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Québec Court of Appeal settles controversy regarding the appointment of national receivers under section 243 of the BIA

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On July 20, 2020, the Court of Appeal of Québec (the QCA) released its reasons in *Séquestre de Media5 Corporation*,[1] putting an end to a long-lasting debate on the availability of national receivers to Québec secured creditors.

In a unanimous decision, the QCA overturned the trial judge's decision and confirmed (i) the existence of an independent remedy to appoint a national receiver pursuant to s. 243 of the *Bankruptcy and Insolvency Act*[2] (the BIA) (a national receiver), and (ii) that prior notices under the Civil Code of Québec (the Civil Code) must be served, published and their delays lapsed, prior to the appointment of a national receiver.

The QCA's reasons provide valuable guidance and resolve the controversy that has existed in Québec both prior to and following the Supreme Court's decision in *Lemare Lake*,[3] regarding the interplay between the provisions of the Civil Code, governing the exercise of hypothecary rights, and the BIA provisions regarding the appointment of a national receiver. The two schools of thought that emerged were irreconcilable, with the first supporting the view that secured creditors could not seek to enforce rights other than by way of the remedies set forth in the Civil Code and the second, recognizing that s. 243 of the BIA provided an additional, autonomous remedy in the secured creditor tool box.

The QCA has settled this debate and provided guidance on the procedural requirements to be followed when seeking the appointment of national receivers in Québec.

Background

Media5 Corporation (Media5) operates in the research and communications technology field as a global supplier of multimedia communications solutions. Acquisitions Essagal Inc. (Essagal, and together with Media5, the Debtors) is a holding company owed and controlled by Media5 and used for international acquisitions.

In 2017, Laurentian Bank of Canada (the Bank) provided financing to both Media5 and Essagal. The Debtors' loans were secured and guaranteed by various security, notably first-ranking movable hypothecs on the universality of the Debtors' property as well as security pursuant to section 427 of the *Bank Act*.

Since 2017, the Debtors have been in default of their obligations to the Bank and despite multiple forbearance agreements, the Debtors failed to cure the defaults.

As a result, in late 2019, the Bank brought an application pursuant to s. 243(1) of the BIA to appoint PricewaterhouseCoopers Inc. (PwC) as the receiver over the assets of the Debtors with the objective to initiate a solicitation process for the sale of the Debtors' businesses as a going concern.

The Court at first instance advised of its intention to dismiss the application on the basis that s. 243 of the BIA did not create an independent remedy or right of action for secured creditors. The Court invited the Bank to consider seeking the appointment of an interim receiver pursuant to section 47 of the BIA. The Bank amended its application to seek the appointment of PwC as the interim receiver. Following the amendment, the Court proceeded to dismiss the Bank's application on the basis that the criteria set forth under s. 47 of the BIA had not been met, namely the Bank's intention to solicit offers for the business or assets of the Debtors could not be characterized as a conservative measure and that the Bank was using the application under s. 47 of the BIA to obtain indirectly what it could not obtain directly under s. 243(1) of the BIA.

The Bank appealed the decision.

Decision

Section 243 of the BIA

First, the QCA confirmed that a secured creditor has the option to either exercise its hypothecary rights and remedies pursuant to the Civil Code *or* to apply for the appointment of a national receiver. The QCA held that despite article 2748 of the Civil Code, Parliament was not precluded from creating additional remedies in favour of a secured creditor (including the remedy under s. 243(1) of the BIA). Thus, the appointment of a national receiver is a remedy that exists in addition to the hypothecary rights and remedies available under the Civil Code.

Second, the QCA held that the appointment of a national receiver is possible even where the debtor has property only located in Québec. In fact, according to the QCA, there is nothing in the text of s. 243 of the BIA or elsewhere in the BIA to suggest that the appointment of a receiver is permitted only where the debtor holds property in more than one Canadian province or territory.

Third, the QCA held that in light of the SCC decision in *Lemare Lake*, all requirements (both substantive and procedural) of the provincial legislation related to the exercise of hypothecary rights should be respected in addition to the requirements set forth under the BIA. Accordingly, prior to seeking the appointment of a national receiver in Québec, the secured creditor must send notice that it intends to appoint a receiver under s. 243 of the BIA as well as send and publish the Civil Code 20-day notice over movable property or a 60-day notice over immovable property, as applicable, and the delays set forth therein must have expired.

Section 47 BIA

The QCA held that pursuant to s. 47 of the BIA, an interim receiver cannot proceed with the sale of the debtor's business as a going concern. Following the adoption of s. 243 of the BIA, the powers that may be granted to an interim receiver under s. 47 of the BIA were limited to conservation measures only. According to the QCA, the role of an interim receiver is to be a "watchdog" to monitor the debtor's property. Therefore, the QCA concluded that the appointment of an interim receiver for the purpose of proceeding to a sale process is not

permitted. In light of this conclusion, it is likely that interim receiver appointments will be less favoured in the future.

Osler's team composed of Sandra Abitan, Fabrice Benoît, Julien Morissette and Ilia Kravtsov represented the Bank in this matter.

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[1] *Séquestre de Media5 Corporation*, 2020 QCCA 943.

[2] *Bankruptcy and Insolvency Act,* RSC 1985, c. B-3.

[3] *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, [2015] 3 SCR 419.