THE NEW SASKATCHEWAN TEMPLATE RECEIVERSHIP ORDER

EXPLANATORY NOTES: JUNE, 2006

TEMPLATE RECEIVERSHIP ORDER COMMITTEE
SASKATOON/REGINA, SASKATCHEWAN

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Template Receivership Order Committee,
Saskatoon/Regina, Saskatchewan.

I. INTRODUCTION

1. Until very recently, the granting of Orders for the appointment of a Court Appointed Receiver or Receiver and Manager (a "**Receiver**") by the Court of Queen's Bench for Saskatchewan (the "**Court**") were uncommon, largely stemming from the decisions of our Court in *Bank of Nova Scotia* v. *Sullivan Investments Ltd.*[1] and *Royal Bank of Canada* v. *White Cross Properties Ltd., et al*.[2] The trend over the last several decades can be largely attributed to the nature and scope of the Orders that were proposed. As the Orders became more and more complicated, our Court became less and less inclined to give such Orders favourable consideration, taking the position that it would only grant an Order dealing with a specific problem that was being encountered.

2. Although our Court was less inclined to grant an Order appointing a Receiver in the first instance, it was prepared to enforce Orders from other jurisdictions. This led to the practice, in some instances where Court Orders were obtained in one jurisdiction and reciprocally enforced in Saskatchewan, even though the main business of the Debtor Corporation was located in Saskatchewan.

3. On September 1, 2003, by means of Practice Directive No. 15, the former Chief Justice W. F. Gerein of our Court introduced, on a trial basis, the Bankruptcy and Insolvency Panel (the "**Panel**"). The Panel consists of voluntary members of the Court interested in hearing bankruptcy and insolvency matters. After a very successful trial period, the Panel has now been made a permanent fixture of our Court.

4. Since the appointment of the Panel, Court Orders appointing Receivers, Receiver – Managers and Interim Receivers (under both provincial law and the *Bankruptcy Insolvency Act* (Canada)[3] (the "***BIA***")) have become more common.

5. With the advent of the Panel, and with the development of a template Receivership Order in the Province of Ontario in November of 2004 (the "**Ontario Template Order**") and a similar template Receivership Order being proposed in the Province of Alberta (the "**Alberta Template Order**"), it was determined that both insolvency

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[1] *Bank of Nova Scotia* v. *Sullivan Investments Ltd.*, (1982) 21 Sask. R 14, [1982] S.J. No. 706 (QL).
[2] *Royal Bank of Canada* v. *White Cross Properties Ltd., et al*., (1984) 34 Sask. R. 315, (1984) 53 C.B.R. (N.S.) 96.
[3] *Bankruptcy Insolvency Act*, R.S.C. 1985, c. B-3.

practitioners and the Court would benefit from a template Receivership Order for use in the Province of Saskatchewan.

6. In consultation with the Chairperson of the Panel, Madam Justice A.R. Rothery, a Committee comprised of insolvency practitioners from both Regina and Saskatoon was set up to review the Alberta Template Order. The Committee consists of the following persons:

Saskatoon	**Regina**
W. Randall Rooke, Q.C. – Chairperson	Michael Milani, Q.C.
Gary Meschishnick	Robert Magnusson
Jeffrey Lee	Conrad Hadubiak
Collin Hirschfeld	
Linda Widdup	
Clayton Barry.	

(collectively the "**Saskatchewan Committee**")

7. At the outset, it was determined by the Saskatchewan Committee in consultation with Madam Justice A.R. Rothery that wherever possible, the format of the Alberta Template Order would be followed in order to have consistency between Alberta and Saskatchewan. The Template Receivership Order presented by the Saskatchewan Committee (the "**Saskatchewan Template Receivership Order**") is not meant to be the only terms of an Order that will be considered by our Court. It would be expected, however, that in circumstances where there are changes to the Saskatchewan Template Receivership Order, those changes would be highlighted in the draft Order presented to the Court, and evidence would be provided to the Court as to why the additional provisions or changes are required.

8. The Saskatchewan Committee would like to acknowledge the valuable input that it received from Madam Justice A.R. Rothery and the contributions of the following Panel members:

(a) Justice L.A. Kyle
(b) Justice G.W. Baynton
(c) Justice J. Klebuc
(d) Justice G.N. Allbright
(e) Justice T.C. Zarzeczny
(f) Justice J.D. Koch
(g) Justice D.P. Ball
(h) Justice R.S. Smith

II. RECEIVER OR INTERIM RECEIVER

9. The Saskatchewan Template Receivership Order appoints a licensed trustee as an Interim Receiver under s. 47 of the *BIA* and as Receiver and Manager pursuant to s. 65(1) of *The Queen's Bench Act, 1998*[4] (the "***QB Act***"). Where the applying

[4] *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01.

Creditor holds a security agreement charging the Debtor Company's personal property, the Order should also provide for an appointment under s. 64(8) of *The Personal Property Security Act, 1993*[5] (the "***PPSA***"). **Practitioners should note that s. 47 of the *BIA* requires that the person appointed as an Interim Receiver be a trustee, within the meaning of the *BIA* (the "Trustee").** On the issuance of the Court Order, the Trustee becomes an officer of the Court (the **"Court Officer"**), and is subject to the direction and control of the Court.

10. *The Business Corporations Act*[6] (the "***SBCA***") previously provided for the appointment of Receivers and Managers in ss. 89 through 96. Those sections were repealed in 1993, other than s. 91 which states:

> If a receiver-manager is appointed by a court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.

11. Section 269.1 of the *SBCA* is also relevant:

> Every receiver, receiver-manager or liquidator shall notify the Director immediately of his appointment and discharge.

12. There are also provisions in the *SBCA* and in *The Non-Profit Corporations Act, 1995*[7] (the "***NPCA***") that allow for a complainant to apply to the Court for an Order appointing a Receiver or Receiver-manager.[8]

13. Section 76 of the *QB Act* states:

> Section 64, subsections 65(2) and (3) and section 66 of [the *PPSA*] apply, with any necessary modification, to:
>
> (a) a receiver or receiver-manager appointed pursuant to clause 234(3)(b) of [the *SBCA*] or clause 225(2)(b) of [the *NPCA*]; or
>
> (b) a receivership of property that is collateral under a security agreement, charge or mortgage to which [the *PPSA*] does not otherwise apply.

14. The Saskatchewan Template Receivership Order assumes the applying Creditor maintains security over all of the Debtor Company's property, business and

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[5] *The Personal Property Security Act*, 1993, S.S. 1993, c. P-6.2.
[6] *The Business Corporations Act*, R.S.S. 1978, c. B-10.
[7] *The Non-Profit Corporations Act, 1995*, S.S. 1995, c. M-4.2.
[8] See ss. 234 of the *BCA* and 225 of the *NPCA*.

undertaking. **It is not the recommended form to be used in land foreclosure actions.**

15. The dual appointment of an Interim Receiver pursuant to s. 47 of the *BIA* and a Receiver and Manager pursuant to s. 65(1) of the *QB Act* is recommended by the Saskatchewan Committee for the reasons referenced in the Ontario Explanatory Notes (the "**Ontario Explanatory Notes**") that were prepared by the Ontario Committee (the "**Ontario Committee**") and that accompanied the final draft of the Ontario Template Order. The reasons suggested by the Ontario Committee are paraphrased below:

    (a) An Order appointing an Interim Receiver under the *BIA* has national scope and is readily enforceable nationally (subject always to local concerns as often may arise in Quebec and elsewhere);

    (b) An Interim Receiver bases its jurisdiction federally and may be better protected against certain provincial liabilities and inequities that may flow from the application of different provincial regimes to the same Debtor's property as may be located in different provinces; and

    (c) A Receiver and Manager under the *QB Act* can be provided with a priority charge in respect of its disbursements and thereby avoid issues concerning the limits on the authority of the Court to grant a priority charge in respect of business losses suffered by an Interim Receiver.

