

# Litigation Webinar Series Part 1: Debtor/creditor issues in the current COVID-19 climate

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# Today's speakers



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# Presentation Overview

1. Default
2. Due Diligence
3. Demand
4. Forbearance
5. Government Relief Programs
6. Rent Distress
7. Relief from Forfeiture
8. Insolvency Proceedings
9. Asset Seizure
10. Limitation Periods
11. Reduced Court Operations
12. Commencing/Defending an Action
13. Virtual Affidavit Commissioning
14. Pre-judgment Remedies
15. Post-judgment Remedies

# Default

- Anticipated default
- Communication
- Consider nature of relationship
- Risk associated with giving creditor a heads up
- What is the nature of the default – payment obligation, technical, etc.?
- Reaction

# Due Diligence

- Publicly accessible searches – debtor and related parties
  - Personal Property Registry
  - Bankruptcy
  - Court
    - Any pending or outstanding litigation?
  - Land title
    - Registered encumbrances?
    - CPLs?
    - New acquisitions? Sales/transfers?
  - BC Assessment
- Consider competing claims and assets of the debtor
- Consider avenues for recovery and collection

# Demands for Payment

- Reasonable notice
  - Look to notice provisions in contract
  - Otherwise, 7-10 business days is considered reasonable
- Notice of Intention to Enforce Security under s. 244 of the *Bankruptcy and Insolvency Act* – 10 days
- How do you send a demand letter in light of COVID-19?
  - Check notice provisions in any relevant agreements
  - Corporation – registered records office and copy to individual contact
  - Individuals – confirm delivery of the letter
    - Registered mail tracking
    - Courier delivery confirmation
  - Email – delivery and read confirmation

# Forbearance

- Consider benefit of certainty versus costs of enforcement
- Shore up security and fix deficiencies in contracts
- Acknowledgments of debt and obligations
- Common terms:
  - Set out the amount of the debt, and the terms of the interest
  - Detail the defaults by the debtor and/or guarantors
  - Confirmation that the contracts and security are valid and enforceable
  - Waiver of defenses
  - If demand has been made, acknowledging the demand and waiving any statutory notice periods
  - Monetary and non-monetary obligations (reporting requirements, further guarantees or security, etc.)
- Be mindful of the provisions of:
  - Section 8 of the *Interest Act*
  - Section 374 of the *Criminal Code* – criminal offence to receive interest in excess of an annual effective rate of 60%

# Government Relief Options

## Federal

- Financial institutions are providing flexible financial solutions
- Business Credit Availability Program
- Canada Emergency Business Account Program
- Canada Emergency Commercial Rent Assistance
- Canada Emergency Wage Subsidy
- GST, PST, and income tax deferrals

## British Columbia

- Provincial business tax deferrals
- Other provincial tax deferrals
- School property tax rate reductions and extended payment periods
- BC Hydro deferrals or flexible payment plans

# Canada Emergency Business Account

- Available to Canadian employers with \$20,000 to \$1.5 million in total payroll in 2019, and operating as of March 1, 2020.
- Financial institutions will be able to provide interest-free credit facilities of up to \$40,000 to eligible businesses.
- Only to be used for non-deferrable operating expenses
- If the loan is repaid by December 31, 2022, 25 per cent (up to \$10,000) will be forgiven.
- If the loan is not repaid by December 31, 2022, the remaining balance will be converted to a three-year term loan at 5 per cent interest.
- For more information see <https://ceba-cuec.ca/>

## Other Business Credit Availability Programs

- Export Development Canada loan guarantee for small and medium-sized enterprises
  - Financial institutions can issue operating credit and cash flow term loans of up to \$6.25 million for existing clients, with 80 per cent guaranteed by EDC
  - Only to be used for operational expenses
  - See: <https://www.edc.ca/en/solutions/working-capital/bcap-guarantee.html>
- Business Development Bank of Canada co-lending program
  - Up to \$6.25 million, based on business revenues
  - 80% of financed amount provided by BDC and the remaining 20% by the financial institution
  - For operational cash flow requirements
  - Available until or before September 30, 2020
  - See: <https://www.bdc.ca/en/pages/special-support.aspx?special-initiative=covid19>

