THE COSTS AND BENEFITS OF DEBT RECOVERY

INTRODUCTION

In both good economic times and bad, insolvencies will occur. The pace and scope of those insolvencies will vary with the general economic climate, but insolvencies are one of the constants of Canadian economic life. Knowing that recovering a debt from an insolvent customer is not a question of if but when, every creditor, from institutional lenders to trade suppliers, should develop a strategy to maximize that recovery. The recovery process begins with recognizing the early warning signs of a pending insolvency.

EARLY WARNING SIGNS OF INSOLVENCY

1. **Know the Business** – Macro economic indicators will eventually affect the more immediate prospect of getting paid. Creditors should pay particular attention to economic trends affecting the industries in which they lend or supply goods or services. For example, a dramatic rise in petroleum prices will translate almost immediately into higher operating costs for transportation companies which are not in a position to pass fuel surcharge costs on to their customers or which have not entered into forward contracts to lock-in fuel costs. Identify the macro economic indicators that will most directly affect your customer or industry and monitor those indicators as frequently as possible.

Similarly, businesses which are regulated by the Provincial or Federal Crown or which operate under license may be faced with regulatory or licensing impediments which can have a significant impact on revenue or expenses. For example, the implementation by the Ontario Ministry of Health of a cap upon the billings by medical laboratories had an immediate impact upon the future profitability of those companies. With no prospect of increasing revenues (and the real prospect of a further reduction in the revenue cap), medical laboratories were faced with the necessity of decreasing expenses to maintain profitability. This impacted not only the medical laboratories themselves, but certain related industries such as medical office buildings, which had been able to obtain above market rental rates from medical laboratories in light of the significant revenues which could be generated from medical office locations.

Businesses which operate under license from private third parties face similar challenges to regulated industries given their reliance upon the license agreement to generate income. Lenders should therefore obtain non-disturbance agreements from the licensor to ensure that the ability to manufacture the licensed product or carry on the licensed activity will not be interrupted by the insolvency, receivership or even bankruptcy of the licensee. Trade suppliers and other non-lender creditors to licensees should factor in to their cost of goods sold to such licensees the risk inherent in dealing with a customer whose license to manufacture or carry on business may potentially be revoked at any time.

2. **Slow Payment means no Payment** – As a general rule, Canadian businesses operate with insufficient working capital and too much debt. It is a very common practice to treat short term debt as working capital and to meet working capital shortages by dragging payment to trade suppliers and other short term debt. Although longer payment terms are the norm in certain industries, as a general rule, every creditor should closely monitor any account receivable that exceeds 90 days, or accounts receivable that are being paid, but over progressively longer periods of time, especially if the debtor has traditionally paid in under 90 days. An aged accounts receivable listing should be monitored at least monthly to determine if sales are declining. Of course, the best indicator that an account may not be paid is a bounced cheque, a cheque upon which payment has been stopped or a debtor's failure to return inquiries.

3. **The Reporting Doesn't Lie (usually)** – Other than the borrowers, officers and employees of the debtor, the party most likely to become aware of a pending insolvency is the debtor's operating lender, typically a Canadian chartered bank. Again, because of the practice in Canada of operating without sufficient working capital, Canadian businesses are generally completely reliant upon their operating line of credit to finance day-to-day operations. Any interruption in availability under that line of credit, in the absence of available working capital, can prove fatal to the subject business almost immediately. An operating line of credit is typically margined against a percentage of good quality accounts receivable excluding contra accounts, holdbacks, inter-company or

related party accounts, doubtful accounts and those accounts aged 90 days and over plus a percentage of inventory, generally up to a stated maximum amount, less all claims which might rank in priority to the operating lender's debt and security. It is therefore essential for the operating lender to review monthly margin reports, accounts payable listings and inventory declarations. Part of this reporting package should include a prior claims declaration summarizing all amounts which might rank in priority to the operating lender's debt and security. Any increase in the amount of prior claims, especially those claims with a super priority, such as employee source deductions, are always cause for alarm. Increasing inventory levels that are counter cyclical to the debtor's business may reflect over production or an inability to move obsolete inventory.