16. **Dual appointments raise distinct procedural and other issues with varying consequences of which counsel must be cognizant, including, for example, differing appeal periods between Queen's Bench civil and bankruptcy actions.**

17. Since the Saskatchewan Template Receivership Order meets the definition of "Receiver" as set out in s. 243(2) of the *BIA*, and also constitutes an appointment under s. 65(1) of the *QB Act*, the Saskatchewan Committee is of the view that:

    (a) The applying Creditor must serve the mandatory s. 244(1) *BIA* Notice prior to the appointment;

    (b) The Receiver is subject to the statutory rights of suppliers under s. 81.1 of the *BIA* in respect of 30 day goods; and

    (c) The required reporting to the Office of the Superintendent in Bankruptcy must be maintained.

18. The Saskatchewan Committee agrees with the approach taken by the Ontario Committee and considers the Saskatchewan Template Receivership Order to be neutral and inclusive in respect to the interests of all stakeholders.

19. On the other hand, the applying Creditor may choose to apply for an appointment of the Court Officer as only an Interim Receiver under s. 47 of the *BIA*. Such an application may be made in cases where the required s. 244(1) *BIA* Notice is about to be served, or has been served but the 10 day notice has not terminated, and/or to potentially gain other arguable advantages that an Interim Receiver appointed solely under s. 47 of the *BIA* may give the applying Creditor in lieu of a dual appointment. Also, depending upon the circumstances, the applying Creditor may prefer to apply for appointment of the Interim Receiver under s. 46 of the *BIA*, after filing an Application for a Bankruptcy Order under the *BIA*. Or, if a Notice of Intention to File a Proposal has been filed, or a Proposal has been filed under the *BIA*, consideration may be given to simply applying for an appointment for an Interim Receiver under s. 47.1 of the *BIA*.

20. In each circumstance, the applying Creditor should consider whether the Court Officer should be appointed solely as an Interim Receiver, or Receiver to preserve and liquidate assets, or as an Interim Receiver and Receiver and Manager to both preserve and realize upon the assets of the company in receivership, and to carry on its business. Counsel should be aware that a Court Officer appointed as Interim Receiver and/or Receiver and Manager to carry on the Debtor Company's business, risks potential additional responsibilities and liabilities over that of an Interim Receiver or Receiver appointed solely to preserve and liquidate the assets.

III. CLAUSE BY CLAUSE REVIEW OF THE SASKATCHEWAN TEMPLATE RECEIVERSHIP ORDER

A. PARTIES, RECITALS AND SERVICE

21. The Saskatchewan Template Receivership Order is drafted on the assumption that it is being sought jointly under both s. 65 of the *QB Act* and s. 47 of the *BIA*. As discussed in the previous section of this commentary, the appointment of a Receiver can be sought under several other pieces of legislation.[9] The Saskatchewan Template Receivership Order is to be sought on motion in an action to be commenced by way of Statement of Claim, by Notice of Motion (in circumstances where no real property is involved),[10] or as may be directed by the Court under s. 27 of the *QB Act*.[11] For the purposes of the *BIA*, there is no requirement that an

[9] The procedure by which a Receivership appointment is sought varies with the other types of legislation. Those pieces of legislation ought to be consulted prior to drafting the materials needed for the appointment.

[10] The Saskatchewan Committee takes cognizance of the decision by the Honourable Mr. Justice Klebuc in *R v. Kiryakos (T.A.)*, (2004) 243 Sask. R. 278, 2004 SKPC 2 (*Kiryakos*). However, the Saskatchewan Committee is of the view that the *Kiryakos* decision is be confined to its unique facts, and, therefore, takes the position that the proceedings may be commenced by way of Notice of Motion in situations where real property does not form part of the application.

[11] The Saskatchewan Template Receivership Order differs from the Alberta and Ontario Template Orders in that it is drafted with a single style of cause, reflecting a Saskatchewan Court of Queen's Bench civil action. Our discussions with the Registrar in Bankruptcy indicated that it was not necessary to start a

Application for a Bankruptcy Order be filed prior to bringing the application under s. 47.

22. The parties consist of the applying Creditor and the Debtor Company, respectively named as either the Plaintiff and the Defendant (in the event the action is commenced by way of Statement of Claim), or as Applicant and Respondent (in the event the action is commenced by way of Notice of Motion). All other parties to the motion would be listed under a third heading entitled Respondents. This category of party could vary based on the particular motion and could expand as more parties are discovered and added. The Committee also recommends having a descriptive title for the motion itself, i.e. under the heading Notice of Motion or Memorandum to Judge, as the case may be, insert, for e.g., Application by ABC Bank.

23. At the end of the motion, the Committee recommends adding "TO:" lines for each of the responding parties.[12] Those parties that are not served with materials of the motion but are nonetheless affected by the Order will in all likelihood be treated by the Court as an *ex parte* order as against those parties with the usual principles applying.

24. The Saskatchewan Committee agrees with the Alberta Template Committee (the "**Alberta Committee**") and takes the position that in urgent situations (imminent risk of asset dissipation, or immediate need to appoint a Receiver to preserve and maintain the value, including the going concern value of the Debtor Company's assets in the best interest of all stakeholders) the application could be made *ex parte* under s. 65 of the *QB Act* and s. 47 of the *BIA*[13] and supported by affidavit evidence of the urgency. The Saskatchewan Template Receivership Order contemplates, however, that it would be granted either with the consent of, or on notice to, the Debtor Company, and on notice to other potentially interested persons that may be affected by the granting of the Order (for example, other Secured Creditors, statutory or otherwise). The appointing Creditor also has to ensure compliance with Rules 441, 441A, and 467 (2a) of *The Queen's Bench Rules*.

25. For the purposes of serving the Order, and for service on subsequent proceedings, the Committee has added paragraphs 30 -32 to the Order which allow for service by way of facsimile or electronic mail.

26. In cases where facts are in dispute between the appointing Creditor and the Debtor Company, but the Court finds it just and convenient to appoint a Receiver to preserve and maintain the status quo while outstanding issues are determined, a number of the powers and authorities of the Receiver granted under the Saskatchewan Template

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separate Bankruptcy action. It should be noted that the potential future enactment of Bill C-55 may impact on the ability to obtain dual appointments and other provisions of the Order.

[12] For example, TO: The Bank of Montreal.

[13] Queen's Bench Rule 387A and s. 192(1)(e)(f) of the *BIA* provide for the application to be done on an *ex parte* basis or on such notice as the Court may direct.

Receivership Order may not be appropriate and may have to be modified, depending upon the applicable facts and the interests of the parties and other affected Creditors.

