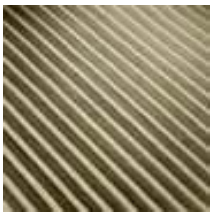

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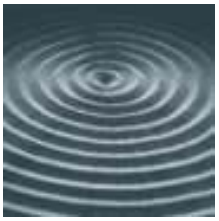

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APPOINTING A RECEIVER AND SEIZING EQUIPMENT

By Jeffrey C. Carhart

December 5, 2005

Ontario Bar Association Seminar
Litigation Under the PPSA
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APPOINTING A RECEIVER AND SEIZING EQUIPMENT

By Jeffrey C. Carhart
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A. DIFFERENCES BETWEEN A COURT AND PRIVATE RECEIVERSHIP

Over the last twenty years or so there has been a major shift, in Ontario, from private receiverships to court based receiverships. The change has been so significant that while in the 1980's one seldom saw court appointed receivers, now it is private receivers who are rarely seen.

Why has this shift occurred? What benefits do receivers and the creditors who seek to appoint them derive from the court based approach as opposed to the private route? A list of the potential benefits of a court appointed receivership over a private receivership includes the following:

1. With a court order, certain provisions can be included which help to stabilize the debtor's situation and thereby preserve the opportunity to operate the debtor's business – and perhaps also sell it – as a going concern. Those types of provisions can include the following:

   (a) A provision imposing a stay of proceedings by other creditors against the debtor or the receiver without either the consent of the receiver or leave of the court (on specified notice).

   (b) A provision mandating that people who supplied product to the debtor prior to the order must continue to provide that supply after the order.

   (c) A provision approving (customized terms relating to) "debtor in possession" ("DIP") financing during the receivership. In that regard, for example, the court order might establish a first ranking charge in favour of the DIP financier for funds advanced during the receivership.

2. When it comes to the sale process itself, the receivership order could dispense with the need to send out "notices of sale" under various governing legislation – such as the *Personal Property Security Act*, R.S.O. 1990, c. P.10 and the *Mortgages Act*, R.S.O. 1990, c. M.40.

3. If a purchaser can be located, then the court appointed receivership mechanism can provide for sale approval orders and vesting orders. In that regard:

   (a) A sale approval order can reduce or eliminate the risk of litigation by subordinate creditors or indeed the "debtor itself" based on allegations of an improvident sale.

* I wish to acknowledge, with appreciation, the assistance of my associate Margaret Sims in the preparation of this paper.

(b) A vesting order can address the needs of the purchaser to acquire "clean title" on a speedy basis. In particular, where there may be a dispute over entitlement to proceeds from the sale of certain assets which are dissipating in value while the dispute rages, such a vesting order can effectively allow for the substitution of money for the assets, such that the competing creditors can fight over the proceeds of the sale of the assets instead of the assets themselves.

4. Orders appointing a receiver may provide for various customized charges in favour of, for example, the receiver itself with respect to its fees and disbursements and other parties.

5. A court appointed receiver may be more readily recognized in other – particularly U.S. – jurisdictions than would be a receiver appointed privately. In particular, Section 304 of the United States *Bankruptcy Code*[1] specifically contemplates recognition of "foreign representatives" within a "foreign proceeding." A receiver appointed by an Ontario Superior Court of Justice will more easily be able to attain such recognition in the U.S. than a privately appointed receiver.

6. Generally speaking, American creditors have become much more involved in Canadian insolvency proceedings and it is equally true on a general level that American creditors are simply more used to having liquidation and insolvency proceedings conducted through a court based process.

7. Depending on the industry within which the debtor carries on business, it may be possible to craft customized provisions for the order so as to address particular concerns with respect to that industry.

Urgent Receivership Appointment and Sale Approval Orders

By definition, insolvency files almost always move rapidly. The value of the assets and money available to fund the operations always seems to be diminishing.

Within the framework of that reality, however, it is always important to consider carefully how matters are "brought before the court."

Sometimes one sees motions whereby the court is asked, on the same day, to do two major things: (i) appoint a receiver; and (ii) approve a sale by that receiver.

Of course, normally the receiver would be appointed *first* and given powers to go out and market the assets of the debtor company for sale and then *later* come back and ask the court for approval of a sale which reflects the result of those marketing efforts.

However, sometimes it is appropriate to compress that process and two recent cases may be noted which help identify the parameters of when the court can be expected to allow the process to be shortened and when it will not do so.

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[1] Title 11, Chapter 3, Subchapter 1.

Laurentian Bank of Canada v. World Vintners Corp.

This 2002 case is reported at 35 C.B.R. (4th) 144.

World Vintners Corp. manufactured kits to make beer and sold these products through a chain of over 100 stores – most of which were franchised but over 20 of which were corporate owned. The company was in default with its bank "since at least March 22, 2002."

On July 19, 2002, the bank applied to have an interim receiver appointed and to have the assets sold to a new company ("Newco"), apparently owned by "the existing management" of World Vintners Corp. The matter was brought forward to the court on no more than two days' notice and on limited service.

The evidence before the court at the hearing included the following:

1. On behalf of the bank, and without yet having been appointed as a receiver, of course, KPMG had received expressions of interest in the World Vintners Corp.'s assets from "seven parties" before the hearing and Newco was "the only party to come forward with an offer."

2. Several parties who were able to get before the court at the hearing lead evidence of various litigation and grievances "against Vintners existing management."

3. The purchase price under the Newco offer was about $3.3 million, with $2.7 million being paid in cash.

4. The bank debt was about $2.5 million.

5. Mr. Justice Cumming declined to approve the sale on July 19 – although he did appoint KPMG as an interim receiver.

In declining to approve the sale, Mr. Justice Cumming held, in part, as follows:

> The bank could have appointed KPMG as an Interim Receiver under its GSA in March or April. Instead it has observed a continually, rapidly deteriorating financial situation over three or four months and only at the point in time when Vintners is completely out of money and there is a crisis asks the Court to approve a sale to existing management on two days notice.
>
> …
>
> The process for the sale of a business by an Interim Receiver must be seen to be fair and commercially reasonable. The existing process does not meet that criterion.
>
> …

> This court does not agree that the process followed supports the statement that there can be any confidence that the purchase price offered by Newco is fair and was arrived at in a commercially reasonable manner. I say this because the only path to confidence in a 'going-concern' sale is through a competitive bidding process in the marketplace with a reasonable opportunity for informed arms-length purchasers to bid.

All Fresh Beverages Canada Corp.

The *World Vintners Corp.* case may be contrasted with the *All Fresh Beverages Canada Corp.* case in 2004. In that case, All Fresh Beverages Canada Corp. and Sun Like Juice Limited applied to the Ontario Superior Court of Justice on very short notice to have an interim receiver appointed and to "immediately" approve and close an agreement of purchase and sale to sell its business pursuant to a vesting order.

In that case, the affidavit material filed in support of the application included evidence with respect to the following matters:

1. All Fresh had "been unable to meet its debt obligations to its lenders" for a period of "four years since its incorporation."

2. All Fresh's management had been "exploring potential options and strategic transactions for over seven months."

3. The corporate finance group of the proposed interim receiver had been retained to assist in the sale and/or restructuring efforts for many months, including in respect of the negotiation of the agreement which the court was being asked to approve.

4. All Fresh had run out of cash on hand "to discharge its day-to-day liabilities" and "would likely be forced very shortly to shut down operations" absent the completion of that transaction.

5. The transaction which the court was being asked to approve would pay out the senior lenders but would result in a shortfall to subordinate lenders of more than $30 million.

The court approved the sale in the *All Fresh* case.

It may also be noted that even in the *World Vintners* case, the sale to the Newco *was* eventually approved after the court had allowed a limited further marketing effort to be pursued by the interim receiver.

