dismiss (throw out) the lawsuit for this reason.

This area of the law is complex. The applicability of limitations defences can turn on fine distinctions of law. In BC, this area of the law became more complex on June 1, 2013, when a new provincial *Limitation Act*, S.B.C. 2012, c. 13, came into effect. The new *Limitation Act* repeals and replaces the former *Limitation Act*, R.S.B.C. 1996, c. 266. However, the former *Limitation Act* will continue to apply to some cases after June 1, 2013. There are complicated transition rules about using the new *Limitation Act* and the former *Limitation Act*.

The summary provided below is only a very brief outline of basic principles. A lawyer should be consulted for an opinion in specific cases.

There are two main principles of limitations law that advocates should be aware of:

- Limitations for debts
- Limitations for judgments

Limitations for debts

The new *Limitation Act*, s. 6, introduces a basic two-year limitation period that applies to most claims for injury, loss, or damage as of June 1, 2013. This section will govern most debt situations. Section 6 provides that legal actions for claims, including unsecured debts, cannot be brought later than two years after the date on which the claim was discovered.

This is quite different from the rules according to the former *Limitation Act*. Section 3(5) of the former *Limitation Act* governed most debt situations before June 1, 2013. It provided that legal actions for claims, including debts, could be brought later than six years from the date on which the right to bring the action arose. Also, although the new *Limitation Act* came into force on June 1, 2013, the former *Limitation Act* will continue to apply to some cases after that date. Figuring out whether the new or former *Limitation Act* applies to a particular case will be very important, as there are big differences in the limitation periods created by each act.

For a summary of the transition rules from the former *Limitation Act* to the new *Limitation Act*, see http://www.ag.gov.bc.ca/legislation/limitation-act/pdf/LAFlowchart.pdf.

The first step in deciding which act applies is to determine the date on which a claim was discovered, or the right to bring the action arose. This is not always easy. In general, a creditor does not have the right to sue a debtor so long as the debtor is keeping up on the payments under the agreement. A creditor's right to bring a legal action arises when the debtor has defaulted on his or her contractual obligation to pay. Most consumer-related credit arrangements, ranging from mortgages to credit cards, require some form of periodic payment. If the periodic payment is missed, the obligation is usually in default and the creditor can sue.

If the creditor's right to sue a debtor first arose on or after June 1, 2013, then the new *Limitation Act* (two-year limitation period) will generally apply. For example, if someone owes periodic payments on a credit card and their periodic payment is first missed on July 12, 2013, the new *Limitation Act* would apply. The creditor now has the right to sue them.

However, if the creditor's right to sue a debtor first arose before June 1, 2013, then the former *Limitation Act* (and general six-year limitation period) may still apply. This is because the new *Limitation Act* only applies to claims that were "discovered" on or after June 1, 2013. For example, if someone stopped paying their credit card bill on July 30, 2008, and the creditor was aware of that right away, the six-year limitation period under the former *Limitation Act* continues to apply. The former act applies because the creditor discovered the claim before June 1, 2013.

There are important provisions in both the new *Limitation Act* and the former *Limitation Act* that can extend a limitation date. Section 24 of the new *Limitation Act*, and s. 5 of the former *Limitation Act*, provide that the applicable limitation period (two years or six years) starts all over again if there has been an acknowledgement of the debt. Both *Limitation Acts* define "acknowledgement" to include making a payment. This means that in many instances, the limitation date will run from the date when a payment was last made, rather than the date when the payments under the agreement were first in default.

Note that under the former *Limitation Act*, unsecured debts to the government (e.g., welfare overpayments) were generally governed by a six-year limitation period. Under the new *Limitation Act*, most debts to the province of BC continue to be governed by a six-year limitation period. This is because, when the new *Limitation Act* was introduced, another provincial statute called the *Financial Administration Act* was amended (see s. 86.1 of the act). In essence, it says that when the BC government or "tax payer supported government reporting entity" has a claim in debt, a six-year limitation period applies. This same six-year limitation period also applies to claims by ICBC for "motor vehicle indebtedness."

If there is some question as to whether a client might have a limitation defence, advocates should tell the client not to make any payments in the meantime, and not to give any kind of written statement (e.g., in a letter to the creditor) acknowledging the debt.

Limitations for judgments

Under s. 7 of the new *Limitation Act* and s. 3(3)(f) of the former *Limitation Act*, creditors have up to 10 years from the date of a judgment to try to enforce the judgment. The creditor is allowed to take enforcement steps at any time during those 10 years. Since the law considers a judgment itself to be a cause of action, a creditor is also allowed to sue the debtor again, at the end of (but within) the 10 years, to get another judgment. That second judgment is also good for 10 years.

Information gathering

Advocates should obtain all related documents from the client and should carefully verify all relevant dates, including when the contract was made, when there was a default or defaults, and, most important, when payments were last made.

Solving the problem

Basically, limitations are defences for debtors. If a limitation defence is applicable, it must be brought to the attention of the court in any legal action. If a limitation defence appears to be applicable, advocates should consult a lawyer, and clients should be advised to have no communication at all with creditors until legal advice is obtained.

Related topics and materials

There are many limitations in law besides the provisions outlined here. UBC Law School's Table of Statutory Limitations manual contains all the statutory limitation provisions and is available by subscription.

34 Misleading advertising: The *Competition Act*

Client problems

- Client has a problem involving:
  - misleading advertising,
  - double ticketing,
  - pyramid selling,
  - the unavailability of an advertised product, or
  - a contest.

Summary of the law

While most consumer and credit law is under provincial jurisdiction, a number of provisions in the federal Competition Act (CA) may help consumers, although some of these overlap with the *Business Practices and Consumer Protection Act* (BPCPA). As with the provincial legislation, the relevance of the CA to consumer problems is two-fold:

- A supplier may be prosecuted for violations of the CA.
- If there has been a violation of a consumer-related provision in the CA, the consumer has a statutory cause of action to seek damages from the supplier.

The following is a summary of the more important consumer protection provisions in the CA:

Misleading advertising: Under s. 74.01, various aspects of misleading advertising are prohibited. Under s. 74.01(1)(a), there is a general prohibition against anything that is misleading in a material respect. Section 74.01(1)(b) prohibits representations in the form of a statement, warranty, or guarantee of the performance of a product that is not based on adequate tests. Section 74.01(1)(c) prohibits misleading warranty promises. Sections 74.01(2), 74.01(3), and 74.05 deal with, and prohibit, misleading price advertising.

Double ticketing: Double ticketing is the practice of having two or more prices marked on a product. If this happens, the CA requires that the product be supplied at the lower price. It is an offence to charge the higher price.

Pyramid selling: Sections 55 and 55.1 define and govern pyramid selling schemes. These schemes are prohibited.

Unavailability of advertised products or "bait and switch" selling: Section 4.04(2) prohibits advertising a product at a bargain price when the supplier does not have the product available in reasonable quantities.

Contests: Section 74.06 sets certain regulations for contests, including disclosing the number and approximate value of prizes, the chances of winning, and the requirements for the timely awarding of prizes.

Information gathering

Obtain full details of the transaction, as well as copies of any communication the client has had with the supplier.

Solving the problem

Arguably, the CA has less direct relevance to most consumer complaints than provincial law (including the common law and BC statute law). The CA focuses on advertising, while provincial law encompasses a broader range of contractual representations. Prohibitions against double ticketing and the regulation of contests focus on relatively narrow areas of consumer protection.

The administration of the CA has been less concerned with resolving individual consumer complaints, and more concerned with prosecuting breaches of the act and generally ensuring compliance with it. Finally, breaches of the CA often have a relatively minor impact on individual consumers, so that seeking compensation under the CA is not practical.

Keep the following situations in mind:

- If the breach of a provision in the CA is particularly widespread by a supplier (e.g., continuously misrepresenting the availability of products), it may be appropriate for you to bring the matter to the attention of Industry Canada. The **Just for consumers** page will help you make a complaint by telephone, fax, or mail, or online.

- Under the CA, if there is a successful prosecution of a supplier, any consumer affected by the supplier's conduct may have a civil remedy against the supplier for any losses suffered (s. 36).
- Specific problems that clients have with contests, pyramid selling, or double ticketing, which cannot be resolved between the parties, could be raised with the Fair Practices Branch of the Competition Bureau.

Related topics and materials

See Contracts: An overview; Contracts: Opting out and cooling-off periods; Sale of goods law; Unfair or deceptive practices: Trade practices legislation.

See also Dishonest Business Practices and Schemes, the Canadian Bar Association BC Branch. The following may also be helpful: Canadian Consumer Handbook, Office of Consumer Affairs at Industry Canada; Consumer Law, People's Law School; and Consumer Protection, UBC Law Students' Legal Advice Program.

35 Payday loans

Client problem

- Client has taken out a payday loan and wants to know what his or her rights are.

Summary of the law

Certain finance companies make small, short-term, high-interest loans that go by a variety of names: payday loans, cash advance loans, post–dated cheque loans, for example. Typically, the borrower writes a personal cheque, post-dated by two weeks and payable to the lender for the amount he or she wishes to borrow plus a fee. The company then gives the borrower the amount of the cheque minus the fee.

In the past, these loans were made on such terms that once all the interest, fees, and charges were factored in, the result was often an effective rate of interest exceeding the maximum rate of 60 percent per year set by s. 347 of the *Criminal Code* (see chapter 30). Because the courts will generally not enforce an illegal contract term, the lenders had trouble enforcing the loans. The criminal justice system in British Columbia was not used to curtail payday lending, possibly for fear of driving borrowers into the hands of loan sharks. Consequently, payday lenders used to operate in a legal grey zone.

In 2007 the *Criminal Code* was amended to allow the provinces to set up regulatory regimes under which they could license lenders to make loans which have (a) a principal of not more than $1,500 and (b) terms of not more than 62 days. The government of British Columbia then moved to regulate payday lending by adding Part 6.1 (Payday Loans) to the *Business Practices and Consumer Protection Act* (BPCPA) and by creating the Payday Loans Regulation. Part 6.1 of the BPCPA and the Payday Loans Regulation came into effect on November 1, 2009.

Under the new legislation, the total maximum amount a licensed payday lender may charge for a loan is 23 percent of the principal, and, in the case of a default, 30 percent per annum on the outstanding principal plus a one-time fee of $20 for a dishonoured cheque or debit. A loan cannot be for more than 50 percent of the borrower's net pay over the term of the loan and a loan agreement cannot require repayment before the borrower's next payday.

The new legislation prohibits certain practices. Lenders may not:

- grant rollovers or give more than one loan at a time to each borrower,
- discount the principal amount of the loan by deducting from the initial advance any part of the cost of credit, or
- charge any fee for prepayment.

Under s. 112.10 of the BPCPA, a lender who:

- contravenes these prohibitions,
- charges any amount that exceeds the permissible amount, or
- makes any prohibited charge,

is no longer entitled to any fees, interest, or charges, and the borrower is responsible only for the amount of the principal of the loan that was actually advanced. Furthermore, the borrower can demand immediate repayment of any amount paid that exceeds the amount of the principal actually advanced.

Lenders are also prohibited from taking:

- assignments of wages,
- undated cheques,
- post-dated cheques for more than the amount payable under the loan on the due date, or
- security in the form of personal property or documents for transferring personal property.

The new legislation also covers measures to inform borrowers of the applicable law and their legal rights. Each payday loan outlet must display a sign of a prescribed size and form that sets out in specified wording:

- the maximum allowable charge under the law (23 percent of the principal);
- the lender's total charges (including an example that is based on a $300, 14-day loan), and a calculation of the effective annual percentage rate;
- the annual percentage rate charged by the lender;
- that this information meets the requirements of the BPCPA; and
- the lender's licence number.

Also, payday loan agreements must be in writing and contain certain particulars specified by s. 112.06 of the BPCPA, including:

- the lender's contact information;
- the amount of the principal;
- details of each fee and charge;
- the rate of interest, along with a statement that interest is chargeable only on the principal of the loan;
- the total cost of credit, along with a calculation of the effective annual percentage rate;
- the amount of each payment and the date on which it is due;
- a statement of the borrower's rights under s. 112.10 of the BPCPA;
- a statement of the borrower's rights under the cooling-off period provision (see below and also chapter 10); and
- a statement that Consumer Protection BC, also known as the Business Practices and Consumer Protection Authority, may be contacted for information on requirements relating to payday loans.

The lender must review with the borrower and have him or her initial the clauses regarding the cost of credit, annual percentage rate, and cancellation rights.

