

CNIE 2019

*Receivership*

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A journey through learning



# Receivership... the basis

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## Definition of receiver

Receiver means a person<sup>1</sup> who

(a) is appointed under 243 BIA; or

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

(i) an agreement under which property becomes subject to a security (referred to as a “security agreement”), or

(ii) a court order made under another Act that provides for / or authorizes the appointment ...

<sup>1</sup> - Only a trustee may be appointed



# Receivers in Québec

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Until the 2009 amendments to the **BIA no identical equivalent existed in Québec for the receiver as known in the common law provinces**, although some of the duties of the receiver appointed privately by a secured creditor in a common law jurisdiction were similar (but not identical) to the role that an agent appointed by a secured creditor in Québec would be called upon to play.

Given that it is possible to appoint a receiver under s. 243 of the BIA, it is **now** possible to appoint a receiver in Québec by a court order issued under the BIA, the CBCA, or the Québec Business Corporations Act.

As well, in view of the definition of the term “receiver” in the BIA, an agent appointed privately by a secured creditor in Québec would often qualify as a receiver within the meaning of the BIA.



# Court may appoint receiver under BIA

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- **243 (1)** On application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
  - (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
  - (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
  - (c) take any other action that the court considers advisable.



# Restriction on appointment of receiver under Section 243 BIA

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- In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), **the court may not** appoint a receiver under section 243 **before the expiry of 10 days** after the day on which the secured creditor sends the notice **unless**
- (a) the insolvent person **consents to an earlier enforcement** under subsection 244(2); or
- (b) the **court considers it appropriate** to appoint a receiver before then.



# Appointment of interim receiver

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- If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may appoint an interim receiver until... the earliest of:
  - (a) the taking of possession by a receiver,
  - (b) the taking of possession by a trustee of the debtor's property over;
  - (c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.
- The court may direct an interim receiver to do any or all of the following:
  - (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;
  - (c) take conservatory measures; and
  - (d) summarily dispose of property that is perishable or likely to depreciate rapidly in value.
- An appointment of an interim receiver 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 notice under subsection 244(1).



# Advance notice (S.244(1) BIA)

A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

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

## Period of notice

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

## No advance consent

- Consent to earlier enforcement of a security **may not be obtained** by a secured creditor **prior to the sending** of the notice

## Exception

- Does not apply, or ceases to apply, in respect of a secured creditor
  - (a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or
  - (b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.



# When the stay has been lifted

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## There is a Limitation

A stay provided under S.69 BIA **does not apply, or terminates,**

in respect of Her Majesty in right of Canada and every province if

- **any other creditor is or becomes entitled to realize a security** on any property that could be claimed by Her Majesty in exercising Her rights under
  - (i) subsection 224(1.2) of the [Income Tax Act](#),
  - (ii) any provision of the [Canada Pension Plan](#) or of the [Employment Insurance Act](#) that refers to subsection 224(1.2) of the [Income Tax Act](#) and provides for the collection of a contribution, as defined in the [Canada Pension Plan](#), an employee's premium, or employer's premium, as defined in the [Employment Insurance Act](#), or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or
  - (iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the [Income Tax Act](#), or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts



# The stay...

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## **Secured creditors to whom proposal not made**

- Subject to sections 79 and 127 to 135 and subsection 248(1), the filing of a proposal under subsection 62(1) does not prevent a secured creditor to whom the proposal has not been made in respect of a particular security from realizing or otherwise dealing with that security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

## **Where secured creditors vote against proposal**

- Subject to sections 79 and 127 to 135 and subsection 248(1), where secured creditors holding a particular class of secured claim vote for the refusal of a proposal, a secured creditor holding a secured claim of that class may henceforth realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.



# Receiver to give notice (S. 245)

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- A receiver shall, as soon as possible and not later than ten days after becoming a receiver, by appointment or otherwise, in respect of property of an insolvent person or a bankrupt, send a notice of that fact, in the prescribed form and manner, to :
  - the Superintendent, accompanied by the prescribed fee, and
    - (a) in the case of a bankrupt, to the trustee; or
    - (b) in the case of an insolvent person, to the insolvent person and to all creditors of the insolvent person that the receiver, after making reasonable efforts, has ascertained.
  - any creditor whose name and address he ascertains

## Names and addresses of creditors

- An insolvent person shall, forthwith after being notified that there is a receiver in respect of any of his property, provide the receiver with the names and addresses of all creditors.



# Receiver's statement

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**24.6 (1)** A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

- (a) to the insolvent person or the trustee (in the case of a bankrupt); and
- (b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

## Receiver's interim reports

- (2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and
  - (a) to the insolvent person or the trustee (in the case of a bankrupt); and
  - (b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

## Receiver's final report and statement of accounts

- (3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and
  - (a) to the insolvent person or the trustee (in the case of a bankrupt); and
  - (b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.



# Good faith, etc.

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247 A receiver shall:

- (a) act honestly and in good faith; and
- (b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.



# Powers of court (S.248 BIA)

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- Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,
  - (a) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or
  - (b) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,
  - or both.
- On the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt) or a creditor, made within six months after the statement of accounts was provided to the Superintendent pursuant to subsection 246(3), the court may order the receiver to submit the statement of accounts to the court for review, and the court may adjust, in such manner and to such extent as it considers proper, the fees and charges of the receiver as set out in the statement of accounts.

## Receiver may apply to court for directions (S.249 BIA)

A receiver may apply to the court for directions in relation to any provision of this Part, and the court shall give, in writing, such directions, if any, as it considers proper in the circumstances.



# Protection of receivers (S.251 BIA)

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- No action lies against a receiver for loss or damage arising from the sending or providing by the receiver of a notice pursuant to section 245 or a statement or report pursuant to section 246, if done in good faith in compliance or intended compliance with those sections.