In short, one should be very careful in bringing "emergency" sale approval orders to the court where the court is being asked to both appoint a receiver and approve the sale on the same day or virtually the same day. [2] In order to support such an effort, at a bare minimum, it seems

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[2] One could argue that the distinctions between the *World Vintners* and *All Fresh Beverages* cases were pretty fine. Among other things, as noted, ultimately, the sale was approved in the *World Vintners* case, as it was in the *All Fresh* case.

necessary to be able to show that a detailed, comprehensive marketing effort has already been undertaken which has resulted in finding the best possible purchaser and fully negotiating the best possible terms of the sale which the court is being asked to approve and which is therefore demonstrably the best possible transaction in the circumstances and that, further, there is genuine urgency (such as an immediate cash crisis) which justifies asking the court to act immediately.

Interestingly, these issues of urgency tie into the issues of relying on vesting orders to close a transaction during the appeal period with respect to such vesting orders – which is discussed later in this paper (in section D).

Reviewing Sales by Receivers

My personal preference is to try to avoid situations where a court is asked to both appoint a receiver and approve a sale by such a receiver at the same time on a "rush" basis. I appreciate that there are a number of factors which may "push" the process away from my preferred approach.[3] However, one factor which I would suggest does support a more traditional approach (of putting the receiver in place and then having the receiver run a classic sale process before subsequently going back to seek the court's approval of the sale to a buyer who has been identified by the receiver as a result of that process) is that there is a strong line of authority in Canada to the effect that the court will seldom rule against the receiver's recommendations under those conditions and that, further, parties who are unsuccessful bidders in such sales proceedings do not have standing to oppose a sale approval motion to appeal a vesting order issued by the court in such a sales process. In that regard, among other cases, I would note the following three major decisions: *Crown Trust v Rosenberg* (1986), 39 D.L.R. (4th) 526 (Ontario H.C.); *Royal Bank v Soundair* (1991), 4 O.R. (3d) 1 (Ont. C.A.); and *Skyepharma plc v. Hyal Pharmaceutical Corporation* (2000), 47 O.R. (3d) 234 (Ont. C.A.).

In the *Crown Trust* case, the court held that the receiver acted reasonably in recommending a lower offer that was not characterized by "troublesome concerns" which attached to a higher offer (because, for example, the higher offer was contingent on certain financing conditions which had not yet been satisfied). In particular, Anderson J. held as follows:[4]

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.
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> . . .
>
> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to

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[3] Those considerations include the concern about a receiver being held to have the status of an "employer" of the debtor companies employees. See the discussion of the *TCT Logistics* case, ahead.

[4] (1986) 39 D.L.R. (4th) 526 at 548 and 550

> the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In the *Soundair* case, Galligan J.A. held, among other things, that:[5]

> It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

Galligan J.A. went on to state:[6]

> …I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.
>
> The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported.

In the *Hyal Pharmaceutical* case, at the trial level Mr. Justice Farley endorsed the general proposition in *Crown Trust Co. v Rosenberg*; Mr. Justice Farley held that the court should place "a great deal of confidence in a receiver's expert business judgement."[7] Mr. Justice Farley went on to hold in *Hyal* that the court should be particularly wary of replacing its own judgment for that of the receiver where the assets involved are unusual and the process of sale is complex.

In the Court of Appeal in the *Hyal* case, Mr. Justice O'Connor confirmed Mr. Justice Farley's decision that an unsuccessful bidder does not have standing to oppose a sale approval motion or to appeal a vesting order issued by the court, on the grounds that it does not have any interest in the proceeds of the sale. In other words, the court-appointed receiver owes the unsuccessful bidder no duty beyond due consideration of its offer and is specifically empowered to reject any offer it does not consider acceptable, as long as, in doing so, the receiver meets the standard of reasonableness, prudence and fairness at arriving at its decision.

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[5] (1991) 4 O.R. (3d) 1 at 13

[6] (1991) 4 O.R. (3d) 1 at 19

[7] (1999), 12 C.B.R. (4th) 87 at 89

I note that, of course, as Mr. Justice Galligan referred to in the passage from the *Soundair* case quoted above, the classic Canadian approach is to avoid some kind of "auction on the court house steps" or a "second kick at the can" by bidders who are beaten out by the successful bidder in a tender process properly run by a court-appointed receiver. The classic American approach is different and is built around the concept of a "stalking horse bid" which emerges from an initial process designed to call for bids. Once such a stalking horse bid is approved by the Court, then the very essence of that American approach is to hold that stalking horse bid up as a target which other bidders can later try to top at a regulated auction process. This stalking horse approach is now being seen in Canada with more frequency. One prominent Canadian case that used this approach was the *Laura Secord* case in 2004. The Canadian operations of Laura Secord were owned by an U.S. company called Archibald Candy which was in a Chapter 11 proceeding based in Chicago. The American stakeholders in the Chicago proceeding were most familiar with the stalking horse sale approach and, working with a cross-border protocol between the Ontario and Chicago insolvency courts, that was the sale process that was adopted in order to market and sell the Laura Secord assets in Canada.

Employee Issues (The *TCT Logistics* case)

The *TCT Logistics* case – which began in January, 2002 - involved the court-appointed receivership of a company, based in Calgary, with wide-spread operations across North America in a number of industries, including trucking, logistics and warehousing.

The original order of the Ontario Superior Court of Justice appointing the receiver was made on the application of GMAC Commercial Credit Corp. of Canada, the main secured creditor, and contained what was then a typical clause indicating that the receiver was insulated from any claims based on an allegation that the receiver was a successor employer (and thereby, among other things, bound by the collective agreement).

In litigation arising in connection with the sale of the warehousing business, Mr. Justice Ground essentially upheld the validity of that clause, although he amended it to provide that "the receiver could not be deemed as a successor employer so long as it acted only as a realizer of the assets of the debtor and not as an employer operating the business."[8]

Somewhat to the surprise of the insolvency bar, Madam Justice Feldman of the Ontario Court of Appeal held that such orders could not validly be made. She held that, in the right circumstances, the Ontario Labour Relations Board continues to have jurisdiction to determine the matter. However, Madam Justice Feldman also held that the Ontario Superior Court (the "bankruptcy Court"[9]) retains a "gatekeeper function"[10] through its jurisdiction to grant leave or to deny leave to a union to bring an application before the Ontario Labour Relations Board to determine the issue. In that regard, a noteworthy comment that she made in her decision is as follows:

> If the receiver can show that by operating the business for a short time it can maximize the value of the business to the benefit of the creditors and, at the same

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[8] *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc.* [2003] O.J. NO. 5761 (Ont. C.A.)

[9] *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc.* (2005) 71 O.R. (3d) 54 at 69

[10] *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc.* (2005) 71 O.R. (3d) 54 at 69

> time, thereby save as many jobs as possible, it will make sense for the court [i.e. the bankruptcy court] to deny leave, particularly where the OLRB will, if appropriate determine that the purchaser is a successor employer, obliged to carry out the collective agreement.[11]

Based on that proposition, it does seem possible for a court-appointed receiver to avoid successor employer liability in "the right case." Of course, however, the frustrating factor at this point, is the level of uncertainty which Madam Justice Feldman's decision has given rise to.

Madam Justice Feldman's decision goes on to state that the Superior Court "will be positioned to assist"[12] if a consensual resolution cannot be reached between the receiver and the employees in advance. Of course, time is always the enemy in these types of situations and, realistically, there may not be enough time to pursue an agreement with the union in advance and then to also pursue some kind of court-supervised agreement/order that would deal with the matter.

A decision by the Supreme Court of Canada on the *TCT Logistics* case is pending as of the date of the writing of this paper.

Costs

Of course, one aspect of court appointed receiverships which is not as beneficial as a private receivership is the issue of the costs associated with the process. Generally speaking, it can be expected that a private receivership will be significantly less costly than a court appointed one.

