Aspects of the Law of Judicial Sequestration in Quebec

Introduction

The recourse in judicial sequestration is an interlocutory and conservatory proceeding which seeks to place into the hands of a third party[1] property or proprietary rights directly or indirectly affected by the principal litigation. This interim remedy is often associated with seizure before judgment and is frequently mistaken for a proceeding under bankruptcy legislation.

To obtain an order of sequestration the petitioner must, by affidavit, but preferably by testimony of witnesses,[2] establish a *prima facie* right which would be irreparably prejudiced or jeopardized if the remedy were not granted. As well, the petitioner must demonstrate that alternative recourses, such as injunctions, are inappropriate in the circumstances.[3] Since sequestration effectively constitutes dispossession of the property (in some sense similar to judicial seizure before judgment) the petitioner must allege gross or fraudulent mismanagement of the property which necessitates urgent judicial intervention.[4] In some circumstances joint sequestrators may be appointed to undertake the administration.[5] The recourse is subject to the discretion of the judge seized with the petition on the basis of proof presented, and the appeal courts will only revise the exercise of such discretion with great reluctance.[6]

The subject matter of this recourse can be as diverse as the subject matter of litigation. Instances involving the proposed intervention of a sequestrator may include the administration of company affairs or share certificates during a dispute between com-

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[1] But see *Giroux* v. *Pelletier* [1962] C.S. 453.

[2] *Pouliot* v. *Sauvé* [1969] B.R. 613.

[3] *Timrod Mining Co.* v. *La Société Minière Louvem Inc.* [1972] C.S. 361, 368.

[4] *Levy* v. *Cohen and Savage* [1966] C.S. 461; *Grimaldi* v. *Pierce* (1934) 37 R.P. 7 (C.S.); *Gagnon* v. *Tétrault* [1958] B.R. 309; *Be-St Realties Corp.* v. *Quintal* [1948] B.R. 139; *Metropolitan Loan Corp.* v. *Fairways Holding Inc.* [1955] R.P. 170 (C.S.); *Globe Textiles Ltd* v. *Brandon Shirt Mfg* [1953] R.P. 132 (C.S.).

[5] *Gennari* v. *Zervos* [1966] C.S. 433.

[6] *Lessard* v. *Ulliac* [1965] B.R. 325; *Blouin* v. *The Louise Wharfage and Warehouse Co.* (1896) 5 B.R. 377; *Bagordo* v. *Mignacca* [1954] B.R. 85.

peting shareholding factions, or prior to corporate liquidation;[7] intrafamilial disputes regarding a testator's estate or matrimonial property;[8] and interim management of an immoveable subject to a hypothecary or *dation en paiement* claim or action *en passation de titre.*[9]

It is evident that the judicial mandate accorded to the sequestrator should be clearly defined, whatever the circumstances giving rise to this remedy, especially in view of the enormous costs involved in dispossessing one of the parties of the moveable or immoveable in question.[10]

Unfortunately, existing legislation provides little assistance. Few qualifications are required of the nominee for sequestrator. The manner of administration and the very term of the sequestration are unclear, and the nature of remuneration for the sequestrator remains unsettled. Little guidance for the sequestrator in the course of this administration is supplied by the legislator nor is full protection assured to the parties involved in the litigation. In

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[7] *Cavanaugh* v. *Machabee* [1969] B.R. 871; *Stephen* v. *The Montreal, Portland & Boston Ry* (1884) 7 L.N. 62, 85 (C.S.); *Bonneville* v. *Salvas* [1916] 49 C.S. 253; *Baran* v. *Danko* [1965] B.R. 618; *Gennari* v. *Zervos, supra,* note 5; *Doyer* v. *Acadia Acceptance Corp.* [1967] R.P. 308 (C.S.).

[8] *Levy* v. *Cohen and Savage, supra,* note 4; *Crevier* v. *Yelle* [1963] C.S. 147; *Société Nationale de Fiducie* v. *Yelle* [1963] C.S. 161; *Monfette* v. *Mainville* [1963] C.S. 208, [1964] R.P. 41 (C.S.); *Gourde* v. *Bilodeau* [1954] C.S. 421; *Zablocki* v. *Zablocki and Mejercik* [1968] B.R. 258; *Paquin* v. *Morand* [1962] B.R. 657; *Houghton* v. *Delle Parmenie Lafortune & Lareau* (1939) 42 R.P. 401 (C.S.).

