File No. CI15-01-97928

THE QUEEN'S BENCH

Winnipeg Centre

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT R.S.C. 1985, c. B-3 AS AMENDED**

B E T W E N:

CAMERON STEPHENS FINANCIAL CORPORATION

Applicant

- and -

5448124 MANITOBA LTD.

Respondent

BRIEF OF THE APPLICANT

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PART I LIST OF DOCUMENTS TO BE RELIED UPON

1. Notice of Application, filed September 25th, 2015;
2. Consent of the Receiver, filed September 28th, 2015; and
3. Affidavit of David Minor, sworn and filed September 25th , 2015.

<u>PART II STATUTORY PROVISIONS AND AUTHORITIES TO BE RELIED UPON</u>

Tab

1. *Bankruptcy and Insolvency Act*, R.S.C. c. B-3, ss. 2, 243 and 244, as amended (the "BIA").

2. *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, Rule 3 (the "BIA").

3. *Court of Queen's Bench Rules*, Man. Reg. 553/88, Rules 3.02(1), 14.05(2), 16.04(1), 16.08, 38.05 and 38.07(2).

4. Bank of Nova Scotia v. Freure Village of Clair Creek, 1996 CanLII 8258 (ON S.C.), 40 C.B.R. (3d) 274 ("*Freure Village*").

5. Maple Trade Finance Inc. v. CY Oriental Holdings Ltd., 2009 BCSC 1527 ("Maple Trade Finance").

6. <u>Bennett on Receiverships</u>, Bennett, Frank. Toronto: Carswell 2011 3rd ed.

PART III LIST OF POINTS TO BE ARGUED

(a) Overview

1. Cameron Stephens Financial Corporation ("**Cameron Stephens**") is non-bank mortgage lender located in Toronto, Ontario and a secured creditor of 5448124 Manitoba Ltd. (the "**Debtor**").

Reference: Affidavit of David Minor sworn September 25, 2015, page 2, para. 1 (the "Minor Affidavit")

2. The Debtor is a Manitoba company whose primary asset is Burnell Apartments, being an apartment development located at 519 Burnell Street in Winnipeg, Manitoba (the "**Building**"). The Building is 3.5 stories and is comprised of 66 one-bedroom and 22 two-bedroom units for a total of 88 units.

Reference: The Minor Affidavit, pages 3-4, paras. 3-4.

3. A commitment letter between and among, *inter alia*, Cameron Stephens as Lender, the Debtor as Borrower and each of Russell Knight ("**Mr. Knight**") and Susannah Simes as Guarantors (the "**Guarantors**"), was issued on or about February 4, 2015 and accepted on or about February 6, 2015 (the "**Credit Agreement**").

Reference: The Minor Affidavit, page 4, para. 5.

4. Pursuant to the Credit Agreement, on or about April 27, 2015, Cameron Stephens advanced to the Debtor the gross amount of $9,425,000.00.

Reference: The Minor Affidavit, page 5, para. 7.

5. Further pursuant to the Credit Agreement, the Debtor granted, *inter alia*, the following in favour of Cameron Stephens as security:

(a) a mortgage over the lands known municipally as 519 Burnell Street, Winnipeg, Manitoba;

(b) a general assignment of rents and leases;

(c) a general security agreement; and

(d) an assignment of insurance policies.

Reference: The Minor Affidavit, pages 7-8, para. 13.

6. Interest has been accruing on the principal sum advanced from and after April 27, 2015, with an interest adjustment date of May 1, 2015. Accordingly, monthly blended payments in the amount of about $90,000.00, comprised of interest and principal, payable in arrears, commenced on June 1, 2015.

Reference: The Minor Affidavit, pages 5-6, paras. 7-10.

7. On or about each of June 1, 2015 and July 1, 2015, the Debtor paid to Cameron Stephens the sum of $88,405.36, comprised of a blended payment of principal and interest in the amount of $68,405.36, plus an additional $20,000.00 in respect of principal.

Reference: The Minor Affidavit, page 6 para. 11.

8. The payments due on August 1, 2015 and September 1, 2015 (in respect of July and August, respectively) were returned due to insufficiency of funds in the Debtor's account.

Reference: The Minor Affidavit, page 6, para. 11.

9. The Debtor's failure to remit these payments constitute defaults under the Credit Agreement and the Debtor remains in default of its obligations to Cameron Stephens under the Credit Agreement.

Reference: The Minor Affidavit, page 11, paras. 17-19.

10. By letter dated August 12, 2015, Cameron Stephens provided formal written notice to the Debtor and the Guarantors of the Debtor's defaults under, *inter alia*, the Credit Agreement and delivered a Notice of Intention to Enforce Security delivered in accordance with subsection 244(1) of the BIA.

Reference: The Minor Affidavit, pages 11-12, paras. 20-22.

11. At or about this same time, Cameron Stephens' concerns regarding the Debtor's efforts to meet its financial obligations as they came due, including its obligations to Cameron Stephens, were increasing.

Reference: The Minor Affidavit, pages 13-17, paras. 23, 26-32.

12. The Debtor was providing to Cameron Stephens conflicting information as to what portions of the monthly rents it was collecting, which only a few months earlier totaled almost $160,000.00, and, consequently, the extent of the arrears of rent at the Building.

Reference: The Minor Affidavit, pages 14-17, paras. 27-30.

13. Cameron Stephens has received no response to its inquiries of the Debtor in regard to the Debtor's defaults and/or explanations of the Debtor's allegation of non-collection of rents at the Building.

Reference: The Minor Affidavit, pages 16-17, paras. 30-31.

14. As a result of further increasing concerns of Cameron Stephens and a lengthening period of cessation in communication between the Debtor and Cameron Stephens, despite Cameron Stephens' repeated and regular efforts to contact the Debtor and to obtain from the Debtor various financial and other information, Cameron Stephens intended to bring this application before this

Honourable Court seeking, *inter alia*, an order to appoint a Receiver of the Debtor (the "**Receivership Application**") on September 24, 2015.

Reference: The Minor Affidavit, page 17, paras. 32-34.

15. However, after the Debtor was advised by Cameron Stephens of the imminent return of Cameron Stephens' Receivership Application but before the materials for same were served on the Debtor, late in the day on September 21, 2015, Cameron Stephens received from the Debtor a signed agreement of purchase and sale in respect of the Building and surrounding lands between the Debtor as seller and GTAC Investment Corp as purchaser dated September 17, 2015 (the "**APS**").

Reference: The Minor Affidavit, page 18, para. 35

16. In an effort to permit the sale under the APS to close, Cameron Stephens elected to delay the return of the Receivership Application and proposed by letter dated September 23, 2015, an agreement pursuant to which Cameron Stephens would forbear from enforcing its rights against the Debtor, provided that the Debtor agreed to reasonable forbearance terms that, together, would ensure that Cameron Stephens' investment, interests and security in the property of the Debtor were protected through ongoing oversight and evaluation of the financial affairs of the Debtor.

Reference: The Minor Affidavit, page 18 para. 36

17. The Debtor's refusal to agree to forbearance terms acceptable to Cameron Stephens and reasonable in the circumstances rendered impossible the restoration of Cameron Stephens' faith or confidence in the Debtor to manage its financial affairs in an appropriate fashion and to provide prompt, full and frank disclosure to Cameron Stephens.

Reference: The Minor Affidavit, pages 19-20, paras. 38-39

18. As of September 21, 2015, the Debtor was indebted to Cameron Stephens in the aggregate amount of $9,455,591.61 and no payment has been made by the Debtor to Cameron Stephens since.

Reference: The Minor Affidavit, page 6, para. 12

19. The payment that the Debtor is required to remit to Cameron Stephens on account of the principal and interest payable for September, 2015, is due on October 1, 2015.

Reference: The Minor Affidavit, page 20, para. 40.

20. Further, rents payable by tenants and/or residents of the Building for October, 2015 will be payable on or after October 1, 2015.

Reference: The Minor Affidavit, page 20, para. 41.

21. Given, *inter alia*, the upcoming payment obligation and funds expected to be paid to the Debtor, Cameron Stephens will suffer prejudice if GTL's appointment as Receiver is not completed in advance of October 1, 2015.

Reference: The Minor Affidavit, page 21, para. 42.

(b) The Court-Appointment of a Receiver

22. Cameron Stephens seeks the appointment of a receiver under s. 243(1) of the BIA over the property of the Debtor. Section 243(1) provides:

*"**Court may appoint receiver***

***243.** (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be <u>just or convenient</u> to do so:*

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then." (emphasis added)

Reference: ***BIA*** **ss. 243(1).**

23. The term "secured creditor" is defined in section 2(1) of the BIA to mean, *inter alia*, a "person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor…".

Reference: **BIA ss.2(1).**

24. The term "insolvent person" is also defined in section 2(1) of the BIA to mean, inter alia, "a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under [this Act] amount to one thousand dollars, and who is for any reason unable to meet his obligations as they generally become due …"

Reference: **BIA ss. 2(1).**

25. The appointment of a receiver is an extraordinary remedy. However,

"...where the security instrument permits the appointment of a private receiver, - and even contemplates, ... the secured creditor seeking a court-appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just and convenient" becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not."

Reference: ***Freure Village,*** **Tab 4, para. 12.**

26. In the exercise of its discretion, the court will have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. If in the light of all of the circumstances, it is "just and convenient" to appoint a receiver, a court may do so.

Reference: ***Freure Village*****, Tab 4, para. 10.**

27. The following are factors which courts have considered when determining whether it is just and equitable to appoint a receiver:

(a) the nature of the property;

(b) the apprehended or actual waste of the debtor's assets;

(c) the fact that the moving party has a right under its security to appoint a receiver. (Courts have found this factor to be a strong factor in support of the imposition of a receiver);

(d) the relationship between the creditor and the debtor, including the likelihood of the creditor cooperating with a private receiver;

(e) the conduct of the parties;

(f) whether a court appointment of the receiver is necessary to enable the receiver to carry out its work more efficiently;

(g) whether a court-appointed receiver increases the likelihood of maximizing the return on the property;

(h) whether the appointment of a court-appointed receiver will assist in the preservation of the subject property;

(i) the best way of facilitating the work and duties of the receiver;

(j) the potential costs;

(k) the length of time that a receiver may be in place;

(l) the effect of the order upon the parties;

(m) the risk to the security holder taking into consideration the size of the debtor's equity in the assets;

(n) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation; and

(o) the balance of convenience to the parties.

Reference: ***Freure Village*, Tab 4, paras. 10 & 12.**

Reference: ***Maple Trade Finance*, Tab 5, para. 25.**

28. Cameron Stephens submits that the appointment of a receiver over the property of the Debtor is just and convenient for the following reasons:

(a) The building is a residential apartment building with occupants who rely on the timely and responsible management of the leased premises and common areas. Cameron Stephens has been unable to ascertain, due to insufficient disclosure by the Debtor, whether services at the Building are being provided and/or maintained by the Debtor and/or its designates to the required standards. The appointment of the receiver is necessary to ensure that suitable services are being provided and conditions maintained at the Building and that the wellbeing of its occupants is ensured.

(b) Cameron Stephens has been unable to obtain from the Debtor disclosure sufficient to assess the accuracy of the statement of the Debtor with regard to its finances. In particular, Cameron Stephens has no knowledge of whether rents are being collected. If rents are being collected, Cameron Stephens has no idea for what purpose these funds are being used if not, at least in part, to service the debt of the Debtor. If rents are not being collected, Cameron Stephens has no idea why and/or what steps are being taken to deal with mounting arrears.

(c) Cameron Stephens has a right under the mortgage (see section 34 to Schedule A to mortgage – Exhibit G to Minor Affidavit) to, at any time or from time to time when the mortgage is in default, to appoint any person to be a Receiver of the mortgage premises or any part thereof and of the rents and profits thereof.

(d) The Debtor has refused to permit the appointment of a private receiver or monitor and, thus, its willingness to cooperate with a private receiver appears limited, if not altogether non-existent.

(e) Cameron Stephens willingness to cooperate with the Debtor, including its willingness to agree to a forbearance agreement that would enable the completion of the APS on terms that would see the preservation of the Debtor's assets and protection of Cameron Stephens' interests in the interim, have been entirely without reciprocity. The Debtor refuses to discharge its obligations to Cameron Stephens, including its obligations to remit monthly payments on account of principal and interest, provide information to Cameron Stephens when requested and to allow for the appointment by Cameron Stephens of a Receiver.

(f) As the Debtor has refused to permit the appointment of a Receiver, the appointment of said Receiver by this Honourable Court appears necessary to enable that Receiver to carry out its work more efficiently, increase the likelihood of maximizing the return of the property; assist in the preservation of the subject property and is the best way of facilitating the work and duties of the Receiver.

(g) Given that Cameron Stephens has little information about the present state of the Building and/or the affairs and assets of the Debtor, the Receiver's appointment is essential in order to get a sense of what may be required of the Receiver henceforth and, thus, the potential costs and length of the Receivership.

(h) Cameron Stephens is likely to suffer irreparable harm if the Debtor is, as Cameron Stephens suspects, misusing funds, including any rents that have and/or will be remitted to the Debtor, or otherwise improperly dissipating its assets. The appointment of the Receiver is necessary to assess whether one or more of these improper acts are being committed by the Debtor and, if so, in order to protect Cameron Stephens' interests as mortgagee in respect of the Lands. As previously advised, this appointment will also ensure that there is no mismanagement of the Building, which could result in irreparable harm to the Building's occupants.

(c) Summary

29. It is submitted that it is just and equitable for this Honourable Court to appoint Grant Thornton Limited as receiver, without security, of all of the assets, undertakings and properties of the Debtor. An appointment by this Honourable Court will facilitate the work and duties of the receiver, increase the likelihood of cooperation from the Debtor, and increase the likelihood of maximizing return on and preservation of the assets, undertakings and property of the Debtor. The

appointment is critical to preserving the *status quo* while further investigations are performed. This appointment will ensure that there will not be any misuse of funds, including any rents that have and/or will be remitted to the Debtor, or other improper dissipation of the Debtor's assets, and will protect Cameron Stephens' interests as mortgagee in respect of the Building and surrounding lands. This appointment will also ensure that orderly management of the Building be restored or maintained, as the case may be, to ensure it remains suitable for occupation by its residents. Therefore, it is respectfully submitted that this Honourable Court should grant the relief requested in the Notice of Application.

All of which is respectfully submitted this 28th day of September, 2015.

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INTERPRETATION

Definitions

2. In this Act,

"affidavit"
« affidavit »

"affidavit" includes statutory declaration and solemn affirmation;

"aircraft objects"

"aircraft objects"[Repealed, 2012, c. 31, s. 414]

"application"
Version anglaise seulement

"application", with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion;

"assignment"
« cession »

"assignment" means an assignment filed with the official receiver;

"bank"
« banque »

"bank" means

(*a*) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(*b*) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(*c*) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (*b*), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association;

"bankrupt"
« failli »

"bankrupt" means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person;

"bankruptcy"
« faillite »

"bankruptcy" means the state of being bankrupt or the fact of becoming bankrupt;

"bargaining agent"
« agent négociateur »

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a person;

"child"

"child"[Repealed, 2000, c. 12, s. 8]

"claim provable in bankruptcy", "provable claim" or "claim provable"
« réclamation prouvable en matière de faillite » ou *« réclamation prouvable »*

"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

"collective agreement"
« convention collective »

"collective agreement", in relation to an insolvent person, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the insolvent person and a bargaining agent;

"common-law partner"
« conjoint de fait »

"common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year;

"common-law partnership"
« union de fait »

"common-law partnership" means the relationship between two persons who are common-law partners of each other;

"corporation"
« personne morale »

"corporation" means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies, loan companies or railway companies;

"court"
« tribunal »

"court", except in paragraphs 178(1)(*a*) and (*a.1*) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act;

"creditor"
« créancier »

"creditor" means a person having a claim provable as a claim under this Act;

"current assets"
« actif à court terme »

"current assets" means cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets;

"date of the bankruptcy"
« date de la faillite »

"date of the bankruptcy", in respect of a person, means the date of

(*a*) the granting of a bankruptcy order against the person,

(*b*) the filing of an assignment in respect of the person, or

(*c*) the event that causes an assignment by the person to be deemed;

"date of the initial bankruptcy event"
« ouverture de la faillite »

"date of the initial bankruptcy event", in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

(*a*) an assignment by or in respect of the person,

(*b*) a proposal by or in respect of the person,

(*c*) a notice of intention by the person, (*d*) the first application for a bankruptcy order against the person, in any case

(i) referred to in paragraph 50.4(8)(*a*) or 57(*a*) or subsection 61(2), or

(ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,

(*e*) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (*d*), or

(*f*) proceedings under the *Companies' Creditors Arrangement Act*;

"debtor"
« débiteur »

"debtor" includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt;

"director"
« administrateur »

"director" in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called;

"eligible financial contract"
« contrat financier admissible »

"eligible financial contract" means an agreement of a prescribed kind;

"equity claim"
« réclamation relative à des capitaux propres »

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(*a*) a dividend or similar payment,

(*b*) a return of capital,

(*c*) a redemption or retraction obligation,

(*d*) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(*e*) contribution or indemnity in respect of a claim referred to in any of paragraphs (*a*) to (*d*);

