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Distinguishing the Appointment of an Interim Receiver: Unique Statutory Tests under Sections 47 and 243 of the *Bankruptcy and Insolvency Act* Are Clarified in *Fluorspar*

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Introduction

The Supreme Court of Newfoundland and Labrador's recent decision in *PricewaterhouseCoopers Inc. v Canada Fluorspar (NL) Inc.* ("*Fluorspar*"), 2022 NLSC 25, provides an overview of the current state of the law on the appointment of interim receivers. As was the result in *Fluorspar*, courts will likely appoint an interim receiver if an applicant can prove the required notice is about to be or was sent and the appointment is necessary for the protection of the debtor's estate or the interests of the creditor who sent that same notice.

Fluorspar also provides a unique jurisprudential break in distinguishing tests for the appointment of an interim receiver under s. 47(1) of the *Bankruptcy and Insolvency Act* (the "**BIA**")[2] versus s. 243(1) or (1.1) of the BIA. As every insolvency situation is unique, interim receivership orders require carefully tailored responses from the courts. Unique legal considerations accordingly apply to applications for interim receiverships that are sought under different provisions of the BIA.

Factual Background

PricewaterhouseCoopers Inc. (the **"Applicant"**), in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and Bridging Income Fund LP, requested an order appointing an interim receiver over the property of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. (collectively, the **"Respondents"**).[3] The Applicant argued that an interim receiver is necessary to "preserve the Respondents' operations and maintain their property (and the security of their creditors) while their stakeholders pursue options to restructure the Respondents and avoid a bankruptcy."[4]

Given that the Respondents' business was financed by significant loans from different secured creditors, including the Applicant, the Applicant sought to develop a restructuring plan in order to avoid consequences such as negative cash flow and operational freezes. Appointing an interim receiver would allow for the preservation of the Respondents' property and business on a temporary basis until a restructuring plan can come to fruition. Ultimately, the Newfoundland

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[2] R.S.C. 1985, c. B-3 [BIA].
[3] *PricewaterhouseCoopers Inc. v Canada Fluorspar (NL) Inc.*, 2022 NLSC 25 at para 1 [*Fluorspar*].
[4] *Ibid.*

and Labrador Supreme Court (the "**NLSC**") appointed an interim receiver and, in the process, clarified the test to be applied when deciding whether its appointment is necessary.

Legal Analysis

The NLSC agreed with the Applicant and allowed an interim receiver to be appointed pursuant to s. 47(1) of the BIA, and extracted two salient factors to be considered when appointing an interim receiver. First, the requisite court must be satisfied that a notice is about to be or was sent under subsection s. 244(1) of the BIA. Second, the appointment of an interim receiver must be necessary for the protection of the debtor's estate or the interests of the creditor who sent the notice under subsection 244(1).

At hand, the only controversial issue to be determined was under the second test - whether the appointment was "necessary" for the protection of one of two things: the debtor's estate or the interests of the creditor who sent the required notice. The Applicant pointed to a recent British Columbia decision, *Pandion Mine Finance Fund LP v Otso Gold Corp.* ("*Pandion Mine*"),[5] as the test that which governs the appointment of an interim receiver under s. 47(1) of the BIA.[6] However, the NLSC disagreed with the Applicant's submission that Pandion Mine was determinative.

In particular, the test articulated in *Pandion Mine* was set out in the context of s. 243 of the *BIA*, not s. 47(1). On application by a secured creditor, s. 243 allows for a court to appoint a receiver if it considers it to be just or convenient to do so. In contrast, the NLSC in *Fluorspar* noted that the words "just and convenient" do not appear anywhere in s. 47 and that the appointment of an interim receiver to be "necessary" is a distinct threshold from that in s. 243.[7]

