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## Debt Recovery in Challenging Economic Times

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# Topics

- Legal remedies available to all creditors
- Practical recovery tips
- Proactive steps for creditors
- Bankruptcy of a debtor
- Bankruptcy protection by the debtor
- Special rights for certain creditors



# Agenda

- Credit issues
- Steps after Default and before Action
- Legal steps to recover debt
- Appointment of Receivers and Receiver-Managers
- Bankruptcy
- BIA Proposals and CCAA Reorganizations
- Recovery of judgments



# Credit Issues

- Credit agreements – unlike invoices, creates an agreement for credit terms
  - Credit search authorizations
  - Interest on overdue accounts
  - Collection costs
  - Security interests
    - Registration
    - PMSI
  - Banking Information
  - Credit References



# Credit Issues (cont'd)

- Searches
  - Credit reporting
  - Corporate
  - Land Title
  - Court Registry
  - Personal Property Registry



# Steps after Default and before Action

- Identifying default
- Demand letters
- Notice of intention to enforce security
- Registration of liens
- Distraint by landlords
- Fraudulent preferences and conveyances



# Identifying Default

- May occur in the following situations:
  - Promissory note
  - Loan agreement
  - Security agreement
  - Mortgage
  - Purchase Order
  - Invoice
  - Lease



# Identifying Default (cont'd)

- It will usually be default in payment
- May involve breach of another covenant
- Consider remedies under the agreement
  - Acceleration of the balance of indebtedness
  - Termination of obligations under agreement
- Consider options on default
  - Demand for payment
  - Enforcement of security interest





# Identifying Default (cont'd)

- Consider options on default (cont'd)
  - Any pre-conditions to demand or enforcement



# Demand Letters

- Required in consumer transactions by *Business Practices and Consumer Protection Act*
- Often required in loan agreements and security agreements
- Not mandatory, but advisable, in other commercial transactions
  - May lead to payment or other resolution without action



# Demand Letters (con't)

- Not mandatory, but advisable, in other commercial transactions (cont'd)
  - Provides structure for subsequent action and enforcement of remedies
- Contents of demand letter
  - Consider using solicitor
  - Set out nature of default
  - Set out amount of indebtedness and accruing interest



# Demand Letters (con't)

- Contents of demand letter (cont'd)
  - Specify length of time to make payment or cure default
  - Advise that in default of payment, all available legal remedies will be pursued
  - Deliver demand letter by courier or fax, not regular mail



# Notice of Intention to Enforce Security

- Required by s.244 of BIA
- Applies only to secured creditor who intends to enforce a security on all or substantially all of the inventory, A/R or other property of an insolvent person
- Security may not be enforced until the expiry of 10 days after sending the notice, unless the insolvent person consents to an earlier enforcement



# Notice of Intention to Enforce Security (cont'd)

- No consent prior to notice permitted
- If risk of assets being dissipated within the 10 days, the Court may appoint an interim receiver under s.47 of BIA



# Fraudulent Preferences and Conveyances

- Fraudulent preference is payment by a debtor who is insolvent, or on the eve of insolvency, to a creditor with the intent of preferring that creditor over other creditors
- Fraudulent conveyance is a disposition by a debtor who is insolvent, or who is rendered insolvent by the disposition, with the intent to hinder, delay, defeat or defraud creditors



# Fraudulent Preferences and Conveyances (cont'd)

- Fraudulent preference payments are usually to arm's-length creditors
- Fraudulent conveyance dispositions are often to related, non-arm's-length parties
- These transactions can be attacked by creditors, receivers, and trustees in bankruptcy
  - Trustees use the BIA





# Fraudulent Preferences and Conveyances (cont'd)

- creditors use the provincial *Fraudulent Preference Act* and *Fraudulent Conveyance Act*
- For fraudulent preference, only intention of the debtor is relevant



# Fraudulent Preferences and Conveyances (cont'd)

- Proof of intention involves examination of “badges of fraud”
- Defences to allegation of fraudulent preference include:
  - Pre-existing obligation to give security
  - Intention to continue in business
- Court will identify “dominant” intention of debtor



# Fraudulent Preferences and Conveyances (cont'd)

- Proceedings to attack fraudulent preferences and conveyances:
  - Application by trustee under BIA
  - Action by creditors
- Time limit for proceedings
  - 3 months or 12 months under BIA
  - 60 days for reverse onus of proof under *Fraudulent Preference Act*



