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CREDIT CONGRESS & EXPO

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# Credit Strategies in Canada: Insights for B2B Success

Presented by: Hubert Sibre, Partner, Miller Thomson LLP  
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## Insolvency Legislation in Canada

- Legislation
  - Winding-up and Restructuring Act (WRA)
  - Companies' Creditors Arrangement Act (C-36 or CCAA)
  - Bankruptcy and Insolvency Act (BIA)
  - Receivership
  - Civil Code of Quebec (CCQ) and other common law legislation

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## Insolvency Legislation in Canada (cont'd)

- Bankruptcy and Insolvency Act (Proposal)
  - Notice of intention to file a proposal
  - Interim Receiver
  - Proposal
  - Bankruptcy
  - Receivership

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## Insolvency Legislation in Canada (cont'd)

- Notice of Intention to File a Proposal
  - Day 1: A notice of intention to file a proposal is filed
  - Day 10: A statement of changes in cash is filed
  - Day 30: A proposal is filed OR the court is asked for a time extension
- Time extension
  - Maximum cumulative extension of 5 months
  - Maximum individual extensions of 45 days

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## Insolvency Legislation in Canada (cont'd)

- Proposals (under the BIA)
  - Stay of proceedings
    - Applies to all ongoing or future legal proceedings
  - Also applies to secured creditors, UNLESS:
    - Assets were taken into possession before insolvency procedures were initiated
    - The 10-Day Notice was served and expired or agreed to by the debtor
  - Election process, as is for CCAA
  - Approval by the Court

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## Insolvency Legislation in Canada (cont'd)

- Interim Receiver and National Receiver
  - The latest trend is the National Receiver (sometimes combined with other proceedings)
  - Increasingly broader objectives and powers
  - As in the case of the CCAA, one must refer to the order
  - The receiver's fees may enjoy priority over the rights of creditors



Insolvency Legislation in Canada (cont'd)

- Bankruptcy (under the BIA)
  - ▶ When a debtor produces a balance sheet showing that he is insolvent
  - ▶ When a debtor transfers, removes, hides or disposes of property with the intention of defrauding or delaying its creditors
  - ▶ When a debtor defaults on a proposal
  - ▶ When a debtor ceases to honour his commitments
  - ▶ Must have a minimum debt of \$1,000



Insolvency Legislation in Canada (cont'd)

- BIA / Bankruptcy
- First Creditor's Meeting
  - ▶ Meeting Objectives
    - Confirm or oppose to the nomination of the Trustee
    - Enable creditors to ask questions to the Debtor or Trustee
    - Appointment of inspectors
      - May become very important towards maintaining control over the Trustee
      - Maintain rigor in the decision-making process



Insolvency Legislation in Canada (cont'd)

- Receivership
  - ▶ Process by a secured creditor
  - ▶ Does not necessarily involve a Trustee
  - ▶ May be paired with a bankruptcy
  - ▶ The receiver (agent) represents only the creditor's interest
  - ▶ May take over the powers of an Interim Receiver
  - ▶ Monitoring process less rigorous than in bankruptcy



Companies' Creditors Arrangement Act

- |  |   |
|--|---|
| <ul style="list-style-type: none"><li>• Older act</li><li>• Application criteria<ul style="list-style-type: none"><li>▶ Minimum of \$5 million debt</li></ul></li><li>• Results from orders issued by the court</li><li>• Very costly process</li><li>• Application is similar to a holding proposal</li></ul> | <p><b>Advantages</b></p> <ul style="list-style-type: none"><li>• Very flexible – made for adapting to complex situations</li><li>• The Court has a lot of discretion</li><li>• Bankruptcy is not an automatic consequence of failure</li><li>• The approach is highly «pro-restructuring»</li><li>• May use an interim receiver (as in the BIA)</li></ul> |
|--|---|



Companies' Creditors Arrangement Act (cont'd)

- Other principles of the CCAA
  - ▶ Classifying creditors
    - Ordinary, secured and others
  - ▶ Applicable to a group of companies, even if one subsidiary is not insolvent
  - ▶ Exclude financial contract, such as letter of credit
  - ▶ Suppliers can always ask for COD payments
  - ▶ Cannot compel someone to advance new money or new credit
  - ▶ The initial order date is fundamental



Companies' Creditors Arrangement Act (cont'd)