"equity interest"
« intérêt relatif à des capitaux propres »

"equity interest" means

(*a*) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(*b*) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

"executing officer"
« huissier- exécutant »

"executing officer" includes a sheriff, a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor;

"financial collateral"
« garantie financière »

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(*a*) cash or cash equivalents, including negotiable instruments and demand deposits,

(*b*) securities, a securities account, a securities entitlement or a right to acquire securities, or

(*c*) a futures agreement or a futures account;

"General Rules"
« Règles générales »

"General Rules" means the General Rules referred to in section 209;

"income trust"
« fiducie de revenu »

"income trust" means a trust that has assets in Canada if

(*a*) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(*b*) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event;

"insolvent person"
« personne insolvable »

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(*a*) who is for any reason unable to meet his obligations as they generally become due,

(*b*) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(*c*) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

"legal counsel"
« conseiller juridique »

"legal counsel" means any person qualified, in accordance with the laws of a province, to give legal advice;

"locality of a debtor"
« localité »

"locality of a debtor" means the principal place

(*a*) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(*b*) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or (*c*) in cases not coming within paragraph (*a*) or (*b*), where the greater portion of the property of the debtor is situated;

"Minister"
« ministre »

"Minister" means the Minister of Industry;

"net termination value"
« valeurs nettes dues à la date de résiliation »

"net termination value" means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions;

"official receiver"
« séquestre officiel »

"official receiver" means an officer appointed under subsection 12(2);

"person"
« personne »

"person" includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person;

"prescribed"
« prescrit »

"prescribed"

(*a*) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(*e*), and

(*b*) in any other case, means prescribed by the General Rules;

"property"
« bien »

"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

"proposal"
« proposition concordataire » ou *« proposition »*

"proposal" means

(*a*) in any provision of Division I of Part III, a proposal made under that Division, and

(*b*) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III

and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement;

"public utility"
« entreprise de service public »

"public utility" includes a person or body who supplies fuel, water or electricity, or supplies telecommunications, garbage collection, pollution control or postal services;

"resolution" or "ordinary resolution"
« résolution » ou *« résolution ordinaire »*

"resolution" or "ordinary resolution" means a resolution carried in the manner provided by section 115;

"secured creditor"
« créancier garanti »

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

(*a*) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(*b*) any of

(i) the vendor of any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights;

"settlement"

"settlement"[Repealed, 2005, c. 47, s. 2]

"shareholder"
« actionnaire »

"shareholder" includes a member of a corporation — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies;

"sheriff"

"sheriff"[Repealed, 2004, c. 25, s. 7]

"special resolution"
« résolution spéciale »

"special resolution" means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution;

"Superintendent"
« surintendant »

"Superintendent" means the Superintendent of Bankruptcy appointed under subsection 5(1);

"Superintendent of Financial Institutions"
« surintendant des institutions financières »

"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*;

"time of the bankruptcy"
« moment de la faillite »

"time of the bankruptcy", in respect of a person, means the time of (*a*) the granting of a bankruptcy order against the person,

(*b*) the filing of an assignment by or in respect of the person, or

(*c*) the event that causes an assignment by the person to be deemed;

"title transfer credit support agreement"
« accord de transfert de titres pour obtention de crédit »

"title transfer credit support agreement" means an agreement under which an insolvent person or a bankrupt has provided title to property for the purpose of securing the payment or performance of an obligation of the insolvent person or bankrupt in respect of an eligible financial contract;

"transfer at undervalue"
« opération sous-évaluée »

"transfer at undervalue" means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor;

"trustee" or "licensed trustee"
« syndic » ou *« syndic autorisé »*

"trustee" or "licensed trustee" means a person who is licensed or appointed under this Act.

R.S., 1985, c. B-3, s. 2; R.S., 1985, c. 31 (1st Supp.), s. 69; 1992, c. 1, s. 145(F), c. 27, s. 3; 1995, c. 1, s. 62; 1997, c. 12, s. 1; 1999, c. 28, s. 146, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25, c. 9, s. 572; 2004, c. 25, s. 7; 2005, c. 3, s. 11, c. 47, s. 2; 2007, c. 29, s. 91, c. 36, s. 1; 2012, c. 31, s. 414; 2015, c. 3, s. 6(F).

PART XI
SECURED CREDITORS AND RECEIVERS

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(*a*) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(*b*) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(*c*) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(*a*) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(*b*) the court considers it appropriate to appoint a receiver before then.

Definition of "receiver"

(2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who

(*a*) is appointed under subsection (1); or

(*b*) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of "receiver" — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (*a*) or subparagraph (*b*)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(*b*).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it

considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of "disbursements"

(7) In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Advance notice

244. (1) A secured creditor who intends to enforce a security on all or substantially all of

(*a*) the inventory,

(*b*) the accounts receivable, or

(*c*) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(*a*) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(*b*) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

1992, c. 27, s. 89; 1994, c. 26, s. 9(E).

Bankruptcy and Insolvency General Rules

C.R.C., c. 368

BANKRUPTCY AND INSOLVENCY ACT

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

SOR/98-240, s. 1.

Manitoba Regulation 553/88

Court of Queen's Bench Rules

General powers of court

3.02(1) The court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

Proceedings which may be commenced by application

14.05(2) A proceeding may be commenced by application,

(a) where authorized by these rules;

(b) where a statute authorizes an application, appeal or motion to the court and does not require the commencement of an action;

(c) where the relief claimed is for,

(i) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust,

(ii) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible,

(iii) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation,

(iv) the determination of rights which depend upon the interpretation of a deed, will, agreement, contract or other instrument, or upon the interpretation of a statute, order in council, order, rule, regulation, by-law or resolution,

(v) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges, or

(vi) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust; or

(d) in respect of any matter where it is unlikely there will be any material facts in dispute.

Where order may be made

16.04(1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

16.08 Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

Generally

38.05(1) The notice of application shall be served on all parties and, where it is uncertain whether anyone else should be served, the applicant may, without notice, make a motion to a judge for an order for directions.

Where notice ought to have been served

38.05(2) Where it appears to the judge hearing the application that the notice of application ought to be served on a person who has not been served, the judge may,

(a) dismiss the application or dismiss it only against the person who was not served;

(b) adjourn the application and direct that the notice of application be served on the person; or

(c) direct that any order made on the application be served on the person.

Time for service (uncontested or urgent)

38.05(3) In any of the cases mentioned in subrule 38.04(2), the noticed of application shall be served at least four days before the date of hearing of the application.

Time for Service (contested)

38.05(4) Where the application is to be contested, the notice of application and the applicant's brief shall be served at least 14 days before the date of hearing of the application.

Immediate hearing where urgent, etc.

38.07(2) In case of urgency or where otherwise appropriate, the judge may proceed to hear the application.

Ontario Supreme Court
Bank of Nova Scotia v. Freure Village of Clair Creek
Date: 1996-05-31

Bank of Nova Scotia

and

Freure Village on Clair Creek et al

Ontario Court of Justice (General Division – Commercial List) Blair J.

Judgment – May 31, 1996.

John J. Chapman and John R. Varley, for Bank of Nova Scotia.

J. Gregory Murdoch, for Freure Group (all defendants).

John Lancaster, for Boehmers, a Division of St. Lawrence Cement.

Robb English, for Toronto-Dominion Bank.

William T. Houston, for Canada Trust.

May 31, 1996. Endorsement.

[1] BLAIR J.: – There are two companion motions here, namely:

(i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by "Freure Management" and "Freure Village" to the Bank, which mortgages have been guaranteed by Freure Investments; and

(ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

This endorsement pertains to both motions.

The Motion for Summary Judgment

[2] Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears.

The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

[3] There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the “good hard look at the evidence” which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1993) 4 O.R. (3d) 545 (C.A.).

[4] On his cross-examination, Mr. Freure admitted:

(i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that

they did not have the money to pay and the $13,200,000 indebtedness was “due and owing” (see cross-examination questions 46-54, 88-96, 233-243).

[5] As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issues exists in that regard.

[6] No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor – Mr. Freure – are the same. Finally, the evidence which is relied upon for the change in the Bank’s position – an internal Bank memo from the local branch to the credit committee of the Bank in Toronto – is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

[7] Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the *Courts of Justice Act* rate.

Receiver/Manager

[8] The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

[9] It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement – which they are, and are not, respectively – the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants – supported by the subsequent creditor on one of the properties (Boehmers, on the Glencairn property) – urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately $20,000,000 between them, take no position on the motion.

[10] The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act,* R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).

[11] The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no

evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

[12] While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver – and even contemplates, as this one does, the secured creditor seeking a court appointed receiver – and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

[13] Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 11/2 years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

[14] I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

[15] Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

[16] Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

Motions granted.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.,* 2009 BCSC 1527

Date: 20090923
Docket: S095413
Registry: Vancouver

Between:

Maple Trade Finance Inc.

Plaintiff

And:

CY Oriental Holdings Ltd.

Defendant

Before: The Honourable Mr. Justice Masuhara

Oral Reasons for Judgment
In Chambers

Counsel for the Plaintiff:	J.J.L. Hunter, Q.C. B.R.H. Johnston
Counsel for the Defendant:	P.J. Reardon
Place and Date of Hearing:	Vancouver, B.C. September 21, 2009
Place and Date of Judgment:	Vancouver, B.C. September 23, 2009

[1] **THE COURT:** This is my ruling with respect to the application of Maple Trade Finance Ltd. made Monday.

[2] The plaintiff seeks an order pursuant to s. 39 of the *Law and Equity Act* and Rule 47 for the appointment of the Bowra Group as receiver and manager over all of the defendant's current and future assets undertaking in properties, including all proceeds. The application arises out of the default by the defendant of a loan owed to the plaintiff. The principal of said loan was some $3.5 million. The plaintiff says that as of July 15, 2009, the outstanding balance owed was $5.7 million.

[3] The defendant does not dispute that it is in default of the loan. Though it disputes the level of interest that has been accrued. It does not dispute that the amount owing is sizable. However, it is prepared to make payments in the order of some $4 million in six equal monthly installments and to have the interest dealt with as a sole issue. In this regard, the defendant has filed a statement of defence and counterclaim.

[4] In terms of background, the plaintiff firm provides accounts and receivable financing to various businesses, including the defendant. The defendant is a holding company whose principal asset is its wholly owned subsidiary, CY Oriental Garments Inc., a private BC company which in turn owns a BBI based company, which in turn owns a Hong Kong company called Huge Best International, which in turn owns two operating companies in China. The operating companies in China are in the garment manufacturing business.

[5] Until early July 2009, the plaintiff company was listed on the TSX Venture Exchange. In January 2006, the plaintiff and defendant entered into a financing agreement dated January 4, 2006. On June 27, 2006, the defendant executed a general security agreement in favour of the plaintiff granting security over all of the defendant's present and after-acquired property. The finance agreement and the GSA were registered in the BC Personal Property Registry.

[6] The GSA provides, *inter alia*, that in the event of default, the following rights:

> 1) the plaintiff may, by instrument in writing, appoint any person as a receiver of all or any part of the collateral;
>
> 2) the plaintiff may from time to time remove or replace a receiver or make application to any court of competent jurisdiction for the appointment of a receiver.

[7] In July 2007, the January 2006 agreement was amended and restated by way of a credit letter which confirmed the earlier agreements and further increased the defendant's credit facility with the plaintiff from $5 million to $8 million.

[8] In furtherance of the financing agreements, the accounts receivable of Huge Best International were assigned to the defendant, who in turn assigned them to the plaintiff. As well a customer, Ideal Century's accounts receivable was also assigned to the plaintiff and to which Century acknowledged such assignment.

[9] The payments to the plaintiff from Ideal went into default. By letter dated March 3rd, 2009, the plaintiff demanded payment in full of the plaintiff's outstanding indebtedness and gave notice to the defendant pursuant to s. 244 of the *Bankruptcy and Insolvency Act.*

[10] In late March, the defendant made a payment of $100,000 to the plaintiff as a gesture of good faith in furtherance of negotiations related to forbearance. In early June 2009, the defendant made a further payment of $270,000 to the plaintiff as part of what it says was an agreement in principle on forbearance. The defendant has strongly denied any such agreement in principle. However, it accepted the monies.

[11] The current application was originally scheduled to be heard on August 27, 2009. On August 26, 2009, at the defendant's request, the plaintiff agreed to adjourn the application to September 11th in order to give the defendant more time to attempt to satisfy its indebtedness to the plaintiff.

[12] Further communications between the plaintiff and the defendant and their counsel carried on, and a letter dated September 10th, 2009, marked "with

prejudice" was delivered. The plaintiff adjourned the within application from September 11th to September 17th in order to fully consider the contents of the "with-prejudice" letter. The plaintiff concluded that the contents of the letter did not set out an acceptable basis for resolving the indebtedness.

[13] The matter now is before the court. The applicable test is whether it is just and convenient to make the order sought for a receiver and manager. The authorities relied upon by the applicant state that the court ought not ordinarily interfere with an express covenant agreeing to the appointment of a receiver in the event of default, which is as in the case of the instant application.

[14] A further case presented to the court, *Bank of Nova Scotia v. Freure* [1996], 40 C.B.R. (3d) 274, the plaintiff has indicated that the test of just inconvenience was said to be met where:

> ... it is more in the interests of all concerned to have the receiver appointed by the court.

[15] In this regard, the applicant submits that for the following reasons, it is more in the interests of all concerned that a receiver and manager be appointed by the court: that the parties have agreed the plaintiff may seek the appointment of a receiver in the event of a default; that the defendant owes a significant sum of money; there appears not to be a dispute with the fact of the size of the indebtedness; and, that the defendant is in default.

[16] The plaintiff noted that there were irregularities within the defendant, including the resignation of its board of directors and its recent delisting from the TSX exchange, which evidences a need to ensure that the defendant's assets are preserved for the plaintiff's benefit; that there are concerns with respect to the financial statements of the defendant; and that the defendant does not indicate what steps are being taken, to address the prospects for early repayment of the defendant's indebtedness.

[17] Further, that the plaintiff is reasonably concerned that the prospect of the defendant performing its various obligation is in jeopardy; that the plaintiff has given the defendant reasonable opportunities to resolve the indebtedness, including the already mentioned adjournments; that the efforts to resolve or restructure or refinance the defendant's indebtedness to the plaintiff have to date proved unsuccessful; and that the defendant is essentially a holding company and presumably exercises oversight over the affairs of subsidiary companies, including the operating companies. As such, the defendant's value is likely to be optimized by a receiver manager ensuring the continued operation of the defendant's subsidiaries.

[18] The respondent in reply submits the following: that it has made a payment of $100,000, and as well as $270,000, which were after the March 2009 notice; that the negotiations had been initiated by the defendant with the plaintiff for terms of forbearance after the March 2009 notice; that the plaintiff has recourse to legal execution and thus the equitable remedy applied for is not warranted, but notes that the plaintiff has started a:

> ... baseless action in the United States against one of the defendant's customers.

[19] In this regard, a sanctions motion is currently before the US court regarding whether the plaintiff's actions there was an abuse of process.

[20] Further, it notes that notwithstanding the cease-trade orders and the delisting of the company from the TSX Venture Exchange and the issues regarding its audited financial statements; that the defendant has a fully functioning board of directors; that the ongoing operations of the defendant's subsidiary operating companies have not been impacted by these issues; and specifically that these operating companies are profitable.

[21] Further, that it has made a with-prejudice proposal to the plaintiff as mentioned on September the 10th, that the essence of which is that the principal majority shareholder of the defendant, who holds 44 percent of the outstanding

shares, would be provided as security. I am assuming that is the 20,715,100 common shares referred to in the affidavit of Mr. Gee.

[22] That $4,084,767, which is the principal and non-default interest accrued, will be paid as follows: that the defendant will pay $1,016,019 plus non-default interest to the plaintiff, which it stated in the September 10th letter would be within ten days of that letter; that the balance of some $3 million would be paid in six equal installments every 30 days thereafter with a seven-day curative period, together with interest at the non-default interest rate.

[23] Further, during the course of the hearing, Ms. Carteri advised that the defendant would agree that it would consent to an order that would lead to the immediate appointment of a receiver upon default of any of the said payments.

[24] The position of the defendant is also that there is no evidence of jeopardy to the plaintiff's security.

[25] There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In *Bennett on Receivership, 2d ed.* (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

[26] The fact that the finance agreement acknowledged the right of the plaintiff to make application for a receiver is a strong factor in support of the imposition of a receiver.

[27] However, on the other hand, there is a proposal by the defendant to repay a significant amount which was further expanded during the hearing by defendant's counsel. This lends support to the defendant's position. I note as well, the more recent payments made by the defendant to the plaintiff are not insignificant, as well as Mr. Gee's statement that since the summer of 2006, the amounts advanced by the plaintiff are in the order of $7.6 million and that repayments through August 2009 have been in the order of $5,238,766. I recognize that interest has been accruing on the principal.

[28] The proposal as explored and discussed during the course of the hearing would align with the factor of controlling the costs to the parties at this point. It would also, align with the likelihood of maximizing return to the parties.

[29] If the company's condition as to its viability was accepted, this would deal in part with the plaintiff's concern regarding jeopardy. The difficulty is the confidence that one can have in the defendant's ability to make good on its payments.