27. It is more likely that the Debtor Company, or other interested persons, will have greater success in a future application to vary or amend the Saskatchewan Template Receivership Order under the "comeback" clause in paragraph 29, if the Debtor Company or any such interested person was not served with notice of the application to obtain the Order. The Debtor Company, and other potentially affected persons, should, therefore, be served with notice of the application where circumstances permit. Further, the preamble in the Order should identify the parties that appear.

28. As stated in the Ontario Explanatory Notes:

> Many rights are affected by service and appearance at a motion. Appeal rights, effective vesting and even the effectiveness of the receivership order itself may depend upon proof of service and appearance. Recitation of these jurisdictional facts in the order itself should not be ignored.

29. Lastly, unless the Order is being consented to by the Debtor Company, it is recommended that the application be made before a member of the Panel. If the order is being sought solely under the provisions of the *BIA*, there is authority to suggest the Registrar can hear the matter if it is urgent or the parties consent. A copy of the Practice Directive regarding the Bankruptcy Panel is attached.

B. PARAGRAPH 3 – THE RECEIVER'S POWERS

30. The Saskatchewan Committee considers the recitation of powers to be given to a Receiver in the Ontario and Alberta Template Orders to be appropriate for the Saskatchewan Template Receivership Order, and adopts the Ontario and Alberta Committees' rationale expressed in the Explanatory Notes, as follows:

    (a) While it is tempting to give the Receiver a broadly worded simple power to take all reasonable steps to conduct the Receivership, it is very helpful and often essential for the Receiver to be able to point to a specifically enumerated power in the Order to enforce compliance or support the Receiver's entitlement to act. Therefore, the most essential and least controversial powers regarding presentation and realization have been identified and included. It is open to counsel to seek to reduce or enlarge upon the listed powers by highlighting the change and bringing it to the Court's attention;

    (b) Among the powers specifically enumerated are the standard powers to take possession of and protect and preserve the Debtor's property, particularly liquid assets;

(c) It is assumed the Receiver will manage the business, hire consultants as required, enter into transactions and compromise claims owing to the Debtor;

(d) Normal powers to litigate are included;

(e) It is assumed the Receiver will market and sell assets with no specific approval of the marketing process required. However, a Receiver is well advised in a significant case to seek prior approval to avoid subsequent questioning of the efficacy of the process itself. There is a materiality level established for assets sold beyond which prior approval of the Court should be sought;

(f) Paragraph 3(n) empowers the Receiver to report to, meet and discuss with affected persons. It is expected that as an officer of the Court, the Receiver will engage in meaningful communications with stakeholders. This process can cause extra costs and therefore requires the Receiver to exercise reasonable discretion. The case law is clear that the use of the Court-appointed Receiver is not the private preserve of the senior creditors and must have some degree of transparency and accountability to stakeholders. Expensive appearances and last minute challenges may be avoided by timely communications among the appropriate parties;

(g) The concluding words of paragraph 3 are designed to clarify that the Receiver is exclusively in control of the Debtor's activities. Absent specific authority, the Debtor's board of directors may not engage in litigation or take any other steps on behalf of the Debtor following the Receiver's appointment; and

(h) There is no specific provision allowing the Receiver to make an assignment in bankruptcy or to consent to the making of a Receiving Order under the *BIA*. While some case law permits Receivers to take such steps, typically Receivers seek prior Court approval even where the specific power to do so is included in the Order. Bankrupting the Debtor may reverse priorities and prejudice or favour certain creditors over others. Bankruptcy is a sufficiently material, substantive and final act that, if a Receiver is empowered to bankrupt the Debtor, it should be expressly brought to the Court's attention.

31. The Saskatchewan Committee agrees with the Alberta Committee and has adopted paragraph 3(j) of the Alberta Template Order which makes it clear that, despite the fact that the Receiver is empowered to defend all actions involving the Debtor, the Receiver is not expected to exercise that authority with respect to the very action in

which the Receiver is appointed. This follows *Toronto-Dominion Bank v. Fortin et al.*[14]

C. PARAGRAPHS 4 TO 6 – INJUNCTIONS, POSSESSION AND ACCESS TO PROPERTY

32. Paragraphs 4 to 6 essentially require the Debtor and other Persons to deliver to the Receiver the property and records of the Debtor in their possession and to grant the Receiver access to any such property. The Saskatchewan Committee considers that paragraphs 4-6 in the Alberta Template Order are appropriate for the Saskatchewan Template Receivership Order and adopts the explanatory notes of the Alberta Committee (the "**Alberta Explanatory Notes**") in relation to paragraphs 4-6 which are as follows:

    (a) Paragraph 4 of the Saskatchewan Template Receivership Order requires the Debtor (including the Debtor's management, advisors, and shareholders), those affiliated with the Debtor and everyone with notice of the Order, to advise the Receiver of the existence of any of the Debtor's property in their possession or control and to deliver to the Receiver such of the Debtor's property that the Receiver requires.

    (b) The limitation of delivery of property to that which the Receiver requires is designed to save costs for third parties and protect the estate from being forced to incur costs to move or store property that might be more efficiently left in the possession of third parties temporarily or permanently.

    (c) Paragraph 4 also qualifies the obligation to protect the interests of third parties who may require continuing possession of the Debtor's property in order to maintain certain lien rights.

    (d) Paragraph 5 mandates the Receiver's entitlement to records in the possession or control of any person that relate to the business or affairs of the Debtor. The Receiver's entitlement to review such records is subject to exceptions for statutory provisions prohibiting such disclosure or privilege attaching to records which are the subject of a solicitor and client communication or are prepared in contemplation of litigation.

D. PARAGRAPHS 7 TO 11 – THE STAY

33. The combined effect of these paragraphs is to restrain the commencement, continuation or exercise of any rights or remedies against the Receiver, the Debtor, or the property of the Debtor under the Receiver's administration.

34. There has been minimal, if any, controversy over the Court's ability to protect its officer, the Court-appointed Receiver, from suit without leave, and it has always

[14] *Toronto-Dominion Bank v. Fortin et al*., (1978) 85 D.L.R. (3d) 111, (1978) 26 C.B.R. (N.S.) 168 (B.C.S.C.).

been a logical extension of that protection to include the assets of the Debtor. The underlying philosophy that has routinely been accepted by the Courts is the need to protect its Officer in the performance of the duties it has been authorized to perform; to permit him or her to gather in all assets of the Debtor free from interference by Creditors attacking individual assets; and to facilitate administration of the entire estate for the benefit of all stake holders with less expense.

35. The Alberta Queen's Bench decision in *Toronto-Dominion Bank v. W-32 Corporation Limited*[15] (***W-32 Corporation***) has, however, cast doubt on the Court's ability to issue what is essentially an injunction restraining suits against Debtors in Receivership. Whether this decision would be persuasive in Saskatchewan is questionable. Section 37(1) of the *QB Act* allows a judge to direct "a stay of proceedings in any action or matter before the Court if the judge considers it appropriate," and s. 63 of the *PPSA* implies that a stay of proceedings is within the range of relief that the Court may grant when dealing with disputes over collateral. The wording of the *QB Act* suggests that a stay would be issued on a case by case basis but the *PPSA* contains no such inference. Section 63(2)(d) of the *PPSA* specifies that an Order staying enforcement of certain rights may be granted, and s. 63(2)(e) allows for the Court to grant "any order that is necessary to ensure protection of the interest of any person in the collateral". These provisions provide a justification for the Court to distinguish the *W-32 Corporation* decision or embrace the logic of Bennett (set out below) with respect to the Court's inherent jurisdiction to ensure an orderly process and to protect its officer.