## Other Business Credit Availability Programs (Cont'd)

- BDC Oil and Gas Sector Financing (forthcoming)
  - For Canadian-based oil and gas producers, oilfield service companies and midstream providers
  - Funds to be used for operational cash flow and business continuity purposes
  - Qualifying businesses must have been financially viable and in good standing prior to the current economic environment
  - Loan size between \$15 million and \$60 million
  - Offered at commercial rates, repayable within 4 years
  - See: <https://www.bdc.ca/en/pages/special-support.aspx?special-initiative=covid19>

# Canada Emergency Commercial Rent Assistance

- Expected to be operational by mid-May
- Forgivable loans to qualifying commercial property owners
  - Both landlords and tenants must agree
- 50% of three monthly rent payments payable by eligible small business tenants who are experiencing financial hardship during April, May, and June (can be applied retroactively)
- Loans will be forgiven if the mortgaged property owner agrees to reduce the small business tenants' rent by at least 75% under a rent forgiveness agreement,
  - Term to not evict the tenant while the agreement is in place.
  - The small business tenant would cover the remainder, up to 25% of the rent
- The deadline to apply is August 31, 2020
- See: <https://www.cmhc-schl.gc.ca/en/finance-and-investing/covid19-cecra-small-business>

# Canada Emergency Wage Subsidy

- 75% of an employee's wages – up to \$847 per week – for employers of all sizes and across all sectors who have suffered a drop in gross revenues of at least 15% in March, and 30% in April and May
- In place from March 15 to June 6, 2020
- Eligible employers are entitled to receive a 100% refund for certain employer contributions to EI and CPP
- See: <https://www.canada.ca/en/revenue-agency/services/subsidy/emergency-wage-subsidy.html>

# Temporary 10% Wage Subsidy

- Three-month measure that will allow eligible employers to reduce the amount of payroll deductions required to be remitted to the Canada Revenue Agency
- Equal to 10% of the remuneration paid from March 18, 2020 to June 19, 2020, up to \$1,375 for each eligible employee to a maximum of \$25,000 total per employer.
- Separate from the Canada Emergency Wage Subsidy
  - Any benefit from the Temporary 10% Wage Subsidy for remuneration paid in a specific period will generally reduce the amount available to be claimed under the Canada Emergency Wage Subsidy in that same period
- See: <https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/frequently-asked-questions-wage-subsidy-small-businesses.html>

# Rent Distress

- Strict requirements
- Have the bailiff secure and sell the property on the premises as provided for in the *Rent Distress Act*, R.S.B.C. 1996, c. 403
- Avoid illegal distress
  - Ensure there is a tenancy (rather than license or other interest)
  - Confirm that rent is owing
  - Other things to avoid for distress
    - Terminating the lease
    - Breaking into the premises or entering during a prohibited period
    - Seizing exempt goods
    - Exercising distress more than six months after the end of the term
    - Continuing the distress after the tenant tenders the rent and costs of the distress
    - Seizing goods off the premises when not permitted

# Relief from Forfeiture

- “Relief from penalties”
- Judicial reinstatement of the contract in question
  - the Court can waive the default and permit the debtor to carry on with the contract despite the desire of the creditor to terminate it.
- s. 24 of the *Law & Equity Act*, R.S.B.C., 1996, c. 253
- Equitable remedy – purely discretionary
- What is fair and reasonable in the overall circumstances?
- Gravity of the breach?
- Disparity in value of the property forfeited and the damage caused by the breach?
- Conduct of the debtor
- Ability to rectify the breach

# Debtors – Consider Insolvency Options

- Proposals to Creditors under the *Bankruptcy and Insolvency Act*
  - Consumer proposals
  - Division I proposals
  - Stay of proceedings
  - Set timelines
- *Companies Creditors' Arrangement Act* proceedings
  - Flexibility
  - Increased expense
- Bankruptcy

