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|---|---|
| OURT FILE NUMBER | 1901-14615 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| APPLICANT | **ORPHAN WELL ASSOCIATION** |
| RESPONTENT | **HOUSTON OIL & GAS LTD.** |
| DOCUMENT | **BENCH BRIEF OF THE RECEIVER, re: Application for Advice and Directions** |

Clerk's Stamp


ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No. 436743.24

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## I. INTRODUCTION

1. This Bench Brief is submitted on behalf of BDO Canada Limited, in its capacity as the court-appointed receiver and manager (the "**Receiver**") of Houston Oil & Gas Ltd. ("**Houston**"), pursuant to a Receivership Order of the Court of Queen's Bench of Alberta pronounced on October 29, 2019, as amended on June 30, 2020 (the "**Receivership Order**").

2. In its Application filed on January 11, 2021 (the "**Application**"), the Receiver seeks this Honourable Court's advice and direction with respect to whether the Receiver should file an assignment in bankruptcy on behalf of Houston. As set out herein, (i) this Court has the authority to authorize the Receiver to assign Houston into bankruptcy, and (ii) should exercise this authority in the present matter to grant the Receiver the investigative powers, and rights remedies of a trustee in bankruptcy, so that the Receiver may potentially set aside several reviewable transactions.

3. The facts in support of the Receiver's Application are set out in the Fourth Report of the Receiver filed on January 11, 2021(the "**Fourth Report**").

## II. ISSUES

4. This Bench Brief addresses the following issues:

   (a) Should this Honourable Court authorize and direct the Receiver to file an assignment in bankruptcy on behalf of Houston; and

   (b) If so, should this Honourable Court authorize and direct that the Receiver to act as the trustee in bankruptcy for Houston?

## III. LAW

### A. A Receiver May Make an Assignment in Bankruptcy

5. Section 49 of the *Bankruptcy and Insolvency Act* ("**BIA**") provides, *inter alia*, that an "insolvent person" may make an assignment in bankruptcy.[1] "Insolvent person" is defined under Section 2 of the BIA as follows:

> insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.[2]

6. Previously, certain authority held that a receiver-manager was not an "insolvent person," and therefore lacked authority to assign a debtor company into bankruptcy. Specifically, in *Everex Systems Inc. v. Pride Computer Distribution Ltd.*, the British Columbia Supreme Court held that a court-appointed receiver-manager was vested only with certain delineated powers, such that it remained "within the power of the existing directors to assign the company in bankruptcy if they resolve to do."[3] Because the power to assign the company in bankruptcy remained with the directors, the Court found that it did not have the power to authorize the receiver-manager to execute an assignment in bankruptcy.[4]

7. However, *Everex* has been considered and distinguished in subsequent decisions, which have expressly declined to follow *Everex*. In the leading case of *Royal Bank v. Sun Squeeze Juices Inc.*, Justice Farley of the Ontario Court of Justice found that *Everex* "dealt not with the jurisdiction of the Court and the capacity of a Court-appointed [receiver-manager], but rather it over-concentrated on the wording of sections 110 and 111 of the [British

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 s 49(1), **Tab 1**.
[2] *Ibid*, s 2, **Tab 1**.
[3] *Everex Systems Inc. v. Pride Computer Distribution Ltd.*, [1988] BCJ No 3089 at para 16 [*Everex*], **Tab 2**.
[4] *Ibid* at para 3, **Tab 2**.

Columbia] *Company Act*, R.S.B.C. 1979, c. 59."[5] In *Sun Squeeze*, Justice Farley stated there was not "any dispute that this Court has the power to authorize the Court-appointed [receiver-manager] to … file an assignment in bankruptcy."[6] Justice Farley's decision in *Sun Squeeze* was later affirmed by the Ontario Court of Appeal.[7]

8. In *Chow v. Bresea Resources Ltd*, the Alberta Court of Appeal set aside an order which directed the interim receiver/manager to assign the debtor company into bankruptcy, given that the company was not actually insolvent.[8] However, the Alberta Court of Appeal expressly endorsed *Sun Squeeze*, holding that, in the appropriate circumstances, the Court has authority to direct that a receiver-manager assign a company into bankruptcy:

> Where a company is insolvent within the meaning of the *Bankruptcy and Insolvency Act*, and is unwilling or incapable of making a voluntary assignment, and there is no creditor qualified or willing to petition the company into bankruptcy, and where bankruptcy is desirable in order to protect the interests of creditors and shareholders, then it may be proper for a court to make an order placing the affairs of the company under the supervision of a receiver/manager or other officer of the court with directions to assign the company into bankruptcy.[9] (underlining added)

9. Since *Sun Squeeze*, Courts have also held that it is "well settled"[4] and that "there is ample authority" supporting the conclusion that "the Court is empowered to authorize the receiver to file an assignment in bankruptcy."[10]

10. For instance, in the very recent decision of the Ontario Superior Court of Justice in *Gustin,* the receiver (with the support of the debtor's major creditor), requested the authority to make the assignment in bankruptcy as it "wishe[d] to avail itself of the enhanced powers available to a trustee in bankruptcy" in order to better investigate the debtor's previous transactions and activities.[11] The Court authorized the receiver to assign the debtor into

---

[5] *Royal Bank v. Sun Squeeze Juices Inc.*, [1994] OJ 567 at para 8 [*Sun Squeeze Juices*], **Tab 3**, aff'd *Royal Bank v. Sun Squeeze Juices Inc.*, [1994] 28 CBR (3d) 201 (Ont. C.A.) [*Sun Squeeze Juices ONCA*], **Tab 4**.
[6] *Sun Squeeze Juices*, *supra* note 4 at para 6, **Tab 3**.
[7] *Sun Squeeze Juices ONCA*, *supra* note 4, **Tab 4**; see also *Brandon Packers Ltd., Re*, [1962] 33 DLR (2d) 503 at para 41, **Tab 5**: which is appellate level authority for the proposition that a court-appointed liquidator may be authorized by the Court to assign a debtor into bankruptcy.
[8] *Chow v. Bresea Resources Ltd.*, [1997] 75 ACWS (3d) 1006 at para 13 [*Chow*], **Tab 6**.
[9] *Ibid*, **Tab 6**.
[10] *RBC v. Gustin*, 2019 ONSC 5370 at para 15 [*Gustin*], **Tab 7**.
[11] *Ibid* at para 8, **Tab 7**.

bankruptcy for this purpose, notwithstanding that the debtor's major creditor was seemingly available to petition the debtor into bankruptcy.

11. In sum, recent authority holds that in the appropriate circumstances it is just and appropriate to authorize a court-appointed receiver to assign a debtor into bankruptcy. This is, indeed, unsurprising given that a court-appointed receiver, is an officer of the Court, is obligated to act in the best interests of stakeholders as a whole, and those interests may compel the receiver to avail itself of the rights and remedies of a trustee under the BIA.[12]

### B. A Receiver May be Appointed as Trustee in Bankruptcy

12. Similarly, it is well established that the activities of a court-appointed receiver-manager, and those of a trustee in bankruptcy appointed under a voluntary assignment, may co-exist in the absence of conflict of interest and of jurisdiction. Put differently, the authority of the receiver-manager may continue in a case where there is no conflict between the receiver-manager and the trustee.[13] Likewise, it is not uncommon in Alberta for a receiver to be appointed as the debtor's bankruptcy trustee, and this occurred in the recent *Quattro* and *Lexin* insolvencies, which concerned Alberta oil and gas debtors.[14]

## IV. CONCLUSION

13. In the instant case, and as detailed in the Fourth Report, this Court should authorize the Receiver to assign Houston into bankruptcy since, *inter alia*:

(a) Houston owes substantial liabilities to its creditors, has no realizable or valuable assets, is unable to meet its obligations as they generally become due, and is an "insolvent person" within the meaning of the BIA;

(b) the Receiver requires the additional powers of a trustee under the BIA to carry-out further investigations, and any applications or actions, in respect of the Potentially Reviewable Transactions;

---

[12] Availing oneself of the enhanced powers, and additional rights and remedies granted by the *BIA* is a valid purpose for seeking an order in bankruptcy, even in the absence of unsecured property in a debtor's estate. See also: *Black Brothers (1978) Ltd., Re*, [1982] 13 ACWS (2d) 316 at para 6, **Tab 8**; and *699845 Ontario Ltd., Re*, [1997] OJ 3660 at paras 9-12, **Tab 9**.

[13] *Canadian Imperial Bank of Commerce v. King Truck Engineering Canada Ltd.*, [1987] 63 CBR 1 (Ont. C.A.), **Tab 10**.

[14] See bankruptcy orders attached hereto as Appendices "A" and "B".

(c) the investigations, and any applications or actions contemplated by the Receiver in respect of the Potentially Reviewable Transactions, are in the interests of stakeholders as a whole, as they may result in millions of dollars returning to the bankrupt estate of Houston;

(d) the OWA supports the Receiver pursuing the Potentially Reviewable Transactions through bankruptcy proceedings;

(e) Houston no longer has any employees, contractors or active management, and thus, the Receiver is unaware of any other person willing to assign Houston into bankruptcy; and

(f) BDO has consented to act as Trustee and there is no conflict by BDO acting both as Receiver and Trustee.

14. For these reasons, the Receiver respectfully requests that the Receiver be authorized and directed to assign Houston into bankruptcy in the manner sought in the Application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF JANUARY 2021.**

**BORDEN LADNER GERVAIS LLP**

Per: 

**Jack R. Maslen / Garrett Finegan**
Counsel for the Receiver,
BDO Canada Limited

**TABLE OF AUTHORITIES**

| TAB | DOCUMENT |
|---|---|
| 1 | *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 |
| 2 | *Everex Systems Inc. v. Pride Computer Distribution Ltd.*, [1988] BCJ No 3089 |
| 3 | *Royal Bank v. Sun Squeeze Juices Inc.*, [1994] OJ 567 |
| 4 | *Royal Bank v. Sun Squeeze Juices Inc.*, [1994] 28 CBR (3d) 201 (Ont. C.A.) |
| 5 | *Brandon Packers Ltd., Re*, [1962] 33 DLR (2d) 503 |
| 6 | *Chow v. Bresea Resources Ltd.*, [1997] 75 ACWS (3d) 1006 |
| 7 | *RBC v. Gustin*, 2019 ONSC 5370 |
| 8 | *Black Brothers (1978) Ltd., Re*, [1982] 13 ACWS (2d) 316 |
| 9 | *699845 Ontario Ltd., Re*, [1997] OJ 3660 |
| 10 | *Canadian Imperial Bank of Commerce v. King Truck Engineering Canada Ltd.*, [1987] 63 CBR 1 (Ont. C.A.) |


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|---|---|
| COURT FILE and BANKRUPTCY NUMBER | 094761 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY |
| JUDICIAL CENTRE | CALGARY |
| | IN THE MATTER OF THE BANKRUPTCY OF QUATTRO EXPLORATION AND PRODUCTION LTD. |
| APPLICANT | HARDIE & KELLY INC., IN ITS CAPACITY AS THE COURT-APPOINTED RECEIVER OF QUATTRO EXPLORATION AND PRODUCTION LTD. |
| RESPONDENT | QUATTRO EXPLORATION AND PRODUCTION LTD. |
| DOCUMENT | **BANKRUPTCY ORDER** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | Jessica L. Cameron<br>Borden Ladner Gervais LLP<br>1900, 520 3rd Ave. S.W.<br>Calgary, AB T2P 0R3<br>Telephone: (403) 232-9715<br>Facsimile: (403) 266-1395<br>Email: jcameron@blg.com<br>File No. 436743/000019 |

I hereby certify this to be a true copy of the original Order of which it purports to be a copy.

Dated this 13 day of Apr 2017

for Registrar at Calgary
Bankruptcy Division of the
Court of Queen's Bench of Alberta

**DATE ON WHICH ORDER WAS PRONOUNCED: APRIL 12, 2017**

**LOCATION WHERE ORDER WAS PRONOUNCED: CALGARY, ALBERTA**

**NAME OF JUSTICE WHO MADE THIS ORDER: K.D. YAMAUCHI**

**UPON** the Application of Hardie & Kelly Inc. ("**HKI**"), the court-appointed receiver and manager (the "**Receiver**") of Quattro Exploration and Production Ltd. ("**Quattro**"); **AND UPON** having read the Affidavit of Verification of Marc E. Kelly, sworn April 3, 2017, filed and the Confidential Affidavit of Marc E. Kelly, sworn, and the Affidavit of Service of Rhonda Lastockin, filed; **AND UPON** being satisfied that Quattro and all interested and affected parties have been served with notice of the within Application; **AND UPON** being satisfied that Quattro has committed an act of bankruptcy within the meaning of subsection 42(1) of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 ("**BIA**") in the six (6) months preceding the filing of the within Application, and specifically that Quattro has ceased to meet its liabilities generally as they become due; **AND UPON** noting the consent of HKI to be appointed as trustee in bankruptcy in the within proceedings and being satisfied that HKI is a person so qualified to act under the

*Bankruptcy and Insolvency Act*; **AND UPON** hearing from counsel for HKI and any other interested party appearing at the Application:

**IT IS HEREBY ORDERED AND DECLARATED THAT:**

1. The service of notice of the Application for this Order and materials filed in support thereof, is hereby validated and deemed good and sufficient, this Application is properly returnable today, and no person other than those persons served is entitled to service of the Notice of Application.