Therefore, one always has to bear that issue in mind and ensure that despite all of the factors which tend to "push" the selection of the process away from private receiverships toward court driven ones, there must be enough value at issue to justify the additional costs associated with a court appointed receivership.

It is noteworthy that section 14.06(1.2) of the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, Chap.B-3, assists in containing the receivership costs to the period post-appointment. This provision provides that a receiver of an insolvent person, whether appointed under the *Bankruptcy and Insolvency Act* or the *Courts of Justice Act*, R.S.O. 1990, c. C-43 or instrument appointed, is not liable for pre-appointment liabilities of the insolvent person even when it is carrying on the business or continuing to employ the debtor's employees. The definition of receiver for the purpose of section 14.06(1.2) is set out in section 243 of the *Bankruptcy and Insolvency Act*. The breadth of this definition means that a "receiver," for the purposes of this section, includes private receivers and court appointed receiver if appointed to take possession of all or substantially all of the inventory, the accounts receivable, or the other property of an insolvent person. This definition means that even if the appointee is called a "monitor" or under another moniker it may apply to limit liability for pre-receivership liabilities. In *Re Colour Box Limited* (1995), 21 O.R. (3d) 746, 29 C.B.R. (3d) 262, Ontario Court (General Division), Lissaman J. confirmed that the definition of "receiver" applied to any person who takes possession or control of the property of the insolvent person or bankrupt under a security

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[11] *GMAC Commercial Corp. v. T.C.T. Logistics Inc.* (2005), 71 O.R. (3d) 54 at 77

[12] *GMAC Commercial Corp. v. T.C.T. Logistics Inc.* (2005), 71 O.R. (3d) 54 at 77

agreement or court order and in that case found that the "receiver" was required to comply with certain requirements of the *Bankruptcy and Insolvency Act*.

B. SECURED CREDITOR TAKING STEPS TO OBTAIN POSSESSION OF COLLATERAL

There are three main ways a secured creditor can take possession of collateral. These are:

1. The secured creditor "repossessing" or otherwise taking possession of collateral itself.

2. The secured creditor making a private appointment of a receiver under its security agreement.

3. The secured creditor applying to court for the appointment of a receiver under statute.

Seizing Collateral

If the collateral at issue is limited to a discrete number of specific items of collateral, then there is likely no need for the creditor to go to the expense of appointing a receiver. The creditor or its representative can physically seize the collateral. Typically, in such circumstances, a secured creditor will use the services of a bailiff to physically seize the collateral. Some particular concerns related to duties in the safeguarding and sale of the collateral are noted below.

Taking Steps to Appoint a Private Receiver

If the right to appoint a receiver is contained in the security agreement, then the private appointment of a receiver is a relatively simple process of the creditor executing an instrument declaring that it holds security pursuant to a security agreement, the debtor is in default of its obligations and appointing the receiver or receiver manager of the specified collateral (which may be the assets and undertaking) of the debtor. This document is then delivered to the receiver who delivers it to the debtor as proof of its authority to act.

Prior to executing the appointment, the secured creditor will need to select the receiver and entered into its retainer and indemnity agreement with the receiver. Further, the secured party should be careful to ensure that the debtor really is in default since it may be exposed to liability if it wrongfully appointed a receiver.

Under section 244(1) of the federal *Bankruptcy and Insolvency Act*, a secured creditor must provide a 10 day written notice to an insolvent person[13] of their intention to enforce security on all or substantially all of the inventory, accounts receivable or other property of the insolvent person. Unless the insolvent person consents, the secured creditor must wait until the expiry of that 10 day period before enforcing such security, including by way of the appointment of a

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[13] Note that it is theoretically possible that a debtor would be in default under the terms of a private credit agreement – thereby giving the secured creditor the right to enforce its security by appointing a receiver (after expiry of the 10 day notice period provided for in section 244 of the *Bankruptcy and Insolvency Act)* – and yet not be "insolvent" as that term is otherwise defined in the *Bankruptcy and Insolvency Act*.

receiver. As a result, the secured creditor will need to determine if the debtor will consent to the earlier enforcement of the security, or, absent such consent, whether there is a concern that steps are needed to protect the property or the secured creditor's interests after delivery of the 10 day notice. If such a protective step appears to be warranted, then the secured creditor may wish to apply for a court appointed receiver under section 47 of the *Bankruptcy and Insolvency Act*; such an appointment under section 47 is discussed below.[14] However, in many instances, the debtor will consent to the earlier enforcement of the security and the appointment of the receiver. In cases involving a corporate debtor, the officers and directors may have personally guaranteed the obligation and may wish to facilitate its orderly repayment to limit their liability.

Taking Steps to Apply for Court Appointment of a Receiver

In Ontario, the main statutes which give the Court the jurisdiction to appoint a receiver are the *Bankruptcy and Insolvency Act*, and the Ontario *Courts of Justice Act*. Under each statute the general concept is that the receiver is in place on an interim or interlocutory basis to take possession of all or part of the debtor's property. The main steps to consider with respect to the appointment of such an "interim" receiver, as discussed in further detail below, are:

1. Determine the statutory provision or provisions that you will apply under.

2. Determine whether you will proceed by way of application or motion in an action.

3. Select a receiver and enter into appropriate indemnity arrangements.

4. Determine who you will and must give notice to.

5. Determine what is required in the supporting materials including a proposed form of Appointment Order.

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[14] I refer to two articles which I have written, or co-written, concerning the scope and functioning of interim receiverships:

Interim Receivers Under the Bankruptcy and Insolvency Act (1999), 9 C.B.R. (4th) 89

Case Comment: GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc. (2004), 45 C.B.R. (4th) 157

As discussed in those articles, the amendments to section 47 of the *Bankruptcy and Insolvency Act* which were introduced in the early 1990s, give the court wide discretion in setting the terms of an order appointing an interim receiver and serve to expand the potential scope of such orders significantly from the "mere watchdog" role that interim receivers under the old *Bankruptcy Act* traditionally performed. Subsections 47(2) and (3) of the *Bankruptcy and Insolvency Act* now allow the court discretion to direct an interim receiver to "…take possession of all…of the debtor's property…[and] exercise such control over that property, and over the debtor's business…[and] to take such other action as the court considers advisable" if the court is satisfied that it is necessary to protect either the debtor's estate or the interests of the secured creditor seeking the appointment.

Certainly, in Ontario, the courts had often exercised that discretion to make numerous orders appointing interim receivers with very broad authority to manage, in effect, all aspects of the debtor's business and to market the business for sale. That approach seems well grounded in the statutory provisions of the *Bankruptcy and Insolvency Act*, although, as discussed in these articles and, as discussed above in this article, in the *TCT Logistics* case, this broad approach has been questioned.

6. Consider issues associated with the receiver taking possession of the property subject to the Appointment Order and providing notice to parties after Appointment Order has been made.

The Need to Determine the Statutory Provision(s) that you will Apply Under.

The first step for the party wishing to apply to the Court for the appointment of a receiver is to determine what provision it will apply under. This decision is largely governed by the facts such that the application will be made as set out in the table below.

Legislative Provision	**Facts**
Section 46 of the *Bankruptcy and Insolvency Act*	Petition for Receiving Order filed but not yet determined.
Section 47 of the *Bankruptcy and Insolvency Act*	Secured Creditor has or is imminently intending to file a section 244(1) notice to enforce security over all or substantially all of property of an insolvent person.
Section 47.1 of the *Bankruptcy and Insolvency Act*	Insolvent Person has filed Notice of Intention to make a proposal to creditors or has filed a proposal to creditors under the *Bankruptcy and Insolvency Act*.
Section 271(3) of the *Bankruptcy and Insolvency Act*	Application by foreign representative for appointment of an interim receiver where there is a foreign proceeding commenced with respect to bankruptcy of to effect a scheme of arrangement with respect to a debtor.
Section 101 of the *Courts of Justice Act*	Other circumstances exist such that it is "just and convenient" for a receiver or receiver and manager to be appointed by interlocutory order.