[9] *Vaillancourt* v. *Faust* (1927) 30 R.P. 136 (C.S.); *Giroux* v. *Pelletier, supra,* note 1; *Gagnon* v. *Tétrault, supra,* note 4; *Proulx* v. *Langlois* [1962] R.P. 97 (C.S.); *Lessard* v. *Ulliac, supra,* note 6. See generally, the *Commissioners' Report of the Code of Civil Procedure of 1965,* art.742, 290; *Shaink* v. *Dussault* [1956] C.S. 164, 170; *Metropolitan Loan Corp.* v. *Fairways Holding Inc., supra,* note 4; But see *Les Entrepôts Frigorifiques Martineau Inc.* v. *Les Entrepôts Frigorifiques Laberge Inc.* [1976] C.S. 1351.

[10] The judicial sequestrator is a court-appointed mandatary of the parties, and does not become a conventional sequestrator simply because the parties to the dispute have, following the granting of the petition, agreed on a nominee to the position. The nominee, in his dealings with third parties, is generally subject to the rules of mandate and will consequently engage his personal liability if he fails to conform to the various requirements contained in arts.1715-1719 C.C. See the use of the appellation "mandat judiciaire" in *Gennari* v. *Zervos, supra,* note 5; arts.1822, 1827 C.C.; *System Theatre Operating Co.* v. *Pulos* [1955] S.C.R. 448. The parties to the litigation cannot by private act revoke the "mandate" without judicial intervention: art.748 C.C.P. But see art.1794 C.C. assimilating sequestration to deposit: *C.F.M.G. Inc.* v. *Pinto,* C.S.M., no 500-05-013200-777, 5 Aug. 1977, *per* Dugas J.

short, the terseness of the governing provisions[11] leaves much to be desired.

This paper, then, will deal with various shortcomings in present legislation and will propose certain amendments in an attempt to overcome these deficiencies.

Qualifications of the Judicial Sequestrator

While the Civil Code does not specifically stipulate the qualifications for the nominee sequestrator, Pothier in *Traité de la procédure civile* prescribes two requirements. He states that the function of the sequestrator demands the nomination of a person having adequate experience in the administration of the object and sufficient assets to provide for compensation to the parties in the event of his default.[12] The Code of Civil Procedure provides a further requirement; it is evident from the phrasing of articles 743 and 746 that the nominee cannot be one of the parties to the litigation.[13]

However, the Civil Code, in one respect, expressly qualifies the nomination: the disabilities imposed upon corporations include the prohibition against a corporate entity acting as a judicial sequestrator.[14] Although the letters patent governing the incorporation may give the company the power to act as a sequestrator, the corporate entity cannot assume the function unless specifically authorized by special legislation.[15]

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[11] Arts.1823, 1827 C.C.; 742-750 C.C.P.

[12] *Oeuvres de Pothier* 2d ed. (1861), Bugnet (ed.), vol.10, 136, para.307. "On doit nommer pour séquestre un homme suffisant, c'est-à-dire capable de bien administrer les biens séquestrés; solvable, pour répondre de son administration; résidant proche du lieu où sont situés les biens qui doivent être séquestrés, pour être à portée de régire et gouverner les biens séquestrés. Il ne doit être ni parent ni allié du juge qui le nomme...".

[13] See also art.667 C.C.P.

[14] Art.365 C.C. Where the court of first instance errs in law by naming a corporate sequestrator, the court of appeal may maintain the order of sequestration but replace the moral with a natural person. In such a case, the acts performed and contracts executed by the corporate sequestrator within the scope of its putative sequestration bind the parties involved in the litigation.

