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Cross Border Restructuring in the Energy Industry: An Overview of Canadian Insolvency Law

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About Fraser Milner Casgrain LLP

- A leading Canadian business law firm
- Over 500 lawyers
- Offices in Vancouver, Edmonton, Calgary, Toronto, Montreal and Ottawa
- FMC is a recognized leader in the Canadian legal arena for complex cross-border restructuring matters.

Poll Question #1

- Describe the nature of your business in Canada
 - Canadian Parent
 - Canadian Subsidiary
 - Supplier to Canada
 - Purchaser from Canada
 - Counterparty
 - Canadian Partner / Joint Venture
 - Canadian Acquisitions
 - Lending to or from Canada

Common Canadian Insolvency Processes

- Bankruptcy
- Receivership
- Debtor-in-Possession Restructuring
 - *Companies Creditors Arrangement Act (CCAA)*
 - *Bankruptcy and Insolvency Act (BIA)*

Bankruptcy

- Governed by the BIA
 - Commenced in 1 of 3 ways:
 - Assignment
 - Petition
 - Failed Proposal

Bankruptcy (con't)

- Assets vest in a Trustee
- Trustee's mandate:
 - Gather in Assets
 - Liquidate
 - Distribute to Creditors
- Enhanced Recovery and Investigative Powers

Receiverships

- Take possession and control of assets
- Court vs. private appointments
- Powers in instrument of appointment
- Varied mandate

Debtor-in-Possession Restructuring

- CCAA or BIA
- Debtor remains in possession and control
- Objective: Plan of Compromise and Arrangement or Proposal
- Monitor/Trustee to oversee

Debtor-In-Possession Restructuring (con't)

- Stay of Proceedings
- “Come-back” Application
- Plans
- Sanction Hearings

Debtor-In-Possession Restructuring (con't)

- CCAA vs. BIA
 - Codification vs. Court Designed
 - Flexibility
 - Size
 - Terminology
 - Entry process
 - Timing
 - Rigidity
 - Tax consequences
 - Consequences of failure

Poll Question

- Which Canadian Provinces do you do business in?
 - B.C.
 - Alberta
 - Saskatchewan
 - Manitoba
 - Ontario
 - Quebec
 - Other

Directors and Officers

- In a bankruptcy – the directors are displaced and have duties prescribed under the BIA
- In a receivership – the powers of the directors are displaced to the extent the receiver's powers “occupy the field”
- In a CCAA/Proposal –as the Debtor remains in possession of its assets, the role and protection of the Debtor’s directors and officers should be clearly defined

Directors and Officers – Fiduciary Duty

BCE Inc. v. 1976 Debentureholders (SCC 2008)

- The fiduciary duty of the directors is a duty to act in the best interests of the corporation
- Often the interests of the shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear – it is to the corporation

Directors and Officers – Business Judgment Rule

The court looks to see that the directors made a reasonable decision not a perfect decision

“Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.”

Directors and Officers – Business Judgment Rule In Practice

- Process issues important
- Proper advice obtained – legal/financial/other?
- Decision-makers – special committee required?
- Independence issues
- Decision-making process – time/discussion/analysis
- Alternatives canvassed and considered, including status quo
- Documenting process to show evidence of “business judgment”

Directors and Officers – Protections

- Indemnities for potential liabilities arising during the restructuring process, secured by a Directors and Officers Charge created in the Initial Order
- Stay granted in the Initial Order may include stay protection for Directors and Officers except in respect of guarantees and injunctive remedies
- In certain circumstances, trusts may be established to provide security for indemnification arrangements
- CCAA also provides that a Plan may compromise claims against Directors and Officers

Executory Contracts

- Defined
- Stay of Proceedings
- Performance Assurance
- Set-off
- Special Contracts
 - Eligible Financial Contracts (EFCs)
 - Approved Contracts
 - Court ordered charges

Supplier Rights

- Supplier security on inventory
- Reclamation Rights (s.81.1 of the BIA)
- Post-filing charges
- Performance Assurance
- Critical Suppliers

Acquisitions

- Established procedure
- Late bidding
- Early bidding – Stalking Horse
- “As-is, where-is”/ Vesting Title

DIP Lending

- Super-priority security
- Enhanced perspective
- Pricing/Break Fee

Legislative Reform

- Recent changes
- Proposed changes (September 18, 2009)

Questions & Answers

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