Mr. Hunter, stated the concern really is not as much to do with the promise, but more to do with performance. I would agree.

[30] However, balancing the factors, an order that would have the automatic imposition of a receiver, upon default in any payment required by the defendant, would address the concerns at this point. I think the balance of convenience can further be achieved through a further modification of the defendant's proposal to reflect the concerns over the lack of financial information to support the contention regarding the financial strength of the operating companies.

[31] To that extent, the payments will be made in this manner: the defendant is to pay the plaintiff on or before the 28th of September, 2009, the sum of $1,016,019 plus non-default interest.

[32] MR. REARDON: Sorry, My Lord, because I'm not familiar, would you mind repeating that number.

[33] THE COURT: Okay. $1,016,019.

[34] MR. REARDON: Yes, thank you.

[35] THE COURT: $1,016,019 plus non-default interest. The defendant is to pay the plaintiff, over four months, the remaining outstanding balance plus non-default interest in equal installments.

[36] The defendant will also provide financial statements related to its company and operations, including its wholly owned subsidiaries. Mr. Chen's shares will be delivered as security to the plaintiff.

[37] There will be a term that any default in payment, not cured within three days, as opposed to the seven days suggested by defence counsel, will lead to the automatic appointment of a receiver on the terms as sought in the application.

[38] There will also be a term that the defendant, will not permit the disposition of any of its property, including wholly owned subsidiaries, except in the ordinary

course of business; and that Mr. Chen and Mr. Gee. are to make monthly representations confirming adherence to this term.

[39] Further, any material adverse change in circumstances in the condition of the defendant or its wholly owned subsidiaries are to be reported immediately to the plaintiff, at which time the plaintiff has leave to bring a further application for the immediate appointment of a receiver.

[40] That concludes my ruling.

"The Honourable Mr. Justice D. M. Masuhara"

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Remedies

1. INTRODUCTION

When the debtor is in default of any one of the events of default under the terms in the security instrument, the security holder has various courses of action. In the event that the debtor is unable to rectify the default either through payment or performance of an obligation, the security instrument generally provides for the acceleration of all amounts due and outstanding irrespective of any term loan or fixed maturity date. Subject to compliance with any conditions precedent, the security becomes legally enforceable.

If the debtor contests the enforceability of the security instrument on the grounds that the conditions precedent, for example, have not taken place, the court may refuse to appoint a receiver. This premature enforcement can have serious effects on the security holder's recovery. In *Mercantile Bank of Canada v. Nelco Corp.*,[1] the debtor alleged that the demand for payment was invalid because the debenture had not been presented at the time demand for payment was made; that the debtor had not been afforded a reasonable time to comply with the demand; that the appointment of a receiver disturbed the status quo and had adverse commercial and financial consequences for the debtor; and that the debenture holder was acting *mala fides* in notifying the debtor's banker of its intention to demand payment. The court concluded,

1 (1982), 47 C.B.R. (N.S.) 165, 1982 CarswellAlta 332 (Alta. Q.B.).

after reviewing affidavit evidence, that these issues could not be summarily determined, having regard to the issue as to whether the debenture was enforceable. The court vacated the earlier court appointment of a receiver.

The security holder who holds several types of security instruments ought to consider the effect of enforcing one type to the exclusion of all or others. The security holder should also consider the effect where one security package may be defective or subject to attack by creditors or a trustee in bankruptcy as well as the timing of enforcement. For example, a security holder may hold a general security agreement and a floating charge debenture. Proceedings to enforce a security agreement and a debenture are governed by the *Personal Property Security Act* and entail specific obligations, invoking certain statutory protections for the debtor and others. These obligations differ from the obligations imposed by the common law upon the enforcement under a debenture covering both real and personal property where the security holder elects to proceed according to its rights and remedies in respect of real property.[2] Likewise, if the security holder is also a bank holding section 427 *Bank Act* security, the security holder has the option to pursue its rights and remedies under section 427.

For example, in *Coopers & Lybrand Ltd. v. Ford Credit Canada, Ltd. et al.*,[3] the trustee in bankruptcy challenged the debenture holder's enforcement on the basis that the affidavit attached to the debenture recited the fact that it was given to secure a stated sum. Notwithstanding that the debenture contained a clause purporting to secure additional amounts, the court concluded that the debenture holder could not recover any additional sums. However, the creditor also held certain chattel mortgages and conditional sale contracts. No demands nor were there any realizations made under those securities. The court stated that the creditor could be deemed to have realized under these securities, and that the trustee in bankruptcy should be in no better position if the security holder had not realized. The court relied upon the *dicta* in other cases[4] to the effect that a trustee in bankruptcy will not be successful in challenging a receiver's *bona fide* sale of assets under defective security as the security is considered spent once the receiver sells the assets.

The security holder has a number of choices of remedies depending upon a number of criteria including the size of the loan, the location of the collateral, the type of security, the anticipated defences, the expected costs of the receiver and its legal counsel, the type of business and the ability and market to sell the assets readily.

The security holder has the following remedies:

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2 Subsection 59(6) of the *Personal Property Security Act*.

3 (1983), 59 N.S.R. (2d) 235, 48 C.B.R. (N.S.) 1555, 1983 CarswellNS 49 (N.S. T.D.), appeal allowed in part (1985), 33 A.C.W.S. (2d) 284 (N.S. C.A.), leave to appeal refused (1985), 72 N.S.R. (2d) 360n, 57 C.B.R. (N.S.) xxix (S.C.C.). See Chapter 12 "4. Causes of Action Available Only to Trustee in Bankruptcy".

4 *Re Shelly Films Ltd.; Clarkson Co. v. Overland Finance Co.*, [1963] 1 O.R. 431, 4 C.B.R. (N.S.) 186, 37 D.L.R. (2d) 419 (Ont. C.A.) and *Re Scott* (1963), 40 D.L.R. (2d) 328 (N.S. T.D.). *Re Shelly Films Ltd.* was overruled by the Supreme Court of Canada in *Royal Bank of Canada v. First Pioneer Investments Ltd. et al.*, [1984] 2 S.C.R. 125, 52 C.B.R. (N.S.) 225, 12 D.L.R. (4th) 1 (S.C.C.), allowing in part an appeal from (1981), 32 O.R. (2d) 121, 39 C.B.R. (N.S.) 147, 121 D.L.R. (3d) 510 (Ont. C.A.).

2. LEGAL PROCEEDINGS FOR ARREARS OF PAYMENTS

A security holder may commence legal proceedings to recover judgment for arrears of either or both principal and interest or any other amounts outstanding under the security instrument. In this situation, the security holder elects not to enforce other remedies under the instrument, at common law, or by statute but is content to allow the debtor to remain in possession of the assets, property, and undertaking.

If the security holder obtains judgment and then files a writ of execution or a writ of seizure and sale against the debtor's assets, its rights under the security instrument ought not to merge.[5] However, its rights as an execution creditor are obviously limited to enforcement through the sheriff's office and rank as any other execution creditor. This remedy is seldom employed except where the security holder wishes to keep the relationship on-going.

3. FORECLOSURE

This remedy is also seldom employed by a security holder except where real property or specific collateral is involved. In many cases, the security holder is a financial institution, not a manufacturer or supplier of goods and services. Such creditors do not wish the ownership of the assets, but simply want payment of their account. Moreover, while foreclosure has the legal effect of barring subsequent encumbrancers and cutting out the debtor's equity of redemption, the remedy also forecloses the security holder's rights to collect any deficiency on the covenant if the property is subsequently resold for a price that is lower than the original debt. Such resale of the property, however, is for the account of the security holder and not for the account of the debtor. If only real property is involved, the security holder may have to proceed judicially through the courts depending upon provincial legislation; on the other hand, legislation may prohibit the sale or foreclosure by a private receiver.[6] If only personal property is involved, the secured party may elect to retain the property or collateral in satisfaction of the debt. However, other secured parties and the debtor have the right to object in which case the secured party is compelled to dispose of the collateral.[7]

In the case where real property is secured by either or both a real property mortgage and a debenture, and the debenture also covers personal property, the security holder has the choice as to what property to foreclose. If the debtor contests and converts the foreclosure into a judicial sale proceeding, the security holder may move for an order appointing a receiver pending the sale. If the foreclosure proceedings continue, the security holder is of course barred from recovering a deficiency since it has elected to take "the property" in lieu of the debt. However, in judicial sale proceedings, the security holder preserves the right to claim a deficiency,

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5 If the *Personal Property Security Act* applies, the security agreement does not merge if the claim has been reduced to judgment or if the secured party has levied execution: subsection 59(7).

6 See, for example, Chapter 7 "4. Sale Under Mortgages and Debentures" (Torrens System).

7 Subsections 65(2) and (3) of the *Personal Property Security Act*.

if any, after sale and does not lose the rights to claim a deficiency balance after an order *nisi* is made directing the sale.[8]

In the case where a debenture secures both real and personal property, the holder may proceed to foreclose on the real property.[9] However, difficult issues arise if the holder also wishes to exercise the power of sale with respect to the personal property. Generally, the holder cannot elect to retain one asset and sell the other at the same time unless there is some mechanism or judicial hearing to value the assets that are being retained or foreclosed and to apply that value in reducing the debt. The remedies are inconsistent without this valuation. However, different instruments securing different debts may solve this problem and give the security holder alternative rights to recover each debt using different instruments.[10]

4. PROCEEDINGS FOR WINDING-UP OR LIQUIDATION

Under federal or provincial law, where not in conflict with federal insolvency law and where the debtor is a corporation, the security holder may have standing and be entitled to an order winding up the debtor or liquidating it. In practice, a security holder seldom uses these remedies. If a security holder or some other creditor or shareholder applies for an order winding-up the debtor, it is common to provide for an appointment of a receiver pending the ultimate order directing a winding-up of the debtor or forcing a buy-sell provision on one or more shareholders. The appointment of a receiver in these types of cases is more akin to a substitution of management, or the appointment of a manager, rather than a receiver and manager, pending some resolution other than a sale of the business.[11]

5. APPLICATION FOR BANKRUPTCY ORDER

In the event that there is a court-appointed receiver in place, it may not be necessary to invoke a bankruptcy against the debtor, except where there are difficulties with respect to priorities, existing contracts, and landlords. Bankruptcy changes priorities, allows the trustee to terminate contracts, and gives the trustee special rights under provincial commercial landlord and tenant law. The court-appointed receiver stands as a fiduciary to all interested parties. Although the court-appointed receiver makes a distribution of proceeds after realization not in accordance with the *Bankruptcy and Insolvency Act*,[12] it is unusual for outside creditors

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8 *Fed. Bus. Dev. Bank v. Red Lion Restaurant Ltd.* (1979), 10 Alta. L.R. (2d) 187, 101 D.L.R. (3d) 480, 1979 CarswellAlta 21 (Alta. T.D.).

9 See, for example, *Man. Dev. Corp. v. Winnipeg Land Titles Office, Dist. Reg.* (1983), 21 Man. R. (2d) 312, [1983] 6 W.W.R. 113, 149 D.L.R. (3d) 181 (Man. Q.B.).

10 See, for example, *Bank of Montreal v. Hardy's Seed Farm Ltd.* (1983), 45 C.B.R. (N.S.) 226, 1983 CarswellSask 43 (Sask. Q.B.), where the bank held four different security documents including a floating charge debenture. The receiver proceeded to realize certain equipment and chattels under the power of sale and then initiated foreclosure proceedings with respect to the real property.

11 See further, Chapter 15 "5. Receiverships of Corporations Governed by Business Corporations Act Legislation".

12 R.S.C. 1985, c. B-3 as amended.

to apply for a bankruptcy order where such ostensible authority rests with the receiver. However, it should be noted that priorities in court-appointed receiverships do not necessarily coincide with the priorities under a bankruptcy and, more particularly, section 136 of the *Bankruptcy and Insolvency Act*. That section generally provides that secured creditors are paid first from the proceeds of realization, to certain preferred creditors second, and then to unsecured creditors. The priorities also vary with specific provincial legislation. In addition, a court-appointed receiver does not acquire the rights and remedies of a trustee in bankruptcy.[13]

On the other hand, in the event that there is a private appointment, a security holder often invokes an application for a bankruptcy order[14] in order to preserve and protect the property for the security holder from other creditors such as landlords and government agencies whose rights are generally not affected by the receivership.

Moreover, unsecured trade creditors may themselves place the debtor into bankruptcy in order to permit a trustee in bankruptcy to review the security and the receiver's realization as well as give the trustee remedies that the private receiver does not possess.[15] Unsecured creditors are better protected with a bankruptcy. A trustee in bankruptcy has many rights and remedies under the *Bankruptcy and Insolvency Act* and provincial legislation which private and court-appointed receivers do not have or acquire. A trustee in bankruptcy has the right to examine anyone who has knowledge of the debtor's affairs without a court order, the right to challenge fraudulent preferences, the right to challenge transfers at undervalue, and the right to challenge defective security. Moreover, as referred to above, bankruptcy may alter the distribution of proceeds from what would otherwise occur under a receivership order. There is no legislation governing the distribution of money realized from the debtor's assets in a court-appointed receivership.

6. APPOINTMENT OF PRIVATE RECEIVER AND MANAGER UNDER SECURITY INSTRUMENT

If the debtor is in default under the security instrument and is entitled to notice, then the security holder must demand compliance or the performance of an obligation under the security instrument. If, after a reasonable period has expired after default or if a time period has been given or prescribed and that time period passed, the security holder can then demand payment before exercising any of its remedies to enforce the security. Often, the security holder serves notice of default and demand on the debtor at the same time. The security instrument contains terms of default and may also provide for certain conditions precedent to occur before the security holder can enforce its security. If the security holder elects receivership to enforce

13 See Chapter 12 "4. Causes of Action Available Only to Trustee in Bankruptcy".

14 In December, 2004, the Act was amended to change the phrase "petition for a receiving order" to its present form.

15 But see *Re Quesnel Machinery Ltd.* (1983), 47 C.B.R. (N.S.) 108, 1983 CarswellBC 546 (B.C. S.C.) where the court stayed the petition for a receiving order on the basis that there would be no purpose for the order other than incurring additional costs. Compare *Re Black Bros. (1978) Ltd.* (1982), 41 C.B.R. (N.S.) 163, 1982 CarswellBC 480 (B.C. S.C.), where the court granted a receiving order on the basis that bankruptcy affords protection to the unsecured creditors.

its loan, as opposed to other remedies that are available,[16] the security holder must decide as to whether the remedy is a private appointment or a court appointment of a receiver and manager. The security instrument must, of course, contain a clause giving the security holder the right to appoint either or both a receiver and manager whether by instrument or by court order. In the event that the instrument is silent, the appointment of a private receiver is invalid.[17] The security holder may have to consider other remedies including the application for a court-appointed receiver. Where the instrument contains such a clause allowing for the appointment of a receiver, the security holder has the right to appoint a receiver as a matter of contract in order to protect its own interests. The security holder is under no duty to refrain from exercising its rights on the basis that it may cause a loss to the debtor or to the debtor's other creditors or that the appointment duplicates the efforts of a trustee in bankruptcy.[18]

In a private appointment, the security holder may prepare a notice or letter of appointment in anticipation of the debtor's not being able to pay or rectify the breach complained of. Once any and all conditions precedent have taken place, the receiver is then in a position to consent to or accept the appointment and enforce the security.

In the notice of appointment, the security holder recites the security held, the appointment of the receiver, and the powers given pursuant to the applicable provisions under the security instrument.

The receiver's consent is usually reduced to an endorsement on the notice of appointment which recites the fact that the receiver agrees to act pursuant to the duties and powers prescribed in the security instrument and the applicable legislation together with such indemnity as may be agreed upon. The indemnity protects the receiver in its personal capacity in carrying out the powers and duties. The notice of appointment may be prepared, dated, and executed prior to any demand on the debtor. Although this may not be good practice, the notice of appointment becomes effective against the debtor when the security holder so advises the receiver of the

16 If a collection house or a financial services corporation assists the debtor company in the collection of receivables, but does not take possession of the debtor's business nor does it have any signing authority or involvement with banking arrangements and the secured creditor merely oversees the process, there is no appointment of a receiver under Part XI of the *Bankruptcy and Insolvency Act*. That Part requires a receiver to perform certain duties such as issuing reports to creditors: *MGI Packers Inc. v. Livestock Financial Protection Board* (2001), 27 C.B.R. (4th) 101, 2001 CarswellOnt 2540 (Ont. S.C.J. [Commercial List]).

17 *Standard Trust Co. v. Turner Crossing Inc.* (1992), 106 Sask. R. 196, 4 P.P.S.A.C. (2d) 238, [1993] 2 W.W.R. 382 (Sask. Q.B.); *Bank of Montreal v. Jarjoura* (2007), 84 Alta. L.R. (4th) 296, 39 C.B.R. (5th) 118, 2007 CarswellAlta 1693 (Alta. Q.B.). If the security instrument provides for the appointment of a receiver and manager, the security holder may face problems if it wants to appoint only a receiver: see *Pathfinder Recreation Ltd. (Receiver of) v. Borg-Warner Acceptance Canada Ltd.* (1990), 52 B.C.L.R. (2d) 135, 1 C.B.R. (3d) 222, 1990 CarswellBC 372 (B.C. C.A.), dismissing an appeal from (1989), 77 C.B.R. (N.S.) 171, 1989 CarswellBC 375 (B.C. S.C.) where the court permitted the security holder to amend the debenture to give it a choice of appointing a receiver or a receiver-manager.