[15] See *Drovers National Bank of Chicago* v. *Capital Funds (IAC) Ltd and Place Champlain (1972) Corp* [1976] C.A. 104, 105: "The last paragraph of article 365 C.C. is indeed quite specific on this point. Counsel for Capital Funds appears to have been taken by surprise by this argument. We accordingly granted him a delay to answer it and particularly to determine

Although an attempt is being made to more strictly define the requisites to nomination,[16] at present the rules respecting the nominee can only be determined by analogy to current legislative structures involving common administrative elements: tutorship, curatorship, judicial advisorship, testamentary executorship, trusteeship, mandate and deposit. Without entering into a detailed comparative analysis, it is fair to say that existing legislative structures reveal the following relevant qualifications for nomination: (1) the nominee must not be in a position of conflicting personal and official interests;[17] (2) the nominee must be physically and mentally capable of coping with the demands of his position;[18] and (3) the nominee must have administrative competence and a previous record of honest performance.[19] Further reference to comparable judicial nominees such as expert surveyors, auditors, practitioners and liquidators[20] indicates that the restrictions facing the nominee parallel those forming the grounds for recusation of a judge.[21]

Under current law, no more express requirements are demanded of the judicial than of the conventional sequestrator, corporate administrators excepted. The sequestrator does not have to be licensed nor carry membership in any professional body recognized by the *Code des Professions*.[22] He cannot be an unemancipated minor, but may be female.[23] Prior to his nomination, he is not required to demonstrate proof of solvency, previous management experience,

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whether any special legislation conferred upon A.E. LePage & Westmount Realties Inc. the right to act as sequestrator notwithstanding article 365 C.C. We have received no further submission in this connection and therefore conclude that there is no special legislation. Under the circumstances, I am of the opinion that we should adopt the suggestion made by Counsel before us and appoint as sequestrator the officer of A.E. LePage & Westmount Realties Inc. who has in fact been acting, the witness Sidney Pinto". See also art.908 C.C.; art.1041 C.C.; Baudry-Lacantinerie and Wahl, *Traité de droit civil* 3d ed. (1907), vol.XXIII, 692, para.1291.

16 *Report on Administration of the Property of Others* (1976), C.C.R.O., Montreal, XLII, 9-13, 35 *et seq.*

17 Arts.269, 311, 337*a*, 1484, 1706 C.C.

18 Arts.274-282, 907, 1800 C.C.

19 Arts.285, 917, 981*d* C.C.

20 Arts.414, 425, 762, 810 C.C.P.

21 See art.234(1)(2)(4)(6)(8) C.C.P. See also the position of inspectors under the *Bankruptcy Act*, R.S.C. 1970, c.B-3, s.94(11).

22 S.Q. 1973, c.43.

23 Unemancipated minors would be precluded by art.290 C.C., which would result in the absurdity of the tutor's nomination *ès qualité*. Emancipated minors are probably precluded because of the practical restrictions on the activities mentioned in arts.319, 320, 231, 233 C.C. But see arts.1707, 1708 C.C.

or lack of interest in the property.[24] Although the petitioning party is often required to provide security for costs of the sequestration, the nominee himself is not obliged to provide a performance bond.[25]

It should be kept in mind that the legislator has placed foremost emphasis on the wishes and consent of the parties regarding the choice of nominee.[26] Thus, the promulgation of additional legislative requirements for nomination might, in given circumstances, adversely affect the attempts of the parties to minimize costs or maintain a continuity of commercial operations in the property under sequestration.

There is, however, one express qualification for nomination which might be subject to severe scrutiny. Recent years have seen the growth and popularity of industrial and real estate management companies specifically organized for, and commercially active in, administering apartment and office buildings as well as manufacturing complexes. This present day reality has superseded the legislative reasoning expressed in article 365 C.C. which prohibits the use of corporate sequestrators.[27] Although parties theoretically avoid this prohibition by appointing a representative of a management com-

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[24] The role of judicial sequestrator of an immoveable is not incompatible in the same person with the function of a liquidator of a real estate enterprise which owns the immoveable: "Sequestre", *Juris classeur,* arts.1896-2091 C.C. para.111.

[25] Regarding the character and qualifications of a trustee under bankruptcy legislation, see *Bankruptcy Act,* R.S.C. 1970, c.B-3, ss.9, 23(7)(8), 173.

[26] Art.743 C.C.P.

