Proceeding to Judgment—Step-by-Step Procedure

V. MAKING DEMAND [§2.31]

A. IS DEMAND FOR PAYMENT NECESSARY? [§2.32]

1. REVIEW DEBT INSTRUMENT OR CONTRACT [§2.33]

If the debt instrument provides that the debt is payable on demand, ensure that demand has been given before the action is commenced. If demand for payment is required before commencing action, ensure that the demand complies with the requirements in the debt instrument and with the common law requirement of reasonable demand as described in §2.34.

2. THE BUSINESS PRACTICES AND CONSUMER PROTECTION ACT [§2.33A]

Section 113 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, defines a "collector" as "a person, whether in British Columbia or not, who is collecting or attempting to collect a debt". The definition appears to be broad enough to include not only a lawyer acting for a creditor, but the creditor itself—whether or not the creditor is making use of the services of a collection agency.

Section 115 of the Act provides that a collector must not attempt to collect payment of a debt until the collector has notified (or made a reasonable attempt to notify) the debtor in writing of:

(a) the name of the creditor;
(b) the amount of the debt; and
(c) the identity and authority of the collector to collect the debt.

Presumably, the commencement of an action is an "attempt to collect payment of a debt", and accordingly notice under s. 115 of the Act must precede the action.

Also note the notice requirement set out in s. 121(2) (collector must notify debtor of intention to recommend legal proceedings prior to so recommending); and the prohibition against threatening legal proceedings without written or lawful authority (s. 121(4)).

3. WHERE A DEMAND FOR PAYMENT IS REQUIRED, THE DEBTOR MUST BE GIVEN A REASONABLE TIME TO PAY [§2.34]

If it is determined that a demand for payment is required before the right to commence an action arises, then, under what is known as the rule in *Lister v. Dunlop* (*Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726), a creditor must give the debtor:

> "... some notice on which he might reasonably expect to be able to act". The application of this simple proposition will depend upon all the facts and circumstances in each case. Failure to give such reasonable notice places the debtor under economic, but nonetheless real duress, often as real as physical duress to the person, and no doubt explains the eagerness of the courts to construe debt-evidencing or creating documents as including in all cases the requirement of reasonable notice for payment.

The rule applies even where the instrument creating the debt provides that payment is to be made immediately upon demand. The rule applies to both demand loans and term loans. In *Mister Broadloom Corporation (1968) Ltd. v. Bank of Montreal* (1979), 25 O.R. (2d) 198 (H.C.), Linden J. listed various factors to be considered in determining what constitutes reasonable notice in each situation:

(1) the amount of the loan;

(2) the risk to the creditor of losing his money or the security;

(3) the length of the relationship between the debtor and the creditor;

(4) the character and reputation of the debtor;

(5) the potential ability to raise the money required in a short period;

(6) the circumstances surrounding the demand for payment; and

(7) any other relevant factors.

Although each case has to be examined on its own facts, it is common practice to give five to seven days or more to pay. In cases of urgency, much shorter notice will often be justified.

Fundamentally, a demand letter is a matter of courtesy to the other side before the legal process is invoked. It puts the other side on notice that a lawyer is involved, and demonstrates that the client "means business". A demand may produce a positive result. A settlement may be reached and litigation avoided. There may be some form of response that provides useful information, such as a confirmation of the address of the debtor or an indication of what may be expected in the way of any defence.

Many limits exist on the conduct of a person demanding payment. Tort law prohibits intentional infliction of nervous shock. Part 7 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 sets out detailed and extensive prohibitions that apply to the conduct of persons collecting or attempting to collect a debt. In particular, ss. 113 through 124 should be considered in detail, as the provisions are very specific and cover, among other things:

(1) with whom the collector may communicate;

(2) when the collector may communicate;

(3) under what circumstances the collector may and may not communicate with the debtor at the debtor's place of employment;

(4) written notices that must be given to a debtor prior to attempting collection;

(5) circumstances in which communication must be in writing only;

(6) circumstances in which the collector must cease communicating with the debtor altogether;

(7) prerequisites to recommending, and commencing, legal action; and

(8) restrictions on seizure, distress, and repossession.

The *Criminal Code*, R.S.C. 1985, c. C-46, prohibits conduct such as direct threats of harm to persons or property (s. 264.1), extortion (s. 346), and conveying false messages with intent to alarm (s. 372).

Particularly important to lawyers are rules in the *BC Code* against communicating directly with opposing parties, or potential witnesses, represented by counsel (rule 7.2-6), and against demanding payment from a person while threatening either a prosecution or a complaint to a regulatory authority (rule 3.2-5).