# Secured Asset Seizure

- PPSA notice requirements
- Consider ability to recover debt in current climate:
  - Online auctions in COVID-19, limited in-person viewings – may impact bidding prices
  - Possible lower overall economic activity and demand for auctioned goods

# Suspended Limitation Periods

- Limitation periods
- Suspended until state of emergency expires or cancelled
- Minister of Public Safety and Solicitor General order suspending “every mandatory limitation period” and “any other mandatory time period that is established in an enactment or law of British Columbia within which a civil or family action, proceeding, claim or appeal must be commenced”.
- Applies to the Provincial Court, Supreme Court, and Court of Appeal
- Discretion for persons, tribunals, or other bodies that have “statutory power of decision”
- Does not apply to:
  - *Builders Lien Act*
  - Part 5 – Division 5 of the *Strata Property Act* (also in relation to builders’ liens)
- See [Ministerial Order No. M098 \(April 8, 2020\)](#)

# Reduced Court Operations

- All matters scheduled between March 19, 2020 and May 29, 2020 have been adjourned
  - Only urgent matters are being heard
  - Parties must still apply to be heard – not guaranteed
- Non-urgent matters eligible for applications by written submissions or telephone conference hearing
  - One issue, less than one hour, single affidavit less than 10 pages, suitable for telephone hearing or determination on written submissions
- Urgent insolvency matters
- See: [https://www.bccourts.ca/supreme\\_court/covid-19\\_notices.aspx](https://www.bccourts.ca/supreme_court/covid-19_notices.aspx)

# Commencing/Defending the Action

- Personal service
- How to personally serve an individual during social distancing?
  - Consider if defendant is under a quarantine order (e.g. returned from abroad)
- Order for alternative service
- Timeline for proceeding
- Consider potential defences
  - Review contract terms for compliance
  - Enforceability of the contract
  - Force majeure clause or, if none, frustration

# Virtual Commissioning of Affidavits

- Paragraph describing that video technology was utilized
- See specific requirements in notices to the process, the public and media issued by the Provincial Court, Supreme Court, and the Court of Appeal
- Review government-issued ID and obtain screen-shot of both sides
- Deponent and commissioner must each have paper copies of the affidavit, including all exhibits, prior to the video conference
- Review each page of the affidavit to ensure pages are identical and initial each page
- Administer the oath
- The deponent will send the signed affidavit
- Before completing the affidavit, the commissioner must compare copies
- Attach each copy, together with a certificate signed by the commissioner

# Sample Certificate of Commissioner

- Example of wording of certificate (to be placed on document with style of proceeding, court file number, and court registry)

## CERTIFICATE OF COMMISSIONER

I, ●, commissioner for taking affidavits of British Columbia, am satisfied that the process of utilizing video technology for remote commissioning of affidavits was necessary because it was impossible or unsafe, for medical reasons, for the deponent and any commissioner to be physically present together.

Dated: April 30, 2020

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# Pre-Judgment Remedy - Garnishing Orders

- Direction that person or institution that is indebted to a defendant pay into court what they would otherwise pay to the defendant
- What can be caught?
- Affidavit setting out:
  - nature of the claim,
  - the actual amount of the debt, claim or demand,
  - the debt is justly due and owing
  - all just discounts have been made.
- The claim must be for a liquidated sum
- Strict formalities
- Setting aside the Order
  - Formalities not followed – e.g. deficiencies in the affidavit or the claim
  - “Just in all the circumstances” (s. 5 of the *Court Order Enforcement Act*)
    - COVID-19 impacts may present undue hardship

# Post-Judgment Remedies

- Potential remedies
  - Garnishment of bank accounts, wages, and other funds
  - Execution against real property
  - Execution against personal property
  - Examination in aid of execution
- Update due diligence that was completed before commencing the action
  - Changes?
- Consider cost and benefits in light of current economic climate
  - Delays in obtaining judgment and post-judgment remedies