18 *Re Potter Oils Ltd. (No. 2)*, [1986] 1 All E.R. 890 (Eng. Ch. Div.) following *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.*, [1971] 2 All E.R. 633 at p. 643 (Eng. C.A.).

appointment.[19] The security holder can advise the receiver that the appointment is operational soon after the security holder gives the debtor a reasonable time to pay and that time has passed.

While the appointment of the receiver is effective when the receiver accepts it and is notified that the appointment is in force, and while the floating charge crystallizes on the appointment, the debtor may continue to deal with the assets until notified. Thus, if the appointment of a receiver is to have any practical effect, the receiver must serve notice on the debtor forthwith. The notice legally deprives the debtor of control of the assets insofar as its dealings with third parties are concerned. Once the receiver takes possession, the receiver can prevent assets from being dissipated. The notice of appointment becomes effective against other parties upon service and, until such time, other creditors may claim priority and set-off.[20]

Where the security instrument does not provide for service of a notice of the appointment of a receiver upon the debtor, the fact that no notice had been served on the debtor does not invalidate the appointment.[21]

As a practical matter, the security holder arranges for a meeting with the debtor. By the time of that meeting, the time for payment or rectification will have expired, if such is provided or requested, or the debtor will, as in most cases, be required to pay the balance outstanding to the security holder forthwith. If the debtor cannot pay, and subject to further time being requested and given, the security holder serves the notice of appointment upon the debtor. Thereafter, the receiver attends at the debtor's place of business as soon as possible and takes possession. As a matter of contract, the security holder and receiver do not require an order of the court to take possession.[22]

However, if the debtor resists or threatens to resist, the security holder may apply to the court for an order appointing a court-appointed receiver. Alternatively, the security holder may apply to confirm the private appointment and for an order

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19 *Windsor Refrigerator Co. v. Branch Nominees Ltd.* (1960), [1961] Ch. 375, [1961] 1 All E.R. 277 (Eng. C.A.). See also *R.A. Cripps & Son Ltd. v. Wickenden; Cripps (Pharmaceuticals) Ltd. v. Wickenden*, [1973] 2 All E.R. 606 (Eng. Ch. Div.).

In *Royal Bank of Canada v. Cal Glass Ltd. et al.* (1979), 18 B.C.L.R. 55, 1979 CarswellBC 437, 1979 CanLII 570 (B.C. S.C.), appeal dismissed (1980), 22 B.C.L.R. 328, 1980 CarswellBC 223, 1980 CanLII 376 (B.C. C.A.), the court held that an appointment of a receiver executed before the demand for payment was delivered was proper and did not affect the validity of the appointment; followed in *Coopers & Lybrand Ltd. v. Ford Credit Can. Ltd. et al.* (1983), 59 N.S.R. (2d) 235, 48 C.B.R. (N.S.) 155 (N.S.T.D.), appeal allowed in part (1985), 33 A.C.W.S. (2d) 284 (C.A.), leave to appeal refused 57 C.B.R. (N.S.) xxix (S.C.C.); *Royal Bank of Canada v. Starr et al.* (1987), 61 O.R. (2d) 6 at pp. 12-13, 41 D.L.R. (4th) 715, 1987 CarswellOnt 1014 (Ont. H.C.).

20 *Harper v. Royal Bank of Canada* (1994), 18 O.R. (3d) 317, 114 D.L.R. (4th) 749, 1994 CarswellOnt 2201 (Ont. Div. Ct.).

21 *Wanapel Co-op Ltd. v. Alta. Agricultural Dev. Corp. et al.* (1978), 29 C.B.R. (N.S.) 65, 1978 CarswellAlta 205 (Alta. T.D.).

22 *Banque Nationale du Canada v. Atomic Slipper Co.*, [1991] 1 S.C.R. 1059, 7 C.B.R. (3d) 275, 80 D.L.R. (4th) 134 (S.C.C.), allowing an appeal from (1988), 70 C.B.R. (N.S.) 1, 53 D.L.R. (4th) 703, 1988 CarswellQue 34 (Que. C.A.). In *Gabriola Bldg. Supplies Ltd. v. Lloyds Bank of Can.* (1989), 72 C.B.R. (N.S.) 188, 1989 CarswellBC 325 (B.C. S.C.) the court did not follow the Court of Appeal in *Atomic*. The court held that no court approval was required for an appointment of an agent under section 178 (now section 427).

requiring the debtor to deliver up possession of the property without making the privately appointed receiver a court-appointed receiver.[23]

7. COURT APPOINTMENT OF RECEIVER AND MANAGER

(a) Jurisdiction

The alternative to the appointment of a receiver or a receiver and manager by instrument is the right of the security holder or some other party to bring a motion in an existing action or an application for an order appointing a court-appointed receiver and manager as an equitable remedy. Apart from legislation, the court has always had the inherent jurisdiction to appoint a receiver to protect the interests of the parties pending resolution and grant ancillary powers to make the jurisdiction effective.[24] The jurisdiction to appoint a receiver and manager is found in section 101 of the Ontario *Courts of Justice Act*.[25] Under the *Courts of Justice Act*, a judge of the Superior Court of Justice may appoint a receiver or a receiver and manager in an action where it is "just or convenient" to do so. The granting of the order is discretionary and, as long as the court does not commit an error of law or base its decision on wrong facts, the appeal court is not likely to interfere.

Section 101 provides:

> (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

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23 Subsection 104(1) of the *Courts of Justice Act*.

Prudential Assurance Co. (Trustee of) v. 90 Eglinton Ltd. Partnership (1994), 18 O.R. (3d) 201, 25 C.B.R. (3d) 139, 1994 CarswellOnt 271 (Ont. Gen. Div. [Commercial List]). In Ontario, Rules 14.05(3)(d), (e), and (h) apply to cloak the court with jurisdiction to determine the rights of the parties under a contract or to declare the nature and extent of an interest in a charge on land; see also *Ontario Hydro v. Endacom 2000 Inc.* (1995), 32 C.B.R. (3d) 185, 1995 CarswellOnt 370 (Ont. Gen. Div.).

Uvalde Investment Co. v. 754223 Ontario Ltd., (1997), 45 C.B.R. (3d) 315 (Ont. Gen. Div.); *STN Labs Inc. v. Saffron Rouge Inc.* (2010), 68 C.B.R. (5th) 287, 2010 ONSC 3042 (CanLII), 2010 CarswellOnt 3588 (Ont. S.C.J.).

See also *Canadian Union of Public Employees v. Haehey et al.*, 2011 NBCA 41 (CanLII), 2001 CarswellNB 208 (N.B. C.A.) where the court refused to confirm the appointment to allow the union to gather information about what assets the Local acquired and how title was being held.

24 *Lundrigans Ltd. (Receivership) v. Bank of Montreal* (1993), 110 Nfld. & P.E.I.R. 91, 1993 CarswellNfld 33 (Nfld. T.D.).

See also *Gentra Canada Investments Inc. v. Lehndorff United Properties (Canada) et al.* (1995), 169 A.R. 138, 1995 ABCA 227 (CanLII), 1995 CarswellAlta 633 (Alta. C.A.) where the court appointed a receiver to manage a shopping mall. The court stated that "the source of power to grant a receivership order is not any right of receivership granted to the lender under their security instrument, but rather the power of the court to preserve property pending litigation".

Re Hickman Equipment (1985) Ltd. [Approval of receiver's fees] (2005), 251 Nfld. & P.E.I.R. 185, 14 C.B.R. (5th) 79, 2005 CarswellNfld 242 (N.L. T.D.).

25 R.S.O. 1990, c. C.43, amended 1994, c. 12, section 40.

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(2) An order under subsection (1) may include such terms as are considered just.[26]

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26 There is similar legislation in provinces and territories:

Alberta - *Judicature Act*, R.S.A. 1980, c. J-1, subsection 13(2); with respect to real property, *Law of Property Act*, R.S.A. 2000, c. L-7, section 49 where the court has the power to appoint a receiver where it is "just and equitable". There is no real difference between the phrases: "just and convenient" and "just and equitable": *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74, 58 D.L.R. (4th) 447, 1989 CarswellAlta 343 (Alta. Q.B.). Also mentioned in *London Life Insurance Company v. WAF Investments* (1985), 61 A.R. 129, 1985 CarswellAlta 481, 1985 CanLII 1497 (Alta. Q.B.). But see *Tow-Mor Properties Ltd. v. W.G. Fahlman Ent. Ltd.* (1986), 62 C.B.R. (N.S.) 297, 1986 CarswellAlta 443, 1986 CanLII 1907 (Alta. Master) where the court made a distinction between the two Alberta statutes.

For equitable execution in Alberta, see sections 85 to 87 of the *Civil Enforcement Act*, R.S.A. 2000, c. C-15 codifying some of the case law; *Mills v. Mills* (2000), 17 C.B.R. (4th) 261 at p. 270, 2000 ABQB 414 (CanLII), 2000 CarswellAlta 596 (Alta. Q.B.) where a receiver was appointed to attach payments from disability insurers.

British Columbia - *Law and Equity Act*, R.S.B.C. 1996, c. 253, section 39;
Manitoba - *Court of Queen's Bench Act*, C.C.S.M. c. C280, section 55;
New Brunswick - *Judicature Act*, R.S.N.B. 1973, c. J-2, section 33;
Newfoundland and Labrador - *Judicature Act*, S.N.L. 1990, c. J-4, section 105;
Nova Scotia - *Judicature Act*, S.N.S. 1972, c. 2, subsection 39(9);
Prince Edward Island - *Supreme Court Act*, R.S.P.E.I. 1988, c. S-10, section 34;
Quebec - *Loi sur l'Autorité des marchés financiers*, L.R.Q. c. A-33.2, section 19.1;
Saskatchewan - *Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01, section 65;
Yukon Territory - *Judicature Act*, R.S.Y. 2002, c. 128, subsection 26(1);
Northwest Territories - *Judicature Act*, R.S.N.W.T. 1988, c. J-1, section 41;
Nunavut - *Judicature Act*, S.N.W.T. (Nu.) 1998, c. 34, subsection 38(1).
Canada - *Federal Courts Act*, R.S.C. 1985, c. F-7, section 44.

See *Cook's Ferry Band v. Cook's Ferry Band Council* (1989), 75 C.B.R. (N.S.) 228, 1989 CarswellNat 652 (Fed T.D.) where the court held that it had jurisdiction to appoint a receiver and manager even though the section referred to a receiver only.

See also *Chapman v. Chicago* (1991), 5 O.R. (3d) 220, 1991 CarswellOnt 721 (Ont. Div. Ct.) where it was held that the provincial court has the jurisdiction to appoint a receiver and manager over the assets of an Indian Band in addition to the jurisdiction under the *Federal Courts Act*. Similarly, in *Pelican Lake First Nation v. Bill* (2003), 244 Sask. R. 182, [2004] 6 W.W.R. 314, 2003 SKQB 566 (CanLII) (Sask. Q.B.), the Saskatchewan court held that it had jurisdiction under the *Queen's Bench Rules* to appoint a receiver but, on the facts of the case, the applicants failed to set out their claim against the Band, the nature of their interest in the assets to be placed under the control of the receiver, or their status to seek an appointment. There was no evidence disclosing the nature of the assets, whether they were in need of preservation, or any unique skills a receiver must have in order to manage them.

See *Tribal Wi-Chi-Way-Win Capital Corp. v. Stevenson* (2009), 237 Man. R. (2d) 94, [2009] 4 W.W.R. 535, 52 C.B.R. (5th) 124 (Man. Q.B.), appeal dismissed (2009), 240 Man. R. (2d) 122, [2010] 1 W.W.R. 107, 55 C.B.R. (5th) 53 (Man. C.A.) where the debtor signed a loan agreement waiving the provisions of the *Indian Act* and allowing the creditor to have access to the business in the event of default. The court dismissed the debtor's motion to set aside certain provisions in the order as the documents clearly showed that the debtor intended that the creditor could enforce its security in the event of default and that the debtor could waive the protection under the Act.

See *Re MacMaster & Labombards Chatham Ltd.* (1985), 50 O.R. (2d) 775, 1985 CarswellOnt 387 (Ont. H.C.), leave to appeal refused (1985), 54 O.R. (2d) 502, 1985 CarswellOnt 522 (Ont. H.C.) which held, prior to the merging of the County and Supreme Courts in Ontario, that a local judge had jurisdiction under the *Business Corporations Act* to appoint a receiver.

The court has a wide discretion in making the appointment and in granting powers to the receiver.

Until 2004 in Ontario, the terms of the initial order appointing a receiver varied with the parties, the nature of the debtor's business, and the creativity of the insolvency practitioners involved. This practice lead to a widespread use of inconsistent orders resulting in apparent unfairness to all the parties including the debtor, subordinate security holders, employees, landlords, suppliers, and government authorities. The initial orders grew incrementally and engrafted provisions from legislation primarily to protect the receiver.

In 2004, the Commercial Users Committee in Ontario adopted the model template receivership order which provided that the appointment can be made jointly under section 101 of the *Courts of Justice Act* and subsection 47(1) of the *Bankruptcy and Insolvency Act*.[27] Where such an order was granted under subsection 47(1), it was automatically recognized across Canada without the need of the security holder to obtain recognition orders in provinces and territories where the debtor had assets. As the *Bankruptcy and Insolvency Act* is federal legislation, the receiver can enforce these orders more readily throughout Canada in the same manner as if the orders were made in another province.[28]

In 2009, Parliament proclaimed more amendments to the *Bankruptcy and Insolvency Act*,[29] and specifically provided for a "national receiver" thereby eliminating the need of the security holder, secured creditor, or receiver to apply in other provinces for an order recognizing the receivership.[30] Parliament enacted subsection 243(1) to provide that a secured creditor may apply for the appointment of a receiver. In January, 2010 following the amendments to the Act,[31] the Commercial Users Committee made amendments to the model template receivership order.[32] In Ontario, the court can appoint a receiver under both section 101 of the *Courts of Justice Act* and subsection 243(1) of the *Bankruptcy and Insolvency Act*. If the applicant is not a secured creditor, then the applicant can proceed under section 101 of the *Courts of Justice Act*. However, if the debtor or respondent has assets in other provinces, the applicant and receiver must apply in that province for an order in aid.

27 Alberta has also adopted a model template receivership order. See Explanatory Notes for Version No. 1, February, 2006, in 18 Comm. Insol. R. 37. British Columbia and Saskatchewan have model template receivership orders.

28 Section 188 of the *Bankruptcy and Insolvency Act*.

29 S.C. 2005, c. 47, subsection 115 and S.C. 2007, c. 36, subsection 58, proclaimed September 18, 2009.

30 See also *Re Royal Oak Mines Inc.* (1999), 14 C.B.R. (4th) 276, 1999 CarswellOnt 3779, 1999 CanLII 15022 (Ont. S.C.J. [Commercial List]) where the B.C. Crown unsuccessfully opposed the making of a vesting order on the basis that it wanted its rights under the limited partnership agreement determined in British Columbia where the mine was located. Here, the B.C. Crown attorned to the Ontario jurisdiction.

31 S.C. 2005, c. 47 and S.C. 2007, c. 36.

32 See Appendix, Precedent B12, model approval and vesting order. There are other changes: the stay of proceedings does not apply to "eligible financial contracts"; the receiver's liability pre-appointment to employees for wages and employee-related claims has been clarified; and it sets out priority of payments.

Rule 41[33] of the Ontario *Rules of Civil Procedure* supplements the power of the court in section 101 of the *Courts of Justice Act.* The Rule sets out minimum standards in the administration. Rule 41 states:

> 41.01 In rules 41.02 to 41.06, "receiver" means a receiver or receiver and manager.
>
> 41.02 The appointment of a receiver under section 101 of the *Courts of Justice Act* may be obtained on motion to a judge in a pending or intended proceeding.
>
> 41.03 An order appointing a receiver shall,
>
> (a) name the person appointed or refer that issue in accordance with Rule 54;[34]
> (b) specify the amount and terms of the security, if any, to be furnished by the receiver for the proper performance of the receiver's duties, or refer that issue in accordance with Rule 54;
> (c) state whether the receiver is also appointed as manager and, if necessary, define the scope of the receiver's managerial powers; and
> (d) contain such directions and impose such terms as are just.
>
> 41.04 An order appointing a receiver may refer the conduct of all or part of the receivership in accordance with Rule 54.
>
> 41.05 A receiver may obtain directions at any time on motion to a judge, unless there has been a reference of the conduct of the receivership, in which case the motion shall be made to the referee.
>
> 41.06 A receiver may be discharged only by the order of a judge.

The order is always interlocutory or interim where the applicant brings a motion in an action.

However, if the applicant brings an application as opposed to a motion within the action, the order appointing the receiver is final with the result that the debtor can bring an appeal directly to the Ontario Court of Appeal. Filing the appeal does not stay the operation of the receivership order. The debtor must apply for a stay of proceedings.[35] On the other hand, if the order is interlocutory within the action, the debtor must appeal to the Divisional Court and must first obtain leave of that court and apply for a stay of proceedings.