2. Quattro Exploration and Production. ("**Quattro**"), a body corporate duly incorporated under the laws of the Province of Alberta and having offices in the City of Calgary, is hereby adjudged bankrupt and a Receiving Order is hereby made against Quattro.

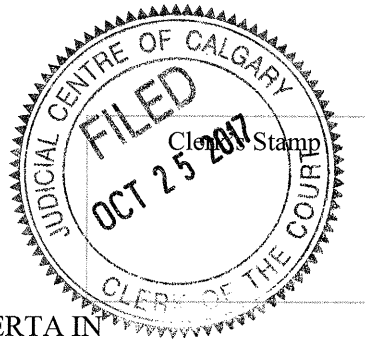
3. Hardie & Kelly Inc. (the "**Trustee**") is appointed as trustee of the bankrupt estate of Quattro, and the Trustee is hereby authorized to take all necessary steps to take possession of the deeds, books, records and documents and all property of the bankrupt and to administer the bankrupt estate of Quattro.

4. In accordance with section 16(1) of the *Bankruptcy and Insolvency Act*, the Trustee shall give security in cash or by bond without delay.

5. The costs of and incidental to this Application are to be paid to the Receiver out of the assets of the bankrupt's estate upon taxation thereof.

"K.D. Yamauchi"

J.C.Q.B.A.




Clerk's Stamp

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| COURT FILE NUMBER | **1701-03460** |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY |
| JUDICIAL CENTRE | CALGARY |
| | **IN THE MATTER OF THE BANKRUPTCY OF LEXIN RESOURCES LTD. AND 0989 RESOURCE PARTNERSHIP** |
| APPLICANT | GRANT THORNTON LIMITED, IN ITS CAPACITY AS THE COURT-APPOINTED RECEIVER OF LEXIN RESOURCES LTD. AND 0989 RESOURCE PARTNERSHIP |
| RESPONDENT | LEXIN RESOURCES LTD. AND 0989 RESOURCE PARTNERSHIP |
| DOCUMENT | **BANKRUPTCY ORDER** |

I hereby certify this to be a true copy of the original
Dated this 25 day of Oct 25
for Clerk of the Court

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No. 547730/000021

**DATE ON WHICH ORDER WAS PRONOUNCED:** October 25, 2017

**NAME OF JUSTICE WHO MADE THE ORDER:** B.E. Romaine

**LOCATION OF HEARING:** Calgary, Alberta

**UPON** the application of Grant Thornton Limited ("**Grant Thornton**"), in its capacity as the court-appointed receiver (the "**Receiver**") of Lexin Resources Ltd. ("**Lexin**"), 1051393 B.C. Ltd., 0989 Resource Partnership ("**0989**"), LR Processing Ltd. and LR Processing Partnership for a bankruptcy order respecting each of Lexin and 0989; **AND UPON** having read the Fifth Report of the Receiver, dated October 12, 2017, filed (the "**Fifth Report**"), the Confidential Supplement to the Receiver's Fifth Report, dated October 18, 2017 (the "**Confidential Report**"), the Affidavits of Service of Vanessa Vu and Kristal Bolton, respectively, each filed, and the pleadings and proceedings filed herein, including the Lexin Receivership

Order granted on March 20, 2017 and the Expanded Receivership Order granted on June 13, 2017 (together the "**Receivership Orders**"); **AND UPON** being satisfied that Lexin, 0989 and all interested and affected parties have been served with the notice of the within Application; **AND UPON** being satisfied that each of Lexin and 0989 have committed an act of bankruptcy within the meaning of subsection 42(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**") in the six (6) months preceding the filing of the within Application, and specifically that each of Lexin and 0989 ceased to meet their liabilities generally as they became due; **AND UPON** noting the consent of Grant Thornton to be appointed as trustee in bankruptcy in the within proceedings and being satisfied that Grant Thornton is a person so qualified to act under the BIA; **AND UPON** hearing from counsel for the Receiver, the Alberta Energy Regulator and counsel for any other interested parties appearing at the hearing of this application:

**IT IS HEREBY ORDERED AND DECLARED THAT:**

1. Service of notice of this Application and materials filed in support thereof, is hereby validated and deemed good and sufficient, this Application is properly returnable today, and no person other than those persons served is entitled to service of the Notice of Application.

2. Lexin Resources Ltd. ("**Lexin**"), a body corporate duly incorporated under the laws of the Province of British Columbia is hereby adjudged bankrupt and a Bankruptcy Order is hereby made against Lexin.

3. 0989 Resource Partnership ("**0989**"), a general partnership duly registered under the laws of the Province of British Columbia is hereby adjudged bankrupt and a Bankruptcy Order is hereby made against 0989.

4. Grant Thornton Limited (the "**Trustee**") is appointed as trustee of the bankrupt estates of each of Lexin and 0989, and the Trustee is hereby authorized to take all necessary steps to take possession of the deeds, books, records and documents and to administer the bankrupt estates of Lexin and 0989.

5. Notwithstanding the appointment of the Trustee and excepting only any causes of action which Lexin or 0989 may have, which causes of action shall remain vested in the Trustee, the business, property, assets and undertakings of each of Lexin and 0989 shall not vest in the Trustee but shall remain under the control of the Receiver, subject to the terms of the Receivership Orders.

6. In accordance with section 16(1) of the BIA, the Trustee shall give security in cash or by bond without delay.

**Miscellaneous Matters**

7. Service of this Order shall be deemed good and sufficient by serving the same on:
   a) the persons listed on the service list (attached as Schedule "A" to the Application); and
   b) by posting a copy of this Order on the Receiver's website at: www.grantthornton.ca/lexin

8. No other persons are entitle to be served with a copy of this Order.

9. Service of this Order shall be deemed good and sufficient regardless of whether service is effected by PDF copy attached to email, facsimile, courier, personal deliver or ordinary mail.

"B.E. Romaine"
Justice of the Court of Queen's Bench of Alberta

# INDEX

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

# Bankruptcy and Insolvency Act

# Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to December 17, 2020

Last amended on November 1, 2019

À jour au 17 décembre 2020

Dernière modification le 1 novembre 2019

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***income trust*** means a trust that has assets in Canada if

**(a)** its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

**(b)** the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event; (*fiducie de revenu*)

***insolvent person*** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

**(a)** who is for any reason unable to meet his obligations as they generally become due,

**(b)** who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

**(c)** the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

***legal counsel*** means any person qualified, in accordance with the laws of a province, to give legal advice; (*conseiller juridique*)

***locality of a debtor*** means the principal place

**(a)** where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

**(b)** where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

**(c)** in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

***Minister*** means the Minister of Industry; (*ministre*)

***net termination value*** means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

***official receiver*** means an officer appointed under subsection 12(2); (*séquestre officiel*)

**b)** il a résidé au cours de l'année précédant l'ouverture de sa faillite;

**c)** se trouve la plus grande partie de ses biens, dans les cas non visés aux alinéas a) ou b). (*locality of a debtor*)

***localité d'un débiteur*** [Abrogée, 2005, ch. 47, art. 2(F)]

***ministre*** Le ministre de l'Industrie. (*Minister*)

***moment de la faillite*** S'agissant d'une personne, le moment :

**a)** soit du prononcé de l'ordonnance de faillite la visant;

**b)** soit du dépôt d'une cession de biens la visant;

**c)** soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

***opération sous-évaluée*** Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu'il a lui-même donnée. (*transfer at undervalue*)

***ouverture de la faillite*** Relativement à une personne, le premier en date des événements suivants à survenir :

**a)** le dépôt d'une cession de biens la visant;

**b)** le dépôt d'une proposition la visant;

**c)** le dépôt d'un avis d'intention par elle;

**d)** le dépôt de la première requête en faillite :

**(i)** dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),

**(ii)** dans le cas où la personne, alors qu'elle est visée par un avis d'intention déposé aux termes de l'article 50.4 ou une proposition déposée aux termes de l'article 62, fait une cession avant que le tribunal ait approuvé la proposition;

**e)** dans les cas non visés à l'alinéa d), le dépôt de la requête à l'égard de laquelle une ordonnance de faillite est rendue;

**f)** l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

***personne***

**Meaning of disbursements**

**(2)** In subsection (1), "disbursements" do not include payments made in operating a business of the debtor.

**Accounts, discharge of interim receivers**

**(3)** With respect to interim receivers appointed under section 46, 47 or 47.1,

**(a)** the form and content of their accounts, including their final statement of receipts and disbursements,

**(b)** the procedure for the preparation and taxation of those accounts, and

**(c)** the procedure for the discharge of the interim receiver

shall be as prescribed.

1992, c. 27, s. 16; 2004, c. 25, s. 30; 2005, c. 47, s. 32; 2015, c. 3, s. 7(F).

**Application of sections 43 to 46**

**48** Sections 43 to 46 do not apply to individuals whose principal occupation and means of livelihood is fishing, farming or the tillage of the soil or to any individual who works for wages, salary, commission or hire at a rate of compensation not exceeding twenty-five hundred dollars per year and does not on their own account carry on business.

R.S., 1985, c. B-3, s. 48; 1997, c. 12, s. 28.

## Assignments

**Assignment for general benefit of creditors**

**49 (1)** An insolvent person or, if deceased, the executor or administrator of their estate or the liquidator of the succession, with the leave of the court, may make an assignment of all the insolvent person's property for the general benefit of the insolvent person's creditors.

**Sworn statement**

**(2)** The assignment must be accompanied by a sworn statement in the prescribed form showing the debtor's property that is divisible among his or her creditors, the names and addresses of all his or her creditors and the amounts of their respective claims.

**Filing of assignment**

**(3)** The assignment made under subsection (1) shall be offered to the official receiver in the locality of the debtor, and it is inoperative until filed with that official receiver, who shall refuse to file the assignment unless it is in the prescribed form or to the like effect and accompanied by the sworn statement required by subsection (2).

**Sens de débours**

**(2)** Pour l'application du paragraphe (1), ne sont pas compris parmi les débours les paiements effectués dans le cadre des opérations propres aux affaires du débiteur.

**Comptes et libération du séquestre intérimaire**

**(3)** La forme et le contenu des comptes — y compris l'état définitif des recettes et des débours — du séquestre intérimaire nommé aux termes des articles 46, 47 ou 47.1 et la procédure à suivre pour leur préparation et leur taxation, ainsi que pour la libération du séquestre intérimaire sont déterminés par les Règles générales.

1992, ch. 27, art. 16; 2004, ch. 25, art. 30; 2005, ch. 47, art. 32; 2015, ch. 3, art. 7(F).

**Application des art. 43 à 46**

**48** Les articles 43 à 46 ne s'appliquent pas au particulier dont la principale activité — et la principale source de revenu — est la pêche, l'agriculture ou la culture du sol, ni au particulier qui travaille pour un salaire, un traitement, une commission ou des gages ne dépassant pas deux mille cinq cents dollars par année et qui n'exerce pas un commerce pour son propre compte.

L.R. (1985), ch. B-3, art. 48; 1997, ch. 12, art. 28.

## Cessions

**Cession au profit des créanciers en général**

**49 (1)** Une personne insolvable ou, si elle est décédée, l'exécuteur testamentaire, le liquidateur de la succession ou l'administrateur à la succession, avec la permission du tribunal, peut faire une cession de tous ses biens au profit de ses créanciers en général.

**Déclaration sous serment**

**(2)** La cession est accompagnée d'une déclaration sous serment dans la forme prescrite, indiquant les biens du débiteur susceptibles d'être partagés entre ses créanciers, les noms et adresses de tous ses créanciers et les montants de leurs réclamations respectives.

**Production de la cession**

**(3)** La cession est présentée au séquestre officiel dans la localité du débiteur, et elle est inopérante tant qu'elle n'a pas été déposée auprès de ce séquestre officiel qui en refuse la production, à moins qu'elle ne soit en la forme

TAB 2

1988 CarswellBC 516
British Columbia Supreme Court

**Everex Systems Inc. v. Pride Computer Distribution Ltd.**

1988 CarswellBC 516, [1988] B.C.J. No. 3089, 15 A.C.W.S. (3d) 56, 68 C.B.R. (N.S.) 24

**EVEREX SYSTEMS INC. v. PRIDE COMPUTER DISTRIBUTION LTD.**

Meredith J.

Judgment: February 23, 1988
Docket: Vancouver No. C875543

Proceedings: additional reasons to *Everex Systems Inc. v. Pride Computer Distribution Ltd.* (1987), 1987 CarswellBC 3654 ((B.C. S.C.))

Counsel: *P. Guy*, for receiver-manager.
*A. Edgson*, for defendant.

Subject: Corporate and Commercial; Insolvency

## Headnote

**Receivers --- Conduct and liability of receiver — Rights**

Assignments — Who may assign — Court-appointed receiver-manager not having authority to assign debtor company into bankruptcy — Court not having power to authorize such assignment.

A court-appointed receiver-manager does not have the authority to execute an assignment in bankruptcy for the debtor company nor does the court have the power to authorize such an action.

Application by receiver-manager for authority to assign debtor into bankruptcy.

***Meredith J.*:**

1 My original reasons for judgment on this application of the receiver-manager for authority to assign in bankruptcy was heard 18th December 1987 [[1988] B.C.W.L.D. 551]. My reasons are dated 21st December 1987. I attach a copy of those reasons for reference [p. 26].

2 Since then, a number of considerations have occurred to me. These are referred to in my memoranda of 6th January 1988 and 4th February 1988. I attach copies of these memoranda as well [pp. 27 and 29].

