# The Interim Receiver under Section 47 of the *Bankruptcy and Insolvency Act* (Canada)

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Law is a service industry; a lawyer's professional prowess may be measured best by the value that he or she can offer to a client. Like all lawyers, insolvency practitioners must constantly seek out new tools with which to advance the interests of their clients. Commercial insolvency and/or restructuring situations often demand that lawyers be particularly creative, as "...the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability."[1]

The enactment of section 47 of the *Bankruptcy and Insolvency Act* (Canada) (the "*BIA*") has added a valuable weapon to the arsenal of the Canadian insolvency professional. Ontario's business-minded Commercial List judges have encouraged the use of interim receiverships by adopting a broad and commercially pragmatic interpretation of the new legislation. Ontario's insolvency practitioners have willingly adopted the section 47 interim receivership and have successfully employed them in a variety of novel and creative ways.

Yet it appears that the rapid growth in the use of interim receiverships has not caught on in other provinces, due in part to an apparent reluctance by the judiciary. The recent decision of Slatter J. in *Big Sky Living Inc. (Re)*[2] was particularly noteworthy (and somewhat alarming) to Ontario's insolvency lawyers due to the extremely limiting interpretation that Slatter J. gave to the legislation governing the use of interim receiverships. Many Ontario practitioners are of the view that the constraints on interim receiverships articulated by Slatter J. were, with all due respect, inappropriate and unsupported by the legislation.

The following paper will address several of the issues raised in the *Big Sky Living* decision. The paper will also discuss three situations in which the section 47 interim receivership mechanism has proved valuable to insolvency practitioners in Ontario: multi-provincial insolvencies, "quick flip" asset sales and restructurings under the *Companies' Creditors Arrangement Act* (Canada).

## Nothing "Interim" about an Interim Receivership

Section 47 of the *BIA* provides for the appointment of an "interim receiver", but there is nothing "interim" about some of the ways in which Ontario insolvency practitioners have put this provision to use. Notwithstanding the view of Slatter J. that section 47 was intended solely to protect creditors from the dissipation of assets pending the issuance of

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[1] *Canada* v. *Curragh Inc.* (1994), 27 C.B.R. (3d) 148 at page 158 (Ont. Gen. Div.) per Farley J.

[2] [2002] A.J. No. 886.

a receiving order,[3] the legislation itself does not in any way limit the duration of the interim receivership; section 47(1) provides that the appointment of the interim receiver is "...for such term as the court may determine." The use of the word "interim" in the name is of historic origin and should not, and does not in the authors' view, limit the authority awarded to the court under the legislation. Accordingly, Ontario courts commonly permit the use of interim receiverships to complete the receivership process through liquidation of the debtor's property and distribution of the proceeds thereof.

In the authors' view, the constraints imposed on an interim receiver under section 46 (the "old style" interim receiver) are not, and should not be, imported into section 47, where the court is expressly given more latitude.

**Powers of an Interim Receiver**

The reason for the rise in the use of the interim receivership to complete the receivership process is that Ontario insolvency lawyers have found it to be a more powerful and flexible tool than traditional receiverships. Section 47 does not impose limitations on the powers that a court can grant to an interim receiver. In *Big Sky Living*, Slatter J. took the view that, in granting powers to the interim receiver, the court "...should have regard to what is truly 'necessary for the protection' of the estate or the creditor."[4] This is a limitation not found in the legislation, which provides that the court may direct the interim receiver to "...take such action as the court considers advisable."[5]

The test cited by Slatter J. relates to the question of whether or not an interim receiver ought to be appointed and not to the question of whether or not a particular authority should be granted to the interim receiver. Interim receivers are often appointed in the midst of chaos; the imposition of the test cited by Slatter J. could have the effect of destroying the practicality of interim receiverships by requiring the applicant party to collect evidence in support of each and every power that the interim receiver will require to deal with the assets of the debtor. The test will often be impossible to meet at the time of appointment, as the full scope of necessary information will likely not be available. Ontario's Commercial List judges have found it expedient, in appropriate circumstances, to grant interim receivers all of the powers that they will need to properly and efficiently deal with the assets of the debtor, similar to those powers given to *Courts of Justice Act* (Ontario) ("CJA") receivers.

Judicial development of the *BIA* interim receivership can be compared usefully to the development of receiverships under the *CJA*. Section 101(2) of the *CJA* provides that a court appointing a receiver may do so on "...such terms as are considered just." The *CJA* provides very little direction to the court as to the powers, authorities and protections that may be settled upon the receiver. Ontario courts have breathed life into this skeletal legislative provision and have had no difficulty cloaking receivers appointed under the *CJA* with the wide and various powers and protections found in almost every *CJA* court

[3] *Ibid.* at paragraph 8.
[4] *Ibid.* at paragraph 7.
[5] *BIA* at section 47(2)(c).

appointment of a receiver in Ontario, including many of those powers and protections sought by the interim receiver in *Big Sky Living*.

The *BIA* specifically contemplates that an interim receiver can be directed to act in a manner traditionally reserved for court appointed receivers in that Section 47(2)(a) authorizes the court to direct an interim receiver to take possession of all or part of a debtor's property. Section 47(2)(b) allows an interim receiver to exercise such control over that property and over the debtor's business as the court considers advisable. The BIA then goes on in Section 47(2)(c) to state broadly that the interim receiver may be directed to " ... take such other action as the Court considers advisable". In the authors' view, Section 47(2)(c) grants a broad authority to the Court to do what the Court considers advisable in the circumstances and is analogous to the power under Section 101(2) of the *CJA* to include "such terms as are considered just" in a *CJA* receivership appointment.