Declining sales, which will translate into decreased accounts receivable and thus decreased margin availability are often the most immediate signs of trouble, especially if the reduction in sales is counter-cyclical to the debtor's usual sales pattern. A debtor unable to manage its cash flow is one of the most telling early warning signs. As with a trade supplier, the operating lender should beware the debtor which consistently writes cheques in excess of funds available under its operating line, repeatedly stops payment on cheques (especially those to key suppliers) or which is unable to quantify the number and amount of cheques in the float. Management information systems and the quality of reporting are generally a very good indicator of the caliber of management and of the success of the business.

Operating lenders should also beware reporting that is too good to be true. A margin shortfall which suddenly disappears with the booking of a new account receivable equal to or exceeding the amount of the margin shortfall should prompt further inquiry. Sometimes reporting may not be intentionally inaccurate but only incomplete. It is worthwhile to test the debtor's accounting practices periodically, usually during the account's annual review.

4. **Talk to the Debtor** – The reporting never tells the full story. Both secured and unsecured creditors can protect their positions by keeping in contact with the debtor. Certain early warning signs which may not show up in a credit bureau report or the company's regular reporting include the loss of a key customer or supplier, the loss of a key employee or employees, or the bankruptcy or insolvency of a significant account debtor.

5. **Growth Pains** – Even successful businesses can expand too quickly, which can result in strains on working capital, difficulty in hiring sufficient skilled employees and customer service issues. Overexpansion may be premature, for example, if increased capacity is added to satisfy a new contract or order and additional sales do not materialize to meet the increased capacity.

6. **Order Searches** – In addition to the reporting provided by the debtor to its operating lender, certain searches of private and public records can be conducted which may assist in evaluating the debtor's financial health.

- A credit bureau search is a low cost method of obtaining a summary of the amounts owing by a particular debtor to its creditors.
- An execution search in the jurisdictions in which the debtor carries on business will reveal if the debtor's financial difficulties have resulted in any judgments being obtained against the debtor.
- A search under the *Personal Property Security Act* (Ontario) (the "PPSA") and under the equivalent statutes in the other provinces and in the United States will disclose the existence of creditors likely to claim a security interest in the assets of the debtor. If so requested, a secured creditor must provide to anyone with an interest in the assets of the debtor affected by the creditor's security a statement as to the amount of the indebtedness and the terms of payment, a description of the collateral secured and a copy of the security agreement or information as to the location of the agreement.
- A bankruptcy search, of course, will reveal if the debtor has been adjudged bankrupt or if a proposal or notice of intention to make a proposal under the provisions of the BIA has been filed.
- A litigation search will reveal if proceedings have been commenced against the debtor in the courts, but is specific to the local judicial district.

- A *Bank Act* search will reveal if the debtor has granted security in any of its inventory to a Canadian chartered bank.
- A title search of real property will generally indicate the owner thereof, the amount originally paid for the property and the face value of any charges registered against the property. A title search will also reveal if the debtor has recently transferred the property, to whom and the transfer price. It is necessary to have a legal description or municipal address to do a subsearch of a particular property, although in certain major cities such as Toronto a search can be performed by a registered owner's name, disclosing all property owned by that person.

7. **Do a Look-see** – Even in circumstances in which there are no deficiencies in the reporting provided to the operating lender, there is no substitute for first hand information. Appointing a monitor to review the books and records of the debtor, its financial position and the assets subject to the operating lender's security is often the best method of looking behind the early warning signs referred to above to determine objectively the financial health of the debtor. The monitor engagement letter should make clear that the appointment of the monitor is not an act of enforcement of security (and therefore contrary to the provisions of section 244 of the BIA in the event a notice of intention to enforce security has not yet been delivered to the debtor) and that the monitor will not take possession or control of the debtor's assets or participate in any management decisions affecting the debtor. The secured creditor, especially the operating lender,

should ensure that it does not direct the debtor to pay certain creditors in preference to others, to terminate employees or to otherwise manage the business of the debtor. Care should be taken when appointing a monitor, particularly where the monitor is given powers to monitor the ongoing affairs of the debtor, as opposed to merely taking a snapshot under a look-see engagement. A bank may be found liable if it or its consultant becomes involved in managing the day-to-day affairs of the debtor, for example, by picking and choosing which cheques to honour if there are insufficient funds to honour all cheques presented to the Bank for payment. In such cases, unpaid creditors may have the ability to commence a fraudulent preference action against the bank or claim that the bank's secured debt has become unsecured under the doctrine of "equitable subordination". Even if the consultant or monitor does not assume responsibility for the debtor's business dealings, the appointing creditor will be taken to have knowledge of the conduct of the debtor during the period of the monitor or consultant's engagement and the creditor may be found liable if it ignores any wrongful conduct on the part of the debtor which benefits the creditor, such as the debtor building up inventory to the detriment of trade suppliers but to the benefit of the creditor which holds security upon that inventory.