36. Frank Bennett, author of Bennett on Receiverships,[16] argues persuasively for the existence of an inherent jurisdiction to grant relief to give effect to a Receivership Order, including staying actions against the Debtor:

> If creditors are able to take proceedings against the debtor without Court approval, the debtor is in most cases without funds to defend. If priority is claimed, the Court-appointed Receiver will be in involved in as many actions as are commenced by creditors against the debtor. If no priority is claimed, the effect of a Judgment is unenforceable until the Receiver is discharged. The Court must be able to control its own judicial process and allow the Receiver sufficient opportunity to perform the powers and duties. Such a condition is not contained in any legislation, but rather it is a condition rooted in the inherent jurisdiction of the Court to control its own process and protect its officers.[17]

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[15] *Toronto-Dominion Bank v. W-32 Corporation Limited*, [1983] 5 W.W.R. 476, (1983) 50 C.B.R. (N.S.) 78.
[16] *Bennett on Receiverships*, 2nd ed. (Scarborough: Carswell, 1999).
[17] *Ibid*. at 200 – 222.

(i) Limitation of Actions

37. Of particular concern to the Saskatchewan Committee is the fact that a party having a claim against a corporation in Receivership might face the possibility of a limitation period expiring before that party could apply to set aside the stay of proceedings to permit its claim to be advanced. In situations that fall under the new *Limitations Act*,[18] s. 26 provides that the limitation period established in that Act is suspended for the time during which a stay of proceedings is in effect under the *BIA*, *Companies' Creditors Arrangement Act* (Canada) [19] (the "***CCAA***"), or the *Farm Debt Mediation Act* (Canada)[20] (the "***FDMA***").

38. In addition, notice periods under *The Saskatchewan Farm Security Act*[21] (the "***SFSA***") are not to be counted with respect to the running of a limitation period in Saskatchewan. Even so, other situations may exist. Under the prior *Limitation of Actions Act*[22] different statutory time frames are dealt with and in many cases, there is no exception. The Saskatchewan Committee is therefore recommending that the general stay be subject to the proviso referenced in paragraph 8 that any party facing the expiry of a limitation period would be entitled to issue and/or file such claims, applications, lien notices or documents as may be necessary to preserve that party's rights, without further Order.

(ii) Termination of Agreements

39. The Saskatchewan Committee adopts the reasoning of the Alberta Committee that s. 65.1(1) of the *BIA* provides that where a Proposal or Notice of Intention to File a Proposal is filed, an automatic general stay applies to prevent termination of agreements based on the Debtor's insolvency. Similarly, where an initial Order is made under the *CCAA*, pursuant to s. 11(3)(a), the initial Order may contain a general stay enjoining termination of contracts with the Debtor. Both the *BIA* (s. 65.1(7)) and the *CCAA* (s. 11.1(2)) except from the general stay, any right a counterparty has to terminate an eligible financial contract ("**EFC**").

40. Where there is no *CCAA* proceeding, Proposal or Notice of Intention to File a Proposal under the *BIA* or winding-up proceeding under the *Winding Up and Restructuring Act* (Canada),[23] there are no statutory provisions governing EFCs. As such, in most Receiverships there will be no applicable statutory provision to except an EFC from the application of a general stay Order.

41. In *Re Enron Canada Corp.*,[24] Hart J. considered an application by Enron Canada Corp. for a general stay in arrangement proceedings it brought under the *Canada*

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[18] *The Limitations Act*, S.S. 2004, c. L-16.1.
[19] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.
[20] *Farm Debt Mediation Act*, S.C. 1997, c. 21.
[21] *The Saskatchewan Farm Security Act*, S.S. 1988-89. c. S-17.1.
[22] *The Limitation of Actions Act*, R.S.S. 1978 c. L-15.
[23] *Winding Up and Restructuring Act*, R.S.C. 1985, c. W-11.
[24] *Re Enron Canada Corp.*, (2001) 310 A.R. 386, (2001) 31 C.B.R. (4th) 15.

Business Corporations Act ("***CBCA***").[25] Although the *CBCA* contained no express statutory exception for EFCs, Hart J. found that just as there is good reason for statutory exceptions of EFCs in insolvency legislation, there is equally good reason to honour the underlying public policy considerations in cases involving solvent applications. Accordingly, Hart J. declined to grant the general stay applied for against termination of EFCs.

42. Although there do not appear to be any cases dealing with the propriety of an exception for EFCs from the general stay provisions of a Receivership Order, the Courts may generally support an exception for EFCs from the general stay. Accordingly, an exception for EFCs has been added to the general stay contained in paragraph 10 of the Saskatchewan Template Receivership Order.

(iii) Crown Corporations and Other Suppliers

43. At law, a Court appointed Receiver is a separate person from the Debtor Company, and as such is entitled to enter into new supply contracts with any supplier. In particular, a Court appointed Receiver, as a "new" customer, is entitled to obtain a supply of water, gas and electricity without the payment of any outstanding arrears, pursuant to the relevant sections of *The Cities Act*;[26] *The SaskEnergy Regulations*;[27] and *Regulations Regarding Electrical and Gas Distribution Systems Belonging to Saskatchewan Power Corporation, The Rendering and Payment of the Corporation's Bills for Service and Other Matters*.[28]

44. The Saskatchewan Committee is mindful of the decision of *Saskatchewan v. Royal Bank of Canada et al.*.[29] This decision dealt with whether a Crown corporation, as an agent of the Crown in right of Saskatchewan, was subject to a Receivership Order that enjoined all persons, firms and corporations from disturbing or interfering with the furnishing of telephones (including the use of present telephone numbers) or any other utility and further enjoined them from disconnecting such services used by the Receiver Manager without further order of the Court. Noble J. determined that SaskTel was an agent of the Crown, and, thus, subject to protection under s. 17(2) of *The Proceedings Against the Crown Act*[30] which provides that any relief equivalent to an injunction or specific performance order cannot be issued against the Crown or an agent of the Crown.

45. However, as s. 4.1 of the *BIA* provides, the Act is binding on both the Federal and Provincial Crown, and s. 47(2)(b) authorizes the Court to determine the degree of

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[25] *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.
[26] *The Cities Act*, S.S. 2002 c. C-11.1.
[27] *The SaskEnergy Regulations*, R.R.S. 2004, c. S-35.1, Reg. 1, O.C. 89/2004.
[28] *Regulations Regarding Electrical and Gas Distribution Systems Belonging to Saskatchewan Power Corporation, The Rendering and Payment of the Corporation's Bills for Service and Other Matters*, S. Reg. 318/1967.
[29] *Saskatchewan v. Royal Bank of Canada et al. (sub nom. Re 238842 Alberta Ltd.)*, (1981) 129 D.L.R. (3d) 665, [1981] 12 Sask. R. 151 (Sask. Q.B.).
[30] *The Proceedings Against the Crown Act*, S.S. 1978 c. P-27.

control an Interim Receiver will have over the business and property of the Debtor. It is the Saskatchewan Committee's conclusion that the decision does not prevent the Court from issuing an Order setting terms for use of the Debtor's assets, including uninterrupted use of utility services.