Borrowers are further protected by a one-day cooling-off period (see chapter 10). Under s. 112.05 of the BPCPA, a borrower can legally cancel a payday loan at any time before the next day that the lender is open for business by:

- repaying all amounts advanced in full, and
- completing the cancellation notice, which the lender must give to the borrower at the time the loan agreement is signed.

If the lender failed to advise the borrower of his or her cancellation rights and did not give him or her a cancellation form, the borrower may cancel the loan at any time. The borrower may also claim a cancellation at any time if the loan agreement does not meet the formal requirements of s. 112.06, or if the lender did not have the borrower review and initial the clauses regarding the cost of credit, annual percentage rate, and cancellation rights.

Information gathering

Obtain a copy of the loan agreement and determine whether or not a cancellation form was provided. Find out from the client the dates and amounts of any payments made, and whether or not he or she has given the lender any undated or post-dated cheques, assignments of wages, personal property, or transfer papers for personal property.

Solving the problem

If the client wants to cancel the loan and can raise the funds to do so, consider whether he or she can make use of the cancellation provisions.

If the lender has made a rollover loan, discounted the initial advance, or charged an illegal or excessive amount, inform the client that he or she is responsible only for the principal amounts actually extended and can demand an immediate refund. If no refund is given, the most practical step is probably to report the matter to Consumer Protection BC.

You should also consider reporting the matter to Consumer Protection BC if the lender has contravened the BPCPA in any other way. Consumer Protection BC can impose administrative fines or revoke licences if a lender repeatedly breaches the BPCPA. If the client has suffered damages as a result of a breach of the BPCPA, he or she may also wish to consider bringing a lawsuit against a lender under s. 171 of the BPCPA.

Related topics and materials

See Contracts: An overview; Contracts: Opting out and cooling-off periods; Interest and the cost of borrowing money.

See also Canadian Consumer Handbook, Office of Consumer Affairs at Industry Canada; Consumer Law, People's Law School; Consumer Protection, UBC Law Students' Legal Advice Program; Getting Your Judgment Paid, the Canadian Bar Association BC Branch; Predatory Lending Issues in Canada, the Canadian Centre for Elder Law; and Your Rights and Responsibilities, Financial Consumer Agency of Canada. Also, MOSAIC has a useful video called Debt and Consumer Law.

36 *Personal Property Security Act*: Security agreements

Client problems

- Client wants to know what a car dealer means when the dealer says it will take a "lien" over a car as part of a financing arrangement.
- Client is buying a used car and wants to be sure that there are no "liens" against the car.
- Client wants to know the difference between a sales agreement and a lease agreement for a car.
- Client is behind in car payments and wants to know his or her rights because the lender is threatening to repossess the car.
- Client's car was repossessed because of missed payments and the client wants to know if anything can be done about it.

Summary of the law

When a buyer does not have the money to pay for goods at the time of purchase, there are two ways the sale can be financed:

- The seller may extend credit to the buyer. This means that the seller and buyer agree that the buyer will pay for the goods over a period of time.
- The buyer may decide to borrow the money to pay for the goods. The buyer may borrow from a lender such as a bank or credit union.

When a buyer borrows money from a lender, that lender wants to ensure that the full amount is repaid and may want more protection than just the buyer's promise. Similarly, a seller who extends credit as part of a sale is concerned about eventually being paid in full for the goods. (See chapter 18.)

In the nineteenth century, sellers who extended credit as part of a sale and lenders such as banks began to develop special contractual terms to ensure repayment. Those terms were part of the sale or lending contract.

Generally, those terms said that the lender or seller had a direct remedy against specific property of the borrower if the borrower defaulted in payment. Sellers could take back the goods and sell them again. Lenders could take the goods and sell them to get their money.

When lenders and sellers (called “creditors”) got those rights against the borrower’s property, it was known as “getting security.” This term is still in use, although sometimes consumers use other language. For example, people talk of a lender taking collateral over property or a seller getting a lien over property. The actual legal meaning of these terms is not always the same. In many instances, these terms are very simple expressions for complex and very different legal arrangements. The term “getting security” is used here to mean the situations in which creditors get rights over a debtor’s personal property.

A creditor who gets security gets special legal advantages. The main advantage arises if the borrower defaults. Creditors who do not have security over a borrower’s property and who want to enforce payment must first sue the borrower and get a judgment. If they get a judgment, they can try to have the borrower’s property seized (see chapter 21) by a court bailiff (see chapter 2). The court bailiff sells the property and gives the money to the creditor.

Security agreements allow the creditor to take the borrower’s property immediately upon default. The secured creditor does not have to sue the borrower first and wait to get a judgment before exercising its rights to take the property of the borrower. In practical terms, security agreements are often important because they allow a creditor first claim to the property of the borrower before creditors who do not have security.

Historically, the two most common forms of security agreements developed for consumer transactions were called chattel mortgages and conditional sales agreements. Typically, chattel mortgages are security that a lender takes, while sellers extend credit and obtain security through conditional sales agreements.

These types of arrangements facilitated sales and the extension of credit. In law, these arrangements allowed the lender or seller to have a “title” interest in the goods, and at the same time allowed the borrower a “possessory” interest. This possessory interest allowed the borrower to keep and use the goods as long as payments were not in default.

Problems arose with these arrangements when other parties became involved with the secured property. For example, sometimes a borrower sold the secured goods to another person without saying anything about the security agreement. In the early twentieth century, many Canadian provinces, including BC, passed laws to address the unfairness that often arose as a result of this legal principle. The basic idea of the laws was to ensure that sellers, lenders, and all borrowers knew when goods were subject to a security agreement. The legislatures did this by setting up government registries to record security agreements such as chattel mortgages and conditional sales agreements. In BC, the registry used to be called the Central Registry. It is now called the Personal Property Registry (see below).

The laws required lenders and sellers to register their security agreements. Registration became important because if an agreement was not registered, anyone who bought the secured goods from the borrower and who had no personal knowledge of the security agreement got to keep the goods. In effect, sellers or lenders lost their title rights, including the right to take the goods if the subsequent purchaser defaulted on payment. However, sellers or lenders still had these rights against the original borrower. If that person were in default and still had the goods, the creditor could still take the goods.

The registration system also gave creditors and consumers some protection by allowing either of them to check with the registry to find out if goods were already subject to a security agreement.

The *Personal Property Security Act*

In the past 25 to 30 years, many provinces have replaced their existing security agreement laws with one comprehensive law. The BC law is called the *Personal Property Security Act* (PPSA). It came into force on October 1, 1990. The previous BC security agreement laws, including the CMA and the CSA, were repealed.

Scope of the PPSA

The PPSA governs almost all personal property security transactions between creditors and individual consumers, and between creditors and businesses (s. 2). It does not govern situations where the security is land (usually known legally as "real property") or where the security agreement is governed by federal law (s. 4). It is clear that security agreements (including those entered into by consumers), which would have been considered chattel mortgages or conditional sales agreements, are governed by the PPSA. In addition, some consumer-type transactions (such as leases of personal property for longer than one year) are now governed by the PPSA (s. 3).

There is a great deal of legal terminology in the PPSA, and it defines many of these terms (s. 1). The borrower is called a "debtor." A creditor with security is called a "secured party." The contract for security between the debtor and the secured party is called a "security agreement." The property to which a debtor and a secured party make a security agreement is "collateral."

The definition for "consumer goods" is very important. Consumer goods are defined in the PPSA as "goods that are used or acquired for use primarily for personal, family or household purposes" (s. 1). This definition is new with the PPSA. The language of the old statutes made it possible, in some instances, for unincorporated businesses (i.e., proprietorships and partnerships) to have consumer-rights protections. The definition of consumer goods in the PPSA appears to have eliminated this possibility. Now only individuals using collateral for personal purposes as defined in the PPSA have those rights.

Like the security agreement laws it replaced, the PPSA governs how a creditor acquires security rights over a debtor's property and how those rights can be enforced if there is default. The PPSA also details how priority rights are decided when more than one secured party claims a security interest in a debtor's property. The PPSA contains transitional rules governing existing security agreements that were registered under the old statutes.

Creating security interests

Prior to the PPSA, most consumer-type security interests were created when two criteria were met:

- The secured party and debtor entered into a written security agreement.
- The security agreement was properly registered under the appropriate statute.

The agreement gave the creditor title rights against the debtor — registration maintained those rights against third parties, as already described. The PPSA introduced new terminology to the creation of security interests. Section 19, a key section in the PPSA, says that a security interest is "perfected" when it has "attached" to the property, and when "all steps required for perfection" under the PPSA have been completed. Perfection gives the secured party certain rights and remedies under the PPSA. Those statutory rights and remedies mean that the distinctions between title and possessory interests are not as important as under the old laws. It is important for creditors to ensure that they comply with the requirements of the PPSA to gain the statutory rights of a secured party.

"Attachment" (s. 12) is a very technical concept under the PPSA. At its simplest, it corresponds to the first criterion under the old security agreement laws, namely that the secured party and the debtor enter into a written agreement. In most consumer transactions involving taking security, attachment requirements are met by written agreement with legal consideration (s. 10). The specific term for consideration used in the PPSA is "value."

The "steps required for perfection" under the PPSA correspond very roughly to the registration requirements under the former statutes. There are perfection "steps" other than registration, but registration continues to be the most common step in consumer transactions.

Registration under the old laws involved filing a copy of the whole security agreement. Under the PPSA, the secured party only registers a document called a "financing statement." This statement is a one-page form prescribed by government regulation. The essential terms of the agreement must be set out in the financing statement, including a description both of the parties and of the property over which security has been taken.

If anyone with a legitimate interest (such as another creditor) wants more detail about the full terms of a security agreement, the PPSA gives that party a right to demand details of the particular security agreement from the secured party (s. 18). The government registry for security agreements is now called the Personal Property Registry.

Priority of security interests

Setting priorities for competing security interests is an important, and complicated, part of the PPSA. The following is a simple example of a priority issue, written using the terminology of the PPSA:

> Bank "A" and Bank "B" take security over the same collateral, a truck, from a debtor company called Mike's Movers Ltd. Both banks have perfected their security by properly registering a financing statement. Mike's Movers Ltd. defaults on both payment obligations. Who gets priority in taking the truck?

The answer is fairly predictable: the secured party that was first to "perfect" takes priority. Assume Bank "A" was the first. It gets to have the full amount of its obligation paid before Bank "B" gets anything — there is no pro rata sharing. It is important to remember that secured parties generally take priority over any unsecured creditor. A creditor who has a judgment and who wants the court bailiff to seize the truck to pay a judgment only gets paid after both banks are paid in full.

The issue of priorities becomes complicated, in part because the PPSA makes rules for a wide range of priority situations that can arise between secured parties, particularly in business transactions. The PPSA also creates several exceptions to these basic priority rules. The most relevant exception to consumer transactions is the "PMSI." PMSI stands for "purchase money security interest"; the term is usually known by its acronym (pronounced "pim-zee").

Here is an example of when a PMSI might be relevant:

> Bank "C" takes a security interest over all chattels (personal, moveable possessions; see chapter 21) that a consumer owns now and might acquire in the future (the PPSA allows this type of agreement). If the consumer owns household furnishings and one car now, and buys a second car for cash later, the second car becomes collateral under the Bank "C" security agreement. But, consider if the consumer only owned household furnishings when the security agreement with the bank was made. Suppose later the consumer wants to buy a car and does not have the cash to buy it. If a car dealership sells the consumer a car on credit, it will probably want security. (Or, if another creditor — such as a bank — gives the consumer a loan to buy the car, it too will probably want security.) When the car dealership searches the Personal Property Registry, it finds that Bank "C" has a security agreement that says it can claim collateral over the car that the consumer is about to buy.

This situation is governed by the PMSI exception. The PPSA says that, among other situations, where credit is extended to a debtor so that the debtor can buy specific collateral (such as the car), the creditor who is extending the credit can take a security agreement, and, when it is perfected (completed), that security agreement takes priority over an agreement already perfected, even though it has terms broad enough to include the specific property that the debtor is now buying.

The example illustrates the fairness of the PMSI exception to the basic rule of priority by time of perfection. The car dealership is advancing credit to facilitate a specific purchase. It probably would not extend credit for the car knowing that Bank "C" has a priority right to take the car upon default under the bank's agreement.

Default rights in consumer transactions

In general, the PPSA maintains the special consumer rights originally enacted under the CMA and the CSA. However, these rights are available only where the collateral is "consumer goods." You must also remember that the rights apply only to "security leases" of consumer goods and not to "true leases" (see chapter 32).