# Mareva Injunction

- Proceeding to prevent insolvent debtor from removing assets from jurisdiction
- Requires evidence of intent by debtor to remove assets from jurisdiction
- Court will freeze debtor's assets pending action by creditor to obtain judgment for debt



# Distrain by Landlords

- A common law and statutory remedy
- Does not require an action
- Applies only to rent in arrears
- Distrain limited to value of tenant's goods located on the leased premises
- Does not apply to third party good on the premises
- Not available for residential tenancies

# Distrain by Landlords (cont'd)

- Done by landlord's bailiff seizing assets on the leased premises and posting distraint notice on them
- No distraint after termination of lease
  - Do not change locks to exclude tenant from access to premises
- After distraint and sale of distrained goods, landlord may commence action to pursue other remedies under the lease



# Registration of Liens

- After default and before action, consider availability of statutory liens
- Liens are available for work done and services provided in several industries:
  - Construction (*Builder's Lien Act*)
  - Forestry (*Woodworker's Lien Act*)
  - Repairers, warehouseers, etc.



# Registration of Liens (cont'd)

- Builder's Liens in construction:
  - Filed in Land Title Office
  - Available to contractors, subcontractors, material suppliers, and workers
  - Must be filed within 45 days from triggering event, such as substantial completion of work or project



# Registration of Liens (cont'd)

- Lien prevents property from being financed or sold, so owner or contractor acts on them quickly, by paying amount owed or providing alternate security
- Lien must be enforced within 1 year of filing by commencement of action and registration of certificate of pending litigation in LTO, unless security posted and lien discharged
- Parties to a lien enforcement action are owner of land and parties with whom lien claimant contracts



# Legal Steps to Recover Debt

- Collection actions
  - Public nature of lawsuits
  - Pre-judgment garnishment
  - Typical steps in a lawsuit
  - Summary judgment
- Security enforcement
  - Personal property security
  - Mortgage foreclosure



# Appointment of Receivers and Receiver-Managers

- Who is entitled to appointment of a receiver?
  - Instrument appointments and Court appointments
  - Powers of receivers
  - Receivers and receiver-managers



# Appointment of Receivers and Receiver-Managers (cont'd)

- Who is entitled to the appointment?
  - Secured creditor with power of appointment in a security agreement
  - Judgment creditors
  - Receiver in aid of equitable execution
  - Shareholders and other parties where it is just and equitable to appoint a receiver



# Appointment of Receivers and Receiver-Managers (cont'd)

- Instrument appointment under general security agreement
- Court appointed receiver
  - Often follow instrument appointment by a secured creditor
  - Court Order required to transfer land owned by debtor



# Appointment of Receivers and Receiver-Managers (cont'd)

- Court appointed receiver (cont'd)
  - To augment powers of instrument appointed receiver if necessary
  - To effectively deal with competing interests and priorities among creditors



# Powers of Receivers

- Powers limited by security agreement for instrument appointed receiver
- Powers sets out in Court Order for Court appointed receiver
  - Standard receivership Order
  - Power to take possession of undertaking, property, and assets of debtor charged by security agreement



# Powers of Receivers (cont'd)

- Powers sets out in Court Order for Court appointed receiver (cont'd)
  - Power to sell property and assets of debtor
  - No action against receiver or property of debtor without Court approval
  - Continuation of supply by suppliers to debtor
  - Borrowing by receiver as priority charge against property and assets of debtor





# Powers of Receivers (cont'd)

- Powers sets out in Court Order for Court appointed receiver (cont'd)
  - Passing of accounts and discharge of receiver



# Receivers and Receiver- Managers

- Except in special circumstances (appointments to maintain status quo pending resolution of a dispute, or in aid of equitable execution), the mandate of every receiver is to sell the property and assets of the debtor



# Receivers and Receiver-Managers (cont'd)

- Receiver-Manager may be appointed to carry on business of the debtor, pending its sale
- Receiver will ultimately pay creditors according to their priority, and account for all proceeds of disposition and costs of the receivership



# Receivers and Receiver- Managers (cont'd)

- A secured creditor may appoint receiver despite bankruptcy of debtor and appointment of trustee in bankruptcy