46. As such, the Saskatchewan Committee agrees with the Alberta Committee that, the "continuation of services" paragraph included in the Ontario Order should be included in paragraph 11 of the Saskatchewan Template Receivership Order. The Saskatchewan Committee concluded that in order to preserve the business and undertaking of the Debtor in the best interests of all stakeholders, it would be preferable at the outset to enjoin the discontinuance, alteration, interference or termination of the supply of goods and services to the Debtor Company (including computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services). In return, the Receiver is obliged to pay the "normal prices or charges for all such goods and services received as and from the date of the Order … in accordance with normal payment practice of the Debtor, or such other practices as may be agreed upon by the supplier or the service provider and the Receiver, or as may be ordered by the Court."

47. In each case, if the Receiver and any particular key supplier cannot agree on the reasonable prices or charges for the supply of any particular goods or services, the matter of the Receiver's obligation to pay a fair price for these can be determined by the Court on application by the Receiver or the supplier.

48. Furthermore, if any supplier believes that they have been unduly affected by paragraph 11 of the Saskatchewan Template Receivership Order, the supplier can also re-apply pursuant to the "comeback clause" in paragraph 29 to vary this provision of the Order.

E. PARAGRAPH 13 - EMPLOYMENT

49. The Saskatchewan Committee is of the view that paragraph 13 of the Alberta Template Order is also appropriate for Saskatchewan's Template Receivership Order. However, as noted by the Alberta Committee, counsel should be aware of the possibility for the Saskatchewan Template Receivership Order to deem a Receiver not to be a successor employer. Paragraph 13 of the Order was taken from the Ontario Template Order and represents one of the most controversial aspects of the Order. As a result, the Ontario Template Order does not contain a provision deeming a Receiver not to be a successor employer.

50. In Saskatchewan, provisions deeming the Receiver not to be a successor employer have been common in Receivership Orders so as to avoid any liability that may arise

due to provisions in *The Trade Union Act*[31] (the "***TUA***") and *The Labour Standards Act*[32] (the "***LSA***"). Section 37 of *TUA* states:

> Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.

51. Section 83 of the *LSA* provides that "where a business or part thereof is sold, leased, transferred or otherwise disposed of, the service of the employees affected shall be deemed to be continuous and uninterrupted by the sale, lease, transfer or other disposition."

52. Although Ontario legislation contains provisions similar to s. 37 of the *TUA* and s. 83 of the *LSA*, a provision deeming a Receiver not to be a successor employer was not included in the Ontario Template Order essentially due to the Ontario Court of Appeal decision in *GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc.*[33] (***TCT Logistics***). In that case, the Court of Appeal noted that ss. 69(12) and 114(1) of *The Labour Relations Act, 1995* (Ontario)[34] (the "***OLRA***") provide the Ontario Labour Relations Board (the "**OLRB**") with the "unequivocal, exclusive jurisdiction" to decide the issue of successor employer for labour relations purposes.

53. The Court of Appeal, therefore, found that the Bankruptcy Court did not have the ability to deem that actions taken by a receiver will not make it a successor employer because s. 47(2) of the *BIA* does not directly authorize the Bankruptcy Court to do so. Leave to appeal to the Supreme Court of Canada was granted. The appeal was heard on November 16, 2005 and the decision reserved. At the time of writing the Supreme Court had not yet handed down its decision.

54. The difference, therefore, between the situation in Ontario and the situation in Saskatchewan is that Saskatchewan's *TUA* does not specifically provide the Labour

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[31] *The Trade Union Act*, R.S.S. 1978, c. T-17.
[32] *The Labour Standards Act*, R.S.S. 1978, c. L-1.
[33] *GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc.*, (2004) 238 D.L.R. (4th) 677, (2004) 71 O.R. (3d) 54.
[34] *The Labour Relations Act, 1995*, S.O. 1995, c.1, Sch. A.

Relations Board with the unequivocal and exclusive jurisdiction to decide whether or not a person acquiring a business was a successor employer. This appears to be the situation in Alberta as well. Nevertheless, in the interests of national uniformity, the Alberta Committee preferred to adopt the Ontario provision. The Saskatchewan Committee also takes this position and adopts paragraph 13 of the Alberta Order.

55. The Alberta Committee's explanatory notes provide further background to the Ontario controversy and the Alberta Committee's perspective on this issue. The Saskatchewan Committee adopts the Alberta Explanatory Notes as they relate to paragraph 13 of the Saskatchewan Order, which notes are as follows:

    (a) Some insolvency professionals are of the view that in order to protect the Receiver from personal liability for termination and severance pay obligations, the Order ought to terminate the employment of all of the Debtor's employees and thereby crystallize termination obligations as claims against the estate. The Receiver is then free to re-hire employees as it wishes, free of pre-existing obligations under s. 14.06(1.2) of the *BIA*. They rely on the limited mandate of the Receiver and the fact that there has been no "sale" of the Debtor's assets to argue that the Receiver will not be a successor employer in these circumstances.

    (b) Other counsel believe that if the Receiver actually hires employees in its own name, the Receiver stands a greater risk of being bound by pre-existing obligations. These counsel prefer to adopt the historical characterization of the Receiver as a third party simply monitoring the affairs of the Debtor's business and therefore not interfering at all in the Debtor' s employment of its own employees. These counsel are of the view that the Receiver will have less risk of being held to be a successor employer because, notionally at least, the Debtor's corporate personality survives during the Receivership with its employment contracts intact. This characterization is at odds with the reality of the Receiver's role in most cases.

    (c) This is a live topic in Ontario with several recent cases having been brought on issues of relevance. While reasonable counsel can differ on the degree of protection available under differing Receivership structures, the Ontario Order was drafted by the Ontario Committee to minimize the disruption to the existing legal relationship, while providing as much protection as they were able to give, having regard to the *TCT Logistics* decision described below, and leaving it open to counsel to seek a wider order in a particular case.

    (d) The decision of the Ontario Court of Appeal in *TCT Logistics* has now effectively prohibited, at least in Ontario, the previous practice of routinely deeming a Receiver not to be a successor employer in Receivership Orders. The background is that Receivers who continue to operate businesses in Receivership can be held to be successor employers under labour

legislation, and become responsible for termination, wage, pension and other obligations.

(e) Section 46(1) of the Alberta *Labour Relations Code*[35] (the "***ALRC***") provides that:

> …when a business or undertaking or part of it is sold, leased, transferred or merged with another business or undertaking or part of it, or otherwise disposed of so that the control, management or supervision of it passes to the purchaser, lessee, transferee or person acquiring it…, and:
>
> (a) if a trade union is certified, the certification remains in effect and applies to the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it, and
>
> (b) if a collective agreement is in force, the collective agreement binds the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it as if the collective agreement had been signed by that person.

(f) Similarly, s. 5 of the Alberta *Employment Standards Code*[36] provides that for the purposes of that Act, "…the employment of an employee is deemed to be continuous and uninterrupted when a business, undertaking or other activity or part of it is sold, leased, transferred or merged or if it continues to operate under a Receiver or Receiver-Manager."