## Defence available

- **252** In any proceeding where it is alleged that a secured creditor or a receiver contravened or failed to comply with any provision of this Part, it is a defence if the secured creditor or the receiver, as the case may be, shows that, at the time of the alleged contravention or failure to comply, he had reasonable grounds to believe that the debtor was not insolvent.



# Alternatives to Receivership ?

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## Forbearance agreements

- negotiated between the parties
- to a financial arrangement to facilitate some form of continuance with existing terms or with a variety of modifications as the situation demands
- Usually the lender will ask the borrower to agree to have its operations monitored



# Receivership as OPPOSED to Bankruptcy

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**Receivership is not an alternative to bankruptcy.** The two procedures are not mutually exclusive though.

- receivership is a remedy that **SECURED** creditors can use to realize certain property of the debtor that is encumbered by a security to obtain repayment of secured loans;
- bankruptcy is a remedy for the benefit of **ALL** creditors in general allowing the trustee to distribute the debtor's property among the creditors in an equitable manner:
  - to conduct investigations of the financial affairs of the bankrupt, or
  - to realign priorities in accordance with an order of priority established by the BIA.



# Decision to use bankruptcy vs receivership

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A secured creditor who wishes to realize his security could prefer:

- to proceed through bankruptcy without receivership
- to have bankruptcy occur concurrently with receivership.

- The main factors that will affect this decision are:
  - the costs related to each of the procedures;
  - the desire to take advantage of the trustee's investigative powers;
  - the possibility of participating in the eventual benefits of the remedies that may be instituted exclusively by the trustee
  - the possibility of benefiting from a change in the order of priorities among the secured creditors and certain creditors who have special rights, due to the effect of the provisions of the BIA regarding the order of priorities of the creditors' claims.



# Concept of dual mandate

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- An insolvency professional may be placed in a dual role, as the receiver appointed either by instrument or by court order, and as trustee in bankruptcy.
- **Requirements and limitations** to accepting to act in a dual role or under a dual mandate:
- S. 13.4 BIA : before accepting an assignment as receiver, or even assisting the secured creditor in any way, the trustee in bankruptcy must obtain a legal opinion from a lawyer who does not act for the secured creditor, confirming that the secured creditor's security interest is valid. The trustee must also inform the OSB and the creditors (or inspectors). In addition the trustee must reveal the basis of his remuneration and disclose the legal opinion on the validity of the security.
- S. 13.3 BIA : a receiver acting in respect of the property of a debtor may not accept the position as trustee in bankruptcy with respect to the same debtor, unless the trustee discloses at the time of his appointment that he is already acting as receiver, and identifies the potential conflict of interest.



# Bank Act: s. 427 Security

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- Security under s. 427 of the Bank Act is limited,
- This security generally covers inventory, raw material, production, packaging, crops and equipment, fertilizer, feed, etc., owned by any wholesale or retail purchaser, manufacturer, aquaculturist, farmer, fisherman or forestry producer.
- There are specific registration and notification issues that need to be observed to ensure the enforceability of this type of security, including registration of the notice of intention to grant security in the Bank of Canada office located in the province where the borrower has its principal place of business. This security does not have to be registered under PPSA or the provincial registration/publication system in Québec.
- Due to the limited coverage of s. 427 security and to restrictions the Bank Act imposes on the realization process, many financial institutions supplement it with general security and other security agreements.



# Demand for Payment :

## A Concept of Reasonable Notice

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It is usually necessary for the secured creditor to give formal notice to the debtor to repay his advances, since it is the failure to effect payment of obligations that gives rise to the remedies, namely the appointment of the receiver, taking of possession and the realization of security.



# Overlap between the federal and provincial laws

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The use of S.243 vs provincial provisions :

*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*

Supreme Court:

Section 243's purpose is simply the establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions.

Section 243(1) of the *Bankruptcy and Insolvency Act* authorizes a court, upon the application of a secured creditor, to appoint a receiver where such appointment is "just or convenient".



# Court appointment...

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Main reasons that would justify an application to the court (rather than a private appointment\*\*\*):

- oppressive conduct;
- the need for a court-ordered stay of proceedings
- very complex problems;
- property in multiple jurisdictions;
- conflicts or competing claims among various secured creditors;
- environmental problems;
- high probability of litigation; and
- in some jurisdictions, the desire to sell real estate as an encumbered asset.



# Considerations... before the appointement

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- Environmental consideration
- Engagement letter (private appointement\*\*\*)
- Indemnities
- Weppa (costs of administration)
- Levy - you're not allowed to mention it 😊



# Taking possession

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## TO BE CONSIDERED:

- physical security of the assets;
- controls for inventory taking procedures – including inventory of raw materials, work-in-process, finished goods, and fixed assets;
- instructions to employees;
- communications planning, including both statutory and non-statutory notices;
- sales controls;
- shipping and receiving controls;
- cash and collection controls;
- purchasing controls; and
- environmental considerations.



# Taking possession (continued)

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- Inventory of the assets
- Insurance
- Books, records, documents
- Assets held by third parties
- Cash flow projections
- Source of information
- Financing needed (DIP/Charge/Etc.) ??



# Operate or not : review and assess

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- major risks associated with continuing operations – including product risks, warranties, compliance with federal, provincial and municipal safety regulations, and additional liabilities;
- current management;
- availability of the debtor's key personnel;
- use of existing premises and equipment;
- contractual obligations and their legal implications;
- other creditors and their claims;
- licences, franchises, and patents;
- projected sales and costs;
- projected cash flow and working capital requirements;
- credit and financing;
- impact on the appointing lender's security;
- customers;
- warranty issues;
- supply chains, or the continued availability of goods and services;
- utilities;
- environmental issues;
- market environment;
- current operating problems.