The following are some examples of how the consumer goods protections apply under the PPSA. In general, these rights cannot be waived by a debtor. In each example, assume that the security agreement was perfected, and that there are no competing secured parties (i.e., there is not a priority issue).

The seize or sue rule

In general, the seize or sue provisions in s. 67 of the PPSA for consumer goods mean the secured party has the option of taking the collateral and selling it, or suing the debtor for the whole amount owing. The PPSA says, essentially, that a secured party can take the collateral regardless of the debtor's wishes. However, if the debtor wants to give up the property, but the secured party does not want to take it back, the secured party cannot be forced to take it back. The secured party must agree. If the secured party does agree to take it back, the PPSA calls this a "surrender," and the seize or sue rules apply as if the creditor had taken the goods when the debtor did not want to give them up. In short, the secured party must accept a surrender — a debtor cannot simply drop the collateral at the creditor's front door and automatically expect to get out of the whole contract.

The two-thirds rule

Section 58(3) of the PPSA says that a secured party cannot repossess consumer goods where at least two-thirds of the total amount secured has been paid unless it can get a court order to do so under s. 58(4). The PPSA says the court can consider factors such as the present value of the goods, the reason for default, and the future circumstances of the parties (s. 58(5)). One potentially important fact about the future circumstances of the debtor is whether the debtor will be able to make any payment in the foreseeable future. For example, if a debtor was temporarily laid off from work but expecting to be back within a few months, the court might be more inclined to refuse the creditor's request for seizure.

The right to reinstate

Where consumer goods have been seized, the debtor is entitled to get the goods back by making up the arrears payments and paying the reasonable expenses incurred by the creditor in seizing the goods (s. 62(1)). Section 59(6) of the PPSA also says that the creditor must give the debtor 20 days' written notice of an intention to sell the goods, and the notice must contain a statement of how much must be paid (i.e., the arrears payments and the secured party's expenses) to reinstate the payments.

An important legal protection (part of the right to reinstate when the collateral is consumer goods) is that the secured party cannot insist on being paid the full amount owing under the agreement rather than just the arrears. The right to demand and sue for the full amount under a credit agreement when the debtor is in default of one or more payments is a standard term in most credit agreements. The PPSA says, in effect, that a secured party cannot insist on the contractual right of acceleration against seized collateral when the default is for consumer goods.

Relevance of the PPSA to the *Bankruptcy and Insolvency Act*

Creditors who have security rights under the PPSA also have special rights under the *Bankruptcy and Insolvency Act* (BIA) (see chapter 2, chapter 3, and chapter 4). In very general terms, creditors with properly registered security agreements can take themselves outside most of the effects of the BIA, including:

- where there is an assignment in bankruptcy, and
- when the debtor has made a consumer proposal.

With some limitations, secured creditors can choose to be included in or excluded from the assignment or proposal — whichever is to their advantage. In most instances, the secured creditor's decision is based on financial considerations.

In many consumer assignments in bankruptcy, secured creditors choose to be excluded from the assignment because the return to creditors in most consumer bankruptcies is minimal. The creditor is usually able to recover more by choosing to repossess and sell the security, and, under the provisions of the BIA, the debtor's exemption claim does not cover secured goods. This means that any goods covered by the security agreement can be repossessed.

In practice, the debtor can only avoid the repossession by entering into a new agreement with the creditor to "buy" the secured goods at their resale value.

Information gathering

Most client problems with secured goods involve the remedies of a creditor when the debtor has defaulted in payments under the security agreement. Be sure to get a copy of the security agreement from the client. (Note that security agreements — as distinguished from financing statements — are not filed in the Personal Property Registry, and copies are only available from the client or the creditor.)

Make sure you have the correct details about the client's history of payment, including how much was borrowed, when payments were made, and when there were defaults (if any). Satisfy yourself that the amount claimed by the creditor is correct.

Assess the entire circumstances of the debtor. If there are other creditors, you may have to recommend a remedy that includes those creditors as well as the secured creditor (see chapter 18). Assess whether the financial difficulties of the client are long term or short term, as this affects the type of approach to take with the secured creditor.

Solving the problem

Assuming the client's only problem is with payments to the security agreement creditor, and assuming there has been default (and perhaps repossession), the approach to solving the client's problem centres on the prospects of the client repaying the security agreement. If the client has some prospect for repayment, you may decide to ask the creditor for reinstatement of the agreement and the return of any repossessed goods. If the client has the financial ability to reinstate and the creditor refuses to agree to it, consider a court action for an order for reinstatement.

If the client is temporarily unable to pay but has future prospects for repayment, approach the creditor for an agreement to suspend enforcement for the short term. It may help if the client can at least make some small payment in the interim. A creditor may agree to renegotiate the agreement, taking smaller payments for the balance of the credit agreement.

If the client's problems are more serious, either because there are other creditors to consider or because the client has a longer-term diminished ability to pay, you may need to review other remedies, such as those available under the BIA.

Finally, there may be some advantages for the client if he or she agrees to surrender a security, such as a car. If there is a significant amount owing above the value of the security, and if there is an obvious inability to pay over the long term, it may be better for the client to give up the security. Use the seize or sue provisions to protect the client from any claim for a deficiency balance when the car is sold.

Related topics and materials

See Bailiffs, court bailiffs, and sheriffs; *Bankruptcy Act*: Assignments in bankruptcy; *Bankruptcy Act*: Orderly payment of debts; *Bankruptcy Act*: Proposals; Creditors (types of); Debtors remedies: Financial remedies; Enforcing judgments against chattels; Leases.

See also Canadian Consumer Handbook, Office of Consumer Affairs at Industry Canada; Consumer Law, People's Law School; Consumer Protection, UBC Law Students' Legal Advice Program; and Your Rights and Responsibilities,Financial Consumer Agency of Canada. Also, MOSAIC has a useful video called Debt and Consumer Law.

37 Prepayment rights

Client problems

- Client wants to pay off a consumer loan or a credit card account and wants to know if he or she can do this and how much has to be paid.
- Client wants to pay off a mortgage and wants to know if he or she can do this and how much has to be paid.

Summary of the law

In common law, parties can set out a variety of terms in a credit agreement. One important term is whether the borrower is allowed to pay off or pay down the obligation earlier than when the periodic payments (e.g., the monthly payments) are due. This is called the right of prepayment.

The advantage to the borrower in prepaying is that the amount of interest paid to the lender is smaller. This may be particularly important for two reasons:

- When interest rates are relatively high, the borrower usually wants to pay off an obligation as fast as possible.
- If interest rates drop during the term of the credit agreement, the borrower may be able to borrow elsewhere at a lower interest rate and pay off the old obligation. Or the borrower may seek to renegotiate a lower interest rate with the existing lender.

In general, the common-law principle says there is no right of prepayment of a credit agreement unless there is a specific term in the agreement saying the borrower can do this. The borrower is obliged to pay principal and interest each month until the end of the agreement. While the parties could renegotiate the agreement to allow for prepayment, the borrower could not force the creditor to accept other than what is called for in the credit agreement: full principal and all the interest payable over the full term of the agreement.

Statutory provisions now govern non-mortgage prepayment rights, making common-law principles irrelevant to non-mortgage credit agreements. Common-law principles still apply to mortgages, however.

Non-mortgage credit agreements

Prepayment rights for consumer loans and consumer credit card accounts are governed by s. 74 of the *Business Practices and Consumer Protection Act* (BPCPA) and Regulations. (In addition, certain aspects of prepayment for bank loans are covered in the federal *Bank Act* (BA) and Regulations.)

Prepayment rights are rights for individual consumers only, not incorporated companies. The rights do not apply to individuals who enter into credit arrangements for business purposes. They do apply where there is a security agreement (see chapter 36) in addition to the borrower's promise to pay.

There are two important aspects to s. 74 of the BPCPA. The first is that consumers are given a statutory right to prepay any credit agreement to which the BPCPA applies, except mortgages on land (see chapter 24). Consumers can prepay some or all of a credit agreement. Under s. 3 of the BPCPA, this statutory right to prepay cannot be waived by a borrower — it is a right, no matter what the credit contract says about prepayment. The creditor cannot charge for prepayment, whether full or partial.

The second important aspect to s. 74 is that it regulates how much of the non-interest finance charges the creditor can require as part of accepting a prepayment. For full prepayment, the creditor must refund the prescribed portion of any non-interest finance charges paid by the borrower or added to the outstanding balance.

For partial repayments, the borrower is not entitled to a refund or credit of any non-interest finance charges.

Mortgages

Most consumers have some idea of the terms "open" and "closed" mortgages. These descriptions refer to the common-law rights of prepayment, which the parties agree to in the mortgage agreement. Open mortgages allow prepayment; closed mortgages do not allow prepayment. In addition, consumers can negotiate some mortgages that allow limited rights of prepayment (e.g., the borrower can prepay a percentage of the outstanding principal once each year, or elect to double the amount of the periodic payments).

The important advantage of an open mortgage to the borrower is the flexibility to prepay or renegotiate the mortgage if interest rates drop. For this reason, lenders usually charge a slightly higher rate for open mortgages than for closed mortgages over a comparable term.

Prepayment rights for mortgages on land are governed by s. 10 of the *Interest Act* (IA) (Canada). Under that section, consumers have more limited rights of prepayment than for non-mortgage agreements governed by the

BPCPA. Basically, there is no statutory right of prepayment where the term of the mortgage is five years or less. For example, a borrower does not have a statutory right to prepay a closed mortgage with a three-year term. If the borrower wants to pay out the mortgage, he or she must negotiate with the lender. In general, lenders are unwilling to allow a mortgage prepayment without at least some additional interest being paid if current interest rates are lower than the rate agreed to in the mortgage. The lender may well insist that all the interest over the term of the mortgage be paid. This makes prepayment expensive and uneconomic, particularly in the early part of the term of the mortgage.

Where the term of the mortgage is for more than five years, the borrower effectively does have a right of prepayment. Section 10 of the IA says that if a creditor refuses a prepayment offer, the borrower is not obliged to pay any further interest. There are two important qualifications to this prepayment right:

- The prepayment can only be made after the first five years of the mortgage.
- The borrower has to pay three months' worth of interest in addition to the principal amount.

Information gathering

Gather and confirm all information about the loan and credit agreement or contract.

Solving the problem

Your main concern when dealing with prepayment rights is probably ensuring that the amount to be paid out is correct. If there is any concern about the calculation of the balance due, it may be wise to ask a professional, such as an accountant or an actuary (or perhaps a credit union manager), for a second opinion.

Related topics and materials

See Contracts: An overview; Foreclosure and mortgages; Interest and the cost of borrowing money.

See also Your Rights and Responsibilities, Financial Consumer Agency of Canada.

38 Recovery of goods

Client problems

- Secured creditor has repossessed property belonging to the client that was not subject to a security agreement.
- Court bailiff has seized property from a judgment debtor that actually belongs to the client, who is not a judgment debtor.
- Client has lent property to someone, and the other person will not give it back.
- Someone has taken the client's property and will not give it back.

Summary of the law

In general, when someone takes or keeps someone else's property, the person taking or keeping the property must have a legal right to do so. The owner of the property usually has the right to attempt to recover it or, if recovery cannot be carried out peacefully, to get a court order for the return of the property.

A range of circumstances give legal rights to take or keep property; those circumstances are discussed throughout this manual. For example, secured creditors (see chapter 18) can repossess property that is the subject of a security agreement (see chapter 36) when the debtor defaults on payment, court bailiffs (see chapter 2) can seize the assets of a judgment debtor under an order for seizure and sale, and repairers have lien rights to keep the chattels (personal, moveable possessions; see chapter 21) of a debtor until payment is made for the repair services (see chapter 39).

The legal right to take or keep property

Determining the legal right to take or keep property can be relatively straightforward, such as when property is lent to a friend or relative. Without a contract or understanding about how long the friend or relative can keep the property, the law usually says that the owner can demand the return of the property whenever he or she wishes.

Another example is when someone claims that property taken from him or her is actually owned by a third party (a court may have to determine true ownership). This issue can arise, for example, when a court bailiff seizes assets from a judgment debtor, and a third party claims that the property seized actually belongs to him or her. If that is true, the third party is entitled to the return of the goods.

Other instances, such as those in which creditors are involved, can be more legally complicated. Basically, the right to take or keep the property depends on the validity of the contractual or legal right claimed. For example, in the case of security agreements, it must be clear that the debtor has defaulted and that the goods in question are subject to the security agreement. The chattels of a debtor cannot be repossessed if the debtor is not in default or if the security agreement only covers a vehicle (and not other chattels) owned by the debtor.