(g) The *OLRA* contains a provision (s. 69) very similar to s. 46(1) of the *ALRC*, and provides that a decision as to whether a purchaser or other party is bound by the certification and collective agreement must be made by the OLRB. Section 114 of the *OLRA* also provides that the determination of the OLRB is final and conclusive for the purposes of that Act, and that the OLRB "…has exclusive jurisdiction … to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes.…" The OLRB's decisions and rulings cannot be questioned or reviewed in any Court.

(h) In *TCT Logistics* the Receiver, acting under the normal Receivership Order of the time, purported to effect a sale of the assets of one of TCT's businesses, and to allow the purchaser to hire only certain of the employees of that business, contrary to the terms of a collective agreement. That was challenged by the union representing the employees. Farley J. decided the

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[35] *Labour Relations Code*, R.S.A. 2000, c. L-1.
[36] *Employment Standards Code*, R.S.A. 2000, c. E-9.

Receiver could not be deemed a successor as long as it was acting "*qua* realizer" of the assets. On appeal, the Ontario Court of Appeal concluded that Farley J. erred by applying the "realizer versus employer" test to effectively determine whether the Receiver was a successor employer, and that the Court had no jurisdiction to make that determination. It concluded that a bankruptcy Justice did not have jurisdiction to exempt a Receiver from the successor employer provisions of the *OLRA*, but could restrain labour proceedings on a temporary basis by refusing to give leave under s. 215 of the *BIA* to a party wishing to proceed with a "successor employer" application under the *OLRA*.

(i) The Alberta situation would appear to be different from the Ontario situation in one key respect: the *ALRC* does not seem to remove from the Alberta Courts the ability to decide whether a Receiver would be bound by s. 46(1) of the *ALRC*. This would appear to allow the Court the ability to decide, on the appropriate facts, that a Receiver was in fact proceeding, as Farley J. held in *TCT Logistics*, *qua* realizer rather than *qua* operator of the business. Accordingly, on proper factual and legal support it appears the Alberta Courts might consider, in appropriate circumstances, taking into account the differences between the *ALRC* and the *OLRA* to issue an Order of limited duration during which the Receiver would be deemed to be operating *qua* realizer rather than as a successor in the business for purposes of the *ALRC*. Clearly, such a provision could not affect the liability of a Receiver under s. 5 of the *Employment Standards Code*, and would not be effective in jurisdictions such as Ontario where the Court does not have the authority to make that determination. The provision could, however, greatly reduce the loss of value in particular cases in Alberta where employees are unionized and continued operations are key to preserving value and jobs.

(j) Since one of the key benefits to appointing an Interim Receiver under s. 47.1 of the *BIA* is the national reach of the Order, there are obvious benefits to using language familiar to an Ontario audience where a Receivership Order may have effect in Ontario. The Alberta Order therefore uses the same language as the Ontario Order. Counsel in Alberta should, however, be aware that the possibility of "deeming" a Receiver not to be a successor employer in Alberta exists. This should probably be done in specific cases on appropriate supporting evidence, with specific reference to Alberta and for a limited time, rather than as a general matter in each Receivership Order.

F. PARAGRAPH 14 – PIPEDA

56. The following commentary is adopted largely from the work of both the Ontario Committee and the Alberta Committee, and explains paragraph 14 of the Saskatchewan Template Receivership Order. The *Personal Information Protection*

and Electronic Documents Act (Canada)[37] (“***PIPEDA***”) seems to impact on the ability of Creditors to realize upon a business. Personal information concerning employees, customers and possibly suppliers could very well be important components of either a Receiver’s ability to run the business or to sell it.

57. *PIPEDA* contains a reasonableness standard that is one of the overriding principles guiding the use and dissemination of personal information. A Receiver has little time and ability to seek a consent of every employee or every customer before disclosing information needed to keep a plant open or to allow an expeditious realization. As such, the reasonableness of limiting the need to obtain expressed consent from every employee and every customer in urgent circumstances in order to keep a business from failing is self-evident. This course of action serves to preserve the jobs of the employees and the business to which individuals have provided their information presumably because they either want their jobs or want to do business with the Debtor. *PIPEDA* also allows for Court Orders limiting the needs to obtain express consent in appropriate circumstances regarding the sharing of personal information.

58. The Ontario, Alberta, and Saskatchewan Template Orders, contain a limitation on the requirement to obtain express consent that was drawn from the *Re PSINET Limited*[38]proceeding under the *CCAA*. In effect, the Order permits the Receiver to disclose personal information to prospective purchasers under the terms of appropriate confidentiality orders and provided that the purchaser, by agreement and Court Order, will make no further use of the Debtor’s data than was available to the Debtor itself.

59. *The Privacy Act*[39] is not nearly as specific or encompassing as *PIPEDA*, its federal counterpart. *The Privacy Act* states that it is a tort for an individual to willfully, and without claim of right, violate the privacy of another person. Although *The Privacy Act* provides some examples regarding what constitutes a violation of privacy, for the most part, it is quite vague. Consequently, compliance with the more specific and onerous *PIPEDA* will in all likelihood prevent any violations under *The Privacy Act*.

G. PARAGRAPH 15 - RECEIVER'S LIABILITY

60. The Alberta Template Receivership Order, but for paragraph numbering, is a recital of s. 14.06(2) to (4) of the *BIA* which limits the liability of Receivers (as defined in s. 14.06(1.1)) for environmental matters.

61. The combined effect of s.14.06(1.1) to (4) is to limit the personal liability of Interim Receivers and Receivers as defined in s. 243(2) of the *BIA* from claims for damage to the environment unless caused by the Receiver’s gross negligence or wilful misconduct. It is doubtful that such a limitation can be found in Saskatchewan, and,

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[37] *The Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.
[38] *Re PSINET Limited*, (2002) 33 C.B.R. (4th) 284, [2002] O.J. No. 1156 (QL) (Ont. S.C.J.).
[39] *The Privacy Act*, R.S.S. 1978, c. P-24.

in particular in *The Environmental Management and Protection Act, 2002*.[40] The Saskatchewan Committee is not aware of any provincial law limiting a Receiver from liability for simple negligence or, in any case, to the value of the assets administered by the Receiver.

62. The Alberta Committee noted:

> In *Big Sky,*[41] Slatter J. reviewed the proper scope of the terms of an Order appointing a Receiver and concluded (at paragraph 46):
>
> > There is no basis for holding that a receiver in Alberta has any immunity for environmental damage beyond what is found in Section 14.06, or the *E.P.E. Act* itself. As was held in *Lindsay*, the court has no general jurisdiction to grant exemptions from statutes.
>
> Slatter J. went on to permit the inclusion of a clause which essentially paralleled the provisions of s. 14.06(2) of the *BIA*. He acknowledged that such a provision might be redundant in legal terms, but believed it would be helpful to note these provisions in the Order.

63. The Saskatchewan Committee is of a similar view. That is, while Paragraph 15 of the Saskatchewan's Template Receivership Order simply restates the protection afforded by the *BIA*, it is useful to note this protection in the Order.