# Bankruptcy

- Initiating bankruptcy
  - Voluntary assignment
  - Petition
  - Failed proposal
- Interim Receiver
- Trustee
- Stay of Proceedings



# Bankruptcy (cont'd)

- 30-Day Goods
- Statement of Affairs
- Proof of Claim
- Participation in process
  - Inspector
  - Bankruptcy Investigations
  - Section 38 Assignment of Claims



# Bankruptcy (cont'd)

- Discharge



# BIA Proposals and CCAA Reorganizations

- Permit insolvent debtor to maintain control of its business and assets
- Stay of proceedings against all creditors, secured and unsecured
- Authorized by the *Bankruptcy and Insolvency Act* (“BIA”), the Companies Creditors’ Arrangement Act (“CCAA”), and the *BC Business Corporations Act* (“BCA”)





# BIA Proposals

- Normally commenced by insolvent debtor filing a Notice of Intention to File a Proposal (“NOI”)
- Initial 30-day stay of proceedings, which can be extended by 45-day extensions to a total of 6 months
- Requires filing of a project cash flow statement within 10 days



# BIA Proposals (cont'd)

- Prevents termination of any agreement by reason of the debtor's insolvency, including a lease
- Immediate payment can be required by suppliers for delivery of additional goods and services
- No further advance of money or credit can be required by the debtor



# BIA Proposals (cont'd)

- Permits debtor to repudiate a commercial lease on 30 days' notice, if required to be able to make a viable proposal
- Debtor will file a proposal, which must be approved by a majority in number and 2/3 in value of each class of creditors



# BIA Proposals (cont'd)

- If Proposal approved by creditors, must be approved by the Court, on the basis that it is reasonable and calculated to benefit the general body of creditors
- If Proposal not approved by creditors and the Court, debtor is automatically bankrupt



# CCAA Restructuring Proceeding

- Used for large restructurings of insolvent companies having debts in excess of \$5 million
- CCAA is not a complete code for the restructuring process, so much of the process is done by the Court
- No time limits, and no automatic bankruptcy if Plan of Arrangement rejected by creditors



# CCAA Restructuring Proceeding (cont'd)

- Proceeding commenced by Petition and *ex parte* Initial Order, confirmed by Come-back Order 30 days later
- Statutory requirement for the appointment of a monitor
- Court can order priority for new debtor in possession (“DIP”) financing



# CCAA Restructuring Proceeding (cont'd)

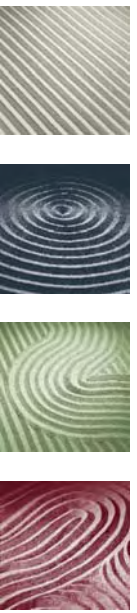
- CCAA Order will protect directors from business liabilities of debtor
- Debtor permitted to repudiate leases and other third-party contracts



# Miscellaneous Restructuring Issues

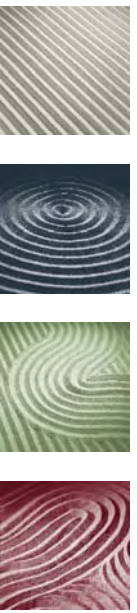
- Creditors are divided into classes according to “commonality of interest”
  - Unsecured creditors form one class
  - Proposal or Plan must be approved by each class to be binding on that class
- Content of Proposals and Plans of Arrangement
  - Can be very flexible, provided the terms are reasonable





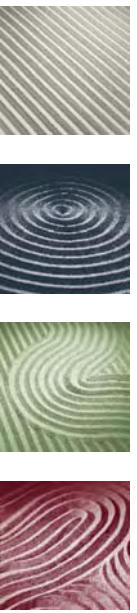
# Miscellaneous Restructuring Issues (cont'd)

- Content of Proposals and Plans of Arrangement (cont'd)
  - Commonly offer creditors a percentage of their claims, or a fixed amount distributed pro-rata
  - Liquidation proposals permit the debtor to liquidate all or part of its assets, and to distribute the proceeds to creditors according to their entitlement



# Miscellaneous Restructuring Issues (cont'd)

- Consideration offered to creditors may include cash or equity in the restructured company
- Advantage for debtor of formal proposals over informal proposals
  - Ability to cram down dissenting creditors



# Recovery of Judgments

- Post-judgment Garnishment
- Writ of Execution
  - Seizure of assets
  - Seizure of shares
- Examinations of debtor