3 Counsel for the receiver-manager has replied to my second memorandum. As I pointed out, s. 31(1) of the Bankruptcy Act, seemingly the sole authority for assignments, limits the making of an assignment to "an insolvent person". The receiver-manager is not, of course, insolvent. However, Mr. Guy submits that in making the assignment the receiver-manager would "make an assignment ... for Pride". I hold against that contention because the receiver-manager has been appointed by the

court, and by virtue of the appointment ceases to be an officer of the corporation (Company Act, s. 111). Thus the receiver-manager after the court appointment must act in accordance with the directions of the court. The receiver-manager cannot thereafter instruct the corporation as an officer thereof. In any event, the directors of the corporation retain their powers except with respect to that part of the undertaking for which the receiver-manager is appointed (Company Act, s. 110). Thus the directors retain the authority to cause the company to execute an assignment in bankruptcy. The receiver-manager does not. Furthermore, I hold that the court has not any power to authorize the receiver-manager to execute an assignment in bankruptcy, ostensibly for the debtor, when the debtor has not done so. For this reason alone, the application must be dismissed.

4 Perhaps I need make no further reference to the submission made by the receiver-manager. But I am prompted to do so because I find it rather strange. The receiver-manager contends that it should be given authority to make the assignment in bankruptcy, notwithstanding that the effect of the assignment would be to:

(a) remove certain assets from the charge which the receiver-manager is there to enforce;

(b) so that the trustee in bankruptcy could carry on the proceedings against the creditor and the receiver-manager for wrongful seizure; and

(c) the trustee in bankruptcy could attack the security of the plaintiff if it were so advised.

It seems to me that none of these results are in the interest of the secured creditor, rather the reverse. If there is no result other than those mentioned, I am at a loss to know why the receiver-manager conceives it incumbent upon it to make the application at all.

5 The defendant is entitled to the costs of these proceedings.

*Application dismissed.*

**APPENDIX 1**

| |
|---|
| Heard - December 18, 1987<br>Judgment - December 21, 1987 |

December 21, 1987. *Meredith J.*: — I conclude that this application of the receiver-manager for authority to assign in bankruptcy must be refused, if only for the reason that on the face of the proceedings the plaintiff has not proven the debt upon which the receivership rests.

The plaintiff chose to take security for the huge unpaid balance of the purchase price of the goods sold, not on the goods but on the business of the plaintiff. It did not deliver the goods on consignment, nor did it take a specific charge on the assets delivered. The consequences were twofold. On the one hand, the defendant had put itself at the mercy of the plaintiff. The very survival of the defendant depended upon the goodwill of the plaintiff. On the other hand, the plaintiff, in choosing its form of security, chose to avail itself of the entire undertaking of the company, such as it might be, when the time came to

demand the balance owing.

The receiver-manager, in effect, now wants to extend the rights of the plaintiff under the debenture. The effect of this would be to give the plaintiff priority of claim over other creditors. The ostensible reason, however, is to bring efficiency and order to the liquidation process. I think the opposite might be the effect. And, furthermore, a bankruptcy on top of the receivership would add greatly to the costs by whomever those costs are to be borne.

A number of questions arise out of the rather unusual circumstances of this case. I mention one. I question the standing of the solicitors, ostensibly acting for the defendant, to oppose the application in the first place, and to purport to defend the action taken by the plaintiff in the second place. The defendant approved the court order appointing the receiver-manager. That order put the receiver-manager firmly in command of all facets of the company operations, including the defence of suits. After the order was made, the defendant purported through its solicitors to enter a defence. Under the receiving order that would be for the receiver-manager to do as an officer of the court. In any event, the main defence pleaded is that the seizure was wrongful and that the claims of the plaintiff (including the claim for the receiving order which was already made) be dismissed. I find it difficult to see how the defendant can resist the propriety of the receiving order when it made no objection and has not appealed.

As I say, I think at the very least before bankruptcy is authorized in the ostensible name of efficiency and orderliness that the plaintiff should be sworn to be a creditor of the company, given that the plaintiff is engaged in pursuing the very rights for which it contracted.

The application is dismissed.

**APPENDIX 2**

January 6, 1988. Memorandum to counsel: — I have the letter of Mr. Guy, directed to the trial coordinator, dated 30th December 1987.

I think the whole question should be reconsidered and would ap preciate it if Mr. Guy would set the matter down for rehearing any day Monday to Thursday in the next three weeks at 9 a.m.

Perhaps in my reasons I have laid too much stress on the question of the proof of the debt upon which the receivership rests.

Although there may be authority to the contrary, I think it highly doubtful that the receiver-manager usurps the function of the directors so as to permit an assignment in bankruptcy to be made by it or, for that matter, that the court can order it. Under s. 108 of the Company Act, the receiver is required to bring the business to a halt. Under s. 110, where the receiver-manager is appointed, the powers of the directors cease "with respect to that part of the undertaking for which he is appointed". But that section does not vest in the receiver-manager the power of the directors. Under s. 111, the receiver-manager is an officer of the court and not of the corporation. He may thus apply to the court for direction

concerning the management of the assets, or under s. 115 for termination of his fiduciary relationship, but surely not for an order directing what happens after the termination of his duties.

Section 116 makes it evident that the powers of the directors are intact except to the extent that they have ceased under s. 110. It seems to me to follow that it remains within the power of the existing directors to assign the company in bankruptcy if they resolve to do so. But the receiver-manager could not by that device divest itself of the responsibilities imposed upon it by the order of the court.

Even if I am wrong in this, before making a blanket order authorizing "an" assignment, I should wish to know who the proposed trustee in bankruptcy is to be, and that the proposed trustee would accept the appointment and is aware of the major responsibility that that appointment would entail. The responsibility I refer to is the conduct of the lawsuit against the plaintiff and the receiver-manager. Because if damages are awarded because the operations of the company have been wrongfully brought to a halt, the damages will be no doubt large and constitute the major asset of the company.

I had thought that it was conceded that the present directors of the company were functus on the appointment of the receiver-manager. I now see that cannot be the case if only because s. 116 authorizes the corporation to make an application to the court (which only can be done at the instance of the directors) and in any case under s. 110 the powers of the directors have not ceased. Thus the existing directors probably continue to have the right to continue the lawsuit against the creditor. But I continue to be confused about the status of the defence and counterclaim after the receiver-manager has been appointed.

I hope on the continuation of the hearing that counsel will have put their minds to these facets of the matter.

**APPENDIX 3**

February 4, 1988. Memorandum to counsel: — At the risk of prolonging consideration of the motion, I have these further observations to make upon which I would appreciate submissions from counsel, particularly counsel for the receiver-manager.

The motion is for an order that the receiver-manager "be authorized and directed to make an assignment for the benefit of creditors ..."

(1) Section 31(1) of the Bankruptcy Act, seemingly the sole authority for assignments, authorizes "an insolvent person" to make an assignment "of all of his property for the general benefit of his creditors." The first question then is whether the receiver-manager can be described as "an insolvent person".

(2) The second question is, since the assignment is of property, what property is it that the receiver-manager purports to assign? If the form of assignment simply says, as it probably will, "all his property", I think it important that the trustee know what property is conveyed to him by virtue of the assignment. Will this be a matter to be debated between the receiver-manager and the assignee?

(3) Assuming that the receiver-manager assigns something (for instance perhaps the assets claimed by the landlord, or assets claimed by virtue of an alleged preference if moneys were owing to the two officers of the company at all), then does the secured creditor give up his charge on those assets? It seems that recovery of property conveyed by the insolvent debtor by way of a preference cannot be recovered by the receiver-manager but only by a trustee in bankruptcy: see *Re Que. Trucks & Trailers Inc; Mercure v. Thermo King-Can. Ltd.*, [1968] Que. S.C. 418, 11 C.B.R. (N.S.) 115.

TAB 3

1994 CarswellOnt 266
Ontario Court of Justice (General Division — Commercial List)

**Royal Bank v. Sun Squeeze Juices Inc.**

1994 CarswellOnt 266, [1994] O.J. No. 567, 24 C.B.R. (3d) 302, 46 A.C.W.S. (3d) 821

**ROYAL BANK OF CANADA v. SUN SQUEEZE JUICES INC. and BEIT-KIRUR LTD.**

Farley J.

Heard: February 28, 1994
Judgment: March 16, 1994
Docket: Doc. B253/93

Counsel: *J.A. Carfagnini* and *R. Chadwick*, for Coopers & Lybrand Ltd., court-appointed receiver and manager.
*Paul G. Macdonald*, for plaintiff.
*Edward M. Morgan*, for defendants.
*Ronald M. Moldaver, Q.C.*, for Josef Blum, majority shareholder of defendants.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

## Headnote

**Bankruptcy --- Receiving order — Effect of receiving order**
**Receivers --- Jurisdiction of court to appoint**

Receiving orders — Effect — Court having jurisdiction to require receiver-manager to consent to receiving order pursuant to petition — Appropriate for court to require consent where bankruptcy best position for debtor and for trustee to resolve certain issues — No interested party to be prejudiced by receiving order.

The bank issued a petition for a receiving order against the defendant company, naming a proposed trustee. The company filed a Notice Disputing the Petition. The court appointed a receiver-manager, which reported that the company's operations were no longer feasible. The receiver-manager was authorized by the court to realize upon the company's assets.

The issue before the court was whether it should authorize the receiver-manager to consent to the receiving order.

**Held:**

The receiver-manager was directed to consent to a receiving order pursuant to the petition.

The evidence showed that the company was indebted to the bank and that it had not, within the six months preceding the petition, met its liabilities generally as they became due. Several actions had been commenced against the company. The receiver-manager saw little benefit to incurring further costs to defend the actions given the bank's priority position and the fact that it would suffer a significant

shortfall on its loans. It was appropriate in the circumstances to direct the receiver-manager to consent to the receiving order. Bankruptcy would allow the trustee to resolve the allegations of fraudulent preferences to the company's majority shareholder, and to investigate suspicious circumstances surrounding a secret bank account. Further, since the company was merely an insolvent shell, its assets having been sold and its operations having been discontinued, no interested party would be prejudiced by a receiving order.

Petition for receiving order.

***Farley J.*:**

1 The critical question to be answered is whether this Court has the jurisdiction to authorize a Court-appointed Receiver and Manager ("R/M") either to assign a debtor company into bankruptcy or to consent to a receiving order being issued against the debtor company. The second question is, if so, whether this Court should so authorize this R/M in these circumstances.

2 On July 21, 1993 the Royal Bank of Canada ("Bank") issued a Petition for a Receiving Order ("Petition") against Sun Squeeze Juices Inc. ("Sun") naming Coopers & Lybrand Limited ("Coopers") as the proposed Trustee. The next day the Court appointed Coopers as R/M on a motion by the Bank, Sun's secured creditor to the extent of approximately $16 million. On August 6th Sun filed a Notice Disputing the Petition ("Dispute"). The R/M was to report to the Court as to the feasibility of continuing the operations of Sun. In its report of August 6th the R/M advised that this was unfeasible and recommended that Sun's operations be discontinued. On August 12th this Court au thorized the R/M to realize upon Sun's assets. Sun is no longer carrying on business as its assets now have been sold with Court approval.

3 Despite the disarray and gaps in the financial and other records of Sun, has determined that Josef Blum ("Blum"), the majority shareholder of Sun, had withdrawn approximately $1.2 million from bank accounts of Sun during the year prior to the R/M's appointment. Contrary to the arrangement with the Bank, a second (and secret) bank account was opened at the Bank of Nova Scotia ("BNS"). Collections which were not referenced in Sun's accounts receivable sub-ledger were deposited in the BNS. The R/M was unable to determine that the monies withdrawn by Blum were used in the business operations of Sun. The R/M has concluded that Sun was insolvent at all relevant times and it appears that these withdrawals had been made with a view to preferring Blum over other creditors. The R/M considers these payments to be fraudulent preferences as defined under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("BIA"). The R/M has similar views as to monies obtained by Blum out of the account at the Bank.

4 Sun's Dispute alleged that Sun was not indebted to the Bank and that it had not, within the 6 months preceding the Petition, failed to meet its liabilities as they generally became due. Given the unchallenged July 8, 1993 letter of Bank counsel to Sun (attention Blum) which recites Blum's request to forbear acting on the demands for payment to afford an opportunity to Sun to submit a proposal for the repayment of the Bank's loans, I am puzzled how Sun can baldly and boldly dispute that it was not

indebted to the Bank. Similarly it seems difficult to understand the disagreement concerning the general meeting of its liabilities given the significant number of outstanding accounts and the number of suppliers which had commenced actions against Sun.

5 Actions have been commended and followed up on by three suppliers and one customer. The R/M has examined these claims and concluded that they appear, on their face, to have some basis in law. However, any successful claim would rank only as an unsecured creditor against the estate of Sun. As the Bank will suffer a significant shortfall on its loans, the R/M sees little benefit to incurring further costs to defend these actions given the Bank's priority position. As to Sun's claims in some of these actions, the R/M advises that it does not have sufficient information to prove these claims. The Bank advised the R/M that it had no interest in funding any of the litigation, including, one assumes, the $75 million suit instituted by Sun and Blum against the Bank the day after the July 8th letter setting out their request for forbearance by the Bank so as to allow them to present a repayment proposal. If Sun were put into bankruptcy, then assuming that the Trustee does not pursue any of the litigation (which appears to be a dead certainty), any creditor (including Blum) who wishes to pursue it may do so at his own cost and for his own benefit pursuant to s. 38 of the BIA. See: *Re Can Corp Financial Services Ltd.* (1991), 4 C.B.R. (3d) 99 (Ont. Bktcy.) at p. 107.