64. The Saskatchewan Committee also wishes to repeat the following comments made by the Alberta Committee:

    (a) A Receiver must apply for an extension of time in which to comply with environmental orders before the later of (a) the time specified in the environmental order, (b) 10 days after the environmental order (if no time is specified), and (c) within 10 days after the appointment of the Receiver, failing which there is an argument that the protection afforded under s. 14.06 of the *BIA* is lost.

    (b) It is not always clear on the date a Receiver is appointed whether any environmental orders exist in respect of the Debtor's property. Accordingly, there may be circumstances (where, for example, the Debtor's records are unreliable or the Debtor has significant or complex holdings of property that could be the subject of an environmental order), where it is appropriate to include a stay pursuant to s. 14.06(5) of the *BIA* in the initial Order that gives the Receiver a more reasonable period of time to review the circumstances surrounding the Debtor's property without fear of losing this protection.

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[40] *The Environmental Management and Protection Act, 2002*, S.S c. E-10.21.
[41] *Re Big Sky Living Inc.*, (2002) 37 C.B.R. (4th) 42, 2002 ABQB 659[*Big Sky*].

65. The Saskatchewan Committee also agrees with the Alberta Committee that any attempt in a court order to allow for conditional possession of property or for broader liability limitations would require an exemption from provincial law. If additional protection is needed, the applicant should be expected to support the request with the requisite facts and judicial or statutory authority.

H. PARAGRAPHS 16 TO 23 - THE FUNDING OF THE RECEIVERSHIP

66. The Saskatchewan Committee adopts the Alberta Explanatory Notes as they relate to paragraphs 16 - 23 of the Saskatchewan Template Receivership Order:

(a) Pursuant to paragraph 16 of the Saskatchewan Template Receivership Order, the Receiver is granted a Receiver's Charge as a first charge on the property in priority to all security interests. Pursuant to paragraph 19, the Receiver's Borrowing Charge ranks just behind the Receiver's Charge and in priority to all security interests.

(b) The priority afforded by these provisions is appropriate where the Receiver has been appointed at the request, or with the consent approval of the holders of all security interests in the property.[42] The priority is also appropriate where the Receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including Secured Creditors, or where the Receiver has expended money for the necessary preservation or improvement of the property.[43]

(c) If a Receiver has not been appointed at the request or with the consent of approval of the holder of a security interest, and if that security interest holder does not fall within one of the other exceptions (referred to above) in *Kowal*, then paragraphs 16 and 19 should be modified so that they do not provide for priority over such a security interest holder.

(d) There may be cases with multiple Secured Creditors with differing priorities over the various assets that comprise the Property. The fees and expenses of the Receiver may benefit some assets, but not others. If the Receiver carries on the business of the Debtor, doing so may benefit or potentially benefit some of the assets, but not others. In such circumstances, receivership costs should be appropriately allocated among the various assets comprising the Property. Paragraph 23 contemplates that any interested party may apply for allocation of both the Receiver's Charge (for its fees and expenses) and the Receiver's Borrowing Charge among the various assets comprising the Property.

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[42] See *Robert F. Kowal Investments Ltd. et al.* v. *Deeder Electric Ltd*., (1975) 59 D.L.R. (3d) 492, (1976) 9 O.R. (2d) 84 (Ont. C.A.) [*Kowal* cited to O.R.].
[43] *Kowal*, *ibid*. at 89 and 91.

(e) The Saskatchewan Template Receivership Order does not specify how the Receiver's Charge and Receiver's Borrowing Charge should be allocated amongst the various assets. Pursuant to an application under paragraph 23, Receivership costs and borrowings should be allocated among the assts equitably (not necessarily equally) having regard, *inter alia*, to the relative benefit or potential benefit to the various assets involved. See, for example, *Re Hunters Trailer & Marine Ltd.*[44] which involved allocation of DIP financing and the Monitor's charge amongst Secured Creditors with priority over differing assets in a *CCAA* proceeding. See also *Re Western Express Airlines Inc.*[45] where aircraft lessors who received no benefit from a *CCAA* restructuring were not required to bear any of the costs of the restructuring.

(f) In *Re New Skeena Forests Products Inc.*[46] the British Columbia Court of Appeal reversed an order of the Supreme Court allocating DIP financing and restructuring costs in a *CCAA* proceeding. The chambers judge had allocated those costs based on relative value of the assets as previously appraised. The Court of Appeal allocated costs on the basis of the actual value at the time the assets were realized but with the proviso that the Secured Creditor could not be required to pay costs in an amount exceeding the value of the property subject to its security.

I. PARAGRAPH 29 – THE COMEBACK CLAUSE

67. The Alberta Committee, after much discussion about whether paragraph 29 the "comeback clause" should include a deadline for applying to vary the Order (namely a set number of days (perhaps 20) after the service of the Order), concluded that it was best to leave the comeback clause the same as in the Ontario Order, since:

(a) circumstances could change after the expiry of the deadline otherwise detailed in a comeback clause, that could affect an applicable interested party;

(b) and the insertion of a deadline in the comeback clause may result in various interested parties filing pro forma applications to vary and then adjourning *sine die* such applications, simply to avoid having their rights affected.

68. After consideration of the matter, the Saskatchewan Committee likewise reached a similar conclusion.

IV. APPEALING A RECEIVERSHIP ORDER

69. Although this will not affect the terms of the Receivership Order, Rule 15(1) of *The Court of Appeal Rules* for Saskatchewan provides that the filing of a Notice of

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[44] *Re Hunters Trailer & Marine Ltd.*, (2001) 305 A.R. 175, 2001 ABQB 1094.
[45] *Re Western Express Airlines Inc.*, (2005) 10 C.B.R. (5th) 154, 2005 BCSC 53.
[46] *Re New Skeena Forests Products Inc.*, (2005) 39 B.C.L.R. (4th) 338, 2005 BCCA 192.

Appeal stays the execution of any other judgment or order pending the disposition of the appeal. Therefore, it should be noted that if the Debtor files a Notice of Appeal, a Receiver will have to apply for an order to lift the stay of execution of the Receivership Order.

V. UNIQUE SASKATCHEWAN CONSIDERATIONS

A. IMPACT OF *THE SASKATCHEWAN FARM SECURITY ACT* AND THE *FARM DEBT MEDIATION ACT* UPON SASKATCHEWAN RECEIVERSHIPS

70. Whether commenced under provincial law or the *BIA*, Saskatchewan court proceedings seeking the appointment of a Receiver against an agricultural enterprise may potentially attract the application of the *SFSA* or the *FDMA*.

71. The potential application of the *SFSA* and the *FDMA* to Saskatchewan receivership proceedings raises the issues of:

    (a) Whether and to what extent a Secured Creditor seeking to commence Saskatchewan court proceedings for the appointment of a receiver against a Saskatchewan agricultural enterprise is required to obtain leave of the Court under s. 11 of the *SFSA* prior to commencing such proceedings?

    (b) Whether and to what extent a Secured Creditor seeking to commence expedited court proceedings for the appointment of a s. 47 *BIA* interim receiver against a Saskatchewan agricultural enterprise in emergent circumstances is prevented from doing so until such time as it has served the s. 21 *FDMA* notice and waited for the required period of fifteen business days specified in s. 21 of the *FDMA*?