8. **The Well is Dry** – If the creditor determines that the debtor requires an immediate cash injection to continue operations, hesitancy or refusal by the shareholders of a closely held corporation to advance those funds or to pledge outside assets as additional security may indicate that the shareholders have lost faith in the business. It is

useful to obtain personal financial statements from the principal shareholders of a company prior to advancing funds, even if those shareholders have not guaranteed the underlying debt, as this information may prove useful in the event the primary debt must be restructured or if the creditor is seeking to obtain an injection of funds from the shareholders.

9. **The Answer Is In Your In-basket** - Many of the statutory notices which are required to be delivered to certain or all of the debtor's creditors will be a good indication of the debtor's viability as a going concern. For example, upon the appointment of a receiver or receiver and manager, section 245 of the BIA requires the receiver to deliver notice of its appointment to all of the creditors of that debtor. Except in certain circumstances, a secured creditor may not sell or otherwise dispose of any of the assets subject to its security unless it provides 15 days' notice of its intention to sell such assets to certain parties including the debtor itself, any guarantors of the applicable debt, any creditors who have perfected a security interest in the collateral whether by way of possession or registration under the PPSA, judgment creditors or any other person known to the creditor issuing the PPSA notice to have an interest in the collateral. With respect to real property, a notice of sale or foreclosure notice must also be delivered to those parties with an interest in the subject property. One of the most telling notices which an operating lender can receive is a requirement to pay from CCRA, especially if the requirement to pay relates to amounts which have a super priority, such as employee source deductions or even amounts which enjoy a deemed lien or trust, such as GST.

RECOVERY OPTIONS

Choosing a method to recover an unpaid debt involves an analysis of the remedy most likely to succeed, balanced against the cost of that remedy. Certain remedies are simply too expensive to pursue unless the unpaid debt is significant. The remedy most appropriate to the circumstances will also depend upon the type of collateral subject to the creditor's security.

A secured creditor will generally have a greater range of recovery options than an unsecured creditor given the many contractual rights of enforcement contained in its security. However, since effective enforcement of security will require that security to be valid and enforceable, a secured creditor should always have its security vetted by external counsel. An independent security review will provide the creditor with an opportunity to rectify any deficiencies prior to enforcement. A trustee in bankruptcy as well as a private or court-appointed receiver or receiver and manager are required to obtain an independent opinion (that is, by a solicitor not acting for the secured creditor) as to the validity and enforceability of the security held by the creditor. Since valid security is the foundation of a secured party's enforcement remedy, most institutional lenders will immediately have security vetted upon transfer of a file into the special loans group prior to taking any further enforcement steps.

1. Am I Working for CCRA?

In addition to determining the validity of the security, it is also essential to determine if the indebtedness secured thereby is subsequent to any prior claims, such as amounts owed in respect of employee source deductions, GST and certain other deemed trusts in favour of both the provincial and federal crown. If the prior claims approximate the liquidation value of the assets subject to the secured creditor's security, the best alternative may be doing nothing to avoid a negative recovery.

2. Demand Payment

The security review referred to above will disclose if the credit facility is payable on demand or is a term loan. A demand for payment under a term loan may only be made upon the occurrence of certain specified events of default or if the facility has matured. The recovery process begins with the demand for payment. The demand letter should reference the specific indebtedness or credit facilities subject to the demand, the rate of interest applicable to those credit facilities, any accrued and unpaid interest arrears, legal fees or other costs, and a per diem rate of interest. Certain lenders will reference a specific time period within which the demand for payment must be satisfied. However, most demands for payment do not specify a cure period since the appropriate cure period will be fact specific, having regard to certain factors such as the amount of indebtedness, the length of the debtor/creditor relationship and the underlying reason for the demand for payment, that is, whether such demand has arisen by virtue of an event of default occurring under the subject indebtedness or because the creditor simply wishes to

exit the relationship. Generally speaking, however, the maximum amount of time which a creditor would be required to provide a debtor to satisfy a demand for payment would not exceed 30 days and in most cases, the demand period would be significantly shorter.