- Other
  - ▶ Appointment of a "Chief Restructuring Officer" (CRO)
  - ▶ Establishing priority expenses, including:
    - Administrative charge
    - D & O charge
  - ▶ Order that provides for trade continuity with and payment of suppliers deemed to be essential – Critical vendor principle
  - ▶ Directors' and officers' compensation adjusted with their new level of responsibilities and risk



**Companies’ Creditors Arrangement Act (cont’d)**

- Dealing with Creditors  
The debtor usually
  - ▶ Begins dialogue with creditors where no alternative exists
  - ▶ Typically, creditors need the debtor’s business and the debtor will use this tool to leverage its relationship, payment terms and ultimately for the vote on the proposal
  - ▶ Creditors actually have more protection post-filing since they can potentially demand COD/CIA terms



**Companies’ Creditors Arrangement Act (cont’d)**

- Dealing with Creditors (cont’d)  
The debtor usually (con’td)
  - ▶ The Debtor begins dialogue with key, if not all customers on trying to receive payment of receivables early
  - ▶ Very common for the Debtor to allow customers significant discounts for payment of outstanding invoices
  - ▶ Factoring or sale of certain receivables



**Companies’ Creditors Arrangement Act (cont’d)**

- Questions to be raised
  - ▶ Who is the chief restructuring office ?
  - ▶ What happens to the directors’ and officers’ responsibilities?
  - ▶ How is the «critical vendor provisions» applied in Canada?
  - ▶ What about 30 day goods or in transit ?
  - ▶ Can I still apply set off principles ?
  - ▶ How does a debtor sell its assets: the Stalking horse bidding process and others
  - ▶ What should I do when I first learn of the issuance of a C-36 Order ?
  - ▶ What are the opportunities for suppliers to influence the process ?
  - ▶ What are the indicators available to assess the potential value of its indebtedness ?
  - ▶ How can I found out if I can assign my debt?



**Companies’ Creditors Arrangement Act (cont’d)**

- How to Protect Yourself
  - ▶ Regularly visit your client at his place of business
  - ▶ Hold regular meetings with management
  - ▶ Request financial statements on a regular basis
  - ▶ Review the RDPRM (PPSA)/Property registry/Corporate record on a regular basis
  - ▶ Obtain a disclosure of goods on consignment
  - ▶ Participate in credit groups for your industry



**Companies’ Creditors Arrangement Act (cont’d)**

- Remember
  - ▶ Obtain a copy of the order
  - ▶ Negotiate an agreement A.S.A.P.
  - ▶ Do not be surprised if the Orders affect third parties’ rights
  - ▶ Devise a strategy very quickly
  - ▶ You may contest provisions within the Orders, but only after the fact



**Companies’ Creditors Arrangement Act (cont’d)**

- Subjects of interest
  - ▶ Critical suppliers
  - ▶ Termination contract
  - ▶ Sale of assets
  - ▶ The role of the Monitor
  - ▶ Return of the stalking horse bids
  - ▶ Representative’ counsels
  - ▶ Environment claim
  - ▶ Suspension of payments to the pension funds
  - ▶ RVOs



Automatic Stay

- U.S. Can suppliers of goods switch from credit to COD/CIA terms? Suppliers can do so in Canada
  - ▶ Is creditor subject to an agreement to extend credit?
  - ▶ Permitted under agreement(s) with Debtor?
  - ▶ Permitted under Uniform Commercial Code if Debtor is insolvent or breaches its contract
  - ▶ Response to threats of breach of contract/violation of automatic stay
  - ▶ Moving for relief in Bankruptcy Court



Automatic Stay (cont'd)

- Does Not Apply to Actions Against Non-Debtors
  - ▶ Drawing on letter of credit
  - ▶ Claim vs. guarantors
- Consequences of Stay Violation
  - ▶ Contempt of court
  - ▶ Sanctions



Goods Suppliers Priority Claim in Canada

- Section 81 of the BIA – Supplier Remedies
- Eligibility Criteria
  - ▶ The claimant must present proof of claim for property to the Trustee
    - Property sold 30 days prior to bankruptcy
    - Must be presented to trustee 15 days after date of bankruptcy
  - ▶ In the 15 following days, the Trustee must:
    - Accept the proof of claim
  - ▶ OR
    - Reject the claim; the claimant may appeal within 15 days following the notice of dispute