The order can be unconditional or upon such terms and conditions as the judge thinks just.[36] In some cases, it may not be necessary for the court to use the model

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33 There does not appear to be any need for Rule 41.02 as the court has direct jurisdiction under section 101 to appoint a receiver. Further, there is no power in the court to confirm the appointment of a receiver where one has been appointed earlier. On the other hand, a security holder may apply to the court for an order declaring the receivership valid and enforceable without invoking a full court-appointed receivership; see *Ontario Hydro v. Endacom 2000 Inc.* (1995), 32 C.B.R. (3d) 185, 1995 CarswellOnt 370 (Ont. Gen. Div.).

34 Rule 54 sets out the conduct of a reference.

35 *Ontario v. Shehrazad Non-Profit Housing Inc.* (2007), 85 O.R. (3d) 81, 2007 ONCA 267 (CanLII), 2007 CarswellOnt 2113 (Ont. C.A.) [In Chambers] where court upheld the right to appeal directly to the Court of Appeal and the test on a stay of proceedings was the same test as in *RJR-MacDonald Inv. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 1994 CarswellQue 120 (S.C.C.).

36 If the court refuses to appoint a receiver or appoints one with restricted powers, it is possible to request a *Mareva* injunction to prevent the debtor from removing the assets from the jurisdiction. For the scope and mechanics of a *Mareva* injunction, see *Z Ltd. v. A and others*, [1982] 1 All E.R. 556 (Eng. C.A.).

template order. The court may appoint an interim receiver to take possession, control the receipts and disbursements, and generally monitor the debtor's business. Where the interim receiver's duties and powers in the initial order are basic, the security holder can return to the court for a full receivership with expanded powers of management and sale.[37]

While the terms of the order follow the model template order in Ontario and elsewhere, it is common to incorporate other legislation where the receiver is given specific powers or is exempt from certain duties. However, where the order is made under the court's general jurisdiction, the receiver's duties and powers originate from the court's inherent equitable jurisdiction and not from any specific legislation unless set out.[38]

In addition to the model template receivership order, the court has jurisdiction under special legislation, such as the *Securities Act*[39] to appoint a receiver over the debtor's assets including trust property for the protection of investors. The court appointment is usually interim or temporary relief pending the disposition of the

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37 *Royal Bank of Canada v. Canadian Print Music Distributors Inc.*, 2006 CanLII 22932, 2006 CarswellOnt 4119 (Ont. S.C.J.). More than often, calling a receiver an "interim" receiver is really a misnomer as it is in effect a full receivership with powers to realize and sell with court approval.

38 See *Galanda Properties Inc. v. Tiercon Industries Inc. (Receiver of)* (2007), 36 C.B.R. (5th) 289, 2007 CarswellOnt 6196, 2007 CanLII 40210 (Ont. S.C.J.), affirming (2007), 38 C.B.R. (5th) 155, 2007 CarswellOnt 6784 (Ont. S.C.J. [Commercial List]) where the court held that it is not constrained by the provisions of the *Personal Property Security Act* if it considers a departure from that statute to be just and equitable.

39 R.S.O. 1990, c. S.5, subsection 129(1). See *Ontario Securities Commission v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 385, 14 C.B.R. (3d) 6, 93 D.L.R. (4th) 321 (Ont. C.A.); *Ontario (Securities Commission) v. Portus Alternative Asset Management Inc.* (2006), 19 C.B.R. (5th) 17, 2006 CarswellOnt 1724, 2006 CanLII 8882 (Ont. S.C.J. [Commercial List]).

Other legislation in Ontario calling for the appointment of a receiver and manager includes:
Business Corporations Act, R.S.O. 1990, c. B16, subsection 248(3)(b). See Chapter 15.
Civil Remedies Act, 2001, S.O. 2001, c. 28, subsection 4(1)3 and subsection 9(1)3.
Commodity Futures Act, R.S.O. 1990, c. C.20, subsection 13(1).
Community Economic Development Act, S.O. 1993, c. 26, section 34.
Construction Lien Act, R.S.O. 1990, c. C.30, section 68. See Chapter 14.
Corporations Act, R.S.O. 1990, c. C.38, subsection 196(1).
Executions Act, R.S.O. 1990, c. E.24, subsection 31.
Funeral Directors and Establishments Act, R.S.O. 1990, c. F.36, subsection 45(1).
Funeral, Burial and Cremation Act, 2002, S.O. 2002, c. 33, section 77.
Insurance Act, R.S.O. 1990, c. I.8, subsection 78(1).
Mining Tax Act, R.S.O. 1990, c. M.15, section 19.
Mortgage Brokerages, Lenders and Administrators Act, 2006, S.O. 2006, c. 29, subsection 37(1).
Motor Vehicle Dealers Act, 2002, S.O. 2002, c. 30, section 21.
Personal Property Security Act, R.S.O. 1990, c. P.10, section 60. While there is no jurisdiction to appoint a receiver under the Act, section 60 gives the court general jurisdiction once there is an appointment under other legislation or under a security instrument. See Chapter 14.
Prohibiting Profiting from Recounting Crimes Act, 2002, S.O. 2002, c. 2, subsection 5(1)2.
Remedies for Organized Crime and Other Unlawful Activities Act, 2001, S.O. 2001, c. 28, subsection 4(1)3.
Social Housing Reform Act, 2000, S.O. 2000, c. 27, subsections 116(1)5 and 120(9). See Chapter 15.
Travel Industry Act, S.O. 2002, c. 30, section 22.

action. In other words, there is no inherent jurisdiction outside the *Courts of Justice Act* or special legislation to appoint a receiver if there is no action between the parties.[40] The court does not generally have the jurisdiction to appoint a receiver by a notice of application under the *Rules of Civil Procedure*[41] unless the claim for relief is ancillary to the main relief nor does the court have the jurisdiction to appoint a receiver on its own initiative and without notice to the parties.[42]

Insofar as special legislation is concerned, each statute must be reviewed carefully as to the jurisdiction to appoint a receiver, the purpose of appointment and the conferring of powers and duties on a receiver.[43] For example, subsection 129(1) of the *Securities Act*[44] provides jurisdiction to the court to appoint a receiver in situations where a corporation is under investigation for the protection of creditors and investors. Ultimately, the receiver may be required to liquidate the portfolio and distribute the proceeds to the investors and to the creditors. Similarly, subsection 248(3)(b) of the *Business Corporations Act* gives jurisdiction to appoint a receiver where the corporation has acted in a manner that is oppressive or unfairly prejudicial to creditors. While the legislation confers jurisdiction to appoint a receiver, they do not contain any other provisions governing the receivership. The court may appoint a receiver and manager to "manage" the corporation pending resolution as to entitlement. In these cases, the receiver and other parties must refer to the common law

40 Nor is there any jurisdiction or authority for the court to initiate the appointment of a receiver and manager on its own: see *Ernst & Young Inc. v. Ontario* (1995), 25 O.R. (3d) 623, 1995 CarswellOnt 1340, 1995 CanLII 7125 (Ont. Gen. Div.) where the receiver was discharged and then sued the Crown for its fees and expenses.

41 *Re Imperial Steel Corp.; Watson v. Imperial Steel Corp.* (1925), 28 O.W.N. 242 (Ont. Div. Ct.), appeal dismissed [1925] S.C.R. 703, [1925] 4 D.L.R. 1080, 1925 CarswellOnt 94 (S.C.C.). However, if the relief is ancillary to the main relief, such as in a foreclosure action, Rule 14.05(3)(g) provides that a proceeding may be brought by application where the rules authorize the commencement of a proceeding by application or where the relief claimed is an injunction, mandatory order, or declaration or the appointment of a receiver or other consequential relief when ancillary to the relief claimed in a proceeding properly commenced by a notice of application. If the evidence does not meet the requirements, the court will dismiss the application: *997724 Ontario Inc. v. 407430 Ontario Ltd.* (1994), 29 C.B.R. (3d) 119, 8 P.P.S.A.C. (2d) 257, 1994 CarswellOnt 323 (Ont. Gen. Div.).

42 *Wunsche v. Wunsche* (1994), 18 O.R. (3d) 161, 114 D.L.R. (4th) 314, 1994 CarswellOnt 838 (Ont. C.A.). For related proceedings on the issue as to who is liable for the receiver's costs, see *Ernst & Young Inc. v. Ontario* (1995), 25 O.R. (3d) 623, 1995 CarswellOnt 1340, 1995 CanLII 7125 (Ont. Gen. Div.).

43 See Chapter 1 "7.(a) Receivership as a Final Remedy".

44 R.S.O. 1990, c. S.5.

In British Columbia, section 152 of the *Securities Act*, R.S.B.C. 1996, c. 418, gives the court jurisdiction to appoint a receiver manager where it is in the best interests of the creditors, a test much wider in scope than the test for a *Mareva* injunction where the court is concerned about the disappearance of assets: *British Columbia (Securities Commission) v. DiCimbriani* (1996), 138 D.L.R. (4th) 263, 11 C.C.L.S. 181, 1996 CanLII 1967 (B.C. C.A.), allowing appeal from (1995), 10 C.C.L.S. 108, 1995 CarswellBC 1220 (B.C. S.C. [In Chambers]).

See also *Re Stenner Fin. Services Ltd.* (1988), 68 C.B.R. (N.S.) 298, 1988 CarswellBC 523, 1988 CanLII 3256 (B.C. S.C.) where the court reviewed an *ex parte* appointment of a receiver under subsection 136(3) of the *Securities Act;* and see *Superintendent of Brokers v. Victoria Mortgage Corporation Ltd.* (1985), 59 C.B.R. (N.S.) 225, 1985 CarswellBC 499, 1995 CanLII 628 (B.C. C.A.), allowing appeal from (1985), 57 C.B.R. (N.S.) 157, 1985 CarswellBC 477, 1985 CanLII 618 (B.C. S.C.) setting aside the receivership order.

for guidance as the purpose of the receivership is something other than a security holder enforcing its security to recover a debt.

There is other legislation that calls for the appointment of a trustee[45] or custodian[46] to take possession of someone's assets or business pending judgment or some other resolution. In these cases, it is necessary to review the purpose of legislation as well as the similarities and differences from court appointments of receivers.

On the other hand, there are some statutes such as the *Personal Property Security Act (PPSA)* and the *Business Corporations Act*[47] that recognize the appointment of a receiver and prescribe their duties and powers, but they do not confer jurisdiction to appoint.[48] In these cases, it is necessary to resort to the "just or convenient" or "just or equitable" legislation to appoint a receiver.[49]

Preservation Order

There is also jurisdiction under Rule 45.01 of the *Rules of Civil Procedure* for a court to make an interim order for the custody or preservation of property pending litigation in order to decide the rights of the parties. The court has the authority to direct that the property be sold, including situations where the property is perishable or likely to deteriorate. Only a judge sitting in court has the power to appoint a receiver. In Ontario, a master does not have jurisdiction.[50]

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45 *Construction Lien Act*, R.S.O. 1990, c. C.30, section 68.

In Ontario, the Law Society of Upper Canada can apply to the Superior Court of Justice for an order placing all or part of a member's trust account in the name of the Society or another person appointed by the court. Such an order can be made to preserve the property, distribute it, carry on the member's practice or wind it up in situations where the member's membership has been revoked, where the member's rights are under suspension, where the member has died or has disappeared, or has neglected his or her practice or has dealt with the trust account improperly: see sections 49.44 to 49.52 of the *Law Society Act*, R.S.O. 1990, c. L.8.

46 In British Columbia, provincial legislation governing lawyers provides for the Law Society to apply for the appointment of a custodian to take possession of and control over all or part of the lawyer's practice for the protection of client's interests. In effect, the legislation is not considered a type of receivership. See *Legal Profession Act*, R.S.B.C. 1998, c. 9, subsection 50(1); *Re Martin* (2005), 42 B.C.L.R. (4th) 380, 11 C.B.R. (5th) 255, 2005 BCSC 586 (CanLII) (B.C. S.C.); *Re De Stefanis* (2005), 38 B.C.L.R. (4th) 1, 9 C.B.R. (5th) 189, 2005 BCCA 156 (CanLII) (B.C. C.A.), dismissing an appeal from (2004), 24 B.C.L.R. (4th) 306, 50 C.B.R. (4th) 175, 2004 BCSC 10 (CanLII) (B.C. S.C.) where the court stated that the nature of the obligations of a custodian appointed under the Act is to protect the clients, not the creditors and is not analogous to that of a receiver or of a monitor appointed under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

47 See Chapters 14 and 15 below.

48 *Standard Trust Co. (Liquidator of) v. Turner Crossing Inc.* (1992), 106 Sask. R. 196, 4 P.P.S.A.C. (2d) 238, [1993] 2 W.W.R. 382 (Sask. Q.B.).

49 Such as subsection 248(3)(b) of the Ontario *Business Corporations Act* which gives the court jurisdiction.

50 *Sanden v. Price et al.* (1972), [1973] 1 O.R. 55, 18 C.B.R. (N.S.) 71, 1972 CarswellOnt 89 (Ont. S.C. [In Chambers]), Rule 37.03 of the Ontario *Rules of Civil Procedure*. Formerly, a local judge for actions brought in his or her county had the power to grant a receivership order if the solicitors for all the parties reside in the county or agree that the matter may be heard before him or her: Rule 212(d) of the Ontario *Rules of Civil Procedure*; *Beaw et al. v. Edgar et al.* (1982), 39 O.R. (2d) 409, 139 D.L.R. (3d) 533, 1982 CarswellOnt 501 (Ont. H.C.). There are jurisdictional difficulties to appoint a receiver over Crown property. While an injunction can ensue against the Crown, there is likewise no difference

Once an order is made appointing a receiver, the court may refer the conduct of all or part of the receivership to a referee under Rule 54 of the Ontario *Rules of Civil Procedure*.[51]

(b) Under What Circumstances—Who May Apply

In determining whether it is "just or convenient" that a receiver should be appointed, the court considers many factors that vary in the circumstances of the case. While the remedy is usually employed by a security holder to enforce payment of a debt, other parties can employ the remedy seeking protection and preservation of assets pending adjudication of the issues. These factors include the following:[52]

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in an appointment of a receiver: see *B.C. Power Corp v. A.G. (B.C.)* (1962), 38 W.W.R. 577 at p. 588 and p. 635 *ff*, 34 D.L.R. (2d) 196 at p. 211, 1962 CarswellBC 71 (B.C. C.A.), appeal allowed (sub nom. *B.C. Power Corp. v. B.C. Electric Co.)* [1962] S.C.R. 642, 38 W.W.R. 701, 34 D.L.R. (2d) 196 at p. 274 (S.C.C.).

See also *McKnight v. Hutchison*, 2011 BCSC 36 (CanLII), 2011 CarswellBC 41 (B.C. S.C.) where the court did not appoint a receiver in a partnership dispute, but made a preservation order pending the trial.

51 Once a court-appointed receiver is appointed, it is doubted that the security holder can simply discontinue the action especially after the court has ordered a sale. Although the appointment of a receiver is corollary relief in an action, the receiver cannot be discharged except by the court which appointed it: see *Guar. Trust Co. of Canada v. 208633 Holdings Ltd.; Northland Bank v. 208633 Holdings Ltd.* (1982), 19 Alta. L.R. (2d) 151, 42 C.B.R. (N.S.) 90, 1982 CarswellAlta 312 (Alta. Q.B.).

52 These factors were considered in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* (2002), 46 C.B.R. (4th) 95, 2002 ABQB 430 (CanLII), 2002 CarswellAlta 1531 (Alta. Q.B.) and in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.* (2009), 60 C.B.R. (5th) 142, 2009 BCSC 1527 (CanLII), 2009 CarswellBC 2982 (B.C. S.C. [In Chambers]).

In *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, 2008 CanLII 66137, 2008 CarswellOnt 7601 (Ont. S.C.J.) at para. 9, leave to appeal to the Divisional Court dismissed 2009 CanLII 9440, 2009 CarswellOnt 1128 (Ont. S.C.J.) where the court considered the four following factors in dismissing a motion for the appointment of an interim receiver:

"(1) Since the appointment of a receiver is very intrusive, it should only be used sparingly with due consideration for the effect on the parties as well as a consideration of conduct of the parties. (See: *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.));

(2) Since an appointment of a receiver is tantamount to execution before judgment, it should not be granted unless there is strong evidence that the creditor will not recover. (See: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.));

(3) When the security interest permits the appointment of a receiver – and the circumstances of default justify the appointment – the extraordinary nature of the remedy is less essential to the consideration of the court. (See *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]));

(4) Where there is default which is not caused by the moving party where a loan had matured and there was no other means to protect the party's interest, then a receivership order should issue. (See *Royal Bank v. 605298 Ontario Inc.*, 1998 CarswellOnt 4436 (Ont. Gen. Div. [Commercial List]))."