Remedies for the return of goods

If it is determined that someone wrongfully took or kept property, the rightful owner of the property has a cause of action for the return of the goods. Both the Small Claims Court and the Supreme Court can make orders for the return of goods. The courts may also award damages, in addition to the return of the property, for the inconvenience of having had the property taken.

There is an additional interim remedy available to parties who have had property wrongfully taken. Under s. 57 of the *Law and Equity Act* (LEA), Small Claims Rule 17(18)(d), and Supreme Court Rule 46, the courts can make an immediate order for the preservation or return of goods, pending a final disposition of the case. This means that the person making the claim may be able to get an immediate order for the return of the goods, on his or her promise to hold the goods until the matter goes to trial — if it comes to that. Consult a lawyer about the process and the likelihood of success with interim applications.

Information gathering

Gather and confirm all information about the circumstances leading up to the goods being taken, including copies of any communication between the parties.

Solving the problem

There are two main situations in which clients seek the recovery of goods:

- When goods have been lent to, left with, or taken by friends or relatives who will not return the property
- When goods have been taken or kept by someone, such as a creditor, who is claiming a legal right of possession

In either situation, be careful in your fact gathering. In particular, look for details that involve the issue of legal justification. As noted above, there are a range of instances that may make the issue legally complicated and that require consultation with a lawyer.

If a party is improperly keeping property, a first step toward resolving the problem should be to approach the other side to demand its return, followed by court action (Small Claims Court, if the value of the property is under $25,000) if necessary. Also consider an application for the interim recovery of the goods. If an application for interim recovery is successful, the other side may well abandon the claim to possession and the matter is resolved.

Related topics and materials

The recovery of goods between separated spouses is a related issue. Consult a lawyer for an opinion on what rights are available to spouses and what assistance the local police may provide in enforcing recovery attempts.

See Bailiffs, court bailiffs, and sheriffs; Creditors (types of); Enforcing judgments against chattels; *Personal Property Security Act*: Security agreements; Repairers' liens.

39 Repairers' liens

Client problems

- Repairer will not return client's goods until the repairs are paid for.
- Repairer is threatening to repossess the repaired goods because client has not paid for the repairs.
- Repairer has repossessed client's goods and is now threatening to sell the goods to cover the repair bill.

Summary of the law

In common law, a repairer is anyone who puts money, labour, or materials toward repairing the chattels (personal, moveable possessions; see chapter 21) of another person. Some common examples are car repair shops, jewellery shops, TV repair shops, and boat marinas.

The rights of repairers

In common law, a repairer has a right to keep goods that have been repaired until the repair bill is paid. This right is an implied term of the repair contract (see chapter 8). The parties do not have to specifically agree to the term. However, the parties can specifically agree to vary the term, though this is not usual. For example, when the consumer first brings the goods in for repairs, the consumer and the repairer might agree that the consumer can pay the repair bill a month after the goods are returned. Or, the repairer and the consumer might agree to this after the repairs are finished. Without this specific agreement, the repairer has the right to demand full payment before the goods are returned to the consumer.

In common law, once the goods are returned to the consumer, the repairer no longer has possessory rights. This point is not relevant if the consumer pays the bill, but it is relevant if the parties agree that the consumer can take the goods and pay the repair bill later. If the consumer were later to default on the promise to pay the bill, the repairer only has a right to sue for the money owed. The repairer does not have any right to take the goods.

There is case law that says that the repairer does not lose a common-law possessory right if the goods are taken away from the repairer without the repairer's permission, such as by trick or stealth. The repairer may be able to retake possession, so long as certain trespasses are not committed (most notably, by breaking into a house or garage) (see chapter 2 and chapter 6), and so long as there is not a breach of the peace that results in a *Criminal Code* charge.

In common law, the repairer also has the right to sell the goods, eventually, if the repair bill is not paid.

Repairers also have rights under statute law. The *Repairers Lien Act* (RLA) gives repairers additional rights beyond the common law. Most importantly, the RLA allows some repairers to retake possession of goods after releasing the goods to the consumer under certain conditions. This right applies to repairers of motor vehicles, aircraft, boats, and outboard motors.

There are two important steps that repairers must take to gain a right to repossess:

- The consumer must sign an "acknowledgement of indebtedness" at the time the goods are released. Repairers cannot rely on work orders signed before the work is done for an acknowledgement of indebtedness.
- The repairer must file a "financing statement" in the Personal Property Registry within 21 days after possession is released to the consumer. The right to file is lost after 21 days.

Once the financing statement is filed, the repairer's lien continues for another 180 days. The repairer's lien rights cease to exist at the end of 180 days unless the chattel has been repossessed or the lien renewed. During those 180 days, the repairer is allowed to repossess the goods if the consumer has not paid the repair bill according to the terms agreed upon prior to release of the goods.

The RLA, s. 2, provides a procedure for the sale of goods held under a repairer's lien. This procedure applies both to when the goods have not been released to the consumer and to when the goods have been released but repossessed from the consumer under the RLA statutory rights. The repairer is entitled to sell the goods to pay the repair bill if:

- the bill is unpaid for 90 days, and
- the sale is advertised for two weeks in a local newspaper.

The repairer can claim proceeds from the sale to cover the repair costs and, if there was a release and repossession, certain repossession costs.

Information gathering

If the goods are still in the possession of the repairer, confirm all the details of the repair agreement between the parties.

If the goods have been released to the consumer and the repairer is threatening to repossess the goods, confirm all the registration details through a search in the Personal Property Registry. It may be that the proper paperwork was not filed. Confirm the date the goods were released to the consumer to determine the 180-day repossession period.

If the goods have been released to the consumer but subsequently repossessed, confirm all registration details through a search in the Personal Property Registry. Confirm the date that the goods were released to the consumer and when the goods were repossessed. Confirm the location of the goods.

Solving the problem

Repairers' liens usually arise because a consumer cannot pay the repair bill as agreed, or because the consumer is dissatisfied with the repair work. If the consumer cannot pay the repair bill as agreed, you should first attempt to negotiate with the repairer for release of the goods with time to pay. If the goods have been released and the repairer is threatening to repossess, you might still try this approach. In either instance, the consumer does not have much bargaining strength. The only realistic way to solve the problem may be for the consumer to somehow come up with the money to pay the bill.

If there is a dispute over the work done (for example, unauthorized repairs, work not done properly, or a bill higher than the estimate given), you may still first try to negotiate with the repairer (whether or not the goods have been released). Again, the consumer may not have much bargaining strength, particularly if the repairer possesses the goods. The practical remedy for the consumer may be to pay the bill, and then start a court action over the dispute.

It is possible for a consumer to have a cause of action against a repairer not only because of a dispute over the repairer's bill, but also because the repairer (or agents of the repairer, such as a bailiff) attempted to enforce possessory rights in an improper fashion. There are many possibilities, and many examples in the case law. A consumer may have a cause of action for damages:

- if the goods are repossessed when the repairer did not have a validly filed lien,
- if the goods are repossessed after 180 days,
- if the goods are sold without meeting the sale requirements of the RLA,
- if the goods are damaged during repossession, or
- if the bailiff or repairer trespasses (e.g., breaks into a house or garage, or assaults the consumer) while repossessing the goods.

Related topics and materials

See Bailiffs, court bailiffs, and sheriffs; Collection agents; Contracts: An overview; Enforcing judgments against chattels; Harassment; Sale of goods law.

40 Sale of goods law

Client problems

- Client bought a consumer good that is not functioning properly.
- Client bought a car from someone, and now someone else is claiming that the car is his or hers and that the seller did not have the right to sell it.
- Client paid a deposit for goods, and the store went out of business without returning the deposit or providing the goods.

Summary of the law

Many common-law principles of contract (see chapter 8) were developed in Britain during the 1800s. In some instances, those principles were codified into statute law by the British parliament. One important area of the common law of contract that was codified was the sale of goods law. BC's present *Sale of Goods Act* (SGA) was modelled after the British law.

The SGA covers the sale of chattels (personal, moveable possessions; see chapter 21), and amendments to the SGA extend its coverage to some leases (see chapter 32) as well (a "lessor" is the person who leases the goods to the consumer; the consumer is known as the "lessee"). Portions of the SGA cover sales or leases between retailers and consumers (e.g., when a consumer buys a car from a dealership), and some portions cover sales or leases between consumers themselves (e.g., when a consumer buys a car from another consumer who is not in the business of selling cars). Sale of goods contracts do not have to be in writing to be protected by the SGA.

The SGA is an important law for consumers because it provides many rights and remedies. It does this in two main ways:

- The SGA deems that many rights are part of a sale of goods contract, regardless of what the parties have (or have not) agreed on. These are called "implied terms." These terms cover the quality of the goods sold and the seller's right to sell the goods. Regardless of whether anything is said when a sale is made, or even if, in some instances, the seller specifically says that the SGA does not apply to the transaction, it is likely that the SGA does apply.

- The SGA gives consumers certain remedies if the seller breaches the rights given under the SGA. The SGA talks of rights that are "conditions" and rights that are "warranties." In very general terms, conditions are seen as the most important basic rights of the contract, while warranties are seen as less important collateral rights. The distinction can be important for the type of remedy (see chapter 11) available to the buyer through the court. In general, breaches of conditions may allow consumers to get out of the transaction altogether (i.e., return the goods and get their money back), while breaches of warranties usually allow consumers only to recover damages (i.e., get some compensation for the defect in the goods).

It is difficult to generalize about all the rights given by the SGA. Considerable case law has interpreted many sections of the SGA and refined the meaning of those sections. The relevance of a section to a particular transaction often depends on the specific facts of the transaction. Also, there are differences in how or whether the SGA's protection applies to transactions. For example, some protections apply to both business-consumer transactions and consumer-consumer transactions, while other protections apply to only business-consumer transactions.

The following is a brief summary of some of the more important consumer-related provisions of the SGA.

Seller's (lessor's) implied condition of title

Under s. 16(a) of the SGA, an implied condition of the contract is that the seller (or lessor) has a right to sell the goods. Essentially, this means that the seller has title to the goods and has the right to sell them. If the seller (or lessor) does not have the right to sell the goods, and this is discovered within a reasonable time, the buyer is entitled to cancel the contract and have the full purchase price returned. This protection usually applies to consumer-consumer sales (or leases) for both new and used goods; this protection always applies to business-consumer sales (or leases) for both new and used goods (since, for retailers, this right cannot be waived; see s. 20(3)).

Seller's (lessor's) implied condition of freedom from encumbrance

Under s. 16(c) of the SGA, an implied condition of the contract is that the seller (or lessor) promises there are no charges or encumbrances on the goods by any third party. Examples of charges or encumbrances include repairers' liens (see chapter 39) and security agreements over the goods registered under the *Personal Property Security Act* (PPSA) (see chapter 36). Again, this protection usually applies to consumer-consumer sales (or leases) for both new and used goods, and always applies to business-consumer sales (or leases) for both new and used goods (retail waivers being void under s. 20(3)).

Seller's (lessor's) implied condition of reasonable durability

Under s. 18(c) of the SGA, an implied condition of the contract is that the goods will be durable for a reasonable period of time, considering both the normal use of the goods and all the surrounding circumstances of the sale or lease. This protection always applies to business-consumer sales (or leases) of new goods (retail waivers are void under s. 20(2)). This protection will probably not apply to business-consumer sales (or leases) of used goods, since waivers are not void under the act in this case and the business may well have the consumer sign a waiver. This protection usually applies to consumer-consumer sales (or leases).

Seller's implied condition of reasonable fitness for purpose

Under s. 18(a) of the SGA, an implied condition of the contract is that the goods sold are reasonably fit for their intended purpose. This condition applies if the following three circumstances are all present:

- The consumer tells the business the intended purpose for the goods.
- The consumer shows that he or she is relying on the seller's skill or judgment.
- The seller sells the goods in the usual course of the seller's business.

There is considerable case law on the interpretation of when the three circumstances are present and what the standard is for reasonable fitness. This protection always applies to business-consumer sales and leases of new goods (retail waivers are void under s. 20(2)). This protection probably does not apply to business-consumer sales or leases of used goods, since waivers are not void and the business may well ask the consumer to sign a waiver. This protection does not apply to consumer-consumer sales.