Bankruptcy and Insolvency Act

Sections 46, 47 and 47.1 of the *Bankruptcy and Insolvency Act* provide for the appointment of an interim receiver in three different situations facing a creditor: (1) the debtor is being petitioned into bankruptcy but no receiving order has yet been made, (2) the debtor is subject to the creditor's security and where a section 244(1) notice has been sent or is about to be sent, and (3) the debtor has filed a notice of intention to make a proposal to creditors or the debtor has filed a proposal. Section 273 of the *Bankruptcy and Insolvency Act* concerns situations where a foreign bankruptcy or restructuring proceeding has been initiated.

Section 46 applies to the appointment of an interim receiver to protect the estate of a debtor after a petition is filed and before a receiving order is made.[15] The appointment of a receiver in such a situation allows conservatory and protective steps to be taken prior to a trustee in bankruptcy being appointed under a receiving order. Section 46 allows either an unsecured creditor or a secured creditor to seek an appointment of an interim receiver to protect the estate. The appointment can be sought immediately following filing to bankruptcy petition.

As noted above, a secured creditor must provide a (10 day) section 244(1) *Bankruptcy and Insolvency Act* notice to an insolvent person of the creditor's intention to enforce security on all or substantially all of the inventory, accounts receivable or other property of the insolvent person and, unless the insolvent person consents, the secured creditor must wait until the expiry of that 10 day period before enforcing such security. Section 47 provides for a secured creditor to apply for the appointment of an interim receiver as a protective step to protect the property or the interests of the secured creditor once the notice has been sent or is imminent.[16] Section 47.1 provides for the appointment of an interim receiver where the insolvent person is subject to the

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[15] Section 46 of the BIA provides, as follows:

> Appointment of interim receiver
>
> 46. (1) The court may, if it is shown to be necessary for the protection of the estate of a debtor, at any time after the filing of an application for a bankruptcy order and before a bankruptcy order is made, appoint a licensed trustee as interim receiver of the property or any part of the property of the debtor and direct the interim receiver to take immediate possession of the property or any part of it on an undertaking being given by the applicant that the court may impose with respect to interference with the debtor's legal rights and with respect to damages in the event of the application being dismissed.
>
> Powers of interim receiver
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> (2) The interim receiver appointed under subsection (1) may, under the direction of the court, take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value and exercise such control over the business of the debtor as the court deems advisable, but the interim receiver shall not unduly interfere with the debtor in the carrying on of his business except as may be necessary for conservatory purposes or to comply with the order of the court.

[16] Section 47 of the BIA provides:

> Appointment of interim receiver
>
> 47. (1) Where the court is satisfied that a notice is about to be sent or has been sent under subsection 244(1), the court may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates, for such term as the court may determine.
>
> Directions to interim receiver
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> (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (*a*) take possession of all or part of the debtor's property mentioned in the appointment;
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> (*b*) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (*c*) take such other action as the court considers advisable.
>
> When appointment may be made
>
> (3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

proposal to creditor process under the *Bankruptcy and Insolvency Act*.[17]

Section 271 of the *Bankruptcy and Insolvency Act* provides for applications by foreign representatives for an interim receiver to be appointed as a protective measure over the debtor's Canadian assets. A foreign bankruptcy or reorganization proceeding with respect to the debtor needs to be demonstrated in such situations.

***Courts of Justice Act* (Ontario)**

An appointment order can be sought under the *Courts of Justice Act* if the sections of the *Bankruptcy and Insolvency Act* are not applicable but the circumstances exist such that a receiver is necessary to protect the interests of a creditor or creditors. Prior to making an appointment under section 101 of the *Courts of Justice Act*, the Court will need to be satisfied that it appear "just and convenient to do so". Section 101 of the *Courts of Justice Act* provides:

> 101(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 interlocutory order, where it appears to a judge of the court to be just and convenient to do so.
>
> (2) An order under subsection (1) may include such terms as are considered just.

(*a*) the debtor's estate; or

(*b*) the interests of the creditor who sent the notice under subsection 244(1).

[17] Section 47.1 of the BIA provides:

> 47.1 (1) Where a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time thereafter, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property, for such term as the court may determine,
>
> (*a*) the trustee under the notice of intention or proposal;
>
> (*b*) another trustee; or
>
> (*c*) the trustee under the notice of intention or proposal and another trustee jointly.
>
> Directions to interim receiver
>
> (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (*a*) carry out the duties set out in subsection 50(10) or 50.4(7), in substitution for the trustee referred to in that subsection or jointly with that trustee;
>
> (*b*) take possession of all or part of the debtor's property mentioned in the order of the court;
>
> (*c*) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (*d*) take such other action as the court considers advisable.
>
> When appointment may be made
>
> (3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of
>
> (*a*) the debtor's estate; or
>
> (*b*) the interests of one or more creditors, or of the creditors generally.

The Need to Determine whether you will Proceed by way of Application or Motion in an Action.

The name "interim" receiver suggests that the appointment is an interim protective step in a proceeding which permits the property to be safeguarded and proceeds received by a court appointed officer. The later pay-out of the proceeds from the property is, generally speaking, a subsequent step in that proceeding. In short, it is necessary to consider the nature of the proceeding founding the seeking of the appointment of a receiver. In that regard, the following general considerations should be kept in mind:

Legislative Provision	**Process**
Section 46 of the *Bankruptcy and Insolvency Act* (Petition for Receiving Order has been filed.)	Application for appointment of interim receiver in Petition proceeding. (see Rule 77, *Bankruptcy and Insolvency Act* Rules).
Section 47 of the *Bankruptcy and Insolvency Act* (s.244(1) notice sent or imminent.)	Application for appointment of interim receiver. (see Rule 77, *Bankruptcy and Insolvency Act* Rules).
Section 47.1 of the *Bankruptcy and Insolvency Act* (NOI or Proposal has been filed.)	Application for appointment of interim receiver in NOI proceeding or in originating application. (see Rule 77, *Bankruptcy and Insolvency Act* Rules).
Section 271(3) of the *Bankruptcy and Insolvency Act*	Application for appointment of interim receiver by way of originating application. (see Rule 77, *Bankruptcy and Insolvency Act* Rules).
Section 101 of the *Courts of Justice Act*	Sometimes applications are brought for the appointment of a receiver, as the only relief sought. However, section 101 sets out that this relief is interlocutory relief and the more traditional approach is to have a proceeding in place (either an application or an action) against the insolvent person with respect to which the appointment is an interim step.

Although there has been a blurring of the distinction between the *Courts of Justice Act* approach and the *Bankruptcy and Insolvency Act* approach in recent years, the traditional approach is that the *Courts of Justice Act* appointment is sought in a motion within an action for recovery against the insolvent person and the *Bankruptcy and Insolvency Act* appointment is sought as a step in the *Bankruptcy and Insolvency Act* proceeding regarding the insolvent person. One wrinkle is that in the case of a motion to appoint an interim receiver under section 47 under the *Bankruptcy*

and Insolvency Act, there is likely no *Bankruptcy and Insolvency Act* "proceeding" in place and, as a result, such a proceeding is generally initiated by an application to the Court.

Common issues arise under the current practice of seeking appointments by way of application under section 47 of the *Bankruptcy and Insolvency Act* and under the *Courts of Justice Act*. Often these application are not founded by a proceeding to enforce the underlying security even though the appointment of the receiver is the first step toward the eventual payout of the secured creditor(s). This may be an issue of form alone since the Court will ultimately direct and approve payment of property and proceeds held by the interim receiver to creditors in a specified manner. However, in terms of process, it would be logical for the relief sought in the application or an action to include a declaration of the validity of the security, the amount of debt secured and the priority of the creditors. In such a situation, the appointment of the interim receiver would clearly be "interim" or interlocutory to that final declaration and the approval of the pay-out of the funds held by the interim receiver would be in accordance with such priorities. As such, the process would be akin to a more traditional mortgage enforcement proceeding where such declarations of priority and amount are common.