In *Lindsey Estate v. Strategic Metals Corp.* (2010), 67 C.B.R. (5th) 88, 2010 ABQB 242 (CanLII), 2010 CarswellAlta 641 (Alta. Q.B.), appeal dismissed (2010), 27 Alta. L.R. (5th) 241, 69 C.B.R. (5th) 42, 2010 ABCA 191 (CanLII) (Alta. C.A.), the motion court considered the following factors in

(1) whether irreparable harm might be caused if no order were made, although it is not essential that the creditor establish that it will suffer irreparable harm if a receiver is not appointed;[53]

(2) the risk to the security holder. In considering the risk factor, the court considers the size of the debtor's equity in the assets and the need for protection or safeguarding the assets while the litigation takes place. If the security holder can readily establish that there is going to be a sizeable deficiency in relation to the size of the loan, then the court will lean in favour of making the appointment as there is clear prejudice to the security holder. On the other hand, the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will adequately protect the security holder;[54]

(3) the nature of the property;

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determining "just or convenient":

> "In determining whether it is just and convenient to appoint a Receiver, a Court should consider various factors such as:
>
> a. whether irreparable harm might be caused if no order is made;
> b. the risk to the parties;
> c. the risk of waste debtor's assets;
> d. the preservation and protection of property pending judicial resolution; and
> e. the balance of convenience."

See also *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 67 C.B.R. (5th) 97, 2010 BCSC 477 (CanLII), 2010 CarswellBC 855 (B.C. S.C. [In Chambers]).

53 *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) referring to *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394 (Ont. H.C.). In the *Odyssey* case, there was no evidence of the loans being in jeopardy of repayment while being in default.

The *Swiss Bank* case has been distinguished and not followed in Alberta: *BG International Ltd. v. Canadian Superior Energy Inc.* (2009), 53 C.B.R. (5th) 161, 2009 ABCA 127 (CanLII), 2009 CarswellAlta 469 (Alta. C.A.) where the court stated that the debtor does not to prove any special hardship, much less "undue hardship" to resist an application for the appointment of a receiver.

See also *Lakeside Colony of Hutterian Brethren v. Hofer* (1993), 87 Man. R. (2d) 216, 19 C.B.R. (3d) 190, 1993 CarswellMan 30 (Man. Q.B.) where the court also took into consideration the fact that the plaintiffs had a strong *prima facie* case and that the balance of convenience favoured the appointment.

54 If there is no danger to the debtor's property, and the appointment will have a devastating effect on the debtor, the court will not appoint a receiver: *HMW-Bennett & Wright Contractors Ltd. v. BWV Investments Ltd.* (1991), 95 Sask. R. 211, 7 C.B.R. (3d) 216, 1991 CarswellSask 42 (Sask. Q.B.)

See also *Ontario Development Corp. v. Ralph Nicholas Enterprises Ltd.* (1985), 57 C.B.R. (N.S.) 186, 1985 CarswellOnt 206 (Ont. H.C.) where the court, after considering that the debtor's financial situation was desperate, appointed a receiver and manager.

In *Churchill (Local Government District) v. Costa Cartage Ltd.* (1994), 94 Man. R. (2d) 216, 1994 CarswellMan 286 (Man. Q.B.) where the debtor threatened to remove the furniture and furnishings of a hotel.

See also *Wilson v. Marine Drive Properties Ltd.* (2008), 51 C.B.R. (5th) 74, 2008 BCSC 1431 (CanLII), 2008 CarswellBC 2240 (B.C. S.C.).

See also *Loblaw Brands Ltd. v. Thornton*, 2009 CanLII 12803, 2009 CarswellOnt 1588 (Ont. S.C.J.) where the unsecured creditor's right to recovery money in a fraud situation is in serious jeopardy.

(4) the rights of the parties thereto;[55]
(5) the apprehended or actual waste of the debtor's assets;
(6) the preservation and protection of the property pending the judicial resolution;[56]
(7) the balance of convenience to the parties;
(8) the fact that the creditor has the right to appoint a receiver under its security;[57]

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55 *Nat. Trust Co. v. Yellowvest Holdings Ltd. et al.* (1979), 24 O.R. (2d) 11, 98 D.L.R. (3d) 189, 1979 CarswellOnt 1364 (Ont. H.C.); applied in *Third Generation Realty Ltd. v. Twigg Holdings Ltd.* (1991), 6 C.P.C. (3d) 366, 1991 CarswellOnt 469 (Ont. Gen. Div.). See also *Royal Trust Corp. of Can. v. D.Q. Plaza Holdings et al.* (1984), 36 Sask. R. 84, 53 C.B.R. (N.S.) 18, 1984 CarswellSask 38 (Sask. Q.B.).

See also *BG International Ltd. v. Canadian Superior Energy Inc.* (2009), 53 C.B.R. (5th) 161, 2009 ABCA 127 (CanLII), 2009 CarswellAlta 469 (Alta. C.A.) where the court stated that an appointment should not lightly be granted and that the rights of both parties should be carefully balanced before an appointment is made.

In *MTM Commercial Trust v. Statesman Riverside Quays Ltd.* (2010), 70 C.B.R. (5th) 233, 2010 ABQB 647 (CanLII) (Alta. Q.B.) the court reviewed the test for the appointment of a receiver as being comparable to the test for an injunction, namely whether there is a serious issue to be tried, irreparable harm if not granted, and the balance of convenience: *RJR MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.).

56 For example, the court has the discretion to appoint a receiver in a mortgage action where the mortgagor fails to manage the buildings properly and make repairs: *Alpha Investments & Agencies Ltd. v. Maritime Life Assurance Company* (1978), 23 N.B.R. (2d) 261, 1978 CarswellNB 96 (N.B. C.A.); *J. P. Capital Corp. (Trustee of) v. Perez* (1996), 38 C.B.R. (3d) 301, 1996 CarswellOnt 430 (Ont. Gen. Div.); *Farallon Investments Ltd. v. Bruce Pallet Fruit Farms Ltd.*, 1992 CarswellOnt 4933, 31 A.C.W.S. (3d) 1283 (Ont. Gen. Div.).

See also *McLennan Ross v. Paramount Life Ins. Co.* (1986), 44 Alta. L.R. (2d) 375, 63 C.B.R. (N.S.) 265, 1986 CarswellAlta 448 (Alta. Q.B.). When a mortgagee applies for a court appointment, the order does not create any new rights; it only protects existing rights. In this case, the court held that the receiver is entitled to collect rent arrears after the appointment, but the receiver cannot collect rent already collected by the mortgagor.

See also *Standard Trust Co. v. Pendygrasse Hldg. Ltd.* (1988), 71 C.B.R. (N.S.) 65, 1988 CarswellSask 27 (Sask. Q.B.) where the court, in referring to many of these factors, refused the appointment on the basis that the mortgagee already had significant control over the management board of a condominium complex and, therefore, its security was not in danger.

See also *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, [1991] O.J. No. 2613, 1991 CarswellOnt 1511 (Ont. Gen. Div.), where the court, in referring to many of these factors, appointed a receiver to complete a large construction project of an office building and to lease out space. Here, the debtor had no substantial equity in the project, its loans were in default and they had matured.

See also *Bank of N.S. v. Marbeck Well Servicing Ltd.; Bank of N.S. v. Becker* (1986), 43 Alta. L.R. (2d) 453 (M.C.) (headnote only).

See also *Yukon v. B.Y.G. Natural Resources Inc.* (2007), 31 C.B.R. (5th) 100, 2007 YKSC 2 (CanLII), 2007 CarswellYukon 1 (Y.T. S.C.) where the court concluded that an interim receiver was needed where there were dangerous and unsafe conditions in a mine site that had been abandoned.

If the property is not in peril or the creditor is unable to demonstrate that, the court will not appoint a receiver: *Tim v. Lai and Harry Invts. Ltd.* (1984), 53 C.B.R. (N.S.) 80, 1984 CarswellBC 575, 1984 CanLII 446 (B.C. S.C.).

Instead of appointing a receiver, the security holder can request an injunction and a preservation order against the debtor pending a declaration that the security holder is entitled to enforce its security.

57 Where this clause is present, the extraordinary nature of the remedy is less essential as a determining factor: *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328, 1996 CanLII 8258 (Ont. Gen. Div. [Commercial List]); *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.* (2009), 60 C.B.R. (5th) 142, 2009 BCSC 1527 (CanLII), 2009 CarswellBC 2982 (B.C. S.C.); *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 67 C.B.R. (5th) 97, 2010 BCSC 477 (CanLII), 2010 CarswellBC 855 (B.C. S.C. [In Chambers]).

(9) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;[58]

(10) that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;[59]

(11) whether a court appointment is necessary to enable a private receiver to carry out its duties more efficiently;[60]

(12) the effect of the order on the parties. If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price;[61]

(13) the conduct of the parties;[62]

(14) the length of time that a receiver may be in place. Usually, a receiver appointed by the court remains in place until after judgment and realization of assets. This could last several years depending upon the nature of the business. However, where a claimant moves for an order appointing a receiver for a short

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See also *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 CarswellOnt 896, 2011 ONSC 1007 (CanLII) (Ont. S.C.J.).

See also below in text (10) extraordinary relief.

See also *Confederation Trust Co. v. Dentbram Developments Ltd.*, [1992] O.J. No. 3870, 1992 CarswellOnt 474 (Ont. Gen. Div.).

58 *STN Labs Inc. v. Saffron Rouge Inc.* (2010), 68 C.B.R. (5th) 287, 2010 ONSC 3042 (CanLII), 2010 CarswellOnt 3588 (Ont. S.C.J.); *Uvalde Investment Co. v. 754223 Ontario Ltd.* (1997), 45 C.B.R. (3d) 315, 1997 CarswellOnt 365 (Ont. Gen. Div.).

59 *Canadian Imperial Bank of Commerce v. Jack*, 1990 CarswellOnt 3055, [1990] O.J. No. 670, 20 A.C.W.S. (3d) 416 (Ont. Gen. Div.) referring to *Fisher Investments Ltd. et al. v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185, 1988 CarswellOnt 180 (Ont. H.C.). While the remedy is extraordinary, the fact that a creditor has the right to appoint a receiver by instrument under its security makes the "extraordinary" nature of the remedy less essential in the consideration: *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328, 1996 CanLII 8258 (Ont. Gen. Div. [Commercial List]).

See also *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.).

See also *D.W. Waste Inc. v. EX-L Sweeping & Flushing Ltd.*, [2003] O.J. No. 3766, 2003 CanLII 34187, 2003 CarswellOnt 3598 (Ont. S.C.J.), appeal dismissed 2004 CarswellOnt 810 (Ont. C.A.); *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.* (2009), 59 C.B.R. (5th) 303, 2009 CanLII 55120 (Ont. S.C.J. [Commercial List]).

60 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CanLII 8258 (Ont. Gen. Div. [Commercial List]); referred to in *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 27 C.B.R. (5th) 1, 2007 CanLII 297 (Ont. S.C.J.); and followed in *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, 2011 ONSC 3851 (CanLII) (Ont. S.C.J.).

61 *Fisher Investments Ltd. et al. v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185, 1988 CarswellOnt 180 (Ont. H.C.). In this case, the court was also concerned about the receiver's capabilities as the proposed receiver lacked experience in operating a nursing home. See also *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.).

62 *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.) where the court in rejecting the appointment reviewed the effect of the order on the parties as well as their conduct.

period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties;[63]

(15) costs to the parties;

(16) the likelihood of maximizing the return to the parties;

(17) facilitating the duties of the receiver;[64] and

(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity.[65]

In many cases, a security holder whose instrument charges all or substantially all of the debtor's property provides for a court-appointed receivership if the debtor is in default and fails to pay following a demand for payment.[66] *Prima facie*, the security holder is entitled to enforce its security by applying for a court-appointed receiver and manager.

If the creditor who applies for the appointment of a receiver is neither a judgment creditor nor a secured creditor, the court will be more cautious in reviewing the factors listed above as they may not readily apply. As has been pointed out in case law, the appointment of a receiver is intrusive and can have disastrous effects on the debtor. The creditor must show that there is a serious issue to be tried, that irreparable harm will occur if an appointment is not made, and that the balance of convenience must be in the creditor's favour. In effect, the court focuses on the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*.[67]

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63 In Ontario, the security holder seldom obtains judgment before the receiver sells the debtor's business. But see *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 59 B.C.L.R. 145, 56 C.B.R. (N.S.) 7, 16 D.L.R. (4th) 181 (B.C. C.A.) where the court commented about the creditor first obtaining judgment before it could sell.

64 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328, 1996 CanLII 8258 (Ont. Gen. Div. [Commercial List]) where the court reviewed many of the above circumstances. In this case, the debtor had been attempting to re-finance real properties for one and a half years and was at odds with the security holder as to marketing them. In postponing the appointment for a short time to give the debtor a further opportunity to re-finance, the court concluded that a court-appointed receiver could resolve that impasse.

65 *Priority 1 Security Inc. v. Phasys Ltd.* (2006), 9 P.P.S.A.C. (3d) 203, 22 C.B.R. (5th) 258, 2006 ABQB 332 (CanLII) (Alta. Q.B.).

66 The above passage as it was written in the first edition was cited in *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74, 1989 CarswellAlta 343, 1989 CanLII 3440 (Alta. Q.B.).

See *Royal Bank v. Brodak Construction Services Inc.* (2002), 34 C.B.R. (4th) 107, 2002 CarswellOnt 1774, 2002 CanLII 49590 (Ont. S.C.J. [Commercial List]) referring to *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]).

67 [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 1994 CanLII 117 (S.C.C.). In *Anderson v. Hunking*, 2010 ONSC 4008 (CanLII), 2010 CarswellOnt 5191 (Ont. S.C.J.), the Ontario court summarized the factors in dismissing an application for the appointment of a receiver where the creditors were neither judgment creditors nor secured creditors at paras. 15 and 16:

> "[15] Section 101 of the *Courts of Justice Act* provides that the court may appoint a receiver by interlocutory order 'where it appears to a judge of the court to be just or convenient to do so.' The following principles govern motions of this kind:
>
> (a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: *Fisher Investments Ltd. v. Nusbaum* (1988), 31 C.P.C. (2d) 158, 71 C.B.R.

If the security holder held a real property mortgage, the former common law

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(N.S.) 185 (Ont. H.C.);

(b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (H.C.);

(c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: *1468121 Ontario Limited v. 663789 Ontario Ltd.*, 2008 CanLII 66137 (ON S.C.), [2008] O.J. No. 5090, 2008 CanLII 66137 (S.C.J.), referring to *Royal Bank v. Chongsim Investments Ltd.* 1997 CanLII 12112 (ON S.C.), (1997), 32 O.R. (3d) 565, [1997] O.J. No. 1391 (Gen. Div.);

(d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village of Clair Creek* 1996 CanLII 8258 (ON S.C.), (1996), 40 C.B.R. (3d) 274, 1996 CanLII 8258 (Ont. S.C.J.);

(e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (S.C.C.), [1994] 1 S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385;

   (i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;

   (ii) it must be determined that the moving party would suffer 'irreparable harm' if the motion is refused, and 'irreparable' refers to the nature of the harm suffered rather than its magnitude – evidence of irreparable harm must be clear and not speculative: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, [1991] F.C.J. No. 424 (C.A.);

   (iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits – that is, the 'balance of convenience' See *1754765 Ontario Inc. v. 2069380 Ontario Inc.* 2008 CanLII 67403 (ON S.C.), (2008), 49 C.B.R. (5th) 214 at paras. 7 and 11, [2008] O.J. No. 5172 (S.C.);

(f) where the plaintiff's claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants' assets: *Loblaw Brands Ltd. v. Thornton* (2009), 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (S.C.J.).

[16] The appointment of a receiver for the purposes of preserving the defendant's assets as security for a potential judgment in favour of the plaintiff is, like a *Mareva* injunction, an exception to the general principle that our courts do not grant execution before judgment. As Salhany L.J.S.C. observed in *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)*, above, at para. 6:

> [T]here is always a risk that a judgment may never be satisfied. It can also probably be said that whenever A claims money from B, it is 'just' or 'convenient' or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is, in effect, an execution before judgment unless there is strong evidence the creditor's right to recovery is in serious jeopardy. . . . [referring also to *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 at 533, 30 C.P.C. 205 (C.A.)]."

Followed in *Schembri v. Way* (2010), 76 B.L.R. (4th) 147, 2010 ONSC 5176 (CanLII), 2010 CarswellOnt 8675 (Ont. S.C.J.) and *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136 (CanLII), 2011 CarswellOnt 5867 (Ont. S.C.J.).

provided that the legal mortgagee could apply for a court-appointed receiver. Subsequent mortgagees had equitable charges that only Courts of Chancery could enforce. With the merging of the English courts in 1873 and those of the Province of Ontario in 1881, the court permitted a subsequent mortgagee to enforce its security subject to the rights of and without prejudice to the prior security holder who might initiate the appointment of its own receiver. There is now no prohibition against subsequent security holders from invoking the jurisdiction of the court to appoint a receiver.

The purpose of a court appointment is to preserve and protect the debtor's property pending judgment between the parties and, after judgment, to enable the judgment creditor to collect in situations where there are legal impediments in enforcing judgment. In exercising the jurisdiction, the court reviews the need for judicial intervention of an extraordinary remedy or the risk to the security holder or to general creditors. If there is no need or purpose of a court appointment to collect a debt, then there may be need to preserve and protect the debtor's property pending a change of management without a sale. From the point of view of all stakeholders in a receivership, the court becomes the supervisor to the determination of priorities of creditors, to the realization of the assets either as a whole or piecemeal if necessary and, ultimately, to the distribution to the creditors. In short,[68]

> The purpose of a general receivership is to enhance and facilitate the preservation and realization of the assets for the benefit of all the creditors, including secured creditors. . . . The debtor's property comes under the administration and supervision of the court, through the receiver and manager, which is the agent of the court and not of the creditors at whose instance it is appointed. This being the case, the integrity of the receivership process requires that the court perform its role as supervisor in connection with what happens to the property that comes under its administration.