6 As to the first question, I do not see that there is any dispute that this Court has the power to authorize the Court-appointed R/M to either file an assignment in bankruptcy or consent to the Petition. See: *First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232 (Ont. Gen. Div.) at p. 240; *Re Brandon Packers Ltd.* (1962), 33 D.L.R. (2d) 503 (Man. C.A.), at pp. 510-511 and 513, leave to appeal to S.C.C. refused [1962] S.C.C. ix; *Prairie Palace Motel Ltd. v. Carlson* (1982), 42 C.B.R. (N.S.) 163 (Sask. Q.B.) at p. 165; *Chinavision Canada Corp. v. Ling* (Ont. Gen. Div.) my unreported decision released Jan. 12, 1994. As Freedman J.A. said in *Brandon* at p. 511:

> The Editor expresses doubt whether a liquidator has power to file an assignment in bankruptcy. With deference, I would suggest that we are concerned not so much with the powers of a liquidator as the powers of a Judge of the Court of Queen's Bench. After all, a liquidator is subject to the jurisdiction of the Court in the same manner as an ordinary officer of the Court (s. 395 of the *Companies Act*). Here Mr. Flintoft did the wise and proper thing by applying to the Court for directions. The assignment in bankruptcy was not filed on his own motion but by express direction of the Court. Was the Court empowered so to direct him? We must bear in mind that we are here concerned with the authority of a superior Court in whose favour jurisdiction should be presumed unless it is expressly or by implication excluded ...

7 As to whether a Court-appointed R/M takes precedence over the directors and shareholders of the company as to which it is appointed, I believe this has been adequately canvassed in Walter and Hunter, *Kerr on the Law and Practice as to Receivers and Administrators*, 17th ed. (London: Sweet & Maxwell, 1989), at p. 219; *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264 (Alta. Q.B.) at p. 268, affirmed without this point (1989), 65 Alta. L.R. (2d) 374 (C.A.); *Nova Metal Products*

*Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at p. 111.

8 Freedman J.A. in *Brandon, supra*, observed at p. 511 that it would not be "necessary that the Court should first of all call upon the directors so to act. The Court is not bound to do a futile thing." It would seem to me that the Court in Everex Systems Inc. v. Pride Computer Distribution Ltd. (1988), 68 C.B.R. (N.S.) 24 at 28 (B.C. S.C.) dealt not with the jurisdiction of the Court and the capacity of a Court-appointed R/M, but rather it over concentrated on the wording of sections 110 and 111 of the *Company Act*, R.S.B.C. 1979, c. 59.

9 As Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada* 3rd ed., Vol.1, (Toronto: Carswell, 1992) express it, where there is a conflict between an assignment and an existing petition, the proper procedure is for there to be a consent to the receivership order being made pursuant to the petition. See at pp. 2-48-2-49 where it is said [at D§12]:

> **(a) Conflict Between Assignment and Petition**
>
> There has been a great deal of litigation over which has priority if both an assignment and a petition are filed. However, the procedure to be followed appears now to be well established, and it is this: (1) if a petition is filed first and the Official Receiver knows of the petition, he should not accept an assignment but should request the debtor to consent to the receiving order being made forthwith; (2) if the Official Receiver accepts the assignment, the court will set it aside and make the receiving order on the petition: *Re Lalonde* (1924), 4 C.B.R. 416 (Ont. S.C.); *Re Lakeshore Golf & Country Club* (1933), 19 C.B.R. 127 (C.S. Que.); *Re Slavonia SS Agencies* (1922), 3 C.B.R. 153 (Ont. S.C.). The reasoning behind these cases is that bankruptcy proceedings are primarily for the benefit of creditors, not debtors, and the trustee selected by the creditors is to be preferred over one selected by the debtor: *Re Croteau & Clark Ltd.* (1920), 1 C.B.R. 364, 48 O.L.R. 359, 55 D.L.R. (413 (S.C.).

Therefore, if circumstances dictate that Sun be put into bankruptcy, it would appear appropriate for the R/M to consent to a receiving order being made pursuant to the Royal Bank's Petition of July 21, 1993. I followed that course in *Chinavision, supra*, at p. 4 as well.

10 Courts in Canada have specifically held that the Court has jurisdiction to authorize and direct a Court-appointed R/M or liquidator to put a debtor company into bankruptcy. See *Prairie Palace, supra*, at p. 65; *Re Western Hemlock Products Ltd.* (1961), 2 C.B.R. (N.S.) 207 (B.C. S.C.) at p. 210; *Chinavision, supra*, at pp. 4-5. Guy J.A. in *Brandon, supra*, said at p. 513:

> Must the Court then close its eyes to the facts as reported by its own officer? It is my feeling that no amount of bankruptcy or winding-up legislation can fetter the Court to the extent that it must remain blind to the reality of bankruptcy.
>
> In this case the Court *directed* its appointee to make an assignment in bankruptcy. It is true the Court might have suggested to a creditor that he launch a petition to have the company declared bankrupt; but this, surely, is asking the Court to shirk its plain responsibility and place that responsibility on some third party. When the affairs of the company are under the jurisdiction of

the Court, it must accept and fulfill its duty and give judgment "according to the very right and justice of the case".

11 Thus this mater boils down to whether in the circumstances I should authorize the R/M to consent to the receiving order. Each case of course must be determined on its own facts. It seems to me that where there is an obvious insolvency then the Court should examine whether there is a "need" for a bankruptcy and if this need overcomes any contras. For this purpose I will ignore the technicality that given the all encompassing receiver and manager order issued on July 22, 1993, there is reason to question whether the officers and directors had any ability to issue the Dispute. See the discussion of this point above in *Kerr, Hat* and *Nova, supra*. The question of "need" for a bankruptcy was canvassed in *Prairie Palace, supra*, at p. 165 and *Chinavision, supra*, at pp. 4-5.

12 Sun's counsel submitted that where a Petition was disputed, the trial of the issue must be held. He cited *Re Goodis-Wolf Inc.* (1990), 80 C.B.R. (N.S.) 146 (Ont. Bktcy.) as standing for the principle that where there was outstanding litigation between the petitioner and the debtor company it was appropriate to stay the bankruptcy petition pending the determination of the various litigation in progress. I am of the opinion that it is an overstatement. Firstly, it was merely a factor to consider; secondly, it was determined in those circumstances that if the petition were granted, the two commenced actions would be unlikely to go to trial. It was acknowledged therein at pp. 154-155 that:

> *The existence of a prior civil action has not always resulted in the court staying or dismissing a petition*: see, for example, *Re Hutchens* (1983), 46 C.B.R. (N.S.) 234 (Ont. S.C.); and *Re H.M. Simpson Ltd.* (1989), 77 C.B.R. (N.S.) 24, 79 Nfld. & P.E.I.R. 307, (sub nom. Jenkins Transfer Ltd. v. H.M. Simpson Ltd.) 246 A.P.R. 307 (P.E.I.C.A.). However, in many cases, petitions have been stayed because of a dispute which the court considered better dealt with by the civil trial process. Here, we have a longstanding civil action and no prejudice shown to other creditors if the petition were to be stayed. The petition is part of the battle between the petitioning creditor and the debtor. There is a question in my mind whether the bankruptcy process should be resorted to in such circumstances. I was told that a pre-trial in the first action was cancelled because of the intervening petition. The action should be able to be tried at an early date. It would be less than satisfactory to all the parties if all the issues in the litigation were not dealt with. While there may be little likelihood of Goodis-Wolf successfully establishing the claim for advertising work, I consider, on balance, that it is preferable that the litigation be allowed to take its course.

13 [emphasis added]

14 That case is not this case however. I am of the view that bankruptcy would be a preferable condition for Sun. The trustee could advise creditors (including Blum) that it did not wish to pursue the litigation (including the $75 million claim against the Bank); I am of the view that such a process would maximize the chance of any valid and sustainable litigation being pursued since the undertaking creditor would be financing litigation under which it would be the initial beneficiary (and ultimate as well in the case of Blum pursuing the Bank litigation). It would also allow the Trustee to resolve the question of whether the payments to Blum were fraudulent preferences, thereby keeping an even hand

among the creditors. As well it would allow the Trustee to fully investigate the suspicious circumstances of the unauthorized and secret BNS account to which there were deposits of surreptitious collections of some of Sun's accounts receivable. Lastly, it would not appear that any interested party (including Sun itself) would be prejudiced by a receiving order issuing since Sun is merely an insolvent shell, its operations and assets having been sold and its business discontinued. Bankruptcy proceedings are class actions on behalf of all creditors and the Trustee must be mindful of the interests of all parties including the shareholders of the bankrupt company.

15 In conclusion I am of the view that it would be appropriate to direct the R/M to consent to the receiving order pursuant to the Petition and allow the Trustee if it proceeds as expected to advise the creditors of the possibility of one or more of them pursuing the existing litigation pursuant to s. 38 of the BIA. There is to be a receiving order issue in the usual form with Coopers & Lybrand Ltd. as Trustee.

*Receiver-manager directed to consent to receiving order.*

TAB 4

1994 CarswellOnt 310
Ontario Court of Appeal

**Royal Bank v. Sun Squeeze Juices Inc.**

1994 CarswellOnt 310, 28 C.B.R. (3d) 201, 51 A.C.W.S. (3d) 208

**ROYAL BANK OF CANADA v. SUN SQUEEZE JUICES INC. and BEIT-KIRUR LTD.**

Grange, Galligan and Osborne JJ.A.

Judgment: October 25, 1994
Docket: Docs. CA C18187, C18188

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

## Headnote

**Bankruptcy --- Receiving order — Effect of receiving order**
**Receivers --- Jurisdiction of court to appoint**

Receiving orders — Effect — Court having jurisdiction to require receiver-manger to consent to receiving order pursuant to petition — Appropriate for court to require consent where bankruptcy best position for debtor and for trustee to resolve certain issues — No interested party to be prejudiced by receiving order — Decision upheld on appeal.

The bank issued a petition for a receiving order against the defendant company, naming a proposed trustee. The company filed a Notice Disputing the Petition. The court appointed a receiver-manager, which reported that the company's operations were no longer feasible. The receiver-manager was authorized by the court to realize upon the company's assets.

It was determined that it was appropriate in the circumstances to direct the receiver-manager to consent to the receiving order as bankruptcy would allow the trustee to resolve certain allegations of fraudulent preferences and to investigate suspicious circumstances involving a secret bank account.

The company appealed.

**Held:**

The appeal was dismissed.

There was no possibility of the dispute to the petition succeeding, and it was in the interest of all the parties that the receiving order be issued.

Appeal from judgment reported at (1994), 24 C.B.R. (3d) 302 (Ont. Gen. Div. [Commercial List]) authorizing receiver-manager to consent to receiving order.

**The judgment of the court was delivered by *Grange J.A.*:**

1 Counsel for Blum speaking on behalf of Sun Squeeze has asked for an adjournment on the ground

that Sun Squeeze is unrepresented. We cannot accede to the request. This appeal was expedited in April so the efforts to obtain new counsel after Mr. Laskin's appointment do not appear to have proceeded in earnest until this month. Moreover Mr. Laskin did not have active control of the matter in his firm. We think the prejudice to the other parties is such that the appeal must proceed today.

. . . . .

2 On proceeding with the appeal, Mr. Moldaver stated that he was not retained by Sun Squeeze. He was permitted to proceed and argued fully and ably the merits of the Sun Squeeze appeal.

3 In our opinion the appeal cannot succeed. The Receiver/Manager had the authority to recommend the consent to the Petition. We are not prepared to say that in all cases the consent and recommendation of the Receiver/Manager alone would enable a Court to adjudge a debtor bankrupt in the face of a dispute. Nevertheless in this case, the debtor participated and was fully heard. On all the evidence the Judge found that there was no possibility of the Dispute succeeding and it was in the interest of all parties for the Receiving Order to go. We agree with those findings and we would therefore dismiss both appeals. The respondents are entitled to their costs out of the bankrupt's estate.

*Appeal dismissed.*

TAB 5

1962 CarswellMan 2
Manitoba Court of Appeal

**Brandon Packers Ltd., Re**

1962 CarswellMan 2, 33 D.L.R. (2d) 503, 39 W.W.R. 1, 3 C.B.R. (N.S.) 326

**Re Brandon Packers Limited; Re Rowe**

Miller C.J.M., Freedman and Guy JJ.A.

Judgment: April 30, 1962

Counsel: *C. V. McArthur, Q.C.*, and *W. S. Martin*, for appellant, Brandon Packers Limited.
*A. Sweatman*, for respondent, Rowe.

Subject: Corporate and Commercial; Insolvency

## Headnote

**Bankruptcy --- Assignments in bankruptcy — Types of assignors — Corporations — General**
**Corporations --- Winding-up — Under provincial acts — Liquidator**

Assignment — Power of court to order a provisional liquidator to make an assignment — Authority of Court to make such order.

Winding-up — Appointment of provisional liquidator — Company discovered to be insolvent — Provisional liquidator ordered to make assignment in bankruptcy.

A motion was brought by a shareholder to wind up the affairs of B.P. Ltd. and the Court made an order directing the winding-up and appointing a provisional liquidator. The provisional liquidator made a hasty investigation into the affairs of the company and came to the conclusion that it was insolvent. The liquidator then applied to the Court for an order directing him to make an assignment in bankruptcy for the company and the order was made. It was submitted that the Court had no power to make such an order.