Selecting a Receiver and determining indemnity arrangements.

Once a particular interim receiver (or other Court appointed officer) is in place, the Court will be loathe to require the removal and replacement of the interim receiver absent proper evidence of some misfeasance. As a result, a creditor applying for an appointment should ensure that they are comfortable with the particular interim receiver being proposed. Also, a creditor who receives notice of an appointment being sought should raise any objection as soon as possible and by all means at the appointment hearing since later objections will be extremely difficult and a high evidentiary burden will need to be satisfied. Part of the reason for this judicial reluctance to interfere with receivers who have "already been appointed" by the Court is that interim receivers are Court appointed officers who will be assumed to conduct themselves appropriately and licensed trustees are licensed after an extensive qualification process.

The table below summarizes some of the statutory requirements of interim receivers under the *Bankruptcy and Insolvency Act* and *Courts of Justice Act*.

Legislative Provision	**Statutory Test for Appointment**
Section 46 of the *Bankruptcy and Insolvency Act* (Petition for Receiving Order has been filed.)	Interim receiver must be a licensed trustee.
Section 47 of the *Bankruptcy and Insolvency Act* (s.244(1) notice sent or imminent.)	Interim receiver must be a licensed trustee.

Section 47.1 of the *Bankruptcy and Insolvency Act* (NOI or Proposal has been filed.)	Court can appoint as the interim receiver: (a) the trustee under the notice of intention or proposal; (b) another trustee; or (c) the trustee under the notice of intention or proposal and another trustee jointly.
Section 271(3) of the *Bankruptcy and Insolvency Act*	Interim receiver must be a licensed trustee.
Section 101 of the *Courts of Justice Act*	No statutory requirement that interim receiver be licenced trustee, but Court will invariably require this qualification.

Once a proposed interim receiver is selected, the creditor seeking the appointment can expect that the receiver will require an indemnity from it. The terms of the indemnity will typically include provisions covering the payment of the receiver's fees, should the realization from the collateral not be sufficient to pay such fees. However, the terms may also be tailored to the particular circumstances of the target insolvent business and may include, for example, an apportionment of liability under the indemnity between more than one creditor. The potential for a priority charge being given to the interim receiver under the Appointment Order may lessen the financial risk associated with the indemnity.

Determining who will be given Notice.

The purpose of insolvency laws is to regulate the allocation of what are, by definition, insufficient assets of the debtor among the various stakeholders, in light of a variety of factors, including the ranking of security interests, government claims, agreements, obligations and protective actions taken by the various stakeholders. As a result, at the time that an appointment of a receiver is sought, it can be expected that there will be competing interests vying for the insufficient assets of the debtor. In this context, it makes common sense that usual notice under the *Rules of Civil Procedure* is rarely prudent or practical. By its nature, the appointment of an interim receiver is an urgent and protective measure. Notice to the debtor and all creditors may lead to the dissipation of property and executory rights of the debtor and may lead to other creditors exercising their rights or self-help remedies to the detriment of the secured creditor but also to the detriment of all stakeholders generally. The need to avoid loss of executory contracts to the maximum extent possible is particularly important to preserving the maximum "going concern" value of the business, if the interim receiver will manage the business as a going concern to seek to maximize value and potentially sell the business as a going concern.

In May, 2002, the Canadian Bar Association Ontario, Insolvency Section sponsored a programme to develop a standard form of order for the appointment of a receiver and manager or an interim receiver. From 2002 to 2004, the resulting Standard Form Template Order Sub-Committee (the "Committee") developed a model receivership order. The model receivership

Order and the Committee's report on the development of that order were published in September, 2004.[18] The model order is discussed below.

In its report, the Committee noted that applications for receivership orders "typically involve little or no notice to anyone other than the most senior creditors."[19] The Committee noted that it made efforts to tighten up on loose language in some clauses of the template order to respect certain issues as to the propriety of affecting third party rights without notice. The model order includes a "Comeback Clause" which permits creditors without notice to bring a particular issue raised by the order back before the Court for determination. To some extent, the Comeback Clause is seen as a means of addressing the lack of notice or inadequate notice given of the seeking of an appointment.

As noted by Mr. Justice Farley in dismissing a request for an adjournment of the application to appoint an interim receiver in *T. Eaton Co. (Re),* [1999] O.J. No. 3646, (Ont. S.C.J. (Commercial List))**:**

> 1. There has been a request for adjournment regarding the appointment of the interim receiver because various of the interested persons have only received the material for this quasi - ex parte motion just moments before court commenced. I have a great deal of sympathy for that position but I am of the view that their concerns may be dealt with under the comeback clause. That is, in these circumstances the comeback clause should be interpreted as allowing any interested person to open up any of the issues involved in this interim receivership motion.
>
> 2. Insolvency matters are never very tidy especially when matters which have previously appeared to be progressing in a reasonably progressive and orderly fashion take a radical deviation from that path as happened in this case on Friday, August 13, 1999. …
>
> 3. … Of course over and above that are the other remedies which interested persons may wish to bring, either sheltered under the comeback clause or with leave independent of the comeback clause - an example being any injunctive relief which certain landlords may wish to bring as to leases prohibiting liquidation sales.

In fact, the motion or application to appoint an interim receiver can be, and usually is, made without notice or with limited notice.[20] Again, a fundamental reason for such applications being made with limited or no notice is to ensure that the assets and executory contracts remain in place at the time of the order to the greatest extent possible. If notice is given, then assets could be disposed of or contracts and leases terminated in advance of the application.[21] Clearly, having assets disposed of or executory contracts terminated would impair or completely destroy the purpose of a receiver-manager continuing to operate the business as a going concern during an interim period.

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[18] Explanatory Notes for New Standard Form Template Receivership Order, Sub-Committee for Standard Form Template Sub-Committee, September, 2004 ("Explanatory Notes"), p. 1. The model receivership order in word format and the explanatory notes are available at http://www.ontariocourts.on.ca/superior_court_justice/commercial/template.htm.

[19] Explanatory Notes, *ibid*. at 2 to 3

[20] L.W. Houlden and G.B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (Toronto, Carswell, 2005) at D17(11), 2-77

[21] *ibid*.

For applications under the *Bankruptcy and Insolvency Act*, Rule 77 of the *Bankruptcy and Insolvency General Rules*, C.R.C. 1978, c.368, as amended, codifies the practice of bringing an application for an interim receiver on an *ex parte* basis. Rule 77 provides that the application for an interim receiver under section 46, 47 or 47.1 or section 271(3) is to be made *ex parte* but also provides that the court may adjourn the application and direct any further required notice.[22]

One consideration in providing notice to senior secured creditors is that it is unlikely that a Receiver's charge will be granted priority over a senior secured creditor in the absence of notice to them. Providing notice and negotiating the terms of such a charge may be necessary to reduce the potential downside risk associated with the indemnity given by the applicant to the receiver.

Illidge (Trustee of) v. St. James Securities Inc.

This case is reported at (2002) 34 C.B.R. (4th) 222 (Ont. S.C.J.) and 227 (Ont. C.A.).

In that case, Soberman Isenbaum Colomby Tessis Inc. was appointed as receiver of two companies called St. James Securities Inc. and St. James Holdings Inc. by an order of Madam Justice Greer. That initial appointment was sought "by way of application rather than on [an] interlocutory motion."[23] The application was apparently under the *Courts of Justice Act*.

A company called 1187264 Ontario Inc.[24] alleged that Soberman Isenbaum had a conflict of interest in the circumstances by reason of their role as trustee in bankruptcy for certain other parties, including a gentleman named John Illidge who was formerly the sole officer and director of each of St. James Securities Inc. and St. James Holdings Inc. 1187264 Ontario Inc. suggested that a different receiver – Horwath Orenstein – be substituted for Soberman Isenbaum as receiver. Madam Justice Greer did not accept 1187264 Ontario Inc.'s submissions and made her order appointing Soberman Isenbaum as receiver of the St. James companies. Madam Justice Greer's order contained a comeback clause. 1177264 Ontario Inc. appealed Madam Justice Greer's decision.