Seller's implied condition of merchantable quality

Under s. 18(b) of the SGA, an implied condition of the contract is that the goods sold are of merchantable quality (i.e., they are in a suitable condition to be sold). This condition applies if the following three circumstances are all present:

- The consumer buys the goods by description from the seller.
- The seller deals in goods of that description.
- The consumer inspects the goods and does not find a defect that he or she ought to have found in making that inspection.

As with the implied condition of fitness for purpose, there is considerable case law on the interpretation of when the three circumstances are present and what the standard is for merchantable quality. This protection always applies to business-consumer sales and leases of new goods (retail waivers are void under s. 20(2)). This protection probably does not apply to business-consumer sales or leases of used goods, since waivers are not void in this case and the business may well have the consumer sign a waiver. This protection does not apply to consumer-consumer sales.

Information gathering

Obtain all the details of the transaction, including basic information about the seller, any documents relating to the sale, and any notes on conversations between the client and the seller throughout the transaction.

You should also consider whether the seller has "policies" that deal with such matters as the return of goods, as with some department stores. Where there are registration requirements for the goods, such as cars, a search may be helpful. Where the problem involves matters of title claims to the goods, search the Personal Property Registry.

Solving the problem

Protections and remedies in the SGA can be an important part of client redress for a wide variety of consumer sales problems. However, beyond a consumer's legal rights, a variety of factors may influence how the problem is approached. A consumer may decide to:

- do nothing,
- attempt to negotiate directly with the seller,
- enlist the assistance of a consumer help service, or
- take legal action, depending on the other factors.

Terms of the contract

Consider SGA rights in the context of the whole of the consumer contract. It is important to know both the terms of the agreement that are implied by law, and also the specific terms agreed to by the parties (e.g., a consumer's right to return goods), which may go beyond the rights under the SGA.

Type of seller

Consider also the type of seller the consumer is dealing with. As described above, some rights arise only with businesses, while other rights arise in both business-consumer and consumer-consumer situations. The type of seller may also factor into the consumer's response. For example, department stores are often easier for consumers to deal with than smaller retail businesses. Many department stores have policies of accepting the return of goods within a reasonable period of time, regardless of whether or not the goods are defective. Car dealers often have a reputation of being harder to deal with.

Type of product

Consider the type of product sold, as it may not be practical to seek a remedy at all. The product's value is of particular relevance.

Seriousness of the defect

How serious is the product's defect? It may be wise, and practical, for a consumer to ignore relatively minor defects, while more serious ones may justify taking the time to seek a remedy in court.

Reality of recovery

In almost any consumer situation, it is important to assess the reality of recovery. If a seller is likely to be unresponsive to a complaint, then the consumer needs to assess the prospect of taking court action. If a seller is an individual from whom it may be difficult to collect even if the consumer obtains a court judgment, it may be wiser to do nothing rather than face continuing frustration without any tangible result.

Related topics and materials

There are various useful texts on this topic, including *Sale of Goods in Canada* by G.H.L. Fridman and *The Sale of Goods* by P.S. Atiyah (note: the latter is based on English law, which differs somewhat from BC law). These texts are a starting point for finding cases that interpret sections of the SGA. Online resources for finding other cases include the Canadian Legal Information Institute website and the LexisNexis Quicklaw pay service. Cases can also be found, online by subscription only, in BestCase, as well as BC Law Reports.

See also Contracts: An overview; Contracts: Remedies; Deposits in consumer transactions; Enforcing judgments against chattels; Leases; *Personal Property Security Act*: Security agreements; Repairers' liens.

41 Stays of enforcement

Client problems

- One or more creditors is demanding payment or suing the client for debts that he or she does not dispute.
- Client has little or no income to pay on his or her debts.
- Client has little future prospect of being able to pay on his or her debts.

Summary of the law

Once a creditor has a judgment against a debtor, the creditor can usually take judgment enforcement steps, such as garnishment (see chapter 27) or seizure of assets. There are exceptions to this general rule. For example, courts may order a stay of enforcement (the order is postponed):

- when a party has begun appeal proceedings,
- when a debtor invokes remedies under the *Bankruptcy and Insolvency Act* (BIA), and
- for assignments in bankruptcy and proposals (see chapter 3 and chapter 5) under part III of the BIA.

This section describes the limited instances where, in the absence of an appeal or any viable remedy being open to the debtor (see chapter 19), the court may be persuaded to make an order specifically prohibiting the creditor from taking judgment enforcement steps. (Historically, this has been called a "stay of execution." For the purposes of this manual, we use the term "stay of enforcement.")

Authority for stay of enforcement orders

There does not appear to be any direct authority in the *Small Claims Act* (SCA) to order a stay of enforcement proceeding. It does appear that a Small Claims Court judge could achieve the same end, essentially, by ordering a very nominal payment schedule under Small Claims Rule 11 (e.g., a judgment payable at $1 per year).

Under s. 48 of the *Court Order Enforcement Act* (COEA), a court "may provide that an order is payable by instalments or may suspend execution for the time it considers proper."

Under Supreme Court Rule 13-2(31), at the time of judgment or any time after, a judge may order a stay of enforcement of the judgment.

There is relatively little case law on stays of enforcement that does not involve an appeal. However, at least two BC cases demonstrate the possible use of the remedy. In *Bank of Montreal v. Price*, the defendant, Price, brought third-party proceedings against his son and former daughter-in-law. The court ordered a five-year stay of enforcement against the former daughter-in-law, taking into consideration her inability to pay, her marital circumstances (divorced with custody of a child), and the close family relationship between the parties.

In *Caisse Populaire Maillardville v. Frigon*, the court refused an application for a stay of enforcement, finding no special circumstances, even though the defendant argued that the eventual disposition of a related court action between the parties in his favour would allow him to sell property and pay the plaintiff's judgment.

Information gathering

There are two important aspects of fact gathering when considering an application for a stay of enforcement:

- The long-term financial circumstances of the client.
- The level of court where the creditor is making the claim.

Advocates should obtain a complete financial picture of the client, including income and expenses, and assets and liabilities. It is particularly important to determine whether there are any other creditors and the extent of the debtor's assets. For this remedy to be viable, it should be evident that the client has little or no ability to pay the creditor's claim, and that there are no other practical remedies available to the debtor.

Court-level information is important because it governs what procedures to follow when applying for the instalment payment order (see chapter 29). If the client has been sued, obtain all the relevant court documents from the client or from the court registry.

If the client has not been sued, determine the amount owing to anticipate in which court an action might be brought.

Solving the problem

Before making an application for a stay of enforcement, consider whether a stay can be negotiated with the creditor. You may be able to explain to the satisfaction of the creditor that the debtor has no ability to pay on the debt, and is unlikely to have any future ability to pay. The creditor may agree to suspending collection efforts in exchange for the debtor agreeing to tell the creditor of any change in circumstances.

This approach may be successful, for example, if a client is on welfare or other income support scheme, and if it is clear to the creditor that enforcement steps are not likely to produce any results.

If the debtor is being sued in Small Claims Court, the judge might be asked to order a stay or to make a nominal payment schedule order. In Supreme Court, the debtor would file a notice of motion with a detailed supporting affidavit in response to the creditor's application for judgment.

Related topics and materials

See *Bankruptcy Act*: Assignments in bankruptcy; *Bankruptcy Act*: Orderly payment of debts; *Bankruptcy Act*: Proposals; Debtors remedies: Financial remedies; Garnishment and set-off; Instalment payment orders.

42 Torts: Assault and trespass

Client problems

- Client was assaulted by a bailiff who was repossessing goods.
- Client's car was taken from his or her property by a bailiff or court bailiff.

Summary of the law

Torts are civil wrongs committed by one person against another for which the law will give a remedy. Torts have developed over many centuries through common-law court decisions. Torts have some parallels with, but are separate from, criminal law. For example, intentionally hitting someone can be a criminal offence of assault, but also a tort of battery. As a criminal matter, the person committing the act may be prosecuted. As a civil matter, the person who was hit may be able to sue the person who did the hitting for damages. This section introduces areas of tort law particularly relevant in consumer or debt situations.

Assault

Historically, an assault was defined in common law as any situation where a wrongdoer instills in the victim the fear that he or she will be struck or otherwise physically attacked. No direct force need be applied to the victim so long as the threat can genuinely make a reasonable person afraid of being injured. The tort of battery occurs when actual violence is applied against the victim, although the violence need not be substantial. Although the distinction between assault and battery is maintained in tort law, common usage calls both wrongs an assault.

There are some consumer or credit situations in which assaults are more likely to occur, such as:

- contractual repossessions of chattels (personal, moveable possessions; see chapter 21) by a bailiff on behalf of a secured creditor, and

- statutory seizures of chattels by a court bailiff acting upon a writ of seizure and sale (see chapter 2).

Deciding who is in the right and who is in the wrong in any confrontation (and, in particular, when the debtor is entitled to resist) involves considering a number of legal principles.

Location of the incident

A key consideration is the location of the confrontation. Often, the confrontation occurs at or around the residence of the debtor. In general, a debtor is entitled to resist any entry to his or her own residence. A residence includes a house or apartment, as well as immediately adjacent buildings or parts of the residence, such as a garage. This principle certainly applies to bailiffs, and it also appears to apply to some situations involving court bailiffs.

Debtor refuses to give consent

The debtor must indicate that he or she is not giving consent to the repossession or seizure. The debtor can refuse entry to his or her residence or property, or request that the person who has entered has to leave. Thus, if a bailiff ignored a refusal of entry to premises and pushed past a debtor to take goods, the debtor would probably be justified in attempting to eject the bailiff. The act of pushing past, and of any subsequent physical confrontation, would probably be considered a civil assault on the part of the bailiff, for which the debtor could seek damages.

Reasonableness of resistance by the debtor

A debtor's resistance must be reasonable under the circumstances. Resistance with a weapon, for example, would probably be considered unreasonable.

Nature of the authority of the bailiff or court bailiff

A possible limitation to the debtor's right to resist might be where the person attempting to repossess or seize, probably with police officers or sheriffs in attendance, is enforcing a specific order of the court, which specifically ordered the debtor to give up certain property. This type of order might be sought, in fairly rare circumstances, where a debtor had initially resisted entry to property either by a bailiff or a court bailiff, and where the creditor had, with notice to the debtor, obtained a further order of the court.

The debtor's right to physically resist a bailiff or court bailiff has repercussions in both civil and criminal law. In criminal law, it usually means that the debtor can use reasonable force in resisting when appropriate. The debtor may well have a valid legal defence to any criminal charge arising from an incident under these circumstances. This also means that bailiffs or court bailiffs themselves could be charged with assault for any force that they used against the debtor, where the debtor had made it clear that he or she was resisting their actions against the debtor's property. In civil law, it would mean that the debtor has a cause of action to sue the bailiff or court bailiff for damages.

There is some important case law that guides and illustrates these principles. In the Ontario case of *R. v. Doucette et al.*, three bailiffs, acting on behalf of a secured creditor, hit a debtor while they were attempting to repossess a television from his apartment. They were convicted of criminal assault, where it was clear that the debtor was not exerting unreasonable force in resisting and where he had clearly communicated a demand for the bailiffs to leave his apartment.

In the BC case of *R. v. Todd*, a debtor was convicted of common assault on a police officer who had accompanied a bailiff to repossess a truck from the debtor. In the course of resisting the repossession, the debtor hit the officer in the head and kicked him in the groin. The court determined that the force used by the debtor in resisting was excessive.

In an older BC civil case called *Roman v. Motorcar Loan Company Limited and Burns*, the plaintiff was hit while a bailiff was attempting to repossess a car from the plaintiff's garage. The plaintiff recovered damages against the bailiff. The BC Court of Appeal held, on the particular facts of the case, that while the bailiff was liable for damages, the creditor should not be held vicariously liable for the acts of the bailiff.

Trespass

Trespass is a very broad legal concept. Basically, it is the wrongful interference with a debtor's property. This includes wrongly taking a debtor's chattels, and wrongly entering or remaining on a debtor's property. Wrongly entering or remaining on a debtor's property usually justifies a debtor's reasonable attempts at removing the person from his or her property. If there is resistance to the removal, it is the trespasser who is in the wrong, and the debtor may be able to claim damages for both trespass to property and assault.

Wrongful taking of a debtor's chattels, as a cause of action separate from assault, involves considering:

- the legal right that the creditor had to take the chattel, and
- the circumstances under which the creditor took the chattel.

Legal right to take chattels

A creditor's right to repossess usually arises from a security agreement. That right must be exercised within the limits of the *Personal Property Security Act* (PPSA) (see chapter 36), as well as other statutes such as the *Business Practices and Consumer Protection Act* (BPCPA).