Occasionally, the creditor may view a demand for payment as premature but still wishes the debtor to obtain alternate financing. In those circumstances, it is appropriate to send a letter advising the debtor to obtain alternate financing, preferably by an outside deadline date. If the subject credit facilities are not payable on demand, the events of default committed by the debtor should be referenced in the letter as well. Certain demand credit facilities will also contain events of default and, in those circumstances, events of default should also be identified. If the creditor has provided this type of letter to the debtor together with a reasonable period of time to obtain alternate financing, the period of time the debtor will have to satisfy a later demand for payment will almost certainly be reduced.

3. **Deliver the BIA Notice**

Section 244 of the BIA provides that prior to enforcing its security on all or substantially all of the inventory, accounts receivable or other property of an insolvent person, that was acquired for or used in relation to, a business carried on by the insolvent person, the secured creditor must deliver a notice in the prescribed statutory form to the debtor indicating its intention to so enforce that security (the "BIA Notice"). The creditor must then wait ten (10) calendar days prior to enforcing the security referenced in the

BIA Notice. The ten (10) day hold period is designed to provide the debtor with an opportunity to seek protection from its creditors pursuant to the proposal provisions of the BIA prior to the secured creditor being in a position to enforce its security. In the event that the debtor, after receiving the BIA Notice, consents to an immediate enforcement of the security referenced therein, the secured creditor may then proceed to enforce the security. However, the BIA prohibits a debtor from waiving its rights under section 244 of the BIA in advance of receiving the BIA Notice. Any such provision contained in a security document or loan agreement would be unenforceable.

4. Monitor Engagement

If, prior to enforcing its security, the creditor wishes to determine the amount of prior claims, the value of assets subject to its security on a going concern or liquidation basis or any other factor material to its security, it may be appropriate to engage a monitor of the debtor's business, on the terms discussed above.

5. Forbearance Agreement

A creditor may choose to forbear from enforcing its rights on certain terms specified in a forbearance or standstill agreement. Commonly, the debtor will request the creditor as a condition of that agreement to waive any defaults committed by the debtor under its credit facilities. Defaults will rarely be waived by a creditor but will rather be expressly preserved. In that way, if demand has been made, a fresh demand for payment (as well as a fresh BIA Notice) will not be required in the event a default occurs under the

forbearance agreement. Forbearance agreement terms will vary from case to case, but the creditor should attempt to incorporate the following provisions in each forbearance agreement:

(i) an acknowledgement and confirmation of the amount of the debt;

(ii) an acknowledgement and confirmation of the validity and enforceability of any security granted to the creditor;

(iii) a release of the creditor, its agents (such as a monitor) and solicitors up to the date of the forbearance agreement;

(iv) an acknowledgement of the validity and enforceability of all guarantees granted to the creditor together with any collateral security thereto;

(v) a waiver of any and all defences under the subject security, the guarantees and any collateral security;

(vi) conditions precedent to the creditor forbearing from enforcing its rights and remedies, such as receiving an original executed copy of the forbearance agreement, or any additional security or documentation to be delivered to the creditor;

(vii) a forbearance fee, if applicable;

(viii) the duration of the forbearance period;

(ix) specific forbearance terminating events;

(x) if the creditor is a lender, an acknowledgement that the creditor will not be required to fund losses during the forbearance period, which is often tied

to the concept that the creditor's security position must not deteriorate during the forbearance period.

6. Interim Receiver

An Interim Receiver may only be appointed by the court, pursuant to the provisions of the BIA. Interim Receiver appointments are usually a matter of great urgency, and are appropriate where:

(a) the creditor has issued, or is about to issue a BIA Notice and is concerned that assets will dissipate during the 10 day notice period, or a third party (such as landlord) is in a position to take certain steps that would be prejudicial to the creditor's position;

(b) the debtor has filed a notice of intention to make a proposal under the BIA which has resulted in a stay of proceedings preventing the creditor from taking steps to protect its security position, and it is necessary for the protection of the debtor's estate or in the interests of one or more creditors that such an appointment be made; or

(c) a petition for receiving order has been issued by a creditor (but the receiving order has not yet been granted) and it is necessary for the protection of the estate that an Interim Receiver be appointed. The debtor is not bankrupt until the receiving order is made, which takes at least 10 days from the date the petition is issued.