[27] The classical authors have repeated the distinction between natural and artifical incapacities suffered by corporations mentioned in arts.365 and 366 C.C.: *Commission for the Codification of the Laws of Lower Canada relating to Civil Matters* (1865), Bk 1, arts.19, 235, 352; Mignault, *Le Droit civil canadien* (1896), vol. 2, 353-54; Trudel, *Traité de droit civil du Québec* (1942), vol.2 492; de Lorimier and Vilbon, *La Bibliothèque du Code civil de la province de Québec* (1874), vol.3, 207 *et seq.* Art.365 C.C. reads as follows:

> "In consequence of the disabilities which arise from their corporate character they can neither be tutors nor curators, nor can they take part in meetings of family councils.
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> They cannot be entrusted with the execution of wills or any other administration which necessitates the taking of an oath, or imposes personal responsibility.
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> They cannot be summoned personally, nor appear in court otherwise than by attorney.
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> They cannot sue nor be sued for assault, battery or other violence to the person.
>
> They cannot serve as witnesses nor as jurors before the courts.
>
> They can neither be guardians nor judicial sequestrators, nor can they

pany to act as a sequestrator, it is evident that such a nominee utilizes the accounting, janitorial, and accessory services offered by the management company.[28] In light of the often consensual nature of the nomination, it appears incongruous that corporations may act as conventional, but not judicial, sequestrators.

Duration and Termination

The sequestrator is by law discharged upon the delivery of the property to the party entitled to it in virtue of the judgment; he cannot be discharged earlier except by the court and for cause.[29] Since the court is empowered to initiate the ordering of a sequestration as well as to name the actual administrator[30] it is, therefore, logical that the court be further entitled to terminate the sequestration prematurely for just reason.[31] However, even without cause, the court may indirectly bring about the discharge. For example, if the property is of a perishable nature or liable to depreciate rapidly, or if the cost of the sequestration is not in proportion to the value

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be charged with any other functions or duties the exercise of which might entail imprisonment."

Given the wording and sequence of art.365 C.C. one might conclude that the prohibition against corporate sequestrators arises from the impossibility of imprisoning a company. If such were the sole reason for the prohibition, then the last paragraph of art.365 C.C. would no longer have general effect, in virtue of art.1, para.4 C.C.P. which declares:

"Notwithstanding any contrary provision of any general law or special act, imprisonment in civil matters is abolished, except in cases of contempt of court."

However, it would seem that the reason for the prohibition is more widely related to the basic lack of human substance in the artificial corporate entity. See, *e.g.*, art.365, para.2 C.C.P. which refers to:

"... administration which necessitates the taking of an oath, or imposes personal responsibility."

It might be argued that the most effective means of compensating for the impossibility of corporate oaths and direct responsibility of corporate members is to permit the nomination of a company as a judicial sequestrator with attendant responsibility, in the event of default or negligence, upon the corporate directors who may be sworn in as duly authorized representatives of the sequestrator.

One remaining question arises; whether trust companies are capable of acting as *judicial* sequestrators in light of the power granted to perform the function of a "sequestrator": *Trust Companies Act*, R.S.Q. 1964, c.287, s.2(7).

[28] *E.g., Scanti Investments Ltd* v. *Kaussen* [1975] C.S. 463.

[29] Art.748 C.C.P.

[30] Arts.742, 743 C.C.P.

[31] Art.17(17) C.C.

of the object to be maintained, the judge may order such object to be sold, in effect terminating the sequestration.[32]

Where the sequestration runs to maturity, that is, to the granting of a judgment for the disposition of the property, the sequestration would appear not only to survive beyond the date of the judgment, but as well, beyond the expiry of the delays for appeal. By declaring his discharge to be effective only when he decides to make actual delivery of the property, the Code of Civil Procedure gives the sequestrator himself the right to determine the final date of his function.[33]

The practical consequence of protracting the duration of the sequestration until the date of actual delivery is to permit the sequestrator to put his house in order, especially where the object of the sequestration is an immoveable requiring various administrative and maintenance tasks. Should the sequestrator refuse for no apparent reason to deliver the property to the person entitled to it within fixed delays, the court may abruptly declare the sequestrator discharged for cause. While it might seem preferable to provide a stricter means of determining the date of delivery, the costs incurred pending actual delivery might be chargeable to the sequestrator personally,[34] thus providing a deterrent to procrastination on his part.

Costs

The costs of the sequestrator include all fees, commissions, disbursements and generally all expenditures incurred in maintaining the object under his control in addition to the fee or remuneration of the sequestrator himself. The law, however, does not expressly recognize any tariff of fees strictly applicable to the administration. The administrator may receive payment by taxing

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[32] Art.747 C.C.P.; art.1821 C.C.; the alienation of the object of the sequestration either by the consent of the parties to the ligitation or by authorization of the court would have the effect of removing the purpose of difficulty which initially gave rise to the extraordinary recourse in sequestration: compare arts.1804, 1805 C.C.; *Bédard* v. *Owens* (1906) 8 R.P. 81, 86 (B.R.).