The most basic mistake that a creditor can make is to have the wrong goods seized. For example, if furniture that is owned by a friend or relative of the debtor is taken as part of a repossession by a bailiff, the rightful owner of the goods will have a right to claim the return of the goods, or damages, or possibly both, from the creditor. Note, however, that the courts are often wary of other people coming forward to claim ownership of goods that are in the possession of a debtor. It may be up to the person claiming ownership to prove to the satisfaction of the court that he or she is indeed the rightful owner of the goods.

There are numerous instances in which a creditor's belief in his or her right to repossession may be mistaken or wrong, and where a debtor may have a right to sue for "trespass to chattels." For example, the security agreement and the common law of contract usually say that the creditor cannot repossess unless there is a default in payment. If a creditor missed crediting a payment made on time by the debtor, and subsequently repossessed a car, the creditor would probably be liable for damages for wrongly taking the car. If a creditor accepts a late payment from a debtor, the law may imply that the creditor has given up a right of repossession until there is another default. If a creditor's employee gives a debtor a verbal extension of time to make a payment, a repossession within that extension period may be considered wrongful.

The statute law sets a number of limits on repossession. If those limits are broken, the debtor may have a cause of action for trespass to chattels. For example, the PPSA, s. 58, says that creditors cannot repossess secured consumer goods where a debtor has paid at least two-thirds of the total amount secured (i.e., two-thirds of what is owed on those goods), unless they get a court order first. A repossession without such a court order would probably be considered a trespass to the chattel, for which the debtor could recover damages.

The BPCPA, s. 122, prohibits bailiffs (but not sheriffs, who are exempted by the Debt Collection Industry Regulation, s. 2(1)) from repossessing chattels unless the debtor, a spouse, the debtor's agent, or an adult resident in the debtor's dwelling is present. So, if a bailiff entered a debtor's house while no one was home and took secured goods, the debtor would have a cause of action for damages resulting from a breach of the statute. This right would likely arise in common law and certainly arises specifically under BPCPA, s. 171. Possible wrongful repossessions where statutory requirements had not been complied with would also exist under the *Repairers Lien Act* (RLA) (see chapter 39).

In the case of *Re Bad Boy Mobile Homes Ltd.*, the court held that a repossession made by a person who was not licensed as a bailiff was unlawful (the repossession had been carried out by an employee of the creditor). An extension of this principle may be that a debtor would be entitled to damages for wrongful repossession, and possibly to the return of any goods taken, where it could be shown the repossession was carried out by an unlicensed person. This situation is illustrated by the case of *Millar v. Sumo Engine Co. (Canada) (1989) Ltd.* (see below).

Wrongful repossession of chattels

Where there has been a trespass to land, the repossession of chattels may be considered wrongful. A trespass to a debtor's residence is usually wrongful in the absence of consent by the debtor. The debtor may have a cause of action for damages for trespass, and the debtor may have a right to have the goods returned. This issue usually arises when bailiffs attempt to repossess motor vehicles on behalf of secured creditors or repairers.

In *Millar v. Sumo Engine Co. (Canada) (1989) Ltd.*, a bailiff, acting on the direction of a creditor who claimed a repairer's lien over a debtor's car, repossessed it from a locked apartment garage by sneaking in behind another tenant who had activated the garage door. The court held that the locked garage was part of the debtor's dwelling house. Since there was no consent to entry, both the entry and the repossession were unlawful, and the court ordered the car returned. However, in *Shane v. Kazakoff*, the court said it was not unlawful to peacefully repossess a car from the driveway of private property.

Information gathering

Clients may be seeking advice on confrontation-type situations either before or after an incident. If an incident has not happened, but the client is asking "what if"–type questions, advocates should direct their fact gathering (and advice) toward helping the client avoid a confrontation. This includes getting a full picture of the client's financial circumstances and as much detail as possible on the actions of the creditor (e.g., what threats have been made).

If an incident has occurred, advocates should be careful to quickly determine if the situation has stabilized (e.g., is the bailiff intending to return? Are criminal charges pending against anyone?).

Solving the problem

Before an incident

Advocates should be very careful when giving advice to clients who are asking "what if"–type questions on such issues as how much force is reasonable in resisting a bailiff. The focus of advice should not be on how far a debtor can resist should a confrontation occur; rather, it should be on how the confrontation can be avoided through resolving the underlying financial or contractual problem. (See also chapter 26.)

After an incident

There are several ways to resolve situations in which there has been a tort against a debtor:

- Do nothing
- Bring tort action against the bailiff and creditor
- Complain to the police
- Complain to a licensing body

The fundamental question for a debtor when he or she is considering any of these remedies is whether it is worthwhile to take action. For example, the debtor should understand that taking a court action, whether in Small Claims Court or in Supreme Court, will likely be time-consuming and the outcome is never certain. The debtor's initial upset and desire for compensation may wane in the face of waiting a long time for the matter to be resolved in the court system.

However, it may well be that the court will demonstrate considerable sympathy to the debtor's circumstances, particularly where the facts show that the creditor or bailiff has acted in an unreasonable or oppressive manner.

Where the facts are favourable to the debtor, the creditor may well decide that it is financially prudent to settle an action for damages before the matter goes to trial. The value to a debtor who brings such an action is that he or she will gain some bargaining advantage to reduce or eliminate the debt to the creditor as a set-off to the damages that might be awarded for the tort of the creditor.

Where the creditor did have a right to repossess, but where the repossession was carried out in a wrongful manner, the debtor may well decide that it is better just to leave matters as they are. For example, if a debtor was in default of a car payment with little likelihood of being able to continue the payments, and if, under the seize or sue provisions of the PPSA, the debtor is no longer indebted to the creditor, the debtor may feel that it is impractical to seek the return of the vehicle.

Complaints to the police may be a remedy in more blatant situations, particularly where there has been actual physical contact between the parties. Complaints to a licensing body may also be a remedy in more blatant situations, where it may be that there is a continuing course of conduct such that the licence of the bailiff might be suspended.

Related topics and materials

See Bailiffs, court bailiffs, and sheriffs; Enforcing judgments against chattels; Harassment; *Personal Property Security Act*: Security agreements; Recovery of goods; Repairers' liens.

43 Travel services

Client problems

- Client has paid a deposit to a travel agent, but the agent has gone out of business and the client has not had or cannot get some or all of the holiday that he or she contracted for.
- Client got a Small Claims Court judgment against a travel agent because the trip the agent supplied was not as advertised, but the agent has gone out of business and the client cannot collect on the judgment.
- Client wants to take an action against a travel agent because the trip the agent supplied was not as advertised.
- Client says a hotel or other travel service was not of the standard promised or advertised.

Summary of the law

In most transactions, a consumer deals directly with a business supplying a service: a car is bought from a car dealer, credit is obtained from a credit union, a repair service is obtained directly from a repairer. With travel services, consumers often use an intermediary, a travel agent, to obtain the services for them. A travel agent provides an efficient and easy way for consumers to purchase hospitality services around the world.

Because travel agents are a main part of the travel industry, and because of the problems consumers may have in obtaining direct satisfaction from a supplier for breach of services provided through a travel agent, it is not surprising that considerable litigation and legislation focuses on the responsibility of travel agents for consumer travel contracts.

When consumers do not use an agent and instead deal directly with businesses supplying travel services, such as a hotel, the usual rules of contract law (see chapter 8, chapter 9, and chapter 11) and the provisions of the *Business Practices and Consumer Protection Act* (BPCPA) apply. The provisions of the BPCPA governing distance contracts apply to Internet purchases of airline tickets, holiday packages, etc. A “distance contract” is basically a contract that is not negotiated in person.

Common-law remedies against travel agents

The relationship between consumers and travel agents is essentially one of contract. However, some special aspects of this relationship are governed by principles of a subcategory of contract law known as the "law of agency." In addition, there have been some court cases that have said that the law of negligence applies to the consumer-agent relationship.

In general, the duty of a travel agent is to exercise reasonable skill and diligence in performing the terms of the agency contract with the consumer. If there is a written contract between the consumer and the agent, the agent may seek to limit its liability under this duty as a term of the written contract. In some instances, therefore, the courts must consider not only whether the agency contract was breached but also whether the particular breach is one for which the agent is responsible.

In *Bratty v. Lloyds World Travel Service*, the BC Court of Appeal upheld a damages award of $3,000 against a travel agent. Among other faults, the agent misadvised the consumer of certain visa requirements, causing the consumer considerable inconvenience. The court held that the actions of the agent were a breach of contract. The court also held that the agent could not rely on the limitations of liability printed on the invoice for services, because the limitations had not been specifically drawn to the consumer's attention prior to travel.

In many cases against travel agents, the issue is what losses can actually be claimed. In general, if an agent is found liable, the agent is responsible for reasonable expenses (e.g., alternative airfare, additional hotel costs) incurred by the consumer in remedying the breach, as well as for refunding the consumer the costs of any unused portion of a trip. In addition, the courts have said that consumers may also be entitled to general damages for the inconvenience arising from the fault of the agent. In *Keks v. Esquire Pleasure Tours Limited*, for example, the plaintiffs were awarded $800 for inconvenience.

Statutory remedies against travel agents

Statutory remedies for consumers are contained in the BPCPA and the Travel Industry Regulation (TIR).

Registration

Travel agents and travel wholesalers (both called travel agents in this section) must be licensed under the act. Consumer Protection BC, also known as the Business Practices and Consumer Protection Authority, supervises the licensing and operation of travel agents. Consumer Protection BC has the power to refuse to issue or renew a licence, to suspend or cancel a licence, or to impose conditions on the licence of a travel agent.

At the time the licence is issued, the agent must post security for claims against the agent by consumers (TIR, s. 14). Consumer Protection BC also has certain investigative powers, as well as powers to protect consumers by ordering assets to be frozen. Further, the authority can apply to court for a receiver to take over the operation of a travel agency.

Travel Assurance Fund

Agents are required to pay into a Travel Assurance Fund from which consumers may be able to get compensation for losses arising from problems with travel agents.

Under s. 18(1) of the TIR, consumers can make claims to the fund when they have suffered a loss by reason of paying a travel agent for travel services that were not provided.

Consumers have six months from the date of their loss to make a claim against the fund. The maximum compensation available from the fund is $5,000 per person who was affected by the loss.

Information gathering

Gather and confirm all information on the circumstances of the vacation and the client's complaint about it.

Solving the problem

Consumer problems with travel agents generally fall into two categories:

- Agents go out of business or do not deliver a service before the consumer travels.
- Consumers are dissatisfied with travel services on trips from which they have now returned.

The Travel Assurance Fund exists to address the first situation. Help the client to prepare and submit a claim to the fund. Carefully review the BPCPA and the TIR to confirm that a claim is appropriate, including how much the client might be able to claim. Staff at Consumer Protection BC may be able to give some guidance on this.

Note that some situations may be urgent and should, initially, be reported to Consumer Protection BC. The TIR allows payments from the Travel Assurance Fund in certain emergency situations (s. 21). If a travel agency has just closed, you should immediately ensure that Consumer Protection BC is aware of the closure. Consumer Protection BC may be able to preserve funds due to the consumer, which might otherwise be lost as a source of compensation if quick action is not taken.

In other situations, the consumer will probably have to consider making his or her own claim against the travel agent through negotiation or court action. In that case, carefully review the travel contract between the consumer and the agent to consider the liability limitations the agent has set. Such limitations may make claims against the agent more difficult, though not necessarily impossible, particularly where there have been misrepresentations for which the BPCPA may give a remedy.

Related topics and materials

See Contracts: An overview; Contracts: Defences; Contracts: Remedies; Unfair or deceptive practices: Trade practices legislation.

See also Canadian Consumer Handbook, Office of Consumer Affairs at Industry Canada; Consumer Law, People's Law School; and Consumer Protection, UBC Law Students' Legal Advice Program.

44 Unfair or deceptive practices: Trade practices legislation

Client problems

- Salesperson made promises about the quality of a product, such as a car, which turned out not to be true, and now the client wants a remedy.
- Client thinks he or she was treated unfairly by a business and that the business took advantage of him or her, and now the client wants a remedy.
- A number of promises were made to a client about the quality of a product, but the promises were not put in a written sales contract, and now the salesperson says that the promises are not binding.