The NLSC then looked to another decision for guidance: *Bank of Nova Scotia v D.G. Jewelry Inc.*[8] There, Ground J of the Ontario Superior Court of Justice (the "**ONSC**") appointed a receiver and found that the receiver's role would be to develop and carry out a reorganization and bring a restructuring plan to the court for approval. The NLSC in *Fluorspar* found this consideration to be relevant and applicable, as the Applicant was seeking to preserve the Respondents' property and business on a temporary basis until a restructuring process could be brought forward. Proceeding on this basis, the NLSC found the following factors raised by the Applicant satisfied the requirements under the BIA and allowed the appointment of the interim receiver:

[5] 2022 BCSC 136 [*Pandion Mines*].
[6] *Ibid* at para 18.
[7] *Ibid* at para 19.
[8] 38 C.B.R. (4th) 7, [2002] O.T.C. 762.

- The receiver, secured creditors, shareholders and employees of the debtor company would suffer irreparable harm if the debtor company were to permanently shut down its business operations;
- The debt secured against the property of the debtor company may be jeopardized if not preserved;
- The remaining cash of the debtor company would be quickly expended if immediate measures are not put in place;
- The secured creditors and debtor company have consented to the appointment of an interim receiver;
- The interim receiver would not take possession of the debtor company's property;
- The interim receivership is only intended for a short period of time (in this case, likely no longer than 30 days);
- Court appointment of an interim receiver is necessary to permit the receiver to take steps to preserve the property of the debtor company; and
- The appointment of an interim receiver will provide the debtor company the opportunity to explore restructuring and maximize the value of its business.[9]

Finding that the appointment of an interim receiver was necessary and appropriate, the court was then tasked with determining the scope of the order. Whalen CJ began by, again, looking to the difference between s. 243(1) and s. 47. First, s. 243 provides for the appointment of a receiver and not an interim receiver. In other words, under s. 243, the appointment is not time limited as it is under s. 47. Additionally, the power that a court may grant a receiver under s. 243(1) is broader in scope than those it may grant to an interim receiver under s. 47.[10] As such, it is unsurprising that the tests under each provision differ. Given this background, while keeping in mind that every insolvency is unique, the NLSC held that the order tendered by the Applicant was overly broad and went beyond what is necessary for the protection of the estate of the debtor, including providing the receiver with immunity not authorized by statute.[11] As such, the court limited the scope of the order to ensure compliance with the statute and allowed only what was necessary for the protection of the estate of the debtor.[12]

Concluding Thoughts and Lasting Impact

The court's decision in *Fluorspar* clarified the necessary elements for appointing an interim receiver under s. 47 of the BIA, in contrast to s. 243. Though s. 243 may also deal with the appointment of receivers, the distinction between the two provisions was a conscious decision made by Parliament and their differences must be reflected in the relevant tests used for each. Under s. 47, a court must be satisfied that a required notice is about to be or was sent and that

[9] *Ibid* at para 22.
[10] *Ibid* at para 25.
[11] *Ibid* at para 32.
[12] *Ibid*.

the appointment of an interim receiver is shown to be necessary for either: (a) the protection of the debtor's estate; or (b) the interests of the creditor who sent the required notice.

Insolvency courts regularly consider extra-provincial decisions, and the impact of *Fluorspar* is likely to resonate in Ontario. Extra-provincial jurisprudence that is sound in law and appropriate in the circumstances of a case regularly serve as persuasive authority. Indeed, as the Honourable Robert J. Sharpe explains in *Good Judgment: Making Judicial Decisions*, a "judge should strive to maintain the coherence and integrity of the law as defined by the binding authorities, using persuasive authority to elaborate and flesh out its basic structure."[13] Given this background, Ontario courts will view the *Fluorspar* decision as persuasive if the facts of the case at bar are analogous to warrant its consideration. Ontario insolvency litigators should ensure that their motion materials provide an appropriate factual basis when moving under the separate receivership tests to accommodate these updated *Fluorspar* legal tests.

[13] Robert J Sharpe, *Good Judgment: Making Judicial Decisions*, (Toronto: University of Toronto Press, 2018) at 171–72.