*Held* (Miller C.J.M. *dissenting*), the order was valid. A liquidator is subject to the jurisdiction of the Court in the same manner as an ordinary officer. The Court had power to direct its officer to file an assignment to put the company into bankruptcy and such order was reasonable and practical.

*Per* Miller C.J.M. *dissenting*. Although the Companies Act of Manitoba does not explicitly say that a company cannot be wound up if it is insolvent except in s. 382(*c*), constitutionally, winding up proceedings do not apply to the winding-up of insolvent companies: Re Shipway Iron Bell & Wire Mfg. Co., 58 O.L.R. 585 at 586, [1926] 2 D.L.R. 887, 9 Can. Abr. 952, 963, quoted and agreed with. Winding-up proceedings relate only to companies which are solvent and once a company subject to a winding up order is found to be insolvent, the order should be cancelled and bankruptcy proceedings initiated.

There is nothing in the Companies Act permitting the Court to make an order authorizing and directing

a provisional liquidator to make an assignment in bankruptcy. There is no difference in this respect between voluntary and compulsory winding up proceedings: *Western Hemlock Products Ltd., Re* (1961), 35 W.W.R. 184, 2 C.B.R. (N.S.) 207, 1961 CarswellBC 20, 27 D.L.R. (2d) 457 (B.C. S.C.), 1961 Can. Abr. 211, not agreed with.

It is doubtful whether the Court could have made an order directing or authorizing the company itself to make an assignment in bankruptcy and therefore there was no reason to justify ordering or authorizing the liquidator to do that which the judge could not have ordered the company itself to do.

It is very doubtful that a provisional liquidator has authority or power to make an assignment of his own volition.

***Miller C.J.M.* (*dissenting*):**

1 These are three appeals filed in the same cause arising out of three separate orders made by Monnin J. (now J.A.) in connection with the affairs of Brandon Packers Ltd. The three appeals were argued together.

2 Gabriel Richard Rowe, the above-named petitioner, filed a petition for the winding-up of Brandon Packers Limited. Mr. Rowe had a very small interest as a shareholder in the company, such interest amounting to about $8 in actual value. However, he was entitled to file a petition, but he did so only on his own behalf. The petitioner contended that the affairs of the company should be wound up, as some alleged irregularities by certain directors of the company, representing the majority shareholders, justified the Court in so acting.

3 The petition was originally filed on 19th December 1960, but due to various intervening court proceedings it was not heard until December, 1961. The order of Monnin J. directing the winding-up was dated 6th December 1961. In that order, among other things, it was directed that Brandon Packers Ltd. be wound up by the Court under the provisions of The Companies Act, R.S.M. 1954, c. 43, and that Christopher Henry Flintoft be appointed provisional liquidator of the company. By the order certain limited powers were given to the provisional liquidator, and the provisions respecting the winding-up of companies, as set out in Part XV of The Companies Act, would apply. The winding-up of companies under order of the Court is provided for in s. 382 and succeeding sections of The Companies Act. The company in question here was a provincial company.

4 The provisional liquidator made a hasty investigation into the affairs of the company and came to the swift conclusion that it was insolvent. He therefore returned to the Court on 11th December 1961, and applied for, and was granted, an order empowering and directing him to make an assignment under the Bankruptcy Act, R.S.C., 1952, c. 14, of all the property of Brandon Packers Ltd. for the general benefit of its creditors. The assignment was actually made pursuant to the order on the same date.

5 On 21st September 1961, Messrs. Paton and Cox, who controlled Great West Saddlery Co. (the majority shareholder in Brandon Packers Ltd.) had disposed of controlling interests in the Great West Saddlery Co. to personal holding companies controlled by Messrs. Cleveland and Holland of Toronto.

(This involved a complicated series of transactions which it is not necessary to discuss for the purposes of this judgment.) Thus, when the winding-up petition, filed in December, 1960, was finally heard in December, 1961, the alleged offending directors Messrs. Paton and Cox were no longer at the helm of Brandon Packers Ltd.

6 Mr. McArthur, Q.C., acting for the appellant, argued that once the company was found to be insolvent the winding-up provisions should have been cancelled by the Court and contended that winding-up proceedings only related to companies which were solvent. I am inclined to think there is strength to this contention; but unfortunately Mr. McArthur and Mr. Cleveland, at the hearing of the winding-up petition, asserted that the company should not be wound up *as it was not insolvent*.

7 The contention of counsel as to solvency cannot alter the law, and if winding-up proceedings should not be ordered in cases of insolvency then this Court must act accordingly.

8 Section 382(*c*) of The Companies Act reads as follows:

> 382. A corporation may be wound up by order of the court, ...
>
> (*c*) where, in the opinion of the court, it is just and equitable for some reason *other than the bankruptcy or insolvency of the corporation that it be wound up*.

[The italics are mine.]

9 It is clear that a company cannot be wound up for insolvency. It is to be noted, too, the section does not explicitly say that even though it may be insolvent a company cannot be wound up for other reasons. My opinion however is that, constitutionally, winding-up proceedings do not apply to the winding-up of an insolvent company under The Companies Act. I agree with what was said by Masten J.A. in Re Shipway Iron Bell & Wire Mfg. Co., 58 O.L.R. 585 at 586, [1926] 2 D.L.R. 887, 9 Can. Abr. 952, 963:

> In the course of the discussion before us, Mr. McPherson very frankly and most properly informed the Court that from the report of the interim liquidator it clearly appeared that the company is utterly insolvent at the present time. This placed on the application an aspect entirely different from that which it presented when it was heard by my brother Rose. Not only does the statute, for constitutional reasons, exclude insolvency as a ground for winding-up, but the admission of insolvency sweeps away all interest of the petitioner in the result — the parties and the only parties really interested in case of insolvency being the creditors, whereas here all the shares are fully paid-up.

10 However, I do not deem it necessary to turn my decision on the above point, but rather do I desire to decide these appeals on my opinion that the learned chambers judge had no authority to authorize and direct a provisional liquidator to make an assignment in bankruptcy. It is my view that, with the evidence before the learned chambers judge, he was justified in making the winding-up order of 6th December 1961, but that upon the return of the provisional liquidator to the Court showing the insolvency of the company, it would be an error to permit him to proceed with the winding-up.

11 With great respect, it seems to me that the learned chambers judge, upon the report of the provisional liquidator and in view of the futility of the winding-up order, should have rescinded that order. This would have left the company in a position where the directors or creditors could have applied for bankruptcy of Brandon Packers under the provisions of the Bankruptcy Act. It is true that on the surface it appears to have been a sensible short cut for the learned chambers judge to have authorized the making of the assignment, though in fact this has not proven to have been a short cut at all. Even though on the merits there is much to recommend the order authorizing and directing bankruptcy made by the chambers judge, I have regretfully come to the conclusion that the order should not have been made and that the winding-up proceedings should have been cancelled and nullified. Then, by due process, and as authorized by the Bankruptcy Act, anyone desiring to place the company in bankruptcy, and authorized to take the proper legal proceedings, could have done so. The normal and proper course would thus have been followed.

12 There is nothing in the provisions of The Companies Act permitting the Court to make an order authorizing and directing an assignment in bankruptcy and, in my opinion, only powers authorized by the Act could be invoked. Furthermore, this bankruptcy order was made under and in winding-up proceed ings although in my view such an order is foreign and repugnant to such proceedings.

13 It was argued that the order directing assignment would be authorized by the inherent jurisdiction of the Court. It seems to me that this is not so. The procedure according to the Act relates only to winding-up a Manitoba company, and what may be done in such winding-up proceedings must be found within the limits of the statute, namely, The Companies Act, and nothing therein gives the Court authority to either direct or authorize bankruptcy proceedings.

14 It has been suggested to us in argument that the provisional liquidator was an officer of the Court. Possibly he was, or was at least an appointee of the Court, but I do not think that adds any strength to the argument. That fact does not clothe the Court with power to authorize the doing of anything beyond the limits of authority granted by the statute.

15 In British Columbia, Macfarlane J. was twice confronted with a somewhat similar problem to that which confronted the learned chambers judge in these hearings. In *Western Hemlock Products Ltd., Re* (1961), 35 W.W.R. 184, 2 C.B.R. (N.S.) 207, 27 D.L.R. (2d) 457 (B.C. S.C.), 1961 Can. Abr. 211, Macfarlane J. felt that in a *voluntary* winding-up the liquidator could, if faced with insolvency, file an assignment in bankruptcy under the Bankruptcy Act, and he ordered accordingly. The same learned judge made an earlier order under similar circumstances in the unreported case of *Re Parker's Mfg. Co. Ltd.* (P. 369/55).

16 So far as the points involved in the instant case are concerned, I do not think there is any difference as between a voluntary winding-up and a court winding-up, except, of course, the applicability of s. 382(*c*) to court winding-up orders. In any event, in the instant case I am not prepared to follow the British Columbia cases above referred to.

17 It seems to me that upon Mr. Flintoft reporting the insolvent condition of the company five days

after he was appointed provisional liquidator, and acceptance by the Court of the truth of that finding by Mr. Flintoft, it was obviously futile to continue the winding-up order and, as above stated, it should have been rescinded. Even though I hold that the order authorizing the assignment is invalid, at least it had the effect of superseding the winding-up order and thereby automatically cancelling same.

18 It is doubtful whether the learned chambers judge could have made an order directing or authorizing the company itself to make an assignment in bankruptcy. Of course in such a case an order is not necessary. I see no reason to justify ordering or authorizing a liquidator to do that which the learned judge could not have ordered the company itself to do.

19 I do not think it necessary to consider whether or not the provisional liquidator, of his own volition and without the intervention of the Court, could have made the assignment. Much of Mr. Sweatman's argument was directed to the powers of the liquidator to make such an assignment, pointing out that the definition of "person" in the Bankruptcy Act had been amended some years ago to include "legal representative of a person" and that, therefore, the legal representative of Brandon Packers (whom Mr. Sweatman contended was the provisional liquidator) was a person authorized to make an assignment for the company, within the meaning of the Bankruptcy Act, as the provisional liquidator purported to do.

20 I have approached this whole question from the viewpoint simply as to whether the Court had power to authorize or order an assignment (as this was the procedure adopted), and I am not concerned at the moment as to whether the provisional liquidator had the authority, without the intervention of the Court, to make the assignment. I might say, though, that I strongly doubt his authority and power so to do.

21 I hold, therefore, that the order of Monnin J. dated 11th December 1961: "that the said provisional liquidator be and he is hereby empowered and directed to make an assignment under the Bankruptcy Act ...," should be set aside.

22 I further hold that the order dated 6th December 1961, ordering the winding-up of Brandon Packers Ltd. under the Court, should be set aside on the ground that it is futile and, in any event, that it has been superseded and cancelled by the subsequent order directing the assignment.

23 It follows as a matter of course that the order dated 8th December 1961, which involved only costs, should also be set aside.

24 I am not disposed to award any costs on this appeal, inasmuch as the first winding-up order was opposed mainly on the ground that the company was not insolvent, which, so far as the records of this Court show, appears to have been incorrect. The true facts concerning the company's affairs should have been known to Messrs. Cleveland and Holland, and Mr. McArthur should have been correctly instructed.

25 All appeals are therefore allowed but, as above indicated, without costs.

***Freedman J.A.*:**

26 Appeals have been taken by Brandon Packers Ltd. from three separate but related orders of Monnin J. (as he then was). The appeals came on for argument together, and in this judgment I will deal with each of them in turn.

**No. 152/61 — First Appeal.**

27 This appeal is from an order made under s. 382(*c*) of The Companies Act, R.S.M., 1954, c. 43, directing that Brandon Packers Ltd. be wound up and appointing Mr. Christopher Henry Flintoft as provisional liquidator. The section referred to is in the following terms:

> 382. A corporation may be wound up by order of the court, ...
>
> (*c*) where, in the opinion of the court, it is just and equitable for some reason other than the bankruptcy or insolvency of the corporation that it be wound up ....

28 The attack on the order is based on several grounds, but these on examination can be reduced to two main ones, namely: (1) That the affidavit in support of the applicant's petition was based on information and belief; and (2) That the learned chambers judge failed to take into account certain material facts bearing upon the issue whether the order should or should not be granted.

29 Concerning the first point, I need only comment that the order rests on much stronger support than the affidavit alone. The learned chambers judge conducted a full scale inquiry in the form of a two-day trial in which several witnesses were examined and cross-examined. Under the circumstances it is idle to challenge the order on the basis that certain paragraphs in the supporting affidavit were allegedly imperfect in form.

30 On the second point, I am bound to say that there was ample evidence to support the conclusion at which the learned chambers judge arrived. The statute empowers the Court to make a winding-up order where, in its opinion, it is just and equitable for some reason other than the bankruptcy or insolvency of the corporation that it be wound up. The learned chambers judge, after careful consideration of the evidence that had been placed before him, formed the opinion that it was indeed just and equitable that the company be wound up.

31 Here I may point out that on the evidence before him, any suggestion that the company was at that time in a state of bankruptcy or insolvency was expressly negatived. Indeed, it was the company which aggressively asserted, as one of the grounds why the order should not be made, that the company under its new management was solvent and well able to carry on its affairs fairly and properly. This line of approach has significance not only here but in the third appeal as well.

32 I would dismiss the appeal and affirm the order of the learned chambers judge.

**No. 153/61 — Second Appeal.**

33 This appeal grows directly out of the first one. In the first order the learned chambers judge reserved the matter of costs. Two days later he disposed of the matter of costs (and certain other points not in issue in this appeal).