Summary of the law

Trade practices legislation for the protection of consumers was first enacted in the 1970s as the *Trade Practices Act* (TPA). Its successor statute, the *Business Practices and Consumer Protection Act* (BPCPA), was enacted in 2004 and repealed the TPA. Both the TPA and BPCPA build on the law of contract, but try to cover situations where the common-law principles of contract law (see chapter 8) are insufficient to give a consumer a remedy (see chapter 11).

Part 2 of the BPCPA, Unfair Practices, applies to consumer transactions that are defined as the supply of goods, services, or real property by a supplier to a consumer for primarily personal, family, or household use. Consumer transactions also include solicitations, offers, advertisements, or promotions by a supplier for sales and services to a consumer. This part of the BPCPA extends protections in three main areas:

- Misrepresentation (which the BPCPA calls deceptive acts or practices)
- Unconscionability
- Unsolicited goods or services

Deceptive acts or practices

Section 4 of the BPCPA generally defines a deceptive act or practice as any form of representation capable of deceiving or misleading a person. The case law has interpreted this to mean an action that tends to lead the consumer to make an error of judgment. Section 4 also lists specific actions deemed to be deceptive, including misrepresentations (i.e., untrue representations) about the quality of a product, prior history of a particular product (e.g., a car), the price advantage the seller is offering, or the availability of an item.

Section 4(3)(c)(iii) says it is a deceptive practice to give an estimate that is "materially less" than the price eventually determined or demanded by the supplier if the consumer has not expressly consented to the higher price before the goods or services are supplied.

A number of reported court decisions have found some types of conduct to be deceptive practices under the TPA, now the BPCPA. Most of the decisions involved representations by salespeople about the quality of consumer products, particularly cars.

Findlay et al. v. Couldwell and Beywood Motors was an early case decided under the old TPA. A salesperson for a used car dealership represented one of the used cars as a vehicle in good running order. Five days after purchase, the engine blew up while the buyer was driving on a highway. The court held that the representation of the car's quality was a "deceptive act or practice" within the meaning of the TPA. (The court also held that the buyer was entitled to succeed in common law on the basis that there had been a fundamental breach of the sales contract; the dealer was not entitled to rely on an "as is — where is" term in the sales contract to exempt itself from liability.)

In *Steiner v. Personal Motors Ltd.*, the court found that a salesperson had made statements "grossly exaggerating" the condition of a car, and that the statements were deceptive within the meaning of the TPA. The buyer was awarded exemplary damages of $500 as well as specific and general damages. *Rushak v. Henneken* is a 1991 Court of Appeal decision dealing with representations made about a car that summarizes the relevant legal principles and case law. In *Casillan v. 565204 B.C. Ltd.*, the BC Supreme Court applied the principles in *Rushak v. Henneken* and found that a used car salesperson engaged in a deceptive act or practice under the BPCPA when a salesperson told a potential buyer that the powertrain of a car was under warranty without confirming if that was in fact the case. In fact, there was no powertrain warranty and the car engine needed to be replaced within five months of purchase, due to a major powertrain malfunction. The court awarded the buyer statutory damages of $13,512.61 under s. 171 of the BPCPA, which was the cost of the engine replacement. In *Simpsons-Sears*

Limited v. Paddock, the court awarded damages under the TPA where a lower quality of roofing shingle than was represented in the sales contract was used.

Unconscionability

The BPCPA does not specifically define unconscionable acts or practices (but see explanation in chapter 9), but it does list some of the circumstances that a court should consider when making a decision on unconscionability, including the following:

- Was undue pressure put on the consumer?
- Was the consumer taken advantage of because of physical or mental infirmity, ignorance, illiteracy, age, or inability to understand anything related to the transaction?
- Was the price charged to the consumer grossly above usual market prices?
- At the time of the transaction, was there no reasonable probability that the consumer would ever be able to make full payment of the total price?
- Were the terms of the transaction so harsh or adverse to the consumer as to be inequitable?

In *Pacific Finance Acceptance Company Limited v. Turgeon and Turgeon*, the court found the conduct of the plaintiff-creditor unconscionable under the TPA. In that case, the consumer-borrowers were initially given three months' relief from loan payments, but were later pressured into refinancing at a higher interest rate under threat of legal action to claim the three payments. The court dismissed the creditor's claim for the balance remaining on the outstanding loan agreement.

Unsolicited goods or services

The BPCPA states that consumers have no legal obligation to a supplier for goods or services that they have not requested unless they acknowledge in writing an intention to accept the goods or services. (See chapter 45.)

Remedies

Significantly, the BPCPA empowers both the consumer and Consumer Protection BC, also known as the Business Practices and Consumer Protection Authority, to seek a remedy for deceptive or unconscionable practices. This allows for the following possibilities:

- A consumer can bring a civil action in Small Claims Court or Supreme Court under the BPCPA.
- The authority can bring a civil action (and take other administrative steps) against the supplier on behalf of one or more consumers.
- The Crown can prosecute a supplier that has contravened the BPCPA.

Consumer remedies

Section 171 of the BPCPA allows a consumer to bring an action for damages arising from a contravention of the BPCPA, including a deceptive or unconscionable practice. If an unconscionable act or practice has occurred in a consumer transaction, s. 10(1) provides that the transaction is not binding on the consumer. In effect, a consumer can use the BPCPA either to bring an action or to defend against a claim by a supplier.

One particular advantage for consumers of bringing an action under the BPCPA is the admissibility of parole evidence. Basically, this rule says that where there is a written contract that appears to contain all of the terms agreed to between the parties, the courts usually will not take notice of unwritten statements (e.g., verbal promises or representations) that go beyond or contradict the terms of the written agreement.

Historically, this rule was a problem for consumers because most written consumer contracts had a clause specifically saying the agreement stood for the entire agreement, and there were to be no other representations or promises made between the parties. If a consumer tried to say in court that a salesperson made a verbal promise or representation about something he or she bought, and the promise or representation turned out not to be true, only in very limited situations would the court admit the consumer's testimony about the verbal promise as part of the court case.

Section 187 of the BPCPA says that in any proceeding involving a consumer transaction (as defined under the BPCPA), the parole evidence rule does not exclude or limit the admissibility of evidence relating to the understanding of the parties to the agreement, or to a particular term of it. The equivalent section in the TPA was applied in the *Findlay* case, which is discussed above.

The BPCPA also provides for the establishment of compensation funds to provide compensation to consumer victims of deceptive or unconscionable acts or practices or other contraventions of the BPCPA. (See also chapter 43.)

Remedies available to Consumer Protection BC

In addition to the right to bring a court action against an offending supplier, the BPCPA provides for a number of remedies that Consumer Protection BC may take on behalf of consumers. Consumer Protection BC may:

- conduct an inspection;
- obtain an undertaking from a supplier;
- make a compliance order;
- make a direct sales prohibition order (a direct sale is one made somewhere other than at the supplier's usual place of business, such as a door-to-door sale);
- make an order freezing the property of a person under inspection; or
- impose administrative penalties of up to $5,000 per day for individuals and up to $50,000 for corporations.

Prosecutions

The BPCPA says it is an offence to contravene the BCPCA. This means that suppliers can be prosecuted in the criminal courts for deceptive or unconscionable practices. Where there is a prosecution and a conviction, a judge can, in addition to imposing fines or jail, order the supplier to compensate a consumer for losses suffered as a result of the offence.

Information gathering

Obtain full details of the particular transaction that the consumer is complaining about, including:

- copies of all sales documents, warranties, correspondence, advertisements, sales brochures, or other promotional materials;
- conversations between the consumer and salespersons or others acting on behalf of the supplier, including conversations made before, during, and after the making of any contract;
- any attempts by the consumer to resolve the complaint, and details of any promises of compensation that may have been made by the supplier; and
- the particular product or service that the consumer is complaining about.

Solving the problem

The consumer has two main options for resolving a complaint that falls under the BPCPA:

- Attempt to resolve the matter directly with the supplier. The usual first step is to attempt to negotiate a resolution (e.g., ask for a refund or some money back to compensate for a product that has been misrepresented). The consumer may have to consider court action if a settlement cannot be negotiated.
- Complain to Consumer Protection BC, asking it to take a remedy on behalf of the consumer, and possibly other consumers who may have been the subject of deceptive or unconscionable practices. The advantage here is that the BPCPA has a number of remedies under the BPCPA only granted to Consumer Protection BC (and not to consumers in their own court action). The consumer also gets the benefit of any court actions by Consumer Protection BC without incurring legal costs.

For most routine cases, the consumer should expect to negotiate or litigate for themselves.

Related topics and materials

See Contracts: An overview; Contracts: Defences; Contracts: Remedies; Contracts: Opting out and cooling-off periods; Misleading advertising: The *Competition Act*; Travel services; Unsolicited goods and services.

See also Dishonest Business Practices and Schemes, the Canadian Bar Association BC Branch.

45 Unsolicited goods and services

Client problems

- Client has received a sample product or other consumer goods that he or she did not contract for and wants to know his or her legal responsibility if he or she keeps the goods.
- Client ordered a product in response to a mail solicitation and wants to get out of the contract.

Summary of the law

In general, contracts must be made by mutual agreement (see chapter 8). One party cannot usually impose a contract or an obligation on another person. For example, if a person performs a service without being requested, or if a person delivers a product without the consumer contracting for that product, the consumer is usually under no obligation to pay for the service or product. The consumer may feel morally obligated, but he or she is not legally obligated.

The *Business Practices and Consumer Protection Act* (BPCPA) deals specifically with the situation of unsolicited goods and services. Essentially, the BPCPA clarifies how common-law principles would probably be applied. Section 12 of the BPCPA says that consumers have no legal obligation to pay for unsolicited goods or services unless they specifically acknowledge in writing to the seller that they intend to accept the goods or services.

Unsolicited goods or services are defined as goods or services that are supplied to a consumer who did not request them. Unsolicited goods or services do not include goods or services that the consumer knew, or ought to have known, were intended for delivery to another person. For example, a consumer cannot keep the fridge that a department store mistakenly delivers to his or her carport when it was obviously intended for a neighbour across the street.

Most consumers regularly encounter instances of unsolicited goods. For example, small sample items delivered door-to-door for which the manufacturer has no expectation of payment but hopes will encourage consumers to purchase the full-size product. Consumers may also receive solicitations for goods, rather than the goods themselves, through junk mail advertising. The consumer only becomes liable to pay for the product if he or she specifically orders it.

Finally, consumers may receive relatively small items (e.g., greeting cards) mailed out by businesses or charities in the hope that consumers will pay for the items. In this last instance, the law clearly says consumers are not legally responsible to pay for the goods and can keep the goods and use them as they wish.

Information gathering

Gather and confirm all information about the unsolicited goods or services.

Solving the problem

You must clearly distinguish between unsolicited goods or services, and solicitations for goods or services to which the consumer has responded. If goods or services meet the description of unsolicited goods or services as described in the BPCPA, then the client has no responsibility.

If the consumer has responded to a solicitation by ordering goods or services, then the usual principles of contract law apply. In general, the consumer does not have a legal right to get out of the agreement unless:

- there is a specific term in the contract between the parties that allows this; or
- there is a breach of the sale agreement by the seller (such as through a defect in the goods or services, or through a misrepresentation by the seller).

In situations where the consumer has responded to some form of solicitation (e.g., by mail, radio, or TV), you may find a specific term in the contract that allows the consumer to get out of it (see chapter 10). It is a common marketing practice for such sellers to offer a limited-time return of the goods for any reason. The matter may be resolved simply by the consumer returning the goods to the seller and requesting a refund.

Related topics and materials

See Contracts: An overview; Contracts: Opting out and cooling-off periods; Contracts: Remedies; Unfair or deceptive practices: Trade practices legislation.

46 Warehouse liens

Client problems

- Client has put goods in storage with a storage company and now cannot pay the bill.
- Client has received notice from a storage company that his or her goods in storage are going to be sold to pay the storage bill.

Summary of the law

The *Warehouse Lien Act* (WLA) gives a statutory lien over property, including a consumer's goods, when that property is deposited by the owner (or the owner's agent) with the warehouser. A warehouser is defined as a person engaged in the business of storing goods.

The effect of the lien right is that the warehouser can keep the goods until the bill for all expenses related to the storage is paid. The WLA also gives the warehouser a statutory right to eventually sell the goods if the bill is not paid. Section 4 of the WLA sets out the procedure that the warehouser must follow:

1. The warehouser must give written notice to the owner that he or she intends to sell the stored goods.
2. The notice must contain a summary of the charges owing.
3. The notice must warn the consumer that he or she has 21 days to pay the bill.
4. If the bill remains unpaid after the 21 days, the warehouser must then publish a newspaper advertisement at least once a week for two consecutive weeks announcing that the goods are to be sold. The sale date must be at least 14 days from the date of the first publication of the advertisement.