The matter was heard by the Ontario Court of Appeal and the decision is important in its holdings on the following points:

(i) First, the Ontario Court of Appeal held that the initial court order appointing the receiver was not an interlocutory order but was, instead, a final order and that any appeal from the order was properly to the Court of Appeal. Specifically, Mr. Justice Armstrong of the Ontario Court of Appeal held that "…orders that finally determine the issues raised in an application are final orders…the issues in dispute on the application ([including] the suitability of Soberman to serve as receiver in

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[22] See David Baird's annotation to *Re Big Sky Living Inc.* (2002) 37, C.B.R. (4th) 42 in which he carefully discussed the issue of the effect of receivership orders on third parties who do not receive notice of the seeking of the order in the first place

[23] (2002) 34 C.B.R. (4th) 227 at 229

[24] 1187264 Ontario Inc. did receive notice of, and did appear at, the initial hearing before Madam Justice Greer.

the face of an alleged conflict…) were finally determined by Justice Greer. Thus, the order is a final one and appeal lies directly to this court."[25]

(ii) Accordingly, the Court of Appeal held that it was not appropriate for the matters which 1187264 Ontario Inc. was raising to be simply brought back before Madam Justice Greer under the "comeback clause" in her initial order. The Court of Appeal rejected the argument of counsel for Soberman Isenbaum that, in effect, just because Madam Justice Greer's order contained a comeback clause, it was effectively an interlocutory order.

With the benefit of some "fresh evidence"[26] the Court of Appeal accepted the submissions of 1187264 Ontario Inc. to the effect that Soberman Isenbaum did have a conflict of interest, in the circumstances. However, the Court of Appeal did not agree to simply substitute Horwath Orenstein as receiver instead of Soberman Isenbaum as 1187264 Ontario Inc. wanted. Instead, the Court of Appeal set aside the appointment of Soberman Isenbaum as the receiver of the St. James companies and referred the matter back to the Commercial List Court "for the appointment of a new receiver."[27]

The Supporting Materials including Proposed Form of Appointment Order.

The appointment of an interim receiver is an extraordinary discretionary remedy. As a result, the materials forming the basis of the application must demonstrate the right to, and necessity of, the remedy being granted. In addition, the mandate and powers to be granted to the interim receiver can vary widely from monitoring only up to and including powers as fundamental as operating the business, terminating the employees of the business, liquidating all the assets of the debtor and even filing an assignment in bankruptcy. As a result, the proposed form of Appointment Order sought is an essential part of the application materials and the need for the powers sought must be supported by the evidentiary materials.

The statutory tests under the *Bankruptcy and Insolvency Act* and *Courts of Justice Act* and provisions respecting powers are summarized in the table below.

Legislative Provision	**Statutory Test for Appointment**
Section 46 of the *Bankruptcy and Insolvency Act* (Petition for Receiving Order has been filed.)	Discretionary remedy ...it is necessary to demonstrate that the appointment of an interim receiver is "necessary for the protection of the estate of a debtor…" Powers which may be granted to the interim receiver are to: a. take conservatory measures,

[25] (2002) 34 C.B.R. (4th) 227 at 229

[26] (2002) 34 C.B.R. (4th) 227 at 231

[27] (2002) 34 C.B.R. (4th) 227 at 232

	b. summarily dispose of property that is perishable or likely to depreciate rapidly in value, c. exercise such control over the business of the debtor as the court deems advisable. However, section 46 specifically provides that the interim receiver "shall not unduly interfere with the debtor in the carrying on of his business except as may be necessary for conservatory purposes or to comply with the order of the court."
Section 47 of the *Bankruptcy and Insolvency Act* (s.244(1) notice sent or imminent.)	Discretionary remedy…as a threshold requirement must demonstrate that a section 244(1) notice is about to be sent or has been sent. An appointment may be made only if it is shown to the court to be necessary for the protection of (*a*) the debtor's estate; or (*b*) the interests of the creditor who sent the s. 244(1) notice. The appointment is limited to the debtor's property that is subject to the security to which the section 244(1) notice relates. Powers which may be granted to the interim receiver are much broader than under s.46 and are to: a. take possession of all or part of the debtor's property mentioned in the appointment; b. exercise such control over that property, and over the debtor's business, as the court considers advisable; and c. take such other action as the court considers advisable.
Section 47.1 of the *Bankruptcy and Insolvency Act* (NOI or Proposal has been filed.)	Discretionary remedy…the requirements are similar to section 47 and set out that appointment may be made only if it is shown to the court to be necessary for the protection of (a) the debtor's estate; or (b) the interests of one or more creditors, or of the creditors generally. The potential powers which may be granted the interim receiver are broad. The court may empower the interim receiver appointed under section 47.1 to: a. carry out the duties of the proposal trustee or trustee named in NOI, in substitution for the trustee referred to in that subsection or jointly with that trustee; b. take possession of all or part of the debtor's property mentioned in the order of the court;

	c. exercise such control over that property, and over the debtor's business, as the court considers advisable; and d. take such other action as the court considers advisable.
Section 101 of the *Courts of Justice Act*	The statutory test under the *Courts of Justice Act* is that the Court may appoint a receiver or receiver and manager by interlocutory order, where "it appears to a judge of the court to be just and convenient to do so." The terms of the order "may include such terms as are considered just."

A useful starting point for any receivership order to be sought in Ontario is the model receivership order developed by the Committee.[28] In fact, the recommended practice is for the court materials to include a black-line showing the additions and deletions in the proposed form of order as against the model order. As the model order was developed in consideration of all of the empowering legislation, it may be that powers listed in the order are more expansive than is justified in a particular application and especially in the case of a section 46 application. In addition, particular facts related to the target insolvent business may require additional provisions tailored to the matters at issue. It can be expected that receivership orders and the model order will evolve over time to address recurring or new issues. A copy of the model order is attached as Appendix "A" to this paper.

The current form of provisions of a receivership order includes provisions with respect to the following matters:

1. APPOINTMENT. The Order provides for the appointment of the particular receiver and specifies the property which is subject to the appointment.

2. RECEIVER'S POWERS. The Receiver's powers are enumerated. The powers include the power to take possession of and safeguard the property, to manage the business of the Debtor, to engage consultants to assist the receiver, to purchase or lease assets to continue the business of the Debtor, to receive and collect all monies owing to the Debtor, to settle or compromise any indebtedness owing to the Debtor, to initiate and continue proceedings and to defend proceedings with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings, to market and sell any or all of the Property, and to report and share information as the Receiver deems advisable.

3. ACCESS AND CO-OPERATION. The Debtor and others are ordered to provide access to the property, co-operation and assistance to the receiver.

4. NO PROCEEDINGS AGAINST THE RECEIVER. Proceedings against the Receiver are prohibited without the consent of Receiver or leave of the Court (on appropriate notice).

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[28] Explanatory Notes, *ibid.* at 2 to 3

5. STAY and NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY. Actions and the exercise of any rights or remedies against the debtor are stayed.

6. CONTINUATION and NON-INTERFERENCE. No person can cease supplying goods and services or terminate any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of the Court. Generally speaking, ordinary payment terms are to remain in place.

7. RECEIVER TO HOLD FUNDS. The Receiver is to collect and hold all funds collected in new accounts, net of receivership costs.

8. EMPLOYEES. Employees remain employees of Debtor until such time as the Receiver may terminate the employment of such employees. The Receiver is not liable for any employee-related liabilities.