If the security holder has the right under an instrument to appoint a receiver, there is no apparent need for the court to exercise its jurisdiction under the general court legislation. However, if the debtor's property is at risk, if the security instrument does not contain adequate powers for the receiver, if the security holder or its privately appointed receiver is having difficulty in enforcing its security against the debtor or in dealing with competing claims, or if the security holder has intentions of purchasing the debtor's business in a public sale,[69] then the court will intervene and appoint a receiver. However, in *Macotta Co. of Canada v. Condor Metal Fabricators Ltd. et al.*,[70] the Alberta Queen's Bench criticized the practice of lenders applying to the court to confirm the appointment of a privately appointed receiver when it was unnecessary:

> One can speculate that the real purpose of such an application is to clothe the appointed receiver with the authority of the court, which may tend to dissuade other creditors and dispossessed debtors from looking too deeply into the actions of debenture holders.

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68 *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781, 32 C.B.R. (3d) 303, 1995 CarswellOnt 374 (Ont. Gen. Div. [Commercial List]).

69 *Great Atlantic & Pacific Co. of Canada v. 1167970 Ontario Inc.* (2002), 37 C.B.R. (4th) 277, 2002 CarswellOnt 3198, 2002 CanLII 12215 (Ont. S.C.J. [Commercial List]).

70 (1979), 35 C.B.R. (N.S.) 144 at p. 148, 1979 CarswellAlta 178 (Alta. Q.B.).

As indicated, the court is concerned that a court appointment discourages other creditors from investigating and challenging the security holder and the receiver's conduct throughout the administration. By their very nature, court appointments tend to be more expensive and time-consuming than private appointments. Additionally, the court appointment protects the security holder who invoked the appointment in the first place against the receiver's conduct, and the receiver is generally protected as the court's officer if it acts in good faith and in a commercially reasonable manner.

(i) Situations Where the Court Will Appoint a Receiver and Manager

There are generally two types of cases where the court will appoint a receiver. First, a security holder who has a large commercial debt to collect under its security will most often invoke the jurisdiction under section 101 of the *Courts of Justice Act*,[71] and where applicable, under subsection 243(1) of the *Bankruptcy and Insolvency Act*. The overriding consideration in making a court appointment is the protection and preservation of the property pending judgment. The security holder wants to preserve and protect the property so that it will be able to realize upon the property in payment of the debt.[72] There are no restrictions as to the type of case wherein a receiver may be appointed to recover a commercial debt.

Second, the court may also appoint a receiver in favour of anyone who can show a sufficient interest in property of another, apart from being a security holder with a debt to collect, to preserve, and protect property as an interim preservation order pending the conclusion of the litigation. In these situations, the court has jurisdiction under section 101 of the *Courts of Justice Act*, rule 45.01 on the *Rules of Civil Procedure*, and in cases where the defendant debtor is insolvent, the court has jurisdiction under section 47 of the *Bankruptcy and Insolvency Act*.[73]

The court will appoint a receiver and manager in many different situations:

(1) in the enforcement of a mortgage on commercial property;[74]
(2) in the enforcement of a security agreement under *Personal Property Security Act* legislation;
(3) in a partnership dispute.[75] If a partnership is already dissolved, the court will usually appoint a receiver almost as a matter of course. If a partnership is still

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71 R.S.O. 1990, c. C.43, amended 1994, c. 12, section 40.

72 See, for example, *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13, 1985 CarswellOnt 404 (Ont. H.C.) where the bank's security was in jeopardy.

73 Where the creditor claims that the debtor is insolvent, the case law under sections 46, 47, and 47.1 comes into play. See Chapter 16 below.

74 *United Savings Credit Union v. F & R Brokers Inc.* (2003), 15 B.C.L.R. (4th) 347, 2003 BCSC 640 (CanLII), 2003 CarswellBC 1084 (B.C. S.C. [In Chambers]) where the court held that a mortgagee is entitled to appoint a receiver as a matter of course if the mortgagor is in default under the mortgage.

See also *Ross v. Ross Mining Ltd.* (2009), 57 C.B.R. (5th) 77, 2009 YKSC 55 (CanLII), 2009 CarswellYukon 123 (Y.T. S.C.) where the debtor company was unable to refinance the business, had no working capital, and had not been profitable for the last three years.

75 *Kady Properties v. Centennial Hotels Ltd.* (1995), 36 C.B.R. (3d) 241, 1995 CarswellOnt 946 (Ont. Gen. Div. [Commercial List]) where the court appointed a receiver to replace a general partner in a limited partnership in order to protect assets as the general partner paid itself and a related company substantial sums.

subsisting, the court will appoint a receiver if there are special grounds;[76]

(4) by an execution creditor for the appointment of an equitable receiver in aid of execution against a debtor;[77]

(5) by shareholders of a corporation which is mismanaged;[78] or in a shareholders'

Embree v. McCurdy (1907), 14 O.L.R. 325 (Ont. C.A.).

See also *Pirbhai Estate v. Pirbhai* (1988), 70 C.B.R. (N.S.) 175, 1988 CarswellBC 535, 1988 CanLII 3263 (B.C. S.C.); *Vantreight v. Vantreight* (2005), 16 C.B.R. (5th) 277, 2005 BCSC 1165 (CanLII), 2005 CarswellBC 2602 (B.C. S.C.); *Naramalta Development Corp. v. Therapy General Partner Ltd.* (2010), 67 C.B.R. (5th) 298, 2010 BCSC 590 (CanLII), 2010 CarswellBC 1072 (B.C. S.C.).

See also *Cantamar Holdings Ltd. v. Tru-View Aluminum Products* (1979), 23 O.R. (2d) 572, 31 C.B.R. (N.S.) 261, 1979 CarswellOnt 238 (Ont. H.C.);

See also *Jo Lynne Enterprises Ltd. v. Dallo Enterprises Ltd.* (2000), 11 B.L.R. (3d) 276, 2000 BCSC 1676 (CanLII), 2000 CarswellBC 2349 (B.C. S.C.) where the court held that it was inappropriate to wait out the litigation amongst the partners and appointed a receiver where there were serious allegations of misconduct and where the partnership relationship was wholly dysfunctional.

See also *Red Burrito Ltd. v. Hussain* (2007), 33 B.L.R. (4th) 205, 2007 BCSC 1277 (CanLII), 2007 CarswellBC 1936 (B.C. S.C.) where the court appointed a receiver to sell the business in a dissolution of a partnership.

See also *McKnight v. Hutchison*, 2011 BCSC 36 (CanLII), 2011 CarswellBC 41 (B.C. S.C.).

See also section 31 of the *Execution Act* where the court may appoint a receiver of a partner's share of profits.

76 See *Jo Lynne Enterprises Ltd. v. Dallo Enterprises Ltd.* (2000), 11 B.L.R. (3d) 276, 2000 BCSC 1676 (CanLII), 2000 CarswellBC 2349 (B.C. S.C.) citing *Lindley & Banks On Partnership*, 17th ed. (London: Sweet & Maxwell, 1995). But see *Koffman v. Filer (No. 1)*, [1927] 2 W.W.R. 817, [1927] 4 D.L.R. 604 (Sask. C.A.) and *Koffman v. Filer (No. 2)*, [1927] 2 W.W.R. 819, [1927] 4 D.L.R. 604 at 607 (Sask. C.A.). If the partnership is dissolved, the retiring partner no longer has any interest in the partnership assets. The court will not appoint a receiver in this case.

77 See Rule 60.02(1)(d) of the *Rules of Civil Procedure*. See Chapter 15, Special Types of Receiverships "2. Appointment of Receiver by Way of Equitable Execution under the Courts of Justice Act".

An execution creditor holding a judgment from another province may be entitled to a *Mareva* injunction and the appointment of a receiver in aid of execution if it can show the debtor is removing assets from the jurisdiction: *NEC Corp. v. Steintron International Electronics Ltd.* (1985), 52 O.R. (2d) 201, 1985 CarswellOnt 596 (Ont. H.C.).

78 See *B.C. Power Corp. v. A.G. (B.C.)* (1962), 38 W.W.R. 577, 34 D.L.R. (2d) 196, 1962 CarswellBC 71 (B.C. C.A.) where the court stated that, in a shareholders' dispute, it had power to appoint a receiver and manager for the shares or an injunction restraining the shareholders and, if there was some breakdown in the management, the court would intervene and appoint a receiver over the management.

See *Stroh v. Millers Cove Resources Inc.* (1995), 55 A.C.W.S. (3d) 895, 83 O.A.C. 202, 1995 CarswellOnt 260 (Ont. Div. Ct.) where the court initially installed an interim receiver to investigate but then, on a subsequent application, stayed the appointment pending an appeal.

See also *Drysdale v. Long* (1993), 16 O.R. (3d) 183, 1993 CarswellOnt 436, 1993 CanLII 5486 (Ont. Gen. Div.) where in an oppression remedy action and a claim for the appointment of a receiver, the plaintiff shareholders were able to transfer the action to the Commercial List. In Ontario, these types of remedies are generally heard by judges sitting on the Commercial List in Toronto, although the Commercial List does not have exclusive jurisdiction.

See *Credit Foncier Franco-Canadien v. C.S.W. Enterprises Ltd.* (1986), 54 Sask. R. 97, 1986 CarswellSask 572 (Sask. Q.B.) where the applicant shareholder of 50 percent applied for the appointment of a receiver where the managing partner was acting to the detriment of the applicant but, in view of the other available remedies including a share purchase, the court declined the appointment.

See also *Saskatchewan Housing Corp. v. Gabriel Housing Corp.* (1998), 174 Sask. R. 200, 8 C.B.R. (4th) 93, 1998 CarswellSask 771 (Sask. Q.B.) where the provincial housing corporation brought an application for the appointment of a receiver-manager of a non-profit corporation that administered publicly funded housing under the oppression remedy of *The Non-Profit Corporations Act*. In this dispute where there is a "hopeless deadlock";[79]

(6) by unsecured creditors whose remedies at law are inadequate;[80]

(7) by a purchaser who seeks to rescind a contract;[81]

(8) by a purchaser in an action for specific performance pending the determination of rights;[82]

(9) by a party to an action where it is necessary to preserve and protect the property that is in dispute pending a declaration or a judgment[83] or the resolution of the amount outstanding to the security holder;[84]

(10) to receive rents and profits under leases and to manage the property in accordance with ownership in the case where the landlord refuses or neglects to collect the rents and perform the covenants to repair and insure the property;[85]

(11) where the landlord advises the tenants to ignore a notice of attornment from the privately appointed receiver;[86]

(12) to collect receivables in the situation where they are in peril, namely more difficult to collect as time passes and where the receiver can sue in the debtor's name and complete settlements;[87]

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case, there was systemic mismanagement of the program, failure to establish appropriate policies and procedures for insuring that the housing goes to those most in need, failure to set proper rent and collect arrears, and failure to set a proper maintenance program.

See also *Piikani Nation v. Piikani Energy Corp.* (2010), 73 B.L.R. (4th) 87, 2010 ABQB 352 (CanLII), 2010 CarswellAlta 1057 (Alta. Q.B.) where the court appointed an "interim conservator" pending a full hearing on a receivership application.

79 *Bank of Nova Scotia v. Del Grande* (1994), 76 O.A.C. 31, 1994 CarswellOnt 1818, 1994 CanLII 1333 (Ont. C.A.).

80 *Derby & Co. Ltd. v. Weldon (No. 2)* (1988), [1989] 1 All E.R. 1002, [1989] 2 W.L.R. 412 (Eng. C.A.).

In *Loblaw Brands Ltd. v. Thornton*, 2009 CanLII 12803, 2009 CarswellOnt 1588 (Ont. S.C.J.), the court appointed an interim receiver where an unsecured creditor established that the defendant had defrauded it of large sums of money and that its right of recovery would be serious jeopardy if a receiver were not appointed. In this case, the purpose of the appointment was to locate, investigate, and monitor the defendant's property and to secure access to his books, records, documents, and information.

81 *Gibbs v. David* (1875), L.R. 20 Eq. 373 (Ch.).

82 *Excelsior Construction Co. Ltd. v. Hinch*, [1939] O.W.N. 285, 1939 CarswellOnt 200 (Ont. H.C.).

83 See, for example, *Tree Savers International Ltd. v. Savoy* (1991), 81 Alta. L.R. (2d) 325, [1991] 6 W.W.R. 84, 1991 ABQB 3952 (CanLII) (Alta. Q.B.), appeal allowed in part (1992), 84 Alta. L.R. (2d) 384, [1992] 2 W.W.R. 470, 87 D.L.R. (4th) 202 (Alta. C.A.) where the court appointed a receiver to protect the plaintiff's interests in a situation where the defendant, a former employee, had breached his fiduciary duty and set up a competing business with the plaintiff.

See also *King (Township) v. Rolex Eqmt. Co.* (1992), 8 O.R. (3d) 457, 90 D.L.R. (4th) 442, 1992 CarswellOnt 216 (Ont. Gen. Div.) where the court appointed a receiver at the request of a township and in the public interest, not to enforce its judgment, but to oversee the removal of waste.

84 *Boychuk v. Hunterline Trucking (B.C.) Ltd.* (1997), 122 Man. R. (2d) 114, 49 C.B.R. (3d) 95, 1997 CarswellMan 429 (Man. Q.B.).

85 *Hart and others v. Emelkirk Ltd.*, [1983] 3 All E.R. 15, [1983] 1 W.L.R. 289 (Ch. Div.) considered in *Clayhope Properties Ltd. v. Evans and another*, [1986] 2 All E.R. 795, [1986] 1 W.L.R. 1223 (C.A.).

86 *Uvalde Investment Co. v. 754223 Ontario Ltd.* (1997), 45 C.B.R. (3d) 315, 1997 CarswellOnt 365 (Ont. Gen. Div.) where the court confirmed the appointment of a private receiver, directed the mortgagor to deliver control and possession of the property, and entitled the receiver to exercise all rights and powers granted under the mortgage.

87 *Cardinal Insurance Co. v. Mendez Holdings (Canada) Ltd.* (1984), 26 A.C.W.S. (2d) 190 (Ont. H.C.).

(13) in circumstances where companies are intricately involved with companies already in receivership, the court can appoint a receiver;[88]

(14) in the context of an application under the *Companies' Creditors Arrangement Act*, the court can appoint a receiver to protect all the creditors, including the secured creditors during the process[89] or upon the restructuring being terminated;

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88 *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.*, 2007 CarswellOnt 7332, 2007 CanLII 48638 (Ont. S.C.J. [Commercial List]), referred to in *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.* (2009), 59 C.B.R. (5th) 303, 2009 CarswellOnt 6182, 2009 CanLII 55120 (Ont. S.C.J. [Commercial List]).

89 Prior to the amendments to the legislation in 1997 providing for the appointment of a monitor, section 11.7, it was common for the court to appoint an interim receiver under the *Courts of Justice Act* or similar legislation covering the administration of the courts to protect the assets pending the completion of the debtor's restructuring. The receiver in these cases was appointed to preserve and protect the assets, not to take possession and operate the business. See, for example, *First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 78 D.L.R. (4th) 585, 1991 CarswellOnt 170 (Ont. Gen. Div.); *Re Ursel Investments Ltd.* (1992), 97 Sask. R. 170, [1992] 3 W.W.R. 106, 89 D.L.R. (4th) 246 (Sask. C.A.), allowing an appeal from (1990), 2 C.B.R. (3d) 260, 1990 CarswellSask 34 (Sask. Q.B.); *Royal Bank of Canada v. Perfection Foods Ltd.* (1991), 90 Nfld. & P.E.I.R. 302, 280 A.P.R. 302, 1991 CarswellPEI 116 (P.E.I. T.D.) where the court dismissed an application to appoint a receiver.

Despite the fact that the legislation now provides for the appointment of a monitor, it is still common for the court to appoint the monitor or some other insolvency practitioner as an interim receiver during the restructuring process: see, for example, *Royal Bank v. Fracmaster Ltd.* (2000), 79 Alta. L.R. (3d) 72, [2000] 7 W.W.R. 486, 2000 CarswellAlta 187 (Alta. Q.B.). The addition of an appointment of an interim receiver adds another layer to the costs of the restructuring, even where one insolvency practitioner acts in both capacities. Alternatively, the creditors can apply to the court to give the monitor expanded powers of an interim receiver.

See *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce* (2005), 11 C.B.R. (5th) 75, 2005 SKQB 294 (CanLII), 2005 CarswellSask 442 (Sask. Q.B.). In an earlier proceeding, the major creditors applied unsuccessfully for an interim receiver, but were met with the argument that the debtor needed some time to develop a plan of reorganization: *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce* (2005), 8 C.B.R. (5th) 34, 2005 SKQB 24 (CanLII), 2005 CarswellSask 22 (Sask. Q.B.). Where a receiver is appointed under subsection 47(1) of the *Bankruptcy and Insolvency Act*, the court transfers the reorganization of the company from management to the receiver. This is a major shift of protection to the creditors. See also *Re Ravelston Corp.*, [2005] O.J. No. 1643, 2005 CanLII 13813, 2005 CarswellOnt 1619 (Ont. S.C.J. [Commercial List]) where the court granted protection to the debtor under the *CCAA*, and then proceeded to appoint an interim receiver under provincial legislation and under subsection 47(1) of the *Bankruptcy and Insolvency Act*. For all intents, the debtor lost control of its being able to restructure to the court-appointed receiver.