Rule 7.2-6 provides as follows:

> Subject to rules 7.2-6.1 and 7.2-7, if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer:
>
> (a) approach, communicate or deal with the person on the matter; or
> (b) attempt to negotiate or compromise the matter directly with the person.
> [amended 09/2013]
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> **7.2-6.1** Where a person is represented by a lawyer under a limited scope retainer on a matter, another lawyer may, without the consent of the lawyer providing the limited scope legal services, approach, communicate or deal with the person directly on the matter unless the lawyer has been given written notice of the nature of the legal services being provided under the limited scope retainer and the approach, communication or dealing falls within the scope of that retainer.
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> **Commentary**
> **1** Where notice as described in rule 7.2-6.1 has been provided to a lawyer for an opposing party, the opposing lawyer is required to communicate with the person's lawyer, but only to the extent of the limited representation as identified by the lawyer. The opposing lawyer may communicate with the person on matters outside of the limited scope retainer.

Be wary of circumstances in which the lawyer of a represented party should be contacted or—for example, if the party is not yet represented "in the proceeding"—at least copied on the demand letter.

In addition to the common law requirement of "reasonable notice", if the debt is secured, several statutes require specific notice periods and methods of giving the notice. An example is the *Farm Debt Mediation Act*, S.C. 1997, c. 21, s. 21, which requires that a 15-day notice (15 business days) be issued in a prescribed manner before any realization can occur against assets owned by a farmer, and before any court proceedings can be commenced.

Section 68(2) of the *Personal Property Security Act* provides that "all rights, duties or obligations arising under a security agreement, this Act or any other law applicable to security agreements or security interests must be exercised or discharged in good faith and in a commercially reasonable manner". Accordingly, the requirement for reasonable notice may apply even where the security agreement provides for immediate payment or seizure.

If reasonable notice is not given, or if the secured creditor has not complied with a statutory notice period such as that in the *Farm Debt Mediation Act*, then the secured creditor, its employees, and the receiver may be found liable to a debtor in trespass and conversion.

The demand must also be reasonable in amount. The creditor should be careful not to demand an excessive amount. If in doubt, it is prudent to use the lesser of two competing calculations of the amount due and owing when making the demand.

If the collection includes realization on security, review whether the 10-day notice of intention to enforce security under s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, needs to be given (see the commentary and precedents at §4.7 and §4.8).

4. METHOD OF GIVING DEMAND [§2.35]

Check the debt instrument, because it may contain provisions requiring demand to be given at a certain address or by a certain means, such as registered mail or personal delivery.

B. DEMAND LETTERS—CONTENTS [§2.36]

The demand letter should identify the creditor and the debtor and should specify the correct amount outstanding, the basis of entitlement to make the demand, and the authority of the collector to collect on behalf of the creditor. In addition, the demand letter should set out a deadline for payment. Also note that under s. 121(2) of the *Business Practices and Consumer Protection Act*, you (as a "collector" as defined in s. 113) must not recommend to your client that a proceeding be brought unless you first give notice to the debtor that you intend to recommend that. Accordingly, the demand letter should include a statement that, in the absence of payment, you intend to recommend to your client that a proceeding for the recovery of the debt be brought. See the sample demand letters at §4.4 to §4.7.

C. CONDITIONS PRECEDENT TO ACTION [§2.37]

Review the debt instrument or contract to determine whether any steps are required before the commencement of an action. For example, the debt instrument or contract may contain clauses requiring notices to be given to the debtor or other parties, giving notice of default and providing a certain time period for the default to be cured. In addition, check the debt instrument or contract to ensure that they do not contain an exclusive jurisdiction clause specifying that any matter in dispute must be determined by the courts of a certain jurisdiction.

In addition, review the debt instrument or contract to ensure that they do not contain a clause requiring the matter to be submitted to arbitration or mediation before a court action can be commenced.

If the client is an assignee of the debt, ensure that notice of the assignment of the debt has been given (see s. 36 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253). If the assignee is the collector, ensure that the notice required by s. 121(1) of the *Business Practices and Consumer Protection Act* has been given. In addition, review the other notice requirements set out in that Act, as discussed at §2.33A.

D. DEMAND TO GUARANTORS [§2.38]

If the creditor holds a guarantee from a third party guaranteeing the indebtedness of the principal debtor to your client, then review the guarantee to determine whether demand for payment under the guarantee is required prior to the commencement of the court action against the guarantor. In addition, consider whether the guarantee requires that there be a default by the principal debtor prior to the commencement of the action against the guarantor. For example, if the indebtedness owing by the principal debtor is payable on demand, and if the guarantee applies only upon the default of the principal debtor, then it is advisable to issue the demand letter to the principal debtor first and to wait for the principal debtor to be in default of the payment under the demand letter before issuing the demand letter to the guarantor.