9. LIMITATION ON ENVIRONMENTAL LIABILITIES. A provision seeks to address and limit potential environmental liability.

10. BORROWING POWER. The Receiver may be authorized to borrow funds to fund the receivership and a priority charge given to this loan.

11. RECEIVER'S / ADMINSTRATIVE CHARGE. The Receiver may be granted a priority charge for the costs of administering the receivership.

Receiver taking possession of property subject to its appointment.

Once the interim receiver has been appointed either by Court order or instrument, the receiver will take steps to safeguard and preserve property and begin its mandate as receiver. As part of that process, the interim receiver will give notice of its appointment. Upon receiving notice, affected parties without notice of the application may either seek to come back to court under any comeback clause or may seek to appeal the order or may seek to set aside a private appointment.

One further issue to consider if the receiver takes possession of and manages an active business is the significant legislative change in the enactment of Bill C-45, *Criminal Code* amendment which is sometimes noted as the "Westray Amendment." Bill C-45 introduced the Westray Amendment to the *Criminal Code*, R.S.C. 1985, Chap. C-46 which added section 217.1. Section 217.1 provides:

> Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

This provision would appear to catch a receiver if in a position to "direct" how work is performed and provides a legal duty to take reasonable steps to prevent harm. If there will be continuing work in the management of the debtor's business during the receivership, it is important to note that active steps are required to ensure safety. This provision is new and there have been debates about whether failing to ensure compliance with the vast array of work place safety legislation will show a failure to "take reasonable steps to prevent bodily harm" and thereby elevate regulatory breaches to criminal misconduct. The real problem is that this new legislation has no track record so there is no determination yet as to the lengths that a receiver

must go to ensure compliance and safety. Is a full compliance audit required or is a lesser review sufficient? Clearly, a receiver must (and as a responsible court officer will) ensure that any known dangers are dealt with, but it is the additional "reasonable steps" which are required which lead to the uncertainty.

One way of trying to limit the exposure under this section is to circumscribe the areas that the receiver can "direct" and thereby try to be out of the ambit of section 217.1. This approach limits the areas that the receiver "undertakes" or "has the authority" for in the language of the section. This approach may not be practical in many instances, but the clearest way of seeking to limit the reach of this provision is if the receiver will not need to direct such work. It is noteworthy that if the receiver does not get powers directly conferred on it related to a particular area of activity then it will still be caught if the receiver does actually "direct" the work in question.

The model order provides that the receiver is authorized (but not obligated) to, among other things, "manage, operate and carry on the business of the Debtor" and "to undertake environmental and workers' health safety assessments of the Property and operations of the Debtor." This authorization likely brings the receiver into the category of a person who "has the authority" under section 217.1 and will likely impose the "legal duty to take reasonable steps to prevent bodily harm" in the operations of the debtor's business.

The best practice and protection is to ensure that proper workplace safety measures are in place and for the receiver to document its efforts to ensure that the operations are safe and comply with relevant safety legislation.

Further, many forms of indemnity agreements provide for an exception with respect to "negligence or wrongful misconduct" of the receiver. It is arguable that the indemnity would not cover any matter which runs afoul of section 217.1, since criminal misconduct would be caught by the exception and it could be argued that the indemnity does not apply if compliance with workplace safety legislation is not ensured. As a result, the cautious approach would be for receivers to seek to change "negligence or wrongful conduct" to "gross negligence and wilful misconduct" as in paragraph 16 of the model receivership order. However it is highly unlikely that seeking to exclude or limit *Criminal Code* liability in the Appointment Order would be enforceable to protect a receiver who has been derelict in its duties with respect to employee safety in the operation of the debtor's business.

C. USE AND PROTECTION OF THE COLLATERAL PENDING JUDGMENT

Section 17 of the *Personal Property Security Act* specifically provides:

> A secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession, and, unless otherwise agreed, in the case of an instrument or chattel paper, reasonable care includes taking necessary steps to preserve rights against prior parties.

A secured party may not contract out of this duty.

D. SELLING THE COLLATERAL BEFORE JUDGMENT

As discussed above, the court based receivership process has a number of advantages. One of those is the ability to obtain vesting orders in order to assist in conveying assets.

However, as was also referred to above, sometimes the entire process can proceed so quickly that problems result. For example, in the *World Vintners* case, the Court declined to grant the order requested because, in part, the matter had effectively just been brought to the court too quickly.

In that regard, one issue which often requires consideration is how quickly one can close a transaction based on a vesting order?

Obviously, the most conservative approach would be for the purchaser to insist upon, and the receiver, as vendor, to agree to, a final and unappealable vesting order being in place before the transaction closes. In turn, that proposition begs at least two fundamental questions: (i) what is the applicable appeal period? and (ii) what are the legal risks associated with proceeding to close the transaction during the appeal period?

Appeal Period

A sale pursuant to a vesting order can occur in a host of different types of court-based insolvency proceedings. For example, and without limitation, such a sale could occur within the context of: (i) a *Companies' Creditors Arrangement Act* R.S.C. 1985, Chap. C-36, proceeding, (ii) a *Bankruptcy and Insolvency Act* proposal proceeding or (iii) a court-appointed receivership.

Sometimes such sales in a proceeding of this nature are by the "debtor company itself" – i.e. as is the case when a company in a *Companies' Creditors Arrangement Act* proceeding is selling assets. Often, as with court-based receiverships, the sale is by a receiver.

Where a *Companies' Creditors Arrangement Act* or a *Bankruptcy and Insolvency Act* proceeding is involved, it seems possible to argue that several different appeal periods would apply with respect to a vesting order. For example, with respect to a vesting order given in a *Companies' Creditors Arrangement Act* or *Bankruptcy and Insolvency Act* proceeding, it seems possible to argue that one of several different appeal periods apply:

1. The most conservative view is that the order is a final order of a judge of the Superior Court of Justice and that the 30 day appeal period provided for in Rule 61.04(1) of the *Rules of Civil Procedure* applies. That rule states:

> An appeal to an appellate court shall be commenced by serving a notice of appeal
>
> …
>
> within 30 days after the making of the order appealed from, unless a statute or these rules provide otherwise…

2. It could be argued that a vesting order, in this context, is an interlocutory, rather than a final, order.[29]

Under section 19(1)(b) of the *Courts of Justice Act*, an appeal of an interlocutory order of a judge of the Superior Court of Justice lies to the Divisional Court, only with leave, as provided in the Rules of Court.

This appeal period is seven (not thirty) days.

Specifically, Rule 62.02(2) of the *Rules of Civil Procedure* provides as follows:

> The notice of motion for leave shall be served within seven days after the making of the order from which leave to appeal is sought or such further time as is allowed by the judge hearing the motion.

3. The *Companies' Creditors Arrangement Act* itself provides for a very customized 21 day appeal period with respect to orders made under the *Companies' Creditors Arrangement Act*.

Specifically, sections 13 and 14 of the *Companies' Creditors Arrangement Act* provide as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.
>
> 14.(1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.
>
> (2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal

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[29] Of course, reference may be made to the discussion of the difference between final and interlocutory orders in the *Illidge* case discussed above.

> and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

4. Where the proceeding is under the *Bankruptcy and Insolvency Act*, a different customized appeal period might also be applicable. Section 193 of the *Bankruptcy and Insolvency Act* provides for appeals to the Court of Appeal from any order or decision of a judge of the Bankruptcy Court.

   In turn, section 31(1) of the *Bankruptcy and Insolvency Act Rules* provides for a ten day appeal period, as follows:

> An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

Status of Transactions Completed Prior to the Expiration of the Appeal Period

What is the status of a transaction completed in reliance on a vesting order, where the transaction is completed prior to the expiry of the applicable appeal period?

This is a difficult question to answer.