34 The present appeal, which is brought by leave of Monnin J., is from that part of his order awarding costs to the petitioner, and reserving the costs of the company.

35 The appeal is by its express language made dependent upon the successful outcome of the first appeal. The sole ground urged against the order is that if the winding-up order should be set aside, the order allowing costs in favour of the petitioner should correspondingly be set aside. Since, however, the winding-up order involved in the first appeal is being upheld, it follows that the second appeal must also be dismissed.

**No. 154/61 — Third Appeal.**

36 The order before us on the third appeal was made upon the application of the provisional liquidator. It arose under the following circumstances:

37 Within a few days after his appointment, the provisional liquidator made a close examination of the affairs of the company. From this examination it became clear that, notwithstanding the evidence led in the contrary direction by the company during the earlier hearing, Brandon Packers Ltd. was in fact insolvent. In these circumstances the provisional liquidator made application to the Court for an order that he be empowered and directed to make an assignment under the Bankruptcy Act of all the property of the company for the general benefit of its creditors. After hearing all interested parties, Monnin J. made the order applied for, and the present appeal is from that order.

38 The substantial point of objection to the order is that the learned trial judge had no jurisdiction to make it. With this contention I am unable to agree.

39 There is judicial precedent to support the course taken by the learned trial judge. In the British Columbia case of *Western Hemlock Products Ltd., Re* (1961), 35 W.W.R. 184, 2 C.B.R. (N.S.) 207, 27 D.L.R. (2d) 457 (B.C. S.C.), 1961 Can. Abr. 211, Macfarlane J. considered the position of a company which, in the process of being voluntarily wound up, was shown to be insolvent. He concluded that the proper course for the liquidator to take was to file an assignment in bankruptcy and then proceed under the Bankruptcy Act. He called attention to the fact that under similar circumstances he had made such an order in an earlier case.

40 To me the course taken by Macfarlane J. in the cases referred to seems, if I may say so with respect, eminently reasonable and practical. In fairness to the contention of the present appellant, however, I must refer to a comment which is appended by the learned editor to the report (2 C.B.R. (N.S.) at p. 211) of the *Western Hemlock Products Ltd., Re* case, *supra*, reading in part as follows:

> Macfarlane, J. suggests that the liquidator should file an assignment in bankruptcy. It is doubtful whether a liquidator has any such power. The corporate existence and corporate powers of the

company continue to exist notwithstanding the fact that the corporation is being wound-up ... and the proper persons to authorize the making of an assignment would seem to be the directors of the company. If the company would not agree to the making of an assignment then there would be nothing improper in the liquidator informing the creditors of the situation and requesting that one of the creditors should take the necessary steps to file a petition.

41 The editor expresses doubt whether a liquidator has power to file an assignment in bankruptcy. With deference, I would suggest that we are concerned not so much with the powers of a liquidator as with the powers of a judge of the Court of Queen's Bench. After all, a liquidator is subject to the jurisdiction of the Court in the same manner as an ordinary officer of the Court (s. 395 of The Companies Act). Here Mr. Flintoft did the wise and proper thing by applying to the Court for directions. The assignment in bankruptcy was not filed on his own motion but by express direction of the Court. Was the Court empowered so to direct him? We must bear in mind that we are here concerned with the authority of a superior court in whose favour jurisdiction should be presumed unless it is expressly or by necessary implication excluded. Counsel have been unable to, nor have I been able to find, any statutory provision expressly denying such power to the Court. Is the absence of such power then to be implied from the fact that in The Companies Act, and particularly in s. 391, certain specific powers of the Court are outlined with respect to winding-up proceedings? I would think not, for the simple reason that winding-up proceedings normally contemplate a condition of solvency on the part of a company, and one would not therefore expect to find, in a statute concerned with winding-up, any provision authorizing a liquidator to file an assignment in bankruptcy. Accordingly, the absence there of such a provision would not determine the matter of jurisdiction.

42 Admittedly the situation which confronted the liquidator was an unexpected and unusual one. The editor, in the comment above referred to, suggests that the liquidator's proper course was to call upon the directors of the company to authorize the making of an assignment, and upon their failure to do so he could then seek assistance from one of the creditors of the company. But we must not overlook the realities of the case. The fact is that the directors strenuously opposed the liquidator's application. It would have been idle to call upon them to take steps to put the company into bankruptcy. Nor in my view was it necessary that the Court should first of all call upon the directors so to act. The Court is not bound to do a futile thing.

43 As to whether the same result could have been achieved by a petition on the part of a creditor is a matter which it is not necessary to consider. All that is before us is the order of the Court — an order which dealt with a difficult situation in a sensible and practical way. I would be distressed to learn that the Court was without power to act as it did, but happily I have not been persuaded that it lacked such power. Indeed, I believe the contrary to be the case.

44 I would dismiss the appeal and affirm the order of the learned trial judge. The respondent should have one set of costs of these appeals.

***Guy J.A.*:**

45 I have had the opportunity to read the reasons for judgment of my brother Freedman, and I concur with his conclusions as to the validity of the orders in question. I only wish to add a few words with respect to the third appeal.

46 This appeal dealt with an order of Monnin J. dated 11th December 1961, in which he authorized and directed the provisional liquidator to make an assignment under the Bankruptcy Act.

47 A great deal of the appellant's counsel's argument was devoted to s. 367 of The Companies Act, R.S.M. 1954, c. 43. The burthen of the argument was that, despite the winding-up order

> ... its corporate state and all its corporate powers ... continue until the affairs of the company are wound up.

48 And this meant that any voluntary assignment in bankruptcy should be made by the directors of the company and not by the liquidator.

49 The learned trial judge relied on the decision of Macfarlane J. in *Western Hemlock Products Ltd., Re* (1961), 35 W.W.R. 184, 2 C.B.R. (N.S.) 207, 27 D.L.R. (2d) 457 (B.C. S.C.), 1961 Can. Abr. 211: at p. 187 Macfarlane J. says:

> Once a company in a *voluntary* winding-up is shown to be insolvent, I think the proper course for the liquidator to take is to file an assignment in bankruptcy or take other appropriate action to put the company in bankruptcy and proceed under the Act. I made an order under similar circumstances in *Re Parker's Mfg. Co. Ltd.* (P. 369/55) which I would suggest that counsel refer to.

50 The editorial comment in 2 C.B.R. (N.S.), at p. 211, reads:

> It is doubtful whether a liquidator has any such power. The corporate existence and corporate powers of the company continue to exist notwithstanding the fact that the corporation is being wound-up .... and the proper persons to *authorize* the making of an assignment would seem to be the directors of the company. If the company would not agree to the making of an assignment then there would be *nothing improper in the liquidator* informing the creditors of the situation and *requesting that one of the creditors should take the necessary steps to file a petition.*

[The italics are mine.]

51 However it must be remembered that in this case there is no *voluntary* winding-up of the company; and this is not a *voluntary* assignment in bankruptcy by the company. Here we have an officer of the Court appointed as provisional liquidator by the Court, and who must answer to the Court. And he shows to the satisfaction of the Court that the company is bankrupt. Any attempt to fulfil the duty imposed upon him by the Court in its order appointing him as liquidator is impossible.

52 Must the Court then close its eyes to the facts as reported by its own officer? It is my feeling that no amount of bankruptcy or winding-up legislation can fetter the Court to the extent that it must remain blind to the reality of bankruptcy.

53 In this case the Court *directed* its appointee to make an assignment in bankruptcy. It is true that the Court might have suggested to a creditor that he launch a petition to have the company declared bankrupt; but this, surely, is asking the Court to shirk its plain responsibility and place that responsibility on some third party. When the affairs of the company are under the jurisdiction of the Court, it must accept and fulfil its duty and give judgment "according to the very right and justice of the case."

54 Accordingly I would dismiss these appeals.

TAB 6

1997 CarswellAlta 1092
Alberta Court of Appeal

**Chow v. Bresea Resources Ltd.**

1997 CarswellAlta 1092, 160 W.A.C. 284, 209 A.R. 284, 75 A.C.W.S. (3d) 1006

**Yate Chow, Bud Damura, et al Appellants (Respondents by Cross-Appeal) and Bresea Resources Ltd., Respondent (Appellants by Cross-Appeal) and Price Waterhouse Limited, Monitor of Bresea Resources Ltd.**

Bracco, O'Leary, Hunt JJ.A.

Heard: November 13, 1997
Judgment: December 4, 1997
Docket: Calgary Appeal 97-17440

Proceedings: additional reasons at (February 3, 1998), Doc. Calgary Appeal 97-17440 (Alta. C.A.)

Counsel: *B.P. O'Leary* and *D.S. Nishimura*, for the Appellants (Respondents by Cross-Appeal).
*J.B. Rooney, Q.C.*, for the Respondent (Appellants by Cross-Appeal).
*P.T. McCarthy*, for the Monitor of Bresea Resources Ltd.

Subject: Insolvency; Corporate and Commercial

## Headnote

**Bankruptcy --- Assignments in bankruptcy — Miscellaneous issues**

Minority shareholders in mining corporation obtained court order appointing interim receiver — Order also required receiver to assign corporation into bankruptcy — Order was then stayed pending appeal — Shareholders appealed stay while corporation cross-appealed appointment of receiver and direction that corporation be assigned into bankruptcy — Appeal and cross-appeal both allowed in part — Evidence supported appointment of receiver but not assigning corporation into bankruptcy — Bankruptcy order could not be made simply because it was convenient to minority shareholders.

APPEAL by minority shareholders of stay of order appointing receiver with direction to assign corporation into bankruptcy; cross-appeal by corporation of order.

**The Court:**

1 The Appellants are Alberta residents who hold approximately 26% of the issued and outstanding shares of Bresea Resources Lid. ("Alberta shareholders"). On November 5, 1997 they succeeded in obtaining an Order from Cairns, J. in Chambers appointing Price Waterhouse Limited as Interim Receiver and Manager of the assets of Bresea and directing the Receiver/Manager to "immediately make an assignment in bankruptcy of Bresea pursuant to Section 49 of the *Bankruptcy and Insolvency Act* ... and pursuant to the assignment, appoint Arthur Andersen Inc. as Trustee in Bankruptcy". The Chambers Judge then stayed the Order pending this appeal. The Order was made in the context of a

shareholders' oppression action commenced by the Alberta shareholders in mid-October.

2 The Alberta shareholders are nominal appellants. They want the stay set aside. This is really an appeal by Bresea and the critical issues are raised in its cross-appeal. Bresea argues that in the circumstances an Interim Receiver/Manager should not have been appointed. Alternatively, if the appointment is justified, the Chambers Judge should not have directed the Receiver/Manager to assign Bresea into bankruptcy.

3 Bresea, Bre-X Minerals Ltd. and Bro-X Minerals Ltd. are related companies and are referred to as "the Bre-X Group". Bre-X owns 12.2 per cent of the shares of Bresea and Bresea owns 22.3 per cent of the shares of Bre-X and 22.7 per cent of the shares of Bro-X. The companies have common officers, directors and employees. At all material times David Walsh was the president and chief executive officer of each company. Numerous and substantial claims have been made against each of the companies, primarily by shareholders, as a result of the sudden and dramatic decline in the market value of Bre-X shares. None of the claims against Bresea have been reduced to judgment. There is no evidence that any of Bresea's assets were acquired through the wrongdoing of Bresea, Bre-X or Bro-X or their officers or directors. Bre-X made a voluntary assignment in bankruptcy hours before the Order appealed was made.

4 On May 8, 1997, Cairns J. made an Order granting each of the companies the protection of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c.C-36 ("C.C.A.A."), and directed each company to file a formal plan of compromise or arrangement before October 31, 1997. Price Waterhouse Limited was appointed to supervise the affairs of Bresea ("the Monitor").

5 Bresea did not file a plan of arrangement by the specified date and its protection under the C.C.A.A. terminated.

6 The Alberta shareholders allege that the Bre-X Group issued false and misleading public statements concerning the value of Bre-X's mining interests in Indonesia, thereby artificially inflating the value of Bre-X shares on public markets. They say that some of the individual representatives of the Bre-X Group participated in a fraud of enormous magnitude, with the shareholders of the companies being the victims. They also claim that Bresea and the other companies have viable causes of action against a number of third parties, including assayers, geological advisers, investment bankers, brokers, financial analysts and advisers, and their own officers and directors.

7 The application was made solely for the purpose of placing Bresea in bankruptcy. The Chambers Judge found that Bresea was insolvent at the date of the Order. That finding was the foundation for his Order. It was made on the basis of a statement in the affidavit of David Walsh dated May 8, 1997 sworn in support of the joint Petition of the Bre-X Group for protection under the C.C.A.A. A company must be "insolvent" to qualify for a protection order under the C.C.A.A. Walsh swore (A.B. Sec. II, Tab A, p.3):

> I do verily believe that the Petitioners' anticipated loss of their mining concessions in Indonesia and the enormous costs, expenses and disbursements necessary for the investigation, defence and, if

> appropriate, resolution of the threatened or perceived imminent shareholders' claims or proceedings has rendered each of the Petitioners to be insolvent.

8 The Chambers Judge found that there was no evidence of a change in Bresea's financial circumstances between May 8, 1997 and the date of the Order and held that Bresea continued to be insolvent. At the same time, he acknowledged that there were no debts or liquidated claims outstanding against Bresea giving rise to "difficulty in a creditor petitioning Bresea [into bankruptcy] under Section 43.". After finding Bresea to be insolvent, the Chambers Judge continued:

> [I]t is in the best interests of the creditors, who are all shareholders, it would appear, that the company be in bankruptcy.

