THE SPLINTERING OF CANADIAN INSOLVENCY LAW: QUEBEC COURT OF APPEAL CONFIRMS EXPIRY OF PROVINCIAL NOTICE PERIODS ARE A PRE-CONDITION TO APPOINTMENT OF A BIA RECEIVER

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In *Séquestre de Média5 Corporation*, 2020 QCCA 943 (« **Media5** »), the Quebec Court of Appeal unanimously held that, in order bring a motion for the appointment of a receiver under s.243 of the Bankruptcy and Insolvency Act (the "**BIA**"), a secured creditor must not only have given the notice required under s.244 of the BIA, it must also have served the prior notice of the exercise of a hypothecary right required under the Civil code of Quebec ("**CCQ**"), and both notice periods must have expired. In so doing, the Court of appeal settled a number of issues raised by the Supreme Court of Canada's majority ruling in the Lemare Lake[1] case, which had divided Quebec case law. Unfortunately, it may complicate enforcement for secured creditors holding collateral in Quebec..

Background on Remedies

The remedies of hypothecary (secured) creditors under the CCQ are limited to those set out in the CCQ; they cannot be varied by contract. The most common of those remedies is the sale by judicial authority (appointing a receiver is not provided for under the CCQ), where the court appoints a person at the request of a secured creditor, to conduct a sale of the charged property, in accordance with the terms set out in the appointing order. Prior to presenting its motion, (i) the secured creditor must have served the debtor with a prior notice of the exercise of a hypothecary right (the "**CCQ Notice**"), which sets out, among other information, the right that will be exercised, the events of default, the amount owing to the secured creditor, and reminds the debtor of its right to correct the defaults, and (ii) the requisite notice period must have elapsed. When the charged property consists of movable (personal) property, that notice period is 20 days[2], and when the charged property includes immovable (real) property, the notice period is 60 days. In both cases, the period runs from the date the notice is published in the Register of Personal and Movable Real Rights, or the Land Register, as applicable. It is not possible to waive the notice period.

Furthermore, under s.244 of the BIA, any secured creditor wishing to exercise its remedies against all or substantially all of the debtor's property must have delivered a notice in the prescribed form (the "**s.244 Notice**") to the debtor, advising it of its intention to enforce its security at the end of the following 10 day period. The debtor may waive the notice period.

Thus, any secured creditor wishing to exercise its remedies under a hypothec must give both the CCQ Notice and s.244 Notice to its debtor, and allow the notice periods to run out before commencing enforcement. The notice periods run concurrently.

However, once the s.244 Notice has been given, it is also possible for a secured creditor to obtain a court order appointing a receiver over the property of its debtor under s.243 BIA. Such orders authorize the receiver to take possession and control of the debtor's property, as well as any other action as the court deems advisable. Over time, a practice developed by which the typical receivership order would permit the receiver to solicit bids for the assets of the debtor, and make a further application to the court to authorize the sale of the assets to the successful bidder, free and clear of any liens or charges. Since these orders are recognized across the country, appointing a receiver became the favored remedy for enforcing security against debtors in multiple provinces, and eventually, the default remedy (including in Quebec for enforcement generally.

Lemare Lake

In the Lemare Lake matter, the Supreme Court of Canada was faced with the appeal of a farmer, contesting its secured creditor's motion to appoint a receiver to the farm. Although the Saskatchewan Farm Security Act (the "**SFSA**") prohibits the taking of any action, including appointing a receiver, against farm land, except (i) upon leave of the court, and (ii) following a mandatory and non-waivable 150 day waiting period, the secured creditor did not comply with that act, having only sent the s.244 Notice. In the secured creditor's view, requiring compliance with provincial notice requirements would frustrate the purpose of the BIA, which sought to establish a "national receiver" to ensure uniform and prompt realization of the insolvent debtor's assets where warranted.

A majority of the court granted the farmer's appeal, and held that while s.243 BIA's purpose was the creation of a "national receivership", it was not incompatible with that purpose to require secured creditors to comply with such longer notice periods as mandatory provincial law may require. The SFSA and the BIA are not in conflict, and no issue of paramountcy arises, because the 10 day period set out in s.244 BIA is a floor, not a ceiling.

Following this ruling, a split arose in Quebec case law, between those who saw the service of the CCQ Notice as a necessary pre-condition to the appointment of a receiver[3], and those who believed that service of the CCQ Notice was not required to appoint a receiver[4]. For those in the second camp, the appointment of a receiver was not a "hypothecary" remedy, and to impose compliance with provincial notice periods when exercising a

distinct remedy under federal law, would be contrary to the rule of federal paramountcy.

Media5

In this case, Laurentian Bank of Canada ("BLC") sought to appoint a receiver over the assets of Media5 Corpration, and it subsidiary, Acquisitions Essagal Inc., in order to conduct a sale of their assets as a going concern. While BLC had served the s.244 Notice, it had not served the CCQ Notice. At the hearing, the trial judge stated that he did not believe s.243 BIA created a standalone remedy, and suggested that BLC bring a motion to appoint an interim receiver under s.47 BIA instead. The hearing was adjourned to allow BLC to make the required amendments to its proceedings.