The *BIA* is remedial legislation and thus "...shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[6] Section 47 of the *BIA* was enacted for the broad purpose of protecting the rights of creditors or the protection of the debtor's estate.[7] This purpose is best served by giving judges flexibility when granting powers to an interim receiver. The *BIA* should be interpreted by courts in a manner that makes commercial sense. The Supreme Court of Canada in *Mercure* v. *A. Marquette & Fils Inc.* noted that:

> Before going on to another point it is perhaps not inappropriate to recall that the Bankruptcy Act, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. It concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it.[8]

Although the above passage was written with respect to the old *Bankruptcy Act*, it applies equally to the *BIA*.

**Third-Party Rights and "Comeback" Clauses**

In *Big Sky Living*, Slatter J. took particular offence with the fact that Ontario judges often appoint interim receivers on an *ex parte* basis, as the appointment orders affect the rights of parties that have not had an opportunity to make representations.[9] Slatter J. found that the variation provisions of the order sought, which allowed affected parties to apply to vary the order at a later date, were insufficient to deal with his concerns.

The practical solution to the concerns of Slatter J. outlined above is to balance the need of the creditor to have the interim receiver appointed quickly, with the rights of third-parties

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[6] *Interpretation Act* (Canada) at section 12.
[7] S.47(3)
[8] [1977] 1 S.C.R. 547 at 556.
[9] *Supra* note 2 at paragraphs 21 to 23.

that will be affected by the appointment order. Ontario's Commercial List judges have found that inserting a variance provision, or "comeback" clause, into an appointment order adequately balances these competing interests. In *T. Eaton Co. (Re)*, Farley J. dealt with concerns similar to those expressed by Slatter J. when he stated:

> 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.[10]

Farley J. was of the view that a broad interpretation of the comeback clause can allow the court to adequately address any particular prejudice sustained by a third-party by varying the appointment where such action is warranted.

**Multi-Province Remedy**

One of the major benefits of an interim receivership commenced under section 47 is that the legislation provides for a true multi-province receivership remedy. Unlike the Ontario *Courts of Justice Act* (and similar legislation in other provinces), the *BIA* is a federal statute and as such has application across the country. Section 188 of the *BIA* requires bankruptcy courts across Canada to enforce orders made under the *BIA* regardless of where the order was made. Consequently, an order appointing an interim receiver in Ontario is equally enforceable with respect to a debtor's property in British Columbia. This is particularly useful where a debtor carries on business in more than one province, as it obviates the necessity of obtaining confirmatory orders in each of the other jurisdictions.

**"Quick Flip" of Assets**

A section 47 interim receiver is particularly useful where it is desirable to sell all or substantially all of the debtor's assets quickly and with a minimum impact on the on-going operations of the debtor company. In certain circumstances, a limited form of interim receivership under the *BIA* can effect an efficient transfer of assets on a going concern basis. The scope of the receivership may be limited to selling the assets, usually conveyed through a vesting order, and distributing the proceeds of realization. In many cases, the interim receiver is not authorized or directed to take possession or control of such assets and all employer and occupation liabilities are thereby avoided. Some factors which suggest the use of this mechanism include situations where the debtor has been cooperative and a willing consensual purchaser has been found, where the nature of the assets are such that a purchaser reasonably requires a vesting order (rather than a mere receiver's bill of sale) and where, for any number of reasons, the time periods required in a private receivership (*i.e.,* under the *Personal Property Security Act* (Ontario) or the *Mortgages Act* (Ontario)) would threaten either the viability of the business or the possibility of achieving a consensual sale. This latter scenario includes situations where a

[10] [1999] O.J. No. 3646 at paragraph 1.

subordinate creditor may not have any reasonable prospect of realization from an economic point of view, but may be unwilling to waive a notice or redemption requirement under the applicable legislation. The "quick flip" through the appointment of an interim receiver, on notice to such dissenting stakeholder, can effect an efficient transfer of assets on a going concern basis where the court is satisfied that the sale is commercially reasonable.

To achieve a "quick flip", either a *Courts of Justice Act* (Ontario) receiver or an interim receiver under the *BIA* could be used, but an appointment order of limited scope is more familiar to interim receivership orders under the *BIA* than *CJA* receivership orders.

**Use in CCAA Context**

In addition to its usefulness in a liquidation scenario, a section 47 interim receivership can be a powerful tool in a restructuring. For example, section 47 interim receiverships have been used in conjunction with the *Companies' Creditors Arrangement Act* (Canada) to sell portions of a debtor company's assets, and there are decisions which suggest that an interim receivership could be used to displace or neutralize the board of directors or management of a debtor company pending exploration of restructuring options.[11] Prior to the enactment of section 47 of the *BIA*, in order to restructure a debtor company it was generally necessary to have the company's management on side. If the creditors of the company hoped to remove management from the company, it was necessary that the company be put into a traditional receivership. The benefits associated with a restructuring would thus be lost to the creditors. The flexible nature of section 47 interim receiverships allows a court to carefully tailor the powers of the interim receiver to meet the exigencies of an insolvency situation, so that creditor value may be maximized.

**Conclusion**

There are many useful aspects of interim receiverships commenced under the *BIA*. One of the most useful aspects of a section 47 interim receivership is the flexibility it offers to creditors and to the court. Every insolvency situation is unique and demands a carefully-tailored response. The judges of Ontario's Commercial List have used the *BIA* interim receivership as a tool through which to exercise the court's inherent jurisdiction, so as to do "... not only what 'justice dictates' but also what practicality demands."[12] It is the duty of the insolvency lawyer to seize upon this remedy and fully use its flexibility to maximize stakeholder value.

[11] See the decision of Blair J. in *General Electric Capital Canada Inc.* v. *Euro United Corp.* (2001), 25 C.B.R. (4th) 250.

[12] *Supra* note 1 at paragraph 16.