[33] Art.748 C.C.P.

[34] Art.478 C.C.P. See also Mignault's argument regarding indemnities due: "Mais il faut, pour que le séquestre soit déchargé, que la partie accepte les biens. S'ils sont détériorés par la faute du séquestre, on comprend qu'il faut autre chose que leur remise; le séquestre ne sera alors déchargé que lorsqu'il aura payé à cette partie l'indemnité à laquelle elle a droit": *Le droit civil canadien* (1909), vol.8, 179.

his costs at the office of the prothonotary, subject to revision and appeal of the costs taxed.[35]

The remuneration for administration is set by reference to the commercial rates in use, often with regard to the schedule of real estate commissions published by the Montreal Real Estate Board. Such tariff is certainly not binding on the court in determining taxable costs[36] but has provided a useful indicator for the setting of remuneration.

The sequestrator may seek the aid of a commercial management firm to administer the daily chores involved in operating and maintaining a residence or office structure. In such a case, the sequestrator may pass on the rates charged by the management firm as well as an additional charge for services personally performed by himself.[37] Where the administrator requires legal and auditing counsel, or must pay leasing and agents' fees in order to properly fulfill his mandate, such expenses form part of the costs of sequestration without any derogation from the rate of remuneration specifically due to the sequestrator. It might very well be argued that management and counselling fees should be contained within and not added to the chargeable fees of the sequestrator himself, especially if one takes the view that the administrator is not entitled to a fee of office[38] but compensation for actual work performed.

The Sequestrator and the Court

The court serves both as the overseer and effective source of authority for the sequestrator.[39] In the course of his functions the sequestrator may require clarification of his judicial mandate. Does it, for example, require him to effect certain repairs, to

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[35] Arts.480, 750 C.C.P.; *System Theatre Operating Co.* v. *Pulos, supra,* note 10; *W & H Management International Ltd* v. *Sterling Bank and Trust Co.* [1976] C.S. 1146; *Maillet* v. *Fontaine* (1912) 21 B.R. 426.

[36] Compare, *Dalling* v. *Brun* [1953] C.S. 29; but note art.1024 C.C.

[37] *Scanti Investment Ltd* v. *Kaussen, supra,* note 28: such costs are not judicial costs of the advocates, and consequently cannot be alleged in a demand under art.65 C.C.P.

[38] See Roch and Paré, *Traité de droit civil du Québec* (1952), vol.13, 326, who consider that while the position of sequestrator is not a "charge publique", the costs arising therefrom are privileged as law costs under arts.1994(1) and 2009(1) C.C.

[39] *Chalifoux* v. *Lafontaine* (1930) 48 B.R. 1; regarding art.465 C.C. see *Côté* v. *Côté* [1957] R.P. 343.

negotiate or settle accounts with creditors having proprietary rights over the object administered, or to make expenditures of significant sums. In order to avoid incurring personal liability for negligent mismanagement, the sequestrator often seeks the consent of the parties to the litigation before acting in a given situation. Where the parties are uncooperative or otherwise refuse to grant consent, the sequestrator must seek judicial advice.

Unfortunately, however, article 745 C.C.P. permits the sequestrator access to the court specifically for authorization to act *beyond* the limits of pure administration. Thus, a restrictive reading of this article would preclude the administrator from seeking judicial counsel on a matter falling within the ordinary scope of his authority.[40]

The economy of the law would normally refrain from imposing upon the courts the obligation to dispense legal advice but since the sequestrator is appointed by the court his situation is exceptional. Furthermore, the recent expansion of the limitations to standing, contained in article 55 C.C.P.,[41] argues in favour of complete access to the courts for the sequestrator, by way of a motion for directions. The most desirable form of recourse which might be implemented is that currently contained in bankruptcy legislation which permits a trustee to apply to the court for written directions in relation to any matter affecting the administration of the estate.[42]

The Sequestrator and the Parties to the Litigation

The parties to the litigation are responsible for both the initiation of an order of sequestration as well as the nomination of a suitable administrator. The parties, as well, are jointly and severally responsible for the payment of the costs and remuneration of the sequestrator following taxation by the prothonotary.[43] While the parties are not given any explicit supervisory role regarding the nominee's administration it is evident that the administrator must, in performing his daily functions, take into account the best

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[40] See *e.g., Bissegger* v. *M.G.A. Development Corp.* [1974] R.P. 265 (C.S.).