The scope of the Interim Receiver's mandate has expanded in recent years from simply taking control of the receipts and disbursements of the debtor on an interim basis (while leaving operation of the business in the debtor's hands), to marketing and selling the debtor's assets.

An Interim Receiver, like a court-appointed receiver, is an officer of the court. It does not take instructions from the creditor which sought its appointment, but rather from the court. It must disclose all material information to the court and carries out its duties in accordance with the appointment Order.

The comments below with respect to fees of a court-appointed receiver apply to an Interim Receiver.

7. Privately Appointed Receiver or Receiver and Manager

A privately appointed Receiver is appointed under a creditor's security to realize upon or "receive" the debtor's assets. The right to appoint the Receiver must be contained in the security. Most security agreements provide that the Receiver remains the agent of the debtor, which may insulate the appointing creditor from liability incurred by the Receiver. The Receiver's appointment does not end the corporate existence of the debtor, but it does remove from the debtor possession and control of its assets. A Receiver does not operate the debtor's business of the debtor.

A Receiver and Manager possesses all the attributes of a Receiver, but is also given the power to operate the debtor's business, usually pending the sale of the business as a going concern.

Unlike a court-appointed Receiver or Interim Receiver, the privately appointed Receiver only owes a duty to its appointing creditor. Nevertheless, a Receiver must act in a commercially reasonable manner when realizing upon the debtor's assets since the proceeds of those assets will be distributed to the various stakeholders of the debtor in accordance with their respective interests.

Most institutional lenders will appoint an accounting firm licensed to carry on business as a trustee in bankruptcy and will agree to pay the Receiver's fees and disbursements and indemnify the Receiver against any losses suffered by the Receiver, except those incurred as a result of negligent or willful misconduct on the part of the Receiver.

The debtor's consent to the Receiver's appointment is not required since the power to appoint the Receiver is contained in the security granted by the debtor to the creditor. However, if the debtor refuses to grant the Receiver access to its premises, the creditor may either seek to have the court confirm the private appointment of the Receiver or obtain the appointment of the Receiver directly by the court. Few debtors

will risk a finding of contempt of court in the face of an order compelling the debtor to provide access to a Receiver. The police will rarely assist a privately appointed Receiver in gaining access to a debtor's premises.

The appointment of a private Receiver does not act as an automatic termination of the debtor's employees. If the employees have not already been terminated by the debtor, the Receiver will often terminate those employees immediately upon its appointment, then re-hire all or certain of the employees on a day-to-day basis. The Receiver must take great care to avoid assuming liabilities incurred by the debtor as the employer of its former employees. The Receiver will usually pay one lump sum to a former employee temporarily re-hired by the Receiver, with no allowance for benefits, RRSP or pension contributions.

Pursuant to the provisions of the BIA, the Receiver has a duty to notify all the creditors of the debtor of its appointment and to make periodic reports to the Official Receiver.

The cost associated with an ongoing receivership will vary greatly with the scope and complexity of the debtor's business. Generally speaking, however, a privately appointed Receiver will result in a cost savings over a court appointed Receiver but will be more expensive than simply monitoring a debtor's business.

8. Court Appointed Receiver or Receiver and Manager

Section 101 of the *Courts of Justice Act* (Ontario) provides for the appointment by the court of a Receiver or Receiver and Manager if it is "just and convenient" to do so.

The powers of a court appointed Receiver are contained entirely within its appointment order and are usually quite extensive. The appointment order will usually contain a stay of proceedings prohibiting any party from interfering with the exercise of the Receiver's duties and empowering the Receiver to take immediate possession and control of the debtor's assets. Unlike a privately appointed Receiver, a court appointed Receiver's mandate is sanctioned by the court and is therefore effective against "the world".

As an officer of the court, the court appointed Receiver owes its duties to all stakeholders of the company in receivership and not just to an appointing creditor. It may only carry out such steps as are authorized under the appointment order and any subsequent orders of the court and will usually seek approval of its actions periodically having regard to the marketing or sale of assets, conservatory measures and the approval of its fees and disbursements. Generally speaking, a court appointed Receiver's fees will rank as a first charge upon the debtor's estate, in priority to all other creditors.