At the second hearing, the court dismissed the application, on the basis that secured creditors wishing to exercise their remedies must do so in accordance with provincial law. Federal law cannot be used to circumvent provincial requirements, and as the CCQ does not provide for the appointment of a receiver, the BIA cannot supplement that remedy. Finally, it was inappropriate to appoint an interim receiver in the circumstances, because the debtors were cooperating with the secured creditor to find a way out of their financial difficulties, and there was no apparent urgency.

The Quebec Court of Appeal unanimously allowed the appeal on the basis that the appointment of a receiver under s.243 BIA is an additional remedy available to secured creditors when their debtors are insolvent. Such appointment is possible even when the debtor's assets are only located in the province of Quebec. However, since the hypothecs arise under the CCQ then, as was the case with the SFSA, the notices required under the CCQ must be given, and all delays expired, prior to seeking that appointment. Where the debtor has assets in multiple provinces, the secured creditor will therefore be required to comply with the mandatory noticing periods in each relevant province.

If the procedural conditions are met, the court must also weigh whether it is appropriate to appoint the receiver in the circumstances. Among other criteria to be considered, the court listed: (a) the good faith of the secured party; (b) whether the appointment of a receiver will adversely affect the recovery other creditors would otherwise have received in bankruptcy; (c) whether the appointment of a receiver is likely to prevent the presentation of a proposal under the BIA or an arrangement under the Companies' Creditors Arrangement Act that was likely to succeed; and (d) the desirability of avoiding the socio-economic losses associated with the liquidation of an insolvent business, while preserving the fair and orderly settlement of the debtor's debts.

Finally, regarding interim receivers under s.47 BIA, their role is that of a custodian; it is not appropriate to authorize an interim receiver to conduct a sale of the debtor's assets or business.

Takeaways

There is no doubt that the Media5 case will have a profound impact on the enforcement of secured remedies in Quebec, and perhaps in Canada as well. At the very least, it confirms that while receivers may be appointed in the province of Quebec, such appointment can only be made once both the BIA and CCQ notice periods have expired. Where the collateral is comprised of both movable and immovable property, appointing a single receiver over all of the assets for the purpose of conduction a sale process may not be possible until 60 days have elapsed since the notices were first registered. Expect an increase in the appointment of interim receivers in such cases.

More broadly and simply stated, it may no longer be possible to appoint a "national receiver" through a single proceeding when assets are located in different provinces with different notice periods, unless such appointment is sought once the most debtor-friendly notice periods have elapsed. It may not always be possible – or prudent – for the creditor to wait out that period; while a receiver is sought in some jurisdictions, interim receiverships will be sought in the others, pending expiry of the local notice periods.

A second consequence of this case is the risk that out-of-court restructurings will become more difficult. Since the CCQ notice period cannot be waived, and the CCQ Notices must be published in order for the notice periods to commence, secured creditors will be unwilling to postpone their service or registration while a forbearance period is in place. Other creditors who consult the registries will see those notices, and may use that information to squeeze concessions from their weakened debtor. Refinancing the debtor may become more challenging, and contracts contingent upon creditworthiness may be terminated or not renewed.

In short, this case represents a further erosion of the former goal of insolvency jurisprudence: a national insolvency statute, nationally applied and interpreted, for consistent and predictable outcomes regardless of the province in which one found oneself.

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[1] *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53.
[2] If the right being exercised is the right of taking possession for the purposes of administration, the notice period is 10 days. In consumer matters, the notice period is 30 days.
[3] *See Atelier Ferland inc. (Séquestre de) et Raymond Chabot inc.,* 2016 QCCS 6038; *Syndic de Moulée RL inc.*, 2017 QCCS 1386; *Ferme des Hautes Collines (Séquestre de) v. Banque nationale du Canada,* 2008 QCCS 1495; *Boréal – Informations stratégiques inc. (Avis d'intention de)*, 2014 QCCS 5595; *Viandes Laroche inc. (Avis d'intention de)*, 2015 QCCS 5768; *Séquestre de Gestion EGR inc. et Lemieux Nolet inc., syndicas de faillite et gestionnaires*, 2017 QCCS 5062 (leave to appeal to the Court of Appeal dismissed); *Séquestre de St-Onge and Banque de Montréal*, 2017 QCCS 5455; *Séquestre de Media5 Corporation*, 2019 QCCS 5369; Mise sous séquestre

de Mécanique NS inc., 2020 QCCS 1010; *Mise sous séquestre de DAC Aviation internationale ltée*, 2020 QCCS 1077.

[4] *See 9113-7521 Québec inc. (Syndic de)*, 2011 QCCS 3429; *Groupe Arsenault inc. (Avis d'intention de)*, 2015 CCS 898; *Groupe Ferme Sylvain Rivard inc. (Séquestre de)*, 2016 QCCS 5088; *Transport Passion R inc. v. Banque de développement du Canada*, 2019 QCCS 2518; *Séquestre de Roland Boulanger & cie ltée*, 2019 QCCS 4838.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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