[41] *E.g.,* arts.448, 453 C.C., 462 C.C.P. Although testamentary executors and trustees under a will have often resorted to the declaratory recourses for clarification of administrative problems, the costs and delays involved are certainly not suited to sequestration requiring a minimization of expenses: see authorities cited in Sarna, *The Scope and Application of the Declaratory Judgment on Motion* (1973) 33 R.du B. 493, 499, 506-507.

[42] *Bankruptcy Act,* R.S.C. 1970, c.B-3, s.16(1).

[43] Art.750 C.C.P.

interests of the parties, thereby minimizing his own personal responsibility for mismanagement. The litigants are, however, implicitly required, or at least given the right, to bring to the court's attention the fact the object under sequestration is liable to rapid depreciation or that the costs of custody and maintenance are reaching excessive proportions.[44] Although the litigants are not given an active function, they are in practice frequently called upon by the sequestrator to give their consent or tacit approval to various repairs, leasing practices or insurance proposals.

Conflict arises between the parties and the sequestrator where each litigant has competing rights requiring immediate resolution. For example, second ranking hypothecary creditors who are brought into litigation involving a first ranking hypothecary claim or *dation en paiement* right might wish to exercise their rights to a forced assignment of rentals in virtue of their mortgage deed. In order for the sequestrator to properly administer the immoveable, it is essential that he be in receipt of all rentals and fruits arising from the property in question. Competing claims over rentals are often resolved by reference to the judgment ordering the sequestration, which usually expressly stipulates the right of the sequestrator to receive all rentals in preference to any of the claims of the parties. Where the judgment fails to make such provision, the tenants, faced with competing notices by both the sequestrator and hypothecary creditor, are forced to deposit the monthly rentals in the office of the court. Even though the judgment ordering the sequestration is silent on the issue of conflicting rights, it may be argued that the sequestrator has rights to revenues overriding those of the parties on the following bases: the costs owed the sequestrator by the parties would ordinarily be paid out of the revenues accruing from the property; *all* parties[45] are bound for payment of the costs; and the taxation of such costs entitles the sequestrator to a first ranking privilege.[46] Furthermore, it is of the essence of the remedy that the sequestrator should not be sterilized in his function by cutting off his source of operating funds.[47] While the effect of the judgment in sequestration may be to play havoc, temporarily, with the rights of the various interested parties, there is no doubt that the court has taken into account the disruptive quality of the remedy before issuing its order.

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[44] Art.747 C.C.P.
[45] Roch and Paré, *supra,* note 38, 314.
[46] Art.2009(1) C.C.
[47] *Bédard* v. *Owens, supra,* note 32.

One way of ensuring the minimization of conflict is to permit interested parties to petition the court on a point of clarification in the same way we suggested the sequestrator be permitted to seek judicial counsel on matters affecting his administration. While it might be cautioned that such recourse would open the doors to a flood of petty complaints from the competing parties, it would appear that the alternative, namely the untimely termination of the sequestration, is much more drastic in effect.

Conclusions

The sparse nature of the governing legislative provisions has resulted in unnecessary ambiguity regarding the roles and functions of the interested parties. Considerable clarification may be achieved by the addition of the following suggested amendments: (1) the imposition of grounds of recusation for the nominee to the sequestration similar to those contained in article 234 C.C.P.; (2) the abolition of the prohibition against corporate sequestrators with, perhaps, personal liability for the acting directors or representatives of such corporations; (3) the formal termination of the sequestration following the expiry of the delays to appeal the final judgment; (4) the enactment of a tariff of taxable costs for sequestrators; and (5) the introduction of a formal recourse permitting a motion for directions by the sequestrator and the interested parties. In short, under current law there is no reason why the court must be required to create a judicial monster in the form of what it would otherwise consider just relief to remedy an urgent situation.

Lazar Sarna*

* B.A., B.C.L. (McGill), member of the Bar of Montreal.