A court appointed Receiver is extremely valuable in circumstances in which the realization by a secured creditor upon its security may be highly contentious or the debtor

will refuse access to the privately appointed Receiver. Since all realization efforts by the court appointed Receiver will be approved by the court, the creditor seeking the Receiver's appointment will be insulated from accusations that a private Receiver had not acted in a commercially reasonable manner. A court appointed Receiver is especially useful in circumstances where there are priority issues amongst various creditors or the nature of the debtor's business is sufficiently unwieldy or complex to require the court's assistance in its administration.

The court appointed receivership is one of the most expensive remedies available to a creditor as it requires numerous court attendances in connection with the court's ongoing supervision of the estate.

One of the main advantages to a court-appointed receivership over a private receivership is the ability to prevent third parties from altering their terms of supply, terminating crucial services, or exercising their rights and remedies against the debtor's assets.

9. Enforcing Mortgage Security

If the creditor has security upon the debtor's real estate, whether a conventional mortgage or as collateral mortgage security, the creditor will have a variety of enforcement options in respect thereto, from selling the subject property under the power of sale provisions contained in the subject mortgage or under the *Mortgages Act*

(Ontario), foreclosing upon the subject property to selling the property by way of a judicial sale. Since the redemption periods governing the enforcement of mortgage security are significantly longer than the periods affecting personal property security, the above noted remedies in respect of a debtor's personal property will generally be exercised in advance of any remedies under mortgage security.

10. **Bankruptcy**

The appointment of a trustee in bankruptcy can either be voluntary by way of the debtor filing an assignment in bankruptcy or non-consensual by way of the creditor issuing a petition for a receiving order. In either case, the effect of bankruptcy is to vest the debtor's assets in the trustee in bankruptcy. A creditor may issue a petition for a receiving order against a debtor, provided the creditor is owed $1,000.00 or more and the debtor has committed an act of bankruptcy in the preceding 6 months. The courts view a petition for a receiving order as an extremely serious matter which has the potential to seriously impair a debtor's reputation and ability to carry on business in the event that the petition has been improperly brought. It is essential to keep in mind that a petition for a receiving order may not be brought to simply recover payment of a debt. The bankruptcy process must not be used as a collection agency. A petition for a receiving order may only be issued in the event that a debtor has committed one of the acts of bankruptcy listed in section 42 of the BIA. Most commonly, the petition for receiving order will provide that the debtor has ceased to meet its liabilities generally as they come due. In order to rely upon that act of bankruptcy, the petitioning creditor must have first hand

knowledge that the debtor is failing to pay other creditors as the debts to those creditors have come due. Even if that is the case, and the debtor has committed an act of bankruptcy, the court may refuse to issue a receiving order if the petitioning creditor has brought the petition for an improper purpose, such as to eliminate a business competitor.

Certain other acts of bankruptcy do not require the petitioning creditor to prove that other creditors are not being paid. If a creditor believes that a fraudulent transaction has occurred contrary to the provisions of the BIA, such as the transfer of the matrimonial home from spouse to spouse with little or no consideration, a petition for a receiving order may be brought against the transferor as a method of attacking that transaction.

Bankruptcy does not affect the rights of secured creditors. Since bankruptcy is a court controlled process, the trustee is an officer of the court and has a duty to protect the rights of unsecured creditors of the bankrupt. A trustee in bankruptcy can exist in conjunction with a receiver or receiver and manager. This often occurs in circumstances in which the creditor wishes to reverse certain governmental priorities.

11. C.O.D.

If the unpaid creditor is a trade supplier, it may wish to cease supplying new goods or services other than on a c.o.d. basis or by requiring payment for not only new goods sold and delivered but also partial payment of the outstanding indebtedness. Requiring payment of an outstanding debt in consideration of a continuing supply of

goods or services will assist a creditor in defending any action brought by a secured creditor, another creditor or a trustee in bankruptcy of the debtor that the creditor received payments in preference to other creditors. Alternatively, the creditor may require the debtor to deliver a post-dated cheque or series of cheques which follow a payment schedule for the outstanding debt. Although these cheques are not security, they will indicate an intention to pay and may hold some moral suasion.

12. Obtain Security

Ideally, if an unsecured creditor is unable to obtain immediate payment of its debt, it may be in a position to obtain a guarantee from a third party or security for that indebtedness and thereby obtain the rights and remedies afforded to secured creditors referred to above. However, pursuant to section 95 of the BIA, the provision of that security may be attracted by a trustee in bankruptcy as a preference in the event that it is granted to the unsecured creditor within 90 days of the date of the debtor's bankruptcy, or within one year of the debtor's date of bankruptcy if the debtor and creditor are related parties.