Suppliers Priority Claim in Canada (cont'd)

- Section 81 of the BIA
- Eligibility Criteria of an Unpaid Supplier
  - ▶ The goods are in the possession of the Trustee
  - ▶ The goods may be identified in a precise manner
  - ▶ The goods are not fully paid
  - ▶ The goods are in the same condition as they were when they were delivered
  - ▶ The goods are not subject to any arm's length selling agreement



Canadian Preference Claims

- Transfers at Under Value and Preferences
  - ▶ Reviewable transactions and preferences are now "transferred under value"
    - Related parties are deemed not to be dealing at arm's length hence any transaction are presumed to be under value
    - Court may grant a judgment for the difference between the actual consideration and the fair market value. If the transfer took place within 5 years before the date of the bankruptcy
    - If the transaction was transferred at under value with arm's length party, judgement can be rendered for the difference if the transaction took place within a year of the initial bankruptcy
    - There is a presumption of intention within a year with a creditor that is not arm's length and within 3 months with a creditor that is arm's length
  - ▶ Most defenses are available



Canadian Equivalent: Assumption Of Contracts

- Disclaimer and Assignment of Agreements
  - ▶ Executory contract may be disclaimed with the approval of the monitor or the trustee
  - ▶ The co-party to the agreement may go to Court to oppose the disclaimer
  - ▶ If the disclaimer is approved the damages can be a claim in the reorganization
  - ▶ If the disclaimer relates to intellectual property, it may not hinder the party's capacity to use the IP to enforce its exclusive rights as long as the said co-party continues to perform its obligation under the agreement



Canadian Equivalent: Assumption Of Contracts (cont'd)

- Disclaimer and Assignment of Agreements (cont'd)
  - ▶ Eligible financial contracts, collective bargaining agreement (unlike U.S.), financing agreements, lease of real property where the debtor is a lessor (unlike U.S.) are not affected by these provisions



Canadian Equivalent: Assumption Of Contracts (cont'd)

- Assignment of Agreement
  - ▶ Possibility to assign any rights and obligations
  - ▶ Certain factors to be considered such as
    - Opinion of controller
    - Capacity of Buyer to respect obligations
    - The opportunity for the estate
  - ▶ Certain types of agreements are excluded, like commercial leases (unlike U.S.), eligible financial contracts, collective bargaining agreements (unlike U.S. special provision) and personal service contracts



Cross Border

- Insolvent Debtors with assets in more then one jurisdiction; either
  - ▶ Recognition of a main foreign proceeding
    - Multijurisdictional protocol (concordat)
    - Competing insolvency processes



Cross Border (cont'd)

- Recognition of foreign proceedings in Canada
  - ▶ CCAA, art. 18.6
    - Mainly subsection 2 (18.6(2)) Powers of Court

*"The Court may, in respect of a debtor company, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a coordination of proceedings under this Act with any foreign proceeding."*
  - ▶ Avoid Conflict/Coordinate/COMI
- U.S. Equivalent Chapter 15



Securing a Transaction

- |  |   |
|--|---|
| <ul style="list-style-type: none"><li>• <b>Red</b><ul style="list-style-type: none"><li>▶ Mortgage (immovable assets)</li><li>▶ Movable mortgage or PPSA</li><li>▶ Possession (retainer or deposit)</li></ul></li><li>• <b>Orange</b><ul style="list-style-type: none"><li>▶ PMSI or Instalment sales (Quebec) *</li><li>▶ Quebec's rights of redemption or resolution</li><li>▶ Leases (true leases vs. financing leases)</li></ul></li></ul> | <ul style="list-style-type: none"><li>• <b>Yellow</b><ul style="list-style-type: none"><li>▶ Consignment sales *</li><li>▶ Guarantee (general or specific) *</li><li>▶ Credit papers (in general)</li></ul></li><li>• <b>Other</b><ul style="list-style-type: none"><li>▶ Buyback agreements are contractual rights</li><li>▶ Licences = a complete different world !</li></ul></li></ul> |
|--|---|



Guarantees

- Minimum requirements
  - ▶ Signature / clarity
  - ▶ Extent of obligations
  - ▶ Obligation guaranteed
  - ▶ Time frame
  - ▶ Joint and several
  - ▶ Capacity for example: from a subsidiary