# Questions?



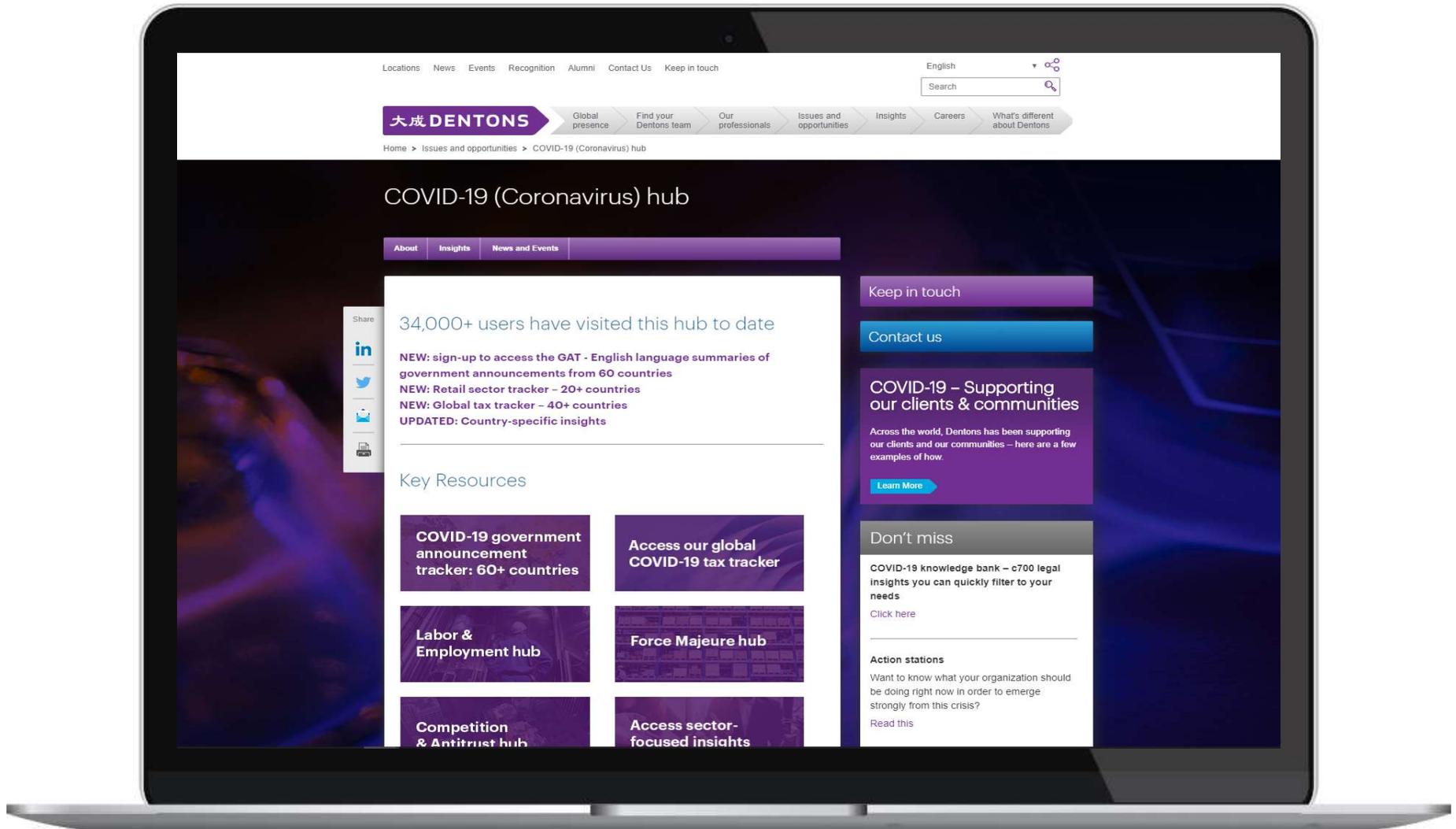
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# COVID-19 (Coronavirus) Client Resource Hub



# Thank you

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