9 In our view, the Chambers Judge made a palpable and overriding error in finding that Bresea was insolvent at the time of the Order. He had before him the periodic reports of the Monitor appointed in the C.C.A.A. proceedings concerning the affairs of Bresea. The Fifth Report dated October 30, 1997, showed that Bresea had assets valued at almost $29 million and liabilities of only $54,000. The liabilities included $50,000 in reserves for anticipated professional fees. The assets included approximately $23 million in cash which has been paid into court, an office building in Calgary valued at approximate $2.5 million and some Indonesian mining claim that are apparently being liquidated in an orderly fashion with the proceeds being held in trust. There is no evidence of any other outstanding liabilities or assets that the Monitor has been able to identify in his six months of overseeing the company's affairs. We appreciate that the Monitor's information was based upon information he received from the company.

10 It is not suggested that Bresea's assets are being dissipated or that they cannot be preserved in some way short of bankruptcy. The validity of the claims being advanced against Bresea by the Alberta shareholders and by other shareholders of the Bre-X Group is uncertain. They are merely disputed unliquidated claims.

11 The uncontradicted evidence before the Chambers Judge demonstrated conclusively that Bresea was not insolvent no matter how that state may be defined and assuming that it means the same thing in both statutes. Walsh's belief on May 8, 1997 may have been an unintentional mistake or it may have been a conscious mis-statement. In any event, it appears in hindsight to have been in error. He was, of course, referring to all three companies collectively. The representation of insolvency may have induced the Court to grant the C.C.A.A. Order. That is not, in our view, justification for making a finding that Bresea is currently in a state of insolvency and ordering bankruptcy when the evidence showed very convincingly that the company was solvent. The finding of the Chambers Judge has the effect of visiting the consequences of Walsh's erroneous belief on all of the shareholders and creditors of the company.

12 The Chambers Judge was also in error in assuming that the Order was in the best interests of shareholders. Shareholders resident in Ontario who are also making claims similar to those of the Alberta shareholders and who hold a larger percentage of outstanding shares have entered into a "stand-by" agreement with Bresea, part of which is an undertaking by Bresea to hold a special meeting of

shareholders within 120 days of the agreement at which time all of the current officers and directors of the company will resign. The apparent object of the agreement is to turn the company over to its shareholders. The Chambers Judge rejected the request of counsel for Bresea that those arrangements be sanctioned by a formal order for the benefit of all shareholders. The Ontario shareholders were served with notice of the motion. They did not support or oppose it. The Order appealed is clearly inconsistent with the stand-by agreement and the benefit of the Order to those shareholders is questionable.

13 In our opinion, the Chambers Judge was not justified in indirectly ordering Bresea into bankruptcy. The authorities relied upon by the Chambers Judge and by the Alberta shareholders have a common feature not present here. In each of those cases the court directed an independent and court-supervised person to assign the company into bankruptcy. Unlike the present case, however, that person had conducted an investigation and determined prior to the order that the company was in a state of insolvency within the meaning of the bankruptcy legislation: See in particular, *Royal Bank v. Sun Squeeze Juices Inc.* (1994), 24 C.B.R. (3d) 302 (Ont. Gen. Div. [Commercial List]) and *Brandon Packers Ltd., Re* (1962), 33 D.L.R. (2d) 503 (Man. C.A.) (leave to appeal to S.C.C. refused). Where a company is insolvent within the meaning of the *Bankruptcy and Insolvency Act*, and is unwilling or incapable of making a voluntary assignment, and there is no creditor qualified or willing to petition the company into bankruptcy, and where bankruptcy is desirable in order to protect the interests of creditors and shareholders, then it may be proper for a court to make an order placing the affairs of the company under the supervision of a receiver/manager or other officer of the court with directions to assign the company into bankruptcy. In our view, however, it is not proper to make an order which has as its purpose the forced bankruptcy of a solvent company simply because it is convenient to a minority of its shareholders to do so.

14 The appointment of an interim receiver and manager is a remedy contemplated in oppression proceedings. The affairs of Bresea are in a state of suspension. It is not carrying on an active business. Its assets are highly liquid and therefore vulnerable. In the circumstances, we would not disturb that part of the Order which appoints Price Waterhouse Limited as the Interim Receiver and Manager of the assets of Bresea. The claims against the company, primarily by shareholders, are substantial. The appointment of a Receiver/Manager will not interfere with any current operations of the company and acts as some protection for its assets, at least on an interim basis.

15 We dismiss the cross appeal with respect to that part of the Order which appoints Price Waterhouse Limited as Interim Receiver and Manager of the assets of Bresea. We direct that the Receiver/Manager take possession of and preserve the assets of Bresea under the supervision of the Court of Queen's Bench. Additional authority and powers may be sought in the usual way by application to the Court. We anticipate that those powers will include the ability to fully investigate Bresea's affairs and the validity of the claims made against it by its shareholders and others as well as any claims Bresea may have against third parties. The Receiver/Manager may ultimately seek authority to take the steps necessary for the orderly realization of Bresea's assets and resolution of the claims against it.

16 We set aside that part of the Order which directs the Interim Receiver/Manager to assign Bresea into bankruptcy and have Arthur Andersen Inc. named as Trustee in Bankruptcy.

17 At the conclusion of the oral hearing we continued the stay of the Order except as to the appointment of the Interim Receiver/Manager. In view of our disposition of the appeal, it is not necessary to deal further with the stay imposed by the Chambers Judge and continued by us.

*Appeal allowed in part; cross-appeal allowed in part by dismissing portion of order requiring corporation to be assigned into bankrupcty.*

TAB 7

2019 ONSC 5370
Ontario Superior Court of Justice

**RBC v. Gustin**

2019 CarswellOnt 14764, 2019 ONSC 5370, 310 A.C.W.S. (3d) 19, 73 C.B.R. (6th) 289

**MNP Limited (Receiver) and Royal Bank of Canada (Applicant) and Grant Gustin (Respondent)**

H.A. Rady J.

Heard: September 13, 2019
Judgment: September 16, 2019
Docket: 35-2225602T

Counsel: J. Ross MacFarlane, for Receiver, MNP Limited
Timothy C. Hogan, for Applicant, Royal Bank of Canada
Benjamin Blay, for Respondent

Subject: Insolvency

## Headnote

**Bankruptcy and insolvency --- Assignments in bankruptcy — Miscellaneous**

Farmer was mortgagor of property — Farmer made misrepresentations regarding assets and ownership of farm — Receiver was appointed regarding farm assets — Receiver brought application to allow bankruptcy — Application granted; receiver entitled to make assignment in bankruptcy — Farmer was no longer protected from being assigned into bankruptcy under s. 48 of Bankruptcy and Insolvency Act, as receiver had been appointed — That debtors were corporations did not affect result.

APPLICATION by receiver for assignment in bankruptcy.

***H.A. Rady J.*:**

**Introduction**

1 MNP, the Court appointed Receiver, seeks the Approval of its first report dated August 30, 2019 and various related relief. The only controversy is whether the Court can and should order the relief sought in para. 8 of the proposed draft order. It authorizes the Receiver to file an assignment in bankruptcy on behalf of the debtor. Royal Bank of Canada supports the relief and Mr. Gustin opposes.

2 I pause here to note that the receiver was also seeking relief against 1886890 Ontario Limited and Frank Gustin, who is Grant Gustin's father. He and the numbered company filed a responding motion record opposing some of the relief the Receiver's being requested. I am advised that the Receiver and Mr. Gustin Sr. have reached an accommodation and as a result, he did not participate in the motion.

**Facts**

3 Grant Gustin has been a farmer operating a hog and cash crop farm in Petrolia on land he owned at 4715 Lasalle Line and also rented elsewhere.

4 Royal Bank of Canada holds a mortgage on the property and a first ranking general security agreement. Mr. Gustin is in default, which led to the appointment of the Receiver. Mr. Gustin has not been cooperative, and there is evidence in the record that he has withheld relevant information and has or has threatened to remove assets from the Receiver's reach.

5 The Receiver and Royal Bank of Canada say that he misrepresented that he was the owner of 931 hogs. The hogs may be owned by J. A. Cryderman Farms Inc. They are being managed by Scott Leystra, a business associate of Mr. Gustin.

6 Mr. Gustin also has made eight payments totaling $242,047 to Mr. Leystra between March and May 2019. There is also an issue respecting the ownership of certain equipment and stored grain (which was the subject of Mr. Gustin Senior's response to the motion). Mr. Gustin has said some of the equipment and crops are jointly owned with or owned outright by his father.

**The Law**

7 As already noted, the Receiver seeks authority from the Court to make an assignment in bankruptcy of the debtor. Obviously, it is not a creditor.

8 It wishes to avail itself of the enhanced powers available to a trustee in bankruptcy under ss. 158 and 161-167 of the *Bankruptcy & Insolvency Act*. This is necessary given Mr. Gustin's lack of cooperation and misrepresentations.

9 In support of the relief sought, Royal Bank of Canada submits that Mr. Gustin has committed acts of bankruptcy as defined in s. 42(1) of the *BIA* and in particular subsections (f), (g), (h) and (j). He availed himself of the provisions of the *Farm Debt Mediation Act*, thereby acknowledging his insolvency.

10 As a preliminary matter, ss. 43-48 of the *BIA* protects farmers from creditor applications for bankruptcy orders. Section 48 provides:

> Sections 43 to 46 do not apply to individuals whose principal occupation and means of livelihood is fishing, farming or the tillage of the soil or to any individual who works for wages, salary, commission or hire at a rate of compensation not exceeding twenty-five hundred dollars per year and does not on their own account carry on business.

11 The Receiver and Royal Bank of Canada submit that Mr. Gustin is no longer entitled to the protection afforded by the *BIA* because he ceased being a farmer when the Receiver was appointed.

12 There is authority supporting the Court's power to grant this form of relief in *Royal Bank v. Sun Squeeze Juices Inc.*, [1994] O.J. No. 567 (Ont. Gen. Div. [Commercial List]) aff'd 1994 CarswellOnt 310 (Ont. C.A.); and *Bank of Montreal v. Owen Sound Golf & Country Club Ltd.*, 2012 ONSC 557 (Ont.

S.C.J. [Commercial List]).

13 On behalf of Mr. Gustin, Mr. Blay opposes the relief for the following reasons:

1) an assignment is premature because there is no evidence of what the creditor's position will be on liquidation;

2) Royal Bank of Canada is a single, secured creditor and as a result, must show special circumstances;

3) the cases relied upon both involved corporations rather than individuals; and

4) there are remedies available under provincial legislation for improper conveyances etc. and resort to the *BIA* is unnecessary.

**Analysis**

14 I agree with the Receiver and Bank that Mr. Gustin ceased to fall within the ambit and protection of s. 48 of the *BIA* upon the appointment of the Receiver. His principal occupation and means of livelihood can no longer be said to be from active farming.

15 Further, the Court is empowered to authorize the Receiver to file an assignment in bankruptcy. There is ample authority supporting that conclusion, including the decisions to which reference has been made, but also the cases cited in those decisions. There is no sound basis to distinguish the cases because the debtors were corporations. There is no legal distinction between a person and a corporation.

16 Nor is Royal Bank of Canada a sole creditor. A list of Mr. Gustin's unsecure Creditors is found in the material filed.

17 Finally, while there may well be remedies available under provincial statues, it is needlessly inefficient and expensive to be required to resort to them. And more importantly, it would serve to delay the orderly execution of the Receiver's undertaking.

18 I am satisfied that the relief sought should be granted as requested and I have signed the order provided.

*Application granted.*

TAB 8

1982 CarswellBC 480
British Columbia Supreme Court, In Bankruptcy

**Black Brothers (1978) Ltd., Re**

1982 CarswellBC 480, [1982] B.C.W.L.D. 651, [1982] B.C.J. No. 1582, 13 A.C.W.S. (2d) 316, 41 C.B.R. (N.S.) 163

**Re BLACK BROS. (1978) LTD.**

McLachlin J. [in Chambers]

Heard: February 26, 1982
Judgment: March 10, 1982
Docket: Vancouver No. 103/82

Counsel: *R. Standerwick*, for petitioner.
*A.R. Caplan*, for respondent Black Bros. (1978) Ltd.

Subject: Corporate and Commercial; Insolvency

## Headnote

**Bankruptcy --- Bankruptcy petitions for receiving orders — Hearing of petition — General**

Bankruptcy petitions for receiving orders — Petition filed by secured creditor — Purpose being to give petitioner's claim priority over statutory claims and to improve its position with respect to transfers of funds prior to bankruptcy — Debtor opposing on ground no assets to be vested in trustee — Creditor having proper and sufficient basis for filing petition — Petition granted.

A secured creditor filed a petition against the debtor for the purposes of giving it priority over certain statutory claims and improving its position with respect to certain transfers of funds made shortly before it installed its receiver. The petitioning creditor held a debenture which contained a floating charge covering all the assets of the debtor. The petition was opposed on the ground that there were no assets to be vested in a trustee in bankruptcy.

**Held:**

Petition granted.

The absence of unsecured property for distribution, among the creditors was not sufficient cause to deny the petitioner's application. One purpose of an order in bankruptcy is to secure an equitable distribution of the debtor's property among creditors. However, another purpose may be to permit creditors to avail themselves of provisions of the Bankruptcy Act which may enhance their positions by giving them certain priorities which they would not otherwise enjoy. The latter purpose is a proper and sufficient basis for granting a bankruptcy receiving order.