Guarantees (cont'd)

- Termination is possible?
  - ▶ Typical third party guarantee
  - ▶ Guarantee given by an officer or director



Guarantees (cont'd)

- Special provisions
  - ▶ Interest applicable
  - ▶ Waives obligation to sue debtor first / sells its assets
  - ▶ Service and notification
  - ▶ Choice of law and jurisdiction
  - ▶ Waives off set / debtor's defence / others
  - ▶ Recognize records of creditors
  - ▶ Payment of attorney's fees



Consignment Arrangement

- General Information
  - ▶ In a consignment agreement, the "purchaser-seller" relationship is substituted by the "consignor-consignee" relationship.
  - ▶ Title remains with consignor.
  - ▶ The burden of proof that a consignment agreement exists lies with the consignor.
- Problem with Consignments
  - ▶ Factors to be considered are:
    - Whether the consignee is a real agent of the consignor



Consignment Arrangement (cont'd)

- Problem with Consignments (cont'd)
  - ▶ Factors to be considered are (cont'd):
    - Whether or not the consignee is required to pay for the goods until he sells them
    - Whether the consignee can return the unsold goods to the consignor
    - Disguised security arrangement



Enforcing Your Rights

- Reasonable delay
- The execution of a contractual right must not be exercised abusively
  - ▶ Commercial reasonableness
  - ▶ BIA – 10 day notice period
  - ▶ PPSA – Additional notice periods
  - ▶ Mortgages – Additional notice periods
- Beware of:
  - ▶ Insufficient time for client to find alternatives



Terms & Conditions

- When is the appropriate time to have them approved?
  - ▶ Back of invoice?
  - ▶ In a contract?
  - ▶ During the credit opening?
  - ▶ In the credit application?
- Validity of reference
  - ▶ To another document
  - ▶ To a web site



Terms & Conditions (cont'd)

- Protection of personal information
  - ▶ Keep them if needed only
  - ▶ No transfer, unless authorized to do so



Legal Elements

- Confirmed Terms & Conditions supersede any other document;
  - ▶ Exceptions
  - ▶ To invalidate written indications on P.O., invoices and payments
  - ▶ Retain right to add new terms & conditions
- Confirm authority of any of the client's representatives
  - ▶ Very useful to evidence receipt



Legal Elements (cont'd)

- Limitation of warranties
  - ▶ What is legal?
  - ▶ To limit remedies available to a party
- Indemnification of one party in favour of the other
  - ▶ They do not have to be identical on both sides
- Assignment of contract
- Limitation period (to raise a claim)



Legal Elements (cont'd)

- Risk of loss
  - ▶ When does it move from one party to the other
- Delays and superior force
  - ▶ Limit (exclude) liability
- Clerical errors
- Collection and attorney's fees



Terms of Payment

- Time
- Interest applicable
- Discount for early payment
- Payment of fees, costs and service charges
- Taxes
- No set-off vs. full set-off
- No retention of payment even when there is a dispute



Terms of Payment (cont'd)

- Allocations of payments, for example:
  - ▶ The product is no longer in your possession
  - ▶ To oldest invoice
  - ▶ Notwithstanding indications or accounting records
- Cost of transportation



Applicable Law

- Choice of law
  - ▶ Considerations
  - ▶ By default
- Choice of jurisdiction (in the event of litigation)
- Alternative notification process
- Acceptance of mode and location of service for legal claims
- Small Claims Court and other courts
- Arbitration clauses
  - ▶ Considerations



BASIC RULES OF THE *COMPETITION ACT* IN CANADA FOR CREDIT MEETINGS



Basic principles

- If you provide credit you have the right to:
  - ▶ Be informed of all pertinent data
  - ▶ Allowing you (and only you) to adequately assess your risks



Section 45: In short!

