



# DOING BUSINESS IN CANADA

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*FCIB*

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- Your sales reps must convince the client that he needs you
- Once he's agreed : He needs to convince you he is credit worthy !
- After that he becomes the client .....
- An opportunity you can't miss!
  - Only once is your client the seducer
  - A credit application must be filled
    - It is expected hence there is no surprise
  - One easy step to follow for the sales team
  - One document to deal with the relationship

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

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

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

- 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

## Red

**Mortgage (immovable assets)  
Movable mortgage or PPSA  
Possession (retainer or deposit)**

## Orange

**PMSI or Instalment sales (Quebec) \*  
Quebec's rights of redemption or resolution  
Leases (true leases vs. financing leases)**

## Yellow

**Consignment sales \*  
Guarantee (general or specific) \*  
Credit papers (in general)**

## Other

**Buyback agreements are contractual rights  
Licences = a complete different world !**



- Minimum requirements
  - Signature / clarity
  - Extent of obligations
  - Obligation guaranteed
  - Time frame
  - Joint and several
  - Capacity for example: from a subsidiary
- Termination is possible?
  - Typical third party guarantee
  - Guarantee given by an officer or director

- 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 attorneys fees

- 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
    - 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

- 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

- 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

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

- Proposals
  - 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
  - All types of proposals are possible
    - Lump sum
    - Percentage dividend
    - Any other combination

- 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



- 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

- 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

- 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

- *Winding-up and Restructuring Act*
  - **Federal act**
  - **Applies only to certain types of companies under federal jurisdiction**
    - **Banks**
    - **Insurance companies – Les Coopérants (early 1990's)**
  - **Rarely used**

- *Companies' Creditors Arrangement Act*
  - Older act
  - Application criteria
    - Minimum of \$5 million debt
  - Results from orders issued by the court
  - Very costly process
  - Application is similar to a holding proposal
- Advantages
  - Very flexible – made for adapting to complex situations
  - The Court has a lot of discretion
  - Bankruptcy is not an automatic consequence of failure
  - The approach is highly «pro-restructuring»
  - May use an interim receiver (as in the BIA)

- 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

## ■ 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
- "DIP-financing" – to be discussed later
- Vulture funds – to be discussed later
- Important recent evolution of situation affecting third parties within the case law

- 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
- 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



## ■ Questions to be raised

- Who is the chief restructuring officer ?
- 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 find out if I can assign my debt?

- 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

- 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

- 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

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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 Crédit, 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.