As a general proposition, the dicta from the highest court in Canada, in the case of *Smith v. Tellier* (1975), 63 D.L.R. (3d) 124, is ultimately somewhat ambivalent and essentially identifies a need to consider the conduct of the parties and the particular facts of each case where the issue arises. The *Smith v. Tellier* case concerned a real estate transaction which failed to close. The purchaser made a requisition on title with respect to some registered restrictions running with the land. The vendor sought to answer the requisition by obtaining an order removing the restrictions. At the date of closing, the time for appeal of that order had not expired and the purchaser refused to close.

The court was asked to consider whether the vendor had adequately answered the requisition. At trial it was held that the requisition had been adequately answered because, it was held, the conclusive effect of a final order is not open to question unless and until an order for judgment is attacked. The Court of Appeal reversed that decision, holding that a judgment does *not* possess the element of absolute finality until the right of appeal is exhausted.

Speaking for the Supreme Court of Canada, Mr. Justice Laskin allowed the appeal but only on the following terms:

> The case appears to have been argued on the footing that either there was or was not an effective, a final order upon which the vendors could rely as satisfactorily answering the purchasers' requisition. On the facts of this case, I would regard this statement of the issue as extreme on each side of the case. An order which is

> subject to appeal cannot be said to be effective for all purposes, even in respect of third parties, before the time for appeal has run. On the other hand, the fact that the time for appeal has not yet run will not invariably stay the full effectiveness of the order, even against third parties, if there is only an ephemeral prospect of an appeal. It is always necessary to consider the purpose for which the finality or want of finality of an order is urged, to consider who is affected by the order, and in what context its finality or lack of finality is asserted at a time when the prescribed appeal period has not yet run.

Re Regal Constellation Hotel Limited

This important decision of the Ontario Court of Appeal is reported at (2004), 50 C.B.R. (4th) 258. The trial decision of Mr. Justice Farley, also discussed below, is reported at (2004), 50 C.B.R. (4th) 207.

In the early 2000's, the business of the Regal Constellation Hotel in Toronto struggled badly for a number of reasons, including a need for repair and renovation of the building and the general slow-down in tourism after the September 11, 2001 terrorist attacks. The sole shareholder of the operating company was a company called Regal Pacific (Holdings) Limited ("Regal Pacific"). In 2002, Regal Pacific entered into a $45 million share sale agreement with a company controlled by the Orenstein Group. As noted by Mr. Justice Blair of the Ontario Court of Appeal, "[t]he transaction was not completed, however, and Regal Pacific and the Orenstein Group [were] in litigation as a result."[30] That litigation was still ongoing in mid-2004.

On the application of HSBC Bank Canada ("HSBC"), Deloitte & Touche Inc. ("Deloitte & Touche") was appointed as a receiver of the Hotel, by an order of Mr. Justice Cumming of the Ontario Superior Court of Justice, on July 4, 2003. At that time, the Hotel owed over $33 million to HSBC and the loan was in default.

In September of 2003, Deloitte & Touche agreed to sell the assets to a numbered company – 2031903 Ontario Inc. ("203") - for $25 million, subject to court approval. As was reviewed later, it would appear that at that time no member of the Orenstein Group had any involvement with 203. Specifically, when that sale approval motion came before Mr. Justice Cameron on September 9, 2003, apparently someone from Regal Pacific expressed a concern that 203 "might be connected to the Orenstein Group"[31] and "Cameron, J. was advised by counsel for the receiver that there was no such connection."[32]

Although Mr. Justice Cameron approved the sale to 203 on September 9, 2003, ultimately that transaction did not close and 203 forfeited its deposit of $3 million.

It would appear that sometime after that sale failed to close, a Mr. Orenstein, who was involved with the Orenstein Group, also became a principal of 203.

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[30] (2004) 50 C.B.R. (4th) 258 at 260-261.

[31] (2004) 50 C.B.R. (4th) 258 at 261.

[32] (2004) 50 C.B.R. (4th) 258 at 261.

In turn, after that development, 203 made a further offer to Deloitte & Touche to purchase the Hotel and in late 2003, Deloitte & Touche again agreed to sell the assets of the Hotel to 203 this time for $24 million, and again, subject to Court approval. As noted by the Ontario Court of Appeal "[g]iven the $3 million in deposits that 203 had previously forfeited, the receiver view[ed] the purchase price as being the equivalent of $27 million."[33]

On December 19, 2003, that second sale to 203 was approved by Madam Justice Sachs, at which time she also made a vesting order pursuant to which title to the Hotel would be conveyed to 203 on closing.

The second sale transaction involving 203 closed on January 6, 2004. At that time, the vesting order was registered on title as was a $20 million mortgage.

Between January 6, 2004 and January 15, 2004, there was an article in the Toronto Star newspaper that indicated that the Hotel had been sold "to the Orenstein Group."[34] The receiver had a motion pending before Mr. Justice Farley on January 15, 2004 for approval of the receiver's conduct and certain other related relief. Regal Pacific sought to have that motion adjourned on the basis that the involvement of the Orenstein Group with 203, in the circumstances, and the failure of the receiver to draw the involvement of the Orenstein Group to Madam Justice Sachs's attention "tainted the fairness and integrity of the process."[35]

Mr. Justice Farley refused to adjourn the hearing on January 15, 2004 and approved the receiver's conduct. He concluded that the identity of the principals behind 203 was irrelevant.

Regal Pacific sought to appeal the vesting order.

In that regard, Mr. Justice Blair held succinctly that:

> "…in my view, once the vesting order has been registered on title its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot."[36]

Mr. Justice Blair makes a careful analysis of the effect of:

(i) the filing of a notice of appeal with respect to any order – and which, as he notes, "does not automatically stay the order [which] in the absence of such a stay, …it remains effective";[37] and

(ii) the registration of a vesting order (i.e. and including such a vesting order 'during the appeal period') on title under the Land Titles system. Concluding a very careful analysis of the relevant sections of the *Land Titles Act*, Mr. Justice Blair states that:

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[33] (2004) 50 C.B.R. (4th) 258 at 262.
[34] (2004) 50 C.B.R. (4th) 258 at 263.
[35] (2004) 50 C.B.R. (4th) 258 at 263.
[36] (2004) 50 C.B.R. (4th) 258 at 265.
[37] (2004) 50 C.B.R. (4th) 258 at 265.

> "Once a vesting order that has not been stayed is registered on title…it is effective as a registered instrument and its characteristics as an order are … overtaken by its characteristics as a registered conveyance on title."[38]

As Mr. Justice Blair goes on to note "[v]esting orders properly registered on title…are not immune from attack. However, any such attack is limited to the remedies provided under the *Land Titles Act*."[39]

Interestingly, Mr. Justice Blair goes on to deal with the subject of appeals from vesting orders, generally. In that regard, he states as follows:[40]

> "I do not mean to suggest by this analysis that a litigant's legitimate rights of appeal from a vesting order should be prejudiced simply because the successful party is able to run to the land titles office and register faster than the losing party can run to the appeal court, file a notice of appeal and a stay motion and obtain a stay. These matters ought not to be determined on the basis that "the race is to the swiftest." However, there is no automatic stay of such an order in this province, and a losing party might well be advised to seek a stay pending appeal from the judge granting the order, or at least seek terms that would enable a speedy but proper appeal and motion for a stay to be launched. Whether the provisions of s. 57 of the *Land Titles Act* (Remedy of person wrongfully deprived of land), or the rules of professional conduct, would provide a remedy in situations where a successful party registers a vesting order immediately and in the face of knowledge that the unsuccessful party is launching an appeal and seeking a timely stay, is something that will require consideration, should the occasion arise."

Therefore, it is clear that when a vesting order deals "only" with personal property, the *Royal Constellation* case will not be dispositive of the matter if the transaction is closed, but an appeal from the vesting order is subsequently launched, all during the appeal period with respect to the vesting order.

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[38] (2004) 50 C.B.R. (4th) 258 at 266.

[39] (2004) 50 C.B.R. (4th) 258 at 268.

[40] (2004) 50 C.B.R. (4th) 258 at 269.