Petition for bankruptcy receiving order.

***McLachlin J.*:**

1 The petitioner seeks an order that the respondent be adjudged bankrupt. It is not disputed that the respondent is insolvent. Indeed, the petitioner has already installed a receiver under the terms of a debenture between it and the respondent. The petitioner frankly admits that it seeks the order for bankruptcy to give it priority over certain statutory claims and improve its position with respect to certain transfers of funds made shortly before it installed its receiver. The respondent opposes on the ground that there are no assets to be vested in a trustee in bankruptcy.

2 Section 25(6) and (7) of the Bankruptcy Act, R.S.C. 1970, c. B-3, govern this matter:

> (6) At the hearing the court shall require proof of the facts alleged in the petition and of the service of the petition, and, if satisfied with the proof, may make a receiving order.
>
> (7) Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, it shall dismiss the petition.

While the court is given a discretion as to whether to make the order, it is to be exercised judicially in accordance with the Act, and in particular s. 25(7).

3 The respondent does not dispute the facts alleged in the petition. Nor does it contend that it is able to pay its debts. The only question, therefore, is whether there is "other sufficient cause" why the order should not be made.

4 The respondent contends that the petition should be dismissed because there would be no assets for a trustee to take in hand. The petitioner's debenture is a floating debenture, giving it security on all the respondent's assets. Section 49(2) of the Act preserves the priority of secured creditors. Since the petitioner has security on everything owned by the respondent, it follows that there can be no property to vest in the trustee.

5 Courts generally will not make orders which they know to be ineffective. If the absence of unsecured property had the consequence that the order for bankruptcy would be totally ineffective, that might well be sufficient cause why no order should be made. But I do not think it has this consequence. An order for bankruptcy does more than vest property in the trustee for distribution among creditors. It brings into operation other provisions of the Act which affect priorities between creditors and the methods by which potential assets may be brought into account. Indeed, it is precisely because an order will have this effect that the petitioner seeks the bankruptcy and the respondent opposes it. Consequently, it cannot be said that an order for bankruptcy would be ineffective or useless in this case.

6 One purpose — usually the main purpose — of an order in bankruptcy is to secure an equitable distribution of the debtor's property amongst creditors. However, another purpose may be to permit creditors to avail themselves of provisions in the Act which may enhance their positions, for example, by giving them certain priorities which they would not otherwise enjoy. The latter

purpose, on the authorities, is a proper and sufficient basis for granting an order. Thus, in *Re Harrop of Milton Inc.* (1979), 22 O.R. (2d) 239, 29 C.B.R. (N.S.) 289, 92 D.L.R. (3d) 535 (H.C.), Henry J. found that since the assets were fully encumbered by the petitioner's debenture, there could be no assets available for distribution to the unsecured creditors. However, he went on to hold that a receiving order should go on the ground that it is not improper for a secured creditor to file a petition or procure an assignment in bankruptcy for the purpose of defeating other creditors' priorities, citing in support Re Develox lndust. Ltd., [1970] 3 O.R. 199, 14 C.B.R. (N.S.) 132, 12 D.L.R. (3d) 579 (H.C.), and *Re Gasthof Schnitzel House Ltd.*, 27 C.B.R. (N.S.) 75, [1978] 2 W.W.R. 756 (B.C.S.C.); see also *Re Koprel Enterprises Ltd.* (1978), 27 C.B.R. (N.S.) 22 (B.C.S.C.).

7 In summary, sufficient grounds to support the petition are established and no sufficient cause has been shown why an order should not be made. Accordingly, the petitioner's application is granted.

*Bankruptcy receiving order granted.*

TAB 9

1997 CarswellOnt 2888
Ontario Court of Justice, General Division (In Bankruptcy)

**699845 Ontario Ltd., Re**

1997 CarswellOnt 2888, [1997] O.J. No. 3660, 48 C.B.R. (3d) 32, 49 O.T.C. 238, 73 A.C.W.S. (3d) 901

**In The Matter of the Bankruptcy of 699845 Ontario Limited**

In The Matter of the Bankruptcy of City Motor Hotel (Hamilton) Limited

W.A. Jenkins J.

Heard: August 13, 1997
Judgment: August 22, 1997
Docket: 35-067895T, 35-068208T

Counsel: *Wayne R. Richard*, for the Petitioner.
*Edward Laan*, for the Debtors.

Subject: Insolvency

## Headnote

**Bankruptcy --- Bankruptcy petitions for receiving orders — Hearing of petition — Defences — Miscellaneous issues**

Petitioners sought to force debtors into bankruptcy — Petitioners had previously obtained appointment of receiver pursuant to civil proceedings — Petition granted — Appointment of receiver did not bar bringing of petition — Petitioners had remedies and priorities under Act which they did not get with receiver — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

The petitioners sold a hotel business to the debtors. As part of the purchase price, the petitioner took back a mortgage and a debenture. Ten years after the sale, the debtors defaulted under the debenture and the mortgage. In addition to the debt owed to the petitioners, the debtors had fallen into arrears on their municipal and federal taxes, and on payments to the Workers' Compensation Board. The petitioners were not prepared to renew the debtors' mortgage, and the debtors had not been able to find alternative financing. The petitioners commenced civil proceedings against the debtors for the payment of the outstanding debt, and obtained an order for the appointment of a receiver. They subsequently brought a petition to force the debtors into bankruptcy. The debtors claimed that the civil proceedings barred the bankruptcy petition.

**Held:** The petition was granted.

There were remedies available to the petitioners under the *Bankruptcy and Insolvency Act* that were not available to them through the appointment of a receiver under the debenture. The fact that the petitioners obtained an order for the appointment of a receiver was not a bar in law to the granting of their petition. They were entitled to take advantage of the remedies and priorities afforded to them under the *Bankruptcy and Insolvency Act*, and which were not available to them through the

appointment of a receiver.

PETITION by creditors to force debtors into bankruptcy.

***W.A. Jenkins J.*:**

1 The petitioners seek to force the debtors 699845 Ontario Limited and City Motor Hotel (Hamilton) Limited into bankruptcy.

**Facts**

2 In 1986 the petitioners sold the City Motor Hotel to the debtors for $2,250,000. As part of the purchase price the petitioners took back a mortgage for $1,700,000 and a debenture in the same amount from the debtors.

3 The mortgage and debenture required the debtors City Motor Hotel (Hamilton) Limited and 699845 Ontario Limited to pay $14,076 per month for a period of 10 years. In December 1996 the debtors defaulted under the debenture and the mortgage which expired on March 23, 1997. As a result the petitioners commenced a civil action against the debtors for payment of the balance due under the mortgage and debenture and for appointment of a receiver. In addition, the petitioners commenced proceedings under s. 43 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 to force the debtors into bankruptcy.

4 At the trial Mr. Paul Winchar, one of the petitioners, testified that not only have the debtors defaulted on payment of the mortgage and debenture, but they have also failed to pay the taxes on the hotel and the City of Hamilton has a claim for arrears in excess of $500,000. In addition, the debtors owe the Government of Canada over $52,000 for G.S.T. and the Worker's Compensation Board arrears of $6,869.

5 Mr. Winchar said the petitioners are not prepared to renew the mortgage and the debtors have not been able to arrange alternate financing. As a result he asks that the debtors be placed in bankruptcy.

6 The debtors oppose the petition on the grounds that the petitioners are abusing the process by proceeding with a both civil action and bankruptcy proceedings at the same time. Further, they contend that since a receiver has been appointed in the civil action nothing will be accomplished by forcing the debtors into bankruptcy.

7 Jagtar Gill, an officer of the City Motor Hotel (Hamilton) Limited testified that he has entered into arrangements with the City of Hamilton, the Government of Canada and the Worker's Compensation Board to pay the amounts owing over a period of time. He said that the hotel's trade accounts and payroll are paid up to date and he is seeking refinancing for the hotel.

**Conclusion**

8 I am satisfied that the debtors have ceased to meet their liabilities as they become due and they are

insolvent. They have been trying to arrange financing for a number of months and have not been successful. The mortgage and debenture arrears and the amounts owed to the various levels of government continue to mount with little prospect of payment.

9 The debtors' contention that nothing will be accomplished by forcing them into bankruptcy because the petitioners have an order for the appointment of a receiver is inaccurate. There are remedies and priorities available to the petitioners under the *Bankruptcy and Insolvency Act* that are not available to them if a receiver is appointed under the debenture.

10 In *Cappe, Re* (1993), 18 C.B.R. (3d) 229 (Ont. Gen. Div. [Commercial List]) (affirmed at (January 19, 1994), Doc. CA C15155 (Ont. C.A.)) Ground J. said at p.232:

> Counsel for the respondents maintains that it is an abuse of the process of the court for the petitioner to bring proceedings to put the respondents in bankruptcy while proceeding with the receivership of Big Slice and with the possibility of the petitioner benefitting from the power of sale proceedings on the Sudbury Street property. It appears to be his position that the petitioner should have to establish that he cannot satisfy his claims in any other way, e.g. by realizing on the security granted by the principle debtors and that, as a policy matter, the creditor with the best chance of being paid out through other proceedings ought not to be the creditor to commence bankruptcy proceedings.

and at p. 235:

> Similarly, I know of no statutory or common law which requires that a petitioning creditor have exhausted all other remedies available to that creditor to collect the debt owing to him or her before proceeding with a petition for a receiving order. In fact, the jurisprudence would seem to be to the contrary.

and at p. 236 and 237:

> The fact that a receiver of the assets, property and undertaking of Big Slice has been appointed and the fact that power of sale proceedings have been commenced with respect to the Sudbury Street property should not, in my view, be a bar to the receiving orders sought by the petitioner.

11 As well, in *Black Brothers (1978) Ltd., Re* (1982), 41 C.B.R. (N.S.) 163 (B.C. S.C.) McLachlin J. as she was then said at p.165 that:

> One purpose - usually the main purpose - of an order in bankruptcy is to secure an equitable distribution of the debtor's property amongst creditors. However another purpose may be to permit creditors to avail themselves of provisions in the *Act* which may enhance their positions, for example, by giving them certain priorities which they would not otherwise enjoy. The latter purpose on the authorities, is a proper and sufficient basis for granting an order.

12 In this case I am satisfied that the fact the petitioners have an order for the appointment of a

receiver is not a bar in law to the granting of petitions. As well, the petitioners are entitled to take advantage of the remedies and priorities afforded to them under the *Bankruptcy and Insolvency Act* and I therefore grant the petitions and order that the debtors be placed in bankruptcy.

13 If necessary, the parties may make written submissions with respect to costs within 15 days from the date of this decision.

*Petition granted.*

TAB 10

1987 CarswellOnt 155
Ontario Supreme Court, Court of Appeal

**Canadian Imperial Bank of Commerce v. King Truck Engineering Canada Ltd.**

1987 CarswellOnt 155, 63 C.B.R. (N.S.) 1

**CANADIAN IMPERIAL BANK OF COMMERCE v. KING TRUCK ENGINEERING CANADA LIMITED et al.**

Blair, Robins and Krever JJ.A.

Judgment: January 13, 1987
Docket: No. 554/86

Counsel: *J.R. Fisher*, for appellants.
*D.D. Langley*, for respondent.

Subject: Corporate and Commercial; Insolvency

## Headnote

**Receivers --- Conduct and liability of receiver — Rights**

Receivers — Status — Court-appointed receiver not necessarily losing jurisdiction to deal with debtor's assets upon debtor's bankruptcy — Effect of bankruptcy on receiver's powers dependent upon circumstances — Co-existence of trustee and receiver possible in absence of conflict of interest or jurisdiction.

The activities of a receiver-manager appointed by order of the court and a trustee in bankruptcy appointed under a voluntary assignment can co-exist in the absence of conflict of interest and of jurisdiction. The authority of the receiver-manager can continue in a case where there is no conflict between the receiver-manager and the trustee with respect to the sale of property and where the trustee concurs in the sale made by the receiver-manager. The effect of bankruptcy on the authority of a court-appointed receiver-manager must depend on the circumstances of each case.

Appeal of order holding court-appointed receiver-manager not deprived of jurisdiction to deal with debtor's property upon bankruptcy of debtor.

***The Court*** **(Endorsement):**

1 The appellants submitted that on the occurrence of the bankruptcy the court-appointed receiver was deprived of jurisdiction to deal with the property of the bankrupt. We do not accept this argument and agree with Hughes J. who held that the activities of a receiver-manager appointed by order of the court and a trustee in bankruptcy not so appointed can co-exist in the absence of conflict of interest and of jurisdiction.

2 On a proper construction of subss. (1), (5) and (6) of s. 50 of the Bankruptcy Act, we are of the opinion that the Act contemplated that the authority of the receiver-manager could continue in a case

such as the present where there was no conflict between the receiver-manager and the trustee with respect to the sale of property, and the trustee concurred in the sale made by the receiver-manager.

3 With respect, we cannot accept the view of Wright J. in *Prairie Palace Motel Ltd. v. Carlson; Eston Dodge-Chrysler Ltd. v. Carlson;* Carlson v. Big Bud Tractor of Can. Ltd. (1982), 42 C.B.R. (N.S.) 163 at 165 (Sask. Q.B.), that in every case where a court-appointed receiver-manager makes an assignment in bankruptcy his authority to act ceases. The effect of bankruptcy on the authority of a court-appointed receiver-manager must depend on the circumstances of each case.

4 Accordingly, the appeal is dismissed with costs.

*Appeal dismissed.*