13. Litigation

Collecting a debt through litigation is one of the most widely understood remedies available to both secured and unsecured creditors. A creditor may also commence litigation pursuant to the oppression remedy provisions of the OBCA or to allege that an officer of the debtor corporation should be held personally liable for tortious acts

committed in the course of his or her employment. However, the significant cost associated with drafting pleadings, preparing affidavits of documents, attending on examinations for discovery and the trial of the matter, as well as the often significant delay in bringing a matter to trial make this a less attractive option. Once obtaining judgment, however, an execution creditor will usually proceed to have a writ of seizure and sale issued by the court since the cost of doing so is quite low. The writ only binds property located in the local geographic judicial district where the writ has been filed. The writ binds the goods and lands of the debtor (if applicable) in the jurisdictions where the writ is filed and notice of the writ will be disclosed under an execution search under that judicial district. The practical effect of filing a writ is that the debtor will be unable to sell or finance its property unless it satisfies the amount owing under the judgment, since any prospective purchaser or financier will refuse to proceed in the face of an execution. There is an important distinction between merely filing the writ with the Sheriff and the more active one of requiring the Sheriff to enforce the writ. The Sheriff will only enforce the writ by seizing and selling the debtor's real and personal property if it receives specific instructions by way of a Direction to Enforce from the creditor.

After obtaining a judgment, an execution creditor may also conduct an examination in aid of execution, commonly referred to as a judgment debtor exam. This examination allows the creditor to question the debtor under oath about the reason for non-payment or non-performance of the judgment or order, the debtor's income and property, the debts owed to and by the debtor, the disposal the debtor has made of any

property either before or after the making of the order or judgment and any other matter relevant to the enforcement of the order or judgment. The creditor may also examine any person who may have knowledge of the debtor's affairs upon obtaining an order of the court.

14. 30 Day Goods Claim

Pursuant to section 81.1 of the BIA, if a person has sold and delivered goods to a purchaser for use in relation to the purchaser's business and the purchaser has not fully paid for the goods, the supplier has certain rights to repossess those goods at its own expense following the bankruptcy of the purchaser or the appointment of a receiver of the purchaser. The supplier of the goods must deliver a written demand for repossession within a period of 30 days after the date of delivery of the goods to the purchaser. Since that demand for repossession runs from the date of supply of the goods and not from the date of the bankruptcy or receivership of the debtor, the window to exercise 30 day goods rights may be quite narrow. The seller of the goods must demonstrate that the goods are in the possession of the trustee or receiver, that they are identifiable and that they are in the same state as they were on delivery to the purchaser. The appointment of an Interim Receiver will not trigger these rights. The goods may not be recovered if they have been resold by the trustee or receiver or are subject to a sale agreement to an arms length purchaser.

15. Join a Group

A single creditor may not have the power to influence the scope or nature of a restructuring, but a group of creditors with a common interest may have that power. In most large restructurings, it is common to see unsecured creditors with like interests band together. In CCAA restructurings, for example, an unsecured creditors' committee is often formed to make submissions to the court or to seek to vary terms of the initial stay order to reflect the special interests of the unsecured creditors. The strength of such an unsecured creditors' committee will be directly influenced by the amount of the unsecured debt which the committee represents as well as the nature of goods or services supplied by those creditors, especially in circumstances in which the debtor requires a continued supply of those goods or services.

16. Sell Your Debt

A recognized market has developed for the sale of both secured and unsecured debt. U.S. vulture funds have become especially prolific consumers of unsecured debt in Canadian insolvency proceedings and are often prepared to buy significant amounts of debt at a discounted price to the dollar. If the restructuring involves a recognized Canadian public company, it is virtually certain that a secondary market in the sale of unsecured debt will exist. Selling debt offers the benefit of an immediate cash recovery without the uncertainties associated with an ongoing restructuring process.

CONCLUSION

There is no one best enforcement strategy. The most appropriate remedy will vary with the facts of each case. A recovery strategy should be developed as soon as possible following the detection of any of the early warning signs referred to above. Understanding the remedies available will permit the creditor to develop the most appropriate enforcement strategy while minimizing costs. As with many things, there is a vast gap between theory and practice. Ironically, those most likely to recover an unpaid debt are those who have had the most experience attempting to do so.