See also *Re SLMSoft Inc.* (2003), 4 C.B.R. (5th) 102, 2003 CarswellOnt 4402, 2003 CanLII 31612 (Ont. S.C.J.) where on an application to continue the proceedings under the *CCAA*, the debtor company failed to demonstrate that it acted in good faith and with due diligence and, as a result, the court appointed an interim receiver under the *Bankruptcy and Insolvency Act* and the provincial general legislation.

See also *Re Tiger Lease Inc.* (2006), 12 P.P.S.A.C. (3d) 62, 26 C.B.R. (5th) 7, 2006 CarswellOnt 6741 (Ont. S.C.J.) where the court appointed the monitor as the receiver under *CCAA* proceedings to protect the creditors and gave the receiver power to apply to the court for directions. Here, the receiver brought a motion for a declaration as to the validity of security interests and for an order approving a proposed distribution.

See also *Re Fracmaster Ltd.* (1999), 11 C.B.R. (4th) 204, 1999 ABQB 379 (CanLII), 1999 CarswellAlta 461 (Alta. Q.B.), appeal dismissed (1999), 11 C.B.R. (4th) 230, 1999 ABCA 178 (CanLII), 1999 CarswellAlta 539 (Alta. C.A.) where in the context of a motion to approve the sale of the debtor's business under the *Companies' Creditors Arrangement Act*, which was dismissed, the

(15) pending an appeal to the Court of Appeal from a judgment at trial.[90] If the court is satisfied that there may be insufficient assets to satisfy the judgment if the debtor were unsuccessful, the court may appoint a receiver.[91] In these situations, the court considers whether the property is in peril or wasting, whether there are irreparable damages, and the costs of the receivership if an appointment is made;[92]

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court appointed an interim receiver to make recommendations with respect to the sale of the business. Subsequently, the interim receiver brought a motion to approve the sale of the business: *Re Fracmaster Ltd.* (1999), 11 C.B.R. (4th) 217, 1999 ABQB 425 (CanLII), 1999 CarswellAlta 475 (Alta. Q.B.), appeal dismissed (1999), 11 C.B.R. (4th) 230, 1999 ABCA 178 (CanLII), 1999 CarswellAlta 539 (Alta. C.A.).

See also *Re Skydome Corp.* (1998), 16 C.B.R. (4th) 125, 1998 CarswellOnt 5914 (Ont. Gen. Div. [Commercial List]) where in the context of an application to extend an order under the *CCAA*, certain secured creditors unsuccessfully brought an application for the appointment of a receiver and for the immediate sale of the Skydome.

See also *I.F. Propco Holdings (Ontario) 36 Ltd. v. 1228851 Ontario Ltd.*, [2002] O.J. No. 1667, 2002 CarswellOnt 6613 (Ont. Div. Ct.) where there was sufficient evidence before the court to show that the secured creditor's security was in jeopardy.

Similarly, in *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622, 2000 CanLII 28202 (Alta. Q.B.), the major secured noteholders brought an application to lift the stay of proceedings and for the appointment of an interim receiver with power to negotiate the sale of the assets. The court held that the appointment of a receiver was premature and the appointment would negate the effect of the stay and thwart the purposes of the Act. The outcome may have been different had the noteholders requested the appointment of an interim receiver without such powers to negotiate a sale of the assets.

Compare the tests: under section 101 of the *Courts of Justice Act*, the test to appoint a receiver is where it is just or convenient whereas the test under subsection 47(1) of the *Bankruptcy and Insolvency Act* is whether such an order is necessary for the protection of the debtor's estate or of the interests of the secured creditor.

90 *Embree v. McCurdy* (1907), 14 O.L.R. 325 (Ont. C.A.).

See also *Bee Chemical Co. v. Plastic Paint & Finish Specialties Ltd.* (1979), 13 C.P.C. 131, 1979 CarswellOnt 468 (Ont. H.C.) where the court was satisfied that the defendants were carrying on activities that were expressly forbidden by an injunction which had been granted as part of the judgment. For related proceedings, see (1978), 9 C.P.C. 100, 1978 CarswellOnt 478 (jurisdiction to appoint a receiver pending an appeal deferred), and (1980), 15 C.P.C. 288, 1980 CarswellOnt 351 (C.A.) [leave to appeal refused 1980 CarswellOnt 1514] (where the court in dealing with an appeal from a contempt order held that affidavits based on information and belief can be adduced on an application to appoint a receiver).

91 *Walter E. Heller Financial Corp. v. American General Supply of Canada (1969) Ltd.* (1986), 56 O.R. (2d) 257, 30 D.L.R. (4th) 600, 1986 CarswellOnt 422 (Ont. C.A.) where the appellant following judgment ceased doing business in Canada and sold many of its assets. The court concluded that as the appellant was disposing of its assets in a manner different from its usual course, a receiver should be appointed but, in the circumstances of the case, the court ordered payment into court in the amount of the judgment and costs. Similarly, on a motion for security for costs, the court will not engage in extensive and speculative inquiries about the availability of assets where it is alleged that one of the parties has insufficient assets to pay the costs: *671122 Ontario Ltd. v. Canadian Tire Corp.* (1993), 15 O.R. (3d) 65, 107 D.L.R. (4th) 207, 1993 CarswellOnt 466 (Ont. C.A.).

92 See, for example, *Re Wardlaw & Whittaker*, [1970] 1 O.R. 86, 1969 CarswellOnt 957 (Ont. C.A.); *Goldex Mines Ltd. v. Revill; Probe Mines Ltd. v. Goldex Mines Ltd.* (1974), 7 O.R. (2d) 216, 54 D.L.R. (3d) 672, 1974 CarswellOnt 871 (Ont. C.A.) (refused); *Katz v. Katz et al.* (1975), 21 C.B.R. (N.S.) 226, 1975 CarswellOnt 127 (Ont. S.C.) (refused); *Katz v. Katz et al.* (1976), 22 C.B.R. (N.S.) 198, 1976 CarswellOnt 65 (appointment made); *Tim v. Lai and Harry Invs. Ltd.* (1984), 53 C.B.R. (N.S.) 80, 1984 CanLII 446, 1984 CarswellBC 575 (B.C. S.C.) (refused); *Cardinal Insurance Co. v. Mendez*

(16) in a matrimonial dispute, the court can appoint a receiver over the assets of one party for the purpose of selling them to permit an equal division of assets;[93]

(17) in the context of bankruptcy and insolvency, the court can appoint an interim receiver in several different situations including an appointment to protect the interests of security holders who have or are about to send a notice of intention to enforce their security;[94]

(18) in the administration of a deceased estate, the court can appoint a receiver where the executor has improperly managed the estate[95] or where the executor becomes bankrupt;[96] or rather than appointing a receiver, the court can appoint a monitor who would "monitor" the actions of the executors, ensure that the dispositions were consistent with the proper administration, comply with the terms of the order and otherwise be faithful to the responsibilities of an officer of the court;[97]

(19) in the context of *Securities Act* legislation, the court can appoint a receiver to protect investors;[98]

(20) in a franchise, the court can appoint a receiver where the franchisee is in breach of making payments, in breach of a security agreement and in payments regarding provincial sales tax.[99]

Section 101 of the *Courts of Justice Act* also gives the court jurisdiction to grant an injunction. However, the purpose of a court granting an injunction differs from the purpose where it can appoint a receiver. An injunction restrains a person who has already interfered or is about to interfere, whereas the appointment of a receiver restrains both the plaintiff and the defendant from interfering with the business. Furthermore, an injunction does not oblige the court to supervise the debtor's business as does the order appointing a receiver. The court may both appoint an interim

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Holdings (Canada) Ltd. et al. (1984), 26 A.C.W.S. (2d) 190 (Ont. H.C.) (appointment made). See also Chapter 15 "2. Appointment of Receiver by Way of Equitable Execution Under the Courts of Justice Act".

Rather than appoint a receiver pending the appeal, the court can order security for costs.

93 *Balic v. Balic* (2006), 59 B.C.L.R. (4th) 222, 271 D.L.R. (4th) 729, 2006 BCCA 335 (CanLII) (B.C. C.A.), leave to appeal refused (2007), 2007 CarswellBC 368 (S.C.C.). On appeal to the B.C. Court of Appeal, the appointment was reversed for different reasons.

94 As set out in Chapter 16, the court can also appoint an interim receiver pending an application to place the debtor in bankruptcy, pending an appeal from a bankruptcy order and during a formal proposal proceeding.

95 *Re Beaird* (1913), 4 O.W.N. 720, 9 D.L.R. 842, 1913 CarswellOnt 52 (Ont. H.C.).

96 *Harrold v. Wallis* (1862), 9 Gr. 443, 1862 CarswellOnt 83 (Upper Canada Ch.).

97 *Re D'Angelo Estate*, 2010 ONSC 7244 (CanLII), 2010 CarswellOnt 9868 (Ont. S.C.J.).

98 *Lindsey Estate v. Strategic Metals Corp.* (2010), 67 C.B.R. (5th) 88, 2010 ABQB 242 (CanLII), 2010 CarswellAlta 641 (Alta. Q.B.), appeal dismissed (2010), 27 Alta. L.R. (5th) 241, 69 C.B.R. (5th) 42, 2010 ABCA 191 (CanLII) (Alta. C.A.).

99 *Prime Restaurants of Canada Inc. v. 1470568 Ontario Ltd.* (2011), 73 C.B.R. (5th) 257, 2011 ONCA 9 (CanLII), 2011 CarswellOnt 126 (Ont. C.A.).

receiver and grant a pre-judgment injunction restraining the defendant and others on notice from interfering with its officer.[100]

The security holder may also invoke the court's jurisdiction if the security instrument is silent with respect to the right of the security holder to appoint a receiver. Moreover, if the security instrument provides for the appointment of a receiver but with unsatisfactory powers in the event of enforcement, the security holder may fall under the jurisdiction afforded by the *Courts of Justice Act* for the appointment of a receiver.

If the security instrument provides that the security holder may "take possession" of the debtor's property, such as in the case of real property security, or where the security holder may appoint a receiver under the instrument to take possession prior to any application for a court-appointed receiver, the security holder or its receiver may incur difficulties in enforcing the rights under the security. Such problems would include, in mortgage receiverships, causing the tenants to attorn to the receiver, effecting distress rights or other proceedings for the collection of rent, effecting repairs, renewing leases, and operating the business. In other business receiverships, the security holder or receiver may confront utilities, Crown liens, and execution creditors while in possession of the debtor's property. In order to obtain some semblance of order, the security holder may bring a motion to the court for a court appointment or for confirmation of a private receiver with attendant powers. The court must be satisfied that there is a valid reason to appoint a court-appointed

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100 See, for example, *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 1981 CarswellOnt 706 (Ont. S.C.), where the court appointed a receiver with the power to sell and subsequently granted an injunction restraining the debtor from disposing of its assets except in the ordinary course of business. Compare, however, *Confederation Life Assur. Co. v. 511666 Ont. Ltd. et al.* (1984), 53 C.B.R. (N.S.) 185, 1984 CarswellOnt 182 (Ont. H.C.), leave to appeal granted where the court dismissed an application to appoint an interim receiver to receive the rents and profits in a mortgage action. In this case, the mortgagee could not demonstrate that it had a strong *prima facie* case and that the security was at risk so as to come within the test adopted in cases of *Mareva* injunctions [see *Mareva Compania Naviera S.A. v. Internat. Bulk Carriers S.A.* (1975), [1980] 1 All E.R. 213, [1975] 2 Lloyd's Rep. 509 (Eng. C.A.)] and as subsequently developed to worldwide injunctions [*Derby & Co. Ltd. v. Weldon (No. 2)*, [1989] 1 All E.R. 1002; [1989] 2 W.L.R. 412 (Eng. C.A.); for related proceedings where the court held that it has the power to order the transfer of receivership assets from one jurisdiction to another, see *Derby & Co. Ltd. v. Weldon (No. 6)*, [1990] 3 All E.R. 263 (Eng. C.A.)]. In the author's view, this case deprives the mortgagee of its rights under the security and places it in a situation no better than an unsecured creditor. If the security is not in dispute, the security holder should not have to meet the test of *Mareva* injunctions when it seeks the court appointment of a receiver.

The considerations in granting a preservation order are identical to those in granting an interlocutory injunction, namely, establishing a *prima facie* case; deciding whether the applicant would suffer irreparable harm if an injunction is not granted and determining the balance of convenience: *BMW-Bennett & Wright Contractors Ltd. v. BWV Investments Ltd.* (1991), 95 Sask. R. 211, 7 C.B.R. (3d) 216, 1991 CarswellSask 42 (Sask. Q.B.).

In *Bernard v. Valentini* (1978), 18 O.R. (2d) 656, 83 D.L.R. (3d) 440, 1978 CarswellOnt 118 (Ont. S.C.), the court granted an injunction in a shareholders' dispute, but declined to appoint a receiver on the basis that it was an expensive process which, in the circumstances of the case, it was neither necessary nor essential for the protection of the plaintiffs or for the company.

See also *1754765 Ontario Inc. v. 2069380 Ontario Inc.* (2008), 49 C.B.R. (5th) 214, 2008 CarswellOnt 7708 (Ont. S.C.J.) where a vendor in enforcing security against its purchaser obtained both an appointment of an interim receiver and an injunction.

receiver in place of the private appointment such as in the case where a foreign court is more likely to recognize a court-appointed receiver rather than one appointed privately[101] or that the privately appointed receiver could not properly fulfill its functions as a receiver.[102]

Alternatively, the security holder may appoint a private receiver and then apply to the court for an order confirming the appointment and an order requiring the debtor to deliver up the property to the receiver. Through this method, the security holder obtains the benefit of an out of court receivership while at the same time, it obtains the necessary orders required for the privately appointed receiver to administer the estate.[103]

(ii) Situations Where the Court Will Refuse to Appoint a Receiver and Manager

The court retains its inherent jurisdiction in exercising its discretion in deciding whether to appoint a receiver and manager. As indicated above, the court considers whether the assets require protection and preservation pending the trial between the parties. While the security holder may have *prima facie* grounds for the appointment of a receiver and manager, the court has the discretion to refuse the order if there is not sufficient prejudice, although this should not be a significant factor if the security holder is entitled to payment and enforcement of the security.

The court will refuse an appointment in the following situations:

(1) in the absence of strong evidence that the creditor's right to recovery is in serious jeopardy, that there is a risk that the assets will be removed before judgment, the court will not grant such extraordinary relief;[104]

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101 In *Ontario Development Corp. v. Ralph Nicholas Enterprises Ltd.* (1985), 57 C.B.R. (N.S.) 186, 1985 CarswellOnt 206 (Ont. S.C.), the security holder appointed a private receiver who was then temporarily ousted by an order giving possession back to the debtor. After reconsideration, the court appointed a receiver as the debtor was in a desperate financial condition and the security in jeopardy.

102 In *Export Development Canada v. IFM Film Associates Inc.* (2003), 242 Sask. R. 277, 46 C.B.R. (4th) 254, 2003 SKQB 469 (CanLII) (Sask. Q.B.), the court appointed a receiver under a security agreement where the debtor's assets were located in California as an order appointing a receiver would be recognized and respected there.

103 *Ontario Hydro v. Endacom 2000 Inc.* (1995), 32 C.B.R. (3d) 185, 2003 SKQB 469 (CanLII) (Ont. Gen. Div.); *Uvalde Investment Co. v. 754223 Ontario Ltd.* (1997), 45 C.B.R. (3d) 315, 1997 CarswellOnt 365 (Ont. Gen. Div.) where the mortgagor refused to co-operate with the private receiver.

104 *Ryder Truck Rental Can. Ltd. v. 568907 Ont. Ltd. (Trustee)* (1987), 16 C.P.C. (2d) 130, 1987 CarswellOnt 383 (Ont. H.C.) where the creditor moved for the appointment of a receiver to collect the debtor's receivables as the debtor was in the process of winding down its affairs; *997724 Ontario Inc. v. 407430 Ontario Ltd.* (1994), 29 C.B.R. (3d) 119, 8 P.P.S.A.C. (2d) 257, 1994 CarswellOnt 323 (Ont. Gen. Div.); *Loblaw Brands Ltd. v. Thornton*, 2009 CanLII 12803, 2009 CarswellOnt 1588 (Ont. S.C.J.).

See also *North American Trust Co. v. Fontana Place Partnership* (1993), 147 A.R. 170, 1993 CarswellAlta 725 (Alta. Master) where the court refused an application as the only evidence was that the building did not produce sufficient revenue to pay all the expenses including taxes and there were some vacancies.

In *Gam-X Inspections (1970) Ltd. v. Cantech Inspections Ltd.*, 1993 CarswellBC 2624, 44 A.C.W.S. (3d) 882 (B.C. S.C.), on a second application for an appointment of a receiver, the applicant failed to show evidence of a significant change in the defendant's financial statements.