The scope of the WLA appears to cover moving companies as well. If there is no agreement that the consumer can pay the bill later, a mover is entitled to full payment before the consumer gets the goods.

Related topics and materials

See Canadian Consumer Handbook, Office of Consumer Affairs at Industry Canada; Consumer Law, People's Law School; Consumer Protection, UBC Law Students' Legal Advice Program; and Warehouse Liens, the Canadian Bar Association, BC branch.

Part III:

Other helpful resources

Appendix 1

Consumer and debtor statutes

Federal statutes

Bank Act, S.C. 1991, c. 46.

Bankruptcy and Insolvency Act, 1985, c. B-3.

Bills of Exchange Act, R.S.C. 1985, c. B-4.

Competition Act, R.S.C. 1985, c. C-34.

Cost of Borrowing (Banks) Regulations SOR/2001-101 [*Bank Act*].

Criminal Code, R.S.C. 1985, c. C-46.

Indian Act, R.S.C. 1985, c. I-5.

Interest Act, R.S.C. 1985, c. I-15.

Tax Rebate Discounting Act, R.S.C. 1985, c. T-3.

Provincial statutes

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

Consumer Contracts Regulation, B.C. Reg. 272/2004 [*Business Practices and Consumer Protection Act*]

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

Court Order Enforcement Exemption Regulation, B.C. Reg. 28/1998 [Court Order Enforcement Act]

Court Order Interest Act, R.S.B.C. 1996, c. 79.

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

Debt Collection Industry Regulation, B.C. Reg. 295/2004 [Business Practices and Consumer Protection Act].

Employment and Assistance Act, S.B.C. 2002, c. 40.

Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127.

Family Maintenance Enforcement Act Regulation, B.C. Reg. 346/88 [Family Maintenance Enforcement Act].

Financial Administration Act, R.S.B.C. 1996, c. 138.

Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163.

Fraudulent Preference Act, R.S.B.C. 1996, c. 164.

Infants Act, R.S.B.C. 1996, c. 223.

Law and Equity Act, R.S.B.C. 1996, c. 253.

Legal Profession Act, S.B.C. 1998, c. 9.

Legal Services Society Act, S.B.C. 2002, c. 30.

Limitation Act, R.S.B.C. 1996, c. 266.

Limitation Act, S.B.C. 2012, c. 13.

Mortgage Brokers Act, R.S.B.C. 1996, c. 313.

Motor Dealer Act Regulation, B.C. Reg. 447/1978 [*Motor Dealer Act*].

Motor Vehicle Act, R.S.B.C. 1996, c. 318.

Partition of Property Act, S.B.C. 1996, c. 347.

Payday Loans Regulation, B.C. Reg. 57/2009 [*Business Practices and Consumer Protection Act*].

Personal Information Protection Act, S.B.C. 2003, c. 63.

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

Property Law Act, R.S.B.C. 1996, c. 377.

Repairers Lien Act, R.S.B.C. 1996, c. 404.

Sale of Goods Act, R.S.B.C. 1996, c. 410.

Sheriff Act, R.S.B.C. 1996, c. 425.

Small Claims Rules, B.C. Reg. 261/1993 [*Small Claims Act*].

Supreme Court Civil Rules, B.C. Reg. 168/2009 [*Court Rules Act*].

Travel Industry Regulation, B.C. Reg. 296/2004 [*Business Practices and Consumer Protection Act*].

Warehouse Lien Act, R.S.B.C. 1996, c. 480.

Appendix 2

Case citations

Most of the cases listed below are reported decisions. The citations are usually from report series that should be readily available at courthouse libraries. British Columbia Law Reports (B.C.L.R.), Western Weekly Reports (W.W.R.), and Dominion Law Reports (D.L.R.) contain the full text of cases. BC Decisions (B.C.D. Civ.) and the BC Weekly Law Digest (B.C.W.L.D.) contain summaries of cases.

Decisions made after 1990 can be found on the websites of the individual courts. The website of the Supreme Court of BC and the BC Court of Appeal is www.courts.gov.bc.ca. The website of the Small Claims Court of BC is www.provincialcourt.bc.ca.

Alternatively, the text of cases may be obtained through www.canlii.org (for free) or through Quicklaw (for a fee). In a few instances, cases are noted as unreported (and are, apparently, unavailable from any reporting service).

ABCO Diesel Ltd. v. Dolphin Delivery Ltd., [1981] B.C.J. No. 634 (April 30, 1981) (BC Co. Ct.).

Accent Leasing & Sales Ltd. v. Babic and Bryant, 2007 BCSC 1481.

Bank of Montreal v. Koszil, [1982] B.C.J. No. 871 (July 8, 1982) (BCSC); see also [1982] B.C.J. 872 (October 12, 1982) (BCSC).

Bank of Montreal v. Price, [1983] B.C.J. No. 1219 (September 13, 1983) (BC Co. Ct.).

Bratty v. Lloyds World Travel Service, [1984] B.C.J. 1569 (March 29, 1984) (BCCA).

Caisse Populaire Maillardville v. Frigon, [1988] B.C.J. 1649 (June 2, 1988) (BCSC).

Canadian Imperial Bank of Commerce v. Pegg, [1994] B.C.J. 182 (January 25, 1994) (BCSC).

Findlay et al. v. Couldwell (c.o.b. Beywood Motors), [1976] B.C.J. 1017 (June 10, 1976) (BCSC).

Keks v. Esquire Pleasure Tours Limited, [1974] M.J. No. 241 (February 25, 1974) (Manitoba County Court).

Marzetti v. Marzetti, [1994] S.C.J. No. 64 (July 14, 1994) (SCC).

McIntosh v. Laronde, [1998] 165 D.L.R. (4th) 178, 31 C.P.C. (4th) 256 (Ont. SCJDC).

Metropolitan Toronto (Municipality) v. O'Brien, [1995] 23 O.R.(3rd) 543, 1995 CanLII (S.C.).

Millar v. Sumo Engine Co., (Canada) (1989) Ltd. [1993] B.C.J. No. 1881 (September 21, 1993) (BCSC).

Morrison v. Coast Finance Ltd., 55 D.L.R. (2d) 710 (October 27, 1965) (BCCA).

Pacific Finance Acceptance Company Limited v. Turgeon and Turgeon, [1978] B.C.J. No. 68 (November 29, 1978) (BCSC).

Plater v. Bank of Montreal, [1988] B.C.J. 139 (January 15, 1988) (BC Co. Ct.).

R. v. Doucette et al., (May 12, 1960)

R. v. Ens [1980] 1 W.W.R. 639 (Saskatchewan District Ct.).

R. v. Todd, (1978) 6 B.C.L.R. 66 (BC Provincial Court).

Re Bad Boy Mobile Homes Ltd., 66 D.L.R. (3d) 324 (February 2, 1976) (BCSC).

Re Halverson, 2011 BCSC 1160 (CanLII).

Roman v. Motorcar Loan Company Limited and Burns, [1930] B.C.J. No. 46 (March 4, 1930) (BCCA).

Royal Bank v. McLennan, [1918] B.C.J. No. 65 (November 21, 1917, and January 28, 1918) (BCSC & BCCA).

Rushak v. Henneken, [1991] B.C.J. No. 2692 (September 20, 1991) (BCCA).

Shane v. Kazakoff, [1990] B.C.J. No. 1067 (May 9, 1990) (BCSC).

Simpsons-Sears Limited v. Paddock, [1984] B.C.J. No. 58 (June 8, 1984) (BC Co. Ct.).

Tilden Rent-A-Car v. Clendenning, (March 30, 1978) (Ontario Court of Appeal).

Toban v. Total Credit Recovery, [2001] B.C.J. No. 1921 (September 5, 2001) (BC Provincial Court).

Toronto-Dominion Bank v. Wong and Lim, [1985] B.C.J. No. 1812 (June 21, 1985) (BCCA).

Total Credit Recovery v. Roach, 2007 BCSC 530.

Waters v. Sun Route Tours Inc, 1994 CanLII 1369 (B.C.S.C.).

Appendix 3

Consumer and debtor resources

The following is a brief description of additional resources that may be useful in resolving consumer or credit/debt law problems. Most of these services and government agencies have websites with links to relevant information.

Agencies

You may consider referring a client to another individual or agency as an alternative for resolving the client's problem. Ensure that referrals are in the best interests of the client (i.e., you should be satisfied that a referral will likely result in the resolution of the client's problem, rather than a further referral or a dead end). Try to avoid simply "unloading" troublesome clients onto other agencies.

It may be useful to meet periodically with, or at least obtain literature on, individuals or agencies to whom you make referrals, so you are clear about when it is appropriate to make referrals. In general, referrals may be appropriate when:

- the problem requires legal knowledge beyond your experience (refer to supervising lawyers, other poverty law lawyers, or lawyers in private practice willing to take the case);
- the problem can best be resolved by a government agency with the authority to impose a remedy, such as the Privacy Commissioner or Consumer Protection BC, also known as the Business Practices and Consumer Protection Authority; and
- you are aware that a professional association or trade organization has the authority or a reputation for resolving complaints (e.g., the Law Society of BC for lawyers, the Better Business Bureau for local businesses, or the Motor Vehicle Sales Authority of British Columbia).

Two valuable resources for finding the names, addresses, and phone numbers of the agencies referred to in this manual are the:

- *Help for Consumers* Web pages, provided by Consumer Protection BC at their website; and
- *BC Lawyers Telephone, Fax and Services Directory*, published annually by the BC Branch of the Canadian Bar Association.

Materials

The following sources provide online and/or print information on consumer or credit/debt law:

Consumer Protection BC: CPBC has a website at www.consumerprotectionbc.ca. It is a good source of information about consumer law and issues in general and emerging trends.

Clicklaw: Clicklaw is a website (www.clicklaw.bc.ca) operated by Courthouse Libraries BC. Its purpose is to publish legal information materials for the layperson. It covers many topics, including credit/debt law and consumer law.

Continuing Legal Education Society (CLE): CLE has produced a number of courses and related materials and manuals on the topics of debt collection and Small Claims Court and Supreme Court practices. The materials and manuals are available in courthouse libraries and on the society's website at www.cle.bc.ca. Look under Publications. CLE's "British Columbia Creditors' Remedies: An Annotated Guide" covers practical aspects of creditors' remedies, and includes forms, precedents, legislation, and checklists.

Law Society of British Columbia: The society publishes the materials for the Professional Legal Training Course. The course materials are available in courthouse libraries and on the society's website at www.lawsociety.bc.ca. Look under Becoming a Lawyer in BC.

UBC Law Students' Legal Advice Program (LSLAP): LSLAP has a manual on various legal topics, including consumer protection and debtors' remedies. The manual can be accessed on online at www.lslap.bc.ca.

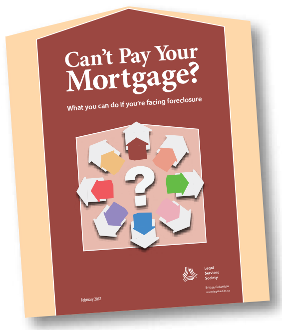
See also: *British Columbia Debtor-Creditor Law and Precedents* (Carswell, 1993) by Lyman R. Robinson, QC. This is a leading text on all aspects of BC credit/debt law.

The Legal Services Society also has an online publication called *Can't Pay Your Mortgage? What You Can Do If You're Facing Foreclosure* (February 2012). It is available from www.legalaid.bc.ca. Look under Our Publications.

For problems relating to family maintenance payments, see the Family Law in BC website. This site is a family law information resource that contains information (including fact sheets and self-help guides to help clients understand the court process) on maintenance (normally referred to as "support" on the site).

For help with understanding legal terminology, see Barron's *Canadian Law Dictionary* (by John A. Yogis Q.C. and Catherine Cotter, LLB, MLIS) and Vancouver Community College's Multilingual Legal Glossary. *Black's Law Dictionary* (edited by Bryan A. Garner) is a useful resource for US terminology.

Another useful resource



Can't Pay Your Mortgage? *What You Can Do If You're Facing Foreclosure*

This booklet is for any homeowner who is about to miss a mortgage payment, has already missed one or more mortgage payments, or has received a Petition to go to court. It explains what homeowners can do when lenders try to take their properties because of missed payments (foreclosure). The booklet lists agencies that can provide information or other kinds of help.

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