- Conspires, agrees or arranges
- May be inferred from circumstantial evidence with or without direct evidence of communication
- Beyond reasonable doubt



Section 45: In short! (cont'd)

- Must have the effect to fix, maintain, increase, control, prevent or lessen or eliminate
  - ▶ Prices
  - ▶ Sales
  - ▶ Territories
  - ▶ Customers
  - ▶ Markets
  - ▶ Supplies



Objectives

- Objectives of the Group when discussing specific accounts
  - ▶ Detect and avoid fraud
  - ▶ Determine insolvency
  - ▶ Establish the adequate level of financial risk associated with this client
- It is not for the Group to
  - ▶ Reach a conclusion
  - ▶ Decide on actions to be taken





**Rules of conduct**

- Establish a protocol
- Have the meetings in the presence of an impartial third party
- Prepare a written agenda
- Never discuss price, production, distribution or markets
- Always talk about the present and the past
- Never express an opinion
- Register concerns
- Keep records of your meetings
- Avoid discussions on specific accounts outside the regularly scheduled session
- Transparency



**Always talk about the present and the past**

- Never discuss what you intend or what is expected
- Talk about what has occurred or what exists now
- This is a single rule easy to follow
- This applies to remarks too!



**Never express an opinion**

- Because it refers normally to a conclusion and includes actions to be taken
- It implies an evaluation
- Having given an opinion to someone in the past is a fact ...
- Suggestions are opinions



**Register concerns**

- If there is something being discussed that you are not comfortable with you must express your concerns
- It is possible to register concerns afterwards
- Have it noted in the records




**Keep records of your meetings**

- Dates
- Name of participants
- Accounts discussed
- Subjects discussed
- Avoid including details (if circulated could be misinterpreted)




**Avoid discussions on specific accounts outside the regularly scheduled session**

- Keep control of the meeting by being methodical
- DO NOT DISCUSS ACCOUNTS OUTSIDE OF SCHEDULED MEETINGS

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### Some of the possible subjects which can be discussed

- Credit limit
- Outstanding debts
- Payment terms and respect thereof
- Changes of the above in the near or more distant past
- Events potentially dramatic

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### Some of the possible subjects which can be discussed (cont'd)

- Difficulty to obtain information
- Rumours (if identified as such)
- Structural changes in the company
- Proof of fraud and insolvency

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### Illustrations

*"We cannot regard the procuring and dissemination of information which tends to prevent the fraudulent securing of deliveries of merchandise ... as an unlawful restraint of trade, even though such information be gathered by those who are engaged in the trade or business principally concerned".*

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### Illustrations (cont'd)

*"The dissemination of information concerning the creditworthiness of customers aids sellers in gaining information necessary to protect themselves against fraudulent or insolvent customers.... Given the legitimate function of such data, it is not a violation of the Sherman Act (U.S.A.) to exchange such information, provided that any action taken in reliance upon it is the result of each firm's independent judgment, and not of agreement".*

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Hubert Sibre (Bar of 1993) is a partner in the Montréal office of DLA Piper (Canada) LLP. Mr. Sibre's practice focuses primarily on commercial litigation, restructuring and insolvency. His roster of clients includes financial institutions, suppliers, investors but mostly businesses dealing with complex and high-risk situations. Prior to joining Davis, Mr. Sibre was a partner at BCF LLP for a decade and has acted as in-house legal counsel at the National Bank of Canada and GMAC. He has authored and co-authored several books and articles on restructuring, insolvency, credit, civil procedures and secured rights. Mr. Sibre holds the prestigious designation as one of the **2009 Lexpert Rising Stars**. In 2010, he was listed by Lexpert as one of the very best in the "Canadian Litigator to Watch" list and was recognized in 2016 by Legal 500 as one of the top Canadian Commercial Litigator. The Global Insolvency and Restructuring review had recognized him as one of the top 40 Under 40.

In addition to his significant legal practice, Mr. Sibre's expertise is frequently sought by academic institutions. He was a guest lecturer on restructuring at the Université du Québec à Montréal's MBA program and University of Montréal. He has taught about secured rights in Québec at the École du Barreau du Québec (Bar's Law School) where he was also responsible for the insolvency curriculum. Mr. Sibre regularly lectures in Canada and the United States regarding insolvency and credit issues for organizations such as the Canadian Institute, Insight, CAIRP, Profile Credit, FCIB, Equifax, NACM and many more. He is a member of INSOL International, the TMA and the Canadian Insolvency Foundation and was a member of the 2007 jury assisting the Office of the Superintendent of Bankruptcy in issuing trustee licenses.

Apart from arguing cases in all level of courts, Mtre Sibre successfully argued before the Supreme Court of Canada the first ever case relating to consumer law before this Court. The unanimous decision against "Time" is a land mark decision on many issues, including such issues as punitive damages in Quebec.



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