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Québec Court of Appeal Settles Controversy Regarding Applicability of CCQ Requirements to Appointment of a Receiver

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In a unanimous decision, the Québec Court of Appeal (QCA) put an end to a controversy in the case law regarding the implementation of the receiver regime under the *Bankruptcy and Insolvency Act* (BIA) in Québec. The QCA confirmed that a secured creditor can have a receiver appointed under the BIA but that the substantial and procedural requirements prescribed by the Civil Code of Québec (CCQ) to exercise a hypothecary right – namely, prior notice and the related time limits – must be followed.

Background

In this case, the appellant, the Laurentian Bank of Canada, appealed a judgment rendered on December 16, 2019, by the Honourable Gaétan Dumas of the Superior Court of Québec (QSC) dismissing its amended application for the appointment of PricewaterhouseCoopers Inc. (PwC) as interim receiver under BIA section 47 to the property of the respondent companies Media5 Corporation and Acquisitions Essagal Inc. (Essagal) in order to begin a process for the solicitation of offers to sell their businesses as going concerns.

In November 2019, due to defaults under the loan agreements, Laurentian Bank asked the QSC to appoint PwC as receiver under BIA section 243 in order to sell their businesses as going concerns as part of a solicitation process.

When the Laurentian Bank presented its motion, the first instance judge advised its attorneys that, in his opinion, BIA section 243 did not create a recourse in Québec. He asked Laurentian Bank to consider submitting a motion to appoint an interim receiver under BIA section 47.

The hearing was postponed so Laurentian Bank could amend its proceedings to ask for the appointment of an interim receiver as the judge had suggested. The hearing continued on December 2, 2019, following which the judge dismissed Laurentian Bank's motion.

The Québec controversy

For several years, the issue of the applicability of BIA section 243 in view of the CCQ provisions regarding the exercise of hypothecary rights has been the subject of much controversy within the QSC.

Some judges held that hypothecary creditors were bound by the CCQ provisions involving hypothecary remedies even if their debtor were insolvent. According to this thesis, the BIA was not intended to set aside the substantial and procedural requirements set out in provincial law dealing with the remedies of secured creditors.

This thesis was divided into two schools of thought. Some judges believed that the prior notice required under the CCQ and the related time limits should be followed but without completely setting aside the use of a receiver appointed under BIA section 243(1). Other judges, such as the judge in first instance, set aside the application of this provision almost completely on the ground that the hypothecary rights prescribed by the CCQ constitute a complete set of rules that cannot be added to in the absence of circumstances having a national aspect.

On the other hand, some judges concluded that the appointment of a receiver under BIA section 243 is a measure that is completely separate from the exercise of hypothecary rights. A receiver could therefore be appointed under this provision without the secured creditor being required to abide by the CCQ's substantial and procedural requirements.

QCA Ends the Controversy

According to the QCA, the right to seek the appointment of a receiver under BIA section 243 is a recourse open to secured creditors in addition to the hypothecary recourses when the debtor is insolvent. Accordingly, if the debtor is insolvent, the hypothecary creditor can exercise its hypothecary rights under the CCQ or apply for the appointment of a receiver under BIA section 243. The fact that the CCQ provisions limit the exercise of hypothecary rights to four measures does not prevent the federal legislator from allowing a secured creditor, including a hypothecary creditor within the meaning of the CCQ, to exercise other recourses if its debtor is insolvent.

The QCA also held that, in view of the reasons of the majority of the Supreme Court of Canada in *Lemare Lake*, the substantial and procedural requirements prescribed by the CCQ to exercise a hypothecary right are apparently not inapplicable or inoperative when a hypothecary creditor asks the QSC to appoint a receiver under BIA section 243. The two regimes therefore work hand in hand.

In summary, the QSC can appoint a receiver under BIA section 243 at the request of a hypothecary creditor in order to sell the business of an insolvent debtor as a going concern. However, since the hypothecary security is what allows the creditor to rely on BIA section 243, the substantial and procedural requirements prescribed by the CCQ to exercise a hypothecary right – namely, prior notice and the related time limits – must be met. Once these requirements are met, the QSC can exercise its discretion BIA section 243 to name a receiver and confer on it the powers it deems advisable.

Criteria for Appointing a Receiver Under BIA Section 243(1)

The QCA set out the following prerequisites and criteria to be met for a hypothecary creditor to have a receiver appointed under BIA section 243:

1. The debtor must be insolvent.
2. The hypothecary security must cover all or substantially all the inventory, accounts receivable or other property acquired or used by the insolvent debtor.
3. The said property must be used in connection with the business of the insolvent debtor.
4. The 10-day notice prescribed by BIA section 244 must have been given and the time limit expired.
5. The substantial and procedural requirements for the exercise of a hypothecary recourse prescribed by the CCQ must have been met, including the publication of a 20- or 60-day prior notice, depending on whether the property is movable or immovable.

The QCA states that, provided that these prerequisites are met, the court can appoint the receiver if it considers this to be just or convenient to do so given all the circumstances, including the following:

1. The hypothecary creditor asking for the appointment of the receiver must be acting in good faith and purposefully.
2. The appointment of the receiver and the powers conferred on it must not interfere with the rights of the other creditors in a way that their claims would be jeopardized in the event of the debtor's bankruptcy.
3. The appointment and powers of the receiver must not be likely to prevent the implementation of a proposal under the BIA or an arrangement under the Companies' *Creditors Arrangement Act* if it is reasonable to believe that such a proposal or arrangement would receive the required approvals.
4. The measures must be justified under the specific circumstances of the case given the broader objectives of the BIA and insolvency law and, in particular, that these measures will make a useful contribution to avoiding, to the extent possible, the social

and economic losses resulting from the liquidation of an insolvent commercial company, while promoting the fair and orderly settlement of the debts of the company in question.

Conclusion

Lastly and not surprisingly, the QCA's decision, rendered on July 20, 2020, confirms that an interim receiver cannot be appointed in order to begin a process for soliciting offers to sell a business as a going concern. In the end, the QCA sent the case back to the QSC so another judge could conduct the necessary analysis and exercise judicial discretion in accordance with BIA section 243.

Implications

The QCA has finally put an end to a controversy by confirming that a secured creditor can have a receiver appointed under BIA section 243 even when all the insolvent debtor's property is located in Québec. The QCA also confirms that in such a case, the creditor must comply with the substantial and procedural requirements prescribed by the CCQ, including the publication of prior notice and the related time limits.

It will be interesting to see to what extent courts in the other provinces follow in the QCA's footsteps and require that a secured creditor holding security affecting property located in more than one province comply with the substantial and procedural requirements for the execution of its security as prescribed by the law of each province concerned before being able to have a receiver appointed under BIA section 243.

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