B. REQUIREMENT FOR SECTION 11 *SFSA* LEAVE OF THE COURT IN SASKATCHEWAN FARM RECEIVERSHIPS

72. The net effect of ss. 9 and 11 of the *SFSA* is that no person shall commence an action in court for sale or possession of Saskatchewan farm land without first obtaining leave of the court under s. 11 of the *SFSA*. In order to obtain such leave, a Secured Creditor must serve a 150-day statutory notice of intention and participate in a mandatory mediation process.

73. Is a Secured Creditor who seeks a an Order for the appointment of a Receiver over Saskatchewan farm land required to obtain leave under s. 11 of the *SFSA* prior to commencing such proceedings? The issue can be addressed in the context of s. 47 *BIA* interim receivership proceedings and in the context of receivership proceedings commenced under provincial law.

74. In regard to s. 47 *BIA* interim receivership proceedings, such proceedings are expressly authorized by the provisions of the *BIA*. The prevailing view among Saskatchewan

insolvency practitioners is that Secured Creditors seeking to invoke statutory rights created under federal law (such as s. 47 *BIA* interim receivership proceedings) are not required to comply with provincial statutory requirements which impede, obstruct or derogate from rights created under federal law.

75. In *Bank of Montreal v. Hall*,[47] the Supreme Court of Canada held that there was an operational conflict between the rights provided to Secured Creditors under federal law (s. 178 of the *Bank Act*) and the procedural requirements of provincial law (the *SFSA*). Pursuant to the Doctrine of Paramountcy, this operational conflict was resolved in favour of the applicable federal law. The competing provisions of provincial law were deemed to be ineffective.

76. A similar operational conflict exists between s. 47 of the *BIA* and ss. 9 and 11 of the *SFSA*. Applying the *Bank of Montreal v. Hall* analysis, the *SFSA* provisions would yield to s. 47 of the *BIA*, with the result that no leave under s. 11 of the *SFSA* would be required prior to a Secured Creditor seeking to commence s. 47 *BIA* interim receivership proceedings against Saskatchewan farmland. Although this precise issue has yet to be addressed by a Saskatchewan Court in any reported decision of which the authors are aware, this appears to be the consensus view among Saskatchewan insolvency practitioner.

77. As a practical matter, the result seems to be no different with regard to receivership proceedings against Saskatchewan farmland commenced under provincial law receivership proceedings such as the *QB Act* or the *PPSA*.

78. The technical argument can be made that receivership proceedings under such provincial laws require leave of the Court under the *SFSA* to the extent that they affect Saskatchewan farmland. However, if such arguments were to find favour with Saskatchewan courts, the practical result would likely be that Secured Creditors would seek Orders appointing receivers of **personal property only** in regard to Saskatchewan farm enterprises. Once such receivership proceedings regarding personal property were concluded, enforcement of security against the remaining farmland would be a mere formality.[48]

C. SECTION 21 OF THE *FDMA* & EMERGENT SECTION 47 *BIA* INTERIM RECEIVERSHIP PROCEEDINGS

79. The broad language of s. 21 of the *FDMA* prohibits any form of enforcement action by a Secured Creditor of a farmer prior to fifteen business days after service upon the farmer by the Secured Creditor of a "Notice of Intention To Enforce Security":

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[47] *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, (1990) 65 D.L.R. (4th) 361.

[48] Manitoba insolvency practitioners report that this has been the practical result in that jurisdiction. *The Family Farm Protection Act* (Manitoba), C.C.S.M. c. F15 requires leave of the Court before a Receiver can be appointed over Manitoba farmland. In actual practice, such leave is seldom obtained, insofar as Manitoba farm Receiverships occur either under section 47 of the *BIA* or occur under provincial law in regard to personal property only.

> 21(1) Every secured creditor who intends to
>
> (a) enforce any remedy against the property of a farmer, or
>
> (b) commence any proceedings or any action, execution or other proceedings, judicial or extra-judicial, for the recovery of a debt, the realization of any security or the taking of any property of a farmer
>
> shall give the farmer written notice of the creditor's intention to do so, and in the notice shall advise the farmer of the right to make an application under section 5.
>
> (2) The notice referred to in subsection (1) must be given to the farmer the prescribed manner at least fifteen business days before the doing of any act described in paragraph (1)(a) or (b).

80. This prohibition on action by the Secured Creditor prior to 15 business days after service of the *FDMA* notice raises a dilemma for Secured Creditors in certain circumstances. Specifically, if the secured creditor is unable to take any action until fifteen business days after service upon the farmer of the s. 21 *FDMA* Notice, how can the Secured Creditor move to protect its position in the event of abandonment, deterioration or extraordinary disposition of the collateral?

81. To frame the Secured Creditor's dilemma in a slightly different fashion, *quaere* whether or not a court application by the Secured Creditor to appoint a s. 47 *BIA* interim receiver to preserve the abandoned collateral amounts to a breach of s. 21 of the *FDMA* if such application is commenced prior to the expiry of the 15 business-day s. 21 *FDMA* notice period.

82. The strict technical answer would appear to be in the affirmative, that a s. 47 *BIA* interim receivership application to preserve collateral would appear to constitute a breach of s. 21 of the *FDMA* if it is commenced prior to the expiry of the s. 21 *FDMA* notice period of fifteen business days after service upon the farmer of the s. 21 *FDMA* notice.

83. Happily for Secured Creditors, the more practical answer to the dilemma is that, without expressly deciding how these two federal statutory provisions interact, Western Canadian Courts have been prepared to grant orders appointing "preservation"-style s. 47 *BIA* interim receivers prior to expiry of the 15 business-day s. 21 *FDMA* Notice period (without power of sale of the assets). In such cases, the secured creditor has been required to return to Court after the expiry of the s. 21 *FDMA* notice period to obtain power of sale of the assets from the Court for the s. 47 *BIA* interim receiver.

84. The issue of the interaction of s. 47 of the *BIA* (and its provision for appointment of interim receivers to preserve collateral in cases of emergency) and s. 21 of the *FDMA* (and its prohibition on the Secured Creditor taking any action until 15 business days after service upon the farmer of the *FDMA* notice) has not been considered in any written decision of a Canadian court of which the authors are aware.

V. CONCLUDING NOTES

85. The Saskatchewan Committee felt it would be useful to have a mechanism by which the Order could be served on the Debtor Company and all Creditors of the Debtor Company. Accordingly, the Saskatchewan Committee is recommending the insertion of paragraphs of 30-32 in the Saskatchewan Template Receivership Order, together with Schedule B, which outlines the wording of a covering letter which is to be sent to the Debtor Company and its Creditors, along with a true copy of the Order. In order to have consistency in the Western Provinces, this is the only significant change that the Saskatchewan Committee has made to the Alberta Template Order. Over time, and especially in circumstances where there have been legislative changes to the BIA, the wording of the Saskatchewan Template Receivership Order may be altered in consultation with the Saskatchewan Committee, the Panel and other Western Provinces. The Saskatchewan Committee wishes to emphasize, once again, that the Saskatchewan Template Receivership Order is not meant to be the only terms of an Order that will be considered by our Court. It would be expected, however, that in circumstances where there are changes to the Saskatchewan Template Receivership Order, those changes would be highlighted in a draft Order presented to the Court, and evidence would be provided to the Court as to why the additional provisions or changes are required.

THE TEMPLATE RECEIVERSHIP ORDER COMMITTEE